GOVERNMENT REGULATION OF SEXUAL ORIENTATION CHANGE EFFORTS: INFRINGEMENT UPON OUR RIGHTS TO EXERCISE PARENTAL AUTHORITY AND PRESERVE FAMILY UNITY

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INTRODUCTION

In the wake of the U.S. Supreme Court ruling in *Obergefell v. Hodges*,[1] in which the Court held that the fundamental right to marry is guaranteed to same-sex couples by both the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment to the Constitution, promoting the rights of lesbian, gay, bisexual, and transgender ("LGBT") individuals and building a more accepting society towards these non-conventional sexual orientations seem to have become a plausible goal of the U.S. society. Many LGBT rights activists argue that sexual orientation is an immutable characteristic and not a preference, therefore our society should create a climate where the LGBT individuals "can live openly without discrimination and enjoy equal rights, personal autonomy, and freedom of expression and association."[2] Exalting the idea of equal protection, personal autonomy, and right of privacy led the public to advocate for the LGBT rights.

However, such a consensus undoubtedly affect important aspects of everyone else's lives. In particular, the freedom of parents to freely control sex education for their children, cultivate important values in their lives, and make medical decisions for them have been slowly but surely infringed upon.[3] Moreover, our rights to free speech and free exercise of religion under the First Amendment have been also infringed upon as we are often compelled to refrain from making religiously motivated statements especially in a professional work environment.[4] Respecting and promoting LGBT rights is one thing, but being forced to accommodate them in a way that denies our own fundamental rights in relation to our very own families and professional lives is another.

One good example, which is the main topic of this Note, is how our society criticizes any Sexual Orientation Change Efforts ("SOCE") put

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1 135 S. Ct. 2584 (2015).

2 *LGBT Rights*, AM. C.L. UNION, https://www.aclu.org/lgbt-rights (last visited Apr. 2, 2016).

3 U.S. CONST. amend. I.

4 U.S. CONST. amend. XIV, § 1.

forth even within the boundaries of our own family life. The term, SOCE is defined in many State statutes as "the practice of seeking to change a person's sexual orientation," including "efforts to reduce or eliminate sexual or romantic attractions or feelings toward a person of the same gender."[5] It is widely referred to as a "conversion" or "reparative" therapy in which mental healthcare practitioners use different types of methods to help LGBT individuals convert back to a life of heterosexuality.[6]

The methods used in SOCE include behavioral techniques, cognitive behavioral techniques, and psychoanalytic techniques, as well as other medical, religious, and spiritual approaches.[7] While some are known to employ extreme and physically intrusive tactics, such as hormone therapy, electric shock, and nausea-inducing drugs, the most common practice used by healthcare practitioners today is the "talk therapy," which does not involve any physical intrusions on patients.[8] Most of the contemporary SOCE therapies only involves verbal communication that discusses "traditional gender-appropriate behaviors" and "biblical perspectives" on sexual orientations.[9]

A step to legally resist SOCE was made by several States when they completely prohibited their mental healthcare practitioners from administering SOCE therapies to minors regardless of whether the minor and his or her parents consented to the therapy.[10] Furthermore, even President Obama has also recently called for banning medical practitioners from administering SOCE therapies on LGBT youth.[11] Although these States' ban on SOCE are enacted to regulate licensed healthcare providers, on a deep level, the most affected stakeholders are in fact private individuals such as parents who are consequently deprived of their fundamental rights to make important decisions

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[5] N.J. STAT. ANN. § 45:1-55 (West 2013).

[6] *Sexual Orientation Change Efforts*, WIKIPEDIA, https://en.wikipedia.org/wiki/Sexual_orientation_change_efforts (last modified Mar. 29, 2016).

[7] *Id.*

[8] Douglas C. Haldeman, *The Practice and Ethics of Sexual Orientation Conversion Therapy*, 62 J. CONSULTING & CLINICAL PSYCHOL. 221 (1994); Jacob M. Victor, *Regulating Sexual Orientation Change Efforts: The California Approach, Its Limitations, and Potential Alternatives*, 123 YALE L.J. 1532, 1534 (2014).

[9] King v. New Jersey, 767 F.3d 216, 221 (3d Cir. 2014); Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014).

[10] CAL. BUS. & PROF. CODE §§ 865.1, 865.2 (West 2012); N.J. STAT. ANN. § 45:1-55.

[11] Michael D. Shear, *Obama Calls for End to 'Conversion' Therapies for Gay and Transgender Youth*, N.Y. TIMES (Apr. 8, 2015), http://www.nytimes.com/2015/04/09/us/politics/obama-to-call-for-end-to-conversion-therapies-for-gay-and-transgender-youth.html?smid=fb-nytimes&smtyp=cur&bicmp=AD&bicmlukp=WT.mc_id&bicmst=1409232722000&bicmet=1419773522000&_r=1.

pertaining to raising their children according to their own family and religious values.

The U.S. consistently maintained that parents possess a fundamental right to raise their children as they see fit, because children undoubtedly depend on their parents, teachers, and other adults in the society to form their values and beliefs.[12] However, as our society's support of homosexuality permeates our children's education, the only remaining place for true influence left for us as parents, who do not wish to accept the same idea, is within the boundary of our own family lives. While our children are exposed to and influenced by such public endorsements of homosexuality, governments increasingly seek to restrain parents' influence over their children's beliefs on the homosexuality agenda. Thus, the change in the contemporary attitude towards homosexuality necessitates a stronger protection of parents' rights to educate their children the way they see fit, particularly when the parents' view on sexuality is in conflict with the government's view.

This Note will address how our current society's promotion of equal protection, personal autonomy, and right of privacy largely affect our rights to promote family unity and exercise parental authority. In particular, in the context of State prohibition on all professional SOCE therapies for minors, this Note will illustrate that such government regulations of SOCE are unconstitutional as they infringe upon the fundamental parental rights. In addition, this Note will suggest numerous alternatives to the complete ban of SOCE therapies. Such alternatives would equally protect any minors who may potentially suffer from any abusive SOCE therapies, without trampling on the constitutional rights of parents, children, and healthcare professionals.

I. BLANKET BANS ON SOCE AND CONSTITUTIONAL CHALLENGES

Due to the growing acceptance of homosexuality and the spotlight on the purported harmful effects of SOCE, there has been widespread criticism against therapeutic interventions on homosexuality. For example, several scientific organizations, such as the American Psychological Association (the "APA"), the American Psychiatric Association, and the Pan American Health Organization, have expressed that the SOCE practice poses serious health risks, such as depression,

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[12] *The Supreme Court's Parental Rights Doctrine*, PARENTALRIGHTS.ORG., http://www.parentalrights.org/index.asp?SEC=12D52BF9-1D6D-4EEC-B83B-F74B3F91BDF6 (last visited Apr. 2, 2016).

anxiety, self-destructive behavior, and suicidality, and that there is no credible evidence that SOCE counseling is effective.[13]

Accordingly, a number of States have passed legislation to protect minors from the purported harmful effects of SOCE, by fully banning licensed counselors from engaging in any SOCE therapies with minors, regardless of whether the minor clients or their parents have consented to the therapy.[14] California was to the first to fully ban these professional SOCE therapies for minors.[15] Other States such as New Jersey, Florida, Hawaii, Iowa, Massachusetts, Michigan, Minnesota, New York, Oregon, Texas, Virginia, Colorado, Connecticut, Kentucky, Maine, Mississippi, New Mexico, Ohio, Oklahoma, Pennsylvania, Rhode Island, Utah, Washington, and Wisconsin are following California, New Jersey, and D.C., by introducing, proposing, and voting on similar legislations.[16] It will not be long before many other States will ban SOCE therapies, since even the White House officials have publicly endorsed this movement.[17]

For example, the State legislations, such as Section 865.1-2 of the California Business and Professional Conduct (the "California SOCE Ban")and Section 45:1-55 of the New Jersey Statute (the "New Jersey SOCE Ban"), prohibit licensed mental health practitioners from providing SOCE therapies to minors under the age of 18.[18] Even though these statutes are actually enacted to regulate the professional conduct of licensed mental healthcare practitioners on the surface, but the language of the statutes suggests that they are also aimed at helping people come to the full self-realization and acceptance of themselves as

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[13] *See e.g.*, *Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts*, AM. PSYCHOL. ASS'N (Aug. 5, 2009), http://www.apa.org/about/policy/sexual-orientation.aspx [hereinafter *APA Resolution*]; *"Therapies" to Change Sexual Orientation Lack Medical Justification and Threaten Health*, PAN AM. HEALTH ORG. (May 18, 2012, 6:43 AM), http://www.paho.org/hq/index.php?option=com_content&view=article&id=6803&Itemid=1926.

[14] CAL BUS. & PROF. CODE §§ 865.1, 865.2; N.J. STAT. ANN. §§ 45-1-54, 55.

[15] CAL BUS. & PROF. CODE §§ 865.1, 865.2; Pickup v. Brown, 740 F.3d at 1208, 1215 (9th Cir. 2014).

[16] Sanam Assil, *Can You Work It? Or Flip It and Reverse It?: Protecting LGBT Youth from Sexual Orientation Change Efforts*, 21 CARDOZO J. L. & GENDER 551, 554 (2015); Jeff Guo, *A Lot of States Are Trying to Ban Gay Conversion Therapy for Kids. Guess Which One Is Doing the Opposite.*, WASH. POST (Mar. 4, 2015), http://www.washingtonpost.com/blogs/govbeat/wp/2015/03/04/a-lot-of-states-are-trying-to-ban-gay-conversion-therapy-for-kids-guess-which-one-is-doing-the-opposite/; Jacob M. Victor, *Ending 'Gay Conversion' for Good*, N.Y. TIMES (Feb. 12, 2014), http://www.nytimes.com/2014/02/13/opinion/ending-gay-conversion-for-good.html?_r=1.

[17] Shear, *supra* note 11.

[18] CAL BUS. & PROF. CODE §§ 865.1, 865.2; N.J. STAT. ANN. §§ 45-1-54, 55; King v. New Jersey, 767 F.3d 216, 221 (3d Cir. 2014); *Pickup*, 740 F.3d at 1215.

an LGBT individual.[19] Such a goal in itself may not seem to be a bad idea, but many citizens believe that promoting the LGBT rights should be pursued only to the extent that the rights of others to choose their own ways to deal with the sexual orientation issue are also respected.

In fact, in *Pickup v. Brown* and in *King v. New Jersey*, these statutes were already challenged by licensed mental healthcare practitioners and the parents of their minor clients who were undergoing professional SOCE therapies.[20] They argued that the statutes violated the practitioners' and their minor clients' First Amendment rights to free speech and free exercise of religions as well as the rights of the minor clients' parents to substantive due process.[21] However, both the Ninth Circuit in *Pickup* and the Third Circuit in *King* found that their States' ban on SOCE therapies is constitutional.[22] Because these two cases currently stand as prevailing precedents on the issue of SOCE therapies, it is imperative for this Note to begin its discussions by analyzing and comparing their decisions first.

A. Ninth Circuit Decision on SOCE Ban (California)

By passing the California SOCE Ban (originally SB 1172) in September 2012, the California legislature aimed to protect minors "against exposure to serious harm caused by SOCE."[23] The intent of the bill was to "limit deceptive therapies that are harmful to minors by mental health providers, seeking to provide awareness of the alternatives to and the potential harmful effects of sexual orientation change therapies while also protecting children from these treatments."[24] Plaintiffs in *Pickup* challenged the statute to be unconstitutional under the First and Fourteenth Amendments.[25]

On the issue of the free speech right violation, the Ninth Circuit characterized talk therapy as "conduct" with only an incidental effect on speech rather than an expressive speech.[26] Therefore, only the "rational basis test" was applied to the free speech violation claim.[27] Under the rational basis test, the court held that the California SOCE Ban was

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19 *See* CAL BUS. & PROF. CODE §§ 865.1, 865.2; N.J. STAT. ANN. §§ 45-1-54, 55.

20 *King*, 767 F.3d at 221; *Pickup*, 740 F.3d at 1215.

21 U.S. CONST. amends. I, XIV, § 1; *see King*, 767 F.3d at 221; *Pickup*, 740 F.3d at 1215.

22 *King*, 767 F3d. at 216; *Pickup*, 740 F.3d at 1215.

23 CAL. BUS. & PROF. CODE § 865.1; *also see* S.B. 1172 § 1(n), 2011-12 S., Reg. Sess. (Cal. 2012).

24 S. Rules Comm., Office of S. Floor Analyses, S.B. 1172: Third Reading, 2d Sess., at 4 (Cal. May 25, 2012).

25 *Pickup*, 740 F.3d at 1225.

26 *Id*. at 1216.

27 *Id*.

constitutional, as it is rationally related to California's legitimate state interest in protecting minors from potential harms of SOCE therapies.[28]

On the issue of the parental right violation claim, the court also held that the statute did not violate the parental fundamental rights because the parents do not have a constitutional right to choose a specific treatment for their children when that treatment is reasonably found to be harmful.[29] Although the court agreed that parents have a fundamental right to raise their children "as they see fit," it emphasized that such a right is "not without limitation."[30] According to the court, the real concern of the parents who challenged the California SOCE Ban was not whether the minor child's right to have a treatment or not is a protected right, but whether his or her selection of a particular treatment is within the area of governmental interest in protecting public health.[31]

Accordingly, the court concluded that parents do not have a constitutional right to obtain "a particular type of treatment or to obtain treatment from a particular provider" for their children if the government has "reasonably prohibited that type of treatment or provider."[32] Furthermore, the court reasoned that if the court recognizes a parental right to choose a specific treatment as a protected right under the Constitution, then that would constitute compelling the California legislature to accept the parents' personal views of what therapy is safe and effective for minors.[33]

B. Third Circuit Decision on SOCE Ban (New Jersey)

In *King*, licensed healthcare practitioners as Plaintiffs argued that the New Jersey SOCE Ban (originally Assembly Bill A3371)[34] violated

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[28] *Id.* at 1231.

[29] *Id.* at 1235.

[30] *Id.* (quoting Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1294 (9th Cir. 2005)); *also see* Prince v. Massachusetts, 321 U.S. 158, 166 (1944); Jehovah's Witnesses of Washington v. King Cty. Hosp., 278 F. Supp. 488, 504 (D. Wash. 1967), *aff'd per curiam*, 390 U.S. 598 (1968); Parham v. J.R., 442 U.S. 584, 603 (1979) ("[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized.").

[31] *Pickup*, 740 F.3d at 1235 (quoting Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997)).

[32] *Id.* at 1235-36 (quoting Mitchell v. Clayton, 995 F.2d 772, 775 (7th Cir. 1993)); Carnohan v. United States, 616 F.2d 1120, 1122 (9th Cir. 1980) (per curiam)(holding that there is no substantive due process right to obtain drugs that the FDA has not approved); Rutherford v. United States, 616 F.2d 455, 457 (10th Cir. 1980).

[33] *Pickup*, at 1236 (quoting Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1203 (9th Cir. 2005) (holding that parents do not have the right to "compel public schools to follow their own idiosyncratic views as to what information the schools may dispense")).

[34] Assembly Bill A3371 is now codified at N.J. STAT. ANN. §§ 45-1-54, 55.

their rights to free speech and free exercise of religion under the First Amendment.[35] Plaintiffs also asserted claims on behalf of their minor clients and the minor clients' parents that the statute violated their substantive due process rights under the Fourteenth Amendment.[36] Even though the Third Circuit, unlike the Ninth Circuit, recognized SOCE as "speech" that deserves a higher scrutiny than the "rational basis test," the court still applied only the "intermediate scrutiny test," reasoning that "professional speech" should not receive full protection under the First Amendment.[37] Unfortunately, the constitutionality of the New Jersey SOCE Ban on the basis of violation of parental rights was not fully considered because the court held that Plaintiffs lacked standing to bring a third-party claim on behalf of their minor clients and the clients' parents.[38] In light of this holding, this Note will further develop on the parental right claim in its later part.

II. OBJECTIONS: FALLIBLE PRESUMPTIONS MADE IN THE ENACTMENT OF THE SOCE BANS

The State legislations banning SOCE therapies, such as the California SOCE Ban[39] and the New Jersey SOCE Ban,[40] practically compel all licensed mental healthcare practitioners to affirm their clients' sexual orientation during counseling, because the statutes required them to provide "acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development" [41] Affirming a minor client's sexual orientation requires a practitioner to define the minor's then sexual orientation, because the practitioner is banned from seeking to change the minor's "behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex," even if the minor is unsure about his or her sexual orientation and consents to SOCE therapies together with his or her parents.[42]

In enacting the full ban on professional SOCE therapies, the State legislatures in California and New Jersey made broad and normative assumptions to justify the SOCE bans.[43] First, the States mistakenly presumed that minor children's sexual orientation or tendency is

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35 King v. New Jersey, 767 F.3d 216, 220 (3d Cir. 2014).

36 U.S. CONST. amends. I, XIV, § 1; *id.*

37 King, 767 F.3d at 231-34.

38 *Id.* at 243-46.

39 CAL BUS. & PROF. CODE §§ 865.1, 865.2.

40 N.J. STAT. ANN. §§ 45-1-54, 55.

41 CAL BUS. & PROF. CODE §§ 865.1, 865.2; *id.*

42 CAL BUS. & PROF. CODE §§ 865.1, 865.2; N.J. STAT. ANN. §§ 45-1-54, 55.

43 Victor, *supra* note 8 at 1538-39.

definitive. Second, the States wrongly presumed that seeking medical treatments for homosexuality is improper simply because homosexuality is not a clinical disease. Third, the States hastily concluded that all types of SOCE therapies are ineffective and per se harmful to minor children. Fourth, the States wrongly concluded that it is better to expose minors to unregulated and unidentified guidance than allowing minors to seek SOCE therapies provided by licensed mental healthcare practitioners. The next section will analyze each of these presumptions in order to demonstrate why they were incorrect and why it was arbitrary for the States to rely on them to fully ban all SOCE therapies for minors.

A. Minor Children's Sexual Orientation Is Not Always Definitive

The APA defines "sexual orientation" as an "enduring pattern of emotional, romantic, and/or sexual attractions to men, women or both sexes," and categorizes it into three different categories: heterosexual, homosexual or lesbian/gay, and bisexual.[44] However, this assumption that a person must be either one way or the other in his or her sexual orientation is the backdrop of what the SOCE bans require of the licensed mental healthcare practitioners. Under the SOCE bans, in order for licensed mental healthcare practitioners to show acceptance and support for their minor clients' feelings about their sexual orientation, the practitioners in their own minds inevitably have to determine which category their clients fall under, so that they do not violate the statute by influencing their clients to depart from their current understanding of their sexual orientation. Licensed mental healthcare practitioners are to recognize any hint of their minor client's LGBT tendency as something positive even if they want to change it.[45]

However, prematurely determining and affirming one's sexual orientation is very dangerous, especially when dealing with minors who are very impressionable and suggestible.[46] Even though identifying LGBT people as a group of individuals with "immutable" homosexuality is a growing trend and many LGBT individuals may understand their sexual orientation as a permanent trait, not everyone struggling with their sexual orientation feels the same.[47] Young people's thinking about

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[44] Judith M. Glassgold et. al., *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, AM. PSYCHOL. ASS'N (2009), http://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf [hereinafter Glassgold, *APA Report*].

[45] *Id.*; Victor, *supra* note 8, at 1547.

[46] Eve Kosofsky Sedgwick, *Epistemology of the Closet 1*, 123 YALE L.J. 1532, 1548 (1990).

[47] *See* Gregory M. Herek et al., *Demographic, Psychological, and Social Characteristics of Self-Identified Lesbian, Gay, and Bisexual Adults in a U.S. Probability Sample*, 7 SEXUALITY RES. & SOC. POL'Y 176, 186 (2010).

gender identity can be temporary, easily influenced by peers, television shows, and teachers that may encourage them to explore new genders.[48] Since the LGBT trait is not always definite or conclusive, the blanket SOCE bans compelling healthcare practitioners to define their clients' then sexual orientation can marginalize the experiences of those who are not so sure about their sexuality.[49]

B. Seeking Medical Treatments Does Not Require Any Clinically Proven Diseases

The State legislature in California emphasized in the statute that "being lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming."[50] Such an emphasis insinuates that one's effort to change his or her sexual orientation is unnecessary and per-se harmful, simply because the LGBT trait, including homosexuality, is not a disease. However, does one have to have a disease in order to seek medical treatment? There are many circumstances in which people freely choose to receive a medical treatment even though whatever they want to change or fix is not clinically defined as a disease or a disorder.

For example, seeking plastic surgery to fix the look of your eyes, nose, or even your facial structure, does not mean that you have a disease or a disorder. Many consent to undergo cosmetic surgeries despite the fact that cosmetic surgeries involve serious risks, simply because they desire to change the way they look. States do not require cosmetic surgeons to only promote their patient's self-acceptance and only affirm their current appearances. States do not accuse cosmetic surgeons of causing damage to their client's autonomy or identity when they perform a surgery that their clients seek. No States prohibit physicians from helping their clients change their looks as long as the clients consent to the surgery.

Of course, some may argue that the issue of cosmetic surgery and SOCE are very different in their nature and seriousness. However, the main point of comparing these two medical treatments is that the fact that homosexuality is not clinically defined as a disease and the fact that SOCE carries some risks of harm do not necessarily mean that any

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[48] DOUGLAS E. ABRAMS ET AL., CHILDREN AND THE LAW: DOCTRINE, POLICY AND PRACTICE 604 (5th ed. 2014); Walt Heyer, *Public School LGBT Programs Don't Just Trample Parental Rights. They Also Put Kids at Risk.*, THE WITHERSPOON INST. PUB. DISCLOSURE (June 8, 2015), http://www.thepublicdiscourse.com/2015/06/15118/.

[49] *See* Lisa Bower, *Queer Problems/Straight Solutions: The Limits of a Politics of "Official Recognition*," *in* PLAYING WITH FIRE: QUEER POLITICS, QUEER THEORIES 267 (Shane Phelan ed., 1997); Janet E. Halley, *Sexual Orientation and the Politics of Biology: A Critique of the Argument from Immutability*, 46 STAN. L. REV. 503, 567 (1994); Kenji Yoshino, *The New Equal Protection*, 124 HARV. L. REV. 747, 795 (2011).

[50] CAL. BUS. & PROF. CODE §§ 865.1, 865.2.

attempt to change the homosexual orientation should be categorized as per se harmful or illegitimate. Individuals may voluntarily seek conversion therapies not because homosexuality is a disease which can be objectively diagnosed and cured, but because they have a subjective dissatisfaction towards their current sexual orientation which they hope to change through the SOCE. Therefore, the assumption that an attempt to change or a failure to properly "affirm" the sexual orientation of a minor denies his or her autonomy is fallible in itself.[51]

C. Verbal SOCE Therapies Are Not Per-se Harmful

The APA defines SOCE in general as "any attempt by licensed mental healthcare practitioners to change sexual orientation."[52] While the APA uses the term, SOCE, to describe all means to change sexual orientation, including those efforts by mental health professionals, lay individuals, religious professionals, religious leaders, social groups, and other lay networks such as self-help groups, the APA also characterizes any SOCE to be "potentially harmful" to a person's autonomy and psychological health.[53] Building on these resolutions made by the APA, the State legislatures in California and New Jersey treated "any questioning" of a minor client's sexual orientation by mental healthcare practitioners as "per se harmful," without considering the significant distinction between physically intrusive methods and pure verbal methods. [54] The SOCE methods that exclusively involve verbal communication are the most common type of SOCE therapies used today, and even according to the APA, the harmfulness of such talk therapies has not been clinically proven due to insufficient clinical evidence and mixed conclusions.[55]

It is important to emphasize that the issue here is whether States are justified to fully ban professional SOCE therapies for minors in its entirety. In order to justify such a full ban, States should show more than just a broad and normative assumption that all minors will somehow suffer from any SOCE therapies. States need to show clinically proven data to support the assumption that all the minors who receive SOCE counseling will face great harm. Given that the most prominent SOCE method is talk therapy, there is not yet sufficient evidence that

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[51] Peter LaBarbara, *The Gay Youth Suicide Myth*, ORTHDOXYTODAY.ORG, http://www.orthodoxytoday.org/articles/LabarberaSuicideMyth.php (last visited Apr. 3, 2016).

[52] Glassgold, *APA Report*, *supra* note 44, at 22-25.

[53] *APA Resolution*, *supra* note 13.

[54] Victor, *supra* note 8 at 1544.

[55] Glassgold, *APA Report*, *supra* note 44, at 41-43.

the harms of SOCE are significant enough to warrant a complete ban.[56] States should show what percentage of the LGBT minors who have undergone professional SOCE therapies has been actually diagnosed with any psychological disorders, what type of methods were used for their SOCE therapies, and whether such disorders can be identified to have clearly originated from their SOCE therapies.[57] In the absence of any concrete evidence, it was arbitrary for the States to conclude that LGBT minors undergoing SOCE therapies, regardless of method, would most likely suffer mental health problems.[58]

While the extreme forms of SOCE could contribute to depression, anxiety, or suicide at the very worst, there is no evidence that SOCE is at least a "but for" cause or the "probable cause" of the said problems to conclude that SOCE is per se harmful to warrant a full ban. Several studies have suggested that most homosexual individuals already deal with psychological problems even before they seek counseling of some kind, and that suicide attempts among homosexuals may be attributed to the lifestyle of homosexuality itself. For example, some studies have shown that about two thirds of suicide attempts among homosexuals were due to broken relationships rather than social stigmatization[59] Comparative studies between several different countries also indicate that the homosexual lifestyle itself, not the social hostility, is a primary cause of their mental health issues.[60]

Additionally, research in a cross-cultural comparison of mental health in the Netherlands, Denmark and the U.S. found no significant differences between countries, with differing degrees of social hostility towards homosexuality, in the level of psychiatric problems for

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[56] *Id.*; Victor, *supra* note 8 at 1540-42.

[57] Amicus Curiae Brief in Support of Plaintiffs and Appellees at *13-14, Welch v. Brown, 740 F.3d 1208 (2014) (No. 13-15023) 2013 WL 950389 [hereinafter Amicus Curiae Brief].

[58] N.E. Whitehead, *Are Homosexuals Mentally Ill?*, HOMOSEXUALITY & THE SCI. EVIDENCE, http://mygenes.co.nz/mental_ill.htm (last visited Apr. 4, 2016).

[59] *Id.* (citing M.T. SAGHIR & E. ROBINS, MALE AND FEMALE HOMOSEXUALITY, A COMPREHENSIVE INVESTIGATION, (Williams & Wilkins, 1973)).

[60] David M. Fergusson et al., *Is Sexual Orientation Related to Mental Health Problems and Suicidality in Young People?*, ARCHIVES. GEN. PSYCHIATRY J. 56, 876-80 (1999); Richard Herrell et al., *Sexual Orientation and Suicidality: A Co-twin Control Study in Adult Men*, ARCHIVES. GEN. PSYCHIATRY J. 56, 867-874 (1999); Theo G. M. Sandfort et al., *Same-sex Sexual Behavior and Psychiatric Disorders*, ARCHIVES. GEN. PSYCHIATRY J. 58, 85-91 (2001); Thaddeus Baklinski, *Poor Mental Health Among Homosexuals Caused by "Lifestyle Itself" or "Discrimination"?*, LIFE SITE, (Apr. 4, 2012, 7:22 PM), https://www.lifesitenews.com/news/poor-mental-health-among-homosexuals-caused-by-lifestyle-itself-or-discrimi.

homosexual individuals.[61] For example, although suicide attempts of homosexuals were common in New Zealand and occurred at about the same rate as in the United States, New Zealand is much more tolerant of homosexuality than the United States.[62] In fact, New Zealand consistently enforces the special legal rights of homosexuals throughout the country with its legislations.[63] Thus, these studies have revealed that a lot of homosexuals suffer from greater mental illnesses even though they live in a country where tolerance of homosexuality is among the highest of all other countries.[64]

These results also support that the homosexual lifestyle itself renders LGBT individuals to be overly sensitive about their surroundings and romantic relationships, in turn being more prone to be "mentally disturbed."[65] Accordingly, there is no sufficient clinical evidence for the States to even "reasonably infer" that SOCE is a but-for cause of or a substantial factor for any of the LGBT clients' diagnosed mental problems to justify full bans on SOCE therapies for minors.

D. Seeking Professional SOCE Therapies Is Better Than Seeking Guidance from Unregulated and Unidentified Groups of People

Some argue that the very fact that a licensed mental healthcare practitioner questions a client's LGBT orientation constitutes an outrageous "homophobic attack," imposing "anti-gay outlook" on his client.[66] Another argument is that when a licensed mental healthcare practitioner questions a minor client about his or her sexual identity, the minor may see it as an "objective medical opinion," carrying "greater authority to define the minor's sense of self-worth and reinforce his self-hatred."[67] However, this is less of a problem when both the minor client and his or her parents willingly consent to the SOCE therapies in their effort to deal with the unwanted sexual desires. Moreover, the danger of the minor client seeing the opinion of his or her therapist carrying a greater authoritative value to define" his or her "sense of self-worth" can

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[61] M.W. Ross, *Homosexuality and Mental Health: A Cross-cultural Review,* J. HOMOSEXUALITY 15:131-152 (1988); NEIL E. WHITEHEAD, MY GENES MADE ME DO IT - A SCIENTIFIC LOOK AT SEXUAL ORIENTATION (Whitehead Assoc. 2010), *available at* http://www.mygenes.co.nz/download.htm.

[62] Ross, *supra* note 61.

[63] *Id.*

[64] *Id.*

[65] B. Riess, *Psychological Tests in Homosexuality*, *in* HOMOSEXUAL BEHAVIOR: A MODERN APPRAISAL 298-311 (J. Macmor ed., 1980).

[66] Laura Gans, *Inverts, Perverts, and Converts: Sexual Orientation Conversion Therapy and Liability*, 8 B.U. PUB. INT. L.J. 219, 245-49 (1999).

[67] David B. Cruz, *Controlling Desires: Sexual Orientation Conversion and the Limits of Knowledge and Law*, 72 S. CAL. L. REV. 1297, 1352-53, 1358-59 (1999).

be easily eliminated by requiring the practitioners to explain to their minor clients that homosexuality is not a disease. The practitioners can be further required to explain about what to expect of a treatment's effectiveness and present credible clinical data regarding SOCE to their clients.

Furthermore, when a legislation such as the California SOCE Ban considers only allowing licensed mental healthcare practitioners to affirm the sexual identity of the confused youths, the youths can only resort to a group of unregulated people who are willing to provide answers to them about their sexual orientation issues. Thus, our children are potentially placed in a situation where they could face another spectrum of risk of possible "abusive conduct" by an unidentified and unregulated group of people, who may be eager to offer them a self-serving guidance of sexuality which is contaminated with their own homosexual politics.[68]

Studies suggest that children, struggling with their gender identity confusion, are often exposed to unregulated organizations, like pro-homosexual organizations that will aggressively solicit them.[69] Many organizations typically operating as "gay and lesbian youth centers" serve as social clubs where adult homosexuals can meet and mingle with teens without supervision or interference by parents or police.[70] If States are willing to allow non-professionals or any activist groups outside the confinement of professional ethics regulation to counsel troubled youths regarding their sexual orientation, then the States are not serving any purpose by banning the educated professionals from helping the same minors. Teens are left unprotected to the exposure of the harmful influences of these unprofessional and unchecked advances without the option of the professional SOCE.

In contrast, licensed mental healthcare practitioners are in a much better position to give more accurate and well-balanced counseling to confused minors. This is because unlike the aforementioned organizations, clinics are and can be carefully regulated in a way that they will not engage in false advertisements or misrepresentation of information. They can be held accountable for harms they cause, if any, according to the code of professional conduct. In fact, the States at issue already require their licensed mental healthcare practitioners to disclose the possible harmful effects of SOCE and to obtain informed consent from their clients.

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[68] SCOTT LIVELY ET. AL., THE LEGAL LIABILITY ASSOCIATED WITH HOMOSEXUALITY EDUCATION IN CALIFORNIA PUBLIC SCHOOLS (2003), http://www.defendthefamily.com/_docs/resources/2032505.pdf.

[69] *Id.*

[70] *Id.*

Furthermore, it is important to note that many youths develop homosexual tendencies due to a negative or traumatic sexual experience and they will be deprived of their right to seek treatment. For example, homosexuals had suffered disproportionately higher sexual abuses during their childhoods compared to their heterosexual counterparts.[71] Also, there is a high level of association between gender identity confusion and parental separation "at critical developmental stages."[72] Blindly affirming their sexual orientation or refusing to help them to change their sexual orientation, without even considering the possible causes of such tendencies, would be depriving the treatment rights of the minors who carry the burden of unwanted homosexuality which originated from their negative childhood experiences.

By prohibiting the licensed mental healthcare practitioners from providing any helpful counseling to minors who want to change their sexual orientation, the States are practically neglecting the minors, leaving them with no knowledgeable or accountable guidance. Troubled youths will be only deferred to unlicensed consultants or activist groups, who pose no less threat to them than the professional counselors who only wish to provide them with help from biblical or conventional perspectives. Invalidating a child's and his or her parents' wishes to pursue SOCE therapies will only create another set of problems for minors and totally defeat the purpose of the SOCE ban itself.

III. FURTHER DEVELOPMENT OF THE PARENTAL RIGHTS CLAIM

The parental rights claim in *Kings*[73] was denied because Plaintiffs lacked standing to bring a third-party claim on behalf of their minor clients and the clients' parents, while the same claim in *Pickup*[74] was inadequately and incorrectly analyzed. The parental rights claim did not receive the attention it deserved in either case, because the main Plaintiffs in both cases were licensed mental healthcare practitioners and they primarily asserted that their rights to free speech under the

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[71] J. SATINOVER, HOMOSEXUALITY AND THE POLITICS OF TRUTH 106 (Hamewith Books 1996); J. BEITCHMAN ET. AL., A REVIEW OF THE SHORT-TERM EFFECTS OF CHILD SEXUAL ABUSE, CHILD ABUSE & NEGLECT 537-56 (1991); JESSICA JONES STEED ET. AL., *Gay Men and Lesbian Women with Molestation History: Impact on Sexual Orientation and Experience of Pleasure*, *in* 3 THE OPEN PSYCHOL. J. 36-41 (2010); D. I. Templer et.al., *Comparative Data of Childhood and Adolescence Molestation in Heterosexual and Homosexual Persons*, 30 ARCHIVES OF SEXUAL BEHAVIOR 535-41 (2001).

[72] J. SATINOVER, HOMOSEXUALITY AND THE POLITICS OF TRUTH 107 (Hamewith Books 1996); G. Rekers & J. Swihart, *The Association of Gender Identity Disorder with Parental Separation, 2* PSYCHOL. REP. 65 1272-74 (1989).

[73] King v. New Jersey, 767 F.3d 216, 246 (3d Cir. 2014).

[74] Pickup v. Brown, 740 F.3d 1208, 1235-36 (9th Cir. 2014).

First Amendment were violated.[75] Consequently, much of the legal analysis by both courts were focused on the Plaintiffs' free speech rights, and a very small portion of the court decisions was spent on the issue of parental rights. At the same time, because these SOCE therapy bans were not directly aimed at regulating parents or even minor clients, but rather at regulating the licensed mental healthcare practitioners, most criticisms against the legislations have been focused on the issue of the free speech rights. The issue of parental rights pertaining to SOCE bans has not been well elaborated or analyzed in any of the court decisions.

However, given the importance of parental rights as one of the enduring fundamental rights protected under the Constitution,[76] the bigger issue of the State legislations banning SOCE therapies is their violation of the fundamental parental rights. Given that an essential element of preserving the integrity of the family is maintaining the autonomy of the parent-child relationship, the complete prohibition of SOCE therapies for minors not only take away the individual rights of parents or children, but also trample their rights to preserve the integrity of their family.[77] Thus, this Note will now further elaborate and analyze the parental rights claim.

A. Parents Have the Fundamental Rights to Rear Their Children and Cultivate Their Parent-Child Relationship

It has been long held by the Supreme Court that the right of parents to "direct the moral upbringing and education of their children" is "one of the most fundamental of all rights"[78] Treating parental rights as a fundamental right is a "settled" and "well-established" principle of constitutional law.[79] Furthermore, the liberties guaranteed under the Fourteenth Amendment have been interpreted to include exclusive rights of parents to raise their children.[80] "The custody, care and nurturing of the child reside first in the parents, whose primary function and freedom include preparation for obligations the State can neither supply nor hinder."[81] This is so because "parental autonomy to care for

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[75] *King*, 767 F.3d at 243-46; *id.*

[76] Santosky v. Kramer, 455 U.S. 745 (1982); Moore v. East Cleveland, 431 U.S. 494, 503 (1977); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972); Stanley v. Illinois, 405 U.S. 645 (1972); Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[77] *See* Quilloin v. Walcott, 434 U.S. 246, 255 (1978); *Yoder*, 406 U.S. at 232 ("[P]rimary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."); *Pierce,* 268 U.S. at 534-35.

[78] *Pierce*, 268 U.S. 510; *Meyer*, 262 U.S. 390.

[79] *Santosky*, 455 U.S. 745; *Stanley*, 405 U.S. 645.

[80] *Meyer*, 262 U.S. at 398-400.

[81] Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

children free from government interference" is crucial for satisfying "a child's need for continuity and thus ensures his or her psychological and physical well-being."[82]

The right of parents to direct the upbringing of their children is also often referred to as "a right to family privacy."[83] The American tradition has ascribed a special importance to the familial relationship, including not only the autonomy of parental decision making authority over their minor children, but also "the freedom of a parent and child to maintain, cultivate, and mold their ongoing relationship." [84] Moreover, the "freedom of personal choice in matters of family life" is also considered to be a "fundamental liberty interest" protected under the Constitution.[85] The Constitution protects a right to family privacy, because the institution of family is "deeply rooted in this nation's history and tradition," and it is through the family that we pass down many of our moral and cultural values to our next generation. [86] Courts have specifically expressed interest in protecting the relationship between the parent and the child in order to strengthen family institutions as a whole.[87] Many courts have also recognized "preserving family unity" as a proper State interest.[88]

A consistent support for parental rights has been upheld even until recently, such as by the Court in *Troxel v. Granville*, which stated that "the Due Process Clause of the Fourteenth Amendment protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children."[89] In *Troxel*, the grandparents of minor children wanted to increase visitation with their grandchildren, but the children's biological mother did not allow what the grandparents desired.[90] The Supreme Court held that granting the grandparents' visitation with the children over the mother's express objection fell within the protected category of family integrity and constituted

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[82] *See* Joseph Goldstein, *Medical Care for the Child at Risk: On State Supervention of Parental Autonomy,* 86 YALE L.J. 645, 649 (1977).

[83] *Pierce*, 268 U.S. at 534.

[84] Franz v. United States, 707 F.2d 582, 595 (D.C. Cir. 1983).

[85] *Id.*

[86] Moore v. East Cleveland, 431 U.S. 494, 503 (1977); Wisconsin v. Yoder, 406 U.S. 205, 232 (1972).

[87] Parham v. J.R., 442 U.S. 584, 610 (1979) (expressing concern regarding adverse effects on the parent-child relationship in the context of whether a formal hearing should be required before a parent admits a child into a mental hospital).

[88] *See, e.g.*, Am. Acad. of Pediatrics v. Lungren, 940 P.2d 797, 825 (Cal. 1997); In re T.W., 551 So.2d 1186, 1192 (Fla. 1989).

[89] Troxel v. Granville, 530 U.S. 57 (2000).

[90] *Id.* at 61.

unconstitutional infringement on the mother's fundamental right to make decisions for her two daughters.[91]

The Court in *Troxel* made several important points in its opinions. First, the Court gave a great deference to the biological parent based on the assumption that parents act in the best interests of their children.[92] Second, the Court balanced a parent's right to raise her child with the State's role in protecting the welfare of the child.[93] Third, the Court stated that the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests" such as the interest of parents in the care, custody, and control of their children.[94]

Even in the context of medical decision makings, courts have held that parents have the full authority over their minor children, based on the common law assumption that a minor generally lacks capacity to consent to medical treatment.[95] In some States like in Illinois, an adult has a common law right to refuse medical treatment on behalf of his child based on the free exercise rights of religion without undue interference from the State, even if it is of a life sustaining nature.[96] Therefore, courts give great deference to parental decisions involving minor children, especially if they relate to family's religious values, and States cannot be easily justified to supersede the judgment of a loving and nurturing parent.

The Ninth Circuit in *Pickup* found that since the parents sought an affirmative right to access SOCE therapy from licensed healthcare practitioners, the precise issue of the case was not really whether parents can seek treatment for their children in general but "whether parents' fundamental rights include the right to choose for their children a particular type of provider for a particular medical or mental health treatment that the State has deemed harmful."[97] The court found that there is no "constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider if the government has

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[91] *Id.* at 57.

[92] *Id.* at 87.

[93] *Id.*; Reno v. Flores, 507 U.S. 292, 303-04 (1993); Santosky v. Kramer, 455 U.S. 745, 760, 767 (1982); Parham v. J.R., 442 U.S. 584, 605 (1979); Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[94] *Troxel*, 530 U.S. at 65 (citing Washington v. Glucksberg, 521 U.S. 702, 720 (1997)); *Reno*, 507 U.S. at 301-02.

[95] In re E.G., 549 N.E.2d 322 (Ill. 1989); Meyer v. Nebraska, 262 U.S. 390, 399-410 (1923); Pierce v. Society of Sisters, 268 U.S. 510, 534-35 (1925); Spiering v. Heineman, 448 F. Supp. 2d 1129, 1142 (D. Neb. 2006).

[96] *In re* E.G., 549 N.E.2d 322.

[97] Pickup v. Brown, 740 F.3d 1208, 1235 (citing Washington v. Glucksberg, 521 U.S. 702, 720-21 (1997)).

reasonably prohibited that type of treatment or provider," which is "within the area of governmental interest in protecting public health."[98]

To support its position on narrowly defining the issue, the court in *Pickup* cited *Washington v. Glucksberg*, which held that liberty under the Due Process Clause must be defined in a most precise and confined manner.[99] However, contextualizing the statement of the *Glucksberg* Court reveals that such an interpretation of the *Glucksberg* decision is misplaced. This is because the gist of the Court's decision is that "the Due Process Clause specifically protects those fundamental rights and liberties" which are "deeply rooted in this Nation's history and traditions," thereby excluding from the category of fundamental liberty interests any liberty interests that are not deeply rooted in the history and tradition, such as the right to end one's life.[100]

The Court in *Glucksberg* even went onto provide the list of the "liberty" interests specially protected under the Due Process Clause,[101] which include the rights to marry,[102] to have children,[103] to direct the education and upbringing of one's children,[104] to marital privacy,[105] to use contraception,[106] to bodily integrity,[107] to abortion,[108] and to refuse unwanted lifesaving medical treatments.[109] The Court did not mean that the fundamental liberty interest under the Due Process Clause should be narrowly defined in order to limit the scope of each right which has been already long recognized, but only meant to not allow any liberty interest that has never been recognized in history and tradition to be included in the category of fundamental liberty interests.[110]

Moreover, according to the recent decision in *Obergefell*, such an approach taken by the court in *Pickup* in interpreting *Glucksberg* is inconsistent with the approach the U.S. Supreme Court has taken to

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[98] *Id.* at 1236 (citing Rutherford v. United States, 616 F.2d 455, 457 (10th Cir. 1980)).

[99] *Glucksberg*, 521 U.S. at 720.

[100] *Id.* at 721.

[101] *Id.* at 720.

[102] Loving v. Virginia, 388 U.S. 1 (1967).

[103] Skinner v. Oklahoma, 316 U.S. 535 (1942).

[104] Pierce v. Society of Sisters, 268 U.S. 510 (1925); Meyer v. Nebraska, 262 U.S. 390 (1923).

[105] Griswold v. Connecticut, 381 U.S. 479 (1965).

[106] Eisenstadt v. Baird, 405 U.S. 438 (1972).

[107] Rochin v. California, 342 U.S. 165 (1952).

[108] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

[109] Cruzan v. Missouri Dep't of Health, 497 U.S.261, 278-79 (1990).

[110] Washington v. Glucksberg, 521 U.S. 702, 721-22, 744 (1997).

address other fundamental rights.[111] In fact, the Court in *Obergefell*, dealing with the fundamental right to marry, cited many cases involving the right to marry, to emphasize that each case inquired about the right to marry "in its comprehensive sense," not about a right to interracial marriage, a right of inmates to marry, or a right of fathers with unpaid child support to marry, even though each case involved the rights of a particular group of people to marry.[112]

Furthermore, contrary to the decision of the Ninth Circuit in *Pickup* in narrowly defining the issue, the real issue is whether parents are deprived of their right to seek a medical treatment for their children. It is precisely because the Statute at issue prohibits all of the licensed healthcare providers from providing any SOCE therapies to minors. Essentially, parents challenging the SOCE bans are not asking for access to a particular provider or a particular treatment, because the SOCE in its entirety is banned by the statute. It is true that the minors may still receive counseling from their parents, pastors, and everybody else. However, such personal counseling will in no way be a medical "treatment." In that sense, the parents challenging the ban are deprived of their fundamental parental rights to seek medical treatment for their children.

The Ninth Circuit in *Pickup* also stated that recognizing the parents' right to access the SOCE therapies would be to "compel the California legislature, in shaping its regulation of mental health providers, to accept Plaintiffs' personal views of what therapy is safe and effective for minors."[113] However, "legislation is measured by its impact on those whose conduct it affects" and "[t]he proper focus of constitutional inquiry is the group for whom the law is a restriction - not the group for whom the law is irrelevant."[114] The minors and their parents who have no desire to access the professional SOCE therapies are an irrelevant group for the constitutional inquiry raised here. However, the SOCE therapy bans do implicate a violation of parental fundamental rights for the parents who want to seek the SOCE therapies for their minor children. Therefore, the correct issue is whether the SOCE bans infringe upon those particular parents' fundamental rights to rear their children, to cultivate important values

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[111] Obergefell v. Hodges, 135 S. Ct. 2584, 2602 (2015); Pickup v. Brown, 740 F.3d 1208, 1235 (9th Cir. 2014).

[112] Turner v. Safley, 482 U.S. 78, 95 (1987); Zablocki v. Redhail, 434 U.S. 374 (1978); Loving v. Virginia, 388 U.S. 1 (1967).

[113] *Pickup*, at 740 F.3d at 1236.

[114] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 894 (1992).

in their lives, and to make medical decisions for them, so as to be invalidated under the Due Process Clause of the Constitution.

B. Blanket Ban on Professional SOCE Therapies Infringes upon Parental Rights

On the surface, the SOCE bans seemed to be no more than a legitimate regulation of professional ethics, since it is the licensed mental healthcare practitioners, not parents or minors, who will be sanctioned in case of violating the law. However, the court in *King* concluded that an informed consent given by the parents of a minor client would not suffice to protect the minor's interest, since minors are "especially vulnerable" and they may feel pressured to receive SOCE therapies by their families and their communities.[115] Those who advocate the full ban of SOCE argue that minor children's vulnerability is exactly the reason why parents should not be allowed to give consent on behalf of their minor children when it comes to SOCE.

Since the interests of parents, children, and the State are all interconnected, recognizing and protecting parental authority is also intertwined with facilitating parental duties.[116] States' power to infringe on a parent's right to rear children can be justified under two general categories: (1) when the State's interest is based on its police power to protect the public at large from societal ills[117] and (2) when the State's interest is based on its *parens patriae* power to protect children who are incapable of protecting themselves.[118] "*Parens patriae*" is Latin for "parent of the nation," referring to the public policy power of the State to intervene against an abusive or negligent parent to "act as the parent of any child or individual who is in need of protection."[119]

Sometimes, these two principles overlap in the sense that a State can assert its *parens patriae* power as a basis for its standing in a suit to represent its citizens or for using its sovereign lawmaking power to address certain harms affecting its citizens.[120] For example, the Court in *Wisconsin v. Yoder*, holding that the First Amendment prohibited the state of Wisconsin to require Amish children to attend public school, pointed out that States may limit parental discretion if it appears that

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[115] King v. New Jersey, 767 F.3d 216, 233 (3d Cir. 2014).

[116] Bellotti v. Baird, 443 U.S. 622 (1979).

[117] *See, e.g.*, Schall v. Martin, 467 U.S. 253, 274 (1984) (discussing the authority of the state to use police power to protect the health and welfare of its citizens); Ginsberg v. New York, 390 U.S. 629, 640 (1968); Jacobson v. Massachusetts., 197 U.S. 11, 25 (1905).

[118] *See* Prince v. Massachusetts, 321 U.S. 158 (1944) (upholding state's authority to punish those who violate child labor laws).

[119] *Parens Patriae*, WIKIPEDIA, https://en.wikipedia.org/wiki/Parens_patriae (last modified Oct. 21, 2015).

[120] Massachusetts v. EPA, 549 U.S. 497 (2007).

parental decisions will "jeopardize the health or safety of the child," or have a "potential for significant social burdens."[121] Nonetheless, the full ban of professional SOCE therapies cannot be justified under either theory.

1. States' Police Powers Do Not Justify the Blanket Ban of Professional SOCE Therapies

Even though the state police power was not explicitly mentioned in either case, the States' general reasoning behind passing the SOCE ban was that SOCE practices are potentially harmful to the society at large, amounting to a "potential for significant social burdens" mentioned in *Yoder*.[122] It is true that state police powers embody the power to promote all aspects of the public's welfare, including public health, safety, morals, and family values.[123] The Supreme Court has long recognized that a state action under such police powers will not be held unconstitutional, unless the action is "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare."[124] Some argue that such state police powers include the power of a State to purely promote the public's welfare, even in the absence of real harm affecting the society at large, such as affirmatively helping minors become autonomous citizens by encouraging their emotional and intellectual development.[125]

However, such a broad interpretation of state police powers, without requiring any societal harm at large, is not justified especially when "the fundamental rights" of the State citizens are at stake. When "the fundamental rights" of the citizens are implicated rather than other less important liberty interests, such as liberty to contract, then the States should be allowed to act only if society at large is at risk.[126] This proposition is supported by the Court in *Yoder*, which held that the State of Wisconsin could limit parental discretion only if the discretion

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[121] Wisconsin v. Yoder, 406 U.S. 205, 234 (1972).

[122] *I Id.*; King v. New Jersey, 767 F.3d 216, 237 (3d Cir. 2014).

[123] Lucas v. S. Carolina Coastal Council, 505 U.S. 1003, 1023 (1992).

[124] Hall v. Geiger-Jones Co., 242 U.S. 539, 548 (1917).

[125] Deana A. Pollard, *Banning Corporal Punishment: A Constitutional Analysis*, 52 Am. U.L. Rev. 447 (2002).

[126] *See, e.g.*, Schall v. Martin, 467 U.S. 253, 274 (1984); *Yoder*, 406 U.S. at 234; Ginsberg v. New York, 390 U.S. 629, 640 (1968); *Jacobson*, 197 U.S. at 25; *see also Developments in the Law: The Constitution and the Family*, 93 HARV. L. REV. 1156, 1199–1202 (1980) (distinguishing the *parens patriae* and police power to justify state regulation of families and explaining that states acting under *parens patriae* authority should advance the best interests of an incompetent person rather than objectives for the general public) [hereinafter *Developments in the Law*].

would "jeopardize the health or safety of the child," or have a "potential for significant social burdens."[127]

In the case of SOCE therapies, there is no clear or direct evidence that the society at large is at risk. It is not clear whether the professional SOCE therapies places any significant portion of the LGBT minors at risk. The States that banned SOCE therapies argue that their objective is to protect their youths from potential harm caused by SOCE therapies, but the language of the Statutes seem to be more geared towards affirmatively helping the LGBT minors to realize and accept themselves.[128] The States should not exercise their police powers to limit the fundamental liberty interests of their citizens, such as parents, without showing of a grave threat to the society at large.

In fact, other than a few interviewees' claims, there is insufficient evidence as to what portion of the minors who suffered from psychological illness actually participated in any SOCE therapies.[129] Moreover, there is no evidence that the harms that those interviewees claimed to have suffered occurred as a result of, during, or after the sessions of SOCE.[130] Therefore, there is no sufficient clinical evidence for the States to "reasonably infer" that SOCE is a but-for cause of or a substantial factor of causing the LGBT individuals' diagnosed mental problems so as to prove real harm and justify the full ban of SOCE for minors. The results of the comparative studies mentioned earlier, which showed that the homosexual lifestyle itself, rather than the social hostility, is a primary cause of their mental health issues further weaken the position of the States.[131]

A juxtaposition of the SOCE ban with a similar issue of corporal punishment at home places the SOCE ban issue into perspective. All States have exceptions to tort and criminal assault and battery committed against children if they are committed for purposes of disciplining a child.[132] However, based on numerous scientific research conducted in the past decade, many child psychologists have suggested that corporal punishment of children should be banned altogether.[133] Despite the majority of scientific research suggesting that some societal

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[127] *Yoder*, 406 U.S. at 234.

[128] *Id.*

[129] Amicus Curiae Brief, *supra* note 57, at *13.

[130] *Id.*

[131] LIFE SITE, *supra* note 60.

[132] *See, e.g.*, People v. Whitehurst, 12 Cal. Rptr. 2d 33 (Ct. App. 1992); Commonwealth v. Ogin, 540 A.2d 549 (Pa. Super. Ct. 1988).

[133] *See, e.g.*, Leonard D. Eron, *Research and Public Policy*, 98 PEDIATRICS 821, 822-23 (1996); Murray A. Straus, *Spanking and the Making of a Violent Society*, 98 PEDIATRICS 837, 838 (1996).

ills do result from corporal punishment, States have been reluctant to completely ban corporal punishment at home.[134]

The advocates of the SOCE ban similarly argue that the LGBT minors at large are in danger of suffering physical and psychological harm from SOCE therapies unless they are fully banned.[135] If States have not fully banned corporal punishment by parents despite the scientific research showing some risk of societal harm, then there is very little reasons why the States can be justified to fully ban all types of SOCE therapies which are not clinically or scientifically proven to harm children except in a few isolated incidents.

2. States' *Parens Patriae* Powers Do Not Justify the Full Denial of Parental Consent for SOCE Therapies

"Children . . . are assumed to be subject to the control of their parents, and if parental control falters, the State must play its part as *parens patriae*." [136] Under this *parens patriae* power, a State can intervene to protect minors who are deemed to be placed in danger.[137] This power, unlike the State police power, enables the State to act on behalf of a specific individual, such as a child, even if there is no threat to society or the public welfare. [138] The *parens patriae* power was traditionally used to consider the child's welfare, known as "the best interest of the child" standard, as the determinative factor in private custody decisions. [139] However, courts have gradually expanded the *parens patriae* power to an extent allowing States to justify the broad "State-initiated intervention into the family."[140]

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[134] Straus, *supra* note 133; Pollard, *supra* note 125.

[135] *See generally* Leonard P. Edwards, *Corporal Punishment and the Legal System*, 36 SANTA CLARA L. REV. 983 (1996); Symposium, *The Short-and Long-term Consequences of Corporal Punishment*, 98 PEDIATRICS 803 (1996); *Child Discipline*, AM. HUMANE ASS'N, http://www.americanhumane.org/children/stop-child-abuse/fact-sheets/child-discipline.html (speaking out against the use of physical punishment in homes and schools) (last visited Apr. 4, 2016). The American Bar Association, the American Medical Association, the American Public Health Association, the American Psychological Association, the National Parent-Teachers Association, the National Association of School Psychologists, the National Education Association, the National Association of Social Workers, and the National Association of Pediatric Nurse Associates and Practitioners all support a ban of child spanking.

[136] Schall v. Martin, 467 U.S. 253, 265 (1984).

[137] *Id.* at 265 (recognizing that state must take over parental role for children when parental control fails); Addington v. Texas, 441 U.S. 418, 426 (1979) (acknowledging state interest in caring for mentally ill individuals using *parens patriae* power).

[138] *Developments in the Law*, *supra* note 126.

[139] *Id.*

[140] *Id.* at 1223–24.

a. States Failed to Rebut the Legal Presumption That Parents Act for the Best Interests of Their Children

According to the Supreme Court, parents have "a fundamental liberty interest in caring for and guiding their children, and a corresponding privacy interest -- absent exceptional circumstances."[141] Moreover, it has been established that this constitutional liberty comes with a legal "presumption" that "'natural bonds of affection lead parents to act in the best interests of their children.'"[142] However, in reality, parents could potentially harm their minor children who are under their care. Therefore, if that presumption can be rebutted, a court will balance "a parent's interests in a child" against the "State's interests in *parens patriae*," so as to adequately protect the children at risk.[143] In other words, States cannot exercise its *parens patriae* power to intervene in child-parent relations, simply because the opinions of the States and parents are at odds, but only when the State can overcome the presumption by showing that the parents' action or inaction was detrimental to the child.[144]

Simply put, States should overcome the legal presumption by showing that the parents whose fundamental rights are infringed upon are unfit or their actions are detriment to their child, in light of the fact that any law infringing on an individual's fundamental rights is "subject to strict scrutiny."[145] Since a violation of any fundamental rights, such as parental rights to rear their children, requires States to show a compelling state interest, then the States' interest in examining the questionable decisions of the parents who are proven to be "unfit" can only constitute a compelling state interest so as to justify the States to exercise its *parens patriae* power to determine the best interest of the children at risk.[146] Without the evidence that the parents seeking SOCE therapies for their children are unfit, States have no reason to invalidate the authority of parents who wish to consent to a medical treatment on behalf of their children.

For example, the Court in *Troxel* found that a Washington statute permitting courts to "order visitation rights for any person when visitation may serve the best interest of the child" violated the mother's

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[141] Troxel v. Granville, 530 U.S. 57, 87 (2000).

[142] Parham v. J.R., 442 U.S. 584, 602 (1979); *see also* Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 895 (1992); Santosky v. Kramer, 455 U.S. 745, 759 (1982).

[143] *Parham*, 442 U.S. at 605; Prince v. Massachusetts, 321 U.S. 158, 166 (1944).

[144] Maldonado S, *When Father or Mother Doesn't Know Best: Quasi-Parents and Parental Deference After Troxel v. Granville*, 88 IOWA L. REV. 865 (2003).

[145] San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[146] *Ex parte* E.R.G., 73 So. 3d 634, 644. (Ala. 2011).

Fourteenth Amendment due process right to bring up her children.[147] Absent evidence that the mother was unfit, the Court treated the best interest of the child as irrelevant and therefore invalidated the statute that allowed third parties to challenge the mother's decision in regards to her child.[148]

Similarly, in the cases of SOCE therapies, the *parens patriae* power of States and the best interest determinations should not come into play, unless the States first show that the parents of the LGBT minors are unfit or causing their children harm amounting to abuse or neglect. Parents often have to "decide between competing alternatives, each of which may entail both benefits and detriments for their children."[149] At times, parents may act against their children's interests or will. But, that does not justify the assumption that all parents generally act against their "child's best interests" so as to invalidate the decisions of all parents.

Likewise, simply that the decision of a parent is not agreeable to that of a child on the issue of homosexuality and SOCE therapies or that such parental decision may involve "some risks" does not automatically transfer the decision making power from the parents to the States on the issue of SOCE therapies entirely.[150] Also, while some minors may not be so inclined to engage in SOCE therapies, some others may genuinely wish to overcome their same sex attraction due to their personal values or religious beliefs. States should not be so quick to assume that the majority of the minors who consent to SOCE therapies are somehow all forced to go through the therapies against their will. States should not use its *parens patriae* power without showing that one's making of a decision to place his child under SOCE therapies amounts to child neglect or abuse.[151]

The relationship between parent and child is constitutionally protected, and the Due Process Clause would be offended if a State infringes on the fundamental rights of parents, "without some showing of unfitness and for the sole reason that to do so was thought to be in the children's best interest."[152] Such a high bar is justified because a State's intervention to act on behalf of a minor by overriding her parent's authority could place the parents and the child as adversaries, thereby

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147 Troxel v. Granville, 530 U.S. 57 (2000).

148 *Id.*

149 *Ex parte E.R.G.*, 73 So. 3d at 668.

150 Parham v. J.R., 442 U.S. 584, 603 (1979).

151 *Id.* at 604.

152 *Id.* at 610; *The Supreme Court's Parental Rights Doctrine*, PARENTALRIGHTS.ORG, http://www.parentalrights.org/index.asp?SEC=12D52BF9-1D6D-4EEC-B83B-F74B3F91BDF6 (last visited Apr. 4, 2016).

damaging their ongoing parent-child relationship and family unity.[153] Especially because a States' right to intervene on behalf of a minor interferes with his or her own parents' ability to fulfill their responsibilities to him or her, [154] the fulfillment of the parental responsibilities can only be accomplished by interpreting parents' autonomy rights expansively while interpreting the State authority narrowly.[155]

Therefore, State interventions should require something more than simply a difference of opinion between a parent and his or her State about where the child's interests lie.[156] So long as a parent adequately cares for his or her children, there is no reason for the State to "inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children."[157] Without the evidence showing that the public at large is at risk or that the parents seeking SOCE therapies for their children are unfit all together, States have no reason to completely invalidate the consent of the parents who want to seek professional SOCE therapies for their children.

b. States' Parens Patriae Power to Act on Behalf of Older Minors Is Weak

In the context of medical treatment, courts have recognized that the level of *parens patriae* power of a State is contingent upon factors such as the maturity of the minor and the nature of the medical treatment involved.[158] For example, in many States, when a minor's ideas conflict with his or her parents' ideas, a principle such as the "mature minor doctrine" may have effect to reflect the minor's preferences in very limited cases.[159] The mature minor doctrine or emancipated minor rules allow a minor to receive medical treatments without parental consent, provided that the minor meets the relevant requirements.[160]

As a case in point, in *Bellotti v. Baird*, despite the remark on the right of parents to have control over their children, the court ultimately decided that minors do not need parental consent for an abortion if they

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[153] *Id.* at 635.

[154] Emily Buss, *The Parental Rights Of Minors*, 48 BUFF. L. REV. 785, 806 (2000).

[155] *Id.*

[156] June Carbone, *Legal Applications of the "Best Interest of the Child" Standard: Judicial Rationalization or a Measure of Institutional Competence?*, 134 PEDIATRICS 110 (2014)., http://pediatrics.aappublications.org/content/134/Supplement _2/S111#xref-ref-4-1.

[157] Troxel v. Granville, 530 U.S. 57, 58 (2000).

[158] Bellotti v. Baird, 443 U.S. 622 (1979); *In re* E.G., 549 N.E.2d 322 (Ill. 1989).

[159] *Bellotti*, 443 U.S. 622.

[160] FAY A. ROZOVSKY, CONSENT TO TREATMENT: A PRACTICAL GUIDE § 5.01[B][3]-[4] (4th ed. 2011).

obtain an approval through judicial bypass.[161] Also, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court reaffirmed its position that a minor seeking an abortion is required to obtain the informed consent of one of her parents or guardians, but has a judicial bypass option available if the minor does not wish to or cannot obtain such consent.[162] The principle behind the aforementioned cases in permitting an "older" minor to partake in deciding on such treatment was that, as a minor approaches the age of maturity, she becomes more capable of making thoughtful and well-informed decisions.[163]

Although this analogy still threatens the traditional view of parental authority, it should be at least equally applied to a State's *parens patriae* power to the extent that it does not easily supersede a child's and his or her parents' decision making powers. In other words, if the minor's maturity or developmental status can be a factor in limiting the authority of the parents who want to consent a certain medical procedure for their minor children, the same factor should be considered in limiting the State power to act on behalf of minor children, especially when the opinions of parents and the minor child on SOCE therapies are in conformity.

It is harsh that parents could lose the opportunity to engage with his or her children in discussing moral and emotional issues implicated by a life altering decision, such as the sufferance of an abortion, simply because the child is approaching his or her adulthood. While there are conflicting views on the question of whether the maturity level of a minor child should be considered to overcome the parents' fundamental right to make medical decisions for their children, these principles, having been already recognized by courts to limit parental authority, should be equally applied to limit States' *parens patriae* powers exercised against parents' and their children's due process interests. In this regard, there are largely three factors that courts have considered to determine the strength or validity of a States' *parens patriae* power.

First, the level of a State's *parens patriae* power to protect purportedly endangered minors is contingent on the age or maturity of the minors in question.[164] A State's *parens patriae* power is strongest when the minor is very young, immature, and incompetent to make any decisions on his or her own.[165] However, this "*parens patriae* authority "fades" as the minor gets older and "disappears" upon her reaching

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[161] *Bellotti*, 443 U.S. 622.

[162] Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).

[163] *Id.*; Molly J. Walker Wilson, *Legal and Psychological Considerations in Adolescents' End-Of-Life Choices*, 109 NW. U. L. REV. 203 (2015).

[164] ABRAMS, *supra* note 48.

[165] *Id.*

adulthood.[166] This factor is particularly important in the SOCE issue at hand, because the majority of the minors dealing with sexual orientation matters are in their teenage years.[167] This leads to the inference that a State's *parens patriae* power is relatively weak compared to the cases involving minors that are much younger.

Second, the State's *parens patriae* power can be exercised only to the extent that the parents' motivation is inconsistent with the best interests of child based on the facts of each case.[168] For example, *Parham v. J.R.* concerned the issue of whether Georgia's voluntary commitment procedures for mentally ill children under 18 violated the Due Process Clause of the Fourteenth Amendment when there is a risk of error inherent in the parental decision to have a child institutionalized for mental health care.[169] The court held that it would not be proper for the State to invalidate the parental consent by requiring a judicial hearing simply because there was an inherent risk of error in the parental decision, therefore limited the parental authority only to the extent that the State can require the parents to satisfy some neutral fact-finding statutory requirements for admission.[170]

Likewise, in the case of SOCE therapies, it would be improper for States to absolutely invalidate parental consent by simply relying on some potential risks that minor clients may suffer or on the speculation that parents' motivation in seeking SOCE for their children will be always inconsistent with the best interests of their children who are struggling with their sexual orientations. Furthermore, when a minor child also assents or consents to a treatment, the State's *parens patriae* power becomes even more diminished because the potential conflict of interests between parents and their child in the context of SOCE therapies is much less severe than the potential risk of errors in the case of sterilization of mentally incompetent children.

Most of the minors who deal with same sex attraction are older and not mentally incompetent. States have a very little justification to exercise their power to completely override parental decisions in engaging their minor children in SOCE therapies. Unless a broad assumption can be justified, each case should be examined based on its own set of facts. A statutory requirement for a neutral fact-finder inquiry would be more than enough to provide a solution for the instances where parents act inconsistent with the best interest of his or her child.

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[166] *In re* E.G., 549 N.E.2d 322 (Ill. 1989).

[167] Jenis Wolak et al., *Online "Predators" and Their Victims*, AM. PSYCHOL. ASS'N (2008), http://www.apa.org/pubs/journals/releases/amp-632111.pdf.

[168] *Id.*

[169] Parham v. J.R., 442 U.S. 584 (1979).

[170] *Id.*

Third, the level of States' *parens patriae* power is contingent on the nature of the medical treatment involved.[171] If a treatment at issue is "potentially life threatening," the State's *parens patriae* interest is greater than if the treatment is "less consequential."[172] For example, the court in *Curran v. Bosze* held that a father's desire to have his three-year-old twin child undergo a bone marrow harvesting procedure on behalf of their half-brother was not in the children's best interests because of the magnitude of the danger involved for the healthy child.[173]

On the other hand, the court in *Hart v. Brown* held that it would be unjust to deny parents, with honorable intentions, the right to consent to one twin's donating a kidney to the other.[174] The court relied on the fact that a trauma to the one remaining kidney of the 7 1/2 year old twin is rare in life.[175] Moreover, this factor is additionally supported by the decision in *In re Green*, dealing with the parental authority to make a medical decision, which stated that "the State does not have an interest of sufficient magnitude outweighing a parent's religious beliefs when the child's life is not immediately imperiled."[176]

Applying the rationale of the two aforementioned cases to the instant case of SOCE therapies, there are no definitive scientific evidence that most of the minors who receive such therapies will suffer a life-threatening danger. The treatment at issue does not involve physical intrusion or implicates a life threatening situation. Only a few isolated incidents, if any, have been reported to show that receiving SOCE therapies itself was the direct cause of a minor's suicide or serious mental illness. It would be arbitrary to define all SOCE therapies as "potentially life threatening" or "consequential." Therefore, the State's *parens patriae* interest is no greater than the fundamental interest of parents.

Accordingly, the combination of an older minor's maturity and the non-life threatening nature of the SOCE treatments should diminish the State's *parens patirae* power to the extent that the parental consent on SOCE therapies is limited only case by case based on the facts of each case. The full bans on professional SOCE therapies for minors overextends the States' *parens patriae* power.

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171 *In re E.G.*, 549 N.E.2d 322.

172 *Id.*

173 Curran v. Bosze, 566 N.E.2d 1319, 1345 (Ill. 1990).

174 Hart v. Brown, 289 A.2d 386, 391 (Conn. Super. Ct. 1972).

175 *Id.*

176 *See e.g.*, *In re* Green, 292 A.2d 387, 392 (Pa. 1972).

C. Parental Rights Must Be Afforded "Strict Scrutiny"

It has been long established that any law infringing on an individual's fundamental rights is "subject to strict scrutiny."[177] The Supreme Court has held that "classifications affecting fundamental rights are given the most exacting scrutiny."[178] As the United States Supreme Court stated, a government may limit a fundamental right of its citizens for the purpose of promoting a compelling interest as long as the government uses the least restrictive or narrowly tailored means to further that interest.[179] Therefore, the strict scrutiny test requires that the State at issue has a compelling state interest and that the least restrictive means is used to achieve that compelling interest.[180]

One of the most recent Supreme Court decisions on the issue of parental rights was made in *Troxel*, as mentioned in an earlier section above. Since the Court ambiguously indicated that the Due Process Clause "provides heightened protection against government interference with certain fundamental rights and liberty interests" such as the interest of parents in the care, custody, and control of their children,[181] the Court's decision has been interpreted as the "interference with the right to family integrity" calling for only intermediate scrutiny.[182] However, *Troxel*'s "tacit intermediate-scrutiny review" has been criticized by many for giving inadequate protection to parental privilege and for representing "a lack of confidence by the Court about constitutional intervention into the family."[183]

In fact, Justice Thomas in his concurring opinion stated that the strict scrutiny test is the appropriate standard of review to apply to infringements of fundamental rights such as parental rights, in his effort to clarify the opinions of the plurality that did not clearly articulate the appropriate standard of review.[184] Therefore, the test should be "so stringent as to be utterly indistinguishable from strict scrutiny" because the State regulations at issue here clearly infringe on the parental

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[177] San Antonio Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973).

[178] Clark v. Jeter, 486 U.S. 456, 461 (1988); Graham v. Richardson, 403 U.S. 365, 375 (1971) ("It is enough to say that the classification involved . . . was subjected to strict scrutiny under the compelling state interest test . . . because it impinged upon the fundamental right of interstate movement.").

[179] Sable Commc'n of California, Inc. v. FCC, 492 U.S. 115 (1989).

[180] *Id.*

[181] Troxel v. Granville, 530 U.S. 57, 65 (2000) (citing Washington v. Glucksberg, 521 U.S. 702, 720 (1997); Reno v. Flores, 507 U.S. 292, 301-02 (1993)).

[182] *Id.*

[183] Stephen G. Gillesa, *Parental (and Grandparental) Rights After Troxel v. Granville*, 9 SUP. CT. ECON. REV. 69 (2001); David D. Meyer, *Lochner Redeemed: Family Privacy After Troxel and Carhart*, 48 UCLA L. REV. 1125, 1140-50 (2001).

[184] *Troxel*, 530 U.S. at 59.

fundamental liberty interests that have been long recognized by the Court.[185]

Also, in *Rideout v. Riendeau*, the Maine Supreme Court ruled that the parent's due process rights may be restricted if the State advances a compelling State interest and the intrusion is narrowly tailored, implying that the strict scrutiny is the right standard for cases implicating the constitutional rights of parents.[186] The court even went onto say that the best interests of the child alone does not constitute a compelling interest, absent a showing of harm.[187] Subsequently, in *Hiller v. Fausey*, the Pennsylvania Supreme Court found the Pennsylvania Grandparent Visitation Act constitutional based on the *Troxel* standard.[188] Justice Newman, in his concurring opinion, also recognized that when the constitutional rights of parents are implicated, the court should determine whether the interference is narrowly tailored to achieve a compelling State interest.

Therefore, absent clear revocation of the earlier strict scrutiny test, the State regulations banning professional SOCE therapies for minors and constraining the rights of the minor children's parents should be reviewed under the strict scrutiny test.[189] "[A] parent's interest in the care, custody, and companionship of a child is a liberty interest that may not be interfered with in the absence of a compelling State interest."[190]

D. SOCE Bans Can Survive Neither the Strict Scrutiny Nor the Intermediate Scrutiny

Even though the strict scrutiny test should apply to the parental rights claim, I would like to analyze the claim under the intermediate scrutiny test for the sake of an argument, because some courts, such as *Troxel*, although not clear, seemed to have applied the intermediate scrutiny test.[191] In fact, the full SOCE bans for minors do not even survive the "intermediate scrutiny" standard of review. The intermediate scrutiny test requires that the statute: (1) "directly advances" a "substantial government interest," and (2) is "not more extensive than

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[185] William Wood, *Hearing on Child Support and Fatherhood Proposals*, *in* ALLIANCE FOR NON-CUSTODIAL PARENTS RTS., PARENTAL RTS. & THE L. (2001).

[186] Rideout v. Riendeau, 761 A.2d 291, 297 (Me. 2000) (holding the best interest of the child is insufficient to intervene in the decision making of competent parents).

[187] *Id.*

[188] Hiller v. Fausey, 904 A.2d 875, 904 (Pa. 2006) (Newman, J., concurring).

[189] *Id.* (commenting "I would apply strict scrutiny to infringements of fundamental rights" on parental rights).

[190] *In re* Marilyn H., 851 P.2d 826, 834 (Cal. 1993).

[191] Troxel v. Granville, 530 U.S. 57, 59 (2000).

necessary to serve that interest."[192] The Third Circuit in *King*, which analyzed the New Jersey SOCE Ban also under the intermediate scrutiny, found that (1) directly advances the State's interest in protecting its citizens from harmful or ineffective professional practices and (2) is no more extensive than necessary to serve that interest.[193] The court's decision was incorrect for two reasons.

First of all, without real proven harm on minors directly associated with the SOCE therapies, it is impossible to analyze whether the legislation banning SOCE "directly advances" the State interest of protecting minors. There was no sufficient evidence for the State to make such inferences. The Third Circuit in *King* said that, in order to survive heightened or intermediate scrutiny, the State must establish that the harms it believes SOCE counseling presents are "real, not merely conjectural," and that "the regulation will in fact alleviate these harms in a direct and material way."[194] The court found that "reasonable inferences" can be made based the provided evidence that the harm was real and that "the legislation will alleviate these harms in a direct and material way."[195]

However, there are no clinically proven data connected to SOCE therapies to support such "inferences." The sources provided for evidence simply suggest that many reputable professional and scientific organizations, such as APA and Pan American Health Organization, have publicly condemned SOCE therapies and warned of the "great" health risks associated with SOCE counseling.[196] Even though such evidence may seem very convincing and conclusive, the positions of such organizations are not necessarily based on any clinically proven data. In fact, the Court in the Third Circuit recognized that APA itself "refused to make a definitive statement about whether recent SOCE is safe or harmful."[197] Furthermore, the APA Report suggested that a lot of evidence regarding the harmfulness of SOCE counseling currently falls short of the demanding standards imposed by the scientific community because there is a "limited amount of methodologically sound research" on SOCE counseling.[198] Nonetheless, the Court insisted that it is "not too far a leap in logic or unreasonable to conclude that a minor client

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[192] Florida Bar v. Went For It, Inc., 515 U.S. 618, 623-24 (1995); Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 557 (1980).

[193] *King*, 767 F.3d at 233.

[194] *Id.* at 238; Pitt News v. Pappert, 379 F.3d 96, 107 (3d Cir. 2004) (explaining that legislatures cannot meet this burden by relying on "mere speculation or conjecture"); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 664 (1994) (plurality opinion).

[195] *King*, 767 F.3d at 238.

[196] *Id.*

[197] *Id.* at 239.

[198] *Id.*; Glassgold, *APA Report*, *supra* note 44.

would suffer psychological harm if he was told by an authority figure that her sexual orientation is something undesirable."[199]

The Third Circuit's conclusion was indeed "too far a leap in logic" and "unreasonable," because whether real harm actually exists or whether any purported harm is caused by SOCE therapies in itself is not researched or proven. Even if there are some incidents in which the LGBT minors who receive SOCE therapies suffered from psychological disorders, such harm has to be real "in relation to SOCE" to be relevant for and justify the "substantial State interest." Unless there is some proven evidence that SOCE therapies are a "but for cause" or a "substantial factor" in causing the LGBT minors' disorders, it would not be reasonable for anyone to infer that the purported harm is "real." The relationship between the homosexual minor children's "psychological difficulties as a whole" and the SOCE seem to lie much closer to "mere speculation or conjecture" based on a lack of clinically proven data on minors who received SOCE therapies.

Relying on *United States v. Playboy Entertainment Group, Inc.*, the Third Circuit in *King* said that a State legislature is not constitutionally required to wait for conclusive scientific evidence before acting to protect its citizens from serious threats of harm. However, the same Court in *Playboy* said that there needs to be more "widespread" "hard evidence" to prove a pervasive harm.[200] In determining the constitutionality of a statute requiring cable television operators to fully block sexually oriented programming or to limit transmission to hours when children were unlikely to be viewing, the Court stated that it was impossible to know how widespread the problem was since the only indicator in the record was a handful of complaints and isolated incidents of problems.[201] Likewise, in the case of SOCE, there is only a handful of complaints from some interviewees and isolated incidents of depression and suicides that are directly connected to professional SOCE therapies. Without widespread hard evidence supporting a causal relationship between SOCE therapies and the psychological disorders that the minors may be suffering, it cannot be said that the purported harm is real.

Second, even if we assume that the State interest is compelling, completely banning SOCE therapies for minors cannot be stated to have any significant impact on the purported psychological harms that LGBT minors may suffer so as to "directly advance" the State interest.

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[199] *Id.*

[200] United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 817, 819, 824 (2000) (citing Edenfield v. Fane, 507 U.S. 761, 770-71 (1993) ("[A] governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real").

[201] *Id.* at 821.

Therefore, the full ban of all forms of SOCE for minors is more extensive than necessary to serve the State interest. However, the Third Circuit emphasized that, under the heightened scrutiny test, the State is "not required to adopt the least restrictive or perfect means conceivable," but it must still demonstrate "narrow tailoring of the challenged regulation to the asserted interest" by showing that the scope of the regulation is "in proportion to the interest served."[202]

In fact, the State has failed to demonstrate that a full ban on all types of SOCE therapies for minors is "in proportion to the interest served."[203] Contrary to the Court's findings, there are a lot more "less-restrictive means" to accomplish the same goal without fully banning all SOCE therapies.[204] For example, the State could have only banned specific forms of methods that are physically intrusive or clinically proven to cause psychological problems to minor clients. Also, the State could require the licensed mental healthcare practitioners to provide their clients with more specific and extensive information about SOCE's potential problems, so that they can truly make an informed decision on receiving SOCE counseling.

Interestingly, the Third Circuit concluded that an informed consent by parents would not adequately serve the State's interests since minors constitute an "especially vulnerable population" and they may feel pressured to receive SOCE counseling by their families and their communities.[205] However, this conclusion is also a broad assumption without any factual basis. "The objective of shielding children" does not automatically suffice to support "a blanket ban" of the purported harmful act if the protection can be accomplished by a less restrictive alternative.[206] It is the government's obligation to "prove" not "assume" that the alternative will be ineffective to achieve its goals.[207] The court is correct that under the intermediary scrutiny test, the State is not required to adopt the "least restrictive means." However, with several less restrictive alternatives available, which I will discuss in the next section, the full ban on SOCE therapies for minors constitute means "more extensive than necessary to serve that interest."[208] The statutes that fully ban professional SOCE therapies for minors do not even

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[202] *King*, 767 F.3d at 239 (quoting Greater New Orleans Broad. Ass'n, Inc. v. United States, 527 U.S. 173, 188 (1999)).

[203] *King*, 767 F.3d at 239.

[204] *Id.* at 240.

[205] *Id.*

[206] United States v. Playboy Entm't Grp., Inc., 529 U.S. 803, 813 (2000).

[207] *Id.*

[208] *King*, 767 F.3d at 233.

survive the intermediate scrutiny test. Accordingly, they violate the Constitution.

IV. ALTERNATIVES TO THE FULL BAN ON SOCE THERAPIES

In search of adequate alternatives, I aimed to find the means that will adequately protect the children's constitutional rights by reducing risks of their parents' error or abuse, but will not unduly trench on the authority and rights of the parents to seek healthcare for their children who face undesired sexual orientation.[209] The following suggestions could be used either independently or collectively to advance the State interest in protecting minor children from clinically proven harms. Requiring more procedural safeguards will adequately advance the State interests in protecting minors from any unethical conduct of licensed mental healthcare practitioners. All the alternatives I suggest support the basic principle that parental consent alone should be sufficient and respected, absent a clear and convincing evidence of coercion or abuse by the parents.

A. Full Ban on Physically Intrusive SOCE Therapies

Considering that most of the clinically proven harms associated with SOCE counseling result from certain physical intrusive methods, the most appropriate alternative to the current full ban legislations would be a full ban solely on physically intrusive SOCE therapies.[210] Especially since the States' assumption that all SOCE or even all professional SOCE therapies are per-se harmful cannot be supported with enough clinical evidence, States may ban the therapies that have been clinically proven to be harmful.

B. More Rigorous Consent and Assent Requirement for Minors and Their Parents

The purported harms resulting from SOCE therapies, if any, can be eliminated by requiring mental healthcare practitioners to use more rigorous steps to obtain informed consent or assent from their minor clients and the parents of the minor clients. Usually, children in their teenage years are old enough to have some understanding of the proposed medical treatment. American Academy of Pediatrics (AAP) lays out the ways a physician should obtain "informed consent" and "assent" from a minor patient: (1) helping the patient achieve an awareness of the nature of his or her condition; (2) telling the patient what he or she can expect with treatments; (3) making a clinical assessment of the patients understanding of the situation and factors influencing how he or she is

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[209] Parham v. J.R., 442 U.S. 584 (1979).

[210] Victor, *supra* note 8.

responding, including whether there is inappropriate pressure to accept therapy; and (4) soliciting an expression of the patient's willingness to accept the proposed care, with weighing them seriously.[211] Approaching the issue of any harms arising from SOCE therapies as a matter of "compelling disclosures of truthful factual information" from healthcare practitioners instead of "prohibiting the counseling itself" would be a good solution.[212]

A State regulation could specifically require licensed mental healthcare practitioners to explain what to expect of a treatment's effectiveness, present credible clinical data regarding SOCE, and disclose the therapists' professional competence to their minor clients and the parents. These types of procedure safeguards can be incorporated into "anti-deception law" or "code of professional conduct," preventing the licensed mental healthcare practitioners from false advertising, misrepresentation, or unprofessional conduct of providing services outside one's fields of competence.[213] While informed consent and assent from both a minor client and his parents should be required at the commencement of the SOCE therapy program, it would be a good idea to add more safeguards by requiring the healthcare practitioners to obtain informed consent or assent from their minor clients at the beginning of every session. The healthcare practitioners can be required to explain in the beginning of each session that his can withdraw his consent at any time. The healthcare practitioners can be also required to provide to their minors clients about very specific information, such as the procedural or legal measures the minor clients can take if they feel coerced to accept any of the SOCE therapies.

C. Statutory Procedures for Voluntary Commitment to SOCE Therapy and Administrative Hearing Process

In *Parham*, the risk of error inherent in the parental decision to have a child institutionalized for mental health care led the court to allow the government to employ some kind of "neutral fact-finder" inquiry procedure.[214] Even though the *Parham* case involved the issue of parental consent for sterilization of mentally incompetent children, the procedure suggested in the decision is very instructive to the issue of addressing some danger of coercive or abusive SOCE therapies. The

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[211] American Academy of Pediatrics, *Committee on Bioethics, Informed Consent, Parental permission, and Assent in Pediatric Practice*, 95 PEDIATRICS 314, 315-16 (1995).

[212] *King*, 767 F.3d at 236; Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626, 650-51 (1985) (outlining the "material differences between disclosure requirements and outright prohibitions on speech" and subjecting a disclosure requirement to rational basis review).

[213] Victor, *supra* note 8, at 1570.

[214] *Parham*, 442 U.S. at 584.

neutral fact-finder" inquiry procedure suggested in *Parham* does not overly border on parental authority, therefore it can be useful for weeding out any coercive and abusive SOCE therapies.

Of course, such a procedure should not be used to give the third party the power to determine whether the best interests of the child is being served, especially because we are not dealing with mentally incompetent or ill children. However, like the "neutral fact-finder" inquiry procedure in *Parham*, a trained third party may be given the authority to determine whether a minor child himself is genuinely assenting to the SOCE therapy or coerced by others. Only after a neutral third party finds that the child in question is genuinely willing to participate in the therapy based on the inquiry procedure, he or she may go through the therapy. In fact, such a procedure can be required even periodically in order to ensure that the child is not psychologically abused in any way.

The administrative hearing process can be also implemented in order to prevent any possible case of abuse. Even though those who advocate the full ban of any types of SOCE may suggest that putting a child through SOCE therapies itself is basically a form of child abuse, and such a broad accusation against parents who consider SOCE would be too big of a leap in logic. Even if there are some cases that involve a minor who is coerced to assent to such counseling, each case should be reviewed independently. Similar to the judicial bypass afforded to certain mature minors, if a minor child believes that he or she is being abused or firmly stands against his parents' opinion on SOCE, he can be afforded an easy judicial process to refuse the treatment. The option of judicial bypass can be more cumbersome than the full ban of SOCE therapies, however, it must be remembered that "the Due Process Clause of the Fourteenth Amendment were designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency and efficacy" of government officials.[215]

Of course, the above alternatives still trample the traditional concept of fundamental parental rights. Nonetheless, they are workable alternatives to effectively balance the intertwined interests of child, parents, and States. These alternatives are meant to still respect the parental rights but to prevent any extreme SOCE therapy cases amounting to child abuse or neglect.

CONCLUSION

The full ban on the licensed mental healthcare practitioners' SOCE therapies not only trample on parental rights but also forces our children

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[215] Stanley v. Illinois, 405 U.S. 645, 656 (1972).

to prematurely affirm their sexual identities. Furthermore, without the option of seeking regulated and professional mental healthcare for SOCE, our children who wish to deal with their unwanted sexual orientation will be exposed to unaccountable outside sources. The State regulations that compel licensed counselors to only encourage the minor clients to internalize and affirm their LGBT identities constitutes manipulating minors and placing undue State influence on the impressionable minds of young people.

Such regulations have been challenged mainly under the First Amendment for infringing upon the free speech rights of the licensed counselors who wish to apply their biblical views in their practice. But, more importantly, the regulations infringe upon the fundamental parental rights that have been long recognized since even before the Constitution or the pre-political era. Except for compelling State interests, the right to control sex education for children, to cultivate important values in their lives, and to make medical decisions for them should belong to the parents, not to a government.

Prohibiting licensed mental healthcare practitioners from making unrealistic promises about proposed treatments' effectiveness and implementing multiple procedural steps to obtain adequate assent and informed consent from parents and minors before treatment would sufficiently advance the same State interest in protecting minor children from any coercive and abusive counseling practices. Such procedural protection approaches, while serving the same state purpose, will carry much less risks of trampling on the constitutional rights of parents, children, and licensed mental healthcare professionals.

As much as the States may want to promote the elevation of the fullest individual self-realization for LGBT individuals, the States should not deprive the parental rights by making a decision for all children who are struggling with their sexual orientations, assuming that their take on the homosexuality issue will always be at odds with the way their parents want to address the same issue. Enacting laws that will prevent parents from controlling sex education for their children, cultivating important values in their lives, and making medical decisions for them undoubtedly infringe upon the fundamental parental rights without any justification.