CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

TARA KING, PH.D., RONALD NEWMAN, PH.D., et al.,

Petitioners,

v.

GOVERNOR OF NEW JERSEY, et al.,

Respondents

GARDEN STATE EQUALITY,

Intervenor/Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When this Court ruled that California's Reproductive FACT Act violates the First Amendment, *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371-74 (2018) ("NIFLA"), it also abrogated **by name** the panel decision at bar, rendering it demonstrably wrong. Other circuits when confronted with supervening decisions by this Court that do not mention a lower court opinion by name but place its core holdings in question have recalled the mandate. *See e.g., Zipfel v. Halliburton Co.,* 861 F.2d 565 (9th Cir. 1988). However, here, the Third Circuit refused to recall the mandate, leaving in place a blatant content-based violation of the First Amendment that creates irreparable harm each day the mandate is not recalled. *See Reed v. Town of Gilbert,* 135 S. Ct. 2218 (2015).

The questions presented are:

1. Whether the Court of Appeals erred when it refused to recall its mandate after this Court explicitly abrogated its opinion by name.

2. Whether a lower court mandate should be recalled when this Court expressly abrogates the ruling by name and when the

lower court's abrogated opinion continues to cause irreparable harm to free speech.

3. Whether a lower court opinion should be vacated and the mandate recalled when this Court expressly overrules the opinion by name and when the lower court opinion continues to cause irreparable harm to free speech.

4. Whether this Court's explicit abrogation of the lower court's opinion by name which departed from this Court's free speech precedents is an extraordinary circumstance justifying recall of the mandate when the lower court opinion continues to cause irreparable harm to free speech.

PARTIES

Petitioners are Tara King, Ph.D., Ronald Newman, Ph.D., The Alliance For Therapeutic Choice and Integrity ("the Alliance"), formerly known as the National Association for Research and Therapy of Homosexuality ("NARTH"), and American Association of Christian Counselors ("AACC").

Respondents are Philip D. Murphy, the Governor of the State of New Jersey; Paul R. Rodriguez, Acting Director of the New Jersey Department of Law and Public Safety: Division

of Consumer Affairs; Milagros Collazzo, Executive Director of the New Jersey Board of Marriage and Family Therapy Examiners; Susan Rischawy, Acting Executive Director of the New Jersey Board of Psychological Examiners; and J Paul Carnilo, President of the New Jersey State Board of Medical Examiners.

Garden State Equality was an Intervenor-Defendant/Respondent in the lower court case.

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly owned corporation owning ten (10) percent or more of either the Alliance's or AACC's stock.

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The opinion of the United States Court of Appeals for the Third Circuit denying a petition for rehearing is unpublished and attached as Appendix E at 69a. The opinion of the United States Court for Appeals for the Third Circuit denying the Motion to Recall the Mandate is unpublished and is attached as Appendix A at 1a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit denying the petition for rehearing en banc was filed on November 13, 2018. The decision of the United States Court of Appeals for the Third Circuit denying the Motion to Recall the Mandate was filed on October 11, 2018. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1). The Third Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The New Jersey statute that is the subject of the constitutional challenge is reproduced in its entirety in the Appendix to this Petition. App. 72a.

The relevant constitutional provisions are reproduced in their entirety in the Appendix to this Petition. App. 81a.

STATEMENT OF THE CASE

In *NIFLA v. Becerra*, 138 S.Ct. 2361 (2018), this Court reversed the Ninth Circuit's validation of California's Reproductive FACT Act and rejected as contrary to precedent the Ninth Circuit's reliance on a free speech "continuum" analysis adopted by the Ninth Circuit in *Pickup v. Brown*, 740 F.3d 1208, 1227–29 (9th Cir. 2014) and used by the Third Circuit panel in this case, *King v. Governor of New Jersey*, 767 F.3d 216, 232 (3rd Cir. 2014). Both lower courts created a new category of "professional" speech providing less speech protection, which *NIFLA* expressly rejected. 138 S.Ct. at 2371-74; *See Pickup,* 740 F.3d at 1228; *King*, 767 F.3d at 233-34. The Ninth Circuit also used the "continuum" concept to find that the content-based Reproductive FACT Act need only satisfy and did satisfy intermediate scrutiny. *NIFLA*, 138 S.Ct. at 2371 (citing *NIFLA v. Harris*, 839 F.3d 823, 839 (9th Cir. 2016)).

This Court rejected these courts' newly minted "professional" speech category, and *by name,* abrogated *Pickup* and *King*, the case at bar. *NIFLA*, 138 S.Ct. at 2371-72.

This Court's rejection of both lower court decisions could not be more clear:

> Although the licensed notice [at issue in *NIFLA*] is content based, the Ninth Circuit did not apply strict scrutiny because it concluded that the notice regulates "professional speech." [*NIFLA v. Harris,*] 839 F.3d at 839. Some Courts of Appeals have recognized "professional speech" as a separate category of speech that is subject to different rules. *See, e.g.,* ***King v. Governor of New Jersey*****, 767 F.3d 216, 232 (C.A.3 2014)**; *Pickup v. Brown*, 740 F.3d 1208, 1227–1229 (C.A.9 2014); *Moore–King v. County of Chesterfield,* 708 F.3d 560, 568–570 (C.A.4 2013). These courts define "professionals" as individuals who provide personalized services to clients and who are subject to "a generally applicable licensing and regulatory regime." *Id.*, at 569; *see also*, ***King, supra*****, at 232**; *Pickup, supra*, at 1230. "Professional speech" is then defined as any speech by these individuals that is based on "[their] expert knowledge and judgment," ***King, supra*****, at 232,** or that is "within the confines of [the] professional relationship,"

Pickup, supra, at 1228. So defined, these courts except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny. *See* ***King, supra*, at 232**; *Pickup*, *supra,* at 1253–1256; *Moore–King, supra*, at 569.

But this Court has not recognized "professional speech" as a separate category of speech. Speech is not unprotected merely because it is uttered by "professionals." This Court has "been reluctant to mark off new categories of speech for diminished constitutional protection." *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 804, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996) (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part). And it has been especially reluctant to "exemp[t] a category of speech from the normal prohibition on content-based restrictions." *United States v. Alvarez*, 567 U.S. 709, 722, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012) (plurality opinion). This Court's precedents do not permit

> governments to impose content-based restrictions on speech without "'persuasive evidence ... of a long (if heretofore unrecognized) tradition'" to that effect. *Ibid.* (quoting *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 792, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011)).
> *This Court's precedents do not recognize such a tradition for a category called "professional speech."*

Id. at 2372. (emphases added).

When, as is true here in *King,* and was true in *NIFLA* and *Pickup*, the speech restriction affects health care professionals, then content-based restrictions pose as great or greater risks of harm as are posed by content-based restrictions in other contexts. *Id.* at 2374. This Court found that increased risk a further reason to reject the intermediate scrutiny analysis adopted by the Third Circuit here and the Ninth Circuit in *Pickup* and *NIFLA*.

> The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the

content of professionals' speech "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Turner Broadcasting [v. FCC]*, 512 U.S.[622], at 641, 114 S.Ct. 2445 [(1994)]. Take medicine, for example. "Doctors help patients make deeply personal decisions, and their candor is crucial." *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1328 (C.A.11 2017) (en banc) (W. Pryor, J. concurring). Throughout history, governments have "manipulat[ed] the content of doctor-patient discourse" to increase state power and suppress minorities:

For example, during the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception. In the 1930s, the Soviet government expedited completion of a construction project on the Siberian railroad by ordering doctors to both reject requests for medical leave from work and conceal this government order from their patients. In Nazi Germany,

the Third Reich systematically violated the separation between state ideology and medical discourse. German physicians were taught that they owed a higher duty to the 'health of the Volk' than to the health of individual patients. Recently, Nicolae Ceausescu's strategy to increase the Romanian birth rate included prohibitions against giving advice to patients about the use of birth control devices and disseminating information about the use of condoms as a means of preventing the transmission of AIDS. Berg, *Toward a First Amendment Theory of Doctor–Patient Discourse and the Right To Receive Unbiased Medical Advice*, 74 B.U.L. REV. 201, 201–202 (1994) (footnotes omitted).

Further, when the government polices the content of professional speech, it can fail to "'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'" *McCullen v. Coakley*, 573 U.S. ——, —— – ——, 134 S.Ct. 2518, 2529, 189 L.Ed.2d 502 (2014). Professionals might have a host of

> good-faith disagreements, both with each other and with the government, on many topics in their respective fields. Doctors and nurses might disagree about the ethics of assisted suicide or the benefits of medical marijuana; lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce; bankers and accountants might disagree about the amount of money that should be devoted to savings or the benefits of tax reform. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting), and the people lose when the government is the one deciding which ideas should prevail.

NIFLA, 138 S.Ct. at 2374-75 (emphasis added). "In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles." *Id.* at 2375. The same is true for the Third Circuit's wholesale adoption

of the Ninth Circuit's continuum concept and intermediate scrutiny analysis of New Jersey's content-based A3371.

After this Court abrogated the panel's decision here by name, Petitioners filed a motion with the Third Circuit to recall the mandate. After receiving responses from Respondents and Intervenor-Respondents, the Third Circuit panel denied the motion without discussion. App. 1a. Petitioners timely sought rehearing en banc, which the Third Circuit treated as a request for reconsideration and denied without discussion. App. 69a.

The Third Circuit abused its discretion in refusing to recall the mandate despite this Court's explicit abrogation of its decision and the continuing irreparable injury occurring as a result of the content-based speech restrictions. Petitioners now seek review of the decision below and ask that this Court grant review and vacate the Third Circuit's denial of the motion to recall the mandate.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT BETWEEN THE THIRD CIRCUIT'S REFUSAL TO RECALL THE MANDATE AND THIS COURT'S EXPRESS ABROGATION OF ITS OPINION.

As this Court acknowledged in *Calderon v. Thompson*, 523 U.S. 538, 549 (1998), "the courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion." "In light of 'the profound interests in repose' attaching to the mandate of a court of appeals, however, the power can be exercised only in extraordinary circumstances." *Id.* at 550 (citing 16 C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3938, p. 712 (2d ed.1996)).

Courts of appeal have defined such extraordinary circumstances as, *inter alia*, "good cause," to "prevent injustice," or in "special circumstances." *American Iron & Steel Institute v. EPA*, 560 F.2d 589, 593 (3d Cir. 1977). In turn, "special circumstances" have included "(1) where clarification of a mandate and opinion is critical; (2) where misconduct has affected the integrity of the judicial process; (3) where there is a danger of incongruent results in cases pending at the same time; and (4) where it is necessary

to revise an 'unintended' instruction to a trial court that has produced an unjust result." *Id.* at 594 (citing *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 278-79 (D.C. Cir. 1971)).

In particular, courts of appeal have found that subsequent decisions by this Court or supervening changes in law can justify recalling a mandate:

> Where, as here, a decision of the Supreme Court the preeminent tribunal in our judicial system departs in some pivotal aspects from those of lower federal courts, amendatory action may be in order to bring the pronouncements of the latter courts into line with the views of the former. As noted above, recall of a mandate traditionally has been warranted when and to the extent necessary "to protect the integrity" of a court's earlier judgment. Certainly, such integrity may be jeopardized when the solemn declarations of a court are called into question by a later Supreme Court opinion. Recall of a mandate, in such a situation, would appear to be an appropriate response by a court of appeals.

Am. Iron & Steel Inst. 560 F.2d at 596–97. "[I]n order to prevent an injustice, we act to free the hand of the district court from any strictures of the 'law of the case' on the former remand." *Verrilli v. City of Concord*, 557 F.2d 664, 665 (9th Cir. 1977). "One circumstance that may justify recall of a mandate is a supervening change in governing law that calls into serious question the correctness of the court's judgment." *Sargent v. Columbia Forest Prod., Inc.,* 75 F.3d 86, 90 (2d Cir. 1996). Here, the court's judgment was not merely questioned, but abrogated by name by this Court, yet the mandate was not recalled.

A. The Third Circuit's Refusal To Recall The Mandate Following This Court's Abrogation Of Its Decision Conflicts With Other Circuits Stating That Recall Is Appropriate When A Subsequent Decision by This Court Proves that the Lower Court Decision is Wrong.

The Third Circuit's refusal to recall the mandate here cannot be reconciled with actions by other circuits which recalled mandates when subsequent decisions by this Court undercut the legal conclusions reached by the lower court.

Circuit courts have recalled their mandates when this Court's later opinions in unrelated cases addressing similar legal issues have shown the appellate court's analysis to be "demonstrably wrong." However, those cases did not involve this Court's express abrogation of the appellate court decision by name, as is true here. If a subsequent case reaching a different conclusion on similar facts has rendered an earlier unrelated case demonstrably wrong and subject to recall, then this Court's explicit abrogation of the case at bar must trigger recall of the mandate. The Third Circuit's refusal to do so is itself demonstrably wrong.

The Fifth Circuit recalled its mandate when a subsequent decision of this Court clarified when a firearm can be considered as having been used in a crime. *United States v. Tolliver*, 116 F.3d 120, 123 (5th Cir. 1997). In *Tolliver*, the defendant had been convicted according to precedent holding that mere possession of a firearm was sufficient. *Id.* at 124. Subsequent to that conviction, this Court issued an opinion in an unrelated case and found that mere possession was not sufficient for a conviction. *Id.* The Fifth Circuit found that the subsequent decision "directly conflicted" with its earlier decision, justifying a recall of the mandate. *Id.* at 123.

> Our authority to recall our own mandate is clear. Under Rule 41.2 of the Fifth Circuit Rules, we may recall our mandate if necessary in order to prevent injustice. An example of such an injustice is when a subsequent decision by the Supreme Court renders a previous appellate decision demonstrably wrong.

Id. Unlike the situation here, in *Tolliver* the subsequent decision did not reference the Fifth Circuit's decision by name as being wrongly decided, yet the court found that recall was necessary to prevent injustice. By contrast, the Third Circuit refused to recall the mandate when this Court explicitly said that the *King* decision was demonstrably wrong. *NIFLA*, 138 S.Ct. at 2372.

The Ninth Circuit also recalled its mandate when a subsequent decision by this Court in an unrelated case resolved an issue differentially from the way it was resolved in the decision at issue. *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988). In *Zipfel*, the Ninth Circuit acknowledged that this Court's decision in another case involving wrongful death claims of foreign nationals had the effect of overruling the Ninth Circuit's resolution of a choice of law issue. *Id.*

> The recent Supreme Court decision in *Chick Kam Choo* [*v. Exxon Corporation,* 486 U.S. 140 (1988)] departs in a pivotal aspect from our decision of the injunction issue in this case. The effect of this departure is to overrule our resolution of the injunction issue, at least in part. We, therefore, exercise our power to recall the mandate and amend the opinion "[b]ecause of an overpowering sense of fairness and a firm belief that this is the exceptional case requiring recall of the mandate in order to prevent an injustice...." *Verrilli* [*v. City of Concord*, 557 F.2d [664] at 665 [9th Cir. 1977)].

Id. 567-68. In *Chick Kam Choo*, the *Zipfel* decision was mentioned as an inter-circuit conflict that needed to be resolved, but this Court did not expressly discuss and abrogate the *Zipfel* decision as the *NIFLA* court did with the Third Circuit's decision here. *Chick Kam Choo*, 486 U.S. at 145, 152. If the mere mention of a case as an inter-circuit conflict is an exceptional circumstance justifying recall of a mandate to prevent injustice, then the explicit abrogation, by name, of a lower court decision is even more

so. The Third Circuit's contrary decision creates an irreconcilable conflict.

The Sixth Circuit also recalled its mandate when a subsequent decision by this Court in an unrelated case issued a new rule regarding criminal sentencing that affected the defendant in the Sixth Circuit case. *U.S. v. Murray*, 2 Fed. Appx. 398, 400 (6th Cir. 2001). "[W]hen an intervening Supreme Court case calls into question the 'integrity' of a separate judgment, the circumstance is extraordinary enough to warrant such an extreme remedy." *Id.* (citing *Zipfel*, 861 F.2d at 567). In *Murray,* as in *Tolliver*, this Court's subsequent decision did not mention the case at issue, let alone, as is true here, explicitly abrogate it. Still, the new rule announced in the case was sufficient to render the Sixth Circuit's decision demonstrably wrong and subject to recall.

The Third Circuit's refusal to recall the mandate conflicts with decisions in other circuits which found that a subsequent decision of this Court which merely departed from but did not explicitly abrogate the lower court case showed that the appellate decision was demonstrably wrong and subject to recall. This Court should grant the Petition to reconcile the conflict.

B. The Third Circuit's Refusal To Recall The Mandate Following This Court's Express Abrogation Of Its Decision Conflicts With Other Circuits' Decisions Recalling Mandates For Far Less Consequential Supervening Changes in the Law.

The Third Circuit's refusal to recall the mandate following this Court's explicit abrogation of its decision also conflicts with decisions in the Eleventh, Second and Ninth circuits that have recalled mandates when supervening changes in the law, including decisions by this Court, have called the appellate court's decision into question. In none of these cases did the supervening change in law involve the circumstances here, *i.e.,* abrogation of the appellate court opinion by name, by this Court, making the Third Circuit's action here all the more egregious.

The Eleventh Circuit recalled its mandate when a subsequent decision by this Court effectively, but not explicitly, abrogated the earlier decision. *Judkins v. Beech Aircraft Corp*., 745 F.2d 1330, 1331–32 (11th Cir. 1984). In *Beech*, the Eleventh Circuit originally held in

the context of a Title VII case that the filing of an EEOC right-to-sue letter and a request for appointment of counsel satisfied the statutory requirement that a lawsuit be brought within 90 days from the issuance of the right-to-sue letter. *Id.* at 1331. In a subsequent unrelated decision, *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149-50 (1984), this Court held that that the filing of an EEOC right-to-sue letter does not satisfy the 90-day statutory limitation period. Unlike *NIFLA, Baldwin County* did not mention, let alone explicit abrogate, *Judkins*. Nevertheless, the Eleventh Circuit found that *Baldwin County* flatly rejected the legal basis and effectively reversed *Judkins*, thus justifying a recall of the mandate. *Id.* The Third Circuit's refusal to recall its mandate in light of *NIFLA*'s explicit abrogation presents a conflict that should be resolved by this Court.

The Second Circuit recalled its mandate after a state Supreme Court decision changed the governing law regarding private rights of action for workers fired in retaliation for filing a worker's compensation claim. *Sargent v. Columbia Forest Prod., Inc.,* 75 F.3d 86, 90 (2d Cir. 1996). "One circumstance that may justify recall of a mandate is '[a] supervening change in governing law that calls into serious question the correctness of the court's judgment.'" *Id.* (quoting *McGeshick v. Choucair*, 72 F.3d 62, 63 (7th Cir.1995); *Zipfel,* 861 F.2d at 567-68).

> Based upon a seemingly clear canon of statutory construction barring an implication of a private right of action where a statute provides an express right, we confidently predicted that the Vermont Supreme Court would not imply a private right of action under the workers' compensation statute. Our prediction was incorrect.

Id. at 89-90. Consequently, the Vermont Supreme Court decision "is beyond any question inconsistent with our earlier decision" and justified recalling the mandate. *Id.* at 90. If there can be no question that a subsequent unrelated state Supreme Court case renders a federal case subject to recall of the mandate, then this Court's explicit abrogation of *King v. Christie* in *NIFLA* is beyond question and the Third Circuit's contrary decision is irreconcilable.

The Ninth Circuit recalled its mandate regarding an award of attorneys' fees when the subsequent passage of the Civil Rights Attorney's Fees Act of 1976 and its decision finding the Act applicable to appeals pending at its passage called the prior ruling into question. *Verrilli v. City of Concord*, 557 F.2d 664, 665 (9th Cir. 1977). "Because of an overpowering sense of

fairness and a firm belief that this is the exceptional case requiring recall of the mandate in order to prevent an injustice, we act to free the hand of the district court from any strictures of the 'law of the case' on the former remand." *Id.*

Here, this Court's explicit abrogation of *King* in *NIFLA* has rendered the Third Circuit's decision unconstitutional and exposes individuals subject to New Jersey's content-based speech restriction not merely to a denial of legal remedies, but to the irreparable injury of violation of free speech rights, as described *infra*.

II. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT BETWEEN THE THIRD CIRCUIT'S REFUSAL TO RECALL THE MANDATE WHEN FREE SPEECH RIGHTS ARE BEING INFRINGED AND OTHER CIRCUITS WHICH HAVE RECALLED MANDATES WHEN CIVIL RIGHTS ARE BEING INFRINGED.

The Third Circuit's refusal to recall its mandate following this Court's explicit abrogation of its intermediate scrutiny analysis of a content-based "professional" speech restriction conflicts with decisions by other appellate courts that have recalled their

mandates when subsequent decisions meant the initial decisions infringe on civil rights. Courts of appeal have found that justice requires a recall of their mandate when supervening decisions showed that the initial decision denied due process, wrongly upheld a conviction or sentence, wrongly deprived a party of legal remedies or otherwise deprived them of civil rights protection.

This case involves just such a deprivation of rights, *i.e.*, infringement of freedom of speech, that requires recall of the mandate. The *NIFLA* Court referred to the Third Circuit's decision *by name* and said that the panel's adoption of intermediate scrutiny analysis for a content-based restriction on professional speech was wrong. *NIFLA,* 138 S.Ct. 2361, 2371-72 (2018) As a consequence, the content of Petitioners' and their minor clients' speech is being restricted without the constitutionally required proof that the restriction is narrowly tailored and necessary to meet a compelling state interest. Far less than an explicit abrogation of a decision infringing upon First Amendment rights has triggered recalls of mandates in other circuits.
The Third Circuit's refusal to recall the mandate under such circumstances creates an issue of profound constitutional importance. That is particularly true in light of the fact that the Third Circuit decision in *King v. Christie*, 767 F.3d 216, 232 (3d Cir. 2014), and the related

Ninth Circuit, decision, *Pickup v. Brown,* 740 F.3d 1208 (9th Cir. 2014), also abrogated by name in *NIFLA,* have been the impetus for similar content-based speech restrictions, and consequently similar deprivations of constitutional rights, across the country. Without this Court's review, those constitutionally deficient bills will continue to proliferate as legislators rely upon the abrogated decision here to justify enacting similar bills.

A. The Third Circuit's Refusal To Recall Its Mandate After This Court Explicitly Abrogated Its Decision By Name Conflicts With Other Circuit Decisions Recalling Mandates When Civil Rights Are At Risk.

While recognizing the importance of the repose that attaches to their judgments, courts of appeal also recognize that is necessary to recall their mandates when they impinge upon civil rights, interfere with judicially prescribed remedies or affect continuing conduct. *See Meredith v. Fair,* 306 F.2d 374, 378 (5th Cir. 1962); *Tolliver*, 116 F.3d at 123; *Verrilli*, 557 F.2d at 665; *United States v. Bd. of Directors of Truckee-Carson Irr. Dist*., 723 F.3d 1029, 1034–35 (9th Cir. 2013); *Ute Indian Tribe of the*

Uintah & Ouray Reservation v. State of Utah, 114 F.3d 1513, 1526 (10th Cir. 1997).

In *Ute Indian* Tribe, the Tenth Circuit opted to modify their mandate instead of recalling it, but confirmed that recall is appropriate when a subsequent change in law impacts ongoing conduct. 114 F.3d at 1526. "Where a prior erroneous judgment necessarily affects continuing conduct, the interests of uniformity may demand departure from the prior judgment to bring a court's view of the law into line with the prevailing view." *Id.* This Court's abrogation of the panel decision by name has rendered the judgment erroneous. As discussed more fully *infra*, the erroneous judgment is adversely affecting the continuing free speech conduct of Petitioners and their minor clients, and similar parties all over the country. This should demand departure from the prior judgment in the form of recall of the mandate.

The Fifth Circuit recalled its mandate when it recognized that its original decision was being interpreted to deprive James Meredith of his equal protection right to enroll in and continue to attend the University of Mississippi. *Meredith*, 306 F.2d at 378. The court recognized the personal nature of the rights recently secured by Mr. Meredith and that the clarification of those rights was an extraordinary circumstance justifying recall of

the mandate. Likewise, here, the Third Circuit's decision is being used to deprive Petitioners of their First Amendment rights, justifying a recall of the mandate. The Third Circuit's refusal to do so is even more egregious in light of the fact that, unlike in *Meredith*, in this case this Court has abrogated the lower court's decision *by name*.

Also, as discussed above, the Fifth Circuit recalled its mandate when a subsequent decision of this Court effectively overruled the appellate court's affirmation of a criminal conviction, thus implicating the petitioner's constitutional rights. *Tolliver*, 116 F.3d at 123. Notably, this Court's subsequent decision only effectively, not explicitly, abrogated the *Tolliver* court's decision. *Id.* Yet the mandate in *Tolliver* was recalled and the mandate here was not.

In *Verrilli*, the Ninth Circuit determined that recall of the mandate was necessary because the supervening change in law meant that the circuit decision deprived the petitioner of the right to seek attorneys' fees. 557 F.2d at 665. "Our prior ruling was not merely an erroneous one, ... it was an unintended unjust result in that it deprived the appellant of a lawful statutory right to invoke the discretion of the district court under the [Civil Rights Attorney's Fees] Act and the holding in *Stanford Daily*" *v. Zurcher*, 550 F.2d 464 (9th Cir. 1977). *Id.* By contrast, here, Petitioners have faced and are continuing to face the deprivation of their

free speech rights by being subjected to a content-based prohibition that does not comport with this Court's First Amendment precedent. The Third Circuit's refusal to correct the deprivation by recalling the mandate contradicts the Ninth Circuit's decision in *Verrilli*.

The Third Circuit's refusal to recall its mandate after the *NIFLA* Court's explicit abrogation left Petitioners subject to a content-based prohibition on their speech that does not satisfy strict scrutiny also conflicts with the Ninth Circuit's decision in *Truckee-Carson*. The Ninth Circuit recalled its mandate when the court recognized that its decision would deprive a Native American tribe of the judicially established protections in a water use agreement between the tribe and the irrigation district. 723 F.3d at 1034-35.

> If the mistake is not corrected, then the immediate beneficiary will be the TCID [Truckee-Carson Irrigation District], which is at fault for the excess diversions, and the ultimate loser will be the Lake, which the OCAPs [operating criteria and procedures] are supposed to protect. The equities thus strongly favor our fashioning a remedy to restore the proper balance between

> the TCID/agricultural and Tribal/environmental interests.

Id. at 1034-35. Similarly, here, if the mandate is not recalled then the State of New Jersey will benefit from restricting speech on the basis of content without having to satisfy strict scrutiny review, and Petitioners' and their minor clients' free speech rights will continue to be infringed. The Third Circuit's refusal to recall the mandate cannot be reconciled with established precedent.

This Court explicitly rejected the Third Circuit's determination that professional speech should be accorded different, less protective, treatment under the First Amendment than are other forms of speech. That clear repudiation of the analytical framework upon which the Third Circuit's decision was built requires a reversal in the form of recalling the mandate.

B. The Third Circuit's Refusal To Recall Its Mandate Exacerbates A Ripple Effect Of Expanding Irreparable Harm As States and Localities Continue To Enact Laws In Reliance Upon The Decision That This Court Abrogated By Name.

This Court's review of the Third Circuit's refusal to recall its mandate is particularly critical because of the irreparable injuries that the Third Circuit decision and the Ninth Circuit decision in *Pickup* (also abrogated by name in *NIFLA*) have caused and are continuing to cause across the country. The Ninth and Third circuits' validation of California's and New Jersey's, respectively, content-based prohibitions against voluntary talk therapy on the issue of reducing or eliminating same-sex attractions and gender identity in children has spawned similar content-based speech prohibitions in fourteen additional states.[1]

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[1] Connecticut, H.B. 6695, January Sess. 2017 (Conn. 2017); Delaware, S.B. 65, 149th Assembly, 2017 Reg. Session, (Del. 2017); District of Columbia, D.C. Code §7-1231.14 (2017); Hawaii, S.B. 270, 29th Leg. (Hawaii

Forty-nine municipalities have also enacted similar content-based speech prohibition ordinances relying on *Pickup* and *King*, both of which were expressly abrogated by this Court.[2]

2017); Illinois, H.B. 0217, 2017 Leg. Sess. (Ill. 2017); Maryland, S.B. 1028, 2018 Reg. Session (Md. 2018); Nevada, S.B. 201, 79th Sess. (2017); New Hampshire, H.B. 587-FN, 2018 Session (N.H. 2018); New Mexico, S.B. 121, 53rd Leg., 1st Sess. (N.M. 2017); New York, S.1046, 2019 Session (N.Y. 2019); Oregon, H.B 2307, 78th Leg. 2015 Sess. (Oregon 2015); Rhode Island, H. 5277 2017 Leg. Sess. (R.I. 2017); Vermont, S.132 2015-16 Leg. Sess. (Vermont 2016); Washington, H.B. 2753, 65th Leg., 2018 Regular Session (Wash. 2018).

[2] Pima County, AZ; Denver, CO; Bay Harbor Islands, FL; Boca Raton, FL; Broward County, FL; Boynton Beach, FL; Delray Beach, FL; El Portal, FL; Gainesville, FL; Greenacres, FL; Key West, FL; Lake Worth, FL; Miami, FL; Miami Beach, FL; North Bay Village, FL; Oakland Park, FL; Palm Beach County, FL; Riviera Beach, FL; Tampa, FL; Wellington, FL; West Palm Beach, FL; Wilton Manors, FL; Albany, NY; Albany County, NY; Erie County, NY; New York City, NY; Rochester, NY; Ulster County, NY; Westchester County, NY; Athens, OH; Cincinnati, OH; Columbus, OH; Dayton, OH; Lakewood, OH; Toledo, OH; Allentown, PA;

Those statutes and ordinances are based on the abrogated decisions in *King* and *Pickup* that the content-based speech restrictions need not satisfy strict scrutiny because they regulate "professional" speech. In the case of Nevada, the legislature specifically cited to both lower court decisions as support for the bill.

> This bill is modeled on similar laws enacted in California and New Jersey. (Cal. Bus. & Prof. Code §§ 865 et seq.; N.J. Stat. Ann. §§ 45:1-54 et seq.).... [C]ourts have ... held that the laws: (1) are a constitutional exercise of the legislative power to regulate licensed health care professionals for the benefit of the public's health, safety and welfare and to protect the well-being of children from ineffective or harmful professional services; (2) do not violate any rights to freedom of speech, association or

---

Bellefonte, PA; Bethlehem, PA; Doylestown, PA; Newtown Township, PA; Philadelphia, PA; Pittsburgh, PA; Reading, PA; State College, PA; Yardley Borough, PA; Cudahy, WI; Eau Claire , WI; Madison, WI; Milwaukee, WI. *See* https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-LGBT-Youth-Jan-2018.pdf.

> religion and are not unconstitutionally overbroad or vague under the First and Fourteenth Amendments to the United States Constitution; and (3) do not violate any other fundamental or substantive due process rights of licensed health care professionals or the parents or children who seek their professional services. (*Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), cert. denied, 134 S.Ct. 2871 and 2881 (2014); *Welch v. Brown*, 834 F.3d 1041 (9th Cir. 2016), cert. denied, No. 16-845, --- S.Ct. --- (May 1, 2017); *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014), cert. denied, 135 S.Ct. 2048 (2015).

S.B. 201, 79th Sess. (Nevada 2017), at 1-2. Other states relied upon the assumed constitutionality of provisions in New Jersey's and California's statutes in enacting their statutes.

This Court's explicit abrogation of *King* and *Pickup* in *NIFLA,* 138 S.Ct. at 2371-72 means that the assumption of constitutionality upon which the laws were passed is invalid. As a result, unconstitutional content-based speech restrictions are being imposed not only on counselors and minor clients in California and

New Jersey, but on counselors and minor clients across the United States.

By refusing to recall the mandate, the Third Circuit is perpetuating irreparable injury to First Amendment rights that is being suffered all over the nation. The injuries are continuing as fourteen more states have introduced similar bills based upon the abrogated analyses in *King* and *Pickup*. [3] Unless and until the demonstrably wrong analytical framework adopted by the Third Circuit is reversed, individuals and organizations across the country will continue to be chilled in their constitutionally protected

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[3] Arizona, S.B. 1047, 54th Leg., 1st Sess. (Ariz. 2019); Colorado, H.B. 19-1129, 72nd Leg., 1st Reg. Sess. (Colo. 2019); Florida, S.B. 84, H.B. 109,2019 Leg. Sess. (Fla. 2019); Idaho, H.B. 52, 65th Leg. 1st Reg. Sess. (Idaho 2019); Indiana, H.B. 1231, S.B. 284, 121st Gen. Assy., 1st Reg. Sess. (Ind. 2019); Iowa, H.F. 106, 88th Sess. (Iowa 2019); Minnesota, S.F. 83, H.F. 12, 91st Leg. Sess. (Minn. 2019); Missouri, H.B. 516, 100th Gen. Assy., 1st Reg. Session (Missouri 2019); Nebraska, L.B. 167, 106th Leg., 1st Sess. (Neb. 2019); Oklahoma, H.B. 2456, 57th Leg., 1st Sess. (Okla. 2019); Pennsylvania S.B. 56, 2019 Leg. Sess. (Penn. 2019); Texas H.B. 517, 86th Leg. (Texas 2019); Virginia, S.B. 1773, 2019 Sess. (Virginia 2019); West Virginia, S.B. 359, 2019 Reg. Sess. (W.V. 2019);

speech under *King*'s now repudiated analysis.

Some of the statutes and ordinances are being challenged based on the *NIFLA* abrogation of *King* and *Pickup*. *See e.g., Doyle v. Hogan,* No. 1:19-cv-190 (D. Maryland filed January 18, 2019); *Vazzo v. City of Tampa,* No. 8:17-cv-2896 (M.D. Fla. filed December 4, 2017);[4] *Otto v. City of Boca Raton and County of Palm Beach, Florida,* No. 9:18-cv-80771 (S.D. Fla. filed June 16, 2018). However, if the *King* mandate is not recalled and the decision reversed, overturning all of the statutes and ordinances would require at least 63 lawsuits. Recalling the mandate and reversing *King* (and *Pickup*) would provide a precedent that would invalidate the statutes and ordinances without having to pursue multi-state litigation that would consume judicial resources and permit protracted losses of precious constitutional

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[4] On January 30, 2019, Magistrate Judge Amanda Arnold Sansone recommended the district court find that a city ordinance which expressly relied upon *King* violates every free speech test, citing to the *NIFLA* Court's abrogation of *King* to support a recommendation that Plaintiffs stated a plausible claim for violation of the First Amendment. *Vazzo v. City of Tampa,* No. 8:17-cv-2896 (M.D. Fla. January 30, 2019) (Report and Recommendation, Dkt. No. 148, at 15-16).

freedoms. This Court should grant review and direct that the mandate be recalled.

III. THIS COURT SHOULD GRANT THE PETITION TO PROVIDE DEFINITIVE GUIDANCE ON WHAT CONSTITUTES EXTRAORDINARY CIRCUMSTANCES SUFFICIENT TO OVERCOME THE INTEREST IN REPOSE ATTACHING TO THE MANDATE OF A COURT OF APPEALS.

In *Calderon* this Court confirmed that courts of appeals have inherent power to recall their mandates "in extraordinary circumstances." 523 U.S. at 549-50. This Court emphasized that "[t]he sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Id.* at 550. However, it has not elucidated what constitutes "extraordinary circumstances" or "grave, unforeseen contingencies" sufficient to activate the power. Without such guidance from this Court, courts of appeal have created an inconsistent patchwork of decisions in response to subsequent changes in law, creating confusion and sometimes, as seen in this case, an infringement of constitutional rights.

The confusion caused by the lack of guidance in defining the "extraordinary circumstances" sufficient to justify recalling the

mandate are reflected in the Second Circuit's discussion in *Sargent:*

> One circumstance that may justify recall of a mandate is "[a] supervening change in governing law that calls into serious question the correctness of the court's judgment."...However, under the strict standards governing the exercise of power to recall a mandate, "an alleged failure to correctly construe and apply the applicable state law does not constitute" by itself a circumstance justifying recall. *Hines v. Royal Indem. Co.*, 253 F.2d 111, 114 (6th Cir.1958). Even where the law governing the disposition of a diversity case is unquestionably at odds with subsequent state court decisions, recall of the mandate is not necessarily justified.
>
> Nevertheless, a variety of factors lead us to conclude that a recall of the mandate is appropriate in this case.

75 F.3d at 90. In other words, a supervening change in governing law might justify recalling

the mandate, but not necessarily, but might when other factors are considered. *Id.*

In *Verrilli*, the Ninth Circuit found extraordinary circumstances justifying a recall of its mandate when a subsequent statute and appellate case interpreting it changed the presumption of the availability of attorneys' fees. 557 F.2d at 665. The court said that the change meant that the prior decision was not merely in error, created "an unintended unjust result" that needed to be rectified. *Id.* On the other hand, the Second Circuit acknowledged that an intervening change in law related to a criminal conviction and sentencing created an inequity for the defendant but said "it is not the kind of 'grave, unforeseen contingenc[y]' that makes recall of the mandate appropriate." *Bottone v. United States*, 350 F.3d 59, 64 (2d Cir. 2003) (quoting *Calderon*, 523 U.S. at 550). In other words, being unable to collect attorneys' fees can be a grave unforeseen contingency, but an erroneous criminal conviction is not.

The Second Circuit found that a subsequent state supreme court decision that changed the governing law rendered their decision demonstrably wrong and justified recall of their mandate. *Sargent,* 75 F.3d at 90. However, the First Circuit said that a subsequent state supreme court decision that explicitly declared parts of its reasoning erroneous did not render its judgment

demonstrably wrong and subject to recall. *Boston & Maine Corp. v. Town of Hampton*, 7 F.3d 281, 283 (1st Cir. 1993).

The lack of definitive guidance from this Court on what constitutes "extraordinary circumstances" sufficient to justify recall of a mandate has left appellate courts hopelessly confused and, in this case, permitted them to simply ignore this Court's explicit abrogation of the panel decision. Meanwhile, Petitioners, their minor clients and others are subjected to content-based speech prohibitions that are not narrowly tailored to serve compelling state interests. Moreover, other states and municipalities are emboldened to impose similar irreparable injuries on their citizens.

By granting review, this Court can provide the necessary definitive guidance to courts of appeal. This would serve the interests of justice in providing one decision that can resolve a constitutional question that is present in at least 15 other states and nearly 50 cities and counties. This will not only create a uniform standard but will also halt the continuing deprivation of constitutional rights occurring as states continue to replicate the content-based speech provisions enacted in New Jersey and California.

CONCLUSION

The Third Circuit abused its discretion when it refused to recall its mandate after this Court abrogated the panel's decision by name in *NIFLA,* 138 S.Ct. 2361, 2371-74 (2018). The refusal to recall the mandate conflicts with decisions in other circuits which recalled mandate when confronted with only effective, not actual, abrogation, and when recall of a mandate was necessary to prevent continuing violations.

This Court should grant review to resolve the conflict and to provide needed guidance on what constitutes extraordinary circumstances sufficient to exercise the right to recall a mandate.

February 11, 2019.

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APPENDIX

APPENDIX A — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED OCTOBER 11, 2018

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-4429
(D.N.J. No. 3-13-cv-05038)

TARA KING, ED. D. INDIVIDUALLY AND ON BEHALF OF HER PATIENTS; RONALD NEWMAN, PH. D., INDIVIDUALLY AND ON BEHALF OF HIS PATIENTS; NATIONAL ASSOCIATION FOR RESEARCH AND THERAPY OF HOMOSEXUALITY, (NARTH); AMERICAN ASSOCIATION OF CHRISTIAN COUNSELORS,

Appellants,

v.

GOVERNOR OF THE STATE OF NEW JERSEY; ERIC T. KANEFSKY, DIRECTOR OF THE NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY: DIVISION OF CONSUMER AFFAIRS, IN HIS OFFICIAL CAPACITY; MILAGROS COLLAZO, EXECUTIVE DIRECTOR OF THE NEW JERSEY BOARD OF MARRIAGE AND FAMILY THERAPY EXAMINERS, IN HER OFFICIAL CAPACITY; J. MICHAEL WALKER, EXECUTIVE DIRECTOR OF THE NEW JERSEY BOARD OF PSYCHOLOGICAL EXAMINERS, IN HIS OFFICIAL CAPACITY; PAUL

Appendix A

JORDAN, PRESIDENT OF THE NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS, IN HIS OFFICIAL CAPACITY

GAREN STATE EQUALITY (Intervenor in D.C.)

September 24, 2018

Present: SMITH, Chief Judge, VANASKIE and SLOVITER,* *Circuit Judges*

1. Motion by Appellants to Recall Mandate;

2. Response by Appellees Milagros Collazo, Governor of New Jersey, Paul Jordan, Eric T. Kanefsky and J. Michael Walker to Motion to Recall Mandate;

3. Response by Appellee Garden State Equality to Motion to Recall Mandate.

Respectfully,
Clerk/slc

* Judge Sloviter was a member of the merits panel. However, she assumed inactive status on April 4, 2016 and did not participate in the consideration of this motion.

Appendix A

ORDER

The foregoing Motion to Recall the Mandate is DENIED.

By the Court,

s/D. Brooks Smith
Circuit Judge

Dated: October 11, 2018

APPENDIX B — LETTER FROM THE OFFICE OF THE CLERK OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED OCTOBER 3, 2014

MARCIA M. WALDRON, CLERK
OFFICE OF THE CLERK
United States Court Of Appeals
21400 United States Courthouse
601 Market Street
Philadelphia, Pa 19106-1790
Website: www.ca3.uscourts.gov
Telephone: 215-597-2995

October 3, 2014

Mr. William T Walsh
United States District Court for the
District of New Jersey
Clarkson S. Fisher Federal Building
and United States Courthouse
402 East State Street
Trenton, NJ 08608

RE: Tara King, et al v. Governor of New Jersey, et al
Case Number: 13-4429
District Case Number: 3-13-cv-05038

Dear Mr. William T. Walsh,

Enclosed herewith is the certified judgment together with copy of the opinion or certified copy of the order in the above-captioned case(s). The certified judgment or order

is issued in lieu of a formal mandate and is to be treated in all respects as a mandate.

Counsel are advised of the issuance of the mandate by copy of this letter. The certified judgment or order is also enclosed showing costs taxed, if any.

Very truly yours,

/s/Marcia M. Waldron
Marcia M. Waldron, Clerk

By: Maria, Case Manager
267-299-4937

APPENDIX C — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED SEPTEMBER 11, 2014

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-4429

TARA KING, ED. D. INDIVIDUALLY AND ON BEHALF OF HER PATIENTS; RONALD NEWMAN, PH. D., INDIVIDUALLY AND ON BEHALF OF HIS PATIENTS; NATIONAL ASSOCIATION FOR RESEARCH AND THERAPY OF HOMOSEXUALITY, (NARTH); AMERICAN ASSOCIATION OF CHRISTIAN COUNSELORS,

Appellants,

v.

GOVERNOR OF THE STATE OF NEW JERSEY; ERIC T. KANEFSKY, DIRECTOR OF THE NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY: DIVISION OF CONSUMER AFFAIRS, IN HIS OFFICIAL CAPACITY; MILAGROS COLLAZO, EXECUTIVE DIRECTOR OF THE NEW JERSEY BOARD OF MARRIAGE AND FAMILY THERAPY EXAMINERS, IN HER OFFICIAL CAPACITY; J. MICHAEL WALKER, EXECUTIVE DIRECTOR OF THE NEW JERSEY BOARD OF PSYCHOLOGICAL EXAMINERS, IN HIS OFFICIAL CAPACITY; PAUL JORDAN, PRESIDENT OF THE NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS, IN HIS OFFICIAL CAPACITY;

GARDEN STATE EQUALITY (Intervenor in D.C.)

Appendix C

On Appeal from the United States District Court
for the District of New Jersey, District Court
No. 13-cv-05038, District Judge: The Honorable
Freda L. Wolfson.

Argued July 9, 2014

Before: SMITH, VANASKIE, and SLOVITER, *Circuit Judges*

(Filed: September 11, 2014)

OPINION

SMITH, *Circuit Judge.*

A recently enacted statute in New Jersey prohibits licensed counselors from engaging in "sexual orientation change efforts"[1] with a client under the age of 18. Individuals and organizations that seek to provide such counseling filed suit in the United States District Court for the District of New Jersey, challenging this law as a violation of their First Amendment rights to free speech and free exercise of religion. Plaintiffs also asserted claims on behalf of their minor clients under the First and Fourteenth Amendments. The District Court rejected Plaintiffs' First Amendment claims and held that they

1. The term "sexual orientation change efforts" is defined 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." N.J. Stat. Ann. § 45:1-55.

lacked standing to bring claims on behalf of their minor clients. Although we disagree with parts of the District Court's analysis, we will affirm.

I.

A.

Plaintiffs are individuals and organizations that provide licensed counseling to minor clients seeking to reduce or eliminate same-sex attractions ("SSA"). Dr. Tara King and Dr. Ronald Newman are New Jersey licensed counselors and founders of Christian counseling centers that offer counseling on a variety of issues, including sexual orientation change, from a religious perspective. The National Association for Research and Therapy of Homosexuality ("NARTH") and the American Association of Christian Counselors are organizations whose members provide similar licensed counseling in New Jersey.

Plaintiffs describe sexual orientation change efforts ("SOCE") counseling as "talk therapy" that is administered solely through verbal communication. SOCE counselors may begin a session by inquiring into potential "root causes" of homosexual behavior, such as childhood sexual trauma or other developmental issues, such as a distant relationship with the same-sex parent. A counselor might then attempt to effect sexual orientation change by discussing "traditional, gender-appropriate behaviors and characteristics" and how the client can foster and develop these behaviors and characteristics. Many counselors,

including Plaintiffs, approach counseling from a "Biblical perspective" and may also integrate Biblical teachings into their sessions.[2]

On August 19, 2013, Governor Christopher J. Christie signed Assembly Bill A3371 ("A3371") into law.[3] A3371 provides:

> a. A person who is licensed to provide professional counseling . . . shall not engage in sexual orientation change efforts with a person under 18 years of age.
>
> b. As used in this section, "sexual orientation change efforts" means the practice of seeking to change a person's sexual orientation, including, but not limited to, efforts to change behaviors, gender identity, or gender expressions, or to reduce or eliminate sexual or romantic attractions or feelings toward a person of the same gender; except that sexual orientation change efforts shall not include counseling for a person seeking to transition from one gender to another, or counseling that:

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2. As the District Court observed, Plaintiffs provide very few details of precisely what transpires during SOCE counseling sessions. The foregoing is the sum total of Plaintiffs' descriptions, which they compiled in response to the District Court's inquiries at the October 1, 2013, hearing. J.A. 556-57.

3. Assembly Bill A3371 is now codified at N.J. Stat. Ann. §§ 45:1-54, 55. Because the parties still refer to the law as A3371, we do so in this Opinion as well.

> (1) provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and identity exploration and development, including orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and
>
> (2) does not seek to change sexual orientation.

N.J. Stat. Ann. § 45:1-55. Though A3371 does not itself impose any penalties, a licensed counselor who engages in the prohibited "sexual orientation change efforts" may be exposed to professional discipline by the appropriate licensing board. *See* N.J. Stat. Ann. § 45:1-21.

A3371 is accompanied by numerous legislative findings regarding the impact of SOCE counseling on clients seeking sexual orientation change. N.J. Stat. Ann. § 45:1-54. The New Jersey legislature found that "being lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming" and that "major professional associations of mental health practitioners and researchers in the United States have recognized this fact for nearly 40 years." *Id.* The legislature also cited reports, articles, resolutions, and position statements from reputable mental health organizations opposing therapeutic intervention designed to alter sexual orientation. Many of these sources emphasized that such

efforts are ineffective and/or carry a significant risk of harm. According to the legislature, for example, a 2009 report issued by the American Psychological Association ("APA Report") concluded:

> [S]exual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people, including confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others, increased self-hatred, hostility and blame toward parents, feelings of anger and betrayal, loss of friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high-risk sexual behaviors, a feeling of being dehumanized and untrue to self, a loss of faith, and a sense of having wasted time and resources.

Id.

Finally, the legislature declared that "New Jersey has a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by sexual orientation change efforts." *Id.*

Appendix C

B.

On August 22, 2013, Plaintiffs filed a complaint against various New Jersey executive officials ("State Defendants")[4] in the United States District Court for the District of New Jersey, alleging that A3371 violated their rights to free speech and free exercise of religion under the First and Fourteenth Amendments. The complaint also alleged constitutional claims on behalf of Plaintiffs' minor clients and their parents. Specifically, Plaintiffs claimed that A3371 violated the minor clients' First and Fourteenth Amendment rights to free speech and free exercise of religion and the parents' Fourteenth Amendment right to substantive due process.[5]

The following day, Plaintiffs moved for a Temporary Restraining Order and/or Preliminary Injunction to prevent enforcement of A3371. During a telephone conference with the parties, the District Court denied Plaintiffs' motion for preliminary relief and, at Plaintiffs'

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4. These State Defendants include Christopher J. Christie, Governor; Eric T. Kanefsky, Director of the New Jersey Department of Law and Public Safety: Division of Consumer Affairs; Milagros Collazo, Executive Director of the New Jersey Board of Marriage and Family Therapy Examiners; J. Michael Walker, Executive Director of the New Jersey Board of Psychological Examiners; and Paul Jordan, President of the New Jersey State Board of Medical Examiners. Plaintiffs filed suit against each official in his or her official capacity.

5. The complaint also alleged various claims under the constitution of New Jersey. Plaintiffs abandoned these claims in the District Court.

request, converted this motion into a motion for summary judgment. On September 6, 2013, Garden State Equality ("Garden State"), a New Jersey civil rights organization that advocates for lesbian, gay, bisexual, and transgender equality, filed a motion to intervene as a defendant. On September 13, 2013, State Defendants and Garden State filed cross-motions for summary judgment. The District Court heard argument on all of these motions on October 1, 2013, and issued a final ruling in an order dated November 8, 2013.

The District Court first considered whether Garden State was required to demonstrate Article III standing to participate in the lawsuit as an intervening party.[6] The Court acknowledged that this was an open question in the Third Circuit, and adopted the view held by a majority of our sister circuits that an intervenor need not have Article III standing to participate. The Court then held that Garden State fulfilled the requirements for permissive intervention pursuant to Federal Rule of Civil Procedure 24(b), reasoning that Garden State's motion was timely, it shared a common legal defense with State Defendants, and its participation would not unduly prejudice the adjudication of Plaintiffs' rights. Accordingly, the Court granted Garden State's motion to intervene.

The District Court then considered whether Plaintiffs possessed standing to pursue claims on behalf of their

6. Article III standing requires (1) an injury in fact, (2) that is causally related to the alleged conduct of the defendant, and (3) that is redressable by judicial action. *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000).

minor clients and their parents. It reasoned first that "Plaintiffs' ability to bring third-party claims hinges on whether they suffered any constitutional wrongs by the passage of A3371." J.A. 24. It then held that because, as it would explain later in its opinion, A3371 did not violate Plaintiffs' constitutional rights, Plaintiffs did not suffer an "injury in fact" sufficient to confer third-party standing. The Court also held that Plaintiffs failed to demonstrate that these third parties were sufficiently hindered in their ability to protect their own interests. Accordingly, the Court granted summary judgment for Defendants on Plaintiffs' third-party claims.

The District Court then considered whether A3371 violated Plaintiffs' right to free speech. Relying heavily on the Ninth Circuit's decision upholding a similar statute in *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013),[7] the Court concluded that A3371 regulates conduct, not speech. The Court also determined that A3371 does not have an "incidental effect" on speech sufficient to trigger a lower level of scrutiny under *United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968). Having determined that A3371 regulates neither speech nor

7. After the District Court issued its opinion, the Ninth Circuit denied a petition for rehearing en banc in *Pickup* and, in the process, amended its opinion to include, *inter alia*, a discussion of *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010). *Compare Pickup*, 728 F.3d 1042 *with Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013) *cert denied*, 134 S. Ct. 2871 (2014) and *cert denied*, 134 S. Ct. 2881 (2014). We will discuss *Pickup* and *Humanitarian Law Project* in more detail *infra*.

expressive conduct, the District Court rejected Plaintiffs' free speech challenge.[8] The District Court also concluded that A3371 is not unconstitutionally vague or overbroad.

The District Court next rejected Plaintiffs' free exercise claim. It was not convinced by Plaintiffs' arguments that A3371 engaged in impermissible gerrymandering, and concluded instead that A3371 was a neutral law of general applicability subject only to rational basis review. The District Court then held that A3371 is rationally related to New Jersey's legitimate interest in protecting its minors from harm and, accordingly, granted Defendants' motions for summary judgment on Plaintiffs' free exercise claim. This timely appeal followed.

II.

The District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291.

We review a district court's legal conclusions de novo and ordinarily review its factual findings for clear error. *Pittsburgh League of Young Voters Educ. Fund v.*

8. After concluding that A3371 regulates neither speech nor expressive conduct, the District Court went on to subject the statute to rational basis review. In a footnote, it explained that it had, by this point, "rejected Plaintiff's First Amendment free speech challenge," but that it was applying rational basis review to determine "whether there [was] any substantive due process violation." J.A. 48 n.26. This explanation is puzzling, however, given that Plaintiffs alleged a substantive due process claim only on behalf of their minor patients' parents, and the District Court's rejection of these third-party claims on standing grounds rendered any further analysis unnecessary.

Port Auth. of Allegheny Cnty., 653 F.3d 290, 295 (3d Cir. 2011). Because this case implicates the First Amendment, however, we are obligated to "make an independent examination of the whole record" to "make sure that the trial court's judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* (internal quotation marks and citations omitted).

III.

We first turn to the issue of whether A3371, as applied to the SOCE counseling Plaintiffs seek to provide, violates Plaintiffs' First Amendment right to free speech. The District Court held that it does not, reasoning that SOCE counseling is "conduct" that receives no protection under the First Amendment. We disagree, and hold that the verbal communication that occurs during SOCE counseling is speech that enjoys some degree of protection under the First Amendment. Because Plaintiffs are speaking as state-licensed professionals within the confines of a professional relationship, however, this level of protection is diminished. Accordingly, A3371 survives Plaintiffs' free speech challenge if it directly advances the State's substantial interest in protecting its citizens from harmful or ineffective professional practices and is not more extensive than necessary to serve that interest. We hold that A3371 meets these requirements.

A.

With respect to Plaintiffs' free speech challenge, the preliminary issue we must address is whether A3371

has restricted Plaintiffs' speech or, as the District Court held, merely regulated their conduct. The parties agree that modern-day SOCE therapy, and that practiced by Plaintiffs in this case, is "talk therapy" that is administered wholly through verbal communication.[9] Though verbal communication is the quintessential form of "speech" as that term is commonly understood, Defendants argue that these particular communications are "conduct" and not "speech" for purposes of the First Amendment because they are merely the "tool" employed by therapists to administer treatment. Thus, the question we confront is whether verbal communications become "conduct" when they are used as a vehicle for mental health treatment.

We hold that these communications are "speech" for purposes of the First Amendment. Defendants have not directed us to any authority from the Supreme Court or this circuit that have characterized verbal or written communications as "conduct" based on the function these communications serve. Indeed, the Supreme Court rejected this very proposition in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010). In that case, plaintiffs claimed that a federal

9. Prior forms of SOCE therapy included non-verbal "aversion treatments, such as inducing nausea, vomiting, or paralysis, providing electric shocks; or having the individual snap an elastic band around the wrist when the individual became aroused to same-sex erotic images or thoughts." J.A. 306 (APA Report). Plaintiffs condemn these techniques as "unethical methods of treatment that have not been used by any ethical and licensed mental health professional in decades" and believe "professionals who engage in such techniques should have their licenses revoked." J.A. 171 (Decl. of Dr. Tara King).

statute prohibiting the provision of "material support" to designated terrorist organizations violated their free speech rights by preventing them from providing legal training and advice to the Partiya Karkeran Kurdistan ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE"). *Id.* at 10-11. Defendants responded that the "material support" statute should not be subjected to strict scrutiny because it is directed toward conduct and not speech. *Id.* at 26-28.

The Supreme Court, however, expressly rejected the argument that "the only thing actually at issue in [the] litigation [was] conduct." *Id.* at 27. It concluded that while the material support statute ordinarily banned conduct, the activity it prohibited in the particular case before it—the provision of legal training and advice—was speech. *Id.* at 28. It reached this conclusion based on the straightforward observation that plaintiffs' proposed activity consisted of "communicating a message." *Id.* In concluding further that this statute regulated speech on the basis of content, the Court's reasoning was again simple and intuitive: "Plaintiffs want to speak to the PKK and the LTTE, and whether they may do so under § 2339B depends on what they say." *Id.* at 27. Notably, what the Supreme Court did *not* do was reclassify this communication as "conduct" based on the nature or function of what was communicated.[10]

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10. Further, a plurality of the Supreme Court in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), acknowledged that a Pennsylvania law requiring physicians to provide information to patients prior to performing abortions regulated *speech* rather than merely "treatment" or "conduct."

Appendix C

Given that the Supreme Court had no difficulty characterizing legal counseling as "speech," we see no reason here to reach the counter-intuitive conclusion that the verbal communications that occur during SOCE counseling are "conduct." Defendants' citation to *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed. 834 (1949), does not alter our conclusion. There, members of the Ice and Coal Drivers and Handlers Local Union No. 953 were enjoined under a state antitrade restraint statute from picketing in front of an ice company in an effort to convince it to discontinue ice sales to non-union buyers. 336 U.S. at 492-494. The Supreme Court rejected the union workers' free speech claim, reasoning that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Id.* at 502 (citations omitted). This passage, which is now over 60 years old, has been the subject of much confusion. *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1314-22 (2005) (discussing eight distinct interpretations of *Giboney*'s "course of conduct" language). Yet whatever may be *Giboney*'s meaning or scope, *Humanitarian Law Project* makes clear that verbal or written communications, even those that function as vehicles for delivering professional services, are "speech" for purposes of the First Amendment. 561 U.S. at 27-28.

Appendix C

In reaching a contrary conclusion, the District Court relied heavily on the Ninth Circuit's recent decision in *Pickup. Pickup* involved a constitutional challenge to Senate Bill 1172 ("SB 1172"), which, like A3371, prohibits state-licensed mental health providers from engaging in "sexual orientation change efforts" with clients under 18 years of age. 740 F.3d at 1221. As here, SOCE counselors argued that SB 1172 violated their First Amendment rights to free speech and free exercise.[11]

The Ninth Circuit disagreed. *Pickup* explained that "the First Amendment rights of professionals, such as doctors and mental health providers" exist on a "continuum." *Id*. at 1227. On this "continuum," First Amendment protection is greatest "where a professional is engaged in a public dialogue." *Id*. At the midpoint of this continuum, which *Pickup* described as speech "within the confines of the professional relationship," First Amendment protection is "somewhat diminished." *Id*. at 1228. At the other end of this continuum is "the regulation of professional *conduct*, where the state's power is great, even though such regulation may have an incidental effect on speech." *Id*. at 1229 (citing *Lowe v. S.E.C.*, 472 U.S. 181, 232, 105 S. Ct. 2557, 86 L. Ed. 2d 130 (1985) (White, J., concurring in the result)) (emphasis in original).

Pickup concluded that because SB 1172 "regulates conduct," it fell within this third category on the continuum. *Id*. It reasoned that "[b]ecause SB 1172

11. Unlike the present case, plaintiffs in *Pickup* included minor patients and their parents.

regulates only treatment, while leaving mental health providers free to discuss and recommend, or recommend against, SOCE, . . . any effect it may have on free speech interests is merely incidental. Therefore, we hold that SB 1172 is subject to only rational basis review and must be upheld if it bears a rational relationship to a legitimate state interest." *Id*. at 1231 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884, 967-68, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (plurality opinion)).[12] The Ninth Circuit concluded that "SB 1172 is rationally

12. It is not entirely clear why, or on what authority, the original *Pickup* opinion concluded that rational basis is the proper standard of review for a regulation of professional conduct that has an incidental effect on professional speech. The original opinion in *Pickup* accompanied this conclusion with a quote from *National Association for the Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043, 1049 (9th Cir. 2000) ("*NAAP*"). 728 F.3d at 1056. The quoted passage from NAAP, however, refers to the proper standard for reviewing an *equal protection* challenge to a law that discriminates against a non-suspect class—it did not, in any way, establish that rational basis is the proper standard for reviewing a *free speech* challenge to a law that regulates professional conduct. *See* 228 F.3d at 1049. When the Ninth Circuit amended *Pickup* following the denial of the petition for rehearing en banc, the panel substituted the citation to NAAP with one to *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884, 967-68, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), in which, according to the Ninth Circuit, "a plurality of three justices, plus four additional justices concurring in part and dissenting in part, applied a reasonableness standard to the regulation of medicine where speech may be implicated incidentally." *Pickup*, 740 F.3d at 1231. We will discuss *infra* the proper standard of review for regulation of professional speech, as well as the relevance of *Casey* to this analysis.

related to the legitimate government interest of protecting the well-being of minors" and, accordingly, rejected the plaintiffs' free speech claim. *Id.* at 1232.

The Ninth Circuit's denial of a petition for rehearing en banc drew a spirited dissent from Judge O'Scannlain. Joined by two other Ninth Circuit judges, he criticized the *Pickup* majority for merely "labeling" disfavored speech as "conduct" and thereby "insulat[ing] [SB 1172] from First Amendment scrutiny." 740 F.3d at 1215 (O'Scannlain, J., dissenting from denial of rehearing en banc). Judge O'Scannlain further explained:

> The panel provides no principled doctrinal basis for its dichotomy: by what criteria do we distinguish between utterances that are truly "speech," on the one hand, and those that are, on the other hand, somehow "treatment" or "conduct"? The panel, contrary to common sense and without legal authority, simply asserts that some spoken words—those prohibited by SB 1172—are not speech.

Id. at 1215-16.

Judge O'Scannlain's dissent also relied heavily upon *Humanitarian Law Project*. Judge O'Scannlain argued that *Humanitarian Law Project* "flatly refused to countenance the government's purported distinction between 'conduct' and 'speech' for constitutional purposes when the activity at issue consisted of talking and writing." *Id.* at 1216. He explained that *Humanitarian Law Project*

stood for the proposition that "the government's *ipse dixit* cannot transform 'speech' into 'conduct' that it may more freely regulate." *Id.*[13]

While *Pickup* acknowledged that SB 1172 *may* have at least an "incidental effect" on speech and subjected the statute to rational basis review,[14] here the District Court went one step further when it concluded that SOCE counseling is pure, non-expressive conduct that falls

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13. The amended *Pickup* opinion acknowledges that *Humanitarian Law Project* found activity to be "speech" when it "consist[ed] of *communicating a message*," but contends that "SB 1172 does not prohibit Plaintiffs from 'communicating a message'" because "[i]t is a state regulation governing the conduct of state-licensed professionals, and it does not pertain to communication in the public sphere." *Id.* at 1230 (quoting *Humanitarian Law Project*, 561 U.S. at 28) (emphasis added by *Pickup*). We are not persuaded. *Humanitarian Law Project* concluded that the "material support" statute regulated speech despite explicitly acknowledging that it did not stifle communication in the public sphere. 561 U.S. at 25-26 ("Under the material-support statute, plaintiffs may say anything they wish on any topic. They may speak and write freely about the PKK and LTTE, the governments of Turkey and Sri Lanka, human rights, and international law. They may advocate before the United Nations.").

14. Judge O'Scannlain's dissent in *Pickup* accuses the majority of "entirely exempt[ing] [SB 1172] from the First Amendment." 740 F.3d at 1215 (O'Scannlain, dissenting from denial of rehearing en banc). We do not believe the Ninth Circuit went that far. As we have explained, the Ninth Circuit acknowledged that SB 1172 "may" have an "incidental effect" on speech, and thus applied rational basis review; it did not exempt SB 1172 from any review at all.

wholly outside the protection of the First Amendment. The District Court's primary rationale for this conclusion was that "the *core characteristic* of counseling is not that it may be carried out through talking, but rather that the counselor applies methods and procedures in a therapeutic manner." J.A. 35 (emphasis added). The District Court derived this reasoning in part from *Pickup*, in which the Ninth Circuit observed that the "key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech." 740 F.3d at 1226 (quoting *National Association for the Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043, 1054 (9th Cir. 2000)). On this basis, the District Court concluded that "the line of demarcation between conduct and speech is whether the counselor is attempting to communicate information or a particular viewpoint to the client or whether the counselor is attempting to apply methods, practices, and procedures to bring about a change in the client—the former is speech and the latter is conduct." J.A. 39.

As we have explained, the argument that verbal communications become "conduct" when they are used to deliver professional services was rejected by *Humanitarian Law Project*. Further, the enterprise of labeling certain verbal or written communications "speech" and others "conduct" is unprincipled and susceptible to manipulation. Notably, the *Pickup* majority, in the course of establishing a "continuum" of protection for professional speech, never explained exactly *how* a court was to determine whether a statute regulated "speech" or "conduct." *See Pickup*, 740 F.3d at 1215-16

(O'Scannlain, J., dissenting from denial of rehearing en banc) ("[B]y what criteria do we distinguish between utterances that are truly 'speech,' on the one hand, and those that are, on the other hand, somehow 'treatment' or 'conduct'?"). And the District Court's analysis fares no better; even a cursory inspection of the line it establishes between utterances that "communicate information or a particular viewpoint" and those that seek "to apply methods, practices, and procedures" reveals the illusory nature of such a dichotomy.

For instance, consider a sophomore psychology major who tells a fellow student that he can reduce same-sex attractions by avoiding effeminate behaviors and developing a closer relationship with his father. Surely this advice is not "conduct" merely because it seeks to apply "principles" the sophomore recently learned in a behavioral psychology course. Yet it would be strange indeed to conclude that the same words, spoken with the same intent, somehow become "conduct" when the speaker is a licensed counselor. That the counselor is speaking as a licensed professional may affect the level of First Amendment protection her speech enjoys, but this fact does not transmogrify her words into "conduct." As another example, a law student who tries to convince her friend to change his political orientation is assuredly "speaking" for purposes of the First Amendment, even if she uses particular rhetorical "methods" in the process. To classify some communications as "speech" and others as "conduct" is to engage in nothing more than a "labeling game." *Pickup*, 740 F.3d at 1218 (O'Scannlain, J., dissenting from denial of rehearing en banc).

Lastly, the District Court's classification of counseling as "conduct" was largely motivated by its reluctance to imbue certain professions—*i.e.*, clinical psychology and psychiatry—with "special First Amendment protection merely because they use the spoken word as therapy." J.A. 38. According to the District Court, the "fundamental problem" with characterizing SOCE counseling as "speech" is that "it would mean that *any* regulation of professional counseling necessarily implicates fundamental First Amendment speech rights." *Id.* at 39. This result, reasoned the District Court, would "run[] counter to the longstanding principle that a state generally may enact laws rationally regulating professionals, including those providing medicine and mental health services." *Id.* (citations omitted).

As we will explain, the District Court's concern is not without merit, but it speaks to whether SOCE counseling falls within a lesser protected or unprotected category of speech—not whether these verbal communications are somehow "conduct." Simply put, speech is speech, and it must be analyzed as such for purposes of the First Amendment. Certain categories of speech receive lesser protection, *see, e.g., Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978), or even no protection at all, *see, e.g., Roth v. United States*, 354 U.S. 476, 483, 77 S. Ct. 1304, 1 L. Ed. 2d 1498 (1957). But these categories are deeply rooted in history, and the Supreme Court has repeatedly cautioned against exercising "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Alvarez*, 132 S. Ct. 2537,

183 L. Ed. 2d 574 (2012) (quoting *United States v. Stevens*, 559 U.S. 460, 472, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010)). By labeling certain communications as "conduct," thereby assuring that they receive no First Amendment protection at all, the District Court has effectively done just that.

Thus, we conclude that the verbal communications that occur during SOCE counseling are not "conduct," but rather "speech" for purposes of the First Amendment. We now turn to the issue of whether such speech falls within a historically delineated category of lesser protected or unprotected expression.

B.

The District Court's focus on whether SOCE counseling is "speech" or "conduct" obscured the important constitutional inquiry at the heart of this case: the level of First Amendment protection afforded to speech that occurs as part of the practice of a licensed profession. In addressing this question, we first turn to whether such speech is fully protected by the First Amendment. We conclude that it is not.

The authority of the States to regulate the practice of certain professions is deeply rooted in our nation's jurisprudence. Over 100 years ago, the Supreme Court deemed it "too well settled to require discussion" that "the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health." *Watson v. State of Maryland*, 218 U.S. 173, 176, 30 S. Ct. 644, 54 L. Ed. 987

(1910). *See also Dent v. West Virginia*, 129 U.S. 114, 122, 9 S. Ct. 231, 32 L. Ed. 623 (1889) ("[I]t has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely."). The Court has recognized that States have "broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975). *See also Ohralik*, 436 U.S. at 460 ("[T]he State bears a special responsibility for maintaining standards among members of the licensed professions."). The exercise of this authority is necessary to "shield[] the public against the untrustworthy, the incompetent, or the irresponsible." *Thomas v. Collins*, 323 U.S. 516, 545, 65 S. Ct. 315, 89 L. Ed. 430 (1945) (Jackson, J., concurring).

When a professional regulation restricts what a professional can and cannot say, however, it creates a "collision between the power of government to license and regulate those who would pursue a profession or vocation and the rights of freedom of speech and of the press guaranteed by the First Amendment." *Lowe v. S.E.C.*, 472 U.S. 181, 228, 105 S. Ct. 2557, 86 L. Ed. 2d 130 (1985) (White, J., concurring in the result). Justice Jackson first explored this area of "two well-established, but at times overlapping, constitutional principles" in *Thomas* 323 U.S. at 544-48 (1945) (Jackson, J., concurring). There, he explained:

> A state may forbid one without its license to practice law as a vocation, but I think it could

> not stop an unlicensed person from making a speech about the rights of man or the rights of labor . . . . Likewise, the state may prohibit the pursuit of medicine as an occupation without its license but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought. So the state to an extent not necessary now to determine may regulate one who makes a business or a livelihood of soliciting funds or memberships for unions. But I do not think it can prohibit one, even if he is a salaried labor leader, from making an address to a public meeting of workmen, telling them their rights as he sees them and urging them to unite in general or to join a specific union.

Id. at 544-45. Ultimately, Justice Jackson concluded that the speech at issue—which encouraged a large group of Texas workers to join a specific labor union— "f[ell] in the category of a public speech, rather than that of practicing a vocation as solicitor" and was therefore fully protected by the First Amendment. *See id.* at 548.

Justice White expounded upon Justice Jackson's analysis in *Lowe*. He and two other justices agreed that "[t]he power of government to regulate the professions is not lost whenever the practice of a profession entails speech" but also recognized that "[a]t some point, a measure is no longer a regulation of a profession but a regulation of speech or of the press." 472 U.S. at 228, 230 (White, J., concurring in the result). Building on Justice Jackson's

concurrence, Justice White defined the contours of First Amendment protection in the realm of professional speech:

> One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession. . . . Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law . . . abridging the freedom of speech, or of the press."

Id. at 232.

The Supreme Court addressed the issue of professional speech most recently in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992) (plurality opinion). Though the

bulk of the plurality's opinion was devoted to a substantive due process claim, it addressed the plaintiffs' First Amendment claim briefly in the following paragraph:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, *see Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L. Ed. 2d 752 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, *cf. Whalen v. Roe*, 429 U.S. 589, 603, 97 S. Ct. 869, 51 L. Ed. 2d 64 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

Id. at 884.

A trio of recent federal appellate decisions has read these opinions to establish special rules for the regulation of speech that occurs pursuant to the practice of a licensed profession. *See Wollschlaeger v. Florida*, No. 12-cv-14009, 2014 U.S. App. LEXIS 14192, 2014 WL 3695296, at *13-21 (11th Cir. July 25, 2014); *Pickup*, 740 F.3d at 1227-29; *Moore-King v. County of Chesterfield, Va.*, 708 F.3d 560, 568-70 (4th Cir. 2013). In *Moore-King*, for example, the Fourth Circuit drew heavily from the concurrences in *Thomas* and *Lowe* in holding that "professional

speech" does not receive full protection under the First Amendment. 708 F.3d at 568-70. Consistent with Justice White's concurrence in *Lowe, Moore-King* explained that "the relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is providing personalized advice in a private setting to a paying client or instead engages in public discussion and commentary." *Id.* at 569. It then concluded that plaintiff's speech, which consisted of "spiritual counseling" that involved "a personalized reading for a paying client," was "professional speech" which the state could regulate without triggering strict scrutiny under the First Amendment. *Id.*

The Ninth Circuit also embraced the idea of professional speech in *Pickup*. Although the District Court focused primarily on *Pickup*'s discussion of whether SOCE counseling is "speech" or "conduct," the Ninth Circuit also relied heavily on the constitutional principle that a licensed professional's speech is not afforded the full scope of First Amendment protection when it occurs as part of the practice of a profession. *See* 740 F.3d at 1227-29. In recognizing a "continuum" of First Amendment protection for licensed professionals, *Pickup* relied heavily on Justice White's concurrence in Lowe and the plurality opinion in *Casey. Id.* As discussed *supra, Pickup* held that First Amendment protection is "at its greatest" when a professional is "engaged in a public dialogue," *id.* at 1227 (citing *Lowe*, 472 U.S. at 232 (White, J., concurring in the result)); "somewhat diminished" when the professional is speaking "within the confines of a professional relationship," *id.* at 1228 (citing *Casey*, 505

U.S. at 884 (plurality opinion)); and at its lowest when "the regulation [is] of professional *conduct* . . . even though such regulation may have an incidental effect on speech," *id.* at 1229 (citing *Lowe*, 472 U.S. at 232 (White, J., concurring in the result)).

Most recently, the Eleventh Circuit also recognized that professional speech is not fully protected under the First Amendment. *Wollschlaeger*, 2014 U.S. App. LEXIS 14192, 2014 WL 3695296. While the Eleventh Circuit would afford "speech to the public by attorneys on public issues" with "the strongest protection our Constitution has to offer," it held that the full scope of First Amendment protection did not apply to a physician speaking "only as part of the practice of medicine, subject to reasonable licensing and regulation by the State." 2014 U.S. App. LEXIS 14192, [WL] at *14 (quoting *Casey*, 505 U.S. at 884 (plurality opinion)). Similar to *Moore-King, Wollschlaeger* explained that "the key to distinguishing between occupational regulation and abridgment of First Amendment liberties is in finding a personal nexus between professional and client." *Id.* (internal quotation marks and citations omitted).

We find the reasoning in these cases to be informative. Licensed professionals, through their education and training, have access to a corpus of specialized knowledge that their clients usually do not. Indeed, the value of the professional's services stems largely from her ability to apply this specialized knowledge to a client's individual circumstances. Thus, clients ordinarily have no choice but to place their trust in these professionals, and, by

extension, in the State that licenses them. *See, e.g., Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 768, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976) ("[H]igh professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject."). It is the State's imprimatur and the regulatory oversight that accompanies it that provide clients with the confidence they require to put their health or their livelihood in the hands of those who utilize knowledge and methods with which the clients ordinarily have little or no familiarity.

This regulatory authority is particularly important when applied to professions related to mental and physical health. *See Watson*, 218 U.S. at 176 ("[T]he police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health."). The practice of most professions, mental health professions in particular, will inevitably involve communication between the professional and her client—this is, of course, how professionals and clients interact. To handcuff the State's ability to regulate a profession whenever speech is involved would therefore unduly undermine its authority to protect its citizens from harm. *See* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 950 (2007) ("The practice of medicine, like all human behavior, transpires through the medium of speech. In regulating the practice, therefore, the state must necessarily also regulate professional speech.").

Thus, we conclude that a licensed professional does not enjoy the full protection of the First Amendment when speaking as part of the practice of her profession. Like the Fourth and Eleventh Circuits, we believe a professional's speech warrants lesser protection only when it is used to provide personalized services to a client based on the professional's expert knowledge and judgment. *See Wollschlaeger*, 2014 U.S. App. LEXIS 14192, 2014 WL 3695296, at *14; *Moore-King*, 708 F.3d at 569. By contrast, when a professional is speaking to the public at large or offering her personal opinion to a client, her speech remains entitled to the full scope of protection afforded by the First Amendment.[15]

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15. While we embrace *Pickup*'s conclusion that First Amendment protection differs in the context of professional speech, we decline to adopt its three categories of protection. It is indisputable that a professional "engaged in a public dialogue" receives robust protection under the First Amendment. *Pickup*, 740 F.3d at 1227. But we find that the other two points on *Pickup*'s "continuum" are usually conflated; a regulation of "professional conduct" will in many cases "incidentally" affect speech that occurs "within the confines of a professional relationship." *Id.* at 1228-29. SB1172 is a prime example: even if, as the *Pickup* panel reasoned, it only "incidentally" affects speech, the speech that it incidentally affects surely occurs within the confines of the counseling relationship. In fact, *Pickup* itself conflated these two categories when applying its "continuum" to SB1172. Though it held that SB1172 implicated the least protected category, *Pickup* subjected the statute to the level of scrutiny of its midpoint category—*i.e.*, *Casey*'s rational basis test. *See id.* at 1228-29. Thus, we refuse to adopt *Pickup*'s distinction between speech that occurs within the confines of a professional relationship and that which is only incidentally affected by a regulation of professional conduct.

With these principles in mind, it is clear to us that speech occurring as part of SOCE counseling is professional speech. SOCE counselors provide specialized services to individual clients in the form of psychological practices and procedures designed to effect a change in the clients' thought patterns and behaviors. Importantly, A3371 does not prevent these counselors from engaging in a public dialogue on homosexuality or sexual orientation change—it prohibits only a professional practice that is, in this instance, carried out through verbal communication. While the function of this speech does not render it "conduct" that is wholly outside the scope of the First Amendment, it does place it within a recognized category of speech that is not entitled to the full protection of the First Amendment.

C.

That we have classified Plaintiffs' speech as professional speech does not end our inquiry. While the cases above make clear that such speech is not fully protected under the First Amendment, the question remains whether this category receives some lesser degree of protection or no protection at all. We hold that professional speech receives diminished protection, and, accordingly, that prohibitions of professional speech are constitutional only if they directly advance the State's interest in protecting its citizens from harmful or ineffective professional practices and are no more extensive than necessary to serve that interest.

In explaining why this level of protection is appropriate, we find it helpful to compare professional speech to commercial speech. For over 35 years, the Supreme Court has recognized that commercial speech—truthful, non-misleading speech that proposes a legal economic transaction—enjoys diminished protection under the First Amendment. *See Ohralik*, 436 U.S. at 454-59.[16] Though such speech was at one time considered outside the scope of the First Amendment altogether, *see Valentine v. Chrestensen*, 316 U.S. 52, 54, 62 S. Ct. 920, 86 L. Ed. 1262 (1942), the Supreme Court reversed course in *Bigelow v. Virginia*, 421 U.S. 809, 818-26, 95 S. Ct. 2222, 44 L. Ed. 2d 600 (1975), and recognized that commercial speech enjoys some degree of protection. The Court has since explained that commercial speech has value under the First Amendment because it facilitates the "free flow of commercial information," in which both the intended recipients and society at large have a strong interest. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 763-64, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976) ("*Virginia Pharmacy*"); *see also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm. of New York*, 447 U.S. 557, 561-62, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) (explaining that commercial speech "assists consumers and furthers the societal interest in the fullest possible dissemination of information"). In

16. Advertisements that are false or misleading have never been recognized as protected by the First Amendment. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771, 96 S. Ct. 1817, 48 L. Ed. 2d 346 (1976). Nor have advertisements proposing illegal transactions. *See id.* at 772.

fact, the Court has recognized that a consumer's interest in this information "may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Virginia Pharmacy*, 425 U.S. at 763.

Despite recognizing the value of commercial speech, the Court has "not discarded the 'common-sense' distinction" between commercial speech and other areas of protected expression. *Ohralik*, 436 U.S. at 455-56 (quoting *Virginia Pharmacy*, 425 U.S. at 771 n.24). Instead, the Court has repeatedly emphasized that commercial speech enjoys only diminished protection because it "occurs in an area traditionally subject to government regulation." *Central Hudson*, 447 U.S. at 562 (quoting *Ohralik*, 436 U.S. at 455-56). Because commercial speech is "linked inextricably with the commercial arrangement it proposes, . . . the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself." *Edenfield v. Fane*, 507 U.S.761, 767, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1993) (internal quotation marks and citations omitted). Accordingly, a prohibition of commercial speech is permissible when it "directly advances" a "substantial" government interest and is "not more extensive than is necessary to serve that interest." *Central Hudson*, 447 U.S. at 566. The Supreme Court later dubbed this standard of review "intermediate scrutiny." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 623-24, 115 S. Ct. 2371, 132 L. Ed. 2d 541 (1995) (internal quotation marks and citation omitted).

We believe that commercial and professional speech share important qualities and, thus, that intermediate

scrutiny is the appropriate standard of review for prohibitions aimed at either category. Like commercial speech, professional speech is valuable to listeners and, by extension, to society as a whole because of the "informational function" it serves. *Central Hudson*, 447 U.S. at 563. As previously discussed, professionals have access to a body of specialized knowledge to which laypersons have little or no exposure. Although this information may reach non-professionals through other means, such as journal articles or public speeches, it will often be communicated to them directly by a licensed professional during the course of a professional relationship. Thus, professional speech, like commercial speech, serves as an important channel for the communication of information that might otherwise never reach the public. *See* Post, *supra*, at 977; *see also Central Hudson*, 447 U.S. at 561-62 (describing "the societal interest in the fullest possible dissemination of information").[17]

Additionally, like commercial speech, professional speech also "occurs in an area traditionally subject to government regulation." *Central Hudson*, 447 U.S. at 562 (quoting *Ohralik*, 436 U.S. at 455-56). As we have previously explained, States have traditionally enjoyed

17. We also recognize that professional speech can often serve an expressive function insofar as a professional's personal beliefs—including deeply-held political or religious beliefs—are infused in the practice of a profession. SOCE counselors, for example, provide counseling not merely for remuneration but as a means of putting important beliefs and values into practice. This expressive value is further reason to afford professional speech some level of protection under the First Amendment.

broad authority to regulate professions as a means of protecting the public from harmful or ineffective professional services. Accordingly, as with commercial speech, it is difficult to ignore the "common-sense" differences between professional speech and other forms of protected communication. *Ohralik*, 436 U.S. at 455-56 (quoting *Virginia Pharmacy*, 425 U.S. at 771 n.24).

Given these striking similarities, we conclude that professional speech should receive the same level of First Amendment protection as that afforded commercial speech. Thus, we hold that a prohibition of professional speech is permissible only if it "directly advances" the State's "substantial" interest in protecting clients from ineffective or harmful professional services, and is "not more extensive than necessary to serve that interest." *Central Hudson*, 447 U.S. at 566.

In so holding, we emphasize that a regulation of professional speech is spared from more demanding scrutiny only when the regulation was, as here, enacted pursuant to the State's interest in protecting its citizens from ineffective or harmful professional services. Because the State's regulatory authority over licensed professionals stems from its duty to protect the clients of these professionals, a state law may be subject to strict scrutiny if designed to advance an interest unrelated to client protection. Thus, a law designed to combat terrorism is not a professional regulation, and, accordingly, may be subject to strict scrutiny. *See Humanitarian Law Project*, 561 U.S. at 25-28. Similarly, a law that is not intended to protect a professional's clients, but to insulate

certain laws from constitutional challenge, is more than just a regulation of professional speech and, accordingly, intermediate scrutiny is not the proper standard of review. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 540-49, 121 S. Ct. 1043, 149 L. Ed. 2d 63 (2001).[18]

We recognize that our sister circuits have concluded that regulations of professional speech are subject to a more deferential standard of review or, possibly, no review at all. *See Pickup*, 740 F.3d at 1231; *Wollschlaeger*, 2014 U.S. App. LEXIS 14192, 2014 WL 3695296, at *13-14; *Moore-King*, 708 F.3d at 567-70. *Pickup*, for example, cited *Casey*, 505 U.S. at 884, 967-68 (plurality opinion), as support for its decision to apply rational basis review to a similar statute. *Pickup*, 740 F.3d at 1231.[19]

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18. Like *Humanitarian Law Project, Velazquez* concerned federal legislation which could not have been passed pursuant to the State's police power. *Velazquez*, 531 U.S. at 536.

19. *Pickup* is the only court to explicitly apply rational basis review to a regulation of professional speech. 740 F.3d at 1231. *Wollschlaeger* and *Moore-King*, by contrast, do not explicitly identify the level of scrutiny they apply, if they apply one at all. In *Wollschlaeger*, the majority held that "a statute that governs the practice of an occupation is not unconstitutional as an abridgment of the right to free speech, so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation." 2014 U.S. App. LEXIS 14192, 2014 WL 3695296, at *13 (internal quotation marks and citation omitted); *see also* 2014 U.S. App. LEXIS 14192, [WL] at *15 (noting that generally applicable licensing regimes "do[] not implicate constitutionally protected activity under the First Amendment") (internal quotation marks and citations omitted). *But see* 2014 U.S. App. LEXIS 14192, [WL] at *41 (Wilson, J., dissenting) (interpreting the majority

Appendix C

To the extent *Casey* suggested rational basis review, we do not believe such a standard governs here. While the plurality opinion noted in passing that speech, when part of the practice of medicine, is "subject to *reasonable* licensing and regulation by the State," 505 U.S. at 884 (emphasis added), the regulation it addressed fell within a special category of laws that compel disclosure of truthful factual information, *id*. at 881. In the context of commercial speech, the Supreme Court has treated compelled disclosures of truthful factual information differently than prohibitions of speech, subjecting the former to rational basis review and the latter to intermediate scrutiny. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 650-51, 105 S. Ct. 2265, 85 L. Ed. 2d 652, 17 Ohio B. 315 (1985) (outlining the "material differences between disclosure requirements and outright prohibitions on speech" and subjecting a disclosure requirement to rational basis review). Thus, to the extent *Casey* applied rational basis review, this facet of the opinion is inapplicable to the present case because the law at issue is a prohibition of speech, not a compulsion of truthful factual information. *See Wollschlaeger*, 2014 U.S. App. LEXIS 14192, 2014 WL 3695296, at *38 (Wilson,

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opinion to apply rational basis review). Similarly, in *Moore-King*, the majority held that "[u]nder the professional speech doctrine, the government can license and regulate those who would provide services to their clients for compensation without running afoul of the First Amendment." 708 F.3d at 569. *But see id*. at 570 (refusing to "afford the government carte blanche in crafting or implementing [occupational] regulations" and refraining from "delineat[ing] the precise boundaries of permissible occupational regulation under the professional speech doctrine").

J., dissenting) (reasoning that "[e]ven if *Casey* applied something less than intermediate scrutiny," *Zauderer* establishes that a more stringent standard of review should apply to restrictions on professional speech.).

Additionally, we have serious doubts that anything less than intermediate scrutiny would adequately protect the First Amendment interests inherent in professional speech. Without sufficient judicial oversight, legislatures could too easily suppress disfavored ideas under the guise of professional regulation. *See Pickup*, 740 F.3d at 1215 (O'Scannlain, J., dissenting from denial of rehearing en banc). This possibility is particularly disturbing when the suppressed ideas concern specialized knowledge that is unlikely to reach the general public through channels other than the professional-client relationship. Intermediate scrutiny is necessary to ensure that State legislatures are regulating professional speech to prohibit the provision of harmful or ineffective professional services, not to inhibit politically-disfavored messages.

Lastly, we reject Plaintiffs' argument that A3371 should be subject to strict scrutiny because it discriminates on the basis of content and viewpoint. First, although we agree with Plaintiffs that A3371 discriminates on the basis of content,[20] it does so in a way that does not trigger strict

20. We have little doubt in this conclusion. A3371, on its face, prohibits licensed counselors from speaking words with a particular content; *i.e.* words that "seek[] to change a person's sexual orientation." N.J. Stat Ann. § 45:1-55. Thus, as in *Humanitarian Law Project*, "Plaintiffs want to speak to [minor clients], and whether they may do so under [A3371] depends on what they say." 561 U.S. at 27.

scrutiny. Ordinarily, content-based regulations are highly disfavored and subjected to strict scrutiny. *See Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664, 180 L. Ed. 2d 544 (2011). And this is generally true even when the law in question regulates unprotected or lesser protected speech. *See R.A.V. v. City of St. Paul*, 505 U.S. 377, 381-86, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). Nonetheless, within these unprotected or lesser protected categories of speech, the Supreme Court has held that a statute does *not* trigger strict scrutiny "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." *Id.* at 388. By way of illustration, the Court explained:

> [A] State may choose to regulate price advertising in one industry but not in others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there. But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion.

Id. at 388-89 (internal citations omitted).

A3371 fits comfortably within this category of permissible content discrimination. As with the content-based regulations identified by *R.A.V.* as permissible, "the basis for [A3371's] content discrimination consists entirely of the very reason" professional speech is a category of lesser-protected speech. *Id.* at 388. The New Jersey legislature has targeted SOCE counseling for prohibition

because it was presented with evidence that this particular form of counseling is ineffective and potentially harmful to clients. Thus, the reason professional speech receives diminished protection under the First Amendment—*i.e.*, because of the State's longstanding authority to protect its citizens from ineffective or harmful professional practices—is precisely the reason New Jersey targeted SOCE counseling with A3371. Therefore, we conclude that A3371 does not trigger strict scrutiny by discriminating on the basis of content in an impermissible manner.

Nor do we agree that A3371 triggers strict scrutiny because it discriminates on the basis of viewpoint. Plaintiffs argue that A3371 prohibits them from expressing the viewpoint "that [same sex attractions] can be reduced or eliminated to the benefit of the client." Appellant's Br. 26. That is a misreading of the statute. A3371 allows Plaintiffs to express this viewpoint, in the form of their personal opinion, to anyone they please, including their minor clients. What A3371 prevents Plaintiffs from doing is expressing this viewpoint in a very specific way—by actually rendering the professional services that they believe to be effective and beneficial. Arguably, any time a professional engages in a particular professional practice she is implicitly communicating the viewpoint that such practice is effective and beneficial. The prohibition of this method of communicating a particular viewpoint, however, is not the type of viewpoint discrimination with which the First Amendment is concerned. If it were, State legislatures could never ban a particular professional practice without triggering strict scrutiny. Thus, a statute banning licensed psychotherapists from administering

treatments based on phrenology would be subject to strict scrutiny because it prevents these therapists from expressing their belief in phrenology by putting it into practice. Such a rule would unduly undermine the State's authority to regulate the practice of licensed professions.

Accordingly, we believe intermediate scrutiny is the applicable standard of review in this case. We must uphold A3371 if it "directly advances" the government's interest in protecting clients from ineffective and/or harmful professional services, and is "not more extensive than necessary to serve that interest." *See Central Hudson*, 447 U.S. at 566. Those are the questions we next address.

D.

Our analysis begins with an evaluation of New Jersey's interest in the passage of A3371. As we have previously explained, the State's interest in protecting its citizens from harmful professional practices is unquestionably substantial. *See Goldfarb*, 421 U.S. at 792; *Watson*, 218 U.S. at 176. Here, New Jersey's stated interest is even stronger because A3371 seeks to protect minor clients—a population that is especially vulnerable to such practices. *See* Supplemental App. 85 (Declaration of Douglas C. Haldeman, Ph.D.) (explaining that adolescent and teenage clients are "much more vulnerable to the potentially traumatic effects of SOCE" because their "pre-frontal cort[ices] [are] still developing and changing rapidly").

Our next task, then, is to determine whether A3371 directly advances this interest by prohibiting a professional

practice that poses serious health risks to minors. To survive heightened 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." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 664, 114 S. Ct. 2445, 129 L. Ed. 2d 497 (1994) (plurality opinion) ("*Turner I*") (citations omitted). *See also 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") (quoting *Edenfield v. Fane*, 507 U.S. 761, 770-71, 113 S. Ct. 1792, 123 L. Ed. 2d 543 (1992)). Even when applying intermediate scrutiny, however, we do not review a legislature's empirical judgment *de novo*—our task is merely to determine whether the legislature has "drawn reasonable inferences based on substantial evidence." *Turner Broad. Sys., Inc., v. F.C.C.*, 520 U.S. 180, 195, 117 S. Ct. 1174, 137 L. Ed. 2d 369 (1997) ("*Turner II*") (internal quotation marks and citation omitted). Further, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377, 391, 120 S. Ct. 897, 145 L. Ed. 2d 886 (2000).

We conclude that New Jersey has satisfied this burden. The legislative record demonstrates that over the last few decades a number of well-known, reputable professional and scientific organizations have publicly condemned the practice of SOCE, expressing serious concerns about its potential to inflict harm. Among others, the American Psychological Association, the American Psychiatric

Association, and the Pan American Health Organization have warned of the "great" or "serious" health risks accompanying SOCE counseling, including depression, anxiety, self-destructive behavior, and suicidality. N.J. Stat. Ann. § 45:1-54 (collecting additional position statements and articles from the American Academy of Pediatrics, the American Psychoanalytic Association, and the American Academy of Child and Adolescent Psychiatry warning of the health risks posed by SOCE counseling). Many such organizations have also concluded that there is no credible evidence that SOCE counseling is effective. *See id.*

We conclude that this evidence is substantial. Legislatures are entitled to rely on the empirical judgments of independent professional organizations that possess specialized knowledge and experience concerning the professional practice under review, particularly when this community has spoken with such urgency and solidarity on the subject. Such evidence is a far cry from the "mere speculation or conjecture" our cases have held to be insufficient. *Pitt News*, 379 F.3d at 107 (internal quotation marks and citations omitted).

Plaintiffs do not dispute the views of the professional community at large concerning the efficacy and potential harmfulness of SOCE counseling. Instead, they fault the legislature for passing A3371 without first obtaining conclusive empirical evidence regarding the effect of SOCE counseling on minors. To be sure, the APA Report suggests that the bulk of empirical evidence regarding the efficacy or harmfulness of SOCE counseling currently

falls short of the demanding standards imposed by the scientific community. *See* J.A. 327 (noting the "limited amount of methodologically sound research" on SOCE counseling); *id.* at 367 (noting that "[t]he few early research investigations that were conducted with scientific rigor raise concerns about the safety of SOCE" but refusing "to make a definitive statement about whether recent SOCE is safe or harmful and for whom" due to a lack of "scientifically rigorous studies" of these practices).[21]

Yet a state legislature is not constitutionally required to wait for conclusive scientific evidence before acting to protect its citizens from serious threats of harm. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822, 120 S. Ct. 1878, 146 L. Ed. 2d 865 (2000) ("This is not to suggest that a 10,000-page record must be compiled in every case or that the Government must delay in acting to address a real problem; but the Government must present more than anecdote and suspicion."). This is particularly true when a legislature's empirical judgment is highly plausible, as we conclude New Jersey's judgment is in this case. *See Nixon*, 528 U.S. at 391. It is not too far a leap in logic to conclude that a minor client might suffer psychological harm if repeatedly told by an authority figure that her sexual orientation—a fundamental aspect of her identity—is an undesirable condition. Further, if SOCE counseling is ineffective—which, as we have

21. It is worth noting that although the APA Report was uncomfortable making a "definitive" statement about the effects of SOCE, it did ultimately observe that there was at least "some evidence to indicate that individuals experienced harm from SOCE." J.A. 287, 367.

explained, is supported by substantial evidence—it would not be unreasonable for a legislative body to conclude that a minor would blame herself if her counselor's efforts failed. Given the substantial evidence with which New Jersey was presented, we cannot say that these fears are unreasonable. We therefore conclude that A3371 "directly advances" New Jersey's stated interest in protecting minor citizens from harmful professional practices.

Lastly, we must determine whether A3371 is more extensive than necessary to protect this interest. To survive this prong of intermediate scrutiny, New Jersey "is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188, 119 S. Ct. 1923, 144 L. Ed. 2d 161 (1999) (citing *Board of Tr. of State Univ. of New York v. Fox*, 492 U.S. 469, 480, 109 S. Ct. 3028, 106 L. Ed. 2d 388 (1989)).[22] Thus, New Jersey must establish "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Id.* (quoting *Fox*, 492 U.S. at 480); *see also Heffner v. Murphy*, 745 F.3d 56, 92-93 (3d Cir. 2014) (upholding regulation of commercial speech while acknowledging that the fit between the statute and its interests was "imperfect").

22. As explained in *Fox*, the word "necessary," in the context of intermediate scrutiny, does not "translate into [a] 'least-restrictive-means' test" but instead has a "more flexible meaning." 492 U.S. at 476-77.

Plaintiffs argue that A3371's ban is overly burdensome, and that New Jersey's objectives could be accomplished in a less restrictive manner via a requirement that minor clients give their informed consent before undergoing SOCE counseling. We are not convinced, however, that an informed consent requirement would adequately serve New Jersey's interests. Minors constitute an "especially vulnerable population," *see* J.A. 405 (APA Report, Appendix A), and may feel pressured to receive SOCE counseling by their families and their communities despite their fear of being harmed, *see* J.A. 301 (APA Report) (explaining that "hostile social and family attitudes" are among the reasons minors seek SOCE counseling). Thus, even if SOCE counseling were helpful in a small minority of cases—and the legislature, based on the body of evidence before it, was entitled to reach a contrary conclusion—an informed consent requirement could not adequately ensure that only those minors that could benefit would agree to move forward. As Plaintiffs have offered no other suggestion as to how the New Jersey legislature could achieve its interests in a less restrictive manner, we conclude that A3371 is sufficiently tailored to survive intermediate scrutiny.

Accordingly, we conclude that A3371 is a permissible prohibition of professional speech.

F.

Lastly, Plaintiffs argue that A3371 is unconstitutionally vague and overbroad. We disagree.

Appendix C

The Supreme Court has held that "standards of permissible statutory vagueness are strict in the area of free expression." *NAACP v. Button*, 371 U.S. 415, 432, 83 S. Ct. 328, 9 L. Ed. 2d 405 (1963) (citations omitted). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* at 433 (citation omitted). Nonetheless, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794, 109 S. Ct. 2746, 105 L. Ed. 2d 661 (1989) (citations omitted). "[B]ecause we are condemned to the use of words, we can never expect mathematical certainty from our language." *Hill v. Colorado*, 530 U.S. 730, 733 (2000) (internal quotation marks and citation omitted). Thus, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Id.* (internal quotation marks and citation omitted).

Plaintiffs argue that A3371 is unconstitutional on its face because the term "sexual orientation change efforts" is impermissibly vague.[23] We disagree. Under A3371, this term is defined as:

> [T]he practice of seeking to change a person's sexual orientation, including, but not limited to, efforts to change behaviors, gender identity, or

23. In the District Court, Plaintiffs also argued that the phrase "sexual orientation" is unconstitutionally vague. They do not pursue this argument on appeal.

> gender expressions, or to reduce or eliminate sexual or romantic attractions or feelings toward a person of the same gender; except that sexual orientation change efforts shall not include counseling for a person seeking to transition from one gender to another, or counseling that:
>
> (1) provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and identity exploration and development, including orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and
>
> (2) does not seek to change sexual orientation.

N.J. Stat. Ann. § 45:1-55. While this statutory definition may not provide "perfect clarity," *Hill*, 530 U.S. at 733 (quotation marks and citation omitted), its list of illustrative examples provides boundaries that are sufficiently clear to pass constitutional muster. Further, counseling designed to change a client's sexual orientation is recognized as a discrete practice within the profession. Such counseling is sometimes referred to as "reparative" or "conversion" therapy and has been the specific target of public statements by recognized professional organizations. *See* N.J. Stat. Ann. § 45:1-54 (quoting

statements from the American Psychiatric Association, the National Association of Social Workers, the American Counseling Association Governing Council, and the Pan American Health Organization referring to this practice). Plaintiffs themselves claim familiarity with this form of counseling and acknowledge that many counselors "specialize" in such practices. *See, e.g.*, J.A. 168 (Decl. of Dr. Tara King) (explaining that Dr. King provides "sexual orientation change efforts ('SOCE') counseling"); J.A. 177 (Decl. of Dr. Ronald Newman) (explaining that "part of [Dr. Newman's] practice involves what is often called sexual orientation change efforts ('SOCE') counseling"); J.A. 182 (Decl. of David Pruden, on behalf of NARTH) (explaining that "NARTH provides various presentations across the country hosted by mental health professionals who specialize in what is referred to in A3371 as sexual orientation change efforts ('SOCE') counseling"). To those in the field of professional counseling, the meaning of this term is sufficiently definite "in the vast majority of its intended applications." *Hill*, 530 U.S. at 733 (quotation marks and citation omitted). Thus, we reject Plaintiffs' argument that A3371 is unconstitutionally vague.

As to overbreadth, a statute that impinges upon First Amendment freedoms is impermissibly overbroad if "a substantial number of its applications are unconstitutional, judged in relation to [its] plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 473, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010) (quoting *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 n.6, 128 S. Ct. 1184, 170 L. Ed. 2d 151 (2008)). Plaintiffs' only argument on this front is that A3371 prohibits SOCE

counseling even when, in Plaintiffs' view, such counseling would be especially beneficial. *See* Appellant's Br. 47 (arguing that A3371 prevents a minor from receiving SOCE counseling even if the cause of their same-sex attractions was sexual abuse). This argument, however, is nothing more than a disagreement with New Jersey's empirical judgments regarding the effect of SOCE counseling on minors. As we have already concluded, New Jersey's reasons for banning SOCE counseling were sufficiently supported by the legislative record. Thus, we hold that A3371 is not unconstitutionally overbroad.

IV.

Plaintiffs' second constitutional claim is that A3371 violates their First Amendment right to the free exercise of religion. For the reasons that follow, we conclude that this claim also lacks merit.

Under the Religion Clauses of the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The right to freely exercise one's religion, however, is not absolute. *McTernan v. City of York*, 577 F.3d 521, 532 (3d Cir. 2009). If a law is "neutral" and "generally applicable," it will withstand a free exercise challenge so long as it is "rationally related to a legitimate government objective." *Brown v. City of Pittsburgh*, 586 F.3d 263, 284 (3d Cir. 2009) (citation omitted). This is so even if the law "has the incidental effect of burdening a particular religious practice" or group. *Id.* at 284 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531, 113 S. Ct. 2217, 124 L. Ed. 2d 472 (1993)).

The issue before us, then, is whether A3371 is "neutral" and "generally applicable." "A law is 'neutral' if it does not target religiously motivated conduct either on its face or as applied in practice." *Blackhawk v. Pennsylvania*., 381 F.3d 202, 209 (3d Cir. 2004) (citing *Lukumi*, 508 U.S. at 533-40; *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 167 (3d Cir. 2002)). "A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated." *Id*. at 209 (citations omitted).

As a preliminary matter, A3371 makes no explicit reference to any religion or religious beliefs, and is therefore neutral on its face. *See Lukumi*, 508 U.S. at 533-34. Nevertheless, Plaintiffs argue that A3371 covertly targets their religion by prohibiting counseling that is generally religious in nature while permitting other forms of counseling that are equally harmful to minors. Specifically, Plaintiffs contend that A3371 operates as an impermissible "religious gerrymander"[24] because it provides "individualized exemptions" for counseling:

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24. A "religious gerrymander" occurs when the boundaries of statutory coverage are "artfully drawn" to target or exclude religiously-motivated activity. *American Family Ass'n, Inc. v. F.C.C.*, 365 F.3d 1156, 1170, 361 U.S. App. D.C. 231 (D.C. Cir. 2004); *see also Lukumi*, 508 U.S. at 535 (describing a "religious gerrymander" as "an impermissible attempt to target petitioners and their religious practices").

> (1) for minors seeking to transition from one gender to another, (2) for minors struggling with or confused about heterosexual attractions, behaviors, or identity, (3) that facilitates exploration and development of same-sex attractions, behaviors, or identity, (4) for individuals over the age of 18, and (5) provided by unlicensed counselors.

Appellant's Br. 51.

None of these five "exemptions," however, demonstrate that A3371 covertly targets religiously motivated conduct. Plaintiffs' first and third "exemptions" are not compelling because nothing in the record suggests that these forms of counseling are equally harmful to minors. Plaintiffs' second "exemption," which implies that A3371 would permit heterosexual-to-homosexual change efforts, misinterprets the statute; A3371 prohibits *all* "sexual orientation change efforts" regardless of the direction of the desired change. *See* N.J. Stat. Ann. § 45:1-55 (defining "sexual orientation change efforts" as "including, *but not limited to*," efforts to eliminate same sex attractions) (emphasis added). Lastly, Plaintiffs' fourth and fifth "exemptions" are simply irrelevant because they have nothing to do with religion. Plaintiffs fail to explain how A3371's focus on the professional status of the counselor or the age of the client belies a concealed intention to suppress a particular religious belief.[25]

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25. Plaintiffs also argue that A3371's neutrality is undermined by a statement made by one of the members of the Task Force that authored the 2009 APA Report. According to

Accordingly, we conclude that A3371 is neutral and generally applicable, and therefore triggers only rational basis review. In so doing, we reject Plaintiffs' argument that even if A3371 were neutral and generally applicable, it should be subject to strict scrutiny under a "hybrid rights" theory. Specifically, Plaintiffs contend that because A3371 "burdens" both their free exercise and free speech rights, they have presented a "hybrid rights" claim that triggers heightened scrutiny. We have previously refused to endorse such a theory, *McTernan v. City of York, Pa.*, 564 F.3d 636, 647 n.5 (3d Cir. 2009), and we refuse to do so today. *See also Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 247 (3d Cir. 2008) ("Until the Supreme Court provides direction, we believe the hybrid-rights theory to be dicta."). Because we have already concluded that A3371 survives intermediate scrutiny, it follows *ipso facto* that this law is rationally related to a legitimate government interest. Therefore, we will affirm the District Court's dismissal of this claim.

Plaintiffs, this researcher claimed that the APA Task Force was unwilling to "take into account what are fundamentally negative religious perceptions of homosexuality—they don't fit into our world view." Appellant's Br. 52. Plaintiffs fail to explain, however, how this statement reflects the New Jersey legislature's motives in passing A3371. This statement was made by one of several members of the APA Task Force, which produced only one of the many pieces of evidence on which the legislature relied when passing A3371. It by no means establishes that New Jersey was secretly motivated by religious animus, as opposed to their stated objective of protecting minor citizens from harm.

V.

Plaintiffs also argue that the District Court erred by concluding that they lacked standing to bring claims on behalf of their minor clients.[26] This argument is also without merit.

"It is a well-established tenet of standing that 'a litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties.'" *Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 288 (3d Cir. 2002) (quoting *Powers v. Ohio*, 499 U.S. 400, 410, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991)). "Yet the prohibition is not invariable and our jurisprudence recognizes third-party standing under certain circumstances." *Id.* (citations omitted). To establish third-party standing, a litigant must demonstrate that (1) she has suffered an "injury in fact" that provides her with a "sufficiently concrete interest in the outcome of the issue in dispute"; (2) she has a "close relation to the third party"; and (3) there exists "some hindrance to the third party's ability to protect his or her own interests." *Powers*, 499 U.S. at 411 (internal quotation marks and citations omitted). In the present case, the parties agree that licensed counselors have a sufficiently "close relationship" to their clients, *see Pennsylvania Psychiatric Soc'y*, 280 F.3d at 289-90, but dispute whether Plaintiffs have suffered a sufficient "injury in fact" and whether Plaintiffs' clients are sufficiently "hindered" in

26. Although Plaintiffs' complaint alleged claims on behalf of their patients' parents, Plaintiffs do not pursue these claims on appeal.

their ability to bring suit themselves. We will address these two elements in turn.

Plaintiffs argue that the District Court erred by holding that they did not suffer an "injury in fact." We agree. The District Court reasoned that "Plaintiffs' ability to bring third-party claims hinges on whether they suffered any constitutional wrongs by the passage of A3371." J.A. 24. We have never held, however, that a plaintiff must possess a successful constitutional claim in order to establish an "injury in fact" sufficient to confer third-party standing. In *Craig v. Boren*, 429 U.S. 190, 191-97, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976), for example, the Supreme Court granted third-party standing to a vendor who did not even allege a violation of her own constitutional rights—she merely alleged that the law at issue, in violating the rights of her customers, resulted in a reduction in her sales. Here, Plaintiffs are similarly injured by A3371 in that they are forced to either sacrifice a portion of their client base or disobey the law and risk the loss of their licenses. Thus, we conclude that Plaintiffs have a "sufficiently concrete interest" in this dispute regardless of whether A3371 violates their constitutional rights.

We agree with Defendants, however, that Plaintiffs have failed to establish that their clients are "hindered" in their ability to bring suit themselves. The only evidence Plaintiffs provide on this issue is Dr. Newman's assertion that "[n]either of [his] clients wants others to even know they are in therapy."[27] J.A. 448 (Decl. of Ronald

27. Further, Dr. Newman made this assertion as a justification for not asking his patients to testify in open court, not

Newman, Ph.D.). While a fear of social stigma can in some circumstances constitute a substantial obstacle to filing suit, *see Pennsylvania Psychiatric Soc'y*, 280 F.3d at 290, Plaintiffs' evidence does not sufficiently establish the presence of such fear here. Further, we note that minor clients have been able to file suit pseudonymously in both *Pickup* and *Doe v. Christie*, 2014 U.S. Dist. LEXIS 104363, 2014 WL 3765310 (D.N.J. July 31, 2014). While we disagree with the District Court that the presence of such lawsuits is dispositive,[28] the fact that minor clients have previously filed suit bolsters our conclusion that they are not sufficiently hindered in their ability to protect their own interests. Accordingly, we hold that Plaintiffs lack standing to pursue claims on behalf of their minor clients.

VI.

Plaintiffs also argue that the District Court erred by allowing Garden State to intervene. They advance two arguments on this point: first, that the District

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as a reason these patients would be unwilling to file suit under a pseudonym. J.A. 448 (Decl. of Ronald Newman, Ph.D.).

28. The District Court reasoned that "since these litigants are bringing their own action against Defendants, there can be no serious argument that these third parties are facing obstacles that would prevent them from pursuing their own claims." J.A. 22. As we have explained, however, "a party need not face insurmountable hurdles to warrant third-party standing." *Pennsylvania Psychiatric Soc'y*, 280 F.3d at 290 (citation omitted). Thus, the fact that a few patients have been able to overcome certain obstacles does not necessarily preclude a determination that these obstacles are a "hindrance" sufficient to justify third-party standing.

Court erroneously concluded that Garden State was not required to possess Article III standing; and second, that the District Court abused its discretion by permitting Garden State to intervene under Federal Rule of Civil Procedure 24(b). For the reasons that follow, we reject both arguments.

A.

"Article III of the Constitution limits the power of federal courts to deciding 'cases' and 'controversies.' This requirement ensures the presence of the 'concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.'" *Diamond v. Charles*, 476 U.S. 54, 61-62, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986) (citing *Baker v. Carr*, 369 U.S. 186, 204, 82 S. Ct. 691, 7 L. Ed. 2d 663 (1962)). In order to ensure that such a "case" or "controversy" is present, the Supreme Court has consistently required prospective plaintiffs to establish Article III standing in order to pursue a lawsuit in federal court. *See, e.g., id.* at 62. Prospective plaintiffs must therefore allege a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Already, LLC v. Nike, Inc.*, 133 S. Ct. 721, 726, 184 L. Ed. 2d 553 (2013) (quotation marks and citation omitted).

Whether prospective *intervenors* must establish Article III standing, however, is an open question in the Third Circuit. *See American Auto. Ins. Co. v. Murray*, 658 F.3d 311, 318 n.4 (3d Cir. 2011) ("[W]e need not today resolve the issue of whether a party seeking to intervene

must have Article III standing."). As the District Court acknowledged, our sister circuits are divided on this question. The majority have held that an intervenor is not required to possess Article III standing to participate. *See San Juan Cnty. v. United States*, 503 F.3d 1163, 1171-72 (10th Cir. 2007) (en banc); *Ruiz v. Estelle*, 161 F.3d 814, 830-33 (5th Cir. 1998); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994); *Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir. 1991); *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989); and *United States Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978). The Eighth and D.C. Circuits have reached a contrary conclusion. *See Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996); *Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777, 779, 241 U.S. App. D.C. 340 (D.C. Cir. 1984).[29]

We find the majority's view more persuasive. If the plaintiff that initiated the lawsuit in question has Article

29. The District Court cited *United States v. 36.96 Acres of Land*, 754 F.2d 855 (7th Cir. 1985), as falling on this side of the split as well. While *36.96 Acres* held that a party seeking intervention as of right must demonstrate an interest that is "greater than the interest sufficient to satisfy the standing requirement," *id*. at 859, it is unclear whether the Seventh Circuit concluded that this greater interest was required by Article III of the Constitution or merely by the then-existing version of Rule 24(a). *See Ruiz*, 161 F.3d at 831 (explaining that "of the cases cited in *Diamond*"—including *36.96 Acres*—"only *Kelly* maintains that Article III (and not just Rule 24(a)(2) & 24(b)(2)) requires intervenors to possess standing."). To the extent *36.96* held that a greater interest was constitutionally required, it provided no reasoning for that conclusion and thus carries no persuasive weight.

III standing, a "case" or "controversy" exists regardless of whether a subsequent intervenor has such standing. *See Ruiz*, 161 F.3d at 832 ("Once a valid Article III case-or-controversy is present, the court's jurisdiction vests. The presence of additional parties, although they alone could independently not satisfy Article III's requirements, does not of itself destroy jurisdiction already established."); *Chiles*, 865 F.2d at 1212 ("Intervention under Rule 24 presumes that there is a justiciable case into which an individual wants to intervene.").

Further, while the Supreme Court has never explicitly concluded that intervenors need not possess Article III standing, this conclusion is implicit in several decisions in which it has questioned whether a particular intervenor has Article III standing but nonetheless refrained from resolving the issue. *See, e.g., McConnell v. Federal Election Comm'n*, 540 U.S. 93, 233, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003) ("It is clear, however, that the [named defendant] has standing, and therefore we need not address the standing of the intervenor-defendants . . . ."), *overruled on other grounds by Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 130 S. Ct. 876, 175 L. Ed. 2d 753 (2010); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66, 117 S. Ct. 1055, 137 L. Ed. 2d 170 (1997) (expressing "grave doubts" about whether intervenors possessed Article III standing but concluding that it "need not definitively resolve the issue"). As the Tenth Circuit reasoned in *San Juan Cnty.*, the Supreme Court could not have avoided these questions if intervenors were required to have standing under Article III "because the Court could not simply ignore whether the requirements

of Article III had been satisfied." 503 F.3d at 1172. *See also id.* ("Standing implicates a court's jurisdiction, and requires a court itself to raise and address standing before reaching the merits of the case before it.") (quotation marks and citations omitted).

Accordingly, we conclude that the District Court did not err by determining that Garden State need not demonstrate Article III standing in order to intervene.

B.

Plaintiffs also argue that the District Court abused its discretion by permitting Garden State to intervene under Federal Rule of Civil Procedure 24(b). This argument lacks merit as well.

Rule 24(b) provides that "[o]n timely motion, the court may permit anyone to intervene who: (A) is given a conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." Fed. R. Civ. P. 24(b)(1). In exercising its discretion, a district court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed. R. Civ. P. 24(b)(3). We have previously noted that a district court's ruling on a motion for permissive intervention is a "highly discretionary decision" into which we are "reluctant to intrude." *Brody By and Through Sugzdinis v. Spang*, 957 F.2d 1108, 1115 (3d Cir. 1992).

We see no reason to disturb the District Court's decision in this case. Garden State's motion was timely, as it was filed a mere 14 days after the complaint. Garden State and New Jersey also share the common legal position that A3371 does not violate Plaintiffs' First Amendment rights. Lastly, Plaintiffs' argument that they are unduly prejudiced by having to respond to "superfluous arguments" is not convincing. Accordingly, we conclude that the District Court did not abuse its discretion by permitting Garden State to intervene.

VII.

Although we reject the District Court's conclusion that A3371 prohibits only "conduct" that is wholly unprotected by the First Amendment, we uphold the statute as a regulation of professional speech that passes intermediate scrutiny. We agree with the District Court that A3371 does not violate Plaintiffs' right to free exercise of religion, as it is a neutral and generally applicable law that is rationally related to a legitimate government interest. We further agree that Plaintiffs lack standing to bring claims on behalf of their minor clients, and conclude that the District Court did not abuse its discretion by permitting Garden State to intervene. Accordingly, we will affirm the judgment of the District Court.

APPENDIX D — JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, FILED SEPTEMBER 11, 2014

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-4429

TARA KING, ED. D. INDIVIDUALLY AND ON BEHALF OF HER PATIENTS; RONALD NEWMAN, PH. D., INDIVIDUALLY AND ON BEHALF OF HIS PATIENTS; NATIONAL ASSOCIATION FOR RESEARCH AND THERAPY OF HOMOSEXUALITY, (NARTH); AMERICAN ASSOCIATION OF CHRISTIAN COUNSELORS,

Appellants,

v.

GOVERNOR OF THE STATE OF NEW JERSEY; ERIC T. KANEFSKY, DIRECTOR OF THE NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY; DIVISION OF CONSUMER AFFAIRS, IN HIS OFFICIAL CAPACITY; MILAGROS COLLAZO, EXECUTIVE DIRECTOR OF THE NEW JERSEY BOARD OF MARRIAGE AND FAMILY THERAPY EXAMINERS, IN HER OFFICIAL CAPACITY; J. MICHAEL WALKER, EXECUTIVE DIRECTOR OF THE NEW JERSEY BOARD OF PSYCHOLOGICAL EXAMINERS, IN HIS OFFICIAL CAPACITY; PAUL JORDAN, PRESIDENT OF THE NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS, IN HIS OFFICIAL CAPACITY

Appendix D

GARDEN STATE EQUALITY (Intervenor in D.C.)

On Appeal from the United States District Court
for the District of New Jersey
District Court No. 13-cv-05038
District Judge: The Honorable Freda L. Wolfson

Argued July 9, 2014

Before: SMITH, VANASKIE, and SLOVITER,
Circuit Judges

JUDGMENT

This cause came on to be considered on the record from the United States District Court for the District of New Jersey and was argued on July 9, 2014. On consideration whereof, it is now hereby ADJUDGED and ORDERED that the judgment of the District Court entered November 8, 2013, be and the same is hereby AFFIRMED. Costs taxed to Appellants. All of the above in accordance with the opinion of this Court.

Attest:

/s/Marcia M. Waldron
Clerk

DATED: September 11, 2014

APPENDIX E — DENIAL OF REHEARING IN THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT, DATED NOVEMBER 9, 2018

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13-4429

November 9, 2018

TARA KING, ED. D. INDIVIDUALLY AND ON BEHALF OF HER PATIENTS; RONALD NEWMAN, PH. D., INDIVIDUALLY AND ON BEHALF OF HIS PATIENTS; NATIONAL ASSOCIATION FOR RESEARCH AND THERAPY OF HOMOSEXUALITY, (NARTH); AMERICAN ASSOCIATION OF CHRISTIAN COUNSELORS,

Appellants,

v.

GOVERNOR OF THE STATE OF NEW JERSEY; ERIC T. KANEFSKY, DIRECTOR OF THE NEW JERSEY DEPARTMENT OF LAW AND PUBLIC SAFETY: DIVISION OF CONSUMER AFFAIRS, IN HIS OFFICIAL CAPACITY; MILAGROS COLLAZO, EXECUTIVE DIRECTOR OF THE NEW JERSEY BOARD OF MARRIAGE AND FAMILY THERAPY EXAMINERS, IN HER OFFICIAL CAPACITY; J. MICHAEL WALKER, EXECUTIVE DIRECTOR OF THE NEW JERSEY BOARD OF PSYCHOLOGICAL EXAMINERS, IN HIS OFFICIAL CAPACITY;

Appendix E

PAUL JORDAN, PRESIDENT OF THE NEW JERSEY STATE BOARD OF MEDICAL EXAMINERS, IN HIS OFFICIAL CAPACITY

GAREN STATE EQUALITY (Intervenor in D.C.)

(D.N.J. No. 3-13-cv-05038)

Present: SMITH, Chief Judge, VANASKIE,* *Circuit Judges*

1. Motion by Appellants titled "Plaintiffs-Appellants' Petition for Rehearing *En Banc*," which the Court may wish to construe as a motion for reconsideration of the Court's Order entered October 11, 2018.

Respectfully,
Clerk/slc

ORDER

The foregoing petition, which is construed as a motion for reconsideration, is DENIED.

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* Judge Sloviter was a member of the merits panel. However, she assumed inactive status on April 4, 2016 and did not participate in the consideration of this motion.

Appendix E

By the Court,

s/D. Brooks Smith
Circuit Judge

Dated: November 13, 2018

APPENDIX F — ASSEMBLY, NO. 3371, STATE OF NEW JERSEY, 215TH LEGISLATURE, INTRODUCED OCTOBER 15, 2012

ASSEMBLY, No. 3371

STATE OF NEW JERSEY

215th LEGISLATURE

INTRODUCED OCTOBER 15, 2012

Sponsored by:
Assemblyman TIMOTHY J. EUSTACE
District 38 (Bergen and Passaic)

Assemblyman HERB CONAWAY, JR.
District 7 (Burlington)

Assemblywoman HOLLY SCHEPISI
District 39 (Bergen and Passaic)

Assemblyman REED GUSCIORA
District 15 (Hunterdon and Mercer)

Assemblyman JOHN J. BURZICHELLI
District 3 (Cumberland, Gloucester and Salem)

Co-Sponsored by:
Assemblywomen Vainieri, Huttle, Lampitt, Tucker,
Assemblyman Wisniewski, Assemblywomen Caride,
Mosquera and Jasey

Appendix F

SYNOPSIS

Protects minors by prohibiting attempts to change sexual orientation.

CURRENT VERSION OF TEXT

Approved August 19, 2013

AN ACT concerning the protection of minors from attempting to change sexual orientation and supplementing Title 45 of the Revised Statutes.

BE IT ENACTED *by the Senate and General Assembly of the State of New Jersey:*

1. The Legislature finds and declares that:

a. Being lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming. The major professional associations of mental health practitioners and researchers in the United States have recognized this fact for nearly 40 years;

b. The American Psychological Association convened a Task Force on Appropriate Therapeutic Responses to Sexual Orientation. The task force conducted a systematic review of peer-reviewed journal literature on sexual orientation change efforts, and issued a report in 2009. The task force concluded that sexual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people, including confusion, depression, guilt,

helplessness, hopelessness, shame, social withdrawal, suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others, increased self-hatred, hostility and blame toward parents, feelings of anger and betrayal, loss of friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high-risk sexual behaviors, a feeling of being dehumanized and untrue to self, a loss of faith, and a sense of having wasted time and resources;

c. The American Psychological Association issued a resolution on Appropriate Affirmative Responses to Sexual Orientation Distress and Change Efforts in 2009, which states: "[T]he [American Psychological Association] advises parents, guardians, young people, and their families to avoid sexual orientation change efforts that portray homosexuality as a mental illness or developmental disorder and to seek psychotherapy, social support, and educational services that provide accurate information on sexual orientation and sexuality, increase family and school support, and reduce rejection of sexual minority youth";

d. (1) The American Psychiatric Association published a position statement in March of 2000 in which it stated: "Psychotherapeutic modalities to convert or 'repair' homosexuality are based on developmental theories whose scientific validity is questionable. Furthermore, anecdotal reports of 'cures' are counterbalanced by anecdotal claims of psychological harm. In the last four decades, 'reparative' therapists have not produced any rigorous scientific research to substantiate their claims of cure. Until there

is such research available, [the American Psychiatric Association] recommends that ethical practitioners refrain from attempts to change individuals' sexual orientation, keeping in mind the medical dictum to first, do no harm;

(2) The potential risks of reparative therapy are great, including depression, anxiety and self-destructive behavior, since therapist alignment with societal prejudices against homosexuality may reinforce self-hatred already experienced by the patient. Many patients who have undergone reparative therapy relate that they were inaccurately told that homosexuals are lonely, unhappy individuals who never achieve acceptance or satisfaction. The possibility that the person might achieve happiness and satisfying interpersonal relationships as a gay man or lesbian is not presented, nor are alternative approaches to dealing with the effects of societal stigmatization discussed; and

(3) Therefore, the American Psychiatric Association opposes any psychiatric treatment such as reparative or conversion therapy which is based upon the assumption that homosexuality per se is a mental disorder or based upon the a priori assumption that a patient should change his/her sexual homosexual orientation";

e. The American School Counselor Association's position statement on professional school counselors and lesbian, gay, bisexual, transgendered, and questioning (LGBTQ) youth states: "It is not the role of the professional school counselor to attempt to change a student's sexual orientation/gender identity but instead to provide support

to LGBTQ students to promote student achievement and personal well-being. Recognizing that sexual orientation is not an illness and does not require treatment, professional school counselors may provide individual student planning or responsive services to LGBTQ students to promote self-acceptance, deal with social acceptance, understand issues related to coming out, including issues that families may face when a student goes through this process and identify appropriate community resources";

f. The American Academy of Pediatrics in 1993 published an article in its journal, Pediatrics, stating: "Therapy directed at specifically changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation";

g. The American Medical Association Council on Scientific Affairs prepared a report in 1994 in which it stated: "Aversion therapy (a behavioral or medical intervention which pairs unwanted behavior, in this case, homosexual behavior, with unpleasant sensations or aversive consequences) is no longer recommended for gay men and lesbians. Through psychotherapy, gay men and lesbians can become comfortable with their sexual orientation and understand the societal response to it";

h. The National Association of Social Workers prepared a 1997 policy statement in which it stated: "Social stigmatization of lesbian, gay and bisexual people is widespread and is a primary motivating factor in leading some people to seek sexual orientation changes. Sexual

orientation conversion therapies assume that homosexual orientation is both pathological and freely chosen. No data demonstrates that reparative or conversion therapies are effective, and, in fact, they may be harmful";

i. The American Counseling Association Governing Council issued a position statement in April of 1999, and in it the council states: "We oppose 'the promotion of "reparative therapy" as a "cure" for individuals who are homosexual";

j. (1) The American Psychoanalytic Association issued a position statement in June 2012 on attempts to change sexual orientation, gender, identity, or gender expression, and in it the association states: "As with any societal prejudice, bias against individuals based on actual or perceived sexual orientation, gender identity or gender expression negatively affects mental health, contributing to an enduring sense of stigma and pervasive self-criticism through the internalization of such prejudice;

(2) Psychoanalytic technique does not encompass purposeful attempts to 'convert,' 'repair,' change or shift an individual's sexual orientation, gender identity or gender expression. Such directed efforts are against fundamental principles of psychoanalytic treatment and often result in substantial psychological pain by reinforcing damaging internalized attitudes";

k. The American Academy of Child and Adolescent Psychiatry in 2012 published an article in its journal, Journal of the American Academy of Child and Adolescent

Psychiatry, stating: "Clinicians should be aware that there is no evidence that sexual orientation can be altered through therapy, and that attempts to do so may be harmful. There is no empirical evidence adult homosexuality can be prevented if gender nonconforming children are influenced to be more gender conforming. Indeed, there is no medically valid basis for attempting to prevent homosexuality, which is not an illness. On the contrary, such efforts may encourage family rejection and undermine self-esteem, connectedness and caring, important protective factors against suicidal ideation and attempts. Given that there is no evidence that efforts to alter sexual orientation are effective, beneficial or necessary, and the possibility that they carry the risk of significant harm, such interventions are contraindicated";

l. The Pan American Health Organization, a regional office of the World Health Organization, issued a statement in May of 2012 and in it the organization states: "These supposed conversion therapies constitute a violation of the ethical principles of health care and violate human rights that are protected by international and regional agreements." The organization also noted that reparative therapies "lack medical justification and represent a serious threat to the health and well-being of affected people"

m. Minors who experience family rejection based on their sexual orientation face especially serious health risks. In one study, lesbian, gay, and bisexual young adults who reported higher levels of family rejection during adolescence were 8.4 times more likely to report having

attempted suicide, 5.9 times more likely to report high levels of depression, 3.4 times more likely to use illegal drugs, and 3.4 times more likely to report having engaged in unprotected sexual intercourse compared with peers from families that reported no or low levels of family rejection. This is documented by Caitlin Ryan et al. in their article entitled Family Rejection as a Predictor of Negative Health Outcomes in White and Latino Lesbian, Gay, and Bisexual Young Adults (2009) 123 Pediatrics 346; and

n. New Jersey has a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting minors against exposure to serious harms caused by sexual orientation change efforts.

2. a. A person who is licensed to provide professional counseling under Title 45 of the Revised Statutes, including, but not limited to, a psychiatrist, licensed practicing psychologist, certified social worker, licensed marriage and family therapist, certified psychoanalyst, or a person who performs counseling as part of the person's professional training for any of these professions, shall not engage in sexual orientation change efforts with a person under 18 years of age.

b. As used in this section, "sexual orientation change efforts" means the practice of seeking to change a person's sexual orientation, including, but not limited to, efforts to change behaviors, gender identity, or gender expressions, or to reduce or eliminate sexual or romantic attractions

or feelings toward a person of the same gender; except that sexual orientation change efforts shall not include counseling for a person seeking to transition from one gender to another, or counseling that:

(1) provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and

(2) does not seek to change sexual orientation.

3. This act shall take effect immediately.

STATEMENT

This bill prohibits counseling to the change sexual orientation of a minor.

Under the provisions of the bill, a person who is licensed to provide professional counseling, including, but not limited to, a psychiatrist, licensed practicing psychologist, certified social worker, licensed marriage and family therapist, certified psychoanalyst, or a person who performs counseling as part of the person's professional training, is prohibited from engaging in sexual orientation change efforts with a person under 18 years of age.

The bill defines "sexual orientation change efforts" as the practice of seeking to change a person's sexual

orientation, including, but not limited to, efforts to change behaviors or gender expressions, or to reduce or eliminate sexual or romantic attractions or feelings toward a person of the same gender. This term, however, does not include counseling for a person seeking to transition from one gender to another, or counseling that: provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and does not seek to change sexual orientation.

U.S. Constitution Amend. I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U.S. Constitution Amend. XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Appendix F

Section 2. Representatives shall be apportioned among the several States according to their respective numbers, counting the whole number of persons in each State, excluding Indians not taxed. But when the right to vote at any election for the choice of electors for President and Vice President of the United States, Representatives in Congress, the Executive and Judicial officers of a State, or the members of the Legislature thereof, is denied to any of the male inhabitants of such State, being twenty-one years of age, and citizens of the United States, or in any way abridged, except for participation in rebellion, or other crime, the basis of representation therein shall be reduced in the proportion which the number of such male citizens shall bear to the whole number of male citizens twenty-one years of age in such State.

Section 3. No person shall be a Senator or Representative in Congress, or elector of President and Vice President, or hold any office, civil or military, under the United States, or under any State, who, having previously taken an oath, as a member of Congress, or as an officer of the United States, or as a member of any State legislature, or as an executive or judicial officer of any State, to support the Constitution of the United States, shall have engaged in insurrection or rebellion against the same, or given aid or comfort to the enemies thereof. But Congress may by a vote of two-thirds of each House, remove such disability.

Section 4. The validity of the public debt of the United States, authorized by law, including debts incurred for payment of pensions and bounties for services in

suppressing insurrection or rebellion, shall not be questioned. But neither the United States nor any State shall assume or pay any debt or obligation incurred in aid of insurrection or rebellion against the United States, or any claim for the loss or emancipation of any slave; but all such debts, obligations and claims shall be held illegal and void.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.