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,

Respondent-Intervenor.

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

New Jersey Assembly Bill No. 3371 ("A3371") makes it unprofessional conduct for any licensed mental health professional to provide to minors any counseling under any circumstances that seeks "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" even if the client desires such counseling, but permits and encourages counseling that "provides acceptance, support, and understanding" of same-sex sexual attractions, behaviors, or identity and also "counseling for a person seeking to transition from one gender to another." N.J. Stat. Ann. § 45:1-55.

This case presents questions of national importance, which have split the circuits and resulted in decisions conflicting with this Court's precedent. The circuit courts of appeal are split as to whether a law restricting what counselors or health-care providers may say and what clients or patients may hear in the privacy of the counselor-client or doctor-patient relationship is speech protected by the First Amendment. The circuit courts of appeal are also split over what level of scrutiny should be applied when reviewing laws that regulate what counselors or health-care providers may say to a client or patient. These are important questions that need to be resolved by this Court.

The questions presented are:

1. Whether a law prohibiting licensed mental health counselors or health-care providers from providing, and clients or patients from receiving, any counsel or communication to change unwanted same-sex attractions, behavior, or identity implicates the First Amendment right to free speech, and, if so, what level of scrutiny should such a prohibition receive?

2. Whether a law that permits the subject of same-sex attractions, behavior, or identity to be discussed in the privacy of a counselor-client or doctor-patient relationship only if such attractions, behavior, or identity are affirmed but not if the client's self-determined objective is to change such attractions, behavior, or identity violates the First Amendment as a viewpoint or content-based restriction on speech.

3. Whether a law that permits the subject of same-sex attractions, behavior, or identity to be discussed in the privacy of a counselor-client or doctor-patient relationship only if such attractions, behavior, or identity are affirmed but not if the client's self-determined objective is to change is subject to intermediate scrutiny under the First Amendment, and, if so, whether the law can survive intermediate scrutiny where informed consent can meet the state's asserted interests.

4. Whether speech between licensed counselors or health-care providers conducted in the privacy of a counselor-client or doctor-patient relationship is

"professional speech" subject to regulation and the same level of First Amendment scrutiny as commercial speech, even where there is no monetary exchange.

5. Whether an advocacy organization supportive of legislation being challenged in federal court must satisfy the requirements of Article III standing to intervene as a party in defense of that legislation.

PARTIES

Petitioners are Tara King, Ph.D., Ronald Newman, Ph.D., National Association for Research and Therapy of Homosexuality ("NARTH"), and American Association of Christian Counselors ("AACC").

Respondents are the 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; Milagros Collazzo, 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.

CORPORATE DISCLOSURE STATEMENT

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

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STATEMENT OF JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was filed on September 11, 2014. 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. The District Court had jurisdiction pursuant to 28 U.S.C. § 1331.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The relevant constitutional and statutory provisions are reproduced in their entirety in the Appendix to this Petition. App. 138a-149a.

STATEMENT OF THE CASE

A3371 prohibits licensed mental health counselors in New Jersey from engaging in sexual orientation change efforts ("SOCE") counseling with minors. N.J. Stat. Ann. §45:1-55; App. 145a-146a. A3371 states that a person licensed to provide mental health counseling "shall not engage

in sexual orientation change efforts with a person under 18 years of age." *Id.*

SOCE counseling is defined as:

> 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.

Id.

A3371 explicitly prohibits licensed counselors from providing, and their clients from receiving, any counseling directed at helping a minor to reduce or eliminate unwanted same-sex attractions, behavior, or identity ("SSA"). N.J. Stat.

Ann. § 45:1-55(b). On its face, A3371 permits licensed counselors to discuss the subject of sexual orientation or gender identity, behaviors, or attractions, but precludes discussion of the particular viewpoint that unwanted SSA can be changed, reduced, or eliminated. A3371 specifically targets only counseling that seeks to "eliminate or reduce sexual or romantic attractions or feelings towards a person of the same gender," while permitting counseling that encourages or affirms SSA. *Id.*

The statute also permits a licensed professional to counsel a client "seeking to transition from one gender to another." *Id.* But, if the client's gender identity, mannerisms, or expressions differ from the client's biological sex and the client's feelings are unwanted – meaning the he does not want to transition from a male to a female identity – but instead wants to "change" his female identity, mannerisms, or expression to conform to his biological sex, then A3371 forbids such counseling. Similarly, the statute permits the counseling of a client to affirm same-sex attractions, but prohibits counseling a minor to change unwanted SSA. Under no circumstances may a licensed counselor counsel a minor to change unwanted SSA. *Id.* Nor may the counselor counsel a minor to change unwanted opposite sex mannerisms, expressions, or identity, even when the client wants to change them based on sincerely held religious beliefs, self identity, or preference. *Id.*

Petitioners include licensed professionals on behalf of their clients and themselves who are forced to choose between facing professional discipline, including loss of their professional license, for providing consensual, beneficial counseling that expresses a viewpoint the state opposes or facing professional discipline for discontinuing beneficial counseling in violation of their clients' right to self-determination and right to set the goals and objectives of the counseling they receive. Petitioners are two licensed mental health professionals in New Jersey and two national associations of mental health professionals that have members in New Jersey whose licenses and livelihoods, as well as their clients' mental health and well being, are severely threatened by A3371's prohibitions.

The SOCE counseling provided by Petitioners involves nothing more than "talk therapy" or "speech." App. at 11a-12a. The counseling sessions consist solely of the counselor or doctor and the client or patient sitting in a room discussing issues and stressors, including unwanted SSA, that are causing the client distress, anxiety, or other mental health difficulties. The therapeutic alliance between the counselor and the client is the same as every other modern form of mental health counseling aimed at helping to reduce or eliminate the cause of the client's stress or anxieties. However, SOCE counseling has been singled out for prohibition merely because the state is opposed to and disagrees with the goal of some clients who want to change or eliminate their

unwanted SSA and to conform their identity, behaviors, and attractions to their own self-perception or conform them to their sincerely held religious beliefs. It is that ideological and political opposition that has given rise to A3371's prohibitions and Petitioners' claims here.

On August 22, 2013, three days after A3371 was signed and became effective, Petitioners filed their Complaint and a Motion for Temporary Restraining Order/Preliminary Injunction with the District of New Jersey seeking relief under the United States and New Jersey Constitutions and 42 U.S.C. § 1983. App. at 70a-72a. On a conference call with the district court, the court denied any emergency relief. *Id.* at 72a. Petitioners then agreed to have their motion for a temporary restraining order/preliminary injunction converted to a motion for summary judgment. *Id.*

On November 8, 2013, the district court issued an order granting summary judgment to the state holding that A3371 did not implicate the First Amendment whatsoever. *Id.* at 64a-134a. The district court concluded that Garden State Equality, an advocacy organization in New Jersey, did not need Article III standing to intervene as a party-defendant to defend a law that it supported in the legislature, even though the organization had an interest identical to that of the state defendants already adequately and vigorously defending the law. *Id.* at 75a-80a. On Petitioners' First Amendment claims presented here, the district court held that A3371 does not directly or

indirectly implicate, regulate, or target speech on its face and that it could only appropriately be characterized as a regulation of conduct. *Id.* at 99a-106a. Additionally, the district court concluded that, as a regulation of conduct with no incidental effect on expression, A3371 was subject to rational basis review. *Id.* at 118a.

On November 12, 2013, Petitioners filed their notice of appeal with the Third Circuit Court of Appeals challenging the district court's ruling. On September 11, 2014, the Third Circuit issued its opinion. *Id.* at 1a-61a. Although it disagreed with portions of the district court's analysis, the Third Circuit affirmed the district court's holding that A3371 is constitutional. *Id.* at 3a. The court did find, contrary to the district court's analysis, that A3371 regulates speech and not conduct, which requires the court to extend First Amendment protection to the communications that take place between a counselor and client or doctor and patient. *Id.* at 11a-22a. However, contrary to the precedent of this Court and its sister circuits, the Third Circuit held that A3371 was subject only to intermediate scrutiny and that it satisfied that standard. *Id.* at 31a-41a.

The Third Circuit's decision below created a conflict among the circuits concerning the First Amendment status of communications between a counselor and client or doctor and patient, and also concerning the appropriate level of scrutiny applicable to regulations of such communications. The decision below is also in conflict with the

precedent of this Court and presents questions of substantial importance. Petitioners now seek review of the decision below and ask that this Court grant review and resolve the conflicts presented herein.

REASONS FOR GRANTING THE PETITION

The circuits are split on the important question of whether the verbal counseling provided by a licensed counselor or health-care provider to a client or patient in the privacy of the counselor-client or doctor-patient relationship is speech under the First Amendment, and this Court should resolve the conflict. The federal circuits are in conflict on the same law regarding whether counselor-client or doctor-patient counsel is speech subject to First Amendment protection. The resolution of the First Amendment status of speech or communication between a counselor and client or a doctor and patient is an important question that should be resolved by this Court.

In addition, this Court should grant review to resolve the conflict among the circuits as to the appropriate level of scrutiny applicable to speech between a counselor and client or doctor and patient. The circuits are in conflict regarding the level of scrutiny that should be applied to such speech. The Third Circuit's decision that viewpoint and content-based restrictions on speech between licensed counselors or health-care providers and their clients or patients are subject to intermediate,

rather than strict, scrutiny conflicts with other circuits.

Finally, this Court should grant review to resolve the conflict among the circuits on the recurring question of whether an advocacy group supportive of challenged legislation must satisfy the requirements of Article III standing to intervene as a party in defense of that legislation.

I. THE CIRCUITS ARE IN DIRECT CONFLICT ON THE IMPORTANT QUESTION OF WHETHER THE FIRST AMENDMENT APPLIES TO SPEECH BETWEEN A COUNSELOR AND CLIENT OR DOCTOR AND PATIENT, AND THIS COURT SHOULD RESOLVE THE CONFLICT.

The federal circuits are in conflict on the same law regarding whether counselor-client or doctor-patient counsel is speech subject to First Amendment protection. This conflict touches upon the rights of professionals, including doctors whose rights date back to the common law and which are "the foundation of free government." *Schneider v. New Jersey*, 308 U.S. 147, 165 (1939). Resolution of the appropriate classification of speech or communication between a counselor and client or doctor and patient is an important question that should be resolved by this Court.

A. The Federal Circuits Are In Conflict On The Same Law Regarding Whether Counselor-Client Or Doctor-Patient Counsel Is Speech Subject To First Amendment Protection.

The Third Circuit's decision below squarely conflicts with a Ninth Circuit decision on the threshold question of whether counselor-client or doctor-patient communication is speech under the First Amendment. *Compare* App. at 22a, *with Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2013). The Third Circuit expressly recognized that it was creating a conflict. *See* App. at 18a n.13 ("The amended [Ninth Circuit] *Pickup* opinion acknowledges that *Humanitarian Law Project* found activity to be 'speech' when it 'consisted of *communicating a message*,' but contends that SB1172 does not prohibit Plaintiffs from 'communicating a message' because it is a state regulation governing the conduct of state-licensed professionals, and it does not pertain to communication in the public sphere.' . . . *We are not persuaded*.") (second emphasis added) (internal citations omitted). The Third Circuit in *King* stated: "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." *Id.* at 30a n.15.

The Third Circuit's decision below also conflicts with a recent decision from the Eleventh Circuit on a substantially similar issue, which

upheld a statute that regulated and limited what communications a doctor was permitted to engage in with his patient during the provision of medical care. *See Wollschlaeger v. Governor of Florida*, 760 F.3d 1195 (11th Cir. 2014). That decision is discussed *infra*.

In *King*, the decision below, the Third Circuit explains in detail that the communication between a counselor and client and a doctor and patient is speech protected by the First Amendment. Indeed, it stated, "the verbal communication that occurs during SOCE counseling *is speech* that enjoys some degree of protection under the First Amendment." App. at 11a (emphasis added). Based on this Court's reasoning in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), the Third Circuit wrote: "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 verbal communications that occur during SOCE counseling are 'conduct.'" *Id.* at 14a.

While recognizing its disagreement with the Ninth Circuit's decision in *Pickup*, the court below noted "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." *Id.* at 19a. "Notably, the [Ninth Circuit] *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.'" *Id.* (emphasis original). Moreover, "[t]o classify some communications as 'speech' and others as 'conduct' is to engage in nothing more than a 'labeling game.'" *Id.* at 20a (quoting *Pickup*, 740 F.3d at 1218 (O'Scannlain, J., dissenting)). The Third Circuit held that "these communications are 'speech' for purposes of the First Amendment." *Id.* at 12a.

That holding conflicts with the Ninth Circuit's treatment of the exact same type of counseling in *Pickup*. Both cases dealt specifically with a law prohibiting communications between licensed mental health professionals and their clients concerning unwanted same-sex attractions, behaviors, or identities. Both laws prohibited counseling to aid a minor in reducing or eliminating unwanted same-sex attractions, behaviors, or identity, but permitted counseling on that same topic that affirmed, encouraged, or facilitated the development of such attractions, behaviors, or identity. *Compare* App. at 4a-5a, *with Pickup*, 740 F.3d at 1223. Indeed, the laws at issue in these cases are identical in virtually every operative provision.

The Ninth Circuit, however, found that California's prohibition on SOCE counseling between licensed mental health counselors and clients "regulates conduct," not speech. *Pickup*, 740 F.3d at 1229. The court constructed a continuum to describe the different treatment of communications

between counselors and their clients and doctors and their patients. In so doing, the court concluded that California's law is more appropriately classified as a "regulation of professional conduct," and does not implicate speech at all. *Id.* It continued, "talk therapy does not receive special First Amendment protection merely because it is administered through speech . . . That holding rests on the understanding of talk therapy as 'the treatment of emotional suffering and depression, not speech.'" *Id.* at 1231 (quoting *Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1054 (9th Cir. 2000) ("*NAAP*")).

Judge O'Scannlain's dissent from the denial of a petition for rehearing en banc in *Pickup* highlights the stark contrast between the Ninth and Third Circuits' decisions. "According to the panel the words proscribed by SB1172 consist entirely of medical 'treatment,' which although effected by verbal communication nevertheless constitutes 'professional *conduct*' entirely unprotected by the First Amendment." *Id.* at 1215 (O'Scannlain, J., dissenting) (emphasis original). Indeed, "[t]he panel, contrary to common sense and without legal authority, simply asserts that some spoken words—those prohibited by SB1172—are not speech." *Id.* at 1216. Judge O'Scannlain's critique of the Ninth Circuit's logic crystallizes the conflict presently splitting the circuits: "The panel cites no case holding that speech, uttered by professionals to their clients, does not actually constitute 'speech' for purposes of the First

Amendment. And that should not surprise us—for the Supreme Court has not recognized such a category." *Id.* at 1221.

Two different Ninth Circuit cases and a Fourth Circuit case support the conclusion reached by the Third Circuit below, as does a dissenting judge in the Eleventh Circuit. *See Moore-King v. Cnty. of Chesterfield, Va.*, 708 F.3d 560 (4th Cir. 2013); *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002); *NAAP*, 228 F.3d 1043; *Wollschlaeger*, 760 F.3d at 1230-71 (Wilson, J., dissenting).

In the Ninth Circuit *Conant* case, the law at issue restricted a physician's communications to his patient during the provision of medical care and prohibited the physician from discussing certain benefits of medical marijuana with his patient, even if he believed such communications were in the best interest of his patient. *Conant*, 309 F.3d at 637. As A3371 does here, that restriction applied directly to the communication that took place during the physician's provision of medical care to his patient. *Id.* The Ninth Circuit recognized that a law limiting what communication can take place between a doctor and patient "strike[s] at core First Amendment interests of doctors and patients." *Id.* at 636. Indeed, "[a]n integral component of the practice of medicine is the communication between a doctor and patient. Physicians must be able to speak frankly and openly to patients. That need has long been recognized by the courts through application of the common law doctor-patient privilege." *Id.*

Asserting, as the Third Circuit did below, that communications between counselor and client and doctor and patient constitute protected speech, the Ninth Circuit in *Conant* noted that the "Supreme Court has recognized that *physician speech* is entitled to First Amendment protection because of the significance of the doctor-patient relationship." *Id.* (emphasis added). Also in agreement with the Third Circuit's decision below, the Ninth Circuit's *NAAP* decision noted that "[t]he communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation." *NAAP*, 228 F.3d at 1054.

The Fourth Circuit has also held that communications between a counselor and client are protected speech under the First Amendment. *See Moore-King*, 708 F.3d at 567 ("The reality that much professional intercourse depends on predictions about what the future may bring suggests that categorical branding of fortune telling as unworthy of First Amendment protection for that same reason is untenable."). "Consequently, we conclude that the First Amendment Free Speech Clause affords some degree of protection to Moore-King's [counseling] activities." *Id.* at 567.

Judge Wilson's dissent in *Wollschlaeger* similarly characterizes communications between a doctor and patient as protected speech. *Wollschlaeger*, 760 F.3d at 1231 ("Precedent firmly establishes that the speech proscribed by the Act—speech that ranges from potentially lifesaving medical information conveyed from doctor to

patient, to political discussions between private citizens, to conversations between people who enjoy speaking freely with each other about a host of irrelevant topics—is protected by the First Amendment."); *id.* at 1241 n.11 ("The Majority's approach converts protected speech into unprotected conduct too easily."); *id.* at 1248 ("[C]ommunication [between doctor and patient] cannot be labeled unprotected speech simply because it takes place within the confines of the professional relationship.").

The majority opinion from the Eleventh Circuit in *Wollschlaeger*, however, directly conflicts with the Third Circuit's opinion below. *See id.* at 1195. In *Wollschlaeger*, the statute at issue prohibited doctors in Florida from asking questions about and communicating with their clients concerning firearm ownership. *Id.* at 1204. Like A3371 here, the law specifically restricted communications that occurred during the doctor's provision of medical care to his patient. *Id.* The Eleventh Circuit held that such communication between a doctor and a patient is not speech protected by the First Amendment, but is instead more appropriately classified as "professional conduct." *Id.* at 1219-20. It noted that "although the Act restricts physicians' ability to ask questions about firearm ownership when doing so would be irrelevant to patients' medical care, it does so only in the service of defining the practice of good medicine, in the context of the very private, physician-patient relationship." *Id.* at 1219. As such, the court held that the challenged "provision

of the Act is a regulation of professional conduct." *Id.* at 1220.

The circuits are divided on the First Amendment status of communications between counselor and client or doctor and patient. *King*, *Moore-King*, *Conant*, and *NAAP* all explicitly hold that these communications are protected speech entitled to at least some constitutional protection. *Pickup* and *Wollschlaeger*, however, reached the contrary conclusion and held such communications are professional conduct not entitled to constitutional protection as speech at all. This Court should grant review to resolve the conflict.

B. Whether The First Amendment Applies To Speech Between Counselor And Client Or Doctor And Patient Is An Important Question That Should Be Resolved By This Court.

As the panel below recognized, "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." App. at 19a. Without proper guidance from this Court on the appropriate categorization of communications between counselor and client or doctor and patient, these professionals are constantly at risk of statutes, such as A3371, that seek to remove their

communications from the requisite level of protection afforded by the First Amendment. Indeed, "[w]ithout sufficient judicial oversight, legislatures could too easily suppress disfavored ideas under the guise of professional regulation . . . 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." *Id.* at 38a. If counseling regarding change is banned today in New Jersey or California, tomorrow a different legislature with an opposite political agenda could ban affirmation and allow only counsel regarding change. The state thwarts self-determination when it interferes with the counselor-client or doctor-patient relationship.

A3371 has created 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. SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring). Indeed, the restriction sharply circumscribes what a counselor may say to a client during the provision of professional services, and it does so based on the nature, content, and viewpoint of the communication. As this Court has recognized, "the principle that government may restrict entry into the profession and vocation through licensing schemes *has never been extended to encompass the licensing of speech*." *Id.* at 229-30 (emphasis added). Yet, this is precisely what New

Jersey has attempted to do here with A3371.[1] Nevertheless, "[a]t some point, a measure is no longer a regulation of a profession but a regulation of speech . . . beyond that point, the statute must survive the level of scrutiny demanded by the First Amendment." *Id.*

The collision between A3371's prohibitions and the First Amendment rights of physicians and counselors alone would present an important question in need of review by this Court, but A3371 presents additional issues elevating the critical need for this Court's review. A3371 represents a gross intrusion into the sacrosanct area of the relationship between counselors and clients and doctors and patients. This relationship, and the therapeutic alliance that develops between counselor and client or doctor and patient, is one of the oldest and most protected in the nation's history. It is a relationship "rooted in the imperative need for confidence and trust . . . the physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosures would impair diagnosis and treatment." *Trammel v. United States*, 445 U.S. 40, 52 (1980). This is why this Court has recognized that the communications that take place between a doctor and patient must be unimpeded

[1] This case does not involve required disclosures or informed consent. *See, e.g.*, *Planned Parenthood of Se. Pa. v.* Casey, 505 U.S. 833 (1992). Nor does it involve what a speaker may say when using government funds. *See Rust v. Sullivan*, 500 U.S. 173 (1991). Rather, this case involves a straight-out prohibition on certain speech of private counselors.

and that the "free flow" of such speech "has great relevance in the fields of medicine and public health, where information can save lives." *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011).

Indeed, "[e]ffective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears." *Jaffree v. Redmond*, 518 U.S. 1, 10 (1996). The need for such trust and confidence was alone sufficient to heighten the respect for such a relationship through the application of privilege. *Id.* ("For this reason, the mere possibility of disclosure may impede development of the confidential relationship necessary for successful treatment."). Because of the critical need for such trust and confidence and the imperative nature of the information and communications exchanged between doctor and patient, this Court recognized that the speech between a professional and her client may be the most respected and protected form of speech under the Constitution. *See Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995); *see also Conant v. Walters*, 309 F.3d 629, 636-37 (9th Cir. 2002).

The importance of this question is further evident by the fact that the judiciary's protection of the relationship between doctors and patients or counselors and clients dates back all the way to the common law. *Conant*, 309 F.3d 636 ("An integral component of the practice of medicine is the communication between a doctor and patient.

Physicians must be able to speak frankly and openly to patients. That need has been recognized by the courts through the application of the common law doctor-patient privilege."). This Court has already recognized the critical importance of the questions presented here, which emphasizes the need for review. The protection of the relationship between a counselor and client "serves the public interest by facilitating the provision of appropriate treatment for individuals suffering the effects of a mental or emotional problem. *The mental health of our citizenry, no less than its physical health, is a public good of transcendent importance*." *Jaffree*, 518 U.S. at 11 (emphasis added). This Court should grant review to resolve this important question.

II. THE CIRCUITS ARE IN CONFLICT AS TO THE APPROPRIATE LEVEL OF SCRUTINY APPLICABLE TO SPEECH BETWEEN COUNSELOR AND CLIENT OR DOCTOR AND PATIENT.

"Speech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by [professionals] *the strongest protections our Constitution has to offer*." *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 634 (1995) (emphasis added). Indeed, "[t]he First Amendment requires heightened scrutiny *whenever* the government creates a regulation of speech because of disagreement with the message it conveys . . . That reality has great relevance in the fields of medicine and public health, where information can

save lives." *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011) (emphasis added) (internal citations omitted). Despite that unequivocal instruction, the circuits are divided on the appropriate level of scrutiny applicable to speech between licensed counselors or healthcare providers and their clients or patients. The Third Circuit's decision that viewpoint and content-based restrictions on such speech are not subject to strict scrutiny conflicts with other circuits. Also, the Third Circuit's decision that such speech is subject to intermediate scrutiny conflicts with the precedent of this Court and the other circuits. This Court should grant review to resolve those conflicts.

A. The Circuits Are In Conflict Regarding The Level Of Scrutiny That Should Be Applied To Speech Between Licensed Counselors Or Healthcare Providers And Their Clients Or Patients.

The Circuits are in direct conflict concerning the appropriate level of scrutiny applicable to speech between counselors and clients or doctors and patients. The Ninth Circuit, in an earlier line of cases, has held, consistent with this Court's precedent, that regulations of speech in the professional setting are subject to strict constitutional scrutiny. *See, e.g.*, *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002); *Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043 (9th Cir. 2000).

In its decision below, however, the Third Circuit held that speech in the context of a counselor and client or doctor and patient relationship is entitled only to intermediate scrutiny. *See* App. at 35a-36a.

Exacerbating this conflict, the Fourth and Eleventh Circuits, as well as a later panel of the Ninth Circuit, have all held that speech between counselor and client or doctor and patient in the context of a professional relationship is entitled to no constitutional protection. *See Wollschlaeger v. Governor of Florida*, 760 F.3d 1195 (11th Cir. 2014); *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013); *Moore-King v. Cnty. of Chesterfield*, 708 F.3d 560 (4th Cir. 2013).

The Third Circuit's decision below creates a direct conflict among the circuit courts concerning the appropriate level of scrutiny applicable to speech between a counselor and client or doctor and patient. Indeed, the panel below explicitly recognized that it was creating a circuit split on this issue: "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." App. at 36a. Nevertheless, the panel held that "speech is speech, and it must be analyzed as such for purposes of the First Amendment." *Id.* at 21a. "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." *Id.* at 30a.

The court below noted that "[w]hile 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." *Id.* at 31a. As such, it held "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." *Id.* Under this holding, the Third Circuit's position is that regulations of speech between counselor and client or doctor and patient are entitled only to intermediate scrutiny. *Id.* at 38a ("we have serious doubts that anything less than intermediate scrutiny would adequately protect the First Amendment interests inherent in professional speech").

The Third Circuit's decision is in direct conflict with the Ninth Circuit's decision in *Conant*, which applied strict scrutiny to regulations of speech between doctor and patient. *See Conant*, 309 F.3d at 637. Indeed, as the Ninth Circuit recognized, "[b]eing a member of a regulated profession does not, as the government suggest, result in a surrender of First Amendment rights." *Id.* (citing *Thomas v. Collins*, 323 U.S. 516, 531 (1945)). In fact, the Ninth Circuit recognized that "professional speech may be entitled to the '*strongest protection our Constitution has to offer*.'"

Id. (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1945)) (emphasis added). The Ninth Circuit emphasized the significant protection afforded to speech between doctor and patient, which dates all the way back to common law. *Id.* at 636. As such, the Ninth Circuit held that content-based restrictions on speech between doctor and patient were 'presumptively unconstitutional.'" *Id.* at 637-38 (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)).

The Ninth Circuit also held that for regulations of speech between doctor and patient "[t]o survive constitutional scrutiny, the government's policy must have the requisite 'narrow specificity.'" *Id.* at 639 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963)). This narrow specificity requirement and the presumptive unconstitutionality of content-based regulations are the touchstones of strict scrutiny. *See, e.g.*, *Wood v. Meadows*, 207 F.3d 708, 716 (4th Cir. 2000) (noting that the narrow specificity requirement "analysis has always been reserved for a court's strict scrutiny of a statute"). The Ninth Circuit's decision in *Conant* is in direct conflict with the Third Circuit decision below.

The level of scrutiny applied by the Ninth Circuit in *Conant* is consistent with this Court's precedent applying strict scrutiny to content-based restrictions on speech, and that is true even in the professional speech context. *See, e.g.*, *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781 (1988).

Nevertheless, recent decisions out of the Fourth, Ninth, and Eleventh Circuits directly contradict this Court's precedent and represent a direct split of authority with the Third Circuit's decision below. *See Wollschlaeger*, 760 F.3d 1195; *Pickup*, 740 F.3d 1208; *Moore-King*, 708 F.3d 560. In *Pickup*, the Ninth Circuit held that "the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it." *Pickup*, 740 F.3d at 1228. The Ninth Circuit stated that such substantial tolerance for the intrusion on free speech rights "makes sense: When professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of clients, rather than to contribute to the public debate." *Id.* The Ninth Circuit found that communication between a counselor and client or doctor and patient "is subject to deferential review just as are other regulations of the practice of medicine." *Id.* at 1231. "[W]e hold that SB1172 is subject to only rational basis review and must be upheld if it bears a rational relationship to a legitimate state interest." *Id.*

The dissent in *Pickup* recognized the direct conflict between the prior Ninth Circuit decisions in *Conant* and *NAAP* and Third Circuit on this issue. "By labeling [communication between counselors and clients] as 'conduct,' the panel's opinion has entirely exempted such regulation from the First Amendment." *Id.* at 1215 (O'Scannlain, J.,

dissenting). While Judge O'Scannlain noted that communications between doctor and patient or counselor and client might not receive *special* First Amendment protection, he chastised the panel for its refusal to provide such speech *any* protection at all, noting that it was inconsistent with substantial federal precedent of speech regulations. *Id.* at 1218-19 ("We concluded, indeed, that psychoanalysts, simply by dent of theirs being the 'talking cure,' do not receive *special* First Amendment protection . . . But, such a statement does not in any way support the novel principle, discerned by the panel, that such 'talk therapy' receives *no First Amendment protection at all*.") (emphasis original). As this discussion highlights, the Third Circuit's decision below is in direct conflict with the strict scrutiny applied in *Conant* and in direct conflict with the rational basis scrutiny applied by *Pickup*.

The conflict among the circuits is further evidenced by the Fourth Circuit's decision in *Moore-King*. There, the Fourth Circuit held that communications between counselor and client receive only rational basis review. *Moore-King*, 708 F.3d at 568-70. The Fourth Circuit "conclude[d] that the First Amendment Free Speech Clause affords some degree of protection to Moore-King's activities," but it did not afford such communications any heightened scrutiny whatsoever. *Id.* at 567. Indeed, the court noted that "a state's regulation of a profession raises *no First Amendment problem* where it amounts to generally applicable licensing provisions affecting those who practice the profession." *Id.* at 569 (emphasis

added). "With respect to an occupation such as fortune telling where no accrediting institution like a board of law examiners or medical practitioners exists, a legislature may *reasonably* determine that additional regulatory requirements are necessary." *Id.* at 570 (emphasis added). While in agreement with *Pickup*, this conclusion is clearly in conflict with the Third Circuit below and with the Ninth Circuit in *Conant*.

The Eleventh Circuit's decision in *Wollschlaeger* is also in direct conflict with the Third Circuit's decision below. There, the court stated that communications between a doctor and patient are subject only to rational basis review. *Wollschlaeger*, 760 F.3d at 1218. In fact, the court stated that protections for communications between a doctor and patient are virtually nonexistent. It held that First Amendment "protections are at their apex when a professional speaks to the public on matters of public concern, *they approach nadir, however, when the professional speaks privately, in the course of exercising his or her professional judgment*, to a person receiving the professional's services." *Id.* (emphasis added). "Therefore, the inquiry provision of the Act is a regulation of professional conduct that implicates physicians' speech only 'as part of the practice of medicine, *subject to reasonable licensing and regulation*,' and does not offend the First Amendment." *Id.* at 1220 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992)) (emphasis added).

Judge Wilson's dissent in *Wollschlaeger* similarly pointed out the minimal level of scrutiny applied by the Eleventh Circuit. *Id.* at 1231 ("In an unprecedented decision, the Majority reverses and holds that this law is immune from First Amendment scrutiny."); *id.* at 1236 ("[T]he Majority concludes that the Acts entirely evades First Amendment scrutiny because the speech occurs in private and within the confines of a doctor-patient relationship.").

As the foregoing cases highlight, there is a substantial conflict among the circuits concerning the level of scrutiny applicable to speech between doctor and patient or counselor and client. This conflict touches upon a critical question implicating the very livelihood of licensed professionals and determining what protection doctors and counselors, as well as lawyers, accountants, and other professionals, receive for the speech occurring as part of the practice of their profession. It also touches upon the critical component of the client's or patient's health and well being. This Court should grant review and resolve the conflict.

B. The Third Circuit's Decision That Viewpoint And Content-Based Restrictions On Speech Between Licensed Counselors Or Healthcare Providers And Their Clients Or Patients Are Not Subject To Strict Scrutiny Conflicts With Other Circuits.

The Third Circuit's decision below, holding that *viewpoint* and *content-based* restrictions on speech between counselor and client or doctor and patient do not receive strict scrutiny, is also in conflict with the decisions of other circuits. The Third Circuit explicitly stated that A3371 regulated the speech of counselors and clients on the basis of its content. App. at 38a ("*we agree with Plaintiffs that A3371 discriminates on the basis of content*") (emphasis added); *id.* at 38a n.20 ("We have little doubt in this conclusion. A3371, on its face, prohibits licensed counselors from speaking words with a particular content."). Nevertheless, in an unprecedented decision, the Third Circuit held that A3371 discriminated on the basis of content "in a way that does not trigger strict scrutiny." *Id.* at 38a-39a. The court recognized that "[o]rdinarily, content-based regulations are highly disfavored and subjected to strict scrutiny" and that "this is generally true even when the law in question regulates unprotected or lesser protected speech." *Id.* at 39a. Despite this axiomatic principle under the First Amendment, the Third Circuit "conclude[d] that A3371 does not trigger strict scrutiny by discriminating on the basis of content in an impermissible manner." *Id.* at 40a.

The decision below is in direct conflict with the decision of the Ninth Circuit in *Conant*. There, the court noted that "[t]he government's policy . . . seeks to punish physicians *on the basis of the content of doctor-patient communications*. Only doctor-patient conversations that include discussions of the medical use of marijuana trigger

the policy. Moreover, the policy does not merely prohibit the discussion of marijuana; *it condemns expression of a particular viewpoint.*" *Conant*, 309 F.3d at 637 (emphasis added). The Ninth Circuit stated that "[s]uch condemnation of particular views is especially troubling in the First Amendment context." *Id.* Indeed, under the policy at issue in *Conant*, "whether a doctor-patient discussion of medical marijuana constitutes a recommendation depends largely on the meaning the patient attributes to the doctor's words. This is not permissible under the First Amendment." *Id.* at 639. Therefore, the court held that the law at issue was subject to strict scrutiny, which it could not survive. *Id.*

The panel's decision below is also in conflict with the Ninth Circuit's decision in *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043 (9th Cir. 2000) ("*NAAP*"). In *NAAP*, the Ninth Circuit considered a statute regulating entrance into the mental health profession, which was challenged on First Amendment grounds. *Id.* at 1047. It required certain education and training to become licensed, but did not implicate the practice of the profession once an individual was licensed. *Id.* Unlike A3371 here, the law at issue in *NAAP* was "content-neutral" and "[did] not dictate what can be said between psychologists and patients during treatment." *Id.* at 1055. Indeed, the court noted that "speech [was] not being suppressed based on its message." *Id.* As such, the Ninth Circuit "conclude[d] that California's licensing scheme was

content and viewpoint neutral; therefore, it does not trigger strict scrutiny." *Id.* This statement presents a stark contrast to A3371 here, where the *raison d'etre* of the law is to regulate the content of what can be said during counseling between a doctor and patient or counselor and client. The panel's decision below, holding that such regulations are subject only to intermediate scrutiny, is in direct conflict with the Ninth Circuit's decision in *NAAP*.

Additionally, as Judge Wilson pointed out in his forceful dissent in *Wollschlaeger*, "'the First Amendment requires heightened scrutiny *whenever* the government creates a regulation of speech because of disagreement with the message it conveys.' The word 'whenever' does not invite exceptions." *Wollschlaeger*, 760 F.3d at 1235 (Wilson, J., dissenting) (quoting *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011)) (emphasis original). The Third Circuit's decision below is in direct conflict with the Ninth Circuit's decisions in *Conant* and *NAAP*, and this Court should grant review to resolve the conflict.

C. The Third Circuit's Decision That Speech Between Licensed Counselors Or HealthCare Providers And Their Clients Or Patients Is Subject To Intermediate Scrutiny Conflicts With This Court's Precedents.

The Third Circuit's decision to employ intermediate scrutiny also directly conflicts with

decisions of this Court. The panel below "conclude[d] that professional speech should receive the same level of First Amendment protection as that afforded commercial speech." App. at 35a. The panel noted that "commercial speech enjoys only diminished protection because it 'occurs in an area traditionally subject to government regulation.'" *Id.* at 34a (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm. of N.Y.*, 447 U.S. 557, 562 (1980)). "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.'" *Id.* at 33a (quoting *Edenfield v. Fane*, 507 U.S. 761, 767 (1993)). As such, the Court stated that it "believe[d] that commercial speech and professional speech share important qualities and, thus, that intermediate scrutiny is the appropriate standard of review for prohibitions aimed at either category." *Id.* at 33a-34a.

The Third Circuit's decision below conflicts with the precedent of this Court on this issue. *See, e.g.*, *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533 (2001); *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781 (1988). In *Velazquez*, the Court addressed a federal limitation on the legal profession that operated in materially the same viewpoint-based manner as A3371. *Velazquez*, 531 U.S. at 537-38. That regulation prevented legal aid attorneys from receiving federal funds if they challenged welfare laws, *i.e.*, rendered professional services espousing a viewpoint challenging welfare laws. *Id.* The effect

of that funding condition was to "prohibit advice or argumentation that existing welfare laws are unconstitutional or unlawful," and thereby exclude certain "vital theories and ideas" from the lawyer's representation. *Id.* at 547-48. This Court held that regulations of speech, even that of professionals in the context of their profession, "cannot be aimed at the suppression of ideas thought inimical to the Government's own interest." *Id.* at 549. Thus, the Court struck down the regulation as a presumptively invalid content-based restriction on speech. *Id.*

In *Riley*, the state also tried to restrict the messaging of licensed professionals by arguing that it was merely commercial in nature and not subject to strict scrutiny. *Riley*, 487 U.S. at 795-96. Contrary to the Third Circuit's conclusions below, this Court stated that "[i]t is not clear that a professional's speech is necessarily commercial whenever it relates to that person's financial motivation for speaking." *Id.* at 795. As such, "even assuming . . . that such speech in the abstract is indeed merely 'commercial,' we do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected expression." *Id.* at 796. "Thus, where . . . the component parts of a single speech are inextricable intertwined, we cannot parcel out the speech, applying one test to one phrase and another test to another phrase. Such an endeavor would be both artificial and impractical. Therefore, *we apply our test for fully protected expression*." *Id.* (emphasis added). "We believe, therefore, that

North Carolina's content-based regulation is subject to exacting scrutiny." *Id.* at 798.

The Third Circuit's decision below is in direct conflict with the precedent of this Court and with the precedent of the other circuits. This Court should grant review to resolve the conflict and afford speech between counselor and client or doctor and patient the exacting level of scrutiny it deserves under the First Amendment.

III. THE CIRCUITS ARE IN CONFLICT ON THE RECURRING QUESTION OF WHETHER AN ADVOCACY GROUP SUPPORTIVE OF CHALLENGED LEGISLATION MUST SATISFY THE REQUIREMENTS OF ARTICLE III STANDING TO INTERVENE AS A PARTY IN DEFENSE OF THAT LEGISLATION.

Finally, this Court should grant review to resolve the conflict among the circuits concerning the recurring question of whether an advocacy group supportive of challenged legislation must satisfy the requirements of Article III standing to intervene as a party in defense of that legislation. The Third Circuit's decision below directly conflicts with the decisions of two other circuits. *Compare* App. at 58a, *with Mausolf v. Babbitt*, 85 F.3d 1295 (8th Cir. 1996), and *Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777 (D.C. Cir. 1984). The conflict among the circuits was explicitly recognized by the panel below. App. at 58a ("our sister circuits are divided on this question"). This Court should grant review and resolve the conflict.

The Third Circuit held that a proposed intervenor need not satisfy the requirements of Article III standing in order to intervene as a party defendant. *Id.* at 60a. It reasoned that "[i]f the plaintiff that initiated the lawsuit in question has Article III standing, a 'case' or 'controversy' exists regardless of whether a subsequent intervenor has such standing." *Id.* at 58a-59a. The court also indicated its belief that this Court has resolved the question of intervenor standing indirectly. It noted that "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." *Id.* at 60a. The court noted that ignoring the issue would not have been permissible if this Court believed that standing was necessary for proposed intervenors, as jurisdiction is an unavoidable question at all stages of litigation. *Id.* "Accordingly, we conclude that the District Court did not err by determining that Garden State need not demonstrate Article III standing to intervene." *Id.*

The conclusion reached by the Third Circuit below is in direct conflict with the Eighth Circuit on this issue. *See Mausolf*, 85 F.3d at 1300 ("We conclude that the Constitution requires that prospective intervenors have Article III standing to litigate their claims in federal court."). The Eighth Circuit reasoned that Rule 24's purpose was to "promote[] the efficient and orderly use of judicial

resources by allowing persons, who might otherwise have to bring a lawsuit on their own to protect their interest or vindicate their rights, to join an ongoing lawsuit instead." *Id.* Nevertheless, "judicial economy and the Rules of Civil Procedure notwithstanding, Congress cannot circumvent Article III's limits on the judicial power." *Id.* Indeed, in the Eighth Circuit's opinion, "an Article III case or controversy, once joined by intervenors who lack standing, is – put bluntly – no longer an Article III case or controversy." *Id.* "An Article III case or controversy is one where *all parties* have standing, and a would-be intervenor, because he seeks to participate *as a party*, must have standing as well." *Id.* (emphasis added).

The D.C. Circuit is in agreement with the Eighth Circuit and in direct conflict with the decision below. *See Southern Christian Leadership Conference*, 747 F.2d at 778 ("We affirm denial of the motion for intervention because the movant lacks a protectable interest sufficient to confer standing."). Much like the Eighth Circuit, the D.C. Circuit stated that the interest requirement of Fed. R. Civ. P. 24 "impliedly refers not to *any* interest the applicant can put forward, but only to a legally protectable one." *Id.* at 779 (emphasis original). Indeed, "[s]uch a gloss upon the rule is in any case required by Article III of the Constitution." *Id.*

This Court should grant review to resolve the conflict among circuits concerning whether proposed intervenors must have Article III standing to participate as a party in defense of that

legislation, or whether their participation without such standing destroys an Article III case or controversy. This question is also one of substantial importance given that it implicates the very essence of the judicial power, which is limited only to actual cases and controversies.

CONCLUSION

The Third Circuit's decision below concerning the appropriate classification of communications between counselor and client or doctor and patient is in direct conflict with the decisions of other circuits. Moreover, the Third Circuit's decision below concerning the appropriate level of scrutiny applicable to regulations of speech between counselor and client or doctor and patient is in direct conflict with the decisions of this Court and the other circuits. The Third Circuit's decision below concerning the Article III standing requirements of proposed intervenors is also in direct conflict with the other circuits.

This Court should grant review and resolve these conflicts.

December 2014

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APPENDIX

APPENDIX A — 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 A

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.*

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.*

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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]

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."

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.

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

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.

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 B — 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 B

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 C — OPINION OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED NOVEMBER 8, 2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 13-5038

TARA KING, ED.D., *et al.*,

Plaintiffs,

vs.

CHRISTOPHER CHRISTIE,
Governor of New Jersey, *et al.*,

Defendants.

November 8, 2013, Decided
November 8, 2013, Filed

OPINION

On August 19, 2013, New Jersey Governor Christopher J. Christie signed into law Assembly Bill Number A3371 ("A3371") (codified at N.J.S.A. 45:1-54, -55),[1] which prohibits New Jersey state licensed practitioners, who

1. At the time Plaintiffs brought this suit, Assembly Bill A3371 had not been codified as a statute, and thus, the parties refer in their papers to the now-codified statute as A3371. In this Opinion, the Court will interchangeably use A3371 or N.J.S.A. 45:1-54. -55.

provide professional counseling services, from treating minors using methods of Sexual Orientation Change Efforts ("SOCE"), more commonly known as "gay conversion therapy;" A3371 became effective on the same date. The Bill is the second piece of legislation of its kind in the nation, with California having been the first state to successfully enact such a law.[2] In passing this statute, the New Jersey Legislature determined, *inter alia*, that this type of treatment subjects minors to potentially harmful consequences. Challengers to the constitutionality of A3371 are Plaintiffs, Tara King Ed.D. and Ronald Newman, Ph.D., who are individual licensed therapists, as well as the National Association for Research and Therapy of Homosexuality ("NARTH") and the American Association of Christian Counselors ("AACC") (collectively, "Plaintiffs"), whose members include various licensed professionals who practice or wish to engage in SOCE.[3] The named defendants are Governor Christie, Eric T. Kanefsky, Director of the New Jersey Dep't of Law and Public Safety, 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

2. Challengers of the California statute were unsuccessful in overturning the law. The Ninth Circuit Court of Appeals, in *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013), recently held that California's statute banning licensed professionals from practicing SOCE is constitutional.

3. There is no dispute that NARTH and AACC have associational standing to bring claims on behalf of their members.

of Medical Examiners (collectively, "Defendants" or the "State"). Plaintiffs also bring constitutional claims on behalf of the licensed professionals' minor clients and the clients' parents.[4] Presently before the Court are cross motions for summary judgment.[5] During the pendency of the briefing, Proposed Intervenor, Garden State Equality ("Garden State"), moved to intervene as a defendant in this case, or in the alternative, it sought *amicus curiae* status.

On these motions, the parties raise a host of legal issues, the most significant of which focuses on whether, by prohibiting the practice of SOCE, the State has impermissibly infringed upon Plaintiffs' First Amendment rights — freedom of speech and free religious expression. Because the Court finds that A3371 restricts neither speech nor religious expression, rational basis review applies. I further find that A3371 passes constitutional muster under that standard. Accordingly, Defendants' cross motion for summary judgment is **GRANTED** in its entirety; and Plaintiffs' motion for summary judgment is **DENIED**. Garden State's motion to intervene is **GRANTED**.

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4. Within the last week, a minor client and his parents, represented by the same counsel as represents Plaintiffs here, filed a similar lawsuit against Defendants challenging the constitutionality of A3371. This matter also is assigned to me. *See Doe v. Christie, et al.*, Civ. No. 13-6629(FLW).

5. Initially, Plaintiffs sought to preliminarily enjoin Defendants from enforcing A3371; however, during the pendency of that motion, the parties agreed to convert the preliminary injunction motion into one for summary judgment, with Defendants cross moving for summary judgment.

Appendix C

BACKGROUND

Assembly Bill A3371 precludes persons licensed to practice in certain counseling professions from engaging in "the practice of seeking to change a [minor's] sexual orientation." § 2(b). The statute has two sections; Section 1 provides legislative findings and declarations, while Section 2 defines SOCE and establishes the scope of the legislative prohibition on such conduct.

Section 1 (N.J.S.A. 45:1-54)

In Section 1 of the Statute, the Legislature declared that "[b]eing 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." § 1(a). The Legislature then went on to state that "[m]inors who experience family rejection based on their sexual orientation face especially serious health risks," and that "[s]uch directed efforts [at changing sexual orientation] are against fundamental principles of psychoanalytic treatment and often result in substantial psychological pain by reinforcing damaging internalized attitudes." §§ 1(m), (j)(2).

In support of its determination, the Legislature cited many of the position statements and resolutions of professional associations, including, *inter alia*, the American Psychiatric Association, the American Academy of Pediatrics and the American Academy of Child and Adolescent Psychiatry. § 1 (c)-(m). According to the

Legislature, each of these professional associations has concluded that there is little or no evidence of the efficacy of SOCE, and that SOCE has the potential for harm, such as causing those treated to experience depression, guilt, anxiety and thoughts of suicide. *Id.* Specifically, relying on the American Psychological Association's report on Appropriate Therapeutic Responses to Sexual Orientation, the Legislature found 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, . . . [and] a feeling of being dehumanized." § 1(b).

Similarly, and particularly relevant to minors, citing an American Academy of Pediatrics journal article, the Legislature concluded that "[t]herapy 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." § 1(f). The Legislature also looked to an American Academy of Child and Adolescent Psychiatry journal article, which states that

> [c]linicians 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 . . . . 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.

§ 1(k).

Indeed, based on these professional associations' findings and other evidence before the Legislature, the State concluded that it "has a compelling interest in protecting the physical and psychological well-being of minors, including gays, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by sexual orientation change efforts." § 1(n).

Section 2 (N.J.S.A. 45:1-55)

Assembly Bill A3371's prohibition on the practice of SOCE with a person under 18 years of age applies to "[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 clinical social worker, licensed 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." § 2(a).[6] Further, the Legislature defines SOCE as " 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 . . . ." § 2(b).

However, the statute makes clear that the prohibition does 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 or unsafe sexual practices"; and (2) any other type of counseling that does not seek to change sexual orientation. *Id.* at (1), (2).

Plaintiff's Challenge to A3371

Plaintiffs challenge the constitutionality of A3371 because they allege the statute violates their state and federal First Amendment rights, namely, freedom of speech and free exercise of religion. In addition, Plaintiffs, on behalf of minor clients and their parents, assert that A3371 interferes with the minor clients' right to self-determination and the parents' fundamental

6. It is important to note that A3371 does not prohibit non-licensed counselors or therapists, including non-licensed religious counselors, from practicing SOCE.

right to direct the upbringing of their children. As to free speech, Plaintiffs maintain that A3371 prohibits licensed professionals from engaging in, or referring to a licensed professional who engages in, counseling with a minor regarding his/her "unwanted" same-sex sexual attractions, placing an unconstitutional restraint on the content of Plaintiffs' message to their clients. Plaintiffs reason that A3371 "authorizes only one viewpoint on SOCE and unwanted same-sex sexual attractions, behaviors, and identity by forcing . . . Plaintiffs . . . to present only one viewpoint on the otherwise permissible subject matter of same-sex attractions . . . ." Compl., ¶ 186.

Plaintiffs further complain that A3371 infringes on their "sincerely held religious beliefs to provide spiritual counsel and assistance to their clients who seek such counsel in order to honor their clients' right to self-determination and to freely exercise their own sincerely held religious beliefs to counsel on the subject matter of same-sex attractions . . . ." Compl., ¶ 235. By doing so, Plaintiffs allege that A3371 "impermissibly burden[s] Plaintiffs' and their clients' sincerely held religious beliefs and compels them to both change those religious beliefs and to act in contradiction to them." *Id.* at ¶ 237. This type of restriction, Plaintiffs assert, violates their state and federal constitutional rights to the free exercise of religion. Finally, Plaintiffs assert that A3371 violates the parents' fundamental rights "to direct the upbringing and education of their children according to their sincerely held religious beliefs," *Id.*, ¶ 260, because the statute "prevents the parents . . . from seeking mental health counseling for their minor children's unwanted same-sex attractions . . . ." *Id.* at ¶ 261.

Appendix C

Shortly after Plaintiffs filed suit, Garden State sought permissive intervention to defend the constitutionality of A3371. Founded in 2004, Garden State is a New Jersey civil rights organization, primarily advocating for lesbian, gay, bisexual, and transgender ("LGBT") equality within the state. It supports and lobbies for legislation, such as A3371, that prohibits, *inter alia*, discrimination on the basis of sexual orientation. Garden State aims to protect the interests of LGBT citizens in New Jersey, including youth. This organization has over 125,000 members, including LGBT minors and their parents, some of whom, according to Garden State, might be subject to SOCE treatment at the insistence of a parent or guardian, or based on the choice of a licensed mental health professional.

Procedural History

Plaintiffs filed their six-count Complaint on August 22, 2013. Initially, Plaintiffs moved to temporarily restrain Defendants from enforcing A3371. However, after a telephone conference, and with the consent of the parties, the Court converted Plaintiffs' motion for a preliminary injunction to a summary judgment motion. Thereafter, Defendants cross-moved for summary judgment. After the filing of Plaintiffs' initial motion, Garden State moved to intervene as a defendant in this matter. By Text Order dated September 16, 2013, the Court granted Garden State's request, and indicated in that Order that the reasoning for the Court's decision would be stated more fully in a written opinion to follow.

Appendix C

On October 1, 2013, the Court held oral argument on these summary judgment motions, wherein counsel for Plaintiffs,[7] Defendants and the Intervenor participated. Notably, during the hearing, Plaintiffs advanced an additional novel argument as to why Garden State should not be granted intervenor status: Garden State must have Article III standing to intervene at the district court level. The Court reserved its decision on that question. In addition, in response to the parties' various evidentiary objections to certain expert opinions/certifications, the Court indicated that all objections will be taken under advisement, and to the extent the Court relies on any certifications, the Court will rule on the relevant objections accordingly in this Opinion. *See* Hearing Transcript ("Tr."), T58:12 - T59:11.

DISCUSSION

I. Standard of Review

A moving party is entitled to judgment as a matter of law where there is no genuine issue as to any material fact. *See* Fed. R. Civ. 56(c); *Brooks v. Kyler*, 204 F.3d 102, 105 n.5 (3d Cir. 2000) (*citing* Fed. R. Civ. 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)); *Orson, Inc. v. Miramax Film Corp.*, 79 F.3d 1358, 1366 (3d Cir. 1996). The burden of demonstrating the absence of a genuine issue of material fact falls on the

7. During a teleconference, counsel for Plaintiffs indicated that they were objecting to Garden State's motion to intervene; however, counsel did not object to Garden State's alternative request to enter the litigation as *amicus*.

moving party. *See Taylor v. Phoenixville Sch. Dist.*, 184 F.3d 296, 305 (3d Cir. 1999) (citations omitted). Once the moving party has satisfied this initial burden, the opposing party must identify "specific facts which demonstrate that there exists a genuine issue for trial." *Orson*, 79 F.3d at 1366.

Not every issue of fact will be sufficient to defeat a motion for summary judgment; issues of fact are genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986). Further, the nonmoving party cannot rest upon mere allegations; he must present actual evidence that creates a genuine issue of material fact. *See* Fed. R. Civ. 56(c); *Anderson*, 477 U.S. at 249 (*citing First Nat'l Bank v. Cities Serv. Co.*, 391 U.S. 253, 290, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)). In conducting a review of the facts, the non-moving party is entitled to all reasonable inferences and the record is construed in the light most favorable to that party. *See Pollock v. Am. Tel. & Tel. Long Lines*, 794 F.2d 860, 864 (3d Cir. 1986). Accordingly, it is not the court's role to make findings of fact, but to analyze the facts presented and determine if a reasonable jury could return a verdict for the nonmoving party. *See Brooks*, 204 F.3d at 105 n. 5 (*citing Anderson*, 477 U.S. at 249); *Big Apple BMW v. BMW of N. Am., Inc.*, 974 F.2d 1358, 1363 (3d Cir. 1992).

Appendix C

II. Motion to Intervene by Garden State

A. Standing as an Intervenor

According to Plaintiffs, in their supplemental briefing, Garden State must independently satisfy Article III standing requirements before it can be granted leave to intervene under Fed. R. Civ. P. 24(b). Generally, to demonstrate the "case or controversy" standing requirement under Article III, § 2 of the United States Constitution, a plaintiff must establish that it has suffered a cognizable injury that is causally related to the alleged conduct of the defendant and is redressable by judicial action. *Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC)*, 528 U.S. 167, 180-81, 120 S. Ct. 693, 145 L. Ed. 2d 610 (2000); *The Pitt News v. Fisher*, 215 F.3d 354, 359 (3d Cir. 2000). Here, Plaintiffs argue that Garden State, a proposed intervening defendant, must also satisfy Article III's standing mandate.

To begin the analysis, I start with the Third Circuit's acknowledgement in *Am. Auto. Ins. Co. v. Murray*, 658 F.3d 311 (3d Cir. 2011), that neither the Third Circuit nor the Supreme Court "has determined whether a potential intervenor must even have Article III standing" to participate in district court proceedings. *Id.* at 318 n.4 (citing *Diamond v. Charles*, 476 U.S. 54, 68-69, 106 S. Ct. 1697, 90 L. Ed. 2d 48 (1986)).[8] While this circuit

8. Suggesting that the Third Circuit requires a proposed intervenor to satisfy standing, Plaintiffs rely on *Frempong v. Nat'l City Bank of Ind.*, 452 Fed. Appx. 167, 172 (3d Cir. 2011). Plaintiffs' reliance is inapt. *Frempong* dealt with a plaintiff husband — not

has not answered the standing question in the context of intervention, *Murray* recognized that other circuit courts are split on this issue. *Compare Ruiz v. Estelle*, 161 F.3d 814, 830 (5th Cir. 1998) (holding that Article III standing is not a prerequisite to intervention); *City of Colo. Springs v. Climax Molybdenum Co.*, 587 F.3d 1071, 1079 (5th Cir. 2009) (same); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994) (same); *Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir. 1991) (same); *Sagebrush Rebellion, Inc., v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983) (same); *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) (same); and *United States Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) (same); *with Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996) (holding that Article III standing is necessary for intervention); *United States v. 36.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985) (concluding that intervention under Rule 24 requires interest greater than that of standing); and *Rio Grande Pipeline Co. v. FERC,* 178 F.3d 533, 538, 336 U.S. App. D.C. 229 (D.D.C. 1999) (an "intervenor must have standing to participate as an intervenor rather than only as an amicus curiae.").[9]

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an intervenor — who brought § 1983 claims in connection with defendant bank's foreclosure of his wife's property. The court found that plaintiff did not have standing to bring claims on his wife's behalf because he did not have any interest in the disputed property. In that context, the issue of whether a proposed intervenor must have independent standing under Article III was not addressed, let alone resolved — the question of intevenor status was not an issue.

9. It bears noting that the recent Supreme Court decision in *Hollingsworth v. Perry*, 133 S. Ct. 2652, 2661, 186 L. Ed.

Having reviewed the conflicting authorities cited above, I find that based on the circumstances of this case, Garden State need not satisfy standing requirements in order to intervene in these proceedings.[10] I start with the "minority" view's reasoning. For example, the Eighth Circuit, in *Mausolf*, takes a rigid approach to intervention. The court there held that an intervenor, regardless of Rule 24 requirements, must have standing because "[a]n Article III case or controversy is one where all parties have standing, and a would-be intervenor, because he seeks to participate as a party, must have standing as well." *Mausolf*, 85 F.3d at 1300. In that court's view, any intervenor that does not have independent standing, "destroys" an Article III case or controversy, regardless whether the original parties have standing to bring suit. *Id.*

2d 768 (2013), did not directly address the issue of intervenor standing in general. Instead, in that case, the Court dealt with a narrower issue: the Court found that standing was lacking when an intervenor sought to appeal the judgment of the district court after the unsuccessful defendant government had decided not to pursue the lawsuit.

10. To the clear, an intervenor, by right or permission, normally has the right to appeal an adverse final judgment by a trial court, just as any other party. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-76, 107 S. Ct. 1177, 94 L. Ed. 2d 389 (1987). However, as any other party, an intervenor seeking to appeal on its own, must have standing under Article III of the Constitution to have the court decide the merits of the dispute. *Diamond*, 476 U.S. at 68. The standing requirement therefore may bar an appeal by an intervenor who nevertheless participated in the litigation before the district court. *United States v. Van*, 931 F.2d 384, 387 (6th Cir. 1991).

On the other side of the coin, the "majority" view does not impose independent standing requirements on an intervenor at the district court level. "'[O]n many occasions the Supreme Court has noted that an intervenor may not have standing, but has not specifically resolved that issue, so long as another party to the litigation has sufficient standing to assert the claim at issue.'" *San Juan County, Utah v. United States*, 503 F.3d 1163, 1171-72 (10th Cir. 2007) (*en banc*) (quoting panel decision in *San Juan County, Utah v. United States*, 420 F.3d 1197, 1205 (10th Cir. 2005) (citing *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 233, 124 S. Ct. 619, 157 L. Ed. 2d 491 (2003)). These cases reason that Article III requires only that justiciable "cases" and "controversies" may be maintained in a federal court, *see Brennan*, 579 F.2d at 190, and, that a proposed intervenor is permitted to intervene on the basis of an existing party's standing to assert the claim at issue, based upon what the Supreme Court has described as "piggyback" standing. *See Diamond*, 476 U.S. at 64, 68-9. Such standing is permissible because "[i]n that circumstance the federal court has a Case or Controversy before it regardless of the standing of the intervenor." *City of Colo.*, 587 F.3d at 1079.

The Eleventh Circuit has explained that the standing requirement exists to ensure that a justiciable case or controversy exists. *Chiles*, 865 F.2d at 1212-13, and, Rule 24, authorizing intervention, presumes that a justiciable case or controversy already exists before the court. *See Id.; see also*, 7C Wright, Miller, and Kane, Federal Practice and Procedure: Civil 2d § 1917 (2d ed. 1986) at 457 ("Intervention presupposes the pendency of an action in a

court of competent jurisdiction . . . .") (footnote omitted). Because a court's subject matter jurisdiction is necessarily established before intervention, the *Chiles* court held that a party seeking to intervene need not have independent standing. *Id.* at 1212-13.

While the Third Circuit has not spoken on this matter and there are no cases on this issue in this district, there are at least three other district court opinions in this circuit that have found that an intervenor need not have independent standing to participate in district court proceedings. *See Indian River Recovery Co. v. The China*, 108 F.R.D. 383, 386-87 (D. Del. 1985) ("an intervenor need not have standing necessary to have initiated the lawsuit"); *Coca-Cola Bottling Co. of Elizabethtown, Inc. v. The Coca-Cola Co.*, 696 F. Supp. 57, 93 (D. Del. 1988) ("The fact that [a party] lack[s] standing, however, does not control the analysis of whether [it] [is] entitled to intervene."); *United States v. Germantown Settlement Homes, Inc.*, No. 84-2622, 1985 U.S. Dist. LEXIS 18193, at *6 n.1 (E.D. Pa. Jul. 5, 1985).

I find the reasoning of those courts that do not require independent standing by an intervenor to be persuasive. First, the constitutional requirement of standing only speaks to whether the federal district court has a justiciable controversy. In my view, so long there is a case or controversy before the court, it is not necessary that an intervenor have independent standing. Rather, Rule 24 aims to promote the efficient and orderly use of judicial resources by allowing persons to participate in the lawsuit to protect their interests or vindicate their

rights. In that furtherance of the Rule, the court makes a determination whether those interests would be impaired by the disposition of the case. Imposing standing on an intervenor would eviscerate Rule 24's practical approach. And, furthermore, such a restriction would impinge on the purposes of permissive intervention. Accordingly, I find that Garden State need not separately satisfy standing requirements to intervene.

B. Permissive Intervention Pursuant to Rule 24(b)

Garden State seeks to intervene on the basis of permissive intervention. Permissive intervention under Rule 24 requires (1) the motion to be timely; (2) an applicant's claim or defense and the main action have a question of law or fact in common; and (3) the intervention may not cause undue delay or prejudice to the original parties' rights. *See* Fed. R. Civ. P. 24(b); *see also N.C.A.A. v. Governor of N.J.*, 520 Fed. Appx. 61, 63 (3d Cir. 2013); *Appleton v. Comm'r*, 430 Fed. Appx. 135, 137-38 (3d Cir. 2011). So long as these threshold requirements are met, whether to allow a party to permissively intervene is left to the sound discretion of the court. *See N.C.A.A.*, 520 Fed. Appx at 63.

As to the first factor, Garden State's motion is timely. Garden State moved to intervene only 14 days after the Complaint was filed. While Plaintiffs suggest that they did not have sufficient time to respond to Garden States' briefing, the Court has provided all parties an opportunity to respond to each other's arguments. There was more than sufficient time for Plaintiffs to address any arguments

made by Garden State before the summary judgment hearing. And, indeed, the Court afforded Plaintiffs an opportunity to submit supplemental briefing on issues they deemed important after the hearing, including on the question of the proposed intervenor's standing.

Next, Plaintiffs contend that intervention is not necessary because Garden State's interests are already adequately represented by Defendants. However, the presence of overlapping interests between Garden State and the State does not preclude permissive intervention. Rather, "[t]he shared interests of [Garden State] and the state defendants support [Garden State's] argument that it shares a common question of law with the current action because it plans to defend the constitutionality of [A3371], the subject of the dispute between plaintiffs and the state defendants." *Pickup v. Brown*, No. 12-2497, 2012 U.S. Dist. LEXIS 172027, at *13-14 (E.D. Cal. Dec. 4, 2012). Indeed, Plaintiffs have not disputed that Garden State's claims or defenses share common questions of law or fact with this action. Accordingly, I find that the second factor is satisfied.

Plaintiffs also contend that allowing Garden State to intervene would cause an undue delay of the resolution of Plaintiffs' claims because it would result in additional briefing by Plaintiffs. I do not find this argument convincing. As I have already explained, Garden State's filings in this matter would not unduly expand Plaintiffs' submissions because Garden State's arguments and positions are similar to those advanced by the State. In other words, while Plaintiffs may have expended

additional time or expense in order to respond to Garden State's arguments, those efforts are not unduly prejudicial or burdensome. Rather, contrary to Plaintiffs' position, I find that Garden State has provided a "helpful, alternative viewpoint from the vantage of some persons who have undergone SOCE treatment or are potential patients of treatment that will aid the court in resolving plaintiffs' claims fully and fairly." 2012 U.S. Dist. LEXIS 172027 at *14.

Accordingly, having satisfied the Rule 24(b) factors, Garden State is given leave to intervene.

III. Eleventh Amendment

In their Complaint, Plaintiffs bring parallel state constitutional claims against Defendants and they seek injunctive and declaratory relief, as well as nominal money damages. Defendants argue that the Eleventh Amendment bars Plaintiffs' § 1983 claims for money damages and state constitutional claims. During the hearing, Plaintiffs argued that they are entitled to nominal money damages in this action should they prevail. Since Plaintiffs did not brief their position on this issue, the Court provided Plaintiffs an opportunity to submit additional briefing. Instead of any substantive response, Plaintiffs subsequently withdrew their claim for nominal damages.[11] *See* Plaintiffs' Response on Claim for Nominal

11. Indeed, it is clear that the Eleventh Amendment bars suits for damages, pursuant to 42 U.S.C. § 1983, against state officials sued in their official capacities. The Eleventh Amendment provides "[t]he Judicial power of the United States shall not be construed

Damages, p. 2. Moreover, Plaintiffs have also withdrawn their state constitutional claims.[12] *See* Tr., T7:22-T8:2.

Accordingly, all federal claims for monetary damages — however nominal — against Defendants in their official capacities are barred, and Plaintiffs' state constitutional claims, i.e., Counts II and V, are dismissed.

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to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. It is beyond cavil that the Eleventh Amendment protects states and their agencies and departments from suit in federal court. *See Bayete v. Ricci*, 489 Fed. Appx. 540, 542 (3d Cir. 2012); *Hafer v. Melo*, 502 U.S. 21, 30, 112 S. Ct. 358, 116 L. Ed. 2d 301 (1991). Similarly, absent consent by a state, the Eleventh Amendment bars federal court suits for money damages against state officers in their official capacities, *Id.*, and section 1983 does not override a state's Eleventh Amendment immunity.

12. Under the Eleventh Amendment, unlike federal claims seeking prospective injunctive relief, Plaintiffs may not bring state law claims — including state constitutional claims — against the State regardless the type of relief it seeks. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104-06, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984). Likewise, supplemental jurisdiction does not authorize district courts to exercise jurisdiction over claims against non-consenting states. There is no doubt that "the Eleventh Amendment bars the adjudication of pendent state law claims against nonconsenting state defendants in federal court." *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 540-41, 122 S. Ct. 999, 152 L. Ed. 2d 27 (2002).

IV. Third-Party Standing

As a jurisdictional matter, Defendants contend that Plaintiffs lack third-party standing to pursue claims on behalf of Plaintiffs' minor clients and parents. As discussed previously, to satisfy the "case or controversy" standing requirement under Article III, a plaintiff must establish that it has suffered a cognizable injury that is causally related to the alleged conduct of the defendant and is redressable by judicial action. Apart from those standing requirements, the Supreme Court has imposed a set of prudential limitations on the exercise of federal jurisdiction over third-party claims. *Bennett v. Spear*, 520 U.S. 154, 162, 117 S. Ct. 1154, 137 L. Ed. 2d 281 (1997) ("The federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.") (quotation and citation omitted); *Powell v. Ridge*, 189 F.3d 387, 404 (3d Cir. 1999). The restrictions against third-party standing do not stem from the Article III "case or controversy" requirement, but rather from prudential concerns, *Amato v. Wilentz*, 952 F.2d 742, 748 (3d Cir. 1991), which prevent courts from "deciding questions of broad social import where no individual rights would be vindicated and . . . limit access to the federal courts to those litigants best suited to assert a particular claim." *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99-100, 99 S. Ct. 1601, 60 L. Ed. 2d 66 (1979); *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 955, 104 S. Ct. 2839, 81 L. Ed. 2d 786 (1984).

It is important to bear in mind that in the jurisprudence of standing, 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." *Powers v. Ohio*, 499 U.S. 400, 410, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991); *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75, 102 S. Ct. 752, 70 L. Ed. 2d 700 (1982); *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 538 (3d Cir. 1994). This principle is based on the assumption that "third parties themselves usually will be the best proponents of their own rights," *Singleton v. Wulff*, 428 U.S. 106, 114, 96 S. Ct. 2868, 49 L. Ed. 2d 826 (1976) (plurality opinion), which serves to foster judicial restraint and ensure the clear presentation of issues. *See Munson*, 467 U.S. at 955.

The prohibition against third-party standing, however, is not absolute. The Supreme Court has found that the principles animating these prudential concerns are not subverted if the third party is hindered from asserting its own rights and shares an identity of interests with the plaintiff. *See Craig v. Boren*, 429 U.S. 190, 193-94, 97 S. Ct. 451, 50 L. Ed. 2d 397 (1976); *Singleton*, 428 U.S. at 114-15; *Eisenstadt v. Baird*, 405 U.S. 438, 443-46, 92 S. Ct. 1029, 31 L. Ed. 2d 349 (1972). Based on that recognition, third-party standing is permitted so long as the plaintiff can satisfy three preconditions: 1) the plaintiff must suffer injury; 2) the plaintiff and the third party must have a "close relationship"; and 3) the third party must face some obstacles that prevent it from pursuing its own claims. *Powers*, 499 U.S. at 411; *Pitt News*, 215 F.3d at 362. It remains for courts to balance these factors to determine if third-party standing is warranted. *Amato*, 952 F.2d at 750.

Here, Plaintiffs assert constitutional claims on behalf of their minor clients and parents. To establish standing for these third parties, Plaintiffs must, in the first instance, show that they have suffered an injury. Indeed, Plaintiffs' ability to bring third-party claims hinges on whether they suffered any constitutional wrongs by the passage of A3371.[13] This question will be addressed extensively later in this Opinion, and, because the Court finds that Plaintiffs have suffered no injuries, they cannot meet the first factor. Furthermore, Plaintiffs cannot meet the third element of the test. Indeed, during the pendency of this matter, a minor and his parents filed suit in this Court, challenging the constitutionality of A3371. Therefore, 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. Accordingly, I find that Plaintiffs do not meet third-party standing requirements, and thus, Counts III and VI are dismissed as well.

V. First Amendment—Freedom of Speech

Plaintiffs first challenge the constitutionality of A3371 on the ground that it violates their First Amendment right to free speech, contending that the statute constitutes an impermissible viewpoint and content-based restriction on their ability to discuss and engage in SOCE. Specifically, Plaintiffs argue that the statute forbids licensed counselors from both (1) speaking on or about the subject of SOCE

13. Plaintiffs concede that their ability to bring third-party claims depends upon whether they have suffered any injuries as a result of the passage of A3371. *See* T8:17-T917.

to their minor clients, including recommending SOCE or referring a client to SOCE, and (2) administering SOCE to their minor clients under any circumstance, regardless of the client's informed consent to the practice. Plaintiffs posit that because psychotherapy is carried out virtually exclusively through "talk therapy," any restriction on a therapist's ability to engage in a particular type of therapy is therefore a restriction on that therapist's First Amendment free speech right. Thus, Plaintiffs argue, that as a regulation of speech, A3371 cannot survive the applicable standard of review, *i.e.*, strict scrutiny.

The State rejects Plaintiffs' interpretation of A3371, and, in particular, that the statute regulates, or implicates, speech in any form. Rather, the State claims that the statute merely restricts a licensed professional from engaging in practicing SOCE counseling, and accordingly is a rational exercise of the State's long-recognized power to reasonably regulate the counseling professions. In that connection, the State asserts that A3371 targets conduct only, not speech. Accordingly, Defendants argue that the statute does not implicate any fundamental constitutional right and withstands rational basis review.

It is clear that the threshold issue before the Court is whether A3371 regulates constitutionally protected speech. I first determine whether the statute on its face seeks to regulate speech; I then turn to whether the statute has the effect of burdening speech or expressive conduct. Ultimately, if the statute does not implicate or burden constitutionally protected speech or expression in any manner, I apply rational basis review. If, however,

the statute does seek to regulate speech or has the effect of burdening protected speech, directly or incidentally, I must determine the degree of constitutional protection afforded to, as well as the resulting burden on, that speech and then apply the appropriate standard of review.

I note that A3371 is a novel statute in New Jersey and other jurisdictions within the Third Circuit, as is the issue of whether counseling, by means of talk therapy, is entitled to any special constitutional protection. However, I do not start with a blank slate. Last year, California passed a law, SB 1172, that is virtually identical to A3371 in both language and purpose. After two district court challenges, one finding SB 1172 constitutional, *Pickup v. Brown*, No. 12-02497, 2012 U.S. Dist. LEXIS 172034, 2012 WL 6021465 (E.D. Cal., Dec. 4, 2012), the other not, *Welch v. Brown*, 907 F. Supp. 2d 1102 (E.D. Cal. 2012), a panel for the Ninth Circuit Court of Appeals concluded that the statute is constitutional.[14] *See Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013). Although the *Pickup* decision is not binding on me, given the relevance of this opinion, and the dearth of decisions from the Third Circuit or other jurisdictions addressing the interplay between constitutionally protected speech and professional counseling, I will turn to the Ninth Circuit's decision where appropriate, and explain my reason for so doing.

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14. Plaintiffs point out that the Ninth Circuit has directed the parties involved in the California statute litigation to brief whether *en banc* review of the panel's decision would be appropriate. As of the date of this Opinion, however, no order for *en banc* review has issued.

Appendix C

A. A3371 Does Not Regulate Speech

I begin by reviewing the plain language of A3371. Even a cursory review reveals that the statute nowhere references speech or communication; instead, the statute contains words and phrases that are generally associated with conduct. For example, the operative statutory language directs that a licensed counselor "shall not *engage in* sexual orientation change *efforts*," and further defines "'sexual orientation change efforts" as "the *practice* of seeking to change a person's sexual orientation." N.J.S.A. 45:1-55 (emphasis added). Such language is commonly understood to refer to conduct, and not speech, expression, or some other form of communication. *See, e.g., Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572-73, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) (Scalia, J., concurring) (noting that a criminal statute prohibiting a person from "engag[ing]," "appear[ing]", or "fondl[ing]" "is not directed at expression in particular"); *United States v. Tykarsky*, 446 F.3d 458, 473 (3d Cir. 2006) (facially reviewing statute with the operative words "engage in prostitution" and determining this term governed conduct); *cf. Associated Film Distribution Corp. v. Thornburgh*, 683 F.2d 808, 814 n.8 (3d Cir. 1982) (finding that Pennsylvania statute regulating the bidding, distribution, screening, and exhibition of motion pictures to have "no facial impact upon speech"); *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1128 (N.D. Cal. 2002) (finding that portion of Copyright Act that "ban[ned] trafficking in devices, whether software, hardware, or other" did not on its face target speech). Moreover, the Ninth Circuit reached the same conclusion in *Pickup*, 728 F.3d 1042, finding that the statute did not implicate

speech. Specifically, the *Pickup* panel determined that the California law did not do any of the following:

- Prevent mental health providers from communicating with the public about SOCE
- Prevent mental health providers from expressing their views to patients, whether children or adults, about SOCE, homosexuality, or any other topic
- Prevent mental health providers from recommending SOCE to patients, whether children or adults
- Prevent mental health providers from administering SOCE to any person who is 18 years of age or older
- Prevent mental health providers from referring minors to unlicensed counselors, such as religious leaders
- Prevent unlicensed providers, such as religious leaders, from administering SOCE to children or adults
- Prevent minors from seeking SOCE from mental health providers in other states

Id. at 1049-50. I find that the *Pickup* panel's explanation of the reach of the California law applies with equal force to A3371, given the statutes' similarities. Nothing in the plain language of A3371 prevents licensed professionals

from voicing their opinions on the appropriateness or efficacy of SOCE, either in public or private settings. Indeed, A3371 does not prevent a licensed professional from, for example, lecturing about SOCE at a conference or providing literature to a client on SOCE; the statute only prohibits a licensed professional from engaging in counseling for the purpose of actually practicing SOCE. In light of the foregoing—and Plaintiffs' failure to provide any substantive support to the contrary, other than their own subjective interpretations—I find that A3371 does not directly regulate or target speech on its face.

In that regard, although Plaintiffs do not meaningfully advance an argument that A3371 regulates speech *per se*, Plaintiffs nevertheless contend that A3371 clearly targets speech by virtue of the statute's application solely to licensed *counselors.* According to Plaintiffs, SOCE counseling necessarily implicates speech because "SOCE counseling is talk therapy." *See* Decl. of Dr. Tara King, ¶ 12;[15] *see also* Pl. Reply, 8 ("Plaintiffs' counseling involves

15. I pause briefly to note that, following oral argument in this matter, Plaintiffs filed a motion to "Reconsider Dispensing of Evidence and Deem Certain Facts Admitted." *See* Dkt. No. 50. The thrust of Plaintiffs' motion is twofold: (1) for the Court to reconsider its ruling that it would not consider evidence submitted in connection with Plaintiffs' summary judgment motion, and (2) to deem the facts in Plaintiffs' Complaint admitted by virtue of the State's failure to timely file an answer. Both of these arguments are without merit.

First, Plaintiffs are mistaken in their belief that I have made any ruling with respect to consideration of their supporting declarations and other evidence. At oral argument, in a colloquy with Plaintiffs' counsel, I made clear that I would consider declarations from the named Plaintiffs as "they are absolutely

no nonspeech elements, and should be considered pure speech."). Plaintiffs explain that:

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relevant." Tr., T59:25-T60:8. I explicitly stated that "I'm taking [Plaintiffs'] declarations," and that "[i]f I find something in there that shouldn't be considered, I'll make a note of it." *Id.* at T60:12-14. With respect to other declarations and evidence filed by Plaintiffs and Intervenor, I noted that there were volumes of submissions and objections, but that I was not making any rulings on the admissibility of the submitted evidence unless and until I determined that such evidence was necessary and appropriate to deciding the issues in this matter. *Id.* at T58:12-59:3. In that connection, I explained that the law was clear that if I were to find rational basis review applies to A3371, it would be unnecessary to consider evidence beyond the legislature's stated findings, and thus there is no reason to prematurely decide the admissibly of such evidence. *Id.* at T59:4-11. Accordingly, there is no basis for Plaintiffs' reconsideration motion, and Plaintiffs' motion is denied in that regard.

Second, Plaintiffs are not entitled to have certain facts in their Complaint be deemed admitted. Initially, Plaintiffs filed their Complaint accompanied by a motion for a preliminary injunction. Following a conversation with counsel for Plaintiffs and the State on August 27, 2013, the parties agreed that (1) the Complaint presented a legal issue only, (2) Plaintiffs' motion should be treated as one for summary judgment, and (3) the State should be given the opportunity to file its own cross-motion for summary judgment. *See* Dkt. No. 13. Under the Federal Rules of Civil Procedure, the time in which a party must file a responsive pleading to a claim is tolled if that party elects to instead file a motion to dismiss. *See* Fed. R. Civ. P. 12(a)(4). In that connection, Rule 12 also permits a court to convert a motion to dismiss into one for summary judgment if evidence has been presented along with the motion. In light of Rule 12, and given the atypical procedural developments in this matter, the State is not yet required to file an answer to the Complaint. Accordingly, Plaintiffs' motion to deem admitted facts in the Complaint is denied.

> SOCE counseling consists of discussions with the client concerning the nature and cause of their unwanted same-sex sexual attractions, behaviors, or identity; the extent of these attractions, behaviors, or identity; assistance in understanding traditional, gender-appropriate behaviors and characteristics; and assistance in fostering and developing those gender-appropriate behaviors and characteristics.

Decl. of Dr. Joseph Nicolosi, ¶ 10. Similarly, during oral argument, counsel for Plaintiffs stated that SOCE therapists "simply talk to [their clients] . . . about what their ultimate objectives are, and they would try to give them support to reach that objective, which in this case would be change." Tr., T18:18-23. Plaintiffs further stress that they do not use any "aversion techniques"[16] with clients seeking to change their sexual orientation, and that they only engage in SOCE with clients who, following informed consent, voluntarily wish to receive such counseling. *See, e.g.*, Decl. of Dr. Tara King, ¶¶

16. As Plaintiff King explained in her declaration, "aversion techniques, such as electroshock treatments, pornographic viewing, nausea-inducing drugs, etc. are unethical methods of treatment that have not been used by any ethical and licensed mental health professional in decades." Decl. of Dr. Tara King, ¶ 12; *see also Pickup*, 728 F.3d at 1048-49 ("In the past, aversive treatments included inducing nausea, vomiting, or paralysis; providing electric shocks; or having an individual snap an elastic band around the wrist when aroused by same-sex erotic images or thoughts. Even more drastic methods, such as castration, have been used.").

10, 12-13; Decl. of Dr. Joseph Nicolosi, ¶¶ 7-8. In sum, Plaintiffs' position is that, regardless of whether A3371 facially appears to target conduct, the statute is directed at "counseling," and counseling, as relevant here, consists almost solely of talk therapy; thus, A3371 effects a constitutionally impermissible viewpoint and content based restriction on Plaintiffs' speech. In contrast, the State maintains that counseling is conduct, subject to regulation by the state, and that A3371, by its own terms, only governs counseling; the statute does not prevent a licensed counselor from speaking about SOCE, but only prohibits the actual practice of counseling to change a minor's sexual orientation.

Plaintiffs' argument rests entirely on the premise that SOCE counseling, in the form of talk therapy, is "speech" in the constitutional sense. Indeed, Plaintiffs, both in their papers and at argument, essentially treat this premise as self-evident, spending little time explaining why talk therapy is properly considered constitutionally protected speech rather than conduct. I believe a more far-reaching analysis is required because, as explained in more detail *infra*, "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." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed. 834 (1949). Accordingly, I must determine whether SOCE counseling should be considered (i) a form of speech, subject to constitutional protections, (ii) mere conduct, subject to reasonable regulation by the state, or (iii) some combination of both.

Appendix C

I begin with the statutory framework in which A3371 is found: Subtitle 1 of Title 45 of the New Jersey Statutes, governing "Professions And Occupations Regulated By State Boards Of Registration And Examination." N.J.S.A. 45:1-55. Indeed, A3371 expressly provides that the statute only applies to: "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 clinical social worker, licensed social worker, licensed marriage and family therapist, certified psychoanalyst . . . ." *Id.* Because the statute only governs "professional counseling" by these, or other similarly "licensed" individuals, I find it helpful to turn to the statutes defining the nature of these licensed practices to better understand the meaning of "counseling" as embodied in A3371.

Section 45:14B-2 of the New Jersey Statute covers psychologists and defines the "practice of psychology" as "the rendering of professional psychological services," which in turn are defined as "the application of psychological principles and procedures in the assessment, counseling or psychotherapy of individuals for the purposes of promoting the optimal development of their potential or ameliorating their personality disturbances and maladjustments as manifested in personal and interpersonal situations." More simply put, this statute regulates licensed psychologists' "application of psychological principles and procedures" to their clients. Because the statute targets the application of principles and procedures, and not any speech, I view this as a regulation of treatment, *i.e.*, conduct. In that

sense, counseling, as it arises in the context of psychology, is identified as one of the vehicles for psychological treatment, not a form of speech or expression. It would therefore appear that the means through which counseling is carried out by a psychologist—*i.e.*, whether through talk therapy or actions—is immaterial for the purposes of this statutory definition; the relevant inquiry is whether the psychologist is applying psychological principles and procedures. Similar conclusions can be drawn from other New Jersey statutes regulating the professions and occupations covered by A3371, as these statutes abound with references to counseling as the application of established sociological or psychological methods, principles, and procedures.[17]

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17. *E.g.*, N.J. Stat. Ann. 45:8B-2(b) ("The practice of marriage and family therapy consists of the application of principles, methods and techniques of counseling and psychotherapy for the purpose of resolving psychological conflict, modifying perception and behavior, altering old attitudes and establishing new ones in the area of marriage and family life."); *id.* at 45:15BB-3 ("'Clinical social work' means the professional application of social work methods and values in the assessment and psychotherapeutic counseling of individuals, families, or groups. Clinical social work services shall include, but shall not be limited to: assessment; psychotherapy; client-centered advocacy; and consultation."); *id.* ("'Psychotherapeutic counseling' means the ongoing interaction between a social worker and an individual, family or group for the purpose of helping to resolve symptoms of mental disorder, psychosocial stress, relationship problems or difficulties in coping with the social environment, through the practice of psychotherapy."); *id.* ("'Social work counseling' means the professional application of social work methods and values in advising and providing guidance to individuals, families or groups for the purpose of enhancing, protecting or restoring the

Appendix C

Beyond New Jersey's statutory scheme, commentators have also long discussed psychological counseling in a manner that suggests counseling is therapy, and thus a form of conduct. *See, e.g.*, Note, *Regulation of Psychological Counseling and Psychotherapy*, 51 Colum. L. Rev. 474, 495 n.2 (1951) ("'Counseling' is a form of psychological aid rendered by a psychologist to an individual for social-psychological adjustment problems." (citing Starke R. Hathaway, *Some Considerations Relative to Nondirective Counseling as Therapy*, 4 J. Clin. Psychology 226-27 (1948); W. C. Menninger, *The Relationship of Clinical Psychology and Psychiatry*, 5 Am. Psychologist 3, 9 (1950))). Similarly, in discussing mental health treatment generally, commentators focus on

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capacity for coping with the social environment, exclusive of the practice of psychotherapy."); *id.* at 45:2D-3 ("'Alcohol and drug counseling' means the professional application of alcohol and drug counseling methods which assist an individual or group to develop an understanding of alcohol and drug dependency problems, define goals, and plan action reflecting the individual's or group's interest, abilities and needs as affected by alcohol and drug dependency problems."); *cf. id.* at 45:9-5, (covering psychiatrists and defining "the practice of medicine and surgery" to "include the practice of any branch of medicine and/or surgery, and any method of treatment of human ailment, disease, pain, injury, deformity, mental or physical condition"); *id.* at 45:11-23(b) ("The practice of nursing as a registered professional nurse is defined as diagnosing and treating human responses to actual or potential physical and emotional health problems, through such services as casefinding, health teaching, health counseling, and provision of care supportive to or restorative of life and well-being, and executing medical regimens as prescribed by a licensed or otherwise legally authorized physician or dentist.").

describing the "services" and "procedures" provided. *See, e.g.*, Stacey A. Tovino, *Conflicts of Interest in Medicine, Research, and Law: A Comparison*, 117 Penn. St. L. Rev. 1291, 1309 (2013) ("Treatment may be defined as 'the provision, coordination, or management of health care and related services by one or more health care providers' to a particular individual. The definition of treatment is based on the concept of health care, which has been defined as care, services, and procedures related to the health of a particular individual. Health care is frequently defined to include preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care that is provided to a particular individual, as well as counseling, assessments, and procedures that relate to the physical or mental condition or functional status of a particular individual. Activities are thus classified as treatment when they involve a health care service provided by a health care provider that is tailored to the specific preventive, diagnostic, therapeutic, or other health care needs of a particular individual."). While such commentary certainly is not dispositive, it provides further support for the concept that counseling is more properly understood as a method of treatment, not speech, since 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.

Notably, by their own admission, Plaintiffs define SOCE counseling as being "no different than any other form of mental health counseling," involving "the traditional psychodynamic process of looking at root causes, childhood issues, developmental factors, and other

things that cause a person to present with all types of physical, mental, emotional, or psychological issues that in turn cause them distress." Decl. of Dr. Tara King, ¶ 12. Accordingly, I find that the mere fact that counseling may be carried out through talk therapy does not alter my finding that A3371 regulates conduct and not speech.

Additional support for this conclusion comes from the Ninth Circuit's decision in *Pickup.*[18] At the core of *Pickup* is the holding that:

> Because SB 1172 regulates only treatment, while leaving mental health providers free to discuss and recommend, or recommend against, SOCE, we conclude that 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 "bear[s] . . . a rational relationship to a legitimate state interest."

Pickup, 728 F.3d at 1056. The *Pickup* panel further concluded that California had a rational basis for enacting SB 1172, and thus the statute was constitutional.

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18. Although I have already noted that the *Pickup* case is not binding, it is significant in that it addresses California statute SB 1172, which is virtually identical to A3371, and appears to be the only Court of Appeals decision analyzing the relationship between conduct and speech in the psychotherapy context. Indeed, both parties have devoted substantial argument to the *Pickup* panel's reasoning and its applicability to this case.

Appendix C

Plaintiffs dispute the relevancy and persuasiveness of *Pickup*, contending that the panel misapplied controlling Ninth Circuit and Supreme Court precedent when it concluded that SB 1172, a law regulating SOCE therapy, is not a regulation of speech, notwithstanding that, as here, therapy in California is carried out almost entirely through "talk therapy." Plaintiffs further argue that even if the *Pickup* panel properly concluded that a statute like A3371 regulates conduct with only an "incidental" impact on speech, the panel nevertheless erred when it applied rational basis review rather than the more demanding *O'Brien* test in upholding the statute. *See United States v. O'Brien*, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968).

I have already independently concluded that A3371 regulates conduct, not speech, and thus I need not devote much time to Plaintiffs' argument that the *Pickup* panel, in its analysis of whether SOCE therapy is conduct, not speech, erred when harmonizing the Ninth Circuit's previous holdings in *National Association for the Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043 (9th Cir. 2000) ("*NAAP*"), and *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). Ninth Circuit law is not binding on this Court, and I am under no obligation to interpret and resolve issues internal to that circuit's jurisprudence. *In re Grossman's Inc.*, 607 F.3d 114, 121 (3d Cir. 2010). Indeed, in the absence of controlling authority, I am free to adopt whatever reasoning I find persuasive from another jurisdiction's decision, while rejecting contrary reasoning from that same jurisdiction—regardless of whether the reasoning

I rely on is binding in that jurisdiction. *See Barrios v. Attorney General of the United States*, 399 F.3d 272, 277 (3d Cir. 2005) (finding persuasive reasoning of dissenting Ninth Circuit opinion while rejecting majority's reasoning from same opinion). In that connection, I briefly highlight certain observations and conclusions in *Pickup* that I find persuasive here.

To begin, the Ninth Circuit, in *Pickup*, aptly explained that "the key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech. That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection." *Pickup*, 728 F.3d at 1052 (quotting *NAAP*, Thus, the *Pickup* panel endorsed the principle that "the communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation." *Id.* However, the *Pickup* panel clarified that the Ninth Circuit had "neither decided how *much* protection that communication should receive nor considered whether the level of protection might vary depending on the function of the communication." *Id.*

The *Pickup* panel distilled several principles applicable to the state's authority and limits in regulating the therapist-client relationship:

> (1) doctor-patient communications *about* medical treatment receive substantial First Amendment protection, but the government has more leeway to regulate the conduct necessary to administering treatment itself;

> (2) psychotherapists are not entitled to special First Amendment protection merely because the mechanism used to deliver mental health treatment is the spoken word; and (3) nevertheless, communication that occurs during psychotherapy does receive *some* constitutional protection, but it is not immune from regulation.

Id.

Although to some extent Plaintiffs take issue with all three of these "principles," the most salient to their challenge in this case is the second— that psychotherapists are not entitled to special First Amendment protection merely because they use the spoken word as therapy. *See, e.g.*, Pl. Reply at 2. This argument is merely a corollary of Plaintiffs' contention that "counseling," by its very nature, is constitutionally protected speech. I have already explained why this is not so for the purposes of A3371. The same rationale extends to why psychotherapists, and other similarly regulated professionals, are not entitled to blanket First Amendment protection for any and all conversations that occur in the counselor-client relationship. To be clear, 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.

However, there is a more fundamental problem with Plaintiffs' argument, because taken to its logical end, it would mean that *any* regulation of professional counseling necessarily implicates fundamental First Amendment free speech rights, and therefore would need to withstand heightened scrutiny to be permissible. Such a result runs counter to the longstanding principle that a state generally may enact laws rationally regulating professionals, including those providing medicine and mental health services. *See Watson v. Maryland*, 218 U.S. 173, 176, 30 S. Ct. 644, 54 L. Ed. 987 (1910) ("It is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health."); *see also Dent v. West Virginia*, 129 U.S. 114, 9 S. Ct. 231, 32 L. Ed. 623 (1889) (holding that states have a legitimate interest in regulating the medical profession through doctors' licensing requirements); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955) (finding it constitutionally permissible for states to require a prescription for opticians to fit or duplicate lenses); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978) (noting that "the State bears a special responsibility for maintaining standards among members of the licensed professions"); *Eatough v. Albano*, 673 F.2d 671, 676 (3d Cir. 1982) ("It is long settled that states have a legitimate interest in regulating the practice of medicine . . . ."); *Lange-Kessler v. Dep't of Educ. of the State of New York*, 109 F.3d 137 (2d Cir. 1997) (finding that regulation of the medical profession is afforded rational basis review); *cf. Washington v. Glucksberg*, 521 U.S. 702, 731, 117 S. Ct.

2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997) ("The State also has an interest in protecting the integrity and ethics of the medical profession."); *Sammon v. New Jersey Bd. of Med. Examiners*, 66 F.3d 639, 645 & nn. 9-10 (3d Cir. 1995) (rejecting argument that choice of provision of medical services is a constitutionally significant interest triggering strict scrutiny review).

Finally, I address Plaintiffs' reliance on *Wollschlaeger v. Farmer*, in which the court found that a Florida law preventing doctors from inquiring into a patient's gun ownership invaded the constitutionally protected realm of doctor-patient communications.[19] 880 F. Supp. 2d 1251, 1266-67 (S.D. Fla. 2012). The *Wollschlaeger* court relied on the proposition that "[c]ourts have recognized that the free flow *of truthful, non-misleading information* is critical within the doctor-patient relationship," *id.* at 1266, and cited *Trammel v. United States*, 445 U.S. 40, 51, 100 S. Ct. 906, 63 L. Ed. 2d 186 (1980) ("[T]he physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment."), *Conant*, 309 F.3d at 636 ("An integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and

19. The *Wollschlaeger* court relied on evidence that "as part of the practice of preventive medicine, practitioners routinely ask and counsel patients about a number of potential health and safety risks," including firearms, and that the Florida law "interfere[d] in the doctor-patient relationship and ha[d] resulted in diminished efficacy of [physicians'] practice of preventive medical care." 880 F. Supp. 2d at 1257.

openly to patients."), and *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653, 2664, 180 L. Ed. 2d 544 (2011) ("A consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. . . . That reality has great relevance in the fields of medicine and public health, where information can save lives."). In contrast here, A3371 does not seek to regulate the conveying of information, only the application of a particular therapeutic method. Thus, *Wollschlaeger* is inapposite.[20]

For the foregoing reasons, I conclude that A3371 on its face does not target speech, and "counseling" is not

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20. Furthermore, here, the State has determined that the potential harm to minors from SOCE, however slight, is sufficient to outweigh any potential benefits. In that connection, I note that Plaintiffs themselves acknowledge that there is a dearth of non-anecdotal evidence to support the success rate, and benefits of SOCE. Thus, unlike the Florida law precluding doctors from ascertaining medically relevant information from their patients, the circumstances here are more akin to a state finding physician assisted suicide to be harmful and enacting a law to prohibit its practice. Because there is no constitutional right to practice a particular type of medical or mental health treatment, A3371's prohibition of a particular form of counseling in which counselors apply therapeutic principles and procedures similarly does not implicate fundamental constitutional rights. *See Washington*, 521 U.S. at 728 ("[T]he asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."); *Sammon v. New Jersey Bd. of Med. Examiners*, 66 F.3d 639, 645 & nn.9-10 (3d Cir. 1995) (rejecting argument that choice of provision of medical services is a constitutionally significant interest triggering strict scrutiny review).

entitled to special constitutional protection merely because it is primarily carried out through talk therapy. Thus, I find that A3371 does not seek to regulate speech; rather the statute regulates a particular type of conduct, SOCE counseling.

B. Level of Scrutiny — Rational Basis Review Applies

Having determined that A3371 regulates conduct, I must still determine if the statute carries with it any incidental effect on speech. Plaintiffs argue that because the conduct being regulated by A3371—SOCE counseling—is carried out entirely through speech, the statute necessarily has, at the very least, an incidental effect on speech and thus, a heightened level of judicial scrutiny applies.[21] *See* Pl. Reply at 8. In that connection,

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21. Plaintiffs similarly challenge the *Pickup* panel's conclusion that the California law, SB 1172, needed only to survive rational basis review. According to Plaintiffs, the *Pickup* court erred by not applying *O'Brien*'s intermediate scrutiny test after finding that "any effect [SB 1172] may have on free speech interests is merely incidental." *Pickup*, 728 F.3d at 1056. Likewise, Plaintiffs contend that that the State here also conceded in its papers that A3371 has an incidental burden on speech. Plaintiffs' argument is misplaced; neither the *Pickup* panel, in connection with SB 1172, nor the State, in connection with A3371, expressly acknowledged that the respective statutes actually had an effect on speech. Rather, both the Ninth Circuit and the State noted that *if* there is an effect on speech, it is no more than incidental. *See id.*; Def. Opp. at 15. In any event, as explained by the analysis that follows, I find that A3371 does not have an effect on speech that would trigger constitutional concerns.

Plaintiffs assert that under Third Circuit precedent, a law that "burdens expression but is content neutral" must be analyzed under the "intermediate scrutiny" standard enunciated by the Supreme Court in *O'Brien*. *See Conchatta Inc. v. Miller*, 458 F.3d 258, 267 (3d Cir. 2006); *Bartnicki v. Vopper*, 200 F.3d 109, 121 (3d Cir. 1999) *aff'd*, 532 U.S. 514, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001) (noting that *O'Brien* standard applies to regulations governing conduct that incidentally restrict expressive behavior). In response, Defendants argue that the mere fact that the conduct in question here is carried out through spoken words is not, by itself, sufficient to show that the statute has an incidental burden on speech; rather, Plaintiffs must also show that their conduct is inherently expressive, which they fail to do.

In *O'Brien*, the Supreme Court addressed a federal law that made it a criminal offense to forge, alter, knowingly destroy, knowingly mutilate, or in any manner change a draft card. *O'Brien*, 391 U.S. at 370. The petitioner had been convicted for burning his draft card on the steps of a court house, and appealed his conviction on the grounds that the law unconstitutionally abridged his freedom of speech. *Id.* As an initial matter, the Supreme Court found that the statute "on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct." *Id.* at 375. However, the *O'Brien* court recognized that the petitioner had burned his draft card to protest the Vietnam War, and accordingly, determined that this "*communicative element* in O'Brien's conduct

[was] sufficient to bring into play the First Amendment." *Id.* at 376 (emphasis added). The Supreme Court reasoned that the federal law was constitutionally permissible, notwithstanding its incidental effect on individuals like the petitioner, explaining that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[22] *Id.*

Thus, the inquiry into whether *O'Brien*'s intermediate scrutiny review is appropriate turns on whether the alleged conduct falls within the scope of the First Amendment's right to freedom of expression, and extends only to "conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative [as] [s]ymbolic expression, otherwise known as expressive conduct." *Bartnicki*, 200 F.3d at 121 (internal quotation marks omitted) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984)).

On the other hand, as I have noted herein, "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." *Giboney*, 336 U.S. at 502. Similarly, "the

22. Ultimately, the *O'Brien* court found that the government's interest in preventing the destruction of draft cards was sufficiently important, and unrelated to the suppression of free expression, to justify the federal law. *O'Brien*, 391 U.S. at 376.

State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik*, 436 U.S. at 456. Thus, in determining whether conduct is deserving of First Amendment speech protection, the focus is on "the nature of [the] activity, combined with the factual context and environment in which it was undertaken," to determine whether "activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. State of Washington*, 418 U.S. 405, 409-10, 94 S. Ct. 2727, 41 L. Ed. 2d 842 (1974). In making that connection, the Supreme Court has "rejected the view that conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea [and has] extended First Amendment protection only to conduct that is *inherently expressive." Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65-66, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006) (other internal quotation marks omitted). Thus, contrary to Plaintiffs' argument, the mere fact that counseling is carried out through speech is not alone sufficient to show that A3371 has an incidental effect on speech. Plaintiffs must also show that counseling is inherently expressive conduct—*i.e.*, that talk therapy (1) is intended to be communicative, and (2) would be understood as such by their clients.[23] Plaintiffs fail to make such a showing.

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23. The Third Circuit has explained that Plaintiffs have the burden of showing whether conduct is expressive. *See Troster v. Pennsylvania State Dep't of Corr.*, 65 F.3d 1086, 1090 (3d Cir. 1995).

Appendix C

Plaintiffs themselves discuss SOCE as a type of therapy, intended to bring about some form of change in the client. *See, e.g.*, Decl. of Dr. Tara King, ¶ 12 (discussing SOCE as a form of counseling involving the "traditional psychodynamic process" to effect "change" in the client's sexual orientation); Decl. of Dr. Ron Newman, ¶ 8 ("I also believe that change is possible and have personally counseled individuals who have successfully reduced or eliminated their unwanted same-sex attractions, behaviors, or identity."); Decl. of Dr. Joseph Nicolosi, ¶ 11 (discussing SOCE as a means to eliminate or reduce a client's unwanted same-sex sexual attractions).[24] Here, Plaintiffs' explanation of their roles and boundaries in the counselor-client relationship leads to the conclusion that counseling is not "conduct that is intended to be communicative" because the counselor's goal is to apply traditional mental health treatment methods and principles to effect a change in the client's sexual orientation. SOCE counseling is not a means of communication to express any particular viewpoint; rather it is a means of treatment intended to bring about a change in the mental health and psyche of the client who desires and seeks out such a change. I therefore do not

24. Moreover, Plaintiffs repeatedly point out that they only engage in SOCE with clients who approach them seeking such a change; indeed, Plaintiffs explain that it would be unethical for them to try to impose their own personal viewpoint on a client. *See, e.g.*, Decl. of Dr. Tara King, ¶ 10 ("It is unethical to attempt to impose any kind of ideology or framework on a client in counseling, so I do not even raise SOCE discussions unless a client wants to engage in such counseling."); *id.*, ¶¶ 12-13; Decl. of Dr. Joseph Nicolosi, ¶¶ 7-8.

find that SOCE counseling, as performed by Plaintiffs, satisfies the *Bartnicki* requirement of conduct that is intended to be communicative.

Moreover, SOCE counseling is not like other forms of conduct traditionally found to be "inherently expressive," such as the burning of a draft card in *O'Brien* or the burning of a flag in *Texas v. Johnson*, 491 U.S. 397, 405-406, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989).[25] In these

25. In *Bartnicki v. Vopper*, 200 F.3d at 120, *aff'd*, 532 U.S. 514, 121 S. Ct. 1753, 149 L. Ed. 2d 787 (2001), the Third Circuit provided cited several examples of Supreme Court cases addressing expressive conduct. *See Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 111 S. Ct. 2456, 115 L. Ed. 2d 504 (1991) (reversing circuit court decision finding Indiana statute prohibiting complete nudity in public places not an unconstitutional abridgement of First Amendment speech rights related to exotic dancing); *Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 705, 106 S. Ct. 3172, 92 L. Ed. 2d 568 (1986) (holding that "unlike the symbolic draft card burning in *O'Brien*, the sexual activity carried on in this case manifests absolutely no element of protected expression" and thus statute authorizing closure of premises did not implicate First Amendment concerns.); *United States v. Albertini*, 472 U.S. 675, 105 S. Ct. 2897, 86 L. Ed. 2d 536 (1985) (finding federal statute making it unlawful to reenter a military base after having been barred by the commanding officer did not implicate First Amendment concerns because "the First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interest"); *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293-299, 104 S. Ct. 3065, 82 L. Ed. 2d 221 (1984) (assuming without deciding that overnight camping in connection with a demonstration was expressive conduct, but nevertheless

cases, there was a clear distinction between the conduct that the statute sought to govern and the expressive conduct incidentally affected by the statute. Here, by contrast, Plaintiffs have identified no conduct, let alone any expressive conduct, other than that covered by A3371. Thus, Plaintiffs' claim is more appropriately governed by *Giboney*, which affords no protection to speech that is integrally part of validly prohibited conduct. *Giboney*, 336 U.S. at 498 ("It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now."); *Rumsfeld*, 547 U.S. at 66 ("If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it. For instance, if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, we would have to apply *O'Brien* to determine whether the Tax Code violates the First Amendment. Neither *O'Brien* nor its progeny supports such a result."); *United States v. Schiavo*, 504 F.2d 1, 21 n.9 (3d Cir. 1974) ("Freedom of expression can

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concluding that National Park Service regulation prohibiting camping in Lafayette Park did not violate the First Amendment); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992) (Minnesota statute prohibiting display of certain objects, including a burning cross or Nazi swastika, improperly regulated expressive conduct and violated the First Amendment because it was not narrowly tailored). Significantly, all of these cases concern expressive conduct different than the actual conduct the statute or regulation seeks to prohibit.

be suppressed if, and to the extent that, it is so brigaded with illegal action as to be an inseparable part of it."). Similarly, I find that Plaintiffs have not shown that A3371 has an incidental effect on expressive conduct, and thus, *O'Brien* does not govern Plaintiffs' challenge to A3371. Instead, I apply rational basis review. *See Sammon*, 66 F.3d at 645 & nn.9-10.

"Where rational basis review is appropriate, a statute withstands a substantive due process challenge if the state identifies a legitimate state interest that the legislature rationally could conclude was served by the statute."[26] *Sammon*, 66 F.3d at 644; *see Scavone v. Pa. State Police*, 501 F. App'x 179, 181 (3d Cir. 2012). "'The law need not be in every respect consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular legislative measure was a rational way to correct it.'" *Rogin v. Bensalem Township*, 616 F.2d 680, 689 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029, 101 S. Ct. 1737, 68 L. Ed. 2d 223 (1981) (quoting *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88, 75 S. Ct. 461, 99 L. Ed. 563 (1955)); *see also Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 682 (3d Cir. 1991), *cert. denied*, 503 U.S. 984, 112 S. Ct. 1668, 118 L. Ed. 2d 389 (1992); *Mabey Bridge & Shore, Inc. v. Schoch*, 666 F.3d 862, 876 (3d Cir. 2012). When legislation is being tested under rational basis review, "those challenging the legislative judgment must convince the court that the

26. Because I have rejected Plaintiffs' First Amendment free speech challenge, my analysis here turns on whether there is any substantive due process violation.

legislative facts on which the classification [of the statute] is apparently based could not reasonably be conceived as true by the governmental decisionmaker."[27] *Id.* (quoting *Vance v. Bradley*, 440 U.S. 93, 111, 99 S. Ct. 939, 59 L. Ed. 2d 171 (1979)); *see also Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1034-35 (3d Cir.), *cert. denied*, 482 U.S. 906, 107 S. Ct. 2482, 96 L. Ed. 2d 375 (1987). Indeed, "those attacking the rationality of the legislative classification have the burden 'to negat[e] every conceivable basis which might support it.'" *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993) (quoting *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364, 93 S. Ct. 1001, 35 L. Ed. 2d 351 (1973)); *see, e.g., Heller v. Doe*, 509 U.S. 312, 319-20, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993) (finding that laws scrutinized under rational basis review are "accorded a strong presumption of validity"). Ordinarily, that burden is nearly insurmountable. "[C]ourts are compelled under rational-basis review to

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27. The Third Circuit has repeatedly cautioned that a court engaging in rational basis review is not entitled

> to second guess the legislature on the factual assumptions or policy considerations underlying the statute. If the legislature has assumed that people will react to the statute in a given way or that it will serve the desired goal, the court is not authorized to determine whether people have reacted in the way predicted or whether the desired goal has been served.

Sammon, 66 F.3d at 645. Thus, the sole question is "whether the legislature rationally might have believed the predicted reaction would occur or that the desired end would be served." *Scavone*, 501 F. App'x at 181.

accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Heller*, 509 U.S. at 321 (internal quotation marks and citations omitted); *N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 399 (3d Cir. 2012).

Importantly, a state need not provide justification or rationale for its legislative decision. Indeed, the Supreme Court has held that "legislative choice[s] [are] not subject to court factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications*, 508 U.S. at 315; *N.J. Retail Merchs.*, 669 F.3d at 399. It is not the courts' role, under a rational basis review, "'to judge the wisdom, fairness, or logic of legislative choices.'" *Parker v. Conway*, 581 F.3d 198, 202 (3d Cir. 2009) (quoting *Beach Commc'ns*, 508 U.S. at 313). Nevertheless, the court must still determine "whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory." *Nebbia v. New York*, 291 U.S. 502, 536, 54 S. Ct. 505, 78 L. Ed. 940 (1934).

Here, the State's professed interest is in protecting minors from professional counseling it deems harmful. It is beyond debate that the State has an interest in protecting vulnerable groups, *Washington*, 521 U.S. at 731, which includes minors. *American Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 251 (3d Cir. 2003) ("[T]here is a compelling interest in protecting the

physical and psychological well-being of minors." (Quoting *Sable Commc'n of California, Inc. v. F.C.C.*, 492 U.S. 115, 126, 109 S. Ct. 2829, 106 L. Ed. 2d 93 (1989).[28] A3371 accomplishes this by ensuring that licensed professionals who engage in counseling do not perform SOCE on minors. Contrary to Plaintiffs' arguments, it is immaterial whether there is any actual evidence of harm from SOCE; for A3371 to have a rational basis, it is sufficient that the legislature could reasonably believe that SOCE conveyed no benefits and potentially caused harm to minors. *Beach Communications*, 508 U.S. at 315. The legislative findings set forth in A3371 support such a conclusion. *See generally* N.J.S.A. 45:1-54. For example, the legislature found:

- "Being lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming";

- "[S]exual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people";

- "[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";

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28. Beyond that, the Supreme Court has recognized that "[t]he mental health of our citizenry, no less than its physical health, is a public good of transcendent importance," *Jaffee v. Redmond*, 518 U.S. 1, 11, 116 S. Ct. 1923, 135 L. Ed. 2d 337 (1996), and that states also have "an interest in protecting the integrity and ethics of the medical profession." *Washington v. Glucksberg*, 521 U.S. at 731.

- "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'"; and

- "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 . . . .'"

Id. It is also immaterial that some of the legislature's findings and declarations address SOCE with respect to adults, as opposed to minors. It is certainly rational for the legislature to believe that the potential harms that attend SOCE for adults exist at least equally for minors. *See Scavone*, 501 Fed. Appx. at 181 (explaining the rational basis inquiry as "whether the legislature rationally might have believed the predicted reaction would occur or that the desired end would be served"). Finally, because in applying the rational basis test I rely only on the legislature's stated findings to determine whether there is a rational basis for A3371—indeed, I need not even rely on those findings, as long as I can conceive of some rational basis for the statute—Plaintiffs' arguments attacking the validity of the studies and reports relied on by the

legislature carry no weight in the analysis.[29] *See N.J. Retail Merchs.*, 669 F.3d at 399; *Beach Communications*, 508 U.S. at 315.

Similarly, A3371's prohibition on the practice of SOCE counseling is rationally related to the harm the statute seeks to prevent. A3371 targets only licensed professionals who engage in professional counseling of minors, and restricts them from performing the specific type of conduct—SOCE counseling—the legislature deemed harmful. This nexus is more than adequate to satisfy rational basis review. *Id.*

In sum, I conclude that: (1) A3371 on its face does not target speech; (2) "counseling" is not constitutionally protected speech merely because it is primarily carried out through talk therapy; (3) no speech or expressive conduct is incidentally burdened by A3371's prohibition, and thus (4) rational basis review is appropriate for adjudging the statute's constitutionality, which is easily satisfied by the stated legislative findings and the statute's purpose.

C. A3371 is Neither Vague Nor Overbroad

In connection with their free speech challenge, Plaintiffs also assert that A3371 is both unconstitutionally vague and overbroad. These arguments are grounded in Plaintiffs' contention that A3371 regulates speech.

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29. For that reason, I need not consider the additional evidentiary submissions filed by Plaintiffs and Intervenor, and thus I need not rule on their admissibility. *See supra*, f.n. 15.

Having determined that A3371 covers conduct only, the majority of Plaintiffs' arguments in this regard no longer apply. I nevertheless address whether, as an otherwise constitutionally permissible, rational regulation of conduct, A3371 is impermissibly vague or overbroad.

1. Vagueness

Plaintiffs contend that A3371 is unconstitutionality vague because Plaintiffs do not know what type of speech or conduct is actually prohibited by the statute. The "vagueness inquiry is grounded in the notice requirement of the Fourteenth Amendment's due process clause." *J.S. v. Blue Mt. Sch. Dist.*, 650 F.3d 915, 935 (3d Cir. 2011) (citing *City of Chicago v. Morales*, 527 U.S. 41, 56, 119 S. Ct. 1849, 144 L. Ed. 2d 67 (1999)). A statute will be considered void for vagueness if it does not allow a person of ordinary intelligence to determine what conduct it prohibits, or if it authorizes arbitrary enforcement. *Id.; Hill v. Colorado*, 530 U.S. 703, 732, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000). However, "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). Indeed, voiding a democratically enacted statute on grounds that it is unduly vague is an extreme remedy. *Id.* More particularly, a facial vagueness attack on a statute that does not infringe on constitutionally protected freedoms—as is the case in this matter—can succeed only if the statute is incapable of any valid application. *Steffel v. Thompson*, 415 U.S. 452, 474, 94 S. Ct. 1209, 39 L. Ed. 2d 505 (1974); *Hoffman Estates v. Flipside, Hoffman Estates,*

Inc., 455 U.S. 489, 495-95, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982); *Brown v. City of Pittsburgh*, 586 F.3d 263, 269 (3d Cir. 2009) ("[A] successful facial challenge requires the challenger to establish that no set of circumstances exists under which the Act would be valid." (internal quotation marks omitted.)); *Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d 1133, 1146 (9th Cir. 2009) (explaining that a statute will survive a facial vagueness challenge so long as "it is clear what the statute proscribes in the vast majority of its intended applications"). In that regard, it is significant to bear in mind that speculation about possible or hypothetical applications does not suffice; a statute that is valid "in the vast majority of its intended applications" cannot be struck down on a facial challenge. *Hill v. Colorado*, 530 U.S. 703, 733, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000).

Moreover, in the context of a statutory proscription that purports to regulate a targeted industry or profession, a slightly different type of analysis applies: "if the statutory prohibition involves conduct of a select group of persons having specialized knowledge, and the challenged phraseology is indigenous to the idiom of that class, *the standard is lowered* and a court may uphold a statute which uses words or phrases having a technical or other special meaning, well enough known to enable those within its reach to correctly apply them." *United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1993) (emphasis added) (quoting *Precious Metals Assocs., Inc. v. Commodity Futures Trading Comm'n*, 620 F.2d 900, 907 (1st Cir. 1980), in turn quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed.

322 (1926) (internal quotations omitted)); *cf. Village of Hoffman Estate*, 455 U.S. at 498 ("[E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because . . . the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.").

Plaintiffs contend that the term "sexual orientation" and the phrase "sexual orientation change efforts" are impermissibly vague. The latter challenge can be quickly dismissed, as it is based on, and significantly overlaps with, Plaintiffs' substantive free speech challenge. Indeed, Plaintiffs' primary theory in this case is that it is unclear whether under A3371 Plaintiffs can talk *about* SOCE to their clients, even if they are not engaging in actual SOCE. Plaintiffs thus argue that A3371 burdens speech because Plaintiffs will either be chilled from, or disciplined for, merely speaking about SOCE. As my earlier discussion makes clear, the reasonable reading of A3371, as well as the State's position throughout this litigation, limits the application of the statute to the actual practice of SOCE. This limitation resolves Plaintiffs contention that SOCE, as a phrase, is unconstitutionally vague.

The statute defines SOCE by providing an illustrative list of practices: "'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."[30] N.J.S.A. 45:1-55(b). Given this definition, it cannot be said that the statute does not allow a person of ordinary intelligence to determine what conduct it prohibits, and therefore it is not facially vague.

Nothing in A3371 prevents a counselor from mentioning the existence of SOCE, recommending a book on SOCE or recommending SOCE treatment by another unlicensed person such as a religious figure or recommending a licensed person in another state. The statute does not require affirmation of a patient's homosexuality. Even if, "at the margins," there is some conjectural uncertainty as to what the statute proscribes, such uncertainty is insufficient to void the statute for vagueness because "it is clear what the statute proscribes in the vast majority of its intended applications," namely counseling intended to alter a minor patient's sexual orientation. *See Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001) (quoting *Hill*, 530 U.S. at 733). Moreover, Plaintiffs are licensed professionals who engage in counseling, and if some Plaintiffs are not familiar with *how* to practice SOCE, Plaintiffs have never suggested that they, or any person who professionally

30. The statute further provides that "'[s]exual orientation change efforts' shall not include . . . 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." N.J.S.A. 45:1-55(b).

counsels, is wholly unfamiliar with the *idea* of SOCE.[31] *See Weitzenhoff*, 35 F.3d at 1289. Thus, Plaintiffs' facial vagueness attack on the term "sexual orientation change efforts" is without merit.

Plaintiffs also challenge the term "sexual orientation," noting that it is undefined in the statute, and citing the APA Task Force that explained that "[s]ame-sex sexual attractions and behavior occur in the context of a variety of sexual orientations . . . and . . . is fluid or has an indefinite outcome." Plaintiffs reason that because the term "sexual orientation" has subjective and interchanging meanings, its usage in the challenged statute makes the statute vague. I am not persuaded that the term "sexual orientation" is unconstitutionally vague.

Plaintiffs, in their own declarations, demonstrate that they understand what the term sexual orientation means

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31. For similar reasons, I reject Plaintiffs' reliance on *Keyishian v. Board of Regents of University of State of N.Y.*, 385 U.S. 589, 599, 87 S. Ct. 675, 17 L. Ed. 2d 629 (1967), which held that a statute prohibiting employing any teacher who "advocates, advises, or teaches the doctrine of forceful overthrow of the government" was unconstitutionally vague because "[i]t w[ould] prohibit the employment of one who merely advocates the doctrine in the abstract without any attempt to indoctrinate others." *Id.* *Keyishian* is easily distinguished from this case; Plaintiffs, as admitted practitioners of SOCE, cannot claim that the phrase "sexual orientation change efforts" creates uncertainty as to what a therapist can and cannot do, as was the case for teachers in *Keyishian.* Indeed, A3371 expressly targets a specific form of therapy known to the community in which it is practiced. *See Pickup*, 2012 U.S. Dist. LEXIS 172034, 2012 WL 6021465, at *14.

and how that term relates to the conduct prohibited by A3371. *See, e.g.*, Decl. of Dr. Tara King, ¶ 4 ("We offer counseling on numerous issues, including . . . sexual orientation change efforts") *id.*, ¶ 5 ("I am *a former lesbian* who went through SOCE counseling." (Emphasis added.); Decl. of Dr. Ron. Newman, ¶ 8 ("Part of my practice involves what is often called sexual orientation change efforts."). Indeed, Plaintiffs are bringing this suit precisely because they wish to engage in SOCE. For Plaintiffs to argue on the one hand that their ability to engage in SOCE is impermissibly restricted by A3371, and on the other hand claim that A3371 is unconstitutionally vague because it fails to define "sexual orientation" strains credulity. Regardless, because I find that a person of ordinary intelligence—let alone Plaintiffs—would understand what the term sexual orientation means, A3371 is not vague for the inclusion of this term.[32]

Canvassing case law on this subject, I have found several courts that have determined that the term sexual

32. For the same reason, I am unpersuaded by Plaintiffs' reliance on the recent revision of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Health Disorders, DSM-V. *See* Pl. Supp. Authority, Dkt. No. 55. According to Plaintiffs, the DSM-V initially classified pedophilia as "sexual orientation," but then later changed the classification to "sexual interest," which Plaintiffs claim shows that the definition of sexual orientation is constantly changing. As the State correctly points out, and indeed, Plaintiffs' own filing shows, the APA released a statement explaining that the initial classification of pedophilia as a sexual orientation was merely a typographical error. Thus, Plaintiffs' claim that sexual orientation lack clear definition based on the DSM-V is meritless, and in fact, borders on being frivolous.

orientation is not unconstitutionally vague. *See Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 545-47 (W.D. Ky. 2001) (relying on Black's dictionary definition, rejecting vagueness challenge to statute banning discrimination on the basis of sexual orientation), *rev'd on other grounds*, 53 Fed. Appx. 740 (6th Cir. 2002); *United States v. Jenkins*, 909 F. Supp. 2d 758, 778-79 (E.D. Ky. 2012). Most recently, the Ninth Circuit reached the same conclusion in *Pickup*, 728 F.3d. at 1059 ("Neither is the term 'sexual orientation' vague. Its meaning is clear enough to a reasonable person and should be even more apparent to mental health providers."). Likewise, the Supreme Court issued an opinion last term on the constitutionality of Section Three of the Defense of Marriage Act, 1 U.S.C. § 7, dealing with the Federal government's authority to define marriage, for federal law purposes, as between members of the opposite sex and to the exclusion of those of the same sex. *See United States v. Windsor*, —U.S.—, 133 S.Ct. 2675, 186 L. Ed. 2d 808 (2013). In discussing the issue of same-sex marriages, the majority and dissenting opinions employed the term "sexual orientation" several times; significantly, none of the authors of these opinions felt it necessary to define this term. Accordingly, I am not persuaded that the term "sexual orientation" is vague to the reasonable individual—and particularly not to mental health counselors—and thus, Plaintiffs' vagueness challenge is dismissed.

2. Overbreadth

Plaintiffs lastly raise an overbreadth claim to A3371 as part of their First Amendment free speech challenge

to the statute. Under the overbreadth doctrine, a law affecting speech will be deemed invalid on its face if it prohibits "a substantial amount of constitutionally protected speech." *City of Houston v. Hill*, 482 U.S. 451, 466, 107 S. Ct. 2502, 96 L. Ed. 2d 398 (1987). In contrast, "where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973). In such cases, "the mere fact that one can conceive of *some* impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984) (emphasis added). Thus, as was the case with their vagueness challenge, much of Plaintiffs' overbreadth argument is premised on A3371 being a statute that restricts or incidentally burdens speech. Having found that the statute only regulates conduct, and not speech in any constitutionally protected form, Plaintiffs' arguments regarding the statute's overbreadth are largely irrelevant.

Moreover, the overbreadth doctrine is more appropriately raised by a party "whose own activities are unprotected . . . [to] challenge a statute by showing that it substantially abridges the rights *of other parties not before the Court.*" *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 634, 100 S. Ct. 826, 63 L. Ed. 2d 73 (1980) (emphasis added). Under this principle, courts should be reluctant to entertain a facial overbreadth challenge "where the parties challenging the statute are those who

desire to engage in protected speech that the overbroad statute purports to punish." *Brockett v. Spokane Arcades*, 472 U.S. 491, 504, 105 S. Ct. 2794, 86 L. Ed. 2d 394 (1985). As one court in this district has explained:

> Unless it appears that "*any attempt to enforce*" the challenged legislation "would create an unacceptable risk of the suppression of ideas," a court should declare an entire statute invalid on its face only if the record indicates that the challenged statute will have a different impact upon third parties not before the court than it has upon the plaintiffs.

Presbytery of New Jersey of the Orthodox Presbyterian Church v. Florio, 902 F. Supp. 492, 517 (D.N.J. 1995) (citing *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801, 104 S. Ct. 2118, 80 L. Ed. 2d 772 (1984)), *aff'd sub nom., Presbytery of New Jersey of the Orthodox Presbyterian Church v. Whitman*, 99 F.3d 101 (3d Cir. 1996); *see also id.* ("Courts should not engage in overbreadth analysis where a plaintiff claims that a statute is overbroad precisely because it applies to him." (citing *Moore v. City of Kilgore*, 877 F.2d 364, 390-92 (5th Cir. 1989))).

Here, the State has represented throughout this litigation that it only intends to enforce A3371 against licensed professionals who actually conduct SOCE as a method of counseling, not against those who merely discuss the existence of SOCE with their clients. Because A3371 is constitutional with respect to its prohibition of the practice

of SOCE, as explained *supra* in this Opinion, there exists at least one constitutional means of enforcing the statute. Thus, on this basis alone, Plaintiffs' overbreadth challenge fails. *Florio*, 902 F. Supp. at 517. For similar reasons, I also find that A3371 does not encroach on any protected First Amendment speech, as the statute by its own terms seeks to regulate the "practice" of SOCE by a licensed professional, and not any speech, public or private, by that professional or other individuals; thus there is not a "real, but substantial" risk of overbreadth when A3371 is "judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 613. Accordingly, Plaintiffs have not shown that A3371 is unconstitutionally overbroad, and Count I is dismissed.

VI. First Amendment — Free Exercise of Religion

Plaintiffs maintain that in addition to their speech being unlawfully constrained, A3371 infringes on their First Amendment right to exercise their sincerely held religious beliefs that changing same-sex attraction or behavior is possible. Therefore, Plaintiffs reason, A3371 imposes a substantial burden on those religious beliefs because it prohibits them from providing spiritual counsel and assistance on the subject matter of same-sex attractions. Plaintiffs' arguments fare no better under this theory.

Under the First Amendment, "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof." *Conestoga Wood Specialties Corp. v. Sec'y of the United States HHS*, 724 F.3d 377, 382-

83 (3d Cir. 2013). It is well-settled that, at its core, the Free Exercise Clause protects religious expression; however, it does not afford absolute protection. *See McTernan v. City of York*, 577 F.3d 521, 532 (3d Cir. 2009). Rather, where a law is "neutral and of general applicability[,]" it "need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice." *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) (citations omitted); *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890, 110 S. Ct. 1595, 108 L. Ed. 2d 876 (1990); *Stormans, Inc. v. Selecky*, 586 F.3d 1109, 1128 (9th Cir. 2012) ("right to freely exercise one's religion . . . does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes conduct that his religion prescribes.'"). If, on the other hand, the government action is not neutral and generally applicable, strict scrutiny applies, and the government action violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest. *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002).

Government action is not neutral and generally applicable if it burdens religious conduct because of its religious motivation, or if it burdens religiously motivated conduct but exempts substantial comparable conduct that is not religiously motivated. *See Hialeah*, 508 U.S. at 543-46; *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004); *Lukumi*, 508 U.S. at 543-46; *FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 364-66 (3d Cir.

1999). On the other hand, "[a] law is 'neutral if it does not target religiously motivated conduct [whether] on its face or as applied in practice." *Conestoga Wood Specialities Corp. v. Sebelius*, 917 F. Supp. 2d 394, 410 (E.D. Pa. 2012). Further, when the law is neutral, the government cannot advance its interests solely by targeting religiously motivated conduct. Instead, the regulation must be generally applicable. *See Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 242 (3d Cir. 2008).

Here, A3371 makes no reference to any religious practice, conduct, or motivation. Therefore, on its face, the statute is neutral. Plaintiffs argue that the provisions of A3371 will disproportionately affect those motivated by religious belief because A3371 effectively engages in impermissible "religious gerrymandering" by providing individualized exemptions from the general prohibitions. Plaintiffs identify these categories of exemptions: (1) minors seeking to transition from one gender to another; (2) minors struggling with or confused about heterosexual attractions, behaviors, or identity; (3) counseling that facilitates exploration and development of same-sex attraction, behaviors, or identity; (4) individuals over the age of 18 who are seeking to reduce or eliminate same-sex attraction; and (5) counseling provided by unlicensed persons. Contrary to Plaintiffs' contentions, A3371 is one of generally applicability, and therefore, it is only subject to a rational basis test.

To begin, there can be no serious doubt that the Legislature enacted A3371 because it found that SOCE "poses critical health risks" to minors. *See* N.J.S.A. 45:1-

54. By doing so, the Legislature exercised its regulatory powers to prohibit licensed mental health professionals in New Jersey from engaging in SOCE. There is no indication in the record that religion was a motivating factor in the passage of A3371. In fact, Plaintiffs have not suggested that the Legislature was motivated by any religious purpose. From its plain language, the law does not seek to target or burden religious practices or beliefs. Rather, A3371 bars all licensed mental health providers from engaging in SOCE with minors, regardless of whether that provider or the minor seeking SOCE is motivated by religion or motivated by any other purpose. Plainly, A3371 is neutral in nature. *See Brown v. City of Pittsburgh*, 586 F.3d 263, 284 (3d Cir. 2009) (finding no Free Exercise violation where challenged restrictions on protests near abortion clinic "app[lied] irrespective of whether the beliefs underpinning the regulated expression are religious or secular"). Because of the statute's neutrality, even if A3371 disproportionately affects those motivated by religious belief, this fact does not raise any Free Exercise concerns. *Lukumi*, 508 U.S. at 581 ("a law that is neutral . . . need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.").

The statute is also generally applicable because A3371 does not suppress, target, or single out the practice of any religion because of religious conduct. At the outset, the Court disagrees with Plaintiffs' characterization that A3371 carves out certain exceptions. Rather, those "exemptions" are areas that A3371 does not seek to

regulate because they fall outside the purpose of the statute. Nevertheless, addressing Plaintiffs' arguments, the "exemptions" to which Plaintiffs point do not undermine the purposes of the law. According to Plaintiffs, the first "exemption" in A3371 is for "counseling for a person seeking to transition from one gender to another"; that is, counseling not related to changing sexual orientation or gender identity, but toward assisting someone seeking to live consistently with his or her gender identity. This exemption does not undermine the purposes of A3371. In fact, it is consistent with the Legislature's concern that conversion therapy is harmful. Next, that unlicensed counselors are not covered by the statute also does not undermine the purpose of the statute. As the Court has discussed earlier, pursuant to its police power, the State only aimed to regulate those professionals who are licensed. Stated differently, it is the State's role to regulate its professionals — medical or otherwise — and therefore, because unlicensed professionals do not fall within the State's comprehensive regulatory schemes, this type of "exemption" neither undermines the statute's purpose nor does it somehow change the statute's general applicability.

Moreover, to the extent that the Legislature distinguished between SOCE provided to minors and adults, this distinction does not render the law not generally applicable. Indeed, because the Legislature determined, pursuant to its regulatory powers, that SOCE treatment poses serious health risks to minors, the limited reach of the statute does not change the nature of the statute, particularly in light of the fact that the Legislature has a strong interest in protecting

minors, a vulnerable group in society. *See, supra*, p. 49. Finally, and more importantly, A3371 does not contain a mechanism for individual exemptions nor does it exempt a substantial category of conduct that is not religiously motivated from its prohibition on the practice of SOCE. Instead, the provision prohibits all state licensed mental health providers from practicing SOCE. Finally, A3371 does not prohibit any religious leaders, who are not licensed counselors, from practicing SOCE. This fact further demonstrates that A3371 has no religious underpinnings and therefore, it does not selectively impose any type of burden on religiously motivated conduct. Accordingly, A3371 is generally applicable since it does not impermissibly target any religious belief. Based upon that finding, the rational basis test applies. For the same reasons why A3371 passes constitutional muster for free speech purposes, it passes rational basis review in this context as well.

Lastly, Plaintiffs argue that even if A3371 is a neutral and generally applicable law, A3371 is nevertheless subject to strict scrutiny as a violation of the "hybrid rights" doctrine. I summarily reject Plaintiffs' invitation to apply the hybrid rights doctrine, as the Third Circuit has declined to apply this theory to Free Exercise claims. *Brown*, 586 F.3d at 284 n.24 ("Like many of our sister courts of appeals, we have not endorsed this theory.").

Count IV of the Complaint is dismissed.

VII.CONCLUSION

For the reasons set forth above, Garden State's motion for permissive intervention is **GRANTED**. Plaintiffs' motion for summary judgment is **DENIED**. Defendants' cross motion for summary judgment is **GRANTED** in its entirety. Accordingly, all of Plaintiffs' federal and state constitutional claims against Defendants are **DISMISSED**, and Plaintiffs have no standing to bring any third party claims on behalf of their minor clients and the clients' parents.

DATED: November 8, 2013

/s/_____
Freda L. Wolfson
United States District Judge

APPENDIX D — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF NEW JERSEY, FILED NOVEMBER 8, 2013

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

Civil Action No. 13-5038

TARA KING, ED.D., *et al.*,

Plaintiffs,

vs.

CHRISTOPHER CHRISTIE,
Governor of New Jersey, *et al.*,

Defendants.

ORDER

THIS MATTER having been opened to the Court by Demetrios K. Stratis, Esq., counsel for Plaintiffs, Tara King ED.D. and Ronald Newman, Ph.D., who are individual licensed therapists, as well as the National Association for Research and Therapy of Homosexuality and the American Association of Christian Counselors (collectively, "Plaintiffs"), and by Robert T. Lougy, Esq., counsel for Defendants, Governor Christie, Eric T. Kanefsky, Director of the New Jersey Dep't of Law and Public Safety, 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 (collectively, "Defendants"), on cross motions for summary judgment; it appearing that Proposed Intervenor Garden State Equality ("Intervenor"), through its counsel, Andrew Bayer, Esq., moved for permissive intervention as a defendant and moved for summary judgment; it appearing that Plaintiffs oppose intervention by Garden State; the Court having considered the parties' submissions in connection with the motions, and having heard oral argument on October 1, 2013, for the reasons set forth in the Opinion filed on even date, and for good cause shown,

IT IS on this 8th day of November, 2013,

ORDERED that Garden State's motion to intervene is **GRANTED**;

ORDERED that Plaintiffs' motion for summary judgment is **DENIED**;

ORDERED that Defendants' cross motion for summary judgment is **GRANTED**;

ORDERED that Garden State's Cross Motion for Summary Judgment is **GRANTED**,

ORDERED that Plaintiffs' Motion to Reconsider Dispensing of Evidence and Deem Certain Facts Admitted is **DENIED**; and it is further

ORDERED that this case shall be marked as **CLOSED**.

/s/_____
Freda L. Wolfson
United States District Judge

APPENDIX E — 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)

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Assemblywomen Vainieri, Huttle, Lampitt, Tucker,
Assemblyman Wisniewski, Assemblywomen Caride,
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Appendix E

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 E

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.