CASE NO. 13-4429
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

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"); and AMERICAN ASSOCIATION OF CHRISTIAN COUNSELORS ("AACC"),

Plaintiff/Appellants,

v.

CHIRSTOPHER CHRISTIE, Governor of the State of New Jersey, in his official capacity; ERIC T. KANEFSKY, Director of the New Jersey Dep't of Law and Public Safety: Division of Consumer Affairs, in his official capacity; MILAGROS COLLAZO, Executive Director of the New Jersey Board of Family Therapy Examiners, in her official capacity; J. MICHAEL WALKER, Executive Director of the New Jersey Board of Psychological Examiners, in his official capacity; and PAUL JORDAN, President of the New Jersey State Board of Medical Examiners, in his official capacity,

Defendant/Appellees

AND

GARDEN STATE EQUALITY,

Intervenor-Defendant/Appellee.

BRIEF OF AMICI CURIAE AGUDATH ISRAEL OF AMERICA AND NEFESH

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[1] We thank Mark Kahn, a student at Georgetown Law School, for drafting this brief.

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Interest of Amici Curiae

Agudath Israel of America is a ninety-two year old national grassroots Orthodox Jewish movement with constituents and branches across the United States, including New Jersey. It is a tax exempt, nonprofit organization arranged under Section 501(C)(3) of the Internal Revenue Code. Its local affiliate in New Jersey is Agudath Israel of New Jersey, which advocates for the interests of its members in this State. Agudath Israel has a long history of submitting *amicus curiae* briefs in cases involving religious liberty in general, and the rights of Orthodox Jews to practice their religion in particular.

Nefesh is an international organization of Orthodox Jewish mental health professionals, including psychiatrists, psychologists, and other therapists, including many in New Jersey. Nefesh views with concern and alarm the prohibition of therapy to assist those who wish help with their sexual orientation.

The instant case is of great interest and concern to Agudath Israel and Nefesh and their respective members. The central issue in this case is whether, by prohibiting the practice of Sexual Orientation Change Efforts ("SOCE"), the State has impermissibly infringed upon Plaintiff-appellant's First Amendment right to freedom of speech. We believe it has.[2]

[2] We have received consent from the appellants and appellee for the submission of this brief.

Legal Argument

I. PSYCHOLOGICAL COUNSEL, AS THE COMMUNICATION OF IDEAS, IS "PURE SPEECH" AND COMMANDS THE FULL PANOPLY OF RIGHTS AFFORDED BY THE FIRST AMENDMENT.

Psychological counsel is the communication of ideas between doctor and patient. As the communication of ideas, psychological counsel constitutes pure speech. It therefore commands the full panoply of rights afforded under the First Amendment of the United States Constitution. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (stating the freedom of speech protects the direct communication of ideas). The lower court's failure to recognize psychological counsel as pure speech was incorrect.

Under the First Amendment, "Congress shall make no law…abridging the freedom of speech." U.S. Const. Amend. I. The constitutional safeguards of the First Amendment were "fashioned to assure [the] unfettered interchange of ideas for the bringing about of political and social changes." *Roth v. United States*, 354 U.S. 476, 484 (1957). The government may not prohibit the communication of an idea simply because society finds the idea itself offensive or disagreeable. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989). "When a statutory provision burdens First Amendment rights, it must be justified by a compelling state interest." *Federal Election Com'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986). The lower court incorrectly held psychological counsel was not the communication of ideas and, therefore, was not pure speech. Accordingly, it failed to hold A3371 to a compelling state interest standard. *King v. Christie*, 2013 WL 5970343, *10.

The lower court relied primarily upon flawed statutory interpretation in rendering its decision. It stated:

> Even a cursory review reveals that the [A3371] 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

King v. Christie, 2013 WL 5970343, *10 (emphasis supplied). The lower court further stated "[n]othing 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…the statute only prohibits a licensed professional from engaging in counseling for the purpose of actually practicing SOCE." *King v. Christie*, 2013 WL 5970343, *11 (citing *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013)).

Instead of engaging in "a holistic endeavor" in which it must give effect to "every word," *United Savings Ass'n v. Timbers of Inwood Forest Assoc., Ltd.*, 484 U.S. 365, 371 (1988); *Lowe v. SEC*, 472 U.S. 181, 207 n.53 (1985); *Scheidermann v. I.N.S.*, 83 F.3d 1517, 1524 (3d Cir. 1996), the lower court plucked a few phrases from A3371 out of context, assigned its own interpretation of their meaning and concluded that the remaining words were "immaterial." *See King v. Christie*, 2013 WL 5970343, *11. In the context of psychological counsel, "applying" principles of psychology means *speaking* with patients. There is no other conduct inherent in its "application." Indeed, "counsel" means "an exchange of opinions or ideas in order to reach a decision" or "advice or guidance, especially from a knowledgeable or experienced person." Webster's II New College Dictionary 263 (3d ed. 2005). Just because the lower court characterized

psychological therapy as conduct does not make it conduct. The lower court's say-so, without further justification or explanation is not sufficient. Absent proof of a compelling state interest to ban SOCE, therefore, A3371 unconstitutionally abridges First Amendment rights and should not be allowed.

The lower court's reliance upon the Ninth Circuit's precedent is similarly flawed. *See King v. Christie*, 2013 WL 5970343, *14 (citing *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013)). In *Pickup v. Brown*, the Ninth Circuit addressed whether a California State statute prohibiting the practice of Sexual Orientation Change Efforts ("SOCE")—the predecessor to A3371—unconstitutionally infringed upon the freedom of speech rights afforded under the First Amendment. Viewing First Amendment rights along a continuum, the Ninth Circuit equated the regulation of psychological therapy with the regulation of professional conduct. *Pickup v. Brown*, 728 F.3d at 1053; *see also Lowe v. SEC*, 472 U.S. at 232 (White, J., concurring) ("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."). The Ninth Circuit rejected the argument that "because psychoanalysis is the 'talking cure,' it deserves special First Amendment protection because it is 'pure speech.'" *National Association for the Advancement of Psychoanalysis v. California Board of Psychology* ("NAAP"), 228 F.3d 1054 (9th Cir.2000). It reasoned: "[T]he 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 v. Brown*, 728 F.3d at 1053 (internal quotation marks and ellipsis omitted).

Like the lower court, the Ninth Circuit fails to adequately articulate why psychological therapy is anything other than pure speech. It relies on the *purpose* of the therapy—the treatment of emotional suffering—as opposed to its *function*—speech. By so doing, it completely disregards the First Amendment. The Ninth Circuit's logic if extended to political speech, is the equivalent of characterizing political speech as not pure speech because its purpose is to effect political change. Under such a standard, any speech could *technically* be conduct and would undermine the significance of the First Amendment. The Ninth Circuit's logic is therefore flawed. Accordingly, absent a better-articulated explanation from the lower court as to why psychological therapy is speech, A3371 cannot be upheld as a regulation of conduct.

A. A3371 INFRINGES UPON THE ABILITY TO RECEIVE INFORMATION, WHICH IS A FUNDAMENTAL RIGHT AS A COROLLARY OF THE RIGHT TO FREEDOM OF SPEECH.

The First Amendment protects the right to receive information as a corollary of the right to speak. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 871-72 (1982) (plurality) ("Our Constitution does not permit the official suppression of ideas."), (Blackmun, J., concurring) ("[O]ur precedents command the conclusion that the State may not act to deny access to an idea simply because state officials disapprove of that idea. . . ."). A3371 deprives minors of that right during counseling sessions because it prohibits licensed counselors from offering SOCE counseling.

In *Griswold v. Connecticut*, 381 U.S. 479 (1965), the Supreme Court, in a plurality opinion, placed its imprimatur on the constitutional right to receive information. There, the appellants Griswold, the Executive Director of the Planned Parenthood League

of Connecticut ("the League"), and Buxton, the Medical Director of the League, gave information and instruction to married persons concerning contraception. Connecticut prosecuted them for violating a state statute which provided that "[a]ny person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined ... or imprisoned ... or be both fined and imprisoned" and "[a]ny person who assists, abets, counsels, causes, hires or commands another to commit any offense may be prosecuted and punished as if he were the principal offender." *Id.* at 480.

The Court struck down each provision as unconstitutional on a variety of grounds, including the First Amendment. The Court reasoned that:

> [T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read…and freedom of inquiry, freedom of thought, and freedom to teach…Without those peripheral rights the specific rights would be less secure.

Id. at 482-83.

The Third Circuit recognized that the First Amendment forbids laws that prohibit individuals from receiving information they are actively seeking and desire to receive. *See Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242, 1252 (3d Cir. 1992) ("[T]he First Amendment, like other constitutional guarantees, encompasses the 'penumbral' right to receive information to ensure its fullest exercise."). "[T]he First Amendment does not merely prohibit the government from enacting laws that censor information, but additionally encompasses the *positive right* of public access to information and ideas." *Id.* at 1255 (emphasis added). A3371 prevents all minors in New Jersey from receiving the viewpoint that SOCE counseling from a licensed professional may be beneficial to those who seek to reduce or eliminate their unwanted SSA. Here,

A3371 runs far afield of this firmly entrenched constitutional principle. A3371 prevents Plaintiffs from receiving counseling that their counselor has determined will be beneficial towards their goal of eliminating unwanted SSA. This government-sanctioned restriction on information and counseling it disapproves of is simply unconstitutional.

In *Virginia State Board of Pharmacy*, 425 U.S. 748 (1976), the Supreme Court articulated that the First Amendment commands more information, not less. In that case, in the context of commercial speech, Virginia banned pharmacists from advertising the prices of prescription drugs. *Va. State Bd. of Pharm*., 425 U.S. at 752. The stated rationale for the statute was to uphold pharmaceutical professionalism against the negative effects of price competition. The Supreme Court dismissed that justification and struck down the statute because the laws governing licensed pharmacists already imposed a high standard of care. *Id.* at 768-69. It determined that the advertisement ban was actually designed to keep the public in ignorance of drug prices, prevent them from "following the discount," and ultimately insulate ethical pharmacists from unethical ones who could operate at a lower cost. *Id.* at 769. The Supreme Court stated that the First Amendment commands the assumption that "information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id.* at 770.

The rule articulated in *Virginia State Board of Pharmacy is* most pronounced in the context of the medical profession. *See Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (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." (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977)); *see also United States v. Caronia*, 703 F.3d 149, 167 (2d Cir. 2012) (quoting *Sorrell*, 131 S. Ct. at 2664). Even more so, it applies with greater force in this area of the mental health profession, where psychological treatment consists entirely of speech ("talk therapy").

Like the advertising ban on prescription drug prices, the stated rationale for A3371 is to protect consumers from the presumed harms of SOCE counseling. A3371 imposes the very harm the State claims it intends to prevent, however, by forcing minors to seek out unlicensed and untrained counselors who are more likely to inflict irreversible emotional damage by providing counseling not subject to the requirements of mental health licensing boards in New Jersey. Moreover, like the laws in *Virginia State Board of Pharmacy*, A3371 suppresses information that plaintiffs have a right to hear. By so doing, A3371 also prevents Plaintiffs from receiving the information and counseling concerning the fact that SSA felt by a given individual may be harmful, may lead to unhappiness, or may not be the only way of living. It prevents them from receiving the counseling of licensed professionals who are best able to provide the information and expertise necessary to help them overcome unwanted sexual orientation, behavior, or identity. Because A3371 suppresses those ideas, it is unconstitutional.

The irrationality of the State's unconstitutional suppression of Plaintiffs' First Amendment rights is made further evident by other provisions regulating the mental health decisions of minors in New Jersey. "[A]ny minor 14 years of age or over may request admission to a psychiatric facility, special psychiatric hospital, or children's crisis intervention service provided the court on a finding that the minor's request is informed

and voluntary enters an order approving the admission." N.J. Ct. R. 4:74-7A(c). Additionally, "the minor may discharge himself or herself from the facility in the same manner as an adult who has voluntarily admitted himself or herself." *Id.* So, New Jersey finds it perfectly acceptable for minors over 14 years of age to check themselves into and out of psychiatric hospitals where they can be given powerful psychotropic medications, but finds them incapable of deciding to sit down and talk with a licensed mental health counselor to reduce or eliminate his or her unwanted sexual orientation, behavior, or identity. New Jersey has effectively decreed such a decision per se harmful to that minor, regardless of the lack of concrete and substantial evidence to the contrary, and the State forever prohibits all minors from receiving such counsel from a licensed mental health professional.

B. THE UNTIED STATES CONSTITUTION PROHIBITS THE ABRIDGMENT OF THE FREEDOM OF SPEECH, EVEN AS APPLIED TO ADOLESCENTS.

The United States Supreme Court has clearly and consistently ruled that children are entitled to the protections afforded by the United States Constitution and that the Bill of Rights is not for adults alone. *See Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *In re Gault*, 387 U.S. 1, 13 (1967). In *Tinker*, the Supreme Court claimed that "[s]tudents in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect." *Id.* at 511. In *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 74 (1976), the Supreme Court further clarified that "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess Constitutional rights."

In *West Virginia v. Barnette*, 319 U.S. 624 (1943), the Court held that, under the First Amendment, students could not be compelled to salute the United States flag as a means of promoting national unity and patriotism during the Second World War. In striking down the flag salute requirement, the Supreme Court expressly recognized that the protections of the First Amendment are fully applicable to students, and that their First Amendment rights cannot be infringed even for so lofty a purpose as the promotion of national unity in a time of war. Like the students in *West Virginia v. Barnette* and *Tinker*, minors in New Jersey are entitled to the protections afforded by the United States Constitution and the First Amendment. Because A3371 seeks to diminish minor's First Amendment rights, the State of New Jersey must present a compelling state interest justify its implementation. The APA Task Force Report, the primary source relied upon by the Legislature admitted that "[b]ecause of the *lack of empirical research* in this area, the conclusions must be viewed as tentative." (Appx., 000328) (emphasis added). More importantly, the report stated that "sexual orientation issues in children are virtually unexamined." (*Id.* at 000375). "There is a dearth of scientifically sound research on the safety of SOCE." (Appx., 000325). "Recent research *cannot provide conclusions* regarding efficacy or safety." (Appx., 000295) (emphasis added). Furthermore, some of the data showed that people benefitted from SOCE counseling. (Appx., 000326). Far from demonstrating a "grave and immediate" danger of harm, the legislative record offers only anecdotes and opinions to support a conclusion that SOCE counseling poses harm to children. Such conjecture does not suffice to impose a ban upon constitutionally protected speech. *Turner Broad Sys. Inc. v. FCC*, 512 U.S. 622, 664 (1994). Without

concrete proof that SOCE counseling is in fact harmful, therefore, A3371 should not be upheld.

II. A3371 IS A VIEWPOINT-BASED RESTRICTION AND SUCH RESTRICTIONS HAVE ALWAYS BEEN FOUND UNCONSTITUTIONAL.

Neither the Supreme Court nor any other court has held up a viewpoint-based speech restriction. A finding of viewpoint discrimination is dispositive. *See Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667 (2011). "In the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995); *see also Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cnty.*, 653 F.3d 290, 296 (3d Cir. 2011) ("Viewpoint discrimination is an anathema to free expression and is impermissible in both public and nonpublic fora"); *Child Evangelism Fellowship of N.J., Inc. v. Stafford Tp. Sch. Dist.*, 386 F.3d 514, 527-28 (3d Cir. 2004) ("To exclude a group simply because it is controversial or divisive is viewpoint discrimination," and a "mere desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint is not enough to justify the suppression of speech") (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829. Speech restrictions are only permissible "as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992). However, "a regulation that is in reality a façade for viewpoint-based discrimination is presumed

unconstitutional." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985)).

A3371 is a viewpoint-based regulation because it allows counselors to discuss, and clients to hear, about the subject of sexual orientation, behavior, or identity, but precludes a particular viewpoint on that subject, namely that sexual orientation, behavior, or identity can change. A3371 silences one viewpoint—change—on an otherwise permissible subject—sexual orientation, behavior, or identity. As defined in A3371, SOCE is counseling that seeks to "eliminate or reduce sexual or romantic attractions or feelings towards individuals of the same sex." N.J.S.A. 45:1–55. SOCE "does not include psychotherapies that: (A) provide acceptance, support, and understanding of clients or facilitation of clients' coping, social support, and identity exploration and development, including sexual orientation-neutral intervention . . . and (B) do not seek to change sexual orientation." *Id.*

As a viewpoint restriction, A3371 is unconstitutional under any circumstance. The context does not matter when viewpoint discrimination of private speech is involved, and proponents of A3371 have failed to refute this argument. A3371 permits minors to hear only one viewpoint on the subject of sexual orientation, behavior, or identity. Minors and their parents are only permitted to receive counsel that affirms sexual orientation, behavior, or identity, even though they desperately seek counsel to help them change or reduce sexual orientation, behavior, or identity. A3371 permits one viewpoint and condemns the opposite viewpoint. The State has gone far beyond regulation of the profession to taking sides on one viewpoint of an otherwise permissible subject. As such,

there is no need to inquire into the government's purported justifications for A3371. Any justifications to prohibiting SOCE are irrelevant, therefore, and A3371 must be enjoined.

Conclusion

For the foregoing reasons, it is respectfully urged that the decision of the District Court for the District of New Jersey be overturned.