No. 15-

IN THE

Supreme Court of the United States

JOHN DOE, *et al.*,

Petitioners,

v.

GOVERNOR OF NEW JERSEY, *et al.*,

Respondents,

GARDEN STATE EQUALITY,

Respondent-Intervenor.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A 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 any counseling *under any circumstances* to aid a minor client "to change behaviors, gender identity, or gender expressions, or to reduce or eliminate sexual or romantic attractions towards a person of the same gender" even when that counseling is desperately desired by the client and consented to by all parties involved. N.J. Stat. Ann. § 45:1-55. Nevertheless, licensed mental health professionals may counsel and are encouraged to counsel minors when that counseling "provides acceptance, support, and understanding" of that minor's unwanted same-sex attractions, behaviors, or identity and also when that counseling provides aid to a minor "seeking to transition from one gender to the another." *Id.* In short, A3371 permits licensed counselors to counsel minors on the subject of same-sex attractions, behaviors, or identity, but strictly prohibits the content and viewpoint of such counseling that aids a minor in seeking to reduce or eliminate their *unwanted* same-sex attractions, behaviors, or identity.

The questions presented are:

1. Whether the communication, discussion, and information provided by licensed mental health counselors or doctors during counseling or other professional services with their clients or patients constitutes speech protected by the First Amendment.

2. Whether a law permitting licensed mental health professionals and doctors to provide counseling concerning

the subject of same-sex attractions, behaviors, or identity but only if such counseling does not include the content and viewpoint that a minor may reduce or eliminate his unwanted same-sex attractions, behaviors, or identity is a content-based restriction of speech subject to strict scrutiny under the firm rule handed down by this Court last term in *Reed v. Town of Gilbert*, 125 S. Ct. 2218 (2015).

3. Whether a law that prohibits parents and minors from seeking and receiving licensed professional counseling consistent with their sincerely held religious convictions violates the fundamental right of parents to direct the upbringing and education of the children.

PARTIES

Petitioners are John Doe, by and through his parents Jack and Jane Doe; Jack Doe, individually and on behalf of his son, John Doe; and Jane Doe, individually and on behalf of her son, John Doe.

Respondent is the Governor of the State of New Jersey, and Intervenor-Respondent is Garden State Equality.

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JURISDICTION

The judgment of the United States Court of Appeals for the Third Circuit was entered on April 13, 2015. The Third Circuit's order denying Petitioner's request for a panel rehearing/rehearing en banc was entered on May 12, 2015. 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 text of the First and Fourteenth Amendment to the United States Constitution and N.J. Stat. 45:1-54 to 55 are reproduced in the Appendix to this Petition. App. at 45a-58a.

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. 54a-55a. The natural corollary to that prohibition is that minors in New Jersey are prohibited from receiving the information and content of such SOCE counseling from licensed mental health professionals who are best educated and equipped to provide it. *Id.*

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 with content to aid a minor in reducing or eliminating unwanted same-sex attractions, behavior, or identity ("SSA"). N.J. Stat. Ann. § 45:1-55(b); App. at 54a-55a. 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 minors "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 a minor child who is seeking to receive SOCE counseling from a licensed psychologist in New Jersey. App. at 10a. His previous SOCE counseling from a licensed counselor in another state allowed him to reduce his anxiety, eliminate his depression, and overcome his daily thoughts of suicide, which resulted in one attempted suicide. *Id.* John Doe seeks this counseling to conform his attractions and identity to his sincere religious convictions and to live his life according to the dictates of his conscience and faith. *Id.* Petitioners also include Jack and Jane Doe who are John Doe's parents and who seek to direct the upbringing and education of their son in accordance with the teachings of their faith, and to aid John Doe in conforming his identity to his true concept of self and align his attractions with his religious beliefs. *Id.*

The SOCE counseling sought by Petitioners involves nothing more than "talk therapy" or "speech." 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. The information Petitioners seek to receive, and have a right to receive under the First Amendment, is only available from competent and educated professionals in New Jersey, who are licensed and trained to provide such counseling. The counseling Petitioners seek is the same as every other modern form of mental health counseling, but it has been singled out by the state for prohibition because of hostility toward the content and viewpoint espoused in such counseling. John Doe has greatly benefitted from the counseling he received in another state, but now is unable to receive the counseling that he desperately desires in his home state. *Id.* A3371 slams the door to all licensed professionals' offices in New Jersey.

On November 1, 2013, Petitioners filed their Complaint and Motion for Preliminary Injunction with the District of New Jersey seeking relief under the United States and New Jersey Constitutions. App. at 10a. On March 28, 2014, over three months after the Motion for Preliminary Injunction was fully briefed, the district court issued an order purporting to stay the matter pending resolution of this Court's consideration of *Pickup v. Brown*, No. 13-1281, *cert denied*, 2014 WL 514711 (June 30, 2014). App. at 11a. Petitioners appealed that order as a *de facto* denial of injunctive relief under 28 U.S.C. § 1292(a)(1). *Id.*

Subsequent to that appeal, the district court entered final judgment against Petitioners, dismissing all counts of their Complaint on July 31, 2014. *Id.* The district court concluded that the communication between a counselor and client and doctor and patient is conduct, not speech, so it was not entitled to any First Amendment protection at all. *Id.* at 21a. The court held that because SOCE counseling was not speech, A3371 was subject to only rational basis review. *Id.* at 21a-22a. The court also concluded that parents did not have the right to choose SOCE counseling for their children if the state has banned it, regardless of the justifications or scientific evidence in support of the State's position. *Id.* at 40a.

On July 31, 2014, Petitioners filed their Notice of Appeal seeking the Third Circuit's review of the district court's decision. *Id.* at 12a. On April 13, 2015, the Third Circuit rejected Petitioners' claims, which gives rise to the instant Petition. Following its previous decision in *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014), the Third Circuit held that the regulation of communications between a counselor and client or doctor and patient is

speech protected by the First Amendment. *Id.* As such, the court held that it is subject *only to intermediate scrutiny* despite the fact that *it was admittedly a content-based restriction on speech*. *Id.* The court held that A3371 satisfied intermediate scrutiny. Additionally, the Third Circuit agreed with the district court that Petitioners do not have a right to obtain information and counseling from licensed mental health professionals if the state has determined that children should not receive such counseling. *Id.*

The Third Circuit's decision below is in direct conflict to this Court's decision in *Reed v. Town of Gilbert*, 125 S. Ct. 2218 (2015). The Third Circuit correctly concluded that A3371 is a content-based restriction on speech but nevertheless held that it was only entitled to intermediate, rather than strict, scrutiny. App. at 8a, 12a. That decision is hopelessly irreconcilable with this Court's mandate that content-based restrictions on speech must always, without exception, receive strict scrutiny. The Third Circuit's decision below is also in direct conflict with the decisions of several other circuit court decisions concerning the application of the First Amendment to communications between a counselor and client or doctor and patient and also the appropriate level of scrutiny applicable to such regulations of speech.

The decision below presents questions of substantial importance that have split the circuits and resulted in decisions directly contrary to this Court's precedent on content-based restrictions of speech. This Court's review is imperative to conform the lower court's decision to the mandates of the First Amendment and this Court's decisions interpreting it. Petitioners respectfully ask this Court to grant review and resolve the conflicts.

REASONS FOR GRANTING THE PETITION

This Court's review is needed to resolve an important question of First Amendment law: the proper classification of and protection extended to communications and counseling that licensed mental health professionals and doctors provide to their clients or patients during the provision of professional services. The Third Circuit's decision below is in direct conflict with this Court's precedent in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015) concerning the appropriate level of scrutiny applicable to content-based restrictions on speech. This Court's review is imperative to conform the lower court's decision to the unequivocal mandate of this Court.

Additionally, the need for this Court's review is further highlighted by the disparate treatment afforded by circuit courts to communications between licensed mental health counselors or doctors and their clients or patients. The Third Circuit's decision below is in direct conflict with the decisions of the Fourth, Ninth, and Eleventh Circuits concerning whether such communication is speech protected by the First Amendment.

Exacerbating the pervasive and entrenched conflict among the circuits and the conflict of those decisions with this Court's precedent in *Reed*, the decision of the Third Circuit below is in direct conflict with the decisions of the Fourth, Fifth, Ninth, and Eleventh Circuits concerning the level of scrutiny applicable to such restrictions of speech between a licensed counselor and client or doctor and patient. Permitting these conflicts to persist will jeopardize the free speech rights of all licensed professionals throughout the country, making their ability

to practice their profession and engage in communication with their clients or patients subject to the whims of 50 different legislatures and countless other professional regulatory bodies. The First Amendment demands more.

This Court's review is needed to restore a concrete and objective standard by which the lower courts may judge restrictions on the speech of counselors, doctors, lawyers, accountants, and other licensed professionals. This Court should grant review and resolve the conflicts.

I. THE THIRD CIRCUIT DECISION BELOW DIRECTLY CONFLICTS WITH THIS COURT'S PRECEDENT ON A QUESTION OF EXCEPTIONAL IMPORTANCE CONCERNING THE LEVEL OF SCRUTINY APPLICABLE TO CONTENT-BASED RESTRICTIONS OF SPEECH.

The Third Circuit's decision below conflicts directly with *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). Just last term, this Court made it abundantly clear that content-based restrictions on speech must always receive strict scrutiny. The Third Circuit's decision below correctly concludes that A3371 is content based, but applies intermediate, rather than strict, scrutiny to review it. This Court should grant review and conform that erroneous decision to *Reed*.

The Third Circuit opinion begins with the recognition that "speech occurring as part of SOCE counseling is professional speech." *Id.* at 8a (quoting *King v. Governor of New Jersey*, 767 F.3d 216, 224 (3d Cir. 2014)). The Third Circuit relied primarily on its previous decision in *King* to reach its conclusion below, largely incorporating its

previous analysis into its opinion. *Id.* at 12a (noting that it reached its conclusion below "[f]or the reasons stated in our recent decision in *King*"). The *King* decision, incorporated into the lower court's decision giving rise to this Petition, held that *A3371 was a content-based restriction on speech*. *See King*, 767 F.3d at 236 ("*we agree with Plaintiffs that A3371 discriminates on the basis of content*.") (emphasis added); *id.* at 236 n.20 ("We have little doubt in this conclusion. *A3371, on its face, prohibits licensed counselors from speaking words with a particular content*.") (emphasis added).

The decision below reached the same conclusion. *Id.* at 8a, 12a. Nevertheless, the Third Circuit erroneously concluded that the facially content-based restriction on speech was subject only to intermediate scrutiny. *Id.* (relying on *King*, 767 F.3d at 236-37) ("A3371 fits comfortably within this category of permissible content discrimination . . . Therefore, we conclude that A3371 does not trigger strict scrutiny by discriminating on the basis of content in an impermissible manner.").[1]

1. As the Third Circuit recognized in its decision below, Petitioners' challenge also involves the corollary to the First Amendment, *i.e.*, the right to receive information. App. at 12a-13a. As such, the analysis concerning the appropriate level of scrutiny applicable to viewpoint and content-based restrictions on speech and the right to receive information is the same. *Bd. of Educ., Island Trees Union Free Sch. Dist. v. Pico*, 457 U.S. 863 (1982); *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57 (1976). Therefore, the decision below should receive the same level of scrutiny as the content-based restrictions in *Reed*. *See* App. at 13a.

The Third Circuit's conclusion below directly contradicts the mandate this Court handed down just last term. *See Reed*, 135 S. Ct. at 2226-31. In *Reed*, this Court stated unequivocally that "[c]ontent-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified *only* if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226 (emphasis added). "Some facial distinction based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. *Both distinctions are drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.*" *Id.* at 2227 (emphasis added). Put simply, this Court handed down a firm rule: laws that are content based on their face must satisfy strict scrutiny. *Id.*; *see also id.* at 2233 ("As the Court holds, what we have termed 'content-based' laws must satisfy strict scrutiny.") (Alito, J., concurring).

Importantly, the majority's firm rule mandating strict scrutiny of facially content-based restrictions on speech applies regardless of the government's alleged purpose in enacting the law. *Reed,* 135 S. Ct. at 2227. "On its face, the [law] is a content-based regulation of speech. We thus have no need to consider the government's justifications or purposes for enacting the [law] to determine whether it is subject to strict scrutiny." *Id.* In so holding, this Court rejected the lower court's rationale – similar to that raised by the Third Circuit below – that the alleged purpose behind enacting the content-based law can justify subjecting it to more relaxed constitutional scrutiny. *Id.* "But this analysis skips the crucial first step . . . determining whether the law is content neutral on its

face." *Id.* at 2228. The answer to that question, this Court said, is dispositive of the level of scrutiny applicable to the regulation of speech. *Id.*

"*A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech*." *Id.* (emphasis added). Indeed, "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Id.* "Innocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." *Id.* at 2229.

This Court acknowledged that its analysis and firm rule also applies to content-based restrictions of the speech of licensed professionals as well.

> Although *Button* predated our more recent formulations of strict scrutiny, the Court rightly rejected the State's claim that its interest in the regulation of professional conduct rendered the statute consistent with the First Amendment, observing that *it is no answer to say that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression.*

Id. (citing *NAACP v. Button*, 371 U.S. 415, 438-39 (1963)) (emphasis added). As such, this Court stated unequivocally that such content-based laws would also be subject to strict scrutiny despite being targeted at licensed professionals. *Id.*

"Because the [law] imposes content-based restrictions on speech, those provisions can stand only if they survive strict scrutiny." *Id.* at 2231. There are no exceptions to that rule. Indeed, the concurring opinions of the other Justices who were not prepared to go as far as the majority did in *Reed* confirm the concrete nature of the rule established by the majority. "In my view, the category 'content discrimination' is better considered in many contexts, including here, as a rule of thumb, rather than as *an automatic strict scrutiny trigger*." *Id.* at 2234 (Breyer, J., concurring in the judgment) (emphasis added); *id.* ("to use the presence of content discrimination *automatically to trigger strict scrutiny* . . . goes too far") (emphasis added); *id.* at 2235 ("the majority [cannot] avoid the application of strict scrutiny"); *id.* ("The better approach is to . . . treat [content discrimination] as a rule of thumb, finding it a helpful but not determinative legal tool.").

Justice Kagan likewise noted the unequivocal nature of the rule handed down by the majority: "Says the majority, When laws single out specific subject matter, they are facially content based; and when they are facially content based, they are *automatically subject to strict scrutiny*." *Id.* at 2236 (emphasis added). Indeed, "the majority insists that applying strict scrutiny to *all* [content-based laws] is 'essential' to protecting First Amendment freedoms." *Id.* at 2237 (emphasis added).

This Court's decision in *Reed*, holding that all content-based restrictions of speech – including those regulating professional speech – trigger strict scrutiny, is in direct conflict with the lower court's decision below applying intermediate scrutiny to an admittedly content-based restriction on speech. Indeed, the Third Circuit's decision

below cannot be reconciled with this Court's decision in *Reed*. This Court's review is imperative to conform the lower court's analysis and opinion to this Court's precedent on critical First Amendment matters with a sweeping effect on fundamental freedoms. This Court should grant the Petition.

II. THE CIRCUITS ARE IN DIRECT CONFLICT CONCERNING THE PROPER CLASSIFICATION OF COMMUNICATION AND COUNSELING THAT LICENSED MENTAL HEALTH PROFESSIONALS AND DOCTORS PROVIDE TO THEIR CLIENTS AND PATIENTS, AND THIS COURT SHOULD RESOLVE THE CONFLICT.

The Third Circuit's decision below directly conflicts with the decisions of numerous other Circuits concerning the threshold question of whether counselor-client or doctor-patient communication is speech under the First Amendment. The Third, Fourth, and Ninth Circuits, and a dissenting judge on the Eleventh Circuit, have all held that such communications are speech protected by the First Amendment. *See* App. at 8a; *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014); *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014); *Moore-King v. Cnty. of Chesterfield*, 708 F.3d 560 (4th Cir. 2013); *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, 1054 (9th Cir. 2000) ("*NAAP*"); *Wollschlaeger v. Governor of Florida*, 760 F.3d 1195 (11th Cir. 2014) (Wilson, J., dissenting). In direct conflict with those decisions, a subsequent decision from the Ninth Circuit and a decision from the Eleventh Circuit have held that such communications between a doctor and patient

or counselor and client is *not* speech at all and, therefore, is entitled to no constitutional protection whatsoever. *See Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2013); *Wollschlaeger*, 760 F.3d 1195.

As in *King*, the Third Circuit stated below: "we reject[] the conclusion that SOCE counseling [is] conduct, not speech." App. at 11a n.4. It held that the communications between licensed professionals and their clients was speech entitled to First Amendment protection. *Id.*

That decision is consistent with the Third Circuit's previous decision, where it stated, "the verbal communication that occurs during SOCE counseling *is speech* that enjoys some degree of protection under the First Amendment." *King*, 767 F.3d at 229 (emphasis added). Based on this Court's reasoning in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), the *King* panel 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 225.

Notably, the *King* panel expressly recognized that it was creating a conflict. *Id.* at 227 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 further: "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 232 n.15.

While recognizing its disagreement with the Ninth Circuit's decision in *Pickup*, the Third Circuit 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 229 (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 224.

The holdings of the Third Circuit below and in *King* conflict with the Ninth Circuit's treatment of the exact same type of counseling in *Pickup*. All three 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 5a-6a and *King*, 767 F.3d 221-22, *with Pickup*, 740 F.3d at 1223. Indeed, the laws at issue in these cases are identical in virtually every operative provision. Yet, the circuits reached opposite and conflicting opinions on the same question.

The Ninth Circuit 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 *NAAP*, 228 F.3d at 1054).

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.

In the Ninth Circuit's *Conant* decision, 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 could 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 or doctor and patient are protected speech under the First Amendment. *See Stuart*, 774 F.3d at 245 ("[W]e agree with the district court that the Requirement [that doctors provide specific information to patients concerning their ultrasound and pregnancy] is a content-based regulation of a medical professional's speech."); *id.* at 242 ("This compelled speech, even though it is a regulation of the medical profession, is ideological in intent and in kind."); *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, the Ninth Circuit's *Conant* and *NAAP* decisions, and the Fourth Circuit's decisions in *Stuart* and *Moore-King*. *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.

As these cases make abundantly clear, the circuits are starkly divided on the critically important question of whether communication between licensed professionals and their clients is speech protected by the First Amendment. The decisions of the Ninth and Eleventh Circuit are inconsistent with the precedent of this Court and the other circuits. *Doe*, *King*, *Moore-King*, *Stuart*, *Conant*, and *NAAP* all explicitly hold that these communications are speech. *Pickup* and *Wollschlaeger* reached the opposite conclusion, holding that such communications are merely conduct unworthy of any First Amendment protection whatsoever. This Court should grant review to resolve the conflict.

III. THE CIRCUITS ARE IN DIRECT CONFLICT CONCERNING THE APPROPRIATE LEVEL OF SCRUTINY APPLICABLE TO VIEWPOINT AND CONTENT-BASED RESTRICTIONS ON SPEECH BETWEEN LICENSED PROFESSIONALS AND THEIR PATIENTS OR CLIENTS.

"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). As this Court has said, "[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). The critical need for this Court's review of the decision

below concerning a matter of such significant importance to cherished constitutional liberties is highlighted further by the additional conflict among the circuits concerning the appropriate level of scrutiny courts should apply to content and viewpoint-based restrictions on speech between counselors and clients or doctors and patients.

The Ninth Circuit, in an earlier line of cases, has held, consistent with *Reed v. Town of Gilbert*, that content-based 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); *see also NAAP*, 228 F.3d 1043 (9th Cir. 2000).

The Third Circuit and a decision from the Fourth Circuit have held that intermediate scrutiny is appropriate for regulations of speech between a licensed professional and his client. *See, e.g.*, App. at 8a, 11a n.4, 12a; *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014); *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014).

Exacerbating the conflict further, four other circuit court opinions reached a different conclusion, holding that no constitutional protection is due these restrictions. *See Hines v. Aldredge*, 783 F.3d 197 (5th Cir. 2015); *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 increases the pervasive and direct conflict among the circuit courts concerning the appropriate level of scrutiny applicable to speech between a counselor and client or doctor and

patient. The court stated that "speech occurring as part of SOCE counseling is professional speech and restrictions on professional speech, like those on commercial speech, are given intermediate scrutiny." App. at 8a.

The Third Circuit in *King* explicitly recognized this conflict: "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." *King,* 783 F.3d at 235. Nevertheless, the Third Circuit held that "speech is speech, and it must be analyzed as such for purposes of the First Amendment." *Id.* at 228-29. "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 232.

The Third Circuit 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 233. 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 in *King* and in the decision below, 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 236 ("we have serious doubts that anything less than intermediate scrutiny would adequately protect the First Amendment interests inherent in professional speech").

That decision is supported by the Fourth Circuit's decision in *Stuart*. There, the Fourth Circuit noted its belief that the speech of licensed professionals should "typically receive a lower level of review," but stated that a professional license "does not mean that individuals simply abandon their First Amendment rights when they commence practicing a profession." *Stuart*, 774 F.3d at 244, 247. The Fourth Circuit – like the lower court here – conceded that the regulation of doctors' speech was content-based. *Id.* at 245, 248 ("the Requirement is clearly a content-based regulation of speech"). Nevertheless, the Fourth Circuit determined that such a regulation might only be entitled to intermediate scrutiny, rather than the automatic strict scrutiny trigger rule this Court handed down in *Reed*. "[W]e agree with the district court that the Requirement is a content-based regulation of a medical professional's speech which must satisfy at least intermediate scrutiny to survive." *Id.* Notably, however, the Fourth Circuit remained open to the fact that such a content-based restriction on professional speech could be subject to strict scrutiny, but reserved the question. "[W]e need not conclusively determine whether strict scrutiny ever applies in similar situations, because in this case 'the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied.'" *Id.* at 248 (quoting *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2667 (2014)).

The Ninth Circuit answered that question in the affirmative in *Conant*, which places that decision in direct conflict with the decisions of the Third Circuit below and in *King*, as well as the Fourth Circuit in *Stuart*. In *Conant*, the Ninth Circuit held that strict scrutiny applied to content-based 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).

In *Conant*, the Ninth Circuit noted that "the 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.*" *Id.* (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. The court held that the law was "presumptively unconstitutional" and subject to strict scrutiny, which it could not survive. *Id.* at 636, 639 (quoting *NAACP v. Button*, 371 U.S. 415, 433 (1963) ("To survive constitutional scrutiny, the government's policy must have the requisite 'narrow specificity.'"). Presumptive unconstitutionality and the narrow specificity requirement 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 *Conant* decision is also consistent with the Ninth Circuit's discussion in *NAAP*, 228 F.3d 1043 (9th Cir. 2000). 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*.

The level of scrutiny applied by the Ninth Circuit in *Conant* and recognized in *NAAP* is also consistent with this Court's firm rule applying strict scrutiny to all

content-based restrictions on speech. *See Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). This Court's mandate that such content-based restrictions receive the most exacting scrutiny is not in any way diminished by the fact that the speech occurs as part of the practice of a profession. *See, e.g.*, *Id.* at 2229; *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); *NAACP v. Button*, 371 U.S. 415, 438-39 (1963).

Nevertheless, recent decisions out of the Fourth, Fifth, Ninth, and Eleventh Circuits directly contradict this Court's precedent in *Reed* and represent a direct split of authority with the Third Circuit's decision below. *See Hines*, 783 F.3d 197; *Wollschlaeger*, 760 F.3d 1195; *Pickup*, 740 F.3d 1208; *Moore-King*, 708 F.3d 560. Those decisions give professional speech no protection under the First Amendment, treating communications between licensed professionals and clients as First Amendment orphans.

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 the Third Circuit's decisions 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, the Fourth Circuit in *Stuart*, and with the Ninth Circuit in *Conant* and *NAAP*.

Exacerbating this pervasive conflict even further, the Fifth Circuit likewise extended no protection to licensed veterinarians whose speech was restrained by professional regulations. *Hines*, 783 F.3d 197. There, the regulation prohibited a licensed veterinarian from providing information and discussion about potential issues over the Internet, because he would not have physically examined the animal prior to giving comments or communication from individuals who contacted him. *Id.* at 199. There, the court dismissed the free speech challenge altogether, stating that such a restriction of professionals presented no constitutional issues whatsoever. "[T]here is a robust line of doctrine concluding that state regulation of the practice of a profession, even though that regulation may have an incidental impact on speech, does not violate the Constitution." *Id.* at 201. Such an incidental restriction, the Fifth Circuit said, "denie[d] the veterinarian no due First Amendment right." *Id.* at 202. That decision is indicative

of the substantial disagreement and conflict among the circuits.

The Eleventh Circuit's decision in *Wollschlaeger* is also in direct conflict with the Third Circuit 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 and pervasive 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 speech inherent in 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.

IV. THE THIRD CIRCUIT DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT ON THE FUNDAMENTAL RIGHT OF PARENTS TO DIRECT THE UPBRINGING AND EDUCATION OF THEIR CHILDREN.

The Third Circuit's determination that A3371 does not infringe Petitioners' parental rights conflicts with this Court's precedent. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57 (2000); *Parham v. J.R.*, 442 U.S. 584 (1979); *Wisconsin v. Yoder*, 406 U.S. 205 (1972); *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Soc'y of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). This Court long ago established the axiomatic principle that parents have the fundamental right to direct the upbringing and education of their children. *Troxel*, 530 U.S. at 65. Indeed, parents are vested with the care, custody, and control of their children. *Id.*

In *Parham*, this Court stated that "our system long ago rejected any notion that a child is a mere creature of

the state and, on the contrary, has asserted that *parents generally have the right, coupled with the high duty . . . to seek and follow medical advice*" for their children. *Parham*, 442 U.S. at 602 (emphasis added). "Simply because the decision of a parent is not agreeable to a child or because it involves risks does not automatically transfer the power to make that decision from the parents to some agency or officer of the state." *Id.* at 603. "That some parents may at times be acting against the interests of their children . . . creates a basis for caution, but it is hardly a reason to discard wholesale from the pages of human experience that teach that parents generally do act in the child's best interests." *Id.* at 602-03. "Rather, *parents have authority to select medical procedures and otherwise decide what is best for their child*, and "[n] either state officials nor federal courts are equipped to review such parental decisions." *Id.* at 603-04 (emphasis added). Indeed, since time immemorial, this Court has rejected the "statist notion that governmental power should supersede parental authority." *Id.*

The interest of parents in the care, custody, and control of their children "*is perhaps the oldest of the fundamental liberty interests recognized by this Court*." *Troxel*, 530 U.S. at 65 (discussing nine seminal cases dealing with this parental liberty interest) (emphasis added). "The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children." *Yoder*, 406 U.S. at 232. American jurisprudence "historically has reflected Western . . . concepts of the family as a unit with broad parental authority over minor children." *Parham*, 442 U.S. at 602. In fact, "it cannot now be doubted that the Due Process Clause of the Fourteenth Amendment

protects the fundamental right of parents to make decisions concerning the care, custody, and control of their children." *Troxel*, 530 U.S. at 66. "*This primary role of the parents . . . is now established beyond debate as an enduring American tradition*." *Yoder*, 406 U.S. at 232 (emphasis added).

The Third Circuit's determination below directly conflicts with this precedent and elevates the state's considerations and views above those of the parents. App. at 14a-15a. Here, the lower court framed the issue as one of parents demanding counseling that the state has deemed harmful, but that determination begins *in medias res*, assuming that such counseling is harmful without requiring the state to provide support for its assertions. *Id.* Yet, no such evidence exists for the state's claims of harm. Therefore, the lower court's decision allowing a state to prohibit licensed professionals from engaging in such counseling without requiring any evidence of harm stands in stark contrast to the Supreme Court's admonitions. This Court should grant review and conform the Third Circuit's decision to this Court's precedent.

CONCLUSION

For the reasons stated in this Petition, and because the Third Circuit's decision is in direct conflict with this Court's precedent in *Reed* and highlights a pervasive conflict among the circuits concerning critical questions involving fundamental free speech rights of licensed professionals, this Court should grant the Petition.

Respectfully submitted,

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