CASE NO. 15-195

IN THE SUPREME COURT OF THE UNITED STATES

JOHN DOE, et al.,

Petitioners,

v.

GOVERNOR OF NEW JERSEY,

Respondent,

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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PETITIONER'S REPLY BRIEF

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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 earnestly 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 counseling that aids a minors 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 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.

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I. THIS COURT SHOULD GRANT REVIEW TO ENSURE CONTENT-BASED RESTRICTIONS ON SPEECH RECEIVE THE STRICT SCRUTINY REVIEW MANDATED IN *REED V. TOWN OF GILBERT*.

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). This Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) provides no refuge for the relaxed scrutiny the Third Circuit applied to a content-based restriction of speech by licensed professionals in New Jersey.

A. The Third Circuit's Decision Below Conflicts With This Court's Precedent in *Reed v. Town of Gilbert*.

The Third Circuit's opinion below, and its application of intermediate scrutiny to a content-based restriction of speech, is irreconcilable with *Reed*. *Reed*, 135 S. Ct. at 2228 ("*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 towards the ideas contained in the regulated speech*.") (emphasis added).

Respondent accuses Petitioners of merely plucking a statement from this Court's opinion in *Reed* to create a conflict. Opp. at 10. Yet, *Reed*'s unequivocal holding reveals that the First Amendment demands more protection than the Third Circuit provided below. *Reed*, 135. S. Ct. at 2227 ("Some facial distinctions 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 are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny."); *id.* at 2230 ("we have insisted that 'laws favoring some speakers over others *demand strict scrutiny* when the legislature's speaker preference reflects a content preference.'") (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 658 (1994)) (emphasis added); *id.* at 2231 ("Not 'all distinctions' are subject to strict scrutiny, only *content-based* ones are.") (emphasis original).

The concurrences in *Reed* also reveal the mandatory nature of this Court's rule that content-based restrictions of speech receive strict scrutiny. *Id.* at 2233 (Alito, J., concurring) ("what we have termed 'content-based' laws *must satisfy strict scrutiny*.") (emphasis added); *id.* at 2234 (Breyer, J., concurring in judgment) ("In my view, the

category of 'content discrimination' is better considered in many contexts, including here, as a rule of thumb, rather than as *an automatic 'strict scrutiny' trigger*.") (emphasis added); *id.* ("content discrimination . . . cannot and should not *always* trigger strict scrutiny) (emphasis original); *id.* ("to use the presence of content discrimination *automatically to trigger strict scrutiny* . . . goes too far.") (emphasis added); *id.* at 2236 (Kagan, J., concurring in judgment) ("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*.") (emphasis added).

While Respondent ignores them, the concurring Justices' statements represent the chief disagreement between themselves and the majority. Justices Breyer and Kagan did not believe a content-based restriction on speech should *automatically* trigger strict scrutiny, but that is the clear holding of *Reed*. Curiously, Respondent makes no attempt to address, explain, or refute these unequivocal statements from this Court. The only response Respondent could muster to explain the undeniable conflict between the Third Circuit below and *Reed* was that Petitioners "plucked" an isolated statement out of *Reed* in hopes of creating a conflict. Such bare assertions do not and cannot refute the fact that the Third Circuit failed to

apply strict scrutiny to what it admitted was a content-based restriction on speech.

Petitioners no more "plucked" isolated statements from *Reed* than the Eleventh Circuit did recently in *Wollschlaeger v. Governor of State of Florida*, No. 12-14009 2015 WL 8639875 *22 (11th Cir. Dec. 14, 2015). After noting that, "[b]roadly reading the Supreme Court's recent *Reed* decision may suggest that any and all content-based regulations, including commercial and professional speech, are now subject to strict scrutiny," the Eleventh Circuit vacated its earlier opinion applying intermediate scrutiny to a Florida regulation of professional speech, and applied strict scrutiny instead. *Id.* (vacating earlier opinion at 797 F.3d 859). The Third Circuit should have taken the same approach, but erred in concluding that not all content-based regulations require strict scrutiny.

Left with no alternative, Respondent suggests that *Reed*'s strict scrutiny mandate is inapplicable to licensed professionals. Opp. at 11-13. That assertion is refuted by this Court's discussion of professional speech in *Reed*. 135 S. Ct. at 2229 (discussing *NAACP v. Button*, 371 U.S. 415 (1963) and stating that content-based restrictions on professional speech are subject to strict scrutiny). This Court's firm

rule is that content-based restrictions of speech must receive and survive strict scrutiny regardless of whether the speech at issue is that of a professional subject to the licensing and regulation of the state. *Id.* Respondent's contention to the contrary is without merit.

B. The Third Circuit's Reliance on *R.A.V. v. City of St. Paul* Does Not Eliminate its Direct Conflict With *Reed*.

This Court's decision in *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), provides no support for Respondent's position that A3371 should not be subjected to strict scrutiny. Opp. at 10-12. Contrary to Respondent's assertion, this Court has permitted diminished protection for content-based restrictions of speech in very limited and defined circumstances. *See, e.g.*, *R.A.V.*, 505 U.S. at 382-83 (noting that this Court has "permitted restrictions upon the content of speech in a few limited areas," and recognizing that the only such areas of content-based restrictions of speech receiving less than strict scrutiny include obscenity and defamation); *id.* at 383 (recognizing that "a limited categorical approach has remained an important part of our First Amendment jurisprudence").

Moreover, this Court has recognized that such content-based restrictions of speech only

receive less than strict scrutiny because the speech involved is *totally proscribable*. *See id.* at 383 ("these areas of speech can, consistently with the First Amendment, be regulated *because of their constitutionally proscribable content* (obscenity, defamation, etc.)—not that they are categories of speech entirely invisible to the Constitution, so that they may be made vehicles for content discrimination *unrelated to their distinctively proscribable content*") (emphasis added). Because the exceptions *R.A.V.* discussed are categories of speech that this Court deemed completely proscribable under the First Amendment, it was *ipso facto* reasonable that those limited categories could be excepted from the prohibition against content-based restrictions. *See, e.g.*, *Davenport v. Washington Educ. Ass'n*, 551 U.S. 177, 189 (2007) ("We said in *R.A.V.* that, *when totally proscribable speech is at issue*, content-based regulation is permissible so long as there is no realistic possibility that official suppression of ideas is afoot.") (emphasis added).

Professional speech has never been included in this narrow group of exceptions, as this Court's substantial precedent makes abundantly clear. *See, e.g.*, *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533, 549 (2001); *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011). Because professional speech does not fall into

the limited categories of speech that the First Amendment permits to be completely proscribed, it follows that content-based restrictions of professional speech are not exempted from the strict scrutiny mandate. The Third Circuit's decision below applying a more lenient level of scrutiny to what it properly classified as a content-based restriction on professional speech is in direct conflict with this Court's precedent.

Moreover, this Court has never given lower courts or legislatures authority to create new categories of proscribable speech. "Before exempting a category of speech from the normal prohibition on content-based restrictions, however, the Court must be presented with persuasive evidence that a novel restriction on content is part of a long . . . tradition of proscription." *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012); *see also Pickup v. Brown*, 740 F.3d 1208, 1221 (9th Cir. 2013) (O'Scannlain, J., dissenting from denial of rehearing en banc) ("The Supreme Court has chastened us lower courts for creating, out of whole cloth, new categories of speech to which the First Amendment does not apply."). The Third Circuit's attempt to create a new category of constitutionally proscribable speech—one never recognized by this Court—places its decision in direct conflict with this Court's precedent.

II. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CIRCUIT SPLIT CONCERNING THE APPLICATION OF THE FIRST AMENDMENT TO COMMUNICATIONS OF LICENSED PROFESSIONALS.

Respondent admits that there is a split of authority among the circuit courts concerning the application of the First Amendment to communications between licensed professionals and their clients. Opp. at 13 ("*other than the Ninth Circuit*, every circuit court that has considered the issue of whether counselor-client or doctor-patient communications are speech has found that such communications are speech.") (emphasis added). Respondent's admission is not surprising, since the Third Circuit acknowledged that it was creating a circuit split concerning this issue. *See King v. Governor of New Jersey*, 767 F.3d 216, 232 n.15 (3d Cir. 2014) ("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.").

Respondent's suggestion that this circuit split is unworthy of this Court's review (Opp. at 13) betrays his profound misunderstanding of

the sharpness and seriousness of the lower courts' disagreement.

Respondent rightfully concedes that under the Ninth Circuit's holding in *Pickup*, communications between licensed professionals and their clients do not constitute "speech" under the First Amendment, but instead represent professional conduct meriting no First Amendment protection at all. *See Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2013).[1] A previous opinion of the Eleventh Circuit agreed that such communications are "professional conduct" and are therefore unworthy of First Amendment protection. *See Wollschlaeger v. Governor of Florida*, 760 F.3d 1195 (11th Cir. 2014).[2]

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[1] In *Pickup*, the Ninth Circuit departed from its own earlier opinions that had recognized and offered some protection to professional speech. *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, 1054 (9th Cir. 2000).

[2] The Eleventh Circuit twice vacated and replaced this opinion, first at 760 F.3d 1195 (July 28, 2015) (concluding that professional speech merits some protection and applying intermediate scrutiny), and then, as noted above, at 2015 WL 8639875 (Dec. 14, 2015)

The Third Circuit, in *King*, reached the exact opposite conclusion. *See King*, 767 F.3d at 229 ("the verbal communication that occurs during SOCE counseling *is speech* that enjoys some degree of protection under the First Amendment.") (emphasis added); *id.* at 224 ("these communications are 'speech' for purposes of the First Amendment."). And in its opinion below, the Third Circuit echoed *King*'s determination. App. at 11a n.4 ("we reject[] the conclusion that SOCE counseling [is] conduct, not speech.").

Other circuits have also parted with the Ninth Circuit in protecting professional speech. The Eleventh Circuit, as noted above, has just revisited its previous opinion that communications between a doctor and patient are merely "professional conduct." *Wollschlaeger*, 2015 WL 8639875 at *16 ("we do not find anything in [Supreme Court precedent] that would countenance the idea that the entire category of professional regulation touches only on conduct, and thus lies beyond the reach of the First Amendment.").

Similarly, the Fourth Circuit has held that communications between licensed

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(applying strict scrutiny to professional speech regulation following *Reed*).

professionals and their clients or patients constitute protected speech. *See, e.g.*, *Stuart v. Camnitz*, 774 F.3d 238 (4th Cir. 2014); *Moore-King v. Cnty. of Chesterfield*, 708 F.3d 560 (4th Cir. 2013).

Unless this Court grants review and harmonizes these decisions, professional speech will enjoy First Amendment protection in *some* circuits, but will be treated as a constitutional orphan in the Ninth Circuit and potentially elsewhere.

III. THIS COURT SHOULD GRANT REVIEW TO RESOLVE THE CIRCUIT SPLIT CONCERNING THE LEVEL OF SCRUTINY THE FIRST AMENDMENT DEMANDS OF CONTENT-BASED RESTRICTIONS ON PROFESSIONAL SPEECH.

Respondent suggests that every circuit court to consider the appropriate level of scrutiny for restrictions on the communications between licensed professionals and their clients has held that such communications receive diminished protection. Opp. at 15. This assertion is demonstrably incorrect and refuted by Respondent's own authorities.

Respondent suggests that the circuit courts are developing uniformity on this issue,

but the most recent case highlights the need for this Court's review and clarification. *Wollschlaeger v. Governor of State of Florida*, No. 12-14009 2015 WL 8639875 at *19 (11th Cir. Dec. 14, 2015) ("The status of professional speech is murkier. The Supreme Court has never precisely addressed the proper level of scrutiny for professional speech."); *id.* at *20 (noting that this Court has provided only "limited guidance" on the issue of professional speech); *id.* at *22 ("The Supreme Court has never directly addressed the appropriate level of scrutiny accorded professional speech regulations. We therefore must proceed from the known to the unknown.").

Respondent is plainly mistaken when he suggests that the Eleventh Circuit's third and latest opinion in *Wollschlaeger* is consistent with the Third Circuit's decision below and in *King*. Opp. at 15. In fact, although it expressed uncertainty about the appropriate level of scrutiny for professional speech regulations, the Eleventh Circuit finally settled on *strict* scrutiny, not intermediate scrutiny as in *King* and below. *Wollschlaeger*, 2015 WL 8639875 at *19 ("we apply strict scrutiny"); *id.* at *24 ("we apply strict scrutiny to the Act"); *id.* at *19 ("[b]ecause the Act is a content-based restriction, it can avoid strict scrutiny only if it is a restriction on professional speech and professional speech receives lesser scrutiny.").

Respondent correctly notes the Eleventh Circuit's doubts with respect to "this difficult question," *id.* at *19, but regardless of that equivocation, the fact that the Eleventh Circuit ultimately applied strict scrutiny to a regulation of speech between a doctor and his client exacerbates the circuit court split on this issue.

Respondent also relies on *Dana's R.R. Supply v. Att'y Gen.*, 807 F.3d 1235 (11th Cir. 2015) to suggest that the circuit courts post-*Reed* are still applying diminished protection to content-based restrictions of professional speech. Opp. at 10. But the Eleventh Circuit's suggestion in *Dana's* that professional speech *might* receive diminished protection in the form of intermediate scrutiny was based on its application of the earlier *Wollschlaeger* opinion, which the Eleventh Circuit has now vacated in favor of strict scrutiny. 807 F.3d at 1235.

Respondent also claims that *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) and the Third Circuit's decision below are not in conflict because the two courts were merely applying the same test and reaching a different result based on the nature of the statute. Opp. at 17. But, Respondent once again misunderstands the reality of the Ninth Circuit's decision in *Conant*. Indeed, when the Third Circuit

discussed *NAACP v. Button*, it was in reference to Petitioner's vagueness challenge. *King*, 767 F.3d at 240. The Ninth Circuit, however, discussed *NAACP v. Button* in the context of the requirement under strict scrutiny analysis that a restriction on speech be narrowly tailored. *See Conant*, 309 F.3d at 637-38 So, Respondent's contention that the conflict is "banal" and unworthy of this Court's review presents a false comparison between the two cases.

Respondent likewise mischaracterizes the natural import of *Nat' Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1054 (9th Cir. 2000) ("*NAAP*"). Opp. at 17. In *NAAP*, "speech [was] not being suppressed based on its message." *NAAP*, 228 F.3d 1043, 1055 (9th Cir. 2000). The Ninth Circuit stated that the law was "content and viewpoint neutral; therefore, it does not trigger strict scrutiny." *Id.* The natural corollary to that holding is that, had the restriction been content or viewpoint based, then it would have been subject to strict scrutiny. As such, the Ninth Circuit decision in *NAAP* properly understands and treats professional speech in a manner directly contradicting the Third Circuit's decision below.

At bottom, the level of scrutiny afforded to professional speech regulation has been

anything but uniform. Different panels of the same circuits (*e.g.*, Eleventh and Ninth) have applied rational basis review, intermediate scrutiny, and strict scrutiny, sometimes within the same litigation. But, the Eleventh Circuit ultimately concluded that strict scrutiny was required. *Wollschlaeger*, 2015 WL 8639875 at *19. The Third Circuit and the Fourth Circuit have applied intermediate scrutiny. *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). In conflict with all of that precedent, the Ninth Circuit's *Pickup* decision applied rational basis review and essentially treated professional speech as a constitutional orphan. *Pickup v. Brown*, 740 F.3d 1208, 1241 (9th Cir. 2013). The need for this Court's review is manifest.

CONCLUSION

As the foregoing discussion demonstrates, this Court should grant review and resolve these conflicts.

Respectfully submitted,

January 6, 2016

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