No. 15-195

IN THE

Supreme Court of the United States

JOHN DOE, *et al.*,

Petitioners,

—v.—

GOVERNOR OF NEW JERSEY and GARDEN STATE EQUALITY,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a state law prohibiting state-licensed mental health professionals from engaging in the practice of sexual orientation change efforts with minors under the age of eighteen violates the freedom of speech guaranteed by the First Amendment to the United States Constitution as incorporated against the states by the Fourteenth Amendment.

2. Whether parents have a constitutionally protected right to require states to permit state-licensed mental health professionals to subject their children to medical treatments that the State reasonably has found to be ineffective and unsafe.

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.

Respondents are the Governor of the State of New Jersey and Garden State Equality.

CORPORATE DISCLOSURE STATEMENT

Garden State Equality is a not-for-profit corporate organization with no parent corporation. No publicly held company owns 10% or more of Garden State Equality's stock.

PRELIMINARY STATEMENT

Both federal courts of appeal that have considered statutes such as New Jersey Assembly Bill A3371, codified into law at N.J. STAT. ANN. § 45:1-54 *et seq.*

(referred to herein as "A3371"), have agreed that such laws are consistent with the First Amendment under this Court's precedents. A3371 does one thing: it prohibits state-licensed mental health professionals from subjecting their minor clients to practices that the State of New Jersey has determined, based on substantial evidence, to be both ineffective and potentially harmful—namely, practices that purport to alter the sexual orientation of minor patients (described in the professional literature and A3371 as "sexual orientation change efforts" or ("SOCE").

This Court already considered a petition for a writ of certiorari challenging the constitutionality of this law and denied certiorari last term. *See King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014), *cert. denied sub nom. King v. Christie*, 135 S. Ct. 2048 (2015). Petitioners, represented by the same counsel as the petitioners in *King*, ask this Court in effect to reconsider its decision, asserting largely the same arguments the Court declined to hear in *King*. Just as this Court denied certiorari in *King*, it should do so here.

This Court long has recognized the broad authority of states to regulate the medical and mental health professions in order to ensure that patients, who typically are at a distinct informational disadvantage, receive safe, competent, and scientifically valid care. More than a century ago, this Court held that "[t]here is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine." *Watson v. Maryland*, 218 U.S. 173, 176 (1910). This principle applies with equal force to cases, like this one, where the purported care is being delivered not by a scalpel or through medications but, rather, through

professional, state-licensed mental health practices, including treatments provided to patients through the vehicle of professional speech. *See Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (noting that speech is "part of the practice of medicine, [and is] subject to reasonable licensing and regulation").

The professional speech implicated by A3371 falls well within the ambit of the State's regulatory authority. To be clear: A3371 does not in any way regulate what anyone, including any licensed mental health professional, may say in the public arena. It does not prohibit anyone from expressing a personal opinion or viewpoint about efforts to alter sexual orientation, including licensed mental health professionals expressing such an opinion to their minor clients. Instead, A3371 solely regulates the provision of mental health treatment by state-licensed professionals to minor patients, including treatment provided through the vehicle of talk therapy.

Petitioners contend that this Court's review is warranted on the ground that the federal courts of appeals are divided on whether laws such as A3371 regulate professional conduct or professional speech, that the Third Circuit's application of intermediate scrutiny to A3371 is purportedly at odds with this Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), and that the decision below infringes on the fundamental right of parents to direct the upbringing of their children. None of these alleged conflicts warrants this Court's review.

Petitioners argue, as did the petitioners in *King*, that "the circuits are starkly divided" as to "whether

communication between licensed professionals and their clients is speech protected by the First Amendment." Pet. at 20.[1] There is no need for this Court to review that issue here, however, because the Third Circuit in this case *agreed* with Petitioners that the First Amendment applies to the speech at issue in this case, while nonetheless upholding A3371. Next, Petitioners here, as in *King*, also contend that there is a "conflict among the circuits concerning the level of scrutiny applicable to speech between doctor and patient or counselor and client." Pet. at 30. That the Third Circuit upheld A3371 after subjecting it to a higher degree of scrutiny than the Ninth Circuit applied in upholding a similar California statute, *see Pickup v. Brown*, 740 F.3d 1208 (9th Cir.), *cert. denied*, 134 S. Ct. 2871, *cert denied sub. nom Welch v. Brown*, 134 S. Ct. 2881 (2014), however, does not justify this Court's review of the Third Circuit's judgment. Nor is there any merit to Petitioners' argument that other past decisions of this Court demonstrate that "content-based restrictions receive the most exacting scrutiny" regardless of "the fact that the speech occurs as part of the practice of a profession." Pet. at 26. None of the cases Petitioners cite in support of this supposed conflict are relevant here because, unlike in this case, the regulations at issue in those cases were not enacted to promote the public interest and impaired, rather than promoted, the provision of competent professional services. (*See infra* at Section I.)

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[1] Citations to "Pet." refer to the Petition for Writ of Certiorari filed on August 10, 2015 by Petitioners (Appellants below), and citations to "App." refer to the Appendix to the Petition.

Next, Petitioners argue that the decision below conflicts with this Court's decision last term in *Reed,* which they claim "made it abundantly clear that content-based restrictions on speech must always receive strict scrutiny." Pet. at 8. But as numerous courts applying that case over the past several months have observed, *Reed* does not abrogate the long line of authority holding that regulations of commercial or professional speech, even where content-based, are subject, at most, to intermediate scrutiny. Indeed, *Reed* does not even cite to, let alone overrule, any of the many cases that Petitioners claim *Reed* overrides. Nothing in *Reed* purports to alter the decades-old framework for analyzing regulations of commercial or professional speech. (*See infra* at Section II.)

Finally, Petitioners argue that "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." Pet. at 30 (capitalization altered). But this Court's precedent firmly supports the Third Circuit's conclusion that this right does not reach so far as to allow a parent to require the State to make available medical treatments that it reasonably has found harmful to the well-being of minors. (*See infra* at Section III.)

Because Petitioners can offer no "compelling reasons" as to why this Court should grant their request for a writ of certiorari, *see* SUP. CT. R. 10, the Court should deny the Petition.

COUNTERSTATEMENT OF THE CASE

A. Background

New Jersey enacted A3371 in 2013 by wide, bipartisan margins based on its finding that sexual orientation change efforts are ineffective and carry significant risk of harm. App. at 46a-52a. In reaching that conclusion, the New Jersey Legislature relied on the views of the leading medical and mental health organizations in the field that sexual orientation change efforts are ineffective, dangerous, and can lead to "depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality, [and] substance abuse," among other negative effects. *Id.* at 46a (citing American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation, REPORT OF THE AMERICAN PSYCHOLOGICAL ASSOCIATION TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 50 (2009)).

1. The New Jersey Legislature's Finding That Being Gay Is Not An Illness

The New Jersey Legislature recognized the modern medical community's understanding that "being lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming" and that "major professional associations of mental health practitioners and researchers in the United States have recognized this fact for nearly 40 years." *Id.* In light of the fact that being gay is not a disease, the Legislature further recognized that attempts by licensed mental health professionals to "cure" homosexuality by changing an individual's sexual

orientation are unsupported by any scientific or medical rationale. *Id.* at 46a-52a.

2. The New Jersey Legislature's Finding That Sexual Orientation Change Efforts Are Ineffective And Potentially Harmful

In concluding that sexual orientation change efforts are ineffective, the New Jersey Legislature also relied on the "judgments of independent professional organizations that possess specialized knowledge and experience concerning" such efforts, and which have "spoken with [ ] urgency and solidarity" regarding their conclusion that sexual orientation change efforts are ineffective, and present risks of serious harm. *King*, 767 F.3d at 238. The court below noted that the legislative record "revealed that various reputable scientific and professional organizations have publicly condemned the practice of SOCE counseling based on its potential to inflict harm and the lack of credible evidence that SOCE counseling is effective." App. at 9a.[2] For example, the American Academy of Child and Adolescent Psychiatry found that "there is [neither] evidence that sexual orientation can be altered through therapy," "no[r] any medically valid basis for attempting to prevent homosexuality, which is not an illness." *Id.* at 51a. The National Association of Social Workers similarly concluded that "[n]o data demonstrates that reparative or conversion therapies are effective." *Id.* at 50a. Numerous other "such organizations have also concluded that there is no credible evidence that [sexual orientation change efforts] counseling is

[2] All internal citations have been omitted and all emphasis has been added unless otherwise noted.

effective." *King*, 767 F.3d at 238 (citing App. at 46a-52a).

In addition to the prevailing medical view that sexual orientation change efforts are not effective, the New Jersey Legislature also relied on substantial evidence that those practices present a risk of serious harm. Specifically, the Legislature relied on a "legislative record demonstrat[ing] that over the last few decades a number of well-known, reputable professional and scientific organizations have publicly condemned the practice of [sexual orientation change efforts], expressing serious concerns about its potential to inflict harm." *Id.* As noted above, the American Psychological Association has warned that sexual orientation change efforts "can pose critical health risks" to lesbian, gay, bisexual, and transgender individuals, including "confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, [and] suicidality," among other negative consequences. App. at 46a. The American Academy of Child and Adolescent Psychiatry similarly has concluded that efforts to change individuals' sexual orientation can "undermine self-esteem, connectedness and caring, [which are] important protective factors against suicidal ideation and attempts." *Id.* at 51a. The New Jersey Legislature considered and relied upon these professional organizations' conclusions, as well as similar statements from a host of other leading organizations. *See id.* at 46a-52a; *see also King*, 767 F.3d at 221-222 (noting that the "legislature [ ] cited reports, articles, resolutions, and position statements from reputable mental health organizations opposing" sexual orientation change efforts).

The Legislature also relied upon research demonstrating that the risks of harm are especially great for minors. It cited research concluding that gay, lesbian, and bisexual young adults who experienced high levels of family rejection in adolescence based on their sexual orientation were 8.4 times more likely to report having attempted suicide and 5.9 times more likely to report high levels of depression than peers from families reporting no or low levels of rejection. App. at 52a. The court below recognized that the State "met its burden of demonstrating that SOCE counseling posed harms that were real, not merely speculative." *Id*. at 8a-9a.

In light of the findings of these leading medical and mental health organizations, the cited research, and the testimony presented to its committees, the Legislature determined that "New Jersey has a compelling interest in protecting the physical and psychological well-being of minors" and protecting them from "serious harms caused by sexual orientation change efforts." *Id*. at 52a.

3. The Statute

Against this backdrop, both houses of the New Jersey Legislature passed A3371 by wide margins and, on August 19, 2013, New Jersey Governor Chris Christie signed A3371 into law. The statute prohibits persons "licensed to provide professional counseling under Title 45 of the Revised Statutes" from performing sexual orientation change efforts on minors. N.J. STAT. ANN. § 45:1-55(a). Such licensed professionals include psychiatrists, licensed practicing psychologists, certified social workers, licensed clinical social workers, licensed social workers, licensed marriage and family therapists,

certified psychoanalysts, and persons who perform counseling as part of their professional training for any of these professions. *Id.*

The practitioners in each of the professions covered in the statute operate under the oversight of a board or committee that is charged with protecting the public by setting standards for examination and licensing, and reviewing and approving applications for licensure. *See* N.J. STAT. ANN. §§ 45:9-1 to -27.9 (physicians and surgeons, including psychiatrists); N.J. STAT. ANN. §§ 45:8B-1 to -50 (marriage and family therapists); N.J. STAT. ANN. §§ 45:8B-34 to -50 (professional counselors); N.J. STAT. ANN. §§ 45:15BB-1 to -13 (social workers); N.J. STAT. ANN. §§ 45:14B-1 to -46 (psychologists); N.J. STAT. ANN. §§ 45:14BB-1 to -12 (state certified psychoanalysts). The Legislature granted each board uniform investigative and enforcement authority and established uniform standards for license revocation, suspension, and disciplinary proceedings for all of the licensees and registrants under their respective jurisdictions. *See* N.J. STAT. ANN. §§ 45:1-14, -15.

B. Proceedings Below

1. The *King* Case.

Soon after Governor Christie signed A3371 into law, a group of licensed therapists and professional organizations represented by the same counsel as Petitioners here filed suit in the District Court, challenging A3371 as a violation of their First Amendment rights to free speech and free exercise of religion. *King*, 767 F.3d at 220-22. In addition to their own claims, those plaintiffs challenged the law on behalf of their minor clients under the First and Fourteenth Amendments. *Id.* at 222.

The District Court rejected the *King* plaintiffs' claims in their entirety, finding that (1) the licensed therapists and professional organizations lacked standing to assert claims on behalf of the minor clients, *Id.* at 223; (2) A3371 was a permissible regulation of professional conduct, *id.*; and (3) A3371 did not violate the *King* plaintiffs' right to the free exercise of religion, *id.* at 223-24.

On appeal, the Third Circuit affirmed the District Court's decision, albeit under a different rationale as regards the freedom of speech claim. In addressing that claim, the Third Circuit held that SOCE counseling involves professional speech and that, as such, A3371 was subject to intermediate First Amendment scrutiny. *Id.* at 237. Noting that "the value of [a] professional's services stems largely from her ability to apply [ ] specialized knowledge to a client's individual circumstances," and that "clients ordinarily have no choice but to place their trust in these professionals, and, by extension, in the State that licenses them," the Third Circuit held that A3371 was constitutional only if it "directly advance[ed] the State's interest in protecting its citizens from harmful or ineffective professional practices and [was] no more extensive than necessary to serve that interest." *Id.* at 232-33. Finding that A3371 easily satisfied this standard, the Third Circuit rejected the *King* appellants' free speech claims. *Id.* at 240-41.[3] The Third Circuit also

[3] The Third Circuit found that the evidence supporting the enactment of A3371 was "substantial" and that the New Jersey legislature was "entitled to rely on the empirical judgments of independent professional organizations that possess specialized knowledge and experience concerning the professional practice under review, particularly when this

rejected the *King* appellants' free exercise claims, and agreed with the District Court that the *King* appellants lacked standing to assert claims on behalf of their minor clients. *Id.* at 241-44. Although the *King* appellants had asserted claims based on their minor clients' right to receive information, the Third Circuit's finding that the *King* appellants lacked standing to assert claims on behalf of their minor clients obviated the need to consider those claims on appeal. *Id*. at 243-44. Finally, while the *King* appellants also had asserted claims on behalf of their minor clients' parents in the District Court, they abandoned those claims on appeal. *Id.* at 243 n.26.

The *King* appellants subsequently filed a petition for writ of certiorari in this Court on December 3, 2014. They argued that the Third Circuit's decision in King created a conflict between the circuits as to whether the treatment prohibited by A3371 is professional conduct or professional speech for purposes of First Amendment analysis, as well as a conflict between the circuits as to the appropriate level of review. They also argued that the Third Circuit's decision in King was not consistent with this Court's precedents regarding the appropriate level of

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community has spoken with such urgency and solidarity on the subject." *Id.* at 238. Among other things, the New Jersey legislature expressly noted that the American Psychological Association's Task Force Report "concluded that sexual orientation change efforts can pose critical health risks to lesbian, gay and bisexual people." App. at 46a-47a (listing litany of potential harms). The legislative findings also relied upon the conclusions of numerous other professional organizations that sexual orientation changes efforts put patients at risk of serious harms, lacks a scientific basis, and provides no demonstrable benefits. *Id.* at 47a-52a.

scrutiny to apply to a restriction on professional speech. Finally, the King appellants also challenged Garden State Equality's standing. Both the State and Garden State Equality submitted oppositions to the petition, demonstrating that the Third Circuit's decision did not create a reviewable conflict, and that the decision was consistent with this Court's precedents. This Court denied the *King* petition on May 4, 2015.

2. The Case at Issue.

While the *King* case remained pending in the District Court, Petitioners filed their complaint in the present case, raising First Amendment claims that were largely identical to those raised by the *King* plaintiffs. Petitioners also raised the right to information and parental rights claims that had been mooted and abandoned in *King*, respectively. The case was transferred to Judge Freda Wolfson on November 4, 2013. App. at 22a.

After the District Court issued its decision in *King* on November 8, 2013, Judge Wolfson asked Petitioners how they wished to proceed with this litigation "given the substantial overlap between *King* and the instant matter." *Id.* at 20a. Petitioners declined to directly challenge the District Court's *King* opinion, and instead "indicated they would rely on their initial briefing and substantially the same law and arguments raised in *King*, but as applied instead to . . . minor individuals and their parents" as opposed to licensed therapists. *Id.*

On July 31, 2014, the District Court issued its opinion rejecting Petitioners' claims. Relying on its holding in *King* that A3371 regulates professional conduct, as the appeal in *King* remained pending in

the Third Circuit, the District Court rejected Petitioners' free speech claims, including their right to information claim. *Id.* at 28a-34a. In addition, noting that Petitioners here "raise virtually identical arguments, and rely on the same case law and reasoning" in support of their free exercise claim as the *King* petitioners, the District Court rejected that claim as well. *Id.* at 34a-36a. Next, observing that "the fundamental rights of parents do not include the right to choose a specific medical or mental health treatment that the state has reasonably deemed harmful or ineffective," the District Court rejected Petitioners' parental rights claims. *Id.* at 36a-41a. Finally, the District Court rejected Petitioners' claim that Garden State Equality lacked standing and failed to satisfy the standard for intervention under Federal Rule of Civil Procedure 24.[4] *Id.* at 26a-27a.

Petitioners filed their notice of appeal with the Third Circuit on July 31, 2014, and their opening brief on October 1, 2014. The parties completed briefing, and the Third Circuit filed its opinion on April 13, 2015, without hearing oral argument, affirming the District Court's judgment. With regard to Petitioners' free exercise and right to receive information claims, the Third Circuit noted that Petitioners "raise the same challenges to A3371 as were raised by the plaintiff counselors in *King*," and summarily affirmed the dismissal of those claims. *Id.* at 12a-13a. The Third Circuit also rejected Petitioners' claim that A3371 violated their fundamental right as parents to direct the upbringing of their child, concluding that "[w]hile the case law

[4] Petitioners did not appeal the District Court's ruling permitting Garden State Equality to intervene in this litigation.

supports Appellants' argument that parents have decision-making authority with regard to the provision of medical care for their children, . . . the case law does not support the extension of this right to a right of parents to demand that the State make available a particular form of treatment." *Id.* at 14a (citing *Parham v. J.R.*, 442 U.S. 584, 603 (1979)). The court of appeals also relied on cases holding that patients do not have a due process right to demand access to specific medical treatments that have not obtained applicable regulatory approvals, agreeing with the Ninth Circuit that "it would be odd if parents had a substantive due process right to choose specific treatments for their children—treatments that reasonably have been deemed harmful by the state—but not for themselves." *Id.* at 14a-15a (quoting *Pickup,* 740 F.3d at 1235-36). Petitioners subsequently filed a petition for rehearing, which the Third Circuit denied on May 12, 2015. *Id.* at 1a-2a.

Petitioners filed their petition for a writ of certiorari in this Court on August 10, 2015.

REASONS FOR DENYING THE PETITION

I. BOTH CIRCUITS TO CONSIDER STATUTES PROHIBITING LICENSED MENTAL HEALTH PROFESSIONALS FROM ENGAGING IN SEXUAL ORIENTATION CHANGE EFFORTS WITH MINORS AGREE THAT SUCH LAWS ARE CONSTITUTIONAL, AND THERE IS NO CONFLICT WITH DECISIONS IN OTHER CIRCUITS THAT WARRANTS THIS COURT'S REVIEW.

Only two courts of appeals, the Third and Ninth Circuits, have addressed the constitutionality of

statutes prohibiting licensed therapists from engaging in sexual orientation change efforts with minors, and both courts have concluded that such statutes are constitutional. *See* App. at 8a ("A3371 … [is] a permissible prohibition of professional speech." (quoting *King*, 767 F.3d at 240)); *Pickup*, 740 F.3d at 1222 ("[California's] SB 1172, as a regulation of professional conduct, does not violate the free speech rights of [sexual orientation change efforts] practitioners or minor patients"); *see also* Pet. at 16 ("the laws at issue in these cases are identical in virtually every operative provision"). While the Third and Ninth Circuits reached the same conclusion by applying different levels of scrutiny (intermediate and rational basis, respectively), that does not create a conflict that warrants this Court's review, given that "[t]his Court, like all federal appellate courts, does not review lower courts' opinions, but their *judgments*." *See Jennings v. Stephens*, 135 S. Ct. 793, 799 (2015); *California v. Rooney*, 483 U.S. 307, 311 (1987) ("This Court 'reviews judgments, not statements in opinions.'") (quoting *Black v. Cutter Labs.*, 351 U.S. 292, 297 (1956)). Because the only circuits to have considered the issue have agreed that statutes prohibiting licensed therapists from engaging in sexual orientation change efforts with minors survive First Amendment scrutiny, there is no circuit conflict warranting granting of the Petition.

Similarly, there is no need for this Court to grant the Petition in order to decide any other issue, including the level of scrutiny applicable to regulations of speech by healthcare professionals and their clients, because the decisions on which Petitioners rely are all consistent with the result that the Third Circuit reached in this case. While

Petitioners, like the *King* petitioners before them, point to various discussions by the Third, Fourth, Fifth, Ninth, and Eleventh Circuits of the appropriate level of scrutiny for regulations of professional speech, nothing in the cases on which Petitioners rely indicates that those circuits would have reached a different result than the Third Circuit in this case. Nor is there any conflict among the circuits concerning Petitioners' claim that A3371 violates the fundamental rights of parents in raising their children.

In *Moore-King v. County of Chesterfield*, 708 F.3d 560 (4th Cir. 2013), the Fourth Circuit upheld municipal registration and tax regulations applicable to fortune-telling. Applying an analysis entirely consistent with that of the Third Circuit in this case, the Fourth Circuit held that professional speech may be subjected to a greater level of regulation under the First Amendment when "the speaker is providing personalized advice in a private setting to a paying client." *Id.* at 569. The court concluded that it "need not delineate the precise boundaries of permissible occupational regulation under the professional speech doctrine" because the regulation at issue fell "squarely within the scope of that doctrine." *Id.* at 570. If anything, the Fourth Circuit applied a *more lenient* standard of scrutiny to regulation of professional speech than the intermediate scrutiny that the Third Circuit applied here. Petitioners fail to point to anything in *Moore-King* that suggests the Third Circuit's judgment should have come out differently in the present case; Petitioners thus fail to demonstrate that resolving any conflict between the Third and Fourth Circuits would redound to Petitioners' favor. *See Jennings*, 135 S. Ct. at 799.

Nor is there any conflict between the Third Circuit's decision below and the Fifth Circuit's decision in *Hines v. Alldredge*, 783 F.3d 197 (5th Cir. 2015). The statute upheld in *Hines* prevented a person from practicing veterinary medicine without having first examined the animal to be treated. 783 F.3d at 199-200. The plaintiff claimed that this statute improperly restricted his First Amendment right to free speech by preventing him from offering veterinary advice based only on documentary evidence. *Id.* Pointing to the "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," the Fifth Circuit concluded that the statute did not violate the plaintiff's First Amendment rights. *Id.* at 201. Indeed, the Fifth Circuit questioned whether the plaintiff's "First Amendment rights are even implicated by this regulation." *Id.* at 202. *Hines* is fully consistent with the Third Circuit's analysis, and nothing in that case indicates that the Fifth Circuit would have reached a different result.

The Third Circuit's decision below also does not conflict with the Eleventh Circuit's decision in *Wollschlaeger v. Governor of Florida*, No. 12-14009, 2015 WL 8639875 (11th Cir. Dec. 14, 2015). In *Wollschlaeger* the Eleventh Circuit rejected a First Amendment challenge to a Florida statute limiting the ability of doctors to ask their patients about firearms. *Id.* at *30. Petitioners contend that the Eleventh Circuit failed to apply a sufficiently stringent First Amendment standard, Pet. at 29, but after Petitioners filed their petition, the Eleventh Circuit, on petition for rehearing, held that the

statute in question would "survive[] even strict scrutiny." *Wollschlaeger*, 2015 WL 8639875, at *19. The court explicitly stated that its holding did not decide "what level of scrutiny should apply" when examining restrictions on professional speech, but simply held that since the Florida law would withstand even strict scrutiny, "the Act also survives any less demanding level of scrutiny." *Id.* Thus, nothing in *Wollschlaeger* suggests that the Eleventh Circuit would have reached a different result than the Third Circuit in this case.

Finally, the Petition's efforts to justify this Court's review by contending that Ninth Circuit precedents other than *Pickup* conflict with the Third Circuit's decision below are unavailing. The Petition first erroneously describes the Third Circuit's decision as being "in direct conflict" with the Ninth Circuit's decision in *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002), a case which "held that strict scrutiny applied to . . . regulations of speech between doctor and patient." Pet. at 23-24. In *Conant*, the Ninth Circuit upheld an injunction prohibiting the federal government from enforcing a policy that threatened to punish doctors for communicating with their patients about the medical use of marijuana as part of a federal criminal drug law enforcement scheme. 309 F.3d at 632. The Ninth Circuit itself in *Pickup* did not regard *Conant* as requiring strict scrutiny of state health regulations prohibiting licensed therapists from engaging in sexual orientation change efforts with minors, as Petitioners here argue. Rather, in upholding California's statute barring such practices, the Ninth Circuit observed that California's statute, "unlike [the federal marijuana policy] in *Conant* . . . *allows* discussions about

treatment, recommendations to obtain treatment, and expressions of opinions about [sexual orientation change efforts] and homosexuality." *Pickup*, 740 F.3d at 1229. The same is true of New Jersey's A3371, and *Conant* therefore presents no conflict with the Third Circuit's decision here.

There also is no merit to the Petition's argument that the Ninth Circuit's decision in *National Association for Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043 (9th Cir. 2000) ("*NAAP*"), conflicts with the Third Circuit's decision below. *See* Pet. at 25-26. In *NAAP*, the Ninth Circuit upheld California's mental health professional licensing requirements against First Amendment challenges. The Petition's suggestion that the Ninth Circuit's *NAAP* holding requires that courts subject laws such as A3371 to strict scrutiny—thereby creating a conflict with the Third Circuit here—misstates the Ninth Circuit's *NAAP* decision, which held that "[t]he communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation." *See NAAP,* 228 F.3d at 1054. Moreover, the Ninth Circuit itself in *Pickup* analyzed and expounded upon *NAAP,* concluding that *NAAP* was fully consistent with its decision to uphold California's prohibition on licensed mental health professionals engaging in sexual orientation change efforts with minors. *See Pickup,* 740 F.3d at 1231. *NAAP* creates no conflict warranting this Court's review, particularly in light of the Ninth Circuit's subsequent decision upholding a statute nearly identical to the statute upheld by the Third Circuit here.

Just as there is no circuit conflict concerning Petitioners' First Amendment claim, there also is no

conflict between the Third Circuit's decision and the decisions of other circuits concerning the scope of parents' rights to direct the upbringing and education of their children. The circuits consistently have held that there is no fundamental right under the Due Process Clause, even on one's own behalf, to obtain particular medical treatments reasonably prohibited by the government. *See, e.g., Abigail Alliance for Better Access to Developmental Drugs v. von Eschenbach,* 495 F.3d 695, 711 (D.C. Cir. 2007) (terminally ill patients have no fundamental right to access treatments whose safety has not yet been tested); *NAAP,* 22 8 F.3d at 1050 ("[S]ubstantive due process rights do not extend to the choice of type of treatment or of a particular health care provider."); *Mitchell v. Clayton,* 995 F.2d 772, 775 (7th Cir. 1993) ("[A] patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider if the government has reasonably prohibited that type of treatment or provider."); *Rutherford v. United States,* 616 F.2d 455, 457 (10th Cir. 1980) (terminally ill cancer patients have no fundamental right to obtain non-FDA-approved drugs). As both the Third Circuit and the Ninth Circuit concluded, "it would be odd if parents had a substantive due process right to choose specific treatments for their children—treatments that reasonably have been deemed harmful by the state—but not for themselves." App. 14a-15a (quoting *Pickup*, 740 F.3d at 1235-36).

In sum, the Petition has not demonstrated that this case presents any circuit conflict that warrants resolution by this Court.

II. THE THIRD CIRCUIT'S OPINION IS CONSISTENT WITH THIS COURT'S PRECEDENT CONCERNING REGULATION OF PROFESSIONAL SPEECH.

This Court long has acknowledged the authority of the States to regulate the practice of certain professions. Over one hundred years ago, this Court stated that it was "too well settled to require discussion" that "the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health." *Watson*, 218 U.S. at 176. To that end, this Court has recognized that States have "broad power to establish standards for licensing practitioners and regulating the practice of professions," *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975), as the exercise of that authority is necessary to "shield[] the public against the untrustworthy, the incompetent, or the irresponsible." *Thomas v. Collins*, 323 U.S. 516, 545 (1945) (Jackson, J., concurring). This Court also has acknowledged that such regulations may from time to time have an incidental effect on the professional's speech, but "[t]he power of government to regulate the professions is not lost whenever the practice of a profession entails speech." *Lowe v. S.E.C.*, 472 U.S. 181, 228 (1985) (White, J., concurring in the judgment). Justice White expounded on the limited First Amendment protection of professional speech that takes place in the context of providing individualized professional services to clients:

> One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and

> circumstances is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession. . . .

Id. at 232. In contrast, Justice White further explained:

> Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that Congress shall make no law . . . abridging the freedom of speech, or of the press.

Id. Justice White made clear that the State properly may impose reasonable regulations on professional speech when it does so in the context of regulating professional interactions with a client, but may not seek to restrict the expression of professional viewpoints and opinions outside of that context, when a professional is not engaging in the provision of services to a particular client. Most recently, this Court addressed the regulation of professional speech by medical practitioners in *Casey*, 505 U.S. 833, wherein the Court considered whether a state law requiring a doctor to provide to a patient seeking an

abortion certain information regarding the health risks of abortion and childbirth violated the doctor's First Amendment rights. This Court upheld the statute, admitting, "[t]o be sure, the physician's First Amendment rights not to speak are implicated, . . . but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State. . . . We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here." *Id.* at 884 (plurality opinion).[5]

The Third Circuit's opinion below comports with this Court's precedent. The Third Circuit noted its previous determination in *King* that A3371 "was a permissible prohibition of professional speech . . . based on our finding that the State has an unquestionably substantial interest in protecting citizens from harmful professional practices, and that this interest is even stronger where the citizens protected are minors, a population that is especially vulnerable to such practices." App. at 8a. The court further acknowledged "that the State met its burden of demonstrating that SOCE counseling posed harms that were real, not merely speculative." *Id.* at 8a-9a. The court also found that the statute only prevents a licensed therapist from providing SOCE counseling to minors and does not prevent a counselor from offering his opinions on SOCE counseling, either in public or to a particular patient. *Id.* at 12a n.5. In sum, the statute affects only professional conduct by state-licensed mental health practitioners when

[5] In addition to the three Justices who joined the plurality opinion in *Casey*, four additional Justices would have upheld the challenged law in its entirety. *Id.* at 944 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Thus, seven Justices voted to uphold the disclosure requirement.

providing treatment to patients, and the Third Circuit's decision is thus consistent with this Court's precedent. *See Casey*, 505 U.S. at 884; *Lowe*, 472 U.S. at 232 (White, J., concurring in the judgment).

Nothing in this Court's decision last Term in *Reed* changes anything about the analysis above or the constitutionality of A3371. While Petitioners frame the *Reed* decision as setting forth a broad "rule mandating strict scrutiny of facially content-based regulations on speech," Pet. at 10, the Court's ruling did not address, much less change, this Court's longstanding framework for analyzing a state's exercise of its police power to impose reasonable health and safety regulations that incidentally restrict some professional speech. In *Reed* this Court examined the constitutionality of a local regulatory scheme that placed various restrictions on outdoor signs depending on which one of 23 categories of speech the content of the sign concerned. Finding no basis at all for the distinctions drawn by the local ordinance, *see Reed*, 135 S.Ct. at 2239 ("The Town of Gilbert's defense of its sign ordinance . . . does not pass strict scrutiny, or intermediate scrutiny, or even the laugh test.") (Kagan, J., concurring in the judgment), the Court struck down the law under strict scrutiny as an unconstitutional content-based restriction. *Id*. at 2224-25. But, as the Eleventh Circuit recently recognized (directly after citing *Reed*), "the general rule that content-based restrictions trigger strict scrutiny is not absolute. Content-based restrictions on certain categories of speech such as commercial and professional speech, though still protected under the First Amendment, are given more leeway because of the robustness of the speech and the greater need for regulatory

flexibility in those areas." *Dana's R.R. Supply v. Att'y Gen.* , __ F.3d __, No. 14-14426, 2015 WL 6725138, at *6 (11th Cir. Nov. 4, 2015) (citing *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011); *Wollschlaeger v. Governor of Fla.*, 797 F.3d 859, 872 (11th Cir. 2015)).

While Petitioners contend that *Reed* silently overruled the commercial and professional speech frameworks originally set forth in this Court's decisions in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, 557, 564 (1980) and *Lowe*, 472 U.S. at 232, the *Reed* decision does not even mention, let alone overrule, either of these cases. Indeed, Justice Breyer's concurrence dispels any idea that *Reed* reaches as broadly as Petitioners urge, quoting a litany of the Court's "subcategories and exceptions to the rule," including those for commercial speech and for "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable," as is the case here. *Reed*, 135 S. Ct. at 2235 (Breyer, J., concurring in the judgment) (citing *Cent. Hudson*, 447 U.S. at 562-63 and quoting *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992)). As such, it is not surprising that lower courts since *Reed* was issued consistently have rejected arguments, like the one advanced by Petitioners here, that *Reed* should be read broadly to sweep all content-based regulations into strict scrutiny review. See, e.g., *S.F. Apartment Ass'n v. City & Cnty of S.F.*, __ F. Supp. 3d __, No. 15-cv-01545-PJH, 2015 WL 6747489, at *7 (N.D. Cal. Nov. 5, 2015) ("*Reed* is inapplicable to the present case, for several reasons, including that it does not concern commercial speech."); *CTIA-The Wireless Ass'n v. City of Berkeley*, __ F. Supp. 3d __,

No. C-15-2529 EMC, 2015 WL 5569072, at *10 (N.D. Cal. Sept. 21, 2015) ("The Supreme Court has clearly made a distinction between commercial and noncommercial speech . . . and nothing in its recent opinions, including *Reed*, even comes close to suggesting that that well-established distinction is no longer valid."); *Contest Promotions, LLC v. City & Cnty. of S.F.*, No. 15-cv-00093 (SI), 2015 WL 4571564, at *3-4 (N.D. Cal. July 28, 2015) ("*Reed* does not concern commercial speech, and therefore does not disturb the framework which holds that commercial speech is subject only to intermediate scrutiny as defined by the *Central Hudson* test."); *Cal. Outdoor Equity Partners v. City of Corona*, No. CV 15-03172 MMM (AGRx), 2015 WL 4163346, at *10 (C.D. Cal. July 9, 2015) ("*Reed* does not concern commercial speech . . . The fact that *Reed* has no bearing on this case is abundantly clear from the fact that *Reed* does not even *cite Central Hudson*, let alone apply it."); *see also Timilsina v. W. Valley City*, No. 2:14-cv-00046-DN-EJF, 2015 WL 4635453, at *7 (D. Utah Aug. 3, 2015) ("Because the parties agree this case concerns commercial speech and that *Central Hudson* applies, the Court need not address how the regulation would fare under [*Reed*].").[6]

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[6] As noted above, the Eleventh Circuit in *Wollschlaeger* recently was asked to apply strict scrutiny to the regulation of professional speech at issue in that case (*see supra* at 18-19) but declined to reach the question of whether *Reed* mandated that strict scrutiny be applied in such circumstances. Indeed, the *Wollschlaeger* court noted that "[r]estrictions on commercial speech traditionally receive intermediate scrutiny," 2015 WL 8639875, at *19 (citing *Cent. Hudson*, 443 U.S. at 564), and that "it is hardly clear that anything has changed," following *Reed*. *Id.* In any case, the Eleventh Circuit did not need to reach the question of whether strict scrutiny should apply because it held

Petitioners also claim that the *Reed* Court's discussion of *NAACP v. Button*, 371 U.S. 415 (1963), "acknowledged that [the Court's strict scrutiny] analysis and firm rule also applies to content-based restrictions of the speech of licensed professionals as well," Pet. at 11, and that "[t]his 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 in part of the practice of a profession." Pet. at 26 (citing *Legal Serv. Corp. v. Velazquez*, 531 U.S. 533 (2001) and *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781 (1988)). Contrary to Petitioner's argument, the Third Circuit's decision is fully consistent with *Button, Velazquez,* and *Riley*. Those cases struck down laws that improperly restricted professional speech for reasons unrelated to protecting public health and safety or enforcing standards of professional competence and that actually *impaired* the provision of competent professional services; in contrast, the court of appeals here upheld A3371 based on the State's interest in *protecting* its citizens from ineffective or harmful professional services.

In *Reed*, this Court discussed *Button* as an example of a case where "content-based legislation" was "used for invidious, thought-controlling purposes," such that the application of strict scrutiny was appropriate. *Reed*, 135 S. Ct. at 2229. The statute at issue in *Button* prevented NAACP representatives from signing up potential plaintiffs for discrimination

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that "the Act survives even strict scrutiny [and] . . . [g]iven this conclusion, we pass no judgment on what level of scrutiny should apply here, but would of course hold that the act also survives any less demanding level of scrutiny." *Id.*

lawsuits at community meetings, thus impairing NAACP attorneys' ability to offer needed legal services. The Court specifically noted that the statute blocked the means whereby "the Association and its members were advocating *lawful means of vindicating legal rights*," and concluded that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Button*, 371 U.S. at 437, 439. Here, A3371 does not restrict access to competent professional services, but instead prevents licensed professionals from subjecting minor patients to discredited, unsafe, and ineffective treatments—professional conduct that the State reasonably has found harmful to patients based on substantial evidence and the conclusions of numerous medical and mental health professional associations. *See* App. at 14a-15a. The Third Circuit's decision therefore does not conflict with *Button*.

In *Velazquez*, this Court struck down a provision of a statute prohibiting federally-funded legal services organizations from initiating or participating in "litigation, lobbying, or rulemaking, involving an effort to reform a Federal or State welfare system." 531 U.S. at 538 (quoting Omnibus Consolidated Rescissions and Appropriations Act of 1996, Pub. L. No. 104-134, § 504(a)(16), 110 Stat. 1321–53). As the Third Circuit explained in *King*, the law in *Velazquez* was subject to "more demanding scrutiny" because it was not "enacted pursuant to the State's interest in protecting its citizens from ineffective or harmful professional services," but instead was intended "to insulate certain laws from constitutional challenge." *King*, 767 F.3d at 235. The statute in *Velasquez* seriously *impaired* the quality of professional legal representation and undermined the interests of

clients because, under the law, attorneys from organizations receiving federal funds "could not advise the courts of serious questions of statutory validity." *Velazquez*, 531 U.S. at 545. That "disability," the Court held, "is *inconsistent with the proposition that attorneys should present all the reasonable and well-grounded arguments* necessary for proper resolution of the case." *Id.* Any comparison between *Velazquez* and this case is thus misplaced.

Nor is the Third Circuit's decision inconsistent with *Riley*. In *Riley*, this Court struck down a North Carolina regulation of professional non-profit fundraisers that (1) limited the fees that they could charge their client organizations; (2) required the fundraisers to disclose the percentage of gross receipts passed along to the organizations; and (3) mandated that the fundraisers obtain licenses. 487 U.S. at 784-86. Unlike the statute at issue in this case, the statute at issue in *Riley* had the effect of impairing the provision of competent professional services. In particular, this Court found that the three provisions at issue in *Riley* (1) "might well drive professional fundraisers out of North Carolina, or at least encourage them to cease . . . representing certain charities (primarily small or unpopular ones . . .)," *id.* at 794 (fee limiting provision); (2) "will almost certainly hamper the legitimate efforts of professional fundraisers" and "necessarily discriminate[ ] against small or unpopular charities," *id.* at 799 (disclosure provision); and (3) created "delay" during the pendency of licensing applications, thus "compel[ling] the speaker's silence," *id.* at 802 (licensing provision). Such impairment of the delivery of competent professional services stands in

stark contrast with A3371, which seeks to ensure that licensed mental health professionals adhere to professional standards of competence and safety. As such, there is no conflict between the Third Circuit's decision and this Court's decision in *Riley*.

III. THE THIRD CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S PRECEDENT REGARDING THE SCOPE OF THE FUNDAMENTAL RIGHT OF PARENTS TO DIRECT THE UPBRINGING AND EDUCATION OF THEIR CHILDREN.

In concluding that the Due Process Clause does not create a fundamental right for parents to obtain a treatment that the legislature reasonably has determined to be unsafe and ineffective, the Third Circuit below agreed with the Ninth Circuit's "careful articulation" of the right at issue. *Pickup,* 740 F.3d at 1235 (citing *Washington v. Glucksberg,* 521 U.S. 702, 720-21 (1997)); App. at 14a-15a. A3371 regulates state-licensed professionals; it does not regulate parents. Accordingly, the Third Circuit correctly determined the right at issue to be a claimed "right of parents to demand that the State make available a particular form of treatment." App. at 14a.

Petitioners cite no precedent indicating that such a right exists. As this Court long ago recognized, parental rights do "not include liberty to expose the community or the child to communicable disease or the latter to ill health or death." *Prince v. Massachusetts*, 321 U.S. 158, 166-67 (1944). States may restrict, or even compel, certain parental actions when the health or safety of the child or the public at large is at issue. For example, even over parental

objections, states may enforce child labor regulations and compulsory vaccination laws and require that children undergo blood transfusions. See *Prince*, 321 U.S. 158; *Jacobson v. Massachusetts*, 197 U.S. 11 (1905); *Jehovah's Witnesses v. King Cnty. Hosp. Unit No. 1 (Harborview)*, 390 U.S. 598 (1968).

Petitioners strain to read *Parham*, 442 U.S. 584, as giving parents the absolute "authority to select medical procedures and otherwise decide what is best for their child." Pet. at 30-31 (emphasis omitted). But *Parham* expressly rejected any such absolute right, affirming that "a state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." 442 U.S. at 603.[7] Here, the State has enacted a reasonable regulation to protect minors from mental health practices that are ineffective and unsafe. Thus, it is well within "the rightful boundary of its power" to protect minors from "harmful possibilities . . . of . . . psychological or physical injury." *Prince*, 321 U.S. at 170.

Consistent with this Court's reasoning in *Parham, Prince,* and other cases, the court of appeals concluded that although "parents have decision-making authority with regard to the provision of

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[7] Petitioners also overstate the scope of the parental right in *Parham*. This Court held that parents may commit their children to mental hospitals without an adversarial hearing, but only because the statute in question properly protected children by requiring "the superintendent of each regional hospital to exercise independent judgment as to the child's need for confinement." *Id.* at 604. Thus, the parental right in *Parham* was limited; the judgment of the medical official would outweigh a parent's wish to commit his or her child if the commitment was not medically warranted.

medical care for their children, . . . the case law does not support the extension of this right to a right of parents to demand that the State make available a particular form of treatment." App. at 14a. The court took notice of lower court "decisions holding that patients do not have the right to choose specific treatments for themselves," *id.*, agreeing with the Ninth Circuit that "it would be odd if parents had a substantive due process right to choose specific treatments for their children—treatments that reasonably have been deemed harmful by the state—but not for themselves." *Id.* at 14a-15a (quoting *Pickup,* 740 F.3d at 1235-36). That conclusion was particularly appropriate given that the state possesses even greater power to protect children from harm than it possesses to protect adults. *See Prince,* 321 U.S. at 170.[8]

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[8] Nor do any of the other cases cited by Petitioners support the existence of a fundamental right of parents to require the state to approve a specific form of medical treatment that it reasonably has determined to be unsafe. None of those cases involve the regulation of health care or medical treatment, and most concern laws that directly regulate the parent-child relationship, unlike the law at issue here. *See Troxel v. Granville*, 530 U.S. 57 (2000) (striking down a "breathtakingly broad" state law permitting courts to award visitation to any person over the objections of a child's parent); *Wisconsin v. Yoder*, 406 U.S. 205 (1972) (striking down a state law requiring Amish children to attend school after eighth grade); *Pierce v. Soc'y of the Sisters of the Holy Names of Jesus & Mary*, 268 U.S. 510 (1925) (invalidating a state law prohibiting parents from sending their children to private rather than public schools). Petitioners also cite to *Meyer v. Nebraska*, 262 U.S. 390, 402 (1923), but that decision invalidated a state law barring the teaching of foreign languages in schools to children below eighth grade on the ground that learning a foreign language is not harmful and that a state cannot restrict the constitutional

In sum, the Petition has not demonstrated that this case presents any conflict with this Court's precedent that warrants resolution by this Court.

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rights of teachers and parents solely in order "to foster a homogeneous people." There is no such impermissible purpose here.

CONCLUSION

For the foregoing reasons, the Court should deny the petition for writ of certiorari.

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