No. 15-195

IN THE

Supreme Court of the United States

JOHN DOE, *et al.*,

Petitioners,

v.

GOVERNOR OF THE STATE 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 FOR THE GOVERNOR OF THE STATE OF NEW JERSEY

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QUESTION PRESENTED

1. Whether a law prohibiting state-licensed mental health providers from engaging in sexual orientation change efforts with minors is a valid exercise of the State's broad police powers consistent with the First Amendment to the United States Constitution.

2. Whether a parent's fundamental right to make decisions concerning the care, custody, and control of his or her children is absolute and unqualified so that a parent can subject the child to a form of medical treatment that the State has found harmful and prohibited.

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PRELIMINARY STATEMENT

New Jersey's historic police powers permit the regulation of the medical and mental health professions to protect the public from ineffective, incompetent, or harmful medical practices. Under that authority, New Jersey enacted Assembly Bill A3371 to prohibit State-licensed mental health providers from engaging in the ineffective and potentially harmful practice of sexual orientation change efforts ("SOCE") with minors. A3371 does not prevent State-licensed professionals from discussing, recommending, or advocating for SOCE. It prohibits only a particular form of mental health treatment that is not immunized from regulation merely because it is carried out through speech. *See, e.g.*, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 844 (1992) (explaining that speech is "part of the practice of medicine, [and is] subject to reasonable licensing and regulation").

Petitioners ask this Court to adopt a theory of the First Amendment that no court has accepted and is contrary to this Court's precedents. The Court's recent opinion in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), did not overturn the rule that a regulation does not trigger strict scrutiny "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable[.]"*R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992). Nor does it call into question the government's deep-rooted authority to regulate the practice of certain professions. As such, Petitioners' reliance on *Reed* amounts to nothing more than an attempt to manufacture a conflict where none exists.

The Third Circuit's decision in *Doe* does not conflict with the Ninth Circuit's decision in *Pickup v. Brown*, 740 F.3d 1208, 1236 (9th Cir.), *cert. denied*, 134 S. Ct. 2871 (2014). The Third and Ninth Circuits have found that regulations prohibiting licensed mental health professionals from engaging in SOCE with minors are constitutional. App. at 8a-9a; *King v. Governor of N.J.*, 767 F.3d 216, 224 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 2048 (2015); *Pickup*, 740 F.3d at 1236. Moreover, when professional speech is viewed more broadly, the circuit courts of appeals are unanimous: professional speech receives diminished protection under the First Amendment "when it is used to provide personalized services to a client based on the professional's expert knowledge and judgment." *King*, 767 F.3d at 232-33; *see Stuart v. Camnitz*, 774 F.3d 238, 248 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2838 (2015); *Wollschlaeger v. Governor of Fla.*, __ F.3d __, __ (11th Cir. 2015) (slip op. at 56); *Pickup*, 740 F.3d at 1228.

Finally, subjecting children to a form of mental health treatment that a state has reasonably deemed harmful and prohibited is not among the fundamental rights of parents to direct the upbringing of their children. As such, the Third Circuit's decision does not conflict with any of this Court's decisions concerning the fundamental rights of parents.

Therefore, no circuit split exists worthy of this Court's review, and certiorari should be denied.

COUNTERSTATEMENT OF THE CASE

A. The Legislature Passes A3371 to Protect Minors from a Potentially Dangerous and Ineffectual Medical Practice.

On August 19, 2013, New Jersey's Governor signed Assembly Bill A3371, codified at N.J. Stat. Ann. §§ 45:1-54, -55, to protect minors from the ineffective and potentially harmful mental health practice of SOCE. App. at 5a-6a. This statute, as part of a comprehensive regulatory framework designed to protect the public, prohibits State-licensed mental health professionals from engaging in SOCE with minors.

In passing A3371, the Legislature considered and relied upon leading medical and mental health organizations in the country, including the American Psychiatric Association, the American Academy of Pediatrics, and the American Psychological Association. *Id.* at 6a-8a. These professional organizations have all concluded that little or no evidence supports the efficacy of SOCE, also known as reparative or conversion therapy, and that SOCE may lead to devastating consequences for minors, including suicide, depression, guilt, and anxiety. *Id.*

A task force established by the American Psychological Association concluded that "sexual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people[.]" App. at 46a. Likewise, the American Psychiatric Association determined that "the potential risks of reparative therapy are great, including depression, anxiety and self-destructive behavior, since therapist

alignment with societal prejudices against homosexuality may reinforce self-hatred already experienced by the patient." *Id.* at 48a. These risks, and the lack of "rigorous scientific research to substantiate their claims of cure," led the American Psychiatric Association to oppose "any psychiatric treatment such as reparative or conversion therapy which is based upon the assumption that homosexuality per se is a mental disorder or based upon the a priori assumption that a patient should change his or her sexual orientation." *Id.* at 47A-48a.

The Legislature also drew on research published in the Journal of the American Academy of Child and Adolescent Psychiatry that found no evidence that sexual orientation can be altered through therapy nor a valid medical basis for attempting to prevent homosexuality. *Id.* at 51a. The American Academy of Child and Adolescent Psychiatry also found that efforts to change a person's sexual orientation "may encourage family rejection and undermine self-esteem, connectedness and caring," which are "important protective factors against suicidal ideation and attempts." *Id.*

Based on these findings, the Legislature recognized first, that "[b]eing lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming[.]" *Id.* at 46a. And second, that "New Jersey has a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting minors against exposure to [the] serious harms caused by sexual orientation change efforts." *Id.* at 52a.

Guided by these considerations, the Legislature passed A3371 to prohibit any person "licensed to provide professional counseling" under New Jersey law from engaging in SOCE with any person under 18 years of age. N.J. Stat. Ann. § 45:1-55(a). A3371 defines SOCE as "the practice of seeking to change a person's sexual orientation, including, but not limited to, efforts to change behaviors, gender identity, or gender expressions, or to reduce or eliminate sexual or romantic attractions or feelings toward a person of the same gender . . . ." N.J. Stat. Ann. § 45:1-55(b). SOCE do 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 applies to State-licensed mental health providers such as 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. N.J. Stat. Ann. § 45:1-55(a). For each of these professions, the Legislature has established a board or committee to set standards for examination and licensing, and to review and approve 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). Each board or committee enjoys uniform investigative and enforcement authority and applies 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 to -15.

B. The Third Circuit Affirms the Constitutionality of A3371.

Petitioners filed a Complaint and a Motion for Preliminary Injunction in the United States District Court for the District of New Jersey on November 1, 2013, seeking injunctive and declaratory relief on the grounds that A3371 violates the United States Constitution. App. at 10a. The State Respondent filed a motion to dismiss Petitioners' Complaint on December 6, 2013.

On March 28, 2014, the District Court entered an order staying the matter pending a decision by the Supreme Court on the Petition for Certiorari in *Pickup v. Brown*, 134 S. Ct. 2871 (2014). App. at 11a. Petitioners then filed a Notice of Appeal on April 18, 2014. *Id.*

After this Court denied the petition for certiorari in *Pickup*, the District Court granted the State Respondent's Motion to Dismiss and denied Petitioners' Motion for Preliminary Injunction. Petitioners filed a second Notice of Appeal on July 31, 2014. App. at 4a-5a; 18a-41a; 42a-44a.

On April 13, 2015, the Third Circuit affirmed the District Court's decision upholding A3371. App. at 16a-17a. At the outset, the Third Circuit recognized that Petitioners were challenging the same statute at issue in *King*, App. at 4a, where the Third Circuit had previously recognized that "a licensed professional does not enjoy the full protection of the First Amendment when speaking as part of the practice of her profession." *King*, 767 F.3d at 232. The Third Circuit explained below 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 (quoting *King*, 767 F.3d at 233-34). Therefore, "a prohibition of professional speech is permissible only if it 'directly advances' the State's 'substantial' interest in protecting clients from ineffective or harmful professional services, and is 'not more extensive than necessary to serve that interest.'" *Id.* (quoting *King*, 767 F.3d at 235).

Applying this standard, the Third Circuit determined that A3371 survives intermediate scrutiny because 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.'" *Id.* (quoting *King*, 767 F.3d at 237-38, 240). The Third Circuit also "found that the State met its burden to demonstrate that SOCE counseling posed harms that were real, not merely speculative." *Id.* at 8a-9a (citing *King*, 767 F.3d at 238) (observing that a number of "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.'"). Recognizing that a "listener's right to receive information is reciprocal to the speaker's right to speak[,] the Third Circuit found that A3371 does not violate Petitioners' right to receive information because the statute does not violate the counselor's right to speak. App. at 13a (citing *King*, 767 F.3d at 240).

Finally, the Third Circuit rejected Petitioners Jack and Jane Doe's argument that they have an absolute and unqualified right to subject their child to a form of medical treatment deemed harmful and prohibited by the State. *Id.* at 14a-15a.

SUMMARY OF THE ARGUMENT

For over a century now, this Court has recognized that the states have broad power to regulate the practice of professions, including those that concern the public health, to protect the public against the untrustworthy, the incompetent, or the irresponsible. To that end, the New Jersey Legislature passed A3371, which prohibits State-licensed mental health providers from engaging in the ineffective and potentially harmful practice of SOCE with minors.

A3371 was passed for the very reason professional speech receives diminished First Amendment protection—to protect citizens from ineffective and harmful medical practices. Therefore, the regulation fits comfortably within the framework established in *R.A.V. v. St. Paul*, 505 U.S. 377, 388 (1992) (holding a content-based regulation does not trigger strict scrutiny "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable.").

Nothing in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), overturns that exception, and the Third Circuit's decision in *Doe* thus comports with this Court's precedents.

The Third Circuit's decision in *Doe* is also consistent with the Ninth Circuit's decision in *Pickup*—as both courts upheld the statutes as valid exercises of the states' broad police powers consistent with the First Amendment. The other circuit courts that have considered regulations of professional speech have also, without exception, found that professional speech receives diminished protection under the First Amendment. Therefore, Petitioners cannot identify a circuit split worthy of this Court's review.

Finally, the fundamental rights of parents do not include the right to subject their children to a form of medical or mental health treatment that the state has prohibited as dangerous. Accordingly, the Third Circuit's opinion does not run afoul of this Court's precedents concerning the fundamental rights of parents to direct the upbringing of their children.

Therefore, this Court should deny certiorari.

ARGUMENT

I. THE THIRD CIRCUIT'S DECISION IN *DOE* FAITHFULLY FOLLOWS THIS COURT'S FIRST AMENDMENT JURISPRUDENCE.

The decision below—though decided before this Court issued its opinion in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015)—reflects an understanding of the First Amendment consistent with *Reed* and this Court's earlier decisions.

In *Reed*, this Court made the familiar observation 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." *Reed*, 135 S. Ct. at 2226 (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992); *Simon & Shuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991)). Petitioners pluck this statement out of the Court's opinion and suggest that because the Third Circuit found that A3371 is a content-based restriction on speech, it should be subject to strict scrutiny. Pet. at 9-10 (quoting *King*, 767 F.3d at 236). However, Petitioners err in interpreting *Reed* so expansively. *See Dana's R.R. Supply v. AG*, __ F.3d __, 2015 U.S. App. LEXIS 19201, *21 (11th Cir. 2015) (concluding post-*Reed* that regulations of professional and commercial speech are subject to intermediate scrutiny).

Long before *Reed*, the Court recognized that "[c]ontent-based regulations are presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992). The *R.A.V.*

Court however cautioned that "the prohibition against content discrimination . . . is not absolute." *Id.* at 387. As the Court explained, a statute or regulation does not trigger strict scrutiny "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable[.]" *Id.* at 388.

Reed does not undermine the exceptions set forth in *R.A.V.* for permissible content-based regulations. The central issue in *Reed* is not whether strict scrutiny should apply to all content-based regulations, including those that implicate commercial speech, professional speech, obscenity, or defamation. *Reed*, 135 S. Ct. at 2227-31. Rather, it is whether a law that is content-based on its face can be regarded as content neutral. *Id.* In answering that question, the Court observed that the Ninth Circuit misunderstood *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), "as suggesting that a government's purpose is relevant even when a law is content based on its face." *Reed*, 135 S. Ct. at 2228. The Court clarified that "*Ward*'s framework 'applies only if a statute is content neutral." *Id.* at 2229 (citing *Hill v. Colorado*, 530 U.S. 703, 766 (2000)). The Court explained that a law need not discriminate between viewpoints to be content-based and that a law will also be regarded as content based if it favors some speakers over others. *Id.* at 2229-30. At no point does the Court imply, much less express, that *R.A.V.* should be relegated to the dustbin.

Nor does *Reed* cast doubt upon the government's deep-rooted authority to regulate the practice of certain professions. As this Court remarked over 100 years ago, it is "too well settled to require discussion" that "the police power of the states extends to the regulation of

certain trades and callings, particularly those which closely concern the public health." *Watson v. State of Maryland*, 218 U.S. 173, 176 (1910). The 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), the exercise of which 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). Therefore, where a physician's First Amendment rights are implicated "as part of the practice of medicine," the physician is "subject to reasonable licensing and regulation by the State[.]" *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion).

Contrary to those precedents, Petitioners suggest that A3371 should be subject to strict scrutiny. Pet. at 12. However, the Third Circuit aptly recognized that A3371 "fits comfortably within" *R.A.V.*'s framework for permissible content discrimination: the "'basis for [A3371's] content discrimination consists entirely of the very reason professional speech is a category of lesser-protected speech.'" *King*, 767 F.3d at 237 (quoting *R.A.V.*, 505 U.S. at 388)). As the Third Circuit explained, "the reason professional speech receives diminished protection under the First Amendment—*i.e.*, because of the State's longstanding authority to protect its citizens from ineffective or harmful professional practices—is precisely the reason New Jersey targeted SOCE counseling with A3371." *Id.*

Accordingly, A3371 falls into the category of permissible content discrimination sanctioned by this

Court in *R.A.V.* and therefore *Doe* does not conflict with any of this Court's precedents.

II. SINCE THE THIRD CIRCUIT ISSUED ITS DECISION IN *KING*, EVERY COURT THAT HAS CONSIDERED THE ISSUE HAS FOUND COUNSELOR-CLIENT AND DOCTOR-PATIENT COMMUNICATIONS ARE PROTECTED SPEECH.

No compelling justification exists for this Court to grant certiorari in this matter because other than the Ninth Circuit, every circuit court that has considered the issue of whether counselor-client or doctor-patient communications are speech or conduct has found that such communications are speech. *Compare* App. at 8a; *Wollschlaeger*, __ F.3d at __ (slip op. at 41-45); *Stuart*, 774 F.3d at 247-48; *King*, 767 F.3d at 233-34; *with Pickup*, 740 F.3d at 1229.

In *Pickup*, the Ninth Circuit classified a regulation of SOCE therapy as one of "professional conduct" and not speech. *Pickup*, 740 F.3d at 1229. When the Third Circuit analyzed similar legislation in *King*, the court disagreed with the Ninth Circuit, as has every circuit court to consider professional speech since the Third Circuit's opinion in *King*. The Third Circuit explained, "speech is speech, and it must be analyzed as such for the purposes of the First Amendment." *King*, 767 F.3d at 229. Using these same words, the Fourth Circuit agreed that "speech is speech" in *Stuart*, 774 F.3d at 247. And while an earlier decision of the Eleventh Circuit had found that a statute that restricted physicians from inquiring about firearms was a valid regulation of professional

conduct, *Wollschlaeger v. Governor of Fla.*, 760 F.3d 1195, 1217 (11th Cir. 2014), that decision was vacated and the Eleventh Circuit now recognizes that doctor-patient communications are protected speech. *Wollschlaeger*, __ F.3d at __ (slip op. at 45). Given the emerging consensus among the circuit courts on this issue, this matter is unsuited for this Court's review.

Moreover, under the Ninth Circuit's theory that a prohibition of a particular medical practice bans conduct and not speech, *Pickup*, 740 F.3d at 1229, 1236, the Third Circuit would have found A3371 constitutional. App. at 8a-9a; *King*, 767 F.3d at 224. Both circuit courts agreed that professional speech receives diminished First Amendment protection. App. at 9a-9a; *King*, 767 F.3d at 233; *Pickup*, 740 F.3d 1228. They agreed that the states have an interest in protecting minors from an ineffective and potentially harmful medical practice. App. at 8a; *King*, 767 F.3d at 237-38; *Pickup*, 740 F.3d at 1231. And both agreed that SOCE, even when administered using talk therapy, falls within the plainly legitimate sweep of the laws. App. at 8a-9a; *King*, 767 F.3d at 241; *Pickup*, 740 F.3d at 1234-35.

Because the Third and Ninth Circuits concur that laws prohibiting the administration of SOCE to minors are constitutional, any differences between those decisions is of no moment. As the Third Circuit recognized, "it follows *ipso facto* that" A3371 would survive rational basis review because it survives intermediate scrutiny by directly advancing the State's substantial interest in protecting minors from an ineffective and potentially harmful medical practice, and because it is not more extensive than necessary to serve that interest. *King*, 767 F.3d at 240, 243; *Pickup*, 740 F.3d at 1231.

Therefore, the Petition does not justify the grant of certiorari as Petitioners would not prevail under either circuit's approach.

III. ALL CIRCUIT COURTS CONSIDERING REGULATIONS OF PROFESSIONAL SPEECH HAVE AGREED THAT WHEN SUCH SPEECH IS USED TO PROVIDE PERSONALIZED SERVICES, IT RECEIVES DIMINISHED FIRST AMENDMENT PROTECTION.

The circuit courts of appeals have uniformly recognized that professional speech receives diminished protection under the First Amendment "when it is used to provide personalized services to a client based on the professional's expert knowledge and judgment." *King*, 767 F.3d at 232-33; *Stuart*, 774 F.3d at 248; *Wollschlaeger*, __ F.3d at __ (slip op. at 46, 56); *Pickup*, 740 F.3d at 1228; *Moore-King v. County of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013).

Just as the Third Circuit concluded in *King*, and more recently in *Doe*, the Fourth and Eleventh Circuits have suggested that regulations of speech between a licensed professional and his or her client are subject to intermediate scrutiny. App. at 8a; *Wollschlaeger*, __ F.3d at __ (slip op. at 46); *Stuart*, 774 F.3d at 245; *King*, 767 F.3d at 234. In *Wollschlaeger*, the Eleventh Circuit explained that "[w]hen the State seeks to impose content-based restrictions on speech in a context in which its regulatory interests are diminished, such as when a professional speaks to the public in a nonprofessional capacity, courts apply the most exacting scrutiny." *Wollschlaeger*, __ F.3d at __ (slip op. at 56). However, the Eleventh Circuit

stated that "[w]hen the State seeks to regulate speech by professionals in a context in which the State's interest in regulating for the protection of the public is more deeply rooted, a lesser level of scrutiny applies." *Id.* The Eleventh Circuit emphasized that regulations of professional speech receive diminished First Amendment protection and left for another day the question of what level of scrutiny should be applied. *Id.* at __ (slip op. at 59).

In *Stuart*, the Fourth Circuit applied intermediate scrutiny to a regulation that compelled physicians to perform an ultrasound, display the sonogram, and describe the fetus to a woman seeking an abortion. 774 F.3d at 242, 248, 250-57. But, the circuit court found that the statue could not survive intermediate scrutiny. That the Third and Eleventh Circuits upheld laws under intermediate scrutiny and the Fourth Circuit struck down another under the same standard does not mean that these decisions conflict. Rather, it shows that any differences between these decisions stem not from a different interpretation of the law but the application of the same legal principle to different statutes.

Petitioners claim that the Fourth Circuit suggested that regulations of professional speech may be subject to strict scrutiny when it said, "we need not conclusively determine whether strict scrutiny ever applies in similar situations." *Stuart*, 774 F.3d at 248. Pet. at 23. However, because this statement is dicta, a circuit split cannot be found. *See Bunting v. Mellen*, 541 U.S. 1019, 1023 (2004) (Scalia, J. dissenting) ("We sit, after all, not to correct errors in dicta").

Petitioners similarly submit that the Third Circuit's decisions in *King* and *Doe* conflict with the Ninth Circuit's decisions in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) and *National Association for the Advancement of Psychoanalysis v. California Board of Psychology* ("*NAAP*"), 228 F.3d 1043 (9th Cir. 2000). Pet. at 23-26. However, the Ninth Circuit roundly rejected this very argument in *Pickup,* explaining that *Conant* and *NAAP* can be read in harmony with its decision that a regulation prohibiting mental health professionals from engaging in SOCE on minors is constitutional. *Pickup*, 740 F.3d at 1225-27.

Furthermore, in *Conant*, the Ninth Circuit observed that a policy banning physicians from merely recommending the use of marijuana lacked the requisite "narrow specificity" to survive First Amendment scrutiny and was, therefore, unconstitutionally vague. *Conant*, 309 F.3d at 639 (citing *NAACP v. Button*, 371 U.S. 415, 433 (1963)). The Third Circuit relied upon *Button* for the very same legal principle and found that A3371 is "sufficiently clear to pass constitutional muster." *King*, 767 F.3d at 240 (quoting *Button*, 371 U.S. at 433). Therefore, where Petitioners perceive a conflict, the reality is more banal: two courts applying the same legal principle to two different statutes and reaching two different conclusions.

In *NAAP*, the Ninth Circuit noted that the "communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation." *NAAP*, 228 F.3d at 1054. Although the Ninth Circuit found that the licensing scheme at issue there did not trigger strict scrutiny because it was content and viewpoint neutral, *id.* at 1055, "it neither decided how

much protection that communication should receive nor considered whether the level of protection might vary depending on the function of the communication." *Pickup*, 740 F.3d at 1226. Thus, the Ninth Circuit did not mandate the use of strict scrutiny in *NAAP*, and that decision in no way conflicts with that of the court below.

Nor does the Fifth Circuit's decision in *Hines v. Alldredge*, 783 F.3d 197 (5th Cir.), *cert. denied*, __ U.S. __ (2015), present a conflict with the Third Circuit's decision here. The law at issue in *Hines* "prohibits the practice of veterinary medicine unless the veterinarian has first physically examined either the animal in question or its surrounding premises." *Id.* at 201. The Fifth Circuit observed that the law neither regulates the content of speech, nor requires veterinarians to deliver any particular message or restricts what can be said once a client-patient relationship has been established. *Id.* For that reason, the court determined that whether the veterinarian's "rights are even implicated by this regulation is far from certain" and concluded the statute is constitutional. *Id.* The Fifth Circuit was thus not presented with an opportunity in *Hines* to determine what level of scrutiny should be applied to regulations of professional speech, and no conflict can be found between that decision and *Doe*.

Finally, Petitioners claim that this Court should grant certiorari because the Fourth Circuit employed a lower standard of review than the Third Circuit in *Moore-King*. Pet. at 27-28 (citing *Moore-King*, 708 F.3d 560). However, even assuming that the Fourth Circuit applied a more deferential standard than the Third Circuit, the Fourth Circuit has since applied intermediate scrutiny to

regulations of professional speech, *Stuart*, 774 F.3d at 248, 250-56, just as the Third Circuit did below. App. at 8a. And if that were not enough, this case is not an appropriate vehicle to address the varying approaches because under any circuit court's formulation, A3371 would survive.

Accordingly, Petitioners are unable to identify a compelling reason for this Court to grant certiorari.

IV. THE THIRD CIRCUIT'S DECISION THAT PARENTS DO NOT HAVE AN ABSOLUTE AND UNQUALIFIED RIGHT TO SUBJECT THEIR CHILDREN TO FORMS OF MEDICAL TREATMENT DEEMED HARMFUL BY THE STATE FULLY COMPORTS WITH THIS COURT'S PRECEDENTS.

The Third Circuit correctly determined that parents have no fundamental right to choose a specific type of medical or mental health treatment for their children that the State has reasonably deemed harmful. App. at 14a. Petitioners suggest that the Third Circuit's decision conflicts with this Court's precedents. Pet. at 30-32 (citing *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)). However, none of those decisions support the proposition that parents have an absolute and unqualified right "to make decisions concerning the care, custody, and control of their children," such that a parent could subject his or her child to a form of medical treatment that the State has prohibited due its harmful nature. *See, e.g.*, *Troxel*, 530 U.S. at 66; *Parham*, 442 U.S. at 604.

Rather, as this Court recognized in *Prince*, the "rights of parenthood are [not] beyond limitation," and a State may act "to guard the general interest in [a] youth's well being." *Prince*, 321 U.S. at 166. States thus may limit parental discretion when a child's "physical or mental health is jeopardized." *Parham*, 442 U.S. at 603. Against this backdrop, the Third Circuit found no basis in the law to extend to parents a right to demand that the State make available a particular form of medical treatment for their children that reasonably has been deemed harmful. App. at 14a. *See also Pickup v. Brown*, 740 F.3d 1208, 1235-46 (9th Cir. 2014) (rejecting argument that parents have a fundamental right to choose a particular mental health treatment for children). That decision is correct. If Petitioners' position is taken to its logical end, then any regulation of the medical profession could be nullified by a parent's objection to the regulation, no matter how idiosyncratic the parent's views. *See, e.g.*, *Prince*, 321 U.S. at 166 (explaining state's authority to limit parental discretion "is not nullified merely because the parent grounds his claim to control the child's course of conduct on religion or conscience").

Petitioners also argue that review is warranted because this Court invalidated legislation in *Meyer*, *Pierce*, *Yoder* and *Troxel*. Pet. at 32. In those cases, the Court determined that there was no evidence that the statutes—which were enacted to protect the safety and welfare of children—actually prevented any harm. *See Meyer*, 262 U.S. at 403 (invalidating legislation because there was no basis for the legislature to conclude that teaching foreign languages would cause injury to children); *Pierce*, 268 U.S. at 534-35 (holding that a regulation that forced students to attend only public schools was unconstitutional

because the education of students in private, preparatory and parochial schools was not "inherently harmful, but long regarded as useful and meritorious"); *Wisconsin*, 406 U.S. 233-35 (invalidating a statute that required school attendance until the age of sixteen because of the dearth of evidence that the statute prevented any harm); *Troxel*, 530 U.S. at 67 (finding a statute that permitted judges to disregard and overturn *any* decision by a fit custodial parent unconstitutional because of the lack of a requirement that a showing of harm be made).

A337 does not suffer from the same defect identified in those cases. As the court below recognized, the Legislature was presented with "substantial evidence" demonstrating SOCE's potential to harm minors and its lack of efficacy. *King*, 767 F.3d at 238. A legislature need not rely upon empirical data; it can "justify speech restrictions by reference to studies," anecdotes, history, consensus and common sense. *Florida Bar v. Went For It, Inc.*, 505 U.S. 618, 628-29 (1995). Thus, where a legislature relies upon empirical evidence, as was the case here, *King*, 767 F.3d at 238-39, certiorari is not warranted as this Court does not, after all, "grant certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925).

Accordingly, there is no conflict between the Third Circuit's decision in *Doe* and any of this Court's precedents.

CONCLUSION

For these reasons, the Court should deny the Petition for Writ of Certiorari.

Respectfully submitted,

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