Appeal No. 13-4429

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TARA KING, ET AL.,

Plaintiffs-Appellants,

vs.

GOVERNOR OF NEW JERSEY, ET AL.,

Defendants-Appellees.

On Appeal from the United States District Court
for the District of New Jersey
Case No. 13-cv-05038
(Honorable Freda L. Wolfson)

BRIEF OF AMICUS CURIAE INTERNATIONAL HEALING FOUNDATION IN SUPPORT OF PLAINTIFFS-APPELLANTS URGING REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, International Healing Foundation states that it is a nonprofit 501(c)(3) corporation, that it has no parent corporation, and that it does not issue stock.

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INTEREST OF AMICUS CURIAE[1,2]

The International Healing Foundation (IHF) is a nonprofit counseling and education center that, since 1990, has helped thousands of individuals and families with sexual orientation issues. IHF affirms clients' right to self-determination and autonomy regarding physical and emotional attractions:

> **We believe we are all free...**
> Some live a heterosexual, homosexual, bisexual, transgender, or transsexual life, while others are unsure about their sexuality and seek to explore alternatives. We uphold your right of self-determination, to follow the path that fills your heart with love.
> **We value...**
> We value your right of autonomy. We love and appreciate you just as you are or how you wish to be. We are committed to accompanying you on your journey of self discovery. We respect your faith and values, and how they impact your choices.
> **Our goal...**
> Our goal is to promote healthy individuals and relationships, while assisting in the healing of families, communities, and places of worship.[3]

IHF Director, Christopher Doyle, MA, is a former homosexual, and a licensed clinical professional counselor specializing in sexual orientation issues. His work has appeared in the *Journal of Human Sexuality*, and he is a former Associate Editor of the peer-reviewed journal *Adolescent and Family Health*.

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[1] No party's counsel authored the brief in whole or in part, and no one other than the amicus curiae, its members, or its counsel contributed money that was intended to fund preparing or submitting the brief.
[2] This brief is filed with the consent of all parties.
[3] *About IHF & What We Believe,* International Healing Foundation, http://www.comingoutloved.com/aboutihfwhatwebelieve (last visited Jan. 15, 2014).

When approached by a client who expresses distress over unwanted same-sex attraction (SSA), IHF advocates for the application of therapeutic guidelines to assist clients in achieving the autonomy they desire.[4] IHF's application of therapeutic guidelines to assist clients in achieving self-determination, like most counseling, is carried out exclusively through communication with the client. This communication helps clients and counselors to identify root causes of emotional distress and hurt, and to heal emotional wounds through standard therapeutic discussions.

The lower court's ruling that communication through counseling is not protected by the First Amendment has the potential to have a broad impact on the rights of all licensed counselors, but especially threatens Amicus and its ability to help its clients' achieve their self-determination or to provide professional assistance by licensed counselors to those with unwanted SSA.

[4] *Therapeutic Guidelines*, International Healing Foundation, http://comingoutloved.publishpath.com/therapeutic-guidelines2 (last visited Jan. 15, 2014).

ARGUMENT

The American Counseling Association Code of Ethics affirms that "the primary responsibility of counselors is to respect the dignity and to promote the welfare of clients." *ACA Code of Ethics*, American Counseling Ass'n, (A)(1)(a) (2005). By regulating the content and viewpoint of counselor-client communications, Assembly Bill 3371 ("A3371") impermissibly impinges on counselors' obligations to affirm the dignity, autonomy, and welfare of their clients. A3371 impairs counselors' ability to respect the dignity and autonomy of clients that wish to change their sexual orientation, and forces them to leave their clients in an unhealthy state of physiological frustration with their sexual orientation. The lower court's exclusion of professional speech from First Amendment protections was erroneous because counseling consists of pure speech and A3371 discriminates based on content and viewpoint. Furthermore, allowing the lower court's rationale to stand endangers a broad spectrum of expression.

I. Counseling Consists of Pure Speech.

Despite recognizing that counseling is carried out through speaking with a client ("talk therapy"), the lower court held that counseling is merely "conduct" that does not involve any element of "speech." (Appellants' App. Vol. I, 000042.) This Court rejected a similar line of reasoning in *Bartnicki v. Vopper*, when it held that "although it may be possible to find some kernel of conduct in almost every act of expression, such kernel of conduct does not take the defendants' speech

activities outside the protection of the First Amendment." 200 F.3d 109, 120-21 (3d Cir. 1999), *aff'd*, 532 U.S. 514 (2001). The practice of counseling is not what is regulated by A3371. What is regulated is counseling *for the purpose of* assisting clients in achieving self-determination concerning their sexual orientation. *See* A3371 § 2. For example, a counselor may ask questions to identify "root causes, childhood issues, [or] developmental factors," that provoke physiological distress in a client (Dr. King Decl., Appellants' App. Vol. II, 000171), but if those questions seek to assist the client to change his or her sexual orientation, then the questions are prohibited by A3371.

Furthermore, the court erred in concluding that "counseling is [not] inherently expressive conduct . . . and would [not] be understood as such by . . . clients." (Appellants' App. Vol. I, 000045.) To the contrary, the record in this case and established counseling principles demonstrate that every form of counseling inherently involves communication. Robert V. Keteyian, *Understanding Individual Communication Styles in Counseling*, 19 The Family Journal 90 (2011) ("communication is the life blood of counseling"). Indeed, all counseling requires discrete and subtle communication methods. *Id.* ("Other factors are important in developing the relationship, of course, but communication is the vehicle, and directly and indirectly, we often teach communication skills: We model positive communication practices and, at times, coach clients about how to handle sensitive discussions with important people in their lives."). Sexual orientation change

efforts (SOCE), in particular, require counselors not only to communicate basic messages of affirmation and safety, but also to communicate, if appropriate under the client's circumstances, the specific message that sexual orientation change is possible. (Dr. King Decl., Appellants' App. Vol. II, 000172-73; Dr. Newman Decl., Appellants' App. Vol. II, 000178-79.) Thus, counseling in general, and SOCE counseling specifically, includes inherently communicative speech elements that are entitled to First Amendment protections. *Bartnicki*, 200 F.3d at 121.

II. A3371 Bans SOCE Counseling Based on Its Content and Viewpoint.

In holding that counselors' communication with their clients is not protected by the First Amendment, the lower court erred, because on its face A3371 plainly restricts the content of expression by counselors.

The reasoning behind the lower court's exclusion of counseling from First Amendment protections reveals that the statute regulates the content of counselor-client communications. The lower court's reasoning placed heavy emphasis on two factors: first, that the statute's use of the words "engage" and "efforts" imply a regulation on conduct not speech (Appellants' App. Vol. I, 000027); and second, that "professional counseling" is merely the "application of . . . methods and . . . procedures." (Appellants' App. Vol. I, 000032-33.) Based primarily on these factors, the lower court concluded that counseling is pure conduct regardless of whether it is carried out through the medium of speech. (Appellants' App. Vol. I, 000042.)

"[T]he First Amendment [should not] be reduced to a simple semantic exercise." *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001). A few analogies illustrate that the lower court's rationales are semantic exercises that do not support excluding counseling from First Amendment protection. For instance, as this Court has recognized, even though the word "use" might imply conduct rather than speech, "[a] statute that prohibited the 'use' of evolution theory would surely violate the First Amendment if applied to prohibit the disclosure of Charles Darwin's writings[.]" *Bartnicki*, 200 F.3d at 121. Similarly, if a statute banned "*engaging* in advertizing *efforts*" or "*engaging* in fast-food consumption change *efforts*," it would be nonsensical to argue that such a statute does not infringe on speech merely because it uses the words "engage" and "efforts." *See Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 367 (2002) (holding that a restriction on advertising non-FDA-approved drugs violated the First Amendment).

Moreover, that psychological counseling involves "the application of methods and procedures" does not exempt it (or other forms of counseling) from First Amendment protection. Like advertising is an *action* that *promotes* a sale, *see* Black's Law Dictionary, advertising (9th ed. 2009) (defining "advertising" as "[t]he action of drawing the public's attention to something to promote its sale"), SOCE counseling is an action (the application of counseling methods) that promotes a client's desired end (change in sexual orientation). But SOCE

counseling's conduct elements, like the conduct elements of advertising, do not exclude its communicative elements from First Amendment protection.

Similarly, even though the practice of law consists of the application of legal methods, procedures, and principles, "[t]here can be little doubt that [legal representation involves] constitutionally protected expression." *Velazquez*, 531 U.S. at 548. In *Velazquez*, the Supreme Court found a First Amendment violation when a statute prohibited legal representation "involv[ing] an effort to amend or otherwise challenge existing law" funded by recipients of Legal Services Corporation moneys. *Id.* at 536-38. The Court reasoned that "[t]he effect of the restriction . . . is to prohibit advice [to a client] or argumentation [to a court] that existing welfare laws are unconstitutional or unlawful." *Id.* at 547. Like in *Velazquez*, where the statute banned "efforts" to bring about change in the law, which in effect prohibited lawyers from giving counsel to a client or argumentation to a court in violation of the First Amendment, A3371 prohibits "efforts" to bring about change in a client, which in effect bans counselors from giving counsel to a client. Thus, the lower court's analysis is superficial and deeply flawed.

A3371 clearly regulates content because it restricts the application of counseling methods only when the content of that counseling seeks to alter a client's sexual orientation. *See* A3371 § 2. The exact same counseling methods—such as asking questions to identify root causes or developmental factors—may be applied to any other client need, so long as the *content* is not calculated to change

sexual or emotional attractions. *Cf. Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) ("The government's policy in this case seeks to punish physicians on the basis of the content of doctor-patient communications. Only doctor-patient conversations that include discussions of the medical use of marijuana trigger the policy."). Thus, the statute does not regulate mere *conduct* as the lower court concluded (Appellants' App. Vol. I, 000042), the statute is expressly concerned with the content of the counseling. *Cf. Conant*, 309 F.3d at 637; *Velazquez*, 531 U.S. at 547. As a result, A3371's regulation of speech's content is subject to careful First Amendment scrutiny. *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

Furthermore, the lower court's rationale that counselors may engage in other forms of communication, including referring a client to an unlicensed counselor, does not mitigate the burden on counselors' speech. To the contrary, it highlights the viewpoint discrimination inherent in A3371. In *Velazquez*, as mentioned above, the Court struck down a statute that restricted an attorney's ability to counsel a client on the constitutionality of welfare statutes. The government there attempted to justify the restriction by arguing that an attorney could withdraw from representation. *Id.* at 546. The Court disagreed:

> It is no answer to say the restriction on speech is harmless because . . . attorneys can withdraw. This misses the point. The statute is an attempt to . . . exclude from litigation those arguments and theories Congress finds unacceptable but which by their nature are within the province of the courts to consider.

Id. Similarly, A3371 attempts to exclude from counselor-client communications contents, viewpoints, and discussions that the legislature finds unacceptable. Indeed, the report that the legislature relied on explicitly notes that the application of counseling, and SOCE specifically, differs depending on the viewpoint of the counselor. *Compare* A3371, § 1 *with Report of the American Psychological Ass'n Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, American Psychological Ass'n 18 (2009) ("different worldviews would approach psychotherapy for these individuals from dissimilar perspectives"). The legislature, in other words, chose to favor one worldview over another. Such blatant viewpoint discrimination violates bedrock constitutional principles. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("Viewpoint discrimination is . . . an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."); *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 99 (1972).

A3371's viewpoint discrimination is also displayed on the face of the statute. It bans counseling "seeking to change a person's sexual orientation," while permitting counseling with any other impetus. The motivation of the speaker, a motivation driven by the self-determination of the client, is thus facially targeted by A3371. But such targeting of speech based on the speaker's "motivating ideology or . . . perspective" is impermissible. *See Rosenberger*, 515 U.S. at 829.

III. Defining Conduct to Exclude its Inherent Communicative Aspects Violates Clearly Established First Amendment Freedoms and Risks Absurd Results.

Categorically defining counseling as conduct devoid of First Amendment protection is a novel departure from sound constitutional jurisprudence. "Such a simplistic, all-or-nothing-at-all approach to First Amendment protection is at odds with common sense and with our jurisprudence as well." *R.A.V.*, 505 U.S. at 384. Like in *R.A.V.*, "[t]he content-based discrimination reflected in [A3371] comes within neither any of the specific exceptions to the First Amendment prohibition . . . nor a more general exception for content discrimination that does not threaten censorship of ideas." *Id.* at 393. While the Supreme Court has excluded some speech from full First Amendment protection (e.g. fighting words, obscenity, and defamation), counseling a client through speaking with them has never been subject to such complete categorical second-class treatment. *Id.* at 383 ("a limited categorical approach has remained an important part of our First Amendment jurisprudence."). While different analytical standards have been applied to restrictions on different categories of speech, exclusion of speech from First Amendment protection is limited to a few clearly defined categories, *id.*—counseling a client on how to change his or her unwanted attractions is not one of them.

Excluding counseling from First Amendment protections conflicts with a host of Supreme Court cases concluding that myriad types of expressive activities

or conduct are speech: saluting a flag, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943); wearing a jacket that reads "Fuck the Draft," *Cohen v. California*, 403 U.S. 15, 16-18 (1971); picketing, *Mosley*, 408 U.S. at 95-96; displaying printed words on a vehicle license plate, *Wooley v. Maynard*, 430 U.S. 705, 715 (1977); burning a flag, *Texas v. Johnson*, 491 U.S. 397, 415-16 (1989); burning a cross, *R.A.V.*, 505 U.S. at 396; placing a sign on private property, *City of Ladue v. Gilleo*, 512 U.S. 43, 58-59 (1994); practicing law, *Velazquez*, 531 U.S. at 548. Given the broad reach of First Amendment protections, and the narrow scope of categorical limitations on speech, *R.A.V.*, 505 U.S. at 383, there is no warrant for excluding counseling, and its inherently communicative aspects, from First Amendment protection.

Applying the lower court's reasoning to hypothetical modified language of A3371 illustrates the dangerous implications of that decision. The court reasoned that A3371 regulates conduct, not speech, because the statute

> directs that a licensed counselor "shall not *engage in* sexual orientation change *efforts*," and further defines "'sexual orientation change efforts" as "the *practice* of seeking to change a person's sexual orientation." N.J.S.A. 45:1-55 (emphasis added). Such language is commonly understood to refer to conduct, and not speech, expression, or some other form of communication.

(Appellants' App. Vol. I, 000027.) But suppose that the legislature enacts a statute stating that a person or some type of licensed professional "shall not *engage in* religion change *efforts*" or "political change *efforts*." Further suppose that the legislature defines religious or political change efforts as "the *practice* of seeking

to change a person's religious or political orientation." The lower court's reasoning would equally exclude these statutes from First Amendment scrutiny. Yet "engaging in" religious or political "change efforts" is undoubtedly protected speech. Allowing the lower court's reasoning to stand thus opens the floodgates for myriad forms of speech regulation under the semantic façade of conduct regulation. *Cf. Velazquez*, 531 U.S. at 547.

CONCLUSION

For the foregoing reasons, Amicus Curiae respectfully requests that this Court reverse the holding of the District Court and grant Plaintiffs' motion for summary judgment.

Respectfully submitted this the 17th day of January, 2014.

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CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Local Rule 28.3(d) and 46.1(e), the undersigned counsel certifies that he is a member of the bar of this Court.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(A)(7)(B) because this brief contains 2,687 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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CERTIFICATION PURSUANT TO 3D CIR. L.A.R. 31.1(c)

I certify that the text of the electronic brief is identical to the text in the paper copies provided to the Court. I also certify that a virus check was performed on this Brief, that no viruses were found, and that the antivirus software used was Sophos Endpoint Security and Control.

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CERTIFICATE OF SERVICE

I hereby certify that on January 17, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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