CASE NO. 13-4429
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TARA KING, ED.D., individually and on behalf of her patients, RONALD NEWMAN, PH.D., individually and on behalf of his patients, NATIONAL ASSOCIATION FOR RESEARCH AND THERAPY OF HOMOSEXUALITY (NARTH), and AMERICAN ASSOCIATION OF CHRISTIAN COUNSELORS (AACC),

Plaintiffs/Appellants,

v.

CHRISTOPHER J. CHRISTIE, Governor of the State of New Jersey, in his official capacity, ERIC T. KANEFSKY, Director of the New Jersey Department of Law and Public Safety: Division of Consumer Affairs, in his official capacity, MILAGROS COLLAZO, Executive Director of the New Jersey Board of Marriage and Family Therapy Examiners, in her official capacity, J. MICHAEL WALKER, Executive Director of the New Jersey Board of Psychological Examiners, in his official capacity; and PAUL JORDAN, President of the New Jersey State Board of Medical Examiners, in his official capacity,

Defendants/Appellees,

And

GARDEN STATE EQUALITY,

Intervenor-Defendant/Appellee.

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DISCLOSURE STATEMENT

Pursuant to 3d Cir. R. 26.1.1, the undersigned states as follows:

There are no affiliate corporations or subsidiaries that have issued shares or debt securities to the public, and there is no publicly held company that owns any part of the Appellants.

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JURISDICTIONAL STATEMENT

The District Court had jurisdiction under 28 U.S.C. §1331 because Plaintiffs raised questions under the United States Constitution and 42 U.S.C. §1983. The order denying Plaintiffs' Motion for Summary Judgment is an appealable final decision under 28 U.S.C. §1291.

The District Court's order was issued on November 8, 2013, and the notice of appeal was filed on November 12, 2013. The appeal is timely under Fed.R.App.P. 4(a)(1)(A).

STATEMENT OF ISSUES ON REVIEW

1. Whether a state law that prohibits licensed counselors who engage solely in counsel or "talk therapy" from presenting minor clients and their parents, at their request and with their consent, with the viewpoint that the clients can reduce or eliminate their *unwanted* same-sex sexual attractions, behavior, or identity (collectively "SSA"), while permitting the viewpoint that SSA may be affirmed and should be accepted violates the First Amendment as an impermissible viewpoint-based restriction on speech. This issue was addressed by the District Court at pp. 000024-000050 in the Appendix.

2. Whether a state law that prohibits licensed counselors who engage solely in counsel or "talk therapy" from presenting under any circumstances "sexual orientation change efforts" to minor clients and their parents, at their

request and with their consent, is impermissibly vague and overbroad. This issue was addressed by the District Court at pp. 000053-000062 of the Appendix.

3. Whether a state law that prohibits licensed counselors who engage solely in counsel or "talk therapy" from presenting minor clients and their parents, at their request and with their consent, with the viewpoint that the clients can reduce or eliminate their *unwanted* SSA, while permitting the viewpoint that SSA may be affirmed and should be accepted infringes upon free exercise rights under the First Amendment. This issue was addressed by the District Court at pp. 000062-000068 of the Appendix.

4. Whether licensed counselors whose free speech and free exercise rights are violated by a statutory ban on any counsel or "talk therapy" to minor clients at their request and with their consent who seek counsel to reduce or eliminate their *unwanted* SSA can assert claims on behalf of their minor clients with whom the counselors have a therapeutic relationship and who for sensitive reasons the minors do not want to assert in their own name. This issue was addressed by the District Court at pp. 000023-000026 of the Appendix.

5. Whether an advocacy organization that has no particularized injury seeking permissive intervention as a defendant in a constitutional challenge to a state law prohibiting a particular viewpoint being offered by licensed counselors to

minor clients must satisfy Article III standing in order to intervene. This issue was addressed by the District Court at pp. 000013-000018 of the Appendix.

6. Whether an advocacy organization that supported legislation but does not provide nor represent those who provide counseling services to minors satisfied the requirements for permissive intervention when the government is providing a full defense of the statute so that the advocacy organization offers merely a "helpful alternative viewpoint" about non-parties who had negative experiences with counseling aimed at reducing and eliminating same-sex attractions. This issue was addressed by the District Court at pp. 000018-000020 of the Appendix.

STATEMENT OF RELATED CASES

This case has not previously been before this Court. A related case, *Doe v. Christie*, Case No. 3:13-cv-06629-FLW-LHG, which also challenges New Jersey law A3371, was filed on November 1, 2013, in the District Court for the District of New Jersey.

STATEMENT OF THE CASE

Appellants ask this Court to reverse a District Court ruling affirming an unprecedented intrusion into the sanctity of the counseling relationship and a client's fundamental right of self-autonomy to establish counseling goals and to align their personal tensions with their values. This law prohibits licensed professional counselors from providing and clients from receiving any counsel to

reduce or eliminate SSA despite the undisputed fact that the clients have significantly benefited from such counsel. On August 19, 2013, New Jersey Gov. Chris Christie signed A3371, which compelled Plaintiffs and other mental health professionals, their minor clients and parents, to immediately terminate ongoing beneficial counseling or risk loss of professional licenses. A3371 prohibits professional counselors from offering minors counseling which is aimed at reducing or eliminating *unwanted* same-sex sexual attractions, behavior, or identity (which A3371calls “sexual orientation change efforts” or “SOCE”). N.J.Stat.Ann. §45:1-55(b). However, counselors are permitted to offer counsel that accepts, affirms, or supports SSA. *Id.*

On August 22, 2013, three days after A3371 became effective, Appellants filed a Complaint seeking declaratory judgment, preliminary and permanent injunctive relief and nominal damages under 42 U.S.C. §1983, alleging that A3371 violates their and their clients’ federal and state constitutional guarantees of Freedom of Speech and Free Exercise of Religion. Appellants simultaneously filed an Application for a Temporary Restraining Order and/or Preliminary Injunction seeking to enjoin the implementation of A3371.[1]

[1] When discussing the law generically Plaintiffs will use the bill number, A3371, and will use the codified sections when directly citing the statute.

Appellants' Complaint sought a temporary restraining order and preliminary injunction prohibiting enforcement of A3371, but the District Court immediately denied such relief on a conference call with the parties. Appellants then agreed to convert the proceedings to a motion for summary judgment under Fed. R. Civ. P. 56. Defendants filed a cross-motion for summary judgment on September 13, 2013.

On September 6, 2013, Garden State Equality ("GSE"), an organization that supports A3371, filed a motion to intervene as a defendant. GSE submitted a cross-motion for summary judgment simultaneously with the named Defendants and submitted a proposed answer. GSE's motion was heard simultaneously with the motions for summary judgment during a hearing on October 1, 2013.

On November 8, 2013, the District Court entered an Opinion denying Plaintiffs' Motion for Summary Judgment and granting Defendants' Cross-Motion for Summary Judgment, and dismissing the Complaint. The court also granted GSE's Motion to Intervene as a Defendant and denied Plaintiffs' Motion for Reconsideration of the court's decision to dispense with consideration of evidence. (Appx., 000006-000076).

The District Court's Order and Opinion are attached hereto as Volume I of the Appendix. On November 12, 2013, Plaintiffs filed a Notice of Appeal.

STATEMENT OF FACTS

A3371 added sections 1-54 and 1-55, governing professional counselors, to Title 45 of the Revised Statutes of New Jersey. (Appx., 000131-000136). Instead of merely regulating who is qualified to become a licensed professional counselor, A3371 regulates what licensed professionals are permitted to—or more specifically not permitted to—say during counseling sessions:

> a. A person who is licensed to provide professional counseling under Title 45 of the Revised Statutes, , . . or a person who performs counseling as part of the person's professional training for any of these professions, *shall not engage in sexual orientation change efforts with a person under 18 years of age*.
>
> b. *"[S]exual orientation change efforts" means the practice of seeking to change a person's sexual orientation, including, but not limited to, efforts to change behaviors, gender identity, or gender expressions, or to reduce or eliminate sexual or romantic attractions or feelings toward a person of the same gender*; except that sexual orientation change efforts *shall not include counseling for a person seeking to transition from one gender to another, or counseling that*:
>
> (1) *provides acceptance, support, and understanding* of a person or facilitates a person's coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; *and*
>
> (2) *does not seek to change sexual orientation*.

N.J. Stat. Ann. §45:1-55 (emphasis added).

The Legislature chose selective paraphrases of articles and position papers regarding SOCE to allege that SOCE poses harm to minors. N.J. Stat. Ann. §§45:1-54(b)-(m). None of the articles or position papers provided empirical

evidence that SOCE harms minors. (Decl. of Joseph Nicolosi, ¶18 Appx., 000237-000238). The Legislature selectively cited to a 2009 report by the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation ("Task Force Report" or "Report"). N.J. Stat. Ann. §45:1-54(b). The Legislature cited a Report statement that SOCE "*can* pose critical health risks to lesbian, gay, and bisexual people," but ignored the Report's conclusion that there is a dearth of information based on sound scientific research concerning the safety of SOCE counseling, that there is evidence SOCE is beneficial to adults, and there is *no research on minors*. (Appx., 000325-000327) (emphasis added).

But, the Report described the lack of rigorous studies on SOCE counseling as "a serious concern" (*Id.*). The Report *does not conclude that SOCE always causes harm*, but concedes that there needs to be more research. (*Id.*). "[T]here are no scientifically rigorous studies of recent SOCE that would enable us to make a definitive statement about whether recent SOCE is safe or harmful and for whom." (Appx., 000351). "Thus, we cannot conclude how likely it is that harm will occur from SOCE." (Appx., 000326). "Given the limited amount of methodologically sound research, *we cannot draw a conclusion regarding whether recent forms of SOCE are or are not effective*" (Appx., 000327) (emphasis added). "Because of *the lack of empirical research* in this area, the conclusions must be viewed as tentative." (Appx., 000328) (emphasis added). "Recent research *cannot provide*

conclusions regarding efficacy or safety." (Appx., 000295) (emphasis added). "[S]exual orientation issues in children are *virtually unexamined*." (*Id.* at 000375).

Despite the acknowledged lack of empirical evidence of harm, the New Jersey Legislature determined that SOCE causes "serious harms" to minors, justifying a total ban on such counseling. N.J. Stat. Ann. §45:1-54(n).

New Jersey's A3371 is modeled after California's SB1172, which was the first law in the nation to ban a particular type of counseling when it was enacted on September 5, 2012. Licensed counselors in California challenged SB1172 as violative of their First Amendment rights to free speech and free exercise of religion in two cases brought in the Eastern District of California. *Welch v. Brown,* 907 F. Supp. 2d 1102 (E.D. Cal. 2012); *Pickup v. Brown,* No. 12–02497, 2012 WL 6021465 (E.D. Cal., 2012). The two California district court judges reached conflicting opinions on the constitutionality of SB1172. A panel of the Ninth Circuit Court of Appeals granted an injunction pending appeal, and another panel ruled that SB1172 does not violate the Constitution. *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013). A Petition for Rehearing or for Rehearing En Banc is pending. (*Pickup v. Brown,* Case No. 12-17681, Ninth Circuit Dkt. 119-1 dated September 10, 2013).

Plaintiffs are two New Jersey licensed counselors, Dr. Tara King and Dr. Ronald Newman, and two counseling organizations, NARTH and AACC, which

have members who are affected by A3371's ban on SOCE counseling. Dr. King is the founder of King of Hearts Counseling Center in Brick, New Jersey, which is a Christian center that focuses on counseling from a Biblical perspective. (Decl. of Tara King, ¶4, Appx., 000168). Dr. King founded King of Hearts, in part, to assist young people with *unwanted* SSA, to find the peace and emotional, mental and spiritual health that she personally experienced from SOCE counseling. (Appx., 000170). Dr. King was sexually abused as a child and experienced tremendous trauma from that abuse and from being raised in a dysfunctional family. (Appx., 000169). Primarily because of the trauma and sexual abuse, Dr. King developed sexual attractions towards other women and was involved in same-sex relationships between the ages of 19 and 24. (*Id.*). Therapists told Dr. King that she was born a lesbian, would always be a lesbian, and should just accept and embrace it because there was nothing she could do about it. (*Id.*). At age 24, Dr. King learned about and began SOCE counseling. (*Id.*). As a result, Dr. King has experienced change that has been successful for 23 years. (*Id.*). Through her counseling practice, she now helps individuals who struggle with unwanted SSA to find the freedom she found through SOCE counseling. (*Id.*).

Dr. King's counseling practice consists entirely of conversation, *i.e.*, talking or speech. (Decl. of Tara King in Support of Emergency Motion on Appeal "King Appeal Declaration," Dkt. 003111462805, at ¶¶10, 12). All of her efforts in the

therapeutic alliance with patients and in all of her counseling sessions consists entirely in talking to clients. (*Id.*). Whether she is "assessing" a client, "counseling" a client or "applying psychotherapy" to a client, Dr. King is engaged in talking, the only tool available to her under the modern doctrine of psychotherapy. (*Id.* at ¶¶12-13).

As a professional counselor, Dr. King is subject not only to New Jersey statutes such as A3371, but also the American Counseling Association Code of Ethics ("ACA Code"). (Appx., 000172-000173). Section A.2 of the ACA code requires that clients receive "adequate information about the counseling process," and that the client has the freedom to choose the counseling relationship. (*Id.*). Section A.4.b of the ACA Code mandates that mental health counselors "avoid imposing values that are inconsistent with counseling goals." (Appx., 000172). Section A.11.a of the ACA states that "[c]ounselors do not abandon or neglect clients in counseling." (*Id.*). With A3371 in place, Dr. King and fellow counselors will not be able to provide adequate information about the counseling process or give the client the freedom to choose because Dr. King will not be able to discuss the availability of nor provide SOCE counseling even if the minor client requests it. (*Id.*). This will place Dr. King in violation of ethical standards. (*Id.*). A3371 requires that she violate Section A.11.a by discontinuing ongoing SOCE counseling and thereby abandoning her clients. (Appx., 000173).

Dr. King challenges A3371 on behalf of herself and her clients who seek SOCE counseling, many of whom developed *unwanted* SSA after being sexually molested, as was true with Dr. King. (Appx., 000171). Many of Dr. King's clients have suffered abuse, trauma or neglect that led to the unwanted attractions and feelings and have found relief from the SOCE counseling. (Appx., 000171-000172). Many of Dr. King's clients experience conflict between their personal religious beliefs and values and the unwanted SSA, and SOCE counseling has alleviated these conflicts and improved the clients' health. (King Appeal Declaration, ¶3). Those improvements, and the clients' well-being, are threatened by A3371, which requires that Dr. King discontinue the counseling that the clients have chosen. (*Id.*).

Dr. Newman is also a New Jersey-based counselor who offers SOCE counseling to minors who have *unwanted* SSA and have consented to counseling aimed at reducing or eliminating the unwanted attractions, behaviors or identities. (Newman Decl., ¶11 Appx., 000178). He is the Founder of the Christian Counseling Consortium of South Jersey ("CCC"), which is an active group of approximately 50 licensed and unlicensed mental health professionals, counselors, and pastors committed to engaging in counseling from a Christian perspective founded on the truths inherent in Scripture. (Appx., 000175). Just as A3371

conflicts with Dr. King's ethical codes, so too it conflicts with Dr. Newman's ethical codes. (Appx., 000178).

Complying with A3371 will cause Dr. Newman to violate Section 3.10 of the American Psychological Association's Ethics Code ("APA Code"), which requires that he provide patients with all information necessary to make an informed decision concerning a particular course of available counseling. (Appx., 000179). A3371 also conflicts with General Ethical Principle E of the APA Code−which requires that he ensure that patients have the freedom to make a self-determined choice concerning their therapy−because the law prohibits him from providing detailed information to clients about the available forms of counseling, including SOCE, so that the client's decision to choose a particular form of counseling is properly informed. (*Id.*).

A3371 has prevented Dr. Newman from speaking, teaching, or writing on the issue of reducing or eliminating unwanted SSA because such communication could be construed as "efforts to change sexual orientation" or reduce or eliminate SSA. (Appx., 000446). A3371 affects virtually all of Dr. Newman's work with minors because discussing sexuality with adolescents undergoing a time of identity formation can be construed as an effort to reduce or eliminate SSA. (Appx., 000447). Adolescents' identity formation commonly involves experimentation that minor clients want to explore in counseling sessions, but under A3371, such

counseling could be construed as attempting to reduce or eliminate same-sex attractions or feelings, so Dr. Newman's counseling has been altered. (*Id.*).

Dr. Newman is also seeking relief on behalf of his minor clients who have suffered from the abrupt disruption in their chosen counseling. (Appx., 000448). Dr. Newman can no longer offer counsel to a minor client who is confused about SSA without running afoul of the statute, because only "gay affirming" counsel is permitted. (Appx., 000447). A3371 also hinders Dr. Newman's counseling of adolescent males who have been sexually abused and need to process the experience, including counsel about the minors' temptations to repeat same-sex behavior, which requires discussions about the possibility of reducing or eliminating SSA. (Appx., 000447-000448). Dr. Newman is only permitted to affirm SSA, even if *unwanted* by the client, and even if the clients' well-being will suffer. (*Id.*). Under A3371, these minors cannot receive the necessary counsel and cannot obtain the results they desire. (*Id.*).

NARTH is a professional, scientific organization that disseminates educational information, conducts and collects scientific research, promotes effective therapeutic counseling, and provides international referrals to those who seek its assistance. (Declaration of David Pruden, ¶3 Appx., 000182). NARTH has hundreds of affiliated counselors, psychologists, and psychotherapists, seventeen of which practice in New Jersey. (*Id.*). NARTH members currently have clients

who were receiving SOCE counseling in New Jersey. (Appx., 000183). Some NARTH members report that five to ten percent of their practices involve SOCE counseling and that nearly half of those seeking such counseling are minors. (*Id.*). Under A3371, those clients cannot continue receiving the SOCE counseling that they desire. (*Id.*). The minor clients will suffer regression in their course of counseling as a result of their counselors being prohibited from continuing to offer the counseling desired by the client. (*Id.*).

NARTH's members face the same ethical conflicts faced by Dr. King and Dr.. (Appx., 000184-000185). A3371 interferes with NARTH members' ethical duty to monitor the progress of any referral while still counseling the client on other issues during the counselor-client relationship. (*Id.*).

AACC was founded in 1989 and now has nearly 50,000 members throughout the world, including in New Jersey. (Declaration of Eric Scalise, ¶5 Appx., 000250). AACC's members represent the entire spectrum of care, from lay/pastoral counselors to licensed mental health professionals. (*Id.*). AACC's members follow the cornerstone principle in mental health counseling of client self-determination as found in the language of the ethical codes of notable professional member organizations such as the American Psychological Association (APA), the American Counseling Association (ACA), and the

American Association of Marriage and Family Therapists (AAMFT). (Appx., 000252).

AACC members encounter minor clients who are facing *unwanted* SSA, and, in keeping with their ethical obligations, discuss those unwanted attractions in a way that will address the possibility of reducing or eliminating those attractions if that is what the client wants. (Appx., 000253-000254). AACC members face a conflict between protecting clients' right of self-determination, which might require addressing the reduction or elimination of *unwanted* SSA, and A3371, which requires that they only affirm or approve SSA in minor clients. (*Id.*). In addition, minor clients are denied the means of resolving conflicts between their *unwanted* same-sex attractions and their religious beliefs and values. (*Id.*). AACC members are restricted from freely engaging with a minor client on the subject of *unwanted* SSA, regardless of any emotional or psychological duress the client may be experiencing due to the conflict of values, and therefore creates a therapeutic double-bind for the client. (Appx., 000255).

SUMMARY OF ARGUMENT

Despite recognizing that SOCE counseling is "talk therapy," the District Court acted contrary to binding precedent when it determined that A3371 is a permissible regulation of professional conduct that does not even incidentally affect speech so as to come under the protection of the First Amendment. The

District Court relied upon the false premise, advanced by Defendants, that SOCE counseling has been proven to be "harmful" to minors and therefore can be banned. However, the evidence relied upon by Defendants and the Legislature in enacting the ban concluded that there is no scientifically valid proof that SOCE causes harm and in particular no studies regarding the effects of SOCE counseling on children. (Appx., 000325-000327, 000351).

Although Plaintiffs established that SOCE counseling consists solely of speech, the District Court created a false distinction between speech and SOCE, which enabled the court to conclude that A3371 is nothing more than a licensing regulation akin to educational and testing requirements. In fact, however, as was true in *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 547-48 (2001), A3371 extends beyond merely regulating professional standards to intruding upon the therapeutic conversations between counselors and minor clients.

The District Court's unsubstantiated conclusion that A3371 only regulates speech created a domino effect as the court went on to conclude that the statute which sanctions the message that same-sex attractions can be reduced or eliminated while permitting the message that they can be affirmed is neither viewpoint- nor content-based, nor vague or overbroad. In turn, the District Court failed to apply the heightened or strict scrutiny required for speech restrictions and

incorrectly concluded both that rational basis should apply and that A3371 satisfies rational basis.

Although A3371 accords unequal treatment to those, like Appellants and their clients, whose religious beliefs teach that same-sex attractions can be reduced or eliminated, the District Court concluded that the statute does not violate the Free Exercise Clause contradicting *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 265 (3d Cir. 2007). The District Court also contravened binding precedent when it determined that Plaintiffs did not have third party standing to assert claims on behalf of their clients. Finally, the District Court abused its discretion when it concluded that Article III standing is not a prerequisite for permissive intervention and granted GSE permissive intervention.

ARGUMENT

I. THE TRIAL COURT ERRED WHEN IT CONCLUDED THAT A3371 DOES NOT VIOLATE PLAINTIFFS' FREE SPEECH RIGHTS.

A. The First Amendment Requires A De Novo Standard With Independent Review Of The Whole Record.

This Court reviews a district court's legal conclusions de novo and its factual findings for clear error. *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cnty.*, 653 F.3d 290, 295 (3d Cir. 2011). However, for the First Amendment "an appellate court has an obligation to 'make an independent examination of the whole record' in order to make sure that 'the judgment does not

constitute a forbidden intrusion on the field of free expression.'" *Id.*; *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499 (1984).

An independent review of the full factual record yields the inescapable conclusion that A3371 violates Appellants' First Amendment rights.

B. A3371 Crosses The Line Between Permissible Professional Regulation And Impermissible Speech Restriction.

A3371 reaches beyond merely regulating the counseling profession to dictating what can be said during counseling sessions. The District Court equated A3371 with statutes regulating who is permitted to practice particular professions, claiming that overturning A3371 "would contradict the longstanding principle that a state generally may enact laws rationally regulating professionals, including those providing medicine and mental health services." (Appx., 000038). But, A3371 does not regulate who can enter the profession or their educational requirements; it censors the viewpoint of licensed counselors.

The state's police power "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), which include requiring examinations, educational training, and experience, *Id.*; *Dent v. State of W.Va.*, 129 U.S. 114 (1889), and standards to protect consumers from fraud in advertising and physicians from contravening their role as healer. *Williamson v. Lee Optical of*

Oklahoma Inc., 348 U.S. 483, 490 (1955); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978); *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997).

However, the state cannot require that a counselor express or refrain from expressing a viewpoint contrary to the counselor's opinion and which is requested by the client. *Rust v. Sullivan*, 500 U.S. 173, 200 (1991). A3371 invades the sacrosanct relationship between counselor and client by prohibiting therapeutic conversations that assist a minor to reduce or eliminate unwanted SSA while permitting conversations that affirm or approve them. N.J. Stat. Ann. §45:1-55.

The federal funding restriction in *Legal Services Corporation v. Velazquez*, 531 U.S. 533, 547-48 (2001), crossed the line between permissible regulation and impermissible speech restriction by prohibiting lawyers from advising indigent clients to challenge welfare laws. The restriction in *Velazquez* was an attempt by Congress to control the communication between attorneys and clients to ban unacceptable opinions. *Id.* at 546. The Supreme Court found this to be impermissible viewpoint discrimination. *Id.* at 549.

The Supreme Court invalidated a policy that required recipients of certain federal funds to explicitly agree with the government's policy opposing prostitution and sex trafficking. *Agency for Int'l Dev. v. Alliance for Open Soc'y Int'l, Inc.*, 133 S. Ct. 2321, 2327 (2013) ("*AID*"). The Court found that the requirement went beyond mere regulation and violated a basic First Amendment

principle that "freedom of speech prohibits the government from telling people what they must say." *Id.*

In *Velazquez* and *AID*, the Supreme Court found that the statutes crossed the point at which "a measure is no longer a regulation of a profession but a regulation of speech" that must survive First Amendment scrutiny. *Lowe v. SEC*, 472 U.S. 181, 229-30 (1985) (White, J., concurring). "[T]he principle that government may restrict entry into the profession and vocation through licensing schemes has never been extended to encompass the licensing of speech." *Id.*

A3371 has crossed the line. The statute does not merely regulate qualifications for professional licensure, or advertising to protect against fraud. Instead, it requires that professional counselors adopt the state's viewpoint that unwanted same-sex attractions must be affirmed or approved and cannot be reduced or eliminated. N.J. Stat. Ann. §45:1-55. As Dr. Newman testified, A3371 mandates that he provide only one viewpoint in his therapeutic conversations with his minor clients. (Appx., Vol. II, p. 000177, Newman Decl. ¶8). Similarly, Dr. King testified that A3371 prohibits her from "even discussing available treatment options that might help alleviate a [minor] client's unwanted same-sex attractions, behaviors, or identity because a client might subsequently view even a simple discussion of SOCE counseling as an effort to reduce or eliminate his or her

unwanted same-sex attractions, behaviors, or identity and subject the counselor to ethical charges and violations." (Appx., 000171).

A3371 forces counselors to impose the government's ideology, *i.e.* that SSA cannot be reduced or eliminated, but must be affirmed and accepted. (Appx., 000172). Such an intrusion into the counseling relationship transcends the professional regulations upheld in *Watson*, *Dent*, *Williamson* and *Ohralik* and enters into the realm of speech regulations overturned in *AID*, *Velazquez* and *Sorrell*. Such regulations are subject to constitutional scrutiny as restrictions of First Amendment rights. *Lowe*, 472 U.S. at 229-30. The District Court's failure to apply binding precedent should be overturned.

C. The District Court Erred When It Concluded That Talk Therapy Is Conduct Not Protected By The First Amendment.

The District Court's analysis was based upon a faulty premise that A3371 "does not seek to regulate speech; rather the statute regulates a particular type of conduct, SOCE counseling." (Appx. 000040). The court disregarded Plaintiffs' undisputed testimony about SOCE counseling and binding precedent differentiating between pure conduct, conduct mixed with speech, and pure speech. *United States v. O'Brien*, 391 U.S. 367, 376 (1968); *Bartnicki v. Vopper*, 200 F.3d 109, 123 (3d Cir. 1999) *aff'd*, 532 U.S. 514 (2001). When Plaintiffs' testimony is

examined in light of precedent and New Jersey's statutory definitions, it is apparent that A3371 regulates speech, not conduct.

In *O'Brien*, the Court enunciated a four-part test that has become the benchmark for determining whether a challenged provision regulates conduct or speech. 391 U.S. at 377.

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.

Id. Of primary importance in *O'Brien* and here is whether the governmental interest is related to the suppression of free expression. *Id.* When "the government's interest in regulating conduct arises in some measure *because* the communication allegedly integral to the conduct is *itself* thought to be harmful," then the provision crosses the line from regulating conduct to regulating speech and must be subject to at least intermediate scrutiny. *Id.* at 382 (emphasis added).

While "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." *Bartnicki*, 200 F.3d at 120. Just because distributing and publishing conversations involved "conduct," did not mean, as the government argued, that it can prohibit the activities. *Id.* This

Court rejected the government's contention that the anti-wiretapping statute should be read as primarily prohibiting conduct, not speech. *Id.*

> The government cites no support for the surprising proposition that a statute that governs both pure speech and conduct merits less First Amendment scrutiny than one that regulates speech alone. We are convinced that this proposition does not accurately state First Amendment law. 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, much as a law that directly prohibited the publication of those writings would surely violate that Amendment.

Id. at 121.

The undisputed evidence shows that SOCE counseling banned by A3371 consists solely of speech. (Appx., 000171). "SOCE counseling is talk therapy. It is no different than any other form of mental health counseling." (*Id.*). "My SOCE counseling consists of discussions with the client concerning the nature and cause of their unwanted SSA; the extent of their SSA; assistance in understanding traditional, gender-appropriate behaviors and characteristics; and assistance in fostering and developing those gender-appropriate behaviors and characteristics." (Appx., 000234).

The District Court acknowledged that SOCE counseling consists of "talk therapy," but nevertheless insisted that such counsel is conduct, not protected speech, nor even expressive conduct intertwined with speech. (Appx., 000035, 000043). The court fashioned its own definition of SOCE "therapy" to fit its

conclusion that SOCE does not even incidentally involve speech. (Appx., 000044). The court's conclusion that Plaintiffs failed to establish that "talk therapy (1) is intended to be communicative, and (2) would be understood as such by their clients" is wrong as a matter of fact and law.

Instead of engaging in "a holistic endeavor" in which it must give effect to "every word," *United Savings Ass'n v. Timbers of Inwood Forest Assoc., Ltd*., 484 U.S. 365, 371 (1988); *Lowe v. SEC*, 472 U.S. 181, 207 n.53; *Scheidermann v. I.N.S*., 83 F.3d 1517, 1524 (3d Cir. 1996), the court plucked a few phrases out of context, assigned its own interpretation of their meaning and concluded that the remaining words were "immaterial." (Appx., 000032-000034). If a counselor is "applying" principles in *counseling*, then the "application" is talking—i.e., speech. There is no other conduct inherent in that application; it is a conversation between client and counselor. Indeed, "counsel" means "an exchange of opinions or ideas in order to reach a decision" or "advice or guidance, especially from a knowledgeable or experienced person." *Webster's II New College Dictionary* 263 (3d ed. 2005).

An examination of the whole record, as required under *Bose Corporation*, 466 U.S. at 499, establishes that the SOCE counseling banned by A3371 is constitutionally protected speech, not conduct. The District Court's contrary conclusion, and its corollary errors, should be overturned.

D. A3371 Constitutes Impermissible Viewpoint Discrimination.

A viewpoint-based restriction on private speech has never been upheld by the Supreme Court or any court. Indeed, a finding of viewpoint discrimination is dispositive. *See Sorrell v. IMS Health*, 131 S. Ct. 2653, 2667 (2011). "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). "When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant." *Id.* at 829. In fact, viewpoint-based regulations are *always* unconstitutional. *See, e.g.*, *Lamb's Chapel v. Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 394 (1993) ("'the First Amendment forbids the government to regulate speech in ways that favor some viewpoints or ideas at the expense of others'" (quoting *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984)).

The Third Circuit has likewise expressed disdain for a government regulation that imposes a restriction on speech based solely on its viewpoint. "Viewpoint discrimination is an anathema to free expression and is impermissible in both public and nonpublic fora." *Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cnty.*, 653 F.3d 290, 296 (3d Cir. 2011). Indeed, "if the government allows speech on a certain subject, it must accept all viewpoints on the

subject . . . even those that it disfavors or that are unpopular." *Id.* (citations omitted). Moreover, "[t]o exclude a group simply because it is controversial or divisive is viewpoint discrimination," and a "mere desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint is not enough to justify the suppression of speech." *Child Evangelism Fellowship of N.J., Inc. v. Stafford Tp. Sch. Dist.*, 386 F.3d 514, 527-28 (3d Cir. 2004) (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)).

A3371 is a textbook example of viewpoint discrimination. The legislation explicitly prohibits licensed counselors from providing, and therefore Appellants' clients from receiving, any information and counseling directing at helping a minor to reduce or eliminate his unwanted SSA. On its face, A3371 allows licensed counselors to discuss the *subject* of sexual orientation, but precludes a particular *view* on that subject, namely that SSA can be reduced or eliminated to the benefit of the client. A3371 specifically targets SOCE that seeks to "eliminate or reduce sexual or romantic attractions or feelings *towards a person of the same gender*." N.J. Stat. Ann. §45:1-55 (emphasis added).

Moreover, A3371 targets the particular viewpoint in favor of SOCE not because it has been definitively proven to be harmful, but instead *because it is unpopular*. The Task Force Report, upon which A3371 relies, concluded that with regard to adults, there was *some* evidence that SOCE was *beneficial*, and *some*

anecdotal evidence that it was *harmful*. (Appx., 000286-000287, 000326, 000333-000334). With regard to children, though, the Report noted that there was *no evidence* concerning the effects of SOCE on children. (Appx., 000375). That is why the Report advised that more research was required. (Appx., 000374). A3371's blanket ban on SOCE was not based on any hard scientific evidence, but rather on the disapproving *opinions* of several professional organizations, such as the APA itself. N.J. Stat. Ann. §45:1-54. That is precisely what the First Amendment forbids: the "mere desire to avoid the discomfort and unpleasantness that always accompanies an unpopular viewpoint." *Child Evangelism Fellowship of N.J.*, 386 F.3d 514, 527-28 (quoting *Tinker*, 393 U.S. at 509).

The authors of the Report and the Report itself reveal that A3371 is aimed at suppressing the viewpoint that Appellants' clients desperately desire on SOCE counseling. "Although many qualified conservative psychologists were nominated to serve on the task force, all of them were rejected." (Declaration of Christopher Rosik, "Rosik Decl." ¶ 3, Appx., 000188). The reason they were excluded was because the leaders of that Task Force were ideologically opposed to their viewpoint. One of the leaders stated, "[w]e cannot take into account what are fundamentally negative religious perceptions in homosexuality—*they don't fit into our world view*." (*Id.*) (emphasis added). "Thus, from the outset of the task force, it

was predetermined that conservative religious viewpoints would only be acceptable when they fit within their pre-existing worldview." (*Id.*).

Moreover, the Report's own statements indicate that it was not going to be objective in its analysis and that any viewpoint contrary to the a priori assumption that same-sex attractions were good and normal would not be accepted. (*See* Appx., 000286) (framing the entire analysis of the Report with the assumption that "[s]ame-sex sexual attractions, behavior, and orientations per se are normal and positive variants of human sexuality"). Beginning with this assumption reveals that the Report would not lend any credence to evidence of non-normative causes of homosexuality and would reject any notion that people should seek to change such attractions, behaviors, or identity. (Declaration of Joseph Nicolosi, "Nicolosi Decl." ¶15, Appx., 000235) The State merely adopted the viewpoint of those ideologically opposed to SOCE counseling, and impermissibly discriminated against Appellants' right to provide and their clients' right to receive information on SOCE counseling. A3371 is therefore unconstitutional.

The statute *permits* a licensed professional to counsel a client "to transition from one gender to another." N.J. Stat. Ann. ¶45:1-55. But, if the client's gender identity, mannerisms, or expression differ from the client's biological sex and the client's feelings are *unwanted* – meaning he does not want to transition from a male identity to a female identity – but instead the client wants to "change" his

female gender identity, mannerisms, or expression to conform to his biological sex, then such counseling is forbidden. The statute permits counsel to *affirm* homosexual attractions, but prohibits counseling a minor to *change unwanted* SSA. Under no circumstances may a licensed counselor counsel a minor client to change *unwanted* SSA. Nor may the counselor counsel the minor client to change *unwanted* opposite sex mannerisms, expressions, or identity, even when the client wants to change them.

A3371 purportedly seeks to "protect . . . lesbian, gay, bisexual, and transgender youth." *Id.* By explicitly mentioning LGBT youth, A3371 clearly aims to ban only counsel that seeks to change SSA. That this is the actual meaning of A3371 is beyond peradventure, because it includes no less than thirteen legislative findings and/or declarations, eleven of which expressly decry efforts to change *non-heterosexual* sexual orientations (i.e. homosexual or bisexual). N.J. Stat. Ann. ¶45:1-54. Despite the State's adamant assertions that attempting to change a minor's sexual attractions, behavior, expressions, mannerisms, or gender identity is harmful, not one legislative finding explicitly opposes counsel seeking to change *heterosexual* attractions. (*Id.*).

A3371's definitions further confirm that only non-heterosexual SOCE counseling is precluded, as SOCE "does *not* include counseling that: (1) provides *acceptance*, *support*, and *understanding* of clients or facilitation of persons'

coping, social support, and identity exploration and development, including *sexual orientation-neutral intervention* to prevent or address unlawful conduct or unsafe sexual practices, and (B) *do not seek to change sexual orientation.*" N.J. Stat. Ann. ¶45:1-55 (emphasis added).

Appellants may provide information and counseling directing them toward or encouraging SSA, to "provide acceptance, support, and understanding," to counsel minors to transition from one gender to another, or to remain neutral. But, they may not provide professional counsel to change unwanted SSA – even when that is what the minor desperately seeks. *Id.* Permitting the subject matter (SSA), A3371 prohibits a viewpoint on that subject matter (change).

The Supreme Court and several other courts have invalidated professional regulations when those regulations would limit what a professional could say, and thereby limit what information a client or patient could receive. *See Sorrell*, 131 S. Ct. 2653 (2011); *Legal Servs. Corp. v. Valazquez*, 531 U.S. 533 (2001); *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). In these cases, the courts recognized the axiomatic truth that the government is not permitted to impose its viewpoint on speakers or prohibit individuals from receiving information.

In *Velazquez*, the High Court addressed a federal limitation on the legal profession that operated in materially the same viewpoint-based manner as does A3371. The regulation in *Velazquez* prevented legal aid attorneys from receiving

federal funds if they challenged welfare laws. *Velazquez*, 531 U.S. at 537-38. The effect of this funding condition was to "prohibit advice or argumentation that existing welfare laws are unconstitutional or unlawful," and thereby exclude certain "vital theories and ideas" from the lawyers' representation. *Id.* at 547-48. The Court invalidated the regulation on its face. *Id*. at 549.

In *Conant*, several physicians and their patients brought a First Amendment challenge to a federal policy that punished physicians for communicating with their patients about the benefits or options of marijuana as a potential treatment. *Conant*, 309 F.3d at 633. The Ninth Circuit noted that "[a]n integral component of the practice of medicine is the communication between a doctor and a patient. *Physicians must be able to speak frankly and openly to patients*. That need has been recognized by courts through the application of the common law doctor-patient privilege." *Id.* at 636 (emphasis added). Indeed, physicians must have this ability to allow patients to receive all of the information relevant to their choice.

Far from being a First Amendment orphan, the court noted that such professional speech "may be entitled to the strongest protection our Constitution has to offer." *Conant*, 309 F.3d at 637 (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995)).The court held that the ban impermissibly regulated physician speech based on viewpoint because the "*policy does not merely prohibit the discussion of marijuana; it condemns expression of a particular viewpoint, i.e.,*

that medical marijuana would likely help a specific patient." *Id.* at 637-38 (emphasis added). "Such condemnation of particular views is especially troubling in the First Amendment context," especially when they limit a patient's access to critical information. *Id.*

A3371 operates almost identically to the federal policy enjoined in *Conant*. Just as the policy in *Conant* prohibited physicians from speaking about the benefits of marijuana to a suffering patient, so A3371 prohibits clients from receiving beneficial information in SOCE counseling that might help them alleviate their psychological distress caused by unwanted SSA or gender confusion. Both policies express governmental preference for the message it wanted individuals to receive over the information that a medical professional thought beneficial or that a client desperately sought. Both should suffer the same constitutional demise.

E. A3371 Is Also A Content-Based Restriction On Speech That Cannot Survive Strict Scrutiny.

1. A3371 Restricts Speech Based Upon Content.

Even if A3371 were not viewpoint-based, which it is, but only a content-based restriction, it still cannot withstand strict scrutiny. A3371 restricts the content of speech regarding SOCE counseling. A3371 is presumptively invalid and can only be upheld if New Jersey "can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly

drawn to serve that interest." *Brown v. Entm't Merchants Ass'n*, 131 S. Ct. 2729, 2738 (2011).

The notion that a content-based restriction on speech is presumptively unconstitutional is "so engrained in our First Amendment jurisprudence that last term we found it so 'obvious' as to not require explanation." *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115-16 (1991). "Regulations that permit the Government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment." *Id.* at 116 (quoting *Reagan v. Time, Inc.*, 468 U.S. 641, 648-49 (1984)). Furthermore, "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 818 (2000). The burden is on the State to prove it satisfies strict scrutiny, but the State cannot meet that burden here. *Id.* at 813.

Government may not regulate speech based on its substantive content or the message it conveys. *Rosenberger*, 515 U.S. at 828. A3371 regulates the substantive content of a counselor's speech in the same way that the government tried to regulate lawyers' speech in *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2723-24 (2010); grant recipients in *AID*, 133 S. Ct. at 2327 and drug manufacturers in *Sorrell,* 131 S. Ct. at 2662.

Holder illustrates why A3371 should be viewed as at least a content-based speech restriction. 130 S. Ct. at 2723-24. As the state does in this case, in *Holder* the government argued that the criminal ban on material support to groups deemed terrorist related involved only conduct, not speech. *Id*. at 2723. The Court disagreed, and its description of the effect of the statute equally describes A3371. *Id*. "Plaintiffs want to speak to the PKK and the LTTE, and whether they may do so under §2339B depends on what they say." *Id.* at 2723-24. Speech that imparted a "specific skill" or communicates advice derived from "specialized knowledge" was barred, but speech that imparted only general or unspecialized knowledge was permitted. *Id.* at 2724. Consequently, the statute "regulates speech on the basis of its content." *Id*. at 2723.

Likewise, in *AID*, the requirement that grant recipients explicitly agree with the Government's policy to oppose prostitution and sex trafficking went beyond preventing misuse of the funds to requiring that they "pledge allegiance to the Government's policy of eradicating prostitution." 133 S. Ct. at 2332. The regulation violated the axiom that "[i]f there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *Id.* (citing *W. Va. State Bd. of*

Educ. v. Barnette, 319 U.S. 624, 642 (1943)). A3371 regulates mental health counselors in the same constitutionally impermissible manner.

Under A3371, what counselors may speak to minor clients with unwanted SSA depends upon what they want to say. N.J. Stat.Ann. §45:1-55. If they want to say that the unwanted SSA must be approved and supported, then they are permitted to proceed. *Id.* If they want to say that the unwanted SSA can be reduced or eliminated, they are prohibited from proceeding. *Id.* As was true about the statute in *Holder*, A3371 is a content-based restriction on speech, not a regulation of "medical treatment" as the District Court found. (Appx., 000033).

2. A13371Does Not Satisfy Strict Scrutiny.

Statutes that regulate on the basis of content are presumptively invalid and can only be upheld if the state "can demonstrate that it passes strict scrutiny—that is, unless it is justified by a compelling government interest and is narrowly drawn to serve that interest." *Brown*, 131 S. Ct. at 2738. "It is rare that a regulation restricting speech because of its content will ever be permissible." *United States v. Playboy Entm't Grp.*, 529 U.S. 803, 818 (2000). The lack of empirical evidence that SOCE harms minors and the availability of less restrictive alternatives demonstrates that New Jersey cannot satisfy its burden of proving that the law satisfies strict scrutiny.

a. A3371 is not justified by a compelling government interest.

When the government seeks to restrict speech, "'[i]t must demonstrate that the recited harms are *real, not merely conjectural*.'" *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994)) (emphasis added). This Court must answer the "question [of] whether the legislative conclusion was reasonable and supported by substantial evidence in the record." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 211 (1997) (citing *Turner I*, 512 U.S. at 665-66). "When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'" *Turner I*, 512 U.S. at 664 (quoting *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1455 (D.C. Cir. 1985)). The State "must specifically identify an actual problem in need of solving." *Brown*, 131 S. Ct. at 2736.

When the government seeks to infringe on the fundamental rights of Appellants to speak, it "must present more than anecdote and suspicion." *Playboy Entm't*, 529 U.S. at 822. "[S]peculative fears alone have never been held sufficient to justify trenching on first amendment liberties." *Century Commc'ns Corp. v. FCC*, 835 F.2d 292, 300 (D.C. Cir. 1987) (holding that government claims that are not based on substantial evidence are "more speculative than real"). A3371 cannot satisfy this rigid standard, as the evidence that SOCE counseling is harmful to minors in all circumstances is insufficient as a matter of law.

The APA Task Force Report, the primary source relied upon by the Legislature admitted that "[b]ecause of *the lack of empirical research* in this area, the conclusions must be viewed as tentative." (Appx., 000328) (emphasis added). "There is a dearth of scientifically sound research on the safety of SOCE." (Appx., 000325). "Recent research *cannot provide conclusions* regarding efficacy or safety." (Appx., 000295) (emphasis added). Furthermore, some of the data showed that people benefitted from SOCE counseling. (Appx., 000326). Most importantly, the report stated that "sexual orientation issues in children are *virtually unexamined*." (*Id.* at 000375). The only other sources for the legislative ban were selective paraphrases of articles and position papers regarding SOCE. N.J. Stat. Ann. §§45:1-54(b)-(m). However, none of the articles or position papers provided empirical evidence that SOCE does in fact harm minors. (Appx., 000237-000238).

Far from demonstrating a "grave and immediate" danger of harm, the legislative record offers only anecdotes and opinions to support a conclusion that SOCE counseling poses harm to children. Such conjecture does not suffice to impose a ban upon constitutionally protected speech. *Turner*, 512 U.S. at 664.

The continued availability of SOCE counseling by unlicensed counselors further reveals that A3371 is not supported by a compelling interest. A3371 prohibits *licensed* counselors from SOCE with *minors*, but the same counselor can counsel *adults*. *Unlicensed* counselors can offer SOCE to *minors and adults*. At a

minimum, A3371 is underinclusive. *City of Ladue v. Gilleo*, 512 U.S. 43, 52 (1994) (holding that exemptions permitting the same harm as that alleged in the prohibited speech can show a regulation is impermissibly underinclusive and designed to suppress only particular content or viewpoint). At worst, it proves the State's interest is not compelling. If the government "fails to enact feasible measures to restrict other conduct producing substantial harm or alleged harm of the same sort, the interest given in justification of the restriction is not compelling." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546-47 (1993).

"[A] law cannot be regarded as protecting an interest 'of the highest order' . . . when it leaves appreciable damage to that supposedly vital interest unprohibited." *Id.* at 547. The State has banned licensed counselors, who have far greater expertise than unlicensed counselors, but allow unlicensed counselors free rein to counsel minors. A3371 not only fails to satisfy strict scrutiny, it also fails even to meet minimal rational basis standards. It is, in a word, irrational at its core.

b. A3371 is not narrowly tailored.

A narrowly tailored regulation is one that achieves the government's interest "*without unnecessarily interfering with First Amendment freedoms*." *Sable Commc'ns of Cal., Inc. v. FCC*, 492 U.S 115, 126 (1989) (emphasis added). It is not enough to show that the government's ends are compelling; the means must be

carefully tailored to achieve those ends. *Id.* In *Sable*, as here, the government argued that a total ban was necessary to protect children from harm. *Id.* at 128. The government also argued that the court should defer to Congress' findings that there no less restrictive alternatives. *Id.* The Supreme Court rejected the argument and added that "[d]eference to a legislative finding cannot limit judicial inquiry when First Amendment rights are at stake. *Id.*

Informed consent, which is the touchstone of professional counseling, and a client's right to self-determination, undercuts any alleged interest of the State because mandating informed consent would be a less restrictive means to achieve the State's alleged goal in preventing harm to clients. When legislation virtually identical to A3371 was being debated in California, several mental health organization recognized there that this type of "legislation is attempting to undertake an unprecedented restriction on psychotherapy." (*See* Appx., 000137-000140, Letter to California Legislature from California mental health organizations). These mental health organizations proposed informed consent language that would have been much more narrowly tailored than the unprecedented intrusion into the relationship between counselor and client, but it was rejected. (*Id.*). A complete ban on SOCE counseling or a viewpoint regarding SSA is not the least restrictive means to achieve any governmental interest. Total prohibitions on constitutionally protected speech are "hardly an exercise of narrow

tailoring." *Awad v. Ziriax*, 670 F.3d 1111, 1131 (10th Cir. 2012). Such extreme measures are constitutionally impermissible.

F. Even If A3371 Were Content-Neutral, It Should Be Subjected To Heightened Scrutiny, Not Rational Basis.

The District Court's conclusion that rational basis review applies contravenes precedent even if A3371 were found to be content-neutral.[2] *United States v. O'Brien*, 391 U.S. 367, 377 (1968). The Supreme Court and this Court have repeatedly recognized that heightened scrutiny is the appropriate analytical standard for content-neutral regulations, including statutes that regulate expressive conduct that has at least an incidental effect on speech. *Id.*; *Turner Broad. Sys.*, 520 U.S. at 189; *Barnes*, 501 U.S. at 567; *Bartnicki*, 200 F.3d at 123; *Conchatta v. Miller*, 458 F.3d 258, 267 (3d Cir. 2006); *Associated Film Distribution Corp. v. Thornburgh*, 800 F.2d 369, 375 (3d Cir. 1986). "A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *O'Brien*, 391 U.S. at 377.

Even if A3371 were determined to be content-neutral, the District Court should have examined whether the regulation is '"narrowly tailored to serve a

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[2] Plaintiffs do not concede that A3371 is content-neutral. It is not. This argument illustrates the District Court's error in applying rational basis.

significant governmental interest' and 'leave[s] open ample alternative channels for communication.'" *Bartnicki*, 200 F.3d at 124 (citing *Clark v. Cmty. for Creative Non–Violence*, 468 U.S. 288, 293 (1984)). The District Court should have required that the state "demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 126 n.5 (citing *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 475 (1995)). A court reviewing even a content-neutral regulation has "a delicate and difficult task" to weigh the circumstances and to appraise the substantiality of the state's justifications for its regulation. *Id.* at 125.

The basis for supporting an important government interest cannot be speculative or anecdotal. *Playboy Entm't*, 529 U.S. at 822 ("the government must present more than anecdote and suspicion"). "No doubt a State possesses legitimate power to protect children from harm . . . but that does not include a free floating power to restrict ideas to which children may be exposed." *Brown* 131 S. Ct. at 2736. "Speech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images the legislative body thinks unsuitable for them." *Id*. As the lack of empirical evidence attests, that is precisely what the legislature attempted to do when it enacted A3371. As was true in *Brown*, the attempt must be rejected.

The lack of empirical evidence that SOCE counseling poses harm to children when placed alongside the legislature's conclusion that it had to enact A3371 to protect children from "serious harms caused by sexual orientation change efforts," N.J. Stat. Ann. §45:1-54, leads to the conclusion that A3371 was enacted to suppress the message that unwanted SSA can be reduced or eliminated. As discussed above, A3371's total ban on SOCE counseling is not the least restrictive means for achieving the state's purported interest of preventing harm to children. Moreover, the purported "harms," are themselves conjectural, not real.

Consequently, even if the Court were to apply intermediate scrutiny, A3371 could not withstand the analysis.

G. A3371 Cannot Satisfy Rational Basis Review.

The Court further erred when it concluded that A3371 could withstand rational basis review. A33371 does not satisfy even rational basis, which requires that the legislation be rationally related to a legitimate state interest. *Romer v. Evans*, 517 U.S. 620, 631(1996). The absence of empirical evidence of harm posed by SOCE counseling, particularly in children, belies any asserted interest in protecting children from "harm." *Id.* In addition, the broad sweep of the prohibition negates the proposition that the measure is rationally related to addressing a purported harm. *Id.* This is particularly true in light of the fact that there are well-accepted less restrictive means, *e.g.*, informed consent, of addressing concerns

about the effects of SOCE counseling. (Appx., 000137-000140). Consequently, even under the District Court's improper legal standard, A3371 is unconstitutional.

H. The District Court's Erred When It Concluded That A3371 Is Not Vague Or Overbroad.

As a restriction on "talk therapy," *i.e.*, speech, A3371 must survive the more rigorous tests for vagueness and overbreadth accorded to regulations that inhibit expression. *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.,* 455 U.S. 489, 499 (1982); *United States v. Stevens*, 130 S. Ct. 1577, 1588 (2010). However, based upon its flawed premise that A3371 "does not infringe on constitutionally protected freedoms" (Appx., 000054), the District Court jettisoned the stricter standard required for speech restrictions in favor of the more deferential standards applied to economic regulations. (Appx., 000053-000062). Utilizing those more lenient standards, the District Court improperly concluded that A3371 is not vague or overbroad. (Appx., 000060-000062).

1. A3371 Is Impermissibly Vague.

The District Court did not dispute that SOCE counseling is carried out through "talk therapy" (Appx., 000036), but insisted that it contains no elements of speech and therefore is not subject to the more stringent standard for facial vagueness challenges of regulations affecting constitutionally protected rights. (Appx., 000054-000055). Instead of requiring that A3371 have the "precision of regulation" necessary to regulate Plaintiffs' expressive conduct, *NAACP v. Button*,

371 U.S. 415, 435 (1963), the District Court presumed that A3371 is not vague unless Plaintiffs prove that it is "incapable of any valid application." (Appx., 000054, citing *Steffel v. Thompson*, 415 U.S. 452, 474 (1974); *Vill. of Hoffman*, 455 U.S. at 495-95; *Brown v. City of Pittsburgh*, 586 F.3d 263, 269 (3d Cir. 2009)). The District Court further concluded that A3371 could not be vague because Plaintiffs must know how the state will interpret "sexual orientation change efforts" in the context of a profession comprised of therapeutic conversations. (Appx., 000055-000058).

The Court's own opinion belies its conclusion, as its descriptions of what it believes "sexual orientation change efforts" means are irreconcilable with Appellants' testimony detailing the actual effects of the statute.[3] Because the court built its opinion on the false premise that SOCE counseling is pure conduct, its recitation of what A3371 prohibits and permits is necessarily flawed. The court claims that A3371 does not prevent counselors from talking about SOCE, only from "practicing SOCE." (Appx., 000054). The court repeats representations made by Defendants' counsel that the state will not enforce the law to prevent discussions about SOCE. (Appx., 000056-000057).

[3] Notably, the very fact that the state's representations of what is permitted/prohibited under A3371 conflict with what the professionals say is permitted/prohibited establishes that the definition of prohibited is not clear, *i.e.*, that the law is vague.

Appellants testified that the only thing involved in "practicing SOCE" is speech. (Appx., 000171, 000234). Regardless of what the court might believe or what representations the state might have provided, the actual effect of prohibiting the "practice" of SOCE counseling is to prevent licensed counselors from speaking to minors about reducing or eliminating unwanted SSA. (Appx., 000447-000448). As Dr. Newman testified,

> Helping a male client process his experience of molestation by another male, including his temptations toward a repetition of that same-sex behavior, can be construed as violation of this law if his heterosexual interests are affirmed and homosexual behavior is discouraged. Or, helping a male client who questions in his diary, "Am I gay?" cannot be objectively counseled without future risk, unless the (non)-therapeutic response is to answer in the affirmative.

(*Id.*). Similarly, Dr. King testified that A3371 prohibits professional counselors

> from even discussing available treatment options that might help alleviate a client's unwanted same-sex attractions, behaviors, or identity because a client might subsequently view even a simple discussion of SOCE counseling as an effort to reduce or eliminate his or her unwanted same-sex attractions, behaviors, or identity and subject the counselor to ethical charges and violations.

(Appx., 000171). Furthermore, "[d]iscussing my personal story, the availability of SOCE counseling, or the notion that I believe change is possible could be considered an effort to change a client's sexual orientation, which would subject me to professional ethics violations." (*Id.*).

A3371's prohibition against the "practice" of SOCE leaves those subject to the law unable to continue counseling relationships for fear of running afoul of its

provisions. As the Supreme Court established, the crucial consideration when analyzing a law for vagueness, "is that no [individual subject to the law] can know just where the line is drawn . . . ." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 599 (1967). Appellants established that that is true here, and the District Court's contrary conclusion should be reversed.

2. A3371 Is Impermissibly Overbroad.

When viewed in the proper context of the speech-centric nature of professional counseling, it is apparent that A3371's language that professional counselors "shall not engage" in counseling, *i.e.*, speech, that seeks to reduce or eliminate SSA creates a sweeping prohibition that this Court and the Supreme Court have found impermissible in statutes affecting expressive activity. *United States v. Stevens*, 559 U.S. 460, 473 (2010); *Free Speech Coalition, Inc. v. Attorney Gen.*, 677 F.3d 519, 538 (3d Cir. 2012); *Stilp v. Contino*, 613 F.3d 405, 409 (3d Cir. 2010). The District Court's finding that A3371 is not overbroad rests upon the same flawed premise that permeates the court's other conclusions, *i.e.*, that the "practice of SOCE" is conduct with no elements of constitutionally protected speech. (Appx., 000060). As Appellants established, professionals "conduct SOCE as a method of counseling" through "discussion" and solely through discussion. (Appx., 000171, 000234). Consequently, the state can only enforce the statute against counselors who discuss SOCE, and there is no

constitutional means of enforcing the statute so as to save it from an overbreadth challenge.

Since A3371 affects constitutionally protected speech, it will be invalidated as overbroad if “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *Stevens*, 559 U.S. at 473 (citing *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449, n. 6 (2008)); *Free Speech Coalition*, 677 F.3d at 538. A3371 creates a prohibition of “alarming breadth” that sweeps within its reach virtually all aspects of Appellants’ practices. (*See* Appx., 000171). The regulation in *Stevens* included exceptions, while A3371 states that counselors “shall not” engage in SOCE counseling under any circumstances. N.J. Stat. Ann. §45:1-55.

A licensed counselor will face disciplinary action if the counselor provides counseling to a minor who wants to reduce or eliminate SSA, mannerisms, or speech, even if the minor pleads for the counseling. A3371 prohibits a minor and his parents from seeking help from a licensed professional even if the minor is molested by the likes of a Jerry Sandusky child molester, develops anger and identity confusion, begins to have urges to act out sexually in the way he was abused and wants to reduce or eliminate that behavior. (*See* Appx., 000171). The parties before this Court provide an example of such abuse leading to confusion and unwanted SSA and a client begging for counseling to alleviate them. (*See*

Appx., 000168-000169). Under A3371, though, a counselor can only affirm those feelings, even if the client abhors them, but under no circumstances may the counselor assist the client in reaching the goal to reduce or eliminate them.

The sweeping prohibition against counseling aimed at reducing or eliminating SSA, under any circumstances, is impermissibly overbroad. The District Court's contrary finding is clear error and should be overturned.

II. THE DISTRICT COURT ERRED WHEN IT DETERMINED THAT A3371 DOES NOT VIOLATE PLAINTIFFS' FREE EXERCISE RIGHTS.

A. This Court Exercises De Novo Review.

When, as here, a case involves First Amendment claims, this Court has "a constitutional duty to conduct an independent examination of the record as a whole,' and cannot defer to the District Court's factual findings unless they concern witnesses' credibility.'" *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 156-57 (3d Cir. 2002) (citing *Hurley v. Irish–American Gay, Lesbian & Bisexual Group of Boston*, 515 U.S. 557, 567 (1995)). Because "the reaches of the First Amendment are ultimately defined by the facts it is held to embrace," *Hurley*, 515 U.S. at 567, "we examine independently the facts in the record and 'draw our own inferences' from them." *Tenafly*, 309 F.3d at 157 (citation omitted).

B. A3371 Is Subject To And Cannot Withstand Strict Scrutiny For Its Infringement Of Appellants' Free Exercise Rights.

A3371 unconstitutionally infringes on the Free Exercise rights of Appellants, their clients and clients' parents by presenting the very type of masked hostility toward religious beliefs that the Supreme Court cautioned against in *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). A3371 forced Appellants to immediately cease counseling for those clients who seek SOCE because of their sincerely held religious beliefs. (Appx., 000171-000172, 000177-000178). This forces Appellants and their clients to choose elevating what the State has determined is an appropriate ideology over their own sincerely held religious beliefs about something as fundamental as their personal identity or violating the law. This Court has called such a false choice a "textbook example" of a substantial burden upon religious exercise that violates the First Amendment. *Washington v. Klem*, 497 F.3d 272, 278 (3d Cir. 2007)."The Supreme Court has stated in its Free Exercise Clause jurisprudence that a substantial burden exists when a follower is forced 'to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand.'" *Id.* (quoting *Sherbert v. Verner*, 374 U.S. 398, 404 (1968)).

"The principle that government may not enact laws that suppress religious belief or practice is so well understood that few violations are recorded in our

opinions." *Lukumi*, 508 U.S. at 523. "Although a law targeting religious beliefs as such is never permissible . . . if the object of the law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Id.* at 533 (citations omitted). Indeed, "[f]acial neutrality is not determinative. The Free Exercise Clause . . . extends beyond facial discrimination. The Clause 'forbids subtle departures from neutrality,' . . . and 'covert suppression of particular religious beliefs.'" *Id.* at 534 (citations omitted). Moreover, "[t]he Free Exercise Clause protects against government hostility which is masked, as well as overt." *Id.*

Although neutral laws of general applicability receive deferential treatment, *Emp't Div., Dep't of Human Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990), "[a] law failing to satisfy these requirements must be justified by a compelling government interest and must be narrowly tailored to advance that interest." *Lukumi*, 508 U.S. at 531-32. A3371 is not neutral or generally applicable and "must undergo the most rigorous of scrutiny." *Id.* at 546. Such a law "will survive strict scrutiny *only in rare cases*." *Id.* (emphasis added).

1. A3371 Is Not Neutral or Generally Applicable.

A3371 prohibits counseling to "reduce or eliminate sexual or romantic attractions or feelings toward a person of the same gender." N.J. Stat. Ann. §45:1-55. As even the Task Force Report recognized, the majority of people seeking this type of counseling do so because of their religious beliefs. (Appx., 000329-

000331). A3371 has a disproportionate effect on those, like Appellants and their clients, who hold such beliefs.

A3371 permits counseling (1) for minors seeking to transition from one gender to another, (2) for minors struggling with or confused about heterosexual attractions, behaviors, or identity, (3) that facilitates exploration and development of same-sex attractions, behaviors, or identity, (4) for individuals over the age of 18, and (5) provided by unlicensed counselors. These individualized exemptions demonstrate that A3371 is not neutral or generally applicable, but operates as an impermissible "religious gerrymander." *Lukumi*, 508 U.S. at 536-38. The Free Exercise Clause is violated when, as is true here, equally detrimental behaviors are accorded unequal treatment. *Lighthouse Institute for Evangelism, Inc. v. City of Long Branch*, 510 F.3d 253, 265 (3d Cir. 2007).

> A law fails the general applicability requirement if it burdens a category of religiously motivated conduct but exempts or does not reach a substantial category of conduct that is not religiously motivated *and that undermines the purposes of the law to at least the same degree as the covered conduct that is religiously motivated.*

Blackhawk v. Pennsylvania, 381 F.3d 202, 209 (3d Cir. 2004) (emphasis added); *see also, Fraternal Order of Police Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 366 (3d Cir. 1999) (noting that when the government makes value judgments that exempt certain individuals for secular reasons but not for religious reasons, the regulation is subject to strict scrutiny).

A3371 permits SOCE counseling for individuals who seek to change sexual orientation towards homosexuality or bisexuality while banning counseling that seeks to *change* sexual orientation from homosexual to heterosexual N.J. Stat. Ann. §45:1-55. A3371 also permits counseling that facilitates exploration or development of SSA or transitioning "from one gender to another. *Id.* If the state contends that "change" of sexual orientation or gender identity is "harmful," then that should be true regardless of the nature of the change. The fact that change in one direction is permitted but change in the other direction is not undermines the state's claim that it seeks to prevent harm. Also, A3371 continues to permit SOCE counseling by unlicensed counselors, which further undermines its purported interest in preventing harm. The State cannot ban what it erroneously deems is harmful in one setting while allowing the exact same alleged harm to go unregulated in another setting.

A3371's legislative history, particularly the Task Force Report, further illustrate that A3371 is not neutral, but targeted specifically at those individuals whose sincerely held religious views inform them that change is possible. One of the leaders of the Task Force stated, "[w]e cannot take into account what are fundamentally *negative religious perceptions in homosexuality—they don't fit into our world view*." (Appx., 000188) (emphasis added). "It appears that the APA operated with a litmus test when considering task force membership—the only

views of homosexuality that were targeted are those *that uniformly endorsed same-sex behavior as a moral good.*" (*Id.*). A3371 is not neutral or generally applicable and must satisfy the most exacting constitutional scrutiny.

2. A3371 Violates Free Speech And Free Exercise Rights.

Even if A3371 were found to be neutral and generally applicable (which it is not), strict scrutiny would still apply because A3371 not only burdens Plaintiffs' and their clients' Free Exercise rights but also infringes their free speech rights, as described above. Consequently, it presents a "hybrid rights" claim that is also subject to strict scrutiny. *Emp't Div.*, 494 U.S. at 881; *Tenafly*, 309 F.3d at 165 n.26. The viewpoint and content-based restriction upon Plaintiffs' and their clients' free speech rights coupled with the burden upon religious exercise are sufficient to create a hybrid rights claim that subjects A3371 to strict scrutiny. *See Emp't Div.*, 494 U.S. at 881.

3. A3371 Cannot Withstand Strict Scrutiny.

As is true in the free speech context, the state cannot meet its burden of demonstrating that A3371 survives strict scrutiny, *i.e.*, it is justified by a compelling governmental interest and narrowly tailored to meet that interest. *Lukumi*, 508 U.S. at 531-32. The state has failed to establish "*that the recited harms are real, not merely conjectural*, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad.*, 512 U.S. at 664

(emphasis added). As discussed above, the state offers wholly unsubstantiated allegations of harm based upon admittedly inadequate research and policy statements from advocacy organizations. (Appx., 000295); N.J. Stat. Ann. §§45:1-54(b)-(m). None of the sources provide empirical evidence that SOCE does in fact harm minors, so the state cannot prove that there is a grave and immediate threat of harm. (Appx., 000237-000238). Similarly, A3371's complete prohibition on SOCE counseling cannot be regarded as narrowly tailored to protect children from purported harm (which itself has not been proven). *Sable Commc'ns*, 492 U.S at 126.

The District Court's conclusion that A3371 does not violate Plaintiffs' Free Exercise rights is clear error. This Court should reverse the decision.

III. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT PLAINTIFFS DID NOT HAVE THIRD PARTY STANDING TO ASSERT CLAIMS FOR THEIR CLIENTS.

A. Plaintiffs Meet The Prerequisites For Third Party Standing.

This Court reviews standing determinations de novo. *ACLU-NJ v. Twp. of Wall*, 246 F.3d 258, 261 (3d Cir. 2001). Under that standard, it is clear that the District Court's conclusion that Plaintiffs did not have third-party standing is in error.

As health care professionals whose practices and clients' well-being are jeopardized by A3371's prohibitions and whose clients are vulnerable minors,

Plaintiffs have met the requirements for asserting claims on their clients' behalf. *Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 289-90 (3d Cir. 2002); *Singleton v. Wulff*, 428 U.S. 106, 117 (1976). The Supreme Court has recognized that litigants may bring actions on behalf of third parties if they demonstrate that (1) they have suffered an "injury in fact," giving them a "sufficiently concrete interest" in the outcome of the issue in dispute, (2) they have a close relation to the third party and (3) there is a hindrance to the third party's ability to protect his or her own interests. *Powers v. Ohio*, 499 U.S. 400, 410-11 (1991). Plaintiffs meet these prerequisites and should have been permitted to pursue the claims brought on behalf of their clients.

As was true in *Craig v. Boren*, 429 U.S. 190, 194-95 (1976), Plaintiffs have established independently their claims "to assert jus tertii standing." The legal duties created by A3371 are addressed directly to professional counselors such as Plaintiffs, who are obliged either to heed the statutory prohibition, thereby incurring an injury to their counseling practices, religious beliefs and the therapeutic relationship with their clients, or to disobey the statute and suffer sanctions and perhaps loss of their licenses. *Id.* at 194. This constitutes a direct injury sufficient to confer Article III standing. *Id.*; *Singleton*, 428 U.S. at 113.

In *Singleton*, the Supreme Court granted physicians third-party standing on behalf of their patients to challenge a statute prohibiting Medicaid funding for

certain abortions. 428 U.S. at 117. Because of the inherent closeness of the doctor-patient relationship, the plurality found the physicians could efficaciously advocate their patients' interests. *Id.*; *see also*, *Griswold v. Connecticut*, 381 U.S. 479, 481 (1965) (Planned Parenthood officials had standing to raise constitutional rights of married people seeking contraceptives with whom they had professional relationship). Building upon *Singleton* and *Griswold*, this Court determined that psychiatrists and their patients have a sufficiently "close relationship" to permit the psychiatrists to effectively advance their patients' claims. *Pennsylvania Psychiatric Soc'y*, 280 F.3d at 289. "Psychiatrists clearly have the kind of relationship with their patients which lends itself to advancing claims on their behalf. This intimate relationship and the resulting mental health treatment ensures psychiatrists can effectively assert their patients' rights." *Id.* "Accordingly, we believe the psychiatrist-patient relationship would satisfy the second criterion for third-party standing." *Id.* at 290. Likewise, Plaintiffs' intimate relationship and mental health treatment with their minor clients ensures that they can effectively assert their clients' rights.

As was true in *Pennsylvania Psychiatric Society*, the clients' mental health problems pose some hindrance to the clients' ability to protect their own interests. *Id.* (citing *Powers*, 499 U.S. at 411). As the Supreme Court said in *Singleton*, a lawsuit's invasion of patient privacy and "imminent mootness" of a particular

health issue can sufficiently impede patients from bringing suit themselves. 428 U.S. at 117. In this case, the privacy issues are even greater since the clients are minors. (Appx., 000448). Dr. Newman testified that he is acting on behalf of his minor clients and refuses to bring them into the case "due to my desire to protect them." (*Id.*).

> They are conscious of this law and the restrictions on my current therapeutic options under this law. Neither has chosen to embrace a gay identity, even though this question was addressed during the course of therapy in the past. Neither of these clients wants others to even know they are in therapy, and it is my clinical judgment that they would suffer significant anxiety and harm if they were influenced to testify in this case.

(*Id.*). The chilling effect that a lawsuit might have upon a patient's desire to protect the privacy of his decision to seek particular counseling or medical treatment is sufficient to establish that a patient is hindered from asserting his own claim for purposes of third party standing. *See Singleton*, 428 U.S. at 117 (woman's desire to protect the privacy of abortion decision was sufficient to give physician standing to assert her interests).[4]

This Court should reverse.

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[4] The fact that one family was willing to proceed pseudonymously to challenge A3371 does not diminish the privacy concerns inherent in a minor's mental health counseling. The District Court's notion that this somehow eliminates Appellants' standing to challenge A3371 on behalf of their clients is without merit.

IV. THE TRIAL COURT ERRED WHEN IT DETERMINED THAT GSE DID NOT NEED TO SATISFY ARTICLE III STANDING.

A. The District Court Erred When It Failed To Require That GSE Have Article III Standing.

Status as an intervenor at the trial level does not confer standing sufficient to keep the case alive on appeal in the absence of the party on behalf of whom intervention was granted. *Diamond v. Charles*, 476 U.S. 54, 68 (1986). The *Diamond* court did not reach the question of whether intervenors must also meet Article III standing before being permitted to intervene *ab initio*. *Id.* at 68-69. Similarly, the Court did not reach the question of intervenor standard *ab initio* when it determined last term that standing was lacking when an intervenor sought to appeal a district court judgment after the unsuccessful government defendant decided not to pursue the lawsuit. *Hollingworth v. Perry*, 133 S.Ct. 2652, 2661 (2013). Consequently, as this Court held:

> The relationship between the interests required for intervention in the district court and the interests required to confer Article III standing on appeal has not been clearly delineated. It is clear, however, that an intervenor defendant−whether permissive or as of right−will not necessarily have standing to appeal.

McLaughlin v. Pernsley, 876 F.2d 308, 313-14 (3d Cir. 1989).

This Court has not directly answered the question, and other circuits have split on the issue. *Am. Auto. Ins. Co. v. Murray*, 658 F.3d 311, 318 n.4 (3d Cir. 2011). The District Court sided with those circuits holding that Article III standing

is not a prerequisite for permissive intervention. (Appx., 000018). This adoption of a lenient standing requirement for GSE, which asserted claims based upon unidentified people and indirect effects of the law, is incompatible with the more restrictive standing analysis applied to Appellants' attempt to assert claims on behalf of their minor clients. (Appx., 000022-000024).

The District Court's more relaxed standard conflicts with the Supreme Court's strict application of standing rules. *United States v. Hays*, 515 U.S. 737, 742 (1995). The Supreme Court has consistently said that federal courts are under an independent obligation to examine their own jurisdiction, and that standing "is perhaps the most important of [the jurisdictional] doctrines." *Id*. The Supreme Court has emphasized that "[s]tanding represents a jurisdictional requirement which remains open to review at all stages of the litigation." *Nat'l Org. for Women, Inc. v. Scheidler*, 510 U.S. 249, 255 (1994). The Supreme Court's continuing adherence to a strict application of standing requirements and determination that intervenors must establish Article III standing on appeal when the main party does not participate militate in favor of finding that intervenors such as GSE must satisfy Article III before being permitted to intervene. *Hollingworth*, 133 S.Ct. at 2661. This Court should clarify its position on this issue by overturning the District Court's decision.

V. THE TRIAL COURT ABUSED ITS DISCRETION WHEN IT GRANTED GSE PERMISSIVE INTERVENTION.

A. Permissive Intervention Was Improvidently Granted.

This Court reviews determinations regarding permissive intervention for abuse of discretion. *N.C.A.A. v. Governor of New Jersey*, 520 F. App'x 61, 63 (3d Cir. 2013). The state's zealous defense of A3371 and GSE's speculative interest demonstrate that the District Court abused its discretion when it granted GSE's motion for permissive intervention. Where, as here, the interests of the applicant in every manner match those of an existing party and the party's representation is deemed adequate, a proposed intervenor's contributions can be viewed as superfluous and its participation as unduly prejudicial. *Hoots v. Pennsylvania*, 672 F.2d 1133, 1135 (3d Cir. 1982). "When the party seeking intervention has the same ultimate objective as a party to the suit, a presumption arises that its interests are adequately represented." *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 315 (3d Cir. 2005). In this case, GSE shares the state's objective of upholding the ban on SOCE. Therefore, the State is presumed to adequately represent the interest of those seeking to uphold its laws. *Pennsylvania v. Rizzo*, 530 F.2d 501, 505 (3d Cir. 1976).

The District Court abused its discretion in granting permissive intervention.

CONCLUSION

The District Court erred when it concluded that A3371 does not violate Appellants' First Amendment Free Speech and Free Exercise rights. The District Court further erred when it concluded that Appellants could not raise claims on behalf of their minor clients and that GSE did not need to satisfy Article III standing. The court abused its discretion when it granted GSE's motion for permissive intervention. For these reasons, the District Court should be reversed.

Dated: January 10, 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 she is a member of the bar of this Court.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies this Brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B).

1. Exclusive of the sections exempted by Fed. R. App. P. 32(a)(7)(B)(iii) , the Brief contains 13,743 words, according to the word count feature of the software (Microsoft Word 2007) used to prepare the Brief.

2. The Brief has been prepared in proportionately spaced typeface using Times New Roman 14 point.

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CERTIFICATE OF SERVICE AND ECF COMPLIANCE

I hereby certify that on this 10th day of January, 2014: (1) I caused Appellants' Opening Brief to be filed electronically via the Court's CM/ECF system and to be served upon all counsel of record via Notice of Docket Activity through the Court's electronic filing system and that all counsel of record are electronic filing users; and (2) a virus check was performed on the Brief, no viruses were found, and that the antivirus software used was Microsoft Forefront Client Security.

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CASE NO. 13-4429
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TARA KING, ED.D., individually and on behalf of her patients, RONALD NEWMAN, PH.D., individually and on behalf of his patients, NATIONAL ASSOCIATION FOR RESEARCH AND THERAPY OF HOMOSEXUALITY (NARTH), and AMERICAN ASSOCIATION OF CHRISTIAN COUNSELORS (AACC),

Plaintiffs/Appellants,

v.

CHRISTOPHER J. CHRISTIE, Governor of the State of New Jersey, in his official capacity, ERIC T. KANEFSKY, Director of the New Jersey Department of Law and Public Safety: Division of Consumer Affairs, in his official capacity, MILAGROS COLLAZO, Executive Director of the New Jersey Board of Marriage and Family Therapy Examiners, in her official capacity, J. MICHAEL WALKER, Executive Director of the New Jersey Board of Psychological Examiners, in his official capacity; and PAUL JORDAN, President of the New Jersey State Board of Medical Examiners, in his official capacity,

Defendants/Appellees,

And

GARDEN STATE EQUALITY,

Intervenor-Defendant/Appellee.

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UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY
TRENTON DIVISION

TARA KING, ED.D., individually and on behalf of her patients, **RONALD NEWMAN, PH.D.**, individually and on behalf of his patients, **NATIONAL ASSOCIATION FOR RESEARCH AND THERAPY OF HOMOSEXUALITY (NARTH)**, **AMERICAN ASSOCIATION OF CHRISTIAN COUNSELORS (AACC)**,

Plaintiffs,

v.

CHRISTOPHER J. CHRISTIE, Governor of the State of New Jersey, in his official capacity, **ERIC T. KANEFSKY**, Director of the New Jersey Department of Law and Public Safety: Division of Consumer Affairs, in his official capacity, **MILAGROS COLLAZO**, Executive Director of the New Jersey Board of Marriage and Family Therapy Examiners, in her official capacity, **J. MICHAEL WALKER**, Executive Director of the New Jersey Board of Psychological Examiners, in his official capacity; **PAUL JORDAN**, President of the New Jersey State Board of Medical Examiners, in his official capacity,

Defendants.

Case No. 3:13-cv-05038

PLAINTIFFS' NOTICE OF APPEAL

Pursuant to Fed. R. App. P. 3, and Third Circuit Rule 3.1, Plaintiffs, Dr. Tara King, Dr. Ronald Newman, National Association for Research and Therapy of Homosexuality ("NARTH"), and American Association of Christian Counselors hereby notice their appeal to the United

States Court of Appeals for the Third Circuit from the Order denying Plaintiffs' motion for a summary judgment entered November 8, 2013 (Dkt. 57).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically with the court on November 12, 2013. Service will be effectuated by the Court's electronic notification system upon all counsel of record.

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***FOR PUBLICATION**

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

The Honorable Freda L. Wolfson, U.S.D.J.

TARA KING, ED.D., *et al.*,	:	Civil Action No. 13-5038
Plaintiffs,	:	**OPINION**
vs.	:	
CHRISTOPHER CHRISTIE, Governor of New Jersey, *et al.*,	:	
Defendants.	:	

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On August 19, 2013, New Jersey Governor Christopher J. Christie signed into law Assembly Bill Number A3371 ("A3371") (codified at N.J.S.A. 45:1-54, -55),[1] which prohibits New Jersey state licensed practitioners, who provide professional counseling services, from treating minors using methods of Sexual Orientation Change Efforts ("SOCE"), more commonly known as "gay conversion therapy;" A3371 became effective on the same date. The Bill is the second piece of legislation of its kind in the nation, with California having been the first state to successfully enact such a law.[2] In passing this statute, the New Jersey Legislature determined, *inter alia*, that this type of treatment subjects minors to potentially harmful consequences. Challengers to the constitutionality of A3371 are Plaintiffs, Tara King Ed.D. and Ronald Newman, Ph.D., who are individual licensed therapists, as well as the National Association for Research and Therapy of Homosexuality ("NARTH") and the American Association of Christian Counselors ("AACC") (collectively, "Plaintiffs"), whose members include various

---

[1] At the time Plaintiffs brought this suit, Assembly Bill A3371 had not been codified as a statute, and thus, the parties refer in their papers to the now-codified statute as A3371. In this Opinion, the Court will interchangeably use A3371 or N.J.S.A. 45:1-54. -55.

[2] Challengers of the California statute were unsuccessful in overturning the law. The Ninth Circuit Court of Appeals, in *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013), recently held that California's statute banning licensed professionals from practicing SOCE is constitutional.

licensed professionals who practice or wish to engage in SOCE.[3] The named defendants are Governor Christie, Eric T. Kanefsky, Director of the New Jersey Dep't of Law and Public Safety, Milagros Collazo, Executive Director of the New Jersey Board of Marriage and Family Therapy Examiners, J. Michael Walker, Executive Director of the New Jersey Board of Psychological Examiners, and Paul Jordan, President of the New Jersey State Board of Medical Examiners (collectively, "Defendants" or the "State"). Plaintiffs also bring constitutional claims on behalf of the licensed professionals' minor clients and the clients' parents.[4] Presently before the Court are cross motions for summary judgment.[5] During the pendency of the briefing, Proposed Intervenor, Garden State Equality ("Garden State"), moved to intervene as a defendant in this case, or in the alternative, it sought *amicus curiae* status.

On these motions, the parties raise a host of legal issues, the most significant of which focuses on whether, by prohibiting the practice of SOCE, the State has impermissibly infringed upon Plaintiffs' First Amendment rights -- freedom of speech and free religious expression.

[3] There is no dispute that NARTH and AACC have associational standing to bring claims on behalf of their members.

[4] Within the last week, a minor client and his parents, represented by the same counsel as represents Plaintiffs here, filed a similar lawsuit against Defendants challenging the constitutionality of A3371. This matter also is assigned to me. *See Doe v. Christie, et al.*, Civ. No. 13-6629(FLW).

[5] Initially, Plaintiffs sought to preliminarily enjoin Defendants from enforcing A3371; however, during the pendency of that motion, the parties agreed to convert the preliminary injunction motion into one for summary judgment, with Defendants cross moving for summary judgment.

Because the Court finds that A3371 restricts neither speech nor religious expression, rational basis review applies. I further find that A3371 passes constitutional muster under that standard. Accordingly, Defendants' cross motion for summary judgment is **GRANTED** in its entirety; and Plaintiffs' motion for summary judgment is **DENIED**. Garden State's motion to intervene is **GRANTED**.

BACKGROUND

Assembly Bill A3371 precludes persons licensed to practice in certain counseling professions from engaging in "the practice of seeking to change a [minor's] sexual orientation." § 2(b). The statute has two sections; Section 1 provides legislative findings and declarations, while Section 2 defines SOCE and establishes the scope of the legislative prohibition on such conduct.

Section 1 (N.J.S.A. 45:1-54)

In Section 1 of the Statute, the Legislature declared that "[b]eing lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming. The major professional associations of mental health practitioners and researchers in the United States have recognized this fact for nearly 40 years." § 1(a). The Legislature then went on to state that "[m]inors who experience family rejection based on their sexual orientation face especially serious health risks," and that "[s]uch directed efforts [at changing sexual orientation] are against fundamental principles of psychoanalytic treatment and often result in substantial psychological pain by reinforcing damaging internalized attitudes." §§ 1(m), (j)(2).

In support of its determination, the Legislature cited many of the position statements and resolutions of professional associations, including, *inter alia*, the American Psychiatric Association, the American Academy of Pediatrics and the American Academy of Child and Adolescent Psychiatry. § 1 (c)-(m). According to the Legislature, each of these professional associations has concluded that there is little or no evidence of the efficacy of SOCE, and that SOCE has the potential for harm, such as causing those treated to experience depression, guilt, anxiety and thoughts of suicide. *Id.* Specifically, relying on the American Psychological Association's report on Appropriate Therapeutic Responses to Sexual Orientation, the Legislature found that "sexual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people, including confusion, depression, guilt, helplessness, hopelessness, shame, social withdrawal, suicidality, substance abuse, stress, disappointment, self-blame, decreased self-esteem and authenticity to others, . . . [and] a feeling of being dehumanized." § 1(b).

Similarly, and particularly relevant to minors, citing an American Academy of Pediatrics journal article, the Legislature concluded that "[t]herapy directed at specifically changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation." § 1(f). The Legislature also looked to an American Academy of Child and Adolescent Psychiatry journal article, which states that

> [c]linicians should be aware that there is no evidence that sexual orientation can be altered through therapy, and that attempts to do so may be harmful . . . . Indeed, there is no medically valid basis for attempting to prevent homosexuality, which is not an illness. On the contrary, such efforts may encourage family rejection and undermine self-esteem, connectedness and caring, important protective factors against suicidal ideation and attempts. Given that there is no evidence that efforts to alter sexual orientation are effective, beneficial or necessary, and the possibility that they carry the risk of significant harm, such interventions are contraindicated.

§ 1(k).

Indeed, based on these professional associations' findings and other evidence before the Legislature, the State concluded that it "has a compelling interest in protecting the physical and psychological well-being of minors, including gays, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by sexual orientation change efforts." § 1(n).

Section 2 (N.J.S.A. 45:1-55)

Assembly Bill A3371's prohibition on the practice of SOCE with a person under 18 years of age applies to "[a] person who is licensed to provide professional counseling under Title 45 of the Revised Statutes, including, but not limited to, a psychiatrist, licensed practicing psychologist, certified social worker, licensed clinical social worker, licensed social worker, licensed marriage and family therapist, certified psychoanalyst, or a person who performs counseling as part of the

person's professional training for any of these professions." § 2(a).[6] Further, the Legislature 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 . . . ." § 2(b).

However, the statute makes clear that the prohibition does 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 or unsafe sexual practices"; and (2) any other type of counseling that does not seek to change sexual orientation. *Id.* at (1), (2).

Plaintiff's Challenge to A3371

Plaintiffs challenge the constitutionality of A3371 because they allege the statute violates their state and federal First Amendment rights, namely, freedom of speech and free exercise of religion. In addition, Plaintiffs, on behalf of minor clients and their parents, assert that A3371 interferes with the minor clients' right to self-determination and the parents' fundamental right to direct the upbringing of their children. As to free speech, Plaintiffs maintain that A3371 prohibits licensed professionals

[6] It is important to note that A3371 does not prohibit non-licensed counselors or therapists, including non-licensed religious counselors, from practicing SOCE.

from engaging in, or referring to a licensed professional who engages in, counseling with a minor regarding his/her "unwanted" same-sex sexual attractions, placing an unconstitutional restraint on the content of Plaintiffs' message to their clients. Plaintiffs reason that A3371 "authorizes only one viewpoint on SOCE and unwanted same-sex sexual attractions, behaviors, and identity by forcing . . . Plaintiffs . . . to present only one viewpoint on the otherwise permissible subject matter of same-sex attractions . . . ." Compl., ¶ 186.

Plaintiffs further complain that A3371 infringes on their "sincerely held religious beliefs to provide spiritual counsel and assistance to their clients who seek such counsel in order to honor their clients' right to self-determination and to freely exercise their own sincerely held religious beliefs to counsel on the subject matter of same-sex attractions . . . ." Compl., ¶ 235. By doing so, Plaintiffs allege that A3371 "impermissibly burden[s] Plaintiffs' and their clients' sincerely held religious beliefs and compels them to both change those religious beliefs and to act in contradiction to them." *Id.* at ¶ 237. This type of restriction, Plaintiffs assert, violates their state and federal constitutional rights to the free exercise of religion. Finally, Plaintiffs assert that A3371 violates the parents' fundamental rights "to direct the upbringing and education of their children according to their sincerely held religious beliefs," *Id.*, ¶ 260, because the statute "prevents the parents . . . from seeking mental health counseling for their minor children's unwanted same-sex attractions . . . ." *Id.* at ¶ 261.

Shortly after Plaintiffs filed suit, Garden State sought permissive intervention to defend the constitutionality of A3371. Founded in 2004, Garden State is a New Jersey civil rights organization, primarily advocating for lesbian, gay, bisexual, and transgender ("LGBT") equality within the state. It supports and lobbies for legislation, such as A3371, that prohibits, *inter alia*, discrimination on the basis of sexual orientation. Garden State aims to protect the interests of LGBT citizens in New Jersey, including youth. This organization has over 125,000 members, including LGBT minors and their parents, some of whom, according to Garden State, might be subject to SOCE treatment at the insistence of a parent or guardian, or based on the choice of a licensed mental health professional.

Procedural History

Plaintiffs filed their six-count Complaint on August 22, 2013. Initially, Plaintiffs moved to temporarily restrain Defendants from enforcing A3371. However, after a telephone conference, and with the consent of the parties, the Court converted Plaintiffs' motion for a preliminary injunction to a summary judgment motion. Thereafter, Defendants cross-moved for summary judgment. After the filing of Plaintiffs' initial motion, Garden State moved to intervene as a defendant in this matter. By Text Order dated September 16, 2013, the Court granted Garden State's request, and indicated in that Order that the reasoning for the Court's decision would be stated more fully in a written opinion to follow.

On October 1, 2013, the Court held oral argument on these summary judgment motions, wherein counsel for Plaintiffs,[7] Defendants and the Intervenor participated. Notably, during the hearing, Plaintiffs advanced an additional novel argument as to why Garden State should not be granted intervenor status: Garden State must have Article III standing to intervene at the district court level. The Court reserved its decision on that question. In addition, in response to the parties' various evidentiary objections to certain expert opinions/certifications, the Court indicated that all objections will be taken under advisement, and to the extent the Court relies on any certifications, the Court will rule on the relevant objections accordingly in this Opinion. *See* Hearing Transcript ("Tr."), T58:12 – T59:11.

DISCUSSION

I. Standard of Review

A moving party is entitled to judgment as a matter of law where there is no genuine issue as to any material fact. *See* Fed. R. Civ. 56(c); *Brooks v. Kyler,* 204 F.3d 102, 105 n.5 (3d Cir. 2000) (*citing* Fed. R. Civ. 56(c); *Celotex Corp. v. Catrett,* 477 U.S. 317, 323 (1986)); *Orson, Inc. v. Miramax Film Corp.,* 79 F.3d 1358, 1366 (3d Cir. 1996). The burden of demonstrating the absence of a genuine issue of material fact falls on the moving party. *See Taylor v. Phoenixville Sch. Dist.,* 184 F.3d 296, 305 (3d

[7] During a teleconference, counsel for Plaintiffs indicated that they were objecting to Garden State's motion to intervene; however, counsel did not object to Garden State's alternative request to enter the litigation as *amicus*.

Cir. 1999) (citations omitted). Once the moving party has satisfied this initial burden, the opposing party must identify "specific facts which demonstrate that there exists a genuine issue for trial." *Orson,* 79 F.3d at 1366.

Not every issue of fact will be sufficient to defeat a motion for summary judgment; issues of fact are genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). Further, the nonmoving party cannot rest upon mere allegations; he must present actual evidence that creates a genuine issue of material fact. *See* Fed. R. Civ. 56(c); *Anderson,* 477 U.S. at 249 (*citing First Nat'l Bank v. Cities Serv. Co.,* 391 U.S. 253, 290 (1968)). In conducting a review of the facts, the non-moving party is entitled to all reasonable inferences and the record is construed in the light most favorable to that party. *See Pollock v. Am. Tel. & Tel. Long Lines,* 794 F.2d 860, 864 (3d Cir. 1986). Accordingly, it is not the court's role to make findings of fact, but to analyze the facts presented and determine if a reasonable jury could return a verdict for the nonmoving party. *See Brooks,* 204 F.3d at 105 n. 5 (*citing Anderson,* 477 U.S. at 249); *Big Apple BMW v. BMW of N. Am., Inc.,* 974 F.2d 1358, 1363 (3d Cir. 1992).

II. Motion to Intervene by Garden State

A. Standing as an Intervenor

According to Plaintiffs, in their supplemental briefing, Garden State must independently satisfy Article III standing requirements before it can

be granted leave to intervene under Fed. R. Civ. P. 24(b). Generally, to demonstrate the "case or controversy" standing requirement under Article III, § 2 of the United States Constitution, a plaintiff must establish that it has suffered a cognizable injury that is causally related to the alleged conduct of the defendant and is redressable by judicial action. *Friends of the Earth, Inc. v. Laidlaw Envt'l. Servs. (TOC), Inc.*, 528 U.S. 167, 180-81 (2000); *The Pitt News v. Fisher*, 215 F.3d 354, 359 (3d Cir. 2000). Here, Plaintiffs argue that Garden State, a proposed intervening defendant, must also satisfy Article III's standing mandate.

To begin the analysis, I start with the Third Circuit's acknowledgement in *Am. Auto. Ins. Co. v. Murray*, 658 F.3d 311 (3d Cir. 2011), that neither the Third Circuit nor the Supreme Court "has determined whether a potential intervenor must even have Article III standing" to participate in district court proceedings. *Id.* at 318 n.4 (citing *Diamond v. Charles*, 476 U.S. 54, 68-69 (1986)).[8] While this circuit has not answered the standing question in the context of intervention, *Murray* recognized that other circuit courts are split on this issue. *Compare Ruiz*

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[8] Suggesting that the Third Circuit requires a proposed intervenor to satisfy standing, Plaintiffs rely on *Frempong v. Nat'l City Bank of In.*, 452 Fed. Appx. 167, 172 (3d Cir. 2011). Plaintiffs' reliance is inapt. *Frempong* dealt with a plaintiff husband -- not an intervenor -- who brought § 1983 claims in connection with defendant bank's foreclosure of his wife's property. The court found that plaintiff did not have standing to bring claims on his wife's behalf because he did not have any interest in the disputed property. In that context, the issue of whether a proposed intervenor must have independent standing under Article III was not addressed, let alone resolved – the question of intevenor status was not an issue.

v. Estelle, 161 F.3d 814, 830 (5th Cir. 1998) (holding that Article III standing is not a prerequisite to intervention); *City of Colo. Springs v. Climax Molybdenum Co.*, 587 F.3d 1071, 1079 (5th Cir. 2009) (same); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir. 1994) (same); *Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir. 1991) (same); *Sagebrush Rebellion, Inc., v. Watt*, 713 F.2d 525, 527 (9th Cir. 1983) (same); *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989) (same); and *United States Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir. 1978) (same); *with Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir. 1996) (holding that Article III standing is necessary for intervention); *United States v. 36.96 Acres of Land*, 754 F.2d 855, 859 (7th Cir. 1985) (concluding that intervention under Rule 24 requires interest greater than that of standing); and *Rio Grande Pipeline Co. v. FERC, 178 F.3d 533*, 538 (D.D.C. 1999) (an "intervenor must have standing to participate as an intervenor rather than only as an amicus curiae.").[9]

Having reviewed the conflicting authorities cited above, I find that based on the circumstances of this case, Garden State need not satisfy standing requirements in order to intervene in these proceedings.[10] I start

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[9] It bears noting that the recent Supreme Court decision in *Hollingworth v. Perry*, 133 S.Ct. 2652, 2661 (2013), did not directly address the issue of intervenor standing in general. Instead, in that case, the Court dealt with a narrower issue: the Court found that standing was lacking when an intervenor sought to appeal the judgment of the district court after the unsuccessful defendant government had decided not to pursue the lawsuit.

[10] To the clear, an intervenor, by right or permission, normally has the right to appeal an adverse final judgment by a trial court, just as any other

with the "minority" view's reasoning. For example, the Eighth Circuit, in *Mausolf*, takes a rigid approach to intervention. The court there held that an intervenor, regardless of Rule 24 requirements, must have standing because "[a]n Article III case or controversy is one where all parties have standing, and a would-be intervenor, because he seeks to participate as a party, must have standing as well." *Mausolf*, 85 F.3d at 1300. In that court's view, any intervenor that does not have independent standing, "destroys" an Article III case or controversy, regardless whether the original parties have standing to bring suit. *Id.*

On the other side of the coin, the "majority" view does not impose independent standing requirements on an intervenor at the district court level. "'[O]n many occasions the Supreme Court has noted that an intervenor may not have standing, but has not specifically resolved that issue, so long as another party to the litigation has sufficient standing to assert the claim at issue.'" *San Juan County, Utah v. United States*, 503 F.3d 1163, 1171-72 (10th Cir. 2007) (*en banc*) (quoting panel decision in *San Juan County, Utah v. United States*, 420 F.3d 1197, 1205 (10th Cir. 2005) (citing *McConnell v. Fed. Election Comm'n*, 540 U.S. 93, 233 (2003)). These cases reason that Article III requires only that justiciable "cases" and "controversies" may be maintained in a federal court, *see*

party. *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375-76 (1987). However, as any other party, an intervenor seeking to appeal on its own, must have standing under Article III of the Constitution to have the court decide the merits of the dispute. *Diamond*, 476 U.S. at 68. The standing requirement therefore may bar an appeal by an intervenor who nevertheless participated in the litigation before the district court. *United States v. Van*, 931 F.2d 384, 387 (6th Cir. 1991).

Brennan, 579 F.2d at 190, and, that a proposed intervenor is permitted to intervene on the basis of an existing party's standing to assert the claim at issue, based upon what the Supreme Court has described as "piggyback" standing. *See Diamond*, 476 U.S. at 64, 68-9. Such standing is permissible because "[i]n that circumstance the federal court has a Case or Controversy before it regardless of the standing of the intervenor." *City of Colo.*, 587 F.3d at 1079.

The Eleventh Circuit has explained that the standing requirement exists to ensure that a justiciable case or controversy exists. *Chiles*, 865 F.2d at 1212-13, and, Rule 24, authorizing intervention, presumes that a justiciable case or controversy already exists before the court. *See Id.; see also*, 7C Wright, Miller, and Kane, Federal Practice and Procedure: Civil 2d § 1917 (2d ed. 1986) at 457 ("Intervention presupposes the pendency of an action in a court of competent jurisdiction . . . .") (footnote omitted). Because a court's subject matter jurisdiction is necessarily established before intervention, the *Chiles* court held that a party seeking to intervene need not have independent standing. *Id.* at 1212-13.

While the Third Circuit has not spoken on this matter and there are no cases on this issue in this district, there are at least three other district court opinions in this circuit that have found that an intervenor need not have independent standing to participate in district court proceedings. *See Indian River Recovery Co. v. The China*, 108 F.R.D. 383, 386-87 (D. Del. 1985) ("an intervenor need not have standing necessary to have initiated the lawsuit"); *Coca-Cola Bottling Co. of Elizabethtown, Inc. v.*

The Coca-Cola Co., 696 F. Supp. 57, 93 (D. Del. 1988) ("The fact that [a party] lack[s] standing, however, does not control the analysis of whether [it] [is] entitled to intervene."); *United States v. Germantown Settlement Homes, Inc.*, No. 84-2622, 1985 U.S. Dist. LEXIS 18193, at *6 n.1 (E.D. Pa. Jul. 5, 1985).

I find the reasoning of those courts that do not require independent standing by an intervenor to be persuasive. First, the constitutional requirement of standing only speaks to whether the federal district court has a justiciable controversy. In my view, so long there is a case or controversy before the court, it is not necessary that an intervenor have independent standing. Rather, Rule 24 aims to promote the efficient and orderly use of judicial resources by allowing persons to participate in the lawsuit to protect their interests or vindicate their rights. In that furtherance of the Rule, the court makes a determination whether those interests would be impaired by the disposition of the case. Imposing standing on an intervenor would eviscerate Rule 24's practical approach. And, furthermore, such a restriction would impinge on the purposes of permissive intervention. Accordingly, I find that Garden State need not separately satisfy standing requirements to intervene.

B. Permissive Intervention Pursuant to Rule 24(b)

Garden State seeks to intervene on the basis of permissive intervention. Permissive intervention under Rule 24 requires (1) the motion to be timely; (2) an applicant's claim or defense and the main action have a question of law or fact in common; and (3) the intervention

may not cause undue delay or prejudice to the original parties' rights. *See* Fed. R. Civ. P. 24(b); *see also N.C.A.A. v. Governor of N.J.*, 520 Fed. Appx. 61, 63 (3d Cir. 2013); *Appleton v. Comm'r*, 430 Fed. Appx. 135, 137-38 (3d Cir. 2011). So long as these threshold requirements are met, whether to allow a party to permissively intervene is left to the sound discretion of the court. *See N.C.A.A.*, 520 Fed. Appx at 63.

As to the first factor, Garden State's motion is timely. Garden State moved to intervene only 14 days after the Complaint was filed. While Plaintiffs suggest that they did not have sufficient time to respond to Garden States' briefing, the Court has provided all parties an opportunity to respond to each other's arguments. There was more than sufficient time for Plaintiffs to address any arguments made by Garden State before the summary judgment hearing. And, indeed, the Court afforded Plaintiffs an opportunity to submit supplemental briefing on issues they deemed important after the hearing, including on the question of the proposed intervenor's standing.

Next, Plaintiffs contend that intervention is not necessary because Garden State's interests are already adequately represented by Defendants. However, the presence of overlapping interests between Garden State and the State does not preclude permissive intervention. Rather, "[t]he shared interests of [Garden State] and the state defendants support [Garden State's] argument that it shares a common question of law with the current action because it plans to defend the constitutionality of [A3371], the subject of the dispute between plaintiffs and the state

defendants." *Pickup v. Brown*, No. 12-2497, 2012 U.S. Dist. LEXIS 172027, at *13-14 (E.D. Cal. Dec. 4, 2012). Indeed, Plaintiffs have not disputed that Garden State's claims or defenses share common questions of law or fact with this action. Accordingly, I find that the second factor is satisfied.

Plaintiffs also contend that allowing Garden State to intervene would cause an undue delay of the resolution of Plaintiffs' claims because it would result in additional briefing by Plaintiffs. I do not find this argument convincing. As I have already explained, Garden State's filings in this matter would not unduly expand Plaintiffs' submissions because Garden State's arguments and positions are similar to those advanced by the State. In other words, while Plaintiffs may have expended additional time or expense in order to respond to Garden State's arguments, those efforts are not unduly prejudicial or burdensome. Rather, contrary to Plaintiffs' position, I find that Garden State has provided a "helpful, alternative viewpoint from the vantage of some persons who have undergone SOCE treatment or are potential patients of treatment that will aid the court in resolving plaintiffs' claims fully and fairly." *Id.* at *14.

Accordingly, having satisfied the Rule 24(b) factors, Garden State is given leave to intervene.

III. Eleventh Amendment

In their Complaint, Plaintiffs bring parallel state constitutional claims against Defendants and they seek injunctive and declaratory relief, as well as nominal money damages. Defendants argue that the Eleventh

Amendment bars Plaintiffs' § 1983 claims for money damages and state constitutional claims. During the hearing, Plaintiffs argued that they are entitled to nominal money damages in this action should they prevail. Since Plaintiffs did not brief their position on this issue, the Court provided Plaintiffs an opportunity to submit additional briefing. Instead of any substantive response, Plaintiffs subsequently withdrew their claim for nominal damages.[11] *See* Plaintiffs' Response on Claim for Nominal Damages, p. 2. Moreover, Plaintiffs have also withdrawn their state constitutional claims.[12] *See* Tr., T7:22-T8:2.

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[11] Indeed, it is clear that the Eleventh Amendment bars suits for damages, pursuant to 42 U.S.C. § 1983, against state officials sued in their official capacities. The Eleventh Amendment provides "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. Const. amend. XI. It is beyond cavil that the Eleventh Amendment protects states and their agencies and departments from suit in federal court. *See Bayete v. Ricci*, 489 Fed. Appx. 540, 542 (3d Cir. 2012); *Hafer v. Melo*, 502 U.S. 21, 30 (1991). Similarly, absent consent by a state, the Eleventh Amendment bars federal court suits for money damages against state officers in their official capacities, *Id.*, and section 1983 does not override a state's Eleventh Amendment immunity.

[12] Under the Eleventh Amendment, unlike federal claims seeking prospective injunctive relief, Plaintiffs may not bring state law claims – including state constitutional claims – against the State regardless the type of relief it seeks. *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 104-06 (1984). Likewise, supplemental jurisdiction does not authorize district courts to exercise jurisdiction over claims against non-consenting states. There is no doubt that "the Eleventh Amendment bars the adjudication of pendent state law claims against nonconsenting state defendants in federal court." *Raygor v. Regents of the Univ. of Minn.*, 534 U.S. 533, 540-41 (2002).

Accordingly, all federal claims for monetary damages -- however nominal -- against Defendants in their official capacities are barred, and Plaintiffs' state constitutional claims, i.e., Counts II and V, are dismissed.

IV. Third-Party Standing

As a jurisdictional matter, Defendants contend that Plaintiffs lack third-party standing to pursue claims on behalf of Plaintiffs' minor clients and parents. As discussed previously, to satisfy the "case or controversy" standing requirement under Article III, a plaintiff must establish that it has suffered a cognizable injury that is causally related to the alleged conduct of the defendant and is redressable by judicial action. Apart from those standing requirements, the Supreme Court has imposed a set of prudential limitations on the exercise of federal jurisdiction over third-party claims. *Bennett v. Spear*, 520 U.S. 154, 162 (1997) ("The federal judiciary has also adhered to a set of prudential principles that bear on the question of standing.") (quotation and citation omitted); *Powell v. Ridge*, 189 F.3d 387, 404 (3d Cir. 1999). The restrictions against third-party standing do not stem from the Article III "case or controversy" requirement, but rather from prudential concerns, *Amato v. Wilentz*, 952 F.2d 742, 748 (3d Cir. 1991), which prevent courts from "deciding questions of broad social import where no individual rights would be vindicated and . . . limit access to the federal courts to those litigants best suited to assert a particular claim." *Gladstone Realtors v. Vill. of Bellwood*, 441 U.S. 91, 99-100 (1979); *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 955 (1984).

It is important to bear in mind that in the jurisprudence of standing, a "litigant must assert his or her own legal rights and interests, and cannot rest a claim to relief on the legal rights or interests of third parties." *Powers v. Ohio*, 499 U.S. 400, 410 (1991); *Valley Forge Christian Coll. v. Ams. United for Separation of Church and State, Inc.*, 454 U.S. 464, 474-75 (1982); *Wheeler v. Travelers Ins. Co.*, 22 F.3d 534, 538 (3d Cir. 1994). This principle is based on the assumption that "third parties themselves usually will be the best proponents of their own rights," *Singleton v. Wulff*, 428 U.S. 106, 114 (1976) (plurality opinion), which serves to foster judicial restraint and ensure the clear presentation of issues. *See Munson*, 467 U.S. at 955.

The prohibition against third-party standing, however, is not absolute. The Supreme Court has found that the principles animating these prudential concerns are not subverted if the third party is hindered from asserting its own rights and shares an identity of interests with the plaintiff. *See Craig v. Boren,* 429 U.S. 190, 193-94 (1976); *Singleton*, 428 U.S. at 114-15; *Eisenstadt v. Baird*, 405 U.S. 438, 443-46 (1972). Based on that recognition, third-party standing is permitted so long as the plaintiff can satisfy three preconditions: 1) the plaintiff must suffer injury; 2) the plaintiff and the third party must have a "close relationship"; and 3) the third party must face some obstacles that prevent it from pursuing its own claims. *Powers*, 499 U.S. at 411; *Pitt News*, 215 F.3d at 362. It remains for courts to balance these factors to determine if third-party standing is warranted. *Amato*, 952 F.2d at 750.

Here, Plaintiffs assert constitutional claims on behalf of their minor clients and parents. To establish standing for these third parties, Plaintiffs must, in the first instance, show that they have suffered an injury. Indeed, Plaintiffs' ability to bring third-party claims hinges on whether they suffered any constitutional wrongs by the passage of A3371.[13] This question will be addressed extensively later in this Opinion, and, because the Court finds that Plaintiffs have suffered no injuries, they cannot meet the first factor. Furthermore, Plaintiffs cannot meet the third element of the test. Indeed, during the pendency of this matter, a minor and his parents filed suit in this Court, challenging the constitutionality of A3371. Therefore, since these litigants are bringing their own action against Defendants, there can be no serious argument that these third parties are facing obstacles that would prevent them from pursuing their own claims. Accordingly, I find that Plaintiffs do not meet third-party standing requirements, and thus, Counts III and VI are dismissed as well.

V. First Amendment—Freedom of Speech

Plaintiffs first challenge the constitutionality of A3371 on the ground that it violates their First Amendment right to free speech, contending that the statute constitutes an impermissible viewpoint and content-based restriction on their ability to discuss and engage in SOCE. Specifically, Plaintiffs argue that the statute forbids licensed counselors

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[13] Plaintiffs concede that their ability to bring third-party claims depends upon whether they have suffered any injuries as a result of the passage of A3371. *See* T8:17-T917.

from both (1) speaking on or about the subject of SOCE to their minor clients, including recommending SOCE or referring a client to SOCE, and (2) administering SOCE to their minor clients under any circumstance, regardless of the client's informed consent to the practice. Plaintiffs posit that because psychotherapy is carried out virtually exclusively through "talk therapy," any restriction on a therapist's ability to engage in a particular type of therapy is therefore a restriction on that therapist's First Amendment free speech right. Thus, Plaintiffs argue, that as a regulation of speech, A3371 cannot survive the applicable standard of review, *i.e.*, strict scrutiny.

The State rejects Plaintiffs' interpretation of A3371, and, in particular, that the statute regulates, or implicates, speech in any form. Rather, the State claims that the statute merely restricts a licensed professional from engaging in practicing SOCE counseling, and accordingly is a rational exercise of the State's long-recognized power to reasonably regulate the counseling professions. In that connection, the State asserts that A3371 targets conduct only, not speech. Accordingly, Defendants argue that the statute does not implicate any fundamental constitutional right and withstands rational basis review.

It is clear that the threshold issue before the Court is whether A3371 regulates constitutionally protected speech. I first determine whether the statute on its face seeks to regulate speech; I then turn to whether the statute has the effect of burdening speech or expressive conduct. Ultimately, if the statute does not implicate or burden constitutionally

protected speech or expression in any manner, I apply rational basis review. If, however, the statute does seek to regulate speech or has the effect of burdening protected speech, directly or incidentally, I must determine the degree of constitutional protection afforded to, as well as the resulting burden on, that speech and then apply the appropriate standard of review.

I note that A3371 is a novel statute in New Jersey and other jurisdictions within the Third Circuit, as is the issue of whether counseling, by means of talk therapy, is entitled to any special constitutional protection. However, I do not start with a blank slate. Last year, California passed a law, SB 1172, that is virtually identical to A3371 in both language and purpose. After two district court challenges, one finding SB 1172 constitutional, *Pickup v. Brown*, No. 12-02497, 2012 WL 6021465 (E.D. Cal., Dec. 4, 2012), the other not, *Welch v. Brown*, 907 F. Supp. 2d 1102 (E.D. Cal. 2012), a panel for the Ninth Circuit Court of Appeals concluded that the statute is constitutional.[14] *See Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013). Although the *Pickup* decision is not binding on me, given the relevance of this opinion, and the dearth of decisions from the Third Circuit or other jurisdictions addressing the interplay between constitutionally protected speech and professional counseling, I will turn

[14] Plaintiffs point out that the Ninth Circuit has directed the parties involved in the California statute litigation to brief whether *en banc* review of the panel's decision would be appropriate. As of the date of this Opinion, however, no order for *en banc* review has issued.

to the Ninth Circuit's decision where appropriate, and explain my reason for so doing.

A. A3371 Does Not Regulate Speech

I begin by reviewing the plain language of A3371. Even a cursory review reveals that the statute nowhere references speech or communication; instead, the statute contains words and phrases that are generally associated with conduct. For example, the operative statutory language 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. *See, e.g.*, *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560, 572-73 (1991) (Scalia, J., concurring) (noting that a criminal statute prohibiting a person from "engag[ing]," "appear[ing]", or "fondl[ing]" "is not directed at expression in particular"); *United States v. Tykarsky*, 446 F.3d 458, 473 (3d Cir. 2006) (facially reviewing statute with the operative words "engage in prostitution" and determining this term governed conduct); *cf. Associated Film Distribution Corp. v. Thornburgh*, 683 F.2d 808, 814 n.8 (3d Cir. 1982) (finding that Pennsylvania statute regulating the bidding, distribution, screening, and exhibition of motion pictures to have "no facial impact upon speech"); *United States v. Elcom Ltd.*, 203 F. Supp. 2d 1111, 1128 (N.D. Cal. 2002) (finding that portion of Copyright Act that "ban[ned] trafficking in devices,

whether software, hardware, or other" did not on its face target speech). Moreover, the Ninth Circuit reached the same conclusion in *Pickup*, 728 F.3d 1042, finding that the statute did not implicate speech. Specifically, the *Pickup* panel determined that the California law did not do any of the following:

- Prevent mental health providers from communicating with the public about SOCE
- Prevent mental health providers from expressing their views to patients, whether children or adults, about SOCE, homosexuality, or any other topic
- Prevent mental health providers from recommending SOCE to patients, whether children or adults
- Prevent mental health providers from administering SOCE to any person who is 18 years of age or older
- Prevent mental health providers from referring minors to unlicensed counselors, such as religious leaders
- Prevent unlicensed providers, such as religious leaders, from administering SOCE to children or adults
- Prevent minors from seeking SOCE from mental health providers in other states

Id. at 1049-50. I find that the *Pickup* panel's explanation of the reach of the California law applies with equal force to A3371, given the statutes' similarities. Nothing in the plain language of A3371 prevents licensed professionals from voicing their opinions on the appropriateness or efficacy of SOCE, either in public or private settings. Indeed, A3371 does not prevent a licensed professional from, for example, lecturing about SOCE at a conference or providing literature to a client on SOCE; the statute only prohibits a licensed professional from engaging in counseling for the purpose of actually practicing SOCE. In light of the foregoing—and Plaintiffs' failure to provide any substantive support to the contrary, other

than their own subjective interpretations—I find that A3371 does not directly regulate or target speech on its face.

In that regard, although Plaintiffs do not meaningfully advance an argument that A3371 regulates speech *per se*, Plaintiffs nevertheless contend that A3371 clearly targets speech by virtue of the statute's application solely to licensed *counselors*. According to Plaintiffs, SOCE counseling necessarily implicates speech because "SOCE counseling is talk therapy." *See* Decl. of Dr. Tara King, ¶ 12;[15] *see also* Pl. Reply, 8

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[15] I pause briefly to note that, following oral argument in this matter, Plaintiffs filed a motion to "Reconsider Dispensing of Evidence and Deem Certain Facts Admitted." *See* Dkt. No. 50. The thrust of Plaintiffs' motion is twofold: (1) for the Court to reconsider its ruling that it would not consider evidence submitted in connection with Plaintiffs' summary judgment motion, and (2) to deem the facts in Plaintiffs' Complaint admitted by virtue of the State's failure to timely file an answer. Both of these arguments are without merit.

First, Plaintiffs are mistaken in their belief that I have made any ruling with respect to consideration of their supporting declarations and other evidence. At oral argument, in a colloquy with Plaintiffs' counsel, I made clear that I would consider declarations from the named Plaintiffs as "they are absolutely relevant." Tr., T59:25-T60:8. I explicitly stated that "I'm taking [Plaintiffs'] declarations," and that "[i]f I find something in there that shouldn't be considered, I'll make a note of it." *Id.* at T60:12-14. With respect to other declarations and evidence filed by Plaintiffs and Intervenor, I noted that there were volumes of submissions and objections, but that I was not making any rulings on the admissibility of the submitted evidence unless and until I determined that such evidence was necessary and appropriate to deciding the issues in this matter. *Id.* at T58:12-59:3. In that connection, I explained that the law was clear that if I were to find rational basis review applies to A3371, it would be unnecessary to consider evidence beyond the legislature's stated findings, and thus there is no reason to prematurely decide the admissibly of such evidence. *Id.* at T59:4-11. Accordingly, there is no basis for Plaintiffs' reconsideration motion, and Plaintiffs' motion is denied in that regard.

Second, Plaintiffs are not entitled to have certain facts in their Complaint be deemed admitted. Initially, Plaintiffs filed their Complaint accompanied by a motion for a preliminary injunction. Following a conversation with counsel for Plaintiffs and the State on August 27, 2013,

("Plaintiffs' counseling involves no nonspeech elements, and should be considered pure speech."). Plaintiffs explain that:

> SOCE counseling consists of discussions with the client concerning the nature and cause of their unwanted same-sex sexual attractions, behaviors, or identity; the extent of these attractions, behaviors, or identity; assistance in understanding traditional, gender-appropriate behaviors and characteristics; and assistance in fostering and developing those gender-appropriate behaviors and characteristics.

Decl. of Dr. Joseph Nicolosi, ¶ 10. Similarly, during oral argument, counsel for Plaintiffs stated that SOCE therapists "simply talk to [their clients] . . . about what their ultimate objectives are, and they would try to give them support to reach that objective, which in this case would be change." Tr., T18:18-23. Plaintiffs further stress that they do not use any "aversion techniques"[16] with clients seeking to change their sexual

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the parties agreed that (1) the Complaint presented a legal issue only, (2) Plaintiffs' motion should be treated as one for summary judgment, and (3) the State should be given the opportunity to file its own cross-motion for summary judgment. *See* Dkt. No. 13. Under the Federal Rules of Civil Procedure, the time in which a party must file a responsive pleading to a claim is tolled if that party elects to instead file a motion to dismiss. *See* Fed. R. Civ. P. 12(a)(4). In that connection, Rule 12 also permits a court to convert a motion to dismiss into one for summary judgment if evidence has been presented along with the motion. In light of Rule 12, and given the atypical procedural developments in this matter, the State is not yet required to file an answer to the Complaint. Accordingly, Plaintiffs' motion to deem admitted facts in the Complaint is denied.

[16] As Plaintiff King explained in her declaration, "aversion techniques, such as electroshock treatments, pornographic viewing, nausea-inducing drugs, etc. are unethical methods of treatment that have not been used by any ethical and licensed mental health professional in decades." Decl. of Dr. Tara King, ¶ 12; *see also Pickup*, 728 F.3d at 1048-49 ("In the past, aversive treatments included inducing nausea, vomiting, or paralysis; providing electric shocks; or having an individual snap an elastic band around the wrist when aroused by same-sex erotic images or thoughts. Even more drastic methods, such as castration, have been used.").

orientation, and that they only engage in SOCE with clients who, following informed consent, voluntarily wish to receive such counseling. *See, e.g.*, Decl. of Dr. Tara King, ¶¶ 10, 12-13; Decl. of Dr. Joseph Nicolosi, ¶¶ 7-8. In sum, Plaintiffs' position is that, regardless of whether A3371 facially appears to target conduct, the statute is directed at "counseling," and counseling, as relevant here, consists almost solely of talk therapy; thus, A3371 effects a constitutionally impermissible viewpoint and content based restriction on Plaintiffs' speech. In contrast, the State maintains that counseling is conduct, subject to regulation by the state, and that A3371, by its own terms, only governs counseling; the statute does not prevent a licensed counselor from speaking about SOCE, but only prohibits the actual practice of counseling to change a minor's sexual orientation.

Plaintiffs' argument rests entirely on the premise that SOCE counseling, in the form of talk therapy, is "speech" in the constitutional sense. Indeed, Plaintiffs, both in their papers and at argument, essentially treat this premise as self-evident, spending little time explaining why talk therapy is properly considered constitutionally protected speech rather than conduct. I believe a more far-reaching analysis is required because, as explained in more detail *infra*, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

Accordingly, I must determine whether SOCE counseling should be considered (i) a form of speech, subject to constitutional protections, (ii) mere conduct, subject to reasonable regulation by the state, or (iii) some combination of both.

I begin with the statutory framework in which A3371 is found: Subtitle 1 of Title 45 of the New Jersey Statutes, governing "Professions And Occupations Regulated By State Boards Of Registration And Examination." N.J.S.A. 45:1-55. Indeed, A3371 expressly provides that the statute only applies to: "A person who is licensed to provide professional counseling under Title 45 of the Revised Statutes, including, but not limited to, a psychiatrist, licensed practicing psychologist, certified social worker, licensed clinical social worker, licensed social worker, licensed marriage and family therapist, certified psychoanalyst . . . ." *Id.* Because the statute only governs "professional counseling" by these, or other similarly "licensed" individuals, I find it helpful to turn to the statutes defining the nature of these licensed practices to better understand the meaning of "counseling" as embodied in A3371.

Section 45:14B-2 of the New Jersey Statute covers psychologists and defines the "practice of psychology" as "the rendering of professional psychological services," which in turn are defined as "the application of psychological principles and procedures in the assessment, counseling or psychotherapy of individuals for the purposes of promoting the optimal development of their potential or ameliorating their personality disturbances and maladjustments as manifested in personal and

interpersonal situations." More simply put, this statute regulates licensed psychologists' "application of psychological principles and procedures" to their clients. Because the statute targets the application of principles and procedures, and not any speech, I view this as a regulation of treatment, *i.e.*, conduct. In that sense, counseling, as it arises in the context of psychology, is identified as one of the vehicles for psychological treatment, not a form of speech or expression. It would therefore appear that the means through which counseling is carried out by a psychologist—*i.e.*, whether through talk therapy or actions—is immaterial for the purposes of this statutory definition; the relevant inquiry is whether the psychologist is applying psychological principles and procedures. Similar conclusions can be drawn from other New Jersey statutes regulating the professions and occupations covered by A3371, as these statutes abound with references to counseling as the application of established sociological or psychological methods, principles, and procedures.[17]

[17] *E.g.*, N.J. Stat. Ann. 45:8B-2(b) ("The practice of marriage and family therapy consists of the application of principles, methods and techniques of counseling and psychotherapy for the purpose of resolving psychological conflict, modifying perception and behavior, altering old attitudes and establishing new ones in the area of marriage and family life."); *id.* at 45:15BB-3 ("'Clinical social work' means the professional application of social work methods and values in the assessment and psychotherapeutic counseling of individuals, families, or groups. Clinical social work services shall include, but shall not be limited to: assessment; psychotherapy; client-centered advocacy; and consultation."); *id.* ("'Psychotherapeutic counseling' means the ongoing interaction between a social worker and an individual, family or group for the purpose of helping to resolve symptoms of mental disorder, psychosocial stress, relationship problems or difficulties in coping with the social environment, through the practice of psychotherapy."); *id.* ("'Social work counseling' means the professional application of social work methods and values in advising and

Beyond New Jersey's statutory scheme, commentators have also long discussed psychological counseling in a manner that suggests counseling is therapy, and thus a form of conduct. *See, e.g.*, Note, *Regulation of Psychological Counseling and Psychotherapy*, 51 Colum. L. Rev. 474, 495 n.2 (1951) ("'Counseling' is a form of psychological aid rendered by a psychologist to an individual for social-psychological adjustment problems." (citing Starke R. Hathaway, *Some Considerations Relative to Nondirective Counseling as Therapy*, 4 J. Clin. Psychology 226-27 (1948); W. C. Menninger, *The Relationship of Clinical Psychology and Psychiatry*, 5 Am. Psychologist 3, 9 (1950))). Similarly, in discussing mental health treatment generally, commentators focus on describing the "services" and "procedures" provided. *See, e.g.*, Stacey A. Tovino, *Conflicts of Interest in Medicine, Research, and Law: A Comparison*, 117 Penn. St. L. Rev. 1291, 1309 (2013) ("Treatment may be defined as 'the

providing guidance to individuals, families or groups for the purpose of enhancing, protecting or restoring the capacity for coping with the social environment, exclusive of the practice of psychotherapy."); *id.* at 45:2D-3 ("'Alcohol and drug counseling' means the professional application of alcohol and drug counseling methods which assist an individual or group to develop an understanding of alcohol and drug dependency problems, define goals, and plan action reflecting the individual's or group's interest, abilities and needs as affected by alcohol and drug dependency problems."); *cf. id.* at 45:9-5, (covering psychiatrists and defining "the practice of medicine and surgery" to "include the practice of any branch of medicine and/or surgery, and any method of treatment of human ailment, disease, pain, injury, deformity, mental or physical condition"); *id.* at 45:11-23(b) ("The practice of nursing as a registered professional nurse is defined as diagnosing and treating human responses to actual or potential physical and emotional health problems, through such services as casefinding, health teaching, health counseling, and provision of care supportive to or restorative of life and well-being, and executing medical regimens as prescribed by a licensed or otherwise legally authorized physician or dentist.").

provision, coordination, or management of health care and related services by one or more health care providers' to a particular individual. The definition of treatment is based on the concept of health care, which has been defined as care, services, and procedures related to the health of a particular individual. Health care is frequently defined to include preventive, diagnostic, therapeutic, rehabilitative, maintenance, or palliative care that is provided to a particular individual, as well as counseling, assessments, and procedures that relate to the physical or mental condition or functional status of a particular individual. Activities are thus classified as treatment when they involve a health care service provided by a health care provider that is tailored to the specific preventive, diagnostic, therapeutic, or other health care needs of a particular individual."). While such commentary certainly is not dispositive, it provides further support for the concept that counseling is more properly understood as a method of treatment, not speech, since the core characteristic of counseling is not that it may be carried out through talking, but rather that the counselor applies methods and procedures in a therapeutic manner.

Notably, by their own admission, Plaintiffs define SOCE counseling as being "no different than any other form of mental health counseling," involving "the traditional psychodynamic process of looking at root causes, childhood issues, developmental factors, and other things that cause a person to present with all types of physical, mental, emotional, or psychological issues that in turn cause them distress." Decl. of Dr. Tara

King, ¶ 12. Accordingly, I find that the mere fact that counseling may be carried out through talk therapy does not alter my finding that A3371 regulates conduct and not speech.

Additional support for this conclusion comes from the Ninth Circuit's decision in *Pickup*.[18] At the core of *Pickup* is the holding that:

> Because SB 1172 regulates only treatment, while leaving mental health providers free to discuss and recommend, or recommend against, SOCE, we conclude that any effect it may have on free speech interests is merely incidental. Therefore, we hold that SB 1172 is subject to only rational basis review and must be upheld if it "bear[s] . . . a rational relationship to a legitimate state interest."

Pickup, 728 F.3d at 1056. The *Pickup* panel further concluded that California had a rational basis for enacting SB 1172, and thus the statute was constitutional.

Plaintiffs dispute the relevancy and persuasiveness of *Pickup*, contending that the panel misapplied controlling Ninth Circuit and Supreme Court precedent when it concluded that SB 1172, a law regulating SOCE therapy, is not a regulation of speech, notwithstanding that, as here, therapy in California is carried out almost entirely through "talk therapy." Plaintiffs further argue that even if the *Pickup* panel properly concluded that a statute like A3371 regulates conduct with only an "incidental" impact on speech, the panel nevertheless erred when it applied rational

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[18] Although I have already noted that the *Pickup* case is not binding, it is significant in that it addresses California statute SB 1172, which is virtually identical to A3371, and appears to be the only Court of Appeals decision analyzing the relationship between conduct and speech in the psychotherapy context. Indeed, both parties have devoted substantial argument to the *Pickup* panel's reasoning and its applicability to this case.

basis review rather than the more demanding *O'Brien* test in upholding the statute. *See United States v. O'Brien*, 391 U.S. 367 (1968).

I have already independently concluded that A3371 regulates conduct, not speech, and thus I need not devote much time to Plaintiffs' argument that the *Pickup* panel, in its analysis of whether SOCE therapy is conduct, not speech, erred when harmonizing the Ninth Circuit's previous holdings in *National Association for the Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043 (9th Cir. 2000) ("*NAAP*"), and *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). Ninth Circuit law is not binding on this Court, and I am under no obligation to interpret and resolve issues internal to that circuit's jurisprudence. *In re Grossman's Inc.*, 607 F.3d 114, 121 (3d Cir. 2010). Indeed, in the absence of controlling authority, I am free to adopt whatever reasoning I find persuasive from another jurisdiction's decision, while rejecting contrary reasoning from that same jurisdiction—regardless of whether the reasoning I rely on is binding in that jurisdiction. *See Barrios v. Attorney General of the United States*, 339 F.3d 272, 277 (3d Cir. 2005) (finding persuasive reasoning of dissenting Ninth Circuit opinion while rejecting majority's reasoning from same opinion). In that connection, I briefly highlight certain observations and conclusions in *Pickup* that I find persuasive here.

To begin, the Ninth Circuit, in *Pickup,* aptly explained that "the key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech. That psychoanalysts employ speech to treat their

clients does not entitle them, or their profession, to special First Amendment protection." *Pickup*, 728 F.3d at 1052 (quotting *NAAP*, Thus, the *Pickup* panel endorsed the principle that "the communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation." *Id.* However, the *Pickup* panel clarified that the Ninth Circuit had "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." *Id.*

The *Pickup* panel distilled several principles applicable to the state's authority and limits in regulating the therapist-client relationship:

> (1) doctor-patient communications *about* medical treatment receive substantial First Amendment protection, but the government has more leeway to regulate the conduct necessary to administering treatment itself; (2) psychotherapists are not entitled to special First Amendment protection merely because the mechanism used to deliver mental health treatment is the spoken word; and (3) nevertheless, communication that occurs during psychotherapy does receive *some* constitutional protection, but it is not immune from regulation.

Id.

Although to some extent Plaintiffs take issue with all three of these "principles," the most salient to their challenge in this case is the second—that psychotherapists are not entitled to special First Amendment protection merely because they use the spoken word as therapy. *See, e.g.*, Pl. Reply at 2. This argument is merely a corollary of Plaintiffs' contention that "counseling," by its very nature, is constitutionally protected speech. I

have already explained why this is not so for the purposes of A3371. The same rationale extends to why psychotherapists, and other similarly regulated professionals, are not entitled to blanket First Amendment protection for any and all conversations that occur in the counselor-client relationship. To be clear, the line of demarcation between conduct and speech is whether the counselor is attempting to communicate information or a particular viewpoint to the client or whether the counselor is attempting to apply methods, practices, and procedures to bring about a change in the client—the former is speech and the latter is conduct.

However, there is a more fundamental problem with Plaintiffs' argument, because taken to its logical end, it would mean that *any* regulation of professional counseling necessarily implicates fundamental First Amendment free speech rights, and therefore would need to withstand heightened scrutiny to be permissible. Such a result runs counter to the longstanding principle that a state generally may enact laws rationally regulating professionals, including those providing medicine and mental health services. *See Watson v. Maryland*, 218 U.S. 173, 176 (1910) ("It is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health."); *see also Dent v. West Virginia*, 129 U.S. 114 (1889) (holding that states have a legitimate interest in regulating the medical profession through doctors' licensing requirements); *Williamson v. Lee Optical of Oklahoma, Inc.*, 348

U.S. 483 (1955) (finding it constitutionally permissible for states to require a prescription for opticians to fit or duplicate lenses); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) (noting that "the State bears a special responsibility for maintaining standards among members of the licensed professions"); *Eatough v. Albano*, 673 F.2d 671, 676 (3d Cir. 1982) ("It is long settled that states have a legitimate interest in regulating the practice of medicine . . . ."); *Lange-Kessler v. Dep't of Educ. of the State of New York*, 109 F.3d 137 (2d Cir. 1997) (finding that regulation of the medical profession is afforded rational basis review); *cf. Washington v. Glucksberg*, 521 U.S. 702, 731 (1997) ("The State also has an interest in protecting the integrity and ethics of the medical profession."); *Sammon v. New Jersey Bd. of Med. Examiners*, 66 F.3d 639, 645 & nn. 9-10 (3d Cir. 1995) (rejecting argument that choice of provision of medical services is a constitutionally significant interest triggering strict scrutiny review).

Finally, I address Plaintiffs' reliance on *Wollschlaeger v. Farmer*, in which the court found that a Florida law preventing doctors from inquiring into a patient's gun ownership invaded the constitutionally protected realm of doctor-patient communications.[19] 880 F. Supp. 2d 1251, 1266-67 (S.D. Fla. 2012). The *Wollschlaeger* court relied on the proposition that "[c]ourts have recognized that the free flow *of truthful, non-misleading*

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[19] The *Wollschlaeger* court relied on evidence that "as part of the practice of preventive medicine, practitioners routinely ask and counsel patients about a number of potential health and safety risks," including firearms, and that the Florida law "interfere[d] in the doctor-patient relationship and ha[d] resulted in diminished efficacy of [physicians'] practice of preventive medical care." 880 F. Supp. 2d at 1257.

information is critical within the doctor-patient relationship," *id*. at 1266, and cited *Trammel v. United States*, 445 U.S. 40, 51 (1980) ("[T]he physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment."), *Conant*, 309 F.3d at 636 ("An integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients."), and *Sorrell v. IMS Health, Inc.*, 131 S.Ct. 2653, 2664 (2011) ("A consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue. . . . That reality has great relevance in the fields of medicine and public health, where information can save lives."). In contrast here, A3371 does not seek to regulate the conveying of information, only the application of a particular therapeutic method. Thus, *Wollschlaeger* is inapposite.[20]

[20] Furthermore, here, the State has determined that the potential harm to minors from SOCE, however slight, is sufficient to outweigh any potential benefits. In that connection, I note that Plaintiffs themselves acknowledge that there is a dearth of non-anecdotal evidence to support the success rate, and benefits of SOCE. Thus, unlike the Florida law precluding doctors from ascertaining medically relevant information from their patients, the circumstances here are more akin to a state finding physician assisted suicide to be harmful and enacting a law to prohibit its practice. Because there is no constitutional right to practice a particular type of medical or mental health treatment, A3371's prohibition of a particular form of counseling in which counselors apply therapeutic principles and procedures similarly does not implicate fundamental constitutional rights. *See Washington*, 521 U.S. at 728 ("[T]he asserted 'right' to assistance in committing suicide is not a fundamental liberty interest protected by the Due Process Clause."); *Sammon v. New Jersey Bd. of Med. Examiners*, 66 F.3d 639, 645 & nn.9-10 (3d Cir. 1995) (rejecting argument that choice of provision of medical services is a constitutionally significant interest triggering strict scrutiny review).

For the foregoing reasons, I conclude that A3371 on its face does not target speech, and "counseling" is not entitled to special constitutional protection merely because it is primarily carried out through talk therapy. Thus, I find that A3371 does not seek to regulate speech; rather the statute regulates a particular type of conduct, SOCE counseling.

B. Level of Scrutiny – Rational Basis Review Applies

Having determined that A3371 regulates conduct, I must still determine if the statute carries with it any incidental effect on speech. Plaintiffs argue that because the conduct being regulated by A3371—SOCE counseling—is carried out entirely through speech, the statute necessarily has, at the very least, an incidental effect on speech and thus, a heightened level of judicial scrutiny applies.[21] *See* Pl. Reply at 8. In that connection, Plaintiffs assert that under Third Circuit precedent, a law that "burdens expression but is content neutral" must be analyzed under the "intermediate scrutiny" standard enunciated by the Supreme Court in *O'Brien*. *See Conchata Inc. v. Miller*, 458 F.3d 258, 267 (3d Cir. 2006);

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[21] Plaintiffs similarly challenge the *Pickup* panel's conclusion that the California law, SB 1172, needed only to survive rational basis review. According to Plaintiffs, the *Pickup* court erred by not applying *O'Brien*'s intermediate scrutiny test after finding that "any effect [SB 1172] may have on free speech interests is merely incidental." *Pickup*, 728 F.3d at 1056. Likewise, Plaintiffs contend that that the State here also conceded in its papers that A3371 has an incidental burden on speech. Plaintiffs' argument is misplaced; neither the *Pickup* panel, in connection with SB 1172, nor the State, in connection with A3371, expressly acknowledged that the respective statutes actually had an effect on speech. Rather, both the Ninth Circuit and the State noted that *if* there is an effect on speech, it is no more than incidental. *See id.*; Def. Opp. at 15. In any event, as explained by the analysis that follows, I find that A3371 does not have an effect on speech that would trigger constitutional concerns.

Bartnicki v. Vopper, 200 F.3d 109, 121 (3d Cir. 1999) *aff'd*, 532 U.S. 514 (2001) (noting that *O'Brien* standard applies to regulations governing conduct that incidentally restrict expressive behavior). In response, Defendants argue that the mere fact that the conduct in question here is carried out through spoken words is not, by itself, sufficient to show that the statute has an incidental burden on speech; rather, Plaintiffs must also show that their conduct is inherently expressive, which they fail to do.

In *O'Brien*, the Supreme Court addressed a federal law that made it a criminal offense to forge, alter, knowingly destroy, knowingly mutilate, or in any manner change a draft card. *O'Brien*, 391 U.S. at 370. The petitioner had been convicted for burning his draft card on the steps of a court house, and appealed his conviction on the grounds that the law unconstitutionally abridged his freedom of speech. *Id.* As an initial matter, the Supreme Court found that the statute "on its face deals with conduct having no connection with speech. It prohibits the knowing destruction of certificates issued by the Selective Service System, and there is nothing necessarily expressive about such conduct." *Id.* at 375. However, the *O'Brien* court recognized that the petitioner had burned his draft card to protest the Vietnam War, and accordingly, determined that this "*communicative element* in O'Brien's conduct [was] sufficient to bring into play the First Amendment." *Id.* at 376 (emphasis added). The Supreme Court reasoned that the federal law was constitutionally permissible, notwithstanding its incidental effect on individuals like the petitioner, explaining that "when 'speech' and 'nonspeech' elements are

combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[22] *Id.*

Thus, the inquiry into whether *O'Brien*'s intermediate scrutiny review is appropriate turns on whether the alleged conduct falls within the scope of the First Amendment's right to freedom of expression, and extends only to "conduct that is intended to be communicative and that, in context, would reasonably be understood by the viewer to be communicative [as] [s]ymbolic expression, otherwise known as expressive conduct." *Bartnicki*, 200 F.3d at 121 (internal quotation marks omitted) (quoting *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

On the other hand, as I have noted herein, "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney*, 336 U.S. at 502. Similarly, "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ohralik*, 436 U.S. at 456. Thus, in determining whether conduct is deserving of First Amendment speech protection, the focus is on "the nature of [the] activity,

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[22] Ultimately, the *O'Brien* court found that the government's interest in preventing the destruction of draft cards was sufficiently important, and unrelated to the suppression of free expression, to justify the federal law. *O'Brien*, 391 U.S. at 376.

combined with the factual context and environment in which it was undertaken," to determine whether "activity was sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments." *Spence v. State of Washington*, 418 U.S. 405, 409-10 (1974). In making that connection, the Supreme Court has "rejected the view that conduct can be labeled "speech" whenever the person engaging in the conduct intends thereby to express an idea [and has] extended First Amendment protection only to conduct that is *inherently expressive*." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 65-66 (2006) (other internal quotation marks omitted). Thus, contrary to Plaintiffs' argument, the mere fact that counseling is carried out through speech is not alone sufficient to show that A3371 has an incidental effect on speech. Plaintiffs must also show that counseling is inherently expressive conduct—*i.e.*, that talk therapy (1) is intended to be communicative, and (2) would be understood as such by their clients.[23] Plaintiffs fail to make such a showing.

Plaintiffs themselves discuss SOCE as a type of therapy, intended to bring about some form of change in the client. *See, e.g.*, Decl. of Dr. Tara King, ¶ 12 (discussing SOCE as a form of counseling involving the "traditional psychodynamic process" to effect "change" in the client's sexual orientation); Decl. of Dr. Ron Newman, ¶ 8 ("I also believe that

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[23] The Third Circuit has explained that Plaintiffs have the burden of showing whether conduct is expressive. *See Troster v. Pennsylvania State Dep't of Corr.*, 65 F.3d 1086, 1090 (3d Cir. 1995).

change is possible and have personally counseled individuals who have successfully reduced or eliminated their unwanted same-sex attractions, behaviors, or identity."); Decl. of Dr. Joseph Nicolosi, ¶ 11 (discussing SOCE as a means to eliminate or reduce a client's unwanted same-sex sexual attractions).[24] Here, Plaintiffs' explanation of their roles and boundaries in the counselor-client relationship leads to the conclusion that counseling is not "conduct that is intended to be communicative" because the counselor's goal is to apply traditional mental health treatment methods and principles to effect a change in the client's sexual orientation. SOCE counseling is not a means of communication to express any particular viewpoint; rather it is a means of treatment intended to bring about a change in the mental health and psyche of the client who desires and seeks out such a change. I therefore do not find that SOCE counseling, as performed by Plaintiffs, satisfies the *Bartnicki* requirement of conduct that is intended to be communicative.

Moreover, SOCE counseling is not like other forms of conduct traditionally found to be "inherently expressive," such as the burning of a draft card in *O'Brien* or the burning of a flag in *Texas v. Johnson*, 491 U.S.

[24] Moreover, Plaintiffs repeatedly point out that they only engage in SOCE with clients who approach them seeking such a change; indeed, Plaintiffs explain that it would be unethical for them to try to impose their own personal viewpoint on a client. *See, e.g.*, Decl. of Dr. Tara King, ¶ 10 ("It is unethical to attempt to impose any kind of ideology or framework on a client in counseling, so I do not even raise SOCE discussions unless a client wants to engage in such counseling."); *id.*, ¶¶ 12-13; Decl. of Dr. Joseph Nicolosi, ¶¶ 7-8.

397, 405-406 (1989).[25] In these cases, there was a clear distinction between the conduct that the statute sought to govern and the expressive conduct incidentally affected by the statute. Here, by contrast, Plaintiffs have identified no conduct, let alone any expressive conduct, other than that covered by A3371. Thus, Plaintiffs' claim is more appropriately governed by *Giboney*, which affords no protection to speech that is integrally part of validly prohibited conduct. *Giboney,* 336 U.S. at 498 ("It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of

[25] In *Bartnicki v. Vopper*, 200 F.3d at 120, *aff'd*, 532 U.S. 514 (2001), the Third Circuit provided cited several examples of Supreme Court cases addressing expressive conduct. *See Barnes v. Glen Theatre, Inc.,* 501 U.S. 560 (1991) (reversing circuit court decision finding Indiana statute prohibiting complete nudity in public places not an unconstitutional abridgement of First Amendment speech rights related to exotic dancing); *Arcara v. Cloud Books, Inc.,* 478 U.S. 697, 705 (1986) (holding that "unlike the symbolic draft card burning in *O'Brien*, the sexual activity carried on in this case manifests absolutely no element of protected expression" and thus statute authorizing closure of premises did not implicate First Amendment concerns.); *United States v. Albertini,* 472 U.S. 675 (1985) (finding federal statute making it unlawful to reenter a military base after having been barred by the commanding officer did not implicate First Amendment concerns because "the First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interest"); *Clark v. Community for Creative Non-Violence,* 468 U.S. 288, 293-299 (1984) (assuming without deciding that overnight camping in connection with a demonstration was expressive conduct, but nevertheless concluding that National Park Service regulation prohibiting camping in Lafayette Park did not violate the First Amendment); *R.A.V. v. City of St. Paul,* 505 U.S. 377 (1992) (Minnesota statute prohibiting display of certain objects, including a burning cross or Nazi swastika, improperly regulated expressive conduct and violated the First Amendment because it was not narrowly tailored). Significantly, all of these cases concern expressive conduct different than the actual conduct the statute or regulation seeks to prohibit.

conduct in violation of a valid criminal statute. We reject the contention now."); *Rumsfeld*, 547 U.S. at 66 ("If combining speech and conduct were enough to create expressive conduct, a regulated party could always transform conduct into 'speech' simply by talking about it. For instance, if an individual announces that he intends to express his disapproval of the Internal Revenue Service by refusing to pay his income taxes, we would have to apply *O'Brien* to determine whether the Tax Code violates the First Amendment. Neither *O'Brien* nor its progeny supports such a result."); *United States v. Schiavo*, 504 F.2d 1, 21 n.9 (3d Cir. 1974) ("Freedom of expression can be suppressed if, and to the extent that, it is so brigaded with illegal action as to be an inseparable part of it."). Similarly, I find that Plaintiffs have not shown that A3371 has an incidental effect on expressive conduct, and thus, *O'Brien* does not govern Plaintiffs' challenge to A3371. Instead, I apply rational basis review. *See Sammon*, 66 F.3d at 645 & nn.9-10.

"Where rational basis review is appropriate, a statute withstands a substantive due process challenge if the state identifies a legitimate state interest that the legislature rationally could conclude was served by the statute."[26] *Sammon*, 66 F.3d at 644; *see Scavone v. Pa. State Police*, 501 F. App'x 179, 181 (3d Cir. 2012). "'The law need not be in every respect consistent with its aims to be constitutional. It is enough that there is an evil at hand for correction, and that it might be thought that the particular

[26] Because I have rejected Plaintiffs' First Amendment free speech challenge, my analysis here turns on whether there is any substantive due process violation.

legislative measure was a rational way to correct it.'" *Rogin v. Bensalem Township*, 616 F.2d 680, 689 (3d Cir. 1980), *cert. denied*, 450 U.S. 1029 (1981) (quoting *Williamson v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-88 (1955)); *see also Midnight Sessions, Ltd. v. City of Philadelphia*, 945 F.2d 667, 682 (3d Cir. 1991), *cert. denied*, 503 U.S. 984 (1992); *Mabey Bridge & Shore, Inc. v. Schoch*, 666 F.3d 862, 876 (3d Cir. 2012). When legislation is being tested under rational basis review, "those challenging the legislative judgment must convince the court that the legislative facts on which the classification [of the statute] is apparently based could not reasonably be conceived as true by the governmental decisionmaker."[27] *Id.* (quoting *Vance v. Bradley*, 440 U.S. 93, 111 (1979)); *see also Pace Resources, Inc. v. Shrewsbury Township*, 808 F.2d 1023, 1034-35 (3d Cir.), *cert. denied*, 482 U.S. 906 (1987). Indeed, "those attacking the rationality of the legislative classification have the burden 'to negat[e] every conceivable basis which might support it.'" *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993) (quoting *Lehnhausen v.*

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[27] The Third Circuit has repeatedly cautioned that a court engaging in rational basis review is not entitled

> to second guess the legislature on the factual assumptions or policy considerations underlying the statute. If the legislature has assumed that people will react to the statute in a given way or that it will serve the desired goal, the court is not authorized to determine whether people have reacted in the way predicted or whether the desired goal has been served.

Sammon, 66 F.3d at 645. Thus, the sole question is "whether the legislature rationally might have believed the predicted reaction would occur or that the desired end would be served." *Scavone*, 501 F. App'x at 181.

Lake Shore Auto Parts Co., 410 U.S. 356, 364 (1973)); *see, e.g.*, *Heller v. Doe*, 509 U.S. 312, 319-20 (1993) (finding that laws scrutinized under rational basis review are "accorded a strong presumption of validity"). Ordinarily, that burden is nearly insurmountable. "[C]ourts are compelled under rational-basis review to accept a legislature's generalizations even when there is an imperfect fit between means and ends. A classification does not fail rational basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Heller*, 509 U.S. at 321 (internal quotation marks and citations omitted); *N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 399 (3d Cir. 2012).

Importantly, a state need not provide justification or rationale for its legislative decision. Indeed, the Supreme Court has held that "legislative choice[s] [are] not subject to court factfinding and may be based on rational speculation unsupported by evidence or empirical data." *Beach Communications*, 508 U.S. at 315; *N.J. Retail Merchs.*, 669 F.3d at 399. It is not the courts' role, under a rational basis review, "'to judge the wisdom, fairness, or logic of legislative choices.'" *Parker v. Conway*, 581 F.3d 198, 202 (3d Cir. 2009) (quoting *Beach Commc'ns*, 508 U.S. at 313). Nevertheless, the court must still determine "whether circumstances vindicate the challenged regulation as a reasonable exertion of governmental authority or condemn it as arbitrary or discriminatory." *Nebbia v. New York*, 291 U.S. 502, 536 (1934).

Here, the State's professed interest is in protecting minors from professional counseling it deems harmful. It is beyond debate that the State has an interest in protecting vulnerable groups, *Washington*, 521 U.S. at 731, which includes minors. *American Civil Liberties Union v. Ashcroft*, 322 F.3d 240, 251 (3d Cir. 2003) ("[T]here is a compelling interest in protecting the physical and psychological well-being of minors." (Quoting *Sable Commc'n of California, Inc. v. F.C.C.*, 492 U.S. 115, 126 (1989).[28] A3371 accomplishes this by ensuring that licensed professionals who engage in counseling do not perform SOCE on minors. Contrary to Plaintiffs' arguments, it is immaterial whether there is any actual evidence of harm from SOCE; for A3371 to have a rational basis, it is sufficient that the legislature could reasonably believe that SOCE conveyed no benefits and potentially caused harm to minors. *Beach Communications*, 508 U.S. at 315. The legislative findings set forth in A3371 support such a conclusion. *See generally* N.J.S.A. 45:1-54. For example, the legislature found:

- "Being lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming";
- "[S]exual orientation change efforts can pose critical health risks to lesbian, gay, and bisexual people";
- "[T]he [American Psychological Association] advises parents, guardians, young people, and their families to avoid sexual orientation change efforts that portray homosexuality as a mental illness or developmental disorder";

[28] Beyond that, the Supreme Court has recognized that "[t]he mental health of our citizenry, no less than its physical health, is a public good of transcendent importance," *Jaffee v. Redmond*, 518 U.S. 1, 11 (1996), and that states also have "an interest in protecting the integrity and ethics of the medical profession." *Washington v. Glucksberg*, 521 U.S. at 731.

- "The American Academy of Pediatrics in 1993 published an article in its journal, Pediatrics, stating: 'Therapy directed at specifically changing sexual orientation is contraindicated, since it can provoke guilt and anxiety while having little or no potential for achieving changes in orientation'"; and
- "The American Academy of Child and Adolescent Psychiatry in 2012 published an article in its journal, Journal of the American Academy of Child and Adolescent Psychiatry, stating: 'Clinicians should be aware that there is no evidence that sexual orientation can be altered through therapy, and that attempts to do so may be harmful . . . .'"

Id. It is also immaterial that some of the legislature's findings and declarations address SOCE with respect to adults, as opposed to minors. It is certainly rational for the legislature to believe that the potential harms that attend SOCE for adults exist at least equally for minors. *See Scavone*, 501 Fed. Appx. at 181 (explaining the rational basis inquiry as "whether the legislature rationally might have believed the predicted reaction would occur or that the desired end would be served"). Finally, because in applying the rational basis test I rely only on the legislature's stated findings to determine whether there is a rational basis for A3371—indeed, I need not even rely on those findings, as long as I can conceive of some rational basis for the statute—Plaintiffs' arguments attacking the validity of the studies and reports relied on by the legislature carry no weight in the analysis.[29] *See N.J. Retail Merchs.*, 669 F.3d at 399; *Beach Communications*, 508 U.S. at 315.

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[29] For that reason, I need not consider the additional evidentiary submissions filed by Plaintiffs and Intervenor, and thus I need not rule on their admissibility. *See supra,* f.n. 15.

Similarly, A3371's prohibition on the practice of SOCE counseling is rationally related to the harm the statute seeks to prevent. A3371 targets only licensed professionals who engage in professional counseling of minors, and restricts them from performing the specific type of conduct—SOCE counseling—the legislature deemed harmful. This nexus is more than adequate to satisfy rational basis review. *Id.*

In sum, I conclude that: (1) A3371 on its face does not target speech; (2) "counseling" is not constitutionally protected speech merely because it is primarily carried out through talk therapy; (3) no speech or expressive conduct is incidentally burdened by A3371's prohibition, and thus (4) rational basis review is appropriate for adjudging the statute's constitutionality, which is easily satisfied by the stated legislative findings and the statute's purpose.

C. A3371 is Neither Vague Nor Overbroad

In connection with their free speech challenge, Plaintiffs also assert that A3371 is both unconstitutionally vague and overbroad. These arguments are grounded in Plaintiffs' contention that A3371 regulates speech. Having determined that A3371 covers conduct only, the majority of Plaintiffs' arguments in this regard no longer apply. I nevertheless address whether, as an otherwise constitutionally permissible, rational regulation of conduct, A3371 is impermissibly vague or overbroad.

1. Vagueness

Plaintiffs contend that A3371 is unconstitutionality vague because Plaintiffs do not know what type of speech or conduct is actually

prohibited by the statute. The "vagueness inquiry is grounded in the notice requirement of the Fourteenth Amendment's due process clause." *J.S. v. Blue Mt. Sch. Dist.*, 650 F.3d 915, 935 (3d Cir. 2011) (citing *City of Chicago v. Morales*, 527 U.S. 41, 56 (1999)). A statute will be considered void for vagueness if it does not allow a person of ordinary intelligence to determine what conduct it prohibits, or if it authorizes arbitrary enforcement. *Id.*; *Hill v. Colorado*, 530 U.S. 703, 732 (2000). However, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity." *Ward v. Rock Against Racism*, 491 U.S. 781, 794 (1989) (citations omitted). Indeed, voiding a democratically enacted statute on grounds that it is unduly vague is an extreme remedy. *Id.* More particularly, a facial vagueness attack on a statute that does not infringe on constitutionally protected freedoms—as is the case in this matter—can succeed only if the statute is incapable of any valid application. *Steffel v. Thompson*, 415 U.S. 452, 474 (1974); *Village of Hoffman Estate v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495-95 (1982); *Brown v. City of Pittsburgh*, 586 F.3d 263, 269 (3d Cir. 2009) ("[A] successful facial challenge requires the challenger to establish that no set of circumstances exists under which the Act would be valid." (internal quotation marks omitted.)); *Humanitarian Law Project v. U.S. Treasury Dep't*, 578 F.3d 1133, 1146 (9th Cir. 2009) (explaining that a statute will survive a facial vagueness challenge so long as "it is clear what the statute proscribes in the vast majority of its intended applications"). In that regard, it is significant to bear in mind that speculation about possible or

hypothetical applications does not suffice; a statute that is valid "in the vast majority of its intended applications" cannot be struck down on a facial challenge. *Hill v. Colorado*, 530 U.S. 703, 733 (2000).

Moreover, in the context of a statutory proscription that purports to regulate a targeted industry or profession, a slightly different type of analysis applies: "if the statutory prohibition involves conduct of a select group of persons having specialized knowledge, and the challenged phraseology is indigenous to the idiom of that class, *the standard is lowered* and a court may uphold a statute which uses words or phrases having a technical or other special meaning, well enough known to enable those within its reach to correctly apply them." *United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1993) (emphasis added) (quoting *Precious Metals Assocs., Inc. v. Commodity Futures Trading Comm'n*, 620 F.2d 900, 907 (1st Cir. 1980), in turn quoting *Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926) (internal quotations omitted)); *cf. Village of Hoffman Estate*, 455 U.S. at 498 ("[E]conomic regulation is subject to a less strict vagueness test because its subject matter is often more narrow, and because . . . the regulated enterprise may have the ability to clarify the meaning of the regulation by its own inquiry, or by resort to an administrative process.").

Plaintiffs contend that the term "sexual orientation" and the phrase "sexual orientation change efforts" are impermissibly vague. The latter challenge can be quickly dismissed, as it is based on, and significantly overlaps with, Plaintiffs' substantive free speech challenge. Indeed,

Plaintiffs' primary theory in this case is that it is unclear whether under A3371 Plaintiffs can talk *about* SOCE to their clients, even if they are not engaging in actual SOCE. Plaintiffs thus argue that A3371 burdens speech because Plaintiffs will either be chilled from, or disciplined for, merely speaking about SOCE. As my earlier discussion makes clear, the reasonable reading of A3371, as well as the State's position throughout this litigation, limits the application of the statute to the actual practice of SOCE. This limitation resolves Plaintiffs contention that SOCE, as a phrase, is unconstitutionally vague.

The statute defines SOCE by providing an illustrative list of practices: "'sexual orientation change efforts' means 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."[30] N.J.S.A. 45:1-55(b). Given this definition, it cannot be said that the statute does not allow a person of ordinary intelligence to determine what conduct it prohibits, and therefore it is not facially vague.

Nothing in A3371 prevents a counselor from mentioning the existence of SOCE, recommending a book on SOCE or recommending

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[30] The statute further provides that "'[s]exual orientation change efforts' shall not include . . . 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." N.J.S.A. 45:1-55(b).

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SOCE treatment by another unlicensed person such as a religious figure or recommending a licensed person in another state. The statute does not require affirmation of a patient's homosexuality. Even if, "at the margins," there is some conjectural uncertainty as to what the statute proscribes, such uncertainty is insufficient to void the statute for vagueness because "it is clear what the statute proscribes in the vast majority of its intended applications," namely counseling intended to alter a minor patient's sexual orientation. *See Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001) (quoting *Hill*, 530 U.S. at 733). Moreover, Plaintiffs are licensed professionals who engage in counseling, and if some Plaintiffs are not familiar with *how* to practice SOCE, Plaintiffs have never suggested that they, or any person who professionally counsels, is wholly unfamiliar with the *idea* of SOCE.[31] *See Weitzenhoff*, 35 F.3d at 1289. Thus, Plaintiffs' facial vagueness attack on the term "sexual orientation change efforts" is without merit.

Plaintiffs also challenge the term "sexual orientation," noting that it is undefined in the statute, and citing the APA Task Force that explained

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[31] For similar reasons, I reject Plaintiffs' reliance on *Keyishian v. Board of Regents of University of State of N.Y.*, 385 U.S. 589, 599 (1967), which held that a statute prohibiting employing any teacher who "advocates, advises, or teaches the doctrine of forceful overthrow of the government" was unconstitutionally vague because "[i]t w[ould] prohibit the employment of one who merely advocates the doctrine in the abstract without any attempt to indoctrinate others." *Id.* *Keyishian* is easily distinguished from this case; Plaintiffs, as admitted practitioners of SOCE, cannot claim that the phrase "sexual orientation change efforts" creates uncertainty as to what a therapist can and cannot do, as was the case for teachers in *Keyishian*. Indeed, A3371 expressly targets a specific form of therapy known to the community in which it is practiced. *See Pickup,* 2012 WL 6021465, at *14.

that "[s]ame-sex sexual attractions and behavior occur in the context of a variety of sexual orientations . . . and . . . is fluid or has an indefinite outcome." Plaintiffs reason that because the term "sexual orientation" has subjective and interchanging meanings, its usage in the challenged statute makes the statute vague. I am not persuaded that the term "sexual orientation" is unconstitutionally vague.

Plaintiffs, in their own declarations, demonstrate that they understand what the term sexual orientation means and how that term relates to the conduct prohibited by A3371. *See, e.g.*, Decl. of Dr. Tara King, ¶ 4 ("We offer counseling on numerous issues, including . . . sexual orientation change efforts") *id.*, ¶ 5 ("I am *a former lesbian* who went through SOCE counseling." (Emphasis added.); Decl. of Dr. Ron. Newman, ¶ 8 ("Part of my practice involves what is often called sexual orientation change efforts."). Indeed, Plaintiffs are bringing this suit precisely because they wish to engage in SOCE. For Plaintiffs to argue on the one hand that their ability to engage in SOCE is impermissibly restricted by A3371, and on the other hand claim that A3371 is unconstitutionally vague because it fails to define "sexual orientation" strains credulity. Regardless, because I find that a person of ordinary intelligence—let alone Plaintiffs—would understand what the term sexual orientation means, A3371 is not vague for the inclusion of this term.[32]

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[32] For the same reason, I am unpersuaded by Plaintiffs' reliance on the recent revision of the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Health Disorders, DSM-V. *See* Pl. Supp. Authority, Dkt. No. 55. According to Plaintiffs, the DSM-V initially

Canvassing case law on this subject, I have found several courts that have determined that the term sexual orientation is not unconstitutionally vague. *See Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 545-47 (W.D. Ky. 2001) (relying on Black's dictionary definition, rejecting vagueness challenge to statute banning discrimination on the basis of sexual orientation), *rev'd on other grounds*, 53 Fed. Appx. 740 (6th Cir. 2002); *United States v. Jenkins*, 909 F. Supp. 2d 758, 778-79 (E.D. Ky. 2012). Most recently, the Ninth Circuit reached the same conclusion in *Pickup*, 728 F.3d. at 1059 ("Neither is the term 'sexual orientation' vague. Its meaning is clear enough to a reasonable person and should be even more apparent to mental health providers."). Likewise, the Supreme Court issued an opinion last term on the constitutionality of Section Three of the Defense of Marriage Act, 1 U.S.C. § 7, dealing with the Federal government's authority to define marriage, for federal law purposes, as between members of the opposite sex and to the exclusion of those of the same sex. *See United States v. Windsor*, ___ U.S. ___, 133 S.Ct. 2675 (2013). In discussing the issue of same-sex marriages, the majority and dissenting opinions employed the term "sexual orientation" several times; significantly, none of the authors of these opinions felt it necessary to

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classified pedophilia as "sexual orientation," but then later changed the classification to "sexual interest," which Plaintiffs claim shows that the definition of sexual orientation is constantly changing. As the State correctly points out, and indeed, Plaintiffs' own filing shows, the APA released a statement explaining that the initial classification of pedophilia as a sexual orientation was merely a typographical error. Thus, Plaintiffs' claim that sexual orientation lack clear definition based on the DSM-V is meritless, and in fact, borders on being frivolous.

define this term. Accordingly, I am not persuaded that the term "sexual orientation" is vague to the reasonable individual—and particularly not to mental health counselors—and thus, Plaintiffs' vagueness challenge is dismissed.

2. Overbreadth

Plaintiffs lastly raise an overbreadth claim to A3371 as part of their First Amendment free speech challenge to the statute. Under the overbreadth doctrine, a law affecting speech will be deemed invalid on its face if it prohibits "a substantial amount of constitutionally protected speech." *City of Houston v. Hill*, 482 U.S. 451, 466 (1987). In contrast, "where conduct and not merely speech is involved, . . . the overbreadth of a statute must not only be real, but substantial as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973). In such cases, "the mere fact that one can conceive of *some* impermissible applications of a statute is not sufficient to render it susceptible to an overbreadth challenge." *Members of City Council v. Taxpayers for Vincent*, 466 U.S. 789, 800 (1984) (emphasis added). Thus, as was the case with their vagueness challenge, much of Plaintiffs' overbreadth argument is premised on A3371 being a statute that restricts or incidentally burdens speech. Having found that the statute only regulates conduct, and not speech in any constitutionally protected form, Plaintiffs' arguments regarding the statute's overbreadth are largely irrelevant.

Moreover, the overbreadth doctrine is more appropriately raised by a party "whose own activities are unprotected . . . [to] challenge a statute by showing that it substantially abridges the rights *of other parties not before the Court*." *Schaumburg v. Citizens for a Better Env't*, 444 U.S. 620, 634 (1980) (emphasis added). Under this principle, courts should be reluctant to entertain a facial overbreadth challenge "where the parties challenging the statute are those who desire to engage in protected speech that the overbroad statute purports to punish." *Brockett v. Spokane Arcades*, 472 U.S. 491, 504 (1985). As one court in this district has explained:

> Unless it appears that "*any attempt to enforce*" the challenged legislation "would create an unacceptable risk of the suppression of ideas," a court should declare an entire statute invalid on its face only if the record indicates that the challenged statute will have a different impact upon third parties not before the court than it has upon the plaintiffs.

Presbytery of New Jersey of the Orthodox Presbyterian Church v. Florio, 902 F. Supp. 492, 517 (D.N.J. 1995) (citing *Members of City Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789, 801 (1984)), *aff'd sub nom.*, P*resbytery of New Jersey of the Orthodox Presbyterian Church v. Whitman*, 99 F.3d 101 (3d Cir. 1996); *see also id.* ("Courts should not engage in overbreadth analysis where a plaintiff claims that a statute is overbroad precisely because it applies to him." (citing *Moore v. City of Kilgore*, 877 F.2d 364, 390-92 (5th Cir. 1989))).

Here, the State has represented throughout this litigation that it only intends to enforce A3371 against licensed professionals who actually

conduct SOCE as a method of counseling, not against those who merely discuss the existence of SOCE with their clients. Because A3371 is constitutional with respect to its prohibition of the practice of SOCE, as explained *supra* in this Opinion, there exists at least one constitutional means of enforcing the statute. Thus, on this basis alone, Plaintiffs' overbreadth challenge fails. *Florio*, 902 F. Supp. at 517. For similar reasons, I also find that A3371 does not encroach on any protected First Amendment speech, as the statute by its own terms seeks to regulate the "practice" of SOCE by a licensed professional, and not any speech, public or private, by that professional or other individuals; thus there is not a "real, but substantial" risk of overbreadth when A3371 is "judged in relation to the statute's plainly legitimate sweep." *Broadrick*, 413 U.S. at 613. Accordingly, Plaintiffs have not shown that A3371 is unconstitutionally overbroad, and Count I is dismissed.

VI. First Amendment – Free Exercise of Religion

Plaintiffs maintain that in addition to their speech being unlawfully constrained, A3371 infringes on their First Amendment right to exercise their sincerely held religious beliefs that changing same-sex attraction or behavior is possible. Therefore, Plaintiffs reason, A3371 imposes a substantial burden on those religious beliefs because it prohibits them from providing spiritual counsel and assistance on the subject matter of same-sex attractions. Plaintiffs' arguments fare no better under this theory.

Under the First Amendment, "Congress shall make no law respecting the establishment of religion or prohibiting the free exercise thereof." *Conestoga Wood Specialties Corp. v. Sec'y of the United States HHS*, 724 F.3d 377, 382-83 (3d Cir. 2013). It is well-settled that, at its core, the Free Exercise Clause protects religious expression; however, it does not afford absolute protection. *See McTernan v. City of York*, 577 F.3d 521, 532 (3d Cir. 2009). Rather, where a law is "neutral and of general applicability[,]" it "need not be justified by a compelling government interest even if the law has the incidental effect of burdening a particular religious practice." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) (citations omitted); *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872, 890 (1990); *Storeman, Inc. v. Selecky*, 586 F.3d 1109, 1128 (9th Cir. 2012) ("right to freely exercise one's religion . . . does not relieve an individual of the obligation to comply with a 'valid and neutral law of general applicability on the ground that the law proscribes conduct that his religion prescribes.'"). If, on the other hand, the government action is not neutral and generally applicable, strict scrutiny applies, and the government action violates the Free Exercise Clause unless it is narrowly tailored to advance a compelling government interest. *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly*, 309 F.3d 144, 165 (3d Cir. 2002).

Government action is not neutral and generally applicable if it burdens religious conduct because of its religious motivation, or if it

burdens religiously motivated conduct but exempts substantial comparable conduct that is not religiously motivated. *See Hialeah*, 508 U.S. at 543-46; *Blackhawk v. Pennsylvania*, 381 F.3d 202, 209 (3d Cir. 2004); *Lukumi*, 508 U.S. at 543-46; *FOP Newark Lodge No. 12 v. City of Newark*, 170 F.3d 359, 364-66 (3d Cir. 1999). On the other hand, "[a] law is 'neutral if it does not target religiously motivated conduct [whether] on its face or as applied in practice." *Conestgoa Wood Specialties Corp. v. Sebelius*, 917 F.Supp. 2d 394, 410 (E.D. Pa. 2012). Further, when the law is neutral, the government cannot advance its interests solely by targeting religiously motivated conduct. Instead, the regulation must be generally applicable. *See Combs v. Homer-Center Sch. Dist.*, 540 F.3d 231, 242 (3d Cir. 2008).

Here, A3371 makes no reference to any religious practice, conduct, or motivation. Therefore, on its face, the statute is neutral. Plaintiffs argue that the provisions of A3371 will disproportionately affect those motivated by religious belief because A3371 effectively engages in impermissible "religious gerrymandering" by providing individualized exemptions from the general prohibitions. Plaintiffs identify these categories of exemptions: (1) minors seeking to transition from one gender to another; (2) minors struggling with or confused about heterosexual attractions, behaviors, or identity; (3) counseling that facilitates exploration and development of same-sex attraction, behaviors, or identity; (4) individuals over the age of 18 who are seeking to reduce or eliminate same-sex attraction; and (5) counseling provided by unlicensed

persons. Contrary to Plaintiffs' contentions, A3371 is one of generally applicability, and therefore, it is only subject to a rational basis test.

To begin, there can be no serious doubt that the Legislature enacted A3371 because it found that SOCE "poses critical health risks" to minors. *See* N.J.S.A. 45:1-54. By doing so, the Legislature exercised its regulatory powers to prohibit licensed mental health professionals in New Jersey from engaging in SOCE. There is no indication in the record that religion was a motivating factor in the passage of A3371. In fact, Plaintiffs have not suggested that the Legislature was motivated by any religious purpose. From its plain language, the law does not seek to target or burden religious practices or beliefs. Rather, A3371 bars all licensed mental health providers from engaging in SOCE with minors, regardless of whether that provider or the minor seeking SOCE is motivated by religion or motivated by any other purpose. Plainly, A3371 is neutral in nature. *See Brown v. City of Pittsburgh*, 586 F.3d 263, 284 (3d Cir. 2009) (finding no Free Exercise violation where challenged restrictions on protests near abortion clinic "app[lied] irrespective of whether the beliefs underpinning the regulated expression are religious or secular"). Because of the statute's neutrality, even if A3371 disproportionately affects those motivated by religious belief, this fact does not raise any Free Exercise concerns. *Lukumi*, 508 U.S. at 581 ("a law that is neutral . . . need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.").

The statute is also generally applicable because A3371 does not suppress, target, or single out the practice of any religion because of religious conduct. At the outset, the Court disagrees with Plaintiffs' characterization that A3371 carves out certain exceptions. Rather, those "exemptions" are areas that A3371 does not seek to regulate because they fall outside the purpose of the statute. Nevertheless, addressing Plaintiffs' arguments, the "exemptions" to which Plaintiffs point do not undermine the purposes of the law. According to Plaintiffs, the first "exemption" in A3371 is for "counseling for a person seeking to transition from one gender to another"; that is, counseling not related to changing sexual orientation or gender identity, but toward assisting someone seeking to live consistently with his or her gender identity. This exemption does not undermine the purposes of A3371. In fact, it is consistent with the Legislature's concern that conversion therapy is harmful. Next, that unlicensed counselors are not covered by the statute also does not undermine the purpose of the statute. As the Court has discussed earlier, pursuant to its police power, the State only aimed to regulate those professionals who are licensed. Stated differently, it is the State's role to regulate its professionals -- medical or otherwise -- and therefore, because unlicensed professionals do not fall within the State's comprehensive regulatory schemes, this type of "exemption" neither undermines the statute's purpose nor does it somehow change the statute's general applicability.

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Moreover, to the extent that the Legislature distinguished between SOCE provided to minors and adults, this distinction does not render the law not generally applicable. Indeed, because the Legislature determined, pursuant to its regulatory powers, that SOCE treatment poses serious health risks to minors, the limited reach of the statute does not change the nature of the statute, particularly in light of the fact that the Legislature has a strong interest in protecting minors, a vulnerable group in society. *See*, *supra*, p. 49. Finally, and more importantly, A3371 does not contain a mechanism for individual exemptions nor does it exempt a substantial category of conduct that is not religiously motivated from its prohibition on the practice of SOCE. Instead, the provision prohibits all state licensed mental health providers from practicing SOCE. Finally, A3371 does not prohibit any religious leaders, who are not licensed counselors, from practicing SOCE. This fact further demonstrates that A3371 has no religious underpinnings and therefore, it does not selectively impose any type of burden on religiously motivated conduct. Accordingly, A3371 is generally applicable since it does not impermissibly target any religious belief. Based upon that finding, the rational basis test applies. For the same reasons why A3371 passes constitutional muster for free speech purposes, it passes rational basis review in this context as well.

Lastly, Plaintiffs argue that even if A3371 is a neutral and generally applicable law, A3371 is nevertheless subject to strict scrutiny as a violation of the "hybrid rights" doctrine. I summarily reject Plaintiffs' invitation to apply the hybrid rights doctrine, as the Third Circuit has

declined to apply this theory to Free Exercise claims. *Brown*, 586 F.3d at 284 n.24 ("Like many of our sister courts of appeals, we have not endorsed this theory.").

Count IV of the Complaint is dismissed.

VII. CONCLUSION

For the reasons set forth above, Garden State's motion for permissive intervention is **GRANTED**. Plaintiffs' motion for summary judgment is **DENIED**. Defendants' cross motion for summary judgment is **GRANTED** in its entirety. Accordingly, all of Plaintiffs' federal and state constitutional claims against Defendants are **DISMISSED**, and Plaintiffs have no standing to bring any third party claims on behalf of their minor clients and the clients' parents.

DATED: November 8, 2013

/s/ Freda L. Wolfson
Freda L. Wolfson
United States District Judge

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

TARA KING, ED.D., *et al.*, Plaintiffs, vs. CHRISTOPHER CHRISTIE, Governor of New Jersey, *et al.*, Defendants.	: : : : : : : : :	Civil Action No. 13-5038 **ORDER**

THIS MATTER having been opened to the Court by Demetrios K. Stratis, Esq., counsel for Plaintiffs, Tara King ED.D. and Ronald Newman, Ph.D., who are individual licensed therapists, as well as the National Association for Research and Therapy of Homosexuality and the American Association of Christian Counselors (collectively, "Plaintiffs"), and by Robert T. Lougy, Esq., counsel for Defendants, Governor Christie, Eric T. Kanefsky, Director of the New Jersey Dep't of Law and Public Safety, Milagros Collazo, Executive Director of the New Jersey Board of Marriage and Family Therapy Examiners, J. Michael Walker, Executive Director of the New Jersey Board of Psychological Examiners, and Paul Jordan, President of the New Jersey State Board of Medical Examiners (collectively, "Defendants"), on cross motions for summary judgment; it appearing that Proposed Intervenor Garden State Equality ("Intervenor"),

through its counsel, Andrew Bayer, Esq., moved for permissive intervention as a defendant and moved for summary judgment; it appearing that Plaintiffs oppose intervention by Garden State; the Court having considered the parties' submissions in connection with the motions, and having heard oral argument on October 1, 2013, for the reasons set forth in the Opinion filed on even date, and for good cause shown,

IT IS on this 8th day of November, 2013,

ORDERED that Garden State's motion to intervene is **GRANTED**;

ORDERED that Plaintiffs' motion for summary judgment is **DENIED**;

ORDERED that Defendants' cross motion for summary judgment is **GRANTED;**

ORDERED that Garden State's cross motion for summary judgment is **GRANTED**;

ORDERED that Plaintiffs' Motion to Reconsider Dispensing of Evidence and Deem Certain Facts Admitted is **DENIED**; and it is further

ORDERED that this case shall be marked as **CLOSED**.

/s/ Freda L. Wolfson
Freda L. Wolfson
United States District Judge