UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

APPELLATE CASE NO. 13-4429

On Appeal from the United States District Court
for the District of New Jersey
Case No. 13-cv-05038 (Hon. Freda L. Wolfson, U.S.D.J.)

TARA KING, *ET AL.*,

Plaintiffs / Appellants,

vs.

GOVERNOR OF NEW JERSEY, *ET AL.*,

Defendants / Appellees.

[REVISED AND CORRECTED] BRIEF OF AMICI CURIAE AGUDATH ISRAEL OF AMERICA AND NEFESH IN SUPPORT OF REVERSAL

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CERTIFICATION OF BAR MEMBERSHIP

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

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INTEREST OF AMICI CURIAE

Agudath Israel of America is a ninety-two year old national grassroots Orthodox Jewish movement with constituents and branches across the United States, including New Jersey. It is a tax-exempt, nonprofit organization arranged under Section 501(C)(3) of the Internal Revenue Code with a local affiliate in New Jersey, Agudath Israel of New Jersey, which advocates for the interests of its members in this State. Agudath Israel has a long history of submitting *amicus curiae* briefs in cases involving religious liberty in general, and the rights of Orthodox Jews to practice their religion in particular.

Nefesh is an unincorporated international association of Orthodox Jewish mental health professionals, including psychiatrists, psychologists, and other therapists, including many in New Jersey. As such, Nefesh views with concern and alarm the prohibition of therapy that could assist those who seek help with their sexual orientation.

The instant case is of great interest and concern to Agudath Israel and Nefesh and their respective members. In the view of *amici*, the central issue in this case is whether, by prohibiting the practice of Sexual Orientation Change Efforts ("SOCE") via Assembly Bill 3371 ("A3371"), the State has

impermissibly infringed upon Plaintiff-appellant's First Amendment right to freedom of speech. *Amici* believe it has, as set out further below.

LEGAL ARGUMENT

I. PSYCHOLOGICAL COUNSEL, AS THE COMMUNICATION OF IDEAS, IS "PURE SPEECH" AND COMMANDS THE FULL PANOPLY OF RIGHTS AFFORDED BY THE FIRST AMENDMENT.

Psychological counsel is, axiomatically, communication between doctor and patient. And as the communication of ideas, psychological counsel constitutes pure speech, and is entitled to the full panoply of rights afforded speech under the First Amendment of the United States Constitution. *See New York Times Co. v. Sullivan*, 376 U.S. 254 (1964) (freedom of speech protects the direct communication of ideas). As set forth below, the District Court's failed to acknowledge that psychological counsel is pure speech, however, which was reversible error.

Under the First Amendment, "Congress shall make no law…abridging the freedom of speech." U.S. Const. Amend. I. The constitutional safeguards of the First Amendment were "fashioned to assure [the] unfettered interchange of ideas for the bringing about of political and social changes." *Roth v. United States,* 354 U.S. 476, 484 (1957). Critically for purposes of this appeal, government may not prohibit the communication of an idea simply because it, or society, finds the idea itself offensive or disagreeable. *See Texas v. Johnson*, 491 U.S. 397, 414 (1989). "When a statutory provision burdens First Amendment rights, it must be justified by a

compelling state interest." *Federal Election Com'n v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 256 (1986). The lower court erroneously held that psychological counsel was not the communication of ideas and, therefore, was not pure speech, in turn failing to require that the State demonstrate the existence of a compelling state interest to justify its radical curtailment of speech between counselor and counseled in A3371. *King v. Christie*, 2013 WL 5970343, *10.

In making this determination, the District Court relied primarily upon flawed statutory interpretation, stating as follows:

> Even a cursory review reveals that the [A3371] 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

King v. Christie, 2013 WL 5970343, *10 (emphasis supplied). The lower court further stated "[n]othing 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 . . . the statute only prohibits a licensed professional from engaging in counseling for the purpose of actually practicing SOCE." *Id.* at *11, citing *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013).

This analysis was erroneous, because instead of engaging in "a holistic endeavor" in which it must give effect to "every word" of a statute, *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 (1985); *Scheidermann v. I.N.S.*, 83 F.3d 1517, 1524 (3d Cir. 1996), the District Court plucked a few phrases from A3371 out of context, assigned its own interpretation of their meaning and concluded that the remaining words were "immaterial." *See King v. Christie*, 2013 WL 5970343, *11. In fact, however, in the context rendering psychological counsel, "applying" principles of psychology means *speaking* with patients. There is no other conduct inherent in its "application." 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).

Merely characterizing a type of speech, such as psychological therapy, as "conduct" does not remove it from the rubric of First Amendment protection and make it conduct. If it were otherwise, virtually any regulation of content in expression could just as easily be restricted by calling it "conduct." In purporting to do so here, the District Court relied on nothing more than its own *ipsi dixit*, and in the process erroneously exempted

appellees from their burden of coming forward with the most elementary justification required by the Constitution for intrusion into a relationship of this nature: demonstration of a compelling state interest. Given the absence in the record of any such justification, amici respectfully submit that as a matter of law, A3371 unconstitutionally abridges the First Amendment rights of therapists and patients, and should be stricken.

The lower court's reliance on the Ninth Circuit's ruling in *Pickup v. Brown*, 728 F.3d 1042, is similarly flawed. *See King v. Christie*, 2013 WL 5970343 at *14. In *Pickup v. Brown*, the Ninth Circuit addressed whether a California statute prohibiting SOCE (i.e., the California version of A3371) unconstitutionally infringed upon the freedom of speech rights afforded under the First Amendment. Viewing First Amendment rights along a continuum, the Ninth Circuit equated the regulation of psychological therapy with the mere regulation of professional conduct. *Pickup v. Brown*, 728 F.3d at 1053. The Ninth Circuit rejected the argument that "because psychoanalysis is the 'talking cure,' it deserves special First Amendment protection because it is 'pure speech'" (citation omitted). It reasoned: "[T]he 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 v. Brown*, 728 F.3d at 1053 (internal quotation marks and ellipsis omitted).

Both the District Court below and the Ninth Circuit, however, fail to actually articulate how psychological therapy is anything other than pure speech, the latter going so far as to reject a straw-man argument (urged by no one) that opponents of statutes such as A3371 are seeking "special" free speech protection. Appellants here, and *amici*, ask for nothing of the sort, however: They seek no more, but no less, than the protection afforded all speech by the First Amendment. The reliance by both courts on the *purpose* of therapy—the treatment of emotional suffering—as opposed to its *function*—speech emasculates the First Amendment entirely. Indeed, such an exercise could just as readily undermine the protection routinely afforded political speech merely by characterizing it as not pure speech because its purpose is to effect political change. Under this standard, any speech could be deemed "conduct" if it met with official disapproval, fatally undermining the protection afforded by the First Amendment. Absent a better articulation explanation from the District Court of why psychological therapy is "conduct" and not speech, A3371 cannot be upheld.

A. A3371 infringes upon the ability to receive information, which is a fundamental right as a corollary of the right to freedom of speech.

The First Amendment protects the right to receive information as a corollary of the right to speak. *See Griswold v. Connecticut*, 381 U.S. 479 (1965); *Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 U.S. 853, 871-72 (1982) (plurality) ("Our Constitution does not permit the official suppression of ideas."), (Blackmun, J., concurring) ("[O]ur precedents command the conclusion that the State may not act to deny access to an idea simply because state officials disapprove of that idea. . . ."). A3371, however, deprives minors of that right during counseling sessions because it prohibits licensed counselors from offering SOCE counseling.

In *Griswold v. Connecticut*, the Supreme Court, in a plurality opinion, placed its imprimatur on the constitutional right to receive information. There, the appellants Griswold, the Executive Director of the Planned Parenthood League of Connecticut ("the League"), and Buxton, the Medical Director of the League, provided information and instruction to married persons concerning contraception. Connecticut prosecuted them for violating a state statute which provided that "[a]ny person who uses any drug, medicinal article or instrument for the purpose of preventing conception shall be fined . . . or imprisoned . . . or be both fined and imprisoned" and "[a]ny person who assists, abets, counsels, causes, hires or commands

another to commit any offense may be prosecuted and punished as if he were the principal offender." *Id.* at 480.

The Court struck down each provision as unconstitutional on a variety of grounds, including the First Amendment. The Court reasoned that:

> [T]he State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge. The right of freedom of speech and press includes not only the right to utter or to print, but the right to distribute, the right to receive, the right to read…and freedom of inquiry, freedom of thought, and freedom to teach…Without those peripheral rights the specific rights would be less secure.

Id. at 482-83.

Following *Griswold*, this Court has recognized that the First Amendment forbids enactments that prohibit individuals from receiving information they are actively seeking and desire to receive. As the Court explained in *Kreimer v. Bureau of Police for Town of Morristown*, 958 F.2d 1242 (3d Cir. 1992), "[T]he First Amendment, like other constitutional guarantees, encompasses the 'penumbral' right to receive information to ensure its fullest exercise." *Id.* at 1252. Moreover, "the First Amendment does not merely prohibit the government from enacting laws that censor information, but additionally encompasses the *positive right* of public access to information and ideas." *Id.* at 1255 (emphasis added). A3371 violates these principles, because it prevents all minors in New Jersey from receiving

the viewpoint that SOCE counseling from a licensed professional may be beneficial to those who seek to reduce or eliminate their unwanted SSA. As a government-mandated restriction on information and counseling it disapproves of, A3371 is clearly unconstitutional.

Indeed, this constitutional imperative is so strong that it protects even speech deemed less than "pure," e.g., commercial speech. Thus in *Virginia State Board of Pharmacy*, 425 U.S. 748 (1976), the Supreme Court articulated the principle that the First Amendment commands more information, not less. In that case, the Commonwealth of Virginia banned pharmacists from advertising the prices of prescription drugs. *Va. State Bd. of Pharm.*, *id*. at 752. The stated rationale for the statute was to uphold pharmaceutical professionalism against the negative effects of price competition. The Supreme Court rejected that justification and struck down the statute because the laws governing licensed pharmacists already imposed a high standard of care. *Id.* at 768-69. The Court determined that the advertisement ban was actually designed to keep the public in ignorance of drug prices, prevent them from "following the discount," and ultimately to insulate ethical pharmacists from unethical ones who could operate at a lower cost. *Id.* at 769. The Supreme Court restated the fundamental principle that the First Amendment commands the assumption that

"information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to close them." *Id.* at 770.

Indeed, the rule articulated in *Virginia State Board of Pharmacy* is particular pronounced in the context of the provision of medical services. Thus in *Sorrell v. IMS Health, Inc.*, __ U.S. __, ___, 131 S. Ct. 2653, 2664 (2011), the Court explained, "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," quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977). *See also United States v. Caronia*, 703 F.3d 149, 167 (2d Cir. 2012) (quoting *Sorrell*, 131 S. Ct. at 2664). This reasoning certainly applies in the area of the mental health services, where psychological treatment typically consists entirely of speech ("talk therapy").

Like the advertising ban on prescription drug prices, the stated rationale for A3371 is to protect consumers from the presumed harms of SOCE counseling. A3371 imposes the very harm the State claims it intends to prevent, however, by forcing minors to seek out unlicensed and untrained

counselors who are more likely to inflict irreversible emotional damage by providing counseling not subject to the requirements of mental health licensing boards in New Jersey. Moreover, like the laws in *Virginia State Board of Pharmacy*, A3371 suppresses information that plaintiffs have a right to hear. By so doing, A3371 also prevents Plaintiffs from receiving the information and counseling concerning the fact that SSA felt by a given individual may be harmful, may lead to unhappiness, or may not be the only way of living. It prevents them from receiving the counseling of licensed professionals who are best able to provide the information and expertise necessary to help them overcome unwanted sexual orientation, behavior, or identity. Because A3371 suppresses those ideas, it is unconstitutional.

The irrationality of the State's unconstitutional suppression of Plaintiffs' First Amendment rights is made further evident by other provisions regulating the mental health decisions of minors in New Jersey, which in every respect provide and protect the ability of minors over a certain age to seek and make decisions about their own mental health treatment. For example, pursuant to N.J. Ct. R. 4:74-7A(c), "any minor 14 years of age or over may request admission to a psychiatric facility, special psychiatric hospital, or children's crisis intervention service provided the court on a finding that the minor's request is informed and voluntary enters

an order approving the admission." Additionally, "the minor may discharge himself or herself from the facility in the same manner as an adult who has voluntarily admitted himself or herself." *Id.*

There is no rational basis on which to distinguish between the legal right of minors over 14 years of age to check themselves into and out of psychiatric hospitals where they can be given powerful psychotropic medications, but forbids them from even discussing his or her treatment options to reduce or eliminate his or her unwanted sexual orientation, behavior, or identity with a licensed mental health counselor. By enacting A3371 New Jersey has effectively decreed such a decision per se harmful to that minor, regardless of the lack of concrete and substantial evidence to the contrary, and the State forever prohibits all minors from receiving such counsel from a licensed mental health professional. For these reasons, even if, contrary to the actual record, the State of New Jersey had been required to and succeeded in establishing a rational basis for A3371, this Court should find that, as a matter of law, the purported basis is anything but rational.

B. The United States Constitution prohibits the abridgment of the freedom of speech, even as applied to adolescents.

Beyond the narrow issue of psychological health, the United States Supreme Court has clearly and consistently ruled that children are entitled to

the protections afforded by the United States Constitution and that the Bill of Rights is not for adults alone. *See Tinker v. Des Moines School District*, 393 U.S. 503 (1969); *In re Gault*, 387 U.S. 1, 13 (1967). In *Tinker*, the Supreme Court claimed that "[s]tudents in school as well as out of school are 'persons' under our Constitution. They are possessed of fundamental rights which the State must respect." *Id.* at 511. In *Planned Parenthood of Missouri v. Danforth*, 428 U.S. 52, 74 (1976), the Supreme Court further clarified that "Constitutional rights do not mature and come into being magically only when one attains the state-defined age of majority. Minors, as well as adults, are protected by the Constitution and possess Constitutional rights."

In *West Virginia v. Barnette*, 319 U.S. 624 (1943), the Court held that, under the First Amendment, students could not be compelled to salute the United States flag as a means of promoting national unity and patriotism during the Second World War. In striking down the flag salute requirement, the Supreme Court expressly recognized that the protections of the First Amendment are fully applicable to students, and that their First Amendment rights cannot be infringed even for so lofty a purpose as the promotion of national unity in a time of war. Like the students in *West Virginia v. Barnette* and *Tinker*, minors in New Jersey are entitled to the protections

afforded by the United States Constitution and the First Amendment. Thus because A3371 diminishes minors' First Amendment rights, the State of New Jersey must present a compelling state interest justify its implementation. Yet 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). More importantly, the report stated that "sexual orientation issues in children are virtually unexamined." (*Id.* at 000375). "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). 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 Broad Sys. Inc. v. FCC*, 512 U.S. 622, 664 (1994). Without concrete proof that SOCE counseling is in fact harmful, therefore, A3371 should not be upheld.

II. A3371 IS A VIEWPOINT-BASED RESTRICTION AND SUCH RESTRICTIONS HAVE ALWAYS BEEN FOUND UNCONSTITUTIONAL.

Neither the Supreme Court nor the Third Circuit has ever deemed a viewpoint-based speech restriction such as that embodied in A3371 valid. Indeed, a finding of viewpoint discrimination is dispositive. *See Sorrell v. IMS Health, Inc.*, *supra*, 131 S. Ct. at 2667. "In the realm of private speech or expression, government regulation may not favor one speaker over another." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995); *see also Pittsburgh League of Young Voters Educ. Fund v. Port Auth. of Allegheny Cnty.*, 653 F.3d 290, 296 (3d Cir. 2011) ("Viewpoint discrimination is an anathema to free expression and is impermissible in both public and nonpublic fora"); *Child Evangelism Fellowship of N.J., Inc. v. Stafford Tp. Sch. Dist.*, 386 F.3d 514, 527-28 (3d Cir. 2004) ("To 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") (quoting *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 509 (1969)). "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. As a rule, speech restrictions are only permissible "as long as the regulation is not an effort to suppress the speaker's activity due to disagreement with the speaker's view." *Int'l Soc'y for Krishna Consciousness, Inc. v. Lee*, 505 U.S. 672, 679 (1992). In contrast, "a regulation that is in reality a façade for viewpoint-based discrimination is presumed unconstitutional." *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc.*, 473 U.S. 788, 811 (1985)).

A3371 is a viewpoint-based regulation because it allows counselors to discuss, and clients to hear, about the subject of sexual orientation, behavior, or identity, but precludes discussion of a particular viewpoint on that subject, namely that sexual orientation, behavior, or identity can change. A3371 silences one viewpoint—change—on an otherwise permissible subject—sexual orientation, behavior, or identity. As defined in A3371, SOCE is counseling that seeks to "eliminate or reduce sexual or romantic attractions or feelings towards individuals of the same sex." N.J.S.A. 45:1–55. SOCE "does not include psychotherapies that: (A) provide acceptance, support, and understanding of clients or facilitation of clients' coping, social support, and identity exploration and development, including sexual orientation-neutral intervention . . . and (B) do not seek to change sexual orientation." *Id.* In short, A3371 embodies a social fashion or posture and seeks to silence

contrary viewpoints even in the absence of rigorous empirical grounds for such a distinction.

As a viewpoint restriction, A3371 is unconstitutional under any circumstances. What the District Court calls "context" does not matter when viewpoint discrimination of private speech is involved, and both the proponents of A3371 and the District Court have failed to address, much less refute, this critical point. A3371 permits minors to hear only one viewpoint on the subject of sexual orientation, behavior, or identity. Under the statute, minors and their parents are only permitted to receive counsel that affirms sexual orientation, behavior, or identity, even though they desperately seek counsel to help them change or reduce sexual orientation, behavior, or identity. A3371 permits one viewpoint and condemns the opposite viewpoint. The State has gone far beyond regulation of the profession to taking sides on one viewpoint of an otherwise permissible subject. As such, there is no need to inquire into the government's purported justifications for A3371. In light of this critical constitutional issue, there can be no justification for a law prohibiting the form of speech described as SOCE, and A3371 must be enjoined.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision of the District Court for the District of New Jersey granting summary judgment to defendant / appellees be reversed.

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January 21, 2014

CERTIFICATE OF SERVICE

I hereby certify that on this date, I electronically filed the foregoing [Revised and Corrected] Brief of Amici Curiae Agudath Israel of America and Nefesh in Support of Reversal with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by using the appellate CM/ECF system. (I attempted to file the same on January 21, 2014 but encountered a technical problem with my ECF registration, and was unable to secure assistance from the Court's technical office due to the early closing of the Court on account of severe snow.) All participants in the case are registered CM/ECF users and will be served by the appellate CM/ECF system.

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

I hereby certify that this electronic version of the brief of amici curiae is in all material respects, including the text, identical to the paper version of the same to be filed pursuant to the Rules of this Court and that it has, prior to filing via ECF, been checked for computer viruses using Kaseya Antivirus 6.0 for Workstations, and was found to contain no computer viruses.

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