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Appeal from the United States District Court Appeal from the United States District Court for the Eastern District of California, William B. Shubb, Senior District Judge, Presiding. D.C. No. 2:12–CV–02497–KJM–EFB, D.C. No. 2:12–CV–02484–WBS–KJN.

Before: ALEX KOZINSKI, Chief Judge, and SUSAN P. GRABER, and MORGAN CHRISTEN, Circuit Judges.

Dissent to Order by Judge O'SCANNLAIN; Opinion by Judge GRABER.

ORDER

The opinion filed on August 29, 2013, and published at 728 F.3d 1042, is replaced by the amended opinion filed concurrently with this order. With these amendments, the panel has voted to deny the petitions for panel rehearing and petitions for rehearing en banc.

The full court has been advised of the petitions for rehearing en banc. A judge of the court called for a vote on whether to rehear the matter en banc. On such vote, a

majority of the nonrecused active judges failed to vote in favor of en banc rehearing.

The petitions for panel rehearing and petitions for rehearing en banc are **DENIED.** No further petitions for panel rehearing ***1215** or petitions for rehearing en banc shall be entertained.

O'SCANNLAIN, Circuit Judge, joined by BEA and IKUTA, Circuit Judges, dissenting from the denial of rehearing en banc:

May the legislature avoid First Amendment judicial scrutiny by defining disfavored talk as "conduct"? That is what these cases are really about.

The State of California, in the statute at issue here, has prohibited licensed professionals from saying certain words to their clients. By labeling such speech as "conduct," the panel's opinion has entirely exempted such regulation from the First Amendment. In so doing, the panel contravenes recent Supreme Court precedent, ignores established free speech doctrine, misreads our cases, and thus insulates from First Amendment scrutiny California's prohibition—in the guise of a professional regulation—of politically unpopular expression.

I respectfully dissent from our court's regrettable failure to rehear these cases en banc.

I

California enacted Senate Bill 1172 ("SB 1172"), which subjects state-licensed "mental health providers"[1] to professional discipline for engaging in "sexual orientation change efforts" with clients who are minors. Cal. Bus. & Prof.Code §§ 865.1, 865.2. The statute defines such change efforts to include "any practices ... that seek to change an individual's sexual orientation." *Id.* § 865(b)(1). Explicitly exempted from the regulation are "psychotherapies that provide acceptance, support, and understanding of clients' coping, social support, and identity exploration and development." *Id.* § 865(b)(2). The law does not expressly prohibit professionals from discussing change efforts with patients, from referring patients to unlicensed practitioners of change efforts, or otherwise from offering opinions on the subject of homosexuality. Amended op. at 26.

In *Welch,* the district court granted plaintiffs an injunction against SB 1172, but a different judge in *Pickup* denied a similar request. Plaintiffs in these cases include licensed professionals who provide change efforts exclusively through speech—i.e., methods such as counseling and prayer.[2] *Cf. id.* at 39 n. 5.

According to the panel the words proscribed by SB 1172 consist entirely of medical "treatment," which although effected by verbal communication nevertheless constitutes "professional *conduct* " entirely unprotected by the First Amendment. *See* amended op. at 37–39. Unlike a professional's opinions, theories, recommendations, or advocacy, such "conduct" effected through speech would receive no constitutional safeguards against state suppression. *Id.* The panel provides no principled doctrinal basis for its dichotomy: by what criteria do we distinguish ***1216** between utterances that are truly "speech," on the one hand, and those that are, on the other hand, somehow "treatment" or "conduct"? The panel, contrary to common sense and without legal authority, simply asserts that some spoken words—those prohibited by SB 1172—are not speech.

Empowered by this ruling of our court, government will have a new and powerful tool to silence expression based on a political or moral judgment about the content and purpose of the communications. The First Amendment precisely forbids government from punishing speech on such grounds.

II

Our precedents do not suggest that laws prohibiting "conduct" effected exclusively by means of speech escape First Amendment scrutiny. In fact, the Supreme Court, in its most recent relevant case, flatly refused to countenance the government's purported distinction between "conduct" and "speech" for constitutional purposes when the activity at issue consisted of talking and writing.

The plaintiffs in *Holder v. Humanitarian Law Project,* 561 U.S. 1, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010), had challenged a Federal statute forbidding "material

support" to terrorist organizations for criminalizing protected verbal communications. *Id.* at 2716–17. The Supreme Court upheld the statute, but only after applying First Amendment scrutiny. Specifically, the Court rejected the government's argument that the statute only punished "conduct": for, in this situation, the "conduct triggering coverage under the statute consists of communicating a message." *Id.* at 2724. In other words, the government's *ipse dixit* cannot transform "speech" into "conduct" that it may more freely regulate. [3]

The panel attempts, vainly, to distinguish *Humanitarian Law Project* from the facts of this case by emphasizing that the change efforts prohibited by SB 1172 are "therapeutic treatment, not expressive speech" and that the practitioners to whom the law applies are "licensed mental health professionals acting within the confines of the counselor-client relationship." Amended op. at 39. In purported contrast is the issue in *Humanitarian Law Project,* which according to the panel dealt with "political speech ... by ordinary citizens." *Id.* at 40. These supposedly distinguishing characteristics find no support in the Supreme Court's holding and do not even fairly characterize the facts of the case.

In the first place, the panel's vague invocation of "ordinary citizens" misses the mark. What exactly the panel means by this locution—more redolent of campaign sound bites or generic political press releases than the customarily more precise language of judicial opinions—is unclear. To the extent that "ordinary citizens" encompass non-professionals, this dichotomy is self-evidently irrelevant on the facts of *Humanitarian Law Project.* The plaintiffs in that case included a nonprofit human-rights organization with consultative status to the United Nations, 130 S.Ct. at 2713–14; the activities in which they had contemplated engaging included offering their professional expertise and advice on various ***1217** international and humanitarian issues, *id.* at 2716–17. Such plaintiffs may not have been doctors or psychoanalysts, but certainly purported to be offering professional services of another sort; the Supreme Court, at least, did not treat them as mere lay people. If that is the distinction the panel perceives in the "ordinary citizens" of *Humanitarian Law Project,* it is illusory.

Furthermore, the Supreme Court in *Humanitarian Law Project* explicitly rejected the plaintiffs' argument that the expression in question consisted of "pure political speech." *Id.* at 2722; *see also id.* at 2724 ("The First Amendment issue before us is ... not whether the Government may prohibit pure political speech."). In explanation, the Court proceeded to enumerate various sorts of political expression that the statute did not abridge—just as the panel's opinion does with respect to SB 1172. The material support statute permitted "plaintiffs ... to say anything they wish on any topic[; t]hey may speak and write freely[;].... [t]hey may advocate before the United Nations." *Id.* at 2722–23; *cf.* amended op. at 26 ("SB 1172 does *not* ... [p]revent mental health providers from communicating with the public about SOCE [; p]revent mental health providers from expressing their views to patients, whether children or adults, about SOCE, homosexuality, or any other topic [; p]revent mental health providers from recommending SOCE to patients, whether children or adults...."). Such classical "political speech," Chief Justice Roberts concluded, did not fall within the statute's strictures; nevertheless, the Court ruled that the First Amendment still applied to the sort of speech in which the plaintiffs contemplated engaging and which they claimed the statute forbade. *See id.* at 2724–27. The reasoning of *Humanitarian Law Project* specifically forecloses courts from approving a statutory restriction on speech simply because it still permits various and extensive political expression.

The cases here present an analogous situation: professionals—including but not limited to doctors and psychologists—desire to "communicate a message" that the law in question does not permit. This court accordingly should subject SB 1172 to *some level of scrutiny* under the First Amendment.

It bears noting, further, that the Court in *Humanitarian Law Project* did not examine the content or purpose of the "message" the plaintiffs desired to communicate. Thus the panel's attempt to validate SB 1172, on the basis that the speech—the communicated "message"—it proscribes is not "expressive" or "symbolic," amended op. at 39, finds no support in *Humanitarian Law Project* itself. Whether the prohibited communications in any given situation qualify as pure political speech or, for example, commercial speech will affect only the level of scrutiny, not whether the First Amendment applies at all. The Supreme Court has not required that speech, as a threshold matter, be "expressive" or "symbolic" before deigning to extend to it constitutional protection. [4]

***1218** The Supreme Court's implication in *Humanitarian Law Project* is clear: legislatures cannot nullify the First Amendment's protections for speech by playing this labeling game. SB 1172 prohibits certain "practices," just as the statute in *Humanitarian Law Project* prohibited "material support"; but with regard to those plaintiffs as well as the plaintiffs here, those laws targeted speech. Thus, the First Amendment still applies.

III

The Federal courts have never recognized a freestanding exception to the First Amendment for state professional regulations.[5] Indeed authoritative precedents have established that neither professional regulations generally, nor even a more limited subclass of such rules, remain categorically outside of the First Amendment's reach.[6] To justify its purported speech/conduct dichotomy in the context of the professions, the panel instead invokes our decisions in *National Association for the Advancement of Psychoanalysis v. California Board of Psychology ("NAAP")*, 228 F.3d 1043 (9th Cir.2000), and *Conant v. Walters*, 309 F.3d 629 (9th Cir.2002), as well as scattered citations of non-authoritative cases. Supreme Court precedent, however, as well as *NAAP* and *Conant* themselves, do not dictate such conclusion—rather, they counsel against it.

A

NAAP confronted the question whether California may regulate the psychoanalytical professions at all. We concluded, indeed, that psychoanalysts, simply by dint of theirs being the "talking cure," do not receive "*special* First Amendment protection." See *NAAP*, 228 F.3d at 1054 (emphasis added). But such statement does not in any way support the novel principle, ***1219** discerned by the panel, that such "talk therapy" receives *no First Amendment protection at all.* In fact *NAAP* explicitly affirmed that the "communication that occurs during psychoanalysis is entitled to constitutional protection," even if it "is not immune from regulation." *Id.* Although the panel implies otherwise, *NAAP* did not hold that psychotherapy administered solely through the spoken word constitutes wholly unprotected speech.[7] Rather we stated in *NAAP* that mental health professionals do not lose all of their First Amendment immunities once their counseling sessions begin.[8]

B

Conant likewise offers no *terra firma* for the panel's unprecedented distinction. In that case, the Ninth Circuit invalidated a Federal regulation that prohibited physicians from recommending medicinal marijuana to their patients. In so doing, we affirmed that doctors' speech to their patients "may be entitled to the strongest protection our Constitution has to offer." *Conant*, 309 F.3d at 637 (internal quotation marks omitted). *Conant* furthermore explained that *NAAP* stated that "communication that occurs during psychoanalysis is entitled to First Amendment protection" and summarized its holding that the regulation at issue in that case passed muster because the "content-neutral" law "did not attempt to dictate the content of what is said in therapy and did not prevent licensed therapists from utilizing particular psycho-analytical methods." *Id.* (internal quotation marks omitted). On its face, this language from *Conant* seems to apply more directly and more strongly to SB 1172 than to the Federal restriction considered in that case. Indeed, SB 1172 explicitly bans speech with a certain content or uttered with a certain intent, and unequivocally prohibits not only "particular psycho-analytical methods" but also particular purposes that both doctor and patient may have for preferring such methods.

The panel, however, claims to find support for its conduct/speech distinction in *Conant's* contrast of *recommending* medicinal marijuana with actually *prescribing* the controlled substance. *See id.* at 635. Because SB 1172 purportedly permits professionals freely to discuss change efforts with—and even recommend change efforts to—their patients, but simply forbids them from engaging in change efforts themselves, the panel asserts that the regulation does not fail under *Conant's* logic. *See* amended op. at 38–39. Such a conclusion depends on an analogy between change efforts and "speak[ing] the words necessary to provide or administer the banned drug." *Id.* at 37–38. But by writing a prescription, a physician's words have an independent legal effect: ordinarily, it entitles the patient to a controlled chemical substance he otherwise would have no right to possess. When the State prohibits a doctor from prescribing a drug, it simply

refuses to accord his written ***1220** words this additional legal significance.[9] Rather, like the regulation challenged and invalidated in *Conant,* SB 1172 prohibits the doctor from speaking to his patient with certain words and in a certain way.[10]

C

Perhaps what really shapes the panel's reasoning in these cases is not the principles supposedly distilled from the case law, but rather problematic and potentially unavoidable implications of an alternative conclusion. By subjecting SB 1172 to any First Amendment scrutiny at all, the panel may fear it will open Pandora's box: heretofore uncontroversial professional regulations proscribing negligent, incompetent, or harmful advice will now attract meritless challenges merely on the basis that such provisions prohibit speech.

Alluding to these concerns, the panel notes that "doctors are routinely held liable for giving negligent medical advice to their patients, without serious suggestion that the First Amendment protects their right to give advice that is not consistent with the accepted standard of care." Amended op. at 36. But the panel nevertheless fails to develop this argument, and cites no authoritative precedent that protects such regulations from First Amendment scrutiny. In the first place, *Humanitarian Law Project* has effectively neutralized this ground of reasoning. The material-support statute in that case attempted, with respect to those plaintiffs, just what SB 1172 proposes to do to Drs. Welch and Pickup: prohibit the provision of certain professional services delivered solely through speech. The statute in *Humanitarian Law Project* survived—but it did not escape—First Amendment scrutiny.

Subjecting regulations of professionals' speech to *some* degree of scrutiny under the First Amendment indeed does not necessarily call their legitimacy into question. But perhaps the panel's common sense ***1221** would afford more deferential treatment to such traditional regulations as, for example, the ethical rules forbidding attorneys from divulging client confidences. Accordingly, the panel intimates a potentially broad exception to the First Amendment for certain categories of speech. The Supreme Court, however, has clearly warned us inferior courts against arrogating to ourselves "any 'freewheeling authority to declare new categories of speech outside the scope of the First Amendment.' " *United States v. Alvarez,* — U.S. —, 132 S.Ct. 2537, 2547, 183 L.Ed.2d 574 (2012) (quoting *United States v. Stevens,* 559 U.S. 460, 472, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010)).[11] The panel cites no case holding that speech, uttered by professionals to their clients, does not actually constitute "speech" for purposes of the First Amendment. And that should not surprise us—for the Supreme Court has not recognized such a category.[12]

III

The Supreme Court has chastened us lower courts for creating, out of whole cloth, new categories of speech to which the First Amendment does not apply. But, that is exactly what the panel's opinion accomplishes in this case, concealing its achievement by casually characterizing the communications prohibited by SB 1172 as nonexpressive conduct. Of course, this begs the question. The panel provides no authority to support its broad intimations that the words spoken by therapists and social workers, if they fall within the statutory language of SB 1172, should receive no protection at all from the First Amendment.

The regulation at issue may very well constitute a valid exercise of California's police power: I take no view as to the merits of SB 1172, either as a matter of policy or on the question whether it would withstand strict or some intermediate level of scrutiny. But as to the threshold issue —may California remove from the First Amendment's ambit the speech of certain professionals when the State disfavors its content or its purpose?—the Supreme Court has definitively and unquestionably said "No." It is no longer within our discretion to disagree.

For the foregoing reasons I respectfully dissent from the court's decision not to rehear these cases en banc.

OPINION

GRABER, Circuit Judge:

The California legislature enacted Senate Bill 1172 to ban state-licensed mental health providers from engaging in "sexual orientation change efforts" ("SOCE") with patients under 18 years of age. Two groups of plaintiffs

sought to enjoin enforcement of the law, arguing that SB 1172 violates the First Amendment and infringes on several other constitutional rights.

In *Welch v. Brown,* No. 13–15023, the district court ruled that Plaintiffs were likely to succeed on the merits of their ***1222** First Amendment claim and that the balance of the other preliminary-injunction factors tipped in their favor; thus, the court granted a preliminary injunction. In *Pickup v. Brown,* No. 12–17681, the district court ruled that Plaintiffs were unlikely to succeed on the merits of any of their claims and denied preliminary relief. The losing parties timely appealed. We address both appeals in this opinion.

[1] Although we generally review for abuse of discretion a district court's decision to grant or deny a preliminary injunction, we may undertake plenary review of the issues if a district court's ruling " 'rests solely on a premise as to the applicable rule of law, and the facts are established or of no controlling relevance.' " *Gorbach v. Reno,* 219 F.3d 1087, 1091 (9th Cir.2000) (en banc) (quoting *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists,* 476 U.S. 747, 755–57, 106 S.Ct. 2169, 90 L.Ed.2d 779 (1986)). Because those conditions are met here, we undertake plenary review and hold that SB 1172, as a regulation of professional conduct, does not violate the free speech rights of SOCE practitioners or minor patients, is neither vague nor overbroad, and does not violate parents' fundamental rights. Accordingly, we reverse the order granting preliminary relief in *Welch* and affirm the denial of preliminary relief in *Pickup.*

FACTUAL AND PROCEDURAL BACKGROUND

A. *Sexual Orientation Change Efforts ("SOCE")*

SOCE, sometimes called reparative or conversion therapy, began at a time when the medical and psychological community considered homosexuality an illness. SOCE encompasses a variety of methods, including both aversive and non-aversive treatments, that share the goal of changing an individual's sexual orientation from homosexual to heterosexual. 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. Today, some non-aversive treatments use assertiveness and affection training with physical and social reinforcement to increase other-sex sexual behaviors. Other non-aversive treatments attempt "to change gay men's and lesbians' thought patterns by reframing desires, redirecting thoughts, or using hypnosis, with the goal of changing sexual arousal, behavior, and orientation." American Psychological Association, *Appropriate Therapeutic Responses to Sexual Orientation* 22 (2009). The plaintiff mental health providers in these cases use only non-aversive treatments.

In 1973, homosexuality was removed from the Diagnostic and Statistical Manual of Mental Disorders. Shortly thereafter the American Psychological Association declared that homosexuality is not an illness. Other major mental health associations followed suit. Subsequently, many mental health providers began questioning and rejecting the efficacy and appropriateness of SOCE therapy. Currently, mainstream mental health professional associations support affirmative therapeutic approaches to sexual orientation that focus on coping with the effects of stress and stigma. But a small number of mental health providers continue to practice, and advocate for, SOCE therapy.

B. *Senate Bill 1172*

Senate Bill 1172 defines SOCE as "any practices by mental health providers [1] that seek to change an individual's sexual orientation[[[***1223** [1] ... includ[ing] efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." Cal. Bus. & Prof.Code § 865(b)(1). SOCE, however,

> does not include psychotherapies that: (A) provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and (B) do not seek to change sexual orientation.

Id. § 865(b)(2). A licensed mental health provider's use of SOCE on a patient under 18 years of age is "considered unprofessional conduct," which will subject that provider to "discipline by the licensing entity for that mental health provider." *Id.* § 865.2. Importantly, SB 1172 does *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

Instead, SB 1172 does just one thing: it requires licensed mental health providers in California who wish to engage in "practices ... that seek to change a [minor's] sexual orientation" either to wait until the minor turns 18 or be subject to professional discipline. Thus, SB 1172 regulates the provision of mental treatment, but leaves mental health providers free to discuss or recommend treatment and to express their views on any topic.

The legislature's stated purpose in enacting SB 1172 was to "protect[ ] the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and [to] protect[ ] its minors against exposure to serious harms caused by sexual orientation change efforts." 2012 Cal. Legis. Serv. ch. 835, § 1(n). The legislature relied on the well-documented, prevailing opinion of the medical and psychological community that SOCE has not been shown to be effective and that it creates a potential risk of serious harm to those who experience it. Specifically, the legislature relied on position statements, ***1224** articles, and reports published by the following organizations: the American Psychological Association, the American Psychiatric Association, the American School Counselor Association, the American Academy of Pediatrics, the American Medical Association, the National Association of Social Workers, the American Counseling Association, the American Psychoanalytic Association, the American Academy of Child and Adolescent Psychiatry, and the Pan American Health Organization.

In particular, the legislature relied on a report created by a Task Force of the American Psychological Association. That report resulted from a systematic review of the scientific literature on SOCE. Methodological problems with some of the reviewed studies limited the conclusions that the Task Force could draw. Nevertheless, the report concluded that SOCE practitioners have not demonstrated the efficacy of SOCE and that anecdotal reports of harm raise serious concerns about the safety of SOCE.

C. *Procedural History*

Plaintiffs in *Welch* include two SOCE practitioners and an aspiring SOCE practitioner. Plaintiffs in *Pickup* include SOCE practitioners, organizations that advocate SOCE, children undergoing SOCE, and their parents. All sought a declaratory judgment that SB 1172 is unconstitutional and asked for injunctive relief to prohibit enforcement of the law.[2]

In *Welch,* Plaintiffs moved for preliminary injunctive relief, arguing that SB 1172 violates their free speech and privacy rights. They also argued that the law violates the religion clauses and is unconstitutionally vague and overbroad under the First Amendment.

[2] The *Welch* court held that SB 1172 is subject to strict scrutiny because it would restrict the content of speech and suppress the expression of particular viewpoints. It reasoned that the fact that the law is a professional regulation does not change the level of scrutiny. The court granted preliminary relief because it determined that the state was unlikely to satisfy strict scrutiny, Plaintiffs would suffer irreparable harm in the absence of an injunction, the balance of the equities tipped in their favor, and the injunction was in the public interest. Because the district court granted relief on their free speech claim, it did not reach Plaintiffs' other constitutional challenges.[3]

***1225** In *Pickup,* Plaintiffs moved for preliminary injunctive relief, arguing that SB 1172 violates the First and Fourteenth Amendments by infringing on SOCE practitioners' right to free speech, minors' right to receive information, and parents' right to direct the upbringing

of their children. They also argued that SB 1172 is unconstitutionally vague.

The *Pickup* court denied Plaintiffs' motion because it determined that they were unlikely to prevail on the merits of any of their claims. It reasoned that, because the plain text of SB 1172 bars only treatment, but not discussions about treatment, the law regulates primarily conduct rather than speech. Applying the rational basis test, the court ruled that Plaintiffs were unlikely to show a violation of the SOCE practitioners' free speech rights or the minors' right to receive information. As for vagueness, the court ruled that the text of the statute is clear enough to put mental health providers on notice of what is prohibited. Finally, the court ruled that SB 1172 does not implicate parents' right to control the upbringing of their children because that right does not encompass the right to choose a specific mental health treatment that the state has reasonably deemed harmful to minors.

DISCUSSION

A. Free Speech Rights

[3] At the outset, we must decide whether the First Amendment requires heightened scrutiny of SB 1172. As explained below, we hold that it does not.

The first step in our analysis is to determine whether SB 1172 is a regulation of conduct or speech. "[W]ords can in some circumstances violate laws directed not against speech but against conduct...." *R.A. V. v. City of St. Paul,* 505 U.S. 377, 389, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). "Congress, for example, can prohibit employers from discriminating in hiring on the basis of race. The fact that this will require an employer to take down a sign reading 'White Applicants Only' hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct." *Rumsfeld v. Forum for Academic & Institutional Rights, Inc. ("FAIR II"),* 547 U.S. 47, 62, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006). The Supreme Court has made clear that First Amendment protection does not apply to conduct that is not "inherently expressive." *Id.* at 66, 126 S.Ct. 1297. In identifying whether SB 1172 regulates conduct or speech, two of our cases guide our decision: *National Association for the Advancement of Psychoanalysis v. California Board of Psychology ("NAAP"),* 228 F.3d 1043 (9th Cir.2000), and *Conant v. Walters,* 309 F.3d 629 (9th Cir.2002).

In *NAAP,* 228 F.3d at 1053, psychoanalysts who were not licensed in California brought a First Amendment challenge to California's licensing scheme for mental health providers. The licensing scheme required that persons who provide psychological services to the public for a fee obtain a license, which in turn required particular educational and experiential credentials. *Id.* at 1047. The plaintiffs alleged that the licensing scheme violated their First Amendment right to freedom of speech because the license examination tested only certain psychological theories and required certain training; plaintiffs had studied and trained under different psychoanalytic theories. *Id.* at 1055. We were equivocal about whether, and to what extent, the licensing scheme in *NAAP* implicated any free speech concerns. ***1226** *Id.* at 1053 ("We conclude that, *even if* a speech interest is implicated, California's licensing scheme passes First Amendment scrutiny." (emphasis added)); *id.* at 1056 ("Although some speech interest *may be* implicated, California's content-neutral mental health licensing scheme is a valid exercise of its police power...." (emphasis added)). We reasoned that prohibitions of conduct have " 'never been deemed an abridgement of freedom of speech ... merely because the conduct was in part initiated, evidenced, or carried out by means of language.' " *See id.* at 1053 (ellipsis in original) (quoting *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 502, 69 S.Ct. 684, 93 L.Ed. 834 (1949)). And, importantly, we specifically rejected the argument that "because psychoanalysis is the 'talking cure,' it deserves special First Amendment protection because it is 'pure speech.' " *Id.* at 1054. We 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." *Id.* (internal quotation marks and ellipsis omitted).

Nevertheless, we concluded that the "communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation." *Id.* But we 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. Given California's strong interest in regulating mental health, we held that the licensing scheme at issue in *NAAP* was a valid exercise of its police power. *Id.* at 1054–55.

We went on to conclude that, even if the licensing scheme in *NAAP* regulated speech, it did not trigger strict scrutiny because it was both content neutral and viewpoint neutral. *Id.* at 1055. We reasoned that the licensing laws did not "dictate what can be said between psychologists and patients during treatment." *Id.* Further, we observed that those laws were "not adopted because of any disagreement with psychoanalytical theories" but for "the important purpose of protecting public health, safety, and welfare." *Id.* at 1056 (internal quotation marks omitted). We again concluded that the laws were a valid exercise of California's police power. *Id.*

In *Conant,* 309 F.3d at 633–34, we affirmed a district court's order granting a permanent injunction that prevented the federal government from revoking a doctor's DEA registration or initiating an investigation if he or she recommended medical marijuana. The federal government had adopted a policy that a doctor's "recommendation" of marijuana would lead to revocation of his or her license. *Id.* at 632. But the government was "unable to articulate exactly what speech [the policy] proscribed, describing it only in terms of speech the patient believes to be a recommendation of marijuana." *Id.* at 639. Nevertheless, the demarcation between conduct and speech in *Conant* was clear. The policy prohibited doctors from *prescribing* or *distributing* marijuana, and neither we nor the parties disputed the government's authority to prohibit doctors from *treating* patients with marijuana. *Id.* at 632, 635–36. Further, the parties agreed that "revocation of a license was not authorized where a doctor *merely discussed* the pros and cons of marijuana use." *Id.* at 634 (emphasis added).

We ruled that the policy against merely "recommending" marijuana was both content- and viewpoint-based. *Id.* at 637. It was content-based because it covered only doctor-patient speech "that include[d] discussions ***1227** of the medical use of marijuana," and it was viewpoint-based because it "condemn[ed] expression of a particular viewpoint, i.e., that medical marijuana would likely help a specific patient." *Id.* We held that the policy did not withstand heightened First Amendment scrutiny because it lacked "the requisite narrow specificity" and left "doctors and patients no security for free discussion." *Id.* at 639 (internal quotation marks omitted).

[4] **[5]** **[6]** We distill the following relevant principles from *NAAP* and *Conant*: (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.

Because those principles, standing alone, do not tell us whether or how the First Amendment applies to the regulation of specific mental health treatments, we must go on to consider more generally the First Amendment rights of professionals, such as doctors and mental health providers. In determining whether SB 1172 is a regulation of speech or conduct, we find it helpful to view this issue along a continuum.

[7] At one end of the continuum, where a professional is engaged in a public dialogue, First Amendment protection is at its greatest. Thus, for example, a doctor who publicly advocates a treatment that the medical establishment considers outside the mainstream, or even dangerous, is entitled to robust protection under the First Amendment —just as any person is—even though the state has the power to regulate medicine. *See Lowe v. SEC,* 472 U.S. 181, 232, 105 S.Ct. 2557, 86 L.Ed.2d 130 (1985) (White, J., concurring) ("Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that 'Congress shall make no law ... abridging the freedom of speech, or of the press.' "); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech,* 2007 U. Ill. L.Rev. 939, 949 (2007) ("When a physician speaks to the public, his opinions cannot be censored and suppressed, even if they are at odds with preponderant opinion within the medical establishment."); *cf. Bailey v. Huggins Diagnostic & Rehab. Ctr., Inc.,* 952 P.2d 768, 773 (Colo.Ct.App.1997) (holding that the First Amendment does not permit a court to hold a dentist liable for statements published in a book or made

during a news program, even when those statements are contrary to the opinion of the medical establishment). That principle makes sense because communicating to the *public* on matters of *public concern* lies at the core of First Amendment values. *See, e.g., Snyder v. Phelps,* —— U.S. ——, 131 S.Ct. 1207, 1215, 179 L.Ed.2d 172 (2011) ("Speech on matters of public concern is at the heart of the First Amendment's protection." (internal quotation markets, brackets, and ellipsis omitted)). Thus, outside the doctor-patient relationship, doctors are constitutionally equivalent to soapbox orators and pamphleteers, and ***1228** their speech receives robust protection under the First Amendment.

At the midpoint of the continuum, within the confines of a professional relationship, First Amendment protection of a professional's speech is somewhat diminished. For example, in *Planned Parenthood of Southeastern Pennsylvania v. Casey,* 505 U.S. 833, 884, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), the plurality upheld a requirement that doctors disclose truthful, nonmisleading information to patients about certain risks of abortion:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, *subject to reasonable licensing and regulation by the State.* We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.[4]

(Citations omitted; emphasis added.) Outside the professional relationship, such a requirement would almost certainly be considered impermissible compelled speech. *Cf. Wooley v. Maynard,* 430 U.S. 705, 717, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977) (holding that a state could not require a person to display the state motto on his or her license plate).

[8] **[9]** Moreover, doctors are routinely held liable for giving negligent medical advice to their patients, without serious suggestion that the First Amendment protects their right to give advice that is not consistent with the accepted standard of care. A doctor "may not counsel a patient to rely on quack medicine. The First Amendment would not prohibit the doctor's loss of license for doing so." *Conant v. McCaffrey,* No. C 97–00139 WHA, 2000 WL 1281174, at *13 (N.D.Cal. Sept. 7, 2000) (order) (unpublished); *see also Shea v. Bd. of Med. Exam'rs,* 81 Cal.App.3d 564, 146 Cal.Rptr. 653, 662 (1978) ("The state's obligation and power to protect its citizens by regulation of the professional conduct of its health practitioners is well settled.... [T]he First Amendment ... does not insulate the verbal charlatan from responsibility for his conduct; nor does it impede the State in the proper exercise of its regulatory functions." (citations omitted)); *cf.* Post, 2007 U. Ill. L.Rev. at 949 ("[W]hen a physician speaks to a patient in the course of medical treatment, his opinions are normally regulated on the theory that they are inseparable from the practice of medicine."). And a lawyer may be disciplined for divulging confidences of his client, even though such disclosure is pure speech. *See, e.g., In re Isaacson,* State Bar Court of California, Case No. 08–O–10684, 2012 WL 6589666, at *4–5 (Dec. 6, 2012) (unpublished) (noting prior suspension of bar license for failure to preserve client confidences). Thus, the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it. And that toleration makes sense: When professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate. *Cf. Lowe,* 472 U.S. at 232, 105 S.Ct. 2557 (White, J., concurring) ***1229** ("One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession.").

[10] At the other end of the continuum, and where we conclude that SB 1172 lands, is the regulation of professional *conduct,* where the state's power is great, even though such regulation may have an incidental effect on speech. *See id.* ("Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession."). Most, if not all, medical

and mental health treatments require speech, but that fact does not give rise to a First Amendment claim when the state bans a particular treatment. When a drug is banned, for example, a doctor who treats patients with that drug does not have a First Amendment right to speak the words necessary to provide or administer the banned drug. *Cf. Conant,* 309 F.3d at 634–35 (noting the government's authority to ban prescription of marijuana). Were it otherwise, then any prohibition of a particular medical treatment would raise First Amendment concerns because of its incidental effect on speech. Such an application of the First Amendment would restrict unduly the states' power to regulate licensed professions and would be inconsistent with the principle that "it has never been deemed an abridgement 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, 69 S.Ct. 684.

[11] Senate Bill 1172 regulates conduct. It bans a form of treatment for minors; it does nothing to prevent licensed therapists from discussing the pros and cons of SOCE with their patients. Senate Bill 1172 merely prohibits licensed mental health providers from engaging in SOCE with minors. It is the limited reach of SB 1172 that distinguishes the present cases from *Conant,* in which the government's policy prohibited speech *wholly apart* from the actual provision of treatment. Pursuant to its police power, California has authority to regulate licensed mental health providers' administration of therapies that the legislature has deemed harmful. Under *Giboney,* 336 U.S. at 502, 69 S.Ct. 684, the fact that speech may be used to carry out those therapies does not turn the regulation of conduct into a regulation of speech. In fact, the *Welch* Plaintiffs concede that the state has the power to ban aversive types of SOCE. And we reject the position of the *Pickup* Plaintiffs—asserted during oral argument—that even a ban on aversive types of SOCE requires heightened scrutiny because of the incidental effect on speech.[5] Here, unlike in *Conant,* 309 F.3d at 639, the law *allows* discussions about treatment, recommendations to obtain treatment, and expressions of opinions about SOCE and homosexuality.

Plaintiffs contend that *Holder v. Humanitarian Law Project,* 561 U.S. 1, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010), supports their position. It does not.

As we have explained, SB 1172 regulates only (1) therapeutic treatment, not expressive speech, by (2) licensed mental health professionals acting within the confines of *1230 the counselor-client relationship. The statute does not restrain Plaintiffs from imparting information or disseminating opinions; the regulated activities are therapeutic, not symbolic. And an act that "symbolizes nothing," even if employing language, is not "an act of communication" that transforms conduct into First Amendment speech. *Nev. Comm'n on Ethics v. Carrigan,* — U.S. ——, 131 S.Ct. 2343, 2350, 180 L.Ed.2d 150 (2011). Indeed, it is well recognized that a state enjoys considerable latitude to regulate the conduct of its licensed health care professionals in administering treatment. *See, e.g., Gonzales v. Carhart,* 550 U.S. 124, 157, 127 S.Ct. 1610, 167 L.Ed.2d 480 (2007) ("Under our precedents it is clear the State has a significant role to play in regulating the medical profession.").

In sharp contrast, *Humanitarian Law Project* pertains to a different issue entirely: the regulation of (1) political speech (2) by ordinary citizens. The plaintiffs there sought to communicate information about international law and advocacy to a designated terrorist organization. The federal statute at issue barred them from doing so, because it considered the plaintiffs' expression to be material support to terrorists. As the Supreme Court held, the material support statute triggered rigorous First Amendment review because, even if that statute "*generally* functions as a regulation of conduct ... as applied to plaintiffs the conduct triggering coverage under the statute consists of *communicating a message.*" *Humanitarian Law Project,* 130 S.Ct. at 2724 (second emphasis added).[6] Again, SB 1172 does not prohibit Plaintiffs from "communicating a message." *Id.* It is a state regulation governing the conduct of state-licensed professionals, and it does not pertain to communication in the public sphere. Plaintiffs may express their views to anyone, including minor patients and their parents, about any subject, including SOCE, insofar as SB 1172 is concerned. The *only* thing that a licensed professional cannot do is avoid professional discipline for *practicing* SOCE on a minor patient.

This case is more akin to *FAIR II.* There, the Supreme Court emphasized that it "extended First Amendment protection only to conduct that is *inherently expressive.*" 547 U.S. at 66, 126 S.Ct. 1297 (emphasis added). The Court upheld the Solomon Amendment, which

conditioned federal funding for institutions of higher education on their offering military recruiters the same access to campus and students that they provided to nonmilitary recruiters. The Court held that the statute did not implicate First Amendment scrutiny, even as applied to law schools seeking to express disagreement with military policy by limiting military recruiters' access, reasoning that the law schools' "actions were expressive only because the law schools accompanied their conduct with speech explaining it." *Id.* at 51, 66, 126 S.Ct. 1297. Like the conduct at issue in *FAIR II*, the administration of psychotherapy is not "inherently expressive." Nor does SB 1172 prohibit any speech, either in favor of or in opposition to SOCE, that might accompany mental health treatment. Because SB 1172 regulates a professional practice that is not inherently expressive, it does not implicate the First Amendment.

We further conclude that the First Amendment does not prevent a state from regulating treatment even when that treatment is performed through speech alone. ***1231** As we have already held in *NAAP*, talk therapy does not receive special First Amendment protection merely because it is administered through speech. 228 F.3d at 1054. That holding rested on the understanding of talk therapy as "the *treatment* of emotional suffering and depression, *not* speech." *Id.* (internal quotation marks omitted) (first emphasis added). Thus, under *NAAP*, to the extent that talk therapy implicates speech, it stands on the same First Amendment footing as other forms of medical or mental health treatment. Senate Bill 1172 is subject to deferential review just as are other regulations of the practice of medicine.

Our conclusion is consistent with *NAAP* 's statement that "communication that occurs during psychoanalysis is entitled to constitutional protection, but it is not immune from regulation." *Id.* Certainly, under *Conant*, content- or viewpoint-based regulation of communication *about* treatment must be closely scrutinized. But a regulation of only *treatment itself*—whether physical medicine or mental health treatment—implicates free speech interests only incidentally, if at all. To read *NAAP* otherwise would contradict its holding that talk therapy is not entitled to "special First Amendment protection," and it would, in fact, make talk therapy virtually "immune from regulation." *Id.*

Nor does *NAAP* 's discussion of content and viewpoint discrimination change our conclusion. There, we used both a belt and suspenders. In addition to holding that the licensing scheme at issue was a permissible regulation of conduct, we reasoned that *even if* California's licensing requirements implicated First Amendment interests, the requirements did not discriminate on the basis of content or viewpoint. *Id.* at 1053, 1055–56. But here, SB 1172 regulates only treatment, and nothing in *NAAP* requires us to analyze a regulation of treatment in terms of content and viewpoint discrimination. [7]

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 bears a rational relationship to a legitimate state interest. *See Casey*, 505 U.S. at 884, 967–68, 112 S.Ct. 2791 (a plurality of three justices, plus four additional justices concurring in part and dissenting in part, applied a reasonableness standard to the regulation of medicine where speech may be implicated incidentally).

According to the statute, SB 1172 advances California's interest in "protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual and transgender youth, and in protecting its minors against exposure to serious harms caused by sexual orientation change efforts." 2012 Cal. Legis. Serv. ch. 835, § 1(n). Without a doubt, protecting the well-being of minors is a legitimate state interest. And we need not decide whether SOCE actually causes "serious harms"; it is enough that it could "reasonably be conceived to be true by the governmental decisionmaker." *NAAP*, 228 F.3d at 1050 (internal quotation marks omitted).

[12] The record demonstrates that the legislature acted rationally when it decided to protect the well-being of minors by prohibiting mental health providers from using ***1232** SOCE on persons under 18. [8] The legislature relied on the report of the Task Force of the American Psychological Association, which concluded that SOCE has not been demonstrated to be effective and that there have been anecdotal reports of harm, including depression, suicidal thoughts or actions, and substance abuse. The legislature also relied on the opinions of many other professional organizations. Each of those

organizations opposed the use of SOCE, concluding, among other things, that homosexuality is not an illness and does not require treatment (American School Counselor Association), SOCE therapy can provoke guilt and anxiety (American Academy of Pediatrics), it may be harmful (National Association of Social Workers), and it may contribute to an enduring sense of stigma and self-criticism (American Psychoanalytic Association). Although the legislature also had before it some evidence that SOCE is safe and effective, the overwhelming consensus was that SOCE was harmful and ineffective. On this record, we have no trouble concluding that the legislature acted rationally by relying on that consensus.

Plaintiffs argue that the legislature acted irrationally when it banned SOCE for minors because there is a lack of scientifically credible proof of harm. But, under rational basis review, "[w]e ask only whether there are plausible reasons for [the legislature's] action, and if there are, our inquiry is at an end." *Romero–Ochoa v. Holder*, 712 F.3d 1328, 1331 (9th Cir.2013) (internal quotation marks omitted).

Therefore, we hold that SB 1172 is rationally related to the legitimate government interest of protecting the well-being of minors.[9]

B. *Expressive Association*

[13] We also reject the *Pickup* Plaintiffs' argument that SB 1172 implicates their right to freedom of association because the First Amendment protects their "choices to enter into and maintain the intimate human relationships between counselors and clients."[10]

First, SB 1172 does not prevent mental health providers and clients from entering into and maintaining therapeutic relationships. It prohibits only "practices ... that seek to change [a minor] individual's sexual orientation." Cal. Bus. & Prof.Code § 865(b)(1). Therapists are free, but not obligated, to provide therapeutic services, ***1233** as long as they do not "seek to change [the] sexual orientation" of minor clients.

[14] **[15]** Moreover, the therapist-client relationship is not the type of relationship that the freedom of association has been held to protect. The Supreme Court's decisions "have referred to constitutionally protected 'freedom of association' in two distinct senses." *Roberts v. U.S. Jaycees*, 468 U.S. 609, 617, 104 S.Ct. 3244, 82 L.Ed.2d 462 (1984). The first type of protected association concerns "intimate human relationships," which are implicated in personal decisions about marriage, childbirth, raising children, cohabiting with relatives, and the like. *Id.* at 617–19, 104 S.Ct. 3244. That type of freedom of association "receives protection as a fundamental element of personal liberty." *Id.* at 618, 104 S.Ct. 3244. The second type protects association "for the purpose of engaging in those activities protected by the First Amendment—speech, assembly, petition for the redress of grievances, and the exercise of religion." *Id.* at 618, 104 S.Ct. 3244. Plaintiffs in *Pickup* claim an infringement of only the first type of freedom of association.

[16] Although we have not specifically addressed the therapist-client relationship in terms of freedom of association, we have explained why the therapist-client relationship is not protected by the Due Process Clause of the Fourteenth Amendment: "The relationship between a client and psychoanalyst lasts only as long as the client is willing to pay the fee. Even if analysts and clients meet regularly and clients reveal secrets and emotional thoughts to their analysts, these relationships simply do not rise to the level of a fundamental right." *NAAP*, 228 F.3d at 1050 (internal quotation marks and citation omitted). Because the type of associational protection that the *Pickup* Plaintiffs claim is rooted in "personal liberty," *U.S. Jaycees*, 468 U.S. at 618, 104 S.Ct. 3244, and because we have already determined that the therapist-client relationship does not "implicate the fundamental rights associated with ... close-knit relationships," *NAAP*, 228 F.3d at 1050, we conclude that the freedom of association also does not encompass the therapist-client relationship.

C. *Vagueness*

[17] We next hold that SB 1172 is not void for vagueness.

[18] **[19]** **[20]** **[21]** **[22]** "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108, 92 S.Ct. 2294, 33 L.Ed.2d 222 (1972). Nevertheless, "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, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). "[U]ncertainty at a statute's margins will not warrant facial invalidation if it is clear what the statute proscribes

'in the vast majority of its intended applications.' " *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir.2001) (quoting *Hill v. Colorado*, 530 U.S. 703, 733, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000)). "A defendant is deemed to have fair notice of an offense if a reasonable person of ordinary intelligence would understand that his or her conduct is prohibited by the law in question." *United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir.1994) (internal quotation marks omitted). But, "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 ***1234** other special meaning, well enough known to enable those within its reach to correctly apply them." *Id.* (internal quotation marks omitted).

Although the *Pickup* Plaintiffs argue that they cannot ascertain where the line is between what is prohibited and what is permitted—for example, they wonder whether the mere dissemination of information about SOCE would subject them to discipline—the text of SB 1172 is clear to a reasonable person. Discipline attaches only to "practices" that "seek to change" a minor "patient ['s]" sexual orientation. Cal. Bus. & Prof.Code §§ 865–865.1. A reasonable person would understand the statute to regulate only mental health treatment, including psychotherapy, that aims to alter a minor patient's sexual orientation. Although Plaintiffs present various hypothetical situations to support their vagueness challenge, the Supreme Court has held that "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Hill*, 530 U.S. at 733, 120 S.Ct. 2480 (internal quotation marks omitted).

Moreover, considering that SB 1172 regulates licensed mental health providers, who constitute "a select group of persons having specialized knowledge," the standard for clarity is lower. *Weitzenhoff*, 35 F.3d at 1289. Indeed, it is hard to understand how therapists who identify themselves as SOCE practitioners can credibly argue that they do not understand what practices qualify as SOCE.

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. In fact, several provisions in the California Code—though not SB 1172 itself—provide a simple definition: "heterosexuality, homosexuality, or bisexuality." Cal. Educ.Code §§ 212.6, 66262.7; Cal. Gov't Code § 12926®; Cal.Penal Code §§ 422.56(h), 11410(b)(7). Moreover, courts have repeatedly rejected vagueness challenges that rest on the term "sexual orientation." *E.g., United States v. Jenkins*, 909 F.Supp.2d 758, 778–79 (E.D.Ky.2012); *Hyman v. City of Louisville*, 132 F.Supp.2d 528, 546 (W.D.Ky.2001), *vacated on other grounds*, 53 Fed.Appx. 740 (6th Cir.2002) (unpublished).

D. *Overbreadth*

[23] We further hold that SB 1172 is not overbroad. [11]

[24] **[25]** **[26]** Overbreadth doctrine permits the facial invalidation of laws that prohibit "a substantial amount of constitutionally protected speech." *City of Houston v. Hill*, 482 U.S. 451, 466, 107 S.Ct. 2502, 96 L.Ed.2d 398 (1987). "[T]he 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, 104 S.Ct. 2118, 80 L.Ed.2d 772 (1984). Rather, "particularly where conduct and not merely speech is involved, ... the overbreadth of a statute must not only be real, but substantial as well, judged in ***1235** relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615, 93 S.Ct. 2908, 37 L.Ed.2d 830 (1973).

Senate Bill 1172's plainly legitimate sweep includes SOCE techniques such as inducing vomiting or paralysis, administering electric shocks, and performing castrations. And, as explained above, it also includes SOCE techniques carried out solely through words. As with any regulation of a particular medical or mental health treatment, there may be an incidental effect on speech. Any incidental effect, however, is small in comparison with the "plainly legitimate sweep" of the law. *Broadrick*, 413 U.S. at 615, 93 S.Ct. 2908.

Thus, SB 1172 is not overbroad.

E. *Parents' Fundamental Rights*

[27] The *Pickup* Plaintiffs also argue that SB 1172 infringes on their fundamental parental right to make important medical decisions for their children. The state does not dispute that parents have a fundamental right to

raise their children as they see fit, but argues that Plaintiffs "cannot compel the State to permit licensed mental health [professionals] to engage in unsafe practices, and cannot dictate the prevailing standard of care in California based on their own views." Because Plaintiffs argue for an affirmative right to access SOCE therapy from licensed mental health providers, the precise question at issue is whether parents' fundamental rights include the right to choose for their children a particular type of provider for a particular medical or mental health treatment that the state has deemed harmful. *See Washington v. Glucksberg*, 521 U.S. 702, 720–21, 117 S.Ct. 2258, 138 L.Ed.2d 772 (1997) (holding that courts should precisely define purported substantive due process rights to direct and restrain exposition of the Due Process Clause).

[28] [29] [30] [31] Parents have a constitutionally protected right to make decisions regarding the care, custody, and control of their children, but that right is "not without limitations." *Fields v. Palmdale Sch. Dist.*, 427 F.3d 1197, 1204 (9th Cir.2005). States may require school attendance and mandatory school uniforms, and they may impose curfew laws applicable only to minors. *See id.* at 1204–05 (collecting cases demonstrating the "wide variety of state actions that intrude upon the liberty interest of parents in controlling the upbringing and education of their children"). In the health arena, states may require the compulsory vaccination of children (subject to some exceptions), *see Prince v. Massachusetts*, 321 U.S. 158, 166, 64 S.Ct. 438, 88 L.Ed. 645 (1944), and states may intervene when a parent refuses necessary medical care for a child, *see Jehovah's Witnesses v. King Cnty. Hosp.*, 278 F.Supp. 488, 504 (W.D.Wash.1967) (three judge panel) (per curiam), *aff'd*, 390 U.S. 598, 88 S.Ct. 1260, 20 L.Ed.2d 158 (1968) (per curiam). "[A] state is not without constitutional control over parental discretion in dealing with children when their physical or mental health is jeopardized." *Parham v. J.R.*, 442 U.S. 584, 603, 99 S.Ct. 2493, 61 L.Ed.2d 101 (1979).

We are unaware of any case that specifically addresses whether a parent's fundamental rights encompass the right to choose for a child a particular type of provider for a particular treatment that the state has deemed harmful, but courts that have considered whether patients have the right to choose specific treatments for *themselves* have concluded that they do not. For example, we have held that "substantive due process rights do not extend to the choice of type of treatment or of a particular health care provider." ***1236** *NAAP*, 228 F.3d at 1050. Thus, we concluded that "there is no fundamental right to choose a mental health professional with specific training." *Id.* The Seventh Circuit has also held that "a patient does not have a constitutional right to obtain a particular type of treatment or to obtain treatment from a particular provider if the government has reasonably prohibited that type of treatment or provider." *Mitchell v. Clayton*, 995 F.2d 772, 775 (7th Cir.1993). Moreover, courts have held that there is no substantive due process right to obtain drugs that the FDA has not approved, *Carnohan v. United States*, 616 F.2d 1120, 1122 (9th Cir.1980) (per curiam), even when those drugs are sought by terminally ill cancer patients, *see Rutherford v. United States*, 616 F.2d 455, 457 (10th Cir.1980) ("It is apparent in the context with which we are here concerned that the decision by the patient whether to have a treatment or not is a protected right, but his selection of a particular treatment, or at least a medication, is within the area of governmental interest in protecting public health."). Those cases cut against recognizing the right that Plaintiffs assert; it would be odd if parents had a substantive due process right to choose specific treatments for their children—treatments that reasonably have been deemed harmful by the state—but not for themselves. It would be all the more anomalous because the Supreme Court has recognized that the state has greater power over children than over adults. *Prince*, 321 U.S. at 170, 64 S.Ct. 438 (stating that "the power of the state to control the conduct of children reaches beyond the scope of its authority over adults").

Further, our decision in *Fields* counsels against recognizing the right that Plaintiffs assert. In that case, parents of school children argued that a school violated their parental rights when it administered to students a survey that contained several questions about sex. *Fields*, 427 F.3d at 1203. We rejected that argument, holding that, although parents have the right to inform their children about sex when and as they choose, they do not have the right to "compel public schools to follow their own idiosyncratic views as to what information the schools may dispense." *Id.* at 1206. Similarly, here, to recognize the right Plaintiffs assert would be to compel the California legislature, in shaping its regulation of mental health providers, to accept Plaintiffs' personal views of what therapy is safe and effective for minors. The aforementioned cases lead us to conclude that the fundamental rights of parents do not include the right to choose a specific type of provider for a specific medical

or mental health treatment that the state has reasonably deemed harmful.

[32] Therefore, SB 1172 does not infringe on the fundamental rights of parents.

CONCLUSION

Senate Bill 1172 survives the constitutional challenges presented here. Accordingly, the order granting preliminary relief in *Welch,* No. 13–15023, is **REVERSED,** and the order denying preliminary relief in *Pickup,* No. 12–17681, is **AFFIRMED.** We remand both cases for further proceedings consistent with this opinion.

All Citations

740 F.3d 1208, 14 Cal. Daily Op. Serv. 985, 2014 Daily Journal D.A.R. 1175

Footnotes

1 According to the statute, "mental health providers" consist not only of the medical doctor and trained psychologist, but also "psychological assistant, intern, or trainee, a licensed marriage and family therapist, a registered marriage and family therapist, intern, or trainee, ... a licensed clinical social worker, an associate clinical social worker, a licensed professional clinical counselor, a registered clinical counselor, intern, or trainee." Cal. Bus. & Prof.Code § 865(a).

2 In surveying the history of "sexual orientation change efforts," the panel also catalogues various "aversive" treatments, some barbaric and many archaic, employed by psychologists of a bygone era. *See* amended op. at 23–24. Such anachronisms are not at issue here.

3 Undoubtedly the State possesses an important interest in regulating the professions in the interest of public health, safety, and morals; but presumably the governmental interest in proscribing criminal activity, and especially support of terrorism, is similarly substantial—if not more so. Yet the Supreme Court declined to declare speech uttered in just such a context as categorically outside of the First Amendment's protections.

4 The panel's reliance on the Supreme Court's opinion in *Rumsfeld v. Forum for Academic & Institutional Rights ("FAIR II"),* 547 U.S. 47, 126 S.Ct. 1297, 164 L.Ed.2d 156 (2006), consequently, begs the question. *See* amended op. at 40. That case "extended First Amendment protection only to conduct that is inherently expressive," *id.* at 66, 126 S.Ct. 1297; but the panel's insufficiently grounded assertion that change efforts constitute "conduct" is precisely what is at issue. *FAIR II* would only control if the panel first correctly determined that change efforts comprise not speech but conduct for the purposes of the First Amendment—a determination that, on these facts, *Humanitarian Law Project* forecloses.

5 The panel places professionals' free-speech rights along a "continuum," on one end of which, "where a professional is engaged in a public dialogue," he enjoys extensive protections under the First Amendment. And, "[a]t the midpoint of the continuum, ... First Amendment protection ... is somewhat diminished" but apparently not obliterated. *See* amended op. at 34–37.

6 *See, e.g., Fla. Bar v. Went For It, Inc.,* 515 U.S. 618, 622–24, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) (applying the First Amendment to state bar rules forbidding certain direct attorney advertising); *Edenfield v. Fane,* 507 U.S. 761, 765–67, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (applying the First Amendment to state professional regulation of accountants); *Ohralik v. Ohio St. Bar Ass'n,* 436 U.S. 447, 454–59, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978) (applying a balancing test under the First Amendment to state professional regulation that prohibited attorney in-person solicitation); *Bates v. St. Bar of Ariz.,* 433 U.S. 350, 363–66, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) (applying First Amendment to state professional regulation that prohibited attorney advertising); *Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council,* 425 U.S. 748, 758–61, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1975) (applying First Amendment to state professional regulation that prohibited pharmacists from advertising prices).

Most precedents addressing the application of the First Amendment to professional regulations have occurred in the context of rules against advertising. The Supreme Court has subjected such "commercial speech" to a lower degree of scrutiny under the First Amendment than classical political expression, respecting the state's traditional "power to regulate commercial activity deemed harmful." *Ohralik,* 436 U.S. at 456, 98 S.Ct. 1912. Unlike advertising—or the "exchange of information about securities, corporate proxy statements, the exchange of price and production information, and employers' threats of retaliation for the labor activities of employees," *id.*—change efforts do not have a necessarily commercial focus. Indeed, SB 1172 does not simply prohibit licensed practitioners from engaging in change

efforts for a fee, but subjects them to professional discipline for doing so even absent any commercial relationship—such as, for example, in connection with a church's ministry.

7 Plaintiffs in that case had challenged California's general licensing scheme for certain mental health professionals, which required practitioners to possess certain educational credentials but otherwise did not "dictate what can be said between psychologists and patients during treatment." *NAAP,* 228 F.3d at 1055. Unlike *NAAP,* this case does not involve simply a general licensing scheme or educational requirements, but rather the substantive regulation of the speech uttered between practitioners and patients.

8 It merits repeating here that SB 1172's reach extends much more broadly than the psychoanalytical professions: it also regulates marriage therapists, social workers, and clinical counselors. *See supra* note 4.

9 For a similar reason, the State may also punish a doctor for purporting to prescribe an illegal drug or otherwise writing a prescription he is not qualified or permitted to write. In such a situation, the doctor is attempting fraudulently to arrogate to his writing a legal significance to which it is not entitled. A psychologist or a social worker who undertakes change efforts on his patient, on the other hand, is not investing, or attempting to invest, his words with any legal effect.

10 Although it quotes, word for word, the statutory definition of "mental health provider," amended op. at 25 n.1, the panel finds no problem characterizing as "medical treatment" the services provided by nonmedical professionals such as marriage therapists, social workers, and clinical counselors—all of whom SB 1172 forbids from engaging in change efforts.

The panel emphasizes the "medical" nature of the regulation at issue. It describes change efforts as "therapeutic treatment" and "activities [that] are therapeutic," and classifies change efforts as analogous for relevant purposes alongside medical procedures. *Id.* at 39–40. Although the panel expressly invokes the statutory language when arguing that SB 1172 regulates conduct, it does not attend as closely to the legislative text in attempting to characterize change efforts as "medicine." Indeed, as emphasized above, SB 1172 extends much more broadly than just to the medical or even the psychoanalytical professions. SB 1172 likewise forbids licensed marriage and family therapists as well as social workers, among others, from engaging in change efforts. *See* Cal. Bus. & Prof.Code § 865(a). It strains credulity to depict the counseling services—socially invaluable as they are—provided by marriage counselors and social workers as "medicine" or "treatment." If the panel's presumption that all change efforts, whether administered by doctors and psychologists, or by social workers and marriage counselors, are necessarily "medicine" is based on scientific or other objective technical expertise, they do not say so. For certainly the text of the statute does not suggest, let alone compel, such a broad proclamation.

11 Notwithstanding my vigorous dissent from our court's denial of en banc rehearing, the Supreme Court ratified the *Alvarez* panel's "novel theory that 'we presumptively protect all speech....' " *United States v. Alvarez,* 638 F.3d 666, 679 (9th Cir.2011) (O'Scannlain, J., dissenting from denial of rehearing). We may not reopen now this settled question.

12 Although the panel fears the implications of *overprotecting* professional speech, it does not consider the potential effects of *underprotection.* If a state may freely regulate speech uttered by professionals in the course of their practice without implicating the First Amendment, then targeting disfavored moral and political expression may only be a matter of creative legislative draftsmanship.

1 California Business and Professions Code section 865(a) defines "mental health provider" as

a physician and surgeon specializing in the practice of psychiatry, a psychologist, a psychological assistant, intern, or trainee, a licensed marriage and family therapist, a registered marriage and family therapist, intern, or trainee, a licensed educational psychologist, a credentialed school psychologist, a licensed clinical social worker, an associate clinical social worker, a licensed professional clinical counselor, a registered clinical counselor, intern, or trainee, or any other person designated as a mental health professional under California law or regulation.

2 In *Pickup,* Equality California, an advocacy group for gay rights, sought and received intervenor status to defend SB 1172. *Pickup* Plaintiffs argue that the Supreme Court's recent decision in *Hollingsworth v. Perry,* —— U.S. ——, 133 S.Ct. 2652, 186 L.Ed.2d 768 (2013), means that Equality California does not have standing to defend the statute. We need not resolve that question, however, because the State of California undoubtedly has standing to defend its statute, and "the presence in a suit of even one party with standing suffices to make a claim justiciable." *Brown v. City of Los Angeles,* 521 F.3d 1238, 1240 n. 1 (9th Cir.2008) (per curiam).

3 The *Welch* Plaintiffs' response brief contains a single paragraph asserting that SB 1172 violates the religion clauses of the First Amendment. That paragraph, which cites neither the record nor any case, is part of Plaintiffs' argument that SB 1172 is not narrowly tailored to achieve a compelling government purpose, as required by the Free Speech Clause, because it contains no clergy exemption. The religion claim, however, is not "specifically and distinctly argued," as ordinarily required for us to consider an issue on appeal. *Thompson v. Runnels,* 705 F.3d 1089, 1099–1100 (9th Cir.) (internal quotation marks omitted), *cert. denied,* —— U.S. ——, 134 S.Ct. 234, 187 L.Ed.2d 174 (2013); *see also Maldonado v. Morales,*

556 F.3d 1037, 1048 n. 4 (9th Cir.2009) ("Arguments made in passing and inadequately briefed are waived."). Moreover, although the *Welch* Plaintiffs raised the claim in the district court, the court did not rule on it because it granted relief on their free speech claim. In these circumstances, we decline to address the religion claim. The district court may do so in the first instance.

4 Although the plurality opinion garnered only three votes, four additional justices would have upheld the challenged law in its entirety. *Casey*, 505 U.S. at 944, 112 S.Ct. 2791 (Rehnquist, C.J., concurring in the judgment in part and dissenting in part). Thus, there were seven votes to uphold the disclosure requirement.

5 We do not mean to suggest that any Plaintiff here conducts aversive SOCE therapy. The record shows that Plaintiffs who are licensed mental health providers practice SOCE only through talk therapy. We mention aversive techniques merely to highlight the state's legitimate power to regulate professional conduct.

6 We also note that Plaintiffs here bring a facial, not an as-applied, challenge to SB 1172.

7 We acknowledge that Plaintiffs ask us to apply strict scrutiny, but they have not cited any case in which a court has applied strict scrutiny to the regulation of a medical or mental health treatment. Nor are we aware of any.

8 We need not and do not decide whether the legislature would have acted rationally had it banned SOCE for adults. One could argue that children under the age of 18 are especially vulnerable with respect to sexual identity and that their parents' judgment may be clouded by this emotionally charged issue as well. The considerations with respect to adults may be different.

9 The foregoing discussion relates as well to the *Pickup* Plaintiffs' claim that SB 1172 violates minors' right to receive information. *See Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1027 n. 5 (9th Cir.1998) (recognizing the "well-established rule that the right to receive information is an inherent corollary of the rights of free speech and press").

10 The *Pickup* Plaintiffs arguably waived their expressive association argument by not raising it in the district court. But "the rule of waiver is a discretionary one." *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318, 1322 (9th Cir.2012) (internal quotation marks omitted). We have discretion to address an argument that otherwise would be waived "when the issue presented is purely one of law and either does not depend on the factual record developed below, or the pertinent record has been fully developed." *Id.* (internal quotation marks omitted). Whether SB 1172 violates the right to expressive association is such an issue, and we exercise our discretion to address it.

11 Intervenor Equality California argues that the *Pickup* Plaintiffs waived their overbreadth challenge by failing to raise it adequately in the district court. Although they did not argue overbreadth with specificity, they did allege it in their complaint and in their memorandum in support of preliminary injunctive relief. Moreover, whether the statute is overbroad is a question of law that "does not depend on the factual record developed below." *Ruiz*, 667 F.3d at 1322. Therefore, we exercise our discretion to address Plaintiffs' overbreadth challenge.

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767 F.3d 216
United States Court of Appeals,
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); American Association of Christian Counselors, Appellants
v.
GOVERNOR OF THE STATE OF NEW JERSEY; 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
Garden State Equality (Intervenor in D.C.).

No. 13–4429.
|
Argued July 9, 2014.
|
Filed: Sept. 11, 2014.

Synopsis

Background: Licensed counselors brought action alleging that New Jersey statute prohibiting them from engaging in sexual orientation change efforts (SOCE) therapy with clients under age 18 violated their and their minor clients' First Amendment rights to free speech and free exercise of religion and clients' parents' right to substantive due process. The United States District Court for the District of New Jersey, Freda L. Wolfson, J., 981 F.Supp.2d 296, granted civil rights organization's motion to intervene, and entered summary judgment in state's favor. Counselors appealed.

Holdings: The Court of Appeals, Smith, Circuit Judge, held that:

[1] statute was not subject to strict scrutiny under First Amendment;

[2] statute did not violate counselors' First Amendment free speech rights;

[3] statute was not void for vagueness;

[4] statute was not impermissibly overbroad;

[5] statute did not violate counselors' rights under Free Exercise Clause;

[6] counselors lacked standing to assert claims on clients' behalf; and

[7] district court did not abuse its discretion by permitting organization to intervene.

Affirmed.

West Headnotes (22)

[1] **Constitutional Law**
Health care professions
Health
Validity

Verbal communication that occurs during sexual orientation change efforts (SOCE) counseling is not conduct, but rather is "speech" that enjoys some degree of protection under First Amendment. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[2] **Constitutional Law**
Trade or Business

Licensed professional does not enjoy full protection of First Amendment when speaking as part of practice of her profession based on professional's expert knowledge and judgment, but when professional is speaking to public at large or offering her personal opinion to client, her speech remains entitled

to full scope of protection afforded by First Amendment. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[3] **Constitutional Law**
Health care professions
Health
Validity

Speech occurring as part of sexual orientation change efforts (SOCE) counseling is professional speech that is not entitled to First Amendment's full protection. U.S.C.A. Const.Amend. 1.

8 Cases that cite this headnote

[4] **Constitutional Law**
Trade or Business

Prohibitions of professional speech comply with First Amendment only if they directly advance state's interest in protecting its citizens from harmful or ineffective professional practices and are no more extensive than necessary to serve that interest. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[5] **Constitutional Law**
Content-Based Regulations or Restrictions
Constitutional Law
Strict or exacting scrutiny;compelling interest test

Although content-based regulations are highly disfavored and ordinarily subjected to strict scrutiny under First Amendment, even when law in question regulates unprotected or lesser protected speech, within unprotected or lesser protected categories of speech, statute does not trigger strict scrutiny when basis for content discrimination consists entirely of very reason entire class of speech at issue is proscribable. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[6] **Constitutional Law**
Health care professions

New Jersey statute prohibiting licensed counselors from engaging in sexual orientation change efforts (SOCE) therapy with clients under age 18 was not subject to strict scrutiny under First Amendment, even though it discriminated on basis of content, where legislature has targeted SOCE counseling for prohibition because it was presented with evidence that that particular form of counseling was ineffective and potentially harmful to clients, and statute did not prohibit counselors from expressing their viewpoint that same sex attractions could be reduced or eliminated to client's benefit, only from engaging in professional practice that implicitly communicated that viewpoint. U.S.C.A. Const.Amend. 1; N.J.S.A. 45:1–55.

Cases that cite this headnote

[7] **Constitutional Law**
Health care professions
Health
Validity
Infants
Child protection in general

New Jersey statute prohibiting licensed counselors from engaging in sexual orientation change efforts (SOCE) therapy with clients under age 18 did not violate counselors' First Amendment free speech rights, even though legislature had not obtained conclusive empirical evidence regarding effect of SOCE counseling on minors, where legislative record demonstrated that number of well-known, reputable professional and scientific organizations had publicly condemned practice of SOCE, expressing serious concerns about its potential to inflict harm, and legislature determined that informed consent requirement could not adequately ensure that only those minors that could benefit would agree to move forward. U.S.C.A. Const.Amend. 1; N.J.S.A. 45:1–54, 45:1–55.

Cases that cite this headnote

[8] **Constitutional Law**
Trade or Business

To survive intermediate scrutiny under First Amendment, state regulation that restricts professional speech is not required to employ least restrictive means conceivable, but it must demonstrate narrow tailoring of challenged regulation to asserted interest. U.S.C.A. Const.Amend. 1.

6 Cases that cite this headnote

[9] **Constitutional Law**
Statutes in general

Speculation about statute's possible vagueness in hypothetical situations not before court will not support facial attack on statute when it is surely valid in vast majority of its intended applications.

Cases that cite this headnote

[10] **Constitutional Law**
Mental Health

Health
Validity

Infants
Child protection in general

New Jersey statute prohibiting licensed counselors from engaging in "sexual orientation change efforts" (SOCE) therapy with clients under age 18 was not void for vagueness; statute's list of illustrative examples provided boundaries that were sufficiently clear, counseling designed to change client's sexual orientation was recognized as discrete practice within profession, and term was sufficiently definite in vast majority of its intended applications to those in field of professional counseling. N.J.S.A. 45:1–55.

Cases that cite this headnote

[11] **Constitutional Law**
Substantial impact, necessity of

Statute that impinges upon First Amendment freedoms is impermissibly overbroad if substantial number of its applications are unconstitutional, judged in relation to its plainly legitimate sweep. U.S.C.A. Const.Amend. 1.

Cases that cite this headnote

[12] **Constitutional Law**
Sex in General

Health
Validity

Infants
Child protection in general

New Jersey statute prohibiting licensed counselors from engaging in sexual orientation change efforts (SOCE) therapy with clients under age 18 was not impermissibly overbroad under First Amendment. U.S.C.A. Const.Amend. 1; N.J.S.A. 45:1–55.

2 Cases that cite this headnote

[13] **Constitutional Law**
Neutrality;general applicability

If law is neutral and generally applicable, it will withstand free exercise challenge under First Amendment so long as it is rationally related to legitimate government objective, even if it has incidental effect of burdening particular religious practice or group. U.S.C.A. Const.Amend. 1.

1 Cases that cite this headnote

[14] **Constitutional Law**
Neutrality;general applicability

Law is "neutral," for purposes of determining whether it violates Free Exercise Clause, if it does not target religiously motivated conduct either on its face or as applied in practice. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[15] **Constitutional Law**
Neutrality;general applicability

In determining whether law violates Free Exercise Clause, law fails general applicability requirement if it burdens category of religiously motivated conduct but exempts or does not reach substantial category of conduct that is not religiously motivated and that undermines purposes of law to at least same degree as covered conduct that is religiously motivated. U.S.C.A. Const.Amend. 1.

2 Cases that cite this headnote

[16] **Constitutional Law**
Health Care

Health
Validity

Infants
Child protection in general

New Jersey statute prohibiting licensed counselors from engaging in sexual orientation change efforts (SOCE) therapy with clients under age 18 was neutral and generally applicable, and therefore triggered only rational basis review under Free Exercise Clause, even though it permitted counseling for minors seeking to transition from one gender to another, counseling for minors struggling with or confused about heterosexual attractions, behaviors, or identity, and counseling that facilitated exploration and development of same-sex attractions, behaviors, or identity, and exempted counseling for individuals over 18 and that provided by unlicensed counselors, where there was no evidence that exempted forms of counseling were equally harmful to minors or had anything to do with religion. U.S.C.A. Const.Amend. 1; N.J.S.A. 45:1–55.

2 Cases that cite this headnote

[17] **Constitutional Law**
Health Care

Health
Validity

Infants
Child protection in general

New Jersey statute prohibiting licensed counselors from engaging in sexual orientation change efforts (SOCE) therapy with clients under age 18 was rationally related to legitimate government interest in protecting minors from significant risk of harm, and thus did not violate counselors' rights under Free Exercise Clause, where legislative record demonstrated that number of well-known, reputable professional and scientific organizations had publicly condemned practice of SOCE, expressing serious concerns about its potential to inflict harm. U.S.C.A. Const.Amend. 1; N.J.S.A. 45:1–54, 45:1–55.

Cases that cite this headnote

[18] **Federal Civil Procedure**
Rights of third parties or public

To establish standing, litigant must assert his or her own legal rights and interests, and cannot rest claim to relief on legal rights or interests of third parties.

1 Cases that cite this headnote

[19] **Federal Civil Procedure**
Rights of third parties or public

To establish third-party standing, litigant must demonstrate that (1) she has suffered injury in fact that provides her with sufficiently concrete interest in outcome of issue in dispute; (2) she has close relation to third party; and (3) there exists some hindrance to third party's ability to protect his or her own interests.

2 Cases that cite this headnote

[20] **Constitutional Law**
Occupation, employment, and profession

Constitutional Law

Occupation, employment, and profession

Licensed counselors lacked standing to assert claim that New Jersey statute prohibiting them from engaging in sexual orientation change efforts (SOCE) therapy with clients under age 18 violated their minor clients' First Amendment rights to free speech and free exercise of religion, even if counselors had sufficiently concrete interest in dispute, where there was no evidence that clients were hindered in their ability to bring suit themselves. U.S.C.A. Const.Amend. 1; N.J.S.A. 45:1–54, 45:1–55.

2 Cases that cite this headnote

[21] **Federal Civil Procedure**

Intervention

Intervenor is not required to possess Article III standing to participate in lawsuit. U.S.C.A. Const.Art. 3, § 2, cl. 1; Fed.Rules Civ.Proc.Rule 24, 28 U.S.C.A.

1 Cases that cite this headnote

[22] **Federal Civil Procedure**

Particular Intervenors

District court did not abuse its discretion by permitting civil rights organization to intervene in licensed counselors' action alleging that New Jersey statute prohibiting them from engaging in sexual orientation change efforts (SOCE) therapy with clients under age 18 violated their First Amendment rights to free speech and free exercise of religion, where organization's motion was timely, organization and state shared common legal position that statute did not violate First Amendment, and there was no evidence of prejudice. U.S.C.A. Const.Amend. 1; Fed.Rules Civ.Proc.Rule 24(b), 28 U.S.C.A.; N.J.S.A. 45:1–54, 45:1–55.

Cases that cite this headnote

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Before: SMITH, VANASKIE, and SLOVITER, Circuit Judges.

OPINION

SMITH, Circuit Judge.

A recently enacted statute in New Jersey prohibits licensed counselors from engaging in "sexual orientation change efforts" [1] with a client under the age of 18. Individuals and organizations that seek to provide such counseling filed suit in the United States District Court for the District of New Jersey, challenging this law as a violation of their First Amendment rights to free speech and free exercise

of religion. Plaintiffs also asserted claims on behalf of their minor clients under the First and Fourteenth Amendments. The District Court rejected Plaintiffs' First Amendment claims and held that they lacked standing to bring claims on behalf of their minor clients. Although we disagree with parts of the District Court's analysis, we will affirm.

I.

A.

Plaintiffs are individuals and organizations that provide licensed counseling to minor clients seeking to reduce or eliminate same-sex attractions ("SSA"). Dr. Tara King and Dr. Ronald Newman are New Jersey licensed counselors and founders of Christian counseling centers that ***221** offer counseling on a variety of issues, including sexual orientation change, from a religious perspective. The National Association for Research and Therapy of Homosexuality ("NARTH") and the American Association of Christian Counselors are organizations whose members provide similar licensed counseling in New Jersey.

Plaintiffs describe sexual orientation change efforts ("SOCE") counseling as "talk therapy" that is administered solely through verbal communication. SOCE counselors may begin a session by inquiring into potential "root causes" of homosexual behavior, such as childhood sexual trauma or other developmental issues, such as a distant relationship with the same-sex parent. A counselor might then attempt to effect sexual orientation change by discussing "traditional, gender-appropriate behaviors and characteristics" and how the client can foster and develop these behaviors and characteristics. Many counselors, including Plaintiffs, approach counseling from a "Biblical perspective" and may also integrate Biblical teachings into their sessions. [2]

On August 19, 2013, Governor Christopher J. Christie signed Assembly Bill A3371 ("A3371") into law. [3] A3371 provides:

> a. A person who is licensed to provide professional counseling ... shall not engage in sexual orientation change efforts with a person under 18 years of age.
>
> b. As used in this section, "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; 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 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. Though A3371 does not itself impose any penalties, a licensed counselor who engages in the prohibited "sexual orientation change efforts" may be exposed to professional discipline by the appropriate licensing board. *See* N.J. Stat. Ann. § 45:1–21.

A3371 is accompanied by numerous legislative findings regarding the impact of SOCE counseling on clients seeking sexual orientation change. N.J. Stat. Ann. § 45:1–54. The New Jersey legislature found that "being lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming" and that "major professional associations of mental health practitioners and researchers in the United States have recognized this fact for nearly 40 years." *Id.* The legislature also cited reports, articles, resolutions, and position ***222** statements from reputable mental health organizations opposing therapeutic intervention designed to alter sexual orientation. Many of these sources emphasized that such efforts are ineffective and/or carry a significant risk of harm. According to the legislature, for example, a 2009 report issued by the American Psychological Association ("APA Report") concluded:

> [S]exual 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, increased self-hatred, hostility and blame toward parents, feelings of anger and betrayal, loss of friends and potential romantic partners, problems in sexual and emotional intimacy, sexual dysfunction, high-risk sexual behaviors, a feeling of being dehumanized and untrue to self, a loss of faith, and a sense of having wasted time and resources.

Id.

Finally, the legislature declared that "New Jersey 11 has a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by sexual orientation change efforts." *Id.*

B.

On August 22, 2013, Plaintiffs filed a complaint against various New Jersey executive officials ("State Defendants")[4] in the United States District Court for the District of New Jersey, alleging that A3371 violated their rights to free speech and free exercise of religion under the First and Fourteenth Amendments. The complaint also alleged constitutional claims on behalf of Plaintiffs' minor clients and their parents. Specifically, Plaintiffs claimed that A3371 violated the minor clients' First and Fourteenth Amendment rights to free speech and free exercise of religion and the parents' Fourteenth Amendment right to substantive due process.[5]

The following day, Plaintiffs moved for a Temporary Restraining Order and/or Preliminary Injunction to prevent enforcement of A3371. During a telephone conference with the parties, the District Court denied Plaintiffs' motion for preliminary relief and, at Plaintiffs' request, converted this motion into a motion for summary judgment. On September 6, 2013, Garden State Equality ("Garden State"), a New Jersey civil rights organization that advocates for lesbian, gay, bisexual, and transgender equality, filed a motion to intervene as a defendant. On September 13, 2013, State Defendants and Garden State filed cross-motions for summary judgment. The District Court heard argument on all of these motions on October 1, 2013, and issued a final ruling in an order dated November 8, 2013.

The District Court first considered whether Garden State was required to ***223** demonstrate Article III standing to participate in the lawsuit as an intervening party.[6] The Court acknowledged that this was an open question in the Third Circuit, and adopted the view held by a majority of our sister circuits that an intervenor need not have Article III standing to participate. The Court then held that Garden State fulfilled the requirements for permissive intervention pursuant to Federal Rule of Civil Procedure 24(b), reasoning that Garden State's motion was timely, it shared a common legal defense with State Defendants, and its participation would not unduly prejudice the adjudication of Plaintiffs' rights. Accordingly, the Court granted Garden State's motion to intervene.

The District Court then considered whether Plaintiffs possessed standing to pursue claims on behalf of their minor clients and their parents. It reasoned first that "Plaintiffs' ability to bring third-party claims hinges on whether they suffered any constitutional wrongs by the passage of A3371." J.A. 24. It then held that because, as it would explain later in its opinion, A3371 did not violate Plaintiffs' constitutional rights, Plaintiffs did not suffer an "injury in fact" sufficient to confer third-party standing. The Court also held that Plaintiffs failed to demonstrate that these third parties were sufficiently hindered in their ability to protect their own interests. Accordingly, the Court granted summary judgment for Defendants on Plaintiffs' third-party claims.

The District Court then considered whether A3371 violated Plaintiffs' right to free speech. Relying heavily on the Ninth Circuit's decision upholding a similar statute in *Pickup v. Brown*, 728 F.3d 1042 (9th Cir.2013),[7] the Court concluded that A3371 regulates conduct, not speech. The Court also determined that A3371 does not have an "incidental effect" on speech sufficient to trigger a lower level of scrutiny under *United States v.*

O'Brien, 391 U.S. 367, 88 S.Ct. 1673, 20 L.Ed.2d 672 (1968). Having determined that A3371 regulates neither speech nor expressive conduct, the District Court rejected Plaintiffs' free speech challenge.[8] The District Court also concluded that A3371 is not unconstitutionally vague or overbroad.

The District Court next rejected Plaintiffs' free exercise claim. It was not convinced by Plaintiffs' arguments that A3371 engaged in impermissible gerrymandering, and concluded instead that A3371 was a ***224** neutral law of general applicability subject only to rational basis review. The District Court then held that A3371 is rationally related to New Jersey's legitimate interest in protecting its minors from harm and, accordingly, granted Defendants' motions for summary judgment on Plaintiffs' free exercise claim. This timely appeal followed.

II.

The District Court had jurisdiction under 28 U.S.C. § 1331. We have jurisdiction under 28 U.S.C. § 1291.

We review a district court's legal conclusions de novo and ordinarily review 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). Because this case implicates the First Amendment, however, we are obligated to "make an independent examination of the whole record" to "make sure that the trial court's judgment does not constitute a forbidden intrusion on the field of free expression." *Id.* (internal quotation marks and citations omitted).

III.

We first turn to the issue of whether A3371, as applied to the SOCE counseling Plaintiffs seek to provide, violates Plaintiffs' First Amendment right to free speech. The District Court held that it does not, reasoning that SOCE counseling is "conduct" that receives no protection under the First Amendment. We disagree, and hold that the verbal communication that occurs during SOCE counseling is speech that enjoys some degree of protection under the First Amendment. Because Plaintiffs are speaking as state-licensed professionals within the confines of a professional relationship, however, this level of protection is diminished. Accordingly, A3371 survives Plaintiffs' free speech challenge if it directly advances the State's substantial interest in protecting its citizens from harmful or ineffective professional practices and is not more extensive than necessary to serve that interest. We hold that A3371 meets these requirements.

A.

With respect to Plaintiffs' free speech challenge, the preliminary issue we must address is whether A3371 has restricted Plaintiffs' speech or, as the District Court held, merely regulated their conduct. The parties agree that modern-day SOCE therapy, and that practiced by Plaintiffs in this case, is "talk therapy" that is administered wholly through verbal communication.[9] Though verbal communication is the quintessential form of "speech" as that term is commonly understood, Defendants argue that these particular communications are "conduct" and not "speech" for purposes of the First Amendment because they are merely the "tool" employed by therapists to administer treatment. Thus, the question we confront is whether verbal communications become "conduct" when they are used as a vehicle for mental health treatment.

[1] We hold that these communications are "speech" for purposes of the First ***225** Amendment. Defendants have not directed us to any authority from the Supreme Court or this circuit that have characterized verbal or written communications as "conduct" based on the function these communications serve. Indeed, the Supreme Court rejected this very proposition in *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010). In that case, plaintiffs claimed that a federal statute prohibiting the provision of "material support" to designated terrorist organizations violated their free speech rights by preventing them from providing legal training and advice to the Partiya Karkeran Kurdistan ("PKK") and the Liberation Tigers of Tamil Eelam ("LTTE"). *Id.* at 10–11, 130 S.Ct. 2705. Defendants responded that the "material support" statute should not be subjected to strict scrutiny because it is directed toward conduct and not speech. *Id.* at 26–28, 130 S.Ct. 2705.

The Supreme Court, however, expressly rejected the argument that "the only thing actually at issue in [the] litigation [was] conduct." *Id.* at 27, 130 S.Ct. 2705. It concluded that while the material support statute

ordinarily banned conduct, the activity it prohibited in the particular case before it—the provision of legal training and advice—was speech. *Id.* at 28, 130 S.Ct. 2705. It reached this conclusion based on the straightforward observation that plaintiffs' proposed activity consisted of "communicating a message." *Id.* In concluding further that this statute regulated speech on the basis of content, the Court's reasoning was again simple and intuitive: "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 27, 130 S.Ct. 2705. Notably, what the Supreme Court did *not* do was reclassify this communication as "conduct" based on the nature or function of what was communicated. [10]

Given that the Supreme Court had no difficulty characterizing legal counseling as "speech," we see no reason here to reach the counter-intuitive conclusion that the verbal communications that occur during SOCE counseling are "conduct." Defendants' citation to *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S.Ct. 684, 93 L.Ed. 834 (1949), does not alter our conclusion. There, members of the Ice and Coal Drivers and Handlers Local Union No. 953 were enjoined under a state antitrade restraint statute from picketing in front of an ice company in an effort to convince it to discontinue ice sales to non-union buyers. 336 U.S. at 492–494, 69 S.Ct. 684. The Supreme Court rejected the union workers' free speech claim, reasoning that "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." *Id.* at 502, 69 S.Ct. 684 (citations omitted). This passage, which is now over 60 years old, has been the subject of much confusion. *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation–Altering Utterances," and the Uncharted Zones*, 90 Cornell L.Rev. 1277, 1314–22 (2005) (discussing eight distinct interpretations of *Giboney* 's "course of conduct" language). Yet whatever may be *Giboney* 's meaning or scope, *Humanitarian Law Project* makes clear that verbal or written communications, even those that function as vehicles ***226** for delivering professional services, are "speech" for purposes of the First Amendment. 561 U.S. at 27–28, 130 S.Ct. 2705.

In reaching a contrary conclusion, the District Court relied heavily on the Ninth Circuit's recent decision in *Pickup*. *Pickup* involved a constitutional challenge to Senate Bill 1172 ("SB 1172"), which, like A3371, prohibits state-licensed mental health providers from engaging in "sexual orientation change efforts" with clients under 18 years of age. 740 F.3d at 1221. As here, SOCE counselors argued that SB 1172 violated their First Amendment rights to free speech and free exercise. [11]

The Ninth Circuit disagreed. *Pickup* explained that "the First Amendment rights of professionals, such as doctors and mental health providers" exist on a "continuum." *Id.* at 1227. On this "continuum," First Amendment protection is greatest "where a professional is engaged in a public dialogue." *Id.* At the midpoint of this continuum, which *Pickup* described as speech "within the confines of the professional relationship," First Amendment protection is "somewhat diminished." *Id.* at 1228. At the other end of this continuum is "the regulation of professional *conduct*, where the state's power is great, even though such regulation may have an incidental effect on speech." *Id.* at 1229 (citing *Lowe v. S.E.C.*, 472 U.S. 181, 232, 105 S.Ct. 2557, 86 L.Ed.2d 130 (1985) (White, J., concurring in the result)) (emphasis in original).

Pickup concluded that because SB 1172 "regulates conduct," it fell within this third category on the continuum. *Id.* It reasoned that "[b]ecause SB 1172 regulates only treatment, while leaving mental health providers free to discuss and recommend, or recommend against, SOCE, ... 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 bears a rational relationship to a legitimate state interest." *Id.* at 1231 (citing *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884, 967–68, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (plurality opinion)). [12] The Ninth Circuit concluded that "SB 1172 is rationally related to the legitimate government interest of protecting the well-being of minors" and, accordingly, rejected the plaintiffs' free speech claim. *Id.* at 1232.

***227** The Ninth Circuit's denial of a petition for rehearing en banc drew a spirited dissent from Judge O'Scannlain. Joined by two other Ninth Circuit judges, he criticized the *Pickup* majority for merely "labeling" disfavored speech as "conduct" and thereby "insulat[ing] [SB 1172] from First Amendment scrutiny." 740 F.3d at 1215 (O'Scannlain, J., dissenting from denial of rehearing en banc). Judge O'Scannlain further explained:

> The panel provides no principled doctrinal basis for its dichotomy: by what criteria do we distinguish between utterances that are truly "speech," on the one hand, and those that are, on the other hand, somehow "treatment" or "conduct"? The panel, contrary to common sense and without legal authority, simply asserts that some spoken words—those prohibited by SB 1172—are not speech.

Id. at 1215–16.

Judge O'Scannlain's dissent also relied heavily upon *Humanitarian Law Project*. Judge O'Scannlain argued that *Humanitarian Law Project* "flatly refused to countenance the government's purported distinction between 'conduct' and 'speech' for constitutional purposes when the activity at issue consisted of talking and writing." *Id.* at 1216. He explained that *Humanitarian Law Project* stood for the proposition that "the government's *ipse dixit* cannot transform 'speech' into 'conduct' that it may more freely regulate." *Id.* [13]

While *Pickup* acknowledged that SB 1172 *may* have at least an "incidental effect" on speech and subjected the statute to rational basis review, [14] here the District Court went one step further when it concluded that SOCE counseling is pure, non-expressive conduct that falls wholly outside the protection of the First Amendment. The District Court's primary rationale for this conclusion was that "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." J.A. 35 (emphasis added). The District Court derived this reasoning in part from *Pickup*, in which the Ninth Circuit observed that the "key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech." 740 F.3d at 1226 (quoting *National Association for the Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043, 1054 (9th Cir.2000)). On this basis, the District Court concluded ***228** that "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." J.A. 39.

As we have explained, the argument that verbal communications become "conduct" when they are used to deliver professional services was rejected by *Humanitarian Law Project*. Further, the enterprise of labeling certain verbal or written communications "speech" and others "conduct" is unprincipled and susceptible to manipulation. Notably, the *Pickup* majority, in the course of establishing a "continuum" of protection for professional speech, never explained exactly *how* a court was to determine whether a statute regulated "speech" or "conduct." *See Pickup*, 740 F.3d at 1215–16 (O'Scannlain, J., dissenting from denial of rehearing en banc) ("[B]y what criteria do we distinguish between utterances that are truly 'speech,' on the one hand, and those that are, on the other hand, somehow 'treatment' or 'conduct'?"). And the District Court's analysis fares no better; even a cursory inspection of the line it establishes between utterances that "communicate information or a particular viewpoint" and those that seek "to apply methods, practices, and procedures" reveals the illusory nature of such a dichotomy.

For instance, consider a sophomore psychology major who tells a fellow student that he can reduce same-sex attractions by avoiding effeminate behaviors and developing a closer relationship with his father. Surely this advice is not "conduct" merely because it seeks to apply "principles" the sophomore recently learned in a behavioral psychology course. Yet it would be strange indeed to conclude that the same words, spoken with the same intent, somehow become "conduct" when the speaker is a licensed counselor. That the counselor is speaking as a licensed professional may affect the level of First Amendment protection her speech enjoys, but this fact does not transmogrify her words into "conduct." As another example, a law student who tries to convince her friend to change his political orientation is assuredly "speaking" for purposes of the First Amendment, even if she uses particular rhetorical "methods" in the process. To classify some communications as "speech" and others as "conduct" is to engage in nothing more than a "labeling game." *Pickup*, 740 F.3d at 1218 (O'Scannlain, J., dissenting from denial of rehearing en banc).

Lastly, the District Court's classification of counseling as "conduct" was largely motivated by its reluctance to imbue certain professions—*i.e.*, clinical psychology and psychiatry—with "special First Amendment protection merely because they use the spoken word as therapy." J.A. 38. According to the District Court, the "fundamental problem" with characterizing SOCE counseling as "speech" is that "it would mean that *any* regulation of professional counseling necessarily implicates fundamental First Amendment speech rights." *Id.* at 39. This result, reasoned the District Court, would "run[ ] counter to the longstanding principle that a state generally may enact laws rationally regulating professionals, including those providing medicine and mental health services." *Id.* (citations omitted).

As we will explain, the District Court's concern is not without merit, but it speaks to whether SOCE counseling falls within a lesser protected or unprotected category of speech—not whether these verbal communications are somehow "conduct." Simply ***229** put, speech is speech, and it must be analyzed as such for purposes of the First Amendment. Certain categories of speech receive lesser protection, *see, e.g., Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 455–56, 98 S.Ct. 1912, 56 L.Ed.2d 444 (1978), or even no protection at all, *see, e.g., Roth v. United States,* 354 U.S. 476, 483, 77 S.Ct. 1304, 1 L.Ed.2d 1498 (1957). But these categories are deeply rooted in history, and the Supreme Court has repeatedly cautioned against exercising "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Alvarez,* —— U.S. ——, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012) (quoting *United States v. Stevens,* 559 U.S. 460, 472, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010)). By labeling certain communications as "conduct," thereby assuring that they receive no First Amendment protection at all, the District Court has effectively done just that.

Thus, we conclude that the verbal communications that occur during SOCE counseling are not "conduct," but rather "speech" for purposes of the First Amendment. We now turn to the issue of whether such speech falls within a historically delineated category of lesser protected or unprotected expression.

B.

The District Court's focus on whether SOCE counseling is "speech" or "conduct" obscured the important constitutional inquiry at the heart of this case: the level of First Amendment protection afforded to speech that occurs as part of the practice of a licensed profession. In addressing this question, we first turn to whether such speech is fully protected by the First Amendment. We conclude that it is not.

The authority of the States to regulate the practice of certain professions is deeply rooted in our nation's jurisprudence. Over 100 years ago, the Supreme Court deemed it "too well settled to require discussion" that "the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health." *Watson v. State of Maryland,* 218 U.S. 173, 176, 30 S.Ct. 644, 54 L.Ed. 987 (1910). *See also Dent v. West Virginia,* 129 U.S. 114, 122, 9 S.Ct. 231, 32 L.Ed. 623 (1889) ("[I]t has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely."). The Court has recognized that States have "broad power to establish standards for licensing practitioners and regulating the practice of professions." *Goldfarb v. Va. State Bar,* 421 U.S. 773, 792, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975). *See also Ohralik,* 436 U.S. at 460, 98 S.Ct. 1912 ("[T]he State bears a special responsibility for maintaining standards among members of the licensed professions."). The exercise of this authority is necessary to "shield[ ] the public against the untrustworthy, the incompetent, or the irresponsible." *Thomas v. Collins,* 323 U.S. 516, 545, 65 S.Ct. 315, 89 L.Ed. 430 (1945) (Jackson, J., concurring).

When a professional regulation restricts what a professional can and cannot say, however, it creates a "collision between the power of government to license and regulate those who would pursue a profession or vocation and the rights of freedom of speech and of the press guaranteed by the First Amendment." *Lowe v. S.E.C.,* 472 U.S. 181, 228, 105 S.Ct. 2557, 86 L.Ed.2d 130 (1985) (White, J., concurring in the result). Justice Jackson first explored this area of "two well-established, but at times overlapping, constitutional principles" in *Thomas* 323 U.S. at 544–48, 65 S.Ct. 315 (1945) (Jackson, J., concurring). There, he explained:

> ***230** A state may forbid one without its license to practice law as a vocation, but I think it could

> not stop an unlicensed person from making a speech about the rights of man or the rights of labor.... Likewise, the state may prohibit the pursuit of medicine as an occupation without its license but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought. So the state to an extent not necessary now to determine may regulate one who makes a business or a livelihood of soliciting funds or memberships for unions. But I do not think it can prohibit one, even if he is a salaried labor leader, from making an address to a public meeting of workmen, telling them their rights as he sees them and urging them to unite in general or to join a specific union.

Id. at 544–45, 65 S.Ct. 315. Ultimately, Justice Jackson concluded that the speech at issue—which encouraged a large group of Texas workers to join a specific labor union-"f[ell] in the category of a public speech, rather than that of practicing a vocation as solicitor" and was therefore fully protected by the First Amendment. *See id.* at 548, 65 S.Ct. 315.

Justice White expounded upon Justice Jackson's analysis in *Lowe*. He and two other justices agreed that "[t]he power of government to regulate the professions is not lost whenever the practice of a profession entails speech" but also recognized that "[a]t some point, a measure is no longer a regulation of a profession but a regulation of speech or of the press." 472 U.S. at 228, 230, 105 S.Ct. 2557 (White, J., concurring in the result). Building on Justice Jackson's concurrence, Justice White defined the contours of First Amendment protection in the realm of professional speech:

> One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. Just as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession.... Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that "Congress shall make no law ... abridging the freedom of speech, or of the press."

Id. at 232, 105 S.Ct. 2557.

The Supreme Court addressed the issue of professional speech most recently in *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992) (plurality opinion). Though the bulk of the plurality's opinion was devoted to a substantive due process claim, it addressed the plaintiffs' First Amendment claim briefly in the following paragraph:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, *see Wooley v. Maynard*, 430 U.S. 705, 97 S.Ct. 1428, 51 L.Ed.2d 752 (1977), but only as part of the practice of ***231** medicine, subject to reasonable licensing and regulation by the State, *cf. Whalen v. Roe*, 429 U.S. 589, 603, 97 S.Ct. 869, 51 L.Ed.2d 64 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

Id. at 884, 112 S.Ct. 2791.

A trio of recent federal appellate decisions has read these opinions to establish special rules for the regulation of speech that occurs pursuant to the practice of a licensed profession. *See Wollschlaeger v. Florida*, No. 12–cv–14009, 760 F.3d 1195, 1217–26, 2014 WL 3695296, at *13–

21 (11th Cir. July 25, 2014); *Pickup*, 740 F.3d at 1227–29; *Moore–King v. County of Chesterfield, Va.*, 708 F.3d 560, 568–70 (4th Cir.2013). In *Moore–King*, for example, the Fourth Circuit drew heavily from the concurrences in *Thomas* and *Lowe* in holding that "professional speech" does not receive full protection under the First Amendment. 708 F.3d at 568–70. Consistent with Justice White's concurrence in *Lowe*, *Moore–King* explained that "the relevant inquiry to determine whether to apply the professional speech doctrine is whether the speaker is providing personalized advice in a private setting to a paying client or instead engages in public discussion and commentary." *Id.* at 569. It then concluded that plaintiff's speech, which consisted of "spiritual counseling" that involved "a personalized reading for a paying client," was "professional speech" which the state could regulate without triggering strict scrutiny under the First Amendment. *Id.*

The Ninth Circuit also embraced the idea of professional speech in *Pickup*. Although the District Court focused primarily on *Pickup* 's discussion of whether SOCE counseling is "speech" or "conduct," the Ninth Circuit also relied heavily on the constitutional principle that a licensed professional's speech is not afforded the full scope of First Amendment protection when it occurs as part of the practice of a profession. *See* 740 F.3d at 1227–29. In recognizing a "continuum" of First Amendment protection for licensed professionals, *Pickup* relied heavily on Justice White's concurrence in *Lowe* and the plurality opinion in *Casey*. *Id.* As discussed *supra*, *Pickup* held that First Amendment protection is "at its greatest" when a professional is "engaged in a public dialogue," *id.* at 1227 (citing *Lowe*, 472 U.S. at 232, 105 S.Ct. 2557 (White, J., concurring in the result)); "somewhat diminished" when the professional is speaking "within the confines of a professional relationship," *id.* at 1228 (citing *Casey*, 505 U.S. at 884, 112 S.Ct. 2791 (plurality opinion)); and at its lowest when "the regulation [is] of professional *conduct* ... even though such regulation may have an incidental effect on speech," *id.* at 1229 (citing *Lowe*, 472 U.S. at 232, 105 S.Ct. 2557 (White, J., concurring in the result)).

Most recently, the Eleventh Circuit also recognized that professional speech is not fully protected under the First Amendment. *Wollschlaeger*, 760 F.3d 1195, 2014 WL 3695296. While the Eleventh Circuit would afford "speech to the public by attorneys on public issues" with "the strongest protection our Constitution has to offer," it held that the full scope of First Amendment protection did not apply to a physician speaking "only as part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Id.* at 1218, 2014 WL 3695296 at *14 (quoting *Casey*, 505 U.S. at 884, 112 S.Ct. 2791 (plurality opinion)). Similar to *Moore–King*, *Wollschlaeger* explained that "the key to distinguishing between occupational regulation and abridgment of First Amendment liberties is in finding a personal nexus between professional and ***232** client." *Id.* (internal quotation marks and citations omitted).

We find the reasoning in these cases to be informative. Licensed professionals, through their education and training, have access to a corpus of specialized knowledge that their clients usually do not. Indeed, the value of the professional's services stems largely from her ability to apply this specialized knowledge to a client's individual circumstances. Thus, clients ordinarily have no choice but to place their trust in these professionals, and, by extension, in the State that licenses them. *See, e.g.*, *Virginia State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 768, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) ("[H]igh professional standards, to a substantial extent, are guaranteed by the close regulation to which pharmacists in Virginia are subject."). It is the State's imprimatur and the regulatory oversight that accompanies it that provide clients with the confidence they require to put their health or their livelihood in the hands of those who utilize knowledge and methods with which the clients ordinarily have little or no familiarity.

This regulatory authority is particularly important when applied to professions related to mental and physical health. *See Watson*, 218 U.S. at 176, 30 S.Ct. 644 ("[T]he police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health."). The practice of most professions, mental health professions in particular, will inevitably involve communication between the professional and her client—this is, of course, how professionals and clients interact. To handcuff the State's ability to regulate a profession whenever speech is involved would therefore unduly undermine its authority to protect its citizens from harm. *See* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L.Rev. 939, 950 (2007) ("The practice of medicine, like all human behavior, transpires through the medium of

speech. In regulating the practice, therefore, the state must necessarily also regulate professional speech.").

[2] Thus, we conclude that a licensed professional does not enjoy the full protection of the First Amendment when speaking as part of the practice of her profession. Like the Fourth and Eleventh Circuits, we believe a professional's speech warrants lesser protection only when it is used to provide personalized services to a client based on the professional's expert knowledge and judgment. *See Wollschlaeger,* 760 F.3d at 1218, 2014 WL 3695296, at *14; *Moore–King,* 708 F.3d at 569. By contrast, when a professional is speaking to the public at large or offering her personal opinion to a client, her speech remains entitled to the full scope of protection afforded by the First Amendment. [15]

***233** **[3]** With these principles in mind, it is clear to us that speech occurring as part of SOCE counseling is professional speech. SOCE counselors provide specialized services to individual clients in the form of psychological practices and procedures designed to effect a change in the clients' thought patterns and behaviors. Importantly, A3371 does not prevent these counselors from engaging in a public dialogue on homosexuality or sexual orientation change—it prohibits only a professional practice that is, in this instance, carried out through verbal communication. While the function of this speech does not render it "conduct" that is wholly outside the scope of the First Amendment, it does place it within a recognized category of speech that is not entitled to the full protection of the First Amendment.

C.

[4] That we have classified Plaintiffs' speech as professional speech does not end our inquiry. While the cases above make clear that such speech is not fully protected under the First Amendment, the question remains whether this category receives some lesser degree of protection or no protection at all. We hold that professional speech receives diminished protection, and, accordingly, that prohibitions of professional speech are constitutional only if they directly advance the State's interest in protecting its citizens from harmful or ineffective professional practices and are no more extensive than necessary to serve that interest.

In explaining why this level of protection is appropriate, we find it helpful to compare professional speech to commercial speech. For over 35 years, the Supreme Court has recognized that commercial speech—truthful, non-misleading speech that proposes a legal economic transaction—enjoys diminished protection under the First Amendment. *See Ohralik,* 436 U.S. at 454–59, 98 S.Ct. 1912. [16] Though such speech was at one time considered outside the scope of the First Amendment altogether, *see Valentine v. Chrestensen,* 316 U.S. 52, 54, 62 S.Ct. 920, 86 L.Ed. 1262 (1942), the Supreme Court reversed course in *Bigelow v. Virginia,* 421 U.S. 809, 818–26, 95 S.Ct. 2222, 44 L.Ed.2d 600 (1975), and recognized that commercial speech enjoys some degree of protection. The Court has since explained that commercial speech has value under the First Amendment because it facilitates the "free flow of commercial information," in which both the intended recipients and society at large have a strong interest. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 763–64, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976) ("*Virginia Pharmacy*"); *see also Central Hudson Gas & Elec. Corp. v. Public Serv. Comm. of New York,* 447 U.S. 557, 561–62, 100 S.Ct. 2343, 65 L.Ed.2d 341 (1980) (explaining that commercial speech "assists consumers and furthers the societal interest in the fullest possible dissemination of information"). In fact, the Court has recognized that a consumer's interest in this information "may be as keen, if not keener by far, than his interest in the day's most ***234** urgent political debate." *Virginia Pharmacy,* 425 U.S. at 763, 96 S.Ct. 1817.

Despite recognizing the value of commercial speech, the Court has "not discarded the 'common-sense' distinction" between commercial speech and other areas of protected expression. *Ohralik,* 436 U.S. at 455–56, 98 S.Ct. 1912 (quoting *Virginia Pharmacy,* 425 U.S. at 771 n. 24, 96 S.Ct. 1817). Instead, the Court has repeatedly emphasized that commercial speech enjoys only diminished protection because it "occurs in an area traditionally subject to government regulation." *Central Hudson,* 447 U.S. at 562, 100 S.Ct. 2343 (quoting *Ohralik,* 436 U.S. at 455–56, 98 S.Ct. 1912). Because commercial speech is "linked inextricably with the commercial arrangement it proposes, ... the State's interest in regulating the underlying transaction may give it a concomitant interest in the expression itself." *Edenfield v. Fane,* 507 U.S. 761, 767, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1993) (internal quotation marks and citations omitted). Accordingly, a prohibition of commercial speech is permissible when it

"directly advances" a "substantial" government interest and is "not more extensive than is necessary to serve that interest." *Central Hudson,* 447 U.S. at 566, 100 S.Ct. 2343. The Supreme Court later dubbed this standard of review "intermediate scrutiny." *Florida Bar v. Went For It, Inc.,* 515 U.S. 618, 623–24, 115 S.Ct. 2371, 132 L.Ed.2d 541 (1995) (internal quotation marks and citation omitted).

We believe that commercial and professional speech share important qualities and, thus, that intermediate scrutiny is the appropriate standard of review for prohibitions aimed at either category. Like commercial speech, professional speech is valuable to listeners and, by extension, to society as a whole because of the "informational function" it serves. *Central Hudson,* 447 U.S. at 563, 100 S.Ct. 2343. As previously discussed, professionals have access to a body of specialized knowledge to which laypersons have little or no exposure. Although this information may reach non-professionals through other means, such as journal articles or public speeches, it will often be communicated to them directly by a licensed professional during the course of a professional relationship. Thus, professional speech, like commercial speech, serves as an important channel for the communication of information that might otherwise never reach the public. *See* Post, *supra,* at 977; *see also Central Hudson,* 447 U.S. at 561–62, 100 S.Ct. 2343 (describing "the societal interest in the fullest possible dissemination of information"). [17]

Additionally, like commercial speech, professional speech also "occurs in an area traditionally subject to government regulation." *Central Hudson,* 447 U.S. at 562, 100 S.Ct. 2343 (quoting *Ohralik,* 436 U.S. at 455–56, 98 S.Ct. 1912). As we have previously explained, States have traditionally enjoyed broad authority to regulate professions as a means of protecting the public from harmful or ineffective professional services. Accordingly, as with commercial speech, it is difficult to ignore the "common-sense" differences between professional speech and other forms of protected communication. *Ohralik,* 436 U.S. at 455–56, 98 S.Ct. 1925 (quoting *Virginia* ***235** *Pharmacy,* 425 U.S. at 771 n. 24, 96 S.Ct. 1817).

Given these striking similarities, we conclude that professional speech should receive the same level of First Amendment protection as that afforded commercial speech. Thus, we hold that a prohibition of professional speech is permissible only if it "directly advances" the State's "substantial" interest in protecting clients from ineffective or harmful professional services, and is "not more extensive than necessary to serve that interest." *Central Hudson,* 447 U.S. at 566, 100 S.Ct. 2343.

In so holding, we emphasize that a regulation of professional speech is spared from more demanding scrutiny only when the regulation was, as here, enacted pursuant to the State's interest in protecting its citizens from ineffective or harmful professional services. Because the State's regulatory authority over licensed professionals stems from its duty to protect the clients of these professionals, a state law may be subject to strict scrutiny if designed to advance an interest unrelated to client protection. Thus, a law designed to combat terrorism is not a professional regulation, and, accordingly, may be subject to strict scrutiny. *See Humanitarian Law Project,* 561 U.S. at 25–28, 130 S.Ct. 2705. Similarly, a law that is not intended to protect a professional's clients, but to insulate certain laws from constitutional challenge, is more than just a regulation of professional speech and, accordingly, intermediate scrutiny is not the proper standard of review. *See Legal Servs. Corp. v. Velazquez,* 531 U.S. 533, 540–49, 121 S.Ct. 1043, 149 L.Ed.2d 63 (2001). [18]

We recognize that our sister circuits have concluded that regulations of professional speech are subject to a more deferential standard of review or, possibly, no review at all. *See Pickup,* 740 F.3d at 1231; *Wollschlaeger,* 760 F.3d at 1217–18, 2014 WL 3695296, at *13–14; *Moore–King,* 708 F.3d at 567–70. *Pickup,* for example, cited *Casey,* 505 U.S. at 884, 967–68, 112 S.Ct. 2791 (plurality opinion), as support for its decision to apply rational basis review to a similar statute. *Pickup,* 740 F.3d at 1231. [19]

To the extent *Casey* suggested rational basis review, we do not believe such a standard governs here. While the plurality ***236** opinion noted in passing that speech, when part of the practice of medicine, is "subject to *reasonable* licensing and regulation by the State," 505 U.S. at 884, 112 S.Ct. 2791 (emphasis added), the regulation it addressed fell within a special category of laws that compel disclosure of truthful factual information, *id.* at 881, 112 S.Ct. 2791. In the context of commercial speech, the Supreme Court has treated compelled disclosures of truthful factual information differently than prohibitions of speech, subjecting the former to rational basis review and the latter to intermediate scrutiny. *See Zauderer v. Office of Disciplinary Counsel of Supreme Court of*

Ohio, 471 U.S. 626, 650–51, 105 S.Ct. 2265, 85 L.Ed.2d 652 (1985) (outlining the "material differences between disclosure requirements and outright prohibitions on speech" and subjecting a disclosure requirement to rational basis review). Thus, to the extent *Casey* applied rational basis review, this facet of the opinion is inapplicable to the present case because the law at issue is a prohibition of speech, not a compulsion of truthful factual information. *See Wollschlaeger*, 760 F.3d at 1246, 2014 WL 3695296, at *38 (Wilson, J., dissenting) (reasoning that "[e]ven if *Casey* applied something less than intermediate scrutiny," *Zauderer* establishes that a more stringent standard of review should apply to restrictions on professional speech.).

Additionally, we have serious doubts that anything less than intermediate scrutiny would adequately protect the First Amendment interests inherent in professional speech. Without sufficient judicial oversight, legislatures could too easily suppress disfavored ideas under the guise of professional regulation. *See Pickup*, 740 F.3d at 1215 (O'Scannlain, J., dissenting from denial of rehearing en banc). This possibility is particularly disturbing when the suppressed ideas concern specialized knowledge that is unlikely to reach the general public through channels other than the professional-client relationship. Intermediate scrutiny is necessary to ensure that State legislatures are regulating professional speech to prohibit the provision of harmful or ineffective professional services, not to inhibit politically-disfavored messages.

[5] Lastly, we reject Plaintiffs' argument that A3371 should be subject to strict scrutiny because it discriminates on the basis of content and viewpoint. First, although we agree with Plaintiffs that A3371 discriminates on the basis of content,[20] it does so in a way that does not trigger strict scrutiny. Ordinarily, content-based regulations are highly disfavored and subjected to strict scrutiny. *See Sorrell v. IMS Health, Inc.*, —U.S. —, 131 S.Ct. 2653, 2664, 180 L.Ed.2d 544 (2011). And this is generally true even when the law in question regulates unprotected or lesser protected speech. *See R.A. V. v. City of St. Paul*, 505 U.S. 377, 381–86, 112 S.Ct. 2538, 120 L.Ed.2d 305 (1992). Nonetheless, within these unprotected or lesser protected categories of speech, the Supreme Court has held that a statute does *not* trigger strict scrutiny "[w]hen the basis for the content discrimination consists entirely of the very reason the entire class of speech at issue is proscribable." *Id.* at 388, 112 S.Ct. 2538. By way of illustration, the Court explained:

> [A] State may choose to regulate price advertising in one industry but not in ***237** others, because the risk of fraud (one of the characteristics of commercial speech that justifies depriving it of full First Amendment protection) is in its view greater there. But a State may not prohibit only that commercial advertising that depicts men in a demeaning fashion.
> *Id.* at 388–89, 112 S.Ct. 2538 (internal citations omitted).

[6] A3371 fits comfortably within this category of permissible content discrimination. As with the content-based regulations identified by *R.A.V.* as permissible, "the basis for [A3371's] content discrimination consists entirely of the very reason" professional speech is a category of lesser-protected speech. *Id.* at 388, 112 S.Ct. 2538. The New Jersey legislature has targeted SOCE counseling for prohibition because it was presented with evidence that this particular form of counseling is ineffective and potentially harmful to clients. Thus, the reason professional speech receives diminished protection under the First Amendment—*i.e.*, because of the State's longstanding authority to protect its citizens from ineffective or harmful professional practices—is precisely the reason New Jersey targeted SOCE counseling with A3371. Therefore, we conclude that A3371 does not trigger strict scrutiny by discriminating on the basis of content in an impermissible manner.

Nor do we agree that A3371 triggers strict scrutiny because it discriminates on the basis of viewpoint. Plaintiffs argue that A3371 prohibits them from expressing the viewpoint "that [same sex attractions] can be reduced or eliminated to the benefit of the client." Appellant's Br. 26. That is a misreading of the statute. A3371 allows Plaintiffs to express this viewpoint, in the form of their personal opinion, to anyone they please, including their minor clients. What A3371 prevents Plaintiffs from doing is expressing this viewpoint in a very specific way—by actually rendering the professional services that they believe to be effective and beneficial. Arguably, any time a professional engages in a particular professional practice she is implicitly communicating the viewpoint that such practice is effective and beneficial. The prohibition of this method of communicating a particular viewpoint, however, is not the type of viewpoint discrimination with which the First

Amendment is concerned. If it were, State legislatures could never ban a particular professional practice without triggering strict scrutiny. Thus, a statute banning licensed psychotherapists from administering treatments based on phrenology would be subject to strict scrutiny because it prevents these therapists from expressing their belief in phrenology by putting it into practice. Such a rule would unduly undermine the State's authority to regulate the practice of licensed professions.

Accordingly, we believe intermediate scrutiny is the applicable standard of review in this case. We must uphold A3371 if it "directly advances" the government's interest in protecting clients from ineffective and/or harmful professional services, and is "not more extensive than necessary to serve that interest." *See Central Hudson,* 447 U.S. at 566, 100 S.Ct. 2343. Those are the questions we next address.

D.

Our analysis begins with an evaluation of New Jersey's interest in the passage of A3371. As we have previously explained, the State's interest in protecting its citizens from harmful professional practices is unquestionably substantial. *See Goldfarb,* 421 U.S. at 792, 95 S.Ct. 2004; *Watson,* 218 U.S. at 176, 30 S.Ct. 644. Here, New Jersey's stated interest is even stronger because A3371 seeks to protect minor ***238** clients—a population that is especially vulnerable to such practices. *See* Supplemental A pp. 85 (Declaration of Douglas C. Haldeman, Ph. D.) (explaining that adolescent and teenage clients are "much more vulnerable to the potentially traumatic effects of SOCE" because their "pre-frontal cort[ices] [are] still developing and changing rapidly").

Our next task, then, is to determine whether A3371 directly advances this interest by prohibiting a professional practice that poses serious health risks to minors. To survive heightened scrutiny, the State must establish that the harms it believes SOCE counseling presents are "real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Turner Broad. Sys., Inc. v. F.C.C.,* 512 U.S. 622, 664, 114 S.Ct. 2445, 129 L.Ed.2d 497 (1994) (plurality opinion) ("*Turner I*") (citations omitted). *See also Pitt News v. Pappert,* 379 F.3d 96, 107 (3d Cir.2004) (explaining that legislatures cannot meet this burden by relying on "mere speculation or conjecture") (quoting *Edenfield v. Fane,* 507 U.S. 761, 770–71, 113 S.Ct. 1792, 123 L.Ed.2d 543 (1992)). Even when applying intermediate scrutiny, however, we do not review a legislature's empirical judgment *de novo*—our task is merely to determine whether the legislature has "drawn reasonable inferences based on substantial evidence." *Turner Broad. Sys., Inc., v. F.C.C.,* 520 U.S. 180, 195, 117 S.Ct. 1174, 137 L.Ed.2d 369 (1997) ("*Turner II* ") (internal quotation marks and citation omitted). Further, "[t]he quantum of empirical evidence needed to satisfy heightened judicial scrutiny of legislative judgments will vary up or down with the novelty and plausibility of the justification raised." *Nixon v. Shrink Mo. Gov't PAC,* 528 U.S. 377, 391, 120 S.Ct. 897, 145 L.Ed.2d 886 (2000).

[7] We conclude that New Jersey has satisfied this burden. The legislative record demonstrates that over the last few decades a number of well-known, reputable professional and scientific organizations have publicly condemned the practice of SOCE, expressing serious concerns about its potential to inflict harm. Among others, the American Psychological Association, the American Psychiatric Association, and the Pan American Health Organization have warned of the "great" or "serious" health risks accompanying SOCE counseling, including depression, anxiety, self-destructive behavior, and suicidality. N.J. Stat. Ann. § 45:1–54 (collecting additional position statements and articles from the American Academy of Pediatrics, the American Psychoanalytic Association, and the American Academy of Child and Adolescent Psychiatry warning of the health risks posed by SOCE counseling). Many such organizations have also concluded that there is no credible evidence that SOCE counseling is effective. *See id.*

We conclude that this evidence is substantial. Legislatures are entitled to rely on the empirical judgments of independent professional organizations that possess specialized knowledge and experience concerning the professional practice under review, particularly when this community has spoken with such urgency and solidarity on the subject. Such evidence is a far cry from the "mere speculation or conjecture" our cases have held to be insufficient. *Pitt News,* 379 F.3d at 107 (internal quotation marks and citations omitted).

Plaintiffs do not dispute the views of the professional community at large concerning the efficacy and potential

harmfulness of SOCE counseling. Instead, they fault the legislature for passing A3371 without first obtaining conclusive empirical evidence regarding the effect of SOCE counseling *239 on minors. To be sure, the A PA Report suggests that the bulk of empirical evidence regarding the efficacy or harmfulness of SOCE counseling currently falls short of the demanding standards imposed by the scientific community. *See* J.A. 327 (noting the "limited amount of methodologically sound research" on SOCE counseling); *id.* at 367 (noting that "[t]he few early research investigations that were conducted with scientific rigor raise concerns about the safety of SOCE" but refusing "to make a definitive statement about whether recent SOCE is safe or harmful and for whom" due to a lack of "scientifically rigorous studies" of these practices). [21]

Yet a state legislature is not constitutionally required to wait for conclusive scientific evidence before acting to protect its citizens from serious threats of harm. *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 822, 120 S.Ct. 1878, 146 L.Ed.2d 865 (2000) ("This is not to suggest that a 10,000–page record must be compiled in every case or that the Government must delay in acting to address a real problem; but the Government must present more than anecdote and suspicion."). This is particularly true when a legislature's empirical judgment is highly plausible, as we conclude New Jersey's judgment is in this case. *See Nixon*, 528 U.S. at 391, 120 S.Ct. 897. It is not too far a leap in logic to conclude that a minor client might suffer psychological harm if repeatedly told by an authority figure that her sexual orientation—a fundamental aspect of her identity—is an undesirable condition. Further, if SOCE counseling is ineffective—which, as we have explained, is supported by substantial evidence—it would not be unreasonable for a legislative body to conclude that a minor would blame herself if her counselor's efforts failed. Given the substantial evidence with which New Jersey was presented, we cannot say that these fears are unreasonable. We therefore conclude that A3371 "directly advances" New Jersey's stated interest in protecting minor citizens from harmful professional practices.

[8] Lastly, we must determine whether A3371 is more extensive than necessary to protect this interest. To survive this prong of intermediate scrutiny, New Jersey "is not required to employ the least restrictive means conceivable, but it must demonstrate narrow tailoring of the challenged regulation to the asserted interest." *Greater New Orleans Broad. Ass'n, Inc. v. United States*, 527 U.S. 173, 188, 119 S.Ct. 1923, 144 L.Ed.2d 161 (1999) (citing *Board of Tr. of State Univ. of New York v. Fox*, 492 U.S. 469, 480, 109 S.Ct. 3028, 106 L.Ed.2d 388 (1989)). [22] Thus, New Jersey must establish "a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *Id.* (quoting *Fox*, 492 U.S. at 480, 109 S.Ct. 3028); *see also Heffner v. Murphy*, 745 F.3d 56, 92–93 (3d Cir.2014) (upholding regulation of commercial speech while acknowledging that the fit between the statute and its interests was "imperfect").

Plaintiffs argue that A3371's ban is overly burdensome, and that New Jersey's objectives could be accomplished in a less *240 restrictive manner via a requirement that minor clients give their informed consent before undergoing SOCE counseling. We are not convinced, however, that an informed consent requirement would adequately serve New Jersey's interests. Minors constitute an "especially vulnerable population," *see* J.A. 405 (A PA Report, Appendix A), and may feel pressured to receive SOCE counseling by their families and their communities despite their fear of being harmed, *see* J.A. 301 (A PA Report) (explaining that "hostile social and family attitudes" are among the reasons minors seek SOCE counseling). Thus, even if SOCE counseling were helpful in a small minority of cases—and the legislature, based on the body of evidence before it, was entitled to reach a contrary conclusion—an informed consent requirement could not adequately ensure that only those minors that could benefit would agree to move forward. As Plaintiffs have offered no other suggestion as to how the New Jersey legislature could achieve its interests in a less restrictive manner, we conclude that A3371 is sufficiently tailored to survive intermediate scrutiny.

Accordingly, we conclude that A3371 is a permissible prohibition of professional speech.

F.

Lastly, Plaintiffs argue that A3371 is unconstitutionally vague and overbroad. We disagree.

[9] The Supreme Court has held that "standards of permissible statutory vagueness are strict in the area

of free expression." *NAACP v. Button,* 371 U.S. 415, 432, 83 S.Ct. 328, 9 L.Ed.2d 405 (1963) (citations omitted). "Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* at 433, 83 S.Ct. 328 (citation omitted). Nonetheless, "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, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) (citations omitted). "[B]ecause we are condemned to the use of words, we can never expect mathematical certainty from our language." *Hill v. Colorado,* 530 U.S. 703, 733, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000) (internal quotation marks and citation omitted). Thus, "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack on a statute when it is surely valid in the vast majority of its intended applications." *Id.* (internal quotation marks and citation omitted).

[10] Plaintiffs argue that A3371 is unconstitutional on its face because the term "sexual orientation change efforts" is impermissibly vague.[23] We disagree. Under A3371, this term is defined as:

> [T]he 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 orientation-neutral interventions to prevent or ***241** address unlawful conduct or unsafe sexual practices; and
> >
> > (2) does not seek to change sexual orientation.

N.J. Stat. Ann. § 45:1–55. While this statutory definition may not provide "perfect clarity," *Hill,* 530 U.S. at 733, 120 S.Ct. 2480 (quotation marks and citation omitted), its list of illustrative examples provides boundaries that are sufficiently clear to pass constitutional muster. Further, counseling designed to change a client's sexual orientation is recognized as a discrete practice within the profession. Such counseling is sometimes referred to as "reparative" or "conversion" therapy and has been the specific target of public statements by recognized professional organizations. *See* N.J. Stat. Ann. § 45:1–54 (quoting statements from the American Psychiatric Association, the National Association of Social Workers, the American Counseling Association Governing Council, and the Pan American Health Organization referring to this practice). Plaintiffs themselves claim familiarity with this form of counseling and acknowledge that many counselors "specialize" in such practices. *See, e.g.,* J.A. 168 (Decl. of Dr. Tara King) (explaining that Dr. King provides "sexual orientation change efforts ('SOCE') counseling"); J.A. 177 (Decl. of Dr. Ronald Newman) (explaining that "part of [Dr. Newman's] practice involves what is often called sexual orientation change efforts ('SOCE') counseling"); J.A. 182 (Decl. of David Pruden, on behalf of NARTH) (explaining that "NARTH provides various presentations across the country hosted by mental health professionals who specialize in what is referred to in A3371 as sexual orientation change efforts ('SOCE') counseling"). To those in the field of professional counseling, the meaning of this term is sufficiently definite "in the vast majority of its intended applications." *Hill,* 530 U.S. at 733, 120 S.Ct. 2480 (quotation marks and citation omitted). Thus, we reject Plaintiffs' argument that A3371 is unconstitutionally vague.

[11] **[12]** As to overbreadth, a statute that impinges upon First Amendment freedoms is impermissibly overbroad if "a substantial number of its applications are unconstitutional, judged in relation to [its] plainly legitimate sweep." *United States v. Stevens,* 559 U.S. 460, 473, 130 S.Ct. 1577, 176 L.Ed.2d 435 (2010) (quoting *Washington State Grange v. Washington State Republican Party,* 552 U.S. 442, 449 n. 6, 128 S.Ct. 1184, 170 L.Ed.2d 151 (2008)). Plaintiffs' only argument on this front is that A3371 prohibits SOCE counseling even when, in Plaintiffs' view, such counseling would be especially beneficial. *See* Appellant's Br. 47 (arguing that A3371 prevents a minor from receiving SOCE counseling even if the cause of their same-sex attractions was sexual abuse). This argument, however, is nothing more than a disagreement with New Jersey's empirical judgments regarding the effect of SOCE counseling on minors. As we have already concluded, New Jersey's reasons for

banning SOCE counseling were sufficiently supported by the legislative record. Thus, we hold that A3371 is not unconstitutionally overbroad.

IV.

Plaintiffs' second constitutional claim is that A3371 violates their First Amendment right to the free exercise of religion. For the reasons that follow, we conclude that this claim also lacks merit.

[13] Under the Religion Clauses of the First Amendment, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The right to freely exercise one's religion, however, is not absolute. ***242** *McTernan v. City of York,* 577 F.3d 521, 532 (3d Cir.2009). If a law is "neutral" and "generally applicable," it will withstand a free exercise challenge so long as it is "rationally related to a legitimate government objective." *Brown v. City of Pittsburgh,* 586 F.3d 263, 284 (3d Cir.2009) (citation omitted). This is so even if the law "has the incidental effect of burdening a particular religious practice" or group. *Id.* at 284 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah,* 508 U.S. 520, 531, 113 S.Ct. 2217, 124 L.Ed.2d 472 (1993)).

[14] **[15]** The issue before us, then, is whether A3371 is "neutral" and "generally applicable." "A law is 'neutral' if it does not target religiously motivated conduct either on its face or as applied in practice." *Blackhawk v. Pennsylvania.,* 381 F.3d 202, 209 (3d Cir.2004) (citing *Lukumi,* 508 U.S. at 533–40, 113 S.Ct. 2217; *Tenafly Eruv Ass'n, Inc. v. Borough of Tenafly,* 309 F.3d 144, 167 (3d Cir.2002)). "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." *Id.* at 209 (citations omitted).

As a preliminary matter, A3371 makes no explicit reference to any religion or religious beliefs, and is therefore neutral on its face. *See Lukumi,* 508 U.S. at 533–34, 113 S.Ct. 2217. Nevertheless, Plaintiffs argue that A3371 covertly targets their religion by prohibiting counseling that is generally religious in nature while permitting other forms of counseling that are equally harmful to minors. Specifically, Plaintiffs contend that A3371 operates as an impermissible "religious gerrymander" [24] because it provides "individualized exemptions" for 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.

Appellant's Br. 51.

None of these five "exemptions," however, demonstrate that A3371 covertly targets religiously motivated conduct. Plaintiffs' first and third "exemptions" are not compelling because nothing in the record suggests that these forms of counseling are equally harmful to minors. Plaintiffs' second "exemption," which implies that A3371 would permit heterosexual-to-homosexual change efforts, misinterprets the statute; A3371 prohibits *all* "sexual orientation change efforts" regardless of the direction of the desired change. *See* N.J. Stat. Ann. § 45:1–55 (defining "sexual orientation change efforts" as "including, *but not limited to,*" efforts to eliminate same sex attractions) (emphasis added). Lastly, Plaintiffs' fourth and fifth "exemptions" are simply irrelevant because they have nothing to do with religion. Plaintiffs fail to explain how A3371's focus on the professional status of the counselor or the age of ***243** the client belies a concealed intention to suppress a particular religious belief. [25]

[16] **[17]** Accordingly, we conclude that A3371 is neutral and generally applicable, and therefore triggers only rational basis review. In so doing, we reject Plaintiffs' argument that even if A3371 were neutral and generally applicable, it should be subject to strict scrutiny under a "hybrid rights" theory. Specifically, Plaintiffs contend that because A3371 "burdens" both their free exercise and free speech rights, they have presented a "hybrid rights" claim that triggers heightened scrutiny. We have previously refused to endorse such a theory, *McTernan v. City of York, Pa.,* 564 F.3d 636, 647 n. 5 (3d Cir.2009), and we refuse to do so today. *See also Combs v. Homer–Center Sch. Dist.,* 540 F.3d 231, 247 (3d Cir.2008) ("Until the Supreme Court provides direction, we believe the hybrid-

rights theory to be dicta."). Because we have already concluded that A3371 survives intermediate scrutiny, it follows *ipso facto* that this law is rationally related to a legitimate government interest. Therefore, we will affirm the District Court's dismissal of this claim.

V.

Plaintiffs also argue that the District Court erred by concluding that they lacked standing to bring claims on behalf of their minor clients.[26] This argument is also without merit.

[18] **[19]** "It is a well-established tenet of standing that '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.' " *Pennsylvania Psychiatric Soc'y v. Green Spring Health Servs., Inc.*, 280 F.3d 278, 288 (3d Cir.2002) (quoting *Powers v. Ohio*, 499 U.S. 400, 410, 111 S.Ct. 1364, 113 L.Ed.2d 411 (1991)). "Yet the prohibition is not invariable and our jurisprudence recognizes third-party standing under certain circumstances." *Id.* (citations omitted). To establish third-party standing, a litigant must demonstrate that (1) she has suffered an "injury in fact" that provides her with a "sufficiently concrete interest in the outcome of the issue in dispute"; (2) she has a "close relation to the third party"; and (3) there exists "some hindrance to the third party's ability to protect his or her own interests." *Powers*, 499 U.S. at 411, 111 S.Ct. 1364 (internal quotation marks and citations omitted). In the present case, the parties agree that licensed counselors have a sufficiently "close relationship" to their clients, *see Pennsylvania Psychiatric Soc'y*, 280 F.3d at 289–90, but dispute whether Plaintiffs have suffered a sufficient "injury in fact" and whether Plaintiffs' clients are sufficiently "hindered" in their ability to bring suit themselves. We will address these two elements in turn.

***244** **[20]** Plaintiffs argue that the District Court erred by holding that they did not suffer an "injury in fact." We agree. The District Court reasoned that "Plaintiffs' ability to bring third-party claims hinges on whether they suffered any constitutional wrongs by the passage of A3371." J.A. 24. We have never held, however, that a plaintiff must possess a successful constitutional claim in order to establish an "injury in fact" sufficient to confer third-party standing. In *Craig v. Boren*, 429 U.S. 190, 191–97, 97 S.Ct. 451, 50 L.Ed.2d 397 (1976), for example, the Supreme Court granted third-party standing to a vendor who did not even allege a violation of her own constitutional rights—she merely alleged that the law at issue, in violating the rights of her customers, resulted in a reduction in her sales. Here, Plaintiffs are similarly injured by A3371 in that they are forced to either sacrifice a portion of their client base or disobey the law and risk the loss of their licenses. Thus, we conclude that Plaintiffs have a "sufficiently concrete interest" in this dispute regardless of whether A3371 violates their constitutional rights.

We agree with Defendants, however, that Plaintiffs have failed to establish that their clients are "hindered" in their ability to bring suit themselves. The only evidence Plaintiffs provide on this issue is Dr. Newman's assertion that "[n]either of [his] clients wants others to even know they are in therapy."[27] J.A. 448 (Decl. of Ronald Newman, Ph.D.). While a fear of social stigma can in some circumstances constitute a substantial obstacle to filing suit, *see Pennsylvania Psychiatric Soc'y*, 280 F.3d at 290, Plaintiffs' evidence does not sufficiently establish the presence of such fear here. Further, we note that minor clients have been able to file suit pseudonymously in both *Pickup* and *Doe v. Christie*, — F.Supp.3d —, 2014 WL 3765310 (D.N.J. July 31, 2014). While we disagree with the District Court that the presence of such lawsuits is dispositive,[28] the fact that minor clients have previously filed suit bolsters our conclusion that they are not sufficiently hindered in their ability to protect their own interests. Accordingly, we hold that Plaintiffs lack standing to pursue claims on behalf of their minor clients.

VI.

Plaintiffs also argue that the District Court erred by allowing Garden State to intervene. They advance two arguments on this point: first, that the District Court erroneously concluded that Garden State was not required to possess Article III standing; and second, that the District Court abused its discretion by permitting Garden State to intervene under Federal Rule of Civil Procedure 24(b). For the reasons that follow, we reject both arguments.

A.

"Article III of the Constitution limits the power of federal courts to deciding 'cases' *245 and 'controversies.' This requirement ensures the presence of the 'concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions.' " *Diamond v. Charles*, 476 U.S. 54, 61–62, 106 S.Ct. 1697, 90 L.Ed.2d 48 (1986) (citing *Baker v. Carr*, 369 U.S. 186, 204, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). In order to ensure that such a "case" or "controversy" is present, the Supreme Court has consistently required prospective plaintiffs to establish Article III standing in order to pursue a lawsuit in federal court. *See, e.g., id.* at 62, 106 S.Ct. 1697. Prospective plaintiffs must therefore allege a "personal injury fairly traceable to the defendant's allegedly unlawful conduct and likely to be redressed by the requested relief." *Already, LLC v. Nike, Inc.*, — U.S. —, 133 S.Ct. 721, 726, 184 L.Ed.2d 553 (2013) (quotation marks and citation omitted).

Whether prospective *intervenors* must establish Article III standing, however, is an open question in the Third Circuit. *See American Auto. Ins. Co. v. Murray*, 658 F.3d 311, 318 n. 4 (3d Cir.2011) ("[W]e need not today resolve the issue of whether a party seeking to intervene must have Article III standing."). As the District Court acknowledged, our sister circuits are divided on this question. The majority have held that an intervenor is not required to possess Article III standing to participate. *See San Juan Cnty. v. United States*, 503 F.3d 1163, 1171–72 (10th Cir.2007) (en banc); *Ruiz v. Estelle*, 161 F.3d 814, 830–33 (5th Cir.1998); *Associated Builders & Contractors v. Perry*, 16 F.3d 688, 690 (6th Cir.1994); *Yniguez v. Arizona*, 939 F.2d 727, 731 (9th Cir.1991); *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir.1989); and *United States Postal Serv. v. Brennan*, 579 F.2d 188, 190 (2d Cir.1978). The Eighth and D.C. Circuits have reached a contrary conclusion. *See Mausolf v. Babbitt*, 85 F.3d 1295, 1300 (8th Cir.1996); *Southern Christian Leadership Conference v. Kelley*, 747 F.2d 777, 779 (D.C.Cir.1984). [29]

[21] We find the majority's view more persuasive. If the plaintiff that initiated the lawsuit in question has Article III standing, a "case" or "controversy" exists regardless of whether a subsequent intervenor has such standing. *See Ruiz*, 161 F.3d at 832 ("Once a valid Article III case-or-controversy is present, the court's jurisdiction vests. The presence of additional parties, although they alone could independently not satisfy Article III's requirements, does not of itself destroy jurisdiction already established."); *Chiles*, 865 F.2d at 1212 ("Intervention under Rule 24 presumes that there is a justiciable case into which an individual wants to intervene.").

Further, while the Supreme Court has never explicitly concluded that intervenors need not possess Article III standing, this conclusion is implicit in several decisions in which it has questioned whether a particular *246 intervenor has Article III standing but nonetheless refrained from resolving the issue. *See, e.g., McConnell v. Federal Election Comm'n*, 540 U.S. 93, 233, 124 S.Ct. 619, 157 L.Ed.2d 491 (2003) ("It is clear, however, that the [named defendant] has standing, and therefore we need not address the standing of the intervenor-defendants...."), *overruled on other grounds by Citizens United v. Federal Election Comm'n*, 558 U.S. 310, 130 S.Ct. 876, 175 L.Ed.2d 753 (2010); *Arizonans for Official English v. Arizona*, 520 U.S. 43, 66, 117 S.Ct. 1055, 137 L.Ed.2d 170 (1997) (expressing "grave doubts" about whether intervenors possessed Article III standing but concluding that it "need not definitively resolve the issue"). As the Tenth Circuit reasoned in *San Juan Cnty.*, the Supreme Court could not have avoided these questions if intervenors were required to have standing under Article III "because the Court could not simply ignore whether the requirements of Article III had been satisfied." 503 F.3d at 1172. *See also id.* ("Standing implicates a court's jurisdiction, and requires a court itself to raise and address standing before reaching the merits of the case before it.") (quotation marks and citations omitted).

Accordingly, we conclude that the District Court did not err by determining that Garden State need not demonstrate Article III standing in order to intervene.

B.

[22] Plaintiffs also argue that the District Court abused its discretion by permitting Garden State to intervene under Federal Rule of Civil Procedure 24(b). This argument lacks merit as well.

Rule 24(b) provides that "[o]n timely motion, the court may permit anyone to intervene who: (A) is given a

conditional right to intervene by a federal statute; or (B) has a claim or defense that shares with the main action a common question of law or fact." Fed.R.Civ.P. 24(b)(1). In exercising its discretion, a district court "must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." Fed.R.Civ.P. 24(b)(3). We have previously noted that a district court's ruling on a motion for permissive intervention is a "highly discretionary decision" into which we are "reluctant to intrude." *Brody By and Through Sugzdinis v. Spang*, 957 F.2d 1108, 1115 (3d Cir.1992).

We see no reason to disturb the District Court's decision in this case. Garden State's motion was timely, as it was filed a mere 14 days after the complaint. Garden State and New Jersey also share the common legal position that A3371 does not violate Plaintiffs' First Amendment rights. Lastly, Plaintiffs' argument that they are unduly prejudiced by having to respond to "superfluous arguments" is not convincing. Accordingly, we conclude that the District Court did not abuse its discretion by permitting Garden State to intervene.

VII.

Although we reject the District Court's conclusion that A3371 prohibits only "conduct" that is wholly unprotected by the First Amendment, we uphold the statute as a regulation of professional speech that passes intermediate scrutiny. We agree with the District Court that A3371 does not violate Plaintiffs' right to free exercise of religion, as it is a neutral and generally applicable law that is rationally related to a legitimate government interest. We further agree that Plaintiffs lack standing to bring claims on behalf of their minor clients, and conclude that the District Court did not abuse its discretion by permitting Garden State to intervene. Accordingly, ***247** we will affirm the judgment of the District Court.

All Citations

767 F.3d 216, 89 Fed.R.Serv.3d 1260

Footnotes

1 The term "sexual orientation change efforts" is defined as "the practice of seeking to change a person's sexual orientation, including ... efforts ... to reduce or eliminate sexual or romantic attractions or feelings toward a person of the same gender." N.J. Stat. Ann. § 45:1–55.

2 As the District Court observed, Plaintiffs provide very few details of precisely what transpires during SOCE counseling sessions. The foregoing is the sum total of Plaintiffs' descriptions, which they compiled in response to the District Court's inquiries at the October 1, 2013, hearing. J.A. 556–57.

3 Assembly Bill A3371 is now codified at N.J. Stat. Ann. §§ 45:1–54, 55. Because the parties still refer to the law as A3371, we do so in this Opinion as well.

4 These State Defendants include Christopher J. Christie, Governor; Eric T. Kanefsky, Director of the New Jersey Department of Law and Public Safety: Division of Consumer Affairs; 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. Plaintiffs filed suit against each official in his or her official capacity.

5 The complaint also alleged various claims under the constitution of New Jersey. Plaintiffs abandoned these claims in the District Court.

6 Article III standing requires (1) an injury in fact, (2) that is causally related to the alleged conduct of the defendant, and (3) that is redressable by judicial action. *Friends of the Earth, Inc. v. Laidlaw Envt'l Servs. (TOC), Inc.*, 528 U.S. 167, 180–81, 120 S.Ct. 693, 145 L.Ed.2d 610 (2000).

7 After the District Court issued its opinion, the Ninth Circuit denied a petition for rehearing en banc in *Pickup* and, in the process, amended its opinion to include, *inter alia*, a discussion of *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S.Ct. 2705, 177 L.Ed.2d 355 (2010). *Compare Pickup*, 728 F.3d 1042 *with Pickup v. Brown*, 740 F.3d 1208 (9th Cir.2013) *cert denied*, —— U.S. ——, 134 S.Ct. 2871, ——L.Ed.2d —— (2014) and *cert denied*, —— U.S. ——, 134 S.Ct. 2881, ——L.Ed.2d —— (2014). We will discuss *Pickup* and *Humanitarian Law Project* in more detail *infra*.

8 After concluding that A3371 regulates neither speech nor expressive conduct, the District Court went on to subject the statute to rational basis review. In a footnote, it explained that it had, by this point, "rejected Plaintiff's First Amendment free speech challenge," but that it was applying rational basis review to determine "whether there [was] any substantive

due process violation." J.A. 48 n. 26. This explanation is puzzling, however, given that Plaintiffs alleged a substantive due process claim only on behalf of their minor patients' parents, and the District Court's rejection of these third-party claims on standing grounds rendered any further analysis unnecessary.

9 Prior forms of SOCE therapy included non-verbal "aversion treatments, such as inducing nausea, vomiting, or paralysis, providing electric shocks; or having the individual snap an elastic band around the wrist when the individual became aroused to same-sex erotic images or thoughts." J.A. 306 (APA Report). Plaintiffs condemn these techniques as "unethical methods of treatment that have not been used by any ethical and licensed mental health professional in decades" and believe "professionals who engage in such techniques should have their licenses revoked." J.A. 171 (Decl. of Dr. Tara King).

10 Further, a plurality of the Supreme Court in *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 884, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), acknowledged that a Pennsylvania law requiring physicians to provide information to patients prior to performing abortions regulated *speech* rather than merely "treatment" or "conduct."

11 Unlike the present case, plaintiffs in *Pickup* included minor patients and their parents.

12 It is not entirely clear why, or on what authority, the original *Pickup* opinion concluded that rational basis is the proper standard of review for a regulation of professional conduct that has an incidental effect on professional speech. The original opinion in *Pickup* accompanied this conclusion with a quote from *National Association for the Advancement of Psychoanalysis v. California Board of Psychology,* 228 F.3d 1043, 1049 (9th Cir.2000) ("*NAAP* "). 728 F.3d at 1056. The quoted passage from *NAAP*, however, refers to the proper standard for reviewing an *equal protection* challenge to a law that discriminates against a non-suspect class—it did not, in any way, establish that rational basis is the proper standard for reviewing a *free speech* challenge to a law that regulates professional conduct. *See* 228 F.3d at 1049. When the Ninth Circuit amended *Pickup* following the denial of the petition for rehearing en banc, the panel substituted the citation to *NAAP* with one to *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 884, 967–68, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992), in which, according to the Ninth Circuit, "a plurality of three justices, plus four additional justices concurring in part and dissenting in part, applied a reasonableness standard to the regulation of medicine where speech may be implicated incidentally." *Pickup,* 740 F.3d at 1231. We will discuss *infra* the proper standard of review for regulation of professional speech, as well as the relevance of *Casey* to this analysis.

13 The amended *Pickup* opinion acknowledges that *Humanitarian Law Project* found activity to be "speech" when it "consist[ed] of *communicating a message,*" but contends that "SB 1172 does not prohibit Plaintiffs from 'communicating a message' " because "[i]t is a state regulation governing the conduct of state-licensed professionals, and it does not pertain to communication in the public sphere." *Id.* at 1230 (quoting *Humanitarian Law Project,* 561 U.S. at 28, 130 S.Ct. 2705) (emphasis added by *Pickup*). We are not persuaded. *Humanitarian Law Project* concluded that the "material support" statute regulated speech despite explicitly acknowledging that it did not stifle communication in the public sphere. 561 U.S. at 25–26, 130 S.Ct. 2705 ("Under the material-support statute, plaintiffs may say anything they wish on any topic. They may speak and write freely about the PKK and LTTE, the governments of Turkey and Sri Lanka, human rights, and international law. They may advocate before the United Nations.").

14 Judge O'Scannlain's dissent in *Pickup* accuses the majority of "entirely exempt[ing] [SB 1172] from the First Amendment." 740 F.3d at 1215 (O'Scannlain, dissenting from denial of rehearing en banc). We do not believe the Ninth Circuit went that far. As we have explained, the Ninth Circuit acknowledged that SB 1172 "may" have an "incidental effect" on speech, and thus applied rational basis review; it did not exempt SB 1172 from any review at all.

15 While we embrace *Pickup* 's conclusion that First Amendment protection differs in the context of professional speech, we decline to adopt its three categories of protection. It is indisputable that a professional "engaged in a public dialogue" receives robust protection under the First Amendment. *Pickup,* 740 F.3d at 1227. But we find that the other two points on *Pickup* 's "continuum" are usually conflated; a regulation of "professional conduct" will in many cases "incidentally" affect speech that occurs "within the confines of a professional relationship." *Id.* at 1228–29. SB 1172 is a prime example: even if, as the *Pickup* panel reasoned, it only "incidentally" affects speech, the speech that it incidentally affects surely occurs within the confines of the counseling relationship. In fact, *Pickup* itself conflated these two categories when applying its "continuum" to SB 1172. Though it held that SB 1172 implicated the least protected category, *Pickup* subjected the statute to the level of scrutiny of its midpoint category—*i.e., Casey* 's rational basis test. *See id.* at 1228–29. Thus, we refuse to adopt *Pickup* 's distinction between speech that occurs within the confines of a professional relationship and that which is only incidentally affected by a regulation of professional conduct.

16 Advertisements that are false or misleading have never been recognized as protected by the First Amendment. *See Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 771, 96 S.Ct. 1817, 48 L.Ed.2d 346 (1976). Nor have advertisements proposing illegal transactions. *See id.* at 772, 96 S.Ct. 1817.

17 We also recognize that professional speech can often serve an expressive function insofar as a professional's personal beliefs—including deeply-held political or religious beliefs—are infused in the practice of a profession. SOCE counselors, for example, provide counseling not merely for remuneration but as a means of putting important beliefs and values into practice. This expressive value is further reason to afford professional speech some level of protection under the First Amendment.

18 Like *Humanitarian Law Project, Velazquez* concerned federal legislation which could not have been passed pursuant to the State's police power. *Velazquez,* 531 U.S. at 536, 121 S.Ct. 1043.

19 *Pickup* is the only court to explicitly apply rational basis review to a regulation of professional speech. 740 F.3d at 1231. *Wollschlaeger* and *Moore–King,* by contrast, do not explicitly identify the level of scrutiny they apply, if they apply one at all. In *Wollschlaeger,* the majority held that "a statute that governs the practice of an occupation is not unconstitutional as an abridgment of the right to free speech, so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation." 760 F.3d at 1217, 2014 WL 3695296, at *13 (internal quotation marks and citation omitted); *see also id.* at 1219, 2014 WL 3695296 at *15 (noting that generally applicable licensing regimes "do[ ] not implicate constitutionally protected activity under the First Amendment") (internal quotation marks and citations omitted). *But see id.* at 1248, 2014 WL 3695296 at *41 (Wilson, J., dissenting) (interpreting the majority opinion to apply rational basis review). Similarly, in *Moore–King,* the majority held that "[u]nder the professional speech doctrine, the government can license and regulate those who would provide services to their clients for compensation without running afoul of the First Amendment." 708 F.3d at 569. *But see id.* at 570 (refusing to "afford the government carte blanche in crafting or implementing [occupational] regulations" and refraining from "delineat[ing] the precise boundaries of permissible occupational regulation under the professional speech doctrine").

20 We have little doubt in this conclusion. A3371, on its face, prohibits licensed counselors from speaking words with a particular content; *i.e.* words that "seek[ ] to change a person's sexual orientation." N.J. Stat Ann. § 45:1–55. Thus, as in *Humanitarian Law Project,* "Plaintiffs want to speak to [minor clients], and whether they may do so under [A3371] depends on what they say." 561 U.S. at 27, 130 S.Ct. 2705.

21 It is worth noting that although the A PA Report was uncomfortable making a "definitive" statement about the effects of SOCE, it did ultimately observe that there was at least "some evidence to indicate that individuals experienced harm from SOCE." J.A. 287, 367.

22 As explained in *Fox,* the word "necessary," in the context of intermediate scrutiny, does not "translate into [a] 'least-restrictive-means' test" but instead has a "more flexible meaning." 492 U.S. at 476–77, 109 S.Ct. 3028.

23 In the District Court, Plaintiffs also argued that the phrase "sexual orientation" is unconstitutionally vague. They do not pursue this argument on appeal.

24 A "religious gerrymander" occurs when the boundaries of statutory coverage are "artfully drawn" to target or exclude religiously-motivated activity. *American Family Ass'n, Inc. v. F.C.C.,* 365 F.3d 1156, 1170 (D.C.Cir.2004); *see also Lukumi,* 508 U.S. at 535, 113 S.Ct. 2217 (describing a "religious gerrymander" as "an impermissible attempt to target petitioners and their religious practices").

25 Plaintiffs also argue that A3371's neutrality is undermined by a statement made by one of the members of the Task Force that authored the 2009 A PA Report. According to Plaintiffs, this researcher claimed that the A PA Task Force was unwilling to "take into account what are fundamentally negative religious perceptions of homosexuality—they don't fit into our world view." Appellant's Br. 52. Plaintiffs fail to explain, however, how this statement reflects the New Jersey legislature's motives in passing A3371. This statement was made by one of several members of the A PA Task Force, which produced only one of the many pieces of evidence on which the legislature relied when passing A3371. It by no means establishes that New Jersey was secretly motivated by religious animus, as opposed to their stated objective of protecting minor citizens from harm.

26 Although Plaintiffs' complaint alleged claims on behalf of their patients' parents, Plaintiffs do not pursue these claims on appeal.

27 Further, Dr. Newman made this assertion as a justification for not asking his patients to testify in open court, not as a reason these patients would be unwilling to file suit under a pseudonym. J.A. 448 (Decl. of Ronald Newman, Ph.D.).

28 The District Court reasoned that "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." J.A. 22. As we have explained, however, "a party need not face insurmountable hurdles to warrant third-party standing." *Pennsylvania Psychiatric Soc'y,* 280 F.3d at 290 (citation omitted). Thus, the fact that a few patients have been able to overcome certain obstacles does not necessarily preclude a determination that these obstacles are a "hindrance" sufficient to justify third-party standing.

29 The District Court cited *United States v. 36.96 Acres of Land*, 754 F.2d 855 (7th Cir.1985), as falling on this side of the split as well. While *36.96 Acres* held that a party seeking intervention as of right must demonstrate an interest that is "greater than the interest sufficient to satisfy the standing requirement," *id.* at 859, it is unclear whether the Seventh Circuit concluded that this greater interest was required by Article III of the Constitution or merely by the then-existing version of Rule 24(a). *See Ruiz*, 161 F.3d at 831 (explaining that "of the cases cited in *Diamond*"—including 36.96 Acres—"only *Kelly* maintains that Article III (and not just Rule 24(a)(2) & 24(b)(2)) requires intervenors to possess standing."). To the extent *36.96* held that a greater interest was constitutionally required, it provided no reasoning for that conclusion and thus carries no persuasive weight.

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The Free Press
(Published Weekly)
Tampa, Hillsborough County, Florida

STATE OF FLORIDA,
COUNTY OF HILLSBOROUGH.

Before the undersigned authority personally appeared JOHN N. HARRISON, IV, who on oath says that he is Publisher of THE FREE PRESS, a weekly newspaper published at Tampa, in Hillsborough County, Florida, that the attached copy of advertising being a true copy in the matter of

ORD. NO. 2017-47

Ordinances approved on 1st Reading – April 6, 2017 at 9:30 a.m.

File No. E2017-8 CH 15
File No. E2017-8 CH 16
File Nos. E2017-48, E2017-8 CH 14 and E2017-8 CH 19

was published in said newspaper in the issues of March 18, 2017.

Affiant further says that the said THE FREE PRESS is a newspaper published at Tampa, in said Hillsborough County, and that the said newspaper has heretofore been continuously published in said Hillsborough County, Florida, each week and has been entered as a second-class mail matter at the post office in Tampa, in said Hillsborough County, Florida for a period of one year next preceding the first publication of the attached copy of advertisement; and affiant further says that he has neither paid nor promised any person, firm or corporation any discount, rebate, commission or refund for the purpose of securing this advertisement for publication in the said newspaper.

This 18th day of March, 2017.

who is personally known to me
SWORN TO and subscribed before me

This 18th day of March, 2017.

Mark Terry

MARK TERRY
COMMISSION # FF938026
EXPIRES Nov. 19, 2019
BONDED THROUGH
INSURANCE COMPANY

NOTICE OF PUBLIC HEARING

ON April 6, 2017 AT 9:30 A.M. IN THE CITY COUNCIL CHAMBERS, CITY HALL, 315 E. KENNEDY BLVD., THIRD FLOOR, TAMPA, FLORIDA, A PUBLIC HEARING WILL BE HELD BY THE TAMPA CITY COUNCIL TO CONSIDER THE FOLLOWING ORDINANCES FOR ENACTMENT:

File No. E2017-8 CH 15

An ordinance of the City of Tampa, Florida, relating to Habitual Parking Violators, making revisions to City of Tampa Code of Ordinances, Chapter 15, (Parking); amending Section 15-3, Definitions; amending Section 15-122, Vehicles parked in violation of regulations deemed nuisance; repealing all ordinances or parts of ordinances in conflict therewith; providing for severability; providing an effective date.

File No. E2017-8 CH 16

An ordinance for first reading concerning an ordinance of the City Tampa, Florida, relating to food distribution, making revisions to City of Tampa Code of Ordinances, Chapter 16 (Parks and Recreation)l amending Section 16-21, facility rentals; amending Section 16-43, prohibited activities; repealing all ordinances or parts of ordinances in conflict therewith; providing for severability; providing an effective date.

File Nos. E2017-48, E2017-8 CH 14, and E2017-8 CH 19

An ordinance of the City of Tampa, Florida, relating to conversion therapy on patients who are minors, making revisions to City of Tampa Code of Ordinances, Chapter 14 (Offenses); creating Article X, Sections 14-310 - 14-313; amending Chapter 19 (Property Maintenance and Structural Standards); amending Section 19.4.(a)(2), Department of Code Enforcement; duties and scope of authority of the director; repealing all ordinances or parts of ordinances in conflict therewith; providing for severability; providing an effective date.

SAID ORDINANCES MAY BE INSPECTED AT THE OFFICE OF THE CITY CLERK, CITY HALL, 3RD FLOOR CITY HALL, 315 E. KENNEDY BLVD., TAMPA, FL, DURING REGULAR BUSINESS HOURS, 8:00 A.M. TO 5:00 P.M., MONDAY THROUGH FRIDAY.

ANY PERSON WHO DECIDES TO APPEAL ANY DECISION OF THE CITY COUNCIL WITH RESPECT TO ANY MATTER CONSIDERED AT THIS MEETING WILL NEED A RECORD OF THE PROCEEDINGS, AND FOR SUCH PURPOSE, MAY NEED TO HIRE A COURT REPORTER TO ENSURE THAT A VERBATIM RECORD OF THE PROCEEDINGS IS MADE, WHICH RECORD INCLUDES THE TESTIMONY AND EVIDENCE UPON WHICH THE APPEAL IS TO BE BASED.

IN ACCORDANCE WITH THE AMERICANS WITH DISABILITIES ACT AND SECTION 286.26, FLORIDA STATUTES, PERSONS WITH DISABILITIES NEEDING SPECIAL ACCOMMODATION TO PARTICIPATE IN THIS MEETING SHOULD CONTACT THE CITY CLERK'S OFFICE AT LEAST FORTY-EIGHT (48) HOURS PRIOR TO THE DATE OF THE MEETING.

INTERESTED PARTIES MAY APPEAR AND BE HEARD AT SAID HEARING.

SHIRLEY FOXX-KNOWLES, CMC
CITY CLERK 3-18

Certified as true
and correct copy