

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

TARA KING, ED.D., individually and on behalf of her patients, RONALD
NEWMAN, PH.D., *et. al.*,

Plaintiffs/Appellants,

v.

PHILIP D. MURPHY, Governor of the State of New Jersey, in his official
capacity, *et. al.*,

Defendants/Appellees.

And
GARDEN STATE EQUALITY,

Intervenor-Defendant/Appellee

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE
DISTRICT OF NEW JERSEY, CIVIL ACTION NO. 13-5038

PLAINTIFFS-APPELLANTS' MOTION TO RECALL MANDATE

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INTRODUCTION

When the United States Supreme Court reversed the Ninth Circuit's decision in *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018) (“*NIFLA*”), it abrogated not only the Ninth Circuit's decision in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013), upon which this Court relied in the case at bar, but also abrogated this Court's decision itself in the case at bar. *Id.* at 2371-75.

In light of the Supreme Court's explicit rejection of the panel's analysis, Plaintiffs are asking the Court to exercise its inherent power to recall the mandate issued on October 3, 2014. (Doc. 003111755727). *See Michael v. Horn*, 144 Fed. App'x 260, 263 (3d Cir. 2005) (affirming the Court's inherent power to recall its mandate to prevent injustice). The Supreme Court's rejection of this Court's analysis presents the kind of extraordinary circumstance that warrants use of the power to recall the mandate. *Calderon v. Thompson*, 523 U.S. 538, 550 (1998) (quoting 16 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE §3938, p. 712 (2d ed.1996)).

FACTUAL AND PROCEDURAL BACKGROUND

In this action, Plaintiffs sought to enjoin New Jersey's A3371, which classified as professional misconduct voluntary talk therapy known as Sexual Orientation Change Efforts (SOCE) for minors who request and desire to receive it, and subjected licensed counselors to discipline up to loss of their licenses if they

provided such speech-only counseling to their willing clients. N.J. Stat. Ann. §45:1–55. In upholding the district court’s denial of the preliminary injunction, this Court relied on the free speech analysis utilized by the Ninth Circuit in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013), which accorded less protection to professional speech than to non-professional speech. *King v. Governor of New Jersey*, 767 F.3d 216, 231 (3d Cir. 2014) (citing *Pickup*, 740 F.3d at 1227–29). This Court noted that *Pickup* was one of a trio of recent federal appellate decisions that had read recent Supreme Court opinions as establishing “special rules for the regulation of speech that occurs pursuant to the practice of a licensed profession.” *Id.* (quoting *Wollschlaeger v. Florida*, 760 F.3d 1195, 1217–26 (11th Cir. 2014); *Pickup*, 740 F.3d at 1227–29; and *Moore–King v. County of Chesterfield, Va.*, 708 F.3d 560, 568–70 (4th Cir. 2013)). Finding the reasoning of those cases “informative,” this Court adopted the differential standard for professional speech. *Id.*

This Court relied significantly on *Pickup* and its “continuum” of diminished First Amendment protection for licensed professionals. *Id.* at 231.

[T]he 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 [*Planned Parenthood of Southeastern Pa. v. Casey*, [505 U.S. 833,] 884, 112 S.Ct. 2791 [(1992)] (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 v. S.E.C.*, 472 U.S. [181,] 232 [(1985)] (White, J., concurring in the result)).

Id.

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; *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.

Id. at 232. Based upon its analysis, as was true with the Ninth Circuit in *Pickup*, this Court applied intermediate scrutiny to A3771 and found that it was “a permissible prohibition of professional speech.” *Id.* at 240.

On September 11, 2014, this Court issued its opinion and judgment. (Docs. 003111734575,003111734586). On September 30, 2014, this Court denied Plaintiffs’ request to stay the mandate pending disposition of Plaintiffs’ Petition for Writ of Certiorari to the United States Supreme Court. (Doc. 003111752701). On October 3, 2014, this Court issued its mandate. (Doc. 003111755726). Plaintiffs’ Petition for Writ of Certiorari to the United States Supreme Court was denied on May 4, 2015. *King v. Christie*, 135 S.Ct. 2048 (2015).

ARGUMENT

I. THIS COURT HAS CLEAR AUTHORITY TO RECALL A MANDATE THAT HAS BEEN ABROGATED BY THE SUPREME COURT.

In *American Iron & Steel Institute v. EPA*, 560 F.2d 589, 593 (3d Cir. 1977), this Court followed its sister circuits in affirming “the proposition that courts of appeals may vacate their judgments in certain limited circumstances.” “Apparently, no court now takes the position that a federal tribunal lacks authority to recall its own mandate.” *Id.* The authority is not explicitly provided for by statute, “but its existence cannot be questioned.” *Id.* at 593-94 (citing *Aerojet-General Corp. v. Am. Arbitration Ass’n*, 478 F.2d 248, 254 (9th Cir. 1973)).

This Court joined with the other circuits in emphasizing that “recall of a mandate is an extraordinary remedy, one to be used sparingly.” *Id.* at 594. Recall may be warranted for “good cause,” to “prevent injustice,” or in “special circumstances.” *Id.* Those circumstances include “(1) where clarification of a mandate and opinion is critical; (2) where misconduct has affected the integrity of the judicial process; (3) where there is a danger of incongruent results in cases pending at the same time; and (4) where it is necessary to revise an ‘unintended’ instruction to a trial court that has produced an unjust result.” *Id.* at 594 (citing *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 278-79 (D.C. Cir. 1971)).

Critically, “**recall of a mandate might be justified if a subsequent Supreme Court decision ‘showed that (the) original judgment was demonstrably wrong.’**” *Id.* at 594 (emphasis added) (quoting *Legate v. Maloney*, 348 F.2d 164, 166 (1st Cir. 1965)). Or, as was the case in *American Iron*, recall is appropriate even if a mandate is not demonstrably wrong, but was called into question by the subsequent decision. *Id.* at 596.

Where, as here, a decision of the Supreme Court the preeminent tribunal in our judicial system departs in some pivotal aspects from those of lower federal courts, amendatory action may be in order to bring the pronouncements of the latter courts into line with the views of the former. As noted above, recall of a mandate traditionally has been warranted when and to the extent necessary “to protect the integrity” of a court’s earlier judgment. Certainly, such integrity may be jeopardized when the solemn declarations of a court are called into question by a later Supreme Court opinion. **Recall of a mandate, in such a situation, would appear to be an appropriate response by a court of appeals.**

Id. (emphasis added). Finding that the subsequent Supreme Court case did not render the panel’s prior decision wrong, but did depart in a pivotal aspect from the panel’s analysis, this Court granted the motion to recall the mandate in *American Iron*. *Id.* at 600.

Similarly, in *United States v. Skandier*, 125 F.3d 178 (3d Cir. 1997), this Court found that recall was justified when a subsequent Supreme Court case clarified the question of whether the Antiterrorism and Effective Death Penalty Act of 1996 applied retroactively to habeas corpus petitions. “[W]e believe that [*United States v. Lindh* [521 U.S. 320 (1997)]] has clarified the matter, discerning a Congressional

intent not to allow the application of the chapter 153 amendments to pending cases unless specifically provided for elsewhere in the Act.” *Id.* at 183. “To that extent, this case falls within the [*American Iron*] criterion listed above. Accordingly, Skandier’s motion must be granted.” *Id.*

Importantly, neither the passage of time (even several years), nor the conclusion of a case to final judgment, deprives this Court of the inherent authority to recall its mandate. *See, e.g., Skandier*, 125 F.3d at 183 (Motion to recall mandate granted 19 months after initial determination, immediately following a Supreme Court decision affecting the plaintiff’s claims); *Am. Iron & Steel*, 560 F.2d at 590-91 (Motion to recall mandate granted 21 months after mandate issued); *United States v. Emearly*, 794 F.3d 526, 529 (5th Cir. 2015) (Motion to recall mandate granted five years after mandate issued); *United States v. Davila*, 890 F.3d 583, 585 (5th Cir. 2018) (Motion to recall mandate granted one year after mandate issued due to intervening appellate court decision); *United States v. Smith*, 685 F. App’x 270, 271 (4th Cir. 2017) (Motion to recall mandate granted 16 months after mandate issued); *Mars, Inc. v. Coin Acceptors, Inc.*, 557 F.3d 1377, 1378 (Fed. Cir. 2009) (Motion to recall mandate granted 8 months after mandate issued); *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988) (Motion to recall mandate granted 15 months after mandate issued).

In this case, recall of the mandate is warranted not merely because a subsequent case has implicitly clarified or questioned one issue, but because the Supreme Court has **explicitly abrogated** this Court’s decision, **and every decision upon which this Court’s judgment was based**. *NIFLA* does not merely “depart in a pivotal aspect” from this Court’s decision, but actually references it by name and declares that it is incompatible with Supreme Court precedent. Consequently, this is an even more exceptional case requiring recall of the mandate than was *American Iron*. Recalling the mandate is also particularly critical in this case because of the far-ranging effects that this Court’s now-abrogated opinion and the *Pickup* opinion have had across the country, as the *NIFLA* decision attests.

II. NIFLA ABROGATED KING BY NAME, EVISCERATED ITS RATIONALE, AND PROHIBITED DISPARATE TREATMENT OF SO-CALLED “PROFESSIONAL SPEECH.”

A. NIFLA Explicitly Abrogated *King* By Name, As Well Two Of The Opinions On Which *King* Relied.

On June 26, 2018, the Supreme Court issued its opinion in *NIFLA*, one of four cases¹ challenging the constitutionality of California’s Reproductive FACT Act. The

¹ *NIFLA v. Harris*, 839 F.3d 823 (9th Cir. 2016), *rev’d and remanded sub nom NIFLA v. Becerra*, 138 S.Ct. 2361(2018); *A Woman’s Friend Pregnancy Resource Clinic v. Harris*, 669 Fed. Appx. 495 (9th Cir. 2016), *cert. granted, vacated and remanded sub nom A Woman’s Fried Pregnancy Resource Clinic v. Becerra*, 2018 WL 3148264 (2018); *Livingwell Medical Clinic, Inc. v. Harris*, 669 Fed. Appx. 493 (9th Cir. 2016), *cert. granted, vacated and remanded sub nom Livingwell Medical Clinic, Inc., v. Becerra*, 2018 WL 3148264 (2018); *Mountain Right to Life v.*

Supreme Court reversed the Ninth Circuit’s decision, which had applied the *Pickup* precedent to find that the FACT Act did not violate the First Amendment. *NIFLA*, 839 F.3d at 842. In reversing the *NIFLA* decision, the Supreme Court discussed the *Pickup* analysis in detail and rejected it as contrary to Supreme Court jurisprudence. *NIFLA*, 138 S.Ct. at 2371-75.

In analyzing the free speech challenge to the FACT Act, the Ninth Circuit had “appl[ied] our precedent in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013)....” *NIFLA*, 839 F.3d at 834. “We conclude that the Licensed Notice regulates speech that falls at the midpoint of the *Pickup* continuum, and that intermediate scrutiny should apply.” *Id.* at 839. “Because the speech here falls at the midpoint of the *Pickup* continuum, it is not afforded the ‘greatest’ First Amendment protection, nor the least.” *Id.* at 840. The Ninth Circuit applied intermediate scrutiny to the FACT Act and found that it met the standard, and on that basis upheld the district court’s denial of a preliminary injunction. *Id.* at 842, 844.

The Supreme Court, however, disagreed. In reversing the Ninth Circuit’s decision in *NIFLA*, the Supreme Court acknowledged the Ninth Circuit’s **and this Court’s** reliance on the *Pickup* continuum and rejected the continuum analysis as contrary to Supreme Court precedent. *NIFLA*, 138 S.Ct. at 2371-72.

Becerra, 692 Fed. Appx. 807 (9th Cir. 2017), *cert. granted, vacated and remanded*, 2018 WL 3148273(2018).

Although the licensed notice is content based, the Ninth Circuit did not apply strict scrutiny because it concluded that the notice regulates “professional speech.” 839 F.3d at 839. Some Courts of Appeals have recognized “professional speech” as a separate category of speech that is subject to different rules. *See, e.g., King v. Governor of New Jersey*, 767 F.3d 216, 232 (C.A.3 2014); *Pickup v. Brown*, 740 F.3d 1208, 1227–1229 (C.A.9 2014); *Moore–King v. County of Chesterfield*, 708 F.3d 560, 568–570 (C.A.4 2013). These courts define “professionals” as individuals who provide personalized services to clients and who are subject to “a generally applicable licensing and regulatory regime.” *Id.*, at 569; *see also, King, supra*, at 232; *Pickup, supra*, at 1230. “Professional speech” is then defined as any speech by these individuals that is based on “[their] expert knowledge and judgment,” *King, supra*, at 232, or that is “within the confines of [the] professional relationship,” *Pickup, supra*, at 1228. So defined, these courts except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny. *See King, supra*, at 232; *Pickup, supra*, at 1253–1256; *Moore–King, supra*, at 569.

But this Court has not recognized “professional speech” as a separate category of speech. Speech is not unprotected merely because it is uttered by “professionals.” This Court has “been reluctant to mark off new categories of speech for diminished constitutional protection.” *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 804, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996) (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part). And it has been especially reluctant to “exemp[t] a category of speech from the normal prohibition on content-based restrictions.” *United States v. Alvarez*, 567 U.S. 709, 722, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012) (plurality opinion). This Court’s precedents do not permit governments to impose content-based restrictions on speech without “persuasive evidence ... of a long (if heretofore unrecognized) tradition” to that effect. *Ibid.* (quoting *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 792, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011)).

This Court’s precedents do not recognize such a tradition for a category called “professional speech.”

Id. (emphasis added). Further explaining the reason for rejecting the *Pickup* and *King* rationales specifically in the context of health care professionals, the Supreme Court said:

The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals' speech "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Turner Broadcasting [v. FCC]*, 512 U.S.[622], at 641, 114 S.Ct. 2445 [(1994)]. Take medicine, for example. "Doctors help patients make deeply personal decisions, and their candor is crucial." *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1328 (C.A.11 2017) (en banc) (W. Pryor, J. concurring). **Throughout history, governments have "manipulat[ed] the content of doctor-patient discourse" to increase state power and suppress minorities:**

For example, during the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception. In the 1930s, the Soviet government expedited completion of a construction project on the Siberian railroad by ordering doctors to both reject requests for medical leave from work and conceal this government order from their patients. In Nazi Germany, the Third Reich systematically violated the separation between state ideology and medical discourse. German physicians were taught that they owed a higher duty to the 'health of the Volk' than to the health of individual patients. Recently, Nicolae Ceausescu's strategy to increase the Romanian birth rate included prohibitions against giving advice to patients about the use of birth control devices and disseminating information about the use of condoms as a means of preventing the transmission of AIDS. Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right To Receive Unbiased Medical Advice*, 74 B.U.L. REV. 201, 201-202 (1994) (footnotes omitted).

Further, when the government polices the content of professional speech, it can fail to “preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.” *McCullen v. Coakley*, 573 U.S. —, —, —, 134 S.Ct. 2518, 2529, 189 L.Ed.2d 502 (2014). **Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields.** Doctors and nurses might disagree about the ethics of assisted suicide or the benefits of medical marijuana; lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce; bankers and accountants might disagree about the amount of money that should be devoted to savings or the benefits of tax reform. “[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market,” *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting), **and the people lose when the government is the one deciding which ideas should prevail.**

Id. at 2374-75 (emphasis added). “In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles.” *Id.* at 2375.

B. The En Banc Eleventh Circuit Has Rejected The Only Other Precedent *King* Relied Upon To Diminish First Amendment Scrutiny and Protection for So-Called “Professional Speech.”

In reaching its decision in *King*, this Court also relied explicitly on the initial Eleventh Circuit panel’s decision in *Wollschlaeger* to suggest that “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.” *King*, 767 F.3d at 232 (citing *Wollschlaeger*, 760 F.3d at 1218). The initial Eleventh Circuit panel, like *King*, *Moore-King*, and *Pickup*, had held that a

content-based regulation of doctor’s speech was merely “a valid regulation of professional conduct that has only an incidental effect on physician’s speech,” *Wollschlaeger*, 760 F.3d at 1217, and thus was only subject to rational basis review. *Wollschlaeger*, 760 F.3d at 1219-20.

However, like *Pickup*, *King* and *Moore-King*, **the *Wollschlaeger* panel opinion is no longer good law.** The en banc Eleventh Circuit explicitly rejected that analysis by stating that the panel’s and *Pickup*’s attempt to confer lesser constitutional protection on professional speech was a “dubious constitutional enterprise.” *Wollschlaeger v. Florida*, 848 F.3d 1293, 1309 (11th Cir. 2017) (en banc). There, the law in question “expressly limit[ed] the ability of certain speakers—doctors and medical professionals—to write and speak about a certain topic—the ownership of firearms—and thereby restrict[ed] their ability to communicate and/or convey a message.” *Id.* The Eleventh Circuit had no doubt these restrictions “trigger First Amendment scrutiny.” *Id.* at 1308. “A state may not, under the guise of prohibiting professional misconduct, ignore constitutional rights.” *Id.*

C. Recalling This Court’s Mandate Is Necessary To Prevent Ongoing Injury To Appellants’ Constitutional Rights.

State legislatures and municipal boards have relied on the *Pickup* decision and by extension this Court’s decision in *King*, either explicitly or implicitly, to adopt or justify laws similar to A3371 that ban voluntary, speech-only SOCE counseling for minors who request and wish to receive it. Legislators in Hawaii and Nevada

explicitly cited to *Pickup* when introducing their similar laws. Other jurisdictions have likewise adopted and justified such bans, including Oregon, Washington, Connecticut, Illinois, Maryland, New Hampshire, Vermont, New Mexico, Rhode Island and the District of Columbia² as well as 42 cities and counties.³ The validity of those laws is in question in light of *NIFLA*'s abrogation of *Pickup* and *King*.

Unless and until this Court recalls its demonstrably erroneous and now-abrogated mandate, individuals and organizations across the country will continue to be chilled in their constitutionally protected speech under *King*'s rationale. More importantly, scores of children, parents and clinicians in New Jersey are being deprived of their freedom to choose voluntary SOCE counseling to meet their

² Oregon Rev. Stat. §§ 675.070, 675.300, 675.336, 675.540, 675.745 (2016); H.B. 2753, 65th Leg., 2018 Regular Session (Wash. 2018); 2017 Conn. Pub. Acts 5; Ill. Comp. Stat. 48/1 (2017); S.B. 1028, 2018 Reg. Session (Md. 2018); H.B. 587-FN, 2018 Session (NH 2018); VT. Stat. Ann. title 18, §8351, title 26, §§ 1354(a), 1842(b), 3016, 3210(a), 3271(a), 4042(a), 4062(a), 4132(a); N.M. Stat. Ann. §61-1-3.3; R.I. Gen. Laws Ann. §§23-94-1 to 23-94-5; D.C. Code §7-1231.14 (2017).

³ Pima County, AZ; Bay Harbor Islands, FL; Boca Raton, FL; Broward County, FL; Boynton Beach, FL; Delray Beach, FL; El Portal, FL; Greenacres, FL; Key West, FL; Lake Worth, FL; Miami, FL; Miami Beach, FL; North Bay Village, FL; Oakland Park, FL; Palm Beach County, FL; Riviera Beach, FL; Tampa, FL; Wellington, FL; West Palm Beach, FL; Wilton Manors, FL; Albany County, NY; Erie County, NY; New York City, NY; Athens, OH; Cincinnati, OH; Columbus, OH; Dayton, OH; Toledo, OH; Allentown, PA; Bethlehem, PA; Doylestown, PA; Philadelphia, PA; Pittsburgh, PA; Reading, PA; State College, PA; Yardley Borough, PA; Madison, WI; Milwaukee, WI. See <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-LGBT-Youth-Jan-2018.pdf>.

therapeutic goals, based upon a legislative scheme that is of questionable constitutionality. These far-reaching effects of the Supreme Court's abrogation of *King* and *Pickup* are extraordinary circumstances that militate in favor of recalling the mandate.

CONCLUSION

The Supreme Court's abrogation of this Court's decision, and of *Pickup*, in *NIFLA* "is the exceptional case requiring recall of the mandate in order to prevent an injustice." *American Iron*, 560 F.2d at 594.

For these reasons, Plaintiffs' motion to recall the mandate should be granted.

Dated: September 10, 2018.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was filed electronically with the court on September 10, 2018. Service will be effectuated by the Court's electronic notification system upon all counsel of record.

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