

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 13-4429

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TARA KING, ED.D, et al.,

Plaintiffs-Appellants,

v.

GOVERNOR OF NEW JERSEY, et al.,

Defendants-Appellees.

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

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BRIEF IN OPPOSITION TO THE MOTION TO RECALL THE MANDATE ON  
BEHALF OF DEFENDANTS-APPELLEES

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## INTRODUCTION

This Court should deny Plaintiffs’ Motion to Recall the Mandate because the extraordinary circumstances to justify such exceptionally rare relief are not present. In seeking this extraordinary relief, Plaintiffs rely on the Supreme Court’s June 26, 2018 decision in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (“*NIFLA*”). There, the majority held that the notice requirements of a California law – the Freedom, Accountability, Comprehensive Care, and Transparency Act, CAL. HEALTH & SAFETY CODE ANN. § 123470 (“FACT Act”) – violated the First Amendment. *Id.* at 2368. In doing so, the majority stated that Supreme Court precedent has not yet “recognized ‘professional speech’ as a separate category of speech,” *id.* at 2371, and that “neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category of speech.” *Id.* at 2375. Nowhere in the opinion does the majority explicitly overturn the Third Circuit’s holding in this matter, nor does it abrogate the core holding of the case.

Courts across the circuits rarely grant the discretionary relief of recalling a mandate, and only do so in the most extraordinary of circumstances. Plaintiffs have not identified any adequate justification for this Court to depart from the longstanding judicial policy in favor of repose and finality. Accordingly, this Court should deny Plaintiffs’ motion to recall.

## **FACTS AND PROCEDURAL HISTORY**

In 2013, Plaintiffs filed a complaint challenging the constitutionality of bill A3371, codified at N.J. STAT. ANN. § 45:1-54 to -55. The statute precludes persons licensed to practice in certain professions from engaging in “sexual orientation change efforts” (“SOCE”) with minors. Plaintiffs alleged that the statute violated their rights to free speech and free exercise of religion under the First and Fourteenth Amendments. *King v. Governor of N.J.*, 767 F.3d 216, 222 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 2048 (2015).

In enacting N.J. STAT. ANN. § 45:1-54 to -55, the Legislature made extensive findings. It stated that “[b]eing lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming. The major professional associations of mental health practitioners and researchers in the United States have recognized this fact for nearly 40 years.” N.J. STAT. ANN. § 45:1-54(a). The Legislature cited many of the position statements and resolutions of those professional associations, including the American Psychiatric Association, the American Academy of Pediatrics, and the American Psychological Association. *Id.* at (c)-(m) . Each of these professional associations, the Legislature recounted, has concluded that there is little or no evidence of the efficacy of SOCE and that SOCE has the serious potential for harm, such as depression, guilt, anxiety and thoughts of suicide. *Id.* The Legislature focused particularly on the potential for harm to minors because “[m]inors who

experience family rejection based on their sexual orientation face especially serious health risks.” *Id.* at (m). Drawing on research published in the Journal of the American Academy of Child and Adolescent Psychiatry, the Legislature explained that efforts to change sexual orientation “may encourage family rejection and undermine self-esteem, connectedness and caring, important protective factors against suicidal ideation and attempts.” *Id.* at (k).

N.J. STAT. ANN. § 45:1-55 defines the prohibition’s scope. First, it defines SOCE as “the practice of seeking to change a person’s sexual orientation, including, but not limited to, efforts to change behaviors, gender identity, or gender expressions, or to reduce or eliminate sexual or romantic attractions or feelings toward a person of the same gender . . . .” *Id.* at (b). The statute expressly excludes from the definition

counseling for a person seeking to transition from one gender to another, or counseling that: (1) provides acceptance, support, and understanding of a person or facilitates a person’s coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and (2) does not seek to change sexual orientation.

[*Id.*]

Second, the prohibition applies only to “sexual orientation change efforts with a person under 18 years of age.” *Id.* at (a).

On a motion for summary judgment, the District Court concluded the statute regulated conduct, not speech, and thus did not violate Plaintiffs' First Amendment right to free speech. *King*, 767 F.3d at 223. Accordingly, it rejected Plaintiffs' free speech challenge. *Id.* at 223.<sup>1</sup>

Plaintiffs appealed, and the matter came before this Court. *See id.* at 222. This Court concluded that “the verbal communication that occurs during SOCE counseling is speech that enjoys some degree of protection under the First Amendment.” *Id.* at 224. The panel reasoned that “[b]ecause Plaintiffs are speaking as state-licensed professionals within the confines of a professional relationship, however, this level of protection is diminished.” *Id.* The Court’s analysis struck a balance between the State’s “broad power to establish standards for licensing practitioners and regulation the practice of professions” against the right to free speech prescribed by the First Amendment. *Id.* at 231 (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975)). Noting that the Supreme Court has recognized “the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health,” *Id.* at 229 (quoting *Watson v. State of Maryland*, 218 U.S. 173, 176 (1910)), the panel reasoned that “a licensed professional does not enjoy the full protection of the First Amendment when

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<sup>1</sup> The District Court also rejected Plaintiffs' free exercise challenge. *Id.* at 224. However, as Plaintiffs' motion for recall focuses on this Court's determination regarding its freedom of speech claims, this brief discusses only those claims.

speaking as part of the practice of her profession” and applied an intermediate scrutiny. *Id.* at 232, 235. The panel concluded that the statute was a “permissible prohibition of professional speech” and emphasized 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.” *Id.* at 235, 240.

Plaintiffs filed a petition for Writ of Certiorari to the United States Supreme Court, which was denied on May 4, 2015. *See King v. Christie*, 135 S. Ct. 2048 (2015).

## **ARGUMENT**

### **I. The Exceedingly Rare Remedy of Recall of Mandate Should Not Be Exercised Here.**

Recall of a mandate is an exceptionally rare remedy, invoked only in the most extraordinary of circumstances. “[T]he courts of appeals are recognized to have an inherent power to recall their mandates.” *Calderon v. Thompson*, 523 U.S. 538, 549 (1998). However, “[i]n light of ‘the profound interests in repose’ attaching to the mandate of a court of appeals . . . the power can be exercised only in extraordinary circumstances.” *Id.* at 550. “The sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies.” *Id.* The power to recall a mandate must therefore be based on “exceptional circumstances” or a “special reason.” *Dilley v. Alexander*, 627 F.2d 407, 410 (D.C. Cir. 1980).

“Only in such circumstances should the doctrine of repose admit of disturbance to settled litigation.” *Id.*

When faced with a motion to recall its mandate, appellate courts are tasked with balancing two competing interests: preventing injustice and the interest in maintaining the finality of the judgment already rendered in the case. *See United States v. Montavalo Davila*, 890 F.3d 583, 585 (5th Cir. 2018). “Assessing the relative weights of these competing considerations and determining whether the overall balance warrants recalling the mandate lies within the court’s sound discretion.” *Id.* at 586. “Above all, . . . recall of a mandate is a mode of relief that falls within the ambit of a court’s discretion[,] . . . [a]nd decisions concerning the propriety of such relief must be rendered on a case-by-case basis.” *Am. Iron & Steel Inst. v. EPA*, 560 F.2d 589, 594–95 (3d Cir. 1977).

“‘A mandate once issued will not be recalled except by order of the court for good cause shown.’ The ‘good cause’ requisite for recall of mandate is the showing of the need to avoid injustice.” *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 277 (D.C. Cir. 1971). “There must be special reason, ‘exceptional circumstances,’ in order to override the strong policy of repose, that there be an end to litigation.” *Id.* at 278 (quoting *Hines v. Royal Indem. Co.*, 253 F.2d 111, 114 (6th Cir. 1958)). Some of these exceptional 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.

[*Am. Iron & Steel Inst*, 560 F.2d at 594.]

Additionally, “recall of a mandate might be justified if a subsequent Supreme Court decision ‘showed that [the] original judgment was demonstrably wrong.’” *Id.* (quoting *Greater Boston Television Corp.*, 463 F.2d at 277).

Even under these enumerated “exceptional circumstances,” the extraordinary remedy “should not be availed of freely as a basis for granting rehearings out of time for the purpose of changing decisions even assuming the court becomes doubtful of the wisdom of the decision that has been entered and become final.” *Greater Boston Television Corp.*, 563 F.2d at 277. “Repose does not carry much weight if no more is involved than correction of clerical or trivial errors. But as the claimed error grows in importance, so does the importance of repose.” 16 Charles Alan Wright, et al., *Federal Practice and Procedure* § 3938 at 712 (3d ed. 2012). Thus, “[r]ecall is approached with great reluctance once minor errors are put behind.” *Id.*

This Circuit has recalled a mandate based on exceptional circumstances only twice before, and both of those cases are easily distinguishable from this matter. In *American Iron & Steel Institute*, the American Steel and Iron Institute petitioned the Third Circuit to review water pollution regulations designed by the EPA. *Am. Iron & Steel Inst.*, 560 F.2d at 591. The panel in *American Steel & Iron Institute v. EPA*,

526 F.2d 1027 (3d Cir. 1975) (*AISI I*) ruled that the regulations in question, which required “single-number effluent limitation standards,” did not comport with certain sections of the Federal Water Pollution Control Act Amendments of 1972 (“FWPCAA”). *Id.* The EPA was thereafter instructed to promulgate guidelines which would specify “‘permissible ‘ranges’ of limitations’ and ‘factors to be taken into account’ by permit-issuing authorities in setting effluent limitation for particular point sources.” *Id.* Thereafter, the United States Supreme Court decided *E.I. duPont de Nemours and Company v. Train*, 430 U.S. 112 (1977) (“*duPont*”), which approved single-number effluent limitations as promulgated for a nearly identical regulatory scheme. *Id.* at 592. The EPA filed a motion for recall, arguing in large part that the Supreme Court’s decision directly abrogated the decision in *AISI I*. *Id.* This Court found that recall was warranted because of the “*confluence* of several unusual factors:” including the incongruencies between the two decisions; the court’s stand-alone position “contrary to that adopted by every court of appeals that has dealt with the issue;” the “heavy burdens, contrary to the public interest,” imposed by adherence to the court’s initial mandate; the continuing nature of the obligations imposed by the original mandate; and the relatively moderate effect of the amendment requested. *Id.* at 600.

In *United States v. Skandier*, 125 F.3d 178 (3d Cir. 1997), the Third Circuit and the Supreme Court interpreted the Antiterrorism and Effective Death Penalty

Act of 1996 (“AEDPA”), to reach opposite conclusions. In the former, Skandier moved to vacate, set aside, or correct his sentence prior to the enactment of the statute. *Id.* at 179. He was informed that under 28 U.S.C. § 2253(c)(1), he needed to obtain a certificate of appealability “before his appeal would be entertained.” *Id.* Skandier’s request for a certificate was denied. *Id.* at 180. In 1997, the Supreme Court decided the matter of *Lindh v. Murphy*, 521 U.S. 320 (1997), which held that “a portion of the AEDPA dealing with state habeas corpus petitions in noncapital cases” did not apply to petitions which, like Skandier’s, were “pending when AEDPA was passed.” *Skandier*, 125 F.3d at 180. The court recalled its earlier mandate because the Supreme Court’s determination in *Lindh* clarified “the uncertainty concerning the applicability of the AEDPA to habeas corpus petitions filed before” its enactment. *Id.* at 183.

*American Steel & Iron Institute* and *Skandier* are unquestionably distinguishable from this matter. In the former two cases, recall of the mandate was warranted because the Supreme Court’s holding was a polar opposite of the holding reached by the Third Circuit. With regard to *NIFLA* and this Court’s holding in *King*, there is no indication that the Supreme Court’s analysis of the FACT Act in California impacts the Third Circuit’s analysis of the SOCE statute in New Jersey. The courts were interpreting two entirely different statutes, regulating two entirely different areas of the law.

What's more, as noted above, the Court in *NIFLA* did not declare that professional speech could never be a category of speech which receives less protection. Indeed, the Court elected to not "foreclose on the possibility" that such a category can exist and instead concluded that with respect to the facts in *NIFLA*, "neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category." *NIFLA*, 138 S. Ct. at 2375.

Plaintiffs have not articulated an extraordinary circumstance to warrant recall of this Court's mandate. In an attempt to shoehorn this matter into the exceptional circumstances category, Plaintiffs claim *NIFLA* abrogates this Court's holding and "eviscerates" its reasoning. However, as explained above, such justification is used sparingly in this Circuit and only in those situations where the Supreme Court reaches a completely opposite conclusion of the Third Circuit in its analysis of the same statute or regulatory scheme. Plaintiffs offer no adequate justification to warrant such extraordinary relief. Accordingly, recall is not warranted here.

## **II. *NIFLA* Does Not Overturn or Abrogate *King*'s Holding.**

Contrary to Plaintiffs' claims, *NIFLA* does not "eviscerate" the holding in this case. Rather, Justice Thomas's majority opinion states there is not currently Supreme Court precedent that delineates "professional speech" as a "separate category of speech that is subject to different rules." *NIFLA*, 138 S. Ct. at 2371. *NIFLA* does not explicitly overturn this Court's core holding in this matter, nor does

it indicate that the Third Circuit erred. Accordingly, Plaintiffs' request to recall this Court's mandate should be denied.

In *NIFLA*, the majority held that the notice provisions of California's FACT Act, a statute enacted to regulate crisis pregnancy centers, violated the First Amendment. *Id.* at 2368. The crisis pregnancy centers are, according to the majority, "pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center." *Id.* The stated purpose of the Act was to "ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them." *Id.* at 2369. To further that purpose, the Act required licensed facilities to "disseminate[] a government-drafted notice on site" stating "California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]." *Id.*

The Court concluded this notice requirement was a "content-based regulation of speech" as it "compe[ls] individuals to speak a particular message," thus altering the content of their speech. *Id.* at 2371. It noted that the Ninth Circuit Court of Appeals, however, did not apply strict scrutiny because it concluded the notice fell

under the category of “professional speech.” *See id.* The Supreme Court stated that it has not yet recognized “‘professional speech’ as a separate category of speech” and has been reluctant to create new categories of speech to be afforded less protection. *Id.* at 2371-72. Ultimately, the Court concluded, “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. However, the Court did not “foreclose on the possibility that some such reason exists.” *Id.* According to the majority, the FACT Act could not survive an intermediate scrutiny analysis even if analyzed under the “professional speech” doctrine and did not address the subject further. *Id.*

*King* was not abrogated by name in *NIFLA*. *King* is mentioned just three times in the opinion and only where the Court seeks to define what has been considered “professional speech” by some circuit courts. *Id.* at 2371. Nowhere in the Court’s opinion does the majority abrogate or explicitly overturn *King*’s decision.

Rather, the majority’s opinion is limited to two principles: 1) that Supreme Court precedent has not yet recognized “such a tradition for a category called ‘professional speech,’” *id.* at 2372, and 2) that “neither California nor the Ninth Circuit has identified a persuasive reason” for the Court to adopt such a doctrine as precedent. *Id.* at 2375. The majority was clearly aware of this Court’s holding, as it cited to this case. Thus, the majority could have rejected and overturned *King*.

However, the Court limited its analysis to the constitutionality of California's FACT Act. Furthermore, the Court left open the opportunity for the establishment of a "professional speech doctrine." *Id.*

Plaintiffs attempt to apply with broad strokes *NIFLA*'s holding to the Third Circuit's determination here. However, the Supreme Court did not suggest that *NIFLA*'s rationale was to be so broadly construed. *NIFLA* presents a completely distinct set of facts from those in this case. For example, in determining the notice requirement was unconstitutional, the Court noted that the requirement was "not tied to a procedure at all." *Id.* at 2373. This case presented the opposite, in that, N.J. STAT. ANN. § 45:1-55 prevents only the procedure of conversion therapy itself, not any speech about such therapy or speech that is untethered to providing a particular ineffective or harmful treatment. Furthermore, N.J. STAT. ANN. § 45:1-55 exempts from the definition of "sexual orientation change efforts" communications or counseling that "provides acceptance, support, and understanding of a person or facilitates a person's coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practice." N.J. STAT. ANN. § 45:1-55(b)(1). Thus, the statute does not prevent all discussion of a minor's sexual

identity or orientation. Instead, it prohibits only those practices deemed harmful by the scientific and psychological community.<sup>2</sup>

There is no indication from the majority that *NIFLA* overturned the Third Circuit's holding in this matter or that its holding was intended to extend beyond the circumstances presented in *NIFLA*. Accordingly, this Court should reject Plaintiffs' claim that recall is necessary.

### **CONCLUSION**

For the foregoing reasons, Plaintiffs' motion should be denied.

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<sup>2</sup> In analyzing the unlicensed facility notice requirement of the FACT Act, the majority stated no justification had been offered that was "more than 'purely hypothetical.'" *NIFLA*, 138 S. Ct. at 2377. Here, the State's justification in this matter could not be more realized, as the scientific and psychological communities have determined that conversion therapy and SOCE pose serious risk of significant harm to minors. *See* N.J. STAT. ANN. § 45:1-54.

**CERTIFICATION OF BAR MEMBERSHIP**

I certify that I am an attorney in good standing of the bar of the Third Circuit.

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**CERTIFICATION OF COMPLIANCE WITH RULE 32(a)**

I certify that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared using Microsoft Word 2010 in Times New Roman 14-point font. I further certify that this brief complies with the type-volume limitation of Fed. R. App. P. 27(d)(2)(A) because this brief contains 3,349 words, and the page limitation of Fed. R. App. P. 27(d)(2)(B) because this brief is 14 pages.

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**CERTIFICATION OF COMPLIANCE WITH LOCAL RULE 31.1(c)**

I certify that the text of the paper copies of this brief and the text of the PDF version of this brief filed electronically with the Court today are identical. I further certify that prior to electronically filing this brief with the Court today it was scanned by McAfee VirusScan Enterprise 5.5.0.447, a virus detection software, and found to be free from computer viruses.

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