13-4429

IN THE

United States Court of Appeals

FOR THE THIRD CIRCUIT

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

Appellant,

—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,

Appellees,

GARDEN STATE EQUALITY,

Intervenor-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

OPPOSITION TO MOTION TO RECALL MANDATE

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PRELIMINARY STATEMENT

Years after this Court issued its decision and mandate in *King v. Governor of New Jersey*, and after the Supreme Court denied certiorari in both this case and in *Doe v. Christie* (a companion case raising substantially similar issues), Appellants seek the extraordinary remedy of a withdrawal of the mandate in *King*, which upheld A3771, New Jersey's 2013 law enjoining state-licensed mental health professionals from subjecting minor patients to harmful treatments designed to change their sexual orientation.

Appellants contend that the Supreme Court's decision in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"), a case adjudicating the constitutionality of a California statute mandating that certain state-licensed clinics provide information regarding abortion services to pregnant women, "abrogated" this Court's decision in *King* and "eviscerated" the Court's rationale in upholding A3771. Appellants' motion has no merit.

Appellants have not come close to meeting the high standard for the extraordinary remedy they seek. *First*, a motion to recall a mandate is reserved only for egregious cases, such as when the Supreme Court has squarely addressed an issue of statutory or criminal law that this Court previously addressed. NIFLA did not address the validity of state laws such as A3771; thus, Appellants cannot satisfy that standard here. *Second*, the Supreme Court's *NIFLA* decision did not "abrogate" this Court's decision in *King*, which is consistent with NIFLA's express affirmation that states continue to have the authority to regulate medical practitioners. *Third*, the circumstances here—including the nearly four years that has passed since the mandate issued in this case—strongly disfavor the relief Appellants seek.

Accordingly, and for the reasons set forth below, Appellants' motion to recall the mandate should be denied.

FACTUAL BACKGROUND

This case concerned a constitutional challenge to a 2013 New Jersey law, A3371, passed by large bipartisan majorities in the New Jersey legislature and signed into law by then-Governor Chris Christie, protecting minor patients from the harmful practice of "sexual orientation change efforts" ("SOCE") by state-licensed mental health professionals. Appellants (two therapists licensed by the state of New Jersey and two organizations whose members include state-licensed professionals who practice or wish to engage in SOCE) filed this lawsuit in the U.S. District Court for the District of New Jersey on August 22, 2013, claiming, among other things, that the law violated their freedom of speech. The district court granted summary judgment on all counts in favor of Appellees, which included then-Governor Christie, the heads of various New Jersey state agencies, and Defendant-Intervenor Garden State Equality. Appellants filed an appeal with this Court.

On September 11, 2014, this Court issued its opinion upholding A3371 as a lawful exercise of the state's well-established power to regulate health professionals. *King v. Governor of N.J.*, 767 F.3d 216 (2014). Appellants sought a stay of this Court's mandate pending the adjudication of a certiorari petition to the Supreme Court, which this Court denied on September 30, 2014. This Court's mandate issued on October 3, 2014. Appellants' certiorari petition was denied on May 4, 2015. *See King v. Christie*, 135 S. Ct. 2048 (2015).

On June 28, 2018, the Supreme Court issued its *NIFLA* decision. More than two months later, on September 10, 2018, Appellants filed the instant motion.

ARGUMENT

I. RECALLING THE MANDATE IS AN EXTRAORDINARY REMEDY WARRANTED ONLY IN EXTREMELY LIMITED CIRCUMSTANCES, NONE OF WHICH EXIST HERE

The decision to recall the mandate of an appellate court is "one of last resort, to be held in reserve against grave, unforeseen contingencies." *Calderon v. Thompson*, 523 U.S. 538, 550 (1998). Because of the "'profound interests in repose' attaching to the mandate of a court of appeals," this Court has recognized that "the power can be exercised only in extraordinary circumstances" and should be "used sparingly." *Id.*; *Am. Iron & Steel Inst. v. Envtl. Prot. Agency*, 560 F.2d 589, 595 (3d Cir. 1977); *see also Johnson v. Bechtel Assocs. Prof'l Corp.*, 801 F.2d 412, 416 (D.C. Cir. 1986) (stating that the recall power should not "be used simply as a device for granting late rehearing").

Courts carefully have cabined the recall power to apply only in limited situations: "(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*, 560 F.2d at 594. Appellants do not point to any of these factors being present here, nor could they. Instead, Appellants rely upon a potential fifth category: where "a subsequent Supreme Court decision 'showed that [the] original judgment was demonstrably wrong.'" *Id.* As explained below, however, this Court's judgment in *King* was not "demonstrably wrong," and Appellants have failed to demonstrate that this is the extremely rare case where recall of an appellate court's mandate would be warranted.

II. THE SUPREME COURT'S DECISION IN *NIFLA* DOES NOT RENDER THIS COURT'S *KING* JUDGMENT "DEMONSTRABLY WRONG"

A. Extraordinary Relief Is Warranted Only When—Unlike Here—A New Supreme Court Decision Shows that an Original *Judgment*, Not Merely the *Reasoning* of a Prior Case, Was "Demonstrably Wrong"

To justify the extraordinary remedy of withdrawing a mandate, a new Supreme Court decision must "show[] that [the] original *judgment* was demonstrably wrong," not merely that the *reasoning* was erroneous. *Bos. & Me. Corp. v. Town of Hampton*, 7 F.3d 281, 283 (1st Cir. 1993) (emphasis added) (citing *Legate v. Maloney*, 348 F.3d 164 (1st Cir. 1965)) (explaining that dicta in *Legate* discussing situations where the "original judgment was demonstrably wrong" applies only where the judgment, not the reasoning, of the original case satisfied that standard); *see also Am. Iron*, 560 F.2d at 594 (discussing *Legate*). Indeed, even in a circumstance where a subsequent court has "explicitly declared part of [the earlier court's] reasoning" to be erroneous, an appellate court "would only compound [its] error by reopening a dispute in which [its] judgment was not demonstrably wrong." *Bos. & Me.*, 7 F.3d at 283 (refusing to recall mandate where Supreme Court of New Hampshire expressly declared that the First Circuit erred in interpreting state law, finding that "the precise issues of substantive law presented by [the case at bar] were not before the Supreme Court of New Hampshire"); *Hines v. Royal Indem. Co.*, 253 F.2d 111, 113-14 (6th Cir. 1958).

This Court has recalled a mandate on the basis of a "demonstrably wrong" judgment only twice—both times in circumstances where the Supreme Court squarely addressed an issue of federal statutory interpretation previously addressed by this Court. *American Iron & Steel Institute* involved a provision of the Federal Water Pollution Control Act Amendments of 1972. While the Supreme Court interpreted the provision to allow the EPA to promulgate "single number" effluent limitation regulations, the Third Circuit (in an earlier case) had found the very same provision to

require the EPA to promulgate a "range" of limitations rather than a single number. *Am. Iron*, 560 F.2d at 592. *United States v. Skandier* involved the retroactive applicability of certain amendments to the Antiterrorism and Effective Death Penalty Act of 1996. The Supreme Court held that the amendments were not retroactive; the Third Circuit (in an earlier case), held that they were. 125 F.3d 178, 179-80, 182 (3d Cir. 1997). In both cases, the Supreme Court's holding would have been controlling in the prior case and would have dictated a different result if the order of the cases had been reversed.

No such circumstances are present here. The Supreme Court's holding in *NIFLA* would not be dispositive if *King* was being decided today; indeed, the cases involve different statutes addressing completely different issues. In *NIFLA*, the Supreme Court considered the constitutionality of the California Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (the "FACT Act"), a statute that required certain licensed California clinics that provide services to pregnant women to provide certain notices regarding, among other things, abortion. 138 S. Ct. at 2368-69. While the Ninth Circuit had upheld the licensed notice provision of the California statute under intermediate scrutiny, the Supreme Court disagreed, finding that the law could not meet that standard. *Id.* at 2361, 2375.

This Court's decision in *King* had nothing to do with the FACT Act and compelled speech about abortion or women's reproductive health. Rather, this case involved the constitutionality of a New Jersey statute prohibiting the practice of sexual orientation change efforts by licensed professionals on minor children. The constitutionality of the California FACT Act is unrelated to A3371 and had the *NIFLA* decision been decided before *King*, it would not have dictated a different judgment in the case. Indeed, the Supreme Court, if it wanted, could have reviewed this Court's decision in *King* (and its decision in the companion *Doe* case), but chose not to by rejecting both

petitions for certiorari. *King*, 135 S. Ct. 2048; *Doe v. Christie*, 136 S. Ct. 1155 (2016). As such, because "the precise issues of substantive law presented by" the *King* decision were not at issue in *NIFLA*, *see Bos. & Me.*, 7 F.3d at 283, the *NIFLA* decision cannot be read to render this Court's judgment in *King* "demonstrably wrong."

B. *NIFLA* Did Not "Abrogate" This Court's Judgment in *King*

Appellants contend that *NIFLA* "explicitly abrogated" this Court's 2014 decision in *King*. (Motion at 7.) It did no such thing. Appellants' claim rests entirely on dicta in *NIFLA* criticizing *King* for suggesting that "professional speech" is "a separate category of speech" for purposes of First Amendment review. 138 S. Ct. at 2371. But the *holding* in *King* does not depend on that broad premise. Rather, it is fully consistent with the more narrow, well-settled principle—expressly affirmed by the *NIFLA* Court—that states may regulate the practice of medicine (including mental health treatments), even when doing so restricts some speech. *Id*. at 2372; *King*, 767 F.3d at 230-31.

NIFLA invalidated a California law requiring licensed pregnancy clinics to notify women that California provides free or low-cost medical care, including abortions. 138 S. Ct. at 2368. *NIFLA* struck down the law because its required disclosures were "not tied to a [medical] procedure" and instead "applie[d] to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed." *Id*. at 2373. The Court found that the law directly regulated speech, entirely apart from the regulation of any medical treatment, and therefore improperly "compel[ed] individuals to speak a particular message." *Id*. at 2371. The Court contrasted these untethered speech requirements with the informed consent requirement upheld in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992), which "regulated speech only as part of the practice of medicine." *NIFLA*, 138 S. Ct. at 2373.

In upholding New Jersey's law protecting minors from certain harmful treatments, this Court in *King* expressly relied on *Casey*'s holding that states may regulate speech involved in the actual "practice of medicine" without raising First Amendment concerns. *King*, 767 F.3d at 230-31. It is true that dicta in *King* appeared to construe *Casey* more broadly to suggest that regulations of professional speech generally or as a category may receive diminished First Amendment protection. But that dicta does not undermine the fundamental soundness of this Court's conclusion that, pursuant to *Casey*, states may regulate medical treatments even when doing so restricts some speech by medical professionals. *Id.*

NIFLA does not call the validity of that principle into question. To hold otherwise, as this Court noted, would entirely negate states' traditional authority to protect their residents from potentially serious harms by licensing and regulating health care professionals. "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." *Id*. at 232. "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." *Id*.; *see NIFLA*, 138 S. Ct. at 2372 (noting that even the (constitutional) requirement that a physician obtain informed consent restricts speech).

None of the factors that led the Supreme Court to invalidate the California law in *NIFLA* are present here. Here, like the regulation in *Casey*, New Jersey's law is expressly limited to a specific mental health treatment—the subjection of minors to sexual orientation change efforts, a dangerous and discredited form of mental health treatment. *See King*, 767 F.3d at 237 ("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.").

In imposing that narrow restriction for licensed therapists, as this Court found, the New Jersey law is limited strictly to speech that is directly involved in providing that specific treatment. The law "does not prevent . . . 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." *Id*. at 233. Nor does the law prohibit mental health professionals from publicly or privately stating a belief in the efficacy or propriety of sexual orientation change efforts for minors or adults, or from publicly or privately stating any other beliefs about sexual orientation or any other topic. *See id.* at 237 (stating that the law does not prevent therapists from expressing any viewpoint about these or other matters "to anyone they please, including their minor clients"). It does not require mental health professionals to make any affirmative statements about sexual orientation, sexual orientation change efforts, or any other subject. And it does not apply at all either to unlicensed therapists or to treatment of adult patients. *Id*. at 221 (describing statute).

In sum, the Supreme Court long has recognized that a state's "regulatory authority is particularly important when applied to professions related to mental and physical health." *Id*. at 232 (citing *Watson v. Maryland*, 218 U.S. 173, 176 (1910)). *NIFLA* went out of its way to reaffirm that precedent, 138 S. Ct. at 2373, and this Court's holding in *King* falls squarely within that settled law.

Finally, it bears emphasis that even if the judgment in *King* depended on a view of professional speech as a category (which it did not), Plaintiffs' claim that *NIFLA* "abrogated" *King* would still have no merit. Despite its lengthy discussion of the professional speech doctrine, *NIFLA* stopped short of rejecting it. The Court expressly declined to decide whether there may be "a persuasive reason for treating professional speech as a unique category" for purposes of First

Amendment review. *Id*. at 2375. "We do not foreclose the possibility that some such reason exists. *We need not do so*, because the licensed notice cannot survive even intermediate scrutiny." *Id*. (emphasis added). Contrary to Plaintiffs' claim, such a carefully limited opinion—leaving the possible scope of the professional speech doctrine to future cases—cannot plausibly be said to have "eviscerated" this Court's decision in upholding New Jersey's law.

C. Even Where a Judgment Is "Demonstrably Wrong," Other Factors—Also Not Present Here—Must Exist to Warrant this Extraordinary Remedy.

In *American Iron & Steel Institute*, this Court based its decision to withdraw the mandate not merely on its determination that the judgment in the decision was "demonstrably wrong," but on "additional factors" supporting its view that the recall motion should be granted.[1] 560 F.2d at 597.

First, this Court found important that its earlier decision stood alone against five other courts of appeals, all of whom had decided the precise issue consistently with the Supreme Court. *Id*. at 597-98. Because the issue in the cases related to "the national program of water pollution

[1] This is consistent with decisions from other Circuits refusing to recall issued mandates even where a subsequent Supreme Court decision rendered a judgment "demonstrably wrong." For example, in *Carrington v. United States*, the Ninth Circuit declined to recall the mandate in two cases to allow criminal defendants to be resentenced after the Supreme Court's decision in *United States v. Booker*, 543 U.S. 220 (2005), even though the defendants would have received lower sentences under *Booker* than they had previously received. In rejecting the motions, the Ninth Circuit noted not just that *Booker* was not retroactive, but that the petitioners were indistinguishable from other prisoners whose sentences would be affected by *Booker* and that the mandates had been final for over five years and were not "still subject to the filing of a petition for a writ of certiorari to the Supreme Court." 503 F.3d 888, 892 (9th Cir. 2007). *See also United States v. Tulare Lake Canal Co.*, 677 F.2d 713, 715 (9th Cir. 1982) ("A change in controlling authority or a conviction that the court erred are ordinarily not alone sufficient grounds for recall of a mandate after final judgment."), *judgment vacated as moot on other grounds*, 459 U.S. 1095 (1983); *Powers v. Bethlehem Steel Corp.*, 483 F.2d 963, 964 (1st Cir. 1973) (same); *Greater Boston Television Corp. v. F.C.C.*, 463 F.2d 268, 277 (D.C. Cir. 1971) (same).

control envisioned by the" statute, rejecting the motion would "prove disruptive" and would require the EPA to promulgate a special set of rules solely "to govern the iron and steel industry and perhaps other industrial categories in the Third Circuit alone." *Id.* at 598.

Second, this Court found it important that the litigation remained ongoing in the district court, where the EPA had been instructed on remand to promulgate rules consistent with its (but not the Supreme Court's) opinion. *Id.* at 591-92, 598 ("Because the interest in avoiding differences in result in cases pending at the same time stands as a valid basis for the recall of a mandate, alteration of the judgment here does not constitute a radically new or unwarranted departure from the strong policy that there be an end to any particular litigation."). As such, modifying this Court's earlier decision "would not be particularly violative of the elemental precept . . . that there should be a conclusion to controversy in litigation." *Id*. at 599. Moreover, this Court noted that "the effect on [its] original judgment of the amendment sought by the EPA [will] be a relatively modest one." *Id*.

Third, this Court recognized that granting a recall motion must be in the public interest. *Id*. at 598 (noting that the public interest component "would seem to be encompassed under the broader rubrics of 'good cause' or 'special circumstances'"). In *American Iron & Steel Institute*, the Court found that, absent a recall, the EPA would "have to restructure its methodology for promulgating regulations [and] devote substantial manpower in order to satisfy the remand instructions," whereas granting the recall would "serve to expedite the operation of the permit system [and] bolster the accomplishment of the central objective of the legislative draftsmen, viz., 'to restore and maintain the chemical, physical and biological integrity of the Nation's waters.'" *Id*.

None of the circumstances cited by this Court in the *American Iron & Steel Institute* case as justification for recalling the mandate are present here. Indeed, all of the facts here point the other way. *First*, whereas this Court's decision in *American Iron & Steel Institute* was an outlier among its sister Circuits (and the Supreme Court), the two Circuit courts to address laws banning the practice of SOCE on minors (this Court and the Ninth Circuit) both have upheld such laws and there is no Supreme Court decision striking any such law down. Likewise, there is no risk of inconsistency in the application of a federal statute or administration of a national program here: A3371 is limited to the regulation of professionals licensed by the State of New Jersey.

Second, whereas in *American Iron & Steel Institute* litigation remained ongoing in the district court, this case has been closed for nearly four years and granting Appellants' motion would seriously undermine the "'profound interests in repose' attaching to the mandate of a court of appeals." *Calderon*, 523 U.S. at 550 (quoting 16 C. Wright, A. Miller & E. Cooper, Fed. Prac. & Proc. § 3938 (2d ed. 1996) at 712); *see also Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944) (noting the "deep rooted policy in favor of the repose of judgments"). The mandate in this case issued on October 3, 2014, nearly four years ago, and with the exception of one case which presented uniquely extraordinary circumstances inapplicable here,[2] none of the cases cited by Appellants involve situations where a motion for recall of an appellate court's mandate was granted more than two years after it was issued. Likewise, the relief Appellants seek

[2] In that case—*United States v. Emeary*—the Fifth Circuit found that a criminal defendant's appointed attorney, and the lower court, "committed plain error in reviewing Emeary's sentence and failing to notice that he was condemned to five more years of incarceration than the law allows." 794 F.3d 526, 528 (5th Cir. 2015). The recall was granted because the court's "plain error" resulted in a "drastic loss of liberty[,]" which the Fifth Circuit determined to be an "injustice." *Id*. at 530. *Emeary* does not involve a subsequent Supreme Court decision that rendered the circuit court's decision "demonstrably wrong" as Appellants contend occurred in the present case, and therefore it is inapposite.

here would be not be "relatively modest," *Am. Iron*, 560 F.2d at 599; it would be a 180-degree reversal of this Court's judgment.

Third, there is a strong public interest undergirding A3371. As this Court recognized, "the State's interest in protecting its citizens from harmful professional practices is unquestionably substantial," an interest that is "even stronger because A3371 seeks to protect minor clients—a population that is especially vulnerable to such practices." *King*, 767 F.3d at 237-38. The Court went on to find that

> "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. Many such organizations have also concluded that there is no credible evidence that SOCE counseling is effective.
>
> 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."

Id. at 238 (internal quotations and citations omitted). Nothing in the Supreme Court's *NIFLA* decision impugns or even discusses these important findings, and they, along with the other circumstances discussed above, strongly militate against granting the relief Appellants seek.

CONCLUSION

For all the reasons explained above, and those set forth in the brief submitted by the State Appellees, this Court should deny Appellants' extraordinary motion to recall this Court's mandate.

Dated: September 20, 2018

Respectfully submitted,

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CERTIFICATION OF COUNSEL

I, David S. Flugman, hereby certify that:

1. I am a member of the bar of this court;

2. This brief complies with the type-volume limitation of Fed. R App. P. 32(a)(7)(B) because this brief contains 3,860 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii);

3. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman;

4. This document was scanned using Microsoft Forefront and that no viruses were detected.

5. Pursuant to Local Appellate Rules 31.1(d) and 113.4(a), I caused the Opposition to Motion to Recall Mandate to be served on counsel for Appellants via the Notice of Docket Activity generated by the Court's electronic filing system (i.e., CM/ECF).

Dated: September 20, 2018
New York, New York

/s/ David S. Flugman
Counsel for Appellee Garden State Equality