CASE NO. 13-4429

IN THE
UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

TARA KING *et al.*

***Plaintiffs and Appellants*,**

v.

CHRISTOPHER J. CHRISTIE, Governor of the State of New Jersey, in his official capacity *et al*,

Defendants and Appellees.

On Appeal From the Order of the United States District Court for the District of New Jersey
(Civil Action No. 13-5038)

AMICUS CURIAE BRIEF OF HEALTH LAW SCHOLARS IN SUPPORT OF DEFENDANTS AND APPELLEES

Eileen R. Ridley (eridley@foley.com)
Thomas F. Carlucci (tcarlucci@foley.com)
Patrick T. Wong (pwong@foley.com)
Kristy K. Marino (kkmarino@foley.com)
Foley & Lardner LLP
555 California Street, 17th Floor
San Francisco, California 94104-1520
Telephone: 415.434.4484

Katherine L. Kraschel
(Kkraschel@foley.com)
Foley & Lardner LLP
111 Huntington Avenue, Suite 2500
Boston, Massachusetts 02199-7610
Telephone: 617.342.4000

Attorneys for Amici Curiae
HEALTH LAW SCHOLARS

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STATEMENT OF INTEREST OF *AMICI CURIAE*

The issues presented to the Court on this appeal concern the scope of the State's regulatory authority regarding healthcare practices. *Amici curiae* are health law scholars who submit this brief to assist the Court in considering the well-established and long history of the State's regulation of healthcare professionals stemming from the State's strong interest in the health and welfare of its citizens. Indeed, the State has historically placed practice limitations on a variety of treatments – including those that involve speech. Thus, New Jersey Assembly Bill 3371 ("A3371")[1] is well within the State's authority to enact laws designed to protect the health and welfare of the people of New Jersey and is not a departure from the State's regulatory framework.

Amicus curiae Brietta Clark is a law professor from Loyola Law School in Los Angeles. Her expertise includes healthcare regulatory compliance. She is an Affiliate Faculty Member of the Bioethics Institute at Loyola Marymount Institute. She is a past member of the Los Angeles County Medical Association-Los Angeles County Bar Association Joint Committee on Biomedical Ethics, a past chair of the Health Law Section Executive Committee of the Los Angeles County Bar Association, and a past member of the institutional review boards for Children's Hospital Los Angeles and California Hospital Medical Center.

[1] A3371 is codified as N.J. Stat.Ann. §§ 45:1-54, 45:1-55.

Amicus curiae Jan Costello is a law professor also from Loyola Law School in Los Angeles. She teaches, lectures, writes and consults in the areas of children and the law, mental disability law, and family law. She is former Chair of the State Bar of California Committee on Legal Rights of Disabled Persons, and Chair of the Law & Mental Disability Section of the American Association of Law Schools (AALS). She served as a board member of Mental Health Advocacy Services, Inc. (MHAS), and the Disability Rights Legal Center (formerly Western Law Center for Disability Rights) associated with Loyola Law School, and as a faculty member of the UCLA Forensic Psychiatry Fellowship Program.

Amicus curiae Judith Daar is a law professor at Whittier Law School and Clinical Professor of Medicine at the University of California, Irvine School of Medicine. Her expertise is on the intersection of law, medicine and ethics. In 2005, she became Chair of the AALS's Section on Law, Medicine and Health Care, and in 2006 she was named to the Board of Directors of the American Society of Law, Medicine & Ethics (ASLME). She was elected President of ASLME in 2009 and re-elected for a second term in 2010. She is a member of the UCI Medical Center Medical Ethics Committee, where she serves on the Bioethics Consultation Team. She has also served as a member of the Harbor-UCLA Hospital Institutional Review Board, and the ABA Coordinating Group on Bioethics.

Amicus curiae Holly Fernandez Lynch is Executive Director of the Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics at Harvard Law School. She also holds an appointment as Lecturer on Law at Harvard Law School, where she teaches a course on bioethics in the courts. Her scholarship is in law and bioethics, focusing on the regulation of human subjects research, pharmaceutical development and regulatory policy, conflicts of conscience in both medical and legal professions, and conflicts of interest in health care. She worked as a bioethicist with the Human Subjects Protection Branch at the National Institutional of Health's Division of AIDS and was a Senior Policy and Research Analyst for President Barack Obama's Commission for the Study of Bioethical Issues. She was also an academic fellow at the Petrie-Flom Center for Health Law Policy, Biotechnology, and Bioethics at Harvard Law School.

Amicus curiae Kimberly Mutcherson is a law professor at Rutgers School of Law in Camden. Her expertise is in bioethics and family law, and her scholarly work focuses on issues at the intersection of health law, bioethics, and family law with a particular interest in assisted reproduction. She is an associate with the Center for Children and Childhood Studies at Rutgers. Her work has been published in the Columbia Journal of Gender Law, Cornell Journal of Law and Public Policy, and the Harvard Journal of Law and Gender. She has spoken nationally on topics related to human subject research and health law.

Amicus curiae Susan Stefan is a visiting law professor at the University of Miami Law School. She has worked previously for the Mental Health Law Project, which is now the Bazelon Center for Mental Health Law. More recently, she was an attorney with the Center for Public Representation in Massachusetts where she directed the Center's National Emergency Department. This department provides consultation and technical support on issues relating to the treatment of people with psychiatric disabilities in emergency department settings and community psychiatric crisis alternatives. She also taught Disability Law and Mental Health Law at the University of Miami School of Law.

Amicus curiae Richard Storrow is a law professor at the City University of New York. His scholarship focuses on health law and bioethics with a concentration on regulating reproductive technology. In 2010, he was a Fulbright Scholar and conducted research on the regulation of assisted reproductive technology in Spain.

Amicus curiae Katrina Karkazis, PhD, MPH is a Senior Research Scholar at the Center for Biomedical Ethics at Stanford University. Her expertise is in clinical and research ethics and pediatric ethics. Internationally recognized for her work in critical medical and science studies and on gender, sexuality, and intersexuality, Dr. Karkazis has lectured at more than 40 universities and her research is widely cited and taught in fields that include psychology, gender and

sexuality studies, and history and philosophy of science. In addition to her research activities in these areas, she has lectured on a wide range of issues at the interface between medicine, ethics, and society having taught at the undergraduate and graduate level in schools of social sciences, public health, and medicine at Stanford and Columbia Universities, as well as Mills College.

Plaintiffs and Appellants have consented to *amici curiae's* request to file an *amicus* brief.

STATEMENT IN COMPLIANCE OF RULE 29(c)(5)

No party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person other than *amici curiae* or their counsel contributed money that was intended to fund preparing or submitting this brief.

SUMMARY OF ARGUMENT

Through its general police powers, the State has the utmost obligation to ensure that the health, safety, and welfare of its citizens are not jeopardized. This strong interest underpins the State's long history of regulation regarding the medical field – including mental health professionals. Laws and regulations that limit what mental health professionals can or cannot do during the treatment of their patients are common.

Furthermore, almost all medical treatment entails some form of speech (*e.g.*, a physician's discussion of his or her patient's symptoms and treatment options). This fact does not, however, thwart the State's ability to regulate the provision of healthcare – including the administration of mental health treatments where communication through speech is involved.

Viewed holistically, mental health practices are conduct-related treatments that include a communication (*i.e.*, talking) component. Similarly, sexual orientation change efforts (or "SOCE") is a discredited practice that utilizes various methods such as physical aversion and non-aversion techniques, including psychoanalysis, aversion conditioning with nausea-inducing drugs, hormone treatments, lobotomy, shock therapy, electroshock, castration, behavioral therapy, and verbal communication components.[2] There is, therefore, nothing unique about SOCE that should hinder the State's ability to regulate the practice in an effort to protect the health and welfare of the people of New Jersey. Indeed, given that there is unanimity among all the respected and mainstream medical organizations (such as the American Academy of Pediatrics, American Psychological Association, American Psychiatric Association, and World Health Organization)

[2] *See Pickup v. Brown* and *Welch v. Brown*, Nos. 12-17681, 13-15023, 2014 U.S. App. LEXIS 1878, *8-*9 (9th Cir. Jan. 29, 2014, as amended); *Pickup et al. v. Brown et al.*, No. 2:12-cv-02497-KJM-EFB, 2012 U.S. Dist. LEXIS 172034, *7-*9 (E.D. Cal. Dec. 4, 2012).

that SOCE has no medical efficacy and is harmful to the individuals receiving it,[3] the State has a greater duty to regulate the use of such a discredited practice – especially when it concerns minors.

Given the above, A3371 appropriately prohibits mental health providers from administering the discredited practice of SOCE to minors because A3371 falls well within the State's regulatory history of the medical field and its interest in promoting the health and welfare of the people of New Jersey. *Contrary to Plaintiffs' assertions*, *A3371 does not prohibit any mental health provider from talking about SOCE or discussing the availability of SOCE*. Instead, A3371 prohibits administering the *technique* of SOCE as a purported form of

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[3] The American Psychoanalytic Association stated that SOCE is "against fundamental principles of psychoanalytic treatment and often result in substantial psychological pain by reinforcing damaging internalized attitudes." The Pan American Health Organization, a regional office of the WHO, said that SOCE "constitute(s) a violation of the ethical principles of health care and violate human rights that are protected by international and regional agreements" and "lack(s) medical justification and represent a serious threat to the health and well-being of affected people." Finally, the American Academy of Child and Adolescent Psychiatry, stated in its 2012 journal, Journal of the American Academy of Child and Adolescent Psychiatry, "there is no medically valid basis for attempting to prevent homosexuality, which is not an illness. … Given that there is no evidence that efforts to alter sexual orientation are effective, beneficial or necessary, and the possibility that they carry the risk of significant harm, such interventions are contraindicated." *See* N.J. Stat. Ann. § 45:1-54(j)(2), (k), (l); A.B. 3371, 215th Leg., ch. 150, ¶¶ 1(j)(2), (k), (l) (Aug. 19, 2013). Moreover, at a United Nations panel discussion on SOCE it was noted that "there is no longer any real debate about this [SOCE] therapy among mental health professionals. *The debate now… is not clinical, but cultural*." www.huffingtonpost.com/2013/02/01/un-conversion-therapy_n_2600742.html (last visited Feb. 16, 2014) (emphasis added.)

psychotherapy. As such, A3371 does not abridge Plaintiffs' First Amendment rights because A3371 does not implicate speech that falls under the First Amendment. SOCE is a conduct-related discredited practice that sometimes involves talking. If Plaintiffs' position is taken to its logical conclusion, any treatment or conduct that involves "talking" would always implicate the First Amendment, and rarely, if at all, would any healthcare regulation pass constitutional muster. Courts have uniformly rejected similar arguments. Plaintiffs' position is not only untenable and wrong, it is also inconsistent with historical and practical precedents in New Jersey healthcare law.

ARGUMENT

I. THE STATE ROUTINELY REGULATES HEALTHCARE PRACTICES.

A. State Regulations Of Healthcare Providers Are Aimed At Protecting The Health, Safety, And Welfare Of Its Citizens.

The propriety of the government's power to regulate the medical profession (including mental health professionals), in this case, the State of New Jersey, is unquestioned. *See State v. Chapman*, 55 A. 94, 95 (N.J. 1903) ("[t]he [power of the legislature to regulate the practice of medicine, dentistry or surgery is undoubted…") (citation omitted). The utmost goal of regulations that affect healthcare providers is to protect the health, safety, and welfare of individuals who receive treatment from providers. States are the primary regulators of healthcare,

and they enact laws and regulations affecting healthcare professionals through the State's police powers. *Sammon v. New Jersey Bd. Of Medical Examiners*, 66 F.3d 639, 645 & nn.9-10 (3d Cir. 1995) (rejecting argument that choice provision of medical services is a constitutionally significant interest triggering strict scrutiny review); *Eatough v. Albano*, 673 F.2d 671, 676 (3d Cir. 1982) ("It is long settled that states have a legitimate interest in regulating the practice of medicine."); *New Jersey Chiropractic Assoc. v. State Bd. of Medical Examiners*, 79 F. Supp. 327, 335 (D.N.J. 1948) ("[T]here is no right to practice medicine which is not subordinate to the police power of the states, ….") (citations omitted); *New Jersey State Board of Optometrists v. S. S. Kresge Co*., 174 A. 353, 355 (N.J. 1934) ("The state, in the exercise of the police power, has the undoubted right to regulate the practice of such professions ['medicine and kindred professions for the treatment of human ailments'] for the protection of the lives and health of the people"); *Chapman*, 55 A. at 95 (same).

Numerous governmental regulations state expressly that the goal of the regulation is to ensure the public's health, safety, and welfare under the States' general police powers. Courts have made clear that states' broad police power includes the right to regulate healthcare professionals and practices for the protection of patients. Indeed, healthcare is one of the most regulated industries in the State and the country as a whole given the life-depending work that the

healthcare professionals do for their patients. *See S.S. Kresge Co*., 174 A. at 355; *Chapman*, 55 A. at 95; *see also Watson v. Maryland*, 218 U.S. 173, 176 (1910) ("There is perhaps no profession more properly open to [state] regulation than that which embraces the practitioners of medicine [] [d]ealing, as its followers do, with the lives and health of the people …."); *Dent v. West Virginia*, 129 U.S. 114, 122-23 (1889) ("Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend …."); *Kenneally et al. v. Medical Board of California et al.*, 27 Cal. App. 4th 489, 500-01 (1994) ("The work of physicians has life and death consequences for their patients. … There is no profession in which it is more critical that errant practitioners be swiftly and expeditiously identified and disciplined."); *Board of Medical Quality Assurance v. Superior Court (Willis)*, 114 Cal. App. 3d 272, 278 (1980) ("[t]he courts have had opportunity to describe the "unique position" of influence of those who are licensed to practice the healing arts.").

One way that states use their regulatory power to protect the public is through laws that establish the qualifications to obtain and maintain a license to provide healthcare. *See* N.J. Stat. Ann. § 45:9-6 (New Jersey's licensing requirement provision for the practice of medicine or surgery); *id*. § 45:1-18.1 (findings and declarations concerning the unauthorized practice of certain

regulated professions, and statement concerning the necessity of regulation "to protect the health, safety, and welfare of the residents of "New Jersey"); *id*. § 45:1-21 (power of a board, including medical board, to refuse granting of a license for various reasons); *id*. § 45:8BB-14 (New Jersey's licensing requirements for marriage counselors); *id*. §§ 45:8BB-39-45:8BB-41.2, 45:8BB-44 (New Jersey's licensing requirements for various licensed professional counselors); *id*. § 45:14B-14 (New Jersey's licensing requirements for psychologists); *id*. § 45:14BB-6 (New Jersey's certification requirements for psychoanalysts); *id*. § 45:15BB-6 (New Jersey's certification requirements for social workers); *Dent*, 129 U.S. 114 at 122-23 ("No one has a right to practice medicine without having the necessary qualifications of learning and skill," and the statute only requires that the physician present evidence by "a certificate or license from a body designated by the State as competent judge of his qualifications."); *S.S. Kresge Co*., 174 A. at 355; *Chapman*, 55 A. at 95; *Kenneally*, 27 Cal. App. 4th at 497 ("No person can acquire a vested right to continue, when once licensed, in a business, trade or occupation which is subject to legislative control under the police powers….") (citations omitted).

States, such as New Jersey, also pass laws to create and empower state boards to oversee and carry out licensure and disciplinary process of professionals – such as the State Board of Medical Examiners, which regulates the practice of

medicine or the Board of Psychology, which regulates the practice of psychology – in accordance with laws defining unprofessional conduct and otherwise regulating the practice of medicine and psychology. *See, e.g.*, N.J. Stat. Ann. §§ 45:1-18-45:1-18.2 (investigative and enforcement powers of various State boards). New Jersey has enacted a number of statutes that govern medical and mental health professionals based upon the State's interest of protecting its citizens. Statutes governing medical and mental health professionals are codified generally in Title 45 of the New Jersey statutes, Professions and Occupations. N.J. Stat. Ann. §§ 45:1-1 *et seq*.

Additionally, New Jersey has empowered various state boards, including State Board of Medical Examiners, State Board of Marriage and Family Therapy Examiners, State Board of Psychological Examiners, and State Board of Social Work Examiners to "adopt rules and regulations to serve the public health, safety and welfare." N.J. Stat. Ann. § 45:1-15.1; *see also id*. §§ 45:1-3.1, 45:1-14, 45:1-18, 45:1-18, 45:1-18.1, 45:1-18.2. For example, the New Jersey regulations on physicians, psychiatrists, and psychoanalysts, among others, are codified in Title 45 of New Jersey statutes, Chapters 8B (marriage and other professional counselors), 9 (physicians and surgeons), 14B (psychologists), 14BB (psychoanalysts), and 15BB (social workers). The overarching findings, declarations, and goal of these regulations are aimed to ensure that the "health and

welfare of the residents of the State will be protected by identifying to the public those individuals who are qualified" to practice their respective professions. *See, e.g.* N.J. Stat. Ann. § 45:14BB-2 ("Findings, declarations relative to certification of psychoanalysts); *see also National Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology (NAAP)*, 228 F.3d 1043, 1047 (9th Cir. 2000). The Ninth Circuit noted emphatically that "the Legislature recognized the actual and *potential consumer harm* that can result from the unlicensed, unqualified or incompetent practice of psychology." *NAAP*, 228 F.3d at 1047 (emphasis added).

Under New Jersey's regulatory scheme, healthcare providers may be disciplined or have their licenses restricted, suspended, or revoked for incompetence, unprofessional conduct, violating other applicable laws, or otherwise failing to adhere to professional standards of competence. The New Jersey Supreme Court has stated that licensing requirements for medical professionals are necessary to protect the citizen's health and welfare by "excluding from practice those who are ignorant and incapable…" *Chapman*, 55 A. at 95; *see also, e.g.,* N.J. Stat. Ann. § 45:1-15.1 (authorizing boards to "adopt rules and regulations to serve the public health, safety and welfare."); *id*. § 45:1-18.1 (same).

Courts have warned against second-guessing the State when it comes to areas that are traditionally within the State's police powers, stating that "[t]he

Legislature is presumed to know the needs of the people and it may draw distinctions based upon degrees of evil without being arbitrary" and, as such, the person challenging the constitutional validity of a statute "has the burden of overcoming the presumption" of validity. *Fried v. Kervick*, 167 A.2d 380, 383-84 (N.J. 1961); *Jamouneau v. Harner*, 109 A.2d 640, 647-48 (N.J. 1954) ("There is a presumption of the constitutional sufficiency of a legislative enactment; and the onus of a showing *contra* is on him who interposes the challenge.") (emphasis included); *Supermarkets General Corp. v. Sills*, 225 A.2d 728, 733 (N.J. Sup. Ct. 1966) (holding that the burden of party attacking the constitutionality of a statute is a "strong one."); *see Williams v. Lee Optical of Oklahoma, Inc.*, 348 U.S. 483, 487-488 (1955) ("It is for the legislature, not the courts, to balance the advantages and disadvantages of the . . . requirement . . . For protection against abuses by legislatures, the people must resort to the polls not the courts."); *Sammon*, 66 F.3d 639 at 645 ("[A] court engaging in rational basis review is not entitled to second guess the legislature on the factual assumptions or policy considerations underlying the [regulation].")

To this end, courts have held that legislative enactments are "presumed to be valid and to be based upon factual support" and that courts must employ the rational basis review in analyzing the challenged statute. *Sills*, 225 A.2d at 733 (citing to *Reingold v. Harper*, 6 N.J. 182 (1951); *Metropolitan Cas. Ins. Co. of*

New York v. Brownell, 294 U.S. 580 (1935); *see also Sammon,* 66 F.3d 639 at 645-646 ("When [regulation] is being tested under rational basis review, those challenging the legislative judgment must convince the court that the legislative facts… could not reasonably be conceived as true by the governmental decision-maker."); *Eatough,* 673 F.2d at 676 & n.4 (Stating that courts "have never insisted that a legislative body articulate its reasons for enacting a [regulation]"); *Brandwein v. The California Board of Osteopathic Examiners et al.*, 708 F.2d 1466 (9th Cir. 1982) ("In general, the Court has been especially deferential to legislative classifications in cases of challenges to the state regulation of licensed professions"); *NAAP*, 228 F.3d at 1051-52 ("Regulating psychology, and through it psychoanalysis, is rational because it is within the state's police power to regulate mental health treatment.")

B. Regulations That Limit Or Ban Specific Healthcare Practices Are Common.

Although every leading and mainstream medical association has rejected the medical efficacy of SOCE, Plaintiffs argue that A3371 is an unprecedented and overly broad regulation of medical speech. Plaintiffs are wrong.

To the contrary, healthcare providers are routinely subject to various state and federal laws that regulate certain healthcare practices, devices or drugs that are deemed to be medically ineffective, pose a significant risk of harm that outweighs any possible or speculative benefit, or involve the failure to adhere to professional

standards of competence. In passing regulations to protect the public, states are mindful of which patient populations may be particularly susceptible to harmful practices and abuse by others, such as incompetent patients, patients with serious mental health concerns, patients belonging to groups suffering discrimination by government/providers in the past, and minors.

The following are but a few examples of such regulations:

1. New Jersey Oversight Of New And Novel Procedures And Clinical Research For Licensed Physicians.

The State Board of Medical Examiners has established standards and procedures relating to certain "new and novel procedures." N.J. Admin. Code § 13:35-6.7. The regulation prohibits physicians from "perform[ing] a procedure in an office setting that is generally recognized as ineffective and unsafe by experts in the field who are qualified by scientific training and experience to evaluate the safety and effectiveness of the procedure for its intended use." *Id.* It also requires a licensee to establish a procedural protocol prior to performing a new or novel procedure. *Id*.

2. New Jersey's Regulation On Psychosurgery, Shock Therapy, Sterilization, And Experimentation On Individuals Under The Care Of A Guardian.

New Jersey has placed special restrictions on certain treatments a physician may perform on individuals under the care of a guardian. N.J. Admin. Code § 10:45-5.1. Under New Jersey law, the applicable medical professional may not

perform shock treatment, psychosurgery, sterilization, pharmacological research, or experimentation to an individual under a guardianship without the individual's consent, and notwithstanding the guardian's position on the issue. *Id*. In other words, guardians cannot consent to these procedures under any circumstances. *Id.* Similarly, individuals who have been committed may not be subjected to experimental research, shock treatment, psychosurgery, or sterilization, without the express and informed consent of the patient after consultation with counsel or an interested party of the patient's choice. N.J. Stat. Ann. § 30:4-24.2. Finally, medical professionals are prohibited from subjecting individuals housed in an institution for the developmentally disabled to shock treatment, psychosurgery, sterilization, or medical behavioral or pharmacological research without the express written and informed consent of the person. *Id.* § 30:6D-5.

3. New Jersey And Federal Regulations Involving Controlled Substances.

One of the most regulated areas for medical practitioners involve the prescription of controlled substances. *See* 21 U.S.C. §§ 801 *et seq*. (Controlled Substances Act). Medical professionals must adhere to strict limitations imposed by both the New Jersey and the federal government regarding the manner by which they treat their patients with controlled substances. New Jersey has deemed "engaging in acts constituting any crime or offense involving moral turpitude or relating adversely to the activity regulated by the board" as grounds for

disciplinary action. N.J. Stat. Ann. § 45:1-21. In addition, the applicable Board may take disciplinary action if a medical practitioner engages in professional or occupational misconduct as may be determined by the board. *Id*.

4. New Jersey Ban On Implanted Prolene Loop Hair Replacement.

New Jersey bans medical professionals from performing the implanted prolene loop procedure or any other cosmetic suturing retaining process involving the use of suture material in the scalp for hair replacement. N.J. Admin. Code § 13:35-6.21. Violation of the prohibition may constitute professional misconduct, gross malpractice, or unprofessional conduct, which are grounds for revocation of the physician's license. *Id.*

5. New Jersey Regulations On Certain Mental Health And Medical Procedures.

The State regulates how medical and mental health professionals conduct their treatment of patients who have been involuntarily committed. For example, the State provides special protection for people suffering from mental health conditions who have been involuntarily detained, and regulates what their treating medical or mental health professional can or cannot do, and can or cannot say. N.J. Stat. Ann. §§ 30:4-27 *et seq*. The intent of the regulation is: (a) to "provide clear standards and procedural safeguards that ensure that only those persons who are dangerous to themselves, others or property, are involuntarily committed to

treatment;" (b) to ensure "that persons in the public mental health system receive inpatient treatment and rehabilitation services in the least restrictive environment in accordance with the highest professional standards and which will enable those persons committed to treatment to return to full autonomy in their community as soon as is clinically appropriate;" and (c) to "protect[] individual liberty and provide[] advocacy and due process for persons receiving treatment and insure[] that treatment is provided in a manner consistent with a person's clinical condition." *Id*. § 30:4-27.1.

6. Other New Jersey Regulations Affecting The Practice Of Various Medical And Mental Health Providers.

There are various other regulations that place limits (or bans) on health professionals' practices, such as:

- Ban on human reproductive cloning. N.J. Stat. Ann. § 2C:11A-1 (deeming such acts a first degree offense);
- Ban on sexual contact and/or sexual harassment between patient and provider, with limited exemptions. N.J. Admin. Code § 13:42-10.9 (deeming such conduct by a psychologist as professional misconduct); *id*. § 13:42-10.7 (describing disclosure requirements for a psychologist who becomes aware of sexual conduct or relations by a patient with the previous psychotherapist); *id*. § 13:34-6.4 (deeming such conduct by a

marriage and family therapist as malpractice or professional misconduct); (describing disclosure requirements for a marriage and family therapist who becomes aware of sexual conduct or relations by a patient with the previous marriage and family therapist); *id*. § 13:34-6.5.

- Limitations on the use of tanning devices, and ban on persons under age seventeen from using a tanning facility. N.J. Stat. Ann. § 26:2D-82.1;
- Criminalizing assisted suicide. *Id.* § 2C:11-6.

The laws referenced above provide but a small sample of various regulations that govern "healing arts" in New Jersey. Many of these regulations not only impose certain requirements regarding what practitioners must do or say, they also prohibit what practitioners can do or say. A3371 falls well within this regulatory history of the healthcare field and is properly within the State's police power to protect its citizens.

C. Many Governmental Regulations Of Medical Practice, Including The Practice Of Mental Health, Apply To Speech That Is Part Of Treatment.

Communication between patient and provider is often a critical part of treatment in a variety of medical contexts – yet, governmental regulation is still permitted in these areas. That is, the fact that a treatment may involve speech does

not, in and of itself, exempt a provider from regulation. To the contrary, treatments with a speech component are, and have been found to be, appropriately subject to governmental regulation.

1. Regulation Of Psychotherapy.

One example of treatment that has a speech component is psychotherapy, which relies heavily on provider communication as the means for helping to treat a patient's illness. Although this Circuit has not previously decided the issue, the Ninth Circuit has held that the mere fact that speech is involved does not exempt psychotherapists from regulation nor does it necessarily mean that such regulations should be subject to greater scrutiny under the First Amendment. *NAAP*, 228 F.3d at 1054. In *NAAP*, the plaintiffs contended that because psychoanalysis is the "talking cure," it deserved special First Amendment protection because it was "pure speech." However, in upholding the district court's dismissal of plaintiff's claims that challenged the state's mental health licensing laws, the Ninth Circuit concurred with the district court's assessment in stating that:

> [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. Thus, even though psychotherapy employs speech in its treatment, it has been found by the Ninth Circuit Court to be a proper subject of the state's power to regulate. *Id*. at 1056.

2. New Jersey Regulations Imposing Mandatory Reporting Duties As Part Of Treatment.

In other instances, New Jersey has promulgated regulations that impose a mandatory reporting duty, which is speech, upon covered healthcare providers. For example, New Jersey law requires physicians to report all cases of communicable diseases, including Human Immunodeficiency Virus (HIV). N.J. Admin. Code § 13:35-6.24. Failure to report is deemed professional misconduct, subject to disciplinary action by the Board of Medical Examiners. *Id.*

Physicians must also provide notice to an un-emancipated minor's parent who seeks access to abortion services, and must provide the minor with a fact sheet regarding her rights under the laws requiring such notice and waiting period. N.J. Stat. Ann. § 9:17A-1.8.

3. New Jersey Regulates Public Communications By Healthcare Providers.

New Jersey also regulates certain communications to the public by licensed professionals, including physicians, surgeons and mental health professionals. For example, New Jersey prohibits marriage and family therapists from "advertis[ing] or communicate[ing] in a manner which appears to intimidate, exert undue

pressure, or unduly influence a prospective client." N.J. Admin. Code § 13:34-7.6. The same limitations apply to psychotherapists. *Id*. § 13:42-9.7.

New Jersey also regulates the content of a psychotherapist's research and requires a psychotherapist to "provide thorough discussion of the limitations of the published data and alternative hypotheses, especially where the work touches on social policy or might reasonably be construed to the detriment of persons in specific age, sex, ethnic, socio-economic or other identifiable social groups." *Id*. § 13:42-10.6.

4. New Jersey Regulations Require Practitioners To Provide Certain Information During Treatment.

New Jersey has imposed regulations that require healthcare providers to provide information while providing certain treatments to patients. For example, the State requires that a physician of a patient who is contemplating disposition of cryopreserved embryos "shall provide the patient with timely, relevant and appropriate information sufficient to allow that person to make an informed and voluntary choice regarding the disposition of any human embryos remaining following the infertility treatment." N.J. Stat. Ann. § 26:2Z-2.

Likewise, the State mandates the physician "shall provide notice to a patient . . . of the right to have a chaperone present" during breast and pelvic exams in females and genitalia and rectal exams in both males and females. N.J. Admin. Code § 13:35-6.23. There are numerous similar instances where the State requires

the dissemination of certain information (in the form of written or verbal speech) by healthcare providers to patients in the course of treatment as follows:

- Requiring nutritional counseling, recommendations for behavior modification, and appropriate exercise for weight loss when a physician engaging in bariatric practice prescribes, orders, dispenses, administers, sells or transfers any drug for the treatment of obesity. N.J. Admin. Code § 13:35-7.5A.
- Requiring a physician or health care practitioner who is the primary caregiver for a pregnant woman to provide the woman with information about HIV and AIDS, including an explanation of HIV infection and the meanings of positive and negative test results and to inform the woman of the benefits of being tested for HIV as early as possible in the course of her pregnancy. N.J. Stat. Ann. § 26:5C-16.

Regulation of these healthcare treatments, like psychotherapy, undoubtedly involve a speech component yet are a proper subject of regulation to protect the health, safety and welfare of patients. Thus, based upon the above examples, the fact that a treatment may have a speech component does not preclude the State from regulating those healthcare treatments. To hold otherwise would bar

numerous existing regulations concerning the provision of healthcare treatments that employ speech.

II. SOCE IS A CONDUCT-BASED PRACTICE, NOT SPEECH.

A. A3371.

New Jersey Governor Christopher J. Christie signed A3371 on August 19, 2013, effective on the same date. A.B. 3371, 215th Leg., Bill Tracking. A3371 (codified as N.J. Stat. Ann. §§ 45:1-54 and 1-55) prohibits mental health providers from administering SOCE to any individual under 18 years old. N.J. Stat. Ann. § 45:1-55(a). A3371 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*. § 45:1-55(b) (emphasis added). Furthermore, A3371 encompasses those persons "licensed to provide professional counseling" including "a psychiatrist, licensed practicing psychologist, certified social worker, licensed clinical social worker, licensed social worker, licensed marriage and family therapist, certified psychoanalyst, or a person who performs counseling as part of the person's professional training for any of these professions…" *Id*. § 45:1-55(a).

The Legislative findings contained in A3371 cite to, and rely upon, the stated position by respected and mainstream medical and psychological

associations all of whom overwhelmingly state that SOCE has no known benefit, is ineffective towards its purported aim, and presents a high likelihood of harm and critical health risks to those who undergo such a technique. *See id*. §§ 45:1-54(b)-(m); A.B. 3371, 215th Leg., ch. 150, ¶¶ 1(b)-1(m) (Aug. 19, 2013). These associations include the American Psychological Association, American Psychiatric Association, American School Counselor Association, American Academy of Pediatrics, American Medical Association Council on Scientific Affairs, National Association of Social Workers, American Counseling Association, American Psychoanalytic Association, American Academy of Child and Adolescent Psychiatry, and the Pan American Health Organization (the regional office of the World Health Organization). None of these organizations recognize SOCE as an accepted practice, and indeed, a number of these organizations expressly reject SOCE as not only discredited and inappropriate, but unethical. *See* N.J. Stat. Ann. §§ 45:1-54(j)(2), (k), (l); A.B. 3371, 215th Leg., ch. 150, ¶¶ 1(j)(2), (k), (l) (Aug. 19, 2013).

Based on these authorities, New Jersey expressly found and declared that is "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." *See* N.J. Stat. Ann. § 45:1-54(n); A.B. 3371, 215th

Leg., ch. 150, ¶ 1(n) (Aug. 19, 2013). Therefore, New Jersey has concluded appropriately that licensed medical and mental health professionals within the State should not be permitted to engage in SOCE.

B. SOCE Is Conduct.

As pertinent to A3371, SOCE refers to the "practice" (*i.e.*, conduct) undertaken by certain mental health providers that seek to change an individual's sexual orientation and "includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." The medically discredited and unproven practice employs a variety of aversive and non-aversive methods, including psychoanalysis, aversion conditioning with nausea-inducing drugs, hormone treatments, lobotomy, shock therapy, electroshock, castration, behavioral therapy, and counseling, all for the purported goal of "curing" same-sex attraction. *See Pickup v. Brown* and *Welch v. Brown*, Case Nos. 12-17681, 13-15023, 2014 U.S. App. LEXIS 1878, *8-*9 (9th Cir. Jan. 29, 2014, as amended); *Pickup et al. v. Brown et al.*, 2:12-cv-02497-KJM-EFB, 2012 U.S. Dist. LEXIS 172034, *7-*9 (E.D. Cal. Dec. 4, 2012). Thus, SOCE is a practice that entails conduct (*e.g.,* aversion therapy and the administration of drugs) with a communication component – it is not "pure speech."

C. The Speech Component Of SOCE Does Not Transform The Practice Into Expressive Speech Or Expressive Conduct.

Although this Circuit has not previously decided the issue, the Ninth Circuit made it clear 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." *NAAP*, 228 F.3d at 1053-54s (citing to *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)). In *NAAP*, certain unlicensed psychoanalysts challenged California's licensing requirements, in part, under the First Amendment arguing that "because psychoanalysis is the 'talking cure,' it deserves special *First Amendment* protection because it is 'pure speech.'" *Id*. at 1054 (emphasis included). The Ninth Circuit rejected that argument holding that while the practice of psychoanalysis employs speech, "'the key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech," and therefore, it does not make it immune from regulation, "especially when public health concerns are affected." *Id*. (citing to *Watson v. Maryland*, 218 U.S. 173, 176 (1910)) (emphasis included).

There are very few instances where a regulation concerning the medical profession has been challenged successfully on constitutional grounds. Moreover, in the rare instance where the challenge has been successful, the regulation at issue was not tethered necessarily to standards of professional competence. Rather, the

regulation prevented the practitioner from sharing information that was *consistent* with generally accepted standards (as opposed to a practice that was at odds with generally accepted standards such as SOCE), or that may provide medical benefit. *See, e.g., Conant v. Walters*, 309 F.3d 629, 638 (9th Cir. 2002) (striking down policy that prevented physicians from even sharing information about the availability of the potential benefit of marijuana, as opposed to prohibiting a physician from actually prescribing marijuana); *Wollschlaeger v. Farmer*, No. 11-22026-Civ, 2012 WL 3064336 (S.D. Fla. June 29, 2012) (finding that a Florida law that prohibited a doctor from inquiring about their patients' gun-ownership ran afoul of the First Amendment because it prevented doctors from communicating with their patients in a manner that was "truthful [and] non-misleading.")

There are two fatal infirmities to the First Amendment challenge against A3371. First, it is indisputable that all respected and mainstream medical, psychological, psychiatric, and counseling organizations, as well as the World Health Organization, have concluded that SOCE confers no medical benefit, and, in fact, poses a risk of serious harm to those subjected to the technique. *See* N.J. Stat. Ann. §§ 45:1-54(b)-(m); A.B. 3371, 215th Leg., ch. 150, ¶¶ 1(b)-1(m) (Aug. 19, 2013). Indeed, it appears that apart from fringe groups, no other organizations of any kind support the use of SOCE. Thus, not only did New Jersey pass A3371 rightfully within its police powers to protect the health, safety, and

welfare of one of the most vulnerable group of its citizens (minors), A3371 also passes muster insofar as the First Amendment is concerned because SOCE is not consistent with the standard of professional competence. Second, unlike in *Conant*, A3371 does not prevent a mental health practitioner from espousing his or her view on SOCE, but rather, prohibits a mental health practitioner from acting upon their favorable view of SOCE by actually administering SOCE to their patients as a purported treatment. A mental health practitioner who believes in SOCE is not prohibited by A3371 from expressing his or her views on SOCE, nor from mentioning the existence or availability of SOCE. Indeed, the Ninth Circuit upheld the constitutionality of a statute that is nearly identical to A3371 in a consolidated case, *Pickup v. Brown* and *Welch v. Brown*, 2014 U.S. App. LEXIS 1878, Case Nos. 12-17681, 13-15023 (9th Cir. Jan. 29, 2014, as amended) and rejected the same arguments and rationale being made in this case. *See King v. Christie*, Case No. 13-5038, 2013 U.S. Dist. LEXIS 160035, *32-*33, *35-*36 (D.N.J. Nov. 8, 2013). A3371 does not, therefore, abridge Plaintiffs' First Amendment rights.

CONCLUSION

New Jersey has a lengthy history of regulating healthcare for the health and welfare of its citizens. Such regulations have routinely addressed the communication component of treatments and have sought to enforce the applicable

standard of care regarding those treatments. A3371 is just the most recent example of the State's exercise of such police power for the health and welfare of one of the most vulnerable segments of its citizenry – minors. Consequently, A3371 falls well within New Jersey's regulatory history of healthcare and appropriately protects the health and welfare of the people of New Jersey.

Respectfully submitted,

DATED: March 6, 2014

FOLEY & LARDNER LLP
Eileen R. Ridley
Thomas F. Carlucci
Patrick T. Wong
Kristy K. Marino
Katherine L. Kraschel

By: s/ Eileen R. Ridley
Eileen R. Ridley
Attorneys for Amici Curiae
HEALTH LAW SCHOLARS

STATEMENT OF RELATED CASES

Pursuant to Third Circuit Local Appellate Rule 28.0, *amici curiae* state that *amici curiae* are unaware of any related case.

DATED: March 6, 2014

FOLEY & LARDNER LLP
Eileen R. Ridley
Thomas F. Carlucci
Patrick T. Wong
Kristy K. Marino
Katherine L. Kraschel

By: s/ Eileen R. Ridley
Eileen R. Ridley
Attorneys for Amici Curiae
HEALTH LAW SCHOLARS

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, TYPE-STYLE REQUIREMENTS, AND WITH THIRD CIRCUIT L.A.R. 31.1(C)

Pursuant to Federal Rule of Appellate Procedure 29(d), 32(a)(7)(B), 32(a)(7)(C) and Third Circuit Local Appellate Rule 31.1, I certify that the attached brief is proportionally spaced, has a typeface of 14 points, and contains 6,768 words, including footnotes, and excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(6), as counted by the Microsoft Word 2003 word-processing software used to generate this brief.

Pursuant to Third Circuit Local Appellate Rule 31.1 I further certify that the text of the electronic brief is identical to the text in the paper copies provided to the Court. I also certify that a virus detection program, Microsoft Forefront Endpoint Protection 2010, has been run on the file and no virus was detected.

DATED: March 6, 2014

FOLEY & LARDNER LLP
Eileen R. Ridley
Thomas F. Carlucci
Patrick T. Wong
Kristy K. Marino
Katherine L. Kraschel

By: s/ Eileen R. Ridley
Eileen R. Ridley
Attorneys for Amici Curiae
HEALTH LAW SCHOLARS

CERTIFICATION OF BAR MEMBERSHIP

Pursuant to Third Circuit Local Appellate Rule 28.3(d) and 46.1(e), the undersigned counsel certifies that she is a member of the bar of this Court. All counsel of record for the *amici curiae* are also members of the bar of this Court.

DATED: March 6, 2014

FOLEY & LARDNER LLP
Eileen R. Ridley
Thomas F. Carlucci
Patrick T. Wong
Kristy K. Marino
Katherine L. Kraschel

By: s/ Eileen R. Ridley
Eileen R. Ridley
Attorneys for Amici Curiae
HEALTH LAW SCHOLARS

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 6th of March, 2014, I filed the foregoing with the Clerk of the Court for the United States Court of Appeal for the Third Circuit electronically through the CM/ECF system. I certify that service as to all participants in the case that are registered CM/ECF users will be accomplished by the appellate CM/ECF system.

DATED: March 6, 2014 By: s/ Kirsten Mikkelsen
Kirsten Mikkelsen