CASE NO.

IN THE SUPREME COURT OF THE UNITED STATES

TARA KING, PH.D., RONALD NEWMAN, PH.D., et al.,

Petitioners,

v.

GOVERNOR OF NEW JERSEY, et al.,

Respondents

GARDEN STATE EQUALITY,

Intervenor/Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

When this Court ruled that California's Reproductive FACT Act violates the First Amendment, *National Institute of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361, 2371-74 (2018) ("NIFLA"), it also abrogated **by name** the panel decision at bar, rendering it demonstrably wrong. Other circuits when confronted with supervening decisions by this Court that do not mention a lower court opinion by name but place its core holdings in question have recalled the mandate. *See e.g., Zipfel v. Halliburton Co.,* 861 F.2d 565 (9th Cir. 1988). However, here, the Third Circuit refused to recall the mandate, leaving in place a blatant content-based violation of the First Amendment that creates irreparable harm each day the mandate is not recalled. *See Reed v. Town of Gilbert,* 135 S. Ct. 2218 (2015).

The questions presented are:

1. Whether the Court of Appeals erred when it refused to recall its mandate after this Court explicitly abrogated its opinion by name.

2. Whether a lower court mandate should be recalled when this Court expressly abrogates the ruling by name and when the

lower court's abrogated opinion continues to cause irreparable harm to free speech.

3. Whether a lower court opinion should be vacated and the mandate recalled when this Court expressly overrules the opinion by name and when the lower court opinion continues to cause irreparable harm to free speech.

4. Whether this Court's explicit abrogation of the lower court's opinion by name which departed from this Court's free speech precedents is an extraordinary circumstance justifying recall of the mandate when the lower court opinion continues to cause irreparable harm to free speech.

PARTIES

Petitioners are Tara King, Ph.D., Ronald Newman, Ph.D., The Alliance For Therapeutic Choice and Integrity ("the Alliance"), formerly known as the National Association for Research and Therapy of Homosexuality ("NARTH"), and American Association of Christian Counselors ("AACC").

Respondents are Philip D. Murphy, the Governor of the State of New Jersey; Paul R. Rodriguez, Acting Director of the New Jersey Department of Law and Public Safety: Division

of Consumer Affairs; Milagros Collazzo, Executive Director of the New Jersey Board of Marriage and Family Therapy Examiners; Susan Rischawy, Acting Executive Director of the New Jersey Board of Psychological Examiners; and J Paul Carnilo, President of the New Jersey State Board of Medical Examiners.

Garden State Equality was an Intervenor-Defendant/Respondent in the lower court case.

CORPORATE DISCLOSURE STATEMENT

There is no parent or publicly owned corporation owning ten (10) percent or more of either the Alliance's or AACC's stock.

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The opinion of the United States Court of Appeals for the Third Circuit denying a petition for rehearing is unpublished and attached as Appendix E at 69a. The opinion of the United States Court for Appeals for the Third Circuit denying the Motion to Recall the Mandate is unpublished and is attached as Appendix A at 1a.

STATEMENT OF JURISDICTION

The decision of the United States Court of Appeals for the Third Circuit denying the petition for rehearing en banc was filed on November 13, 2018. The decision of the United States Court of Appeals for the Third Circuit denying the Motion to Recall the Mandate was filed on October 11, 2018. This Court has jurisdiction over this matter pursuant to 28 U.S.C. § 1254(1). The Third Circuit had jurisdiction pursuant to 28 U.S.C. § 1291.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The New Jersey statute that is the subject of the constitutional challenge is reproduced in its entirety in the Appendix to this Petition. App. 72a.

The relevant constitutional provisions are reproduced in their entirety in the Appendix to this Petition. App. 81a.

STATEMENT OF THE CASE

In *NIFLA v. Becerra*, 138 S.Ct. 2361 (2018), this Court reversed the Ninth Circuit's validation of California's Reproductive FACT Act and rejected as contrary to precedent the Ninth Circuit's reliance on a free speech "continuum" analysis adopted by the Ninth Circuit in *Pickup v. Brown*, 740 F.3d 1208, 1227–29 (9th Cir. 2014) and used by the Third Circuit panel in this case, *King v. Governor of New Jersey*, 767 F.3d 216, 232 (3rd Cir. 2014). Both lower courts created a new category of "professional" speech providing less speech protection, which *NIFLA* expressly rejected. 138 S.Ct. at 2371-74; *See Pickup,* 740 F.3d at 1228; *King*, 767 F.3d at 233-34. The Ninth Circuit also used the "continuum" concept to find that the content-based Reproductive FACT Act need only satisfy and did satisfy intermediate scrutiny. *NIFLA*, 138 S.Ct. at 2371 (citing *NIFLA v. Harris*, 839 F.3d 823, 839 (9th Cir. 2016)).

This Court rejected these courts' newly minted "professional" speech category, and *by name,* abrogated *Pickup* and *King*, the case at bar. *NIFLA*, 138 S.Ct. at 2371-72.

This Court's rejection of both lower court decisions could not be more clear:

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

Pickup, supra, at 1228. So defined, these courts except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny. *See* ***King, supra*, at 232**; *Pickup*, *supra,* at 1253–1256; *Moore–King, supra*, at 569.

But this Court has not recognized "professional speech" as a separate category of speech. Speech is not unprotected merely because it is uttered by "professionals." This Court has "been reluctant to mark off new categories of speech for diminished constitutional protection." *Denver Area Ed. Telecommunications Consortium, Inc. v. FCC*, 518 U.S. 727, 804, 116 S.Ct. 2374, 135 L.Ed.2d 888 (1996) (KENNEDY, J., concurring in part, concurring in judgment in part, and dissenting in part). And it has been especially reluctant to "exemp[t] a category of speech from the normal prohibition on content-based restrictions." *United States v. Alvarez*, 567 U.S. 709, 722, 132 S.Ct. 2537, 183 L.Ed.2d 574 (2012) (plurality opinion). This Court's precedents do not permit

> governments to impose content-based restrictions on speech without "'persuasive evidence ... of a long (if heretofore unrecognized) tradition'" to that effect. *Ibid.* (quoting *Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 792, 131 S.Ct. 2729, 180 L.Ed.2d 708 (2011)).
> *This Court's precedents do not recognize such a tradition for a category called "professional speech."*

Id. at 2372. (emphases added).

When, as is true here in *King,* and was true in *NIFLA* and *Pickup*, the speech restriction affects health care professionals, then content-based restrictions pose as great or greater risks of harm as are posed by content-based restrictions in other contexts. *Id.* at 2374. This Court found that increased risk a further reason to reject the intermediate scrutiny analysis adopted by the Third Circuit here and the Ninth Circuit in *Pickup* and *NIFLA*.

> The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the

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

For example, during the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception. In the 1930s, the Soviet government expedited completion of a construction project on the Siberian railroad by ordering doctors to both reject requests for medical leave from work and conceal this government order from their patients. In Nazi Germany,

the Third Reich systematically violated the separation between state ideology and medical discourse. German physicians were taught that they owed a higher duty to the 'health of the Volk' than to the health of individual patients. Recently, Nicolae Ceausescu's strategy to increase the Romanian birth rate included prohibitions against giving advice to patients about the use of birth control devices and disseminating information about the use of condoms as a means of preventing the transmission of AIDS. Berg, *Toward a First Amendment Theory of Doctor–Patient Discourse and the Right To Receive Unbiased Medical Advice*, 74 B.U.L. REV. 201, 201–202 (1994) (footnotes omitted).

Further, when the government polices the content of professional speech, it can fail to "'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'" *McCullen v. Coakley*, 573 U.S. ——, —— – ——, 134 S.Ct. 2518, 2529, 189 L.Ed.2d 502 (2014). Professionals might have a host of

> good-faith disagreements, both with each other and with the government, on many topics in their respective fields. Doctors and nurses might disagree about the ethics of assisted suicide or the benefits of medical marijuana; lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce; bankers and accountants might disagree about the amount of money that should be devoted to savings or the benefits of tax reform. "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams v. United States*, 250 U.S. 616, 630, 40 S.Ct. 17, 63 L.Ed. 1173 (1919) (Holmes, J., dissenting), and the people lose when the government is the one deciding which ideas should prevail.

NIFLA, 138 S.Ct. at 2374-75 (emphasis added). "In sum, neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles." *Id.* at 2375. The same is true for the Third Circuit's wholesale adoption

of the Ninth Circuit's continuum concept and intermediate scrutiny analysis of New Jersey's content-based A3371.

After this Court abrogated the panel's decision here by name, Petitioners filed a motion with the Third Circuit to recall the mandate. After receiving responses from Respondents and Intervenor-Respondents, the Third Circuit panel denied the motion without discussion. App. 1a. Petitioners timely sought rehearing en banc, which the Third Circuit treated as a request for reconsideration and denied without discussion. App. 69a.

The Third Circuit abused its discretion in refusing to recall the mandate despite this Court's explicit abrogation of its decision and the continuing irreparable injury occurring as a result of the content-based speech restrictions. Petitioners now seek review of the decision below and ask that this Court grant review and vacate the Third Circuit's denial of the motion to recall the mandate.

REASONS FOR GRANTING THE PETITION

I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT BETWEEN THE THIRD CIRCUIT'S REFUSAL TO RECALL THE MANDATE AND THIS COURT'S EXPRESS ABROGATION OF ITS OPINION.

As this Court acknowledged in *Calderon v. Thompson*, 523 U.S. 538, 549 (1998), "the courts of appeals are recognized to have an inherent power to recall their mandates, subject to review for an abuse of discretion." "In light of 'the profound interests in repose' attaching to the mandate of a court of appeals, however, the power can be exercised only in extraordinary circumstances." *Id.* at 550 (citing 16 C. Wright, A. Miller, & E. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3938, p. 712 (2d ed.1996)).

Courts of appeal have defined such extraordinary circumstances as, *inter alia*, "good cause," to "prevent injustice," or in "special circumstances." *American Iron & Steel Institute v. EPA*, 560 F.2d 589, 593 (3d Cir. 1977). In turn, "special circumstances" have included "(1) where clarification of a mandate and opinion is critical; (2) where misconduct has affected the integrity of the judicial process; (3) where there is a danger of incongruent results in cases pending at the same time; and (4) where it is necessary

to revise an 'unintended' instruction to a trial court that has produced an unjust result." *Id.* at 594 (citing *Greater Boston Television Corp. v. FCC*, 463 F.2d 268, 278-79 (D.C. Cir. 1971)).

In particular, courts of appeal have found that subsequent decisions by this Court or supervening changes in law can justify recalling a mandate:

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

Am. Iron & Steel Inst. 560 F.2d at 596–97. "[I]n order to prevent an injustice, we act to free the hand of the district court from any strictures of the 'law of the case' on the former remand." *Verrilli v. City of Concord*, 557 F.2d 664, 665 (9th Cir. 1977). "One circumstance that may justify recall of a mandate is a supervening change in governing law that calls into serious question the correctness of the court's judgment." *Sargent v. Columbia Forest Prod., Inc.,* 75 F.3d 86, 90 (2d Cir. 1996). Here, the court's judgment was not merely questioned, but abrogated by name by this Court, yet the mandate was not recalled.

A. The Third Circuit's Refusal To Recall The Mandate Following This Court's Abrogation Of Its Decision Conflicts With Other Circuits Stating That Recall Is Appropriate When A Subsequent Decision by This Court Proves that the Lower Court Decision is Wrong.

The Third Circuit's refusal to recall the mandate here cannot be reconciled with actions by other circuits which recalled mandates when subsequent decisions by this Court undercut the legal conclusions reached by the lower court.

Circuit courts have recalled their mandates when this Court's later opinions in unrelated cases addressing similar legal issues have shown the appellate court's analysis to be "demonstrably wrong." However, those cases did not involve this Court's express abrogation of the appellate court decision by name, as is true here. If a subsequent case reaching a different conclusion on similar facts has rendered an earlier unrelated case demonstrably wrong and subject to recall, then this Court's explicit abrogation of the case at bar must trigger recall of the mandate. The Third Circuit's refusal to do so is itself demonstrably wrong.

The Fifth Circuit recalled its mandate when a subsequent decision of this Court clarified when a firearm can be considered as having been used in a crime. *United States v. Tolliver*, 116 F.3d 120, 123 (5th Cir. 1997). In *Tolliver*, the defendant had been convicted according to precedent holding that mere possession of a firearm was sufficient. *Id.* at 124. Subsequent to that conviction, this Court issued an opinion in an unrelated case and found that mere possession was not sufficient for a conviction. *Id.* The Fifth Circuit found that the subsequent decision "directly conflicted" with its earlier decision, justifying a recall of the mandate. *Id.* at 123.

> Our authority to recall our own mandate is clear. Under Rule 41.2 of the Fifth Circuit Rules, we may recall our mandate if necessary in order to prevent injustice. An example of such an injustice is when a subsequent decision by the Supreme Court renders a previous appellate decision demonstrably wrong.

Id. Unlike the situation here, in *Tolliver* the subsequent decision did not reference the Fifth Circuit's decision by name as being wrongly decided, yet the court found that recall was necessary to prevent injustice. By contrast, the Third Circuit refused to recall the mandate when this Court explicitly said that the *King* decision was demonstrably wrong. *NIFLA*, 138 S.Ct. at 2372.

The Ninth Circuit also recalled its mandate when a subsequent decision by this Court in an unrelated case resolved an issue differentially from the way it was resolved in the decision at issue. *Zipfel v. Halliburton Co.*, 861 F.2d 565, 567 (9th Cir. 1988). In *Zipfel*, the Ninth Circuit acknowledged that this Court's decision in another case involving wrongful death claims of foreign nationals had the effect of overruling the Ninth Circuit's resolution of a choice of law issue. *Id.*

> The recent Supreme Court decision in *Chick Kam Choo* [*v. Exxon Corporation,* 486 U.S. 140 (1988)] departs in a pivotal aspect from our decision of the injunction issue in this case. The effect of this departure is to overrule our resolution of the injunction issue, at least in part. We, therefore, exercise our power to recall the mandate and amend the opinion "[b]ecause of an overpowering sense of fairness and a firm belief that this is the exceptional case requiring recall of the mandate in order to prevent an injustice...." *Verrilli* [*v. City of Concord*, 557 F.2d [664] at 665 [9th Cir. 1977)].

Id. 567-68. In *Chick Kam Choo*, the *Zipfel* decision was mentioned as an inter-circuit conflict that needed to be resolved, but this Court did not expressly discuss and abrogate the *Zipfel* decision as the *NIFLA* court did with the Third Circuit's decision here. *Chick Kam Choo*, 486 U.S. at 145, 152. If the mere mention of a case as an inter-circuit conflict is an exceptional circumstance justifying recall of a mandate to prevent injustice, then the explicit abrogation, by name, of a lower court decision is even more

so. The Third Circuit's contrary decision creates an irreconcilable conflict.

The Sixth Circuit also recalled its mandate when a subsequent decision by this Court in an unrelated case issued a new rule regarding criminal sentencing that affected the defendant in the Sixth Circuit case. *U.S. v. Murray*, 2 Fed. Appx. 398, 400 (6th Cir. 2001). "[W]hen an intervening Supreme Court case calls into question the 'integrity' of a separate judgment, the circumstance is extraordinary enough to warrant such an extreme remedy." *Id.* (citing *Zipfel*, 861 F.2d at 567). In *Murray,* as in *Tolliver*, this Court's subsequent decision did not mention the case at issue, let alone, as is true here, explicitly abrogate it. Still, the new rule announced in the case was sufficient to render the Sixth Circuit's decision demonstrably wrong and subject to recall.

The Third Circuit's refusal to recall the mandate conflicts with decisions in other circuits which found that a subsequent decision of this Court which merely departed from but did not explicitly abrogate the lower court case showed that the appellate decision was demonstrably wrong and subject to recall. This Court should grant the Petition to reconcile the conflict.

B. The Third Circuit's Refusal To Recall The Mandate Following This Court's Express Abrogation Of Its Decision Conflicts With Other Circuits' Decisions Recalling Mandates For Far Less Consequential Supervening Changes in the Law.

The Third Circuit's refusal to recall the mandate following this Court's explicit abrogation of its decision also conflicts with decisions in the Eleventh, Second and Ninth circuits that have recalled mandates when supervening changes in the law, including decisions by this Court, have called the appellate court's decision into question. In none of these cases did the supervening change in law involve the circumstances here, *i.e.,* abrogation of the appellate court opinion by name, by this Court, making the Third Circuit's action here all the more egregious.

The Eleventh Circuit recalled its mandate when a subsequent decision by this Court effectively, but not explicitly, abrogated the earlier decision. *Judkins v. Beech Aircraft Corp*., 745 F.2d 1330, 1331–32 (11th Cir. 1984). In *Beech*, the Eleventh Circuit originally held in

the context of a Title VII case that the filing of an EEOC right-to-sue letter and a request for appointment of counsel satisfied the statutory requirement that a lawsuit be brought within 90 days from the issuance of the right-to-sue letter. *Id.* at 1331. In a subsequent unrelated decision, *Baldwin County Welcome Center v. Brown*, 466 U.S. 147, 149-50 (1984), this Court held that that the filing of an EEOC right-to-sue letter does not satisfy the 90-day statutory limitation period. Unlike *NIFLA, Baldwin County* did not mention, let alone explicit abrogate, *Judkins*. Nevertheless, the Eleventh Circuit found that *Baldwin County* flatly rejected the legal basis and effectively reversed *Judkins*, thus justifying a recall of the mandate. *Id.* The Third Circuit's refusal to recall its mandate in light of *NIFLA*'s explicit abrogation presents a conflict that should be resolved by this Court.

The Second Circuit recalled its mandate after a state Supreme Court decision changed the governing law regarding private rights of action for workers fired in retaliation for filing a worker's compensation claim. *Sargent v. Columbia Forest Prod., Inc.,* 75 F.3d 86, 90 (2d Cir. 1996). "One circumstance that may justify recall of a mandate is '[a] supervening change in governing law that calls into serious question the correctness of the court's judgment.'" *Id.* (quoting *McGeshick v. Choucair*, 72 F.3d 62, 63 (7th Cir.1995); *Zipfel,* 861 F.2d at 567-68).

> Based upon a seemingly clear canon of statutory construction barring an implication of a private right of action where a statute provides an express right, we confidently predicted that the Vermont Supreme Court would not imply a private right of action under the workers' compensation statute. Our prediction was incorrect.

Id. at 89-90. Consequently, the Vermont Supreme Court decision "is beyond any question inconsistent with our earlier decision" and justified recalling the mandate. *Id.* at 90. If there can be no question that a subsequent unrelated state Supreme Court case renders a federal case subject to recall of the mandate, then this Court's explicit abrogation of *King v. Christie* in *NIFLA* is beyond question and the Third Circuit's contrary decision is irreconcilable.

The Ninth Circuit recalled its mandate regarding an award of attorneys' fees when the subsequent passage of the Civil Rights Attorney's Fees Act of 1976 and its decision finding the Act applicable to appeals pending at its passage called the prior ruling into question. *Verrilli v. City of Concord*, 557 F.2d 664, 665 (9th Cir. 1977). "Because of an overpowering sense of

fairness and a firm belief that this is the exceptional case requiring recall of the mandate in order to prevent an injustice, we act to free the hand of the district court from any strictures of the 'law of the case' on the former remand." *Id.*

Here, this Court's explicit abrogation of *King* in *NIFLA* has rendered the Third Circuit's decision unconstitutional and exposes individuals subject to New Jersey's content-based speech restriction not merely to a denial of legal remedies, but to the irreparable injury of violation of free speech rights, as described *infra*.

II. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CONFLICT BETWEEN THE THIRD CIRCUIT'S REFUSAL TO RECALL THE MANDATE WHEN FREE SPEECH RIGHTS ARE BEING INFRINGED AND OTHER CIRCUITS WHICH HAVE RECALLED MANDATES WHEN CIVIL RIGHTS ARE BEING INFRINGED.

The Third Circuit's refusal to recall its mandate following this Court's explicit abrogation of its intermediate scrutiny analysis of a content-based "professional" speech restriction conflicts with decisions by other appellate courts that have recalled their

mandates when subsequent decisions meant the initial decisions infringe on civil rights. Courts of appeal have found that justice requires a recall of their mandate when supervening decisions showed that the initial decision denied due process, wrongly upheld a conviction or sentence, wrongly deprived a party of legal remedies or otherwise deprived them of civil rights protection.

This case involves just such a deprivation of rights, *i.e.*, infringement of freedom of speech, that requires recall of the mandate. The *NIFLA* Court referred to the Third Circuit's decision *by name* and said that the panel's adoption of intermediate scrutiny analysis for a content-based restriction on professional speech was wrong. *NIFLA,* 138 S.Ct. 2361, 2371-72 (2018) As a consequence, the content of Petitioners' and their minor clients' speech is being restricted without the constitutionally required proof that the restriction is narrowly tailored and necessary to meet a compelling state interest. Far less than an explicit abrogation of a decision infringing upon First Amendment rights has triggered recalls of mandates in other circuits.
The Third Circuit's refusal to recall the mandate under such circumstances creates an issue of profound constitutional importance. That is particularly true in light of the fact that the Third Circuit decision in *King v. Christie*, 767 F.3d 216, 232 (3d Cir. 2014), and the related

Ninth Circuit, decision, *Pickup v. Brown,* 740 F.3d 1208 (9th Cir. 2014), also abrogated by name in *NIFLA,* have been the impetus for similar content-based speech restrictions, and consequently similar deprivations of constitutional rights, across the country. Without this Court's review, those constitutionally deficient bills will continue to proliferate as legislators rely upon the abrogated decision here to justify enacting similar bills.

A. The Third Circuit's Refusal To Recall Its Mandate After This Court Explicitly Abrogated Its Decision By Name Conflicts With Other Circuit Decisions Recalling Mandates When Civil Rights Are At Risk.

While recognizing the importance of the repose that attaches to their judgments, courts of appeal also recognize that is necessary to recall their mandates when they impinge upon civil rights, interfere with judicially prescribed remedies or affect continuing conduct. *See Meredith v. Fair,* 306 F.2d 374, 378 (5th Cir. 1962); *Tolliver*, 116 F.3d at 123; *Verrilli*, 557 F.2d at 665; *United States v. Bd. of Directors of Truckee-Carson Irr. Dist.*, 723 F.3d 1029, 1034–35 (9th Cir. 2013); *Ute Indian Tribe of the*

Uintah & Ouray Reservation v. State of Utah, 114 F.3d 1513, 1526 (10th Cir. 1997).

In *Ute Indian* Tribe, the Tenth Circuit opted to modify their mandate instead of recalling it, but confirmed that recall is appropriate when a subsequent change in law impacts ongoing conduct. 114 F.3d at 1526. "Where a prior erroneous judgment necessarily affects continuing conduct, the interests of uniformity may demand departure from the prior judgment to bring a court's view of the law into line with the prevailing view." *Id.* This Court's abrogation of the panel decision by name has rendered the judgment erroneous. As discussed more fully *infra*, the erroneous judgment is adversely affecting the continuing free speech conduct of Petitioners and their minor clients, and similar parties all over the country. This should demand departure from the prior judgment in the form of recall of the mandate.

The Fifth Circuit recalled its mandate when it recognized that its original decision was being interpreted to deprive James Meredith of his equal protection right to enroll in and continue to attend the University of Mississippi. *Meredith*, 306 F.2d at 378. The court recognized the personal nature of the rights recently secured by Mr. Meredith and that the clarification of those rights was an extraordinary circumstance justifying recall of

the mandate. Likewise, here, the Third Circuit's decision is being used to deprive Petitioners of their First Amendment rights, justifying a recall of the mandate. The Third Circuit's refusal to do so is even more egregious in light of the fact that, unlike in *Meredith*, in this case this Court has abrogated the lower court's decision *by name*.

Also, as discussed above, the Fifth Circuit recalled its mandate when a subsequent decision of this Court effectively overruled the appellate court's affirmation of a criminal conviction, thus implicating the petitioner's constitutional rights. *Tolliver*, 116 F.3d at 123. Notably, this Court's subsequent decision only effectively, not explicitly, abrogated the *Tolliver* court's decision. *Id.* Yet the mandate in *Tolliver* was recalled and the mandate here was not.

In *Verrilli*, the Ninth Circuit determined that recall of the mandate was necessary because the supervening change in law meant that the circuit decision deprived the petitioner of the right to seek attorneys' fees. 557 F.2d at 665. "Our prior ruling was not merely an erroneous one, ... it was an unintended unjust result in that it deprived the appellant of a lawful statutory right to invoke the discretion of the district court under the [Civil Rights Attorney's Fees] Act and the holding in *Stanford Daily*" *v. Zurcher*, 550 F.2d 464 (9th Cir. 1977). *Id.* By contrast, here, Petitioners have faced and are continuing to face the deprivation of their

free speech rights by being subjected to a content-based prohibition that does not comport with this Court's First Amendment precedent. The Third Circuit's refusal to correct the deprivation by recalling the mandate contradicts the Ninth Circuit's decision in *Verrilli*.

The Third Circuit's refusal to recall its mandate after the *NIFLA* Court's explicit abrogation left Petitioners subject to a content-based prohibition on their speech that does not satisfy strict scrutiny also conflicts with the Ninth Circuit's decision in *Truckee-Carson*. The Ninth Circuit recalled its mandate when the court recognized that its decision would deprive a Native American tribe of the judicially established protections in a water use agreement between the tribe and the irrigation district. 723 F.3d at 1034-35.

> If the mistake is not corrected, then the immediate beneficiary will be the TCID [Truckee-Carson Irrigation District], which is at fault for the excess diversions, and the ultimate loser will be the Lake, which the OCAPs [operating criteria and procedures] are supposed to protect. The equities thus strongly favor our fashioning a remedy to restore the proper balance between

> the TCID/agricultural and Tribal/environmental interests.

Id. at 1034-35. Similarly, here, if the mandate is not recalled then the State of New Jersey will benefit from restricting speech on the basis of content without having to satisfy strict scrutiny review, and Petitioners' and their minor clients' free speech rights will continue to be infringed. The Third Circuit's refusal to recall the mandate cannot be reconciled with established precedent.

This Court explicitly rejected the Third Circuit's determination that professional speech should be accorded different, less protective, treatment under the First Amendment than are other forms of speech. That clear repudiation of the analytical framework upon which the Third Circuit's decision was built requires a reversal in the form of recalling the mandate.

B. The Third Circuit's Refusal To Recall Its Mandate Exacerbates A Ripple Effect Of Expanding Irreparable Harm As States and Localities Continue To Enact Laws In Reliance Upon The Decision That This Court Abrogated By Name.

This Court's review of the Third Circuit's refusal to recall its mandate is particularly critical because of the irreparable injuries that the Third Circuit decision and the Ninth Circuit decision in *Pickup* (also abrogated by name in *NIFLA*) have caused and are continuing to cause across the country. The Ninth and Third circuits' validation of California's and New Jersey's, respectively, content-based prohibitions against voluntary talk therapy on the issue of reducing or eliminating same-sex attractions and gender identity in children has spawned similar content-based speech prohibitions in fourteen additional states.[1]

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[1] Connecticut, H.B. 6695, January Sess. 2017 (Conn. 2017); Delaware, S.B. 65, 149th Assembly, 2017 Reg. Session, (Del. 2017); District of Columbia, D.C. Code §7-1231.14 (2017); Hawaii, S.B. 270, 29th Leg. (Hawaii

Forty-nine municipalities have also enacted similar content-based speech prohibition ordinances relying on *Pickup* and *King*, both of which were expressly abrogated by this Court.[2]

2017); Illinois, H.B. 0217, 2017 Leg. Sess. (Ill. 2017); Maryland, S.B. 1028, 2018 Reg. Session (Md. 2018); Nevada, S.B. 201, 79th Sess. (2017); New Hampshire, H.B. 587-FN, 2018 Session (N.H. 2018); New Mexico, S.B. 121, 53rd Leg., 1st Sess. (N.M. 2017); New York, S.1046, 2019 Session (N.Y. 2019); Oregon, H.B 2307, 78th Leg. 2015 Sess. (Oregon 2015); Rhode Island, H. 5277 2017 Leg. Sess. (R.I. 2017); Vermont, S.132 2015-16 Leg. Sess. (Vermont 2016); Washington, H.B. 2753, 65th Leg., 2018 Regular Session (Wash. 2018).

[2] Pima County, AZ; Denver, CO; Bay Harbor Islands, FL; Boca Raton, FL; Broward County, FL; Boynton Beach, FL; Delray Beach, FL; El Portal, FL; Gainesville, FL; Greenacres, FL; Key West, FL; Lake Worth, FL; Miami, FL; Miami Beach, FL; North Bay Village, FL; Oakland Park, FL; Palm Beach County, FL; Riviera Beach, FL; Tampa, FL; Wellington, FL; West Palm Beach, FL; Wilton Manors, FL; Albany, NY; Albany County, NY; Erie County, NY; New York City, NY; Rochester, NY; Ulster County, NY; Westchester County, NY; Athens, OH; Cincinnati, OH; Columbus, OH; Dayton, OH; Lakewood, OH; Toledo, OH; Allentown, PA;

Those statutes and ordinances are based on the abrogated decisions in *King* and *Pickup* that the content-based speech restrictions need not satisfy strict scrutiny because they regulate "professional" speech. In the case of Nevada, the legislature specifically cited to both lower court decisions as support for the bill.

> This bill is modeled on similar laws enacted in California and New Jersey. (Cal. Bus. & Prof. Code §§ 865 et seq.; N.J. Stat. Ann. §§ 45:1-54 et seq.).... [C]ourts have ... held that the laws: (1) are a constitutional exercise of the legislative power to regulate licensed health care professionals for the benefit of the public's health, safety and welfare and to protect the well-being of children from ineffective or harmful professional services; (2) do not violate any rights to freedom of speech, association or

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Bellefonte, PA; Bethlehem, PA; Doylestown, PA; Newtown Township, PA; Philadelphia, PA; Pittsburgh, PA; Reading, PA; State College, PA; Yardley Borough, PA; Cudahy, WI; Eau Claire , WI; Madison, WI; Milwaukee, WI. *See* https://williamsinstitute.law.ucla.edu/wp-content/uploads/Conversion-Therapy-LGBT-Youth-Jan-2018.pdf.

> religion and are not unconstitutionally overbroad or vague under the First and Fourteenth Amendments to the United States Constitution; and (3) do not violate any other fundamental or substantive due process rights of licensed health care professionals or the parents or children who seek their professional services. (*Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), cert. denied, 134 S.Ct. 2871 and 2881 (2014); *Welch v. Brown*, 834 F.3d 1041 (9th Cir. 2016), cert. denied, No. 16-845, --- S.Ct. --- (May 1, 2017); *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014), cert. denied, 135 S.Ct. 2048 (2015).

S.B. 201, 79th Sess. (Nevada 2017), at 1-2. Other states relied upon the assumed constitutionality of provisions in New Jersey's and California's statutes in enacting their statutes.

This Court's explicit abrogation of *King* and *Pickup* in *NIFLA,* 138 S.Ct. at 2371-72 means that the assumption of constitutionality upon which the laws were passed is invalid. As a result, unconstitutional content-based speech restrictions are being imposed not only on counselors and minor clients in California and

New Jersey, but on counselors and minor clients across the United States.

By refusing to recall the mandate, the Third Circuit is perpetuating irreparable injury to First Amendment rights that is being suffered all over the nation. The injuries are continuing as fourteen more states have introduced similar bills based upon the abrogated analyses in *King* and *Pickup*. [3] Unless and until the demonstrably wrong analytical framework adopted by the Third Circuit is reversed, individuals and organizations across the country will continue to be chilled in their constitutionally protected

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[3] Arizona, S.B. 1047, 54th Leg., 1st Sess. (Ariz. 2019); Colorado, H.B. 19-1129, 72nd Leg., 1st Reg. Sess. (Colo. 2019); Florida, S.B. 84, H.B. 109,2019 Leg. Sess. (Fla. 2019); Idaho, H.B. 52, 65th Leg. 1st Reg. Sess. (Idaho 2019); Indiana, H.B. 1231, S.B. 284, 121st Gen. Assy., 1st Reg. Sess. (Ind. 2019); Iowa, H.F. 106, 88th Sess. (Iowa 2019); Minnesota, S.F. 83, H.F. 12, 91st Leg. Sess. (Minn. 2019); Missouri, H.B. 516, 100th Gen. Assy., 1st Reg. Session (Missouri 2019); Nebraska, L.B. 167, 106th Leg., 1st Sess. (Neb. 2019); Oklahoma, H.B. 2456, 57th Leg., 1st Sess. (Okla. 2019); Pennsylvania S.B. 56, 2019 Leg. Sess. (Penn. 2019); Texas H.B. 517, 86th Leg. (Texas 2019); Virginia, S.B. 1773, 2019 Sess. (Virginia 2019); West Virginia, S.B. 359, 2019 Reg. Sess. (W.V. 2019);

speech under *King*'s now repudiated analysis.

Some of the statutes and ordinances are being challenged based on the *NIFLA* abrogation of *King* and *Pickup*. *See e.g., Doyle v. Hogan,* No. 1:19-cv-190 (D. Maryland filed January 18, 2019); *Vazzo v. City of Tampa,* No. 8:17-cv-2896 (M.D. Fla. filed December 4, 2017);[4] *Otto v. City of Boca Raton and County of Palm Beach, Florida,* No. 9:18-cv-80771 (S.D. Fla. filed June 16, 2018). However, if the *King* mandate is not recalled and the decision reversed, overturning all of the statutes and ordinances would require at least 63 lawsuits. Recalling the mandate and reversing *King* (and *Pickup*) would provide a precedent that would invalidate the statutes and ordinances without having to pursue multi-state litigation that would consume judicial resources and permit protracted losses of precious constitutional

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[4] On January 30, 2019, Magistrate Judge Amanda Arnold Sansone recommended the district court find that a city ordinance which expressly relied upon *King* violates every free speech test, citing to the *NIFLA* Court's abrogation of *King* to support a recommendation that Plaintiffs stated a plausible claim for violation of the First Amendment. *Vazzo v. City of Tampa,* No. 8:17-cv-2896 (M.D. Fla. January 30, 2019) (Report and Recommendation, Dkt. No. 148, at 15-16).

freedoms. This Court should grant review and direct that the mandate be recalled.

III. THIS COURT SHOULD GRANT THE PETITION TO PROVIDE DEFINITIVE GUIDANCE ON WHAT CONSTITUTES EXTRAORDINARY CIRCUMSTANCES SUFFICIENT TO OVERCOME THE INTEREST IN REPOSE ATTACHING TO THE MANDATE OF A COURT OF APPEALS.

In *Calderon* this Court confirmed that courts of appeals have inherent power to recall their mandates "in extraordinary circumstances." 523 U.S. at 549-50. This Court emphasized that "[t]he sparing use of the power demonstrates it is one of last resort, to be held in reserve against grave, unforeseen contingencies." *Id.* at 550. However, it has not elucidated what constitutes "extraordinary circumstances" or "grave, unforeseen contingencies" sufficient to activate the power. Without such guidance from this Court, courts of appeal have created an inconsistent patchwork of decisions in response to subsequent changes in law, creating confusion and sometimes, as seen in this case, an infringement of constitutional rights.

The confusion caused by the lack of guidance in defining the "extraordinary circumstances" sufficient to justify recalling the

mandate are reflected in the Second Circuit's discussion in *Sargent:*

> One circumstance that may justify recall of a mandate is "[a] supervening change in governing law that calls into serious question the correctness of the court's judgment."...However, under the strict standards governing the exercise of power to recall a mandate, "an alleged failure to correctly construe and apply the applicable state law does not constitute" by itself a circumstance justifying recall. *Hines v. Royal Indem. Co.*, 253 F.2d 111, 114 (6th Cir.1958). Even where the law governing the disposition of a diversity case is unquestionably at odds with subsequent state court decisions, recall of the mandate is not necessarily justified.
>
> Nevertheless, a variety of factors lead us to conclude that a recall of the mandate is appropriate in this case.

75 F.3d at 90. In other words, a supervening change in governing law might justify recalling

the mandate, but not necessarily, but might when other factors are considered. *Id.*

In *Verrilli*, the Ninth Circuit found extraordinary circumstances justifying a recall of its mandate when a subsequent statute and appellate case interpreting it changed the presumption of the availability of attorneys' fees. 557 F.2d at 665. The court said that the change meant that the prior decision was not merely in error, created "an unintended unjust result" that needed to be rectified. *Id.* On the other hand, the Second Circuit acknowledged that an intervening change in law related to a criminal conviction and sentencing created an inequity for the defendant but said "it is not the kind of 'grave, unforeseen contingenc[y]' that makes recall of the mandate appropriate." *Bottone v. United States*, 350 F.3d 59, 64 (2d Cir. 2003) (quoting *Calderon*, 523 U.S. at 550). In other words, being unable to collect attorneys' fees can be a grave unforeseen contingency, but an erroneous criminal conviction is not.

The Second Circuit found that a subsequent state supreme court decision that changed the governing law rendered their decision demonstrably wrong and justified recall of their mandate. *Sargent,* 75 F.3d at 90. However, the First Circuit said that a subsequent state supreme court decision that explicitly declared parts of its reasoning erroneous did not render its judgment

demonstrably wrong and subject to recall. *Boston & Maine Corp. v. Town of Hampton*, 7 F.3d 281, 283 (1st Cir. 1993).

The lack of definitive guidance from this Court on what constitutes "extraordinary circumstances" sufficient to justify recall of a mandate has left appellate courts hopelessly confused and, in this case, permitted them to simply ignore this Court's explicit abrogation of the panel decision. Meanwhile, Petitioners, their minor clients and others are subjected to content-based speech prohibitions that are not narrowly tailored to serve compelling state interests. Moreover, other states and municipalities are emboldened to impose similar irreparable injuries on their citizens.

By granting review, this Court can provide the necessary definitive guidance to courts of appeal. This would serve the interests of justice in providing one decision that can resolve a constitutional question that is present in at least 15 other states and nearly 50 cities and counties. This will not only create a uniform standard but will also halt the continuing deprivation of constitutional rights occurring as states continue to replicate the content-based speech provisions enacted in New Jersey and California.

CONCLUSION

The Third Circuit abused its discretion when it refused to recall its mandate after this Court abrogated the panel's decision by name in *NIFLA,* 138 S.Ct. 2361, 2371-74 (2018). The refusal to recall the mandate conflicts with decisions in other circuits which recalled mandate when confronted with only effective, not actual, abrogation, and when recall of a mandate was necessary to prevent continuing violations.

This Court should grant review to resolve the conflict and to provide needed guidance on what constitutes extraordinary circumstances sufficient to exercise the right to recall a mandate.

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