Case No. 25-2090

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Shannon MacDonald, M.D.; Paul Gardner, M.D.; J.A., a minor, by and through guardian and next friend Michael Abell; Michael Abell; and Hank Jennings,

Plaintiffs - Appellants,

v.

S. Chetan Shah, M.D., in his official capacity as President of the New Jersey State Board of Medical Examiners,

Defendant - Appellee.

On Appeal from the U.S. District Court
District of New Jersey
Hon. Edward S. Kiel
Case No. 1:23-cv-23044-ESK-SAK

APPELLANTS' REPLY BRIEF

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INTRODUCTION

This case challenges the State of New Jersey's decision to criminalize ordinary conversations between doctors and patients when those words cross a state line. Plaintiffs-Appellants J.A., Michael Abell, and Hank Jennings need to consult out-of-state specialists about rare cancers. Drs. MacDonald and Gardner are such specialists—board-certified physicians who treat such cancers daily in Massachusetts and Pennsylvania. New Jersey's telemedicine rule forbids them from speaking to each other unless the doctors first obtain a duplicative New Jersey license. In doing so, the State converts protected speech into a regulated privilege.

The First Amendment does not evaporate when speech concerns medicine, and it does not tolerate censorship based on a speaker's profession or location. Yet New Jersey's rule draws both distinctions: it bars speech because of its *subject matter* (medical advice) and its *speaker* (out-of-state doctors). What remains is a law that punishes words—not conduct.

This narrow, as-applied case does not question New Jersey's authority to license physicians or ensure competent care. It asks only

whether the State may forbid conversation between a willing listener and the expert best positioned to help him. The Constitution's answer is "no."

By silencing those exchanges, the rule also erects a barrier to interstate commerce, shields New Jersey doctors from out-of-state competition, and burdens the right to pursue a lawful calling. And for parents like Michael Abell, it intrudes on their fundamental right to direct a child's medical care. This Court should reverse the dismissal below and reaffirm a principle as old as the Republic: the government may not license the exchange of knowledge and ideas among the people.

ARGUMENT

I. APPELLANTS STATE A FIRST AMENDMENT CLAIM

A. New Jersey's Telemedicine Rule Is a Content- and Speaker-Based Restriction on Speech

This case challenges New Jersey's criminalization of speech between a doctor and a patient via telemedicine when the physician lacks a duplicative New Jersey license. Drs. MacDonald and Gardner are fully licensed and qualified to perform proton therapy and skull base surgery on New Jersey patients at their medical facilities in Massachusetts and Pennsylvania. JA38–39 ¶¶ 7–8. At those same locations, they may examine, prescribe medicine, and plan recovery for those patients. What

New Jersey's telemedicine rule, N.J. Stat. § 45:1-62(b), forbids is the use of use of telecommunications technology to speak with New Jersey patients about that care.

This case therefore does not challenge the State's general authority to license physicians; it challenges only Defendant-Appellee S. Chetan Shah's ("Medical Board" or "Board") restriction on who may speak with New Jersey patients. Because the rule regulates "speech as speech," *Nat'l Inst. of Family & Life Advocates* (*NIFLA*) *v. Becerra*, 585 U.S. 755, 770 (2018), the First Amendment's stringent protections apply.

The Board's effort to recast this as a neutral regulation of conduct is misguided. When a specialist like Dr. MacDonald or Dr. Gardner uses telemedicine to talk to a cancer patient like J.A. or Mr. Jennings, nothing occurs but speech. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 570 (2011) (citing *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001) ("[I]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct.")). *See also Wollschlaeger v. Governor*, 848

F.3d 1293, 1307 (11th Cir. 2017) (en banc).[1] The First Amendment therefore applies in full.

The Board leans heavily on *National Association for the Advancement of Multijurisdiction Practice v. Castille*, 799 F.3d 216 (3d Cir. 2015), but that decision does not control. *Castille* was a general challenge to licensing requirements for the practice of law in Pennsylvania. *Id.* at 221. There, this Court held that the licensing requirement did not restrict speech, only the act of practicing law. *Id.* at 219–21. This case's distinctions from *Castille* are decisive here, for four reasons.

First, the telemedicine rule is a content- and speaker-based restriction because it forbids conversations because of their *subject* (medical care) and their *speakers* (out-of-state physicians). *See Reed v. Town of Gilbert*, 576 U.S. 155, 163–64 (2015); *Sorrell*, 564 U.S. at 564.

[1] As noted in Appellants' Opening Brief, *see* AOB at 26 n.4, the Supreme Court recently granted certiorari in *Chiles v. Salazar*, 116 F.4th 1178 (10th Cir. 2024), *cert. granted*, 145 S. Ct. 1328 (2025), argued October 7, 2025. If the in-person therapeutic conversation in that case is protected speech—as the Supreme Court appears poised to rule—then this case is the same: telemedicine conversations that consist solely of the exchange of medical information, without physical treatment, are quintessential First Amendment speech. Indeed, if "talk therapy" is speech, then this case—where nothing occurs but speaking—is as well.

Second, although the practice of medicine has communicative and noncommunicative aspects, Appellants bring an as-applied challenge to the telemedicine rule only insofar as it regulates conversations. *See* AOB at 27, JA35–52 ¶¶ 1, 3, 20–27, 31–33, 52–53, 59. Appellants do not seek to administer medicine or perform procedures via telemedicine; they wish only to speak. *NIFLA*, 585 U.S. at 770; *cf. Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010).

Third, *Castille* was decided on summary judgment.[2] This Court looked to the record for evidence of whether Pennsylvania engaged in viewpoint discrimination, noting that "nothing in the record suggests that Pennsylvania is even aware of the views of the Appellants or any other applicant, or of what applicants will say or do during their legal careers." *Castille*, 799 F.3d at 220–21. Here, at the pleading stage, Appellants are entitled to prove that the rule discriminates by subject and speaker. *Bruni v. City of Pittsburgh*, 824 F.3d 353, 357 (3d Cir. 2016).

Fourth, the practice of medicine differs materially from law. State variations in continuing education or insurance do not alter the uniform

[2] *Castille* was also decided before the Supreme Court's decision in *NIFLA*, 585 U.S. 755.

substance of medical knowledge—and certainly not enough to defeat First Amendment protection.

The Board's reliance on *City of Austin v. Reagan National Advertising of Austin, LLC*, 596 U.S. 61 (2022), and *Mazo v. N.J. Secretary of State*, 54 F.4th 124, 149 (3d Cir. 2022), fares no better. The sign ordinance in *City of Austin* was "agnostic as to content," and akin to a time, place, and manner restriction. 596 U.S. at 69, 71. The consent rule in *Mazo*, meanwhile, regulated an extrinsic feature (consent of the subject), not the message itself. 54 F.4th at 147–52. New Jersey's telemedicine rule, by contrast, singles out speech about a topic—medical consultations—for differential treatment. *City of Austin*, 596 U.S. at 71; *see also* AOB at 31; N.J. Stat. §§ 45:1-61, 1-62(b). The prohibition is not incidental. To the contrary, it is a quintessential example of a content-based speech regulation.

Nor is the rule saved by history or tradition.[3] The Board's reliance on *Vidal v. Elster*, 602 U.S. 286, 295–301 (2024), is misplaced; that case

[3] *Planned Parenthood v. Casey*, 505 U.S. 833 (1992), which reviewed the constitutionality of an informed consent law, is inapposite. Informed consent laws are not analogous to the medical advice at issue in this case. They are a requirement that physicians must obey before treating a

involved a restriction on trademark registration, which the Supreme Court held was constitutional due to "the uniquely content-based nature of trademark regulation and the longstanding coexistence of trademark regulation with the First Amendment" in a narrow ruling. *Vidal*, 602 U.S. at 300. The century-old licensing cases the Board cites concerned medical acts, not the speech of physicians. *See Dent v. West Virginia*, 129 U.S. 114, 118 (1889) (general challenge to a licensing law alleging that it deprived plaintiff of the right to practice his profession); *Collins v. Texas*, 223 U.S. 288, 296–97 (1912) (Fourteenth Amendment challenge to general osteopathy licensing); *Graves v. Minnesota*, 272 U.S. 425, 426–27 (1926) (Due Process challenge to licensing requirement for dentistry). None approved silencing doctors' conversations. To the contrary, *NIFLA* squarely held that states like New Jersey cannot "reduce a group's First Amendment rights by simply imposing a licensing requirement." 585 U.S. at 773.[4]

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patient and are "firmly entrenched in American tort law." *NIFLA*, 585 U.S. at 770 (quoting *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 269 (1990)).

[4] *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), is therefore inapplicable because "[i]n-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component." 436 U.S. at 457.

This Court likewise recognized that so-called "professional" speech is protected in *Veterans Guardian VA Claim Consulting LLC v. Platkin*, 133 F.4th 213, 218–19 (3d Cir. 2015), where it held that advice about veterans' claims was constitutionally protected because it was delivered through speech. The same is true here. Professionals do not forfeit First Amendment rights when they speak in their professional capacity. *NIFLA*, 585 U.S. at 770; *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002). The State's attempt to characterize these doctor-patient conversations as "conduct" cannot obscure that the trigger for the rule is the speech itself. *See NIFLA*, 585 U.S. at 773.

The distinction between treatment and advice is both workable and constitutionally essential. *Conant* and *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), draw precisely that line. The rule here bars only speech—advice, consultation, follow-up—and that is what the First Amendment protects.[5] New Jersey asks this Court to bless categorical control over

[5] Multiple Supreme Court Justices found the distinction between treatment and other forms of medical speech significant in the recent oral argument for *Chiles v. Salazar*. *See, e.g.*, Tr. of Oral Argument at 12:3–8 (Roberts, C.J.) ("[I]f, in addition to the counseling, there is more what I'll call medical treatment, whether it's medications, shots, whatever?"); 13:4–9 (Kagan, J.) ("if the speech is the speech that your client engages

what physicians may say. But *NIFLA* warns against that very request. Because this rule is triggered by subject matter and speaker identity, it is a content- and speaker-based restriction subject to strict scrutiny, which cannot be satisfied at the pleading stage. *See Sorrell*, 564 U.S. at 564; *Reed*, 576 U.S. at 163.

B. At the Pleading Stage, the Rule Cannot Survive Strict—or Even Intermediate—Scrutiny

Not only does the telemedicine rule fail strict scrutiny, it cannot satisfy intermediate scrutiny—particularly at this stage of the litigation. Intermediate scrutiny applies only to content-neutral restrictions and would require the Board to show that its rule "advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997). The Board cannot meet that burden on the pleadings. *See Bruni*, 824 F.3d at 357.

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in and, in addition, she engages in something that's non-speech"). The Court appears prepared to affirm Appellants' position here: that when the government punishes a conversation simply because it concerns medicine, it regulates speech.

First, the Board's asserted interest in regulating the practice of medicine is inseparable from suppressing the speech Appellants wish to engage in here. *Turner*, 520 U.S. at 189. For these Appellants, the telemedicine rule operates solely to silence out-of-state physicians from speaking with New Jersey patients. A regulation whose purpose and effect is to restrict speech cannot be recast as a neutral professional standard.

Second, the rule is not tailored to achieve the Board's claimed interest. It is a categorical ban on communication between out-of-state specialists and New Jersey patients, a sledgehammer-like approach that burdens far more speech than necessary to achieve the government's interest. New Jersey could address concerns about competence or discipline through less restrictive means, including by enforcing its existing malpractice regime, using fraud laws, or disciplining actual misconduct. The Board offers no reason why banning all telemedicine conversations is necessary when targeted enforcement tools exist.

The Board's speculation that duplicative licensure is essential to protecting patients cannot defeat the well-pled allegations in the Complaint. Appellants allege that Drs. MacDonald and Gardner are

board-certified and that they meet standards that are functionally identical to New Jersey physicians. *See* JA48 ¶ 45; *see also* JA58 ¶ 84. At this stage in the litigation, those allegations must be taken as true. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 556 (2007); *Bruni*, 824 F.3d at 357. Nor does the Board explain why a blanket speech ban is necessary when the State already relies on home-state licensure and nationwide boards to ensure competence when out-of-state specialists treat New Jersey patients in person. Far from protecting New Jersey patients from substandard doctors, the rule isolates them from speaking to the experts most qualified to treat their rare cancers. *See* JA58–61 ¶¶ 88–100.

The Board has made no effort to show that the telemedicine rule does "not burden substantially more speech than is necessary to further" its interests, even if they were legitimate. *Free Speech Coal., Inc. v. Paxton*, 606 U.S. 461, 496 (2025). The State's tailoring problem is underscored by the obvious, less restrictive alternatives Appellants identify. New Jersey could, for example, (1) require out-of-state specialists to verify home-state licensure; (2) rely on disclaimers; (3) punish actual misconduct after it occurs; or (4) limit the rule to video-based consultations while allowing audio-only conversations. Each of

these alternatives would burden less speech than a categorical ban. That the State chose the most restrictive option—silencing all out-of-state specialists—demonstrates the rule is not narrowly tailored.

The Board's argument that streamlined licensing mitigates the burden is beside the point. Appellants allege that duplicative licensure remains costly, burdensome, and in practice blocks out-of-state specialists from speaking with New Jersey patients. JA48 ¶¶ 43–50. At this stage, those allegations must be credited. And because the rule is triggered here by speaking—not by physical treatment—the State cannot rely on its licensure scheme to evade heightened First Amendment scrutiny. *NIFLA*, 585 U.S. at 773.

Because the telemedicine rule targets speech based on its subject matter, strict scrutiny applies. But even under intermediate scrutiny, the rule cannot be upheld on a motion to dismiss. The Board's asserted interests are speculative, the rule's tailoring nonexistent, and Appellants have alleged that the rule blocks vital medical conversations while achieving little in return. The First Amendment does not allow the government to ban speech simply because it is about medicine. And no matter what standard of review applies, Rule 12(b)(6) entitles Appellants

to progress beyond the pleadings and obtain discovery. This Court should reverse the district court's dismissal of Appellants' First Amendment claim.

II. APPELLANTS STATE A DORMANT COMMERCE CLAUSE CLAIM

A. The Telemedicine Rule Discriminates Against Interstate Commerce

Drs. MacDonald and Gardner plausibly allege that the telemedicine rule, as applied to interstate telemedicine conversations, discriminates against interstate commerce by raising the cost of doing business for out-of-state physicians while leaving in-state physicians unaffected. *See West Lynn Creamery, Inc. v. Healy*, 512 U.S. 186, 196 (1994) (quoting *Exxon Corp. v. Gov. of Maryland*, 437 U.S. 117, 126 n.16 (1978)); *see* JA47–57 ¶¶ 21–22, 24, 26, 30, 36, 40, 42–43, 45–47, 52–54, 58, 60–61, 74–76. By forcing out-of-state specialists to obtain an additional medical license to speak with New Jersey patients—while in-state physicians need only one license—the rule "eliminates [out-of-state physicians'] competitive advantage" and shields New Jersey doctors from interstate competition. *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 351–52 (1977); *see also* AOB at 42–44.

Tolchin v. Supreme Court of the State of New Jersey, 111 F.3d 1099 (3d Cir. 1997), and *Heffner v. Murphy*, 745 F.3d 56, 70 (3d Cir. 2014), do not defeat the claim. Those cases involved professions inherently tied to in-state activity—legal practice and funeral services. *Heffner*, for example, heavily emphasized the "highly localized" nature of funeral services in concluding that Pennsylvania's licensing scheme applied evenly to in-state and out-of-state residents. 745 F.3d at 72–73. Telemedicine is the opposite. Its defining feature is the delivery of advice over long distances. N.J. Stat. § 45:1-61; N.J. Admin. Code § 13:35-6B.2; JA42–56 ¶¶ 21–26, 42–43, 45, 72–76. A rule that eliminates that interstate advantage and forces specialists to duplicate licensure burdens them in ways not shared by in-state physicians.

Nor does *Tolchin* apply. The burden there—maintaining an in-state office—fell on "those who wish[ed] to maintain small or sporadic practices" whether they were residents or nonresidents. 111 F.3d at 1107. Here, by contrast, only out-of-state specialists who physically treat patients only in their home state must obtain a second license to speak with New Jersey patients. JA48, 56 ¶¶ 45, 75–77. A New Jersey oncologist needs only one license to speak to New Jersey patients; Drs.

MacDonald and Gardner need two. That is a classic discriminatory effect under *Hunt*. *See* 432 U.S. at 350–52.

The Board's assertion that these burdens somehow fall equally on all physicians is unsupported and inappropriate on a motion to dismiss. At this stage, Appellants' well-pled allegations control. *Twombly*, 550 U.S. at 556; *see also* AOB 43–44, JA47–48 ¶¶ 42–43, 45. And those allegations describe precisely the kind of protectionist consequence—shielding in-state practitioners from out-of-state competition—that the Dormant Commerce Clause forbids. *Hunt*, 432 U.S. at 351.

The Medical Board also claims that it is irrelevant that *Tolchin* and *Heffner* were decided on summary judgment. But whether a facially neutral regulation discriminates in effect is a fact-intensive question that cannot be resolved at the pleading stage. *See Twombly*, 550 U.S. at 556. In *Heffner*, the plaintiffs lost because they failed to produce evidence sufficient to show discriminatory effect. *See* 745 F.3d at 72. Here, Appellants plausibly allege that effect and are entitled to develop a record before those allegations are rejected. The district court's decision to resolve this factual dispute under Rule 12(b)(6) was error.

Because Appellants plausibly allege discrimination in effect, they state a Dormant Commerce Clause claim, and dismissal was improper.

B. The Rule Fails Under the *Pike* Balancing Test

Even if the rule were considered nondiscriminatory, it still violates the Dormant Commerce Clause under *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). Appellants allege substantial burdens on interstate commerce: duplicative licensure requirements, lost access to out-of-state specialists, and impediments to the flow of medical advice across state lines—the very purpose and value of telemedicine. *See* JA42–57 ¶¶ 21–26, 30, 36, 40, 42–47, 52–62, 74–76. These burdens strike at the heart of interstate medical communication and are anything but incidental.

The State's asserted local benefits do not outweigh these burdens at the pleading stage. Appellants allege that Drs. MacDonald and Gardner are nationally renowned experts in rare cancer treatment, and that New Jersey's rule deprives patients of essential medical advice not available in the state. JA36–56 ¶¶ 3, 7–8, 19, 27, 42–62, 68, 76. The rule thus "protects" patients not from harm, but from precisely the advice they need most. AOB at 50. That is a substantial burden.

The Board's speculation about protecting patients from incompetent care ignores the less restrictive alternatives Appellants identify, including relying on home-state licensure, enforcing existing malpractice laws, using disclaimers, or punishing actual misconduct. JA41–58 ¶¶ 16, 26, 33, 40, 43–44, 48, 51–53, 60–68, 85. *Pike* requires considering whether such alternatives could achieve the State's goals with less interference in interstate commerce. 397 U.S. at 142. Appellants plausibly allege that they could.

Because Appellants allege that the burdens imposed by the telemedicine rule substantially outweigh any putative local benefits, they state a claim under *Pike*. Dismissal at this stage was improper.[6]

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[6] In the cases cited by the Board in which the court dismissed Dormant Commerce Clause claims at the pleading stage, the plaintiffs failed to adequately allege a Dormant Commerce Clause violation under *Pike*. *See Nat'l Pork Producers Counsil v. Ross*, 598 U.S. 356, 377–86 (2023) (plaintiffs failed to adequately allege a discriminatory purpose and their alleged harms were speculative); *Just Puppies, Inc. v. Brown*, 123 F.4th 652, 670–71 (4th Cir. 2024) ("[P]laintiffs failed to plausibly allege that the [] Statute substantially burdens interstate commerce" because out-of-staters could still sell to in-state consumers); *Owner Operator Indep. Drivers Ass'n, Inc. v. Pa. Turnpike Comm'n*, 934 F.3d 283, 294 n.12 (3d Cir. 2019) (court declined to rule on the *Pike* test because it held that the challenged activity was authorized by Congress). This case is different—Appellants alleged that the rule has a discriminatory purpose and that the burdens of the rule cause real harm to patients by limiting their

III. DRS. MACDONALD AND GARDNER STATE A PRIVILEGES AND IMMUNITIES CLAIM

A. The Telemedicine Rule Discriminates Against Out-of-State Physicians in Their Pursuit of a Common Calling

The Privileges and Immunities Clause prevents states from "discriminat[ing] against out-of-state residents on matters of fundamental concern," including the fundamental privilege to pursue a common calling. *United Bldg. & Constr. Trades Council of Camden Cnty. & Vicinity v. Mayor and Council of City of Camden*, 465 U.S. 208, 219–20 (1984). Appellants plausibly allege such discrimination here.

The Board's assertion that the rule is facially neutral is beside the point.[7] "[T]he absence of an express statement" identifying nonresidents does not defeat a Privileges and Immunities claim. *Hillside Dairy Inc. v. Lyons*, 539 U.S. 59, 67 (2003); *see also Chalker v. Birmingham & Nw. Ry. Co.*, 249 U.S. 522, 527 (1919). Drs. MacDonald and Gardner allege that the "practical effect of the provision [is] discriminatory," which is all they

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access to care and by imposing burdens on out-of-state experts. AOB at 49–52; JA36–56 ¶¶ 3, 7–8, 19, 27, 42–62, 68, 76.

[7] Under the Board's argument, it could impose other facially neutral requirements that have the practical effect of preventing out-of-staters from pursing their profession or exercising other fundamental privileges. It could, for example, require any motorist driving through New Jersey to obtain a New Jersey driver's license, thus burdening the right to travel.

need do at this stage of litigation. *See Hillside Dairy*, 539 U.S. at 67. *See also Twombly*, 550 U.S. at 556; JA48 ¶¶ 45–46.

The Board's reliance on *McBurney v. Young*, 569 U.S. 221 (2013), does not change the analysis. *McBurney* was decided on summary judgment after a full evidentiary record.[8] 569 U.S. at 225. And the plaintiff in that case did "not allege" and "offered no proof" Virginia acted to confer a competitive economic advantage on its own residents. 569 U.S. at 228. Here, Drs. MacDonald and Gardner allege precisely that: the rule protects New Jersey doctors from competition by out-of-state specialists who practice only in their home states and who cannot feasibly obtain duplicative licensure in every jurisdiction where their patients reside. JA38–58 ¶¶ 7–8, 27, 45–47, 52–53, 81–84.

At this stage, those allegations must be taken as true. *Twombly*, 550 U.S. at 556. Because Appellants plausibly allege an effect that disfavors nonresident physicians in their pursuit of a common calling, they state a Privileges and Immunities claim.

[8] Defendant's reliance on *Castille* is misplaced for the same reason. 799 F.3d at 219.

B. The State Cannot Justify Its Discrimination at the Pleading Stage

Even if the Medical Board could show that the telemedicine rule addresses a substantial state interest, it also must demonstrate "a substantial relationship to the State's objective." *Tolchin*, 111 F.3d at 1111. The State cannot make that showing on a motion to dismiss.

The Supreme Court has repeatedly emphasized that the availability of "less restrictive means" is an essential component of this inquiry. *See Sup. Ct. of New Hampshire v. Piper*, 470 U.S. 274, 284 (1985). Appellants allege numerous less restrictive alternatives—verifying home-state licensure, punishing misconduct, using disclaimers, relying on national board certification—that could achieve the State's asserted goals without barring all telemedicine conversations between out-of-state specialists and New Jersey patients. JA53–54 ¶¶ 63–68. At this stage, those allegations are more than sufficient to require factual development.

The Board's reliance on *Tolchin* again overlooks posture. There, this Court ruled that the challenged office and in-person class requirements were not overly burdensome on summary judgment, after the plaintiffs had the opportunity to create a factual record. *Tolchin*, 111 F.3d at 1102. Here, Appellants have alleged that the telemedicine rule

bears no substantial relationship to the State's objectives and that less restrictive means are readily available. Those allegations must be credited unless and until the State can prove otherwise. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *see also United Bldg.*, 465 U.S. at 223.[9]

Because Appellants plausibly allege discrimination against nonresidents in their ability to pursue a common calling, and because the State has not shown that such discrimination is closely related to its asserted interest, dismissal of the Privileges and Immunities claim was improper.

[9] As with Appellants' Dormant Commerce Clause claim, the cases the Board cites in support of its claim that Appellants' Privileges and Immunities claim should be dismissed are easily distinguishable. *See Gattineri v. Town of Lynnfield*, 58 F.4th 512, 516 (1st Cir. 2023) (all parties were residents of the same state); *Sarasota Wine Market, LLC v. Schmitt*, 987 F.3d 1171, 1184–85 (8th Cir. 2021) (challenged licensure requirement was an essential element defining the three-tiered alcohol distribution system); *Willman v. Att'y Gen. of the United States*, 972 F.3d 819, 825–26 (6th Cir. 2020) (plaintiff failed to allege burden on the right to travel); *Yerger v. Mass. Tpk. Auth.*, 395 F. App'x 878, 885 (3d Cir. 2010) (nonprecedential case in which there was no indication that E-ZPass use was a proxy for state citizenship); *Selevan v. N.Y. Thruway Auth.*, 584 F.3d 82, 103–04 (2d Cir. 2009) (plaintiff was a resident of Canada, and therefore restrictions on his right to travel were not implicated by the plain text of the Privileges and Immunities Clause).

IV. APPELLANT ABELL STATES A FOURTEENTH AMENDMENT CLAIM

A. The Telemedicine Rule Interferes with a Parent's Fundamental Right to Direct a Child's Medical Care

The Fourteenth Amendment protects the "the interest of parents in the [direction of the] care, custody, and control of their children," including the fundamental right to "to seek and follow medical advice" for a child's care. *Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Parham v. J.R.*, 442 U.S. 584, 602 (1979). Appellant Abell alleges that the telemedicine rule violates that right by preventing him from consulting with the physician best equipped to treat his son's rare cancer. *See* JA36–52 ¶¶ 3, 7, 19, 31, 33, 54, 56, 58–61; AOB at 57–58. At this stage, those allegations must be accepted as true.

The Medical Board argues that *Sammon v. New Jersey Board of Medical Examiners*, 66 F.3d 639, 647 (3d Cir. 1995), controls, but *Sammon* does not defeat Abell's claim. There, this Court stressed that the plaintiffs did not allege any shortage of licensed midwives or any inability to obtain competent care within the state. *See* 66 F.3d at 644. Here, in contrast, Abell alleges precisely that: there is no physician qualified to treat his son's cancer in New Jersey, and he must consult with Dr. MacDonald—who is licensed where the treatment would occur—

to ensure continuity of care. JA36, 38, 51 ¶¶ 3, 7, 54, 56; AOB at 58–59. Those factual allegations distinguish this case from *Sammon* and state a plausible Due Process claim. *Compare* 66 F.3d at 644 n.6 ("Plaintiffs' briefing acknowledges that there are certified nurse midwives licensed to practice midwifery in New Jersey.") *with* JA36, 38, 51 ¶¶ 3, 7, 54, 56.

The Board's continued reliance on *Doe v. Christie*, 33 F.Supp.3d 518 (D.N.J. 2014), *aff'd by Doe v. Governor of New Jersey*, 783 F.3d 150 (3d Cir. 2015), also fails. *Doe* involved a state prohibition on treatment the state deemed harmful. *Doe*, 783 F.3d at 156. Nothing in the Complaint suggests that Dr. MacDonald's nationally renowned expert advice—or proton therapy itself—is harmful. Nor does Abell seek to compel the State to provide treatment within its borders; he seeks only to consult his son's treating physician before traveling out of state for care. *See* JA44–45, 62–64 ¶¶ 29–33, 104–09, Prayer for Relief C; AOB at 61.

B. The State Cannot Justify This Intrusion at the Pleading Stage

The Medical Board's assertion that recognizing Abell's claim would lead to "disastrous" consequences is unfounded. *See* Resp. Br. at 54–55. This case only challenges the telemedicine licensure rule, and only as-applied to already licensed specialists who seek only to provide advice—

not physical treatment—to New Jersey patients. JA63–64 ¶ 109, Prayers for Relief B and C. The Board itself suspended licensure restrictions for telemedicine during the COVID-19 pandemic with no resulting disaster. JA54 ¶¶ 65, 68. That experience supports, rather than undermines, Abell's allegations.

Moreover, Appellants identify numerous less restrictive means by which New Jersey could protect patients from "incompetent and unqualified doctors." *See* Resp. Br. at 55. The Board could, for example, verify home-state licensure, enforce malpractice laws, or discipline actual misconduct. JA41–58 ¶¶ 16, 26, 33, 40, 43–44, 48, 51–53, 60–68, 85. While the Board prefers the regulatory convenience of the telemedicine rule, convenience is insufficient to justify a restriction on a fundamental right. Fundamental rights do not yield to administrative preference.

CONCLUSION

Because Appellants plausibly allege that New Jersey's telemedicine rule suppresses protected speech, burdens interstate commerce, discriminates against nonresidents, and interferes with a parent's fundamental right to secure medical advice for his child, dismissal at the pleading stage was improper. The district court resolved fact-intensive

constitutional claims without a record and in disregard of the Rule 12(b)(6) standard.

This Court should reverse and remand for discovery and further proceedings.

DATED: November 14, 2025.

Respectfully submitted,

PACIFIC LEGAL FOUNDATION

By *s/ Jack E. Brown*

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COMBINED CERTIFICATES

I hereby certify

that I, Jack E. Brown, am a member in good standing of the bar of this Court, and a member in good standing of the state bars of Virginia, Pennsylvania, and the District of Columbia, and the Bar of the U.S. Ninth Circuit Court of Appeals;

that this brief complies with the requirements of Fed. R. App. P. 32(a)(5)(A) because it has been prepared in 14-point Century Schoolbook font;

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DATED: November 14, 2025.

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