Protecting the Speech We Hate

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ARLINGTON, Va. — SHOULD one-on-one advice and counseling be protected as free speech? It sounds like a no-brainer. Of course it should be. But a recent decision by a three-judge panel of the United States Court of Appeals for the Ninth Circuit says otherwise.

Ruling on two First Amendment challenges to a California law that prohibits licensed medical providers from using talk therapy to try to change a minor’s sexual orientation, the court said that such therapy is “conduct,” not “speech,” and therefore deserves no protection.

Let’s get this out of the way right up front: We have no sympathy for the plaintiffs in these cases. We are offended by their speech. And we think the world would be a better place if the plaintiffs accepted gay people for who they are, instead of treating them as if they were broken and required what is euphemistically called “reparative” therapy.

But none of that has anything to do with the central legal question: Is one-on-one advice and counseling — not just about homosexuality, but about anything — protected free speech under the First Amendment?

The answer to that question has national significance and will extend well beyond the fate of the California law and a similar one in New Jersey that is now being challenged in federal court. The Ninth Circuit’s ruling that talk therapy doesn’t count as “speech” has drastic consequences for thousands of Americans who speak on all sorts of harmless, everyday topics.

Those Americans include people like Steve Cooksey. Mr. Cooksey is a resident of North Carolina who was recently ordered by that state’s dietitian licensing board to stop offering dietary advice through his Web site. The board’s reasoning? Dietary advice is not speech, it’s the “conduct” of nutritional assessing and counseling.

His case is not unique. Our organization, the Institute for Justice, which represents Mr. Cooksey in a First Amendment lawsuit against the North Carolina licensing board, is confronting similar arguments nationwide in cases involving speech about parenting, pet care and even history. Under the Ninth Circuit’s ruling, governments could regulate this speech however they wanted, as long as they relabeled it “conduct.”

Lawyers for the state of California made exactly this argument. They said the state was not regulating “speech,” but rather “medical treatment” that could be restricted just like brain surgery or electroshock therapy. But whether or not something is protected by the First Amendment does not hinge on whether we decide to call it “speech” or “treatment.” It hinges on whether or not the government is regulating something that communicates a message. Brain surgery and electroshock therapy do not, but talk therapy — whatever else it does — clearly communicates a message.

Accepting California’s approach would undermine free-speech protections entirely. After all, any kind of speech can be relabeled “conduct.” Professors engage in the conduct of “instructing,” political consultants in the conduct of “strategizing,” and stand-up comedians in the conduct of “inducing amusement.”

Fortunately, the United States Supreme Court has made clear that governments cannot escape the First Amendment by playing this kind of labeling game. Three years ago, the court held that the First Amendment applied even to expert legal advice to terrorist groups. The federal government in that case made exactly the same argument that California was making here, that such advice was “conduct,” not speech. The Supreme Court rejected that argument, though it did find that the government’s interest in combating terrorism was strong enough to uphold the law under First Amendment scrutiny.

The same reasoning applies here. Talk therapy, like other advice, consists of communication, and communication gets First Amendment protection even when the government calls it conduct.

Importantly, the plaintiffs in the California case would not have automatically won their case had the Ninth Circuit held that the First Amendment applied. Instead, the government would then have had the burden of coming forward with actual evidence that the law addressed a real problem and limited speech no more than was necessary. That burden is serious, but it is not insurmountable. It simply means that courts take free speech very seriously, and government officials must present real evidence that their restrictions are necessary to fight a real danger.

It is possible, maybe even likely, that California will be able to meet this burden with regard to its reparative therapy law. But it was the Ninth Circuit’s responsibility to ensure that the state did so, and the court failed.

Now the Ninth Circuit has a chance to correct this error. The plaintiffs in these cases have asked the court to grant a rare “en banc” rehearing, before the entire court, to reverse the panel’s ruling. Our organization has filed a brief in support of this request. The Ninth Circuit should grant the review — not for the sake of the plaintiffs, but for the sake of the thousands of other people who speak for a living and whose rights also hang in the balance here.