No. 22-942

IN THE

Supreme Court of the United States

BRIAN TINGLEY,
Petitioner,
v.
ROBERT W. FERGUSON, in his official capacity as Attorney General for the State of Washington, *et al.*,
Respondents.

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

Brief *Amicus Curiae* of America's Future, Public Advocate of the United States, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund in Support of Petitioner

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INTEREST OF THE *AMICI CURIAE*[1]

America's Future, Public Advocate of the United States, U.S. Constitutional Rights Legal Defense Fund, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law.

STATEMENT OF THE CASE

A Washington State statute prohibits licensed health care providers from counseling minors "to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." Wash. Rev. Code § 18.130.020(4)(a). The law declares such efforts to be "conversion therapy" and decrees such counseling to be unprofessional conduct subjecting the licensee to professional sanctions. *Id*. On the other hand, the statute exempted from its definition of "conversion therapy" counseling that does "not seek to

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[1] It is hereby certified that counsel of record for all parties received notice of the intention to file this brief at least 10 days prior to the filing of it; that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

change sexual orientation or gender identity." *Id*. at (4)(b). Counselors operating "under the auspices of a religious ... organization" are also exempt, but Petitioner Tingley does not qualify for that exemption. Wash. Rev. Code § 18.225.030(4).

Based upon the Ninth Circuit's decision in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), the district court determined that Tingley's Christian counseling against homosexuality and transgenderism constituted "conduct," and not speech. *Id*. at 1140-1141. As such, the district court applied rational basis review and found the statute survived that low standard, dismissing Tingley's complaint. *Id*. at 1142-43.

On appeal, the Ninth Circuit accepted the proposition that Tingley's counseling involved only speech and was explicitly religious:

> [H]is Christian views inform his work. Tingley believes that the sex each person is assigned at birth is "a gift of God" that should not be changed and trumps an individual's "feelings, determinations, or wishes." He also believes that "sexual relationships are beautiful and healthy" but only if they occur "between one man and one woman committed to each other through marriage." Tingley claims that many of his clients share his religious viewpoints and come to him specifically because he holds himself out as a "Christian provider[]." [*Tingley v. Ferguson*, 47 F.4th 1055, 1065 (9th Cir. 2022).]

Nevertheless, citing its 2014 decision in *Pickup*, the court concluded that there were at least three categories of speech along a "continuum" which must be evaluated differently. *Id.* at 1072-73. Speech that is "'public dialogue'" on issues receives "'robust'" First Amendment protection. *Id.* Speech "'within the confines of a professional relationship'" receives "'somewhat diminished'" First Amendment protection. *Id.* at 1073. And professional "conduct," even if it has "'an incidental effect on speech,'" is subject to "'great'" government regulation. *Id.*

On appeal, with respect to this Court's decision in *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018), the Ninth Circuit found a "long (if heretofore unrecognized) tradition" of "regulation governing the practice of those who provide health care within state borders." *Tingley*, 47 F.4th at 1080. On that basis, the Ninth Circuit categorized Tingley's counseling using only speech as "treatment," not "speech." *Id.* at 1082.

The Ninth Circuit concluded that "Tingley's free speech challenge" was subordinated to the Washington law's pursuit of "individual identity." *Id.* at 1084. It found the Washington law to be "neutral and generally applicable" under *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990). *Id.* The court affirmed the district court's dismissal.

On January 23, 2023, the Ninth Circuit denied Tingley's petition for rehearing *en banc*. *Tingley v. Ferguson*, 57 F.4th 1072 (9th Cir. 2023), with Judges O'Scannlain, Ikuta, R. Nelson, and VanDyke

dissenting. *Id.* Thereafter, Tingley petitioned this Court for a writ of certiorari.

STATEMENT

Washington State law prohibits licensed counselors from speaking Biblical truth to protect the morals and health of minors. Preventing parents and their children from learning the dangerous consequences of immoral choices would have been unthinkable just a few years ago. The fact that this law has been upheld by the lower courts demonstrates that speech and free exercise analytical approaches that were applied strayed far from the requirements of Constitutional text.

The Declaration of Independence asserts that "Governments are instituted among Men" in order to "secure" certain "unalienable Rights" with which we were "endowed by [our] Creator...." However, the courts below elevated invented homosexual and transgender rights over the once "unalienable" speech and free exercise rights which are sourced in Holy Writ.

The Framers would never have countenanced shutting the mouths of those offering Biblical counsel, but Washington State suppresses truth, allowing lies to flourish, harming the young as well as the nation.[2] Washington State assumes a person can change his

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[2] "For the wrath of God is revealed from heaven against all ungodliness and unrighteousness of men, who suppress the truth in unrighteousness." *Romans* 1:18.

sex, in defiance of biological and Biblical truth.[3] And the state legislature then empowers its state officials to fine, sanction, and withdraw the licenses from counselors who adhere to Biblical morality.[4] None of these dangerous results can be allowed to stand.

SUMMARY OF ARGUMENT

The Ninth Circuit has affirmed a radical and unconstitutional Washington State law which prevents licensed Christian counselors from providing Biblical counseling about sexual morality to young people. The fact that the law expressly authorizes young people to be counseled in the opposite direction — to embrace homosexuality and transgenderism — demonstrates that this law was enacted in support of a religious and political agenda which could fairly be described as anti-Christian.

Without any analysis, the courts below accepted at face value the perverse presuppositions underlying this legislation: homosexuality is normal if not preferable to heterosexuality; a person can change their sex; minors are better equipped to make irreversible decisions that could deform their bodies and leave them sterile and drug dependent for life[5]

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[3] "[T]he whole world lies under the sway of the wicked one." *1 John* 5:19.

[4] "If a ruler hearken to lies, all his servants are wicked." *Proverbs* 29:12.

[5] "Pro-Transgender Medical Professionals Cashing-in on Lifelong Patients," *Project Veritas* (Apr. 25, 2023).

after hearing only one side of the argument; and parents have no right to engage Christian counselors to help their children embrace moral choices.

The Ninth Circuit's decision violates the First Amendment's protections of both free speech and free exercise. The Christian Counseling under attack is pure speech, not conduct, but even if viewed as conduct under the Ninth Circuit's professional speech exception, the Christian Counselors' words are protected by the Free Exercise Clause as proselytizing, expressly recognized by *Employment Division v. Smith*.

This Court's subsequent cases have consistently rejected viewpoint-based legislation of this sort. Occupational licensure under a state police power may require certain educational or experiential credentials, but may not require licensed persons to embrace state-defined religious viewpoints.

ARGUMENT

I. THE WASHINGTON STATE LAW CENSORS THOSE COUNSELORS WHO OPPOSE THE LEGISLATORS' IRRELIGIOUS VIEWS ON HOMOSEXUALITY AND TRANSGENDERISM.

The challenged Washington state law was analyzed by both the district court and the Ninth Circuit as just another state-imposed, health-based, medical consensus-supported restriction on licensed health care providers designed to protect clients and

patients under their care. *See Tingley v. Ferguson*, 557 F. Supp. 3d 1131, 1141, 1143 (W.D. Wash. 2021); *Tingley v. Ferguson*, 47 F.4th 1055, 1064 (9th Cir. 2022). This characterization of the issue before those courts furnished the predicate for upholding the law as a protection of the health and safety of minors. However, when the Washington legislature classified "[p]erforming conversion therapy on a patient under age eighteen" (Wash. Rev. Code § 18.130.180(27)) as an act of "unprofessional conduct" for which licensed health care providers could be sanctioned and barred from the profession, it was doing much more. It was censoring one side in what has become the central religious debate of our day.[6]

There is no "settled science" supporting the Washington law. The Ninth Circuit asserted the Washington legislature's "intent" was "'protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth,'" based on "a report from the Washington State

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[6] Throughout our nation's history, with considerable overlap, different discrete religious questions have dominated public debate. During the 1800s, the central religious debate was over slavery. As the nation entered World War I, a religious debate over pacifism raged. During the 1950s and 1960s, that issue was civil rights. There have been periods when the debate over capital punishment was intense, and certainly that was true of America's involvement in Vietnam. Since this Court's now-repudiated decision in *Roe v. Wade*, 410 U.S. 113 (1973), the nation has been wracked by the religious debate over abortion. At least since the Stonewall riots in 1969, the issue of homosexuality has come to center stage and the issue of transgenderism — particularly the ability of children to have life-altering, irreversible surgical and pharmaceutical interventions to "change sex" — has now joined it.

Board of Health." *Tingley*, 47 F.4th at 1065. However, if the legislature had relied on the guidance issued last year by Florida Department of Health, the Washington law governing transgenderism would have been very different, as Florida concluded: "(i) [s]ocial gender transition should not be a treatment option for children or adolescents; (ii) [a]nyone under 18 should not be prescribed puberty blockers or hormone therapy; and (iii) [g]ender reassignment surgery should not be a treatment option for children or adolescents." Florida Department of Health, "Treatment of Gender Dysphoria for Children and Adolescents" (Apr. 20, 2022).

The degree to which children are being harmed by those who would affirm their "gender feelings" has been repeatedly exposed. *See generally* Abigail Shrier, Irreversible Damage: The Transgender Craze Seducing Our Daughters (Regnery Publishing: 2020). However, even if there were a secular "scientific consensus" about optimal treatment, it does not remove its status as a religious issue. "Science" (an always evolving proposition) is never "settled," and it certainly is not protected by the Constitution — while "religion" is.

Moreover, it cannot be said that homosexuality and transgenderism are not religious issues, when Holy Writ gives clear guidance on these matters. "Male and female he created them, and he blessed them and named them Man when they were created." *Genesis* 5:2 (ESV). "Thou shalt not lie with mankind, as with womankind: it is abomination." *Leviticus* 18:22 (KJV).

> For this cause God gave them up unto vile affections: for even their women did change the natural use into that which is against nature: And likewise also the men, leaving the natural use of the woman, burned in their lust one toward another; men with men working that which is unseemly, and receiving in themselves that recompence of their error which was meet. And even as they did not like to retain God in their knowledge, God gave them over to a reprobate mind, to do those things which are not convenient.... [*Romans* 1:26-28 (KJV).]

Further, it cannot be said that Washington was adopting a neutral position on a religious issue when it banned "conversion therapy," defined as "a regime that seeks to change an individual's sexual orientation or gender identity," while expressly excluding "counseling or psychotherapies that provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development that do not seek to change sexual orientation or gender identity." Wash. Rev. Code § 18.130.020(4). The *status quo ante*, allowing counselors to take either side of this issue, constituted a neutral position. Washington State adopted the anti-Christian side of a religious issue by imposing an occupational licensure rule designed to undermine what has been one of the foundations of Western Civilization, and the dominant view during the founding era. *See generally* Blackstone, IV Commentaries on the Laws of England, Chapter 15,

"Crimes against Nature" (1769); D. Miller, Ph.D., "The Founders on Homosexuality," Apologetics Press (2008).

Opposition to Biblical Christianity is widely understood to be a central tenet of the trans movement.[7] *See, e.g.,* T. Carlson, "The trans movement is targeting Christians," *Fox News* (Mar. 28, 2023) ("The trans movement is the mirror image of Christianity, and therefore its natural enemy."). What has received less notice is that the trans movement is increasingly described as a religious cause by the left. *See generally* L. Melonakos-Harrison & H. Bowman, "Solidarity With Trans Lives is How We Fight the Right," *ChristianSocialism.com* (May 18, 2022) ("[T]he church must form a deliberate community of solidarity with trans youth and their families. A refusal of this solidarity will sideline the church as a mere mystical body...."); J. Nichols, "Calling on the Religious Left to Protect Trans Kids," *Patheos.com* (Apr. 20, 2023) ("All Lefty Religious, please stand behind and protect trans youth and their families because they are innocently trying to exist, follow science, follow their doctors' orders, and take care of their families. Get behind them and let them know that God is on their side."). The trans movement has been described as "a new

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[7] *See also*, Jonathan Cahn, The Return of the Gods (Frontline: 2022) at 55 ("And so as America and Western civilization turned away from God, they began undergoing a process of subjectification. As they moved away from ... the concept of truth itself, that there was any truth to begin with.... If a man believed he was not himself but was someone or something other than what he was, a child, a woman, a leopard, or a tree, there was no ultimate or absolute truth or any truth, no objective reality to contradict his own personal 'truth.'").

religion for the left." I. Haworth, "How trans activism became the new religion of the left," *New York Post* (Mar. 18, 2023).

To be sure, the Washington legislature has not censored all speech in defense of Biblical sexual morality. The Ninth Circuit took pains to point out where the law did not censor speech by counselors who work for "religious organizations," and further:

> Washington's law does not prevent health care providers from **communicating with the public** about conversion therapy; expressing their **personal views**[8] to patients (including minors) about conversion therapy, sexual orientation, or gender identity; practicing conversion therapy on **patients over 18 years** old; or **referring minors** seeking conversion therapy to counselors practicing "under the auspices of a religious organization" or health providers in other states. [*Tingley*, 47 F.4th at 1065 (emphasis added).]

The Ninth Circuit apparently believed it significant that those other avenues for speech have not been

[8] The basis for this claim is unclear. Since a counselor may not "seek to change an individual's sexual orientation or gender identity," it would appear highly risky to share his "personal views" on those same issues.

closed in Washington State — at least not yet.[9] But this law must be viewed as the camel's nose under the tent, censoring religious speech only in an area where several recent misguided court decisions, such as *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), have already allowed breaches of First Amendment protections.

It is in this religious context that the Washington statute should be viewed, and the speech and free exercise claims should be considered.

II. THE FRAMERS ESTABLISHED THE FREE EXERCISE OF RELIGION AS A JURISDICTIONAL LIMIT ON THE POWER OF GOVERNMENT.

The Ninth Circuit cites *Employment Div. v. Smith*, 494 U.S. 872, 879 (1990) for its conclusion that the free exercise of religion "'does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability,'" and since the law here was neutral, strict scrutiny would not be used, and rational basis review would suffice. *Tingley* at 1084. The Ninth Circuit misconstrues both the Free Exercise Clause and the *Smith* decision.

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[9] Although the Washington statute made an exception for licensed professionals "counseling under the auspices of a religious denomination [or] church" (Wash. Rev. Code § 18.225.030(4)), certain other states provide no such exception. *See, e.g.*, Cal. Busi. & Prof. Code § 865.1; N.Y. Educ. Law § 6509-e.

The First Amendment guarantees that "Congress shall make no law ... prohibiting the free exercise [of religion]." In 1878, this Court recognized the significance of James Madison's Memorial and Remonstrance in understanding the meaning of the religion clauses of the First Amendment, stating that there, Madison "demonstrated 'that religion, or the duty we owe the Creator,' was not within the cognizance of civil government." *Reynolds v. United States*, 98 U.S. 145, 163 (1879). The Ninth Circuit apparently believes that government is empowered to punish a Christian counselor who counsels in a manner consistent with his Christian convictions, but in doing so, it is exceeding the authority of government under the First Amendment.

The First Amendment protects against government control of our exercise of religion, and religion is defined as "the duty we owe the Creator." Here, the duty owed to our Creator relates to proselytizing about biblical morality (*see, e.g., 1 Corinthians* 6:9-20 (KJV) (neither "effeminate, nor abusers of themselves with mankind" "shall inherit the kingdom of God")), and acceptance of his created order (male and female) and his standards. Such proselytizing is in no way comparable to the issue involved in *Smith*. As Washington State seeks to restrict the free exercise of religion, there is no balancing test to be applied. Once the activity being restricted is understood to be within the definition of "religion," it is jurisdictionally beyond the authority of the government.

Although Petitioners ask this Court to consider overruling *Smith* (Petition for Certiorari at 35), the Ninth Circuit's decision is not permitted even under *Smith*. In *Smith,* the Court offered a basic definition of what the "free exercise" clause requires. The Court stated: "[T]he 'exercise of religion' often involves not only belief and profession but **the performance of ... physical acts [and] proselytizing**...." *Smith* at 877 (emphasis added). While the distinction between speech and conduct may be instructive in considering claims under freedom of speech, it is not relevant in evaluating a free exercise claim. Under *Smith*, the Free Exercise Clause protects both speech (proselytizing) and conduct (physical acts). "Proselytizing" is defined as "the act or process of converting or attempting to convert someone to a religion or other belief system." "Proselytizing," *Dictionary.com*.

Indeed, according to *Smith*, government may compel action only pursuant to a "valid law prohibiting **conduct that the State is free to regulate**." *Id*. at 879 (emphasis added). The State is not free to regulate Christian proselytizing. The Washington State legislators who favor a homosexual and transgender agenda seek to shut the mouths of their religious and political opponents by prohibiting a Christian counselor from counseling for Biblical morality, but they are jurisdictionally barred from restricting that activity, whether viewed as speech or conduct, by the First Amendment.

In *Smith*, this Court expressly denied to government the power to "regulate religious beliefs [or]

the communication of religious beliefs." *Smith* at 882. But the Ninth Circuit, in its *Pickup* and *Tingley* decisions, continues to attempt to breach this jurisdictional divide, along with Petitioner's Free Exercise of Religion which this separation was designed to protect.

Post-*Smith*, this Court has continued to uphold the Free Exercise Clause's jurisdictional hierarchy between a citizen's civil obligations to the state, and his prior obligations to God. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), this Court noted that whether the state is free to regulate particular conduct is determined by the original definition of "religion" in the free exercise guarantee itself. As Madison explained, government has no jurisdiction whatsoever over duties owed to the Creator which, by nature, are enforceable only "by reason and conviction," not "force and violence" — the weapons of government which Washington State seeks to wield here. Virginia Declaration of Rights (1776).

III. THE NINTH CIRCUIT'S DECISION REPEATEDLY DEFIES THIS COURT'S FIRST AMENDMENT JURISPRUDENCE.

A. *Tingley* Defies this Court's Free Speech holding in *Nat'l Inst. of Family & Life Advocates.*

In *Pickup*, the Ninth Circuit created a category known as "professional speech," and declared it subject to a less-rigorous "intermediate scrutiny" standard of

review. *See Tingley v. Ferguson*, 47 F.4th at 1075. As Judge O'Scannlain noted in his dissent from the Ninth Circuit's denial of rehearing *en banc* (*Tingley v. Ferguson*, 57 F.4th 1072 (9th Cir. 2023)), this Court has resoundingly rejected the rationale of *Pickup*. Speech is not unprotected merely because it is uttered by "professionals." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371-2372 (2018) ("*NIFLA*"). Moreover, this Court in *NIFLA* rebuked courts of appeals that, like the Ninth Circuit, created a "professional speech" category out of whole cloth and then reduced the First Amendment protection available to it.

> Some Courts of Appeals have recognized "professional speech" as a separate category of speech that is subject to different rules.... So defined, these courts except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny.... 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's precedents do not recognize such a tradition for a category called "professional speech." [*Id*. at 2371-2372 (cleaned up) (emphasis added).]

But the Ninth Circuit spent significant effort in attempting to evade this Court's strictures in *NIFLA*. The Ninth Circuit reiterated its judicially contrived three-part "continuum" in *Pickup*. *Pickup* had determined that, at one end of the "continuum,"

"public dialogue" by a medical or therapeutic professional was entitled to "robust protection" under the First Amendment, "professional speech 'within the confines of a professional relationship'" receives "diminished" protection, but at the other end of the spectrum, the state has "great" power to regulate "conduct," even if the regulation has an "incidental effect" on speech. *Tingley,* 47 F.4th at 1072-1073.

"*NIFLA*," the Ninth Circuit reasoned, "abrogated only the 'professional speech' doctrine — the part of *Pickup* in which we determined that speech within the confines of a professional relationship (the 'midpoint' of the continuum) categorically receives lesser scrutiny." *Tingley*, 47 F.4th at 1073.

Recognizing that under *NIFLA* the court was deprived of the ability to practice unfettered regulation of "professional speech" as such, the Ninth Circuit proceeded to simply redefine the terms.

First, it identified a new subset of "professional speech" that it could regulate based on a "long (if heretofore unrecognized) tradition" of "regulation governing the practice of those who provide health care within state borders." *Id*. at 1080. This was a transparent linguistic effort to evade this Court's rule for "professional speech" regulation by creating a smaller subset of "professional speech in the context of medical treatment.

Additionally, the court reframed its "professional speech" regulations this Court overturned as merely "regulations of professional **conduct**." *Id*. at 1076

(emphasis added). It mattered not to the court that Tingley's "conduct" was 100 percent speech, and the Ninth Circuit went on to apply an even lower standard for "conduct" ("rational basis" review) than the intermediate scrutiny it had applied to "professional speech" before *NIFLA*. Thus, in a neat piece of judicial wordsmithing, not only is this Court's repudiation of the "professional speech/intermediate scrutiny" doctrine evaded, but also by recasting speech as conduct, the threshold for government to regulate it is lowered yet again.

But this Court has been clear that if "conduct" consists of speech, then it must be evaluated under First Amendment Free Speech principles. If **"the conduct triggering coverage under the statute consists of communicating a message**," and if "**Plaintiffs want to speak ... and whether they may do so under [the statute] depends on what they say**," then First Amendment protection applies. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) (emphasis added).

Even assuming arguendo that speech for purposes of medical treatment is also "conduct," it is immaterial, because the clear purpose of the censorship law is still the suppression of particular speech. In *United States v. O'Brien*, 391 U.S. 367, 377 (1968), this Court held that even where there is a significant governmental interest, any incidental effect on free speech pursuant to that interest is permissible only "if the governmental interest is unrelated to the suppression of free expression." Here, the suppression of a particular viewpoint in counseling is not only related,

but is the direct target of the censorship law. The law cannot stand.

B. *Tingley* Defies this Court's Free Exercise Holding in *Kennedy v. Bremerton School District.*

In *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407 (2022), this Court made clear that "[t]he [Free Exercise] Clause protects not only the right to harbor religious beliefs inwardly and secretly. It does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life...." *Id.* at 2421. Citing to Madison, this Court made clear that religious speech and expression is "doubly protect[ed] by the First Amendment":

> Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities.... That **the First Amendment doubly protects religious speech** is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent. *See, e.g.*, A Memorial and Remonstrance Against Religious Assessments, in Selected Writings of James Madison 21, 25 (R. Ketcham ed. 2006). "[I]n Anglo-American history, ... **government suppression of speech has so commonly been directed *precisely* at religious speech** that a free-speech clause without

> religion would be Hamlet without the prince." [*Kennedy* at 2421 (bold added; italics original).]

Instead of honoring this Court's "double protection," the Ninth Circuit instead has returned to the "government suppression of speech" that necessitated the Free Exercise Clause in the first place. The Ninth Circuit further reduced Petitioner's protection from "intermediate scrutiny" to "rational basis" scrutiny with creative but constitutionally unfaithful wordplay.

C. *Tingley* Defies this Court's Ban on Overt Government Hostility toward Religion as Stated in *Masterpiece Cakeshop*.

The court below cast the Washington statute as "neutral and generally applicable." *Tingley*, 47 F.4th at 1084. In reality, both the Washington statute and the Ninth Circuit's decision were anything but neutral.

The Ninth Circuit revealed the sort of "overt hostility" to religion that this Court rebuked in *Masterpiece Cakeshop, Ltd. v. Colo. Civil Rights Comm'n*, 138 S. Ct. 1719 (2018). As Judge O'Scannlain noted in his dissent to the denial of rehearing, the court "commended Washington for concluding 'that health care providers should not be able to treat a child by such means as telling him that he is "the abomination we had heard about in Sunday school."'" *Tingley*, 57 F.4th at 1082-1083 (O'Scannlain, J., dissenting from denial of reh'g *en banc*). It did so despite a complete lack of evidence of any such name-calling by Petitioner. As Judge O'Scannlain noted,

"Far from showing that conversion therapy bans are constitutionally innocuous, this passage in the panel majority opinion unwittingly reveals why First Amendment scrutiny is necessary." *Id*.

As Justice Kennedy wrote for this Court, the state has a "duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." *Masterpiece Cakeshop,* 138 S. Ct. at 1731. The government "cannot act in a manner that passes judgment upon or presupposes the illegitimacy of religious beliefs and practices." Yet that is exactly what the Ninth Circuit has sanctioned here.

IV. THE USE OF OCCUPATIONAL LICENSURE TO PUNISH POLITICAL AND RELIGIOUS SPEECH VIOLATES THE FIRST AMENDMENT.

The use of licensing by government to suppress dissenting speech has a long and ugly history. The First Amendment was born in part out of a reaction to the dreaded Star Chamber in 16th-century England, and its requirement that all printers be licensed and dissemination of any opinions contrary to government-approved ones forbidden.[10] "The Star Chamber has long symbolized the arbitrary and uncontrollable abuse of power both in England and the United States." *Id*. at 299.

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[10] M. Meyerson, "The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link between the First Amendment and the Separation of Powers," 34 IND. L. REV. 295, 299-300 (2001).

The dissenting judges below pointed out a principle this Court has repeatedly upheld — that when government forbids businesses to speak, or compels them to speak, it violates the First Amendment. This Court has long recognized that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Yet a prior restraint on speech — disguised as a licensing requirement — is precisely what Washington's counseling censorship law is.

In *NIFLA*, this Court applied the First Amendment's ban on government suppression of speech based on its content. This Court struck down a California law requiring crisis pregnancy centers that "'aim to discourage and prevent women from seeking abortions'" to "notify women that California provides free or low-cost services, including abortions, and give them a phone number to call." *NIFLA* at 2368.

"By requiring petitioners to inform women how they can obtain state-subsidized abortions — at the same time petitioners try to dissuade women from choosing that option — the licensed notice plainly 'alters the content' of petitioners' speech," the Court noted. The Court held that "[c]ontent-based regulations [which] 'target speech based on its communicative content' ... 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'" *Id*. at 2371.

The affront to the First Amendment is heightened when government suppresses speech based not only on its content, but also on the viewpoint expressed in that content. In *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), this Court recognized that:

> [w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.... Viewpoint discrimination is thus an egregious form of content discrimination. The government **must** abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction. [*Id.* at 829 (emphasis added).]

As the Ninth Circuit plainly admits, the counseling censorship law is pure viewpoint discrimination. The law prohibits any "regime that seeks to change an individual's sexual orientation or gender identity." *Tingley*, 47 F.4th at 1071-1072. However, the law allows "[P]sychotherapies that ... provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development, including sexual orientation-neutral interventions...." *Id.* at 1072. Thus, the censorship law's entire premise, as admitted by the Ninth Circuit, is bald viewpoint discrimination. Counselors can use speech that encourages "identity exploration and development," but not speech that "seeks to change ... sexual orientation." A more brazen

command of viewpoint discrimination would be difficult to conceive.

If a "licensed mental health provider[]" such as Petitioner violates the counseling censorship law, it "would be considered unprofessional conduct subject to discipline" under Washington's licensing law. Washington has converted its licensing laws from a police powers shield to protect the public health and safety, into a censorship sword, with the right to practice a licensed profession conditioned on accepting government-approved shackles on speech.

"It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.... And the State's asserted power to license professional[s] carries with it (unless properly constrained) the power directly and substantially to affect the speech they utter." *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 801 (1988). Thus, "[r]egulations of expressive activity are valid only when the government's regulatory interest aims at the nonexpressive component of the activity."[11] In this case, there is no nonexpressive component.

The relatively recent nature of occupational licensing supports the conclusion that the Ninth Circuit is wrong in holding that government can suppress or compel speech by recategorizing it as

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[11] R. Kry, "The 'Watchman for Truth': Professional Licensing and the First Amendment," 23 SEATTLE U. L. REV. 885, 892 (2000).

"professional conduct." Until the late 1800s, there was relatively little occupational licensing at all.[12] When states did begin licensing, it was primarily directed toward skilled professions with significant risk to clients, such as doctors, dentists, attorneys, and pharmacists. *Id.* Licensing was a police powers "public health and safety" measure, not a backdoor means for the government to squash disfavored speech. *Id*. As this Court put it in an early case approving state licensing powers, the object was to shield clients against "the consequences of ignorance and incapacity as well as of deception and fraud." *Dent v. West Virginia*, 129 U.S. 114, 122 (1889).

> Simply put, the historical practices at the time of the ratification of the First and Fourteenth Amendments show that the rendering of personalized advice to specific clients was not one of the "well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought to raise any constitutional problem." Viewed in this light, the licensure of professional advice is inconsistent with the original understanding of the First Amendment.[13]

The Ninth Circuit's purported discovery of a "long (if heretofore unrecognized) tradition" of "regulation

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[12] M. Kleiner, "Reforming Occupational Licensing Policies" at 7, *Brookings* (Mar. 2015).

[13] Kry, "The Watchman for Truth," at 957 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-572 (1942).

governing the practice of those who provide health care within state borders" is a judicial fiction.

This Court has long held that government cannot restrict commercial speech to ensure that only approved speech enters the flow of commerce:

> [I]f [the free flow of commercial information] is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal. [*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976).]

This Court has recognized the First Amendment's "general rule, that the speaker has the right to tailor the speech." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). The benefit is "enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by professional publishers. **Its point** is simply the point of all speech protection, which **is to shield just those choices of content that in someone's eyes are misguided, or even hurtful**." *Id*. (emphasis added).

Yet in the arena of professional licensing, federal and state regulators are increasingly imposing "coercive elimination of dissent." Professor Timothy Zick has noted that "[s]tates are becoming increasingly active, even aggressive, in the area of professional speech regulation."[14] Washington's blanket ban on speech designed to help children accept their scientific biological reality is only the latest example.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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[14] T. Zick, "Professional Rights Speech," 47 ARIZ. ST. L.J. 1289, 1291 (2015).

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