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 State of Washington; UMAIR A. SHAH, in his official capacity as Secretary of Health for State of Washington; and SASHA DE LEON, in her official capacity as Assistant Secretary of the Health Systems Quality Assurance Division of the Washington State Department of Health,
Respondents,
EQUAL RIGHTS WASHINGTON,
Respondent-Intervenor.

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

BRIEF IN OPPOSITION OF RESPONDENT-INTERVENOR EQUAL RIGHTS WASHINGTON

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QUESTIONS PRESENTED

Washington defines 28 categories of "unprofessional conduct" for licensed health care professionals, one of which is "[p]erforming conversion therapy on a patient under age eighteen." Wash. Rev. Code § 18.130.180(26). "Conversion therapy" is defined as "a regime that seeks to change an individual's sexual orientation or gender identity." *Id.* § 18.130.020(4)(a). "'Conversion therapy' does not," however, "include 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." *Id.* § 18.130.020(4)(b).

The questions presented are:

1. Whether Petitioner has standing to challenge Washington's restriction on conversion therapy, when he does not allege that he will engage in conversion therapy.
2. Whether Petitioner's challenge to Washington's restriction on conversion therapy is ripe, when there are no specific facts in the record regarding Petitioner's therapeutic techniques.
3. Whether Washington's restriction on conversion therapy violates the Free Speech Clause.
4. Whether Washington's restriction on conversion therapy violates the Free Exercise Clause.

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INTRODUCTION

Under Washington law, "performing conversion therapy on a patient under eighteen" is a type of "unprofessional conduct" for licensed health care professionals. Wash. Rev. Code § 18.130.180(26). In the decision below, the Ninth Circuit rejected Petitioner's Free Speech and Free Exercise challenges to Washington's law. The Ninth Circuit's decision does not warrant Supreme Court review. This Court has repeatedly denied review in challenges to conversion therapy laws, *see Welch v. Brown*, 137 S. Ct. 2093 (2017) (No. 16-845); *Doe v. Christie*, 577 U.S. 1137 (2016) (No. 15-195); *King v. Christie*, 575 U.S. 996 (2015) (No. 14-672); *Pickup v. Brown*, 573 U.S. 945 (2014) (No. 13-949), and it should reach the same result here.

With respect to his Free Speech claim, Petitioner contends that the Ninth Circuit's decision conflicts with *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020), *rehearing denied*, 41 F.4th 1271 (11th Cir. 2022) (en banc). But there is no genuine split. Although the Eleventh Circuit invalidated two Florida ordinances restricting the practice of conversion therapy, those ordinances differed in numerous respects from Washington's law, and those differences drove the divergent outcomes.

Even if a split existed, this case would be a poor vehicle to resolve that split. In Respondent-Intervenor's view, Petitioner lacks standing and this case is unripe. Although the Ninth Circuit found the case to be justiciable, its reasoning rested on a misunderstanding of the complaint. The Court could not

reach the question presented unless it resolved those case-specific threshold obstacles. It would not be difficult for a plaintiff with genuinely justiciable claims to make allegations sufficient to establish standing and ripeness, and the Court should await a vehicle in which a plaintiff does so.

Petitioner's Free Exercise claim also does not warrant review. Petitioner does not meaningfully grapple with the Ninth Circuit's conclusion that Washington's law is neutral and generally applicable, thus requiring rational basis review under *Employment Division v. Smith*, 494 U.S. 872 (1990). The Court should reject Petitioner's invitation to overrule *Smith*. The Court has repeatedly and recently denied similar requests to reconsider *Smith*, and this case would be a poor vehicle for the Court to change course.

STATEMENT

Petitioner Brian Tingley seeks to enjoin enforcement of Wash. Rev. Code § 18.130.180(26), which provides that "[p]erforming conversion therapy on a patient under eighteen" is a type of "unprofessional conduct" for licensed counselors.

A. Washington's Regulation of Mental Health Counseling.

Under Washington law, a person may apply to become a licensed "mental health counselor" or licensed "marriage and family therapist." Wash. Rev. Code § 18.225.020. Counselors may not represent themselves as licensed unless they have a license. *Id.* Washington's licensing regime is categorically inapplicable, however,

to "[t]he practice of marriage and family therapy, mental health counseling, or social work under the auspices of a religious denomination, church, or religious organization." Wash. Rev. Code § 18.225.030(4).

In addition, Washington permits persons to apply to become a "certified counselor" without becoming a "licensed mental health practitioner." *See* Wash. Rev. Code § 18.19.200.[1] Washington authorizes certified counselors to "counsel and guide a client in adjusting to life situations, developing new skills, and making desired changes, in accordance with the theories and techniques of a specific counseling method and established practice standards." *See id.* § 18.19.200(2). Washington does not require certification for several categories of counseling, including "counseling by a person for no compensation," "counseling by persons offering services for public and private nonprofit organizations or charities not primarily engaged in counseling for a fee when approved

[1] For patients with Global Assessment of Functioning Scores of more than 60 (mild symptoms or less), Washington permits certified counselors to practice without restriction. *See* Wash. Rev. Code § 18.19.200(1); *see Global Assessment of Functioning*, Wikipedia https://en.wikipedia.org/wiki/Global_Assessment_of_Functioning (last edited May 21, 2023); IH Monrad Aas, *Guidelines for Rating Global Assessment of Functioning (GAF)*, ANN. GEN. PSYCHIATRY (Jan. 20, 2011), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3036670/). For patients with scores of 60 (moderate symptoms), Washington permits certified counselors to be a patient's sole treatment provider if the certified counselor declines in writing to receive treatment from a licensed physician, nurse, or mental health practitioner. Wash. Rev. Code § 18.19.200(3)(b). For patients with scores of 50 or less (serious symptoms), the certified counselor must be supervised by a licensed physician, nurse, or mental health practitioner. *Id.*

by the organizations or agencies for whom they render their services," "counseling by a person under the auspices of a religious denomination, church, or organization, or the practice of religion itself," and "counseling by peer counselors who use their own experience to encourage and support people with similar conditions." Wash. Rev. Code § 18.19.040.

For health care providers who hold themselves out as licensed, Washington defines 28 categories of "unprofessional conduct." Wash. Rev. Code § 18.130.180. Some of these categories are general in nature, *e.g.*, *id.* § 18.130.180(4) ("[i]ncompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed"), while others refer to specific treatments. *E.g.*, *id.* §§ 18.130.180(26), 18.130.420 (performing stem cell therapy without informed consent). Engaging in unprofessional conduct may lead to sanctions up to and including revocation of the license. *Id.* § 18.130.160.

B. Washington's Restrictions on "Conversion Therapy" by Licensed Counselors.

In 2018, Washington enacted Senate Bill 5722, which defines a new category of "unprofessional conduct": "Performing conversion therapy on a patient under age eighteen." *Id.* § 18.130.180(26). "Conversion therapy" is defined as "a regime that seeks to change an individual's sexual orientation or gender identity." Wash. Rev. Code § 18.130.020(4)(a). "The term includes efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." *Id.* "The term includes, but

is not limited to, practices commonly referred to as 'reparative therapy.'" *Id.* "'Conversion therapy' does not include 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." *Id.* § 18.130.020(4)(b).

In enacting S.B. 5722, the legislature stated that its purpose was to "regulate 'the professional conduct of licensed health care providers'" practicing in the state. Pet. App. 8a (quoting 2018 Wash. Sess. Laws, ch. 300, § 1(1)). It explained that "[Washington] ha[s] 'a compelling interest in protecting the physical and psychological well[-]being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by conversion therapy.'" *Id.* at 8a–9a (quoting 2018 Wash. Sess. Laws, ch. 300, § 1(2)). The legislature relied on evidence that "[e]very major medical and mental health organization has uniformly rejected aversive and non-aversive conversion therapy as unsafe and inefficacious." Pet. App. 38a (internal quotation marks omitted).

In connection with S.B. 5722's enactment, the Washington State Board of Health presented a health impact report to the legislature. 1-SER-70-83.[2] Pet.

[2] "ER" and "SER" refer to the Excerpts of Record and the Supplemental Excerpts of Record in the Ninth Circuit, respectively. The report is also available online. *See* Wash. State Bd. of Health, *Executive Summary: Health Impact Review of SB*

App. 9a. The report canvassed the available medical literature on conversion therapy and concluded that there is a "fair amount of evidence that conversion therapy is associated with negative health outcomes such as depression, self-stigma, cognitive and emotional dissonance, emotional distress, and negative self-image." Pet. App. 37a–38a (quoting 1-SER-73). It further stated that "the literature indicates that large proportions of surveyed individuals who have been a part of conversion therapy report adverse health effects associated with these efforts." Pet. App. 38a (quoting 1-SER-74). The report found "[v]ery strong evidence that LGBTQ adults and youth disproportionately experience many negative health outcomes, and therefore mitigating any emotional, mental, and physical harm among this population has potential to decrease health disparities." Pet. App. 99a.

The Washington State Board of Health's conclusions are consistent with the conclusions reached by the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services. In 2015, that agency reviewed the scientific literature and issued a report concluding that "none of the existing research supports the premise that mental or behavioral health interventions can alter gender identity or sexual orientation." 2-SER-362. It concluded: "Interventions aimed at a fixed outcome, such as gender conformity or heterosexual orientation, including those aimed at changing gender identity,

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5722 (Nov. 20, 2017), https://sboh.wa.gov/sites/default/files/2022-01/HIR-2017-18-SB5722.pdf.

gender expression, and sexual orientation are coercive, can be harmful, and should not be part of behavioral health treatment." *Id.*

Since Washington's law was enacted, additional research has corroborated those findings:

- A 2018 study found that more than 60 percent of young adults who had been subjected to conversion therapy as minors reported attempting suicide. 2-ER-187 (Table 3).
- A 2020 study found that youth who underwent conversion therapy were "more than twice as likely to report having attempted suicide" and more than three times as likely to report multiple suicide attempts in the past year compared to those who did not. 2-SER-440, 2-SER-442–443.
- In 2023, the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services issued a new report similarly documenting the harms of conversion therapy. *See* SAMHSA, *Moving Beyond Change Efforts: Evidence and Action to Support and Affirm LGBTQI+ Youth* (2023), https://store.samhsa.gov/sites/default/files/pep22-03-12-001.pdf. The report "documents that attempts to change an individual's sexual orientation and gender identity … are harmful and should not be provided." *Id.* at 7. According to the report, "[n]o research indicates" that sexual orientation or gender identity change efforts

> are effective in altering sexual orientation or gender identity, and "these efforts can cause significant harm, including suicide attempts and other negative behavioral health outcomes." *Id.* at 26.

C. Procedural History

Petitioner has worked as a licensed marriage and family therapist in Washington for over twenty years. Pet. 6. On May 12, 2021, Petitioner filed a complaint and a motion for preliminary injunction, alleging that, as relevant here, S.B. 5722 violates his First Amendment rights to free speech and free exercise of religion. Pet. App. 10a.

Respondent-Intervenor Equal Rights Washington is the largest civil rights organization in Washington advocating for the state's LGBTQ residents. It has more than 40,000 members, including LGBTQ children who are at risk of being subjected to conversion therapy as well as the parents of LGBTQ children. Equal Rights Washington was the lead organization supporting passage of S.B. 5722, and some of its members testified before both houses of the Washington Legislature in support of S.B. 5722. *See* D. Ct. Dkt. No. 17. On May 27, 2021, Equal Rights Washington filed a motion to intervene as a defendant. Pet. App. 102a. The district court granted the motion to intervene. *Id.*

Both Washington and Equal Rights Washington filed motions to dismiss Petitioner's complaint. Pet. App. 97a–98a. The district court dismissed Petitioner's complaint. First, the district court held that Petitioner had standing to bring claims in his individual capacity

but lacked standing to bring claims on behalf of his minor clients. Pet. App. 103a–106a. On the merits, the district court held that Washington's law was "nearly identical to a California statutory licensing requirement that the Ninth Circuit previously upheld in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014)." Pet. App. 107a. In *Pickup*, the Ninth Circuit upheld California's restriction on conversion therapy, finding that California's law regulated conduct rather than speech, and that rational basis review therefore applied. *Pickup v. Brown*, 740 F.3d 1208, 1231 (9th Cir. 2014). Petitioner argued that *Pickup* was no longer good law following the Supreme Court's decision in *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"). The district court rejected Petitioner's argument, explaining that "*NIFLA* considered professional *speech*, not conduct." Pet. App. 110a. Further, *NIFLA* reiterated the principle that "States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* (quoting *NIFLA*, 138 S. Ct. at 2372). Applying *Pickup*, the district court held that because Washington's law regulated conduct rather than speech, rational basis review applied. Pet. App. 113a. It concluded that Washington's law is constitutional because it is "rationally related to the State's asserted interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harm caused by conversion therapy." *Id.* (internal quotation marks

omitted).

The Ninth Circuit affirmed. The court upheld the district court's holding that Petitioner had standing to bring claims in his individual capacity but not on behalf of his minor clients. Pet. App. 12a–17a. The Ninth Circuit also held that Petitioner's claims are prudentially ripe. Pet. App. 19a–21a.

On the merits, the Ninth Circuit held that *NIFLA* did not require the Court to "abandon [its] analysis in *Pickup* insofar as it is related to conduct." Pet. App. 27a. The Court reasoned that *NIFLA* had abrogated "only the 'professional speech' doctrine," *i.e.*, "the part of *Pickup* in which [the Ninth Circuit] determined that speech within the confines of a professional relationship . . . categorically receives lesser scrutiny." *Id.* (quoting *NIFLA*, 138 S. Ct. at 2372). Concluding that *Pickup*'s professional conduct holding remains good law, the Ninth Circuit held that it controlled. In the Ninth Circuit's view, Washington's law satisfied rational basis review because it advanced the legitimate state interest of protecting minors from physical and psychological harm. *See* Pet. App. 36a–37a.

The Ninth Circuit also held that the Supreme Court "has recognized that laws regulating categories of speech belonging to a 'long . . . tradition' of restriction are subject to lesser scrutiny." Pet. App. 39a (quoting *NIFLA*, 138 S. Ct. at 2372 (internal citations omitted)). The court concluded that "Washington's law regulates a category of speech belonging to such a tradition, and it satisfies the lesser scrutiny imposed on such laws." *Id.* The court found that Washington's law fell within the

"tradition of regulation governing the practice of those who provide health care within state borders." Pet. App 41a. It found that Petitioner's argument would "endanger other regulations on the practice of medicine where speech is part of the treatment" as well as "centuries-old medical malpractice laws that restrict treatment and the speech of health care providers." Pet. App. 44a–45a.

As to Petitioner's Free Exercise Clause claim, the Ninth Circuit explained that a court applies strict scrutiny "only when a law fails to be neutral and generally applicable, even if the law incidentally burdens religious practice." Pet. App. 51a. The court found that Washington's law was neutral and generally applicable. As to neutrality, "Washington's law prohibits therapists from practicing conversion therapy on minors. It makes no reference to religion, except to clarify that the law does not apply to practice by religious counselors." Pet. App. 53a. The court rejected Petitioner's argument that S.B. 5722 reflected hostility to religion and would, as a practical matter, apply only to religious therapists. Pet. App. 53a–58a. The court further found that the law was generally applicable, as it included no exemptions and did not favor secular activity over religious exercise. Pet. App. 58a–61a.

Petitioner sought rehearing en banc. The Ninth Circuit denied the petition, with four judges dissenting. Pet. App. 71a.

REASONS FOR DENYING THE WRIT

This Court should deny certiorari as to both questions presented. The Court has repeatedly denied

petitions for certiorari challenging conversion therapy laws. *See Welch v. Brown*, 137 S. Ct. 2093 (2017) (No. 16-845); *Doe v. Christie*, 577 U.S. 1137 (2016) (No. 15-195); *King v. Christie*, 575 U.S. 996 (2015) (No. 14-672); *Pickup v. Brown*, 573 U.S. 945 (2014) (No. 13-949). No intervening development warrants resolving this petition differently.

I. The Court Should Deny Certiorari as to Petitioner's Free Speech Claim.

Petitioner's Free Speech claim does not warrant review. Contrary to Petitioner's contention, the Ninth Circuit's decision does not conflict with *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020), or any other decision. Even if there was a conflict, this case would be a poor vehicle to consider the constitutionality of conversion therapy laws because Petitioner lacks standing and this case is unripe. Finally, the Ninth Circuit's decision is correct.

A. The Ninth Circuit's decision does not conflict with *Otto*.

Petitioner claims that the Ninth Circuit's decision conflicts with the Eleventh Circuit's decision in *Otto*. Pet. 17. In *Otto*, the Eleventh Circuit invalidated ordinances enacted by the City of Boca Raton and Palm Beach County that restricted "sexual orientation change efforts." 981 F.3d at 859. Equal Rights Washington respectfully disagrees with the Eleventh Circuit's decision in *Otto* and believes that the ordinances at issue were constitutional. Nevertheless, even assuming the Eleventh Circuit's decision is correct, there are multiple differences between the ordinances at issue in *Otto* and

Washington's law. In light of those differences, it is far from clear how the Eleventh Circuit would have resolved a constitutional challenge to Washington's law.

First, the Florida ordinances were freestanding provisions by the city and county banning conversion therapy, untethered from any broader licensing scheme. By contrast, Washington's restriction on conversion therapy is nested within Washington's Uniform Disciplinary Act as one of 28 different types of "unprofessional conduct." Wash. Rev. Code § 18.130.180.

This difference matters because the Eleventh Circuit concluded that the ordinances at issue are "not connected to any regulation of separately identifiable conduct." 981 F.3d at 865. It emphasized, too, that its decision "does not stand in the way of '[l]ongstanding torts for professional malpractice' or other state-law penalties for bad acts that produce actual harm." *Id.* at 870 (citation omitted). By contrast, the Ninth Circuit rooted its decision in the fact that Washington's restriction on conversion therapy was tethered to other professional conduct restrictions, such that a decision invalidating the former could threaten the latter. The court explained:

> Aside from prohibiting practicing conversion therapy on minors, Washington's Uniform Disciplinary Act contains other limitations on speech uttered by licensed health care professionals. Wash. Rev. Code § 18.130.180(16), for instance, prohibits the "[p]romotion for personal gain of any unnecessary or inefficacious drug, device, treatment, procedure, or service."

> Similarly, § 18.130.180(4) precludes "[i]ncompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed." Section 18.130.180(19) subjects to discipline the offering "to cure or treat diseases by a secret method." And § 18.130.180(3) prohibits all advertising by health care professionals that is "false, fraudulent, or misleading."
>
> Because the Uniform Disciplinary Act applies to licensed marriage and family therapists like Tingley, and because Tingley claims his treatments "consist entirely of speech," all these limitations impose restrictions on his speech based on the content of his words. If Washington's prohibition on licensed health care providers practicing conversion therapy on minors (§ 18.130.180(27)) is an unconstitutional content-based restriction on the speech of licensed health care professionals, then this would preclude other reasonable "health and welfare laws," *Dobbs*, 142 S. Ct. at 2284, that apply to health care professionals and impact their speech.

Pet. App. 44a–45a. This reasoning would not apply to Florida's ordinances, which are not part of any broader regulatory scheme analogous to the Uniform Disciplinary Act.

Indeed, in a post-*Otto* decision, the Eleventh Circuit *rejected* a First Amendment challenge to the regulation of professional services delivered through speech when

that regulation *was* part of the state's comprehensive licensing scheme. Florida regulates "nutrition counseling," which entails "advising and assisting individuals or groups on appropriate nutrition intake by integrating information from the nutrition assessment." *Del Castillo v. Sec'y, Fla. Dep't of Health*, 26 F.4th 1214, 1225 (11th Cir. 2022) (quoting Fla. Stat. §§ 468.504, 468.503(10)). The Eleventh Circuit "upheld Florida's licensing scheme" because it "regulated professional conduct and only incidentally burdened … speech." *Id.* at 1218, 1225. "Assessing a client's nutrition needs, conducting nutrition research, developing a nutrition care system, and integrating information from a nutrition assessment are not speech. They are 'occupational conduct'; they're what a dietician or nutritionist does as part of her professional services." *Id.* at 1225–26. "The profession also involves some speech—a dietician or nutritionist must get information from her clients and convey her advice and recommendations. But, to the extent the Act burdens speech, the burden is an incidental part of regulating the profession's conduct." *Id.* at 1226. The same reasoning applies to Washington's comprehensive regulation of health care professionals.

Second, the sanctions imposed by the provisions differ. A counselor who violated Florida's ordinances faced criminal fines prosecuted in misdemeanor court. 981 F.3d at 859 & n.2; *see* Palm Beach County, Fla., Ord. No. 2017-046, Sec. 7 (adopted Dec. 19, 2017) (referencing Fla. Stat. § 125.69). Florida's ordinances did not, however, impose any sanctions related to professional licensing. By contrast, in Washington, counselors who

engage in conversion therapy are subject to the exact same process and potential sanctions as counselors who violate any other requirements of a professional license, up to and including loss of the license. *See* Wash. Rev. Code §§ 18.130.160, 18.130.180.

This distinction materially affects the First Amendment analysis. The Ninth Circuit upheld Washington's law on the understanding that it "regulate[s] the safety of medical treatments performed under the authority of a state license." Pet. App. 5a. In other words, in the Ninth Circuit's view, Washington's law was not a ban on speech but instead a regulation on the exercise of state-conferred professional privileges. This characterization of Washington's law made sense, given that violating Washington's law could lead to Washington retracting those professional privileges. By contrast, because the Florida ordinances were not an aspect of the state's licensing regime, the state could not, and did not, uphold the restrictions on that basis.

Third, Florida's ordinances were flat-out bans on conversion therapy. While the ordinances applied only to licensed counselors, 981 F.3d at 859, it does not appear that Florida, in contrast to Washington, provides any avenue for an unlicensed person (other than clergy) to provide mental health counseling. *Id.* at 863 (characterizing ordinances as "speech bans").

By contrast, Washington's law cannot be characterized as a "speech ban[]" for non-clergy. Pet. 27 (internal citation omitted). Washington's licensing regime does not apply to "[t]he practice of marriage and family therapy, mental health counseling, or social work

under the auspices of a religious denomination, church, or religious organization." Wash. Rev. Code § 18.225.030(4). Notably, this exception does not require the practitioner to be a member of the clergy.

In addition, Washington's certification regime for counselors does not apply to "counseling by a person for no compensation," "counseling by persons offering services for public and private nonprofit organizations or charities not primarily engaged in counseling for a fee when approved by the organizations or agencies for whom they render their services," "counseling by a person under the auspices of a religious denomination, church, or organization, or the practice of religion itself," and "counseling by peer counselors who use their own experience to encourage and support people with similar conditions." Wash. Rev. Code § 18.19.040. Thus, so long as he did not hold himself out as licensed, a counselor who provided such services for no compensation would not be subject to Washington's regulation of unprofessional conduct.

This point was important to the Ninth Circuit. It emphasized that "[w]hat licensed mental health providers do during their appointments with patients *for compensation* under the authority of a state license is treatment" and that Petitioner's argument "minimizes the rigorous training, certification, and post-secondary education that licensed mental health providers endure to be able to treat other humans for *compensation*." Pet. App. 47a (emphases added). This point bolstered the Ninth Circuit's reasoning that Washington's law should be understood as the regulation of a *transaction*—the

provision of therapy in exchange for compensation, as opposed to a conversation.

To be sure, Washington's law bars mental health counselors from holding themselves out as licensed while engaging in conversion therapy. Wash. Rev. Code § 18.225.020. In addition, insurance companies would not be legally required to cover the services of an unlicensed provider. Wash. Rev. Code § 18.19.010. But a law that merely provides that Washington will not *endorse* conversion therapy via a license, and will not legally *mandate* reimbursement by insurance companies, differs materially from the laws at issue in *Otto*.

For each of these reasons, Washington's law is significantly different from the ordinances invalidated in *Otto*. Hence, the Ninth Circuit's decision upholding Washington's law does not conflict with *Otto*.

B. The Ninth Circuit's decision does not conflict with any other decision.

The decision below does not conflict with any other decision. Petitioner errs in asserting a conflict (Pet. 16–17) with *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014). Although the *King* court applied intermediate rather than rational basis scrutiny, it reached the same bottom-line result: New Jersey's restriction on conversion therapy was constitutional. The Third Circuit emphasized that "[t]he legislative record demonstrates that over the last few decades a number of well-known, reputable professional and scientific organizations have publicly condemned the practice of [Sexual Orientation Change Efforts], expressing serious concerns about its potential to inflict

harm." 767 F.3d at 238. Hence, New Jersey's law "'directly advances' New Jersey's stated interest in protecting minor citizens from harmful professional practices." *Id.* at 239. In this case, as in *King*, "Washington legislators relied on the fact that '[e]very major medical and mental health organization' has uniformly rejected aversive and non-aversive conversion therapy as unsafe and inefficacious." Pet. App. 38a. Thus, there is no conflict: Washington's law is constitutional under the Third Circuit's analysis.

Contrary to Petitioner's claim, the Ninth Circuit's decision does not implicate any "deeper splits over how courts differentiate speech from conduct." Pet. 18–21. The Ninth Circuit adhered to circuit precedent holding that restrictions on conversion therapy are conduct restrictions because they regulate "only treatment." Pet. App. 26a (quotation marks omitted). They "still allow[] therapists to discuss conversion therapy with patients, recommend that patients obtain it (from unlicensed counselors, from religious leaders, or from out-of-state providers, or after they turn 18), and express their opinions about conversion therapy or homosexuality more generally." *Id.* None of Petitioner's cited cases address laws that regulate *treatments* while giving health care providers free rein to speak *about* the treatments. Instead, they address laws that have nothing to do with the regulation of health care treatment delivered through speech. *See Cap. Associated Indus., Inc. v. Stein*, 922 F.3d 198, 208 (4th Cir. 2019) (restriction on practice of law by corporations); *Billups v. City of Charleston*, 961 F.3d 673, 683 (4th Cir. 2020) (tour guide restrictions); *PETA*

v. N.C. Farm Bureau Fed'n, Inc., 60 F.4th 815, 828 (4th Cir. 2023) (restriction on criticizing employer), *petition for cert. filed*, 91 U.S.L.W. 3311 (U.S. May 26, 2023) (No. 22-1148).

Moreover, the Ninth Circuit offered a detailed alternative holding that, regardless of where exactly to draw the line between speech and conduct, Washington's law is constitutional because it falls within a longstanding tradition that states could deem treatments to be unprofessional, even if they were delivered through speech. For example, states could impose tort liability on offering incompetent medical advice, even if that medical advice was pure speech and would be protected by the First Amendment were not it delivered as part of a doctor-patient relationship. Pet. App. 39a–51a. That holding does not implicate any "deeper split" on differentiating speech from conduct.

C. This case would be a poor vehicle to consider the constitutionality of conversion therapy restrictions.

Even if the constitutionality of conversion therapy restrictions warranted review in the appropriate case, this case would not be it.

First, Petitioner lacks standing. To establish standing, Petitioner must allege that his "intended speech is arguably proscribed by" Washington's law. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 162 (2014) (internal quotation marks omitted). Petitioner's allegations do not meet that burden. He has steadfastly refused to allege that he will engage in conversion therapy, and therefore lacks standing to challenge a law

restricting conversion therapy.

Although the Ninth Circuit concluded that Petitioner has standing, its decision was based on a misreading of Petitioner's complaint. The Ninth Circuit quoted portions of Petitioner's complaint alleging that parents sought his assistance in "reducing same-sex attractions" for their child or enabling a child to "return to comfort with her female body" and reproductive potential. Pet. App. 13a–14a; *see* Pet. App. 157a–159a, 174a–176a ¶¶ 109–119, 159–164. But these allegations refer to the *parents*' goals for their children. The complaint is carefully crafted to *avoid* stating that Petitioner is engaged in conversion therapy within the meaning of Washington's law. Instead, the complaint states that Petitioner listens to his clients and helps them work towards their own goals. *E.g.*, *id.* 175a–176a, ¶ 163 ("Plaintiff never promises clients that he will be able to solve the problems they bring to him, and he has not done so for this individual. However, he provides sympathetic counseling that is respectful of the client's faith and his personal goals and desires. Through ordinary techniques of counseling including caring listening and questions to help the client understand himself and his personal history, Plaintiff supports this client as he works toward the change he desires to see in his own life."); *id.* 158a–159a, ¶¶ 114–116 (similar). Notably, Washington's definition of conversion therapy does not encompass "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)(b).

Like the complaint, the petition for certiorari is careful to avoid representing that Petitioner intends to violate Washington's law. In the first paragraph of the petition, Petitioner represents he wishes to discuss with his patients "the emerging international medical consensus to treat gender dysphoria with watchful waiting instead of affirmation." Pet. 2. Nothing in Washington's statute bars a counselor from engaging in "watchful waiting."[3] Likewise, nothing in Washington's statute prohibits a counselor from expressing the opinion that "the sex each person receives at conception is not an accident or error but rather a gift from God," or that "sexual relationships" outside of marriage "between one man and one woman" is "inconsistent with God's design." Pet. 7. Elsewhere, Petitioner offers vague generalities that give no indication of what therapy Petitioner plans to offer, such as that he seeks to have an "uninhibited discussion of ideas and therapies," Pet. 8–9, and "provide advice consistent with his clients' desires and viewpoints," Pet. 18. While Petitioner believes that "change is possible with God's help," Pet. 7, he does not state he ever has or ever will engage in conversion therapy within the statutory definition.

At a minimum, lingering questions over standing make this case a poor vehicle. It would be easy for a plaintiff to establish standing. All the plaintiff has to say

[3] Equal Rights Washington strongly disagrees that there is any "emerging international medical consensus" against "affirmation." Pet. 2.

is: "I intend to engage in therapy to change a patient's sexual orientation or gender identity." The Court should await a vehicle where standing is clear rather than granting certiorari in a case where the complaint and petition appear deliberately written to be ambiguous on this issue.

In addition, this case is prudentially unripe. Contrary to the Ninth Circuit's view, the issues raised "require further factual development." Pet. App. 19a. And even if this case is justiciable, the lack of a factual record makes it a poor vehicle for Supreme Court review.

As noted above, because Petitioner's descriptions of his anticipated therapy sessions are so vague, it is impossible to know whether Petitioner is trying to alter his patients' sexual orientation or gender identity. Without more facts on what Petitioner's conduct actually is, the Court will be hard-pressed to know whether Petitioner's acts are properly characterized as "conduct," whether proscribing Petitioner's conduct falls within a state's traditional regulatory power, or whether proscribing Petitioner's conduct satisfies a higher standard of scrutiny.

Twenty-one states and the District of Columbia prohibit conversion therapy for minors.[4] Pet. App. 5a. If

[4] The Ninth Circuit stated that 20 states and the District of Columbia have such laws. Pet. App. 5a. In April 2023, after the Ninth Circuit ruled, Minnesota enacted a similar statute. *See* Movement Advancement Project, *LGBTQ Youth: Conversion "Therapy" Laws*, *Movement Advancement Project*, https://www.lgbt

any of those jurisdictions enforces its laws against a licensed therapist, a record could be created on precisely what conduct violated the law, and the therapist could assert a First Amendment defense. In such a case, the Court could assess that record to determine whether the therapist engaged in protected speech. The Court should await such a case rather than determining whether particular speech is protected by the First Amendment without knowing what that speech is.

D. The Ninth Circuit's decision is correct.

The Ninth Circuit correctly rejected Petitioner's Free Speech Clause challenge to S.B. 5722.

The Ninth Circuit accurately held that S.B. 5722 should be treated as a restriction on conduct. S.B. 5722 allows the provider to express his views, publicly or privately, on any issue. Therapists are free to "discuss conversion therapy with patients, recommend that patients obtain it (from unlicensed counselors, from religious leaders, or from out-of-state providers, or after they turn 18), and express their opinions about conversion therapy or homosexuality more generally." Pet. App. 26a. S.B. 5722 merely regulates the provider's activities within the scope of his professional license.

Petitioner emphasizes that he is uttering words when he engages in mental health counseling. True enough, but that argument proves too much: "Most medical treatments require speech, we explained, but a

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map.org/img/maps/citations-conversion-therapy.pdf (no updates since June 28, 2023) (cataloguing conversion therapy laws).

state may still ban a particular treatment it finds harmful; otherwise, any prohibition of a medical treatment would implicate the First Amendment and unduly limit the states' power to regulate licensed professions." Pet. App. 26a (internal quotation marks omitted). Indeed, Petitioner's argument would suggest that Washington's entire licensing regime for mental health counseling violates the First Amendment. States may not ordinarily grant licenses to engage in pure speech—no court would uphold a regime under which authors had to apply for licenses to write books. Washington's licensing regime is constitutional because it is properly understood as a regulation of *conduct*—treatment—even if the method for delivering that treatment is speech.

Petitioner insists he merely wants to express his ideas without state "censorship," but that is not the relief he seeks. Instead, he seeks Washington's *endorsement* of his therapeutic methods. Petitioner holds a license and seeks to represent to his clients (and their parents) that the therapy he is performing falls within the scope of that license. In effect, he wants to tell his patients that the State of Washington deems him an expert and that his treatment methodologies are an exercise of that expertise. The Constitution does not require Washington to endorse treatment methodology that Washington believes to be ineffective and unsafe. Inherent in any licensing regime, in which the state certifies a provider's knowledge of effective treatment techniques, is that a state may decide that some treatment techniques are ineffective. That is all the state has done here. Petitioner is entitled to his opinion

on what treatment methods are effective, but the First Amendment does not require Washington to agree with him.

The Ninth Circuit did not "thumb[] its nose at *NIFLA*," as Petitioner claims. Pet. 23. In *NIFLA*, this Court recognized that the First Amendment "does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech, and professionals are no exception to this rule." 138 S. Ct. at 2373 (internal quotation marks omitted). "Longstanding torts for professional malpractice, for example, fall within the traditional purview of state regulation of professional conduct." *Id.* (internal quotation marks omitted). Washington's law, which essentially treats conversion therapy as a form of professional malpractice, is constitutional under that principle.

Although the *NIFLA* Court did invalidate a California law that regulated professionals' speech, that law bears a scant resemblance to Washington's law. The *NIFLA* Court invalidated a law that restricted providers' speech *outside the scope of the treatment offered pursuant to their license.* The law at issue in *NIFLA* required licensed clinics to post a notice in their waiting rooms stating that California provides free or low-cost abortions. 138 S. Ct. at 2368. Crucially, clinics were forced to utter this message to patients before any licensed practitioner gave any treatment to anyone. This Court invalidated the law because "it is not tied to a procedure at all," but instead "applies to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever

sought, offered, or performed." *Id.* at 2373. That is nothing like Washington's law, which regulates only the provision of treatment itself.

Moreover, the Ninth Circuit correctly held that Washington's law falls within a longstanding tradition of health care regulation. Pet. App. 41a–48a. "The health professions differ from other licensed professions because they treat other humans, and their treatment can result in physical and psychological harm to their patients. This is why there is a historical tradition of states restricting the medical practices health care providers can use." Pet. App. 47a.

Petitioner insists that the "history of regulating medical *practices*" does not equate with a "history of regulating [] *speech*." Pet. 25. But he does not grapple with the Ninth Circuit's core point—for professions such as psychotherapy and counseling, treatment is delivered *through* speech, so if Petitioner's argument is correct, these professions cannot be regulated at all. Petitioner does not acknowledge, much less defend, that extraordinary conclusion. Petitioner's comparison of Washington's law to proposed laws that would restrict speech on social media (Pet. 28) again overlooks the key point—Washington's law regulates the provision of therapy and nothing else.

Even assuming Washington's law regulates speech, it is constitutional. The Third Circuit concluded that New Jersey's conversion therapy law regulated speech, but nonetheless upheld it. The court held that intermediate scrutiny, rather than strict scrutiny, applied because New Jersey's law fell within the state's

"longstanding authority to protect its citizens from ineffective or harmful professional practices." 767 F.3d at 237. Notably, Washington's law only applies to the provision of professional services, *supra*, at 5, underscoring that it too falls within Washington's authority to regulate professional practices. The Third Circuit held that New Jersey's law was constitutional because it "'directly advances' New Jersey's stated interest in protecting minor citizens from harmful professional practices." *Id.* at 239. Given the overwhelming evidence of conversion therapy's harms, *supra* at 5–8, identical reasoning justifies upholding Washington's statute.

II. The Court Should Deny Certiorari as to Petitioner's Free Exercise Claim.

Petitioner's Free Exercise Clause challenge does not warrant review. The Ninth Circuit faithfully applied *Employment Division v. Smith*, 494 U.S. 872 (1972), and Petitioner offers no persuasive reason to reconsider *Smith*.

The Ninth Circuit correctly held that Washington's law is both neutral and generally applicable, warranting rational basis review under *Smith*. As the Ninth Circuit explained, Washington's law is neutral because it prohibits all therapists from practicing conversion therapy on minors, while making no reference to religion. Pet. App. 53a. Further, Washington's law is generally applicable because it includes no exemptions and does not treat secular activity differently from religious activity. Pet. App. 58a–61a. That holding does not implicate any circuit conflict and does not warrant

review.

Petitioner does not appear to contest the Ninth Circuit's conclusion that Washington's law, by its terms, is neutral and generally inapplicable. Instead, he contends that Washington's law violates the Free Exercise Clause because children seek conversion therapy for "primarily" religious reasons. Pet. 30. But Petitioner does not cite any evidence from the statute, or even the legislative record, to support this proposition. Instead, Petitioner cites two alleged statements by professional organizations as well as a single statement allegedly appearing in the Journal of Sex Research in 2016. *Id.*; Pet. App. 142a, 143a, 144a.

Petitioner identifies no authority suggesting that statements by third parties speculating on the motives of private citizens is relevant to whether a statute is "neutral" and "generally applicable" under *Smith*. Moreover, as the Ninth Circuit explained, "the legislative history and evidence before the Washington legislature show that the legislators understood that people seek conversion therapy for religious and secular reasons, such as social stigma, family rejection, and societal intolerance for sexual minorities, and that the harm from conversion therapy is present regardless of why people seek it." Pet. App. 57a (internal quotation marks omitted).

Petitioner also asks this Court to overrule *Smith*. Pet. 35-37. But the Court declined to overrule *Smith* in *Fulton v. City of Philadelphia*, 141 S. Ct. 1868 (2021), and since then, it has denied multiple requests to reconsider *Smith*. For example, in *303 Creative LLC v.*

Elenis, the petition for certiorari asserted both Free Speech and Free Exercise challenges and asked this Court to overrule *Smith*. However, in its order granting certiorari, the Court rewrote the question presented to make clear it was only considering the petitioner's Free Speech challenge, and not its Free Exercise challenge or its request to overrule *Smith*. *See 303 Creative LLC v. Elenis*, 142 S. Ct. 1106 (2022) (mem.). The Court has also denied other recent petitions for certiorari seeking to overrule *Smith*. *See Dr. A v. Hochul*, 142 S. Ct. 2569 (2022) (No. 21-1143); *Calvary Chapel of Bango v. Mills*, 142 S. Ct. 71 (2021) (No. 20-1346); *Ricks v. Idaho Contractors Board*, 141 S. Ct. 2850 (2021) (No. 19-66). There is no reason for a different result here.

Moreover, this would be a poor vehicle to reconsider *Smith*. As noted above, Petitioner lacks standing and this case is unripe. The Court could not resolve Petitioner's Free Exercise claim without resolving those threshold disputes.

In addition, this case is a poor vehicle because it arises in the idiosyncratic context of health care licensing. Petitioner contends that Washington is constitutionally obligated to treat his counseling methodology as a permissible exercise of his state-conferred license to practice mental health counseling. Effectively, he seeks state *endorsement* of his treatment methodology. *See* Pet. App. 47a ("When a health care provider acts or speaks about treatment with the authority of a state license, that license is an imprimatur of a certain level of competence") (internal quotation marks omitted). Whether the Free Exercise Clause

affirmatively requires the State to *license* particular conduct—as opposed to not *restricting* it—is a question going well beyond the facts of *Smith*, which addressed a ban on peyote use that incidentally burdened religious exercise. If the Court elects to reconsider *Smith*, it should do so in a more typical case that does not arise in the context of professional licensing.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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