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,

and

EQUAL RIGHTS WASHINGTON,

RESPONDENT-INTERVENOR.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

STATE RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether a State may condition a state healthcare license on a requirement not to use treatments on children that the Legislature has reasonably determined fall below the acceptable level of care.

2. Whether a state law conditioning a state healthcare license on not subjecting minor clients to harmful forms of treatment violates the Free Exercise Clause where the law explicitly exempts religious counseling from its scope.

3. Whether this Court should overrule *Employment Division, Department of Human Resources of Oregon v. Smith*, 494 U.S. 872 (1990), where Petitioner has failed to address the relevant considerations for overturning precedent.

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INTRODUCTION

This Court has held that the First Amendment protects a person's right to say deeply harmful things in public, such as holding signs saying "God hates Gays" or "Gays should kill themselves." But if a teenager told their state-licensed therapist: "I think I am gay," and the therapist responded: "Well then God hates you," or "Well then you should kill yourself," the therapist could lose their license and be sued for malpractice. No reasonable person would disagree. Yet Petitioner asks this Court to hold that these statements should be analyzed identically. Nonsense. For decades, this Court has held that States can regulate conduct by licensed professionals, even if the regulations incidentally impact speech. That is all the lower court held here. There is no basis for this Court to grant review and disturb this well-settled rule.

In 2018, Washington passed Senate Bill 5722, prohibiting licensed health professionals from practicing "conversion therapy" on their minor clients. 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). In practice, it can include everything from inducing nausea in patients to discourage same-sex attraction to "talk therapy." Under the law, licensed therapists can discuss conversion therapy with minor clients, recommend it be performed by others (e.g., religious counselors), promote it in public or private, and even perform it themselves when not operating as a state-licensed therapist. All they cannot do is perform

conversion therapy in their capacity as licensed therapists. Pet. App. 97a. Petitioner Brian Tingley challenged the law, but the district court dismissed his case, and the Court of Appeals affirmed.

Petitioner claims that the lower court's decision conflicts with this Court's precedent, expands conflict in the lower courts, presents a perfect vehicle to address this issue, and involves a topic of pressing importance. None of these claims is accurate.

The Court of Appeals decision in this case carefully applied and is entirely consistent with this Court's precedent. This Court has long held that "States may regulate professional conduct, even though that conduct incidentally involves speech." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra* (*NIFLA*), 138 S. Ct. 2361, 2372 (2018) (citing cases). The lower court properly applied this rule here, recognizing that Washington's law prohibiting conversion therapy for minors by licensed health professionals regulates professional conduct, with only an incidental impact on speech.

Petitioner's claim of widespread disagreement about this issue in the lower courts is inaccurate. Before *NIFLA*, lower courts disagreed about whether to apply a broad "professional speech" exemption to the First Amendment. *NIFLA* clarified that this Court had recognized no such generic exemption while reiterating that "States may regulate professional conduct, even though that conduct incidentally involves speech." *NIFLA*, 138 S. Ct. at 2372. Petitioner cites only one post-*NIFLA* case that he

claims conflicts with the opinion here, *Otto v. City of Boca Raton, Florida*, 981 F.3d 854 (11th Cir. 2020), but that case addressed local criminal ordinances untethered from professional licensing, and it did so on a preliminary injunction appeal devoid of facts. Both before and after *Otto*, the Eleventh Circuit has held that States can regulate the conduct of professions—as Washington's law does—even if those professions consist largely of speech. *See Del Castillo v. Sec'y, Fla. Dep't of Health*, 26 F.4th 1214, 1216 (11th Cir.), *cert. denied sub nom. Del Castillo v. Ladapo*, 143 S. Ct. 486 (2022) (dieticians); *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011), *cert. denied*, 565 U.S. 1111 (2012) (interior designers). Given *Otto*'s unique facts and how few courts have addressed laws like this one, it would be a mistake for this Court to grant review now.

It would be especially imprudent for the Court to grant review here because Petitioner lacks standing and the lower court offered an independent rationale for its holding. The court explained that *NIFLA* left open the prospect of recognizing narrower categories of professional speech that have historically received less protection, and the court identified just such a category based on our nation's "tradition of regulation governing the practice of those who provide health care within state borders." Pet. App. 41a. Thus, even if this Court granted review, found standing, and reversed as to whether SB 5722 is permissible as a regulation of conduct, this alternative rationale would remain, leaving the outcome unchanged and rendering this case a terrible vehicle.

Finally, this issue is not pressing enough to warrant this Court's attention. Petitioner is the only

licensed therapist in Washington who has alleged any harm from the law. To the extent any licensed therapist wishes to perform conversion therapy on minors, they can do so in other capacities, such as by offering religious counseling through a church. And to the extent any minor wishes to undergo conversion therapy, they can also do so in a range of other settings. In short, the petition addresses no real problem. The Court should deny certiorari.

COUNTERSTATEMENT OF THE CASE

A. Conversion Therapy Is Widely Discredited

Conversion therapy, also called sexual orientation and gender identity change efforts, encompasses a range of interventions directed at changing a person's sexual orientation or gender identity. These interventions include physical methods, like aversive conditioning through use of electric shocks, nausea-inducing drugs, or elastic bands around wrists while showing patients erotic images. Interventions also include non-aversive therapies, which may incorporate psychoanalysis or counseling. *See* Am. Psych. Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* 22, 31 (2009) (*APA Taskforce Report*) (available at 2SER 213-350); S.B. Report on S.B. 5722, at 2, 65th Leg., Reg. Sess. (Wash. Feb. 28, 2018) (available at 2SER 61-63). Conversion therapy originated as a treatment for what health professionals once considered a mental disorder or illness—a position these professions have long since

abandoned. *See* Pet. App. 6a; *Pickup v. Brown*, 740 F.3d 1208, 1222 (9th Cir.), *cert. denied*, 573 U.S. 945 (2014).

The evidence-based medical consensus is that conversion therapy is not a safe or effective treatment for any condition and that the practice of conversion therapy on minors falls below the prevailing standard of care. U.S. Dep't of Health & Hum. Servs., Substance Abuse & Mental Health Servs. Admin. (SAMHSA), *Moving Beyond Change Efforts: Evidence and Action to Support and Affirm LGBTQI+ Youth* 26-28 (2023).[1] Conversion therapy puts minors at risk of serious, long-lasting harms, including increased risks of suicide and depression. *Id.* at 26-30. For example, a 2020 study found that exposure to conversion therapy doubled the odds of lifetime suicidal ideation, increased the odds of planning to attempt suicide by 75 percent, increased the odds of a suicide attempt with no or minor injury by 88 percent, and increased the odds of a suicide attempt resulting in moderate or severe injury by 67 percent. *See* John R. Blosnich et al., *Sexual Orientation Change Efforts, Adverse Childhood Experiences, and Suicide Ideation and Attempt Among Sexual Minority Adults, United States, 2016–2018*, 110 Am. J. Pub. Health 1024, 1027 (2020) (available at 2SER 431-37). Another study found that conversion interventions performed on LGBTQ minors were associated with depression, suicidal thoughts, suicide attempts, less educational achievement, and lower weekly income; and that lesbian, gay, and bisexual minors who had been

[1] https://store.samhsa.gov/sites/default/files/pep22-03-12-001.pdf.

subjected to conversion efforts had attempted suicide at a rate nearly three times higher than other lesbian, gay, and bisexual minors. Caitlin Ryan et al., *Parent-Initiated Sexual Orientation Change Efforts with LGBT Adolescents: Implications for Young Adult Mental Health and Adjustment*, 67 J. of Homosexuality 159, 168 (2020) (available at 2ER 177-92).

For transgender and gender-nonconforming youth, conversion therapy poses even greater risk of harm; one study found that more than 60 percent of transgender minors subjected to gender identity change efforts before age 10 attempted suicide. Jack L. Turban et al., *Association Between Recalled Exposure to Gender Identity Conversion Efforts and Psychological Distress and Suicide Attempts Among Transgender Adults*, 77 JAMA Psychiatry 68, 74 (2019) (available at 2ER 194-202). Conversion therapy can create and compound psychological pain and trauma. Blosnich, 110 Am. J. Pub. Health at 1028. It may also prevent or delay access to efficacious mental health care a child may need. SAMHSA, *Moving Beyond Change Efforts* 30.

Conversion therapy is also ineffective. Methodologically sound scientific and medical studies offer no support for conversion therapy's reliability or effectiveness in reducing same-sex attraction, increasing heterosexual attraction, or changing gender identity, even in patients who desire those outcomes. *See* SAMHSA, *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth* 12 (2015) (2SER 354-429); *APA Taskforce Report* 26-34. There is no peer-reviewed literature supporting the

efficacy of conversion therapy with any population, including children. *See* SAMHSA, *Ending Conversion Therapy* 13, 26.

Every major medical, psychiatric, psychological, and professional mental health organization, including the American Psychological Association, the American Psychiatric Association, the National Association for Social Workers, and the American Academy of Child and Adolescent Psychiatry, has repudiated conversion therapy. Pet. App. 6a-7a; SAMHSA, *Moving Beyond Change Efforts* 30; *see* 1SER 41-46 (collecting position statements). The U.S. Department of Health and Human Services' Substance Abuse and Mental Health Services Administration has emphatically stated that sexual orientation and gender identity "change efforts in children and adolescents are harmful and should *never* be provided." SAMHSA, *Moving Beyond Change Efforts* 8 (emphasis added). Instead, effective therapeutic approaches provided by health professionals "support youth in identity exploration and development without seeking predetermined outcomes related to their sexual orientation, gender identity, or gender expression." *Id.* at 51.

At present, 26 States and the District of Columbia have prohibited or restricted the practice of conversion therapy on minors.[2]

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[2] *See* Pet. App. 5a (noting 20 States and the District of Columbia had enacted laws at the time the opinion issued); *see also* Third Eng. H.F. 16, 93rd Leg., Reg. Sess. (Minn. 2023) (enacted in 2023); Exec. Order by Gov. Tim Wolf, No. 2022-02 (Penn. 2022) (issued in 2022); H.B. 228, 65th Leg., Reg. Sess. (Utah 2023) (enacted in 2023); Movement Advancement Project,

B. SB 5722 Prohibits Licensed Professionals From Practicing Conversion Therapy On Minors

Like every other State, Washington seeks "to promote quality" in health care services for residents. 2008 Wash. Sess. Laws 691-92 (ch. 134, § 1). To achieve this goal, it requires health care providers to be licensed before they can practice in Washington. This helps ensure they are able to safely practice and do not present a risk of patient harm. Wash. Rev. Code § 18.130.010. Washington's Uniform Disciplinary Act provides uniform regulations for licensed health professionals, including a list of grounds on which disciplinary action may be taken. Wash. Rev. Code § 18.130.180.

In 2018, the Legislature enacted SB 5722 (*codified at* Wash. Rev. Code §§ 18.130.020(4), .180(27)). SB 5722 amended the State's Uniform Disciplinary Act to restrict the practice of conversion therapy on minors. The bill first defined "conversion therapy":

> (a) "Conversion therapy" means a regime that seeks to change an individual's sexual orientation or gender identity. 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. The term includes,

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Conversion "Therapy" Laws, https://www.lgbtmap.org/equality-maps/conversion_therapy (last visited June 27, 2023) (identifying 26 States and the District of Columbia as prohibiting or restricting conversion therapy for minors).

> but is not limited to, practices commonly referred to as "reparative therapy."
>
> (b) "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.

Wash. Rev. Code § 18.130.020(4).

The bill also added a ground for a finding of unprofessional conduct by a licensee: "Performing conversion therapy on a patient under age eighteen[.]" Wash. Rev. Code § 18.130.180(27).

SB 5722 "may not be construed to apply to":

> (1) Speech that does not constitute performing conversion therapy by licensed health care providers on patients under age eighteen;
>
> (2) Religious practices or counseling under the auspices of a religious denomination, church, or organization that do not constitute performing conversion therapy by licensed health care providers on patients under age eighteen; and
>
> (3) Nonlicensed counselors acting under the auspices of a religious denomination, church, or organization.

2018 Wash. Sess. Laws 2437 (ch. 300, § 2).

SB 5722 prohibits conversion therapy for minors as practiced by licensed health professionals, but the law does not prevent licensed health professionals from:

- Recommending conversion therapy to patients, whether children or adults, and referring them to religious counselors;
- Expressing their views to patients, whether children or adults, about conversion therapy, sexual orientation, gender identity, or any other topic;
- Communicating with the public about conversion therapy;
- Administering conversion therapy to any person who is 18 years of age or older; or
- Administering conversion therapy under the auspices of their church or religious organization if they are not acting in their capacity as a state-licensed therapist.

See Pet. App. 9a; *Pickup*, 740 F.3d at 1223.

In enacting the law, the Legislature's stated intent was to regulate "the professional conduct of licensed health care providers . . . ." 2018 Wash. Sess. Laws 2437 (ch. 300, § 1). The Legislature found that "Washington has 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." 2018 Wash. Sess. Laws 2437 (ch. 300, § 1).

Both the House and Senate heard testimony on the harms caused by conversion therapy, including testimony from the Washington State Psychological Association, who described the consensus of leading professional organizations that "[a]vailable literature shows that conversion therapy is tied to negative self-image, depression, and other issues, in youth who receive it." S.B. Rep. on S.B. 5722, at 3; *see also* Senate Health & Long Term Care Committee, *Public Hearing: SB 5722, SB 6026, SB 5700* (Wash. Jan. 11, 2018), at 1:31:12–1:42:04, *video recording by* TVW, Washington State's Public Affairs Network, https://www.tvw.org/watch/?eventID=2018011104, (hearing testimony on harms); House Health Care & Wellness Committee, *Public Hearing: SB 5722, SSB 6219*, (Wash. Feb. 7, 2018), at 0:18:25–00:30:20, *video recording by* TVW, Washington State's Public Affairs Network, https://www.tvw.org/watch/?eventID=2018021058 (similar). In addition, a report from the Washington State Board of Health that accompanied the bill found that prohibiting conversion therapy on minors would decrease health risks and improve health outcomes for LGBTQ minors. Wash. State Bd. of Health, *Health Impact Review of SB 5722* (Nov. 20, 2017) (available at 1SER 70-83).

The Department of Health intends to enforce SB 5722 as it enforces other restrictions on professional conduct. The Department typically does not conduct investigations unless a complaint has been filed against a licensee's practice. No enforcement action has yet been taken under SB 5722.

C. Procedural History

Three years after SB 5722 took effect, Petitioner Brian Tingley sued state officials to invalidate the law and sought preliminary injunctive relief. Pet. App. 10a. Petitioner is a state-licensed marriage and family therapist who alleged that SB 5722 violates his free speech and free exercise rights under the First Amendment, as well as those of his clients, and that the law is unconstitutionally vague under the Fourteenth Amendment. Pet. App. 10a. Equal Rights Washington, a lead supporter of SB 5722's passage, intervened. Pet. App. 10a. The State Respondents moved to dismiss the complaint, which the district court granted. Pet. App. 10a, 97a-118a. The Ninth Circuit affirmed and later denied rehearing en banc. Pet. App. 1a-67a, 69a-71a.

In affirming the dismissal of Petitioner's complaint, the Ninth Circuit held that SB 5722 was a valid exercise of the State's power to protect public health and safety by regulating professional misconduct. Pet. App. 36a-37a. Relying on an earlier decision, *Pickup*, 740 F.3d 1208, the court first determined that the law regulated conduct, with only an incidental impact on speech. Pet. App. 36a. The court then determined that "[t]he Washington legislature acted rationally when it decided to protect the 'physical and psychological wellbeing' of its minors by preventing state-licensed health care providers from practicing conversion therapy on them." Pet. App. 37a. In doing so, the court

emphasized the numerous scientific studies and unanimity among major medical and mental health organizations that had rejected conversion therapy as harmful to minors. Pet. App. 37a-38a.

The court also carefully considered and rejected Petitioner's claim that this Court's opinion in *NIFLA* had abrogated its earlier decision in *Pickup* on this issue. Although *NIFLA* criticized *Pickup* and decisions of other Courts of Appeals for identifying "professional speech" as a separate category of speech, *NIFLA* did not disturb the holding that a law making conversion therapy unprofessional conduct regulated conduct, not speech. Pet. App. 27a. Rather, *NIFLA* reaffirmed that "States may regulate professional conduct, even though that conduct incidentally involves speech." Pet. App. 28a (quoting *NIFLA*, 138 S. Ct. at 2372).

The court went on to offer an independent ground for its holding, even if SB 5722 were viewed as primarily regulating speech. *See* Pet. App. 39a-51a. The court noted that in *NIFLA*, this Court left open the possibility that specific categories of speech might be subject to greater regulation based on historical tradition. *NIFLA*, 138 S. Ct. at 2372. Citing several decisions from this Court, the court then explained: "There is a long (if heretofore unrecognized) tradition of regulation governing the practice of those who provide health care within state borders." Pet. App. 41a. The court held that SB 5722 falls under this long tradition of regulations on the practice of medical treatments, satisfying the requisite scrutiny. Pet. App. 41a. The court explained that to hold

otherwise would endanger other regulations on the practice of medicine where speech is part of the treatment. Pet. App. 44a.

The Ninth Circuit also rejected Petitioner's free exercise claim, applying the principles laid down by this Court in determining the law was neutral and generally applicable. Pet. App. 51a-58a.

REASONS FOR DENYING THE PETITION

A. The Court Of Appeals Opinion Is Consistent With This Court's Precedent

1. States have broad authority to regulate the practice of medicine consistent with the First Amendment

As this Court has long recognized, a "vital part of a state's police power" is the "broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there[,]" including "the regulation of all professions concerned with health." *Barsky v. Bd. of Regents of Univ.*, 347 U.S. 442, 449 (1954). Washington restricts the practice of conversion therapy on children by licensed health professionals to regulate medical practice and safeguard the health, safety, and welfare of its youth—core areas of traditional state concern. *See Gonzales v. Oregon*, 546 U.S. 243, 270 (2006) (States have "great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons.") (internal quotation marks omitted).

Indeed, state regulations on the practice of medicine predate the First Amendment,[3] and in the late colonial and early independence periods, States passed a variety of licensing laws for doctors.[4] This Court has repeatedly recognized this history and authority, affirming numerous times that States have exercised their police powers to enact standards for obtaining and maintaining a professional license and to protect the public from substandard care "from time immemorial" without running afoul of the Constitution. *Dent v. West Virginia*, 129 U.S. 114, 122 (1889); *see also Watson v. Maryland*, 218 U.S. 173, 176 (1910) ("It is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health," and that "[t]here is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine."); *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) ("[A]s part of [States'] power to protect the public health . . . they have broad power to establish standards for licensing practitioners and regulating the practice of professions.").

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[3] *See* David A. Johnson & Humayun J. Chaudry, *Medical Licensing and Discipline in America: A History of the Federation of State Medical Boards* 4 (2012).

[4] *See* S. David Young, *The Rule of Experts: Occupational Licensing in America* 12 (1987).

2. The opinion below is consistent with precedent concerning regulations of professional conduct and the First Amendment

Virtually all medical and mental health treatments involve speech, but that does not give rise to a First Amendment claim when a State prohibits a particular treatment. For example, every prescription for medication or referral to another provider consists primarily (if not entirely) of words, but that does not mean that state limitations on prescribing or referring patients are subject to strict scrutiny. Instead, this Court has repeatedly reaffirmed that States may "regulate professional conduct, even though that conduct incidentally involves speech." *NIFLA*, 138 S. Ct. at 2372. Likewise, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language[.]" *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (internal quotation marks omitted). It follows that the First Amendment does not deprive States of authority to regulate the provision of specific medical treatments, even where the treatment involves speech. Whether a doctor physically gives a patient the wrong medication or instead tells the patient to take the wrong medication, she can be disciplined for misconduct; it does not matter that in the latter example her harmful act is performed by speaking.

NIFLA addressed a First Amendment challenge to a California law requiring that licensed

facilities offering pregnancy or family planning services post notices informing patients that subsidized reproductive health care services were available from the state. *NIFLA*, 138 S. Ct. at 2368-69. The Court held that the notice law was not a regulation of professional *conduct*, reasoning that the required notice was "not tied to a [medical] procedure at all," but applied to all interactions between a facility and its clients. *Id.* at 2373. The Court disapproved of the Ninth Circuit's application of intermediate scrutiny for "professional speech," but ultimately did not "foreclose the possibility" of such a "professional speech" standard in specific contexts, instead deciding that the law's content-based regulation could not survive even intermediate scrutiny. *Id.* at 2375.

In an attempt to create a conflict with this Court's precedent, Petitioner mischaracterizes the opinion below and the impact of *NIFLA*. Pet. 14-16. Petitioner claims that the panel opinion resuscitated the *Pickup* opinion's "continuum" analysis that *NIFLA* rejected. Pet. 16. Petitioner is doubly wrong. First, the panel opinion explicitly rejected what Petitioner characterizes as the "continuum" analysis, and instead applied the holding in *Pickup* that a law regulating medical treatments—even if the treatment involves talk therapy—primarily regulated conduct, not speech. Pet. App. 29a. Second, *NIFLA* did not reject *Pickup*'s holding that speech can be regulated as incidental to conduct in some circumstances; it did just the opposite by reinforcing this bedrock principle. *NIFLA*, 138 S. Ct. at 2372-74.

Important here, the opinion below relied on a central principle derived from *NIFLA*: "States may regulate professional *conduct*, even though that conduct incidentally involves speech." *NIFLA*, 138 S. Ct. at 2372 (emphasis added); *see* Pet. App. 31a. As examples of such conduct afforded lesser protection, this Court discussed approvingly cases about malpractice, anticompetitive agreements, client solicitation, and informed consent. *See NIFLA*, 138 S. Ct. at 2372-73. Thus, "[l]ongstanding torts for professional malpractice . . . 'fall within the traditional purview of state regulation of professional conduct'" without running afoul of the First Amendment. *NIFLA*, 138 S. Ct. at 2373 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). And although obtaining informed consent for abortion procedures involves verbal communication, this Court has approved of state laws regulating such speech "as part of the *practice* of medicine, subject to reasonable licensing and regulation by the State." *NIFLA*, 138 S. Ct. at 2373 (quoting *Planned Parenthood of Se. Penn. v. Casey*, 505 U.S. 833, 884 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022)).

Petitioner claims that this Court's opinion in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), shows that the State cannot regulate medical therapies involving speech, but that case is wholly inapposite here. In *Humanitarian Law Project*, this Court examined a federal statute that prohibited providing material support or resources, including "expert advice or assistance," to designated terrorist organizations. *Id.* at 8-15. The Court held that

although a statute "may be described as directed at conduct," strict scrutiny applied as to the plaintiffs because "the conduct triggering coverage under the statute consist[ed] of communicating a message[,]" *id.* at 28, about how to resolve disputes peacefully, *id*. at 36-37. But Washington's law does not prohibit Petitioner from "communicating a message." Contrary to Petitioner's description, he is allowed to tell patients and the public that he thinks conversion therapy is wonderful and that they would benefit from it, and he is even allowed to refer patients to other providers to receive conversion therapy. *Contra* Pet. 2 (inaccurately claiming that Petitioner could not discuss his view that watchful waiting instead of affirmation would be acceptable to treat gender dysphoria). He is even allowed to practice conversion therapy himself when acting under the auspices of a religious organization and not holding himself out as a state-licensed therapist. The law regulates only (1) therapeutic treatment by (2) licensed mental health professionals acting within the confines of the counselor-client relationship. *See* Pet. App. 47a-48a; *Pickup*, 740 F.3d at 1229-30.

The State can regulate what is actually professional conduct, such as the provision of mental health services pursuant to a state license, so long as it has a rational basis for doing so. *See Arcara v. Cloud Books, Inc.*, 478 U.S. 697, 706-07 (1986) ("[T]he First Amendment is not implicated by the enforcement of a public health regulation of general application," and heightened scrutiny does not apply to a statute directed to nonexpressive activity.).

The State agrees that it cannot regulate disfavored speech merely by relabeling it as "conduct" to make an end-run around the First Amendment. *See* Pet. 23. But the provision of health care—including mental health treatment like talk therapy—necessarily involves the use of speech and the verbal exchange of words as part of treatment. Pet. App. 47a ("What licensed mental health providers do during their appointments with patients for compensation under the authority of a state license is treatment."). Contrary to Petitioner's position, the use of words as a course of treatment does not automatically trigger heightened First Amendment scrutiny. *See Casey*, 505 U.S. at 884 ("To be sure, the physician's First Amendment rights not to speak are implicated [by an informed consent statute] . . . but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State[.]"). Otherwise, a State would be unable to regulate a physician who fails to provide information necessary for informed consent or regulate a certified nutritionist who counsels starvation diets to pre-teen anorexic clients. The First Amendment does not compel such outcomes.

In short, SB 5722 protects children and youth from ineffective and harmful treatments performed under a state-authorized license. The law does not prevent licensed health professionals from talking about or recommending conversion therapy to their minor clients or discussing their views on sexual orientation and gender identity generally. The opinion below is consistent with this Court's precedent, in particular *NIFLA*. *NIFLA* makes clear that

regulations that facilitate informed consent to medical treatments are permissible; a fortiori, a law like SB 5722 that regulates the treatment itself is permissible.

3. The panel opinion scrupulously followed this Court's precedent in rejecting Petitioner's free exercise claim

The Free Exercise Clause prevents governments from making laws "prohibiting the free exercise" of religion. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993). But as the panel correctly observed, this right "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." Pet. App. 51a (quoting *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990)).

The opinion below faithfully followed this Court's precedent in determining that Washington's law is neutral and generally applicable. First, as Petitioner "all but concede[d]" below, the law is facially neutral, simply prohibiting therapists from practicing conversion therapy on minors. Pet. App. 53a. Second, and in accord with this Court's precedent, the panel closely examined the law to determine whether its object was to restrict practices "*because of* the religious motivations of those performing the practices[.]" Pet. App. 52a (citing *Parents for Priv. v. Barr*, 949 F.3d 1210, 1235 (9th Cir.), *cert. denied*, 141 S. Ct. 894 (2020)); c*f. Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) ("Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or

restricts practices because of their religious nature."); *Lukumi*, 508 U.S. at 533-34 (examining whether object of law is to restrict practices "because of" their religious motivation by looking to text and operation of law).

The law's text and operation make plain that its object was not hostility to any religion but rather "protecting the physical and psychological well-being of minors" through regulating "the professional conduct of licensed health care providers." 2018 Wash. Sess. Laws 2437 (ch. 300, § 1(1)); *accord* Pet. App. 52a (describing the object of the law as "the prevention of harm to minors, regardless of the motivations for seeking or providing conversion therapy") (internal quotation marks omitted). The law applies only to conduct within the confines of the counselor-client relationship and does not regulate the way in which licensed professionals (or their clients) practice their religions. 2018 Wash. Sess. Laws 2437-38 (ch. 300, §§ 1-3). Its neutral, secular basis is apparent from the evidence the Legislature had before it that conversion therapy is an ineffective practice and particularly harmful to minors. Pet. App. 6a-7a (noting that "[a]s of 2015, every major medical, psychiatric, psychological, and professional mental health organization opposes the use of conversion therapy"); Pet. App. 37a-38a (noting the "scientifically credible proof of harm," the *Health Impact Review of SB 5722* accompanying the law, the medical recommendations of expert organizations, and qualitative evidence from Washington residents exposed to conversion therapy that the Legislature considered).

If there were any doubt that the object of the law was neutral and not hostile to religion, its explicit protection for religious practices or counseling relating to conversion therapy would remove it. *See* 2018 Wash. Sess. Laws 2437 (ch. 300, § 2); Pet. App. 53a. This express protection for religious practices, and the law's narrow scope targeted to regulating a licensed profession, make Petitioner's claim that the law was designed to "silence people of faith and their religious beliefs about human sexuality" untenable. Pet. 32.

The opinion below regarding neutrality was thus well grounded in this Court's precedent. By contrast, Petitioner's theory advanced in his petition is untethered to any authority.

Petitioner claims that the law primarily impacts those who have particular religious views, and thus necessarily is targeted at religious practices, Pet. 30-31, but this argument has two fatal flaws. First, the Washington Legislature considered evidence that people seek conversion therapy for many secular reasons, so the practice is not confined to the religious. Pet. App. 57a; *see APA Taskforce Report* 45 ("Clients' motivations to seek out and participate in [sexual orientation change efforts] seem to be complex and varied and may include mental health and personality issues, cultural concerns, religious faith, internalized stigma, as well as sexual orientation concerns[.]"); *APA Taskforce Report* 45-49; *see also Welch v. Brown*, 834 F.3d 1041, 1046-47 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2093 (2017) (explaining that scientific evidence before

California's legislature when enacting its parallel conversion therapy law stressed that people seeking conversion therapy seek it "for many secular reasons"). Second, Petitioner's argument jettisons this Court's precedent focusing on whether a government addressed a practice "because of" its religious nature in favor of a new rule that this Court has never recognized—a rule that would prevent government from enacting any laws that might incidentally impact primarily one religious group or another. Petitioner cites no authority for this remarkable expansion of this Court's precedent, let alone a conflict meriting this Court's review.

The panel also closely followed this Court's precedent in determining that the law was generally applicable. Applying the criteria outlined in *Fulton*, the panel determined that there was no mechanism for granting exceptions that might be exercised to disadvantage religion (which Petitioner never disputes in his petition) and that the law did not prohibit religious conduct while permitting secular conduct that would undermine the government's asserted interest in a similar way. Pet. App. 58a (quoting *Fulton*, 141 S. Ct. at 1877); *see also Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022) (identifying the same two criteria for assessing general applicability).

Petitioner does not allege that the opinion below conflicts with any of the principles from this Court's precedent, instead complaining about their application. Specifically, Petitioner alleges that the opinion below failed to consider gender-affirming therapy as "comparable secular conduct" that was

permitted while conversion therapy was not. Pet. 34. But the opinion below correctly rejected this argument, closely following this Court's precedent in doing so. Although Petitioner claims that in comparing secular and religious conduct, the opinion below "play[ed] with the level of generality," Pet. 34, in reality, the opinion relied on this Court's instruction: "Whether secular and religious activity are 'comparable' is evaluated 'against the asserted government interest that justifies the regulation at issue' and requires looking at the risks posed, not the reasons for the conduct." Pet. App. 60a (quoting *Tandon v. Newsom*, 141 S. Ct. 1294, 1298 (2021)). The asserted government interest in enacting SB 5722 was protecting the physical and psychological well-being of minors from a therapy that has been determined by a consensus of psychiatric professionals and every major psychiatric professional association as harmful. Failure to also prohibit other therapies that Petitioner dislikes, and for which there is not similar evidence or consensus in the scientific community, is not comparable.

B. There Is No Meaningful Disagreement In The Lower Courts About The Constitutionality Of State Licensing Laws Like Washington's

Petitioner's claim that the decision below exacerbates a circuit split is incorrect. Over 20 States have laws restricting conversion therapy as part of professional licensing rules, and Petitioner has not cited a single case invalidating any of them. To the State's knowledge, every court to consider such a law

has upheld it.[5] Petitioner relies on outdated, distinguishable, or irrelevant cases, none of which show a split meriting this Court's intervention.

Petitioner first claims that the decision below conflicts with the Third Circuit's decision in *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014), *cert. denied*, 575 U.S. 996 (2015), but this Court explicitly criticized *King* in *NIFLA*, 138 S. Ct. at 2371. *King* upheld New Jersey's law restricting conversion therapy by licensed therapists as consistent with the First Amendment. *King*, 767 F.3d at 220. The Third Circuit recognized that it would be contrary to history and deeply problematic if States were powerless to regulate health professions (like psychology and psychiatry) that consist largely of speaking, *id.* at 228, but it resolved this by holding that "professional speech" in this context received less protection than other speech and was subject to intermediate scrutiny, a test New Jersey's law survived because of the State's strong interest in outlawing a harmful treatment for minors, *id.* at 229-40. *NIFLA*, of course, rejected the "professional speech" doctrine, *NIFLA*, 138 S. Ct. at 2371, and the Third Circuit has not addressed a state law restricting conversion therapy since. It is true that in the course of its opinion, the

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[5] *See Chiles v. Salazar*, No. 1:22-CV-02287-CNS-STV, 2022 WL 17770837 (D. Colo. Dec. 19, 2022), *appeal docketed*, Nos. 22-1445, 23-1002 (10th Cir. 2022, 2023); *Doyle v. Hogan*, 411 F. Supp. 3d 337 (D. Md. 2019), *vacated*, 1 F.4th 249 (4th Cir. 2021); *Welch v. Brown*, 834 F.3d 1041 (9th Cir. 2016), *cert. denied*, 137 S. Ct. 2093 (2017); *Doe ex rel. Doe v. Governor of New Jersey*, 783 F.3d 150 (3d Cir. 2015), *cert. denied*, 577 U.S. 1137 (2016); *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014), *cert. denied*, 575 U.S. 996 (2015); *Pickup*, 740 F.3d 1208.

Third Circuit rejected the idea that state regulation of conversion therapy should be analyzed as a restriction of conduct, but that was before *NIFLA* reiterated, in the healthcare context, that "States may regulate professional conduct, even though that conduct incidentally involves speech." *NIFLA*, 138 S. Ct. at 2372. *NIFLA* thus rejected two pillars of *King*'s reasoning: (1) its skepticism of the speech/conduct distinction; and (2) the availability of a broad "professional speech" exemption to deal with the untenable outcome of leaving certain healthcare professions free from state regulation. In light of that double undermining, there is no basis to assume that the Third Circuit would apply the same approach in analyzing a State conversion therapy law today.

Petitioner next claims that the opinion below is irreconcilable with *Otto*, 981 F.3d 854, but this claim ignores crucial distinctions between the two cases. *Otto* involved local ordinances that threatened criminal punishment for therapists who practiced conversion therapy on minors, punishments entirely untethered from the State's system for licensing healthcare practitioners. This lack of connection to any professional licensing scheme played a key role in the Eleventh Circuit's decision, with the court emphasizing that the ordinances were "not connected to any regulation of separately identifiable conduct[,]" *Otto*, 981 F.3d at 865, so striking them down did not threaten "'[l]ongstanding torts for professional malpractice' or other state-law penalties for bad acts[.]" *Id.* at 870 (first alteration in original). Here, by contrast, the Ninth Circuit emphasized that Washington's law is part of Washington's Uniform Disciplinary Act, which also prohibits

"[i]ncompetence, negligence, or malpractice which results in injury to a patient," Pet. App. 45a (alteration in original) (quoting Wash. Rev. Code § 18.130.180(4)), so striking down this law "would endanger other regulations on the practice of medicine where speech is part of the treatment," Pet. App. 44a. The court noted that doctors are routinely disciplined or held liable in malpractice for things they say—such as inaccurate instructions or dangerous advice—and striking down SB 5722 would threaten any such patient protections. Pet. App. 45a-47a.

Both before and after *Otto*, the Eleventh Circuit has upheld state-imposed professional licensing statutes, like SB 5722, that applied to professions even when those professions consisted largely of speech. For example, in *Del Castillo*, 26 F.4th 1214, the plaintiff argued that her business of "one-on-one health coaching," which involved "meeting with clients and discussing overall health and wellness, as well as goal setting" and "tailored advice on dietary choices, exercise habits, and general lifestyle strategies[,]" consisted of speech, and thus was protected by the First Amendment. *Id.* at 1216. The court disagreed, holding that although the practice of "nutrition counseling" "involves some speech," it also involved conduct, like assessing the patient's needs, conducting research, and developing an individual treatment plan, so any restriction on speech was incidental to regulating this conduct. *Id.* at 1225-26. The Ninth Circuit correctly reached the same conclusion as to conversion therapy, noting that "Washington law defines psychotherapy as more than just talking. It is the 'practice of counseling using

diagnosis of mental disorders according to the fourth edition of the diagnostic and statistical manual of mental disorders . . . and the development of treatment plans . . . in accordance with established practice standards." Pet. App. 46a (quoting Wash. Rev. Code § 18.19.020). Thus, the Eleventh Circuit has upheld state laws restricting the practice of a state-licensed professional to protect public health, as here. *See also Locke*, 634 F.3d 1185 (upholding state law restricting practice of interior designers while acknowledging that their work consisted largely of speaking with their clients).

Petitioner's remaining citations are a grab bag of at best tangentially relevant decisions. He cites cases dealing with tour operators, legal advertising, and veterinarians, Pet. 18-20, and says that some of these cases (unclear which) have properly "heeded th[e] line" between conduct and speech. Pet. 18. But he never explains what rule should apply other than the rule this Court articulated in *NIFLA* that the Ninth Circuit applied here: "States may regulate professional conduct, even though that conduct incidentally involves speech." Pet. App. 28a (quoting *NIFLA*, 138 S. Ct. at 2372). While that line may be difficult to draw in some cases, and different facts and laws may lead to differing results, Petitioner points to no disagreement about the proper test to apply. There is no reason for the Court to wade back into this area so soon after *NIFLA*; lower courts continue to implement this Court's direction from that case, and as yet there is no split of authority about how that case applies to state healthcare licensing standards like SB 5722.

C. Accepting Petitioner's Argument Would Upend State Laws And The Authority Of States To Regulate Professionals

State governments have long exercised their power to regulate health care providers by setting minimum educational and professional standards for licensing. *Barsky*, 347 U.S. at 451 ("[P]ractice is a privilege granted by the State under its substantially plenary power to fix the terms of admission."). Washington legislates the scope of practice and minimum "standard of care" for the profession and investigates and disciplines providers whose practice falls outside the scope of their profession or below the standard of care. *See* Wash. Rev. Code § 18.130.180 (defining unprofessional conduct for licensed health professionals); Wash. Rev. Code ch. 18.225 (requirements for marriage and family therapists and mental health counselors). State laws regulating health care practices specify acts that fall below the standard of care, such as sexual misconduct, fraud or misrepresentation, the commission of acts involving moral turpitude, or betrayal of the practitioner-patient privilege. *See* Wash. Rev. Code § 18.130.180. Washington may also discipline a licensed health professional for professional conduct that is incompetent, negligent, or which results in injury to a patient or creates an unreasonable risk that a patient may be harmed. *See* Wash. Rev. Code § 18.130.180. SB 5722 easily fits within this time-tested framework.

States do not lose their power to regulate medical treatments "merely because those treatments are implemented through speech rather than through scalpel." Pet. App. 5a. Petitioner's contention that talk therapy cannot be regulated as a health care practice

and is instead speech—the regulation of which must survive strict scrutiny—would essentially deregulate this form of health care, leaving children and adults unprotected from treatments that violate generally accepted standards of care. Petitioner's position is even more sweeping than just immunizing talk therapy from regulation; every word a health care provider speaks or writes would be protected under the strict scrutiny standard, no matter how unrelated to the provision of evidence-based health care or how harmful to patients.

Yet States routinely regulate what health professionals may say in order to protect patients, as a few recent examples from Washington demonstrate. In 2018, Washington found that a licensed marriage and family therapist practiced below the standard of care by: (1) suggesting inappropriate medication in inaccurate dosages to a client's physician, and (2) disclosing a minor client's masturbation habits at a school meeting, ignoring the goals of the discussion and distressing all of the participants. *Townsend v. State Dep't of Health*, No. 34754-1, 2018 WL 6584582 (Wash. Ct. App. Dec. 13, 2018) (unpublished). Similarly, the Washington state medical commission disciplined a psychiatrist for violating the standard of care for his profession where he "failed to maintain an appropriate doctor-patient relationship by encouraging his minor patient's 'unhelpful dependency'" on the psychiatrist and communicating with the patient's parents in a way that alienated family members from each other. *Huffine v. State Dep't of Health, Med. Quality Assurance Comm'n*, No. 61119-4, 2009 WL 137512, *2 (Wash. Ct. App. Jan. 20, 2009) (unpublished). Under Petitioner's

framing, the State would have no authority to determine that the provider's conversations with the minor and their parents fell below the standard of care for his profession. *See also Shea v. Bd. of Med. Exam'rs*, 81 Cal. App. 3d 564 (1978) (revoking doctor's license where doctor's monologues with hypnotized patients graphically described sexual acts); *Davis v. State Bd. of Psych. Exam'rs*, 791 P.2d 1198 (Colo. App. 1989) (psychologist's license revoked for disclosing confidential information about patients and soliciting loans from patients). And "doctors are routinely held liable for giving negligent medical advice to their patients, without serious suggestion that the First Amendment protects their right to give advice that is not consistent with the accepted standard of care." *Pickup*, 740 F.3d at 1228. The First Amendment does not prohibit a doctor from being disciplined if she "counsel[ed] a patient to rely on quack medicine." *Id.* (internal quotation marks omitted); *see also NIFLA*, 138 S. Ct. at 2373.

Under Petitioner's view, medical professionals can cloak themselves in First Amendment protection based on the notion that their medical practice entails "private conversations." Pet. 12. This position, unsupported by this Court's precedent and States' practice, endangers regulations on the practice of medicine where speech is part of the treatment. It would leave doctors, psychologists, counselors, and therapists who perpetuate substandard care unchecked and would leave State residents at risk of serious harms.

D. This Case Is A Poor Vehicle To Address The Question Presented Because The Court Of Appeals Offered An Independent Basis For Its Ruling And Petitioner Lacks Standing

A further reason to deny certiorari here is that this case suffers from serious vehicle problems.

First, for the reasons set out in State Respondents' answering brief below and Respondent-Intervenor's brief in opposition to this Court, Petitioner lacks standing and this case is not ripe. Tingley has faced no disciplinary action and studiously avoids stating he actually seeks to practice conversion therapy on his minor clients. If the Court determines this issue merits its consideration, it should wait for a case where standing is clear, e.g., where a State has taken disciplinary action against a licensed health professional for clearly described practices.

Second, the Court of Appeals offered an independent basis for its holding that does not turn on whether SB 5722 is treated as a regulation of speech or conduct. Thus, even addressing the illusory circuit split Petitioner alleges would not alter the outcome.

In addition to holding that SB 5722 "is a regulation on conduct that incidentally burdens speech," Pet. App. 36a, the Court of Appeals offered "an additional reason for reaching the conclusion that we reach today." Pet. App. 39a. The court cited this Court's statement in *NIFLA* "that laws regulating categories of speech belonging to a 'long . . . tradition'

of restriction are subject to lesser scrutiny." Pet. App. 39a (alteration in original) (quoting *NIFLA*, 138 S. Ct. at 2372). The court then held that SB 5722 fell into just such a category: the long tradition of laws regulating the provision of healthcare by licensed professionals. Pet. App. 41a. The court emphasized that there have always been laws restricting what medical professionals can recommend or prescribe, and this Court has upheld such laws for over a century. Pet. App. 41a-42a. As the court explained, in light of this tradition: "Whether children with a mental health condition go to a primary care physician and seek anti-depressant pills, or a therapist and seek psychotherapy, or a psychiatrist and seek both, the State may regulate the licensed provider's treatment of those health conditions." Pet. App. 48a.

Petitioner recognizes that the Court of Appeals offered an "alternative holding," Pet. 24, and briefly argues that the alternative holding is incorrect, Pet. 24-27, but he never claims that there is a circuit split about this topic. There is no basis to grant review here in light of this alternative holding.

E. This Case Is Not The Vehicle To Reconsider *Employment Division v. Smith*

This case is not the appropriate vehicle for this Court to reconsider *Employment Division v. Smith*, 494 U.S. 872. Resolving this issue would have no impact here, and the petition never attempts to answer the many questions inherent in reconsidering *Smith*.

Smith's viability will not impact the outcome here because SB 5722 is constitutional under either *Smith* or pre-*Smith* precedent. *See Burton v. United States*, 196 U.S. 283, 295 (1905) ("It is not the habit of the court to decide questions of a constitutional nature unless absolutely necessary to a decision of the case."). SB 5722 complies with *Smith* for the reasons stated above. It also readily meets the pre-*Smith* framework established in *Sherbert v. Verner*, 374 U.S. 398 (1963). Under *Sherbert*, "governmental actions that substantially burden a religious practice must be justified by a compelling governmental interest." *Smith*, 494 U.S. at 883. But government actions only impose a "substantial burden" when individuals are "coerced by the Government's action into violating their religious beliefs" or "governmental action penalize[s] religious activity by denying any person an equal share of the rights, benefits, and privileges enjoyed by other citizens." *Lyng v. Nw. Indian Cemetery Protective Ass'n*, 485 U.S. 439, 449 (1988) (applying *Sherbert*).

Given this high bar, even before *Smith*, this Court had "never invalidated any governmental action on the basis of the *Sherbert* test except the denial of unemployment compensation." *Smith*, 494 U.S. at 883. And unemployment compensation presents unique free exercise issues because it is fundamentally a "system of individual exemptions" in which the State cannot "refuse to extend that system to cases of 'religious hardship' without compelling reason" because to do so would deny generally available benefits on account of the claimant's religious exercise. *Id.* at 884.

Here, in contrast, SB 5722 does not deny Petitioner any privileges or benefits granted to others; nor does it coerce him to do anything. To the contrary, SB 5722 explicitly exempts religious activity. Specifically, it exempts counseling provided by non-licensed counselors "acting under the auspices" of a church or religious organization. 2018 Wash. Sess. Laws 2437 (ch. 300, § 2); *see also* Pet. App. 52a. It thus would have no impact on counseling provided by clergy or religious organizations. SB 5722 also provides broad leeway for religious exercise by licensed professionals. Those professionals are free, for instance, to communicate their *views* on conversion therapy to the public and to their minor patients. Licensed professionals may also provide conversion therapy when they are counseling under the auspices of a religious organization and not representing themselves as acting in their licensed capacity and collecting a fee. 2018 Wash. Sess. Laws 2437 (ch. 300, § 2). And even when acting in their licensed capacity, they may counsel patients on "acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development" that does not seek to change sexual orientation or gender identity. Wash. Rev. Code § 18.130.020(4)(b).

SB 5722 thus does not coerce anyone or deny anyone generally available benefits. The law's elimination of the imprimatur of a state license on discredited and harmful treatment practices does not impose a "substantial burden" under *Sherbert*. And even if it arguably did so, the State's interest in mitigating suicidality and other harmful impacts of such practices on vulnerable youth provides more

than compelling justification for the law. Invalidating *Smith* thus would have no impact on the outcome here, making this case a particularly inappropriate vehicle to reconsider such foundational precedent. *Cf. Fulton*, 141 S. Ct. at 1876-77 (declining to address continuing validity of *Smith* where determination did not impact outcome).

Even if this Court were inclined to establish a new test for free exercise claims in place of *Smith*, this is a poor vehicle for resolving the many questions inherent in formulating that test. When this Court granted certiorari on this issue in *Fulton*, one concurring opinion expressed skepticism that *Smith*'s "categorical anti-discrimination approach" could be swapped for an "equally categorical strict scrutiny regime[.]" *Fulton*, 141 S. Ct. at 1883 (Barrett, J., concurring). It raised numerous issues that would require resolution if *Smith* were overruled, including (1) whether entities functioning as an arm of a church would be treated differently than individuals; (2) whether to distinguish between indirect and direct burdens on religious exercise; (3) what forms of scrutiny should apply; and (4) if strict scrutiny applies, whether pre-*Smith* cases rejecting free exercise challenges to garden-variety laws would come out the same way. *Id.*

This case is not an appropriate vehicle for resolving these essential questions. SB 5722 explicitly exempts religious organizations and churches and thus does not present a good vehicle for addressing differential treatment of religious organizations versus individuals. And SB 5722's supposed impacts on Petitioner's religious exercise are indirect and tenuous at best and thus do not present a robust

backdrop to address the dividing line between direct and indirect impacts or the level of scrutiny that should apply in these cases. Nor would it answer whether pre-*Smith* cases would reach the same outcome under a new test.

This case is also a poor vehicle to reconsider *Smith* because the petition does not articulate and thus cannot meet the standard for overcoming stare decisis. Traditional stare decisis factors include "the quality of the decision's reasoning; its consistency with related decisions; legal developments since the decision; and reliance on the decision." *Ramos v. Louisiana*, 140 S. Ct. 1390, 1405 (2020) (quoting *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1499 (2019)). Petitioner addresses none of these factors. The request to overturn *Smith* is at best an afterthought, underscoring its ill fit for addressing such a cornerstone of free exercise jurisprudence.

CONCLUSION

The petition for writ of certiorari should be denied.

RESPECTFULLY SUBMITTED.

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