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

REPLY BRIEF FOR PETITIONER

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CORPORATE DISCLOSURE STATEMENT

The Corporate Disclosure Statement in the Petition for Writ of Certiorari remains unchanged.

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Many minors struggling with gender dysphoria seek counseling to align their mind and body instead of rushing headlong into experimental medical interventions. Pet.4, 9. Yet it is this desperately needed counseling—encouraging words between a licensed counselor and a consenting minor client with parental permission—that Washington State forbids through its viewpoint-based Counseling Censorship Law.

Respondents say this Court can avoid review because no circuit split exists. But no amount of wordsmithing refutes the obvious—the circuits are split on the *exact* speech question presented: can states regulate counseling speech by labeling it "professional conduct"? Pet.16–21. The panel below acknowledged the split. Pet.App.35a. So did the en banc dissent. Pet.App.82a. As have other judges. *Vazzo* v. *City of Tampa*, 2023 WL 1466603, at *1 (11th Cir. Feb. 2, 2023) (per curiam) (Rosenbaum, J., concurring in the judgment).

This undeniable split and the urgent need for the counseling Brian Tingley provides require this Court's intervention. Review should be granted.

REPLY ARGUMENT

I. The Ninth Circuit correctly held that this case is justiciable because Tingley showed intent to speak in a way that would prompt enforcement against him.

Respondents press an issue that every federal judge to examine this case—15 in all—has rejected: that Tingley must wait until Washington "enforces its laws against" him before suing. Intervenor.BIO.24. But it has never been "necessary that petitioner first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 158 (2014) (cleaned up). That's especially true when First Amendment rights are at stake. Given "the sensitive nature of constitutionally protected expression," this Court has long allowed plaintiffs to challenge laws without "risk[ing] prosecution." *Dombrowski* v. *Pfister*, 380 U.S. 479, 486 (1965). To establish standing, a plaintiff need only demonstrate that (1) he intends to speak in a way the law arguably proscribes, and (2) the state will likely enforce its law against him. *SBA List*, 573 U.S. at 159. Tingley made both showings here.

The Ninth Circuit examined Tingley's complaint, credited his allegations as true, and correctly held that he had standing. He alleged a chilling effect, noting that his conversations with minor clients have been "more guarded and cautious" because he is unable "to freely and without fear speak what he believes to be true." Pet.App.180a. He has even been hesitant to "publiciz[e] the fact that he offers to counsel minors on" sexuality and gender identity

issues because of Washington's Censorship Law. Pet.App.181a. This "self-censorship" is a "harm that can be realized even without an actual prosecution." *Virginia* v. *Am. Booksellers Ass'n*, 484 U.S. 383, 393 (1988).

Tingley also alleged past, present, and future conversations that the Law "arguably … proscribe[s]." *SBA List*, 573 U.S. at 159. For instance, when he sued, Tingley was counseling a particular "client as he work[ed] toward the change [in sexual orientation] he desire[d]." Pet.App.175a. Tingley wants to continue counseling such clients who "seek his help with issues relating to gender identity, sexual attractions, and sexual behaviors." *Id.* at 178a.

Throughout this litigation, Washington has argued that this counseling "violate[s]" its Law. Washington.CA9.Br.18. Washington could clear up any confusion by disavowing future enforcement against Tingley. *SBA List*, 573 U.S. at 165; *303 Creative LLC* v. *Elenis*, 143 S. Ct. 2298, 2310 (2023) (finding standing where state refused to disavow). That the State has not done so shows its desire to silence Tingley's speech. That gives him standing, plain and simple.

Respondents now say that Tingley "carefully crafted" his complaint to "*avoid* stating" that he intends to speak in a way that violates the Law. Intervenor.BIO.21. Not so. As discussed, Tingley alleges not only that he *has had* conversations, but also that he intends *to continue having* conversations with clients that Washington has said violates its Law. Pet.App.174a–81a.

If anyone is playing word games, it's Intervenor. Contra Intervenor.BIO.20–23. Intervenor suggests that Tingley's concrete allegations might not violate the Law because some conversations involve client-directed goals. But Washington's Law does not contain an exception for client-directed goals. Instead, the Law censors *all* conversations that "seek[ ] to change an individual's sexual orientation or gender identity." Pet.App.119a. Conversations that "seek to change sexual orientation or gender identity" are *not* excepted, even if they "provide acceptance, support, and understanding." *Ibid.* That's the interpretation Washington has argued at every step. *E.g.*, Washington.CA9.Br.18. And this Court accepts state officials' pronouncements about a statute's breadth, not that of interested observers. *Broadrick* v. *Oklahoma*, 413 U.S. 601, 617–18 (1973).

While Tingley has not resisted the statute's application, he has admittedly resisted Respondents' attempts to recharacterize his conversations with clients as "conversion therapy." Intervenor.BIO.20. With that loaded phrase, Respondents hope to invoke images of physical practices long denounced and *never* used by Tingley. For these reasons, Tingley agrees with the Alliance for Therapeutic Choice and Scientific Integrity: using the term "conversion therapy" to refer to speech—mere words—discussing voluntary change is "no longer scientifically or politically tenable."[1]

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[1] *Why the Alliance Supports SAFE-Therapy*, Alliance for Therapeutic Choice & Scientific Integrity, https://perma.cc/N4KA-TPLF.

All Tingley does—and all Washington wants to prohibit here—is have conversations with consenting clients. *SBA List* is instructive. The government there contested standing because SBA List "insist[ed] that its speech [was] factually true" and the statute prohibited only lying. 573 U.S. at 163. That did not defeat standing because there was "every reason to think" the government would treat "similar speech" as lies. *Ibid.* Likewise here, there is "every reason to think" Tingley's speech will be prosecuted by the government as "conversion therapy," even if he does not use the term. Washington says so. Accordingly, no standing issue clouds this petition.

II. This Court should grant review and resolve the circuit split over the speech question.

A. A real and intractable circuit split exists on the validity of censoring counselors' speech based on viewpoint.

The lower courts are divided over the validity of Counseling Censorship Laws. The Third and Eleventh Circuits have held that those laws target speech, not conduct. Pet.16–18. And in a different context, the Second Circuit concluded that counseling involves not conduct but speech. *Brokamp* v. *James*, 66 F.4th 374, 383–84 (2d Cir. 2023). Only the Ninth Circuit has held a counselor's words can be regulated as conduct.

Attempting to muddy the circuit-split waters, Respondents contend that *Otto* v. *City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020) (*Otto I*), does not conflict with the decision below because *Otto* involved criminal punishments, whereas this case concerns professional licensing. But both cases involved the question whether government may restrict

counseling speech. Indeed, the local governments in *Otto* defended their censorship the same way Washington does: by arguing that counseling was "professional speech or conduct[, and] they have the power to limit it." *Id.* at 864. Rejecting that argument, the Eleventh Circuit recognized that what those local governments "call[ed] a 'medical procedure' consists—entirely—of words." *Id.* at 865. And those governments' Censorship Laws were "direct, not incidental, regulations of speech." *Ibid.* That holding squarely and irreconcilably conflicts with the Ninth Circuit's holding here.

Respondents point to the Eleventh Circuit's decisions in *Del Castillo* and *Locke* and argue that states can censor speech as part of a "comprehensive licensing scheme." Intervenor.BIO.15; Washington.BIO.3 (citing *Del Castillo* v. *Sec'y, Fla. Dep't of Health*, 26 F.4th 1214 (11th Cir. 2022); *Locke* v. *Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011)). But those decisions involved broad challenges to licensing laws. They did not challenge laws that censored speech based on viewpoint. In contrast, Washington's Law prohibits counselors like Tingley from uttering certain words based on its viewpoint. That's what the Censorship Law in *Otto* did, and it's why the Eleventh Circuit struck it down while upholding the laws in *Del Castillo* and *Locke*.

In reality, *Del Castillo* and *Locke* highlight the difference between a content- and viewpoint-based speech regulation and a conduct regulation that incidentally affects speech. Licensing laws generally regulate *who* can speak, not *what* they can say. They do not "dictate the content of what is said" by the professional. *Conant* v. *Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (cleaned up). Any effect on speech is

therefore incidental. The same is not true here, where the Censorship Law regulates not *who* speaks but *what* can be said. It tells Tingley what he cannot say on threat of revoking his license.

Respondents also downplay the broader split between the decision below and *King* v. *Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014), by simultaneously arguing that *National Institute of Family & Life Advocates* v. *Becerra*, 138 S. Ct. 2361 (2018) (*NIFLA*) expressed "skepticism" of *King*'s "speech/conduct distinction," Washington.BIO.26–27, while leaving intact the Ninth Circuit's treatment of the speech/conduct distinction in *Pickup* v. *Brown*, 740 F.3d 1208 (9th Cir. 2014), Washington.BIO.17–18. But *NIFLA* "disapproved" of both *King*'s and *Pickup*'s "willingness to except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny." *Otto I*, 981 F.3d at 867 (cleaned up). *King*'s tactic was to treat counselors' words as *speech* subject to *intermediate scrutiny*, 767 F.3d at 228, while *Pickup* held that any speech labeled "medical treatment" transforms speech into *conduct*. *NIFLA* rejected both maneuvers. Respondents' attempt to bless *Pickup*'s approach while denouncing *King*'s error is indefensible and wholly irreconcilable with *NIFLA*.

In short, the decision below exacerbates a direct and mature circuit split over the validity of Counseling Censorship Laws and also a broader circuit split over the line between speech and conduct in the professional setting. Rather than allow government officials to censor based on viewpoint and prohibit desired counseling conversations depending on a counselor's location, this Court should grant certiorari and resolve the divide.

B. The Ninth Circuit's cavalier treatment of history should be rejected.

Respondents all but concede that there's no historical precedent for censoring a counselor's speech based on viewpoint. Yet Washington "bears the burden of proving the constitutionality of its actions." *N.Y. State Rifle & Pistol Ass'n* v. *Bruen*, 142 S. Ct. 2111, 2130 (2022). And it failed to meet that burden.

Respondents instead continue to "equate[ ] a history of regulating medical *practices* with a history of regulating medical *speech*." Pet.25. Whatever history there is of regulating medical practices, "there is *no* tradition of regulating professional speech"—not even speech related to therapy. *Otto* v. *City of Boca Raton*, 41 F.4th 1271, 1274 (11th Cir. 2022) (*Otto II*) (Grant, J., concurring in the denial of rehearing en banc). Contra Intervenor.BIO.27 (suggesting Washington's Law has a historical pedigree because it "regulates the provision of therapy and nothing else").

Respondents use the Ninth Circuit's faulty history to conjure up an imaginary vehicle problem. Washington.BIO.33–34. But here, as with most constitutional questions, history is part and parcel of the First Amendment inquiry. Respondents also overlook that the question presented—which asks "[w]hether a law that censors conversations between counselors and clients as 'unprofessional conduct' violates the Free Speech Clause"—comfortably encompasses *both* the circuit split described above *and* the Ninth Circuit's egregious historical errors. There's no impediment to this Court addressing both those matters.

C. States can regulate professionals—they just can't censor them based on viewpoint.

The sky will not fall if the First Amendment prevents the states from regulating a professional's speech based on viewpoint. A victory for Tingley will not invalidate "Washington's entire licensing regime." Contra Intervenor.BIO.25. States' licensing regimes generally do not target speech directly, and they certainly do not silence particular viewpoints. Such schemes typically affect speech only incidentally, if at all. Again, licensing laws regulate *who* may speak, whereas Censorship Laws regulate *what* they may say. That makes all the constitutional difference.

Nor would states be powerless to deal with Respondents' farcical hypotheticals. Intervenor erroneously suggests that a ruling for Tingley means that professionals who use speech "cannot be regulated at all." Intervenor.BIO.27. Not so. Neither Tingley nor the Eleventh Circuit's decision in *Otto* challenge the states' historical authority to set general standards of care or enforce malpractice actions. *NIFLA*, 138 S. Ct. at 2373. Such actions regulate conduct; to the extent they affect speech, they do so only incidentally. *E.g.*, Timothy Zick, *Professional Rights Speech*, 47 Ariz. St. L.J. 1289, 1336–37 (2015) ("Malpractice laws generally require the trier of fact to assess a course of care").

This case does *not* implicate those historical powers. Malpractice actions will still hold accountable the dietician who advises a starvation diet or a psychiatrist who prescribes the wrong drug. Washington.BIO.20, 31. And the rare professional standard that regulates speech in a content- and

viewpoint-neutral manner is likely to survive First Amendment scrutiny.

By contrast, Counseling Censorship Laws do not "merely codify general standards of professional care"—they regulate speech "direct[ly]," in an "increasingly detailed[ ] and explicitly content-based" way that has the effect of "prescribing or proscribing *communications*." Zick, *supra*, at 1336–37. "Such regulations fit uncomfortably within a tradition of professional malpractice regulation." *Ibid.*

It is thus Washington, not Tingley, that takes an "extraordinary" position. Intervenor.BIO.27. To police professionals generally, Washington insists that it must proscribe entire viewpoints on a complicated and still-developing topic. That has never been necessary to hold professionals accountable. Affected individuals may pursue malpractice actions, and states may bring disciplinary actions against licensed professionals who contravene standards of care. "[T]he First Amendment … does not stand in the way of 'longstanding torts for professional malpractice' or other state-law penalties for bad acts that produce actual harm. People who actually hurt children can be held accountable, but broad prophylactic rules in the area of free expression are suspect." *Otto I*, 981 F.3d at 870 (cleaned up).

Finally, Respondents say that Tingley wants Washington to endorse his views. Intervenor.BIO.25. That's ridiculous. No reasonable person would think Washington endorses every "therapeutic" viewpoint a counselor holds. A professional license attests to the state's endorsements of a person's *qualifications*, like schooling and exams, not his *ideas*. Respondents' endorsement argument falls flat.

D. States cannot censor professionals based on a flawed, supposed "consensus."

Respondents suggest that this Court should deny certiorari because the "major medical" associations oppose Tingley's views. Washington.BIO.7. To start, that is "just another way of arguing that majority preference can justify a speech restriction." *Otto I*, 981 F.3d at 869. Yet the whole "point of the First Amendment is that majority preferences *must* be expressed in some fashion other than silencing speech" based on its content. *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 392 (1992) (emphasis added).

Respondents' argument also ignores the unreliability of so-called "major medical associations." Repeatedly, these organizations have put politics above science, Am.Coll.Pediatricians.Amicus.Br.16–26, resulting in many "about-face[s]"—most notably, the associations' initial stance that homosexuality is a "paraphilia, disorder, or disturbance," *Otto I*, 981 F.3d at 869. So "institutional positions cannot define the boundaries of constitutional rights." *Ibid.*

Respondents also get the science wrong. Almost every major study they cite examined aversive and long-discredited techniques like electroshock, nausea induction, and elastic bands—all practices Tingley denounces and has *never* used. There's an acknowledged "*lack* of rigorous research on nonaversive" counseling. *Otto I*, 981 F.3d at 868 & n. 7. Respondents' invocation of irrelevant studies using discredited techniques is fearmongering. The Court should not be cowed from protecting speech and striking down a viewpoint-based Censorship Law that bullies counselors and harms consenting minors who merely want to talk about their identity.

III. This Court should resolve the circuit split on free-exercise comparability and overturn *Smith*.

Washington's Law silences viewpoints it disagrees with, and those viewpoints, as Judge Bumatay noted, are "overwhelmingly—if not exclusively—religious." Pet.App.94a. (Bumatay, J., dissenting from the denial of rehearing). What should be a straightforward First Amendment violation gets disguised as a so-called "neutral" law because the State could, hypothetically, prevent a nonreligious person from obtaining or giving the counsel at issue here. For the reasons recounted in the petition, to allow such a law to stand misreads this Court's treatment of free exercise. Pet.30–32.

To the extent the Ninth Circuit correctly applied *Smith*, the time has come to overrule it. This Court should restore the Free Exercise Clause to its "original meaning and history." *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2428 (2022).

IV. This Court's immediate review is needed.

Sometimes percolation ends a circuit split naturally. Here, it will not. A debate many thought *NIFLA* "resolved" has now become a direct and mature circuit split that will not harmonize without this Court's intervention. Pet.App.82a (O'Scannlain, J., respecting the denial of rehearing). Only this Court's review can restore the uniform and clean rule that *NIFLA* sought to establish in the first place.

Recent developments underscore the danger. One state is now citing the decision below to argue that adoptive parents are "licensed professionals" who can't adopt children if they do not mouth the

government's orthodoxy on sex and gender issues. Oregon's MPI Response at 15–16, *Bates* v. *Pakseresht*, No. 2-23-cv-00474-AN (D. Or. June 1, 2023) (citing *Tingley*). That harms kids who need loving homes.

More directly, the decision below has devastating consequences for minors who need and desire the counseling that Tingley offers. Not only is there a critical lack of counselors available to provide such help, but more than 120 jurisdictions now bar counselors from even offering it. Pet.4 n.1. Every day the circuit split stands and Censorship Laws remain, struggling minors cannot get the help they desire and need. That is unconscionable and calls for immediate review, as the 11 supporting *amici* briefs attest. Certiorari should be granted.

Alternatively, the Court could summarily reverse the Ninth Circuit, given its manifest disregard of *NIFLA*. Or, at the very least, the Court could grant the petition, vacate the decision, and remand for reconsideration in light of *303 Creative*.

CONCLUSION

For the foregoing reasons, and those discussed in the petition for writ of certiorari, the petition should be granted.

Respectfully submitted,

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