NO. _____

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*

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

Brian Tingley is a licensed marriage and family counselor who helps clients with various issues, including sexuality and gender identity. A practicing Christian, Tingley grounds human identity in God's design rather than a person's feelings or wishes. Many of his clients agree and seek his counsel precisely *because* they want to align their identity with their faith. But Washington censors Tingley from speaking with clients in that way. Its Counseling Censorship Law prohibits any conversations that might encourage "change [of] an individual's sexual orientation or gender identity," while allowing conversations that "support … identity exploration" and "do not seek to change sexual orientation or gender identity." Wash. Rev. Code § 18.130.020(4).

The Ninth Circuit allowed the state to censor Tingley's conversations with clients, holding that the Law prohibits Tingley's *conduct*, not speech. In so doing, the court split with the Third and Eleventh Circuits, which do not treat counseling—i.e., mere talking—as conduct, and exacerbated a larger split over professional speech regulation. The court also rejected Tingley's free-exercise claim even though the Law's burden falls predominantly on those who seek and provide counseling for religious reasons. The questions presented are:

1. Whether a law that censors conversations between counselors and clients as "unprofessional conduct" violates the Free Speech Clause.

2. Whether a law that primarily burdens religious speech is neutral and generally applicable, and if so, whether the Court should overrule *Employment Division* v. *Smith*, 494 U.S. 872 (1990).

## PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Brian Tingley, an individual person.

Respondents are Robert W. Ferguson, in his official capacity as Attorney General for the State of Washington; Umair A. Shah, in his official capacity as Secretary of Health for the 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.

## LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit, Cross Appeal Nos. 21-35815 and 21-35856, *Tingley* v. *Ferguson*, opinion issued September 6, 2022, en banc review denied January 23, 2023. Mandate issued January 31, 2023.

U.S. District Court for the Western District of Washington, No. 3:21-cv-05359-RJB, Order entered August 30, 2021.

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The Ninth's Circuit opinion affirming the district court's order is reported at 47 F.4th 1055 (9th Cir. 2022) and reprinted at App.1a. The Ninth's Circuit order denying rehearing en banc is available at 57 F.4th 1072 (9th Cir. 2023) and reprinted at App.69a.

## STATEMENT OF JURISDICTION

The Ninth Circuit entered judgment on September 6, 2022, and denied rehearing en banc on January 23, 2023. Lower courts had jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1248. This Court has jurisdiction under 28 U.S.C. 1254(1).

## PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."

The Fourteenth Amendment to the United States Constitution provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Relevant portions of the Washington Code appear at App.119a–127a.

## INTRODUCTION

There are no legal consequences if Petitioner Brian Tingley tells his neighbor about the emerging international medical consensus to treat gender dysphoria with watchful waiting instead of affirmation. But if he discusses that same topic in the same way with a counseling client, the State of Washington can strip his license under Washington's Counseling Censorship Law, Wash. Rev. Code § 18.130.020(4)(a). That Law prohibits counselors from engaging in any "regime that seeks to change an individual's sexual orientation or gender identity," while exempting counseling that "support[s] … identity exploration" without "seek[ing] to change sexual orientation or gender identity." *Ibid.* The Law applies to counseling that consists entirely of spoken words—pure speech.

The Ninth Circuit said that such content- and viewpoint-based speech suppression is constitutional under *Pickup* v. *Brown*, 740 F.3d 1208 (9th Cir. 2014), which upheld an indistinguishable California censorship law. In the Ninth Circuit, counseling speech is not speech at all; it is professional *conduct* the government can freely regulate. But that view is indefensible after this Court criticized *Pickup* by name while holding that "[s]peech is not unprotected merely because it is uttered by 'professionals.'" *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 138 S. Ct. 2361, 2371–72, 2375 (2018) (*NIFLA*). It also places the Ninth Circuit in conflict with the Third and Eleventh Circuits, both of which have held that speech in a counseling context is still speech entitled to First Amendment protection. *King* v. *Governor of N.J.*, 767 F.3d 216, 228 (3d Cir. 2014) (upholding a counseling censorship law on different grounds), *abrogated in part by NIFLA*, 138 S. Ct. at 2371–72; *Otto* v. *City of*

*Boca Raton*, 981 F.3d 854, 867–68 (11th Cir. 2020) (*Otto I*) (striking down a counseling censorship law).

To justify snubbing *NIFLA*, the Ninth Circuit discovered a "previously unknown tradition of" regulating all speech connected to a "medical treatment." App.82a (O'Scannlain, J., respecting the denial of rehearing en banc). As Judge O'Scannlain explained, this so-called discovery both "radically underestimated" the "burden of proof" necessary to find a "new tradition of [speech] regulation" and "the narrowness with which any such tradition must be defined." App.82a. Under this theory, the government can regulate *any* speech that a bureaucrat labels "medical treatment." And the *actual* historical record shows the havoc government wreaks playing this "labeling game." *Pickup*, 740 F.3d at 1218 (O'Scannlain, J., dissenting from the denial of rehearing en banc); *NIFLA*, 138 S. Ct. at 2374.

Finally, the Ninth Circuit dismissed the reality that Tingley's client conversations are "often grounded in religious faith." App.92a (Bumatay, J., dissenting from the denial of rehearing en banc). Judge Bumatay noted that the Law primarily prohibits counseling from a "religious" viewpoint, sought almost "exclusively" by "individuals who have strong religious beliefs." App.94a, 143a. The Law's "real operation" is to ban a religiously motivated viewpoint from the counseling room—even when that shared viewpoint is precisely what the client wishes to hear. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 534–35 (1993). Alarmingly, the Ninth Circuit compared Tingley—a man of faith who cares deeply for his clients—to a counselor who chastises clients that they are "the abomination we had heard about in Sunday school." App.49a. This

shocking rebuke places the Ninth Circuit in conflict with this Court's free-exerise precedents.

The Court should not allow the circuit split to stand. Otherwise, counselors like Tingley—not to mention countless other professionals "who provide personalized services to clients" or "who are subject to a … licensing and regulatory regime"—will receive First Amendment protections in some states but not others. *NIFLA*, 138 S. Ct. at 2371 (cleaned up).[1] Constitutional rights should not depend on geographical happenstance. This dispute is ripe for this Court's review, especially given that the split over counseling censorship laws is a subset of the broader, mature circuit conflict over professional speech.

The Ninth Circuit's cramped view of the Constitution has devastating real-world consequences. In jurisdictions with counseling censorship laws, many young people cannot receive the care they seek and critically need. A growing number of young adults who transitioned away from a biologically aligned gender identity now desire to "detransition." An independent policy review commissioned by the English National Health Service noted the urgent and unmet need for mental health services to support these individuals. The Cass Review, *Independent Review of Gender Identity Services for Children and Young People*, at 49 (Feb. 2022). The Ninth Circuit's ruling leaves these individuals without the counseling they desperately want.

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[1] Twenty States and over 100 municipalities have enacted counseling censorship laws like Washington's. *Conversion "Therapy" Laws*, MOVEMENT ADVANCEMENT PROJECT, https://perma.cc/75TJ-RB4A (last visited Mar. 20, 2023).

To be clear, Brian Tingley seeks only to speak "in a manner consistent with [his] religious beliefs; [he] does not seek to impose those beliefs on anyone else." *Fulton* v. *City of Philadelphia*, 141 S. Ct. 1868, 1882 (2021). He works with clients only if they are "willing to work with him" and "participate[ ]" voluntarily; for his minor clients, both parent and client must consent. App.147a. And Tingley's clients seek his counsel voluntarily because they want the help his viewpoint provides. Yet the Law forbids him from speaking, treating his professional license as a license for government censorship.

This Court's review is urgently needed to reaffirm that the government cannot censor messages "under the guise" of regulating conduct. *NAACP* v. *Button*, 371 U.S. 415, 439 (1963). Nor can the government impose content- and viewpoint-based speech restrictions on a profession simply because there is a history of regulating that profession's conduct. The petition should be granted.

## STATEMENT OF THE CASE

For over 20 years, Brian Tingley has worked as a licensed marriage and family counselor. App.99a. His family-oriented private practice counsels clients of all ages on "many" topics, including "interpersonal and family conflict, communication issues, marital and post-divorce issues, individual identity challenges, emotional management including depression and anxiety, anger management." App.144a.

To provide counsel on these sensitive matters, Tingley must build a relationship of trust with each client. He wants to "provide a safe environment" that allows clients to freely "open[ ] up to discuss all kinds of sensitive issues." App.145a. His "first priority" is ensuring "trust with" his clients. *Ibid.* He invites clients to share "their stories, their fears, and their hopes." App.146a. He asks them questions, listens empathetically to their answers, and suggests how they can better understand their emotions, their relationships, and ultimately themselves. *Ibid.*

Once Tingley establishes that trust, he helps clients "identify their own objectives" so that he and the clients can "work together to accomplish" them. App.145a. With both minors and adults, Tingley works with clients only if they are "willing to work with him" and "participate[ ] voluntarily." App.147a.

Tingley understands his work as an outgrowth of his faith. As a Christian, Tingley wants to help his clients achieve "personal and relational growth as well as healing for the wounded spirit, soul, and body." App.100a. Tingley does not seek to impose his faith on anyone, but that faith informs how he sees human nature and healthy relationships. App.146a.

That includes sexuality. Tingley—like many people of many faiths—grounds human identity in God's design rather than a person's subjective emotions or attractions. App.161a–164a. Consistent with this, Tingley believes that the sex each person receives at conception is not an accident or error but rather a gift from God, integral to our very being.

Tingley also believes that sexual relationships should occur in a particular context—between one man and one woman mutually committed through marriage. App.9a. Any sexual relationship outside this context is inconsistent with God's design. App.161a.

Many clients share these viewpoints. Some are referred by local churches. App.135a. Others see that Tingley's website advertises his practice group as "Christian providers." These clients come to him precisely *because* he shares their faith-based convictions and worldview. App.145a. They want counsel that respects and is informed by that mutual worldview.

These clients bring a wide variety of issues, including struggles with gender identity or sexuality. Some want to become comfortable with their biological sex. Others want Tingley's help to direct their focus to opposite-sex relationships. Still others want freedom from what they see as harmful sexual behaviors, such as pornography use. These clients believe their lives will be more fulfilling if aligned with the teachings of their faith. Though Tingley never promises that he can solve these issues, he, like his Christian clients, believes that change is possible with God's help.

Faith and science are not in conflict on these issues. Most children who experience gender dysphoria grow comfortable with their biological sex if *not* affirmed in a transgender identity. Expert Decl. of Levine in Supp. of Pl.'s Mot. for Prelim. Inj. at 27–28, ECF No. 2-3; accord Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. OF CLINICAL ENDOCRINOLOGY & METABOLISM 3869, 3879 (2017). In 2023, Finland's "leading expert on pediatric gender medicine" summarized multiple studies and concluded that "four out of five children will grow out of their gender confusion." Christina Buttons, *Finland's Leading Gender Dysphoria Expert Says 4 Out of 5 Children Grow Out of Gender Confusion*, DAILY WIRE (Feb. 6, 2023).[2] Some studies conclude that up to 98% will. App.153a. Respected researchers Lisa Diamond and Clifford Rosky, who consider themselves advocates for LGBT issues, reviewed the scientific literature and concluded that "arguments based on the immutability of sexual orientation are unscientific, given that scientific research does not indicate that sexual orientation is uniformly biologically determined at birth or that patterns of same-sex and other-sex attractions remain fixed over the life course." App.163a–164a.

In Tingley's professional opinion, scientific knowledge is far from complete on matters of gender identity and sexual orientation, so professionals must have an uninhibited discussion of ideas and

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[2] https://perma.cc/G6NB-VEV8

therapies. Given the evolving science, an "affirm-only" approach endangers many clients.

Though the number of minors presenting with gender dysphoria has skyrocketed, a growing collection of European and U.S. health authorities are voicing warnings or cautions against affirming transgender identities in youths. *E.g.*, Fla. Dep't of Health, *Treatment of Gender Dysphoria for Children and Adolescents* (Apr. 20, 2022) (warning against affirmation due to "the lack of conclusive evidence" and "potential for long-term, irreversible effects");[3] Soc'y for Evidence Based Gender Medicine, *2022 Year End Summary* (Jan. 1, 2023) (summarizing developments in England, Sweden, Finland, France, Australia, and New Zealand);[4] NHS Foundation Trust, *Referrals to the Gender Identity Development Service (GIDS) Level Off in 2018–19* (June 28, 2019) ("[T]here is no single pathway for young people … and many elements need to be taken into account in decisions about which path may be best for them.").[5]

An interim report commissioned by the English National Health Service confirmed that many regret their gender transition and seek to "detransition"; it also noted an urgent and unmet "need for services" for those who desire to realign their gender identity with their biological sex. The Cass Review, *supra*, at 49. Tingley wants to meet this need and give his clients counsel that aligns with this science and their faith.

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[3] https://perma.cc/4K5M-7HVT.

[4] https://perma.cc/JLB7-MJA2.

[5] https://tavistockandportman.nhs.uk/about-us/news/stories/referrals-gender-identity-development-service-gids-level-2018-19/.

Advancing an opposite ideology, Washington declares it illegal for Tingley to provide such support. In March 2018, the State enacted SB 5722, which censors certain conversations a counselor may have with his clients under age 18— denouncing these talks as so-called "conversion therapy." Wash. Rev. Code § 8.130.180. The Counseling Censorship Law defines "conversion therapy" broadly to include any "regime that seeks to change an individual's sexual orientation or gender identity"—which specifically includes any effort to "change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex." *Id.* § 18.130.020. The prohibition applies even if the individual herself "seeks" that "change."

Notably, the Law exempts "counseling … that provide[s] acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development that do[es] not seek to change sexual orientation or gender identity." *Ibid.* So a counselor who encourages same-sex conduct or assists a young person to adopt a transgender identity is free to do so. But a counselor who discusses a client's desire *not* to pursue sexual relationships outside of marriage between one man and one woman, or to *align* the client's sense of identity and biological sex, faces steep penalties. Section 18.130.160 of the Law threatens fines up to $5,000 for each violation, possible suspension from practice, and revocation of the counselor's license. And Section 18.130.185 authorizes "any … person"—including ideological opponents with no connection to the counselor or Washington—to bring enforcement actions. Cf. *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 164 (2014).

Faced with these draconian penalties, Tingley's conversations with clients about gender, gender identity, gender expression, sexual orientation, and sexual behaviors have understandably become "more guarded and cautious," even though he has not stopped providing his clients with counsel to support the change they desire. App.16a. He lives in continuous fear of government persecution. *Ibid.* That fear is compounded by the hostile political climate—both nationally and in Washington State—where a single activist can maliciously target Tingley and accuse him of violating the Law, potentially costing Tingley his license and his livelihood.

Tingley sued to vindicate his constitutional rights, arguing that Washington's Counseling Censorship Law abridges his free-speech and free-exercise rights. He also moved for a preliminary injunction. The district court denied Tingley's motion and granted Washington's motion to dismiss.

The Ninth Circuit affirmed. Based on the discredited *Pickup* decision, which the court pronounced still valid after *NIFLA*, the court classified Tingley's conversations as conduct, not speech, and held that the Law satisfied the rational-basis test. App.36a. A panel majority also said that the Law fit comfortably within a "long (if heretofore unrecognized) tradition of regulating the practice of those who provide health care within state borders." App.41a. Judge Bennett did not join this statement, as it was "unnecessary" and violated "judicial restraint." App.67a (Bennett, J., concurring in part).

The Ninth Circuit denied rehearing en banc. Judge O'Scannlain, joined by Judges Ikuta, R. Nelson, and VanDyke, objected, faulting the panel for follow-

ing *Pickup* after this Court—"and other circuits"—"rejected *Pickup* by name." App.71a–72a (O'Scannlain, J., respecting the denial of rehearing en banc). He noted that, while *Pickup* and the panel saw "no distinction between treatments implemented through speech and those implemented through scalpel, the First Amendment recognizes the obvious difference, and protects therapeutic speech in a way it does not protect physical medical procedures." App.75a (cleaned up). Judge O'Scannlain also criticized the panel for confusing a history of regulating medical practices with one regulating medical speech, and for dismissing the "relevant" "constitutional tradition" "of protecting" religion. App.89a–90a.

Judge Bumatay dissented separately, agreeing that conversations between Tingley and his clients are speech. App.92a. He emphasized that the kind of counseling in which Tingley engages "is often grounded in religious faith." *Ibid.* "As a result, Tingley cannot discuss traditional Christian teachings on sexuality or gender identity with his minor clients, even if they seek that counseling." App.93a–94a. And while it "may be easier to dismiss this case under a deferential review to Washington's law," Judge Bumatay concluded, "the Constitution commands otherwise." App.95a.

## REASONS FOR GRANTING THE WRIT

A private conversation is speech, not conduct. And that does not change just because one participant is a licensed counselor and the other his client. Otherwise, government can alchemize almost any professional's speech into conduct that can be silenced—something the First Amendment forbids. Here, however, the Ninth Circuit upheld such blatant censorship.

The Ninth Circuit's analysis directly contradicts two circuits on this exact issue. Whereas the Ninth Circuit "oxymoronic[ally]" considers the conversations between Tingley and his clients as conduct, both the Third and Eleventh Circuits recognize them for what they are: speech. App.75a (O'Scannlain, J., respecting the denial of rehearing). So, counselors in the Ninth Circuit have less constitutional protection for their speech than those in the Third and Eleventh. The First Amendment should protect the speech of professionals, not empower government to police "the content of professional speech," and thereby "fail to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *NIFLA*, 138 S. Ct. at 2374–75 (cleaned up).

More broadly, the Ninth Circuit's decision deepens a substantial circuit split over how courts evaluate whether a law regulates a professional's speech or conduct. *NIFLA* rejected the "continuum" framework that *Pickup* created and "reoriented courts [back] toward the traditional taxonomy that draws the line between speech and conduct," even in the professional context. *Vizaline, LLC* v. *Tracy*, 949 F.3d 927, 933 (5th Cir. 2020) (cleaned up). By resuscitating *Pickup*'s continuum, the Ninth Circuit "perpetuated a circuit split that many had thought resolved." App.82a (O'Scannlain, J., respecting the denial of rehearing). This Court should grant certiorari and clarify that professionals do not lose their speech rights simply because they have a license.

The Ninth Circuit also took the extreme position that, as a historical matter, government can regulate speech based on content and viewpoint whenever it is connected to a "medical treatment." App.41a. This Nation's history has *never* allowed censoring speech

that happens to occur in a medical context; that has been the province of totalitarian governments. *NIFLA*, 138 S. Ct. at 2374. Yet this Court is again called on to correct the Ninth Circuit in this error.

Finally, this Court should grant review to clarify that laws whose burdens fall predominantly on religious speech or practices violate the Free Exercise Clause. That such laws might "treat[ ] some comparable secular" speech or practices "as poorly as or even less favorably than the religious exercise at issue" does not cure the constitutional problem. *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). And if, despite the Law's lopsided burden on people of faith, it is considered both neutral and generally applicable, the Court should overrule *Employment Division* v. *Smith,* 494 U.S. 872 (1990).

## I. The Ninth Circuit's decision created a circuit split over whether the First Amendment protects counseling conversations as speech.

In holding that government may censor professional speech wholesale, the Ninth Circuit created a circuit split on the constitutionality of counseling censorship laws. More broadly, by disregarding this Court's commands in *NIFLA* and *Holder* and resuscitating the discredited *Pickup* decision, the Ninth Circuit exacerbated a division among courts over how to determine if a law regulates speech or conduct in the professional setting. Absent correction, the Ninth Circuit's decision will continue to erode essential speech protections and embolden government bureaucrats to censor speech by labeling it mere "conduct."

### A. The Ninth Circuit authorizes government to censor counseling conversations by labeling them "conduct."

The Ninth Circuit held that Tingley's conversations with clients, though involving nothing but words, are conduct, not speech. In the Ninth Circuit, governments are free to censor one viewpoint in a debate "of profound value and concern to the public." *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018) (cleaned up).

This was not the first time the Ninth Circuit made this error. In its 2014 *Pickup* decision, the court considered California's counseling censorship law—"identical," "for all intents and purposes," to Washington's, App.36a—and held that it, too, regulated conduct, not speech. The court posited that "the First Amendment rights of professionals" exist on a "continuum," where "public dialogue" garners full protection, so-called "professional speech" earns diminished protection, and anything labeled "conduct" has none. 740 F.3d at 1226–28. Bans on counseling conversations are "conduct" because, to the *Pickup* panel, they are bans on "treatment." *Id.* at 1229.[6] That panel admitted these conversations "require speech," but said "the fact that speech may be used to carry out those therapies does not turn the regulation of conduct into a regulation of speech." *Ibid.*

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[6] Tingley's counseling consists of "a client-directed conversation consisting entirely of speech." *Otto* v. *City of Boca Raton*, 981 F.3d 854, 866 n.3 (11th Cir. 2020). A "sophomore psychology major" could converse with another student in a way that looks identical to Tingley's discussions with clients. *King* v. *Governor of N.J.*, 767 F.3d 216, 228 (3d Cir. 2014).

Despite this Court's direct criticism of that approach in *NIFLA*, discussed below, the panel here doubled down on *Pickup*'s logic. It suggested that *Pickup*'s continuum was still valid after *NIFLA*. And it held that, once the government labels Tingley's professional conversations "treatment," the government has free rein to regulate them, even though that so-called "treatment" consists entirely of ideas delivered "through speech." App.5a.

### B. The Third and Eleventh Circuits have held that nearly identical laws regulate speech, not conduct.

Two other circuits have considered nearly identical counseling censorship laws. Unlike the Ninth Circuit, they reached the commonsense conclusion that a law targeting certain words regulates speech.

Shortly after *Pickup*, the Third Circuit considered a New Jersey counseling censorship law and held it regulated speech. Without difficulty, the Third Circuit concluded that this Court's precedents foreclosed "the argument that verbal communications become 'conduct' when they are used to deliver professional services." *King*, 767 F.3d at 228. And it criticized *Pickup* as allowing bureaucrats to engage in a "labeling game" that was "unprincipled and susceptible to manipulation." *Ibid.* "Notably, the *Pickup* majority, in the course of establishing a 'continuum' of protection for professional speech, never explained exactly *how* a court was to determine whether a statute regulated 'speech' or 'conduct.'" *Ibid.* The Third Circuit reached the straightforward conclusion that "methods, practices, and procedures" do not "transmogrify [a professional's] words into 'conduct.'" *Ibid.*

The Third Circuit ultimately upheld New Jersey's counseling censorship law under intermediate scrutiny. *King*, 767 F.3d at 232. But as the panel here conceded, App.32a, *NIFLA* abrogated that part of *King*, 138 S. Ct. at 2371. And *King*'s holding—that a counselor's speech is speech and not conduct—remains intact and faithful to this Court's precedents.

Recently, the Eleventh Circuit—in a case the Ninth Circuit recognized "create[ed] a split with" *Pickup* and the decision here, App.35a—"rejected the practice of relabeling controversial speech as conduct." *Otto I*, 981 F.3d at 861; accord *Vazzo* v. *City of Tampa*, 2023 WL 1466603, at *1 (11th Cir. Feb. 2, 2023) (per curiam). The Eleventh Circuit considered a local counseling censorship law virtually identical to Washington's and held that it targeted not conduct but speech. Relying on circuit precedent and *NIFLA*, the Eleventh Circuit concluded that government cannot evade the First Amendment by saying that "speech is actually conduct." *Otto I*, 981 F.3d at 861.

The Eleventh Circuit also held that censorship laws like Washington's "are direct, not incidental, regulations of speech." *Id.* at 865. "What the governments call a medical procedure consists—entirely—of words." *Ibid.* (cleaned up). The counseling is "not just carried out *in part* through speech" but "*is entirely* speech." *Ibid.* (cleaned up). To conclude that words are conduct—or that laws censoring certain messages burden speech only incidentally—would allow the government to ban virtually any speech. It's like saying that "limitations on walking and running are merely incidental to ambulation." *Wollschlaegar* v. *Governor of Fla.*, 848 F.3d 1293, 1308 (11th Cir. 2017) (en banc) (striking down a law that banned doctors' conversations with patients about gun use).

After these conflicting decisions, a counselor's ability to provide advice consistent with his clients' desires and viewpoints depends entirely on where that counselor practices. In the Ninth Circuit, government can freely censor one viewpoint. In the Third and Eleventh, counselors may give advice consistent with their clients' desires. In other circuits, a counselor's speech rights depend unpredictably on which precedent will be followed.[7] It is imperative that this Court resolve this split in circuit authority.

### C. The Ninth Circuit exacerbated a deeper split over how courts differentiate speech from conduct in the professional context.

*NIFLA* "reoriented courts toward the traditional taxonomy that draws the line between speech and conduct," even in the professional context. *Vizaline,* 949 F.3d at 933 (cleaned up). Many courts have heeded that line. For instance, since *NIFLA*, some have correctly distinguished between regulations aimed at lawyers' communications, which "indisputably [target] speech," *Upsolve, Inc.* v. *James*, 604 F. Supp. 3d 97, 114 (S.D.N.Y. 2022), and regulations that "focus more broadly on the question of who may conduct themselves as a lawyer," which target conduct, *Cap. Associated Indus., Inc.* v. *Stein*, 922 F.3d 198, 208 (4th Cir. 2019).

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[7] A district court in the Tenth Circuit, relying on the decision below, held that an indistinguishable law in Colorado "regulates professional conduct." *Chiles* v. *Salazar*, 2022 WL 17770837, at *6–8 (D. Colo. Dec. 19, 2022). Conversely, in the context of online counseling, a district court in the D.C. Circuit followed *Otto* and held "counseling" "is speech, not conduct." *Brokamp* v. *District of Columbia*, 2022 WL 681205, at *1 (D.D.C. Mar. 7, 2022).

Other courts have held that laws that "prohibit[ ] unlicensed tour guides from leading visitors on paid tours" are not simply "restriction[s] on economic activity" but prohibitions on "an activity which, by its very nature, depends upon speech or expressive conduct." *Billups* v. *City of Charleston*, 961 F.3d 673, 683 (4th Cir. 2020). Similarly, courts have explained that a law prohibiting an employee from using information gathered at work to criticize an employer targets not the conduct of the employee's "disloyalty" but her speech; to say the statute targets conduct is mere "wordplay" that "plainly cannot transmute an unconstitutional statute into one of constitutional merit." *PETA* v. *N.C. Farm Bureau Fed'n, Inc.*, 60 F.4th 815, 828 (4th Cir. 2023). And courts have rightly held that a law prohibiting a retired veterinarian from giving advice to pet owners without first physically examining the pet targets "speech, and not conduct," because "all of [the veterinarian's] interactions with pet owners took the form of verbal and written communications." *Hines* v. *Quillivan*, 2021 WL 5833886, at *3 (S.D. Tex. Dec. 9. 2021).

To get there, courts have almost "uniformly rejected" *Pickup* and its First Amendment continuum. App.80a (O'Scannlain, J., respecting the denial of rehearing en banc). Even before *NIFLA*, courts expressed "serious doubts about whether *Pickup* was correctly decided." *Wollschlaegar*, 848 F.3d at 1309. To "characteriz[e] speech as conduct" was, the en banc Eleventh Circuit concluded, "a dubious constitutional enterprise"; it lacked a "principled doctrinal basis for distinguishing between utterances that are truly speech, on the one hand, and those that are, on the other hand, somehow treatment or conduct." *Ibid.* (cleaned up).

The other circuits' approach is consistent with *NIFLA*. There, this Court directed that government cannot use labels—whether "professional" or "conduct" or "treatment"—to "reduce … First Amendment rights." 138 S. Ct. at 2375. As the Sixth Circuit held, *NIFLA* "did *not* adopt any of the different rules applied in *Pickup*" and rejected the rule that speech is protected on a "sliding scale." *EMW Women's Surgical Ctr., PSC* v. *Beshear*, 920 F.3d 421, 436 (6th Cir. 2019) (cleaned up). Both the Fourth and Fifth Circuits have likewise held that this Court rejected *Pickup*'s attempt to define "different rules" for a professional's speech. *Vizaline*, 949 F.3d at 931–32; *Stein*, 922 F.3d at 207 (noting *Pickup*'s abrogation).

Indeed, before the decision below, even the *Ninth* Circuit recognized that *NIFLA* "abrogated" *Pickup*, and that *Pickup*'s distinction between speech and conduct was no longer valid. App.81a (O'Scannlain, J., respecting the denial of rehearing en banc) ("[M]any circuits *including our own* have noticed that *NIFLA* rejected *Pickup*.") (citing *Pac. Coast Horseshoeing Sch., Inc.* v. *Kirchmeyer*, 961 F.3d 1062, 1068–69 (9th Cir. 2020)); accord *Am. Beverage Ass'n* v. *City & Cnty. of S.F.*, 916 F.3d 749, 759 (9th Cir. 2019) (Ikuta, J., concurring in the judgment) ("*NIFLA* overruled our opinion in *Pickup*.").

The panel here acted contrary to all those authorities, sidestepping the need for an en banc rehearing to overrule *Pacific Coast Horseshoeing* and *American Beverage* by characterizing those cases as "confirm[ing] that *Pickup*'s treatment of regulations of professional conduct incidentally affecting speech survives *NIFLA*." App.33a. And the Ninth Circuit is not the only court trying to revive *Pickup*'s discredited continuum.

Indeed, multiple courts have used *Pickup*—and now its progeny, *Tingley*—to reach startling results. Relying on *Pickup*, two district courts have upheld similar counseling bans. *Doyle* v. *Hogan*, 411 F. Supp. 3d 337, 344 (D. Md. 2019) (holding that "verbal communications become conduct when they are used as a vehicle for mental health treatment" (cleaned up)), *vacated on other grounds*, 1 F.4th 249 (4th Cir. 2021); *Chiles* v. *Salazar*, 2022 WL 17770837, at *7 (D. Colo. Dec. 19, 2022) (holding that "speech made in professional contexts is not always pure speech"). Another court, evaluating a challenge to California's law making it "unprofessional conduct for a physician and surgeon to disseminate misinformation or disinformation related to COVID-19," found "*Pickup*'s analysis of the conduct/speech dichotomy on-point," and upheld the law against a free-speech challenge. *McDonald* v. *Lawson*, 2022 WL 18145254, at *2, 10 (C.D. Cal. Dec. 28, 2022).

Doubling down on *Pickup*, the panel here "perpetuated a circuit split that many had thought resolved." App.82a (O'Scannlain, J., respecting the denial of rehearing en banc); accord *Vazzo*, 2023 WL 1466603, at *1 (Rosenbaum, J., concurring in the judgment) (acknowledging the circuit split). Absent this Court's prompt correction, the continuum approach that *NIFLA* tried to bury will continue to "invite[ ] chaos in lower courts, le[a]d to differing results in materially identical cases, and create a minefield for legislators." Cf. *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2427 (2022) (cleaned up). This Court should inter *Pickup* for good.

### D. The Ninth Circuit's decision contradicts this Court's free-speech precedents.

The Ninth Circuit's First Amendment "continuum" eviscerates this Court's protection for professionals' free-speech rights. For nearly a century, this Court has drawn the line between speech and conduct based on what the government regulates. If a law regulates conduct that "was *in part* initiated, evidenced, or carried out by means of language," then the law might burden speech only incidentally. *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (emphasis added). But if the "only conduct which the State [seeks] to punish [is] the fact of communication," the statute regulates speech, not conduct. *Otto I*, 981 F.3d at 866 (quoting *Cohen* v. *California*, 403 U.S. 15, 18 (1971)). The State must demonstrate that its regulation targets some "separately identifiable conduct." *Cohen*, 403 U.S. at 18.

Even when a law "generally functions as a regulation of conduct," officials must point to "separately identifiable" conduct before even attempting to apply the law to speech. *Holder* v. *Humanitarian L. Project*, 561 U.S. 1, 28 (2010). In *Holder*, the challenged statute prohibited "material support" to certain organizations. *Id.* at 7. On its face, the prohibition targeted only conduct. But the plaintiffs wanted to provide certain organizations with "expert advice." *Id.* at 21–22. The government characterized that advice as conduct. But this Court rejected that word game: the only "conduct triggering coverage under the statute consist[ed] of communicating a message," and that was speech. *Id.* at 28.

Again, in *NIFLA*, the Court affirmed that this test applied in the professional context. "Speech is not unprotected merely because it is uttered by 'professionals.'" *NIFLA*, 138 S. Ct. at 2371–72. Governments do not have a freer hand to regulate speech simply because the one speaking is "licensed" or giving "specialized advice." *Id.* at 2374. This Court "stressed the danger of content-based regulations in the fields of medicine and public health, where information can save lives." *Ibid.* (cleaned up).

The Ninth Circuit thumbed its nose at *NIFLA*. The court said that Tingley's speech was conduct because Washington chose to relabel it "treatment." But "a State cannot foreclose the exercise of constitutional rights by mere labels." *Button*, 371 U.S. at 429; accord *Telescope Media Grp.* v. *Lucero*, 936 F.3d 740, 752 (8th Cir. 2019) ("Speech is not conduct just because the government says it is."). That was the lesson in *Holder*: speech did not become conduct just because the government called it "material support." 561 U.S. at 28. So too here. "Talk therapy [may be] … a form of treatment," but it "consists—entirely—of words." *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). Outside a narrow band of "historic and traditional categories long familiar to the bar," words are constitutionally protected speech. *United States* v. *Stevens*, 559 U.S. 460, 468 (2010) (cleaned up).

No one—not Washington, not the panel, not *Pickup*—has identified any "separately identifiable" conduct that Tingley and counselors like him engage in apart from their words. That means regulations like Washington's Counseling Censorship Law target speech, not conduct. Period.

### E. The Ninth Circuit created a shockingly ahistorical allowance for content-based speech restrictions.

The panel majority also erred by placing "regulations on healthcare practice" in the same unprotected First Amendment category as fraud, true threats, and obscenity. It separately justified Washington's Law as consistent with a "heretofore unrecognized" historical regulation of health-care practice. App.39a. Given this "tradition," the majority held that Washington could "impose restrictions on [Tingley's] speech based on the content of his words." App.45a. Setting aside the obvious tension between this alternative holding and the panel's first—how can Tingley's speech be both "conduct" *and* historically regulated speech?—this conclusion was dangerously wrong. App.67a (Bennett, J., concurring in part). It turns professional settings—law, medicine, psychotherapy, and counseling in particular—into First Amendment-free zones.

To start, this Court has consistently warned lower courts not to "exempt a category of speech from the normal prohibition on content-based restrictions." *NIFLA*, 138 S. Ct. at 2372 (cleaned up). This Court has demonstrated an "especial[ ] reluctan[ce]" to do so, not discovering a new category of unprotected speech in decades. *Ibid.*; *Brown* v. *Ent. Merchs. Ass'n*, 564 U.S. 786, 792 (2011) (no exception for depictions of violence); *Williams-Yulee* v. *Fla. Bar*, 575 U.S. 433, 446 (2015) (no exception for campaign finance). For the most part, lower courts have exhibited similar reluctance. *E.g.*, *IMDb.com Inc.* v. *Becerra*, 962 F.3d 1111, 1124 (9th Cir. 2020) (no exception for biographical information).

For good reason. A novel discovery of a claimed historical tradition requires "persuasive evidence." *Brown*, 564 U.S. at 792. That evidence must be "historically rooted in a tradition of regulation going back to the Founding." *Upsolve*, 604 F. Supp. 3d at 116; accord *NIFLA*, 138 S. Ct. at 2373; *N.Y. State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 142 S. Ct. 2111, 2130 (2022). That list has been "tightly limited in number" to "defamation, incitement, fraud, and obscenity," which all have extensive historical pedigrees. *Upsolve*, 604 F. Supp. 3d at 116.

But "there is *no* tradition of regulating professional speech"—not even speech related to medicine or therapy. *Otto II*, 41 F.4th at 1274 (Grant, J., concurring in the denial of rehearing en banc). At the Founding, "almost anyone could practice 'medicine,' and many did." Elliott A. Krause, DEATH OF THE GUILDS 30 (1996); accord S. David Young, THE RULE OF EXPERTS: OCCUPATIONAL LICENSING IN AMERICA 12 (1987) ("[B]y the mid-1800s the medical professional was open to almost anyone who chose to hang out a shingle."). Various medical "theories and approaches warred with one another" without government interference. Krause, *supra*, at 30. Only in the 1880–1920s—well *after* the First and Fourteenth Amendments were ratified—did the States consistently impose licensing laws.

Even then, there's *no* historical evidence that governments regulated speech related to these professions. The panel equated a history of regulating medical *practices* with a history of regulating medical *speech*. But "[t]raditional exceptions to First Amendment scrutiny aren't defined at such a high level of generality." App.85a (O'Scannlain, J., respecting the denial of rehearing en banc).

If a State could point to its police power as an analogy for speech regulation, Judge O'Scannlain explained, the State could evade First Amendment "scrutiny for signage regulations simply by pointing out that building regulation is within the police power." App.86a. To say that a State regulated medicine generally and so can regulate speech specifically is just another way of declaring that a statute that generally regulates conduct can specifically regulate speech. *Holder* rejected that exact approach. 561 U.S. at 28.

The panel's faulty historiography is of a piece to New York City's in *Bruen*. There, New York pointed to *some* historical regulations on firearms to argue it could ban *all* firearms. But New York needed to do more than point to some historical regulations; it bore the burden of providing "comparable" historical examples of regulations that burdened firearms as much as New York's challenged law. 142 S. Ct. at 2133. "[L]oose analogies" based on broad propositions were insufficient. App.84a (O'Scannlain, J., respecting the denial of rehearing en banc).

As in *Bruen*, the historical silence here is deafening. Though New York could point to three colonial regulations, that was not enough to show a long-standing tradition. Certainly, then, *zero* examples do not suffice here. 142 S. Ct. at 2142. There is *no* "historical evidence" that laws regulating medical practice allowed governments to censor pure speech. *Id.* at 2130 (cleaned up). Indeed, "the historical practices at the time of the ratification of the First and Fourteenth Amendment show that the rendering of personalized advice to specific clients was not one of the well-defined and narrowly limited classes of speech, the prevention and punishment of which has

never been thought to raise any constitutional problem." Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885, 957 (2000) (cleaned up).

The Ninth Circuit badly misread history "to make a loophole for this one category of speech bans." *Otto II*, 41 F.4th at 1274 (Grant, J., concurring in the denial of rehearing en banc). The panel ignored *NIFLA*'s warnings about the historical dangers of governments "manipulat[ing] the content of doctor-patient discourse." 138 S. Ct. at 2374. Our historical tradition does not sit comfortably among the likes of "the Soviet government" or "Nicolae Ceausescu's … Romania[ ]." *Ibid.* This Court should grant the petition and repudiate the Ninth Circuit's flawed view.

### F. The Ninth Circuit's decision will empower government bureaucrats to censor speech they disfavor.

Like a growing cancer on the First Amendment, the Ninth Circuit's "freewheeling" decision is spreading beyond the counseling context. *United States* v. *Alvarez*, 567 U.S. 709, 722 (2012). States across the country target speech "under the guise" of regulating "professional conduct." *Button*, 371 U.S. at 438–39.

As noted, California recently prohibited as "unprofessional conduct" any "false or misleading information" or "disinformation related to COVID-19." *Høeg* v. *Newsome*, 2023 WL 414258, at *1 (E.D. Cal. Jan. 25, 2023) (quoting Cal. Bus. & Prof. Code § 2270). In this "medical censorship," the State decides what constitutes "misinformation," then suppresses that speech by calling it conduct and

threatening the licenses and livelihoods of physicians who advocate disfavored interpretations of data. Editorial Bd., *California Loses on Medical Censorship*, WALL ST. J. (Jan. 30, 2023). Defending its censorship, California relies on *Pickup* and *Tingley* for the extraordinary proposition that what a doctor tells patients is "care," not speech. Br. for Kristina D. Lawson at 27, *McDonald* v. *Lawson*, Nos. 22-56220, 23-55069 (9th Cir. Mar. 2, 2023), 2023 WL 2465197. Similarly, New York recently defined a category of illegal "hateful conduct" to include "the use of a social media network to vilify, humiliate, or incite violence"—what one court held was not conduct but "speech." *Volokh* v. *James*, 2023 WL 1991435, at *2, 7 (S.D.N.Y. Feb. 14, 2023) (quoting N.Y. Gen. Bus. Law § 394-ccc(1)(a)). And Missouri attempted to prohibit pharmacists from expressing certain views about the efficacy of possible COVID medications. *Stock* v. *Gray*, 2023 WL 2601218 (W.D. Mo. Mar. 22, 2023).

Though these laws target speech, the Ninth Circuit's logic would uphold them as regulating conduct, subjecting "wide swaths of protected speech" "to regulation by the government." *Telescope Media*, 936 F.3d at 752. If a counselor's speech can be transformed into conduct, so too can a doctor's speech about the best COVID treatments or a social media blogpost about a controversial political issue—or even "teaching or protesting," "[d]ebating," or "[b]ook clubs." *Otto I*, 981 F.3d at 865.

The Ninth Circuit swept aside these concerns as "minimiz[ing] the rigorous training, certification, and post-secondary education that licensed mental health providers endure to be able to treat other humans for compensation." App.47a. But it is nonsensical to say that because a professional has *more* education, his

speech within that educational area is *less* protected. "Speech is speech, and it must be analyzed as such for purposes of the First Amendment." *Wollschlaegar*, 848 F.3d at 1307 (cleaned up). To treat speech as conduct based on training and licensing does exactly what this Court forbade in *NIFLA*: giving the "States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." 138 S. Ct. at 2375.

The merits of Tingley's speech-based counseling rests not with a court or legislature but with his clients and the "uninhibited marketplace of ideas." *NIFLA*, 138 S. Ct. at 2374. Some government officials dislike those ideas, but it is in cases like this one that "we must be *most* vigilant in adhering to constitutional principles." App.95a (Bumatay, J., dissenting from the denial of rehearing en banc) (emphasis added). The "government cannot limit speech 'simply because society finds the idea itself offensive or disagreeable.'" *Ibid.* (quoting *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989)).

This Court has been clear: the First Amendment is not an impotent Maginot Line, easily evaded by regulating speech "under the guise" of regulating conduct. *Button*, 371 U.S. at 439. And though "[t]he speech/conduct line is hard to draw," it is not new—nor even hard to discern here. Elena Kagan, *Regulation of Hate Speech and Pornography After* R.A.V., 60 U. CHI. L. REV. 873, 884 (1993). The Ninth Circuit's failure to grapple with this distinction runs headlong into this Court's precedents and multiple circuits' decisions. Certiorari is warranted.

## II. The Ninth Circuit's decision substantially narrows *Lukumi*, gutting free-exercise claims against laws that target religion.

The Ninth Circuit's decision also ignored that Washington's Counseling Censorship Law targets "overwhelmingly—if not exclusively—religious" speech. App.94a (Bumatay, J., dissenting from the denial of rehearing). In doing so, the Ninth Circuit neutered both this Court's decision in *Lukumi* and the Free Exercise Clause's protections for people like Tingley and his clients. If the Ninth Circuit correctly interpreted *Employment Division* v. *Smith* to allow government to target religion as Washington's Law does, this Court should overrule *Smith*.

### A. The Ninth Circuit ignored the Counseling Censorship Law's target and real-world operation.

When Washington enacted its Counseling Censorship Law, it was well known that the counseling viewpoint the State censored is primarily *sought* "for religious reasons" and *provided* by those who believe in "Christian faith-based methods." App.57a. Researchers Diamond and Rosky noted that "the majority of individuals seeking" this counseling do so "for religious reasons." App.144a. The American Psychological Association reported that "*most* [counseling of this nature] currently seem[s] directed to those holding conservative religious … beliefs, and recent research … includes *almost exclusively* individuals who have strong religious beliefs." App.143a (emphasis added). The American Counseling Association flatly asserted that such counseling "is a religious … practice." App.142a.

The Ninth Circuit closed its eyes to this reality. Washington's law rains on the religious and the nonreligious alike, the court reasoned, and that was enough to defeat Tingley's free-exercise claim. But that is not how this Court has analyzed the First Amendment, which vigorously protects religious speech. *Kennedy*, 142 S. Ct. at 2421 (noting that the First Amendment "doubly protects religious speech"). The Free Speech and Free Exercise "Clauses work in tandem" to "provide[ ] overlapping protection." *Ibid.*

That is "no accident." *Ibid.* "In Anglo-American history, government suppression of speech has so commonly been directed *precisely* at religious speech." *Ibid.* (cleaned up). Free speech has its intellectual origins in free *religious* speech. Given the English government's centuries-long wrangling over religious opinions, the Framers had a natural "distrust of government attempts to regulate religion and suppress dissent." *Ibid.* (citing A Memorial and Remonstrance Against Religious Assessments, *in* SELECTED WRITINGS OF JAMES MADISON 21, 25 (R. Ketcham ed. 2006)). They enshrined this distrust in the First Amendment. Akhil Reed Amar, *How America's Constitution Affirmed Freedom of Speech Even Before the First Amendment*, 38 CAP. U. L. REV. 503, 506 (2010) (quoting 4 Annals of Cong. 934 (1794)).

These protections apply just as much to professionals like Tingley as to anyone. The Constitution protects "the right to harbor religious beliefs inwardly and secretly" *and* "the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life." *Kennedy*, 142 S. Ct. at 2421. Tingley does not surrender his free-exercise rights through his license—or through government disdain for his views.

Given the "special solicitude" the First Amendment gives religious speech, App.91a., this Court instructs lower courts to zealously guard against even "subtle departures from neutrality," *Lukumi*, 508 U.S. at 534. Courts must examine a law's "real operation" and discern its true "object." *Id.* at 535. Here, it is fatal that the Counseling Censorship Law is designed to silence people of faith and their religious beliefs about human sexuality. Laws that burden religious exercise and are the result of "'official expressions of hostility' to religion" must be "'set aside,'" "without further inquiry." *Kennedy*, 142 S. Ct. at 2422 n.1 (quoting *Masterpiece Cakeshop, Ltd.* v. *Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1732 (2018)).

That the Law *could* prohibit counseling sought for secular reasons does not cure its lack of neutrality. As *Lukumi* held, a law can implicate "multiple concerns unrelated to religious animosity" and still violate neutrality. 508 U.S. at 535. A law does not pass constitutional muster merely by treating "some comparable secular" speech "as poorly as or even less favorably than the religious exercise at issue." *Tandon*, 141 S. Ct. at 1296. No matter a law's impact on secular activity, courts must assess if its "adverse impact" on religious exercise is an incidental flaw or a targeted design. *Lukumi*, 508 U.S. at 535. Ignoring this principle, the Ninth Circuit effectively neutered *Lukumi*.

This Court has consistently protected "religious and philosophical objections to matters of sexuality and gender identity." App.94a. It should grant certiorari and do so again here.

### B. The decision below shows that this Court should overrule *Smith*.

The decision below puts *Smith*'s limitations on full display. To begin, courts like the Ninth Circuit interpret *Smith* to allow regulations that, like Washington's Law, "outlaw[ ]" the disfavored speech "for all." App.57a. That's true even if the speech "is often grounded in religious faith"—to the point that nearly everyone recognizes it as "overwhelmingly—if not exclusively—religious." App.92a, 94a. (Bumatay, J., dissenting from the denial of rehearing en banc). That's like saying a law that prohibits steeples on buildings is "neutral" because it applies against the religious and nonreligious alike. *Fulton*, 141 S. Ct. at 1884 (Alito, J., concurring in the judgment) (the Volstead Act "would have been consistent with *Smith* even though it would have prevented the celebration of a Catholic Mass anywhere in the United States"). "[N]o matter how severely [such laws] burden[ ] religious exercise," *id.* at 1882 (Barrett, J., concurring), if they "make[ ] no reference to religion" on their face, App.53a., the Ninth Circuit will uphold them as "neutral" under *Smith*.

"General applicability" suffers from similar flaws. For the same reasons the Ninth Circuit held the Counseling Censorship Law neutral, it held the Law generally applicable: the Law supposedly applies "evenhandedly" and prevents a hypothetical counselor from providing counseling for "secular reasons." App.57a. No matter that neither Washington nor the Ninth Circuit has pointed to any "real" world examples of that. *Lukumi*, 508 U.S. at 535.

This Court's attempts to constrain *Smith* should have prevented the outcome here: *Tandon* held that laws cannot treat "comparable secular activity more favorably than religious exercise," 141 S. Ct. at 1296. But the Ninth Circuit found this an easy hurdle to clear. It "play[ed] with the level of generality" to say Tingley's religious speech isn't comparable to so-called "gender-affirming therapy." Cf. *Masterpiece Cakeshop*, 138 S. Ct. at 1738 (Gorsuch, J., concurring). The harms from that therapy, the Ninth Circuit said, derive solely from "anecdotal reports," while the alleged harms from Tingley's speech are supposedly "scientifically documented." App.60a. But Tingley proved the harms from Washington's preferred therapy through scientific studies, not anecdotal reports, and further studies have continued to vindicate his claims. That a court can ignore Tingley's evidence as "noncomparable" by labeling it "anecdotal"—while citing a *New York Times* op-ed as "scientific evidence," App.49a n.3—vividly illustrates that *Smith* is not a viable construction of the Free Exercise Clause or a sufficient protection against government coercion.

Though constitutional interpretation looks to "original meaning and history," *Kennedy*, 142 S. Ct. at 2428, *Smith* did not reconcile its holding with either. *Fulton*, 141 S. Ct. at 1888 (Alito, J., concurring in the judgment) (*Smith*'s "interpretation has been undermined by subsequent scholarship on the original meaning of the Free Exercise Clause"). Instead, *Smith* relied on policy concerns to reach what the Court considered a "permissible" construction, 494 U.S. at 878, 888: that the Free Exercise Clause "offers nothing more than protection from discrimination," *Fulton*, 141 S. Ct. at 1882 (Barrett, J., concurring).

*Smith* "drastically cut back on the protection provided by the Free Exercise Clause." *Kennedy* v. *Bremerton Sch. Dist.*, 139 S. Ct. 634, 637 (2019) (Alito, J., statement respecting denial of certiorari).

In recent years, this Court laudably has done much to realign constitutional interpretation with text and history. *Bruen*, 142 S. Ct. at 2129–31 (Second Amendment); *Dobbs* v. *Jackson Women's Health Org.*, 142 S. Ct. 2228, 2246–47 (2022) (Due Process Clause); *Kennedy*, 142 S. Ct. at 2427–28 (Establishment Clause). In the free-exercise context, the best historical evidence establishes that government cannot interfere with religious exercise absent historical analogue. See Douglas Laycock, *Religious Liberty as Liberty*, 7 J. CONTEMP. LEGAL ISSUES 313, 337 (1996). Because there is no historical analogue of censoring religious counseling, this Court should use this case to overrule *Smith* and restore a historically based standard that genuinely protects religious exercise.

## III. This case is an ideal vehicle to resolve circuit conflicts and provide critical clarity on First Amendment freedoms.

This case presents a focused and compelling vehicle for the Court to clarify First Amendment freedoms in the professional context.

First, there is an acknowledged circuit split on whether States can constitutionally ban disfavored viewpoints from the counseling room. The Third and Eleventh Circuits treat these laws as targeting speech, and the Eleventh has held that the First Amendment prohibits such censorship. The Ninth Circuit takes the opposite view, holding that counseling censorship laws lawfully target only conduct.

In doing so, the Ninth Circuit resurrected a circuit split once thought settled. In *NIFLA*, this Court criticized *Pickup* by name and reoriented lower courts away from its First Amendment "continuum" and back toward *Holder*'s speech/conduct divide. The Ninth Circuit flouted that instruction, and some lower courts have followed its lead in reviving the erroneous and dangerous continuum. Some States are now taking advantage and trying to sweep speech they dislike under the "conduct" rug. This Court should settle that debate conclusively.

Moreover, the Ninth Circuit's decision creates a twilight zone in many professional settings where the First Amendment does not apply. Provided government bureaucrats use the right label, the Ninth Circuit and courts that follow it allow officials to regulate professional speech with impunity based on content and viewpoint. This goes against the overwhelming weight of history and deserves this Court's immediate correction.

Finally, the impact of counseling censorship laws like Washington's fall predominantly on counselors and clients of faith. That reality should weigh heavily in the analysis of a free-exercise claim. That it did not here signals the urgent need for this Court to consider Tingley's free-exercise rights and outlaw the severe burden on religious exercise that Washington's Law imposes.

Further percolation will not help. The lines have been clearly drawn between freedom of speech and censorship, between *NIFLA* and *Pickup*. Only this Court can resolve the competing decisions and protect Tingley's First Amendment freedoms. Certiorari is warranted.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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MARCH 2023

# APPENDIX

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**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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| BRIAN TINGLEY,<br>*Plaintiff-Appellant*,<br>v.<br>ROBERT W. FERGUSON, in his official capacity as Attorney General for the State of Washington; UMAIR A. SHAH, in his official capacity as Secretary of Health for the State of Washington; KRISTIN PETERSON, in her official capacity as Assistant Secretary of the Health Systems Quality Assurance division of the Washington State Department of Health,<br>*Defendants-Appellees*,<br>EQUAL RIGHTS WASHINGTON,<br>*Intervenor-Defendant-Appellee*. | No. 21-35815<br>D.C. No. 3:21-cv-05359-RJB |
| BRIAN TINGLEY,<br>*Plaintiff-Appellee*,<br>v.<br>ROBERT W. FERGUSON, in his official capacity as Attorney | No. 21-35856<br>D.C. No. 3:21-cv-05359-RJB |

General for the State of Washington; UMAIR A. SHAH, in his official capacity as Secretary of Health for the State of Washington; KRISTIN PETERSON, in her official capacity as Assistant Secretary of the Health Systems Quality Assurance division of the Washington State Department of Health,

*Defendants-Appellants*,

and

EQUAL RIGHTS WASHINGTON,

*Intervenor-Defendant*.

OPINION

Appeal from the United States District Court
for the Western District of Washington
Robert J. Bryan, District Judge, Presiding

Argued and Submitted May 17, 2022
Seattle, Washington

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Before: Kim McLane Wardlaw, Ronald M. Gould, and Mark J. Bennett, Circuit Judges.

Opinion by Judge Gould;
Concurrence by Judge Bennett

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**OPINION**

GOULD, Circuit Judge:

This appeal requires us to decide, again, whether a state may prohibit health care providers operating under a state license from practicing conversion therapy on children. Twenty states and the District of Columbia have laws prohibiting or restricting the practice of conversion therapy, which seeks to change an individual's sexual orientation or gender identity. This appeal concerns Washington's law that subjects licensed health care providers to discipline if they practice conversion therapy on patients under 18 years of age.

In 2014, we upheld a substantially similar law enacted by California that subjects its state-licensed mental health providers to discipline for practicing conversion therapy on minor clients. *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). Finding itself bound by *Pickup*, the district court in this case dismissed Plaintiff Brian Tingley's challenge to Washington's nearly identical law.

We affirm. Washington's licensing scheme for health care providers, which disciplines them for practicing conversion therapy on minors, does not violate the First or Fourteenth Amendments. States do not lose the power to regulate the safety of medical treatments performed under the authority of a state license merely because those treatments are implemented through speech rather than through scalpel.

## BACKGROUND

### I

Conversion therapy encompasses therapeutic practices and psychological interventions that seek to change a person's sexual orientation or gender

identity. The goal is to change an individual's sexual orientation from gay to heterosexual or to change an individual's gender identity from transgender to cisgender. Within the field of psychology, conversion therapy is also known as "reparative therapy" or "sexual orientation and gender identity change efforts" ("SOGICE").[1] Conversion therapy developed in the mid-nineteenth century to "cure" patients of homosexual desires and gender-nonconforming behaviors, which were viewed at that time as mental illnesses. Such views, once held by professional organizations in the psychology and psychiatric fields, have evolved with time and research.

The American Psychological Association ("APA") removed homosexuality from the Diagnostic and Statistical Manual of Mental Disorders in 1973, and it now views gender nonconforming behaviors as "gender dysphoria," rather than as a "gender identity disorder." The APA has twice conducted a systematic review of the research on conversion therapy and adopted a resolution that conversion therapy "puts individuals at a significant risk of harm" and is not effective in changing a person's gender identity or sexual orientation. The APA opposes conversion therapy "in any stage of the education of psychologists" and instead "encourages psychologists to use an affirming, multicultural, and evidence-based approach" that includes "acceptance, support, . . . and identity exploration and development, within a culturally competent framework." As of 2015, every major medical, psychiatric, psychological, and

[1] Because the text of the Washington law uses "conversion therapy," that is the term we use in this opinion.

professional mental health organization opposes the use of conversion therapy.

**II**

Washington requires health care providers to be licensed before they may practice in Washington. *See* Wash. Rev. Code § 18.122.030(2). Title 18 of the Revised Code of Washington regulates business and professions, and Chapter 130 of Title 18, Washington's "Uniform Disciplinary Act,"[2] lists actions that are considered "unprofessional conduct" for licensed health care providers and subjects them to disciplinary action. *Id.* §§ 18.130.180, 18.130.160. Therapists, counselors, and social workers who "work under the auspices of a religious denomination, church, or religious organization" are exempted from the Chapter's requirements. *Id.* § 18.225.030(4).

Washington enacted Senate Bill 5722 ("SB 5722") in 2018, which added "[p]erforming conversion therapy on a patient under age eighteen" to the list of unprofessional conduct in the Uniform Disciplinary Act for licensed health care providers. S.B. 5722, 65th Leg., Reg. Sess. (Wash. 2018), codified at Wash. Rev. Code §§ 18.130.020(4) and 18.130.180(27). SB 5722 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

[2] The Uniform Disciplinary Act "governs unlicensed practice, the issuance and denial of licensure, and the discipline of persons licensed under this chapter." Wash. Rev. Code § 18.225.080.

> gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex. The term includes, 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)(a)–(b). The legislature expressly specified that SB 5722 may not be applied to (1) speech by licensed health care providers that "does not constitute performing conversion therapy," (2) "[r]eligious 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," and (3) "[n]onlicensed counselors acting under the auspices of a religious denomination, church, or organization." 2018 Wash. Sess. Laws, ch. 300, § 2.

The legislature's asserted intent in enacting SB 5722 was to regulate "the professional conduct of licensed health care providers." *Id.* § 1(1). It found that it had "a compelling interest in protecting the physical and psychological wellbeing of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by conversion therapy." *Id.* §

1(2). Health Impact Review of SB 5722, a report from the Washington State Board of Health, accompanied SB 5722 and was presented to the Legislature. Reviewing the available research on conversion therapy, the report found that "conversion therapy is associated with negative health outcomes such as depression, self-stigma, cognitive and emotional dissonance, emotional distress, and negative self-image."

Washington's law does not prevent health care providers from communicating with the public about conversion therapy; expressing their personal views to patients (including minors) about conversion therapy, sexual orientation, or gender identity; practicing conversion therapy on patients over 18 years old; or referring minors seeking conversion therapy to counselors practicing "under the auspices of a religious organization" or health providers in other states.

## III

Tingley has worked as a licensed marriage and family therapist for more than twenty years. Although he does not work "under the auspices of a religious denomination," Wash. Rev. Code § 18.225.030(4), his Christian views inform his work. Tingley believes that the sex each person is assigned at birth is "a gift of God" that should not be changed and trumps an individual's "feelings, determinations, or wishes." He also believes that "sexual relationships are beautiful and healthy" but only if they occur "between one man and one woman committed to each other through marriage." Tingley claims that many of his clients share his religious viewpoints and come to

him specifically because he holds himself out as a "Christian provider[ ]."

Tingley sued state officials ("Washington") in May 2021, seeking to enjoin SB 5722. He alleged that Washington's ban on practicing conversion therapy on minors 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. Equal Rights Washington ("ERW"), the lead organization supporting SB 5722's passage, intervened as a defendant. Tingley sought a preliminary injunction, which Washington and ERW both opposed, and the defendants filed motions to dismiss his complaint.

The district court granted Washington's motion to dismiss. The district court first held that Tingley had standing to bring claims in his individual capacity but that he lacked standing to bring claims on behalf of his minor clients. As to the merits, the district court recognized that Washington's motion to dismiss hinged squarely upon whether our decision in *Pickup v. Brown* remained good law. Concluding that *Pickup* remained controlling, the district court applied *Pickup* to reject Tingley's constitutional claims.

Tingley appealed, and Washington and ERW cross-appealed, contending that the district court erred in holding that Tingley had standing. We have jurisdiction under 28 U.S.C. § 1291 and affirm the district court's dismissal of Tingley's complaint.

## STANDARD OF REVIEW

We review *de novo* questions of standing and ripeness. *Cal. Pro-Life Council, Inc. v. Getman*, 328

F.3d 1088, 1093 (9th Cir. 2003). We also review *de novo* the district court's dismissal for failure to state a claim, crediting all factual allegations in the complaint as true and construing the pleadings in the light most favorable to Tingley, the nonmoving party. *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029–30 (9th Cir. 2009). Dismissal is proper "if there is a 'lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory.'" *Conservation Force v. Salazar*, 646 F.3d 1240, 1242 (9th Cir. 2011) (citation omitted).

We review for abuse of discretion a district court's decision to deny a preliminary injunction. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012).

## DISCUSSION

### I

Tingley has standing to bring his claims in an individual capacity but does not have standing to bring claims on behalf of his minor clients. Because Article III limits our jurisdiction to cases and controversies, the "irreducible constitutional minimum of standing" requires a plaintiff to have suffered an injury in fact, caused by the defendant's conduct, that can be redressed by a favorable result. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560–61 (1992). At the motion to dismiss stage, "general factual allegations of injury" suffice to meet the plaintiff's burden. *Id.* at 561. Where, as here, the plaintiff alleges a future injury, the threatened injury must be "certainly impending" or there must be a "substantial risk" of the harm occurring. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014) (citation omitted).

**A**

Washington contends that the district court improperly relaxed the standing inquiry because Tingley brought First Amendment claims. But the district court did not err on standing. The "unique standing considerations" in the First Amendment context "tilt dramatically toward a finding of standing" when a plaintiff brings a pre-enforcement challenge. *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010) (cleaned up). "[T]he Supreme Court has dispensed with rigid standing requirements" for First Amendment protected speech claims and has instead endorsed a "hold your tongue and challenge now" approach. *Cal. Pro-Life Council*, 328 F.3d at 1094 (citation omitted). We have held that "a chilling of the exercise of First Amendment rights is, itself, a constitutionally sufficient injury." *Libertarian Party of Los Angeles Cnty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013). Washington argues that the district court erred in applying a relaxed standing analysis "to First Amendment claims given its correct conclusion that the First Amendment *does not apply* to Tingley's claims" and that under our precedent, "there is no viable argument that such conduct is protected by the First Amendment." Tingley's standing to bring First Amendment claims, however, "in no way depends on the merits" of those claims. *See Arizona v. Yellen*, 34 F.4th 841, 849 (9th Cir. 2022) (quoting *Warth v. Seldin*, 422 U.S. 490, 500 (1975)). The district court followed the law as declared by the Supreme Court and did not improperly relax the standing inquiry.

Washington also contends that Tingley does not have standing to bring a facial challenge to the constitutionality of a law not yet enforced against

him. A "recurring issue" for federal courts is determining when the threat of enforcement creates a sufficient injury for a party to have standing to bring a pre-enforcement challenge to a law. *Driehaus*, 573 U.S. at 158. *Driehaus* set the general standard for pre-enforcement standing: a plaintiff must allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Id.* at 159 (quoting *Babbitt v. Farm Workers*, 442 U.S. 289, 298 (1979)).

We rely on a three-factor inquiry to help determine whether a threat of enforcement is genuine enough to confer an Article III injury. We consider (1) whether the plaintiff has a "concrete plan" to violate the law, (2) whether the enforcement authorities have "communicated a specific warning or threat to initiate proceedings," and (3) whether there is a "history of past prosecution or enforcement." *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc). "Neither the mere existence of a proscriptive statute nor a generalized threat of prosecution" satisfies this test. *Id.*

**1**

The first factor is satisfied by Tingley's complaint. It specifically alleged Tingley's past work with clients and expectations for future work with clients that show a plan or desire to violate Washington's law. Tingley claims that he has worked with several minors in recent years who have "sought his help in reducing same-sex attractions," and others "who have expressed discomfort with their biological sex." He details a few examples. In one instance, "parents

brought to [Tingley's] clinic their teenage minor daughter who had . . . begun expressing unhappiness with her female gender identity, and . . . asserting a male gender identity." The parents sought a counselor who would "hopefully enable her to return to comfort with her female body." The client, after a few sessions with Tingley, "expressed a desire to become more comfortable with her biological sex," and Tingley "worked with her toward that goal."

In another example, Tingley described working with a teen who sought his help with "unwanted same-sex attractions" and "attraction to pornography." Tingley "supports this client as he works toward the change he desires to see in his own life." Given Tingley's "visible identity as a licensed counselor who is a Christian," Tingley expects that "parents and minors will continue to come to him for counseling with a goal of" helping children "return to comfort with a gender identity aligned with [their] biological sex" or lessen same-sex attractions. Tingley "currently works with and will continue to work with clients to these ends."

Relying upon our language in *Thomas*, Washington asserts that Tingley has failed to specify "when, to whom, where, or under what circumstances" he plans to violate the law. 220 F.3d at 1139. But we do not require plaintiffs to specify "when, to whom, where, or under what circumstances" they plan to violate the law when they have already violated the law in the past. *See*, *e.g.*, *Oklevueha Native Am. Church of Haw., Inc. v. Holder*, 676 F.3d 829, 836 (9th Cir. 2012) (explaining that "plaintiffs had more than a concrete plan to violate the laws at issue because they actually did violate them on a

number of occasions") (internal quotation marks and citations omitted). In *Stormans, Inc. v. Selecky*, 586 F.3d 1109 (9th Cir. 2009), we determined that pharmacists challenging state rules requiring them to sell Plan B emergency contraceptives could not "control when a patient requesting Plan B will visit their pharmacy" but nevertheless satisfied Article III's requirements because they "can point to specific past instances when they have refused to sell Plan B" as "direct violations of the challenged rules." *Id.* at 1123. Similarly, Tingley cannot control when clients will come to him for help changing their sexual orientation or gender identity, but his complaint describes "specific past instances" of working with minors in a way that would violate the law.

**2**

The second prong of the *Thomas* inquiry into the credibility of the threat of enforcement is whether the authorities in charge of enforcing the challenged law "have communicated a specific warning or threat to initiate proceedings." 220 F.3d at 1139. Washington has not issued a warning or threat of enforcement to Tingley. We have, however, interpreted the government's failure to *disavow* enforcement of the law as weighing in favor of standing. *See*, *e.g.*, *Cal. Trucking Ass'n v. Bonta*, 996 F.3d 644, 653 (9th Cir. 2021) (explaining that "the state's refusal to disavow enforcement of [the challenged law] against motor carriers during this litigation is strong evidence that the state intends to enforce the law and that [plaintiffs] face a credible threat" of enforcement). Washington has not disavowed enforcement and instead has confirmed that it will enforce the ban on conversion therapy "as it enforces other restrictions

on unprofessional conduct."

And in the context of pre-enforcement challenges to laws on First Amendment grounds, a plaintiff "need only demonstrate that a threat of potential enforcement will cause him to self-censor." *Protectmarriage.com-Yes on 8 v. Bowen*, 752 F.3d 827, 839 (9th Cir. 2014). Tingley has alleged that the law has chilled his speech and that he has self-censored himself out of fear of enforcement. He claims to be unable "to freely and without fear speak what he believes to be true" and contends that his conversations with new clients are "more guarded and cautious" and that he is afraid to "publiciz[e] . . . that he offers to counsel minors on these issues." Washington's general warning of enforcement coupled with Tingley's self-censorship in the face of the law satisfy the second prong of the *Thomas* inquiry for standing.

**3**

The third factor, concerning the history of enforcement, carries "'little weight' when the challenged law is 'relatively new' and the record contains little information as to enforcement." *Cal. Trucking*, 996 F.3d at 653 (quoting *Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010)). SB 5722 was enacted in 2018, and Washington apprised us before argument that it had just received its first complaint alleging that a licensed mental health provider performed conversion therapy on minors. The sparse enforcement history weighs against standing but "is not dispositive." *Libertarian Party*, 709 F.3d at 872; *see also Italian Colors Rest. v. Becerra*, 878 F.3d 1165, 1174 (9th Cir. 2018); *Wolfson*, 616 F.3d at 1060. Because the first two factors are

satisfied by the "general factual allegations of injury" contained in Tingley's complaint, which we must take to be true at this early juncture, we hold that Tingley has standing to bring the First and Fourth Amendment challenges to SB 5722 on behalf of himself.

**B**

Tingley does not, however, have standing to bring claims on behalf of his minor clients. The ordinary rule of standing is that a party "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth*, 422 U.S. at 499. Courts may allow plaintiffs to assert the rights of third parties in cases where the rights of those parties would be indirectly violated if the challenged law is enforced against the plaintiff. *June Med. Servs. L.L.C. v. Russo*, 140 S. Ct. 2103, 2118–19 (2020), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

Plaintiffs must satisfy two additional elements to establish third-party standing. First, a plaintiff must have a "'close' relationship" to the third parties whose rights he claims will be indirectly violated by the law. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004) (quoting *Powers v. Ohio*, 499 U.S. 400, 411 (1991)). Second, a plaintiff must show that the third parties are hindered from protecting their own interests by bringing a lawsuit of their own. *Id.*

Tingley has alleged a sufficiently close relationship with his current clients to meet this standard. But Tingley makes generalized statements about the rights of his clients that are purportedly

violated by this law, claiming that the law denies clients "access to ideas that they wish to hear, and to counseling that is consistent with their own personal faith, life goals and motivations." Tingley does not explain how a law that allows minors to seek conversion therapy from counselors practicing under the "auspices of a religious denomination," Wash. Rev. Code § 18.225.030(4), denies his clients "access to ideas that they wish to hear, and to counseling that is consistent with their own personal faith." Without more detail about his current clients, their desired information, or how the law has specifically deprived them of access to this information, an opinion adjudicating the alleged rights of these third parties would be plainly advisory. *See United Pub. Workers v. Mitchell*, 330 U.S. 75, 89, (1947).

Further, Tingley's allegations of the asserted hindrances his clients face in bringing their own claims are speculative. Minors seeking conversion therapy have brought their own lawsuits challenging conversion therapy bans in other states. *See*, *e.g.*, *Pickup*, 740 F.3d at 1224; *Doe v. Christie*, 33 F. Supp. 3d 518 (D.N.J. 2014), *aff'd*, 783 F.3d 150 (3d Cir. 2015) (citation omitted). Pseudonymous filing would be appropriate in this context to "preserve privacy in a matter of sensitive and highly personal nature." *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1068 (9th Cir. 2000). Tingley does not engage with why pseudonymous filing would not ease the alleged stigma and emotional hardship he claims is preventing his clients from being able to assert their own rights, or why his minor clients are different from those in other states who brought their own lawsuits.

Tingley emphasizes that the bar to third-party

standing is lowered in the First Amendment context. While this is true, it is because "'society's interest in having the statute challenged' may outweigh the prudential considerations that normally counsel against third-party standing." *Mothershed v. Justices of the Supreme Court*, 410 F.3d 602, 610 (9th Cir. 2005) (quoting *Sec'y of State v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984)). Because we conclude that Tingley has standing to bring claims in his individual capacity, this societal interest is already met. We will not strain the limitations imposed on us by Article III to reach undeveloped claims brought on behalf of third-party minors.

**C**

Washington claims that Tingley's lawsuit is also nonjusticiable because his claims are prudentially unripe. The two guiding considerations for prudential ripeness are "the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Thomas*, 220 F.3d at 1141 (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 149 (1967)). Both are satisfied here.

The fitness prong is met when "the issues raised are primarily legal, do not require further factual development, and the challenged action is final." *Stormans*, 586 F.3d at 1126 (citation omitted). We consider whether the action "has a direct and immediate effect on the complaining parties; whether the action has the status of law; and whether the action requires immediate compliance with its terms." *Id.* (citation omitted). Here, the law Tingley challenges is final, with the "status of law." *Id.* The law represents Washington's final decision with

respect to prohibiting licensed health care providers from performing conversion therapy on minors, and it is binding on providers like Tingley who must immediately comply with its terms. The issues Tingley raises with respect to the law are purely legal, on First and Fourteenth Amendment grounds. *See Driehaus*, 573 U.S. 167.

Of course, bringing a First Amendment challenge to a law does not necessarily mean that the issues presented are "purely legal." *Thomas*, 220 F.3d at 1142. Although the plaintiffs in *Thomas* challenged a law on First Amendment grounds, we held that the challenge did not present "purely legal" issues because the claim "rest[ed] upon hypothetical situations with hypothetical tenants" and was "devoid of any specific factual context." 220 F.3d at 1141–42. Tingley's claims concerning *future* clients rest upon hypothetical situations with hypothetical clients, but he also described the current clients who he "continues to work with to these ends." Tingley has provided enough of a specific factual context for the legal issues he raises, and his claims do not leave "incomplete hypotheticals or open factual questions akin to those in *Thomas*." *Stormans*, 586 F.3d at 1126.

Evaluating whether withholding judicial review presents a hardship requires looking at whether the challenged law "requires an immediate and significant change in the plaintiffs' conduct of their affairs with serious penalties attached to noncompliance." *Id.* (citation omitted). Tingley claims that SB 5722 required an "immediate and significant change" in his conduct, forcing him to choose between refraining from desired speech or engaging in that speech and risking costly sanctions. And the law imposes "serious

penalties," upon therapists who do not comply: fines up to $5,000 for each violation, censure, probation, suspension from practice, or even revocation of their license to practice. *See* Wash. Rev. Code § 18.130.160. Washington's contention that Tingley is not actually forced to choose between refraining from protected speech or risking enforcement because the law regulates his conduct, not his speech, again invites us to peek impermissibly at the merits in determining questions of justiciability. *Twitter, Inc. v. Paxton*, 26 F.4th 1119, 1124 (9th Cir. 2022) ("Prudential ripeness is a non-merits threshold issue."). Satisfying both prongs of our ripeness inquiry, the claims Tingley brings on behalf of himself are prudentially ripe.

**II**

After holding that Tingley's claims are justiciable, we now consider the merits of his claims. We begin by analyzing Tingley's primary challenge to Washington's law: that it violates his right to free speech by regulating what he, as a licensed health care provider in Washington, can say and do to minor clients within the confines of the counselor-client relationship.

On this question, we do not write on a clean slate. In our 2014 decision in *Pickup v. Brown*, we upheld a nearly identical law enacted by California that prohibited licensed mental health providers from performing any "sexual orientation change efforts" on minors. 740 F.3d at 1221. Our full court declined to rehear the case en banc. *Id.* at 1214. Accordingly, resolving Tingley's free speech challenge appears straightforward. But Tingley claims that the Supreme Court's intervening decision in *National*

*Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"), abrogated *Pickup* to the point that it is no longer binding on us.

We proceed to analyze Tingley's free speech challenge in several steps. We first compare Washington's law banning conversion therapy to California's law in *Pickup*. The two laws are nearly identical. We then examine our decision in *Pickup* and whether we are bound by it. We are.

**A**

Because Tingley, in his briefing, attempts to distinguish the law we examined in *Pickup* from the one he challenges here, we compare the two laws. Both Washington and California amended their code of professional conduct for licensed mental health providers to specify that practicing conversion therapy on minors would be considered unprofessional conduct subject to discipline. California prohibited "[a]ny sexual orientation change efforts attempted on a patient under 18 years of age," Cal. Bus. & Prof. Code § 865.2, while Washington prohibited "[p]erforming conversion therapy on a patient under age eighteen," Wash. Rev. Code § 18.130.180(27). Washington and California use substantially similar language to describe what conduct is encompassed by their respective laws:

> [A]ny practices by mental health providers that seek to change an individual's sexual orientation. This 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.

Cal. Bus. & Prof. Code § 865(b)(1).

> [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.

Wash. Rev. Code § 18.130.020(4)(a). The two laws also use almost identical language to describe what conduct is not encompassed by their bans on conversion therapy:

> [P]sychotherapies that: (A) provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and (B) do not seek to change sexual orientation.

Cal. Bus. & Prof. Code § 865(b)(2).

> [C]ounseling 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). And the two legislatures use identical language to describe their purpose in enacting the laws: "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, ch. 300, § 1; *see also* 2012 Cal. Legis. Serv. ch. 835, § 1(n) (using same language with "sexual orientation change efforts" in place of "conversion therapy"). Tingley's attempts to distinguish the two laws are without merit, and are contradicted by his concession to the district court that the two laws are "substantively similar" and that *Pickup* "is binding . . . if it is still good law." This is the question that we next address.

**B**

*Pickup* involved an appeal of consolidated cases challenging California's licensing scheme that disciplined mental health providers from performing any "sexual orientation change efforts" on minors. 740 F.3d at 1221. We looked to our earlier precedents to distill principles about whether, and when, a state can regulate the conduct and speech of health care providers without running afoul of the First Amendment. We examined *National Ass'n of the Advancement of Psychoanalysis v. California Board of Psychology*, 228 F.3d 1043 (9th Cir. 2000) ("*NAAP*"), in which we upheld California's licensing scheme for mental health providers. *Id.* at 1056. There, we rejected the idea that therapists are entitled to special First Amendment protection simply because they "employ speech to treat their clients." 228 F.3d at 1054. We held that while communication during therapy "is entitled to constitutional protection," it is "not immune from regulation." *Id.*

We also considered *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), in which we invalidated a federal policy that allowed doctor's licenses to be revoked if they recommended medical marijuana to a patient. *Id.* at 638–39. We distinguished prohibiting doctors from *treating* patients with marijuana—which the government could do—from prohibiting doctors from simply *recommending* marijuana. *Id.* at 634–37. A prohibition on the latter is based on the content and viewpoint of speech, while the former is a regulation based on conduct. *Id.*

Noting that the line between conduct and speech can be difficult to discern, we drew upon principles from *NAAP* and *Conant* to develop a continuum approach in *Pickup* for determining whether a law regulates the speech or conduct of professionals. 740 F.3d at 1227. We held that "public dialogue" by a professional is at one end of the continuum and receives the greatest First Amendment protection. *Id.* To illustrate, we explained that even though a state can regulate the practice of medicine, a doctor who *publicly* advocates for a position that the medical establishment considers outside the mainstream would still receive "robust protection" from the First Amendment. *Id.*

At the midpoint of the continuum is professional speech "within the confines of a professional relationship," which we held, as a category, received "somewhat diminished" protection under the First Amendment. *Id.* at 1228. We provided the example of truthful informed consent disclosures as falling into this category, as well as laws giving rise to liability for negligent medical advice. 740 F.3d at 1228.

At the other end of the continuum is where the regulation of professional *conduct* falls. *Id.* at 1229. At this end, the state's power to regulate is "great" even though this type of regulation "may have an incidental effect on speech." *Id.* Most medical treatments require speech, we explained, but a 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." *Id.*

We applied this continuum to California's conversion therapy law and held that it was a regulation of conduct. Unlike the law at issue in *Conant* that prohibited doctors from recommending the use of marijuana to patients, California's ban on practicing conversion therapy on minor patients still allowed 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.* at 1229. California's conversion therapy ban "regulate[d] only treatment" and "any effect it may have on free speech interests is merely incidental." *Id.* at 1231. We further held that California's regulation of conversion therapy treatment, because it was a regulation of conduct, did not require content and viewpoint analysis. *Id.* at 1231. Under rational basis review, we upheld California's conversion therapy law, holding that it was "rationally related to the legitimate government interest of protecting the well-being of minors." *Id.* at 1232.

**1**

The Supreme Court's intervening decision in *NIFLA* does not require us to abandon our analysis in *Pickup* insofar as it related to conduct. *NIFLA* abrogated only the "professional speech" doctrine—the part of *Pickup* in which we determined that speech within the confines of a professional relationship (the "midpoint" of the continuum) categorically receives lesser scrutiny. 138 S. Ct. at 2372.

*NIFLA* involved a challenge to a California law that required licensed pregnancy clinics to inform clients that California provides free or low-cost family planning services, including abortion. 138 S. Ct. at 2368. The district court denied the plaintiffs' motion for injunctive relief, and we affirmed. *See Nat'l Inst. of Family & Life Advoc. v. Harris*, 839 F.3d 823, 830 (9th Cir. 2016). We applied the continuum framework from *Pickup*, concluded that the law fell at the midpoint and regulated professional speech, and upheld the law as satisfying intermediate scrutiny. *Id.* at 838–42.

The Supreme Court granted certiorari and reversed our decision. It expressly rejected the professional speech doctrine. *NIFLA*, 138 S. Ct. at 2371–72. On this point, the Court criticized *Pickup* by name, along with decisions by other circuit courts embracing the doctrine. Explaining that it had never "recognized 'professional speech' as a separate category of speech," the Supreme Court concluded that speech is "not unprotected merely because it is uttered by 'professionals.'" *Id.* at 2371–72. The Court, however, did not "foreclose the possibility" that there might be some reason in the future to treat

professional speech as a unique category. *Id.* at 2375.

Despite abrogating the professional speech doctrine, the Court nevertheless affirmed that there are some situations in which speech by professionals *is* afforded less protection under the First Amendment. *Id.* at 2372. The first exception is for commercial speech or compelled disclosures, in which professionals are required to "disclose factual, noncontroversial information," such as the terms under which professional services are offered. *Id.* (citing *Zauderer v. Office of Disciplinary Couns. of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985)). The second exception, which corresponds to the holding in *Pickup*, is that "States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* As support, the Court described regulations on professional conduct it had previously upheld, such as state rules limiting lawyers' communication with potential clients, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449 (1978); state regulation of malpractice by professionals, *NAACP v. Button*, 371 U.S. 415, 438 (1963); and the right of states to compel doctors performing abortions to provide information "in a manner mandated by the State" about the risks of this medical treatment, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022).

But the Court concluded that the notice requirement for licensed clinics at issue in *NIFLA* did not meet any exception for lessened scrutiny. It was not limited to factual, noncontroversial information about the terms of services. *Id.* at 2372 (citing *Zauderer*, 471 U.S. at 651). Nor was it an "informed-

consent requirement or any other regulation of professional conduct." *Id.* at 2373. The notice requirement was "not tied to a procedure" and applied to all interactions a client has with a clinic, "regardless of whether a medical procedure is ever sought, offered, or performed." *Id.*

**2**

*NIFLA* did not abrogate *Pickup* to the extent that Tingley contends it did. All parties agree that *NIFLA* abrogated the part of *Pickup* in which we stated that professional speech, *as a category*, receives less protection under the First Amendment. There is no question that *NIFLA* abrogated the professional speech doctrine, and its treatment of all professional speech *per se* as being subject to intermediate scrutiny. But Tingley instead contends that *NIFLA* abrogated *Pickup* in full, and that *Pickup* and *NIFLA* are irreconcilable to the point where *Pickup* is no longer binding law. We do not agree.

The presumption in this Court is that three-judge panels are bound by prior precedent. *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc). The only exception to that general rule is that when a prior case is "clearly irreconcilable" with an intervening decision by a higher authority, a panel is "bound by the later and controlling authority" instead of the prior circuit authority, which it should consider "effectively overruled." *Id.* at 893.

The "clearly irreconcilable" requirement from *Miller* is a "high standard" to meet. *Murray v. Mayo Clinic*, 934 F.3d 1101, 1105 (9th Cir. 2019) (citation omitted). It is not enough for there to be "some tension" between the cases or for the intervening

authority to "cast doubt" on this Court's prior authority. *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (citations omitted). As long as we can apply prior circuit precedent "consistently with" or "without 'running afoul'" of the intervening authority, we must do so. *Id.* (quoting *United States v. Orm Hieng*, 679 F.3d 1131 1140 (9th Cir. 2012)); *FTC v. Consumer Def.*, LLC, 926 F.3d 1208, 1213 (9th Cir. 2019) ("[I]f we can apply our precedent consistently with that of the higher authority, we must do so.").

*Miller*'s high standard is not met here. *Pickup* "can be reasonably harmonized" with *NIFLA*, and we can apply *Pickup* to the facts of this case "without 'running afoul'" of *NIFLA*. *Lair*, 697 F.3d at 1206–07. In *Pickup*, we held that California's law banning conversion therapy regulated professional conduct, and we described a continuum approach to regulating the speech of professionals. 740 F.3d at 1227–29 (citation omitted). In *NIFLA*, we applied *Pickup*'s continuum and held that the notice requirement at issue in that case fell at the midpoint and regulated "professional speech." 839 F.3d at 839. We held that professional speech, as a category, is subject to intermediate scrutiny (a question left unanswered by *Pickup*), and that the notice requirement for licensed clinics in *NIFLA* satisfied this level of scrutiny. *Id.* at 840–41. The Supreme Court reversed, holding that our application of the First Amendment to professional speech, as its own category, was improper, and that professional speech is not categorically subject to lesser scrutiny. *NIFLA*, 138 S. Ct. at 2371–72. But the Court affirmed that two exceptions exist in which professional speech *is* afforded less protection. *Id.* at 2371–75. One of those

exceptions the Court recognized is the regulation of professional conduct, even if it "incidentally burden[s] speech." *Id.* at 2373. Because *Pickup*'s holding rests upon that exception, it survives *NIFLA*.

*NIFLA* only abrogated the theoretical "midpoint" of *Pickup*'s continuum—which we did not apply to the conversion therapy law in *Pickup*—and the idea that professional speech *per se* receives less protection. The two cases can be applied consistently: *Pickup*'s approach survives for regulations of professional conduct.

**3**

Tingley is wrong to claim that we have twice recognized that *NIFLA* fully abrogated *Pickup*. We have not. Neither case provides the support he ascribes to it.

*American Beverage Ass'n v. City & County of San Francisco*, 916 F.3d 749 (9th Cir. 2019) (en banc), involved a challenge to an ordinance that required health warnings on advertisements for certain sugary drinks. We clarified, in light of *NIFLA*, how we approach a First Amendment claim concerning compelled truthful disclosures. *Id.* at 755–56. Specifically, we reexamined our decision in *CTIA–The Wireless Ass'n v. City of Berkeley*, 854 F.3d 1105 (9th Cir. 2017) ("*CTIA I*"), a case about compelled commercial speech that predated *NIFLA*. In *American Beverage*, we "reaffirm[ed] our reasoning and conclusion" in *CTIA I*. 916 F.3d at 756. We concluded that "nothing in *NIFLA* suggests that *CTIA [I]* was wrongly decided" and, "[t]o the contrary, *NIFLA* preserved the exception to heightened scrutiny" for compelled disclosures, including "health

and safety warnings." *Id.* Because the required health warnings for sugary drinks was a compelled truthful disclosure and one of the exceptions *NIFLA* recognized, we applied the *Zauderer* test the Court described in *NIFLA* and held that the plaintiffs met the requirements for a preliminary injunction. *Id.* at 756–58.

Even though *NIFLA* abrogated the professional speech doctrine, we have twice upheld a pre-*NIFLA* case expressly because *NIFLA* affirmed that exceptions exist for speech by professionals that is subject to less scrutiny. *Am. Bev. Ass'n*, 916 F.3d at 756; *see also CTIA–The Wireless Ass'n v. City of Berkeley*, 928 F.3d 832, 837, 844 (9th Cir. 2019) ("*CTIA II*") ("In light of our en banc decision in *American Beverage,* and having considered the parties' supplemental briefing on *NIFLA*, we again affirm the district court's decision."). Under our reasoning in these cases, *Pickup*, which concerns the other exception preserved in *NIFLA*, must also be reaffirmed along those lines.

Our decision in *Pacific Coast Horseshoeing School, Inc. v. Kirchmeyer*, 961 F.3d 1062 (9th Cir. 2020), also indicates that the conduct-versus-speech distinction from *Pickup* remains intact. There, we heard a challenge to a California licensing restriction requiring a private school to reject students' applications if they did not have a high school diploma or GED or had not passed a certain federal exam. *Id.* at 1067. We analyzed whether the licensing restriction was a regulation of conduct, as the district court had found, demonstrating that the exception for regulations on professional conduct survives *NIFLA*. *Id.* at 1069–73. We ultimately reversed the district

court's holding that California's law regulated conduct and instead concluded that it was a content-based regulation on speech. *Id.* at 1073. We remanded to the district court to decide if the exception recognized in *NIFLA* for commercial speech applied and what level of scrutiny to apply. *Id.* at 1074. Both *American Beverage* and *Pacific Coast Horseshoeing School* confirm that *Pickup*'s treatment of regulations of professional conduct incidentally affecting speech survives *NIFLA*.

Tingley also contends that "other circuits have likewise recognized that *NIFLA* is irreconcilable with *Pickup*." But the decisions Tingley cites do not suggest that *NIFLA* fully abrogated *Pickup*.

In *Capital Associated Industries, Inc. v. Stein*, 922 F.3d 198 (4th Cir. 2019), the Fourth Circuit recognized that the Supreme Court "disapproved of" the "so-called 'professional speech doctrine" in *Pickup*. *Id.* at 207. The Fourth Circuit, however, held that the law before it, which prohibited the practice of law by corporations, "fits within *NIFLA*'s exception for professional regulations" of conduct "that incidentally affect speech." *Id.* The Fourth Circuit explained that *NIFLA* "recognize[d] two situations in which states have broader authority to regulate the speech of professionals than that of nonprofessionals." *Id.* Although "[m]any laws that regulate the conduct of a profession or business place incidental burdens on speech . . . the Supreme Court has treated them differently than restrictions on speech." *Id.* at 207–08. Instead of supporting Tingley's argument, the Fourth Circuit's decision in *Capital Associated Industries* shows the opposite: *Pickup* was abrogated only in part by *NIFLA*.

So does the Fifth Circuit decision in *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 934 (5th Cir. 2020), which involved a First Amendment challenge to state surveyor-licensing requirements. *Id.* at 928–29. The Fifth Circuit clarified that "to the extent *Hines* [*v. Alldredge*, 783 F.3d 197 (5th Cir. 2015), the Fifth Circuit equivalent of *Pickup*] relied on the professional speech doctrine, its reasoning has been abrogated by *NIFLA*," but the Fifth Circuit "reiterate[d] *NIFLA*'s insistence on the conduct-speech analysis." *Id.* at 934. Because the district court did not conduct the requisite conduct-speech analysis and erred by "categorically exempting occupational-licensing requirements from First Amendment scrutiny," the Fifth Circuit remanded for the district court to determine whether the plaintiff's practice "constitutes speech or conduct." *Id.*

The Sixth Circuit decision similarly recognizes only a partial abrogation of *Pickup*. *EMW Women's Surgical Center, P.S.C. v. Beshear*, 920 F.3d 421 (6th Cir. 2019), concerned a state statute that compelled doctors to, among other things, "describe the ultra-sound images to the patient" before performing the abortion the patient requested. *Id.* at 423. The Sixth Circuit noted that heightened scrutiny under the First Amendment "generally applies to content-based regulation of any speaker, including a physician or other professional," but that "the Supreme Court noted in *NIFLA* [that] there is 'less protection for professional speech in two circumstances,'" including the "regulation of 'professional conduct.'" *Id.* at 426 (quoting *NIFLA*, 138 S. Ct. at 2372). Examining the compelled informed-consent statute for doctors performing abortions, the Sixth Circuit held that even

though the law controlled the doctors' speech, it did not violate the First Amendment "because the required disclosures are incidental to the Commonwealth's regulation of doctors' professional conduct." *Id.* at 432.

Nor does the Eleventh Circuit's decision in *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020), show that *Pickup* has been abrogated in full by *NIFLA*. There, the Eleventh Circuit examined conversion therapy bans instituted by a city and county in Florida. *Id.* at 859. Although it rejected the argument that the conversion therapy bans regulated professional conduct, creating a split with our circuit, it recognized that "certain types of speech receive either less protection or no protection under the First Amendment." *Id.* at 865. The Eleventh Circuit explained that *NIFLA* "refused to recognize professional speech as a new speech category," but that the Court recognized two exceptions: "commercial speech, as well as incidental speech swept up in the regulation of professional conduct." *Id.* at 865, 867. Even though the Eleventh Circuit did not agree that the conversion therapy ordinances regulated conduct, it confirmed that "there is no doubt that 'States may regulate professional conduct,'" *id.* at 865 (quoting *NIFLA*, 138 S. Ct. at 2372), because "words can in some circumstances violate laws directed not against speech but against conduct," *id.* (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992)).

Every decision by our sister circuits that Tingley relies upon shows that *NIFLA* did not fully abrogate *Pickup*. The exception to heightened scrutiny for regulations of professional conduct survives *NIFLA*.

Tingley, and some of our sister circuits, may disagree with whether laws prohibiting licensed therapists from practicing conversion therapy on minors regulate conduct, but disagreement with our ultimate conclusion on the merits does not mean that *Pickup*, or the exception for regulations of professional conduct, is abrogated by *NIFLA*. Because *NIFLA* abrogated only the part of *Pickup* relating to the professional speech doctrine, and not its central holding that California's conversion therapy law is a regulation on conduct that incidentally burdens speech, *Pickup* remains binding law and controls the outcome of this case.

**C**

We now apply *Pickup* to Washington's law. Washington's law is, for all intents and purposes, identical to California's law that we held satisfied rational basis review. States carry a "light burden" under this review. *Erotic Serv. Provider Legal Educ. & Rsch. Project v. Gascon*, 880 F.3d 450, 457 (9th Cir. 2018), *amended*, 881 F.3d 792 (9th Cir. 2018). A law is "presumed to be valid and will be sustained" under rational basis review if it is "rationally related to a legitimate state interest. *Id.* (quoting *Cleburne v. Cleburne Living Ctr. Inc.*, 473 U.S. 432, 440 (1985)); *see also Dobbs*, 142 S. Ct. at 2284 (stating that health and welfare laws are entitled to a "strong presumption of validity") (quoting *Heller v. Doe*, 509 U.S. 312, 319 (1993)).

Washington's law satisfies rational basis review for the same reason that California's law satisfied this level of review in *Pickup*. The Washington Legislature's stated purpose in enacting SB 5722 is

identical (besides using "conversion therapy" instead of "SOCE") to the California Legislature's stated purpose in enacting SB 1172: "protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and . . . protecting its minors against exposure to serious harms caused by conversion therapy." 2018 Wash. Sess. Laws, ch. 300, § 1. This is, "[w]ithout a doubt," a legitimate state interest. *Pickup*, 740 F.3d at 1231. Washington also has a "compelling interest in the practice of professions within [its] boundaries," *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975), "regulating mental health," *NAAP*, 228 F.3d at 1054, and affirming the equal "dignity and worth" of LGBT people, *Fulton v. City of Philadelphia, Pa.*, 141 S. Ct. 1868, 1882 (2021) (citation omitted).

The 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. It considered evidence that demonstrated a "scientifically credible proof of harm" to minors from conversion therapy. *Pickup*, 740 F.3d at 1232. The APA, whose task force systematically reviewed the scientific research on conversion therapy and adopted a resolution against it in 2009, confirmed in its amicus brief that the research presented to Washington showed harm from both aversive practices and non-aversive practices, such as talk therapy. The report accompanying Washington's law 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" and 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." The report acknowledged that "[r]esearch ethics make it difficult to rigorously study a practice associated with harm." In other words, ethical review boards are unlikely to approve double-blind research studies subjecting children to a practice for which there is already a fair amount of evidence indicating it is harmful.

Further, 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. State legislators also considered qualitative evidence of harm from Washington residents who were exposed to non-aversive conversion "talk" therapy and urged them to enact legislation prohibiting the practice. *See*, *e.g.*, *Senate Floor Debate*, TVW (Jan. 19, 2018 10:00 AM), https://tvw.org/video/senate-floor-debate-2018011151/?eventID=2018011151 at 1:18:00–1:20:20.

In relying on the body of evidence before it as well as the medical recommendations of expert organizations, the Washington Legislature rationally acted by amending its regulatory scheme for licensed health care providers to add "[p]erforming conversion therapy on a patient under age eighteen" to the list of unprofessional conduct for the health professions. Wash. Rev. Code § 18.130.180(27). As in *Pickup*, we hold that Washington's law satisfies rational basis review.

## III

In addition to following our precedent in *Pickup*, we have an additional reason for reaching the conclusion that we reach today. The Supreme Court has recognized that laws regulating categories of speech belonging to a "long . . . tradition" of restriction are subject to lesser scrutiny. *NIFLA*, 138 S. Ct. at 2372 (citation omitted). Washington's law regulates a category of speech belonging to such a tradition, and it satisfies the lesser scrutiny imposed on such laws.

### A

In *NIFLA*, the Court rejected that professional speech, as a category, is subject to lesser scrutiny under the First Amendment. This is because a category that would exempt all speech uttered by individuals in professional capacities as varied as accounting, consulting, law, dentistry, architecture, investment banking, and contracting could entirely swallow the protection for free speech that the Founders enshrined in our Constitution.

Even so, the Court has repeatedly recognized that there may be categories of speech warranting lesser scrutiny under the First Amendment that, while appearing novel, belong to a "long (if heretofore unrecognized) tradition" of restriction. *Id.* (citation omitted). To impose content-based restrictions on such categories, States must have "persuasive evidence" of a "tradition to that effect." *Id.* (internal quotation marks and citation omitted).

The Court first left open the door to new categories of speech in *United States v. Stevens*, 559 U.S. 460 (2010). There, it declined to carve out a

"novel exception" from the First Amendment for speech depicting extreme animal cruelty. *Id.* at 472. The Court reasoned that there was no evidence that this type of speech has historically been unprotected, yet it declined to "foreclose the future recognition of such additional categories." *Id.* Instead, it invalidated the law as unconstitutionally overbroad. *Id.* at 482.

In *Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 792 (2011), the Court rejected the government's attempt to "create new categories of unprotected speech" for restrictions on the labeling and sale of violent video games. The Court affirmed that States could not create new categories of speech "without persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription." *Id.* Instead of a long tradition of proscription, the Court characterized the State's attempt to restrict the sale of violent video games as an "attempt to shoehorn speech about violence into obscenity." *Id.* at 793.

In *United States v. Alvarez*, 567 U.S. 709, 730 (2012), the Court affirmed our determination that the Stolen Valor Act, which made it a crime to lie about receiving a military award, violated the First Amendment. The Court stated that there may exist "some categories of speech that have been historically unprotected . . . but have not yet been specifically identified or discussed . . . in our case law." *Id.* at 722 (citation omitted). It declined, however, to recognize a new, broad category encompassing all false statements "made to any person, at any time, in any context." *Id.* at 720.

Drawing upon this line of cases in *NIFLA*, the

Court held that there was not "'persuasive evidence . . . of a long (if heretofore unrecognized) tradition'" of exempting speech by professionals from First Amendment protection. NIFLA, 138 S. Ct. at 2372 (quoting *Alvarez*, 567 U.S. at 722). A category encompassing all words spoken by individuals in their professional capacity, in the Court's eyes, was too broad and lacked "such a tradition." *Id.* But, as described *supra*, the Court recognized that some subcategories of speech by professionals *are*, in fact, excepted from heightened scrutiny and instead subject to less scrutiny. *Id.*

What follows from this line of cases is that in some circumstances, a seemingly novel restriction on speech, even if content-based, may be tolerated, but only if there is a "long (if heretofore unrecognized) tradition" of that type of regulation, *id.*, and the category is not too broad. Whether we view Washington's law as falling into the exception from heightened scrutiny for regulations on professional conduct that incidentally involve speech, *see* Part II, *supra*, or, alternatively, as discussed below, as falling into the tradition of regulations on the practice of medical treatments, the law satisfies the requisite scrutiny.

**B**

There is a long (if heretofore unrecognized) tradition of regulation governing the practice of those who provide health care within state borders. *See Dent v. West Virginia*, 9 S. Ct. 231, 232 (1889) (upholding medical licensing requirements, including a prohibition on "swear[ing] falsely to any question which may be propounded to him on his

examination") (citation omitted); *see also Hawker v. People of New York*, 170 U.S. 189, 191 (1898) (allowing state, as part of its police power, to deem who possesses a "sufficient good character" to practice medicine).

And such regulation of the health professions has applied to all health care providers, not just those prescribing drugs. In *Collins v. Texas*, 223 U.S. 288 (1912), for instance, the Court affirmed the conviction of a man practicing osteopathy without a license, reasoning that "[i]t is true that he does not administer drugs, but he practises what at least purports to be the healing art." *Id.* at 296. Texas, and all other states, "constitutionally may prescribe conditions to such practice, considered by it to be necessary or useful to secure competence in those who follow it." *Id.* The Court provided a long list of cases from state courts similarly establishing "the right of the state to adopt a policy even upon medical matters concerning which there is difference of opinion and dispute." *Id.* at 297–98.

Conversion therapy, as the briefing here has highlighted, involves a difference of opinion and dispute. Tingley contends that "change in gender identity and sexual orientation" is "possible with God's help" and wants to practice conversion therapy on minor clients who seek it. Equal Rights Washington, in turn, cites studies in the record documenting that "youth who underwent conversion therapy were 'more than twice as likely to report having attempted suicide'" and that the medical community has rejected the practice as "unnecessary, ineffective, and unsafe." Tingley responds that states, and courts in reviewing their laws, cannot rely upon

the positions of expert medical organizations because "it is not uncommon for professional organizations to do an about-face in response to new evidence or new attitudes."

But the Court has upheld substantive regulations on medical treatments based upon differences of opinion and, in doing so, has relied upon the positions of the professional organizations Tingley criticizes, even when those positions have changed over time. In *Lambert v. Yellowley*, 272 U.S. 581 (1926), the Court upheld the constitutionality of the National Prohibition Act's limit on the prescription of spirit liquor for medical treatment. Under that Act, only a licensed physician could prescribe liquor, and no more than a pint of liquor could be prescribed for medical treatment. *Id.* at 587. The evidence presented to Congress showed that "practicing physicians differ about the value of malt, vinous, and spiritous liquors for medicinal purposes, but that the preponderating opinion is against their use for such purposes." *Id.* at 590. The Court relied upon a resolution adopted by the American Medical Association declaring that "the use of alcoholic liquor as a thereapeutic [sic] agent was without 'scientific basis' and 'should be discouraged.'" *Id.* at 591.

Nearly 100 years later, we are faced with a similar situation. As in *Lambert*, the evidence presented shows some difference in opinion about the efficacy and harm of conversion therapy, but the "preponderating opinion" in the medical community is against its use. *Id.* at 590. Washington relied upon a resolution adopted by the American Psychological Association that the use of conversion therapy "should be discouraged." *Id.* at 591. Just as Tingley claims his

minor clients want conversion therapy, in 1926, some patients likely wanted their doctor to treat their condition with more than a pint of liquor. That purported desire, and a patient's right to choose, nevertheless did not overcome the right of the government to regulate what medical treatments its licensed health care providers could practice on their patients according to the applicable standard of care and governing consensus at the time (even if not unanimous).

That expert medical organizations have changed their view over time, with additional research, is a good thing. Science, and the medical practices used to treat human conditions, evolve over time. But we still trust doctors, and the professional organizations representing them, to treat our ailments and update their recommendations on the governing standard of care. That doctors prescribed whiskey in 1922, and thought of homosexuality as a disease in 1962, does not mean that we stop trusting the consensus of the medical community in 2022 or allow the individual desires of patients to overcome the government's power to regulate medical treatments.

**C**

Washington, understandably, rests its case upon our precedent in *Pickup*. But the long tradition of this type of regulation provides further support for our decision today.

Otherwise, this would endanger other regulations on the practice of medicine where speech is part of the treatment. 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. It would also, as *amici* warn, endanger centuries-old medical malpractice laws that restrict treatment and the speech of health care providers. *See also* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 950 (2007) (contending that "doctors are routinely held liable for malpractice for speaking or for failing to speak" without First Amendment

concern, such as by "failing to inform patients in a timely way of an accurate diagnosis" or by "failing to give patients proper instructions").

The practice of psychotherapy is not different from the practice of other forms of medicine simply because it uses words to treat ailments. Tingley is not immune from regulation on the practice of medicine because he claims that all he does "is sit and talk" with his clients. 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, published in 1994, and the development of treatment plans for counseling based on diagnosis of mental disorders in accordance with established practice standards." Wash. Rev. Code § 18.19.020.

Marriage and family therapy, more specifically, is the "diagnosis and treatment of mental and emotional disorders, whether cognitive, affective, or behavioral, within the context of relationships, including marriage and family systems." *Id* § 18.225.010(8). This type of therapy "involves the professional application of psychotherapeutic and family systems theories and techniques in the delivery of services to individuals, couples, and families for the purpose of treating such diagnosed nervous and mental disorders." *Id.* And Washington defines mental health counseling as "the application of principles . . . for the purpose of treatment of mental disorders" which "includes, but is not limited to, the assessment, diagnosis, and treatment of mental and emotional disorders." *Id.* § 18.225.010(9).

If Washington's law is upheld and conversion therapy is considered conduct, Tingley contends, then "protesting," "debating," and "book clubs" could be next. This misses the mark. What licensed mental health providers do during their appointments with patients for compensation under the authority of a state license is treatment. The work that Tingley does is different than a conversation about the weather, even if he claims that all he does is "sit and talk." 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." *Otto v. City of Boca Raton*, No. 19-10604, 2022 WL 2824907, at *19 (11th Cir. July 20, 2022) (Rosenbaum, J., joined by Pryor, J.J., dissenting in the denial of rehearing en banc). Comparing the work that licensed mental health providers do to book club discussions or conversations among friends minimizes the rigorous training, certification, and post-secondary education that licensed mental health providers endure to be able to treat other humans for compensation.

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, while not, for instance, forbidding architects from "propos[ing] buildings in the style of I.M. Pei" or preventing accountants from "discuss[ing] legal tax avoidance techniques." *Otto*, 981 F.3d at 867. The expressive conduct of other professions, even when involving the speech of professionals within the

confines of a client relationship, does not run the same risk of harm. From "time immemorial," we have recognized "[t]he power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud." *Dent*, 129 U.S. at 122. And "[f]ew professions require more careful" scrutiny than "that of medicine." *Id.*; *see also Shea v. Bd. of Med. Examiners*, 146 Cal. Rptr. 653, 661 (Ct. App. 1978) ("The Legislature . . . has the right to require that those licensed to practice medicine be of good moral character, reliable, trustworthy, and not given to deception of the public or to the practice of imposing upon credulous or ignorant persons.").

Tingley's minor patients come to him for his help in treating a mental health condition, such as anxiety or depression. Washington law defines Tingley's practice as "the diagnosis and treatment of mental and emotional disorders," Wash. Rev. Code § 18.225.010(8), even if he only uses speech in that treatment. Whether children with a mental health condition go to a primary care physician and seek anti-depressant pills, or a therapist and seek psycho-therapy, or a psychiatrist and seek both, the State may regulate the licensed provider's treatment of those health conditions. That some of the health providers falling under the sweep of Wash. Rev. Code § 18.130 use speech to treat those conditions is "incidental[]." *NIFLA*, 138 S. Ct. at 2372. The treatment can be regulated all the same.

**D**

Washington, like other states, has concluded that health care providers should not be able to treat a child by such means as telling him that he is "the abomination we had heard about in Sunday school."[3] Washington's law not only falls within the tradition of state regulation of the health professions, but it also affects the health of children—a vulnerable group in the eyes of the law.

Tingley claims that he has minor patients who want to receive conversion therapy. Perhaps he does. But a review of his complaint reveals examples of children who claim to want conversion therapy only after their parents bring them to Tingley for it. He describes working with a teenage girl whose parents brought her to Tingley with a belief that "God had created their daughter female" and "sought [his] professional expertise as a counselor to work with their daughter towards" a goal of "return[ing] to comfort with her female body and reproductive potential, and with a gender identity as a female." Only "[a]fter several counseling sessions" with Tingley did this child "express[] a desire to become more comfortable with her biological sex, notwithstanding her previous claims of a male gender identity." As for counseling minors on sexual orientation, Tingley provided the example of counseling a teen whose "parents first brought him to

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[3] *See* John J. Lapin, Note, *The Legal Status of Conversion Therapy*, 22 Geo. J. Gender & L. 251, 251 (2021) (quoting Sam Brinton, *I Was Tortured in Gay Conversion Therapy. And It's Still Legal in 41 States*, N.Y. Times (Jan. 24, 2018), https://www.nytimes.com/2018/01/24/opinion/gay-conversion-therapy-torture.html.

my office." And then, only "over time" like the other client he described, did this client seek Tingley's "counsel on a number of topics including attraction to pornography and unwanted same-sex attractions." These examples highlight the difficulty in assessing whether there has been knowing, informed, and voluntary consent, *c.f. Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973), when it comes to children receiving medical treatment. This is particularly so when that treatment is encouraged by the sincerely held religious beliefs of their parents, from whom children rely on for shelter, food, and financial support.

The difficulties in having therapists, legislators, and judges assess whether a minor is consenting, without coercion, to a therapeutic practice that every major medical organization has opposed, demonstrates why Washington's law is appropriately tailored to its interest in "protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth." 2018 Wash. Sess. Laws, ch. 300, § 1. Washington cannot easily draw lines between children who want conversion therapy because of their own free will and religious beliefs, children who want conversion therapy because of internalized homophobia and transphobia, and children who want conversion therapy because their parents want them to have conversion therapy. Instead, Washington reasonably relied on scientific evidence and the consensus of every major medical organization to prohibit the practice on all children, regardless of the religious beliefs of the child, and regardless of the religious beliefs of the health care provider.

Children may identify as gay, straight, cisgender, or transgender. These identities "must be honored out of 'that respect for the individual which is the lifeblood of the law.'" *Faretta v. California*, 422 U.S. 806, 834 (1975). We uphold Washington's law and reject Tingley's free speech challenge because the Washington law permissibly honors individual identity.

## IV

Tingley also appeals the district court's dismissal of his free exercise challenge to Washington's law. The Free Exercise Clause of the First Amendment prevents Congress from making a law "prohibiting the free exercise" of religion and applies to the States through the Fourteenth Amendment. *Church of the Lukumi Babalu Aye, Inc., v. City of Hialeah*, 508 U.S. 520, 531 (1993). But this right "does not relieve an individual of the obligation to comply with a valid and neutral law of general applicability." *Emp. Div., Dep't of Hum. Res. of Or. v. Smith*, 494 U.S. 872, 879 (1990) (internal quotation marks and citation omitted). We apply strict scrutiny only when a law fails to be neutral and generally applicable, even if the law incidentally burdens religious practice. *Church of the Lukumi*, 508 U.S. at 531. Otherwise, we apply rational basis review. *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1076 (9th Cir. 2015) ("*Stormans II*").

### A

Washington's law satisfies neutrality. Tingley has failed to "discharge[] his burdens" at the first step of our Free Exercise Clause inquiry. *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022).

**1**

To start, we evaluate the object of the law. If the purpose of the law is to restrict practices *because of* the religious motivations of those performing the practices, the law is not neutral. *Parents for Priv. v. Barr*, 949 F.3d 1210, 1235 (9th Cir. 2020), *cert. denied*, 141 S. Ct. 894. The object of Washington's law is not to target religion. In *Welch v. Brown*, 834 F.3d 1041 (9th Cir. 2016), we considered and rejected a free exercise challenge to California's nearly identical conversion therapy law.[4] Here, as in *Welch*, the object of the State's ban on conversion therapy is "the prevention of harm to minors, regardless of the motivations for seeking" or providing conversion therapy. *Welch*, 834 F.3d at 1047; *see also* 2018 Wash. Sess. Laws, ch. 300, § 1. Washington's exemption for counselors practicing in a religious capacity, Wash. Rev. Code § 18.225.030(4), shows that it intended to regulate health care providers only to the extent they act in a licensed and non-religious capacity, "*only* within the confines of the counselor-client relationship." *Welch*, 834 F.3d at 1045. Washington restricted licensed providers from performing conversion therapy on minors because of the demonstrated harm that results from these practices, and not to target the religious exercise of health care providers. This is unlike the situation in *Kennedy*, in which the school district admitted that it "sought to restrict [the coach's] actions at least in part because of their

[4] After our decision in *Pickup*, one of the two consolidated cases came back to us after the district court denied the plaintiffs' request for a preliminary injunction based on free exercise grounds. We affirmed. *Welch*, 834 F.3d at 1044.

religious character." 142 S. Ct. at 2422.

**2**

The next step in evaluating a law for neutrality is to examine the text of the law to determine if it is neutral on its face. *Church of the Lukumi*, 508 U.S. at 533. A law fails to be neutral if "it refers to a religious practice without a secular meaning discernible from the language or context." *Id.* 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. *See* 2018 Wash. Sess. Laws, ch. 300, § 2. The law's express protection for the practice of conversion therapy in a religious capacity is at odds with Tingley's assertion that the law inhibits religion. Tingley all but concedes the law is facially neutral, instead arguing that facial neutrality is "not determinative" and advocating what he sees as "subtle departures from neutrality," *Church of the Lukumi*, 508 U.S. at 534 (citation omitted), which we discuss below.

**3**

The circumstances surrounding the enactment of SB 5722 do not undermine its facial neutrality. Beyond examining a law's neutrality on its face, we also look at the circumstances of the law's enactment, including the historical background, precipitating events, and legislative history. *Church of the Lukumi*, 508 U.S. at 540; *see also Kennedy*, 142 S. Ct. at 2422 n.1.

Tingley's primary mode of distinguishing this case from *Welch* is by pointing to comments made by

Washington legislators that, to him, show the law is "tainted with anti-religious animus." He analogizes to *Masterpiece Cakeshop, Ltd. v. Colorado Civil Rights Commission*, 138 S. Ct. 1719 (2018), in which the Court found that comments by members of the Colorado Civil Rights Commission evinced a lack of neutrality under the Free Exercise Clause. *Id.* at 1723–24. For several reasons, Tingley's comparison fails.

First, the comments to which Tingley refers do not show a hostility toward religion. Washington State Senator Liias's comment, in which he "speak[s] for [him]self," that the bill is directed against "barbaric practices," goes toward the mode of treatment that constituents described to him—such as using electroshock therapy or inducing vomiting—and not toward the religious belief Tingley and others hold against homosexuality. *Senate Floor Debate*, TVW (Jan. 19, 2018 10:00 AM), https://tvw.org/video/senate-floor-debate-2018011151/?eventID=2018011151 at 1:16:48–1:20:23.

Tingley also claims that another sponsor of the bill, Republican State Senator Maureen Walsh, denounced those who try to "pray the gay away," which implicitly suggests that the law has an object of inhibiting religion. Tingley takes Senator Walsh's comments out of context. Walsh, whose daughter is gay, was speaking to her personal experience as a parent. She shared the story of a friend's experience of conversion therapy and used her friend's words that he thought he could "pray the gay away" but instead found the conversion therapy to be ineffective. *Senate Floor Debate*, TVW (Jan. 19, 2018 10:00 AM), https://tvw.org/video/senate-floor-debate-2018011151

/?eventID=2018011151 at 1:20:30–1:23:50. Soon after that comment, Senator Walsh invoked her own Christian beliefs, that "God put us all on the Earth to be here and function as we do." She acknowledged that this issue is complicated and said that she understood why some of her colleagues would not vote for the bill. Viewed in context, these comments do not establish the anti-religious bias that Tingley claims.

We reject Tingley's contention that these stray, out-of-context comments by Washington legislators are "more overtly hostile" than the statements in *Masterpiece*. *Masterpiece* involved a free exercise challenge brought by a cake shop owner who refused to bake wedding cakes for same-sex couples. 138 S. Ct. at 1723. Public, on-the-record comments by Colorado Civil Rights Commission members compared the plaintiff's invocation of his religious beliefs to "defenses of slavery and the Holocaust," and individual commissioners disparaged his religious invocation as "despicable." *Id.* at 1729. The stray comments from Washington legislators speaking for themselves about the experiences of friends and constituents who underwent conversion therapy come nowhere close to the hostility contained in the comments at issue in *Masterpiece*.

*Masterpiece* also examined public comments by government officials in a different context. The commissioners' statements about the plaintiff and his religious beliefs were made during the *adjudication of the plaintiff's specific case* before the commission. *Id.* at 1729–30. Here, in comparison, the stray comments were made as part of a voluminous legislative history that does not show a hostility toward religion, nor an object of targeting religious practice. The Court in

*Masterpiece* acknowledged the distinction between hostile comments made by an adjudicatory body when deciding a case in front of it, and comments made by a legislative body when debating a bill. *Id.* at 1730. In *Masterpiece*, the Court could not "avoid the conclusion that these statements cast doubt on the fairness and impartiality of the Commission's adjudication of [the plaintiff's] case." *Id.* at 1730.

Stray remarks of individual legislators are among the weakest evidence of legislative intent. The Court has "long disfavored arguments based on alleged legislative motives" because such inquiries are a "hazardous matter." *Dobbs*, 142 S. Ct. at 2255–56 (quoting *United States v. O'Brien*, 391 U.S. 367, 383 (1968)). The Court has "been reluctant to attribute those motives to the legislative body as a whole" because "[w]hat motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it." *Id.* at 2256 (quoting *O'Brien*, 391 U.S. at 384).

The allegedly hostile comments cited by Tingley do not establish a free exercise violation. Viewed in context, the stray comments are not hostile toward religious practice, they did not take place in an adjudicative context like *Masterpiece*, and, as the Court recently made clear, they are weak evidence of the intent of the entire legislature in enacting the challenged law.

**4**

In addition to the object, text, and legislative history, we also consider the real-world operation of a law to determine if it is neutral. *Church of the Lukumi*, 508 U.S. at 535. In *Church of the Lukumi*, a

city's ordinances against animal sacrifices contained so many exemptions that in practice, the city effectively accomplished a "religious gerrymander" targeting the petitioners' religious exercise. *Id.* (citation omitted). Tingley contends that Washington's law is not operationally neutral because the Washington Legislature knew the law would prohibit counseling "almost exclusively" "sought 'for religious reasons' and provided by those who believe in 'Christian faith-based methods.'" But 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," *Welch*, 834 F.3d at 1046, and that the harm from conversion therapy is present regardless of why people seek it.

SB 5722 evenhandedly prohibits health care providers from performing conversion therapy on minors, whether those minors seek it for religious or non-religious reasons: "[t]he same conduct is outlawed for all." *Stormans II*, 794 F.3d at 1077 (quoting *Am. Life League, Inc. v. Reno*, 47 F.3d 642, 656 (4th Cir. 1995)). The law prohibits, or more accurately deems "unprofessional," the practice of conversion therapy by all licensed providers (regardless of their religious or secular motivations) on clients who are under the age of 18 (regardless of their religious or secular motivations). If SB 5722 was aimed only at therapists wanting to practice conversion therapy on minors for religious reasons, this would be cause for concern. But that "a particular group, motivated by religion, may be more likely to

engage in the proscribed conduct" does not amount to a free exercise violation. *Welch*, 834 F.3d at 1047 (quoting *Stormans II*, 794 F.3d at 1077).

SB 5722 is a neutral law targeted at preventing the harms associated with conversion therapy, and not at the religious exercise of those who wish to practice this type of therapy on minors.

**B**

Tingley also does not carry his burden of showing that Washington's law is not a law of general applicability. Broadly speaking, there are two ways a law is not generally applicable. *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021). The first is if there is a "formal mechanism for granting exceptions" that "invite[s] the government to consider the particular reasons for a person's conduct." *Id.* at 1879 (internal quotation marks and citation omitted). The second is if the law "prohibits religious conduct while permitting secular conduct" that also works against the government's interest in enacting the law. *Id.* at 1878. Neither applies here.

**1**

SB 5722 does not provide a formal and discretionary mechanism for individual exceptions. Tingley contends that the vague terms in Washington's law will lead to a discretionary system of individual exemptions. Specifically, he suggests that the hostile comments made by individual legislators indicate that "these officials" (even though they are not the ones who will enforce the law) "will likely exempt secular, 'value-neutral' counseling" as not violative of the law "while punishing counseling

. . . informed or motivated by faith-based convictions." This speculative and conclusory "possibility" is not sufficient to meet Tingley's burden.

The Supreme Court in *Fulton* described a "formal mechanism" for granting individual exceptions that vests discretion with the enforcing officers. 141 S. Ct. at 1879. There, Philadelphia stopped referring children to a Catholic adoption agency that refused to recognize same-sex parents. *Id.* at 1875. The city relied upon a contractual provision that prohibited adoption agencies from discriminating against prospective adoptive parents based upon their sexual orientation "unless an exception is granted by the Commissioner . . . in his/her sole discretion." *Id.* at 1878. The Court found that this provision (1) was a formal mechanism, (2) creating a system of individual exceptions, (3) that would be exercised at the discretion of a government official. *Id.* at 1878–79. There is no provision in the Washington law for individual exceptions that would allow secular exemptions but not religious ones. In fact, there is no exemption system whatsoever, not even one that affords "some minimal governmental discretion." *Stormans II*, 794 F.3d at 1082.

**2**

Nor does the Washington law "treat any comparable secular activity more favorably than religious exercise." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021); *see also Stormans II*, 794 F.3d at 1079 ("A law is not generally applicable if its prohibitions substantially underinclude non-religiously motivated conduct that might endanger the same governmental interest that the law is

designed to protect."). In *Tandon*, the Supreme Court granted an application for emergency injunctive relief requested by plaintiffs who wished to gather for religious exercise in violation of California's pandemic restrictions. 141 S. Ct. at 1297. Because California permitted hair salons, retail stores, movie theaters, and indoor restaurants to bring more than three households together, but it did not permit the same for people who wanted to gather for at-home religious exercise, the Court concluded the State's policy was not generally applicable. *Id.*

Tingley is unable to identify comparable secular activity that undermines Washington's interest in enacting SB 5722 but is permitted under the law. 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. *Id.* at 1298.

We do not accept Tingley's contention that gender-affirming therapy "can lead to the very types of psychological harms" Washington says it wants to eliminate by prohibiting conversion therapy. SB 5722 is not targeted toward anecdotal reports of "regret" from "sex reassignment surgery" or the prescription of "puberty blocking drugs" about which Tingley's complaint warns. Instead, the law is targeted toward the scientifically documented increased risk of suicide and depression from having a licensed mental health provider try to change you. These harms are not the same. *See Tandon*, 141 S. Ct. at 1298 (Kagan, J., dissenting) ("[T]he law does not require that the State equally treat apples and watermelons."). Tingley is unable to show that Washington's law permits secular

conduct that undermines the same interest Washington asserted in enacting SB 5722. Washington's law is neutral and generally applicable, and survives rational basis review, for the reasons described in Part II.[5]

## V

Aside from his First Amendment claims, Tingley also challenges Washington's law as unconstitutionally vague under the Fourteenth Amendment's Due Process Clause. A law is unconstitutionally vague if it does not give "a person of ordinary intelligence fair notice of what is prohibited" or if it is "so standardless that it authorizes or encourages seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (9th Cir. 2008). Tingley raises a vagueness challenge under both the fair notice and the arbitrary enforcement theories.

### A

The operative question under the fair notice theory is whether a reasonable person would know what is prohibited by the law. The terms of a law cannot require "wholly subjective judgments without statutory definitions, narrowing context, or settled

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[5] We decline Tingley's demand to apply strict scrutiny under the "hybrid rights exception," which stems from dicta in *Smith*, 494 U.S. at 881–82. We have cast doubt on whether this exception exists, and we have not applied strict scrutiny to a challenged law on this basis. *See Parents for Privacy v. Barr*, 949 F.3d 1210, 1236–37 (9th Cir. 2020) (doubting whether exception exists and whether strict scrutiny would be required if it does); *see also Jacobs v. Clark Cnty. Sch. Dist.*, 526 F.3d 419, 440 n.45 (9th Cir. 2008) (describing widespread criticism and declining to adopt the exception).

legal meanings." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 20 (2010) (quoting *United States v. Williams*, 553 U.S. 285, 306 (2008)). For facial vagueness challenges, we tolerate uncertainty at the margins; the law just needs to be clear "in the vast majority of its intended applications." *Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1151 (9th Cir. 2001) (quoting *Hill v. Colorado*, 530 U.S. 703, 733 (2000). Here, Washington's law gives fair notice to a reasonable person of what conduct is prohibited in the "vast majority of its intended applications."

Tingley claims that "sexual orientation" and "gender identity" are vague terms without consistent definitions. Neither term is unconstitutionally vague. We previously rejected a challenge on vagueness grounds to "sexual orientation" in California's nearly identical law, foreclosing Tingley's challenge to this term. *Pickup*, 740 F.3d at 1234. Sexual orientation has only become more commonly understood in society since we decided *Pickup* in 2014, *see Obergefell v. Hodges*, 576 U.S. 644, 661 (2015), as has gender identity. "Gender identity" and "gender expression" are common legal terms that appear in multiple provisions of Washington law, federal statutes, and caselaw. *See*, *e.g.*, Wash. Rev. Code § 48.43.072 (defining terms); 18 U.S.C. § 249(c)(4) (including "gender identity" as a protected characteristic under the federal hate crimes act); *see also Bostock v. Clayton County*, 140 S. Ct. 1731, 1737 (2020) (holding that an employer violates Title VII by discriminating against someone because of their sexual orientation or "gender identity").

"Sexual orientation" and "gender identity" have common meanings that are clear to a reasonable

person—let alone a licensed mental health provider. Usually, we look to a term's common meaning, but if the law regulates the "conduct of a select group of persons having specialized knowledge," then the "standard is lowered" for terms with a "technical" or "special meaning." *United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1993) (citation omitted). Here, Washington's law proscribes the conduct of licensed mental health providers—a "select group of persons having specialized knowledge"—so we must also consider the specialized knowledge of this group and its familiarity with these terms. *Id.* Washington's expert, who chaired the APA Task Force surveying the scientific literature about conversion therapy, stated in a declaration that "sexual orientation" and "gender identity" are well-established concepts in the psychology field. Tingley himself holds himself out as having counseled minors on "gender identity" issues, making it difficult to believe that he, a licensed mental health provider in Washington, does not understand what this term means.

We also reject Tingley's argument that a reasonable person could not understand what conduct is proscribed by Washington's law because the line between permissible counseling involving "identity exploration and development" and impermissible counseling seeking to "change" a minor's identity may be hard to discern. But the terms of the statute provide a clear, dividing line: whether change is the object. *See* Wash. Rev. Code § 18.130.020(4)(b) ("'Conversion therapy' does not include counseling or psychotherapies that provide . . . identity exploration and development *that do not seek to change sexual orientation or gender identity*.") (emphasis added);

Wash. Rev. Code § 18.130.020(4)(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 . . . .") (emphasis added). As Washington explains, what matters is not whether change occurs, but whether the therapeutic interventions have a "fixed outcome" or an "a priori goal of an externally-chosen identity." Tingley ignores that "identity exploration" and "identity development" are technical psychological terms that are "well enough known" by those in the industry "to correctly apply them." *Weitzenhoff*, 35 F.3d at 1289 (citation omitted). Tingley's "speculation about possible vagueness in hypothetical situations not before the Court will not support a facial attack." *Hill*, 530 U.S. at 733.

**B**

Tingley's arbitrary enforcement theory for unconstitutional vagueness also fails. A law is void for vagueness if it "lack[s] any ascertainable standard for inclusion and exclusion." *Kashem v. Barr*, 941 F.3d 358, 374 (9th Cir. 2019) (internal quotation marks and citation omitted). Here, the law provides ascertainable standards to determine what is conversion therapy and what is not conversion therapy. Psychotherapy practices that seek to "change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex" constitute conversion therapy. Wash. Rev. Code § 18.130.020(4)(a). Psychotherapy practices, however, that "provide acceptance, support, and understanding of clients" do not constitute prohibited conversion therapy, nor do practices that facilitate

"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 statute effectively provides a checklist of practices for "inclusion and exclusion." *Kashem*, 941 F.3d at 374 (citation omitted).

That the law's injunctive relief provision, Wash. Rev. Code § 18.30.185, allows "any . . . person" to initiate an action to enjoin the licensed therapist from practicing conversion therapy does not render the licensing scheme unconstitutionally vague. The "any . . . person" provision applies only to injunctive relief. The disciplinary sanctions are instead governed by § 18.130.080 and § 18.130.165, which vest the Washington Department of Health, not "any" person, with responsibilities for enforcement. *See also id.* § 18.130.040 (designating the Department of Health Secretary as the disciplining authority). Section 18.130.080 provides standards for the Washington Department of Health to use in determining whether a complaint "merits investigation." Section 18.130.160 vests the Department of Health with the authority to issue an order sanctioning a license holder, but only after making "a finding, after [a] hearing." This provision also tells the Department of Health what information it may properly consider and what sanctions are permissible. Wash. Rev. Code § 18.130.160. Tingley's contention that § 18.30.185 gives "unconstrained discretion" to "activists . . . who ideologically oppose [his] faith and viewpoint" in a way that "multiplies the threat" of arbitrary enforcement is speculative and contradicted by the standards provided by the licensing scheme. And even though section 18.30.185 permits "any" person to

initiate an action for injunctive relief, such a person would still need to prove the traditional factors for injunctive relief to enjoin a license holder's purported conduct; mere disagreement with someone's "faith and viewpoint" will not carry this burden.

Washington's law prohibiting licensed mental health providers from practicing conversion therapy on minors is not unconstitutionally vague. By its terms, the law gives fair notice of what conduct is proscribed to a reasonable person, and certainly to a license-holding provider with the specialized, technical knowledge of the psychology profession. The law contains standards limiting the discretion of those who will enforce it, and it does not matter that the law allows individuals to initiate actions for injunctive relief. Because the law "provides both sufficient notice as to what is prohibited and sufficient guidance to prevent against arbitrary enforcement," *United States v. Kuzma*, 967 F.3d 959, 970 (9th Cir. 2020), the district court did not err in dismissing Tingley's vagueness challenge.

## CONCLUSION

Our decision today is controlled by our precedent and ample reasoning. Tingley has standing to bring his free speech and free exercise challenges to Washington's law, but they cannot proceed under *Pickup* and *Welch*. In addition to being supported by circuit precedent, our decision to uphold Washington's law is confirmed further by its place within the well-established tradition of constitutional regulations on the practice of medical treatments. Finally, Washington's law is not void for vagueness. We thus affirm the district court's dismissal of

Tingley's claims.

**AFFIRMED**.

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BENNETT, Circuit Judge, concurring in part:

I join the majority opinion except as to Part III of the Discussion section and those portions of the Conclusion that refer to Part III's reasoning. Respectfully, I believe that we should not hypothesize with dicta when our conclusion is commanded by binding precedent. "As a three-judge panel of this circuit, we are bound by prior panel decisions . . . and can only reexamine them when their 'reasoning or theory' of that authority is 'clearly irreconcilable' with the reasoning or theory of intervening higher authority." *Rodriguez v. AT & T Mobility Servs., LLC*, 728 F.3d 975, 979 (9th Cir. 2013) (quoting *Miller v. Gammie*, 335 F.3d 889, 893 (9th Cir. 2003) (en banc), *overruled on other grounds by Sanchez v. Mayorkas*, 141 S. Ct. 1809 (2021)). As we hold in Part II of the Discussion section, we are bound by *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), as to Tingley's free speech claim. Part III is therefore unnecessary, including its discussion of the "long (if heretofore unrecognized) tradition of regulation governing the practice of those who provide health care within state borders"—an attempt to meet *NIFLA*'s exception for a category of speech warranting lesser scrutiny. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018). "The 'cardinal principle of judicial restraint' is that 'if it is not necessary to decide more, it is necessary not to decide more.'" *Midbrook Flowerbulbs Holland B.V. v. Holland Am. Bulb Farms, Inc.*, 874 F.3d 604, 617 n.13 (9th Cir. 2017)

(quoting *PDK Lab'ys Inc. v. Drug Enf't Admin.*, 362 F.3d 786, 799 (D.C. Cir. 2004) (Roberts, J., concurring in part and in the judgment)).

**FOR PUBLICATION**

**UNITED STATES COURT OF APPEALS**
**FOR THE NINTH CIRCUIT**

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|---|---|
| BRIAN TINGLEY,<br>*Plaintiff-Appellant,*<br>v.<br>ROBERT W. FERGUSON, in his official capacity as Attorney General for the State of Washington; UMAIR A. SHAH, in his official capacity as Secretary of Health for the State of Washington; KRISTIN PETERSON, in her official capacity as Assistant Secretary of the Health Systems Quality Assurance division of the Washington State Department of Health,<br>*Defendants-Appellees,*<br>EQUAL RIGHTS WASHINGTON,<br>*Intervenor-Defendant-Appellee.* | No. 21-35815<br>D.C. No. 3:21-cv-05359-RJB<br>ORDER |
| BRIAN TINGLEY,<br>*Plaintiff-Appellee,*<br>v. | No. 21-35856<br>D.C. No. 3:21-cv-05359-RJB |

ROBERT W. FERGUSON, in his official capacity as Attorney General for the State of Washington; UMAIR A. SHAH, in his official capacity as Secretary of Health for the State of Washington; KRISTIN PETERSON, in her official capacity as Assistant Secretary of the Health Systems Quality Assurance division of the Washington State Department of Health,

*Defendants-Appellants,*

and

EQUAL RIGHTS WASHINGTON,

*Intervenor-Defendant.*

Filed January 23, 2023

Before: Kim McLane Wardlaw, Ronald M. Gould, and Mark J. Bennett, Circuit Judges.

Order;
Statement by Judge O'Scannlain;
Dissent by Judge Bumatay

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**ORDER**

The full court was advised of the petition for

rehearing *en banc*. A judge requested a vote on whether to rehear the matter *en banc*. The matter failed to receive a majority of the votes of the nonrecused active judges in favor of *en banc* consideration. *See* Fed. R. App. P. 35. Judges Collins and Lee did not participate in the deliberations or vote in this case.

The petition for rehearing *en banc* is **DENIED**.

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O'SCANNLAIN, Circuit Judge,[1] joined by IKUTA, R. NELSON, and VANDYKE, Circuit Judges, respecting the denial of rehearing en banc:

Is therapeutic speech speech? Does a tradition of licensing a given profession override all First Amendment limits on licensing requirements? The three-judge panel answered 'no' to the first question, and a majority of the panel answered 'yes' to the second. In my view, both holdings are erroneous and significant constitutional misinterpretations, and I respectfully dissent from our court's regrettable failure to rehear this case en banc.[2]

First, the panel said that therapeutic speech is non-speech conduct and so protected only by rational basis review. *Tingley v. Ferguson*, 47 F.4th 1055, 1077

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[1] As a judge of this court in senior status, I no longer have the power to vote on calls for rehearing cases en banc or formally to join a dissent from failure to rehear en banc. See 28 U.S.C. § 46(c); Fed. R. App. P. 35(a). Following our court's general orders, however, I may participate in discussions of en banc proceedings. See Ninth Circuit General Order 5.5(a).

[2] Although the panel's treatment of religious liberty is also concerning, this statement focuses on the free speech issue.

(9th Cir. 2022). True, it reached this result by faithfully applying our decision in *Pickup v. Brown*, which held that a California ban on "sexual orientation change efforts" was a regulation of professional conduct only incidentally burdening speech. 740 F.3d 1208, 1221 (9th Cir. 2014). But the Supreme Court has rejected *Pickup* by name. *Nat'l Inst. of Family & Life Advocates v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361, 2372 (2018). And other circuits have rejected *Pickup*'s holding, concluding instead that therapeutic speech is—speech, entitled to some First Amendment protection. *See King v. Governor of New Jersey*, 767 F.3d 216, 224-29 (3d Cir. 2014); *Otto v. City of Boca Raton*, 981 F.3d 854, 865-66 (11th Cir. 2020). The panel's defense of *Pickup*'s continuing viability is unconvincing. We should have granted rehearing en banc to reconsider *Pickup* and so to resolve this circuit split.

Second, a majority of the panel purported to discover a "long (if heretofore unrecognized) tradition of regulation" which warrants applying only rational basis review to laws burdening therapeutic speech. *Tingley*, 47 F.4th at 1080 (2022) (quoting *NIFLA*, 138 S. Ct. at 2372). In reality, the majority drew out a gossamer thread of historical evidence into a sweeping new category of First Amendment exceptions. If new traditions are so easily discovered, speech-burdening laws can evade *any level of scrutiny* simply by identifying some legitimate purpose which they might serve. We should have granted rehearing en banc also to clarify that regulation of the medical profession is not a First-Amendment-free zone.

I

Brian Tingley, a licensed Washington therapist, challenged a 2018 Washington law prohibiting "conversion therapy." The case turns entirely on the language of the statute and the First Amendment to the United States Constitution.

A

In 2018, the Washington legislature enacted S.B. 5722, which made "[p]erforming conversion therapy on a patient under age eighteen" a form of unprofessional conduct subject to discipline. S.B. 5722, 65th Leg., Reg. Sess. (Wash. 2018), *codified at* Wash. Rev. Code §§ 18.130.020(4), 18.130.180(27). "[C]onversion therapy" is defined as any "regime that seeks to change an individual's sexual orientation or gender identity." Wash. Rev. Code § 18.130.020(4)(a). The statute clearly applies to conversion therapy performed entirely through speech.

Tingley's therapeutic work consists of conversations with his patients. These conversations are informed by his belief that a person's biological sex should not be changed, and that sexual relationships ought to occur "between one man and woman committed to each other through marriage." *Tingley*, 47 F.4th at 1065. He "has worked with several minors ... who have 'sought his help in reducing same-sex attractions,' and others 'who have expressed discomfort with their biological sex.'" *Id.* at 1067. He plans to continue working with minor patients along these lines despite S.B. 5722. *Id.* at 1068. He sought injunctive relief against state officials ("Washington"), alleging, inter alia, that the threat that Washington will enforce S.B. 5722 against him unconstitutionally chills his right to free speech.

B

The district court dismissed Tingley's claims, and Tingley appealed. The panel affirmed, and in particular held that Tingley's free speech claim was foreclosed by our holding in *Pickup*. A majority of the panel affirmed on the additional grounds that S.B. 5722 belonged to a longstanding tradition of regulating medical practice.

1

In *Pickup*, our court held that a California conversion therapy ban similar to the Washington law at issue here was a regulation of "the conduct of state-licensed professionals," and that "any effect it may have on free speech interests is merely incidental." 740 F.3d 1208, 1230-31. The panel here applied Ninth Circuit precedent to conclude that Tingley's talk therapy was conduct, not speech, thereby effectively putting him at risk of professional discipline. *Id.* at 1073.

Although the Supreme Court in *NIFLA* criticized *Pickup* by name, the three-judge panel concluded that *Pickup*'s relevant holding remained good law because it and *NIFLA* were not "clearly irreconcilable." *Tingley*, 47 F.4th at 1074-75 (quoting *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc)). *Pickup* described a continuum of constitutional protection for speech by licensed professionals, from most-protected "public dialogue," to least-protected "professional *conduct*," with "professional speech 'within the confines of a professional relationship'" somewhere in between. The "conversion therapy" ban, according to *Pickup*, was in the least-protected category: a mere "regulation of conduct," protected

only by "rational basis review." *Id.* at 1072-73 (quoting *Pickup*, 740 F.3d at 1228). Since "*NIFLA* only abrogated the theoretical 'midpoint' of *Pickup*'s continuum," the panel here reasoned that "*Pickup*'s approach survives for regulations of professional conduct." *Id.* at 1075.

2

A majority of the panel identified a second reason to uphold the ban: a "long (if heretofore unrecognized) tradition of regulation governing the practice of those who provide health care within state borders." *Id.* at 1080; *see id.* at 1092 (Bennett, J., concurring in part) (declining to join this "unnecessary" "dicta"). The panel majority's primary purported evidence was a handful of turn-of-the-century cases upholding regulations of medical practice, without reference to medical practitioner speech. *Id.* at 1080-81. The panel majority then held that medical regulations burdening such speech are within the tradition, and so receive no First Amendment scrutiny, but are subject only to rational basis review.

II

Our decision in *Pickup* is, I suggest, no longer viable. While *Pickup* may have seen no distinction between "treatments ... implemented through speech" and those implemented "through scalpel," *Tingley*, 47 F.4th at 1064, the First Amendment recognizes the obvious difference, and protects *therapeutic speech* in a way it does not protect *physical medical procedures*. *NIFLA* further clarifies that *Pickup*'s oxymoronic characterization of therapeutic speech as non-speech conduct was incorrect. Other circuits have noted *Pickup*'s error and declined to follow its reasoning. We

should have done the same here.

A

The Supreme Court has already ruled: the First Amendment cannot be evaded by regulating speech "under the guise" of regulating conduct. *NAACP v. Button*, 371 U.S. 415, 439 (1963). "[I]ncidental speech" is permissibly burdened when regulated conduct "'was in part initiated, evidenced, or carried out by means of language,'" *Pickup*, 740 F.3d at 1229 (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949))—but the key phrase is "in part." There must be some "separately identifiable" conduct to which the speech was incidental. *Cohen v. California*, 403 U.S. 15, 18 (1971). Even when a law "generally functions as a regulation of conduct," it merits First Amendment scrutiny insofar as it burdens conduct which "consists of communicating a message" and nothing more. *Holder v. Humanitarian L. Project* ("*HLP*"), 561 U.S. 1, 28 (2010). In sum, under binding Supreme Court precedents, conversion therapy consisting entirely of speech cannot be prohibited without some degree of First Amendment scrutiny.

In reaching the contrary conclusion, *Pickup* erred. Along the way, it grievously misinterpreted most of the precedents on which it most heavily relied:

- The Supreme Court in *HLP* held that the First Amendment protected expert instruction and advice by licensed professionals. 561 U.S. at 27. *Pickup* wrongly claimed that *HLP* involved only "political speech" by "ordinary citizens." 740 F.3d at 1230.

- Our court has held that medical practitioners cannot be prohibited from recommending marijuana use because doing so would "alter[ ] the traditional role of medical professionals by prohibiting speech necessary to the proper functioning" of the medical profession. *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (cleaned up). *Pickup* mistakenly distinguished *Conant* as turning on whether the law burdened speech "wholly apart from the actual provision of treatment." *Pickup*, 740 F.3d at 1229. While *Conant* considered the ban's effect on speech outside the treatment context, it did so only *after* concluding that the ban must be subject to strict scrutiny.
- Our court has said that, while psychoanalytic practice per se is not entitled to First Amendment protection, "[t]he communication that occurs during psychoanalysis is." *Nat'l Ass'n for the Advancement of Psychoanalysis v. California Bd. of Psychology* ("*NAAP*"), 228 F.3d 1043, 1054 (9th Cir. 2000). *NAAP* then applied mere rational basis review to the law at issue only because it did "not dictate what can be said between psychologists and patients during treatment." *Id.* at 1054. *Pickup* contradicted *NAAP* by applying neither intermediate nor strict scrutiny, despite the obvious fact that a conversion therapy ban *does* dictate the content of therapeutic speech.
- *Pickup* misleadingly cited Supreme Court precedent for the proposition that some speech "is not 'an act of communication'." *Pickup*, 740

> F.3d at 1230 (citing *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 126 (2011)). *Carrigan* was not about speech, but expressive conduct: it held that a vote does not communicate because it has a direct legal effect and no generally understood meaning beyond that effect. Speech uttered during therapy, in contrast, has no effect *other than* through what it communicates. *Carrigan* gives no support for the proposition that such speech is not speech at all.

Given the flaws in *Pickup*'s reasoning and its misreading of relevant precedents, it is unsurprising that the Supreme Court in *NIFLA* rejected—not only *Pickup*'s professional-speech doctrine—but also its analysis of the line between speech and conduct.

B

*NIFLA* distinguished speech from conduct, but it rejected *Pickup*'s analysis of the speech-conduct distinction. *Pickup* asked if the speech burdened fell under the vague heading "'*treatment* of emotional suffering and depression,'" in which case it was "'*not* speech.'" 740 F.3d at 1231 (quoting *NAAP*, 228 F.3d at 1054, but see discussion of *NAAP* supra). *NIFLA* rejected recategorizing speech as professional conduct merely because it took place in a professional context. 138 S. Ct. at 2373. Instead, *NIFLA* asked if the speech was incidental to some discrete instance of non-speech conduct, such as a "medical procedure" whose commission "'without the patient's consent'" would constitute "'assault.'" 138 S. Ct. at 2373 (quoting *Schloendorff v. Soc'y of N.Y. Hosp.*, 211 N.Y. 125, 129-30 (1914) (Cardozo, J.)). Under *NIFLA*, a law

regulating medical professional speech "regardless of whether a medical procedure is ever sought, offered, or performed," and not incidental to some other discrete instance of professional conduct, receives at least intermediate scrutiny, and likely strict scrutiny. *Id.* at 2373, 2375.

Especially after *NIFLA*, it is clear that simply labeling therapeutic speech as "treatment" cannot turn it into non-speech conduct. *Pickup*'s efforts to effect this transformation were unpersuasive, and the panel here fared no better. The panel alludes to two further reasons why talk therapy might be non-speech conduct, but neither is convincing.

First, the panel notes that the Washington legislature reasonably believed conversion therapy to have negative effects on "physical and psychological wellbeing," *id.* at 1078, suggesting that therapeutic speech is not speech because it is reasonably thought to risk physical harm. But it would make no sense for the First Amendment to protect speech through heightened scrutiny while subjecting legislative determinations of the line between speech and conduct only to rational basis review. The panel cites no evidence for the implausible proposition that conversion therapy conducted entirely by means of speech risks direct physical harm. *Id.* Speech which risks psychological harm does not thereby become non-speech conduct entirely without First Amendment protections. *Snyder v. Phelps*, 562 U.S. 443, 450 (2011) (protecting speech which a jury had found "outrageous," and which experts testified "had resulted in severe depression and had exacerbated pre-existing health conditions").

Second, the panel finds that conversion therapy bans are in line with "the medical recommendations of expert organizations," *Tingley*, 47 F.4th at 1078, suggesting that therapeutic speech is not speech because it is not public discourse, but belongs to the realm of expertise. Two panel members go further, pointing out that therapists use professional reference books, follow "established practice standards," and apply "theories and techniques." *Id.* at 1082 (quoting Wash. Rev. Code §§ 18.19.010, 18.19.020). But if these features transformed speech into conduct, the First Amendment would not protect legal advice (attorneys make use of authoritative references), education (teachers follow established practice standards), or advertising (marketing professionals apply theories and techniques). Actually, the First Amendment offers at least some protection to all of these forms of expert speech. *See HLP*, 561 U.S. 1, 27 (legal advice); *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1069 (9th Cir. 2020) (teaching); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 366 (2002) (advertising).

C

Other circuits analyzing the issue have uniformly rejected our *Pickup* case. Considering a closely analogous challenge to a conversion therapy ban, the Eleventh Circuit held that the 'conduct' involved in talk therapy "consists—entirely—of words," and that calling it non-speech conduct was mere "relabeling." *Otto v. City of Boca Raton*, 981 F.3d 854, 865 (11th Cir. 2020). Further noting that "*NIFLA* directly criticized *Pickup*," the Eleventh Circuit concluded that there was "not ... much question that, even if some type of professional speech might conceivably

fall outside the First Amendment," therapeutic speech did not. *Id.* at 867.

Even before *NIFLA*, other circuits had found *Pickup*'s analysis of the speech-content distinction both incoherent and foreclosed by Supreme Court precedent. "[I]t would be strange indeed," the Third Circuit reasoned, if "the same words, spoken with the same intent, somehow become 'conduct' when the speaker is a licensed counselor" rather than a student—and in any case "the argument that verbal communications become 'conduct' when they are used to deliver professional services was rejected by *Humanitarian Law Project*." *King v. Governor of New Jersey*, 767 F.3d 216, 228 (3d Cir. 2014). While the Third Circuit did ultimately uphold a conversion therapy ban, it did so only *after* applying intermediate scrutiny, and it had "serious doubts that anything less than intermediate scrutiny would adequately protect the First Amendment interests inherent" in professional speech. *Id.* at 236. In any event, *King*'s holding that intermediate scrutiny applies did not survive *NIFLA*, and *King* now stands *only* for the proposition that therapeutic speech is entitled to some First Amendment protection.

In addition to these emphatic rejections, many circuits *including our own* have noticed that *NIFLA* rejected *Pickup*, including its version of the speech-content distinction. *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 436 (6th Cir. 2019) (noting that *NIFLA* "did *not* adopt any of the 'different rules' applied in *Pickup*"); *Pac. Coast Horseshoeing*, 961 F.3d at 1068 (9th Cir.) (rejecting *Pickup*'s version of the speech-conduct distinction, and noting *Pickup*'s abrogation by *NIFLA*); *see also Cap. Associated*

*Indus., Inc. v. Stein*, 922 F.3d 198, 207 (4th Cir. 2019) (noting in passing *Pickup*'s abrogation); *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 932 (5th Cir. 2020) (same). By reaching the opposite conclusion, the panel here perpetuated a circuit split that many had thought resolved. This error should have been corrected through en banc rehearing.

III

Unrelated to its reliance on *Pickup*, the panel majority also erred in holding that a previously unknown tradition of regulation authorizes Washington's conversion therapy ban. The majority purported to identify a new entry in the "long familiar" catalog of carve-outs such as "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (citations omitted). But the majority's purported evidence simply does not demonstrate a long tradition of regulating therapeutic speech, but only what everyone already knew, that the police power extends to regulating medical practice. That a law exercises the police power does not exempt it from First Amendment scrutiny.

A

The majority's analysis radically underestimated both the burden of proof facing any purported discovery of a new tradition of regulation, and the narrowness with which any such tradition must be defined.

To start, the majority failed to grapple with the Supreme Court's "especial[ ] reluctan[ce]" to recognize new traditional exceptions. *NIFLA*, 138 S. Ct. at 2372.

In the dozen years since *Stevens*, the Supreme Court has never once found the requisite "persuasive evidence" of a new tradition. *Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 792 (2011) (no traditional exception for depictions of violence); *see NIFLA*, 138 S. Ct. at 2371 (nor for professional speech); *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 446 (2015) (nor for campaign finance).[3] Circuit courts have been similarly reluctant, rejecting almost all purported new traditions—most often sub silentio, sometimes explicitly. *E.g.*, *IMDb.com Inc. v. Becerra*, 962 F.3d 1111, 1124 (9th Cir. 2020) (no traditional exception for biographical information); *Otto v. City of Boca Raton*, 41 F.4th 1271, 1274 (11th Cir. 2022) (Grant, J., concurring in denial of rehearing en banc) (nor for medical practitioner speech); *see also State v. Casillas*, 952 N.W.2d 629, 637 (Minn. 2020) (nor for non-consensual transmittals of sexual images). And for good reason: a new tradition requires extensive historical evidence. *E.g.*, *NetChoice LLC v. Paxton*, 49 F.4th 439, 469-80 (5th Cir. 2022) (opinion of Oldham, J.) (surveying evidence for a tradition of common carrier regulations of the communications industry).

Further, the panel majority severely underestimates the narrowness with which any new regulatory tradition must be defined. It must be—not just "not too broad," *Tingley*, 47 F.4th at 1080—but as narrow as the existing exceptions, whose narrowness the Supreme Court has repeatedly emphasized. *E.g.*,

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[3] Even when a new tradition would only reduce the level of scrutiny from strict to intermediate, the Court has required an "unbroken tradition" of regulation dating to the "late 1860s." *City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 142 S. Ct. 1464, 1469 (2022).

*United States v. Alvarez*, 567 U.S. 709, 718-19 (2012) (tradition does not recognize a broad exception for all false speech, but narrow exceptions for defamation, fraud, invasion of privacy, and the like); *New York Times Co. v. Sullivan*, 376 U.S. 254, 269 (1964) (a law cannot merely bear the "epithet" of a traditional regulatory category, it must fall into the category as "measured by standards that satisfy the First Amendment"). Following the Supreme Court's lead, circuits have not allowed laws to evade means-end scrutiny through loose analogies to traditional categories. *E.g.*, *United States v. Anderson*, 759 F.3d 891, 894 (8th Cir. 2014) (child-pornography category limited to images of actual abuse); *Am. Meat Inst. v. U.S. Dep't of Agric.*, 760 F.3d 18, 31 (D.C. Cir. 2014) (Kavanaugh, J., concurring) (required-disclosure category limited to disclosures preventing deception or ensuring health or safety).

In sum, a content-discriminatory law has two ways to survive a First Amendment challenge: it must either pass "rigorous" means-end scrutiny, or fit within a carefully "delimit[ed]" long-standing tradition. *Bennett v. Metro. Gov't of Nashville & Davidson Cnty.* 977 F.3d 530, 553 (6th Cir. 2020) (Murphy, J., concurring in the judgment). Both routes require not one, but two showings: either the regulation must be *narrowly* tailored to serve a *compelling* interest, or it must belong to a *narrowly* delimited and *longstanding* tradition. The panel majority erred in concluding that S.B. 5722 could traverse the second route without clear showings of narrowness and longevity.

B

The panel majority ran afoul of the Supreme Court's requirement that regulatory traditions be defined narrowly. It defined its new tradition broadly, as including all "regulation governing the practice of those who provide health care within state borders," *Tingley*, 47 F.4th at 1080—a definition so broad as not even to be a tradition of regulating *speech*. To be sure, *certain subcategories* of speech related to medical practice may well be unprotected. The Supreme Court has acknowledged, for example, that professional malpractice torts "fall within the traditional purview of state regulation of professional conduct." *NIFLA*, 138 S. Ct. at 2373 (quoting *NAACP*, 371 U.S. at 438, and preempting the panel majority's argument that malpractice laws will be "endanger[ed]" absent a new tradition, *Tingley*, 47 F.4th at 1082). But a narrow exception for malpractice does not imply a broad exception for all speech related to medical practice, any more than the narrow exception for fraud implies a broad exception for all false speech, or for all speech inviting detrimental reliance. *See Alvarez*, 567 U.S. at 718; *cf. NIFLA*, 138 S. Ct. at 2373 (quoting *NAACP*, 371 U.S. at 439). Traditional exceptions to First Amendment scrutiny aren't defined at such a high level of generality—or, at least, shouldn't be.

Even setting aside the narrowness requirement, the panel majority's proposed tradition makes little sense on its own terms. That regulations of medical practice get rational basis review cannot on its own save a regulation of therapeutic speech from First Amendment scrutiny. After all, building regulations, too, get rational basis review. *Village of Euclid v. Ambler Realty Co.*, 272 U.S. 365 (1926). *Contra*

*Tingley*, 47 F.4th at 1083 (suggesting that medicine and architecture differ in this regard). But a state cannot evade First Amendment scrutiny for signage regulations simply by pointing out that building regulation is within the police power, *cf. Reagan Nat'l Advert.*, 142 S. Ct. at 1473 (applying intermediate scrutiny to signage regulation), let alone evade scrutiny of restrictions on the speech of licensed architects by redescribing it as "building castles in air."

The panel majority's argument produces the absurd implication that any speech-burdening regulation which can be characterized as an exercise of the police power is exempt from First Amendment scrutiny.

C

Even construing the panel majority to intend a more narrowly defined tradition of regulating medical practitioner speech within the treatment context, there simply is no evidence of any such tradition. Though the panel majority cited various Supreme Court precedents, *none* involves such a regulation:

- *Dent v. West Virginia* upheld a medical licensing requirement against a substantive due process challenge. 129 U.S. 114 (1889). But the regulation did not burden speech. Although it did "prohibit[ ] 'swearing falsely to any question which may be propounded'" to a license applicant, *Tingley*, 47 F.4th at 1080 (citing *Dent*, 129 U.S. at 126) (cleaned up), the panel majority gained nothing from emphasizing this fact—fraud has always been recognized as a traditional regulatory category. *See Alvarez*, 567 U.S. at 718.

- *Hawker v. New York* upheld a law barring convicted felons from medical practice based on their lack of good character. 170 U.S. 189 (1898). More recent Supreme Court decisions establish that good character requirements in professional licensing are generally permissible—*unless* they burden speech, in which case they receive constitutional scrutiny. *See Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 263 (1957).
- *Collins v. Texas* upheld application of a medical licensing law to an osteopath. 223 U.S. 288, 296 (1912). The Supreme Court found the application "intelligible" because the osteopath engaged in purportedly "scientific manipulation affecting the nerve centers," *Collins*, 223 U.S. at 296—in other words, it did not regulate his speech, but his physical contact with patients.
- *Collins* also contains what the panel majority called a "long list of cases from state courts," *Tingley*, 47 F.4th at 1080—really four Supreme Court cases appealed from state courts. Two upheld medical licensing laws, *Hawker*, 170 U.S. 189; *Meffert v. Packer*, 195 U.S. 625 (1904), while another upheld a vaccine mandate, *Jacobson v. Massachusetts*, 197 U.S. 11 (1905). The fourth case regulated speech, but not medical speech in particular; it targeted advertising not just of medical practices, but also of "hotels, lodging houses, eating houses, [and] bath houses."

*Williams v. Arkansas*, 217 U.S. 79, 89 (1910). It is well-established that medical advertising enjoys some degree of First Amendment protection. *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 366 (2002).

- *Lambert v. Yellowley* upheld a Prohibition-era limitation on medical prescriptions of alcohol. 272 U.S. 581 (1926). Although prescriptions do involve words, they are also legally efficacious acts, and so can be regulated as conduct. *See Conant*, 309 F.3d at 634. And although this case does show that the practice of medicine has long been regulated despite good-faith disagreement about which regulations are desirable, *Tingley*, 47 F.4th at 1080-81, this fact is irrelevant. It shows only that medical regulations generally get rational basis review—not that medical regulations *burdening speech* receive no more scrutiny than other medical regulations.

- *Dobbs v. Jackson Women's Health Organization* included an appendix cataloging nineteenth-century abortion laws, 142 S. Ct. 2228, 2285-2300 (2022), which the panel majority describes as "apply[ing] to health care professionals and impact[ing] their speech," *Tingley*, 47 F.4th at 1082. But really, the laws in question only burdened speech "suggest[ing]," "advis[ing]," "direct[ing]," or otherwise incidental to the procuring of an abortion, itself a criminal act at the time. It has long been understood that speech which aids and abets

> criminal conduct is not protected speech. *See United States v. Freeman*, 761 F.2d 549, 551 (9th Cir. 1985).

A later section of the majority opinion includes additional citations, but these are even less relevant to the tradition-of-regulation analysis, being dated a century too late to support a *longstanding* constitutional tradition. *Tingley*, 47 F.4th at 1081-82 (citing a Washington statute enacted in 1984 and a 2007 law review article discussing recent caselaw). And in any event, the regulations they contain are easily cognizable under well-understood First Amendment categories such as fraud, informed consent, and aiding and abetting liability. In sum, the panel majority's scattershot citations are not merely insufficient evidence—they are not even relevant evidence. They do not so much as give reason to suspect a long-standing tradition of regulating therapeutic speech.[4]

D

While there is no longstanding tradition of regulating therapeutic speech, there *is* a constitutional tradition relevant here—namely, that

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[4] Judge Rosenbaum's dissental in *Otto,* which similarly argued for new tradition of regulation, cited only three pre-1970 cases not cited by the panel majority here—and they are equally unavailing. 41 F.4th at 1291-95. Two concern equal protection challenges to licensing law exemptions, *Crane v. Johnson*, 242 U.S. 339 (1917) (upholding prayer healer exemption); *Watson v. Maryland*, 218 U.S. 173 (1910) (upholding grandfather exemption), while the third involved medical advertising, *Semler v. Oregon State Bd. of Dental Examiners*, 294 U.S. 608 (1935). As already shown, neither type of law supports a broader tradition of regulating medical practitioner speech.

of protecting religious speech. Unfortunately, the panel did not consider it.

The Supreme Court has repeatedly emphasized that protections for religious speech are at the core of the First Amendment. *E.g.*, *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) ("[A] free-speech clause without religion would be Hamlet without the prince."). As the very term "conversion therapy" suggests, the speech Washington's law singles out for opprobrium is religious speech. *Cf. Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993) (an ordinance's "use of the words 'sacrifice' and 'ritual'" indicates that it targeted religion). S.B. 5722's carve-out for "[n]on-licensed counselors acting under the auspices of a religious [group]" implicitly acknowledges the constitutional issue, 2018 Wash. Sess. Laws, ch. 300, § 2, but it cannot save the law from constitutional challenge. Many licensed therapists take seriously the origins of "psychotherapy" in the religious "cure of souls." Institute for Faith & Family Amicus Br. at 13-14 (quoting Thomas Szasz, *The Myth of Psychotherapy* 28 (1978)). Tingley is among them. "[H]is Christian views inform his work," including his practice of conversion therapy, in which he speaks to his patients about "what he believes to be true," such as that a person's biological sex is "'a gift of God' that should not be changed." *Tingley*, 47 F.4th at 1065, 1068. Tingley's religious speech does not lose its constitutional protection simply because he is subject to a licensing requirement. *Cf. Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1884 (2021) (Alito, J., concurring) (arguing that traditional religious practices merit constitutional protection even when

the state has imposed licensing requirements).

Yet the panel majority here entirely ignored the First Amendment's special solicitude for religious speech. Instead, it commended Washington for concluding "that health care providers should not be able to treat a child by such means as telling him that he is 'the abomination we had heard about in Sunday school'." *Tingley*, 47 F.4th at 1083 (quoting a law review note quoting an op-ed). Far from showing that conversion therapy bans are constitutionally innocuous, this passage in the panel majority opinion unwittingly reveals why First Amendment scrutiny is necessary.[5]

## IV

The Supreme Court has already spoken: a legislature cannot evade First Amendment scrutiny simply by labeling therapeutic speech as conduct, and the First Amendment's protections continue to apply even when a state legislature exercises its traditional police power. Because the panel failed to apply binding Supreme Court precedent, I respectfully dissent from the court's decision not to rehear this case en banc.

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[5] This section of the panel majority, *Tingley*, 47 F.4th at 1083-84, contains more rhetoric than law. It cites only two binding authorities, one about coerced consent to police search of a vehicle, *Schneckloth v. Bustamonte*, 412 U.S. 218, 228 (1973), the other about the right to conduct one's own criminal defense, *Faretta v. California*, 422 U.S. 806, 834 (1975). It concludes: "We uphold Washington's law and reject Tingley's free speech challenge because the Washington law permissibly honors individual identity." *Tingley*, 47 F.4th at 1084. That a law burdens speech in order to "honor[] individual identity" does not, as far as I am aware, exempt it from First Amendment scrutiny.

BUMATAY, Circuit Judge, dissenting from the denial of rehearing en banc:

The issues at the heart of this case are profoundly personal. Many Americans and the State of Washington find conversion therapy—the practice of seeking to change a person's sexual orientation or gender identity—deeply troubling, offensive, and harmful. They point to studies that show such therapy ineffective. Even worse, they claim that conversion therapy correlates with high rates of severe emotional and psychological trauma, including suicidal ideation. Under the appropriate level of judicial review, these concerns should not be ignored.

But we also cannot ignore that conversion therapy is often grounded in religious faith. According to plaintiff Brian Tingley, a therapist licensed by the State of Washington, his practice of conversion therapy is an outgrowth of his religious beliefs and his understanding of Christian teachings. Tingley treats his clients from the perspective of a shared faith, which he says is conducive to establishing trust. And as part of his therapeutic treatment, Tingley counsels his clients to live their lives in alignment with their religious beliefs and teachings.

To be sure, the relationship between the LGBT community and religion may be a complicated one. But as with any community, members of the LGBT community have different experiences with faith. According to one 2013 survey, 42% of LGBT adults identify as "Christian." Forty-three percent consider religion to be important in their lives—including 20% who say it is "very important" to them. *A Survey of LGBT Americans*, Pew Research Center, 91–92, 96

(June 13, 2013).[1] A more recent study found that 46.7% of LGBT adults, or 5.3 million LGBT Americans, are religious. Kerith J. Conron et al., *Religiosity Among LGBT Adults in the US*, UCLA Williams Institute, 2, 5 (Oct. 2020).[2] Thus, for many who voluntarily seek conversion therapy, faith-based counseling may offer a unique path to healing and inner peace. Indeed, Tingley only works with clients who freely accept his faith-based approach.

Ordinarily, under traditional police powers, States have broad authority to regulate licensed professionals like Tingley. Under that authority, the State of Washington has banned the practice of conversion therapy on minors. *See* Wash. Rev. Code §§ 18.130.020(4), 18.130.080(27). The prohibition applies to all forms of the treatment, including voluntary, non-aversive, and non-physical therapy. *Id.*[3] In other words, Washington outlaws pure talk therapy based on sincerely held religious principles. As a result, Tingley cannot discuss traditional

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[1] Available at: https://www.pewresearch.org/social-trends/wp-content/uploads/sites/3/2013/06/SDT_LGBT-Americans_06-2013.pdf.

[2] Available at: https://williamsinstitute.law.ucla.edu/wpcontent/uploads/LGBT-Religiosity-Oct-2020.pdf.

[3] Washington notes that conversion therapy may encompass more pernicious practices, such as electric shock treatment or the use of nausea-inducing drugs. I have little doubt that a law prohibiting coercive, physical, or aversive treatments on minors would survive a constitutional challenge under any standard of review. But Washington's law proscribes a broad range of counseling, some of which would clearly be classified as voluntary, religious, and speech. Under Tingley's constitutional challenge, we must focus on the law's impact on these aspects of conversion therapy.

Christian teachings on sexuality or gender identity with his minor clients, even if they seek that counseling. While States' regulatory authorities are generally broad, they must give way to our Constitution.

And here, the First Amendment protects against government abridgment of the "freedom of speech." U.S. Const. amend. I. No matter our feelings on the matter, the sweep of Washington's law limits speech motivated by the teachings of several of the world's major religions. Such laws necessarily trigger heightened levels of judicial review. After all, "religious and philosophical objections" to matters of sexuality and gender identity "are protected views and in some instances protected forms of expression." *Masterpiece Cakeshop v. Colo. Civ. Rts. Comm'n*, 138 S. Ct. 1719, 1727 (2018). As Judge O'Scannlain writes, religious speech gains "special solicitude" under the First Amendment. *See also Capitol Square Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995). And those protections don't dissipate merely because Tingley is a licensed therapist. In the free exercise context, the Court has recently remarked that the First Amendment protects "the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022). That principle applies equally when faith takes the form of speech.

Because the speech underpinning conversion therapy is overwhelmingly—if not exclusively—religious, we should have granted Tingley's petition for en banc review to evaluate his Free Speech claim under a more exacting standard. It may well be the case that, even under heightened review,

Washington's interest in protecting minors would overcome Tingley's Free Speech challenge. But our court plainly errs by subjecting the Washington law to mere rational-basis scrutiny. *See Tingley v. Ferguson*, 47 F.4th 1055, 1077–78 (9th Cir. 2022).

It is a "bedrock principle" of the First Amendment that the government cannot limit speech "simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). While I recognize that the speech here may be unpopular or even offensive to many Americans, it is in these cases that we must be most vigilant in adhering to constitutional principles. Those principles require a heightened review of Tingley's Free Speech claim. It may be easier to dismiss this case under a deferential review to Washington's law, but the Constitution commands otherwise.

I respectfully dissent from the denial of rehearing en banc.

* * * * *

Attachments to the Ninth Circuit's Order Denying Rehearing En Banc are not reproduced in this Appendix but are available as follows:

*A Survey of LGBT Americans*, Pew Research Center (June 13, 2013), available at: https://perma.cc/5QZY-GA9A

Kerith J. Conron et al., *Religiosity Among LGBT Adults in the US*, UCLA Williams Institute, 2, 5 (Oct. 2020), available at: https://perma.cc/B6L5-GUR5

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT TACOMA

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| BRIAN TINGLEY,<br>Plaintiff,<br>v.<br>ROBERT W. FERGUSON, in his official capacity as Attorney General for the State of Washington; UMAIR A. SHAH, in his official capacity as Secretary of Health for the State of Washington; and KRISTIN PETERSON, in her official capacity as Assistant Secretary of the Health Systems Quality Assurance division of the Washington State Department of Health;<br>Defendants,<br>and<br>EQUAL RIGHTS WASHINGTON,<br>Intervenor Defendant. | CASE NO. 3:21-cv-05359-RJB<br><br>ORDER GRANTING DEFENDANTS' MOTION TO DISMISS AND DENYING PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION |

This matter comes before the Court on Plaintiff's Motion for a Preliminary Injunction (Dkt. 2), Intervenor Defendant Equal Rights Washington's

Motion to Dismiss (Dkt. 26), and Defendants' Motion to Dismiss (Dkt. 27). The Court has considered the pleadings filed in support of and in opposition to the motions and the file herein and heard oral argument on 27 August 2021.

Plaintiff, Brian Tingley, is a licensed Marriage and Family Therapist. Dkt. 2. He brings this lawsuit and the pending motion for a preliminary injunction to enjoin enforcement of Wash. Rev. Code §§ 18.130.020 and 18.130.180, which prohibit licensed counselors from engaging in "conversion therapy" with a minor (the "Conversion Law"). Wash. Rev. Code § 18.130.180(27).

Defendants Robert Ferguson, Kristin Peterson, and Umair Shah ("State Defendants") and Intervenor Defendant Equal Rights Washington oppose Plaintiff's Motion for a Preliminary Injunction and move to dismiss his claims. Dkts. 26 and 27. For the following reasons, State Defendant's Motion to Dismiss (Dkt. 27) should be granted, and Intervenor Defendant's Motion to Dismiss (Dkt. 26) and Plaintiff's Motion for a Preliminary Injunction (Dkt. 2) should be denied as moot.

## I. FACTS AND PROCEDURAL HISTORY

### A. FACTS

When the Washington State Legislature enacted Senate Bill 5722, the precursor to the codified Conversion Law, it declared 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 minors against exposure to serious harms

caused by conversion therapy." 2018 Wash. Sess. Laws, ch 300 § 1. The bill's legislative history also includes a health impact report, available at HIR-2017-18-SB5722.pdf (wa.gov). The report summary includes the following findings:

- A fair amount of evidence that prohibiting the use of conversion therapy in the treatment of minors would decrease the risk of harm and improve health outcomes for LGBTQ individuals.
- Very 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.

The Conversion Law includes the following definitions:

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

Wash. Rev. Code § 18.130.020(4)(a).

> "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)(b).

Furthermore, the Conversion Law states that "[p]erforming conversion therapy on a patient under age eighteen" constitutes "unprofessional conduct for any license holder under the jurisdiction of [Wash. Rev. Code 18.130]." Wash. Rev. Code § 18.130.180(27). A person found to be in violation of the law may be subject to professional sanctions. Wash. Rev. Code § 18.130.050(15). The Conversion Law does not apply to therapy provided "under the auspices of a religious denomination, church, or religious organization." Wash. Rev. Code § 18.225.030(4).

Plaintiff is a Christian, but he does not practice under such auspices. Dkt. 2 at 9. His practice group consists of Christian counselors who seek to help clients achieve "personal and relational growth as well as healing for the wounded spirit, soul, and body through the healthy integration of relationship, psychological, and spiritual principles with clinical excellence." *Id.* Plaintiff asserts that most of his clients share his Christian faith, and that he does not seek to impose his faith on any of his clients. *Id.*

According to Plaintiff, some of his clients, including minor clients, have asked him to assist them in reducing same-sex attraction, achieving comfort with their biological sex, or to desist from sexual behaviors including addiction to pornography or ongoing sexual activity that the client believes is wrong. *Id.* at 5. He claims that he is currently or

recently has violated the Conversion Law "[b]y counseling minors who have expressed a transgender identity to assist them in achieving their self-chosen goal of changing that sense of identity to a gender identity consistent with their biological sex" and "[b]y counseling minors who experience same-sex attraction to assist them in achieving their self-chosen goal of changing their sexual attractions by reducing same-sex attractions and increasing attraction to the opposite sex." Dkt. 44 at 3.

In 2012, California enacted a similar law, enacted as Senate Bill 1172 ("SB 1172"), which prohibits a mental health provider from engaging in sexual orientation change efforts with a patient under 18 years of age. Cal. Bus. & Prof. Code §§ 865.1, 865.2. SB 1172 defines sexual orientation change efforts as, "any practices by mental health providers that seek to change an individual's sexual orientation. This 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." Cal. Bus. & Prof. Code § 865(b)(1). Explicitly excluded from the definition are "psychotherapies that: (A) provide acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices; and (B) do not seek to change sexual orientation." Cal. Bus. & Prof. Code § 865(b)(2). In short, both Washington and California's laws explicitly prohibit counseling designed to change a minor's sexual orientation, but permit counseling designed to provide support, understanding, and

development. There are, however, slight differences in the laws regarding gender identity. The California law does not specifically use the term "gender identity," as does the Washington law, but it does prohibit "efforts to change ... gender expressions[.]" *See* Cal. Bus. & Prof. Code §§ 865.1, 865.2; Wash. Rev. Code §§ 18.130.020, 18.130.180.

The Ninth Circuit affirmed dismissals of claims brought against the California conversion law that are similar to Plaintiff's claims in this case. *See Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014); *Welch v. Brown*, 834 F.3d 1041 (9th Cir. 2016).

## B. PROCEDURAL HISTORY

On May 13, 2021, Plaintiff filed the complaint (Dkt. 1) and the pending Motion for Preliminary Injunction (Dkt. 2). On May 25, 2021, the parties stipulated to set a briefing schedule, which permitted Defendants to respond to the Motion for Preliminary Injunction and to file a Motion to Dismiss by June 25, 2021 (Dkt. 11). On May 27, 2021, Equal Rights Washington filed a motion to intervene as a party defendant (Dkt. 16), which the Court granted on June 28, 2021 (Dkt. 33). On June 25, 2021, Intervenor Defendant Equal Rights Washington and State Defendants filed separate documents opposing Plaintiff's Motion for Preliminary Injunction and moving to dismiss Plaintiff's claims. Dkts. 26 and 27. In addition to the motions filed by the parties, The Trevor Project, Inc., American Foundation for Suicide Prevention, and American Association of Suicidology filed an *amici curiae* brief in support of Defendants' Motion to Dismiss and Opposition to Plaintiff's Motion for Preliminary Injunction. Dkt. 34.

### C. PENDING MOTIONS AND ORGANIZATION OF OPINION

There are three pending motions before the Court: Plaintiff's Motion for Preliminary Injunction (Dkt. 2), Intervenor Defendants' Motion to Dismiss (Dkt. 26), and State Defendants' Motion to Dismiss (Dkt. 27). This Order will first consider State Defendants' Motion to Dismiss, which should be granted for the reasons stated below. Because State Defendants' Motion to Dismiss should be granted and this case dismissed, both Intervenor Defendants' Motion to Dismiss and Plaintiff's Motion for Preliminary Injunction should be denied as moot.

## II. DISCUSSION

### A. STATE DEFENDANTS' MOTION TO DISMISS

#### 1. STANDING AND RIPENESS

Plaintiff brings claims both in his individual capacity and on behalf of his minor patients who he claims seek therapy designed at changing their sexual orientation or gender identity. Defendants argue Plaintiff lacks standing and that his claims are not ripe. While Plaintiff does have individual standing and his claims are ripe, he does not have standing to bring claims on behalf of his minor patients.

##### a. STANDING AND RIPENESS – INDIVIDUAL CLAIMS

Defendants argue that Plaintiff fails to establish standing and that his claim is not ripe. Dkt. 27 at 11. Neither argument is persuasive.

The Court "need not delve into the nuances of the

distinction between the injury in fact prong of standing and the constitutional component of ripeness [because] in this case, the analysis is the same." *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc). "Whether the question is viewed as one of standing or ripeness, [Article III of the United States] Constitution mandates that prior to our exercise of jurisdiction there exist a constitutional 'case or controversy,' that the issues presented are 'definite and concrete, not hypothetical or abstract.'" *Id.* To determine whether a plaintiff satisfies this jurisdictional prerequisite, courts "consider whether the plaintiffs face 'a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement,' *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979), or whether the alleged injury is too 'imaginary' or 'speculative' to support jurisdiction." *Thomas*, 220 F.3d at 1139.

In the context of a First Amendment challenge, however, "the inquiry tilts dramatically toward a finding of standing." *LSO, Ltd. v. Stroh*, 205 F.3d 1146, 1155 (9th Cir. 2000). So, while a general allegation of a "subjective chill" in First Amendment activity is insufficient to demonstrate injury, *Laird v. Tatum*, 408 U.S. 1, 14–15 (1972), a plaintiff need not show that a law has been enforced or that the government threatened enforcement against the plaintiff, *see LSO*, 205 F.3d at 1155. It is sufficient that a plaintiff shows a credible threat of enforcement. *Id.* at 1156.

Plaintiff claims that he has recently or is currently "counseling minors who have expressed a transgender identity to assist them in achieving their

self-chosen goal of changing that sense of identity to a gender identity consistent with their biological sex," and "counseling minors who experience same-sex attraction to assist them in achieving their self-chosen goal of changing their sexual attractions by reducing same-sex attractions and increasing attraction to the opposite sex." Dkt. 24 at 8; *see* Dkt. 1 at 22. This counseling is prohibited under the Conversion Law. *See* Wash. Rev. Code 18.130.020(4)(a). While State Defendants argue that Plaintiff does not establish a credible threat of enforcement because the State typically only investigates unprofessional conduct if a complaint is filed against a licensee and to date no complaint has been filed against Plaintiff or any other licensee for violation of the Conversion Law, it also acknowledges that it "intends to enforce the [Conversion] Law as it enforces other restrictions on unprofessional conduct." Dkt. 27 at 10. Plaintiff's claims that he engages in activity prohibited by the law that could realistically lead to enforcement action against him are sufficient to establish a realistic danger of enforcement. He need not wait for the law to actually be enforced against him, especially in this context because he brings a First Amendment challenge. Therefore, Plaintiff has standing and his claim is ripe.

**b. THIRD-PARTY STANDING**

Plaintiff does not, however, have third-party standing to bring claims on behalf of his minor patients.

A plaintiff seeking to assert third-party standing must demonstrate: (1) "injury-in-fact," (2) "a close relation to the third party," and (3) "a hindrance to

the third party's ability to protect his or her own interests." *Powers v. Ohio*, 499 U.S. 400, 410–11 (1991).

Plaintiff does not demonstrate that his minor patients are hindered in their ability to protect their own interests. His assertion that his patients may be hindered in their ability to bring their own claims is speculative. This conclusion is consistent with findings from other courts considering similar claims. *See*, *e.g.*, *Doyle v. Hogan*, Case No. 19-cv-0190-DKC, 2019 WL 3500924 (D. Md. Aug. 1, 2012); *vacated on other grounds*, 1 F.4th 249 (4th Cir. 2021); *King v. Gov. of the State of New Jersey*, 767 F.3d 216, 244 (3rd Cir. 2014).

**2. STANDARD FOR MOTION TO DISMISS**

Fed. R. Civ. P. 12(b) motions to dismiss may be based on either the lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory. *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1990). Material allegations are taken as admitted and the complaint is construed in the plaintiff's favor. *Keniston v. Roberts*, 717 F.2d 1295 (9th Cir. 1983). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitlement to relief requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 554–55 (2007) (internal citations omitted). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the

allegations in the complaint are true (even if doubtful in fact)." *Id.* at 555. The complaint must allege "enough facts to state a claim to relief that is plausible on its face." *Id.* at 547.

**3. FIRST AMENDMENT**

The statutory licensing requirement at issue here is 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). Plaintiff concedes that the laws at issue are substantively similar and that "the Ninth Circuit's decision in *Pickup v. Brown* ... is binding on this Court if it is still good law." Dkt. 43 at 14. Therefore, this motion to dismiss depends squarely on that question: is *Pickup* good law, or, as Plaintiff argues, has *Pickup* been overruled?

In *Pickup*, the Ninth Circuit consolidated and considered together two challenges to the California conversion law, Senate Bill 1172. 740 F.3d 1208. As a threshold question, the court found it must "determine whether SB 1172 is a regulation of conduct or speech," and two cases guided its decision: *National Association for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology* ("*NAAP*"), 228 F.3d 1043 (9th Cir. 2000), and *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), both of which provide helpful illustration for the question before the Court. *Id.* at 1225.

In *NAAP*, the first case analyzed by that court, the Ninth Circuit upheld a licensing scheme that required persons who provide psychological services to the public pay a fee and meet educational and experiential requirements to obtain a license to

practice. 740 F.3d at 1225 (citing *NAAP*, 228 F.3d at 1056). The *NAAP* court reasoned that the licensing scheme, even if it implicated speech, was a valid exercise of California's police power. 740 F.3d at 1226 (citing *NAAP*, 228 F.3d at 1056). Significant for the *Pickup* decision, the court in *NAAP* emphasized that "psychoanalysis is the treatment of emotional suffering and depression, *not* speech." 740 F.3d at 1226 (citing *NAAP*, 228 F.3d at 1054).

In *Conant*, the Ninth Circuit considered federal policy permitting federal regulators to revoke a doctor's license to prescribe controlled substances if the doctor recommended medical marijuana to a patient. *Id.* at 1226 (citing *Conant*, 309 F.3d at 632). The court affirmed a district court's order granting a permanent injunction enjoining that policy "where the basis for the government's action is solely the physician's professional 'recommendation' of the use of medical marijuana." *Conant*, 309 F.3d at 632. It emphasized that "neither we nor the parties disputed the government's authority to prohibit doctors from *treating* patients with marijuana." *Pickup*, 740 F.3d at 1226 (citing *Conant*, 309 F.3d at 632, 635–36). As opposed to treatment, however, the policy at issue regulated "recommending" marijuana, which the court found was regulation of viewpoint-based speech because it "condemned expression of a particular viewpoint, i.e., that medical marijuana would likely help a specific patient." *Pickup*, 740 F.3d at 1226–27 (quoting *Conant*, 309 F.3d at 637).

Together, *NAAP* and *Conant* underscored the difference between the act of providing treatment (conduct) and speech that may be otherwise involved with providing treatment, including making

recommendations or discussing treatment options. *See id.*

In *Pickup*, the court built on that logic to find that SB 1172 regulated "professional conduct" (treatment) and that, while professional conduct is entitled to some level of constitutional protection, it is not entitled the same protection as speech. 740 F.3d at 1227. Professional conduct, the court found, falls on the side of a continuum of protection where the state's power to regulate "is subject to only rational basis review and must be upheld if it bears a rational relationship to a legitimate state interest." *Id.* at 1229, 1231. Notably, the *Pickup* court emphasized that SB 1172 "bans a form of treatment for minors; it does nothing to prevent licensed therapists from discussing the pros and cons of [sexual orientation change efforts] with their patients." *Id.* at 1229. This bore a rational relationship to "California's 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 sexual orientation change efforts.'" *Id.* at 1231 (quoting 2012 Cal. Legis. Serv. ch. 835, § 1(n)). Therefore, SB 1172 withstood rational basis review and was found to be constitutional. *Pickup*, 740 F.3d at 1232.

The same is true of the Conversion Law currently before the Court. Plaintiff asserts that the Supreme Court overruled this holding in *NIFLA v. Becerra*, 138 S. Ct. 2361 (2018), and that *Pickup* is no longer good law. For the following reasons, the Court disagrees.

In *NIFLA*, the Supreme Court considered challenges to a California law requiring licensed

pregnancy-related clinics to provide notice of the existence of publicly-funded family-planning services, including for contraception and abortions, and requiring unlicensed pregnancy-related clinics to provide notice that they were not licensed. 138 S. Ct at 2361. The Court struck down both notice requirements on the grounds that they unduly burdened protected speech. *Id.* at 2361–62. *NIFLA*, however, does not overturn *Pickup*'s holding because *NIFLA* considered professional *speech*, not conduct.

Central to the Supreme Court's decision in *NIFLA* was that it "has not recognized 'professional speech' as a separate category of speech." *Id.* at 2371–72. While the Supreme Court did not find that no such category could exist, it disagreed with the Ninth's Circuit's analysis and held that "[s]peech is not *unprotected* merely because it is uttered by 'professionals.'" *Id.* (emphasis added). The Court eventually found that both notice requirements unduly burdened speech, but it also explicitly recognized that "under our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* at 2372; *see id.* at 2373 ("The licensed notice at issue here is not an informed-consent requirement or any other regulation of professional conduct.").

The *NIFLA* decision is based on an analysis of speech, not conduct, and it does not undermine the distinction between speech and conduct central to the holding in *Pickup*. Conduct, albeit conduct of therapists whose job inextricably involves speech, was at issue in *Pickup* and is at issue in this case. The notice requirements at issue in *NIFLA* were speech. The prohibited conduct at issue here, performing

conversion therapy, is analogous to doctor giving a prescription for marijuana because it involves engaging in a specific act designed to provide treatment. In contrast, the speech at issue in *NIFLA*, notice requirements that regulated the information a provider must give to its patients, is more analogous to a doctor recommending that a patient use marijuana because both consider information that a provider may discuss with a patient. Both the California and Washington conversion laws specifically permit a therapist to engage in that type of speech because they permit discussing various treatment options, including conversion therapy. *See* Wash. Rev. Code 18.130.020(4); *see also* Cal. Bus. & Prof. Code § 865(b).

Furthermore, the Conversion Law does not apply to therapy provided "under the auspices of a religious denomination, church, or religious organization." Wash. Rev. Code § 18.225.030(4); *see* SB 5722 § 2 (SB 5722 "may not be construed to apply to ... 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 ... and nonlicensed counselors acting under the auspices of a religious denomination, church, or organization."). So, like a doctor in *Conant* who may recommend medical marijuana, a licensed therapist could recommend conversion therapy, it would just need to be provided by someone else, someone under the auspices of a religious denomination.

Plaintiff argues that the Ninth Circuit's decision in *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062 (9th Cir. 2020), demonstrates that

*Pickup* is no longer good law and compels a different conclusion because *Horseshoeing Sch.* noted in a citation that *NFLA* "abrogated" *Pickup*. That citation, however, is not dispositive. *Horseshoeing Sch.* considered a licensing restriction requiring a vocational school, in this case the only school for horseshoeing in the State of California, to deny a prospective student's application if that applicant did not have a high school diploma, a GED, or had not passed an exam provided by the U.S. Department of Education. *Id.* at 1065. The court held that the restriction burdened plaintiffs' right to free speech because it regulated the availability of educational messaging. *Id.* In a citation, the court wrote that *NIFLA* "abrogated" *Pickup*. *Id.* at 1068. This citation, however, does not reflect or consider the distinction between conduct and speech considered in *Pickup*. Instead, *Horseshoeing Sch.* rests on analysis of speech and found that "[t]here can be little question that vocational training is speech protected by the First Amendment ... and ... 'an individual's right to speak is implicated when information he or she possesses is subjected to "restraints on the way in which the information might be used" or disseminated.'" *Id.* at 1069 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011)).

The Washington Conversion Law does not restrain the dissemination of information. It prohibits a licensed therapist from engaging in a specific type of conduct. The holding from *Pickup*, at least as it pertains to this case, was not overruled by *NIFLA*, and *Horeshoeing Sch.* does not conclude otherwise. Without "clearly inconsistent" higher precedent, the Court should not depart from the Ninth Circuit's

holding in *Pickup*. *See Lair v. Bullock*, 697 F.3d 1200, 1206 (9th Cir. 2012); *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003). The Circuit well knows how to clearly reverse a precedential opinion, and the citation in *Horseshoeing Sch.* did not do that.

Furthermore, both the Ninth Circuit and the Supreme Court denied petitions by the *Pickup* plaintiff to recall the court's decision in light of *NIFLA*. *See Pickup v. Brown*, Case No. 12-17681, 2018 WL 11226270 (9th Cir. Nov. 6, 2018); *Pickup v. Newsom*, No. 18-1244, 2019 WL 1380186, *petition denied* May 20, 2019. The Supreme Court also denied a similar petition from the Third Circuit. *King v. Murphy*, 139 S. Ct. 1567 (Apr. 15, 2019); *denying writ of certiorari for King v. Gov. of the State of New Jersey*, 767 F.3d 216 (3rd Cir. 2014). These denials indicate that the "extraordinary circumstances" required to overturn precedent are not present. *See Pickup*, Case No. 12-17681, 2018 WL 11226270.

Therefore, as in *Pickup*, the Washington Conversion Law is subject to rational basis review, 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," and, therefore, it does not unduly burden Plaintiff's First Amendment rights. *See Pickup*, 740 F.3d at 1232. The Conversion Law does not violate Plaintiff's First Amendment free speech rights.

**4. DUE PROCESS**

Plaintiff asserts that the Conversion Law violates

his Constitutional right to due process because it is impermissibly vague. Plaintiff argues that the line between identity exploration and development, which is permitted, and seeking to change that person's gender identity or sexual orientation, which is prohibited, is not clear. Dkt. 2 at 24 – 25

The Ninth Circuit considered and rejected this argument in *Pickup*. 740 F.3d at 1233–34. "A reasonable person would understand the statute to regulate only mental health treatment, including psychotherapy, that aims to alter a minor patient's sexual orientation [or gender identity]." *Id.* at 1234. The *Pickup* court also considered whether "sexual orientation" is a vague term and found that it is not. Similarly, Plaintiff argues that the terms "gender identity," "gender expressions," "identity exploration," and "identity development" are vague. Dkt. 2 at 25.

Ample definitions for these terms are available, including in the Washington Revised Code. *See* Wash. Rev. Code § 48.43.072(8)(a) ("'Gender expression'" means a person's gender-related appearance and behavior, whether or not stereotypically associated with the person's gender assigned at birth."); Wash. Rev. Code § 48.43.072(8)(b) ("'Gender identity' means a person's internal sense of the person's own gender, regardless of the person's gender assigned at birth."); *see also Exploration*, WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1983) ("the act or an instance of exploring"); *Explore*, *id.* ("to investigate, study, or analyze"); *Development*, *id.* ("the act, process, or result of developing"). Moreover, the Conversion Law "regulates licensed mental health providers, who constitute a 'select group of persons

having specialized knowledge,' [so] the standard for clarity is lower." *Id.* (quoting *United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1993)). These terms are not vague, and neither is the line between permitted conduct, discussion and exploration of one's own identity, and prohibited conduct, "seek[ing] to change an individual's sexual orientation or gender identity." Wash. Rev. Code 18.130.020(4)(a).

Plaintiff also argues that the Conversion Law is impermissibly vague because the statute permits "the attorney general, any prosecuting attorney ... or any other person [to] maintain an action ... to enjoin the person from committing the violations." Wash. Rev. Code 18.130.185. Plaintiff argues that permitting "any other person" to bring an enforcement action "hands the keys to the enforcement car to activists and ideologues."

This argument fails because Conversion Law gives clear notice of what activity Plaintiff may and may not engage in. He cannot claim that he would be subject to "arbitrary enforcement" because he knows what activity puts him at risk of an enforcement action. *See United States v. Melgar-Diaz*, 2 F.4th 1263, 1269–70 (9th Cir. 2021). It does not matter that he does not have advance notice of who might bring that action.

**5. FREE EXERCISE**

Plaintiff argues that the Conversion Law violates his right to "free exercise" of his right to live his faith because the law has an "anti-religious target." Dkts. 2 at 26 and 43 at 21–22. In *Welch v. Brown*, which was one of the consolidated cases the Ninth Circuit

considered in *Pickup*, the court considered and rejected a similar argument. 834 F.3d 1041, 1047–48 (9th Cir. 2016). Plaintiff's free exercise claim should be dismissed for similar reasons.

"If the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral." *Id.* at 1047 (quoting *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520 (1993). Like in *Welch*, however, the object of the Conversion Law is not to infringe upon or restrict practices *because of* their religious motivation. Its object is to "protect[ ] the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth [by] protecting [ ] minors against exposure to serious harms caused by conversion therapy." 2018 Wash. Sess. Laws, ch 300 § 1. The Conversion Law does not, either in practice or intent, regulate the way in which Plaintiff or anyone else practices their religion. Instead, it "regulates conduct only *within the confines of the counselor-client relationship*." *Welch*, 834 F.3d at 1044. Plaintiff is free to express and exercise his religious beliefs; he is merely prohibited from engaging in a specific type of conduct while acting as a counselor.

Plaintiff's final argument is that the "hybrid rights" exception applies to his free exercise claim and requires a higher level of scrutiny than the Ninth Circuit applied in *Welch*. It is not clear that the hybrid rights exception "truly exists." *Parents for Privacy v. Barr*, 949 F.3d 1210, 1236 (9th Cir. 2020). Assuming it does exist, the doctrine would compel a higher level of scrutiny for claims that implicate multiple constitutional rights, in this case free exercise and

free speech. *See id.* Because the Court already established that Plaintiff's claim does not implicate free speech, the hybrid rights exception does not apply and does not undermine the holding from *Welch*.

Accordingly, Plaintiff's free exercise claim fails as a matter of law.

**6. CONCLUSION**

State Defendants' Motion to Dismiss should be granted for the foregoing reasons.

**B. PLAINTIFF'S MOTION FOR A PRELIMINARY INJUNCTION**

Plaintiff's Motion for a Preliminary Injunction (Dkt. 2) should be denied as moot.

**C. INTERVENOR DEFENDANTS' MOTION TO DISMISS**

Intervenor Defendants' Motion to Dismiss (Dkt. 26) should be denied as moot.

## III. ORDER

Therefore, it is hereby **ORDERED** that:

- State Defendants' Motion to Dismiss (Dkt. 27) **IS GRANTED**;
- Plaintiff's Motion for Preliminary Injunction (Dkt. 2) **IS DENIED** as moot;
- Intervenor Defendants' Motion to Dismiss (Dkt. 26) **IS DENIED** as moot;
- This case **IS DISMISSED**.

The Clerk is directed to send uncertified copies of this Order to all counsel of record and to any party appearing *pro se* at said party's last known address.

Dated this 30th day of August, 2021.

ROBERT J. BRYAN
United States District Judge

**Washington Rev. Code § 18.130.020(4)(a)-(b)**
**Definitions**

(4)(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, 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.

## Washington Rev. Code § 18.130.180
## Unprofessional Conduct

The following conduct, acts, or conditions constitute unprofessional conduct for any license holder under the jurisdiction of this chapter:

(1) The commission of any act involving moral turpitude, dishonesty, or corruption relating to the practice of the person's profession, whether the act constitutes a crime or not. If the act constitutes a crime, conviction in a criminal proceeding is not a condition precedent to disciplinary action. Upon such a conviction, however, the judgment and sentence is conclusive evidence at the ensuing disciplinary hearing of the guilt of the license holder of the crime described in the indictment or information, and of the person's violation of the statute on which it is based. For the purposes of this section, conviction includes all instances in which a plea of guilty or nolo contendere is the basis for the conviction and all proceedings in which the sentence has been deferred or suspended. Nothing in this section abrogates rights guaranteed under chapter 9.96A RCW;

(2) Misrepresentation or concealment of a material fact in obtaining a license or in reinstatement thereof;

(3) All advertising which is false, fraudulent, or misleading;

(4) Incompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed. The use of a nontraditional treatment by itself shall not constitute unprofessional conduct, provided that it does not result in injury to a patient or create an

unreasonable risk that a patient may be harmed;

(5) Suspension, revocation, or restriction of the individual's license to practice any health care profession by competent authority in any state, federal, or foreign jurisdiction, a certified copy of the order, stipulation, or agreement being conclusive evidence of the revocation, suspension, or restriction;

(6) Except when authorized by RCW 18.130.345, the possession, use, prescription for use, or distribution of controlled substances or legend drugs in any way other than for legitimate or therapeutic purposes, diversion of controlled substances or legend drugs, the violation of any drug law, or prescribing controlled substances for oneself;

(7) Violation of any state or federal statute or administrative rule regulating the profession in question, including any statute or rule defining or establishing standards of patient care or professional conduct or practice;

(8) Failure to cooperate with the disciplining authority by:

(a) Not furnishing any papers, documents, records, or other items;

(b) Not furnishing in writing a full and complete explanation covering the matter contained in the complaint filed with the disciplining authority;

(c) Not responding to subpoenas issued by the disciplining authority, whether or not the recipient of the subpoena is the accused in the proceeding; or

(d) Not providing reasonable and timely access for authorized representatives of the disciplining

authority seeking to perform practice reviews at facilities utilized by the license holder;

(9) Failure to comply with an order issued by the disciplining authority or a stipulation for informal disposition entered into with the disciplining authority;

(10) Aiding or abetting an unlicensed person to practice when a license is required;

(11) Violations of rules established by any health agency;

(12) Practice beyond the scope of practice as defined by law or rule;

(13) Misrepresentation or fraud in any aspect of the conduct of the business or profession;

(14) Failure to adequately supervise auxiliary staff to the extent that the consumer's health or safety is at risk;

(15) Engaging in a profession involving contact with the public while suffering from a contagious or infectious disease involving serious risk to public health;

(16) Promotion for personal gain of any unnecessary or inefficacious drug, device, treatment, procedure, or service;

(17) Conviction of any gross misdemeanor or felony relating to the practice of the person's profession. For the purposes of this subsection, conviction includes all instances in which a plea of guilty or nolo contendere is the basis for conviction and all proceedings in which the sentence has been deferred or suspended. Nothing in this section abrogates rights guaranteed under

chapter 9.96A RCW;

(18) The procuring, or aiding or abetting in procuring, a criminal abortion;

(19) The offering, undertaking, or agreeing to cure or treat disease by a secret method, procedure, treatment, or medicine, or the treating, operating, or prescribing for any health condition by a method, means, or procedure which the licensee refuses to divulge upon demand of the disciplining authority;

(20) The willful betrayal of a practitioner-patient privilege as recognized by law;

(21) Violation of chapter 19.68 RCW or a pattern of violations of RCW 41.05.700(8), 48.43.735(8), 48.49.020, 48.49.030, 71.24.335(8), or 74.09.325(8);

(22) Interference with an investigation or disciplinary proceeding by willful misrepresentation of facts before the disciplining authority or its authorized representative, or by the use of threats or harassment against any patient or witness to prevent them from providing evidence in a disciplinary proceeding or any other legal action, or by the use of financial inducements to any patient or witness to prevent or attempt to prevent him or her from providing evidence in a disciplinary proceeding;

(23) Current misuse of:

(a) Alcohol;

(b) Controlled substances; or

(c) Legend drugs;

(24) Abuse of a client or patient or sexual contact with a client or patient;

(25) Acceptance of more than a nominal gratuity, hospitality, or subsidy offered by a representative or vendor of medical or health-related products or services intended for patients, in contemplation of a sale or for use in research publishable in professional journals, where a conflict of interest is presented, as defined by rules of the disciplining authority, in consultation with the department, based on recognized professional ethical standards;

(26) Violation of RCW 18.130.420;

(27) Performing conversion therapy on a patient under age eighteen;

(28) Violation of RCW 18.130.430.

## Washington Rev. Code § 18.130.160
## Finding of Unprofessional Conduct—Orders—Sanctions—Stay—Costs—Stipulations

Upon a finding, after hearing, that a license holder has committed unprofessional conduct or is unable to practice with reasonable skill and safety due to a physical or mental condition, the disciplining authority shall issue an order including sanctions adopted in accordance with the schedule adopted under RCW 18.130.390 giving proper consideration to any prior findings of fact under RCW 18.130.110, any stipulations to informal disposition under RCW 18.130.172, and any action taken by other in-state or out-of-state disciplining authorities. The order must provide for one or any combination of the following, as directed by the schedule, except as provided in RCW 9.97.020:

(1) Revocation of the license;

(2) Suspension of the license for a fixed or indefinite term;

(3) Restriction or limitation of the practice;

(4) Requiring the satisfactory completion of a specific program of remedial education or treatment;

(5) The monitoring of the practice by a supervisor approved by the disciplining authority;

(6) Censure or reprimand;

(7) Compliance with conditions of probation for a designated period of time;

(8) Payment of a fine for each violation of this chapter, not to exceed five thousand dollars per

violation. Funds received shall be placed in the health professions account;

(9) Denial of the license request;

(10) Corrective action;

(11) Refund of fees billed to and collected from the consumer;

(12) A surrender of the practitioner's license in lieu of other sanctions, which must be reported to the federal data bank.

Any of the actions under this section may be totally or partly stayed by the disciplining authority. Safeguarding the public's health and safety is the paramount responsibility of every disciplining authority. In determining what action is appropriate, the disciplining authority must consider the schedule adopted under RCW 18.130.390. Where the schedule allows flexibility in determining the appropriate sanction, the disciplining authority must first consider what sanctions are necessary to protect or compensate the public. Only after such provisions have been made may the disciplining authority consider and include in the order requirements designed to rehabilitate the license holder. All costs associated with compliance with orders issued under this section are the obligation of the license holder. The disciplining authority may order permanent revocation of a license if it finds that the license holder can never be rehabilitated or can never regain the ability to practice with reasonable skill and safety.

Surrender or permanent revocation of a license under this section is not subject to a petition for reinstatement under RCW 18.130.150.

The disciplining authority may determine that a case presents unique circumstances that the schedule adopted under RCW 18.130.390 does not adequately address. The disciplining authority may deviate from the schedule adopted under RCW 18.130.390 when selecting appropriate sanctions, but the disciplining authority must issue a written explanation of the basis for not following the schedule.

The license holder may enter into a stipulated disposition of charges that includes one or more of the sanctions of this section, but only after a statement of charges has been issued and the license holder has been afforded the opportunity for a hearing and has elected on the record to forego such a hearing. The stipulation shall either contain one or more specific findings of unprofessional conduct or inability to practice, or a statement by the license holder acknowledging that evidence is sufficient to justify one or more specified findings of unprofessional conduct or inability to practice. The stipulation entered into pursuant to this subsection shall be considered formal disciplinary action for all purposes.

**UNITED STATES DISTRICT COURT**
**WESTERN DISTRICT OF WASHINGTON**
**AT TACOMA**

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|---|---|
| **BRIAN TINGLEY**,<br>Plaintiff,<br>v.<br>**ROBERT W. FERGUSON**, in his official capacity as Attorney General for the State of Washington; **UMAIR A. SHAH**, in his official capacity as Secretary of Health for the State of Washington; and **KRISTIN PETERSON** in her official capacity as Assistant Secretary of the Health Systems Quality Assurance division of the Washington State Department of Health,<br>Defendants. | Case No. 3:21-cv-5359<br><br>**VERIFIED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF** |

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## INTRODUCTION

1. Plaintiff Brian Tingley is a licensed Marriage and Family Therapist practicing in Fircrest, Washington. For over twenty years, Mr. Tingley's clients have looked to him for support in pursuing meaningful and positive change in their lives.

2. Plaintiff finds great fulfillment in working with

clients to identify their objectives and encouraging them to achieve the goals that they set for themselves, consistent with their own moral values and religious beliefs. In close relationships built on a strong foundation of trust and openness, Plaintiff has seen adults, couples, teenagers, and children achieve great improvements in relationships as well as in personal stability and happiness simply by talking through the personal challenges that they face.

3. Plaintiff works with couples, individual adults, family groups, and individual children and teenagers, depending on the need. Among the wide range of issues that Plaintiff addresses from time to time with minor clients are issues relating to gender and sexual attractions and behaviors. Needless to say, these are among the most sensitive and private conversations possible.

4. Yet in passing Senate Bill 5722, codified at Wash. Rev. Code §§ 18.130.020 and 18.130.180 (the "Counseling Censorship Law," or "the Law"), Washington State seeks to insert itself into the privacy of Plaintiff's counseling room and censor his discussion and exploration of certain ideas with his young clients. The Law threatens severe sanctions—including substantial fines, suspension from practice, and even loss of his license and livelihood—if Plaintiff speaks ideas, and assists his clients towards goals, of which the State disapproves.

5. Through the Counseling Censorship Law, Washington State seeks to impose uniformity and silence dissent on topics about which both clients and counselors hold differing views motivated by ideology, faith beliefs, and differing interpretations of science.

6. Specifically, the Counseling Censorship Law prohibits—in vague and expansive terms—any conversation or exchange of ideas between a counselor and his minor client in pursuit of a goal to "change" that young person's gender identity or sexual attractions, orientation, or behaviors.

7. The Law is not aimed at any particular practices. Amendments to limit the law to physically abusive practices were rejected. Instead, and by design, the Law sweeps in even simple conversation, within a voluntary counseling relationship between a minor client and his chosen counselor, in pursuit of personal goals set by the client.

8. Worse, the Counseling Censorship Law intrudes and censors with a decidedly biased and unbalanced hand.

9. For a minor client who seeks the assistance of a counselor to pursue a personally chosen goal of achieving comfort with a gender identity congruent with the client's biological sex, or a goal of reducing same-sex attraction and increasing sexual attraction to the opposite sex, the Law steps in to deny that young person the professional help that he or she desires.

10. For a minor client of faith who seeks the assistance of a counselor who shares his faith, to help him align his thoughts and his conduct with the teachings of his faith, the Law again says "No," denying that young person professional help towards his goal.

11. Meanwhile, however, the Law imposes no barrier to a counselor supporting a client in

"exploring" or "developing" any other sort of gender or sexual identity—or even guiding a minor towards permanently sterilizing treatments and procedures to alter that young person's body to more closely match a perceived gender identity.

12. In short, through the Counseling Censorship Law, the State of Washington seeks to impose its own new orthodoxy concerning sexual morality, human nature, personal identity, and free will. And it seeks to do all this at expense of the freedom, beliefs, and even religious convictions of both counselors and clients.

13. But our Constitution does not permit government to impose any orthodoxy in thought, belief, or speech. The First Amendment and Fourteenth Amendment strongly protect the rights of both counselors and clients to speak freely between themselves on any topic, in pursuit of any personal goal, and guided by any religious or moral convictions.

14. Under our system, the government has no power to censor ideas and speech with which it disagrees, even if it believes those ideas to be wrong, offensive, and potentially harmful.

15. As a result, the Washington State Counseling Censorship Law is unconstitutional and unenforceable in its entirety.

16. Because the Law violates the rights of Plaintiff Brian Tingley and of his clients, and because it threatens Plaintiff with the loss of his livelihood, Plaintiff brings this lawsuit to obtain a declaration that the Counseling Censorship Law is unconstitutional both on its face and as applied, and to enjoin its

enforcement.

## I. JURISDICTION AND VENUE

17. This civil rights action pursuant to 42 U.S.C. § 1983 raises federal questions under the United States Constitution, particularly the First and Fourteenth Amendments.

18. This Court has original jurisdiction under 28 U.S.C. §§ 1331 and 1343.

19. This Court has authority to award the requested declaratory relief under 28 U.S.C. §§ 2201-02 and Federal Rule of Civil Procedure 57; the requested injunctive relief under 28 U.S.C. § 1343 and Federal Rule of Civil Procedure 65; and costs and attorneys' fees under 42 U.S.C. §1988.

20. Venue is proper in this Court under 28 U.S.C. § 1391(b) because a substantial part of the events or omissions giving rise to the claims occurred in this District and the Defendants are located in relevant part in this District.

## II. PARTIES

A. Plaintiff

21. **Plaintiff Brian Tingley** is a licensed Marriage and Family Therapist in the State of Washington. He resides in Tacoma, Washington and practices in Fircrest, Washington.

22. Mr. Tingley obtained his Master of Science in Marriage and Family Therapy from Seattle Pacific University in 2001, and has gained 20 years of experience in active practice since that time. Previously, he had an award-winning career in video and news production for local network affiliates,

during which he took on many assignments focusing on the needs of youth, family, and the community.

23. Mr. Tingley is an Approved Supervisor by the State of Washington and the American Association for Marriage and Family Therapy, as well as a Clinical Fellow Member of the American Association for Marriage and Family Therapy. He has maintained a private practice of counseling since 2002, working with adolescents, adults, and couples on a wide variety of matters. He also has experience in crisis intervention and has worked alongside child protective services and law enforcement where children have been placed in protective custody.

24. Mr. Tingley has taught college courses in Psychology and Human Relations, and has facilitated training seminars and workshops at the request of local therapist groups.

25. He has provided both in-person and written testimony to the Washington State Legislature on issues pertaining to teenage sexuality and identity on several occasions, including in connection with the bill that was ultimately passed as the Counseling Censorship Law.

26. Mr. Tingley is a committed Christian who also has theological training, having received a Diploma in Ministry and Biblical Studies in 1984. He is regularly asked to provide seminars and workshops to local churches on challenges facing children and families that take into account a biblical perspective as well as his professional expertise.

27. While Mr. Tingley does not impose his Christian faith on anyone, his faith informs his views

concerning human nature, healthy relationships, and what paths and ways of thinking will enable his clients to achieve comfort with themselves and live happy and satisfied lives.

28. Mr. Tingley works with both Christian and non-Christian clients, and he approaches counseling of any clients who choose his services in a consistent way. However, many of his clients are referred to him by local churches, and the majority of his clients share his Christian faith.

B. Defendants

29. **Defendant Umair A. Shah** is the Secretary of Health for the State of Washington, having been appointed by Governor Jay Inslee on December 21, 2020.

30. By virtue of his position as Secretary of Health, Dr. Shah has jurisdiction and disciplinary authority over a number of licensed professions pursuant to Wash. Rev. Code ("RCW") § 18.130, including licensed marriage and family therapists under RCW § 18.130.040 (2)(a)(x).

31. Dr. Shah is authorized under RCW § 18.130.050 to "investigate all complaints or reports of unprofessional conduct" and to conduct any associated hearings. He is further authorized under RCW § 18.130.185 to bring an action against any regulated professional to enjoin him or her from violating the Counseling Censorship Law.

32. Dr. Shah is named in his official capacity only.

33. **Defendant Kristin Peterson** is the Assistant Secretary of the Health Systems Quality

Assurance division of the Washington State Department of Health.

34. Under the direction of Ms. Peterson, the Health Systems Quality Assurance team within the Department of Health claims the right to investigate and prosecute complaints against healthcare providers licensed by the State of Washington further to RCW § 18.130.[1]

35. Complaints against healthcare providers and facilities in the State of Washington are to be directed to the Health Systems Quality Assurance group, which considers the substance of the complaint and determines what action is to be taken.

36. Ms. Peterson is named in her official capacity only.

37. **Defendant Robert W. Ferguson** is the Attorney General for the State of Washington.

38. As Attorney General, Mr. Ferguson is the first person identified by RCW § 18.130.185 as authorized to bring an enforcement action to enjoin a person from violating the Counseling Censorship Law.

39. On information and belief, the Attorney General works with the Health Systems Quality Assurance team to identify potential violations and evaluate evidence concerning alleged violations of the

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[1] Health Systems Quality Assurance, WASHINGTON STATE DEPARTMENT OF HEALTH, https://www.doh.wa.gov/AboutUs/ProgramsandServices/HealthSystemsQualityAssurance (last visited April 29, 2021).

Counseling Censorship Law.[2]

40. Mr. Ferguson is named in his official capacity only.

## III. FACTUAL BACKGROUND

A. The Counseling Censorship Law

41. In March 2018, Washington Governor Jay Inslee signed Senate Bill 5722 into law, which came into effect on June 7, 2018, and was codified at RCW § 18.130.020 and 18.130.180.

42. The Counseling Censorship Law added "performing conversion therapy on a client under age eighteen" to the list of conduct, acts, or conditions that would constitute "unprofessional conduct" for a "license holder."

43. Marriage and Family Therapists are among those deemed to be covered "license holders" under the definitions outlined in RCW § 18.120.020.

44. "Conversion therapy" is defined in terms that are vague, content-based, and biased against one perspective or point of view:

> "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.

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[2] Health Professions Complaints Process, WASHINGTON STATE DEPARTMENT OF HEALTH, https://www.doh.wa.gov/LicensesPermitsandCertificates/FileComplaintAboutProviderorFacility/HealthProfessionsComplaintProcess (last visited April 29, 2021).

> The term includes, but is not limited to, practices commonly referred to as "reparative therapy."
>
> "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."

45. The Counseling Censorship Law provides no definitions of the terms "gender identity", "gender expressions", "identity exploration", and "identity development." It provides no information at all as to what "behaviors" a therapist may not help a client attempt to change.

46. The Law provides no explanation on how an individual can engage in "exploration and development" relating to sexual orientation or gender identity without undergoing "change," or where the boundary between "exploration and development" and "change" might be.

47. The Law does not state whether the violative intent to "seek" change is the intent of the therapist, or the client, or both.

48. The Law contains no language concerning "sexual or romantic attractions or feelings towards individuals" of the opposite sex.

49. The prohibitions of the Counseling Censorship Law seek to enforce the Washington legislature's particular viewpoint concerning human sexuality, identity, and morality. Under this view, feelings of identification with the opposite sex, or sexual or

romantic attractions or feelings toward individuals of the same sex, are the highest value, and must only be "affirmed," regardless of the wishes, personal life goals, and religious beliefs of the individual affected.

50. It is well known that many religious faiths have for countless generations taught a different view concerning sexual morality and the proper place of sexuality in relation to one's identity, conduct, and relationships. Nevertheless, the Counseling Censorship Law contains no meaningful religious exemption to protect the freedoms of counselors and clients to hold, speak and act on such faith-based views of human nature, healthy relationships, and morality.

51. Instead, the Counseling Censorship Law provides a sham exemption that is in fact no exemption at all. The Counseling Censorship Law states that it does not apply to "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 clients under age eighteen." However, as the Counseling Censorship Law prohibits nothing *except* "performing conversion therapy by licensed health care providers on clients under age eighteen," this does not exempt religious providers and clients from anything at all. Instead, it indirectly asserts the right and power to prohibit even "religious . . . counseling" by a license holder "under the auspices of a . . . church," if the counsel that is given disagrees with the viewpoint enshrined in the Counseling Censorship Law.

52. Similarly, the Counseling Censorship Law states that it does not apply to "nonlicensed

counselors acting under the auspices of a religious denomination, church, or organization." But this again is a sham and empty exception, since the Law never applies to "nonlicensed counselors," whether religious or not.

53. The Counseling Censorship Law threatens severe sanctions against any therapist or counselor found to have violated its vague and viewpoint-based prohibitions. It threatens these penalties based on nothing more than private conversations and counsel that is desired by clients and their parents.

54. As stipulated in RCW § 18.130, in the event of a violation of the Counseling Censorship Law, the Secretary "must" impose one of a number of sanctions listed in RCW § 18.130.160 that range from "censure or reprimand," to fines of $5,000 for each violation, to permanent revocation of the professional's license—destroying that professional's very means of earning a living and supporting a family.

55. Further, the Law authorizes not just the Secretary or responsible disciplinary bodies, but "any other person" to file a lawsuit accusing a counselor or therapist of violating the Counseling Censorship Law, RCW § 18.130.185, exposing professionals who do not agree with the State's approved viewpoint on these matters of sexuality and identity to harassment and attack by private activists.

56. Restrictions on so-called "conversion therapy" are often justified by claims that unscrupulous practitioners have resorted to electroshock therapy or physical restraint, and the bill's primary sponsor Senator Liias asserted that the law is directed against "barbaric practices." The Senate Bill Report behind

SB 5722 expressed concern about supposed practices that "induce nausea, vomiting, and other responses from youth, while showing them erotic images."= No specific instances are documented in the Report. The House Report asserted that problematic practices include "physical abuse of children." However, the legislative record of the Counseling Censorship Law did not contain any testimony or evidence that such practices have *ever* been engaged in by "license holders" in the State of Washington.

57. In reality, the Counseling Censorship Law is directed against specific ideas and personal goals, not against specific practices. During consideration of the Law, the Washington legislature rejected an amendment that would have limited the proscribed conduct to "aversion therapy" that involved "electrical shock, extreme temperatures, prolonged isolation, chemically induced nausea or vomiting, assault" or other procedures intended to cause "pain, discomfort, or unpleasant sensations."

58. Likewise, the Washington legislature rejected an amendment that would have limited the definition of prohibited "conversion therapy" to mean "aversive or coercive" regimes that would include physical restraints, "use of pornographic material, and electro-convulsive therapy conducted outside of medically accepted use."

59. It is revealing to note that the Washington legislature also rejected an amendment that would have specifically exempted counseling that would have been "consistent with the client's affirmatively stated goals or objectives."

60. Instead, Senator Liias, one of the sponsors of

the bill, argued in debate that in his view counseling consisting of mere talk could be "just as pernicious" as abusive practices, and affirmed that the bill was directed to "use [of] words."

61. This legislative history confirms that the intent of the Counseling Censorship Law is to suppress ideas and advice that the government of Washington State frowns on, and instead to restrict counseling in this State to viewpoints and advice that reflect certain values.

62. Further, it is well known to both advocates and practitioners in the field, and on information and belief, was well known to the legislative sponsors of the Counseling Censorship Law, that most of those who seek counseling to change sexual orientation are motivated by religious convictions.

63. Thus, in 2013 the American Counseling Association issued a statement declaring that "Conversion therapy as a practice is a religious, not psychologically-based, practice…. The treatment may include techniques based in Christian faith-based methods…." In other words, according to the ACA, what the Counseling Censorship Law seeks to prohibit is "a religious . . . practice."

64. Another of the Bill's sponsors, Senator Maureen Walsh, implicitly admitted this while advocating passage of the Bill when she denounced those who (in her words) might seek to "pray the gay away."

65. The Human Rights Campaign organization, which is active nationally in promoting counseling censorship laws and ordinances, in its website

accuses "right-wing religious groups" of "promot[ing] the concept that an individual can change their sexual orientation or gender identity."

66. In a booklet published by the Human Rights Campaign and National Center for Lesbian Rights titled "Protecting our children from the harms of conversion therapy," the introduction blames "churches, synagogues, mosques and temples around the world" for telling LGBTQ people that "they are sinful," and the booklet refers to religious faith and religious leaders and institutions on almost every page.

67. In a report published in 2009, a task force of the American Psychological Association reported that "most SOCE ["sexual orientation change efforts"] currently seem directed to those holding conservative religious and political beliefs, and recent research on SOCE includes almost exclusively individuals who have strong religious beliefs." The Task Force further reported that those who seek counseling with a goal of moving away from same-sex attractions are "predominately . . . men who are strongly religious and participate in conservative faiths."[3]

68. Leading authors in the field have made the same observation repeatedly over the last two decades. In 1999, psychology professor and prominent advocate of counseling censorship laws Douglas Haldeman wrote that "Historically, most conversion therapy occurred in religious settings." In 2004, Prof.

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[3] American Psychological Association, *Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (2009), http://www.apa.org/pi/lgbc/publications/therapeutic-resp.html (last visited April 29, 2021).

Haldeman again wrote that "the vast majority of those seeking sexual orientation change because of internal conflict have strong religious affiliations." Douglas C. Haldeman, *When Sexual & Religious Orientation Collide: Considerations in Working with Conflicted Same-Sex Attracted Male Clients*, 32 THE COUNSELING PSYCHOLOGIST 691, 693 (2004). And in an important paper in 2016, internationally prominent authors Prof. Lisa Diamond and Prof. Clifford Rosky cited multiple peer-reviewed papers to conclude that "[T]he majority of individuals seeking to change their sexual orientation report doing so for religious reasons rather than to escape discrimination." Lisa M. Diamond & Clifford J. Rosky, *Scrutinizing Immutability: Research on Sexual Orientation & U.S. Legal Advocacy for Sexual Minorities*, 52 J. OF SEX RESEARCH, 1, 6 (2016).

69. In sum, through the Counseling Censorship Law, the State of Washington is not only seeking to censor and suppress ideas and personal goals with which it disagrees; it is targeting ideas and motivations well known to be primarily associated with and advocated by people of faith, for reasons of faith.

B. The Plaintiff's clients and his practice

70. Plaintiff Tingley founded his own private therapy practice in 2002, and since that time has offered a wide range of therapy services to adolescents, adults, couples, and families addressing interpersonal and family conflict, communication issues, marital and post-divorce issues, individual identity challenges, emotional management including depression and anxiety, anger management, and adult Attention Deficit Hyperactivity Disorder,

among many other matters. The practice web page states that the practice group consists of Christian counselors, who share a goal of helping clients achieve "personal and relational growth as well as healing for the wounded spirit, soul, and body through the healthy integration of relational, psychological, and spiritual principles with clinical excellence."[4]

71. While Plaintiff is a committed Christian, his services are available to anyone, regardless of whether they have a different faith background or no faith at all. Nevertheless, Mr. Tingley's clients are frequently referred to him by local churches, and the majority are Christians. Many of them come to Plaintiff because they desire a counselor who shares and so will understand and respect their Christian beliefs. Often, Plaintiff's clients express the belief that alignment between their actions and feelings on the one hand, and their religious convictions on the other, will be important to helping them to heal from past trauma, as well as to pursuing their personal goals and the lives that they wish to lead going forward.

72. Plaintiff's counseling approach is to provide a safe environment for each client to allow for his or her own self exploration. Plaintiff's first priority is ensuring that he establishes trust with his clients, so that they feel safe in opening up to discuss all kinds of sensitive issues. Once rapport is established, Plaintiff can help clients identify their own objectives and then, through discussion over time, work together to accomplish those objectives.

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[4] *See* Family Foundations Counseling, https://www.familyfoundationscounseling.com/ (last visited April 29, 2021).

73. Because Mr. Tingley is a Christian himself, he is able to engage with his Christian clients in a manner that is particularly understanding and respectful of, and informed by, shared faith convictions and the personal goals of the client that may be guided by the client's faith convictions, or by the client's desire to live a life of integrity within his or her family.

74. Where clients have a strong faith, Mr. Tingley has recognized that it can be of particular importance to them to know that there are no unspoken concerns or suspicions about their beliefs on the part of their counselor. This is because of the central role that faith plays in their lives—touching on all aspects of their lives—as well as their prior experiences of varying degrees of opposition to their faith from those who do not share their beliefs. Consequently, in many cases he is specifically sought out by clients because they want to speak with a counselor who shares their Christian worldview about the issues that are affecting their lives.

75. However, Plaintiff is not a pastor, and does not consider it part of his role to rebuke clients, or to tell them how they should live their lives.

76. Working with his clients, all Mr. Tingley does is listen and talk with them. He spends time listening to their stories, their fears, and their hopes—at times probing with questions to aid their own self-discovery. Through thoughtful discussion, ideas are exchanged and positions are queried. This process allows clients to reflect on their identity and their beliefs, as well as enabling them to identify personal goals and objectives which are not immediately clear to them.

77. Plaintiff provides counseling concerning a wide array of issues that arise in personal, marriage, and family life. Issues relating to gender identity and sexual attractions and behaviors are simply some of the many issues that clients bring into his counseling room and about which they ask his assistance.

78. Given his expertise and his family-oriented practice, a significant part of Mr. Tingley's practice is dedicated to counseling minors. He works with minors on a wide variety of issues as they transition into adulthood, but his basic approach to them as clients remains the same.

79. Although the wishes of the parents may often overlap with those of their children, Mr. Tingley's approach is to support the minor in his or her own personal exploration and development. As he works with the minors over the course of continued discussion, he seeks to offer them the support and encouragement that they need to achieve the goals and objectives that they set for themselves.

80. While in most cases the minor will initially attend on the prompting of their parent or parents, Mr. Tingley will only continue to see a minor as a client if the minor is willing to work with him, and participates voluntarily.

81. Topics about which Plaintiff has counseled minors include depression, anxiety, anger management, and other issues of emotional management. They also include concerns or confusion about gender identity, unwanted same-sex attraction, and other unwanted sexual behaviors such as addiction to pornography.

82. In these cases, as with any other, Mr. Tingley does nothing but talk with his clients. He simply listens to what his clients say, asks them questions, and talks with them.

C. Plaintiff's counseling relating to gender identity

83. "Gender identity" is not defined in the Counseling Censorship Law.

84. Gender dysphoria is defined in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-5"), in adolescents and adults, as "A marked incongruence between one's experienced/expressed gender and assigned gender [i.e., biological sex], of at least 6 months duration," along with certain other indicators, and resulting in "clinically significant distress or impairment in social, occupational, or other important areas of functioning."

85. In recent years, rapidly increasing numbers of minors have been referred to gender clinics for diagnosis for potential gender dysphoria, with one noted clinic reporting a more than eight-fold increase between 2002 and 2013, M. Aitken et al., *Evidence for an Altered Sex Ratio in Clinic-Referred Adolescents with Gender Dysphoria*, 12 J. OF SEXUAL MEDICINE, 756, 757 (2015), and a more recent paper recognizing that "most studies" demonstrate a "clear trend" of "growth in the proportion of [transgender] self-identifying individuals over time." Ian Nolan et al., *Demographic and Temporal Trends in Transgender Identities and Gender Conforming Surgery*, 8 TRANSITIONAL ANDROLOGY AND UROLOGY, 184, 185 (2019).

86. Nolan et al. report that transgender identification "appears to be more common among younger age groups," with noticeable geographic concentrations. In particular, a 2016 survey of 9th to 11th graders in Minnesota reported "exceptionally high rates of [transgender] identities," reaching 2,700 per 100,000 youths, or almost 3%. *Id.* at 185.

87. Of particular concern, across the last 20 years the proportion of adolescents referred to gender clinics who are biologically female—girls—has changed rapidly, *doubling* at one clinic from about 30% during the 1999-2005 time period to more than 60% during the 2006-2013 time period. Aitkin et al. at 758. Academics and practitioners in the field have described evidence that many of these girls appear to have been strongly influenced by internet contacts, or by local friend groups. Lisa Littman, *Parent Reports of Adolescents and Young Adults Perceived to Show Signs of a Rapid Onset of Gender Dysphoria*, 13 PLoS ONE, e0202330 (2018).

88. Rapid changes in numbers and sex ratios of individuals reporting concerns about gender identity, as well as striking geographic variations, strongly suggest that social and cultural factors are affecting many adolescents' sense of comfort with—or distress about—their natal sex.

89. The widely urged path of "affirming" a transgender identity for girls includes the use of puberty blockers beginning as young as eight; cross-sex hormones a few years later which build muscle mass, cause growth of facial hair and a deepened voice; "social transition" including adoption of a male name and male pronouns and dress; breast-binding to

conceal their developing female biology; and ultimately double mastectomy and hysterectomy, followed by life-long administration of cross-sex hormones.

90. Obviously "sex reassignment surgery," which removes testicles or ovaries, permanently sterilizes the affected individual. However, it is generally recognized by practitioners that cross-sex hormones, which are increasingly prescribed even for minors, may also irreversibly sterilize a child for life. A Harvard Medical School professor and her co-authors, who are active in medically transitioning minors, admit that "cross-sex hormones . . . may have irreversible effects," and describes infertility as "a side effect" of these drugs. Carly Guss et al., *Transgender and Gender Nonconforming Adolescent Care: Psychosocial and Medical Considerations*, 26 CURR. OPIN. PEDIATRICS, 421, 424-5. Another team of prominent practitioners in the field caution that there is evidence that cross-sex hormones administered to minors will permanently and irreversibly sterilize at least some of these youths, both male and female. Yet these practitioners also recognize that "research suggest[s] some of these individuals may desire genetic children as adults." Amy Tishelman et al., *Health Care Provider Perceptions of Fertility Preservation Barriers and Challenges with Transgender Patients*, 36 J. OF ASSISTED REPRODUCTION AND GENETICS, 579, 580 (2019).

91. In addition to permanent sterilization, accepting and living in a transgender identity carries a number of known or likely lifetime costs and risks for a young person.

92. Any individual whose testicles or ovaries are surgically removed through so-called "sex reassignment surgery" requires life-long medical hormonal therapy. In general, the use of cross-sex hormones, once begun, will be continued for life.

93. As a result of chemical or surgical impacts on their sexual development and organs, some transgender adults experience diminished sexual response, and are unable ever to experience orgasm.

94. Multiple authors have cautioned that administration of cross-sex hormones to biological males increases the individual's risk of blood clots and resulting strokes, heart attack, and lung and liver failure.

95. It is often asserted that transgender youth attempt suicide at much higher rates than the general adolescent population. This is true. But it is not true that there is any statistically significant evidence that "affirmation" in a transgender identity substantially reduces actual suicide attempts. Instead, multiple studies report that adolescents and adults who adopt and live in a transgender identity continue to suffer severely negative mental health outcomes—including suicide and attempted suicide—throughout their lives, and this remains true even if they undergo the ultimate "gender-affirming" step of extensive surgery to reconfigure their body to conform in appearance to their desired gender identity.

96. A long-term study in Sweden found that *after* sex-reassignment surgery transgender individuals exhibited a rate of completed suicide 19 times higher than the control group, suicide attempts at a 7.6 times higher rate, and hospitalization for any psychiatric

condition at a 4.2 times higher rate. These researchers concluded that "[t]he most striking result was the high mortality rate in both male-to-females and female-to-males, compared to the general population." C. Dhejne et al., *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, 6 PLoS ONE, e16885, 5-6 (2011).

97. Similarly, a study in the United States found that the death rates of transgender-identifying veterans are comparable to those who suffer from schizophrenia and bipolar diagnoses—dying 20 years earlier on average than a comparable population.

98. Many academics and practitioners and even transgender activists have observed that gender identity is not necessarily either binary or fixed for life. Indeed, in formally promulgating a rule in 2016, the United States Department of Health and Human Services defined "gender identity" as "an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth," and disparaged "the expectation that individuals will consistently identify with only one gender" as an inaccurate "sex stereotype." *Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31,376 (May 18, 2016) at 31,384 and 31,468.

99. In addition, at least for pre-adolescents who experience gender dysphoria and receive therapeutic support but do *not* socially transition, "*every* follow-up study of GD children, without exception, found the same thing: By puberty, the majority of GD children

ceased to want to transition." J. Cantor, *Transgender and Gender Diverse Children and Adolescents: Fact-Checking of AAP Policy*, 46 J. OF SEX &MARITAL THERAPY, 1, 1 (2019). In fact, multiple studies have documented that for pre-pubertal children who suffer from gender dysphoria, the very large majority—estimates range between 80%-98% percent—will grow into comfort with a gender identity congruent with their biological sex by young adulthood, so long as they are *not* affirmed as children in a transgender identity. S. Adelson & American Academy of Child & Adolescent Psychiatry, *Practice Parameter on Gay, Lesbian, or Bisexual Sexual Orientation, Gender Nonconformity, and Gender Discordance in Children and Adolescents*, 51 J. AM. ACAD. CHILD ADOLESCENT PSYCHIATRY, 957, 963 (2012).

100. It is not surprising, therefore, that increasing numbers of young women are speaking up who for a time transitioned to live in a male gender identity, and underwent varying degrees of hormonal and surgical "transition," but who later regretted those decisions, and reclaimed a female gender identity. These women are publicly expressing regret about the harm done to their bodies and minds, and anger against the too-hasty counsel and medical advice they received as minors which steered them into that transgender identity and those medical choices.

101. While many of these women had previously detailed their experiences on internet blog websites pseudonymously, in recent years they have become more visible, writing under their real names, posting videos online, and forming support groups for those in

similar situations.[5] In 2018, *The Atlantic* profiled several high-profile "detransitioners" who have been raising awareness of their own stories as a warning to those who are promoting or hearing only positive narratives about the impact of gender transition on affected individuals.[6]

102. For example, Max Robinson, who has been featured at length in both *The Atlantic* and *The Economist*[7], became convinced that her internal discomfort needed to be resolved by a sex "transition" after discovering the "world of online gender-identity exploration" at age 15. A doctor prescribed cross-sex hormones for her beginning at age 16, and at age 17 she underwent a double mastectomy. While Max was initially pleased with the results, it wasn't long before she realized that she had made a mistake and began the process of "detransitioning" at age 19. She lives with permanent physical changes—a deep voice, a beard, and a flat chest—that cannot be reversed. *See* attached Exhibits A and B.

103. Similarly, Cari Stella was prescribed cross-sex hormones by a doctor at age 17, and underwent a

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[5] *See* Pique Resilience Project, https://www.piqueresproject.com/ (last visited April 29, 2021); Detrans Canada, https://detranscanada.com/ (last visited April 29, 2021); and Lost in Transition, https://lostintransition.info/ (last visited April 29, 2021), among others.

[6] *See* Jesse Singal, *When Children Say They're Trans*, The Atlantic, July/August 2018, https://www.theatlantic.com/magazine/archive/2018/07/when-a-child-says-shes-trans/561749/, attached as Exhibit A.

[7] *See* Charlie McCann, *When girls won't be girls*, The Economist, Sept. 28, 2017, https://www.economist.com/1843/2017/09/28/when-girls-wont-be-girls, attached as Exhibit B.

double mastectomy at age 20. According to Cari, from the time she first saw a therapist, no professional ever suggested or helped her explore alternatives to a "transition."[8] Already by age 22, Cari realized that she had been led into a mistake, and "detransitioned." Cari maintained a blog[9] and YouTube channel[10] reflecting on her experiences, and in a video posted in 2016 said: "I'm a real-live 22-year-old woman with a scarred chest and a broken voice and a 5 o'clock shadow because I couldn't face the idea of growing up to be a woman."

104. In the United Kingdom, 23-year-old Keira Bell successfully sued the Tavistock and Portman NHS Trust—the leading British clinic responsible for administering puberty blocking drugs—after her own experience culminated in the realization that she had been rushed "down the wrong path."[11] As a teenager, Keira went through a regimen of puberty blockers and cross-sex hormones, before undergoing a double mastectomy at age 20. She initially believed that the measures would help her achieve happiness, but "detransitioned" shortly after having the double

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[8] *See In praise of gatekeepers: An interview with a former teen client of TransActive Gender Center*, 4th Wave Now, April 21, 2016, https://4thwavenow.com/2016/04/21/in-praise-of-gatekeepers-an-interview-with-a-former-teen-client-of-transactive-gender-center/

[9] *See* Cari Stella, Guide on Raging Stars Blog, https://guideonragingstars.tumblr.com/ (last visited April 29, 2021).

[10] *See* Cari Stella, YouTube, https://www.youtube.com/channel/UChCA LScK33yNsiq0BIAa2g (last visited April 29, 2021).

[11] *See Puberty blockers: Under-16s "unlikely to be able to give informed consent,"* BBC News, Dec. 1, 2020, https://www.bbc.com/news/uk-england-cambridgeshire-55144148.

mastectomy. Keira has become an outspoken campaigner for reform, stating that her doctors had failed her as a confused and distressed adolescent by failing to "challenge" her oversimplified desires to be male. "I think it's up to these [medical] institutions," Keira has said, "to step in and make children reconsider what they are saying, because it is a life-altering path."

105. Many similar stories are coming to light as more individuals realize that they are not alone in enduring these experiences.[12] It is not surprising, therefore, that increasing numbers of young people who struggle with questions of gender identity, and the parents of such young people, are aware that there are often grave and lasting costs resulting from adopting a transgender identity, and that adoption of or attraction to a transgender identity is not necessarily fixed, unchangeable, or desirable.

106. It is also not surprising, and is entirely reasonable and legitimate, that some young people (and/or their parents) wish to explore whether it is possible for them to escape from gender dysphoria and achieve comfort with their own biological sex, so as to avoid all of these potentially severe lifetime costs of living in a transgender identity.

107. Meanwhile, there are no statistically significant studies that demonstrate that voluntary conversational counseling which aims to help the

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[12] *See* Post Trans, https://post-trans.com/ (last visited April 29, 2021), *Voices*, Sex Change Regret, https://sexchangeregret.com/voices/ (last visited April 29, 2021), among others. *See also* Abigail Shrier, *Irreversible Damage: The Transgender Craze Seducing Our Daughters,* Regnery Publishing (2020).

client towards a personally chosen goal of achieving or returning to comfort with his or her own biological sex is in any way harmful to clients.

108. Mr. Tingley has worked with minors who have expressed discomfort with their biological sex and struggled with questions and feelings around their gender identity.

109. In one incidence since the enactment of the Counseling Censorship Law, parents brought to Plaintiff's clinic their teenage minor daughter who had been exposed to websites advocating transgender identification for girls, and who had begun expressing unhappiness with her female gender identity, and even asserting a male gender identity. This girl had been previously diagnosed with high-functioning autism and was facing various social difficulties at school with her peers, but in earlier years had appeared comfortable in her identity as a girl.

110. The parents were aware that gender dysphoria is often accompanied by mental health co-morbidities, that gender identity in young people is not necessarily fixed, and that long-term adoption of a transgender identity by their daughter would likely lead to sterilization, lifelong dependence on extraordinary medical care including cross-sex hormones, and an increased risk of physical, social, and mental health difficulties.

111. The parents and child were also Christian. Contrary to basic assumptions of contemporary "gender ideology," many Christians, as well as believers in other historic religions, believe that God intended and designed humanity as "male and female," that God has created each individual as

either male or female, and that obedience, well-being, and happiness lie in acceptance of and gratitude for the particular sex that God has given each individual.

112. The parents' desire was thus to find a counselor who would assist their daughter in understanding herself and exploring the reasons for her unhappiness with her sex and identity as a girl, and hopefully enable her to return to comfort with her female body and reproductive potential, and with a gender identity as a female, girl, and in years to come, woman.

113. The parents expressed these thoughts and goals to Mr. Tingley, and sought his professional expertise as a counselor to work with their daughter towards that goal. The daughter also expressed a willingness to meet and talk with Plaintiff. Accordingly, Plaintiff entered into this counseling relationship, taking the girl on as a client.

114. Plaintiff's counseling of this client mainly consisted of private discussions, consisting for the most part of prompting questions, and sympathetic listening. It also included discussions with the girl and her parents together.

115. At no point did the client indicate that she was talking with Plaintiff against her will, or that she felt that Plaintiff was coercing her in any manner.

116. After several counseling sessions, the girl expressed a desire to become more comfortable with her biological sex, notwithstanding her previous claims of a male gender identity. Plaintiff did not challenge her new goal or the "change" that it would mark, but worked with her toward that goal. Over the

course of several years of observing and talking with this girl, Plaintiff saw a notable improvement in her demeanor and self-esteem, and understood the client to be more comfortable identifying herself as a girl and to be much happier with her direction in life.

117. Another recent instance occurred when a Christian family came to Mr. Tingley after their minor daughter had begun expressing discomfort with her biological sex and asserting a male gender identity. This girl had exhibited no signs associated with gender dysphoria as a young child, but had begun to assert a transgender identity only after exposure to online material advocating transgender identification.

118. Her parents were aware that gender dysphoria is often accompanied by mental health co-morbidities, that gender identity in young people is not necessarily fixed, and that long-term adoption of a transgender identity by their daughter would likely lead to sterilization and lifelong medical complications.

119. These parents also sought a counselor who would assist their daughter in understanding herself and exploring the reasons for her unhappiness with her sex and identity as a girl, and hopefully enable her to return to comfort with her female body and reproductive potential, and with a gender identity as a female, girl, and in years to come, woman.

120. However, while the parents of this minor client expressed their faith-based hopes and goals for their daughter's counseling regarding gender identity, they also discussed the Counseling Censorship Law with Plaintiff, and expressed great

fear about what being accused of being involved in a violation of that Law might do to their family, including their fear that it could lead to the intrusion of Child Protective Services between themselves and their daughter.

121. As the daughter was willing to meet and talk with Plaintiff, Plaintiff took her on as a client. However after a few sessions, without expressing any dissatisfaction with Plaintiff's counseling, the parents terminated the counseling relationship, on information and belief due to their fears resulting from the Counseling Censorship Law.

122. Plaintiff has supported several adolescent clients in similar circumstances who have sought his help as a therapist in addressing questions and concerns surrounding their gender identity. In some of those cases, during counseling the client has specifically expressed the desire to accept and achieve comfort with their God-given sex as a faith-driven motivation for their goals in counseling. In others of such cases, neither the parents nor the client have expressed any religious motivation for achieving their chosen goals.

123. Given the rapid and large increase in children and teens who are experiencing gender dysphoria, and given Plaintiff's visible identity as a licensed counselor who is a Christian who has previously and is currently helping clients with these issues, Plaintiff expects with high confidence that parents and minors will continue to come to him for counseling with a goal of helping a child who is exhibiting gender dysphoria or a transgender identity return to comfort with a gender identity aligned with

his or her biological sex. Plaintiff wishes to provide such counseling for minors who are willing to engage in such conversational counseling on a strictly voluntary basis.

D. Counseling and change relating to sexual attractions

124. Individuals who experience same-sex attractions may and do have multiple reasons not to accept those attractions nor to let those attractions define their lives and relationships.

125. A young person may have a personal life goal to enter into a stable marriage in which he or she can raise children who are the natural, genetic children of both spouses. Indeed, the ability to form one's own natural family has been recognized as one of the greatest joys in life, and one of the most fundamental human rights, across cultures and history. Of course, this can only happen in a heterosexual relationship.

126. Further, major historic faiths including Judaism, Christianity, and Islam, have long taught that the only moral context for sexual relationships is within a heterosexual marriage. Individuals who believe any one of these religions may well wish to bring both their desires and their conduct into conformity with the moral teachings of their faith, and what they believe to be the commandments of God. Indeed, recognizing that humans experience wrong or misguided desires in many contexts—not just sexual—and striving to bring not just conduct but desires into line with the moral teachings of the faith, is a central aspect of each of these religions.

127. For example, the Lubavitcher Rebbe

Menachem Mendel Schneerson, an internationally famous Jewish teacher, in a well-known letter to a young man who struggled with same-sex attractions, wrote that "Every day children are born with particular natures and innate tendencies or drives, some of them good and some of them bad. . . . The Creator endowed human beings with the capacity to improve, indeed even to change their 'natural' (i.e. innate) traits." Similarly, Christianity teaches that our "natural" desires are often misguided and harmful, but that God can work within an individual to give him a "new heart."(Ezekiel 26:36.) The Bible's teaching in the New Testament further emphasizes both the necessity and the possibility of profound inner change, for example in the Apostle Paul's instruction to believers: "Do not conform to the pattern of this world, but be transformed by the renewing of your mind. Then you will be able to test and approve what God's will is—his good, pleasing and perfect will." (Romans 12:2.) With regard to gender identity, formal teaching of the Catholic Church instructs believers that "man . . . has a nature that he must respect and that he cannot manipulate at will" (*Laudato Si*, No. 1555 (2015)), and that "the young need to be helped to accept their own body as it was created" (*Amoris Laetitia*, No. 285 (2016)).

128. Each of these religions also teaches that, with divine help, individuals *can* make real progress in changing our desires and bringing them into line with the moral teachings of the faith—that is, that we are not mere machines irrevocably destined to be inescapably controlled by chemically programmed desires.

129. Each of these religions also teaches that faith

in God and obedience to his moral law is more important to an individual's being and personal identity than are his or her sexual desires. Even noted authors Professors Lisa Diamond and Clifford Rosky, who consider themselves advocates for LGBTQ issues, recognize that assertions that sexual orientation cannot change "fail to adequately serve the interests of sexual minorities [i.e., all who experience anything other than purely heterosexual attractions] from ethnic, cultural, or religious backgrounds that do not share the contemporary Western conceptualization of sexual orientation as a defining status definition. Such individuals may believe that their status as a . . . religious minority is more critical to their sense of selfhood than their status as a sexual minority." Diamond & Rosky (2016) 21.

130. In fact, the historic Western religions do not "share the contemporary Western conceptualization" that sexual orientation defines the individual, and instead contend that belief in and obedience to God is "more critical to [the believer's] sense of selfhood" than is his or her sexual desires. Those who adhere to these faiths are fully entitled to believe this, to structure their own lives accordingly, and to pursue their own goals of personal identity and conduct informed by those beliefs.

131. It is often asserted that sexual attractions or orientation are fixed and not subject to change. But this is incorrect, and indeed is unsustainable in the face of modern science. In fact, a much-cited recent review of the relevant scientific literature by prominent LGBTQ-advocate authors concluded that "[A]rguments based on the immutability of sexual

orientation are unscientific, given that scientific research does not indicate that sexual orientation is uniformly biologically determined at birth or that patterns of same-sex and other-sex attractions remain fixed over the life course." Diamond & Rosky (2016) 2. These authors conclude that rather than resting on science, assertions that sexual orientation cannot change "rely on unspoken legal and moral premises whose validity must be questioned." Diamond & Rosky (2016) 11.

132. In the past many authors have hypothesized that same-sex attractions are biologically determined. However, no such causes have been found. A 2019 large-scale study by a team of authors from Harvard, MIT, and several other prestigious institutions analyzed the genomes of *almost half a million individuals*, along with self-reported information about heterosexual and same-sex sexual behaviors from these individuals. This massive study found only "very small" correlations between any genes and same-sex behavior. The authors concluded that the impact of genetic factors on sexual orientation were so small that they "do not allow meaningful prediction of an individual's sexual preference." Andrea Ganna et al., *Large-scale GWAS reveals insights into the genetic architecture of same-sex sexual behavior*, SCIENCE, 882 (2019).

133. Before the extensive genomic work of Ganna et al. published in 2019, some studies had attributed a somewhat higher influence of genetics on the formation of sexual orientation. But even these studies attributed only minority influence to genetics, leaving sexual orientation no more genetically determined than "a range of characteristics that are

not widely considered immutable, such as being divorced, smoking, having lower back pain, and feeling body dissatisfaction." Diamond & Rosky (2016) 4.

134. Rather than being biologically predestined, many individuals who identify as other than heterosexual believe that they possessed and exercised choice in their sexual orientation. Surveying the literature again, Diamond and Rosky reject the claims of "[b]oth scientists and laypeople . . . that same-sex sexuality is rarely or never chosen," instead concluding that "individuals who perceive that they have some choice in their same-sex sexuality are more numerous than most people think." Diamond & Rosky (2016) 20.

135. Suggesting there is much left to learn about the complex origins of same-sex attractions and behavior, the American Psychological Association's stance on the biological origin of sexual orientation has shifted over the years. In 1998, the APA appeared to support the theory that homosexuality is innate and people were simply "born that way," asserting that "There is considerable recent evidence to suggest that biology, including genetic or inborn hormonal factors, plays a significant role in a person's sexuality." But just ten years later, in 2008, the APA described the matter differently:

> "There is no consensus among scientists about the exact reasons that an individual develops a heterosexual, bisexual, gay, or lesbian orientation. Although much research has examined the possible genetic, hormonal, developmental, social, and cultural influences

> on sexual orientation, *no findings have emerged that permit scientists to conclude that sexual orientation is determined by any particular factor or factors*. Many think that nature and nurture both play complex roles...." (Emphasis added).[13]

136. As to the possibility of *change* in sexual attractions or behaviors; it has often been assumed or asserted in the literature in the past, and is still often asserted by non-scientists or in the popular press today, that sexual orientation is fixed and unchanging. However, this assumption is not just unfounded, but provably false. Diamond and Rosky concluded in 2016, after surveying the scientific literature, that "Studies unequivocally demonstrate that same-sex and other-sex attractions do change over time in some individuals," and that the evidence for this is now so clear as to be "indisputable." Diamond & Rosky (2016) 6-7.

137. Empirically, the frequency of change in sexual orientation is particularly high among those who experience same-sex attraction.

138. Thus, after reviewing and summarizing extensive scientific literature, chapters in the American Psychological Association Handbook of Sexuality and Psychology conclude that "research on sexual minorities [i.e., all those who do not identify as exclusively heterosexual] has long documented that many recall having undergone notable shifts in their

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[13] American Psychological Association, *Answers to Your Questions For a Better Understanding of Sexual Orientation and Homosexuality* (2008), https://www.apa.org/topics/lgbtq/orientation (last visited April 29, 2021).

patterns of sexual attractions, behaviors, or identities over time" (636), and that "Youth who are unsure or uncertain of their identity predominantly transition to a heterosexual identity" (562).

139. Many individual articles and studies reach the same conclusion.

140. A study by authors from the Harvard School of Public Health and other respected institutions examined "gender- and age-related changes in sexual orientation identity from early adolescence through emerging adulthood" in over 13,000 youth from 12 to 25 years of age, examining data collected for each participant at four times over a period of seven years. Miles Ott et al., *Stability and Change in Self-Reported Sexual Orientation Identity in Young People: Application of Mobility Metrics*, 40 ARCH. SEXUAL BEHAV., 519 (2011). On this sample, Diamond and Rosky note that "Of the 7.5% of men and 8.7% of women who chose a nonheterosexual descriptor at ages 18 to 21, 43% of the men and 46% of the women chose a different category by age 23. Among the same-sex-attracted youth who changed, 57% of the men's changes and 62% of the women's changes involved switching to completely heterosexual."

141. Diamond and Rosky gather the results of the Ott et al. study along with two separate "longitudinal" studies (i.e., studying the same individuals over time), done by different researchers at different times on different samples, and report that, for young adult populations (starting ages from 18 to 26), of those who initially reported "any same sex attractions," every study found that between 40% to 60% of each sex reported a "change in attractions" when resurveyed a

few years later. Of those who experienced a "change," at least half and as high as 83% "changed to heterosexuality at the second assessment." Diamond & Rosky (2016) 7.

142. Authors analyzing data collected for approximately 2,500 individuals as part of the National Survey of Midlife Development in the United States found that, of those of any age who identified at the start of the study as bisexual, a decade later approximately 32% identified as exclusively heterosexual, while of those who identified at the start of the study as homosexual (that is, exclusively attracted to the same sex), a decade later 28% identified as attracted to the opposite sex (heterosexual or bisexual). Steven E. Mock & Richard P. Eibach, *Stability and Change in Sexual Orientation Identity Over a 10-year Period in Adulthood*, 41 ARCHIVES OF SEXUAL BEHAVIOR 642 (2011) (Table 2). Heterosexual identity was far more stable: among those who identified as heterosexual at the start of the study, only 0.78% of men and 1.36% of women identified a different orientation a decade later. Mock & Eibach (2012) 645.

143. Another often-cited paper by prominent researchers summarized scholarship and cautioned that "there was little evidence of true bipolarity in sexual orientation" and that sexual orientation is instead "a continuous construct." These authors observed that one study found that "Only 38% of exclusive same-sex attracted females stayed in this group [between ages 21 and 26], with the rest moving into 'occasional' same-sex attraction (38%) or exclusive opposite-sex attraction (25%)," while another found that across a multi-year study period

"Most (62%) young women changed their identity labels at least once. . . Over time, lesbian and bisexual identities lost the most adherents and heterosexual and unlabeled identities gained the most." In short, this paper's literature review found that "Evidence to support sexual orientation stability among non-heterosexuals is surprisingly meager." Ritch C. Savin-Williams & Geoffrey L. Ream, *Prevalence and Stability of Sexual Orientation Components During Adolescence and Young Adulthood*, 36 ARCHIVES OF SEXUAL BEHAVIOR 385, 386 (2007).

144. Savin-Williams' and Ream's own study of adolescents and young adults pointed to the same conclusion, "highlight[ing] the high proportion of participants with same- and both-sex attraction and behavior that migrated into opposite-sex categories between [interview periods]." Savin-Williams & Ream (2007) 388.

145. Meanwhile, other noted scholars argue that the "sexual orientation" categories of "gay" or "straight" are to some extent socially defined, such that surrounding "cultural press" may in essence coerce an adolescent boy who merely experiences "affectional bonding" with another male to categorize and thus understand himself through the rigid binary category of "gay," whereas that same type of affection would not lead the boy to think of himself that way in a different cultural setting. Phillip Hammack, *The Life Course Development of Human Sexual Orientation: An Integrative Paradigm*, 48 HUMAN DEVELOPMENT, 267 (2005).

146. In light of these facts and considerations, some individuals who believe that they are

experiencing same-sex attractions may want to understand themselves better, to understand relationships and life experiences that may have produced those feelings in themselves, and to examine whether any of those influences, understandings, and feelings can be changed, so that they can happily pursue the life built around a heterosexual relationship that they desire, and that they believe their faith instructs them to pursue. Because self-understanding is difficult, they may wish the assistance of a sympathetic professional counselor to assist them in that inquiry and effort.

147. It is also beyond dispute that there are large numbers of individuals who at one time in their lives have considered themselves gay or lesbian, and who have experienced same-sex attraction and even relationships, but who later, and with the support of secular or religious counseling, developed opposite-sex attractions, and even entered into lasting opposite-sex marriages. For some, this change has been motivated by and assisted by religious conviction; for others, not. Others, while not necessarily succeeding in eliminating same-sex attractions, have changed their behaviors to obey the moral teachings of their faith by abandoning same-sex relationships in favor of a celibate life. Multiple organizations exist made up of individuals who have experienced one of these paths as their own story, and who affirm that their lives are happier and more fulfilled as a result.

148. It is often asserted that "conversion therapy" or other forms of "sexual orientation change efforts" (or "SOCE") are severely harmful. In fact, there is no meaningful evidence that conversational counseling

with willing clients to explore possibilities of change in unwanted same-sex attractions is harmful to most or even many participants. On the contrary, in a major 2009 report based on a review of many studies, a task force of the American Psychological Association concluded:

> a) "Although the recent studies do not provide valid causal evidence of the efficacy of SOCE or of its harm, some recent studies document that there are people who perceive that they have been harmed through SOCE… just as other recent studies document that there are people who perceive that they have benefited from it. . . . . We conclude that there is a dearth of scientifically sound research on the safety of SOCE. Early and recent research studies provide no clear indication of the prevalence of harmful outcomes among people who have undergone efforts to change their sexual orientation or the frequency of occurrence of harm because no study to date of adequate scientific rigor has been explicitly designed to do so. Thus, we cannot conclude how likely it is that harm will occur from SOCE." (42) b) "[I]t is still unclear which techniques or methods may or may not be harmful." (91)

149. Writing in 2021, a group of proponents of "SOCE" bans affirmed that the pertinent research base remains sparse up to the present, providing an insufficient basis on which to make confident judgments about SOCE. As they wrote, "There is limited SOGIECE [sexual orientation and gender identity and expression change efforts]-related

research—a critical knowledge gap . . . Rigorous research syntheses to support or refine legislative proposals related to SOCIECE are not available at this time." David Kinitz et al., *The Scope and Nature of Sexual Orientation and Gender Identity and Expression Change Efforts: A Systematic Review Protocol*, 10 SYSTEMATIC REVIEWS, 3 (2021).

150. Specifically with respect to willing participants who are motivated at least in part by religious beliefs and goals, a six year longitudinal study concluded that "The attempt to change sexual orientation did not appear to be harmful on average for these participants. The only statistically significant trends that emerged…indicated improving psychological symptoms." Stanton Jones & Mark Yarhouse, *A longitudinal study of attempted religiously mediated sexual orientation change*, 37 J. OF SEX & MARITAL THERAPY, 404, 424 (2011).

151. It is also frequently asserted—despite the extensive evidence that change in the components of sexual orientation is not only possible but frequent—that counseling to assist an individual toward desired change is never effective. Again, the available science does not support this assertion.

152. The same 2009 APA Task Force report acknowledged that "There are no studies of adequate scientific rigor to conclude whether or not recent SOCE do or do not work to change a person's sexual orientation." (120) More specifically:

> "We found that nonaversive and recent approaches to SOCE have not been rigorously evaluated. Given the limited amount of methodologically sound research, we cannot

> draw a conclusion regarding whether recent forms of SOCE are or are not effective." (43)

153. Plaintiff uses only a "nonaversive," conversational method of counseling.

154. In fact, authors from a variety of perspectives acknowledge that there is evidence that voluntary counseling is effective for at least some individuals who are highly motivated to change sexual attractions and behaviors.

155. The 2009 APA Task Force report stated:

> a) "Former participants in SOCE reported diverse evaluations of their experiences: Some individuals perceived that they had benefited from SOCE, . . . [These] individuals reported that SOCE was helpful—for example, it helped them live in a manner consistent with their faith. Some individuals described finding a sense of community through religious SOCE and valued having others with whom they could identify." (3) b) "For instance, participants reporting beneficial effects in some studies perceived changes to their sexuality, such as in their sexual orientation, gender identity, sexual behavior, [and] sexual orientation identity…." (49)

156. The longitudinal study of religiously motivated nonaversive therapy conducted by Jones and Yarhouse found that about half of participants reported progress towards their desired goal, with 23% of study participants reporting substantial reduction in homosexual attraction and substantial

increase in heterosexual attraction and functioning, while an additional 30% of participants reported that same-sex attraction remained present only incidentally or in a way that did not seem to bring about distress.

157. A 2010 study surveyed 117 men who participated in some form of secular or religious counseling or support group activities designed to reduce same-sex attraction. Of these, some were single and some were in heterosexual marriages. 88% were motivated at least in part by what they perceived as conflict between their same-sex desires and conduct and the teachings of their faith. Within the whole study group, responses indicated a "large effect" in decrease of same-sex attractions and behavior, and also a "large effect" in increase of heterosexual attraction and behavior. Elan Karten & Jay Wade, *Sexual orientation change efforts in men: a client perspective*, JOURNAL OF MEN'S STUDIES, Vol. 18 No. 1, 84 (2010).

158. Over the years, Plaintiff Tingley has had multiple clients, including minor clients, who experienced unwanted same-sex attraction and desired Mr. Tingley's help in reducing those attractions so that they could enter into heterosexual romantic relationships and live the family lives which they longed for, and also so that they could live in a manner consistent with the moral teachings of their Christian faith.

159. For example, in recent years Plaintiff counseled an older teen whose parents first brought him to Plaintiff. Over time, this client has himself sought Plaintiff's counsel on a number of topics

including attraction to pornography and unwanted same-sex attractions.

160. Like many young people, this individual first fell into a pattern of repeated access to online pornography. In time, he encountered online pornography depicting same-sex conduct, and believes that this pornography stirred up same-sex attractions in himself that he did not previously experience and would not otherwise have experienced.

161. The client has a personal Christian faith, and desires to live his life in accordance with what he understands to be the teachings of his faith. He is of the opinion that he will flourish—spiritually, emotionally and in relationships—through obedience to the teachings of his faith. He believes that his faith in God is a personal priority over sexual attractions, and that God has determined his identity according to what is revealed in the Bible rather than his own desires and perceptions.

162. In that context, the client has sought Plaintiff's counsel to achieve a personal goal of reducing his same-sex attractions and strengthening his sexual attraction to women.

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. And indeed this

particular client feels that he has made, and is making progress towards his goals.

164. This particular client's experience is not unique. Over the years Mr. Tingley has worked with several minors—both male and female—who have revealed similar thoughts and circumstances, and have sought his help in reducing same-sex attractions and developing their sense of sexual attraction to the opposite sex.

165. Some former clients who sought Plaintiff's counseling aid on this topic as minors achieved their goals, and as adults are now living stable and happy lives in heterosexual marriages.

166. Mr. Tingley currently works with and will continue to work with clients to these ends, and based on his many years of experience, he expects that he will continue to engage with minor clients with similar goals in future practice.

E. Plaintiff's counseling relating to sexual "behaviors"

167. From time to time, Plaintiff also works with minor teens who have expressed a desire to desist from ongoing sexual behaviors which they consider harmful to themselves and inconsistent with their religious beliefs about sexual morality.

168. Several minor clients have sought Plaintiff's help to break out of a pattern of frequent viewing of pornography for sexual gratification. For example, Plaintiff recently worked with a minor who came for counseling after his mother had initially sought help for him. The client had become obsessed with watching pornography, and despite the efforts of the

mother to restrict access to computers and the internet, the client would still find ways to get online and view pornography.

169. The client came from a Christian home and attended church. During discussions with the Plaintiff, the client said that he did not like the fact that he was so drawn to pornography, and personally expressed the belief that it was wrong to look at pornography. He further expressed feeling out of control in his viewing of pornography, and affirmed that he wanted to stop. Plaintiff worked with the client towards a goal of ending his regular viewing of pornography, with the client making good progress toward that end during the time that they spent together.

170. Plaintiff has supported many other clients in similar circumstances who have sought to stop viewing pornography after expressing a wish to change this behavior that they perceive to be wrong and unhealthy for them to engage in.

171. Plaintiff has also worked with clients who have wanted to cease consensual sexual activity with others of the opposite sex. One example occurred with a teenage client who had initially come to the Plaintiff to address academic difficulties at school. The client was a Christian, involved with his church youth group and with church mission trips to serve other communities. After several counseling sessions with the Plaintiff, the client raised concerns about the way in which he viewed girls, and in particular his relationship with his girlfriend.

172. The client believed that it was not right for him to be sexually involved with his girlfriend, and

felt that his thoughts and behaviors were in conflict with his faith and morals. He expressed frustration that he repeatedly fell into conduct that he believed was wrong and harmful to both himself and his girlfriend, and expressed a desire to align his sexual thoughts and actions with his faith. The client worked with the Plaintiff to that end, as part of a wider effort on the part of the client to become a more healthy and stable individual. Over time, the Plaintiff observed the client moving to a much happier place, with better self-esteem and drive, as the client addressed these behaviors that he believed to be wrong and harmful.

173. Similar scenarios frequently arise in Mr. Tingley's practice, and he works with his clients toward goals that enable them to live happier, stabler and more fulfilled lives. Based on his experience and his understanding of adolescents and teens, Plaintiff expects that minor clients will continue to seek his counseling assistance to change sexual behaviors that they believe are harmful and inconsistent with their personal goals and religious convictions.

174. No client has ever filed any complaint against Plaintiff relating to any counseling that Plaintiff has provided, related to any issue of gender identity, sexual attraction, sexual behaviors, or otherwise.

F. The impact of the Counseling Censorship Law on the Plaintiff's practice and clients

175. For professional, religious, and human reasons, Mr. Tingley desires to continue to support current and future clients who seek his help with issues relating to gender identity, sexual attractions, and sexual behaviors.

176. The Counseling Censorship Law seeks to prevent Plaintiff from providing counsel in these areas that his clients desire, that is consistent with their own religious beliefs and with Plaintiff's, and that is consistent with Plaintiff's professional judgment as to what path will lead his clients into healthy, fulfilled, and stable lives over the long term.

177. If Plaintiff provides such counsel, the Counseling Censorship Law threatens him with harassment, investigation, and severe penalties potentially including the loss of his license and his livelihood. He fears the credible and substantial risk of being subjected to enforcement proceedings under the Counseling Censorship Law for each client that raises these issues with him.

178. While at present Plaintiff continues to provide such counsel to clients who request it, Plaintiff must and does experience a substantial and reasonable fear that hostile activists will maliciously and dishonestly present themselves as clients in an effort to entrap him and accuse him of violating the Counseling Censorship Law. Similarly, even in the case of a client who seeks Plaintiff's assistance in good faith, Plaintiff must and does reasonably fear that some other individual—even an unrelated individual—will learn of the nature of such counseling and file a complaint against Plaintiff, or even initiate a third-party enforcement action as authorized by the Counseling Censorship Law.

179. In practice, this has meant that conversations with clients on matters of gender, gender expression, sexual orientation, sexual behaviors, or sexual or romantic attractions—

particularly at the outset of conversations with a new client, or when these issues are first raised by an existing client—are inevitably more guarded and cautious than would otherwise be the case.

180. Plaintiff is not able to freely and without fear speak what he believes to be true, and his client is therefore denied the right to receive open and uninhibited thoughts from his or her chosen counselor. This chilling is inimical to a healthy counseling relationship, which must be built on openness and trust between client and counselor.

181. In fact, the vagueness surrounding the terms and definitions involved in the Counseling Censorship Law mean that Plaintiff must fear that almost *any* exploratory discussions he has with his clients on matters of gender, gender expression, sexual orientation, sexual behaviors, or sexual or romantic attractions could later be accused as violations of the Counseling Censorship Law, casting a chill over all such conversations. Since these are very common matters of concern for troubled teens, this chill has a grave impact on both Plaintiff and his clients.

182. The prospect of merely going through an investigative process if accused of a violation of the Counseling Censorship Law—regardless of whether a violation is ultimately shown—causes Plaintiff to fear these exploratory discussions, particularly with the likelihood that such a process would be accompanied by hostile and uninformed publicity.

183. Not only does the Counseling Censorship Law chill discussions that Plaintiff has with his clients, but he also is chilled from more actively

publicizing the fact that he offers to counsel minors on these issues, as he would otherwise desire to do. Specifically, Plaintiff would advertise on his practice website that he offers counsel on sexual orientation and gender identity issues to adolescents, but is currently chilled from doing so because of the explicit prohibitions of the Counseling Censorship Law and the prospect of enforcement proceedings being brought against him.

184. On information and belief, this chilling effect is intentional on the part of the State of Washington because of its clear disapproval of the content of Plaintiff's speech, and the religious beliefs underlying that speech.

185. In fact, for Plaintiff to be in compliance with the Counseling Censorship Law, not only must he actively censor his own speech, but the Law compels him to counsel and speak to his clients on the premise that seeking to reduce same-sex attraction, and achieving comfort with their biological sex *could not* be successful, and would instead harm their physical and psychological wellbeing. Not only are these viewpoints directly contrary to the beliefs of Mr. Tingley and those of many of his clients, but they are also contradicted by science and by the experience of many of his clients.

186. If Plaintiff—and other license holders in the State of Washington—are successfully barred from working with their clients on matters of gender, gender expression, sexual orientation, sexual behaviors, or sexual or romantic attractions by the Counseling Censorship Law, then those clients are effectively denied access to ideas that they wish to

hear, and to counseling that is consistent with their own personal faith, life goals, and motivations. Parents of affected minor clients are likewise deprived of their right to hear such ideas, and to direct the upbringing of their children.

187. Likewise, when Plaintiff—and other license holders in the State of Washington—are caused by fear of the Counseling Censorship Law and loss of their livelihoods to self-censor even in part the messages, ideas, encouragement, and support that they would otherwise offer their clients, then those clients are effectively denied full and unfettered access to ideas that they wish to hear, and to counseling that is consistent with their own personal faith, life goals, and motivations. Parents of affected minor clients are likewise deprived of their right to hear such ideas, and to direct the upbringing of their children.

**COUNT I**

For Denial of Free Speech Rights of Mr. Tingley That Are Guaranteed by the First Amendment

188. Plaintiff incorporates all paragraphs above by reference.

189. By purporting to censor what Plaintiff may or may not say in the course of his professional counseling work, the Counseling Censorship Law violates Plaintiff's First Amendment rights.

190. The Counseling Censorship Law intrudes the censoring hand of government into one of the most private and sensitive spaces—the counseling room where an individual talks with his chosen counselor about his most personal longings, troubles, concerns,

and personal goals.

191. Plaintiff's right of free speech protected by the First Amendment includes the right to speak freely with his clients about the problems, questions, and goals that they bring to him. It includes the right to speak the ideas, suggestions, and advice that Plaintiff believes to be true and helpful. And this right to speak freely and honestly is fully protected even if the majority of the Washington State legislature disapprove of the client's chosen goals, and disagree with Plaintiff's views and advice. Indeed, the central role of the First Amendment is to protect the right of individuals to speak beliefs and views that the government disapproves of.

192. The Counseling Censorship Law is not a neutral "time, place or manner" regulation. Instead, it censors the conversations that a counselor and client may engage in based on the content of that speech, and based on its viewpoint.

193. This is evident from the fact that determining whether a counselor's or therapist's speech violates the Counseling Censorship Law will necessarily require an inquiry into both the content and the viewpoint of that speech. The Law purports to outlaw and punish only certain speech relating to specifically listed categories of content, including "sexual orientation or gender identity," change to "behaviors or gender expressions," and efforts to "eliminate or reduce romantic attractions or feelings towards individuals of the same sex."

194. As to these topics, the Counseling Censorship Law prohibits only speech promoting a certain viewpoint concerning human sexuality, identity,

morality, and indeed free will: that is, the viewpoint that change in an individual's gender identity or sexual orientation to align with their natural reproductive biology is possible, and may be a legitimate and desirable goal for some individuals.

195. The Law is not viewpoint neutral because it prohibits "efforts to . . . eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex," but does not prohibit efforts to reduce sexual or romantic attractions toward a member of the opposite sex, nor does it prohibit efforts to increase attractions toward a member of the same sex.

196. The Law is not viewpoint neutral because it permits counseling that reflects "acceptance" and "facilitation" of any sort of "exploration and development" of gender identity or sexual attractions or behaviors—except "change" to "sexual orientation or gender identity." Meanwhile, it prohibits counseling that does not insist on "accepting" a client's undesired feelings and instead seeks to assist that client toward his chosen goal of changing feelings relating to gender identity or sexual attractions.

197. Therefore, far from being viewpoint and content neutral, the Counseling Censorship Law actively aims to suppress the dissemination of ideas and information about human sexuality and the human capacity for change in this area that are unpopular with and disapproved by the government of the State of Washington.

198. The Counseling Censorship Law also seeks to compel speech, by demanding that counselors and therapists speak to clients on the premise that

seeking to align an individual's sense of gender identity with his or her biological sex, or seeking to align their sexual attractions and relationships with their body's natural reproductive capabilities, is not possible or desirable, and will necessarily harm them, regardless of their own life goals and religious beliefs. This necessarily alters the content of speech for therapists who disagree with the viewpoint of the government on these matters.

199. The Counseling Censorship Law does not adopt the least restrictive means to pursue a compelling government interest.

200. The government has no cognizable interest at all—let alone a compelling interest—in preventing citizens from hearing ideas that those citizens wish to hear from their chosen counselor or therapist.

201. The government has no cognizable interest at all—let alone a compelling interest—in preventing the dissemination of ideas that the government believes are false, offensive, misguided, or even hurtful.

202. The Counseling Censorship Law is overbroad rather than narrowly tailored. Assuming that there are particular physical or pharmaceutical practices that the state may legitimately regulate to safeguard the physical and psychological well-being of a minor, the Counseling Censorship Law makes no attempt at all to identify those practices and target its prohibitions against them. As the large preponderance of mental health counselors engage solely in speech, a substantial number of the Counseling Censorship Law's applications are unconstitutional judged in relation to what any

possible legitimate application might be.

203. For these reasons, the Counseling Censorship Law is unconstitutional as a violation of the free speech rights of Plaintiff Brian Tingley as well as all other "license holders."

204. This ongoing deprivation of constitutional rights constitutes irreparable injury.

205. Wherefore, Plaintiff Brian Tingley respectfully requests that the Court grant declaratory and injunctive relief against the Counseling Censorship Law pursuant to 28 U.S.C. §§ 20201 and 2202, as set forth in the Prayer for Relief.

**COUNT II**

For Denial of Free Speech Rights of the Clients of Mr. Tingley That Are Guaranteed by the First Amendment

206. The First Amendment not only protects the right of each individual to speak, but also to *hear* desired information and ideas, free from government censorship. This includes ideas that depart from conventional wisdom, and ideas that the government believes are false, offensive, misguided, or even hurtful.

207. By prohibiting counselors and other "license holders" from talking to minor clients with a view toward helping them achieve their personal goals of changing their feelings of gender identity to align with their biological sex, or reducing same-sex attraction or increasing opposite-sex attraction, the Counseling Censorship Law violates those clients' First Amendment right to hear speech that they and

their parents desire them to hear.

208. For the reasons set forth above (¶ 192-197), this infringement of the First Amendment rights of counseling clients including Plaintiff's minor clients is neither content neutral nor viewpoint neutral.

209. For the reasons set forth above (¶ 199-202), this infringement of the First Amendment rights of counseling clients including Plaintiff's minor clients is not narrowly tailored to serve a compelling governmental interest.

210. Counselors including Plaintiff have standing to assert and seek redress for the First Amendment rights of their clients that are violated by enforcement of the Counseling Censorship Law, and also by the chilling effect that the very existence of that Law has on free and open communications between these clients and their chosen counselors.

211. Counselors, including Plaintiff, enter into an extremely close and intimate relationship with clients who seek their assistance to pursue personal goals relating to the sensitive and important topics of sexual attractions, behaviors, and orientation—a relationship in which openness and candor is crucial.

212. Many clients feel that their discussions with their chosen counselor about sexual attractions, behaviors, and orientation involve the most intimate, difficult, important, and embarrassing topics in their lives. Because of this, it is extremely difficult or even impossible as an emotional and social matter for these clients to step forward to protect their own constitutional rights to engage in the conversations with their counselor that they desire.

213. Further, because the Counseling Censorship Law on its face does not penalize *receiving* counsel of any sort, clients are not themselves subject to any threat of enforcement under the Law, so they risk being denied their right to receive desired counseling while at the same time being denied any forum in which to assert and protect that right.

214. The violation of the protected free speech rights of counseling clients, including minor clients of Plaintiff, constitutes irreparable injury.

215. Wherefore, Plaintiff respectfully requests that the Court grant declaratory and injunctive relief against the Counseling Censorship Law pursuant to 28 U.S.C. §§ 20201 and 2202, as set forth in the Prayer for Relief.

**COUNT III**

For Denial of the Due Process Rights of Plaintiff in Violation of the Fourteenth Amendment Because the Prohibitions of the Counseling Censorship Law Are Impermissibly Vague

216. The Fourteenth Amendment's guarantee of Due Process prohibits the government from imposing or threatening punishment based on laws that are so vague that they do not provide fixed legal standards as to what is prohibited and what is not, and so leave room for standardless or discriminatory enforcement.

217. In fact, as detailed below, essentially all of the key terms in the Counseling Censorship Law are undefined in the Law itself, and also undefined in science, and indeed have more in common with slogans than with a fixed standard identifying what counseling speech is prohibited and subject to

punishment under the Law, and what is not.

218. As a result, the Counseling Censorship Law is unconstitutional on its face because it does not provide adequate standards or guidelines to govern the actions of those empowered to enforce it—which, as noted above, includes not only the Secretary of Health, the Attorney General, and the Health Systems Quality Assurance team, but also "any other person." Instead, the Law enables and authorizes those who are empowered to pursue enforcement actions in this highly controversial and politicized area to do so based on their personal predilections, rather than on any fixed legal standard, and likewise to pursue discriminatory enforcement.

219. The vagueness and lack of fixed legal standards in the Counseling Censorship Law is all the more impermissible because it impacts a fundamental right, in that because of this vagueness and the unbounded discretion that it affords to those authorized to bring enforcement actions, counselors engaging with a client who raises concerns relating to gender identity, same-sex attractions, or sexual behaviors must be all the more fearful that they will be accused of violating the law. As a result, consciously or unconsciously, counselors including Plaintiff inevitably engage in a degree of self-censorship that infringes the freedom of discussion of both counselor and client.

220. The Counseling Censorship Law is unconstitutionally vague because it provides no standards or guidelines defining the line between speech that permissibly seeks to "facilitat[e]" a client's "development" of his or her gender identity or

sexual orientation, and speech that unlawfully seeks to "change" that person's gender identity or sexual orientation.

221. Given that "development" necessarily involves "change," the purported distinction is incoherent, and thus leaves those authorized to bring enforcement actions free to do so based on their personal predilections, or for discriminatory purposes including disapproval of the beliefs, viewpoint, or messages of a particular counselor.

222. The prohibition on seeking to "change an individual's . . . gender identity" also fails to provide adequate standards or guidelines to govern the actions of those authorized to bring enforcement actions because the term "gender identity" is undefined in the law and is vague.

223. This vagueness is made worse rather than resolved by consulting Washington State governmental position statements and publications in the field. The Washington State Human Rights Commission "Guide to Sexual Orientation and Gender Identity" published in 2014 asserts that "gender expression or identity" "as defined in the law" means "having *or being perceived as having* a gender identity, self-image, appearance, behavior, or expression . . ." (emphasis added). According to this meandering definition, an effort to "change" "gender identity" could include assisting a client to pursue her goal of changing gender-related aspects of her dress, or even of changing how other people *perceive* her gender identity.

224. "Gender identity" has no clearer definition in the wider world. As noted above, in a 2016 rule

interpreting Section 1556 of the Patient Protection and Affordable Care Act, the Department of Health and Human Services defined "gender identity" as "an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth." *Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31,376 (May 18, 2016) at 31,384.

225. A publication sponsored by the ACLU, Human Rights Campaign, and National Education Association asserts that gender identity encompasses any "deeply-felt sense of being male, female, both or neither," and can include a "gender spectrum" "encompassing a wide range of identities and expressions." *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools*, at 6-7.

226. The National Center for Lesbian Rights contends that "Gender is comprised of a person's physical and genetic traits, their own sense of gender identity and their gender expression" and similarly asserts that gender identity "is better understood as a spectrum." That source goes on to say that an individual may have an "internal sense of self as male, female, both or neither," and that "each person is in the best position to define their own place on the gender spectrum."[14] Indeed, the medical text

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[14] Asaf Orr et al., National Center for Lesbian Rights, *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools* 5, 6 (2015), https://www.nclrights.org/wpcontent/uploads/2015/08/Schools-in-Transition-2015-Online.pdf (last visited April 29, 2021).

*Principles of Transgender Medicine and Surgery*, declares that "Gender identity can be conceptualized as a continuum, a Mobius, or patchwork."[15]

227. An individual who is unhappy with or uncertain about his or her "sense of being male, female, both or neither," or who wishes to evaluate and "define their own place on the gender spectrum," or who does not wish to live life with an identity as amorphous as a Mobius strip or a "patchwork," may well wish the aid of a professional counselor or therapist. But what conversation will comprise permissible "development" of that individual's place on that disorienting Mobius strip, and what will be condemned as an unlawful effort to "change" the individual's "gender identity," is unknowable.

228. Because the Counseling Censorship Law fails to define "gender identity," and that term has no consistent definition in the wider law or medical science, the Counseling Censorship Law leaves those authorized to bring enforcement actions free to do so based on their personal predilections, or for discriminatory purposes including disapproval of the beliefs, viewpoint, or messages of a particular counselor.

229. The prohibition on seeking to "change an individual's sexual orientation" also fails to provide adequate standards or guidelines to govern the actions of those authorized to bring enforcement actions, because the term "sexual orientation" is undefined in the Law and is vague.

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[15] *Principles of Transgender Medicine and Surgery* 43 (Randi Ettner, Stan Monstrey & Eli Coleman eds., 2nd ed. 2016).

230. There is no definition of the term in the Counseling Censorship Law itself. The Washington State Human Rights Commission elsewhere states that "As defined in the law, 'sexual orientation' means heterosexuality, homosexuality, bisexuality, *and gender expression or identity*," bringing into the term "sexual orientation" all the vagueness and ambiguity that is embedded in the term "gender identity."

231. There is equally no agreement in the scientific literature as to the definition of "sexual orientation," or to what extent "orientations" may overlap or blend from one to another. The APA Handbook of Sexuality and Psychology cautions that "Sexual orientation is usually considered a multi-dimensional construct" in which "aspects of sexual orientation . . . are not necessarily concordant." (556). Diamond and Rosky (2016) warn that "it is important to note that sexual orientation is not easy to define or measure," and "is a multifaceted phenomenon" which cannot be simplified to mere "sexual attractions," but instead incorporates (among other components) "sexual attractions, . . . sexual behavior, and sexual identity," while "identity and behavior are structured by social context, social constraints, and social opportunities." (3) This, say Diamond and Rosky, "obviously poses a problem for research on the causes of sexual orientation." (3) It also poses a severe problem for a counselor, therapist, or client who wishes to know what type of counseling or therapeutic goals might be condemned as seeking to change "sexual orientation."

232. Because the Counseling Censorship Law fails to define "sexual orientation," and that term has no consistent definition in the wider law or medical

science, the Counseling Censorship Law leaves those authorized to bring enforcement actions free to do so based on their personal predilections, or for discriminatory purposes including disapproval of the beliefs, viewpoint, or messages of a particular counselor.

233. The Counseling Censorship Law is further impermissibly vague because it prohibits any "regime that *seeks* to change . . ." sexual orientation or gender identity. The Law fails to provide any standards or guidelines as to whether this refers to the subjective intent of the client, or that of the counselor, again leaving unfettered discretion on this critical question to any person authorized to bring an enforcement action, and inviting discriminatory enforcement.

234. Indeed, a client's personal intention in raising a subject relating to sexuality may or may not be known to the counselor, and may change from one meeting to the next. Consequently, a counselor might face sanctions on the basis of the shifting subjective thoughts and goals of his client that are beyond the counselor's knowledge.

235. The Counseling Censorship Law further fails to provide adequate standards or guidelines to govern the actions of those authorized to bring enforcement actions because it provides no definitions of terms "gender expressions", "identity exploration", and "identity development," and provides no information at all as to what "behaviors" a therapist may or may not help a client attempt to change.

236. In the absence of any clarity on these terms, almost any counseling conversation that relates to gender, intimate relationships, or sexuality could be

accused of seeking to "change . . . sexual orientation or gender identity." Thus, the failure of the Counseling Censorship Law to define these terms additionally leaves those authorized to bring enforcement actions free to do so based on their personal predilections, or for discriminatory purposes including disapproval of the beliefs, viewpoint, or messages of a particular counselor.

237. Meanwhile, the sanctions faced by therapists for violating the Counseling Censorship Law are severe, ranging up to the revocation of their licenses and the loss of their livelihoods.

238. For these reasons, the Counseling Censorship Law is so vague on its face that it deprives counselors and other "license holders" of Due Process rights protected by the Fourteenth Amendment.

239. The deprivation of these rights constitutes irreparable injury.

240. Wherefore, Plaintiff respectfully requests that the Court grant declaratory and injunctive relief against the Counseling Censorship Law pursuant to 28 U.S.C. §§ 20201 and 2202, as set forth in the Prayer for Relief.

**COUNT IV**

For Denial of Free Exercise Rights of Mr. Tingley That Are Guaranteed by the First Amendment

241. Plaintiff incorporates all paragraphs above by reference.

242. Mr. Tingley's rights of free exercise protected by the First Amendment include the right to use his professional skills to assist his clients to live in

accordance with their own religious beliefs, and equally to speak in the course of his professional work in a manner that is consistent with his own religious beliefs.

243. The Counseling Censorship Law is premised on the belief that volitional change away from transgender identification, or away from same-sex attractions, is not possible or desirable, and that any attempt to make such a change is harmful.

244. On the contrary, Plaintiff, like many adherents of Christianity and other historic religions, believes based on his faith (as well as based on science) that this "unchangeable" view of human nature is mistaken, that such change is possible, that God can and does work profound changes in individuals who desire and seek to change, and that change to a gender identity or sexual orientation aligned with an individual's reproductive biology can and does increase well-being at least in individuals who pursue this goal in obedience to their own religious convictions.

245. Further, Plaintiff believes that as a Christian he has a religious obligation to use his time and professional skills to help fellow Christians who seek his assistance to live consistently with the teachings of their shared faith. For clients who share his beliefs, he offers a safe harbor where they can be assured that their Christian worldview will not be subject to doubt, or even hostility, that they frequently experience in their daily lives.

246. As applied to Plaintiff, the Counseling Censorship Law substantially burdens his religious beliefs by requiring him to practice and speak in a

manner that is contrary to his religious beliefs, prevents him from sharing his religious beliefs about the possibility of change with his clients in the course of discussions, and subjects him to a risk of severe sanctions for speaking to clients consistently with his religious beliefs.

247. Because the Counseling Censorship Law was aimed against counseling goals and speech which are well known to be primarily associated with counselors and therapists of faith, the Law is not neutral or generally applicable.

248. The Counseling Censorship Law is also not neutral or generally applicable because it imposes a viewpoint-based restriction on speech, directed against a viewpoint which is well known to be primarily associated with individuals of faith.

249. The Counseling Censorship Law does not represent the least restrictive means of furthering a compelling state interest as it is both overbroad and underinclusive.

250. By depriving Plaintiff of the right to practice his religious beliefs by speaking to clients on topics of gender identity and sexual attractions and change in a manner consistent with the teachings of his faith and that of his clients, the Counseling Censorship Law denies Plaintiff his rights of free exercise guaranteed by the First Amendment.

251. The deprivation of these rights constitutes irreparable injury.

252. Wherefore, Plaintiff respectfully requests that the Court grant declaratory and injunctive relief against the Counseling Censorship Law pursuant to

28 U.S.C. §§ 20201 and 2202, as set forth in the Prayer for Relief.

**COUNT V**

For Denial of Free Exercise Rights of Clients of Mr. Tingley That Are Guaranteed by the First Amendment

253. Plaintiff incorporates all paragraphs above by reference.

254. The right of free exercise under the First Amendment protects an individual's right to live in accordance with his or her religious beliefs.

255. Based on the teachings of their Christian faith, some of Plaintiff's clients believe that they have a moral obligation to strive to bring their sense of gender identity into alignment with the biological sex that God gave to them, and/or to bring their sexual attractions and relationships in line with their reproductive biology—that is, into a heterosexual orientation, and/or to change their sexual behaviors by abstaining from sexual relationships outside the context of a heterosexual marriage.

256. By threatening Plaintiff and all counselors, therapists, or other "license holders" with severe penalties including loss of their license and livelihood if they assist clients to pursue these faith-directed personal goals, the Counseling Censorship Law does, and was intended to, interfere with these clients' free exercise of their religion, in violation of the First Amendment.

257. Because the Counseling Censorship Law was aimed against personal goals and goals for counseling

which are well known to be primarily associated with individuals of faith, the Law is not neutral or generally applicable.

258. The Counseling Censorship Law is also not neutral or generally applicable because it imposes a viewpoint-based restriction on speech, directed against a viewpoint which is well known to be primarily associated with individuals of faith.

259. The Counseling Censorship Law does not represent the least restrictive means of furthering a compelling state interest as it is both overbroad and underinclusive.

260. Accordingly, the Counseling Censorship Law denies Plaintiff's Christian clients their rights to free exercise guaranteed by the First Amendment.

261. The deprivation of these rights constitutes irreparable injury.

262. Plaintiff has standing to assert and seek redress for the First Amendment rights of his clients that are violated by the enforcement of the Counseling Censorship Law, including his clients' free exercise rights.

263. Wherefore, Plaintiff respectfully requests that the Court grant declaratory and injunctive relief against the Counseling Censorship Law pursuant to 28 U.S.C. §§ 20201 and 2202, as set forth in the Prayer for Relief.

**PRAYER FOR RELIEF**

Plaintiff respectfully requests that this Court enter judgment against Defendants and grant the following relief:

(A) A declaration that—both facially and as applied—the Counseling Censorship Law violates the First Amendment right to free speech of Plaintiff Mr. Tingley and of his clients who seek his professional assistance to achieve comfort with a gender identity congruent with the client's biological sex, or to reduce unwanted same-sex attraction and/or develop or increase opposite-sex attractions, or to change sexual behaviors of any sort;

(B) A declaration that—both facially and as applied—the Counseling Censorship Law violates the free exercise rights of Plaintiff Mr. Tingley and of his clients who seek his professional assistance to achieve comfort with a gender identity congruent with the client's biological sex, or to reduce unwanted same-sex attraction and/or develop or increase opposite-sex attractions, or to change sexual behaviors of any sort;

(C) A declaration that, because it is so vague that it does not provide fixed legal standards as to what is prohibited and what is not, the Counseling Censorship Law facially violates the Due Process rights of Mr. Tingley protected by the Fourteenth Amendment.

(D) That this Court enter a preliminary injunction and permanent injunction barring all enforcement of the Counseling Censorship Law;

(E) That this Court award Plaintiff costs and expenses of this action, including reasonable attorneys' fees, in accordance with 42 U.S.C. § 1988;

(F) That this Court issue the requested injunctive relief without a condition of bond or other security being required of Plaintiff;

(G) That this Court grant any other relief that it deems equitable and just in the circumstances; and

(H) That this Court retain jurisdiction over this matter for the purpose of enforcing its orders.

Respectfully submitted this 13th day of May, 2021.

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**VERIFICATION OF COMPLAINT**

I declare under penalty of perjury, pursuant to 28 U.S.C. § 1746, that I have read the foregoing Verified Complaint, and the factual allegations thereof, and that to the best of my knowledge the facts alleged therein are true and correct.

Executed this 12th day of May, 2021.

s/ Brian Tingley
Brian Tingley, Plaintiff