No. 22-942

# In the Supreme Court of the United States

BRIAN TINGLEY,

*Petitioner*

*v.*

ROBERT W. FERGUSON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR THE STATE OF WASHINGTON, *ET AL.*,

*Respondents*

and

EQUAL RIGHTS WASHINGTON,

*Respondent-Intervenor.*

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

## BRIEF FOR DAVID WIEDIS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

SEAN P. GATES
*Counsel of Record*
*Charis Lex P.C.*
*225 S. Lake Ave., Ste. 300*
*Pasadena, CA 91101*
*(626) 508-1715*
*sgates@charislex.com*

*Counsel for* Amicus Curiae

## QUESTION PRESENTED

Whether a law that censors religious speech between licensed professionals and their clients in the context of one-on-one mental health counseling should be subject to only minimal scrutiny under the Free Speech and Free Exercise Clauses, as the Ninth Circuit held, or a more exacting standard, as the Third and Eleventh Circuits have held.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

***Cases***

***Statutes***



***Other Authorities***

## INTEREST OF *AMICUS CURIAE*[1]

*Amicus curiae* David Wiedis is the founder and Executive Director of ServingLeaders Ministries, a Christian ministry that provides counseling services to pastors, ministry leaders, and their families to help them deal with the pressures of ministry and the devastation to families and churches that results from the lack of pastoral care for ministry leaders. Mr. Wiedis founded ServingLeaders after twenty years of practicing law and obtaining a Masters in Christian Counseling from the Philadelphia Biblical University (now Cairn University), where he serves as an adjunct faculty member, teaching courses on ethical, moral, and legal issues in counseling.

Mr. Wiedis seeks to help other Christians through his ministry by providing biblical, Christ-centered counseling based on his and his clients' shared worldview. He and other counseling colleagues, including those who are licensed, both within his organization and within associated Christian institutions, provide their counseling services based on biblical precepts that many counselees specifically pursue based on their own Christian views and behaviors.

Mr. Wiedis seeks to bring to the Court's attention the scientific literature documenting the importance of integrating religious and spiritual beliefs into counseling practice and to emphasize how the First Amendment guarantees of free speech and the free exercise of

---

[1] No party or counsel for a party authored this brief in whole or in part. No one other than *Amicus* or his counsel made a monetary contribution to preparing or submitting this brief. *Amicus* gave timely notice to each of the parties regarding the filing of this amicus brief.

religion are necessary to ensure effective counseling for religious adherents.

## SUMMARY OF ARGUMENT

This case involves the question whether the state may censor discussions of religious beliefs in the context of one-on-one counseling between licensed mental health professionals and clients who share the same religious faith.

Over two forceful dissents from the denial of rehearing—which together garnered five votes—the Ninth Circuit said yes, if those discussions involve traditional religious beliefs about sexuality and gender. According to the court, such a ban need only pass the rational basis test; neither heightened nor strict scrutiny applies.

The Ninth Circuit thus upheld a statute that bans "pure talk therapy based on sincerely held religious principles" and therefore "limits speech motivated by the teachings of several of the world's major religions." In doing so, the court effectively put one-on-one discussions of religious beliefs regarding sexuality and gender on par with "electric shock treatment or the use of nausea-inducing drugs," which are also proscribed by the statute.

In addition to the reasons given by the petitioner—chiefly, that the decision below splits the circuits—the Court should grant certiorari for two reasons.

*First*, hundreds of recent studies show that integrating discussions of religious beliefs and practices in mental health therapies leads to better outcomes. These studies have compelled the mental health professions to seek to incorporate religious and spiritual concepts in their therapies. For instance, the World

Psychiatry Association now urges the inclusion of spirituality and religion in psychiatric clinical practice.

The decision below, however, will allow states to proscribe such therapies based on philosophical objections. According to the lower court, for instance, the at-issue statute—which prohibits counseling designed to help those who want to change their sexual orientation or gender identity—must be upheld because it "permissibly honors" individual identities, whether "gay, straight, cisgender, or transgender."

But by barring discussions based on the religious beliefs of the client, the statute denigrates the client's religious identity and restricts therapeutic religious speech. In effect, the lower court elevated sexual and gender identities over religious identities. Under this reasoning, even if the client earnestly wants help to live out his or her faith, the statute prohibits mental health professionals from using therapies consistent with the client's religious beliefs.

*Second*, the lower court decision reveals confusion about the place of religious speech in this Court's First Amendment precedent. This Court has repeatedly noted that the Amendment's text and history demand special solicitude for religious speech. After all, the First Amendment was "written to quiet well-justified fears … arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak." *Engel* v. *Vitale*, 370 U.S. 421, 435 (1962).

But in other cases, this Court has treated religious speech as any other type of speech. True, the Court has insisted that religious speech be accorded no *less* protection than secular speech. But treating religious

expression no differently than nude dancing, racist speech, profanity, or any other secular speech is contrary to the original understanding that "religious discourse is somehow importantly different from non-religious discourse."

The result of slighting religious speech is what we see in the decision below. The state may limit "speech motivated by the teachings of several of the world's major religions" with only minimal constitutional scrutiny.

The Court should make clear that censoring religious speech requires more.

## STATEMENT

Brian Tingley is a licensed marriage and family counselor and a committed Christian with theological training. App. 133a–134a. Although he serves people of any faith, with his religious background, Tingley "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." App. 146a. Tingley is "specifically sought out by clients because they want to speak with a counselor who shares their Christian worldview." *Ibid.*

Tingley does not seek to impose his faith on anyone, nor does he tell his clients how they should live their lives. App. 146a. His counseling consists of listening and talking, allowing clients to "reflect on their identity and their beliefs, as well as enabling them to identify personal goals and objectives." *Ibid.*

Over the years, Tingley has counseled multiple clients, including minors, "who experienced unwanted

same-sex attraction and desired Mr. Tingley's help in reducing those attractions so that they could … live in a manner consistent with the moral teachings of their Christian faith." App. 174a. He has also counseled adolescents who have "specifically expressed the desire to accept and achieve comfort with their God-given sex as a faith-driven motivation for their goals in counseling." *Id.* 160a.

In all of these cases, Tingley "does nothing but talk with his clients." App. 148a. "He simply listens to what his clients say, asks them questions, and talks with them." *Ibid.*

The State of Washington, however, enacted a statute banning counseling for minors such as Tingley's, deeming it "conversion therapy." Wash. Rev. Code Ann. § 18.130.180(27). Regardless of the client's desires and goals, the statute prohibits any counseling to change the client's sexual orientation or gender identity, but it allows counseling that provides "acceptance, support, and understanding":

> (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.

Wash. Rev. Code Ann. § 18.130.020.

"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 (Butamay, J., dissenting from the denial of rehearing en banc). As the State of Washington admitted, the statute treats religious speech as it does "electric shock treatment or the use of nausea-inducing drugs." App. 93a n.3.

The court below upheld the statute against Tingley's free speech claim. Splitting with the Third and Eleventh Circuits, the court held that statutes restricting religious speech in counseling need only satisfy rational basis review. *Compare* App. 35a, *with King* v. *Governor of N.J.*, 767 F.3d 216, 224 (3d Cir. 2014) (applying intermediate scrutiny), *and Otto* v. *City of Boca Raton*, 981 F.3d 854, 867–868 (11th Cir. 2020) (applying strict scrutiny).

The court below applied this minimal standard even though "the speech underpinning conversion therapy is overwhelmingly—if not exclusively—religious," and the statute, therefore, "limits speech motivated by the teachings of several of the world's major religions." App. 94a (Butamay, J., dissenting from the denial of rehearing en banc).

The court believed the ban justified by the content of this sort of traditional religious speech: "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.'" App. 49a.

The court further held that the state may require counselors to honor a client's stated sexual or gender identity:

> 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.'" We uphold Washington's law and reject Tingley's free speech challenge because the Washington law permissibly honors individual identity.

App. 51a (citation omitted). In other words, religious speech that does not honor these identities may be banned.

Four judges dissenting from the denial of rehearing en banc emphasized that the court's decision "entirely ignored the First Amendment's special solicitude for religious speech." App. 91a (O'Scannlain, J., joined by Ikuta, J., R. Nelson, J., and VanDyke, J., dissenting from the denial of rehearing en banc). A fifth believed that because Tingley's "Free Speech claim" involved religious speech, it must be evaluated under "a more exacting review." App. 94a (Butamay, J., dissenting from the denial of rehearing en banc).

## ARGUMENT

### I. Review is needed because the decision below allows the state to censor vitally important religious speech.

The relationship between religion and mental health treatment has a long history. Appalled by the barbaric treatment of patients at Bedlam, the leading psychiatric institution in the late 1700s, William Tuke established York Retreat based on the Quaker religious conviction that the mentally ill are equal human

beings, to be treated with gentleness, humanity, and respect. *See* Harold G. Koenig, *Religion, Spirituality, and Health: The Research and Clinical Implications*, ISRN Psychiatry, Vol. 2012, Article ID 278730, at 1–2 ("Koenig 2012"). Instead of shackles, squalor, and physical punishment that amounted to torture, Tuke's "moral treatment" was based on personalized attention, conversation, religious services, prayer, and benevolence all provided in a bucolic setting. Tanaquil Taubes, *"Healthy Avenues of the Mind": Psychological Theory Building and the Influence of Religion During the Era of Moral Treatment*, 155(8) Am. J. Psychiatry 1001, 1003-1007 (1998); *see also* Louis C. Charland, *Benevolence and discipline: the concept of recovery in early nineteenth-century moral treatment*, *in* Recovery of People with Mental Illness: Philosophical and Related Perspectives 66–67, 74–75 (Abraham Rudnick, ed., 2012).

In the early 1800s, Quakers brought the moral treatment philosophy to the United States, founding mental health facilities in Pennsylvania. The Quakers' religious principles not only "played a very significant role in the development of the humane treatment of the mentally ill," they also "laid the foundation for modern psychiatric medicine in the United States." Debbie Price, *For 175 Years: Treating Mentally Ill With Dignity*, N.Y. Times, sec. 1, p. 48 (Apr. 17, 1988).

Psychoanalytic theory developed in the 20th century, however, became hostile to religion, drawing "parallels between religion and both neurosis and psychosis." David Lukoff, et al. *Toward a more culturally sensitive DSM-IV*, 180(11) J. Nervous and Mental Disease 673, 674 (1992) ("Lukoff 1992"). The leading theoreticians viewed religion as a "universal obsessional neurosis," "irrational," and an "emotional

disturbance." *Id.* at 674. Indeed, in a 1980 article, the founder of rational emotive behavior therapy, Albert Ellis, asserted that "[t]he less religious [patients] are, the more emotionally healthy they will tend to be." Albert Ellis, *Psychotherapy and atheistic values: A response to A. E. Bergin's "Psychotherapy and Religious Issues,"* 48 J. Consult. Clin. Psychol. 635 (1980).

As hundreds of scientific studies have now shown, Ellis and the other leading theoreticians were dead wrong. Not only are religious beliefs and practices associated with better mental and physical health, but the mental health professions now recognize the need to incorporate religious concepts in their therapies.

Despite this recognition, most mental health professionals still do not incorporate religious concepts in their practices. In contrast, religious counselors, already equipped with knowledge and understanding of an adherent's religious convictions, can speak to their religious client's deepest needs.

Yet it is this very religious speech that the Ninth Circuit allowed to be censored.

### A. The scientific consensus recognizes religion's important role in mental health therapy.

#### 1. Studies show that religion is associated with better mental health.

Scientific studies have consistently found religious practices and belief are associated with better mental health outcomes. For example, a 2012 review of 454 studies showed how religious and spiritual beliefs and practices helped people cope with a wide range of illnesses and stressful situations, including chronic pain, kidney disease, diabetes, pulmonary disease, cancer,

blood disorders, cardiovascular diseases, neurological disorders, psychiatric illness, bereavement, and end-of-life issues. *See* Koenig 2012, *supra*, at 4. By 2014, more than 3,000 empirical studies showed, in general, that individuals who have more religious and spiritual belief and practice "have less depression, anxiety, suicide attempts, and substance use/abuse, and experience a better quality of life, faster remission of depressive symptoms, and better psychiatric outcomes." Alexander Moreira-Almeida, et al., *Clinical implications of spirituality to mental health: review of evidence and practical guidelines*, 36 Brazilian J. Psychiatry 176, 176 (2014). Similarly, a 2021 review of the scientific literature showed that higher levels of religiosity and spirituality are associated with lower depressive symptoms, lower suicidality, lower substance abuse, better outcomes related to bipolar disorder, and serve as a buffer against post-traumatic stress. *See* Giancarlo Lucchetti, et al., *Spirituality, religiousness, and mental health: A review of the current scientific evidence*, 9(26) World J. Clin. Cases 7620, 7622–625 (2021) ("Luchetti 2021").

A few examples illustrate the point:

*Self-esteem*. Critics have claimed that religion "adversely affects self-esteem because it emphasizes humility rather than pride in the self" and "could exacerbate guilt in some for not living up to the high standards of conduct prescribed by religious traditions, resulting in low self-esteem." Koenig 2012, *supra*, at 4. But in an analysis of 69 studies, "42 (61%) found greater self-esteem among those who were more [religious or spiritual] and two (3%) reported lower self-esteem." *Ibid.*

*Suicide*. Numerous studies find that religious beliefs and practices reduce attempted suicides. *See* Lucchetti 2021, *supra*, at 7623. For instance, a 2016 systematic review of 89 studies found that religious affiliation and attending religious services are associated with decreased attempted suicide, even after adjusting for social support measures. Ryan E. Lawrence, et al., *Religion and Suicide Risk: A Systematic Review*, 20(1) Arch Suicide Res. 1, 5, 7 (2016). A 14-year study of 89,708 women in the United States aged 30 to 55 years found that attending religious services was associated with a five-fold lower incidence of suicide compared to never attending religious services. Tyler J. VanderWeele, et al., *Association Between Religious Service Attendance and Lower Suicide Rates Among US Women*. 73(8) JAMA Psychiatry 845, 845 (2016). And a study of data from 22 European countries found that "religiousness is associated with lower suicide rates," even "in secularized European nations, where there is a relatively weak moral community to reinforce religion." Steven Stack & Frederique Laubepin, *Religiousness as a Predictor of Suicide: An Analysis of 162 European Regions*, 49(2) Suicide and Life-Threatening Behavior 371 (2019).

*Depression*. A 2003 meta-analysis of the results of 147 studies, which included almost 100,000 participants, found that those with religious and spiritual beliefs and practices were less likely to suffer from depression. T.B. Smith, et al., *Religiousness and depression: Evidence for a main effect and the moderating influence of stressful life events*, 129(4) Psychol. Bull. 614 (2003). More recently, a 14-year follow-up study in Canada that included 12,583 participants found that monthly religious attenders had a 22% lower risk of depression compared to non-attenders. Lloyd

Balbuena, et al., *Religious Attendance, Spirituality, and Major Depression in Canada: A 14-Year Follow-up Study*, 58(4) Can. J. Psychiatry 225 (2013). Similarly, a 20-year follow up study in the United States found that increased religious attendance was associated with a 43% lower risk of developing mood disorders and a 53% lower risk of developing any psychiatric disorder. S. Kasen, et al., *Religiosity and resilience in persons at high risk for major depression*, 42(3) Psychol. Med. 509 (2012).

**2. The mental health professions recognize the importance of incorporating religion and spirituality in counseling.**

Not surprisingly, the mental health professions now recognize the need to integrate religious and spiritual beliefs and practices in therapies. Numerous studies have shown that "clients utilizing religiously-integrated therapies or relying on their religious beliefs and practices experience fewer depressive symptoms and faster recoveries, less anxiety, lower suicide rates, and lower overall mortality." Holly K. Oxhandler, et al., *The Religious and Spiritual Beliefs and Practices among Practitioners across Five Helping Professions*, 8 Religions 237 (2017) (citations omitted). Based on the scientific evidence, the World Psychiatry Association urges the inclusion of spirituality and religion in psychiatric clinical practice and training to provide a more holistic and comprehensive form of mental health care. Alexander Moreira-Almeida, et al., *WPA Position Statement on Spirituality and Religion in Psychiatry*, 15(1) World Psychiatry 87 (2016).

As summarized in an article published in an American Psychological Association journal, in light of the close connection between religion and positive mental

health, the scientific literature and experts in the area identified a number of recommendations for psychotherapists, including:

- using "clients' religious beliefs to help inform therapy decisions";
- including "religious dimensions in case conceptualization";
- helping "clients explore their religious questions in therapy";
- integrating "religious resources into treatment";
- using "prayer as a psychotherapy intervention";
- citing "religious texts (i.e., scripture) in treatment";
- helping "clients deepen their religious beliefs"; and
- modifying "treatment plans to account for clients' religious concerns."

Royce E. Frazier & Nancy Downing Hansen, *Religious/Spiritual Psychotherapy Behaviors: Do We Do What We Believe To Be Important?*, 40(1) Prof. Psychol.: Res. and Prac., 81, 83 (2009); *see also* Laura E. Captari, et al., *Integrating clients' religion and spirituality within psychotherapy: A comprehensive meta-analysis*, 74 J. Clin. Psychol. 1938, 1941-42 (2018) (providing case examples).

The desire to incorporate religious and spiritual beliefs and practices in mental health treatment comes from patients as well. A national survey of current mental health patients found two out of three indicating that their religious and spiritual beliefs "are important to them during difficult times[,] and over half indicated that discussing their [religious and spiritual] beliefs in therapy helps improve their mental health." Holly K. Oxhandler, et al., *Current Mental Health*

*Clients' Attitudes Regarding Religion and Spirituality in Treatment: A National Survey*, 12 Religions 371 (2021). Three-quarters of patients agreed that a good therapist is sensitive to clients' religious beliefs (75.6%, with 7.3% disagreeing). *Id.* at 7. Over seventy percent were open to discussing their religious and spiritual beliefs in therapy (71.0%, with 12.0% disagreeing). *Ibid.* And a majority agreed that discussing their religious and spiritual beliefs in treatment improves their mental health outcomes. *Ibid.*

Consistent with these finding, guidelines from the American Counseling Association provide that counselors should "a) modify therapeutic techniques to include a client's spiritual and/or religious perspectives, and b) utilize spiritual and/or religious practices as techniques when appropriate and acceptable to a client's viewpoint." Assoc. for Spiritual, Ethical, and Religious Values in Counseling, *Competencies for Addressing Spiritual and Religious Issues in Counseling*, Competency 13 (2009) ("*Competencies*").

### B. Despite this recognition, the mental health professions have failed to adequately integrate religion into counseling.

Although the mental health professions recognize the need to integrate religious and spiritual beliefs and practice into counseling, progress has been slow to nonexistent. A 2023 study based on interviews of mental health professionals showed that "most professionals" favor "incorporating the spiritual dimension into clinical practice; however, few professionals" do so. Rocío de Diego-Cordero, et al., "*More Spiritual Health Professionals Provide Different Care": A Qualitative Study in the Field of Mental Health*, 11 Healthcare 303 (2023). Despite the "recognition by professionals of

spiritual practices, little attention is paid to the spiritual approach in clinical practice or professional training due to the entrenchment of the biomedical model in our health care system." *Ibid.*

As another study indicated, although the "disciplines that provide psychotherapy agree about the importance of addressing religion and spirituality," "mental health professions, in general, have fallen short with sufficiently addressing religious and spiritual identities in practice and education." Waleed Y., Sami, et al., *Disenchantment, Buffering, and Spiritual Reductionism: A Pedagogy of Secularism for Counseling and Psychotherapy*, 12 Religions 612 (2021) ("Sami 2021"). Many clinicians "report feeling unprepared to implement religious/spiritual competencies." *Ibid.*

This failure is not simply the result of a lack of training. Despite the evidence, there remains an "ongoing hostility (or indifference) to religion and religious worldviews within …. psychiatry, psychology, psychotherapy, and psychoanalysis." Rob Whitley, *Religious competence as cultural competence*, 49(2) Transcultural Psychiatry 245, 249 (2012). Professionals in these fields "are much more likely to be atheists than both other health care professionals and the general population." *Ibid.* And mental health professionals "have tended to ignore or pathologize the religious and spiritual dimensions of life, partly as a consequence of their own personal belief systems." *Ibid.* (quotation omitted). Indeed, doctoral students in counseling programs still report being "misunderstood," "judg[ed]," and being made to feel they are "not fit for the profession" because of their religious beliefs. Sami 2021, *supra*.

### C. Religious mental health professionals can best fill the gap, but the decision below allows states to censor this critically needed religious-based counseling.

Religious mental health professionals can fill what's been called the "'religiosity gap' between clinicians and patients." Lukoff 1992, *supra*, at 673. For religious clients, it is critical to use a therapist who is not only familiar with their religion, but who also does not dismiss (or worse, pathologize) their religious beliefs and worldview. As recognized in the mental health literature,

> Clients can't check their worldviews, spirituality, or values at our door. … A religious identity and worldview are integral aspects of how religious clients think about, experience, respond to, and take action upon their world.

Holly K. Oxhandler, et al., *Current Mental Health Clients' Attitudes Regarding Religion and Spirituality in Treatment: A National Survey*, 12 Religions 371 (2021) (quoting Michelle J. Pearce, Cognitive Behavioral Therapy for Christians with Depression: A Practical Tool-Based Primer (2016)).

Simply put, because they share the client's faith and worldview, religious mental health professionals can speak to the client's needs in a way that other counselors who do not share the client's faith cannot. In keeping with ethical guidelines, which require counselors to respect the client's freedom of choice as to a counseling plan and to avoid imposing their own beliefs, religious mental health counselors are best equipped to set "goals with the client that are consistent with the client's spiritual and/or religious perspectives" and "therapeutically apply theory and

current research supporting the inclusion of a client's spiritual and/or religious perspectives and practices." Assoc. for Spiritual, Ethical, and Religious Values in Counseling, *supra*, Competencies 12 and 14; *see also* App. 145a (Petitioner helps clients "identify their own objectives" so they can "work together to accomplish" the client's goals); App. 147a (Petitioner ensures that clients are "willing to work with him" and that they "participate[ ] voluntarily").

The inclusion of religious beliefs and practices in therapy is especially important for Christian professionals counseling fellow Christians, as in the case below. The Christian faith requires them to "instruct one another" in biblical knowledge (Rom. 15:14), "encourage one another with" Scripture (1 Thess. 4:18), "exhort one another" so that none "may be hardened by the deceitfulness of sin" (Heb. 3:13), and "stir up one another to love and good works" (Heb. 10:24).

For Christian counselors and their Christian counselees, counseling sessions may therefore become more than the application of secular therapy techniques. The sessions may also be an exercise in the Christian religion, seeking to fulfill these commandments. Christian counselees often request, and Christian counselors often provide, spiritual support through prayer, bible reading, meditation, and devotional materials.

But the Washington statute "outlaws" this sort of "pure talk therapy based on sincerely held religious principles." App. 93a (Butamay, J., dissenting from the denial of rehearing en banc). The "sweep of Washington's law," therefore, "limits speech motivated by the teachings of several of the world's major religions," including Christianity. App. 94a.

The decision below upheld this statute based on a rational basis test. Under this standard, neither the state nor the court below had to grapple with the hundreds of scientific studies demonstrating the importance of integrating religious beliefs and practices in counseling. Moreover, because the statute is purportedly neutral and generally applicable, the lower court never considered how the statute chills the free exercise of religion.

The decision therefore allows the state to ban discussions of religious beliefs in the context of one-on-one counseling by a mental health professional based on secular philosophical objections. According to the lower court, for instance, the at-issue statute must be upheld because it "permissibly honors" individual identities, "gay, straight, cisgender, or transgender." App. 51a.

In other words, according to the lower court, the state can bar discussions based on the religious beliefs of a mental health client because the state believes sexual and gender identity is more important than religious identity. Religious adherents who want to live out their faith are left in the cold. The state can prevent them from finding help from a mental health professional who would speak to them about their religious beliefs or help them achieve goals based on their sincerely held religious beliefs.

## II. Review is needed to clarify the First Amendment standard for religious speech.

Because "the speech underpinning" the therapy at issue below "is overwhelmingly—if not exclusively—religious," the Court should grant review to clarify that it must be evaluated "under a more exacting standard." App. 94a (Butamay, J., dissenting from the

denial of rehearing en banc). As this Court has recognized, the text and history of the First Amendment demonstrate that the protection of religious speech is a core constitutional concern. But the court below separated its free speech and free exercise analyses, resulting in its holding that religious speech in the context of one-on-one professional counseling deserves only minimal constitutional protection. By treating the Free Speech and Free Exercise Clause as "hermetically sealed," separate units, the court below accorded no special solicitude to religious speech. *Green* v. *Miss U.S. of Am., LLC*, 52 F.4th 773, 787 n.14 (9th Cir. 2022).

This separation of free speech and free exercise concerns resulted from a lack of clarity in this Court's precedents. As numerous scholars have noted, this Court's First Amendment precedent has resulted in a form of reductionism, rendering the Free Exercise Clause virtually "redundant." Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 Loy. U. Chi. L.J. 71, 73 (2002); see also W. Cole Durham, Jr., *Against Free Exercise Reductionism*, 17(1) Educação & Linguagem 11, 13-18 (2014). Other than protection against blatant discrimination, the Free Exercise Clause would seem, under some of this Court's precedents, to add nothing to the analysis of religious speech. As result, lower courts are losing the notion that "religious discourse is somehow importantly different from non-religious discourse." *Ibid.* The Court can correct that misconception, and clarify its precedents, by granting review in this case.

### A. The protection of religious speech is a core concern of the First Amendment.

"The First Amendment ensures that religious … persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Obergefell* v. *Hodges*, 576 U.S. 644, 679-80 (2015). Religious teaching, such as the one-on-one counseling at issue in this case, is speech. And, as this Court recently recognized, the First Amendment "doubly protects religious speech." *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022). The "Free Exercise Clause protects religious exercises," including those that are "communicative." *Ibid.* And "the Free Speech Clause provides overlapping protection for expressive religious activities." *Ibid.*

This double protection "is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent." *Kennedy*, 142 S. Ct. at 2421. That distrust is reflected in state laws and constitutions contemporaneous with the adoption of the First Amendment. For instance, the Virginia Statute for Religious Freedom, adopted in 1786, recognized that "to restrain the *profession or propagation* of [religious] principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty." Va. Code Ann. § 57-1 (emphasis added).

The First Amendment was therefore written to prevent government from "shackl[ing] men's tongues to make them speak only the religious thoughts that government want[s] them to speak." *Engel*, 370 U.S. at 435. The underlying principle is that "religious expression [is] too precious to be either proscribed or

prescribed by the State." *Lee* v. *Weisman*, 505 U.S. 577, 589 (1992).

The protection of religious speech is thus central to the promises of the First Amendment. "Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995).

### B. Nonetheless, this Court's First Amendment precedent is confused, which has led lower courts to fail to accord religious speech special solicitude.

Despite recognizing that protecting religious speech is a central purpose of the First Amendment, this Court's decisions have failed to live up to that promise. In contrast to the expressed importance of religious speech, the Court's precedent does not recognize religious speech as any "different from non-religious discourse." Tushnet, *supra*, 33 Loy. U. Chi. L.J. at 73.

To be sure, this Court's "precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Pinette*, 515 U.S. at 760. "Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally." *McDaniel* v. *Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

But that's the problem. Despite this Court's repeated recognition that the protection of religious speech is at the heart of the First Amendment, these

precedents seem to treat religious speech as no more important than nude dancing, Ku Klux Klan rallies, a teenager's vulgarities, or any other speech. See *Barnes* v. *Glen Theatre*, 501 U.S. 560 (1991); *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) (per curiam); *Mahanoy Area Sch. Dist.* v. *B.L.*, 141 S. Ct. 2038 (2021). The Free Exercise Clause seems to add nothing to the analysis. Even this Court's more recent Free Exercise cases hold no more than that government regulation may not treat "comparable secular activity more favorably than religious exercise." *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1296 (2021).

In other words, at times this Court seems to have adopted the view that there's nothing special about religious speech. The Court has in effect applied "a doctrine holding that religious belief is indistinguishable from other types of belief, so that neither the free exercise nor the establishment clause constrains governmental action any differently than the free speech clause does." Stephen L. Carter, The Culture of Disbelief 130 (1993) (quotation omitted) ("Culture of Disbelief").

But the history and text of the First Amendment require special solicitude for religious speech. As discussed above, the need to protect religious speech animated the adoption of the First Amendment. *E.g.*, *Kennedy*, 142 S. Ct. at 2421. As that history shows, the First Amendment "gives 'religion in general' preferential treatment" because the Framers believed "the public virtues inculcated by religion are a public good." *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring).

Special solicitude is also mandated by the text. As this Court recently recognized, it has treated "the

'Establishment Clause,' the 'Free Exercise Clause,' and the 'Free Speech Clause'" as "separate units." *Kennedy*, 142 S. Ct. at 2426. It is this separate treatment that has led to the current situation in which the sum of the parts is less than the whole. But all three clauses "appear in the same sentence of the same Amendment," and should be read together as having "'complementary' purposes." *Ibid.*

When it comes to religious speech, therefore, there is "a confluence of speech and free exercise principles." *Masterpiece Cakeshop, Ltd.* v. *Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1723 (2018). Just as the Amendment's text "gives special solicitude" for the "rights of religious organizations," *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 189 (2012), the text requires the same for religious speech. It would be a "remarkable view that the Religion Clauses have nothing to say about a religious [speech]." *Ibid.*

Traditional religious beliefs about sexuality and gender are increasingly viewed by many as harmful. Thirty years ago, the "message of contemporary culture" was "that it is perfectly all right to believe that [religious] stuff—we have freedom of conscience, folks can believe what they like but you really ought to keep it to yourself, especially if your beliefs are the sort that cause you to act in ways that are ... well ... a bit unorthodox." Culture of Disbelief 24. Today, the message is that religious mental health counselors cannot even discuss those religious beliefs in one-on-one counseling sessions with fellow religious adherents.

The Court needs to clarify that the Amendment provides special protection for religious speech.

## CONCLUSION

Certiorari should be granted.

Respectfully submitted.

SEAN P. GATES
*Counsel of Record*
Charis Lex P.C.
*225 S. Lake Ave., Ste. 300*
*Pasadena, CA 91101*
*(626) 508-1715*
*sgates@charislex.com*

*Counsel for* Amicus Curiae

APRIL 2023