No. 22-942

In the Supreme Court of the United States

BRIAN TINGLEY,

Petitioner,

v.

ROBERT W. FERGUSON, ATTORNEY GENERAL OF WASHINGTON, ET AL.,

Respondents.

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

BRIEF OF *AMICI CURIAE* INSTITUTE FOR FAITH AND FAMILY AND ADVOCATES FOR FAITH & FREEDOM IN SUPPORT OF PETITIONER

TAMI FITZGERALD
THE INSTITUTE FOR FAITH AND FAMILY
9650 Strickland Road
Suite 103-222
Raleigh, NC 27615
(980) 404-2880
tfitzgerald@ncvalues.org

DEBORAH J. DEWART
Counsel of Record
ATTORNEY AT LAW
111 Magnolia Lane
Hubert, NC 28539
(910) 326-4554
lawyerdeborah@outlook.com

ROBERT H. TYLER
MARIAH GONDEIRO
TYLER LAW, LLP
25026 Las Brisas Road
Murrieta, CA 92562
(951) 600-2733

Counsel for Amici Curiae

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The Institute for Faith and Family, and Advocates for Faith & Freedom, as *amici curiae*, respectfully urge this Court to grant the Petition for Certiorari and reverse the decision of the Ninth Circuit.

The Institute for Faith and Family is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom through public policies that protect constitutional liberties, including the right to live and work according to conscience and faith. See https://iffnc.com.

Advocates for Faith & Freedom is dedicated to protecting and preserving the fundamental liberties that define the United States as a beacon of freedom and prosperity. These rights include the right to freely exercise your religion, the right to speak openly and freely, and the right to care for and educate your child.

---

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

As this Court recently affirmed, "[t]he [Free Exercise] Clause protects not only the right to harbor religious beliefs inwardly and secretly," but also "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). Washington's Censorship Law (Wash. Rev. Code § 18.130.180(27)) renders that freedom virtually impossible for many state-licensed counselors.

The Ninth Circuit erred in characterizing the law as a regulation of *conduct*, compounding its error by citing a young man's account of his experience with "conversion therapy." *Tingley v. Ferguson*, 47 F.4th 1055, 1083 n. 3 (9th Cir. 2022), citing Sam Brinton, *I Was Tortured in Gay Conversion Therapy. And It's Still Legal in 41 States*, N.Y. Times (Jan. 24, 2018). Here is how Brinton describes his experience: "The therapist ordered me bound to a table to have ice, heat, and electricity applied to my body. I was forced to watch clips on a television of gay men holding hands, hugging and having sex."[2] These practices are clearly *conduct* that could lawfully be prohibited—conduct that a Christian counselor would abhor—*in contrast to the pure speech that Tingley seeks to engage in with his counseling clients*.

---

[2] https://www.nytimes.com/2018/01/24/opinion/gay-conversion-therapy-torture.html.

Washington's law is a direct attack on *pure speech* that codifies the State's viewpoint on one of the most contentious social issues of our time. The "fixed star in our constitutional constellation"—barring any public official from prescribing orthodoxy in religion (*West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943))—shines across decades of precedent and prohibits this draconian law that conditions Tingley's counseling practice on the demise of his speech and religious liberties. The statute flouts the Constitution, which "affirmatively mandates accommodation, not merely tolerance, of all religions, and forbids hostility towards any." *Lynch v. Donnelly*, 465 U.S. 668, 672 (1974).

Counseling is not religiously neutral. On the contrary, counseling is a profession that uniquely touches religion. Religion and counseling both involve thoughts, emotions, speech, conduct, conscience, morality, and personal *values*. Counselors are not robots, and values cannot be extracted from counseling.

ARGUMENT

I. WASHINGTON REGULATES PURE *SPEECH*.

Free speech jurisprudence has long guarded even "the thought that we hate." *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting). Washington crushes the "bedrock principle" that government may not suppress an idea merely because some find it "offensive or

disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Otto v. City of Boca Raton*, 981 F.3d 854, 872 (11th Cir. 2020).

Washington bypassed the warning that "regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try." *Thompson v. Western States Medical Ctr.*, 535 U.S. 357, 383 (2002); *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002). No matter how politically popular it is to promote LGBT ideology, the government must nevertheless "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014), quoting *FCC v. League of Women Voters of Cal.,* 468 U.S. 364, 377 (1984). Policing "professional" speech risks suppressing that free "marketplace." *Nat'l Inst. of Family & Life Advocates v. Becerra* ("*NIFLA*"), 138 S. Ct. 2361, 2374 (2018).

A. The law regulates pure speech, *not conduct*.

"If *speaking* to clients is not *speech*, the world is truly upside down." *Otto*, 981 F.3d at 866 (emphasis added). Professional *conduct* may be regulated even if it incidentally involves speech. *NIFLA*, 138 S. Ct. at 2372. The law requires "separately identifiable" conduct to which the speech is incidental. *Cohen v. California*, 403 U.S. 15, 18 (1971). No such conduct is present here. Washington's statute "sanction[s] speech directly, not incidentally." *Otto*, 981 F.3d at 866.

The district court evaded the obvious First Amendment concerns by diverting its attention to "treatment," contending that "psychoanalysis is the treatment of emotional suffering and depression, *not* speech." *Tingley v. Ferguson*, 557 F.Supp. 3d 1131, 1139 (W.D. Wash. 2021), quoting *National Association for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology ("NAAP")*, 228 F.3d 1043, 1054 (9th Cir. 2000); *Pickup v. Brown*, 740 F.3d 1208, 1226 (9th Cir. 2014). In *Pickup*, California had "ban[ned] a form of treatment for minors" (*id.* at 1229) while allowing counselors to discuss sexual orientation change efforts with minor clients. *Tingley*, 557 F.Supp. 3d at 1140. The district court found Washington's prohibition "analogous to [a] doctor giving a prescription for marijuana," as in *Conant*, because it "involves engaging in a specific act designed to provide treatment." *Id.*, 1141.

The government plays word games, regulating speech by improperly "relabeling it as conduct." *Otto*, 981 F.3d at 865. Such "relabeling" is "unprincipled and susceptible to manipulation." *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1308 (11th Cir. 2017) (en banc). The "past aversive treatments" described in *Pickup*, 740 F.3d at 1222—"inducing nausea, vomiting, or paralysis; providing electric shocks; or having an individual snap an elastic band around the wrist when aroused by same-sex erotic images or thoughts"—are conduct that could be proscribed on a content-neutral basis. But this case restricts "purely speech-based therapy" (*Otto*, 981 F.3d at 859), "talk therapy . . . administered solely through verbal communication." *King v. Gov. of the State of New*

Jersey, 767 F.3d 216, 221 (3rd Cir. 2014). The Third Circuit had no trouble concluding that SOCE[3] implicated *speech*, rather than *conduct*, for First Amendment purposes. *Id*. at 225, 229.

In a strange twist, like falling down Alice-in-Wonderland's rabbit-hole, the California and Washington SOCE bans expressly allow "discussing various treatment options, including conversion therapy." *Tingley*, 557 F.Supp. 3d at 1141; *Tingley*, 47 F.4th at 1073; *see* Wash. Rev. Code 18.130.020(4), Cal. Bus. & Prof. Code § 865(b). The therapist may even *recommend* SOCE, provided the client seeks it **"**from unlicensed counselors, from religious leaders, or from out-of-state providers, or after they turn 18." *Tingley*, 47 F.4th at 1073. California counselors may "communicat[e] with the public about SOCE," "express[] their views to patients," or "refer[] minors to unlicensed counselors, such as religious leaders." *Pickup*, 740 F.3d at 1223. Close scrutiny would admittedly apply to "content- or viewpoint-based regulation of communication *about* treatment" but "*treatment* itself" could be regulated. *Id*. at 1231.

This hair-splitting exercise collides with the Constitution. "The First Amendment does not [merely] protect the right to speak about banned speech; *it protects speech itself*, no matter how disagreeable that speech might be to the government." *Otto*, 981 F.3d at 863 (emphasis added). In *Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977), it would have been bizarre to suggest that

[3] Sexual Orientation Change Efforts ("SOCE").

"people were welcome to *advocate* for a pro-Nazi demonstration" but "could not actually hold the demonstration." *Otto*, 981 F.3d at 863. And it would be a strange counseling session if a therapist recommended the benefits of SOCE but could not provide it. *Id.* Indeed, since the therapy itself is speech, it may be impossible to distinguish between talking *about* SOCE and actually providing it.

Courts must consider the practical effect of a law to determine whether it implicates speech. *Thomas v. Collins*, 323 U.S. 516, 536 (1945). Even a law that "may be described as directed at conduct" implicates speech where "the conduct triggering coverage under the statute consists of communicating a message." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). There is no question that discussions about discussions about SOCE and SOCE communicate a message.

B. The law is not neutral with respect to either content or viewpoint.

Sexuality is "anything but an 'uncontroversial' topic." *NIFLA*, 138 S. Ct. at 2372. The speech here is "highly controversial" but "the First Amendment has no carveout for controversial speech." *Otto*, 981 F.3d at 859. The Ninth Circuit decision threatens to hand the government "a new and powerful tool to silence expression based on a political or moral judgment." *Pickup*, 740 F.3d at 1216 (O'Scannlain, J., dissenting from denial of rehearing en banc). Under "the guise of a professional regulation," the Ninth Circuit "insulates from First Amendment scrutiny"

Washington's prohibition of "politically unpopular expression." *Id*. at 1215.

Washington's Law is unquestionably content-based because it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). In *Conant*, the government penalized physicians precisely because of the content—doctor-patient discussions about the medical use of marijuana. *Conant*, 309 F.3d at 637. These cases contrast with *NAAP*, where California did not "dictate the content of what is said in therapy" or prohibit particular "psychoanalytical methods." 228 F.3d at 1055-1056.

Washington's "mere assertion of a content-neutral purpose" cannot salvage the statute, "which, on its face, discriminates based on content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642-643 (1994). Regardless of the law's purpose, the first question is "whether it restricts or penalizes speech on the basis of that speech's content." *Otto*, 981 F.3d at 862. Like past SOCE cases, Washington purports to protect children. But that important interest "does not include a free-floating power to restrict the ideas to which children may be exposed." *Brown v. Entm't Merchs. Ass'n*, 564 U.S. 786, 794-95 (2011); *Otto*, 981 F.3d at 868.

Washington's viewpoint discrimination is revealed by the "significant carveout" (*Otto*, 981 F.3d at 860) for counseling that provides "acceptance, support, and understanding of clients or the

facilitation of clients' coping, social support, and identity exploration and development" but does "not seek to change sexual orientation or gender identity." Wash. Rev. Code § 18.130.020(4)(b); *Tingley*, 47 F.4th at 1065, 1073, 1091. Viewpoint-based regulations are "an egregious form of content discrimination" (*Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995)) and "a matter of serious constitutional concern" (*NIFLA*, 138 S. Ct. at 2378 (Kennedy, J., concurring)). Washington's statute "is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression." *Id*. Washington codifies the viewpoint that "sexual orientation is immutable, but gender is not" (*Otto*, 781 F.3d at 864), and that homosexuality and transgenderism are normal and morally right.

The government "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Boy Scouts of Am. v. Dale,* 530 U.S. 640, 661 (2000), quoting *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 579 (1995). Washington silences one side of a contentious debate and unlawfully demands that licensed counselors conform to the State's view. Tingley's speech would be protected even if it were an unpopular minority viewpoint. *Dale,* 530 U.S. at 660; *Texas v. Johnson*, 491 U.S. 397 (burning American flag). Instead, his views follow centuries of moral and *religious* teaching. Washington's censorship is especially disturbing in a changing social

environment—"the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view." *Dale,* 530 U.S. at 660. People of faith are entitled to a voice and "frequently take strong positions on public issues." *Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970).

Tingley's religious beliefs touch a matter of intense public controversy that has escalated exponentially following the Supreme Court's redefinition of marriage. It is not the business of *any* government official to coerce *any* citizen's convictions on this sensitive topic.

C. *NIFLA* rules out diminished protection for "professional" speech.

Attempts to regulate "professional" speech raise the specter of viewpoint discrimination—"the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *NIFLA*, 138 S. Ct. at 2374, quoting *Turner*, 512 U.S. at 641; *Otto*, 781 F.3d at 861.

Licensing. States may impose professional licensing requirements (*see NAAP*, 228 F.3d 1043 (psychotherapy)) but do not have "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *NIFLA*, 138 S. Ct. at 2375. Otherwise, they would have a "powerful tool" to impose "invidious discrimination of disfavored subjects." *Id.*, quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423-424, n. 19 (1993).

Constitutional collision. "[A] State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *NAACP* v. *Button*, 371 U. S. 415, 439 (1963); *NIFLA*, 138 S. Ct. at 2373; *Tingley v. Ferguson*, 2023 U.S. App. LEXIS 1632, *10 (O'Scannlain, J., dissenting from denial of rehearing en banc). The SOCE cases—*Pickup*, *King*, *Otto*, and now *Tingley*—demonstrate the danger of a diminished standard for "professional speech." The state does not have carte blanche to engage in blatant viewpoint discrimination, especially concerning a contentious matter that implicates deeply held religious convictions. *See, e.g., Snyder v. Phelps*, 562 U.S. 443 (2011). Washington creates a "collision between the power of government to license and regulate" and the free speech rights "guaranteed by the First Amendment." *King*, 767 F.3d at 229, quoting *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring in the result). "At some point, a measure is no longer a regulation of a profession but a regulation of speech or of the press." *King*, 767 F.3d at 230, quoting *Lowe*, 472 U.S. at 228, 230 (White, J., concurring in the result).

Medical/Health Context. The state may regulate medicine, but "a doctor who publicly advocates a treatment that the medical establishment considers outside the mainstream, or even dangerous, is entitled to robust protection under the First Amendment." *Pickup*, 740 F.3d at 1227; *see Lowe*, 472 U.S. at 232 (White, J., concurring). One important concern is confidentiality in the doctor-patient relationship. "Doctors help patients make deeply personal decisions, and their candor is crucial."

Wollschlaeger, 848 F.3d at 1328 (W. Pryor, J. concurring). But governments have "manipulat[ed] the content of doctor-patient discourse" to increase state power and suppress minorities." *NIFLA*, 138 S. Ct. at 2374, citing Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right To Receive Unbiased Medical Advice*, 74 B. U. L. Rev. 201, 201-202 (1994). Frank and open communication is essential. *Conant*, 309 F.3d at 636.

New speech categories. "The Supreme Court has chastened us lower courts for creating, out of whole cloth, new categories of speech to which the First Amendment does not apply." *Pickup*, 740 F.3d at 1221 (O'Scannlain, J., dissenting from denial of rehearing en banc). "Speech is not unprotected merely because it is uttered by 'professionals.'" *NIFLA*, 138 S. Ct. at 2371-2372. To the contrary, *NIFLA* "addressed similar doctrinal issues" and "directly criticized other circuit decisions [*Pickup, King*] approving of SOCE bans." *Otto*, 981 F.3d at 867.

Professional speech may be entitled to "the strongest protection our Constitution has to offer." *Florida Bar v. Went-For-It, Inc.*, 515 U.S. 618, 634 (1995); *In re Primus*, 436 U.S. 412, 432 (1978) (noncommercial speech of lawyers). As this circuit acknowledged, "[b]eing a member of a regulated profession does not . . . result in a surrender of First Amendment rights." *Conant*, 309 F.3d at 637.

Professionals may be required to "disclose factual, noncontroversial information." *NIFLA*, 138 S. Ct. at 2372. States may regulate professional *conduct*

that incidentally implicates speech, such as the "past aversive treatments" described in *Pickup*, 740 F.3d at 1222 (Sect. I-A, *supra*). *NIFLA*, 138 S. Ct. at 2372. Here, the Ninth Circuit glided over the critical distinction between such conduct and the pure speech between Tingley and his clients.

II. COUNSELING IS NOT RELIGIOUSLY NEUTRAL.

Counseling and religion both involve values, morality, thoughts, beliefs, emotions, and conduct—including sexual conduct and morality. Counseling is a highly subjective undertaking, not a hard science. Washington regulates *religious* speech, which is not only "as fully protected . . . as secular private expression," but historically, "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) (internal citations omitted). "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" and that "necessarily trigger[s] heightened levels of judicial review." *Tingley*, *29 (Bumatay, J., dissenting from denial of rehearing en banc). Tingley's clients typically share his "*religious* beliefs conflicting with homosexuality, and voluntarily seek SOCE counseling in order to live in congruence with their faith and to conform their identity, concept of self, attractions, and behaviors to their sincerely held *religious* beliefs." *Otto*, 981 F.3d at 860 (emphasis added). Washington

claims that the object of the law is "not to infringe upon or restrict practices *because of* their religious motivation" (*Tingley*, 557 F.Supp.3d at 1143; *Tingley*, 47 F.4th at 1085) and that it "regulates conduct *only* within the confines of the counselor-client relationship" (*id*., quoting *Welch v. Brown*, 834 F.3d 1041, 1044 (9th Cir. 2016)). But the statute tacitly admits that Washington has wandered into theological territory: The law is inapplicable to therapy provided "under the auspices of a religious denomination, church, or religious organization." Wash. Rev. Code § 18.225.030(4); *Tingley*, 557 F.Supp.3d at 1136; *Tingley*, 47 F.4th at 1064-1065. The carve-out "implicitly acknowledges the constitutional issue, 2018 Wash. Sess. Laws, ch. 300, § 2, but it cannot save the law from constitutional challenge." *Tingley v. Ferguson*, *25 (O'Scannlain, J., dissenting from denial of rehearing en banc). Indeed, the statutory language highlights the inherently religious nature of counseling and the statute's squashing religious liberty.

Many counseling centers and professional associations exist to serve Christians. See, e.g., American Association of Christian Counselors (www.aacc.net); National Christian Counselors Association (www.ncca.org); Association of Certified Biblical Counselors ("ACBC") (www.biblicalcounseling.com); Christian Counseling and Educational Foundation (www.ccef.org); Institute for Biblical Counseling and Discipleship (https://ibcd.org). In the Preamble to its doctrinal standards, ACBC emphasizes the *theological* nature of its mission: "We are an association of Christians who

have been called together by God to help the Church of Jesus Christ excel in the ministry of biblical counseling. We do this with the firm resolve that counseling is a fundamentally *theological* task. The work of understanding the problems which require counseling and of helping people with those problems is *theological* work requiring *theological* faithfulness in order to accomplish that effectiveness which honors the triune God." (emphasis added)[4] Washington's rigid stance will exclude many people of faith from entering the counseling profession.

Among those who share Tingley's Christian worldview, there is vigorous debate concerning whether (or to what extent) theories of modern psychotherapy should be integrated with religious doctrine. *See, e.g.*, Paul C. Vitz, *Psychology as Religion* (1994); Jay E. Adams, *Competent to Counsel* (1970); Gary R. Collins, *Can You Trust Psychology?* (1988); Siang-Yan Tan, *Counseling and Psychotherapy: A Christian Perspective* (2011). The existence of these discussions is strong testimony that counseling is not religiously neutral.

The counseling profession is not uniform. There are a multitude of competing approaches: "A clear trend in psychotherapeutic interventions since the mid-1960s has been the proliferation not only of the types of practitioners, but also of the types and numbers of psychotherapies used alone and in combination in day-to-day practice." Allen E. Bergin

---

[4] https://biblicalcounseling.com/about/beliefs/positions/standards-of-doctrine/.

and Sol L. Garfield, *Handbook of Psychotherapy and Behavior Change* (5th Edition) (2004), 6. Outside the faith community, psychiatrist Thomas Szasz observed that "psychotherapy is a modern, scientific-sounding name for what used to be called the 'cure of souls.'" Thomas Szasz, *The Myth of Psychotherapy* (1978), 26. One reason he wrote *The Myth of Psychotherapy* was "to show how, with the decline of religion and the growth of science in the eighteenth century, the cure of (sinful) souls, which had been an integral part of the Christian religions, was recast as the cure of (sick) minds, and became an integral part of medicine." *Id.* at xxiv.

A. The government may not condition the practice of counseling on the counselor's forfeiture of constitutional rights to free speech and religion.

The Constitution entitles Americans to enter the counseling profession without sacrificing core religious beliefs. "Being a member of a regulated profession does not . . . result in a surrender of First Amendment rights." *Conant*, 309 F.3d at 637, citing *Thomas v. Collins*, 323 U.S. at 531. The Constitution "protects not only the right to hold a particular religious belief, but also the right to engage in conduct motivated by that belief." *Prater v. City of Burnside*, 289 F.3d 417, 427 (6th Cir. 2002); *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990) ("the exercise of religion often involves not only belief and profession but the performance of (or abstention from) physical acts").

The drafters of the Constitution "fashioned a charter of government which envisaged the widest possible toleration of conflicting views." *United States v. Ballard*, 322 U.S. 78, 87 (1944). Washington unilaterally imposes a secular orthodoxy that tolerates no dissenting voices and represents only one side of a contentious issue that intersects law, religion, philosophy, morality, and politics. If people of faith are forced to abandon their moral principles in the workplace and squeezed out of full participation in civic life, constitutional guarantees ring hollow.

Washington unlawfully suppresses Tingley's religious beliefs and excludes him from serving as a counselor. Tingley is not compelled to become a counselor, but he may not be excluded from the profession by unconstitutional criteria. *Baird v. State Bar of Arizona*, 401 U.S. 1, 6-7 (1971); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 607 (1967). Counseling, like the practice of law, "is not a matter of grace, but of right for one who is qualified by his learning and his moral character." *Baird*, 401 U.S. at 8. More generally, the state "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

B. The State's thinly veiled hostility to religion clashes with the "benevolent neutrality" required of government.

The Free Exercise Clause "protects against governmental hostility which is masked as well as

overt." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). Religious teachings commonly include standards of conduct, including sexual morality. Washington's law reeks of hostility toward religious traditions that define marriage as a relationship between one man and one woman and do not affirm same-sex relationships or the ability to transition to the opposite sex.

The Framers intentionally protected "the integrity of individual conscience in religious matters." *McCreary County, KY v. ACLU*, 545 U.S. 844, 876 (2005). This Court has a "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). "A state-created orthodoxy"—Washington's preferred views about sexual morality—"puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Id.* at 592.

Washington runs roughshod over Tingley's conscience, exhibiting the very hostility the Constitution prohibits. The Religion Clauses forbid government hostility or callous indifference toward religion. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Lynch v. Donnelly*, 465 U.S. at 673. "No person can be punished for entertaining or professing religious beliefs or disbeliefs . . . ." *Everson v. Bd. of Educ. of Ewing*, 330 U.S. 1, 15-16 (1947). Washington punishes Tingley, his clients, and others like them for their religious beliefs. "State power is no more to be used so as to handicap religions than it is to favor them." *Id.* at 18. Washington handicaps counselors

and clients who will not espouse the State's view of sexual morality.

Washington "conveys a message" strongly disapproving Tingley's religious beliefs. *Lynch v. Donnelly*, 465 U.S. at 690 (O'Connor, J., concurring); *County of Allegheny v. ACLU*, 492 U.S. 573, 597 (1989). The State not only inhibits Tingley's ability to adhere to his religious faith—it renders his religion relevant to his standing in the community, potentially barring him from his chosen profession unless he abandons his beliefs. *Id.* at 594. Washington's frontal assault on Tingley's religious beliefs is a more personalized disapproval—with more serious, permanent consequences—than many earlier cases involving religious expression. *See, e.g., Lynch v. Donnelly*, 465 U.S. at 678-679 (Christmas display); *County of Allegheny v. ACLU*, 492 U.S. 573 (creche and menorah display); *Lee v. Weisman*, 505 U.S. at 592 (high school graduation invocation).

If "[t]he Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation" (*Lee v. Weisman*, 505 U.S. at 596)—then it surely precludes exacting such conformity and "employ[ing] the machinery of the State to enforce religious orthodoxy"—as the price of entering or remaining in the counseling profession. *Id*. at 592.

CONCLUSION

Counseling necessarily implicates values, beliefs, morality, and religion. Clients are best served

by a system that respects the values and conscience of both counselor and client. Washington's statutory scheme fails to preserve the counselor's liberties of speech and religion.

This Court should grant the Petition for Certiorari and reverse the Ninth Circuit ruling.

Respectfully submitted,

DEBORAH J. DEWART
Counsel of Record
ATTORNEY AT LAW
111 Magnolia Lane
Hubert, NC 28539
(910) 326-4554
lawyerdeborah@outlook.com

TAMI FITZGERALD
THE INSTITUTE FOR FAITH AND FAMILY
9650 Strickland Road
Suite 103-222
Raleigh, NC 27615
(980) 404-2880
tfitzgerald@ncvalues.org

ROBERT H. TYLER
MARIAH GONDEIRO
TYLER LAW, LLP
25026 Las Brisas Road
Murrieta, CA 92562
(951) 600-2733