No. 22-942

IN THE

Supreme Court of the United States

BRIAN TINGLEY,

PETITIONER,

V.

ROBERT W. FERGUSON, IN HIS OFFICIAL CAPACITY AS ATTORNEY GENERAL FOR STATE OF WASHINGTON; UMAIR A. SHAH, IN HIS OFFICIAL CAPACITY AS SECRETARY OF HEALTH FOR STATE OF WASHINGTON; AND SASHA DE LEON, IN HER OFFICIAL CAPACITY AS ASSISTANT SECRETARY OF THE HEALTH SYSTEMS QUALITY ASSURANCE DIVISION OF THE WASHINGTON STATE DEPARTMENT OF HEALTH,

RESPONDENTS.

AND

EQUAL RIGHTS WASHINGTON,

RESPONDENT-INTERVENOR.

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

AMICUS CURIAE BRIEF OF THE LIBERTY JUSTICE CENTER IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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).

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INTEREST OF THE *AMICUS CURIAE*[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation center located in Chicago, Illinois that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. *See, e.g., Janus v. AFSCME,* 138 S. Ct. 2448 (2018). To that end, the Liberty Justice Center litigates cases around the country, including many cases addressing the intersection of professional regulation and freedom of expression. *See*, *e.g.*, *McDonald v. Lawson*, Ninth Cir. No. 22-56220; *File v. Martin*, 33 F.4th 385 (7th Cir. 2022).

This case concerns *amicus* because the right to speak is fundamental, and that right applies equally to professionals as to all other citizens.

INTRODUCTION AND SUMMARY OF ARGUMENT

First Amendment protections do not vanish when professionals are involved. "To the contrary, professional speech may be entitled to 'the strongest protection our Constitution has to offer.'" *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2022) (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995)). Indeed,

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than *amicus* funded its preparation or submission. All parties received timely notice of amicus' intent to file this brief.

this Court recently emphasized that no special exception applies to professional speech. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2374–75 (2018) ("*NIFLA*").

But the Ninth Circuit below said otherwise, holding that this Court's express rejection of its professional speech jurisprudence did not overrule its professional speech jurisprudence. 47 F.4th 1055, 1084 (9th Cir. 2022). The Washington law at issue prohibits licensed medical professionals from offering "conversion therapy" to minors, declaring it unprofessional conduct subject to discipline. S.B. 5722, 65th Leg., Reg. Sess. (Wash. 2018), codified at Wash. Rev. Code §§ 18.130.020(4) and 18.130.180(27). This forbids licensed therapists, such as Brian Tingley, from offering professional counseling on the basis of the *content* of that counseling. *Tingley v. Ferguson*, 47 F.4th 1055, 1067 (9th Cir. 2022).

Because one must look to the content of what therapists are saying—and check whether that content agrees with the government's viewpoint—to see whether the law is violated, SB 5722 is "presumptively unconstitutional" and must satisfy the strictest form of constitutional scrutiny. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). That is, SB 5722's speech restrictions may be "justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* But the Ninth Circuit thought otherwise, holding instead that it could ignore *NIFLA* by declaring Tingley's speech "conduct," 47 F.4th at 1074, and therefore applied only rational basis review to uphold the Act. *Tingley*, 47 F.4th at 1077.

This Court should grant the petition and hold that *NIFLA* meant what it said: that professionals do not

turn in their free speech rights in return for the license to practice their profession.

ARGUMENT

I. The Ninth Circuit upheld a content-based and viewpoint-based regulation in defiance of this Courts' holding in NIFLA.

A. The Ninth Circuit erred in giving Washington's content and viewpoint-based regulation only rational basis scrutiny.

"If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Indeed, "the First Amendment has no carveout for controversial speech." *Otto v. City of Boca Raton*, 981 F.3d 854, 859 (11th Cir. 2020). Any such regulation discriminates against speech based on its content, and "as a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002). Put another way, the government violates a speaker's First Amendment rights by "interfer[ing] with the [speaker's] ability to communicate [their] own message." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 64 (2006). Under the First Amendment, "minority views are treated with the same respect as are majority views." *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000).

i. SB 5722 discriminates on the basis of content.

On its face, S.B. 5722 discriminates on the basis of content. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). The simplest way of identifying a content-based restriction is by considering whether the law "requires authorities to examine the contents of the message to see if a violation has occurred." *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1073 (9th Cir. 2020) (cleaned up); *see McCullen v. Coakley*, 573 U.S. 464, 479 (2014).

Here, the content of the therapist's speech must be examined to determine whether it "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." S.B. 5722, 65th Leg., Reg. Sess. (Wash. 2018), codified at Wash. Rev. Code §§ 18.130.020(4) and 18.130.180(27).

Faced with a substantively equivalent ban on conversion therapy, the Eleventh Circuit had little trouble finding the regulation to be content-based: "because the ordinances depend on what is said, they are content-based restrictions that must receive strict scrutiny." *Otto v. City of Boca Raton*, 981 F.3d 854, 861 (11th Cir. 2020). The same principle applies here. To determine whether a therapist has broken the law, one must look at what the therapist said about sexual orientation or gender identity. This is particularly troubling, as this Court has specifically "stressed the danger of content-based regulations 'in fields of medicine and public health." *NIFLA* 138 S. Ct. at 2374 (2018)

(quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011)).

ii. SB 5722 discriminates on the basis of viewpoint.

Even worse than content-based regulations are viewpoint-based regulations. "Government discrimination among viewpoints—or the regulation of speech based on the specific motivating ideology or the opinion or perspective of the speaker—is a more blatant and egregious form of content discrimination." *Reed*, 576 U.S. at 168 (cleaned up). This Court has strongly condemned viewpoint discrimination: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters." *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

Yet this is the precise goal of S.B. 5722: to threaten the license and livelihood of a therapist who, in the State's view, conveys information or advice on a particular topic—sexual orientation—that expresses a viewpoint contrary to that of the State. S.B. 5722 therefore "on its face burdens disfavored speech by disfavored speakers." *Sorrell*, 564 U.S. at 564. Where a state expressly targets one set of disfavored views, "official suppression of ideas is afoot." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 390 (1992). This becomes particularly obvious when considering that the law offers an exception for the *opposite* speech, allowing speech that provides "identity exploration and development that do[es] not seek to change sexual orientation or gender identity." S.B. 5722, 65th Leg., Reg. Sess. (Wash. 2018), codified at Wash. Rev. Code §§ 18.130.020(4) and 18.130.180(27). The law thus codifies a particular viewpoint. *Otto*, 981 F.3d at 864.

B. This Court should grant certiorari to clarify that the "professional speech doctrine" was fully abrogated by NIFLA.

Courts do not have "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (cleaned up). Professional speech is not a category that traditionally falls outside the First Amendment. *Otto,* 981 F.3d 866. When recently given an opportunity to reduce First Amendment protection for professional speech, this Court refused. *See generally*, *NIFLA*, 138. S. Ct. at 2375. In *NIFLA*, this Court explained that "[a]s with other kinds of speech, regulating the content of professionals' speech poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Id.* at 2374 (cleaned up).

Freedom of speech among professionals is imperative precisely *because* of myriad disagreements "with each other and with the government, on many topics in their respective fields." *Id.* at 2375. These range from minor technical disputes to life-altering views, such as "the ethics of assisted suicide[.]" *Id.* In instances such as these, "when the government polices the content of professional speech, it can fail to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Id.* at 2374 (cleaned up). Consequently, "the people lose when the government is the one deciding which ideas should prevail." *Id.* at 2375.

iii. Despite NIFLA*'s rejection of the "professional speech doctrine," lower courts are still applying it in practice.*

This Court in *NIFLA* noted with disapproval that some circuit courts had created a separate category for professional speech, and lamented that those courts had exempted professional speech from the "rule that content-based regulations are subject to strict scrutiny." *NIFLA*, 138 S. Ct. at 2365, 2371–72. In doing so, the Court expressly disapproved of *Pickup v. Brown* 740 F.3d 1208, 1231 (9th Cir. 2014)—the very precedent on which the decision below in this case is predicated.

If a state can compel therapists to express only the approved view regarding their patients' mental health problems, it can "'easily tell architects that they cannot propose buildings in the style of I.M. Pei, or general contractors that they cannot suggest the use of cheaper foreign steel in construction projects, or accountants that they cannot discuss legal tax avoidance techniques.'" *Otto,* 981 F.3d at 867 (quoting *Locke v. Shore*, 634 F.3d 1185, 1311 (11th Cir. 2011)). Indeed, by this logic, the government could forbid attorneys from challenging the government. *But see Legal Services Corp. v. Velazquez,* 531 U.S. 533 (2001) (ban on legal advocacy to change welfare laws is viewpoint discrimination). This Court warned that "[a]s defined by the courts of appeals, the professional-speech doctrine would cover a wide array of individuals—doctors, lawyers, nurses, physical therapists, truck drivers, bartenders, barbers, and many others." *NIFLA* at 2375. The Eleventh Circuit likewise recognized, in direct conflict with the Ninth Circuit below, that "[t]he list could go on" because "the same limits apply everywhere." *Otto*, 981 F.3d at 867.

In contrast, the Ninth Circuit in *Tingley* attempted to abrogate *NIFLA,* reopening the door to regulation of

countless professionals' speech. It declared that because therapists follow "established practice standards" and apply "theories and techniques," their speech receives only rational basis protection. *Tingley*, 47 F.4th at 1082. But as Judge O'Scannlain has pointed out, "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)." *Tingley v. Ferguson*, 57 F.4th 1072, 1077 (9th Cir. 2023) (O'Scannlain, J., dissenting statement from denial of en banc hearing). As this Court recognized in *NIFLA,* there is no real limit once one starts down the road of bifurcating professional speech from conduct.

This slippery slope is not hypothetical: these speech restrictions are already reaching beyond 'conversion' therapy. For instance, a more recent California law penalizes doctors for simply conveying information about COVID-19 that does not align with the State of California's official views regarding vaccines, masking, and so on. Cal. Bus. & Prof Code § 2270 ("AB 2098"). This represents alarming censorship, undermining the trust between doctors and patients, since "[d]octors help patients make deeply personal decisions, and their candor is crucial." *NIFLA*, 138 S. Ct. 2374 (cleaned up).

Amicus Liberty Justice Center is currently challenging this in *McDonald v. Lawson*, 9th Cir. No. 22-56220. Despite this Court's rejection of *Pickup v. Brown*, the district court relied on *Pickup* in finding that a statute that restricts the expression of doctors'

disfavored views is somehow not a content or viewpoint restriction on speech. *McDonald v. Lawson*, No. 8:22-cv-01805-FWS-ADS, 2022 U.S. Dist. LEXIS 232798, at *3 (C.D. Cal. Dec. 28, 2022). Following the Ninth Circuit's decision in *Tingley,* the district could found that "[w]hile *NIFLA* voided the professional speech doctrine as a categorial rule, it did not abrogate California's ability to regulate licensed professionals any time those measures relate to the provision of professional advice." *Id.* at *47. Such jaundiced interpretations of *NIFLA* demonstrate why this Court should grant certiorari to provide needed clarity about the protections afforded to professional speech.

To justify its decision below, the Ninth Circuit relied on on this Court's narrow reservation of some undefined scope of state regulation not applicable here, claiming that "*NIFLA* abrogated only the 'professional speech' doctrine" and "did not require [the court] to abandon [the] analysis in *Pickup* insofar as it related to conduct." *Tingley,* 47 F.4th 1073. The Court found that *Pickup*'s relevant holding remained good law because it was not "clearly irreconcilable" with *NIFLA*. *Tingley*, 47 F.4th at 1074-75 (quoting *Miller v. Gammie*, 335 F.3d 889, 899 (9th Cir. 2003) (en banc)). In the Ninth Circuit's view, *NIFLA* only rejected the theoretical "midpoint" of *Pickup*'s continuum of protected speech, in which alleged professional conduct receives only rational basis protection. *Tingley*, 47 F.4th at 1075; *Pickup v. Brown*, 740 F.3d 1208, 1072–73 (9th Cir. 2014).

But to qualify under *NIFLA*'s reservation there must be "'separately identifiable' conduct to which the speech was incidental." *Tingley,* 57 F.4th at 1075–76 (O'Scannlain, J., dissenting statement from denial of

en banc hearing) (quoting *Cohen v. California*, 403 U.S. 15, 18 (1971)). So-called conduct that consists entirely of speech—such as conversion therapy—does not meet the "separate" requirement of the conduct exception. As the dissenting statement below noted, this Court in *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.'" *Tingley*, 57 F.4th at 1077 (O'Scannlain, J., dissenting statement) (quoting *NIFLA*, 138 S. Ct. at 2373) (cleaned up).

This Court determined that a law burdening "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.* (quoting *NIFLA*, 138 S. Ct. at 2373, 2375). Indeed, if the talk therapy banned by Washington state is conduct, then "the same could be said of teaching or protesting—both are activities, after all." *Otto,* 981 F.3d at 865. The Ninth Circuit's fundamental misapplication of applicable precedent demonstrates the importance of the Court granting certiorari in this case.

CONCLUSION

If the Ninth Circuit's decision is allowed to stand, professionals will lose free speech rights to which they are entitled under the First Amendment and this court's precedent. The petition for certiorari should be granted.

Respectfully submitted,

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