APPEAL NOS. 21-35815, 21-35856

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIAN TINGLEY,

Plaintiff-Appellant / Cross-Appellee,

v.

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,

Defendants-Appellees / Cross-Appellants,

and

EQUAL RIGHTS WASHINGTON,

Intervenor-Defendant-Appellee.

On Appeal from the United States District Court
for the Western District of Washington
Case No. 3:21-cv-05359-RJB / Hon. Robert J. Bryan

APPELLANT'S OPENING BRIEF

KRISTEN K. WAGGONER
JOHN J. BURSCH
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
(202) 393-8690
kwaggoner@ADFlegal.org
jbursch@ADFlegal.org

ROGER G. BROOKS
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
rbrooks@ADFlegal.org

DAVID A. CORTMAN
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
dcortman@ADFlegal.org

CODY S. BARNETT
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Lansdowne, VA 20176
(571) 707-4655
cbarnett@ADFlegal.org

GREGORY D. ESAU
ELLIS LI MCKINSTRY
1700 Seventh Avenue, Suite 1810
Seattle, WA 98101
(206) 682-0565
gesau@elmlaw.com

Counsel for Plaintiff-Appellant

CORPORATE DISCLOSURE STATEMENT

As a private individual, Brian Tingley does not have a parent corporation or a stockholder.

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JURISDICTIONAL STATEMENT

Brian Tingley sued Washington officials Robert Ferguson, Umair Shah, and Kristin Peterson (collectively, Defendants) in the United States District Court for the Western District of Washington under 42 U.S.C. § 1983, alleging violations of his rights under the First and Fourteenth Amendment to the United States Constitution. The district court properly exercised federal-question jurisdiction under 28 U.S.C. §§ 1331 and 1343.

On August 30, 2021, the district court denied Tingley's motion for a preliminary injunction and instead granted Defendants' motion to dismiss. 1-ER-20. Tingley timely filed his notice of appeal on September 28, 2021, within the 30-day period established in 28 U.S.C. § 2107(a) and Federal Rule of Appellate Procedure 4(a)(1)(A). 2-ER-24. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether a law that prohibits pure speech—and only speech—in a counseling session between counselor and client, based both on that speech's content and its viewpoint, violates the First Amendment.

2. Whether a law that intentionally suppresses a religious viewpoint, as acknowledged in derogatory comments from state legislators and observed in the law's practical operation, unconstitutionally targets religious exercise in violation of the First Amendment.

3. Whether a law that suppresses pure speech and burdens religious exercise serves any interest other than suppressing a viewpoint with which the government disagrees, or, whether the government could have achieved its interest without burdening either.

4. Whether a law that permits speech that encourages "exploration and development" but silences speech that might "change" gender identity or sexual orientation—without defining *any* of these words—is so vague as to violate due process.

PERTINENT STATUTES AND REGULATIONS

Per Circuit Rule 28-2.7, an addendum is attached to this brief, identifying the pertinent constitutional and statutory provisions at issue in this appeal and cited throughout the brief.

INTRODUCTION

Counselors "help [clients] make deeply personal decisions." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2374 (2018) (*NIFLA*). For those decisions to be "best for" the client, the client needs "an unconstrained flow of information from" a counselor who speaks candidly. Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. REV. 201, 235–36 (1994).

The government has no business forcing its way into these private conversations. Here, however, Washington has done just that. It enacted a counseling censorship law that prevents counselors from providing particular counsel on deeply intimate matters like gender identity—even if clients voluntarily want to hear that counsel. And Washington did so merely because it disagrees with that counsel's viewpoint.

Such heavy-handed censorship threatens cherished First Amendment liberties. When experts disagree, the State cannot "favor some viewpoints or ideas at the expense of others." *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804 (1984). In doing so here, Washington violated the Constitution. The law should be enjoined.

STATEMENT OF THE CASE

For over 20 years, Brian Tingley has worked as a licensed marriage and family therapist. 3-ER-339, 372. His family-oriented private practice counsels clients of all ages on a wide variety of topics. For instance, Tingley helps his clients address problems such as "interpersonal and family conflict, communication issues, marital and post-divorce issues, individual identity challenges, emotional management including depression and anxiety, anger management," and "many other matters." 3-ER-372.

To provide counsel on these deeply intimate matters, Tingley must build a relationship with each client. He wants to "provide a safe environment for each client" that allows them to freely "open[ ] up to discuss all kinds of sensitive issues." 3-ER-372. His "first priority" is ensuring that he can "establish trust with" the clients. 3-ER-340. He invites clients to share "their stories, their fears, and their hopes." 3-ER-373. He asks them questions, listens empathetically to their answers, and suggests how they can better understand their emotions, their relationships, and ultimately themselves. 3-ER-341, 352, 373.

Once Tingley establishes trust with his client, he helps them "identify their own objectives" so that he and the client can "work together to accomplish those objectives." 3-ER-373. With minors as with adults, Tingley will work with clients only if they are "willing to work with him" and "participate[ ] voluntarily." 3-ER-374.

Tingley understands his work as an outgrowth of his faith. As a committed Christian, Tingley wants to help his clients achieve "personal and relational growth as well as healing for the wounded spirit, soul, and body." 3-ER-340, 372. Tingley is not a pastor and does not seek to impose his faith on anyone. But his Christian views inform how he sees human nature and healthy relationships. 3-ER-340, 364.

That includes sexuality. Tingley—like people of many faiths—grounds human identity in God's design rather than a person's feelings, determinations, or wishes. 3-ER-342–45, 385–86. Consistent with this tenet, Tingley believes that the sex each person receives at conception is not an accident but rather a gift of God, "integral to our very being." 3-ER-343–44.

Moreover, Tingley and many others believe that sexual relationships are beautiful and healthy, but only if lived out in a particular

context—namely, between one man and one woman committed to each other through marriage. 3-ER-344, 385. Any sexual relationship outside this context would be inconsistent with God's design for healthy relationships. 3-ER-344, 385.

Many clients share these viewpoints. Some are referred by local churches. Others see that Tingley's website advertises his practice group as "Christian providers." 3-ER-340. These clients come to him precisely because he shares their faith-based convictions and worldview. They *want* counsel that respects and is informed by that worldview. 3-ER-340–41, 372–73.

Clients bring a wide variety of issues, including struggles relating to gender or sexuality. Some want to grow comfortable with their biological sex. Others want Tingley's help to direct their focus to opposite-sex relationships. And others want freedom from sexual behaviors, such as pornography, that they see as contrary to the tenets of their faith. These clients believe that life will be more fulfilling if aligned with the teachings of their faith than if aligned with Washington's views. Though Tingley never promises that he can solve these

issues, he, like his Christian clients, believes that change—even radical change—is possible with God's help.

Contrary to common assertions, faith and science are not in conflict when it comes to the possibility of change in gender identity and sexual orientation. Many young people who experience gender dysphoria end up identifying with their biological sex. With young children, that number can get as high as 80–98%. 3-ER-261. And though it was once asserted that change in sexual orientation was rare or impossible, research shows that change is "indisputable." 3-ER-316. 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." 3-ER-314.

Consistent with this science, Tingley wants to give his clients counsel that aligns with their faith and his. In his professional opinion, "scientific knowledge is far from complete" on matters of gender identity

and sexual orientation, so professionals like himself must have "an uninhibited discussion of ideas[and] therapies." 3-ER-350.

But Washington now forbids him from doing so. In March 2018, Washington enacted Senate Bill 5722, which censors conversations that counselors may have with clients under age eighteen—condemning certain conversations as "conversion therapy." WASH. REV. CODE § 18.130.180 (the "Counseling Censorship Law" or the "Law"). The 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 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." *Id.*

Washington does not define the line between "explor[ing] and develop[ing]" one's "sexual orientation or gender identity" on the one hand versus "chang[ing]" it on the other. *Id.* Yet anyone who crosses

that line, even inadvertently, faces steep penalties. The Law threatens fines up to $5,000 for each violation, possible suspension from practice, and even revocation of the counselor's license. *Id.* § 18.130.160. The Law also authorizes "any . . . person"—including ideological opponents or activists who have no connection to the counselor at issue, or even to Washington State—to bring enforcement actions. *Id.* § 18.130.185.

Faced with such draconian penalties, Tingley's conversations with clients about gender, gender identity, gender expression, sexual orientation, and sexual behaviors have become "more guarded and cautious." 3-ER-400. While he continues to provide counsel to clients who request it, he lives in continual fear that he will be accused of violating Washington's Law. That fear is compounded by the hostile political climate, both nationally and in Washington State specifically, where an activist could maliciously target Tingley and accuse him of violating the Law. 3-ER-355, 399.

So Tingley sued to vindicate his constitutional rights, arguing that the Law unconstitutionally abridges his free speech, free exercise, and due process rights. Concomitant with his complaint, Tingley moved the district court for a preliminary injunction that would protect his rights.

The district court denied Tingley's motion and instead granted Washington's motion to dismiss. The court concluded that Ninth Circuit precedent compelled a holding that Tingley's counseling involved not speech but "conduct"—even though "Tingley does nothing but talk with his clients." 3-ER-374. The district court grounded its counterfactual conclusion on *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), a precedent that almost every other court has rejected as either wrong at the time or as irreconcilable with the Supreme Court's subsequent decision in *NIFLA*. The district court also took comfort in the fact that the Law would still allow Tingley to "discuss" his viewpoint with his clients—even though the Law contains no such exception and, as attested by its legislative history, is designed to prevent just that.

That legislative history should have given the district court pause before dismissing Tingley's free-exercise claims. Legislators derided Tingley's faith-based viewpoint as "barbaric." 3-ER-368. One legislator mocked conversations between counselors who share Tingley's views and their clients as efforts to "pray the gay away." 3-ER-370. But the district court ignored this history and concluded that the Law did not target religion because Tingley could "express and exercise his religious

beliefs"; he just cannot "engag[e] in a specific type of conduct while acting as a counselor." 1-ER-19. The court did not specify, however, how Tingley could express his beliefs when the Law labeled the expression of such beliefs as prohibited conduct.

This upside-down world—where speech is somehow not speech but conduct—is made more confusing by the fact that the Law fails to define the line between impermissible speech that encourages "change" on the one hand and permissible speech that instead encourages "exploration and development" on the other. The district court brushed this essential vagueness aside with a few dictionary definitions. None of these definitions provides clarity for a counselor who faces revocation of his license if he inadvertently crosses a line that is not only undefined, but undefinable.

Facing severe penalties for the exercise of his constitutional rights, Tingley timely filed a notice of appeal.

SUMMARY OF ARGUMENT

Brian Tingley did not "surrender [his] First Amendment rights" when he became a counselor. *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002). In fact, First Amendment protections are particularly important for counselors like Tingley, who must candidly explore their clients' intimate concerns and personal goals. Tingley's speech is "entitled to 'the strongest protection our Constitution has to offer.'" *Id.* (quoting *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 634 (1995)).

Washington's Counseling Censorship Law would turn that "strong[ ] protection" into an easily evaded Maginot Line. Washington cannot tiptoe around the Constitution by relabeling Tingley's speech as conduct. *All* Tingley does is talk with his clients. No amount of legerdemain can turn that speech into conduct. The Supreme Court and other circuits have rejected government attempts to "rescue . . . [unconstitutional laws] by calling the plaintiffs' speech conduct" as "unprincipled and susceptible to manipulation." *Otto v. City of Boca Raton*, 981 F.3d 854, 861 (11th Cir. 2020). So should this Court. Washington's Law plainly targets speech.

Indeed, the Law targets speech in a content- and viewpoint-based way. The Law "limit[s] a category of people—therapists—from communicating a particular message," a message "grounded in a particular viewpoint about sex, gender, and sexual ethics." *Otto*, 981 F.3d at 863–64. The Law instead forces those counselors to adopt the State's approved viewpoint: that "sexual orientation is immutable, but gender is not," that "exploration and discovery" is beneficent but "change" is harmful. *Id.* at 864. Washington does not have a compelling interest that justifies this biased censorship.

The Law also violates Tingley's free-exercise rights. Tingley works as an overtly Christian counselor. Most of his clients seek out his counseling precisely because they share his faith and want counseling consistent with their worldview. The Law, however, declares that worldview off-limits. Washington legislators made clear that they found Tingley's worldview "barbaric" and wanted the Law to suppress it. In doing so, Washington abandoned its duty to remain neutral and violated the Free Exercise Clause.

Finally, the Law is so vague that it leaves impermissible discretion to enforcers to censor disfavored viewpoints. While the Law encourages "identity exploration and development," it forbids speech that seeks to "change" gender identity or sexuality. Yet it provides no metric to determine what divides the two. By failing to define the line, Washington has invested the enforcement authorities with almost unbounded discretion to decide who will be accused of violating the Law—and on what basis. If Washington officials disfavor Tingley, he faces not only steep fines but even the loss of his license. And by granting "any . . . person" the power to bring an enforcement action in this zone of intense ideological polarization, the Law multiplies the fear and real risk of biased enforcement. WASH. REV. CODE § 18.130.185. Due process demands more.

Not only is Tingley likely to succeed on the merits of these claims, but other equitable factors favor enjoining Washington's unconstitutional Law. The district court erred when it failed to do so. This Court should reverse the district court and remand with instructions to enjoin the Law.

ARGUMENT

I. Washington's Counseling Censorship Law unconstitutionally suppresses Brian Tingley's speech—not his conduct—and does so based on that speech's content and viewpoint.

A. Governing legal standards

This Court reviews de novo the district court's dismissal for failure to state a claim, including "[c]onstitutional questions implicating the First Amendment." *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1067 n.3 (9th Cir. 2020). All factual allegations in Tingley's complaint are accepted "as true" and construed "in the light most favorable" to him. *Rowe v. Educ. Credit Mgmt. Corp.*, 559 F.3d 1028, 1029–30 (9th Cir. 2009).

As reviewed more fully below, this Court's precedent in *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), does not govern this case. For all the reasons that Judge O'Scannlain noted in his dissent from the denial of rehearing en banc, *Pickup* was wrongly decided. *Id.* at 1215 (O'Scannlain, J., dissenting from the denial of rehearing en banc). Virtually every other court of appeals that has considered the issue has agreed with him. More important, so did the Supreme Court. Its decision in *NIFLA* cannot be reconciled with *Pickup*, so *Pickup* is no longer good law and does not bind this panel.

Therefore, this Court should analyze Tingley's case under traditional First Amendment principles. If he can demonstrate that the Law suppresses his speech based on its content or viewpoint—a threshold he easily clears—then Washington's Law is presumptively unconstitutional and must be enjoined unless Washington can show that the Law satisfies strict scrutiny. As reviewed below, it cannot do so.

B. Washington's Law suppresses Tingley's speech, not his conduct.

The First Amendment prohibits the government from "abridging the freedom of speech." Speech can come in wide varieties, for the Constitution protects expression beyond the spoken word. For instance, "topless dancing" can be speech. *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010). So can "movies" or "parades." *Id.*

But no one doubts that, *at minimum*, the Constitution shields "written or spoken words." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995). "Under nearly every theory of free speech, the right to free speech is at its core the right to communicate—to persuade and to inform people through the content of one's message." Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances,"*

and the Uncharted Zones, 90 CORNELL L. REV. 1277, 1304 (2005). Thus, "words . . . are forms of pure expression . . . entitled to full First Amendment protection." *Anderson*, 621 F.3d at 1061.

The conversations Tingley has with his clients are just that: words entitled to full First Amendment protection. All he does is "listen and talk with" his clients. 3-ER-373. First he hears "their stories, their fears, and their hopes." *Id.* Then he "prob[es] with questions," exchanges ideas, and questions clients' positions, all in an attempt "to aid their own self-discovery." *Id.* Whether clients come to him with anger issues, relationship problems, or struggles with gender identity, Tingley does "nothing but talk" with them. 3-ER-342, 374.

Washington "cannot regulate [Tingley's] speech by relabeling it as conduct." *Otto*, 981 F.3d at 865. Though some laws that regulate conduct will *incidentally* affect speech, to try to bypass the First Amendment by calling speech itself conduct "is a dubious constitutional enterprise" that "is unprincipled and susceptible to manipulation." *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1308–09 (11th Cir. 2017) (en banc).

That is exactly what the Law does. It restricts Tingley from speaking to his clients in a way that might assist them to align their desires with their beliefs or their biology. And "[w]hen the government restricts professionals from speaking to their clients, it's restricting speech, not conduct." Volokh, *Speech as Conduct*, 90 CORNELL L. REV. at 1346.

In any other context, Tingley's speech would be uncontroversially recognized as an information exchange entitled to First Amendment protection. Clients "disclose" their stories, fears, and goals to Tingley. 3-ER-373. Tingley listens and asks questions to help them "reflect on their identity and their beliefs." *Id.* If "the[se] acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category." *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001). Though Washington attempts to justify its censorship by labeling the "information communicated" as conduct, not speech, *see id.* at 527 n.11, this is a legal fiction. In reality, its Counseling Censorship Law impermissibly "sanction[s] speech directly." *Otto*, 981 F.3d at 866.

Washington cannot alchemize Tingley's speech into non-speech by labeling it as "treatment." Depending on the objective facts, "treatment" could refer to either speech or conduct. To "treat" a patient by

recommending marijuana is merely to engage in "the dispensing of information"—protected speech. *Conant*, 309 F.3d at 635. But to "treat" a patient by prescribing marijuana is to engage in "the dispensing of controlled substances"—conduct beyond the First Amendment's pale. *Id.* at 636. Here, the only interactions that Tingley has with his clients consist entirely of speech. He "listen[s] and talk[s]." 3-ER-373. The district court asserted that Tingley's words were "treatment" and that treatment is conduct, not speech. But we must call words what they are: speech. *Otto*, 981 F.3d at 866.

Nor can Washington label Tingley's speech as incidental to conduct. As applied against conversational counseling, Washington has not identified "any separately identifiable conduct" that its Law would punish. *Cohen v. California*, 403 U.S. 15, 18 (1971). In this setting, the "only 'conduct' which the State [seeks] to punish" is "the fact of communication," in violation of the First Amendment. *Id.* at 16.

To hold otherwise would allow the government to mislabel "wide swaths of protected speech" as associated with some trivial (or in this case nonexistent) conduct, label the speech as a mere "mechanism" that "delivers" the conduct, and freely censor the speech. *Telescope Media*

Grp. v. Lucero, 936 F.3d 740, 752 (8th Cir. 2019). And under this logic, what would stop the government from suppressing a newspaper editorial as a "mechanism" incidental to "the mechanical operation of a printing press[?]" *Id.* (citing *Miami Herald Publ'g Co. v. Tornillo*, 418 U.S. 241, 256–58 (1974)). "Simply put, it is *never* enough for the government to show how speech can also be framed as conduct." *Otto*, 981 F.3d at 866 (emphasis added).

If the conversations between Tingley and his clients can be dismissed as less- or un-protected conduct instead of speech, then so can "protesting," "debating," and "book clubs." *Id.* at 865. All include *some* incidental activity, even though at their core they are words. "But the law does not require us to flip back and forth between perspectives until our eyes hurt." *Id.* at 865–66. Instead, the law is simple: "[s]peech is speech" and "must be analyzed as such." *Wollschlaeger*, 848 F.3d at 1307.

In enacting the Law, the Washington Legislature even acknowledged that it was targeting speech. The Law's co-sponsor explicitly stated that the Law censors the "use [of] words." 3-ER-369. And the Legislature rejected numerous amendments that would have limited

the Law's scope only to conduct. The State cannot now reverse course and claim that the Law targets conduct and impacts speech only incidentally. "Saying that restrictions on writing and speaking are merely incidental to speech is like saying that limitations on walking and running are merely incidental to ambulation." *Wollschlaeger*, 848 F.3d at 1308. As the legislature made clear, "the only 'conduct' at issue [here] is speech." *Otto*, 981 F.3d at 866.

The Supreme Court has consistently held that the government cannot characterize speech as conduct to untie its regulatory hands. For instance, in *Holder v. Humanitarian Law Project*, plaintiffs challenged a federal statute that forbade providing "material support" to terrorist organizations. 561 U.S. 1, 26–27 (2010). The government defended the statute by arguing "that the only thing truly at issue . . . is conduct, not speech," but the Supreme Court rejected that contention because "the conduct triggering coverage under the statute consists of communicating a message." *Id.* at 26–28. Thus, "[t]he Supreme Court's implication in *Humanitarian Law Project* is clear: legislatures cannot nullify the First Amendment's protections for speech by" transforming speech into conduct. *Pickup*, 740 F.3d at 1218 (O'Scannlain, J., dissenting).

This Court has also denounced this "labeling game." *Id.* (O'Scannlain, J., dissenting). Though the district-court opinion cited several cases to justify relabeling Tingley's speech as conduct, those cases stand for the opposite proposition. For instance, when several psychoanalysts challenged California's mental-health licensing laws, this Court rejected their attempt to receive "*special* First Amendment protection" that would have exempted them from a content-neutral licensing scheme that explicitly did "*not* dictate what can be said between psychologists and patients during treatment." *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1054–55 (9th Cir. 2000) (emphasis added). But this Court affirmed that the psychoanalysts nonetheless received the First Amendment's "core" protection for "[t]he *communication* that occurs during psychoanalysis." *Id.* at 1054 (emphasis added).

Here, Tingley seeks that same "core" protection, not any "special" treatment. He does not seek First Amendment protection for any "action" or conduct" that he engages in—only for "the communication that occurs during" the conversations between himself and his clients. *Id.* And unlike the content-neutral licensing scheme in *NAAP*, here the

Law explicitly "dictate[s]" what Tingley can say "during treatment." *Id.* at 1055. *NAAP* supports, not undermines, Tingley's position.

The principles that dictated the result in *Conant* apply equally here. There, this Court invalidated a law that prevented doctors from recommending medical marijuana to patients. In doing so, this Court affirmed that a doctor's speech to his patients "may be entitled to the strongest protection our Constitution has to offer." *Conant*, 309 F.3d at 637 (cleaned up). And it explained that the licensing scheme in *NAAP* survived judicial review largely because it was "content-neutral" and "did not attempt to dictate the content of what is said in therapy and did not prevent licensed therapists from utilizing particular psycho-analytical methods." *Id.* (cleaned up). So rather than undermine Tingley's position, this Court's precedents strongly support it. The district court erred to conclude otherwise.

C. *NIFLA* supersedes *Pickup*, which is not binding on this panel.

Though the district court discussed *NAAP* and *Conant*, the court relied most heavily on *Pickup* to relabel Tingley's speech as conduct. 740 F.3d at 1208. There, this Court confronted a constitutional challenge to California's ban on "sexual orientation change efforts." *Id.* at

1221. The *Pickup* court concluded that the ban targeted conduct, not speech, and was therefore subject only to rational-basis review. And even if the therapy at issue qualified as speech, the panel reasoned in dicta that the constitutional protection afforded to "a professional's speech is somewhat diminished." *Id.* at 1228.

Almost immediately, there were "serious doubts about whether *Pickup* was correctly decided." *Wollschlaeger*, 848 F.3d at 1309. In 2014, three judges on this Court—Judges O'Scannlain, Bea, and Ikuta—castigated *Pickup*'s reasoning as "contrary to common sense and without legal authority." *Pickup*, 740 F.3d at 1215–16 (O'Scannlain, J., dissenting). Shortly thereafter, the Third Circuit agreed in rejecting *Pickup*'s reasoning, holding that the government cannot transform speech into conduct simply by engaging in a "labeling game."[1] *King v. Governor of N.J.*, 767 F.3d 216, 228 (3d Cir. 2014) (cleaned up). The Eleventh Circuit followed suit in 2017, rejecting *Pickup*'s "labeling

[1] The Third Circuit did, however, adopt *Pickup*'s erroneous dicta that "a licensed professional does not enjoy the full protection of the First Amendment when speaking as part of the practice of her profession." *King v. Governor of N.J.*, 767 F.3d 216, 232 (3d Cir. 2014). The Supreme Court has since explicitly rejected this proposition. *NIFLA*, 138 S. Ct. at 2371–72.

game" and noting that the only "relevant insight" that *Pickup* provided was "that 'doctor-patient communications about medical treatment receive substantial First Amendment protection.'" *Wollschlaeger*, 848 F.3d at 1309 (quoting *Pickup*, 740 F.3d at 1227).

Most important, in its 2018 decision in *NIFLA*, the Supreme Court held that so-called professional speech does not categorically receive less constitutional protection than any other speech. 138 S. Ct. at 2371–72. And it warned lower courts *not* to "exempt a category of speech from the normal prohibition on content-based restrictions." *Id.* at 2372 (cleaned up). In doing so, the Court cited *Pickup* to "directly criticize[ ]" it, *Otto*, 981 F.3d at 867, and directly rejected *Pickup*'s central premises.

That's true of both of *Pickup*'s attempts to diminish constitutional protection for speech, first by labeling it as "conduct," then by labeling it as "professional." In *NIFLA*, the Supreme Court began its consideration of "professional speech" by including both the "doctor-patient discourse" and speech between counselor and client as examples of communications subject to First Amendment protections—an analysis that cannot be reconciled with the relabeling of such speech as unprotected conduct. *NIFLA*, 138 S. Ct. at 2374–75.

Then, responding to the suggestion that such "professional speech" should receive lessened protection, the Court noted that it has never recognized such a less-protected category, and emphasized its "reluctan[ce] to mark off new categories of speech for diminished constitutional protection," going so far as to associate governmental efforts to control "the content of doctor-patient discourse" with Nazi, Romanian, and Soviet totalitarian regimes. *Id*. at 2372, 2374. By recognizing the "doctor-patient" discourse as protected speech, and by declining to create or recognize a less-protected category of "professional speech," *NIFLA* cut both legs out from underneath *Pickup*'s reasoning—leaving it without a leg to stand on.

This Court has already joined the voices that recognize that *NIFLA* abrogated *Pickup*. In 2019, Judge Ikuta flatly stated that "*NIFLA* overruled [this Court's] opinion in *Pickup*." *Am. Beverage Ass'n v. City & Cnty. of San Francisco*, 916 F.3d 749, 759 (9th Cir. 2019) (Ikuta, J., concurring in the judgment). And just one year later, in *Pacific Coast Horseshoeing School, Inc.*, a panel of this Court noted that *Pickup* was "abrogated by" *NIFLA*. 961 F.3d at 1068–69.

At least three other circuits have likewise recognized that *NIFLA* is irreconcilable with *Pickup*. *Capital Associated Indus., Inc. v. Stein*, 922 F.3d 198, 207 (4th Cir. 2019); *Vizaline, LLC v. Tracy*, 949 F.3d 927, 932 (5th Cir. 2020); *EMW Women's Surgical Ctr., PSC v. Beshear*, 920 F.3d 421, 436 (6th Cir. 2019). So, too, have district courts in still more circuits. *Otto v. City of Boca Raton*, 353 F. Supp. 3d 1237, 1249 (S.D. Fla. 2019) (*NIFLA* "raise[s] questions as to the validity of" this Court's "reasoning" in *Pickup*); *Nat'l Inst. of Fam. & Life Advocs. v. Schneider*, 484 F. Supp. 3d 596, 610 (N.D. Ill. 2020).

Thus, the district court erred when it held that it was bound by *Pickup* because "[t]he holding from *Pickup* . . . was not overruled by *NIFLA*." 1-ER-16. When "intervening Supreme Court authority is clearly irreconcilable with . . . prior circuit authority," then "three-judge panel[s] of this court and district courts" are "bound by the intervening higher authority and [should] reject the prior opinion of this court as having been effectively overruled." *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003) (en banc). "[T]he issues decided by the higher court need not be *identical* in order to be controlling over a prior circuit decision." *SEIU Local 121RN v. Los Robles Reg'l Med. Ctr.*, 976 F.3d 849, 854–55

(9th Cir. 2020) (cleaned up). Instead, all that is necessary is that the Supreme Court "must have undercut the *theory* or *reasoning* underlying the prior circuit precedent in such a way that the cases are clearly irreconcilable." *Id.*

That is the case here. *NIFLA* so drastically undermines *Pickup*'s reasoning that this Court cannot "apply [*Pickup*] without running afoul of" *NIFLA*. *Aleman Gonzalez v. Barr*, 955 F.3d 762, 766 (9th Cir. 2020). *Pickup* is no longer good law.

D. The Law chills protected speech even under *Pickup*'s erroneous analysis.

The Counseling Censorship Law challenged here differs from the one addressed in *Pickup* in any event. According to *Pickup*, California's ban on "sexual orientation change efforts" nonetheless "*allow[ed]* discussions about treatment, recommendations to obtain treatment, and expressions of opinions about [sexual orientation change efforts] and homosexuality." 740 F.3d at 1229 (emphasis added). In contrast, Washington's Law forces Tingley to fear enforcement, fines, and even loss of his license if he engages in any sort of "discussions," "recommendations," or "expressions" that could be construed as encouraging "change." The Law expressly includes within its ambit *any* "effort[ ] to change behaviors or gender expressions." WASH. REV. CODE § 18.130.020(4)(a).

The district court thus additionally erred when it concluded that the Law "permit[s] a therapist to engage in . . . speech because [it] permit[s] discussing various treatment options, including conversion therapy." 1-ER-14–15. And the Law chills speech that even *Pickup* recognized must be considered protected.

E. The Law is presumptively unconstitutional because it restricts speech based on its content and viewpoint.

A law regulates speech based on content "if it, by its very terms, singles out particular content for differential treatment." *IMDb.com v. Becerra*, 962 F.3d 1111, 1120 (9th Cir. 2020) (cleaned up). If a law goes further and suppresses speech based "not [only on] subject matter, but [also on] particular views taken by speakers on a subject," then that law discriminates based on viewpoint, *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995), which is a particularly "egregious form of content discrimination," *Reed v. Town of Gilbert*, 576 U.S. 155, 168 (2015).

Laws that censor based on content and viewpoint are "presumptively invalid," *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and so "blatant[ly]" violate the First Amendment that they rarely survive review, *Rosenberger*, 515 U.S. at 829.[2]

[2] Arguably, viewpoint-discriminatory laws are more than presumptively unconstitutional; they might even be "unconstitutional per se." *Otto v. City of Boca Raton*, 981 F.3d 854, 870 n.12 (11th Cir. 2020) (citing *Members of the City Council v. Taxpayers for Vincent*, 466 U.S. 789, 804–05 (1984)).

As the Eleventh Circuit observed when confronted with a closely similar law, here "[t]he answer to the content-based-or-not question turns out to be . . . easy." *Otto*, 981 F.3d at 861. Washington's Law singles out disapproved speech based on both content and viewpoint.

A simple test to determine whether a speech restriction is content-based "is to ask whether enforcement authorities must 'examine the content of the message that is conveyed.'" *Id.* at 862 (quoting *McCullen v. Coakley*, 573 U.S. 464, 479 (2014)). And to enforce its Law, Washington must examine what a counselor says. The Law is implicated only if the counselor discusses "sexual orientation or gender identity." WASH. REV. CODE § 18.130.020(4)(a). A counselor could talk about other struggles—like anxiety or addiction—without triggering the Law. Likewise, if the counselor's speech somehow "seeks to change an individual's sexual orientation or gender identity," then the Law punishes that speech as "unprofessional conduct." WASH. REV. CODE § 18.130.020. But if the counselor instead "provide[s] acceptance, support, and understanding" of the client's "identity exploration and development," then the counselor does not violate the Law. *Id.*

§ 18.130.020(4)(b). Because the Law's triggers depend on "the topic discussed," it regulates speech based on content. *Reed*, 576 U.S. at 163.

A law goes further and suppresses speech based on viewpoint when it targets "the specific motivating ideology or the opinion or perspective of the speaker." *Id.* at 168–69. Washington's Law completely prohibits speech by counselors from one "ideology" or "perspective"—even if that perspective is shared by both counselor and client. It does so on topics that are deeply private and personal, and at the same time at the center of a "hotly contested" "political topic[ ]." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2476 (2018).); *Meriwether v. Hartop*, 992 F.3d 492, 506 (6th Cir. 2021).

The Law does not ban *all* conversations about gender identity and sexual orientation. Rather, it permits counselors to talk about these topics in a way that Washington believes "provide acceptance, support, and understanding" of "identity exploration and development," WASH. REV. CODE § 18.130.020(4)(b), while prohibiting any speech that might support or assist a client in "changing" his or her gender identity or sexual orientation. In doing so, the Law "codif[ies] a particular

viewpoint"—namely, that "change in areas of sexual orientation, sexual behaviors . . . or gender identity is either impossible or undesirable," 3-ER-345; *Otto*, 981 F.3d at 864, while prohibiting counseling from the viewpoint that both felt gender identity and sexual orientations can, for at least some individuals, change to align with an individual's biology and beliefs. In doing so, the Law discriminates based on viewpoint.

F. Tingley has standing to assert the free-speech rights of his clients to receive desired counsel.

The Counseling Censorship Law also materially intrudes on Tingley's clients' protected "right to receive" desired information and counsel. *See Griswold v. Connecticut*, 381 U.S. 479, 482 (1965). "[T]he right to receive ideas is a necessary predicate to the recipient's meaningful exercise of his own rights of speech, press, and political freedom." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982) (plurality opinion) (emphasis omitted).

Washington's Law prevents citizens who voluntarily seek help with their gender-identity and sexual-orientation struggles from "obtaining candid and reliable information about a possible avenue" of counseling. *Conant*, 309 F.3d at 643 (Kozinski, J., concurring). Even if a client wants professional counsel and support as he seeks to align his

identity or attractions with the teachings of his faith, the Law demands instead that the counselor encourage those clients to "explor[e] and develop[ ]" their sexual identities—but not to change them. In doing so, the Law violates the clients' First Amendment rights, and the district court did not hold otherwise.

Instead, the district court held that Tingley had no standing to assert his clients' free-speech claims. This was error; the facts alleged match the criteria that courts have held authorize third-party standing in contexts that likewise involve profoundly sensitive topics relating to human sexuality, such as contraception and abortion. Tingley "has a 'close' relationship with [his clients,] who possess[ ] the right" at issue. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). His counseling sessions typically focus on topics that are sensitive and intimate, where "candor is crucial." *NIFLA*, 138 S. Ct. at 2374; 3-ER-372, 406. He develops a deep bond of trust with clients as together they explore how to meet the clients' objectives. 3-ER-340.

Meanwhile, there are multiple obstacles that prevent clients from "protect[ing their] own interests." *Kowalski*, 543 U.S. at 130. First, though the Law prevents clients from receiving the counsel that they

desire, its burdens "fall[ ] directly and personally on the" counselor. *Conant*, 309 F.3d at 639 (Kozinski, J., concurring). Clients thus "are not themselves subject to prosecution and, to that extent, are denied a forum in which to assert their own rights." *Eisenstadt v. Baird*, 405 U.S. 438, 446 (1972). Second, it is emotionally very difficult or even impossible for these clients to step forward to vindicate their own rights to engage in therapeutic conversations with Tingley. 3-ER-357. These clients already experience emotional turmoil, and it is hardly speculative to predict that putting their personal difficulties into the spotlight of litigation would cause additional anguish and harm. *Id.* No defensible line separates the case of the patient who desires an abortion from that of the counseling client who desires counseling on the deeply personal and too-often humiliating topic of sexual orientation. Third-party standing has repeatedly been recognized in the former case, and for all the same reasons should be recognized here.

Finally, where First Amendment rights are threatened, the rules for representative standing are relaxed. *Sec'y of State of Md. v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984). Courts find standing "when enforcement of the challenged restriction against the litigant would . . .

indirectly [violate] third parties' rights." *Warth v. Seldin*, 422 U.S. 490, 510 (1975); *see also Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976) (advertisers may assert readers' right to receive information). This concern is present here.

II. Washington's Counseling Censorship Law abridges the ability to give and receive counsel consistent with one's faith, in violation of the Free Exercise Clause.

A. Governing legal standards

The First Amendment prohibits the government from burdening "the free exercise" of religion. If the government enacts a law that targets religious beliefs or practices, such a law "doubtless[ly]" violates this core protection. *Emp. Div., Dep't of Human Res. of Ore. v. Smith*, 494 U.S. 872, 877 (1990). A law targets religion if it lacks either neutrality or general applicability. Whether a law targets religion is a fact-specific inquiry, so this Court's conclusion about a different law passed in a different context by a different state legislature does not govern. *See Welch v. Brown*, 834 F.3d 1041, 1046–47 (9th Cir. 2016).

B. Washington's Law is not neutral because it is based on religious hostility and targets a religious practice.

"[T]he Constitution requires" the government to commit itself to "religious neutrality." *Masterpiece Cakeshop. Ltd. v. Colo. C.R. Comm'n*,

138 S. Ct. 1719, 1724 (2018). At minimum that means that government officials cannot enact laws based on religious hostility. "[U]pon even slight suspicion that" government officials act out of "animosity to religion or distrust of its practices," courts must "'pause' for discovery" before dismissing a complaint. *Id.* at 1731; *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 163 (2d Cir. 2020). Such a pause guards against even "subtle departures from neutrality." *Masterpiece Cakeshop*, 138 S. Ct. at 1731; *New Hope*, 966 F.3d at 162–63.

Washington's departure from neutrality in passing the Law was not subtle. When Washington enacted its Law, it was well known that counseling from the now-prohibited viewpoint is primarily *sought* "for religious reasons" and *provided* by those who believe in "Christian faith-based methods." 3-ER-370–71. The Law's legislative sponsors advocated it using anti-religious and hostile comments. And they demonstrated their intentional anti-religious gerrymandering by including an illusory "religious exemption."

As Tingley has alleged, citing multiple authorities, it was well known that counseling from the viewpoint and with the goals prohibited by the Law is primarily a "religious . . . practice." Researchers Diamond

and Rosky noted that "the majority of individuals seeking to change their sexual orientation report doing so *for religious reasons* rather than to escape discrimination." 3-ER-371. The American Psychological Association similarly reported that "*most* [sexual orientation change efforts] currently seem directed to those holding conservative religious . . . beliefs, and recent research . . . includes *almost exclusively* individuals who have strong religious beliefs." 3-ER-370–71 (emphasis added). And the American Counseling Association asserted that "conversion therapy . . . is a religious . . . practice." 3-ER-370.

Thus, Tingley has reasonably alleged that the Law's ban falls "almost exclusively on" counselors and clients who hold "particular religious beliefs." *New Hope*, 966 F.3d at 169; 3-ER-370. As detailed in the complaint, the Law prevents clients who "*almost exclusively* [are] individuals who have strong religious beliefs" from seeking counsel that aligns with and respects their beliefs. 3-ER-370. It is reasonable—and sufficient, for purposes of defeating a motion to dismiss—to infer prohibited animus and targeting from these facts: "the effect of a law in its real operation is strong evidence of its object." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534–35 (1993)

(cleaned up). Washington's Law violates the Constitution by targeting "a religious viewpoint." *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

But there is more. Courts assessing "governmental neutrality" may look, among other things, at "legislative . . . history." *Id.* As Tingley pled, co-sponsoring legislators openly expressed anti-religious animus and contempt by deriding careful counseling conversations such as Tingley's as efforts to "pray the gay away" and as "barbaric." 3-ER-368–70. In openly expressing such statements, Washington's legislators evinced that they had "violated the State's duty under the First Amendment not to base laws or regulations on hostility to a religion or religious viewpoint." *Masterpiece Cakeshop*, 138 S. Ct. at 1731.

Indeed, these statements are more overtly hostile than statements that courts have found to violate neutrality—at least at the pleadings stage, when Tingley "can hardly be required to plead facts [that are] specific and detailed." *E.g.*, *New Hope*, 966 F.3d at 165, 168. In *Masterpiece Cakeshop*, for instance, it was enough that the plaintiff detailed government statements that the plaintiff, a businessman who "want[ed] to do business in the state" but had "an issue with . . . the

law's impacting his personal belief system," "need[ed] to look at being able to compromise." 138 S. Ct. at 1729.

The legislature's anti-religious targeting and gerrymandering is made more obvious by its insertion of an entirely illusory "religious exemption." That provision exempts no conduct or conversation that would otherwise be prohibited by the Law's core provisions. Specifically, the so-called "exemption" claims to except "*nonlicensed* counselors acting under the auspices of a religious denomination, church, or organization" from its reach, but the Law regulates only "unprofessional conduct for any *license holder*," so such "nonlicensed" counselors were not covered in any event, whether "acting under the auspices" of a religious organization or not. WASH. REV. CODE § 18.130.180 (emphasis added). The supposed exemption has no operation but to mislead the public, and perhaps courts.

When a law targets a religiously motivated practice, it is no cure that the law also applies to some secular conduct. "[F]acial neutrality is only the first, and by no means the determinative, step in a Free Exercise inquiry." *New Hope*, 966 F.3d at 163. A law can implicate "multiple concerns unrelated to religious animosity" that "mask" its real

target: religion. *Lukumi*, 508 U.S. at 535; *New Hope*, 966 F.3d at 163. To the extent that the *Welch* court thought that California's law did not violate the Constitution because it also prohibited counseling based on secular reasons, that misses the point. As the Supreme Court later held in *Tandon*, even if states treat "some comparable secular" conduct "as poorly as or even less favorably than the religious exercise at issue," that does not answer the question. *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). When faced with a Free Exercise issue, courts must dig beneath the surface to guard against even "subtle" departures from neutrality that can be cleverly masked by "facial neutrality." *Lukumi*, 508 U.S. at 534.

Nor can Washington excuse or disguise its targeting of a primarily religiously motivated practice or viewpoint by claiming that Washington is exercising its police powers. The district court thought the Law was designed not to target religion but to "protect[ ] the physical and psychological well-being of minors," 1-ER-19, but that overgeneralizes the issue. "[G]overnment[s], in pursuit of [even] legitimate interests, cannot in a selective manner impose burdens only on conduct [or speech] motivated by religious belief." *Lukumi*, 508 U.S. at 543. So too

here. Whatever valid interest Washington has in protecting minors, it cannot pursue that interest in a manner that targets a particular religious viewpoint or practice. *Cent. Rabbinical Congress of U.S. & Canada v. N.Y. City Dep't of Health & Mental Hygiene*, 763 F.3d 183, 197 (2d Cir. 2014) (invalidating a regulation that targeted a religious practice even though the government "may have [had] legitimate reasons for addressing HSV infection risk among infants").

Most fundamentally, Washington State's attempt to impose its views in an area of profound religious, philosophical, and scientific debate is itself a violation of neutrality. As several courts have recognized, issues of gender identity and sexuality are "hotly contested matter[s] of public concern." *Meriwether*, 992 F.3d at 506. On one side of that debate are "major historic faiths[,] including Judaism, Christianity, and Islam," which "have long taught [among other tenets] that the only moral context for sexual relationships is within a heterosexual marriage." 3-ER-385. Washington now forces counselors and clients with these religious convictions to advocate only the contrary viewpoint, one that insists on "exploration and development" rather than working to bring one's heart, desires, and conduct into line with the teachings of

one's faith. WASH. REV. CODE § 18.130.020(4). It is not the government's role to decide this religious debate, but rather "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen*, 573 U.S. at 476. And "[t]he need to prevent the government from picking ideological winners and losers is as important" here "as it is in any other context." *Wollschlaeger*, 848 F.3d at 1328 (W. Pryor, J., concurring). When the government abandons its duty—when it "is the one deciding which ideas should prevail"—"[t]he people lose." *NIFLA*, 138 S. Ct. at 2375 (cleaned up).

C. Washington's Law is not generally applicable because its use of vague terms invites individualized exemptions permitting secular conduct that equally undermine the asserted governmental interest.

"A law is not generally applicable if it invites the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1877 (2021) (cleaned up). Similarly, a "law also lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* Washington's Counseling Censorship Law fails both tests.

First, Washington's Law is framed in vague terms that invite enforcement authorities to pass individualized judgment and make individualized exemptions for secular counselors of whose attitudes they approve. The Law favors speech that "facilita[tes]" "identity exploration and development," while simultaneously prohibiting speech that "seeks to change an individual's sexual orientation or gender identity." WASH. REV. CODE § 18.130.020(4). But "exploration and development" can amount to or result in "change;" the line between the allowed and the prohibited rests at the enforcement authority's "sole discretion." *Fulton*, 141 S. Ct. at 1879. And given the history and context reviewed above, it is no reach to expect that "change" that results from secular, "value-neutral" counseling will be treated as exempt and lawful, while "change" that results from counseling informed by faith-based convictions about identity and sexual morality will be treated as unlawful. Certainly, the Law's ambiguities allow ample room for that result, and that possibility "renders [the Law] not generally applicable . . . because it invites the government to decide which reasons for not complying with the [Law] are worthy of solicitude." *Id.* (cleaned up).

Second, the Law exempts speech that, according to the allegations, could perpetuate the same harms that Washington claims its Law combats. As Tingley pled in his complaint, supported by citations to the scientific literature, a one-size-fits-all counseling that encourages only "exploration and development" can lead to the very types of psychological harms that Washington claims it wants to eliminate. 3-ER-376–84. Whether this is true is a matter of factual and scientific debate not amenable to resolution on a motion to dismiss; for present purposes, the allegations of the complaint must be accepted as true. By suppressing only speech that may encourage "change," Washington revealed that its true intent is to silence a viewpoint with which it disagrees. Its Law is thus not generally applicable.

D. Washington's Law triggers strict scrutiny in any event because it arguably infringes on two rights.

This Court should also subject Washington's Law to strict scrutiny because it implicates both free-exercise and free-speech rights. Such a "hybrid-rights claim"—a claim invoking "the Free Exercise Clause in conjunction with other constitutional protections," *Smith*, 494 U.S. at 881–82—is "*entitled* to strict scrutiny." *Miller v. Reed*, 176 F.3d 1202, 1207–08 (9th Cir. 1999) (emphasis added). To make out a "hybrid-rights

claim," Tingley need only have pled "a 'colorable claim' that a companion right has been violated—that is, a 'fair probability' or a 'likelihood,' but not a certitude, of success on the merits." *Id.* at 1207 (cleaned up). As demonstrated above, Tingley has surpassed this low threshold.

E. Washington's Law violates the free-exercise rights of Tingley's clients, and he has standing to pursue their claims.

Washington's Law also violates the free-exercise rights of Tingley's clients. "[T]he majority of individuals seeking to change their sexual orientation report doing so *for religious reasons* rather than to escape discrimination." 3-ER-371 (emphasis added). These clients voluntarily want help "to change their sexual attractions by reducing unwanted same-sex attraction and development or increasing opposite sex attraction," to "become more comfortable with [their] biological sex," to "break out of a pattern of frequent viewing of pornography"—all so they can live consistently with the teachings of their faith traditions. 3-ER-346, 348, 353. By preventing these individuals from having candid conversations with counselors that will help them pursue these faith-informed goals, Washington infringes their free exercise of religion.

For the same reasons noted above, Tingley has standing to pursue his clients' free-exercise claims.

III. Washington's Counseling Censorship Law cannot survive strict scrutiny because it advances no legitimate governmental interest and is not narrowly tailored.

A. Governing legal standards

Washington's Law violates both Tingley's free-speech and free-exercise rights. That makes the Law presumptively unconstitutional. *R.A.V.*, 505 U.S. at 382. Washington thus bears the burden entirely to show that its Law survives strict scrutiny review—"the most demanding test known to constitutional law." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). To do so, Washington must demonstrate that its Law is narrowly tailored to serve compelling state interests. *Reed*, 576 U.S. at 163 (free speech); *Fulton*, 141 S. Ct. at 1881 (free exercise). Washington can demonstrate neither.

B. As enforced against pure speech, the Law serves no legitimate governmental interest.

The Law's text and legislative history confirm that, in enacting the Law, Washington's primary interest was suppressing a viewpoint with which Washington disagrees. But "the government may not prohibit the expression of an idea simply because society finds the idea it-

self offensive or disagreeable." *Texas v. Johnson,* 491 U.S. 397, 414 (1989). "While the law is free to promote all sorts of conduct," "it 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." *Hurley,* 515 U.S. at 579.

Washington has no business "picking ideological winners and losers." *Wollschlaeger*, 848 F.3d at 1328 (W. Pryor, J., concurring). No matter how much Washington dislikes the ethics, goals, and religious beliefs that motivate clients to seek counseling for unwanted gender identity and sexual attraction issues, "the [client's] freedom to learn about them, fully to comprehend their scope and portent, and to weigh them against the tenets of the 'conventional wisdom,' may not be abridged." *Eisenstadt*, 405 U.S. at 457 (Douglas, J., concurring).

And no matter how many "professionals" agree with Washington's viewpoint, that does not give Washington an interest in silencing the other side of the debate. "[M]ajority preferences must be expressed in some fashion other than silencing speech on the basis of its content."[3]

[3] After all, "it is not uncommon for professional organizations to do an about-face in response to new evidence or new attitudes." *Otto*, 981 F.3d

R.A.V., 505 U.S. at 392. So "[s]trict scrutiny cannot be satisfied by professional societies' opposition to speech." *Otto*, 981 F.3d at 869.

Nor does Washington have a legitimate interest in suppressing ideas it considers "harmful." Indeed, "the point of all speech protection . . . is to shield just those choices of content that in someone's eyes are misguided, or *even hurtful*." *Hurley,* 515 U.S. at 574 (emphasis added). Ideas may have consequences, but those consequences cannot support censorship unless they present a high and immediate risk of physical harm. *See Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (per curiam). Even then, the "degree of imminence" that physical harm will occur must be "extremely high before" speech can "be punished." *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 845 (1978). And Washington would need "actual facts" that show that consensual counseling conversations cause physical harm. *Id.* at 843. Instead,

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at 869. "[O]ne example stands out." *Id.* For many years, "the American Psychiatric Association considered homosexuality a paraphilia, disorder, or disturbance." *Id.* Today that position is, "to put it mildly, broadly disfavored." *Id.* This example demonstrates why "[n]eutral principles," rather than the ever-shifting tides of "professional consensus," must govern this case and others like it. *Id.* at 869–70. "Professional opinions and cultural attitudes may have changed, but the First Amendment has not." *Id.* at 870.

Washington has produced only conjecture, and conjecture does not give the state an interest in suppressing an idea it considers harmful.

Similarly, Washington does not have an interest in protecting its citizens from pursuing emotional or identity goals that the government deems "bad." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002). Washington might believe that "volitional change away from transgender identification, or away from same-sex attractions, is not possible or desirable." 3-ER-413. And it might believe that those who pursue volitional change are making a mistake that may harm them. *Id.* But Washington cannot stop those clients from voluntarily seeking emotional changes that *the clients* believe will increase well-being solely because, in the government's eyes, such change is a "bad decision[ ]." *Thompson*, 535 U.S. at 374. The Supreme Court has consistently rejected such an approach as illegitimately "paternalistic." *Id.* at 375. "It is precisely this kind of choice, between the dangers of suppressing information, and the dangers of its misuse if it is freely available, that the First Amendment makes for us." *Va. State Bd. of Pharmacy*, 425 U.S. at 770.

Moreover, Washington's paternalism rests on "questionable assumption[s]" that counselors will, through words that encourage "change" over "exploration and development," harm clients who voluntarily want to talk about the ideas that Washington disfavors. *Thompson*, 535 U.S. at 374. In "formulating its judgments," the legislature was required to "draw[ ] *reasonable* inferences based on *substantial* evidence." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (cleaned up) (emphasis added).

Washington's legislature did the opposite. As Tingley pled, scientific studies show that counselors can "increase well-being . . . in individuals who pursue this goal [of change] in obedience to their own religious convictions." 3-ER-413. Such conversations have, in fact, "generally reduced" suicide among these individuals. 3-ER-325. Conversely, studies show that some clients are harmed by counseling that encourages them to "explor[e] and develop[ ]," including "greatly increased rates of mental health problems" ranging from "depression" and "anxiety" to "suicidal ideation" and "suicide attempts." 3-ER-284. If Washington wants citizens to flourish, it should leave decisions as to which counseling to pursue to those who know best: counselor and client.

That Washington has a general interest in "safeguarding the physical and psychological well-being of a minor" does not give it a freer hand in suppressing speech. *New York v. Ferber*, 458 U.S. 747, 756–57 (1982). Washington does not have "a free-floating power to restrict the ideas to which children may be exposed." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 794–95 (2011). Speech "cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213–14 (1975).

When the government invokes this "abstract" interest, it "must demonstrate," at the very least, "that the recited harms are real, not merely conjectural, and that the [censorship] will in fact alleviate these harms in a direct and material way." *Video Software Dealers Ass'n v. Schwarzenegger*, 556 F.3d 950, 962 (9th Cir. 2009) (cleaned up). In the face of Tingley's detailed and supported allegations to the contrary, it is not apparent that Washington could even in theory meet this burden at the motion-to-dismiss stage. In any case, Washington has done nothing more than express a preference in protecting minors from "words" that the legislators found "pernicious"—without any evidence that words

themselves cause harm, particularly to religiously motivated individuals pursuing self-chosen goals. 3-ER-369. In fact, as Tingley pled, "consensus does not exist regarding best practice" with children who struggle with gender identity. 3-ER-272. Washington's general interest in protecting minors does not justify its censorship.

C. The Law is not narrowly tailored because it is not necessary, is overbroad, is underinclusive, and could achieve Washington's objectives through less restrictive avenues.

"A narrowly tailored regulation . . . actually advances the state's interest (is necessary), does not sweep too broadly (is not overinclusive), does not leave significant influences bearing on the interest unregulated (is not underinclusive), and" cannot "be replaced" by a regulation "that could advance the interest as well with less infringement of speech (is the least-restrictive alternative)." *Republican Party of Minn. v. White*, 416 F.3d 738, 751 (8th Cir. 2005); *accord Victory Processing, LLC v. Fox*, 937 F.3d 1218, 1227–28 (9th Cir. 2019). "[S]o long as the government can achieve its interests in a manner that does not burden religion"—or that does not burden speech—"it *must* do so," *Fulton*, 141 S. Ct. at 1881 (emphasis added) (religion); *United States v. Playboy Ent. Grp., Inc.*,

529 U.S. 803, 813 (2000) (speech). Washington's Counseling Censorship Law fails on all fronts.

First, Washington has not identified a need to suppress the consensual conversations between Tingley and his clients. To satisfy strict scrutiny, Washington must "specifically identify an actual problem" and show that suppressing "speech [is] actually necessary to the solution." *Brown*, 564 U.S. at 799 (cleaned up). The Law's legislative history notes concern about practices that "induce nausea, vomiting, and other responses from youth[ ] while showing them erotic images." 3-ER-368. But Washington has not documented *any* specific instances where counselors used these practices, much less where a single individual has been harmed. As Washington's own experts admitted, "Licensed therapists haven't been doing electric shock therapy and adversant practices *in decades*."[4] Washington needs "more than anecdote and supposition" for its Law to survive strict scrutiny; it needs "evidence" of an actual problem. *Victory Processing*, 937 F.3d at 1228. It hasn't provided any.

[4] *Watered Down Anti-Conversion Therapy Bill Passes Utah House Committee; Original Sponsors Vote Against It*, Q Salt Lake Magazine (Mar. 5, 2019), https://perma.cc/864F-LMST (emphasis added).

Moreover, Washington cannot satisfy strict scrutiny as applied to Tingley. For "[t]he question . . . is not whether [Washington] has a compelling interest in enforcing its" Law "*generally*, but whether it has such an interest in" enforcing it against Tingley specifically. *Fulton*, 141 S. Ct. at 1881 (emphasis added). The practices identified in the legislative history have nothing to do with Tingley. Tingley does not use them in his counseling. As he pled—and as this Court must accept as true—*all* Tingley "does is listen and talk with" his clients. 3-ER-373. The practices noted in the legislative history are nothing more than a bait-and-switch.

Second, the Law sweeps more broadly than necessary. "Precision must be the touchstone when it comes to regulations of speech," but Washington's Law widely misses this mark. *NIFLA*, 138 S. Ct. at 2376 (cleaned up). If the State wanted to stop "physical abuse of children," as its legislators asserted, it could have done so without suppressing speech. 3-ER-369. There is no evidence that the consensual conversations between Tingley and his clients amount to "physical abuse." In fact, legislators offered several amendments that would have limited the Law to *actual* abuse. For instance, one amendment would have

limited the Law's proscriptions to counseling 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." 3-ER-369. Another amendment would have limited the Law to counseling that used physical restraints, pornographic materials, or electroconvulsive therapy. *Id.* Yet another amendment would have exempted counseling that was "consistent with the client's affirmatively stated goals or objectives." *Id.* The legislature rejected them all. As the Law's co-sponsor made clear, the target was the "use [of] words." *Id.*

Third, if Washington's goal is to protect its minors, its Law is so underinclusive that it fails to capture other closely related speech that could harm them, "rais[ing] serious doubts about whether [the government] is, in fact, serving, with this statute, the significant interests which [it] invokes" to justify its Law. *Fla. Star v. B.J.F.*, 491 U.S. 524, 540 (1989). As Tingley's complaint documented, some studies show that encouraging "exploration and development" of transgender identity, rather than "change" to align identity with biology, could, in some cases, "lead to additional sources of crippling emotional and

psychological pain." 3-ER-278. Yet the Law explicitly exempts speech that "facilita[tes]" such "exploration and development." WASH. REV. CODE § 18.130.020(4).

Thus, the very harm that Washington's Law purportedly addresses can come from the very speech that Washington's Law promotes. *See* 3-ER-278–87 (documenting the physical and emotional harms that come from a once-size-fits-all approach to gender identity and sexuality counseling that only encourages "exploration and development"). This shows that, rather than maintain an open marketplace of ideas that empowers the public to decide the best course of counseling, Washington has really just taken a side in an ongoing debate about gender identity and sexuality—and wants to suppress the opposing viewpoint.

The Law is likewise radically underinclusive with respect to its purported purpose as a result of its unexplained exemption of speech by "nonlicensed counselors," which surely can have the same psychological effect (whatever that disputed effect may be) as speech by licensed counselors. This further undermines any contention that the Law "can brook no departures." *Fulton*, 141 S. Ct. at 1882.

Fourth, Washington could have achieved its purported objectives without censoring Tingley's speech. Almost without fail, when the government disfavors speech, the least restrictive regulation of that speech will involve "more speech," not censorship. *Whitney v. California*, 274 U.S. 357, 377 (1927). "This is the ordinary course in a free society." *United States v. Alvarez*, 567 U.S. 709, 727 (2012). For instance, Washington could have embarked on an "education campaign" to promote the speech it favors as "true" in comparison to the speech it disfavors. *Video Software Dealers*, 556 F.3d at 965. That it did not pursue this avenue shows the Law is not the least restrictive means.

IV. Washington's Counseling Censorship Law violates Due Process because it invests enforcement authorities with unfettered discretion to punish speech with which they may disagree.

Due process prevents the government from enacting a law so vague that "its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A law "can be impermissibly vague . . . if it authorizes or even encourages arbitrary and discriminatory enforcement." *Hill v. Colorado*, 530 U.S. 703, 732 (2000).

Due-process concerns are entwined with and heightened by First Amendment concerns. Vague laws "raise[ ] special First Amendment

concerns" because they empower the government to silence viewpoints with which it disagrees. *Reno v. ACLU*, 521 U.S. 844, 871–72 (1997). So, "where First Amendment freedoms are at stake, a[ ] . . . great[ ] degree of specificity and clarity of laws is required." *Edge v. City of Everett*, 929 F.3d 657, 664 (9th Cir. 2020) (cleaned up). When "[d]efinitions of proscribed conduct . . . rest wholly or principally on the subjective viewpoint of a law enforcement officer," such laws "run the risk of unconstitutional murkiness." *Id.* at 666.

Multiple ambiguities at the center of Washington's Law combine to leave so much to the "subjective viewpoint" of enforcement authorities that the Law impermissibly empowers them to silence only speech with which they disagree.

The Law purports to prohibit "a regime that seeks to change" gender identity or sexual orientation. It excepts speech that encourages "exploration and development." WASH. REV. CODE § 18.130.020(4). But "development" is indisputably a type of "change," and "exploration" implies at least openness to change. Counseling conversations that encourage "exploration and development" could sound identical to counseling that encourages "change." The Law provides no clarification

nor means of differentiation. This leaves it too easy for enforcement officials to tag as prohibited only counseling that facilitates "change" or development in a direction of which they disapprove. Too probably, that will mean, in the case of gender identity, punitive action against any speech directed towards achieving comfort with a gender identity aligned with a client's biology, but approval of any speech directed towards achieving a gender identity at odds with a client's biology.

Consider a young client who currently expresses a transgender identity at school but feels conflicted and unstable and seeks counseling. The counselor encourages that client to "explore" what the client's struggles surrounding gender mean and how that client wants to live. The client takes the counselor's advice and, after both thought and prayer, decides to "change" her gender identity back to align with her biological sex. Together, the client and counselor celebrate this result. Did the counselor's advice run afoul of Washington's Law? The Law does not clarify. Ostensibly, the counselor merely encouraged "exploration," but that "exploration" led the client to "change."

The district court cited dictionary definitions that define "exploration" as including "investigat[ing], study[ing], or analyz[ing],"

and "development" as "the act, process, or result of developing." 1-ER-17 (citing Webster's Ninth New Collegiate Dictionary (1983)). But those definitions do not eliminate the overlap and ambiguity. "Change" means "to make different in some particular." *Change, Merriam-Webster Online*, https://perma.cc/6S2K-VA5X. "Development" of an individual's experienced gender identity or sexual orientation necessarily implies change that leaves that characteristic "different in some particular." Government officials are left with a free rein to discriminate between favored "change" and disfavored "change," based on ideology or policy preference rather than anything in the text of the Law.

A second critical ambiguity lurks in the Law's peculiar phrasing, which prohibits any "regime that seeks to change" gender identity or sexual orientation. But "regimes" do not "seek" change—people do. Is it the client's goal and intent that determine whether a violation has occurred, or that of the counselor? The Law does not say. Counselors are "left in the dark." *Wollschlaeger*, 848 F.3d at 1321–22. The counselor must proceed in continual fear that a client's evolving personal goals will place the counselor in violation of the Law—perhaps unknowingly. And enforcement authorities are again left with wide discretion to

accuse and penalize counselors whose viewpoint and beliefs they disapprove.

Finally, the Law makes no attempt to define what it means by "gender identity." The district court assumed that this phrase takes on its dictionary definition: "a person's internal sense of the person's own gender, regardless of the person's gender assigned at birth." 1-ER-17. But to say this, the court had to ignore the contrary definition given by the Washington State Human Rights Commission—the authorities primarily charged with enforcing the Law. As alleged in the complaint, the Commission contends that gender identity "as defined in the law" also includes "being *perceived* as having a gender identity." 3-ER-408 (emphasis altered). In other words, gender identity may be defined by the perceptions of *others*, rather than of the individual. Under that reading, if a counselor encourages a client to change how she dresses to better match her felt gender, but that dress pattern conflicts with that individual's gender as perceived by others, the counselor could violate the Law.

As a result of all these ambiguities, whether the counselor's speech qualifies as encouraging "exploration" or "change" is left to the

"subjective judgments" of enforcement authorities. *Edge*, 929 F.3d at 667. Counselors like Tingley are "thus left guessing as to when their" speech "crosses the line"—"and wrong guesses will yield severe consequences." *Wollschlaeger*, 848 F.3d at 1319. With the counselor's license and livelihood at risk, "a statute written in muted shades of gray will not suffice." *Id.*

Finally, the Law's extraordinary provision empowering "*any* . . . person" to sue, WASH. CODE REV. § 18.130.185 (emphasis added), multiplies the threat of "arbitrary and discriminatory enforcement" to intimidate and silence a particular viewpoint, *Hill*, 530 U.S. at 732. The unconstrained discretion created by these ambiguities is entrusted even to the hands of activists who have no connection to Tingley or his clients, but who ideologically oppose the faith and viewpoint that Tingley and his clients share. Such an activist can initiate an enforcement action based on his own judgments about what constitutes "change," "seeking," or "gender identity," and "[e]ven the mere filing of a complaint can have serious consequences for [Tingley's] career." *Wollschlaeger*, 848 F.3d at 1323.

The Law thus violates due process. *Pickup* does not dictate contrary conclusions for the dual reasons that *Pickup* did not even address an "excessive enforcement discretion" Due Process claim, and the different law at issue in *Pickup* did not multiply the chilling threat against free speech by handing enforcement authorization to private, ideological opponents of faith-informed counselors such as Tingley. Further, the *Pickup* court did not consider the impact of the added ambiguity and discretion inherent in the phrase "gender identity" given the Washington State Human Rights Commission's broad interpretation.

V. Because Washington's Law violates Tingley's constitutional rights and cannot satisfy strict scrutiny, it must be enjoined.

This Court reviews the denial of a preliminary injunction for an abuse of discretion. *Doe v. Kelly*, 878 F.3d 710, 719 (9th Cir. 2017). "The district court's interpretation of the underlying legal principles, however, is subject to de novo review and a district court abuses its discretion when it makes an error of law." *S.C. ex rel. K.G. v. Lincoln Cnty. Sch. Dist.*, 16 F.4th 587, 591 (9th Cir. 2021).

To obtain a preliminary injunction, Tingley needed to show "(1) that he is likely to succeed on the merits, (2) that he is likely to suffer irreparable harm in the absence of preliminary relief, (3) that the balance of equities tips in his favor, and (4) that [the requested] injunction is in the public interest." *Am. Beverage Ass'n*, 916 F.3d at 754 (quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)) (cleaned up). But when First Amendment rights are at risk, the analysis essentially reduces to a single question—whether the plaintiff is likely to succeed on the merits. This is because even the brief loss of First Amendment rights constitutes "irreparable injury" and tilts "the balance of hardships . . . sharply in [the plaintiff's] favor," and "it is always in the public interest to prevent the violation of a party's constitutional rights." *Id.* at 758 (cleaned up); *see also Sammartano v. First Judicial Dist. Ct.*, 303 F.3d 959, 974 (9th Cir. 2002) ("Courts considering requests for preliminary injunctions have consistently recognized the significant public interest in upholding [the] First Amendment.").

Because Tingley has a high likelihood of success on the merits, this Court should remand with instructions to enter a preliminary injunction against the Counseling Censorship Law.

CONCLUSION

Brian Tingley wants to "help [his] clients achieve the lives and the personal goals that they have set out for themselves based on their own beliefs and wishes." 3-ER-341. He can no longer do so under Washington's unconstitutional Counseling Censorship Law. That Law forces Tingley to make a choice. He must either forego working with minors who want to change their gender identity, sexual orientation, or sexual behaviors, lest he somehow violate the Law, or instead he must counsel those clients according to the government's viewpoint, regardless of what he or the client want. The Constitution does not countenance the invasion of these deeply intimate discussions.

First, the Law silences Tingley's speech. It does not target his conduct, for all Tingley does is listen and talk with his clients. As applied to Tingley, Washington cannot identify *any* separately identifiable conduct that its Law would regulate. And the Law censors Tingley's speech based on its content and viewpoint. Washington does not have a compelling interest in silencing one side of an ongoing national debate.

The Law also targets Tingley's religious beliefs. Washington legislators did not hide their hostility to those who, in good conscience, believe that changing gender identity or sexual orientation is desirable. Legislators labeled such views as "barbaric" and mocked them as efforts to "pray the gay away." The Law falls "almost exclusively" on individuals with religious beliefs and violates the government's obligation to maintain neutrality. It cannot stand.

Finally, the Law is so vague that it invites Washington officials to punish only that speech with which the government disagrees. The Law expressly permits speech that encourages "exploration and development" while forbidding speech that instead encourages "change." But the Law provides no way to ascertain a difference between the two. Instead, it vests discretion in the hands of state officials, who inevitably will punish speakers with whose viewpoint and goals they disagree, even if those speakers say the exact same things as speakers with whom the government agrees. Such arbitrary enforcement violates due process.

This Court should reverse the dismissal of Tingley's case and remand with instructions to enter his requested injunction.

Respectfully submitted,

Dated: December 6, 2021

By: */s/ Roger G. Brooks*

KRISTEN K. WAGGONER
JOHN J. BURSCH
ALLIANCE DEFENDING FREEDOM
440 First Street, NW, Suite 600
Washington, DC 20001
(202) 393-8690
kwaggoner@ADFlegal.org
jbursch@ADFlegal.org

DAVID A. CORTMAN
ALLIANCE DEFENDING FREEDOM
1000 Hurricane Shoals Rd. NE
Suite D-1100
Lawrenceville, GA 30043
(770) 339-0774
dcortman@ADFlegal.org

GREGORY D. ESAU
ELLIS LI MCKINSTRY
1700 Seventh Avenue, Suite 1810
Seattle, WA 98101
(206) 682-0565
gesau@elmlaw.com

ROGER G. BROOKS
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020
rbrooks@ADFlegal.org

CODY S. BARNETT
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Lansdowne, VA 20176
(571) 707-4655
cbarnett@ADFlegal.org

Counsel for Plaintiff-Appellant

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Opening Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system on December 6, 2021. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the EM/ECF system.

/s/ Roger G. Brooks
Roger G. Brooks
Attorney for Plaintiff-Appellant

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ADDENDUM

ADDENDUM

Statutes

Washington Revised Code § 18.130.20

The definitions in this section apply throughout this chapter unless the context clearly requires otherwise.

(1) "Board" means any of those boards specified in RCW 18.130.040.

(2) "Clinical expertise" means the proficiency or judgment that a license holder in a particular profession acquires through clinical experience or clinical practice and that is not possessed by a lay person.

(3) "Commission" means any of the commissions specified in RCW 18.130.040.

(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.

(5) "Department" means the department of health.

(6) "Disciplinary action" means sanctions identified in RCW 18.130.160.

(7) "Disciplining authority" means the agency, board, or commission having the authority to take disciplinary action against a holder of, or applicant for, a professional or business license upon a finding of a violation of this chapter or a chapter specified under RCW 18.130.040.

(8) "Health agency" means city and county health departments and the department of health.

(9) "License," "licensing," and "licensure" shall be deemed equivalent to the terms "license," "licensing," "licensure," "certificate," "certification," and "registration" as those terms are defined in RCW 18.120.020.

(10) "Practice review" means an investigative audit of records related to the complaint, without prior identification of specific patient or consumer names, or an assessment of the conditions, circumstances, and methods of the professional's practice related to the complaint, to determine whether unprofessional conduct may have been committed.

(11) "Secretary" means the secretary of health or the secretary's designee.

(12) "Standards of practice" means the care, skill, and learning associated with the practice of a profession.

(13) "Unlicensed practice" means:

(a) Practicing a profession or operating a business identified in RCW 18.130.040 without holding a valid, unexpired, unrevoked, and unsuspended license to do so; or

(b) Representing to a consumer, through offerings, advertisements, or use of a professional title or designation, that the individual is qualified to practice a profession or operate a business identified in RCW 18.130.040, without holding a valid, unexpired, unrevoked, and unsuspended license to do so.

Washington Revised Code § 18.130.160

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.

Washington Revised Code § 18.130.180

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 Revised Code § 18.130.185

If a person or business regulated by this chapter violates RCW 18.130.170 or 18.130.180, the attorney general, any prosecuting attorney, the secretary, the board, or any other person may maintain an action in the name of the state of Washington to enjoin the person from committing the violations. The injunction shall not relieve the offender from criminal prosecution, but the remedy by injunction shall be in addition to the liability of the offender to criminal prosecution and disciplinary action.