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,
Defendant-Intervenor-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)

ANSWERING BRIEF OF DEFENDANT-INTERVENOR-APPELLEE EQUAL RIGHTS WASHINGTON

Shannon Minter (CA SBN: 168907)
Christopher Stoll (CA SBN: 179046)
National Center for Lesbian Rights
870 Market Street, Suite 370
San Francisco, CA 94102
T: (415) 392-6257
F: (415) 392-8442
Email: sminter@nclrights.org

Raegen Rasnic (WA SBN: 25480)
Skellenger Bender, P.S.
1301 Fifth Ave., Suite 3401
Seattle, WA 98101
T: (206) 623-6501
F: (206) 447-1973
Email: RRasnic@skellengerbender.com

Attorneys for Defendant-Intervenor-Appellee Equal Rights Washington

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTRODUCTION

Washington Senate Bill 5722, codified at Wash. Rev. Code §§ 18.130.020(4) and 18.130.180(27) ("SB 5722"), is based on the medical consensus that treatments that seek to change a minor's sexual orientation or gender identity are unnecessary, provide no therapeutic benefit, and are dangerous. Conversion therapy unnecessarily seeks to "treat" a condition—being lesbian, gay, bisexual, or transgender—that is not a mental illness or disorder. For decades, "psychiatrists and others [have] recognized that sexual orientation is both a normal expression of human sexuality and immutable." *Obergefell v. Hodges*, 576 U.S. 644, 661 (2015). Similarly, medical science recognizes that being transgender is "not a mental disorder" and that "diversity in gender identity and expression is part of the human experience." 2-ER-85–86.

In addition to being unnecessary because it does not address any underlying illness or disease, conversion therapy is ineffective. As the federal government has explained, "[n]o research has been published in the peer-reviewed literature that demonstrates the efficacy of conversion therapy efforts with gender minority youth, nor any benefits of such interventions to children and their families." 2-SER-387.

Conversion therapy—also known as sexual orientation or gender identity change efforts (SOCE or GICE)—provides no benefit to a minor patient; however, it often causes significant harm. Decades of research have demonstrated that

conversion therapy puts minors at high risk of depression, suicide, and other serious harms. In 2021, the American Psychological Association (APA) found that "sexual minority youth and adults who have undergone SOCE are significantly more likely to experience suicidality and depression than those who have not undergone SOCE…; and this elevated risk of suicidality, including multiple suicide attempts, persists when adjusting for other risk factors." 2-ER-74. According to one study cited by the APA, "SOCE 'was the strongest predictor of multiple suicide attempts, even after adjustment for other known risk factors.'" 2-ER-74 (citation omitted).

A treatment "is unsafe if its potential for inflicting death or physical injury is not offset by the possibility of therapeutic benefit." *U.S. v. Rutherford*, 442 U.S. 542, 556 (1979). That principle informs Washington's law. If any other treatment were known to put children at such high risk while addressing no underlying illness or disease and providing no benefit, its use by state-licensed providers would be prevented, as the Washington Legislature has properly done here.

In the absence of legislative action, minors have no adequate protection against these dangerous practices. Every leading medical and mental health organization in the country has issued policy statements warning against the use of conversion therapy on minors. Importantly, however, those organizations have no way to prevent providers from engaging in these practices because the regulation of licensed health providers rests with the states, not with professional organizations.

For these compelling reasons, the District of Columbia and twenty states, including Washington, have enacted laws protecting minors from conversion therapy. With minor variations, these laws are substantially identical to the first such law enacted by California in 2012. Almost all these statutes, including Washington's law, were enacted with bipartisan support. They have been signed into law by both Democratic and Republican governors.

This Court previously upheld California's conversion therapy law against the same constitutional challenges raised by Plaintiff-Appellant/Cross-Appellee Brian Tingley (Tingley) in this case. *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014); *Welch v. Brown*, 834 F.3d 1041 (9th Cir. 2016). Those precedents are controlling here. Like California's substantially identical law, SB 5722 falls squarely within the well-established authority of state legislatures to regulate medical treatments and to protect minors from serious harms. It regulates a mental health treatment, not speech, and it does so neutrally and evenhandedly, regardless of a provider's identity, beliefs, or motivation for wishing to administer conversion therapy to a minor. Nothing in the Supreme Court's decision in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*"), alters the controlling status of those precedents in this case.

Because this Court has already rejected the legal arguments that Tingley raises here, the District Court correctly dismissed Tingley's complaint for failure to state a

claim. This Court should affirm. [1]

JURISDICTIONAL STATEMENT

The district court had jurisdiction under 28 U.S.C. §§ 1331 and 1343. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUES

1. Whether the District Court correctly dismissed Tingley's free speech challenge to SB 5722 based on this Court's precedent upholding a substantively identical California statute against the same claim.
2. Whether the District Court correctly dismissed Tingley's due process challenge to SB 5722 based on this Court's precedent upholding a substantively identical California statute against the same claim.
3. Whether the District Court correctly dismissed Tingley's free exercise challenge to SB 5722 based on this Court's precedent upholding a substantively identical California statute against the same claim.

[1] Courts in other circuits have likewise repeatedly upheld substantially identical laws protecting minors from conversion therapy by licensed therapists, both before and after *NIFLA* was decided. *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014); *Doyle v. Hogan*, 411 F. Supp. 3d 337 (D. Md. 2019), *vacated on other grounds*, 1 F.4th 249 (4th Cir. 2021); *Otto v. City of Boca Raton*, 353 F.Supp.3d 1237 (S.D. Fla. 2019), *rev'd*, 981 F.3d 854 (11th Cir. 2020). To date, the only federal appellate court to reach a contrary result is the Eleventh Circuit in *Otto*. The Eleventh Circuit has withheld its mandate in that case pending its decision on a petition for rehearing en banc.

STATEMENT OF THE CASE

A. Conversion Therapy Is Unnecessary, Ineffective, And Harmful For Minors

Decades of research have documented significant harms associated with conversion therapy. In 2009, the American Psychological Association reviewed the scientific literature and concluded that "sexual orientation change efforts" ("SOCE") are unnecessary, ineffective, and put minors at risk of serious harm. 2-SER-213–350. The APA concluded:

- **SOCE is unnecessary:** "Same-sex sexual attractions, behavior, and orientations per se are normal and positive variants of human sexuality—in other words, they are not indicators of mental or developmental disorders." 2-SER-283.
- **SOCE for minors is ineffective:** "We found no empirical evidence that providing any type of therapy in childhood can alter adult same-sex sexual orientation." 2-SER-299.
- **SOCE is harmful for minors:** "[S]cientific evidence shows that SOCE is not likely to produce its intended outcomes and can produce harm … ." 2-SER-303. The harms reported by patients who have undergone conversion therapy include: "anger, anxiety, confusion, depression, grief, guilt, hopelessness, deteriorated relationships with family, loss of social support, loss of faith, poor self-image, social isolation, intimacy difficulties, intrusive imagery,

suicidal ideation, self-hatred, and sexual dysfunction." 2-SER-262. These harms are associated with all forms of conversion therapy, including non-aversive techniques. *Id*.

- **SOCE offers no unique benefits:** "The positive experiences [some] clients report in SOCE are not unique," and "the benefits reported by participants in SOCE may be achieved through treatment approaches that do not attempt to change sexual orientation." 2-SER-288; *see also* 2-SER-273 (same).
- **SOCE cannot be justified by invoking client autonomy or self-determination:** "[S]imply providing SOCE to clients who request it does not necessarily increase self-determination but rather abdicates the responsibility of LMHP [licensed mental health professionals] to provide competent assessment and interventions that have the potential for benefit with a limited risk of harm." 2-SER-289.
- **Licensed mental health providers should not engage in sexual orientation change efforts with minors, including with "children and adolescents who present a desire to change their sexual orientation"**: "We recommend that LMHP provide multiculturally competent and client-centered therapies to children, adolescents, and their families *rather than SOCE*. … These approaches would support children and youth in identity exploration and development *without seeking predetermined outcomes*." 2-SER-299–300

(emphasis added).

In 2015, the Substance Abuse and Mental Health Services Administration of the U.S. Department of Health and Human Services conducted an updated review of the scientific literature. 2-SER-354–429. The report found "none of the existing research supports the premise that mental or behavioral health interventions can alter gender identity or sexual orientation." 2-SER-362. It concluded: "Interventions aimed at a fixed outcome, such as gender conformity or heterosexual orientation, including those aimed at changing gender identity, gender expression, and sexual orientation are coercive, can be harmful, and should not be part of behavioral health treatment." *Id.*

Other professional medical and mental health organizations have reached similar conclusions, including: the American Medical Association, the American Psychiatric Association, the American Academy of Child and Adolescent Psychiatry, the American Academy of Pediatrics, the American College of Physicians, the National Association of Social Workers, the American Association for Marriage and Family Therapy, the American Psychoanalytic Association, the American Counseling Association, and the American School Counselor Association. 1-SER-41–46.

Since Washington's law was enacted, additional research has corroborated these findings. A 2018 study found that more than 60 percent of young adults who

had been subjected to conversion therapy as minors reported attempting suicide. 2-ER-187 (Table 3).

A 2020 study found that youth who underwent conversion therapy were "more than twice as likely to report having attempted suicide" and more than three times as likely to report multiple suicide attempts in the past year compared to those who did not. 2-SER-440, 2-SER-442–443.

A 2019 study documented an even higher risk of suicidality for transgender youth exposed to conversion therapy. Based on a cross-section of 27,715 transgender adults, the study found that "recalled exposure to gender identity conversion efforts was significantly associated with increased odds of severe psychological distress during the previous month and lifetime suicide attempts compared with transgender adults who had discussed gender identity with a professional but who were not exposed to conversion efforts." 2-ER-195. Transgender adults reporting gender identity conversion efforts before the age of 10 were four times more likely to experience suicide attempts than other transgender individuals. 2-ER-199 (Table 4).

B. Senate Bill Number 5722

When the Washington Legislature enacted SB 5722, it found and declared that "Washington has a compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harms caused by conversion

therapy." 2018 Wash. Sess. Laws ch. 300, § 1.

A health impact report was prepared in connection with the introduction of SB 5722. 1-SER-70–83. The report concluded that "SB 5722 has potential to mitigate harms and improve health outcomes among lesbian, gay, bisexual, transgender, queer, and questioning (LGBTQ) individuals, a population that is disproportionally impacted by poor health outcomes." 1-SER-73. The report further found that "the literature indicates that large proportions of surveyed individuals who have been a part of conversion therapy report adverse health effects associated with these efforts." 1-SER-74.

SB 5722 amended Washington's Uniform Disciplinary Act, Wash. Rev. Code §§ 18.130.010 et seq., which the Legislature established as "a uniform disciplinary act with standardized procedures for the licensure of health care professionals and the enforcement of laws the purpose of which is to assure the public of the adequacy of professional competence and conduct in the healing arts." Wash. Rev. Code § 18.130.010. SB 5722 added "performing conversion therapy on a patient under age eighteen" to the list of acts constituting unprofessional conduct for any license holder subject to the Act. *Id.* § 18.130.180(27).

The statute defines "conversion therapy" as "a regime that seeks to change an individual's sexual orientation or gender identity." It specifies that 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." *Id.* § 18.130.020(4)(a). It expressly distinguishes conversion therapy from "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." *Id.* § 18.130.020(4)(b).

The statute also provides that its prohibition of conversion therapy for minors does not apply to "[r]eligious practices or counseling under the auspices of a religious denomination, church, or organization that do not constitute performing conversion therapy by licensed health care providers on patients under age eighteen" or to "[n]onlicensed counselors acting under the auspices of a religious denomination, church, or organization." 2018 Wash. Sess. Laws ch. 300, § 2.

C. Procedural History

Tingley filed his complaint on May 12, 2021. 3-ER-358. The same day, he filed a motion for preliminary injunction. 3-ER-424.

On May 27, 2021, Equal Rights Washington filed a motion to permissively intervene as a party defendant. 3-ER-425. Equal Rights Washington is the largest civil rights organization in the State of Washington advocating for the state's lesbian, gay, bisexual, transgender and queer ("LGBTQ") residents. It has more than 40,000 members, including LGBTQ children and youth who are at risk of being subjected

to the harmful practice of conversion therapy and parents who wish to ensure that their LGBTQ children cannot be subjected to this practice by licensed health professionals. Equal Rights Washington was the lead organization supporting passage of SB 5722, and some of its members testified before both houses of the Washington Legislature in support of SB 5722. *See* Decl. of Monisha Harrell 1-2, ECF No.17. On June 28, 2021, the District Court granted Equal Rights Washington's motion to intervene under Federal Rule of Civil Procedure 24(b). 3-ER-427.

Both the State of Washington defendants and Equal Rights Washington opposed Tingley's motion for preliminary injunction and filed motions to dismiss his complaint for failure to state a claim. 3-ER-426.

On August 30, 2021, the District Court denied Tingley's motion for preliminary injunction and granted the defendants' motions to dismiss. 3-ER-428. The court first ruled that Tingley did not have third-party standing to assert claims on behalf of his patients but could assert claims on his own behalf. 1-ER-8–10. On the merits, the court concluded that Ninth Circuit precedent required dismissal of all of Tingley's claims as a matter of law.

With respect to Tingley's free speech claim, the District Court observed that multiple decisions of this Court have drawn a crucial distinction for First Amendment purposes between laws that regulate "the act of providing treatment (conduct) and speech that may be otherwise involved with providing treatment,

including making recommendations or discussing treatment options." 1-ER-12 (citing *National Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology* ("*NAAP*"), 228 F.3d 1043 (9th Cir. 2000); *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002)). Taken together, these decisions established that "while professional conduct [i.e., treatment] is entitled to some level of constitutional protection, it is not entitled the same protection as speech" and "'is subject to only rational basis review and must be upheld if it bears a rational relationship to a legitimate state interest.'" 1-ER-13 (quoting *Pickup*, 740 F.3d at 1229, 1231).

The District Court rejected Tingley's argument that *Pickup* is no longer good law. The court concluded that the Supreme Court's decision in *NIFLA* "does not overturn *Pickup*'s holding because *NIFLA* considered professional speech, not conduct." 1-ER-14. The court noted that *NIFLA* "explicitly recognized that 'under our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech.'" 1-ER-14 (quoting *NIFLA*, 138 S. Ct. at 2372). For this reason, *NIFLA* "does not undermine the distinction between speech and conduct central to the holding in *Pickup*." 1-ER-14.

The District Court concluded that, like the California law upheld in *Pickup*, SB 5722 "does not restrain the dissemination of information. It prohibits a licensed therapist from engaging in a specific type of conduct." 1-ER-16. For this reason, "as in *Pickup*, the Washington Conversion Law is subject to rational basis review, it is

rationally related to the State's asserted interest 'in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth, and in protecting its minors against exposure to serious harm caused by conversion therapy,' and, therefore, it does not unduly burden Plaintiff's First Amendment rights." 1-ER-16–17 (quoting *Pickup*, 740 F.3d at 1242).

The District Court also ruled that *Pickup* required dismissal of Tingley's due process claim, concluding that the terms used in SB 5722 "are not vague, and neither is the line between permitted conduct, discussion and exploration of one's own identity, and prohibited conduct, 'seek[ing] to change an individual's sexual orientation or gender identity.'" 1-ER-18 (quoting Wash. Rev. Code. § 18.130.020(4)(a)). Thus, the statute "gives clear notice of what activity Plaintiff may and may not engage in." 1-ER-18.

Finally, the District Court held that this Court's decision in *Welch* foreclosed Tingley's religious liberty claim under the Free Exercise Clause. The court observed that as in *Welch*, "the object of [SB 5722] is not to infringe upon or restrict practices because of their religious motivation. Its object is to 'protect[] the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth [by] protecting [] minors against exposure to serious harms caused by conversion therapy.'" 1-ER-19 (quoting 2018 Wash. Sess. Laws, ch. 300 § 1).

For these reasons, the District Court granted the motions to dismiss for failure

to state a claim. This appeal and cross-appeal followed.

SUMMARY OF ARGUMENT

This Court has previously considered and rejected each of Tingley's constitutional arguments in precedential opinions upholding a California statute that is substantially identical in all relevant respects to SB 5722. The District Court correctly applied those precedents in concluding that Tingley's complaint must be dismissed.

In *Pickup*, this Court rejected the same arguments Tingley asserts here based on the First Amendment's guarantee of freedom of speech. *Pickup* upheld a substantially identical statute prohibiting licensed professionals from performing conversion therapy on minors. The Court held that such a statute does not implicate the First Amendment because it regulates only the provision of medical treatment, not speech. "[P]sychotherapists are not entitled to special First Amendment protection merely because the mechanism used to deliver mental health treatment is the spoken word." *Pickup*, 740 F.3d at 1227. The statute therefore was a valid exercise of states' "authority to regulate licensed mental health providers' administration of therapies that the legislature has deemed harmful." *Id.* at 1229.

Tingley argues that *Pickup* is no longer good law in light of the Supreme Court's decision in *NIFLA*, but *NIFLA* in fact reaffirmed the central principle on which *Pickup* relied. *NIFLA* held that "States may regulate professional conduct,

even though that conduct incidentally involves speech." 138 S. Ct. at 2372. The Supreme Court's reasoning was entirely consistent with *Pickup*'s holding that a statute protecting minors from conversion therapy by licensed therapists "regulates only . . . therapeutic treatment, not expressive speech." 740 F.3d at 1229.

Tingley's vagueness challenge to SB 5722 under the Due Process Clause is also foreclosed by *Pickup*, which held that the text of California's substantially identical statute was "clear to a reasonable person." *Pickup*, 740 F.3d at 1234. That was particularly true because in that case, as here, the statute "regulate[d] licensed mental health providers," who are professionals having specialized knowledge of the subject matter and the terminology used in the law. *Id.*

Tingley's Free Exercise Clause claim also fails under this Court's decision in *Welch*, which held that California's conversion therapy statute was neutral with respect to religion and generally applicable. *Welch*, 834 F.3d at 1047. The same is true here; SB 5722 regulates the conduct of licensed professionals in the same way regardless of whether such conduct is engaged in for secular or religious reasons, and its sole purpose is the purely secular aim of protecting children from the documented harms of conversion therapy.

STANDARD OF REVIEW

For a complaint to survive a motion to dismiss, "the plaintiff must provide 'a short and plain statement of the claim showing the pleader is entitled to relief' which

'contain[s] sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face.'" *Disability Rts. Montana, Inc. v. Batista*, 930 F.3d 1090, 1096 (9th Cir. 2019) (quoting *Sheppard v. David Evans & Assoc.*, 694 F.3d 1045, 1048 (9th Cir. 2012)). "A dismissal under rule 12(b)(6) may be based on either a lack of a cognizable legal theory or the absence of sufficient facts alleged under a cognizable legal theory." *Kwan v. SanMedica Int'l*, 854 F.3d 1088, 1093 (9th Cir. 2017) (citations and internal quotation marks omitted). "[This Court] review[s] *de novo* the district court's judgment granting a 12(b)(6) motion for failure to state a claim upon which relief can be granted." *Id.* (citation omitted).

The Court reviews the denial of a preliminary injunction for abuse of discretion. *CDK Glob. LLC v. Brnovich*, 16 F.4th 1266, 1274 (9th Cir. 2021).

ARGUMENT[2]

I. THE DISTRICT COURT CORRECTLY CONCLUDED THAT *PICKUP* REQUIRES DISMISSAL OF TINGLEY'S FREE SPEECH CLAIMS

This case is controlled by *Pickup*, which rejected the same free speech claims

[2] Equal Rights Washington agrees with the State of Washington defendants that Tingley's complaint was subject to dismissal for lack of standing and ripeness. Tingley has alleged neither a sufficiently concrete plan to violate SB 5722 nor a sufficient threat of enforcement, and he has no standing to assert, on a third party basis, claims on behalf of minor patients. *See King*, 767 F.3d at 244; *Doyle v. Hogan*, No. CV DKC 19-0190, 2019 WL 3500924, at *9 (D. Md. Aug. 1, 2019). This Court "may affirm the [District Court's] dismissal 'based on any ground supported by the

raised by Tingley here. Washington's law is substantially identical to the California law upheld in *Pickup*. Both laws protect minors from treatments that seek to change sexual orientation or gender identity. Both apply only to the actual provision of these treatments to minors by licensed health professionals, while imposing no restrictions on therapists' ability to express their views about sexual orientation or gender identity (or any other topic) to patients or anyone else. Tingley has identified no differences between California's and Washington's law that would require the Court to apply a different analysis, or reach a different conclusion, than it did with respect to California's law in *Pickup*, nor do any exist. As such, *Pickup*'s holding that California's law regulates professional conduct, not speech, is controlling and required dismissal of Tingley's free speech claims in this case.

Tingley's free speech claims rest entirely on his contention that because the therapy he provides is carried out verbally, Washington's law restricts his right to free speech and may be upheld only if it survives strict scrutiny. But this Court squarely rejected that argument in *Pickup*. As *Pickup* explained, the argument that psychotherapy is entitled to special First Amendment protection and may not be regulated like other medical treatments conflicts with established law in this Circuit. *See Pickup*, 740 F.3d at 1226.

---

record.'" *Kwan*, 854 F.3d at 1093 (quoting *Johnson v. Riverside Healthcare Sys., LP*, 534 F.3d 1116, 1121 (9th Cir. 2008)).

Tingley's argument ignores that psychotherapy is a *treatment* intended to effect a change in a patient's mental health, not expressive speech. In *Pickup*, the Court affirmed its prior decision *NAAP*, 228 F.3d 1043, which rejected the argument that "because psychoanalysis is the 'talking cure,' it deserves special First Amendment protection." *Pickup*, 740 F.2d at 1226 (quoting *NAAP*, 228 F.3d at 1054). As this Court held in *NAAP*: "[T]he key component of psychoanalysis is the treatment of emotional suffering and depression, *not* speech. That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection." *NAAP*, 228 F.3d at 1054 (internal quotation marks and ellipsis omitted) (emphasis in original).

Tingley's argument runs directly afoul of that clear holding, which *Pickup* affirmed: "psychotherapists are not entitled to special First Amendment protection merely because the mechanism used to deliver mental health treatment is the spoken word." *Pickup*, 740 F.3d at 1227. Rather, as *Pickup* held, "California has authority to regulate licensed mental health providers' administration of therapies that the legislature has deemed harmful." *Id*. at 1229.

Tingley's contrary argument "would be inconsistent with the principle that 'it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed.'" *Id*. (quoting

Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949)). *Pickup* held that conversion therapy is just such a "course of conduct"; the mere fact that it is "carried out by means of language" does not alter its status as a medical treatment that may be regulated by the state. "Under *Giboney*, … the fact that speech may be used to carry out those therapies does not turn the regulation of conduct into a regulation of speech." *Id*.

In sum, "to the extent that talk therapy implicates speech, it stands on the same First Amendment footing as other forms of medical or mental health treatment. [The SOCE law] is subject to deferential review just as are other regulations of the practice of medicine." *Pickup*, 740 F.3d at 1231. Tingley makes no attempt to reconcile his argument with this controlling precedent, nor could he.

As the District Court correctly noted, Tingley's invocation of *Conant*, 309 F.3d 629, also misses the mark. *Pickup* distinguished the law struck down in *Conant*, which penalized doctors merely for recommending marijuana to their patients, from California's law barring therapists from performing SOCE on minors. The law in *Conant* ran afoul of the First Amendment because it went beyond prohibiting doctors from *treating* patients with marijuana and limited what doctors could say *about* medical marijuana to their patients. As *Pickup* explained, "doctor-patient communications *about* medical treatment receive substantial First Amendment protection, but the government has more leeway to regulate the conduct necessary

to administering treatment itself." 740 F.3d at 1227.

In contrast to the law struck down in *Conant*, *Pickup* held that California's law banning the use of SOCE on minors "regulates conduct. It bans a form of treatment for minors; it does nothing to prevent licensed therapists from discussing the pros and cons of SOCE with their patients." *Id.* at 1229. The same is true of the law challenged here. "It is the limited reach of [Washington's law] that distinguishes the present cases from *Conant*, in which the government's policy prohibited speech *wholly apart* from the actual provision of treatment. Pursuant to its police power, [Washington] has authority to regulate licensed mental health providers' administration of therapies that the legislature has deemed harmful." *Id*.

Tingley makes no meaningful attempt to distinguish *Pickup*'s analysis of why *Conant* has no application to a law barring therapists from performing SOCE on minors, nor is there any basis for doing so.[3] *Pickup*'s analysis of *Conant* is controlling and requires dismissal of Tingley's free speech claim.

Importantly, *Pickup* did not rely on the proposition that "professional speech" as a category is entitled to a lesser degree of First Amendment protection than other

[3] Tingley suggests that there is some relevant difference between the scope of the California law and that of the Washington law based on the latter's inclusion of "efforts to change behaviors or gender expressions" in the definition of prohibited conduct. Opening Brief at 30 (quoting Wash. Rev. Code § 18.130.020(4)(a)). But identical language appears in the California law and was upheld in *Pickup*. *See* Cal. Bus. & Prof. Code § 865(b)(1).

forms of speech. *Pickup* did include a discussion of case law holding that regulations of professional speech are subject to intermediate rather than strict scrutiny, but that discussion was clearly identified as dicta and played no role in the panel's holding. Indeed, Tingley acknowledges that these portions of the *Pickup* opinion were dicta that did not form the basis of this Court's judgment. *See* Opening Brief at 25 & n.25. *Pickup*'s holding instead rested on the proposition that the law "regulates only treatment, while leaving mental health providers free to discuss and recommend, or recommend against, SOCE." 740 F.3d at 1231. As a result, the *Pickup* panel concluded "that any effect it may have on free speech interests is merely incidental." *Id.*

II. NOTHING IN *NIFLA* ALTERS *PICKUP*'S STATUS AS CONTROLLING PRECEDENT IN THIS CASE

Having no grounds on which to distinguish *Pickup*, Tingley bluntly asserts that, after *NIFLA*, "*Pickup* is no longer good law and does not bind this panel." Opening Brief at 16. Notably, despite asking the Court to disregard one of its precedents, Tingley has not filed a petition for initial hearing en banc. *See* Fed. R. App. P. 35(c). Nor has Tingley come close to meeting the "high standard," *Lair v. Bullock*, 697 F.3d 1200, 1207 (9th Cir. 2012) (cleaned up), of showing that *Pickup* is so "clearly irreconcilable" with *NIFLA* that a panel of this Court need not follow it. *Miller v. Gammie*, 335 F.3d 889, 900 (9th Cir. 2003). Nothing in *NIFLA*—neither its reasoning nor its result—alters *Pickup*'s status as controlling precedent in this

case. The principles articulated in both *NIFLA* and *Pickup* mandated dismissal of Tingley's free speech claims, as the District Court correctly concluded.

NIFLA affirmed that "States may regulate professional conduct, even though that conduct incidentally involves speech." 138 S. Ct. at 2372. The Court expressly rejected the argument—relied on by Tingley here—that a regulation of medical treatment triggers heightened First Amendment scrutiny if it has any impact on speech at all. "[T]he First Amendment does not prevent restrictions directed at . . . conduct from imposing incidental burdens on speech." *Id*. at 2373 (internal citations and quotation marks omitted).

Instead, *NIFLA* affirmed longstanding precedent that states may regulate medical treatments, including verbal communications involved in such treatments. In such a case, the government is not regulating speech as such, because of its expressive content, but only incidentally—only insofar as verbal communications are involved in administering a particular treatment. Were the law otherwise, the ability of states to regulate medical practice would be severely diminished, since almost all medical treatment involves some verbal communication between patients and health care providers. But as the Supreme Court has repeatedly held, the First Amendment is not offended by a "law that regulate[s] speech only as part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Id*. at 2373 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992)

(internal quotation marks omitted).

The law upheld in *Casey* required doctors to provide information to patients undergoing abortions. *Id*. In contrast, *NIFLA* invalidated a California law requiring pregnancy clinics to provide information to women even when they were not seeking or undergoing any medical treatment. 138 S. Ct. at 2368. The Court explained that the pregnancy clinic law violated the First Amendment because—unlike the law in *Casey*—its notice requirement was "not tied to a [medical] procedure." 138 S. Ct. at 2373. The clinics were required to convey certain information "regardless of whether a medical procedure [was] ever sought, offered, or performed." The law therefore regulated "speech as speech." *Id*. at 2374.

This Court's holding in *Pickup* is consistent with *NIFLA*. *Pickup* held that, California's SOCE law "regulates only … therapeutic treatment, not expressive speech." 740 F.3d at 1229. To the extent it restricts any speech, it does so only incidentally, to prohibit the administration of an unnecessary, dangerous, and ineffective treatment, not to prevent the expression of ideas.

The same analysis applies here. Washington's law is firmly tethered to a specific medical treatment—the practice by licensed therapists of conversion therapy on minors. It is narrow, applying only to the actual provision of that dangerous and discredited treatment. Under Washington's law, Tingley and other licensed therapists remain free to communicate to their patients (or others), publicly

or privately, any information or views they may hold about the morality of same-sex attraction, altering sexual orientation, conversion therapy, or anything else. The only thing they may not do is subject minor patients to a specific course of medical treatment that has been rejected by the medical community as unnecessary, ineffective, and unsafe. Accordingly, "any effect [SB 5722] may have on free speech interests is merely incidental" and warrants no heightened scrutiny. 740 F.3d at 1231.

III. CIRCUIT PRECEDENT REQUIRES DISMISSAL OF TINGLEY'S DUE PROCESS CLAIM

Pickup and other controlling precedent also required dismissal of Tingley's argument that Washington's law is unconstitutionally vague, as the district court properly held. As an initial matter, Tingley's facial challenge fails because he does not even attempt to show that the statute "is impermissibly vague in all of its applications." *Village of Hoffman Estates v. Flipside, Hoffman Estates, Inc*., 455 U.S. 489, 494–95 (1982); *see also Pickup*, 740 F.3d at 1234. Tingley's other arguments are equally without merit.

In *Pickup*, the plaintiffs "argue[d] that they cannot ascertain where the line is between what is prohibited and what is permitted." *Id*. at 1234. In this case, Tingley likewise contends that he cannot ascertain the line between treatment that seeks to change an individual's sexual orientation and gender identity and that which encourages identity exploration by the individual. *See* Opening Brief at 63–64. But

as this Court held regarding California's substantially identical statute, the text of SB 5722 "is clear to a reasonable person." *Pickup*, 740 F.3d at 1234.

Moreover, "if the statutory prohibition involves conduct of a select group of persons having specialized knowledge, and the challenged phraseology is indigenous to the idiom of that class, *the standard is lowered* and a court may uphold a statute which uses words or phrases having a technical or other special meaning, well enough known to enable those within its reach to correctly apply them." *United States v. Weitzenhoff*, 35 F.3d 1275, 1289 (9th Cir. 1993) (emphasis added). Here, "considering that [Washington's law] regulates licensed mental health providers, who constitute 'a select group of persons having specialized knowledge,' the standard for clarity is lower." *Pickup*, 740 F.3d at 1234 (citing *Weitzenhoff*, 35 F.3d at 1289). "Identity exploration and "identity development" are well-established concepts in adolescent psychiatry, as are "sexual orientation," "gender identity" and "gender expression." 2-SER-170–173.

The terms "gender identity" and "gender expression" are also common legal terms. Multiple provisions of Washington law use the terms "gender identity" and "gender expression."[4] In addition, Wash. Rev. Code § 48.43.072 defines both terms.

[4] *See, e.g.*, Wash. Rev. Code § 9A.08.040; Wash. Rev. Code § 9A.16.025; Wash. Rev. Code § 9A.36.078; Wash. Rev. Code § 9A.36.080; Wash. Rev. Code § 18.130.020; Wash. Rev. Code § 28A.642.010; Wash. Rev. Code § 28A.642.080; Wash. Rev. Code § 28A.405.170; Wash. Rev. Code § 28B.15.012; Wash. Rev. Code § 28B.112.050; Wash. Rev. Code § 36.28A.030; Wash. Rev. Code

See Wash. Rev. Code § 48.43.072(8)(b) ("'Gender identity' means a person's internal sense of the person's own gender, regardless of the person's gender assigned at birth"); § 48.43.072(8)(a) ("'Gender expression' means a person's gender-related appearance and behavior, whether or not stereotypically associated with the person's gender assigned at birth.").

The term "gender identity" also appears in many federal statutes. *See*, *e.g.*, 18 U.S.C. § 249(c)(4) ("gender identity" is a protected characteristic under the federal hate crimes act); 34 U.S.C. § 10441(b)(19) ("gender identity" is included as a relevant factor for programs and grants aimed at increasing law enforcement to combat domestic violence); 34 U.S.C. § 12291(a)(39) ("gender identity" is included as a relevant characteristic for defining an "underserved population" that faces barriers to accessing victim services); 34 U.S.C. § 30503(a)(1)(C) (the Attorney General may provide assistance in the criminal investigation or prosecution of any crime that is motivated by "gender identity"); 34 U.S.C. § 41305(b)(1) (providing that data shall be collected on crimes that manifest evidence of prejudice based on "gender identity"); 42 U.S.C. § 2000e ("gender identity" is included in Executive Order No. 11246 regarding Equal Opportunity in Federal Employment); 50 U.S.C. § 3334b(f)(3) ("gender identity" is incorporated into the definition of "diversity" for

---

§ 48.43.072; Wash. Rev. Code § 49.60.040; Wash. Rev. Code § 50A.05.100; Wash. Rev. Code § 74.09.875.

the purposes of workforce data collection).

Many federal court decisions also use the terms "gender identity" and "gender expression." *See, e.g.*, *Bostock v. Clayton County*, 140 S. Ct. 1731, 1739 (2020) (gender identity); *Smith v. Spisak*, 558 U.S. 139, 154 (2010) (gender identity); *Karnoski v. Trump*, 926 F.3d 1180, 1199 et passim (9th Cir. 2020) (gender identity); *Edmo v. Corizon, Inc.*, 935 F.3d 757, 770 (9th Cir. 2019) (gender identity and gender expression)

Given this well-established meaning, courts have repeatedly rejected vagueness challenges to the term "gender identity." *See, e.g.*, *Hyman v. City of Louisville*, 132 F. Supp. 2d 528, 546 (W.D. Ky. 2001), *vacated on other grounds*, 53 Fed. Appx. 740 (6th Cir. 2002) (unpublished); *Reynolds v. Talberg*, No. 1:18-cv-69, 2020 WL 6375396, *9 (W.D. Mich. Oct. 30, 2020).

There is also no merit to Tingley's argument that the law is unconstitutionally vague because it does not indicate whether the prohibition on treatments that seek to change sexual orientation or gender identity refers to "the client's goal and intent … or that of the counselor." Opening Brief at 62. Under its plain terms, the law prohibits treatments that seek to change a minor's sexual orientation or gender identity, regardless of whether a minor client purportedly seeks out such change or whether that goal is imposed by the therapist. The statute simply protects minors from being subjected to such treatments, consistent with the American Psychological

Association's clear directive that licensed mental health providers should not engage in SOCE with minors under any circumstances, including with "children and adolescents who present a desire to change their sexual orientation." 2-SER-299–300.

Tingley's assertion that the law's enforcement mechanism, section 18.30.185, creates a risk of arbitrary and discriminatory enforcement has no merit. Tingley contends this provision was enacted to "intimidate and silence a particular viewpoint." Opening Brief at 64. In fact, section 18.30.185 predates SB 5722 and applies to any violation of chapter 18.130, not only to the prohibition of conversion therapy. In addition, regardless of who initiates an action, any petitioner would be required to prove an actual violation of the statute, based on the standard it sets forth and on probative evidence, not on mere disagreement with Tingley's "faith and viewpoint." Opening Brief at 64. In short, because the terms of the statute are clear to a reasonable person, SB 5722 "provides both sufficient notice as to what is prohibited and sufficient guidance to prevent against arbitrary enforcement." *United States v. Kuzma*, 967 F.3d 959, 970 (9th Cir. 2020).

IV. CIRCUIT PRECEDENT REQUIRES DISMISSAL OF TINGLEY'S FREE EXERCISE CLAIM

Tingley's claim under the Free Exercise Clause is also foreclosed by controlling precedent. The right to free exercise of religion "does not relieve an individual of the obligation to comply with a valid and neutral law of general

applicability on the ground that the law proscribes (or prescribes) conduct that his religion prescribes (or proscribes)." *Emp't Div. v. Smith*, 494 U.S. 872, 879 (1990).

In *Welch*, 834 F.3d at 1044, this Court applied the *Smith* standard and upheld California's substantively identical law prohibiting the use of conversion therapy on minors against a challenge by mental health providers who argued that the law violated their rights under the First Amendment's religion clauses. The Court held that the California statute was subject only to rational basis review, which it easily satisfied. *See id. See also King*, 767 F.3d at 241-43 (rejecting free exercise challenge to substantially identical New Jersey law).

There is no relevant legal or factual difference between this case and *Welch* that would warrant a different result. To the contrary, the arguments Tingley offers here were considered and expressly rejected in *Welch*.

Tingley argues that SB 5722 is not neutral because at the time of its passage, it was "well known" that conversion therapy "is primarily sought 'for religious reasons.'" Opening Brief at 38 (citing 2-ER-370–371). The Court rejected the same argument in *Welch*:

> The object of SB 1172 is the prevention of harm to minors, regardless of the motivations for seeking SOCE. As we have explained, many persons seek SOCE for secular reasons. Moreover, even if we assume that persons with certain religious beliefs are more likely to seek SOCE, the "Free Exercise Clause is not violated even if a particular group, motivated by religion, may be more likely to engage in the proscribed conduct."

Welch, 834 F.3d at 1047 (quoting *Stormans, Inc. v. Wiesman*, 794 F.3d 1064, 1077 (9th Cir. 2015)).

Tingley points to statements in the 2009 APA Report and other materials from mental health organizations and academics indicating that conversion therapy is frequently sought by individuals with religious convictions. *See* Opening Brief at 38–39. This argument, too, was rejected in *Welch*: "Even viewing the APA Task Force's report in isolation does not support a conclusion that only those with religious views sought SOCE. Although the report concluded that those who seek SOCE 'tend' to have strong religious views, the report is replete with references to non-religious motivations, such as social stigma and the desire to live in accordance with 'personal' values." *Welch*, 834 F.3d at 1046.

In addition, contrary to Tingley's claim, nothing in the legislative record of SB 5722 shows that the law has the purpose or effect of targeting religiously motivated conduct. Rather, as this Court noted of California's similar law: "The bill's text and its legislative history make clear that the legislature understood the problem of SOCE to encompass not only those who seek SOCE for religious reasons, but also those who do so for secular reasons of social stigma, family rejection, and societal intolerance for social minorities." *Welch*, 834 F.3d at 1046. For example, the House Bill Report states that parents may place their children in conversion therapy based on social stigma: "Devaluation and punishment toward the

LGBTQ community still exists and may lead families to consider this kind of therapy." 1-SER-67. Both today and in the past, those who promote conversion therapy includes those who do so for secular as well as religious reasons. *See, e.g.*, John Horgan, *Bizarre Brain-Implant Experiment Sought to 'Cure' Homosexuality*, Scientific American (Oct. 13, 2017), *available at* https://blogs.scientificamerican.com/cross-check/bizarre-brain-implant-experiment-sought-to-cure-homosexuality/. By its plain language, the SB 5722 prohibits any treatment that seeks to change a child's sexual orientation or gender identity regardless of a provider's motivation for wishing to bring about such a change.

Tingley's claim that SB 5722 permits "individualized exemptions" is equally unavailing. The law sets forth a uniform standard that applies universally to all licensed health professionals. It contains no discretionary exemptions of any kind, nor does it include any process by which individuals can seek such exemptions. To the extent Tingley claims that prosecutors may apply the law in a biased way, nothing in the law authorizes any such selective or biased enforcement, and the mere speculation that it might occur cannot support a claim of religious bias.

Tingley also argues that the "hybrid rights exception" requires application of strict scrutiny even if SB 5722 is a neutral and generally applicable law because it implicates both his free speech and free exercise rights. *See* Opening Brief at 46–47.

This Court has questioned whether the hybrid rights doctrine even exists, but assuming it does, "alleging multiple failing constitutional claims that do not have a likelihood of success on the merits cannot be enough to invoke a hybrid rights exception and require strict scrutiny." *Parents for Privacy v. Barr*, 949 F.3d 1210, 1237 (9th Cir. 2020). Because Tingley's free speech claims were properly dismissed for the reasons stated above, his hybrid rights claim fails as well.

V. SB 5722 SURVIVES ANY LEVEL OF REVIEW

Even if Tingley could establish that SB 5722 significantly restricts constitutionally protected speech or other rights—which he cannot—it would survive any level of constitutional scrutiny. Washington's law "is justified by a compelling government interest and is narrowly drawn to serve that interest"; it would satisfy even strict scrutiny, if it applied. *See Brown v. Entertainment Merchants Ass'n*, 564 U.S. 786, 799 (2011).

A. Washington Has A Compelling Interest In Protecting Children From Harm

Washington enacted SB 5722 to carry out its "compelling interest in protecting the physical and psychological well-being of minors" and "in protecting its minors against exposure to serious harms caused by conversion therapy." 2018 Wash. Sess. Laws ch. 300, § 1. Governments have a compelling interest in the health and well-being of their citizens. *See Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975). The Supreme Court "ha[s] sustained legislation aimed at protecting the

physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionality protected rights." *N.Y. v. Ferber*, 458 U.S. 747, 757 (1982). That interest is plainly served here, where the government seeks to protect minors who are "especially vulnerable to [the] practices" barred by the law. *King*, 767 F.3d at 238.

In enacting SB 5722, the Legislature relied on substantial evidence that conversion therapy puts minors at risk of serious harms. Tingley complains that the evidence showing the harms of conversion therapy is not sufficiently conclusive. But the First Amendment does not require the government to delay action to protect children from serious threats of harm until it possesses absolute certainty, particularly when acquiring such proof would produce the very harm the government seeks to avoid. *See FCC v. Fox Television Stations*, 556 U.S. 502, 519 (2009). Responsible professionals stopped conducting double-blind studies on conversion therapy precisely because it was harmful, particularly to minors, and therefore would be unethical to attempt. *See* 1-SER-73 ("Research ethics make it difficult to rigorously study a practice associated with harm."); 2-SER-311; *Otto*, 353 F.Supp.3d at 1260 & n.12.

The harms associated with conversion therapy are significant and include a dramatically increased risk not merely of suicidal feelings, but of multiple suicide attempts. 2-ER-74. Considering that evidence, no ethical researcher or parent would

place a child in a control group receiving conversion therapy, and no review board would grant permission for such an experiment. When such controlled studies were performed on adult patients receiving conversion therapy in the past, they showed severe harms, including "[loss of] all sexual feeling" and "severe depression." 2-SER-261.

B. SB 5722 Is Narrowly Tailored To Advance The State's Compelling Interest

Tingley's contention that the Washington Legislature should have considered a less restrictive alternative has no merit. There are inherent, potentially deadly, dangers when a therapist subjects a minor to conversion therapy; as a result, there are no practical alternatives to a prohibition on licensed health professionals performing such treatments on minors. The "less restrictive alternatives" Tingley proposes would still allow minors to be exposed to the very physical and mental harms that are the subject of the medical literature cited by the Legislature and that the law seeks to prevent. *See Otto*, 353 F.Supp.3d at 1266–67.

Tingley contends that SB 5722 "sweeps more broadly than necessary" because it prohibits conversion therapy even if treatment is entirely carried out through talk therapy requested by the minor patient, as opposed to restricting only involuntary and/or aversive treatments. Opening Brief at 56. As an initial matter, relying on a distinction between voluntary and involuntary treatment would provide little protection for minors, who are under the legal control of parents or guardians.

As such, "[m]inors constitute an 'especially vulnerable population,' and may feel pressured to receive [conversion therapy] counseling by their families and their communities despite their fear of being harmed." *King*, 767 F.3d at 240 (quoting 2-SER-341). Indeed, Tingley himself stated that "[i]n most cases a minor will initially come to my office brought by and at the prompting of his or her parent or parents."3-ER-342. The fact that minor patients may agree to continue in therapy does not eliminate their ongoing vulnerability or the fact that their participation may be influenced or coerced by such pressures.

In addition, even for adults, there are many treatments a therapist cannot provide, even when requested by clients to do so, because they are harmful. "For example, if an anorexic patient asks for help in losing more weight, competent psychologists do not defer to this goal out of respect for the patient's self-determination due to the known harm in doing so." 2-ER-38; *see also* 2-ER-72. As the American Psychological Association has explained: "[S]imply providing SOCE to clients who request it does not necessarily increase self-determination but rather abdicates the responsibility of LMHP [licensed mental health professionals] to provide competent assessment and interventions that have the potential for benefit with a limited risk of harm." 2-SER-289.

Restricting the statute only to so-called "aversive" treatments such as electroshock therapy would be equally ineffective. As the American Psychological

Association and many other professional organizations have warned, being subjected to non-aversive conversion therapy also puts minors at high risk of depression, suicide, and other serious harms. *See* 2-SER-188; 2-SER-262; 2-SER-299–300; *Otto*, 353 F. Supp. 3d. at 1267. The government has a compelling interest in protecting minors from that harm.

Tingley also contends that the law is "underinclusive" because the state has not banned other "speech by 'nonlicensed counselors,' which surely can have the same psychological effect" as speech by licensed professionals. Opening Brief at 58. But when licensed health providers subject minor patients to conversion therapy, they are providing medical treatment, not simply engaging in conversations. *See Pickup*, 740 F.3d at 1226–27. Tingley's argument conflates the provision of mental health care with the dissemination of ideas concerning personal, philosophical, scientific, and religious topics in settings other than treatment by a licensed professional. As the Court held in *Pickup*, a law prohibiting the use of conversion therapy on minors "regulates only (1) therapeutic treatment, not expressive speech, by (2) licensed mental health professionals acting within the confines of the counselor-client relationship. The statute does not restrain [Tingley] from imparting information or disseminating opinions; the regulated activities are therapeutic, not symbolic." *Id.* at 1229–30. That holding is controlling here.

In sum, even if intermediate or strict scrutiny applied, Washington's law is

narrowly tailored to protect minors from treatments that are unnecessary, ineffective, and potentially devastating to their physical and mental health—an interest that is sufficiently compelling to pass muster any standard of review.

VI. THE DISTRICT COURT DID NOT ABUSE ITS DISCRETION IN DENYING A PRELIMINARY INJUNCTION

For the reasons stated above, Tingley's complaint was properly dismissed for failure to state a claim. Accordingly, Tingley did not show a likelihood of success on the merits. The District Court therefore could properly deny his motion for a preliminary injunction without considering the remaining preliminary injunction factors. *See CDK Glob.*, 16 F.4th at 1274.

Even if his complaint had alleged claims sufficient to survive a motion to dismiss, the District Court did not abuse its discretion in declining to grant a preliminary injunction. Tingley alleged no irreparable harm other than the claimed violation of his First Amendment rights, which, as argued above, he cannot establish under the precedents controlling this case. Apart from that asserted constitutional injury, Tingley has no legitimate interest as a licensed health provider in subjecting minor patients to unnecessary treatments that provide no demonstrable benefit and put them at risk of serious harm. In any event, Tingley offered no evidence that he faces an imminent threat of enforcement from the State. In contrast, granting Tingley a preliminary injunction would severely impair the State of Washington's compelling interest in preventing state-licensed therapists from harming their minor

patients. For the same reason, the public interest also weighs heavily in favor of leaving this protective law in place.

CONCLUSION

For the foregoing reasons, Equal Rights Washington respectfully requests that this Court affirm the judgment of the District Court.

DATED: January 14, 2022

Respectfully submitted,

NATIONAL CENTER FOR LESBIAN RIGHTS
SKELLENGER BENDER, P.S.

By: s/ *Christopher F. Stoll*

Attorneys for Defendant-Intervenor-Appellee
Equal Rights Washington

STATEMENT OF RELATED CASES

There are no related cases pending in this Court.

DATED: January 14, 2022

Respectfully submitted,

NATIONAL CENTER FOR LESBIAN RIGHTS
SKELLENGER BENDER, P.S.

By: s/ *Christopher F. Stoll*

Attorneys for Defendant-Intervenor-Appellee
Equal Rights Washington

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Answering Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit using the CM/ECF system on January 14, 2022. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the EM/ECF system.

DATED: January 14, 2022

Respectfully submitted,

NATIONAL CENTER FOR LESBIAN RIGHTS
SKELLENGER BENDER, P.S.

By: s/ *Christopher F. Stoll*

Attorneys for Defendant-Intervenor-Appellee
Equal Rights Washington

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Form 8. Certificate of Compliance for Briefs

Instructions for this form: http://www.ca9.uscourts.gov/forms/form08instructions.pdf

9th Cir. Case Number(s) 21-35815, 21-35856

I am the attorney or self-represented party.

This brief contains 8,558 **words,** excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[X] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[ ] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:
- [ ] it is a joint brief submitted by separately represented parties;
- [ ] a party or parties are filing a single brief in response to multiple briefs; or
- [ ] a party or parties are filing a single brief in response to a longer joint brief.

[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

Signature *Christopher F. Stoll* **Date** January 14, 2022
*(use "*s/[typed name]*" to sign electronically-filed documents)*