APPEAL NO. 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

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INTRODUCTION

This case presents a classic example of a government using labels to get what it wants, even if those labels make no sense—and even if what the government wants is expressly forbidden. *See* George Orwell, *Politics and the English Language* (1946). Washington wants to silence consensual conversations between Brian Tingley and his clients, conversations where Tingley counsels those clients to "help [them] make deeply personal decisions." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2374 (2018) (*NIFLA*). And the State wants to do so merely because it disagrees ideologically with that counsel's viewpoint.

Rather than admit as much, the State tries to label this intimate speech as "conduct." But not once does the State explain this counter-intuitive labeling. Washington simply insists on its ability to make words mean whatever it says they mean. Lewis Carroll, *Through the Looking-Glass and What Alice Found There* 124 (1872) ("'When I use a word,' Humpty Dumpty said in a rather scornful tone, 'it means just what I choose it to mean—neither more nor less.'").

But no matter how hard Washington tries, it cannot transform Tingley's words into conduct. "Speech is speech," even—especially—when the State disfavors its viewpoint. *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1307–09 (11th Cir. 2017) (en banc). This Court should heed the admonition that "state labels" cannot circumscribe the Constitution and reverse. *NIFLA*, 138 S. Ct. at 2375 (cleaned up).

ARGUMENT

I. Tingley has standing to challenge the Counseling Censorship Law.

A. Tingley alleged that the Law forces him to self-censor and live in constant fear that he might be punished for the words he uses.

As Tingley has shown, Washington's Law silences his speech and thereby violates his First Amendment rights. Opening Br. at 17–24. The State first argues that Tingley lacks standing to vindicate these rights. State Br. at 17–22. But this Court has continually recognized that "First Amendment cases raise unique standing considerations . . . that tilt *dramatically* toward a finding of standing." *Lopez v. Candaele*, 630 F.3d 775, 781 (9th Cir. 2010) (emphasis added) (cleaned up). Tingley needed to show only that he faces "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Id.* at 785 (cleaned up).

Tingley demonstrated that "realistic danger" by "alleg[ing] an intention to engage in a course of conduct arguably affected with a constitutional interest, [one] proscribed by a statute, [with] a credible threat of prosecution thereunder." *Id.*; *accord Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 159 (2014). In his complaint, Tingley alleged a desire to continue to provide counsel to clients who "seek his help with issues relating to gender identity, sexual attractions, and sexual behaviors." 3-ER-399. Further, his complaint documented, in "adequate

detail[ ]," specific counseling conversations he has had with clients in recent years—conversations that he wants to continue having with clients who desire them.[1] *Lopez*, 630 F.3d at 787. The State had no problem concluding that, in its view, these conversations "violate" the Counseling Censorship Law. State Br. at 18.

And even though a litigant need not allege that "he will in fact violate th[e] law," *Susan B. Anthony List*, 573 U.S. at 163, here Tingley specifically alleged—contrary to the State's contention—that he "*continues* to provide such counsel to clients who request it." 3-ER-399 (emphasis added). By the State's own admission that such conversations violate the Law, at any moment the State's "iron fist [could] slip its velvet glove" and punish Tingley for his speech. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1088 (10th Cir. 2006). The danger to Tingley could not be more realistic. That he "continues" to have conversations the State deems violative of its Law is alone sufficient to show an injury and therefore standing.

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[1] In one such example, Tingley documented how he counseled one client who used pornography but "desire[d] to live his life in accordance with what he understands to be the teachings of his faith." 3-ER-351. The State contends that this counseling would not violate its Law because "[the Law] does not prohibit counseling related to pornography use or other sexual behavior unless it attempts to change a client's sexual orientation or gender identity." State Br. at 19. But the State ignores that Tingley specifically alleged that this client sought counseling for his pornography use because it "stirred up same-sex attractions in himself" that he otherwise would not have felt. 3-ER-351.

In addition to alleging that he speaks in a way "arguably . . . proscribed by [the Law]," *Susan B. Anthony List*, 573 U.S. at 159, Tingley also alleged that the Law forces him to speak in a "more guarded and cautious [way] than would otherwise be the case." 3-ER-356. By being "forced to modify [his] speech . . . to comply with the statute," Tingley further alleged "self-censorship; a harm that can be realized even without an actual prosecution." *Ariz. Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1006 (9th Cir. 2003) (cleaned up). And this self-censorship "is, itself, a constitutionally sufficient injury." *Libertarian Party of L.A. Cnty. v. Bowen*, 709 F.3d 867, 870 (9th Cir. 2013).

Neither the Supreme Court nor this Court has ever required a plaintiff suffering censorship to allege the specificity that the State here demands. It is sufficient that Tingley alleged that his "intended future [speech] is arguably proscribed by the [Counseling Censorship Law that he] wish[es] to challenge." *Susan B. Anthony List*, 573 U.S. at 162 (cleaned up). Though the State faults Tingley for not identifying "a particular individual" or a "particular time and place," State Br. at 18, this Court has made clear that a "concrete plan does not mean cast in stone," *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134, 1139 (9th Cir. 2000) (en banc) (cleaned up). In *Italian Colors Restaurant*, for instance, this Court recognized as concrete a business's stated intent to impose "credit card surcharges at their stores, on their

customers, when credit card surcharges are legal." *Italian Colors Restaurant v. Becerra*, 878 F.3d 1165, 1174 (9th Cir. 2018). Here Tingley alleged an intent to "continue to support current and future clients who seek his help with issues relating to gender identity, sexual attractions, and sexual behaviors." 3-ER-399. "This is enough to show a concrete plan." *Italian Colors Restaurant*, 878 F.3d at 1174.

B. As even the State admits, Tingley faces a credible threat that the State will enforce its Law against him.

The State does not hide its intentions, admitting that it "intends to enforce [the Counseling Censorship Law] as it enforces other regulations on unprofessional conduct." State Br. at 12. It also linked the conversations that Tingley documented in his complaint—conversations that he alleged that he "continues" to have, 3-ER-399—as violative of its Law. State Br. at 18. These statements alone demonstrate a "reasonable likelihood that the government will enforce the challenged law" against Tingley. *Lopez*, 630 F.3d at 786.

Rather than address its willingness to enforce its censorship Law, the State, without supplying a citation, contends that "Tingley conceded below that there was no specific 'threat'" that the State would enforce that Law against him. State Br. at 18. Not so. Throughout this litigation, both below and on appeal, Tingley has alleged his "substantial and reasonable fear" that the State will sanction him for the conversations he continues to have with clients who seek his help. 3-ER-399.

Washington's similar allusion to the Law's "sparce enforcement history is misplaced." *Italian Colors Restaurant*, 878 F.3d at 1173. Enforcement history has "little weight" when, as here, a law "is relatively new and the record contains little information as to enforcement or interpretation." *Wolfson v. Brammer*, 616 F.3d 1045, 1060 (9th Cir. 2010). The Law has not "fallen into desuetude," nor has Washington "disavow[ed] [its] application" to Tingley. *Italian Colors Restaurant*, 878 F.3d at 1173 (cleaned up). On the contrary: the State continues to express its intent to enforce the Law. Tingley therefore has a credible fear that the State will silence his speech. Accordingly, this Court should affirm the district court's ruling that Tingley has standing to pursue his constitutional claims.

C. Because his clients would face emotional and mental hardship in bringing suit themselves, Tingley also has standing to assert their First Amendment rights.

Tingley demonstrated that his clients face hardships in challenging the Law themselves, so this case presents a "circumstance[ ] where it is necessary to grant [him] standing to assert" their First Amendment rights. *Kowalski v. Tesmer*, 543 U.S. 125, 129–30 (2004); *see* Opening Br. at 34–37. The State contends that there would be no hardship in these clients bringing suit themselves, comparing them to clients in other cases involving counseling censorship laws. But the State's cited cases are inapposite; in both, the counselors alleged but one hindrance:

stigma. *King v. Governor of N.J.*, 767 F.3d 216, 244 (3d Cir. 2014) (alleging that clients faced only "a fear of social stigma"); *Doyle v. Hogan*, No. DKC 19-0190, 2019 WL 3500924, at *9 (D. Md. Aug. 1, 2019) (alleging that clients faced only "embarrassment, stigmatization, and opprobrium"). To be sure, Tingley's clients face that same stigma. But unlike the counselors in *King* and *Doyle*, Tingley also noted the mental and emotional hardship that his clients would face if they were to step into litigation's harsh spotlight.

Pseudonymity does not solve that hardship. Though the State insists that Tingley's clients could challenge the Law anonymously, that would, at most, protect them only from the stigma noted in *King* and *Doyle*. It would do nothing to alleviate the mental anguish that they—minors already experiencing severe emotional turmoil—would face as active participants in litigation.

Further, on this point *King* and *Doyle*, even on their own facts, were wrongly decided by courts outside this circuit. The Supreme Court has "generally permitted plaintiffs to assert third-party rights in cases where the enforcement of the challenged restriction against the litigant would result indirectly in the violation of third parties' rights." *June Med. Servs. LLC v. Russo*, 140 S. Ct. 2103, 2118–19 (2020) (plurality op.) (cleaned up). These cases have ranged from doctors vindicating a woman's ability to get an abortion, *id.*, to attorneys raising clients' rights to challenge restrictions on fee arrangements, *U.S. Dep't of Labor*

v. Triplett, 494 U.S. 715, 720 (1990). "In such cases, the obvious claimant and the least awkward challenger is the party upon whom the challenged statute imposes legal duties and disabilities." *June Med.*, 140 S. Ct. at 2119 (cleaned up). Here, that is Tingley. While the Law restricts his clients' right to receive ideas and information, its burdens "fall[ ] directly and personally on" Tingley. *Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002) (Kozinski, J., concurring). Tingley has standing to assert his counseling clients' First Amendment interests.

D. The Law's censorious effect works a hardship on Tingley that makes this case fit for review.

"[A] federal court's obligation to hear and decide cases within its jurisdiction is virtually unflagging." *Susan B. Anthony List*, 573 U.S. at 167 (cleaned up). Accordingly, the "continuing vitality of the prudential ripeness doctrine" is in question. *Id.* This Court should not invoke it here when Tingley has "alleged a sufficient Article III injury." *Id.*

In any event, "the 'fitness' and 'hardship' factors are easily satisfied." *Id.* Tingley's challenge to the Law presents an issue that is "purely legal, and will not be clarified by further factual development." *Id.* And "denying prompt judicial review would impose a substantial hardship on [Tingley], forcing [him] to choose between refraining from core [protected] speech on the one hand, or engaging in that speech and risking costly" sanctions "on the other." *Id.* at 167–68. His case is ripe for review, both individually and on behalf of his clients.

II. Washington cannot regulate Tingley's speech by relabeling it as "conduct" or "treatment."

A. The Counseling Censorship Law prohibits Tingley's speech, not his conduct.

Both below and in his opening brief, Tingley demonstrated that all he does is "listen and talk" to his clients. 3-ER-373; *accord* Opening Br. at 18. The State nowhere disputes this decisive fact. Rather it tries to obscure it by simply changing the labels. For instance, the State employs loaded language like "conversion therapy" in the hope that this Court will connect Tingley's speech to "invasive *physical* tactics, such as revulsion therapy and electro-shock therapy." State Br. at 39 (emphasis added). Not only has Tingley never used these methods, but the State's own expert acknowledged that "[l]icensed therapists haven't been" using them "*in decades*."[2]

Again, the State relies on mere label-changing by calling Tingley's speech "treatment" and insisting that the State has unfettered authority to regulate anything it designates as "treatment." But it does not. As this Court made clear in *Conant*, the word "treatment" can connote either speech or conduct, so the charge that Tingley is engaging in "treatment" leaves unanswered the question of whether he is engaging in unprotected conduct or protected speech. *Conant*, 309 F.3d

[2] *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).

at 635–36. Rather than elucidate what "treatment" Tingley performs, the State is studiously vague. Yet when trying to describe what "treatment" is, the State cannot help but admit that treatment is "through *verbal* means," i.e., pure speech. State Br. at 42 (emphasis added).

The very cases that the State relies on to suggest that it can regulate "treatment" affirm that the State *may not* do so when that treatment involves speech rather than conduct. In *National Association for the Advancement of Psychoanalysis v. California Board of Psychology*, this Court affirmed what the State here tries to deny—that "[t]he communication that occurs" between counselors and their clients "is entitled to constitutional protection." 228 F.3d 1043, 1054 (9th Cir. 2000) (*NAAP*). There, this Court held only that such speech was not "entitle[d] . . . to *special* First Amendment protection." *Id.* (emphasis added). As *Conant* later clarified, if the law at issue in *NAAP* had "attempt[ed] to 'dictate the content of what is said in therapy,'" that law would not have survived First Amendment review. *Conant*, 309 F.3d at 637 (quoting *NAAP*, 228 F.3d at 1055–56). But this is precisely what the State is doing here.

Similarly, when, in *Conant*, a regulation tried to invade the confidential doctor-patient dialog, this Court held that the speech at issue—even though it was "treatment"—was entitled to "the strongest protection our Constitution has to offer." *Id.* (cleaned up).

Perhaps if the State could identify some "separately identifiable conduct" that Tingley does apart from listen and talk to his clients, its argument would have more force. *Cohen v. California*, 403 U.S. 15, 18 (1971). States can validly regulate conduct, even if such regulation affects genuinely incidental speech. States can, for instance, "require[ ] that a doctor give a woman certain information as part of obtaining her consent to an abortion" because such a requirement is connected to "the *practice* of medicine" (i.e., performing an abortion). *NIFLA*, 138 S. Ct. at 2373 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992)).[3]

But States *cannot* regulate speech by connecting it to some incidental conduct. If they could, then in *Cohen*, California could have suppressed the "profanity-emblazoned jacket" at issue by saying that its message was incidental to "putting on the shirt." *Otto v. City of Boca Raton*, 981 F.3d 854, 866 (11th Cir. 2020). As the Supreme Court recognized, this incidental conduct was not the issue; the message was. So too here. The "treatment" that the State wants to suppress "consists—entirely—of words." *Id.* at 865. Washington's Law does not regulate speech incidentally. It silences it directly.

[3] In *Casey*, the "practice of medicine" referred to, among other things, concrete and invasive medical procedures, like performing abortions. It was not a catch-all tautology that meant whatever the State insisted it meant—the way the State here uses the word "treatment."

As the Eleventh Circuit recognizes, Washington's argument would extend with equal force to "[d]ebating" and "[b]ook clubs." *Otto*, 981 F.3d at 865; *see* Opening Br. 20–21. So the State pivots and contends that protesting and debating are "inherently expressive" (and therefore protected), State Br. at 40, whereas the conversations between Tingley and his clients are not. In doing so, however, the State attempts to import a *limitation* on free speech that does not exist. Washington transplants the phrase "inherently expressive" from a line of cases dealing with actual *conduct* that is expressive, rather than cases delineating a less-protected category of verbal speech. *E.g.*, *Rumsfeld v. FAIR, Inc.*, 547 U.S. 47, 65–66 (2006). As the Supreme Court has made clear, if the so-called "conduct triggering coverage under [a] statute consists of communicating a message," that conduct is not conduct at all but is instead speech and must be analyzed as such. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 26–28 (2010). The question of whether that speech is "inherently expressive" does not arise.

And in any case, the assertion is untrue on its face. It is difficult to imagine a conversation more "inherently expressive" than one exploring a client's feelings, beliefs, and personal goals. As much as protests and debates and book clubs, these conversations have at their core "written or spoken word[s]"—what the First Amendment shields as pure speech. *Texas v. Johnson*, 491 U.S. 397, 406 (1989); *accord Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1058–59 (9th Cir. 2010).

To call Tingley's conversations conduct and not speech is a fiction. Even those who agree with laws like Washington's admit as much. *See, e.g.*, R. Randall Kelso, *Substantive Toleration and Viewpoint Discrimination*, 61 S. TEX. L. REV. 97, 135 (2021). Rather than adopt this fiction, this Court should follow the logically correct and easily administrable rule that "[s]peech is speech" and "must be analyzed as such for purposes of the First Amendment." *Wollschlaeger*, 848 F.3d at 1307 (cleaned up). And under this clear rule, Washington's Law silences Tingley's speech.

B. The State failed to reckon with *NIFLA*'s fatal effect on *Pickup*, which does not bind this panel.

In his opening brief, Tingley elucidated how *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), is no longer good law. Opening Br. at 24–29. The State devotes most of its brief to argue that *Pickup* nevertheless resolves this case. State Br. at 28–38. But when the Supreme Court "undercut[s] the *theory* or *reasoning* underlying . . . prior circuit precedent in such a way that" the prior precedent is "clearly irreconcilable" with the Supreme Court's decision, *SEIU Local 121RN v. Los Robles Reg'l Med. Ctr.*, 976 F.3d 849, 854–55 (9th Cir. 2020), then "three-judge panel[s] of this court" 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).

Pickup is "clearly irreconcilable" with the Supreme Court's intervening decision in *NIFLA*. *Pickup*'s central holding rested on the theory that a state can diminish the constitutional protection afforded speech by labeling that speech as something else. That's the same theory the state advanced in *NIFLA*. And it's the same theory that the Supreme Court squarely rejected. The Court condemned any approach that would allow the State to "choose the protection that speech receives under the First Amendment" by imposing labels it deems "dispositive." 138 S. Ct. at 2375.

Washington insists that *Pickup* and *NIFLA* can be reconciled by treating *NIFLA* as a case about "professional speech" and *Pickup* as a case about "professional conduct." That merely perpetuates the evil that *NIFLA* condemned: allowing the State to "choose the protection that speech receives under the First Amendment" by imposing labels it deems "dispositive." *NIFLA*, 138 S. Ct. at 2375. And it also ignores the fact that the Supreme Court expressly included instances of speech by professionals among its examples of "speech." *Id.* at 2374–75; *see* Opening Br. at 26.

As every other federal appellate court has acknowledged, both *NIFLA* and *Pickup* involved regulations on protected speech. *See, e.g.*, *King*, 767 F.3d at 228 ("To classify some communications as 'speech' and others as 'conduct' is to engage in nothing more than a labeling game." (cleaned up)). In *NIFLA*, the State labeled the speech as "professional,"

whereas in *Pickup* the State labeled it as "conduct." In both cases, the State used these malleable labels to circumvent the First Amendment. The Supreme Court held that states could not do so. *Pickup* therefore does not bind this panel.

C. The Counseling Censorship Law differs materially from the law in *Pickup*.

Moreover, Washington's Counseling Censorship Law differs materially from the statute involved in *Pickup* and is not, as the State contends, "functionally identical." State Br. at 28. The statute in *Pickup* prohibited only "practices." CAL. BUS. & PROF. CODE § 865(b)(1). Counselors could thus have "discussions about treatment" with clients and make "recommendations to obtain treatment[ ] and expressions of opinions about [sexual orientation change efforts] and homosexuality." *Pickup*, 740 F.3d at 1229. By contrast, Washington's Law prohibits any "*effort*[ ] to change behaviors or gender expressions." WASH. REV. CODE § 18.130.020(4)(a) (emphasis added).

The State wrongly insists that its Law "does nothing to prevent licensed therapists from discussing the pros and cons of [sexual orientation change efforts] with their patients." State Br. at 30 (quoting *Pickup*, 740 F.3d at 1229). Nowhere does the Law list such an exception, and the State does not illuminate how the broadly-worded statutory text—which condemns *any* "effort[ ] to change behaviors or gender expressions"—could be read to provide one. If Tingley were to

praise the utility of counseling towards a gender identity congruent with biology, and encourage a client to research and pursue that option ("the pros"), he could have no confidence that that discussion would not be accused as a violation. The State's assertion to the contrary is baseless. That means Tingley's "First Amendment rights . . . exist only at the sufferance of the" State; he has "no guarantee that the [State] might not tomorrow bring its interpretation more in line with the [Law's] plain language." *N.C. Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 711 (4th Cir. 1999). The statute at issue here is broader in this important respect from that addressed by the *Pickup* court.

D. The State all but concedes that its Law discriminates based on content and viewpoint.

As Tingley demonstrated, Washington's Law not only "singles out particular content"—speech involving "sexual orientation or gender identity," WASH. REV. CODE § 18.130.020(4)(a)—"for differential treatment," *IMDb.com v. Becerra*, 962 F.3d 1111, 1120 (9th Cir. 2020) (cleaned up); it also silences "particular views taken by speakers on [that] subject," *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995); *see* Opening Br. at 31–34. It is therefore "presumptively invalid." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992).

Rather than grapple with these basic and firmly established principles, Washington simply changes the topic and returns to its assertion that its Law does not regulate speech when the State calls

that speech "treatment." State Br. at 45. In doing so, the State all but concedes that if this Court concludes that talking and listening are speech, then the Law suppresses that speech based on content and viewpoint. This Court should therefore treat the Law as "presumptively invalid." *R.A.V.*, 505 U.S. at 382.

III. 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. *Welch* cannot control because a finding concerning the motivations of one state cannot decide the motivations of another.

In reviewing the legislative history and actual operation of Washington's Law, Tingley demonstrated that the Counseling Censorship Law violates the government's "commit[ment] . . . to religious tolerance." *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1731 (2018); *see* Opening Br. at 37–47. Washington nonetheless asks this Court to ignore Tingley's allegations of non-neutrality and treat *Welch v. Brown*, 834 F.3d 1041 (9th Cir. 2016), as dictating rejection of Tingley's free exercise claim.

But *Welch* cannot compel any result here. For the law in *Welch* and Washington's Law have different "historical background[s]." *Masterpiece Cakeshop*, 138 S. Ct. at 1731. As Tingley has pled, the history behind Washington's Law is tainted with anti-religious animus; during the Law's enactment, Washington legislators vented that

animus by making derogatory comments that, among other things, condemned careful counseling conversations as "barbaric." 3-ER-368–70.

It is also true that *Welch* was wrongly decided. The panel there examined the Free Exercise issue only cursorily, accepting without much analysis that California's law was rooted in "the prevention of harm to minors" rather than anti-religious animus. *Welch*, 834 F.3d at 1047. But that defined the law's object at too high a level of generality. As the Supreme Court later clarified in *Fulton*, "the First Amendment demands a more precise analysis." *Fulton v. City of Philadelphia*, 141 S. Ct. 1868, 1881 (2021). The *Welch* court, acting prior to *Fulton*, did not perform that now-required "precise analysis" of animus. Because States rarely broadcast religious animus openly, courts must dig beneath a law's surface to guard against even "subtle" departures from neutrality that clever legislators can mask beneath "facial[ly] neutral[ ]" language and broadly-defined objectives. *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 534 (1993). Here, the facts alleged by Tingley (and reviewed below) evince more than "subtle" departures from neutrality. The cursory analysis by the *Welch* court of the neutrality of a different statute enacted by a different legislature at a different time is simply not relevant, much less controlling.

B. Washington fails to rebut the sufficiency of Tingley's allegations that the law is not neutral.

Tingley's complaint raises more than a "slight suspicion" that Washington's Law "stem[s] from animosity to religion or distrust of its practices." *Masterpiece Cakeshop*, 138 S. Ct. at 1731. Washington offers no persuasive argument why this Court should not, at the very least, "pause for discovery" to "survey meticulously the totality of the evidence, both direct and circumstantial." *New Hope Fam. Servs., Inc. v. Poole*, 966 F.3d 145, 163 (2d Cir. 2020) (cleaned up). Instead, the State insists that its Law is neutral because "the Legislature's primary intent was [not] to target religious practices." State Br. at 62. But the totality of the evidence tells a different story.

To start, Washington enacted its Law knowing that it would almost exclusively prohibit counseling sought "for religious reasons" and provided by those who believe in "Christian faith-based methods." 3-ER-370–71. And "a law is not neutral if its object is to infringe upon or restrict practices because of their religious motivation." *New Hope*, 966 F.3d at 162 (cleaned up).

That the Law *could* also prohibit some counseling sought for secular reasons does not cure its lack of neutrality. Washington contends that, even though the legislature knew that the vast majority of those seeking the now-prohibited counseling did so for religious reasons, a small fraction *might* do so for secular reasons. State Br. at

63. But Washington has the question just backwards. As the Supreme Court made clear in *Lukumi*, a law can implicate "multiple concerns unrelated to religious animosity" and still violate neutrality. *Lukumi*, 508 U.S. at 535. A law does not pass constitutional muster merely because it treats "some comparable secular" practice "as poorly as or even less favorably than the religious exercise at issue." *Tandon v. Newsom*, 141 S. Ct. 1294, 1296 (2021) (per curiam). Regardless of a law's impact on secular activity, courts must assess whether its "adverse impact" on religious exercise is an incidental flaw—or a targeted design. *Lukumi*, 508 U.S. at 535.

And several Washington legislators made clear that the Law was designed to target those with "strong religious beliefs." 3-ER-370–71. Co-sponsoring legislators derided careful counseling conversations like those between Tingley and his clients as efforts to "pray the gay away" and as "barbaric." 3-ER-368–70. One legislator even went so far as to equate these conversations with "torture."[4] These statements are more overtly hostile than more innocuous statements that courts have found to violate neutrality. If telling a cake baker that he cannot do business in a state unless he can "compromise" his religious views raises a slight suspicion that the government has violated neutrality, *Masterpiece*

[4] *Senate Floor Debate*, TVW (Jan. 19, 2018 10:00 AM), https://tvw.org/video/senate-floor-debate-2018011151/?eventID=2018011151.

Cakeshop, 138 S. Ct. at 1729, then so must the legislative comments here, *a fortiori*.

The Law's illusory "religious exemptions" further highlight its anti-religious targeting. As predicted, *see* Opening Br. at 41, the State argues that these so-called exemptions demonstrate the Law's neutrality. The State ignores—and hopes this Court will ignore—that the "exemptions" are a complete sham, "exempting" only "nonlicensed" counselors who were not covered by the terms of the Law anyway. WASH. REV. CODE § 18.130.180; *see* Opening Br. at 42. The illusory "exemption" provision does not negate anti-religious animus.

C. Washington fails to rebut the sufficiency of Tingley's allegations that its Law is not generally applicable.

As demonstrated, Washington's vaguely worded Law would empower government officials to silence speakers like Tingley while permitting speakers that the government agrees with to say virtually the same things. *See* Opening Br. at 44–45, 59–65. Washington offers no response except to insist without explanation that its Law does not invest enforcement authorities with "sole discretion" to determine permissible speech. *Cf. Fulton*, 141 S. Ct. at 1878.

As the history and context reviewed above suggests, these officials will likely exempt secular, "value-neutral" counseling as "exploration" even if it leads a client to "change" his identity or orientation—while punishing counseling, no matter how similar, if it results in "change"

and is informed or motivated by faith-based convictions. The possibility alone "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.* at 1879 (cleaned up).

Further, a law "lacks general applicability if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at 1877. Throughout its brief, Washington insists that the Law reflects its interest in preventing harm to minors. *See, e.g.*, State Br. at 61. Yet the Law explicitly exempts speech that could perpetuate the very types of harms that the State claims the Law combats. As Tingley pled in his complaint, with extensive support from scientific literature, a one-size-fits-all counseling regime that permits only "exploration and development" can produce the psychological harms that Washington says it wants to eliminate. For purposes of the motion to dismiss, the court was required to credit these (detailed and substantiated) allegations but did not. The State asks this Court to repeat that error.

Rather than identifying any inadequacy in Tingley's allegations of "underbreadth," in its brief Washington simply asserts that *Welch* approved this discrepancy. *Welch* did no such thing. There is no sign that the panel in *Welch* was presented with such allegations, nor that it considered and decided any question of underbreadth or "general applicability." The issue is newly presented here.

By suppressing only speech deemed to encourage "change" rather than "development"—speech that Washington does not dispute is overwhelmingly associated with a religious viewpoint—the State betrayed its intent to silence a religiously-motivated viewpoint with which it disagrees. The Law is not generally applicable.

IV. Washington's presumptively invalid Law cannot survive strict scrutiny—or any other level of review.

As Tingley demonstrated, the Law violates both his free-speech and free-exercise rights and therefore must survive strict scrutiny review. Opening Br. at 48. Washington makes no serious effort to argue that it can satisfy its burden under this "most demanding test." *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997). Instead, it cites a single, vacated district court opinion to argue again that Tingley's speech is not speech, and that strict scrutiny does not apply. That argument is without merit. In any case, Washington's Law cannot satisfy even a lesser level of scrutiny.

A. Washington must, but cannot, satisfy strict scrutiny.

Washington cites *Doyle v. Hogan*, 411 F. Supp. 3d 337 (D. Md. 2019), to assert again that Tingley's counseling conversations are conduct, not speech, and that only intermediate scrutiny applies. As reviewed above, this since-vacated decision is a lone outlier that essentially ignored the Supreme Court's holding in *NIFLA*. As Tingley has previously detailed, after *NIFLA*, no other court has accepted the

"conduct-not-speech" labelling, and the Eleventh Circuit has expressly rejected it as inconsistent with *NIFLA*. *Otto*, 981 F.3d at 866; *see* Opening Br. at 24–29. Therefore, strict scrutiny applies.

As applied to Tingley's pure speech, Washington has not demonstrated any legitimate interest in censoring an idea it disagrees with. The State reasserts "broadly formulated interests," such as protecting minors, regulating mental health, and affirming citizens' dignity. *Fulton*, 141 S. Ct. at 1881. But these interests do not give Washington a free-floating power to suppress ideas that it deems "bad." *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374 (2002). Washington instead needed to show that its "recited harms are real, not merely conjectural, and that [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). Given that Tingley's detailed factual allegations must be credited, the State could not possibly carry this burden on a motion to dismiss.

Indeed, in responding to an as-applied challenge under strict scrutiny, the State must—but cannot—demonstrate a compelling interest in enforcing the Law *against Tingley specifically*, rather than merely a general interest. *Fulton*, 141 S. Ct. at 1881. But the State has done nothing more than express a preference in protecting minors from "words" that its legislators found "pernicious," without a shred of evidence that these words cause harm to religiously motivated

individuals pursuing self-chosen goals. 3-ER-369. Tingley has alleged facts to the contrary. *E.g.*, 3-ER-374–97.

And Washington all but concedes that its Law is not narrowly tailored. The State offers no response to the problem that its Law sweeps more broadly than necessary. *See* Opening Br. at 54–59. The legislative history that the State points to shows concern about certain physical practices. *See* 3-ER-368. But that same history also shows that Tingley has never used these practices; in fact, Washington failed to document a single instance where a counselor has in decades. And the history also shows that legislators offered several amendments that would have limited the Law's scope to *actual* abuse. But the Law's co-sponsor made clear that the Law's target was the "use [of] words." 3-ER-369.

B. Washington's Law cannot even survive lower scrutiny.

Though Washington urges this Court to adopt intermediate review, it spends scant time defending its Law under this standard. *See* State Br. at 47–48. For good reason: for many of the same reasons reviewed above, Washington's Law cannot satisfy intermediate scrutiny. For "[e]ven when the Court is not applying strict scrutiny, [it] still require[s] a fit that is not necessarily perfect, but reasonable; that represents not necessarily the single best disposition but one whose scope is in proportion to the interest served." *McCutcheon v. FEC*, 572

U.S. 185, 218 (2014). Even taking the State's highly generalized asserted interest (protecting minors), Washington offers no evidence that silencing the conversations between Tingley and his clients serves that goal. The Law's "scope" far exceeds "the interest served."

Finally, Washington's Law cannot satisfy even rational basis review. While deferential, this review does not give the legislature a complete pass. For instance, when "formulating its judgments," the Washington legislature was nonetheless required to "draw[ ] *reasonable* inferences based on *substantial* evidence." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 195 (1997) (cleaned up). Yet the legislature took evidence about physical practices—practices that Tingley does not employ—and inferred that similar harms might result from mere words. That is not a reasonable inference, let alone one backed by "substantial" evidence. Washington's Law therefore fails even rational basis review.

V. Washington failed to clarify the multiple ambiguities that make its Law vague and violative of the Due Process Clause.

Tingley highlighted numerous ambiguities in the Counseling Censorship Law. Opening Br. at 59–65. Despite Washington's attempted narrowing definitions, the Law remains "impermissibly vague" and thus violates due process. *Hill v. Colorado*, 530 U.S. 703, 732 (2000). Counseling conversations that encourage "exploration and

development"—something the Law expressly permits—could sound indistinguishable from counseling that encourages "change"—something the Law expressly forbids. There is significant overlap between these concepts, but the State does nothing to untangle the knot.

Instead, Washington merely declares that "the law is clear" and prohibits only "[i]nterventions aimed at a fixed outcome that steers a minor into a particular identity or orientation that does not align with their own sense of identity or orientation." State Br. at 55. But this "clarification" is incoherent—and inconsistent with the text of the Law: precisely what Washington seeks to censor is counseling that assists an individual who wants to *change* "their own sense of identity or orientation." If "their own sense of identity or orientation" changes, then that new sense will remain "aligned with" itself (if not with the "old" sense). If it does not change, then there has been no "change."

The State's focus on the word "goal" adds no clarity. State Br. at 54. The Law does not say, and the State does not say, whether it will make these judgments based on the *counselor's* goals, the *client's* goals, or *both*. Nor does it say whether a tacit or implicit goal could create a violation. In the end, the "[d]efinitions of proscribed conduct . . . rest wholly or principally on the subjective viewpoint of a law enforcement officer," and that "run[s] the risk of unconstitutional murkiness." *Edge v. City of Everett*, 929 F.3d 657, 666 (9th Cir. 2019) (cleaned up). As

Tingley has previously demonstrated, Washington's Law thus violates due process. Opening Br. at 59–65.

VI. Given the First Amendment interests at stake, this Court should direct the district court to issue a preliminary injunction on remand.

Tingley demonstrated that he will likely succeed on the merits. Opening Br. at 66. Though the State challenges that likelihood, for all the reasons reviewed above, it fails to persuade that its Law does not at least arguably "threaten[ ]" or "impair[ ]" Tingley's First Amendment rights. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) (plurality op.). And the State does not—indeed cannot—deny that the "loss of [these] First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Id.* So the State instead pivots to its contention that "Tingley faces no imminent threat of enforcement." State Br. at 69. As Tingley noted above, however, the State's own admissions show otherwise. *See* State Br. at 18. Finally, the State's broadly asserted interest in "protecting children and teenagers" does not outweigh Tingley's interest in speaking freely when the State has failed to show that Tingley's speech would cause *any* harm to minors. *See id.* at 69–70.

This Court should therefore instruct the district court to enter a preliminary injunction on remand.

CONCLUSION

Tingley did not, "as the government suggests," surrender his First Amendment rights simply by "[b]eing a member of a regulated profession." *Conant*, 309 F.3d at 637. He does not seek any "special" protection, but instead invokes his fundamental First Amendment right to speak openly and candidly with his clients. *Contra NAAP*, 228 F.3d at 1054. Though the State tries to smother this case with "sheer cloudy vagueness," its relabeling is merely an attempt to mask the fact that it is censoring Tingley's speech. Orwell, *Politics and the English Language*. But the Constitution is clear: the State "cannot regulate [Tingley's] speech by relabeling it." *Otto*, 981 F.3d at 865. Whether by calling Tingley's speech "conduct" or "conversion therapy" or "treatment," the State engages in "a dubious constitutional enterprise" that "is unprincipled and susceptible to manipulation." *Wollschlaeger*, 848 F.3d at 1308–09. At the end of the day, "[w]hen the government restricts professionals from speaking to their clients, it's restricting speech" and nothing else. Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1346 (2005).

Washington has failed to meet its burden to show the necessity of this censorship. This Court should therefore reverse the dismissal of Tingley's case and remand with instructions to enter his requested injunction.

Respectfully submitted,

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By: */s/ Roger G. Brooks*

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CERTIFICATE OF SERVICE

I hereby certify that on February 11, 2022, I electronically filed the foregoing Reply Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system, which will accomplish service on counsel for all parties through the Court's electronic filing system.

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February 11, 2022

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FOR THE NINTH CIRCUIT

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