No. 22-942

In the Supreme Court of the United States

BRIAN TINGLEY,

Petitioner,

v.

ROBERT W. FERGUSON, in his official capacity as Attorney General for State of Washington, et al.,

Respondents.

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

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BRIEF OF *AMICUS CURIAE* CATHOLICVOTE.ORG EDUCATION FUND IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTERESTS OF *AMICUS*[1]

CatholicVote.org Education Fund ("CVEF") is a nonpartisan voter education program devoted to serving the Nation by supporting educational activities that promote an authentic understanding of ordered liberty and the common good. Given its educational mission, CVEF is deeply concerned that *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022) poses a threat to the ability of professionals in any licensed field to speak freely when treating, counseling, representing, or advising their patients and clients. If States are permitted to transform a professional's speech into conduct whenever they impose a licensing requirement, the government will be able to censor specific topics and viewpoints with which it disagrees. Wash. Rev. Code § 18.130.020(4) ("SB 5722") does just that, precluding disfavored speech during counseling sessions between licensed counselors and their minor clients. The Ninth Circuit's analysis vests Washington with the authority to impose content-based restrictions on expression in any professional field. *Tingley v. Ferguson*, 57 F.4th 1072, 1077 (9th Cir. 2023) (O'Scannlain, J., statement respecting the denial of rehearing en banc) (explaining that under the panel's analysis "the First Amendment would not protect legal advice …, education, …, or

[1] Each party received notice of the filing of this *amicus* brief as required by Rule 37.2. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

advertising"). This holding conflicts with *Nat'l Inst. of Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018) as well as decisions from the Third and Eleventh Circuits. *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014), *abrogated in part by NIFLA*, 138 S.Ct. at 2371-72; *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020). CVEF, therefore, comes forward to support the right of all professionals to practice their vocation (and convey their views) in a manner that is consistent with their training, expertise, and (as here) religious faith.

ARGUMENT

This case centers on (what appears to be) an easy and straightforward question: Is professional speech speech? This Court, along with the Third and Eleventh Circuits, has said that the answer is "yes:" "Speech is not unprotected merely because it is uttered by 'professionals.' " *NIFLA*, 138 S.Ct. at 2371; *King*, 767 F.3d at 224; *Otto*, 981 F.3d at 861. Although some types of speech (*e.g.*, commercial speech and expressive conduct) receive somewhat diminished protection and a few types fall within a narrow subset of unprotected speech (*e.g.*, obscenity and fighting words), speech is speech. Accordingly, "this Court has not recognized 'professional speech' as a separate category of speech" subject to a unique set of rules. *NIFLA*, 138 S.Ct. at 2371.

Surprisingly, the Ninth Circuit reached the opposite conclusion, contradicting its sister circuits and *NIFLA*. Relying directly on *Pickup v. Brown*, *Tingley* held that professional speech is non-speech conduct under certain, largely unspecified circumstances. 740 F.3d 1208, 1230 (9th Cir. 2014) ("We further conclude that the First Amendment

does not prevent a state from regulating treatment even when that treatment is performed through speech alone."). *Tingley* upheld SB 5722 even though it imposed a content-based and viewpoint-based restriction on Tingley, preventing him from engaging in talk therapy with his minor clients. The panel neither provided a test for its novel "speech is conduct" rule nor articulated any limiting principles that might cabin that rule. As a result, States in the Ninth Circuit may regulate—and even ban—disfavored professional speech simply by labeling it conduct. Certiorari is required to resolve the circuit split and to ensure that the government cannot sidestep the First Amendment by reclassifying professional speech as professional conduct.

I. SB 5722 imposes a content-based restriction on government-disfavored speech, severely limiting the rights of professionals to speak and the rights of their patients to receive professional advice.

The now-discredited professional speech doctrine viewed professional speech as unique and, therefore, not subject to traditional First Amendment rules. The doctrine defined "professionals" as "individuals who provide personalized services to clients and who are subject to 'a generally applicable licensing and regulatory regime.'" *NIFLA*, 138 S.Ct. at 2371 (quoting *Moore-King v. County of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2014)). "Professional speech" included "any speech by these individuals that is based on '[their] expert knowledge and judgment' or that is 'within the confines of [the] professional relationship.'" *Id.* (citations omitted). In *Pickup*, the Ninth Circuit went farther, holding that

professional speech falls along a continuum, with professional speech on matters of public concern on one end (greatest protection), professional conduct on the other (least protection), and speech "within the confines of a professional relationship" in the middle (diminished protection). *Pickup* took California's conversion therapy ban to be a regulation of conduct that at most had "an incidental effect on speech." 740 F.3d at 1228-29.

In *Tingley*, the Ninth Circuit revisited *Pickup* in the wake of *NIFLA*'s express criticism of the professional speech doctrine. Undeterred, the *Tingley* panel doubled down on the *Pickup* framework, contending that "*NIFLA* abrogated only the 'professional speech' doctrine—the part of *Pickup* in which we determined that speech within the confines of a professional relationship (the 'midpoint' of the continuum) categorically receives lesser protection." 47 F.4th at 1073. *Pickup* "survive[d] *NIFLA*" because *Pickup*'s "holding rest[ed] upon that exception [for the regulation of professional conduct that incidentally burdens speech]." *Id.* at 1075. According to the panel, Washington's ban on conversion therapy (even when conducted exclusively through speech) was constitutional because it regulated only a form of treatment, which was subject to the States' police powers: "States do not lose the power to regulate the safety of medical treatments performed under the authority of a state license merely because those treatments are implemented through speech rather than through scalpel." *Id.* at 1064.

Tingley directly conflicts with *NIFLA* and the protection afforded speakers against content-based and viewpoint-based laws. *Ashcroft v. ACLU*, 535

U.S. 564, 573 (2002) ("[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). SB 5722 contravenes "the usual rule that governmental bodies may not prescribe the form or content of individual expression." *Cohen v. California*, 403 U.S. 15, 24 (1971). Content-based regulations "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). A government regulation of expression "is content based if a law applies to particular speech because of the topic discussed or the idea or message conveyed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). A hallmark of a content-based regulation is that "it require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)).

There is no doubt that SB 5722 "regulates speech on the basis of its content," precluding talk therapy while allowing professionals to convey reinforcing messages about sexual orientation and gender identity. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) ("*HLP*"); *Otto*, 981 F.3d at 863 ("Whether therapy is prohibited depends only on the content of the words used in that therapy, and the ban on that content is because the government disagrees with it."). Tingley "want[s] to speak to [his minor clients], and whether [he] may do so under [SB 5722] depends on what [he] say[s]." *HLP*, 561

U.S. at 27. If Tingley's speech with minor clients involves "efforts to change behaviors or gender expressions, or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same sex," Wash. Rev. Code § 18.130.020(4)(a), "then it is barred" even though it "communicates advice derived from [his] 'specialized knowledge.'" *HLP*, 561 U.S. at 27. Tingley's expression is permitted, however, if it conveys "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." Wash. Rev. Code, § 18.130.020(4)(b). Thus, state-approved messages are allowed, while Tingley's desired message is barred. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 5687 (2011) ("An individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated.") (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984)).

Allowing Tingley to express other statements related to conversion therapy does not cure the constitutional violation. *Otto*, 981 F.3d at 863 ("[T]he constitutional problem posed by speech bans like this one is not mitigated when closely related forms of expression are considered acceptable."); *Pickup*, 740 F.3d at 1217 (O'Scannlain, J., dissenting from the denial of rehearing en banc) ("The reasoning of [*HLP*] specifically forecloses courts from approving a statutory restriction on speech simply because it still permits various and extensive political expression."). While SB 5722 allows Tingley

to "communicat[e] with the public about conversion therapy; express[his] personal views to patients (including minors) about conversion therapy, sexual orientation, or gender identity; … or refer[] minors seeking conversion therapy to" others not covered by SB 5722, it still precludes him from engaging in talk therapy. *Tingley*, 47 F.4th at 1065. Because some topics are permitted while others are not, whether his speech is banned "depend[s] on what is said." *Otto*, 981 F.3d at 861. This is a content-based restriction of speech the government dislikes: "[t]he First Amendment does not protect the right to speak about banned speech; it protects speech itself, no matter how disagreeable that speech might be to the government." *Id.* at 863; *HLP*, 561 U.S. at 25-26 (finding a violation of the First Amendment even though plaintiffs remained able to "say anything they wish on any topic," including the ability to "speak and write freely about the PKK and LTTE, the governments of Turkey and Sri Lanka, human rights, and international law"). Where, as here, "the conduct triggering coverage under the statute consists of communicating a message," First Amendment protections adhere. *Id.*; *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("[N]o official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."); *Turner*, 512 U.S. at 641 (affirming that "[a]t the heart of the First Amendment lies the principle that each person should decide for himself or herself the ideas and beliefs deserving of expression, consideration, and adherence").

Drawing on their training and experience, professionals, such as Tingley, convey specific messages to their patients and clients, exercising their "right as a private speaker to shape [their] expression by speaking on one subject while remaining silent on another." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 574 (1995). Washington disagreed with the message Tingley sought to communicate through talk therapy. And "[t]he message it disfavored is not difficult to identify." *Id.* The State opposed conversion therapy based on its "particular viewpoint about sex, gender, and sexual ethics." *Otto*, 981 F.3d at 864. In its place, Washington codified its own perspective—that "sexual orientation is immutable, but gender is not"—and prevented therapists from engaging in counseling that was inconsistent with the State's view. *Id.* By barring particular viewpoints, Washington skewed the marketplace of ideas, permitting only state-approved speech on the specific topic. The First Amendment prohibits such expressive gerrymandering:

> The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.

Hurley, 515 U.S. at 579; *Barnette*, 319 U.S. at 642 ("But freedom to differ is not limited to things that do not matter much. That would be a mere shadow

of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."); *Otto*, 981 F.3d at 862 ("Forbidding the government from choosing favored and disfavored messages is at the core of the First Amendment's free-speech guarantee.").

Washington remains free to engage in its own expression to promote its preferred messages regarding medical treatments, conversion therapy, and other issues. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (explaining that the government "has the right to speak for itself, … to say what wishes, and to select the views that it wants to express") (cleaned up). But in the realm of "private speech or expression, government regulation may not favor one speaker over another." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Nor can it censor messages it dislikes: "Our cases establish that the State cannot advance some points of view by burdening the expression of others." *Pacific Gas & Electric Co. v. Public Utilities Comm'n of Cal.*, 475 U.S. 1, 20 (1986) (plurality opinion); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978) ("Especially where … the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended."). The way for the government to promote its views on sexual orientation and gender identity (or any other issue) "is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." *Texas v. Johnson*, 491 U.S. 397, 419 (1989).

Unfortunately, Washington takes a different path. By banning talk therapy, the State violates both Tingley's right to speak and the right of his patients to receive desired information. *Sorrell*, 564 U.S. at 578 ("The defect in Vermont's law is made clear by the fact that many listeners find detailing instructive."); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) ("In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.' "). While Washington believes talk therapy is ineffective and harmful to minors, "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975); *Snyder v. Phelps*, 562 U.S. 443, 450 (2011) (protecting speech even though a jury found it "outrageous" and experts testified it "had resulted in severe depression and had exacerbated pre-existing health conditions"). The First Amendment shields speech even when the government seeks to protect children from expression it views as harmful. *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 804-05 (2011) ("Even where the protection of children is the object, the constitutional limits on governmental action apply."). As this Court confirmed in *Erznoznik*, "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." 422 U.S. at 213-14; *Brown*, 564 U.S. at 794-95 (holding that the State's power to protect children "does not include a free-floating power to restrict the ideas to which children may be

exposed"). Otherwise, the government could "shut off discourse solely to protect others from hearing it … effectively empower[ing] a majority to silence dissidents simply as a matter of personal predilections." *Cohen*, 403 U.S. at 21. This Court long ago rejected the view that the Constitution "prescribe[es] limits, and declar[es] that those limits may be passed at pleasure." *Marbury v. Madison*, 5 U.S. 137, 178 (1803). To protect children (or anyone else) through content-based regulations, the government must satisfy heightened scrutiny. *NIFLA*, 138 S.Ct. at 2371.

Furthermore, Washington cannot justify its content-based restriction by invoking "the medical recommendations of expert organizations." *Tingley*, 47 F.4th at 1078. While appeals to authority may be rhetorically powerful, they do not alter the First Amendment analysis. For example, *Casey* upheld Pennsylvania's informed consent law even though the district court had "found that '[t]he informed consent requirements of the [Pennsylvania law] represent a substantial departure from the ordinary medical requirements of informed consent' … and that various provisions of the Pennsylvania law conflicted with the official positions of ACOG and the American Public Health Association." *EMW Women's Surgical Center, P.S.C. v. Beshear*, 920 F.3d 421, 438 (6th Cir. 2019) (citation omitted). Similarly, in *Gonzales v. Carhart*, 550 U.S. 124 (2007) this Court upheld a federal ban on partial-birth abortion "despite the district court's findings that the law was contrary to certain medical-profession views, including that ACOG 'told Congress several times that the procedure should not be banned.' " *Beshear*, 920 F.3d at 438 (citation omitted).

As these cases demonstrate, the views of professional organizations do not determine the scope of constitutionally protected speech. Professionals "have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields." *NIFLA*, 138 S.Ct. at 2374-75. To protect the marketplace of ideas, the Court—not the legislature and not professional organizations—must determine the constitutionality of the regulation at issue. *Id*. at 2375 ("[T]he people lose when the government is the one deciding which ideas should prevail."); *Tingley*, 57 F.4th at 1077 (O'Scannlain, J., dissenting from denial of rehearing en banc) ("But it would make no sense for the First Amendment to protect speech through heightened scrutiny while subjecting legislative determinations of the line between speech and conduct only to rational basis review."). Accordingly, review is needed to determine the appropriate level of scrutiny for content-based regulations of professional speech.

II. *Tingley*'s "speech is conduct" rule conflicts with *NIFLA* and impermissibly empowers governments to regulate disfavored speech just by labeling that speech as conduct.

Tingley confronts a significant problem. Content-based regulations of professional speech run headlong into the First Amendment. *NAACP v. Button*, 371 U.S. 415, 438 (1963) (rejecting Virginia's attempt to ban the litigation related speech of NAACP attorneys through a statute precluding "improper solicitation"); *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 798 (1988) (finding speech compulsions related to professional

fundraising unconstitutional); *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 637 n.7 (1985) (noting that, if communicated outside the commercial speech context, the lawyer's statements would have been "fully protected speech"). This is true even when "[t]he law … may be described as directed at conduct, as the law in *Cohen* was directed at breaches of the peace, but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *HLP*, 561 U.S. at 28. Moreover, *NIFLA* confirmed, "[s]peech is not unprotected merely because it is uttered by 'professionals.' " 138 S.Ct. at 2371-72; *King*, 767 F.3d at 225 ("Given that the Supreme Court had no difficulty characterizing legal counseling as 'speech,' we see no reason here to reach the counter-intuitive conclusion that verbal communications that occur during SOCE counseling are 'conduct.' "); *Otto*, 981 F.3d at 867 ("What the governments call a 'medical procedure' consists—entirely—of words…. 'Speech is speech, and it must be analyzed as such for purposes of the First Amendment.' ") (quoting *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1307 (11th Cir. 2017)).

To avoid subjecting SB 5722's content-based restrictions to strict scrutiny, *Tingley* had three options. First, the panel could show that there is " 'persuasive evidence … of a long (if heretofore unrecognized) tradition' of allowing content-based restrictions on professional speech." *NIFLA*, 138 S.Ct. at 2372. In the alternative, the panel could argue that SB 5722 should be afforded less protection because, second, it "require[s] professionals to disclose factual, noncontroversial

information in their 'commercial speech,' " or, third, it "regulate[s] professional conduct, even though that conduct incidentally involves speech." *Id.*; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) ("[I]t 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.").

The panel did not pursue the second option for obvious reasons—SB 5722 does not regulate commercial speech. Two members of the panel tried—unsuccessfully—to pigeonhole SB 5722 into the first exception. The difficulty was that *NIFLA* previously held there was no tradition of regulating professional speech generally or medical speech in particular. 138 S.Ct. at 2372; *Tingley*, 57 F.4th at 1078-79 (O'Scannlain, J., dissenting from denial of rehearing en banc). In addition, having ruled that talk therapy (consisting entirely of speech) is conduct, the panel members could not turn around and assert that this conduct was actually speech subject to a longstanding, albeit previously unrecognized, tradition of content-based regulations. Speech is speech or speech is conduct; the panel cannot have it both ways.

Not surprisingly, then, *Tingley*'s central argument was that SB 5722 is a regulation of professional conduct that incidentally involves speech. *Tingley*, 47 F.4th at 1073 (adopting *Pickup*'s position that a ban on "conversion therapy treatment … was a regulation of conduct" subject only to "rational basis review"); *Sorrell*, 564 U.S. at 567 ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from

imposing incidental burdens on speech."). To fall within this category of diminished protection, there must be some conduct—other than the act of communication itself—that is the object of the governmental regulation. *Otto*, 981 F.3d at 866 (explaining that "the State punishes speech, not conduct" when "the only conduct which the State [seeks] to punish [is] the fact of communication"). As a result, the threshold question is whether SB 5722 regulates expression or conduct. *King*, 767 F.3d at 224 (recognizing that "the preliminary issue" involving New Jersey's ban on conversion therapy "is whether [the law] has restricted Plaintiffs' speech or … merely regulated their conduct"). Although "drawing the line between speech and conduct can be difficult," this Court "ha[s] long drawn it, and the line is 'long familiar to the bar.' " *NIFLA*, 138 S.Ct. at 2373 (quoting *Stevens*, 559 U.S. at 468) (cleaned up).

Examples of regulations of conduct that incidentally burden speech abound. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (upholding mandatory disclosures as part of obtaining informed consent to a physician's performing an abortion); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component."); *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006) (bans on discrimination in hiring prohibiting a "White Applicants Only" sign); *R.A.V. v. St. Paul*, 505 U.S. 377, 385 (1992) ("an ordinance against outdoor fires" preventing "burning a flag"); *Giboney*, 336 U.S. at 502 (antitrust laws precluding

"agreements in restraint of trade"). In these cases, the government regulated the underlying conduct, not the speech itself.

SB 5722 does the opposite; it regulates professional speech directly—even though the First Amendment precludes such speech-focused regulations. *Hurley* illustrates the point. Although public accommodations laws generally are constitutional when applied to a business's conduct, *Hurley*, 515 U.S. at 572 (noting that on its face the Massachusetts public accommodations law prohibited "the act of discriminating against individuals in the provision of publicly available goods, privileges, and services on the proscribed grounds"), the Court held that such laws must yield to the First Amendment when "the sponsors' speech itself [is taken] to be the public accommodation." *Id*. at 573. Massachusetts could not treat expression as conduct and then claim a broader authority to regulate that expression: "While the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Id*. at 579. The Massachusetts public accommodations law *could not* be "applied in a peculiar way"—to the organizers' expression itself—because "this use of the State's power violates the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id*. at 573.

The same analysis applies to professional speech. *PG&E*, 475 U.S. at 11 (noting that "*all* speech inherently involves choices of what to say and what

to leave unsaid"). That *Hurley* involved a speech compulsion while SB 5722 imposes a speech restriction does not alter the constitutional analysis. *Riley*, 487 U.S. at 796 ("[I]n the context of protected speech, the difference [between compelled speech and compelled silence] is without constitutional significance."). The government generally has no power to compel speech it likes or to censor speech it disfavors given that the point of the First Amendment's "general rule, that the speaker has the right to tailor the speech, … is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Hurley*, 515 U.S. at 573-74. Labeling expression (whether the selection of parade components or talk therapy) as conduct (marching in the street or treatment) does not magically transform speech into conduct. If it did, *Hurley* would have come out the other way. *Wollschlaeger*, 848 F.3d at 1308 (citation omitted) ("[T]he enterprise of labeling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and susceptible to manipulation.").

Instead, Hurley recognized that if the Massachusetts law was permitted to regulate the organizers' expression, "any contingent of protected individuals with a message would have the right to participate in petitioners' speech." *Hurley*, 515 U.S. at 573. Similarly, if SB 5722 is permitted to ban professional speech, state legislatures would have the authority to regulate a professional's speech with her patient based " 'upon a categorical balancing of the value of the speech against its societal costs.' " *Stevens*, 559 U.S. at 470 (citation omitted). That is what Washington did—banned conversion therapy

because its legislature concluded that such therapy was ineffective, disfavored by various professional groups, and harmful to minors. *Tingley*, 47 F.4th at 1064-65.

The problem is that *Stevens* expressly rejected this type of balancing test:

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

559 U.S. at 470. The Washington legislature may view talk therapy as "valueless or unnecessary," but its "ad hoc calculus of costs and benefits" does not determine the scope of First Amendment protection. *Id.* at 471; *Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). Whether Washington disagrees with talk therapy (or any other type of professional speech) "for good reasons, great reasons, or terrible reasons has nothing at all to do with it. All that matters is that a therapist's speech to a minor client is legal or illegal under the ordinances based solely on its content." *Otto*, 981 F.3d at 863.

Tingley approaches talk therapy from a particular professional and religious background; "his Christian views inform his work," and "many of his clients share his religious viewpoints and come to him specifically because he holds himself out as a 'Christian provider[].' " *Tingley*, 47 F.4th at 1065. Drawing on his training and faith, Tingley "help[s] patients make deeply personal decisions, and [his] candor is crucial. If anything, the doctor-patient relationship provides more justification for free speech, not less." *Wollschlaeger*, 848 F.3d at 1328.

Washington disagreed with Tingley so strongly that it prohibited him from speaking. What stops the legislature from doing the same to other professionals? Given that the First Amendment does not protect professional speech under *Tingley*, the answer seems to be "the discretion of the legislature." Why? Because the panel provides no test to determine which speech counts as conduct and under what circumstances. The outer limits of the "speech is conduct" rule are left undefined:

> The panel provides no principles doctrinal basis for its dichotomy; by what criteria do we distinguish between utterances that are truly "speech," on the one hand, and those that are, on the other hand, somehow "treatment" or "conduct"? The panel, contrary to common sense and without legal authority, simply asserts that some spoken words—those prohibited by SB 1172—are not speech.

Pickup, 740 F.3d at 1215-16 (O'Scannlain, J., dissenting from denial of rehearing en banc). If

Tingley is correct, a State can declare disfavored speech to be conduct and then impose a content-based restriction on that speech/conduct.

Tellingly, the panel cites no authority to support giving Washington the authority to declare pure expression to be something that it is not—conduct—and then regulate such "conduct" free from the strictures of the First Amendment. In fact, this Court's precedents cut in the opposite direction. *Riley*, 487 U.S. at 796 ("[S]tate labels cannot be dispositive of [the] degree of First Amendment protection."); *Button*, 371 U.S. at 439 (explaining that "a State may not, under the guise of prohibiting professional misconduct, ignore [First Amendment] rights"); *Cohen*, 403 U.S. at 18 (upholding an individual's right to wear a jacket displaying offensive words because "[t]he only 'conduct' which the State sought to punish is the fact of communication," which meant that the "conviction rest[ed] solely upon 'speech' "); *Telescope Media Group v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019) ("Speech is not conduct just because the government says it is."). And they do so for good reason—the dangers to free speech are the same whether the government is allowed to regulate professional speech or professional "conduct" that consists in communicating a message. *Johnson*, 491 U.S. at 416 ("The State's argument cannot depend here on the distinction between written or spoken words and nonverbal conduct. That distinction, we have shown, is of no moment where the nonverbal conduct is expressive, as it is here, and where the regulation of that conduct is related to expression, as it is here.").

Unmoored from the First Amendment, the scope of *Tingley*'s rule is alarming—"cover[ing] a wide array of individuals—doctors, lawyers, nurses,

physical therapists, truck drivers, bartenders, barbers, and many others." *NIFLA*, 138 S.Ct. at 2375. Attorneys, teachers, social workers, physician assistants, registered nurses, therapists, and other licensed professionals counsel clients, treat patients, and teach through various speech acts. Protesting, debating, and meeting to discuss books are other forms of expression that the government might classify as conduct under the Ninth Circuit's analysis. *Pickup*, 740 F.3d at 1221 n.10 (O'Scannlain, J., dissenting from rehearing en banc) ("If a state may freely regulate speech uttered by professionals in the course of their practice without implicating the First Amendment, then targeting disfavored moral and political expression may only be a matter of creative legislative draftsmanship."). Having the authority to regulate the act of communication itself, the government could "easily tell architects that they cannot propose buildings in the style of I.M. Pei, or general contractors that they cannot suggest the use of cheaper foreign steel in construction projects, or accountants that they cannot discuss legal tax avoidance techniques, and so on and so on." *Wollschlaeger*, 848 F.3d at 1311.

A recent example from the legal field further illustrates how *Tingley* jeopardizes professional speech. In 2016, the American Bar Association proposed Model Rule 8.4(g). Under the proposed Rule:

> It is professional misconduct for a lawyer to: … (g) Engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity,

> marital status or socioeconomic status in conduct related to the practice of law.... This paragraph does not preclude legitimate advice or advocacy consistent with these rules.

ABA, Model Rules of Professional Conduct, Rule 8.4 (Aug. 2016) ("Rule 8.4(g)") (available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/). While the Rule's text referred only to conduct, Comment 3 revealed that the Rule also operated as a speech code, regulating written and oral expression:

> Discrimination and harassment by lawyers in violation of paragraph (g) … includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.

ABA, Model Rules of Professional Conduct, Rule 8.4, Comments (Aug. 2016) (available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/comment_on_rule_8_4/). The purpose of the Rule was to foster a "cultural shift" in views on discrimination and harassment: "There is a need for a cultural shift in understanding the inherent integrity of people regardless of their race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation,

marital status, or disability, to be captured in the rules of professional conduct." December 22, 2015 Memorandum, Standing Committee on Ethics and Professional Responsibility (available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.pdf). To bring about this "cultural shift," the ABA sought to regulate both "physical conduct" and "verbal conduct."

Among other problems, Model Rule 8.4(g) conflated speech and conduct in the same way as *Tingley*. Discriminatory and harassing conduct included speech with which the ABA disagreed. By labeling the disfavored speech as "verbal conduct," the ABA attempted to move the Rule outside the protection of the First Amendment. Consistent with *Tingley*, the ABA's "speech is conduct" rule had broad scope, applying to all "[c]onduct related to the practice of law[, which] includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law." Rule 8.4, Comment 4. Transforming speech into conduct, Rule 8.4(g) sought to codify viewpoint-based discrimination in relation to the practice of law. Speech that did not "manifest bias or prejudice" was permissible, and "[l]awyers may engage in conduct undertaken to promote diversity and inclusion without violating this rule…." Rule 8.4(g). As Professor Rotunda aptly put the point, "[t]he ABA rule is not about forbidding discrimination based on sex or marital status; it is about punishing those who say or do things that do not support the ABA's particular view of sex discrimination or marriage." Ronald D. Rotunda, Heritage Foundation Legal Memorandum (No. 191), "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' but not Diversity of Thought"

(Oct. 6, 2016) (available at http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf). If *Tingley* stands, States could adopt Model Rule 8.4(g) and silence lawyers who hold views that interfere with the ABA's "cultural shift."

CONCLUSION

The object of SB 5722 "is simply to require [professionals] to modify the content of their expression to whatever extent" the legislature may want, thereby promoting "messages of [its] own." *Hurley*, 515 U.S. at 578. Given that SB 5722 prohibits speech based on content and viewpoint, "this object is merely to allow exactly what the general rule of speaker's autonomy forbids"—governmental control over the content of expression on disputed and controversial topics. *Id*. This Court should grant certiorari, therefore, not because of "any particular view about [Tingley's] message," but because of "the Nation's commitment to protect freedom of speech," including the speech of professionals. *Id*. at 581.

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