No. 22-942

In The
# Supreme Court of the United States

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BRIAN TINGLEY,

*Petitioner,*

v.

ROBERT W. FERGUSON, in his official capacity as Attorney General for State of Washington; UMAIR A. SHAH, in his official capacity as Secretary of Health for State of Washington; and SASHA DE LEON, in her official capacity as Assistant Secretary of the Health Systems Quality Assurance Division of the Washington State Department of Health,

*Respondents.*

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**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit**

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**BRIEF OF IDAHO AND 11 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF PETITIONER**

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## INTERESTS OF AMICI CURIAE[1]

Laws censoring the speech of Americans through the arms of State regulating agencies are growing in popularity across the Union. Feeling unchecked and emboldened, many States are targeting disfavored messages and outright banning them, bullying citizens with threats of criminal penalties and licensure revocation. Washington, like nineteen other States and the District of Columbia, disapproves of therapists who counsel patients that their biology should be embraced and bans therapists from speaking that now-disfavored message.

*Amici* States are home to many Americans who are, or will soon be, affected by these censorship laws. Their citizens border the censoring States and cannot speak or receive certain messages in those States. *Amici* States have a compelling interest in protecting the First Amendment rights of their citizens.

*Amici* State legislatures and regulating authorities also regulate professionals themselves. Guidance in this important area will benefit these bodies as they consider regulations that impact the First Amendment rights of their citizens.

The panel opinion is now the controlling law in federal courts for *Amici* States within the Ninth Circuit, like Idaho and Montana, as well as the numerous

[1] *Amici* submit this brief pursuant to Sup. Ct. R. 37.2. *Amici* provided all counsel of record timely notice of the State of Idaho's intent to file the brief.

therapists who believe as Tingley within those States. Correcting it will ensure that First Amendment rights in the Ninth Circuit are no less protected than in other circuits.

The Ninth Circuit opinion has already led other courts astray. A district court in the Tenth Circuit, for example, recently relied on *Tingley* in rejecting a First Amendment challenge to Colorado's materially similar censorship law. *See Chiles v. Salazar*, 2022 WL 17770837, at *10 (D. Colo. Dec. 19, 2022). Thus, the present decision not only creates circuit splits, as Petitioner has detailed, but perpetuates a plainly erroneous view of the First Amendment. Certiorari is warranted.

## SUMMARY OF THE ARGUMENT

Twenty States and the District of Columbia censor therapists from speaking disfavored messages to their patients. *Tingley v. Ferguson*, 47 F.4th 1055, 1063 (9th Cir. 2022). Circuits are split on whether a State may do this consistent with the First Amendment. The Third, Ninth, and Eleventh Circuits are squarely split on whether States may ban so-called "conversion therapy." The panel below held that "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." *Tingley*, 47 F.4th at 1064. The Eleventh Circuit, on the other hand, has

struck down such speech restrictions because they "sanction speech directly, not incidentally—the only 'conduct' at issue is speech." *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 866 (11th Cir. 2020). The Third Circuit likewise rejected "the argument that verbal communications become 'conduct' when they are used to deliver professional services." *King v. Governor of New Jersey*, 767 F.3d 216, 228 (3d Cir. 2014), *abrogated in part by Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361 (2018).

Once again, a Ninth Circuit case comes to this Court after knocking down the First Amendment's bulwark against content-based state laws restricting speech. The panel below held that Washington's law banning therapists from talking to their patients "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), poses no First Amendment concern. *Tingley*, 47 F.4th at 1072, 1079. As both Judge O'Scannlain and the petition for certiorari detail, the panel's decision is dangerously wrong. It opens the door for "the absurd implication that any speech-burdening regulation which can be characterized as an exercise of the police power is exempt from First Amendment scrutiny." *Tingley v. Ferguson*, 57 F.4th 1072, 1080 (9th Cir. 2023) (O'Scannlain, J., dissenting from denial of rehearing en banc). Under the Ninth Circuit's view, Washington's censorship law triggers only the lowest level of First Amendment scrutiny. Its low view of the freedom of speech is wrong.

*First*, free citizens don't need to choose between making a living in a licensed profession and retaining their right to speak freely. The First Amendment protects Americans from such fundamental compromises. Robust free speech also ensures that professions remain guided by truth rather than dogma. The First Amendment guards the medical field no less than the political arena.

*Second*, citizens have a right to hear and receive information. Censorship not only violates a speaker's right to deliver a message, but the citizenry's right to hear it. This First Amendment right to receive information is of great importance in the medical field, where "information can save lives." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). And the First Amendment further tolerates no government-declared orthodoxy that halts the scientific endeavor. *See Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967).

And *third*, a government cannot regulate speech by calling it conduct. Sometimes speech is inextricably caught up in lawfully regulated professional conduct, which this Court has acknowledged that States may regulate even if it "incidentally involves speech." *NIFLA*, 138 S. Ct. at 2372. But such regulation is only permissible where its object is the conduct, not the speech. In reaching that conduct, some speech may of necessity be burdened, but the law cannot target speech directly.

The Ninth Circuit's opinion paves the way for undermining foundational rights enshrined in the First Amendment. Contrary to those foundational guarantees, the Ninth Circuit says that states may "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." *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). But of course, no star is more "fixed" in "our constitutional constellation" than that State officials may ***not*** do that. The panel decision below threatens important First Amendment rights, and so the Court should grant certiorari and reverse.

## ARGUMENT

### I. The Freedoms Recognized by the First Amendment Protect Licensed Professionals from State-Imposed Orthodoxy.

Licensed professionals do not give up their First Amendment rights by entering a regulated field. That proposition shouldn't be controversial under this Court's First Amendment jurisprudence. But it is in lower courts. Circuits are splitting with each other and even internally over the protections the First Amendment offers to licensed professionals. *See Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022); *Del Castillo v. Sec'y, Fla. Dep't of Health*, 26 F.4th 1214, 1225 (11th Cir.), *cert. denied sub nom., Heather Kokesch Del Castillo v. Ladapo*, 143 S. Ct. 486 (2022); *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854 (11th Cir. 2020); *King v.*

*Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014). The effect is a continual erosion of this Court's holding in *NIFLA*.

Laws like Washington's that "invade[] the sphere of intellect and spirit" are anathema to the First Amendment. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). A government, including a state government exercising police power, "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (citation omitted). The people have wisely refused to give government the power of censorship. *Id.* They've instead created a "market for ideas" where each man sifts, judges, and decides for himself what is true. *Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991).

No other approach respects the "individual dignity and choice upon which our political system rests." *Id.* at 449 (citation omitted). The right memorialized in the First Amendment is a reminder to government that Americans are citizens—not subjects—who are "free to develop their faculties." *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). "[T]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984). Over time, this Court has embraced the conviction "that the best test of truth is the power of the thought to get itself accepted in the competition of

the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

The Ninth Circuit gave no force to these core constitutional principles. It carved out "a First-Amendment-free zone," *Tingley v. Ferguson*, 57 F.4th 1072, 1074 (9th Cir. 2023) (O'Scannlain, J., dissenting from denial of rehearing en banc), by relying on "a long (if heretofore unrecognized) tradition of regulation governing the practice of those who provide health care within state borders." *Tingley*, 47 F.4th at 1080. So it cleared the way for the State to ban Tingley speaking certain messages, demagogically likening Tingley's message to "torture." *Id.* at 1083 n.3. The panel's comparison is troubling on its own—the First Amendment's very purpose is to protect speech from being treated like physical assault. Tortured better describes the panel's historical analysis. There just is no history of muzzling medical professionals in the name of regulation—not in the United States at least.

To the contrary, Washington's licensing regulation springs from the same root the First Amendment cut off. It censors speech and declares what shall be orthodox just like Parliament's Licensing Order of 1643 did. John Milton's opposition to the 1643 Licensing Order in *Areopagitica* provides a timeless response to Washington's licensing order: "that if it come to prohibiting, there is not ought more likely to be prohibited then truth it self; whose first appearance to our eyes blear'd and dimm'd with prejudice and custom, is more unsightly and unplausible then many errors." John Milton, *Areopagitica; A Speech of Mr. John Milton for*

*the Liberty of Unlicensed Printing, To the Parliament of England* (1644), DARTMOUTH COLLEGE: THE JOHN MILTON READING ROOM, Areopagitica: Text (dartmouth.edu) (last visited April 24, 2023).

The Framers were well aware of Milton's opposition to these measures. *See* Harrop A. Freeman, *A Remonstrance for Conscience*, 106 U. PA. L. REV. 806, 815 (1958) ("Perhaps no two writers in our civilization have had more influence on American constitutional thought than John Locke [and John Milton]."); David Cole, *Agon at Agora: Creative Misreadings in the First Amendment Tradition*, 95 YALE L.J. 857, 875-78 (1986) (tracing the First Amendment's "philosophical origins" to John Milton, amongst others).[2] Those principles supported the First Amendment creed that the "liberty to know, to utter, and to argue freely according to conscience [is] above all liberties." Milton, *Areopagitica*, *supra*.

Censoring talking does not protect people; it does not preserve truth, and it does not advance knowledge. One reason is that no one—and government in particular—is fit to censor speech. Believing otherwise confers upon government bureaucrats, "above all others in the Land, the grace of infallibility, and uncorruptednesse[.]" *Id.* Another reason is that truth is the only worthy foe for falsehood: "Let her and Falshood grapple; who ever knew Truth put to the wors, in a free and

[2] A copy of Milton's *Paradise Lost* is the only book known to bear both James Madison's and Thomas Jefferson's signatures, more evidence of his influence on the founding generation.

open encounter. Her confuting is the best and surest suppressing." *Id.* State censorship, by contrast, will lead only to a "fail[ure] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *NIFLA*, 138 S. Ct. at 2374 (internal quotation marks and citation omitted).

Washington's licensing regime not only attempts to resurrect the very object of the First Amendment's prohibition, but it also mirrors more recent authoritarian licensing. In *NIFLA*, this Court recited several examples of totalitarian governments "manipulat[ing] the content of doctor-patient discourse." *NIFLA*, 138 S. Ct. at 2374. The Soviet Union ordered doctors to withhold information from patients to fast-track construction projects; the Third Reich commanded physician fealty to state ideology above patient wellbeing; and Romanian Communists prohibited doctors from providing their patients with information about birth control to increase the country's birth rate. *Id.* The goal in each of these instances ultimately was "to increase state power and suppress minorities." *Id.* That is the very same danger presented by Washington's licensing regime.

This Court has recognized that the ability of medical professionals to speak freely is especially important. In the "fields of medicine and public health," "information can save lives." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). So this Court has been quick to reject content-based regulations like Washington's that "seek[ ] not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information."

*NIFLA*, 138 S. Ct. at 2374 (citation omitted). Such laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163 (citation omitted).

Washington's censorship also taints science with politics. Free speech protects professional fields like medicine from the political pressures that often stifle rather than advance the scientific endeavor. That has been the case for treating patients with gender dysphoria. Contrary to the dogma embedded in Washington's law, it is far from settled whether medical professionals should offer a one-way treatment option and encourage minors to "transition" when they present with gender dysphoria. *See*, *e.g.*, NHS Foundation Trust, *Referrals to the Gender Identity Development Service (GIDS) Level Off in 2018–19* (June 28, 2019) ("[T]here is no single pathway for young people . . . and many elements need to be taken into account in decisions about which path may be best for them."); Christina Buttons, *Finland's Leading Gender Dysphoria Expert Says 4 Out of 5 Children Grow Out of Gender Confusion*, DAILY WIRE (Feb. 6, 2023) (summarizing multiple studies and concluding that "four out of five children will grow out of their gender confusion"); Fla. Dep't of Health, *Treatment of Gender Dysphoria for Children and Adolescents* (Apr. 20, 2022) (finding that an affirmation approach has "potential for long-term, irreversible effects" and "lack[s] of conclusive evidence").

This Court has definitively rejected treating "professional speech" as a separate category of speech, whether expressly or by implication. *NIFLA*, 138 S. Ct. at 2371. "Speech is not unprotected merely because it is uttered by 'professionals.'" *Id.* at 2371-72. Yet that is the very effect of Washington's law. What no one disputes could be taught at the lectern is at the same time banned from the therapist's couch. *Keyishian v. Bd. of Regents of Univ. of N.Y.*, 385 U.S. 589, 603 (1967) (The First Amendment "does not tolerate laws that cast a pall of orthodoxy over the classroom."). Permitting Tingley's methods in the classroom but not a clinician's office is a mere relabeling. But government "cannot nullify the First Amendment's protections for speech by playing this labeling game." *Pickup v. Brown*, 740 F.3d 1208, 1218 (9th Cir. 2014), *abrogated by NIFLA*, 138 S. Ct. 2361 (2018) (O'Scannlain, J., dissenting from denial of rehearing en banc).

Washington's censorship regime has no place in our constitutional order. It strikes at the heart of the First Amendment, and between the two, it must fall. Certiorari is warranted.

## II. The Public has a First Amendment Right to Hear and Receive Tingley's Message.

Washington's law also unconstitutionally deprives others from hearing Tingley's message. As this Court has recognized, there is "a First Amendment right to receive information and ideas, and that freedom of speech necessarily protects the right to receive."

*Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 756-57 (1976) (internal quotation marks and citation omitted).

Unlike Washington's censorship, the First Amendment respects "individual dignity and choice." *Cohen v. California*, 403 U.S. 15, 24 (1971). "It is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity." *Id.* Our constitutional order respects the individual capacity to choose. Washington's paternalism, like the objects of Milton's scorn, is a "reproach" to the common man, "censur[ing] them for a giddy, vitious, and ungrounded people; in such a sick and weak estate of faith and discretion, as to be able to take nothing down but through the pipe of a licencer." Milton, *Areopagitica*, *supra*. The First Amendment is grounded in a decidedly different view of citizens.

Nor can Washington justify its censorship in the name of protecting minors. First, purportedly harmful speech is still protected speech. *Snyder v. Phelps*, 562 U.S. 443, 450 (2011) (holding that First Amendment protects speech which experts testified "had resulted in severe depression and had exacerbated pre-existing health conditions"). Second, a law narrowly tailored to require informed consent would accomplish any legitimate state purpose. But Washington's ban isn't concerned with informed consent—its aim is state-conformed counseling. The Ninth Circuit questioned a

minor's ability to provide informed consent, but the Ninth Circuit's real suspicion seems to be with parents. *Tingley*, 47 F.4th at 1084 (noting the "difficulties" of assessing "whether a minor is consenting, without coercion," or whether a minor is consenting "because their parents want them to have conversion therapy"). Parents, however, have always been deemed fit to consent to medical decisions on behalf of their children. Indeed, the right of "parents in the care, custody, and control of their children . . . is perhaps the oldest of the fundamental liberty interests recognized by this Court." *Troxel v. Granville*, 530 U.S. 57, 65 (2000). Denying "conversion therapy" to minors in the face of parental consent intrudes on this fundamental liberty.

Washington's law denies both minors and their parents the right to receive information, and it denies parents the right to care for their children. The denial undermines two fundamental constitutional liberties. *Red Lion Broad. Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) ("It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences."); *Wisconsin v. Yoder*, 406 U.S. 205, 232 (1972) ("The history and culture of Western civilization reflect a strong tradition of parental concern for the nurture and upbringing of their children. This primary role of the parents in the upbringing of their children is now established beyond debate as an enduring American tradition."). This Court should grant certiorari and correct this grave error.

## III. The Line Between Speech and Conduct Must be Vigilantly Guarded to Preserve the Freedom of Speech.

The Ninth Circuit breezed past the constitutional guardrails above by treating Tingley's speech as conduct. *Tingley*, 47 F.4th at 1079. But the purported speech–conduct distinction it drew will mislead lower courts and undermine *NIFLA*'s holding. It warrants swift correction.

In *NIFLA*, this Court recognized that "States may regulate professional conduct, even though that conduct incidentally involves speech." *NIFLA*, 138 S. Ct. at 2372. But this Court was quick to warn that States may ***not*** regulate speech "under the guise of prohibiting professional misconduct." *Id.* (citing *NAACP v. Button*, 371 U.S. 415, 439 (1963)). Washington's law is a textbook example of disguising speech regulation as conduct regulation.

The Ninth Circuit failed to draw any "line between speech and conduct." *Cf. NIFLA*, 138 S. Ct. at 2373. Drawing that line "can be difficult," but "this Court's precedents have long drawn it." *Id.* Tingley's counseling, which consists of therapeutic speech, cannot fall on the conduct side of the line. *Tingley*, 57 F.4th at 1075 ("*NIFLA* further clarifies that *Pickup*'s oxymoronic characterization of therapeutic speech as non-speech conduct was incorrect."). At a minimum, courts must ensure that laws burdening speech at least regulate some conduct and not pure speech. *NIFLA*, 138 S. Ct. at 2373.

Washington's ban impermissibly burdens speech because regulable conduct is not its object. Contrast the ban with laws that require doctors to provide informed consent. Yes, those laws reach speech, but they do so only in service to regulating the procedure itself. *Id*. ("[T]he requirement that a doctor obtain informed consent to perform an operation is 'firmly entrenched in American tort law.'"); *see also* Paula Berg, *Toward A First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. Rev. 201, 206-07 (1994) ("The practical objective of a First Amendment theory of doctor-patient speech therefore must be to aid courts in distinguishing between regulations that encourage the disclosure of information necessary for rational, autonomous medical choices, and those that impose official dogma upon medical choices."). In other words, a law that burdens speech must be a necessary means of regulating conduct subject to a state's police power. Speech itself is not a proper object of state police power. "It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (citation omitted). But that is what Washington's law does.

Washington's ban "target[s] speech based on its communicative content." *Reed*, 576 U.S. at 163. It outlaws speech that affirms biological conformity but permits speech that affirms biological disunity. It is a "content-based law" and thus "presumptively unconstitutional and may be justified only if the government

proves that they are narrowly tailored to serve compelling state interests." *Id.* Certiorari should be granted to correct the Ninth Circuit's error here as well as clarify the test for conduct-based regulations.

## CONCLUSION

For the reasons stated, this Court should grant certiorari and reverse the decision below.

Respectfully Submitted,

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