No. 22-942

IN THE

Supreme Court of the United States

BRIAN TINGLEY,

Petitioner,

v.

ROBERT W. FERGUSON,
ATTORNEY GENERAL OF WASHINGTON, ET AL.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF OF *AMICUS CURIAE* HEARTBEAT INTERNATIONAL IN SUPPORT OF PETITIONER

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April 27, 2023

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INTEREST OF *AMICUS CURIAE*[1]

Heartbeat International, Inc. is a § 501(c)(3) non-profit, interdenominational Christian organization whose mission is to support the pro-life cause through an effective network of affiliated pregnancy resource centers. Heartbeat serves approximately 3,030 pro-life centers, maternity homes, and nonprofit adoption agencies in over 79 countries, including more than 1,857 in the United States—making Heartbeat the world's largest such affiliate network.

Heartbeat is concerned with recent state efforts—like the one here—to restrict professional speech merely because it is adjacent to medical practice. If states are allowed to relabel speech as professional conduct and restrict it on that basis, states will predictably aim similar laws at pregnancy resource centers. Such laws are likely to force pregnancy resource centers to dilute their life-affirming message, or otherwise "alter[] the content of [their] speech." *Nat'l Inst. of Fam. and Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371 (2018) (cleaned up). Heartbeat thus has an interest in this important case.

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[1] Pursuant to this Court's Rule 37.6, counsel for *amicus curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amicus* curiae or its counsel has made a monetary contribution to the preparation or submission of this brief. Parties received timely notice of the intent to file this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

This Court has made clear that "States cannot choose the protection that speech receives under the First Amendment." *Nat'l Inst. of Fam. and Life Advocs. v. Becerra* (*NIFLA*), 138 S. Ct. 2361, 2375 (2018). Yet that is precisely what the state of Washington has done here. Washington enacted a law banning licensed mental health care providers from performing so-called "conversion therapy" on minors. App. 7a-10a. This ban bars mental health care providers like Petitioner Brian Tingley from engaging in talk therapy with his clients if he does not provide the "gender-affirming" perspective the state requires.

To get around the First Amendment and this Court's decision in *NIFLA*, Washington law re-classifies Tingley's speech as conduct and regulates it as such. Thus the law regulates—in fact, bans altogether—an activity that consists of nothing more than conversation. And it does so simply by "characteriz[ing] [] therapeutic speech as non-speech conduct." App. 75a (O'Scannlain, J.). Notwithstanding *NIFLA* and the First Amendment, however, the court below held that the state had equal power to regulate "treatments ... implemented through speech" and "through scalpel." App. 5a.

If allowed to stand, that decision will undermine *NIFLA*'s rejection of states' attempt to censor speech "under the guise of" regulating professional conduct. *NIFLA*, 138 S. Ct. at 2373. And the speech of pregnancy resource centers—frequent targets of anti-speech regulations—will be burdened most.

Pregnancy resource centers like Heartbeat International's affiliates exist to offer pregnant women critical resources. Heartbeat believes that no woman should feel so alone or hopeless that she turns to abortion in the mistaken belief that it is her only choice. Heartbeat seeks to empower pregnant women with such support and resources that they are able to thrive while also giving life to their unborn children. Indeed, Heartbeat's vision is a "world where every new life is welcomed and children are nurtured within strong families, according to God's Plan, so that abortion is unthinkable." Heartbeat's entire ministry is built on the ability to speak to pregnant women in need. And laws (like the one here) that restrict what speech professionals can and cannot utter threaten the ability to carry out that important ministry.

Upholding laws that recast speech as conduct—like the law at issue here—is especially concerning at a time when states are weaponizing laws against disfavored parties. Following this Court's opinion in *Dobbs v. Jackson Women's Health Organization*, 142 S. Ct. 2228 (2022), pro-abortion extremists have targeted pregnancy resource centers with threats and acts of violence. And politicians across the country are introducing laws that "harass caring people that simply want to help women make a different choice than abortion." Jor-El Godsey, *By Accusing Pregnancy Centers Of False Advertising, Pro-Abortion Politicians Prove They Can't Handle The Truth*, The Federalist (Feb. 20, 2023), bit.ly/3KS4161. If this Court allows states to relabel speech as conduct merely because it takes place in a professional setting, states will

continue to weaponize those laws against pregnancy resource centers.

The Court should grant the petition and reverse the decision below.

ARGUMENT

I. Allowing states to restrict disfavored speech by recasting it as conduct will have a disproportionate effect on pregnancy resource centers.

The decision below disregards the principle that "States cannot choose the protection that speech receives under the First Amendment." *NIFLA*, 138 S. Ct. at 2375. If they could, it "would give [states] a powerful tool to impose 'invidious discrimination of disfavored subjects.'" *Id.* Moreover, while regulation of *actual* conduct may evade strict scrutiny under the First Amendment, *see United States v. O'Brien*, 391 U.S. 367, 376 (1968), states cannot restrict disfavored speech even if they categorize such speech as conduct, *see Holder v. Humanitarian L. Project*, 561 U.S. 1, 27-28 (2010). Yet by upholding—under rational-basis review—a Washington state law that re-classifies as conduct the speech of a medical professional (unrelated to any other procedure) and regulates it as such, the decision below disregards this principle, too.

If allowed to stand, the decision below will undermine *NIFLA*'s rejection of states' attempt to regulate speech "under the guise of" regulating professional conduct. *NIFLA*, 138 S. Ct. at 2373; *NAACP v. Button*, 371 U.S. 415, 439 (1963). And the speech of pregnancy resource centers—frequent

targets of anti-speech regulations—will be burdened most.

A. *NIFLA* rejects attempts to regulate speech under the guise of regulating conduct.

"[T]he First Amendment cannot be evaded by regulating speech 'under the guise' of regulating conduct." App. 76a (O'Scannlain, J., respecting the denial of rehearing en banc) (quoting *Button*, 371 U.S. at 439). This Court recently reaffirmed this principle in *NIFLA*. 138 S. Ct. at 2373. And *NIFLA* governs here.

While *NIFLA* recognized that speech and conduct are distinct, 138 S. Ct. at 2373, this Court definitively rejected re-classifying speech as professional conduct because it takes place in a professional context. *Id.* at 2371-72 ("Speech is not unprotected merely because it is uttered by 'professionals.'"); *see also Humanitarian L. Project*, 561 U.S. at 27-28; *Button*, 371 U.S. at 438-39. Instead, regulations that burden speech in a professional context can only avoid strict scrutiny if the "restrictions" are "directed at commerce or conduct" and the burden on speech remains "incidental." *NIFLA*, 138 S. Ct. at 2373.

Thus in the medical-professional context, "the First Amendment recognizes the obvious difference" between "'treatments ... implemented through speech' and those implemented 'through scalpel.'" App. 75a (O'Scannlain, J.). Namely, it "protects *therapeutic speech* in a way it does not protect *physical medical procedures*." *Id.* For example, *NIFLA* explained that an informed-consent requirement is permissible in the

medical context because it "regulate[s] speech only 'as part of the *practice* of medicine,'" and because such a requirement is "'firmly entrenched in American tort law'" as a condition of an "'operation'" (i.e., non-speech conduct) that would otherwise be "'an assault.'" 138 S. Ct. at 2373.

By contrast, laws regulating a medical professional's speech "regardless of whether a medical procedure is ever sought, offered, or performed" receive full First Amendment scrutiny. *Id*. at 2373-74. Such laws are "not tied to a procedure at all." *Id.* at 2373. Instead, they "regulat[e] speech as speech." *Id.* at 2374. In other words, "[e]specially after *NIFLA*, ... simply labeling therapeutic speech as 'treatment' cannot turn [speech] into non-speech conduct." App. 79a (O'Scannlain, J.).

Here, even though the state targets and regulates "speech as speech," the Ninth Circuit upheld the law. Washington bans licensed mental health care providers from performing so-called "conversion therapy" on minors. App. 7a-10a. This ban bars mental health care providers like Petitioner from providing "conversion therapy" even wholly through speech—i.e., without prescribing drugs, performing surgeries, or providing other interventions. The law prohibits an activity that consists of nothing more than conversation. And it does so through an "oxymoronic characterization of therapeutic speech as non-speech conduct." App. 75a (O'Scannlain, J.). Notwithstanding *NIFLA* and the First Amendment, the court below held that the state had equal power to regulate "treatments ... implemented through speech" and "through scalpel." App. 5a.

B. Laws restricting what speech professionals can and cannot say will especially burden pregnancy centers.

Pregnancy resource centers exist to offer pregnant women critical resources. Heartbeat International believes that no woman should feel so alone or hopeless that she turns to abortion, believing it to be her only choice. Its affiliates share resources on parental education, maternity homes, and adoption; they offer pregnant women resources like baby formula, diapers, clothing; and they provide other life-affirming services. Some affiliates also provide ultrasounds and STD/STI testing and/or treatment. Heartbeat affiliates share these resources by informing women of their options regarding their pregnancy.

In so doing, Heartbeat promotes its own life-saving mission: to "reach and rescue as many lives as possible, around the world, through an effective network of life-affirming pregnancy help." *About Us*, Heartbeat Int'l (Apr. 25, 4:15 PM), bit.ly/41Lx8it. Ultimately, Heartbeat seeks to empower pregnant women with such support and resources that they are able to thrive while also giving life to their unborn children. Indeed, Heartbeat's vision is a "world where every new life is welcomed and children are nurtured within strong families, according to God's Plan, so that abortion is unthinkable." *Id.* Indeed, Heartbeat's entire ministry is built on the ability to speak to pregnant women in need. This is plainly speech. And laws (like the one here) that restrict what speech professionals can and cannot say threaten the ability to carry out that important ministry.

The state cannot limit this speech just because it is adjacent to what the state deems to be medical practice. *See NIFLA*, 138 S. Ct. at 2373, 2375. If states may relabel speech as professional conduct and restrict it on that basis, they will not stop at restricting "conversion therapy." Instead, states will predictably aim similar laws at pregnancy resource centers. *See, e.g.*, *id.* at 2368-70 (recounting extensive history of California laws targeting centers that offer free pregnancy options, counseling, and other services).

Such laws will likely force pregnancy resource centers to dilute their life-affirming message, or otherwise "alter[] the content of [their] speech." *Id.* at 2371. Take a law aimed at forcing pregnancy resource center workers, as part of an ethical or professional code, to provide both life-affirming advice and resources on abortions or risk professional discipline by a state regulatory board. In effect, this type of professional code of conduct would operate like the notice requirement did in *NIFLA*, altering the content of the pregnancy resource center's speech by compelling workers to discuss pro-abortion policies they oppose. *See NIFLA*, 138 S. Ct. at 2371. Yet based on the decision below, the Ninth Circuit would characterize this regulation as one of "professional conduct" only requiring rational basis review. App. 26a, 34-38a.

Or consider a law aimed at forcing pregnancy resource centers, as a part of an ethical or professional code, to refrain from speaking about life-affirming services and instead only allow pregnancy resource centers to provide resources that support abortion.

This too seems clearly unconstitutional. Yet under the decision below, this law would stand so long as the state labeled conversations about life-affirming services as professional conduct. But again, *NIFLA* prevents a state from regulating pregnancy resource centers in this way because it would force them to alter their message and speak in favor of abortion, which they vehemently oppose. *See* 138 S. Ct. at 2371.

Finally, consider a law prohibiting pregnancy resource centers, as part of an ethical or professional code, from speaking about any services whatsoever, whether life-affirming or abortion-related. Like the previous two examples, this law would stand under the decision below as a regulation of professional conduct, but fail under *NIFLA*.

As these examples illustrate, the decision below gives states a free hand to regulate the message of pregnancy resource centers to the women they serve simply by labeling their speech as conduct. Under that decision, any burden on speech can be waved away (with only rational-basis review) as a burden "incidenta[l]" to "the regulation of professional conduct," App. 31a, even though there is no other conduct involved besides speech itself, App. 76a (O'Scannlain, J.). Shielded from proper scrutiny, such laws would chill the free speech of Heartbeat affiliates and countless other pregnancy resource centers.

II. There is a troubling trend of weaponizing laws against pregnancy resource centers.

Heartbeat affiliates, like other pregnancy resource centers, play a vital role in the lives of millions of women and children every year. Heartbeat's mission is to ensure that every woman feels loved and supported during her pregnancy. And Heartbeat affiliates work to ensure that pregnant mothers are equipped with support, resources, and education.

Despite providing this critical function, pregnancy resource centers across the country are under attack. Following this Court's opinion in *Dobbs*, pregnancy resource centers have increasingly been the target of acts of violence, unwarranted scrutiny, and onerous regulations. Upholding laws that recast speech as conduct—like the law at issue here—is especially concerning at a time when laws are being weaponized against disfavored viewpoints.

A. Pregnancy resource centers face increasing political attacks and unwarranted scrutiny from lawmakers.

Pregnancy resource centers across the country have increasingly faced political attacks and unwarranted scrutiny from lawmakers. These attacks mark a growing desire to enact new laws and weaponize existing laws to burden pregnancy centers, including by employing privacy laws, deceptive trade practices and truth-in-advertising laws, and licensing and inspection requirements. Although the legal framework may vary, the goal is consistent: use onerous regulation to regulate pregnancy resource centers out of existence.

Start with Congressional efforts to silence resource centers. Recently, a United States Senator called for Congress to "move more aggressively" in regulating pregnancy resource centers. Alison Kuznitz, *U.S. Sen. Elizabeth Warren Wants to Crack Down on 'Deceptive' Crisis Pregnancy Centers in Massachusetts, Across the Country*, MassLive, (Jun. 29, 2022) bit.ly/3oCyQ7f. The same Senator then accused life-affirming pregnancy resource centers of "torturing" pregnant women and called upon the federal government to "shut them down all around the country." Jessica Chasmar, *Google to Crack Down on Search Results for Crisis Pregnancy Centers After Dem Pressure*, Fox Business, (Aug. 25, 2022), bit.ly/40niaPn. And nearly two dozen Members of Congress even pressured Google to "crack down on *search results* for crisis pregnancy centers." *Id.* (emphasis added).

Politicians have resorted to using privacy concerns as a pretext for targeting pregnancy centers too. Recently, for example, a group of pro-abortion United States Senators baselessly accused Heartbeat of failing to maintain secure data for the women who seek out the network's services and resources. *See* Letter from Seven United States Senators to Heartbeat Int'l (Sep. 19, 2022) (on file with counsel). As Heartbeat responded through its counsel, that letter appeared simply "to be an unwarranted effort to investigate a private organization which holds to a religious and ideological opinion with which [those federal officials] disagree." Letter from Heartbeat Int'l to Sen. Elizabeth Warren, et al. (Oct. 1, 2022) (on file with counsel). Indeed, political hostility towards pregnancy resource centers and groundless

accusations against their operators are at an all-time high.

Federal lawmakers have also targeted pregnancy centers with "deceptive practices" legislation. In June 2022, after accusing (without evidence) pregnancy centers of using "deceptive or misleading advertisements about abortion services," a group of Congressmen introduced the "Stop Anti-Abortion Disinformation Act" (SAD Act), which would weaponize the Federal Trade Commission to crack down on entities that discuss pregnancy from a life-affirming viewpoint. *See* Nick Popli & Vera Bergengruen, *Lawmakers Scramble to Reform Digital Privacy After Roe Reversal*, Time (Jul. 1, 2022), bit.ly/3L0HFR1.

There have been similar efforts at the state level. State attorneys general have threatened enforcement actions against facilities that hold life-affirming views. In June 2022, for example, California Attorney General Rob Bonta issued a consumer alert targeting pregnancy centers, calling them "fake clinics" and accusing them of employing "deceptive" tactics to get women to choose life. Paul Sisson, *In San Diego, Attorney General Puts Anti-Abortion Clinics on Notice*, San Diego Union-Tribune, (Jun. 1, 2022), bit.ly/3KYFRIs. That same month, Massachusetts Attorney General Maura Healey issued a similar consumer advisory warning. David L. Ryan, *Maura Healey Issues Warning About 'Crisis Pregnancy Centers' in Mass.*, Boston.com (Jul. 6, 2022), bit.ly/3L3pH0A. Healey accused pregnancy centers of offering "misleading information" about their services and alleged that they are not required to keep medical

information private or to follow professional medical ethics. *Id.* Both Bonta and Healey encouraged women to file complaints against pregnancy centers. *Id*.

Other states have targeted life-affirming pregnancy centers for offering alternatives to abortion. In early 2023, Colorado and New Jersey lawmakers introduced bills describing pro-life pregnancy centers as "fake clinics" that "use deceptive advertising to draw in vulnerable people seeking care to harass them with biased and inaccurate information about abortion and contraceptives." *See* Dana DiFilippo, *Deceptive Marketing by Crisis Pregnancy Centers Prompts Bills, Consumer Alert*, New Jersey Monitor, (Jan. 17, 2023), bit.ly/3MNihzB; Brandon Richard, *Opponents Respond to Bill Targeting Anti-Abortion Pregnancy Centers in Colorado*, Denver7 News, (Mar. 18, 2023), bit.ly/3KCRwex. The Illinois Senate recently passed a similar bill targeting pro-life pregnancy resource centers. *See* Andrew Adams & Nika Schoonover, *Illinois Senate Approves Measure to Crack Down on 'Crisis Pregnancy Centers,'* Rockford Register Star (Apr. 3, 2023), bit.ly/3AqVrXl. And in May 2021, the Connecticut legislature passed a law banning "deceptive advertising" by pregnancy centers. *See* Matthew McDonald, *Connecticut Crisis-Pregnancy Center Withdraws Lawsuit Against 'Deceptive Advertising' Ban*, National Catholic Register (Jan. 21, 2023), bit.ly/3A2jNWU. But after the law was challenged on First Amendment grounds, Attorney General William Tong conceded in the litigation that he was not aware of any women who had ever been deceived by pregnancy centers. *Id.*

Opponents of pro-life pregnancy centers have also sought to impose overly strict licensing and inspection requirements in order to make it more difficult for pregnancy resource centers to operate. New York recently created a task force to investigate only those centers holding a pro-life viewpoint. Micaela Burrow, *New York Law Lets Pro-Abortion Activists Investigate Crisis Pregnancy Centers,* Pregnancy Help News, (Jun. 14, 2022), bit.ly/41ako4W. A co-sponsor of the bill, New York state Senator Brad Holyman, said that the task force would report on "unlicensed, often misleading facilities that offer pregnancy-related services but don't provide or refer for comprehensive reproductive healthcare" including abortion. *Id.* Legislators in Arizona, Indiana, Kentucky, Minnesota, and New Jersey have also recently introduced legislation that would impose unnecessary and burdensome licensing requirements on pregnancy resource centers. Laura Morel, *Kentucky Lawmaker Pushes to Regulate Anti-Abortion Pregnancy Centers After Reveal Investigation*, Reveal News, (Mar. 27, 2023), bit.ly/418JpO0.

Unfortunately, these states and others are "leveraging their [] taxpayer pockets by creating new laws with vague investigative powers often coupled with enforcement mechanisms designed to harass caring people that simply want to help women make a different choice than abortion." Godsey, *supra*. But pregnancy resource centers "set the standard for true compassion and support for women." *Id.* Indeed, "far from deceptively holding themselves out as providers of abortion, crisis pregnancy centers hold themselves out as providers of an alternative to abortion." Jacoby,

supra. And women "who find and utilize these pregnancy help services overwhelmingly give pregnancy centers 99 percent satisfaction ratings for the care they receive because it helps them through difficult times and puts them on a path toward success as parents." Godsey, *supra.*; *see* Moira Gaul, *Fact Sheet: Pregnancy Centers–Serving Women and Saving Lives*, Charlotte Lozier Inst. (July 2021), bit.ly/3V0haig.

B. Pregnancy resource centers also increasingly face threats of violence and violent attacks.

As a result of this political hostility, pregnancy resource centers have increasingly face threats and violent attacks too. This trend has only intensified following the *Dobbs* decision.

After the *Dobbs* leak, "a wave of vandalism and violence [was] unleashed against crisis pregnancy centers around the country." Jeff Jacoby, *Attacks on Pregnancy Centers, Like Attacks on Abortion Clinics, Should Be Intolerable*, Boston Globe (July 17, 2022), bit.ly/40vRGuk. "In one attack, arsonists firebombed CompassCare, a Christian pregnancy center in Buffalo, N.Y., shattering its windows and destroying much of its interior." *Id.* In Longmont, Colorado, activists set the local pregnancy resource center on fire. *Id.* In Anchorage, Alaska, vandals smashed the door of the Community Pregnancy Center and covered its parking lot with nails. *Id.* And a group of pro-abortion extremists operating as "Jane's Revenge" has declared "open season" on pregnancy resource centers across the country, promising to enact "revenge"

against the centers, causing significant property damage, and spray-painting threatening graffiti slogans such as "If abortions aren't safe, neither are you." *Id.*

These examples are only the tip of the iceberg. Indeed, centers have faced more than 100 attacks over the past year. *See* Patty Knap, *A New Low: Pregnancy Center Board Member's Home Vandalized*, Pregnancy Help News, (Feb. 27, 2023), bit.ly/3KhROsi. Activists have even targeted the private homes of those merely *associated* with crisis pregnancy centers. *Id.* (noting that activists vandalized the home of a pregnancy resource center board member). And even though these actions clearly violate the Federal Access to Clinics Entrances Act (FACE Act), 18 U.S.C. § 248, they have largely gone unprosecuted by the Department of Justice and uncondemned by pro-abortion officials.

At bottom, Heartbeat and other pregnancy resource centers are increasingly the target of violent and unjustified attacks in order to silence them.

* * *

Laws like Washington's ban on "conversion therapy" are one of many that represent the increasing "[w]eaponiz[ation] … of government against ideological foes." *Greater Balt. Ctr. for Pregnancy Concerns, Inc. v. Mayor & City Council of Balt.*, 879 F.3d 101, 113 (4th Cir. 2018). If this Court, like the Ninth Circuit, allows states to relabel speech as conduct merely because it takes place in a professional setting, that weaponization will know no end. The decision below clearly runs afoul of this

Court's decision in *NIFLA*, and the First Amendment's promises of free speech. The Court should not let it stand.

CONCLUSION

For these reasons, the Court should grant the petition and reverse the decision below.

Respectfully submitted,

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