No. 24-539

IN THE
Supreme Court of the United States

KALEY CHILES,

Petitioner,

v.

PATTY SALAZAR, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE COLORADO DEPARTMENT OF REGULATORY AGENCIES, ET AL.,

Respondents.

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

AMICUS CURIAE BRIEF OF NATIONAL RELIGIOUS BROADCASTERS IN SUPPORT OF PETITIONER

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Interest of Amicus Curiae

National Religious Broadcasters (NRB) is a non-partisan association of Christian broadcasters united by their shared purpose of proclaiming Christian teaching and promoting biblical truths. NRB's 1,487 members reach a weekly audience of approximately 141 million American listeners, viewers, and readers through radio, television, the Internet, and other media.[1]

Since its founding in 1944, NRB has worked to foster excellence, integrity, and accountability in its membership. NRB also works to promote its members' use of all forms of communication to ensure that they may broadcast their messages of hope through First Amendment guarantees. NRB believes that religious liberty and freedom of speech together form the cornerstone of a free society.

Radio and television stations operate under licenses from the government. If licensing agencies may silence mental health professionals from expressing opinions contrary to official viewpoints, a dangerous precedent is set that could lead to the empowerment of regulators to silence unwelcome speech by broadcasters. Free speech must never be regulated under such principles.

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[1] Pursuant to Supreme Court Rule 37.6, counsel for your amicus certifies that no counsel for any party authored this brief in whole or in part. No person or entity other than NRB furnished any monetary contribution for the preparation of this brief.

Summary of the Argument

The key holding of the Tenth Circuit was that advice by a licensed mental health professional regarding sexual orientation or gender identity constitutes conduct since it is medical treatment. As conduct, the Circuit held, it is not entitled to the normal protections of the First Amendment. There is no logical ground for limiting this holding to this particular topic. The rule announced by the Tenth Circuit applies with equal force to every topic upon which a mental health professional offers advice. Accordingly, it is not just mental health professionals offering advice to minors on sexual topics who lose the full protection of the First Amendment under this rubric. All advice by all mental health professionals is subject to the same rule.

Accordingly, the Circuit's ultimate holding was that mental health professionals offering verbal advice only receive rational basis review when the government censors their speech. This approach is suited to substantive due process, not the First Amendment. This semantic sleight of hand cannot be legitimized. Medical professionals' advice and counseling are clearly and robustly protected by the First Amendment.

In *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. 755, 766–67 (2018), this Court clearly held that content-based laws suppressing or compelling professional speech must satisfy strict scrutiny. *Id.* Colorado's law is unquestionably content-based. *See id.* at 766. The state must, like other content-based laws, show that

the law is narrowly tailored to fulfill a compelling government interest. *See id.*

If anything, professional speech should be entitled to even greater First Amendment protection because of the important role that professionals play in the development of the marketplace of ideas. Moreover, the rights of listeners are acutely at stake when their medical advisers are prevented from giving advice freely according to the client's needs.

While there is some dispute about the nature of the conversations that Ms. Chiles has with her clients, this brief assumes the posture of the Tenth Circuit: that Ms. Chiles provides professional mental health advice. This approach, if *NIFLA* is to be followed, results in no diminution of her free speech rights.

Argument

I. Professional Speech is Fully Protected

The Tenth Circuit professed to follow this Court's ruling in *NIFLA*. *Chiles v. Salazar*, 116 F.4th 1178, 1201–03 (10th Cir. 2024). But the Circuit robbed this professed compliance of any meaning by adopting the premise that all advice given by licensed mental health professionals is "medical treatment" and is thus subject to the lowest level of constitutional review. *Id.* at 1206-07. The principle adopted by the Tenth Circuit leaves medical health professionals, like Ms. Chiles, with no speech rights within the practice of her profession. Substantive due process provides a curtailed certain freedom for conduct, but

such protections are vastly inferior to the First Amendment's protection for freedom of speech.

In *NIFLA,* this Court rejected content-based restrictions on professional speech. It should do the same here. Strict scrutiny provides the necessary balance between Ms. Chiles's freedom of speech and the adequate regulation of the medical profession. *NIFLA*, 585 U.S. at 767.

It is a longstanding rule that "[c]ontent-based laws . . . are presumptively unconstitutional" and survive judicial scrutiny only if "narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). *See also R.A.V. v. St. Paul*, 505 U.S. 377, 386 (1992) (Laws that censor based on content and viewpoint are "presumptively invalid"). A law is content-based if it "target[s] speech based on its communicative content," *Reed*, 576 U.S. at 163, or where it "require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *Animal Legal Defense Fund v. Kelly*, 9 F.4th 1219, 1228 (10th Cir. 2021) (quoting *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (brackets in original). Alternatively, laws are considered content-based, where the laws cannot be "'justified without reference to the content of the regulated speech,' or that were adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Reed*, 576 U.S. at 164 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (brackets in original).

NIFLA applied the content-based rule to professional speech. The Court held that "professional speech" is not a "unique category [of speech]," and thus "[a]s with other kinds of speech . . . regulating the content of professionals' speech" must survive strict scrutiny. *Id*. at 767, 771 (cleaned up). To permit otherwise "pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *NIFLA*, 585 U.S. at 771 (quoting *Reed*, 576 U.S. at 163) (brackets in original).

The Tenth Circuit erred when it failed to recognize that the Colorado law is a content-based law subject to strict scrutiny under *NIFLA*. *Id*. at 767. Ms. Chiles professional speech is not a "unique category" of speech. Content-based regulations of Ms. Chiles's professional speech are subject to strict scrutiny. *Id*. at 767, 771. And the Colorado law was a content-based regulation. First, the law targeted the "communicative content" of Ms. Chiles's speech to her clients. *Reed*, 576 U.S. at 163. Talk therapy "is not just carried out *in part* through speech: the treatment . . . *is entirely* speech." *Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 865 (11th Cir. 2020) (emphasis in original). And the regulation directly censored the content of that speech by suppressing what content Ms. Chiles could or could not say. *See* Claudia E. Haupt, *The Limits of Professional Speech*, 128 Yale L.J.F. 185, 188 (2018) ("[T]he regulation of professional speech, in order to achieve its aim, *cannot be content-neutral*; indeed, the value of professional advice depends on its content.") (emphasis added) (footnote omitted). Second, the Colorado law required "enforcement authorities to

examine the content" of Ms. Chiles's speech "to determine whether a violation ha[d] occurred." *McCullen* 573 U.S. at 479. Under both standards, the Colorado law is content-based.

To avoid this presumption, the Tenth Circuit relied on an exception to content-based scrutiny. The Circuit pointed to *Casey*, asserting that "[a]ny speech affected by the [MCTL] is incidental to the professional conduct it regulates." *Chiles*, 116 F.4th 1178, 1209 (10th Cir. 2024) (quoting App. at 776).

The Tenth Circuit attempts to wrap itself in the mantle of a three-judge opinion from *Planned Parenthood v. Casey*. *See Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992) (Joint opinion of O'Connor, Kennedy, and Souter, JJ.) overruled on other grounds by *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022); *Chiles*, 116 F.4th at 1209. But in *Casey,* the doctors were required to give certain information to their patients prior to performing a surgical abortion. *See Casey*, 505 U.S. at 881. That was speech genuinely incident to professional conduct and was upheld by this Court. *Id.* at 884.

In *NIFLA*, California sought to treat everything said by the medical professionals in a licensed facility as speech incidental to conduct. *See* Brief for the State Respondents at 34, *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, No. 16-1140, 2018 WL 1027815 (U.S. Feb. 20, 2018). But this Court recognized that the doctors and other licensed professionals in the prolife centers were only speaking with their patients, not performing surgery. *See NIFLA*, 585 U.S. at 770.

NIFLA held that when the entire interaction between a medical professional and a client is verbal, normal First Amendment rules presumptively apply. *Id.*

The Colorado law can only be explained as a content-based prohibition of speech on a particular topic. A Christian minor, who wants to follow her faith and expresses that she understands that her faith forbids same-sex relationships but also expresses that she may have same-sex attraction, cannot be told to follow her faith. The law forces Christian counselors affirm the sexual attraction thereby counseling a disavowal of a faithful walk with God. By so doing, the counselor is required to advocate for a change in the client's religious beliefs. Calling this rule "anti-change" is disingenuous. It is hard to imagine a more brazen repudiation of this nation's core commitments to freedom of speech than the ruling below, which affirmed a categorical denial of free speech protections for mental health professionals as justification for a content-based limitation on speech.

II. Professional Speech Demands More, Not Less, First Amendment Scrutiny

A fundamental principle undergirding the First Amendment is "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). Professionals hold an influential role in that marketplace. Governments recognize this and have tried—time and time again—to use professionals' place of pedigree to further their coercive ends. Accordingly,

"[i]f anything, the doctor-patient relationship provides *more* justification for free speech, not less."

Wollschlaeger v. Governor, Fla., 848 F.3d 1293, 1328 (11th Cir. 2017) (en banc) (Pryor, J., concurring) (emphasis added).

A. Professionals Guide The Marketplace Of Ideas

Professionals speak from expertise. That gives their speech a weight deserving special protection. *NIFLA*, 585 U.S. at 772. As one scholar describes:

> The information that the knowledge community communicates to clients through individual professionals cumulatively enhances the basis upon which public opinion is formed. This is not simply a matter of enabling self-government through ordinary deliberation by adding another opinion to the public discussion. Rather, professionals contribute specialized, technical knowledge to which lay citizens would not otherwise have access. It is precisely in their capacity as members of knowledge communities that professionals enhance the process of self-governance, and so as members of knowledge communities that they should enjoy First Amendment protection.

Claudia E. Haupt, *Professional Speech*, 125 YALE L.J. 1238, 1244 (2016) (footnotes omitted).

The public relies on the professional marketplace of ideas. "The professional-client relationship is

typically characterized by an asymmetry of knowledge." *Id.* at 1243. "The average patient has little or no understanding of the medical arts and ordinarily has only his physician to whom he can look for enlightenment with which to reach an intelligent decision." *Canterbury v. Spence*, 464 F.2d 772, 780 (D.C. Cir. 1972). "The client seeks the professional's advice precisely because of this asymmetry." Haupt, *Professional Speech*, 125 YALE L.J. at 1243. But when professional speech is censored or compelled, the listener cannot discern professional truth from state-enforced propaganda.

Professional speech also forms the basis for professional standards, what can be termed the "epistemic marketplace." *Id.* at 1244. In any field, professionals have "a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields." *NIFLA*, 585 U.S. at 772. It is this good-faith disagreement that allows for the growth and development of professional standards. Haupt, *Professional Speech*, 125 YALE L.J. at 1244 ("Professional standards are generated by testing insights in that marketplace."). The Court in *NIFLA* provided examples:

> Doctors and nurses might disagree about the ethics of assisted suicide or the benefits of medical marijuana; lawyers and marriage counselors might disagree about the prudence of prenuptial agreements or the wisdom of divorce; bankers and accountants might disagree about the amount of money that should be devoted to savings or the benefits of tax reform.

NIFLA, 585 U.S. at 772.

Indeed, prior to 1973, the American Psychiatric Association viewed homosexuality as a mental disorder. *Lesbian/Gay Freedom Day Comm., Inc. v. U.S.I.N.S.*, 541 F. Supp. 569, 572 (N.D. Cal. 1982) (citing Press Release of American Psychiatric Association (December 15, 1973)). In that era, a proper interpretation of the First Amendment would clearly have prevented a state licensing board from punishing mental health professionals who dared to disagree with the APA's view and shared that disagreement with their patients. If it was permissible to coerce unanimity of professional opinion in the pre-1973 era, then a change of position by the APA might never have occurred.

The First Amendment exists to protect the very conditions in which such disagreement can thrive. "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 340 (2010). "[T]he people lose when the government is the one deciding which ideas should prevail." *NIFLA*, 585 U.S. at 772. Accordingly, "[c]ourts must be particularly wary that in a contentious and evolving field, the government and its supporters would like to bypass the marketplace of ideas and declare victory for their preferred ideas by fiat." *Chiles*, 116 F.4th 1178, 1238 (10th Cir. 2024) (Hartz, J., dissenting).

Of course, while the public is "free to hear and decide for themselves the merits of various contributions people make to democratic discourse, they are not similarly left to fend for themselves when faced with possibly fraudulent or ineffective professional or commercial services." Marc Jonathan Blitz, *Free Speech, Occupational Speech, and Psychotherapy*, 44 HOFSTRA L. REV. 681, 732 (2016). The application of strict scrutiny creates the effective balance "of filtering out government regulation that . . . attempt[s] to skew the marketplace of ideas" and those regulations that are necessary for the maintenance of compelling government interests. Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 112 (2016).

Here, the Tenth Circuit's decision risks stifling the professional marketplace of ideas without demonstrating any compelling governmental need to do so. Ms. Chiles speaks from a place of expertise to her clients. *See* App. at 42, 44. Her clients depend on and trust in her care. *See Id.* at 31. This asymmetry of knowledge is exactly why she must never become a mouthpiece for the government. Her professional speech should be entitled to "the strongest protection our Constitution has to offer." *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995)).

Ms. Chiles also offers a distinct voice within the professional community, grounded in both clinical training and a religious worldview. *See* App. 042-43. Many of her clients seek her counseling to address "sexual attraction[s], behaviors, or identity" precisely because of this religious worldview. App. 037. By

drawing on her faith-informed perspective, Ms. Chiles contributes to the epistemic marketplace in a unique capacity. The First Amendment protects that contribution not despite its distinctiveness, but because of it.

Claims of scientific consensus supply no legitimate basis for censorship of other views. A real and present danger arises from enforcing the government's ideology concerning gender and sexual identity in order to "bypass the marketplace of ideas and declare victory for their preferred ideas by fiat." *Chiles*, 116 F.4th at 1238 (Hartz, J., dissenting).

Protecting Ms. Chiles speech does not mean exempting it from all regulation. The public is not left to "fend for themselves" when facing fraudulent or incompetent services. Blitz, *Free Speech, Occupational Speech, and Psychotherapy*, 44 HOFSTRA L. REV. at 732. But "existing First Amendment doctrines are perfectly suited to the task." Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. at 69. The application of strict scrutiny will serve to determine whether the government is merely seeking to "skew the marketplace of ideas" or to provide protection for a compelling government interest. *Id.* at 112.

B. Professionals Retain a Unique Autonomy Interest on Behalf of the Speaker (Themselves) and the Listener (Their Client in Need)

i. Professional Autonomy Interests

Professionals do not shed their First Amendment protections upon dawning the white coat, the suit and tie, or the hard hat. *NIFLA*, 585 U.S. at 767 ("Speech is not unprotected merely because it is uttered by 'professionals.'") (citation omitted). Nor do they shed their First Amendment protections simply by providing "specialized advice." *NIFLA*, 585 U.S. at 771 (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27–28 (2010)). Professionals are entrusted with a duty to provide the best suited provisions to meet the clients' needs. *See* Robert C. Post, *Democracy, Expertise, And Academic Freedom: A First Amendment Jurisprudence for the Modern State* 47 (2012) ("Clients are presumed to be dependent upon professional judgment and unable themselves independently to evaluate its quality."). To fulfill that duty, "candor is crucial." *NIFLA*, 585 U.S. at 771 (quoting *Wollschlaeger*, 848 F.3d at 1328 (Pryor, J., concurring)). Professionals must be able to freely express, prod, challenge, inform, encourage, refute, or agree with the patient to provide adequate care. *See* 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, 235-36 (1994). Any restriction on the professionals' speech will necessarily hinder their ability to treat the patient's needs. *See e.g. National Association for the Advancement of Psychoanalysis v.*

California Board of Psychology, 228 F.3d 1043, 1056 (9th Cir. 2000) (Upholding a California licensing requirement, noting that California did not attempt to "dictate the content of what is said in therapy.").

Restricting the speech that Ms. Chiles may use during talk therapy undermines her professional autonomy interest by impeding her duty to her clients. Ms. Chiles works with "adults who are seeking Christian counseling and minors who are internally motivated to seek counseling." App. at 41-42. Several patients have sought out Ms. Chiles, "seeking to live a life consistent with their faith . . . which sometimes includes clients seeking to reduce or eliminate unwanted sexual attractions, change sexual behaviors, or grow in the experience of harmony with one's physical body." App. at 38, 44. Ms. Chiles' only opportunity to aid these clients is speech. *Otto*, 981 F.3d 854, 865 (11th Cir. 2020) (talk therapy "is not just carried out *in part* through speech: the treatment . . . *is entirely* speech."). A law that imposes an undue burden on her ability to exercise that speech, and thus prevents her from fulfilling her clients' goals, inhibits her from fulfilling her role as a counselor and helping her clients effectively.

ii. Patient Autonomy Interests

"[T]he Constitution protects the right to receive information and ideas," which "is an inherent corollary of the rights of free speech and press." *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 867 (1982)). Decisional autonomy

for the patient or client is even more important. In *Griswold v. Connecticut*, this Court reaffirmed that "[t]he right of freedom of speech" necessarily includes "the right to receive [speech], the right to read and freedom of inquiry." 381 U.S. 479, 482 (1965). "In other words, the State may not, consistently with the spirit of the First Amendment, contract the spectrum of available knowledge." *Id*. Patient autonomy is a cornerstone of the American medical practice.

> [T]he last century has seen the recognition of patients' autonomy interests and, as a result, significant changes in the doctor-patient relationship. "Autonomy soon became the driving principle used to resolve issues within medicine," and, with it, "informed consent doctrine . . . driven in large part by a desire to combat the paternalism of medicine."

Haupt, *Professional Speech*, 125 YALE L.J. at 1287-88 (quoting Sonia M. Suter, *The Politics of Information: Informed Consent in Abortion and End-of-Life Decision Making*, 39 AM. J.L. & MED. 7, 13, 15 (2013)) (footnotes omitted).

Permitting Colorado to silence Ms. Chiles does not merely restrict her speech, it denies her clients the right to hear it. Clients seek Ms. Chiles counsel precisely because of her "Christian counseling." App. 042–43. *Griswold* makes clear that these clients have the "the right to receive" this counseling and the "right to inquir[e]" about matters deeply personal to them. *Griswold*, 381 U.S. at 482. The MCTL law inhibits both from occurring in talk therapy. The Tenth Circuit's decision, by endorsing a one-sided

restriction on counseling, allows Colorado to "contract the spectrum of available knowledge" to Ms. Chiles' clients and affronts the First Amendment in doing so. *Id*.

In one study, "[a]lmost 12% of the respondents reported homosexual contact after 15 years of age, and only 6.7% did so after 19 years, which suggests that same-sex behavior may be more frequent during adolescence and may not reflect a long-lasting homosexual orientation." Susanne M. Stronski Huwiler & Gary Remafedi, *Adolescent Homosexuality*, 33 REV. JUR. U.I.P.R. 151, 154 (1999). Given the experimental and transient nature of adolescent sexual activity, common sense forecloses any suggestion that counselors should not be able to guide a minor client in a direction different from their most recent sexual experience.

III. There is a Troubling History of Governmental Abuse of Professional Speech

"Throughout history, governments have 'manipulat[ed] the content of doctor-patient discourse' to increase state power and suppress minorities." *NIFLA*, 585 U.S. at 771 (citation omitted). Two methods recur: (1) the abuse of licensing to suppress speech, and (2) direct imposition of state-approved views. *NIFLA* warned against both. *Id*. at 771, 773.

A. Abuse of Licensing

Licensing cannot serve as a pretext to suppress speech. Allowing content-based licensure gives states

a "powerful tool to impose 'invidious discrimination of disfavored subjects.'" *NIFLA*, 585 U.S. at 773 (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423-424, n. 19 (1993). *See also City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 750 (1988) ("When a licensing statute vest unbridled discretion in a government official over whether to permit or deny expressive activity . . . . Such a statute constitutes a prior restraint and may result in censorship, engendering risks to free expression"). And the danger extends beyond the medical profession. If licensing authority implies the power to regulate content, then the First Amendment yields wherever the state requires a license. *NIFLA*, 585 U.S. at 773. The state may exert suppression or compulsion of speech over "virtually any licensed calling," including, lawyers, architects, teachers, truck drivers, bartenders and even fortune tellers. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. at 68.

For more than a century prior to the adoption of the First Amendment, the British government relied on licensing schemes to restrain disfavored expression. *Grosjean v. Am. Press Co.*, 297 U.S. 233, 245 (1936) (citing COLLET DOBSON COLLET, HISTORY OF THE TAXES ON KNOWLEDGE, vol. I, 4–6 (London, T. Fisher Unwin 1899). The Star Chamber's 1637 decree required printers to obtain licenses from church authorities, and punished unauthorized printing with whipping, the pillory, and imprisonment. COLLET, vol I, at 3. When formal licensing ended in 1695, Parliament required printing approvals in the form of stamps. Beginning in 1712, Parliament imposed stamp requirements on newspapers and

advertisements as means to "suppress all expression of discontent" towards the Crown. *Id*. at 2, 14. While the stamp acts were promulgated under the guise of preventing sedition and libel, "[a]ny man who carried on printing or publishing for a livelihood was actually at the mercy of the Commissioners of Stamps, when they chose to exert their powers." *Grosjean,* 297 U.S. at 245 (quoting COLLET, vol I, at 14).

In this context, the early American tradition rejected content-based licensure. *Grosjean*, 297 U.S. at 248. In 1779, Thomas Jefferson's *Virginia Bill for Establishing Religious Freedom* warned that "to compel a man to furnish contributions of money for the propagation of opinions which he disbelieves, is sinful and tyrannical." Virginia Act for Establishing Religious Freedom, reprinted in 5 *The Founders' Constitution* 84 (item #44) (P. Kurland & R. Lerner eds., Univ. of Chi. Press 1987). His warning undergirded the First Amendment's adoption twelve years later.

Here, the state seeks to propagate opinions that Ms. Chiles disbelieves and threatens the possible revocation of her license if she refuses to comply. COLO. REV. STAT. § 12-245-202(3.5) (a). This licensure abuse flies in the face of the First Amendment. "Being a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights." *Conant*, 309 F.3d 629 (9th Cir. 2002) (citing *Thomas v. Collins*, 323 U.S. 516, 531 (1945)). If the state is permitted to regulate talk therapy simply because Ms. Chiles is a licensed professional, they are free to "invidiously discriminate" based on viewpoints on which they disagree. *NIFLA*,

585 U.S. at 778. Permitting this justification here will allow licensure abuse not just in the medical profession, but in every profession where the government chooses to impose a license. *Id*.

B. Government Imposition of State-Sponsored Opinion

Throughout history, governments routinely use content-based laws to directly impose state-sponsored opinions. *NIFLA*, 585 U.S. at 771–72. This danger is present here. *NIFLA* provided examples of government mandating the content of doctors' speech:

> [D]uring the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception. In the 1930s, the Soviet government expedited completion of a construction project on the Siberian railroad by ordering doctors to both reject requests for medical leave from work and conceal this government order from their patients. In Nazi Germany, the Third Reich systematically violated the separation between state ideology and medical discourse. German physicians were taught that they owed a higher duty to the 'health of the Volk' than to the health of individual patients. Recently, Nicolae Ceausescu's strategy to increase the Romanian birth rate included prohibitions against giving advice to patients about the use of birth control devices and disseminating information about the use of condoms as a means of preventing the transmission of AIDS.

NIFLA, 585 U.S. at 771–72 (quoting Berg, *Toward a First Amendment Theory of Doctor–Patient Discourse and the Right To Receive Unbiased Medical Advice*, 74 B.U.L. REV. 201, 201–202 (1994)) (footnotes omitted).

Further historical review provides additional instances relating to counseling and diagnosis. For example, "[h]istorically seen, using psychiatry as a means of repression has been a particular favorite of Socialist-oriented regimes." Robert van Voren *Political Abuse of Psychiatry—An Historical Overview*, 36 SCHIZOPHRENIA BULL. 33, 34 (2010).

> The political abuse of psychiatry in the Soviet Union originated from the concept that persons who opposed the Soviet regime were mentally ill because there was no other logical explanation why one would oppose the best sociopolitical system in the world. The diagnosis "sluggish schizophrenia". . . provided a very handy framework to explain this behavior. [M]ost experts agree that the core group of psychiatrists who developed this concept did so on the orders of the party and the Soviet secret service KGB[.]

Id. at 33–34.

In China, between the 1970s and 1980s, "the diagnosis of choice in political cases appears to have shifted towards 'paranoid psychosis.'" Robin Munro, *Judicial Psychiatry in China and Its Political Abuses*, 14 COLUM. J. ASIAN L. 1, 16 (2000). A textbook on forensic psychiatry produced in 1983 by the official publishing house of the Chinese Ministry of Public

Security serves as an incredibly potent example of governments' ability to dictate ideology by controlling the advice to be given by mental health professionals:

> Under the dominant influence of pathological thinking and other symptoms of psychological disease, mentally ill people may engage in behavior that sabotages the proletarian dictatorship and the socialist state . . . . The most commonly encountered pathological states involving counterrevolutionary behavior by the mentally ill are delusions of grandeur and delusions of persecution.

Munro, *Judicial Psychiatry in China and Its Political Abuses*, 14 COLUM. J. ASIAN L. at 38 (quoting Liu Anqiu (ed.), Sifa Jingshenbingxue Jichu Zhishi [*Basic Knowledge in Forensic Psychiatry*] 18-19 (1983)).

Content-based regulation of speech is also found in the United States. But Circuit courts have largely rejected the government's attempts to do so. In *Otto v. City of Boca Raton,* the Eleventh Circuit struck down a municipal ban on sexual orientation change efforts (SOCE) parallel to Colorado rule here. 981 F.3d 854, 864 (11th Cir. 2020). In *Conant v. Walters*, the Ninth Circuit overturned the revocation of a doctor's license for giving advice on the medical benefits of marijuana. 309 F.3d 629, (9th Cir. 2002). In *Wollschlaeger v. Governor of Florida*, the Eleventh Circuit en banc again struck down a Florida law that prohibited doctors from asking patients about firearm ownership. 848 F.3d 1293, 1307 (11th Cir. 2017) (en banc) (quoting *King v. Governor of New Jersey*, 767 F.3d 216, 229 (3d Cir. 2014)).

Colorado contends that it is protecting patients, but "[i]nnocent motives do not eliminate the danger of censorship presented by a facially content-based statute, as future government officials may one day wield such statutes to suppress disfavored speech." *Reed*, 576 U.S. 155, 167 (2015). *See also United States v. Stevens*, 559 U.S. 460, 480 (2010) ("[T]he First Amendment protects against the Government; it does not leave us at the mercy of noblesse oblige. We would not uphold an unconstitutional statute merely because the Government promised to use it responsibly.").

* * *

NIFLA resolved this very issue: "professional speech," as is directly found here, is not a "unique category . . . that is exempt from ordinary First Amendment principles." *NIFLA*, 585 U.S. at 755, 773. "[T]his Court's precedents have long protected the First Amendment rights of professionals." *Id*. at 771. And this court should protect them again here. The Tenth Circuit's decision invites sweeping and dangerous intrusions on protected speech.

Conclusion

For the foregoing reasons, the judgment of the United States Court of Appeals for the Tenth Circuit should be reversed.

Respectfully submitted,

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