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 Department of Regulatory Agencies, et al.,

Respondents.

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

BRIEF OF *AMICI CURIAE* AMERICAN ASSOCIATION OF CHRISTIAN COUNSELORS, ASSOCIATION OF CHRISTIANS IN HEALTH AND HUMAN SERVICES, ASSOCIATION FOR MENTAL HEALTH PROFESSIONALS, AND DAVID WIEDIS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae American Association of Christian Counselors (AACC) is the world's largest faith-based behavioral health organization. It is committed to encouraging, strengthening, and serving Christian behavioral and mental health professionals, including psychiatrists, psychologists, social workers, psychotherapists, marriage and family therapists, and addictions counselors, as well as Christian life and mental health coaches, pastors, lay counselors, and the community at large. AACC equips leaders in the helping professions by integrating research-based biopsychosocial principles with spiritual truths to aid in counseling and ministering to those who seek assistance in achieving mental wellness, personal wholeness, interpersonal competence, and spiritual maturity.

Amicus curiae the Association of Christians in Health and Human Services seeks to support Christian health and human services professionals—including social workers, counselors, psychologists, nurses, pharmacists, physicians, physical therapists, occupational therapists, chaplains, and human services workers—by promoting biblical integration and ethical practice, affirming the inerrancy of Scripture devoid of any postmodern efforts of deconstruction or superimposed individual narratives, promoting an appreciation of member diversity and unity in Jesus Christ as the risen Lord, and supporting committed professionals to uphold biblical views regarding issues such as the sanctity of life, God's creation of man and

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[1] No party or counsel for a party authored this brief in whole or in part. No one other than *Amici* or their counsel made a monetary contribution to preparing or submitting this brief.

woman in His image, and God's intended purpose for marriage as being of one man and one woman.

Amicus curiae the Association for Mental Health Professionals, which includes mental health counselors and related professionals, seeks to put the counseling profession back firmly on a science-based, peer-reviewed track and to expand the basic counseling model from a neck-up, pharma-based solution to a more holistic, whole body approach that recognizes the superior benefits of the mind-body-spirit approach to mental health.

Amicus curiae David Wiedis is the founder and Executive Director of ServingLeaders Ministries, a Christian ministry that provides counseling services to pastors, ministry leaders, and their families to help them deal with the pressures of ministry and the devastation to families and churches that results from the lack of pastoral care for ministry leaders. Mr. Wiedis founded ServingLeaders after twenty years of practicing law and obtaining a Masters in Christian Counseling from the Philadelphia Biblical University (now Cairn University), where he serves as an adjunct faculty member, teaching courses on ethical, moral, and legal issues in counseling.

Through his ministry, Mr. Wiedis seeks to help other Christians by providing biblical, Christ-centered counseling based on his and his clients' shared worldview. He and other counseling colleagues, including those who are licensed, both within his organization and within associated Christian institutions, provide counseling services based on biblical precepts that many counselees specifically pursue based on their own Christian views and behaviors.

Amici seeks to bring to the Court's attention the scientific literature documenting the importance of integrating religious and spiritual beliefs into counseling practice and to emphasize how the First Amendment guarantees of free speech and the free exercise of religion are necessary to ensure effective counseling for religious adherents.

SUMMARY OF ARGUMENT

This case involves the question of whether the state may censor discussions of religious beliefs in the context of one-on-one counseling between licensed mental health professionals and clients who share the same religious faith.

Over a forceful dissent, the Tenth Circuit said yes—*if* those discussions involve traditional religious beliefs about sexuality and gender. According to the majority, because the discussions involve a mental health professional, they are conduct, not speech. The majority thus held that banning such discussions only "incidentally involves speech because an aspect of the counseling conduct, by its nature, necessarily involves speech." Pet. App. 50a.

As the dissent pointed out, "[S]uch wordplay poses a serious threat to free speech." *Id.* at 83a (Hartz, J., dissenting). Under the majority's reasoning, all "the government needs to do to regulate speech without worrying about the First Amendment is put it within a category … that includes conduct and declare that any regulation of speech within the category is merely incidental to regulating the conduct." *Id.* at 95a; *see also Otto v. City of Boca Raton*, 981 F.3d 854, 865 (11th Cir. 2020) (holding similar ban should be preliminarily enjoined because the "government cannot regulate speech by relabeling it as conduct"); *King v. Governor*

of N.J., 767 F.3d 216, 228 (3d Cir. 2014) ("That the counselor is speaking as a licensed professional … does not transmogrify her words into 'conduct.'"), *abrogated in part on other grounds*, *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755, 767 (2018).

The result is a troubling precedent that allows the government to ban anything "other than the state-approved opinion." *Tingley v. Ferguson*, 144 S. Ct. 33, 35 (2023) (Thomas, J., dissenting from denial of certiorari). Here, for instance, the at-issue statute bans discussions to help a client fulfill a desire to "change [his or her] sexual orientation or gender identity" but allows discussions that offer "[a]cceptance, support, and understanding" or "[a]ssistance to a person undergoing gender transition." Colo. Rev. Stat. § 12-245-202(3.5).

The majority thus greenlighted censoring "speech motivated by the teachings of several of the world's major religions." *Tingley v. Ferguson*, 57 F.4th 1072, 1084 (9th Cir. 2023) (Bumatay, J. dissenting from the denial of en banc review). Under the statute, counselors cannot provide pure talk therapy consistent with their clients' "sincerely held religious beliefs" that hold to traditional views of sexuality. Pet. App. 176a. Nor may counselors help clients who seek "to prioritize their religious and moral values above unwanted same-sex sexual attractions, behaviors, or identities." *Ibid*. In effect, the majority put one-on-one discussions of religious beliefs regarding sexuality and gender on par with conduct such as "electric shock treatment or the use of nausea-inducing drugs." 57 F.4th at 1084 n.3.

The Court should hold that the Colorado law violates the First Amendment.

First, pure talk therapy is exactly that—talk, otherwise known as speech. By concluding that it only "incidentally involves speech," the lower court fundamentally misapprehended the nature of talk therapy.

Second, hundreds of recent studies show that integrating discussions of religious beliefs and practices in mental health therapies leads to better outcomes. These studies have compelled the mental health professions to incorporate religious and spiritual concepts in their therapies. For instance, the World Psychiatry Association now urges the inclusion of spirituality and religion in psychiatric clinical practice.

By barring discussions based on the client's religious beliefs, the statute denigrates the client's religious identity and restricts therapeutic religious speech. In effect, the lower court elevated sexual and gender identities over religious identities. Under this reasoning, even if the client earnestly wants help to live out his or her faith, the statute prohibits mental health professionals from using pure talk therapy consistent with the client's religious beliefs.

Third, the lower court's decision reveals confusion about the place of religious speech in this Court's First Amendment precedent. This Court has repeatedly noted that the Amendment's text and history demand special solicitude for religious speech. After all, the First Amendment was "written to quiet well-justified fears … arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak." *Engel* v. *Vitale*, 370 U.S. 421, 435 (1962).

In other cases, however, this Court has described religious speech as any other type of speech. True, the

Court has insisted that religious speech be accorded no *less* protection than secular speech. But treating religious expression no differently than nude dancing, racist speech, profanity, or any other secular speech is contrary to the original understanding that religious discourse is importantly different from non-religious discourse.

The decision below shows the result of slighting religious speech. The state may limit speech motivated by the teachings of several of the world's major religions with only minimal constitutional scrutiny.

The Court should make clear that censoring religious speech requires more.

ARGUMENT

I. Talk therapy involves speech, not conduct.

The court below held that Colorado's statute "does not regulate expression" but only "the provision of a therapeutic modality—carried out through use of verbal language—by a licensed practitioner." Pet. App. at 46a. Under this view, talk therapy is like surgery with the scalpel replaced by "verbal language." Thus, according to the court, the statute does not "restrict any speech uttered by professionals." *Ibid.* This reasoning shows a fundamental misunderstanding of psychotherapy.

Although often couched in scientific jargon, talk therapy boils down to a collaborative conversation between the counselor and client: "Talk therapy, also called psychotherapy, is the process by which a person attends sessions with a therapist to talk through their experiences." Lindsey Tool, *What to know about talk therapy*, Medical News Today (July 9, 2021). As one of

the leading introductory counselor education textbooks puts it, psychotherapy is essentially a dialogue:

> Psychotherapy is a process of engagement between two people, both of whom are bound to change through the therapeutic venture. At its best, this is a collaborative process that involves both the therapist and the client in co-constructing solutions to concerns.…
>
> Therapists are not in business to change clients, to give them quick advice, or to solve their problems for them. Instead, counselors facilitate healing through a process of genuine dialogue with their clients.

Gerald Corey, Theory and Practice of Counseling and Psychotherapy 7 (9th ed. 2013) ("Theory and Practice").

Through this dialogue, "the therapist does not start out trying to change clients, but instead attunes to clients and meets them where they are." Sue Johnson, Attachment Theory in Practice 27-28 (2019). The goal is to discover how clients' "current dilemmas make exact and exquisite sense," helping them to "explore, formulate, and tolerate their inner world." *Id.* "The therapist's central task is connecting with the client in a way that honors and expands this personhood." *Id.*

Thus, talk therapy is not about imposing values on the client. To the contrary, the therapist's role is to help clients understand their own values, goals, and worldview and to then "assist clients in making decisions that are congruent with their worldview, not to live by the therapist's values." Theory and Practice at 24. The counseling task, therefore, "is to assist individuals in finding answers that are most congruent with their *own values*." *Id.* at 23 (emphasis added).

The counselor provides "a safe and inviting context in which clients can explore the congruence between their values and their behavior." *Ibid.* Only when clients "acknowledge that what they are doing is not getting them what they want," can the counselor "assist them in developing new ways of thinking and behaving to help them move closer to their goals." *Ibid.*

Talk therapy is thus unlike medical interventions that involve the professional physically treating the patient's body, such as surgery, setting a broken bone, prescribing medications, etc. Talk therapy is a collaborative process of discussing the client's issues and assisting them to "clarify their own values and goals, make informed decisions, choose a course of action, and assume responsibility and accountability for the decisions they make." *Ibid.*

As the mental health profession now recognizes, when a client's values and goals are grounded in religion, the counselor's role is to help the client live consistently with those religiously based goals.

II. The decision below allows the state to censor vitally important religious speech.

The relationship between religion and mental health treatment has a long history. Appalled by the barbaric treatment of patients at Bedlam, the leading psychiatric institution in the late 1700s, William Tuke established York Retreat based on the Quaker religious conviction that the mentally ill are equal human beings, to be treated with gentleness, humanity, and respect. *See* Harold G. Koenig, *Religion, Spirituality, and Health: The Research and Clinical Implications*, ISRN Psychiatry, Vol. 2012, Article ID 278730, at 1–2 ("Koenig 2012"). Instead of shackles, squalor, and physical punishment that amounted to torture, Tuke's

"moral treatment" was based on personalized attention, conversation, religious services, prayer, and benevolence, all provided in a bucolic setting. Tanaquil Taubes, *"Healthy Avenues of the Mind": Psychological Theory Building and the Influence of Religion During the Era of Moral Treatment*, 155(8) Am. J. Psychiatry 1001, 1003-1007 (1998); *see also* Louis C. Charland, *Benevolence and discipline: the concept of recovery in early nineteenth-century moral treatment*, *in* Recovery of People with Mental Illness: Philosophical and Related Perspectives 66–67, 74–75 (Abraham Rudnick ed., 2012).

In the early 1800s, Quakers brought the moral treatment philosophy to the United States, founding mental health facilities in Pennsylvania. The Quakers' religious principles not only "played a very significant role in the development of the humane treatment of the mentally ill," they also "laid the foundation for modern psychiatric medicine in the United States." Debbie Price, *For 175 Years: Treating Mentally Ill With Dignity*, N.Y. Times, sec. 1, p. 48 (Apr. 17, 1988).

Psychoanalytic theory developed in the 20th century, however, became hostile to religion, drawing "parallels between religion and both neurosis and psychosis." David Lukoff et al., *Toward a more culturally sensitive DSM-IV*, 180(11) J. Nervous and Mental Disease 673, 674 (1992) ("Lukoff 1992"). The leading theoreticians viewed religion as a "universal obsessional neurosis," "irrational," and an "emotional disturbance." *Id.* at 674. Indeed, in a 1980 article, the founder of rational emotive behavior therapy, Albert Ellis, asserted that "[t]he less religious [patients] are, the more emotionally healthy they will tend to be." Albert Ellis, *Psychotherapy and atheistic values: A response to A. E.*

Bergin's "Psychotherapy and Religious Issues," 48 J. Consult. Clin. Psychol. 635 (1980).

As hundreds of scientific studies have shown, Ellis and the other leading theoreticians were dead wrong. Not only are religious beliefs and practices associated with better mental and physical health, but the mental health professions now recognize the need to incorporate religious concepts in their therapies.

Despite this recognition, however, most mental health professionals still do not incorporate religious concepts in their practices. In contrast, religious counselors, already equipped with knowledge and understanding of an adherent's religious convictions, can speak to their religious client's deepest needs.

Yet it is this very religious speech that the Tenth Circuit allowed to be censored.

A. The scientific consensus recognizes religion's important role in mental health therapy.

1. Studies show that religion is associated with better mental health.

Scientific studies have consistently found religious practices and beliefs are associated with better mental health outcomes. For example, a 2012 review of 454 studies showed how religious and spiritual beliefs and practices helped people cope with a wide range of illnesses and stressful situations, including chronic pain, kidney disease, diabetes, pulmonary disease, cancer, blood disorders, cardiovascular diseases, neurological disorders, psychiatric illness, bereavement, and end-of-life issues. *See* Koenig 2012, *supra*, at 4. By 2014, more than 3,000 empirical studies showed, in general, that individuals who have more religious and spiritual

belief and practice "have less depression, anxiety, suicide attempts, and substance use/abuse, and experience a better quality of life, faster remission of depressive symptoms, and better psychiatric outcomes." Alexander Moreira-Almeida et al., *Clinical implications of spirituality to mental health: review of evidence and practical guidelines*, 36 Brazilian J. Psychiatry 176, 176 (2014). Similarly, a 2021 review of the scientific literature showed that higher levels of religiosity and spirituality are associated with lower depressive symptoms, lower suicidality, lower substance abuse, better outcomes related to bipolar disorder, and serve as a buffer against post-traumatic stress. *See* Giancarlo Lucchetti et al., *Spirituality, religiousness, and mental health: A review of the current scientific evidence*, 9(26) World J. Clin. Cases 7620, 7622–625 (2021) ("Luchetti 2021").

A few examples illustrate the point:

Self-esteem. Critics have claimed that religion "adversely affects self-esteem because it emphasizes humility rather than pride in the self" and "could exacerbate guilt in some for not living up to the high standards of conduct prescribed by religious traditions, resulting in low self-esteem." Koenig 2012, *supra*, at 4. But in an analysis of 69 studies, "42 (61%) found greater self-esteem among those who were more [religious or spiritual] and two (3%) reported lower self-esteem." *Ibid.*

Suicide. Numerous studies find that religious beliefs and practices reduce attempted suicides. *See* Lucchetti 2021, *supra*, at 7623. For instance, a 2016 systematic review of 89 studies found that religious affiliation and attending religious services are associated with decreased attempted suicide, even after adjusting

for social support measures. Ryan E. Lawrence et al., *Religion and Suicide Risk: A Systematic Review*, 20(1) Arch Suicide Res. 1, 5, 7 (2016). A 14-year study of 89,708 women in the United States aged 30 to 55 years found that attending religious services was associated with a five-fold lower incidence of suicide compared to never attending religious services. Tyler J. VanderWeele et al., *Association Between Religious Service Attendance and Lower Suicide Rates Among US Women*. 73(8) JAMA Psychiatry 845, 845 (2016). And a study of data from 22 European countries found that "religiousness is associated with lower suicide rates," even "in secularized European nations, where there is a relatively weak moral community to reinforce religion." Steven Stack & Frederique Laubepin, *Religiousness as a Predictor of Suicide: An Analysis of 162 European Regions*, 49(2) Suicide and Life-Threatening Behavior 371 (2019).

Depression. A 2003 meta-analysis of the results of 147 studies, which included almost 100,000 participants, found that those with religious and spiritual beliefs and practices were less likely to suffer from depression. T.B. Smith et al., *Religiousness and depression: Evidence for a main effect and the moderating influence of stressful life events*, 129(4) Psychol. Bull. 614 (2003). More recently, a 14-year follow-up study in Canada that included 12,583 participants found that monthly religious attenders had a 22% lower risk of depression compared to non-attenders. Lloyd Balbuena et al., *Religious Attendance, Spirituality, and Major Depression in Canada: A 14-Year Follow-up Study*, 58(4) Can. J. Psychiatry 225 (2013). Similarly, a 20-year follow-up study in the United States found that increased religious attendance was associated with a 43% lower risk of developing mood disorders

and a 53% lower risk of developing any psychiatric disorder. S. Kasen et al., *Religiosity and resilience in persons at high risk for major depression*, 42(3) Psychol. Med. 509 (2012).

2. The mental health professions recognize the importance of incorporating religion and spirituality in counseling.

Not surprisingly, the mental health professions now recognize the need to integrate religious and spiritual beliefs and practices in therapies. Numerous studies have shown that "clients utilizing religiously-integrated therapies or relying on their religious beliefs and practices experience fewer depressive symptoms and faster recoveries, less anxiety, lower suicide rates, and lower overall mortality." Holly K. Oxhandler et al., *The Religious and Spiritual Beliefs and Practices among Practitioners across Five Helping Professions*, 8 Religions 237 (2017) (citations omitted). Based on the scientific evidence, the World Psychiatry Association urges the inclusion of spirituality and religion in psychiatric clinical practice and training to provide a more holistic and comprehensive form of mental health care. Alexander Moreira-Almeida et al., *WPA Position Statement on Spirituality and Religion in Psychiatry*, 15(1) World Psychiatry 87 (2016).

As summarized in an article published in an American Psychological Association journal, in light of the close connection between religion and positive mental health, the scientific literature and experts in the area identified a number of recommendations for psychotherapists, including:

- using "clients' religious beliefs to help inform therapy decisions";

- including "religious dimensions in case conceptualization";
- helping "clients explore their religious questions in therapy";
- integrating "religious resources into treatment";
- using "prayer as a psychotherapy intervention";
- citing "religious texts (i.e., scripture) in treatment";
- helping "clients deepen their religious beliefs"; and
- modifying "treatment plans to account for clients' religious concerns."

Royce E. Frazier & Nancy Downing Hansen, *Religious/Spiritual Psychotherapy Behaviors: Do We Do What We Believe To Be Important?*, 40(1) Prof. Psychol.: Res. and Prac., 81, 83 (2009); *see also* Laura E. Captari et al., *Integrating clients' religion and spirituality within psychotherapy: A comprehensive meta-analysis*, 74 J. Clin. Psychol. 1938, 1941-42 (2018) (providing case examples).

The desire to incorporate religious and spiritual beliefs and practices in mental health counseling is shared by clients. A national survey of current mental health clients found two out of three indicating that their religious and spiritual beliefs "are important to them during difficult times[,] and over half indicated that discussing their [religious and spiritual] beliefs in therapy helps improve their mental health." Holly K. Oxhandler et al., *Current Mental Health Clients' Attitudes Regarding Religion and Spirituality in Treatment: A National Survey*, 12 Religions 371 (2021). Three-quarters of clients agreed that a good therapist is sensitive to clients' religious beliefs (75.6%, with 7.3% disagreeing). *Id.* at 7. Over seventy percent were open to discussing their religious and spiritual beliefs

in therapy (71.0%, with 12.0% disagreeing). *Ibid.* And a majority agreed that discussing their religious and spiritual beliefs in treatment improves their mental health outcomes. *Ibid.*; *see also* Cassandra Vieten et al., *Mental health professionals' perspectives on the relevance of religion and spirituality to mental health care*, 11 BMC Psychology 439 (2023) (discussing multiple surveys showing the vast majority of mental health clients view religious beliefs and practices as essential to their well-being).

Consistent with these findings, guidelines from the American Counseling Association provide that counselors should "a) modify therapeutic techniques to include a client's spiritual and/or religious perspectives, and b) utilize spiritual and/or religious practices as techniques when appropriate and acceptable to a client's viewpoint." Assoc. for Spiritual, Ethical, and Religious Values in Counseling, *Competencies for Addressing Spiritual and Religious Issues in Counseling*, Competency 13 (2009) ("*Competencies*").

B. Despite this recognition, the mental health professions have failed to integrate religion into counseling adequately.

Although the mental health professions recognize the need to integrate religious and spiritual beliefs and practice into counseling, progress has been slow to nonexistent. A 2023 study based on interviews of mental health professionals showed that "most professionals" favor "incorporating the spiritual dimension into clinical practice; however, few professionals" do so. Rocío de Diego-Cordero et al., "*More Spiritual Health Professionals Provide Different Care": A Qualitative Study in the Field of Mental Health*, 11 Healthcare 303 (2023). Despite the "recognition by professionals of

spiritual practices, little attention is paid to the spiritual approach in clinical practice or professional training due to the entrenchment of the biomedical model in our health care system." *Ibid.*

As another study indicated, although the "disciplines that provide psychotherapy agree about the importance of addressing religion and spirituality," "mental health professions, in general, have fallen short with sufficiently addressing religious and spiritual identities in practice and education." Waleed Y., Sami et al., *Disenchantment, Buffering, and Spiritual Reductionism: A Pedagogy of Secularism for Counseling and Psychotherapy*, 12 Religions 612 (2021) ("Sami 2021"). Many clinicians "report feeling unprepared to implement religious/spiritual competencies." *Ibid.*

This failure is not simply the result of a lack of training. Despite the evidence, there remains an "ongoing hostility (or indifference) to religion and religious worldviews within …. psychiatry, psychology, psychotherapy, and psychoanalysis." Rob Whitley, *Religious competence as cultural competence*, 49(2) Transcultural Psychiatry 245, 249 (2012). Professionals in these fields "are much more likely to be atheists than both other health care professionals and the general population." *Ibid.* And mental health professionals "have tended to ignore or pathologize the religious and spiritual dimensions of life, partly as a consequence of their own personal belief systems." *Ibid.* (quotation omitted). Indeed, doctoral students in counseling programs still report being "misunderstood," "judg[ed]," and being made to feel they are "not fit for the profession" because of their religious beliefs. Sami 2021, *supra*.

C. Religious mental health professionals can best fill the gap, but the decision below allows states to censor this critically needed religious-based counseling and mandates a state-sponsored view.

Religious mental health professionals can fill what's been called the "'religiosity gap' between clinicians and patients." Lukoff 1992, *supra*, at 673. For religious clients, it is critical to use a therapist who is not only familiar with their religion, but who also does not dismiss (or worse, pathologize) their religious beliefs and worldview. As recognized in the mental health literature,

> Clients can't check their worldviews, spirituality, or values at our door. … A religious identity and worldview are integral aspects of how religious clients think about, experience, respond to, and take action upon their world.

Holly K. Oxhandler et al., *Current Mental Health Clients' Attitudes Regarding Religion and Spirituality in Treatment: A National Survey*, 12 Religions 371 (2021) (quoting Michelle J. Pearce, Cognitive Behavioral Therapy for Christians with Depression: A Practical Tool-Based Primer (2016)).

Simply put, because they share the client's faith and worldview, religious mental health professionals can speak to the client's needs in a way that other counselors who do not share the client's faith cannot. In keeping with ethical guidelines, which require counselors to respect the client's freedom of choice as to a counseling plan and to avoid imposing their own beliefs, religious mental health counselors are best equipped to set "goals with the client that are

consistent with the client's spiritual and/or religious perspectives" and "therapeutically apply theory and current research supporting the inclusion of a client's spiritual and/or religious perspectives and practices." Assoc. for Spiritual, Ethical, and Religious Values in Counseling, *supra*, Competencies 12 and 14; *see also* Pet. App. 145a (Petitioner helps clients "identify their own objectives" so they can "work together to accomplish" the client's goals); Pet. App. 147a (Petitioner ensures that clients are "willing to work with him" and that they "participate[ ] voluntarily").

Including religious beliefs and practices in therapy is especially important for Christian professionals counseling fellow Christians, as in the case below. The Christian faith requires them to "instruct one another" in biblical knowledge (Rom. 15:14), "encourage one another with" Scripture (1 Thess. 4:18), "exhort one another" so that none "may be hardened by the deceitfulness of sin" (Heb. 3:13), and "stir up one another to love and good works" (Heb. 10:24).

For Christian counselors and their Christian counselees, counseling sessions may become more than applying secular therapy techniques. The sessions may also be an exercise in the Christian religion, seeking to fulfill these commandments. Christian counselees often request, and Christian counselors often provide, spiritual support through prayer, Bible reading, meditation, and devotional materials.

But applying only the rational basis test, the Ninth and Tenth Circuits have upheld statutes that censor these types of discussions. Under this deferential standard, neither the state nor the courts had to grapple with the hundreds of scientific studies demonstrating the importance of integrating religious beliefs and

practices in counseling. Moreover, because the statute is purportedly neutral and generally applicable, the lower court never rightly considered how the statute chills the free exercise of religion.

The decisions, therefore, allow the state to ban discussions of religious beliefs in the context of one-on-one counseling by a mental health professional based on secular philosophical objections. According to the Ninth Circuit, for instance, the at-issue statute must be upheld because it "permissibly honors" individual identities, "gay, straight, cisgender, or transgender." *Tingley v. Ferguson*, 47 F.4th 1055, 1084 (9th Cir. 2022).

In other words, according to these lower courts, the state can bar discussions based on the religious beliefs of a mental health client because the state believes sexual and gender identity is more important than religious identity. Religious adherents who want to live out their faith are left in the cold. The state can prevent them from finding help from a mental health professional who would speak to them about their religious beliefs or help them achieve goals based on their sincerely held religious beliefs.

III. The Court should clarify the First Amendment standard for religious speech.

Because "the speech underpinning" the therapy at issue below "is overwhelmingly—if not exclusively—religious," the Court should hold that it must be evaluated "under a more exacting standard." *Tingley*, 57 F.4th at 1084 (Butamay, J., dissenting from the denial of rehearing en banc). As this Court has recognized, the text and history of the First Amendment demonstrate that the protection of religious speech is a core constitutional concern. But the court below separated

its free speech and free exercise analyses, resulting in its holding that religious speech in the context of one-on-one professional counseling deserves only minimal constitutional protection. By treating the Free Speech and Free Exercise Clause as "hermetically sealed," separate units, the court below accorded no special solicitude to religious speech. *Green* v. *Miss U.S. of Am., LLC*, 52 F.4th 773, 787 n.14 (9th Cir. 2022).

This separation of free speech and free exercise concerns resulted from a lack of clarity in this Court's precedents. As numerous scholars have noted, this Court's First Amendment precedent has resulted in a form of reductionism, rendering the Free Exercise Clause virtually "redundant." Mark Tushnet, *The Redundant Free Exercise Clause?*, 33 Loy. U. Chi. L.J. 71, 73 (2002); see also W. Cole Durham, Jr., *Against Free Exercise Reductionism*, 17(1) Educação & Linguagem 11, 13-18 (2014). Other than protection against blatant discrimination, under some of this Court's precedents, the Free Exercise Clause would seem to add nothing to the analysis of religious speech. As a result, lower courts are losing the notion that "religious discourse is somehow importantly different from non-religious discourse." *Ibid.* The Court should correct that misconception and clarify its precedents.

A. The protection of religious speech is a core concern of the First Amendment.

"The First Amendment ensures that religious … persons are given proper protection as they seek to teach the principles that are so fulfilling and so central to their lives and faiths." *Obergefell* v. *Hodges*, 576 U.S. 644, 679-80 (2015). Religious teaching, such as the one-on-one counseling at issue in this case, is speech. And, as this Court recently recognized, the

First Amendment "doubly protects religious speech." *Kennedy* v. *Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022). The "Free Exercise Clause protects religious exercises," including those that are "communicative." *Ibid.* And "the Free Speech Clause provides overlapping protection for expressive religious activities." *Ibid.*

This double protection "is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent." *Kennedy*, 142 S. Ct. at 2421. That distrust is reflected in state laws and constitutions contemporaneous with the adoption of the First Amendment. For instance, the Virginia Statute for Religious Freedom, adopted in 1786, recognized that "to restrain the *profession or propagation* of [religious] principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty." Va. Code Ann. § 57-1 (emphasis added).

The First Amendment was therefore written to prevent government from "shackl[ing] men's tongues to make them speak only the religious thoughts that government want[s] them to speak." *Engel*, 370 U.S. at 435. The underlying principle is that "religious expression [is] too precious to be either proscribed or prescribed by the State." *Lee* v. *Weisman*, 505 U.S. 577, 589 (1992).

The protection of religious speech is thus central to the promises of the First Amendment. "Indeed, in Anglo-American history, at least, government suppression of speech has so commonly been directed precisely at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995).

B. Nonetheless, this Court's First Amendment precedent is confused, which has led lower courts to fail to accord religious speech special solicitude.

Despite recognizing that protecting religious speech is a central purpose of the First Amendment, this Court's decisions have failed to live up to that promise. In contrast to the expressed importance of religious speech, the Court's precedent does not recognize religious speech as any "different from non-religious discourse." Tushnet, *supra*, 33 Loy. U. Chi. L.J. at 73.

To be sure, this Court's "precedent establishes that private religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression." *Pinette*, 515 U.S. at 760. "Religionists no less than members of any other group enjoy the full measure of protection afforded speech, association, and political activity generally." *McDaniel* v. *Paty*, 435 U.S. 618, 641 (1978) (Brennan, J., concurring).

But that's the problem. Despite this Court's repeated recognition that the protection of religious speech is at the heart of the First Amendment, these precedents seem to treat religious speech as no more important than nude dancing, Ku Klux Klan rallies, a teenager's vulgarities, or any other speech. See *Barnes* v. *Glen Theatre*, 501 U.S. 560 (1991); *Brandenburg* v. *Ohio*, 395 U. S. 444 (1969) (per curiam); *Mahanoy Area Sch. Dist.* v. *B.L.*, 141 S. Ct. 2038 (2021). The Free Exercise Clause seems to add nothing to the analysis. Even this Court's more recent Free Exercise cases hold no more than that government regulation may not treat "comparable secular activity more

favorably than religious exercise." *Tandon* v. *Newsom*, 141 S. Ct. 1294, 1296 (2021).

In other words, at times, this Court seems to have adopted the view that there's nothing special about religious speech. The Court has, in effect, applied "a doctrine holding that religious belief is indistinguishable from other types of belief so that neither the free exercise nor the establishment clause constrains governmental action any differently than the free speech clause does." Stephen L. Carter, The Culture of Disbelief 130 (1993) (quotation omitted) ("Culture of Disbelief").

But the history and text of the First Amendment require special solicitude for religious speech. As discussed above, the need to protect religious speech animated the adoption of the First Amendment. *E.g.*, *Kennedy*, 142 S. Ct. at 2421. As that history shows, the First Amendment "gives 'religion in general' preferential treatment" because the Framers believed "the public virtues inculcated by religion are a public good." *Lamb's Chapel* v. *Ctr. Moriches Union Free Sch. Dist.*, 508 U.S. 384, 400 (1993) (Scalia, J., concurring).

Special solicitude is also mandated by the text. As this Court recently recognized, it has treated "the 'Establishment Clause,' the 'Free Exercise Clause,' and the 'Free Speech Clause'" as "separate units." *Kennedy*, 142 S. Ct. at 2426. It is this separate treatment that has led to the current situation in which the sum of the parts is less than the whole. But all three clauses "appear in the same sentence of the same Amendment" and should be read together as having "'complementary' purposes." *Ibid.*

When it comes to religious speech, therefore, there is "a confluence of speech and free exercise principles."

Masterpiece Cakeshop, Ltd. v. *Colo. C.R. Comm'n*, 138 S. Ct. 1719, 1723 (2018). Just as the Amendment's text "gives special solicitude" for the "rights of religious organizations," *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 565 U.S. 171, 189 (2012), the text requires the same for religious speech. It would be a "remarkable view that the Religion Clauses have nothing to say about a religious [speech]." *Ibid.*

Traditional religious beliefs about sexuality and gender are increasingly viewed by many as harmful. Thirty years ago, the "message of contemporary culture" was "that it is perfectly all right to believe that [religious] stuff—we have freedom of conscience, folks can believe what they like but you really ought to keep it to yourself, especially if your beliefs are the sort that cause you to act in ways that are ... well ... a bit unorthodox." Culture of Disbelief 24. Today, the message is that religious mental health counselors cannot even discuss those religious beliefs in one-on-one counseling sessions with fellow religious adherents. But the First Amendment protects even religious speech that may raise "sharp differences" and "may seem the rankest error" to some, because the freedom to express religious views is "essential to enlightened opinion and right conduct on the part of the citizens of a democracy." *Cantwell v. Connecticut*, 310 U.S. 296, 309 (1940).

The Court needs to clarify that the Amendment provides special protection for religious speech.

CONCLUSION

The Colorado statute restricts the speech of mental health professionals. The Court should hold that it violates the First Amendment.

Respectfully submitted.

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