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.

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

BRIEF OF PARTIES IN OTHER FIRST AMENDMENT CASES PENDING BEFORE THE COURT AS AMICI CURIAE SUPPORTING NEITHER PARTY AND VACATUR

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INTEREST OF AMICI CURIAE[1]

Amici are plaintiffs in First Amendment cases now pending at the certiorari stage before this Court.

After receiving a cease-and-desist letter, 360 Virtual Drone Services LLC and Michael Jones brought an as-applied challenge to North Carolina's surveyor-licensing law, which forbids them from communicating photographic maps and models without a land-surveyor license. On appeal, the Fourth Circuit introduced a "non-exhaustive list of factors" to hold that North Carolina's law "regulates professional conduct and only incidentally burdens speech." *360 Virtual Drone Servs. LLC* v. *Ritter*, 102 F.4th 263, 278 (2024), *pet. for cert. docketed* (No. 24-279). Using a "more relaxed" and "loosened" level of First Amendment scrutiny, the court then ruled for the State. *Id.* at 271, 276.

Ryan Crownholm and Crown Capital Adventures, Inc. (doing business as MySitePlan.com) use public data to create drawings showing the basic layout of customers' property. They, too, were singled out for unlicensed surveying, by California's surveying board. Analogizing Crownholm's drawings to the practice of a profession like "psychoanalysis" or "conversion therapy," the Ninth Circuit categorized his images as "unlicensed land surveying conduct" and held that California's law "imposes only incidental burdens on [his] speech." *Crownholm* v. *Moore*, No. 23-15138, 2024 WL 1635566, at *1, 2 (Apr. 16, 2024), *pet. for cert. docketed* (No. 24-276). The court then applied rational-basis review and ruled for the State.

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[1] In accordance with Rule 37.6, no counsel for a party authored this brief in whole or in part, and no person other than amici or their counsel have made any monetary contributions intended to fund the preparation or submission of this brief.

In Texas, disabled veterinarian Ron Hines was punished by the veterinary board for e-mailing advice to animal lovers worldwide without first inspecting each animal in person (among them, an Iranian pigeon and a Glaswegian cat). Unlike the Fourth and Ninth Circuits, the Fifth Circuit adhered to "the 'traditional conduct-versus-speech dichotomy'" and held that Texas's law "primarily regulates Dr. Hines's speech—and not merely incidentally to his conduct." *Hines* v. *Pardue*, 117 F.4th 769, 775, 777 (2024), *pet. for cert. docketed* (No. 24-920). The court then held that the law, as applied, failed even intermediate scrutiny. Texas has petitioned for certiorari.

Amici exemplify the millions of people nationwide who pursue their calling through communicating with others. Under the logic of the Tenth Circuit's decision below, however, their e-mails, photos, and drawings could be punished with few or no First Amendment guardrails. The same would be true of the speech and advice, articles and blogs, lectures and lessons of countless others. For that matter, important free-speech principles would be subverted as well by several of the arguments pressed by petitioner in the lower courts and at the certiorari stage. While petitioner's views on the First Amendment might secure her own rights against the statute with which she takes issue, those views, if accepted, would open obvious loopholes for States to burden the speech of many other people—including conversion therapists.

Against this backdrop, amici have a keen interest in the Court's articulating the governing First Amendment principles in a way that protects the rights, not just of petitioner, but of all Americans whose livelihoods and vocations involve sharing information with others.

SUMMARY OF ARGUMENT

In affirming the denial of petitioner's motion for a preliminary injunction, the decision below erred at the first inflection point: it broke with this Court's traditional speech–conduct standard to hold that, as applied to petitioner, Colorado's conversion-therapy law regulates her speech incidentally, not directly. That error can and should be corrected. In so doing, however, the Court should give no support to petitioner's cert-stage suggestion that laws restricting "who can speak" are somehow more benign than laws restricting "what can be said." That split-the-difference model defies precedent and should find no home in the Court's decision. Rather, the court of appeals' error can and should be resolved narrowly. A determination that the court misapplied the threshold speech–conduct standard would eliminate the lower-court conflict petitioner identified, answer the question meriting certiorari, and well-position the courts on remand to address all remaining First Amendment questions in the first instance.

ARGUMENT

The court of appeals' speech–conduct analysis is unsound, but several of petitioner's cert-stage arguments would improperly subvert the free-speech rights of amici and many other speakers.

A. The court of appeals misapplied the First Amendment.

Below, the court of appeals stated its intent to "apply 'ordinary First Amendment principles'" in addressing petitioner's challenge to Colorado's conversion-therapy law. Pet. App. 37a. But the principles the court proceeded to apply were anything but ordinary. In holding that Colorado's law, as applied to petitioner, regulates conduct and

affects speech only incidentally, the court implemented a standard that looks nothing like the one this Court has used for a half-century or more.

1. A law that is triggered by speech restricts that speech directly, not incidentally.

a. In as-applied free-speech challenges, the Court has long recognized that the first-order question is whether the challenged law regulates speech or regulates non-speech conduct. Ordinarily, the answer to that question dictates the level of First Amendment review (if any). If the law is triggered by "'nonspeech' conduct" that "bears absolutely no connection to any expressive activity," the First Amendment usually is not implicated at all. *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 707 n.3 (1986). If, by contrast, "[t]he only 'conduct'" triggering the law "is the fact of communication," *Cohen* v. *California*, 403 U.S. 15, 18 (1971), the law calls for heightened First Amendment scrutiny—strict if content-based, intermediate if content-neutral. And if "'speech' and 'nonspeech' elements are combined in the same course of conduct," a law triggered purely by the "noncommunicative aspect of [the] conduct" may impose "incidental limitations" on the communicative aspect. *United States* v. *O'Brien*, 391 U.S. 367, 376, 381-82 (1968). (David O'Brien's draft-card prosecution is a classic example.) Below, the court of appeals classified Colorado's law as falling into this final category: "a regulation of professional conduct incidentally involving speech." Pet. App. 58a.[2]

b. As *O'Brien* synthesized, a law may be said to restrict speech incidentally "when 'speech' and 'nonspeech'

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[2] For laws that burden speech only incidentally, the Court has held that the level of review "is little, if any, different" from the intermediate scrutiny applicable to content-neutral laws. *Texas* v. *Johnson*, 491 U.S. 397, 407 (1989) (citation omitted). Even so, the court of

elements are combined in the same course of conduct" and a restriction triggered by the "nonspeech element" yields "incidental limitations" on the speech. 391 U.S. at 376. When, in contrast, the act of communicating is itself what "trigger[s]" the law, the speech is restricted not "incidentally," but directly. *Holder* v. *Humanitarian L. Proj.*, 561 U.S. 1, 26, 28 (2010). This distinction is the essence of "the line between speech and conduct . . . long familiar to the bar." *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 585 U.S. 755, 769 (2018) (*NIFLA*) (citation omitted).

A slate of examples shows the line in practice. A ban on race-based hiring is triggered by nonspeech conduct (race-based hiring) even if it has the at-most-incidental effect of obliging employers to remove "White Applicants Only" signs. *See Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 567 (2011). A price cap is triggered by nonspeech conduct (collecting money) even if it has an incidental effect on the numbers printed on price tags. *See Expressions Hair Design* v. *Schneiderman*, 581 U.S. 37, 47 (2017). An informed-consent requirement is triggered by nonspeech conduct (performing a medical procedure) even if it has the incidental effect of obliging the surgeon to convey information to the patient. *See NIFLA*, 585 U.S. at 770. An ordinance against outdoor fires is triggered by nonspeech conduct (burning outdoor fires) even as applied to someone torching a flag in an act of protest. *See R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 385 (1992).

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appeals applied no First Amendment review because petitioner "d[id] not argue, even in the alternative," that anything other than rational-basis review applies to such laws. Pet. App. 60a n.38. In cases where that issue has been preserved, the lower courts remain inexplicably divided on the level of scrutiny to apply. Pet. App. 60a n.38; *see also* Pet. at 33-34, *Crownholm* v. *Moore* (No. 24-276).

Then there are laws triggered, not by "the independent noncommunicative impact of conduct," but by the act of communicating itself. *O'Brien*, 391 U.S. at 382. So applied, these laws—unlike the examples above—restrict speech directly. This Court's decision in *Holder* v. *Humanitarian Law Project* well illustrates the point. The plaintiffs there challenged 18 U.S.C. § 2339B(a)(1), which prohibits giving "material support" to foreign terrorist organizations. In the main, material support does not take the form of speech; the term covers all sorts of resources, from safehouses to bombs. 18 U.S.C. §§ 2339A(b)(1), 2339B(g)(4). But as applied to the plaintiffs in *Humanitarian Law Project*, the statute was in fact triggered by speech. The plaintiffs wished to train members of a terrorist group on humanitarian and international law. 561 U.S. at 14-15. And the material-support statute barred them from doing so; among the categories of forbidden material support are "training" and "expert advice or assistance." 18 U.S.C. § 2339A(b)(1)-(3).

Unanimously, the Court agreed that the statute, as applied to the plaintiffs, restricted speech directly. 561 U.S. at 27-28; *id.* at 45 (Breyer, J., dissenting). In the government's telling, "the only thing truly at issue . . . [was] conduct, not speech," and the material-support statute "only incidentally burdens [the plaintiffs'] expression." *Id.* at 26. Yet the Court held otherwise. "The Government is wrong," the Court reasoned, "that the only thing actually at issue in this litigation is conduct, and therefore wrong to argue that *O'Brien* provides the correct standard of review." *Id.* at 27. Rather, whether the plaintiffs could "speak" to their would-be trainees "depends on what they say." *Id.* If their speech "imparts a 'specific skill' or communicates advice derived from 'specialized knowledge,'" it would be barred. *Id.* If "it imparts only general or unspecialized knowledge," it would be permit-

ted. *Id.* "[A]s applied to plaintiffs," in short, "the conduct triggering coverage under the statute consists of communicating a message"—no matter that the statute "*generally* functions as a regulation of conduct" in other contexts. *Id.* at 27-28. In turn, the statute restricted the plaintiffs' speech not incidentally, but directly.

Humanitarian Law Project is not an outlier in this regard. In *Cohen* v. *California*, the Court held that a disorderly-conduct statute restricted a defendant's speech directly, when "[t]he only 'conduct' which the State sought to punish is the fact of communication," not any "separately identifiable" nonspeech conduct. 403 U.S. at 18. In *Expressions Hair Design* v. *Schneiderman*, the Court rejected the lower court's view that a surcharge-labeling law "regulated conduct, not speech" when the law "regulat[ed] the communication of prices rather than prices themselves." 581 U.S. at 46, 48. In *NIFLA*, the Court held that a notice requirement "regulates speech as speech" when its applicability was "not tied to a procedure" or to any other form of nonspeech conduct. 585 U.S. at 770. In *Consolidated Edison Co. of New York* v. *Public Service Commission*, the Court rejected the view that a ban on certain bill inserts only "incidentally limit[ed] speech." 447 U.S. 530, 541 n.9 (1980). Not only was the ban triggered by the information on the inserts, *id.* at 532-33, but the state courts "justified the ban expressly on the basis that the speech might be harmful to consumers." *Id.* at 541 n.9.

Distilled, the analysis is relatively simple. A law restricts conduct and burdens speech only incidentally if it is triggered by "some 'separately identifiable' conduct to which the speech was incidental." *Tingley* v. *Ferguson*, 57 F.4th 1072, 1075-76 (9th Cir. 2023) (statement of O'Scannlain, J., respecting the denial of rehearing en banc). But whatever a statute may cover "generally," it

acts as a direct restraint on speech when "the conduct triggering coverage . . . consists of communicating a message." *Humanitarian L. Proj.*, 561 U.S. at 28. Applying these principles, "courts have generally been able to distinguish" between laws that restrict speech directly and those that regulate nonspeech conduct and burden speech only incidentally. *Barr* v. *Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 620 (2020) (plurality opinion).

2. Colorado's law restricts petitioner's speech directly, not incidentally.

Applying the above principles, Colorado's conversion-therapy law burdens petitioner's speech directly. Much like the material-support statute in *Humanitarian Law Project*, Colorado's law functions as a regulation of nonspeech conduct in many of its applications. As the State points out, it can be triggered by noncommunicative acts like administering electric shocks or inducing vomiting. Br. in Opp. 14 n.4. But as applied to petitioner, it is triggered purely by "the fact of communication." *Cohen*, 403 U.S. at 18. For her, the conduct triggering coverage is the "use of verbal language" and nothing else. Pet. App. 46a. Based on a straightforward application of this Court's precedent, the law does far more than burden her speech only incidentally.

The State's defense drives home the point. Whatever harms follow from petitioner's "counseling conduct" (Pet. App. 50a), those harms "arise[] in some measure because the communication allegedly integral to the conduct is itself thought to be harmful." *O'Brien*, 391 U.S. at 382. The words (or "verbal language") petitioner wishes to communicate to her clients are thought to cause serious risks of emotional trauma, depression, anxiety, suicidality, and self-hatred. Pet. App. 46a, 51a & n.30. And perhaps they do. Perhaps those risks are great enough to justify Colo-

rado's law under First Amendment scrutiny—a point the dissent below stressed several times over. *E.g.*, Pet. App. 97a-98a n.4, 107a (opinion of Hartz, J.). Either way, the risks the State seeks to curtail, and the act triggering its law's application to petitioner, cannot be said to be "limited to the noncommunicative aspect of [her] conduct." *O'Brien*, 391 U.S. at 381-82. For our part, we take no position on whether Colorado's law would survive First Amendment scrutiny (an issue addressed by neither court below). But on the antecedent question whether the law restricts petitioner's speech directly or incidentally, the answer is clear-cut: it is a direct restraint on her speech, and it should have been analyzed as such.

3. The court of appeals' contrary holding is premised on a standard that bears no resemblance to this Court's.

a. Although the court of appeals purported to apply "ordinary First Amendment principles," Pet. App. 37a (citation omitted), its mode of analysis was anything but ordinary. The court did not consider whether, as applied to petitioner, the conduct triggering coverage under Colorado's statute consists of "the fact of communication" or some "separately identifiable" noncommunicative conduct. *Cohen*, 403 U.S. at 18. In fact, the court openly renounced the principles of *Humanitarian Law Project* and *Cohen*. Those precedents are "not instructive," the court posited, because the statutes in those cases were held to restrict speech directly, not incidentally. Pet. App. 54a. Yet the *reasons* for that bottom line in those cases apply with equal force here. According to the court of appeals, for example, "the conduct triggering coverage" under Colorado's statute "is not communicating a message but practicing a 'treatment.'" Pet. App. 54a. But much the same could have been said—and was—by the federal government in *Humanitarian Law Project*. Br. for Re-

spondents at 47 (No. 08-1498) ("[T]he statute's aim is not the content or viewpoint of the speech, but the act of aiding deadly terrorist organizations."). According to the court of appeals, "[petitioner] may communicate whatever message she likes about any subject without triggering coverage under the statute." Pet. App. 54a. Again, the same could have been said—and was—in *Humanitarian Law Project*. 561 U.S. at 26 ("As the Government states: 'The statute does not prohibit independent advocacy or expression of any kind.'").

In all but name, moreover, the analysis the court of appeals adopted mirrors one this Court repudiated in 2018: the "professional speech" doctrine. *NIFLA*, 585 U.S. at 767. In the court of appeals' view, Colorado's law restricts petitioner's speech only incidentally because it regulates "specifically credentialed professionals" and covers an "array" of nonspeech conduct. Pet. App. 38a, 39a. As for the law's application to petitioner, the court added, it "fall[s] under the . . . umbrella" of the "practice of mental health treatment" and thus does not regulate her speech directly. Pet. App. 40a (citation omitted), 49a.

This is precisely the mode of analysis the Court extinguished in *NIFLA*, one under which a string of lower courts had diluted or eliminated First Amendment review for speech restrictions that came in the form of "generally applicable licensing and regulatory regime[s]." *NIFLA*, 585 U.S. at 767 (citation omitted). As if to fortify the parallels, the decision below three times invoked a forty-year-old concurrence that has long been credited as the source of the lower courts' professional-speech doctrine. Pet. App. 45a, 49a (quoting *Lowe* v. *SEC*, 472 U.S. 181 (1985) (White, J., concurring in the result)); *see also King* v. *Governor of N.J.*, 767 F.3d 216, 230 (3d Cir. 2014) ("Justice White defined the contours of First Amendment protection in the realm of professional speech[.]"), *abrogated*

by NIFLA, 585 U.S. 755. For good measure, the court of appeals also joined (Pet. App. 42a, 49a) with an Eleventh Circuit decision that has been justly criticized for "at once reject[ing] the professional speech doctrine, while in the same breath endorsing it under another name," 2 *Smolla & Nimmer on Freedom of Speech* § 20:37.40 (Apr. 2024 update) (Smolla & Nimmer), and for "adher[ing] to the 'professional speech doctrine'" through a "studied attempt at camouflage," Br. Amici Curiae of Rodney A. Smolla, Floyd Abrams, Erwin Chemerinsky, et al. in Support of Petitioner at 9, *Del Castillo* v. *Sec'y, Fla. Dep't of Health* (No. 22-135).

The court of appeals appears to have labored under the belief that this Court's decision in *NIFLA* somehow blessed the above approach. In this, the court erred. It is true, as the court remarked, that this Court has recognized that "'[t]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech,' and professionals are no exception to this rule." *NIFLA*, 585 U.S. at 769 (quoting *Sorrell*, 564 U.S. at 567). But contrary to the court of appeals' assumption, that proposition does not signal a bespoke, uniquely malleable speech–conduct standard for whatever speech or conduct can be called "professional." Quite the opposite: it means that the traditional "line between speech and conduct" applies to cases involving the speech of professionals just as it applies everywhere else. *Id.*; *see also Vizaline, LLC* v. *Tracy*, 949 F.3d 927, 932 (5th Cir. 2020) ("[*NIFLA*'s reasoning] was merely an application of the general principle that legislatures may 'impos[e] incidental burdens on speech' by regulating 'commerce or conduct.'"). That the court of appeals could resort to an oxymoron like "counseling conduct" (Pet. App. 50a) only spotlights how far afield it strayed.

b. The court of appeals signaled misgivings that applying this Court's traditional speech–conduct standard would imperil States' ability to regulate mental-health professionals. Pet. App. 52a. That concern was misplaced. To start, many of the restrictions in Colorado's Mental Health Practice Act are triggered by noncommunicative conduct—using aversive (i.e., physical) conversion-therapy techniques; using "rebirthing" methods, which involve placing the client in physical restraints; exploiting clients for financial gain; having sex with them; and so on. Colo. Rev. Stat. § 12-245-224(1)(j), (r), (t)(IV), (t)(V). In addition, "[l]ongstanding torts for professional malpractice" are available to redress past harms and to serve as guideposts for counselors in the future, including those who engage in conversion therapy. *NIFLA*, 585 U.S. at 769. Other remedies may be available as well. *Cf.* Susan K. Livio, *Group claiming to turn gay men straight committed consumer fraud, N.J. jury says*, NJ.com (June 25, 2015), https://tinyurl.com/3yenwza2. Even for Colorado's conversion-therapy provision in particular, the fact that it restricts petitioner's speech directly does not mean it necessarily is invalid—only, as Judge Hartz remarked below, that it is subject to First Amendment review. Pet. App. 97a-98a n.4, 107a (dissenting opinion).

At the same time, the court of appeals overlooked the destabilizing effects of its approach and the potential to harm the very demographics Colorado is understandably concerned with protecting. For if Colorado can classify conversion therapy as "counseling conduct," other States with other priors can execute the same maneuver and prohibit counselors from engaging in "counseling conduct" that *affirms* sexual orientations and gender identities. *Cf. Brandt* v. *Rutledge*, 551 F. Supp. 3d 882, 893-94 (E.D. Ark. 2021) (reading state law as barring healthcare professionals from telling minor patients about lawful

gender-transition procedures and holding that the law likely violated the First Amendment), *aff'd on other grounds*, 47 F.4th 661 (8th Cir. 2022); *see also* Anna Claire Vollers, *Laws banning gender-affirming treatments can block trans youth from receiving other care*, Stateline (July 27, 2023) ("In some states, new laws banning gender-affirming care for transgender youth are dissuading health care providers from offering mental health services and other medical care that isn't explicitly banned by those laws."), https://tinyurl.com/37wvtz3e. This case's controversial subject matter thus cements the importance of adhering to a non-controversial rule of decision—the usual speech–conduct standard—that "applies evenhandedly" to all restrictions on speech. *NIFLA*, 585 U.S. at 796 (Breyer, J., dissenting).

c. The court of appeals' other strands of reasoning reinforced its basic error. For example, the court posited that whether petitioner's talk therapy is prohibited turns not on "what she says," but on "the intended effect" of what she says. Pet. App. 57a n.35. Of course, "defining regulated speech by its function or purpose" is often a proxy for more "obvious" content-based distinctions. *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015); *see also City of Austin* v. *Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 74 (2022); Pet. Br. 38-40. More fundamentally, the court of appeals' characterization, even if correct, would at most support reviewing Colorado's law as content-neutral rather than content-based. Yet the court did neither; having held that the law restricted petitioner's speech only incidentally, it applied no First Amendment scrutiny at all.

The court also commented on the "long-established history of states regulating the healthcare professions." Pet. App. 40a-41a. *But cf.* Pet. App. 37a n.24 (acknowledging that "[t]he parties do not advance any . . . reasons" for

exempting petitioner's speech from ordinary First Amendment principles). That exercise was misguided. The court compiled instances of other courts' treating the regulation of medical practitioners as within the States' police power. Pet. App. 40a-41a, 52a. But "[t]hat a law exercises the police power does not exempt it from First Amendment scrutiny." *Tingley*, 57 F.4th at 1078 (statement of O'Scannlain, J., respecting the denial of rehearing en banc). Nor did the court's appeal to history unearth a compelling record of "regulating medical practitioner speech," as opposed to regulating nonspeech conduct like "physical contact with patients." *Id.* at 1080-81. Nor did the court acknowledge that licensure of counseling is a conspicuously modern phenomenon, taking hold only in the 1970s. *See* Pet. Br. 9.

This imprecision is not unique to the decision below, and it sounds a cautionary note about the mishandling of history in these types of cases. In amicus 360 Virtual Drone Services' case, for instance, North Carolina has similarly gestured at "history and tradition"—even though (like other States) North Carolina did not mandate surveyor licenses until the mid-twentieth century and did not sweep in aerial maps and models until the late '90s. Cert. Reply Br. at 9, *360 Virtual Drone Servs. LLC* v. *Ritter* (No. 24-279). Consider, too, a recent concurrence from the Third Circuit, which cited a "long tradition of professional licensing schemes" to suggest that licensing laws might be exempt from ordinary First Amendment principles. *Veterans Guardian VA Claim Consulting LLC* v. *Platkin*, 133 F.4th 213, 224 (2025) (Krause, J., concurring). Notable in its list of historically licensed professions: almost all (besides printers) involved mainly nonspeech conduct, from driving coaches to keeping inns. (As for printers, their tangles with licensing authorities contributed directly to the First Amendment.) To the extent

it relied on history, the decision below misused it in much the same way.

In a similar vein, the court of appeals suggested that applying the traditional speech–conduct analysis to Colorado's conversion-therapy law might mean the same method of analysis could apply to laws governing lawyers. Pet. App. 49a n.29. But this Court already *has* applied this method of analysis to laws governing lawyers. *NIFLA*, 585 U.S. at 771 (collecting authority). And the heavens remain unfallen. As with other professions, many aspects of the practice of law are regulated based on noncommunicative characteristics—for instance, the independent legal effect of a contract or the holding of client funds. Other aspects (e.g., representing clients in court) are susceptible to greater regulation given courts' status as nonpublic forums. Derek A. Denckla, *Nonlawyers and the Unauthorized Practice of Law: An Overview of the Legal and Ethical Parameters*, 67 Fordham L. Rev. 2581, 2583 (1999) (discussing history); *see also Veterans Guardian*, 133 F.4th at 219 (Bibas, J.). At the same time, applying the traditional speech–conduct standard ensures that even legal-practice regulations do not violate free-speech rights on an as-applied basis. For, as courts have recognized, "[t]here may well be many activities which lawyers routinely engage in which are protected by the First Amendment and which could not be constitutionally prohibited to laypersons." *Lawline* v. *Am. Bar Ass'n*, 956 F.2d 1378, 1386 (7th Cir. 1992), *cert. denied*, 510 U.S. 992 (1993); *see also Upsolve, Inc.* v. *James*, 604 F. Supp. 3d 97, 103 (S.D.N.Y. 2022) (preliminarily enjoining UPL statute as applied to nonprofit and reverend who "crafted a program that would train non-lawyers to give legal advice to low-income New Yorkers who face debt collection actions"), *appeal docketed*, No. 22-1345 (2d Cir.). Below, in fact, the State itself agreed. Appellee C.A.

Br. 47-48 (Doc. 78) (indicating that the district court in *Upsolve* rightly "applied heightened scrutiny to a law restricting legal advice given by *unlicensed* individuals" because the law did not "regulate[] the actual conduct engaged in by professionals").

Also misplaced were the court of appeals' observations that Colorado's statute lets petitioner "share with her minor clients her own views on conversion therapy," so long as her words do not cross into "conversion therapy treatment itself." Pet. App. 47a, 48a. That some of petitioner's speech is left unregulated has no bearing on the First Amendment analysis for the speech that is in fact restricted. Not for the first time, the federal government pressed the same argument—nearly verbatim, and without success—in *Humanitarian Law Project*. *Compare* Br. for Respondents at 50 (No. 08-1498) ("[P]etitioners are free to join and communicate with the members of the PKK or LTTE, so long as they do not use that communication as a vehicle for conveying material assistance."), *with* Pet. App. 48a ("Chiles is free to tell any minor client that conversion therapy may serve their goals and refer the client to a religious minister who can provide that service." (citation omitted)).

B. No support should be given to petitioner's cert-stage views on how the First Amendment applies to occupational-licensing laws.

A determination that the court of appeals misapplied the threshold speech–conduct standard would eliminate the conflict in the courts of appeals and fully resolve the question meriting certiorari in this case. *See* pp. 26-28, *infra*. While advocating a faithful application of that standard for her own speech, however, petitioner took pains at the cert stage to co-sign the court of appeals' flawed logic as it applies to many other Americans—people who are

barred outright from speaking about specific topics by licensing laws (like amici 360 Virtual Drone Services, Michael Jones, Ryan Crownholm, and MySitePlan.com) and, potentially, people like amicus Ron Hines, a license holder whose advice is barred by regulations that are not obviously viewpoint-discriminatory. If accepted, petitioner's arguments on this front would subvert the rights of countless Americans and give States wide latitude to restrict even the conversion-therapy speech petitioner prioritizes.

1. Petitioner's stance subverts the free-speech rights of countless Americans.

a. In defending its statute below, the State successfully urged the lower courts to adopt the Eleventh Circuit's logic in *Del Castillo* v. *Secretary of the Florida Department of Health*, 26 F.4th 1214, *cert. denied*, 143 S. Ct. 486 (2022), *cited at* Pet. App. 41a-42a, 49a. That decision is the one noted above, criticized for "at once reject[ing] the professional speech doctrine, while in the same breath endorsing it under another name." Smolla & Nimmer § 20:37.40. Briefly, that case involved a diet coach who brought a First Amendment suit after Florida's dietetics board fined her for "providing individualized dietary advice in exchange for compensation in Florida" without a dietetics license. 26 F.4th at 1217. On appeal, the Eleventh Circuit applied no First Amendment review. Rather, it deployed a standard that another circuit (the Fifth) has singled out as emblematic of the "professional speech doctrine" this Court has "rejected." *Vizaline, LLC*, 949 F.3d at 931-32; *see also* Cert. Reply Br. at 6, *360 Virtual Drone Servs. LLC* v. *Ritter* (No. 24-279). On that basis, it then classed the plaintiff's thoughts and words ("[a]ssessing," "research[ing]," and "integrating information") as "occupational conduct" and held that Florida's dietetics law "only incidentally burdened [her] free speech rights." 26

F.4th at 1225-26; *see also Richwine* v. *Matuszak*, 707 F. Supp. 3d 782, 803 (N.D. Ind. 2023) ("*Del Castillo* allowed a state to transform pure speech about diet advice into non-expressive conduct by simply labeling it 'the practice of dietetics.'"), *appeal docketed*, No. 24-1081 (7th Cir.).

Petitioner resists the application of *Del Castillo*'s logic to her case, but she does so at the expense of administrable First Amendment principles. In petitioner's telling, *Del Castillo* is sensible and broadly applicable—except, it seems, when it comes to laws impeding conversion therapy. The licensing law in *Del Castillo*, petitioner asserts, was indeed properly understood as "a conduct regulation that incidentally affects speech" because it "regulate[s] *who* can speak, not what they can say." Cert. Reply Br. 3. Colorado's law, meanwhile, "regulates not who speaks but what can be said." Cert. Reply Br. 3 (emphasis omitted). That distinction, petitioner says, makes all the difference. Appellant's C.A. Reply Br. 22 (Doc. 144) ("Licensing laws regulate *who* can speak, not *what* can be said."); Cert. Reply Br. at 6-7, *Tingley* v. *Ferguson* (No. 22-942) ("Any effect on speech is therefore incidental.").

b. Petitioner's stance is wrong and unadministrable.

i. Contrary to petitioner's suggestion, a law that restricts "*who* can speak" on certain topics is no less a direct burden on speech than one restricting "what can be said." Cert. Reply Br. 3. "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell*, 564 U.S. at 566. And were petitioner's view correct, governments could gatekeep all manner of speech, demanding licenses for columnists and reporters, artists and authors, poets and pundits. *Richwine*, 707 F. Supp. 3d at 803. By comparison, even the discredited professional-speech doctrine would be more speech-protective. "Surely it cannot be said"—wrote

Justice White in his wellspring professional-speech concurrence—"that if Congress were to declare editorial writers fiduciaries for their readers and establish a licensing scheme under which 'unqualified' writers were forbidden to publish, this Court would be powerless to hold that the legislation violated the First Amendment." *Lowe*, 472 U.S. at 231. Yet taken to its logical conclusion, petitioner's line would open the door for precisely that unconstitutional result. Indeed, Colorado's law itself could be recast as a restriction on "who" can engage in conversion-therapy counseling (Ministers? Yes. Counselors? No) rather than a restriction on "what" counselors can say. *See* Pet. App. 78a n.49.

As a raft of examples spotlights, moreover, licensure regimes restricting "who can speak" can abridge speech just as directly as ones regulating "what can be said" by those already licensed. The psychology board in Kentucky, for instance, sent a cease-and-desist letter to nationally syndicated columnist John Rosemond; publishing his parenting column in Kentucky newspapers, the board warned, amounted to the unlicensed practice of psychology. *Rosemond* v. *Markham*, 135 F. Supp. 3d 574 (E.D. Ky. 2015); *see also* Br. Amici Curiae of John Rosemond et al., *Crownholm* v. *Moore* (No. 24-276). The North Carolina dietetics board took a literal red pen to a diabetic's health blog, claiming the unlicensed practice of dietetics. *Cooksey* v. *Futrell*, 721 F.3d 226, 230-32 (4th Cir. 2013). More recently, that State's surveying and engineering board sent a cease-and-desist letter to a retiree for testifying as an expert witness about water flow in pipes. His offense? The unlicensed practice of engineering. *Nutt* v. *Ritter*, 707 F. Supp. 3d 517 (E.D.N.C. 2023). The same board, of course, targeted amici Michael Jones and 360 Virtual Drone Services as well, for the unlicensed practice of surveying. And in doing so, the agency freely admitted

the obvious: that as applied to Jones and his company, its law was triggered by speech. Pet. at 10-11, *360 Virtual Drone Servs. LLC* v. *Ritter* (No. 24-279).

Nor are these cases peculiar to the East Coast. Oregon's engineering board fined a man $500 for criticizing the mathematical formula used to time traffic lights: the unlicensed practice of engineering. *Järlström* v. *Aldridge*, 366 F. Supp. 3d 1205 (D. Or. 2018). The same board targeted an out-of-state engineer on the same basis, for working with a grassroots coalition to author a memo opposing a landfill project. D. Ct. Doc. 74-5, at 1-4, *Järlström* v. *Aldridge*, No. 17-cv-652 (D. Or. May 29, 2018). Along similar lines, the agency proceeded against an activist for working with a neighborhood group to oppose the noise impact of a proposed power plant, culminating in a $1,000 fine. In the board's telling, "[m]aking public statements about a major public works project without licensure has the potential to allow for significant impact to the welfare of the residents . . . ." D. Ct. Doc. 74-42, at 4-5, *Järlström* v. *Aldridge*, No. 17-cv-652 (D. Or. May 29, 2018). Not to be outdone, Oregon's geology-licensing board threatened to fine a geology professor for speaking out against a gravel pit planned for his neighborhood. (Unlicensed geology.) Garrett Epps, *License to Speak: The state of Oregon is abusing its authority to regulate professional services to silence its critics*, The Atlantic (May 5, 2017), https://tinyurl.com/3bwkwdyk.

The list goes on, but the point is simple: any suggestion that government restrictions on "*who* can speak" are somehow more benign (or incidental) than restrictions on "*what* can be said" is without merit. Cert. Reply Br. 3. Contrary to petitioner's view, "restrictions distinguishing among different speakers, allowing speech by some but not others," are no less suspect under the First Amendment. *Citizens United* v. *Fed. Election Comm'n*, 558

U.S. 310, 340 (2010). In *NIFLA* itself, the lower-court decisions the Court abrogated included not just ones upholding restrictions on what license holders can say, but also one upholding restrictions on who can speak in the first place. *Moore-King* v. *County of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013). Other courts have followed suit. Of particular note, the Fifth Circuit in 2020 vacated a district-court decision that—tracking petitioner's faulty logic almost word for word—held that a State's surveyor-licensing statutes "only 'incidentally infringed upon' [the plaintiff's] speech because they merely 'determin[e] *who* may engage in certain speech.'" *Vizaline, LLC*, 949 F.3d at 932; *see also id.* ("This analysis runs afoul of *NIFLA*.").

ii. Petitioners' line between restricting "who can speak" versus restricting "what they can say" is not just incorrect, but unadministrable. After all, restricting "who" can speak on a certain topic necessarily restricts "what" that person can say. Below, even petitioner struggled to balance on her stated line; a law requiring tour guides to get a license, she acknowledged, restricts speech directly—even though it is a textbook example of a law restricting who can speak. Appellant's C.A. Br. 19 (Doc. 31) (discussing *Billups* v. *City of Charleston*, 961 F.3d 673, 683 (4th Cir. 2020)).

So if who-versus-what isn't petitioner's line, what is? Is it that laws regulating "who can speak" are "a conduct regulation that incidentally affects speech" (Cert. Reply Br. 3) only when the speech is sufficiently specialized or professional? If so, how is that different from the professional-speech doctrine abrogated in *NIFLA*? For that matter, how are courts to decide what speech is sufficiently professional? "'Professional speech'" is a punishingly "difficult category to define with precision." *NIFLA*, 585 U.S. at 773. And petitioner's briefing proves the point. Petitioner seems comfortable saying that Heather

Del Castillo's advice about eating veggies is unworthy of full First Amendment protection. Kim Billups's tours of Charleston, meanwhile, seem to fall on the other side of petitioner's line. But what if Charleston disagrees?[3] More to the point, how does petitioner's analysis cash out for Michael Jones's photos? Or Ryan Crownholm's site plans? Or John Rosemond's columns? Or the diabetic's blog in North Carolina? Or the landfill memo in Oregon? What about the support and guidance provided by death doulas?[4] Or horse-massage lessons?[5] Or a nonprofit's advice to low-income debtors?[6] How about "art therapy"?[7] Or music therapy?[8] How about fortune-telling?[9]

Petitioner's submissions could, alternatively, be read as suggesting that the dispositive line is not between professional speech and non-professional speech (whatever that might mean) but between laws that might mask viewpoint preferences versus ones that might not. Cert. Reply Br. 3 ("*Del Castillo* highlights the difference between a viewpoint-based speech regulation and a conduct regulation that incidentally affects speech."). On this front, too,

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[3] D. Ct. Doc. 109, at 120, *Billups* v. *City of Charleston*, No. 16-cv-264 (D.S.C. Apr. 20, 2018) ("Q. So the City considers tour guides to be professionals? A. Yes.").

[4] *E.g.*, *Richwine* v. *Matuszak*, *supra*, 707 F. Supp. 3d at 803-04 ("Because . . . Indiana's funeral-licensing scheme directly regulates speech, ordinary First Amendment principles apply.").

[5] *Mox* v. *Olson*, No. 23-cv-3543, 2024 WL 3526913 (D. Minn. July 24, 2024).

[6] *Upsolve, Inc.* v. *James*, *supra*, 604 F. Supp. 3d 97.

[7] *E.g.*, Va. Code § 54.1-3516(A) ("No person shall engage in the practice of art therapy . . . unless he is licensed by the Board.").

[8] *E.g.*, *id.* § 54.1-3709.2(B).

[9] *Moore-King* v. *County of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2013), *abrogated by NIFLA*, 585 U.S. 755.

however, petitioner again struggles to toe the line. According to the Fourth Circuit, for instance, Charleston's tour-guide ordinance was not viewpoint-based. *Billups*, 961 F.3d at 677. Yet petitioner (rightly) accepts that Charleston's ordinance restricted speech directly, not incidentally. Appellant's C.A. Br. 19 (Doc. 31). Likewise for amicus Ron Hines's veterinary advice. Below, petitioner singled him out (rightly) as someone whose speech is restricted directly, not incidentally. Appellant's C.A. Br. 19 (Doc. 31). But while Texas's law is surely triggered by Dr. Hines's e-mailed advice, it does not "target viewpoints within that subject matter." *Hines*, 117 F.4th at 789 (Ramirez, J., concurring) (citation omitted).

These examples also illustrate a more basic point. Whether a law is viewpoint-based certainly may inform whether it violates the First Amendment; viewpoint discrimination of course is an "egregious form of content discrimination." *Reed*, 576 U.S. at 168-69 (citation omitted). But viewpoint discrimination is not a prerequisite for invoking the First Amendment in the first place; all manner of laws are held to restrict speech directly even though not viewpoint-based. The material-support statute in *Humanitarian Law Project* is an obvious one. So was the licensed-notice statute in *NIFLA*, which the Court held "regulates speech as speech" while not addressing whether it discriminated based on viewpoint. 585 U.S. at 770; *see also id.* at 779 (Kennedy, J., concurring) ("The Court, in my view, is correct not to reach this question."). Simply, the first-order question whether a law restricts speech directly or incidentally has never depended on whether the law is or is not viewpoint-based.

Rightly so. For one thing, the Court has long "rejected the argument that 'discriminatory . . . treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.'" *Reed*, 576 U.S. at

168. For another, it's well-recognized that even speech restrictions that are not openly viewpoint-based nonetheless can be harnessed to stifle unpopular speech. *Id.* at 167-68. And licensing laws are no exception. Columnist John Rosemond? Reported to the Kentucky psychology board by "a formerly licensed Kentucky psychologist" who "took issue with [the] advice" in one of his articles. *Rosemond*, 135 F. Supp. 3d at 579. The retiree who testified about pipes? Reported to North Carolina's engineering board by an expert witness on the other side. *Nutt*, 707 F. Supp. 3d at 526. The professor who spoke out against the gravel pit? Reported to Oregon's geology board by the gravel company. Sherri Buri McDonald, *Company's campaign against UO professor fails*, The Register-Guard (Nov. 27, 2002), at 1A. The activist who criticized the power plant? Reported to Oregon's engineering board by an agent of the power plant. D. Ct. Doc. 75, at 2-3, *Järlström* v. *Aldridge*, No. 17-cv-652 (D. Or. May 29, 2018).

Nor is the risk of viewpoint discrimination confined to informers. When board members voted to fine the power-plant activist, for example, they did so while surmising that the local officials he'd petitioned "didn't really value what he had to say." *See* D. Ct. Doc. 72, at 41, *Järlström* v. *Aldridge*, No. 17-cv-652 (D. Or. May 29, 2018). Likewise for the man targeted for criticizing traffic-light formulas: board members and staff derided him as "a one-man band to correct Oregon and the nation's wrongs relative to red lights." *See id.* at 40; *see generally* Karl Bode, *Man Fined for Engineering Without a License Was Right All Along*, Vice (Mar. 2, 2020), https://tinyurl.com/ye99pm9e. And those cases are hardly unique. *See Nutt*, 707 F. Supp. 3d at 544 ("At its core, this case concerns the extent to which a law-abiding citizen may use his technical expertise to offer a dissenting perspective against the govern-

ment."). In this one regard, the decision below was right: "[a]s an analytical matter," there is "no reason to distinguish between cases involving licensing requirements . . . and cases involving regulations of already-licensed professionals . . . ." Pet. App. 55a-56a n.34.

2. Petitioner's stance would open easy loopholes for States to restrict the speech of conversion therapists.

Petitioner's premise, if accepted, would also create a blueprint for States like Colorado to continue restricting the speech of would-be conversion therapists. Just as licensure laws are used to restrict speakers like John Rosemond and Ryan Crownholm and 360 Virtual Drone Services, so, too, they could readily be repurposed for conversion therapy. Rather than banning conversion therapy outright, for example, Colorado could statutorily define it as a specialty practice that requires its own license, its own application process, its own fees, its own set of experience and educational requirements, and more. *Cf.* Va. Code § 54.1-3516(A) (art therapy). It could require applicants to take time-intensive, costly courses about the risks of conversion therapy, about its history of misuse, and so on. It could even expand the license requirements' compass beyond existing bounds to reach life coaches and personal coaches (largely exempted from the statute as now written). Colo. Rev. Stat. § 12-245-217(2)(f). Or expand it further still, to staff members at conversion-related support groups or camps. And the flipside: States with lawmakers of a different ideological stripe could introduce onerous licensing regimes for gender-*affirming* counselors, coaches, support groups, and camps. In all these hypotheticals—on petitioner's cert-stage view—the laws might fairly be couched as restrictions on "who can speak" rather than on "what can be said." And all of them

could restrict speech directly under the guise of doing so "incidentally."

That is not and should not become the law. Nor is this the first time litigants in ideologically charged cases have urged rules of decision that may serve their parochial interests at the expense of just and workable First Amendment standards. The petitioners in *NIFLA*, for example, charted a similarly ill-considered course, suggesting that the Ninth Circuit's professional-speech doctrine might apply to speech that is compensated but not speech "offered for free." Pet. at 21-22, *NIFLA* (No. 16-1140). That argument, of course, was wrong. *Sorrell*, 564 U.S. at 567; *NIFLA*, 585 U.S. at 771-73. More to the point, it was short-sighted: seven years on, petitioner here is (rightly) advocating full First Amendment protection for the very speech the petitioners in *NIFLA* were poised to offer up as sacrifice. And as there, so too here: the simpler approach is the correct one—the traditional speech–conduct standard applies with equal force, not just to laws regulating "what can be said," but to laws regulating "who can speak." Petitioner's suggestions to the contrary should find no place in the Court's decision.

C. The Court can vacate and remand without addressing the many parts of the question presented that were not considered below.

Petitioner's question presented asks "[w]hether a law that censors certain conversations between counselors and their clients based on the viewpoints expressed regulates conduct or violates the Free Speech Clause." Many components of that question, however, were not addressed below. Based on its threshold conclusion that Colorado's law restricts petitioner's speech only incidentally, the court of appeals did not evaluate whether the law is content-based or content-neutral, viewpoint-based or

viewpoint-neutral. Nor did it consider what level of First Amendment scrutiny might be appropriate. Even Judge Hartz, dissenting, disclaimed "any definitive conclusions about the prohibition challenged by [petitioner]." Pet. App. 123a; *see also* Pet. App. 106a ("That should be the task of the district court in the first instance . . . .").

Amici take no position on whether Colorado's law is valid, but as plaintiffs in free-speech cases they have a firm interest in courts' deciding serious controversies in an orderly way. And where a lower-court decision suffers from a starting-gate legal error, this Court's usual process is straightforward: consider the "threshold question" presented by the decision under review, answer it, then remand for the lower courts to resolve whatever issues their original error "prevented them from addressing." *City of Austin*, 596 U.S. at 77 (citation omitted).

Petitioner gives no reason to depart from that practice here. Below, the court of appeals' threshold error was a simple one: in adjudicating petitioner's as-applied challenge, it failed to adhere to the traditional line between speech and conduct. That error is also the source of the confusion in conversion-therapy cases nationwide. The Eleventh Circuit held that the conversion-therapy ordinances before it "[we]re direct, not incidental, regulations of speech." *Otto* v. *City of Boca Raton*, 981 F.3d 854, 865 (2020). In turn, it classified the ordinances as content-based and subject to strict scrutiny. *Id.* at 862-65. The Ninth and Tenth Circuits, meanwhile, broke with the Eleventh at the first fork in the road: because each viewed the law before it as "a regulation on conduct that incidentally burdens speech," neither applied any level of First Amendment review. *Tingley* v. *Ferguson*, 47 F.4th 1055, 1077 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 33 (2023); Pet. App. 58a-59a.

Against this backdrop, there appears to be no mature conflict on the ultimate question whether conversion-therapy laws violate (or likely violate) the First Amendment. Where the courts have fractured, rather, is on the first-order question whether those laws restrict speech directly or incidentally. This case presents that question cleanly, and it can be isolated and corrected narrowly. The Court can confirm that the traditional speech–conduct standard applies to regulations of "professional conduct" no less than to other laws. The Court can apply that standard to hold that Colorado's law regulates petitioner's speech directly, not incidentally. Having done so, the Court can then follow its usual practice of remanding for the lower courts to address such logically subsequent questions as whether the State can carry its burden under the appropriate level of First Amendment review.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

Respectfully submitted.

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