No. 24-539

In the Supreme Court of the United States

KALEY CHILES,

Petitioner,

v.

PATTY SALAZAR, in her official capacity as Executive Director of the Colorado Department of Regulatory Agencies, et al.,

Respondents.

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

Brief of *Amicus Curiae* Professor Eugene Volokh in Support of Neither Party

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Interest of the *Amicus Curiae*[1]

Eugene Volokh is the Thomas M. Siebel Senior Fellow at the Hoover Institution at Stanford University. He is one of the few professors to have written on the speech integral to illegal conduct exception to the First Amendment, on which the decision below relied in part, Pet. App. 49a-50a. In particular, he is the author of *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981 (2016); *Overbroad Injunctions Against Speech (Especially in Libel and Harassment Cases)*, 44 Harv. J.L. & Pub. Pol'y 147 (2022); *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyberstalking,"* 107 Nw. U. L. Rev. 731 (2013); and over 50 other law review articles on the First Amendment, as well as a First Amendment casebook.

Amicus hopes that this brief can help explain the proper boundaries of the speech integral to illegal conduct exception, and can show that this Court—unlike the court below—should not rely on that exception in this case.

Summary of Argument

1. *Amicus* takes no position on what First Amendment test this Court should articulate for restrictions on professional-client speech. But this Court should

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or their counsel, make a monetary contribution to the preparation or submission of this brief.

not apply the speech integral to illegal conduct exception to formulate such a test, or to resolve this case.

Speech cannot lose its protection just because it is relabeled conduct and then banned. Indeed, this Court has consistently recognized that making "conduct" illegal or tortious abridges free speech when the conduct consists of speech that supposedly causes harm because of what it communicates.

Rather, the "speech integral to illegal conduct" exception properly applies to speech that sufficiently risks causing or threatening *some other* nonspeech crime or tort: It is that relationship that makes speech "integral" to the criminal or tortious conduct.

The illegal conduct can consist of physical nonspeech behavior. It can consist of speech that is independently constitutionally unprotected under some other exception. And it can consist of an agreement, which is treated as analogous to physical conduct. But it is not enough that *the speech itself* be labeled illegal conduct, such as "contempt of court," "breach of the peace," "sedition," "use of illegally gathered information," "treatment," or "professional advice."

2. The Tenth Circuit thus erred in relying (Pet. App. 49a-50a) on the speech integral to conduct exception and on the case that first enunciated it, *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949). It is a mistake to say that the Colorado law "incidentally involves speech." Pet. App. 50a. Rather, the Colorado ban on conversion therapy, when applied to therapy that involves purely speech (as opposed to, say, the administration of medicines), targets speech precisely because of what it communicates.

In such cases, there is only speech—and no other illegal conduct. When psychotherapists counsel patients about how to accept their biological sex or how to avoid same-sex attraction, the psychotherapist is not promoting or threatening any separate crime or tort.

Argument

I. The speech integral to illegal conduct exception only applies to speech that promotes some other crime or tort

A. Speech cannot be restricted as "integral to illegal conduct" simply by classifying it as conduct

The First Amendment protects speech against many laws that make such speech illegal. Governments cannot evade that protection using laws that reclassify speech as conduct. To "classify some communications as 'speech' and others as 'conduct' is to engage in nothing more than a 'labeling game.' . . . Simply put, speech is speech, and it must be analyzed as such for purposes of the First Amendment." *King* v. *Governor of N.J.*, 767 F.3d 216, 228 (3d Cir. 2014) (citation omitted) (concluding that restrictions on conversion therapy cannot be justified by the argument that therapy, even purely verbal therapy, is conduct). If the "'only "conduct" which the State [seeks] to punish'" is "'the fact of communication,'" the statute regulates speech, not conduct. *Otto* v. *City of Boca Raton*, 981 F.3d 854, 866 (11th Cir. 2020) (citation omitted) (likewise).

Indeed, "[s]aying that restrictions on writing and speaking are merely incidental to speech is like saying

limitations on walking and running are merely incidental to ambulation." *Wollschlaeger* v. *Governor of Fla.*, 848 F.3d 1293, 1308 (11th Cir. 2017) (en banc) (invalidating a law that restricted doctors' conversations with patients about gun possession). Adopting this "circular" reclassification argument would enable governments to ban virtually any speech. *Matter of Welfare of A.J.B.*, 929 N.W.2d 840, 859 (Minn. 2019) (striking down a stalking law, as applied to speech, and rejecting argument that it merely regulated conduct). The speech integral to illegal conduct exception does not validate such circular reasoning.

B. "Speech integral to illegal conduct" must refer to speech that promotes or threatens *other* illegal conduct

Rather, the word "integral," as used in the cases that apply the speech integral to illegal conduct exception, must be seen as referring to speech being connected to *some other* crime. "[T]he cases that involve this form of unprotected speech involve speech that furthers *some other activity* that is a crime." *State* v. *Doyal*, 589 S.W.3d 136, 143 (Tex. Crim. App. 2019). "[F]or the exception to apply, the speech must be integral to *some conduct or scheme* that is illegal in nature and *independent of the speech* that might be used to facilitate or accomplish the conduct or scheme." *People* v. *Burkman*, 15 N.W. 3d 216, 236 (Mich. 2024) (emphasis added); *see also State* v. *Shackelford*, 825 S.E.2d 689, 698-99 (N.C. Ct. App. 2019) (same). The exception cannot justify banning speech simply because the speech is illegal under the law that is being challenged, because then there is no *other* crime to which the speech is integral.

The progenitor of the speech integral to illegal conduct exception, *Giboney*, 336 U.S. 490, well illustrates how speech can lose constitutional protection by promoting some other illegal act. There, Empire Storage & Ice refused to join an unlawful cartel, and a "union thereupon informed Empire that it would use other means at its disposal to force Empire to come around to [its] view." *Id.* at 492. When "Empire still refused to agree," "[i]ts place of business was promptly picketed by union members." *Id.*

The Government could prohibit the union's picketing, this Court held, because the picketing essentially solicited a separate criminal act by Empire: The picketers' "sole, unlawful immediate objective was to induce Empire to violate the Missouri law" forbidding agreements in restraint of trade "by acquiescing in unlawful demands to agree not to sell ice to nonunion peddlers." *Id.* at 502. The speech integral to illegal conduct exception, however, would not have condoned prosecuting mere picketing, in the absence of some other crime that the picketing solicited.

Likewise, many courts considering bans on harassment or stalking have recognized the same principle. Those statutes generally make it a crime to communicate with the intent to "abuse," "annoy," "harass," "offend," or "severe[ly] emotional[ly] distress" a particular person. Volokh, *One-to-One Speech vs. One-to-Many Speech, Criminal Harassment Laws, and "Cyber Stalking," supra*, 107 Nw. U. L. Rev. at 740, 768-69. Because such laws are not limited to speech "'proximate[ly] link[ed]'" to "some other criminal act," they amount to "a direct limitation on speech that does not require any relationship—integral or otherwise—to

unlawful conduct." *People* v. *Relerford*, 104 N.E.3d 341, 352 (Ill. 2017).

Similarly, in *Matter of Welfare of A.J.B.*, the Minnesota Supreme Court rejected the Government's argument that a stalking by mail statute was valid under the "speech integral to [illegal] conduct" exception. 929 N.W.2d at 852, 859. There, the statute was unconstitutional because it was not limited to speech aimed "to induce or commence a separate crime." *Id.* at 852. The court recognized that the exception did not apply because "the speech covered by the statute is integral to [illegal] conduct because the statute itself makes the conduct illegal." *Id.* at 859; *see also Doyal*, 589 S.W.3d at 143 (the exception only covers "speech that furthers some other activity that is a crime"); *State* v. *Burkert*, 174 A.3d 987, 1000 (N.J. 2017) (harassment "cannot be transformed into [illegal] conduct" based on "[t]he circularity of the language of [a statute]"); *People* v. *Marquan M.*, 19 N.E.3d 480, 484-86 (N.Y. 2014) (same for "cyberbullying").

Of course, legislatures are free to punish nonspeech stalking conduct, as well as narrow categories of constitutionally unprotected speech, such as true threats. But they cannot label speech that mentally distresses people "stalking" and then punish all such speech as integral to illegal conduct. Speech that is intended to annoy, offend, or distress does not help cause or threaten other illegal acts. And the same is true for labeling speech that allegedly psychologically harms clients as "counseling conduct" or "treatment[]." Pet. App. 50a.

To be sure, some courts have mistakenly concluded that the speech integral to illegal conduct exception

applies to speech itself that is made illegal. In *Commonwealth* v. *Johnson*, 21 N.E.3d 937 (Mass. 2014), for example, the court supposed that a criminal harassment statute could be applied to online speech because "cyber harassment will consistently involve a hybrid of speech and conduct." *Id.* at 947 n.11. "There is content within the communications" involved in the case, the court admitted, "but the very act of using the Internet as a medium through which to communicate implicates conduct." *Id.*; *see also United States* v. *Orsinger*, 753 F.3d 939, 942, 944 (9th Cir. 2014) (likewise); *United States* v. *Gonzalez*, 905 F.3d 165, 193 (3d Cir. 2018) (likewise).

But if "the very act of using the Internet" "implicates conduct" and thus triggers lower protection, then a newspaper article likewise "implicates conduct" in the sense that a printing press has to put ink on paper. If such speech is "conduct," it is only conduct in the trivial sense that all speech is also conduct. The *Johnson* court erred in concluding that the speech integral to illegal conduct exception applied—there was no *other* act besides the challenged speech.

C. The exception is a basis for several canonical First Amendment exceptions that also require separate illegal acts

This Court has cited *Giboney* to help explain why several categories of speech receive no constitutional protection. In the process, this Court has narrowly and carefully defined those traditional exceptions to ensure they cover only unprotected speech: Not all speech that does tend to indirectly promote crime is constitutionally unprotected. *See* Volokh, *The "Speech Integral to Criminal Conduct" Exception*, *supra*, 101

Cornell L. Rev. at 993-97, 998-99, 1000-03, 1005-07, 1008-10. But in any event, this Court has limited those *Giboney*-linked exceptions to speech that sufficiently risks causing or threatening a nonspeech crime or tort.

1. Fighting words are a special case of the *Giboney* principle. *Giboney* cited *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 (1942), this Court's seminal fighting words case, to support *Giboney*'s articulation of the speech incident to illegal conduct exception. 336 U.S. at 502; *see also Cox* v. *Louisiana*, 379 U.S. 559, 563 (1965) (citing *Chaplinsky* and *Giboney* as examples where "conduct mixed with speech may be regulated or prohibited"). And this makes sense: *Giboney* applies to fighting words because fighting words tend to cause other criminal conduct (retaliatory violence).

2. The *Giboney* rule is also linked to the true threat exception. *Giboney* relied on two cases that discussed the threats doctrine in concluding speech "used as an essential and inseparable part of a grave offense against an important public law" may be restricted. 336 U.S. at 590 (citing *Thomas* v. *Collins*, 323 U.S. 516, 537-38 (1945); *Va. Elec. & Power Co.* v. *NLRB*, 319 U.S. 533, 539, 549 (1943)). In turn, *Giboney* has been cited for the proposition that threats are constitutionally unprotected. *See, e.g.*, *Ohralik* v. *Ohio State Bar Ass'n.*, 436 U.S. 447, 456 (1978) (citing *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575 (1969)).

Rumsfeld v. *FAIR*, 547 U.S. 47 (2006), offers a concrete example of why threats can be integral to illegal conduct. "The fact that" bans on racial discrimination in hiring "will require an employer to take down a sign reading 'White Applicants Only' hardly means that the

law should be analyzed as one regulating the employer's speech rather than conduct." *Id.* at 62.

The sign "White Applicants Only" is a threat of tortious conduct (illegal discrimination). Someone who is not white and sees the sign will know that, if he applies for the job, he will get nothing except a humiliating rejection. As a result, he will not apply. Threatening potential applicants with unlawful exclusion from consideration for a job is unprotected speech, because it is a threat of a separate tortious act: illegal discrimination.

3. Criminal solicitation is another proper application of *Giboney*. In *United States* v. *Williams*, 553 U.S. 285 (2008), this Court cited *Giboney* for the proposition that "[o]ffers to engage in illegal transactions are categorically excluded from First Amendment protection." *Id.* at 297. This Court explained that such speech is closely connected to illegal conduct because "offers to provide" contraband solicit listeners to commit unlawful receipt of contraband, and "requests to obtain contraband," solicit listeners to commit unlawful distribution of contraband. *Id.* And this Court listed "solicitation" of crime alongside offers of contraband as covered by the *Giboney* principle. *Id.* at 297-98. *United States* v. *Hansen*, 599 U.S. 762 (2023), likewise cited *Giboney* as support for the proposition that "[s]peech intended to bring about a particular unlawful act"—especially including solicitation—is generally constitutionally unprotected. *Id.* at 783.

4. The child pornography exception is another prominent application of *Giboney*. This Court cited *Giboney* to explain that child pornography is unprotected because its production and distribution is

illegal. "The market for child pornography was 'intrinsically related' to the underlying abuse, and was therefore 'an integral part of the production of such materials, an activity illegal throughout the Nation.'" *United States* v. *Stevens*, 559 U.S. 460, 471 (2010) (quoting reasoning from *New York* v. *Ferber*, 458 U.S. 747, 761-62 (1982), which *Ferber* in turn quoted from *Giboney*). The existence of a market for child pornography helps cause the production of more child pornography (and thus the abuse of more children). And this *other* crime does not itself consist of protected speech.

5. *Giboney* is also a basis for laws that ban conspiracies to engage in illegal conduct, such as conspiracies to restrain trade. *See Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 567 (2011) (citing *Giboney* for the proposition that antitrust law can constitutionally prohibit "agreements in restraint of trade"); *Ohralik*, 436 U.S. at 456 (1978) (same). Such conspiracies fit neatly within the speech integral to illegal conduct exception, because they tend to cause a distinct, nonspeech crime.

6. And *Giboney* is also a basis for laws that may be applied to conduct that has "incidental" effects on speech that are independent to its communicative impact. In *Sorrell*, this Court suggested that when "an ordinance against outdoor fires" is applied to "burning a flag," that application is valid for reasons related to the *Giboney* rationale. 564 U.S. at 567. "[B]urning a flag" was affected "incidental[ly]," in the sense that the ordinance applied to such speech without regard to the supposed harms that flowed from its communicative content. *Id*. Indeed, the language of "incidental" restrictions on speech was used in *United States* v. *O'Brien*, 391 U.S. 367 (1968), the precedent that would normally be applied to restrictions on outdoor fires. *Id.*

at 376-77. *Sorrell*'s explanation of "incidental" fits well with *Giboney*'s statement that the First Amendment generally does not protect "speech or writing used as an integral part of conduct in violation of a valid criminal statute," 336 U.S. at 498—which is to say in violation of a criminal statute (such as an ordinance against outdoor fires) that targets nonspeech conduct.

Rumsfeld provides another example of a law that has "incidental" effects on speech. *Rumsfeld* cited *Giboney* in holding that a law requiring universities to treat military recruiters on par with other recruiters could constitutionally be applied to the universities' sending out announcements about where the recruiters were going to be. 547 U.S. at 61-62. The equal treatment provision applied to equal distribution of speech as well as, for instance, equal provision of space. *Id.* at 70. As in *Sorrell,* the law affected speech "incidentally" in *Rumsfeld* because it applied to the speech without regard to its communicative impact.

* * *

The speech integral to illegal conduct exception has helped this Court develop rules allowing restrictions on some narrow categories of speech in some situations where that speech may cause *other* unlawful (criminal or tortious) conduct. It does not authorize speech restrictions that are justified simply by labeling the speech itself as forbidden conduct.

D. Even general restrictions on conduct are treated as speech restrictions when they target speech because of what it communicates

Some laws ban broad range of conduct, but in the process cover some speech precisely because of what the speech communicates. In those situations, the laws are treated as speech restrictions, and the speech integral to illegal conduct exception does not justify them.

1. Consider, for example, breach of the peace. *Cohen* v. *California* involved a defendant who was prosecuted for breach of the peace because he wore a shirt with an expletive in a courthouse. 403 U.S. 15, 16-17 (1971). This Court reversed: Because "[t]he only 'conduct' which the State sought to punish is the fact of communication," this Court held, "we deal here with a conviction resting solely upon 'speech.'" *Id.* at 18. The conduct regulation "rested solely upon speech," that is, on "the fact of communication." *Id.* And the Court reasoned this way even though other defendants could breach the peace through many other kinds of conduct that did not involve speech. *Id.* at 16 & n.1.

Nor would the speech integral to illegal conduct have justified a different result. Before and after *Giboney*, this Court invalidated generally applicable breach-of-the peace laws when those laws were applied to speech based on "the effect of [the speaker's] communication on his hearers." *Cantwell* v. *Connecticut*, 310 U.S. 296, 309 (1940); *see also Edwards* v. *South Carolina*, 372 U.S. 229, 234-37 (1963); *Hess* v. *Indiana*, 414 U.S. 105, 105 n.1, 107-09 (1973).

2. Like breach-of-peace law, contempt-of-court law prohibits a wide range of conduct, speech or otherwise.

Yet by the time this Court decided *Giboney*, it had already held that facially valid contempt-of-court rules might be unconstitutional as applied to out-of-court speech because of what it communicates. *Bridges* v. *California*, 314 U.S. 252, 258, 278 (1941). And this Court set aside convictions for statutory contempt of court under the First Amendment, both before and after *Giboney*. *See, e.g.*, *Pennekamp* v. *Florida*, 328 U.S. 331, 333, 349-50 (1946); *Craig* v. *Harney*, 331 U.S. 367, 368, 378 (1947); *Wood* v. *Georgia*, 370 U.S. 375, 395 (1962).

3. Or take the intentional infliction of emotional distress tort, which covers, among other things, a wide range of conduct and constitutionally unprotected speech (such as threats, *State Rubbish Collectors Ass'n* v. *Siliznoff*, 240 P.2d 282 (Cal. 1952)). Yet in *Hustler Magazine, Inc.* v. *Falwell*, 485 U.S. 46 (1988), and *Snyder* v. *Phelps*, 562 U.S. 443 (2011), this Court set aside intentional infliction of emotional distress verdicts when those verdicts were based on constitutionally protected speech that caused distress due to its message. To be sure, this Court has left open the possibility that speech that is not "of public concern" and that outrageously inflicts severe emotional distress may be actionable. *Snyder*, 562 U.S. at 451-52. But this was *not* based on any general conclusion that a facially speech-neutral tort could be freely applied to speech as well as conduct.

4. Likewise, the tort of interference with business relations—another facially valid tort that covers a wide range of conduct—is subject to serious First Amendment scrutiny when it is applied to speech because of what it communicates. In *NAACP* v. *Claiborne Hardware Co.*, 458 U.S. 886 (1982), this

Court held that the First Amendment barred applying the tort to speech that interfered with business relations by urging a political boycott: "[T]he presence of activity protected by the First Amendment imposes restraints on the grounds that may give rise to damages liability." *Id.* at 912-13, 916-17.

5. *Holder* v. *Humanitarian Law Project*, 561 U.S. 1 (2010), also considered a statute triggered by the communicative content of speech as a speech restriction. The statute in *Holder* prohibited providing "material support" to foreign terrorist organizations. *Id.* at 26. The statute covered conduct, such as the provision of money or goods, and speech, such as "training on the use of international law or advice on petitioning the United Nations." *Id.* at 27.

The Government argued that the law was therefore a speech-neutral conduct restriction that only incidentally burdened speech—even when the law was triggered by the communicative content of certain speech (such as training or advice). *Id.* at 27-28. Under this theory, there would be no need to conclude that the speech constitutes punishable solicitation of some other crime (or threat, conspiracy, or aiding and abetting). So long as the speech fits the elements of the facially speech-neutral material support statute, it can be punished.

Holder rejected that argument. Like *Cohen*, this Court explained, *Holder* "involved a generally applicable regulation of conduct." *Id.* at 28. But *Cohen* "recognized that the generally applicable law was directed at Cohen because of what his speech communicated—he violated the breach of the peace statute because of the offensive content of his particular message." *Id.* Thus,

this Court "applied more rigorous scrutiny," and "did not apply *O'Brien*," the test applicable to conduct restrictions that incidentally burden speech. *Id.* Rather, strict scrutiny had to be applied to the material support ban where the speech constitutes material support "because of what [the] speech communicated." *Id.*

This Court did not have occasion in *Holder* to expressly decide whether the speech integral to illegal conduct exception would render the plaintiffs' speech unprotected. The Government had briefly argued that the Humanitarian Law Project's speech was unprotected because it was "coordinated with foreign terrorist organizations" and was similar to "speech effecting a crime, like the words that constitute a conspiracy." *Id.* at 27 n.5. The Court cited *Giboney* as a "See, e.g.," following this statement, but then declined to "consider any such argument because the Government does not develop it." *Id.* Still, consistent with *Cohen*, *Holder*'s reasoning does reject the more general claim that speech can be punished whenever it violates a generally applicable conduct restriction.

* * *

The logic of the examples above applies equally to restrictions on professional-client conduct: Even when those restrictions apply to nonspeech conduct (e.g., administering medicine) as well as to speech, they must be treated as speech restrictions when they are applied to speech because of its communicative impact.

II. The speech integral to illegal conduct exception does not explain what restrictions on professional speech are permissible

How much First Amendment protection professional-client speech should receive is a difficult and important question this Court should answer. *Amicus* takes no position on this question. But the speech integral to illegal conduct exception does not help answer this question, and it would be a mistake for this Court to apply the exception here.

The Tenth Circuit held that Colorado's statute was constitutional in part because of the speech integral to conduct exception:

> "[I]t has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 502 (1949). The MCTL incidentally involves speech because an aspect of the counseling conduct, by its nature, necessarily involves speech. By regulating which treatments Ms. Chiles may perform in her role as a licensed professional counselor, Colorado is not restricting Ms. Chiles's freedom of expression. In other words, Ms. Chiles's First Amendment right to freedom of speech is implicated under the MCTL, but it is not abridged.

Pet. App. 49a-50a. The Tenth Circuit was mistaken, for the reasons discussed in Part I. That court's reasoning would allow any government to eliminate the

First Amendment's protections by creating a category (say, "counseling conduct") that includes conduct and declare that any regulation of speech within the category is a conduct restriction. But "'[m]ere labels' of state law" do not confer "talismanic immunity from constitutional limitations"—whether the labels are "insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business," *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964), or "professional conduct" or "therapy." Pet. App. 47a-48a. Restrictions on speech, this Court explained, "must be measured by standards that satisfy the First Amendment," regardless of how the speech is labeled. *N.Y. Times*, 376 U.S. at 269.

Thus, whatever rule the Court adopts for professional-client speech, it should not craft it based on *Giboney* and on the speech integral to illegal conduct exception. The exception is triggered, as Part I explained, only when the speech tends to cause or threaten *other* illegal conduct, not when the only illegality is that the speech violates the challenged law itself.

The exception thus is not applicable here. When a psychotherapist counsels a patient about how the patient can "grow in the experience of harmony with [the patient's] physical body," the psychotherapist is not promoting or threatening any separate crime or tort. Pet. App. 12a-14a. Petitioner's "speech is not just one step in service of some separately illegal act, unlike the speech involved in soliciting a crime, demanding ransom, or posting a 'White applicants only' sign as part of hiring discrimination." *Veterans Guardian VA Claim Consulting LLC* v. *Platkin*, 133 F.4th 213, 221 (3d Cir. 2025). Rather, petitioner is conveying advice,

or teaching a patient how to avoid some legal behavior and to engage in other legal behavior instead, Pet. App. 12a-14a—and advice and teaching are classic examples of speech. Petitioner's "speech is the core of what [she] does." *Veterans Guardian*, 133 F.4th at 221. She may be speaking during an extended set of conversations (a "course of conduct" in that sense of the phrase), but that does not make the speech regulable.

The Tenth Circuit was thus mistaken to rely on *Giboney* for the conclusion that Colorado's law "incidentally involves speech because an aspect of the counseling conduct, by its nature, necessarily involves speech." Pet. App. 50a. "What *Cohen* and *Holder* teach is that a regulation that bars speech because of what it communicates is a direct regulation of speech, not a regulation of conduct that incidentally affects speech." *Id.* at 99a (Hartz, J., dissenting).

To be sure, some restrictions on some professional-client speech may indeed focus on speech closely related to nonspeech conduct. For instance, as *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 585 U.S. 755, 768 (2018) (*NIFLA*), makes clear, when a doctor seeks to perform "an operation" (such as abortion), "the requirement that a doctor obtain informed consent to perform an operation is 'firmly entrenched in American tort law.'" *Id.* at 770 (citation omitted). Such a requirement is a classic example of a regulation of "professional conduct, even though that conduct incidentally involves speech," *id.* at 768: The underlying regulation is of the nonspeech physical procedure, and the compelled speech is just what is necessary to obtain informed consent for the physical procedure.

By contrast, the challenged statute in *NIFLA* was viewed as an impermissible speech compulsion, because it was not closely tied to physical conduct other than speech. In *NIFLA*, pregnancy centers were required to inform patients about the availability of low-cost abortions. *Id.* at 762-66. The law was "not tied to a procedure at all" and "applie[d] to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed." *Id.* at 770. The statute in *NIFLA* thus could not be sustained as "an informed-consent requirement or any other regulation of professional conduct." *Id.* Indeed, the *NIFLA* law applied even when a clinic would merely "offer[] counseling about[] contraception or contraceptive methods," or "pregnancy options counseling," rather than any medical procedure. *Id.* at 777.

To be sure, women who go to pregnancy counseling centers are likely contemplating some future medical procedure, whether an ultrasound, an eventual delivery of a child, or an eventual abortion. *Id.* at 779 (Breyer, J., dissenting). But the majority's view appeared to be that speech compulsions are allowed only when they discuss the particular procedure that the speaker was planning to perform, or alternatives to that procedure. *Id.* at 770.

NIFLA also suggested there may be other zones of permissible restriction on professional-client speech. That is particularly true as to professionals' commercial advertising: "[L]aws that require professionals to disclose factual, noncontroversial information in their commercial speech" get "less protection." *Id.* at 768. And it may also be true when there is "'persuasive evidence of a long (if heretofore unrecognized) tradition

to that effect.'" *Id.* at 767 (citation omitted). Some widespread professional speech regulations, such as licensing requirements and compelled disclosures protections, could conceivably qualify. Volokh, *The "Speech Integral to Criminal Conduct" Exception*, *supra*, 101 Cornell L. Rev. at 1043 nn.331-33 (providing examples of typical state regulations in these areas).

But in any event, whatever professional-client speech doctrine this Court chooses to adopt, it should not rely on *Giboney* or conclude that professional-client speech may be regulated simply by labeling it counseling conduct.

Conclusion

The speech integral to illegal conduct exception does not apply to this case because the exception only covers speech closely tied to a separate crime or tort. Laws like Colorado's, which reclassify certain speech as conduct and then ban it, do not qualify. There is no *other* crime here. "Professional services delivered by speaking or writing are speech." *Veterans Guardian*, 133 F.4th at 229.

Amicus does not take a position on what sorts of restrictions on professional speech are permissible. But the explanation for any broad lack of protection must come from something other than a "conduct, not speech" argument—just as the explanation for exceptions such as defamation comes from something other than labeling the speech "conduct." *N.Y. Times*, 376 U.S. at 269.

Respectfully submitted,

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