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 *AMICI CURIAE* FIRST AMENDMENT SCHOLARS IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a law that censors certain conversations between counselors and their clients based on the viewpoints expressed regulates conduct or violates the Free Speech Clause.

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INTERESTS OF *AMICI CURIAE*

Amici curiae are two dozen legal scholars and philosophers from across the country who teach and write about the Constitution and the First Amendment specifically. Their interest in this case arises from their shared commitment, not to any particular form of therapy, but rather to the constitutional freedoms of speech and religion. A list of the *Amici* is found at Appendix A.[1]

SUMMARY OF THE ARGUMENT

This case squarely poses the perennial question that is at the heart of freedom of speech: who should determine which ideas will be communicated or, conversely, restricted or excluded from pertinent conversations? Should such judgments be made through the voluntary choices of speakers and listeners, diverse and fallible though they may be, in a free and competitive marketplace of ideas? Or should appointed or self-appointed authorities be empowered to censor expression in order to protect people from ideas the authorities deem to be detrimental?

The Constitution's answer to that question is clear: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can

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[1] Pursuant to Rule 37.6, the *Amici Curiae* affirm that no counsel for a party authored this brief in whole or in part and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No one other than the *Amici Curiae* or their counsel made such a monetary contribution.

prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion . . ." *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

This answer is hardly inevitable. Throughout history, and still today, many governments as well as eminent thinkers going back at least to Plato have maintained that learned experts or government regulators ought to have the power to censor ideas they deem to be false, harmful, or superstitious. That position has its appeal. Words *can* be harmful. And people are imperfect: not only those who are inadequately informed but even those with extensive educations can and do make mistakes, which can sometimes be tragic. Nonetheless, the freedom of speech is a central, defining feature of the American constitutional character and tradition. Like other rights, to be sure, freedom of speech cannot be absolute. Even so, jurists and especially this Court have insisted, over and over again, that limits on expression must be narrowly formulated and cautiously applied – else the ever-present temptation to substitute the judgments of authorities or regulators for the judgments of free individuals might overwhelm the constitutional commitment to freedom of speech. *See, e.g., Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989).

The present case poses this fundamental choice in a stark way. As applied to persons like petitioner Kaley Chiles, Colorado's Minor Conversion Therapy Law, Colo. Rev. Stat. § 12-245-244(1), presents a classic case of would-be authorities imposing an orthodoxy and forcing people – including licensed

counselors like Chiles and their patients – to conform to that orthodoxy. That imposition violates the most fundamental tenets of freedom of speech as articulated by this Court. Thus, the counseling that Chiles provides, and that the Colorado law would prohibit, is not borderline or nonverbal expression, like burning a draft card or defacing an American flag: it is simply and purely *speech*, in *words*. Colorado's prohibition is explicitly and unapologetically content- and viewpoint-based. In reality, the State's rationale for outlawing "conversion therapy" for minors – namely, that such therapy causes psychological harm to patients – does not apply to the purely voluntary, purely verbal counseling that Chiles provides. But even on the assumption that such counseling can cause harm to some patients, the harm would result directly and solely from the expressive or communicative content of her speech. In such cases, the First Amendment applies with full force.

The State and the Tenth Circuit attempt to excuse this direct infringement of the freedom of speech by recharacterizing Chiles' counseling as "conduct" rather than speech. But this recharacterization demonstrably fails under any of this Court's carefully developed understandings of the "speech/conduct" distinction.

What drives the law and its application in this case, and what led the Tenth Circuit to disregard or rationalize away long-standing First Amendment principles, is the belief that the expression being censored is condemned by a collection of experts and professionals, to which the appellate court gave lavish

deference. But that is precisely the kind of authority-based censorship that the First Amendment forbids. Moreover, in giving lesser constitutional protection to professional speech which deviates from an orthodoxy within the profession, the Tenth Circuit acted in defiance of this Court's ruling in *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. 755 (2018). Indeed, the Tenth Circuit's stance gains no support even from the dissent in that case.

The question, therefore, is whether the fundamental American commitment to freedom of speech will be honored, or rather overridden by the opinion of authorities and professional associations imposed in the form of a legal prohibition.

ARGUMENT

I. As Applied to Chiles and Similarly Situated Persons, the Colorado Law Prohibits Speech at the Core of First Amendment Protection.

The Colorado statute outlaws "conversion therapy" for minors.[2] But "conversion therapy" is a

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[2] Because the law applies to minors, it potentially raises challenging questions concerning the relative responsibilities of parents, schools, the state, and others in the upbringing of children. *See Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923). However, the Tenth Circuit did not address these questions, nor were they certified for review by this Court. Instead the Court granted review with respect to the question: "Whether a law that censors certain conversations between counselors and their clients based on the viewpoints expressed regulates conduct or violates the Free

loose term that has been used to describe a wide array of techniques or practices. Some of these techniques – *e.g.,* electric stimulations or shocks, forced isolation from family and friends, hormonal treatments – would not naturally or conventionally be described as "speech" (even though, as with virtually all human activities, speaking would typically occur in the course of such techniques). These forms of therapy might plausibly be described as "conduct" to which speech is merely "incidental"; and a state might accordingly regulate such practices without implicating the Free Speech Clause.

But Chiles engages in none of these practices. On the contrary, what she does is *talk:* she talks with and listens to willing patients, from a Christian perspective – sometimes (if this is what a patient wants to discuss) about sexual orientation questions or challenges they may experience.[3] Her interactions

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Speech Clause." This brief accordingly does not address the questions potentially raised by *Meyer* and *Pierce*.

[3] In fact, Chiles provides what might be described as "conversion therapy" only if and when her patients desire such counseling. As the Tenth Circuit acknowledged, Chiles "does not try to help minors change their attractions, behavior, or identity, when her minor clients tell her they are not seeking such change." *Chiles v. Salazar*, 116 F.4th 1178, 1193 (10th Cir. 2024). On the contrary, Chiles explains that she

> does not seek to "cure" clients of same-sex attractions or to "change" clients' sexual orientation; she seeks only to assist clients with their stated desires and objectives in counseling, which sometimes includes clients seeking to reduce or eliminate unwanted sexual attractions, change

with patients plainly involve speech. Indeed, these interactions consist of *nothing but* speech. In prohibiting such speech, Colorado strikes at the heart of the First Amendment.

Moreover, Colorado's disregard for freedom of speech exhibits features that this Court has repeatedly found to be especially unacceptable under the First Amendment. Colorado's prohibition is plainly and explicitly directed at the content and the viewpoint of Chiles' communications. If she were willing to tell patients that their sexual orientation is natural and normal, as the current orthodoxy in the psychological profession holds, and that they should reject or disregard biblical or religious teachings that may seem to them to teach otherwise, Chiles would enjoy the State's blessing. It is only because she attempts to counsel minor patients based on professionally disfavored biblical teachings – teachings that both she and her patients believe (and that they have a constitutional right to believe and to "exercise") – that the State attempts to censor what she can say.

Nor can the prohibition be rationalized as a "time, place, and manner" regulation. Insofar as Chiles' beliefs fall under the State's description of "conversion therapy," there is no time, place, or manner in which, as a counselor, Chiles is permitted to present and discuss these beliefs with minor

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> sexual behaviors, or grow in the experience of harmony with one's physical body.

Ibid.

patients, even if the patients themselves desire such counseling.

In sum, the Colorado statute censors what is purely and undeniably "speech," and it does so in ways that violate the most fundamental First Amendment principles that this Court has repeatedly articulated.

II. In Recharacterizing Chiles' Speech as "Conduct," the State and the Tenth Circuit Deviate from Well-Developed Understandings of the Speech/Conduct Distinction.

Partisans of censorship often try to avoid the First Amendment by characterizing the subject of their restrictions as "conduct" rather than "speech". Such characterizations are easy enough to devise. That is because expression always involves some kind of conduct: the moving of lips, the sliding of pen across paper, the pounding of fingers on a keyboard. Moreover, hardly anyone speaks just for the sake of speaking: speech always serves some function and seeks to achieve some objective, such as education, edification, or coordination. Consequently, it is always possible to redescribe any kind of expression in terms that refer only to its "conduct" dimension, or that refer only to the function or objective of the expression rather than to the expression itself.

This case is a clear example: the State and the Tenth Circuit have attempted to deflect First Amendment concerns by characterizing the subject of regulation not as speech – even though it undeniably *is* speech, as least in Chiles' case – but rather as

"treatment," or "therapy." The Colorado law "does not regulate expression," declared the Tenth Circuit, but rather "the practice of conversion therapy." *Chiles*, 116 F.4th at 1209.

If it were possible to defeat the First Amendment by the simple expedient of recharacterization, however, the essential constitutional commitment could easily be negated. Courts, lawyers, and scholars have accordingly devoted considerable thought to determining when expression can properly be classified as "conduct" to which speech is only incidental.

Three main approaches have emerged, which might be described as the "intent and perception" approach, the "governmental purpose" approach, and the "communicative impact" approach. Although each of these approaches can claim support in the caselaw and the scholarly literature, there is no need in this case to select among the three approaches because the Tenth Circuit's attempt to recharacterize Chiles' speech as "conduct" rather than expression demonstrably fails under all three approaches.

The intent and perception approach. In *Spence v. Washington*, 418 U.S. 405, 410-411 (1974), in ruling that the display of an American flag upside-down with a peace symbol attached qualified as constitutionally protected expression, this Court stated that "expressive conduct" should be classified as speech under the First Amendment if there is "an intent to convey a particularized message" together with a likelihood that "the message would be understood by those who viewed it." The *Spence* test has been useful

mainly in cases of unconventional or nonverbal forms of communication, such as the desecration of flags as a means of protest. *See*, *e.g.*, *Texas v. Johnson*, 491 U.S. 397, 403 (1989).

In the present case, this test cannot justify the reclassification of Chiles' counseling as unprotected "conduct," because she engages in purely verbal communication of the most conventional and classic kind. She *talks*, in words. She surely intends to convey a message. And no one who observes such communication, much less the patients who seek Chiles' assistance, could doubt that she is *speaking*.

A comparison may serve to underscore the point. In a recent controversy involving a Christian baker who objected to baking a custom cake for a same-sex wedding, *Masterpiece Cakeshop v. Colorado Civil Rights Commission*, 584 U.S. 617 (2017), the State and some critics argued that, however expressive this activity might be *to the baker*, baking a cake is not conventionally perceived as a means of expression; and hence it should not count as "speech" for First Amendment purposes. Even the State and the critics typically conceded, however, that if the would-be clients had asked the baker to prepare a cake with *words* on it (like "God bless this same-sex wedding"), the baker would have had a valid First Amendment claim. *See* Andrew Koppelman, *The Gay Wedding Cake Case Isn't About Free Speech*, The American Prospect (Nov. 27, 2017), https://prospect.org/justice/gay-wedding-cake-case-free-speech/ ("[Jack Phillips] is free to refuse to write 'Support Gay Marriage' on any cakes that he sells, so long as he refuses that to both gay and heterosexual

customers.") Indeed, the Colorado court from whose adverse judgment the baker appealed acknowledged that baking a cake *could* involve expression but ruled that the baker could not invoke that possibility because he had declined to bake the cake "without any discussion regarding the wedding cake's design or any possible *written inscriptions*." *Craig v. Masterpiece Cakeshop*, 370 P.3d 272, 288 (Colo. App. 2015) (emphasis added).

In the present case, however, Chiles' counseling *does* involve words; indeed, as noted, it consists of *nothing but* words. Under the intent and perception approach, there is no plausible way to deny that Chiles is engaged in *speech*.

The government purpose approach. A different approach to the speech/conduct distinction urges that the focus should be on the government's motive or purpose in regulating. *See, e.g.*, Jed Rubenfeld, *The First Amendment's Purpose*, 53 Stanford L. Rev. 767 (2001); Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrines*, 63 U. Chi. L. Rev. 413 (1996). Even though the subject matter of regulation might indisputably involve speech, if the government's motive or purpose is unrelated to expression, then the First Amendment would not be implicated. Thus, if a protestor scrawls "The Mayor is Scum" on the wall of City Hall, the protestor has undeniably engaged in expression; but a prosecution for vandalism will not implicate the First Amendment because the purpose of the vandalism prohibition is to protect property, not to censor speech.

Once again, however, this approach is of no help to Colorado or the Tenth Circuit in this case. This is because the purpose of Colorado's prohibition is precisely to prevent Chiles from performing the counseling she offers because the State disagrees with and condemns the ideas that Chiles is expressing. Indeed, there is nothing objectionable to the State in Chiles' counseling *except for* the ideas that she communicates.

It is true that the State objects to the communication of these ideas because it believes they may cause harm. But if speech could be converted to unprotected "conduct" merely by a governmental assertion (no matter how sincere, or how plausible) that the speech to be regulated causes harm, there would be very little left of the freedom of speech. In a society in which a myriad of views are expressed, government officials may in the abstract disagree with many of those views, but they will typically not expend time and resources attempting to censor ideas that they regard as mistaken but harmless. Government will act to censor only expression it views as harmful. And yet that is precisely the evil that the freedom of speech is designed to prevent.

To be sure, early in the history of free speech jurisprudence, courts sometimes failed to appreciate this point. They adopted a "bad tendency" test, under which speech could be censored if it had a tendency to cause harm. *See* Geoffrey R. Stone, *Origins of the "Bad Tendency" Test: Free Speech in Wartime*, 2002 Sup. Ct. Rev. 411 (2002). But that approach has long since been repudiated – and properly so, because courts and scholars came to recognize that, if a

tendency to cause harm justifies censorship of expression, the freedom of speech would be eviscerated. Dean Geoffrey Stone observes that the "bad tendency" test was embraced under the cultural pressures of a World War by "federal judges [who] had no tolerance for dissenters and no interest in . . . the protections of the First Amendment." *Id.* at 419. Fortunately, subsequent constitutional jurisprudence manifests a much greater appreciation of those protections.

The communicative impact approach. A third approach to the speech-conduct distinction suggests that even if a prohibition is framed in terms of conduct rather than speech, and even if government is not acting with a purpose of limiting expression, the First Amendment nonetheless applies in full force if the harm that the government is seeking to prevent results from the expressive or communicative impact of what the speaker or actor is communicating. *See* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277 (2005).

Once again, this approach cannot excuse Colorado's or the Tenth Circuit's attempt to circumvent the First Amendment by characterizing Chiles' counseling as conduct rather than speech. Colorado contends that conversion therapy causes harm to patients. At least for purposes of argument, let us concede that it does. If Chiles were administering electric shocks to her patients, or if she were prescribing psychological isolation from family or friends, or if she were administering hormones or

medication capable of producing detrimental physical or psychological effects, it might plausibly be contended that the harm the State seeks to prevent results from something other than the expressive or communicative content of her therapy; and the State's regulation might accordingly be viewed as covering "conduct" rather than "speech." But Chiles does none of these things. Once again, the only thing she does is talk, and listen. And if we assume that patients suffer some kind of harm, as the State contends, that harm would come solely from what Chiles and her patients are *saying* to each other.

In short, whatever harm patients may suffer comes from the communicative or expressive content of the therapy. A prohibition forbidding such therapy clearly covers "speech"; it cannot plausibly be redescribed as applying merely to "conduct."

In sum, although the Tenth Circuit could plausibly say that the Colorado law regulates "the practice of conversion therapy," the Court's conclusion that the law therefore "does not regulate expression" amounted to a bald *non sequitur*. One might as logically say that because a mugger is attempting to make a living he is therefore not committing a theft, or that because a pianist is pressing keys she is not playing music. No matter what characterization an advocate may devise, the obvious fact is that, at least as applied to a counselor like Chiles, the Colorado law *does* regulate speech; and it does so precisely because the State objects to the expressive content of that speech. Regardless of which approach to the speech/conduct distinction this Court might choose to take, therefore, the conclusion is inescapable: the

Colorado statute is a prohibition on speech, not merely on conduct to which speech is only incidental.

III. The Fact that Chiles' Speech Occurs in the Course of Offering Professional Counseling Provides No Justification for Denying Her (or her Patients) the Full Protection of the First Amendment.

The Tenth Circuit evidently believed that Chiles' speech does not qualify for full First Amendment Protection because it occurs in the course of providing professional counseling. First, the court's opinion suggests that it was quietly trying to revive the idea, explicitly rejected by this Court in *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. 755 (2018) ("*NIFLA*"), that "professional speech" constitutes a category of constitutionally unprotected or lesser value speech. While purporting to accept that decision, the appellate court seized on an exception that is plainly inapplicable to this case, and then reworked and expanded the exception so broadly as effectively to negate the holding in *NIFLA*. Second, the court repeatedly and extensively invoked an ostensible consensus of experts and professional associations that views any kind of conversion therapy as unacceptable. *Chiles*, 116 F.4th at 1205, 1216-20. Neither consideration, however, can justify deviating from the well-established First Amendment principles that protect Chiles along with other persons and professionals from a coercively imposed orthodoxy.

A. The Tenth Circuit's Decision Amounts to a Thinly-Disguised Effort to Create a New Unprotected Category for "Professional Speech," but this Effort is Inconsistent with Both the Majority and Dissenting Opinions in *NIFLA*.

This Court has recognized a small class of speech categories that do not receive full constitutional protection, *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942), but the Court has insisted that such categories must be limited in number and narrow in scope. And with good reason: any other course would seriously dilute the constitutional commitment to freedom of speech.

Thus, whenever government is tempted to regulate a kind of speech, there will presumably be reasons for believing that such speech is harmful or unworthy; and hence there will always be a temptation to create new categories of speech unprotected by the First Amendment. But the multiplication of unprotected categories would greatly enfeeble the central constitutional commitment manifest in the Free Speech Clause. This Court explained as much when it declined to create new unprotected categories for speech that is loathsome and harmful; for example, so-called "crush films" depicting the unspeakably savage torture and mutilation of animals, *United States v. Stevens*, 559 U.S. 460 (2010), and violent video games shown by social science research to promote violence and anti-social behavior in adolescents who may become addicted to such games, *Brown v. Entertainment Merchants Assoc.*, 564 U.S. 786 (2011). In *Brown*, this

Court ruled that "new categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated." 564 U.S. at 791.

More specifically, this Court has considered and expressly rejected the proposal to recognize precisely the category of "professional speech" from which the Tenth Circuit now seeks to withdraw full constitutional protection. In *NIFLA*, the Court explicitly rejected the argument that "professional speech" is entitled to lesser constitutional protection; and the Court elaborated at length on the reasons for its rejection. 585 U.S. at 766-73. While acknowledging that regulations of professional speech had in rare instances been permitted, the Court explained that these regulations had been unrelated to the fact that speakers were professionals; the regulations were justified, rather, under other established First Amendment doctrines or decisions. *Id.* at 773. In the present case, the Tenth Circuit has attempted to invoke (or, more accurately, to transform and expand) one of those exceptions; but in reality, not only does the exception not apply: it shows how the State's and the Tenth Circuit's position gains no support even from the dissenting opinion in *NIFLA*.

Under the "no compelled speech" doctrine, *NIFLA* struck down a California provision requiring pro-life crisis pregnancy counseling centers to post notices conspicuously informing clients of the availability of more abortion-friendly services and providers. *Id.* at 778-79. A dissent by Justice Breyer joined by Justices Ginsberg, Sotomayor, and Kagan

argued that the California requirement could be upheld as an "informed consent" provision similar to measures often required by statute or tort law, including an "informed consent" provision that (as the majority acknowledged) had been upheld in *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992). *Id.* at 788 (Breyer, J., *et al.*, dissenting).

Here, even assuming that the dissent's rationale is persuasive on the facts of *NIFLA*, it serves mainly as a contrast, underscoring how much more invasive of freedom of speech the Colorado prohibition is. After all, the California requirement invalidated in *NIFLA* did not attempt to prevent pro-life professionals from saying anything they might choose to say. *Id.* at 761-62. Pregnancy counselors were still completely free to provide counseling in accordance with their Christian or pro-life convictions; they were merely required to inform clients of alternative possibilities. *Id.* at 770. The Colorado statute is completely different. It does not require a counselor like Chiles to inform clients of the Christian convictions that guide her treatment – although, in fact, she *does* so inform them – or to explain that counseling not based on religious convictions is also available. *See* Colo. Rev. Stat. § 12-245-202(3.5)(a), (b). On the contrary, the law prohibits Chiles or other counselors from expressing biblically- or religiously-based beliefs that might be construed as "conversion therapy" during counseling with minors; and it thus operates to preclude even younger patients who may themselves hold such beliefs from receiving counseling in accordance with their own beliefs. *See Chiles*, 116 F.4th at 1194. Nothing in the *NIFLA* majority opinion, the concurrences, or the dissent

provides any justification for this kind of stifling prohibition.

B. The First Amendment Protects the Right of Professionals and Professional Associations to Hold and Advocate Their Views, but It Does Not Permit Them to Impose These Views through Coercive Censorship.

The Tenth Circuit repeatedly invoked a reported consensus of professional associations and professionals who condemn any kind of "conversion therapy."[4] Such professionals and professional associations serve an essential function in our society; they are important contributors to the marketplace of

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[4] Whether the rationale for the American Psychological Association's condemnation applies to the counseling performed by Chiles is doubtful. APA President Jennifer F. Kelly explains that "[a]ttempts to *force* people to conform with *rigid gender identities* can be harmful to their mental health and well-being." Press release, Am. Psych. Ass'n, "APA Adopts Resolution Opposing Biased or Coercive Efforts to Change Individuals' Gender Identity," (March 2, 2021) (available at https://www.apa.org/news/press/releases/2021/03/change-gender-identity) (emphasis added). And the APA Resolution on Gender Identity Change Efforts asserts that "individuals who have experienced *pressure or coercion* to conform to their sex assigned at birth or therapy that was biased toward conformity to one's assigned sex at birth have reported harm resulting from these experiences, such as emotional distress, loss of relationships, and low self-worth." (emphasis added). *See ibid.* As noted above, however, Chiles emphatically does *not* "force people" to "conform with rigid gender identities," nor does she apply "pressure or coercion" to her patients. She offers what may qualify as "conversion therapy" only when her patients indicate that this is what they are seeking.

ideas. Consequently, they themselves enjoy the protections of the First Amendment freedoms of speech and association. It is a wholly different matter, however, when these persons and associations seek to have their views legally imposed through laws censoring the speech of citizens or other professionals who depart from professional orthodoxies.

The American Bar Association ("ABA"), for example, takes positions on any number of controversial legal and political issues: over the years, the ABA has opposed capital punishment and has supported abortion rights, same-sex marriage, and the Religious Freedom Restoration Act. Among the hundreds of thousands of lawyers in the country, many surely disagree with one or more of the ABA's official positions, as do millions of non-lawyers; nonetheless, the ABA enjoys a constitutional freedom to advocate positions on such controversial issues. But if the ABA were to attempt to persuade legislators to adopt laws punishing lawyers who in the course of their professional activities or advocacy express views that depart from the ABA's official positions, the First Amendment would be directly implicated. The same is true for other associations, including the American Psychological Association ("APA").

Moreover, reflection on this case reveals the wisdom of the "fixed star in our constitutional constellation" which holds that "no official, high or petty" – including legislators acting under the guidance of professional associations – shall be permitted to "prescribe what shall be orthodox" and

then mandate conformity to that orthodoxy. *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

Thus, the APA is forthright in stating the positivistic and humanistic premises on which its judgment condemning conversion therapy is based. It takes the view that "diversity in sexual orientation represents normal human variation," and it condemns "the pervasive heterosexism and monosexism in society." *See* Am. Psych. Ass'n, APA Resolution on Sexual Orientation Change Efforts, at 2, 4 (Feb. 2021) (available at https://www.apa.org/about/policy/resolution-sexual-orientation-change-efforts.pdf). More specifically, the Resolution condemns "prejudice directed against individuals or groups, derived from or based on religious or spiritual beliefs." *Id.* at 4. While acknowledging that many individuals voluntarily seek counseling that might include conversion therapy, the APA insists that these people are misguided; they are acting for a variety of unacceptable reasons, including "the belief that expressions of same-gender attractions are sinful or against religious teachings." *Id.* at 2. The Resolution peremptorily rejects such beliefs and teachings as irrational and unscientific. "There is no *scientific* basis for regarding any sexual orientation negatively"; and "[t]he APA opposes any efforts that use *nonscientific* explanations that stigmatize sexual orientation diversity and efforts that frame same-gender and multiple-gender orientations as unhealthy." *Id.* at 1 (emphasis added).

From these stated premises it naturally follows that any psychological distress or depression that a

person or a patient might feel based on the belief that "same-gender attractions are sinful or against religious teachings" is nothing more than gratuitous suffering grounded in irrational, unscientific "prejudice," as the APA views it. *Id.* at 4. The APA asserts that the obvious remedy is to avoid such wholly unwarranted harm by freeing people from such misguided religious beliefs, or at the very least to prevent people in their formative stages from receiving professional counseling influenced by such pernicious beliefs. *See id.* at 1-4.

There is nothing at all novel in this stance. Similar positivistic and humanistic views have been confidently proclaimed, over and over again, by many thinkers who have been among the molders of modernity. Relentlessly recurring themes include the following: beliefs, moral values, and public policies must be governed by "science," not by traditional religion, which has been shown by modern science to be outmoded and lacking in rationality.[5] Among the

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[5] The Humanist Manifesto, issued in 1933 and signed by a long list of luminaries including John Dewey, asserted that "the nature of the universe depicted by modern science makes unacceptable any supernatural or cosmic guarantees of human values," and that "the time has passed for theism [and] deism." https://americanhumanist.org/what-is-humanism/manifesto1/. Four decades later, Humanist Manifesto II, signed by an even longer list of distinguished thinkers and influencers including many philosophers, ministers, and writers, reiterated that "traditional theism, especially faith in the prayer-hearing God, assumed to live and care for persons, to hear and understand their prayers, and to be able to do something about them, is an unproved and outmoded faith." Am. Humanist Ass'n, Humanist Manifesto II (1973) (available at https://americanhumanist.org/what-is-humanism/manifesto2/). Modern thinking should instead be based on "apply[ing] the scientific method to nature

baleful features of traditional religion is that it teaches sinfulness, causing people needlessly to feel shame and guilt.[6] In the sexual realm specifically, traditional religion irrationally and unscientifically disapproves of attitudes and practices that are shown by "science" to be natural and normal; and religion thereby causes repression and inflicts gratuitous suffering on people.[7] In various forms and manifestations, these themes constitute a virtual

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and human life." https://americanhumanist.org/what-is-humanism/manifesto2/. For a more recent expression, *see* Sam Harris, THE MORAL LANDSCAPE: HOW SCIENCE CAN DETERMINE HUMAN VALUES (2010). Harris insists that moral values and judgments should be based on science – not on religion, which is to blame for "many dark centuries of religious bewilderment and persecution." *Id.* at 24.

[6] *See* Bertrand Russell, *Why I Am Not a Christian*, ttps://users.drew.edu/~jlenz/whynot.html (contending that religious ideas of sinfulness have caused "an unspeakable amount of misery in the world" and that "the more intense has been the religion of any period and the more profound has been the dogmatic belief, the greater has been the cruelty and the worse has been the state of affairs").

[7] *See, e.g.,* SIGMUND FREUD, THE FUTURE OF AN ILLUSION 56 (JAMES STRACHEY ed. and tr. 1961) (asserting that "religious teachings" are "neurotic relics" and that "the time has probably come . . . for replacing the effects of repression by the results of the rational operation of the intellect"). *See also* Humanist Manifesto II, *supra* (asserting that "intolerant attitudes, often cultivated by orthodox religions and puritanical cultures, unduly repress sexual conduct"); Christopher Hitchens, GOD IS NOT GREAT: HOW RELIGION POISONS EVERYTHING 53-54 (2007) (observing that "merely to survey the history of sexual dread and proscription, as codified by religion, is to be met with a very disturbing connection between extreme prurience and extreme repression. Almost every sexual impulse has been made the occasion for prohibition, guilt, and shame").

credo of a recognizable tradition in modern thought. To say this is not in any way to discredit that credo or that tradition, but merely to observe that it *is* one modernist intellectual tradition, but far from being any sort of exclusive or mandatory mode of thinking that all reasonable people should be compelled to accept and live by.

The APA's position on sexual orientation and conversion therapy, and the general premises on which that position is explicitly based, are unmistakably in this positivistic and humanistic intellectual tradition. And, as noted, the APA along with anyone else has a constitutional right to hold and to act on such premises. However, millions of Americans, while often deeply appreciating (and indeed engaging in) the enterprise of science, embrace moral, epistemic, and ontological views that are not confined to this positivistic interpretation of what is mandated by "science." And just as the Constitution protects the professionals and the positivistic thinkers, it likewise protects – in both the Free Speech Clause and the Free Exercise Clause – these Americans' right to hold and to act on beliefs that do not conform to positivistic prescriptions.

One kind of commonly held alternative view does not deny that beliefs in sinfulness *can* cause psychological distress or depression. Indeed, the Christian tradition offers numerous poignant instances: Augustine of Hippo and Martin Luther are classic and dramatic examples. In this alternative view, however, sinfulness is not an irrational superstition but rather a pervasive fact that cannot

be wished away.[8] But it is also only part of a larger plan of redemption that promises healing and peace as well as rewards that surpass the placid equilibrium that the positivist program contemplates if people could only be educated to cast off the "prejudice" and "neurotic relics" that come from outmoded "religious teaching."

As the APA Resolution reflects, more positivistic philosophies often see the traditional religious faiths as irrational and unscientific, and as a source of gratuitous suffering and guilt. Conversely, more religious views often embrace science in a less exclusionary sense, and they may regard the narrower positivistic position as a tragic truncation of human worth, understanding, dignity, and destiny. Both families of philosophies in their various manifestations claim numerous adherents in our society. And the ongoing dialogue between such philosophies has been a shaping and arguably invigorating and enriching feature of modern life. Both kinds of philosophies surely have a legitimate place in the marketplace of ideas sponsored by the First Amendment, which does not itself endorse either, or any, of these competing views.

But neither does that Amendment allow officials, high or petty, to establish any of these competing views as the state-established orthodoxy that professionals will be compelled to adhere to, and that patients seeking professional counseling will be consigned to accept. The Amendment wisely assures,

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[8] G. K. Chesterton quipped that original sin is "the only part of Christian theology which can really be proved."

rather, that people – even professional counselors, and patients who seek their services – will be allowed to consider, believe, and live by the philosophies that seem to them valuable and true.

CONCLUSION

The judgment of the Tenth Circuit should be reversed.

June 13, 2025

Respectfully submitted,

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APPENDIX A

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