No. 24-539

In the Supreme Court of the United States

KALEY CHILES,

Petitioner,

v.

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

Respondents.

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

BRIEF OF *AMICUS CURIAE* CATHOLICVOTE.ORG EDUCATION FUND IN SUPPORT OF PETITIONER

SCOTT W. GAYLORD
HIGH POINT UNIVERSITY SCHOOL OF LAW
APPELLATE ADVOCACY CLINIC
One University Parkway
High Point, NC 27268
Phone: (336) 841-2635
Email: sgaylord@highpoint.edu

Counsel for Amicus Curiae

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CatholicVote.org Education Fund ("CVEF") is a nonpartisan voter education program devoted to serving the Nation by supporting educational activities that promote an authentic understanding of ordered liberty and the common good. Given its educational mission, CVEF is deeply concerned that *Chiles v. Salazar*, 116 F.4th 1178 (10th Cir. 2024) threatens the ability of professionals in any licensed field to speak freely when treating, counseling, representing, or advising their patients and clients. The object of Colo. Rev. Code § 12-245-202(3.5) and § 12-245-224(1)(t)(V) (collectively, the "Ban" or "Counseling Ban") "is simply to require [professionals] to modify the content of their expression to whatever extent" the legislature may want, thereby promoting "messages of [its] own." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 578 (1995). The law targets particular speech (expression directed at changing a person's sexual orientation or gender identity) when uttered by licensed counselors. Consequently, the Ban "turn[s] on the

[1] Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

fact that professionals [are] speaking," moving the law outside *Giboney*'s narrow exception for regulations of conduct that incidentally involves speech. *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). CVEF, therefore, comes forward to support the right of all professionals to practice their vocation—and convey their views—in a manner that is consistent with their training, expertise, and (as here) religious faith.

SUMMARY OF ARGUMENT

The First Amendment safeguards the "freedom to think as you will and to speak as you think." *Boy Scouts of America v. Dale*, 530 U.S. 640, 660-61 (2000). Kaley Chiles, a licensed counselor and a practicing Christian, seeks to counsel her minor clients "who privilege their faith above their feelings" and "believe their faith and their relationships with God supersede romantic attractions." *Chiles*, 116 F.4th at 1193 (cleaned up). Engaging only in expression, Chiles wants to speak to her clients—and her clients want to hear—about her thoughts and strategies to help them align their sexual identity with their faith.

The lower court's opinion not only prevents her from doing so, but also contravenes this Court's holding in *Nat'l Inst. of Family and Life Assocs. v. Becerra* that "[s]peech is not unprotected merely because it is uttered by 'professionals.' " 585 U.S.

755, 767 (2018) ("*NIFLA*"). The Tenth Circuit now joins the Ninth Circuit in permitting States to silence the speech of licensed professionals, who wish to express views with which the government disagrees, simply by labeling such expression as "conduct" or "treatment." But as *NIFLA* explained, professional speech is speech and receives full First Amendment protection except in two narrow circumstances—where the government compels disclosure of factual, noncontroversial information as part of a professional's commercial speech (*Zauderer v. Off. of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985)) or regulates conduct that involves speech only incidentally (*Giboney*, 336 U.S. at 502)—and then only if the governmental regulation does not "turn[] on the fact that professionals were speaking." *NIFLA*, 585 U.S. at 768.

Colorado's Counseling Ban does not fit within either exception. The communications Chiles wants to have with her minor clients are not commercial speech and concern controversial topics—sexual orientation and gender identity. Moreover, because the Ban restricts the act of communicating itself (the discussion between a professional and her minor patients) and not some independent "conduct [that] was *in part* initiated, evidenced, or carried out by means of language, either spoken, written, or printed," Colorado cannot squeeze its regulation into

the *Giboney* exception. 336 U.S. at 502. Accordingly, this Court should overturn the Tenth Circuit's decision and confirm what *NIFLA* intimated—that the government cannot sidestep the First Amendment simply by reclassifying speech as conduct whenever a professional engages in expression the government disfavors. 585 U.S. at 767.

ARGUMENT

I. The Tenth Circuit's opinion adopts a professional-speech-as-conduct doctrine that contravenes *NIFLA* by focusing on whether a professional is speaking and regulating the act of communication itself, not a separate form of conduct.

Courts adopting the professional speech doctrine viewed professional speech as unique and, therefore, not subject to traditional First Amendment protections. As *NIFLA* detailed, these courts defined "professionals" as "individuals who provide personalized services to clients and who are subject to 'a generally applicable licensing and regulatory regime.' " *Id*. (quoting *Moore-King v. County of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2014)). "Professional speech" included "any speech by these individuals that is based on '[their] expert knowledge and judgment' or that is 'within the

confines of [the] professional relationship.' " *Id.* (citations omitted). Given this "specialized knowledge," coupled with "the State's imprimatur and … regulatory oversight," such courts concluded "that a licensed professional does not enjoy the full protection of the First Amendment when speaking as part of the practice of her profession." *King v. Governor of New Jersey*, 767 F.3d 216, 232 (3d Cir. 2014), *abrogated by*, *NIFLA*, 585 U.S. 755.

NIFLA expressly rejected the professional speech doctrine, denying that professional speech is "a separate category of speech that is subject to different rules." 585 U.S. at 767. As this Court explained, "[s]peech is not unprotected merely because it is uttered by 'professionals.' " *Id.* To impose content-based or viewpoint-based restrictions on a category of speech, like Colorado's Ban on change counseling, a State must present " 'persuasive evidence … of a long (if heretofore unrecognized) tradition' to that effect." *Id.* (quoting *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (plurality opinion) (cleaned up)). *NIFLA* found no "such … tradition for a category called 'professional speech,' " *id.* at 768, and Colorado offered no such evidence to support taking professional speech to be conduct.

In fact, *NIFLA* identified only two situations in which this Court has afforded professional speech "less protection"—compelled disclosure of factual,

noncontroversial information as part of a professional's commercial speech (as in *Zauderer*) and a regulation of conduct that involves speech only incidentally (as in *Giboney*). *Id.*; *Giboney*, 336 U.S. at 502 (stating that "it has never been deemed an abridgement of freedom of speech or press 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"). The Court emphasized, however, that neither of these exceptions "turned on the fact that professionals were speaking." *NIFLA*, 585 U.S. at 768.

Undeterred, the Tenth Circuit sought to avoid *NIFLA* by adopting *Tingley*'s novel professional-speech-as-conduct doctrine, attempting to squeeze Colorado's Counseling Ban into the narrow confines of the *Giboney* exception. *Tingley v. Ferguson*, 47 F.4th 1055, 1064 (9th Cir. 2022) ("States do not lose the power to regulate the safety of medical treatments performed under the authority of a state license merely because those treatments are implemented through speech rather than through scalpel."). According to the panel, Chiles's speech was actually a form of conduct, a means of treating her clients. *Chiles*, 116 F.4th at 1209 (holding that Colorado's Ban "implicates mental health professionals' speech only as part of their practice of mental health treatment"); *Tingley*, 47 F.4th at 1073

(adopting the position in *Pickup v. Brown,* 740 F.3d 1208, 1229 (9th Cir. 2014), o*verruled on other grounds by NIFLA*, 585 U.S. 755, that a ban on "conversion therapy treatment … was a regulation of conduct" subject only to "rational basis review"). Given that her counseling occurred within the counselor-client relationship, the Tenth Circuit held that Chiles's desired speech was directed at assisting her patients and, therefore, was a form of treatment.

In so holding, the Tenth Circuit ignored a critical feature of the two contexts where this Court has afforded professional speech "less protection"—that "neither [situation] turned on the fact that professionals were speaking." *Id*. at 768. The problem with the lower court's opinion is that its professional-speech-as-conduct doctrine *is* based on Chiles's being a licensed counselor who engages in specific expression with her minor clients. To obscure this fact, the panel engages in verbal gymnastics:

> [T]he MCTL regulates the provision of a therapeutic modality—carried out through use of verbal language—by a licensed practitioner authorized by Colorado to care for patients…. [It] does not regulate expression. It is the practice of conversion therapy—not the discussion of the subject by the mental

> health provider—that is a "[p]rohibited activit[y]" under the MCTL.

Chiles, 116 F.4th at 1208. Pure speech (the "use of verbal language") that a professional ("a licensed practitioner authorized by Colorado to care for patients") engages in to help a patient (a "therapeutic modality") now becomes conduct subject to government regulation ("the practice of conversion therapy"). *Id.* ("[T]he MCTL prohibits a particular mental health treatment provided by a healthcare professional to her minor patients."). Under this logic, all expression within the professional relationship that relates to counseling patients becomes incidental to a form of conduct—namely, treatment. *Id.* ("And the MCTL applies to mental health professionals while practicing their profession—which is treating patients."). While the Tenth Circuit interprets the current Ban to permit counselors to talk about, promote, or refer their clients for change counseling,[2] they cannot engage

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[2] If *Chiles* is upheld, a counselor's ability to discuss, promote, or refer patients for change counseling may be a matter of legislative (or judicial) grace. Under the panel's analysis, a legislature (or court) could readily find that discussing, promoting, and referring a minor for change counseling constitutes a "practice … that attempts or purports to change an individual's sexual orientation or gender identity, including efforts to change behaviors or gender expressions or to eliminate or reduce sexual or romantic attraction or feelings toward individuals of the same sex." Colo. Rev. Stat. § 12-245-

directly in such counseling with their minor patients because Colorado has the power to preclude such professional "conduct." This is the only way the panel can support its remarkable claim that, despite prohibiting speech by a healthcare professional to a minor patient "that attempts or purports to change an individual's sexual orientation or gender identity," Colo. Rev. Stat. § 12-245-202(3.5), "[t]he MCTL does not regulate expression." *Chiles*, 116 F.4th at 1208.

If this sounds familiar, it should. The Tenth Circuit is effectively reincarnating the professional speech doctrine under the guise of a professional treatment doctrine. Change counseling is dealt with differently from the identical expression by a classmate, religious advisor, or friend *because a professional is speaking*. Unlike "an exchange between a 'sophomore psychology major' and her peers," the Tenth Circuit contends "the counseling relationship between provider and patient" receives less First Amendment protection because that relationship "involves special privileges, a power differential, and a financial arrangement." *Id*. When Chiles engages in speech as a professional counselor, her expression (change counseling)

202(3.5). Such conversations about, oral support for, or references to other counselors could constitute a "practice"—a pattern of conduct—that was directed at helping minor patients change their sexual orientation or gender identity.

becomes a form of treatment (a "therapeutic modality") that is subject to regulation by the State. When the psychology major says the exact same things, though, her speech remains fully protected because the panel views it as "an informal conversation among friends." *Id*. What accounts for the difference? The identity of the speaker—Chiles's expression receives diminished protection because she is a professional counselor engaged in certain (disfavored) professional speech. Thus, whether the expression is protected speech or "a particular mental health treatment" depends on the identity of the speaker. *Id*.

The Tenth Circuit's reliance on the special nature of the counselor-client relationship mirrors the defining characteristics of "professional speech" that *NIFLA* considered and rejected. Under the professional speech doctrine, professionals are "individuals who provide personalized services to clients and who are subject to 'a generally applicable licensing and regulatory regime.' " *NIFLA*, 585 U.S. at 767. " 'Professional speech' is then defined as any speech by these individuals that is based on '[their] expert knowledge and judgment' or that is 'within the confines of [the] professional relationship.' " 585 U.S. at 767 (citations omitted).

The Tenth Circuit's professional-speech-as-treatment doctrine applies only to the speech between a professional ("a licensed practitioner

authorized by Colorado to care for patients") and her client because that professional relationship "involves special privileges, a power differential, and a financial relationship." 116 F.4th at 1208. Given Chiles's expert knowledge and state license, her expression "within the confines of [the] professional relationship" becomes a treatment, a form of conduct that the State can regulate more readily. Consequently, whether expression should be treated as pure speech or professional conduct depends entirely on who says the words (a professional or a lay person).

But this just is the professional speech doctrine under a different name, which is evidenced by the lower court's invoking the same passage in *Lowe v. SEC* that *Pickup* relied on when proffering its (now discredited) formulation of the professional speech doctrine: "One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession." 472 U.S. 181, 232 (1985) (White, J., concurring) (quoted in *Pickup*, 740 F.3d at 1229 and *Chiles*, 116 F.4th at 1208). And to borrow from Shakespeare, a professional speech doctrine by any other name is just as unconstitutional.

By removing First Amendment protection from expression "merely because it is uttered by

'professionals,' " *Chiles* and *Tingley* directly contravene *NIFLA*. 585 U.S. at 767. Regardless of the label used (professional speech or professional treatment), change counseling consists exclusively of speech between a counselor and her client. Colorado's Ban, therefore, regulates *expression*, not conduct, and is subject to First Amendment scrutiny. *Cohen v. California*, 403 U.S. 15, 18 (1971) ("The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon 'speech.' "); *Hines v. Pardue*, 117 F.4th 769, 776 (5th Cir. 2024) (recognizing that the regulation in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) ("*HLP*") "barred certain forms of speech" because "whether the plaintiffs could speak with designated terrorist organizations 'depended[ed] on what they [said]' "); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (concluding that wearing a black armband "was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment").

Moreover, the Tenth Circuit cannot avail itself of *Giboney*'s "conduct that incidentally involves speech" exception because that exception applies only if there is some conduct—other than the act of communication itself—that is the object of the governmental regulation. *Otto v. City of Boca Raton*,

981 F.3d 854, 866 (11th Cir. 2020) (explaining that "the State punishes speech, not conduct" when "the only conduct which the State [seeks] to punish [is] the fact of communication"); *Chiles*, 116 F.4th at 1228 (Hartz, J., dissenting) ("[A] restriction on speech is not *incidental* to regulation of conduct when the restriction is imposed because of the expressive content of what is said."). Under *Giboney*, conduct is not immune from regulation simply because that "conduct was *in part* initiated, evidenced, or carried out by means of language, either spoken, written, or printed." 336 U.S. at 502 (emphasis added). But when the alleged conduct being regulated consists *entirely* of a speaker speaking, First Amendment safeguards *are* triggered. Because change counseling involves pure speech, Chiles's conversations with her minor patients remain speech under the First Amendment: "What the governments call a 'medical procedure' consists—entirely—of words…. 'Speech is speech, and it must be analyzed as such for purposes of the First Amendment.' " *Otto*, 981 F.3d at 867 (quoting *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1307 (11th Cir. 2017)); *King*, 767 F.3d at 225 ("Given that the Supreme Court had no difficulty [in *HLP*] characterizing legal counseling as 'speech,' we see no reason here to reach the counter-intuitive conclusion that verbal communications that occur during SOCE counseling are 'conduct.' ").

The difference between conduct incidentally involving speech and the act of directly communicating a message is firmly embedded in this Court's case law. *NIFLA*, 585 U.S. at 769 (quoting *United States v. Stevens*, 559 U.S. 460, 468 (2010) (cleaned up)) (noting that although "drawing the line between speech and conduct can be difficult" in some cases, "the line is 'long and familiar to the bar' "). In the first category, the government's "restrictions [are] directed at commerce or conduct" and have only an "incidental burden[] on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011). Such regulations of conduct that incidentally implicate speech have been regularly upheld. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (upholding mandatory disclosures as part of obtaining informed consent to a physician's performing an abortion); *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006) (bans on discrimination in hiring prohibiting a "White Applicants Only" sign); *R.A.V. v. St. Paul*, 505 U.S. 377, 385 (1992) ("an ordinance against outdoor fires" preventing "burning a flag"); *Giboney*, 336 U.S. at 502 (antitrust laws precluding "agreements in restraint of trade"). In each of these cases, the government regulated "commerce or conduct" that involved speech only as a part of the broader conduct, not speech itself. The same is true of the regulations on the practice of medicine that *Tingley* invoked. 47 F.4th at 1081 (describing laws

that prohibit the "[p]romotion for personal gain of any unnecessary or inefficacious drug, device, treatment, procedure, or service," "[i]ncompetence, negligence, or malpractice which results in injury to a patient or which creates an unreasonable risk that a patient may be harmed," and all advertising by health care professionals that is "false, fraudulent, or misleading").

Tellingly, the lower court cited no authority to support giving Colorado the authority to declare pure expression to be something that it is not—conduct—and then to regulate such "treatment" free from the strictures of the First Amendment. In fact, this Court's precedents cut in the opposite direction. *Riley v. Nat'l Fed. of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) ("[S]tate labels cannot be dispositive of [the] degree of First Amendment protection."); *NAACP v. Button*, 371 U.S. 415, 439 (1963) (explaining that "a State may not, under the guise of prohibiting professional misconduct, ignore [First Amendment] rights"); *Cohen*, 403 U.S. at 18 (upholding an individual's right to wear a jacket displaying an offensive word because "[t]he only 'conduct' which the State sought to punish is the fact of communication," which meant that the "conviction rest[ed] solely upon 'speech' "); *Telescope Media Group v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019) ("Speech is not conduct just because the government says it is."). And they do so for good

reason—the dangers to free speech are the same whether the government is allowed to regulate professional speech or professional "conduct" that consists solely of communicating a message. In both situations, professionals are precluded from expressing their desired messages because the government disagrees with those messages. *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) ("[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

These prohibitions, therefore, contradict "the usual rule that governmental bodies may not prescribe the form or content of individual expression." *Cohen*¸ 403 U.S. at 24. Such content-based regulations "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994). And that is especially true of regulations, like Colorado's Counseling Ban, that discriminate based on a speaker's viewpoint. *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) ("When the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant.").

Colorado, of course, remains free to promote its preferred messages regarding medical treatments, change counseling, and other issues. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (explaining that the government "has the right to speak for itself, … to say what wishes, and to select the views that it wants to express") (cleaned up). But in the realm of "private speech or expression, government regulation may not favor one speaker over another." *Rosenberger*, 515 U.S. at 828. Nor can the government censor messages it dislikes: "Our cases establish that the State cannot advance some points of view by burdening the expression of others." *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 20 (1986) (plurality opinion); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978) ("Especially where … the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage in expressing its views to the people, the First Amendment is plainly offended."). The way for the government to promote its views on sexual orientation and gender identity (or any other issue) "is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." *Texas v. Johnson*, 491 U.S. 397, 419 (1989).

Unfortunately, Colorado took a different path, banning professional speech that involved a

particular set of views (change counseling) with which Colorado disagreed. This Ban violated both Chiles's right to speak and the right of her clients to receive desired information. *Sorrell*, 564 U.S. at 578 ("The defect in Vermont's law is made clear by the fact that many listeners find detailing instructive."); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (quoting *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)) ("In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.' "). While Colorado believes change counseling is ineffective and harmful to minors, "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer," *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975), let alone willing listeners such as Chiles's minor clients. *Snyder v. Phelps*, 562 U.S. 443, 450 (2011) (protecting speech even though a jury found it "outrageous" and experts testified it "had resulted in severe depression and had exacerbated pre-existing health conditions"). Post-*NIFLA*, if the government wants to prohibit professional speech in content-based or viewpoint-based ways, it must satisfy strict scrutiny. 585 U.S. at 767 (overturning the decisions of courts that "except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny").

And such heightened scrutiny is all the more appropriate given that the Ban discriminates based on viewpoint. Absent heightened scrutiny, state legislatures across the country may be emboldened to regulate a professional's speech with her patient based " 'upon a categorical balancing of the value of the speech against its societal costs.' " *United States v. Stevens*, 559 U.S. 460, 470 (2010) (citation omitted). That is what Colorado did—banning change counseling because its legislature concluded that such counseling was ineffective, disfavored by various professional groups, and harmful to minors. *Chiles*, 116 F.4th at 1216-18.

The problem is that *Stevens* expressly rejected this type of balancing test:

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

559 U.S. at 470. The Colorado legislature may view change counseling as "valueless or unnecessary,"

but its "ad hoc calculus of costs and benefits" does not determine the scope of First Amendment protection. *Id*. at 471; *Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). Whether Colorado disagrees with change counseling (or any other type of professional speech) "for good reasons, great reasons, or terrible reasons has nothing at all to do with it. All that matters is that a therapist's speech to a minor client is legal or illegal under the ordinances based solely on its content." *Otto*, 981 F.3d at 863.

The same analysis applies even when the government seeks to protect children from expression it views as harmful: "Even where the protection of children is the object, the constitutional limits on governmental action apply." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 804-05 (2011). As this Court explained in *Erznoznik*, "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." 422 U.S. at 213-14; *Brown*, 564 U.S. at 794-95 (holding that the State's power to protect children "does not include a free-floating power to restrict the ideas to which children may be exposed"). Otherwise, the

government could "shut off discourse solely to protect others from hearing it … effectively empower[ing] a majority to silence dissidents simply as a matter of personal predilections." *Cohen*, 403 U.S. at 21. This Court long ago rejected the view that the Constitution "prescribe[es] limits, and declar[es] that those limits may be passed at pleasure." *Marbury v. Madison*, 5 U.S. 137, 178 (1803); *Tingley*, 57 F.4th at 1077 (O'Scannlain, J., dissenting from denial of rehearing en banc) ("But it would make no sense for the First Amendment to protect speech through heightened scrutiny while subjecting legislative determinations of the line between speech and conduct only to rational basis review."); *Wollschlaeger*, 848 F.3d at 1308 (citation omitted) ("[T]he enterprise of labeling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and susceptible to manipulation.").

To protect children (or anyone else) through content-based or viewpoint-based restrictions on speech, the government must satisfy heightened scrutiny. *NIFLA*, 585 U.S. at 766 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)) ("As a general matter, [content-based regulations] 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.' "). Mirroring the professional speech

doctrine, however, the Tenth Circuit applied only rational basis review to Colorado's viewpoint-based Ban, 116 F.4th at 1215, and, therefore, should be reversed.

II. *Button*, *White*, *Hurley*, *and 303 Creative* confirm that professional speech, like other forms of expression, receives full First Amendment protection.

As this Court explained in *Button*, when professionals engage in expression as part of their jobs, the government cannot circumvent First Amendment protections simply by claiming that it is safeguarding professional standards: "it is no answer to the constitutional claims asserted by petitioner to say … that the purpose of these regulations was merely to insure high professional standards and not to curtail free expression." 371 U.S. at 438. In *Chiles*, Colorado did just that, claiming that its Mental Health Practice Act was meant to " 'protect the people of this state against the unauthorized, unqualified, and improper application' of mental healthcare." 116 F.4th. at 1205. While ensuring that professionals adhere to appropriate standards of conduct is important, *Button* and its progeny require States to satisfy strict scrutiny when regulating the expression of professionals in a content-based or viewpoint-based way.

In *Button*, Virginia sought to ban "the NAACP's activities in furtherance of litigation" through a statute that precluded "improper solicitation." 371 U.S. at 438. The "activities" at issue consisted entirely of speech—"urg[ing] Negroes aggrieved by the allegedly unconstitutional segregation of public schools in Virginia to exercise their legal rights and to retain members of the Association's legal staff." *Id*. at 437. This Court did not hesitate to reject Virginia's claim that the NAACP attorneys' speech "f[e]ll within the traditional purview of state regulation of professional conduct," confirming that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id*. at 438; *Riley*, 487 U.S. at 798 (finding speech compulsions related to professional fundraising unconstitutional). Because Virginia's law was "content-based" and "regulate[d] the noncommercial speech of lawyers," *Button* applied strict scrutiny. *NIFLA*, 585 U.S. at 771 (citing to *Reed*'s discussion of *Button*).

Under *Button*, then, "a State cannot foreclose the exercise of constitutional rights by mere labels." 371 U.S. at 429. Courts must look beyond the government's characterization of a law as a regulation of "conduct" to determine whether the law "was directed at [petitioner] because of what [her] speech communicated." *HLP*, 561 U.S. at 28; *Reed*, 576 U.S. at 167 (describing how "the Court

rightly rejected the State's claim [in *Button*] that its interest in the 'regulation of professional conduct' rendered the statute consistent with the First Amendment"). Strict scrutiny applies when "[t]he law … may be described as directed at conduct, as the law in *Cohen* was directed at breaches of the peace, but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *HLP*, 561 U.S. at 28; *Hines*, 117 F.4th at 776 (concluding, based on *HLP*, that "a particular act constitutes protected speech, rather than unprotected conduct, if that act 'consists of communicating a message' ").

Professionals engage in a wide range of activities when serving their clients and patients. At their core, many of these activities involve "communicating a message" regardless of how the government describes them. *HLP*, 561 U.S. at 28. *Button* is instructive on this point. Lawyers—who are legal professionals—represent clients, appear in court, research legal matters, solicit new business, negotiate, draft settlements, and engage in a vast array of other activities that the government might claim "fall within the traditional purview of state regulation of professional conduct." *Button*, 371 U.S. at 438. But when the only conduct the State seeks to regulate is the act of communication itself, "this Court's precedents have long protected the First Amendment rights of professionals." *NIFLA*,

585 U.S. at 771; *Button*, 371 U.S. at 438 (striking down Virginia's attempt "to insure high professional standards" for lawyers because the regulation imposed a "serious encroachment … upon protected freedoms of expression").

Content-based regulations of professional speech, like the Ban here, "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Turner Broad.*, 512 U.S. at 641. Because counselors and "[d]octors help patients make deeply personal decisions, … their candor is crucial," *Wollschlaeger*, 848 F.3d at 1328, and strict scrutiny is needed to ensure that the government does not " 'manipulat[e] the content of doctor-patient discourse; to increase state power and suppress minorities." *NIFLA*, 585 U.S. at 771 (citation omitted); *United States v. Eichman*, 496 U.S. 310, 317-18 (1990) (holding that legislation "must be subjected to 'the most exacting scrutiny' " when "[i]t suppresses expression out of concern for its likely communicative impact").

In the wake of *Button*, this Court has subjected other restrictions on professional speech to strict scrutiny. For example, in *Republican Party of Minnesota v. White*, Minnesota sought to regulate the campaign activity of candidates for judicial office. While running for a seat on the Minnesota Supreme Court, Gregory Wersal "distributed

literature criticizing several Minnesota Supreme Court decisions on issues such as crime, welfare, and abortion." 536 U.S. 765, 768 (2002). A complaint was filed against Wersal with the Minnesota Lawyers Professional Responsibility Board (the "Board"), alleging that his literature violated a provision of the Minnesota Code of Judicial Conduct (the "Announce Clause"), which prohibited a judicial candidate from "announc[ing] his or her views on disputed legal or political issues." *Id.* Fearing that such complaints might jeopardize his ability to practice law, Wersal withdrew from the election. Two years later, he ran again for the same position but sought an advisory opinion from the Board regarding its intent to enforce the Announce Clause. Having not received a definitive answer, Wersal filed suit in federal court seeking a declaration that the Announce Clause violated the First Amendment.

Although Wersal engaged in certain forms of conduct (*e.g.*, running for office and campaigning), the Announce Clause directly restricted his expression, "prohibit[ing] speech on the basis of its content and burden[ing] a category of speech that is 'at the core of our First Amendment freedoms'—speech about the qualifications of candidates for public office." *Id.* at 774. The regulation, therefore, restricted the speech of legal professionals, and the Court applied strict scrutiny, requiring the state

parties to prove that the Announce Clause was narrowly tailored to serve a compelling interest. *Id.*

What *White* said about speech restrictions in the context of legal professionals running for judicial office applies with equal force to professional speech generally: "If the State chooses to tap the energy and the legitimizing power of the [professional licensing] process, it must accord the participants in that process … the First Amendment rights that attach to their roles." *Id.* at 788 (cleaned up). Not surprisingly, despite Minnesota's interest in "preserving the impartiality of the state judiciary," *id.* at 755, the Board and its officers could not satisfy strict scrutiny because, *inter alia*, " '[i]t is simply not the function of the government to select which issues are worth discussing or debating in the course of a political campaign.' " *Id.* at 782 (quoting *Brown v. Hartlage*, 456 U.S. 45, 60 (1982)).

Button and *White* directly support *NIFLA*'s holding that professional speech is not *sui generis*. Professional speech is speech and, as a result, receives full First Amendment protection unless the government "require[s] professionals to disclose factual, noncontroversial information in their 'commercial speech' " or "regulate[s] professional conduct, even though that conduct incidentally involves speech." *NIFLA*, 585 U.S. at 768; *Zauderer*, 471 U.S. at 637 n.7 (noting that, if communicated outside the commercial speech context, the lawyer's

statements would have been "fully protected speech"). Colorado's Ban is not directed at Chiles's commercial speech or her non-speech conduct; rather, Colorado targets her expression because it advances a particular viewpoint with which the State disagrees. *Rosenberger*, 515 U.S. at 829 ("Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction."); *Turner Broad.*, 512 U.S. at 642 ("Our precedents thus apply the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens upon speech because of its content.").

And "[t]he message [Colorado] disfavored is not difficult to identify." *Hurley*, 515 U.S. at 574. Colorado opposed change counseling based on its "particular viewpoint about sex, gender, and sexual ethics." *Otto*, 981 F.3d at 864. In place of change counseling, Colorado codified its own perspective—that "sexual orientation is immutable, but gender is not"—and prevented therapists from engaging in expression that was inconsistent with the State's view. *Id*. By barring a particular viewpoint on this important issue, Colorado skewed the marketplace of ideas, permitting only state-approved speech in sessions with minor clients who sought help

"prioritiz[ing] their faith above their feelings … to live a life consistent with their faith." *Chiles*, 116 F.4th at 1193; *FCC v. Pacifica Found.*, 438 U.S. 726, 745-46 (1978) ("[T]he fact that society may find speech offensive is not a sufficient reason for suppressing it. Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas."). The First Amendment prohibits such expressive gerrymandering:

> The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people, grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.

Hurley, 515 U.S. at 579; *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."); *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring) (explaining that when the

government objects to expression, "the remedy to be applied is more speech, not enforced silence"); *Otto*, 981 F.3d at 862 ("Forbidding the government from choosing favored and disfavored messages is at the core of the First Amendment's free-speech guarantee.").

Hurley illustrates the point well. In *Hurley*, this Court recognized that public accommodations laws "do not, as a general matter, violate the First or Fourteenth Amendments." 515 U.S. at 572. When "applied in a peculiar way" (*i.e.*, "to the sponsors' speech itself"), however, such laws "violate[] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id*, at 572-73. The government's authority to regulate conduct—namely, "the act of discriminating against individuals in the provision of publicly available goods, privileges, and services"—did not extend to the regulation of "[t]he protected expression that inheres in a parade." *Id*. at 572, 569. Although "marching" is a form of conduct, "[p]arades are … a form of expression" through which "marchers … mak[e] some sort of collective point." *Id*. at 568. Accordingly, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened

either purpose may strike the government." *Id.* at 579.

Similarly, *303 Creative* concluded that Colorado's public accommodations law violated the First Amendment because Colorado sought "to use the law to compel an individual to create speech she does not believe." 600 U.S. at 578-79. Instead of regulating 303 Creative's conduct, Colorado applied its public accommodations law to its owner's expressive activity: "If she wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs." *Id.* at 589. This Court concluded that such an alleged "choice … 'is enough,' more than enough, to represent an impermissible abridgment of the First Amendment's right to speak freely." *Id.* (quoting *Hurley*, 515 U.S. at 574). Although the public accommodations law "had many lawful applications," Colorado could not apply that law to a business owner's expression. *Id.* at 592; *Id.* ("When a state public accommodations law and the Constitution collide, there can be no question which must prevail.").

The same analysis governs the Counseling Ban. Although Colorado generally can regulate the conduct of counselors and other professionals, its attempt to regulate Chiles's oral communications with her minor clients "collides" with the First Amendment. Here, as in *303 Creative*, Colorado contended that its laws regulated only conduct

("treatment" in *Chiles* and the "sale of an ordinary commercial product" in *303 Creative*). *Id.* at 593. "On the State's telling" in both cases, "speech more or less vanishes from the picture—and, with it, any need for First Amendment scrutiny." *Id.* Yet, as discussed above, a State cannot transform speech into conduct simply by (repeatedly) calling it "treatment." *Riley*, 487 U.S. at 781 (citing *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975)) ("[S]tate labels cannot be dispositive of [the] degree of First Amendment protection.").

Colorado's Ban violates the First Amendment because it restricts Chiles's expression, putting her to the same type of Hobson's choice that this Court found unconstitutional in *303 Creative*: Chiles may counsel her minor clients on gender identity "as the State demands" (*i.e.*, by "provid[ing] … [a]cceptance, support, and understanding for the facilitation of" gender transition, Colo. Rev. Stat. § 12-245-202(3.5)) or "face sanctions for expressing her own beliefs" during counseling sessions (*i.e.*, by "attempt[ing] or purport[ing] to change an individual's sexual orientation or gender identity," *id.*). *303 Creative*, 600 U.S. at 589. The only other alternative—remain quiet and forego engaging in her desired expression—compels silence, which also violates the First Amendment. *Riley*, 487 U.S. at 796 (explaining that "in the context of protected speech, the difference [between compelled speech

and compelled silence] is without constitutional significance"). The Counseling Ban, therefore, "plainly 'alters the content' of [Chiles's] speech," *NIFLA*, 585 U.S. at 766 (quoting *Riley*, 487 U.S. at 795), which, in turn, "regulat[es] the content of [her] speech [and] 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.' " *Id.* at 771 (quoting *Turner Broad.*, 512 U.S. at 641); *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.").

As a result, "Colorado does not seek to impose an incidental burden on speech. It seeks to force [Chiles] to 'utter what is not in [her] mind' about a question of political and religious significance," and to "affect a 'speaker's message' by 'forc[ing]' her to 'accommodate' other views," to " 'alter' the 'expressive content' of her message," and to " 'interfer[e] with' her 'desired message.' " *303 Creative*, 600 U.S. at 596 (citations omitted); *id.* at 597 (concluding that a burden on speech is not "incidental" when a State "intends to force [a speaker] to convey a message she does not believe with the 'very purpose' of '[e]liminating … ideas' that differ from its own") (citation omitted); *Hurley*, 515 U.S. at 563 (using Massachusetts's public

accommodations law to force parade organizers to include speech with which they disagreed was more than an " 'incidental' " infringement on First Amendment speech rights); *Dale*, 530 U.S. at 659 (requiring the Boy Scouts to accept particular members under a public accommodations law had more than "an incidental effect on protected speech"). Contrary to *Giboney*, Colorado's Counseling Ban imposes a direct and substantial burden on professional speech, not an incidental one.

A recent example from the legal field further illustrates how the Tenth Circuit's decision jeopardizes professional speech. In 2016, the American Bar Association proposed Model Rule 8.4(g). Under the proposed Rule:

> It is professional misconduct for a lawyer to: … (g) engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related to the practice of law…. This paragraph does not preclude legitimate advice or advocacy consistent with these rules.

ABA, Model Rules of Professional Conduct, Rule 8.4 (Aug. 2016) (available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/). While the text of the Rule referred only to conduct, Comment 3 revealed that the Rule also operated as a speech code, curtailing written and oral expression:

> Discrimination … by lawyers in violation of paragraph (g) … includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.

ABA, Model Rules of Professional Conduct, Rule 8.4, Comments (Aug. 2016) (available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/comment_on_rule_8_4/). The purpose of the Rule was to foster a "cultural shift" in views on discrimination and harassment: "There is a need for a cultural shift in understanding the inherent integrity of people

regardless of their race, color, national origin, religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability, to be captured in the rules of professional conduct." December 22, 2015 Memorandum, Standing Committee on Ethics and Professional Responsibility (available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.authcheckdam.pdf). To bring about this "cultural shift," the ABA deemed it necessary to regulate both "physical conduct" and "verbal conduct."

Among its other problems, Model Rule 8.4(g) conflates speech and conduct in the same way that *Chiles* and *Tingley* do. Discriminatory and harassing conduct includes speech with which the ABA disagrees. By labeling the disfavored speech as "verbal conduct," the ABA attempts to move the Rule outside the protection of the First Amendment. Consistent with *Chiles*, the ABA's "speech is conduct" rule has broad scope, applying to all "[c]onduct related to the practice of law[, which] includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law." Rule 8.4, Comment 4. Transforming speech into conduct, Rule 8.4(g) seeks to codify viewpoint-based discrimination in relation to the practice of law. Speech that does not "manifest bias or prejudice" is

permissible, and "[l]awyers may engage in conduct undertaken to promote diversity and inclusion without violating this rule…." Rule 8.4(g). As Professor Rotunda aptly put the point, "[t]he ABA rule is not about forbidding discrimination based on sex or marital status; it is about punishing those who say or do things that do not support the ABA's particular view of sex discrimination or marriage." Ronald D. Rotunda, The Heritage Foundation Report (October 6, 2016), "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' but not Diversity of Thought" (available at https://www.heritage.org/report/the-aba-decision-control-what-lawyers-say-supporting-diversity-not-diversity-thought). If the Tenth Circuit's decision stands, States will be able to adopt Model Rule 8.4(g) and silence lawyers who hold views that interfere with the ABA's efforts to bring about its desired "cultural shift."

CONCLUSION

For the foregoing reasons, this Court should reverse the Tenth Circuit and, in so doing, reaffirm *NIFLA*'s recognition that professional speech is fully protected unless it falls within the narrow exceptions set forth in *Zauderer* and *Giboney*, neither of which applies to Chiles's professional speech with her minor clients.

Respectfully submitted,

SCOTT W. GAYLORD
HIGH POINT UNIVERSITY SCHOOL OF LAW
APPELLATE ADVOCACY CLINIC
One University Parkway
High Point, NC 27268
Phone: (336) 841-2635
Email: sgaylord@highpoint.edu

Counsel for Amicus Curiae

June 13, 2025