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* NATIONAL ASSOCIATION OF SCHOLARS IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE[1]

Amicus Curiae National Association of Scholars ("NAS") is an independent membership association of academics, including professors, graduate students, administrators and trustees, that works to foster academic freedom and to sustain the traditions of intellectual integrity, individual merit and freedom of inquiry in America's colleges and universities.

NAS is particularly interested in this case because it concerns the freedom of speech of professionals – and thus, in a classroom setting, academic freedom. If the state can ban therapists from even **talking** – with young clients who want to have the discussion – about a potential change in sexual identity or orientation, based on the assertion that such a discussion is "harmful" to minors, it could bar teachers and professors from even presenting the view that such change is possible or desirable (or the "incorrect" side of other issues), even to students in an elective course who want to hear both sides of the issue.

NAS is also interested in this case because of its concern, as an organization committed to high professional standards and an objective search for the truth, about the politicization of science – that it has too often become "dominated by ideology rather than evi-

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

dence" in the words of the dissent below questioning the basis for the challenged ban on Petitioner's speech, Pet.App. 86a.

SUMMARY OF ARGUMENT

Dissenting from the denial of rehearing en banc in *Pickup v. Brown,* 740 F.3d 1208, 1215-21 (9th Cir. 2014), the first of two cases in which the Ninth Circuit, like the panel below here, upheld a ban on so-called "conversion therapy" after subjecting it to only rational basis review, Judge O'Scannlain observed:

> Perhaps what really shapes the panel's reasoning in these cases is not the principles supposedly distilled from the case law, but rather problematic and potentially unavoidable implications of an alternative conclusion. By subjecting SB 1172 to any First Amendment scrutiny at all, the panel may fear it will open Pandora's box: heretofore uncontroversial professional regulations proscribing negligent, incompetent, or harmful advice will now attract meritless challenges merely on the basis that such provisions prohibit speech.

Id. at 1220 (O'Scannlain, J., dissenting from denial of reh'g en banc).

This conundrum for courts confronting this issue has only grown sharper in the eleven years since *Pickup*. On the one hand, the case law establishing that the counselling at issue, like other medical and

professional speech, **is** speech, has become even clearer, if not indisputable, in light of this Court's intervening decision in *Nat'l Inst. of Family & Life Advocates v. Becerra* ("*NIFLA*"), 585 U.S. 755 (2018). In the wake of *NIFLA* it is untenable to attempt to relabel such speech as purely "conduct" out of the ambit of the First Amendment, with the speech that is its sole medium merely "incidental" to this "conduct" and thus unworthy of any protection.

Indeed, as we discuss in Point I, to deny that therapeutic speech is speech is not just untenable but ironic, as there are many therapists – and particularly those who are most likely to support bans on this one type of therapy – who otherwise proudly proclaim that therapy is political speech.

At the same time, the intersection of health care with controversial social and political issues has obviously grown even more fraught, and rife with abuses on both sides of the "culture wars," since *Pickup*. On one side it is undeniable that much of the "medical community" has become thoroughly politicized, so that "overwhelming consensus" such as that touted here often reflects ideological conformity rather than scientific evidence. But it is also undeniable that this politicization of medicine has created a void that has too often been filled by the charlatans and quacks lurking in Judge O'Scannlain's Pandora's Box. And the desire to avoid the mischief of such characters bringing "meritless challenges" to "heretofore uncontroversial professional regulations proscribing negligent, incompetent, or harmful advice" is understandable. (*See* Point II *infra*.)

The Court can resolve this conundrum, and validate free speech without opening Pandora's Box, by holding that restrictions on therapeutic speech relating to controversial matters of public concern, and utilizing or advocating approaches which either currently have, or within recent history have had, the support of more than a small fringe of the medical community, are subject to strict scrutiny. As we discuss in Point II, this rule would keep the snake oil salesmen at bay, while appropriately applying searching review to Colorado's ban on Petitioner Chiles's counselling concerning gender dysphoria (the treatment of which has become a major international scientific controversy, in which the U.S. medical establishment which would bar Chiles's approach has rapidly become an outlier) and sexual orientation (on which the purported evidence of "inefficacy" and "harm" from this approach, which was standard until a generation ago, is far less "conclusive" than Respondents suggest).

This does not mean that the ban will necessarily be struck down. *See Holder v. Humanitarian Law Project,* 561 U.S. 1 (2010) (upholding prohibition of speech aiding terrorist organizations after subjecting it to strict scrutiny). Pet.App. 106a-07a (dissenting opinion of Judge Hartz below). But it does mean that the government will be put to the test before shutting down Chiles's speech and quashing the hopes of clients desperate for her help.

ARGUMENT

I. The Counselling Offered by Chiles, which Consists Solely of Speech, *is* Speech Under the First Amendment – and, indeed, even many therapists who decry "conversion therapy" also call therapy "political speech."

As discussed at length in Petitioner's Brief and the dissenting opinion of Judge Hartz below, it is clear beyond cavil after this Court's decisions in *NIFLA* and earlier cases such as *Holder v. Humanitarian Law Project, supra*, that the counselling offered by Chiles, which consists solely of speech, **is** speech for purposes of First Amendment analysis. Pet'r Br. 26-38; Pet.App. 90a-106a (Hartz dissent); *accord Tingley v. Ferguson*, 57 F.4th 1072, 1073-81 (9th Cir. 2023) (opinion of O'Scannlain, J., respecting denial of reh'g en banc); *Otto v. City of Boca Raton,* 981 F.3d 854, 861-62, 865-68 (11th Cir. 2020).[2] Thus courts cannot remove such speech from the ambit of the First Amendment, or from heightened scrutiny thereunder, via the "wordplay" or "labeling game" (Pet.App. 83a (Hartz dissent); *Pickup,* 740 F.3d at 1218 (O'Scann-

[2] Even prior to *NIFLA* the Third Circuit reached the same conclusion in *King v. Governor of New Jersey*, 767 F.3d 216, 224-29 (3d Cir. 2014), though it upheld the counselling ban at issue there by applying an intermediate scrutiny test for "professional speech" that was later explicitly rejected by this Court in *NIFLA*, 585 U.S. at 767. *See also Pickup,* 740 F.3d at 1215-21 (O'Scannlain, J., dissenting from denial of reh'g en banc) (similarly rejecting lesser protection for counselling or other speech by professionals based on this Court's pre-*NIFLA* case law).

lain, J., dissenting from denial of reh'g en banc)) of attempting to transmute it into "conduct" or into an orphaned category of "professional speech" incidental to conduct – at least not where, as here, the purported "conduct" is the speech itself.

Furthermore, the argument here by the state and many of its amici that Chiles's therapeutic speech is not speech worthy of protection under the First Amendment is ironic in view of the recent movement among progressive therapists to proclaim that therapy is inherently political and therapeutic speech is thus inherently political speech. *See* Richard Brouillette, *Why Therapists Should Talk Politics*, N.Y. Times, Mar. 15, 2016;[3] Emaline Friedman, *How Politics Pervade the Practice of Therapy*, Mad in America, Mar. 27, 2021;[4] Reina Gattuso, *Therapy is Political. It's High Time Therapists Acknowledge This,* Talkspace, Nov 18, 2020;[5] Susan Bearden, *Why I'm Talking Politics Now: Therapy is a Political Act*, Nov. 19, 2024[6] ("therapy is inherently political … a site of struggle … where the political context cannot be ignored"); Critical Therapy Institute, *Therapy is political*, Mar. 20, 2016;[7] CYOP, *The Inherent Connection*

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[3] https://archive.nytimes.com/opinionator.blogs.nytimes.com/2016/03/15/why-therapists-should-talk-politics/

[4] https://www.madinamerica.com/2021/03/politics-pervades-practice-therapy/

[5] https://www.talkspace.com/blog/mental-health-is-political

[6] https://sbearden.com/2024/11/19/why-im-talking-politics-now

[7] https://criticaltherapy.org/2016/03/20/therapy-is-political/

Between Therapy and Politics;[8] Kindman & Co., *On What "Therapy is Political" Means to Kindman & Co.*[9] ("Therapy is political because what happens in the therapy room can't (and shouldn't) be separated from the outside world. … the work of therapy is a political act").

To compound this irony, many of the therapists in the forefront of this "therapy is political speech" movement are those who are also most likely to support bans on the one type of therapy at issue here. *See* Gattuso, *supra* note 5 (decrying that "harmful and pseudoscientific practices like gay conversion therapy persist"). But if speech in the therapy room, whether that of Chiles or of those with different views, is "a political act" or "inherently political" then it is "of course … 'at the core of what the First Amendment is designed to protect.'" *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (quoting *Virginia v. Black,* 538 U.S. 343, 365 (2003) (plurality opinion)).

II. This Court Can Uphold Chiles's First Amendment Rights Without "Opening Pandora's Box."

Dissenting from the denial of rehearing en banc in *Pickup*, *supra,* the first of two cases in which the Ninth Circuit, like the panel below here, upheld a ban

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[8] https://www.cyopinc.org/blog/therapy-and-politics

[9] https://www.kindman.co/blog/why-therapists-will-bring-up-politics-in-therapy-and-how-thats-important

on "conversion therapy" after subjecting it to only rational basis review, Judge O'Scannlain observed:

> Perhaps what really shapes the panel's reasoning in these cases is not the principles supposedly distilled from the case law, but rather problematic and potentially unavoidable implications of an alternative conclusion. By subjecting SB 1172 to any First Amendment scrutiny at all, the panel may fear it will open Pandora's box: heretofore uncontroversial professional regulations proscribing negligent, incompetent, or harmful advice will now attract meritless challenges merely on the basis that such provisions prohibit speech.

740 F.3d at 1220 (O'Scannlain, J., dissenting from denial of reh'g en banc).

This conundrum for courts confronting this issue has only grown sharper in the eleven years since *Pickup*. On the one hand, as noted in Point I, the case law establishing that the counselling at issue, like other medical and professional speech, **is** speech, has become even clearer if not indisputable in light of this Court's intervening decision in *NIFLA*.

At the same time, the intersection of health care with controversial social and political issues has obviously grown even more fraught, and rife with abuses on both sides of the "culture wars," since *Pickup*. On one side it is undeniable that much of the "medical community" has become thoroughly politicized on

many "hot button" cultural issues, so that "overwhelming consensus" such as that touted here often reflects ideological conformity rather than scientific evidence. But it is also undeniable that this politicization of medicine has created a void that has too often been filled by the charlatans and quacks lurking in Judge O'Scannlain's Pandora's Box. And the desire to avoid the mischief of such characters bringing "meritless challenges" to "heretofore uncontroversial professional regulations proscribing negligent, incompetent, or harmful advice" is understandable.

As we discuss in Point B *infra*, the Court can resolve this conundrum, and validate Chiles's First Amendment Rights, without opening this Pandora's Box.

A. The State's Purported Evidence for its Ban on Free Speech Represents Politicized and Unreliable Science.

Judge Hartz discussed the problem of politicized medicine at length in his dissent below, noting that "the mandates of professional organizations are too likely to be dominated by ideology rather than evidence." Pet.App. 86a; *see generally id.* 86a, 104a-11a. He noted (*id.* 104a-05a) that in *NIFLA* this Court addressed the closely related problem that the professional establishment "consensus" will often closely align with the government and majoritarian view, and thus "regulating the content of professionals' speech 'poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.'" 585

U.S. at 771 (quoting *Turner Broadcasting Systems, Inc. v. FCC*, 512 U.S. 622, 641 (1994)). This presents a particular problem in medicine, the Court warned, because "[t]hroughout history, governments have 'manipulat[ed] the content of doctor-patient discourse' to increase state power and suppress minorities." 585 U.S. at 771 (quoting *Wollschlaeger v. Governor of Florida*, 848 F. 3d 1293, 1328 (11th Cir. 2017) (en banc) (W. Pryor, J., concurring).

The Court proceeded to quote at length from Judge Pryor's concurrence in *Wollschlaeger*, which struck down a ban on medical speech on the other end of our nation's political divide, prohibiting doctors from asking their patients if they owned guns or hectoring them about the dangers of it. *See* 848 F. 3d at 1302-03, 1338. In the passage quoted at length by the *NIFLA* Court, 585 U.S. at 771-72 (and by Judge Hartz below, Pet.App.104a-05a), Judge Pryor warned of the danger of the government "overtly politiciz[ing] the practice of medicine" and "restricting access to medical information," observing that:

> During certain historical periods, governments have overtly politicized the practice of medicine, restricting access to medical information …. For example, during the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception. In the 1930s, the Soviet government expedited completion of a construction project on the Siberian railroad by ordering doctors to both reject

> requests for medical leave from work and conceal this government order from their patients. In Nazi Germany, the Third Reich systematically violated the separation between state ideology and medical discourse. German physicians were taught that they owed a higher duty to the "health of the Volk" than to the health of individual patients. Recently, Nicolae Ceausescu's strategy to increase the Romanian birth rate included prohibitions against giving advice to patients about the use of birth control devices and disseminating information about the use of condoms as a means of preventing the transmission of AIDS.

848 F. 3d at 1328 (W. Pryor, J., concurring) (quoting Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice,* 74 B.U. L. Rev. 201, 201-02 (1994)).

This concern about the politicization of medicine and the subordination of science to ideology is not just theoretical. In releasing its "Diversity, Equity and Inclusion Competencies" for medical students and residents two years ago, the Association of American Medical Colleges stated that the study of "systems of oppression ... deserves just as much attention as the latest scientific breakthroughs." Editorial, *Medical Education Goes Woke: Future doctors will be obliged to learn how health relates to 'systems of oppression,'*

Wall St. J., Jul. 26, 2022.[10] Similarly, the promotion criteria for faculty at Brown University Medical School give more weight to "demonstrated commitment to diversity, equity, and inclusion" than to "excellent clinical skills." Aaron Sibarium, *Brown Medical School Gives DEI More Weight Than 'Clinical Skills' in Promotion Criteria for Faculty*, Wash. Free Beacon, Feb. 4, 2025[11] *See generally* David Randall, *Politicized Science*, 32 Acad. Questions 215 (2019).[12]

A study of the impact of this politicization on academic psychology found that:

> [S]ocial scientists … have allowed their … political biases to influence their research. These biases may influence the development of research hypotheses, the design of studies and methods and materials chosen to test hypotheses, decisions to publish or not publish results …, and how results are described and disseminat[ed] …. The fact that these processes occur within academic disciplines … that strongly skew to the political left compounds the problem.

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10 https://www.wsj.com/opinion/medical-training-goes-woke-association-of-american-medical-colleges-doctors-11658871789

11 https://freebeacon.com/campus/brown-medical-school-gives-dei-more-weight-than-clinical-skills-in-promotion-criteria-for-faculty/

12 https://www.nas.org/academic-questions/32/2/politicized-science/pdf

The Politics of Social Psychology (Jarret T. Crawford, & Lee Jussim, eds., 2018).[13] In view of this, as Judge Hartz noted, "one may question whether research that may go against the grain of prevailing opinion can get funding, much less be published." Pet.App 110a-11a & n. 10 (citing Colin Wright, *Anatomy of a Scientific Scandal*, City J. (Jun. 12, 2023),[14] (retraction of a paper on Rapid Onset Gender Dysphoria by a leading journal after pressure from "activists")).

In view of this, courts should heed Judge Hartz's warning below to "be skeptical" of purportedly expert medical and psychological opinion, Pet.App. 109a, even when it is claimed to represent a "consensus" in the field, *id.* 107a ("Consensus is irrelevant to science."). And, as he notes, such skepticism is especially appropriate given the "replication crisis" that has plagued the sciences, and psychology in particular, for two decades. *Id.* 109a-10a & n. 6 & sources cited there; *see also* Ed Yong, *Psychology's Replication Crisis Is Running Out of Excuses*, The Atlantic, Nov. 19, 2018;[15] Joseph P. Simmons, Leif D. Nelson & Uri Simonsohn, *False-Positive Psychology: Undisclosed Flexibility in Data Collection and Analysis Allows Presenting Anything as Significant*, 22 Psych. Sci.

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[13] https://www.routledge.com/Politics-of-Social-Psychology/Crawford-Jussim/p/book/9781138930605

[14] https://www.city-journal.org/article/anatomy-of-a-scientific-scandal

[15] https://www.theatlantic.com/science/archive/2018/11/psychologys-replication-crisis-real/576223/

1359 (2011);[16] John P. A. Ioannidis, *Why Most Published Research Findings Are False*, 2 PLOS Med. 696 (2005); *see generally* David Randall & Christopher Welser, Nat'l Ass'n of Scholars, *The Irreproducibility Crisis of Modern Science: Causes, Consequences, and the Road to Reform* (2018).[17]

As summarized in the Atlantic (Yong, *supra*), "whenever psychologists undertake [to] replicate past experiments …, they typically succeed, on average, half of the time," and thus "[i]ronically … one of the most reliable findings in psychology is that only half of psychological studies can be successfully repeated." Related to the replication crisis, studies have found a disturbing amount of research misconduct (fabrication, falsification, and plagiarism) and other questionable practices among academic psychologists and other scientists: some 40% of respondents in a recent meta-analysis had witnessed other researchers engage in questionable practices. Pet.App. 110a & nn. 8 & 9 (citing Leslie K. John et al., *Measuring the Prevalence of Questionable Research Practices With Incentives for Truth Telling*, 23 Psych. Sci. 524 (2012),[18] and Yu Xie et al., *Prevalence of Research Misconduct and Questionable Research Practices: A Systematic Review and MetaAnalysis*, 27 Sci. & Eng'g Ethics (Jun. 29,

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[16] https://journals.sagepub.com/doi/epub/10.1177/0956797611417632

[17] https://www.nas.org/storage/app/media/Reports/Irreproducibility%20Crisis%20Report/NAS_irreproducibilityReport.pdf

[18] https://www.cmu.edu/dietrich/sds/docs/loewenstein/MeasPrevalQuestTruthTelling.pdf

2021)).[19] For these reasons, as Judge Hartz cautioned, "[n]ot every study published in a peer-reviewed journal can be relied on." Pet.App. 109a.

The studies put forth by Colorado and its amici to support its ban on Chiles's speech must be evaluated in this context – and also in light of the context that the counterintuitive proposition that these studies purport to establish, and that lies at the heart of the ban at issue here, is that, as the Eleventh Circuit put it in *Otto*, "sexual orientation is immutable, but gender is not." 981 F.3d at 864. The support for this dubious proposition is in fact far weaker than the state would have the Court believe.

1. Sexual Identity Counselling

As to sexual identity, it is not even clear that the ban could survive rational basis review, much less the strict scrutiny applicable to restrictions on political or other protected speech. Over the last few years the U.S. medical establishment which would bar Chiles's counselling approach in favor of "gender-affirming care" has rapidly become an international outlier. As described by Judge Hartz:

> [O]utside this country there is substantial doubt about th[e] studies [relied on by Colorado]. In the past few years there has been significant movement in Europe away from American orthodoxy. For example, medical authorities in Fin-

[19] https://link.springer.com/article/10.1007/s11948-021-00314-9

> land, Sweden, Denmark, and Norway have … restricted medical treatment (as opposed to psychotherapy) of minors to enhance gender transition. Most notably, the English National Health Service has now greatly restricted medical treatment of minors to assist in gender transition except as part of scientific studies to test the efficacy of such treatment. This decision was based on the "largest review ever undertaken in the field of transgender health care." Commissioned by England's National Health Service and led by Dr. Hilary Cass, former President of the Royal College of Paediatrics, its findings cast serious doubt on the current state of youth transgender medicine. The report says that youth transgender medicine is "an area of remarkably weak evidence," and that "we have no good evidence on the long-term outcomes of interventions to manage gender-related distress." [Hillary Cass], *Independent Review of Gender Identity Services for Children and Young People* (*the Cass Review*) 13 (April 2024).

Pet.App. 112a-13a (footnotes omitted; quoting and citing, in addition to the Cass Review,[20] Azeen Ghorayshi, *Youth Gender Medications Limited in England,*

[20] The Cass Review can be downloaded, and an official summary is available, at https://webarchive.nationalarchives.gov.uk/ukgwa/20250310143933/https://cass.independent-review.uk/home/publications/final-report/

Part of Big Shift in Europe, N.Y. Times (April 9, 2024),[21] and The Economist, *The Cass Review damns England's youth gender services* (Apr. 10, 2024)[22]).

See also Pamela Paul, *Why Is the U.S. Still Pretending We Know Gender-Affirming Care Works?*, N.Y. Times (July 12, 2024),[23] which describes the hostile reaction of the American medical establishment to the Cass Review even though:

> After the release of Cass's findings, the British government issued an emergency ban on puberty blockers for people under 18. Medical societies, government officials and legislative panels in Germany, France, Switzerland, Scotland, the Netherlands and Belgium have proposed moving away from a medical approach to gender issues …. Scandinavian countries have been moving away from the gender-affirming model for the past few years. Reem Alsalem, the United Nations special rapporteur on violence against women and girls, called the review's recommendations "seminal" and said that policies on gender treat-

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[21] https://www.nytimes.com/2024/04/09/health/europe-trans gender-youth-hormonetreatments.html

[22] https://www.economist.com/ britain/2024/04/10/the-cass-review-damns-englands-youth-gender-services [https://perma.cc/WQK8-797R]

[23] https://www.nytimes.com/2024/07/12/opinion/gender-affirming-care-cass-review.html

> ments have "breached fundamental principles" of children's human rights, with "devastating consequences."

Id.

The Cass Review noted that "[y]oung people's sense of identity is not always fixed and may evolve over time" and that [w]hilst some young people may feel an urgency to transition, young adults looking back at their younger selves would often advise slowing down." Cass Review, *supra*, at 21. It recommended that, in lieu of the immediate institution of "gender affirming care" such as puberty blockers and hormones, "children/ young people referred to … gender services [should] receive a holistic assessment of their needs" including "a mental health assessment." *Id.* at 29, 148.

"For the majority of young people," the Review stated, "a medical pathway" [i.e., such gender affirming care] "may not be the best way to … address distress and … barriers to participation in everyday life," but even "[f]or those young people for whom a medical pathway is clinically indicated, it is not enough to provide this without also addressing wider mental health … problems" via "psychological therapies." *Id.* at 30. The purpose of such talk therapy, it continued, is "not to change the person's perception of who they are, but to work with them to explore their concerns and experiences and help alleviate their distress regardless of whether or not the[y] subsequently proceed[]

on a medical pathway." *Id.* at 31; *accord id.* at 150.[24] *See also id.* at 155 (evidence does not indicate that puberty blockers and hormones "improve gender dysphoria or overall mental health" so "it is important to explore other approaches for addressing the gender-related distress, which … may be of value regardless of whether or not an endocrine pathway is [eventually] chosen.").

While it is true, as the state has noted, that the Review criticized what it termed "conversion therapy" (*id.* at 150-51; Br. Opp'n Cert. 7), it is **not** true that "[i]t advocates the approach taken by" the Colorado law. Rather the Review seems to have accepted, as many on both sides of this debate have, the pejorative connotation of that term,[25] and then taken pains to distinguish its approach from this bogeyman. But what it actually recommends looks very much like what Chiles does that the state prohibits.

As just noted, it advocates at least some initial period of mental health counselling before a "gender affirming" path is considered. And it laments the "unhelpfully polarised debate around conversion practices." *Id.* at 150. While averring that "no LGBTQ+ group should be subjected to conversion practice" it immediately adds, however, that "children and young people with gender dysphoria may have a

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[24] The Review also found that "there is no evidence that gender-affirmative treatments reduce" suicide among young people with gender dysphoria. *Id.* at 195; *accord id.* at 187.

[25] *See*, *e.g.*, Pet.App. 11a ("Ms. Chiles has alleged the term 'conversion therapy' is 'no longer scientifically or politically tenable.'")

range of complex psychosocial challenges and/or mental health problems impacting on their gender-related distress. Exploration of these issues is essential." *Id.* at 150. "It is harmful to equate this approach to conversion therapy," the Review stresses, "as it may prevent young people from getting the emotional support they deserve." *Id.*

Chiles's approach is similar. As stressed throughout this litigation she does not utilize "aversive techniques" but only engages in talk therapy. Pet'r Br. 5; Pet.App. 205a–06a. She "does not begin counseling with any predetermined goals." *Id.* 207a. Rather, "[s]he sits down with her clients and talks to them about their goals, objectives, religious or spiritual beliefs, values, desires, and identity to help them (1) explore and understand their feelings and (2) formulate methods of counseling that will most benefit them." *Id.* She "does not seek to 'cure' clients," *id.*, or "determine clients' goals … but respects her clients' right of self-determination," *id.* 213a.

Notably, she "has had minor clients … who … are happy identifying as gay, lesbian, bi-sexual, or gender non-conforming … and do not want [to] chang[e]. … In such cases, [she] asks if there are any other goals that the minor is interested in pursuing. … She does not try to help minors change their [orientation] or identity, when [they] tell her they are not seeking such change." *Id.* 213a-14a.

In sum, the Cass Review, and the international reaction to it, demolishes any chance that Colorado's

ban on sexual identity counselling could survive even intermediate scrutiny.

2. Sexual Orientation Counselling

As Judge Hartz concluded below, the evidence supporting the ban on sexual orientation counselling is actually not much stronger. Pet.App. 114a-24a. The state has relied heavily on the *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (2009) ("APA Report"), J.A. 131-398. But as the Eleventh Circuit found of this and similar studies in *Otto*:

> [W]hen examined closely, these documents offer assertions rather than evidence, at least regarding the effects of purely speech-based [sexual orientation change efforts ("]SOCE["]. Indeed, [the APA report] … concedes that "nonaversive and recent approaches to SOCE have not been rigorously evaluated." In fact, it found a "complete lack" of "rigorous recent prospective research" on SOCE. As for speech-based SOCE, the report notes that recent research indicates that those who have participated have mixed views: "there are individuals who perceive they have been harmed and others who perceive they have benefited from nonaversive SOCE." What's more, because of this "complete lack" of rigorous recent research, the report concludes that it has "no clear indication of

> the prevalence of harmful outcomes among people who have undergone" SOCE. We fail to see how, even completely crediting the report, such equivocal conclusions can satisfy strict scrutiny and overcome the strong presumption against content-based limitations on speech."

981 F. 3d at 868-69 (footnotes omitted; quoting current J.A. 254-56);[26] *accord* Pet.App. 114a-18a (Hartz dissent).

Indeed, the Report, which reviewed studies from 1960 to 2007, but mostly before 1981, acknowledged "serious methodological problems in this area of research":

> only a few studies met the minimal standards for evaluating whether psychological treatments such as efforts to change sexual orientation are effective. Few studies—all conducted in the period from 1969 to 1978—could be considered true experiments or quasi-experiments …. Only one actually compared people who received a treatment with people who did not. … **None of the recent**

[26] The court noted that it focused on the APA Report both because it purported to "perform[] a systematic review of the peer-reviewed literature to assess SOCE" and because "[m]any of the other reports cited" to defend bans like the ones at issue here and in *Otto* "primarily rely on" it to form their conclusions. *Id.* at 869 n. 8 (quoting current J.A. 140).

> **research … meets methodological standards that permit conclusions regarding efficacy or safety.**

J.A. 140-41 (emphasis added; citations omitted); *accord id*. 154 ("The research on SOCE has not adequately assessed efficacy and safety."); *id.* 253 (same). The Report "conclude[d] that **there is a dearth of scientifically sound research on the safety of SOCE**." *Id.* 254 (emphasis added).

Significantly, the Report acknowledged that there is almost no reliable research on the talk therapy employed by Chiles and other modern therapists in the field. Of the early studies, not only were very few rigorous but "**those focus on the use of aversive treatments**," while "**nonaversive and recent approaches to SOCE have not been rigorously evaluated**. Given the limited amount of methodologically sound research, **we cannot draw a conclusion regarding whether recent forms of SOCE are or are not effective.**" *Id*. 255-56; *accord id.* 370 ("There are no scientifically rigorous studies of recent SOCE that would enable us to make a definitive statement about whether recent SOCE is safe or harmful.")

The Report also noted that there is **no** published research on SOCE counselling of minors. *Id.* 337, 341.

Thus, as Judge Hartz noted, no study reviewed in the Report "focuse[d] on the type of therapy at issue in this case: talk therapy for a minor provided by a licensed mental-health professional." Pet.App. 119a. And subsequent studies relied on by the state suffer from the same defect:

> The great bulk of the[se] studies do not describe the therapy provided, so **there is no way to know whether any of the therapy was limited to speech.** Of the four studies that described the therapy as including both talk and aversion therapy, three did not distinguish between the types of therapy in stating the results.

Id. 120a-21a (emphasis added; citations omitted). Notably, "[t]he one that did distinguish between the types of therapy found that the negative effects of aversion therapy were far greater." *Id.* 121a (citing Kate Bradshaw et al., *Sexual Orientation Change Efforts Through Psychotherapy for LGBQ Individuals Affiliated With the Church of Jesus Christ of Latter-Day Saints*, J. Sex & Marital Therapy (May 2014)).

Ironically, while the APA could not actually find any reliable evidence that SOCE is harmful, or even ineffective, other current research has cast doubt on the fundamental hypothesis underlying its efforts, and underlying Colorado's ban on such talk therapy: that sexual orientation is immutable. *See* Lisa M. Diamond & Clifford J. Rosky, *Scrutinizing Immutability: Research on Sexual Orientation & U.S. Legal Advocacy for Sexual Minorities*, 53 J. of Sex Rsch. 363, 363 (2016), https://perma.cc/BFN8-UGLT (research review by two LGBT scholars concluding that "arguments based on the immutability of sexual orientation are unscientific, given what we now know from longitudinal, population-based studies of naturally occurring changes in the same-sex attractions of some individuals over time"). The authors note that "the cur-

rent scientific revolution in our understanding of the human epigenome challenges the very notion of being 'born gay.'" *Id.* at 366.[27]

Of course, none of this establishes conclusive proof that the counselling at issue here **is** effective. But that is not the standard, as Judge Hartz and the Eleventh Circuit realized: "It is true that no proper studies show benefits, but neither do any show that such therapy 'can pose harm.' The [APA]'s views … need further support if they are to justify a restriction on First Amendment freedom." J.A. 123a. Similarly, after observing that the APA's "equivocal conclusions can[not] satisfy strict scrutiny and overcome the strong presumption against content-based limitations on speech" (*see* p. 22 *supra*) the *Otto* court noted that "because the government bears the risk of uncertainty [under strict scrutiny], 'ambiguous proof' will not suffice. Permitting uncertain evidence to satisfy strict scrutiny would blur the lines that separate it from lesser tiers of scrutiny." 981 F. 3d at 869 n. 9 (quoting *Brown v. Ent. Merch's Ass'n,* 564 U.S. 786, 799-800 (2011)).

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[27] The authors include a de rigueur criticism of "conversion therapy" as harmful and ineffective, citing the APA Report. *Id.* at 368. But this prompts the question: if, as they assert, sexual orientation can change "naturally" and spontaneously among the general population, why would it be **less** likely to do so among persons motivated to change and working towards that goal with a trained supportive non-aversive counsellor?

B. A Ruling for Chiles Would Not Undermine Public Protection Against Dangerous Medical Practices.

As discussed above, because the politicization of medical science, and the resulting discrediting of medical experts among much of the public, has created a void that has too often been filled by charlatans, we understand the fear that Judge O'Scannlain suggested in his *Pickup* dissent might have motivated the Ninth, and now the Tenth, Circuits to uphold the counselling bans in these cases – i.e., that a contrary ruling upholding free speech might open a Pandora's Box of litigation against reasonable regulations protecting the public against truly harmful medical practices. 740 F.3d at 1220.

This need not be so. For one thing, as the Eleventh Circuit said of its decision striking down the bans in *Otto*:

> [I]t does not mean that society is powerless to remedy harmful speech. While the First Amendment rejects the governments' approach here, it does not stand in the way of "[l]ongstanding torts for professional malpractice" or other state-law penalties for bad acts that produce actual harm. People who actually hurt children can be held accountable.

981 F. 3d at 870 (quoting *NIFLA,* 585 U.S. at 769; internal citation omitted); *see also Tingley*, *supra*, 57 F.4th at 1084 n. 3 (Bumatay, J., dissenting from

denial of reh'g en banc) ("I have little doubt that a law prohibiting coercive, physical, or aversive treatments on minors would survive a constitutional challenge under any standard of review.").

But the Court can also structure a free speech ruling in a way that further guards against Judge O'Scannlain's Pandora's Box. It can do this by holding that restrictions on therapeutic speech relating to controversial matters of public concern, and utilizing or advocating approaches which either currently have or within recent history have had the support of more than a small fringe of the medical community, are subject to strict scrutiny. This rule would draw on cases such as *Morse v. Frederick*, *supra*, 551 U.S. at 403, and *Virginia v. Black, supra*, 538 U.S. at 365, holding that political speech "is at the core of what the First Amendment is designed to protect," as well as cases such as *Connick v. Myers*, 461 U.S. 138 (1983), providing heightened protection for speech on "matters of public concern."

By requiring some small but material modicum of support from other professionals before triggering strict scrutiny, the rule would keep the snake oil salesmen at bay, while appropriately applying searching review to bans on counselling speech such as Chiles's that, while extremely unpopular among the medical and psychological establishment, has at least this modicum of support. As seen, her approach to sexual identity counselling, far from being a fringe position, is now the dominant view in Western Europe, while the "gender affirming care" favored by those who would silence her is fast becoming an out-

lier. Her approach to sexual orientation counselling, though more unpopular, was the standard protocol in the field until barely a generation ago, when the profession almost uniformly took the position not merely that persons voluntarily wishing to try to alter their orientation should be free to try but that homosexuality was a disorder that **must** be treated. *See* J.A. 161-62.

Establishing this rule would not mean that the ban here would necessarily be struck down, as Judge Hartz noted. Pet.App. 107a ("I do not think it out of the question that the government can justify a ban on conversion therapy …. But there needs to be evidence, good evidence.") *See Holder v. Humanitarian Law Project, supra* (upholding prohibition of speech aiding terrorist organizations after subjecting it to strict scrutiny). But it would mean that the government will be put to the test before shutting down Chiles's speech and quashing the hopes of clients desperate for her help.

CONCLUSION

The Court should reverse the judgment below.

Respectfully submitted,

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