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 *Amicus Curiae* of America's Future, Public Advocate of the United States, Public Advocate Foundation, U.S. Constitutional Rights Legal Defense Fund, One Nation Under God Foundation, Restoring Liberty Action Committee, and Conservative Legal Defense and Education Fund in Support of Petitioner

JOSEPH W. MILLER
LAW OFFICES OF
JOSEPH MILLER, LLC
1532 S. 1400 Road
Council Grove, KS 66846

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
**Counsel of Record*
Attorneys for Amici Curiae

June 13, 2025

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INTEREST OF THE *AMICI CURIAE*[1]

Amici America's Future, Public Advocate of the United States, Public Advocate Foundation, U.S. Constitutional Rights Legal Defense Fund, One Nation Under God Foundation, and Conservative Legal Defense and Education Fund are nonprofit organizations, exempt from federal income tax under either section 501(c)(3) or 501(c)(4) of the Internal Revenue Code. Restoring Liberty Action Committee is an educational organization. These entities, *inter alia*, participate in the public policy process, including conducting research, and informing and educating the public on the proper construction of state and federal constitutions, as well as statutes related to the rights of citizens, and questions related to human and civil rights secured by law. Some of these *amici* have filed *amicus* briefs in a number of cases involving similar issues to the present case:

- *NIFLA v. Becerra*, No. 16-1140 (U.S. Supreme Court on Petition), Brief *Amicus Curiae* of U.S. Justice Foundation, *et al.* (Apr. 20, 2017);

- *NIFLA v. Becerra*, No. 16-1140 (U.S. Supreme Court on the Merits), Brief *Amicus Curiae* of Conservative Legal Defense and Education Fund, *et al.* (Jan. 16, 2018); and

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[1] It is hereby certified that no counsel for a party authored this brief in whole or in part; and that no person other than these *amici curiae*, their members, or their counsel made a monetary contribution to its preparation or submission.

- *Tingley v. Ferguson*, No. 22-942 (U.S. Supreme Court), Brief *Amicus Curiae* of America's Future, *et al.* (Apr. 27, 2023).

STATEMENT OF THE CASE

In 2019, Colorado enacted the "Minor Therapy Conversion Law." C.R.S. §§ 12-245-202, 12-245-101a ("MTCL"). The law bars licensed counselors from using "Conversion therapy with a client who is under eighteen years of age." C.R.S. § 12-245-224(1)(t)(V). The term "conversion therapy" is defined in C.R.S. § 12-245-202(3.5):

> (a) "Conversion therapy" means any practice or treatment by a licensee, registrant, or certificate holder 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**. [Emphasis added.]

While the first portion of the definition would appear to be neutral, barring any practice "to change an individual's sexual orientation or gender identity," it was written to allow only counseling of minors to change from straight to homosexual and transition from one's biological gender. A practice to change from homosexual to straight, or to "identify" with one's biological sex, is prohibited. The prohibition on counseling against homosexual "attraction or feelings"

is made express in the last sentence, preserving and protecting homosexual "attraction or feelings."

The next subsection also gives the impression that this is a neutral law, barring counseling to "change sexual orientation or gender," but, again, in the last sentence, it makes clear that this is no neutral statute with respect to "gender transition":

> (b) "Conversion therapy" does not include practices or treatments that provide:
> (I) Acceptance, support, and understanding for the facilitation of an individual's coping, social support, and identity exploration and development, including sexual-orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices, as long as the counseling does not seek to **change sexual orientation or gender identity**; or
> (II) Assistance to a person undergoing **gender transition**. [C.R.S. § 12-245-202(3.5)(b). (emphasis added)]

In sum, in the great sexual divide of our time, Colorado has come down squarely in favor of homosexuality over heterosexuality and gender transition over acceptance of biological reality.

Lastly, C.R.S. § 12-245-217 provides an exemption for those "engaged in the practice of religious ministry." That exemption is quite narrow. It appears to protect, for example, a counselor on the payroll of a Church, but not a Christian counselor like Kaley Chiles who is seeking to practice the free exercise of

her religion by offering the counseling that even a Christian minor is seeking — if the counselor is self-employed or works for any other type of employer than what Colorado may consider "religious ministry." Should the Colorado law be upheld, there is no guarantee that this exemption would not be removed after this litigation concludes.

Petitioner Kaley Chiles is both a licensed counselor in Colorado and a practicing Christian. She considers her occupation to be a natural extension of her faith, and she avers that:

> Many of her clients are also Christians who seek her help *because of* their shared religious beliefs.... These clients often believe "that God determines their identity according to what He has revealed in the Bible rather than their attractions or perceptions determining their identity." [Brief for Petitioner ("Pet. Br.") at 4-5.]

Petitioner does not seek to impose her beliefs on her minor clients; rather, her goal is to be a resource primarily for other Christians who seek her out in hopes of receiving counsel from a Biblical viewpoint. By contrast, here the government attempts to "enact[] a viewpoint-based speech restriction on counselors," and it believes traditional morality is harmful to public safety and health. Pet. Br. at 2.

Petitioner alleged that Colorado's restrictions on her speech ban her ability to counsel her clients toward traditional Biblical morality, permitting only

counseling against such Biblical morality, which constitutes both content and viewpoint discrimination in violation of the First Amendment speech and free exercise protections. Nevertheless, the District Court for the District of Colorado ruled that "[t]he Minor Therapy Conversion Law is viewpoint neutral and does not impose content-based speech restrictions." *Chiles v. Salazar*, 2022 U.S. Dist. LEXIS 227887 (D. Colo. 2022) ("*Chiles I*") at *25. The district court reasoned that the ban "is a public health law that regulates professional conduct," and that "[a]ny speech affected by the Minor Therapy Conversion Law is incidental to the professional conduct it regulates." *Id.*

On appeal, the Tenth Circuit affirmed "in full." *Chiles v. Salazar*, 116 F.4th 1178, 1191 (10th Cir. 2024) ("*Chiles II*"). The court recognized that "Ms. Chiles uses only talk therapy in her counseling practice." *Id.* at 1193. However, the Tenth Circuit adopted the reasoning of the district court that, as long as the speech is a part of medical treatment, it may be regulated through professional licensing laws. The court declared that "the conduct triggering coverage under the MCTL — administering conversion therapy to minors — is not communicating a message but practicing a treatment ... that attempts or purports to change an individual's sexual orientation or gender identity." *Id.* at 1212 (internal quotation omitted).

Lastly, the Tenth Circuit turned to Chiles' free exercise claim, addressing only whether the law appears to be neutral or generally applicable. The jurisdictional limit on government imposed by the Free Exercise Clause was never addressed. *Id.* at 1221-25.

The dissenting opinion by Judge Hartz described the central holding of the majority to be that "speech by licensed professionals in the course of their professional practices is not speech, but conduct" as it is always "just incidental to the regulation of conduct." *Id*. at 1226 (Hartz, J., dissenting). Judge Hartz correctly observed that "such wordplay poses a serious threat to free speech." *Id*. The risk here is even greater, because the court purported to make decrees about "science" based on the "prestige" of the scientists, which may not equate with truth. *Id*. The dissent asks: "What if the shoe were on the other foot?" *Id*. at 1227. It then cut to the core of the case:

> The issue in this case is whether to recognize an exception to freedom of speech when the leaders of national professional organizations declare certain speech to be dangerous and demand deference to their views by all members of their professions, regardless of the relevance or strength of their purported supporting evidence. [*Id*.]

STATEMENT

Colorado State law prohibits licensed counselors from speaking traditional Biblical truth to protect the morals and health of minors. Preventing parents and their children from access to such counseling would have been unthinkable just a few years ago. The fact that this law has been upheld by the lower courts demonstrates that speech and free exercise analytical approaches that were applied have strayed far from the requirements of the constitutional text.

The Declaration of Independence asserts that "Governments are instituted among Men" in order to "secure" certain "unalienable Rights" with which we were "endowed by [our] Creator...." The courts below transformed homosexual and transgender behaviors into rights, and elevated them over the once "unalienable" speech and free exercise rights which are sourced in Holy Writ.

The Framers would never have countenanced shutting the mouths of those offering Biblical counsel, but Colorado suppresses what Christian counselors view to be truth, allowing politically correct claims to go unrebutted, harming the young as well as the nation.[2] Colorado allows only one side of the debate to be told to minors, that a person can change his sex, in defiance of biological and Biblical truth, leading to life altering and irreversible surgeries and pharmaceutical regimens. Colorado makes homosexuality the preferred sexual orientation. The Colorado state legislature empowers state officials to fine, sanction, and withdraw licenses from counselors who embrace Biblical morality. None of these dangerous results can be allowed to stand.

SUMMARY OF ARGUMENT

The district and circuit courts below recognized that this Court's 2018 *National Institute of Family and Life Advocates v. Becerra* decision clearly prohibited state

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[2] "For the wrath of God is revealed from heaven against all ungodliness and unrighteousness of men, who suppress the truth in unrighteousness." *Romans* 1:18 (KJV).

regulation of "professional speech." Thus, to uphold the Colorado law regulating professional speech in counseling minors, it needed to invent a path around *NIFLA* which dissenting Judge Hartz correctly described as "wordplay."

The panel's majority adopted a two-step plan. First, the majority believed that the law which muzzles the speech of most licensed Colorado counselors could be upheld by labeling the speech used in talk therapy as "conduct." Then, since the majority could not deny that talking was speech, and that it was speech that was being prohibited, it then deemed that the state's primary regulation was not to be of speech, but of conduct, and the undeniable regulation of speech was secondary, or incidental, to the permissible regulation of conduct. Without question, this was "wordplay."

The statute regulated speech based on both content and viewpoint, but the panel majority remarkably denied it did either. Colorado has come down on one of the principal public policy issues of the day, squarely in favor of homosexuality over heterosexuality, and in favor of transgenderism over recognition of biological reality. There is certainly no scientific consensus with respect to the benefits of transgender surgery or hormone therapy, and Judge Hartz in dissent explained the danger of courts muzzling all views not in accord with the politicized decisions of so-called "professional" associations.

Making the Colorado law even worse is that the censorship is directed to religious speech, which, as

has been ruled in the past, is doubly protected as free speech and under the free exercise of religion. The law is targeting the teaching of Biblical morality, and thus is doubly unconstitutional.

ARGUMENT

I. THE TENTH CIRCUIT'S DECISION DEFIES THIS COURT'S FIRST AMENDMENT JURISPRUDENCE.

A. The Decisions Below Defy this Court's Free Speech Holding in *Nat'l Inst. of Family & Life Advocates*.

Although the Tenth Circuit expressly denied that it was creating a category of speech known as "professional speech," it knew it was banning speech essential to providing care. *See Chiles II* at 1202, n.21 and 1215, n.38. As Judge Hartz noted in his dissent, this Court resoundingly rejected the creation of a lesser protected category of "professional speech" in *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755, 766-68 (2018) ("*NIFLA*"). *See Chiles II* at 1229 (Hartz, J., dissenting). Yet this is what the courts below did, albeit using different terms. This Court in *NIFLA* rebuked such efforts:

> Some Courts of Appeals have recognized "professional speech" as a separate category of speech that is subject to different rules.... So defined, these courts except professional speech from the rule that content-based regulations of speech are subject to strict

> scrutiny.... But **this Court has not recognized "professional speech" as a separate category of speech**. Speech is not unprotected merely because it is uttered by "professionals".... This Court's precedents do not recognize such a tradition for a category called "professional speech." [*NIFLA* at 767-68 (cleaned up) (emphasis added).]

The Tenth Circuit spent significant effort attempting to evade this Court's strictures in *NIFLA*, relying on one aberrant Ninth Circuit case, *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022), where these *amici* filed an *amicus* brief in support of a petition in this Court, but where certiorari was denied. The Tenth Circuit noted that, "[i]n reaching our holding, we join the Ninth Circuit in concluding a 'law[] prohibiting licensed therapists from practicing conversion therapies on minors ... is a regulation on conduct that incidentally [involves] speech.'" *Chiles II* at 1214 (quoting *Tingley* at 1082-83).

The Tenth Circuit performed the same verbal gymnastics here as in *Tingley*: "On the record before us, we agree the MCTL regulates professional conduct that 'incidentally involves speech.'" *Chiles II* at 1204. "This distinction — misunderstood by the dissent — makes all the difference." *Id*. at 1212, n.32.

But this Court has been clear that if "conduct" consists of speech, then it must be evaluated under First Amendment Free Speech principles. If "the **conduct** triggering coverage under the statute consists of **communicating a message**," and if

"Plaintiffs want to **speak** ... and whether they may do so under [the statute] depends on what they say," then First Amendment protection applies. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27-28 (2010) (emphasis added).

Even assuming arguendo that speech for purposes of medical treatment is also "conduct," it is immaterial, because the clear purpose of the censorship law is still the suppression of particular speech. In *United States v. O'Brien*, 391 U.S. 367, 377 (1968), this Court held that, even where there is a significant governmental interest, any incidental effect on free speech pursuant to that interest is permissible only "if the governmental interest is unrelated to the suppression of free expression." Here, the suppression of a particular viewpoint in counseling is not only related, but is also the direct target of the censorship law.

B. *Chiles* Defies this Court's Holding in *Kennedy v. Bremerton School District.*

In *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022), this Court made clear that "[t]he [Free Exercise] Clause protects not only the right to harbor religious beliefs inwardly and secretly. That clause does perhaps its most important work by protecting the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life...." *Id.* at 524. Citing Madison, this Court made clear that religious speech and expression is "doubly protect[ed]" by the First Amendment:

> Where the Free Exercise Clause protects religious exercises, whether communicative or not, the Free Speech Clause provides overlapping protection for expressive religious activities.... That **the First Amendment doubly protects religious speech** is no accident. It is a natural outgrowth of the framers' distrust of government attempts to regulate religion and suppress dissent. *See, e.g.*, A Memorial and Remonstrance Against Religious Assessments, in Selected Writings of James Madison 21, 25 (R. Ketcham ed. 2006). "[I]n Anglo-American history, ... **government suppression of speech has so commonly been directed *precisely* at religious speech** that a free-speech clause without religion would be Hamlet without the prince." [*Kennedy* at 523-24 (bold added, italics original).]

Instead of honoring this Court's "double protection," the Tenth Circuit instead has returned to the "government suppression of speech" that necessitated the Free Exercise Clause in the first place. The Tenth Circuit further reduced Petitioner's protection to "rational basis" scrutiny with creative but constitutionally unfaithful wordplay.

II. THE COLORADO STATE LAW CENSORS THOSE COUNSELORS WHO OPPOSE THE LEGISLATORS' RELIGIOUS VIEWS.

The challenged Colorado state law was analyzed by both the district court and the Tenth Circuit as just

another state-imposed, health-based, medical consensus-supported restriction on licensed health care providers, designed to protect clients and patients under their care. *See Chiles I* at *26-28; *Chiles II* at 1205. This characterization of the issue before those courts furnished the predicate for upholding the law as a protection of the health and safety of minors. The truth is the Colorado law impinges on speech rights on a quintessentially religious issue. When the Colorado legislature banned conversion therapy on a patient under age eighteen, it censored certain speech in what has become the central religious debate of our day.[3]

The issue of homosexuality and transgenderism is much bigger than a dispute within the medical community. As the Tenth Circuit dissent pointed out, there is no "settled science" supporting the Colorado law. The Tenth Circuit based its decision on the evidence accepted by the district court, which stated, "[t]he preliminary injunction record amply shows that

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[3] Throughout our nation's history, with considerable overlap, different discrete religious questions have dominated public debate. During the 1800s, the central religious debate was over slavery. As the nation entered World War I, a religious debate over pacifism raged. During the 1950s and 1960s, that issue was civil rights. There have been periods when the debate over capital punishment was intense, and certainly that was true of America's involvement in Vietnam. Since this Court's now-repudiated decision in *Roe v. Wade*, 410 U.S. 113 (1973), the nation has been wracked by the religious debate over abortion. At least since the Stonewall riots in 1969, the issue of homosexuality has come to center stage and the issue of transgenderism — particularly the ability of children to have life-altering, irreversible surgical and pharmaceutical interventions to "change sex" — has now joined it.

the Minor Therapy Conversion Law comports with the prevailing medical consensus regarding conversion therapy and sexual orientation change efforts." *Chiles I* at *28 n.10.

However, if the Colorado legislature had based its law on the evidence submitted by petitioners (*see Chiles II* at 1193-94), or the guidance issued recently by the Florida Department of Health, the Colorado law governing transgenderism could have been very different. A study by the State of Florida has concluded: "[i] [s]ocial gender transition should not be a treatment option for children or adolescents; [ii] [a]nyone under 18 should not be prescribed puberty blockers or hormone therapy; [and iii] [g]ender reassignment surgery should not be a treatment option for children or adolescents." Florida Department of Health, "Treatment of Gender Dysphoria for Children and Adolescents" (Apr. 20, 2022).

Even more recently, a study of transgender minors funded by the National Institutes of Health was completed which demonstrated that hormone therapy did not improve the children's state of mental health. Because its results conflicted with the same transgender narrative being pushed by Colorado, the study was suppressed, as "[a] prominent doctor and trans rights advocate admitted she deliberately withheld publication of a $10 million taxpayer-funded study on the effect of puberty blockers on American

children — after finding no evidence that they improve patients' mental health.[4]

The degree to which children are being harmed by those who would affirm their "gender feelings" has been repeatedly exposed. *See generally* A. Shrier, Irreversible Damage: The Transgender Craze Seducing Our Daughters (Regnery Publishing: 2020). However, even if there were a secular "scientific consensus" about optimal treatment, it does not remove its status as a religious issue. "Science" (an always evolving proposition) is never "settled," and it certainly is not protected by the Constitution — while "religion" is.

Moreover, it cannot be said that homosexuality and transgenderism are not religious issues, when Holy Writ addresses these matters. "Male and female he created them, and he blessed them and named them Man when they were created." *Genesis* 5:2 (ESV). "Thou shalt not lie with mankind, as with womankind: it is abomination." *Leviticus* 18:22 (KJV). The New Testament is in full accord. *See Romans* 1:26-28 (KJV).

Further, it cannot be said that Colorado was adopting a neutral position on a religious issue when it banned "conversion therapy," defined as a regimen that seeks "to change an individual's sexual orientation or gender identity," while expressly

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[4] C. Nesi, "Woke doc refused to publish $10 million trans kids study that showed puberty blockers didn't help mental health," *New York Post* (Oct. 23, 2024).

excluding "[a]ssistance to a person undergoing gender transition."

The district court should have enjoined the operation of the Colorado law while the challenge was pending. The *status quo ante* would be allowing counselors to counsel minors without being censored. Colorado adopted the anti-Christian side of a religious issue by imposing an occupational licensure rule designed to censor views that have been at the foundations of Western Civilization, and the dominant view during the Founding era. *See generally* Blackstone, IV Commentaries on the Laws of England, Chapter 15, "Crimes against Nature" (1769); D. Miller, Ph.D., "The Founders on Homosexuality," Apologetics Press (Aug. 10, 2008).

Opposition to Biblical Christianity is widely understood to be a central tenet of the trans movement.[5] *See, e.g.,* T. Carlson, "The trans movement is targeting Christians," *Fox News* (Mar. 28, 2023) ("The trans movement is the mirror image of Christianity, and therefore its natural enemy."). What has received less notice is that the trans movement is increasingly described as a religious cause by the left.

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[5] *See also* J. Cahn, The Return of the Gods (Frontline: 2022) at 55 ("And so as America and Western civilization turned away from God, they began undergoing a process of subjectification. As they moved away from ... the concept of truth itself, that there was any truth to begin with.... If a man believed he was not himself but was someone or something other than what he was, a child, a woman, a leopard, or a tree, there was no ultimate or absolute truth or any truth, no objective reality to contradict his own personal 'truth.'").

See generally L. Melonakos-Harrison & H. Bowman, "Solidarity With Trans Lives is How We Fight the Right," *ChristianSocialism.com* (June 10, 2022) ("[T]he church must form a deliberate community of solidarity with trans youth and their families. A refusal of this solidarity will sideline the church as a mere mystical body...."); J. Nichols, "Calling on the Religious Left to Protect Trans Kids," *Patheos.com* (Apr. 21, 2023) ("All Lefty Religious, please stand behind and protect trans youth and their families because they are innocently trying to exist, follow science, follow their doctors' orders, and take care of their families. Get behind them and let them know that God is on their side."). The trans movement has been described as "a new religion for the left." I. Haworth, "How trans activism became the new religion of the left," *New York Post* (Mar. 18, 2023).

The Tenth Circuit concluded its description of the statute with an effort to demonstrate how narrow the law is, since it allows counseling of adults, and under it:

> Ms. Chiles may ... **share** with her minor clients her own views on conversion therapy, sexual orientation, and gender identity.... She may **refer** her minor clients to service providers outside of the regulatory ambit who can legally engage in efforts to change a client's sexual orientation or gender identity.... [*Id.* at 1209 (emphasis added).]

The Tenth Circuit did not explain where that line may be found between talking about her "own views"

which constitutes speech and the type of talking which the Tenth Circuit called "therapeutic attempts ... to change a client's sexual orientation or gender identity." *Id*. at 1191. Few licensed counselors would dare exercise that right to express personal views since, if Colorado drew the line differently, it would put the counselor's entire career at risk. This is especially true when those in the Colorado government drawing that line are those who have the same commitment to the superiority of homosexuality and transgenderism and the same contempt for Biblical morality that is embodied in this curiously worded Colorado statute.

Even if there is some space for counselors to share the Biblical morality they embrace, there is no guarantee this will not be removed after this litigation is concluded. The same is true for the exemption for counselors engaged in religious ministry.[6] But this law must be viewed as the camel's nose under the tent, censoring religious speech only in an area where several recent misguided court decisions, such as *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), have already allowed breaches of First Amendment protections.

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[6] Although the Colorado statute made an exception for licensed professionals "engaged in the practice of religious ministry" (C.R.S. § 12-245-217(1)), certain other states provide no such exception. *See, e.g.*, Cal. Busi. & Prof. Code § 865.1; N.Y. Educ. Law § 6509-e.

III. THE USE OF OCCUPATIONAL LICENSURE TO PUNISH POLITICAL AND RELIGIOUS SPEECH VIOLATES THE FIRST AMENDMENT.

The use of licensing by government to suppress dissenting speech has a long and ugly history. The First Amendment was born in part out of a reaction to the dreaded Star Chamber in 16th-century England and its requirement that all printers be licensed and dissemination of any opinions contrary to government-approved ones forbidden.[7] "The Star Chamber has long symbolized the arbitrary and uncontrollable abuse of power both in England and the United States." *Id*. at 299.

This Court has long recognized that "prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976). Yet a prior restraint on speech — disguised as a licensing requirement — is precisely what Colorado's counseling censorship law is.

In *NIFLA*, this Court applied the First Amendment's ban on government coercion of speech based on its content. This Court struck down a California law requiring crisis pregnancy centers that "'aim to discourage and prevent women from seeking

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[7] M. Meyerson, "The Neglected History of the Prior Restraint Doctrine: Rediscovering the Link Between the First Amendment and the Separation of Powers," 34 IND. L. REV. 295, 299-300 (2001).

abortions'" to "notify women that California provides free or low-cost services, including abortions, and give them a phone number to call." *NIFLA* at 761.

According to *NIFLA*, "[b]y requiring petitioners to inform women how they can obtain state-subsidized abortions — at the same time petitioners try to dissuade women from choosing that option — the licensed notice plainly 'alters the content' of petitioners' speech." The Court held that "[c]ontent-based regulations [which] 'target speech based on its communicative content' ... 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'" *Id*. at 2371.

The affront to the First Amendment is heightened when government suppresses speech based not only on its content, but also on the viewpoint expressed in that content. In *Rosenberger v. Rector & Visitors of the Univ. of Va.*, 515 U.S. 819 (1995), this Court recognized that:

> [w]hen 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.... 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. [*Id*. at 829 (emphasis added).]

The Colorado law bans "conversion therapy" which is defined as any effort "to eliminate or reduce sexual or romantic attraction or feelings toward individuals of the **same sex**." Thus it is lawful for a counselor to urge homosexuality, but unlawful for a counselor to urge heterosexuality. C.R.S. § 12-245-202(3.5)(b)(I) (emphasis added). With respect to the transgender issue, expressly excluded from the transgender definition is "Assistance to a person undergoing gender transition." C.R.S. § 12-245-202(3.5)(b)(II).

Thus, the censorship law's entire premise is bald viewpoint discrimination. A more brazen command of viewpoint discrimination would be difficult to conceive.

Colorado has converted its licensing laws from a police powers shield to protect the public health and safety, into a censorship sword, with the right to practice a licensed profession conditioned on accepting government-approved shackles on speech.

This Court has made clear: "It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.... And the State's asserted power to license professional[s] carries with it (unless properly constrained) the power directly and substantially to affect the speech they utter." *Riley v. Nat'l Fed'n of Blind*, 487 U.S. 781, 801 (1988). Thus, "[r]egulations of expressive activity are valid only when the government's regulatory interest aims

at the nonexpressive component of the activity."[8] In this case, there is no nonexpressive component.

The relatively recent nature of occupational licensing supports the conclusion that the Tenth Circuit is wrong in holding that government can suppress or compel speech by recategorizing it as "incidental" to professional conduct. Until the late 1800s, there was relatively little occupational licensing at all.[9] When states did begin licensing, it was primarily directed toward skilled professions with significant risk to clients, such as doctors, dentists, attorneys, and pharmacists. *Id.* Licensing was a police powers "public health and safety" measure, not a backdoor means for the government to squash disfavored speech. *Id*. As this Court put it in an early case approving state licensing powers, the object was to shield clients against "the consequences of ignorance and incapacity as well as of deception and fraud." *Dent v. West Virginia*, 129 U.S. 114, 122 (1889).

> Simply put, the historical practices at the time of the ratification of the First and Fourteenth Amendments show that the rendering of personalized advice to specific clients was not one of the "well-defined and narrowly limited classes of speech, the prevention and punishment of which has never been thought

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[8] R. Kry, "The 'Watchman for Truth': Professional Licensing and the First Amendment," 23 SEATTLE U. L. REV. 885, 892 (2000).

[9] M. Kleiner, "Reforming Occupational Licensing Policies" at 7, *Brookings* (Mar. 2015).

> to raise any constitutional problem." Viewed in this light, the licensure of professional advice is inconsistent with the original understanding of the First Amendment.[10]

Even if the speech were to be viewed as commercial, this Court has long held that government cannot restrict that speech to ensure that only approved speech enters the flow of commerce:

> [I]f [the free flow of commercial information] is indispensable to the proper allocation of resources in a free enterprise system, it is also indispensable to the formation of intelligent opinions as to how that system ought to be regulated or altered. Therefore, even if the First Amendment were thought to be primarily an instrument to enlighten public decisionmaking in a democracy, we could not say that the free flow of information does not serve that goal. [*Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748, 765 (1976).]

This Court has recognized the First Amendment's "general rule, that the speaker has the right to tailor the speech." *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557, 573 (1995). The benefit is "enjoyed by business corporations generally and by ordinary people engaged in unsophisticated expression as well as by

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[10] Kry, "The Watchman for Truth," at 957 (quoting *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942)).

professional publishers. Its point is simply the point of all speech protection, which is to shield just those choices of content that in someone's eyes are misguided, or even hurtful." *Id*.

Yet in the arena of professional licensing, federal and state regulators are increasingly imposing a "coercive elimination of dissent." Professor Timothy Zick has noted that "[s]tates are becoming increasingly active, even aggressive, in the area of professional speech regulation."[11] Colorado's blanket ban on speech designed to help children accept the state's hotly disputed scientific reality is only one recent example.

IV. THE CONCERNS EXPRESSED BY JUDGE HARTZ IN DISSENT ABOUT POLITICIZED ASSOCIATIONS ARE WELL FOUNDED.

In dissent, Judge Hartz asserted that speech cannot be suppressed in service to "the mandates of professional organizations [because they] are too likely to be dominated by ideology rather than evidence...." *Id*. at 1227. The rush to grant special rights to homosexuals has been less about truth or logic, and more about "political correctness." This conclusion is well supported by the history of the changing views of one of the *amici* in the Tenth Circuit. Much of the support for granting special homosexual and transgender rights has come from the American Psychological Association ("APA"). An analysis of the issue by APA's past president Dr. Nicholas A.

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[11] T. Zick, "Professional Rights Speech," 47 ARIZ. ST. L.J. 1289, 1291 (2015).

Cummings demonstrates that choices are made for political reasons, not scientific:

> We might be hard-pressed to define political correctness. Yet we all recognize it and think and behave accordingly lest we offend or be accused of being insensitive, lacking in compassion, or just plain stupid.... PC is impervious to critical self-examination. [N. A. Cummings & W. T. O'Donohue, Eleven Blunders that Cripple Psychotherapy in America (Routledge: 2008) at 187, 189.]

Former APA President Dr. Nicholas Cummings, Ph.D., Sc.D., described the relentless pressure within the profession to promote a political agenda without scientific support. Dr. Cummings explained that the APA's endorsement of gay marriage was based on "the flimsiest of research evidence," and how those in his profession not in line with the new agenda seek anonymity for fear of retaliation. *See id.* at 211, 213-14.

Dr. Cummings, joined by psychologist Dr. Rogers H. Wright, Ph.D., authored a powerful book explaining the effect of "political correctness" on "distorting the science and corrupting the profession." R.H. Wright & N. Cummings, Destructive Trends in Mental Health: The Well-Intentioned Path to Harm (Routledge: 2005) at 4, 65-82. Psychologists who opposed "normalizing homosexuality" were demonized and even threatened, rather than scientifically refuted. *Id.* at 9. Even Congress has recognized the extreme politicization of the APA, rendering it the "only professional society in

the history of America to be censured by the Congress." *Id.* at xvii.

V. THE FRAMERS ESTABLISHED THE FREE EXERCISE OF RELIGION AS A JURISDICTIONAL LIMIT ON THE POWER OF GOVERNMENT.

Although the question presented on which this Court granted review relates to the Free Speech Clause, Petitioner also made a Free Exercise claim, and the courts below addressed and denied that claim. Since the speech being banned here is religious in nature, some observations on the rationale applied below are offered here.

The Tenth Circuit relied on *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021), quoting *Employment Div. v. Smith*, 494 U.S. 872, 884 (1990), for its conclusion that a law violates the free exercise of religion "'if it "invites" the government to consider the particular reasons for a person's conduct by providing "a mechanism for individualized exemptions," from the law's requirements'" and since the law here was neutral, strict scrutiny would not be used, and rational basis review would suffice. *Chiles II* at 1224. The Tenth Circuit misconstrues both the Free Exercise Clause and the *Smith* line of decisions.

The First Amendment guarantees that "Congress shall make no law ... prohibiting the free exercise [of religion]." In 1878, this Court recognized the significance of James Madison's A Memorial and Remonstrance in understanding the meaning of the

religion clauses of the First Amendment, stating that there, Madison "demonstrated 'that religion, or the duty we owe the Creator,' was not within the cognizance of civil government." *Reynolds v. United States*, 98 U.S. 145, 163 (1879). The Tenth Circuit apparently believes that government is empowered to sanction a Christian counselor who counsels in a manner consistent with her Christian convictions. That ruling is exceeding the authority of government under the Free Speech Clause.

The Free Exercise Clause protects against government control of our exercise of religion, where religion is defined as "the duty we owe the Creator." Here, the duty owed to our Creator includes proselytizing about Biblical morality (*see, e.g., I Corinthians* 6:9-20 (KJV) (neither "effeminate, nor abusers of themselves with mankind" "shall inherit the kingdom of God")), and acceptance of his created order (male and female) and his standards. Such proselytizing is in no way comparable to the activity involved in *Smith*, and indeed, *Smith* expressly protects proselytizing. As Colorado seeks to restrict the free exercise of religion, there is no balancing test to be applied. Once the activity being restricted is understood to be within the definition of "religion," it is jurisdictionally beyond the authority of the government.

The Tenth Circuit's decision should not be permitted even under *Smith*. In *Smith,* the Court offered a basic definition of what the "free exercise" clause requires, stating: "[T]he '**exercise of religion**' often **involves** not only belief and profession but the

performance of … physical acts [and] **proselytizing**…." *Smith* at 877 (emphasis added). Although the distinction between speech and conduct may be instructive in considering claims under freedom of speech, it is not relevant in evaluating a free exercise claim. Under *Smith*, the Free Exercise Clause protects both speech (proselytizing) and conduct (physical acts). "Proselytizing" is defined as "the act or process of converting or attempting to convert someone to a religion or other belief system." "Proselytizing," *Dictionary.com*.

Indeed, according to *Smith*, government may compel action only pursuant to a "valid law prohibiting **conduct that the State is free to regulate**." *Id*. at 879 (emphasis added). The State is not free to regulate Christian proselytizing. The Colorado legislators who favor a homosexual and transgender agenda seek to shut the mouths of their religious and political opponents by prohibiting a Christian counselor from counseling for Biblical morality, but those legislators are jurisdictionally barred from restricting that activity, whether viewed as speech or conduct, by the Free Exercise Clause.

In *Smith*, this Court expressly denied to government the power to "regulate religious beliefs [or] the communication of religious beliefs." *Smith* at 882. But the Tenth Circuit continues to attempt to breach this jurisdictional divide, along with Petitioner's Free Exercise of Religion, which this separation was designed to protect.

Post-*Smith*, this Court has continued to uphold the Free Exercise Clause's jurisdictional hierarchy between a citizen's civil obligations to the state and his prior obligations to God. In *Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC*, 565 U.S. 171 (2012), this Court noted that whether the state is free to regulate particular conduct is determined by the original definition of "religion" in the free exercise guarantee itself. As Madison explained, government has no jurisdiction whatsoever over duties owed to the Creator which, by nature, are enforceable only "by reason and conviction," not "force or violence" — the weapons of government which Colorado seeks to wield here. Virginia Declaration of Rights (1776).

CONCLUSION

For the foregoing reasons, the lower court's denial of injunctive relief should be reversed.

Respectfully submitted,

JOSEPH W. MILLER
LAW OFFICES OF
JOSEPH MILLER, LLC
1532 S. 1400 Road
Council Grove, KS 66846

WILLIAM J. OLSON*
JEREMIAH L. MORGAN
WILLIAM J. OLSON, P.C.
370 Maple Ave. W., Ste. 4
Vienna, VA 22180
(703) 356-5070
wjo@mindspring.com
**Counsel of Record*
Attorneys for Amici Curiae

June 13, 2025