No. 24-539

In the Supreme Court of the United States

KALEY CHILES,

Petitioner,

v.

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

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF *AMICUS CURIAE* OF CHRISTIAN LEGAL SOCIETY IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Christian Legal Society ("CLS") is a nonprofit, non-denominational association of Christian attorneys, law students, and law professors. Founded in 1961, CLS has members in all 50 states and chapters on at least 130 law school campuses. CLS—through its advocacy ministry, the Center for Law & Religious Freedom—pursues a pluralistic vision of a free civil society that respects all Americans' religious freedom and free speech. As an association of legal professionals, CLS desires to protect its members' interest in the free exercise of religion and free speech rights in counseling, particularly by attorneys, but also other licensed professionals.

CLS has appeared before this Court and other courts many times, both as a party and as an amicus, to advocate for the principles enshrined in the First Amendment. *See, e.g.*, Br. Amici Curiae of Christian Legal Society et al., *Smith v. City of Atlantic City*, No. 23-3265 (3rd Cir. May 30, 2025); Br. Amici Curiae of Christian Legal Society et al., *Mahmoud v. Taylor*, No. 23-1890 (U.S. Mar. 10, 2025); Br. Amici Curiae of Christian Legal Society et al., *Groff v. DeJoy*, No. 22-174 (U.S. Feb. 28, 2023); *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist.*, 82 F.4th 664 (9th Cir. 2023).

CLS has advocated extensively to the American Bar Association (ABA) and state bars and supreme courts to ensure that the regulation of legal

[1] No party or party's counsel authored this brief in whole or in part, and no person other than amicus or its counsel contributed to the costs of its preparation.

professionals safeguards attorneys' rights to speak freely on important political, social, cultural, and religious topics. Since the ABA adopted ABA Model Rule 8.4(g) in 2016, CLS has actively opposed adoption of such a rule in every jurisdiction in which CLS was aware of an open comment period. CLS' extensive testimony includes comment letters to 5 state bar associations and 18 state supreme courts.

INTRODUCTION & SUMMARY OF ARGUMENT

Colorado's Minor Conversion Therapy Law ("MCTA") prohibits licensed mental health counselors from engaging in counseling conversations with minors that might encourage them to *change* their "sexual orientation or gender identity, including efforts to change behaviors or gender expressions," but it allows conversations that offer "[a]cceptance, support, and understanding for . . . identity exploration and development," as well as "[a]ssistance to a person undergoing gender transition." Colo. Rev. Stat. § 12-245-202(3.5).

The MCTA singles out licensed counselors and regulates their professional speech as pure speech, even restricting the expressive content of "talk therapy" that does not involve any physical therapeutic techniques. Contrary to the Tenth Circuit's holding, that is a regulation of speech, not conduct, and the fact that it restricts only *professional* speech does not cure this constitutional defect. The MCTA violates the First Amendment because it regulates speech based on content and viewpoint, and it cannot satisfy strict scrutiny.

This Court's decision on the constitutionality of the MCTA will affect many other licensed professionals, including attorneys. Government attempts to penalize speech through the regulation of licensed professionals are widespread. CLS and its members have been at the forefront of this issue in recent years, particularly with the penalization of attorneys' speech through the American Bar Association (ABA) Model Rule 8.4(g), which prohibits "verbal or physical conduct" "related to the practice of law" that is deemed harassing or discriminatory.

Like the MCTA, Model Rule 8.4(g) and its state equivalents penalize pure speech based on content and viewpoint, and it does so with an exceptionally broad sweep, threatening to chill attorneys' expression not only in the actual practice of law, but also in virtually any setting where an attorney's speech, writing, or associations might implicate controversial social or political issues. In holding the MCTA unconstitutional, this Court should make clear that *any* professional regulation that penalizes or burdens pure speech in a content- or viewpoint-discriminatory way is unconstitutional.

ARGUMENT

I. The MCTA Regulates Speech, not Conduct.

The First Amendment guarantees the rights of professionals, just like any other American, to speak freely. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 768 (2018) ("*NIFLA*"). If professional speech were not protected, that would leave the government "unfettered power to reduce a group's

First Amendment rights by simply imposing a licensing requirement." *Id.* at 773. Such a result runs contrary to the First Amendment.

While "[s]tates may regulate professional *conduct*" that "incidentally involves speech," such laws must target the underlying conduct, not speech, to pass constitutional muster. *Id.* (emphasis added); *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) (noting that "words can in some circumstances violate laws directed not against speech but against conduct").

There is undoubtedly some overlap between conduct and speech in the medical context. But the MCTA fails to make the critical distinction between therapeutic methods in mental health that involve *physical* elements versus those that rely purely on *speech*. Thus, the breadth of the law at issue allows the state government to penalize speech based on content and viewpoint while advancing no regulatory interest other than restricting disfavored speech.

As the Eleventh Circuit has recognized, laws like the MCTA fundamentally miscategorize speech as conduct to evade the First Amendment's strictures. *Otto v. City of Boca Raton,* 981 F.3d 854, 864 (11th Cir. 2020); *see also Honeyfund.com Inc. v. Governor*, 94 F.4th 1272, 1281 (11th Cir. 2024) ("Florida's attempts to repackage its Act as a regulation of conduct rather than speech do not work. Laws that 'cannot be justified without reference to the content of the regulated speech, or that were adopted by the government because of disagreement with the message' conveyed, are still 'distinctions drawn based

on the message a speaker conveys.'" (quoting *Reed v. Town of Gilbert,* 576 U.S. 155, 163-64 (2015))).

This is especially true when the proscribed "counseling practices are grounded in a particular viewpoint about sex, gender, and sexual ethics." *Otto*, 981 F.3d at 864. Indeed, confirming that the point of the MCTA is viewpoint discrimination, the law carves out a specific exemption for *its preferred viewpoint*—codifying a specific ideological orthodoxy into law—thus limiting the right of therapists and clients to speak if their professional opinion as to what is best for a patient might lead outside that orthodoxy.[2]

This point is crucial because the moral and philosophical views of a mental health provider are necessarily more deeply intertwined with the provision of healthcare treatment than that of, say, a heart surgeon. Physical ailments lend themselves more easily to clear, unambiguous treatment protocols. A competent cardiologist will prescribe the same treatment for cardiac arrest regardless of his religious, philosophical, or political beliefs. The same cannot be said in mental healthcare. A Christian client, for example, is unlikely to seek out counseling services from a committed Satanist, and an atheist

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[2] Colorado defines "[c]onversion therapy" as "any practice or treatment . . . 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." "'Conversion therapy' does *not*," however, "include treatments that provide . . . [a]cceptance, support, and understanding" for minors exploring their sexual identity, or "[a]ssistance to a person undergoing gender transition." Colo. Rev. Stat. § 12-245-202 (3.5)(b) (emphasis added).

might not choose an Orthodox Jew as her psychotherapist.

Yet, when determining whether the MCTA regulated professional speech as speech, the Tenth Circuit compared the law to an informed consent requirement prior to an abortion procedure. *Chiles v. Salazar*, 116 F.4th 1178, 1203 (10th Cir. 2024) (citing *Planned Parenthood of Southeastern. Pa. v. Casey*, 505 U.S. 833 (1992)). But the state law in *Casey* is easily distinguished from the MCTA.

In *Casey,* the Supreme Court upheld a statute requiring physicians to provide specific, factual information prior to performing abortion procedures. While the law incidentally regulated speech, it was fundamentally a regulation of conduct: it set the conditions under which an abortion could be legally performed and whether and how physicians obtained informed consent.

Here, in contrast, the MCTA's restrictions on talk therapy regulate no conduct apart from pure speech. The Tenth Circuit's own reasoning shows the absence of professionally regulated conduct. *Chiles*, 116 F.4th at 1209. In affirming the MCTA, the Tenth Circuit reasoned that conversion therapy is speech "incidental to the professional conduct" of providing mental healthcare, regardless of therapeutic method. *Id.* The Court also reasoned that the MCTA regulates "the practice of conversion therapy" while allowing therapists to share their personal views on conversion therapy, including positive thoughts. *Id.* at 1206. This is incorrect.

Talk therapy is a therapeutic model based solely on speech. How would a practitioner know when she has moved from "shar[ing] . . . her views on . . . sexual orientation[] and gender identity" to making "attempts . . . to change" the client's sexual orientation or gender identity? *Id.* at 1214. Does the answer depend on whether the client agrees with the therapist's viewpoints? Must a therapist include a disclaimer that any such views are merely her subjective opinions or that they are not medical advice?

The answers are unclear because the law identifies no actual *conduct* that is regulated aside from the *speech* of the therapists or the cumulative meaning of the dialogue between therapist and client. The inevitable result of an unclear boundary between protected speech and license-revoking conduct is self-censorship of the former.

Any regulation of the therapeutic relationship implicates the First Amendment because expressive conduct falls under constitutional protection.[3] However, attempts to statutorily redefine speech as conduct are especially troubling. If upheld, such a law threatens to destroy the First Amendment by transforming professional speech into an unprotected

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[3] In *TikTok, Inc. v. Garland,* 145 S. Ct. 57 (2025), the Court reiterated the difficulty presented to lower courts when assessing state regulation of expressive conduct, noting that such laws do not always trigger strict scrutiny. This, however, does not place expressive conduct outside of constitutional protection. The Court has applied strict scrutiny to laws regulating conduct with expressive elements as well as regulations that "impose a disproportionate burden upon those engaged in protected First Amendment activities." 145 S. Ct. at 65 (citations omitted).

form of expression, resulting in the destruction of the constitutional rights the First Amendment protects.

II. The MCTA's Provisions Are Unconstitutional as Content-Based and Viewpoint-Based Restrictions on Professional Speech.

Content-based restrictions on speech are facially unconstitutional unless they pass strict scrutiny. *Reed*, 576 U.S. at 163. A regulation is content based if it applies to speech based on the topic discussed or the idea or message expressed. *Id.* A regulation is also content based if it "cannot be justified without reference to the content of the regulated speech" or was "adopted by the government because of disagreement with the message the speech conveys." *Id.* at 164 (citation omitted). Restrictions based on the identity of the speaker are likewise subject to strict scrutiny when they betray a "preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say)." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 658 (1994).

Here, the MCTA imposes restrictions based on both content and the identity of the speaker. First, the MCTA's application depends on the idea or message expressed: messages that "attempt[] or purport[] to change an individual's sexual orientation or gender identity." Colo. Rev. Stat. § 12-245-202 (3.5)(a). The MCTA cannot be justified without reference to the content of the regulated speech. There would be no way for Colorado to enforce the MCTA without examining what a therapist communicated to a patient.

Even worse, the MCTA expressly discriminates on the basis of Colorado's favored viewpoint. While speech intended to *change* sexual orientation or gender identity is prohibited, speech that *affirms* either of these is allowed. *Id.* at (b)(I) (exempting "practices or treatments that provide . . . [a]cceptance, support, and understanding for the facilitation of an individual's coping, social support, and identity exploration and development," and "[a]ssistance to a person undergoing gender transition").

The MCTA is also speaker based because it favors some speakers (non-licensees) over others (licensees). Non-licensees are free to engage in talk conversion therapy. Licensees are not.[4] This distinction shows the regulation is a speaker-based attempt to control the content of speech. Only if a Colorado resident is a licensee will the restriction apply, and the MCTA unquestionably expresses an "aversion to what the disfavored speakers have to say." *Turner Broad. Sys.*, 512 U.S. at 658. Singling out mental health professionals specifically because of the "deeply held trust" they enjoy, *Chiles*, 116 F.4th at 1207, is no different from imposing special restrictions on other influential figures, like journalists, religious ministers, attorneys, law professors, or teachers, to

[4] Indeed, the Tenth Circuit relied heavily on this distinction. Addressing the point that talk therapy is speech, the Tenth Circuit emphasized that it is only because Ms. Chiles is a licensed professional counselor that her speech is subject to regulation. *Chiles*, 116 F.4th at 1207–08. The majority expressly distinguished between what a counselor says in a professional setting and an "informal conversation among friends." *Id.* at 1208. Ironically, this very distinction is part of the MCTA's undoing because it reveals a speaker-based distinction designed to suppress certain speech.

prevent them from lending their credibility to disfavored ideas in the public eye.

Because the MCTA bans speech based on content, viewpoint, and the identity of the speaker, it is subject to strict scrutiny, a demanding standard the MCTA cannot survive. Strict scrutiny requires the government to prove that the law is narrowly tailored to further a compelling government interest. *Reed*, 576 U.S. at 171. While the government has a compelling interest in protecting the psychological well-being of minors, Colorado cannot prove that the MCTA actually furthers that interest—let alone that it is narrowly tailored to do so. Colorado would have to prove that banning change therapy furthers the interest of protecting the mental health of minors.

CLS leaves it to the parties and other amici to analyze the evidence regarding conversion therapy; however, it offers a few general observations to help guide that inquiry.

First, where constitutional rights are at risk amidst an emotionally-charged debate over a controversial topic, CLS respectfully submits that courts must be on heightened alert for activism masquerading as science and for invidious viewpoint discrimination masquerading as public health. Petitioners, other amici, and courts in similar cases have amply pointed out that the psychology establishment's conclusions regarding change therapy are not actually supported by the cited studies, which often come with broad caveats. *See, e.g.*, *Otto*, 981 F.3d at 868-69 (noting that the American Psychological Association found a "complete lack" of rigorous research on change therapy and

acknowledging that some have "perceived they have benefited from" change therapy). The Court simply cannot be confident, to a level that would satisfy strict scrutiny, that the new consensus on gender and sexuality is unrelated, and uninfluenced, by the massive cultural upheaval surrounding these issues that has emerged in the last three decades. *See Chiles*, 116 F.4th at 1242 n. 20 (Hartz, J., dissenting) (detailing how one professor in 2012 apologized and retracted a study he conducted in 2003 showing that conversion therapy had worked for some men).

Second, courts should hesitate to credit studies in the field of psychology in the same way they might credit proofs in the "hard sciences," particularly in a strict scrutiny context. The lower courts in this case casually treated mental healthcare and physical healthcare as absolute equivalents. *Id.* at 1206–08. The Tenth Circuit even went out of its way to attack any contrary view as "misguided thinking." *Id.* at 1211. But there are good reasons to doubt that the field of psychotherapy can achieve the same level of proof as the hard sciences, especially in an area that is highly personal, intensely emotional, often confusing, infused with political overtones, and individually unique.

Third, perhaps the most important distinction between the regulation of physical and mental health in the First Amendment context is that the latter has a much more direct impact on individual choice than does the regulation of physical healthcare. Mental health deals directly with the mind, the locus of moral agency. Because it is those very choices that the First Amendment is intended to protect, courts should

exercise an extra degree of caution before accepting the government's justification for speech restrictions on therapists.

For example, no one would doubt that an atheist and a Muslim, each with the same heart ailment, are likely to receive the same scientifically-based advice and treatment from a doctor regardless of the doctor's religious persuasion. But a 14-year old Christian raised by religious conservatives and a 14-year old atheist raised by socially liberal parents might appropriately seek very different kinds of therapy to address gender dysphoria. Indeed, the success of the entire psychotherapeutic enterprise depends on the therapeutic relationship between therapist and client, requiring client engagement that can only be developed and nurtured with trust and mutual goals. *See generally* Caitlin Opland & Tyler J. Torrico, *Psychotherapy and Therapeutic Relationship*, NAT'L LIBR. MED. (Oct. 6, 2024).[5] For this issue in particular—bound up as it is with religious, cultural, and personal values—this Court simply should not accept that a newfound orthodoxy applies universally, regardless of values or individual preference of those whose welfare the state purports to protect.

Finally, the accepted standard of competent treatment is not the test of compliance with the First Amendment. *Chiles*, 116 F.4th at 1206. The Tenth Circuit erroneously assumed that the academy's opinion that a regulation is needed absolves the state of a constitutional violation or excuses it from strict scrutiny. The First Amendment does not carve out exceptions for "established" theories favored by the

[5] https://www.ncbi.nlm.nih.gov/books/NBK608012/.

government. It was written precisely to protect theories the government previously embraced (and even criminally enforced) but now deems unhealthy. Surely the First Amendment covers a Christian therapist working in good faith with minors who hope to develop a value system they consider to be incompatible with same-sex attraction or gender transitioning.

In sum, because of the extreme difficulty of establishing evidence in the field of psychology, Colorado is unable to prove the MCTA furthers a compelling interest. The MCTA, therefore, fails strict scrutiny and violates the First Amendment.

III. This Case Implicates Broader Issues of Penalization—and Resulting Self-Censorship—Through Government Regulation of Professional Speech.

Much depends on the Court's decision in this case. As the circuit split on this issue highlights, government attempts to penalize speech through the regulation of licensed professionals are widespread. CLS and its members have been at the forefront of this issue in recent years, particularly with the penalization of attorneys' speech through the ABA's Model Rule 8.4(g) and its state equivalents.

ABA Model Rule 8.4(g) and its state-law equivalents penalize the speech of attorneys in fundamentally the same way that the MCTA penalizes Petitioner's speech, and it is unconstitutional for the same reasons.

The Court's resolution of this case will affect whether states are free to penalize other licensed professionals' speech under the guise of regulating professional conduct. And conditioning a professional license on conformity to certain speech codes is more problematic than other contexts, where courts at times defer to a state's expertise. For example, with public schools and the government's control of what is said in them, families and teachers still have the option to pursue the private school option. Similarly, in the context of conditional public funding, there is still the option of private funding. But when it comes to licensing—and conditioning licensure on speech restrictions that are clearly intertwined with otherwise protected speech—there is no other option for functioning in the professional space. Either a professional must self-sensor or lose their license and livelihood. There is no alternative route.

A. ABA Model Rule 8.4(g) unconstitutionally regulates attorneys' speech based on content and viewpoint.

Just as the MCTA unconstitutionally penalizes Petitioner's speech, so too does ABA Model Rule 8.4(g) and its state-law equivalents penalize the speech of attorneys in fundamentally the same way. In both scenarios, a professional's free speech is pitted against their licensure as their respective professions are inextricably intertwined with their speech. The result is that each professional (whether health counselors or legal counselors) must either self-censor to adhere to the accepted speech codes of the licensing authority or else must speak their minds and face the penalty of losing their license and livelihood. The Constitution

prohibits states from imposing such a lose-lose scenario.

In August 2016, the ABA's House of Delegates adopted this new model disciplinary rule. In relevant part, the model rule states:

> 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.

Am. Bar Ass'n, Model Rule of Professional Conduct 8.4(g) ("Model Rule 8.4(g)").[6]

The rule applies exceptionally broadly, covering not just what an attorney does in the course of representing a client but any "[c]onduct related to the practice of law, including interacting with witnesses, coworkers, court personnel, lawyers *and others* while engaged in the practice of law, operating or managing a law firm or law practice; and participating in bar association, business or social activities in connection with the practice of law." *Id.* cmt. 4 (emphasis added).

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[6] http://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/.

In this way, Model Rule 8.4(g) represents a significant departure from prior comment 3 to ABA Model Rule 8.4 and even from versions of Model Rule 8.4(g) that the ABA considered, which, like most such professional regulations, applied only to actions taken "in the course of representing a client." Nathan Moelker, *Conduct Relating to the Practice of Law: ABA Model Rule 8.4(g) and Its History in Light of the Constitution*, 13 St. Mary's J. on L. Malpractice & Ethics 331, 335-337 (2023).

The rule's official commentary, as well as comments from those who adopted the rule, make clear that the rule's prohibition on discriminatory or harassing "conduct" includes not just actual conduct but pure speech as well. *See* Model Rule 8.4(g) cmt. 3 ("Such discrimination includes harmful *verbal* or physical conduct that manifests bias or prejudice towards others. Harassment includes . . . derogatory or demeaning *verbal* or physical conduct.") (emphasis added).

Significantly, Model Rule 8.4(g) is viewpoint- and content-discriminatory in much the same way as the MCTA. Comment 4 to the model rule provides a safe harbor for certain favored speech that, but for the exemption, might fall within the rule's prohibition on "discrimination [and] harassment." The comment explicitly protects some viewpoints over others by allowing lawyers to "engage in conduct undertaken to promote diversity and inclusion without violating this Rule by, for example, implementing initiatives aimed at recruiting, hiring, retaining and advancing diverse employees or sponsoring diverse law student organizations." This impermissibly favors speech that

"promote[s] diversity and inclusion" over speech that does not. But that is the very definition of viewpoint discrimination. The government cannot pass laws that allow citizens to express one viewpoint on a particular subject but penalize citizens for expressing an opposing viewpoint on the same subject. It is axiomatic that viewpoint discrimination is "an egregious form of content discrimination," and that "[t]he 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." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995).

And Model Rule 8.4(g)'s constitutional infirmities are not healed by the fact that it is designed to regulate professional speech. Indeed, in *NIFLA*, this Court clarified that the Constitution's prohibition on content-based speech restrictions extend to professional speech. While *NIFLA* did not directly involve ABA Model Rule 8.4(g), the Court's analysis makes clear that ABA Model Rule 8.4(g)—and its state level cognates—are unconstitutional content-based restrictions on attorneys' speech. In *NIFLA*, the Court held that government restrictions on professionals' speech—including the professional speech of attorneys—are "presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." 585 U.S. at 766 (quoting *Reed*, 576 U.S. at 163). The Court explained that "[c]ontent-based regulations 'target speech based on its communicative content.'" *Id.* The Court observed that governments have "'no power to restrict expression because of its message, its ideas, its subject

matter, or its content.'" *Id. (*quoting *Police Dept. of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). "Speech is not unprotected merely because it is uttered by 'professionals.'" *NIFLA*, 585 U.S. at 756.

B. To the extent states adopt it, Model Rule 8.4(g) chills free expression and undermines the principles of free speech.

As a practical matter, Model Rule 8.4(g) raises a host of problems. Its broad wording and the problematic guidance in its comments will likely empower state regulators to use the rule to punish attorneys' expression of disfavored viewpoints on various political, religious, and social issues.

To begin with, virtually everything an attorney does is "conduct related to the practice of law" and therefore subject to Model Rule 8.4(g): that includes dinners, holiday parties, golf outings, conferences, any other "business or social activities" an attorney may attend. *See* Model Rule 8.4(g) & cmt. 4. It also likely covers any statements an attorney makes when publishing law review articles, blog posts, and social media posts, as well as speaking at public events, serving a religious congregation, doing pro bono work, and participating in political activities and public advocacy that involves controversial social, religious, and other issues.

For these reasons, Professor Eugene Volokh has described Model Rule 8.4(g) as a "speech code for lawyers," explaining:

> [S]ay that you're at a lawyer social activity, such as a local bar dinner, and

> say that you get into a discussion with people around the table about such matters — Islam, evangelical Christianity, black-on-black crime, illegal immigration, differences between the sexes, same-sex marriage, restrictions on the use of bathrooms, the alleged misdeeds of the 1 percent, the cultural causes of poverty in many households, and so on. One of the people is offended and files a bar complaint.
>
> Again, you've engaged in "verbal . . . conduct" that the bar may see as "manifest[ing] bias or prejudice" and thus as "harmful." This was at a "social activit[y] in connection with the practice of law." The state bar, if it adopts this rule, might thus discipline you for your "harassment."

Eugene Volokh, *A Speech Code for Lawyers, Banning Viewpoints that Express 'Bias,' including in LawRelated Social Activities*, The Washington Post (Aug. 10, 2016).[7]

A law professor, adjunct faculty member, or even an attorney who teaches continuing legal education seminars might have occasion to discuss controversial topics, use controversial words to make a point, or develop arguments for unpopular viewpoints. Because

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[7] https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/08/10/aspeech-code-for-lawyers-banning-viewpoints-that-express-bias-including-in-lawrelated-social-activities-2/?tid=a_inl&utm_term=.f4beacf8a086.

such speech is "related to the practice of law," it could subject the speaker to professional discipline under Model Rule 8.4(g) if it is deemed to "manifest" a discriminatory thought or conviction.

Similarly, if an attorney serves on the board of a religious institution, she may be asked to help craft a church's policy on whether its clergy will perform same-sex marriages or whether it will allow receptions for same-sex weddings in its social hall. An attorney on the board of trustees for a religious college might review the school's housing policy or its student code of conduct. Drafting and reviewing such policies is arguably "conduct related to the practice of law" and thus could subject an attorney to sanctions under Model Rule 8.4(g) if the advice she renders is deemed "discriminatory."

The rule even raises doubts about whether attorneys can be *members* in political, social, or religious organizations that promote, for instance, traditional values regarding sexual conduct and marriage. Indeed, the California Supreme Court adopted a disciplinary rule that prohibited all California state judges from participating in Boy Scouts because of the organization's teaching regarding sexual conduct. Mark Pulliam, *Blacklisting the Boy Scouts*, Citi Journal (Feb 6, 2015).[8]

Even if some of the above speech were not deemed to violate Model Rule 8.4(g), the rule forces attorneys to self-censor themselves out of fear that their speech *might* subject them to professional discipline every

[8] https://www.city-journal.org/article/blacklisting-the-boy-scouts.

time they speak on an issue that could be considered controversial. May an attorney participate in a panel discussion only if all the attorneys on the panel speak in favor of the inclusion of "sexual orientation" or "gender identity" as a protected category in a nondiscrimination law being debated in the state legislature? Is an attorney subject to discipline if she testifies on behalf of a client mosque before a city council against amending a nondiscrimination law to add any or all the protected characteristics listed in Model Rule 8.4(g)? Is a candidate for office, who also happens to be an attorney, subject to discipline for socio-economic discrimination if she proposes that only low-income students be allowed to participate in government tuition assistance programs? Model Rule 8.4(g) does not provide answers to these kinds of questions, but it forces attorneys to ask them—with their law licenses and livelihoods at stake—every time they open their mouths on something consequential or controversial.

In short, the regulation raises serious risks that attorneys could face professional discipline, not merely for what they say or write when practicing law, but for what they say or write when teaching, socializing, volunteering, serving on nonprofit boards, speaking on panels, or otherwise engaging in the kinds of public discussions of political, social, and religious issues that attorneys frequently take part in.

The model rule has already gained some traction.[9] Moreover, other states restrict attorneys' speech

[9] Vermont has adopted Model Rule 8.4(g) verbatim. *See supra* Moelker at 343. Maine has also adopted the rule with only slight modifications. Debra Cassens Weiss, *Second State Adopts ABA*

through "anti-discrimination" provisions in their rules of professional conduct that, while not as draconian as Model Rule 8.4(g), may still violate the First Amendment for similar reasons, either facially or as applied.[10]

Until this Court rebukes the professional penalization that renders Model Rule 8.4(g) defective, the ABA and others will continue to push it.

Model Rule 8.4(g) and its state-law equivalents penalize the speech of attorneys in fundamentally the same way that the MCTA penalizes Petitioner's speech, and it is unconstitutional for the same reasons. Other professionals across the country face similar threats to their free speech rights. *See, e.g.*, Br. Amicus Curiae of Assocs. of Certified Biblical Counselors in Support of Pet'r at 1, *Chiles v. Salazar*, No. 24-539 (U.S. Dec. 13, 2024) ("The rationale used to justify this improper designation affects not just Christian therapists in Colorado, but any licensed occupation that uses communication as part of the profession."); Br. Amicus Curiae of Christian Medical

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Model Rule Barring Discrimination and Harassment by Lawyers, ABA Journal (June 13, 2019), https://www.abajournal.com/news/article/second-state-adopts-aba-model-rule-barring-discrimination-by-lawyers. Alaska, Connecticut, Illinois, New Hampshire, New Mexico, New York, and Pennsylvania have also adopted a version of Model Rule 8.4(g).

[10] *See, e.g.*, Conn. Rules of Professional Conduct Rule 8.4(7) (2022); Ill. Rules of Professional Conduct Rule 8.4(j) (2024); Me. Rules of Professional Conduct Rule 8.4(g) (2019); N.Y. Rules of Professional Conduct Rule 8.4(g) (2022); Pa. Rules of Professional Conduct Rule 8.4(g) (2024) and accompanying comments to each rule.

& Dental Assocs. in Support of Pet'r at 6-7, *Chiles v. Salazar*, No. 24-539 (U.S. Dec. 13, 2024) (arguing that "without a reversal of [the MCTA] as unconstitutional, the state is encouraged to expand its censorship of speech to doctors as well").

In sum, there is real risk of licensed professionals suffering negative consequences for speaking about their beliefs—particularly religious beliefs—in a wide variety of workplace settings, and there is no reason to doubt that those who seek to suppress and retaliate against such beliefs would readily use Model Rule 8.4(g) and the MCTA to do so.

This Court would vindicate the rights of all these licensed professionals and their clients throughout the nation by reversing the Tenth Circuit's decision and holding the MCTA's restrictions unconstitutional under the First Amendment.

CONCLUSION

For these reasons, CLS respectfully urges the Court to reverse the decision below.

Respectfully submitted,

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