No. 24-539

IN THE

Supreme Court of the United States

KALEY CHILES,

Petitioner,

v.

PATTY SALAZAR, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE COLORADO DEPARTMENT OF REGULATORY AGENCIES, ET AL.,

Respondents.

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

BRIEF OF THE ANGLICAN CHURCH IN NORTH AMERICA; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; THE COALITION FOR JEWISH VALUES; AND THE NATIONAL ASSOCIATION OF EVANGELICALS AS *AMICI CURIAE* SUPPORTING PETITIONER

R. SHAWN GUNNARSON
Counsel of Record
CHRISTOPHER A. BATES
JAROM M. HARRISON
CATHERINE L. GRANTHAM
KIRTON | MCCONKIE
36 South State Street
Suite 1900
Salt Lake City, Utah 84111
(801) 328-3600
sgunnarson@kmclaw.com

Counsel for Amici Curiae

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INTERESTS OF *AMICI CURIAE*[1]

Amici are religious organizations with a shared commitment to defending religious freedom under the Constitution. Some of us have joined *amicus* briefs in previous litigation before the Court. See, *e.g.*, *Carson* v. *Makin*, 596 U.S. 767 (2022); *Fulton* v. *City of Philadelphia*, 593 U.S. 522 (2021). We recognize that young people of faith can experience serious distress and confusion in connection with same-sex attraction and gender dysphoria. *We do not practice or endorse "conversion therapy" under any rational definition*. But nor are we willing to abandon our children to self-destructive behaviors or powerful social trends. We and their parents seek to guide them in wisdom and love, not merely to endorse their impulses and anxieties. Colorado's overbroad and viewpoint-based definition of conversion therapy seeks to prevent that vital effort. The State's regime of censorship is not only unconstitutional but harmful to youth who struggle to cope with such feelings while remaining true to their faith.

SUMMARY OF ARGUMENT

Colorado has proscribed professional counselors from engaging in what the State terms "conversion therapy," in the name of guarding minors from harm. Colo. Rev. Stat. § 12-245-224(1)(t)(V). That proscription not only bans some harmful practices but also protected speech about sexual and gender-related behaviors that the State merely dislikes. Talk therapy is no less speech because it's therapy. See *Holder* v.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part and that no entity or person, aside from *amici*, their members, and their counsel, made any monetary contribution toward the preparation or submission of this brief.

Humanitarian L. Project, 561 U.S. 1, 27–28 (2010). Because Colorado law restricts speech based on content and viewpoint, it must satisfy strict scrutiny. See, *e.g.*, *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015). The State's attempt to evade that standard by invoking *National Institute of Family & Life Advocates* v. *Becerra* (*NIFLA*), 585 U.S. 755 (2018), falters. *NIFLA* affirmed that speech does not lose First Amendment protection "merely because it is uttered by 'professionals.'" *Id.* at 767. The Tenth Circuit erred when it concluded otherwise.

Three points underscore the constitutional defects of Colorado's law.

First, *conversion therapy* has a long-established meaning that the Colorado law confuses. Decades of medical science and professional usage understood conversion therapy as the application of discredited treatments, including coercive and aversive physical treatments, to change sexual orientation. The practice of conversion therapy later expanded to cover gender dysphoria. So understood, many religious communities—including some of *amici*—condemn such practices. Licensed psychotherapists with a religious outlook like Chiles do not practice conversion therapy; they aim instead to assist clients with their self-chosen goals. Many religious youth want help learning to act on their faith rather than on their feelings of same-sex attraction or gender dysphoria.

Second, the Colorado law challenged here does not regulate only *conversion therapy*—it regulates *talk therapy* under the guise of banning conversion therapy. The statute bars any psychotherapy addressing LGBT issues that does not affirm or facilitate a young client's asserted LGBT identity. See Colo. Rev. Stat. § 12-245-202(3.5)(b). The statute thus proscribes therapeutic

messages the State disapproves—not just harmful conversion therapy practices as ordinarily understood. Because treating non-affirmative therapy as harmful has weak evidentiary support, censoring such speech is unjustified. It is also unconstitutional.

Third, because the Colorado statute restricts speech, not merely conduct, it must satisfy ordinary doctrines under the Free Speech Clause. *NIFLA* affirmed full First Amendment protection for professional speech, 585 U.S. at 767, and the Colorado statute does not fit into *NIFLA*'s exception for restrictions on professional conduct when speech is "incidental." 585 U.S. at 769. Therapeutic speech is no more *incidental* to the statute's effects on protected speech than a blast area is incidental to a guided missile. By design, Colorado engages in viewpoint discrimination—an exercise of authority that is "presumptively unconstitutional." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 830 (1995). Not only that. The law specifically burdens religious speech. Forcing licensed religious counselors to choose between their profession and their faith resembles civil disabilities historically imposed to exclude religious dissenters from certain professions. See 4 William Blackstone, *Commentaries* 55 (1769). Because the First Amendment renounces such inequality, Colorado's conversion therapy ban cannot stand. The judgment below should be reversed.

ARGUMENT

I. CONVERSION THERAPY MEANS THE USE OF DISCREDITED COERCIVE OR AVERSIVE TREATMENTS—NOT TALK THERAPY TO HELP EXPLORE A PATIENT'S IDENTITY.

A. Conversion Therapy Has Long Meant the Use of Coercive or Aversive Treatment to Eliminate Same-Sex Attraction.

The Colorado statute purports to ban "conversion therapy," defined as "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." Colo. Rev. Stat. § 12-245-202(3.5)(a). But that definition gives the term a meaning at odds with long-established usage.

Originally, *conversion therapy* denoted physically coercive practices to eliminate same-sex attraction. Nineteenth-century physicians "initially viewed homosexuality as a medical problem" that resulted from a physical maladaptation in the body. Tiffany C. Graham, *Conversion Therapy: A Brief Reflection on the History of the Practice and Contemporary Regulatory Efforts*, 52 Creighton L. Rev. 419, 421 (2019). That conception led to barbaric physical treatments, such as "castration, testicle implants, bladder washing, and rectal massage." *Ibid.* Lobotomies and other surgical trauma to the brain and genitals were shockingly common. See Kenji Yoshino, *Covering*, 111 Yale L.J. 769, 787 (2002) (describing "hysterectomy, ovariectomy, clitoridectomy, castration, vasectomy, pudic nerve surgery, and lobotomy."). "[B]y 1913 though, doctors started to

realize that these techniques did not work," and the drive to "cure" gay and lesbian people shifted from physicians to mental health professionals. Graham, 52 Creighton L. Rev. at 421.

Twentieth-century psychology was dominated by behaviorism, or the idea that cognition is influenced through environmental stimuli such as pain or pleasure. See generally Susan M. Schneider & Edward K. Morris, *A History of the Term* Radical Behaviorism*: From Watson to Skinner*, 10 Behav. Analyst 27 (1987). Stimulus-and-response theory deeply influenced mental health practitioners working to eliminate same-sex attraction. See Jonathan S. Comer et al., *Reckoning with Our Past and Righting Our Future: Report from the Behavior Therapy Task Force on Sexual Orientation and Gender Identity/Expression Change Efforts (SOGIECEs)*, 55 Behav. Therapy 649, 652 (2024).

Aversion (or *aversive*) *therapy* rested on the theory that inducing physical discomfort in response to homoerotic stimulus could eliminate same-sex attraction. See, *e.g.*, Jonathan Katz, *Gay American History: Lesbians and Gay Men in the United States* 164–201 (rev. ed. 1992). Therapy in this mode ran the gamut from telling a patient to snap his wrist with a rubber band to using drugs for "inducing nausea or paralysis." Graham, 52 Creighton L. Rev. at 422. Of all these methods, electroshock therapy was the most infamous. See Yoshino, 111 Yale L.J. at 784–85.

Decades of experience, and untold suffering, finally led mental health professionals to accept that aversive "techniques were not simply torturous; they did not work." Graham, 52 Creighton L. Rev. at 422. Many therapists abandoned physical treatment (and mis-treatment), shifting the focus instead to psychoanalysis.

See Jack Drescher, *I'm Your Handyman: A History of Reparative Therapies*, 36 J. Homosexuality 19, 20 (1998).

Sigmund Freud, for instance, dissented from attempts to change a patient's sexual orientation. He sought to understand the background impulses behind the patient's sexuality—including, in classic Freudian fashion, the patient's sexual development during childhood. *Id.* at 21–25. Later psychoanalytic approaches built on Freud's work. "When psychoanalysis reached its highest influence in psychiatry and academia during the 1940s and through the 1960s, many gay men and women voluntarily sought psychoanalytic treatment for their same-sex feelings." *Id.* at 26. Therapeutic approaches ranged from counseling patients through their reported childhood traumas to more active techniques like exposure therapy, where gay men were encouraged to pursue romantic and sexual relationships with women. See *id.* at 29–30.

A new school of psychotherapy arose in the 1990s called *reparative therapy*. Its founder, Joseph Nicolosi, emphasized "the significance of gender difference, the worth of family and conventional values, and the importance of the prevention of gender confusion in children." Joseph Nicolosi, *Reparative Therapy of Male Homosexuality: A New Clinical Approach* 23 (1991). While avoiding the physically abusive techniques of aversive therapy, reparative therapy still sought to eliminate same-sex attraction. See Drescher, 36 J. Homosexuality at 25–38.

In 2009, the American Psychological Association (APA) published a resolution condemning what it called "sexual orientation change efforts" on the ground that "the notion that sexual orientation can be changed" is untenable. APA, *Resolution on Appropriate Affirmative Responses to Sexual Orientation Distress*

and Change Efforts (2009).[2] The phrase "sexual orientation change efforts" signaled a sea change in professional nomenclature by using a single term to describe *all* psychotherapeutic approaches other than affirmative talk therapy. *Ibid.* (explaining that the term "describe[s] all means to change sexual orientation (e.g., behavioral techniques, psychoanalytic techniques, medical approaches, religious and spiritual approaches)").

The APA Resolution dismissed studies finding that "some individuals modified their sexual orientation identity (i.e., group membership and affiliation), behavior, and values" in response to psychotherapy. *Ibid.* These earlier studies, while not purporting to change sexual orientation, offered the hope of relieving distress for some patients. But the APA turned away from that possibility, directing practitioners to "provide assistance to those who seek sexual orientation change by utilizing affirmative * * * and client-centered approaches" that "recognize the negative impact of social stigma on sexual minorities." *Ibid.* By endorsing *affirmative therapy* as the sole legitimate psychotherapeutic approach to sexual orientation and gender identity, the APA marginalized other approaches (including exploratory therapy, discussed below) as questionable. The APA did so despite evidence that such therapeutic modes help some patients live in harmony with their deeply held values.

Other professional associations eventually coalesced around the APA's position that psychotherapy other than affirmative therapy is harmful to minors. See,

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[2] In 1973, the American Psychiatric Association removed homosexuality from the Diagnostic and Statistical Manual of Mental Disorders. See Drescher, 36 J. Homosexuality at 31. That decision meant that, for the psychiatric profession, same-sex attraction did not require professional treatment.

e.g., Pan Am. Health Org., *"Cures" for an Illness That Does Not Exist* (May 15, 2012); Am. Psychoanalytic Ass'n, *Position Statement on Attempts to Change Sexual Orientation, Gender Identity, or Gender Expression* (June 2012); Hilary Daniel & Renee Butkus, *Lesbian, Gay, Bisexual, and Transgender Health Disparities: Executive Summary of a Policy Position Paper from the American College of Physicians*, 163 Annals Internal Med. 135 (2015).

Eliding the difference between *conversion therapy* and *talk therapy* that's neither coercive nor aversive holds grave consequences, both for professional counselors and for young patients in need of professional help. Counselors risk challenges to their professional reputation and licensure by helping young clients to choose different responses to feelings of same-sex attraction or nonconforming gender identity, thereby relieving their distress. As petitioner says, "[t]here's an urgent need for counseling for those suffering from issues relating to gender and sexuality." Pet.28. That need is acute for children and adolescents. Without professional counseling to help them navigate complex and multifaceted issues of mental health and personal identity—including religious identity—young patients and their parents are left to fend for themselves.

B. Religious Organizations Condemn Conversion Therapy.

Many religious organizations, including *amici* who have addressed it specifically, oppose conversion therapy. All of us agree that coercive or abusive treatment is irreconcilable with the love and respect every human being deserves—especially a child.

The Roman Catholic Church teaches that gay and lesbian people "must be accepted with respect,

compassion, and sensitivity." *Catechism of the Catholic Church* § 2358 (USCCB 2d ed. 2019). "Every sign of unjust discrimination in their regard should be avoided." *Ibid.* Catholic leaders in the United States have denounced conversion therapy and declared that the Church opposes the practice. See, *e.g.*, Maria Wiering, *'Dear Alana,' Podcast Spotlights Conversion Therapy and Catholics Who Say It's Harmed Them*, OSV News (Sept. 3, 2023) (quoting statement by the Archdiocese of Denver that the Church does not practice conversion therapy and "reject[s] any practices that are manipulative, coercive, or pseudoscientific"); Brian Mastre, *Nebraska Legislature Hears Testimony on Conversion Therapy*, 6 News WOWT (Feb. 7, 2019) (quoting statement by the executive director of the Nebraska Catholic Conference that conversion therapy is "wrong" and "ha[s] been condemned universally").

The Church of Jesus Christ of Latter-day Saints likewise "opposes 'conversion therapy' and [its] therapists do not practice it." The Church of Jesus Christ of Latter-day Saints, Official Statement, *Church Continues to Oppose Conversion Therapy* (Oct. 25, 2019), *available at* https://newsroom.churchofjesuschrist.org/article/statement-proposed-rule-sexual-orientation-gender-identity-change; see also *ibid.* ("The Church denounces any therapy, including conversion and reparative therapies, that subject an individual to abusive practices * * * ."). The Church's Family Services program, which provides professional counseling on a range of topics, "has a longstanding and express policy against using therapies that seek to 'repair,' 'convert,' or 'change' sexual orientation." *Ibid.* "Those, including youth, who seek therapies that constitute sexual orientation change efforts will not receive them from Family Services counselors." *Ibid.*

Many Evangelical leaders, too, have denounced conversion therapy. According to the national director of the Fellowship of Independent Evangelical Churches in the United Kingdom, "[t]he idea that" sexual orientation can be changed "by consensual or forced sex, psychotherapy, hormone therapy or electroconvulsive therapy * * * ought to be rejected." John Stevens, *Conversion Therapy: A Biblical Response* (May 25, 2021). The Evangelical Alliance, another British evangelical association, likewise declares that "the use of electro-shock treatment" and other "abusive practices" is "clearly wrong and should be ended." Letter from Peter Lynas, UK Dir., Evangelical All., to the Right Hon. Boris Johnson (Mar. 15, 2021).

Pastoral guidance from the Lutheran Church–Missouri Synod (LCMS) is in accord. LCMS instructs its ministers that "the goal of pastoral care" is "to affirm the person's identity in Christ" and warns that efforts to change a person's sexual orientation "can often result in frustration and hurt." The Lutheran Church–Missouri Synod, Task Force on Ministry to Homosexuals and Their Families, *A Plan for Ministry to Homosexuals and Their Families* 17–18 (1999).

Leading Orthodox Jewish authorities likewise condemn conversion therapy. The executive vice president of the Rabbinical Council of America, the country's largest Orthodox rabbinical organization, called conversion therapy "wrong" and "not something that should be [practiced]." Rachel Delia Benaim, *As a New Jersey Court Considers Conversion Therapy, Many Orthodox Jews Have Moved on*, Wash. Post (June 3, 2015). The Council issued a statement opposing reparative therapy and concluding that "responsible therapists, in partnership with amenable clients, should be able to work on whatever issues those clients voluntarily

bring to their session." Rabbinical Council of Am., *Rabbinical Council of America's Statement Regarding JONAH (Jews Offering New Alternatives to Homosexuality)* (Nov. 29, 2012), *available at* http://web.archive.org/web/20151223235645/http://www.rabbis.org/news/article.cfm?id=105723.

Prominent Muslim organizations, too, have denounced coercive conversion therapy techniques. Last year, three leading Muslim organizations in the United Kingdom—the British Board of Scholars and Imams, the Muslim Council of Scotland, and the Muslim Council of Wales—published a joint report declaring efforts to "change or suppress an individual's sexual orientation or gender identity by force * * * reprehensible." *Conversion Therapy: What Should Muslims Know?* 19 (Mar. 2024).

Statements such as these illustrate that many religious communities condemn the coercive or abusive practices long associated with conversion therapy. Such mistreatment of LGBT people, no matter the reason, is a violation of their dignity and humanity that cannot be justified.

C. Many Licensed Therapists Who Are Religious Use Exploratory Talk Therapy—Not Conversion Therapy—to Assist Youth.

Debates over the proper treatment of children and adolescents who question their sexual orientation or gender identity turn on a false choice between conversion therapy and affirmative therapy. See, *e.g.*, Roberto D'Angelo et al., *One Size Does Not Fit All: In Support of Psychotherapy for Gender Dysphoria*, 50 Archives Sexual Behav. 7, 7 (2021). The term *affirmative therapy* or *affirming care* describes therapeutic

methods designed to help a patient to live openly with her sexual orientation or transition to a new gender identity. See, *e.g.*, Juan Carlos d'Abrera et al., *Informed Consent and Childhood Gender Dysphoria: Emerging Complexities in Diagnosis and Treatment*, 28 Australasian Psychiatry 536, 536 (2020); Substance Abuse & Mental Health Servs. Admin. (SAMHSA), *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth* (Oct. 2015).[3] But this either-or choice is too simplistic. It ignores reputable therapeutic models for helping youth who face challenges involving sexual orientation and gender identity.

Psychotherapy offers alternatives. It "involves communication between patients and therapists" to help patients find relief from emotional distress by locating solutions to personal challenges. APA, *What is Psychotherapy?* (2017), https://www.apa.org/ptsd-guideline/patients-and-families/psychotherapy. Psychotherapy is sometimes called "talk therapy." Nat'l Inst. of Mental Health, *Psychotherapies* (Feb. 2024), https://www.nimh.nih.gov/health/topics/psychotherapies.

One mode of psychotherapy is *exploratory therapy*, which "aim[s] to help individuals gain a deeper understanding of their discomfort with themselves, the factors that have contributed to their distress, and their motivations for seeking transition." D'Angelo et al., 50 Archives Sexual Behav. at 12. It is a "neutral, unbiased psychotherapeutic process that allows * * * patients to clarify their feelings and assess the various treatment options." *Ibid.* In contrast to affirmative

[3] The term *affirming* (or *affirmative*) *care* is most commonly used in the gender identity context but is also sometimes used in relation to sexual orientation, in contrast to conversion therapy. See, *e.g.*, SAMHSA, *Ending Conversion Therapy*.

therapy, which directs the patient toward a particular outcome—such as "transition[ing] to the[ir] preferred gender as safely as possible," d'Abrera et al., 28 Australasian Psychiatry at 536—exploratory therapy focuses on "helping patients gain greater clarity about the sources of their distress," Roberto D'Angelo, *Supporting Autonomy in Young People with Gender Dysphoria: Psychotherapy Is Not Conversion Therapy*, 51 J. Med. Ethics 3, 6 (2024). The objective is to "help[] individuals locate and illuminate the origins of their distress so that durable, meaningful solutions can be generated" and patients can "make truly informed choices about their lives." *Id.* at 5–6.

Exploratory therapy involves a "collaborative exploration" between the therapist and patient of the patient's feelings, experiences, and personal story. Anastassis Spiliadis, *Towards a Gender Exploratory Model: Slowing Things Down, Opening Things Up and Exploring Identity Development*, 35 Metalogos 1, 6 (2019). Religious speech naturally enters this dialogue when a patient's self-chosen aim is to live his or her religion more fully. See, *e.g.*, Mark A. Yarhouse, *Understanding Gender Dysphoria: Navigating Transgender Issues in a Changing Culture* 25 (2015) ("I know many people who are navigating gender identity concerns who love Jesus and are desperately seeking to honor him.").

Critics sometimes mischaracterize exploratory therapy as conversion therapy. See D'Angelo, 51 J. Med. Ethics at 4–5. Unlike conversion therapy, which seeks to "change" or "suppress" a person's "expression of sexual orientation or gender identity," exploratory therapy "does not aim for any fixed outcome." Peter Jenkins & Dwight Panozzo, *"Ethical Care in Secret": Qualitative Data from an International Survey of*

Exploratory Therapists Working with Gender-Questioning Clients, 50 J. Sex & Marital Therapy 557, 558–59 (2024). Indeed, a "core ethical principle" of exploratory therapy "is that therapists must respect patient autonomy and self-determination and refrain from any attempt to influence the patient." D'Angelo, 51 J. Med. Ethics at 5 (citation omitted).[4] Exploratory therapy thus "resides *outside* the affirmation-conversion binary and aims to address the distress of gender-dysphoric youth"—or youth experiencing questions about their sexual orientation. *Ibid.* (emphasis omitted); accord UK Council for Psychotherapy, *UKCP Guidance Regarding Gender Critical Views* (Nov. 2, 2023) ("Exploratory therapy should not in any circumstances be confused with conversion therapy, which seeks to change or deny a person's sexual orientation and/or gender identity.").

Exploratory therapy also should not be confused with reparative therapy. Reparative therapy seeks to eliminate same-sex attraction, while exploratory therapy helps the patient explore the sources of her distress without aiming at a predetermined outcome.

Counselors from many religious communities, including *amici*, practice exploratory therapy with gender- or sexual orientation–questioning youth. See, *e.g.*, Lara Pickford Gordon, *Psychotherapy to Manage Gender Dysphoria*, CatholicTT (July 21, 2023) (describing presentation to archdiocese about use of exploratory therapy to treat children with gender dysphoria); Letter from The Church of Jesus Christ of Latter-day Saints Family Services to Larry Marx,

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[4] See generally APA, *Ethical Principles of Psychologists and Code of Conduct*, Principle E (2017) (listing "self-determination" among patients' basic rights).

Utah Dep't of Com., Div. of Occupational & Prof'l Licensing (Oct. 15, 2019) (describing how Family Services counselors "assist young children in healthy identity exploration and development"); Mark A. Yarhouse, *Sexual Identity and Faith: Helping Clients Find Congruence* xii (2019) (explaining that religious clients "need[] a safe therapeutic space to discuss how their current values ha[ve] shaped and informed how they view[] their sexuality in ways not understood by many * * * [n]onreligious clinicians"). These counselors believe such therapy is safe, effective, and consistent with their religious faith. In addition, while not specifically endorsing exploratory therapy, the American Association of Christian Counselors—the Nation's largest faith-based counseling association—instructs its members to "acknowledge the client's fundamental right to self-determination." Am. Ass'n of Christian Couns., *AACC Code of Ethics* 14 (2023). Exploratory therapy follows that direction—elevating patient self-determination as a "core ethical principle." D'Angelo, 51 J. Med. Ethics at 5.

Exploratory therapy thus avoids the false dichotomy between affirmative therapy and conversion therapy. Unlike these two approaches, exploratory therapy respects a patient's autonomy by seeking to relieve distress by locating solutions to personal challenges involving same-sex attraction and gender dysphoria. Exploratory therapy tries to help a patient better understand herself, make more informed choices, and reduce personal distress surrounding sexual orientation and gender identity. It does not try to impose change on patients. Yet Colorado's law treats any form of psychotherapy other than affirmative therapy as conversion therapy and bans it.

II. COLORADO'S CONVERSION THERAPY STATUTE IS PART OF AN EMERGING BODY OF STATE LAWS THAT CENSOR EXPLORATORY TALK THERAPY.

A. Colorado Law Proscribes Not Only Conversion Therapy—But Legitimate Talk Therapy.

Labeling the object of Colorado's law *conversion therapy* is a misnomer. Conversion therapy, as we've explained, was long understood to involve physical treatment and other coercive techniques,[5] but the Colorado statute says nothing about physical treatment. Instead, the statute provides that conversion therapy "means any practice or treatment by a [covered professional] that attempts or purports to change an individual's sexual orientation or gender identity." Colo. Rev. Stat. § 12-245-202(3.5)(a). Included in this prohibition are any "*efforts to change behaviors or gender expressions* or to eliminate or *reduce sexual or romantic attraction* or feelings toward individuals of the same sex." *Ibid.* (emphasis added). Thus, the statute bars a religious counselor from suggesting to an immature 15-year-old boy with same-sex attraction that he abstain from sexual relations with other boys, since that would be an "effort[] to change behaviors." *Ibid.* The same prohibition would bar counseling that encouraged a gender dysphoric youth to avoid venues, places, or groups that promote transgender identities, such as certain websites.

Granted, the statute permits "[a]cceptance, support, and understanding for the facilitation of an individual's

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[5] Reparative therapy is not a meaningful exception. Although it seeks to eliminate same-sex attraction through talk therapy, it did not arise until decades after *conversion therapy* had come to mean the physical treatments we have described.

coping, social support, and identity exploration and development." *Id.* § 12-245-202(3.5)(b)(I). Also permitted is "[a]ssistance to a person undergoing gender transition." *Id.* § 12-245-202(3.5)(b)(II). But these provisions merely authorize the affirmation of sexual orientation and gender identity over other aspects of client identity, including religious identity. And therapists may "address unlawful conduct or unsafe sexual practices," but only when such "interventions" are "sexual-orientation-neutral." *Id.* § 12-245-202(3.5)(b)(I).

Colorado's restrictions govern mental health professionals, including licensed therapists, *id.* § 12-245-202(3.5), and physicians, *id.* § 12-240-104(5.5). But the statute does not apply to "[a] person engaged in the practice of religious ministry * * * except that the person shall not publicly claim to hold any title," such as *psychologist*, "unless the person is licensed or certified" under Colorado law. *Id.* § 12-245-217(1). Otherwise, the statute offers no relief for counselors employed by a church or other religious organization or for religious organizations themselves.[6] Nor does the law accommodate counselors like Chiles, whose sincere religious beliefs conflict with the command to accept and facilitate LGBT-related assertions of personal identity.

The statute is silent about consent. The statute prevents therapists from helping a young client prioritize religious identity and beliefs over contrary

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[6] Compare Utah Code § 58-1-511(3) (enumerating safe harbors in the Utah conversion therapy law, including therapy that "discusses moral, philosophical, or religious beliefs or practices"); *id.* § 58-1-511(4) (enumerating exclusions, including a person who "act[s] substantially in the capacity of a religious advisor and not in the capacity of a health care professional").

sexual behaviors or gender expressions—even at the client's or parents' request.

Sanctions are severe. Violations constitute "unprofessional conduct," *id.* § 12-240-121(ee), and may result in a fine up to $5,000 per incident, suspension from practice, or revocation of the violator's professional license, *id.* § 12-245-225.

Colorado's conversion therapy law thus poses serious consequences for professional counselors. Assisting a young patient "to change behaviors or gender expressions" or merely to "reduce" feelings of same-sex attraction, *id.* § 12-245-202(3.5)(a), risks the loss of the counselor's license—even if such assistance reflects the counselor's sincere religious beliefs and even if the patient and her parents consent. The implications for the lives of children and adolescents are no less severe. Without professional counseling to help them navigate the complex nature of personal identity—including religious identity—young patients and their parents are left to cope alone.

B. Recent Government Reports Cast Doubt on the Basis for Regarding Non-Coercive Talk Therapy as Harmful to Minors.

Twenty-three States have adopted laws like Colorado's, prohibiting conversion therapy for minors. See Lois A. Weithorn, *The Intrusive State: Restrictions on Gender-Affirming Healthcare for Minors, Exceptions to the Doctrine of Parental Consent, and Reliance on Science and Medical Expertise*, 75 UC L.J. 713, 719 (2024). Many of these laws resemble Colorado's in defining *conversion therapy* to include non-aversive talk therapy even when not aimed at changing sexual orientation or gender identity. See, *e.g.*, Del. Code tit.

24, § 1702(3) (defining *conversion therapy* to include "any effort to change behaviors or gender expressions or to eliminate or reduce sexual or romantic attractions or feelings toward individuals of the same gender"); Conn. Gen. Stat. § 19a-907 (similar); 405 Ill. Comp. Stat. 48/15 (similar).

Skepticism about the evidentiary basis for such legislation is growing. A recent report by the U.S. Department of Health and Human Services concludes that there is no "international consensus" concerning the appropriate treatment of pediatric patients with mental health conditions related to transgender issues. U.S. Dep't of Health & Hum. Servs., *Treatment for Pediatric Gender Dysphoria: Review of Evidence and Best Practices* 13 (2025) (HHS Report). There's more. HHS found that "[e]quating 'exploratory therapy' with 'conversion therapy' is misguided." *Id*. at 254. HHS views psychotherapy as a "noninvasive alternative" to puberty blockers and surgeries for transgender patients and found no evidence of harm from such therapy. *Id*. at 16. HHS likewise noted the "robust evidence" that psychotherapeutic care is "effective[]" in addressing co-occurring and "similar types of psychological distress" such as depression, anxiety, and eating disorders—and "carries little risk." *Id*. at 259–60. The Report added that such therapy "tr[ies] to help children and adolescents come to terms with their bodies." *Id*. at 253. Indeed, HHS concluded that "[t]he effectiveness of psychotherapy for a wide range of mental health problems, including those that often present with [gender dysphoria], suggests it may also be beneficial for [gender dysphoria]." *Id*. at 254.

The Cass Review, commissioned by the United Kingdom's National Health Service, voices similar doubts. It criticizes laws preventing therapists from

providing minors in need of mental health care with anything but affirmative care. See *The Cass Review: Independent Review of Gender Identity Services for Children and Young People* 150 (2024) (Cass Review). The Review further warns, "[i]t is harmful to equate [therapeutic treatment] to conversion therapy." *Ibid*. And the Review notes that the choice between "therapeutic interventions or a medical pathway" is false, since psychotherapy aims not to change identity but to "alleviate * * * distress." *Ibid*.

These government-issued reports cast doubt on the central premises of Colorado's statutory regime. The evidentiary foundation for barring non-affirmative, exploratory talk therapy that aims to assist youth with LGBT-related issues is weak. See HHS Report at 186, 265. Both reports say that overbroad conversion therapy bans deny children and adolescents a non-invasive means of addressing a range of mental health conditions. See *id.* at 16 ("Psychotherapy is a non-invasive alternative to endocrine and surgical interventions for the treatment of pediatric gender dysphoria. Systematic reviews of evidence have found no evidence of adverse effects of psychotherapy in this context."); Cass Review at 150 ("The intent of psychological intervention 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 they pursue a medical pathway or not. It is harmful to equate this approach to conversion therapy as it may prevent young people from getting the emotional support they deserve."). Yet when it comes to youth who have questions or concerns about their sexual orientation or gender identity, Colorado persists in sharply restricting talk therapy despite the meaningful relief it could provide. That law

is not only unjustified—it is an unconstitutional restriction on protected speech.

III. COLORADO'S CONVERSION THERAPY STATUTE UNLAWFULLY ENGAGES IN VIEWPOINT DISCRIMINATION AGAINST RELIGIOUS SPEECH.

A. Colorado Law Restricts Protected Speech—Not Merely Speech Incidental to Professional Conduct.

Bedrock principles under the Free Speech Clause require that a law must withstand strict scrutiny when it restricts speech based on content or viewpoint. See, *e.g.*, *Reed*, 576 U.S. at 163; *Rosenberger*, 515 U.S. at 829. Colorado's statute restricts the clinical speech of psychologists, psychiatrists, and other talk therapists based on both. The statute must therefore meet the exacting demands of strict scrutiny.

The State resists that conclusion. By its lights, the statute "implicates mental health professionals' speech only as part of their practice of mental health treatment." App.49a. The Tenth Circuit endorsed that defense, adding that "[u]nder *NIFLA*, this is precisely the type of regulation that 'regulate[s] professional conduct * * * incidentally involv[ing] speech.'" *Ibid.* (quoting *NIFLA*, 585 U.S. at 768). That conclusion misreads free speech precedent and transforms professional counseling into a First Amendment–free zone.

NIFLA found no "persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles." *NIFLA*, 585 U.S. at 773. Because there is no tradition justifying the content-based regulation of professional speech writ large, governments may "afford[] less protection for professional speech in two circumstances." *Id.* at 768. One, a "more deferential review"

may apply to "laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Ibid.* Two, deferential review is fitting when States "regulate professional *conduct*, even though that conduct incidentally involves *speech*." *Ibid.* (emphasis added).

Colorado insists that its conversion therapy law is a valid regulation of professional conduct because any effect on professional speech is incidental. App.45a–50a. Not so. Contrast Colorado's conversion therapy ban with laws primarily regulating professional conduct, such as informed consent laws. See *NIFLA*, 585 U.S. at 769–70. Requiring a physician to tell a patient about the nature of a medical procedure and its attendant risks is incidental to the legislative object of preventing medical operations without patient consent. Colorado's conversion therapy law inverts the relationship between speech and conduct. When it comes to conversion therapy, speech *is* the law's object; any non-speech conduct is incidental and therefore outside the *NIFLA* exception. See Merriam-Webster, *Incidental*, https://www.merriam-webster.com/dictionary/incidental (last visited June 10, 2025) (defining *incidental* as "occurring merely by chance or without intention or calculation"). Prohibiting and punishing certain therapeutic speech is the very purpose of Colorado's law—not the chance effect of regulating professional conduct.

Nor does Colorado's statutory ban resemble laws punishing professional malpractice. A counselor assisting a patient to pursue his own goal of refraining from sexual conduct is not remotely like a lawyer who delivers advice that lands his client in legal jeopardy or a doctor whose advice leads to medical injury. Such therapeutic counsel may encourage a youthful patient

to delay acting on same-sex attraction or feelings of nonconforming gender identity until she becomes an adult. Rather than exposing the patient to imminent harm, such advice cautiously seeks "to help children and adolescents come to terms with their bodies" before irreparably changing them. HHS Report at 25; see also Cass Review at 165 (advising clinicians to assist young patients to avoid "premature decisions").

NIFLA is only one of a line of decisions rejecting restrictions on speech related to health and medical care. *Sorrell* v. *IMS Health, Inc.*, 564 U.S. 552 (2011), held that a Vermont law restricting the disclosure and use of information in pharmacy records for marketing offended the Free Speech Clause. *Sorrell* applied standard free speech doctrine, starting with the principle that "[t]he First Amendment requires heightened judicial scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'" *Id.* at 566 (quoting *Ward* v. *Rock Against Racism*, 491 U.S 781, 791 (1989)). The Court rejected Vermont's contention that "heightened scrutiny [was] unwarranted because its law [was] a mere commercial regulation." *Ibid.* As the Court explained, the challenged statute "imposes more than an incidental burden on protected expression. Both on its face and in its practical operation, Vermont's law imposes a burden based on the content of speech and the identity of the speaker." *Id.* at 567. So too, here.

Professional speech is fully secured by the First Amendment's aegis. See *Holder*, 561 U.S. at 27–28 (holding that communication keeps First Amendment protection even when delivered as professional advice). Talk therapists are entitled to the full protection of the Free Speech Clause, no less than lawyers or others for whom the practice of their

profession necessarily entails speech. See *Gentile* v. *State Bar of Nev.*, 501 U.S. 1030, 1054 (1991) ("[N]one of the justifications put forward by [the State Bar] suffice to sanction abandonment of our normal First Amendment principles in the case of speech by an attorney regarding pending cases.").

B. Colorado's Statute Engages in Content and Viewpoint Discrimination.

The Colorado law violates the crucial principle that "[t]he First Amendment generally prevents government from proscribing speech * * * because of disapproval of the ideas expressed." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 382 (1992). That is why a law that sanctions speech because of its content can be sustained only when "narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. A law is "content based if [it] applies to particular speech because of the topic discussed or the idea or message expressed." *Ibid.* By contrast, "[g]overnment discrimination among viewpoints—or the regulation of speech based on 'the specific motivating ideology or the opinion or perspective of the speaker'—is a 'more blatant' and 'egregious form of content discrimination.'" *Id.* at 168 (quoting *Rosenberger*, 515 U.S. at 829). A content-based restriction resembles "a law banning the use of sound trucks for political speech," while a viewpoint-based restriction might be a law banning the use of sound trucks by Democrats. *Id.* at 169. Colorado's conversion therapy law is content-based, in that it restricts speech by licensed counseling professionals to minors on the topics of sexual orientation and gender identity. See Colo. Rev. Stat. § 12-245-202(3.5)(a).

Worse yet, the Colorado statute engages in viewpoint discrimination. A therapist may provide "[a]cceptance, support, and understanding for the

facilitation of an individual's coping, social support, and identity exploration and development." *Id.* § 12-245-202(3.5)(b)(I). And the statute permits "[a]ssistance to a person undergoing gender transition." *Id.* § 12-245-202(3.5)(b)(II). Colorado thus permits therapeutic counseling that accepts and supports a young patient's LGBT-related behavior, feelings, and expressions but not counseling that probes or questions them. What's more, the statute condemns "efforts to change behaviors" involving same-sex attraction or gender identity or to "reduce" same-sex attraction and feelings. *Id.* § 12-245-202(3.5)(a). Even "interventions to prevent or address unlawful conduct or unsafe sexual practices" must be "sexual-orientation-neutral." *Id.* § 12-245-202(3.5)(b)(I). In short, viewpoints that affirm and facilitate the expression of same-sex attraction and nonconforming gender identity are legal, while viewpoints that question such expression—even when rooted in sincere religious beliefs—can incur serious penalties. Like the invalid statute in *NIFLA*, "viewpoint discrimination is inherent in the design and structure of this Act." 585 U.S. at 779 (Kennedy, J., concurring).

As with any law that engages in viewpoint discrimination, Colorado's statute is presumptively invalid. See *Rosenberger*, 515 U.S. at 828. "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. By permitting only therapeutic messages it approves, the State censors other messages—including messages of love and support for a young patient's challenges that also help him to cope with his feelings in harmony with his stated religious identity and self-chosen religious commitments.

C. Colorado's Statute Discriminates Against Religious Speech and Religious Speakers.

Colorado's attempt to silence viewpoints it disapproves is all the more objectionable because the law censors religious speech. "[I]n Anglo–American history, at least, 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." *Capitol Square Rev. & Advisory Bd.* v. *Pinette*, 515 U.S. 753, 760 (1995). Not only that. Religious speech is doubly protected by the overlapping security of the Free Speech and Free Exercise Clauses—a feature of the Bill of Rights that reflects "the framers' distrust of government attempts to regulate religion and suppress dissent." *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 524 (2022).

Yet Colorado's statutory regime discriminates against certain forms of religious speech. Therapeutic dialogue affirming or facilitating traditional religious understandings of sexuality and gender fall within the statute's prohibition. See Colo. Rev. Stat. § 12-245-202(3.5)(a). That prohibition falls heaviest on professionals with viewpoints influenced by traditional beliefs about sexuality and gender. Such a therapist may risk the loss of professional license simply by probing the patient's own religious beliefs or responding to the patient's religious concerns. In effect, the statute amounts to a rule excluding certain religious denominations, confessions, or creeds from an important corner of the counseling profession.

That sobering consequence calls to mind Holmes's aphorism: "a page of history is worth a volume of logic." *N.Y. Trust Co.* v. *Eisner*, 256 U.S. 345, 349 (1921). By prohibiting and punishing therapeutic speech from traditional religious viewpoints, Colorado's statute

echoes the civil disabilities historically deployed to punish religious dissenters.

Pre-revolutionary English law, for instance, excluded Catholics who refused to take particular oaths renouncing Catholic doctrines or participate in Anglican religious services from teaching school or practicing law (along with other disabilities). See Corporation Act 1661, § IX, *reprinted in English Historical Documents 1660–1714*, at 376 (Andrew Browning ed., 1953) (school teaching); An Act Requiring the Practicers of Law to Take the Oaths and Subscribe the Declaration Therein Mentioned 1695, 7 & 8 Will. III, c. 24, *reprinted in* 7 *The Statutes of the Realm* 109 (1820) (legal profession). See generally 4 Blackstone, *Commentaries* at 54–56 (describing disabilities on Catholics under eighteenth-century English law).

Early American colonies and States likewise imposed civil disabilities on religious dissidents. See Lawrence Henry Gipson, *The Coming of the Revolution: 1763–1775*, at 13 (1954). One scholar concluded that "the bulk of complaints about infringement of religious liberty during the preconstitutional period apparently concerned outright discrimination against dissenters from the dominant sect." David P. Currie, *The Constitution in the Supreme Court: The First Hundred Years, 1789–1888*, at 440 (1985).

The founding generation was thus familiar with the use of civil disabilities—and renounced the practice. Amendments offered by State ratifying conventions expressed a commitment to religious equality. Virginia proposed an amendment declaring that "all men have an equal, natural and unalienable right to the free exercise of religion according to the dictates of conscience, and that no particular sect or society ought to be favored or established by Law in preference to

others." Va. Ratifying Convention, Proposed Amendments, June 27, 1788, *reprinted in Complete Bill of Rights* 13 (Neil H. Cogan ed., 2d ed. 2015). New York's ratifying convention submitted a parallel amendment. It declared that "the People have an equal, natural, and unalienable right, freely and peaceably to Exercise their Religion according to the dictates of Conscience, and that no Religious Sect or Society ought to be favoured or established by Law in preference of others." N.Y. Ratifying Convention, Proposed Amendments, July 26, 1788, *reprinted in id.* at 12. Maryland Antifederalists followed suit. See Md. Ratifying Convention, Minority Proposal, Apr. 26, 1788, *reprinted in id.* at 11. So did representatives in North Carolina and Rhode Island. See *id.* at 12–13.

These State proposals appear to have influenced the First Amendment. Madison had at hand a pamphlet compiling the amendments offered by State ratifying conventions while preparing amendments for consideration by Congress. See Carl H. Esbeck, *Uses and Abuses of Textualism and Originalism in Establishment Clause Interpretation*, 2011 Utah L. Rev. 489, 526. Evidently guided by State concerns, he framed the first draft of the First Amendment in part as an express ban on religious discrimination. Madison's proposed amendments included guarantees that "[t]he civil rights of none shall be abridged on account of religious belief or worship" and that "the full and equal rights of conscience" would be secure. See 1 *Annals of Cong.* 451 (Joseph Gales ed., 1834). Madison's effort to disempower the national government from engaging in religious discrimination was consistent with his understanding of religious freedom. See James Madison, *Memorial and Remonstrance Against Religious Assessments* (June 20, 1785), *reprinted in James Madison: Writings* 33 (Jack N. Rakove ed.,

1999) (decrying a proposed Virginia law that would "degrade[] from the equal rank of Citizens all those whose opinions in Religion do not bend to those of the Legislative authority").

An early scholar of the Constitution neatly captured the founding generation's understanding in these terms: In this country, he wrote, "legal persecution is unknown." William Rawle, *A View of the Constitution of the United States of America* 119 (1825). That is because America's commitment to "the equality of all our citizens" precludes "the denial of the smallest civic right" on the ground of "religious intolerance." *Id.* at 117.

* * *

By censoring therapeutic speech it disapproves, Colorado silences religious therapists with a traditional or historical viewpoint on sexuality and gender. The State has thus lost sight of the "fixed star in our constitutional constellation"—that "no official, high or petty, can prescribe what shall be orthodox * * * or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ.* v. *Barnette*, 319 U.S. 624, 642 (1944). Colorado's ban on what it calls conversion therapy should be declared void, not only because of its interference with free speech and legitimate patient interests in self-determination—but also because of the law's suppression of religious freedom.

CONCLUSION

The Tenth Circuit's decision should be reversed.

Respectfully submitted,

R. SHAWN GUNNARSON
Counsel of Record
CHRISTOPHER A. BATES
JAROM M. HARRISON
CATHERINE L. GRANTHAM
KIRTON | MCCONKIE
36 South State Street
Suite 1900
Salt Lake City, Utah 84111
(801) 328-3600
sgunnarson@kmclaw.com

Counsel for Amici Curiae

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