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

AMICUS CURIAE BRIEF OF THE LIBERTY JUSTICE CENTER IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a law that censors certain conversations between counselors and their clients based on the viewpoints expressed regulates conduct or violates the Free Speech Clause.

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INTEREST OF THE *AMICUS CURIAE*[1]

The Liberty Justice Center is a nonprofit, nonpartisan, public-interest litigation center that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. *See, e.g., Janus v. AFSCME*, 138 S. Ct. 2448 (2018). To that end, the Liberty Justice Center litigates cases around the country, including many cases addressing the intersection of professional regulation and freedom of expression. *See, e.g., McDonald v. Lawson*, Ninth Cir. No. 22-56220; *File v. Martin*, 33 F.4th 385 (7th Cir. 2022).

This case concerns amicus because the right to speak is fundamental, and that right applies equally to professionals as to all other citizens.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Colorado Minor Conversion Therapy Law ("MCTL") prohibits licensed mental health professionals from engaging in counseling or talk therapy with minors who seek to change or reduce same-sex attraction or gender nonconformity. See Colo. Rev. Stat. § 12-245-202(3.5). The law's definition of "conversion ther-

[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than amicus funded its preparation or submission.

apy" is broad, encompassing not only physical interventions but also any counseling or talk therapy that attempts to alter a client's sexual orientation or gender identity. The statute does not limit its reach to aversive or coercive practices, but instead covers any attempt to "change" or "reduce" same-sex attraction or gender nonconformity, regardless of the method employed. *Id.* Enforcement is delegated to the state's mental health professional boards, which may revoke licenses, issue cease-and-desist orders, or impose administrative fines of up to $5,000 per violation. Colo. Rev. Stat. § 12-245-225.

Chiles challenges the MCTL on the grounds that it violates the First Amendment by regulating speech, not conduct. The core issue is whether the counseling prohibited by Colorado's statute constitutes protected speech under the First Amendment, or whether it is merely professional conduct subject to regulation. The Tenth Circuit and Respondents argue that medical treatments are not protected speech, even when the "treatment" consists solely of counseling—i.e., the spoken word between counselor and client. This position is contrary to the Supreme Court's decision in *National Institute of Family and Life Advocates v. Becerra* ("*NIFLA*"), which held that professional speech is not categorically exempt from First Amendment protection. *See NIFLA v. Becerra*, 138 S. Ct. 2361, 2371-72 (2018).

The MCTL regulates speech, and therefore constitutes impermissible viewpoint discrimination in violation of the First Amendment. A historical review of medical licensing laws demonstrates that counseling

and similar non-physical interventions were not considered medical treatment and thus fall within the ambit of protected speech. The Supreme Court has cautioned that states may not "regulate speech by simply labeling it conduct." *NIFLA*, 138 S. Ct. at 2373 (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27–28 (2010)). When the regulated activity is the communication of ideas, advice, or information—rather than the administration of drugs, surgery, or other physical interventions—it is speech protected by the First Amendment.

The statute targets a specific perspective—counseling aimed at altering or reducing same-sex attraction or gender nonconformity—while permitting counseling that affirms or supports such identities. This selective regulation of speech triggers strict scrutiny, as it explicitly favors one ideological viewpoint over another. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015); *NIFLA*, 138 S. Ct. at 2375. The state's asserted interest in protecting minors from harmful practices does not justify the statute's broad prohibition on non-coercive, consensual talk therapy. The MCTL's failure to distinguish between harmful conduct and purely expressive counseling sessions is an overreach that burdens protected speech unnecessarily.

The MCTL's viewpoint-based restriction on counseling violates the First Amendment by failing to satisfy the rigorous demands of strict scrutiny. The law neither demonstrates a sufficiently tailored approach nor justifies its sweeping prohibition on protected speech. The Supreme Court should reverse the judgment below and hold that Colorado's MCTL is unconstitutional.

ARGUMENT

I. States have not historically regarded counseling as medical treatment, therefore counseling cannot be considered conduct.

Colo. Rev. Stat. § 12-245-202(3.5) defines conversion therapy 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." The definition encompasses not only physical interventions but also any counseling or talk therapy that seeks to address a client's sexual orientation or gender identity. Colo. Rev. Stat. § 12-245-202(3.5). The statute does not limit its reach to aversive or coercive practices, but also attempts to "change" or "reduce" same-sex attraction or gender nonconformity, regardless of the method employed. *Id*.

Colo. Rev. Stat. § 12-245-224(1)(t)(V) subsequently criminalizes the practice of conversion therapy by anyone with a license granted by the various state mental-health professional boards, including the Colorado State Board of Licensed Professional Counselor Examiners, which licenses counselors. Boards overseeing mental health professionals may "take disciplinary actions or bring injunctive actions, or both." Colo. Rev. Stat. § 12-245-101(2). If a mental health professional violates the MCTL, the statute authorizes the overseeing board to send the provider a letter of admonition

or concern; deny, revoke, or suspend the provider's license; issue a cease-and-desist order; or impose an administrative fine on the provider of up to $5,000 per violation. Colo. Rev. Stat. § 12-245-225.

The Tenth Circuit and Respondents argue that medical treatments are not protected speech, even when the "treatment" consists solely of counseling—i.e., the spoken word between counselor and client. See Reply Br. at 2-3, 8-9. But this is contrary to the Supreme Court's decision in *National Institute of Family and Life Advocates v. Becerra* ("*NIFLA*"), which held that professional speech is not categorically exempt from First Amendment protection. *See NIFLA v. Becerra*, 138 S. Ct. 2361, 2371-72 (2018); see also Pet. Br. at 17-19.

However, assuming such a distinction exists in contravention of this Court's decision in NIFLA, Colorado's MCTL regulates speech, rather than conduct. A historical review of similar practices demonstrates counseling was traditionally not deemed medical treatment, as in conduct, and therefore must constitute speech.

During the period between 1874 and 1915, the various state legislatures enacted over 400 statutes relating to medical practice, revising, amending, and supplementing their original medical licensing regimes. "Report of the Secretary of the Committee on Medical Legislation," American Medical Association Bulletin, IV 162-63 (March 15, 1909). By 1901, every single state and the District of Columbia had a medical licensing regime of some sort in effect. James C. Mohr, *Licensed to Practice: The Supreme Court Defines the*

American Medical Profession, 51 J. Hist. Med. & Allied Sci. 73, 75 (1996). Despite the abundance of these laws, the statutes themselves in addition to case law reveals that non-physical interventions akin to counseling were not considered a form of medical treatment.

While counseling is relatively new, there is a historical analog in the "drugless practitioners" of the late 19th and early 20th centuries. Two types of 'drugless healers,' as they were called, were especially abundant during the rise of licensing laws from which the definition of medical treatment was a frequent debate: Christian Scientists and Mind Curers. Norman Gevitz, *The D.O.s: Osteopathic Medicine in America* 41–43 (2d ed. 2004).

In 1879, Mary Baker Eddy founded the Church of Christ. whose practitioners rejected the use of drugs and surgery and purported to cure disease by persuading their patients of God's goodness and the unreality of sin, sickness, and death. Around the same time, Quimby disciple Warren Felt Evans helped forge a spiritual (though less explicitly scriptural) school of thought known as the Mind Cure or New Thought movement, which stressed the healing power of positive thinking. Charles S. Braden, *Spirits in Rebellion: The Rise and Development of New Thought* 85–87 (1963).

Uniting both Christian Scientists and the New Thought Movement was the practice of not utilizing physical interventions, such as drugs or surgery. Recognizing the unique nature of these practices, many states expressly exempted drugless healers from med-

ical licensing laws. For example, in 1893, the Connecticut medical licensing law explicitly stated that it did not apply "to any chiropodist or clairvoyant who does not use in his practice any drugs, medicines or poison, nor to any person practicing the massage method, or Swedish movement cure, sun cure, mind cure, magnetic healing, or Christian science, nor to any other person who does not use or prescribe in his treatment of mankind, drugs, poisons, medicine, chemicals, or nostrums." Conn. Pub. Acts ch. 194, § 1 (1893). Five years later, Massachusetts would go on the pass a law also exempting drugless healers from license examination and registration. Mass. Acts ch. 489, § 1 (1898).

Although no medical licensing statutes outside New England included similarly broad exceptions for drugless practitioners, a growing number of jurisdictions expressly exempted treatment by prayer generally, or Christian Science in particular. By 1907, Christian Scientists were exempted from medical licensing in eleven states—a number that would grow to twenty-eight by 1917. Lewis A. Grossman, *Orthodoxy and "The Other Man's Doxy": Medical Licensing and Medical Freedom in the Gilded Age*, draft ch. 2 of *You Can Choose Your Medicine: Freedom of Therapeutic Choice in American History and Law* (forthcoming, Oxford Univ. Press), at 16. Around the same time, two court cases defined medical practice as requiring some form of drugs or surgery.

In *Bennet v. Ware*, 4 Ga. App. 293, 302 (Ga. Ct. App. 1908), the Court of Appeals of Georgia explicitly defined "mental therapeutics" as not medical practice, stating:

> All statutes for the regulation of the practice of medicine…are not directed against or intended to include…those who heal or pretend to heal the sick by any form of mental therapeutics, such as Christian science, magnetic treatment, hypnotism, and the like.

In *State v. Biggs*, 133 N.C. 729, 771 (1903), the North Carolina Supreme Court concluded that the federal and state constitutions required that the state's licensing requirement did not apply to a drugless practitioner who treated patients with physical manipulation and dietary advice. The case found that the "practice of medicine and surgery" excludes practices like advice to patients on what to eat or not. The Court not only found that such actions were not medical treatments, but that, "This is a free country, and any man has a right to be treated by any system he chooses. The law cannot decide that any one system shall be the system he shall use. If he gets improper treatment for children or others under his care, whereby they are injured, he is liable to punishment; but whether it was proper treatment or not is a matter of fact to be settled by a jury of his peers, and not a matter of law to be decided by a judge nor prescribed beforehand by an act of the Legislature." *Id.* at 773.

What these two cases, and the numerous exemptions for drugless practitioners during the original age of licensing, demonstrate is that the distinction between speech and conduct in the context of counseling is not merely semantic. The Supreme Court has cautioned that states may not "regulate speech by simply labeling it conduct." *NIFLA*, 138 S. Ct. at 2373 (citing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27–

28 (2010)). When the regulated activity is the communication of ideas, advice, or information—rather than the administration of drugs, surgery, or other physical interventions—it falls squarely within the ambit of protected speech. *See King v. Governor of N.J.*, 767 F.3d 216, 229 (3d Cir. 2014) (recognizing that "talk therapy" is "the quintessential form of speech in the counseling context"), abrogated on other grounds by *NIFLA*, 138 S. Ct. 2361.

Colorado's statute, by its plain terms, regulates what counselors may say to their clients, not what they may do to them. Accordingly, under established First Amendment doctrine, counseling as defined by Colorado law is speech.

II. The MCTL's prohibition on "conversion therapy" is a violation of viewpoint discrimination.

Under the First Amendment, viewpoint discrimination occurs when the government regulates speech based on the specific perspective or ideology expressed, targeting particular messages while allowing others. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Such regulations are subject to strict scrutiny, requiring the government to demonstrate a compelling interest and that the restriction is narrowly tailored to achieve that interest. *Id.* at 163-64.

The Supreme Court has consistently held that laws singling out speech based on its communicative content, particularly when they prohibit only certain viewpoints, violate the First Amendment's guarantee

of free expression. *See, e.g., Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (holding that denying funding to a student publication based on its religious perspective constituted impermissible viewpoint discrimination).

In the context of professional speech, the Court in *NIFLA*, 138 S. Ct. at 2371-72, clarified that speech does not lose First Amendment protection simply because it occurs in a professional setting, rejecting categorical exemptions for professional conduct that is expressive in nature. A law that prohibits professionals from expressing certain viewpoints, while permitting others, triggers heightened scrutiny and is presumptively unconstitutional unless the government can meet the exacting standards of strict scrutiny. *Id.* at 2374-75.

To pass this test, the government must show that the law addresses a harm of the highest order (e.g., preventing imminent danger or protecting public safety) and that no less restrictive alternative could achieve the same goal. *See, e.g., Burson v. Freeman*, 504 U.S. 191, 198 (1992) (upholding a content-based restriction only because it was narrowly tailored to prevent voter intimidation, a compelling interest). Failure to meet either prong—compelling interest or narrow tailoring—renders the regulation unconstitutional. *Id.*

In the context of Colorado's Minor Conversion Therapy Law (MCTL), Colo. Rev. Stat. § 12-245-202(3.5), the statute's prohibition on counseling that "attempts or purports to change an individual's sexual orienta-

tion or gender identity" constitutes viewpoint discrimination by targeting a specific perspective—counseling aimed at altering or reducing same-sex attraction or gender nonconformity—while permitting counseling that affirms or supports such identities. This selective regulation of speech, as established previously, triggers strict scrutiny, as it explicitly favors one ideological viewpoint over another. *See Reed*, 576 U.S. at 168; *NIFLA*, 138 S. Ct. at 2375 (striking down a law compelling speech that favored a pro-abortion viewpoint).

To survive strict scrutiny, Colorado must demonstrate that the MCTL serves a compelling governmental interest, such as protecting minors from harm, and that it is narrowly tailored to achieve that interest without unduly restricting protected speech.

The MCTL's broad scope, which encompasses noncoercive, consensual talk therapy without limiting its prohibition to aversive or harmful practices, undermines its claim to narrow tailoring. See Colo. Rev. Stat. § 12-245-202(3.5). The statute's failure to distinguish between harmful conduct (e.g., coercive or abusive therapies) and purely expressive counseling sessions between licensed professionals and willing clients is an overreach that burdens protected speech unnecessarily. *See NIFLA*, 138 S. Ct. at 2377 (noting that less restrictive alternatives, such as public education campaigns, could achieve similar goals without compelling or restricting speech).

Moreover, the MCTL's enforcement mechanisms, including license revocation, cease-and-desist orders, and fines of up to $5,000 per violation, directly penalize the expression of a disfavored viewpoint, chilling

counselors' ability to engage in professional speech consistent with their expertise or their clients' preferences. Colo. Rev. Stat. § 12-245-225. The Supreme Court has repeatedly invalidated regulations that impose such penalties on expressive activity, particularly when they discriminate based on viewpoint. *See, e.g., Iancu v. Brunetti*, 139 S. Ct. 2294, 2301 (2019) (striking down a trademark restriction for targeting specific viewpoints); *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570-71 (2011) (invalidating a law restricting speech based on the speaker's perspective).

To meet the narrow tailoring requirement, Colorado would need to show that no less restrictive means—such as regulating only demonstrably harmful practices or requiring informed consent—could achieve its goal. The state's failure to explore such alternatives, coupled with the statute's broad prohibition on a specific type of counseling, renders it unlikely to survive strict scrutiny. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993) (holding that a law is not narrowly tailored if it fails to address the targeted harm with precision).

Thus, the MCTL's viewpoint-based restriction on counseling violates the First Amendment by failing to satisfy the rigorous demands of strict scrutiny, as it neither demonstrates a sufficiently tailored approach nor justifies its sweeping prohibition on protected speech

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Tenth Circuit and hold that Colorado's Minor Conversion Therapy Law violates the First Amendment.

Respectfully submitted,

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