No. 24-539

In the Supreme Court of the United States

KALEY CHILES,

Petitioner,

v.

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

Respondents.

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

BRIEF OF IOWA AND 20 OTHER STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does a law that censors certain conversations between counselors and their clients based on the viewpoints expressed regulate conduct or speech protected by the Free Speech Clause?

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INTEREST OF AMICUS CURIAE

Amici curiae States of Iowa, Alabama, Alaska, Arkansas, Florida, Georgia, Kansas, Kentucky, Idaho, Louisiana, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, South Dakota, Texas, and West Virginia, and the Arizona Legislature ("amici States") submit this brief in support of Petitioner, Kaley Chiles, urging this Court to reverse the Tenth Circuit's decision. That decision allowed Colorado to regulate counselors' speech on a topic of "fierce public debate." *Tingley v. Ferguson*, 144 S.Ct. 33, 33 (2023) (Thomas, J., dissenting from denial of certiorari). That debate is over how to best "help minors with gender dysphoria." *Id.*

This Court should hold that laws telling counselors how they must treat hotly contested issues go too far. Such a stance is consistent with longstanding case law—for example, Judge Hartz below recognized that the majority erred "because Supreme Court doctrine is so clearly to the contrary—the majority opinion treats speech as conduct." *Chiles v. Salazar*, 116 F.4th 1178, 1228 (10th Cir. 2024) (Hartz, J., dissenting).

Amici States have a strong interest in protecting their licensed professionals—and the children whom they treat—from State-imposed orthodoxy. Amici States have experience with regulating professional conduct in a manner that does

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[1] Amici curiae States state that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than amici curiae, its members, or its counsel contributed to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

not violate the First Amendment. Indeed, many professional-licensure requirements and other professional-practice prerequisites designed to protect the public from incompetence are undeniably constitutional. But the Tenth Circuit's decision risks unduly restricts counselors' ability to advise and help children based on the message the counselors wish to impart. Amici States are home to many Americans who could be affected by censorship laws like Colorado's. Many border States in that Circuit and cannot speak or receive certain messages in those States. And this type of ban on counseling will create problems for children that split time between the censoring States and amici States.

When this Court considers the regulations at issue in Colorado, it should keep in mind that Amici States regulate professionals in many other contexts, too. Guidance as to the propriety of those regulations is important and will benefit Amici States as they ensure that their regulations properly respect speech while still protecting their residents from bad conduct. This Court's guidance is therefore critical to preserving the careful balance between professional regulation and the First Amendment.

The Tenth Circuit's decision imposes undue and illegal burdens on citizens' First Amendment rights. This Court should reverse that decision and hold that Colorado's challenged law is subject to First Amendment scrutiny.

SUMMARY OF ARGUMENT

More than twenty States censor therapists from speaking disfavored messages to their patients. *Tingley v. Ferguson*, 47 F.4th 1055, 1063 (9th Cir.

2022). This Court should hold that professional regulations like this are subject to heightened scrutiny under the standard applicable for viewpoint discrimination.

The Tenth Circuit here recognized that Petitioner's "First Amendment right to freedom of speech is implicated" under Colorado's law but erred when concluding that right " is not abridged." *Chiles*, 116 F.4th at 1210. The Tenth Circuit found that Colorado's law banning "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" does not intrude on a therapist's First Amendment rights. *Chiles*, 116 F.4th at 1192 (quoting Colo. Rev. Stat. § 12-245-202(3.5)). Violating that law "has consequences in Colorado." *Id.* Indeed, those consequences include revocation or suspension of "the provider's license" or fines up to "$5,000 per violation." *Id.* (quoting Colo. Rev. Stat. § 12-245-225).

Judge Hartz's dissent recognized the deep problems in the majority opinion's categorical holding that "engaging in the practice of a profession is conduct (even if the practice consists exclusively of talking)." *Id.* at 1226 (Hartz, J., dissenting). Under that logic, "any restriction on professional speech is just incidental to the regulation of conduct." *Id.*

But that cannot be. Indeed, this Court has found that "such wordplay poses a serious threat to free speech." *Id.*

This Court took this case and now should clarify two outstanding and important issues. *First*, free citizens need not choose between making a living in a licensed profession and retaining their right to speak freely. *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 796 (1988) ("The government may not … require a speaker to forgo compensation in order to engage in protected speech."); *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring in result) ("The First Amendment … does not permit the government to force individuals to choose between earning a living and exercising their right to speak."). *Second*, a government cannot regulate speech by calling it conduct. Laws that target "speech as speech" trigger heightened First Amendment scrutiny. *Nat'l Inst. of Fam. & Life Advocates v. Becerra*, 138 S.Ct. 2361, 2374 (2018) ("*NIFLA*"). This Court should restore balance to the First Amendment and hold that Colorado's challenged law targets speech and is thus subject to heightened scrutiny, while also reiterating that true professional-conduct restrictions do not implicate the First Amendment.

ARGUMENT

I. THE FREEDOMS RECOGNIZED BY THE FIRST AMENDMENT PROTECT LICENSED PROFESSIONALS FROM STATE-IMPOSED ORTHODOXY.

Licensed professionals do not lose their First Amendment rights by entering a regulated profession. Despite that, warnings that courts may erode professionals' First Amendment rights have "proved prescient." *Tingley*, 144 S.Ct. at 35 (Thomas, J., dissenting).

Colorado's law invading "the sphere of intellect and spirit" in a professional's practice violates the First Amendment. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). Colorado's law invades "the sphere of intellect and spirit" in a professional's practice by banning an entire viewpoint in the therapeutic dialogue. *Id.* A State government exercising police power, "has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (citation omitted). State governments cannot censor in that way. *Id.*

Limiting professionals' ability to speak in violation of the First Amendment fails to respect the "individual dignity and choice upon which our political system rests." *Leathers v. Medlock*, 499 U.S. 439, 448–49 (1991). The First Amendment guarantees to Americans their free speech rights as citizens. "[T]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503–04 (1984).

Unfortunately, the Tenth Circuit's approach sets aside those core constitutional principles by carving out "a First-Amendment-free zone." *Tingley v. Ferguson*, 57 F.4th 1072, 1074 (9th Cir. 2023) (O'Scannlain, J., dissenting from denial of rehearing en banc). Indeed, the panel below "pa[id] lip service to the proposition that the Supreme Court has never recognized a lesser First Amendment protection for 'professional' speech." *Chiles*, 116 F.4th at 1227 (Hartz, J., dissenting). And that approach "ignores"

protections for professional speech that this Court has held "cannot be treated differently" from generally protected speech "just because it is uttered by a professional." *Id.*

Colorado's message-restricting approach revives the very evil that the First Amendment intended to eliminate. The First Amendment has roots that go across the pond to England, which can help inform this Court's original analysis.

A good example with which the Framers would have been familiar is Parliament's Licensing Order of 1643. In 1643, Parliament decreed that no printer could publish a pamphlet touching "Church or State" without first securing an official imprimatur. The Order worked by tying the right to earn a living to the government's prior approval of content: print the wrong viewpoint and you lost both your press and your livelihood. Colorado's law does the same for licensed counselors. Section 12-245-225 makes a therapist's right to practice contingent on voicing only State-favored views about sexual orientation and gender identity; utter the disapproved viewpoint once, and the State can rescind the very license that lets the counselor speak professionally at all.

The Framers would have been familiar with John Milton's opposition to that order in *Areopagitica*: "that if it come to prohibiting, there is not ought more likely to be prohibited then truth it self; whose first appearance to our eyes blear'd and dimm'd with prejudice and custom, is more unsightly and unplausible than many errors." John Milton, *Areopagitica; A Speech of Mr. John Milton for the Liberty of Unlicensed Printing, To the Parliament of England* (1644), DARTMOUTH COLLEGE: THE JOHN

MILTON READING ROOM, Areopagitica: Text (dartmouth.edu) (last visited Nov. 26, 2024); *see* Harrop A. Freeman, *A Remonstrance for Conscience*, 106 U. Pa. L. Rev. 806, 815 (1958) (recognizing Milton's influence). Because Colorado revives the very ill rejected by the Framers in enacting the First Amendment, Colorado's law cannot be reconciled with the Constitution.

While in some extremely limited circumstances it is proper for the State to intercede and protect its citizens by restricting speech, this is not one. Colorado's actions here mirror what this Court in *NIFLA* described as occasions when totalitarian governments "manipulat[ed] the content of doctor-patient discourse." *NIFLA*, 138 S.Ct. at 2374. The Soviet Union ordered doctors to withhold information from patients to fast-track construction projects; the Third Reich commanded physician fealty to state ideology above patient wellbeing; and Romanian Communists prohibited doctors from providing their patients with information about birth control to increase the country's birth rate. *Id.* The goal in each of these instances ultimately was "to increase state power and suppress minorities." *Id. NIFLA*'s examples and warnings could apply with equal vigor to Colorado's anti-speech law here.

This Court has long recognized that the ability of medical professionals to speak freely is especially important. In the "fields of medicine and public health . . . information can save lives." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). So this Court has been quick to reject content-based regulations like Colorado's that do not "advance a legitimate regulatory goal, but [instead] suppress unpopular

ideas or information." *NIFLA*, 138 S.Ct. at 2374. That type of law—as here—is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163 (citation omitted).

That warning rings especially true when laws like Colorado's risk tainting medicine with politics. Free speech should protect the medical field from political pressure seeking to stifle scientific advancements. And it is far from clear that the ideological partisan bent embodied in Colorado's law is "settled" in any meaningful sense. *Chiles*, 116 F.4th at 1241 (Hartz, J., dissenting). Indeed, not that long ago the "shoe" was "on the other foot." *Id.* at 1227. Then, "the mental-health establishment declared homosexuality to be a mental disorder." *Id.* Under the Tenth Circuit's position, "a state law *prohibiting* therapy that affirmed a youth's homosexual orientation would have faced only rational-basis review and very likely would have been upheld as constitutional." *Id.* Of course, the Colorado Legislature likely would blanch if the law were reversed.

And perhaps most importantly here, the Tenth Circuit erred in avoiding this Court's binding precedent. This Court rejected treating "professional speech" as a separate category; and it rejected treating regulating professional speech categorically as conduct that incidentally touches on speech. *NIFLA*, 138 S.Ct. at 2371. "Speech is not unprotected merely because it is uttered by 'professionals.'" *Id.* at 2371–72. But that is what Colorado does here. Colorado "cannot nullify the First Amendment's protections for

speech by playing this labeling game." *Pickup v. Brown*, 740 F.3d 1208, 1218 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing en banc), *abrogated by NIFLA*, 138 S.Ct. 2361 (2018).

Colorado's censorship regime flouts the First Amendment and vital protections guaranteed by our Constitution. This Court should reverse the Tenth Circuit before more Americans' First Amendment rights are threatened.

II. THE LINE BETWEEN SPEECH AND CONDUCT MUST BE VIGILANTLY GUARDED TO PRESERVE THE FREEDOM OF SPEECH.

The Tenth Circuit mistakenly found that Colorado's law "does not regulate expression." *Chiles*, 116 F.4th at 1208. Indeed, it held that the law prohibited some forms of therapy but did not prohibit discussions about why prohibiting that therapy is improper. On that basis, the court explained that upholding the Colorado law that prohibited therapists from disfavored speaking did not "restrict any speech uttered by professionals simply by relabeling it conduct." *Id.* at 1209.

NIFLA recognized that "States may regulate professional conduct, even though that conduct incidentally involves speech." 138 S.Ct. at 2372. Many professional regulations will fit into that rubric. For example, States' law- and medical-licensure requirements are not "directed at" speech content, so they do not trigger First Amendment scrutiny even though they may incidentally burden speech. *IMS Health*, 564 U.S. at 567. Similarly, Texas's law requiring a veterinarian to physically examine an animal before treating the animal is not directed at

speech content and thus should not implicate the First Amendment. *But see Hines v. Pardue*, 117 F.4th 769, 777–78 (5th Cir. 2024) (holding that Texas's physical-examination requirement violated the First Amendment), *petition for cert. filed* (U.S. Feb. 26, 2024) (No. 24-920). The Court appears to be holding the petition filed in *Hines* for its decision here. The Court should make clear that the veterinary physical-examination requirement, like any professional-conduct regulation, does not implicate heightened First Amendment scrutiny.

But that incidental exception at issue in Hines should not swallow the generally protective rule that applies here. Indeed, *NIFLA* explained that States may not regulate speech "under the guise of prohibiting professional misconduct." *Id.* The Tenth Circuit, recognizing that flaw, offered a fig leaf rejecting that it was doing just that. *Chiles*, 116 F.4th at 1209. But Colorado's law, like Washington's in *Tingley*, is an example of speech regulation disguised as conduct regulation.

The Tenth Circuit thus failed to draw a distinction "between speech and conduct." *Cf. NIFLA*, 138 S.Ct. at 2373. Drawing such a distinction may be difficult, but the Tenth Circuit's decision shows it is necessary. *Id.* Chiles's therapeutic communications fall on the speech side of the line.

Judge Hartz in dissent carefully explains step-by-logical-step the "remarkable" error that "treats speech as conduct." *Chiles*, 116 F.4th at 1228 (Hartz, J., dissenting). That is because "a restriction on speech is not *incidental* to regulation of conduct when the restriction is imposed because of the expressive content of what is said." *Id.* And "the 'conduct' being

regulated here is speech itself'—even worse, that speech "is being regulated because of disapproval of its expressive content." *Id.* That leads to the absurd result that to avoid the First Amendment, all a State must do "is put it within a category ('a therapeutic modality') that includes conduct and declare that any regulation of speech within the category is merely incidental to regulating the conduct." *Id.* at 1231. But that "labeling game" fails. *Id.* (quoting *King v. Governor of N.J.*, 767 F.3d 216, 228–29 (3d Cir. 2014)).

Colorado's ban impermissibly burdens speech because conduct is not its object. Contrast Colorado's law with laws requiring doctors to provide informed consent. Those laws reach speech—but only in service of regulating a given procedure. *NIFLA*, 138 S.Ct. at 2373 ("[T]he requirement that a doctor obtain informed consent to perform an operation is 'firmly entrenched in American tort law.'"). To be like informed consent laws, a law that burdens speech must regulate conduct, like a law-licensure requirement or Texas's physical-examination requirement discussed above. But pure speech itself falls outside of those bounds. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). And unlike informed-consent laws which compel factual, value-neutral information, here, the license bans a disfavored viewpoint. And regulating speech—the therapy at issue here—is the object and subject of Colorado's law.

Colorado's ban "target[s] speech based on its communicative content." *Reed*, 576 U.S. at 163. It outlaws speech based on a viewpoint unpopular in the regulated profession. It is a "content-based law" and thus may be justified only if the State proves it is

"narrowly tailored to serve compelling state interests." *Id.*

CONCLUSION

This Court should reverse the Tenth Circuit's judgment.

Respectfully submitted,

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June 13, 2025

APPENDIX

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