No. 23-477

In the Supreme Court of the United States

UNITED STATES OF AMERICA,
Petitioner,
v.
JONATHAN THOMAS SKRMETTI, ATTORNEY GENERAL AND REPORTER FOR TENNESSEE, ET AL.,
Respondents,
and
L.W., BY AND THROUGH HER PARENTS AND NEXT FRIENDS,
SAMANTHA WILLIAMS AND BRIAN WILLIAMS, ET AL.,
Respondents in support of Petitioner.

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

BRIEF OF AMICUS CURIAE LIBERTY COUNSEL SUPPORTING RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Liberty Counsel is a nonprofit public interest legal organization that advances the freedom of speech, religious liberty, and the sanctity of human life. Liberty Counsel engages in strategic litigation to protect the freedom of speech of professionals, businessowners, ministers, and ordinary Americans from all walks of life. Liberty Counsel attorneys have represented clients before this Court, federal circuit courts of appeals, and federal and state trial courts nationwide. Liberty Counsel attorneys also have spoken or testified before Congress on matters relating to government infringement on First Amendment rights.

As part of its mission, Liberty Counsel has represented or provided legal counsel to numerous licensed counselors who diagnose and treat patients with emotional and mental disorders and dysfunctions (whether cognitive, affective, behavioral, or sexual), including patients with unwanted same-sex attractions, behaviors, or identity, and gender dysphoria. These counselors exclusively use talk therapy whereby the client expresses his or her stressor to the counselor, and the counselor and client talk to help the client achieve their self-determined objective. To that end, Liberty Counsel has challenged on First Amendment grounds several state and local laws that prohibit counselors from using talk therapy to help their clients explore their unwanted

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[1] No counsel for any party authored this brief in whole or in part, and no person other than Amicus or its counsel made a monetary contribution intended to fund this brief's preparation or submission.

sexual attractions, behaviors, or confusion. See, *e.g.*, *Otto* v. *City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020); *Vazzo* v. *City of Tampa*, No. 19-14387, 2023 WL 1466603 (11th Cir. Feb. 2, 2023); *King* v. *Governor of the State of New Jersey*, 767 F.3d 216 (3d Cir. 2014), *cert denied sub nom.*, *King* v. *Christie*, 575 U.S. 996 (2015); *Pickup* v. *Brown*, 740 F.3d 1208 (9th Cir. 2014), *cert denied*, 573 U.S. 945 (2014). See also *Mountain Right to Life, Inc.* v. *Becerra*, 585 U.S. 1027 (2018) (granting petition for writ of certiorari in challenge to California law that mandated crisis pregnancy centers to notify women about the availability of state-sponsored services, including abortion, and vacating Ninth Circuit decision and remanding for reconsideration in light of *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 585 U.S. 755 (2018)).

Liberty Counsel therefore has a vital interest in ensuring that the Court decides this case by making a clear distinction between talk therapy—which is pure speech protected by the First Amendment—and invasive medical interventions involving controlled drugs and surgery—which are most often appropriately categorized as conduct that the state may regulate.

SUMMARY OF ARGUMENT

This case raises critical questions about the tiers of judicial scrutiny applied to laws that regulate medical treatments involving dangerous drugs and experimental surgery on the one hand, and, on the other hand, mental health counseling that involves pure speech for minors who present with gender dysphoria and unwanted sexual attractions, behaviors, and identity. Tennessee's law prohibiting certain

experimental invasive medical procedures, such as dangerous drugs and experimental surgeries for minors, does not implicate a suspect class or impinge upon a fundamental right, and therefore the law warrants only rational basis review. However, whatever tier of scrutiny this Court determines is applicable in this case and those involving similar questions, the Court should clearly limit its decision to laws that regulate conduct—invasive medical procedures like drugs and surgery—not protected speech.

Although this case involves an equal protection challenge to Tennessee's law prohibiting certain off label use of dangerous drugs and experimental surgeries for minors, if not narrowly circumscribed the Court's decision about the appropriate tier of scrutiny could have broader implications for its First Amendment jurisprudence. If the Court applies a relaxed standard of review for laws prohibiting invasive medical procedures for minors, lower courts may improperly use that precedent to also apply rational basis review to laws banning therapeutic counseling for minors who seek to align their identity with their biological sex on the incorrect grounds that both are forms of conduct, and this Court has already determined that the latter is not. The deepening circuit split over the proper level of judicial scrutiny applied to bans on such talk therapy, which involve only First-Amendment protected speech, highlights the need for this Court to provide clear guidance on this issue.

Dangerous and experimental medical procedures like puberty blockers, cross-sex hormone drugs, and surgery fall squarely within the state's traditional authority to regulate public health and safety, and

laws regulating such conduct do not trigger heightened scrutiny. Prescribing drugs and performing invasive surgery is most often appropriately considered conduct, not speech. In contrast, therapeutic counseling, or talk therapy, that helps minors align their attractions, feelings, identity, and behaviors to their religious or other values involves First Amendment-protected speech, and any laws that prohibit such counseling are constitutionally suspect because they are both content- and viewpoint-based.

In short, by affirming the distinction between conduct and speech, the Court can ensure that its First Amendment jurisprudence remains consistent insofar that content- and viewpoint-based laws are presumptively unconstitutional.

ARGUMENT

I. The Court Must Make a Clear Distinction Between Invasive Medical Interventions Involving Dangerous Drugs and Experimental Surgeries, Which Are Most Often Appropriately Considered Conduct, and Counseling Involving Talk Therapy, Which is Pure Speech.

This Court must preserve the essential distinction between laws that regulate conduct and those that restrict speech. This Court's precedents have drawn a line between the government's authority to govern conduct—particularly in the realm of public health and safety—and the heightened scrutiny required when the government discriminates against speech on the basis of content or viewpoint.

Laws that prohibit speech because of its content or viewpoint automatically trigger strict scrutiny, regardless of the justification. Therefore, in the context of laws regulating invasive medical interventions involving drugs and experimental surgeries, this Court should be clear that they are most often appropriately considered conduct and subject to a rational basis standard, and they are not pure speech, the regulation of which is subject to strict scrutiny.

A. The Court's decision should make a clear distinction between conduct and speech.

Over the past fifty years, "the most important doctrinal development in the jurisprudence of constitutional rights has been the formulation, and proliferation, of 'tiers of scrutiny.'" Ashutosh Bhagwat, *The Test That Ate Everything: Intermediate Scrutiny in First Amendment Jurisprudence*, 2007 U. Ill. L. Rev. 783, 784 (2007). "Tiered scrutiny" refers to "the varying levels of review courts use when deciding constitutional questions, and typically includes rational basis review, intermediate scrutiny, and strict scrutiny." John Inazu, *First Amendment Scrutiny: Realigning First Amendment Doctrine Around Government Interests*, 89 Brook. L. Rev. 1, 52 n.102 (2023). As one scholar explained, this Court created these tiers "to formalize the jurisprudence of rights, and reconcile the general presumption of constitutionality and deference to legislative bodies with the inherently countermajoritarian nature of judicial review." Bhagwat, 2007 U. Ill. L. Rev. at 784.

In Equal Protection cases, this Court applies strict scrutiny to "classifications that disadvantage a

'suspect class,' or that impinge upon the exercise of a 'fundamental right.'" *Plyler* v. *Doe*, 457 U.S. 202, 216–17 (1982) (cleaned up). Otherwise, the Court "will uphold the legislative classification so long as it bears a rational relation to some legitimate end." *Romer* v. *Evans*, 517 U.S. 620, 631 (1996). In First Amendment speech cases, the Court applies strict scrutiny to content-based laws—that is, laws "that target speech based on its communicative content," *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015)—and intermediate scrutiny to "content-neutral restrictions that impose an incidental burden on speech," see *United States* v. *O'Brien*, 391 U.S. 367, 376 (1968).

Granted, the present case does not involve a First Amendment claim. But this Court has recognized that "an equal protection claim" can be "closely intertwined with First Amendment interests and that content-based restrictions on speech can violate equal protection. *Police Dep't of City of Chicago* v. *Mosley*, 408 U.S. 92, 94–95 (1972); accord, *Simon & Schuster, Inc.* v. *Members of New York State Crime Victims Bd.*, 502 U.S. 105, 124 (1991) (Kennedy, J., concurring in the judgment) (observing that the strict scrutiny test applied to content-based speech restrictions "derives from our equal protection jurisprudence"). That being so, although the present case involves an equal protection challenge to a state's law prohibiting certain invasive and experimental medical interventions for minors including drugs and surgeries, the Court's decision on the appropriate tier of scrutiny could reverberate beyond this case. See, *e.g.*, *Tingley* v. *Ferguson*, 144 S. Ct. 33, 34 (2023) (denying certiorari in First Amendment

challenge to the State of Washington's ban on therapy to help gender-dysphoric minors align their feelings with their biological sex); *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 585 U.S. 755 (2018); *Pickup* v. *Brown*, 740 F.3d 1208 (9th Cir. 2014); *King* v. *Governor of the State of New Jersey*, 767 F.3d 216 (3d Cir. 2014).

A ruling in this case that upholds a relaxed standard of review for laws targeting invasive and experimental medical procedures could mislead lower courts to apply rational basis review to laws banning counseling or talk therapy on the erroneous basis that both types of legislation regulate conduct rather than speech. Thus, Amicus urges the Court to be mindful of the broader implications that its decision in this case could have on its First Amendment jurisprudence, particularly in cases that involve laws regulating counseling involving only speech.

Indeed, the Court's selection of a particular tier of judicial scrutiny in this matter could impact First Amendment challenges to bans on laws that prohibit counseling that helps a client align unwanted attractions, behavior, identity, or confusion with religious or other moral values. Therefore, the Court's application of a particular tier of scrutiny in this case could set the framework for how lower courts scrutinize laws that regulate counseling for adolescents with gender dysphoria or unwanted sexual attractions, behaviors, and identity.

B. There is a deepening circuit split over the proper tier of judicial scrutiny applied to counseling bans.

The danger of an inconsistent and erroneous tier of scrutiny is not speculative: There is already a deepening circuit split over the level of judicial review accorded to laws that ban counseling or talk therapy.[2]

The Eleventh Circuit has concluded that three local ordinances banning counseling regulated First Amendment-protected speech, and thus it held that the ordinances were unconstitutional content- and viewpoint-based speech restrictions that failed to satisfy strict scrutiny. See *Otto* v. *City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020) (striking Boca Raton and Palm Beach County ordinances on First Amendment grounds). See also *Vazzo* v. *City of Tampa*, *supra*, 2023 WL 1466603, at *1 (finding that "[t]he City of Tampa's SOCE ordinance * * * is substantively the same as the ordinances at issue in *Otto*" and affirming district court's grant of summary judgment to counselors that challenged ordinance). The court of appeals in *Otto* found that the ordinances were "plainly speaker-focused and content-based restrictions on speech: they limit a category of people—therapists—from communicating a particular message." *Id*. at 863 (citation omitted). "Whether therapy is prohibited depends only on the content of the

[2] Such laws often use the terms "conversion therapy" or "sexual orientation change efforts"—neither of which are counseling terms and neither term has been used by counselors to describe their practice of counseling minors with unwanted same-sex attractions, behaviors, or identity. Rather, these terms are used for political purposes by proponents of such laws.

words used in that therapy, and the ban on that content is because the government disagrees with it." *Id*.

The Eleventh Circuit also rejected the government-defendants' suggestion that the "ordinances here—even if based on the content of a therapist's speech—fall into a kind of twilight zone of 'professional speech' or 'professional conduct.'" 981 F.3d at 864–65. The court of appeals observed that "[t]he government cannot regulate speech by relabeling it as conduct." *Id*. at 865. And, most relevant here, it noted that "speech-based SOCE" is not a "medical practice" but "a client-directed conversation consisting entirely of speech." *Id*. at 866 n.3; see also *id*. at 865 ("What the governments call a "medical procedure" consists—entirely—of words.").

Finally, relying on this Court's precedents, the Eleventh Circuit rejected the argument that governments have the unfettered power to regulate "professional speech." 981 F.3d at 866–67 (citation omitted). The court of appeals observed that "[t]he idea that the ordinances target 'professional speech' does not loosen the First Amendment's restraints." *Id*. at 867. The court of appeals went on to hold that because the ordinances were content-based regulations, they must survive strict scrutiny. *Id*. at 867–68. Noting that strict scrutiny is a "demanding standard," *id*. at 869 n.9 (quoting *Brown* v. *Ent. Merchants Ass'n*, 564 U.S. 786, 799 (2011)), the court of appeals found that the government-defendants failed to meet their burden of proving that the ordinances were narrowly tailored to further a compelling interest in protecting minors from "purely speech-based SOCE," *id*. at 868.

In *Pickup* v. *Brown*, however, the Ninth Circuit reviewed California's law that similarly banned counseling under the rational basis standard, finding that the law "regulates conduct," specifically "therapeutic treatment." 740 F.3d 1208, 1229–30 (9th Cir. 2014). In doing so, the Ninth Circuit observed that "it is well recognized that a state enjoys considerable latitude to regulate the conduct of its licensed health care professionals in administering treatment." *Id.* at 1230 (citing *Gonzales* v. *Carhart,* 550 U.S. 124, 157 (2007)). The court of appeals found that the law passed First Amendment muster because it regulated "professional conduct, where the state's power is great, even though such regulation may have an incidental effect on speech." *Id.* at 1229. The court of appeals went further, concluding that the law did not even implicate the First Amendment because it targeted only "treatment," which is merely conduct, and "the fact that speech may be used to carry out those therapies does not turn the regulation of conduct into a regulation of speech." *Id*. In other words, the Ninth Circuit held that because talk therapy is actually conduct, the First Amendment offers no protection for licensed therapists. *See id*. at 1231.

In *King* v. *Governor of New Jersey*, the Third Circuit reviewed New Jersey's similar counseling ban under intermediate scrutiny. See 767 F.3d 216, 234–37 (3d Cir. 2014). The Third Circuit disagreed with the Ninth Circuit and noted that "verbal communication that occurs during SOCE counseling is speech that enjoys some degree of protection under the First Amendment." *Id*. at 224. But the court of appeals nevertheless upheld the law under intermediate scrutiny. The Third Circuit reasoned that the law

"warrants lesser protection," *id.* at 232, because it regulated professional speech expressed while the counselor provides "personalized services to a client based on the professional's expert knowledge." *Id.* at 233 (concluding "that speech occurring as part of SOCE counseling is professional speech").

Although the court of appeals acknowledged that the law "discriminates on the basis of content," *id.* at 236, it concluded that such discrimination was "permissible" because "[t]he New Jersey legislature * * * targeted SOCE counseling for prohibition because it was presented with evidence that this particular form of counseling is ineffective and potentially harmful to clients, *id.* at 237. In other words, the court of appeals held that the state could discriminate on the basis of content "to protect its citizens from ineffective or harmful professional practices." *Id.* The Third Circuit went on to uphold the law under intermediate scrutiny, finding that it "directly advances the government's interest in protecting clients from ineffective and/or harmful professional services" and is "sufficiently tailored" to further that end. *Id.* at 237, 240.

Another case that relied on the so-called "professional speech" doctrine was *Moore-King* v. *County of Chesterfield*, 708 F.3d 560 (4th Cir. 2013). There, the Fourth Circuit held that several county ordinances that regulated fortune teller businesses did not violate the First Amendment free expression rights of a self-described "spiritual counselor." See 708 F.3d at 569. The court of appeals held that "[u]nder the professional speech doctrine, the government can license and regulate those who would provide services to their clients for compensation without running

afoul of the First Amendment." *Id*. The court of appeals concluded that the plaintiff's "activities fit comfortably within the confines of professional speech analysis" because "her psychic activities and spiritual counseling generally involve a personalized reading for a paying client." *Id.*

This Court identified by name and soundly and unequivocally rejected the holdings of *Pickup*, *King*, and *Moore-King* in *National Institute of Family & Life Advocates* v. *Becerra*, 585 U.S. 755 (2018) ("*NIFLA*"). Observing that it "has 'been reluctant to mark off new categories of speech for diminished constitutional protection,'" *id.* at 767 (quoting *Denver Area Educ. Telecommunications Consortium, Inc.* v. *F.C.C.*, 518 U.S. 727, 804 (1996) (Kennedy, J., concurring in part)), this Court noted that it "has not recognized 'professional speech' as a separate category of speech," *id*. "And it has been especially reluctant to 'exemp[t] a category of speech from the normal prohibition on content-based restrictions.'" *Id*. (quoting *United States* v. *Alvarez,* 567 U.S. 709, 722 (2012) (plurality opinion)). Under this Court's precedents, governments may not impose content-based restrictions on speech without "persuasive evidence of a long (if heretofore unrecognized) tradition to that effect." *Id*. (cleaned up).

This Court further observed that "[t]he dangers associated with content-based regulations of speech are also present in the context of professional speech." *NIFLA*, 585 U.S. at 771. The Court cautioned that "regulating the content of professionals' speech 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or

information.'" *Id.* (citing *Turner Broad. Sys., Inc.* v. *F.C.C.*, 512 U.S. 622, 641 (1994)). The Court considered the practice of medicine as an example in which speech should be protected, observing that "[d]octors help patients make deeply personal decisions, and their candor is crucial." *Id.* (quoting *Wollschlaeger* v. *Governor, Fla.,* 848 F.3d 1293, 1328 (11th Cir. 2017) (en banc) (Pryor, J., concurring)).

The Eleventh Circuit case that the Court cited, *Wollschlaeger*, is illustrative. There, the court of appeals held that the record-keeping provision of Florida's Firearm Owners' Privacy Act, which prohibited physicians from intentionally entering any disclosed information concerning firearm ownership into the patient's medical record under certain circumstances, constituted a speaker-focused and content-based restriction on speech, and thus was subject to First Amendment scrutiny. See 848 F.3d at 1307. The court of appeals found that "[t]he record-keeping and inquiry provisions expressly limit the ability of certain speakers—doctors and medical professionals—to write and speak about a certain topic—the ownership of firearms—and thereby restrict their ability to communicate and/or convey a message." *Id.* As a result, the court of appeals concluded, "there can be no doubt that these provisions trigger First Amendment scrutiny." *Ibid.*

The Eleventh Circuit rejected the argument that the First Amendment is not implicated because any effect on speech would be merely incidental to the regulation of professional conduct. 848 F.3d at 1308. The court of appeals observed that "characterizing speech as conduct is a dubious constitutional enterprise," *id.* at 1309, and noted that this Court has

consistently "applied heightened scrutiny to regulations restricting the speech of professionals," *id.* at 1310.

Despite this Court's explicit rejection and abrogation of *Pickup* and *King* in *NIFLA*, the Ninth Circuit Court of Appeals continues to uphold content-based bans on counseling. In *Tingley* v. *Ferguson*, the Ninth Circuit upheld Washington's law that subjects licensed health care providers to discipline if they practice "conversion therapy" on minor patients, finding that the law did not violate the First Amendment. 47 F.4th 1055, 1084 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 33 (2023). The court of appeals rejected the argument that *NIFLA* fully abrogated *Pickup*, concluding that "[it] abrogated only the 'professional speech' doctrine—the part of *Pickup* in which we determined that speech within the confines of a professional relationship (the "midpoint" of the continuum) categorically receives lesser scrutiny." *Id.* at 1073. In the Ninth Circuit's view, "*NIFLA* does not require us to abandon our analysis in *Pickup* insofar as it related to conduct." *Id.* The court of appeals concluded that *NIFLA* does not prevent "the regulation of professional conduct, even if it "incidentally burden[s] speech." *Id.* at 1075 (quoting 585 U.S. at 769). For that reason, the court of appeals held that "[b]ecause *Pickup*'s holding rests upon that exception, it survives *NIFLA*." *Id.* The Ninth Circuit then found that the law survived rational basis review. See *id.* at 1078.

Members of this Court have acknowledged that "[t]he Ninth Circuit's opinion created a Circuit split." *Tingley* v. *Ferguson*, 144 S. Ct. 33, 34 (2023) (Thomas, J., dissenting from denial of certiorari)

(citing *Otto*, 981 F.3d at 859, 865); see also *id*. at 35 (Alito, J., dissenting from denial of certiorari) (noting that "[t]here is a conflict in the Circuits about the constitutionality of [conversion therapy] laws"). As Justice Thomas observed, "the Ninth Circuit attempted to sidestep" this Court's precedents subjecting content-based laws to strict scrutiny "by concluding that counseling is unprotected by the First Amendment because States have traditionally regulated the practice of medicine." *Tingley*, 144 S. Ct. at 34–35. But "[t]he Court has already made clear its 'reluctance to exempt a category of speech from the normal prohibition on content-based restrictions.'" *Id*. (quoting *NIFLA*, 585 U.S. at 767) (cleaned up). And "the Court has instructed that states may not 'impose content-based restrictions on speech without 'persuasive evidence * * * of a long (if heretofore unrecognized) tradition' to that effect.'" *Id*. (quoting *NIFLA*, 585 U.S. at 767 (citation omitted)). Yet, as Justice Thomas observed, "the Ninth Circuit did not offer a single example of a historical regulation analogous to [Washington's conversion-therapy law], which targets treatments conducted solely through speech." *Id*.

The Tenth Circuit exacerbated the circuit split last month when it upheld Colorado's counseling ban. *Chiles* v. *Salazar*, --- F.4th ----, 2024 WL 4157902 (10th Cir. Sept. 12, 2024). Following the Ninth Circuit's interpretation of *NIFLA*, the court of appeals found that Colorado's law fit within what it deemed "the second *NIFLA* context"—namely, that "States may regulate professional conduct." 2024 WL 4157902, at *11. The Tenth Circuit observed that "[t]here is a long-established history of states

regulating the healthcare professions," *id.*, at *15, and it agreed with the district court that "talk therapy provided by mental health professionals is a medical treatment," *id.*, and that the law "incidentally involves speech because an aspect of the counseling conduct, by its nature, necessarily involves speech," *id.*, at *18. The court of appeals then upheld the law under rational basis review, finding that it was "rationally related to Colorado's interest in protecting minor patients seeking mental health care from obtaining ineffective and harmful therapeutic modalities." *Id.*, at *28.

The sharp circuit split over the level of judicial review accorded to laws banning counseling demonstrates the need for precision in the Court's decision in this case (and also future clarification from this Court). In *Pickup*, the Ninth Circuit applied rational basis scrutiny, deeming California's counseling ban as a mere regulation of "professional conduct." 740 F.3d at 1229. In *King*, the Third Circuit took a different approach, subjecting a similar law to intermediate scrutiny on the grounds that the speech involved in therapy, though not fully protected, warrants heightened protection. *See* 767 F.3d at 237. But this Court in *NIFLA* emphatically and unequivocally rejected the creation of a "professional speech" doctrine, holding that content-based speech restrictions cannot be justified without a clear historical basis. See 585 U.S. at 767. Despite *NIFLA*'s clear abrogation of *Pickup* and *King*, lower courts continue to defy this Court's unequivocal instructions. The Ninth Circuit in *Tingley*, 47 F.4th at 1084, and the Tenth Circuit in *Chiles*, 2024 WL 4157902, at *11, have improperly upheld "conversion therapy"

bans by treating therapeutic speech as professional conduct and applying rational basis review. These rulings deepen a conflict that cuts to the heart of this Court's First Amendment jurisprudence and disregards this Court's precedents that content-based speech restrictions are always subject to strict scrutiny. See *Reed*, 576 U.S. at 163. As Members of this Court have acknowledged, this Court must eventually intervene to resolve the constitutional confusion created by the lower courts' ongoing misinterpretation of *NIFLA* and affirm that content- and viewpoint-based speech restrictions, even under the guise of regulating medical treatments, are subject to strict scrutiny. *E.g.*, *Tingley*, 144 S. Ct. at 34 (Thomas, J., dissenting from denial of certiorari); *id.* at 35 (Alito, J., dissenting from denial of certiorari). In the meantime, this Court should carefully confine the standard of review that it will announce in this case to medical procedures and interventions that involve actual conduct, not pure speech.

II. Invasive Medical Interventions Involving Drugs and Surgeries Are Conduct, Whereas Counseling or Talk Therapy is Speech Protected by the First Amendment.

Dangerous and scientifically contraindicated medical procedures such as puberty blockers, cross-sex hormone treatment and experimental and invasive surgeries are most often appropriately considered forms of conduct that fall within a state's traditional authority to regulate public health and safety. By contrast, talk therapy counseling that helps a client align unwanted sexual attractions, behaviors, and identities, or gender dysphoria with religious or

moral values is speech that lies at the heart of First Amendment protections. The Court should make a clear distinction when determining the appropriate level of judicial scrutiny in the context of laws that regulate invasive and experimental medical interventions involving dangerous drugs and life-altering surgeries—which is most often appropriately considered conduct—from counseling or talk therapy—which is speech.

A. Invasive medical interventions involving drugs and surgeries are conduct, not speech.

Dangerous and scientifically contraindicated medical interventions such as puberty blockers, cross-sex hormone therapy and experimental surgeries, fundamentally differ from counseling or talk therapy. Invasive medical interventions involving dangerous drugs and experimental surgeries are most often appropriately considered conduct. Cf. *L. W. by & through Williams* v. *Skrmetti*, 83 F.4th 460, 466 (6th Cir.), *cert. granted sub nom. United States* v. *Skrmetti*, 144 S. Ct. 2679 (2024) (noting that the medical profession offered "a variety of treatments," including "cross-sex hormones and surgeries, for "individuals suffering from a lack of alignment between their biological sex and perceived gender" (citing Walter O. Bockting & Eli Coleman, *A Comprehensive Approach to the Treatment of Gender Dysphoria*, 5 J. Psych. & Hum. Sexuality 131, 132 (1992)). As such, medical procedures involving dangerous drugs and experimental surgeries are subject to regulation under the state's traditional authority over health and safety. See *Gonzales* v. *Carhart*, *supra*, 550 U.S. at 157 ("Under our precedents it is clear the State

has a significant role to play in regulating the medical profession.").

B. Drug and surgical interventions are inherently non-communicative and do not implicate the First Amendment.

Invasive medical interventions involving drugs and experimental surgeries are not protected speech or symbolic conduct. Such interventions do not "convey a particularized message." *Spence* v. *State of Wash.*, 418 U.S. 405, 411 (1974) (per curiam). Gender dysphoria is generally the result of underlying mental health conditions, adverse childhood experiences or trauma, family difficulties, or significantly higher rates of neurodevelopmental disorders such as autism spectrum disorder. See International Foundation for Therapeutic & Counselling Choice, *IFTCC Principles for Approaches to Transgender Treatments* (Mar. 9, 2023) (hereinafter "*Principles*") (citing studies)[3]; see also Melanie Bechard et al., *Psychosocial and Psychological Vulnerability in Adolescents with Gender Dysphoria: A "Proof of Principle" Study*, 43 J. Sex & Marital Therapy 678, 678–88 (2017) (finding that "a large percentage of adolescents referred for gender dysphoria have a substantial co-occurring history of psychosocial and psychological vulnerability"). Unlike recognized forms of symbolic speech, such as displaying a flag upside down, see *Spence*, 418 U.S. at 406, or wearing an armband, see *Tinker* v. *Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 511 (1969), these medical

[3] Available at https://learning.iftcc.org/wp-content/uploads/2023/12/IFTCC-Principles-for-Approaches-to-Transgender-Treatments.Final-01-12-23.pdf.

interventions do not convey a specific, particularized message to the public. Their primary purpose is medical—purportedly aimed at alleviating the distress associated with gender dysphoria—rather than serving as an expression of personal or political beliefs. Nor would the intended audience have a great likelihood of understanding the message given the surrounding circumstances. See *Spence*, 418 U.S. at 411.

C. Counseling is First Amendment-protected speech.

Unlike medically invasive procedures, involving dangerous drugs and experimental surgeries, mental health counseling that helps clients align their feelings, attractions, behaviors, or identity with religious and moral values is First Amendment-protected speech.

Clinical and scientific evidence has consistently demonstrated that exploring a client's unwanted same-sex attractions, behaviors, and identity in a professional therapeutic setting through talk therapy is safe and effective. See, *e.g.*, Paul Santero et al., *Effects of Therapy on Religious Men Who Have Unwanted Same-Sex Attraction*, 85 Linacre Q. 1–17 (2018); Stanton L. Jones et al., *A Longitudinal Study of Attempted Religiously Mediated Sexual Orientation Change*, J. Sex & Marital Therapy (2011); Elan Karten et al., *Sexual Orientation Change Efforts in Men*, J. Men's Studies 84–102 (2010).

Client-directed counseling is entirely speech based. Clients seeking counseling typically hold traditional religious and moral values and seek to align their feelings, attractions, behaviors, and identity

with their beliefs. They seek counseling because they want to live in accordance with their sincerely held religious and moral beliefs. Thus, the clients' primary goal in seeking counseling is often part of their broader desire to live consistent with their religious beliefs and moral values. See Christopher Rosik, *Motivational, Ethical and Epistemological Foundations In The Clinical Treatment Of Unwanted Homoerotic Attraction*, 29 J. Marital & Fam. Therapy 13 (2003). And, the fundamental principle of all mental health counseling—that the client has the right to self-determination—demands that clients are entitled to make that decision.

As discussed above, the Eleventh Circuit found that laws prohibiting therapists from counseling clients with unwanted sexual attractions and behaviors are unconstitutional content- and viewpoint-based regulations of speech. See *Otto* v. *City of Boca Raton*, *supra*, 981 F.3d at 854. The court of appeals noted that the First Amendment prohibits the government from regulating or punishing speech—including speech by licensed professionals—because of its message, ideas, or opinions. See *id*. at 862 (citing *Mosley*, 408 U.S. at 95). The court of appeals thus found that the ordinances were "plainly speaker-focused and content-based restrictions on speech: they limit a category of people—therapists—from communicating a particular message" *Id*. at 863 (citation omitted). "Whether therapy is prohibited depends only on the content of the words used in that therapy, and the ban on that content is because the government disagrees with it." *Id*.

The Eleventh Circuit's holding is correct because it is consistent with this Court's precedents. State and

municipal laws that target counseling under the guise of banning one viewpoint are unconstitutional. Such laws disfavor speech with a particular content—voluntary talk therapy about unwanted same-sex attraction and gender dysphoria. And they disfavor particular speakers—licensed counselors and therapists who help clients with unwanted sexual attractions and behaviors. Conversely, these laws do not ban a counselor from encouraging a boy to "transition" to a girl, as if such a denial of chromosomal reality is even possible. Nor do they prohibit a counselor from helping a girl embrace her same-sex attractions, behaviors, or identity. As such, counseling bans like the challenged ordinances in *Otto* "go[] even beyond mere content discrimination, to actual viewpoint discrimination." *R.A.V.* v. *St. Paul*, 505 U.S. 377, 391 (1992). Such bans are presumptively unconstitutional and therefore subject to strict scrutiny.

CONCLUSION

The Court should affirm the decision below.

Respectfully submitted.

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