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 *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS IN SUPPORT OF PETITIONER

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June 12, 2025

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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INTERESTS OF *AMICUS CURIAE*[1]

Amicus Association of American Physicians and Surgeons ("AAPS") is a national association of physicians, founded in 1943. AAPS is dedicated to protecting the patient-physician relationship, and has been a litigant in this Court and in other appellate courts. *See, e.g.*, *Ass'n of Am. Physicians & Surgs. v. Mathews*, 423 U.S. 975 (1975); *Ass'n of Am. Physicians & Surgs. v. Tex. Med. Bd.*, 627 F.3d 547 (5th Cir. 2010). AAPS's *amicus* briefs have been cited by justices of this Court. *See, e.g.*, *District of Columbia v. Heller*, 554 U.S. 570, 704 (2008) (Breyer, J., dissenting).

As a group of physicians, AAPS has strong interests in defending and restoring freedom of speech in the medical profession.

SUMMARY OF ARGUMENT

Physicians, therapists, and other caregivers are professionals not to be censored and controlled. They must retain First Amendment freedom of speech rights after licensure which they properly enjoyed prior to licensure. They have at least as much freedom of speech rights as a public high school football coach whose free speech rights were fully recognized recently by this Court. Therapists do not have to give up their free speech rights as a condition for licensure any more than an attorney abdicates his unfettered right to

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[1] Pursuant to Rule 37.6, counsel for *amicus curiae* authored this brief in whole, no counsel for a party authored this brief in whole or in part, and no such counsel or a party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity – other than this *amicus curiae*, its members, and its counsel – contributed monetarily to the preparation or submission of this brief.

communicate with his client, including speech contrary to what the State may prefer. Viewpoint discrimination – censorship here – is an infringement on a licensed professional's free speech rights just as it would be for anyone else.

Moreover, Colorado may not constitutionally censor speech that is central to maintaining good standing in well-established religions. While the Colorado law at issue here is facially neutral as to religion, it infringes on religious beliefs of families who encounter gender dysphoria in their children. Their freedom of speech in being allowed to communicate and hear candid talk therapy to overcome gender dysphoria, in a manner consistent with their faith, is infringed by Colorado's ban on conversion therapy, which could more accurately be called "gender support therapy."

There is no religious exemption in Colorado's Minor Conversion Therapy Law (MCTL), and a general statutory religious exemption is inadequate for most Coloradans. The general exemption limits this counseling to when it is performed as part of a religious ministry, which makes it practically impossible for a specialist to offer gender support therapy to religious adherents. The incidence of gender dysphoria is far less than 10%, such that even the largest religious congregations in Colorado would not have sufficient demand to support an in-house therapist for this. It is akin to asking a church to have its own in-house fire department service rather than sharing the costs of that service with the broader community. Religious adherents have a First Amendment right of access, for their own religious needs and goals, to speech such as talk therapy

without interference with free market funding of that service.

The science concerning conversion therapy is unsettled, which reinforces the command by the First Amendment to respect freedom of speech to resolve this in the marketplace of ideas. In contrast with transgender operations on minors, talk therapy is reversible and there is no compelling interest by the State to ban it. Strict scrutiny is the exacting legal standard that must be applied to all infringements on the First Amendment, and Colorado cannot possibly satisfy this level of scrutiny for its content-based censorship of certain talk therapy. The decision below should be reversed.

ARGUMENT

The State does not censor what an attorney may tell a client, and Colorado may not properly censor talk therapists as to their confidential communications with their clients. Yet Colorado's MCTL, as quoted by the court below, expressly prohibits:

> any practice or treatment by 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.

Chiles v. Salazar, 116 F.4th 1178, 1192 (10th Cir. 2024) (quoting Colo. Rev. Stat. § 12-245-202(3.5)). Colorado thereby bans counseling to reduce same-sex attractions, as quoted above, while exempting "[a]ssistance to a person undergoing gender transition." *Id.*

This is an explicit content-based censorship of speech. It dictates that counseling against someone adhering to his biological gender is just fine, but counseling to affirm one's biological gender is a no-no. As further quoted by the Tenth Circuit, MCTL imposes draconian penalties against any therapist who counsels a minor to abide by his or her own biological gender:

> Violating the MCTL has consequences in Colorado. 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.

Chiles v. Salazar, 116 F.4th at 1192. Therapists risk punishment if a patient no longer wants to change his gender after therapy.

Amicus AAPS submits three reasons why the Tenth Circuit decision upholding the MCTL should be reversed. First, it infringes on free speech contrary to prior rulings by this Court, and also infringes on religious liberty. Second, the general exemption for religious ministries, on which Colorado relies, is inadequate. Third, the rational basis standard of review as invoked below to uphold this content-based censorship is erroneous, and the MCTL cannot survive the strict scrutiny standard of review that should apply.

I. Colorado Infringes on Free Speech Contrary to this Court's Ruling in *Kennedy*, and Violates Religious Liberty Too.

Robust freedom of speech is essential to religious liberty, as this Court recognized in its landmark decision in *Kennedy v. Bremerton Sch. Dist.*, 597 U.S. 507 (2022). There this Court upheld the free speech right of a public school football coach to pray in the middle of the field after games, surrounded by students. A football coach need not be a religious minister to pray in a stadium, as Colorado argues that therapists who offer conversion therapy must be; moreover, patients disliking conversion therapy can easily change therapists, in contrast with high school football players having no choice of coaches.

"[I]n no world may a government entity's concerns about phantom constitutional violations justify actual violations of an individual's First Amendment rights." *Id.* at 543. All that Colorado can present here are "phantom" concerns of isolated unproven, and reversible, harm. Arguments of anecdotal lack of success in conversion therapy are not a sufficient justification for Colorado's sweeping ban on freedom of speech for this. There is not properly a "heckler's veto" such that a few who are opposed to conversion therapy can properly shut it down and forbid it for everyone else. *See, e.g.*, *Brown v. Louisiana*, 383 U.S. 131, 133 n.1 (1966) (rejecting censorship that is the form of a "heckler's veto").

Just as teachers and students do not shed their rights to freedom of speech at the schoolhouse gate, a therapist does not shed her free speech rights by obtaining a license. As this Court held in *Kennedy* with respect to a public high school football coach:

> When it comes to Mr. Kennedy's free speech claim, our precedents remind us that the First Amendment's protections extend to "teachers and students," neither of whom "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

Kennedy, 597 U.S. at 527 (quoting *Tinker* v. *Des Moines Independent Community School Dist.*, 393 U.S. 503, 506 (1969), and citing *Lane* v. *Franks*, 573 U.S. 228, 231 (2014)).

The MCTL is as impractical as it is unconstitutional. It is ambiguous whether it would impose fines on a licensed therapist for providing conversion therapy before or after a formal therapy session with a patient. This is analogous again to the issue of a football coach praying after a game, which this Court resolved in favor of the coach's right to do so. "Both the Free Exercise and Free Speech Clauses of the First Amendment protect expressions like Mr. Kennedy's," this Court held. *Kennedy*, 597 U.S. at 514.

As Justice Thomas pointed out in a prior case from the State of Washington in which this Court denied the petition for *certiorari*:

> Under SB 5722, licensed counselors can speak with minors about gender dysphoria, but only if they convey the state-approved message of encouraging minors to explore their gender identities. Expressing any other message is forbidden—even if the counselor's clients ask for help to accept their biological sex. That is viewpoint-based and content-based discrimination in its purest form. As a result, SB 5722 is presumptively unconstitutional, and the

> state must show that it can survive strict scrutiny before enforcing it.
>
> … [T]he Ninth Circuit did not offer a single example of a historical regulation analogous to SB 5722, which targets treatments conducted solely through speech.
>
> … As we explained, however, speech is not unprotected merely because it is uttered by 'professionals.

Tingley v. Ferguson, 144 S. Ct. 33, 34-35 (2023) (Thomas, J., dissenting from a denial of a petition for *certiorari*, inner quotations and brackets omitted).

"[R]egulating 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.'" *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755, 771 (2018) ("*NIFLA*") (quoting *Turner Broadcasting System, Inc.* v. *FCC*, 512 U.S. 622, 641 (1994)). As this Court continued in *NIFLA*: "'Take medicine, for example. 'Doctors help patients make deeply personal decisions, and their candor is crucial.'" *NIFLA*, 585 U.S. at 771 (quoting *Wollschlaeger* v. *Governor of Florida*, 848 F.3d 1293, 1328 (11th Cir. 2017) (en banc, W. Pryor, J. concurring). Candor is particularly important in therapy.

Yet Colorado is suppressing speech that is highly correlated with religious viewpoints towards gender dysphoria. As the State of Washington failed to do in *Tingley*, Colorado does not and cannot "offer a single example of a historical regulation analogous to" its MCTL at issue here. (Pet Br. 8-10)

The question presented here is based on the Free Speech Clause, but freedom of speech and religion are intertwined here as in other landmark cases. *See, e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control."); *Texas v. Johnson*, 491 U.S. 397, 414 (1989) ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). MCTL imposes analogous viewpoint discrimination, intruding on rights of conscience, and cannot stand.

II. Colorado's General Religious Exemption Is Inadequate, and MCTL Infringes on the Right to Hear.

Conversion therapy, which is more accurately called "gender support therapy," is correlated with religious beliefs, as confirmed by a survey published in England by the BBC:

> About 10% of Christian respondents and 20% of Muslims [to a UK-wide LGBT Survey in 2018] said they had undergone or been offered conversion therapy, compared to 6% of those with no religion.
>
> More than half of those who had received the therapy said it had been conducted by a faith group, while a fifth received it from healthcare professionals.

"What is conversion therapy and when will it be banned?" *BBC* (Sept. 20, 2024).[2]

The Eleventh Circuit has likewise noticed a correlation between this therapy and religious beliefs:

> People have intense moral, religious, and spiritual views about these matters—on all sides. And that is exactly why the First Amendment does not allow communities to determine how their neighbors may be counseled about matters of sexual orientation or gender.

Otto v. City of Boca Raton, 981 F.3d 854, 871-72 (11th Cir. 2020).

"Facial neutrality is not determinative" as to whether there is an unconstitutional infringement on religious liberty. *Church of Lukumi Babalu Aye v. City of Hialeah*, 508 U.S. 520, 534 (1993). Additional factors "relevant to the assessment of governmental neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history ….'" *Masterpiece Cakeshop, Ltd. v. Colo. C.R. Comm'n*, 584 U.S. 617, 639 (2018) (quoting *Church of Lukumi Babalu Aye*, 508 U.S. at 540). MCTL is a highly partisan result of initiatives in Democrat-controlled states, without any justification in tradition, as nearly no Republican states have adopted any similar measures.

The dominant view of the major religions and philosophers of natural law since antiquity is that

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[2] https://www.bbc.com/news/explainers-56496423 (viewed May 31, 2025).

there are only two genders, as evident at birth. One defender of transgender rights admits that:

> There is a growing consensus within Natural Law that explains transgender identity as an "embodied misunderstanding." The basic line of argument is that our sexual identity as male or female refers to our possible reproductive roles of begetting and conceiving. Since these two possibilities are determined early on by the presence or absence of a Y chromosome, our sexual identity is biological and so cannot be changed or reassigned. Therefore, any identity claim that is contrary to this biological reality is a self-misunderstanding.

Kurt Blankschaen, "Including Transgender Identities in Natural Law," *Ergo an Open Access Journal of Philosophy* 10:18 (2023).[3] Professor Blankschaen expressed his own disagreement with this natural-law consensus, and thus his acknowledgement of it is significant.

The general exemption from MCTL for religious ministries is inadequate to protect the rights of therapists and those seeking gender support therapy for religious purposes. *See* Colo. Rev. Stat. § 12-245-217(1). Churches, synagogues, and mosques in the United States are typically not large enough to have their own in-house gender support therapy ministries for merely one or a few families who may seek this. By banning gender support therapy except when offered as part of religious ministries, it is as though Colorado were to shut down public transportation on days of worship while allowing religious facilities to provide their own system of buses and subways. It is not

[3] https://doi.org/10.3998/ergo.4648 (viewed May 31, 2025).

practical or cost-effective for ministries to develop and offer these services in-house, as they are only cost-effective on a community-wide basis.

For example, while the Amish are a rapidly growing religion, there are only 1,000 Amish in the entire vast state of Colorado.[4] Statistically, there would be at most only a few Amish children suffering from gender dysphoria and in need of gender support therapy in Colorado. But MCTL completely prohibits access by the Amish to a secular counselor for this therapy. No therapist can earn a living by serving merely a handful of Amish. For other medical care, Amish go to secular community physicians, and it is an infringement on their religious liberty to deny them access to a community physician for gender support therapy. Catholics, though larger in number than the Amish in Colorado, do not have a church structure to provide church-approved therapists as Colorado argues is allowed. How would the therapists be approved, and who would issue malpractice insurance to protect the religious institutions against politically motivated lawfare? Colorado does not say, because it is implausible that religious institutions would take on the risk of lawfare by sponsoring this.

Muslims total about 70,000 in Colorado as distributed among about 14 mosques, for an average of about 5,000 adherents per mosque.[5] There would be

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[4] Amish America, https://amishamerica.com/colorado-amish/ (viewed May 26, 2025).

[5] Associated Press, "Muslim leader talks about Islam's place in Colorado community," Coloradan (Aug. 5, 2017). https://www.coloradoan.com/story/news/local/colorado/2017/08/06/muslim-leader-talks-islams-place-colorado-community/543061001/ (viewed May 26, 2025).

merely a few children per mosque who might suffer from gender dysphoria and seek gender support therapy. No counselor can earn a living serving such a small population.

Doctrines in orthodox Jewish, Christian, Muslim and other religions require adherence to biological gender determined at the moment of conception, and access to gender support therapy is necessary for families devoted to these religions to remain in good standing consistent with the principles of their faiths.

Some doctrines in orthodox Judaism, for example, stand against transgenderism as explained in connection with a custody proceeding in England:

> the father was transgender and lived as a woman; the mother and children were members of an ultra-orthodox Jewish Charedi community; the father had left the community but both parents wanted the children to remain within it; the community would not accept transgender identity and the imposition of contact risked exposing the children to the harm of being ostracised by their community.

Daniel Monk, "Muscular Liberalism and the Best Interests of the Child," 77 *The Cambridge Law Journal* 261-65 (2018).

Roman Catholic Church doctrine also stands firmly against gender transitions:

> in recent decades, attempts have been made to introduce new rights that are neither fully consistent with those originally defined nor always acceptable. They have led to instances of ideological colonization, in which gender theory plays a central role; the latter is extremely dangerous since it

> cancels differences in its claim to make everyone equal.

The Declaration "Dignitas Infinita" on Human Dignity (Apr. 2, 2024) ("Declaration").[6] "The greatest possible difference that exists between living beings" is the "sexual difference" between male and female, this Declaration about human dignity confirms. *Id.* "This foundational difference is not only the greatest imaginable difference but is also the most beautiful and most powerful of them. In the male-female couple, this difference achieves the most marvelous of reciprocities." *Id.* The doctrinal position of Catholic Church is that "[a]ll attempts to obscure reference to the ineliminable sexual difference between man and woman ***are to be rejected***." *Id.* (emphasis added).

Islamic beliefs are likewise infringed upon by Colorado's MCTL. A similar ban on gender support therapy in Michigan was strongly opposed in court by an *amicus* brief filed on behalf of the Council on American Islamic Relations – Michigan (CAIR-MI), with this argument:

> Muslims seeking counseling for gender dysphoria and/or same sex attraction that aligned with their religious beliefs would be without a place to obtain such a treatment and alternatively that the organization itself may be forced to provide counseling in a manner that was in direct contradiction to the purpose and faith values of the organization.

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[6] https://www.vatican.va/roman_curia/congregations/cfaith/documents/rc_ddf_doc_20240402_dignitas-infinita_en.html (viewed June 11, 2025).

Council on American Islamic Relations – Michigan Amicus Brief in Support of Plaintiff's Motion for Temporary Restraining Order in *Catholic Charities of Jackson v. Whitmer*, Case No. 1:24-cv-718, 64 F. Supp. 3d 623 (W.D. Mich. 2025) (ECF No. 25, at p.16).

Thus MCTL directly interferes with the ability of orthodox Jewish, Catholic, and Muslim families to abide by their faiths with respect to a child who is experiencing gender dysphoria. These religions have large numbers of adherents in the United States, but the content-based censorship by Colorado should be invalidated even if its infringement were against only a tiny minority, such as the Amish referenced above. As Justice Gorsuch observed, "In this country, neither the Amish nor anyone else should have to choose between their farms and their faith." *Mast v. Fillmore Cty.*, 141 S. Ct. 2430, 2434 (2021) (Gorsuch, J., concurring).

A half-century ago the Supreme Court upheld the rights of religious minorities in requiring access by a prisoner having a religion with a small following in the United States:

> If [the prisoner] was a Buddhist and if he was denied a reasonable opportunity of pursuing his faith comparable to the opportunity afforded fellow prisoners who adhere to conventional religious precepts, then there was palpable discrimination by the State against the Buddhist religion, established 600 B. C., long before the Christian era. The First Amendment, applicable to the States by reason of the Fourteenth Amendment, *Torcaso v. Watkins*, 367 U.S. 488, 492-493, prohibits government from making a law "prohibiting the free exercise" of religion. If the allegations of this

> complaint are assumed to be true, as they must be on the motion to dismiss, Texas has violated the First and Fourteenth Amendments.

Cruz v. Beto, 405 U.S. 319, 322 (1972) (the Religious Freedom Restoration Act of 1993 subsequently strengthened this right; footnote omitted).

Religious devotees need access to gender support therapy to remain compliant with their religions. Infringement on this right of access violates their religious liberty. At risk in this case is not merely the right of a therapist to speak as the therapist feels is most beneficial, but also the right of religious adherents to hear what they need to remain true to their religious doctrines.

If Colorado were to ban sermons by clergy, that would infringe not merely on the clergy but also on the rights of Coloradans to hear sermons. This is part of the First Amendment-protected "right to hear," and a fundamental aspect of religious freedom. "While we have recognized a 'First Amendment right to receive information and ideas,' we have identified a cognizable injury only where the listener has a concrete, specific connection to the speaker." *Murthy v. Missouri*, 603 U.S. 43, 75 (2024) (Barrett, J., quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972)). That "concrete, specific connection" exists between a patient and his therapist, and MCTL infringes on this right to hear.

III. The Rational Basis Review Below Is Incorrect for this Viewpoint Discrimination.

Rational basis review, as invoked below by the Tenth Circuit and by other lower courts in reviewing laws similar to MCTL, is plainly incorrect for assessing this content-based censorship. "This Court's

precedents do not permit governments to impose content-based restrictions on speech without persuasive evidence of a long (if heretofore unrecognized) tradition to that effect." *NIFLA*, 585 U.S. at 767 (cleaned up, citations omitted). No such tradition for this regulation exists.

The rational basis review used once by the Eleventh Circuit to punish someone who provided nutritional advice for compensation without a license is inapposite here. *Castillo v. Secy, Fla. Dep't of Health*, 26 F.4th 1214 (11th Cir. 2022) (cited by Resps. Br. on Pet. at 3, 17, 18). There "a licensed dietician filed a complaint against Del Castillo with the Florida Department of Health, alleging that Del Castillo was violating the Act by providing nutritionist services without a license." *Id.* at 1217. The State of Florida investigated and found Del Castillo in violation of a law requiring a license before providing nutritional advice for compensation. She was fined $500.00 and additionally charged $254.09 for "providing individualized dietary advice in exchange for compensation in Florida." *Id.* (inner quotations omitted).

The *Castillo* decision upheld a straightforward requirement of professional licensure, where the content of the speech itself was not even being regulated. Rather, the issue was practicing in a licensed profession without obtaining a required license to do so. The Eleventh Circuit had no difficulty distinguishing its precedent in *Otto* whereby it invalidated a ban on conversion therapy similar to the ban here, because "the Act's licensing scheme for dieticians and nutritionists regulated professional

conduct and only incidentally burdened Del Castillo's speech." *Id.* at 1225.

Here, there is no challenge to a licensing scheme, and MCTL more than "incidentally" burdens counselors' speech. Colorado is engaging in viewpoint discrimination by forbidding counselors from making politically disfavored statements, such as talking to help someone align with his own biological gender. Freedom of speech surely protects what half of our country (nearly all of the so-called red states) allows, and none of the categorical exceptions to freedom of speech, such as laws against obscenity, applies here.

The Tenth Circuit below acknowledged that "as a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States v. Stevens*, 559 U.S. 460, 468 (2010) (quoting *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002)). In other contexts the Tenth Circuit itself has held that "if a law targets protected speech in a content-based manner," then strict scrutiny applies. *Animal Legal Def. Fund v. Kelly*, 9 F.4th 1219, 1227 (10th Cir. 2021). The Tenth Circuit held that even a law prohibiting deception to gain access to a facility was subject to strict scrutiny. *See id.* at 1232. Similarly, the Eighth Circuit held that a law requiring videographers to make same-sex wedding videos regulates speech and thus is subject to strict scrutiny. *See Telescope Media Grp. v. Lucero*, 936 F.3d 740, 750 (8th Cir. 2019).

Colorado's MCTL is explicitly based on content. Counseling to affirm one's biological gender is prohibited, while counseling to change such gender is allowed. The Tenth Circuit erred by not applying strict

scrutiny in reviewing the Colorado law.

The holding by this Court in *303 Creative*, also against Colorado, requires invalidation of the MCTL:

> [A]s this Court has long held, the opportunity to think for ourselves and to express those thoughts freely is among our most cherished liberties and part of what keeps our Republic strong. Of course, abiding the Constitution's commitment to the freedom of speech means all of us will encounter ideas we consider unattractive, misguided, or even hurtful. But tolerance, not coercion, is our Nation's answer. The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands. Because Colorado seeks to deny that promise, the judgment is
>
> *Reversed.*

303 Creative LLC v. Elenis, 600 U.S. 570, 603 (2023) (inner quotations and citations omitted). Likewise, Colorado's arguments here should be rejected.

CONCLUSION

For the above reasons and those set forth by Petitioner and the *amici* in her support, the Court should reverse the decision below.

Respectfully submitted,

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