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 Amicus Curiae of Pacific Legal Foundation in Support of Petitioner

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QUESTION PRESENTED

Does the First Amendment apply to speech regulation when the regulated speech constitutes "treatment"?

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INTEREST OF THE AMICUS CURIAE

Pacific Legal Foundation (PLF), a nonprofit law firm, has defended individual liberty since 1973—including many appearances before this Court. [1] PLF has a special interest in protecting the rights of professionals and workers to speak in the course of their employment, whether that be mural painters seeking to promote their artwork,[2] musicians trying to earn a living doing what they love,[3] or doctors sharing life-saving information with patients via telehealth services.[4] Indeed, the fate of several PLF clients—both patients and telehealth providers—may turn on the outcome in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

Access to information about healthcare can make the difference between living and dying, flourishing and withering. Yet state regulators sometimes choke off the supply of healthcare information, even when patients are eager to receive it. The Court's approach to this case will—quite literally—affect the lives of

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[1] No party's counsel authored any part of this brief. No person or entity, other than Amicus Curiae and its counsel, paid for the brief's preparation or submission.

[2] *Tilt Vision Studios, LLC v. The City of Waller, Texas*, No. 4:23-cv-03864, First Amended Complaint (S.D. Tex. July 26, 2024).

[3] *Barilla v. City of Houston*, No. 4:20-CV-00145 (S.D. Tex. Jan. 15, 2020).

[4] *See MacDonald v. Sabando*, No. 1:23-cv-23044, Complaint for Declaratory and Injunctive Relief at 27 (D.N.J. Dec. 13, 2023); *see McBride v. Hawkins*, No. 2:24-cv-01394-KJM-AC, Complaint for Declaratory and Injunctive Relief at 1 (E.D. Cal. May 16, 2024).

millions of patients and families who rely on the free flow of medical information.

Too often, courts confronted with the regulation of healthcare professionals' speech have given little thought for the rights and interests of patients—the very people most affected by restricting healthcare information.

Not only will this case have a profound impact on patients, but the Court should take this opportunity to clarify that the First Amendment protects patients' and clients' rights to receive information, as much as it protects the rights of medical professionals to give it. *See* Ethan Blevins, *Listening to the Listeners: A Patient's Right to Receive Information via Telehealth*, _ George Mason L. Rev. _ (forthcoming 2025), SSRN No. 5086249[5] (explaining how regulations of communication between professionals and clients interact with the right to receive information).

The right to receive information is a recognized corollary to the right to speak. The speech-conduct distinction relied on by the Tenth Circuit here and other circuits in similar cases neglects the interests and rights of listeners. The decision of the Tenth Circuit should be reversed.

[5] https://papers.ssrn.com/sol3/papers.cfm?abstract_id=5086249

ARGUMENT

I. The Outcome in This Case Will Affect the Many Patients Who Depend on Telehealth

This case will affect the regulatory environment across the healthcare industry, particularly for telehealth practitioners and their patients.

A. Jun's Case

Telehealth saves lives. It certainly saved Jun Abell's. At eighteen months old, Jun was diagnosed with a rare brain tumor. *See Cancer doctors and patients fight for right to telehealth*, Pac. Legal Found., https://perma.cc/DAA7-6YJJ. Time was short. His parents arranged for treatment, and Jun's dad waged a multi-day war to save his son's life by calling every pediatric oncologist in the country he could find. *Ibid.*

Chemotherapy and multiple surgeries failed to kill the tumor. But then Jun's parents found Dr. Shannon MacDonald, who works in Massachusetts. Dr. MacDonald specializes in proton therapy, an innovative treatment unavailable at that time in New York. *Ibid.*

Jun's parents consulted with Dr. MacDonald remotely via telehealth, and the family decided to start treatment under her care in Massachusetts. That decision saved Jun's life. *Ibid.*

But Jun's fight is not over. He needs monitoring for the rest of his life to guard against relapse. But he now lives with his family in New Jersey, a state that forbids virtual doctor-patient visits with out-of-state practitioners. *Ibid.*

If Jun and his family had lived in New Jersey when he'd first been diagnosed, the telehealth campaign

that saved his life might not have happened. Yet even now New Jersey makes it harder for Jun to consult with the specialists most suited to watch over him. *Ibid.*

Jun's family is not alone. People who suffer rare diseases must often seek care outside their own state or region because few specialists in the country may know how to best care for them. Without telehealth options, they will have to face the burdens of regular travel or forego essential care.

Dr. MacDonald and Jun's family are now both plaintiffs represented by PLF in a lawsuit challenging New Jersey's telehealth laws under the First Amendment, among other theories. *See* Complaint for Declaratory and Injunctive Relief at 27, *MacDonald v. Sabando*, No. 1:23-cv-23044, 2025 WL 1367443 (D.N.J. Dec. 13, 2023). The district court recently dismissed their complaint. *Id.* at *16. The case is now on appeal to the Third Circuit. This Court's resolution of this matter may determine whether Dr. MacDonald can continue to help Jun via telehealth.

B. Shellye's Case

The Court's decision in this matter may also affect the outcome in a telehealth case in the Ninth Circuit. Shellye Horowitz lives in a rural coastal community in northern California. *See McBride v. Hawkins*, No. 2:24-cv-01394-KJM-AC, Complaint for Declaratory and Injunctive Relief at 1 (E.D. Cal. May 16, 2024). Like Jun, she suffers from a rare condition—a bleeding disorder that requires specialized care. No such specialists live in her community. Her hemophilia specialist lives in distant Portland, Oregon. Telehealth would allow her to reach her specialist despite the distance. Instead, since

California prohibits physicians not licensed in the state to offer care via telehealth to California patients, she must make a 14-hour round-trip drive to even get an oral consultation.

Despite Shellye's rare condition, she is hardly alone. Rural areas often suffer from inadequate access to healthcare even for those with more common maladies. *See* Linda J. Redford, *Building the Rural Healthcare Workforce: Challenges—and Strategies—in the Current Economy*, 43 J. Am. Soc'y of Aging 71, 71 (2019). This problem has only grown thanks to an ongoing physician shortage. *See* Caitlin Styrsky et al., *Restrictions to Care* 1, Pacific Legal Foundation (May 2025).[6] Experts have long touted telehealth as a vital weapon in combating this sobering problem. *See* Redford, *supra* at 73. This includes expanding access to medical care as well as mental health care. *See* Bipartisan Policy Center, *The Future of Telehealth After COVID-19: New Opportunities and Challenges* 23–24 (2022).[7]

C. Dr. Sean McBride

Dr. Sean McBride is a nationally renowned radiation oncologist specializing in genitourinary and head and neck cancers. *See McBride*, Complaint at 2–3. He works at a top specialty cancer hospital in New York, but he has patients nationwide. He often visits with out-of-state patients virtually. He has patients

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[6] *Available at* https://pacificlegal.org/restrictions-to-care-how-collaborative-practice-agreements-for-advanced-practice-registered-nurses-and-certified-nurse-midwives-limit-patient-access/

[7] *Available at* https://bipartisanpolicy.org/report/future-of-telehealth/

in California, but he cannot advise and consult with those patients via telehealth thanks to California's strict licensure rules.

Dr. McBride and Shellye Horowitz—represented by PLF—have joined together to sue the state of California. Like Jun and Dr. MacDonald, they argue that California's rules banning out-of-state telehealth violate the First Amendment. *See McBride*, Complaint.

Unfortunately, the federal district court dismissed their legal challenge late last year. In rejecting their First Amendment argument, the district court relied on the same reasoning as the Tenth Circuit in this matter. According to the district court, California's rules barring physicians not licensed in California from consulting with patients via telehealth regulates conduct, not speech, because such consultations "offer treatment." *See McBride*, No. 2:24-cv-01394-KJM-AC, Order Granting Motion to Dismiss at 13 (E.D. Cal. Nov. 19, 2024). The case is now on appeal, and its fate will depend in large part on the Court's approach here.

II. The Right to Receive Information Undermines the Speech-Conduct Distinction

Patients have a right to receive information. When a medical professional speaks with a patient, the First Amendment protects both the speaker and the listener. *See Va. St. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976). But courts, including the Tenth Circuit here, have tended to uphold regulations of professional-client speech on theories that disregard the patient's First Amendment rights. *See, e.g.*, *Chiles v. Salazar*, 116

F.4th 1178 (10th Cir. 2024); *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022).

The Tenth Circuit's reasoning focused only on the professional's right to speak, with no thought for the right of the client to listen. This neglect of listeners' rights hurts patients. This Court should reject the Tenth Circuit's speech-conduct reasoning, not only because it violates the freedom of the professional to speak, but also because it ignores the client's right to receive information.

Below, the Tenth Circuit held that a therapeutic method involving only speech was subject to rational basis review because the regulation forbidding that speech was in fact a regulation of conduct given that the speech was "treatment." *See Chiles*, 116 F.4th at 1206. This holding departs from this Court's traditional First Amendment jurisprudence, and the Petitioner and other amici ably address the flaws in the Tenth Circuit's reasoning. But that reasoning also violates the underappreciated right of the client to receive information.

A. Listeners' Rights

"[T]he right to hear and the right to speak are flip sides of the same coin." *Conant v. Walters*, 309 F.3d 629, 643 (9th Cir. 2002) (Kozinski, J., concurring). This right to hear is alive and justiciable even when the speaker lacks a First Amendment right to speak. For example, in *Lamont v. Postmaster General*, 381 U.S. 301 (1965), this Court addressed a statute requiring that incoming foreign mail deemed "communist political propaganda" be detained and released only upon the addressee's request. *Id.* at 302. The postal service had intercepted a copy of the "Peking Review #12," addressed to Mr. Lamont, who

sued claiming a First Amendment injury. *Id.* at 304. Even though the foreign correspondent did not enjoy First Amendment protection, this Court held that Lamont had a First Amendment right as a listener. *See id.* at 305 ("We conclude that the Act as construed and applied is unconstitutional because it requires an official act . . . as a limitation on the unfettered exercise of the addressee's First Amendment rights.").

The concurrence went into greater depth: "The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and consider them. It would be a barren marketplace of ideas that had only sellers and no buyers." *Id.* at 308. *Lamont* and cases like it indicate that listeners' rights stand independent from speakers' rights. The right to receive information is not a conditional right that exists only when there is a corollary and actionable right to speak.

This First Amendment right to receive information has appeared in the healthcare context as well. In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, a consumer group challenged a rule forbidding licensed pharmacists from advertising drug prices. Even though the lawsuit was not made "by one directly subject to its prohibition," the consumers could defend their own rights to receive information, since "the protection afforded is to the communication, to its source and to its recipients both." *Id.* at 753, 756. The Court struck down the advertising ban. *Id.* at 773.

Likewise, the right to receive information arose in a Ninth Circuit case involving doctor recommendations that patients consume medical marijuana, which at the time were unlawful under

federal marijuana policy. *Conant*, 309 F.3d at 632. While the majority only mentioned in passing the patient's First Amendment rights, Judge Kozinski's concurrence focused on the right to receive information. He agreed that the policy violated physicians' speech rights, but he felt the greater First Amendment injury was to the patients' rights to listen:

> [I]t is perfectly clear that the harm to patients from being denied the right to receive candid medical advice is far greater than the harm to doctors from being unable to deliver such advice. While denial of the right to speak is never trivial, the simple fact is that if the injunction were denied, the doctors would be able to continue practicing medicine and go on with their lives more or less as before. It is far different for patients . . . .

Id. at 643–44 (Kozinski, J., concurring).

B. The Tenth Circuit Failed to Recognize Listeners' Rights

The Tenth Circuit held that talk therapy is "treatment" and therefore "conduct" under First Amendment analysis. This holding neglects the therapist's speech rights as discussed in other briefing, but it also discounts a right that the Tenth Circuit failed to even mention: the right to receive information.

A focus on the right to receive information reveals a flaw in the speech-as-conduct approach taken by cases like this one: the listener receives *less* protection when the information is targeted at the

listener, and *more* protection when the speech is addressed to the public at large.

This problem is evident from the Ninth Circuit's reasoning in *Tingley v. Ferguson*, which the Tenth Circuit embraced in this case. *Tingley*, which involved a therapy ban much like this one, adopted a "continuum approach" to the speech-conduct dichotomy. At one end of the continuum is "public dialogue," which "receives the greatest First Amendment protection," and speech that arises in the context of medical treatment is at the other end of the continuum, where protections weaken. *Tingley*, 47 F.4th at 1072–73. Hence, a doctor who publicly advocates against COVID vaccines for children under ten is fully protected, but if that doctor advises a pediatric patient to forgo a COVID vaccine, then she is not as protected.

This continuum results in a paradox: the strength of the listeners' interests grows along the continuum as the First Amendment protections weaken. For instance, if Ms. Chiles were to post her viewpoints about mental health on social media, that speech is fully protected, but if she were to express that same viewpoint in a clinical setting to an individual client, her speech would be unprotected. Yet surely Ms. Chiles's client, who has sought her out for counseling targeted at the client's highly personal needs, has a far greater interest in receiving that information than the random social media user who scrolls across Ms. Chiles's viewpoints online.

Any given internet user has a right to hear Ms. Chiles's viewpoint, but that interest is abstract and generalized. Ms. Chiles's clients, however, have a concrete and specific interest because her speech is

targeted at the client's circumstances and needs, and the client has sought out her speech. The result is that listeners who have only a vague and generic interest at stake enjoy First Amendment protection, while listeners with a poignant and deeply personal interest at stake enjoy little to none. Under the Tenth Circuit's approach, the First Amendment protects least the speech that affects listeners' rights the most.

This continuum defies this Court's precedents regarding the right to receive information. Under *Lamont*, the degree of protection afforded to the speaker does not affect whether the recipient of that information is entitled to First Amendment protection. Thus, even if Ms. Chiles's talk therapy does not enjoy First Amendment protection, the client would still enjoy the right to receive her therapy. And under *Virginia Board of Pharmacy*, recipients of information have an actionable right to receive information even if they are not the direct objects of the regulation at issue.[8]

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[8] This Court should not hesitate to consider the right to receive information just because there are no therapy patients before the Court in this case. This Court has often addressed the right to receive information where only speakers were the parties before the Court. *See, e.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 339 (2010) (in a case brought by speaker, this Court weighed "[t]he right of the citizens to inquire, to hear, to speak, and to use information"); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 503 (1996) (in a case brought by regulated liquor retailers, this Court struck down restrictions on liquor price information because they "deprive consumers of accurate information"). A healthy marketplace of ideas is a key concern in First Amendment analysis, *see Virginia v. Hicks*, 539 U.S. 113, 119 (2003) (reasoning that censorship violates the First Amendment in part because it harms "society as a whole, which

Finally, viewing the Tenth Circuit's reasoning through the lens of listeners' rights underscores its shortcomings. From the listener's perspective, the Tenth Circuit's amalgam of speech and conduct disintegrates. The Tenth Circuit reasons that "[t]alk therapy is no less a medical treatment . . . simply because it is 'implemented through speech rather than through scalpel.'" *Chiles*, 116 F.4th at 1211. But for the patient or client, there is a big difference between information (speech) and a scalpel (conduct).

Unlike hands-on treatment, harm caused by doctor-patient or therapist-client speech is indirect and depends on the listener's agency. *See Va. St. Bd. of Pharmacy*, 425 U.S. at 770 ("[I]nformation is not in itself harmful."). Any harm from faulty advice turns on whether the listener accedes to the practitioner's judgment after engaging in their own information-seeking behavior. *See Edenfield v. Fane*, 507 U.S. 761, 767 (1993) ("[T]he general rule is that the speaker and the audience, not the government, assess the value of the information presented."). When a scalpel slips, the patient bleeds. When a doctor gives bad advice, harm to the patient is still only one of many possibilities. That is how any speech works: information may lead to behavior that can be subject to regulation, but until it does, it is still just information—information that patients and clients are entitled to hear.

This does not leave the state helpless to protect patients and clients. The state can respond to speech it deems harmful with the storied instrument of its own counter-speech. *See Whitney v. California*, 274

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is deprived of an uninhibited marketplace of ideas"), so the rights of both speakers and listeners are ever intertwined.

U.S. 357, 377 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."), *overruled on other grounds by Brandenburg v. Ohio*, 395 U.S. 444 (1969). This is a vital distinction between hands-on treatment and information about treatment: the state cannot easily place a shield between scalpel and skin, but it can influence the health information marketplace with its own public information campaigns, informed-consent requirements, and disclosures. This approach has the triple virtue of respecting the listeners' right to receive information, enhancing listeners' interests by spoiling them with more information, and promoting the state's interest in public health and safety.

None of this is to say that the government can never curtail the right to receive information to address concerns about manipulation and abuse of vulnerable minors or other risks. Just as with the right to speak, the right to listen is subject to exceptions and varying tiers of scrutiny. *See* Blevins, *supra* (discussing limits and exceptions to the right to receive information).

But this Court prefers more information rather than the "highly paternalistic" approach of keeping people in the dark for their own good. *Va. State Bd. of Pharmacy*, 425 U.S. at 770; *see also Citizens United*, 558 U.S. at 361 ("[I]t is our law and our tradition that more speech, not less, is the governing rule."). Courts should instead recognize "that people will perceive their own best interests if only they are well enough informed, and that the best means to that end is to open the channels of communication rather than to

close them." *Va. St. Bd. of Pharmacy*, 425 U.S. at 770; *see also 44 Liquormart*, 517 U.S. at 503 ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."). The state can rebut this presumption; if Ms. Chiles's controversial therapy poses a serious risk of harm to minors, the government should carry the burden to prove it.

CONCLUSION

Patients have a right to seek out and receive information vital to their welfare and survival. The Tenth Circuit has imperiled that right. This Court should reverse.

Respectfully submitted,

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