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.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING PETITIONER

D. JOHN SAUER
Solicitor General
Counsel of Record
BRETT A. SHUMATE
Assistant Attorney General
HASHIM M. MOOPPAN
Deputy Solicitor General
ZOE A. JACOBY
Assistant to the Solicitor General
MICHAEL S. RAAB
LOWELL V. STURGILL JR.
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTION PRESENTED

A Colorado statute prohibits mental-health professionals from engaging in "any practice or treatment"—including talk therapy—that "attempts or purports to change" a minor's "sexual orientation or gender identity." Colo. Rev. Stat. § 12-245-202.(3.5)(a) (2024); *id.* § 12-245-224(1)(t)(V). The statutory prohibition covers "efforts to change behaviors or gender expressions or to eliminate or reduce sexual or romantic attraction or feelings toward individuals of the same sex," but excludes practices or treatments that provide "[a]cceptance, support, and understanding for the facilitation of an individual's coping, social support, and identity exploration and development." *Id.* § 12-245-202(3.5)(a) and (b)(I). The question presented is:

Whether, as applied to talk therapy, Colorado's statute is a content-based regulation of speech subject to strict scrutiny.

TABLE OF CONTENTS

Page

Interest of the United States 1
Introduction 1
Statement 4
Summary of Argument 8
Argument:
A. The standard of scrutiny under the First Amendment varies based on the manner in which speech triggers a law regulating conduct 11
1. Laws that restrict speech based on content are generally subject to strict scrutiny, even if they also restrict non-speech conduct 11
2. The same rule applies in the context of professional speech and conduct 15
3. An exception exists for laws regulating conduct that burden speech incidentally, but that applies only if the speech is restricted based on its connection to some separate regulated conduct or for reasons unrelated to its communicative content 17
B. The MCTL is subject to strict scrutiny here because it restricts petitioner's speech based on content 21
C. The court of appeals erred in treating the MCTL's speech restriction as incidental to the regulation of professional conduct 27
D. Vacatur and remand is warranted for the lower courts to apply strict scrutiny in the first instance 31
Conclusion 35

TABLE OF AUTHORITIES

Cases: Page

Arcara v. *Cloud Books, Inc.*, 478 U.S. 697 (1986) 21
Bridges v. *California*, 314 U.S. 252 (1941) 14, 28
Buck v. *Bell*, 274 U.S. 200 (1927) 32
City of Austin v. *Reagan Nat'l Adver. of Austin, LLC*, 596 U.S. 61 (2022) 12, 22
Cohen v. *California*, 403 U.S. 15 (1971) 13, 21, 23, 24, 28, 33
Conant v. *Walters*, 309 F.3d 629 (9th Cir. 2002), cert. denied, 540 U.S. 946 (2003) 26
Davenport v. *Washington Educ. Ass'n*, 551 U.S. 177 (2007) 12
Giboney v. *Empire Storage & Ice Co.*, 336 U.S. 490 (1949) 19
Goldfarb v. *Virginia State Bar*, 421 U.S. 773 (1975) 31
Holder v. *Humanitarian Law Project*, 561 U.S. 1 (2010) 2, 8, 12-14, 16, 20-23, 27, 28
Iancu v. *Brunetti*, 588 U.S. 388 (2019) 23
King v. *Governor*, 767 F.3d 216 (3d Cir. 2014), cert. denied, 575 U.S. 996 (2015), abrogated by *National Inst. of Family & Life Advocates* v. *Becerra*, 585 U.S. 755 (2018) 22, 24
McCullen v. *Coakley*, 573 U.S. 464 (2014) 16
National Inst. of Family & Life Advocates v. *Becerra*, 585 U.S. 755 (2018) 2, 3, 6, 7, 9, 15-18, 20-22, 24-26, 28-30
New York v. *Ferber*, 458 U.S. 747 (1982) 31
New York State Rifle & Pistol Ass'n, Inc. v. *Bruen*, 597 U.S. 1 (2022) 25
Ohralik v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978) 18-20

Cases—Continued: Page

Otto v. *City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020) 32
Pickup v. *Brown*, 740 F.3d 1208 (9th Cir.), cert. denied, 573 U.S. 945 (2014), abrogated by *National Inst. of Family & Life Advocates* v. *Becerra*, 585 U.S. 755 (2018) 22, 24
Planned Parenthood of Se. Pa. v. *Casey*, 505 U.S. 833 (1992) 18, 29
Police Dep't v. *Mosley*, 408 U.S. 92 (1972) 11
R.A.V. v. *City of St. Paul*, 505 U.S. 377 (1992) 12, 20, 21, 24
Reed v. *Town of Gilbert*, 576 U.S. 155 (2015) 11, 12, 22
Rosenberger v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819 (1995) 23
Rumsfeld v. *Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47 (2006) 19
Simon & Schuster, Inc. v. *Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105 (1991) 12
Snyder v. *Phelps*, 562 U.S. 443 (2011) 14
Sorrell v. *IMS Health Inc.*, 564 U.S. 552 (2011) 20, 25
Texas v. *Johnson*, 491 U.S. 397 (1989) 20, 21
Tingley v. *Ferguson*, 144 S. Ct. 33 (2023) 23, 25
United States v. *Hansen*, 599 U.S. 762 (2023) 19
United States v. *National Treasury Emps. Union*, 513 U.S. 454 (1995) 27
United States v. *O'Brien*, 391 U.S. 367 (1968) 21
United States v. *Playboy Entm't Grp. Inc.*, 529 U.S. 803 (2000) 34
United States v. *Stevens*, 559 U.S. 460 (2010) 12, 25
United States v. *Williams*, 553 U.S. 285 (2008) 19

Cases—Continued: Page

Williams-Yulee v. *Florida Bar*, 575 U.S. 433 (2015) 27
Zauderer v. *Office of Disciplinary Counsel*, 471 U.S. 626 (1985) 17

Constitution and statutes:

U.S. Const.:
Amend. I 2, 3, 6-16, 19, 21, 33
Free Speech Clause 1, 11, 31
Amend. XIV 6
18 U.S.C. 2339A(b)(1) 13
Mental Health Practice Act, Colo. Rev. Stat. § 12-245-101 *et seq.* (2024) 4
§ 12-245-202(3.5)(a) 2, 5, 22, 23
§ 12-245-202(3.5)(b) 5
§ 12-245-202(3.5)(b)(1) 22
§ 12-245-224 4
§ 12-245-224(1)(t)(III) 4
§ 12-245-224(1)(t)(V) 4, 22
§ 12-245-225 5
§ 12-245-225(1)(a) 5
§ 12-245-225(1)(b) 5
§ 12-245-225(1)(c) 5
§ 12-245-225(1)(f) 5
§ 12-245-225(2) 5
§ 12-245-225(3) 5
§ 12-245-302 4
§ 12-245-304 4
§ 12-245-602 4
§ 12-245-604 4
§ 12-245-802 4

Statutes—Continued: Page

§ 12-245-804 4

Minor Conversion Therapy Law, 2019 Colo. Sess. Laws 3409-3412 4

Miscellaneous:

Am. Psychological Ass'n, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (2009) 31, 33

Restatement (Second) of Torts (1965) 14

U.S. Dep't of Health & Human Servs.:

Substance Abuse and Mental Health Servs. Admin., *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth* (Oct. 2015) 31

Treatment for Pediatric Gender Dysphoria: Review of Evidence and Best Practices (May 1, 2025), https://opa.hhs.gov/sites/default/files/2025-05/gender-dysphoria-report.pdf 34

Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981 (2016) 14, 19, 20

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INTEREST OF THE UNITED STATES

This case concerns whether and under what circumstances a general regulation of professional conduct that restricts what a professional can say to her clients violates the First Amendment's Free Speech Clause. The United States has a substantial interest in protecting citizens' constitutional rights of free expression and also in preserving the ability of governments to regulate conduct despite incidental burdens on speech.

INTRODUCTION

A recurring issue in free-speech jurisprudence is how to distinguish between speech and conduct. As part of a broad regulation of the practice of mental-health professionals, Colorado has passed a law preventing

providers from employing "any practice or treatment" that "attempts or purports to change" a minor's "sexual orientation or gender identity." Colo. Rev. Stat. § 12-245-202(3.5)(a) (2024). The statute reaches conduct that has no First Amendment protection because it is not carried out through speech, such as using negative stimuli to create an aversive response. But the statute also covers talk therapy—a course of mental-health treatment conducted solely through the spoken word. The question presented is whether, as applied to petitioner's talk therapy, the law operates as a content-based speech restriction or merely as a regulation of conduct that incidentally burdens speech.

This Court's precedents supply a clear answer: Colorado's law is a content-based restriction on petitioner's speech because it is triggered by that speech's communicative content. In *Holder* v. *Humanitarian Law Project*, 561 U.S. 1 (2010), and similar cases, this Court has held that even if a law "may be described as directed at conduct," it operates as a content-based speech restriction, as applied, if "the conduct triggering coverage under the statute consists of communicating a message." *Id.* at 28. That is equally true in the context of "'professional speech,'" which this Court "has not recognized * * * as a separate category of speech" under the First Amendment. *National Inst. of Family & Life Advocates* v. *Becerra*, 585 U.S. 755, 769 (2018) (*NIFLA*). The *Holder* principle resolves this case.

Below, the court of appeals and respondents took a different view. They contended that the State's law is not subject to First Amendment scrutiny, reasoning that it is a regulation of conduct that only "incidentally involves speech." Pet. App. 37a. But while this Court has recognized an exception to strict scrutiny for

conduct regulations that "incidentally" burden speech, that exception applies only if the speech is restricted (1) based on its connection to some separate regulated conduct or (2) for reasons unrelated to its communicative content. Here, the only conduct of petitioner's that Colorado is regulating is the words that she says to their clients, and the State is doing so because it disagrees with the viewpoint conveyed—in short, the law regulates speech as speech.

This Court should reaffirm that *Holder* is the doctrine that applies when speech triggers a regulation because of its communicative content independent from any other regulated conduct. Doing so would not upend state regulations of professional conduct. States may still regulate professional speech based on its connection to separate regulated conduct or for reasons unrelated to its content (or if it is otherwise historically recognized as unprotected). And while strict scrutiny will apply to certain regulations of professional speech, States can meet that burden when they make a sufficient showing that they need to restrict speech that is harmful or ineffective. What a State cannot do, however, is avoid the rigors of strict scrutiny by labeling talk therapy as conduct rather than speech.

This Court warned in *NIFLA* that "regulating the content of professionals' speech poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." 585 U.S. at 771. Here, Colorado is muzzling one side of an ongoing debate in the mental-health community about how to discuss questions of gender and sexuality with children. Under the First Amendment, the State bears a heavy burden to justify that content-based restriction on protected speech.

STATEMENT

1. a. Colorado regulates the licensure and practice of mental-health professionals under the Mental Health Practice Act, Colo. Rev. Stat. § 12-245-101 *et seq.* The Act establishes state boards of examiners to oversee various mental-health subfields, including psychology, professional counseling, and addiction counseling. See, *e.g.*, *id.* §§ 12-245-302, 12-245-602, 12-245-802. And it sets out qualifications that professionals in those subfields must satisfy to obtain the licenses, registrations, or certifications required to practice in the State. See, *e.g.*, *id.* §§ 12-245-304, 12-245-604, 12-245-804.

The Act also regulates the conduct of Colorado's mental-health professionals once they are authorized to practice. Among other things, it contains a list of "[p]rohibited activities." Colo. Rev. Stat. § 12-245-224. This includes, for example, performing "any service or treatment that is contrary to the generally accepted standards of the person's practice and is without clinical justification." *Id.* § 12-245-224(1)(t)(III).

b. In 2019, Colorado enacted the Minor Conversion Therapy Law (MCTL), 2019 Colo. Sess. Laws 3409-3412. As relevant here, the MCTL makes it a prohibited activity for a covered mental-health professional to engage in "[c]onversion therapy with a client who is under eighteen years of age." Colo. Rev. Stat. § 12-245-224(1)(t)(V). The MCTL defines "[c]onversion therapy" as:

> any practice or treatment * * * 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.

Id. § 12-245-202(3.5)(a). The statute further clarifies:

> "Conversion therapy" does not include practices or treatments that provide:
>
> (I) Acceptance, support, and understanding for the facilitation of an individual's coping, social support, and identity exploration and development, including sexual-orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices, as long as the counseling does not seek to change sexual orientation or gender identity; or
>
> (II) Assistance to a person undergoing gender transition.

Id. § 12-245-202(3.5)(b).

A covered mental-health professional who violates the conversion-therapy ban is subject to various statutory penalties. See Colo. Rev. Stat. § 12-245-225. Among other things, the relevant state board may issue her a letter of admonition, place her on probation, revoke her authorization to practice, apply for an order enjoining her from practicing, and issue a $5000 administrative fine per violation. *Id.* § 12-245-225(1)(a), (b), (c), and (f), (2), and (3).

2. a. Petitioner is a licensed professional counselor in Colorado. Pet. App. 12a. She is a Christian who works with "adults who are seeking Christian counseling and minors who are internally motivated to seek counseling." *Id.* at 13a. Petitioner's counseling practice consists exclusively of talk therapy. *Id.* at 14a. In her practice, petitioner seeks "to assist clients with their stated desires and objectives in counseling." *Ibid.* According to petitioner, these objectives sometimes include "seeking to reduce or eliminate unwanted sexual

attractions, change sexual behaviors, or grow in the experience of harmony with one's physical body." *Ibid.*

In 2022, petitioner brought this pre-enforcement suit against respondents—Colorado officials who administer the MCTL and two state boards of examiners. Pet. App. 14a-15a. Petitioner alleged that the MCTL violates her (and her minor clients') rights to freedom of speech and free exercise of religion under the First Amendment, as well as her right to due process under the Fourteenth Amendment. *Id.* at 15a & n.8. Petitioner sought a preliminary injunction on all of those grounds. *Id.* at 135a.

b. The United States District Court for the District of Colorado denied a preliminary injunction. Pet. App. 135a-173a.

The district court first determined that petitioner had standing to assert her own rights, but not the rights of her clients. Pet. App. 145a-147a. It then held that petitioner was unlikely to succeed on the merits of her free-speech claim. *Id.* at 150a.

The district court reasoned that the MCTL "regulates professional conduct" in the form of a particular type of medical treatment, "not speech." Pet. App. 150a. It acknowledged that petitioner's practice of the prohibited treatment—talk therapy—"is administered through words." *Id.* at 154a. But it opined that the statute's effect on speech was merely "incidental[]" to its regulation of a particular course of medical treatment. *Id.* at 150a (citing *National Inst. of Family & Life Advocates* v. *Becerra*, 585 U.S. 755, 768 (2018)).

The district court next concluded that rational-basis review applied. Pet. App. 155a. It rejected petitioner's argument that the MCTL is subject to strict scrutiny for discriminating based on viewpoint, reiterating the

conclusion that the law "prohibits therapeutic *practices*" and burdens speech only incidentally. *Id.* at 155a n.8. And the court finally determined that the law satisfies rational-basis review. *Id.* at 157a.

c. A divided panel of the United States Court of Appeals for the Tenth Circuit affirmed. Pet. App. 1a-82a.

In an opinion by Judge Rossman, joined by Judge Moritz, the court of appeals emphasized that *NIFLA* stated that the regulation of "professional conduct that 'incidentally involves speech'" is permissible under the First Amendment. Pet. App. 37a (quoting 585 U.S. at 768). The Tenth Circuit concluded that the MCTL is a regulation of professional conduct because it "regulates mental health professionals practicing their profession." *Id.* at 38a-39a. The court further held that the MCTL's application to talk therapy was also a regulation of professional conduct, because talk therapy is "a medical treatment." *Id.* at 42a. It acknowledged that "an aspect of the counseling conduct, by its nature, necessarily involves speech." *Id.* at 50a. But the court determined that petitioner's freedom of speech was only "implicated," not "abridged," because the MCTL only "incidentally involves speech." *Ibid.* It reasoned that the MCTL "does not regulate expression," because the law leaves petitioner free to "share with her minor clients her own views on conversion therapy." *Id.* at 46a-47a. Instead, the court found that the "only conduct prohibited" is providing a "treatment" to minor clients. *Id.* at 47a.

The court of appeals further held that rational-basis review applies and is satisfied. Pet. App. 59a-72a. It noted that the State has legitimate interests in "safeguarding the physical and psychological well-being of a minor" and in "regulating and maintaining the integrity

of the mental-health profession." *Id.* at 63a. The court concluded that the MCTL is rationally related to those interests, upholding the district court's findings on the preliminary-injunction record. *Id.* at 67a.

Judge Hartz dissented. Pet. App. 83a-125a. He reasoned that the MCTL is subject to strict scrutiny because it regulates petitioner's talk therapy based on its expressive content. *Id.* at 87a-88a. Judge Hartz identified "serious questions" about respondents' ability to satisfy strict scrutiny on the current evidentiary record, *id.* at 86a, and would have remanded to allow the district court to address those issues in the first instance. *Id.* at 106a.[1]

SUMMARY OF ARGUMENT

The question presented is whether, as applied to talk therapy, Colorado's Minor Conversion Therapy Law (MCTL)—which prohibits any mental-health treatment by licensed therapists that attempts to change a minor's sexual orientation or gender identity—operates as a content-based speech restriction subject to strict scrutiny under the First Amendment. The answer is yes.

A. When speech triggers a law that regulates conduct, the level of First Amendment scrutiny that applies depends on how the law operates. As a general rule, if the speech is covered based on its communicative content, then the law triggers strict scrutiny, even if the law also covers non-speech conduct. For example, in *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 28 (2010), the Court applied strict scrutiny to a federal

[1] Petitioner also appealed the district court's separate holding that petitioner is unlikely to succeed on her free-exercise claim, which the court of appeals affirmed as well. Pet. App. 72a-82a, 161a-171a. Petitioner did not seek further review of that question.

statute banning "material support" to terrorist organizations because, as applied to the plaintiffs' intended speech, the law banned the speech based on its message.

The same general rule applies to a law regulating professional speech, which is subject to the same First Amendment rules as other speech. See *National Inst. of Family & Life Advocates* v. *Becerra*, 585 U.S. 755, 766-773 (2018). A professional conduct regulation that is applied to restrict speech based on its content is thus generally subject to strict scrutiny, even if it also covers non-speech conduct.

This Court in *NIFLA* recognized an exception to that general rule: "States may regulate professional conduct, even though that conduct incidentally involves speech." 585 U.S. at 768. *NIFLA* used the term "incidental" to describe two different types of relationships between speech and conduct. First, speech may be "incidentally" burdened in the sense that the speech is *closely connected* to separate, non-speech conduct that is being regulated. Second, speech may be "incidentally" burdened in the sense that the speech is regulated for *reasons unrelated* to its content. Importantly, however, *Holder* dictates that a law does not qualify as an "incidental" burden in either sense simply because it applies to both speech and non-speech conduct.

B. Under those principles, strict scrutiny is the proper standard for petitioner's free-speech claim. The MCTL restricts what she may say to her minor clients based on the content and viewpoint of her speech, which generally triggers strict scrutiny. That the MCTL also applies to non-speech conduct does not change the analysis, per *Holder*. And the MCTL is not a conduct regulation that "incidentally" burdens speech under *NIFLA*. The MCTL's ban on petitioner's speech

is not tied to any separate non-speech conduct, but rather regulates speech solely as speech. And the MCTL bans that speech because of its message, not for any content-neutral reason.

C. The Tenth Circuit erroneously applied rational-basis review, reasoning that the MCTL regulates a particular mental-health "treatment" and that any burden on petitioner's speech is "incidental[]." Pet. App. 46a-47a, 54a-56a. The court essentially deemed the MCTL's burden on speech to be "incidental" simply because the statute also regulates conduct. That reasoning contradicts *Holder* and misreads *NIFLA*. Relatedly, the court treated petitioner's speech differently from other speech because it is spoken by a professional, disregarding *NIFLA*'s admonition that professional speech should not be treated differently from other speech under the First Amendment.

D. This Court should vacate and remand for the lower courts to apply strict scrutiny in the first instance. But to the extent the Court wishes to offer guidance on that score, the record strongly suggests that respondents cannot carry their burden. While Colorado has compelling interests in protecting minors from harmful or ineffective treatments provided by licensed mental-health professionals, the State appears to lack persuasive evidence that the MCTL's ban on conversion therapy substantially advances those interests, raising the inference that the State is merely seeking to suppress a disfavored viewpoint.

ARGUMENT

A. The Standard Of Scrutiny Under The First Amendment Varies Based On The Manner In Which Speech Triggers A Law Regulating Conduct

When speech triggers a law that regulates conduct, the level of First Amendment scrutiny that applies depends on how the law operates. In general, if the speech is covered because of its communicative content, then the law is subject to strict scrutiny, notwithstanding that it also covers non-speech conduct. And the same general rule applies for professional speech. An exception exists, however, when the conduct regulation only incidentally burdens speech. But that exception applies only if the speech is restricted based on its connection to some separate regulated conduct or for reasons unrelated to its communicative content.

1. Laws that restrict speech based on content are generally subject to strict scrutiny, even if they also restrict non-speech conduct

a. The core guarantee of the Free Speech Clause of the First Amendment, applicable to the States through the Fourteenth Amendment, is that the government may not "restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't* v. *Mosley*, 408 U.S. 92, 95 (1972). Thus, "[c]ontent-based laws —those that target speech based on its communicative content—are presumptively unconstitutional." *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015). Absent an exception, such laws "may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Ibid.*

A speech restriction is content-based if it "applies to particular speech because of the topic discussed or the

idea or message expressed." *Reed*, 576 U.S. at 163; see *City of Austin* v. *Reagan Nat'l Adver. of Austin, LLC*, 596 U.S. 61, 73-74 (2022). In other words, if a speaker's violation of the law "depends on what they say"—their topic or message—the law is content-based. *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 27 (2010).

Content-based laws are presumptively unconstitutional because "content discrimination 'raises the specter that the Government may effectively drive certain ideas or viewpoints from the marketplace.'" *Davenport* v. *Washington Educ. Ass'n*, 551 U.S. 177, 188 (2007) (quoting *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 387 (1992)). There are some circumstances "in which that risk is inconsequential, so that strict scrutiny is unwarranted," *ibid.*, including for certain "historic and traditional categories" of unprotected speech, *United States* v. *Stevens*, 559 U.S. 460, 468 (2010). Bans on fighting words and defamation are classic examples. See *R.A.V.*, 505 U.S. at 383. But outside such exceptions, the First Amendment "put[s] the decision as to what views shall be voiced largely into the hands of each of us," to play out in the marketplace of ideas. *Simon & Schuster, Inc.* v. *Members of the N.Y. State Crime Victims Bd.*, 502 U.S. 105, 116 (1991).

b. Content-based speech restrictions sometimes arise in the context of laws that more broadly regulate non-expressive conduct. In a long line of cases, involving many types of laws, this Court has consistently held that even general conduct regulations warrant strict scrutiny when they are applied to restrict speech based on its communicative content. In other words, a law that regulates speech based on its content is no less suspect just because the law can also be violated by conduct that does not communicate a message.

Cohen v. *California*, 403 U.S. 15 (1971), is a leading illustration of the principle. In *Cohen*, a man who wore a jacket bearing the words "Fuck the Draft" in a county courthouse, in order to protest the Vietnam War, was convicted under a state law that prohibited "maliciously and willfully disturbing the peace." *Id.* at 16 (brackets omitted). The law did not facially target speech as such; a person can disturb the peace through non-expressive conduct (like engaging in a riot). But this Court held that, as applied to Cohen, the law operated as a content-based speech restriction, because the conviction "quite clearly rest[ed] upon the asserted offensiveness of the *words* Cohen used to convey his message." *Id.* at 18. Put differently, Cohen violated the law only because of the communicative content of his jacket; a jacket bearing a different message would not have disturbed the peace. *Ibid.*

This Court took the same approach to a different statute in *Holder* v. *Humanitarian Law Project*, *supra*. That case involved a First Amendment challenge to a federal statute that prohibited providing "material support or resources" to certain foreign terrorist organizations. 561 U.S. at 7. The statute covered a variety of property and services, including "expert advice or assistance." 18 U.S.C. 2339A(b)(1). The plaintiffs objected that the statute prevented them from providing "legal training[] and political advocacy" (among other things) for designated organizations. *Holder*, 561 U.S. at 10. As in *Cohen*, the statute in *Holder* was facially speech-neutral: it banned all manner of material support that "d[id] not take the form of speech at all." *Id.* at 26. But as applied to the plaintiffs, the Court held that the statute operated as a content-based speech restriction, because the plaintiffs' compliance with the

material-support statute "depends on what they say"—in that case, whether their advocacy constituted prohibited "expert advice or assistance." *Id.* at 22, 27.

Relying on *Cohen*, *Holder* rejected the argument that the material-support statute should receive less-than-strict scrutiny "because it *generally* functions as a regulation of conduct." 561 U.S. at 27. The Court explained: "The law here may be described as directed at conduct, as the law in *Cohen* was directed at breaches of the peace, but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Id.* at 28.

Cohen and *Holder* are part of a broader line of cases that apply the same rule. See Eugene Volokh, *The "Speech Integral to Criminal Conduct" Exception*, 101 Cornell L. Rev. 981, 1015-1021 (2016). For example, the tort of intentional infliction of emotional distress (IIED) can be committed through non-expressive conduct. See, *e.g.*, Restatement (Second) of Torts § 46 cmt. f, illus. 11 (1965) (shooting a pet dog). But when a defendant is sued for IIED because of the communicative content of his speech, he can raise a First Amendment defense. See, *e.g.*, *Snyder* v. *Phelps*, 562 U.S. 443, 451 (2011). Contempt of court is another example. A person can act in contempt of court through conduct or speech. And this Court has recognized that "facially valid contempt-of-court rules might be unconstitutional as applied to out-of-court speech criticizing a judge's decision." Volokh 1019; see, *e.g.*, *Bridges* v. *California*, 314 U.S. 252, 258-260 (1941). In short, although the Court has not always expressly reiterated the reasoning in *Holder* and *Cohen*, it has consistently applied their rule: strict scrutiny generally applies when a law regulating conduct is triggered by the communicative content of speech.

2. The same rule applies in the context of professional speech and conduct

a. The general rule articulated above applies in the same way to laws regulating professionals. In *National Institute of Family & Life Advocates* v. *Becerra*, 585 U.S. 755 (2018), this Court made clear that it "has not recognized 'professional speech' as a separate category of speech." *Id.* at 767. *NIFLA* addressed a First Amendment challenge to a California law that required crisis pregnancy centers to make certain disclosures. *Id.* at 766. The Court held that the challenged law was a "content-based regulation of speech," but noted that the lower court had declined to "apply strict scrutiny because it concluded that the notice regulates 'professional speech.'" *Id.* at 766-767. This Court rejected that reasoning, explaining that "[s]peech is not unprotected merely because it is uttered by 'professionals.'" *Id.* at 767. *NIFLA* had no occasion to formally "foreclose the possibility that some such reason exists" to apply less exacting scrutiny to content-based regulations of professional speech, because the law at issue did not survive even intermediate scrutiny. *Id.* at 773. But the Court's reasoning effectively closes that door.

NIFLA identified several reasons why content-based regulations of professional speech, like other content-based speech regulations, should be presumed unconstitutional. To begin, "information can save lives" in fields like "medicine and public health." *NIFLA*, 585 U.S. at 771. Moreover, the "dangers associated with content-based regulations of speech are also present in the context of professional speech," as there is the same "inherent risk that the Government seeks * * * to suppress unpopular ideas of information." *Ibid.* And ultimately, "when the government polices the content of

professional speech, it can fail to 'preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.'" *Id.* at 772 (quoting *McCullen* v. *Coakley*, 573 U.S. 464, 476 (2014)). "Professionals might have a host of good-faith disagreements, both with each other and with the government," about the "ethics" or "prudence" of various practices in their fields. *Ibid.* *NIFLA* thus concluded that, for professional speech no less than other types of speech, "the people lose when the government is the one deciding which ideas should prevail," rather than allowing "accept[ance] in the competition of the market" to serve as "[t]he best test of truth." *Ibid.*

b. Because "professional speech" is not subject to different First Amendment rules under *NIFLA*, the *Holder* rule applies equally in the context of professional regulation. See Pet. App. 98a-99a (Hartz, J., dissenting). This means that a content-based restriction on professional speech "cannot escape rigorous First Amendment scrutiny simply because the prohibition may also apply to much conduct." *Id.* at 98a.

In fact, *Holder* itself involved professional speech. The plaintiffs there were organizations that wanted to provide specialized advice about international law to the designated entities—*i.e.*, professionals. *Holder*, 561 U.S. at 10. *NIFLA* thus specifically cited *Holder* as an example of a case that "applied strict scrutiny to content-based laws that regulate" the speech of "professionals." 585 U.S. at 771.

3. An exception exists for laws regulating conduct that burden speech incidentally, but that applies only if the speech is restricted based on its connection to some separate regulated conduct or for reasons unrelated to its communicative content

NIFLA does not hold that all laws restricting professional speech are subject to strict scrutiny. This Court recognized that it "has afforded less protection for professional speech" in certain circumstances, though for reasons that did not "turn[] on the fact that professionals were speaking." 585 U.S. at 768. As relevant here, *NIFLA* observed that "States may regulate professional conduct, even though that conduct incidentally involves speech." *Ibid.* The Court explained that "[t]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech, and professionals are no exception to this rule." *Id.* at 769 (citations omitted). This case raises the scope of *NIFLA*'s exception for professional conduct regulations that "incidentally" burden speech. *Ibid.*[2]

As detailed below, *NIFLA* and the decisions it cited used the term "incidental" to describe two distinct types of relationships between speech and conduct. First, speech may be "incidentally" burdened in the sense that the speech is *closely connected* to separate, non-speech

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[2] The Court in *NIFLA* also recognized a second context in which professional speech warrants "less protection" for reasons independent of the status of professionals: restrictions on "'commercial speech'" proposing a transaction, such as "laws that require professionals to disclose factual, noncontroversial information" in advertisements. 585 U.S. at 768 (citing *Zauderer* v. *Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)). This case does not implicate that exception, and "[n]o one suggests" otherwise. Pet. App. 37a n.25.

conduct that is being regulated. In such cases, the speech is regulated because of its communicative content, but that is deemed ancillary to the regulation of unprotected conduct. Second, speech may be "incidentally" burdened in the sense that the speech is regulated for *reasons unrelated* to its content. In such cases, the speech is not regulated because of its communicative content at all.

a. *NIFLA* cited two precedents to illustrate laws "regulat[ing] professional conduct" that "incidentally involve[] speech," 585 U.S. at 768: *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833 (1992); and *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447 (1978). Each of those cases falls in the category of speech that is restricted because it is closely connected to separate, non-speech conduct that is being regulated.

In *Casey*, the controlling opinion upheld a state law requiring doctors to provide a woman with certain information before performing an abortion. See *NIFLA*, 585 U.S. at 769-770. Although the law compelled speech, it did so "as part of obtaining [the patient's] consent" to perform a "medical procedure." *Casey*, 505 U.S. at 884 (plurality opinion). The opinion thus treated the law as a regulation of conduct. *Ibid.* Critically, though, the fact that the speech was "tied to a procedure" separate from the speech itself is what made the speech restriction an "incidental burden[]." *NIFLA*, 585 U.S. at 769-770.

Likewise, in *Ohralik*, the Court upheld a state law banning in-person solicitation by lawyers. 436 U.S. at 454-455. The Court reasoned that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Id.* at 456. And the Court concluded

that "[i]n-person solicitation" of "remunerative employment is a business transaction in which speech is an essential but subordinate component," and where one party "may exert pressure" on the other. *Id.* at 457.[3] The Court held that this "lowers the level of appropriate judicial scrutiny," though it did not go so far as to hold that it "remove[d] the speech from the protection of the First Amendment" altogether, as it did in *Casey*. *Ibid.*

The Court's holdings in *Casey* and *Ohralik* are close cousins of the doctrine of "speech integral to unlawful conduct." *United States* v. *Hansen*, 599 U.S. 762, 783 (2023). In a long line of cases dating to *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949), this Court has held that the First Amendment does not protect certain speech that causes or facilitates unlawful non-speech conduct. For instance, the Court has held that the First Amendment does not protect speech that promotes the sale of a particular item of contraband. *United States* v. *Williams*, 553 U.S. 285, 297-298 (2008). And it has explained that the government can ban employers from putting up a "White Applicants Only" sign, as such conduct would cause or facilitate the unlawful conduct of discriminatory hiring. *Rumsfeld* v. *Forum for Academic & Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006). In those examples, the speech at issue is unlawful because of its content, but strict scrutiny is nevertheless inapplicable because the speech is being "used as an integral part" of separate conduct that is unlawful. *Giboney*, 336 U.S. at 498.

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[3] Although contracts are formed through communication, this Court has long treated contract formation as conduct rather than speech. See Volokh 1008 ("Agreements are a longstanding category of speech that has been historically excluded from constitutional protection.").

Casey and *Ohralik* can be understood similarly. *Casey* compelled speech by doctors to prevent them from performing abortions on patients lacking informed consent, and *Ohralik* banned in-person solicitation by lawyers to prevent them from coercively engaging clients. Indeed, *Giboney* was cited in *Ohralik*, 436 U.S. at 456, and in *NIFLA*, 585 U.S. at 769.

To be clear, while some separate regulated conduct is necessary for the speech to be "incidental" or "integral" in the sense of *Casey*, *Ohralik*, and *Giboney*, the mere presence of any such conduct is not sufficient. See Volokh 1011-1013 (citing cases); cf. *Holder*, 561 U.S. at 27 n.5 (declining to consider whether, under *Giboney*, the organizations' advice was integral to the terrorists' crimes). This Court need not resolve in this case the precise relationship required under the doctrine between the speech and the conduct, because there is *no* separate regulated conduct here. See p. 24, *infra*.

b. *NIFLA* also quoted *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 567 (2011), for the proposition that "[t]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." 585 U.S. at 769. And *Sorrell*, in turn, used the term "incidental" to describe cases that fall, not just in the *Giboney* category, but also in the category of speech that is restricted for reasons unrelated to its content. 564 U.S. at 567.

In particular, *Sorrell* described as an "incidental burden[]" the fact that "'an ordinance against outdoor fires' might forbid 'burning a flag.'" 564 U.S. at 567 (quoting *R.A.V.*, 505 U.S. at 385). Although flag burning can in some circumstances be protected expressive activity, see *Texas* v. *Johnson*, 491 U.S. 397, 403 (1989), it is covered by an outdoor-fire ban "because of the

action it entails, * * * not because of the idea it expresses." *R.A.V.*, 505 U.S. at 385.

When the restriction unrelated to content directly applies to the expressive activity, intermediate rather than strict scrutiny applies. See *Texas*, 491 U.S. at 403 (citing *United States* v. *O'Brien*, 391 U.S. 367, 377 (1968) (ban on destroying draft cards)). And when the restriction unrelated to content only indirectly affects the expressive activity, no First Amendment scrutiny applies at all. See *Arcara* v. *Cloud Books, Inc.*, 478 U.S. 697, 704-705 (1986) (closure of an adult bookstore because it was also operating as a brothel).

c. Importantly, a law does not fall within either of the two senses of "incidental" burdens in *NIFLA* simply because it applies to both speech and non-speech conduct. *Holder* and many other cases reject that proposition. See 561 U.S. at 26-28; pp. 12-14, *supra*.

Instead, a court must ask if the restriction of speech (1) "rests upon * * * [the] message" conveyed and (2) "not upon any separately identifiable conduct." *Cohen*, 403 U.S. at 18. If the answer to both questions is yes, then the law "regulates speech as speech," *NIFLA*, 585 U.S. at 770, and strict scrutiny applies (absent a historically grounded exception).

B. The MCTL Is Subject To Strict Scrutiny Here Because It Restricts Petitioner's Speech Based On Content

Applying the foregoing principles, strict scrutiny is the appropriate standard to analyze petitioner's free-speech challenge to the MCTL. No sound doctrinal or practical reason justifies a less rigorous review.

1. As applied to petitioner, the MCTL restricts her speech based on its communicative content. The lower courts acknowledged that when petitioner talks to her clients, she is engaged in "speech." See Pet. App. 50a

("[A]n aspect of the counseling conduct, by its nature, necessarily involves speech."); *id.* at 154a ("[T]he treatment technique of talk therapy is administered through words."). And the MCTL restricts that speech because of its message. Under the MCTL, petitioner cannot say certain messages to her minor clients—namely, she cannot say anything that "attempts or purports" to change their "sexual orientation or gender identity." Colo. Rev. Stat. § 12-245-202(3.5)(a); see *id.* § 12-245-224(1)(t)(V). Indeed, *NIFLA* itself described two lower-court cases reviewing similar laws as involving "content-based regulations of speech." 585 U.S. at 767 (citing *King* v. *Governor*, 767 F.3d 216, 232 (3d Cir. 2014), cert. denied, 575 U.S. 996 (2015); *Pickup* v. *Brown*, 740 F.3d 1208, 1253-1256 (9th Cir. 2014), cert. denied, 573 U.S. 945 (2014)).

The MCTL's safe harbor for certain therapeutic practices confirms that petitioner's compliance with the law "depends on what [she] say[s]." *Holder*, 561 U.S. at 27; see Pet. App. 98a (Hartz, J., dissenting). To determine whether petitioner's talk therapy violates the law, state regulators would have to analyze "the topic discussed or the idea or message expressed" to her minor clients. *City of Austin*, 596 U.S. at 73-74 (quoting *Reed*, 576 U.S. at 171). If the message conveys "[a]cceptance, support, and understanding for the facilitation of an individual's coping, social support, and identity exploration and development," then she does not violate the MCTL. Colo. Rev. Stat. § 12-245-202(3.5)(b)(1). But if her message conveys "efforts to change behaviors or gender expressions or to eliminate or reduce sexual or romantic attraction or feelings toward individuals of the same sex," then she does violate the MCTL. *Id.* § 12-245-202(3.5)(a).

Even worse, the MCTL restricts petitioner's speech based on viewpoint—an especially "egregious form of content discrimination." *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). How "best to help minors" struggling with issues of gender or sexuality is a subject of "fierce public debate." *Tingley* v. *Ferguson*, 144 S. Ct. 33, 33 (2023) (Thomas, J., dissenting from the denial of certiorari). Colorado has effectively "silenced one side of this debate" by allowing licensed therapists to convey only "the state-approved message of encouraging minors to explore their gender identities." *Id.* at 33-34. That alone requires subjecting the MCTL to strict scrutiny. See, *e.g.*, *Iancu* v. *Brunetti*, 588 U.S. 388, 392-394 (2019).

2. There is no doctrinal justification for applying lesser scrutiny to the MCTL's content- and viewpoint-based speech restriction.

To begin, Colorado "cannot escape rigorous First Amendment scrutiny simply because the prohibition may also apply to much conduct." Pet. App. 98a (Hartz, J., dissenting). That conclusion follows directly from *Holder*. Like the statute there, the MCTL applies to both speech and non-speech conduct. See Colo. Rev. Stat. § 12-245-202(3.5)(a) (prohibiting "any practice or treatment" that qualifies as "[c]onversion therapy"); Pet. App. 136a n.2 (discussing non-verbal "[a]versive techniques" for conversion therapy, including electroshock). The MCTL thus "may be described as directed at conduct" rather than speech as such. *Holder*, 561 U.S. at 28. Nevertheless, "the conduct triggering coverage under the statute" in this case "consists of communicating a message." *Ibid.*; accord *Cohen*, 403 U.S. at 26.

That the MCTL regulates *professional* speech does not alter the analysis either. As *NIFLA* held, "this Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered by 'professionals.'" 585 U.S. at 767. Professional speech, therefore, does not receive "diminished constitutional protection." *Ibid.* Indeed, *NIFLA* specifically criticized two lower-court cases that had applied rational-basis review to conversion-therapy bans similar to the MCTL. *Ibid.* (discussing *King*, *supra*, and *Pickup*, *supra*). As Judge Hartz put it, "[w]hen [*NIFLA*] said that 'professional' speech is not excepted from 'the rule that content-based regulations of speech are subject to strict scrutiny,'" this Court "undoubtedly had regulation of conversion therapy" in mind. Pet. App. 104a. "It would be passing strange for the Court to cite critically those particular cases if it thought the decisions were ultimately correct." *Ibid.*

Nor is the MCTL a "regulation[] of professional conduct that incidentally burden[s] speech" in either of the two senses in which *NIFLA* used that term. 585 U.S. at 769; see pp. 17-21, *supra*. First, unlike in *Casey*, *Ohralik*, and *Giboney*, the application of the MCTL to petitioner rests "solely upon 'speech,' not upon any separately identifiable conduct." *Cohen*, 403 U.S. at 18. It is thus like the speech disclosures in *NIFLA* itself, which were "not tied to" a separate procedure being performed. 585 U.S. at 770. Second, unlike in *O'Brien*, the MCTL bans petitioner's speech "because of the ideas it expresses," not "because of the action it entails." *R.A.V.*, 505 U.S. at 385. It is thus like the state law in *Sorrell*, which restricted the dissemination of pharmacy records that reveal individual doctors' prescribing

practices. 564 U.S. at 557. In reasoning that applies equally here, this Court held that the law "impose[d] more than an incidental burden on protected expression" because it "impose[d] a burden based on the content of speech and the identity of the speaker." *Id.* at 567; *see id.* at 563-566.

Finally, respondents have not identified a "historic and traditional categor[y]" of speech regulation, *Stevens*, 559 U.S. at 468, that could justify subjecting the MCTL to less rigorous scrutiny. As *NIFLA* emphasized, "[t]his 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." 585 U.S. at 767 (quotation marks omitted). In this case, the court of appeals invoked a "long-established history of states regulating the healthcare professions." Pet. App. 40a-41a; accord Br. in Opp. 25. But that framing is pitched at too high a level of generality to show that "historical regulations impose[d] a comparable burden on the right" *to speak*. Cf. *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 29-30 (2022). It would eviscerate *NIFLA* if the States' history of generally regulating the medical profession were enough to disregard "[t]he dangers associated with content-based regulations" of "professional speech." 585 U.S. at 771. Instead, respondents would need to offer a historical analogue of a government specifically restricting mental-health "treatments conducted solely through speech" based on content and viewpoint. *Tingley*, 144 S. Ct. at 35 (Thomas, J., dissenting from the denial of certiorari). They have not done so.

3. Applying strict scrutiny here would not jeopardize longstanding professional regulations that implicate speech, as respondents have contended.

Respondents argue (Br. in Opp. 25-26) that the MCTL is no different from traditional state regulations of a doctor's failure to warn about the risks of an operation or to ask about a patient's medical history before prescribing a drug. But many such failures could be addressed through *NIFLA*'s exception from strict scrutiny for laws mandating certain factual and uncontroversial disclosures. 585 U.S. at 768-769. Moreover, in respondents' examples, like in *Casey*, the State is compelling certain speech to ensure that separate physical acts are safely performed. See Pet. App. 93a n.2 (Hartz, J., dissenting). Those examples thus fall squarely into *NIFLA*'s exception for "regulations of professional conduct that incidentally burden speech." 585 U.S. at 769.

To be sure, regulations of the mental-health profession are less likely to qualify as "incidental" burdens on speech under cases like *Casey*, because much mental-health treatment is conducted using only speech. See Pet. App. 52a. But restrictions on truly "harmful [or] ineffective" forms of talk therapy (Br. in Opp. 22) will likely survive strict scrutiny. For example, a State could surely justify a rule prohibiting licensed therapists from recommending that their clients follow through on suicidal thoughts. Such a rule would be a content-based regulation of speech, not conduct. See *Conant* v. *Walters*, 309 F.3d 629, 638 (9th Cir. 2002) (holding that a doctor's recommendation to use medical marijuana is speech), cert. denied, 540 U.S. 946 (2003). But a State should have little trouble providing compelling evidence of the need to prevent the unique harms posed by speech of that type, given the special duties

and relationship between therapist and client. See Br. in Opp. 21-23; see also *Williams-Yulee* v. *Florida Bar*, 575 U.S. 433, 444 (2015) (rejecting the notion "that strict scrutiny is 'strict in theory, but fatal in fact' "); *Holder*, 561 U.S. at 39 (upholding material-support statute under strict scrutiny).

Respondents' concerns about malpractice liability (Br. in Opp. 26) are especially misplaced. This Court has recognized that it is easier to justify an "isolated disciplinary action" that is "taken in response to actual speech" than a "ban [that] chills potential speech before it happens." *United States* v. *National Treasury Emps. Union*, 513 U.S. 454, 468 (1995). Rather than speculating about potential future harms, the State in a malpractice action should have evidence of actual harm incurred. But its "burden is greater" where, as here, it adopts a sweeping content-based speech restriction, which "gives rise to far more serious concerns than could any single supervisory decision." *Ibid.*

C. The Court Of Appeals Erred In Treating The MCTL's Speech Restriction As Incidental To The Regulation Of Professional Conduct

Instead of applying strict scrutiny, the Tenth Circuit analyzed petitioner's free-speech claim under rational-basis review. Pet. App. 55a-56a. The court reasoned that the MCTL regulates a particular mental-health "treatment," not "expressive activity," and that any burden on speech is "incidental[]." *Id.* at 46a-47a. That reasoning rests on several basic errors.

1. Most fundamentally, the court of appeals contravened *Holder*'s instruction that a general conduct regulation is subject to strict scrutiny when it is applied to restrict speech based on content. 561 U.S. at 27-28. The court asserted that strict scrutiny did not apply because

the MCTL regulates "the provision of a therapeutic modality" that, in petitioner's case, simply happens to be "carried out through use of verbal language." Pet. App. 46a. That rationale is untenable. While the MTCL would prevent other licensed therapists from using nonverbal modalities of conversion therapy (such as negative physical stimuli), "the conduct triggering coverage under the statute" for petitioner "consists of communicating a message." *Holder*, 561 U.S. at 28. Strict scrutiny therefore applies under *Holder*, *Cohen*, and all the cases discussed above. See pp. 12-14, *supra*.

The court of appeals wrongly insisted that *Holder* is inapposite because talk therapy is a "treatment." Pet. App. 54a. As Judge Hartz observed, the term "medical treatment" has "no talismanic power" under this Court's free-speech precedents. *Id.* at 99a. Colorado cannot hide behind the "treatment" label any more than California could hide behind the "contempt" label in *Bridges*, 314 U.S. at 258. State-law "labels cannot be dispositive of the degree of First Amendment protection." *NIFLA*, 585 U.S. at 773 (brackets omitted).

The court of appeals also noted that petitioner "may communicate whatever message she likes" outside of therapy sessions. Pet. App. 54a. That too is immaterial. California likewise did not try to stop Cohen from wearing his expletive-emblazoned jacket in all other places. But the First Amendment still applied when the State deemed wearing his jacket in a courthouse a disruption of the peace, solely based on "the *words* [he] used to convey his message." *Cohen*, 403 U.S. at 18.

The court of appeals further objected that *Holder* and related cases "do not even deal with regulations of professional conduct." Pet. App. 54a. In fact, *Holder* did involve a federal statute restricting the speech and

conduct of professionals, as *NIFLA* itself recognized. See p. 13, *supra*. And more importantly, under *NIFLA*, "'professional speech'" is not "a separate category of speech." 585 U.S. at 767.

2. The court of appeals also misunderstood the scope of the exception to strict scrutiny for regulations of professional conduct "incidentally involv[ing] speech." Pet. App. 50a; see *NIFLA*, 585 U.S. at 769. It reasoned that "the MCTL incidentally involves speech because an aspect of the counseling conduct, by its nature, necessarily involves speech." Pet. App. 50a. But that alone does not constitute an "incidental" burden on speech in either of the two senses contemplated in *NIFLA*: The MCTL neither applies to petitioner's speech for reasons *unrelated to its content* nor restricts that speech because of its *close connection to some separate regulated conduct*. See p. 24, *supra*. The court never suggested that the MCTL falls within either limited category, and its broader reading of *NIFLA* is irreconcilable with the *Holder* line of cases.

The court of appeals likewise erred in insisting that its upholding of the MCTL was "fully consistent with *Casey*." Pet. App. 48a. It read *Casey* to mean that speech restrictions are permissible whenever they are imposed "only as part of the practice of medicine." *Ibid.* (quoting 505 U.S. at 884 (plurality opinion)). But that overreads *Casey*, as *NIFLA* confirms. "[T]his Court has stressed the danger of content-based regulations in the fields of medicine and public health," including as part of the "doctor-patient discourse." *NIFLA*, 585 U.S. at 771 (quotation marks omitted). The mandated disclosure in *Casey* was different because it was not regulating speech as such. Rather, it was "tied to" the conduct of performing abortions, in order to "facilitate

informed consent to [that] medical procedure." *Id.* at 770. Here, by contrast, there is no separate conduct at all, and thus the MCTL regulates petitioner's "speech as speech," not "incidentally" to other regulated conduct. *Id.* at 769-770.

3. Relatedly, the court of appeals contravened *NIFLA*'s admonition that "[s]peech is not unprotected merely because it is uttered by 'professionals.'" 585 U.S. at 767. The court acknowledged that the State could not prohibit a "sophomore psychology major" from conveying the same message to her peers that petitioner seeks to convey to her clients. Pet. App. 44a-45a. But it reasoned that talk therapy is different because it "is a treatment, not an informal conversation among friends." *Id.* at 45a. That is just another way of saying that speech merits less protection when it is spoken in a professional relationship—exactly the notion that *NIFLA* rejected.

It is true, of course, that the therapist-client relationship involves different dynamics than a college student and her peers, including because of the "power differential" and the "financial arrangement." Pet. App. 44a-45a. But while those factors may bear on the State's ability to satisfy strict scrutiny, they do not exempt professional speech from strict scrutiny altogether.

Faithful application of *NIFLA* does not require this Court to "conclude—erroneously—that mental health care is not really health care and that talk therapy is not really medical treatment." Pet. App. 51a. It just requires acknowledging, correctly, that talk therapy is really conducted through speech and only speech. When mental-health treatment consists exclusively of speech, restricting that treatment because of the message communicated requires satisfying strict scrutiny under

cases like *Holder* and *Cohen*. Put differently, it should be no surprise that the Free *Speech* Clause treats medical treatment consisting solely of speech differently from medical treatment consisting of conduct or conduct mixed with speech.

D. Vacatur And Remand Is Warranted For The Lower Courts To Apply Strict Scrutiny In The First Instance

This Court should hold that the lower courts erred in applying rational-basis review and that strict scrutiny applies to Colorado's content- and viewpoint-based restriction of petitioner's speech. Correcting that error would resolve the division of authority that prompted the Court's review. See Pet. i, 16-20.

If the Court wishes to offer further guidance, there are substantial reasons to conclude that respondents are unlikely to meet their burden under strict scrutiny. To be sure, Colorado has a compelling interest in "safeguarding the physical and psychological well-being of a minor," *New York* v. *Ferber*, 458 U.S. 747, 756-757 (1982), and in protecting its citizens from fraud or other unethical behavior by licensed professionals, *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 792 (1975). But the record at the preliminary-injunction stage strongly suggests that respondents are not likely to prove, as they must, that the talk therapy prohibited by the MCTL is harmful or ineffective.

Respondents put forward three pieces of evidence below: (1) a declaration by Judith Glassgold, a licensed psychologist and lecturer at Rutgers University; (2) a 2009 report by the American Psychological Association (APA) Task Force titled *Appropriate Therapeutic Responses to Sexual Orientation* (2009 APA Report); and (3) a 2015 report by the Substance Abuse and Mental Health Services Administration titled *Ending*

Conversion Therapy: Supporting and Affirming LGBTQ Youth. See J.A. 17-97, 131-659. Respondents contend that those sources indicate that the "professional consensus is that conversion therapy is ineffective and poses the risk of harm." Pet. App. 64a-65a (brackets omitted). But respondents cannot carry their burden under strict scrutiny merely by pointing to a putative "professional consensus" against the speech they seek to ban. That would be "just another way of arguing that majority preference can justify a speech restriction." *Otto* v. *City of Boca Raton*, 981 F.3d 854, 869 (11th Cir. 2020).

Indeed, recent history reveals the dangers of relying on the consensus views of professional organizations to dictate what professionals may lawfully say. As recently as the 1980s, the APA considered homosexuality a mental disorder—a "consensus" that could have been invoked to support the opposite rule to the one Colorado defends here. *Otto*, 981 F.3d at 869; see Pet. App. 85a (Hartz, J., dissenting). Other "professional consensuses" that prevailed in recent history included the lifelong institutionalization of children with Down syndrome and the involuntary sterilization of the mentally disabled. See, *e.g.*, *Buck* v. *Bell*, 274 U.S. 200, 207 (1927) ("Three generations of imbeciles are enough."). One value of dissenting speech is its power to change such consensuses, often for the better—including, in the therapeutic context, by possibly demonstrating the efficacy of disfavored approaches. That is why professional consensus is relevant under strict scrutiny only insofar as it is "based on persuasive evidence." Pet. App. 107a (Hartz, J., dissenting).

Here, Colorado does not appear to have put forward the requisite evidence. As Judge Hartz pointed out, the

reports in the record do not focus on "the type of therapy at issue in this case: talk therapy for a minor provided by a licensed mental-health professional." Pet. App. 119a. The 2009 APA Report, for example, canvassed early studies that focus mainly on aversive techniques—physical acts like electroshock therapy—that pose distinct risks of physical harm, and that Colorado may (and does) ban without any First Amendment constraints. J.A. 221. The report also addressed more recent studies about a "wider variety of interventions," including psychotherapy, but those "were conducted in such a way that it is not possible to attribute results to any particular intervention component." *Ibid.* Evidence of harm caused by non-speech conduct cannot justify a content-based speech restriction. California could not justify banning Cohen's jacket based on the threat of disruption it posed, much less by pointing to non-speech conduct that could be banned for carrying the same risk of disruption. *Cohen*, 403 U.S. at 21-22.

To the extent the reports in the record *do* specifically discuss "nonaversive" techniques such as talk therapy, they appear agnostic on its harmfulness and effectiveness. For example, the 2009 APA Report, which focused on sexual orientation, said: "Given the limited amount of methodologically sound research, we cannot draw a conclusion regarding whether recent forms of [conversion therapy] are or are not effective." J.A. 256. It also said that "[r]ecent research reports indicate that there are individuals who perceive they have been harmed and others who perceive they have benefited from nonaversive [conversion therapy]." *Ibid.* And critically, the 2009 APA Report noted that the evidence was particularly lacking with respect to minor patients, see J.A. 337-341, yet the MCTL applies only to them.

Likewise, respondents did not present any stronger evidence with respect to nonaversive conversion therapies focused on gender identity. That is unsurprising, given that a recent report from the Department of Health and Human Services concluded that there is a "dearth of research on psychotherapeutic approaches to managing gender dysphoria in children and adolescents."[4]

Respondents have argued that they cannot be required to furnish studies proving the harms of the prohibited talk therapy, because such studies would be "unethical" to produce. Pet. App. 71a n.47. But a State seeking to restrict talk therapy could attempt to meet its burden with other types of evidence, including evidence of the outcomes in the States and countries that do not ban the practice. "This is not to suggest that a 10,000-page record must be compiled in every case or that the Government must delay in acting to address a real problem." *United States* v. *Playboy Entm't Grp. Inc.*, 529 U.S. 803, 822 (2000). But when a State restricts speech based on content to address a harm, it "must present more than anecdote and suspicion." *Ibid.* The record strongly suggests that respondents have not done so in this case. Indeed, the lack of convincing evidence of harm raises the inference that the State's prohibition actually seeks merely to suppress a disfavored viewpoint—which demonstrates why the application of strict scrutiny is appropriate here.

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[4] Department of Health & Human Servs., *Treatment for Pediatric Gender Dysphoria: Review of Evidence and Best Practices* 16 (May 1, 2025), https://opa.hhs.gov/sites/default/files/2025-05/gender-dysphoria-report.pdf.

CONCLUSION

The judgment of the court of appeals should be vacated, and the case remanded for further proceedings.

Respectfully submitted.

D. JOHN SAUER
Solicitor General
BRETT A. SHUMATE
Assistant Attorney General
HASHIM M. MOOPPAN
Deputy Solicitor General
ZOE A. JACOBY
Assistant to the Solicitor General
MICHAEL S. RAAB
LOWELL V. STURGILL JR.
Attorneys

JUNE 2025