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 THE FRED T. KOREMATSU CENTER FOR LAW AND EQUALITY, THE CENTER FOR CIVIL RIGHTS AND CRITICAL JUSTICE, THE CENTER ON RACE, INEQUALITY, AND THE LAW, AND THE CENTER FOR RACIAL AND ECONOMIC JUSTICE AS AMICI CURIAE IN SUPPORT OF RESPONDENTS

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae, the Fred T. Korematsu Center for Law and Equality (Korematsu Center), is a non-profit organization based at UC Irvine School of Law that works to advance justice through research, advocacy, and education. Inspired by the legacy of Fred Korematsu, who defied the military orders during World War II that ultimately led to the incarceration of 120,000 Japanese Americans, the Korematsu Center works to advance social justice for all. The Korematsu Center has a strong interest in ensuring that the government is empowered to protect vulnerable groups, including LGBTQ youth, from harm. Amicus is acutely aware of the harm subordinated minorities can suffer when laws passed for their protection are challenged by those claiming a constitutional privilege to act in ways that harm subordinated minorities. Amicus submits this brief in support of affirming the decision below and upholding Colorado's legislative scheme because it believes states must be able to exercise their legislative authority to guarantee equal treatment to all people in the United States and protect subordinated minorities from harmful treatment. The Korematsu Center does not, in this brief or otherwise, represent the official views of UC Irvine School of Law.

The Center for Civil Rights and Critical Justice (CCRCJ) is based at Seattle University School of Law

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[1] No counsel for a party authored the brief in whole or in part. No party, counsel for a party, or any person other than amici and their counsel made a monetary contribution intended to fund the preparation or submission of the brief.

and works to achieve a legal system where both historical and present-day racism, oppression, and marginalization no longer control outcomes or otherwise contribute to inequality. The Center educates future lawyers to be agents for social change and racial equality in all areas of the law, advocates for advancement of the law to achieve equal justice, and produces research to drive effective reform by revealing systems of oppression and exclusion. The CCRCJ does not, in this brief or otherwise, represent the official views of Seattle University. The CCRCJ has a special interest in ensuring that states can protect the rights of historically marginalized groups, whether through the legislative process, or through a more protective individual rights regime stemming from state constitutional law.

The Center on Race, Inequality, and the Law at New York University School of Law was created to confront the vast array of laws, policies, and practices that produce racial inequality. The Center fulfills its mission through public education, research, advocacy, and litigation to advance racial and social justice for all. That work includes ensuring that civil rights laws enacted to guarantee the equal protection of subordinated people are not upended by claims of a constitutional privilege to act in ways that foster harm. Neither this brief, nor the Center on Race, Inequality, and the Law, purport to represent the views of New York University School of Law or New York University.

The Center for Racial and Economic Justice (CREJ) is based at the University of California Col-

lege of the Law, San Francisco (UC Law SF). The mission of CREJ is to advance equity and justice for marginalized and subordinated groups through education, research, and academic-community partnerships. Amicus has a strong interest in ensuring that government can protect the wellbeing of LGBTQ children, who are a marginalized and subordinated group, from immediate and long-term harms. Amicus understands the significant risks associated with allowing claims of constitutional privilege to facilitate harmful and subordinating treatment of marginalized people, and in particular children. Amicus submits this brief in support of affirming the decision below and upholding Colorado's legislative scheme to preserve states autonomy, states legislative authority to guarantee equal treatment to all people in the United States, and ensure that marginalized groups are protected from harmful treatment. CREJ does not, in this brief or otherwise, represent the official institutional views of UC Law SF.

ARGUMENT

I. Opponents of Civil Rights Legislation Have Long Tried to Ground a Right to Discriminate in Free Speech or Free Exercise Theories.

Since this country's founding, racial, ethnic, and other minorities have faced discriminatory laws and practices subjecting them to unique harm based on their minority status. The underlying message of these laws is that minorities are "other" and should not be able to enjoy the same privileges as "ordinary" Americans. One of Congress's first major attempts to

prevent this harm, the Civil Rights Act of 1875, was found to have exceeded Congress's power under the Thirteenth and Fourteenth Amendments. *The Civil Rights Cases*, 109 U.S. 3 (1883). In a now infamous passage, Justice Bradley held that racial minorities should not be treated as "the special favorite of the law[]." *Id.* at 25.

Emboldened by the *Civil Rights Cases*, a wave of post-Reconstruction segregation laws, ordinances, and customs "lent the sanction of law to a racial ostracism that extended to churches and schools, to housing and jobs, to eating and drinking" and "to virtually all forms of public transportation, to sports and recreations, to hospitals, orphanages, prisons, and asylums, and ultimately to funeral homes, morgues, and cemeteries." C. Vann Woodward, *The Strange Career of Jim Crow* 7 (3d rev. ed. 2002). From cradle to grave, segregation laws sanctioned harmful conduct against racial minorities.

Federal and state legislatures attempted to combat this unequal treatment through the passage of civil rights legislation and public accommodation laws—most notably, the Civil Rights Acts of 1957 and 1964. Title II of the Civil Rights Act of 1964, a watershed moment in civil rights legislation, aimed to eliminate the loss of "personal dignity that surely accompanies denials of equal access to public establishments." S. Rep. No. 88-872 (1964), *as reprinted in* 1964 U.S.C.C.A.N. 2355, 2370. Alongside those legislative efforts, strategic lawsuits resulted in recognition and affirmation of the fundamental right to equality across all walks of life. In the 1940s and

1950s, minorities won crucial victories to prevent discrimination in access to voting (*Smith v. Allwright*, 321 U.S. 649 (1944)), interstate buses (*Morgan v. Virginia*, 328 U.S. 373 (1946)), graduate school facilities (*McLaurin v. Okla. State Regents for Higher Educ.*, 339 U.S. 637 (1950)), law school admissions (*Sweatt v. Painter*, 339 U.S. 629 (1950)), and, most famously, public school education (*Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)).

This groundbreaking progress was often met with vehement resistance, with opponents such as the White Citizens' Councils and the Ku Klux Klan promoting segregation and white supremacy in their communities through extra-legal means, including economic coercion, social pressure, and even violence. *White Citizens' Councils*, The Martin Luther King, Jr. Rsch. & Educ. Inst. at Stanford, https://tinyurl.com/56phn7x3. This "terror and intimidation" included attacks levied against those who integrated schools, buses, interstate transportation, and places of public accommodation.

These opponents also fought progress in the courts, raising First Amendment challenges to new civil rights laws. For example, opponents of Title II of the Civil Rights Act of 1964 argued that the law "violated the rights of owners of public accommodations to decide whom to serve, characterizing this as both an individual right of association and a property right." Brian K. Landsberg, *Public Accommodations and the Civil Rights Act of 1964: A Surprising Success?*, 36 Hamline J. Pub. L. & Pol'y 1, 4 (2014).

This Court has repeatedly and without reservation rejected such challenges. In the first major challenge to Title II, *Heart of Atlanta Motel, Inc. v. United States*, 379 U.S. 241, 260 (1964), this Court "rejected the claim" that the law violated property owners' speech rights. Similarly, this Court has rejected free exercise challenges to anti-discrimination laws, rejecting the arguments of a restaurant chain owner who refused to integrate his establishments on the basis that Title II violated his First Amendment rights. *Newman v. Piggie Park Enters., Inc.*, 390 U.S. 400 (1968) (per curiam), *aff'g*, 256 F. Supp. 941 (D.S.C. 1966). Civil rights laws protecting other subordinated minorities similarly have been upheld against First Amendment challenges. *See*, *e.g.*, *Hishon v. King & Spalding*, 467 U.S. 69 (1984) (rejecting First Amendment defense against Title VII enforcement); *Bd. of Dirs. of Rotary Int'l v. Rotary Club of Duarte*, 481 U.S. 537 (1987) (rejecting assertion of First Amendment right to bar women from Rotary Club membership, in violation of state civil rights law); *Roberts v. U.S. Jaycees*, 468 U.S. 609 (1984) (no First Amendment right to discriminate on the basis of gender).

The underlying rights those challengers unsuccessfully sought to vindicate are not fundamentally different from the rights Petitioner asserts here. Petitioner "views her work [as a licensed counselor] as an outgrowth of her Christian faith." Pet'r Br. 4. And she claims her "religious beliefs compel her" to provide conversion therapy treatment to LGBTQ+ patients on "gender, sexuality, and identity," *id.* at 5, regardless of the harm such treatment causes. The challengers in these other cases similarly held viewpoints or beliefs, religious or otherwise, that members of different

races, genders, or other minority communities should be subjected to different treatment based on their minority status. Those challenges failed in those cases and should likewise be rejected here.

II. States Have Inherent Authority to Protect Youth From Harmful Medical Treatments.

Colorado enacted the law at issue with the purpose of furthering its interest in "safeguard[ing] the public health, safety, and welfare" of its residents and to protect them "against the unauthorized, unqualified, and improper application of psychology, social work, marriage and family therapy, professional counseling, psychotherapy, and addiction counseling." Colo. Rev. Stat. Ann. § 12-245-101(1). Understanding the susceptibility of minors to these "unauthorized, unqualified, and improper" treatments, Colorado enacted provisions for the sole benefit of minors. *See id.* § 12-245-203.5. These interests are at the heart of a state's power to legislate. *See Prince v. Massachusetts*, 321 U.S. 158, 168, (1944) ("The state's authority over children's activities is broader than over like actions of adults."); *Chiles v. Salazar*, 116 F.4th 1178, 1220 (10th Cir. 2024) (court had "no trouble" finding the state's "interest in protecting minor patients seeking mental health care from obtaining ineffective and harmful therapeutic modalities" satisfied its review.). Further, Colorado has a "legitimate interest . . . in regulating and maintaining the integrity of the mental-health profession." *Ferguson v. People*, 824 P.2d 803, 810 (Colo. 1992).

Unsurprisingly, courts time and again uphold "legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *New York v. Ferber*, 458 U.S. 747, 757 (1982). And as this Court has long recognized, a challenger's objection to the law on the basis of "religion or conscience" does not negate the state's authority to legislate. *Prince*, 321 U.S. at 166; *see also, e.g.*, *Jehovah's Witnesses v. King Cnty. Hosp.*, 390 U.S. 598 (1968) (per curiam) (state's interest in providing minor child with blood transfusion). Indeed, this Court has long allowed laws that have only an incidental imposition on religion. *See, e.g.*, *Fulton v. City of Philadelphia*, 593 U.S. 522, 533 (2021) ("laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable."); *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) ("[O]ur cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice.").

Colorado's law further vindicates states' "weighty" interest in protecting LGBTQ+ people from being "treated as social outcasts or as inferior in dignity and worth." *Fulton*, 593 U.S. at 542 (internal quotation marks omitted). In amicus's experience, the Colorado statute also fulfills the fundamental role state governments have in protecting vulnerable and traditionally subordinated classes of people to promote their equal treatment. "The guaranty of 'equal

protection of the laws is a pledge of the protection of equal laws.'" *Romer v. Evans*, 517 U.S. 620, 633-34 (1996) (quoting *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 541 (1942)). Anti-discrimination laws need not be limited to groups that received "the protection of heightened equal protection scrutiny" under this Court's precedent, but instead can encompass "an extensive catalog of traits which cannot be the basis for discrimination, including . . . sexual orientation." *Id.* at 628-29. Preventing a state government from protecting a class of citizens is antithetical to the Constitution. *Id.* at 635. This protection extends to prevention of healthcare regimes specifically harming LGBTQ+ patients. *See N. Coast Women's Care Med. Grp., Inc. v. Super. Ct.*, 189 P.3d 959, 966-68 (Cal. 2008) (rejecting practitioners' free speech and free exercise challenges and holding that lesbian patients may not be singled out for denial of fertility treatment).

Beyond the significant interests articulated above, states further have inherent authority to regulate the professional practice of medicine to prevent citizens from harm caused by unsafe or unsound treatments. This Court has recognized the state's "broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there" with ample discretion extending to "the regulation of all professions concerned with health." *Barsky v. Bd. of Regents*, 347 U.S. 442, 449-51 (1954); *see also Dent v. West Virginia*, 129 U.S. 114, 122 (1889) ("The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations as in its judgment will secure or

tend to secure them against the consequences of ignorance and incapacity, as well as of deception and fraud. As one means to this end it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely."); *Watson v. Maryland*, 218 U.S. 173, 176 (1910) ("It is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health. There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine.").

There can be no question that the law here furthers all these compelling interests. As the Tenth Circuit noted, Colorado legislated on a well-established record of unspeakable harm conversion therapy causes to LGBTQ+ children on account of their sexual orientation and/or gender identity. Colorado enacted the statute "because all of the prevailing science and modern medicine tells us that not only does this practice [of conversion therapy] not work, but it . . . actually harms young people." Pet. App. 40a. Further, "[t]he record confirms the Colorado legislature determined the practice of conversion therapy constituted an 'improper application' of professional counseling." Pet. App. 40a.

III. A Ruling for Petitioner Would Threaten Longstanding and Hard-Found Civil Rights Protections.

If the Court were to disturb the panel decision and find that Petitioner enjoys a constitutional privilege to engage in harmful treatment of LGBTQ+ children under the guise of free speech or free exercise, then, by extension, holders of discriminatory beliefs can claim the same privilege to evade civil rights laws and engage in harmful treatment of subordinated minorities in other contexts. This result would undermine civil rights protections for minorities at a time when such protections remain critical to ensuring equal protection for all Americans.

The very arguments Petitioner employs to oppose Colorado's legal protections for LGBTQ+ youth have been rejected by this Court when applied to other minorities. For example, this Court found a religious exercise objection to interracial marriage did not overcome the government's interest in combatting race-based discrimination. *Bob Jones Univ. v. United State*s, 461 U.S. 574 (1983). Unfortunately, some continue to use religious beliefs as a guise for discriminating against those involved in interracial relationships: as recently as 2019, a wedding venue refused to rent to an interracial couple, citing religious beliefs. P.R. Lockhart, *A Venue Turned Down an Interracial Wedding, Citing "Christian Belief." It's Far From the First to Do So*, VOX (Sept. 3, 2019), https://perma.cc/5WWN-JPW2. And just last year, a pizzeria in Chattanooga, Tennessee created controversy when it refused to cater a same-sex couple's wedding, also citing personal religious beliefs. *Red*

Bank Pizzeria Faces Backlash for Refusing Same-Sex Couple's Catering Request, LOCAL3 NEWS (Dec. 19, 2024), https://tinyurl.com/2fmt85ys.

Courts throughout the country have not hesitated in rejecting analogous First Amendment arguments asserted to justify excluding individuals from public accommodations like bars, restaurants, and stores across the country. In 2015, for example, when a student filed a complaint against his former college, alleging that the college expelled him for racially discriminatory reasons in violation of the Pennsylvania Fair Educational Opportunities Act ("PFEOA"), the state court found that "[t]here is no dispute that the [PFEOA] is a neutral law" that can be applied to religiously affiliated colleges without infringing their religious autonomy. *Chestnut Hill Coll. v. Pa. Human Rels. Comm'n*, 158 A.3d 251, 265 (Pa. Commw. Ct. 2017).

In 2017, several businesses similarly raised First Amendment arguments to challenge the application of an Oklahoma state non-discrimination statute after those businesses publicly posted signs declaring their business was a "Muslim free establishment" and denied service to an African American Muslim U.S. Army Reserve member. Mot. for Voluntary Dismissal at 1-2, *Fatihah v. Neal*, No. 16-cv-00058 (E.D. Okla. Apr. 19, 2019), ECF No. 106. The district court rejected these arguments, holding that "[t]he First Amendment is not a defense to a discrimination claim." Order at 10, *Fatihah*, No. 16-cv-00058 (E.D. Okla. Dec. 19, 2018), ECF No. 97. Like these similar laws, Colorado's law prohibiting conversion therapy applies neutrally to all licensed therapists acting in

their licensed capacity in Colorado. This Court should not permit the First Amendment to be used as a sword of discrimination.

Lawsuits challenging discriminatory denials of service in public accommodations capture only a small subset of the pervasive, harmful, and longstanding discrimination that minorities face in this country. For example, in 2013, a nightclub refused to serve people of Korean ancestry because of their race and national origin. Joseph William Singer, *We Don't Serve Your Kind Here: Public Accommodations and the Mark of Sodom*, 95 B.U. L. Rev. 929, 930 (2015). In 2018, a landscaper in Georgia refused services for a gay couple because of their sexuality and even admitted to doing so against other LGBTQ+ customers as a matter of course. Andy Pierrotti and Lindsey Basye, *Legal Discrimination: 'This Is One of the Most Blatant That We've Seen,'* 11 ALIVE (Oct. 1, 2018), https://tinyurl.com/3pdfh2xv.

These examples are merely the tip of the iceberg of discrimination in public places in the U.S., but they demonstrate that robust legal protections are necessary to prevent harmful treatment of minorities. If Petitioner's First Amendment arguments permit such discrimination, antidiscrimination laws will be severely undermined. A free speech or free exercise right to visit harmful treatments on subordinated patients could readily spread into a right to visit other harms on minority populations, undermining decades of efforts to combat discrimination and to erect legal and structural protections that guarantee equal rights to all citizens.

CONCLUSION

This Court should affirm the decision below.

Respectfully submitted,

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