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 CONSTITUTIONAL ACCOUNTABILITY CENTER AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
PRAVEEN FERNANDES
ANA M. BUILES
CONSTITUTIONAL ACCOUNTABILITY CENTER
1730 Rhode Island Ave. NW, Suite 1200
Washington, DC 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

* Counsel of Record

August 26, 2025

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Legislative Provisions

TABLE OF AUTHORITIES – cont'd

TABLE OF AUTHORITIES – cont'd

Page(s)

TABLE OF AUTHORITIES – cont'd

Page(s)

INTEREST OF *AMICUS CURIAE*[1]

Constitutional Accountability Center (CAC) is a think tank and public interest law firm dedicated to fulfilling the progressive promise of the Constitution's text and history. CAC works in our courts, through our government, and with legal scholars to improve understanding of the Constitution and preserve the rights and freedoms it guarantees. CAC accordingly has a strong interest in the scope of the First Amendment's protections and in this case.

INTRODUCTION AND SUMMARY OF ARGUMENT

In 2019, based on an overwhelming scientific and professional consensus that efforts by mental health professionals to try to change someone's sexual orientation or gender identity can cause serious harm, Colorado joined 23 states and the District of Columbia in prohibiting the practice of "conversion therapy" on children. Minor Conversion Therapy Law ("MCTL"), Colorado Revised Statutes ("C.R.S.") § 12-245-224; *see also* Pet. App. 40a, 158a (noting Colorado's reliance on scientific studies in passing the MCTL).

Petitioner is a licensed counselor in Colorado who, notwithstanding the strong consensus that "conversion therapy" is harmful, seeks to engage in that practice as she treats children in the state. She argues that therapy is purely a form of speech and therefore Colorado cannot, under the First Amendment, regulate

---

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

how she treats her clients. That is wrong, as a matter of both history and this Court's precedents.

Therapy and advice provided by professionals have long been treated differently than purely private speech. Indeed, a number of bedrock First Amendment principles apply with less force in the context of treatment by professionals than they do in other contexts because of the professional-client relationship and the long history of state regulation of that relationship. For example, even though there is generally a "heavy presumption" against the "constitutional validity" of prior restraints on speech, *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971), treatment and advice by professionals are routinely subject to prior restraint, in the form of licensing laws that prevent individuals from treating or advising individuals unless they have first satisfied the state's requirements to become licensed. And while it is generally anathema under the First Amendment to regulate speech based on its content or viewpoint, *see, e.g.*, *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 51 (1988), states have long used professional malpractice liability to regulate "'unprofessional' speech," or "bad professional advice," on these generally forbidden bases, Claudia E. Haupt, *Professional Speech*, 125 Yale L.J. 1238, 1284 (2016). In other words, when it comes to therapy and other forms of advice by professionals, speech that falls outside the bounds of professional norms can be regulated because of its content. Finally, although the First Amendment generally prohibits the compulsion of speech no less than it prohibits the restriction of speech, in the professional context, states routinely compel professionals to speak to protect their clients' well-being, such as by reciting, on pain of liability, the risks and alternatives to a proposed medical

intervention.

This Court has long recognized these differences. While this Court has held that "[s]peech is not unprotected merely because it is uttered by 'professionals,'" it has long recognized that the speech uttered by professionals is "afforded less protection" under the First Amendment in at least two situations. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra* ("*NIFLA*"), 585 U.S. 755, 767-68 (2018). First, this Court has applied "more deferential review" to state regulations on professionals' "commercial speech." *Id.* at 768. In so doing, it has recognized that the First Amendment does not require a "parity of constitutional protection" for professional solicitation and other "forms of speech more traditionally within the concern of the First Amendment." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 455-56 (1978). This is so not only because of the state's "general interest in protecting consumers and regulating commercial transactions," but also because "the State bears a special responsibility for maintaining standards among members of the licensed professions," an interest that allows states to constitutionally enact "prophylactic measures" to protect the welfare of consumers. *Id.* at 460, 464. As this Court has observed, "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.

Second, this Court has also long recognized that states "may regulate professional conduct, even though that conduct incidentally involves speech." *NIFLA*, 585 U.S. at 768 (citing *Ohralik*, 436 U.S. at 456, and *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992)). In *Planned Parenthood v. Casey*, for example, this Court considered the constitutionality of a statutory requirement that physicians provide information about the risks of abortion and the age of the

fetus, as well as the availability of state-printed materials describing the fetus and providing information about medical assistance for childbirth. Although the statute compelled content-based counseling, this Court held that it did not violate doctors' First Amendment rights because it was "part of the practice of medicine, subject to reasonable licensing and regulation by the State" while "not prevent[ing] the physician from exercising his or her medical judgment." *Casey,* 505 U.S. at 884. As *Casey* reflects, states can supplement longstanding common law principles with newer forms of regulations that govern the treatment provided by professionals in order to protect the public and enforce professional norms.

Together, these decisions demonstrate that this Court has treated professional advice, given as part of the professional-client relationship and tailored to the individualized needs of a particular client, differently than a professional's private speech. And it has allowed states, pursuant to their interest in ensuring the health and welfare of their residents, to regulate the ways professionals speak to their clients, including by enacting content-based regulations.

MCTL is a constitutionally valid regulation of professionals' treatment of their clients or patients. It was enacted by the Colorado legislature as part of a comprehensive set of regulations to prevent mental health professionals from treating clients in a manner "that is contrary to the generally accepted standards of the person's practice." C.R.S. § 12-245-224(1)(t)(III). Thus, it targets precisely the type of treatment by professionals that states have a strong interest in, and a long history of, regulating. The First Amendment poses no bar to this sort of regulation, and this Court should decline Petitioner's invitation to adopt a "novel" First Amendment rule that would call into question

this "unbroken tradition" of state regulation. *See City of Austin v. Reagan Nat'l Advert., LLC*, 596 U.S. 61, 75 (2022).

This Court's decision in *NIFLA* is not to the contrary. In *NIFLA*, this Court struck down a state law that required certain licensed clinics to "notify women that California provides free or low-cost services, including abortions, and give them a phone number to call." 585 U.S. at 760. But it did so not because speech uttered by professionals can never be treated differently than private speech under the First Amendment, but because the specific speech at issue there did not warrant such differential treatment. The notice there was "not tied to a [medical] procedure at all," and in fact "applie[d] to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed." *Id.* at 770. MCTL, by contrast, only regulates a licensed mental health professional's treatment of her client. As a result, state authority is at its apex because of the state's "special responsibility" to "protect[] consumers" by "maintaining standards among members of the licensed professions." *Ohralik*, 436 U.S. at 460. MCTL does nothing to regulate what Petitioner can say outside of that context.

In short, MCTL regulates only the way in which professionals treat their clients, and it does nothing to interfere with the "marketplace of ideas" protected by the First Amendment. Petitioner—just like anyone else—can advocate for "conversion therapy," make the case that it is within professional norms, and try to convince the Colorado legislature that it should repeal this ban. But the First Amendment does not allow courts to override the judgment of the Colorado legislature that the treatment Petitioner wishes to provide is outside the bounds of professional norms and

threatens to harm Colorado's residents under the age of eighteen. This Court should affirm.

ARGUMENT

I. Advice and Treatment Provided by Professionals Are Different from Private Speech.

A. First Amendment analysis begins with a consideration of the "nature of the burden imposed by the law and the nature of the speech at issue." *Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291, 2302 (2025); *see also Legal Services Corp. v. Velazquez*, 531 U.S. 533, 543 (2001) (considering the "accepted usage" of a "particular medium" to determine the constitutionality of speech restrictions within that medium).

Petitioner insists that therapy is a form of pure speech and therefore her right to communicate with her patient overrides the state's regulatory goal of protecting Colorado's residents from a harmful form of treatment. Petitioner's sweeping theory, however, ignores the many ways therapy provided by licensed professionals differs from speech by private individuals. If this Court were to adopt Petitioner's view, harmful forms of therapy "would be virtually immune to effective oversight and regulation by the State." *Ohralik*, 436 U.S. at 466.

Professionals—like lawyers, doctors, and psychologists—are paid by clients who "rely on the professional's competent, accurate, and comprehensive advice" to resolve their disputes or solve their individual problems. Claudia E. Haupt, *Unprofessional Advice*, 19 U. Pa. J. Const. L. 671, 672 (2017). Lawyers advise their clients about the law privately and speak on their behalf in court. Physicians provide their patients with information about their health and advise them about the benefits and potential consequences of various

treatments. And psychologists and other mental health counselors talk with their patients or clients to help them work through whatever concerns brought them to therapy.

In providing this advice, professionals draw on a "shared reservoir of knowledge." Haupt, *Professional Speech*, *supra*, at 1251; *see also* Richard A. Posner, *Professionalisms*, 40 Ariz. L. Rev. 1, 2 (1998) (noting that the "hallmark of a profession" is, among other things, "highly specialized, even esoteric, knowledge that can be acquired only by specialized formal education or a carefully supervised apprenticeship"). Indeed, "[t]he very reason the professional's advice is valuable to the client is that the professional has knowledge that the client lacks." Haupt, *Unprofessional Advice*, *supra*, at 680; *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring) (clients seek out professionals who can "take[] [their] affairs" "personally in hand" and "exercise judgment on [their] behalf").

Because professionals have an expertise that their patients and clients lack, and those patients and clients are "unable themselves independently to evaluate [the] quality" of the advice provided by professionals, Haupt, *Professional Speech*, *supra*, at 1271, there is an "imbalance of authority" in the professional-client relationship, Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions,* 147 U. Pa. L. Rev. 771, 845 (1999), and "the government may properly try to shield the client from the professional's incompetence or abuse of trust," Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1344 (2005).

Indeed, this is why attorneys, physicians, therapists, and other professionals have certain ethical obligations to their clients. Haupt, *Professional Speech*, *supra*, at 1271; *see, e.g.*, *Ryder v. Mitchell*, 54 P.3d 885, 891 (Colo. 2002) (therapists owe a "duty of care" to their clients); *Neade v. Portes*, 739 N.E.2d 496, 500 (Ill. 2000) ("Illinois courts have recognized a fiduciary relationship between a physician and his patient."); Restatement (Third) of the Law Governing Lawyers § 49 (Am. L. Inst. 2000) (lawyers owe their clients a "fiduciary duty"). For example, professionals must use their "best judgment" and act in the client's "best interest," Halberstam, *supra*, at 845; *see also, e.g.*, *Landeros v. Flood*, 551 P.2d 389, 392-93 (Cal. 1976) (explaining that the duty of care owed by a physician to a patient requires the physician to "possess and exercise, in both diagnosis and treatment, that reasonable degree of knowledge and skill which is ordinarily possessed and exercised by other members of his profession in similar circumstances"); *Pavlik v. Kornhaber*, 761 N.E.2d 175, 184 (Ill. App. Ct. 2001) (concluding that the "defendant had a professional duty of care as a therapist toward plaintiff to refrain from activity which carried a foreseeable and unreasonable risk of emotional harm"); *In re Cooperman*, 633 N.E.2d 1069, 1071 (N.Y. 1994) (noting that the "fiduciary attorney-client relationship" arises from the fact that people hire lawyers to "exercise professional judgment on a client's behalf" and are therefore expected to "deal fairly, honestly, and with undivided loyalty"); Restatement (Third) of the Law Governing Lawyers, *supra*, §§ 16(3), 20 (fiduciary duty requires lawyers to, among other things, "deal honestly" and "reasonably inform[]" their clients). And whether a professional has satisfied that standard is often determined with reference to norms established by their professional community. *See, e.g.*, *Spitz v. Bd. of Exam'rs of Psychs.*, 12 A.3d

1080, 1083 (Conn. App. Ct. 2011) (upholding suspension of a professional psychologist for violating "applicable standard of care," which was set out in state regulations and the American Psychological Association ethical code); *Pontiff v. Pecot & Assocs. Rehab. & Physical Therapy Servs., Inc.*, 780 So. 2d 478, 486 (La. Ct. App. 2001) (duty of licensed physical therapist to client "is defined by the standard of care of similar physical therapists and the Association of Physical Therapists of America").

Given the special relationship between a professional and their clients, the advice and treatment that professionals provide as part of the professional-client relationship is treated differently than the private speech that the professional might engage in outside of that relationship. Halberstam, *Commercial Speech, supra*, at 843 ("[S]peech in the professions may be regulated because of the relationship of trust between professional and client, that is, because they have established a special relationship beyond that between strangers discussing politics on the street corner."). This differential treatment manifests in multiple ways, including that professional advice can be subject to prior restraint in the form of licensing requirements; the state can regulate the content and viewpoint of the advice and treatment provided by professionals to ensure it respects professional norms; and professional advice can be compelled, notwithstanding the First Amendment's protection against governmentally compelled speech. Petitioner's argument ignores each of these fundamental characteristics of the professional-client relationship.

B. To start, consider prior restraints. "[I]t has been generally, if not universally, considered that it is the chief purpose of the guaranty" of freedom of speech "to prevent previous restraints upon publication."

Near v. Minn. ex rel. Olson, 283 U.S. 697, 713 (1931). Typically, "[a]ny prior restraint on expression comes to this Court with a 'heavy presumption' against its constitutional validity." *Keefe*, 402 U.S. at 419 (citations omitted).

But advice and treatment given in the context of a professional relationship is routinely subject to prior restraint because professionals must generally be licensed by the state before they can provide that advice or treatment. *Cf. FWI/PBS, Inc. v. Dallas*, 493 U.S. 215, 225 (1990) (noting that licensing schemes act as prior restraints on speech). These licensing regimes reflect states' interest in protecting their residents against abuses by individuals who purport to act in their best interest based on specialized training and expertise. *See* Marc T. Law & Sukkoo Kim, *Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing Regulation* 4 (Nat'l Bureau of Econ. Rsch. Working Paper No. w10467, 2004) (noting that because of the asymmetry of knowledge between professionals and their clients, states have a legitimate need to regulate professions to "eliminate charlatans, incompetents or frauds and protect the safety and welfare of consumers" (internal quotation marks and citation omitted)); *see also Dent v. West Virginia*, 129 U.S. 114, 123 (1888) ("Due consideration, therefore, for the protection of society may well induce the state to exclude from practice those who have not such a license, or who are found upon examination not to be fully qualified."); Haupt, *Professional Speech, supra*, at 1279-80 (discussing the long pedigree of licensing requirements for law and medicine that date to the Founding).

In Colorado, for example, the state legislature concluded that "in order to safeguard the public

health, safety, and welfare of the people of this state and in order to protect the people of this state against the unauthorized, unqualified, and improper application of psychology, social work, marriage and family therapy, professional counseling, psychotherapy, and addiction counseling, it is necessary that the proper regulatory authorities be established and adequately provided for." C.R.S. § 12-245-101(1). To practice as a licensed counselor, one must have, among other things, completed a master's or doctoral degree in professional counseling; have at least two years' practice after completing their degree; have at least two thousand hours of practice in total; and passed an exam supervised by the professional board. *Id.* § 12-245-604. Anyone who falsely holds themselves out as a licensed counselor is subject to penalty. *Id.* §§ 12-245-228, 18-1.3-501 (the unauthorized practice of a mental health profession is a misdemeanor subject to a maximum sentence of 364 days, not more than a thousand dollar fine, or both).

In Colorado, as elsewhere, *see, e.g.*, N.Y. Jud. Law § 478 (licensing for lawyers); Cal. Bus. & Prof. Code § 2052 (licensing for doctors); Tex. Occ. Code § 501.251 (licensing for psychologists), professional licensing both "establishes a minimum educational basis for admission into a profession," Claudia E. Haupt, *The Limits of Professional Speech*, 128 Yale L.J.F. 185, 190 (2018), and helps "maintain[] standards among members of the licensed professions," *Ohralik*, 436 U.S. at 460; *see also Barsky v. Bd. of Regents of Univ. of State of N.Y.*, 347 U.S. 442, 451 (1954) ("It is equally clear that a state's legitimate concern for maintaining high standards of professional conduct extends beyond initial licensing. Without continuing supervision, initial examinations afford little protection.").

In short, to serve a state's interest in protecting its

people from relying on unqualified professionals for expert advice or treatment, state licensing regimes appropriately prevent those who have not satisfied the state standards from providing professional advice.

C. Next, consider the authority of states to regulate professional advice and treatment on the basis of content and viewpoint. Because a central tenet of public discourse under the First Amendment is "that the best test of truth is the power of the thought to get itself accepted in the competition of the market," *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting), "[t]he First Amendment recognizes no such thing as a 'false' idea," *Hustler Magazine*, 485 U.S. at 51 (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)). For that reason, this Court has said that "[a]ny restriction on expressive activity because of its content would completely undercut the 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and [wide]-open.'" *Police Dep't of Chi. v. Mosley,* 408 U.S. 92, 96 (1972) (quoting *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)); *id.* at 95 (in the context of private speech, "the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

But the "classic notion of a 'free trade in ideas' has little purchase as between the professional and the client." Haupt, *Professional Speech*, *supra*, at 1243 (footnote omitted). Indeed, states have long regulated "'unprofessional' speech," or "bad professional advice" through "professional malpractice liability." *Id.* at 1284. This, in essence, entails state regulation based on the content or viewpoint of the advice. For example, when an attorney tells potential clients with a

legitimate claim that they do not have a case without performing "the minimal research that an ordinarily prudent attorney would do before rendering legal advice," that attorney can be held liable for malpractice. *Togstad v. Vesely, Otto, Miller & Keefe*, 291 N.W.2d 686, 693 (Minn. 1980).

Similarly, if a physician advises a patient who later dies of a heart attack that he did not need a referral to a cardiologist while failing to disclose financial incentives from the insurer designed to discourage such referrals, that doctor can be held liable for medical malpractice because professional norms forbid him from rendering such advice without disclosing such incentives. *Shea v. Esensten II*, 208 F.3d 712, 715, 717 (8th Cir. 2000). And a therapist who "mishandles transference" and continues to advise a married couple while carrying on a sexual relationship with the wife is liable for malpractice. *Lenhard v. Butler*, 745 S.W.2d 101, 103 (Tex. Ct. App. 1988). That these individuals were engaging in "speech" will not save them from liability if they provided faulty professional advice or treatment.

In other words, in the context of professional advice and treatment, there is such a thing as a "false idea." Some forms of advice and treatment can be regulated precisely because their content or viewpoint transcends the accepted norms of the profession and risks harm to clients. *See* Haupt, *The Limits of Professional Speech*, *supra*, at 188 ("[T]he regulation of professional speech, in order to achieve its aim, cannot be content-neutral; indeed, the value of professional advice depends on its content."); Robert Post, *Reconciling Theory and Doctrine in First Amendment Jurisprudence*, 88 Cal. L. Rev. 2353, 2364 (2000) ("[C]ontent-based regulation of speech is routinely enforced without special constitutional scrutiny, as for example

when lawyers or doctors are held liable in professional malpractice for the communication of irresponsible opinions.").

To be sure, within any profession, there may be "a range of valid professional opinions that members of the knowledge community may disagree on," but there is also "a universe of advice that is plainly wrong as a matter of expert knowledge." Haupt, *Unprofessional Advice*, *supra*, at 682. That explains why the state has the authority to regulate the content of professional speech to ensure that clients are not harmed by "false" ideas, and why a professional's opinion that transcends professional norms, in the context of treating or advising a client, "is not treated as equal to other opinions." *Id.*; Robert Post, NIFLA *and the Construction of Compelled Speech Doctrine*, 97 Ind. L.J. 1071, 1083 (2022) ("In the eyes of the law, a licensed MD is not entitled to force patients to wager their salvation on the experiment of a professional's wayward opinion. The marketplace of ideas is incompatible with the competent practice of medicine."). Here, as in other areas of First Amendment law, "content-based . . . rules have long coexisted with the Free Speech Clause, and their function is generally compatible with it." *See Vidal v. Elster*, 602 U.S. 286, 316 (2024) (Barrett, J., concurring).

D. Finally, in the professional context, speech can be compelled in a way that is not permissible in other contexts. In the realm of private speech, this Court has typically struck down government regulations that compel individuals to express views or affirm beliefs they do not hold. *See, e.g.*, *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642-43 (1943) (holding that students cannot be compelled to recite the Pledge of Allegiance); *Wooley v. Maynard*, 430 U.S. 705, 717 (1977) (overturning New Hampshire law requiring

residents to display state motto on license plate); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 21 (1986) (holding that a utility company could not be compelled to include messages from a consumer group in its newsletter).

But in the professional context, the state routinely compels professionals to speak to protect clients' well-being. *See* Haupt, *The Limits of Professional Speech*, *supra*, at 191. For example, because of the asymmetries in knowledge between physicians and their patients, physicians are liable for malpractice if they do not disclose the material risks of a suggested treatment, thereby failing to obtain the "informed consent" of patients. *See, e.g.*, *Scott v. Bradford*, 606 P.2d 554, 556-57 (Okla. 1979). Lawyers must keep clients updated on the status of their case so that they can make "informed decisions" about their representation. N.Y. R. Prof. Conduct 1.4(b); *see also In re Cheema*, 230 A.D.3d 760, 772 (N.Y. App. Div. Aug. 28, 2024) (suspending an attorney for failing to keep her clients informed about the outcomes of their cases in violation of the rules of professional conduct). And psychologists, at the beginning of working with a client, are required to disclose the nature of their relationship, including "the role of the psychologist," the "probable uses of the services provided or the information obtained, and any known or probable limits to confidentiality." Mo. Code Regs. Ann. tit. 20, § 2235-5.030; *see also* Fla. Admin. Code Ann. R. 64B19-19.006 (requiring therapists to explain limits of confidentiality); Ga. Comp. R. & Regs. 510-4-.02(3)(j) (3.10) (requiring licensed therapists to get "informed consent" from clients by disclosing the nature of anticipated services); Ohio Adm. Code 4732-17-01(C)(5) (same). Here too this speech by professionals is fundamentally different than purely

private speech because of the relationship between the professional and the client.

The fact that treatment and advice provided by professionals have long been viewed differently than private speech is reflected in this Court's First Amendment case law as well, as the next Section discusses.

II. This Court Has Long Treated at Least Some Speech Uttered by Professionals Differently than Other Speech Under the First Amendment.

While "[s]peech is not unprotected merely because it is uttered by 'professionals,'" this Court has long recognized that states may regulate speech uttered in the course of a professional-client relationship differently than purely private speech. *NIFLA*, 585 U.S. at 767; *see, e.g.*, *id.* at 669.

In *NIFLA*, this Court rejected an approach taken by some courts of appeals that had "recognized 'professional speech' as a separate category of speech that is subject to different rules." *Id.* at 767. Though recognizing that there might be reasons for "treating professional speech as a unique category that is exempt from ordinary First Amendment principles," it concluded that none had been identified in that case and, in any event, it did not matter because the challenged law could not, in its view, "survive even intermediate scrutiny." *Id.* at 773.

But even in *NIFLA*, this Court acknowledged that professional speech is sometimes "afforded less protection," *id.* at 768, pointing to two contexts recognized by this Court's cases. First, this Court's cases "have applied more deferential review" to some laws governing professionals' "commercial speech." *Id.* (citing *Zauderer v. Office of Disciplinary Couns. of*

Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985)).

In *Ohralik v. Ohio State Bar Association*, for example, this Court upheld a state ban on in-person solicitation of legal services. 436 U.S. at 454. Though the Court had recently recognized that truthful, "restrained" advertising was not wholly outside the scope of the First Amendment, *id.* at 454-55 (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 384 (1977)), the First Amendment did not require "a parity of constitutional protection" for that type of professional speech and "forms of speech more traditionally within the concern of the First Amendment," *id.* at 455-56.

In rejecting the idea that the highest level of First Amendment protection was required, this Court noted that "[t]he solicitation of business by a lawyer through direct, in-person communication with the prospective client has long been viewed as inconsistent with the profession's ideal of the attorney-client relationship and as posing a significant potential for harm to the prospective client" and "has been proscribed by the organized Bar for many years." *Id.* at 454. Reflecting the power and knowledge imbalance between professionals and potential clients, this Court observed that "[t]he aim and effect of in-person solicitation may be to provide a one-sided presentation and to encourage speedy and perhaps uninformed decisionmaking." *Id.* at 457; *see also id.* at 464-65 ("it hardly need be said that the potential for overreaching is significantly greater when a lawyer, a professional trained in the art of persuasion, personally solicits an unsophisticated, injured, or distressed lay person").

This Court also recognized that the "state interests implicated" in regulating professionals' in-person solicitation of potential clients "are particularly strong" because "[i]n addition to its general interest in protecting consumers and regulating commercial

transactions, the State bears a special responsibility for maintaining standards among members of the licensed professions." *Id.* at 460; *see id.* at 461 (noting that an earlier decision of the Court "did not question a State's interest in maintaining high standards among licensed professionals"). Because of this strong interest, states can constitutionally enact "prophylactic measures whose objective is the prevention of harm before it occurs" in "circumstances" in which states' "perception of the potential for harm" is "well founded." *Id.* at 464; *see also id.* ("the State has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful solicitation by lawyers whom it has licensed"); *id.* at 466-67 (rejecting argument that the state needs to prove "actual injury" because it would make in-person solicitation "virtually immune to effective oversight and regulation . . . in contravention of the State's strong interest in regulating members of the Bar in an effective, objective, and self-enforcing manner").

Several years later, in *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, this Court upheld a state regulation requiring attorneys advertising contingency-fee rates to disclose to potential clients that they might be liable for costs even if their claims were unsuccessful. 471 U.S. at 633. As this Court explained, the state had an interest in imposing this disclosure requirement because "the advertisement would suggest that employing appellant would be a no-lose proposition in that his representation in a losing cause would come entirely free of charge," an assumption that to clients who "are often unaware of the technical meanings of such terms as 'fees' and 'costs'" would be misleading. *Id.* at 652. And because of the "'common-sense' distinction between speech proposing a commercial transaction,"

id. at 637 (quoting *Ohralik*, 436 U.S. at 455-56), and noncommercial speech, the state regulation passed muster under the First Amendment even though the same statements, "in another context, would be fully protected speech," *id.* at 637 n.7. That the advertisement linked the attorney's proffered services "to a current public debate" did not mean that it was "entitled to the constitutional protection afforded noncommercial speech." *Id.* (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 562 n.5 (1980)).

And in *Florida Bar v. Went For It, Inc.*, this Court upheld a state regulation prohibiting personal injury lawyers from sending personal solicitations to victims and their relatives shortly after an accident. 515 U.S. 618, 620 (1995). Acknowledging that "States have a compelling interest in the practice of professions within their boundaries" and a "broad power to establish standards for licensing practitioners and regulating the practice of professions," *id.* at 625 (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975)), the Court upheld the regulation after the state submitted significant evidence in support of the purported harm the regulation was meant to address, *id.* at 625-26. "Speech by professionals," the Court stated, "obviously has many dimensions." *Id.* at 634. "There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer." *Id.* But there are other circumstances, like solicitation, where the Court has "always reserved a lesser degree of protection under the First Amendment." *Id.* at 635. "Particularly because the standards and conduct of state-licensed lawyers have traditionally been subject to extensive regulation by the States," the Court concluded, "it is

all the more appropriate that we limit our scrutiny of state regulations to a level commensurate with the subordinate position of commercial speech in the scale of First Amendment values." *Id.* (citation and internal quotation marks omitted).

Second, this Court in *NIFLA* noted that "States may regulate professional conduct, even though that conduct incidentally involves speech." *NIFLA*, 585 U.S. at 768 (citing *Ohralik*, 436 U.S. at 456, and *Casey*, 505 U.S. at 884). In *Casey*, the Court considered a state regulation that required doctors performing abortions to provide their clients with information about the risks of the procedure and the age of the fetus, as well as the availability of state materials describing the fetus and providing information about medical assistance for childbirth, "in a manner mandated by the State," unless the doctor could prove that doing so would severely affect the patient's physical or mental health. 505 U.S. at 883-84. Although the Pennsylvania law forced doctors to deliver a state-prescribed message designed to "express[] a preference for childbirth over abortion, *id.* at 883, this Court concluded that this informed consent requirement did not violate doctors' First Amendment rights because it was "part of the practice of medicine, subject to reasonable licensing and regulation by the State" while "not prevent[ing] the physician from exercising his or her medical judgment," *id.* at 884.

Together, these decisions demonstrate that this Court has treated the advice and treatment provided by professionals, tailored to the individualized needs of a particular client, differently than a professional's private speech. And it has allowed states, pursuant to their traditional police power and interest in ensuring the health and welfare of their residents, to regulate

how professionals speak to their clients in ways that would not be permissible in other contexts.

In *NIFLA*, this Court struck down a state law that required certain licensed clinics to "notify women that California provides free or low-cost services, including abortions, and give them a phone number to call," 585 U.S. at 761, but as noted earlier, it did so not because speech uttered by professionals can never be treated differently than private speech under the First Amendment, but because the Court decided that the specific speech at issue there did not warrant such differential treatment, *id.* at 768 (holding that "neither line of precedents" was implicated by the state law at issue). As this Court explained, the first line of precedents did not apply because the licensed notice was "not limited to 'purely factual and uncontroversial information.'" *Id.* (quoting *Zauderer*, 471 U.S. at 651). And the second line of precedents did not apply because the licensed notice "is not an informed-consent requirement or any other regulation of professional conduct." *Id.* at 770. Rather, it was a general notice provided to individuals who came in contact with the clinics, outside of any professional relationship between doctor and patient.

Here, by contrast, the Colorado law at issue regulates precisely the sort of treatment provided by professionals that states have a long history of, and strong interest in, regulating, as the next Section discusses.

III. The Colorado Ban on Conversion Therapy Regulates Treatment Provided by Professionals and Should Be Upheld.

"[I]n order to safeguard the public health, safety, and welfare of the people of this state," the Colorado legislature, like that of many other states, has enacted a comprehensive regulatory scheme to prohibit

"unauthorized, unqualified, and improper" mental health practices. C.R.S. § 12-245-101. In it, Colorado sets out the requirements to become a licensed mental health provider, *id.* §§ 12-245-201-33; authorizes such professionals to treat patients' mental and behavioral health, *id.* §§ 12-245-603, 12-245-803, 12-245-202(14)(a); and prohibits treatment that is harmful to patients, including "[o]rdering or 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).

In 2019, Colorado joined 23 states and the District of Columbia in concluding that using "conversion therapy" in the treatment of minors is contrary to "the generally accepted standards of" mental health professionals and any mental health professional practicing it should be disciplined. *Id.* § 12-245-224. Under Colorado law, "[c]onversion therapy" encompasses "any practice" 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). This prohibition only applies to licensed professionals practicing mental health care with a particular client. It does not, in other words, apply to either licensed professionals outside of their work or unlicensed counselors, like life coaches or religious ministers. *See id.* § 12-245-217(1), (2)(f).

As the proceedings below demonstrate, the Colorado legislature passed this ban on conversion therapy based on the overwhelming scientific consensus that conversion therapy exposes children to serious harm. Resp. Br. 5-6; *see also* Pet. App. 40a (noting that one of the MCTL's sponsors explained that the Act was passed "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" (quoting Supp. App. 86, Dkt. No. 79-1, *Chiles v. Salazar*, 116 F.4th 1178 (10th Cir. 2023) (alteration in original))); *id.* at 158a ("Colorado considered the body of medical evidence regarding conversion therapy and sexual orientation change efforts—and their harms—when passing the Minor Therapy Conversion Law and made the reasonable and rational decision to protect minors from ineffective and harmful therapeutic modalities"). Indeed, over the last two decades, studies have demonstrated that "conversion therapy" considerably increases the likelihood that those who undergo it will suffer serious psychological distress and suicidality. Resp. Br. 6-7; *see also* Pet. App. 65a. A systematic review of this evidence led the American Psychiatric Association and the American Psychological Association to recommend against its use. American Psychological Association, *APA Resolution on Sexual Orientation Change Efforts*, (Feb. 26, 2021), https://www.apa.org/about/policy/resolution-sexual-orientation-change-efforts.pdf (noting that the American Psychological Association has recommended against the use of conversion therapy since 1998 and the American Psychiatric Association has done so since 2000).

In imposing professional sanctions and fines on licensed counselors who prescribe a course of therapy that is contrary to the generally accepted standards of the profession, the Colorado legislature engaged in a type of regulation that states have long used "to provide for the general welfare of [their] people." *Dent*, 129 U.S. at 122. As this Court has repeatedly stated, states have a strong interest in protecting consumers' welfare and maintaining the standards of their licensed professions. *See, e.g.*, *Goldfarb*, 421 U.S. at 792

("We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.").

Because of that important interest, states can enact measures to protect their residents from the harm caused by treatment that falls outside of the accepted standards of the profession. *See Ohralik*, 436 U.S. at 464. And that is exactly what Colorado did in passing the MCTL: it prohibited a type of medical treatment that the Colorado legislature concluded, based on overwhelming scientific evidence, would be ineffective and would cause significant harm to minor patients. Like state laws that authorize professional discipline or hold professionals liable for malpractice when they do not comply with professional norms or give unprofessional advice, the MCTL regulates the sort of treatment provided by professionals that has long been viewed differently than purely private speech under the First Amendment. *See NIFLA*, 585 U.S. at 769 (noting that "[l]ongstanding torts for professional malpractice, for example, 'fall within the traditional purview of state regulation of professional conduct'" (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963))).

NIFLA does not control here because it involved a fundamentally different kind of state regulation. The notice at issue in *NIFLA* was "not tied to a [medical] procedure at all," and in fact "applie[d] to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed," *id.* at 770; *id.* ("The licensed notice regulates speech as speech."). Here, by contrast, the Colorado law only regulates a mental

health professional's treatment of their patient. As discussed earlier, this sort of regulation has long been treated differently than the regulation of private speech because of states' interest in protecting their residents when they interact with professionals who have greater expertise and authority. *See supra* Part I.

To be sure, as this Court noted in *NIFLA*, "[p]rofessionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields." 585 U.S. at 772. But the existence of such disagreements does not lessen the state interest in protecting people from treatment and advice by professionals that the state has reasonably concluded falls outside professional norms. A patient being treated by a therapist would expect that therapist to conform to professional norms no less simply because there might be disagreement about those norms. And this Court "has given state and federal legislatures wide discretion to pass legislation in areas where there is medical and scientific uncertainty." *Gonzalez v. Carhart*, 550 U.S. 124, 163 (2007); *Kansas v. Hendricks*, 521 U.S. 346, 360 n.3 (1997) ("[I]t is precisely where such disagreement exists that legislatures have been afforded the widest latitude in drafting such statutes.").

Moreover, nothing in the Colorado law prevents therapists from discussing conversion therapy and giving their views, so long as they do so outside the context of treating a patient. *See* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 947 (2007) (explaining that in the early 2000s a dentist that told her patients not to get a certain dental treatment would have been disciplined for failing "to maintain a reasonable standard of competency," but that

same dentist would have received the full range of First Amendment protection for writing an op-ed urging people not to get that treatment).

The Colorado law thus does not run the risk of interfering with the marketplace of ideas by allowing the government to regulate the content of speech in that marketplace. *Cf. Snyder v. Phelps*, 562 U.S. 443, 452 (2011) (noting that speech on "matters of purely private significance" does not "implicate the same constitutional concerns as limiting speech on matters of public interest" because "'[t]here is no threat to the free and robust debate of public issues'" (quoting *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 760 (1985)); *Lowe*, 472 U.S. at 232 (White, J., concurring) (distinguishing between the situation where an individual "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances" and "[w]here the personal nexus between professional and client does not exist" and noting that the First Amendment should apply differently to regulations in those contexts). Debate about professional norms can take place, and the people of a state can determine the scope of state regulation of professional treatment and advice through their elected representatives. Here, the people of Colorado, through their elected representatives, concluded that mental health professionals should not practice conversion therapy on minors because such "therapy" would harm children far more than it would help them.

* * *

As this Court has repeatedly emphasized, advice and treatment provided by professionals are distinct, under the First Amendment, from private speech. States have an important, and longstanding, interest

in ensuring that the treatment and advice given by professionals who act with the state's imprimatur fall within the standards of professionally accepted conduct. Colorado has reasonably determined, based on scientific evidence and the overwhelming consensus within the professional community, that "conversion therapy" is harmful and should not be practiced on children. Petitioner's view that the state cannot regulate such treatment would wreak havoc on the law, overriding the longstanding power of states to regulate licensed professionals to protect consumers by enforcing professional norms. The upshot, if Petitioner were to prevail, would be to make harmful forms of therapy "virtually immune to effective oversight and regulation by the State." *Ohralik*, 436 U.S. at 466. Nothing in the First Amendment or this Court's precedents requires that result. The MTCL should be upheld.

CONCLUSION

For the foregoing reasons, this Court should affirm.

Respectfully submitted,

ELIZABETH B. WYDRA
BRIANNE J. GOROD*
DAVID H. GANS
PRAVEEN FERNANDES
ANA M. BUILES
CONSTITUTIONAL
ACCOUNTABILITY CENTER
1730 Rhode Island Ave. NW
Suite 1200
Washington, DC 20036
(202) 296-6889
brianne@theusconstitution.org

Counsel for Amicus Curiae

August 26, 2025 * Counsel of Record