No. 24-539

IN THE

Supreme Court of the United States

KALEY CHILES,

Petitioner,

v.

PATTY SALAZAR, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE COLORADO DEPARTMENT OF REGULATORY AGENCIES, *et al.*,

Respondents.

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

BRIEF OF *AMICUS CURIAE* INTERNATIONAL LAW SCHOLAR PAUL BEHRENS, IN SUPPORT OF RESPONDENTS

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TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES:

Cited Authorities

Page

STATUTES & OTHER AUTHORITIES:

Page

Cited Authorities

Page

Cited Authorities

Page

Page

Page

Page

Page

Page

INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Dr. Paul Behrens is Reader (Associate Professor) in Law at the University of Edinburgh where he specializes in international law. He has an interest in ensuring that the compliance of Colorado's statutory ban on conversion "therapy" for minors is determined in accordance with First Amendment principles and consistent with principles of human rights law.

Dr. Behrens was a Member of the Expert Advisory Group to the Scottish Government on Ending Conversion Practices in Scotland. He is co-editor of *Justice After Stonewall: LGBT Life Between Challenge and Change* (with Becker, Routledge 2023), has written the report "Selected ICESCR Rights and Their Impact on LGBT+ Matters" (2023), and given papers and presentations on matters of LGBT+ law. At Edinburgh, he teaches the masters course "LGBT Rights: A Legal Perspective."

SUMMARY OF ARGUMENT

This submission analyzes First Amendment considerations applying to the Colorado Minor Conversion Therapy Law ("MCTL"), Colo. Rev. Stat § § 12-245-224(1)(t)(V), in conjunction with corresponding conclusions in human rights law and other laws against conversion "therapies."

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1. Amicus curiae states that no counsel for any party authored this brief in whole or in part, and no counsel for any party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity, other than amicus curiae or its counsel contributed to the preparation or submission of this brief. *See* Sup. Ct. R. 37.6.

Professional conduct, not speech, triggers the MCTL. Relevant considerations are the particular direction that this behavior pursues, the interpretation of the MCTL itself, and the necessity to regulate harmful conduct and unscientific conduct adopted by healthcare professionals. Laws against conversion practices adopted in other jurisdictions have taken these points as their legislative purposes; human rights law acknowledges rights limitations where these aspects of their conduct raise considerations linked to the protection of health.

Rational basis review requires the existence of a legitimate government purpose, which plainly exists with the MCLT. For the corresponding element in human rights law (the requirement of a "legitimate aim"), protection of health, prevention of discrimination based on sexual orientation and gender identity, freedom from torture and inhuman or degrading treatment, and children's rights are all recognized as such aims under the equivalent analysis.

The MCLT also passes the strict scrutiny standard. The existence of compelling State interests is clear, especially where the safeguarding of a minor's well-being is concerned. Human rights law, too, recognizes that a "compelling social need" must exist before State interference with freedom of expression can be justified; it has further accepted this exists in cases relating to information harmful to human health.

The MCTL also passes the least restrictive means test. Its "restrictive impact" is limited from the outset. Comparison of MCTL to other conversion practices laws shows that the latter are more extensive— they tend to apply to any provider and often to any recipient. Some

of these laws do not recognize exemptions; and custodial sentences are often available. Moreover, given the severity of conversion practices, it is not possible to find alternatives that, while less restrictive, are equally effective.

Insights from human rights law and comparative law provide additional value. These insights apply particularly where human rights law has developed mechanisms to counter the possible abuse of rights by some persons to deprive others of their freedoms. The insights also apply with regard to the need for a balancing exercise that inevitably arises where freedom of expression meets other, equally legitimate, interests. Human rights law also recognizes certain positive obligations applicable to States, including for rights applicable here, even where the primary violation was done by private parties. The MCTL thus complies not only with First Amendment considerations, but it also assists Colorado in discharging its obligations under international human rights law.

ARGUMENT

I. Comparative law and human rights law are relevant to this Court's consideration.

Petitioner's position that the Colorado ban on conversion "therapy" in the MCTL affects her "constitutional right to free speech" and impinges on First Amendment protection of the "speech of professionals"[2] is at odds with conversion practice laws around the world, as well as conclusions drawn by many human rights bodies. This amicus curiae

2. Appellant's Br. 11, ECF 31; *see also* Appellant's Br., 14, 15, 21, 25.

urges the Court to consider comparative law and other human rights law that have similarly reviewed conversion practices and which are relevant in this context.

It is universally accepted that conversion "therapy" or conversion practices have a deleterious impact on the interests of individuals. For example, in the 2020 report on this topic, the Independent Expert on Sexual Orientation and Gender Identity ("Independent Expert") reported "anxiety, depressive syndrome, social isolation . . . self-hatred, shame and guilt . . . suicidal ideation and suicide attempts and symptoms of post-traumatic stress disorder" among the demonstrable impact these practices have on individuals.[3] Persons subjected to conversion practices are often young: a global 2019 survey suggested 36.9 percent of those subjected to these practices were under 18 years of age; 45.2 percent were between 18 and 24 years old.[4]

The international medical community recognizes that conversion practices lack scientific basis. The World Medical Association found that they are "unjustifiable practices that should be denounced and subject to sanctions and penalties," and that it was "unethical for physicians

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3. Independent Expert on Protection against Violence and Discrimination Based on Sexual Orientation and Gender Identity, Practices of So-Called "Conversion Therapy," Rep. to the Human Rights Council, ¶ 56, U.N. Doc. A/HRC/44/53 (May 1, 2020) ("Independent Expert") (citing sources); *See also* Paul Behrens, *False Therapy, Real Harm Aspects of Conversion Practices and Their Evaluation*, **Justice After Stonewall: LGBT Life Between Challenge and Change** 250 (Paul Behrens & Sean Becker, eds., 2023) (citing sources).

4. Amie Bishop, *Harmful Treatment. The Global Reach of So-Called Conversion Therapy* 42 (OutRight Action International 2019).

to participate" in them.[5] Numerous national medical associations have taken similar stances.[6] The U.N. Special Rapporteur on Torture noted that conversion practices have "been rejected by every mainstream medical and mental health organization for decades."[7] International human rights bodies also share these concerns about conversion practices.[8]

These harmful effects and scientifically unsubstantiated methods form the background to legislation against conversion practices in the United States and beyond. More than twenty U.S. States have banned them,[9] as have countries outside the U.S. and sub-national jurisdictions.[10] Elsewhere, bans are under consideration, and preliminary work supporting the bans exists.[11]

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5. World Medical Association, *WMA Statement on Natural Variations of Human Sexuality*, **World Medical Association** (October 2013), https://www.wma.net/policies-post/wma-statement-on-natural-variations-of-human-sexuality/.

6. *See* Independent Expert, *supra* note 3, ¶ 20 (citing sources).

7. Special Rapporteur on Torture, Relevance of the Prohibition of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment to the Context of Domestic Violence, ¶ *48,* U.N. Doc. A/74/148 (July 12, 2019) ("Special Rapporteur").

8. *See* Behrens, *supra* note 3, at 250–51 (citing sources).

9. *Conversion "Therapy" Laws*, **Movement Advancement Project** (Aug. 21, 2025), https://www.lgbtmap.org/equality-maps/conversion_therapy.

10. Vianey Estrada, *IDAHOBIT 2025: Charting Global Progress on Banning Conversion Practices*, **Global Equality Caucus** (May 16, 2025), https://equalitycaucus.org/news/article/idahobit-2025-charting-global-progress-on-banning-conversion-practices.

11. *E.g. Expert Advisory Group on Ending Conversion Practices, Report and Recommendations*, Scottish Government

Certainly, the protection of individual victims is a legislative aim in the various legal bans of conversion practices across the world, but there are other considerations as well. For example, the relevant law of Victoria, Australia ("Victoria") speaks to the Parliamentary intention to affirm that conversion practices are also "harmful" "to the community as a whole."[12] That is, conversion practices exert a negative impact on societal interests. Based on the assumption "that sexual orientation and gender diversity are disorders," they are "discriminatory in nature."[13] The pathologization of these aspects of human identity conveys a message to society that Lesbian, Gay, Bisexual, and Transgender ("LGBT") persons fall short of desirable standards and facilitates their stigmatization.[14] These points are reflected in various anti-conversion practices laws. For example, the Maltese law affirms "that all persons have a sexual orientation, a gender identity and a gender expression, and that no particular combination of these three characteristics constitutes a disorder, disease, illness, deficiency, disability" or "shortcoming."[15] Laws against conversion practices also assist the State

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(October 4, 2022), https://www.gov.scot/publications/expert-advisory-group-ending-conversion-practices-report-recommendations/ ("Scottish EAG").

12. *Change or Suppression (Conversion) Practices Prohibition Act 2021* (Vic) s 3(2)(d) (Austl.) ("Victoria").

13. Independent Expert, *supra* note 3, ¶ 83.

14. Bundestag: Drucksache [BT] 19/17278 (Ger.) at 11, 17.

15. Act No. LV of 2016, Malta (Dec 9, 2016), Preamble ("Malta"); *see also* Victoria, *supra* note 12, ss 3(1)(c), 3(2)(b–c); Health Legislation Amendment Bill 2019 (Qld) Explanatory Notes 13 (Austl.) ("Queensland Notes").

in protecting the public from services that are falsely represented as recognized medical treatments, when in fact, they lack any scientific foundation.

Finally, freedom of expression is expressly recognized in human rights law and has received interpretation by international human rights courts and agencies and domestic case law. Commonalities with First Amendment questions exist on the regulation of healthcare professionals' conduct, but also regarding the possible protection of patients and societies from harmful or medically inaccurate measures. They also exist where interests are concerned that compete with freedom of speech.[16]

This amicus submission presents these human rights law and comparative law findings for this Court's consideration on these weighty and important legal issues. This amicus particularly focuses on the case law of European Court of Human Rights, which has generated more material on freedom of expression than comparable international bodies.

II. Rational basis review is applicable and has been appropriately performed.

A. Limitations on professionals' freedom of speech are possible and appropriate.

Petitioner accepts that she is a professional counselor and that the rules pertaining to the rights of professional

16. *See infra* text accompanying notes 80–88.

licensees apply.[17] She does, however, assert that the First Amendment "protects the speech of professionals everywhere" and that the government is prevented from failing "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."[18]

This Court has not gone so far, however, as to say that regulation of the conduct of professionals, or even of professional speech, is not possible. In *NIFLA*, this Court affirmed that "States may regulate professional conduct, even though that conduct incidentally involves speech."[19]

Internationally, laws against conversion "therapy" have taken the conduct of healthcare providers into account. For example, Malta criminalizes conversion practices for any perpetrator, but makes it unlawful (only) for "professionals" to offer them or to "make a referral to any other person to perform conversion practices on any person," with the term "professional" covering mainly healthcare workers.[20] Where such professionals have acted, a higher sentence applies than that available for nonprofessionals.[21] In another instance, the law of Queensland ("Queensland") applies only to "health service providers" as perpetrators of conversion practices.[22] The Explanatory Queensland Notes highlight the reasoning: "health professionals," according to the

17. Appellee's Br. 5, 15–16, ECF 78.

18. *Id.* at 14, (citing *NIFLA v. Becerra*, 585 U.S. 755, 772 (2018)).

19. *NIFLA*, 585 U.S. at 768.

20. Malta, *supra* note 15, ss 2 and 3(b).

21. *Id.* at s 4.

22. Health Legislation Amendment Act 2020 (Qld) s 213H (Austl.).

Notes, "have ethical obligations not to engage in practices that are harmful and not evidence-based."[23]

Human rights law recognizes the importance of freedom of expression. The European Court of Human Rights ("ECtHR") accepts that the scope of freedom of expression is not restricted to "'information' or 'ideas' that are favourably received . . . but also to those that offend, shock or disturb."[24] The ECtHR expressly affirms that freedom of expression applies to medical doctors who enjoy the right to "participate in debates on public health issues, including expressing critical and minority opinions."[25] That does not mean, however, that the ECtHR has not accepted the possibility of limitations on the rights of professionals; rather, it is the very nature of the professional activity that can justify restrictions. In the case of the healthcare profession, the ECtHR thus referred to the "special relationship of medical practitioners with patients based on trust, confidentiality and confidence that the medical practitioners will use all available knowledge and means for ensuring" their well-being[26] and to the "key role" they play 'in the context of public health debates," because of "their expert knowledge in the medical field and the professional services they offer in the interest of public health."[27]

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23. Queensland Notes, *supra* note 15, at 10.

24. Handyside v. United Kingdom, App. No. 5493/72, Eur. Ct. H.R. at 49 (1976).

25. Bielau v. Austria, App. No. 20007/22, Eur. Ct. H.R. at 44 (2024).

26. *Id.* at 43.

27. *Id.* at 44; *see also* Adil v. General Medical Council, [2023] EWCA Civ 1261, ¶¶ 51, 55 (Eng.).

As demonstrated in the above examples, under specific conditions,[28] limitations to the freedom of speech of medical professionals are therefore possible.

B. The conditions of rational basis review are in place.

1. It is professional conduct, not speech, that brings the activity into the scope of the law.

Practices that are meant to have a direct impact on their recipients and indeed create the potential for an infringement of their rights, may well involve a communicative aspect; but, by their very nature, those practices go beyond the realm of the "mere" expression of an opinion. This is a point which gains particular clarity in the case of conversion "therapy," whose purpose is to induce a direct change of the most intimate elements of the recipients' lives. Where that is the case, the aspect of the practices that takes center stage is the conduct itself. The fact that speech is involved in its realization, is no more than incidental.

The professional character of the act itself plays a significant role in this analysis. To the licensed counselor, the speech that is unavoidably involved in the practices, is not a carrier for the expression of an opinion, but a tool of the trade.[29] It is for that reason that the MCTL is well aligned with this Court's finding in *Giboney* that it had "never been deemed an abridgement of freedom of

28. See *infra* text accompanying notes 124–29.

29. *See also Tingley v. Ferguson*, 47 F.4th 1055, 1064 (9th Cir. 2022), *cert. denied*, 1144 S.Ct. 33 (2023).

speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[30]

It is this directive element that is reflected in the concept of conversion practices as it appears in laws around the world. There, reference is made to this element either on the objective or on the subjective side: Malta refers to conduct that "aims" to change the relevant characteristics.[31] Victoria stresses the requirement of intent underlying the relevant practice,[32] and conversion practices, according to it, are characterized by a "purpose" of effecting the relevant change.[33]

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30. *Giboney v. Empire Storage Co.*, 336 U.S. 490, 502 (1949); *see also* Petition for Writ of Certiorari Chiles v. Salazar et al., No. 24-539 (2024), at 49a-50a..

31. Malta, *supra* note 15, s 2; *see also* Victoria, *supra* note 12, s 5(1); *compare* Gesetz zum Schutz vor Konversionsbehandlungen [Act to Protect Against Conversion Treatments], June 24, 2020, § 1(1) ("Germany"). *See also* Law for the Real and Effective Equality of Trans People and for the Guarantee of the Rights of LGBTI People Art. 79 (B.O.E. 2023) (Spain) ("Spain"); Voorstel van Wet (Wet strafbaarstelling conversiehandelingen) 36 178, nr. 2, Tweede Kamer, vergaderjaar 2021–2022, Arts. I B and III A (Netherlands); Scottish EAG, *supra* note 11, Recommendation 2.1.

32. Victoria, *supra* note 12, ss 10–11; *see also* Scottish EAG, *supra* note 11, Recommendation 3.

33. Victoria, *supra* note 12, s 5(1).

2. Legislative intent and textual interpretation indicate that conduct is being targeted.

Where the distinction between "conduct" and "speech" is approached from the perspective of the legal provision itself, an interpretation based on the legislative intent demonstrates that the MCTL is aimed at the prohibition of the relevant practice, rather than the expression of an opinion— a point substantiated through the codification history.[34]

The textual interpretation of the MCTL also supports the finding that the law targets conduct rather than speech. By referring to "any practice or treatment," the MCTL makes clear that it is the behavior of conversion practices that is the object of the MCTL.[35] The law targets conduct, rather than speech. Speech is not mentioned, and counselling as such is not targeted.[36]

A consideration of the Mental Health Act as a whole does not lead to a different result. The ban on conversion practices appears within a section of prohibited activities, which frequently refers to improper medical treatment (such as acting "in a manner that does not meet the generally accepted standards of the professional discipline under which the person practices").[37]

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34. App. to Pet. Cert., No. 24-539, at 40a.

35. *See also* App. to Pet. Cert., No. 24-539 (2024), at 38a, 39a, 46a.

36. *See also* Colo. Rev. Stat. § 12-245-217(2)(a) (2022) (laying out exceptions).

37. Colo. Rev. Stat. § 12-245-224(1)(g)(I) (2024).

Petitioner's argument that the Tenth Circuit engaged in "labeling games" when it held "that Chile's speech is conduct if the state calls it "treatment,"[38] does not withstand scrutiny under comparative law. Colorado is hardly alone in its approach. Jurisdictions such as France, Malta, New Zealand, Victoria, and the Australian Capital Territory ("ACT") refer to "practice(s)," in their related laws,[39] as does the Scottish Expert Advisory Group.[40] Canada and Spain employ the word "therapy."[41] Germany's related law uses "treatment,"[42] which also turns up in other laws as a sub-category to "practice" or "therapy."[43]

38. Appellant's Br. 21.

39. Loi 2022-92 du 31 janvier 2022 interdisant les pratiques visant à modifier l'orientation sexuelle ou l'identité de genre d'une personne [Law 2022-92 of January 31, 2022 on practices aimed at modifying the sexual orientation or gender identity of a person], Journal Officielle de la Republique Francaise [J.O.] [Official Gazette of France], Art. 1; Malta, *supra* note 15, s 2; Conversion Practices Prohibition Legislation Act 2022, s 5(1) (N.Z.) ("New Zealand"); Victoria, *supra* note 12, s 5(1); Sexuality and Gender Identity Conversion Practices Act 2020 (ACT) s 7 (Austl.) ("ACT").

40. Scottish EAG, *supra* note 11, Recommendation 2.1.

41. An Act to Amend the Criminal Code (Conversion Therapy), S.C. 2021, c 24, s 5 (Can.) ("Canada"); Spain, *supra* note 31, art. 17.

42. Germany, *supra* note 31, § 1(1).

43. *See* Canada, *supra* note 41, s 5; Malta, *supra* note 15, s 2; ACT, *supra* note 39, s 7; Victoria, *supra* note 12, s 5(3)(a); Scottish EAG, *supra* note 11, Recommendation 2.1.

The terms "efforts,"[44] "methods,"[45] and "programs"[46] likewise find mention in laws around the world addressing this same issue of conversion practices.

The German debate on the relevant term is illuminating: during the legislative process, an amendment was (unsuccessfully) moved, expressing discontent with the word "treatment," which was seen as associated with the concept of the treatment of an illness.[47] Yet the suggested alternative was "measures," which, too, is wide enough to pertain to a range of acts without focusing on speech.

There appears to be not a single law against conversion practices that takes "pure speech" as its target. Moreover, some laws and preparatory proposals in this field expressly promote counseling tasks. The Scottish EAG, for instance, conceived of the offer of support to victims of conversion practices and would, in particular "arrange for counselling . . . in line with individualised needs where victims . . . of conversion practices so request."[48] New Zealand goes further and states one of its purposes as the promotion of "respectful and open discussion regarding

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44. Malta, *supra* note 15, s 2; Scottish EAG, *supra* note 11, Recommendation 2.1.

45. Spain, *supra* note 31, Art. 17.

46. *Id.*

47. Bundestag: Drucksache [BT] 19/18768 (Ger.) at 14–15 (Änderungsantrag 1 by FDP).

48. Scottish EAG, *supra* note 11, Recommendation 6.2.3(a)(i). *See also* Spain, *supra* note 31, Art. 33(b).

sexuality and gender."[49] The legislators thus clarify that they do not see the regulation of conversion practices and the provision of counseling as contradictions: these are not speech-averse laws.

It is not tenable that all these jurisdictions have engaged in "labeling games" to avoid the classification of the conduct as "speech." The First Amendment does not apply to them, and many are, in fact, parties to human rights treaties which expressly envisage limitations to freedom of expression.[50] The legislators in these jurisdictions could therefore have easily targeted talk "therapy" or other forms of speech, had such been their intent. They did not.

There are, however, good reasons why a wider scope was adopted in the comparative laws. Conversion practices extend to a range of techniques including electric shock "treatments," medication,[51] beatings, rape, force-feeding, food deprivation, isolation, confinement,[52] and others that inflict physical and psychological pain. Limiting the relevant legislation to a specific form of behavior only would therefore have been an ineffective way of addressing the problem. The issue for legislatures around

49. New Zealand, *supra* note 39, s 3(b).

50. *See* Council of Europe, *European Convention on Human Rights*, 213 UNTS 221 (1950) ("ECHR"), Art. 10(2); United Nations, International Covenant on Civil and Political Rights, 999 UNTS 171 (1966) ("ICCPR"), Art. 19(3); Organization of American States, *American Convention on Human Rights*, 1144 UNTS 123, (1969) ("ACGR"), Art. 13(2).

51. *See* Special Rapporteur, *supra* note 7, ¶ 46.

52. Independent Expert, *supra* note 3, ¶ 55.

the world was the problem of conversion practices, not the expression of opinions.

3. Where the danger of harmful conduct by medical professionals exists, the State must be able to adopt laws to counter it.

The Tenth Circuit approved of the view that mental health providers "may properly be subject to sanction" in cases where the evidence of "ineffectiveness or harm is strong enough."[53] Reference to the harm caused by conversion practices is made above.

But prevention of harm has also been an important consideration in other laws on conversion practices; often, it informs the legislative purpose.[54] The Queensland Notes clarify the particular link between harm and medical services: they observe that the "offence and penalties are justified as an appropriate response to the harm caused by conversion therapy and the need to ensure these practices are not carried out in a health care context."[55]

In human rights law, the protection of health is recognized as a legitimate interest that has the potential of competing with certain human rights,[56] and the ECtHR has affirmed that "fundamental public-health considerations" can take precedence "even over certain

53. *Chiles v. Salazar*, 116 F.4th 1178, 1206 (10th Cir. 2024) (quoting *id.* at 1226–27 (Hartz, J., dissenting)).

54. *See* Malta, *supra* note 15, Preamble; New Zealand, *supra* note 39, s 3(a); Victoria, *supra* note 12, s 3(2)(a).

55. Queensland Notes, *supra* note 15, at 13–14.

56. *See supra* note 50.

fundamental rights such as freedom of expression."[57] Sanctions imposed on medical doctors for behavior causing harm to the public, as the Court of Appeal of England and Wales held in *Adil*, "also directly engage[] the aim of protection of public health and safety."[58] The court there refused to find that a medical doctor's opinions which are dangerous are "incapable of amounting to misconduct."[59] The special relationship that medical practitioners enjoy with patients and the public justifies limitations in this context.[60]

But courts evaluating human rights have also considered the potential consequences if the scope of freedom of expression were to extend to harmful conduct. In *Adil*, Lord Justice Bean suggested the hypothetical example of a medical doctor publishing the view "that smoking was good for health, and that people were encouraged to smoke at least 40 cigarettes a day"—conduct which, in the view of the court, "would be so far removed from any concept of legitimate medical debate that an appeal to the importance and breadth of the freedom of expression protected by article 10 [ECHR] would be misplaced."[61] Lord Justice Bean's example

57. Hachette Filipacchi Presse Automobile et Dupuy v. France, App. No. 13353/05, Eur. Ct. H.R. at ¶46 (2007); Bielau v. Austria, App. No. 20007/22, Eur. Ct. H.R. at ¶36 (2024).

58. Adil v. General Medical Council, [2023] EWCA Civ 1261, ¶ 47 (Eng.) (discussing Article 10(2) of European Convention of Human Rights).

59. *Id.*, ¶ 69.

60. See *supra* text accompanying notes 26–27.

61. Adil v. General Medical Council, [2023] EWCA Civ 1261, ¶ 50 (Eng.).

applies with equal validity to dangerous medical advice considered under the First Amendment, and it highlights the inconsistency that would result from an unduly extensive understanding of freedom of speech. A medical doctor who pours a glass of whisky to calm a nervous patient could be censured for unprofessional conduct. His colleague who advises patients to smoke 40 cigarettes a day, could not. Nor could a healthcare professional who engages in conversion practices, for all the harm they cause. It is a better view to consider that, in these instances, the expression of views is no longer the center of the behavior. Rather, these are cases of dangerous conduct by licensed healthcare providers for which legal regulation must be available.

4. Where medically inaccurate statements are made by professionals, regulation must be possible.

The Tenth Circuit aptly noted the authority of the State to regulate the medical profession, quoting this Court's opinion in *Dent v. West Virginia* noting the appropriateness of adopting regulations to protect against the "consequences of ignorance and incapacity."[62] It found that the long history of regulations in that regard was "unsurprising because medical treatment provided to the public must fall within the accepted standard of care for the profession."[63]

Several laws against conversion practices recognize the unscientific nature of the underlying methods:

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62. *Chiles*, 116 F.4th at 1206 (citing *Dent v. West Virginia*, 129 U.S. 114, 122 (1889)).

63. *Id.*

Victoria, for one, expressly states the legislative purpose "to affirm" the "deceptive" nature of these conversion practices.[64]

In view of this overwhelming recognition and understanding regarding scientifically baseless conversion "therapies," regulation banning such medically inaccurate statements to patients and patients' families is not only possible, but necessary. Scientific opinion can change over time, but that does not mean that regulation should be abandoned or that the doors must be flung open to allow magic incantations and exorcisms by healthcare professionals.[65] If the regulation of healthcare is to be possible at all, it has to be based on the best insights available at any given time.

The ECtHR has considered the regulation of unscientific statements as well. In *Bielau* an Austrian doctor who, having made "scientifically untenable statements about the ineffectiveness of vaccines on his website" and "in connection with his medical practice," had received a disciplinary sanction. The ECtHR found that no violation of freedom of expression had taken place.[66] In that case, the position of the applicant (as a medical doctor) mattered to the court, as well as the fact that "the

64. Victoria, *supra* note 12, s 3(2); *see also* Queensland Notes, *supra* note 15, at 13.

65. Exorcisms have played a role in conversion practices. *See Javier García Oliva & Helen Hall, Exorcism and Other Spiritual Modes of "Conversion Therapy" in Banning 'Conversion Therapy': Legal and Policy Perspectives* 167–87 (Ilias Trispiotis & Craig Purshouse, eds., Hart 2023).

66. Bielau v. Austria, App. No. 20007/22, Eur. Ct. H.R. at ¶46–47 (2024).

information posted . . . was found not to be in line with the current state of medical science."[67] In such cases, the particular obligations of healthcare professionals affect the availability of limitations[68]—as they should, given that people are more likely to follow healthcare professionals' pronounced views on medical matters "on trust."[69]

From the perspective of rational basis review, the unscientific nature of the conduct the MCTL targets makes clear that the focus of the regulatory purpose is on behavior that deviates from widely accepted medical standards, rather than pure speech. A reading which "immuniz[ed] talk therapy from regulation"[70] would, far from protecting the rights of the people, lead to a situation where astonishing loopholes for unscientific methods in the healthcare sector would arise. Licensed healthcare professionals who seek to treat cancer by burning joss sticks could, quite reasonably, face regulatory limits; their colleagues who substitute magic spells for medically recognized cancer treatment could rely on the proposed extensive interpretation of freedom of speech.

C. Rational basis review was correctly performed.

Under rational basis review, the relevant measure must have been "rationally related to a legitimate

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67. *Id.* at ¶42. *See also* Adil v. General Medical Council, [2023] EWCA Civ 1261, ¶¶ 53, 93 (Eng.).

68. *See supra* text accompanying notes 26–27.

69. *See* Adil v. General Medical Council, [2023] EWCA Civ 1261, ¶ 55 (Eng.) (referencing guidance by the General Medical Council).

70. *Chiles*, 116 F.4th at 1211.

government purpose or end."[71] Here, the Tenth Circuit found that health and welfare laws were in this regard "entitled to a 'strong presumption of validity,'"[72] and held that "Colorado's interest in 'safeguarding the physical and psychological well-being of a minor' [was] undoubtedly legitimate."[73] Colorado's interest in "regulating and maintaining the integrity of the mental-health profession" was evaluated in the same way.[74]

The protection of health is an objective of laws against conversion practices around the world.[75] Beyond that, counteracting the discriminatory effect of conversion practices is likewise recognized as a legislative interest.[76] Queensland also makes reference to a person's "right to protection from torture and cruel, inhuman or degrading treatment,"[77] and the Scottish EAG recommended that the Government be guided *inter alia* by the capacity of conversion practice to violate children's rights.[78]

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71. *Christian Heritage Acad. v. Oklahoma Secondary Sch. Activities Ass'n,* 483 F.3d 1025, 1032 (10th Cir. 2007).

72. *Chiles*, 116 F.4th at 1215 (discussing *Dobbs*, 597 U.S. 215, 301 (2022)).

73. *Id.* at 1216.

74. *Id.*

75. Queensland Notes, *supra* note 15, at 13; *see also* Victoria, *supra* note 12, s 3(2)(d).

76. See *supra* text accompanying notes 13–15.

77. Queensland Notes, *supra* note 15, at 13; *see also* Scottish EAG, *supra* note 11, Recommendation 1.1.

78. Scottish EAG, *supra* note 11, Recommendation 1.2.

These legislative interests and aims reflect considerations of human rights law. In that field, the concept of "legitimate aims" arises as the basis for rights restrictions,[79] making it congruent to this limb of rational basis review. Among these aims is the protection of health,[80] (including protection from medically inaccurate information[81] and from harmful information[82], as well as protection of public confidence in the medical profession).[83] "Rights" and "reputations" of others are likewise recognized as legitimate aims,[84] implicating freedom from discrimination on grounds of sexual orientation and gender identity in this context.[85] Legitimate aims further include freedom from torture, inhuman and degrading treatment,[86] and the U.N. Special Rapporteur on Torture emphasized that conversion practices can amount to torture or "to other cruel, inhuman or degrading

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79. *See supra* note 50; *see also* Vejdeland and Ors v Sweden, App. No. 1813/07, Eur. Ct. H.R. at 48 (2012)

80. *See supra* note 50.

81. *See supra* text accompanying notes 67–69. *See also* Bielau v. Austria, App. No. 20007/22, Eur. Ct. H.R. at 33 (2024).

82. *See supra* text accompanying notes 58–59.

83. Adil v. General Medical Council, [2023] EWCA Civ 1261, ¶¶ 31, 65 (Eng.).

84. *See supra* note 50.

85. *See* Vejdeland and Ors v. Sweden, App. No. 1813/07, Eur. Ct. H.R. at 55 (2012).

86. Council of Europe, *European Convention on Human Rights*, 213 UNTS 221 (1950), Art. 3; United Nations, International Covenant on Civil and Political Rights, 999 UNTS 171 (1966), Art. 7; Organization of American States, *American Convention on Human Rights*, 1144 UNTS 123, (1969), Art. 5(2).

treatment or punishment."[87] Children's rights, too, fall within the "rights of others."[88]

Under rational basis review, the relevant measure must also be "rationally related" to the specific government purpose. The Tenth Circuit in *Chiles* found that this element in relation to the MCTL and the outlined government purposes was fulfilled.[89]

Here, too, human rights law has a corresponding requirement: the ECtHR will thus raise the question whether "relevant and sufficient" reasons were provided for the particular government interference.[90] Where inaccurate information, "not . . . validated by the current state of scientific knowledge" had been disseminated by members of the medical profession, this requirement has in the past been accepted as fulfilled.[91] Where the other conditions attaching to a justified interference were satisfied,[92] this has led the ECtHR to conclude that no violation of freedom of expression had taken place.

In sum, the rational basis review conducted by the Tenth Circuit below, which is analogous and consistent

87. Special Rapporteur, *supra* note 7, ¶ 50.

88. *See, e.g.*, United Nations, *Convention on the Rights of the Child*, 1577 UNTS 3, Arts. 8(1), 37(a) (1989); Committee on the Rights of the Child, General Comment No. 20 (2016), U.N. Doc. CRC/C/GC/20 (2016) ¶ 34.

89. *Chiles*, 116 F.4th at 1220–21.

90. Bielau v. Austria, App. No. 20007/22, Eur. Ct. H.R. at 40 (2024).

91. *Id.* at 35.

92. *See infra* text accompanying notes 98, 101–02.

with human rights laws and comparative law, is applicable and has been appropriately performed. The Court should affirm on this basis.

III. The MCTL also fulfils the conditions of strict scrutiny.

The MCTL is subject to and meets the rational basis review, but even if the Court were to find that rational basis review is not applicable to the Colorado law, the MCTL would also pass the test of strict scrutiny.

Under a strict scrutiny review, the government must show that the relevant measures are "narrowly tailored to serve compelling state interests."[93] In *Otto v. City of Boca Raton, Florida*, the Eleventh Circuit, considering a conversion-practices law in Florida, acknowledged the principle that "[i]t is indisputable 'that a State's interest in safeguarding the physical and psychological well-being of a minor is compelling.'"[94] The dissent in *Otto* further explained that the extensive disapproval of conversion practices by medical professional organizations refers to the "real risks of harm on children" as substantiated "by a mountain of rigorous evidence."[95] In *Chiles*, the dissent also accepted that compelling reasons may exist where the law refers to certain inaccurate statements by professionals.[96]

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93. *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015).

94. *Otto v. City of Boca Raton, Fla.,* 981 F.3d 854, 868 (11th Cir. 2020) (quoting *New York v. Feber*, 458 U.S. 747, 756–57 (1982)).

95. *Id.* at 877–78 (Martin, J., dissenting).

96. *Chiles*, 116 F.4th at 1237 (Hartz, J., dissenting).

Compelling interests are expressly mentioned in conversion practices laws,[97] and they also find a corresponding element in human rights law. In addition to the "legitimate aim" that must exist for lawful State interference with the relevant right, the ECtHR also requires the interference to correspond to a "pressing social need."[98] In the past, this condition had been considered fulfilled in certain cases relating to harmful information; for instance, "given the importance of public health," the pressing social need element was met when a State had taken measures against tobacco advertisements.[99]

Under the strict scrutiny test, the relevant measure also must have been "the least restrictive means of achieving" the compelling State interest.[100] This test is part of human rights law as well where it forms one of the constituent elements of the proportionality assessment which must be carried out if State interference with the relevant right is to be considered justified.[101] The ECtHR

97. S.B. 1172 § 1(n), 2011-12 S., Reg. Sess. (Cal. 2012).

98. Vejdeland and Ors v. Sweden, App. No. 1813/07, Eur. Ct. H.R. at 51 (2012); *see also* Bielau v. Austria, App. No. 20007/22, Eur. Ct. H.R. at 36 (2024).

99. Bielau v. Austria, App. No. 20007/22, Eur. Ct. H.R. at 36 (2024) (quoting Hachette Filipacchi Presse Automobile et Dupuy v. France, App. No. 13353/05, Eur. Ct. H.R. (2009)).

100. *McCullen v. Coakley*, 573 U.S. 464, 478 (2014); *cf. Otto v. City of Boca Raton, Fla.*, 981 F.3d 854, 880 (11th Cir. 2020) (Martin, J., dissenting) (stating that the "narrow regulation of a harmful medical practice affecting vulnerable minors falls within the narrow band of permissibility.").

101. *See* Vejdeland and Ors v. Sweden, App. No. 1813/07, Eur.

thus found that "there must be no other means of achieving the same end that would interfere less seriously with the fundamental right concerned."[102]

The "restrictive nature" of the MCTL is limited from the outset: it is well defined and of comparatively low impact on the rights of providers. The sanctions are disciplinary in nature;[103] and custodial sentences for conversion practices are not contemplated. The Tenth Circuit pointed out that Petitioner may still (i) "share with her minor clients her own views on conversion therapy, sexual orientation, and gender identity," (ii) "criticize Colorado for restricting her ability to administer conversion therapy," and (iii) "refer her minor clients to service providers . . . who can legally engage" in conversion practices, such as religious ministers.[104]

The minimally restrictive nature of the MCTL becomes particularly clear in the context of comparative law. Laws against conversion practices outside the United States tend to be far more extensive in their scope. The ban is often triggered when conversion practices are carried out on "any" person, not just minors—as

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Ct. H.R. at 52 (2012) (discussing the proportionality assessment in general).

102. Glor v. Switzerland, App. No. 13444/04, Eur. Ct. H.R. at 94 (2009).

103. Colo. Rev. Stat § 12-245-225(1)(a), (e), (c), and § 12-245-225(2).

104. *Chiles*, 114 F.4th at 1209.

in Victoria,[105] Canada, [106] Spain,[107] and France.[108] Laws against conversion practices enacted outside the United States tend not to be limited to healthcare providers.[109] The referral of a person to another provider, so that conversion practices can be carried out, is expressly criminalized in some laws, such as those of Malta (when done by a professional)[110] and Victoria.[111] By way of further comparison, unlike the MCTL, foreign laws also extend to promotion,[112] advertising,[113] offering of conversion practices,[114] or the removal of a person from the

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105. Victoria, *supra* note 12, s 10–11; *see id*. s 5(1).

106. Canada, *supra* note 41, s 5.

107. Spain, *supra* note 31, Arts. 17 and 79(4)(d).

108. France, *supra* note 39, Art. 1; see also Scottish EAG, *supra* note 11, Recommendations 2.1, 3.1 and 4.2.2.

109. See Germany, *supra* note 31, § 2 (*but see id.* § 5); Malta, *supra* note 15, s 3(a); Victoria, *supra* note 12, ss 5, 9, 10, 11; Spain, *supra* note 31, Art. 17; *see also* Scottish EAG, *supra* note 11, Recommendations 2.1 and 3.

110. Malta, *supra* note 15, s 3(b)(ii).

111. Victoria, *supra* note 12, ss 5(3)(c), 10–11. *See also* Scottish EAG, *supra* note 11, Recommendation 3.1.4.

112. Canada, *supra* note 41, s 5(320.103); Spain, *supra* note 31, Art. 79(4)(d); Scottish EAG, *supra* note 11, Recommendation 3.1.3.

113. Canada, *supra* note 41, s 5(320.103); Germany, § 3; Malta, *supra* note 31 s 3(a)(iii); Victoria, *supra* note 12, s 13; *see also* Scottish EAG, *supra* note 11, Recommendation 3.1.3.

114. Germany, *supra* note 31, § 3; Malta, *supra* note 15, s 3(b)(i) (for professionals); *see also* Scottish EAG, *supra* note 11, Recommendation 3.1.2.

relevant jurisdiction for conversion practice purposes.[115] And unlike the MCTL that provides an extensive list of exemptions from the concept of conversion practices (e.g., for religious ministers),[116] some laws have no exemptions at all.[117] Moreover, it is not uncommon for these laws to include custodial sentences. Victoria, which requires the causation of injury as a necessary aspect of the crime, has the possibility of imprisonment up to five years.[118] With the benefit of this comparative context, the very limited scope of the MCTL is apparent and thus militates in favor of finding that it is narrowly tailored and does not impose an excessive burden.

This Court noted that the alternative measures (claimed to be less restrictive) had to be "at least as effective in achieving the legitimate purpose" of the statute.[119] It is on the basis of this standard that the *Otto* dissent found the regulation of conversion practices in that case permissible and rejected the suggestion of alternative measures, as it was not shown that they would be effective.[120]

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115. ACT, *supra* note 39, s 9; Victoria, *supra* note 12, s 12; *see also* Scottish EAG, *supra* note 11, Recommendation 3.1.5.

116. Colo. Rev. Stat § 12-245-217(1).

117. Spain, *supra* note 31, Art. 17; *see also* Scottish EAG, *supra* note 11, Recommendation 3.4.

118. Victoria, *supra* note 12, s 11(1). See also Germany, *supra* note 31, § 5(1); Malta, *supra* note 15, s 4(1).

119. *Reno v. American Civil Liberties Union*, 521 U.S. 844, 846 (1997).

120. *Otto*, 981 F.3d at 879–80 (Martin, J., dissenting).

The codification history of other laws against conversion practices shows that this aspect of the proportionality assessment had been a concern to other legislators, too. The German reasoning is particularly interesting here. The German government reflected on information campaigns as alternatives to criminalization but found that they were not sufficient.[121] It came to this conclusion because scientific and psychotherapeutic associations had already advised that "conversion treatments" were harmful and incompatible with ethical medical conduct, but the relevant practices were still being performed.[122]

The ECtHR is also willing to consider whether suggested alternatives would have reached the same level of efficiency.[123] Aspects that matter include the importance of the interest that the State seeks to protect. In *Vérités*, the ECtHR thus referred to "serious questions of public interest concerning human health" which were involved.[124] The particular position of the applicant (e.g., a medical doctor) is of significance again, with the ECtHR accepting particular "professional obligations" for medical doctors.[125] The court recognized the significance of the

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121. Bundestag: Drucksache [BT] 19/17278 (Ger.) at 12.

122. *Id.*

123. *See* Bielau v. Austria, App. No. 20007/22, Eur. Ct. H.R., at 34 (with reference to Palusinski v. Poland, App. No. 62414/00, Eur. Ct. H.R. (2006)).

124. Vérités Santé Pratique Sarl v. France, App. No. 74766/01, Eur. Ct. H.R. (2001).

125. Bielau v. Austria, App. No. 20007/22, Eur. Ct. H.R., at 44 (2024).

young age of recipients of the relevant expressions, for example, in cases involving homophobic expressions[126] and expressions harmful to human health.[127] It also considered the "nature and contents" of the relevant statements, as well as their impact, as part of their proportionality assessment.[128] All of these aspects fairly play a role where the MCTL is concerned. Here, too, the Colorado ban relates to important matters connected to the protection of health; the providers of conversion practices are healthcare professionals; the practices are harmful; and the recipients are children. These are factors that raise the bar for the suggestion of alternative measures: the severe character of conversion practices cannot be met with less restrictive measures if they are to possess the same degree of efficiency.

CONCLUSION

The consideration of other laws against conversion practices and of human rights law allows the identification of several points that are of relevance to rational basis review and strict scrutiny review, as discussed above. They also permit the following conclusions:

First, the rights of those subjected to the relevant conversion practices play an indispensable part in the evaluation of conversion practices laws, whose legislative purpose they inform. Under human rights law they are

126. Vejdeland and Ors v. Sweden, App. No. 1813/07, Eur. Ct. H.R. at 56 (2012).

127. *See supra* text accompanying note 99.

128. Bielau v. Austria, App. No. 20007/22, Eur. Ct. H.R., at 40 (2024).

an integral part of the assessment of the legality of State interference with freedom of expression. The rights of victims are recognized among legitimate aims that compete with this freedom.[129] As has been seen, they are, however, also of importance for rational basis review and strict scrutiny. The position of victims also impacts the very concept of the underlying acts: communication used to effect a direct impact on the rights of others moves away from "pure" expressions of opinions, making it suitable for laws that occupy themselves with the regulation of particular professional conduct.

But the consideration of victims also allows a consideration of the wider rights framework within which the prohibition of conversion practices is placed. The fact that providers and recipients of conversion practices both claim rights urges the question of whose legitimate interests had been violated in the first place. On that basis, the rights of the victims, whose violation had made the prohibitive laws necessary to begin with, must gain focus. This is a point of legal significance. The leading human rights treaties all contain rules against the abuse of rights;[130] in other words, as García and Hall put it for the ECtHR, they "will not allow individuals or groups to weaponise their rights as a vehicle for stripping third parties of theirs."[131] The use of freedom of expression in

129. *See supra* text accompanying notes 84-88.

130. Council of Europe, *European Convention on Human Rights*, 213 UNTS 221 (1950), Art. 17; United Nations, International Covenant on Civil and Political Rights, 999 UNTS 171 (1966), Art. 5; Organization of American States, *American Convention on Human Rights*, 1144 UNTS 123, (1969), Art. 29.

131. Javier García Oliva & Helen Hall, *Exorcism and Other Spiritual Modes of "Conversion Therapy" in Banning 'Conversion*

order to limit another person's right to health, to freedom from discrimination on grounds of sexual orientation and gender identity, and children's rights has to be seen in this context.

Second, the very fact that the First Amendment is characterized by an "absence of an express limitation clause"[132] may invite the tempting conclusion that a balancing of rights does not have to be performed here. The balancing of interests, as done under human rights treaties, can indeed be a challenging task, but it also allows insights on the legitimate interests that human rights bodies recognize as competing with freedom of expression and on the mechanisms they apply to allow the core character of all competing legitimate interests to survive.

Moreover, competing interests have been identified in United States constitutional law, too. "Legitimate government purposes" and, indeed, "compelling State interests" are recognized for the evaluation of First Amendment rights, especially in the field of health rights, including the well-being of minors. That means that a balancing exercise is an inevitability. An attempt to escape this difficulty by opting for the absolute protection of freedom of speech already entails a decision for one of the competing interests.

Third, human rights law, under certain circumstances, recognizes obligations of the State to assure the protection

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Therapy': Legal and Policy Perspectives 177 (Oxford ed., 2023).

132. *See* Sandra Fredman, *Comparative Human Rights Law* 306 (2018).

of the relevant rights, even if the primary human rights violation had been carried out by private parties. Such affirmative (or "positive") obligations have been accepted for various rights that are threatened where conversion practices are concerned, including the right to life,[133] freedom from discrimination,[134] freedom from torture,[135] and the right to respect for private life[136]—rights enshrined in the leading human rights treaties, including the ICCPR, to which the United States is party.[137]

In adopting the MCTL, the Colorado legislature not only acted in a manner that satisfies review under the First Amendment. It also complied with its duty to protect persons under its jurisdiction— in particular children— from acts that would constitute a severe violation of their established rights. The MCTL meets the relevant tests for enforceability under United States law, and it also discharges obligations incumbent upon the State under international human rights law. For these reasons, the Tenth Circuit's decision should be affirmed.

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133. *See* Osman v. United Kingdom, App. No. 23452/94, Eur. Ct. H.R. at 115. (1998).

134. Human Rights Comm., Communication No. 608/1995 (Nahlik), U.N. Doc. CCPR/C/57/D/608/1995, 8.2 (1996).

135. Human Rights Comm., General Comment 31, CCPR/C/21/Rev.1/Add.13, ¶ 8 (2004); *see also* X and Others v. Bulgaria, App. No. 22457/16, Eur. Ct. H.R. (2021).

136. MC v Bulgaria, App No 39272/98, Eur. Ct. H.R. at 150 (2003).

137. United Nations, International Covenant on Civil and Political Rights, 999 UNTS 171 (1966), Arts. 6, 7, 17, 26.

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