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 U.S. COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* MATHEW SHURKA IN SUPPORT OF RESPONDENTS

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INTERESTS OF AMICUS CURIAE[1]

Beginning when he was 16 years old, Amicus Mathew Shurka was subjected to five years of treatment by licensed medical professionals intended to change his sexual orientation by eradicating his romantic attraction towards men and creating a romantic attraction to women. This treatment was entirely ineffective and, as detailed in this brief, had a devastating impact on Mathew's mental and physical health, his sense of self-worth and his family relationships. The treatment also caused significant harm to Mathew's family.

Mathew came out publicly as gay at the age of 23 and began sharing his story of enduring "conversion therapy". Through an online video he posted, the story of his ordeal "went viral." Since then, his experience and his advocacy against the practice of so-called "conversion therapy" have been covered by numerous prominent media outlets, including CNN, NBC, Newsweek, FOX, PBS, The Washington Post, The New York Times and The Guardian, among others.

Since coming out, Mathew has met with government officials and testified dozens of times before legislatures in an effort to prevent children in states across the country from suffering the catastrophic consequences of "conversion therapy". Mathew testified four separate times between 2018 and 2019 in support of the Colorado Minor Conversion Therapy Law ("MCTL") at issue in this case.

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1. No counsel for a party authored this brief in whole or in part, and no person other than the amicus and his counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Mathew's experience, while deeply personal, is also tragically common. He submits this brief to ensure that every child is protected from harm under the guise of sanctioned therapy — and to remind this Court that the question before it is not abstract. To the contrary, this decision will have concrete and potentially lethal results. If treating a minor with "conversion therapy" is considered an exercise of free speech, that outcome can lead to damaged mental health, self-harm, suicidal ideation, and other harms, as well as blurred boundaries of professional accountability and a loss of trust in the psychiatric profession.

As a survivor of "conversion therapy" who has dedicated his life to combatting the harms thereof, and whose personal experience was the subject of Colorado's legislative investigation supporting its decision to pass the MCTL, Mathew Shurka is heavily interested in the outcome of this case.

SUMMARY OF THE ARGUMENT

The primary issue in this case is whether "conversion therapy", intended to change one's sexual orientation or gender identity, is fairly characterized as expressive speech or professional conduct.

In grappling with this question, the appellate briefing and judicial opinions posit hypotheticals, analogies and comparisons to other acts that involve the use of language. The abstract reaches of this conversation obscure the proper inquiry into the actual nature of "conversion therapy". This is brought into sharp relief by the fact that

the Petitioner, Ms. Chiles, does not even claim to have ever treated a patient with "conversion therapy", let alone done so successfully.

By contrast, in enacting the MCTL, the Colorado legislature specifically heard testimony from Mathew regarding his real-life experience enduring years of "conversion therapy", during which he was told that being gay was a mental illness that could be cured, and that "conversion therapy" would change his attractions, his thoughts, his feelings and his identity. As part of this treatment, he was assured that unless he were cured, he would never live a happy and fulfilled life.

However, instead of changing his sexual orientation, "conversion therapy" caused Mathew extraordinary mental distress and severely damaged his relationship with family members whom, he was told during treatment, were the root of his homosexuality. Mathew's experience singularly demonstrates the compelling interest that Colorado has in protecting its youth. More importantly on this appeal, however, it also brings the abstract discussion of whether "conversion therapy" is medical treatment or speech into crisp focus.

This case is not about a therapist's right to hold or express personal beliefs and opinions. It is not about the right of licensed therapists to engage in expressive speech, let alone to practice a chosen religion or espouse the ideology of that religion. It is about whether a state may protect its youth by democratically prohibiting licensed professionals from inflicting psychological harm on minors in the name of treatment.

"Conversion therapy", including its universally accepted psychotherapy or "talk-based" forms, is a mode of medical intervention that has left patients — like the amicus — with enduring trauma and fractured relationships with family members, many of whom – including Mathew's parents – ultimately regret the decision to subject their children to this abuse, feel swindled by false promises, and have suffered themselves as a result of the impact of "conversion therapy" on their own relationships. The state has the authority, and the duty, to regulate it.

Ms. Chiles's contention that treatment by a licensed professional, upon a child, that is expressly intended to change the child's sexual orientation, could seriously be characterized as targeting her First Amendment right to give an opinion, ignores the lived experience of Mathew and other survivors of "conversion therapy" nationwide. Amicus Mathew Shurka sincerely believes that the Court would benefit from considering his real-life experience with "conversion therapy" and the harm that it caused him before deciding whether Colorado's regulation of therapeutic conduct is constitutional.

ARGUMENT

I. Amicus Mathew Shurka's Personal Experience with "Conversion Therapy"

At 16 years old, Amicus Mathew Shurka experienced bullying at school culminating in a physical assault that left him hospitalized. Although the assault was not provoked by homophobia, Mathew was left contemplating

his identity and self-worth, and shortly thereafter came out as gay to his parents. He did so despite awareness of the homophobic attitudes held by some in his close-knit community in Great Neck, New York, and despite lacking openly gay role models.

Although his father said that he loved Mathew "no matter what", he also said that he would "handle it". Within days, his father convened an "emergency" family meeting at which he announced that Mathew's homosexuality was simply an ailment requiring a "cure." Although Mathew's father was unfamiliar with the term "conversion therapy," he began searching for a medical professional to "fix" Mathew. It was important to him that any provider Mathew saw was a licensed therapist, as he had doubts about the efficacy of any treatment administered by an "unofficial" practitioner such as a religious counselor or life coach.

In the fall of 2004, Mathew's father connected with "S,"[2] a practitioner of "conversion therapy" referred through the organization Jews Offering New Alternatives for Healing, previously known as Jews Offering New Alternatives for Homosexuality (JONAH). S, an older man, was a therapist licensed by the state of New York who also offered other forms of traditional therapy. This marked the beginning of a long and profoundly damaging experience for then-16-year-old Mathew.

2. Mathew's therapists have been anonymized in this submission.

A. "Therapy" That Denied and Prohibited Mathew's Feelings

S's weekly talk therapy sessions with teenaged Mathew were deeply invasive. S, with whom Mathew had trouble relating given their age gap, demanded detailed accounts of Mathew's sexual experiences, warning him that any homosexual encounters would only complicate his "treatment." S quickly "diagnosed" Mathew with what S called "SSA" (same-sex attraction), which S claimed was a disorder that was either a more severe form rooted in childhood trauma, or a milder form stemming from an overbearing mother or an absent father, despite Mathew denying all those experiences.

Following further talk therapy sessions, S eventually diagnosed Mathew with the "milder" form of SSA and told Mathew and his father that, given Mathew's limited sexual experience, he could return to being straight in as little as six weeks' time if he committed to the process. Mathew was assured that "conversion therapy" would change his attractions, thoughts, and feelings.

Although S was recommended by JONAH, S was not affiliated with any religious organization, and did not invoke religious teachings or traditions during his treatment of Mathew. Rather, S's treatment was rooted in shame-based intervention, aiming to alter Mathew's sexual orientation and attractions by inducing guilt and terrible self-loathing. According to S, all humans were born heterosexual, and thus once Mathew identified and healed the "trauma" underlying his SSA, he would be restored to the "normal" state of heterosexuality.

Mathew was warned that a lifetime of problems awaited him if he did not "fix" his homosexuality immediately. Instead of helping Mathew understand his feelings, S pathologized them, attempting to shame Mathew into heterosexuality through verbal abuse.

Nothing in Mathew's talk therapy sessions with S addressed his underlying emotional challenges, including the fallout from his brutal assault. The entire focus of every session was on his SSA. Mathew continued to attend his weekly sessions out of fear – including fear of losing parental affection, and fear that his life would be a failure if he "allowed himself" to accept his true feelings.

Disappointed and confused, Mathew pled with his father to try a new therapist.

B. Escalating Harm with a New Therapist

JONAH provided Mathew's father with the name of a new therapist, H, who was in his early thirties and seemed more relatable to Mathew. H presented as highly qualified. A licensed practitioner in California, H had trained with Joseph Nicolosi –considered the "father" of "conversion therapy" – he taught at a prestigious university and boasted a 92% success rate in "making boys straight." Like S, H assured Mathew and his father that Mathew could expect his heterosexuality to "come back" in as little as six weeks of treatment. Due to Mathew's age and lack of "profound trauma", such as childhood sexual abuse, and his lack of gay sexual experiences, he was deemed an "easy case." Also, like S, H was unaffiliated with any religious organization or tradition.

Despite the promise that Mathew initially felt in his treatment with H, things quickly devolved. H concurred with S's diagnosis, agreeing that Mathew's SSA arose from the "milder" cause of having an overbearing mother or distant father. The abusive, shame-based talk therapy interventions continued. Upon confessing that he was secretly in love with a male friend, Mathew was counseled that he was wrong, as "love" could not exist between two people of the same sex, that homosexuality was a mental illness, and that uncured homosexuality led to destructive outcomes — including promiscuity, drug addiction, and suicide — which H described as common within the LGBTQ+ community. Worse, H's treatment introduced coercive control over Mathew's other relationships and encouraged the misuse of prescription medicine.

H's treatment of Mathew was entirely focused on taking steps to overcome his SSA. H's "treatment plan" involved instructing Mathew to avoid all communication with his mother, with whom he lived, and his sisters, claiming those relationships to be the source of his SSA and that he needed to reclaim his masculinity.

Mathew, who had previously been close to his mother, now blamed her for his homosexuality, transforming his home into a nightmare; it was a constant source of conflict and resentment. For nearly three years, at H's instruction, Mathew seldom spoke to his mother, avoiding family mealtimes and one-on-one interactions with her. On H's instructions, Mathew's father reinforced this dynamic, demanding that there be no contact between Mathew and his mother, over his mother's objection, damaging the relationship between Mathew's parents.

Mathew's mother tried to bridge the gulf widening between them, occasionally reassuring him that she knew he was gay and – unlike his father – she did not need him to change. In response, Mathew would lash out at her, telling her that she was the problem and the cause of his SSA and the suffering he was experiencing.

Mathew spoke with H several times a week, during which calls, H verbally coached Mathew on dating and on developing friendships with male classmates. H pressured Mathew into dating young women, for whom Mathew had no attraction. H instructed Mathew to mislead the young women about his feelings towards them, impacting the lives of these women who wanted to date him. When Mathew expressed anxiety about sleeping with women, H instructed him how to obtain Viagra (normally prescribed to adults experiencing erectile dysfunction) and then directed him to use it to "boost [his] confidence" during sexual encounters with girls, despite Mathew not presenting with any clinical symptoms that would justify use of this prescription medication.

Through spoken language, H's "therapy" also incorporated pseudoscientific behavioral conditioning. For example, teenaged Mathew was verbally told to masturbate every time he had a homosexual thought, regardless of his location. This led to humiliating experiences like rushing to the bathroom during high school classes, and even resulted in physical injury due to excessive masturbation. When Mathew expressed frustration that his SSA was not going away, despite following H's coaching, he was told by H that he had to "work harder." The treatment applied by S and H made Mathew feel like a failure – the exact opposite of what psychotherapy is intended to do.

H also introduced Mathew to "desensitization therapy", which involved him being verbally instructed to watch pornographic videos and focus solely on the women, supposedly to condition himself to be sexually stimulated by women. But after watching a video, Mathew often realized that he had focused on the male performer, and would force himself to start the video over and try again. His fear that he could not perform even the desensitization exercises correctly caused his anxiety to intensify.

C. Profound and Lasting Impact

By the middle of 2006, as a consequence of the treatments being forced on him, Mathew's mental health deteriorated. Therapy was never a place to talk about his emotional well-being. It was only about receiving verbal instructions on purported techniques to rid himself of his SSA, and as his feelings for other men continued, he felt worse and worse. It had been ingrained in him by state-licensed therapists that unless he overcame his SSA, he would never be happy.

Without proper mental health counseling, Mathew was failing school, his home life was difficult, and his only source of happiness was a close friend who eventually became Mathew's first boyfriend. When Mathew confessed his feelings and described this relationship to H, H told Mathew that he was not in love, but rather, Mathew's feelings arose from pathological "OCD-type tendencies" that made him obsess. When his boyfriend later broke off ties with Mathew, H told Mathew that he should admire his strength in overcoming his SSA and try to do the same himself.

The impact of this prolonged and abusive "treatment" – which consisted almost exclusively of "talk therapy" – was devastating. Mathew experienced isolation and suicidal ideation, and worsening depression, suffering the loss of significant relationships with his father, mother, sisters, and romantic partner. He also endured panic attacks owing to the talk therapy he was receiving, some severe enough to warrant emergency room visits. Despite having a licensed mental health therapist with whom he was in regular contact, Mathew did not have a safe space to address his declining mental health and was instead repeatedly assured that his SSA was the cause of his problems.

Mathew abandoned treatment with H upon learning that H had colluded with Mathew's father in orchestrating Mathew's boyfriend's breakup with Mathew. Mathew had come to understand that his father had demanded that the boyfriend break off ties with Mathew and had threatened to expose the boyfriend, who was not yet out to his family, and that H had coached Mathew's father through this process.

Experiencing great emotional pain, Mathew dropped out of college and moved to California. He began to rebuild a relationship with his mother and with her encouragement, he saw a therapist who did not practice "conversion therapy". Yet, Mathew, like so many other minors who are subjected to "conversion therapy" continued to be terribly scarred by messaging that he had come to sincerely believe that his attraction to men persisted only because he "didn't try hard enough" in "conversion therapy." He also believed that unless he

overcame his SSA, he would never have a happy and fulfilled life. The relationship between Mathew's mother and father deteriorated further and eventually became damaged beyond repair. They ultimately divorced.

D. A Return by Choice, and Disillusionment

At the age of 20, Mathew made the decision to return to "conversion therapy", believing it was his only path to a comfortable adult life. His third "conversion therapist", L, claimed to have successfully "converted" from gay to straight himself and encouraged Mathew to use L's own life as an example. With L's encouragement, Mathew attended a "Journey Into Manhood" retreat that L was helping facilitate for men looking to be cured of SSA. L administered treatment to Mathew in both a one-on-one setting and group therapy sessions that L facilitated, including group sessions with men with severe addictions to pornography and indecent exposure, despite Mathew not having such addictions.

At first, Mathew had confidence in L and thought therapy might be successful this time. Mathew soon saw L for the fraud he was. After several months of treatment, Mathew asked L to introduce him to people who had success with "conversion therapy". The people he met admitted that they were still were attracted to men but had trained themselves not to act on those attractions, essentially treating their most personal feelings as an addiction.

Not long after those encounters, during a group therapy session, Mathew revealed to the group that L was working to eliminate his SSA through "conversion therapy". Rather than support Mathew, L denied

administering the treatment, going so far as to tell the group that Mathew was lying and asking him to leave, ultimately escorting him out of the building.

E. The End of Mathew's "Conversion Therapy"

In one last desperate attempt, Mathew returned to JONAH for guidance. He was encouraged to meet with D, a purported top counselor in "conversion therapy". Like L, D claimed to have been "cured" of his own SSA. D also reinforced the prognosis that Mathew had been told time and time again, that he would not be happy, and would likely lose his life, unless he rid himself of his SSA. After just one session with D, Mathew finally admitted to himself that "conversion therapy" could never change his sexual orientation.

After enduring five years of trauma and shame from four separate, licensed, therapists and after witnessing the fracture of his own family and the destruction of his own life, caused by the failed "conversion therapy", Mathew spent many years recovering from the harm he endured and the knowledge of all that was robbed of him during his adolescence. He is thankful he did not take his own life, even when he felt that was the only option. It took years for Mathew to trust medical and mental health professionals again. He was recently diagnosed with Complex Post-Traumatic Stress Disorder, a condition caused by long exposure to trauma. Very few people experience CPTSD, which is often seen in former prisoners of war.

Eventually, Mathew became an advocate for "conversion therapy" survivors and co-founded Born Perfect, a campaign that seeks to end "conversion therapy". Since 2012, he has spoken with over 1,000 other

survivors and has advocated across the country for an end to the devastating practice of "conversion therapy" treatment.

Mathew has also testified before many state legislatures in connection with proposed legislation banning "conversion therapy", including in Colorado. Specifically, he testified in support of the MCTL before the Colorado House Committee on Public Health Care & Human Services on March 20, 2018, and before the Colorado Senate Committee on State, Veterans & Military Affairs on April 23, 2018. He further testified before the Colorado House Committee on Public Health Care & Human Services on February 13, 2019, and before the Colorado Senate Committee on State, Veterans & Military Affairs on March 18, 2019.[3] Following Mathew's testimony, the MTCL was passed into law and signed by Colorado's governor.

II. This Court's Precedent Properly Distinguishes Between Expressive Speech and Speech That Is Incidental to a Course of Professional Conduct, Like The "Therapy" That Mathew Endured.

The United States has a historic tradition of regulating of professional conduct and the Supreme Court has long held that such regulations are permissible, even where they may incidentally involve language as a means to effectuate conduct. This has been especially commonplace

3. *See e.g.,* Respondents' Brief on The Merits at p. 5 citing Mathew Shurka's testimony at *Prohibit Conversion Therapy for A Minor: Hearing on H.B. 19-1129 Before the H. Pub. Health Care and Hum. Serv. Comm.*, 2019 Leg., 72d Gen. Sess., 2:51:29–2:54:38 (Colo. Feb. 13, 2019).

in connection with regulations impacting the medical profession, where health and safety are directly at issue, but has also been applied to regulations impacting other professions.

For example, nearly 50 years ago, in *Ohralik v. Ohio State Bar Ass'n.*, 436 U.S. 447 (1978), this Court rejected the notion that professional conduct could not be regulated because it involved verbal communication. This doctrine has effectively served the dual goals of enabling states to exercise control over the conduct of licensed professionals, as is necessary to protect the public, while preserving the ability of such professionals to separately express their opinions and views.

In *Ohralik*, 436 U.S. at 447, an Ohio attorney encouraged two 18-year-old car accident victims to engage him as their counsel immediately after the accident. Both clients engaged and then discharged the attorney from representation, but he nonetheless sued the teenagers for breach of contract, seeking a share of their recovery. (*Id.* at 452.) The former clients filed grievances, and the local County Bar Association found that the attorney had violated disciplinary rules governing the in-person solicitation of clients. (*Id.*) The attorney challenged the decision, arguing that the disciplinary rules violated the First Amendment and that the conduct of solicitation was protected speech because his alleged misconduct had been effectuated through words.

The Court began by noting the long history of regulating professional conduct that involved communication, as distinct from regulating the expression of an opinion or view:

> [I]t has never been deemed an abridgment of freedom of 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. Numerous examples could be cited of communications that are regulated without offending the First Amendment, such as the exchange of information about securities, corporate proxy statements, the exchange of price and production information among competitors, and employers' threats of retaliation for the labor activities of employees. Each of these examples illustrates that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.

(*Id.* at 456 (citations and quotations omitted); quoting *Giboney v, Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).)

With a clear understanding of the difference between professional conduct and protected expression, the Court concluded that the lawyer's solicitation clearly "falls within the State's proper sphere of economic and professional regulation," because the State "bears a special responsibility for maintaining standards among members of the licensed professions." (*Id.* at 460.)

Based on this reasoning and because "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 464) the Court rejected Ohralik's misguided free speech argument, creating precedent directly applicable to this case.

More recently, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992), overruled on other grounds by *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022), this Court again had occasion to consider the regulation of a course of professional conduct that was effectuated in part through speech.

In *Casey*, 505 U.S. at 833, the Commonwealth of Pennsylvania enacted a law that required physicians to make certain disclosures to women seeking to terminate a pregnancy and obtain written consent in advance of performing an abortion. Specifically, the law required that:

> (1) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician has orally informed the woman of: (i) The nature of the proposed procedure or treatment and of those risks and alternatives to the procedure or treatment that a reasonable patient would consider material to the decision of whether or not to undergo the abortion. . . .
>
> (2) At least 24 hours prior to the abortion, the physician who is to perform the abortion or the referring physician, or a qualified physician assistant, health care practitioner, technician or social worker to whom the responsibility

> has been delegated by either physician, has informed the pregnant woman that: (i) The department publishes printed materials. . . .
>
> (3) A copy of the printed materials has been provided to the woman if she chooses to view these materials.
>
> (4) The pregnant woman certifies in writing, prior to the abortion, that the information required to be provided under paragraphs (1), (2) and (3) has been provided.

18 Pa. Cons. Stat. § 3205(a)(2)(i)-(iii) (1990) (emphasis added).

Planned Parenthood of Southeastern Pennsylvania and other providers challenged the law, arguing that requiring licensed professionals to make these disclosures as part of their medical practice violated the First Amendment.

The Court considered this argument but, consistent with *Ohralik*, 436 U.S. at 447, concluded that because the communications at issue were being regulated "only as part of the practice of medicine," *i.e.*, incidentally, they were necessarily "subject to reasonable licensing and regulation by the State." Consequently, there was "no constitutional infirmity in the requirement that the physician provide the information mandated by the State here," once again explicitly recognizing the distinction between the right to express an opinion or viewpoint, and the obligation to ensure safe, effective professional practices within the Commonwealth. (Casey 505 U.S. at

884) ("To be sure, [a] physician's First Amendment rights not to speak are implicated by [an informed consent requirement] . . . but only as part of the practice of medicine, subject to reasonable licensing and regulation . . ." (citations omitted, emphasis added)).

Thus, in *Casey*, 505 U.S. at 833, a plurality of three justices, plus four additional justices concurring in part and dissenting in part, applied a reasonableness standard to the regulation of medicine where speech may be implicated incidentally, directly analogous to this case.

More recently still, in *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755 (2018) ("*NIFLA*"), the Court considered whether a regulation requiring a public notice to be posted at licensed medical facilities providing information concerning reproductive health matters violated the First Amendment.

Unlike in *Ohralik*, 436 U.S. at 447, and *Casey*, 505 U.S. at 833, the regulation at issue in *NIFLA*, 585 U.S. at 755, did not apply to any specific treatment, procedure or course of conduct with respect to any specific client or patient, but rather called for a public notice outside of any treatment context, as general information to any member of the public visiting their premises (*i.e.*, whether or not such person was seeking or receiving any pregnancy-related treatment). The statute at issue in NIFLA required that licensed medical providers:

> Shall disseminate to clients on site the following notice … "California has public programs that provide immediate free or low-cost access to comprehensive family planning services

> (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women. To determine whether you qualify, contact the county social services office at [insert the telephone number]."

Cal. Health & Safety Code Ann. §123472(a)(1).

The Court began its analysis by noting that it "has upheld regulations of professional conduct that incidentally burden speech." *NIFLA, supra* at 18. The Court was rightfully cognizant that "[w]hile drawing the line between speech and conduct can be difficult, this Court's precedents have long drawn it," and that "[l]ongstanding torts for professional malpractice," for example, "fall within the traditional purview of state regulation of professional conduct." *Id*. at 18-19.

The Court distinguished the notice in *NIFLA*, 585 U.S. at 755 from the informed consent requirement in *Casey*, 505 U.S. at 833, aptly characterizing the regulation in *NIFLA, supra* at 770, as of "speech as speech" rather than as part of a course of treatment, such as a disclosure made attendant to, or as a precursor to, a procedure or treatment. The Court explained that "[t]he … notice at issue here is not an informed-consent requirement *or any other regulation of professional conduct*. The notice does not facilitate informed consent to a medical procedure. In fact, it is not tied to a procedure at all." *Id.* (emphasis added). Thus, the Court found that petitioners' challenge of the law had a likelihood of success, applying intermediate scrutiny <u>because the law at issue was not in furtherance of any specific treatment or procedure</u>.

The current circuit split giving rise to this writ largely focuses on whether a licensed professional's course of treatment by "conversion therapy" on a minor is, for First Amendment purposes, "speech as speech" so that strict scrutiny applies, or by contrast, incidental to a course of professional conduct and thus subject to either rational basis review or intermediate scrutiny. *See King v. Governor of N. J.*, 767 F.3d 216, 224 (3rd Cir. 2014) (applying intermediate scrutiny and upholding the law as constitutional); *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022) (applying rational basis review and upholding the law as constitutional); *Chiles v. Salazar*, 116 F.4th 1178, 1221 (10th Cir. 2024) (same); *Otto v. City of Boca Raton*, 981 F.3d 854, 859, 865 (11th Cir. 2020) (applying strict scrutiny and finding the law unconstitutional).

To make a practical and informed decision in this case, the actual process of "conversion therapy" must be the Court's primary focus. Mathew's experience illustrates precisely how therapeutic treatment – including as it incidentally involves speech – is inherently different from expressive speech. The Colorado statute does not prohibit the expressive statements of a therapist, which may still be freely posted, printed or sold. Rather, the Colorado statute targets an exchange of words in combination with prescribed thoughts and activities for the minor patient to undertake with a long-term goal of effectuating a change in that patient's sexual orientation. The State of Colorado is within its power to prohibit that conduct.

III. The Interpretation of This Court's Precedent by the Third, Ninth and Tenth Circuits Should be Affirmed.

A. The MCTL Takes Pains to Restrict Professional Conduct Only and to Protect Expressive Speech.

The MCTL, passed in 2019, prohibits "[a] person licensed, registered, or certified under this article" from "engag[ing] in . . . [c]onversion therapy with a client who is under eighteen." Colo. Rev. Stat. Ann. § 12-245-224(1)(t)(V). "Conversion therapy" is defined as:

> [A]ny practice or treatment by a licensee, registrant, or certificate holder 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. at § 12-245-202(3.5(a)).[4] The law applies to all mental health practitioners[5] licensed by their respective state

4. Exempted from the definition are "(a)cceptance, support, and understanding for the facilitation of an individual's coping, social support, and identity exploration and development, including sexual-orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices, *as long as the counseling does not seek to change sexual orientation or gender identity*" and "[a]ssistance to a person undergoing gender transition." *Id.* at 3.5(b)(I-II) (emphasis added).

5. These include psychologists, social workers, marriage and family therapists, licensed professional counselors, and addiction counselors. *Id.* at §§ 12-245-301 through 806.

boards of examiners, all of which are empowered to license and certify mental health practitioners and to take disciplinary and injunctive action against any mental health practitioner who violates any provision of the MCTL. *Id.* at § 12-245-101. The law is not applicable to the practice of religious ministry (*id.* at § 12-245-217(1)), meaning that religious-based counselors are permitted to practice "conversion therapy" on minors.

Petitioner does not dispute Colorado's legitimate interest in "safeguard[ing] the public health, safety, and welfare of the people of this state and . . . protect[ing] the people . . . against the unauthorized, unqualified, and improper application of psychology, social work, marriage and family therapy, professional counseling, psychotherapy, and addiction counseling," the stated legislative intent behind the state's licensure requirements. *Id.* at § 12-245-101.

Rather, Petitioner attempts to characterize the MCTL as "counseling censorship" (*Chiles v.* Salazar *Petition for a Writ of Certiorari* (hereinafter referred to as *Cert. Pet.*) at 4), disingenuously framing the therapy she provides as comprising of "conversations . . . involv[ing] *no* conduct" (*Chiles v. Salazar Brief for Petitioner* (hereinafter referred to as *Pet'r Br.*) at 23) (emphasis in original) and complaining that Colorado "forbid[s] her from discussing the values she and her clients share." (*Cert. Pet.* at 10.) But therapy is not a 'conversation' between peers; it is the application of medical treatment within a formal therapist-patient relationship, which inherently involves the therapist's use of training to assert influence on the patient's mental processes and/or behaviors (and typically involves payment of a fee for such specialized services).

Petitioner's characterization of her profession – which required her to obtain a master's degree, complete two years of post-master's practice and many hours of supervised training, and pass certain licensure examinations – is deliberately facile. *See Colo. Rev. Stat. Ann.* at § 12-245-604(1)(a-e). Colorado does not view therapy as casually as Petitioner. Rather, the state defines "psychotherapy" clinically, including:

> treatment, diagnosis, testing, assessment, or counseling in a professional relationship to assist individuals or groups to alleviate behavioral and mental health disorders, understand unconscious or conscious motivation, resolve emotional, relationship, or attitudinal conflicts, or modify behaviors that interfere with effective emotional, social, or intellectual functioning. Psychotherapy follows a planned procedure of intervention that takes place on a regular basis, over a period of time. . .

Id. at § 12-245-202(14)(a).

Acknowledging that her work is not merely a "conversation" with a patient, Ms. Chiles admits to "formulat[ing] methods of counseling that will most benefit" her clients. (*Cert. Pet.* at 4). While Mathew's experience of "conversion therapy" – from multiple providers across multiple states – involved speech necessary for his therapists to communicate with him, such treatment, although conducted through instructions and language, was not merely an exchange of competing views in a "conversation." Ms. Chiles's characterization to the contrary, ignores the experience of survivors of

"conversion therapy" and the actual nature of the work of licensed therapists, like her, everywhere.

Nor does the MCTL "censor" Petitioner's expressive speech regarding "conversion therapy" in any way; she is free to express her personal and professional opinions on "conversion therapy" (and, for that matter, on any sexual and/or gender identification) anywhere she pleases, and to refer minor clients to religious-based counselors for "conversion therapy". What the State of Colorado has determined she is not permitted to do is to engage in a therapeutic treatment plan that seeks to change a minor's sexual orientation or gender identity – regardless of whether that therapeutic treatment plan consists only of psychotherapy or incorporates other therapeutic modalities.

Because the MCTL only impacts speech as incidental to a professional course of conduct that has been determined to be harmful to a vulnerable class of the public (*i.e.,* minors), it is a rational regulation of such conduct, and not a prohibition on expressive speech.

B. Colorado Has a Strong Interest in Prohibiting Licensed Therapists from Engaging in "Conversion Therapy" Because "Conversion Therapy" Is Unsafe and Ineffective.

States have a strong interest "in protecting the integrity and ethics of the medical profession." *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997); *Crane v. Johnson*, 242 U.S. 339, 340, 343 (1917) (upholding medical licensing requirement challenged by a "drugless practitioner" who "does not employ either medicine, drugs, or surgery in

his practice" but instead "employ[s] faith, hope, and the processes of mental suggestion").

The counseling relationship between provider and patient involves special privileges, a power differential, and a financial arrangement. Mental health treatment can carry long-lasting, life-altering consequences for patients. "Talk therapy" is no less a medical treatment than the procedures described in *Casey*, 505 U.S. at 833, simply because it is "implemented through speech rather than through scalpel." *Tingley*, 47 F.4th at 1064. And "[t]he difference between skilled and inept talk therapy — no less than that between deft and botched surgery — can, in some cases, mean the difference between life and death." *Otto v. City of Boca Raton*, 41 F.4th 1271, 1292 (Mem) (Rosenbaum, J., dissenting from the denial of rehearing *en banc*).

The harmful effects of "conversion therapy" are well documented. Mathew offers his story to the Court to provide further texture and perspective, to help the Court understand more directly the practical consequences of subjecting minors to "conversion therapy", and to illustrate the real dangers and harms that gave rise to the MCTL.

As noted by the often-cited Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation 43 (2009):

> [A]ttempts to change sexual orientation may cause or exacerbate distress and poor mental health in some individuals, including depression and suicidal thoughts [as well as] anger, anxiety,

> confusion, depression, grief, guilt, hopelessness, deteriorated relationships with family, loss of social support, loss of faith, poor self-image, social isolation, intimacy difficulties, intrusive imagery, suicidal ideation, self-hatred, and sexual dysfunction.

A 2019 report from Amicus the Trevor Project revealed forty-two percent of LGBTQ youth who underwent "conversion therapy" reported a suicide attempt in the past year, more than twice the rate of their LGBTQ peers who did not undergo "conversion therapy". These youth are also three times as likely to report multiple suicide attempts than those who did not undergo "conversion therapy." According to the Trevor Project and many others,[6] "conversion therapy" is a source of deep anxiety for many LGBTQ youth, and no available research supports the claim that "conversion therapy" efforts are beneficial to children, adolescents, or families.

Mathew experienced essentially every one of these harms, and, after hearing Mathew's testimony, the Colorado legislature came to the same conclusion. As Colorado Senator Stephen Fenberg stated in the legislative history, Colorado enacted the MCTL "because all of the prevailing science and modern medicine tells us that not

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6. The American Academy of Pediatrics, American Psychiatric Association, American Psychological Association Council of Representatives, American Psychoanalytic Association, American Academy of Child and Adolescent Psychiatry, American School Counselor Association, American Psychological Association and U.S. Department of Health and Human Services have all recognized the risks that "conversion therapy" presents for children. *See Pickup v. Brown,* 740 F.3d 1208 (9th Cir. 2014).

only does this practice [of conversion therapy] not work, but it . . . actually harms young people." The District Court likewise made a factual finding that "Colorado considered the body of medical evidence" demonstrating the harms of "conversion therapy" before passing the MCTL.

"If a state could not revoke the license of (or otherwise discipline) a professional whose inept talk therapy contributed in a significant way to, for example, clients' decisions to kill themselves, the state's police power to protect public health and safety would be effectively worthless." *Otto,* 41 F.4th at 1294 (Rosenbaum, J., dissenting). "And it is antithetical to that purpose for licensed professionals to engage in a practice on their young clients that has repeatedly been shown to be associated with more than doubling the risk of death and has not been shown to be efficacious." *Id.* at 1319.

The Courts have also acknowledged the compelling reasons for banning "conversion therapy". "The record demonstrates that the legislature acted rationally when it decided to protect the well-being of minors by prohibiting mental health providers from using [conversion therapy] on persons under 18. The legislature relied on the report of the Task Force of the American Psychological Association, which concluded that ["conversion therapy"] has not been demonstrated to be effective and that there have been anecdotal reports of harm, including depression, suicidal thoughts or actions, and substance abuse. The legislature also relied on the opinions of many other professional organizations. Each of those organizations opposed the use of ['conversion therapy'], concluding, among other things, that homosexuality is not an illness and does not require treatment (American School Counselor Association), [conversion] therapy can provoke guilt and

anxiety (American Academy of Pediatrics), it may be harmful (National Association of Social Workers), and it may contribute to an enduring sense of stigma and self-criticism (American Psychoanalytic Association)." *Pickup*, 740 F.3d at 1232.

Mathew's personal experience confirms that Colorado's "interest in safeguarding the physical and psychological wellbeing of a minor is compelling" and real. *See New York v. Ferber*, 458 U.S. 747, 756-57 (1982) (internal quotation marks omitted). The MCTL focuses on the vulnerability of minors, who are unable to truly give consent to treatment. Although Petitioner suggests that she seeks to have "consensual . . . conversations" with her clients (*Pet'r Br.* at 23), she elides the fact that the minors she would be treating cannot give informed consent in the way that term is understood with respect to adult patients.

C. "Conversion Therapy", Including Talk Therapy, is Medical Treatment, Not Expressive Speech.

Petitioner, a licensed therapist, ironically seeks to convince the Court that her practice is not actually a form of health care at all, and that talk therapy is not medical treatment, but simply the expression of an opinion. Mathew's personal experience, and a significant body of caselaw, put the lie to this conceit.

The Third Circuit, Ninth Circuit and now the Tenth Circuit have all concluded that the medical practice of psychotherapy is conduct susceptible to state regulation, even where it involves speech. See *King* , 767 F. 3d at 216 , *Pickup,* 740 F.3d at 1208, *Tingley*, 47 F.4th at 1055 and *Chiles*, 116 F.4th at 1178.

In determining whether a California statute licensing psychoanalysts violated the First Amendment by prohibiting the speech employed during their treatment of patients, the Ninth Circuit held that "[t]he key component of psychoanalysis is the treatment of emotional suffering and depression, not speech. That psychoanalysts employ speech to treat their clients does not entitle them, or their profession, to special First Amendment protection." *National Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043 (9th Cir. 2000); *see also Otto*, 41 F.4th at 1285 (Rosenbaum, J., dissenting) ("no one goes to a doctor or therapist to engage in a political, social, or religious debate; they go to obtain treatment of their health condition.") (internal quotation marks and alterations omitted); *see also Tingley*, 47 F.4th at 1082–83 ("What licensed mental health providers do during their appointments with patients for compensation under the authority of a state license is treatment. . . That some of the health providers falling under the sweep of [state licensure requirements] use speech to treat [patients] is 'incidental.'").

Petitioner's insistence that the therapy she administers to minor clients is analogous to "conversation" or discussion with peers is unavailing and an affront to her own profession. Mathew saw four different providers for "talk therapy," none of whom employed the outdated "aversive techniques" referred to by Petitioner. Yet the treatment administered on Mathew was not limited to "conversations" about his sexuality or eliminating "sexual behaviors" that were upsetting him. (*Pet'r Br.* at 23, 5.)

Rather, he was clinically "diagnosed" multiple times with a fictional "disorder" dubbed "Same Sex Attraction,"

into which category one provider lumped "OCD-type tendencies." He was instructed to perform certain masturbation exercises at home, effectively relocating the "aversive techniques" from the therapist's office to his home and school, where he performed these punitive techniques on himself. He was also instructed to obtain prescription medication, and to physically and emotionally force himself to engage in sexual encounters with women that he did not want. He was commanded not to speak to his own mother, which caused a breakdown of his previously supportive parental relationship. All these devastating practices were administered within the confines of typical talk therapy. When Mathew discussed his genuine feelings about his sexuality, he was told that his emotional experience of falling in love was false, and nothing more than a symptom of his "disease" of SSA. All the foregoing was treatment – and radical, harmful treatment, at that – effectuated through speech. The fact that speech was the method of communicating by those administering Mathew's therapy should not insulate it *carte blanche* from regulation.

Mathew's "therapeutic" history also illustrates the inherent problem of informed consent when it comes to minors. When Mathew stopped seeing his first therapist, S, it was not because he thought "conversion therapy" itself was the problem. He did not question S's professional licensed assertion, nor that of subsequent therapist, H, that Mathew should have seen progress "within six weeks." Rather, he blamed himself for failing to work hard enough to change. During their therapeutic relationship, Mathew's contact with H escalated from weekly scheduled appointments to nearly constant calls to "check in" when Mathew experienced attraction to men, or to get

precise instructions on how to conduct himself during social situations with his peers. When that therapeutic relationship likewise failed to convert Mathew "back to heterosexual", he once again blamed himself for failing, and not H or the practice of "conversion therapy".

His response is not surprising; as a vulnerable teenager experiencing coercion from his father to solve a "problem" deemed "life or death," Mathew was not equipped to resist or even to question what he was being told by the adults in his life, including medical professionals licensed by the state.

Recognizing this paradigm, the Tenth Circuit dispensed with Petitioner's argument analogizing talk therapy to a "conversation," noting that "the counseling relationship between provider and patient involves special privileges, a power differential, and a financial arrangement. Such a relationship bears no resemblance to an exchange between a 'sophomore psychology major' and her peers." *Pet'r Br.* at 45-46; *see also Tingley*, 47 F.4th at 1082 ("[t]he work that [a therapist] does is different than a conversation about the weather, even if he claims that all he does is 'sit and talk.'"). Similarly, in Respondents' brief to the Tenth Circuit, they astutely noted:

> [T]he relationship between patient and licensed therapist, like other relationships between professionals and their clients or patients, involves a significant power disparity that is absent from a typical relationship between a lay person and a peer. A client may divulge deeply personal information to a mental health professional in search of treatment or support,

> but therapists do not share the same with their clients. In fact, this one-sided self-disclosure is among the reasons for the therapist-client privilege.

Chiles v. Salazar Appellee's Principal and Response Brief in the United States Court of Appeals For the Tenth Circuit at 34-35.

For these reasons, courts have recognized that "[w]hen professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate." *Pickup,* 740 F.3d at 1228, citing *Lowe v. SEC*, 472 US 181, 232 (1985). In other words, the treatment addressed by the MCTL is entirely distinct from "speech as speech".

This Court should join the majority of circuit courts and conclude that the licensure of therapeutic treatment is geared toward regulation of a course of conduct, does not impede expressive speech, and only impacts speech incidentally (as it is used to communicate directly in connection with the course of conduct). The MCTL is accordingly not subject to heightened scrutiny for First Amendment reasons and should be upheld. *See Pickup, supra* at 1229-30.

CONCLUSION

Mathew Shurka's personal experience vividly illustrates both the harms of "conversion therapy", and why it cannot be reasonably characterized as expressive speech rather than a course of treatment and conduct. For the reasons set forth herein, and for the reasons stated in Merits Brief of Respondents, Amicus Curiae Mathew Shurka urges the Court to affirm the judgment of the lower court.

Respectfully submitted,

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