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 *AMICI CURIAE* CONSTITUTIONAL LAW AND FIRST AMENDMENT SCHOLARS IN SUPPORT OF RESPONDENTS

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INTEREST OF *AMICI CURIAE*[1]

Amici are scholars of constitutional law and the First Amendment who have made extensive contributions to and are widely recognized as leading experts in these fields.[2] As scholars dedicated to studying and teaching constitutional law, *amici* share an interest in ensuring the application of settled First Amendment principles regarding regulations of professional conduct in determining the constitutionality of Colorado's statute prohibiting licensed mental healthcare professionals from providing "conversion therapy" to minors. *Amici* submit this brief in support of Respondents' argument that the statute is not subject to heightened First Amendment scrutiny.

SUMMARY OF ARGUMENT

States have well-established authority to regulate the activities of professionals, in particular those seeking to cloak themselves in the imprimatur of a state-issued license. Though that power extends to myriad professional contexts, it is particularly entrenched in state regulation of healthcare providers.

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[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in any part, and that no person or entity, other than *amici* and their counsel, made a monetary contribution to fund its preparation and submission.

[2] A complete list of *amici curiae* is attached as Appendix A. *Amici* join on their own behalf and not as representatives of the universities with which *amici* are affiliated; university names are provided only for identification purposes.

Petitioner is a mental healthcare provider licensed by the State of Colorado. Like physicians, chiropractors, and physical therapists, she provides healthcare services to her clients. Ignoring that the provision of most health care involves provider communication, Petitioner argues that her services cannot be subject to regulation because, rather than scalpels or stethoscopes, she provides her services via verbal communication. For this remarkable proposition, Petitioner puts misplaced reliance on the First Amendment. As this Court's precedent makes clear, the First Amendment is not alchemical; it does not transform every uttered word into protected speech subject to heightened scrutiny, and it cannot immunize Petitioner's services from reasonable regulation.

That is all Colorado has done. As a result of the democratic process, in 2019, the elected representatives of the Colorado legislature amended an existing statutory regime to prohibit mental healthcare providers from "engaging in conversion therapy" with minor patients. C.R.S. §§ 12-245-202(3.5)(a), 12-245-224(1)(t)(V) (the "Statute"). The provision of so-called "conversion therapy"[3] has been banned in some form in twenty-three states and the District of Columbia and disavowed as ineffective and harmful by every major association of medical and psychological professionals.

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[3] *Amici* use the term "conversion therapy" to mean "any practice or treatment" that "attempts or purports to change an individual's sexual orientation or gender identity . . . ." C.R.S. § 12-245-202(3.5)(a). *Amici*'s use of this term in no way serves as an endorsement of "conversion therapy" as "therapeutic."

Colorado's ban on the provision of "conversion therapy" to minor patients does not implicate heightened scrutiny merely because mental healthcare providers undertake their treatment via verbal communication. The Statute regulates the conduct of mental healthcare providers that are licensed, registered, or certified in Colorado, and aligns with this Court's precedent affirming regulations of professional conduct that implicate verbal communications. This Court has consistently held that communications that are part of the provision of professional services are not subject to heightened First Amendment protection when those communications depart from a legally delineated professional standard of care. *National Institute of Family and Life Advocates v. Becerra* ("*NIFLA*"), 585 U.S. 755 (2018), did not abrogate this precedent. Quite the contrary. In *NIFLA*, the Court, although declining to carve out "professional speech" as a wholesale category of communication exempt from First Amendment coverage, reaffirmed that verbal communications "'as part of the *practice* of'" a licensed profession can be constitutionally regulated as a form of "professional conduct" that "incidentally involves speech." 585 U.S. at 768, 770 (quoting, with emphasis, *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality op.)). *NIFLA* did not, as Petitioner argues, transform all professionals' verbal communications into speech subject to heightened First Amendment protection. This Court should follow the approach of the Tenth Circuit below and the Ninth Circuit in *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022), which upheld a statute banning "conversion therapy" after *NIFLA*, 47 F.4th at 1091, because this approach is consistent with the Court's

jurisprudence upholding regulations of professional conduct involving written or verbal communications.

Finally, the Statute is consistent with the longstanding legal tradition recognizing states' constitutional power to prohibit conduct by licensed healthcare providers that falls outside of accepted medical standards and harms patients. Petitioner is not prevented from expressing her ideas when she is not treating minor patients under the imprimatur of a state professional license. To extend heightened First Amendment protection to all professional services enacted through verbal communication would strip states of their first-order purpose to serve and protect their citizens and would undercut legal regimes long established to enable this purpose, such as licensing, tort, and malpractice regimes. It also poses the risk of weakening the exacting strict scrutiny inquiry. For these reasons, the Court should affirm the Tenth Circuit.

ARGUMENT

I. TARGETED REGULATIONS OF PROFESSIONAL CONDUCT THAT HAPPEN TO IMPLICATE VERBAL OR WRITTEN COMMUNICATION ARE NOT SUBJECT TO HEIGHTENED FIRST AMENDMENT REVIEW.

The fact that an individual conveys information through words does not necessarily render their words covered "speech" entitled to heightened scrutiny under the First Amendment. *See, e.g.*, *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

There are "vast stretches of ordinary verbal expression"—such as communications between lawyers and clients, corporations and shareholders, and doctors and patients—that states may properly regulate in the interest of public health, safety, and welfare and to which heightened First Amendment scrutiny does not ordinarily attach.[4] Under the Court's jurisprudence, communications by licensed mental healthcare providers in their administration of "conversion therapy" to minor patients reside within the stretches of verbal expression not subject to the Free Speech Clause's heightened protection.

A. First Amendment Heightened Scrutiny Does Not Apply To Written Or Verbal Communication That Is Part Of The Provision Of Licensed Professional Conduct.

The First Amendment does not require that regulations of professional conduct meet heightened scrutiny whenever the regulated conduct involves written or verbal communication. To the contrary, the Court has repeatedly held that reasonable regulations of professionals' verbal or written utterances were not subject to First Amendment heightened scrutiny where those communications were tied to their professional work. For instance, nearly fifty years ago, the Court held that a state law prohibiting lawyers from soliciting accident victims did not violate the First Amendment. *Ohralik v. Ohio State Bar Ass'n*,

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[4] ROBERT C. POST, DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE 15 (2012).

436 U.S. 447, 468 (1978). Describing the solicitation of accident victims as "a business transaction in which speech is an essential but subordinate component," the Court reasoned that "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Id.* at 456–57. Dispositive to that analysis was the fact that the law furthered the state's "special responsibility for maintaining standards among members of the licensed professions," *id.* at 460, because the law regulated conduct tied to the professional practice of law—the provision of legal advice to clients. Similarly, nearly a century ago, the Court held that a statute regulating a licensed dentist's advertisements of his practice did not violate the First Amendment—even though the advertisements were communications disseminated to the public and not directly linked to the provision of dental care. *Semler v. Ore. State Bd. of Dental Exam'rs*, 294 U.S. 608, 612–13 (1935).

Compared to the regulations at issue in *Ohralik* and *Semler*, the Statute is even more closely tied to the primary professional conduct of the regulated providers—the administration of mental healthcare treatment to patients through talk therapy, regulating the actual provision of mental healthcare services in private treatment sessions (and not any non-service speech, such as solicitation or advertisement). The fact that talk therapy is carried out chiefly by communication does not deprive the state of its ability to regulate that activity, a point underscored by the many commonsense regulations upheld by the Court.

Indeed, as in this case, searching First Amendment scrutiny is especially unwarranted when the professional conduct *is* the alleged communication. Colorado, like all states, bears "a special responsibility for maintaining standards among members of the licensed professions." *Ohralik*, 436 U.S. at 460. First Amendment jurisprudence has accordingly drawn a distinction between communications made by licensed professionals in the performance of their daily professional activities, which generally do not receive heightened First Amendment protection, and communications made by licensed professionals as private citizens outside the scope of their professional activities, which do receive such protection. *See, e.g.*, *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1071 ("[I]n the courtroom itself, during a judicial proceeding, whatever right to 'free speech' an attorney has is extremely circumscribed."); *Garcetti v. Ceballos*, 547 U.S. 410, 422 (2006) (that deputy district attorney's duties "sometimes required him to speak or write" did not insulate him from discipline for communications made in professional capacity). When a professional provides specialized "advice tailored to the individual needs of each client," reasonable regulation of that professional conduct is not subject to strict scrutiny. *Lowe v. S.E.C.*, 472 U.S. 181, 233 (1985) (White, J., concurring). First Amendment jurisprudence does not require the dogmatic application of strict scrutiny to all regulations that implicate verbal or written communication, particularly when the state is regulating licensed professional conduct.

This is acutely true in the context of healthcare regulations. Indeed, when considering First

Amendment challenges to regulations of healthcare professionals, this Court has consistently declined to apply heightened scrutiny and held that healthcare professionals' communications are "subject to reasonable licensing and regulation by the State" when implicated "as part of the practice of medicine." *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality op.) (citation omitted), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215 (2022). Nowhere is the state's authority to license and regulate more firmly established than in the field of medicine and its attendant professions. *See, e.g.*, *Barsky v. Bd. of Regents of Univ.*, 347 U.S. 442, 449 (1954) ("It is elemental that a state has broad power to establish and enforce standards of conduct within its borders relative to the health of everyone there."). This discretion "extends naturally to the regulation of all professions concerned with health," *id.* at 449, including mental healthcare providers—"drugless practitioner[s]" who employ "in practice faith, hope, and the processes of mental suggestion and mental adaptation," *Crane v. Johnson*, 242 U.S. 339, 340 (1917). And this Court has recognized that a state's proper exercise of its regulatory function includes "protect[ing] minors" from harm, *Free Speech Coal., Inc. v. Paxton*, 145 S. Ct. 2291, 2309 (2025), and prohibiting medical treatment it deems harmful to the health of its citizens, even when "there is difference of opinion and dispute," *Collins v. State of Tex.*, 223 U.S. 288, 297–98 (1912).

It is against this backdrop that Petitioner's First Amendment challenge to a state licensing regime for healthcare professionals must be viewed.

The applicability of the Statute turns not on whether a provider is speaking but instead on whether that provider is administering "conversion therapy" as a treatment. When the Court most recently considered a First Amendment challenge to a regulation implicating medical professionals' verbal communications when providing medical treatment—a law requiring physicians to inform patients undergoing an abortion of risks associated with the procedure—it applied only rational basis scrutiny and found "no constitutional infirmity" because the regulation proscribed verbal communications "as part of the practice of medicine." *Casey*, 505 U.S. at 884; *see also NIFLA*, 585 U.S. at 769–70 (endorsing *Casey*'s holding on this point). These decisions rely on the key distinction between regulations that limit public, expressive statements by healthcare professionals, which trigger heightened First Amendment scrutiny, and regulations that implicate statements made by healthcare professionals in the course of treating patients, which do not.[5]

In accordance with this jurisprudence, courts have routinely upheld regulations that implicate verbal or written communications made by healthcare professionals as part of their provision of medical treatment. *See, e.g.*, *Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psych.*, 228 F.3d 1043, 1054 (9th Cir. 2000) ("That psychoanalysts employ

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[5] *See* Robert C. Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 949 (2007) ("[W]hen a physician speaks to a patient in the course of medical treatment, his opinions are normally regulated on the theory that they are inseparable from the practice of medicine.").

speech to treat their clients does not entitle them, or their profession, to special First Amendment protection."); *Brokamp v. James*, 66 F.4th 374, 403 (2d Cir. 2023) (upholding New York licensure requirement for mental health counselors against First Amendment challenge); *Del Castillo v. Sec'y, Fla. Dep't of Health*, 26 F.4th 1214, 1225–26 (11th Cir. 2022) (upholding Florida licensing scheme for dietetics and nutrition counseling because nutritionists "get information from [their] clients and convey [their] advice and recommendations" as part of their "occupational conduct"); *Shea v. Bd. of Med. Exam'rs*, 81 Cal. Ct. App. 3d 564, 569–70, 577 (Cal. 1978) (rejecting First Amendment challenge to statute pursuant to which medical license of doctor who had delivered inappropriately sexual monologues to patients was revoked). These cases demonstrate that the First Amendment neither "insulate[s] the verbal charlatan from responsibility for his conduct" nor "impede[s] the State in the proper exercise of its regulatory functions." *Id.* at 577.

As the Tenth Circuit correctly reasoned, "[t]alk therapy is no less a medical treatment" subject to reasonable regulation "simply because it is 'implemented through speech rather than through scalpel.'" Pet.App. 51a (quoting *Tingley v. Ferguson*, 47 F.4th 1055, 1064 (9th Cir. 2022)). In fact, "[m]ost medical treatments require speech." *Tingley*, 47 F.4th at 1073. And as the Ninth Circuit in *Tingley* observed, the fact that the provision of a course of treatment—for instance, the administration of a medication—requires a licensed healthcare professional to communicate with their patient verbally or in writing—for instance, by providing verbal

instructions or writing a prescription—does not give rise to First Amendment heightened scrutiny whenever a state law "appl[ies] to health care professionals and impact[s] their speech." *Id*. at 1082. Increasingly, doctor-patient interactions occur through telehealth rather than in-person office visits. These interactions remain medical in nature even if the doctor is providing care through only words as opposed to physical examination. Thus, even if a healthcare professional provides their services solely through verbal communication, state regulation of those services to maintain and enforce a standard of care in a professional relationship of dependence does not trigger heightened First Amendment scrutiny.

Similarly, under malpractice and tort liability schemes, healthcare providers are routinely—and appropriately—held liable if they are negligent in their provision of care to patients. It is uncontroversial that a medical doctor or mental health counselor could be sued in malpractice for providing substandard care, and a damages award would not trigger First Amendment scrutiny, *see NIFLA*, 585 U.S. at 769 ("Longstanding torts for professional malpractice . . . fall within the traditional purview of state regulation of professional conduct." (cleaned up)), even though torts such as libel and intentional infliction of emotional distress would trigger heightened scrutiny, *see N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 265–66 (1964); *Snyder v. Phelps*, 562 U.S. 443, 458 (2011). And in the name of protecting the public from harm, courts have consistently upheld regulations that go beyond proscribing certain treatments, requiring providers to engage in compelled communications. *See, e.g.*,

Tarasoff v. Regents of University of California, 551 P.2d 334, 339–40 (Cal. 1976) (holding that mental healthcare professionals have a duty to warn third parties facing a threat of bodily harm by a patient); *Clanton v. United States*, 20 F.4th 1137, 1146 (7th Cir. 2021) (affirming malpractice liability under federal law for healthcare providers who fail to educate their patients as to diagnoses and treatment regimens). This solicitude for professional tort and malpractice liability demonstrates that state regulations aimed at enforcing the standard of care in a licensed profession are not subject to heightened scrutiny, even where the professional service consists of words.

B. *NIFLA* Affirmed This Court's Jurisprudence That Communication As Part Of The Practice Of Medicine Is Not Subject To Heightened First Amendment Review.

NIFLA did not abrogate the longstanding permissibility of regulation of communication that is part of or incidental to professional conduct. To the contrary, *NIFLA* repeatedly affirmed the constitutionality of "regulations of professional conduct that incidentally" involve speech on the basis that communication as part of the provision of licensed healthcare services is not subject to heightened scrutiny. *See* 585 U.S. at 769.

NIFLA's principal holding—that a California law requiring certain healthcare facilities to post a notice containing specified language in their offices violated the First Amendment, *id*. at 778—is readily

distinguishable from the Statute barring the practice of "conversion therapy" for minors. The law at issue in *NIFLA* "compell[ed] individuals to speak a particular [government-drafted] message" about the availability of state-sponsored treatments including abortion services in a public setting and *outside* the context of a healthcare professional's treatment of a patient. *Id.* at 766, 770. The law's aim was not to regulate professional conduct, but rather to pressgang covered professionals into disseminating the state's message.

NIFLA expressly endorsed the long-established constitutionality of regulating "speech only 'as part of the *practice* of medicine, subject to reasonable licensing and regulation by the State.'" *NIFLA*, 585 U.S. at 770 (quoting *Casey*, 505 U.S. at 884); *see also Doe v. Rokita*, 54 F.4th 518, 520–21 (7th Cir. 2022) ("[*NIFLA*] does not question the propriety of requirements that medical professionals alert patients to laws that affect medical choices."). This framework is central to *NIFLA*'s conclusion that, although "States may regulate professional conduct" that "incidentally involves speech," California's law was unconstitutional because it was not tied to the practice of medicine at all. 585 U.S. at 768, 770. By contrast, the Statute directly regulates treatment.

In attempting to rely on *NIFLA*, Petitioner conflates the colloquial meaning of "speech" with the First Amendment's highly reticulated definition, which does not protect every course of conduct "in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed," *Giboney*, 336 U.S. at 502. The Statute does not, as Petitioner

and her *amici* argue, regulate Petitioner's "speech as speech." Pet'r Br. at 32–33; *see also* U.S. Br. at 30. Instead, it regulates only those verbal communications that comprise Petitioner's provision of treatment. That verbal communication is the "only tool" that Petitioner uses when providing mental health treatment, Pet'r Br. at 33, does not change the fact that the Statute regulates purely professional conduct.

Petitioner misconstrues *NIFLA* and its progeny's use of "incidental," arguing that communication can only be "incidental" to conduct when it is a non-essential component of that conduct. *Id.* at 28–29. Not so. What makes communication "incidental" to regulated conduct is that the regulation does not hinge, one way or another, on the fact that the conduct is carried out through words. *Cf. United States v. O'Brien*, 391 U.S. 367, 382 (1968). Here, the targeted purpose and focus of the Statute is protecting minors from harmful, medically dubious treatment. Accordingly, the Statute would apply with equal force if Petitioner provided "conversion therapy" through physical, aversive techniques rather than talk therapy. Because the Statute's target is the licensed provision of "conversion therapy" to minors and not opinions on "conversion therapy" generally, the Tenth Circuit correctly applied *NIFLA* in holding that the Statute regulates professional conduct—mental health treatment—and determining that Petitioner's provision of talk therapy falls squarely within the realm of such conduct.

In support of Petitioner, the United States puts forth a whole cloth test untethered to precedent: that

for a regulation of professional conduct implicating communication to pass constitutional muster under *NIFLA*, the communication must be "separate" from the regulated professional conduct. U.S. Br. at 30. However, *NIFLA* said nothing of a "separate, non-speech conduct" requirement. *Id.* at 18. What made California's law impermissible in *NIFLA* was the fact that the information clinics were required to provide in the "government-drafted notice" could not have been incidental to anything, because the notice was required regardless of the reason a patient came into the clinic and was "not tied to a procedure at all." 585 U.S. at 763, 770. By contrast, the Statute is specifically tied to a treatment: "conversion therapy." The Statute regulates Petitioner's verbal communications only to the extent they are part of her provision of "conversion therapy," demonstrating that any regulation of communication is incidental to the real target of the Statute—the "therapy" itself. Properly viewed in this light, all Colorado has done here is exercise the "broad power" this Court has repeatedly recognized that states possess "to establish standards for licensing practitioners and regulating [professional] practice." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 792 (1975).

The Statute also does not restrict Petitioner's speech based on content or viewpoint. *See* Pet'r Br. at 26; U.S. Br. at 21–23. The Statute does not prevent Petitioner from expressing her views publicly or in private discussions; rather, it prohibits her from providing treatment that Colorado has determined falls outside the standard of care for licensed mental health counseling providers. As the Tenth Circuit noted, whether Petitioner violates the Statute

depends not on what she says publicly, as a private citizen, or even in talk therapy sessions but instead on whether her treatment aims to change the sexual orientation or gender identity of a minor patient. *See* Pet.App. 57a n.35.

The cases on which Petitioner primarily relies, *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023), *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), and *Cohen v. California*, 403 U.S. 15 (1971), are inapposite. None of these cases concerned the regulation of licensed professions; they addressed challenges to laws of general applicability on the basis that certain aspects of the regulated conduct were expressive. *303 Creative* addressed a challenge by a wedding website designer—an unlicensed creative professional—to a Colorado public accommodations law that would have required her to provide wedding website design services to same-sex couples. *See* 600 U.S. at 580–81. The Court applied heightened First Amendment scrutiny to the extent the law implicated the petitioner's expressive conduct, relying on the parties' stipulation that the petitioner's creation of "original, customized" websites for each couple was "expressive in nature." *Id.* at 594 (citations omitted). The petitioner did not, as Petitioner does here, argue that every activity of theirs regulated by the law was First Amendment speech. Indeed, the Court's application of heightened scrutiny turned on the fact that the petitioner was "*not* seek[ing] to sell an ordinary commercial good" but instead was seeking to provide bespoke creative design services with expressive value. *Id.* at 593.

Holder and *Cohen*, both of which addressed speaker-driven subjective expression and neither of which involved communications by a licensed professional in a traditionally regulated industry, are likewise inapposite. In *Holder*, the Court applied heightened First Amendment scrutiny to a statute prohibiting the provision of support to designated foreign terrorist organizations as applied to those who sought to provide training and advocacy support to designated organizations because that conduct "consist[ed] of communicating a message." *Holder*, 561 U.S. at 28. And *Cohen* addressed a challenge to a California statute criminalizing the "disturb[ance] [of] the peace" by an individual who had been arrested for wearing a jacket bearing the words "Fuck the Draft." 403 U.S. at 15–16. The Court held that heightened scrutiny was appropriate because California was using a generally applicable criminal statute to prosecute expressive conduct. *Id.* at 18. The expressive conduct at issue in *Holder* and *Cohen* is a far cry from the provision of services by a licensed professional in a traditionally and carefully regulated profession. Here there is no credible argument that the provision of mental health treatment, the conduct regulated by the Statute, is any more "expressive" than a medical doctor writing a prescription, inquiring about a patient's medical history in the course of making a diagnosis, advising a patient to avoid certain activities or medications based on that patient's medical history, conduct squarely covered by uncontroverted regulatory schemes around the country.

C. The Tenth And Ninth Circuits' Approach Is Consistent With *NIFLA* And This Court's Jurisprudence.

In the face of a circuit split on the appropriate level of scrutiny for regulations of professional conduct implicating written or verbal communications, this Court should adopt the approach of the Tenth and Ninth Circuits. The Tenth Circuit's decision below and Ninth Circuit's decisions in *Tingley* and *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), comport with controlling precedent, including *NIFLA*, in upholding statutory bans on "conversion therapy." In contrast, the reasoning of the Eleventh and Third Circuits in *Otto v. City of Boca Raton, Florida*, 981 F.3d 854 (11th Cir. 2020) and *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014), does not align with the Court's jurisprudence regarding licensing regulations. The Tenth and Ninth Circuits' well-reasoned analyses should be followed here.

The Tenth Circuit held that the Statute is not subject to heightened First Amendment scrutiny because it is a "regulation of professional conduct incidentally involving speech" under *NIFLA*. Pet.App. 58a. Petitioner challenges this approach, arguing that the Tenth Circuit erroneously "transformed [her] speech into conduct" to "circumvent[]" *NIFLA*'s repudiation of a "professional speech" exception to the First Amendment or to create a new "treatment speech" exception. Pet'r Br. at 33, 38. The Tenth Circuit did no such thing. In holding that the Statute did not trigger heightened scrutiny, the Tenth Circuit relied on *NIFLA*'s "reaffirm[ance]" of the principle that First Amendment heightened scrutiny does not

attach to "restrictions directed at . . . conduct from imposing incidental burdens on speech." Pet.App. 33a (quoting *NIFLA*, 585 U.S. at 769). The Tenth Circuit correctly concluded that the Statute fell within this context as a regulation of medical treatment, reasoning that "[t]alk therapy is no less a medical treatment than the procedures described in *Casey* simply because it is 'implemented through speech rather than through scalpel.'" Pet.App. 51a (quoting *Tingley*, 47 F.4th at 1064). Petitioner argues that the Tenth Circuit misinterpreted *NIFLA*'s distinction between "speech and conduct." Pet'r Br. at 33. But Petitioner ignores that the dispositive distinction in *NIFLA* was whether or not communications were "tied to a [medical] procedure," not whether conduct involved verbal or written communication. *NIFLA*, 585 U.S. at 770. Petitioner also ignores that *NIFLA* relied on *Casey* for this proposition, *see id.*, thereby reaffirming *Casey*'s holding that heightened scrutiny does not apply where a law implicates a healthcare professional's communication "only as part of the practice of medicine, subject to reasonable licensing and regulation by the State," *Casey*, 505 U.S. at 884. The Tenth Circuit correctly relied on *Casey* and *NIFLA* in holding that the Statute regulates conduct tied to a medical treatment—talk therapy. *See* Pet.App. 46a–48a.

Recognizing that the Statute is plainly tied to the treatment of talk therapy, Petitioner attacks the Tenth Circuit's reasoning by arguing that the court erred in labeling licensed mental health clinicians' provision of talk therapy a "medical treatment." Pet'r

Br. at 34.[6] The Tenth Circuit correctly observed that endorsing Petitioner's view would require the erroneous conclusion "that mental health care is not really health care and that talk therapy is not really medical treatment," which "minimizes the mental health profession, distorts reality, and ignores the record in this case." Pet.App. 51a.[7] The Tenth Circuit's reasoning is consistent with this Court's jurisprudence recognizing the constitutionality of regulations of professional conduct.

Prior to the Tenth Circuit, the Ninth Circuit twice upheld laws prohibiting licensed therapists

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[6] Mental health treatment is medical in nature. *See, e.g.*, Br. for The Trevor Project, Inc., et al. as *Amici Curiae* Supporting Defendants-Appellees, at 28, No. 22-1445 (10th Cir. May 5, 2023) (Dkt. No. 101). The undisputed record demonstrates that Petitioner is seeking to offer mental health treatment. *See* Pet.App. 206a (Petitioner claiming she treats "clinical issues" including addictions and attachment, personality, and eating disorders).

[7] The Tenth Circuit also properly distinguished *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), which applied heightened scrutiny to a federal policy prohibiting doctors from "recommending or prescribing" medical marijuana. 309 F.3d at 632. As the Tenth Circuit recognized, *Conant* is distinguishable because "[c]rucial" to its reasoning was the fact that the policy prohibited "even the '*recommendation*' of marijuana to a patient," which in turn "chill[ed] the exercise of a doctor's 'right to explain the medical benefits of marijuana to patients.'" Pet.App. 48a (quoting *Conant*, 309 F.3d at 638). Unlike the policy at issue in *Conant*, the Statute does not prohibit Petitioner from recommending "conversion therapy" to minor patients, and Petitioner's extensive media campaign and support by over 50 *amici* demonstrate the absence of any chilling effect on her right to explain what she believes to be the medical benefits of "conversion therapy" for minors.

from providing "conversion therapy" to minor patients on the ground that mental healthcare treatment is professional conduct rather than strict scrutiny-protected speech. *See Pickup*, 740 F.3d at 1225–32, *Tingley*, 47 F.4th at 1077. Together, these decisions correctly analyze controlling First Amendment precedent including, in the case of *Tingley*, *NIFLA*. In *Pickup*, the Ninth Circuit held that a California statute banning "conversion therapy" was not subject to heightened scrutiny because it "regulate[d] only (1) therapeutic treatment, not expressive speech, by (2) licensed mental health professionals acting within the confines of the counselor-client relationship." 740 F.3d at 1229–30. And in *Tingley*, the Ninth Circuit applied *Pickup* to an analogous Washington statute, reasoning that *NIFLA*, although declining to adopt wholesale *Pickup*'s "professional speech" framework, did not abrogate *Pickup*'s "central holding that California's conversion therapy law is a regulation on conduct that incidentally burdens speech." 47 F.4th at 1077. Accordingly, the Tenth and Ninth Circuits properly held—relying on *NIFLA* and other First Amendment precedent—that the "therapeutic" practices Petitioner employs are conduct and not subject to heightened First Amendment protection.

The reasoning of the Third and Eleventh Circuits does not align with this Court's jurisprudence regarding professional licensing provisions. In *Otto*, the Eleventh Circuit held that a city ordinance banning "conversion therapy" was subject to heightened scrutiny, reasoning that the ordinance directly regulated speech and not conduct. *See* 981 F.3d at 866. The *Otto* court acknowledged that "conversion therapy" could reasonably be

characterized as "a course of conduct" but mistakenly concluded that therapy was speech merely because it is a practice "consist[ing]—entirely—of words." *Id.* at 865. This analysis ignores *NIFLA*'s recognition that the First Amendment affords lower protection for speech that is incidental to professional conduct. *See NIFLA*, 585 U.S. at 766–767. Although *NIFLA* declined to carve out a "professional speech" exception to the First Amendment, it did not eliminate all distinctions for professional contexts and endorsed regulations of healthcare professionals' conduct through licensing, malpractice, and tort regimes, even when that conduct involves verbal or written communications. *Id.* *Otto*'s formalistic word-based analysis thus conflicts with *NIFLA*'s functional approach to professional medical regulation and, as discussed *infra* Part II, presents dangerous consequences for professional regulations more broadly. And the Court's jurisprudence recognizing that conduct can sometimes be symbolically expressive (that is, covered First Amendment "speech") further illustrates that the lynchpin of First Amendment heightened scrutiny is not whether expression involves the use of words. The regulation of words doesn't automatically trigger First Amendment heightened scrutiny, nor does regulation targeted at expression not involving words negate First Amendment heightened scrutiny. *See, e.g.*, *Tex. v. Johnson*, 491 U.S. 397, 404 (1989).

The Third Circuit's reasoning in *King* is similarly deficient. There, the court held that a "conversion therapy" ban was subject to heightened First Amendment scrutiny but nonetheless passed muster, without the benefit of *NIFLA*'s reasoning. *See*

King, 767 F.3d at 239–40. The *King* court also wrongly relied on *Holder* by overreading it to require that all written or verbal communications by professionals be subject to heightened First Amendment protection. *See id.* at 224–25. But *Holder* nowhere reaches this sweeping conclusion, which would fly in the face of the Court's jurisprudence as discussed *supra* Section I.A.[8] Thus, *King*'s analysis should not be relied upon.

D. The Text And Context Of The Statute Demonstrate That It Is A Regulation Of Professional Conduct.

As part of Colorado's licensing scheme for mental health providers, the Statute bars the "practice or treatment" by licensed providers of a "therapeutic" modality that Colorado's democratically elected representatives (and the modern scientific community) have reasonably determined to be harmful to minors. The Statute does not prohibit licensed providers from expressing their viewpoints about "conversion therapy" or referring a client to a non-licensed professional for those services. That is because the target of the Statute is not speech or the expression of the licensed provider's personal views

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[8] Contrary to the Third Circuit's reasoning, *Holder* did not address the issue of licensed professionals engaging in their heartland professional and regulated conduct. Although the petitioners included a doctor and a lawyer, they were not seeking to provide medical care or legal advice but instead to provide training on political advocacy and conflict resolution. *See Holder*, 561 U.S. at 37.

but rather their professional conduct: providing a specific treatment to minors.

The Statute regulates the conduct of mental health practitioners whose credentials are sanctioned by the State of Colorado through licensing, registration, or certification. C.R.S. §§ 12-245-202(2)–(16). Colorado has an identical statute regulating the conduct of licensed medical professionals. *See* C.R.S. § 12-240-121(1)(ee) (defining "unprofessional conduct" to include "[e]ngaging in conversion therapy with a patient who is under eighteen years of age"). As this Court has held repeatedly, a state may regulate the conduct of licensed professionals, including where that conduct implicates speech "as part of the practice." *Casey*, 505 U.S. at 884. This is just such a regulation. It does not bar Petitioner from speaking about her beliefs regarding the purported benefits of "conversion therapy." Rather, the Statute prohibits her from conducting "conversion therapy" on minor patients as a licensed professional, and it is therefore plainly outside the scope of First Amendment heightened scrutiny.

The goals of Colorado's statutory scheme are to "safeguard the public health, safety, and welfare of the people of [Colorado]" and to protect against "the unauthorized, unqualified, and improper application of psychology, social work, marriage and family therapy, professional counseling, psychotherapy, and addiction counseling." C.R.S. § 12-245-101(1). Vital to achieving these goals is protecting the physical and mental wellbeing of children, some of the state's most vulnerable citizens. *See Free Speech Coal.*, 145 S. Ct. at 2304. The Colorado legislature, in its reasoned

judgment, determined that the practice of "conversion therapy" is an "improper application" of therapy that the state would not sanction for children under eighteen years of age. This determination aligns with the widespread consensus among medical and psychological professionals that "conversion therapy" harms patients.[9] When used on adolescents, the risk of harm is particularly acute and life threatening.[10] Colorado does not stand alone; twenty-three states and the District of Columbia have passed laws that ban, in some form, the practice of "conversion therapy" on minors. The Statute, which narrowly proscribes a treatment regime proven to be harmful, falls squarely in line with historical examples of constitutional malpractice regulation.

As this Court has repeatedly stated, "the State has a significant role to play in regulating the medical profession." *Gonzales v. Carhart*, 550 U.S. 124, 157 (2007). The Court's recent decision in *United States v. Skrmetti*, 145 S. Ct. 1816 (2025), implicitly reaffirms that recognition and attendant deference. In *Skrmetti*, the Court upheld a Tennessee law prohibiting doctors from providing certain medical treatments to transgender minors as a permissible regulation of professional conduct. *See* 145 S. Ct. at 1836. The law

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[9] *See, e.g.*, *Advocating for the LGBTQ community*, AM. MED. ASS'N (opposing "the use of 'conversion therapy' for sexual orientation or gender identity"), https://www.ama-assn.org/delivering-care/population-care/advocating-lgbtq-community (last visited Aug. 23, 2025).

[10] *See, e.g.*, *Conversion Therapy*, AM. ACAD. OF CHILD & ADOLESCENT PSYCHIATRY (Feb. 2018), https://www.aacap.org/aacap/Policy_Statements/2018/Conversion_Therapy.aspx.

does not prohibit Tennessee doctors from voicing their opposition to the restrictions as unwarranted and antithetical to the provision of medical care to minors in need. But Tennessee's law most certainly does implicate communications by doctors. For instance, a doctor would violate the law by writing a prescription for a puberty blocker, and this Court's precedent would not support a determination that the writing of a prescription (or the delivery of a written treatment plan that called for the use of puberty blockers) constitutes expressive speech rather than professional conduct. *Cf. Casey*, 505 U.S. at 884 (1992).[11]

Yet such a determination is precisely what Petitioner seeks here. Petitioner is a licensed mental health professional. Pet.App. 12a. When patients come to her, it is for mental health treatment. It is not for "speech" as the First Amendment would describe it; patients do not come to Petitioner to hear her thoughts or opinions on "matters of profound value and [public] concern." Pet'r Br. at 28. If she chooses, Petitioner can opine to a patient that the best treatment for them is "conversion therapy." She can offer her personal and religious views, and can refer patients to providers who are not subject to Colorado's restrictions.[12] And, if the patient is an adult, she can

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[11] By the same token, if Petitioner's services *are* beyond the reach of reasonable regulation because she uses communicative means to provide them, so too must be the Tennessee physician's use of written communication to prescribe puberty blockers to a minor.

[12] Petitioner argues that this fact renders the Statute "underinclusive" and therefore "constitutionally problematic."

administer that treatment herself. But if she chooses to administer "conversion therapy" to a minor in violation of the Statute, Petitioner stands in the same place as a doctor in Tennessee prescribing puberty blockers. Under this Court's existing precedent, in neither case does the First Amendment provide a shield against the consequences of administering treatment proscribed by the state. And as this Court has repeatedly recognized, including recently in *Free Speech Coalition*, the protection of minors is a sufficiently important state interest to justify incidental burdens to First Amendment speech. *See* 145 S. Ct. at 2309 (Texas law's burden on adults "only incidental" to its regulation of activity "not protected by the First Amendment").

At bottom, the Statute governs the *licensed practice of therapy* with the purpose of protecting the state's minors from suffering harm during psychological treatment. Colorado's definition of "conversion therapy"—"any practice or treatment" that "attempts or purports to change an individual's sexual orientation or gender identity," C.R.S. § 12-245-202(3.5)(a)—underscores the Statute's focus on professional *treatment* rather than verbal expression

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Pet'r Br. at 51. But this argument lays bare Petitioner's fundamental misunderstanding of where heightened First Amendment protection begins and ends in the context of regulations of licensed professionals. *NIFLA* reaffirmed the principle that the First Amendment does not prohibit states from regulating professional conduct merely because the conduct involves speech. *See supra* Section I.B. The Statute, as part of Colorado's licensing regime for mental healthcare providers, is a regulation of professional conduct borne from Colorado's authority to regulate in "the vital interest of public health." *Semler*, 294 U.S. at 612.

(which is the line drawn by *NIFLA*). Colorado's approach to exercising its broad and well-established power to regulate "all professions concerned with health," *Barsky*, 347 U.S. at 449, is both legally sound and constitutionally valid.

II. A RULING THAT ALL PROFESSIONAL CONDUCT INVOLVING VERBAL COMMUNICATION IS SUBJECT TO HEIGHTENED SCRUTINY RISKS DESTROYING STATES' AUTHORITY TO REGULATE PROFESSIONS OR ERODING STRICT SCRUTINY.

The Statute aligns with the longstanding, widely accepted practice of regulating the professional conduct of licensed healthcare providers to ensure adherence to medical standards and prevent harm to patients. Petitioner's argument that heightened First Amendment scrutiny must extend to all professional services rendered verbally, such as talk therapy, *see* Pet'r Br. at 37–38, would erode states' ability to regulate professional services through long-established licensing, tort, and malpractice regimes. These regimes, which enable states to fulfill their primary duty to protect their citizens, have been repeatedly endorsed by this Court, including in *NIFLA*. A ruling for Petitioner would distort the First Amendment's scope by requiring every regulation of communication-based professional services, including those historically subject to strict licensure requirements, to satisfy strict scrutiny, risking the disappearance of all such regulations.

Integral to a state's police power is its authority to regulate the conduct of professionals to protect the health, safety, and well-being of its citizens. *See supra* Section I.A. This authority does not dissipate whenever regulated conduct involves communication. *Cf. NIFLA*, 585 U.S. at 769. And attendant to this authority is a wide latitude to regulate professional services through licensing, malpractice, and tort regimes, crucial mechanisms for maintaining and enforcing standards of care for professional service providers, including holding liable those who provide substandard care and cause harm. *See, e.g.*, *Barsky*, 347 U.S. at 451–52; *CTS Corp. v. Waldburger*, 573 U.S. 1, 19 (2014).

A ruling that Colorado's regulation of licensed mental healthcare providers implicates First Amendment speech would upend innumerable state licensing regimes.[13] However Petitioner chooses to frame her request, she is unquestionably asking this Court to hold that all regulations of communications-based professions be subject to our Constitution's most stringent inquiry. Adopting Petitioner's argument would subject widely accepted state licensing requirements to a First Amendment challenge *any* time a licensed professional practices their trade through verbal communication, opening

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[13] *See* Post, *supra* note 4, at 3 ("First Amendment coverage does *not* extend to large patches of perfectly ordinary state legislation, like . . . the imposition of tort liability for the negligent failure to warn, even though such legislation precisely seeks to control the successful communication of particularized messages in language.").

the floodgates to constitutional challenges whenever a professional takes issue with such a requirement.[14]

Beyond the field of medicine, states have long exercised their "broad power to establish standards for licensing practitioners and regulating the practice of professions" by establishing standards of practice for scores of licensed professions. *Goldfarb*, 421 U.S. at 792. Indeed, widespread and longstanding forms of state regulation "embody a constitutional judgment—made by generations of legislators and by the American people as a whole—that commands [the Court's] respect." *Free Speech Coal.*, 145 S. Ct. at 2316. Accordingly, states have extensive statutory schemes regulating professions in which verbal and written communication comprise much if not all of the relevant professional conduct, including lawyers,[15] accountants,[16] stock brokers,[17] nutritionists and

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[14] To the extent any level of scrutiny higher than rational basis is necessary, the "deferential but not toothless" standard of intermediate scrutiny endorsed by the Court in *Free Speech Coalition* is appropriate. 145 S. Ct. at 2316.

[15] *See* A.B.A., LAW. REGUL. FOR NEW CENTURY: REP. COMM'N ON EVALUATION DISCIPLINARY ENF'T (Sept. 18, 2018) ("[J]udicial regulation of lawyers is a principle firmly established in every state.").

[16] *See, e.g.*, 22 TEX. ADMIN. CODE §§ 501.51–55; GA. COMP. R. & REGS. § 43-3-18; ILL. ADMIN. CODE tit. 68, § 1420.200.

[17] *See, e.g.*, FLA. STAT. § 517.1217; OHIO REV. CODE ANN. § 1707.01; CAL. CODE REGS. tit. 10, § 260.210.

registered dieticians, [18] athletic trainers, [19] and interior decorators.[20] This Court and numerous state and federal courts have affirmed these statutory schemes against First Amendment challenges. *See, e.g.*, *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977) ("[R]egulation of the activities of the bar is at the core of the State's power to protect the public."); *Hayes v. N.Y. Att'y Grievance Comm. of the Eighth Jud. Dist.*, 672 F.3d 158, 167 (2d Cir. 2012) (upholding restrictions governing attorney disclosure statements under First Amendment); *Locke v. Shore*, 634 F.3d 1185, 1190–92 (11th Cir. 2011) (upholding licensing requirement for interior designers because designers' personalized communications with clients constitute "occupational conduct"); *cf. 360 Virtual Drone Servs. LLC v. Ritter*, 102 F.4th 263, 270 (4th Cir. 2024) (upholding licensing regime for land surveying because land surveyors' "mapping activities" constitute professional conduct rather than speech); *Lowe*, 472 U.S. at 233 (White, J., concurring) (regulation of investment advisors "justified as a legitimate exercise of the power to license those who would practice a profession"). A ruling that the Statute is subject to heightened scrutiny would effectively require the abrogation of these cases and a legion of others, requiring new assessment of whether those regulations could survive exacting strict scrutiny, thereby upending longstanding and broadly

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[18] *See, e.g.*, TEX. OCC. CODE § 701.251; MO. REV. STAT. §§ 324.200–225; WASH. REV. CODE §§ 18.138.010–110.

[19] *See, e.g.*, LA. ADMIN. CODE tit. 46, pt. XLV, §§ 3101–3179; FLA. STAT.§ 468.707; N.Y. EDUC. LAW § 8355.

[20] *See, e.g.*, FLA. STAT. § 481.2131; NEV. REV. STAT. § 623.192; CAL. BUS. & PROF. CODE § 5800.

accepted regulatory regimes that further a state's legitimate interests in protecting its citizens.

It is no refuge to say, as the United States argues, that restrictions on the most harmful forms of talk therapy are likely to survive strict scrutiny. *See* U.S. Br. at 26. Strict scrutiny is "the most rigorous of scrutiny." *Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 546 (1993). And "it is the rare case in which a State demonstrates that a speech restriction is narrowly tailored to serve a compelling interest." *Williams-Yulee v. Fla. Bar*, 575 U.S. 433, 444 (2015) (cleaned up). Indeed, in the past forty years, this Court has held that a speech restriction survived strict scrutiny on only three occasions. *See id.*; *Burson v. Freeman*, 504 U.S. 191, 211 (1992) (plurality op.); *Holder*, 561 U.S. at 39. Although Respondents persuasively explain why the Statute can survive strict scrutiny, and the substantial harms of "conversion therapy" are well documented, the inescapable reality is that all sorts of generally accepted professional regulations will not be able to follow suit and would fall. Accepting that strict scrutiny applies to the Statute and analogous laws, it is difficult to see how professional licensing regimes in their entirety could be upheld under strict scrutiny, should a professional challenge such a regime as a prior restraint. This grim scenario imposes on lower courts a Hobson's choice: either strike down commonsense, decades' or centuries' old regulations of professional conduct designed to protect public health and safety, or uphold those laws and risk the *sub silentio* creation of a new form of "skim milk" strict scrutiny. Although the latter may yield the desired end-result for a particular regulation, the resulting

caselaw would be ripe for application to any number of laws, transforming this exacting inquiry into a roulette wheel.

Finally, "it is a cardinal principle" that questions of law should be construed to avoid significant constitutional problems whenever possible. *Crowell v. Benson*, 285 U.S. 22, 62 (1932). As the Court recently reaffirmed, such "[a] decision contrary to long and unchallenged practice should be approached with great caution." *Free Speech Coal.*, 145 S. Ct. at 2316 (cleaned up). A ruling that the treatment modalities licensed mental health care providers employ (words) transform their professional conduct into First Amendment speech would undermine the constitutionality of imposing civil liability for malpractice and professional discipline. There would be no limiting principle to what therapists could say in the course of treatment.

CONCLUSION

"People who actually hurt children can be held accountable." *Otto*, 981 F.3d at 870. Colorado's Statute ensures that mental healthcare providers do not practice harmful "conversion therapy" treatment on minors. Under the Court's longstanding precedent, the Statute is a constitutionally viable regulation of professional conduct. The fact that the professional conduct of mental healthcare providers involves verbal communication does not trigger heightened First Amendment scrutiny. To invalidate regulations barring the practice of "conversion therapy" on minors under the First Amendment would pervert our constitutional values. The Tenth Circuit's decision should be affirmed.

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New York, NY

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APPENDIX

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APPENDIX A

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