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 Department of Regulatory Agencies, et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

REPLY BRIEF FOR PETITIONER

JOHN J. BURSCH
DAVID A. CORTMAN
ERIN M. HAWLEY
CAROLINE C. LINDSAY
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(202) 393-8690

JAMES A. CAMPBELL
Counsel of Record
KRISTEN K. WAGGONER
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Lansdowne, VA 20176
(571) 707-4655
jcampbell@ADFlegal.org

Counsel for Petitioner
[additional counsel listed on inside cover]

JONATHAN A. SCRUGGS
JACOB P. WARNER
ROGER G. BROOKS
BRYAN D. NEIHART
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

BARRY K. ARRINGTON
ARRINGTON LAW FIRM
4195 Wadsworth Blvd.
Wheat Ridge, CO 80033
(303) 205-7870

SHAUN PEARMAN
PEARMAN LAW FIRM
4195 Wadsworth Blvd.
Wheat Ridge, CO 80033
(720) 343-8534

TABLE OF CONTENTS

Table of Authorities iii

Introduction..... 1

Argument..... 2

I. Colorado's counseling restriction is broad. 2

II. Chiles has standing. 6

III. Strict scrutiny applies to Chiles's claim. 8

A. The counseling restriction discriminates based on viewpoint. 9

B. The counseling restriction is nothing like the malpractice suits or licensing laws that Colorado discusses..... 10

1. The restriction is unlike malpractice suits. 10

2. The restriction is unlike other licensing laws..... 14

3. Colorado's other historical and professional-speech arguments fail..... 15

C. Chiles's position preserves ample regulatory authority, while Colorado's position imperils free speech..... 16

D. Intermediate scrutiny is not the correct standard..... 20

IV. Applying the counseling restriction to Chiles fails heightened scrutiny. 21

A. Censoring Chiles does not advance compelling or important interests. 22

B. Censoring Chiles lacks narrow tailoring. 25

Conclusion 27

TABLE OF AUTHORITIES

Cases

Ake v. *Oklahoma*,
470 U.S. 68 (1985)..... 19

Blass v. *Weigel*,
85 F. Supp. 775 (D.N.J. 1949) 14

Bloate v. *United States*,
559 U.S. 196 (2010)..... 2

Bose Corporation v. *Consumers Union of United States, Inc.*,
466 U.S. 485 (1984)..... 24

Brokamp v. *James*,
66 F.4th 374 (2d Cir. 2023) 14

Duncan v. *Walker*,
533 U.S. 167 (2001)..... 2

Edwards v. *Lamb*,
45 A. 480 (N.H. 1899) 18

Free Speech Coalition, Inc. v. *Paxton*,
145 S. Ct. 2291 (2025)..... 21

Ghadiali v. *Delaware State Medical Society*,
48 F. Supp. 789 (D. Del. 1943) 14

Harris v. *Kreutzer*,
624 S.E.2d 24 (Va. 2006) 13

Hurley v. *Irish-American Gay, Lesbian & Bisexual Group of Boston*,
515 U.S. 557 (1995)..... 18

Illinois ex rel. Madigan v. *Telemarketing Associates, Inc.*,
538 U.S. 600 (2003)..... 11–12

Kleindienst v. *Mandel*,
408 U.S. 753 (1972)..... 16

Knox v. *Service Employees International Union, Local 1000*,
567 U.S. 298 (2012)..... 2

Lyman v. *Town of Bow Mar*,
533 P.2d 1129 (Colo. 1975) 2

Matal v. *Tam*,
582 U.S. 218 (2017)..... 20

Mower v. *Baird*,
422 P.3d 837 (Utah 2018)..... 13

Murthy v. *Missouri*,
603 U.S. 43 (2024)..... 16

NAACP v. *Button*,
371 U.S. 415 (1963)..... 12

National Association for Advancement of Psychoanalysis v. *California Board of Psychology*,
228 F.3d 1043 (9th Cir. 2000) 14

National Institute of Family & Life Advocates v. *Becerra*,
585 U.S. 755 (2018).....12–13, 16–18, 20

National Rifle Association of America v. *Vullo*,
602 U.S. 175 (2024)..... 9

R.A.V. v. *City of St. Paul*,
505 U.S. 377 (1992)..... 25

Riley v. *National Federation of the Blind of North Carolina, Inc.*,
487 U.S. 781 (1988)..... 11

Roberts v. *Salmi*,
866 N.W.2d 460 (Mich. Ct. App. 2014) 13

Skillings v. *Allen*,
173 N.W. 663 (Minn. 1919) 18

Sorrell v. *IMS Health Inc.*,
564 U.S. 552 (2011)..... 20

Southeastern Promotions, Ltd. v. *Conrad*,
420 U.S. 546 (1975)..... 11

State Board of Medical Examiners v. *Kempkes*,
160 A. 827 (N.J. Sup. Ct. 1932)..... 15

Susan B. Anthony List v. *Driehaus*,
573 U.S. 149 (2014)..... 6–7

The Florida Star v. *B.J.F.*,
491 U.S. 524 (1989)..... 12

Thomas v. *Collins*,
323 U.S. 516 (1945)..... 9

United States v. *National Treasury Employees Union*,
513 U.S. 454 (1995)..... 11

United States v. *Skrmetti*,
145 S. Ct. 1816 (2025)..... 10, 19

United States v. *Stevens*,
559 U.S. 460 (2010)..... 6, 18–19

United States v. *Virginia*,
518 U.S. 515 (1996)..... 24

Virginia State Board of Pharmacy v. *Virginia Citizens Consumer Council, Inc.*,
425 U.S. 748 (1976)..... 21

Virginia v. *American Booksellers Association, Inc.*,
484 U.S. 383 (1988)..... 8

Statutes

Colo. Rev. Stat. § 12-245-202..... 2–6, 9–10

Colo. Rev. Stat. § 12-245-224..... 15, 17

Colo. Rev. Stat. § 12-245-603..... 9

Colo. Rev. Stat. § 24-34-301..... 3

N.J. Stat. Ann. § 45:1-21..... 15

Utah Code Ann. § 58-1-511..... 5

Other Authorities

Amy Przeworski et al., *A Systematic Review of the Efficacy, Harmful Effects, and Ethical Issues Related to Sexual Orientation Change Efforts*, 28 Clinical Psychology: Science and Practice 81 (2021) 22

Colo. Dep't of Regulatory Agencies, *Annual Report Division of Professions and Occupations* (2017) 7–8

Detransition, Cambridge Dictionary 5

Hilary Cass, *Independent Review of Gender Identity Services for Children and Young People: Final Report* (2024) 24

Restatement (Third) of Torts: Medical Malpractice (2024) 11

Transition, Cambridge Dictionary 5

INTRODUCTION

Colorado does not dispute three key points that sink its case. First, it cites no study focusing on what's at issue here: voluntary counseling between minors and licensed counselors. Second, its own evidence disclaims proof that this counseling causes harm. Third, the same evidence concedes that many people have experienced benefits from this counseling. Put it together, and Colorado cannot possibly justify its viewpoint-based prior restraint banning voluntary conversations on disputed questions of moral and religious significance.

In a bind, Colorado runs from the broad counseling restriction its legislature actually passed. The State's Attorney General now offers a new interpretation, but it defies the statutory text and his arguments below. And Chiles has standing to challenge the law because she intends to engage in prohibited conversations and is currently chilling her speech.

On the merits, the State compares its counseling restriction to malpractice actions and other licensing laws. But malpractice suits aren't prior restraints, and they have built-in safeguards for speech that Colorado's statute lacks. Also, the State cites no other licensing law that preemptively bars voluntary counseling conversations because of the views expressed.

Protecting Chiles won't undermine state power to regulate healthcare or ban coercive or aversive conduct. Rather, it will stop officials from applying this outlier statute to bar young people from accessing the caring counseling conversations they seek on these critical questions of identity, sex, and gender.

ARGUMENT

I. Colorado's counseling restriction is broad.

Unable to defend the counseling restriction as written or deny Chiles's standing, Colorado's Attorney General seeks to overhaul the statute at the eleventh hour. But this reimagining contradicts the statute's plain text, the technical understanding of the statute's terms, and the State's arguments below. "Such postcertiorari maneuvers … must be viewed with a critical eye." *Knox* v. *Serv. Emps. Int'l Union, Loc. 1000*, 567 U.S. 298, 307 (2012).

Colorado's law defines forbidden "[c]onversion therapy" to "mean[] any practice or treatment … that attempts or purports to change [a minor'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." Colo. Rev. Stat. § 12-245-202(3.5)(a) (emphasis added).

For the first time, the Attorney General argues that the statute does not bar efforts to change same-sex sexual behaviors or attractions or gender expressions unless the counselor and client *also* have "*the purpose of* 'chang[ing] … sexual orientation or gender identity.'" Resp.Br.21 n.15 (quoting Colo. Rev. Stat. § 12-245-202(3.5)(a)). That distorts the meaning of "including"—effectively reading what comes after it out of the statute. *Duncan* v. *Walker*, 533 U.S. 167, 174 (2001) (canon against surplusage). "Including" is an "illustrative term," *Bloate* v. *United States*, 559 U.S. 196, 207 (2010), "a word of extension," *Lyman* v. *Town of Bow Mar*, 533 P.2d 1129, 1133 (Colo. 1975). What follows "including" is a subset of what came before. So under the statute, "efforts to change"

behaviors, gender expressions, or attractions *are* examples of prohibited "attempts … to change … sexual orientation or gender identity." Colo. Rev. Stat. § 12-245-202(3.5)(a).

A. Other indicators confirm this interpretation. Start with sexual orientation. In unison, Colorado's brief, Resp.Br.6, its expert's testimony, J.A.40, and the 2015 SAMHSA report, J.A.541, agree that sexual orientation *itself* consists of "behavior," "attraction," and "identity." See also Colo. Rev. Stat. § 24-34-301(24) (defining "[s]exual orientation" in nondiscrimination law to include "identity," "behavior," and "attraction"). So efforts to change sexual-orientation-related behavior, attraction, or identity are *themselves* attempts to change sexual orientation. That's why Colorado's counseling restriction treats them as such.

Colorado's reading would reduce the law to barring only attempts to change identity. According to the Attorney General, counselors can help clients stop same-sex sexual "behaviors" or "eliminate or reduce [same-sex] sexual or romantic attraction," Colo. Rev. Stat. § 12-245-202(3.5)(a), so long as clients aren't "trying to change their identity," Resp.Br.21. No one has read this statute so narrowly—until now.

That includes the Attorney General. Below, he recognized that the counseling restriction's "prohibited conduct" includes counseling "seeking to eliminate unwanted same-sex … behaviors." D.Ct.Doc.52 at 5 n.3 (cleaned up). And he said that Chiles would "violate the Law" if she and her clients "seek to reduce or eliminate same-sex sexual attractions" or "behaviors." D.Ct.Doc.45 at 10. The Attorney General had it right the first time.

Now consider gender identity. Colorado's own expert materials confirm that the technical meaning of "conversion therapy" includes standalone efforts to change gender expressions—regardless of whether they also seek to change identity. The 2015 SAMHSA report defines "[c]onversion therapy" as "[e]fforts to change an individual's sexual orientation, gender identity, *or* gender expression." J.A.649 (emphasis added). Likewise, the State's expert testified that "[c]onversion therapy … includes efforts to change gender identity, gender expression, *or* associated components of these to be consistent with gender role behaviors that are stereotypically associated with sex." J.A.46–47 (emphasis added).

B. The Attorney General twists the statute's application to gender-identity issues in other ways. For one, he insists that "[n]othing in this law encourages … a medicalized pathway for minors experiencing gender dysphoria." Resp.Br.22 n.16. That ignores reality. Young people with gender dysphoria experience "incongruence" between their "gender identity" and sex. Pet.Br.6. Some choose to realign their identity with their body, while others change their body to match their identity. The statute forbids counseling for the first option but approves counseling to support "gender transition." Colo. Rev. Stat. § 12-245-202(3.5)(b)(II). That approval, Colorado's expert concedes, allows support for "gender-affirming care" such as "pubertal suppression," "hormonal treatment," and "surgical interventions." J.A.45–46. This undoubtedly encourages the medicalized pathway despite its risks. Pet.Br.15–17.

Trying to obscure this encouragement, the Attorney General claims counselors may freely "explore their [clients'] identity." Resp.Br.18–19. Not so. The

statute allows "[a]cceptance, support, and understanding" to facilitate "identity exploration and development … *as long as the counseling does not seek to change sexual orientation or gender identity*." Colo. Rev. Stat. § 12-245-202(3.5)(b)(I) (emphasis added). That substantially constrains "identity exploration" in two ways. First, exploration is off-limits if the goal is change—unless that change is a gender transition. Second, any help facilitating "identity exploration" is restricted to "[a]cceptance, support, and understanding," *ibid.*—questioning, "challeng[ing]," and "confront[ing]" are forbidden, Pet.App.208a.

The Attorney General also argues that the statute allows counseling to pursue both "gender transition" and "detransition." Resp.Br.22. The text says otherwise. The statute's approval of support for "gender transition," Colo. Rev. Stat. § 12-245-202(3.5)(b)(II), covers only the process of making "changes" to depart from one's sex "at birth," *Transition*, Cambridge Dictionary, perma.cc/9WN2-A3L6. There's no permission to support detransition—"the process of stopping" or reversing a gender transition. *Detransition*, Cambridge Dictionary, perma.cc/6LAE-6QJT. Because a detransition involves changes to gender identity and expression, supporting it falls squarely within the statute's prohibition.

C. Colorado repeatedly invokes Utah's statute. Resp.Br.20 n.14, 22. But that only highlights the breadth of Colorado's law. Utah's definition of "conversion therapy" does *not* include "efforts to change behavior or gender expression." Utah Code Ann. § 58-1-511(1)(a). Its examples of prohibited "practices" involve conduct rather than mere speech. *Id.* § 58-1-511(1)(a)(i)–(iv). And it allows counseling for "a gender transition *in any direction*." *Id.* § 58-1-511(3)(c)

(emphasis added). Colorado's reliance on Utah's statute undercuts its case.

The Attorney General treads the long-rejected path of government attorneys trying to dodge free-speech violations by creative constructions. But to read Colorado's statute as the Attorney General "desires requires rewriting, not just reinterpretation." *United States* v. *Stevens*, 559 U.S. 460, 481 (2010). Colorado must defend the law its legislature wrote.

II. Chiles has standing.

Plaintiffs have pre-enforcement standing when (1) they intend to engage in speech that is "arguably proscribed" by statute, and (2) a "threat of future enforcement" exists. *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 161–64 (2014) (*SBA List*) (cleaned up). Both lower courts found these factors satisfied, Pet.App.20a–26a, 140a–45a; and federal courts have uniformly affirmed standing in similar cases, Pet.Br.20–21. This Court should join that consensus. Colson.Center.Am.Br.4–15.

Arguably Proscribed Speech. Colorado's statute bans "attempts … to change [a minor's] sexual orientation or gender identity, including efforts to change behaviors or gender expressions or … attraction or feelings." Colo. Rev. Stat. § 12-245-202(3.5)(a). Chiles intends to provide "voluntary counseling that fully explores sexuality and gender," Pet.App.217a, including "clients' reported orientation, identity, behaviors[,] and feelings," Pet.App.216a. On sexual orientation, Chiles will help clients "seeking to reduce or eliminate unwanted sexual attractions" or "change sexual behaviors." Pet.App.207a. And on gender identity, she will counsel clients "seeking to … grow in the experience of harmony with [their] physical

body" or resist the "sense that [they] must change [their] physical body as a solution to gender dysphoria." Pet.App.207a. This testimony easily establishes Chiles's intent to engage in arguably proscribed speech, as both lower courts held. Pet.App.22a–24a, 141a–42a.

Colorado responds that Chiles "disclaims" an intent "to violate the law" because she "'does not seek to "cure" clients of same-sex attractions or to "change" clients' sexual orientation.'" Resp.Br.19 (quoting Pet.App.207a). But Colorado ignores the rest of Chiles's sentence: "she seeks only to assist clients with their stated desires and objectives in counseling, which *sometime includes* clients seeking to reduce or eliminate unwanted sexual attractions, change sexual behaviors, or grow in the experience of harmony with one's physical body." Pet.App.207a (emphasis added). Elsewhere, Colorado says Chiles "'does not begin counseling with any predetermined goals,'" Resp.Br.11 (quoting Pet.App.207a), yet again omits what follows: "other than those [goals] that the clients themselves identify and set," Pet.App.207a. These statements don't remotely undercut—but instead prove—Chiles's intent to violate the statute.

Threat of Enforcement. A threat exists because Colorado hasn't "disavowed enforcement." *SBA List*, 573 U.S. at 165. If Colorado truly thought Chiles's intended counseling complied with its statute, it could have entered a consent decree agreeing not to prosecute her. Its failure to do so shows a credible threat remains. That threat is "bolstered" because "any person" may file a complaint against any counselor, *id.* at 164; and the State actively enforces its mental-health licensing laws, Colo. Dep't of Regulatory Agencies, *Annual Report Division of Professions and*

Occupations 29 (2017), perma.cc/ESD6-ATB7 (administering over 600 complaints against mental-health professionals in one year alone).

Moreover, because the statute is currently chilling Chiles's speech, Pet.Br.18–19, that "self-censorship" is itself a present injury that establishes standing, *Virginia* v. *American Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988). This ongoing chill of Chiles and others explains why Colorado hasn't "received any complaint alleging a violation," Opp.5, or "enforced the [counseling restriction] against any licensees," Resp.Br.23 n.18. Despite this, Chiles's "self-censorship … harm" exists "even without an actual prosecution." *American Booksellers*, 484 U.S. at 393. Like other counselors in similar cases, Chiles undeniably has standing.

* * *

The Attorney General's attempts to manipulate the statute's scope and distort Chiles's allegations cannot hide the State's free-speech violation. Colorado must account for the harm its law inflicts.

III. Strict scrutiny applies to Chiles's claim.

Colorado no longer argues that Chiles's counseling conversations are conduct. Resp.Br.36 (acknowledging the law "regulates … words"). Nor does it deny that the statute regulates Chiles's speech based on content. Resp.Br.38 (arguing that laws may "require[] consideration of … treatment's content"). So the State must reckon with strict scrutiny.

Colorado offers four responses: (A) denying viewpoint discrimination; Resp.Br.38–40; (B) comparing the counseling restriction to malpractice suits and other licensing laws, Resp.Br.23–37; (C) worrying

about States' authority to regulate healthcare, Resp.Br.41–42; and (D) urging intermediate instead of strict scrutiny, Resp.Br.42–44. Each argument fails.

A. The counseling restriction discriminates based on viewpoint.

Content discrimination typically requires strict scrutiny. Pet.Br.38. Here, the counseling restriction's viewpoint discrimination—which "is uniquely harmful," *National Rifle Ass'n of Am.* v. *Vullo*, 602 U.S. 175, 187 (2024)—leaves no doubt that strict scrutiny applies.

Colorado counters that its statute "regulates … treatments, not … viewpoints." Resp.Br.39. But the law goes beyond "treatment" and covers "any practice," Colo. Rev. Stat. § 12-245-202(3.5)(a), including "[p]sychotherapy," *id.* § 12-245-603(2)(k), which broadly encompasses "counseling" not only to "alleviate behavioral and mental health disorders," but also to help clients "understand [their] motivation, resolve emotional, relationship, or attitudinal conflicts, or modify behaviors," *id.* § 12-245-202(14)(a). This reaches all kinds of conversations between Chiles and her clients.

Colorado also argues that the statute turns not on viewpoint but on the "outcomes" those conversations "seek." Resp.Br.38–39. Yet in counseling discussions, the outcome or "action" sought generally dictates the views expressed. See *Thomas* v. *Collins*, 323 U.S. 516, 537 (1945). Consider two examples. The statute allows counseling that encourages a minor's "transition" away from her sex. Colo. Rev. Stat. § 12-245-202(3.5)(b)(II). But it bans attempts to "change" iden-

tity by realigning with sex. *Id.* § 12-245-202(3.5)(a). The only difference between the permitted and forbidden counseling is the view expressed. The same is true of the line between (authorized) counseling that supports the status quo on sexual-orientation-related identities, behaviors, or attractions and (banned) counseling that seeks "change" in those areas. *Ibid.*

Colorado's reliance on *United States* v. *Skrmetti*, 145 S. Ct. 1816, 1830 (2025), for its viewpoint arguments is misguided. Resp.Br.39. *Skrmetti* applied equal-protection principles to physicians' conduct in administering drugs. It didn't address the First Amendment, viewpoint discrimination, or speech. Nothing it says justifies censoring Chiles's speech based on viewpoint.

B. The counseling restriction is nothing like the malpractice suits or licensing laws that Colorado discusses.

Colorado claims its counseling restriction is just like malpractice suits and other licensing laws. Resp.Br.23–37. But its arguments miss the mark.

1. The restriction is unlike malpractice suits.

Malpractice actions differ significantly from Colorado's law. Those suits require proof that past speech violated the standard of care and caused harm to specific people. In contrast, the counseling restriction is a sweeping, prophylactic, prior restraint on speech based on viewpoint. The many differences between malpractice actions and Colorado's statute raise First Amendment alarm bells.

"Broad prophylactic rules in the area of free expression are suspect." *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988). "[A] free society prefers to punish the few who abuse rights of speech" rather "than to throttle them … beforehand." *Southeastern Promotions, Ltd.* v. *Conrad*, 420 U.S. 546, 559 (1975). So a preemptive speech restriction, compared to "an adverse action taken in response" to speech, raises "far more serious [constitutional] concerns"—and the government's "burden is greater"—because it "chills potential speech before it happens." *United States* v. *National Treasury Emps. Union*, 513 U.S. 454, 468 (1995).

Malpractice actions afford many safeguards for free speech that Colorado's statute lacks. In malpractice, a plaintiff must prove speech violated the standard of care, establish harm, and demonstrate causation. Restatement (Third) of Torts: Medical Malpractice §§ 4–6 (2024). Those kinds of "[e]xacting proof requirements" generally "provide sufficient breathing room for protected speech." *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 620 (2003). Colorado's statute lacks them.

Malpractice law also protects client autonomy and professional disagreement, while Colorado's statute thwarts them. Many States' malpractice laws recognize "respectable minority" practices and allow clients to select "an approach to care different" from the prevailing standard, particularly when clients seek novel treatment and give informed consent. Restatement (Third) of Torts: Medical Malpractice §§ 5, 11 (2024). Yet Colorado's statute categorically bans voluntary conversations—no exceptions.

This Court has contrasted statutes that impose "categorical," "automatic[]," "*per se*" liability for speech with "common law tort[s]" proven through "case-by-case findings." *The Florida Star* v. *B.J.F.*, 491 U.S. 524, 539 (1989) (ruling against statute that made publishing names of sexual-assault victims negligence per se). In the fraud context, for example, "there are differences critical to First Amendment concerns between … individual cases and statutes that categorically ban" certain speech. *Madigan*, 538 U.S. at 617. Such "individualized adjudication" is "indispensable," *Florida Star*, 491 U.S. at 540, to give First Amendment freedoms adequate "breathing space," *NAACP* v. *Button*, 371 U.S. 415, 433 (1963).

Colorado's misplaced reliance on common-law actions mirrors Virginia's error in *Button*. There, Virginia "equate[d]" the challenged professional regulation with "common-law barratry, maintenance, and champerty." *Id.* at 438. But just as Virginia's law went far beyond those common-law claims by dropping the requirement of "[m]alicious intent," *id.* at 439–40, so too does Colorado's counseling restriction by omitting core malpractice elements, such as proving specific harm and causation.

This exposes Colorado's flawed reliance on *NIFLA* v. *Becerra*, 585 U.S. 755 (2018). Resp.Br.33–36. True, *NIFLA* acknowledged that "[l]ongstanding torts for professional malpractice … fall within the traditional purview of state regulation of professional conduct." 585 U.S. at 769 (cleaned up). But in the very same breath, it cautioned that a "State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights," citing Virginia's blunder in *Button*. *Ibid.* (cleaned up). By imposing a prophy-

lactic, viewpoint-based ban on counseling conversations, that's exactly what Colorado has done.

The State also tries to shoehorn its statute within *NIFLA*'s informed-consent discussion. Resp.Br.34–35. But Colorado's law isn't an informed-consent requirement; it's a flat ban on voluntary conversations. Beyond that, *NIFLA* tailored its discussion of informed consent to speech incidental to the conduct of a medical procedure. Using the words "procedure" or "operation" at least eight times in three paragraphs, *NIFLA* stressed that "informed consent to perform an operation is firmly entrenched in American tort law" because "a surgeon who performs an operation" without it "commits an assault." 585 U.S. at 769–70 (cleaned up). But unlike doctors performing procedures, Chiles's counseling includes no separate conduct allowing Colorado to invoke speech-incidental-to-conduct principles. Eugene.Volokh.Am.-Br.18–19.

Lastly, Colorado's slog through malpractice cases cites only three that involved mental-health professionals. Resp.Br.26. All three held only that the professionals owed duties to the plaintiffs. *Mower* v. *Baird*, 422 P.3d 837, 863 (Utah 2018) (duty to clients' parents); *Roberts* v. *Salmi*, 866 N.W.2d 460, 473 (Mich. Ct. App. 2014) (same); *Harris* v. *Kreutzer*, 624 S.E.2d 24, 32–33 (Va. 2006) (duty to patient seen during court-order examination). They did not consider any First Amendment argument or resolve the other malpractice elements that provide such critical safeguards for speech.

2. The restriction is unlike other licensing laws.

Colorado does not identify any licensing law that remotely resembles its counseling restriction. It cites no statute—past or current—that preemptively muzzles voluntary counseling based on viewpoint, let alone conversations discussing debated moral and religious issues.

The State cites only three cases—none involving counselors—that it says rejected free-speech claims to licensing laws. Resp.Br.32. All those cases enforced prohibitions on nonprofessionals practicing medicine without a license. Those laws are nothing like Colorado's counseling restriction: they establish objective competency requirements for *who* can practice; they don't dictate *what* licensed practitioners can say to clients. *E.g.*, *Brokamp* v. *James*, 66 F.4th 374, 394 (2d Cir. 2023) (upholding unauthorized-practice law because, unlike ban on "conversion therapy," it did not depend on anything "said between a counselor and a client"); *National Ass'n for Advancement of Psychoanalysis* v. *California Bd. of Psychology*, 228 F.3d 1043, 1055 (9th Cir. 2000) (upholding similar law because it did "not dictate what can be said between psychologists and patients").

Colorado's three cases are particularly unavailing. One *didn't even reach* the merits of the free-speech claim but dismissed it on collateral-estoppel grounds. *Blass* v. *Weigel*, 85 F. Supp. 775, 782–83 (D.N.J. 1949). The claims in another didn't "point[] out" the First Amendment. *Ghadiali* v. *Delaware State Med. Soc'y*, 48 F. Supp. 789, 792 (D. Del. 1943). And the last was a per curiam opinion rejecting a state free-speech claim in a brief paragraph with no

analysis. *State Bd. of Med. Exam'rs* v. *Kempkes*, 160 A. 827, 828 (N.J. Sup. Ct. 1932). These cases are irrelevant.

The State also cites general licensing provisions that ban counselors from violating "the generally accepted standards" of the profession, Colo. Rev. Stat. § 12-245-224(1)(g)(I), or "engag[ing] in professional or occupational misconduct," N.J. Stat. Ann. § 45:1-21(e). See Resp.Br.27, 1a–8a. But those general provisions are facially viewpoint- and content-neutral, and their application rarely turns on the views expressed in counseling sessions. In contrast, Colorado's counseling restriction targets specific goals and perspectives on profound moral questions and is triggered here by the views Chiles wants to express. Thus, the State's quest to find an analogue for its counseling restriction has come up empty.

3. Colorado's other historical and professional-speech arguments fail.

Colorado has not come close to showing that Chiles's voluntary conversations fall within a "heretofore unrecognized" category of unprotected speech. Contra Resp.Br.33–34 n.23. The State's cursory discussion of early American history references legal actions and licensing laws involving physicians and conduct—not counselors or speech—and the State concedes that even those licensing laws largely evaporated in the mid-1800s. Resp.Br.28–30 & n.22. Neither Colorado nor its amici have provided any analogous historical proscription on counseling; their alleged examples aren't even in the ballpark. See Med.Hist.Scholars.Am.Br.10–11, 18–19 (citing later-revoked ban on smallpox inoculation and malpractice actions against doctors for performing nonsterile

surgeries). Colorado's statute is foreign to our nation's history of "therapeutic freedom." Anthony.Joseph.-Am.Br.24; accord Ams.for.Prosperity.Am.Br.18–23.

Equally ineffective is Colorado's theme that Chiles's speech should be unprotected because she applies "expert knowledge" to patients in "individualized fiduciary relationship[s] to achieve outcomes that promote patient health." Resp.Br.37; accord Resp.Br.16, 23. *NIFLA* already refused to withdraw speech protection for professionals "who provide personalized services to clients … based on their expert knowledge and judgment or … within the confines of the professional relationship." 585 U.S. at 767 (cleaned up). And the Court emphasized "doctor-patient discourse" and the speech of "lawyers and … counselors," so it clearly had fiduciary relationships in mind. *Id.* at 771–72.

Turning the First Amendment on its head, Colorado would strip protection from speech that listeners desire most. Pac.Legal.Am.Br.6–14. Listeners have a cognizable interest in "'receiv[ing] information and ideas'" when there's "a concrete, specific connection to the speaker." *Murthy* v. *Missouri*, 603 U.S. 43, 75 (2024) (quoting *Kleindienst* v. *Mandel*, 408 U.S. 753, 762 (1972)). But Colorado would prevent clients from accessing sought-after conversations with their fiduciaries—speech deserving full constitutional protection. See *NIFLA*, 585 U.S. at 771–72.

C. Chiles's position preserves ample regulatory authority, while Colorado's position imperils free speech.

1. Ruling for Chiles will not "erode" state power to regulate counselors or other healthcare professionals.

Contra Resp.Br.41–42. Various First Amendment doctrines allow States to safeguard the public without sacrificing free speech. Pet.Br.26–33. Governments may broadly regulate conduct, proscribe unprotected speech, incidentally burden speech, regulate speech that's incidental to conduct, and restrict speech if strict scrutiny is satisfied. See *ibid.*

These doctrines disprove Colorado's boogeymen. Begin with counselor regulations. States can regulate counselors' conduct without violating the First Amendment. This allows Colorado to ban conduct-based aversive techniques prohibited under the challenged statute and "rebirthing" techniques that impose bodily "restraint" and risk "physical injury or death." Colo. Rev. Stat. § 12-245-224(1)(t)(IV). It also permits Colorado to regulate speech incidental to performing banned conduct. *NIFLA*, 585 U.S. 769–70.

Unauthorized-practice laws requiring counselors to be licensed are facially viewpoint- and content-neutral, and courts have widely upheld them against free-speech claims. See p.14, *supra* (citing cases). Similarly, prohibitions on counselors providing "demonstrably unnecessary" treatments or services beyond their "training, expertise, or competence," Resp.Br.41–42, are facially viewpoint- and content-neutral, and so long as States do not apply those laws to target speech because of its message, they don't tread on First Amendment freedoms.

Colorado suggests that States won't be able to punish counselors who negligently fail to provide information. Resp.Br.27–28. But when speakers fail to provide information because of negligence rather than an "object[ion] to the [information's] content," protections against compelled speech aren't impli-

cated. *Hurley* v. *Irish-American Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 580 (1995).

Turning to physicians, laws that ban them from claiming to "cure incurable disease," Resp.Br.27, are constitutionally permissible because they prohibit unprotected fraud, *Stevens*, 559 U.S. at 468–69. Also, legal obligations to "explain treatment options, risks, and benefits," Resp.Br.42, are "informed-consent requirement[s]" incidental to the conduct of performing "medical procedure[s]," examining patients, or administering drugs, *NIFLA*, 585 U.S. at 769–70. And physician speech necessary to gather and evaluate health information—such as questions "about a patient's medical history," Resp.Br.42—is likewise integral to performing procedures, conducting examinations, or providing medicine. So States can regulate that too.

Malpractice actions remain a critical tool to protect the public, including when physicians convey inaccurate instructions while treating physical conditions. *Skillings* v. *Allen*, 173 N.W. 663, 663 (Minn. 1919) (scarlet fever); *Edwards* v. *Lamb*, 45 A. 480, 480–81 (N.H. 1899) (treating wound). Relying on malpractice suits rather than broad, preemptive, speech-chilling bans strikes the appropriate balance, especially when forbidding voluntary conversations on unsettled moral issues. Counselors and clients who want these conversations can pursue them, while any clients harmed by counseling can pursue relief. Colorado's approach—prophylactically banning and chilling speech before it occurs—is odious to the First Amendment.

2. On the flip side, Colorado's approach would imperil professional speech and run roughshod over *NIFLA*'s protection for it.

Colorado argues that anything States characterize as professional standards of care in counseling or healthcare—even if it silences speech because of its viewpoint—"fall[s] into a First Amendment Free Zone." *Stevens*, 559 U.S. at 469 (cleaned up). According to Colorado, States could ban any view from counseling conversations or doctor-patient discussions by declaring the speech part of the professional's practice and the disfavored views "substandard." Resp.Br.1. That, in turn, would block people from accessing the counseling they seek and empower governments to remove "unpopular ideas or information" from professional discussions. *NIFLA*, 585 U.S. at 771. Colorado would turn licensing laws into playgrounds of censorship. Pet.Br.36–37.

Colorado dismisses this concern, saying its law advances the professional "consensus." Resp.Br.39 n.26. Chiles's deluge of amicus support disproves this. *E.g.*, Int'l.Found.for.Therapeutic.Choice.Am.Br.A-1–A-3 (listing associations that reject the alleged consensus); All.for.Therapeutic.Choice.Am.Br.4–34; Sexual.Orientation.Scholars.Am.Br.4–24; see also *Ake* v. *Oklahoma*, 470 U.S. 68, 81 (1985) (mental-health professionals "disagree widely and frequently"). Regardless, States can—and do—part ways with professional associations. And those associations aren't a failsafe because they often are driven by ideology, change their positions, rely on sloppy research techniques that cannot be replicated, and adopt positions beyond what data support—especially on gender dysphoria. *Skrmetti*, 145 S. Ct. at 1847–49 (Thomas, J., concurring); Pet.App.109a–11a; Family.-

Research.Council.Am.Br.4–28; Pet.Br.45–48. Colorado says no need to worry if society "trusts the experts," but history tells a different story. See *NIFLA*, 585 U.S. 771–72.

The fallout of Colorado's position will extend beyond mental-health and medical professionals. By arguing that factors like expert knowledge, individual consultation, and legal duties warrant reduced speech protection, Resp.Br.16, 23, 37, Colorado threatens to strip free-speech rights from "lawyers, accountants, [and] stock brokers"—even "athletic trainers[] and interior decorators" would be in peril. Const.Law.-Scholars.Am.Br.30–31. This would usher in the society-wide professional censorship that *NIFLA* rejected. 585 U.S. at 773.

D. Intermediate scrutiny is not the correct standard.

Invoking commercial-speech principles and its desire to "protect" the public from Chiles's views, Colorado requests "intermediate, not strict scrutiny." Resp.Br.43. But even commercial-speech doctrine rejects paternalistic desires to block state-disfavored information based on "a difference of opinion," "for what the government perceives to be [the public's] own good." *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 577, 579 (2011). Similarly, commercial-speech principles do not support an "exemption from the First Amendment's requirement of viewpoint neutrality." *Matal* v. *Tam*, 582 U.S. 218, 251 (2017) (Kennedy, J., concurring). Thus, the commercial-speech doctrine provides no haven for Colorado's paternalistic, viewpoint censorship.

Beyond that, two reasons why commercial speech receives reduced protection—its "greater objectivity and hardiness"—don't apply here. *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 n.24 (1976). Chiles's counseling conversations—unlike objective offers of "commercial transaction[s]," *ibid.*—are deeply personal dialogues about matters of moral and religious concern. And the widespread chilling of counselors subject to Colorado's (and similar) statutes—backed by loss-of-licensure threats—proves that professional speech is not robust enough to withstand censorship. Pet.Br.20–21 (collecting cases); Becket.Fund.Am.Br.13–14; Joy.Buchman.Am.Br.1–2; Erin.Brewer.Am.Br.16–24; Changed.Movement.Am.Br.8–9.

Pivoting, Colorado argues that *Free Speech Coalition, Inc.* v. *Paxton*, 145 S. Ct. 2291, 2306–11 (2025), requires intermediate scrutiny. Resp.Br.44. It does not. The statute challenged there, unlike Colorado's, did not "regulate the content of protected speech," and the burden on that speech was "only incidental." *Paxton*, 145 S. Ct. at 2309. Also, while applying strict scrutiny in *Paxton* would have "call[ed] into question the validity" of an entire class of laws (other age-verification requirements), *ibid.*, Colorado has not identified another viewpoint-based, prophylactic ban on counseling conversations that would be threatened by applying strict scrutiny here. Subjecting this historical outlier to strict scrutiny jeopardizes no other laws.

IV. Applying the counseling restriction to Chiles fails heightened scrutiny.

The parties agree that this Court may address the scrutiny analysis now. Colorado requests a remand

only if the Court "believes more recent evidence must be considered." Resp.Br.51 n.32. But more evidence isn't needed. The State made its record, and its own evidence *disproves* its case. Pet.Br.45–46. Indeed, another State recently conceded that its similar law is unconstitutional as applied to "talk therapy." *Raymond* v. *Virginia Dep't of Health Professions*, No. CL24006296-00, Consent Decree (Va. Cir. Ct. Henrico Cnty. June 4, 2025). Meanwhile, Chiles has endured years of irreparable harm, and many young people and their families remain desperate for counseling like hers. Colorado cannot justify limiting this access. The Court should say so.

A. Censoring Chiles does not advance compelling or important interests.

Colorado does not deny that (1) strict scrutiny requires it to "prove" Chiles's counseling conversations "*cause*" harm or (2) its own expert materials *concede* the State cannot make this showing. Pet.Br.45–46; J.A.65, 141, 154, 253–54, 370, 390–91; see also J.A.24–25 n.7 (citing a 2021 systematic review—Amy Przeworski et al., *A Systematic Review of the Efficacy, Harmful Effects, and Ethical Issues Related to Sexual Orientation Change Efforts*, 28 Clinical Psychology: Science and Practice 81, 95 (2021)—that confirms "there is virtually no research regarding potential harmful effects of attempts to alter gender identity"). Nor does Colorado dispute that many have experienced life-changing benefits from the counseling Chiles wants to provide. J.A.143, 253–54, 266–67, 271–76, 308, 376; Changed.Movement.Am.Br.7–11; Erin.Brewer.Am.Br.25–33. The State's silence on these points gives the game away.

Also sinking Colorado's case is its recognition, echoed by the panel below, that no study—prospective or retrospective—focuses on what's at issue here: voluntary counseling by licensed professionals with minors. Pet.Br.12–13; Pet.App.71a n.47, 119a–22a. Colorado responds that it would be unethical to do those studies prospectively. Resp.Br.47 n.28. But that (1) ignores the lack of both prospective and retrospective studies, Pet.App.122a n.26, (2) assumes such counseling has already been proven harmful (despite the State's own materials conceding insufficient research on harm, see p.22, *supra*), and (3) contradicts the APA's call for "[f]uture research … allow[ing] for conclusions about cause and effect to be confidently drawn," J.A.391; see Do.No.Harm.Am.Br.16–17. And in evaluating options for gender-dysphoric minors, it is unconvincing for Colorado to attack voluntary counseling as too dangerous to study when the State pays for—and mandates that employers cover—drugs and surgeries to alter those kids' bodies. Becket.-Fund.Am.Br.12 & n.12.

Worse, Colorado hasn't refuted that its law will harm some gender-dysphoric minors. Pet.Br.46–47. The State accepts that most children who experience gender dysphoria before puberty will "resolve those feelings either naturally or through counseling." Resp.Br.50 (quoting Pet.Br.6–7). But the counseling restriction explicitly allows support for "gender transition" while threatening the livelihood of counselors who help children realign their identity with their sex. See pp.4–5, *supra*. That incentivizes counselors to push children down the dangerous medicalized path. Pet.Br.15–17. That's the opposite of protecting kids.

Backed into a corner, Colorado charges Chiles with failing to challenge on appeal the district court's factual observations in its ends-means analysis. Resp.Br.46. That's not true. CA.10.Appellant.Br.6–7, 11–12, 40–47. Nor are those purported "factual findings," Resp.Br.46, insulated from review; they are "constitutional fact[s]" that require "independent," "de novo review," *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 508 n.27 (1984); see Do.No.-Harm.Am.Br.4–9. And though the Court need not consider studies outside the record to rule for Chiles, it can do so. *E.g.*, *United States* v. *Virginia*, 518 U.S. 515, 541–46 (1996) (stating facts based on extra-record materials).

The State's claimed support from the Cass Review gets it backward. Resp.Br.49. That review decries efforts—including "legislation"—that "equate" coercive "conversion therapy" with voluntary counseling discussing clients' "concerns and experiences" to "alleviate their distress." Hilary Cass, *Independent Review of Gender Identity Services for Children and Young People: Final Report* 150, 202 (2024). Those legislative efforts make counselors "fearful" and "prevent young people from getting the emotional support they deserve." *Ibid.* Yet by defining "conversion therapy" broadly, that's exactly what Colorado has done.

Finally, Colorado's treatment of the studies is one-sided. It touts studies that lump together different change efforts, use biased sample recruitment, rely on self-reporting, and ignore preexisting distress and events. All.for.Therapeutic.Choice.Am.Br.23–31; Sexual.Orientation.Scholars.Am.Br.7–15; Do.No.Harm.Am.Br.18–26. Elsewhere, the State's expert materials criticize many of these failings in studies Colorado dislikes. J.A.62 n.77, 65, 214–16, 222–24.

That casting of stones shatters the State's glass house and confirms that Colorado cannot satisfy heightened scrutiny.

B. Censoring Chiles lacks narrow tailoring.

The counseling restriction is not narrowly tailored because of its overinclusiveness, underinclusiveness, and failure to use less restrictive alternatives. Pet.Br.49–54. The State's response on overinclusiveness rests on its already-debunked statutory construction. Resp.Br.52. By shutting down voluntary counseling that seeks disfavored changes in behaviors, expressions, attractions, or identity, Colorado reaches too far. Pet.Br.49–51. And by banning counseling that has helped many, the State sabotages its interest in protecting youth. Pet.Br.46–47.

On underinclusivity, Colorado does not deny that professional associations "oppose[] as unsafe" other kinds of counseling that the State's laws have not targeted. Pet.Br.51. This reveals the State's "special hostility" toward the views that counselors like Chiles express and debunks Colorado's narrative that it only cares about stopping harmful counseling. *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 396 (1992).

And on less restrictive alternatives, Colorado does not respond to Chiles's arguments that the State failed to consider other options or that this failure dooms its case. Pet.Br.54. The State's plea instead is that nothing other than its counseling restriction will protect children. But many other States protect young people without laws like the counseling restriction. Iowa.Am.Br.1–2. Colorado can do the same, using the alternatives Chiles has offered. Pet.Br.53–54.

Addressing specific alternatives, the State argues that banning only conduct-based aversive therapy won't work because "*no* form of conversion therapy" is safe. Resp.Br.53. But Colorado admits it has no study focusing on the type of counseling Chiles provides. Resp.Br.47 n.28. So it cannot support its sweeping claim.

Colorado also insists that requiring informed consent from minors and their parents isn't an option. Resp.Br.52–53. But the State doesn't deny that Colorado minors (without their parents) can consent to counseling *affirming* LGBT identities, expressions, behaviors, and attractions, Pet.Br.52–53, and the State's evidence claims that gender-dysphoric minors (with their parents) can consent to puberty blockers, hormones, and surgeries, J.A.582–83; see also Becket.Fund.Am.Br.24–26 (Colorado allows minors and their parents to consent to "electroconvulsive therapy" and medical marijuana). Colorado's objection to informed consent rings hollow.

Ultimately, the State's scrutiny arguments are so weak they cannot withstand even intermediate scrutiny. Pet.Br.44–54.

* * *

Colorado has silenced caring counselors, deprived distressed families of the help they seek, and hurt young people who would benefit from those counselors' voices. See Erin.Lee.Am.Br.1–3; Joy.Buchman.Am.Br.2–5; Our.Duty.USA.Am.Br.21–28; Erin.-Brewer.Am.Br.24. The Court should end this senseless and harmful censorship.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

JAMES A. CAMPBELL
Counsel of Record
KRISTEN K. WAGGONER
ALLIANCE DEFENDING FREEDOM
44180 Riverside Pkwy
Lansdowne, VA 20176
(571) 707-4655
jcampbell@ADFlegal.org

BARRY K. ARRINGTON
ARRINGTON LAW FIRM
4195 Wadsworth Blvd.
Wheat Ridge, CO 80033
(303) 205-7870

SHAUN PEARMAN
PEARMAN LAW FIRM
4195 Wadsworth Blvd.
Wheat Ridge, CO 80033
(720) 343-8534

JOHN J. BURSCH
DAVID A. CORTMAN
ERIN M. HAWLEY
CAROLINE C. LINDSAY
ALLIANCE DEFENDING FREEDOM
440 First Street NW
Suite 600
Washington, DC 20001
(202) 393-8690

JONATHAN A. SCRUGGS
JACOB P. WARNER
ROGER G. BROOKS
BRYAN D. NEIHART
ALLIANCE DEFENDING FREEDOM
15100 N. 90th Street
Scottsdale, AZ 85260
(480) 444-0020

SEPTEMBER 2025