

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

- - - - -
KALEY CHILES,)
)
Petitioner,)
)
v.) No. 24-539
PATTY SALAZAR, IN HER OFFICIAL)
)
CAPACITY AS EXECUTIVE DIRECTOR OF)
)
THE COLORADO DEPARTMENT OF)
)
REGULATORY AGENCIES, ET AL.,)
)
Respondents.)
- - - - -

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1 P R O C E E D I N G S

2 (10:05 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument first this morning in Case 24-539,
5 Chiles versus Salazar.

6 Mr. Campbell.

7 ORAL ARGUMENT OF JAMES A. CAMPBELL

8 ON BEHALF OF THE PETITIONER

9 MR. CAMPBELL: Thank you, Mr. Chief
10 Justice, and may it please the Court:
11 Colorado forbids counselors like Kaley
12 Chiles from helping minors pursue
13 state-disfavored goals on issues of gender and
14 sexuality. This law prophylactically bans
15 voluntary conversations, censoring widely held
16 views on debated moral, religious, and
17 scientific questions. Aside from this law and
18 recent ones like it, Colorado hasn't identified
19 any similar viewpoint-based bans on counseling.

20 These laws are historic outliers. In
21 NIFLA, this Court protected professional
22 speech, highlighting the dangers of censoring
23 private conversations between professionals and
24 their clients, and this Court rejected by name
25 two lower court decisions upholding laws like

1 Colorado's. But the Tenth Circuit gutted
2 NIFLA's speech protection.

3 Colorado insists that its law is
4 subject only to rational basis review, yet that
5 would allow states to silence all kinds of
6 speech in the counseling room, such as
7 disfavored views on divorce or abortion. If
8 heightened scrutiny doesn't apply, states can
9 transform counselors into mouthpieces for the
10 government.

11 Here, Colorado can't satisfy any level
12 of heightened scrutiny. It didn't seriously
13 consider any less restrictive alternatives.
14 And Colorado can't prove harm because it hasn't
15 cited a study focusing on what's at issue here:
16 voluntary speech between a licensed
17 professional and a minor. Nor can Colorado
18 deny that many people have experienced
19 life-changing benefits from the kind of
20 counseling that Ms. Chiles wants to provide.

21 The First Amendment doesn't permit
22 Colorado's censorship.

23 I welcome the Court's questions.

24 JUSTICE THOMAS: In its introduction
25 of its brief, Colorado says that the only thing

1 that the law prohibits therapists from doing is
2 performing a treatment that seeks the
3 predetermined outcome of changing a minor's
4 sexual orientation or gender identity because
5 the treatment is unsafe and ineffective.

6 One, is this what Colorado argued
7 below? And, two, is that your reading of the
8 Colorado statute?

9 MR. CAMPBELL: Colorado took a
10 different position below in its motion to
11 dismiss, specifically Footnote 3, and on page
12 10 of its opposition to the motion for
13 preliminary injunction, it recognized that
14 efforts to change unwanted same-sex behavior or
15 to reduce unwanted same-sex attraction would
16 indeed violate the law. And that's contrary to
17 the position it's taking now.

18 I do think, if we look at the plain
19 language of the statute, we will find that what
20 Ms. Chiles alleges in this case falls squarely
21 within it. The statute says that there can be
22 no efforts to change sexual orientation or
23 gender identity, including efforts to change
24 behavior, gender expression, or attraction. On
25 page 207 of the Petition Appendix, Ms. Chiles

1 alleges in her verified complaint that
2 sometimes she helps clients who want to reduce
3 unwanted same-sex attraction, change unwanted
4 same-sex behavior, and to resolve dysphoria
5 that they're experiencing with their bodies.

6 JUSTICE SOTOMAYOR: Counsel --

7 MR. CAMPBELL: All of that --

8 JUSTICE SOTOMAYOR: -- you -- you are
9 right that that fits the definition of the law,
10 but we have been very clear in Susan B. Anthony
11 that there has to be a sufficiently imminent
12 and credible threat of prosecution. We've said
13 merely having a law on the books is not enough.
14 A chilling effect doesn't exist.

15 This is an unusual case because we
16 have basically six years of no enforcement of
17 this law, three before this lawsuit, three
18 since, and we have the entity charged with
19 administering the law saying we're not going to
20 apply it to your kind of -- of therapy.

21 So how does that fit into being an
22 imminent threat of prosecution? Yes, you have
23 an argument. They've disavowed it. How does
24 that give you standing?

25 MR. CAMPBELL: I don't believe that

1 the state has disavowed enforcement. The state
2 is relying on a misreading of the allegations
3 in this claim -- case to say that there's no
4 standing, but they have not disavowed
5 enforcement. If Colorado truly believed that
6 it wouldn't enforce the law and that Ms. Chiles
7 wasn't --

8 JUSTICE SOTOMAYOR: All right. So --
9 so tell me what kind of disavowal you would
10 need to find no standing. Would it be
11 sufficient to say that consent, which is what
12 your complaint claimed, that your therapy is
13 consensual talk therapy where you would seek to
14 change the behavior of a child only if that's
15 what they want -- correct? Am I articulating
16 it correctly?

17 MR. CAMPBELL: That is certainly an
18 aspect of what Ms. Chiles would like --

19 JUSTICE SOTOMAYOR: No, I don't want
20 an aspect. Define your talk therapy. And
21 then, when they get up, they can tell us
22 whether they're disavowing any enforcement of
23 that kind of talk therapy.

24 MR. CAMPBELL: I would -- I would go
25 back to what I referenced before, which is

1 Petition Appendix page 207 and --

2 JUSTICE SOTOMAYOR: Counselor, please
3 answer my question.

4 MR. CAMPBELL: I'm trying to answer
5 your question.

6 JUSTICE SOTOMAYOR: What is your talk
7 therapy and -- that you want them to say they
8 will not enforce it against?

9 MR. CAMPBELL: Ms. Chiles helps
10 clients when their goals are to resolve gender
11 dysphoria by getting comfortable with their
12 body and realigning their identity with their
13 sex. She also helps them if they're
14 experiencing unwanted same-sex attraction, if
15 that's their goal to reduce it. And she helps
16 them deal with issues of unwanted same-sex
17 behavior.

18 That's the kind of counseling that
19 we've alleged in the complaint. And, here,
20 there's a credible --

21 JUSTICE SOTOMAYOR: Would any of that
22 include what's talked about as aversion
23 therapy, which is encouraging them to vomit,
24 encouraging them to go into electric shock
25 treatment, encouraging -- the typical aversion

1 therapy?

2 MR. CAMPBELL: No. Ms. Chiles does
3 not do any of that. All she does is speech in
4 her -- in her counseling.

5 JUSTICE SOTOMAYOR: And does that --
6 so what behavior does that include? Does that
7 include date other people of your --

8 MR. CAMPBELL: No. She --

9 JUSTICE SOTOMAYOR: -- of the opposite
10 sex?

11 MR. CAMPBELL: No, she does not --
12 that's not the kind of counseling she engages
13 in. She engages in a discussion where her and
14 the clients explore via concepts of identity,
15 behavior --

16 JUSTICE SOTOMAYOR: So go back to my
17 last part of my question. If they disavow
18 enforcement of that kind of talk therapy, do
19 you have standing in this case?

20 MR. CAMPBELL: We still have standing
21 in this case.

22 Over the last few weeks, there have
23 been anonymous complaints filed against my
24 client, and those complaints are now being
25 investigated by the State of Colorado for

1 allegations that she's violating the very law
2 that we're challenging.

3 So we had a credible threat of
4 enforcement before. Because there's no
5 disavowal, anyone can file a complaint at any
6 time, which this Court recognized bolsters a
7 credible threat of enforcement in SBA List.
8 But now that the State is actively
9 investigating our client for supposedly
10 violating this law --

11 JUSTICE SOTOMAYOR: Well, they
12 haven't -- okay. We're -- we're -- we're in a
13 vicious cycle because, if they get up here and
14 say they're disavowing, then they won't be
15 investigating.

16 MR. CAMPBELL: But, regardless, if
17 they disavow, it's only based on not only a
18 misreading of the statute but also a misreading
19 of the allegations in the complaint.

20 As we pointed out in our reply brief,
21 there are often uses of portions of quotes, and
22 the State of Colorado is ignoring the rest of
23 the sentences in the allegations.

24 Once those are read, just as the lower
25 courts found, there is standing in this case.

1 CHIEF JUSTICE ROBERTS: Counsel --

2 JUSTICE GORSUCH: Counsel --

3 CHIEF JUSTICE ROBERTS: -- how does
4 your position change if, in addition to the
5 counseling, there is more what I'll call
6 medical treatment, whether it's medications,
7 shots, whatever? Does that alter your
8 position?

9 MR. CAMPBELL: It certainly does alter
10 our position.

11 So, as this Court talked about in
12 NIFLA, when speech is incidental to regulated
13 conduct, then that changes the analysis. And
14 so, if we were in the medical context and there
15 was something like administering drugs,
16 performing procedures, conducting examinations,
17 that would take it outside of the arguments
18 we're making into a different --

19 JUSTICE KAGAN: How about if it's
20 just both? In other words, the speech isn't
21 incidental to giving somebody a prescription
22 for medicine, it's -- it's -- it's speech and
23 it's giving somebody a prescription for
24 medicine?

25 MR. CAMPBELL: It would depend on how

1 closely connected they are. So, if the speech
2 is describing how to take the medication, then
3 that would be incidental.

4 JUSTICE KAGAN: Right. But -- but,
5 if -- if the speech is the speech that your
6 client engages in and, in addition, she engages
7 in something that's non-speech, would we look
8 at it separately, or would we look at it as a
9 package?

10 MR. CAMPBELL: If they're sufficiently
11 disconnected, I think you would look at them
12 separately.

13 And my client doesn't have the
14 authority to prescribe drugs because she's
15 not a psychiatrist.

16 And the State of Colorado recognizes
17 that there's a very big difference because it
18 treats psychiatrists under Section 240 of the
19 code and it treats counselors under 245, and
20 that's a recognition that it's just different
21 regulation when medicine is at issue.

22 In this case, Colorado is violating
23 the promise that this Court laid out in NIFLA,
24 which is that states should not manipulate
25 private conversations between licensed

1 professionals and clients.

2 Beyond that --

3 JUSTICE BARRETT: Counsel, how would
4 this apply to a malpractice suit? Let's
5 say that we think that this is content
6 discrimination and it triggers strict scrutiny.

7 Would your client then be subject to a
8 malpractice suit?

9 MR. CAMPBELL: She would be subject
10 to a malpractice suit, but she would have the
11 protection of the rigorous elements of
12 malpractice. She would be able to show that
13 she's not violating the standard of care,
14 that she would be able to establish what the
15 standard of care is. She would be able to show
16 there's no harm and there's no causation.

17 JUSTICE BARRETT: Well, I assume there
18 would be a battle about the standard of care
19 with, you know, competing experts, competing
20 medical associations. Colorado has pointed to
21 some professional associations in this case.

22 Would the First Amendment have
23 anything to say about that? I mean, would it
24 be strict scrutiny? I mean, it's -- it's the
25 elements of a tort. It's a different thing.

1 We didn't get to this question in Snyder.

2 MR. CAMPBELL: As a general matter,
3 the elements of a malpractice suit are
4 sufficient to protect freedom of speech.

5 Now I'm not willing to foreclose
6 the fact that there might not be an argument
7 someone might make in a particular malpractice
8 case, but for our purposes, the elements of
9 malpractice are generally sufficient to protect
10 free speech.

11 And in this case, the Court doesn't
12 need to resolve whether there might be
13 additional protection because the way that
14 Colorado is using malpractice is as an analogue
15 to what it's doing here. But it's nothing like
16 the law that we're challenging.

17 JUSTICE BARRETT: Well, I -- I -- I
18 wasn't actually asking about the analogue
19 argument. I was just asking it independently.
20 So --

21 JUSTICE JACKSON: Can I just ask you
22 to --

23 JUSTICE KAGAN: I took you to say on
24 page 18 of your reply brief that, in fact, a
25 malpractice suit could go forward and,

1 completely separate from the First Amendment,
2 that what you need to prove a malpractice suit
3 provides sufficient protection.

4 Is -- is that a -- a -- a --

5 MR. CAMPBELL: That --

6 JUSTICE KAGAN: -- a right reading of
7 what you said?

8 MR. CAMPBELL: It is a right reading,
9 although we said that those elements are
10 generally sufficient. So I won't -- I don't
11 want to foreclose that in a particular case
12 there might be an argument, but, generally
13 speaking, a malpractice action subject to the
14 rigorous elements would be sufficient to
15 protect free speech.

16 JUSTICE JACKSON: Can I get you to
17 address whether or not the provision of therapy
18 and the kind of therapy that your client
19 practices is a medical treatment?

20 I mean, I understood the sort of basis
21 of the Tenth Circuit's view to be that she's a
22 licensed professional who is providing medical
23 treatment, but your answers to the Chief
24 Justice and Justice Kagan suggested that you're
25 putting the practice of medicine on one side

1 and her therapy on another.

2 So I'm just unclear as to whether
3 or not you're categorizing her therapy as a
4 medical treatment.

5 MR. CAMPBELL: I -- I don't believe
6 that we are categorizing that -- it that way,
7 but I don't think it matters because the
8 First Amendment depends on the difference
9 between speech and conduct, not on the
10 difference between treatment and non-treatment.

11 So, in my response to the Chief
12 Justice --

13 JUSTICE JACKSON: But I guess the
14 argument -- the argument that the Tenth Circuit
15 seemed to find persuasive was that if you are
16 in the world of medical treatment, you are
17 regulating conduct, that the medical treatment
18 itself is a -- an activity that is being
19 licensed and that is being performed and that
20 it really isn't speech, that speech is the tool
21 that is being used, just like in other medical
22 treatments you have scalpels, you have, you
23 know, tools that medical professionals use to
24 accomplish certain goals and to provide
25 treatment.

1 And so, in that sense, I think their
2 argument was that speech is incidental to the
3 provision of this medical treatment. So I
4 guess we need to understand whether her therapy
5 qualifies as medical treatment.

6 MR. CAMPBELL: The question is whether
7 her speech is incidental to conduct. That's
8 what the Court said in NIFLA. It said that
9 if there's professional conduct, then speech
10 that's incidental to that could be regulated.

11 But, here --

12 JUSTICE JACKSON: So treatment is not
13 conduct in your view, medical treatment?

14 MR. CAMPBELL: If the -- if the
15 treatment consists only of speech, then it
16 doesn't trigger the speech-incidental-to-
17 conduct doctrine. And, here, we're just in
18 First Amendment land, where there is full,
19 robust protection.

20 That's why I answered the Chief
21 Justice's questions differently and
22 acknowledged that if there was conduct in the
23 practice of medicine going on, it changes the
24 analysis.

25 JUSTICE JACKSON: But I guess it seems

1 very odd that you could have two scenarios
2 where you have two licensed professionals
3 both attempting to provide treatment to an
4 individual, say, for the same issue, that,
5 you know, the person says: I'd like to live
6 consistently with my biological sex, I feel
7 that I -- I'm not doing that, I'd like your
8 help. Medical Professional A treats that
9 "condition" with medication. Medical
10 Professional B treats that condition with talk
11 therapy.

12 And I guess, under your theory, those
13 two scenarios are sufficiently different from
14 a constitutional perspective that one could be
15 allowed and the other not?

16 MR. CAMPBELL: I think that's
17 potentially correct because the First Amendment
18 would apply to the speech-only therapy.

19 JUSTICE JACKSON: Just because words
20 are being used to accomplish the therapy in one
21 scenario and not the other?

22 MR. CAMPBELL: No. No, because only
23 words are being used in the one scenario.

24 Again, if there's a combination of
25 words and conduct, I think that takes us into a

1 different -- into a different realm.

2 But one of the things that's so
3 problematic about Colorado's law is that it
4 undermines the well-being of kids that are
5 struggling with gender dysphoria.

6 And so Colorado accepts that up to
7 90 percent of kids who struggle with that
8 before puberty will work their way through it
9 and realign their identity with their sex. But
10 this law says that if any of those children go
11 to a licensed professional and say: I would
12 like help realigning my identity with my sex,
13 that licensed professional has to decline to
14 help them.

15 On the other hand --

16 JUSTICE KAGAN: Does the same analysis
17 apply if the law is not this law? I think
18 Colorado has something like the law I'm going
19 to describe, but I'm not trying to describe
20 Colorado's law. Just take it as my
21 hypothetical.

22 If instead of this law, which really
23 focuses on the kinds of treatment it is and the
24 kinds of goals everybody has, it just says
25 you're subject to penalties if you do any

1 medical treatment, and that includes talk
2 therapy, that deviates from the standard of
3 care, and then it goes on to say something
4 about how we find the standard of care, and
5 suppose that sort of law was applied to your
6 client.

7 Is it the same analysis or a different
8 one?

9 MR. CAMPBELL: I think it's a similar
10 analysis. So, if a law like that were applied
11 against my client and all she did was speak,
12 then I believe that the strict scrutiny
13 analysis would apply and the government would
14 have to satisfy it. But the underlying
15 analysis would change somewhat too because my
16 client, under those circumstances, would be
17 able to establish that the kind of counseling
18 she provides is consistent with the standard of
19 care versus, under the current law, she's not
20 able to make that showing.

21 JUSTICE KAGAN: Right. So she is able
22 to make that showing under my hypothetical law,
23 but -- but you're saying still that -- that she
24 would have a kind of separate argument that
25 there needed to be strict scrutiny applied?

1 MR. CAMPBELL: She would. She -- she
2 would be able to argue that, and that would
3 require the other side to show that what she's
4 doing is causing harm because that ties into
5 what this Court's recognized in cases like
6 Brown under strict scrutiny.

7 CHIEF JUSTICE ROBERTS: Thank you,
8 counsel.

9 Justice Thomas?

10 Justice Alito?

11 Justice Sotomayor?

12 JUSTICE SOTOMAYOR: Counselor, in your
13 introduction, you appeared to be applying
14 strict scrutiny, and one of the factors you
15 said is the state has not pointed to a study
16 that shows that talk therapy is harmful.

17 I don't believe strict scrutiny always
18 requires a study. I mean, look, give me --
19 I'll give you a hypothetical. A state tells
20 dietitians don't encourage anorexic patients to
21 engage in more restrictive eating, all right?

22 I don't think the state has to provide
23 a study to show that that advice is not sound.
24 Do you agree?

25 MR. CAMPBELL: Justice Sotomayor, I

1 think that might be true, but that's because
2 that kind of hypothetical is very different
3 than what we have here. In that --

4 JUSTICE SOTOMAYOR: So explain the
5 difference.

6 MR. CAMPBELL: In that hypothetical,
7 the counselor or dietitian is telling the
8 client to do something that directly harms
9 their body. In this case, Ms. Chiles is trying
10 to help gender-dysphoric kids avoid --

11 JUSTICE SOTOMAYOR: That -- that --
12 that begs -- that begs the question, because
13 there are studies that say that this advice
14 does harm the child -- the people emotionally
15 and physically.

16 But putting that aside, you agree then
17 that you don't always need a study? An
18 absolute statement like that misstates the law?

19 MR. CAMPBELL: No. What I -- what I
20 agree is that if what the state is getting at
21 is a statement by a professional that's telling
22 someone to harm their body, that that's a
23 different category.

24 But, if we're in a situation like
25 this, where there is debated science, where the

1 counselor is trying to help the child achieve
2 their goals, then absolutely the standard this
3 Court set in Brown would apply, which requires
4 a showing of causation.

5 JUSTICE SOTOMAYOR: So there's only
6 one circuit that has applied strict scrutiny to
7 this kind of talk therapy. It's the Eleventh.
8 The others, the Ninth and the Third, have not.

9 You seem to be encouraging us to apply
10 strict scrutiny here, and the question I
11 have -- we're not a court of first review on
12 this issue -- why don't we send it back? I'm
13 assuming that the Third and the Ninth didn't
14 apply strict scrutiny because they thought
15 they'd have a problem with applying it to this
16 law. Why should we be do -- breaking our
17 normal pattern in this case?

18 MR. CAMPBELL: Because there is
19 ongoing harm every day. Ms. Chiles is being
20 silenced, and the kids and families who want
21 her help are unable to access it.

22 It's very similar to what this Court
23 did last term in the Mahmoud case, where the
24 two lower courts had decided the case on
25 rational basis review, and when this Court

1 decided that strict scrutiny was the proper
2 analysis --

3 JUSTICE SOTOMAYOR: Remember, I
4 dissented.

5 (Laughter.)

6 MR. CAMPBELL: I do remember that,
7 Justice Sotomayor.

8 CHIEF JUSTICE ROBERTS: Justice Kagan?

9 JUSTICE KAGAN: Do you think if -- if
10 there were the exact opposite kind of law -- so
11 this is a therapist that, consistent with the
12 child's goals, is trying to get the child, you
13 know, to accept a gay identity or a trans
14 identity, so it's -- it's exactly the same
15 statute, but it's just flipped around, same
16 argument?

17 MR. CAMPBELL: Strict scrutiny would
18 apply to that, unless there was conduct
19 involved. If there was conduct and that
20 conduct was unlawful, then the speech-integral-
21 to-unlawful-conduct doctrine would apply. But.
22 If it's only speech, then yes, same.

23 JUSTICE KAGAN: Right. I'm assuming
24 that your caveat, unless there was conduct
25 involved, applies to your case as well, right?

1 That that applies symmetrically to both, unless
2 there was conduct involved that was of that
3 kind?

4 MR. CAMPBELL: That's correct.

5 JUSTICE KAGAN: Okay. So -- so
6 symmetrical?

7 MR. CAMPBELL: Correct.

8 JUSTICE KAGAN: Okay. What do you
9 think -- suppose -- I mean, you argue in your
10 briefs that this is -- this law is a -- is --
11 has viewpoint bias in it. And suppose that
12 that was accepted.

13 Do you think that we should stop
14 there? Is there any reason at that point to go
15 on to say how, in this particular context of
16 medical treatment, we would treat a
17 content-based law that is not viewpoint-based?

18 MR. CAMPBELL: I don't think the Court
19 needs to address that if it finds that this is
20 viewpoint-based discrimination. It reminds me
21 of the distinction between this Court's
22 decision -- decision in *Brunetti* and then in
23 *Vidal*. In *Brunetti*, there was viewpoint
24 discrimination, and then, when just content
25 discrimination was at issue, the Court treated

1 it differently.

2 JUSTICE KAGAN: Thank you.

3 CHIEF JUSTICE ROBERTS: Justice
4 Gorsuch?

5 JUSTICE GORSUCH: Just quickly back to
6 the late-breaking standing argument, which is
7 in I think Footnote 18 on page 23 of Colorado's
8 brief, and what your client intends to do, as I
9 read the verified complaint, she would,
10 consistent with the patient's wishes, explore
11 changes to not just attraction, behaviors, and
12 expressions but also identity, is that correct?

13 MR. CAMPBELL: That's correct.

14 JUSTICE GORSUCH: Okay. So, even
15 under Colorado's new reading of the statute,
16 which is only about identity and orientation
17 and not about those other things, even though
18 the statute includes them, even under
19 Colorado's understanding, your client would
20 still wish to counsel people in a way that
21 contravenes Colorado's present understanding of
22 the statute?

23 MR. CAMPBELL: That's correct.

24 JUSTICE GORSUCH: Okay. Thank you.

25 CHIEF JUSTICE ROBERTS: Justice

1 Kavanaugh?

2 Justice Barrett?

3 Justice Jackson?

4 JUSTICE JACKSON: So, as I understand
5 it, the First Amendment protects the
6 communication of messages, expression, et
7 cetera. Am I right about that? I mean, you're
8 communicating and that's what the First
9 Amendment is about?

10 MR. CAMPBELL: Correct.

11 JUSTICE JACKSON: So I guess I'm still
12 just struggling with whether a therapist who is
13 acting in their professional capacity to help
14 someone achieve their goals is really
15 expressing the kind of message or expressing a
16 message for First Amendment purposes. I mean,
17 I understand if Ms. Chiles here were writing an
18 article about conversion therapy or writing --
19 or -- or -- or giving a speech about it.

20 But it's just a little puzzling to me
21 that she would stand in a different position
22 than a medical professional who has exactly the
23 same goals, exactly the same interests, and
24 would just be prescribing medication for that
25 rather than her talking with the client.

1 MR. CAMPBELL: I -- I don't think that
2 they would have exactly the same goals --

3 JUSTICE JACKSON: Why not?

4 MR. CAMPBELL: -- because the --
5 because this involves a conversation.

6 JUSTICE JACKSON: Yes.

7 MR. CAMPBELL: There is a back and
8 forth -- so this Court has recognized many
9 times in cases like McCullen that a one-on-one
10 conversation is a form of speech. And that's
11 exactly what's going on with Ms. Chiles and her
12 clients.

13 So, when she engages in those
14 conversations, she's encouraging them to
15 achieve their goals. She's discussing concepts
16 of identity and behavior and attractions and
17 how they fit together. This is an ongoing
18 active dialogue where she's helping them to
19 explore their goals, and that absolutely has to
20 be protected by the First Amendment.

21 JUSTICE JACKSON: And -- and you're
22 saying a similar kind of exchange doesn't occur
23 with a provision of other medical services that
24 don't involve talking directly?

25 MR. CAMPBELL: It -- it certainly

1 might occur in other instances, but oftentimes
2 there's conduct connected to it. That's what's
3 different about the medical context.

4 JUSTICE JACKSON: And -- and, I'm
5 sorry, can I just ask you again what Justice
6 Sotomayor asked, which is why wouldn't we send
7 this back if you're right about strict
8 scrutiny --

9 MR. CAMPBELL: Because --

10 JUSTICE JACKSON: -- and let the lower
11 courts apply that standard?

12 MR. CAMPBELL: Because there is
13 irreparable harm going on right now.
14 Ms. Chiles is being silenced. The kids and the
15 families who want help -- this kind of help
16 that she'll offer are being left without any
17 support.

18 JUSTICE JACKSON: No, I understand,
19 but -- but strict scrutiny is not necessarily
20 fatal, right? We have cases in which strict
21 scrutiny was applied and it was surmounted. So
22 why wouldn't we give the lower courts a chance
23 to evaluate whether there's sufficient evidence
24 here for the state to actually go forward with
25 this regulation?

1 MR. CAMPBELL: Because we were arguing
2 for strict scrutiny in the trial court, so
3 Colorado knew that was our position and they
4 had an opportunity to make their record.

5 But the evidence that they submitted
6 and the expert materials undermine their case.
7 The expert materials admit that they don't have
8 any study addressing precisely what's at
9 issue -- or specifically focusing on precisely
10 what's at issue here, which is voluntary
11 conversations between a licensed professional
12 and a minor.

13 Their -- their expert materials also
14 recognize that they cannot prove harm. We've
15 catalogued all the places in their expert
16 materials on page 22 of our reply brief where
17 they concede that.

18 And, lastly, their own expert
19 materials recognize that many people have
20 experienced life-changing benefits from this
21 kind of counseling.

22 Again, the APA's own report talks
23 about how this helps people because they're
24 able to align their life with their religion.
25 They're able to find deeper relationships with

1 God. They're enabled -- they're able to
2 find --

3 JUSTICE JACKSON: Doesn't Colorado
4 have some evidence that conversion therapy more
5 broadly is harmful?

6 MR. CAMPBELL: It -- it --

7 JUSTICE JACKSON: I mean, I think
8 there are, like, 25 states or something who
9 have similar laws, so someone has some evidence
10 related to the harmfulness of this activity,
11 right?

12 MR. CAMPBELL: Colorado certainly
13 cites studies, but those studies suffer from
14 significant flaws. The main flaw in all of
15 them is that they lump together dissimilar
16 approaches. They treat voluntary conversations
17 the same as shock therapy.

18 JUSTICE JACKSON: Thank you.

19 CHIEF JUSTICE ROBERTS: Thank you,
20 counsel.

21 MR. CAMPBELL: Thank you.

22 CHIEF JUSTICE ROBERTS: Mr. Mooppan.

23

24

25

1 ORAL ARGUMENT OF HASHIM M. MOOPPAN
2 FOR THE UNITED STATES, AS AMICUS CURIAE,
3 SUPPORTING THE PETITIONER

4 MR. MOOPPAN: Mr. Chief Justice, and
5 may it please the Court:

6 Colorado's law is subject to strict
7 scrutiny under the First Amendment for three
8 straightforward reasons. First, the law
9 restricts speech based on content and
10 viewpoint. It prohibits Petitioner from
11 counseling minor clients to help change certain
12 feelings and behaviors. It is thus subject to
13 strict scrutiny, unless an exception applies.

14 Second, the law falls outside the
15 exception for regulations of conduct that only
16 incidentally burden speech. There's no
17 separate non-speech conduct being regulated
18 here. And professional medical treatment is
19 not exempt from the ordinary First Amendment
20 rule that strict scrutiny applies even to laws
21 that generally regulate conduct where those
22 laws are triggered by the communicative content
23 of speech.

24 Third, the law falls outside any
25 historically grounded exception. There is no

1 longstanding tradition of states imposing this
2 type of categorical prior restraint on the
3 speech of therapists.

4 I welcome this Court's questions.

5 JUSTICE THOMAS: In the context of
6 strict scrutiny, how strong evidence would
7 Colorado have to show in order to prevail?

8 MR. MOOPPAN: Well, in this case, Your
9 Honor, Colorado has no evidence, so I don't --
10 I think it's pretty --

11 JUSTICE THOMAS: I understand that,
12 but, hypothetically, how much would -- what
13 would they have to show?

14 MR. MOOPPAN: I think, for this sort
15 of sweeping categorical prior restraint, I
16 think they would have to have very strong
17 evidence that there was direct harm to
18 patients, no countervailing benefit, along
19 those lines before we could even talk about
20 whether they could meet the high standards of
21 strict scrutiny.

22 But, again, this case is a much easier
23 case because I think counsel will have to
24 concede that if you look at the preliminary
25 injunction record, both the three pieces of

1 evidence that they put in, the Glassgold
2 report, the 2009 APA report, and the 2015
3 SAMHSA report and all the materials cited
4 therein, none of those, none of them consider
5 the type of speech at issue here, speech by a
6 licensed therapist involving non-aversive
7 methods to minors. They just don't have any
8 evidence of that. So, certainly, that's not
9 enough under strict scrutiny.

10 CHIEF JUSTICE ROBERTS: Does your
11 analysis -- how does your analysis change if
12 there is an aspect of -- of -- of conduct
13 involved?

14 MR. MOOPPAN: So I have the same
15 answer, Your Honor. I think that if there is
16 conduct, then the question would be, is the
17 restriction of speech incidental to the conduct
18 or -- the regulation of the conduct or not?

19 And this Court hasn't drawn a
20 particularly clear line about when speech is
21 close enough to conduct to be viewed as
22 incidental, but, here, again, this is an easy
23 case because there is no conduct. There -- all
24 that is happening here is speech.

25 Now there have been a lot of questions

1 about, well, what if it's medical treatment or
2 what if you had a general rule about standard
3 of care?

4 And this Court's cases and cases like
5 Holder and Cohen make clear that that is still
6 speech. In Cohen, for example, breach of peace
7 was a violation of the law. You could breach
8 the peace in the courthouse in -- in California
9 in a lot of different ways.

10 JUSTICE JACKSON: Right. But neither
11 Cohen nor Holder involved medical treatment,
12 right?

13 MR. MOOPPAN: No. So that's true.
14 But that's just a label. And this Court has
15 also said that labels don't matter in cases
16 like Bunin. There's nothing conceptually
17 different.

18 Take Holder, for example. In Holder,
19 there was a statute that said don't materially
20 support terrorists. You can materially support
21 terrorists in lots of different ways. You
22 could give them money. You could give them
23 guns. Or, as in Holder, you could give them
24 advice about how to commit their acts.

25 JUSTICE JACKSON: I understand. But

1 there are -- you know, when you look at the
2 Tenth Circuit's opinion, they talk about how
3 there is a long historical tradition of
4 regulation of medical treatment as a particular
5 thing --

6 MR. MOOPPAN: Right. But --

7 JUSTICE JACKSON: -- the provision of
8 these kinds of therapies.

9 MR. MOOPPAN: Right. And the problem
10 is the level of generality. There was also a
11 long historical tradition in this country of
12 regulating contempt of court and breach of
13 peace.

14 But what there is not a long history
15 and tradition in this country of doing is
16 regulating contempt of court and breach of
17 peace when it's purely based on speech.

18 And if you look at the history that
19 the other side cites here, what is totally
20 absent is the regulation of medical treatment
21 that consists solely of speech --

22 JUSTICE JACKSON: So does the federal
23 government agree with Justice Kagan's flip-side
24 scenario? So it -- it doesn't matter to you
25 that we're talking about Mrs. Chiles's forms --

1 form of therapy versus gender-affirming care
2 form of therapy?

3 MR. MOOPPAN: We do. And, in fact, we
4 think that's a strong reason in support of our
5 position. Colorado's position, I think,
6 inevitably leads to the conclusion that all the
7 states in Skrmetti could have not only banned
8 things like cross-sex hormones and prescription
9 blockers -- or puberty blockers but also
10 therapy, talk therapy, along the same lines.

11 Even starker, in the 1970s, it was the
12 standard of care, professional consensus, that
13 being gay was a mental illness. So, on their
14 position, a state in the 1970s could have made
15 it illegal for a therapist in the state to
16 counsel a gay patient that they weren't
17 mentally ill.

18 JUSTICE BARRETT: Can you --

19 MR. MOOPPAN: That just cannot be
20 right under the First Amendment.

21 JUSTICE BARRETT: Can you address
22 Justice Sotomayor's question from before about
23 whether we should apply strict scrutiny,
24 assuming we think it applies here, or remand it
25 to the Tenth Circuit to do so? What does the

1 United States want to say about that?

2 MR. MOOPPAN: So you could remand, but
3 we think, like in Mahmoud, this is a case where
4 it would be probably fairly appropriate to
5 actually just resolve the case here.

6 JUSTICE BARRETT: Why?

7 MR. MOOPPAN: And for two reasons.
8 One is there is ongoing irreparable harm to the
9 Petitioner because of the restriction of their
10 speech. And the second is the evidentiary
11 record here is totally clear that they can't
12 satisfy strict scrutiny.

13 If you look at the record on what's in
14 the preliminary injunction record, there is
15 just no evidence that this type of speech, not
16 aversive therapy, not speech by non-licensed
17 professionals, not speech to adults but speech
18 to minors by licensed therapists --

19 JUSTICE BARRETT: Okay. Do you
20 have -- just last -- last point, last question
21 from me -- standing? What's your position on
22 the late-breaking standing argument?

23 MR. MOOPPAN: So precisely because
24 it's late-breaking, first of all, I think the
25 most important thing is it's mootness, not

1 standing. The question is whether there was a
2 credible threat of enforcement for standing
3 purposes.

4 There clearly was because, as counsel
5 said, if you match up paragraph 87 of the
6 complaint with the statute, the conduct that
7 Petitioner wanted to engage in is clearly
8 covered by the plain text of the statute.

9 So, at most, we're talking about
10 mootness because the government has come in now
11 and suggested that somehow the plain text of
12 the statute doesn't apply or they're not going
13 to enforce the statute despite that.

14 And we don't think that in these
15 circumstances, when the state comes in
16 post-certiorari and advances a fairly
17 implausible reading of their statute, that that
18 should be enough to defeat standing.

19 If I could say one more thing about
20 how implausible their reading is, as I
21 understand their position, it seems to be that
22 the language after "including" isn't
23 independently sufficient. You have to be
24 trying to change behavior orientation
25 independently.

1 If that was true, it would equally
2 apply to aversive therapy. So, if someone went
3 into a therapist's office and said: I don't
4 want to be gay anymore, I don't want to engage
5 in same-sex conduct, if the therapist said:
6 Look, I can't change your orientation, but I
7 can try to change your behavior, and I'm going
8 to use electroshock therapy, according to the
9 state as I understand their position, they seem
10 to be saying that that's not covered by their
11 statute. I find that awfully hard to believe.

12 And that just sort of underscores how
13 implausible their reading of the statute is and
14 perhaps why it showed up on Footnote 18 after
15 the Court granted cert.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel.

18 Justice Thomas, anything further?

19 Justice Alito?

20 JUSTICE ALITO: If we thought that
21 this statute engages in viewpoint
22 discrimination, does that have a bearing on
23 whether we should decide whether it satisfies
24 the applicable constitutional standard or
25 remand the case?

1 MR. MOOPPAN: I think it makes it even
2 clearer why it fails strict scrutiny, but I
3 think, even as a content-based restriction, it
4 pretty clearly fails strict scrutiny.

5 JUSTICE ALITO: Thank you.

6 CHIEF JUSTICE ROBERTS: Justice
7 Sotomayor?

8 JUSTICE SOTOMAYOR: I keep going back
9 to the question of the studies and what's the
10 strongest -- list -- tick off -- the thing that
11 grants -- that gives me pause in not applying
12 strict scrutiny or in applying it is that none
13 of the studies say that talk therapy is
14 harmful. Is that correct? And Colorado --

15 MR. MOOPPAN: For -- for this type --
16 for talk therapy by a licensed therapist to
17 minors. They don't have any studies that say
18 that that is either harmful or ineffective.
19 And, indeed, they often concede that they don't
20 have that.

21 The 2009 APA report expressly
22 acknowledges at pages JA 221 and 256, expressly
23 acknowledges that they don't have evidence of
24 that. And if you look at the Glassgold
25 declaration, which is after 2009, she too

1 doesn't cite anything.

2 If you look at the studies that she
3 cites in her declaration, all of them are
4 conflating either aversive and non-aversive or
5 licensed and non-licensed or minors or adults.
6 They just don't have anything.

7 And there was a -- this came -- this
8 comes up to the Court after a PI hearing. And
9 if strict scrutiny applies, they bore the
10 burden and they just don't have anything.

11 JUSTICE SOTOMAYOR: Thank you.

12 CHIEF JUSTICE ROBERTS: Justice Kagan?

13 JUSTICE KAGAN: Mr. Mooppan, you have
14 an evocative example in your brief which I want
15 to pick up on, which is let's say there's a
16 school of psychotherapists that say, that think
17 that the best way to deal with suicidal
18 patients is to go dare them to commit suicide.

19 And you basically say yes, strict
20 scrutiny applies, but don't worry, it -- it --
21 it -- it could be satisfied in a case like
22 that. And I just want you to run through that
23 and tell me why -- why you think strict
24 scrutiny applies and why you're confident that
25 it could come out the way you think.

1 MR. MOOPPAN: All right. So I'll say
2 a couple things about that, Your Honor. So,
3 first, we think strict scrutiny applies if the
4 law was structured the way this law is.

5 JUSTICE KAGAN: Yeah. That's what I'm
6 assuming.

7 MR. MOOPPAN: So if it was a
8 categorical prior restraint. So, if it was a
9 categorical prior restraint, we think strict
10 scrutiny applies because it's content-based,
11 it's not incidental to any conduct, and there
12 isn't any history or tradition of imposing that
13 sort of prior restraint. So we think you're in
14 strict scrutiny.

15 As to why we think you could satisfy
16 strict scrutiny, because that type of speech
17 has utterly no redeeming value. It might be
18 the type of speech where you don't even need a
19 study because it's so obviously harmful --

20 JUSTICE KAGAN: Yeah. But how --

21 MR. MOOPPAN: -- and there's no real
22 benefit.

23 JUSTICE KAGAN: Is that -- is that the
24 right analysis? I mean, when I think about
25 Brown, which I found one of the most difficult

1 cases that I've ever encountered on this Court,
2 you know, we really did insist, no, you need
3 to -- you need to have studies. You need to
4 have a kind of scientific showing of causation
5 rather than rely on your intuitions that, of
6 course, this causes harm.

7 And why -- why wouldn't that be true
8 in a case like this? And if it's not true, if
9 you're right, you know, are we basically
10 diluting our strict scrutiny standard in a way
11 that will come back to haunt us elsewhere?

12 MR. MOOPPAN: So I guess what I would
13 say is this, Your Honor. If you were not
14 confident in your judgment, then you probably
15 should require studies. But, if you were
16 confident -- and I think, on a case like that,
17 you probably should be -- it would be enough.

18 But what I absolutely agree with is
19 that you should not dilute strict scrutiny.
20 It's important that strict scrutiny retain its
21 rigor where it applies. But it's also
22 important, as this Court held in NIFLA, not to
23 create additional exceptions to the general
24 rule that content-based restrictions are
25 subject to strict scrutiny.

1 And if you take a step back, the other
2 side just doesn't have any doctrinal or
3 historical basis for getting this out of strict
4 scrutiny. They can't say it's conduct because
5 there is no conduct. They can't say it's
6 history because there is no relevant history.
7 All of their arguments would blow a massive
8 hole in this Court's case law, emphasizing that
9 its treatment is inconsistent with Holder and
10 Cohen, which says that the fact that you could
11 point to some other law that generally
12 regulates conduct isn't enough if the
13 particular speech is what's triggering that
14 content-based restriction.

15 JUSTICE KAGAN: Thank you.

16 CHIEF JUSTICE ROBERTS: Justice
17 Gorsuch?

18 JUSTICE GORSUCH: In Justice Kagan's
19 hypothetical, could you point to a long history
20 against assisting suicides?

21 MR. MOOPPAN: You could, but whether
22 there's a long history of speech related to
23 that, especially in a context where the
24 speech -- where if suicide was unlawful, but
25 it -- it could --

1 JUSTICE GORSUCH: There have been
2 cases for counseling people to commit suicide
3 and encouraging them to do so and providing --
4 and maybe providing a substantial step
5 toward -- those -- those --

6 MR. MOOPPAN: It --

7 JUSTICE GORSUCH: -- have been all
8 over the books for hundreds of years.

9 MR. MOOPPAN: It's true it's a little
10 trickier because -- I don't want to -- I agree
11 with you that that's a potential additional
12 argument the state could make. I wouldn't want
13 to leap to that because it would turn on things
14 like --

15 JUSTICE GORSUCH: Speech versus
16 conduct.

17 MR. MOOPPAN: -- is -- is suicide
18 prohibited, so it's unlawful conduct.

19 JUSTICE GORSUCH: No, it's not. No,
20 it's not.

21 MR. MOOPPAN: Right.

22 JUSTICE GORSUCH: But assisting is in
23 most states.

24 MR. MOOPPAN: Right. Right. But --
25 so then it's a little bit harder to say it's

1 speech incidental to regulated conduct. And
2 even if --

3 JUSTICE GORSUCH: Yeah. No, I follow
4 you.

5 MR. MOOPPAN: -- even if suicide is
6 illegal, the degree of connection, it's, you
7 know, the -- the incitement question under
8 cases like Brandenburg.

9 JUSTICE GORSUCH: Yeah, it essentially
10 becomes an incitement.

11 MR. MOOPPAN: Exactly.

12 JUSTICE GORSUCH: And -- and that is
13 illegal.

14 MR. MOOPPAN: Yeah. And I did want to
15 make one other point about -- to Justice Kagan,
16 which is, you know, I think another way of
17 thinking about this. Her question was about ex
18 ante categorical prior restraint, but often
19 this sort of speech, where I think that the --

20 JUSTICE GORSUCH: It's always after
21 the fact.

22 MR. MOOPPAN: -- quite easy as
23 after-the-fact malpractice.

24 JUSTICE GORSUCH: Yeah.

25 MR. MOOPPAN: But I would like to say

1 a couple things about malpractice because I
2 think malpractice presents very different types
3 of questions than this sort of law.

4 JUSTICE GORSUCH: Because it's not
5 prior restraint.

6 MR. MOOPPAN: Yes, for three reasons.
7 So the first reason is often malpractice is
8 incidental to conduct. It's speech that's
9 restricted tied to some conduct.

10 The second is, as Your Honor just
11 noted, this is a prior restraint. And this
12 Court has recognized in a lot of cases, like
13 Florida Star and NTEU and Madigan, that for
14 First Amendment purposes, there's -- it's very
15 important, the difference between letting
16 someone speak and then adjudicating
17 individually the -- that speech after the fact
18 rather than categorically began banning it ex
19 ante.

20 And the third and related point is, as
21 a matter of history and tradition, we have a
22 long history and tradition in this country of
23 malpractice. Now how that history and
24 tradition cashes out for this type of speech is
25 a tougher question, to be candid. But what is

1 not a tough question is there is no history and
2 tradition for this sort of prior restraint.

3 JUSTICE GORSUCH: Thank you. Thank
4 you.

5 CHIEF JUSTICE ROBERTS: Justice
6 Kavanaugh?

7 Justice Barrett?

8 Justice Jackson?

9 JUSTICE JACKSON: Can I ask you about
10 licensing? You talked a lot about malpractice.
11 But don't states tend to tie licensing
12 requirements to the standard of care? And so,
13 if we had a situation like this in which a
14 state licensing board disciplined a doctor for
15 a speech-based practice outside of the standard
16 of care, would that doctor have a First
17 Amendment defense?

18 MR. MOOPPAN: So there is a long
19 history and tradition in this country of
20 licensing and even licensing for people who
21 engage in speech.

22 What there isn't a long history and
23 tradition of is, as a condition of that
24 license, imposing a prior restraint on the
25 types of speech they engage in. And we know

1 from NIFLA that the mere fact that there's a
2 license isn't enough to obviate First Amendment
3 review. Obviously, the whole point of NIFLA,
4 it was -- it was regulating an --

5 JUSTICE JACKSON: But NIFLA was a
6 notice scenario, right? It wasn't --

7 MR. MOOPPAN: To a -- for a licensed
8 clinic.

9 JUSTICE JACKSON: No, I understand,
10 but it wasn't connected to the provision of
11 services to particular people. That was part
12 of the analysis. And so I guess what I'm
13 saying is --

14 MR. MOOPPAN: So that's true, but --

15 JUSTICE JACKSON: -- a doctor who's
16 providing services pursuant to a state license,
17 I'm just trying to understand how the First
18 Amendment protects that doctor from providing
19 therapy that is outside the standard of care.

20 MR. MOOPPAN: Well, because, in NIFLA
21 itself, the Court made clear that part of the
22 reason it was rejecting a professional speech
23 exception is because it was very worried about
24 the risks of the state interfering with the
25 doctor/patient discourse, and it gave as an

1 example how, in certain authoritarian
2 governments, they do things like tell doctors
3 you can't tell patients --

4 JUSTICE JACKSON: Yeah.

5 MR. MOOPPAN: -- about birth control.

6 JUSTICE JACKSON: Yeah.

7 MR. MOOPPAN: Those people are all
8 licensed. And so, if -- if there was some sort
9 of argument that because you're licensed, all
10 of a sudden the state could tell you what to
11 say and not say to your patients, those very
12 harms, the precise harms that NIFLA pointed
13 to --

14 JUSTICE JACKSON: Yeah.

15 MR. MOOPPAN: -- could happen.

16 JUSTICE JACKSON: So can I ask you
17 just one final question just sort of from a
18 very broad perspective? I'm wondering why this
19 regulation at issue here isn't really just the
20 functional equivalent of Skrametti. I mean, I
21 realize that -- that there were two different
22 constitutional provisions at issue, but the
23 regulations work in basically the same way and
24 the question of scrutiny applies in both
25 contexts. So it just seems odd to me that we

1 might have a different result here.

2 MR. MOOPPAN: Well, Skrmetti was a law
3 that regulated on the basis of age and medical
4 treatment.

5 JUSTICE JACKSON: No, but here's what
6 I mean, right? In Skrmetti, we had a state
7 that wanted to prohibit certain medical
8 treatment, gender-affirming care, being given
9 to minors in the form of medication.

10 And we said that was okay. And I
11 understand there are particulars with respect
12 to how the -- the arguments, the constitutional
13 arguments, worked, but the state can prohibit
14 that.

15 Here, we have a state that wants to
16 prohibit gender-related medical treatment in
17 the form of talk therapy, but we now have the
18 First Amendment that is inhibiting the state's
19 ability to do that.

20 And I'm just, from a very, very broad
21 perspective, concerned about making sure that
22 we have equivalence with respect to these
23 things.

24 MR. MOOPPAN: Well, from a very broad
25 perspective, there shouldn't be equivalence

1 because --

2 JUSTICE JACKSON: Okay.

3 MR. MOOPPAN: -- obviously, we have a
4 First Amendment. So, when you have freedom to
5 make that call on speech --

6 JUSTICE JACKSON: Because talk
7 therapy -- talk therapy -- the speech is what
8 is at the core for you?

9 MR. MOOPPAN: Right.

10 JUSTICE JACKSON: It's not necessarily
11 the state's interest in protecting minors from
12 what it believes to be certain harmful --

13 MR. MOOPPAN: Right.

14 JUSTICE JACKSON: -- treatments.

15 MR. MOOPPAN: Just like in Holder, the
16 state had a very compelling interest in
17 stopping material support of terrorism.

18 JUSTICE JACKSON: Right.

19 MR. MOOPPAN: But, when you stop
20 terrorism through speech versus from conduct,
21 the analysis is different.

22 JUSTICE JACKSON: Got it. All right.

23 Thank you.

24 CHIEF JUSTICE ROBERTS: Thank you,
25 counsel.

1 Ms. Stevenson.

2 ORAL ARGUMENT OF SHANNON W. STEVENSON

3 ON BEHALF OF THE RESPONDENTS

4 MS. STEVENSON: Mr. Chief Justice, and
5 may it please the Court:

6 Throughout its history, this Court has
7 recognized that state power is at its apex when
8 it regulates to ensure safety in the healthcare
9 professions. Colorado's law lies at the
10 bull's-eye center of this protection because it
11 prohibits licensed professionals from
12 performing one specific treatment because that
13 treatment does not work and carries great risk
14 of harm.

15 No court has ever held that a law like
16 this implicates the First Amendment and for
17 good reason.

18 First, the law applies only to
19 treatments, that is, only when a licensed
20 professional is delivering clinical care to an
21 individual patient. In that setting, providers
22 have a duty to act in their patients' best
23 interest and according to their professional
24 standards. The First Amendment affords no
25 exception.

1 Second, because this law governs only
2 treatments, it does not interfere with any
3 First Amendment interest. It does not stop a
4 professional from expressing any viewpoint
5 about that treatment to their patient or to
6 anyone else.

7 And because Colorado's law regulates
8 treatments only and because it enforces the
9 professional standard of care, the law falls
10 squarely into the reasonable regulation of
11 professional conduct that does not trigger
12 First Amendment scrutiny.

13 Petitioner's argument, on the other
14 hand, cannot be reconciled with history,
15 precedent, or common sense. A state cannot
16 lose its power to regulate the very
17 professionals that it licenses just because
18 they are using words.

19 A healthcare provider cannot be free
20 to violate the standard of care just because
21 they are using words. And a state cannot be
22 required to let its vulnerable young people
23 waste their time and money on an ineffective,
24 harmful treatment just because that treatment
25 is delivered through words.

1 Petitioner asks you to enjoin a
2 bipartisan law passed by 25 different states,
3 but she did not put one single piece of
4 evidence into the record, not a single expert,
5 not a single study, not a single mental health
6 professional willing to endorse conversion
7 therapy, and there is a mountain of evidence to
8 the contrary.

9 On this record, we request that you
10 affirm the denial of preliminary injunction.

11 I welcome your questions.

12 JUSTICE THOMAS: If Petitioner were a
13 non-therapist, would this be protected speech?

14 MS. STEVENSON: Well, so I wanted to
15 mention our law covers physicians as well.
16 They are also subject to the -- to the
17 conversion therapy ban. But, if you're talking
18 about a non-professional, I think it -- it
19 would. Our -- our -- our argument is premised
20 on the notion that there is a special
21 relationship between a healthcare provider and
22 a patient where that patient is in a position
23 of vulnerability and dependency on the
24 healthcare provider, and the healthcare
25 provider owes fiduciary duties to act in that

1 patient's best interest only.

2 JUSTICE THOMAS: In Colorado, are
3 there only healthcare providers who provide
4 this sort of service?

5 MS. STEVENSON: No. The law
6 excepts -- I don't know factually if there are,
7 but the law exempts religious ministers and
8 ministries from this, and there is also a group
9 of people called life coaches who could perform
10 this therapy.

11 JUSTICE THOMAS: So what exactly
12 transforms speech in that context to -- speech
13 that is protected in that context to speech
14 that is not in the therapist's context?

15 MS. STEVENSON: It is the relationship
16 between a healthcare provider and the patient
17 that establishes this special context. And,
18 again, if you go to a life coach or you go to
19 someone else, they're not licensed by the
20 state. You're not expecting them to be
21 complying with standards of care. You have a
22 different expectation.

23 When you're going to see a licensed
24 healthcare professional who owes you fiduciary
25 duties, your expectations are different.

1 You're expecting information that is complying
2 with the standard of care and not expecting
3 the -- the practitioner to just be exercising
4 their right to say whatever they want to say.
5 And that's just materially different and it's
6 always been treated so.

7 JUSTICE THOMAS: So what if someone
8 who was -- happened to be devoutly religious
9 and actually relied more on the minister than
10 the therapist? It would seem that that person
11 would be equally dangerous.

12 MS. STEVENSON: Well, I think that
13 that would be a personal choice that they were
14 making to rely on their religious minister. It
15 wouldn't be a representation from the state
16 that this is a licensed professional who we are
17 holding to a certain standard of care. And so
18 the expectation at least vis-à-vis the state
19 license would matter a lot.

20 And, in addition, the religious
21 minister just as a legal matter doesn't owe
22 fiduciary duties in the same way that a
23 healthcare practitioner does.

24 CHIEF JUSTICE ROBERTS: Counsel, you
25 said, you know, just because they're -- they're

1 using words. But our cases separate those out,
2 Holder, NIFLA. In other words, just because
3 they're engaged in conduct doesn't mean that
4 their words aren't protected.

5 MS. STEVENSON: So, Chief Justice, our
6 case is absolutely premised on the notion that
7 communications that are happening in the very
8 specific context of treatment, which I will
9 call a licensed professional delivering
10 clinical care to an individual patient where
11 they are subject to fiduciary duties and
12 subject to malpractice, that that is
13 fundamentally different -- a fundamentally
14 different regulation than a regulation of -- of
15 people out in the world going about their
16 business, like at issue in Holder, where you
17 have general -- general -- generally applicable
18 statutes that apply to everyone.

19 This is just a fundamentally different
20 relationship. It has always been treated like
21 that. In NIFLA, the Court talked about the
22 fact that longstanding torts for malpractice
23 were -- did not implicate heightened First
24 Amendment scrutiny, and I think that analysis
25 is exactly the same here. Malpractice, you're

1 dealing with that same individualized
2 relationship. And this is the exact same
3 context.

4 JUSTICE GORSUCH: Ms. Stevenson, I
5 want to ask you the mirror -- what Justice
6 Kagan called the mirror image question and
7 Mr. Mooppan and Judge Hart's example about
8 homosexuality in the 1970s was professionally
9 considered to be a mental health disorder.

10 What if a state back then might have
11 passed a law prohibiting talk therapy that
12 affirmed homosexuality? Would that be subject
13 to rational basis review on -- on your theory?

14 MS. STEVENSON: So, Your Honor,
15 what -- what our theory depends on is that
16 there is a treatment being provided that's
17 being regulated --

18 JUSTICE GORSUCH: Yeah.

19 MS. STEVENSON: -- and that the
20 regulation is consistent --

21 JUSTICE GORSUCH: And check --

22 MS. STEVENSON: -- with the standard
23 of care.

24 JUSTICE GORSUCH: Let's check --

25 MS. STEVENSON: Right.

1 JUSTICE GORSUCH: -- both of those
2 boxes in our hypothetical.

3 MS. STEVENSON: Then -- then, yes.
4 And I want to return to Justice Jackson's point
5 because --

6 JUSTICE GORSUCH: So yes --

7 MS. STEVENSON: They could regulate.

8 JUSTICE GORSUCH: -- the state could
9 forbid a -- a regulated licensed professional
10 from affirming homosexuality --

11 MS. STEVENSON: If that were --

12 JUSTICE GORSUCH: -- if that were
13 consistent with the then-prevailing standard of
14 care?

15 MS. STEVENSON: That -- that's right.
16 And I don't --

17 JUSTICE GORSUCH: And so, likewise,
18 if -- if the prevailing standard of care were
19 to change or to solidify that this sort of talk
20 therapy is beneficial to minors or at least not
21 harmful to minors, then a state could pass a
22 mirror image statute to Colorado's that -- that
23 prohibits any attempt to affirm changes of
24 gender identity or sexual orientation and that
25 would be subject to mere rational basis review

1 on your theory?

2 MS. STEVENSON: That's right, Your
3 Honor.

4 JUSTICE GORSUCH: Thank you.

5 MS. STEVENSON: And just to
6 illustrate, it's not -- the fact that there are
7 boards involved doesn't make a difference. So
8 states like we recognized in Skrmetti have the
9 power to regulate even in the face of medical
10 uncertainty. The laws or the, you know, the
11 standard of care could change there, and the
12 legislature can act to change that, and the --

13 JUSTICE GORSUCH: So even -- even
14 in -- even cases where medical uncertainty
15 exists, you think that the state could pass
16 such a law prohibiting ex ante speech that
17 would affirm gender identity changes or sexual
18 orientation changes or homosexuality?

19 MS. STEVENSON: I don't think you have
20 to reach that question in this case because,
21 here --

22 JUSTICE GORSUCH: I'm asking about the
23 logic of your argument. I think you just said
24 states can regulate even in the absence of
25 medical consensus in this fashion, is that

1 right?

2 MS. STEVENSON: Where -- where there
3 are no words involved and no First Amendment
4 issue raised, and I'm just --

5 JUSTICE GORSUCH: No, no, I'm asking
6 what -- we're talking about speech and we're
7 talking about therapy, talk therapy. That's
8 what I want to get at. And I think you're
9 saying that if there's medical consensus, a
10 state surely could pass mirror image laws. And
11 I think you're saying, but I want to make sure
12 that even in cases where there's medical
13 uncertainty, a state could so regulate?

14 MS. STEVENSON: You could reach a
15 holding in this case that said yes, treatment
16 is treatment and this can be -- it doesn't
17 matter whether it's full -- you know,
18 consistent with the standard of care or not.

19 We would urge you to reach a narrower
20 holding in this case.

21 JUSTICE GORSUCH: I -- I understand
22 that. But I'm asking you to answer my
23 question.

24 Could a state -- and -- and when
25 there's medical uncertainty, and we normally

1 provide, this Court has many times said when
2 there's medical uncertainty we defer to state
3 judgments.

4 And I think you're saying that, yes,
5 I -- I think the logic of your position has to
6 be yes, and I'll let you go as soon as you give
7 me an answer up or down on the state of medical
8 uncertainty and whether they could pass mirror
9 image laws.

10 MS. STEVENSON: I think it's less
11 clear that that fits into the historical
12 tradition identified in NIFLA that calls
13 specifically out malpractice, which is an
14 enforcement of the standard of care. And while
15 that question could come up in another day here
16 where we meet the standard of care, we don't
17 think you need to reach it.

18 JUSTICE BARRETT: Counsel, it's pretty
19 important that we think about how this would
20 apply to cases down the road. So let me
21 describe medical uncertainty as competing
22 medical views, and let's say that you have some
23 medical experts that think gender-affirming
24 care should be -- is dangerous to children and
25 some that say that this kind of conversion talk

1 therapy is dangerous.

2 Can a state pick a side? So it's
3 not -- I -- I want to be very clear. It's not
4 that the medical community says we just don't
5 know. It's that there are competing strands,
6 and some states like, say, Tennessee, which was
7 the state at issue in *Skrmetti*, pick one side.
8 Colorado picks another side.

9 Your position is that rational basis
10 applies?

11 MS. STEVENSON: Our position in this
12 case is that the standard of care is important.
13 It's important because that's been the
14 historical tradition.

15 JUSTICE BARRETT: But -- but, like
16 Justice Gorsuch said, just answer -- answer
17 that question.

18 MS. STEVENSON: No. Our view is that
19 that would not be the right rule here, one,
20 because that's not consistent with the history
21 and tradition identified in *NIFLA*, and, two,
22 because the reason why that history is
23 important and the reason why the standard of
24 care is important is because it's a -- a
25 confirmation that the state is not actually

1 trying to shut down viewpoints.

2 JUSTICE BARRETT: Okay. I'm not
3 understanding the why the standard of care --
4 tell me -- I mean, maybe I'm just -- I'm not --
5 I'm not following you.

6 Are you saying that the standard of
7 care -- why -- why do you think the standard of
8 care question isn't relevant there? Because
9 wouldn't that be a situation in which Colorado
10 is essentially saying that the standard of
11 care, that we're -- we're essentially looking
12 at expert evidence and saying that we think
13 this is what's appropriate, that we shouldn't
14 have this kind of talk therapy, and Tennessee
15 is choosing a different one as a matter of its
16 state law? Or am I not understanding that
17 correctly?

18 MS. STEVENSON: What I'm saying is,
19 where there is a First Amendment issue raised
20 and the state can show we're regulating a
21 treatment and we're regulating consistent with
22 the standard of care, there is a confirmation,
23 a security that the Court can have that
24 there -- there is no other motive going on to
25 suppress viewpoints or expression. And that's

1 what's consistent with --

2 JUSTICE BARRETT: So Colorado's law
3 would trigger rational basis, but Tennessee's
4 hypothetical law would be strict scrutiny?

5 MS. STEVENSON: If it were -- if it
6 were against the standard of care.

7 JUSTICE BARRETT: So there's no mirror
8 image rule Justice Kagan --

9 JUSTICE JACKSON: Counsel, can you
10 define standard of care to help us? Is the
11 standard of care a medical consensus about what
12 should happen in this situation?

13 MS. STEVENSON: It's the same standard
14 of care that would apply in a malpractice case.

15 JUSTICE JACKSON: So it's not a
16 situation in which you have competing doctors
17 and there isn't a consensus on what is supposed
18 to happen?

19 MS. STEVENSON: Correct.

20 JUSTICE JACKSON: So in your --

21 JUSTICE BARRETT: No, but I think you
22 could have that. In my hypothetical, I'm
23 saying that there might be a dispute in the
24 medical community, is my hypothetical, where
25 you have some experts saying that this should

1 be the standard of care and others saying
2 something different. That was the
3 hypothetical.

4 MS. STEVENSON: Well, I -- I -- the
5 question would be, is the regulation enforcing
6 the existing standard of care. And you're
7 describing a situation where it sounds like
8 there would be many viable options under a
9 standard of care?

10 JUSTICE BARRETT: Yeah.

11 MS. STEVENSON: Right. And so in that
12 instance, I think that would raise more
13 significant questions if there were actual
14 multiple procedures, treatments available that
15 all met the standard of care.

16 And, again, this is just a question
17 that would be resolved exactly the same as it
18 would be in a malpractice case, where you could
19 have, you know, competing experts as well and
20 we'll decide, is this thing inside or outside
21 the standard of care. If -- if Petitioner
22 could put on an expert to show conversion
23 therapy is inside the standard of care, then I
24 think we wouldn't be here. This -- that would
25 be a different standard to apply to our law.

1 JUSTICE SOTOMAYOR: I have a question
2 about how you're distinguishing Holder. It was
3 a generalized law against providing material
4 support to terrorists, but you seem to be
5 suggesting that if there was a bar association
6 rule that said it's a breach of your duty as a
7 lawyer if you tell terrorists how they can
8 break the law, that that would be subject to
9 rational basis review.

10 MS. STEVENSON: So I think, again, the
11 critical aspect of the relationship is that
12 there is a duty between the professional and
13 the receiver of the professional services. And
14 it sounds like in the law that you're
15 describing, Justice Sotomayor, there would be
16 -- the law is passed for some other interest
17 than to protect the client in that case. And I
18 think that's materially different when we're
19 talking about a special relationship where the
20 client is depending on the expertise and
21 training --

22 JUSTICE SOTOMAYOR: I -- I'm not --

23 MS. STEVENSON: -- of the lawyer --

24 JUSTICE SOTOMAYOR: -- but I'm just
25 not sure why that makes a difference. If we're

1 talking about the speech aspects of it, why
2 that becomes any less protected.

3 MS. STEVENSON: It's because that's
4 how we've always treated speech between --
5 especially in the healthcare context, between
6 providers and patients. This has been an area
7 that has been heavily regulated from the
8 beginning of our country. And no one has ever
9 suggested that a doctor has a First Amendment
10 defense to say the wrong advice to their
11 patient.

12 And -- and just to give an example on
13 this speech/conduct distinction -- distinction,
14 if I went to my doctor and had high
15 cholesterol, she could tell me a number of
16 things. She could say come back next year.
17 She could say eat less red meat. She could say
18 I'm going to prescribe you a statin, or she
19 could say you need an arterial stint. And
20 whichever way she violated the standard of care
21 in -- in making a -- a wrong judgment there
22 could be equally harmful to me.

23 And so I don't see how you can parse
24 out whether there is conduct involved in terms
25 of when you're talking about professional

1 services delivered in a fiduciary relationship,
2 where the -- the client or the patient is
3 expecting accurate information and -- and
4 information delivered to benefit their health.

5 JUSTICE ALITO: I don't really see --

6 JUSTICE KAGAN: Wouldn't --

7 JUSTICE ALITO: -- a difference
8 between the argument that you're making now and
9 the argument that I thought we rejected in
10 NIFLA, that professional speech is a special
11 category that's outside normal First Amendment
12 scrutiny, but I'll -- let me put that aside and
13 ask about your interpretation of the statute at
14 this stage in the litigation.

15 And let me give you this example:
16 Suppose an adolescent male comes to a licensed
17 therapist and says he attracted -- he's
18 attracted to other males but feels uneasy and
19 guilty about those feelings, and he wants to
20 end or lessen them and asks for the therapist's
21 help in doing so.

22 Under your interpretation of the
23 statute, is that banned?

24 MS. STEVENSON: So, Your Honor, our
25 interpretation of the statute turns entirely on

1 whether the purpose of the therapy is to change
2 the person's sexual orientation or gender
3 identity. If that minor --

4 JUSTICE ALITO: Well, what's the
5 answer -- what is the answer to my question?
6 Is that banned or is it not banned?

7 MS. STEVENSON: If the therapist told
8 him or he asked can you help me become
9 straight, the answer would be it would be
10 banned. If it was can you help me cope with my
11 feelings as to -- to how I am and how I want to
12 live my life, that's permitted.

13 And all of that comes --

14 JUSTICE ALITO: Why doesn't that fall
15 -- why doesn't the situation that I have just
16 described fall squarely within the terms of the
17 statute, which says that conversion therapy
18 includes "efforts to eliminate or reduce sexual
19 or romantic attraction or feelings toward
20 individuals of the same sex"?

21 MS. STEVENSON: If those things are
22 undertaken with the purpose of changing
23 orientation or identity, then they violate the
24 statute.

25 JUSTICE ALITO: But that's not what

1 your statute says.

2 MS. STEVENSON: This is the way we've
3 interpreted the statute from the beginning of
4 this case. It's the way both of the lower
5 courts interpreted the statute. It's the way
6 every state that has this statute interprets
7 it.

8 And the reason why is because the
9 harms from conversion therapy come from when
10 you tell a young person you can change this
11 innate thing about yourself. And they try and
12 they try and they fail, and then they have
13 shame and they're miserable. And then it ruins
14 their relationships with their family or --

15 JUSTICE ALITO: Well, I know, I
16 understand.

17 MS. STEVENSON: This is where the harm
18 comes from.

19 JUSTICE ALITO: I understand -- I
20 understand all of those arguments. What I
21 don't understand is how you can square your
22 interpretation with the plain meaning of this
23 statute.

24 Are you suggesting that everything
25 beginning with the word "including" is

1 irrelevant? That just -- you just want all of
2 that deleted from the statute?

3 MS. STEVENSON: No, it's -- it's
4 illustrative. And so, for example, one of the
5 ways that people try to engage in convert --
6 conversion therapy would be by saying, look,
7 you need to start dressing like a boy, and then
8 that will make you change your gender identity.
9 That's a way you could go about that.

10 But if the -- if the minor wants to
11 start dressing like a boy to match his gender
12 identity, not because --

13 JUSTICE ALITO: But that -- that's
14 just not the --

15 MS. STEVENSON: -- he think it's going
16 to change --

17 JUSTICE ALITO: -- that's just not the
18 way language works. Suppose that -- I mean,
19 there's a sign -- there's a rule that says you
20 may not bring any dangerous animals in the
21 park, including pit bulls.

22 Doesn't that definitively provide you
23 can't bring a pit bull into the park?

24 MS. STEVENSON: Yes, because a pit
25 bull is a subsidiary of a dangerous animal.

1 But I don't think you can read "and including"
2 to contradict the -- the anchor term. So here
3 "conversion therapy" is an effort to change
4 orientation or identity.

5 If you read -- read it to not mean
6 that, then -- then you've ruined that part of
7 the statute.

8 JUSTICE ALITO: All right. Let me --

9 MS. STEVENSON: You can't say --

10 JUSTICE ALITO: I'm sorry. Go ahead.

11 MS. STEVENSON: I was just going to
12 say I can't say I like meat including tomatoes
13 and celery. That doesn't make any sense. And
14 that's how we read the statute and, again, have
15 been -- consistently read the statute that way
16 from the beginning of this case in every
17 pleading that we've filed.

18 JUSTICE ALITO: I -- if you recall the
19 example that I gave you -- I'll -- I'll give it
20 to you again because I want to contrast it with
21 another situation.

22 So in the first situation, an
23 adolescent male comes to a licensed therapist
24 and says he's attracted to other males, but he
25 feels uneasy and guilty with those feelings.

1 He wants to end or lessen them, and he asks for
2 the therapist's help in doing so.

3 The other situation is a similar
4 adolescent male comes to a licensed therapist,
5 says he's attracted to other males, feels
6 uneasy and guilty about those feelings, and he
7 wants the therapist's help so he will feel
8 comfortable as a gay young man.

9 It seems to me you're interpreting --
10 your statute dictates opposite results in those
11 two situations, based on the view -- based on
12 the viewpoint expressed. One viewpoint is the
13 viewpoint that a minor should be able to obtain
14 talk therapy to overcome same-sex attraction,
15 if that's what he -- or he or she wants. And
16 the other is the viewpoint that the minor
17 should not be able to obtain talk therapy to
18 overcome same-sex attraction, even if that is
19 what he or she wants.

20 Looks like blatant viewpoint
21 discrimination.

22 MS. STEVENSON: As I heard your
23 examples, I think they would both be
24 permissible because it didn't sound like in
25 either case the goal was to actually change

1 sexual orientation. And -- and, again, that's
2 the touchstone because that's where the harms
3 come from. And if there is no goal being
4 reached --

5 JUSTICE KAGAN: I guess I don't quite
6 -- I guess I have the same kind of question
7 that Justice Alito had. I mean, if we assume,
8 for example -- and this is a big assumption on
9 your part -- but just assume that we're in
10 normal free speech land rather than in this
11 kind of doctor land. And if -- if a doctor
12 says I know you identify as gay, and I'm going
13 to help you accept that, and another doctor
14 says I know you identify as gay, and I'm going
15 to help you to change that, and one of those is
16 permissible and the other is not, that seems
17 like viewpoint discrimination in the way we
18 would normally understand viewpoint
19 discrimination.

20 MS. STEVENSON: I -- I don't disagree
21 with that, Justice Kagan, and that's why
22 medical treatment has to be treated
23 differently, because any time you exclude one
24 harmful practice, you are by definition saying
25 these things are allowed because they are not

1 harmful and these things are excluded because
2 they are harmful.

3 That's the driving force behind
4 regulating the particular practice.

5 JUSTICE ALITO: Let me ask you about
6 the standing argument.

7 There's a statute on the books, and if
8 it prohibits what the Petitioner wants to do,
9 why doesn't she have standing?

10 Why -- why is it an answer: Well, we
11 haven't prosecuted her or anybody else under
12 this statute.

13 MS. STEVENSON: I -- I think it would,
14 if she said that she wanted to do something
15 that violated this statute. And I think
16 there's just been an ambiguity that has
17 persisted in this case.

18 What I can say is, if she does not
19 want to engage in a therapy for the purpose of
20 changing a minor's sexual orientation or gender
21 identity, then she is not violating the
22 statute.

23 JUSTICE GORSUCH: Well, both the
24 district court, which ruled for you, found
25 standing, and the Tenth Circuit, which ruled

1 for you, found standing.

2 And you didn't cross appeal on those.

3 And -- not that you had to, it's standing. You
4 didn't even put a Roman numeral in your brief
5 on it or even a subsection. It's -- it's
6 footnote 18 on page 23.

7 That doesn't exactly suggest that
8 you have great confidence in that argument,
9 does it?

10 MS. STEVENSON: Well -- well, we
11 recognize we lost it twice. And again, it is
12 the Petitioner's burden. And it has been a
13 persistent issue in the case, I think, in
14 defining exactly what it is she wants to do.

15 And to come back to this conduct
16 point --

17 JUSTICE GORSUCH: But if she's -- if
18 she does, consistent with a patient's -- if
19 I am reading the verified complaint, if I
20 understand that to mean, paragraphs 86, 87,
21 that she wishes to help clients who voluntarily
22 come and -- with the desire to change their
23 behaviors, expressions, attractions, and
24 identity, then that, that would give her
25 standing, wouldn't it?

1 MS. STEVENSON: Identity, yes.

2 JUSTICE GORSUCH: Only identity.

3 MS. STEVENSON: But the others not.

4 JUSTICE GORSUCH: The others not

5 because of your peculiar reading of the

6 statute.

7 But identity would, that would give

8 her standing?

9 MS. STEVENSON: I -- the change in
10 sexual orientation or identity is the key to --

11 JUSTICE GORSUCH: And that would give
12 her standing?

13 MS. STEVENSON: That would.

14 JUSTICE GORSUCH: Okay.

15 JUSTICE SOTOMAYOR: Because you're not
16 disavowing that.

17 MS. STEVENSON: No.

18 JUSTICE SOTOMAYOR: Okay. So that
19 settles the standing question.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Justice Thomas, anything further?

23 JUSTICE THOMAS: You rely on the
24 history of regulating the medical profession
25 quite a bit.

1 What's the history of regulating
2 therapists? When did -- when did that begin?

3 MS. STEVENSON: Right. So I would say
4 mental health and healthcare delivered through
5 words, both were in full force at the founding
6 of this country. At the time, that -- that was
7 done by people you might call physicians, and
8 all of their practice was pretty much carried
9 out through words and giving advice.

10 As time went on and specialties
11 developed further and the mental health
12 profession sort of came into existence,
13 those same standards applied and governed
14 psychologists and therapists.

15 And then I would say the -- the
16 licensing of counselors as other professionals
17 in the mental health field was sort of the
18 second half of the 1900s.

19 JUSTICE THOMAS: With respect to this
20 type of regulation that is a prior restraint on
21 speech, what was the first example of that?

22 MS. STEVENSON: So Justice Thomas,
23 I want to push back on the notion that this
24 is a prior restraint on speech. There's no
25 enforcement of this law unless somebody files

1 a complaint with Petitioner's licensing board
2 and she has an adjudicatory hearing and an
3 opportunity for judicial review and all those
4 things.

5 So it's like many other statutes in
6 that way. It simply calls out a specific
7 practice that violates the standard of care.

8 And those types of statutes have been
9 around for a very long time. They were in the
10 late 1800s. Those types of statutes governed
11 medical professionals and then have been added
12 over time as the mental health profession has
13 developed and governed mental health profession
14 -- professionals in every state.

15 CHIEF JUSTICE ROBERTS: Justice Alito?

16 JUSTICE ALITO: Your argument depends
17 very heavily on the standard of care which I
18 take it is defined by the medical -- by a
19 medical consensus; is that correct?

20 MS. STEVENSON: That's correct.

21 JUSTICE ALITO: Have there been
22 occasions -- I mean, the medical consensus
23 is usually very reasonable and it's very
24 important. But have there been times when the
25 medical consensus has been politicized, has

1 been taken over by ideology?

2 MS. STEVENSON: We have no facts about
3 that in this case, but I -- I wouldn't disagree
4 --

5 JUSTICE ALITO: Well --

6 MS. STEVENSON: -- that that's
7 possible. And I think it's a really --

8 JUSTICE ALITO: -- isn't it a fact
9 that it's happened in the past?

10 MS. STEVENSON: I think that's --

11 JUSTICE ALITO: Three generations of
12 idiots are enough?

13 MS. STEVENSON: I think that's
14 certainly a concern. And if there were
15 evidence of that in the record, as to whether
16 or not there were a standard of care that
17 wasn't a -- really based on patient safety,
18 that would be highly relevant evidence.

19 JUSTICE ALITO: Well, isn't that a
20 reason to apply First Amendment scrutiny when
21 what's being -- what is being regulated is pure
22 speech, and not just saying medical standard of
23 care, medical consensus, that's the end of the
24 day, rational basis review, anything goes?

25 MS. STEVENSON: No, Your Honor.

1 Because, again, when we're talking about words
2 used to deliver medical treatment, those issues
3 are the same whether you're talking about words
4 being used or whether you're talking about
5 medical practices that don't involve words.
6 Those issues are the exact same.

7 And there is nothing about this
8 statute, for example, that stops anyone from
9 sharing any opinion about conversion therapy or
10 about how the consensus on that was reached.

11 And, again, in this case, there is
12 just no evidence of any motive by either the
13 Colorado legislature or any medical association
14 to reach this conclusion on anything based --
15 based on anything other than protection of --
16 of minors and a -- and a decades-long record of
17 research.

18 JUSTICE ALITO: Was there once -- was
19 there a time when many medical professionals
20 thought that certain people should not be
21 permitted to procreate because they had
22 low IQs?

23 MS. STEVENSON: I don't know that, but
24 I will accept the premise.

25 JUSTICE ALITO: Was there a time when

1 there were many -- many medical professionals
2 who thought that every child born with Down
3 syndrome should be immediately put in an
4 institution?

5 MS. STEVENSON: I -- I don't know
6 that, Your Honor.

7 JUSTICE ALITO: Thank you.

8 CHIEF JUSTICE ROBERTS: Justice
9 Sotomayor?

10 Justice Kagan?

11 JUSTICE KAGAN: If I could go back to
12 your example about having high cholesterol and
13 all the various things that a doctor could say.

14 And I don't think, like, anybody wants
15 to remove doctors from, you know, liability or
16 any kind of professional sanction for giving
17 utterly wrong medical advice just because the
18 giving of that advice involves words, right?

19 So if the doctor said you can lower
20 your cholesterol by going out and eating
21 dessert every meal, we would think that was,
22 like, not a good thing for a doctor to say.
23 And we wouldn't say, oh, the First Amendment
24 has something to do with this.

25 But I -- I guess I have this feeling

1 that that's a different kind of case, that that
2 is a case where the speech is incidental to
3 whatever conduct it is that the doctor is
4 offering, you know, whether it's, you know, you
5 should take this pill or you should do these
6 eating practices or so forth and so on.

7 And are you saying that there's no
8 distinction between what we're dealing with
9 here and the range of things that a doctor can
10 tell you in her office about what kind of care
11 is appropriate for any particular condition?

12 MS. STEVENSON: I don't think there
13 is any distinction, because just like in the
14 medical field, counseling is an evidence-based
15 practice that Petitioner trained for thousands
16 of hours to be qualified to do.

17 And her advice and -- and counseling
18 therapies through her words can be extremely
19 harmful. And so there is no difference between
20 that and the medical context.

21 And I wanted to come back to the first
22 part of your question about calling out a
23 specific practice that violates the standard of
24 care. This is a thing that legislatures do,
25 not irregularly, when you have a practice that

1 although it's ineffective or although it's
2 harmful, it persists anyway.

3 So, for example, in Colorado there's
4 a specific provision that says it's
5 unprofessional conduct for medical doctors
6 to prescribe anabolic steroids for sports
7 performance.

8 Now, normally something like that
9 might die out, but you can understand why there
10 are cultural -- cultural pressures that make
11 this continue to be interesting to people, even
12 when they know there's harm. And this has been
13 the problem with conversion therapy.

14 Although every theory that it's relied
15 on has been debunked and debunked and debunked,
16 people continue to seek it and to want it and
17 to believe that they can make this change.
18 And I think that's understandable. It's a
19 challenge to find out that you're a gay or
20 transgender person.

21 And then, finally, to -- to the issue
22 of regulating a specific practice, we cited you
23 a couple of cases about false memory recovery.
24 So there was a practice going on in -- with
25 psychotherapists in the 1990s where they were

1 using a therapy that was causing children to
2 come up with false memories of sexual abuse.
3 And there were several malpractice cases about
4 it.

5 That -- that therapy died out on
6 its own. But if it hadn't and therapists had
7 continued to do it -- and, again, it was done
8 only with words -- surely a state could step in
9 and say that's unprofessional conduct, and
10 that's exactly what Colorado and 25 other
11 states have done here.

12 JUSTICE KAGAN: Thank you.

13 CHIEF JUSTICE ROBERTS: Justice
14 Gorsuch?

15 Justice Kavanaugh?

16 Justice Barrett?

17 JUSTICE BARRETT: What is your best
18 evidence on this record, thinking about the
19 application of strict scrutiny, that this kind
20 of talk therapy by a licensed professional,
21 licensed therapist, to minors causes harm?

22 MS. STEVENSON: Sure. I would direct
23 you, Your Honor, to JA 64 through 74. And I do
24 want to note this particular argument about
25 this specific study came up at -- for the first

1 time at Tenth Circuit oral argument. And I
2 think had we had an opportunity, we could
3 absolutely have put in even more evidence to
4 nail this down in the district court.

5 But if you look there, our expert
6 walks through all of the research that's been
7 done since 2009. Aversive practices have not
8 been at use since the 1980s or before, so all
9 of these studies do not concern aversive
10 practices at all.

11 And then I would direct you
12 specifically to the Green study and the Turban
13 study. The Green study looked at 34,000 13- to
14 25-year-olds who had gone through conversion
15 therapy and, after controlling for other
16 factors, found there was a two times rate of
17 attempted suicides among that group.

18 And in the Turban study, Dr. Turban
19 looked at 27,000 participants. This was
20 specifically on gender identity change efforts,
21 including people who had received those efforts
22 under the age of ten. He looked specifically
23 at childhood exposure and found association
24 with adverse mental health outcomes in
25 adulthood, including suicide ideation and

1 attempts.

2 You know, I -- this question about
3 whether it's voluntary or not, that's just not
4 an issue that had ever been raised to focus on.
5 And I -- you know, especially with children
6 under ten, I don't even know how you would
7 assess that.

8 I would also direct you to
9 Dr. Turban's amicus brief, though, where he
10 further describes the techniques that he used
11 in his study to show how much they would align
12 with I think -- what Petitioner would imagine
13 that she would want to try to do.

14 And then you have to put it in the
15 context of people have been trying to do
16 conversion therapy for a hundred years with no
17 record of success. There is no study, despite
18 the fact that people tried to advance this
19 practice, that has ever shown that it has any
20 chance of being efficacious.

21 And, again, the -- the harm from it
22 comes not from the -- from the aversive
23 practice; it comes from telling someone there's
24 something innate about yourself you can change,
25 and then you spend all kinds of time and effort

1 trying to do that and you fail.

2 JUSTICE BARRETT: But you -- you bore
3 the burden. She didn't have to show that it
4 was efficacious, right? You had to show that
5 it was -- you had to show that it caused harm.

6 MS. STEVENSON: Right. But in light
7 of 100 years of studies that all point in the
8 same direction, with no efficaciousness and
9 evidence of significant risk of harm, we think
10 we amply carried that burden.

11 JUSTICE BARRETT: Tell me more. You
12 said that in the Tenth Circuit you wished --
13 because if you had been back before the
14 district court, you could have introduced more
15 evidence? Did you not? It was a PI hearing.

16 Why didn't you have enough -- the
17 opportunity to introduce all the evidence you
18 wanted to?

19 MS. STEVENSON: There -- there was no
20 hearing. We filed our response in -- in
21 response to Petitioner's brief, where she had
22 no evidence. We put in a, you know, 60-page
23 expert declaration covering all of this and
24 including not just the studies but the fact
25 that all of the theories underlying conversion

1 therapy have been debunked. You know,
2 initially it was homosexuality is a pathology
3 that we need to treat. That's been debunked.
4 Then it was homosexuality is caused by trauma.
5 That's been debunked. Then it was
6 homosexuality is caused by a relationship you
7 had with your parents. That's been debunked.
8 There's not even a --

9 JUSTICE BARRETT: So just on the very
10 specific evidentiary question, are you
11 representing, then, if this went back, you want
12 the opportunity to have a hearing to put in
13 different evidence that it causes harm?

14 MS. STEVENSON: I -- I think if there
15 was -- if there's some, you know, argument that
16 we need to show that these studies were done on
17 people who engaged in voluntary therapy, I
18 think you could potentially go to the study
19 authors and get that.

20 But that particular critique was never
21 raised. And, again, I just think if -- if what
22 Petitioner is saying is you have to have a
23 randomized control trial on children in order
24 to establish the -- you know, with respect to
25 the particular thing she wants to do, that

1 would be, I think, a study that would -- not
2 even medicine would -- would require a study
3 like that to come up with a standard of care.

4 CHIEF JUSTICE ROBERTS: Justice
5 Jackson?

6 JUSTICE JACKSON: Can I just quickly
7 get you to address Justice Alito's question
8 about how you distinguish NIFLA? You -- you
9 have definitely focused very clearly on the
10 special relationship, the professional context,
11 and the fact that this is medical care being
12 provided in a counseling relationship.

13 But as Justice Alito points out, we
14 have addressed professional speech and the
15 extent to which it should be treated
16 differently. And it's -- has has said no. So
17 how do you distinguish that case?

18 MS. STEVENSON: So professional speech
19 as it was addressed in NIFLA is a much broader
20 category than what we're talking about here.
21 It would include things professionals are
22 saying in any -- any professional capacity.

23 We are focused on the very narrow
24 context where a healthcare provider is
25 delivering healthcare to a patient. They are

1 under fiduciary duties to act in that patient's
2 best interest. And they are subject to
3 malpractice liability.

4 And that is just a different category
5 of speech.

6 JUSTICE JACKSON: So you're -- you're
7 -- you're saying that this is a very narrow
8 carve-out, no matter what we sort of said other
9 -- otherwise with respect to professional, that
10 you'd be advocating for a very narrow rule
11 here?

12 MS. STEVENSON: Yes, it would be very
13 narrow. And I think it's consistent with the
14 precise doctrines that NIFLA called out as --
15 as not triggering heightened First Amendment
16 scrutiny, like malpractice, like informed
17 consent, because those are things that are
18 taking place in the exact same -- the exact
19 same relationship that we're talking about
20 here.

21 JUSTICE JACKSON: Thank you.

22 CHIEF JUSTICE ROBERTS: Thank you,
23 counsel.

24 Rebuttal, Mr. Campbell?

25

1 REBUTTAL ARGUMENT OF JAMES A. CAMPBELL

2 ON BEHALF OF THE PETITIONER

3 MR. CAMPBELL: Thank you, Mr. Chief
4 Justice.

5 On standing, Justice Gorsuch in -- in
6 response to your question, I heard the State
7 say that they are not disavowing enforcement,
8 particularly if the effort involves discussions
9 that seek change on identity. On pages 216 to
10 217, Ms. Chiles talks about how she wants to
11 have full conversations exploring issues of
12 identity and gender, and that includes
13 considering change.

14 On the issue of studies, there was a
15 reference to the Green and Turban studies. All
16 of those studies relied on biased sampling,
17 self-reporting. They conflated aversive
18 techniques with voluntary counseling. They did
19 not isolate licensed counselors, and they did
20 not purport even in their own study to prove
21 causation.

22 Beyond that, Justice Thomas, in
23 response to one of your questions, the State
24 conceded that it would be speech if it was a
25 life coach, but it's for some reason not

1 protected speech if it is a professional. That
2 is an attempt to revive the professional speech
3 doctrine that this Court rejected in NIFLA.

4 This law's viewpoint discrimination is
5 even worse than we've heard so far this morning
6 because the State of Colorado would allow a
7 12-year-old without their parents' consent to
8 enter into counseling that would go the
9 opposite way on these issues of gender identity
10 and sexual orientation, but if that same
11 12-year-old with their parents' consent want to
12 seek counseling in the opposite direction, the
13 kind that my client would provide, they are not
14 able to do that. That kind of viewpoint
15 discrimination must survive strict scrutiny.

16 This law harms gender dysphoric kids
17 because the statistics that we've cited in our
18 verified complaint, as well as in the brief
19 that we cited with this Court, indicate that
20 90 percent of young people who are struggling
21 with gender dysphoria before puberty work their
22 way through it and realign their identify with
23 their sex, but if one of those children go to a
24 counselor and they specifically say that is the
25 help I want, realigning my identity with their

1 sex, they cannot receive that help from someone
2 like my client.

3 Moreover, if they're continuing down
4 the path of transition, then unfortunately they
5 get locked into that path, and eventually it
6 leads, over 90 percent of the time once they
7 start down the path of social transition, it
8 will lead to the route of medicalized
9 transition, which the Cass report tells us
10 comes with a lot of harm and devastation.

11 And, lastly, there should be no remand
12 in this case for all of the reasons that I just
13 explained. In addition to that, I heard
14 Ms. Stevenson say that they were aware below
15 that we were arguing for strict scrutiny and
16 that they had an opportunity to put studies in.
17 So all remand would do in this case is continue
18 to prolong the ongoing harm that's happening
19 not only to my client but, more importantly,
20 the kids who are struggling with gender
21 dysphoria.

22 Thank you.

23 CHIEF JUSTICE ROBERTS: Thank you,
24 counsel.

25 The case is submitted.

1 (Whereupon, at 11:31 a.m., the case
2 was submitted.)
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