NO. 24-539

IN THE

Supreme Court of the United States

KALEY CHILES,

Petitioner,

v.

PATTY SALAZAR, in her official capacity as Executive Director of the Department of Regulatory Agencies, et al.,

Respondents.

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

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QUESTION PRESENTED

Whether a law that censors certain conversations between counselors and their clients based on the viewpoints expressed regulates conduct or violates the Free Speech Clause.

PARTIES TO THE PROCEEDING

Petitioner is Kaley Chiles, an individual.

Respondents are Patty Salazar, in her official capacity as Executive Director of the Department of Regulatory Agencies; Reina Sbarbaro-Gordon, in her official capacity as Program Director of the State Board of Licensed Professional Counselor Examiners and the State Board of Addiction Counselor Examiners; Jennifer Luttman, Andrew Harris, Marykay Jimenez, Kalli Likness, Sue Noffsinger, Laura Gutierrez, and Richard Cohan, in their official capacities as members of the State Board of Licensed Professional Counselor Examiners; and Halcyon Driskell, Kristina Daniel, Erika Hoy, Crystal Kisselburgh, Ramzy Nagy, Leiticia Smith, and Jonathan Culwell, in their official capacities as members of the State Board of Addiction Counselor Examiners.

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STATEMENT OF JURISDICTION

The Tenth Circuit entered judgment on September 12, 2024. The petition was timely filed and then granted on March 10, 2025. Lower courts had jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1292(a)(1). And this Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

Relevant portions of the United States Constitution and Colorado statutes appear at J.A.1–16, Pet.1, and Pet.App.232a.

INTRODUCTION

"The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind" through censorship. *Riley* v. *National Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 791 (1988). It is up to "speakers and listeners"—not the government—to determine "how best to speak" on the important issues affecting their lives. *Ibid.* This includes what is said during private conversations between counselors and their clients.

Yet in a sharp break from historical counseling regulations, Colorado enacted a viewpoint-based speech restriction on counselors. That law violates Petitioner Kaley Chiles's freedom to express views that her clients want to hear on a topic of "fierce public debate." *Tingley* v. *Ferguson*, 144 S. Ct. 33, 33 (2023) (Thomas, J., dissenting from the denial of certiorari). When Chiles counsels young people with gender dysphoria, Colorado allows her to speak if she helps them embrace a transgender identity. But if those clients choose to align their sense of identity with their sex by growing comfortable with their bodies, Chiles must remain silent or risk losing her license, her livelihood, and the career she loves.

This viewpoint-based censorship "in the field[] of … public health" is "danger[ous]." *National Inst. of Fam. & Life Advocs.* v. *Becerra*, 585 U.S. 755, 771 (2018) (*NIFLA*). Many families and adolescents want to address gender dysphoria by aligning identity and sex. But in Colorado, they cannot choose a licensed counselor to help them pursue that goal. Instead, counselors may engage with those clients only if they push them down the path of transition—potentially to a lifetime of medical interventions, starting with

puberty blockers and proceeding to cross-sex hormones and even surgeries. Through a gag order on counselors, Colorado increases the likelihood that kids will go down that road.

No respecter of the First Amendment, Colorado is once again trying to censor speech for "the very purpose of eliminating ideas" it opposes. *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 597 (2023) (cleaned up). But just as the Free Speech Clause stopped Colorado a few years ago, see *ibid.*, it does so again here. Because the State's restriction silences Chiles's counseling conversations based on viewpoint, this application of the statute must satisfy strict scrutiny. Neither the professional setting nor any relevant historical tradition calls for reduced constitutional protection. And Colorado's own evidence shows that it cannot come close to satisfying strict scrutiny. That's good news—because many young people will benefit from the compassionate counseling Chiles offers.

An unprecedented percentage of teenagers are struggling with questions about gender and feelings of discomfort with their bodies. Many of them want to talk to a counselor, sometimes from a religious perspective. This case is about who gets to decide the views expressed in those important conversations: families and their chosen counselors or government officials. The First Amendment protects those private discussions and bars the State from intruding. Because the Tenth Circuit held the opposite, this Court should reverse.

STATEMENT OF THE CASE

I. Kaley Chiles, inspired by her faith and love for others, helps clients achieve their goals through counseling conversations.

Kaley Chiles loves helping people and is passionate about counseling. She has devoted her career to walking alongside young people with various mental-health struggles, including issues related to trauma, personality disorders, addiction, eating disorders, gender dysphoria, and sexuality. Pet.App.206a, 213a–15a. After earning her master's degree in clinical mental health, she now works as a licensed counselor at Deeper Stories Counseling in Colorado Springs. Pet.App.212a.

Chiles's individual clients voluntarily seek her counseling and "determine the goals that they have for themselves." Pet.App.213a; see also Gerald Corey, *Theory and Practice of Counseling and Psychotherapy* 24 (10th ed. 2021) (it is "the client's responsibility to decide upon goals"). When those clients are minors, she counsels them only if their parents consent and the clients "are internally motivated to seek counseling (as opposed to being required to come"). Pet.App.212a. Chiles respects her clients' autonomy and "right of self-determination"—she does not "impose her values" on them or determine their goals. Pet.App.212a–13a. She treats every client "with unconditional positive regard." Pet.App.213a.

Chiles views her work as an outgrowth of her Christian faith. Pet.App.212a–14a, 221a. Many of her clients are also Christians who seek her help *because of* their shared religious beliefs. Pet.App.214a. These clients often believe "that God determines their identity according to what He has revealed in the

Bible rather than their attractions or perceptions determining their identity." *Ibid.*; see also J.A.139 (recognizing that "[s]ome individuals choose to live their lives in accordance with personal or religious values"). When her clients seek it, Chiles provides faith-informed counseling. Pet.App.212a; Deeper Stories Counseling, *Faith Informed Counseling*, perma.cc/L3B9-A8X9.

Chiles has counseled minor clients who want to discuss their gender, sexuality, and identity. Pet.App.206a–07a, 216a. Some believe they are living "inconsistent with their faith or values" on these issues, resulting in "internal conflicts, depression, [or] anxiety." Pet.App.214a–15a. They desire counseling—sometimes based on their faith—"to reduce or eliminate unwanted sexual attractions, change sexual behaviors, or grow in the experience of harmony with [their] physical body." Pet.App.207a. As "a client-directed counselor," Pet.App.213a, Chiles "seeks … to assist [those] clients" in pursuing those "desires and objectives." Pet.App.207a. Her religious beliefs compel her to give this "counsel and assistance to … clients who seek" it. Pet.App.221a.

"Speech is the only tool that [Chiles] uses in her counseling with minors seeking to discuss" these issues. Pet.App.206a. She never invokes conduct-based "aversive techniques" and is not "aware of any [counselor] who engages in such practice[s]." Pet.App.205a–06a.

Chiles begins her counseling conversations with these clients by discussing their "goals, objectives, [and] religious or spiritual beliefs." Pet.App.207a. Then she "talk[s] with them about gender roles, identity, sexual attractions, root causes of desires,

behavior[,] and values." Pet.App.206a. And she discusses their "experiences around sexuality and gender" and how their "thoughts, beliefs …, and behaviors intersect." Pet.App.215a. Chiles's counseling on these issues is shaped by her understanding of gender identity and sexual orientation.

II. Gender identity and sexual orientation consist of various mutable features including expression, identity, behavior, and feelings.

Gender identity. Gender identity is an ill-defined concept that refers to a person's "sense of self in relation to [her] gender." *Gender Identity*, Dictionary of Psychology, American Psychological Ass'n, perma.cc/3S2J-MXYK (APA Dictionary). According to Colorado's expert, this "nonbinary construct … allows for a range of gender identities" manifest through various "gender expression[s]" such as "physical appearance, clothing choice, accessories, and behaviors." J.A.41.

Gender dysphoria is a feeling of "discomfort or distress related to incongruence between a person's gender identity" and sex. *Gender Dysphoria*, APA Dictionary, perma.cc/7PGQ-WCC5; Pet.App.184a. It is manifest by "[a] strong *desire* to be … the other gender" and need not include "an insistence that one *is* the other gender." U.S. Dep't of Health and Hum. Servs., *Treatment for Pediatric Gender Dysphoria: Review of Evidence & Best Practices* 33 n.19 (2025) (HHS Report). The term transgender refers to people who assert a "gender identity" that "does not match their … sex." J.A.41.

Most children who experience gender dysphoria before puberty (roughly 90%) resolve those feelings—

either naturally or through counseling—and live consistent with their sex with no issues. Devita Singh et al., *A Follow-Up Study of Boys with Gender Identity Disorder*, 12 Frontiers in Psychiatry 632784 (2021), https://perma.cc/58FQ-TK6U. Colorado's evidence confirms that "[f]or many … children, gender dysphoria will not persist." J.A.525.

Some young people who experience gender dysphoria decide to identify as transgender. Of those, a subset known as detransitioners later regret that decision and realign their identity and sex. Hilary Cass, *Independent Review of Gender Identity Services for Children and Young People: Final Report* 21 (2024) (Cass Review) ("Some may transition and then de/retransition and/or experience regret."); see also Pet.App.191a–95a.

This reality shows that "[y]oung people's sense of [gender] identity … may evolve over time." Cass Review, *supra*, at 21. Even Colorado's expert recognizes that for some individuals, their "gender identity evolves or they change identity goals." J.A.83; see also J.A.42 (various aspects of "[h]uman development," including matters of identity, are "marked by changes over time").

Sexual orientation. Sexual orientation is typically thought of in terms of "romantic" or "sexual attractions." J.A.40. But it is a "multidimensional" concept that also includes "behavior" and "identity" related to those attractions. *Ibid.*

Sexual orientation changes for many people. Respected researchers of LGBT issues have long observed that "longitudinal, population-based studies" show "changes in the same-sex attractions of some individuals over time." Lisa M. Diamond &

Clifford J. Rosky, *Scrutinizing Immutability: Research on Sexual Orientation & U.S. Legal Advocacy for Sexual Minorities*, 53 J. of Sex Rsch. 363, 363 (2016), perma.cc/BFN8-UGLT; accord Pet.App.204a. And the American Psychological Association's (APA) 2009 Task Force Report—a centerpiece of Colorado's evidence here—concedes that "for some, sexual orientation identity … is fluid," J.A.139, and "[t]he available evidence" shows that some modify their sexual-orientation-related "behavior," J.A.144. One study of more than 13,000 people found that roughly 50% of those who identified as nonheterosexual before age 21 identified as heterosexual by age 23. Diamond & Rosky, *supra*, at 369–70.

To deny and suppress the reality that gender identity and sexual orientation can change, Colorado put its licensing power to a speech-censoring use that's inconsistent with history and tradition.

III. States have not historically censored counseling speech based on viewpoint.

Before the founding, "efforts to create [healthcare] licensing regimes [in the States] were generally unsuccessful, and those few licensing laws that passed … did not penalize practice by unlicensed physicians." Lewis A. Grossman, *The Origins of American Health Libertarianism*, 13 Yale J. Health Pol'y, L. & Ethics 76, 89 (2013). Even as new licensing regimes appeared soon after the founding, the laws were inconsistent among the States. *Id*. at 103.

Then, in the middle of the 1800s, States largely repealed or substantially weakened their medical licensing laws. *Id.* at 80, 102–04; accord Elliott A.

Krause, *Death of the Guilds* 30 (1996). It wasn't until "the late nineteenth century" that "a second wave of medical licensing statutes" arose. Grossman, *supra*, at 80. But a "demand for freedom of therapeutic choice ensured that these laws were drafted, revised, interpreted, and enforced" narrowly. *Ibid.*

"The origins of the counseling profession in the United States have generally been attributed" to the emergence of career counseling around the beginning of the 1900s. Michael Leahy et al., *A Brief History of Counseling and Specialty Areas of Practice* 4, in *The Professional Counselor's Desk Reference* (2d ed. 2015). Counseling then "gained considerable autonomy and visibility" when Carl Rogers pioneered "client-centered counseling" in the 1940s. *Id.* at 5. Yet it wasn't until 1976 that Virginia passed "the first counselor-licensure bill." Inst. of Med. of the Nat'l Academies, *Provision of Mental Health Counseling Services under TRICARE* 94 (2010), perma.cc/94G3-TZX5 (TRICARE Manual). And it took until 2009 for all States to join Virginia in "pass[ing] licensure bills for counselors." *Ibid.*

Historically, these counseling regulations have *not* censored speech based on viewpoint but have instead focused on "establishing minimum standards of preparation and ensuring the professional is qualified." David M. Bergman, *The Role of Government and Lobbying in the Creation of a Health Profession: The Legal Foundations of Counseling*, 91 J. of Counseling & Dev. 61, 62 (2013). To obtain a license, state law generally requires certain degrees, certification exams, and minimum amounts of supervised clinical experience. TRICARE Manual, *supra,* at App. G ("State Laws and Regulations Regarding the Practice of Counselors"); 4 Colo. Code Regs. § 737-

1:1.14 (requirements for licensure by examination). Retention and renewal of licensure have likewise been tied to objective, nonideological measures, such as continuing-education requirements, sufficient practice hours, and ongoing competence. TRICARE Manual, *supra*, at App. G; 4 Colo. Code Regs. § 737-1:1.10(D) (requiring "competence" for renewal).

IV. Colorado's counseling restriction broadly censors counseling conversations that pursue forbidden changes.

In the 2010s, some States broke new ground by enacting viewpoint-based counseling restrictions like the one challenged here. Movement Advancement Project, *LGBTQ Youth: Conversion "Therapy" Laws*, perma.cc/Y6BC-YNSS. Colorado's version forbids a licensed counselor from engaging in so-called "[c]onversion therapy with a client who is under eighteen years of age." Colo. Rev. Stat. § 12-245-224(1)(t)(V).

Colorado uses the loaded term "conversion therapy" to evoke long-abandoned, aversive practices like electric-shock therapy. But the law's prohibition extends far beyond that.

The State defines the prohibited counseling to include "*any* practice or treatment"—including speech—"that attempts or purports to change an individual's sexual orientation or gender identity." Colo. Rev. Stat. § 12-245-202(3.5)(a) (emphasis added). Colorado's expert admits that the forbidden "practices" occur "primarily by verbal efforts." J.A.47.

The statute casts "change" of gender identity or sexual orientation in broad terms. As discussed, gender identity implicates matters of identity, expression, behavior, and feelings; and sexual orientation

similarly encompasses identity, behavior, and attractions. See p. 6–8, *supra*. The stunning breadth of Colorado's law bans efforts to change *any* of it: "behaviors," "gender expressions," "attraction[,] or feelings." Colo. Rev. Stat. § 12-245-202(3.5)(a).

In practical terms, Colorado forbids counselors from helping minors experiencing gender dysphoria who want to "come to terms with their bodies." HHS Report, *supra*, at 253. That's because those clients seek to "change" aspects of their "gender identity" and "expressions." Colo. Rev. Stat. § 12-245-202(3.5)(a). Colorado also prohibits counselors from supporting adolescents who desire to stop their same-sex sexual "behaviors," even if they have no goal to change their attractions. *Ibid.*

The statute favors the expression of some views over others. On gender identity, it bans speech encouraging young people who have gender dysphoria or who identify as transgender to live at peace with their bodies or realign their identity with their sex. But it allows speech encouraging "a person undergoing gender transition" away from her sex. *Id.* § 12-245-202(3.5)(b)(II). And on sexual orientation, it silences conversations that seek to "change" any identity, behavior, or feeling related to sexual orientation, while permitting discussions affirming the status quo on those issues. *Id.* § 12-245-202(3.5)(a).

Colorado allows counselors to express "[a]cceptance, support, and understanding for the facilitation of an individual's coping, social support, and identity exploration and development," but *not* when a client requests "counseling … to change sexual orientation or gender identity" or any associated behavior,

expression, or feeling. *Id.* § 12-245-202(3.5)(b)(I). And any help with "the facilitation of … identity exploration" is limited to "[a]cceptance, support, and understanding." *Ibid.* Speech "challeng[ing] and confront-[ing]" clients "to assist [them] in building [their] own sense of self," Pet.App.208a—an approach widely used in "other areas" of counseling such as assisting with "trauma" or "eating disorders," Pet.App.215a—is banned.

Counselors like Chiles face steep penalties if they help a client pursue one of the forbidden goals. She may be fined up to $5,000 for each violation, suspended from practice, and even stripped of her license. Colo. Rev. Stat. § 12-245-225. Those penalties are strong incentives not to speak messages that Colorado disapproves. Chiles doesn't want the State to strip away her ability to do the work she loves.

The statute also disrespects clients' autonomy to set their own goals—often based on deeply held religious beliefs. Young people cannot obtain the banned counseling even if they voluntarily choose it, are motivated to pursue change, and have parents who consent.

V. Evidence does not support applying Colorado's counseling restriction to voluntary professional counseling.

Science does not support banning Chiles's speech-only, nonaversive counseling for minors who seek change. This was true when Colorado enacted its law, and it is even clearer today. During questioning at the Tenth Circuit oral argument, Colorado's counsel conceded that she "kn[e]w of no … studies" focusing on "talk therapy" by a licensed counselor with a

willing minor seeking change on issues of gender identity or sexual orientation. Audio of Oral Arg. at 13:42–15:32, perma.cc/2VKB-LJSN.

Gender identity. Consistent with this concession, no study shows that voluntary counseling by a licensed professional is ineffective or harmful when it aims to help gender-dysphoric youth achieve comfort with their bodies.

Most young people experiencing gender dysphoria struggle with other mental-health issues, such as anxiety, eating disorders, and body dissatisfaction. HHS Report, *supra*, at 65–66, 248–51; Cass Review, *supra*, at 90–97. Counseling is the standard treatment for these co-occurring issues, and addressing them often helps resolve—or at least better understand—the dysphoria. HHS Report, *supra*, at 248–51.

Counseling's "effectiveness" at addressing these co-occurring issues supports its use for gender dysphoria "specifically." *Id.* at 254. The existing evidence on counseling for gender dysphoria confirms this. "[S]everal studies suggest that psychotherapy … may effectively resolve the condition noninvasively." *Id.* at 251. And "there is no reliable evidence to suggest that psychotherapy for [gender dysphoria] is harmful." *Id.* at 252. A recent APA-published book confirms the absence of any "empirical base supporting … harm." David Rivera & Seth Pardo, *Gender Identity Change Efforts* 62, in *The Case Against Conversion "Therapy"* (2022). For adolescents in particular, counseling for gender dysphoria "is a well-suited intervention." HHS Report, *supra*, at 257.

Based on the evidence, the U.S. Department of Health and Human Services (HHS) recently con-

cluded that the "risk/benefit profile" for addressing gender dysphoria through counseling "is favorable." *Id.* at 262. And many European countries are recommending counseling as the "first-line treatment," while prohibiting or severely restricting medicalized efforts. *Id.* at 142–46, 246–47 (discussing Sweden, Finland, and England).

Sexual orientation. Likewise, no reliable science establishes that voluntary counseling is ineffective or harmful when licensed professionals assist minors who seek to change identities, behaviors, or feelings associated with sexual orientation.

The APA's 2009 report—again, a key piece of Colorado's evidence—recognized the "*lack* of published research on [sexual-orientation-change efforts] among children" and the absence of "empirical research on adolescents who request [those efforts]." J.A.337, 341 (emphasis added). Even the research on adults, the report said, "has not adequately assessed efficacy and safety." J.A.154.

On efficacy, because "nonaversive and recent approaches … have not been rigorously evaluated," the APA report drew no "conclusion regarding whether [they] are or are not effective." J.A.255–56. Still, the report recognized that some people attest "they … benefited," particularly when it "helped them live in a manner consistent with their faith." J.A.143; accord J.A.256 (some say "they have benefited from nonaversive" efforts); see also Pet.App.203a (former APA president observed that "[o]f the patients [he] oversaw who sought to change their orientation, *hundreds were successful*").

On harm, the report "conclude[d] that there is a dearth of scientifically sound research on the safety"

of these efforts, and that existing studies "do not provide valid causal evidence" of "harm." J.A.253–54; accord J.A.370 (finding "no scientifically rigorous studies" to support "a definitive statement about whether [these efforts are] safe or harmful and for whom"). Colorado's expert reviewed the studies since that report's publication and admitted that they "cannot determine causal effects" or "causality." J.A.64–65.

On the flip side, some sexual-orientation studies have shown that nonaversive counseling pursuing clients' desire for change can be beneficial. *E.g.*, Decl. of D. Paul Sullins, *Bury* v. *City of Kansas City*, No. 4:25-cv-00084-RK (W.D. Mo. Apr. 14, 2025), ECF No. 31-2 ¶¶ 99–112 (summarizing "multiple clinical studies" that "reported successful change … and strong net psychological benefit"). And recent evidence analyzing a randomly selected group of 1,518 people from across the country concluded that these efforts "do[] not result in higher suicidality … and may sharply reduce subsequent suicide attempts." D. Paul Sullins, *Sexual Orientation Change Efforts Do Not Increase Suicide: Correcting a False Research Narrative*, 51 Archives of Sexual Behavior 3377, 3377 (2022), perma.cc/H2QH-U92H. Instead of preventing harm, Colorado's statute inflicts it.

VI. Colorado's counseling restriction inflicts harm on young people, families, counselors, and Chiles.

Many young people are in crisis. The number of children and adolescents (especially young girls) struggling with gender dysphoria—and co-occurring mental-health issues—has drastically increased in recent years. HHS Report, *supra*, at 9; Cass Review,

supra, at 85. Research suggests "social influence [and] pressure have played a role" in this surge. HHS Report, *supra*, at 66–67.

Colorado's law pushes these young people down an unproven, dangerous, and increasingly rejected path. Counselors cannot help them grow comfortable with their bodies or realign their identity and sex. They may only encourage a child's transgender identity and the accompanying "gender transition," Colo. Rev. Stat. § 12-245-202(3.5)(b)(II)—even if the client doesn't want that, and even though Colorado's expert admits "gender identity evolves" for some people, J.A.83.

Colorado's viewpoint censorship locks kids into a single track that often leads to taking puberty blockers and cross-sex hormones and undergoing surgical procedures (like mastectomies) that remove healthy body parts. Pet.App.184a–85a. That's because children encouraged to begin "social transition"—the process of identifying and presenting inconsistent with their sex—typically persist in their dysphoria rather than growing comfortable with their developing bodies. Kristina R. Olsen et al., *Gender Identity 5 Years After Social Transition*, 150 Pediatrics e2021056082 (2022), perma.cc/ZLZ3-X3PW. And they almost invariably pursue puberty blockers and cross-sex hormones—cementing their destiny as lifelong medical patients. HHS Report, *supra*, at 89; Cass Review, *supra*, at 31.

The best available evidence does not support doing this to kids. The United Kingdom's groundbreaking Cass Review found "no good evidence on the long-term outcomes of [these] interventions to manage gender-related distress." Cass Review, *supra*,

at 13. Nor do reliable studies "support the claim" that these medical interventions "reduce[] suicide risk." *Id.* at 187, 195. Instead, science shows that these uses of puberty blockers and cross-sex hormones *create* risks, including to "neurocognitive development, psychosexual development, … bone health," Cass Review, *supra*, at 32, fertility, liver function, and cardiovascular health, *L.W. ex rel. Williams* v. *Skrmetti*, 83 F.4th 460, 489 (6th Cir. 2023) (noting the "considerable evidence [on] the risks of these treatments"). These significant concerns have led most States and many European nations to prohibit or severely curtail these medical interventions. Amy Harmon, *These 26 States Have Restricted Gender-Transition Treatments for Minors Since 2021*, N.Y. Times (Dec. 4, 2024); HHS Report, *supra*, at 142–46, 246–47. But Colorado's counseling restriction pushes young people down that path.

The statute also scares away counselors from helping kids struggling with gender dysphoria. "[T]he specter of being labeled a 'conversion therapist'" and potentially punished under a law like Colorado's "has created a climate of anxiety among mental health professionals." HHS Report, *supra*, at 253–54; accord Cass Review, *supra*, at 202 (the mere "potential" of similar legislation in the United Kingdom "has left some clinical staff fearful"). That has "a chilling effect" on counselors' "willingness to take on complex" cases of gender dysphoria in minors, which makes "it much harder for [those kids] to access quality mental health care." HHS Report, *supra*, at 255–56. This exacerbates the existing shortage of counselors who support "gender-questioning young people." Cass Review, *supra*, at 202. Meeting the needs of children

and their families has been "hindered by the politicization of the issue." *Id.* at 253.

That brings us back to Chiles. Colorado's statute has undeniably silenced her. Before the law, she "helped clients freely discuss sexual attractions, behaviors, and identity by talking with them about gender roles, identity, sexual attractions, root causes of desires, behavior[,] and values." Pet.App.206a. She still "wants to" provide this "voluntary counseling related to sexuality and gender[] to minor clients," Pet.App.216a—to assist them with "their stated desires and objectives … to reduce or eliminate unwanted sexual attractions, change sexual behaviors, or grow in the experience of harmony with [their] physical body," Pet.App.207a. She cares about these children and deeply desires to help them achieve their goals.

Chiles continues to "receive[] requests for counseling for … matters related to sexual attractions and gender identity." Pet.App.216a. But "[s]ince the [law]" was enacted, she "has intentionally avoided conversations with clients that may be perceived as violating" it, Pet.App.206a, forcing her to be guarded and cautious with existing clients and "prevent[ing] future clients from getting help," Pet.App.216a. And because of the law, Chiles "is not currently engaging in discussions with minor clients if they have concerns about their sexual attractions or sexual orientation." Pet.App.206a–07a.

In short, Chiles "has been and will be forced to deny" to "her clients and potential clients" any "counseling that fully explores sexuality and gender." Pet.App.217a. She "has been unable to fully explore certain clients' bodily experiences around sexuality

and gender and how their … thoughts, beliefs, interpretation, and behaviors intersect." Pet.App.215a. If she chooses to help young people achieve one of the forbidden goals, she jeopardizes her career. This chilling of speech harms both Chiles—who cannot speak messages informed by science, experience, and faith—and her clients, who are denied the professional help they seek.

VII. The lower courts deny relief.

Because of the harm that Colorado's law causes, Chiles filed this suit, arguing that the statute violates the Free Speech Clause. Pet.App.174a, 218a–20a. She moved to preliminarily enjoin the law as applied to her counseling. Pet.App.135a.

The district court denied the motion. Pet.App.173a. The court began by affirming Chiles's standing: "She has in the past engaged in the type of speech [prohibited by the law], demonstrated that she has a present desire to engage in" that same speech, and shown that "she has no intention to engage in this speech based on a 'credible fear' that the [law] will be enforced against her." Pet.App.145a.

The court then rejected Chiles's free-speech claim, reasoning that the counseling restriction is a "prophylactic measure" that permissibly "regulates professional conduct" by banning "speech made in a professional context." Pet.App.151a–52a. Applying rational-basis review, the court held that "Colorado considered the body of medical evidence regarding conversion therapy and sexual orientation change efforts … when passing the [law]" and reasonably decided to ban counseling for minor clients who want to pursue change. Pet.App.158a.

A sharply divided Tenth Circuit affirmed. Like the district court, the Tenth Circuit held that Chiles established standing. Pet.App.16a–26a. Before the law's enactment, Chiles engaged in speech "she believes the [law] proscribes," by helping minors who desire to "change their sexual orientation or gender identity." Pet.App.21a–22a. She also showed a "present desire to engage in the restricted speech" because she seeks to "assist clients" when their objective is "to reduce or eliminate unwanted sexual attractions, change sexual behaviors, or grow in the experience of harmony with [their] physical body." Pet.App.22a–23a (cleaned up). And she alleged "a credible threat that the statute will be enforced" because "Colorado has never disavowed punishing those who violate" it. Pet.App.24a–26a (cleaned up).

This conclusion on standing mirrors that of other courts when they have decided pre-enforcement lawsuits to statutes like Colorado's. Eight decisions (including the two below) have expressly found standing. Pet.App.16a–26a; *id.* at 138a–45a; *Tingley* v. *Ferguson*, 47 F.4th 1055, 1066–69 (9th Cir. 2022); *Catholic Charities of Jackson* v. *Whitmer*, 764 F. Supp. 3d 623, 637–43 (W.D. Mich. 2025); *Tingley* v. *Ferguson*, 557 F. Supp. 3d 1131, 1137–38 (W.D. Wash. 2021); *Doyle* v. *Hogan*, No. DKC 19-0190, 2019 WL 3500924, at *8–9 (D. Md. Aug. 1, 2019); *Otto* v. *City of Boca Raton*, 353 F. Supp. 3d 1237, 1245–46 (S.D. Fla. 2019); *Vazzo* v. *City of Tampa*, No. 8:17-cv-2896-T-02AAS, 2019 WL 1048294, at *4–5 (M.D. Fla. Jan. 30, 2019), *Rep. & Rec. adopted*, 2019 WL 1040855 (M.D. Fla. Mar. 5, 2019). Six more implicitly found standing by addressing the merits. *Otto* v. *City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020); *Welch* v. *Brown*, 834 F.3d 1041 (9th Cir. 2016); *King* v. *Governor of N.J.*,

767 F.3d 216 (3d Cir. 2014); *Pickup* v. *Brown*, 728 F.3d 1042 (9th Cir. 2013); *Pickup* v. *Brown*, 42 F. Supp. 3d 1347 (E.D. Cal. 2012); *Welch* v. *Brown*, 907 F. Supp. 2d 1102 (E.D. Cal. 2012).

On the merits, the majority below said it applied "ordinary First Amendment principles." Pet.App.37a (quoting *NIFLA*, 585 U.S. at 773). But it labeled Chiles's conversations with clients—undeniably speech by any ordinary measure—as "professional *conduct*" because they occur in the context of helping clients. Pet.App.38a–45a (emphasis added). On the majority's telling, Chiles's counseling conversations are the "conduct" of "treatment"—a "therapeutic modality … carried out through use of verbal language." Pet.App.46a. Colorado's law only "incidentally involves speech," the majority reasoned, "because an aspect of the counseling conduct, by its nature, necessarily involves speech." Pet.App.50a.

The majority then applied rational-basis review. Pet.App.59a–72a. It "acknowledge[d] … that the reports in the record do not describe studies confined *only* to talk-based conversion therapy administered only to minors." Pet.App.71a n.47. Despite that, the court relied on statements of professional associations and the APA's 2009 report—which itself recognized the "dearth of scientifically sound research" on harm, J.A.254—to conclude that the record supports Colorado's asserted harms. Pet.App.64a–66a.

Judge Hartz dissented. He criticized as "remarkable" and "contrary" to this Court's precedents the majority's decision to treat Chiles's "speech as conduct." Pet.App.87a, 90a–106a (discussing *NIFLA*, 585 U.S. at 766–73, *Holder* v. *Humanitarian L. Project*, 561 U.S. 1, 25–28 (2010), and *Cohen* v.

California, 403 U.S. 15, 18 (1971)). He also explained that "a restriction on speech is not *incidental* to regulation of conduct when the restriction is imposed because of the expressive content of what is said." Pet.App.87a–88a. As applied to Chiles, Colorado's law directly regulates speech because it is triggered solely by what she says. Pet.App.98a–99a. So strict scrutiny applies. Pet.App.106a.

Judge Hartz doubted that Colorado could satisfy that demanding standard. Pet.App.107a. The Cass Review and experiences of European countries, he explained, cast "substantial doubt" on the claims that the only proper treatment for gender dysphoria in young people is to affirm their stated identity. Pet.App.112a–13a. And he emphasized that both the APA's 2009 report and its follow-up 2021 report lacked "any study (good or bad) that focuses on the type of therapy at issue in this case: talk therapy for a minor provided by a licensed mental-health professional." Pet.App.119a–22a.

It "was not terribly long ago," Judge Hartz added, that professional associations "declared homosexuality to be a mental disorder." Pet.App.85a. Yet under the majority's approach, a then-enacted law "*prohibiting* therapy that affirmed a youth's homosexual orientation would have faced only rational-basis review and very likely would have been upheld." *Ibid.* That cannot be squared with the First Amendment right "to speak our minds … in every context." Pet.App.86a.

SUMMARY OF THE ARGUMENT

Colorado censors licensed counselors from expressing certain views to willing clients simply because the State thinks it knows best which ideas they should discuss. The First Amendment does not tolerate this kind of government intrusion on speech. The Constitution "put[s] the decision as to what views shall be voiced … into the hands of each of us," not the government. *Cohen*, 403 U.S. at 24.

Chiles's counseling conversations are constitutionally protected speech. They communicate messages that clients want to hear as they struggle to address some of the most important issues, moral questions, and feelings they are facing. These personal, consensual, and caring conversations are an invaluable lifeline to young people and their families.

Applying Colorado's statute to Chiles's counseling conversations directly censors her speech. It goes far beyond an incidental burden because it targets her speech based on its communicative content. *Holder*, 561 U.S. at 25–28; *Cohen*, 403 U.S. at 18. Nor does this application of the statute regulate speech incidental to conduct because Chiles's counseling conversations involve *no* conduct. The only tool she uses is speech.

The Tenth Circuit's attempt to transform counseling conversations into the "professional conduct" of "treatment" fails miserably. Cases like *NIFLA* and *NAACP* v. *Button*, 371 U.S. 415 (1963), foreclose that route. They establish that labels don't control First Amendment analysis and that conversations between healthcare professionals and their clients are fully protected speech.

Following the Tenth Circuit down its misguided path would empower States to interfere with countless conversations between professionals and their clients. States could, for example, ban doctors from discussing birth control or counselors from encouraging (or discouraging) options like divorce. Contra *NIFLA*, 585 U.S. at 771–72. That would deal a devastating blow to free speech.

As applied to Chiles's speech, Colorado's counseling restriction censors based on content and viewpoint. Counselors and their clients can pursue change for all sorts of behaviors, feelings, and identities, except on two topics: gender identity or sexual orientation. That's content-based discrimination. And for young people who experience gender dysphoria or identify as transgender, counselors can speak messages supporting "gender transition," but not messages supporting detransition or living at peace with their body, even if the client chooses those goals. That's viewpoint-based discrimination.

Because this application of Colorado's statute discriminates based on content and viewpoint, the State bears the heavy burden of satisfying strict scrutiny. *Reed* v. *Town of Gilbert*, 576 U.S. 155, 171 (2015). But applying the counseling restriction here does not further a compelling interest because Colorado has failed to show that Chiles's counseling causes harm. On the contrary, it is Colorado's statute that harms vulnerable youth by depriving them of counseling that can help them.

Nor has Colorado acted in a narrowly tailored manner. The statute is overinclusive because it bans far more speech than necessary. It forbids all caring counseling conversations when a client seeks change

for any behavior, feeling, or identity connected with gender identity or sexual orientation. And it does so even while Colorado's own evidence recognizes benefits for some.

The statute is also underinclusive. It allows anyone who is not a licensed mental-health professional to have the same conversations it bans for Chiles, and it even permits licensed counselors to have the same conversations with adults. If Chiles's speech were as dangerous as Colorado claims, its actions are inexplicable. This exposes the State's true aim: to silence and marginalize views it dislikes by gagging the professionals best equipped to speak on the issues.

In short, the Free Speech Clause forbids the State from censoring mutual conversations on important topics. This includes discussions between counselors and clients on deeply personal issues. Colorado's viewpoint-based intrusion into the counseling room is unconstitutional.

ARGUMENT

I. Colorado's counseling restriction bans Chiles's speech based on content and viewpoint.

The First Amendment prohibits the government from abridging "the freedom of speech." U.S. Const. amend. I. As applied to Chiles's counseling, Colorado's counseling restriction is a content- and viewpoint-based ban on speech.

This Court has "long protected the First Amendment rights of professionals" like Chiles. *NIFLA*, 585 U.S. at 771. In *NIFLA*, the Court reaffirmed that "professional speech" is not "a separate category of speech that is subject to different rules" or afforded "diminished constitutional protection." *Id.* at 767. The same "ordinary First Amendment principles" that apply outside the professional context apply within it. *Id.* at 773.

As *NIFLA* recognized, the "Court has afforded less protection for professional speech in [only] two circumstances—neither of which turned on the fact that professionals were speaking." *Id.* at 768. The first allows States to compel the disclosure of "factual, noncontroversial information in … 'commercial speech.'" *Ibid.* (citing *Zauderer* v. *Office of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985)). The second permits "regulations of professional conduct that incidentally burden speech." *Id.* at 769. The Tenth Circuit tried to shoehorn this case into the second category. Pet.App.37a. But it doesn't fit.

A. Chiles's counseling conversations are speech.

The threshold issue is whether Chiles's forbidden counseling conversations qualify as speech. They surely do.

The quintessential "mediums of expression" are "written or spoken words." *Hurley* v. *Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 U.S. 557, 569 (1995). Words spoken during "conversation[s] … transmi[t] … ideas" and thus are speech. *McCullen* v. *Coakley*, 573 U.S. 464, 488 (2014); accord *United States* v. *Alvarez*, 567 U.S. 709, 722–23 (2012) (plurality opinion) (acknowledging that "personal ... conversations" are speech). The Court has held that conversations constitute speech both outside the professional context, *e.g.*, *McCullen*, 573 U.S. at 488 (conversations on sidewalks), and within it, *e.g.*, *Legal Servs. Corp.* v. *Velazquez*, 531 U.S. 533, 542–43 (2001) ("advice from [an] attorney to [a] client").

Chiles's counseling conversations are paradigmatic speech. She begins by dialoguing with clients about their "goals, objectives, [and] religious or spiritual beliefs." Pet.App.207a; see also Corey, *supra*, at 4 (counselors engage in a "genuine dialogue with their clients"). Then she "talk[s] with them about gender roles, identity, sexual attractions, root causes of desires, behavior[,] and values." Pet.App.206a; see also Abraham Nussbaum, *The Pocket Guide to the DSM-5-TR Diagnostic Exam* 23–25 (2022) (counselors ask questions, discuss concerns, "instill hope," and "provide support").

Throughout the conversations, Chiles speaks messages encouraging her clients to achieve "the goals that they have for themselves." Pet.App.213a.

That includes affirming clients who want their faith to inform "their identity." Pet.App.214a. She also "challenge[s] and confront[s]" her clients "to assist [them] in building their own sense of self." Pet.App.208a. During this wide-ranging discourse, Chiles and her clients exchange "deeply personal" messages. *NIFLA*, 585 U.S. at 771.

Such "personal, caring, consensual conversations" between Chiles and her clients are among the most effective ways to communicate. *McCullen*, 573 U.S. at 488–89. It is through these discussions that her clients' "convictions and beliefs are influenced, expressed, and tested" and their "personalities are formed and expressed." *United States* v. *Playboy Ent. Grp., Inc.*, 529 U.S. 803, 817 (2000). And the topics they address—"sexual orientation and gender identity"—are "matters of profound value and concern." *Janus* v. *American Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 913–14 (2018) (cleaned up).

Simply put, these counseling conversations are essential lifelines for young people and families urgently searching for help. They are *valuable* speech. The First Amendment protects them.

B. The counseling restriction directly burdens Chiles's speech.

The Tenth Circuit held that Colorado's counseling restriction is a professional-conduct regulation that only *incidentally* burdens speech. Pet.App.30a–59a. But as applied to Chiles, the statute *directly* burdens speech because she is not engaged in conduct and the statute is triggered by her communicative content.

The First Amendment affords less protection to "restrictions directed at … conduct" that "impos[e] incidental burdens on speech." *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 567 (2011). Examples include applying a general "ordinance against outdoor fires" to a person who "burn[s] a flag" to express a message, *ibid.*, and applying a general statute against destroying a draft card to a person who burns his card to express antiwar beliefs, *United States* v. *O'Brien*, 391 U.S. 367, 376–77 (1968). In those situations, the law is not triggered by the message. That's what makes the speech burden *incidental* to the conduct regulation.

In contrast, when a law is applied to "bar[] speech because of what it communicates," that "is a direct regulation of speech, not a regulation of conduct that incidentally affects speech." Pet.App.99a (Hartz, J., dissenting). This is the lesson of *Holder*, *Cohen*, and *303 Creative*.

In *Holder*, an attorney and nonprofit organizations filed suit to protect their right to provide legal training and advice to terrorist groups. 561 U.S. at 14. They argued that the First Amendment protected them from a law that banned providing "material support" to those groups. The government argued that "the only thing truly at issue" was "conduct, not speech." *Id.* at 26. The Court disagreed. "[A]s applied to plaintiffs the conduct triggering coverage under the statute consist[ed] of communicating a message," and its application "depend[ed]" on what the plaintiffs said. *Id.* at 27–28. Importantly, as *NIFLA* recognized (and the Tenth Circuit admitted below, Pet.App.54a n.32), *Holder* involved "the First Amendment rights of *professionals*" to "provide[] specialized advice about international law." *NIFLA*, 585 U.S. at 771 (emphasis

added). So the principles it announced apply with full force in the professional context.

Cohen is also instructive. California convicted Cohen for engaging in "offensive conduct" when he wore a jacket that said "F*** the Draft." 403 U.S. at 16. The lower courts affirmed the conviction as a valid regulation of conduct. *Id.* at 17. But this Court held that the application of the statute regulated speech, not conduct, because the conviction "rest[ed] upon the asserted offensiveness of the words Cohen used to convey his message." *Id.* at 18. "The only 'conduct' which the State sought to punish is the fact of communication." *Ibid.* There was no "separately identifiable conduct," and the State lacked the "power to punish Cohen for the underlying … message." *Ibid.*

303 Creative—a case familiar to Colorado—is similar. There, Colorado threatened to apply its public-accommodation law to force a graphic artist to create websites expressing messages about marriage. Colorado argued that it merely regulated the artist's "'conduct,' not her speech." *303 Creative*, 600 U.S. at 597. Yet the Court held that the "burden on speech" was not "incidental" because Colorado applied its law to "alter the expressive content of her message" and "interfere with her desired message." *Id.* at 596–97 (cleaned up).

As in *Holder*, *Cohen*, and *303 Creative*, this application of Colorado's counseling restriction directly burdens speech. The statute is "trigger[ed]" by words "communicating a message." *Holder*, 561 U.S. at 28. Chiles "want[s] to speak," and "whether [she] may do so … depends on what [she] say[s]." *Id.* at 27.

If her speech supports a young person's "gender transition," Colorado allows it. Colo. Rev. Stat. § 12-

245-202(3.5)(b)(II). But if she encourages the same person—at his request—to accept his body and "change" his gender identity, "expressions," or "behaviors," Colorado prohibits it. *Id.* § 12-245-202(3.5)(a).

Applying the statute to Chiles thus "does not simply have an effect on speech"—it "is directed at certain content" and views. *Sorrell*, 564 U.S. at 567. That direct burden on speech demands rigorous review under the First Amendment. *Holder*, 561 U.S. at 28–39. (Indeed, even indirect burdens must withstand intermediate scrutiny. *O'Brien*, 391 U.S. at 376–77.)

The Tenth Circuit denied any burden on Chiles's speech because she may "share with her minor clients her own views" about the counseling she wants to offer or "refer" those "clients to service providers" unregulated by the statute. Pet.App.47a. For starters, state law likely forbids Chiles from speaking these messages because the "practice" of counseling includes what counselors say during "[c]onsultation" discussions and "[r]eferral[s]." Colo. Rev. Stat. § 12-245-603(2)(g)&(m).

Regardless, the Court has "consistently rejected the suggestion that a government may justify a content-based prohibition by showing that speakers have alternative means of expression." *Consolidated Edison Co. of N.Y.* v. *Public Serv. Comm'n of N.Y.*, 447 U.S. 530, 541 n.10 (1980). And speakers' freedom "to employ other means to disseminate their ideas does not take their speech … outside the bounds of First Amendment protection." *Meyer* v. *Grant*, 486 U.S. 414, 424 (1988).

That's especially so here because Chiles's talking about or referring for counseling is not the same

speech—nor is it as effective—as engaging in the counseling conversations that her clients request. Indeed, the burden on the plaintiffs' speech in *Holder* wouldn't have evaporated even if they could have referred the terrorist organizations for the legal training they sought. The same is true here.

C. Chiles's speech is not incidental to conduct.

Speech that is merely incidental to conduct is not entitled to full constitutional protection. *NIFLA*, 585 U.S. at 768. To illustrate the principle within the professional context, *NIFLA* discussed *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*, 505 U.S. 833, 884 (1992). *Casey* "upheld a law requiring physicians to obtain informed consent before they could perform an abortion." 585 U.S. at 769. That law regulated professional conduct—the performance of a "medical procedure" and the obtaining of "informed consent to perform [the] operation." *Id.* at 770. Getting informed consent requires doctor-patient communication. But that speech is incidental to regulable conduct—the performing of a procedure.

Outside the professional setting, the Court has recognized other examples. States "may require employers to remove" a "White Applicants Only" sign because that speech is incidental to the targeted conduct of illegal "race-based hiring." *Sorrell*, 564 U.S. at 567. And governments may prohibit the speech involved in making "agreements in restraint of trade" because it is incidental to the illegal business practices targeted by "antitrust laws." *Ibid.* (citing *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

Each of these examples involves conduct that the government may legitimately regulate: medical procedures, unlawful employment practices, and illegal restraints on trade. But here, when Colorado applies its counseling restriction to Chiles, there is no conduct because "[s]peech is the only tool" she uses "in her counseling with minors seeking to discuss" gender or sexuality issues. Pet.App.206a. The absence of conduct means that speech-incidental-to-conduct rules don't govern. Here, as in *NIFLA*, Colorado's law "regulates speech as speech." 585 U.S. at 770.

D. There is no "treatment speech" exception to the First Amendment.

The Tenth Circuit realized that it needed some "professional conduct" to justify silencing Chiles's speech under *NIFLA*. 585 U.S. at 768–69. So it converted her counseling conversations from speech to "professional conduct" by labeling those discussions "treatment" carried out through "verbal language." Pet.App.42a–46a. But "[n]othing in the [First] Amendment's text draws a [treatment/non-treatment] distinction." *New York State Rifle & Pistol Ass'n, Inc.* v. *Bruen*, 597 U.S. 1, 32 (2022). It instead separates "speech and conduct." *NIFLA*, 585 U.S. at 769. That is the relevant line for First Amendment analysis.

When drawing that line, "a State cannot foreclose the exercise of [First Amendment] rights by mere labels." *Button*, 371 U.S. at 429; see also *Riley*, 487 U.S. at 796 ("labels cannot be dispositive of [the] degree of First Amendment protection"); *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964) ("labels" cannot claim "talismanic immunity" from the First Amendment).

Button illustrates this by rejecting such a labeling game in the professional context. Virginia's highest court concluded that attorney conversations "advis-[ing]" individuals about their "legal rights" violated a "state statute" regulating "professional conduct." *Button*, 371 U.S. at 434, 438. But this Court held that the First Amendment protected those conversations because "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights." *Id*. at 439. Just as Virginia could not restrict attorney-client conversations by calling them legal practice, Colorado cannot restrict counselor-client conversations by calling them medical treatment.

NIFLA cuts squarely against the Tenth Circuit's view that speech transforms into conduct when professionals are "treating" people. The *NIFLA* opinion presupposes that "doctor-patient discourse"—where "[d]octors help patients make deeply personal decisions" about their health—is speech. 585 U.S. at 771; accord *id.* at 767 (noting that "[p]rofessional speech" is speech "within the confines of [a] professional relationship"). This includes physicians advising "patients about the use of birth control" or "the benefits of medical marijuana." *Id.* at 772; see also *Rust* v. *Sullivan*, 500 U.S. 173, 192–200 (1991) (presupposing that physician "abortion counseling" is speech). The Court even assumes that "counselors" discussing "the wisdom of divorce" with clients qualifies as speech. *NIFLA*, 585 U.S. at 772.

NIFLA also rejects the Ninth Circuit's analysis in *Pickup* v. *Brown*, 740 F.3d 1208 (9th Cir. 2014), which reviewed a California counseling restriction like Colorado's. *NIFLA*, 585 U.S. at 767. In the pages from *Pickup* that the Court cited disapprovingly, *ibid.* (citing pages 1227–29), the Ninth Circuit held that

the challenged law "regulates conduct" because the speech at issue is "a form of treatment." *Pickup*, 740 F.3d at 1229. That logic doesn't survive *NIFLA*.

Reinforcing that point, the Ninth Circuit decision under review in *NIFLA* similarly declared that when the "speech at issue is … a form of treatment," it qualifies as mere "professional conduct." *National Inst. of Fam. & Life Advocs.* v. *Harris*, 839 F.3d 823, 839 (9th Cir. 2016). Yet this Court held that the Ninth Circuit had not "identified a persuasive reason for treating professional speech" outside "ordinary First Amendment principles." *NIFLA*, 585 U.S. at 773; see also Pet.App.94a (Hartz, J., dissenting) (making this point); *Tingley* v. *Ferguson*, 57 F.4th 1072, 1077 (9th Cir. 2023) (O'Scannlain, J., respecting the denial of reh'g en banc) (rejecting this "treatment" argument).

The same concerns that prompted this Court to affirm full protection for professional medical speech in *NIFLA* apply here. *NIFLA* "stressed the danger of content-based regulations in the fields of medicine and public health." 585 U.S. at 771 (cleaned up). "Throughout history, governments have manipulated the content of doctor-patient discourse" to "suppress unpopular ideas or information." *Ibid.* (cleaned up). That deprives society of "an uninhibited marketplace of ideas" essential to fostering the discovery of "truth." *Id.* at 772.

Here, Colorado controls the content of counselor-client conversations to suppress disfavored views. The State wants counselors to encourage young people to pursue a gender transition, but it forbids them from counseling minors to live at peace with their bodies or realign their identity and sex.

That the Tenth Circuit labeled Chiles's conversations "treatment" seeking to resolve young people's "turmoil" serves only to highlight the need for constitutional protection. Pet.App.43a–44a. In public health specifically, "the people lose when the government is the one deciding which ideas should prevail." *NIFLA*, 585 U.S. at 772.

The Tenth Circuit justified its "counseling is treatment" theory by noting that counselors develop expertise through "advanced education," use counseling "modalit[ies]," and earn money through "financial arrangement[s]" with clients. Pet.App.44a–46a. But *NIFLA* rejected the idea that professionals should enjoy less speech protection because of their "expert knowledge," skill, or "judgment." 585 U.S. at 767. Nor is First Amendment protection lost because a person "offers her speech for pay." *303 Creative*, 600 U.S. at 594. Those features of counseling—expertise, techniques, and remuneration—apply to countless other speakers, professionals and nonprofessionals alike, such as artists, attorneys, and journalists. They don't justify transforming speech into conduct.

Accepting the Tenth Circuit's "treatment" rationale would deliver a sweeping blow to free speech. Colorado broadly defines regulable "[p]sychotherapy" to include "counseling" that helps clients "alleviate behavioral and mental health disorders, understand unconscious or conscious motivation, resolve emotional, relationship, or attitudinal conflicts, or modify behaviors." Colo. Rev. Stat. § 12-245-202(14)(a); see *id.* § 12-245-603 (defining "practice of licensed professional counseling" to include "[p]sychotherapy"). So under the Tenth Circuit's rule, counseling conversations discussing conditions like gender dysphoria, exploring the motives behind

clients' actions, helping clients resolve relational strife, or assisting them in stopping unwanted behaviors are no longer speech.

This would empower States to censor all kinds of views and options in counseling discussions. A State that wants to promote marriage could ban counselors from encouraging divorce for clients depressed about their marriages. A pro-abortion State could forbid counselors from "discouraging a [client] from aborting her unborn child." *Wollschlaeger* v. *Governor, Fla.*, 848 F.3d 1293, 1329 (11th Cir. 2017) (W. Pryor, J., concurring). Or another State could invoke data showing that "female liberal adolescents" suffer high rates of depression and ban counselors from promoting liberal political views to minors. Catherine Gimbrone et al., *The Politics of Depression: Diverging Trends in Internalizing Symptoms Among US Adolescents by Political Beliefs*, 2 SSM Mental Health 100043 (2022). The counseling censorship possibilities appear endless with no First Amendment backstop.

The concerns don't end with counselors either. If counseling can be recast as conduct, so can other professional speech. States might say that nutrition counseling is conduct and forbid those professionals from advising about certain diets for climate-change reasons. States might insist that licensed teachers are engaged in the conduct of "training" and censor the teaching of disfavored political views. Contra *Holder*, 561 U.S. at 27 (treating "training" as speech). Or States might reframe attorney-client speech as the conduct of "advising" and forbid attorneys from informing illegal immigrants about their rights. Contra *Velazquez*, 531 U.S. at 542–43 (treating "advice from [an] attorney to [a] client" as speech).

In short, the Tenth Circuit's transformation of Chiles's speech into conduct circumvents *NIFLA*'s full protection for professional speech. This Court should not allow its precedent to be so easily cast aside.

II. Colorado's content- and viewpoint-based counseling restriction is subject to strict scrutiny.

Strict scrutiny applies to this application of Colorado's counseling restriction. The statute targets Chiles's speech based on its content and viewpoint. And there is no historical basis for subjecting Chiles's speech to reduced scrutiny.

A. The counseling restriction silences Chiles's speech based on content and viewpoint.

States generally have "no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Reed*, 576 U.S. at 163. That's why content- and viewpoint-based restrictions on speech are "presumptively unconstitutional." *NIFLA*, 585 U.S. at 766.

A speech regulation is content-based "if it targets speech based on its communicative content." *City of Austin* v. *Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 69 (2022) (cleaned up). This happens when a law "applies to particular speech because of the topic discussed or the idea or message expressed." *Ibid.*

This application of Colorado's counseling restriction is content-based because it singles out speech addressing a specific "subject matter." *Reed*, 576 U.S. at 163. The statute poses no bar if Chiles affirms her adolescent client's desire to change his binge eating

habit. But it's illegal if she affirms that same client's goal to change any "behavior[]" associated with sexual orientation. Colo. Rev. Stat. § 12-245-202(3.5)(a). Sexual orientation and gender identity—including all related identities, behaviors, expressions, and feelings—are the only topics about which counselors and their clients cannot pursue the goal of change (unless the change is a gender transition). On all other subjects, change (which is the goal of most counseling) is fair game. "That is about as content-based as it gets." *Barr* v. *American Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 619 (2020) (plurality opinion). "The First Amendment does not permit" Colorado to impose such "special prohibitions" on certain "subjects." *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 391 (1992).

Additionally, in its application here, the counseling restriction turns on the "function [and] purpose" of speech, *Reed*, 576 U.S. at 163, treating purpose as a "proxy" for disfavored content, *City of Austin*, 596 U.S. at 74. The statute censors counseling conversations that have the purpose of "attempt[ing]" to assist clients in their goal "to change" most anything associated with gender identity or sexual orientation. Colo. Rev. Stat. § 12-245-202(3.5)(a). Like laws banning signs "designed to influence the outcome of an election," *Reed*, 576 U.S. at 164, or forbidding photographs of currency except for "newsworthy or educational" purposes, *Regan* v. *Time, Inc.*, 468 U.S. 641, 648–49 (1984), Colorado's purpose-based statute discriminates against disfavored messages—change for gender identity or sexual orientation—when applied to Chiles's counseling.

The Tenth Circuit inexplicably held that the statute was not content-based, reasoning that its application to Chiles "does not turn on what she says

but on the therapy she practices." Pet.App.56a–57a n.35. That's wrong. Because "[s]peech is the only tool that [Chiles] uses," Pet.App.206a, the statute *necessarily* turns on what she says, and whether she is punished turns on the content of her speech. Also, the statute allows other counselors to use the same methods and techniques as Chiles so long as they don't pursue any of the forbidden goals. The restriction thus depends on the counselor's message, not her methods.

The Tenth Circuit next said that Chiles's statutory compliance "depends" not on her message but "on the intended effect" of her counseling conversations. Pet.App.56a–57a n.35. Yet the intended effect of speech—including the effect of spurring people "to action"—is part of its communicative content. *Thomas* v. *Collins*, 323 U.S. 516, 537 (1945). Regardless, the Tenth Circuit's intended-effect argument effectively concedes that Colorado bans speech based on its "function or purpose," which the State cannot do. *Reed*, 576 U.S. at 163.

Worse, the counseling restriction discriminates based on viewpoint, targeting "particular views … on a subject" for censorship. *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995). This viewpoint discrimination occurs whether Chiles addresses gender identity or sexual orientation.

On gender identity, the law allows counselors to speak messages supporting a "gender transition." Colo. Rev. Stat. § 12-245-202(3.5)(b)(II). But it forbids speech encouraging a gender-dysphoric child to become comfortable with her body or encouraging a detransitioning teenager to realign her gender and sex. Speech supporting change in one direction—

transitioning—is allowed, but speech supporting a different course is censored.

That takes sides in the "fierce public debate over how best to help minors with gender dysphoria." *Tingley*, 144 S. Ct. at 33 (Thomas, J., dissenting from the denial of certiorari). It silences counselors who disagree with Colorado's view and harms young people who want to hear those counselors' messages. In so doing, Colorado disadvantages the views it dislikes in "the public dialogue" and pushes people to embrace the State's favored position. *303 Creative*, 600 U.S. at 588. "But the concept that government may restrict the speech of some elements of our society in order to enhance the relative voice of others is wholly foreign to the First Amendment." *Buckley* v. *Valeo*, 424 U.S. 1, 48–49 (1976) (per curiam).

On sexual orientation, the law allows counselors to support the *status quo* of their clients' asserted identities, behaviors, attractions, and feelings. But they may not support those clients' pursuit of *change* in those areas. This discriminates based on viewpoint because it allows counseling conversations "when their messages accord with, but not when their messages defy," Colorado's preferred views on sexual orientation. *Iancu* v. *Brunetti*, 588 U.S. 388, 394 (2019). That violates a "core postulate" of the First Amendment: the "government may not discriminate against speech based on the ideas or opinions it conveys." *Id.* at 393.

B. No persuasive historical evidence establishes that Chiles's speech is subject to reduced constitutional protection.

Colorado cannot circumvent strict scrutiny by carving out counseling as a new category of unprotected or less-protected speech. Such categories—which include "obscenity, defamation, fraud, incitement, and speech integral to criminal conduct"—are "historic," "well-defined," "narrowly limited," and "long familiar to the bar." *United States* v. *Stevens*, 559 U.S. 460, 468–69 (2010) (cleaned up).

This Court "has been especially reluctant" to create new categories exempt "from the normal prohibition on content-based restrictions." *NIFLA*, 585 U.S. at 767. It will do so only based on "persuasive evidence that a novel restriction on content is part of a long (if heretofore unrecognized) tradition of proscription." *Brown* v. *Entertainment Merchs. Ass'n*, 564 U.S. 786, 792 (2011). Colorado "bears the burden" of "point[ing] to *historical* evidence about the reach of the First Amendment's protections." *Bruen*, 597 U.S. at 24–25 (citing *Stevens*, 559 U.S. at 468–71).

The Tenth Circuit did not claim to find a new category of unprotected or less-protected speech. Nor did Colorado argue for one below. For good reason. No State even regulated counseling as a profession until 1976. TRICARE Manual, *supra,* at 94. Since then, state regulation has focused on ensuring that counselors have sufficient training to justify receiving and retaining a license. See p. 9–10, *supra*. But States have no tradition of silencing counselors' speech based on viewpoint.

The decision below referenced a generic "history of states regulating the healthcare professions."

Pet.App.40a–42a. That discussion broadly addressed healthcare professions as a whole and only vaguely mentioned the nature of the regulations. *Ibid.* But this framed the historical inquiry at too high a level of generality to establish a tradition of viewpoint-based laws proscribing counselors' speech. So the Tenth Circuit failed to show a "historical analogue." *United States* v. *Rahimi*, 602 U.S. 680, 699–701 (2024); see also *id.* at 740 (Barrett, J., concurring) (cautioning against reading a historical "principle at such a high level of generality that it waters down [a] right").

The Tenth Circuit's historical discussion is also woefully incomplete. It cited nothing from the founding era and failed to recognize that in the middle of the 1800s—when the Fourteenth Amendment was ratified—the States had generally repealed or substantially weakened their medical licensing regimes. Grossman, *supra*, at 80, 102–04. At that time, the American people would have viewed regulation of "the advice-rendering subset of [medical] practice" to be "singularly repugnant." Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 Seattle U. L. Rev. 885, 956 (2000). Even when medical regulation increased in the late 1800s, States did not prophylactically burden protected speech based on viewpoint. Rather, they enacted laws to ensure that providers had sufficient competence to practice. *E.g.*, *Collins* v. *Texas*, 223 U.S. 288, 296 (1912) (allowing conditions "to secure competence"); *Dent* v. *West Virginia*, 129 U.S. 114, 122 (1889) (ensuring "a certain degree of skill and learning").

In sum, the historical record does not establish that counselors' conversations with their clients are

"part of a long … tradition" of state regulation and "proscription." *Brown*, 564 U.S. at 792. So ordinary content- and viewpoint-based rules apply, and Colorado must overcome strict scrutiny. *Reed*, 576 U.S. at 171. At a minimum, Colorado must satisfy intermediate scrutiny because this application of its statute imposes at least an "incidental burden" on Chiles's speech. *Turner Broad. Sys., Inc.* v. *FCC*, 512 U.S. 622, 661–62 (1994).

III. Colorado's counseling restriction does not survive heightened scrutiny.

Strict scrutiny requires Colorado to show that its counseling restriction is "narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163. The State cannot meet that standard. In fact, Colorado's case is so weak—particularly on narrow tailoring—that it cannot satisfy even intermediate scrutiny, which requires that the law be "narrowly tailored to serve a significant governmental interest." *McCullen*, 573 U.S. at 486.

Just as a law with "deep roots in our legal tradition" is typically "compatible with the First Amendment," *Vidal* v. *Elster*, 602 U.S. 286, 301 (2024), a statute foreign to our history is unlikely to survive review. That is especially so for a restriction like Colorado's that targets certain speech "because of disagreement with the message it conveys." *Sorrell*, 564 U.S. at 566. It would take a formidable case for Colorado to justify its hostility toward the views it silences. The State failed to make that case here.

A. Censoring Chiles's counseling conversations does not advance a compelling or significant interest.

Colorado says its counseling restriction protects minors from harm. Opp.4–7. But when applied to Chiles's counseling, the statute does the opposite.

Strict scrutiny "demands a more precise analysis" than invoking "broadly formulated interests." *Fulton* v. *City of Phila.*, 593 U.S. 522, 541 (2021). Colorado must show "a compelling interest" specifically in silencing Chiles's counseling conversations. *Ibid.*; *e.g.*, *Federal Election Comm'n* v. *Wisconsin Right to Life, Inc.*, 551 U.S. 449, 478 (2007) (opinion of Roberts, C.J.) (requiring that a compelling interest support "*each application* of a statute restricting speech"). It must prove that her speech poses "an actual problem" and that curtailing it is "necessary to the solution." *Brown*, 564 U.S. at 799 (cleaned up). "[A]mbiguous proof will not suffice," *id.* at 800, because "[m]ere speculation of harm does not constitute a compelling state interest," *Consolidated Edison Co.*, 447 U.S. at 543.

Censoring Chiles's counseling conversations with young people who want to pursue one of the forbidden goals does not advance Colorado's interest because no study shows that this type of counseling causes harm. Indeed, Colorado admitted below that it "know[s] of no … studies" focusing on "talk therapy" by a licensed counselor with a willing minor seeking change on these issues. See p. 13, *supra*; see also Pet.App.119a–22a (Hartz, J., dissenting) (confirming this about the APA's 2009 and 2021 reports).

Colorado's evidence is its own demise. The APA's 2009 report recognizes the "lack of published

research" involving "children" and "adolescents." J.A.337, 341. And the report notes that the studies on adults reveal "a dearth of scientifically sound research on … safety," no "valid causal evidence" of "harm," and no "causal attributions for harm." J.A.253–54; see *Otto*, 981 F.3d at 868–69 (concluding that the APA report "offer[s] assertions rather than evidence" and cannot "satisfy strict scrutiny"). Colorado's expert similarly admits that the post-2009 studies she cites "cannot determine causal effects" or "causality." J.A.64–65. Meanwhile, other recent evidence undercuts the State's claims of harm. See p. 16–17, *supra* (discussing harms of medicalized transition efforts); Sullins, *supra*, at 3377 (debunking Colorado's suicidality concerns).

Under strict scrutiny, the absence of evidence establishing harm is dispositive. In *Brown*, California cited studies and statements of professional groups to "show a connection" between violent video games and harm to minors. 564 U.S. at 800; accord *id*. at 853–55 (Breyer, J., dissenting) (highlighting consensus of "associations of public health professionals" citing over "1000 studies"). That evidence failed to satisfy strict scrutiny because California's cited studies did "not prove that violent video games *cause*" harm but "at best" showed only "correlation." *Id*. at 800; see also *Alvarez*, 567 U.S. at 725 (plurality opinion) (demanding "a direct causal link"). The lack of proof here is even clearer because Colorado's own evidence says it cannot make the necessary showing.

It gets worse for Colorado because the State is *actually* inflicting harm through its statute. That restriction cuts off distressed kids and their families from the counseling they seek. For gender issues, some families who share Chiles's views will benefit

from her counseling. After all, childhood gender dysphoria resolves at high rates by aligning the mind and body, see p. 6–7, *supra*, and lifelong harms arise when professionals mistakenly push young people down a medicalized path, see p. 16–17, *supra*. Similarly, Chiles's counseling on sexuality will benefit some teenagers, particularly when it "help[s] them live in a manner consistent with their faith." J.A.143.

Ignoring the harm that Colorado inflicts, the Tenth Circuit put its trust in the pronouncements of professional associations. Pet.App.66a. But those associational positions are no "substitute" for studies and evidence. Pet.App.107a (Hartz, J., dissenting).

Just last month, the federal government sounded the alarm: professional associations' "handling of issues related to [gender dysphoria] illustrates how institutional biases" undermine those groups' "scientific credibility." HHS Report, *supra*, at 208. "[R]ecent revelations" exposed that the World Professional Association for Transgender Health (WPATH)—a leading professional association on transgender issues—acts based on "ideology, not science." *Eknes-Tucker* v. *Governor of Ala.*, 114 F.4th 1241, 1261 (11th Cir. 2024) (Lagoa, J., concurring in the denial of reh'g en banc). And the APA has taken a definitive position against counseling seeking change even while conceding that reliable evidence of harm is lacking, J.A.253–54, that some people have found change efforts helpful, J.A.143, 256, and that many people do shift their "identity" and "behavior," J.A.139, 144.

With ideology playing such a prominent role, it's no wonder these groups have a track record of "do[ing] an about-face in response to … new attitudes," just as

the APA did when scrapping its view that homosexuality is a disorder. *Otto*, 981 F.3d at 869. What they condemned yesterday, they praise today. And often the position change is slow coming as those associations scramble to preserve "their institutional credibility" first. HHS Report, *supra*, at 205. This should give courts pause when deciding cherished constitutional rights based on these organizations' say-so. The First Amendment cannot rest on such shifting sand. To override free speech, governments must produce compelling proof—not the "pronouncements" of fickle, face-saving organizations unsupported by "sound evidence." Pet.App.83a (Hartz, J., dissenting).

Colorado's failure to prove harm, combined with the statute's viewpoint discrimination, exposes the State's true aim: "to give one side of a debatable public question an advantage in expressing its views to the people." *First Nat'l Bank of Bos.* v. *Bellotti*, 435 U.S. 765, 785 (1978). But Colorado cannot "interfere with speech" for the purpose of "promoting an approved message or discouraging a disfavored one." *Hurley*, 515 U.S. at 579. Nor may the State take the "highly paternalistic approach" of censoring ideas based on fears that—at least from Colorado's perspective—people will "make bad decisions," *Thompson* v. *Western States Med. Ctr.*, 535 U.S. 357, 374–75 (2002), or "decisions inimical" to their assumed "self-interest," *Linmark Assocs., Inc.* v. *Willingboro Twp.*, 431 U.S. 85, 96 (1977). Courts should be "especially skeptical of regulations that seek to" deprive people of speech "for what the government perceives to be their own good." *Sorrell*, 564 U.S. at 577; see *Brown*, 564 U.S. at 804 (finding unconstitutional a speech restriction that advanced "what the State thinks parents *ought* to want").

For these same reasons, Colorado cannot show that applying its statute to Chiles's counseling furthers a "significant governmental interest" under intermediate scrutiny. Far from protecting vulnerable youth, this application of the statute causes harm by banning counseling that will help some. Kids with gender dysphoria cannot access professional counseling conversations that help them grow comfortable with their bodies. This skyrockets the chances that they will travel the life-altering path of risky drugs and surgeries with unproven benefits. See p. 16–17, *supra*. Because Colorado's actions are at war with its asserted interest in child welfare, the State cannot satisfy the first prong of strict or intermediate scrutiny.

B. Censoring Chiles's counseling conversations is not narrowly tailored.

"Broad prophylactic rules in the area of free expression are suspect." *Button*, 371 U.S. at 438. "Precision must be the touchstone when it comes to regulations of speech," which explains why narrow tailoring is essential. *NIFLA*, 585 U.S. at 775 (cleaned up). To satisfy that requirement, a law cannot be overinclusive or underinclusive. *Bellotti*, 435 U.S. at 792–95 (strict scrutiny); *McCullen*, 573 U.S. at 486 (intermediate scrutiny analyzing overinclusiveness); *NIFLA*, 585 U.S. at 773–75 (intermediate scrutiny analyzing underinclusiveness). And under strict scrutiny, "[i]f a less restrictive alternative" is available, the government "must use" it. *Playboy*, 529 U.S. at 813. Colorado cannot check any of these boxes.

Overinclusivity. Colorado's counseling restriction is overinclusive because it "burden[s] substantially more speech than is necessary." *McCullen*, 573 U.S.

at 486. The statute reaches far beyond aversive conduct and bans voluntary counseling conversations with willing and motivated clients, despite the lack of evidence showing that such counseling causes harm. Restricting these "personal, caring, consensual conversations"—highly "effective" means of communication—imposes "an especially significant First Amendment burden" on speech. *Id.* at 488–89.

Within the topics of gender identity and sexual orientation, the ban on speech is stunning in scope. It forbids compassionate counseling conversations to help clients wanting to change any "behavior[]," "expression[]," "identity," or "feeling" associated with those subjects—except changes that pursue a "gender transition." Colo. Rev. Stat. § 12-245-202(3.5). This means Chiles could not lovingly counsel a religious adolescent who seeks to change only his same-sex sexual behavior by becoming celibate, despite the APA's recognition that "clinical articles and surveys of individuals indicate … some may find such a life fulfilling." J.A.308. Nor could Chiles counsel a young male who identifies as a girl and wants help to stop using the girls' locker room at school. Given this blunderbuss approach, Colorado cannot show that "each activity within the proscription's scope is an appropriately targeted evil." *Frisby* v. *Schultz*, 487 U.S. 474, 485 (1988).

The statute also goes too far by muzzling exploratory counseling conversations pursued with a desire for change. Though the statute allows counselors to express "[a]cceptance, support, and understanding for the facilitation of an individual's coping, social support, and identity exploration and development," they may *not* express those messages if "the counseling … seek[s] to change" any aspect of "sexual orienta-

tion or gender identity." Colo. Rev. Stat. § 12-245-202(3.5)(b)(I). Young people often experience uncertainty about their sexuality, gender, and body. That they desire change—and that their counselor supports them in that goal—should not bar those exploratory discussions. By forbidding even that, Colorado's law is hopelessly overinclusive.

Underinclusivity. Underinclusiveness is constitutionally problematic because it "raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint." *Brown*, 564 U.S. at 802. Colorado invokes an interest in prohibiting harmful counseling. But it does not forbid other counseling that the APA opposes as unsafe. See American Psychological Ass'n, *Special Issue on Harmful Treatments in Psychotherapy* (May 24, 2021), https://perma.cc/3P9G-N8MJ (opposing "critical incident stress debriefing" to help with trauma and "scared straight" interventions for unruly minors). By singling out and prophylactically banning only counseling expressing certain views on two controversial topics, Colorado betrays its "special hostility towards" those views. *R.A.V.*, 505 U.S. at 396.

Further undercutting the State's asserted interests is its decision to allow everyone *except* certain licensed mental-health professionals to provide the prohibited counseling. This includes life coaches, mentors, and social-media influencers—to name just a few. Colo. Rev. Stat. § 12-245-217(2)(f). Supporters of laws like Colorado's have recognized that their "most glaring flaw … is that they only apply to licensed practitioners." Cameron J. Rachford, *Botched Bans: Analyzing Conversion Therapy Bans After A*

Decade of Legal Challenges, 99 Ind. L.J. 1403, 1411 (2024). This renders Colorado's statute "ineffective" because "the vast majority of conversion therapy [78 percent] is performed by unlicensed professionals." *Id.* at 1411–12. Such "wild[] underinclusive[ness] … is alone enough to defeat" the statute. *Brown*, 564 U.S. at 802.

More troubling, Colorado's law "put[s] minors in greater risk of harm." Rachford, *supra*, at 1412. It tells them not to seek the help they desire from licensed professionals who offer caring, consensual, and skilled counseling—and instead leaves them to pursue "backdoor conversion therapies." *Ibid.* If Colorado truly thought it was addressing a "serious social problem," "[t]hat is not how" the State would do it. *Brown*, 564 U.S. at 802.

The counseling restriction is also underinclusive because it allows this purportedly dangerous counseling for all adults. Colo. Rev. Stat. § 12-245-224(1)(t)(V). The APA opposes this counseling regardless of age, so it makes no sense that the law applies only when minors seek counseling. A regulatory scheme like this, which allows "widespread availability" of the allegedly harmful speech, is not sufficiently "drawn to serve [the claimed] interest." *Sorrell*, 564 U.S. at 572–73.

Consent issues cannot explain the discrepancy between the State's treatment of minors and adults. Colorado has decided that minors can consent to counseling *starting at age 12*. Colo. Rev. Stat. § 12-245-203.5; see also J.A.345 (APA claims that "adolescents are cognitively able to participate in some health care treatment decisions"). This means that 12-year-olds acting without parental approval

may access counseling to affirm a transgender identity, but those same children cannot obtain counseling to realign their identity with their sex, even if their parents support it.

Colorado's inconsistency shows that it passed the counseling restriction to send the message—"through [the law's] expressive function"—that behaviors, feelings, identities, or expressions associated with gender identity or sexual orientation cannot change. Marie-Amélie George, *Expressive Ends: Understanding Conversion Therapy Bans*, 68 Ala. L. Rev. 793, 825–30 (2017). The State pursues that goal by silencing the professionals best equipped to speak the forbidden messages to families wanting to hear them. But as Colorado recently learned, the State cannot use censorship for the "purpose of eliminating ideas that differ from its own." *303 Creative*, 600 U.S. at 597 (cleaned up).

Less Restrictive Means. The availability of less restrictive alternatives further dooms Colorado's case. Under strict scrutiny, "the legislature must use" a "less restrictive alternative" when it "would serve the [g]overnment's purpose." *Playboy*, 529 U.S. at 813. And under intermediate scrutiny, a slew of "readily available," "less intrusive" options confirms a lack of narrow tailoring. *McCullen*, 573 U.S. at 494. Here, Colorado has numerous less restrictive options besides its prophylactic, viewpoint-based ban on speech. Consider a few:

1. Colorado could ban just aversive conduct seeking to change gender identity or sexual orientation.

2. Colorado could use "its own speech," *Sorrell*, 564 U.S. at 578—by running a "public-informa-

tion campaign," *NIFLA*, 585 U.S. at 775—to express the State's views about counseling.

3. Colorado could list on government websites its preferred counselors for minors experiencing gender-identity and sexual-orientation issues. *Alvarez*, 567 U.S. at 729 (plurality opinion).

4. Colorado could offer its preferred counseling services directly to its citizens. *Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682, 728 (2014).

5. Or Colorado could enforce existing laws if counselors (unlike Chiles) try to override their clients' goals or autonomy. Colo. Rev. Stat. § 12-245-224(1)(j). *E.g.*, *Illinois ex rel. Madigan* v. *Telemarketing Assocs., Inc.*, 538 U.S. 600, 619 (2003) (preferring "a properly tailored fraud action" over a prophylactic rule); *Riley*, 487 U.S. at 800 (similar).

"[R]egulating speech must be a last—not first—resort." *Thompson*, 535 U.S. at 373. Yet Colorado has not shown that it "seriously" tried or "considered" these alternatives, much less "demonstrate[d]" they "would fail" to work. *McCullen*, 573 U.S. at 494–95. That is decisive under intermediate scrutiny. *Ibid.* Even more so for strict scrutiny because a government cannot meet its "obligation" to prove an "alternative will be ineffective" if it never considered that option. *Playboy*, 529 U.S. at 816. As applied to Chiles, Colorado's "prophylactic … and unduly burdensome" counseling restriction violates the First Amendment. *Riley*, 487 U.S. at 800.

* * *

Counseling is vital speech that helps young people better understand themselves, their desires, their actions, and their identity. Colorado interjects itself into those conversations, silences views it dislikes, and tries to control what those kids believe about themselves and who they can become. Such priceless speech on such important issues lies at the First Amendment's core. The Court should protect it.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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