IN THE COURT OF APPEALS OF THE STATE OF OREGON

Frank Canepa,
Petitioner,

v.

Board of Licensed Professional Counselors and Therapists,
Respondent.

Board of Licensed Professional Counselors and Therapists
Case No. 2023-144

Case No. A188808

PETITIONER'S OPENING BRIEF AND EXCERPT OF RECORD*

Appeal from the Final Order served on August 6, 2025 and Bill of Costs served on September 5, 2025

Oregon Board of Licensed Professional Counselors and Therapists,
Daniel Reeser, LMFT, Board Chair

This brief includes challenges to the constitutionality of Rule A.4.b of the American Counseling Association Code of Ethics (adopted by the State of Oregon under OAR 833-100-0011 and ORS 675.785(11)), and to ORS 675.745(7). *See* ORAP 5.12

*Confidential Attachment Filed Separately Under ORAP 16.15(5)(b).

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STATEMENT OF THE CASE

A. Nature of the Action and Relief Sought

Petitioner Frank Canepa seeks judicial review of the Board's Final Order and Bill of Costs, issued pursuant to the Oregon Administrative Procedures Act, ORS 183.482. The Board disciplined Canepa for repeatedly deflecting and then finally answering a client's persistent inquiries about Canepa's personal views by ordering him to take six hours of continuing education and pay $89,636.43 in costs, permanently tarnishing his record as a licensed counselor.

Canepa asks this Court to set aside the Order because it is unconstitutional and contrary to law under ORS 183.482(8)(a)(A) and it is not supported by substantial evidence in the record under ORS 183.482(8)(c). In the alternative, Canepa asks the Court to remand the case under ORS 183.482(8)(a)(B).

B. Nature of the Orders Sought to be Reviewed

The orders on appeal resulted from a contested case hearing held before Administrative Law Judge ("ALJ") Elizabeth Jarry on January 30, 2025. (ER 133). The ALJ issued a proposed order concluding that Canepa violated Rule A.4.b of the American Counseling Association Code of Ethics ("ACA Code"), as adopted by the State of Oregon through OAR 833-100-0011, and recommending professional discipline of six hours of continuing education and costs up to $100,000. The Board approved the ALJ's recommendations

through its Final Order effective August 5, 2025. (ER 145). The Board then issued a Bill of Costs to Canepa, requiring him to pay $89,636.43. (ER 149).

C. Basis for Appellate Jurisdiction

This Court has appellate jurisdiction under ORS 183.482(1), which provides "[j]urisdiction for judicial review of contested cases."

D. Timeliness of Appeal

An appeal from an order following a contested case hearing is properly initiated by a petition for review "filed within 60 days only following the date the order upon which the petition is based is served." ORS 183.482(1). The Board's Final Order was served on August 6, 2025. (ER 147). The Board's Bill of Costs was served on September 5. (ER 168).[1] Canepa timely filed and served his petition for review of "the final order," "the Bill of Costs," and "any enforcement thereof" on October 2, 2025, within 60 days of both Board actions. Pet. Judicial Review 1 (Oct. 2, 2025).

E. Nature and Jurisdictional Basis of Agency Action

Oregon law empowers the Board to discipline licensed professional counselors if the licensee "[h]as violated any rule of the board pertaining to the licensure of professional counselors." ORS 675.745(1)(f). The Board has discretion to choose the sanction to

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[1] The Bill of Cost's certificate of service erroneously states it was served on August 5. (ER 151). The Board later acknowledged the Bill of Costs was "issued and served" on September 5. (ER 168).

impose, ranging from reprimand to revocation of licensure. ORS 675.745(1); ORS 675.745(2)(a). The Board is not limited to the sanctions specifically listed by law: it "may take such disciplinary action as the board in its discretion finds proper, including but not limited to the assessment of the costs of the disciplinary process." ORS 675.745(7).

The Board's process against Canepa began with an investigation of a complaint under ORS 675.785(5)(a). After correspondence with Canepa and the complainant, the Board sent a Notice of Proposed Disciplinary Action. (ER 6–8). At that point, Canepa had the option to request a hearing, though doing so would subject him to the cost of the hearing and the government's attorneys' fees, should the Board impose that sanction under ORS 675.745(7). On the other hand, failure to request a hearing would risk a "Final Order by Default" imposing "the proposed sanctions." (ER 10). So Canepa answered the Notice and requested a hearing. (ER 12–15).

The ALJ conducted the hearing under ORS 183.417 and OAR 833-001-0005. After the hearing, the ALJ issued a proposed order under ORS 183.470. The Board approved the proposed order and imposed the recommended sanctions under ORS 675.745(1)(f) and ORS 675.745(7) on August 1, 2025. (ER 134). The Board served its Final Order on Canepa on August 6 (and its Bill of Costs on September 5), from which Canepa timely appealed.

F. Questions Presented on Appeal

1. Did the Board violate Canepa's First Amendment right to free speech when it punished him under Rule A.4.b for the viewpoint and content of his expression?
2. Did the Board violate Canepa's First Amendment right to free exercise when it applied Rule A.4.b in a manner that is neither neutral nor generally applicable?
3. Did the Board erroneously conclude that Canepa violated Rule A.4.b by answering a client's repeated inquiries about his views?
4. Did the Board violate Canepa's right to a civil jury under the Seventh Amendment to the U.S. Constitution when it imposed enormous costs and professional burdens on him through a statutory scheme that denies him a jury trial?
5. Did the Board impose an excessive fine in violation of Canepa's Eighth and Fourteenth Amendment rights when it ordered him to pay $89,636.43 simply because he requested a hearing?

G. Summary of Arguments

1. As the U.S. Supreme Court recently confirmed, counselors' speech is protected by the First Amendment, and the government can't punish that speech because of its viewpoint. Yet Rule A.4.b's prohibition on imposing personal values is a viewpoint-based restriction: in the same counseling conversation, the rule

permits a counselor to affirm same-sex relationships, but he cannot say that his religious beliefs prevent him from personally affirming those relationships. According to the Board, the latter is "discriminatory" and prohibited.

Rule A.4.b is also content-based. Speech on topics unrelated to morality or values is unrestricted, while much speech that conveys a view about those topics is.

Both viewpoint and content discrimination trigger strict scrutiny, meaning the Board acted unconstitutionally unless it proves its actions are narrowly tailored to achieve a compelling state interest. The Board can't meet that burden: it has no compelling interest in punishing counselors for answering a client's repeated questions about her personal views. And Rule A.4.b is both over- and under-inclusive, the antithesis of narrow tailoring.

In addition, Rule A.4.b violates the First Amendment because it is facially overbroad. And the rule is vague both on its face and as applied.

2. The Board's order also violates Canepa's right to free exercise of religion. The government must be neutral toward religious speech (it cannot treat it differently) and its restrictions must be generally applicable (it cannot permit secular speech that's similar to the prohibited religious speech). The Board's application of Rule A.4.b fails both requirements.

3. The Board's order rests on an error of law and is unsupported by substantial evidence. The order defines "imposing" values to include any statements communicating a value, contradicting its own textual analysis of that term. And the order found that Canepa "forced" his client's attention on his views, even though the record undisputedly shows that Canepa consistently *declined* to express his personal view and offered it only after the client repeatedly insisted.

4. The State of Oregon imposed enormous financial penalties on Canepa. The Board exercised its "discretion" under ORS 675.745(7) to assess "the costs of the disciplinary process" as part of its "disciplinary action" against Canepa. The Board ultimately fined him $89,636.43, a sum combining the costs incurred in investigating, prosecuting, and adjudicating a hearing that the State is constitutionally required to provide. Penalties of this nature trigger Canepa's Seventh Amendment right to a civil jury.

5. Finally, the Board's massive penalty against Canepa—imposed on him merely for requesting a hearing—constituted an excessive fine and violated his right to due process of law.

H. Statement of Facts

Canepa is a licensed professional counselor, License No. C7920. (ER 156). He is also a Roman Catholic. (ER 2). His counseling, which he provides consistent with his religious beliefs, is focused on "achiev[ing] the client's articulated goals." (ER 159). As Canepa

wrote to the Board, "I believe it is my duty to work toward the wellbeing of my clients in all situations." (ER 5).

Canepa practices counseling consistent with Existential Humanistic Therapy. (ER 157). To counteract the tendency of clients to "idealize" the counselor, Canepa's counseling conversations focus on "authenticity and transparency" to "help[ ] the client to perceive the [counselor] as another authentic human being traveling the same 'path.'" (ER 157–58). Achieving this goal requires the counselor to "cultivate [an] authentic relationship through appropriate self-disclosure." (ER 158). "This can (and must) be achieved by revealing truths about the [counselor] while refraining from imposing the [counselor]'s values on the client." (*Id.*).

The authentic, transparent relationship made possible through appropriate self-disclosure also helps clients become comfortable in the counseling relationship. (*Id.*). Often, clients find it difficult to honestly reveal their emotions or experiences, especially when they begin seeing a counselor. (*Id.*). By showing that the counselor and client "inhabit the same existential 'soup,'" the counselor can "establish a rapport that will encourage client candor." (*Id.*). As Canepa explained, "I generally try to be transparent with my clients when they ask me personal questions in order to build our [counseling] relationship and to respect what they deem is important to know about me." (ER 5).

By contrast, refusal to make personal disclosures can rupture the "strong" working relationship that a counselor and client have built. (ER 2). It can create the impression that the counselor is "unduly evasive." (ER 158). It is not always possible within Canepa's counseling to completely avoid answering personal questions. Nor is it always possible within any evidence-based counseling method to avoid "conversations that elicit strong emotional responses, including crying." (*Id.*).

Canepa counseled the client involved in the Board's Final Order from November 2020 until mid-July 2023. (ER 24, 74). Through most of that time, Canepa saw the client weekly. (ER 1). For about one-third of that time, Canepa saw the client twice a week. (*Id.*). For all that time, Canepa offered his services at "an extremely reduced fee" (ER 112:16), including many pro bono sessions.

Over two and a half years, Canepa developed a "strong" counseling relationship with the client. (ER 1). Much of their discussions centered on the client's "difficulty in relationships." (*Id.*). There were times when Canepa revealed his personal views on moral issues (like the philosophical nature of good and evil (ER 29)) and shared his personal experiences (counting himself among those who have thoughts of doing bad things "flashing into [their] heads" (ER 38)) when he thought it would be helpful to address matters raised by the client. Other times when the client brought up moral issues,

Canepa refrained from sharing his view if it was in the client's best interest. (*See*, *e.g.*, ER 39; 43).

In at least *44* different sessions from November 2020 through July 3, 2023, the client brought up issues related to same-sex and opposite-sex relationships.[2] Canepa never disclosed his personal view about such relationships in those sessions. He routinely offered counsel to "honor her personal life choices and direction in her own life." (ER 2).

On July 10, 2023, the client again raised questions about same-sex relationships. She expressed "concern about * * * her own ambivalence about whether she wanted to date men or women." (ER 109:18–19). And she once again asked Canepa for his personal opinion on same-sex relationships. (ER 1). Canepa's approach was "not to answer with [his] personal beliefs, but try to emphasize her right to decide how she lives." (ER 2). So his "first answer was that [he] did not think [his] personal beliefs about same-sex relationships were important because it was her own choices in her life that were important." (*Id*.).

But the client "continued to press [Canepa] very strongly on" his "personal beliefs for about twenty minutes," and her "insistence on knowing" created an "inner conflict" for Canepa between his

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[2] *See* ER 25, 26–28, 30–37, 40–42, 44–72.

common avoidance of his personal views and the need to give truthful answers for the sake of authenticity and transparency. (*Id.*).

The client persisted, asking for Canepa to give "a personal blessing on [her] current same-sex relationship." (*Id.*) (citation modified). At this point, Canepa faced a choice between two difficult options: answer the question despite his reluctance "to make statements about [his] personal beliefs," or refuse to answer and in so doing breach what he "felt" as "a duty to answer her truthfully." (*Id.*).

To preserve the counseling relationship, Canepa knew that stonewalling was not an option. Ultimately, "out of respect" for their long-term counseling "relationship and trust that what she was asking was important to her," Canepa truthfully answered the client's question. (ER 4). He "told her [he] was unable to provide" the "level of personal affirmation for same-sex relationships" the client sought "because of [his] Catholic faith." (ER 2).

Canepa "never intended nor desired to speak about" his "private beliefs, but only did so out of respect for this client who pressed" him "so hard on the matter." (*Id.*). This was in keeping with Canepa's counseling method. As Bob Edelstein, a leader in the Existential Humanistic Therapy field and Canepa's professional mentor (ER 106:1–5) has written, this counseling method requires the counselor to be "open, honest, direct, and clear with [the] client—and to be therapeutically appropriate in terms of when and how [to] express [oneself]." *See* Bob Edelstein, *A Baker's Dozen: Proposed*

Therapeutic Interventions of an Existential-Humanistic Therapist, ahp Perspective 13 (Dec. 2010/Jan. 2011), https://perma.cc/DEF5-WNYE. The counselor must not shy away from this: "[e]ven if the relationship is challenging at times, it can be rewarding for [the client] to experience * * * how differences can be accepted positively." *Id.* Canepa's decision—to answer his client's question openly and directly to preserve authenticity and transparency—followed the standard in his field.

The client was saddened by Canepa's answer to her question. She asked if Canepa "thought she was a bad person." (ER 2). Canepa assured her that he "value[s] above all the agency and freedom of each person," stating "I do not judge anyone else based on my private faith." (*Id.*). The two met one more time on July 17, after which the client decided to discontinue the sessions. (ER 4).

A complaint was filed, and the Board charged Canepa with violating ACA Code Rule A.4.b, which orders counselors to "avoid imposing * * * their own values * * * especially when the counselor's values are * * * discriminatory in nature." (ER 136). The Board interpreted this rule to include any statement "communicating a value judgment." (ER 142) (citation modified). And the Board concluded that Canepa's statement declining to provide "personal affirmation" for same-sex relationships (ER 2) was a "discriminatory" statement because it took "the position that a minority group (here,

same-sex couples) are distinct or set apart from others." (ER 143) (citation modified).

I. FIRST ASSIGNMENT OF ERROR: The Board Erred by Violating Canepa's Right to Free Speech Under the First Amendment to the U.S. Constitution.

The Board's Final Order adopted the ALJ's conclusion in her ruling on motions for summary determination. (ER 139). Relying on *Tingley v. Ferguson*, 47 F4th 1055, 1077 (9th Cir. 2022), the Board held that Rule A.4.b was "a regulation of professional *conduct* that incidentally burdens speech," and thus not subject to First Amendment scrutiny at all. (ER 89) (emphasis added). By adopting this conclusion, the Board erred, as the U.S. Supreme Court recently confirmed in *Chiles v. Salazar*, 607 US ___, ___, 146 S Ct 1010, 1026 (2026). Under *Chiles*, this Court should hold that the Board violated Canepa's free-speech rights and thus set aside the order under ORS 183.482(8)(a)(A).

A. Preservation of Error

Canepa raised his First Amendment free-speech rights throughout the proceedings below, at the motion for summary determination stage (ER 17, 22, 80–81), in his pre-hearing memorandum (ER 97–99), at closing argument (ER 129–131), and in his request for stay pending appeal. (ER 165–66).

B. Standard of Review

This Court "review[s] an agency's order in a contested case for errors of law." *Dorn v. Tchr. Standards & Pracs. Comm'n*, 316 Or

App 241, 243, 504 P3d 44 (2021). When ruling on federal free-speech questions, this court "must 'make an independent examination of the whole record,'" including the agency's factual conclusions. *Post v. Oregonian Publ'g Co.*, 268 Or 214, 222 n.6, 519 P2d 1258 (1974) (quoting *Edwards v. South Carolina*, 372 US 229, 235, 8 S Ct 680, 9 L Ed 2d 697 (1963)). "In drawing the line between speech unconditionally guaranteed and speech which may legitimately be regulated, 'the rule is that we 'examine for ourselves the statements in issue and the circumstances under which they were made to see * * * whether they are of a character which the principles of the First Amendment * * * protect.'" *Id.* (quoting *Pennekamp v. Florida*, 328 US 331, 335, 66 S Ct 1029, 90 L Ed 1295 (1946)).

C. Argument

The Board erred by disciplining Canepa under Rule A.4.b because the Board's application of that rule violates his free-speech rights. As applied, Rule A.4.b restricts speech based on viewpoint and content, and it is thus subject to strict scrutiny. Yet the Board "below failed to apply sufficiently rigorous First Amendment scrutiny." *Chiles*, 146 S Ct at 1023. Nor could it satisfy strict scrutiny. The Board broadly interprets the rule to censor client-requested expressions of personal values, including religious beliefs, if the Board considers them discriminatory. The State has no interest in punishing such disclosures. Nor does it advance its interest through narrowly tailored means. Finally, the rule is

unconstitutionally overbroad and vague, granting the Board unbridled discretion to censor speech.

1. The U.S. Supreme Court directly rejected the Board's position, holding that counseling conversations are protected speech.

The Board concluded that Rule A.4.b, as applied to Canepa's speech-only counseling conversations, is a "regulation of professional conduct that incidentally burdens speech," and thus is subject to only rational basis scrutiny. (ER 89). The U.S. Supreme Court just rejected this reasoning. *See Chiles*, 146 S Ct at 1026.

In *Chiles*, the Supreme Court addressed a Colorado law that covered both counseling conduct and conversations, but the plaintiff challenged only the law's application to counseling done through words. *Id.* at 1028. Colorado advanced the same argument the Board invoked here—that speech by licensed counselors may be regulated because the speech is incidental to the provision of professional services. *Compare id.* at 1026 *with* (ER 89). The Supreme Court rejected this argument, holding that the challenged application of Colorado's counseling restriction "does not regulate speech incident to conduct; it regulates 'speech as speech.'" *Chiles*, 146 S Ct at 1026 (quoting *NIFLA v. Becerra*, 585 US 755, 770, 138 S Ct 2361, 201 L Ed 2d 835 (2018)).

As the Supreme Court explained, speech by "licensed professionals," including speech by counselors during their counseling sessions, receives "the First Amendment's protections."

Chiles, 146 S Ct at 1022. Governmental attempts to punish the views expressed during counseling conversations "strike[ ] at the heart of the First Amendment's protections for free speech." *Id.* at 1020.

2. The Board applies Rule A.4.b based on viewpoint.

The prohibition on viewpoint discrimination, which is a "core postulate of free speech law," forbids the government from "discriminat[ing] against speech based on the ideas or opinions it conveys." *Iancu v. Brunetti*, 588 US 388, 393, 139 S Ct 2294, 204 L Ed 2d 714 (2019). "[T]he First Amendment's protections," including its prohibition on viewpoint discrimination, "extend to licensed professionals" like counselors. *Chiles*, 146 S Ct at 1022. In the counseling setting, the rule against viewpoint discrimination protects against "state-imposed orthodoxies" and "secures, even and especially, the right to voice dissenting views." *Id.* at 1024.

Rule A.4.b states:

> Counselors are aware of—and avoid imposing—their own values, attitudes, beliefs, and behaviors. Counselors respect the diversity of clients, trainees, and research participants and seek training in areas in which they are at risk of imposing their values onto clients, especially when the counselor's values are inconsistent with the client's goals or are discriminatory in nature.

(ER 136). As applied to Canepa's counseling conversations, this rule restricts speech based on viewpoint. *Chiles*, 146 S Ct at 1029. It does this in at least four ways.

First, the Board interprets Rule A.4.b to forbid "communicating a value judgment," even when the client demands that speech. (ER 142) (citation modified). A value judgment is a statement "assigning a value (such as good or bad) to something." *Value Judgment*, Merriam-Webster Dictionary, https://perma.cc/N58R-PMV7 (last visited Apr. 27, 2026). Just as "[g]iving offense is a viewpoint," *Matal v. Tam*, 582 US 218, 243, 137 S Ct 1744, 198 L Ed 2d 366 (2017) (plurality), so is expressing a value judgment. Banning value judgments on a topic, while allowing factual statements about that same topic, is a form of viewpoint discrimination. Even if Rule A.4.b were to "evenhandedly prohibit[ ]" all value judgments, which it doesn't (as explained below), that would easily fall within the U.S. Supreme Court's "broad" understanding of "'viewpoint' discrimination." *Matal*, 582 US at 243 (plurality).

Second, the Board disfavors some value judgments by reading Rule A.4.b to target value judgments that "burden" others. The Board does this by defining "impose" to mean "to cause to be burdened." (ER 142) (citation modified). Because the Board concluded that Canepa's "express[ion] regarding same-sex relationships went to the Client's identity" and elicited an emotional response, "[t]he harmful impact on the Client," the Board reasoned, "demonstrates that Canepa imposed his beliefs on her." (*Id.*) Had Canepa expressed a different personal view about same-sex relationships, such as one expressing approval, he would not have

been punished. Because he spoke a view that differed from the client's—after the client repeatedly asked to know his view—he was punished.

Corroborating this viewpoint discrimination, ACA Rule C.5 orders counselors not to "condone * * * discrimination against * * * clients * * * based on * * * gender, gender identity," and a host of other traits. This confirms that the Board condemns value judgments declining to affirm same-sex relationships while welcoming judgments that affirm those unions.

Third, Rule A.4.b "especially" targets value judgments that "are discriminatory in nature." (ER 141). The Board's Final Order defines "discriminatory" as "taking the position that a minority group (here, same-sex couples) [is] distinct or set apart from others." (ER 143) (citation modified). Thus, as the Board's expert testified, the rule doesn't forbid the expression of all values that are "discriminatory" (for example, discrimination against someone for dietary preferences). (ER 121:5–6). Rather, Rule A.4.b singles out speech that is "discriminatory against someone's personhood," like "racism and sexism and misogyny" and, according to the Final Order, Roman Catholicism. (ER 112:5, 112:17).

That mirrors viewpoint discrimination that the U.S. Supreme Court has already denounced. In *Matal*, 582 US at 243–44, the Court held that a trademark restriction on names that "disparage the members of a racial or ethnic group" was unconstitutional viewpoint

discrimination. *Id.* at 233. And in *R.A.V. v. City of St. Paul*, 505 US 377, 391, 112 S Ct 2538, 120 L Ed 2d 305 (1992), the Court held the same about a law restricting "fighting words"—a category of *un*protected speech—only when they "provoke violence, 'on the basis of race, color, creed, religion or gender.'" Here, too, the Board's decision to target allegedly discriminatory speech—or, more precisely, only a subset of discriminatory speech—is textbook viewpoint discrimination.

Fourth, the Board places viewpoint-based restrictions on the way counselors explain why they cannot answer questions. "To comply with * * * ACA A.4.b," the Board reasoned, "Canepa should have refrained from voicing his personal beliefs and redirected the Client back to herself." (ER 142). The Board highlighted the state's expert's testimony "that Canepa could have turned it into a teaching moment * * * [or] refocused on what the Client thought and felt, or informed the Client that he does not discuss his personal beliefs." (ER 143).

That, too, restricts speech based on its viewpoint. Had Canepa said "I [am] unable to provide that level of personal affirmation for same-sex relationships because of the rules of ethics," he would not have been punished. But because he said "I [am] unable to provide that level of personal affirmation for same-sex relationships because of my Catholic faith," he was punished. Each of those views

expresses a personal value—that some rules or doctrines should be followed—yet the Board bans only the latter.

3. Rule A.4.b restricts speech based on content.

Rule A.4.b also restricts speech based on content. "Government regulation of speech is content based" if it draws "distinctions based on the message a speaker conveys." *Reed v. Town of Gilbert*, 576 US 155, 163, 135 S Ct 2218, 192 L Ed 2d 236 (2015). "Viewpoint discrimination is * * * an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 US 819, 829, 115 S Ct 2510, 132 L Ed 2d 700 (1995). So the Rule discriminates based on content for all the same reasons it discriminates based on viewpoint.

In addition, the Rule is content-based because it allows speech on any topic that is value-neutral—such as small talk about the weather or logistical speech rescheduling an appointment. But it forbids speech on subjects that "communicat[e] a value judgment," including speech about religion. (ER 142) (citation modified).

Because the Rule's application depends "entirely on the communicative content of the" counselor's message, it is content-based. *Reed*, 576 US at 164. Thus, it is "presumptively unconstitutional and may be justified only if the government" satisfies strict scrutiny. *Id.*

4. Rule A.4.b fails strict scrutiny.

To withstand strict scrutiny, the Board bears the burden of showing *both* that this application of Rule A.4.b advances a

"compelling state interest[ ]" and that the Rule is "narrowly tailored to serve" that interest. *Reed*, 576 US at 164. The standard is demanding. Few interests have been recognized as compelling. And a restriction fails narrow-tailoring if it is not the *least* restrictive means to achieve the government's interest. *See United States v. Playboy Ent. Grp., Inc.*, 529 US 803, 813, 120 S Ct 1878, 146 L Ed 2d 865 (2000). The U.S. Supreme Court has "held only once that a law triggered but satisfied strict scrutiny"—and that case, unlike here, involved the government's compelling interest in opposing terrorism. *Free Speech Coal., Inc. v. Paxton*, 606 US 461, 484, 145 S Ct 2291, 222 L Ed 2d 643 (2025). The Board fails this test on both elements.

No Compelling Interest. The compelling-interest analysis must focus on the government's interest in applying the challenged law against this specific party. *Fulton v. City of Phila.*, 593 US 522, 541, 141 S Ct 1868, 210 L Ed 2d 137 (2021) (demanding a "precise analysis"). Rule A.4.b advances no compelling interest in punishing a counselor for respectfully expressing his personal views in response to a client's repeated questions. "However well-intentioned," even where the state may "may regard its policy as essential to public health and safety," a rule that punishes "speech based on viewpoint represents an 'egregious' assault on" the First Amendment's "commitments." *Chiles*, 146 S Ct at 1029 (quoting *Rosenberger*, 515 US at 829).

Nor does the Board have a compelling interest in eliminating speech it deems "discriminatory." The U.S. Supreme Court has consistently regarded any such interest as a "decidedly fatal objective." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Bos.*, 515 US 557, 579, 115 S Ct 2338, 132 L Ed 2d 487 (1995). *Accord 303 Creative LLC v. Elenis*, 600 US 570, 597, 143 S Ct 2298, 216 L Ed 2d 1131 (2023).

Neither can the Board offer an interest in preventing a client's subjective harm. First, Canepa's client repeatedly insisted that he share his views on same-sex relationships. Under these circumstances, any interest in protecting the client from subjective offense is misplaced. Second, the Board concedes that "a showing of harm is not a requirement of ACA A.4.b." (ER 143). Third, the Board accepts that, under ordinary First Amendment principles, "the government cannot restrict a private person from * * * saying things that simply hurt another person's feelings." (ER 123).

Despite this, the Board applied a lower standard of harm—essentially any hurt feelings—to punish Canepa (ER 142) because it had already concluded that the First Amendment did not apply. The U.S. Supreme Court disagrees: First Amendment principles *do* apply to counselors as "much as * * * everyone else." *Chiles*, 146 S Ct at 1022. Under those principles (as the Board admitted) "speech cannot be restricted simply because it is upsetting." *Snyder v. Phelps*, 562 US 443, 458, 131 S Ct 1207, 179 L Ed 2d 172 (2011). This is

especially true for counseling, where conversations may evoke deeply emotional reactions in the moment and are necessary for both the client's well-being and the client-counselor relationship. (ER 158).

No Narrow Tailoring. Whatever interests the Board may invoke, its application of Rule A.4.b is not narrowly tailored to achieve them. A speech restriction fails narrow tailoring unless it is the least restrictive means of achieving the compelling interest. *Playboy Ent. Grp.*, 529 US at 813.

The Board's own statements rebut any argument that Rule A.4.b is the least restrictive means to achieve its asserted interests. On harm, again, the Board admits that "a showing of harm is not a requirement of ACA A.4.b." (ER 143). Thus, by definition, Rule A.4.b. restricts much more speech than necessary to avoid harm to clients. In fact, the Board's expert opined that Rule A.4.b applies to any personal disclosure that expresses any "kind of value." (ER 115:5). Such a sweeping restriction on expression is not narrowly tailored to any asserted state interest.

In fact, the Board's application of Rule A.4.b undermines the state's interest in ensuring clients receive quality counseling. By its nature, counseling involves conversations about matters inextricably linked to questions of morality and values. Clients come to counselors with their deepest struggles and most challenging life situations. Addressing these matters always involves values: some behaviors, relationships, or personal outlooks are healthy, others are

unhealthy. The endeavor to resolve issues through counseling itself presumes certain values (e.g., that the status quo is suboptimal in some way and that counseling may improve it). The Board's position—that "simply communicating a value" violates Rule A.4.b—sterilizes the counseling space and chills counselors from providing good help. (ER 142) (citation modified). Even asking probing questions about a client's behavior, relationships, or thought processes could implicitly reveal the counselor's views about those matters and subject the counselor to discipline. The Board's interpretation of Rule A.4.b makes it harder for clients to get the help they need.

The Board's actions here further undermine narrow tailoring. Canepa did not mention his personal views on sexual relationships for two and a half years, and all the while he offered supportive counsel to the client on her same-sex relationships. He offered his views only after the client demanded it repeatedly—and after he tried to avoid answering for 20 minutes. (ER 2). Whatever interest Oregon might have in stopping counselors from "imposing" values on unwilling clients, punishing counselors for expressing a requested viewpoint is not the least restrictive means of achieving that interest.

There are other things the Board could do to pursue legitimate interests while restricting less speech. The Board could limit the rule to instances where counselors impose personal values through non-

expressive conduct rather than mere speech. *See Chiles*, 146 S Ct at 1023 (distinguishing restrictions on speech from "aversive physical interventions"). Or the Board could focus on whether the counselor uses a harassing "manner" of speech instead of the speech's viewpoint. *See*, *e.g.*, *Ward v. Rock Against Racism*, 491 US 781, 791, 109 S Ct 2746, 105 L Ed 2d 661 (1989).

Alternatively, the Board could pattern its enforcement of Rule A.4.b on existing school or workplace restrictions. For example, Title IX, 20 USC § 1681–1688, which prohibits sexual harassment in schools, bans only harassment that is "severe, pervasive, and objectively offensive [such] that it can be said to deprive the victims of access to * * * opportunities or benefits." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 US 629, 650, 119 S Ct 1661, 143 L Ed 2d 839 (1999). A similar standard applies in the workplace under Title VII, 42 USC. § 2000e–2000e-17. *See Harris v. Forklift Systems, Inc.*, 510 US 17, 21, 114 S Ct 367, 126 L Ed 2d 295 (1993).[3]

In contrast, Rule A.4.b has *no* requirement of objectivity, *no* threshold of severity, and *no* concept of pervasiveness to distinguish speech like Canepa's—a single instance of disclosing a personal value

[3] "There is no categorical 'harassment exception' to the First Amendment's free speech clause." *Saxe v. State Coll. Area Sch. Dist.*, 240 F3d 200, 204 (3d Cir. 2001). But requirements of objective offensiveness, severity, pervasiveness, and harm causally connected to the speech can help a restriction satisfy the applicable standard of review.

at the client's repeated request—from other speech that the government might have an interest in restricting.

Oregon could also rely on malpractice suits to advance its asserted interests. *Chiles*, 146 S Ct at 1028. "In a traditional malpractice action, liability attaches only if the plaintiff shows, among other things, that he has suffered an injury caused by the defendant's breach of the applicable duty of care." *Id.* No such finding was made here as the Board did not prove, nor did it need to prove, a "causal link between" Canepa's words and harm. *Brown v. Ent. Merchs. Ass'n*, 564 US 786, 799, 131 S Ct 2729, 180 L Ed 2d 708 (2011). And malpractice elements go much further than Rule A.4.b in protecting free-speech interests. Such suits may even trigger a right to a jury trial, which helps protect against viewpoint discrimination and overzealous government censorship. *See Parklane Hosiery Co. v. Shore*, 439 US 322, 343, 99 S Ct 645, 58 L Ed 2d 552 (1979).

Finally, the Board's application of the rule undermines narrow tailoring for another reason: it is "underinclusive" because it leaves *un*regulated speech that undermines its purported interest. *Brown*, 564 US at 802. According to the Board, the rule applies only to speech "taking a position that a minority group" is "distinct or set apart." (ER 143) (citation modified). If the state truly had a compelling interest in banning all "discriminatory" speech (which it does not, *see Hurley*, 515 US at 579), it would extend this rule to discrimination against members of *all* groups, minority or otherwise.

The attempt to restrict only a subset of "discriminatory" speech, which the state cannot do even when it regulates *un*protected expression, *see R.A.V.*, 505 US at 391, "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 US at 802. That means this "regulation is wildly underinclusive when judged against its asserted justification, which * * * is alone enough to defeat it." *Id.*

5. Rule A.4.b is overbroad and vague.

Rule A.4.b also violates the First Amendment because it's overbroad and vague.

Overbreadth. A law regulating speech is facially unconstitutional if "a substantial number of [the law's] applications are unconstitutional, judged in relation to [its] plainly legitimate sweep." *Ams. for Prosperity Found. v. Bonta*, 594 US 595, 615, 141 S Ct 2373, 210 L Ed 2d 716 (2021). The Board interprets Rule A.4.b to prohibit "communicating a value judgment." (ER 142) (citation modified). As the Board's expert testified, even a counselor telling a client that his favorite movie is Jaws would violate Rule A.4.b because that expression "has some kind of value." (ER 115:5). "In general," the expert emphasized, counselors "should * * * never expose[ ] any of their personal opinions." (ER 118:5–7). This shows that the unconstitutional applications of this law dramatically outnumber its "plainly legitimate" ones. *Bonta*, 594 US at 615.

The ACA does not define "values" or "beliefs," so we turn "to the dictionary to determine their ordinary meaning." *State v. Baker-Kroftt*, 348 Or 655, 661, 239 P3d 226 (2010). The term "values" means "principles that help you decide * * * how to act in various situations," *Values*, Cambridge Academic Dictionary, https://perma.cc/BC6D-2WKH (last visited Apr. 27, 2026), and "beliefs" are simply things "you believe," *Belief*, Cambridge Academic Dictionary, https://perma.cc/B3ZK-KR6S (last visited Apr. 27, 2026). Discussion of "principles that help you decide * * * how to act in various situations" is essentially what counseling is all about: how should one relate to a spouse or boss? How should one respond to certain cravings or emotions? Values constantly arise. Because the mere expression of *any* viewpoint that a counselor personally believes may trigger discipline, the Rule sweeps far too broadly to satisfy the First Amendment's demands.

In short, the Rule has virtually no guardrails. So its "unconstitutional applications substantially outweigh" any "constitutional ones." *Moody v. NetChoice, LLC*, 603 US 707, 724, 144 S Ct 2383, 219 L Ed 2d 1075 (2024).

Vagueness. The Rule is also vague both facially and as applied. The vagueness doctrine addresses "two connected but discrete" concerns and demands "rigorous adherence" when "speech is involved." *FCC v. Fox Television Stations, Inc.*, 567 US 239, 253–54, 132 S Ct 2307, 183 L Ed 2d 234 (2012); *see Reno v. ACLU*, 521 US 844, 871–

72, 117 S Ct 2329, 138 L Ed 2d 874 (1997) ("[V]agueness * * * raises special First Amendment concerns."). Laws must (1) inform "regulated parties" about "what is required of them" and (2) provide "guidance" to prevent "arbitrary or discriminatory" enforcement. *Fox Television Stations*, 567 US at 253. Rule A.4.b does neither.

First, the Rule provides inadequate notice of the proscribed conduct. It requires counselors to "avoid imposing [ ] their own values, attitudes, beliefs, and behaviors." But none of these terms is defined. And as shown above, dictionaries clarify little—nearly any speech that the counselor personally believes can violate the Rule. May a counselor say "cheer up" to encourage a client experiencing depression? Or ask an anorexic client to go out for lunch? Each statement imposes a value, attitude, belief, or behavior. But counselors don't know if either is forbidden. The "unmoored use of the term[s]" values, attitudes, beliefs, and behaviors—"combined with haphazard interpretations" from the Board's expert that would forbid even announcing one's favorite movie—provides no "objective, workable standard[ ]." *Minn. Voters All. v. Mansky*, 585 US 1, 17, 21, 138 S Ct 1876, 201 L Ed 2d 201 (2018). It is anyone's guess which speech is forbidden. More clarity is required. *Id.* at 22–23.

Second, Rule A.4.b provides little guidance to restrain arbitrary enforcement. Case in point: seeing no meaningful limits on the Rule's face, the Board interprets it to cover any statement that "communicate[es] a value judgment" (ER 142) (citation modified).

And because the rule does not require proof of harm (ER 143), the Board decides each case entirely as it chooses, without reference to any specific standard. That makes Rule A.4.b unconstitutionally vague. *See City of Lakewood v. Plain Dealer Publ'g Co.*, 486 US 750, 757, 108 S Ct 2138, 100 L Ed 2d 771 (1988).

II. SECOND ASSIGNMENT OF ERROR: The Board Erred by Violating Canepa's Right to Free Exercise of Religion under the First Amendment to the U.S. Constitution.

The Board's Final Order also violates Canepa's right to free exercise of religion under the First Amendment to the U.S. Constitution.

A. Preservation of Error

Canepa raised his free-exercise rights at the summary determination phase (ER 22–23, 80–81), in his pre-hearing memorandum (ER 99–101), at closing argument (ER 127–131), and in his request for a stay pending appeal (ER 165–66).

B. Standard of Review

This Court "review[s] an agency's order in a contested case for errors of law." *Dorn*, 316 Or App at 243.

C. Argument

The First Amendment proscribes state action that penalizes citizens for their exercise of religion. *See Sherbert v. Verner*, 374 US 398, 402, 83 S Ct 1790, 10 L Ed 2d 965 (1963). Restrictions on religious exercise that are not neutral or generally applicable must pass strict scrutiny. *See Emp. Div., Dep't of Hum. Res. of Or. v.*

Smith, 494 US 872, 879, 110 S Ct 1595, 108 L Ed 2d 876 (1990). The government fails neutrality "when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 593 US at 533. The government fails general applicability if it "invite[s] the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions," *id.* (citation modified) or if it "treat[s] *any* comparable secular activity more favorably than religious" speech. *Tandon v. Newsom*, 593 US 61, 62, 141 S Ct 1294, 209 L Ed 2d 355 (2021). Rule A.4.b fails on each front.

1. Rule A.4.b is not neutral.

The Free Exercise Clause requires that all state regulation—even restrictions on conduct—must be neutral toward religion. *See Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 US 520, 546, 113 S Ct 2217, 124 L Ed 2d 472 (1993). Yet here, a Board resource "specifically references religion" as a "viewpoint" that, if expressed, may violate Rule A.4.b, *Bates v. Pakseresht*, 146 F4th 772, 792 (9th Cir. 2025). The resource says that "counselors' personal beliefs—sometimes religious in nature—put them at risk of imposing these beliefs" on clients. (ER 78) (emphasis added); *see* (ER 75) (invoking Jeffrey E. Barnett & W. Brad Johnson, *Ethics Desk Reference for Counselors, Second Ed.* 66 (Dec. 26, 2023), https://perma.cc/3Q2B-FNDQ, as interpretive guide for Rule A.4.b). And the resource reiterates: "When a counselor holds strong *religious*

or other cultural values, it may be easy to impose—consciously or unconsciously—those values on clients." (ER 78) (emphasis added). These statements mirror the policy held non-neutral in *Bates*, 146 F4th at 793.

The Board's practice confirms this non-neutrality. While the Board punished Canepa for declining to express an affirming statement because of his religious beliefs, it expects counselors to find ways to communicate *genuine* respect for all clients." Barnett & Johnson, *supra*, at 66 (emphasis added). So despite the Board's insistence that it does not require counselors to "make affirmative statements that are contrary to [their] religious beliefs," (ER 79), its resource expects counselors to communicate *genuine*—that is, personally "real, not false," *Genuine*, Cambridge Academic Content Dictionary, https://perma.cc/HDH2-QLST (last visited Apr. 27, 2026)—beliefs that "admir[e]" the client for his or her "ideas or qualities," *Respect*, Cambridge Advanced Learner's Dictionary & Thesaurus, https://perma.cc/6CPB-QQ5R (last visited Apr. 27, 2026). This is consistent with the Board's mandate for counselors to impose non-discrimination values and its special focus on viewpoints that are "discriminatory" when applying Rule A.4.b. § I.C.2; *see* (ER 77) (ACA Rule C.5) "By drawing a distinction between different types of religious beliefs—those that 'affirm'" the client's ideas or qualities and those that are "unsupportive"—the Board fails to act neutrally toward religion, *Bates*, 146 F4th at 793.

2. Rule A.4.b is not generally applicable.

Rule A.4.b is also not generally applicable. First, it gives the Board "substantial discretion." *Bates*, 146 F4th at 796. As shown above, the Rule on its face forbids even the mere expression of a personal belief, and the Board's interpretation fits that understanding: "[S]imply *communicating* a value judgment * * * is enough." (ER 142) (citation modified). But the Board alone decides which speech is prohibited, and it does not apply this rule "*without exception*," *Bates*, 146 F4th at 796—as it allows counselors to express affirming and non-discrimination values without punishment. § I.C.2; II.C.1. The Board makes these calls "on an ad hoc basis." *Bates*, 146 F4th at 796. The "mere existence" of such "discretion"—regardless of how it is exercised—"is enough to render a policy not generally applicable." *Fellowship of Christian Athletes v. San Jose Unified Sch. Dist. Bd. of Educ.*, 82 F4th 664, 685 (9th Cir. 2023) (citing *Fulton*, 593 US at 537). The Board's limitless discretion triggers strict scrutiny.

Second, the Board prohibits Canepa's religious disclosure while allowing analogous secular disclosure. Secular counselors may impose non-discrimination values, § I.C.2; *see* (ER 77) (ACA Rule C.5), and harm-avoidance values (as the Board defines them), *see* (ER 76) (ACA Rule A.4), consistent with their personal, secular beliefs. For example, a secular counselor may refuse to affirm a female client's desire to "detransition" away from a transgender identity or a

male client's desire to convince his wife that women shouldn't work outside the home. Indeed, Rule C.5's nondiscrimination requirements obligate the secular counselor to condemn those client goals.

But religious counselors may not even communicate personal values consistent with their religious beliefs. This is so even when a client requests such speech and staying silent would cause harm. Because the Board treats "comparable secular [speech] more favorably than religious" speech, its restriction on personal disclosures is not generally applicable. *Tandon*, 593 US at 62.

3. Rule A.4.b fails strict scrutiny.

Strict scrutiny for restrictions on free exercise is the same standard as strict scrutiny for restrictions on free speech. *See Fulton,* 593 US at 541. Rule A.4.b fails strict scrutiny for the reasons described in Part I.C.3.

III. THIRD ASSIGNMENT OF ERROR: The Board erred in concluding that Canepa violated Rule A.4.b by answering a client's repeated inquiries about his views.

The Board erred when it found Canepa in violation of Rule A.4.b because its interpretation of "imposing" was contrary to law and its application of the rule here was not supported by substantial evidence.

A. Preservation of Error

Canepa challenged the Board's definition of "imposing" and its application of the term to him at the motion for summary determination phase (ER 18–21), in his pre-hearing memorandum

(ER 93–95), at closing argument (ER 124–26), and in his request for a stay pending appeal (ER 162–64).

B. Standard of Review

This Court "review[s] an agency's order in a contested case for errors of law." *Dorn*, 316 Or App at 243. Because the facts underlying this assignment of error are common to the federal free-speech issue in the First Assignment of Error, this court "must 'make an independent examination of the whole record,'" including the agency's factual conclusions here, too. *See Post*, 268 Or at 222 n.6 (quoting *Edwards*, 372 US at 235). "It * * * is for the court, and not the jury," (or administrative agency) "to decide where the line is to be drawn between * * * protected and * * * unprotected" speech. *Id.* at 222.

This assignment of error describes "the line between" protected and unprotected speech because, if this Court accepts the Board's construction and application of Rule A.4.b., it must reach the constitutional issues in the First and Second Assignments of Error and set aside the Board's Order. If, however, it rejects the Board's construction and application of the rule, it need not reach those issues (though it still must set aside, modify, or remand the Order). In this situation, this Court examines for itself "'the statements in issue and the circumstances under which they were made to see * * * whether they are of a character which the principles of the First

Amendment * * * protect.'" *Id.* at 222 n.6 (quoting *Pennekamp*, 328 US at 335.

C. Argument

The Board erroneously interpreted the term "imposing" under Rule A.4.b, then erroneously applied it to Canepa. "Imposing" is not defined in the ACA Code of Ethics or under any Oregon rule or statute. (ER 141). So it must be interpreted according to its "text" and "context." *PGE v. Bureau of Lab. & Indus.*, 317 Or 606, 610–11, 859 P2d 1143 (1993).[4] To do that, the Board looked to the dictionary definitions, "to cause to be burdened," "to take [usually] unwarranted advantage of something," "to take unwarranted advantage of," or "to force * * * upon the attention of another." (ER 142) (citation modified). But then, the Final Order declares that "simply communicating a value judgment * * * is enough." (*Id.*) (citation modified). This is "inconsistent with" the dictionary definitions cited for the meaning of "the wording of the rule itself." *Don't Waste Or. Comm. v. Energy Facility Siting Council*, 320 Or 132, 142, 881 P2d 119 (1994). "[S]imply communicating a value judgment" is *not* "enough" to "*cause* to be *burdened*," "take unwarranted *advantage*," or "*force* * * * upon the attention of another." (ER 142) (citations

[4] *PGE* was superseded in part by ORS 174.020. *See State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009). But even after "the 2001 amendments to ORS 174.020, the appropriate methodology['s] * * * first step remains an examination of text and context." *Id.*

modified). This Court should set aside the Final Order as contrary to law because, according to every definition cited by the Board, "imposing" means something *more* than "simply communicating a value judgment." (ER 142) (citation modified).

The Final Order also erroneously applied Rule A.4.b to Canepa in a manner contrary to the evidence. As the Board concluded:

> [I]n this case, to avoid imposing his views on Client, Licensee should not have *forced Client's attention* on his views and should not have *taken advantage of their relationship to express his views*, or otherwise burdened Client with his views, which by virtue of privileging opposite-sex relationships over same-sex relationships, were discriminatory against client.

(ER 141) (citation modified). Three undisputed facts show this conclusion was contrary to the evidence. First, Canepa counseled the client for two-and-a-half years, during which matters related to client's same-sex and opposite-sex relationships arose regularly. *See* Statement of the Case, § H & n.2. Second, Canepa never affirmatively raised his personal views about same-sex or opposite-sex relationships in any session with the client, even though the subject came up in at least 44 prior sessions. (*Id.*). Third, the only time Canepa mentioned his personal view on these topics was after having it repeatedly demanded by the client for 20 minutes. (ER 2).

On the undisputed facts of this record, it's simply not possible to conclude that Canepa "forced Client's attention on his views," or took "advantage of their relationship to express his views." (ER 141).

To the contrary, Canepa did all he could to *avoid* drawing the Client's attention to his views and *only* answered her questions once he determined, consistent with his counseling methodology, that an answer was necessary to preserve authenticity and transparency. (ER 2). Because the Order is not supported by substantial evidence in the record, this Court should set it aside under ORS 183.482(8)(c).

IV. FOURTH ASSIGNMENT OF ERROR: The Board Erred by Violating Canepa's Right to a Trial by Jury Under the Seventh Amendment to the U.S. Constitution.

A. Preservation of Error

Canepa preserved this issue in his pre-hearing memorandum. (ER 96–97).

B. Standard of Review

This Court "review[s] an agency's order in a contested case for errors of law." *Dorn*, 316 Or App at 243.

C. Argument

"[T]he Seventh Amendment guarantees that in '[s]uits at common law, * * * the right of trial by jury shall be preserved.'" *SEC v. Jarkesy*, 603 US 109, 122, 144 S Ct 2117, 219 L Ed 2d 650 (2024). This guarantee extends to administrative actions by the government. *Id.* It "embrace[s] all suits which are not of equity or admiralty jurisdiction, whatever may be the peculiar form which they may assume." *Id.* (citation modified).

The key factor is whether a statutory scheme "tie[s] the availability of civil penalties to the perceived need to punish the

defendant rather than to restore the victim." *Id.* at 124. In such cases, the "considerations are legal rather than equitable," triggering the right to a civil jury. *Id.* The proceedings against Canepa are purely punitive—the client is not a party to the proceedings and will receive no compensation regardless of the outcome. Therefore, the proceeding against him triggers his right to a jury. Canepa accepts that the U.S. Supreme Court has ruled that the Seventh Amendment is not incorporated to the States, *Minneapolis & St. Louis R.R. Co. v. Bombolis*, 241 US 211, 215, 36 S Ct 595, 60 L Ed 961 (1916), so he seeks only to preserve this argument for appeal.

V. FIFTH ASSIGNMENT OF ERROR: The Board erred by imposing an excessive fine in violation of Canepa's rights under the Eighth and Fourteenth Amendments to the U.S. Constitution when it ordered him to pay $89,636.43.

The Board's assessment of $89,636.43 in costs against Canepa was an excessive fine in violation of the Eighth and Fourteenth Amendments to the U.S. Constitution.

A. Preservation of Error

Canepa preserved this issue in his objection to the Board's Bill of Costs. (ER 152–156).

B. Standard of Review

This Court "review[s] an agency's order in a contested case for errors of law." *Dorn*, 316 Or App at 243.

C. Argument

The Eighth Amendment, applicable to the State of Oregon through the Fourteenth Amendment, *see Timbs v. Indiana*, 586 US 146, 150, 139 S Ct 682, 203 L Ed 2d 11 (2019), provides that "excessive fines" may not be "imposed." US Const, Amend VIII. "Excessive fines" include civil fines that qualify as a "punishment." *Austin v. United States*, 509 US 602, 609, 113 S Ct 2801, 125 L Ed 2d 488 (1993). A fine counts as punishment if at least part of its function is punitive, even if it also serves remedial purposes. A court "must determine that [the civil fine] can only be explained as serving *in part* to punish." *Id.* (emphasis added).

A civil fine under ORS 675.745(7) is expressly a punishment. The statute designates "assessment of the costs of the disciplinary process" as "disciplinary action." *Id.* The law's operation confirms it's punitive: costs are discretionary, not mandatory.

Since the Bill is in part a punishment, it is unconstitutional if it is "excessive," or "grossly disproportional to the gravity of [the defendant's] offense." *United States v. Bajakajian*, 524 US 321, 324, 118 S Ct 2028, 141 L Ed 2d 314 (1998). The $89,636.46 fine on Canepa for a single alleged violation is grossly disproportionate. Courts have upheld substantial administrative penalties where "the amount of the penalty is the direct result of the number of individual offenses committed." *Korangy v. FDA*, 498 F.3d 272, 278 (4th Cir. 2007). But that's not what Oregon's law does. The most Canepa could

be *fined* for a single infraction is $2,500. ORS 675.745(5). ORS 675.745(7)'s catchall provision allowed the Board to ratchet the penalty up more than 35 times. Courts have questioned whether penalties with a *1:1* ratio are constitutional. *Pimentel v. L.A.*, 115 F4th 1062, 1074 (9th Cir. 2024) ("we cannot conclude as a matter of law that" a late fee with a 1:1 ratio to the underlying parking ticket "is not unconstitutionally excessive"). The Board's $89,636.43 penalty is "grossly disproportional" to the gravity of Canepa's alleged offense. *Bajakajian*, 524 US at 324.

The penalty also violates the Fourteenth Amendment, which prohibits Oregon from "depriv[ing] any person of life, liberty, or property, without due process of law." US Const, Amend. XIV.

Oregon attempts to meet its due-process obligations by providing counselors a right to a contested hearing. *See* ORS 183.417. But Oregon sets an enormous price on exercising that right: a counselor may be forced to bear "the costs of the disciplinary process" as a part of any ensuing "disciplinary action." ORS 675.745(7).

What's more, this penalty can be imposed for any infraction, however minor. *Id.* All that's necessary to open the door to this heavy financial burden is for the counselor to request a hearing (absent a hearing, there are few costs to impose). Imposing this stiff penalty has "no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise

them" and is thus "patently unconstitutional." *United States v. Jackson*, 390 US 570, 581, 88 S Ct 1209, 20 L Ed 2d 138 (1968).

Oregon's law is harsher than some held unconstitutional in other states. For example, in *California Teachers Ass'n v. State*, 20 Cal 4th 327, 975 P.2d 622 (1999), the California Supreme Court held that a law requiring teachers to pay half the costs of an administrative proceeding was unconstitutional under the Fourteenth Amendment. "The statute impermissibly chills the right to a hearing in every case." *Id.* at 345. Same (only double) for ORS 675.745(7), since it allows the Board to charge the full "costs of the disciplinary process" as the Board did here.

By treating the hearing costs as a form of discipline, vesting the Board with sole discretion, and authorizing the Board to collect all *its* investigatory and administrative costs *along with* the attorney and expert witness fees of the Department of Justice, Oregon goes too far. Many states have no cost-shifting provision for counselor discipline.[5] Others have some, but cap the fee well below the total cost, or permit prevailing licensees to recover their fees.[6] On its face and as applied to Canepa, ORS 675.745(7) denies Canepa due process of law. The

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[5] *See*, *e.g.*, Alaska Stat Ann § 08.01.075 (listing sanctions; not including costs); Code Ark R 007.11.1-8.3 (same); Colo Rev Stat Ann § 12-245-225 (same); Conn Gen Stat Ann § 19a-17 (same); Del. Code Ann. tit. 24, § 3011 (same).

[6] *See* NH Rev Stat Ann § 310:12 (capping costs at $10,000); Idaho Code Ann § 12-117(5) (authorizing prevailing licensees to recover costs).

Board's imposition of a $89,636.43 disciplinary penalty was an unconstitutional excessive fine.

On its face and as applied to Canepa, ORS 675.745(7) denies Canepa the right to due process of law. The Board's imposition of a $89,636.43 disciplinary penalty was an unconstitutional excessive fine.

CONCLUSION

For the foregoing reasons, the Board's Final Order and Bill of Costs should be set aside.

Respectfully submitted this 27th day of April, 2026.

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CERTIFICATE OF COMPLIANCE WITH BRIEF LENGTH AND TYPE SIZE REQUIREMENTS

Brief length

I certify that (1) this brief complies with the word-count limitation in ORAP 5.05 (1)(b) and (2) the word-count of this brief (as described in ORAP 5.05(1)(b)(ii)(A) is 9,618 words.

Type Size

I certify that the size of the type in this brief is not smaller than 14 point for both the text of the brief and footnotes as required by ORAP 5.05(2)(d)(ii).

Dated: April 27, 2026

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CERTIFICATE OF SERVICE

I certify that on April 27th, 2026, I filed the Petitioner's Opening Brief and Excerpt of Record with the State Court Administrator by using the court's electronic filing system, which will give notice of such filing to all counsel of record.

I further certify that, pursuant to ORAP 5.12, I served a true copy of Petitioner's Opening Brief by U.S.P.S. Certified Mail on:

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