No. 24-539

IN THE

Supreme Court of the United States

KALEY CHILES,

Petitioner,

v.

PATTY SALAZAR, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE COLORADO DEPARTMENT OF REGULATORY AGENCIES, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF *AMICUS CURIAE* ASSOCIATIONS OF CERTIFIED BIBLICAL COUNSELORS IN SUPPORT OF PETITIONER KALEY CHILES

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TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

Cases

Cited Authorities

Cited Authorities

Page

Statutes, Rules and Regulations

Other Authorities

Cited Authorities

Page

Cited Authorities

Page

Page

INTEREST OF THE AMICUS CURIAE[1]

The Association of Certified Biblical Counselors Inc. ("ACBC") is a Section 501(c)(3) corporation whose purpose is to promote and defend the provision of counseling which accords with historical Christian teaching on human life. They believe freedom and justice will be served by reversal of the ruling of the Tenth Circuit.

SUMMARY OF ARGUMENT

The lower courts improperly measured Colorado's "Minor Conversion Therapy Law" (hereinafter, "MCTL") against a rational basis rather than strict scrutiny as required for use with a content-based restriction on speech. To support the misapplication of the standard, the lower courts called speech "conduct." The rationale used to justify this improper designation affects not only Christian therapists in Colorado, but any licensed occupation that uses communication as part of the profession. Accordingly, Amicus prays this Court grant certiorari and rectify this misuse of law and logic before others find the rationale used against their speech.

Ms. Chiles, plaintiff below, is a Christian who holds a license from Colorado which permits her to practice therapy. She talks to clients. Her clients talk to

1. In accordance with Rule 37.6, counsel affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae made a monetary contribution to its preparation or submission. The Parties received 10-days' notice, per Rule 37.2.

her[2]. Like lawyers, the practice of her profession consists of the use of words. She isn't inciting violence, she isn't engaged in fighting words, her words are not in furtherance of crime. The Tenth Circuit concluded that Ms. Chiles' words are "conduct" not "speech." How can the court conclude words are conduct, unless it evaluates the opinions expressed? In other words, *because of its content*. (*Cf.*, *Cohen v. California*, 403 U.S. 15, 18 (1971))[3]

The decision represents theories which have been extensively set forth in competing lines of authority split among four Circuits[4]. The 9th (*Tingley v. Ferguson*,

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2. "Ms. Chiles treats her patients in counseling sessions where she provides talk therapy." (*Chiles v. Salazar*, No. 22-1445, at *43 (10th Cir. Sep. 12, 2024)).

3. As explained herein, to uphold Colorado's "Minor Conversion Therapy Law", the 10th Circuit created an expansive "conduct exception" for "professional speech." By supporting this theory with a reference to attorneys in footnote 29, the 10th Circuit suggests another area which Colorado may wish to "regulate."

4. This Court often permits a question to be thoroughly considered by various judges to create a sufficient basis upon which this Court may be confident the issues have been well addressed. (*See*, *e.g.*, *U.S. v. Comstock*, 560 U.S. 126 (2010)) These cases in part implicate the speech-conduct distinction, which is a matter well developed by many previous courts. (*See*, *e.g.*, *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2372 (2018) ["under our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech"]; *United States v. O'Brien*, 391 U.S. 367 (1968); *Volokh v. James*, 656 F. Supp. 3d 431 (S.D.N.Y. 2023); *Upsolve, Inc. v. James*, 604 F. Supp. 3d 97 (S.D.N.Y. 2022); *All-Options, Inc. v. Attorney General of Indiana*, 546 F. Supp. 3d 754 (S.D. Ind. 2021); *Greenberg v. Haggerty*, 491 F. Supp. 3d 12 (E.D. Pa. 2020)) Likewise, the

47 F.4th 1055, 1077 (9th Cir. 2022)) and 10th (*Chiles v. Salazar*, No. 22-1445 (10th Cir. Sep. 12, 2024)) on one hand; on the other, the 11th (*Otto v. City of Boca Raton*, 981 F.3d 854, 859, 865 (11th Cir. 2020), *Otto v. City of Boca Raton*, 41 F.4th 1271 (11th Cir. 2022))[5], and the 3rd (*King v. Governor of N.J.*, 767 F.3d 216, 224 (3d Cir. 2014)), abrogated on other grounds by *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018).

The writ should be granted because the argument and analysis of the lower courts concern a number of fundamental questions which arise under the First Amendment concerning speech vs. conduct (*Otto v. City of Boca Raton*, 41 F.4th 1271, 1274-75 (11th Cir. 2022)); professional speech vs. regulating a profession; the rights of minors vs. "protection" of minors from "harmful" (disapproved) speech; competing philosophies of human nature: nature vs. nurture; determinism vs. self-determinism; ontology (realism vs. nominalism); the conflict of "religion" and "science"; theories of political structure and justifications therefor.

As such, the case presents questions of fundamental importance[6]. (*Obergefell v. Hodges*, 576 U.S. 644, 701

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question of "professional speech" has been addressed by prior cases. (*Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985)) Hence, a sufficient background exists for this Court to take up this law at this time.

5. This second decision is responsive to an earlier dissent, which provides yet another level of lower court consideration of these issues.

6. This case presents a question of a matter of national importance. (*Flower v. United States*, 407 U.S. 197 (1972); cf.

(2015) [citation omitted])[7] The lower court and Colorado contend the government gets to resolve such questions. The Constitution leaves the answers in the hands of the individual. (John Locke, *An Essay Concerning Human Understanding* (1690) ["Nor is it a small power it gives one man over another, to have the authority to be the dictator of principles and teacher of unquestionable truths."])

By giving and revoking a license to speak [which what the lower court called "regulating conduct"] Colorado exercises power of censorship. This is precisely how England exercised censorship centuries ago: "In sixteenth-century England, the Crown granted to the Stationers' Company the exclusive right to publish and print all published works (apparently to enable censorship of Protestant materials)." (*Lasercomb America, Inc. v. Reynolds*, 911 F.2d 970, 974 (4th Cir. 1990)) Here, Colorado "licenses" therapy; but denies licensure and penalizes when the counseling does not fit the legislature's ideals. Thus, this case concerns censorship.

The argument in favor of the state requires great dexterity and complication. One must contend speech is not speech, restriction is not restriction—and then claim speech and liberty are maintained despite their

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Tingley v. Ferguson, No. 22-942, at *1 (Dec. 11, 2023) (Thomas, J., dissenting) ["Because this question has divided the Courts of Appeals and strikes at the heart of the First Amendment, I would grant review."])

7. Such questions entail not merely moral but also political and cultural implications. (Rieff, Philip. *The Triumph of the Therapeutic : Uses of Faith after Freud ; with a New Preface.* University Of Chicago Press, 1987, p. 40)

elimination. Ms. Chiles' argument (and the contention of Amicus) is direct: the law is content-based restriction on speech and thus is unconstitutional.[8]

ARGUMENT

I. WITH FEW EXCEPTIONS THE FIRST AMENDMENT PROTECTS THE EXCHANGE OF IDEAS

It is undisputed that "talk therapy" performed by Ms. Chiles involves talking, hence, "speech." "Ms. Chiles treats her patients in counseling sessions where she provides talk therapy." (*Chiles v. Salazar*, No. 22-1445, at *43 (10th Cir. Sep. 12, 2024)). If her conduct in talk therapy were truly improper, a counselee *who first asked for this particular type of therapy* could bring a suit for malpractice. It is not as if the public is left without remedy.

The MCTL targets speech based upon its content. Hence, it is presumptively unconstitutional. (*Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)) That analysis should end the inquiry: Colorado's ban on communication offends against the Constitution unless it can point to compelling state interest in its suppression.

But, for reasons addressed below, both Colorado (among other states) and seemingly the lower courts believed themselves to be asserting and consolidating

8. More fully stated: Since the law constitutes a content based restriction on speech, it must be justified under a strict scrutiny review. (*United States v. Playboy Entertainment Group, Inc.*, 529 U.S. 803, 813 (2000))

a moral/philosophical position which has the right to circumnavigate the bar to censorship.[9] To justify the conclusion a handful of tactics were advanced. Permitting any of these tactics to remain in place jeopardizes the protections the First Amendment affords. Hence, it is necessary for this Court to again assert the boundary upon with a state may not transgress.

A. Calling Communication "Conduct" is Pure Sophistry

The lower court labelled the (counseling) words used by Ms. Chiles "conduct." They then claimed any restriction on "speech" was merely "incidental." But words used in counseling cannot be transmogrified by alchemy into "conduct," without impermissibly restricting that content on the basis of its message:

> It may not, however, proscribe particular conduct *because* it has expressive elements. "[W]hat might be termed the more generalized guarantee of freedom of expression makes the communicative nature of conduct an inadequate *basis* for singling out that conduct for proscription. A law *directed at* the communicative nature of conduct must, like a law directed at speech itself, be justified by the substantial showing of need that the First

9. "Propaganda can exist only in societies in which secondhand opinion definitely dominates primary opinion, and the latter is reduced and driven into a minority position then, when the individual finds himself between the two conflicts." (Ellul, Jacques. *Propaganda: The Formation of Men's Attitudes*. 1965. Vintage Books, 1973, 102.)

> Amendment requires." *Community for Creative Non-Violence* v. *Watt, 227 U.S.App.D.C. 19, 55-56, 703 F.2d 586, 622-623* (1983) (Scalia, J., dissenting) (emphasis in original), rev'd *sub nom. Clark* v. *Community for Creative Non-Violence, supra.*

(*Texas v. Johnson*, 491 U.S. 397, 406 (1989))

The *conduct* of the lower court is *conduct* worthy of the Humpty-Dumpty:

> *'But "glory" doesn't mean "a nice knock-down argument,"' Alice objected.*
>
> *'When I use a word,' Humpty Dumpty said in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.'*

Concluding speech is conduct or that regulating the words of a therapist is justified as part of the state's licensure endangers not merely Christian therapists but atheist attorneys and anyone the state decides to "license." If words can be kidnapped and forced to deny their sense, the law becomes unmoored, and state power becomes absolute and arbitrary. (*Cf.*, The infamous, "2+2=5" from *1984*; De Tocqueville, "And for these reasons I can never willingly invest any number of my fellow creatures with that unlimited authority which I should refuse to any one of them." De Tocqueville, Alexis. *Democracy in America*. Translated by Henry Reeve, Esq., American, George Dearborn & Co. 1838, 240-241)

As will be discussed below, the words of Chiles

become conduct precisely because of what is being said and to whom the words are conveyed. An absolute bar is called "incidental." And so, definitions become a game of labelling, in which the Constitution is overthrown while proclaiming it has been upheld. [10]

Any number of decisions have found even non-verbal conduct to be protected communication under the First Amendment. Of particular interest is expansive protection the 9th and 10th Circuits have afforded non-verbal conduct as communicative conduct and hence, "speech." (*See*, *e.g.*, *W. Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017) [and cases cited therein]); *Anderson v. City of Hermosa Beach*, 621 F.3d 1051, 1060 (9th Cir. 2010) [and cases cited therein])

In light of such authorities, to claim that Ms. Chiles engages in regulable "conduct" and not "speech" is to demonstrate the lower courts have begun with a particular moral and political framework upheld by an abuse of language. (*Cf.*, "De Do Do Do, De Da Da Da," The Police,

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10. The late Justice Scalia's note is appropriate here:

> It thus seems more accurate to say that the joint opinion would uphold abortion regulations only if they do not *unduly* hinder the woman's decision. That, of course, brings us right back to square one: defining an "undue burden" as an "undue hindrance" (or a "substantial obstacle") hardly "clarifies" the test. Consciously or not, the joint opinion's verbal shell game will conceal raw judicial policy choices concerning what is "appropriate" abortion legislation.

(*Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 987 (1992) (Scalia, J., concurring and dissenting)).

1980)

B. Courts May Not Censor Speech By Equivocating on "Incidental"

The lower court justified censorship on the ground such restriction was merely "incidental." Equivocating on the word "incidental," the lower court justified its decision by using the authority of this Court.

There are two fundamental ways in which the restriction may be "incidental": (1) it could be minor, as in an automobile collision which results in "incidental damage;" or (2) incidental in the sense of tangential.[11] The slight differences in meaning set out fundamentally different scope.[12] The 10th Circuit sets out the rule as follows:

> It is well settled "if a law targets protected speech in a content-based manner," it is subject to strict scrutiny. [citation omitted]

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11. The Shorter OED defines incidental as "occurring as something casual or of secondary importance not directly relevant; following upon as a subordinate circumstance." (Brown, Lesley, ed. 1993. *The New Shorter Oxford English Dictionary* . Thumb Index. Vol. 1. New York: Oxford University Press.)

12. "The fallacy of *equivocation* is an argument which exploits the ambiguity of a term or phrase which has occurred at least twice in an argument, such that on the first occurrence it has one meaning and on the second another meaning." (Hansen, Hans. "Fallacies." *Stanford Encyclopedia of Philosophy*, edited by Edward N. Zalta, Summer 2020, Metaphysics Research Lab, Stanford University, 2020, plato.stanford.edu/entries/fallacies/#CorFal.)

> However, "the First Amendment does not prevent restrictions directed at . . . conduct from imposing incidental burdens on speech." [citation omitted] Under these circumstances, the law must withstand a "lower level of scrutiny." *Nat'l Inst. of Fam. & Life Advocs.v. Becerra*, 585 U.S. 755, 765 (2018) (*NIFLA*).

(*Chiles*, No. 22-1445, at *27) The citation to *Sorrell* demonstrates that "incidental" when used by this Court refers to a law which targets an activity which "incidentally" captures activity which is otherwise protected:

> It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech. That is why a ban on race-based hiring may require employers to remove "'White Applicants Only' "signs [citation omitted]; why "an ordinance against outdoor fires" might forbid "burning a flag," [citation omitted] and why antitrust laws can prohibit "agreements in restraint of trade," [citation omitted].

(*Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011)) A law prohibits outdoor fires would be permissible to promote health and safety. That the law of general application may *incidentally* include some communicative *conduct* would an "incidental" restriction on speech:

> The ordinance, like a statute barring anti-competitive collusion [citation omitted], is not wholly unrelated to a communicative

> component, but that in itself does not trigger First Amendment scrutiny. *See Arcara, 478 U.S. at 708, 106 S.Ct. 3172* (subjecting every incidental impact on speech to First Amendment scrutiny "would lead to the absurd result that any government action that had some conceivable speech-inhibiting consequences, such as the arrest of a newscaster for a traffic violation, would require analysis under the First Amendment") (O'Connor, J., concurring). Although the franchisees are identified in part as companies associated with a trademark or brand, the ordinance applies to businesses that have adopted a particular business model, not to any message the businesses express.

(*Int'l Franchise Ass'n, Inc. v. City of Seattle*, 803 F.3d 389, 408-09 (9th Cir. 2015)) But here, the law targets the *words* in the first instance, based upon their *communicative content*. This is not the arrest of a newscaster for a traffic violation which has an incidental affect upon her inability to reach the studio and broadcast of the news.

By calling the restriction "incidental," the 10th Circuit is, in effect, saying the restriction is "no big deal." Still, how is any amount of censorship "incidental" even under the 10th Circuit's theory? Under this theory, if the court sees the speech as of low or even negative value, it discounts the harm done. That is a moral claim, not a legal claim. That is the evaluation of worth, not an analysis of effect.

If Courts are permitted to impose their own moral consideration upon speech and then dismiss their censorship as "incidental" restriction, any speech which displeases any judge (or any two circuit judges) can be squelched. Yes, the decision harmed Ms. Chiles, but the rationale can be applied to any person.

C. The Poor Analogy to the "Key Precedent"

The lower court referred to *Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) ("*NIFLA*") as the "key precedent." (*Chiles*, No. 22-1445, at *27) Yet NIFLA rejected the doctrine (effectively advanced below) of "professional speech." The lower court ignored this Court's opinion that requiring the licensed clinics to make a statement required by law (as is required by MCTL, dictating the terms of Ms. Chiles' speech).

Moreover, it overlooked this Court's distinction between pre-and-post contract speech, "The licensed notice at issue here is not an informed-consent requirement or any other regulation of professional conduct" (*Nat'l Inst. of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2373 (2018))

The lower court also ignored the difference between the two uses of the word "incidental" (minor vs. tangential). MCTL dictates the content of Ms. Chiles' service. It strikes directly at the exercise of both the counselor and the client's First Amendment rights.[13] As such, the MCTL is

13. The lower court unironically reversed this argument when it claimed the law did not suppress the speech of the human being Ms. Chiles, but only the speech of the licensed professional,

an "incidental" infringement. The law directly strikes the speech and nothing else. It is not precontractual speech. (*Ohralik v. Ohio State Bar Assn*, 436 U.S. 447 (1978) [distinguishing pre and post contractual speech]) MCTL is a substantive restriction on the First Amendment based upon the content of the speech and the religious beliefs of the persons so involved.[14]

"Ms. Chiles may, in full compliance with the MCTL, share with her minor clients her own views on conversion therapy, sexual orientation, and gender identity. She may exercise her First Amendment right to criticize Colorado for restricting her ability to administer conversion therapy." (*Chiles*, No. 22-1445, at *45) How could Ms. Chiles doff and don her license like a cap when in conversation with a minor who asks about the topic? If she says, "The State requires me to lie to you, and so you must disregard all that I am saying", will that be permitted? If she gives advice on how one may do or not do a certain thing, will it suffice that she says, "This is my personal not professional advice?" How does that conversation legally proceed? (*See*, *e.g.*, *W. Watersheds Project v. Michael*, 869 F.3d 1189 (10th Cir. 2017) [discussing how courts may seek to evade First Amendment protections]) If someone were to ask one of these judges that judge's opinion about a legal topic, would it be heard as their "personal" opinion and not their opinion informed by their law degree and their judicial experience? How does someone carve out their personal history? Is it taking money for the opinion? ("KENT: This is nothing, fool. FOOL. Then 'tis like the breath of an unfee'd lawyer—you gave me nothing for't." King Lear, Act I, sc. iv.)

14. Since the States have shown a willingness to expand the range of "professions" (by requiring a license), the decision could be used to justify draconian control over speech, while all the while giving lip service (an ironic turn of phrase here) to freedom of speech.

II. A MINOR'S RIGHT TO SPEAK AND HEAR

Another justification used by the lower court, is that the law censors only the adult (Chiles) while ignoring the rights of the minor client to hear. The 10th Circuit specifically referenced the limitation of the rights of minors being a basis to uphold the law. (*Chiles*, No. 22-1445 at *45) Since the law includes discussion of "transition" and "transgender" proceedings, the law segregates minors to a realm of permanent alteration of their body and their lives; yet does not allow them to hear alternatives.

Colorado may then argue, we are not merely banning "harmful" speech, but we are banning speech which is "harmful" specifically to *minors*. Apparently, this claim is based on the minor being too delicate to hear about chastity. Nor may a minor hear of the irreversible damage that may result from hormone therapy or surgery related to "transition."[15]

But adding the word "minors" to the equation does not move the constitutional analysis in favor of censorship. The basic principle at issue here was affirmed by the United States Supreme Court 48 years ago. (*Erznoznik v. City of*

15. The prohibition on Ms. Chiles not being empathetic with a client who happens to be a minor. In fact, no psychologist in the state of Colorado may be empathetic with the client who seeks assistance, and it is desire to not change one sex or to not being sexually attracted to a member of one's own sex. The American psychologist Carl Rogers noted of empathy, that it requires to be with another in this way means that "for the time being, you lay aside your own views and values in order to enter another's world without prejudice." (Rogers, Carl R. *A Way of Being*. Houghton Mifflin, 1980, p. 143)

Jacksonville, 422 U.S. 205, 212-13 (1975)) Since that time, a number of courts have developed and clarified the principle that minors are entitled to First Amendment protection for the information they receive. Those cases affirm that minors have robust First Amendment rights. (*Brown v. Entertainment Merchants Assn.*, 564 U.S. 786, 794-95 (2011) [non-obscene speech cannot be prohibited because it is "harmful"]; s*ee*, *e.g.*, *Entertainment Software Ass'n. v. Blagojevich*, 404 F. Supp. 2d 1051, 1059 (N.D. Ill. 2005); *Entertainment Software Ass'n v. Blagojevich*, 469 F.3d 641, 646-47 (7th Cir. 2006) ; *Entertainment Software Ass'n v. Granholm*, 426 F. Supp. 2d 646, 649-50 (E.D. Mich. 2006) [and the cases cited therein]; Ulrich Schimmack. "Which Social Psychologists Can You Trust?" *Replicability-Index*, 8 Jan. 2023, replicationindex.com/2023/01/08/which-social-psychologists-can-you-trust/.)

In this particular instance, speech which is consistent with the religious and moral traditions of millions of Americans, and which has an extensive history would be among the speech which the statute seeks to prohibit. And, if a state can prohibit the speech under the guise of licensure, the state would then arguably be able to ban any speech by any person by merely exercising the "harmful" standard. The courts have wisely rejected that standard to date. This Court should stand with them.

III. HOW MORAL POSITIONS ARE USED TO "JUSTIFY" THE UNDERLYING LAWS

Where a case entails a conflict of moral and philosophical vision[16], it encourages even a judge to enforce a moral and philosophical position.

The moral complexity of this lawsuit moves along multiple axes: for example, it pits parental rights versus children, minors versus adults, "science" versus "religion." It could have been possible for the 10th Circuit to have merely stated, the state found protection of minors to have been a sufficient rationale to justify regulation of conduct. Instead, it went far beyond that.

A. Colorado and the Courts Necessarily Have Undertaken a Moral Analysis

Human beings do not calculate outcomes like the proverbial Mr. Spock. A moral justification runs through

16. Colorado has adopted a nominalist position concerning human nature, particularly sex. The belief that one is male, or female based upon what one says, means that "sex" is a matter of name not nature. In effect, Colorado has chosen over Ockham over Plato. It is not the place of a Court to enforce a metaphysic by means of law. (Stoljar, Natalie. "Different Women. Gender and the Realism-Nominalism Debate." *Feminist Metaphysics*, Nov. 2010, pp. 27–46, https://doi.org/10.1007/978-90-481-3783-1_3.; Limin, Jerika, and Mark Dacela. *Ontology of Gender: The Trans Community in the Gender Realism and Gender Nominalism Discourse*. 2017, www.dlsu.edu.ph/wp-content/uploads/pdf/conferences/research-congress-proceedings/2017/TPH/TPH-II-007.pdf; Rodriguez-Pereyra, Gonzalo. "Nominalism in Metaphysics (Stanford Encyclopedia of Philosophy)." *Stanford.edu*, 2015, plato.stanford.edu/entries/nominalism-metaphysics/#WhaNom.)

lower courts' opinions, albeit buttressed by "science."[17] The lower courts made an argument on the basis of "science," but not science which implies empiricism; rather "science" as a philosophical branch of inquiry which implicitly contains a moral assertion.

The argument is structured as follows: A proposition is the result of rigorous "science," as such it is unquestionably "true." Such a simplistic belief is not warranted by actual science. (Bird, Alexander. "Thomas Kuhn." *Stanford.edu*, 31 Oct. 2018, plato.stanford.edu/entries/thomas-kuhn/; Toulmin, Stephen. 1953. *The Philosophy of Science.* New York: Hutchenson University Press.)

Being "true," these are "facts" which cannot be questioned. Since organizations such as the American Psychological Association ("APA") make such assertions, it is "scientists" making "scientific" assertions. In the courts below, no attempt at replicating the research was made; no attempt at weighing harms to minors were made when not allowing them to hear contrary viewpoints. Rather, the cause was assumed.

On the other side are those who make unjustified moral assertions. For example, the APA in *The Case Against Conversion Therapy* asserts:

> It is important to mention that religious traditions tend to use sacred scripture (e.g., the Bible), historical traditions, and

17. As will be explained below, "science" knows nothing and has no opinions; nor are the conclusions matters which have passed rigorous scientific protections.

> moral philosophy determine their views and prescriptions on sexual behavior an ethics rather than contemporary social science research. Therefore, to better understand where their views, perspectives, and prescriptions come from, one must examine critical elements of these influences and most especially sacred scripture (Countryman, 2013). Additionally, to further complicate the matter, little quality empirical social science research has been conducted in this area as of late period much more research is clearly needed in the psychology and sociology of religion as relates to lesbian, gay, bisexual, transgender, queer, and intersex (LGBTQI+) populations and engagements with SOCE, and GICE.[18]

A woman such as Ms. Chiles holds a bare "moral" position versus social *science*. To stand with Chiles is no better than condemning Galileo.

It is of course a moral argument which is made in favor of the Colorado law. As the story is told, to fail to accept this law will be to sentence untold minors to certain suicide. If even one life is saved, then the First Amendment be damned.

B. "Science" is Has Become a Bludgeon

As Foucault demonstrated in his extensive works, most particularly *History of Madness*, the language of

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18. Haldeman, Douglas C. *The Case against Conversion "Therapy" : Evidence, Ethics, and Alternatives*. American Psychological Association, 2022, p. 111.

science can be used to achieve moral ends. To define something as sane or mad, healthy or mentally ill, easily becomes a restatement of moral language cloaked with a veneer of science.[19] In the instant case, the position asserted in the Colorado legislature and argued at some length by the lower courts is that the government may censor Ms. Chiles as "unscientific." (A full examination of the APA's book length explanation of the "science" explains, a "religious" belief on these issues is "harmful," hateful, troglodyte.) Even if unscientific, that neither makes it right nor does it justify censorship. Colorado is using a nominalist metaphysic to support its "scientific" position. Since Ms. Chiles is "unscientific" under these terms, she is immoral and must be censored by removing her license.

By straying from a bare constitutional analysis into an allegedly "scientific" one and thereupon assert a morally superior position, the state claims it is righteous when it censors Ms. Chiles. That position minimally is misguided; or worse, positively dangerous. Reliance on the APA's "scientific" justifications is grossly misguided. The APA refers to its owned positions as, "Evidence-based, secular minded, and ethical mental health and health care," as opposed to "religion-based behavior that is discriminatory, homophobic, intolerant, and narrow minded."[20] This statement belies the contention of the

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19. See, e.g., Falzon, Chris. *Foucault and Social Dialogue*. Routledge, 2006, pp. 49, et seq; Kelly, M. G. E. (2014). Foucault and Politics : A Critical Introduction. Edinburgh University Press., pp. 31, et seq; Gutting, Gary, and Johanna Oksala. 2003. "Michel Foucault ." Stanford Encyclopedia of Philosophy. April 2, 2003. https://plato.stanford.edu/entries/foucault/.

20. Haldeman, Douglas C. *The Case against Conversion "Therapy" : Evidence, Ethics, and Alternatives*. American

lower courts that the law shows no evidence of intolerance; the law being a crystalline example of sober reason and "evidence;" when in reality it is merely adopted a partisan view of practice and thought.[21]

Psychological Association, 2022, 118. Strikingly, the APA not merely considers itself to be an arbiter of "evidence" but even of religion to the point that it considers *those "theologians" who differ from the APA to be inaccurate in their understanding of another's own religion!*

21. For a more comprehensive statement of how the sexual liberation espoused by MCTL entails cultural, religious, and familial structures, see, generally, Marcus, Herbert. *Eros and Civilization*. Beacon Press, 1966; Williams, Raymond. *Marxism and Literature*. 1977. Oxford University Press.

CONCLUSION

It is the position of amicus that the 10th Circuit utilized the wrong standard by which to review the MCTL. In support of its mistaken analysis, the lower court set forth a series of rationale which endanger the First Amendment rights of others not party to this case. Since this is the fourth circuit decision to address these issues, (1) the topic has been well developed, and (2) there is a fundamental conflict among the circuits. Accordingly, the matter is now ripe for review by this Court. Amicus respectfully requests that this Court grant the petition.

Respectfully submitted,

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