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

BRIEF OF *AMICI CURIAE* NC VALUES INSTITUTE AND ADVOCATES FOR FAITH & FREEDOM IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

NC Values Institute and Advocates for Faith & Freedom, as *amici curiae*, respectfully urge this Court to grant the Petition for Certiorari and reverse the decision of the Tenth Circuit.

NC Values Institute ("NCVI"), formerly known as the Institute for Faith and Family, is a North Carolina nonprofit corporation established to preserve and promote faith, family, and freedom through public policies that protect constitutional liberties, including the right to live and work according to conscience and faith. See https://ncvi.org. NCVI submitted amicus briefs in several iterations of *Tingley v. Ferguson* in the Ninth Circuit, and one in the Tenth Circuit in this case. Co-amicus Advocates for Faith Freedom joined NCVI in a brief supporting *Tingley*'s petition for certiorari.

Advocates for Faith & Freedom is dedicated to protecting and preserving the fundamental liberties that define the United States as a beacon of freedom and prosperity. These rights include the right to freely exercise your religion, the right to speak openly, and

[1] Counsel of record for all parties received notice at least 10 days prior to the due date of *amici*'s intention to file this brief. *Amici curiae* certify that no counsel for a party authored this brief in whole or in part and no person or entity, other than *amici*, their members, or their counsel, has made a monetary contribution to its preparation or submission.

the right to care for and educate your child. See https://faith-freedom.com.

INTRODUCTION AND SUMMARY

Many lower courts have fallen down the proverbial "rabbit hole" where "the world is truly upside down"—a counselor "speaking to clients" about gender identity "is not speech" unless the message echoes the government's preferred viewpoint. *Otto v. City of Boca Raton*, 981 F.3d 854, 866 (11th Cir. 2020). This Court now has a second opportunity to address this matter of "fierce public debate" that "strikes at the heart of the First Amendment." *Tingley v. Ferguson*, 144 S. Ct. 33 (2023) (Thomas, J., dissenting from the denial of certiorari).

"The [Free Exercise] Clause protects not only the right to harbor religious beliefs inwardly and secretly," but also "the ability of those who hold religious beliefs of all kinds to live out their faiths in daily life . . . ." *Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2421 (2022); *Tingley v. Ferguson*, 57 F.4th 1072, 1084 (9th Cir. 2023) (Bumatay, J., dissenting from the denial of reh'g en banc). Colorado's Minor Therapy Conversion Law, C.R.S. §§ 12-245-202, 12-245-101 (hereafter "Censorship Law") renders that freedom virtually impossible for many state-licensed counselors and codifies Colorado's viewpoint on one of today's most contentious issues. The "fixed star in our constitutional constellation"—barring any public official from prescribing religious orthodoxy (*West Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943))—shines across decades of precedent and

prohibits this draconian law that conditions Chiles' counseling practice on the demise of her speech and religious liberties.

Counseling is not religiously neutral. On the contrary, counseling is a profession that uniquely touches religion. Religion and counseling both involve speech, thoughts, emotions, conduct, conscience, morality, and *values*. Counselors are not robots, and values cannot be extracted from counseling. Persons who seek counseling are best served by a system that incorporates respect for the values and conscience of both counselor and counselee. Colorado's unconstitutional scheme fails to do so.

ARGUMENT

I. COLORADO REGULATES PURE *SPEECH* BASED ON CONTENT AND VIEWPOINT—CONTRARY TO THIS COURT'S PRECEDENT

"[T]he 'conduct' being regulated here is speech itself, and it is being regulated because of disapproval of its expressive content." *Chiles v. Salazar*, 116 F.4th 1178, *79 (10th Cir. 2024) (Hartz, J., dissenting).

American free speech jurisprudence has long guarded free expression, even "the thought that we hate." *United States v. Schwimmer*, 279 U.S. 644, 655 (1929) (Holmes, J., dissenting). A "bedrock principle underlying the First Amendment" is that government may not suppress an idea merely because some (or even a majority) might find it "offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *Otto*, 981 F.3d at 872. Even speech that "risks

psychological harm does not thereby become non-speech conduct entirely without First Amendment protections." *Tingley*, 57 F.4th at 1077 (O'Scannlain, J., respecting the denial of reh'g en banc), citing *Snyder v. Phelps*, 562 U.S. 443, 450 (2011) (protecting speech a jury found "outrageous").

Colorado's Censorship Law, allowing counselors to "convey the state-approved message" about gender identity while silencing opposing messages, is "viewpoint-based and content-based discrimination in its purest form." *Tingley*, 144 S. Ct. at 34 (Thomas, J., dissenting from the denial of certiorari). Colorado bypassed this Court's warning that "[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort. Yet here it seems to have been the first strategy the Government thought to try." *Thompson v. Western States Medical Ctr.*, 535 U.S. 357, 383 (2002); *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002). No matter how politically popular it is to promote LGBT ideology, the government must "preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *McCullen v. Coakley*, 573 U.S. 464, 476 (2014), quoting *FCC v. League of Women Voters of Cal.,* 468 U.S. 364, 377 (1984). Policing "professional" speech short-circuits the search for truth and risks suppressing the free "marketplace of ideas." *Nat'l Inst. of Family & Life Advocates v. Becerra*, 585 U.S. 755, 772 (2018) ("*NIFLA*").

A. The law regulates pure *speech*, not *conduct.*

Professional *conduct* that incidentally involves speech may be regulated. *NIFLA*, 585 U.S. at 768. But Colorado "sanction[s] speech directly, not incidentally." *Otto*, 981 F.3d at 866. The First Amendment recognizes the obvious difference between "therapeutic speech" and "physical medical procedures." *Tingley*, 57 F.4th at 1075 (O'Scannlain, J., respecting the denial of reh'g en banc).

Courts evade the First Amendment by diverting attention to "treatment." "[P]sychoanalysis is the *treatment* of emotional suffering and depression, *not* speech." *National Association for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology ("NAAP")*, 228 F.3d 1043, 1054 (9th Cir. 2000) (emphasis added); *Pickup v. Brown*, 740 F.3d 1208, 1226 (9th Cir. 2014). In *Pickup*, California allegedly banned "a form of treatment for minors" (*id.* at 1229) while allowing counselors to discuss sexual orientation change efforts ("SOCE") with their minor clients. In *Tingley*, the district court found Washington's prohibition "analogous to [a] doctor giving a prescription for marijuana," as in *Conant*, because it "involves engaging in a specific act designed to provide treatment." *Tingley v. Ferguson*, 557 F. Supp. 3d 1131, 1141 (W. D. Wash. 2021).

Although "talk therapy" "consists—*entirely*—of words," Colorado deceptively relabels it as conduct. *Otto*, 981 F.3d at 865 (emphasis added). Such "relabeling" is "unprincipled and susceptible to

manipulation." *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1308 (11th Cir. 2017) (en banc). "[P]ast aversive treatments" include "inducing nausea, vomiting, or paralysis; providing electric shocks; or having an individual snap an elastic band around the wrist when aroused by same-sex erotic images or thoughts." *Pickup*, 740 F.3d at 1222. The Ninth Circuit equated speech with these abusive techniques. *Tingley v. Ferguson*, 47 F.4th 1055, 1083 n.3 (9th Cir. 2022), citing Sam Brinton, *I Was Tortured in Gay Conversion Therapy. And It's Still Legal in 41 States*, N.Y. Times (Jan. 24, 2018). [2] These practices are clearly *conduct* that could lawfully be prohibited on a content-neutral basis—*conduct* any Christian counselor would abhor—*in contrast to the pure speech Chiles seeks to engage in with her counseling clients*. The laws in *Chiles*, *Tingley*, *Otto*, and others restrict "purely speech-based therapy" (*Otto*, 981 F.3d at 859) "administered solely through verbal communication." *King v. Gov. of the State of New Jersey*, 767 F.3d 216, 221 (3rd Cir. 2014). The Third Circuit easily concluded that SOCE implicates *speech*, not *conduct*, for First Amendment purposes. *Id.* at 225, 229.

In a strange twist, SOCE bans in Washington, California, and Colorado allow "discussing various treatment options, including conversion therapy." Wash. Rev. Code 18.130.020(4); Cal. Bus. & Prof. Code § 865(b); *Chiles*, 116 F.4th at *40-41. The counselor may even *recommend* SOCE if someone else provides

[2] https://www.nytimes.com/2018/01/24/opinion/gay-conversion-therapy-torture.html.

it. *Tingley*, 47 F.4th at 1072. In California, the law did not prohibit counselors from "communicating with the public about SOCE," "expressing their views to patients, whether children or adults," or "referring minors to unlicensed counselors, such as religious leaders." *Pickup*, 740 F.3d at 1223. Close scrutiny would admittedly be required for "content- or viewpoint-based regulation of communication *about* treatment" but "*treatment* itself" could purportedly be regulated. *Id.* at 1231.

This hair-splitting exercise assaults the Constitution. "The First Amendment does not [merely] protect the right to speak *about* banned speech; *it protects speech itself*, no matter how disagreeable that speech might be to the government." *Otto*, 981 F.3d at 863 (emphasis added). In *Nat'l Socialist Party of Am. v. Village of Skokie*, 432 U.S. 43 (1977), it would have been bizarre to suggest that "people were welcome to *advocate* for a pro-Nazi demonstration" but "could not actually hold the demonstration." *Otto*, 981 F.3d at 863. Similarly, it would be a strange counseling session if a counselor recommended the benefits of SOCE but could not provide it. *Id.* Indeed, since the therapy consists entirely of speech, it could be impossible to distinguish between talking *about* SOCE and actually providing it.

Courts must also consider the practical effect of a law to determine whether it implicates speech. *Thomas v. Collins*, 323 U.S. 516, 536 (1945). Even a law "directed at conduct" implicates speech where "the conduct triggering coverage . . . consists of

communicating a message." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010); *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1069 (9th Cir. 2020) (regulating what educational programs may be offered "squarely implicates the First Amendment"). It is indisputable that SOCE itself, or even discussing it, communicates a message. The government simply dislikes that message and therefore seeks to censor it.

B. Colorado's Censorship Law is not neutral with respect to either content or viewpoint.

Like abortion, sexuality is "anything but an 'uncontroversial' topic." *NIFLA*, 585 U.S. at 769. But "the First Amendment has no carveout for controversial speech." *Otto*, 981 F.3d at 859. At the heart of the First Amendment is the principle that "government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *Police Dep't of Chicago v. Mosley*, 408 U.S. 92, 95 (1972). But if the Tenth Circuit decision stands, it will hand the government "a new and powerful tool to silence expression based on a political or moral judgment." *Pickup*, 740 F.3d at 1216 (O'Scannlain, J., dissenting from the denial of reh'g en banc). Using "the guise of a professional regulation," the circuit court "insulates from First Amendment scrutiny" Colorado's prohibition of "politically unpopular expression" (*id.* at 1215) and continues to follow *Tingley*'s "troubling precedent" (*Tingley*, 144 S. Ct. at 35 (Thomas, J., dissenting from the denial of certiorari)).

Colorado's Censorship Law is unquestionably content based because it "applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). In *Conant*, similarly, the government penalized physicians precisely because of the content of discussions with their patients about the medical use of marijuana. *Conant*, 309 F.3d at 637. These statutes contrast with the content-neutral law upheld in *NAAP*, where California's licensing requirements did not "dictate the content of what is said in therapy" or prohibit particular "psychoanalytical methods." *NAAP*, 228 F.3d at 1055-56.

Importantly, the "mere assertion of a content-neutral purpose" cannot salvage Colorado's statute, "which, on its face, discriminates based on content." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642-643 (1994). Citing *Turner* (*id.* at 641), this Court warned that "regulating the content of professionals' speech 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.'" *NIFLA,* 585 U.S. at 771. "That warning has proved prescient." *Tingley*, 144 S. Ct. at 35 (Thomas, J., dissenting from the denial of certiorari). Regardless of the law's purpose, the first question is "whether it restricts or penalizes speech on the basis of that speech's content." *Otto*, 981 F.3d at 862. Here, as in past SOCE cases, the law purports to protect children. *Chiles*, 116 F.4th at *34. But important as that interest is, it "does not include a free-floating power to restrict the ideas to which children may be exposed." *Brown v. Entm't*

Merchs. Ass'n, 564 U.S. 786, 794-95 (2011); *see also Erznoznik v. City of Jacksonville*, 422 U.S. 205, 213-14 (1975) (speech "cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them"); *Otto*, 981 F.3d at 868 (citing both cases).

Colorado's viewpoint discrimination is revealed by the "significant carveout" (*Otto*, 981 F.3d at 860) for counseling that provides "[a]cceptance, support, and understanding for the facilitation" of a client's therapeutic needs but prohibits using "practices or treatment" to "change sexual orientation or gender identity." C.R.S. § 12-245-202(3.5)(b)(I); *Chiles*, 116 F.4th at *21. This is comparable to Washington's carveout for counseling that provides "acceptance, support, and understanding of clients or the facilitation of clients' coping, social support, and identity exploration and development that do not seek to change sexual orientation or gender identity." Wash. Rev. Code § 18.130.020(4)(b). These viewpoint-based regulations are "an egregious form of content discrimination" (*Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995)) and consequently "a matter of serious constitutional concern" (*NIFLA*, 585 U.S. at 779 (Kennedy, J., concurring)). As in *NIFLA*, Colorado's statute "is a paradigmatic example of the serious threat presented when government seeks to impose its own message in the place of individual speech, thought, and expression." *Id.* Colorado attempts to "codify a particular viewpoint—sexual orientation is immutable, but gender is not." *Otto*, 981 F.3d at 864.

Even more, the law codifies the viewpoint that homosexuality and transgenderism are normal, morally right, and should be affirmed.

The government "is not free to interfere with speech for no better reason than promoting an approved message or discouraging a disfavored one, however enlightened either purpose may strike the government." *Boy Scouts of Am. v. Dale,* 530 U.S. 640, 661 (2000), quoting *Hurley v. Irish-American Gay,* 515 U.S. 557, 579 (1995). Colorado unlawfully demands that licensed counselors conform to the State's view on one side of a contentious debate. Chiles' speech would be protected even if it were an unpopular minority viewpoint. *Dale,* 530 U.S. at 660; *Texas v. Johnson*, 491 U.S. 397 (burning American flag). Instead, her views follow centuries of moral and *religious* teaching. Colorado's viewpoint discrimination is especially disturbing in a changing social environment—"the fact that an idea may be embraced and advocated by increasing numbers of people is all the more reason to protect the First Amendment rights of those who wish to voice a different view." *Dale,* 530 U.S. at 660. People of faith are entitled to a voice and "frequently take strong positions on public issues." *Walz v. Tax Comm'n*, 397 U.S. 664, 670 (1970). "We could not expect otherwise, for religious values pervade the fabric of our national life." *Id*. at 670.

The religious beliefs at issue here touch a matter of intense public controversy. Courts and legislatures across America continue to address a wide spectrum of LGBT issues. The controversy has only escalated following this Court's redefinition of

marriage in a manner that conflicts with many religious traditions. It is not the business of *any* government official in *any* position to coerce *any* citizen's chosen perspective on this hot-button topic.

C. *NIFLA* rules out diminished protection for "professional" speech.

Attempts to regulate "professional" speech raise the specter of viewpoint discrimination—"the inherent risk" that the State seeks to stifle disfavored ideas rather than pursue a legitimate regulatory purpose. *NIFLA*, 585 U.S. at 771; *Turner*, 512 U.S. at 641; *Otto*, 791 F.3d at 861.

Licensing. States may impose licensing requirements for professions that require special education and training. *See NAAP*, 228 F.3d 1043 (upholding licensing scheme for psychotherapy). This power "extends . . . particularly to those [trades] which closely concern the public health." *King*, 767 F.3d at 229, quoting *Watson v. State of Maryland*, 218 U.S. 173, 176 (1910). But as this Court cautioned in considering how to define "professional speech," the states do not have "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *NIFLA*, 585 U.S. at 773. Otherwise, they would have a "powerful tool" to impose "invidious discrimination of disfavored subjects." *Id.*, quoting *Cincinnati* v. *Discovery Network, Inc.*, 507 U.S. 410, 423-24, n. 19 (1993).

Constitutional collision. "[A] State may not, under the guise of prohibiting professional

misconduct, ignore constitutional rights." *NAACP v. Button*, 371 U.S. 415, 439 (1963); *NIFLA*, 585 U.S. at 769. SOCE cases—*Pickup*, *King*, *Otto, Tingley*, and now *Chiles*—demonstrate the danger of subjecting "professional speech" to a diminished First Amendment standard. The state does not have carte blanche to engage in blatant viewpoint discrimination, especially concerning a contentious matter of public concern that implicates deeply held religious convictions. *See, e.g., Snyder*, 562 U.S. 443. On the contrary, the state may cross the line and create a "collision between the power of government to license and regulate" and the free speech rights "guaranteed by the First Amendment." *King*, 767 F.3d at 229, quoting *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring in the result). As some courts acknowledge, "[a]t some point, a measure is no longer a regulation of a profession but a regulation of speech or of the press." *King*, 767 F.3d at 230, quoting *Lowe*, 472 U.S. at 228, 230 (White, J., concurring in the result).

Medical/Health Context. Where medical treatment is concerned, "a doctor who publicly advocates a treatment that the medical establishment considers outside the mainstream, or even dangerous, is entitled to robust protection under the First Amendment—just as any person is—even though the state has the power to regulate medicine." *Pickup*, 740 F.3d at 1227; *see Lowe*, 472 U.S. at 232 (White, J., concurring). One important concern is the confidential nature of the doctor-patient relationship. "Doctors help patients make deeply personal decisions, and

their candor is crucial." *Wollschlaeger*, 848 F. 3d at 1328 (W. Pryor, J. concurring). Past governments have "manipulated the content of doctor-patient discourse to increase state power and suppress minorities" (cleaned up). *NIFLA*, 585 U.S. at 771-72, citing Paula Berg, *Toward a First Amendment Theory of Doctor-Patient Discourse and the Right To Receive Unbiased Medical Advice*, 74 B. U. L. Rev. 201, 201-202 (1994). Frank and open communication is essential. *Conant*, 309 F.3d at 636. Furthermore, this Court has "stressed the danger of content-based regulations 'in the fields of medicine and public health, where information can save lives.'" *NIFLA*, 585 U.S. at 771, quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011).

New speech categories. This Court has strongly cautioned lower courts against exercising "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Alvarez*, 132 S. Ct. 2537 (2012), quoting *United States v. Stevens*, 559 U.S. 460, 472 (2010); *see King*, 767 F.3d at 229; *Otto*, 981 F.3d at 866 (acknowledging this limitation). "The Supreme Court has chastened us lower courts for creating, out of whole cloth, new categories of speech to which the First Amendment does not apply." *Pickup*, 740 F.3d at 1221 (O'Scannlain, J., dissenting from the denial of reh'g en banc). Nevertheless, some courts have carved out "professional speech" as "a separate category of speech that is subject to different rules." *NIFLA*, 585 U.S. at 767, citing *King*, 767 F.3d at 232 ("a licensed professional does not enjoy the full protection of the

First Amendment when speaking as part of the practice of her profession"); *Pickup*, 740 F.3d at 1227-1229; *Moore-King v. County of Chesterfield*, 708 F. 3d 560, 568-570 (4th Cir. 2014).

This Court has never recognized "professional speech" as a separate category subject to diminished First Amendment protection. "Speech is not unprotected merely because it is uttered by 'professionals.'" *NIFLA*, 585 U.S. at 767. Explaining its reluctance to "exempt a category of speech from the normal prohibition on content-based restrictions" (*id.* at 2372, quoting *United States v. Alvarez*, 567 U.S. at 722 (plurality opinion)), this Court noted that such an exemption would require "persuasive evidence" of a "long tradition." *NIFLA*, 585 U.S. at 767, quoting *Brown*, 564 U.S. at 792. No such evidence or tradition has emerged, as the Eleventh Circuit recognized: "In fact, the *NIFLA* decision not only addressed similar doctrinal issues to those we face here—it directly criticized other circuit decisions [*Pickup, King*] approving of SOCE bans." *Otto*, 981 F.3d at 867.

Standard for "Professional" Speech. This Court's "precedents have long protected the First Amendment rights of professionals." *NIFLA*, 585 U.S. at 771; *In re Primus*, 436 U.S. 412, 432 (1978) (noncommercial speech of lawyers). Professional speech may be entitled to "the strongest protection our Constitution has to offer." *Florida Bar v. Went-For-It, Inc.*, 515 U.S. 618, 634 (1995). "Being a member of a regulated profession does not . . . result in a surrender of First Amendment rights." *Conant*, 309 F.3d at 637. The Third Circuit departed from *NIFLA* in concluding

that a regulation could survive a free speech challenge if it "directly advance[d] the State's substantial interest in protecting its citizens from harmful or ineffective professional practices" and was "not more extensive than necessary to serve that interest." *King*, 767 F.3d at 225, 233. This tracks the standard for commercial speech announced in *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm. of New York*, 447 U.S. 557, 566 (1980) but does not conform to this Court's current precedent as articulated in *NIFLA*.

Professional speech may be limited in two narrow circumstances. First, professionals may be required to "disclose factual, noncontroversial information." *NIFLA*, 585 U.S. at 768; *see Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651 (1985); *Milavetz, Gallop & Milavetz, P. A. v. United States*, 559 U.S. 229, 250 (2010); *Ohralik v. Ohio State Bar Assn.*, 436 U.S. 447, 455-456 (1978). Second, states may regulate professional *conduct* (assuming it truly *is* conduct rather than pure speech), even if it incidentally implicates speech. *NIFLA*, 585 U.S. at 768; *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 884 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.). Neither exception applies here. This case is not about a disclosure requirement for "factual, noncontroversial information," and unlike *Casey*, it is unrelated to informed consent.

II. COUNSELING IS NEITHER VALUE-FREE NOR RELIGIOUSLY NEUTRAL

Counseling and religion both involve values, morality, thoughts, beliefs, emotions, and conduct—including sexual conduct and morality. Counseling is a highly subjective undertaking, not a hard science. "[T]he speech underpinning conversion therapy is overwhelmingly—if not exclusively—religious." *Tingley*, 57 F.4th at 1084 (Bumatay, J., dissenting from the denial of reh'g en banc). Colorado is regulating *religious* speech, which is not only "as fully protected . . . as secular private expression," but historically, "government suppression of speech has so commonly been directed *precisely* at religious speech that a free-speech clause without religion would be Hamlet without the prince." *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995) (internal citations omitted). Like the panel majority in *Tingley*, the Tenth Circuit "entirely ignored the First Amendment's special solicitude for religious speech," contrary to this Court's "repeatedly emphasiz[ing] that protections for religious speech are at the core of the First Amendment." *Tingley*, 57 F.4th at 1082 (O'Scannlain, J., respecting the denial of reh'g en banc).

Chiles' clients typically share her "sincerely held *religious* beliefs conflicting with homosexuality, and voluntarily seek SOCE counseling in order to live in congruence with their faith and to conform their identity, concept of self, attractions, and behaviors to their sincerely held *religious* beliefs." *Otto*, 981 F.3d at 860 (emphasis added). Colorado denies targeting

religion, asserting that its law does not "restrict [therapeutic] practices *because of* their *religious* nature." *Chiles v. Salazar*, 2022 U.S. Dist. LEXIS 227887, *33-34 (D. Colo. 2022), quoting *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1877 (2021) (citation omitted) (emphasis added). Similarly, Washington denied explicitly targeting religion—"the object of the Conversion Law is not to infringe upon or restrict practices *because of* their religious motivation" . . . it "regulates conduct only *within the confines of the counselor-client relationship*." *Tingley*, 557 F. Supp. 3d at 1143, quoting *Welch v. Brown*, 834 F.3d 1041, 1044 (9th Cir. 2016) (emphasis in original). But the very wording of the statutes tacitly admits that Colorado and Washington have both wandered into theological territory. The law is inapplicable to religious ministries. *Chiles*, 2022 U.S. Dist. LEXIS 227887, *36; C.R.S. § 12-245-217(1) ("A person engaged in the practice of religious ministry is not required to comply with [the Minor Therapy Conversion Law].") Washington's prohibition also does not apply to therapy provided "under the auspices of a religious denomination, church, or religious organization." Wash. Rev. Code § 18.225.030(4). These disclaimers do not salvage the statutes but merely expose the inherently religious nature of counseling and the statutes' blatant violation of religious liberty.

Many counseling centers exist to serve Christian clients. So do entire professional associations, e.g., American Association of Christian Counselors (www.aacc.net); National Christian

Counselors Association (www.ncca.org); Association of Certified Biblical Counselors (www.biblicalcounseling.com); Christian Counseling and Educational Foundation (www.ccef.org); Institute for Biblical Counseling and Discipleship (https://ibcd.org). In the Preamble to its doctrinal standards, the Association of Certified Biblical Counselors emphasizes the *theological* nature of its mission: "We are an association of Christians who have been called together by God to help the Church of Jesus Christ excel in the ministry of biblical counseling. We do this with the firm resolve that counseling is a fundamentally *theological* task. The work of understanding the problems which require counseling and of helping people with those problems is *theological* work requiring *theological* faithfulness in order to accomplish that effectiveness which honors the triune God." (emphasis added)[3] Colorado's rigid stance will exclude many people of faith from entering the profession as licensed counselors.

Among those who share Chiles' Christian worldview, there is vigorous debate concerning whether (or to what extent) theories of modern psychotherapy should be integrated with religious doctrine. *See, e.g.*, Paul C. Vitz, *Psychology as Religion* (1994); Jay E. Adams, *Competent to Counsel* (1970); Gary R. Collins, *Can You Trust Psychology?* (1988); Siang-Yan Tan, *Counseling and Psychotherapy: A Christian Perspective* (2011). The existence of these

[3]https://biblicalcounseling.com/about/beliefs/positions/standards-of-doctrine/.

discussions is strong testimony that counseling is not religiously neutral.

"Many licensed therapists take seriously the origins of 'psychotherapy' in the religious 'cure of souls.'" *Tingley*, 57 F.4th at 1082 (O'Scannlain, J., respecting the denial of reh'g en banc), citing Institute for Faith & Family Amicus Br. at 13-14. Outside the faith community, psychiatrist Thomas Szasz observed that "psychotherapy is a modern, scientific-sounding name for what used to be called the 'cure of souls.'" Thomas Szasz, *The Myth of Psychotherapy* (1978), 26. One reason he wrote *The Myth of Psychotherapy* was "to show how, with the decline of religion and the growth of science in the eighteenth century, the cure of (sinful) souls, which had been an integral part of the Christian religions, was recast as the cure of (sick) minds, and became an integral part of medicine." *Id.* at xxiv.

The counseling profession is not uniform. There are a multitude of competing approaches:

> A clear trend in psychotherapeutic interventions since the mid-1960s has been the proliferation not only of the types of practitioners, but also of the types and numbers of psychotherapies used alone and in combination in day-to-day practice. Garfield (1982) identified 60 forms of psychotherapy in use in the 1960s. In 1975, the Research Task Force of the National Institute of Mental Health estimated that there were 125 different forms. Herink (1980) listed

> over 200 separate approaches, while Kazdin (1986) noted 400 variants of psychotherapy.

Allen E. Bergin and Sol L. Garfield, *Handbook of Psychotherapy and Behavior Change* (5th Edition) (2004), 6.

A. The government may not condition the practice of counseling on a requirement that the counselor forego the exercise of his or her constitutional rights to free speech and religion.

The First Amendment entitles Americans to enter the counseling profession without sacrificing their religious beliefs about marriage and sexuality. "Being a member of a regulated profession does not . . . result in a surrender of First Amendment rights." *Conant*, 309 F.3d at 637, citing *Thomas v. Collins*, 323 U.S. at 531 ("the rights of free speech and a free press are not confined to any field of human interest"). The Constitution "protects not only the right to hold a particular religious belief, but also the right to engage in conduct motivated by that belief." *Prater v. City of Burnside*, 289 F.3d 417, 427 (6th Cir. 2002); *Emp't Div. v. Smith*, 494 U.S. 872, 877 (1990) ("the exercise of religion often involves not only belief and profession but the performance of (or abstention from) physical acts").

The drafters of the Constitution "fashioned a charter of government which envisaged the widest possible toleration of conflicting views." *United States*

v. Ballard, 322 U.S. 78, 87 (1944). Colorado tolerates no dissent, unilaterally imposing a secular orthodoxy that represents only one side of a contentious issue that intersects law, religion, philosophy, morality, and politics. Colorado's Censorship Law is a massive violation of Chiles' rights that implicates both speech *and* religion. Believers who are forced to abandon their moral principles in the workplace are squeezed out of full participation in civic life. Nora O'Callaghan, *Lessons From Pharaoh and the Hebrew Midwives: Conscientious Objection to State Mandates as a Free Exercise Right*, 39 Creighton L. Rev. 561, 561-3 (2006). If religion is thrust to the private fringes of life, constitutional guarantees ring hollow. Michael W. McConnell, *"God is Dead and We have Killed Him!" Freedom of Religion in the Post-Modern Age*, 1993 BYU L. Rev. 163, 176 (1993).

A citizen may not be excluded from public office based on "state-imposed criteria forbidden by the Constitution." *Torcaso v. Watkins*, 367 U.S. 488, 495-496 (1961) (striking down requirement that notary public declare a belief in God). *Torcaso's* holding encompasses both religious belief and conduct. "The government may not...impose special disabilities on the basis of religious views or religious status." *Smith,* 494 U.S. at 877. This Court, striking down a Tennessee statute that disqualified religious leaders from public office, reasoned that "ministerial status is defined in terms of conduct and activity rather than in terms of belief." *McDaniel v. Paty*, 435 U.S. 618, 627 (1978). Chiles is not compelled to become a counselor, but she may not be excluded from the profession by

unconstitutional criteria. *Baird v. State Bar of Arizona*, 401 U.S. 1, 6-7 (1971); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 607 (1967). Counseling, like the practice of law, "is not a matter of grace, but of right for one who is qualified by his learning and his moral character." *Baird*, 401 U.S. at 8. More generally, the state "may not deny a benefit to a person on a basis that infringes his constitutionally protected interests—especially, his interest in freedom of speech." *Perry v. Sindermann*, 408 U.S. 593, 597 (1972).

B. Colorado's thinly veiled hostility to religion clashes with the "benevolent neutrality" required of government.

The district court summarily dismissed Colorado's blatant viewpoint discrimination in a one-word sentence that reeks of hostility to religion: "Nonsense." *Chiles,* 2022 U.S. Dist. LEXIS 227887, *36. In cases where a law or policy burdening religion is accompanied by such an "official expression of hostility," this Court does not hesitate to "set aside" that law or policy "without further inquiry." *Bremerton*, 142 S. Ct. at 2422 n. 1 (2022), citing *Masterpiece Cakeshop*, *Ltd.* v. *Colorado Civil Rights Comm'n*, 138 S. Ct. 1719, 1732 (2018).

"[T]he Free Exercise Clause pertain[s] if the law at issue discriminates against some or all religious beliefs . . . ." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 532 (1993). The Clause "protects against governmental hostility

which is masked as well as overt." *Id*. at 534. Religious teachings commonly include standards of conduct, including sexual morality. The Colorado law, even absent a facial attack on religion, is saturated with hostility toward religious traditions that teach the religious view of marriage as a relationship between one man and one woman and do not affirm same-sex relationships or the ability to transition to the opposite sex.

This Court has a "duty to guard and respect that sphere of inviolable conscience and belief which is the mark of a free people." *Lee v. Weisman*, 505 U.S. 577, 592 (1992). "A state-created orthodoxy"—Colorado's preferred views about sexual morality—"puts at grave risk that freedom of belief and conscience which are the sole assurance that religious faith is real, not imposed." *Id*. at 592. The Constitution demands a benevolent government neutrality so that each religious creed may "flourish according to the zeal of its adherents and the appeal of its dogma." *Zorach v. Clauson*, 343 U.S. 306, 313 (1952). The Framers intentionally protected "the integrity of individual conscience in religious matters." *McCreary County, KY v. ACLU*, 545 U.S. 844, 876 (2005).

Colorado runs roughshod over Chiles' faith, exhibiting the very hostility the Constitution forbids. The Religion Clauses forbid government hostility or callous indifference toward religion. *Epperson v. Arkansas*, 393 U.S. 97, 104 (1968); *Lynch v. Donnelly*, 465 U.S. 668, 673 (1984). "No person can be punished for entertaining or professing religious beliefs or disbeliefs. . . ." *Everson v. Bd. of Educ. of Ewing*, 330

U.S. 1, 15-16 (1947). Colorado punishes Chiles, her clients, and others like them for holding to their religious beliefs. "State power is no more to be used so as to handicap religions than it is to favor them." *Id.* at 18. Colorado handicaps both counselors and counselees who will not espouse the State's view of sexual morality. Colorado unlawfully suppresses Chiles' religious beliefs and excludes her from serving others in the community as a counselor—even where the minor client and his or her parents are in agreement and fully informed about the nature of the counseling.

Colorado "conveys a message" strongly disapproving Chiles' religious beliefs. *Lynch*, 465 U.S. at 690 (O'Connor, J., concurring); *County of Allegheny v. ACLU*, 492 U.S. 573, 597 (1989). The State not only inhibits Chiles' ability to adhere to her religious faith—it renders her religion relevant to her standing in the community, potentially barring her from her chosen profession unless she abandons her beliefs. *Id.* at 594. Colorado's frontal assault on Chiles' religious beliefs is a more personalized disapproval—with more serious, permanent consequences—than many earlier cases where government has limited religious expression. *See, e.g., Lynch*, 465 U.S. at 678-679 (creche in city Christmas display); *County of Allegheny*, 492 U.S. 573 (creche and menorah display); *Lee v. Weisman*, 505 U.S. at 592 (high school graduation invocation).

If "[t]he Constitution forbids the State to exact religious conformity from a student as the price of attending her own high school graduation" (*id.* at

596)—then it surely precludes exacting such conformity and "employ[ing] the machinery of the State to enforce religious orthodoxy"—as the price of entering or remaining in the counseling profession. *Id*. at 592.

CONCLUSION

When this Court declined to hear *Tingley*, Justice Thomas predicted the issue would come before the Court again. Now that it has, "the Court should do what it should have done [there]: grant certiorari to consider what the First Amendment requires." *Tingley*, 144 S. Ct. at 35 (Thomas, J., dissenting from the denial of certiorari).

Respectfully Submitted,

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