No. 24-539

# In the Supreme Court of the United States

KALEY CHILES,

*Petitioner*,

v.

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

*Respondents*.

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

## BRIEF OF *AMICUS CURIAE* CATHOLICVOTE.ORG EDUCATION FUND IN SUPPORT OF PETITIONER

SCOTT W. GAYLORD
HIGH POINT UNIVERSITY SCHOOL OF LAW
APPELLATE ADVOCACY CLINIC
One University Parkway
High Point, NC 27268
Phone: (336) 841-2635
Email: sgaylord@highpoint.edu

*Counsel for Amicus Curiae*

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## INTERESTS OF *AMICUS*[1]

CatholicVote.org Education Fund ("CVEF") is a nonpartisan voter education program devoted to serving the Nation by supporting educational activities that promote an authentic understanding of ordered liberty and the common good. Given its educational mission, CVEF is deeply concerned that *Chiles v. Salazar*, 116 F.4th 1178 (10th Cir. 2024) threatens the ability of professionals in any licensed field to speak freely when treating, counseling, representing, or advising their patients and clients. If States are permitted to transform a professional's speech into conduct whenever they impose a licensing requirement, governments will be able to censor specific topics and viewpoints with which they disagree. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988) ("States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose invidious discrimination of disfavored subjects.") (cleaned up); *Tingley v. Ferguson*, 57 F.4th 1072, 1077 (9th Cir. 2023) (O'Scannlain, J., statement respecting the denial of rehearing en banc) (explaining that under the Ninth Circuit's analysis "the First Amendment would not protect legal advice …, education, …, or advertising"). Colo. Rev. Code § 12-245-202(3.5)(a) and § 12-245-224(t)(V) (collectively, the "Ban" or

[1] Each party received notice of the filing of this *amicus* brief as required by Rule 37.2. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no person other than the *amicus* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Talk Therapy Ban") do just that, prohibiting disfavored speech during counseling sessions between licensed counselors and their minor clients. CVEF, therefore, comes forward to support the right of all professionals to practice their vocation—and convey their views—in a manner that is consistent with their training, expertise, and (as here) religious faith.

## SUMMARY OF ARGUMENT

The First Amendment safeguards the "freedom to think as you will and to speak as you think." *Boy Scouts of America v. Dale*, 530 U.S. 640, 660-61 (2000). Kaley Chiles, a licensed counselor and a practicing Christian, seeks to engage in talk therapy with her minor clients "who privilege their faith above their feelings" and "believe their faith and their relationships with God supersede romantic attractions." *Chiles*, 116 F.4th at 1193 (cleaned up). Engaging only in expression, Chiles wants to speak to her clients—and her clients want to hear—about her thoughts and strategies to help them align their sexual identity with their faith.

In *Chiles*, Colorado precluded Chiles from engaging in such speech, deepening the circuit split regarding the constitutionality of bans on talk therapy. In the Ninth and Tenth Circuits, counselors and other licensed professionals may be punished for "pure speech" despite *Nat'l Inst. of Family and Life Assocs. v. Becerra*'s admonition that "[s]peech is not unprotected merely because it is uttered by 'professionals.' " 585 U.S. at 767 ("*NIFLA*"); *303 Creative LLC v. Elenis*, 600 U.S. 570, 587 (2023) (quoting *Kaplan v. California*, 413 U.S.

115, 119-20 (1973)) ("All manner of speech—from 'pictures, films, painting, drawings, and engraving,' to 'oral utterance and the printed word'—qualify for the First Amendment's protections."). The Third and Eleventh Circuits, on the other hand, afford full First Amendment protection to talk therapy. *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014), *abrogated in part by NIFLA*, 585 U.S. at 767-68; *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020). Adding to the uncertainty, the Fifth Circuit recently expressed concern about *Chiles*'s speech-as-conduct rule. *Hines v. Pardue*, 117 F.4th 769, 778 n.50 (5th Cir. 2024) ("Given our analysis in today's case, we are hesitant to embrace *Chiles*'s threshold conclusion that conduct, and not speech, was the target of the Colorado law.").

Depending on where one lives, talk therapy bans either impermissibly trench on the First Amendment speech rights of professionals or represent a proper exercise of States' authority to regulate professional "conduct," even when the alleged conduct consists entirely of speech activity. Both positions cannot be correct. One is inconsistent with the Constitution, and only this Court can decide which one. *Elrod v. Burns*, 427 U.S. 347, 373-74 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). Certiorari is required, therefore, to resolve this circuit split on an issue of national importance, *Tingley v. Ferguson*, 144 S. Ct. 33, 35 (2023) (Alito, J., dissenting from denial of certiorari) (recognizing that the Ninth Circuit's upholding a ban on talk therapy "presents a question of national importance"), and to ensure that the government cannot sidestep the First

Amendment simply by reclassifying speech as conduct whenever a professional engages in expression the government disfavors.

## ARGUMENT

### I. The Tenth Circuit cannot avoid First Amendment safeguards by recasting professional speech as professional conduct because, contrary to *NIFLA*, *Chiles*'s analysis depends on the fact that a professional is speaking and regulates the act of communication itself, not a separate form of conduct.

The now-discredited professional speech doctrine viewed professional speech as unique and, consequently, not subject to traditional First Amendment rules. The doctrine defined "professionals" as "individuals who provide personalized services to clients and who are subject to 'a generally applicable licensing and regulatory regime.' " *NIFLA*, 585 U.S. at 767 (quoting *Moore-King v. County of Chesterfield*, 708 F.3d 560, 569 (4th Cir. 2014)). "Professional speech" included "any speech by these individuals that is based on '[their] expert knowledge and judgment' or that is 'within the confines of [the] professional relationship.' " *Id.* (citations omitted).

In *NIFLA*, this Court denied that professional speech is "a separate category of speech that is subject to different rules," explaining that "[s]peech is not unprotected merely because it is uttered by 'professionals.' " 585 U.S. at 767. In fact, *NIFLA* identified only two situations in which this Court had afforded professional speech "less protection"—

commercial speech and a regulation of conduct that involved speech only incidentally. *Id.* at 768; *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (stating that "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed").

Undeterred, the Tenth Circuit pivoted from the professional speech doctrine to *Tingley*'s novel professional speech-as-conduct rule in an attempt to squeeze Colorado's Talk Therapy Ban into the narrow confines of the *Giboney* exception. *Tingley*, 47 F.4th at 1064 ("States do not lose the power to regulate the safety of medical treatments performed under the authority of a state license merely because those treatments are implemented through speech rather than through scalpel."). According to the panel, Chiles's speech was a form of treatment. 116 F.4th at 1209 (holding that Colorado's Ban "implicates mental health professionals' speech only as part of their practice of mental health treatment"); *Tingley*, 47 F.4th at 1073 (adopting the position in *Pickup v. Brown,* 740 F.3d 1208, 1229 (9th Cir. 2014), o*verruled on other grounds by NIFLA*, 585 U.S. 755, that a ban on "conversion therapy treatment … was a regulation of conduct" subject only to "rational basis review"). Given that Chiles's desired speech would be uttered in the context of the counselor-client relationship, her talk therapy could be classified as a treatment, a type of conduct directed at assisting her clients.

In so holding, the Tenth Circuit ignored a critical limitation on both exceptions that *NIFLA*

identified—that "neither of [these exceptions] turned on the fact that professionals were speaking." 585 U.S. at 768. The problem is that the Tenth Circuit's speech-as-conduct rule *is* predicated on the fact that Chiles is a licensed counselor who engages in specific expression to help her minor clients. The Tenth Circuit engages in verbal gymnastics to obscure this fact:

> [T]he MCTL regulates the provision of a therapeutic modality—carried out through use of verbal language—by a licensed practitioner authorized by Colorado to care for patients…. [It] does not regulate expression. It is the practice of conversion therapy—not the discussion of the subject by the mental health provider—that is a '[p]rohibited activit[y]' under the MCTL.

*Chiles*, 116 F.4th at 1208. Pure speech (the "use of verbal language") that a professional engages in as part of a category of treatment (a "therapeutic modality") now becomes conduct subject to government regulation ("the practice of conversion therapy"). *Id.* ("[T]he MCTL prohibits a particular mental health treatment provided by a healthcare professional to her minor patients.").

The panel, however, cannot escape the fact that its analysis treats talk therapy differently from the identical expression of a classmate, religious advisor, or friend *because a professional is involved*. This is why the Tenth Circuit rejected Chiles's argument that her talk therapy resembled "an exchange between a 'sophomore psychology major' and her peers." *Id.* Unlike "an informal

conversation among friends," "the counseling relationship between provider and patient involves special privileges, a power differential, and a financial arrangement." *Id.* When Chiles engages in speech as a professional counselor, her expression (talk therapy) is transformed into a form of treatment, a "therapeutic modality," that is not subject to First Amendment scrutiny. When the psychology major says the exact same things, though, her speech remains speech. What accounts for the difference? The identity of the speaker—Chiles's expression receives diminished protection because she is a professional counselor.

If this sounds familiar, it should. The Tenth Circuit effectively reincarnates the professional speech doctrine under the guise of a professional treatment doctrine. *Chiles*'s reliance on the special nature of the counselor-client relationship mirrors the defining characteristics of "professional speech" that *NIFLA* considered and rejected: " 'Professional speech' is then defined as any speech by these individuals [who provide personalized services to clients and who are subject to 'a generally applicable licensing and regulatory regime'] that is based on '[their] expert knowledge and judgment' or that is 'within the confines of [the] professional relationship.' " 585 U.S. at 767 (citations omitted). That the Tenth Circuit grounded its analysis on *the fact that a professional was speaking* is apparent from its invoking the same passage in *Lowe v. SEC* that *Pickup* relied on when proffering its (now discredited) formulation of the professional speech doctrine: "One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the

client's individual needs and circumstances is properly viewed as engaging in the practice of a profession." 472 U.S. 181, 232 (1985) (White, J., concurring) (quoted in *Pickup*, 740 F.3d at 1229 and *Chiles*, 116 F.4th at 1208).

Review is warranted, therefore, because the Ninth and Tenth Circuits directly contravene *NIFLA* by removing First Amendment protection from expression "merely because it is uttered by 'professionals.' " 585 U.S. at 767. Given that talk therapy consists exclusively of speech between a counselor and her client, Colorado's Ban regulates *expression* and should be subject to First Amendment scrutiny. *Cohen v. California*, 403 U.S. 15, 18 (1971) ("The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon 'speech.' "); *Hines*, 117 F.4th at 776 (recognizing that the regulation in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) ("*HLP*") "barred certain forms of speech" because "whether the plaintiffs could speak with designated terrorist organizations 'depended[ed] on what they [said]' "); *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503, 505-06 (1969) (concluding that wearing a black armband "was closely akin to 'pure speech' which, we have repeatedly held, is entitled to comprehensive protection under the First Amendment").

The second lesson *Chiles* ignored about *Giboney*'s "conduct that incidentally involves speech" exception is that diminished protection applies only if there is some conduct—other than the act of communication itself—that is the object of the governmental regulation. *Otto*, 981 F.3d at 866 (explaining that "the State punishes speech, not

conduct" when "the only conduct which the State [seeks] to punish [is] the fact of communication"); *Chiles*, 116 F.4th at 1228 (Hartz, J., dissenting) ("[A] restriction on speech is not *incidental* to regulation of conduct when the restriction is imposed because of the expressive content of what is said."). Under *Giboney*, conduct is not immune from regulation simply because that "conduct was *in part* initiated, evidenced, or carried out by means of language, either spoken, written, or printed." 336 U.S. at 502 (emphasis added). But when the conduct being regulated consists entirely of a speaker speaking, First Amendment safeguards *are* triggered. Speech may be used to treat a patient, but it remains speech nonetheless: "What the governments call a 'medical procedure' consists—entirely—of words…. 'Speech is speech, and it must be analyzed as such for purposes of the First Amendment.' " *Otto*, 981 F.3d at 867 (quoting *Wollschlaeger v. Governor of Florida*, 848 F.3d 1293, 1307 (11th Cir. 2017)); *King*, 767 F.3d at 225 ("Given that the Supreme Court had no difficulty [in *HLP*] characterizing legal counseling as 'speech,' we see no reason here to reach the counter-intuitive conclusion that verbal communications that occur during SOCE counseling are 'conduct.' ").

The difference between conduct incidentally involving speech and the act of directly communicating is firmly embedded in this Court's caselaw. Regulations of the former have been regularly upheld. *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (upholding mandatory disclosures as part of obtaining informed consent to a physician's performing an abortion); *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456

(1978) ("In-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component."); *Rumsfeld v. Forum for Academic and Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006) (bans on discrimination in hiring prohibiting a "White Applicants Only" sign); *R.A.V. v. St. Paul*, 505 U.S. 377, 385 (1992) ("an ordinance against outdoor fires" preventing "burning a flag"); *Giboney*, 336 U.S. at 502 (antitrust laws precluding "agreements in restraint of trade").

Tellingly, *Chiles* cites no authority to support giving Colorado the authority to declare pure expression to be something that it is not—conduct—and then to regulate such "treatment" free from the strictures of the First Amendment. In fact, this Court's precedents cut in the opposite direction. *Riley*, 487 U.S. at 796 ("[S]tate labels cannot be dispositive of [the] degree of First Amendment protection."); *NAACP v. Button*, 371 U.S. 415, 439 (1963) (explaining that "a State may not, under the guise of prohibiting professional misconduct, ignore [First Amendment] rights"); *Cohen*, 403 U.S. at 18 (upholding an individual's right to wear a jacket displaying an offensive word because "[t]he only 'conduct' which the State sought to punish is the fact of communication," which meant that the "conviction rest[ed] solely upon 'speech' "); *Telescope Media Group v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019) ("Speech is not conduct just because the government says it is."). And they do so for good reason—the dangers to free speech are the same whether the government is allowed to regulate professional speech or professional "conduct" that consists solely of communicating a message. In both

situations, professionals are precluded from expressing their desired messages, messages that the government disfavors. *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) ("[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). These prohibitions, therefore, contravene "the usual rule that governmental bodies may not prescribe the form or content of individual expression." *Cohen*, 403 U.S. at 24. Such content-based regulations "pose the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994).

Colorado, of course, remains free to promote its preferred messages regarding medical treatments, conversion therapy, and other issues. *Pleasant Grove City v. Summum*, 555 U.S. 460, 467 (2009) (explaining that the government "has the right to speak for itself, … to say what wishes, and to select the views that it wants to express") (cleaned up). But in the realm of "private speech or expression, government regulation may not favor one speaker over another." *Rosenberger v. Rector and Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). Nor can the government censor messages it dislikes: "Our cases establish that the State cannot advance some points of view by burdening the expression of others." *Pacific Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 20 (1986) (plurality opinion); *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 785-86 (1978) ("Especially where … the legislature's suppression of speech suggests an attempt to give one side of a debatable public question an advantage

in expressing its views to the people, the First Amendment is plainly offended."). The way for the government to promote its views on sexual orientation and gender identity (or any other issue) "is not to punish those who feel differently about these matters. It is to persuade them that they are wrong." *Texas v. Johnson*, 491 U.S. 397, 419 (1989).

Unfortunately, Colorado took a different path, banning talk therapy completely. This Ban violated both Chiles's right to speak and the right of her clients to receive desired information. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 578 (2011) ("The defect in Vermont's law is made clear by the fact that many listeners find detailing instructive."); *Kleindienst v. Mandel*, 408 U.S. 753, 762 (1972) (quoting *Martin v. City of Struthers*, 319 U.S. 141, 143 (1943)) ("In a variety of contexts this Court has referred to a First Amendment right to 'receive information and ideas.' "). While Colorado believes talk therapy is ineffective and harmful to minors, "the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer," *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210 (1975), let alone willing listeners such as Chiles's minor clients. *Snyder v. Phelps*, 562 U.S. 443, 450 (2011) (protecting speech even though a jury found it "outrageous" and experts testified it "had resulted in severe depression and had exacerbated pre-existing health conditions").

If Colorado is permitted to ban professional speech, state legislatures across the country may be emboldened to regulate a professional's speech with her patient based " 'upon a categorical balancing of the value of the speech against its societal costs.' "

*United States v. Stevens*, 559 U.S. 460, 470 (2010) (citation omitted). That is what Colorado did—banned conversion therapy because its legislature concluded that such therapy was ineffective, disfavored by various professional groups, and harmful to minors. *Chiles*, 116 F.4th at 1216-18.

The problem is that *Stevens* expressly rejected this type of balancing test:

> The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits. The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it.

559 U.S. at 470. The Colorado legislature may view talk therapy as "valueless or unnecessary," but its "ad hoc calculus of costs and benefits" does not determine the scope of First Amendment protection. *Id.* at 471; *Johnson*, 491 U.S. at 414 ("If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable."). Whether Colorado disagrees with talk therapy (or any other type of professional speech) "for good reasons, great reasons, or terrible reasons has nothing at all to do with it. All that matters is that a therapist's speech to a minor client is legal or illegal under the

ordinances based solely on its content." *Otto*, 981 F.3d at 863.

And this is true even when the government seeks to protect children from expression it views as harmful: "Even where the protection of children is the object, the constitutional limits on governmental action apply." *Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 804-05 (2011). As this Court explained in *Erznoznik*, "[s]peech that is neither obscene as to youths nor subject to some other legitimate proscription cannot be suppressed solely to protect the young from ideas or images that a legislative body thinks unsuitable for them." 422 U.S. at 213-14; *Brown*, 564 U.S. at 794-95 (holding that the State's power to protect children "does not include a free-floating power to restrict the ideas to which children may be exposed"). Otherwise, the government could "shut off discourse solely to protect others from hearing it … effectively empower[ing] a majority to silence dissidents simply as a matter of personal predilections." *Cohen*, 403 U.S. at 21. This Court long ago rejected the view that the Constitution "prescribe[es] limits, and declar[es] that those limits may be passed at pleasure." *Marbury v. Madison*, 5 U.S. 137, 178 (1803); *Tingley*, 57 F.4th at 1077 (O'Scannlain, J., dissenting from denial of rehearing en banc) ("But it would make no sense for the First Amendment to protect speech through heightened scrutiny while subjecting legislative determinations of the line between speech and conduct only to rational basis review."); *Wollschlaeger*, 848 F.3d at 1308 (citation omitted) ("[T]he enterprise of labeling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and susceptible to

manipulation."). To protect children (or anyone else) through content-based restrictions on speech, the government must satisfy heightened scrutiny. *NIFLA*, 585 U.S. at 766 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)) ("As a general matter, [content-based regulations] 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.' ").

## II. Even if Chiles's speech is considered to be a type of conduct, that "conduct" still qualifies for First Amendment protection under *Hurley* and *303 Creative* because it is expressive.

The Tenth Circuit's analysis also contravenes a central teaching of *Hurley* and *303 Creative*—that the government's authority to regulate conduct is not "immune from the demands of the Constitution" when applied to expressive activity. *303 Creative*, 600 U.S. at 592. Even assuming that talk therapy is a form of conduct-based treatment, which it is not, Colorado's Ban runs headlong into the First Amendment. *Button*, 371 U.S. at 438 (rejecting Virginia's attempt to ban the litigation-related speech of NAACP attorneys through a statute precluding "improper solicitation"); *Riley*, 487 U.S. at 798 (finding speech compulsions related to professional fundraising unconstitutional); *Zauderer v. Off. of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 637 n.7 (1985) (noting that, if communicated outside the commercial speech context, the lawyer's statements would have been "fully protected speech"). The same is true

even when "[t]he law … may be described as directed at conduct, as the law in *Cohen* was directed at breaches of the peace, but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *HLP*, 561 U.S. at 28; *Hines*, 117 F.4th at 776 (concluding, based on *HLP*, that "a particular act constitutes protected speech, rather than unprotected conduct, if that act 'consists of communicating a message' ").

If talk therapy is a form of treatment, that treatment "consists of communicating a message," *HLP*, 561, U.S. at 28—a message that Colorado sought to prohibit. And "[t]he message [Colorado] disfavored is not difficult to identify." *Hurley v. Irish-American Gay, Lesbian, and Bisexual Group of Boston*, 515 U.S. 557, 574 (1995). The State opposed conversion therapy based on its "particular viewpoint about sex, gender, and sexual ethics." *Otto*, 981 F.3d at 864. In its place, Colorado codified its own perspective—that "sexual orientation is immutable, but gender is not"—and prevented therapists from engaging in expression that was inconsistent with the State's view. *Id.* By barring a particular viewpoint on this important issue, Colorado skewed the marketplace of ideas, permitting only state-approved speech in sessions with minor clients who sought help "prioritiz[ing] their faith above their feelings … to live a life consistent with their faith." *Chiles*, 116 F.4th at 1193. The First Amendment prohibits such expressive gerrymandering:

> The very idea that a noncommercial speech restriction be used to produce thoughts and statements acceptable to some groups or, indeed, all people,

> grates on the First Amendment, for it amounts to nothing less than a proposal to limit speech in the service of orthodox expression. The Speech Clause has no more certain antithesis.

*Hurley*, 515 U.S. at 579; *W.V. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) ("But freedom to differ is not limited to things that do not matter much. That would be a mere shadow of freedom. The test of its substance is the right to differ as to things that touch the heart of the existing order."); *Otto*, 981 F.3d at 862 ("Forbidding the government from choosing favored and disfavored messages is at the core of the First Amendment's free-speech guarantee.").

*Hurley* illustrates the point. In *Hurley*, this Court recognized that public accommodations laws "do not, as a general matter, violate the First or Fourteenth Amendments." 515 U.S. at 572. When "applied in a peculiar way"—*i.e.*, "to the sponsors' speech itself"—such laws "violate[d] the fundamental rule of protection under the First Amendment, that a speaker has the autonomy to choose the content of his own message." *Id*, at 572-73. The government's authority to regulate conduct—namely, "the act of discriminating against individuals in the provision of publicly available goods, privileges, and services"—did not extend to the regulation of "[t]he protected expression that inheres in a parade." *Id*. at 572, 569. Although "marching" is a form of conduct, "[p]arades are … a form of expression" through which "marchers … mak[e] some sort of collective point." *Id*. at 568. Accordingly, "[w]hile the law is free to promote all sorts of conduct in place of harmful behavior, it 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." *Id.* at 579

Similarly, *303 Creative* concluded that Colorado's public accommodations law violated the First Amendment because Colorado sought "to use the law to compel an individual to create speech she does not believe." 600 U.S. at 578-79. Instead of regulating 303 Creative's conduct, Colorado applied its public accommodations law to its owner's expressive activity: "If she wishes to speak, she must either speak as the State demands or face sanctions for expressing her own beliefs." *Id.* at 589. This Court concluded that such an alleged "choice … 'is enough,' more than enough, to represent an impermissible abridgment of the First Amendment's right to speak freely." *Id.* (quoting *Hurley*, 515 U.S. at 574). Although the public accommodations law "had many lawful applications," Colorado could not apply it to a business owner's expression. *Id.* at 592; *id.* ("When a state public accommodations law and the Constitution collide, there can be no question which must prevail.").

The same analysis governs the Talk Therapy Ban here. Although Colorado generally can regulate the conduct of counselors and other professionals, its attempt to regulate Chiles's oral communications with her minor clients "collides" with the First Amendment. In *Chiles*, as in *303 Creative*, Colorado contended that its laws regulated only conduct (here, "treatment," and in *303 Creative* the "sale of an ordinary commercial product"). *Id.* at 593. "On the State's telling" in both cases, "speech more or

less vanishes from the picture—and, with it, any need for First Amendment scrutiny." *Id.* Yet, as discussed above, a State cannot transform speech into conduct simply by (repeatedly) calling it "treatment." *Riley*, 487 U.S. at 781 (citing *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975)) ("[S]tate labels cannot be dispositive of [the] degree of First Amendment protection.").

Colorado's Ban violates the First Amendment because it puts Chiles to the same type of Hobson's choice that this Court found unconstitutional in *303 Creative*: Chiles may counsel her minor clients on gender identity "as the State demands" (*i.e.*, by "provid[ing] … [a]cceptance, support, and understanding for the facilitation of" gender transition, Colo. Rev. Stat. § 12-245-202(3.5)) or "face sanctions for expressing her own beliefs" during counseling sessions (*i.e.*, by "attempt[ing] or purport[ing] to change an individual's sexual orientation or gender identity," *id.*). *303 Creative*, 600 U.S. at 589. The only other alternative—remain quiet and forego engaging in her desired expression—compels silence, which also violates the First Amendment. *Riley*, 487 U.S. at 796 (explaining that "in the context of protected speech, the difference [between compelled speech and compelled silence] is without constitutional significance"). Colorado's Talk Therapy Ban, therefore, "plainly 'alters the content' of [Chiles's] speech," *NIFLA*, 585 U.S. at 766 (quoting *Riley*, 487 U.S. at 795), which, in turn, "regulat[es] the content of [her] speech [and] 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or

information.' " *Id.* at 771 (quoting *Turner Broadcasting*, 512 U.S. at 641).

As a result, "Colorado does not seek to impose an incidental burden on speech. It seeks to force [Chiles] to 'utter what is not in [her] mind' about a question of political and religious significance," and to "affect a 'speaker's message' by 'forc[ing] her to 'accommodate' other views," to " 'alter' the 'expressive content' of her message," and to 'interfer[e] with' her 'desired message.' " *303 Creative*, 600 U.S. at 596 (citations omitted); *id.* at 597 (concluding that a burden on speech is not "incidental" when a State "intends to force [a speaker] to convey a message she does not believe with the 'very purpose' of '[e]liminating … ideas' that differ from its own") (citation omitted); *Hurley*, 515 U.S. at 563 (using Massachusetts's public accommodations law to force parade organizers to include speech with which they disagreed was more than an " 'incidental' " infringement on First Amendment speech rights); *Dale*, 530 U.S. at 659 (requiring the Boy Scouts to accept particular members under a public accommodations law had more than "an incidental effect on protected speech"). The Ban imposes a direct and substantial burden on professional speech, not an incidental one.

Moreover, given that *Chiles*'s speech-as-conduct rule is unmoored from the First Amendment, its scope is alarming—"cover[ing] a wide array of individuals—doctors, lawyers, nurses, physical therapists, truck drivers, bartenders, barbers, and many others." *NIFLA*, 585 U.S. at 773. Attorneys, teachers, social workers, physician assistants, registered nurses, therapists, and other licensed

professionals counsel clients, treat patients, and teach through their speech. If the government is permitted to classify expression as "conduct" and then regulate that conduct, it may set its sights on other forms of speech like protesting, debating, and meeting to discuss books. *Pickup*, 740 F.3d at 1221 n.10 (O'Scannlain, J., dissenting from rehearing en banc) ("If a state may freely regulate speech uttered by professionals in the course of their practice without implicating the First Amendment, then targeting disfavored moral and political expression may only be a matter of creative legislative draftsmanship."). Having the authority to regulate the act of communication itself, the government could "easily tell architects that they cannot propose buildings in the style of I.M. Pei, or general contractors that they cannot suggest the use of cheaper foreign steel in construction projects, or accountants that they cannot discuss legal tax avoidance techniques, and so on and so on." *Wollschlaeger*, 848 F.3d at 1311.

A recent example from the legal field further illustrates how *Chiles* jeopardizes professional speech. In 2016, the American Bar Association proposed Model Rule 8.4(g). Under the proposed Rule:

> It is professional misconduct for a lawyer to: … (g) Engage in conduct that the lawyer knows or reasonably should know is harassment or discrimination on the basis of race, sex, religion, national origin, ethnicity, disability, age, sexual orientation, gender identity, marital status or socioeconomic status in conduct related

> to the practice of law…. This paragraph does not preclude legitimate advice or advocacy consistent with these rules.

ABA, Model Rules of Professional Conduct, Rule 8.4 (Aug. 2016) ("Rule 8.4(g)") (available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/). While the text of the Rule referred only to conduct, Comment 3 revealed that the Rule also operated as a speech code, curtailing written and oral expression:

> Discrimination and harassment by lawyers in violation of paragraph (g) … includes harmful verbal or physical conduct that manifests bias or prejudice towards others. Harassment includes sexual harassment and derogatory or demeaning verbal or physical conduct. Sexual harassment includes unwelcome sexual advances, requests for sexual favors, and other unwelcome verbal or physical conduct of a sexual nature.

ABA, Model Rules of Professional Conduct, Rule 8.4, Comments (Aug. 2016) (available at https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/rule_8_4_misconduct/comment_on_rule_8_4/). The purpose of the Rule was to foster a "cultural shift" in views on discrimination and harassment: "There is a need for a cultural shift in understanding the inherent integrity of people regardless of their race, color, national origin,

religion, age, sex, gender identity, gender expression, sexual orientation, marital status, or disability, to be captured in the rules of professional conduct." December 22, 2015 Memorandum, Standing Committee on Ethics and Professional Responsibility (available at https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/rule_8_4_amendments_12_22_2015.pdf). To bring about this "cultural shift," the ABA sought to regulate both "physical conduct" and "verbal conduct."

Among other problems, Model Rule 8.4(g) conflated speech and conduct in the same way as *Chiles*. Discriminatory and harassing conduct included speech with which the ABA disagreed. By labeling the disfavored speech as "verbal conduct," the ABA attempted to move the Rule outside the protection of the First Amendment. Consistent with *Chiles*, the ABA's speech-is-conduct rule had broad scope, applying to all "[c]onduct related to the practice of law[, which] includes representing clients; interacting with witnesses, coworkers, court personnel, lawyers and others while engaged in the practice of law." Rule 8.4, Comment 4. Transforming speech into conduct, Rule 8.4(g) sought to codify viewpoint-based discrimination in relation to the practice of law. Speech that did not "manifest bias or prejudice" was permissible, and "[l]awyers may engage in conduct undertaken to promote diversity and inclusion without violating this rule…." Rule 8.4(g). As Professor Rotunda aptly put the point, "[t]he ABA rule is not about forbidding discrimination based on sex or marital status; it is about punishing those who say or do things that do not support the ABA's particular view

of sex discrimination or marriage." Ronald D. Rotunda, Heritage Foundation Legal Memorandum (No. 191), "The ABA Decision to Control What Lawyers Say: Supporting 'Diversity' but not Diversity of Thought" (Oct. 6, 2016) (available at http://thf-reports.s3.amazonaws.com/2016/LM-191.pdf). If *Chiles* stands, States could adopt Model Rule 8.4(g) and silence lawyers who hold views that interfere with the ABA's efforts to bring about its desired "cultural shift."

## CONCLUSION

The object of Colorado's Talk Therapy Ban "is simply to require [professionals] to modify the content of their expression to whatever extent" the legislature may want, thereby promoting "messages of [its] own." *Hurley*, 515 U.S. at 578. The law targets particular speech (expression directed at changing a person's sexual orientation or gender identity) when uttered by licensed counselors. Consequently, the Ban "turn[s] on the fact that professionals [are] speaking," moving the law outside *Giboney*'s narrow exception for regulations of conduct that incidentally involve speech. Moreover, even if classified as a form of treatment, talk therapy is expressive and subject to full First Amendment protection under *Hurley* and *303 Creative*. This Court should grant certiorari, therefore, not because of "any particular view about [Chiles's] message," but because of "the Nation's commitment to protect freedom of speech," including the speech of professionals. *Id*. at 581.

Respectfully submitted,

SCOTT W. GAYLORD
HIGH POINT UNIVERSITY SCHOOL OF LAW
APPELLATE ADVOCACY CLINIC
One University Parkway
High Point, NC 27268
Phone: (336) 841-2635
Email: sgaylord@highpoint.edu

*Counsel for Amicus Curiae*

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