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

AMICUS CURIAE BRIEF OF THE LIBERTY JUSTICE CENTER IN SUPPORT OF PETITIONER

Jacob Huebert
Counsel of Record
Reilly Stephens
Noelle Daniel
LIBERTY JUSTICE CENTER
7500 Rialto Blvd.
Suite 1-250
Austin, TX 78735
(512) 481-4400
jhuebert@ljc.org

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QUESTION PRESENTED

1. Whether a law that censors conversations between counselors and clients as "unprofessional conduct" violates the Free Speech Clause.

2. Whether a law that primarily burdens religious speech is neutral and generally applicable, and if so, whether the Court should overrule *Employment Division v. Smith*, 494 U.S. 872 (1990).

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INTEREST OF THE *AMICUS CURIAE*[1]

The Liberty Justice Center is a nonprofit, nonpartisan public-interest litigation center that seeks to protect economic liberty, private property rights, free speech, and other fundamental rights. The Liberty Justice Center pursues its goals through strategic, precedent-setting litigation to revitalize constitutional restraints on government power and protections for individual rights. *See, e.g., Janus v. AFSCME,* 138 S. Ct. 2448 (2018). To that end, the Liberty Justice Center litigates cases around the country, including many cases addressing the intersection of professional regulation and freedom of expression. *See*, *e.g.*, *McDonald v. Lawson*, Ninth Cir. No. 22-56220; *File v. Martin*, 33 F.4th 385 (7th Cir. 2022).

This case concerns Amicus because the right to speak is fundamental, and that right applies equally to professionals as to all other citizens.

INTRODUCTION AND SUMMARY OF ARGUMENT

First Amendment protections do not vanish when professionals are involved. "To the contrary, professional speech may be entitled to 'the strongest protection our Constitution has to offer.'" *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2022) (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995)). Indeed,

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[1] Rule 37 statement: No counsel for any party authored any part of this brief, and no person or entity other than *amicus* funded its preparation or submission. All parties received notice of amicus' intent to file this brief and consented to amicus' filing

this Court recently emphasized that no special exception applies to professional speech. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2374–75 (2018) ("*NIFLA*").

But the Tenth Circuit below said otherwise, holding that this Court's express rejection of its professional speech jurisprudence did not overrule its professional speech jurisprudence. *Chiles v. Salazar*, 116 F.4th 1178, 1202-4 (10th Cir. 2024). The Colorado law at issue prohibits licensed medical professionals from offering "conversion therapy" to minors, resulting in disciplinary measures. Colo. Rev. Stat. § 12-245-224(1)(t)(V); defined at Colo. Rev. Stat. § 12-245-202(3.5)(a). This forbids licensed counselors, such as Kaley Chiles, from offering professional counseling on the basis of the *content* of that counseling. *Chiles*, 116 F.4th at 1211.

Because one must look to the content of what counselors are saying—and check whether that content agrees with the government's viewpoint—to see whether the law is violated, C.R.S. § 12-245-224 is "presumptively unconstitutional" and must satisfy the strictest form of constitutional scrutiny. *See Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). That is, C.R.S. § 12-245-224's speech restrictions may be "justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* But the Tenth Circuit thought otherwise, holding instead that it could ignore *NIFLA* by declaring Chile's speech "conduct," 116 F.4th at 1214, and therefore applied only rational basis review to uphold the Act. *Chiles*, 116 F.4th at 1215.

This Court should grant the petition and hold that *NIFLA* meant what it said: that professionals do not

turn in their free speech rights in return for the license to practice their profession.

ARGUMENT

I. The Tenth Circuit upheld a content-based and viewpoint-based regulation in defiance of this Courts' holding in *NIFLA*.

A. The Tenth Circuit erred in giving Colorado's content- and viewpoint-based regulation only rational basis scrutiny.

"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." *Texas v. Johnson*, 491 U.S. 397, 414 (1989). Indeed, "the First Amendment has no carveout for controversial speech." *Otto v. City of Boca Raton*, 981 F.3d 854, 859 (11th Cir. 2020). Any such regulation discriminates against speech based on its content, and "as 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." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002). Put another way, the government violates a speaker's First Amendment rights by "interfer[ing] with the [speaker's] ability to communicate [their] own message." *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 64 (2006). Under the First Amendment, "minority views are treated with the same respect as are majority views." *Bd. of Regents of Univ. of Wis. Sys. v. Southworth*, 529 U.S. 217, 235 (2000).

i. C.R.S. § 12-245-224 discriminates on the basis of content.

On its face, C.R.S. § 12-245-224 discriminates on the basis of content. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). The simplest way of identifying a content-based restriction is by considering whether the law "requires authorities to examine the contents of the message to see if a violation has occurred." *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1073 (9th Cir. 2020) (cleaned up); *see also McCullen v. Coakley*, 573 U.S. 464, 479 (2014).

Here, the content of the counselor's speech must be examined to determine whether it "attempts or purports to change an individual's sexual orientation or gender identity, including efforts to change behaviors or gender expressions or to eliminate or reduce sexual or romantic attraction or feelings toward individuals of the same sex." C.R.S. § 12-245-202(3.5)(a).

Faced with a substantively equivalent ban on conversion therapy, the Eleventh Circuit had little trouble finding the regulation to be content-based: "because the ordinances depend on what is said, they are content-based restrictions that must receive strict scrutiny." *Otto v. City of Boca Raton*, 981 F.3d 854, 861 (11th Cir. 2020). The same principle applies here. To determine whether a counselor has broken the law, one must look at what the counselor said about sexual orientation or gender identity. This is particularly troubling, as this Court has specifically "stressed the danger of content-based regulations 'in fields of medicine and public health." *NIFLA* 138 S. Ct. at 2374

(2018) (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011)).

ii. C.R.S. § 12-245-224 discriminates on the basis of viewpoint.

Even worse than content-based regulations are viewpoint-based regulations. "Government discrimination among viewpoints—or the regulation of speech based on the specific motivating ideology or the opinion or perspective of the speaker—is a more blatant and egregious form of content discrimination." *Reed*, 576 U.S. at 168 (cleaned up). This Court has strongly condemned viewpoint discrimination: "Those who begin coercive elimination of dissent soon find themselves exterminating dissenters." *W. Va. State Bd. Of Educ. v. Barnette*, 319 U.S. 624, 641 (1943).

Yet this is the precise goal of C.R.S. § 12-245-224: to threaten the license and livelihood of a counselor who, in the State's view, conveys information or advice on a particular topic—sexual orientation—that expresses a viewpoint contrary to that of the State. The law therefore "on its face burdens disfavored speech by disfavored speakers." *Sorrell*, 564 U.S. at 564. Where a state expressly targets one set of disfavored views, "official suppression of ideas is afoot." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 390 (1992). This becomes particularly obvious when considering that the law offers an exception for the *opposite* speech, allowing speech that provides "identity exploration and development" that "does not seek to change sexual orientation or gender identity." C.R.S. § 12-245-202(3.5)(b)(I). The law thus codifies a particular viewpoint. *Otto*, 981 F.3d at 864.

B. This Court should grant certiorari to clarify that the "professional speech doctrine" was fully abrogated by *NIFLA*.

Courts do not have "freewheeling authority to declare new categories of speech outside the scope of the First Amendment." *United States v. Alvarez*, 567 U.S. 709, 722 (2012) (cleaned up). Professional speech is not a category that traditionally falls outside the First Amendment. *Otto,* 981 F.3d 866. When recently given an opportunity to reduce First Amendment protection for professional speech, this Court refused. *See generally*, *NIFLA*, 138. S. Ct. at 2375. In *NIFLA*, this Court explained that, "[a]s with other kinds of speech, regulating the content of professionals' speech poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *Id.* at 2374 (cleaned up).

Freedom of speech among professionals is imperative precisely *because* of myriad disagreements "with each other and with the government, on many topics in their respective fields." *Id.* at 2375. These range from minor technical disputes to life-altering views, such as "the ethics of assisted suicide." *Id.* In instances such as these, "when the government polices the content of professional speech, it can fail to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *Id.* at 2374 (cleaned up). Consequently, "the people lose when the government is the one deciding which ideas should prevail." *Id.* at 2375.

iii. Despite NIFLA*'s rejection of the "professional speech doctrine," lower courts are still applying it in practice.*

This Court in *NIFLA* noted with disapproval that some circuit courts had created a separate category for professional speech, and lamented that those courts had exempted professional speech from the "rule that content-based regulations are subject to strict scrutiny." *NIFLA*, 138 S. Ct. at 2365, 2371–72. In doing so, the Court expressly disapproved of *Pickup v. Brown* 740 F.3d 1208, 1231 (9th Cir. 2014)—the very precedent on which the decision below in this case is predicated.

If a state can compel counselors to express only the approved view regarding their patients' mental health problems, it can "'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.'" *Otto,* 981 F.3d at 867 (quoting *Locke v. Shore*, 634 F.3d 1185, 1311 (11th Cir. 2011)). Indeed, by this logic, the government could forbid attorneys from challenging the government. *But see Legal Services Corp. v. Velazquez,* 531 U.S. 533 (2001) (ban on legal advocacy to change welfare laws is viewpoint discrimination). This Court warned that "[a]s defined by the courts of appeals, the professional-speech doctrine would cover a wide array of individuals—doctors, lawyers, nurses, physical therapists, truck drivers, bartenders, barbers, and many others." *NIFLA* at 2375. The Eleventh Circuit likewise recognized, in direct conflict with the Tenth Circuit below, that "[t]he list

could go on" because "the same limits apply everywhere." *Otto*, 981 F.3d at 867.

This slippery slope is not hypothetical: these speech restrictions are already reaching beyond 'conversion' therapy. For instance, a recent California law penalized doctors for simply conveying information about COVID-19 that the state of California disagreed with. This alarming censorship threatened to undermine the trust between doctors and patients, since "[d]octors help patients make deeply personal decisions, and their candor is crucial." *NIFLA*, 138 S. Ct. 2374 (cleaned up).

Amicus Liberty Justice Center challenged that statute. Despite this Court's rejection of *Pickup v. Brown*, the district court in that case nonetheless relied on *Pickup* in finding that a statute that restricts the expression of doctors' disfavored views is somehow not a content- or viewpoint-based restriction on speech. *McDonald v. Lawson*, No. 8:22-cv-01805-FWS-ADS, 2022 U.S. Dist. LEXIS 232798, at *3 (C.D. Cal. Dec. 28, 2022). The statute was thankfully repealed before the Ninth Circuit could rule on it. *See McDonald v. Lawson*, 94 F.4th 864 (9th Cir. 2024). But such jaundiced interpretations of *NIFLA* demonstrate why this Court should grant certiorari to provide needed clarity about the protections afforded to professional speech.

This Court determined that a law burdening "medical professional speech 'regardless of whether a medical procedure is ever sought, offered, or performed' and not incidental to some other discrete instance of professional conduct, receives at least intermediate scrutiny, and likely strict scrutiny." *Id.* (quoting *NIFLA*, 138 S. Ct. at 2373, 2375). Indeed, if the talk therapy banned by Colorado is conduct, then "the same

could be said of teaching or protesting—both are activities, after all." *Otto,* 981 F.3d at 865. The Tenth Circuit's fundamental misapplication of applicable precedent demonstrates the importance of the Court granting certiorari in this case.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

Jacob Huebert
Counsel of Record
Reilly Stephens
Noelle Daniel
LIBERTY JUSTICE CENTER
7500 Rialto Blvd.
Suite 1-250
Austin, TX 78735
(512) 481-4400
jhuebert@libertyjustice-center.org

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