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

BRIEF OF AMICI CURIAE JAMES DOBSON FAMILY INSTITUTE, ANDREW WOMMACK MINISTRIES, TRUTH AND LIBERTY COALITION, DIOCESE OF COLORADO SPRINGS, AND THE COLSON CENTER FOR CHRISTIAN WORLDVIEW IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The interest of amici are as follows.

The Dr. James Dobson Family Institute is a nonprofit corporation that uplifts and defends the biblical and traditional framework of the family, which includes parental rights and the freedom to exercise one's religious beliefs. Inherent within these convictions are the freedom of speech and the right for parents to have the principal input and influence over their child's upbringing. These fundamental rights have been preserved for centuries and must be maintained for the institution of the family to remain intact and flourish.

Andrew Wommack Ministries, Inc. is a Colorado non-profit corporation, based in Woodland Park, Colorado. Andrew Wommack Ministries is a teaching ministry that places special emphasis on the unconditional love of God and living in the balance of grace and faith. Our vision is to reach as many people as possible with the almost too good to be true news that God loves them unconditionally, and He has proven it through His son, Jesus. They share the Gospel using radio, television, internet, and social media, and by developing free material for those who cannot otherwise afford it. Charis Bible College has over seventy Charis campuses in the United States and around the world, thousands of students every year are being transformed by the Word of God.

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[1] No party's counsel authored this brief in whole or in part, and no person or entity other than amici curiae, their counsel, or their members made a monetary contribution intended to fund the brief's preparation or submission.

Truth and Liberty Coalition, Inc. is a Colorado non-profit corporation, based in Woodland Park. The mission of Truth and Liberty Coalition is to educate, unify, and mobilize followers of the Lord Jesus Christ to stand for truth in all areas of cultural influence, including the family, church, business, education, arts and entertainment, media, and government. Modern political and cultural forces have caused many Christians to become uncertain and fearful about how to live for Christ and express their faith publicly. It works therefore to encourage and equip believers to live consistently with a biblical worldview and Christ's commands by sharing Truth in all aspects of life, both public and private, both in word and action.

The Diocese of Colorado Springs is that portion of the people of God in central Colorado that has been entrusted by the Holy Father to the Bishop of Colorado Springs, the Most Rev. James Golka, with his priests for him to shepherd. Through the thirty-nine parishes and missions and various Catholic schools within its boundaries, the Catholic Church within the Diocese provides sacramental care, religious formation, and instruction to 190,000 Catholics and more than 5,000 students.

The Colson Center for Christian Worldview exists to build and resource a national and global movement of Christians committed to cultural restoration and to living and defending a Christian worldview. Through its daily and weekly *BreakPoint* commentaries and its Colson Educators program, The Colson Center provides Christians with clarity, confidence, and courage in this unique cultural moment. Its Colson Fellows Program educates and equips believers with a robust Christian worldview so they can thoughtfully engage with the culture, inspire reflection in others, and work effectively toward reshaping the world in light of God's kingdom.

SUMMARY OF THE ARGUMENT

Colorado law bars licensed counselors from engaging in talk therapy based on Biblical truth. This violates the First Amendment and restricts the rights of Coloradoans from hearing messages consistent with longstanding religious views of human sexuality. This heavy-handed government censorship prevents parents and their children from learning about the dangerous consequences of immoral choices.

Colorado has adopted the viewpoint that people can change their sex. This contradicts biological and Biblical truth. Counseling consistent with the Christian worldview is a protected free speech viewpoint. The State seeks to enforce its own viewpoint by censoring contrary views upon pain of fines, sanctions, and licensure restrictions. The Tenth Circuit upheld Colorado's censorship.

As this amicus brief explains, the fallout of Colorado's censorship goes well beyond the individual counselor, Kaley Chiles, and works to chill the speech of many religious organizations and churches. The harms are manifest. Churches and religious organizations are prevented from referring minors who need counseling for unwanted sexual or gender identity ideations from receiving licensed counseling for their mental conditions. Moreover, churches and religious institutions also face the prospect that Colorado, empowered by the Tenth Circuit, will engage in more direct regulation of religiously minded speech under the guise that the content of religious speech is mere conduct lacking First Amendment protection.

This Court has made clear the First Amendment demands more: "States cannot choose the protection

that speech receives under the First Amendment." *Nat'l Inst. of Fam. and Life Advocs. v. Becerra*, 585 U.S. 878 (2018) (*NIFLA*). Yet Colorado has done just that. It has banned licensed counselors from providing so-called "conversion therapy" on minors. C.R.S. § 12-245-202(3.5)(a). Under this law talk therapy cannot occur if it does not agree with the State's "gender-affirming" perspective.

Colorado seeks to avoid the First Amendment and this Court's decision in *NIFLA*, by simply labeling Chiles' speech as "conduct.". The law bans an activity that consists of nothing more than conversation, i.e. pure speech. Judge Hartz, in dissent, rightly recognized that "the government may not, under the guise of regulating mere 'conduct,' regulate pure speech under some kind of lesser First Amendment standard. *Chiles v. Salazar*, 116 F.4th 1178, 1234 (10th Cir. 2024).

Colorado, of all states, ought to appreciate that targeting "pure speech" contravenes the First Amendment. *See 303 Creative LLC v. Elenis*, 600 U.S. 570, 603 (2023) ("The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish, not as the government demands."). In *303 Creative*, this Court found that Colorado violated the First Amendment by using "its law to compel an individual [website designer] to create speech she does not believe." *Id.* at 579. There, Colorado characterized the website designer's activity as mere "conduct," yet the Court found that it was "pure speech." 600 U.S. at 587. Just so here. "All manner of speech," including "oral utterance and the printed word," are protected by the First Amendment." *Id.* at 587.

If allowed to stand, the Tenth Circuit decision below will eviscerate *NIFLA*'s rejection of states' attempt to censor speech "under the guise of" regulating professional conduct. *NIFLA*, 585 U.S. at 769. And the speech of religious counselors and those who desire to refer minors in need of counseling services, will be severely curtailed.

Colorado is far from alone in the attempt to regulate religiously informed speech about sexuality and gender identity in the context of professional counseling. The Tenth Circuit has joined the Ninth Circuit in a direct conflict with the Third and Eleventh Circuits, both of which have held that speech in a counseling context is protected by the First Amendment. *King v. Governor of the State of N.J.*, 767 F.3d 216, 228 (3d Cir. 2014) (upholding a counseling censorship law on different grounds), *abrogated in part by NIFLA*, 585 U.S. at 767,[2] *Otto v. City of Boca Raton*, 981 F.3d 854, 867–68 (11th Cir. 2020) (striking down a counseling censorship law).

The Tenth Circuit's miserly view of the First Amendment has devastating real-world consequences. Consider that in Colorado and similar jurisdictions, censorship of counseling will prevent young people from receiving the care they critically want and need. When it comes to so-called gender transition, the existence of a growing number of minors who transitioned away from a biologically aligned gender identity, but come to desire to "detransition," cannot be

[2] The Third Circuit upheld New Jersey's counseling censorship law under intermediate scrutiny. *King*, 767 F.3d at 232, but *NIFLA* abrogated that portion of the ruling, 585 U.S. at 767. The relevant holding in King—that a counselor's speech is speech and not conduct—remains good law.

denied. *See* argument transcript *United States v. Skrmetti*, No. 23-477, 12/4/24, p.49 (Justice Kavanaugh: "You acknowledge that there is some group, though, who later changes their mind and wants to detransition? … Solicitor General Prelogar: "Yes, yes. We're certainly not denying that some people might detransition or regret this care…")[3]. Consistent with this reality, a recent independent policy review by the English National Health Service identified the need for mental health services to support these individuals. *See* The Cass Review, *Independent Review of Gender Identity Services for Children and Young People*, at 49 (Feb. 2022)[4]. The Tenth Circuit's ruling prevents these individuals from receiving the counseling they desperately want and need.

ARGUMENT

I. Allowing States to restrict disfavored speech by recasting it as conduct will undermine religiously motivated conduct.

Colorado's law is a direct attack on pure speech that improperly favors the State's viewpoint on one of the most contentious social issues of our time. The decision below undermines *NIFLA's* rejection of states' attempt to regulate speech "under the guise of" regulating professional conduct. 585 U.S. at 769 (quoting *Button*, 371 U.S. at 438).

The Tenth Circuit disregarded the principle that "States cannot choose the protection that speech

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[3] Available at https://www.supremecourt.gov/oral_arguments/argument_transcripts/2024/23-477_c07d.pdf

[4] Available at https://cass.independent-review.uk/home/publications/final-report/

receives under the First Amendment." *NIFLA*, 58 U.S. at 773. If they could, it "would give [states] a powerful tool to impose 'invidious discrimination of disfavored subjects.'" *Id.* The First Amendment does not allow states to restrict disfavored speech even if they label such speech as conduct, see *Holder v. Humanitarian L. Project*, 561 U.S. 1, 27- 28 (2010). Yet by upholding Colorado's law that bans as conduct the speech of a medical professional (unrelated to any physical procedure), the decision below contravenes established First Amendment doctrine.

Under the promise of government neutrality inherent in the First Amendment, citizens need not choose between making a living in a licensed profession and exercising their right to speak freely. Colorado's censorship puts counselors to the test. The First Amendment exists to ensure citizens, such as Chiles, need not make such a fundamental compromise. The right to free speech allows counselors to be free from such censorship.

The interest of minors and parents in receiving desired counseling consistent with the Biblical worldview cannot be ignored. Citizens have a right to hear and receive information contrary to the government's favored viewpoint. Censorship that prevents a speaker, here a licensed counselor from speaking, prevents patients from hearing a disfavored message. In the medial field in particular, "information can save lives." *Sorrell v. IMS Health Inc.*, , 564 U.S. 552, 566 (2011). Our history and constitutional tradition teach that censoring speech does not protect people, nor does it preserve truth or advance knowledge.

When the government restricts "expression because of its message, its ideas, its subject matter, or

its content." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015) (citation omitted). The First Amendment works to create a "market for ideas" where each citizen decides for himself or herself what is true. *Leathers v. Medlock*, 499 U.S. 439, 448-49 (1991); *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984) ("[T]he freedom to speak one's mind is not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole."). Indeed, "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

As Judge Hartz explained in detail, "[t]he majority opinion holds, in essence, that speech by licensed professionals in the course of their professional practices is not speech, but conduct. … [S]uch wordplay poses a serious threat to free speech." *Chiles*, 116 F.4th at 1126. Allowing the Colorado censorship of targeted talk therapy opens the door for "the absurd implication that any speech burdening regulation which can be characterized as an exercise of the police power is exempt from First Amendment scrutiny." *Tingley v. Ferguson*, 57 F.4th 1072, 1080 (9th Cir. 2023) (O'Scannlain, J., dissenting from denial of rehearing en banc).

A. The Tenth Circuit contravened the First Amendment analysis of NIFLA.

At bottom, the Tenth Circuit upheld Colorado's counseling censorship law by labeling the disfavored viewpoint to be conduct. "[T]he First Amendment cannot be evaded by regulating speech 'under the guise' of regulating conduct." *Tingley v. Ferguson*, 57 F.4th

1072, 1080 (9th Cir. 2023) (O'Scannlain, J., respecting the denial of rehearing en banc) (quoting *Button*, 371 U.S. at 439) (1963). *NIFLA* reaffirmed this bedrock principle. 585 U.S. at 773.

As *NIFLA* recognized, speech and conduct are distinct, 585 U.S. at 773. This Court emphatically rejected the attempt to regulate speech by reifying it as professional conduct. *Id.* at 767 ("Speech is not unprotected merely because it is uttered by professionals.'"); *see also Humanitarian Law Project*, 561 U.S. at 27-28; *Button*, 371 U.S. at 438-39. Regulations that burden speech in a professional context can avoid strict scrutiny if the "restrictions" are "directed at commerce or conduct" making the burden on speech "incidental." *NIFLA*, 585 U.S. at 769. There can be no doubt, however, that Colorado's regulation is more than merely an incidental burden on speech.

For instance, *NIFLA* described informed-consent requirements as being permitted in the medical context because it "regulate[s] speech only 'as part of the practice of medicine,'" and because such a requirement is "'firmly entrenched in American tort law.'" 585 U.S. at 770 (quotation omitted). The analysis continued by noting that regulation of a medical professional's speech "regardless of whether a medical procedure is ever sought, offered, or performed" receives full First Amendment protection. *Id.* at 756. In other words, when the speech being regulated is "not tied to a procedure at all," then the regulation is of "speech as speech." *Id.* at 770.

Contrary to this clear teaching, the Tenth Circuit countenanced Colorado playing word games and seeking to restrict speech by labeling it as conduct. As the Eleventh Circuit found in the context of a similar

counseling ban, Colorado restricts "purely speech-based therapy" *Otto*, 981 F.3d at 859. In other words, "talk therapy … administered solely through verbal communication." *King*, 767 F.3d at 221. Contrary to this sound analysis, the Tenth Circuit engages in semantics to label pure speech as conduct. "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. To be sure, the speech at issue in this case is "highly controversial" but "the First Amendment has no carveout for controversial speech." *Id.* at 859.

As Judge Hartz warned, "the 'conduct' being regulated here is speech itself, and it is being regulated because of disapproval of its expressive content." The implications of this word game are stark: "I daresay any speech that a government finds offensive could be placed within a field of conduct and, under the analysis of the majority opinion, regulated as 'incidental' to regulation of that field of conduct." *Chiles*, 116 F.4th at 1128.

That the speech censorship here operates in the context of professional licensed conduct makes no difference. NIFLA definitively rejected treating "professional speech" as a separate category of less-protected speech. *NIFLA*, 585 U.S. 767 ("Speech is not unprotected merely because it is uttered by 'professionals.'"). The government "cannot nullify the First Amendment's protections for speech by playing this labeling game." *Pickup v. Brown*, 740 F.3d 1208, 1218 (9th Cir. 2014) (O'Scannlain, J., dissenting from the denial of rehearing en banc), abrogated by *NIFLA*, 585 U.S. at 767. Simply put, "a State cannot foreclose the

exercise of constitutional rights by mere labels." *Button*, 371 U.S. at 429; *accord Telescope Media Grp. v. Lucero*, 936 F.3d 740, 752 (8th Cir. 2019) ("Speech is not conduct just because the government says it is.") While talk therapy may be "a form of treatment," it "consists—entirely—of words." *Otto v. City of Boca Raton*, 41 F.4th 1271, 1274 (11th Cir. 2022) (Grant, J., concurring in the denial of rehearing en banc).

As Judge Hartz warned in dissent, "[c]ourts must be particularly wary that in a contentious and evolving field, the government and its supporters would like to bypass the marketplace of ideas and declare victory for their preferred ideas by fiat." *Chiles*, 116 F.4th at1238.

B. Government censorship of unwanted viewpoints violates the First Amendment.

Colorado's censorship is unquestionably content based. 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). The First Amendment does not tolerate viewpoint-based regulations, which are "an egregious form of content discrimination." *Rosenberger v. Rector & Visitors of Univ. of Virginia*, 515 U.S. 819, 829 (1995). The viewpoint discrimination is particularly plain here where Colorado adopted an express carve out for counseling that "provide[s] … [a]cceptance, support, and understanding for the facilitation of an individual's coping, social support, and identity exploration and development, including sexual orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices, as long as the counseling does not seek to change sexual orientation or gender identity;

or … [a]ssistance to a person undergoing gender transition." C.R.S. § 12-245-202(3.5).

The legal favoritism Colorado has adopted is "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." *NIFLA*, 585 U.S. at 779 (Kennedy, J., concurring). Just as the Eleventh Circuit recognized in a similar context, Colorado has codified the viewpoint that "sexual orientation is immutable, but gender is not." Otto, 981 F.3d at 864.

Consider how the law applies to pick winners and losers in the marketplace of ideas. If allowed to stand, Colorado law will permit a counselor to encourage same-sex conduct or to assist a minor to adopt a transgender identity. At the same time, a counselor who uses talk therapy to address a client's desire to not pursue same-sex relationships, or to align the minor's current sense of gender identity contrary to biological sex, would be barred from speaking. This blatant viewpoint discrimination would allow the government to censor one viewpoint in a debate "of profound value and concern to the public." *Janus v. Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 914 (2018) (cleaned up); see also *Shurtleff v. City of Bos., Massachusetts*, 596 U.S. 243, 258 (2022) (the government "may not exclude private speech based on 'religious viewpoint'; doing so 'constitutes impermissible viewpoint discrimination.'") (citing *Good News Club v. Milford Central School*, 533 U.S. 98, 112 (2001).

Colorado evidently disagrees with Chiles' beliefs about gender and sexuality. It has gone further than disagreement alone, however, and elected to prohibit

speech about views it does not favor. In essence, Colorado seeks to insert the government in the counseling relationship and forbid counselors from discussing the religious and moral values shared between the counselor and client. It prohibited certain conversations between a counselor and her clients under age 18, condemning these conversations as "conversion therapy." C.R.S. § 12-245-202(3.5)(a).

Thus, in Colorado, counselors with viewpoints hat encourage a minor's same-sex attractions or gender transition are favored while any counselor who discusses a client's desire to resist same-sex relationships or align the client's sense of gender identity to be consistent with biological sex would be a scofflaw.

C. Regulating counseling on sensitive, religiously-laden topics threatens the religious community well beyond counselors alone.

Laws restricting what speech professionals can and cannot say about sexuality and gender will especially burden churches and religious ministries in Colorado. While Colorado's censorship of counselors is a direct affront to the First Amendment rights of counselors themselves, it also greatly restricts the rights of churches and religious institutions despite the current statutory exemption that permits unlicensed religious counseling.

Amici represents Chirstian ministries dedicated to speaking Biblical truth and encouraging all persons, including minors, to live a life consistent with Biblical teachings. The mission of the amici includes speech about the same topics Colorado targets as conversion therapy. Critically, churches and religious

ministries often find it necessary to refer minors in need and their families to professional counseling services, including for the counseling Colorado has banned. The record reflects that Chiles herself frequently receives patient referrals from *churches*. While not directly targeted by Colorado's current law, these religious ministries, up to and including churches, have a well-known desire to refer minors struggling with sexuality and gender identity for counseling. If Colorado's censorship law is allowed to stand, then churches and ministries alike will be severely curtailed in their ability to make religiously motivated referrals for counseling.

Colorado's law will force churches and ministries to dilute their Biblical message regarding sexuality. Colorado's ban would compel churches and ministries to alter the content of their counseling referral message, just as California unconstitutionally compelled pregnancy resource centers to alter the content of their speech. See *NIFLA*, 585 U.S. at 767.

Colorado's law prohibits churches and religious ministries from speaking about any counseling services that would fall within Colorado's censorship regime, whether sexuality-affirming or gender identity related. The Tenth Circuit decision thus shields from proper constitutional scrutiny Colorado's viewpoint discrimination and chills the free speech of amici and countless other churches and religious ministries.

The restriction on Chiles counseling reaches issues of sexual ethics where many people of faith have sincere religious views grounded in human identity in God's design rather than a person's subjective emotions or attractions. Amici and many other religious organizations in Colorado believe that the sex each

person receives at conception is not an accident but rather a gift from God. Many prospective counseling clients share these viewpoints. Some are referred by local churches and other ministries for counseling.

Churches and ministries routinely encounter minors with a wide variety of issues, including struggles with gender identity or sexuality. Some desire to become comfortable with their biological sex. Some want counseling help to direct their focus to opposite-sex relationships. Churches and ministries, consistent with their Biblical convictions, believe these prospective clients' lives will be more fulfilling if aligned with the teachings of their faith.

The deleterious effects of Colorado's counseling censorship also reach the minors themselves who are the prospective counseling clients. Colorado's law unconstitutionally deprives these minors from hearing the counselor's message. The First Amendment includes a "right to receive information and ideas, and that freedom of speech necessarily protects the right to receive." *Virginia Pharmacy Bd. v. Virginia Consumer Council*, 425 U.S. 748, 756-57 (1976) (internal quotation marks and citation omitted).

The First Amendment respects "individual dignity and choice." *Cohen v. California*, 403 U.S. 15, 24 (1971). The First Amendment "is designed and intended to remove governmental restraints from the arena of public discussion, putting the decision as to what views shall be voiced largely into the hands of each of us, in the hope that use of such freedom will ultimately produce a more capable citizenry and more perfect polity." *Id.* Under the First Amendment, citizens have a right to hear these messages.

As this Court recently affirmed, "[t]he [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). The government may not suppress ideas it finds "offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 . Religious speech is in particular need of protection. "[G]overnment 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 Rev. & Advisory Bd. v. Pinette*, 515 U.S. 753, 760 (1995).

As Judge Bumatay recognized in the challenge to California's similar counseling ban, counseling conversations are "often grounded in religious faith." *Tingley v. Ferguson*, 57 F.4th 1072, 1083 (9th Cir. 2023) (Bumatay, J., dissenting from the denial of rehearing en banc). That speech ban, just as Colorado's virtually identical ban, primarily prohibits counseling from a "religious" viewpoint, sought almost "exclusively" by "individuals who have strong religious beliefs." *Id.* Thus, the counseling censorship's "real operation" is to ban a religiously motivated viewpoint.

CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

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