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

REPLY BRIEF FOR PETITIONER

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REPLY ARGUMENT SUMMARY

Amidst a nationwide mental-health crisis, many minors struggling with gender dysphoria are seeking the counseling that Kaley Chiles would like to provide. They *want* help aligning their mind and body rather than chasing experimental medical interventions and risking permanent harm. Yet it is this desperately needed counseling—encouraging words between a licensed counselor and a consenting minor client—that Colorado forbids with its viewpoint-based Counseling Restriction.

Respondents attempt to avoid certiorari by denying a circuit split. But no amount of legerdemain refutes the obvious—the Eleventh and Third Circuits are split with the Ninth and Tenth over whether states can regulate counseling speech by labeling it "professional conduct."

That narrow question does not implicate every professional regulation; it merely asks the Court to recognize that the First Amendment protects words spoken between a counselor and her clients from a prophylactic, viewpoint-based ban. And there are no justiciability or record issues that impede review.

In short, the question presented "easily satisfies [this Court's] established criteria for granting certiorari." *Tingley* v. *Ferguson*, 144 S. Ct. 33, 36 (2023) ("*Tingley III*") (Alito, J., dissenting from the denial of certiorari). Now that the issue has "come before the Court again," the Court should grant review. *Id.* at 35 (Thomas, J., dissenting from the denial of certiorari).

ARGUMENT

I. This Court should grant review and resolve the split.

A. An intractable circuit split exists on the validity of viewpoint-based censorship of counselors' speech.

Lower courts are split on the validity of viewpoint-based counseling restrictions. The Eleventh and Third Circuits hold that such laws target speech, not conduct. Pet.17–19 (citing *Otto* v. *City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020); *King* v. *Governor of N.J.*, 767 F.3d 216, 228 (3d Cir. 2014), *abrogated in part by Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 585 U.S. 755, 767–69 (2018) ("*NIFLA*")). The Ninth and Tenth Circuits hold the opposite. Pet.19–20. At least two members of this Court have acknowledged this split. *Tingley III*, 144 S. Ct. at 34 (Thomas, J., dissenting from the denial of certiorari); *id.* at 35–36 (Alito, J., dissenting from the denial of certiorari). So have many lower court judges. Pet.App.95a (Hartz, J., dissenting); *Tingley* v. *Ferguson*, 47 F.4th 1055, 1077 (9th Cir. 2022) (*"Tingley I*").

Respondents say no split exists. First, they argue that, in *Otto*, the Eleventh Circuit addressed municipalities' penal laws restricting counselors' speech, whereas this case concerns a state's professional licensing scheme restricting counselors' speech. But *Otto,* too, turned on whether a counselor's words are protected speech under the First Amendment; its analysis had nothing to do with which governmental body enacted the underlying law or what precise penalties were imposed. 981 F.3d at 861–65.

The local governments in *Otto* even defended their counseling restrictions the same way Colorado does here, arguing that counseling is "professional speech or conduct[, and that] they have the power to limit it" like any other "professional regulation[ ]." 981 F.3d at 861, 864. Rejecting that argument, the Eleventh Circuit recognized that what those local governments "call[ed] a 'medical procedure' consists—entirely—of words," and the "characterization of [the] ordinances as professional regulations" did not transmogrify words into conduct. *Id.* at 861, 865. Those counseling restrictions were "direct, not incidental, regulations of speech." *Id.* at 865. The Tenth Circuit held the exact opposite here.

Respondents' discussion of *Del Castillo* v. *Secretary, Florida Department of Health*, 26 F.4th 1214 (11th Cir. 2022), is misplaced. Opp.17–18. There, the plaintiffs challenged an entire professional licensing regime that did not directly regulate speech at all, much less based on viewpoint. In contrast, Chiles does not challenge Colorado's licensing scheme; she challenges a Counseling Restriction that bars her from uttering certain words Colorado disapproves.

In fact, *Del Castillo* highlights the difference between a viewpoint-based speech regulation and a conduct regulation that incidentally affects speech. Licensing laws, like the one in *Del Castillo,* generally regulate *who* can speak, not what they can say. Any effect on speech is incidental. Colorado's law regulates not who speaks but *what* can be said—on threat of license revocation. That's not an incidental regulation of speech. It's direct censorship.

Second, Respondents say the *King* decision is not part of the split because the Third Circuit "applied an analysis that *NIFLA* later rejected." Opp.19. But *NIFLA* left untouched how *King* answered the threshold question: whether counseling restrictions target speech or conduct. *Tingley I*, 47 F.3d at 1073–75. And the Third Circuit's holding—counseling restrictions regulate speech—conflicts with the holding here.

In sum, "[t]here is a conflict in the Circuits about the constitutionality of" laws like Colorado's Counseling Restriction. *Tingley III*, 144 S. Ct. at 35 (Alito, J., dissenting from the denial of certiorari). In the south and northeast, conversations between counselors and clients are constitutionally protected; but in western states, counselors can be silenced and vulnerable minors deprived of urgently needed counseling. The Court should resolve the divide.

B. States can regulate professionals without engaging in viewpoint censorship.

Upholding Chiles's First Amendment rights will not "upend … professional health care practice." Opp.20. To the contrary, this Court has warned against the dangers of state-imposed orthodoxy in professional settings, especially "in the fields of medicine and public health, where information can save lives." *NIFLA*, 585 U.S. at 771 (cleaned up). Amidst a growing mental-health crisis, counseling restrictions like Colorado's expose professionals to liability risks and prevent them from sharing life-saving information with clients struggling with gender dysphoria. See The Cass Review, *Independent Review of Gender Identity Services for Children and Young People* at 202 (Apr. 2024).

Chiles's claim is narrow. She does not challenge a law that targets conduct and incidentally affects speech. Contra Opp.26. Nor does she argue that every professional regulation restricting speech fails constitutional scrutiny. Contra Opp.26. She simply contends that "[s]peech is speech, and it must be analyzed as such for purposes of the First Amendment." *Otto*, 981 F.3d at 866 (cleaned up).

Nor does Chiles dispute that states may impose duties on professionals that don't apply to laypeople. Opp.22. But she *does* dispute that those duties alchemize speech into conduct. Whether uttered by a professional or a layperson, words alone are speech. Whatever interest the state has in regulating a professional's words goes to whether constitutional scrutiny is satisfied, not whether those words are speech.

Respondents identify no difference between Chiles's conversations with clients and those a psychology student could have with peers that make one conduct and the other speech. *King*, 767 F.3d at 228 (making this point). They merely resurrect the discredited notion that "'professional speech' [i]s a separate category of speech"—in direct conflict with *NIFLA*. 585 U.S. at 767.

Respondents attempt to seek cover in *NIFLA*, faulting Chiles for not "mention[ing] … *NIFLA*'s reliance on malpractice liability and informed consent laws." Opp.26. But such laws are not constitutionally similar to prophylactic speech prohibitions. Many implicate speech only incidentally, and those that do so directly pass constitutional scrutiny. They are not viewpoint-based censorship.

Take Respondents' examples of laws that prevent professionals from "unduly influencing their patients for the provider's financial gain," or preventing "professionals [from] disclosing patients' confidential information." Opp.26. Even assuming those laws directly regulate speech, "surely there are compelling reasons" to uphold them. Pet.App.106a–07a (Hartz, J., dissenting). A ruling for Chiles will not endanger such "typical professional regulations." Pet.App.106a (Hartz, J., dissenting).

Or consider Respondents' invocation of telehealth regulations that allow a counselor to conduct sessions virtually. Opp.26. These sessions "involve[ ] only speech in the form of questions, diagnoses, and explanation of treatment options." Opp.26. So if Colorado engages in viewpoint-based censorship in that context, it must satisfy constitutional scrutiny, just like in-person regulations. *E.g.*, *Wollschlaeger* v. *Governor of Fla.*, 848 F.3d 1293 (11th Cir. 2017) (holding unconstitutional a law prohibiting doctors from asking about firearm ownership). Telehealth regulations are immaterial here unless Respondents think the Constitution gives more freedom to regulate speech online than in-person—contrary to *Moody* v. *NetChoice, LLC*, 603 U.S. 707, 733 (2024).

At bottom, the First Amendment does not "undermine states' longstanding authority to regulate professional conduct." Opp.25. But when states restrict speech based on viewpoint, courts "play a vital role" in holding states accountable. Pet.App.108a–09a (Hartz, J., dissenting). The Court should not allow states to avoid that accountability by relabeling speech as conduct.

C. No evidence supports suppressing Chiles's speech.

Respondents suggest the Court should deny review because Chiles "failed to develop a record." Opp.27. That gets the burden exactly backward. Chiles showed that the Counseling Restriction suppresses her speech based on viewpoint. So it is Respondents' "heavy burden" to prove the Restriction passes constitutional muster. *United States* v. *Playboy Ent. Grp., Inc.*, 529 U.S. 803, 816–17 (2000).

Respondents cannot meet that burden. They cite no study showing harm from the speech Chiles wants to provide. Pet.App.119a (Hartz, J., dissenting). While they repeatedly claim "overwhelming" evidence that consensual counseling for adults with unwanted sexuality and gender-identity issues is "unsafe and ineffective," *e.g.*, Opp.1, 6, 28, their own support shows otherwise. The centerpiece—the 2009 American Psychological Association Task Force report—found a "*dearth* of scientifically sound research," such that "there was insufficient objective evidence to determine … efficacy and danger." Pet.App.117a–18a (Hartz, J., dissenting) (quoting the report). Indeed, there's a "lack of rigorous research on nonaversive" counseling in this context. *Otto*, 981 F.3d at 868 & n.7.

The Task Force report did not even consider the counseling "at issue in this case: [counseling] for a *minor* provided by a *licensed* mental-health professional." Pet.App.119a (Hartz, J., dissenting) (emphasis added). "In fact, no study was limited to minors and no study was limited to" speech-only counseling. *Ibid.* Whatever "overwhelming evidence" is, it is not "no study."

When confronted with their lack of studies, Respondents—and the panel below—claimed such studies would be "unethical." Pet.App.71a. That "ignores the fact that the studies in this area have generally been retrospective," and creates a tautology "Lewis Carroll would love: 'We assert, without adequate supporting evidence, that this therapy is ineffective and harmful. Therefore, you cannot conduct a study to see if there is support for our assertion, because it would be unethical to provide this therapy.'" Pet.App.122a (Hartz, J., dissenting).

At most, Respondents rely on "national professional organizations" to justify the Counseling Restriction. Pet.App.107a (Hartz, J., dissenting). That's "just another way of arguing that majority preference can justify a speech restriction." *Otto*, 981 F.3d at 869. The whole "point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech" based on viewpoint. *R.A.V.* v. *City of St. Paul*, 505 U.S. 377, 392 (1992). Indeed, courts "must exercise the utmost caution" when considering so-called "expert" positions, Pet.App.108a (Hartz, J., dissenting), for "institutional positions cannot define the boundaries of constitutional rights," *Otto*, 981 F.3d at 869.

As Judge Hartz observed, psychology has been long plagued by "sloppy work," data fabrication and falsification, and "questionable research practices," putting ideology over science. Pet.App.109a–10a (Hartz, J., dissenting). These organizations are no exception. Liberty.Counsel.Br.4–10. This has resulted in many "about-face[s]"—most notably, their abandonment of a prior stance that homosexuality is a "paraphilia, disorder, or disturbance," *Otto*, 981 F.3d

at 869. Here, they disregard recent studies showing that children with gender dysphoria who seek harmony with their bodies and desire counseling find "significant improvement" with depression, anxiety, and suicidality and experience no "adverse or negative effects." Cass Review at 153. And these associations ignore the momentous shift in Europe *away* from encouraging minors to transition. Pet.App.112a (Hartz, J., dissenting).

Respondents couch the organizations' conclusions as "factual findings" of the district court. Opp.28. They are not. These alleged "findings" amount to a single, conclusory sentence affirming facts the legislature referenced in enacting the Counseling Restriction. Pet.App.158a. Such facts are "legislative" or "nonadjudicative," and need not be the subject of "formal findings at any level" or even "introduc[ed into] evidence through regular channels." Fed. R. Evid. 201, adv. comm. note (a). Appellate courts generally do not defer to such lower-court "findings." See *Lockhart* v. *McCree*, 476 U.S. 162, 168 n.3 (1986); *United States* v. *Singleterry*, 29 F.3d 733, 740 (1st Cir. 1994); *Dunagin* v. *City of Oxford*, 718 F.2d 738, 748 n.8 (5th Cir. 1983) (en banc) (plurality opinion).

Nor are appellate courts bound by the "record" of nonadjudicative facts considered below. "[Such] courts, including [this] Court, regularly receive new factual material on appeal and engage in a form of factfinding, even where the facts are not clearly undisputed, to determine 'legislative facts.'" Timothy B. Dyk, *The Role of Non-Adjudicative Facts in Judicial Decisionmaking*, 76 Stanford L. Rev. Online 10–11 (2023); Fed. R. Evid. 201 adv. comm. note (a) (approving such "judicial access to legislative facts").

Contrary to Respondents' suggestions, nothing restricts this Court from reconsidering the evidence—or lack thereof—supporting the Counseling Restriction, or from acknowledging comprehensive, international studies like the Cass Review, proving the Counseling Restriction's lack of foundation.

Judge Hartz exhaustively canvassed the existing evidence, and his analysis condemned Respondents' case. The "great bulk of" Respondents' studies did not even "describe the therapy provided, so there is no way to know whether any of the therapy was limited to speech." Pet.App.120a (Hartz, J., dissenting). Most studies failed even to distinguish between therapy that used aversive techniques and counseling that did not. Pet.App.121a (Hartz, J., dissenting). And "a little less than half the cited papers did not indicate who gave the therapy, [while] a little more than half said that the therapy was provided by both licensed *and* unlicensed practitioners." *Ibid.* (emphasis added). These are "significant factor[s]" when asking whether science supports speech suppression. *Ibid.* The district court considered none of it.

"There is a fierce public debate over how best to help minors with gender dysphoria." *Tingley III*, 144 S. Ct. at 33 (Thomas, J., dissenting from the denial of certiorari). Colorado has taken a side in this debate and, with a lack of evidence, silenced the other. The Constitution leaves "these judgments [to] the individual to make, not for the Government to decree." *Playboy*, 529 U.S. at 818. The Court should grant review and vindicate Chiles's First Amendment rights.

II. The petition is an excellent vehicle for addressing this critically important issue.

Respondents do not contest the importance of the question presented, evinced by the 15 supporting amicus briefs. Instead, Respondents say this case is not the *best* vehicle because the record is undeveloped and Chiles lacks standing. Neither argument has merit.

As just explained, Respondents' failure to satisfy their burden of proof below is an indictment of their merits case, not an impediment to review. And as every federal judge to consider this case has recognized, Chiles's allegations establish standing for a pre-enforcement challenge. Pet.App.16a–26a, 139a–45a. She has "alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the Counseling Restriction]"—counseling conversations that seek to help minor clients who want to eliminate unwanted sexual attractions or live in harmony with their biological sex—"and there exists a credible threat of prosecution." *Susan B. Anthony List* v. *Driehaus*, 573 U.S. 149, 160 (2014).

Colorado argues that Chiles has not alleged she intends to engage in prohibited speech, claiming the Counseling Restriction does not prohibit the types of conversations her complaint describes. Opp.34. Not so. The statute proscribes all "efforts to change behaviors or gender expressions or to eliminate or reduce sexual or romantic attraction or feelings toward individuals of the same sex." Colo. Rev. Stat. §§ 12-245-202(3.5)(a), -224(1)(t)(V). Chiles has alleged that, but for this Act, she would "assist clients" in

"seeking to reduce or eliminate unwanted sexual attractions, change sexual behaviors, or grow in the experience of harmony with one's physical body." Pet.App.207a. Accord Pet.App.214a. There is no daylight between what the statute proscribes and what Chiles desires to say. Respondents' contrary argument relies on cherry-picked partial quotations and semantics. At the least, Chiles has demonstrated a desire to speak in a way "[she] believe[s] [is] covered by the statute," which is all *SBA List* requires. 573 U.S. at 160 (citing *Virginia* v. *Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 393 (1988)).

Even if Respondents did *not* regard Chiles's intended speech as prohibited, they've failed to disavow prosecution. See *SBA List*, 573 U.S. at 161 (citing *Holder* v. *Humanitarian L. Project*, 561 U.S. 1, 15 (2010) (refusal to disavow demonstrates a credible threat of enforcement)). Instead, Colorado confirms its intent to enforce the Counseling Restriction to the hilt, stating that "[a] health care professional who engages" in counseling conversations seeking "to change behaviors or gender expressions or to eliminate or reduce [same-sex] sexual or romantic attraction" will "face[ ] discipline," which could include a "revocation of their license." Opp.5.

So Chiles's fear of prosecution is not "imaginary"—Colorado's enforcement is well beyond "remotely possible"; it is extremely "likely." *Babbitt* v. *United Farm Workers Nat'l Union*, 442 U.S. 289, 298–99 (1979). Colorado's record of zealously prosecuting citizens who disagree with its viewpoint on matters of sexuality is infamous. *E.g.*, *303 Creative LLC* v. *Elenis*, 600 U.S. 570 (2023); *Masterpiece Cakeshop, Ltd.* v. *Colo. C.R. Comm'n*, 584 U.S. 617 (2018).

Because there are no justiciability issues, the petition presents a clean vehicle for resolving an entrenched and acknowledged circuit split over a question that impacts the fundamental constitutional rights of counselors across the country. Every day the Tenth Circuit's decision remains in place, it denies urgently needed counseling to vulnerable minors amidst a nationwide mental-health crisis. There is no time to lose.

CONCLUSION

For the foregoing reasons, and those discussed in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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JANUARY 2025