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 A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF IOWA AND 11 OTHER STATES AS AMICI CURIAE IN SUPPORT OF GRANTING THE PETITION

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QUESTION PRESENTED

Does a law that censors certain conversations between counselors and their clients based on the viewpoints expressed regulate conduct or violate the Free Speech Clause?

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INTEREST OF AMICUS CURIAE[1]

Amici curiae States of Iowa, Alaska, Arkansas, Georgia, Idaho, Kansas, Kentucky, Missouri, Montana, North Dakota, Oklahoma, and South Carolina ("amici States") submit this brief in support of Petitioner, Kathy Chiles, urging this Court to reverse the Tenth Circuit's decision. That decision allowed Colorado to regulate counselors' speech on a topic of "fierce public debate." *Tingley v. Ferguson*, 144 S.Ct. 33, 33 (2023) (Thomas, J., dissenting from denial of certiorari). That debate is over how to best "help minors with gender dysphoria." *Id.*

Whether those laws regulate speech is the subject of an open circuit split. *Compare Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020) (laws regulate speech) *and King v. Governor of N.J.*, 767 F.3d 216, 228 (3d Cir. 2014) (same), *abrogated in part by Nat'l Inst. Of Fam. & Life Advocs v. Becerra*, 585 U.S. 755, 767 (2018) *with Tingley v. Ferguson*, 47 F.4th 1055, 1077 (9th Cir. 2022) (laws regulate conduct with an incidental effect on speech). With another circuit joining the fray, the circuits are intractably split.

Three justices dissented from denial of cert in *Tingley v. Ferguson*, which previously presented this Court with this same issue——now, after the issue further percolated and the split deepened, this Court should step in and find that laws telling counselors how they must treat hotly contested issues go too far. Indeed, in this case Judge Hartz dissented too—because "remarkabl[y]—because Supreme Court

[1] Pursuant to Rule 37.2, amici provided timely notice of their intent to file this brief to all parties.

doctrine is so clearly to the contrary—the majority opinion treats speech as conduct." *Chiles v. Salazar*, 116 F.4th 1178, 1228 (10th Cir. 2024) (Hartz, J., dissenting).

Amici States have a strong interest in protecting their licensed professionals—and the children whom they treat—from State-imposed orthodoxy. The Tenth Circuit's decision risks imposing undue restrictions on counselors' ability to advise and help children. Amici States are home to many Americans who are, or will soon be, affected by these censorship laws. Their citizens border the censoring States and cannot speak or receive certain messages in those States. And this type of ban on counseling will create problems for children that split time between these States.

Amici States regulate professionals. Guidance as to the propriety of those regulations is important and will benefit Amici States as they consider the regulations they intend to enact regarding counseling.

The Tenth Circuit's interpretation imposes undue and illegal burdens on the First Amendment. The Ninth and Tenth Circuits together cover much of the American west. And now there is a clear and deep split on this important First Amendment issue. This Court should grant review to bring clarity to this important and often-recurring question.

SUMMARY OF ARGUMENT

More than twenty States censor therapists from speaking disfavored messages to their patients. *Tingley*, 47 F.4th at 1063. At the last opportunity this Court had to weigh in on the propriety of States engaging in such censorship, three Justices dissenting

from denial of certiorari. *See Tingley*, 144 S.Ct. at 33 (Thomas, J., dissenting from denial of certiorari); *id.* at 35 (Alito, J., dissenting from denial of certiorari); *id.* at 33 (Kavanaugh, J., "would grant the petition for a writ of certiorari").

Now, the Third, Ninth, Tenth, and Eleventh Circuits are evenly split on whether States may ban some medical treatments that people seek regarding their sexuality. The Tenth Circuit here held that Petitioner's "First Amendment right to freedom of speech is implicated" under Colorado's law "but it is not abridged." *Chiles*, 116 F.4th at 1210. That echoes the Ninth Circuit's earlier admonition that "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." *Tingley*, 47 F.4th at 1064. And both of those Circuits cannot be reconciled with the Eleventh Circuit, which set aside as unconstitutional speech restrictions because they "sanction speech directly, not incidentally—the only 'conduct' at issue is speech." *Otto*, 981 F.3d at 866. So too with the Third Circuit that rejected "the argument that verbal communications become 'conduct' when they are used to deliver professional services." *King*, 767 F.3d at 228.

The Tenth Circuit found that Colorado's law banning "any practice or treatment by licensee registrant, or certificate holder that 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" does not intrude

on a therapist's First Amendment rights. *Chiles*, 116 F.4th at 1192 (quoting Colo. Rev. Stat. § 12-245-202(3.5)). Violating that law "has consequences in Colorado." *Id.* Indeed, those consequences include revocation or suspension of "the provider's license" or fines up to "$5,000 per violation." *Id.* (quoting Colo. Rev. Stat. § 12-245-225.

Judge Hartz's dissent recognized the deep problems in the majority opinion's holding that "engaging in the practice of a profession is conduct (even if the practice consists exclusively of talking)." *Id.* at 1226 (Hartz, J., dissenting). Under that logic, "any restriction on professional speech is just incidental to the regulation of conduct." *Id.*

But that cannot be. Indeed, this Court has found that "such wordplay poses a serious threat to free speech." *Id.*

This Court should take the case to clarify two outstanding and important issues. *First*, free citizens need not choose between making a living in a licensed profession and retaining their right to speak freely. *Second*, a government cannot regulate speech by calling it conduct. This Court should restore balance to the First Amendment and prohibit States from regulating professional speech in this way.

ARGUMENT

I. THE FREEDOMS RECOGNIZED BY THE FIRST AMENDMENT PROTECT LICENSED PROFESSIONALS FROM STATE-IMPOSED ORTHODOXY.

Licensed professionals do not lose their First Amendment rights by entering a regulated profession.

Yet now another court has deepened the circuit split as to whether such regulations are appropriate or fall subject to the protections the First Amendment offers licensed professionals. *See Chiles*, 116 F.4th 1178; *Tingley*, 47 F.4th 1055; *Del Castillo v. Sec'y, Fla. Dep't of Health*, 26 F.4th 1214, 1225 (11th Cir.*), cert. denied sub nom., Heather Kokesch Del Castillo v. Ladapo*, 143 S. Ct. 486 (2022); *Otto*, 981 F.3d 854; *King*, 767 F.3d 216. And warnings that courts may continue to erode professionals' First Amendment rights have "proved prescient." *Tingley*, 144 S.Ct. at 35 (Thomas, J., dissenting).

Colorado's law invading "the sphere of intellect and spirit" in a professional's practice violates the First Amendment. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943). A State government exercising police power, "has no power to restrict 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). State governments cannot censor in that way. *Id.*

Limiting professionals' ability to speak in violation of the First Amendment fails to respect the "individual dignity and choice upon which our political system rests." *Leathers v. Medlock*, 499 U.S. 439, 448–49 (1991). The First Amendment guarantees to Americans their free speech rights as citizens. "[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." *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 503-04 (1984).

Unfortunately, the Tenth Circuit's approach sets aside those core constitutional principles by carving out "a First-Amendment-free zone." *Tingley v. Ferguson*, 57 F.4th 1072, 1074 (9th Cir. 2023) (O'Scannlain, J., dissenting from denial of rehearing en banc). Indeed, the panel below "pa[id] lip service to the proposition that the Supreme Court has never recognized a lesser First Amendment protection for 'professional' speech." *Chiles*, 116 F.4th at 1227 (Hartz, J., dissenting). And that approach "ignores" protections for professional speech that this Court has held "cannot be treated differently" from generally protected speech "just because it is uttered by a professional." *Id.*

Colorado's licensing approach fails to work within any appropriate First Amendment framework. The First Amendment has roots that go across the pond to England, which can help inform this Court's original analysis. A good example with which the Framers would have been familiar is Parliament's Licensing Order of 1643. Famously, John Milton's opposition to that order in *Areopagitica*: "that if it come to prohibiting, there is not ought more likely to be prohibited then truth it self; whose first appearance to our eyes blear'd and dimm'd with prejudice and custom, is more unsightly and unplausible than many errors." John Milton, Areopagitica; A Speech of Mr. John Milton for the Liberty of Unlicensed Printing, To the Parliament of England (1644), DARTMOUTH COLLEGE: THE JOHN MILTON READING ROOM, Areopagitica: Text (dartmouth.edu) (last visited Nov. 26, 2024); *see* Harrop A. Freeman, *A Remonstrance for Conscience*, 106 U.Pa.L.Rev. 806, 815 (1958) (recognizing Milton's influence).

While there can be extremely limited instances when it is proper for the State to intercede and protect its citizens by restricting speech, this is not one of those instances. And its efforts mirror what this Court in *NIFLA* described as occasions when totalitarian governments "manipulat[ed] the content of doctor-patient discourse." *NIFLA v. Becerra*, 585 U.S. 755, 771 (2018). The Soviet Union ordered doctors to withhold information from patients to fast-track construction projects; the Third Reich commanded physician fealty to state ideology above patient wellbeing; and Romanian Communists prohibited doctors from providing their patients with information about birth control to increase the country's birth rate. *Id.* The goal in each of these instances ultimately was "to increase state power and suppress minorities." *Id.*

This Court long recognized that the ability of medical professionals to speak freely is especially important. In the "fields of medicine and public health," "information can save lives." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011). So this Court has been quick to reject content-based regulations like Colorado's that do not "advance a legitimate regulatory goal, but [instead] suppress unpopular ideas or information." *NIFLA*, 585 U.S. at 771. That type of law—this type of law—is "presumptively unconstitutional and may be justified only if the government proves that [it is] narrowly tailored to serve compelling state interests." *Reed*, 576 U.S. at 163 (citation omitted).

That warning rings especially true when laws like Colorado's risk tainting medicine with politics. Free speech should protect the medical field from political pressure seeking to stifle scientific

advancements. And it is far from clear that the ideological partisan bent embodied in Colorado's law is "settled" in any meaningful sense. *Chiles*, 116 F.4th at 1241 (Hartz, J., dissenting). Indeed, not that long ago the "shoe" was "on the other foot." *Id.* at 1227. Not that long ago "the mental-health establishment declared homosexuality to be a mental disorder." *Id.* Under the Tenth Circuit's position, "a state law *prohibiting* therapy that affirmed a youth's homosexual orientation would have faced only rational-basis review and very likely would have been upheld as constitutional." *Id.* The Colorado Legislature likely would blanche if the valence were reversed.

And perhaps most importantly here, the Tenth Circuit erred in avoiding this Court's binding precedent. This Court rejected treating "professional speech" as a separate category; and rejected treating regulating professional speech categorically as conduct that incidentally touches on speech. *NIFLA*, 585 U.S. at 767. "Speech is not unprotected merely because it is uttered by 'professionals.'" *Id.* But that is what Colorado does here. Colorado "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 denial of rehearing en banc), *abrogated by NIFLA*, 138 S.Ct. 2361.

Colorado's censorship regime flouts the First Amendment and vital protections guaranteed by our Constitution. This Court should grant certiorari to resolve the deepened circuit split before more Americans' First Amendment rights are threatened.

II. THE LINE BETWEEN SPEECH AND CONDUCT MUST BE VIGILANTLY GUARDED TO PRESERVE THE FREEDOM OF SPEECH.

The Tenth Circuit mistakenly found that Colorado's law "does not regulate expression." *Chiles*, 116 F.4th at 1208. Indeed, it found that the law prohibited some forms of therapy but did not prohibit discussions about why prohibiting that therapy is improper. On that basis, the court explained that affirming the Colorado law that prohibited therapists from disfavored speaking did not "restrict any speech uttered by professionals simply by relabeling it conduct." *Id.* at 1209.

This Court had an opportunity to grant certiorari in *Tingley* but declined to do so. In *Tingley*, several States urged the Court to grant certiorari, arguing that failure to do so would "mislead lower courts and undermine *NIFLA*'s holding"—precisely what has now transpired. *Tingley v. Ferguson*, Amicus Brief of Idaho et al., 2023 WL 3235258, at *14.

NIFLA held that "States may regulate professional conduct, even though that conduct incidentally involves speech." 585 U.S. at 768. But that incidental exception risks swallowing the generally protective rule. Indeed, *NIFLA* explained that States may not regulate speech "under the guise of prohibiting professional misconduct." *Id.* at 769. The Tenth Circuit, recognizing that flaw, offered a fig leaf rejecting that it was doing just that. *Chiles*, 116 F.4th at 1209. But Colorado's law, like Washington's in *Tingley*, is an example of speech regulation disguised as conduct regulation.

The Tenth Circuit thus failed to draw a distinction "between speech and conduct." *Cf. NIFLA*, 585 U.S. at 769. Drawing such a distinction may be difficult, but the Tenth Circuit's decision shows it is necessary. *Id.* Chiles's therapeutic communications fall on the speech side of the line.

Judge Hartz in dissent carefully explains step-by-logical-step the "remarkable" error that "treats speech as conduct." *Chiles*, 116 F.4th at 1228 (Hartz, J., dissenting). That is because "a restriction on speech is not *incidental* to regulation of conduct when the restriction is imposed because of the expressive conduct of what is said." *Id.* And "the 'conduct' being regulated here is speech itself"—even worse, that speech "is being regulated because of disapproval of its expressive content." *Id.* That leads to the absurd result that to avoid the First Amendment, all a State must do "is put it within a category ('a therapeutic modality') that includes conduct and declare that any regulation of speech within the category is merely incidental to regulating the conduct." *Id.* at 1231. But that "labeling game" fails. *Id.* (quoting *King*, 767 F.3d at 228–29).

Colorado's ban impermissibly burdens speech because conduct is not its object. Contrast Colorado's law with laws requiring doctors to provide informed consent. Those laws reach speech—but only in service of regulating a given procedure. *NIFLA*, 585 U.S. at 770 ("[T]he requirement that a doctor obtain informed consent to perform an operation is 'firmly entrenched in American tort law.'"). To be like informed consent laws, a law that burdens speech must be a necessary means of regulating conduct subject to State regulation. Pure speech itself falls outside of those

bounds. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995). But regulating speech—the therapy at issue here—is the object and subject of Colorado's law.

Colorado's ban "target[s] speech based on its communicative content." *Reed*, 576 U.S. at 163. It outlaws speech based on a viewpoint unpopular in the regulated profession. It is a "content-based law" and thus may be justified only if the State proves it is "narrowly tailored to serve compelling state interests." *Id.* Certiorari should be granted to correct the Tenth Circuit's error here and to clarify the test for conduct-based regulations.

CONCLUSION

This Court should grant certiorari to reverse the Tenth Circuit Court's judgment.

Respectfully submitted,

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