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 U.S. Court of Appeals for the Tenth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Licensed health professionals in Colorado are subject to professional discipline for providing treatment to their patients that falls below the accepted standard of care. Petitioner wants this Court to exempt professional health care providers who wish to provide a treatment that seeks to change a minor patient's sexual orientation or gender identity and so falls below the standard of care. The question presented is:

Whether the First Amendment bars a State from imposing discipline on professional health care providers for violating a requirement not to use treatments on children that the Legislature has reasonably determined to be below the standard of care.

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INTRODUCTION

Based on overwhelming evidence that efforts to change a child's sexual orientation or gender identity are unsafe and ineffective, Colorado's legislature amended the state's Mental Health Practice Act to subject mental health professionals to discipline for practicing conversion therapy on children. This Minor Conversion Therapy Law ("the MCTL") prohibits licensed mental health professionals from trying to change their minor patients' sexual orientation or gender identity, a treatment demonstrably harmful and ineffective. More than 20 states impose discipline on professional health care providers for engaging in this practice through laws like the MCTL, and no court has invalidated any of them.

Petitioner is a licensed professional counselor and a licensed addiction counselor. Neither of the Respondent Boards has received a complaint about Petitioner, much less taken any disciplinary action against her. Petitioner has never alleged that she intends to practice conversion therapy as defined by the MCTL. She nonetheless filed a pre-enforcement challenge in 2022, more than three years after the MCTL took effect.

This Court's precedent makes clear that the First Amendment allows states to reasonably regulate professional conduct to protect patients from substandard treatment, even when that regulation incidentally burdens speech. This is the case, for instance, of informed consent requirements and malpractice laws ensuring that professionals treat their patients consistent with their fields' standards of care. The Court of Appeals engaged in a straightforward application of

this precedent to hold that the First Amendment allows states to regulate the professional practice of conversion therapy, like other unsafe and ineffective health care treatments, to protect minor patients from substandard professional care.

Notwithstanding Petitioner's claim to the contrary, there is no circuit split over the First Amendment analysis that applies to states' imposition of professional discipline on mental health professionals for practicing conversion therapy on minor patients. Only the Ninth and Tenth Circuits have considered this specific question since *National Institute of Family and Life Advocates v. Becerra* ("*NIFLA*"), 585 U.S. 755 (2018), and both applied the same analysis with the same result. More specifically, both the decision below and the Ninth Circuit's decision in *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022), *cert. denied*, 144 S. Ct. 33 (2023), applied *NIFLA* to conclude that states' regulation of the professional practice of conversion therapy is a permissible regulation of professional conduct that incidentally burdens speech.

Petitioner claims that these decisions conflict with the Eleventh Circuit's decision in *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020). But the Eleventh Circuit has yet to consider a law imposing professional discipline on mental health professionals for practicing conversion therapy on minor patients, as *Otto* instead involved municipal ordinances that imposed fines separate and apart from the state's regulatory framework for professional health care practice. And when, more recently, the Eleventh Circuit confronted a First Amendment challenge to a state's regulation of professional practice that involved the

counseling of clients, it applied *NIFLA* to conclude that the state had permissibly regulated professional conduct that incidentally involved speech. *See Del Castillo v. Sec'y, Fla. Dep't of Health*, 26 F.4th 1214 (11th Cir. 2022) (upholding state's disciplinary regime for professional dieticians' and nutritionists' counseling of their clients). Nor does *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014), create a conflict among the lower courts. *King* applied an analysis that *NIFLA* later rejected—and the Third Circuit has yet to consider a related case since *NIFLA* clarified that states may regulate professional conduct that incidentally burdens speech.

Central to Petitioner's position is her claim that mental health professionals' counseling of their patients is no different from a chat with one's college roommate, such that both interactions receive the same First Amendment protection. Not so. Indeed, as the Court of Appeals recognized, Petitioner's argument misunderstands the reality of professional health care as well as this Court's precedent. A professional's treatment of her patients and clients is fundamentally different, for First Amendment purposes, from laypersons' interactions with each other. Unlike laypersons, those who choose to practice as health professionals are required, among various other responsibilities, to provide treatment to their patients consistent with their field's standard of care. Petitioner's claim would undercut states' longstanding ability to protect patients and clients from harmful professional conduct.

Finally, this case is an especially poor vehicle for this Court's review because Petitioner failed to develop a record to support her claims. Petitioner offered no expert declarations or affidavits and now invokes unvetted and irrelevant non-record material to suggest that young people's health is at risk if health care professionals are unable to engage in conversion therapy—when the evidence indicates nothing of the sort. Her failure to develop a record also makes this an especially poor vehicle for considering her pre-enforcement, facial challenge. And because Petitioner failed to offer any evidence that she intends to violate the MCTL, she also lacks standing.

This Court should deny certiorari.

STATEMENT OF THE CASE

I. Colorado enacted the MCTL as part of its regulation of mental health professionals' conduct to protect patients from harmful treatment.

In 2019, in response to a growing mental health crisis among Colorado teenagers and mounting evidence that conversion therapy is associated with increased depression, anxiety, suicidal thoughts, and suicide attempts, Colorado's General Assembly joined numerous other states in imposing professional discipline on mental health professionals for practicing conversion therapy on minors. As part and parcel of Colorado's regulation of professional health care practice to protect patients from harm, s*ee* COLO. REV. STAT. ("C.R.S.") §§ 12-200-101 to 12-315-310, the MCTL prohibits "any practice or treatment [upon minors] . . . 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." C.R.S. §§ 12-245-202(3.5)(a), -224(1)(t)(V).

A health care professional who engages in this practice faces discipline ranging from a letter of admonition to revocation of their license. C.R.S. § 12-245-225. The MCTL applies only to licensed professionals' practice of mental health care: it does not apply to those professionals' actions apart from their treatment of patients, nor does it apply to those providing services outside of the professional health care context, like religious ministers or life coaches. *See* C.R.S. § 12-245-217(1), (2)(f).

Respondents are the members of, and program director for, the Board of Professional Counselor Examiners and Board of Addiction Counselor Examiners (the "Boards").[1] The Boards manage licensing and registration of mental health professionals in Colorado, regulate the profession, and enforce the MCTL through administrative disciplinary proceedings. *See* C.R.S. § 12-245-101. Neither the MCTL nor the Boards regulate surgery or any other practice of medicine. Since Colorado's MCTL took effect in October 2019, the Boards have neither received any complaint alleging a violation of the MCTL nor initiated any disciplinary proceeding to enforce the MCTL. D. Colo. Decl. of Reina Sbarbaro-Gordon, Dkt. No. 52-1, ¶ 4.

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[1] Respondent Patty Salazar is the executive director of the Colorado Department of Regulatory Agencies, which oversees professional licensing programs in Colorado.

II. As the record makes clear, the overwhelming weight of scientific evidence demonstrates that conversion therapy is an unsafe and ineffective treatment.

That conversion therapy inflicts harm has been confirmed by at least twelve research studies, four systematic reviews of that research, and two independent evaluations of conversion therapy and the attendant research. D. Colo. Decl. of Dr. Judith Glassgold, Dkt. No. 45-1 ("Decl."), ¶ 14. Conversion therapy's documented harms include depression, anxiety, loss of sexual feeling, negative self-esteem, negative changes in family relationships, loss of faith, and suicidality. Decl. ¶¶ 65-68, 72-84 (citing studies). A cross-sectional survey of over 27,000 transgender adults found that exposure to conversion therapy at any time in a transgender person's life was associated with adverse mental health outcomes in adulthood that included severe psychological distress, suicidal thoughts, and suicide attempts. *Id.* ¶ 78. The studies of adults who underwent voluntary conversion therapy also found that they experienced harms including shame, a loss of faith in religious institutions, and suicidal thoughts. *Id.* ¶¶ 70-71, 83 (citing studies).

In short, "[s]tudies dating across two decades have evaluated [conversion therapy] and identified it as a potentially harmful treatment." Decl. ¶ 61. A systematic review of this evidence led the American Psychiatric Association, American Psychological Association, and other professional health care providers' associations to recommend against the use of conversion therapy due to the evidence that it harms young people. *Id.* ¶ 19. Nothing in the Cass Review—

cited for the first time in the Petition, *see* Pet. 3-4, 8-9, 28[2]—challenges the evidence on conversion therapy's harmful effects. Indeed, that Review states that "no LGBTQ+ group should be subjected to conversion practice," Cass Review at 150 § 11.5, and observes that "[n]o formal science-based training in psychotherapy, psychology or psychiatry teaches or advocates conversion therapy." *Id.* at 151 § 11.7. It advocates the approach taken by the MCTL: "If an individual were to carry out such practices they would be acting outside of professional guidance, and this would be a matter for the relevant regulator." Cass Review at 151 § 11.7.

III. Procedural history

Petitioner filed a pre-enforcement challenge on September 5, 2022, more than three years after the MCTL took effect. App. 174a-231a. She asked the District Court to issue preliminary and permanent injunctions prohibiting the Boards from enforcing the MCTL and a declaratory judgment that the MCTL is unconstitutional both on its face and as applied. *Id.* Petitioner did not request an evidentiary hearing, did not submit any declarations or affidavits in support of her Complaint, and did not allege that she intends to violate the MCTL.

The District Court denied the Motion for Preliminary Injunction. App. 135a-73a. While the District Court preliminarily found Chiles had pre-enforcement standing to bring her action, it concluded that she

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[2] The Cass Review: Independent Review of Gender Identity Services for Children and Young People (Apr. 2024), https://cass.independent-review.uk/home/publications/final-report/ ("Cass Review").

failed to demonstrate likelihood of success on the merits of her First Amendment claims. App. 145a, 160a, 169a. Concluding that the MCTL regulates professional conduct that incidentally involves speech, the District Court found that the MCTL is subject to, and satisfies, rational-basis review. *Id.* at 157a-160a. More specifically, it found that "conversion therapy is ineffective and harms minors" and that "Colorado considered the body of medical evidence regarding conversion therapy and sexual orientation change efforts—and their harms—when passing the [MCTL] and made the reasonable and rational decision to protect minors from ineffective and harmful therapeutic modalities." *Id.* at 158a. The Court similarly rejected Petitioner's free exercise claims, holding that Petitioner failed to show the MCTL is not neutral and generally applicable. App. 169a.

Petitioner appealed the Order, seeking review of both the free speech and free exercise claims. The Court of Appeals affirmed the District Court's ruling. As to Petitioner's free speech claim, the Court of Appeals recognized that the MCTL regulates mental health providers' professional conduct—specifically, talk therapy, which is a health care treatment. App. 42a-43a. Applying this Court's precedent in *NIFLA* and *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833 (1992), the Court of Appeals concluded that the MCTL implicates speech only as part of the practice of mental health treatment, which is subject to reasonable licensing by the state. App. 48a-50a. And it concluded that the MCTL advances the state's interests in protecting minors and maintaining the integrity of the mental health profession. *Id.* at 62a-63a. In so doing, it cited the district court's factual findings on

the harms of conversion therapy, which it concluded were extensively supported by the preliminary injunction record. *Id*. Judge Hartz dissented. *Id*. at 83a-125a.

Petitioner now seeks review only of her free speech claim.

REASONS FOR DENYING THE PETITION

I. The Court of Appeals' decision is consistent with this Court's precedent.

This Court's precedent makes clear that the First Amendment does not relieve professional health care providers from their responsibility to provide treatment consistent with their fields' standards of care. The Court of Appeals engaged in a straightforward application of that precedent to hold that the First Amendment permits states to regulate the professional practice of conversion therapy, like other unsafe and ineffective health care treatments, even when those treatments involve speech.

A. This Court's precedent makes clear that states may reasonably regulate professional conduct to protect patients from substandard care, even when that regulation incidentally burdens speech.

As the Court of Appeals acknowledged, "when speech is uttered by professionals, we may not treat it differently from speech uttered by laypersons—unless it falls within one of the two" contexts in which this Court has afforded lesser protection. App. 34a, n.21. One of those circumstances lies at the center of this case: "States may regulate professional conduct, even though that conduct incidentally involves speech."

NIFLA, 585 U.S. at 768.[3] To date, this Court has discussed the First Amendment implications of a state's regulation of professional conduct in the contexts of health care and law. *See id.* at 768-70; *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456-60 (1978). Within these settings, this Court "has upheld regulations of professional conduct that incidentally burden speech." *NIFLA,* 585 U.S. at 769.

As *NIFLA* recognized, states reasonably regulate professional conduct when they impose malpractice liability to protect patients from substandard care even when that regulation incidentally burdens speech: "Longstanding torts for professional malpractice, for example, 'fall within the traditional purview of state regulation of professional conduct.'" *Id.* at 769 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). Malpractice liability often turns on what health care professionals say, or don't say, to their patients. Health care professionals can be held liable for failing to warn their patients of certain risks, or for inaccurately describing a diagnosis or available treatments along with their risks and benefits. And none of this need be tied to a procedure: think of a doctor's failure to warn, upon determining that a patient has a certain condition, that consuming alcohol is especially dangerous for those with that condition.

NIFLA also identified informed consent requirements as examples of states' permissible regulation of professional conduct that incidentally involves speech. *NIFLA,* 585 U.S. at 769-70; *see also* App. 34a-35a,

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[3] The other context involves laws requiring professionals to disclose factual, noncontroversial information when engaging in commercial speech. 585 U.S. at 768.

n.22. More specifically, *NIFLA* cited *Planned Parenthood of Southeastern Pa. v. Casey* to illustrate this principle. *NIFLA,* 585 U.S. at 769. In *Casey*, this Court rejected a First Amendment challenge to a state law that required doctors performing abortions to discuss that procedure's risks and alternatives with their patients. *Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 884 (1992), *overruled on other grounds by Dobbs v. Jackson Women's Health Org*., 597 U.S. 215 (2022). As this Court explained, laws that require health care professionals to speak to obtain their patients' informed consent permissibly regulate those professionals' speech "as part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Casey*, 505 U.S. at 884.

To be sure, a professional health care provider does not engage in professional conduct for First Amendment purposes when she is not treating a patient. To illustrate, the law at issue in *NIFLA* did not regulate health care professionals' treatment of their patients; it instead required those professionals to post notices disclosing the availability of *other providers'* services—more specifically, state-provided services, including abortions, available to pregnant women. *NIFLA*, 585 U.S. at 762-63, 770.

In the same vein, the law considered by this Court in *Holder v. Humanitarian Law Project* did not regulate lawyers' representation of their clients but instead prohibited *anyone*—regardless of their professional status—from providing material support, including but not limited to expert advice, to organizations designated as terrorist. 561 U.S. 1, 7, 22-23 (2010). That law, like the law at issue in *NIFLA*, did

not regulate professional conduct to protect clients from substandard care or representation—in stark contrast to informed consent requirements, malpractice liability, and the MCTL.

B. The Court of Appeals applied this Court's precedent to hold that the First Amendment allows states to regulate the professional practice of conversion therapy, like other unsafe and ineffective health care treatments, even when they involve speech.

The Court of Appeals correctly applied this Court's precedent when it held that the First Amendment permits states to regulate the professional practice of conversion therapy as an unsafe and ineffective health care treatment, even when it involves speech. Like informed consent requirements and malpractice laws, the MCTL is a regulation of professional conduct that incidentally burdens speech.

The MCTL is part of Colorado's Mental Health Practice Act ("the Act"), which regulates professional mental health care practice "to safeguard the public health, safety, and welfare of the people of this state." C.R.S. § 12-245-101(1). The Act authorizes mental health professionals like Petitioner to engage in various forms of "practice or treatment" to promote and restore their patients' mental and behavioral health. C.R.S. §§ 12-245-603, 12-245-803, 12-245-202 (14)(a). These authorized "practices" and "treatments" include assessment, psychotherapy, consultation, testing, and implementing crisis intervention. *Id*. The Act defines authorized "psychotherapy" as "treatment, diagnosis,

testing, assessment, or counseling in a professional relationship to assist individuals or groups to alleviate behavioral and mental health disorders, understand unconscious or conscious motivation, resolve emotional, relationship, or attitudinal conflicts, or modify behaviors that interfere with effective emotional, social, or intellectual functioning." C.R.S. § 12-245-202 (14)(a).

The Act prohibits licensed mental health professionals from engaging in a variety of professional conduct that is harmful to patients—and much of this involves speech. Examples include "[o]rdering or performing any service or treatment that is contrary to the generally accepted standards of the person's practice and is without clinical justification" (C.R.S. § 12-245-224(1)(t)(III)); exercising undue influence on the client (C.R.S. § 12-245-224(1)(j)); accepting commissions or rebates for referring a client to another professional (C.R.S. § 12-245-224(1)(o)); or resorting to fraud in obtaining a license or taking a licensure exam (C.R.S. § 12-245-224(1)(s)).

The MCTL, more specifically, prohibits mental health professionals from engaging in a specific professional practice that falls below the standard of care: seeking to change a minor client's sexual orientation or gender identity through any of a variety of interventions, including those that involve speech. *See* App. 46a. It prohibits mental health professionals from engaging in *any* therapeutic modalities—including counseling that can take the form of behavioral therapy, art therapy, play therapy, or animal therapy, as well

as physically aversive treatments,[4] testing, assessments or other treatments—that seek to change their minor clients' sexual orientation or gender identity. *See* C.R.S. §§ 12-245-224(1)(t)(V); 12-245-202 (3.5).

By prohibiting the professional practice of conversion therapy on minors, the MCTL regulates the treatments mental health professionals can provide their patients. App. 46a; *see also id.* at 45a ("Talk therapy is a treatment, not an informal conversation among friends."). As the Court of Appeals determined, the MCTL regulates "the professional care that mental health providers give their patients. That is, undoubtedly, professional conduct." App. 40a. The Court of Appeals correctly applied *NIFLA* to conclude that the MCTL permissibly regulates professional conduct that "incidentally involves speech because an aspect of the counseling conduct, by its nature, necessarily involves speech." App. 50a.

At the same time, the Court of Appeals properly recognized that not everything a professional says is incidental to professional conduct for First Amendment purposes: "Colorado's power to regulate the counseling profession does not authorize the state to regulate all speech uttered by a counseling professional." App. 37a; *see also NIFLA*, 585 U.S. at 767-68. Unlike the laws at issue in *NIFLA* and *Holder,* the

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[4] "'Aversion techniques' include treatments that 'induc[e] nausea, vomiting, or paralysis; providing electric shocks; or having the individual snap an elastic band around the wrist when the individual bec[omes] aroused to same-sex erotic images or thoughts.'" App. 136a, n.2; D. Colo. Report of the Am. Psych. Ass'n Task Force on Appropriate Therapeutic Responses to Sexual Orientation, Dkt. No. 45-3 at 30.

MCTL regulates only mental health professionals' treatment of their patients. It does not regulate a professional's speech outside of an individualized provider-patient relationship. It does not regulate professionals' speech to their patients when that speech is not pursuant to their treatment of those patients. Nor does it regulate those providing services outside of the professional health care context, like religious ministers or life coaches.

For these reasons, the MCTL does not restrict Petitioner's ability to communicate her views on conversion therapy, sexual orientation, or gender identity to anyone, nor does it bar her from criticizing the MCTL to anyone. It does not bar her from suggesting that a patient seek conversion therapy from a religious minister or life coach outside the bounds of a professional-client relationship, nor does it bar her from engaging in conversion therapy as a religious advisor or life coach herself (rather than in her scope of practice as a mental health professional). *See* C.R.S. § 12-245-217. Indeed, the MCTL's express exemption of conversion therapy provided by persons who are not licensed health care professionals further makes clear that it regulates only the kind of professional conduct that this Court has held may be regulated consistent with the First Amendment: health care treatment within the scope of professional practice. *See NIFLA*, 585 U.S. at 767-68. And the MCTL does not limit in any way what patients can say to their mental health professionals. *Contra* Pet. 15 (claiming that "half the country" cannot talk freely with their counselors).

The MCTL instead only prohibits mental health professionals from providing their patients an unsafe

and ineffective treatment. The Court of Appeals thus correctly followed this Court's precedent, which makes clear that the First Amendment does not relieve professional health care providers from their responsibility to provide treatment consistent with their fields' standards of care, even when that treatment involves speech.

II. There is no disagreement among the Courts of Appeals on this question.

Despite Petitioner's claim of a circuit split, no post-*NIFLA* decision has invalidated a state law that, like the MCTL, imposes professional discipline on mental health professionals for practicing conversion therapy on minor patients—even though more than 20 states have such laws. *See* CA10 Br. of Washington, *et al.*, Dkt. No. 109 at 1; D. Colo. Defs.' Resp. to Mot. for Prelim. Inj., Dkt. No. 45 at 5, n.1.

Only the Ninth and Tenth Circuits have considered this question since *NIFLA*, and both applied the same rules with the same result. Both courts considered First Amendment challenges to state laws subjecting mental health professionals to professional discipline for practicing conversion therapy on their minor patients as part of their broader regulatory regimes for regulating health care practice. App. 38a-40a (reviewing portion of the state's Mental Health Practice Act that licenses and regulates mental health professionals); *Tingley*, 47 F.4th at 1064 (addressing provision of the state's Uniform Disciplinary Act for licensed health care providers that identifies "unprofessional conduct"). Both courts recognized that professional speech is not categorically exempt from ordinary First Amendment principles. App. 32a-33a,

n.18; *Tingley*, 47 F.4th at 1073-74. Both courts also recognized that the First Amendment permits states to regulate professional conduct that incidentally involves speech. App. 32a-33a; *Tingley*, 47 F.4th at 1074. Applying these rules, both courts found that the laws at issue permissibly regulated professional conduct even though they incidentally burdened speech. App. 49a-50a; *Tingley,* 47 F.4th at 1073-79.

Petitioner inaccurately claims that these decisions conflict with the Eleventh Circuit's decision in *Otto,* 981 F.3d 854, 865-66. They do not. The Eleventh Circuit has yet to consider a law imposing professional discipline on mental health professionals for practicing conversion therapy on minor patients. *Otto* instead addressed municipal ordinances that imposed fines untethered to, and separate from, the state's licensing and regulation of health care professionals, and held that those ordinances regulated speech, rather than professional conduct. *Id.* As the *Otto* Court emphasized, that case was "not about licensure requirements" nor did it "stand in the way of '[l]ongstanding torts for professional malpractice.'" *Id.* at 866, 870 (internal citations omitted). Because *Otto* did not consider the question at issue here, it is not in conflict with the Court of Appeals' decision below.

Indeed, when the Eleventh Circuit more recently considered a state licensing law regulating professional practice, it applied *NIFLA* to conclude that the law permissibly regulated professional conduct that incidentally involved speech. *Del Castillo*, 26 F.4th at 1223-26 (upholding state's regulation of professional dieticians' and nutritionists' counseling to protect clients' health and safety). *Del Castillo* involved a First

Amendment challenge to Florida's professional licensing requirement for dieticians and nutritionists engaged in "'nutrition counseling,' which entail[ed] 'advising and assisting individuals or groups on appropriate nutrition intake by integrating information from [a] nutrition assessment,'" a requirement based on legislative findings that "'the *practice* of dietetics and nutrition or nutrition counseling by unskilled and incompetent practitioners presents a danger to the public health and safety.'" *Id.* at 1225 (internal citations omitted). An unlicensed dietician and nutritionist alleged that the licensing requirement violated her rights "to communicate her opinions and advice on diet and nutrition to her clients." *Id.* at 1216. Consistent with the approach taken by the Ninth and Tenth Circuits, the Eleventh Circuit applied *NIFLA* to reject the challenge, concluding that "[a]ssessing a client's nutrition's needs, conducting nutrition research, developing a nutrition care system, and integrating information from a nutrition assessment are not speech. They are 'occupational conduct'. . . ." *Id.* at 1225-26 (internal citations omitted).[5] The Ninth and Tenth Circuit's approach thus mirrors, rather than contradicts,

[5] To date, this Court has discussed the First Amendment implications of a state's regulation of professional conduct in only two settings: health care and law. *See NIFLA*, 585 U.S. at 760-63, 766-772; *Ohralik*, 436 U.S. at 456-60. This Court thus has yet to consider whether practitioners in any other fields (including but not limited to dieticians and nutritionists), engage in "professional" conduct for First Amendment purposes, and this case does not require such an inquiry, since it falls squarely in the health care context. *Del Castillo* is nevertheless instructive in illustrating the Eleventh Circuit's application of *NIFLA* to the

the Eleventh Circuit's First Amendment analysis of states' regulation of professional practice, through professional discipline, to protect patients and clients from harm.

Petitioner also argues that the Court of Appeals' decision conflicts with the Third Circuit's pre-*NIFLA* ruling in *King,* 767 F.3d at 216. But *King* applied an analysis that *NIFLA* later rejected (and that the Court of Appeals in this case did not apply), and the Third Circuit has yet to revisit this issue after *NIFLA*.

In *King*, the Third Circuit concluded that the conversion therapy regulated by the law at issue was "speech," rather than "conduct," for purposes of the First Amendment. *Id.* at 224-25. But *King* also recognized that this conclusion posed a "fundamental problem," in that "it would mean that *any* regulation of professional counseling necessarily implicates fundamental First Amendment speech rights," (emphasis in original) and "[t]o handcuff the State's ability to regulate a profession whenever speech is involved would . . . unduly undermine its authority to protect its citizens from harm." *Id.* at 228, 232. To resolve this perceived conflict, *King* concluded that "speech that occurs as part of the practice of a licensed profession" is not fully protected by the First Amendment and instead receives diminished protection. *Id.* at 229, 233. In so doing, it relied in part on *Casey*, 505 U.S. 833.

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regulation of what that court considered to be professional conduct—an application entirely consistent with that of the Ninth and Tenth Circuits.

But *NIFLA* rejected *King*'s professional speech analysis, clarifying that *Casey* did not involve the regulation of "professional speech" but instead the permissible regulation of "professional conduct, even though that conduct incidentally involve[d] speech." 585 U.S. at 768. Because *NIFLA* rejected *King*'s analysis, and because the Third Circuit has yet to revisit this issue since *NIFLA*'s elucidation of states' permissible regulation of professional conduct that incidentally burdens speech, *King* does not create a circuit split.[6]

In short, there is no disagreement among the lower courts on this question.

III. Petitioner's position, if accepted, would upend both professional health care practice and this Court's precedent.

Resisting the circuit courts' consensus regarding professional licensing regulations of professional conduct, Petitioner repeatedly insists that mental health professionals' counseling of their patients is no different from casual discussions with a sophomore psychology major or a book club member, such that the same First Amendment rules apply to all these interactions. D. Colo. Mot. for Prelim. Inj., Dkt. No. 29 at 16; CA10 Br. of Appellant/Cross-Appellee, Dkt. No. 31 at 23, n.4;

[6] For this reason, Petitioner's claim that *NIFLA* criticized conversion therapy laws, Pet. 21, is incorrect. There this Court rejected lower courts' holdings that those laws regulated an unprotected category of "professional speech" (broadly defined as any speech by professionals based on their expert knowledge or judgment or occurring within a professional relationship). *NIFLA*, 585 U.S. at 767. But it did not address the question of whether such laws regulate professional conduct.

Pet. 23. Not so. As the Court of Appeals explained, Petitioner's position "would require us to conclude—erroneously—that mental health care is not really health care, and that talk therapy is not really medical treatment," which would "minimize[] the mental health profession, distort[] reality, and ignore[] the record in this case." App. 51a.

A. Petitioner's claim that mental health professionals' counseling of their patients is no different from conversations among laypersons fundamentally misunderstands both professional health care practice and this Court's precedent.

Petitioner's effort to equate mental health professionals' counseling with laypersons' conversations is wrong as a factual matter. Interactions between mental health professionals and their patients differ from those between laypersons because patients rely on those professionals' knowledge and expertise to promote and restore their mental health. *See* Decl. ¶¶ 98-100. Before they can engage in psychotherapy and other mental health care treatment, professional counselors like Petitioner must have completed a master's or doctorate degree along with thousands of hours of supervised counseling, must have passed a national examination that demonstrates "special knowledge and skill in licensed professional counseling," and must maintain their professional competency through continuing education. C.R.S. §§ 12-245-604, -606. Patients rely on these professionals' evidence-based training to diagnose behaviors and other symptoms observed in session, and to inform proposed treatment to restore and promote their mental health. And for

these reasons, patients seek out (and pay for) professional mental health care rather than just talk with their roommates or book club members.

Interactions between mental health professionals and their patients also differ from those between laypersons because patients occupy positions of dependence and vulnerability with respect to their professional health care providers. Minors are particularly vulnerable in these relationships due to developmental differences in cognition and understanding, as well as in emotional maturity. Decl. ¶¶ 43-52, 100.

States thus regularly impose responsibilities on health care professionals to maintain the safety of these relationships. Examples include informed consent and malpractice liability laws to protect patients from harmful and ineffective care—laws expressly identified by this Court as examples of permissible regulations of professional conduct that incidentally burden speech. *NIFLA,* 585 U.S. at 769-70. Unlike conversations among laypersons, a professional's treatment of her patient must remain focused on achieving therapeutic goals by following the treatment plan created specifically for that patient. *See* Decl. ¶ 22; C.R.S. § 12-245-224(1)(i) (mental health professionals are not to engage in dual relationships with clients, e.g., simultaneously acting as their mental health care provider and as their friend or supervisor). What that professional says—or doesn't say—while treating her patient must comport with the applicable standard of care. *See* Decl. ¶¶ 15-16. And professionals must maintain the confidentiality of their communications with their patients. *E.g., Jaffee v. Redmond*, 518 U.S. 1, 11 (1996) (extending the federal

psychotherapist privilege to licensed social workers engaging in psychotherapy because of the privilege's importance to patient health). Petitioner's description of professional counseling as simple "conversations" that are part of an "uninhibited marketplace of ideas," Pet. 31-32, fundamentally misunderstands the reality of professional mental health practice.

None of these responsibilities apply outside of the professional-patient relationship. Sophomore psychology majors, book club members, and other laypersons, in contrast, are not expected or required to have any level of expertise. They owe no duty of care to those with whom they talk, nor to inform them of the risks of following their advice, nor to keep their communications confidential.

Petitioner's effort to equate mental health professionals' counseling to laypersons' conversations is also wrong as a matter of this Court's precedent, which makes clear that professionals' treatment of their patients and clients is fundamentally different, for First Amendment purposes, from laypersons' interactions with each other. As explained above, *NIFLA* reaffirmed that the First Amendment permits states to regulate professional conduct that incidentally involves speech through, for example, informed consent requirements and malpractice law. *NIFLA,* 585 U.S. at 769-70. And in *Ohralik*, this Court concluded that the First Amendment permitted a state to discipline an attorney's in-person solicitation of hospitalized, and thus vulnerable, clients to protect them from harmful professional conduct. 436 U.S. at 463-65.

Because Petitioner recognizes no difference between conversations among laypersons and interactions between professionals and their patients, she relies on cases that have nothing to do with the regulation of professionals to protect their patients and clients from substandard care. *See* Pet. 23-25. As the Court of Appeals correctly recognized, those decisions have no bearing on this case. *See* App. 54a-55a, n.32.

More specifically, *Cohen v. California* overturned a defendant's conviction for wearing a jacket in public that displayed the words "F--- the Draft." 403 U.S. 15, 16-21 (1971). *Cantwell v. Connecticut* overturned defendants' conviction for publicly playing recorded messages disparaging onlookers' religion. 310 U.S. 296, 301-11 (1940). *Terminiello v. Chicago* overturned a defendant's conviction for his speech, at a public meeting, denigrating various political and racial groups. 337 U.S. 1, 2-6 (1949). And *Hess v. Indiana* overturned a defendant's conviction for saying "[w]e'll take the f----g street again" at a public antiwar demonstration. 414 U.S. 105, 106-07 (1973). Finally, *303 Creative, LLC v. Elenis* blocked the potential enforcement of public accommodations law against a website designer who wanted to make and sell wedding websites celebrating opposite-sex, but not same-sex, marriages. 600 U.S. 570, 579-80, 589-90 (2023). None of these decisions considered states' power to impose professional discipline on health care professionals to protect patients from substandard care. And none undermines the Court of Appeals' decision.

B. Petitioner's position would undermine longstanding precedent and states' ability to protect patients from harmful professional conduct.

Adopting Petitioner's position would undermine states' longstanding authority to regulate professional conduct, a power essential for ensuring patients' ability to trust health care providers to deliver safe and effective treatment consistent with the standard of care. First established and provided by colonial governments, these protections have been continued by state legislatures ever since. *See Dent v. West Virginia*, 129 U.S. 114, 122-23 (1889). In *Dent*, this Court recognized the importance of states' regulation of professional health care so "that the community might trust with confidence those receiving a license under authority of the state." *Id.* at 128; *see also Watson v. Maryland*, 218 U.S. 173, 176 (1910) (observing that states' authority to regulate "certain trades and callings, particularly those which closely concern the public health" is "too well-settled to require discussion").

Exercise of these powers enables states to protect patients from substandard professional care. As the Court of Appeals recognized, adopting Petitioner's position "could insulate swaths of professional conduct by therapists from regulation, such as Colorado's prohibitions on administering 'demonstrably unnecessary' treatments without clinical justification and 'perform[ing] services outside of the [provider's] area of training, expertise, or competence." App. 52a. Petitioner's claim would also leave patients vulnerable to other forms of harmful professional conduct inci-

dentally involving speech that states routinely regulate. Think, for instance, of states' discipline of professionals for unduly influencing their patients for the provider's financial gain, C.R.S. § 12-245-224(1)(j), and of states' discipline of professionals for disclosing patients' confidential information, *see Davis v. State Bd. of Psych. Exam'rs,* 791 P.2d 1198, 1200, 1203-04 (Colo. App. 1989).

Tellingly, *nowhere* does Petitioner make any mention of *NIFLA*'s reliance on malpractice liability and informed consent laws to illustrate states' permissible regulation of professional conduct that incidentally burdens speech. To do so would require her to address how professional health care treatment—regardless of the specific field at issue—routinely requires speech. And to do so would thus expose how her position, if adopted, would undermine states' ability to protect patients and clients from harmful professional conduct that involves speech.

Think of telehealth, which—regardless of the field at issue—necessarily involves only speech in the form of questions, diagnoses, and explanation of treatment options. *See* C.R.S. § 24-60-4302(2)(Y) (authorizing the practice of telehealth and its regulation to protect public health and safety). Think too of a health care professional's failure to ask her patient about their medical history or current medications before prescribing a new medication, or that professional's failure to warn her patient of the risks associated with a proposed course of treatment. *E.g., Haley v. United States,* 739 F.2d 1502, 1505 (10th Cir. 1984) (explaining that a health care professional's failure to elicit all information pertinent to a patient's treatment, and to

inform her of the risks of treatment options, constitutes malpractice).

Adopting Petitioner's position would also undermine states' routine regulation of attorneys to protect their clients from substandard representation. *See* App. 49a, n.29 (discussing commonplace regulations of attorneys' speech incidental to their representation of clients). Yet nowhere does Petitioner make any mention of her claim's implications for states' regulation of the practice of law, which inevitably involves lawyers' speech in asking questions, conducting interviews, drafting pleadings, advocating, negotiating, and more.

IV. Petitioner's failure to develop a record to support her claims and to establish standing makes this an exceptionally poor vehicle for resolving the question presented.

Because Petitioner failed to develop a record to support her claims, this case presents a poor vehicle for review. First, the Petition invokes unvetted and irrelevant non-record material to suggest that young people's health is at risk if health care professionals are unable to engage in conversion therapy—when no evidence (in the record or elsewhere) suggests anything of the sort. Second, the lack of a developed record makes this an especially poor vehicle for considering Petitioner's pre-enforcement, facial challenge. Finally, Petitioner has failed to put forward any evidence demonstrating her intent to engage in conduct prohibited by the MCTL, and thus has failed to establish standing.

A. The Petition invokes unvetted non-record material in urging this Court's review, when reliance on such material undermines quality judicial decision-making.

Petitioner failed to offer *any* expert declarations in the record below that would undermine the evidentiary basis for the District Court's conclusion that mental health professionals' practice of conversion therapy on minors is unsafe and ineffective. Newly invoking unvetted, unreliable, and irrelevant material in her Petition, Petitioner now attempts to undermine the MCTL's evidentiary justification by pointing to alleged harms that are not caused by the MCTL and were not alleged below. Petitioner's reliance on such material, together with her failure to develop a record, make this case an especially poor vehicle for this Court's consideration. *See Illinois v. Gates*, 462 U.S. 213, 224 (1983) (emphasizing the importance of "a factual record" and "discouraging the framing of broad rules, seemingly sensible on one set of facts, which may prove ill-considered in other circumstances").

The courts below concluded that the First Amendment permits Colorado to protect minor patients by subjecting licensed mental health professionals to discipline for engaging in health care practices demonstrated to cause harm to vulnerable youth. Their decisions rest on factual findings made by the District Court and well-supported by the record. *See* App. 65a-72a; App. 157a-160a; Decl.; D. Colo. Report of the Am. Psych. Ass'n Task Force on Appropriate Therapeutic Responses to Sexual Orientation, Dkt. No. 45-3; *see su-*

pra Statement of the Case, Part B. Relying on Colorado's expert declaration from a licensed psychologist who specializes "in psychotherapy with lesbian, gay, bisexual, and transgender (LGBT) issues working with children, adolescents, and adults," which carefully examined the research on the effects of conversion therapy, Decl. ¶ 4, the District Court found that "conversion therapy is ineffective and harms minors who identify as gay, lesbian, bisexual, transgender, or gender non-conforming," App. 158a. It also found the record "amply shows that [the MCTL] comports with the prevailing medical consensus regarding conversion therapy and sexual orientation change efforts." App. 158a-159a n.10. Finally, the District Court examined the MCTL's legislative history and found that "Colorado considered the body of medical evidence regarding conversion therapy and sexual orientation change efforts—and their harms," and "made the . . . decision to protect minors from ineffective and harmful therapeutic modalities." App. 158a. And as highlighted by the Court of Appeals, Petitioner did not dispute this legislative history or its relevance to the Court of Appeals' analysis that the MCTL survives rational basis review. App. 66a-67a.

Petitioner now claims—unsupported by any record evidence—that "restrictions like Colorado's" have left "detransitioners . . . with *no* counseling support whatsoever in much of the United States," suggesting that patients struggling with their gender identity or sexuality will not be able to find counselors willing to treat them because counselors will fear inadvertently violating the MCTL. Pet. 3, 9. Petitioner cites to anonymous user messages posted on Reddit (an online social media message board) that reference incendiary

anecdotes purporting to describe difficulties in obtaining objective counseling services that don't seek to drive clients to "an ideologically driven pathway to drugs and surgeries." Pet. 9. But these anecdotes have not been verified by any source, much less vetted through their inclusion in the record.

In the same vein, Petitioner now alleges that laws like the MCTL steer minor patients towards medical interventions like surgery—again without any record evidence to support her claim. *See* Pet. 28.[7] The MCTL has nothing to do with such medical interventions, which fall far outside the scope of Petitioner's license and the Boards' jurisdiction. The MCTL does not make counseling unavailable; it narrowly bars a particular form of therapy that has been demonstrated to be harmful. *See* Decl. ¶¶ 13-22, 102-108. Nor does the MCTL support a particular sexual orientation or gender identity outcome, much less one that requires surgery or medication. *See* C.R.S. § 12-245-202(3.5)(b)(I); Decl. ¶¶ 20-22, 33-38.

At bottom, Petitioner's belated efforts to marshal evidence to challenge the district court's findings do not warrant review by this Court. Many have emphasized the acute risks posed when courts rely on material outside the record to undergird their decision-

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[7] As explained above in the Statement of the Case, Petitioner's citation to the Cass Review for this proposition is particularly inapt because that Review straightforwardly affirms that conversion therapy is a harmful and ineffective treatment that should be subject to professional regulation. Cass Review at 150 § 11.5, 151 § 11.7.

making. As Justice Scalia highlighted in his dissenting opinion in *Sykes v. United States*:

> Supreme Court briefs are an inappropriate place to develop the key facts in a case. We normally give parties more robust protection, leaving important factual questions to district courts and juries aided by expert witnesses and the procedural protections of discovery. An adversarial process in the trial courts can identify flaws in the methodology of the studies that the parties put forward; here, we accept the studies' findings on faith, without examining their methodology at all.

564 U.S. 1, 31 (2011) (Scalia, J., dissenting), *overruled by Johnson v. United States*, 576 U.S. 591 (2015) (citations omitted). The majority below also underlined the dangers of appellate courts introducing new facts not available for vetting by the district court as fact-finder. App. 28a-30a, n.17.

That this case involves an appeal from a preliminary injunction adds to the reasons why it is an especially poor vehicle for review. "A preliminary injunction is an extraordinary remedy never awarded as of right." *Winter v. Nat. Res. Def. Couns.*, 555 U.S. 7, 24 (2008). The standard for reversing the denial of a preliminary injunction is high: the district court must have abused its discretion, and factual findings are reviewed for clear error. *Benisek v. Lamone*, 585 U.S. 155, 158 (2018); *Glossip v. Gross*, 576 U.S. 863, 881 (2015); Fed. R. Civ. P. 52(a)(6). By invoking non-record evidence, Petitioner seeks to undermine the District Court's findings regarding the Act's evidentiary basis.

B. Petitioner's failure to develop a record makes this an especially poor vehicle for considering her facial challenge.

Petitioner's Complaint alleges a facial, as well as an as-applied, challenge, App. 178a, 182a, yet it is the *only* document in the record in which she alleges facts at issue in this case, App. 68a-69a. Petitioner failed to put forward even her own declaration, much less any from experts or clients. *Id.*

Members of this Court have repeatedly underscored the caution with which it should proceed when presented with a facial challenge. *E.g., Moody v. NetChoice, LLC*, 603 U.S. 707, 749 (2024) (Jackson, J., concurring) ("[W]hen evaluating a broad facial challenge, courts must make sure they carefully parse not only what entities are regulated, but how the regulated activities *actually function* before deciding if the activity in question constitutes expression and therefore comes within the First Amendment's ambit."); *id.* at 760 (Thomas, J., concurring) (describing facial challenges as "ask[ing] courts to resolve potentially thorny constitutional questions with little factual background and briefing by a party who may not be affected by the outcome"); *id.* at 778 (Alito, J., concurring) ("[W]hen a court holds that a law cannot be enforced against anyone under any circumstances, it effectively grants relief with respect to unknown parties in disputes that have not yet materialized.").

In the First Amendment context, in particular, the test for a facial challenge is "whether a substantial number of the law's applications are unconstitutional, judged in relation to the statute's plainly legitimate

sweep." *Moody*, 603 U.S. at 723 (cleaned up). This requires courts to "assess the state law['s] scope," then to "decide which of the law['s] applications violate the First Amendment, and to measure them against the rest." *Id.* at 724-25. But here, there has been no record developed on the range of specific activities by mental health professionals that the MCTL allows or prohibits. Petitioner instead invites the Court to prematurely consider abstract and hypothetical applications of the MCTL.

This Court has warned of the dangers of facial challenges based on "factually barebones records." *Sabri v. United States,* 541 U.S. 600, 609 (2004). Here, Petitioner brings a facial challenge based on the barest of records.

C. Petitioner lacks standing to challenge the MCTL.

Finally, as Colorado has maintained from this litigation's outset,[8] Petitioner lacks standing because she has failed to establish that she intends to engage in conduct that violates the MCTL.[9] *See Murthy v. Missouri*, 603 U.S. 43, 58 (2024) (emphasizing that "at the preliminary injunction stage," a plaintiff must make a "clear showing" that she will likely establish standing). She has faced no disciplinary action and has carefully avoided stating that she seeks to practice

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[8] D. Colo. Mot. to Dismiss, Dkt. No. 52.

[9] Indeed, given this case's posture as an appeal from the denial of a preliminary injunction and the District Court's stay of proceedings, the parties have yet to develop any factual record about Petitioner's conduct pursuant to her mental health practice.

conversion therapy on her minor clients, instead describing practices the MCTL would not prohibit. App. 206a-08a. Absent concrete harm or the credible prospect of imminent enforcement, this case is a poor candidate for this Court's consideration. *See Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013) (emphasizing that a plaintiff's alleged injury must be "*certainly impending*" for standing).

To establish standing, Petitioner must show a concrete, imminent harm that is fairly traceable to the challenged law and likely to be redressed by judicial relief. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992). Petitioner cannot establish concrete harm, because she has not alleged that she wishes to engage in conduct prohibited by the MCTL. Instead, she relies on abstract fears, failing to allege any "specific present objective harm" or "threat of specific future harm." *Laird v. Tatum*, 408 U.S. 1, 14 (1972). With respect to minor clients experiencing gender dysphoria, Petitioner claims she wants to help minor patients who wish to "address unwanted sexual attraction, behaviors, or identity," including "gender roles, identity, sexual attractions, root causes of desires, behavior and values." App. 206a-207a. But the MCTL permits this help, so long as Petitioner does not purport or attempt to change her patient's sexual orientation or gender identity—which she expressly disclaims. *See* C.R.S. § 12-245-202(3.5)(b); App. 207a.

For the same reasons, Petitioner cannot demonstrate a "credible threat of prosecution," which requires her to show "a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement." *Babbit v. United Farm Workers Nat.*

Union, 442 U.S. 289, 298 (1979). She has failed to show that her practice, centered on exploration and acceptance rather than prohibited "conversion therapy," falls within the MCTL's reach. *See* C.R.S. § 12-245-202(3.5)(a)-(b)(I); App. 206a-208a. Petitioner states that "she seeks only to assist clients with their stated desires and objectives in counseling, which sometime[s] includes clients seeking to reduce or eliminate unwanted sexual attractions [and] change sexual behaviors[.]" App. 207a. But Petitioner "does not imply that categorical change in attractions is a therapeutic goal" she wishes to, or can, achieve. App. 206a. To the contrary, she states emphatically that she "does not seek to 'cure' clients of same-sex attractions or to 'change' clients' sexual orientation." App. 207a. According to her own Complaint, then, she has not plainly alleged that she wants to engage in conversion therapy.

In sum, if this Court determines that this issue merits its consideration, it should await a case with more than a "barebones" record and where standing is clear. *See Baker v. Carr,* 369 U.S. 186, 204 (1962) (emphasizing that the "actual controvers[y]" requirement serves to "sharpen[] the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions").

CONCLUSION

The petition should be denied.

Respectfully submitted,

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