NO. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Kaley Chiles is a licensed counselor who helps people by talking with them. A practicing Christian, Chiles believes that people flourish when they live consistently with God's design, including their biological sex. Many of her clients seek her counsel precisely *because* they believe that their faith and their relationship with God establishes the foundation upon which to understand their identity and desires. But Colorado bans these consensual conversations based on the viewpoints they express. Its content- and viewpoint-based Counseling Restriction prohibits counseling conversations with minors that might encourage them to change their "sexual orientation or gender identity, including efforts to change behaviors or gender expressions," while allowing conversations that provide "[a]cceptance, support, and understanding for … identity exploration and development, including … [a]ssistance to a person undergoing gender transition." Colo. Rev. Stat. § 12-245-202(3.5).

The Tenth Circuit upheld this ban as a regulation of Chiles's conduct, not speech. In doing so, the court deepened a circuit split between the Eleventh and Third Circuits, which do not treat counseling conversations as conduct, and the Ninth Circuit, which does.

The question presented is:

Whether a law that censors certain conversations between counselors and their clients based on the viewpoints expressed regulates conduct or violates the Free Speech Clause.

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner is Kaley Chiles, an individual person.

Respondents are Patty Salazar, in her official capacity as Executive Director of the Department of Regulatory Agencies; Reina Sbarbaro-Gordon, in her official capacity as Program Director of the State Board of Licensed Professional Counselor Examiners and the State Board of Addiction Counselor Examiners; Jennifer Luttman, Andrew Harris, Marykay Jimenez, Kalli Likness, Sue Noffsinger, Laura Gutierrez, and Richard Cohan in their official capacities as members of the State Board of Licensed Professional Counselor Examiners; and Halcyon Driskell, Kristina Daniel, Erika Hoy, Crystal Kisselburgh, Ramzy Nagy, Leiticia Smith, and Jonathan Culwell, in their official capacities as members of the State Board of Addiction Counselor Examiners.

LIST OF ALL PROCEEDINGS

U.S. Court of Appeals for the Tenth Circuit, Cross Appeal Nos. 22-1445 and 23-1002, *Chiles* v. *Salazar*, opinion issued September 12, 2024. Mandate issued October 4, 2024.

U.S. District Court for the District of Colorado, No. 1:22-cv-02287-CNS-STV, Order entered December 19, 2022.

TABLE OF CONTENTS

APPENDIX TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

DECISIONS BELOW

The district court's order denying Chiles's Motion for a Preliminary Injunction is available at 2022 WL 17770837 and reprinted at App.135a–173a.

The Tenth Circuit's opinion affirming the district court's order is reported at 116 F.4th 1178 and reprinted at App.1a–125a.

STATEMENT OF JURISDICTION

The Tenth Circuit entered judgment on September 12, 2024. Lower courts had jurisdiction under 28 U.S.C. 1331 and 28 U.S.C. 1292(a)(1). This Court has jurisdiction under 28 U.S.C. 1254(1).

PERTINENT CONSTITUTIONAL PROVISIONS AND STATUTES

The First Amendment to the United States Constitution provides: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech."

The Fourteenth Amendment to the United States Constitution provides: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

Relevant portions of the Colorado Revised Statutes appear at App.232a.

INTRODUCTION

"The First Amendment envisions the United States as a rich and complex place where all persons are free to think and speak as they wish." *303 Creative LLC* v. *Elenis*, 600 U.S. 570, 603 (2023). That promise protects every viewpoint, "no matter how controversial." *Id.* at 601. And it encompasses the layperson and professional alike. *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 585 U.S. 755, 767 (2018) ("*NIFLA*") ("Speech is not unprotected merely because it is uttered by 'professionals.'").

Yet over 20 states and 100 locales have enacted laws that silence counselors' ability to express views their clients seek on a topic of "fierce public debate"—"how best to help minors with gender dysphoria." *Tingley* v. *Ferguson*, 144 S. Ct. 33, 33 (2023) (Thomas, J., dissenting from the denial of certiorari) ("*Tingley III*"). The Eleventh and Third Circuits have rightly concluded that such laws regulate speech. *Otto* v. *City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020) ("*Otto I*"); *King* v. *Governor of N.J.*, 767 F.3d 216, 228 (3d Cir. 2014), *abrogated in part by NIFLA*, 585 U.S. at 767–69. But the Tenth Circuit has now joined the Ninth in blessing censorship by labeling counseling speech "conduct."

The Court should not allow this conflict to persist. Otherwise, counselors like Kaley Chiles and countless other professionals "who provide personalized services to clients" or "who are subject to a … licensing and regulatory regime" will have First Amendment protections in some states but not others. *NIFLA*, 585 U.S. at 767 (cleaned up). Constitutional rights should not depend on geographical happenstance.

The 2–2 circuit conflict can be traced to lower-court confusion over this Court's precedents. In *Holder* v. *Humanitarian Law Project*, the Court held that even laws that "generally function[ ] as a regulation of conduct" still silence speech if they target "a message." 561 U.S. 1, 27–28 (2010) (emphasis omitted). And in *NIFLA*, the Court affirmed that this test applies to professionals. 585 U.S. at 767. Governments do not have a freer hand to regulate speech simply because the speaker is "licensed" or giving "specialized advice." *Id.* at 771. But, rather than considering what laws regulate, the Ninth and Tenth Circuits insist on a speech "continuum" that looks at *who* is speaking. And when a professional speaks, those courts have often treated it as conduct. Without this Court's intervention, those decisions erode *NIFLA*'s promise to protect professionals' speech.

The Tenth Circuit's cramped view of *NIFLA* has devastating real-world consequences. In jurisdictions with counseling restrictions, many young people cannot receive the care they seek—and critically need. An independent policy review commissioned by the English National Health Service noted the urgent and unmet need for mental health services to support "gender-questioning young people." The Cass Review, *Independent Review of Gender Identity Services for Children and Young People* at 202 (Apr. 2024). And it linked this shortage to restrictions like Colorado's. Such restrictions have "left some clinical staff fearful" of "providing professional support" to young people at all. *Id.* at 202. That result leaves detransitioners—those who adopted a transgender identity but now identify with their biological sex—with *no* counseling support whatsoever in much of the United States.

Meanwhile, "'affirmative' and 'exploratory' approaches"—the very ones Colorado blesses—have been "weaponised [such] that … young person[s]" feel forced into "a medical pathway"—despite the lack of evidence that experimental medical intervention will help. Cass Review at 150. By upholding counseling censorship, the Tenth Circuit's ruling here and the Ninth Circuit's in *Tingley* tell countless minors they have no choice but to medically transition.

This is not the first time Colorado has sought to regulate speech "in ways that align with its views but defy [an individual's] conscience about a matter of major significance." *303 Creative*, 600 U.S. at 602–03. To be clear, Chiles seeks only to speak "in a manner consistent with [her] religious beliefs; [she] does not seek to impose those beliefs on anyone else." *Fulton* v. *City of Phila.*, 593 U.S. 522, 542 (2021). She works "with voluntary clients who determine the goals that they have for themselves." App.213a. And Chiles's clients voluntarily and specifically seek her counsel because they want the help her viewpoint provides. Yet Colorado's law forbids her from speaking, treating her professional license as a license for government censorship.

This Court's review is urgently needed to reaffirm that the government cannot censor messages "under the guise" of regulating conduct. *NAACP* v. *Button*, 371 U.S. 415, 439 (1963). Nor can the government impose viewpoint-based restrictions on a professional's speech simply because there is a history of regulating that profession's conduct. Because "this case easily satisfies [this Court's] established criteria for granting certiorari," *Tingley III*, 144 S. Ct. at 36 (Alito, J., dissenting), the petition should be granted.

STATEMENT OF THE CASE

I. Kaley Chiles and her clients

Kaley Chiles is a professional counselor licensed by Colorado. App.212a. Through her counseling, she serves adults and young people with various mental health needs, including issues related to trauma, personality disorders, eating disorders, addiction, gender dysphoria, and sexual attractions. App.215a.

Chiles is also a practicing Christian who views her career as an outgrowth of her faith. App.212a–14a. Many of Chiles's clients are also Christian and specifically seek her help because of their shared faith-based convictions and biblical worldview. App.214a. These clients are sometimes referred by local churches. *Ibid.* Others hear about Chiles's Christian-based counseling through word of mouth. *Ibid.* Chiles "highly respects client autonomy and therefore does not seek to impose her values or beliefs on her clients." App.212a. After discussing a client's objectives, desires, and religious or spiritual values, Chiles assists with "formulat[ing] methods of counseling that will most benefit" the client. App.207a.

Some of the issues that clients want to discuss implicate Christian values about human sexuality and the treatment of their own body. At times, those clients are living "inconsistent with their faith or values," resulting in internal conflict, depression, and anxiety. App.214a–215a. They seek Christian-based counseling "to reduce or eliminate unwanted sexual attractions, change sexual behaviors, or grow in the experience of harmony with [their] physical body." App.207a.

Like Chiles, these clients "believe their faith and their relationships with God" inform "romantic attractions and that God determines their identity according to what He has revealed in the Bible." App.214a. These clients believe their lives will be more fulfilling if aligned with the teachings of their faith, and they want to achieve freedom from what they see as harmful self-perceptions and sexual behaviors.

Chiles works only "with voluntary clients who determine the goals that they have for themselves." App.213a. If clients are content with their sexual orientation or gender identity, Chiles does not "try to help [them] change their attractions, behavior, or identity" but instead helps them develop other therapeutic goals. App.214a.

Chiles's clients seek a counselor who respects and shares their values. App.214a–15a. After a client communicates his or her "goals, desires and objectives," Chiles "provides counseling that aligns with the client's self-determined choices." App.176a. Together, Chiles and her clients "freely" and "fully explore" issues about "gender roles, identity, sexual attractions, root causes of desires, behavior and values." App.206a. Though Chiles never promises that she can solve these issues, she believes clients can accept the bodies that God has given them and find peace.

II. The importance of Chiles's counseling

A growing body of research reveals how critical Chiles's counseling is, especially for young people. Most minors who experience gender dysphoria become comfortable with their biological sex if they are *not* affirmed in a transgender identity. Wylie C. Hembree et al., *Endocrine Treatment of Gender-Dysphoric/Gender-Incongruent Persons: An Endocrine Society Clinical Practice Guideline*, 102 J. of Clinical Endocrinology & Metabolism 3869, 3879 (2017); Christina Buttons, *Finland's Leading Gender Dysphoria Expert Says 4 Out of 5 Children Grow Out of Gender Confusion*, Daily Wire (Feb. 6, 2023).[1] Some studies say 98 percent of gender dysphoric children will identify with their biological sex before adulthood. Jiska Ristori & Thomas D. Steensma, *Gender Dysphoria in Childhood*, 28 Int'l Rev. of Psychiatry 13–20 (2016).

Actions and desires related to human sexuality are also subject to change. Respected researchers who support LGBT advocacy have concluded that "arguments based on the immutability of sexual orientation are unscientific, given that scientific research does not indicate that sexual orientation is uniformly biologically determined at birth or that patterns of same-sex and other-sex attractions remain fixed over the life course." Lisa M. Diamond & Clifford J. Rosky, *Scrutinizing Immutability: Research on Sexual Orientation & U.S. Legal Advocacy for Sexual Minorities*, 53 J. of Sex Research 1–2 (2016).

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[1] https://perma.cc/G6NB-VEV8.

The former president of the American Psychological Association, Dr. Nicholas Cummings, agrees that sexual orientation and gender identity are not immutable. After counseling hundreds of clients who successfully changed their unwanted sexual orientations and gender identities, Dr. Cummings concluded that it is "a distortion of reality" to suggest that change is impossible. App.203a.

Other nations that initially adopted an "affirm-only" approach now caution against it—and, in some cases, ban the practice of affirming young peoples' gender dysphoria. *E.g.*, Soc'y for Evidence Based Gender Medicine, *2022 Year-End-Summary* (Jan. 1, 2023) (summarizing developments in England, Sweden, Finland, France, Australia, and New Zealand).[2] In light of this seismic shift, many countries now *prioritize* psychotherapy while restricting medical treatment, a counseling-first approach that is now banned in much of the United States. *Ibid.*

A seminal report commissioned by the English National Health Service concluded that the research on youth transgenderism is "an area of remarkably weak evidence." Cass Review at 13. It concluded that psychotherapy for minors with gender dysphoria "has been overshadowed by an unhelpfully polarised debate around conversion practices." *Id.* at 150. The report recognized that methods like talk therapy can "help alleviate [minors'] distress," and that "[i]t is harmful to equate this approach to conversion therapy as it may prevent young people from getting the emotional support they deserve." *Ibid.*

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[2] https://perma.cc/JLB7-MJA2.

Indeed, many counselors won't take clients struggling with gender dysphoria "because any topic but 'affirming' can be said to violate" laws like Colorado's. Walt Heyer, TRANS LIFE SURVIVORS 117 (2018). That includes exploring important issues like "childhood trauma," "grief counseling," or "diagnos[ing] comorbid disorders." *Id.* at 118. As a result, many struggling with gender dysphoria do not "trust … anyone involved in gender or transgender health" because they perceive the field as "bullying … in the guise of being healers." r/detrans, *finding a normal therapist in 2024*, Reddit (Sept. 1, 2024), http://bit.ly/4fWs81B. They lament that they can't find professional therapists to help them with their struggles because "it could jeopardize [the therapist's] licenses in almost every state." *Ibid.* Some—even those who "don't believe in God"—have turned to nonprofessional counselors in churches because those counselors "tend to want people to do healthy behaviors," rather than push them down an ideologically driven pathway to drugs and surgeries. *Ibid.*

Although more research is needed, recent studies show that those who desire harmony with their bodies and seek counseling find "significant improvement" with depression, anxiety, and suicidality and experience no "adverse or negative effects." Cass Review at 153. Chiles wants to provide that emotional support in an evidence-based manner that aligns with her and her clients' shared convictions.

III. Colorado's viewpoint-based censorship and its damaging effects

Colorado disagrees with Chiles's beliefs on gender and sexuality. So much so that the State puts itself in Chiles's counseling room, forbidding her from discussing the values she and her clients share. It enacted the Counseling Restriction in 2019 and prohibited certain conversations between a counselor and her clients under age 18, condemning (and mislabeling) these conversations as "conversion therapy." Colo. Rev. Stat. § 12-245-202(3.5)(a). The Restriction broadly defines "conversion therapy" as "any practice or treatment … that attempts or purports to change an individual's sexual orientation or gender identity," specifically including any effort to "change behaviors or gender expressions or to eliminate or reduce sexual or romantic attraction or feelings toward individuals of the same sex." *Ibid.* That prohibition applies even when the client herself desires that "change."

Notably, the law is unabashedly content- and viewpoint-based, *exempting* counseling that provides "[a]cceptance, support, and understanding for the facilitation of an individual's coping, social support, and identity exploration and development, including sexual-orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices," or "[a]ssistance to a person undergoing gender transition." *Id.* § 12-245-202(3.5)(b)(I)–(II). So Colorado counselors that encourage a minor's same-sex attractions or gender transition are free to do so. But a counselor who discusses a client's desire to *resist* same-sex relationships or *align* the client's sense of identity and biological sex faces steep penalties. A counselor doing no more than speaking

words beyond the bounds of Colorado's declared orthodoxy can be fined up to $5,000 for each violation, suspended from practice, and even have her license revoked. *Id.* § 12-245-225.

Faced with these draconian penalties and fearing her conversations with clients "may be perceived as violating the law," Chiles is guarded and cautious with clients facing issues related to sexuality and gender. App.206a. By "intentionally avoid[ing] conversations," Chiles has not been "able to fully explore the topic of sexuality with minor [clients]" who are likewise "prevented from being able to fully explore the topic with her." *Ibid.* That hindrance harms the relationship between counselor and client, prohibits Chiles from providing support based on her understanding of the science and her faith, and deprives young people of mental health resources they seek and critically need.

IV. Proceedings below

Chiles sued Colorado to vindicate her constitutional right to free speech and moved to preliminarily enjoin the Counseling Restriction. The district court denied Chiles's motion, and a divided Tenth Circuit affirmed.

Over Judge Hartz's dissent, the majority held that Chiles's conversations with her clients were "undoubtedly[ ] professional conduct" rather than pure speech. App.40a. Specifically, the court labeled Chiles's discussions as a "therapeutic modality" that is "carried out through use of verbal language." App.46a. Under rational-basis review, the law passed constitutional muster. App.59a–72a.

The majority acknowledged that it "join[ed] the Ninth Circuit," which has likewise held that a prohibition on counseling conversations "is a regulation on conduct that incidentally [involves] speech." App.58a (quoting *Tingley* v. *Ferguson*, 47 F.4th 1055, 1077 (9th Cir. 2022) ("*Tingley I*") (cleaned up)). The majority rejected as "unpersuasive" the Eleventh Circuit's reasoning in *Otto I*, 981 F.3d 854, which found a similar law to be an unconstitutional restriction on pure speech. App.43a–44a.

Judge Hartz dissented, sharply criticizing the majority's unprincipled approach. He concluded that "a restriction on speech is not *incidental to* regulation of conduct when the restriction is imposed *because of the expressive content of what is said*." App.87a–88a (emphasis added). And he condemned the majority for playing a "labeling game" in which "all the government needs to do to regulate speech without worrying about the First Amendment" is categorize the speech broadly enough that it also encompasses non-speech and then "declare that any regulation of speech within the category is merely incidental to regulating the conduct." App.95a.

Judge Hartz warned that "[c]ourts must be particularly wary that in a contentious and evolving field, the government and its supporters would like to bypass the marketplace of ideas and declare victory for their preferred ideas by fiat." App.108a–109a. Indeed, under laws like Colorado's, "licensed counselors cannot voice anything other than the state-approved opinion on minors with gender dysphoria without facing punishment." *Tingley III*, 144 S. Ct. at 35 (Thomas, J., dissenting from the denial of certiorari).

Multiple members of this Court have already recognized that legal challenges to laws like Colorado's raise "a question of national importance," *id.* at 35 (Alito, J., dissenting from the denial of certiorari), that "has divided the Courts of Appeals and strikes at the heart of the First Amendment," *id.* at 33 (Thomas, J., dissenting from the denial of certiorari). When this Court previously denied certiorari in a similar case, Justice Thomas foresaw that "the issue it presents [would] come before the Court again," writing that "[w]hen it does, the Court should do what it should have done here: grant certiorari to consider what the First Amendment requires." *Id.* at 35. This case gives the Court that opportunity.

Thousands of young people desire and need the counseling that Colorado, California, and countless other states and local jurisdictions now prohibit with the blessing of the Ninth and Tenth Circuits. The Court should grant the petition, resolve the circuit split, restore First Amendment protections to counselors, and provide much-needed relief to children and families seeking such counseling.

ARGUMENT

The court of appeals' divided decision exacerbated a circuit split on "a question of national importance." *Tingley III*, 144 S. Ct. at 35 (Alito, J., dissenting from the denial of certiorari). The Tenth Circuit joined the Ninth in "oxymoronic[ally]" declaring words spoken between a counselor and her clients to be conduct. *Tingley* v. *Ferguson*, 57 F.4th 1072, 1075 (9th Cir. 2023) (O'Scannlain, J., respecting the denial of reh'g en banc) ("*Tingley II*"). The Eleventh and Third Circuits recognize them for what they are: speech. App.95a (Hartz, J., dissenting) (acknowledging the circuit split). Accord *Tingley I*, 47 F.4th at 1077.

Counselors in the Ninth and Tenth Circuits have less constitutional protection for their speech than those in the Eleventh and Third. But the Constitution's guarantees do not depend on geographical happenstance. The First Amendment protects the speech of professionals everywhere by precluding the government from policing "the content of professional speech" and thereby "fail[ing] to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail." *NIFLA*, 585 U.S. at 772 (cleaned up).

The decision below also conflicts with this Court's decision in *NIFLA*, which held that states lack the "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." 585 U.S. at 773. Nor can governments "say that just because a broadly applicable law that restricts speech also restricts conduct, the restriction on speech is merely incidental to the regulation of conduct." App.88a (Hartz, J., dissenting). Here, the Tenth Circuit did just that and upheld censorship.

Such censorship attacks the First Amendment's "foundational principles" in ways that *303 Creative* forewarned. By labeling one side of a national debate as "professional conduct," Colorado yet again attempts to "excise certain ideas or viewpoints from the public dialogue." *303 Creative*, 600 U.S. at 588 (cleaned up). But "the First Amendment's protections" do not "belong only to speakers whose motives the government finds worthy; its protections belong to all." *Id.* at 595. That includes Chiles and her clients, who view gender and sexuality differently than Colorado.

When the government decides what ideas should prevail, "the people lose." *NIFLA*, 585 U.S. at 772. Amidst a national mental health crisis, many young people desperately want—and need—the counseling that Chiles provides. Testimonies from those who have benefited from this counseling show the life-changing difference that caring conversations can make. With the circuits split on whether those conversations receive First Amendment protection, half the country cannot talk freely with a licensed counselor.

A private conversation is speech, not conduct. That does not change just because one participant is a licensed counselor and the other her client. "[T]he First Amendment *never* cares whether 'professionals [are] speaking.'" App.91a (Hartz, J., dissenting) (quoting *NIFLA*, 585 U.S. at 768). Otherwise, government bureaucrats could alchemize almost any professional's speech into conduct that can be silenced. App.88a (Hartz, J., dissenting) (noting that "any speech that a government finds offensive could be placed within a field of conduct and … regulated as 'incidental' to regulation of that field of conduct").

This Court should grant certiorari, resolve the circuit split, and clarify that professionals do not lose their speech rights simply because they have a professional license.

I. The Tenth Circuit's decision deepened a circuit split over whether the First Amendment protects conversations spoken between counselors and their clients.

The decision below worsened a circuit conflict over whether conversations that occur in a licensed counselor's office are mere conduct or constitutionally protected speech. Two circuits—the Eleventh and Third—rightly treat these conversations as speech under the First Amendment. Yet the Tenth Circuit joined the Ninth in calling these conversations "professional conduct" that falls outside the First Amendment's protections, resulting in an acknowledged 2–2 circuit split.

As a result, in at least 15 states across the Ninth and Tenth Circuits, if a "government considers [a professional's] speech" to be "deeply misguided," *303 Creative*, 600 U.S. at 586 (cleaned up), it can censor that viewpoint, even in a debate "of profound value and concern to the public," *Janus* v. *Am. Fed'n of State, Cnty., & Mun. Emps., Council 31*, 585 U.S. 878, 914 (2018) (cleaned up). The government can wield that power even in the context of counseling that many medical professionals and scientists consider crucial to young people's mental health and physical well-being.

This erroneous interpretation dates back to 2014, when the Ninth Circuit considered California's near-identical counseling restriction and held that it, too, regulated conduct, not speech. *Pickup* v. *Brown*, 740 F.3d 1208, 1229 (9th Cir. 2014). The court posited that "the First Amendment rights of professionals" exist on a "continuum," where "public dialogue" garners full protection, so-called "professional[ ] speech" earns diminished protection, and anything labeled "conduct" has none. *Id.* at 1226–28. Bans on counseling conversations are "conduct" because, to the *Pickup* panel, they are bans on "treatment." *Id.* at 1229. That panel admitted these conversations "require speech," but said that "the fact that speech may be used to carry out those therapies does not turn the regulation of conduct into a regulation of speech." *Ibid.*

The Third Circuit largely rejected the Ninth Circuit's approach. When considering a similar counseling restriction, that court concluded that this Court's precedents foreclosed "the argument that verbal communications become 'conduct' when they are used to deliver professional services." *King*, 767 F.3d at 228. To hold otherwise would allow government bureaucrats to engage in a "labeling game" that is "unprincipled and susceptible to manipulation." *Ibid.* Nonetheless, the court embraced *Pickup*'s continuum and upheld that counseling restriction under the so-called "professional speech" doctrine, *id.* at 231. (Though this Court abrogated the professional-speech-doctrine portion of *King* in *NIFLA*, 585 U.S. at 767–69, it left in place the Third Circuit's holding that speech by professionals is speech, not conduct.)

As more and more courts followed the Ninth Circuit through the looking glass, this Court corrected course. "Speech is not unprotected merely because it is uttered by 'professionals.'" *NIFLA*, 585 U.S. at 767. The Court criticized precedents—calling out *Pickup* by name—that gave the government a freer hand in restricting speech such as "specialized advice." *Id.* at 771. It directed that governments cannot "reduce … First Amendment rights" by slapping labels on speech like "professional." *Id.* at 773. (The same would be true by slapping labels on speech such as "conduct" or "treatment.") And the Court "stressed the danger of content-based regulations in the fields of medicine and public health, where information can save lives." *Id.* at 771 (cleaned up). In doing so, *NIFLA* "reoriented courts toward the traditional taxonomy that draws the line between speech and conduct." *Vizaline, LLC* v. *Tracy*, 949 F.3d 927, 933 (5th Cir. 2020) (cleaned up).

Many courts heeded this much-needed course correction. The Eleventh Circuit did so specifically in the counseling context. In *Otto* v. *City of Boca Raton*, the Eleventh Circuit considered a local counseling restriction almost identical to Colorado's and held that it targeted speech, not conduct. In doing so, the court emphatically "rejected the practice of relabeling controversial speech as conduct." *Otto I*, 981 F.3d at 861. Accord *Vazzo* v. *City of Tampa*, No. 19-14387, 2023 WL 1466603, at *1 (11th Cir. Feb. 2, 2023) (per curiam). Relying on circuit precedent and *NIFLA*, the Eleventh Circuit concluded that government cannot evade the First Amendment by saying that "speech is actually conduct." *Otto I*, 981 F.3d at 861.

The Eleventh Circuit also held that counseling restrictions like Colorado's "are direct, not incidental, regulations of speech." *Otto I*, 981 F.3d at 865. "What the governments call a medical procedure consists—entirely—of words." *Ibid.* (cleaned up). The counseling is "not just carried out in part through speech" but "is entirely speech." *Ibid.* (cleaned up).

To conclude that words are conduct—or that laws censoring certain messages burden speech only incidentally—would allow the government to ban virtually any speech. It's like saying that "limitations on walking and running are merely incidental to ambulation." *Wollschlaeger* v. *Governor of Fla.*, 848 F.3d 1293, 1308 (11th Cir. 2017) (en banc) (striking down a law that banned doctors' conversations with patients about gun use). Cf. *Hines* v. *Pardue*, 117 F.4th 769, 778 & n.50 (5th Cir. 2024) ("Given our analysis in today's case, we are hesitant to embrace *Chiles*'s threshold conclusion that conduct, and not speech, was the target of the Colorado law.").

Yet the Ninth Circuit in *Tingley* reached that upside-down conclusion. Even after this Court—"and other circuits"—"rejected *Pickup* by name," *Tingley II*, 57 F.4th at 1074 (O'Scannlain, J., respecting the denial of reh'g en banc), the Ninth Circuit doubled down and reaffirmed its view that counseling conversations are not speech but conduct, *Tingley I*, 47 F.4th at 1073. It held that these conversations are a "treatment," and anything a state labels as "treatment" it can regulate as conduct, thus dodging First Amendment scrutiny. *Ibid.*

The Tenth Circuit now embraces this view, deepening the split. It, too, held that Chiles's speech is a "treatment," and that regulations of "treatment" target not speech but conduct. This logic permits what *NIFLA* forbade: a "labeling game." *Pickup*, 740 F.3d at 1218 (O'Scannlain, J., dissenting from the denial of reh'g en banc). Accord *NIFLA*, 585 U.S. at 773 ("State labels cannot be dispositive of the degree of First Amendment protection.") (cleaned up).

"[T]reatment," after all, "has no purchase in First Amendment doctrine." App.98a (Hartz, J., dissenting). Labeling speech as "treatment" is simply "irrelevant to whether [it] is speech." *Ibid.* Yet the Ninth and Tenth Circuits have imbued "the epithet" "treatment" with "talismanic immunity from constitutional limitations"—even if such "treatment" consists of nothing but words. Cf. *N.Y. Times Co.* v. *Sullivan*, 376 U.S. 254, 269 (1964) (refusing to give the label "libel" any talismanic power).

With these conflicting decisions, a counselor's ability to provide advice consistent with her clients' desires and viewpoints depends entirely on where she practices. In the Ninth and Tenth Circuits, government can freely censor one viewpoint because counseling is considered conduct. But in the Eleventh and Third Circuits, counseling is speech protected by the First Amendment. This Court should resolve this split and squash the widespread government efforts to engage in viewpoint-based censorship.

II. The Tenth Circuit's decision conflicts with this Court's free-speech jurisprudence.

The Tenth Circuit's decision contravenes many of this Court's precedents. First, the court of appeals' ruling defies *NIFLA* by treating Chiles's professional license as dispositive and upholding the very "circuit decisions" that *NIFLA* "directly criticized." *Otto I*, 981 F.3d at 867. Accord *NIFLA*, 585 U.S. at 767. Second, the Tenth Circuit's decision ignores "doctrinal" cases, including *Holder*, drawing the line between conduct and protected speech. *Otto I*, 981 F.3d at 867. Finally, the decision below flouts the fundamental free-speech principles this Court recently affirmed in *303 Creative*.

1. Start with the conflict between the ruling below and *NIFLA*. The panel majority failed to reckon with the fact that *NIFLA* cited disapprovingly "circuit decisions" that upheld the very censorship restrictions challenged here. *Otto I*, 981 F.3d at 867. "The context was essentially identical." App.104a (Hartz, J., dissenting). As Judge Hartz noted, when this Court held that "professional speech is not excepted from the rule that content-based regulations of speech are subject to strict scrutiny," it "undoubtedly" had in mind counseling restrictions like Colorado's. *Ibid.* (cleaned up). "It would be passing strange for the Court to cite critically those particular cases if it thought the decisions were ultimately correct." *Ibid.*

Moreover, *NIFLA* made clear that states "cannot foreclose the exercise of constitutional rights by mere labels." *Button*, 371 U.S. at 429. Yet the Tenth Circuit held that Chiles's speech is conduct if the state calls it "treatment," embracing the very labeling games

that *NIFLA* prohibited. 585 U.S. at 773. Chiles's counseling may be "a form of treatment," but it "consists—entirely—of words." *Otto* v. *City of Boca Raton*, 41 F.4th 1271, 1274 (11th Cir. 2022) ("*Otto II*") (Grant, J., concurring in the denial of reh'g en banc) (cleaned up). Outside a narrow band of "historic and traditional categories long familiar to the bar," words are constitutionally protected speech. *United States* v. *Stevens*, 559 U.S. 460, 468 (2010) (cleaned up). No one has identified any separately identifiable conduct that Chiles and counselors like her engage in apart from their words, proving that restrictions like Colorado's target speech, not conduct.

This Court in *NIFLA* also went out of its way to note "the dangers of allowing the government to tell medical professionals what and what not to say to patients." App.104a (Hartz, J., dissenting) (quoting *NIFLA*, 585 U.S. at 771–72). "[I]n the fields of medicine and public health … information can save lives." *NIFLA*, 585 U.S. at 771 (cleaned up). This Court warned about regulating doctors' ability to "giv[e] advice to patients about the use of birth control devices" or "information about the use of condoms as a means of preventing the transmission of AIDS." *Id.* at 772. Yet if the banning of counseling "constitutes merely regulation of professional conduct," then so too would state laws prohibiting "treatment" that takes the form of discussions about birth control devices. App.105a (Hartz, J., dissenting). "But *NIFLA* … considered the speech involved in providing such 'medical treatment' to be protected by the First Amendment." App.106a. The Tenth Circuit's decision to hold otherwise is yet another affront to *NIFLA*.

NIFLA also stressed that the First Amendment doesn't have different rules for professionals. 585 U.S. at 768. Accord *303 Creative*, 600 U.S. at 600 (holding that the "First Amendment extends to all persons engaged in [speech], including those who seek profit"). The "same rules" apply whether the speech is uttered by a professional or a layperson. App.91a (Hartz, J., dissenting). Yet over and over, the Tenth Circuit invoked Chiles's state license to justify Colorado's censorship. *E.g.*, App.38a–50a.

Colorado's law could not treat conversations between a "sophomore psychology major" and her peers as regulable conduct, even though those conversations could mirror those between Chiles and her clients. *King*, 767 F.3d at 228. The distinction the Tenth Circuit drew was that Chiles, unlike a psychology student, "is a licensed professional counselor, a position earned after years of advanced education and licensure." App.44a. That distinction matters *only* if "professional speech should be treated differently under the First Amendment from identical speech by a nonprofessional[.]" App.102a (Hartz, J., dissenting). But that "fl[ies] in the face of" *NIFLA*. *Ibid*.

2. The Tenth Circuit's decision also flouts this Court's approach to drawing the speech/conduct line in First Amendment cases. For nearly a century, this Court has stressed that the important question is *what* the challenged law regulates in each case. *E.g.*, *Cantwell* v. *Connecticut*, 310 U.S. 296 (1940) (breach-of-peace statute applied to audio recording); *Terminiello* v. *City of Chi.*, 337 U.S. 1 (1949) (breach-of-peace statute as applied to address in an auditorium); *Hess* v. *Indiana*, 414 U.S. 105 (1973) (per

curiam) (disorderly conduct statute applied to words); *Bartnicki* v. *Vopper*, 532 U.S. 514 (2001) (anti-eavesdropping statute applied to audio recording).

If a law regulates conduct that "was *in part* initiated, evidenced, or carried out by means of language," then the law might burden speech only incidentally. *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949) (emphasis added). But if the "only 'conduct' which the State [seeks] to punish [is] the fact of communication," the statute regulates speech, not conduct. *Otto I*, 981 F.3d at 866 (quoting *Cohen* v. *California*, 403 U.S. 15, 18 (1971)). In short, the State must show that its regulation targets some "separately identifiable conduct." *Cohen*, 403 U.S. at 18.

Courts must consider the law's "effect, as applied, in a very practical sense—[and] to not follow whatever label a state professes." *Hines*, 117 F.4th at 777 (quoting *Thomas* v. *Collins*, 323 U.S. 516, 536 (1945)). Even if a law regulates conduct *generally*, that does not give the state a free pass to regulate speech *specifically*. There, too, the State must point to "separately identifiable conduct" before even trying to apply the law to speech. *Cohen*, 403 U.S. at 18.

Both *Cohen* and *Holder* prove the point. In *Cohen*, the government prosecuted someone for disturbing the peace by wearing a shirt with an offensive expletive. Even though "the speech satisfied all the elements of a criminal statute generally regulating conduct," App.96a (Hartz, J., dissenting), this Court treated it as speech, *Cohen*, 403 U.S. at 18.

In *Holder*, the challenged statute prohibited conduct generally—providing "material support" to certain organizations—but targeted speech as applied to plaintiffs who wanted to give those organizations "expert advice." 561 U.S. at 7, 21–22. Here, too, the government characterized the prohibited speech as conduct, but the Court rejected that word game: the only "conduct triggering coverage under the statute consist[ed] of communicating a message," and that was speech. *Id.* at 28. That holding applies equally to Colorado's law here.

Though the Tenth Circuit acknowledged that Colorado's law targets Chiles's "verbal language," it nonetheless held that her language becomes conduct because the law *generally* regulates conduct. App.46a. That's the same "maneuver" this Court "rejected" in *Cohen* and *Holder*. App.95a (Hartz, J., dissenting). And it's the same maneuver the Ninth Circuit adopted in *Pickup* before this Court denounced that decision in *NIFLA*.

3. Finally, the Tenth Circuit's decision cannot be reconciled with this Court's understanding of free speech guarantees more generally, reiterated most recently in *303 Creative*. The First Amendment is for all—it does not merely protect "*some* messages and *some* persons." 600 U.S. at 602. Yet the Tenth Circuit's opinion excludes some from constitutional protection.

Colorado's law prohibits a category of persons—licensed counselors—from using certain "words about sexuality and gender." *Otto I*, 981 F.3d at 864. Worse, it prohibits only certain *views* on those topics. Only if a counselor's views are "grounded in a particular

viewpoint about sex, gender, and sexual ethics" does the law apply. *Ibid.* The law goes out of its way to exempt speech with which the State agrees. That is an "egregious" violation of the First Amendment. *Rosenberger* v. *Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995).

The Tenth Circuit suggested that Chiles could engage in *some* speech adjacent to counseling. She remains free, the court said, to "share" what her counseling is, what her "views on" it are, and "who can legally" provide it (since she cannot). App.47a. That, too, radically departs from how this Court and other circuits view the First Amendment. "The First Amendment does not protect the right to speak *about* banned speech; it protects speech itself, no matter how disagreeable that speech might be to the government." *Otto I*, 981 F.3d at 863 (emphasis added).

Embedded in the Tenth Circuit's reasoning are the seeds of its own undoing. For an enforcement official to determine whether Chiles is permissibly "discussing" her views on sexuality and gender with a client or impermissibly advocating "change," that official would have to "examine the content of the message that is conveyed." *McCullen* v. *Coakley*, 573 U.S. 464, 479 (2014) (cleaned up). But that isn't drawing a line between speech and conduct—it's distinguishing between a permissible viewpoint and a disfavored one. The government ultimately decides the line. That's not only illogical—akin to modern-day alchemy—but it is also "unprincipled and susceptible to manipulation." *Wollschlaeger*, 848 F.3d at 1308 (cleaned up).

The Tenth Circuit here accepted an argument rejected in *303 Creative*. Both here and in *303 Creative*, Colorado insisted it was regulating conduct, not speech. But because the law there applied to words, the Court easily concluded that Colorado targeted "pure speech," 600 U.S. at 587, and rejected the dissent's characterization of the regulation of words as merely "incidental" burdens on "First Amendment liberties," *id.* at 599–600. "*All* manner of speech"—including "oral utterance[s]"—"qualify for the First Amendment's protections." *Id.* at 587 (emphasis added) (cleaned up).

As in *303 Creative*, Colorado intends "to force [a speaker] to convey a message she does not believe with the very purpose of eliminating ideas that differ from its own." 600 U.S. at 597 (cleaned up). But "no government may interfere with her desired message." *Id.* at 596 (cleaned up). The Tenth Circuit's contrary holding "is emblematic of an unfortunate tendency by some to defend First Amendment values only when they find the speaker's message sympathetic." *Id.* at 602. That holding requires immediate review.

III. The Tenth Circuit's decision has devastating and far-reaching consequences.

The question presented is critically important wholly apart from the need for circuit uniformity. Amidst an unprecedented mental-health crisis among this country's young people, the Tenth and Ninth Circuits' erroneous interpretation of the First Amendment prevents vulnerable individuals in many states from obtaining the counseling they desire and desperately need. These decisions also empower government censorship of professional speech more broadly.

There's an urgent need for counseling for those suffering from issues relating to gender and sexuality. Many have suggested that the answer lies with experimental drugs and surgeries. Yet the most comprehensive assessment of the risks and benefits of pediatric gender medicine to date found "remarkably weak" evidence for the safety and efficacy of this path. Cass Review at 13. That Review instead calls for a cautious, individualized approach to these issues that prioritizes counseling. But counseling cannot happen in the shadow of restrictions like Colorado's. As the Review noted, such restrictions have "left some clinical staff fearful" of "providing professional support" to young people at all. *Id.* at 202.

For many suffering young people, counseling like the kind that Chiles provides is crucial. Consider Brie Jentry's teenage daughter, Maxine, who struggled with gender dysphoria in her early teens. Rather than subject her daughter to "significant bodily harm," Brie "supported her in her discomfort." Heyer, *supra* at 88. Through therapy, Maxine "came to some self-understanding" and realized "[d]iscomfort about your body and sometimes dysphoria are a normal part of being a teenager and having your body change." *Id.* at 88–89. Now her "life is full and rich, and [she's] very glad [she] did not medically transition."[3] Yet Colorado and states like it give struggling teens like Maxine little other choice.

Or take Bree Stevens. She "was attacked and sexually assaulted by a young man" at age 15.

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[3] 4thWaveNow, *It's not conversion therapy to learn to love your body: A teen desister tells her story* (Aug. 28, 2019), https://perma.cc/TBN4-6JTF.

Changed Movement, https://perma.cc/9KNL-WBCT. "That experience left" her "with bruises, confusion, suicidal thoughts, self-harming behavior, self-hatred, and deep inner turmoil, including the belief that men were not safe." *Ibid.* She turned initially to a sexual relationship with a female friend to "feel safe again." *Ibid.* Yet as she "began to understand [her] deeper needs," she realized that a same-sex relationship wasn't what she wanted. *Ibid.* She "sought healing through Christian counselors"—which included "talk therapy"—and that "enabled [her] to resolve the hurts of [her] past while confronting what [she] had wrongly believed about womanhood and men." *Ibid.* In many places, this "journey of healing" that has allowed Bree to live "a life of joy, health, and wholeness" is illegal.

Or consider Ken Williams. He started "experiencing same-sex attraction[s]" in middle school, but "didn't want to have those desires." Changed Movement, https://perma.cc/BKC8-UAES. By age 17, this inner turmoil made him feel "so hopeless that [he] started planning [his] suicide." *Ibid.* Fortunately, he asked to see a "Christian counselor" instead, and those "five years of counseling saved [his] life." *Ibid.* Yet Ken could not have gotten this life-saving help in more than half the country.

The Tenth and Ninth Circuits' approach also has destructive consequences on the law more generally. Courts' "freewheeling" decisions to treat words as conduct is spreading beyond the counseling context. *United States* v. *Alvarez*, 567 U.S. 709, 722 (2012) (cleaned up). States across the country are targeting speech "under the guise" of regulating "professional []conduct." *Button*, 371 U.S. at 439. For example, California recently prohibited as "unprofessional conduct"

any "false or misleading information [i.e., disinformation] regarding … [COVID-19]." *Høeg* v. *Newsome*, 652 F. Supp. 3d 1172, 1179 (E.D. Cal. 2023) (quoting Cal. Bus. & Prof. Code § 2270). Engaging in "medical censorship," the State decides what is "misinformation," then suppresses that speech by calling it conduct and threatening the licenses and livelihoods of physicians who advocate disfavored science. Editorial Bd., *California Loses on Medical Censorship*, Wall St. J. (Jan. 30, 2023). Defending this censorship, California relies on *Pickup* and *Tingley* for the extraordinary proposition that what a doctor tells patients is "care," not speech. Appellees' Consolidated Answering Br., *McDonald* v. *Lawson*, Nos. 22-56220, 23-55069, 2023 WL 2465197, at *27 (9th Cir. 2023).

Similarly, New York recently defined a category of illegal "hateful conduct" to include "the use of a social media network to vilify, humiliate, or incite violence"—what one court held was not conduct but "speech." *Volokh* v. *James*, 656 F. Supp. 3d 431, 437, 442 (S.D.N.Y. 2023) (quoting N.Y. Gen. Bus. Law § 394-ccc(1)(a)).

Though these laws target speech, the Tenth and Ninth Circuits' reasoning would uphold them as regulating conduct, subjecting "wide swaths of protected speech … to regulation by the government." *Telescope Media Grp.* v. *Lucero*, 936 F.3d 740, 752 (8th Cir. 2019). If a counselor's speech can be transformed into conduct, so too can a doctor's speech about the best COVID treatments or a social media post about a controversial political issue. The censorship could even extend to "teaching or protesting," "[d]ebating," or "[b]ook clubs." *Otto I*, 981 F.3d at 865.

The Tenth Circuit insisted that counseling must qualify as conduct because "[t]he difference between skilled and inept talk therapy … can, in some cases, mean the difference between life and death." App.51a (quoting *Otto II*, 41 F.4th at 1292 (Rosenbaum, J., dissenting)). But that's no less true than "good or bad advice as to birth control or the use of condoms to prevent AIDS"—the very speech this Court protected in *NIFLA*. App.106a (Hartz, J., dissenting). To treat speech as conduct based on training and licensing does exactly what *NIFLA* forbade: giving the "States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." 585 U.S. at 773. People turn to many sources—from self-help books to ancient religious texts—to cope with their struggles, overcome their fears, and gain self-understanding. Yet in Colorado, minors who hold disfavored views about their gender identities cannot turn to those specifically trained and licensed to help them.

The merits of Chiles's counseling rests not with a court or legislature but with her clients and the "uninhibited marketplace of ideas." *NIFLA*, 585 U.S. at 772. Some government officials dislike the ideas that Chiles expresses, but it is in cases like this that "we must be *most* vigilant in adhering to constitutional principles." *Tingley II*, 57 F.4th at 1084–85 (Bumatay, J., dissenting from the denial of reh'g en banc). The "government cannot limit speech 'simply because society finds the idea itself offensive or disagreeable.'" *Id.* at 1084 (Bumatay, J., dissenting from the denial of reh'g en banc) (quoting *Texas* v. *Johnson*, 491 U.S. 397, 414 (1989)). Otherwise, the First Amendment will protect only "sympathetic"

speech—but "[a] commitment to speech for only *some* messages and *some* persons is no commitment at all." *303 Creative*, 600 U.S. at 602.

This Court has been clear: the First Amendment is not easily evaded by regulating speech "under the guise" of regulating conduct. *Button*, 371 U.S. at 439. And though "[t]he speech/conduct line is hard to draw," it is not new—nor even hard to discern here. Elena Kagan, *Regulation of Hate Speech and Pornography After* R.A.V., 60 U. Chi. L. Rev. 873, 884 (1993). The Tenth Circuit's failure to grapple with this distinction conflicts with this Court's precedents. Certiorari is warranted.

IV. This case is an ideal vehicle to resolve the circuit conflict and provide critical clarity to First Amendment freedoms.

This case presents a focused and compelling vehicle to resolve the entrenched circuit split and clarify First Amendment freedoms for professionals.

Further percolation will not help. The issue is straightforward, the lines have been clearly drawn, and the circuit split is now firmly rooted around conflicting readings of this Court's precedents. Two circuits treat counseling conversations as speech; two do not. Absent this Court's immediate review, this split will not resolve but will only deepen. Neither side represents an outlier that could self-correct upon further review. The disagreement among the circuits is real, will not go away, and will continue hurting countless individuals until this Court steps in.

Other cases involving professional speech will not resolve this controversy. *NIFLA* itself denounced the dangers of censorship in medicine, but that has not stopped lower courts from upholding counseling restrictions. What's more, lower courts' treatment of these censorship laws created—and now has revived—the so-called professional speech doctrine that *NIFLA* tried to abolish. The Court should take this opportunity to clarify that the First Amendment applies in the counseling room.

Finally, while further percolation will not aid this Court's analysis, it will result in real harm to vulnerable populations. As this Court has recognized, "information can save lives," and that applies all the more amidst a national mental-health crisis. *NIFLA*, 585 U.S. at 771. Further delay in resolving this ripe circuit split and addressing unconstitutional counseling censorship is unthinkable.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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NOVEMBER 2024

APPENDIX

APPENDIX TABLE OF CONTENTS

PUBLISH

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

KALEY CHILES,

Plaintiff – Appellant/Cross - Appellee,

v.

PATTY SALAZAR, in her official capacity as Executive Director of the Department of Regulatory Agencies; REINA SBARBARO-GORDON, in her official capacity as Program Director of the State Board of Licensed Professional Counselor Examiners and the State Board of Addiction Counselor Examiners; JENNIFER LUTTMAN, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners; AMY SKINNER, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners; KAREN VAN ZUIDEN, in her official

Nos. 22-1445 & 23-1002

capacity as a member of the State Board of Licensed Professional Counselor Examiners; MARYKAY JIMENEZ, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners; KALLI LIKNESS, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners; SUE NOFFSINGER, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners; RICHARD GLOVER, in his official capacity as a member of the State Board of Licensed Professional Counselor Examiners; ERKIA HOY, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners; KRISTINA DANIEL, in her official capacity as a member of the State Board of Addiction Counselor Examiners; HALCYON DRISKELL, in her official capacity as a member of the State Board of Addiction

Counselor Examiners; CRYSTAL KISSELBURGH, in her official capacity as a member of the State Board of Addiction Counselor Examiners; ANJALI JONES, in her official capacity as a member of the State Board of Addiction Counselor Examiners; THERESA LOPEZ, in her official capacity as a member of the State Board of Addiction Counselor Examiners; JONATHAN CULWELL, in his official capacity as a member of the State Board of Addiction Counselor Examiners,

Defendants – Appellees/Cross - Appellants.

INSTITUTE FOR FAITH AND FAMILY; ASSOCIATIONS OF CERTIFIED BIBLICAL COUNSELORS; INSTITUTE FOR JUSTICE; ETHICS AND PUBLIC POLICY CENTER, ASSOCIATIONS OF CERTIFIED BIBLICAL COUNSELORS; ETHICS AND PUBLIC POLICY

CENTER; INSTITUTE FOR FAITH AND FAMILY; INSTITUTE FOR JUSTICE; AMERICAN ASSOCIATION OF SUICIDOLOGY; AMERICAN FOUNDATION FOR SUICIDE PREVENTION; TREVOR PROJECT, INC.; DISTRICT OF COLUMBIA; STATE OF CALIFORNIA; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MASSACHUSETTS; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF OREGON; STATE OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF WASHINGTON; ONE COLORADO; CARLOS A. BALL; ASHUTOSH BHAGWAT; MICHAEL BOUCAI; ALAN E. BROWNSTEIN; ERIN CARROLL; ERWIN CHEMERINSKY; MICHAEL

C. DORF; THOMAS E. KADRI; SUZETTE M. MALVEAUX; TONI MASSARO; NEIL RICHARDS; JOCELYN SIMONSON; SCOTT SKINNER-THOMPSON; CATHERINE SMITH; KYLE COURTENAY VELTE; ARI E. WALDMAN,

Amici Curiae.

Appeal from the United States District Court for the District of Colorado (D.C. No. 1:22-CV-02287-CNS-STV)

Cody S. Barnett of Alliance Defending Freedom, Lansdowne, Virginia (John J. Bursch of Alliance Defending Freedom, Washington, D.C., Barry K. Arrington of Arrington Law Firm, Wheat Ridge, Colorado, and Shaun Pearman of Pearman Law Firm, Wheat Ridge, Colorado, with him on the briefs), for Plaintiff-Appellant / Cross-Appellee.

Helen Norton, Deputy Solicitor General (Philip J. Weiser, Attorney General, Shannon Wells Stevenson, Solicitor General, Robert Finke, First Assistant Attorney General, Bianca E. Miyata, Assistant Solicitor General, Janna K. Fischer, Assistant Solicitor General, Abby Chestnut, Assistant Attorney General, and Brianna S. Tancher, Assistant Attorney General, Office of the Attorney General for the State

of Colorado, with her on the briefs), Denver, Colorado, for Defendants-Appellees / Cross-Appellants.

Peter Breen of Thomas More Society, Chicago, Illinois, and Michael G. McHale of Thomas More Society, Omaha, Nebraska, filed an amicus curiae brief for the Ethics and Public Policy Center, in support of Plaintiff-Appellant.

Edward C. Wilde and Michael S. Overing of the Law Offices of Michael S. Overing, APC, Pasadena, California, filed an amicus curiae brief for the Associations of Certified Biblical Counselors, in support of Plaintiff-Appellant.

Deborah J. Dewart, Hubert, North Carolina, filed an amicus curiae brief for the Institute for Faith and Family, in support of Plaintiff-Appellant.

Paul M. Sherman and Robert J. McNamara of the Institute for Justice, Arlington, Virginia, filed an amicus curiae brief for the Institute for Justice, in support of Neither Party.

Shannon Minter and Christopher Stoll of the National Center for Lesbian Rights, San Francisco, California, and Craig M. Finger and Amalia Sax-Bolder of Brownstein Hyatt Farber Schreck, LLP, Denver, Colorado, filed an amicus curiae brief for One Colorado, in support of Appellees.

Jessica Ring Amunson and Jessica Sawadogo of Jenner & Block LLP, Washington, D.C., and Deanne M. Ottaviano of the American Psychological Association, Washington, D.C., filed an amicus curiae brief for the American Psychological Association, in support of Defendants-Appellees.

Shireen A. Barday and Mark C. Davies of Pallas Partners (US) LLP, New York, New York; Kate Googins and Caelin Moriarity Miltko of Gibson, Dunn & Crutcher LLP, Denver, Colorado; Abbey Hudson and Theo Takougang of Gibson, Dunn & Crutcher LLP, Los Angeles, California; Kelly E. Herbert of Gibson, Dunn & Crutcher LLP, New York, New York; and Brandon Willmore of Gibson, Dunn & Crutcher LLP, Washington, D.C., filed an amicus curiae brief for the Trevor Project, Inc., American Foundation for Suicide Prevention, and American Association of Suicidology, in support of Defendants-Appellees / Cross-Appellants.

Luke A. Barefoot and Thomas S. Kessler of Cleary Gottlieb Steen & Hamilton LLP, New York, New York, filed an amicus curiae brief for Constitutional Law & First Amendment Scholars, in support of Defendant-Appellees.

Robert W. Ferguson, Attorney General, Cristina Sepe, Deputy Solicitor General, Alexia Diorio, Assistant Attorney General, Sarah E. Smith, Assistant Attorney General, and Sierra McWilliams, Assistant Attorney General, Office of the Attorney General for the State of Washington, Olympia, Washington; Rob Bonta, Attorney General, Office of the Attorney General for the State of California, Oakland, California; William Tong, Attorney General, Office of the Attorney General for the State of Connecticut, Hartford, Connecticut; Kathleen Jennings, Attorney General, Office of the Attorney General for the State of Delaware, Wilmington, Delaware; Brian L. Schwalb, Attorney General, Office of the Attorney General for the District of Columbia, Washington, D.C.; Anne E. Lopez, Attorney General,

Office of the Attorney General for the State of Hawai'i, Honolulu, Hawaii; Kwame Raoul, Attorney General, Office of the Attorney General for the State of Illinois, Chicago, Illinois; Aaron M. Frey, Attorney General, Office of the Attorney General for the State of Maine, Augusta, Maine; Andrea Joy Campbell, Attorney General, Office of the Attorney General for the State of Massachusetts, Boston, Massachusetts; Dana Nessel, Attorney General, Office of the Attorney General for the State of Michigan, Lansing, Michigan; Keith Ellison, Attorney General, Office of the Attorney General for the State of Minnesota, St. Paul, Minnesota; Aaron D. Ford, Attorney General, Office of the Attorney General for the State of Nevada, Carson City, Nevada; Raúl Torrez, Attorney General, Office of the Attorney General for the State of New Mexico, Santa Fe, New Mexico; Matthew J. Platkin, Attorney General, Office of the Attorney General for the State of New Jersey, Trenton, New Jersey; Letitia James, Attorney General, Office of the Attorney General for the State of New York, Albany, New York; Ellen F. Rosenblum, Attorney General, Office of the Attorney General for the State of Oregon, Salem, Oregon; Michelle A. Henry, Attorney General, Office of the Attorney General for the State of Pennsylvania, Harrisburg, Pennsylvania; Peter F. Neronha, Attorney General, Office of the Attorney General for the State of Rhode Island, Providence, Rhode Island; Charity R. Clark, Attorney General, Office of the Attorney General for the State of Vermont, Montpelier, Vermont; and Joshua L. Kaul, Attorney General, Office of the Attorney General for the State of Wisconsin, Madison, Wisconsin, filed an amicus curiae brief for Washington, California, Connecticut,

Delaware, the District of Columbia, Hawai'i, Illinois, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Wisconsin, in support of Defendants-Appellees.

Before **HARTZ**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

ROSSMAN, Circuit Judge.

Colorado's Minor Conversion Therapy Law (MCTL), Colo. Rev. Stat § 12-245-224(1)(t)(V), prohibits mental health professionals from providing "conversion therapy" to minor clients. "Conversion therapy," as we will explain, is defined by statute, *see* Colo. Rev. Stat. § 12-245-202(3.5), but generally refers to therapeutic attempts by a mental health professional to change a client's sexual orientation or gender identity. Plaintiff-Appellant Kaley Chiles, a licensed professional counselor in Colorado, brought a pre-enforcement challenge under 42 U.S.C. § 1983, contending the MCTL violates the Free Speech and Free Exercise clauses of the First Amendment.[1] She sought a preliminary injunction to enjoin enforcement of the MCTL. The district court denied the motion, and Ms. Chiles now appeals. Defendants-Appellees, the Executive Director of the Colorado Department of Regulatory Agencies, and members of the Colorado

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[1] Ms. Chiles refers to the MCTL in her Verified Complaint as the "Counseling Censorship Law."

Board of Licensed Professional Counselor Examiners and the Board of Addiction Counsel Examiners, cross-appeal the district court's determination that Ms. Chiles has standing. Exercising jurisdiction under 28 U.S.C. § 1292(a)(1), we affirm the district court in full.

I

Our opinion proceeds as follows. First, we describe the legal, factual, and procedural background underlying these appeals. Next, we address the threshold issue of whether Ms. Chiles has standing to pursue her pre-enforcement First Amendment challenge. We conclude she does. We then consider whether the district court abused its discretion in finding Ms. Chiles failed to show a likelihood of success on the merits of her First Amendment claims. As we explain, we discern no error.

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This appeal concerns one aspect of Colorado's Mental Health Practice Act, which applies to those who are licensed, registered, or certified in the state to practice psychology, social work, marriage and family therapy, professional counseling, psychotherapy, and addiction counseling. *See* Colo. Rev. Stat. § 12-245-101(1).[2] Through the Mental Health Practice Act, Colorado has established state

[2] We refer broadly to the category of professionals regulated under this Title as mental health providers or mental health professionals. *See* Colo. Rev. Stat. Ann. § 12-1-103 ("Profession or occupation" is defined as "an activity subject to regulation by a part or article of this title 12.").

authorities[3] to license and regulate mental health professionals. Colo. Rev. Stat. § 12-245-101(2). The statutory scheme also prohibits mental health professionals from securing licensure through fraudulent means and performing services outside of the provider's area of training. *See* Colo. Rev. Stat § 12-245-224(h), (s).

In 2019, Colorado added the MCTL to the Mental Health Practice Act. Under the MCTL, a mental health professional may not engage in "[c]onversion therapy with a client who is under eighteen years of age." Colo. Rev. Stat. § 12-245-224(1)(t)(V). "Conversion therapy"[4] is defined in the MCTL as

> 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. . . .
>
> "Conversion therapy" does not include practices or treatments that provide . . . [a]cceptance, support, and understanding for the facilitation of an individual's coping, social support, and identity exploration and development, including sexual-orientation-

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[3] These state authorities include the Board of Licensed Professional Counselor Examiners and the Board of Addiction Counsel Examiners, members of which are Defendants in this appeal. *See* Colo. Rev. Stat. § 12-245-101(2).

[4] Ms. Chiles has alleged the term "conversion therapy" is "no longer scientifically or politically tenable." App. at 36 ¶ 81.

> neutral interventions to prevent or address unlawful conduct or unsafe sexual practices, as long as the counseling does not seek to change sexual orientation or gender identity; or . . . [a]ssistance to a person undergoing gender transition.

Colo. Rev. Stat. § 12-245-202(3.5). Anyone "engaged in the practice of religious ministry" is exempt from complying with the Mental Health Practice Act—including the MCTL. Colo. Rev. Stat. § 12-245-217(1).

Violating the MCTL has consequences in Colorado. Boards overseeing mental health professionals may "take disciplinary actions or bring injunctive actions, or both." Colo. Rev. Stat. § 12-245-101(2). If a mental health professional violates the MCTL, the statute authorizes the overseeing board to send the provider a letter of admonition or concern; deny, revoke, or suspend the provider's license; issue a cease-and-desist order; or impose an administrative fine on the provider of up to $5,000 per violation. Colo. Rev. Stat. § 12-245-225. Defendants have never enforced the MCTL against anyone.

2[5]

Ms. Chiles is a licensed professional counselor[6] in Colorado. In 2014, she graduated with a Master of Arts in clinical mental health. Since then, Ms. Chiles "has engaged in providing counseling and coaching to

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[5] We derive these facts from Ms. Chiles's complaint and motion for a preliminary injunction.

[6] A "licensed professional counselor means a professional counselor who practices professional counseling and who is licensed pursuant to this part 6." Colo. Rev. Stat. § 12-245-601.

clients, court ordered coparenting classes, parent coordinator/decision making, and court ordered substance-abuse evaluations." App. at 42 ¶ 105. She began her career with an interest in providing mental health care to "underserved populations" who she perceived "as having issues that are resistant to typical counseling or that prevented them from benefitting from typical talk therapy." App. at 44 ¶ 113. Ms. Chiles specialized in trauma and treated addictions and personality disorders. "Recently she has taken more interest in specializations such as eating disorders, gender dysphoria and sexuality." App. at 44 ¶ 113.

In her complaint, Ms. Chiles alleged she works at Deeper Stories Counseling in Colorado Springs, where her duties "include counseling assigned clients." App. at 42 ¶ 106. At Deeper Stories, clinicians may limit or expand their caseloads depending on interest and specialties. Ms. Chiles is a practicing Christian and works with "adults who are seeking Christian counseling and minors who are internally motivated to seek counseling." App. at 41–42 ¶¶ 104, 106.

Some clients find Ms. Chiles through referrals from churches or word-of-mouth. These clients "uphold a biblical worldview which includes the concepts that attractions do not dictate behavior, nor do feelings and perceptions determine identity." App. at 43–44 ¶ 110. And they "believe their faith and their relationships with God supersede romantic attractions and that God determines their identity according to what He has revealed in the Bible rather than their attractions or perceptions determining their identity." App. at 43–44 ¶ 110. According to Ms.

Chiles, clients with "same-sex attractions or gender identity confusion" who "prioritize their faith above their feelings are seeking to live a life consistent with their faith," and not being able to do so leads to "internal conflicts, depression, anxiety, addiction, eating disorders and so forth." App. at 44 ¶ 111.

Ms. Chiles uses only talk therapy in her counseling practice.[7] Ms. Chiles claims that, using talk therapy, she

> does not seek to "cure" clients of same-sex attractions or to "change" clients' sexual orientation; she seeks only to assist clients with their stated desires and objectives in counseling, which sometimes includes clients seeking to reduce or eliminate unwanted sexual attractions, change sexual behaviors, or grow in the experience of harmony with one's physical body.

App. at 38 ¶ 87. And she "does not try to help minors change their attractions, behavior, or identity, when her minor clients tell her they are not seeking such change." App. at 43 ¶ 109.

B

In September 2022, Ms. Chiles sued in federal

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[7] Ms. Chiles alleges she does not use "aversive techniques." App. at 36 ¶ 82. She does not specify in her complaint what that term means, but the district court concluded aversive 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. at 60 n.2 (citation omitted). Ms. Chiles has not challenged the district court's stated understanding of "aversive techniques."

court in the District of Colorado alleging the MCTL violates the Free Speech Clause and Free Exercise Clause of the First Amendment on its face and as applied to her. "The purpose of this action," she explained, "is to seek a declaration that the [MCTL] is unconstitutional and to enjoin the Defendants from enforcing this unconstitutional law against Plaintiff."[8] App. at 19 ¶ 36.

Ms. Chiles alleged that, before Colorado enacted the MCTL, she "helped clients freely discuss sexual attractions, behaviors, and identity by talking with them about gender roles, identity, sexual attractions, root causes of desires, behavior and values." App. at 37 ¶ 83. "However, after the mandates of the [MCTL] were imposed on her," Ms. Chiles "has been unable to fully explore certain clients' bodily experiences around sexuality and gender and how their sensations, thoughts, beliefs, interpretations, and behaviors intersect." App. at 44 ¶ 113. While "she has continued to have these discussions freely with some clients," she has "intentionally avoided conversations" with other clients "that may be perceived as violating" the MCTL. App. at 37 ¶ 83. Ms. Chiles maintains, because of the MCTL, she has been "forced to deny voluntary counseling that fully explores sexuality and gender to her clients and potential clients in violation of her and her clients' sincerely held religious beliefs." App. at 46 ¶ 120.

Ms. Chiles moved for a preliminary injunction to enjoin Colorado from enforcing the MCTL. She did not

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[8] Ms. Chiles also brought a First Amendment claim on behalf of her minor clients and a Fourteenth Amendment due process claim. Neither is at issue on appeal.

request a hearing and relied wholly on the allegations in her verified complaint. Defendants opposed the motion and submitted documentary evidence.[9] The district court denied relief. Both parties timely appealed.[10]

We first consider whether Ms. Chiles has Article III standing to bring her pre-enforcement First Amendment claims. *See Kerr* v. *Polis*, 20 F.4th 686, 692 (10th Cir. 2021) (describing Article III standing as a "threshold question of subject-matter jurisdiction"). We next consider whether the district court abused its discretion by finding Ms. Chiles failed to demonstrate a likelihood of success on the merits of those claims.

II

"Standing is a prerequisite to a federal court's exercise of Article III jurisdiction, 'serv[ing] to identify those disputes which are appropriately resolved through the judicial process.'" *Peck* v. *McCann*, 43 F.4th 1116, 1129 (10th Cir. 2022)

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[9] This evidence included: (1) a declaration by Judith Glassgold, Psy.D, a licensed psychologist and lecturer at Rutgers University, who "specialize[s] in psychotherapy with lesbian, gay, bisexual, and transgender (LGBT) issues working with children, adolescents, and adults," Supp. App. at 99; (2) a report by the American Psychological Association (APA) Task Force titled *Appropriate Therapeutic Responses to Sexual Orientation*, Supp. App. at 170; and (3) a report by the Substance Abuse and Mental Health Services Administration (SAMHSA) titled *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth*, Supp. App. at 310.

[10] We appreciatively note the substantial involvement of amici in this appeal. We have reviewed all these briefs and will discuss some of them in our analysis.

(quoting *Lujan* v. *Defs. of Wildlife*, 504 U.S. 555, 560 (1992)). A plaintiff bears the burden of establishing Article III standing by showing (1) an "injury in fact" that is "concrete and particularized" and "actual or imminent"; (2) the injury is "fairly . . . trace[able] to the challenged action of the defendant," and (3) the injury is likely to be "redressed by a favorable decision" by the court. *Lujan*, 504 U.S. at 560–61 (quoting *Simon* v. *E. Ky. Welfare Rts. Org.*, 426 U.S. 26, 41–42 (1976)).

In resolving the motion for a preliminary injunction, the district court first considered whether Ms. Chiles has standing to proceed in federal court on her constitutional claims.[11] The district court concluded Ms. Chiles "established the injury in fact requirement," the MCTL's alleged violation of her First Amendment rights "is undisputedly traceable to the statute itself," and the alleged constitutional violations "could be redressed by [a court's] invalidation of the law." App. at 67 & n.5 (quoting *Peck*, 43 F.4th at 1129).

On appeal, Defendants do not contest Ms. Chiles satisfies the traceability and redressability requirements. *See* App. at 67 n.5 (explaining "the statute's alleged violation of [Ms. Chiles's] First Amendment rights is undisputedly traceable to the statute itself and could be redressed by [a court's]

[11] In opposing Ms. Chiles's preliminary injunction motion, Defendants contended Ms. Chiles lacked standing "to bring claims on behalf of alleged minor clients, or potential future minor clients." Supp. App. at 95. The district court concluded Ms. Chiles lacked standing to assert claims on behalf of her minor clients. Ms. Chiles's does not challenge that aspect of the district court's ruling.

invalidation of the law" (quoting *Peck*, 43 F.4th at 1129)). Guided by the parties' arguments, therefore, we focus our inquiry on the first prong and ask whether Ms. Chiles has alleged an injury in fact. As we explain, she has.

Standing in the First Amendment context is assessed with some leniency, thereby "facilitating pre-enforcement suits" like the one brought by Ms. Chiles. *Peck*, 43 F.4th at 1129. "[A] plaintiff bringing a First Amendment claim can show standing by alleging . . . 'a credible threat of future prosecution' plus an 'ongoing injury resulting from the statute's chilling effect on [her] desire to exercise [her] First Amendment rights.'"[12] *Id.* (quoting *Ward* v. *Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003)). When pre-enforcement relief is based on an alleged "chilling effect," a plaintiff must come forward with

> (1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so because of a credible threat that the statute will be

[12] We have also held a plaintiff bringing a pre-enforcement First Amendment claim may demonstrate standing "by alleging 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by statute.'" *Peck* v. *McCann*, 43 F.4th 1116, 1129 (10th Cir. 2022) (quoting *Ward* v. *Utah*, 321 F.3d 1263, 1267 (10th Cir. 2003)). We do not consider this possible path to standing because Ms. Chiles has not relied on it.

enforced.

Initiative & Referendum Inst. v. *Walker*, 450 F.3d 1082, 1089 (10th Cir. 2006) (en banc). These elements of the required injury-in-fact showing are known as the "*Walker* test."[13] *See Peck*, 43 F.4th at 1130.

Defendants contest the district court's conclusion under the *Walker* test. We "review the district court's rulings on standing de novo." *See Aptive Env't, LLC* v. *Town of Castle Rock, Colo.*, 959 F.3d 961, 973 (10th Cir. 2020) (quoting *Niemi* v. *Lasshofer*, 770 F.3d 1331, 1344 (10th Cir. 2014)). "It is axiomatic that standing is evaluated as of the time a case is filed." *Rio Grande Found.* v. *Oliver*, 57 F.4th 1147, 1161 (10th Cir. 2023). "[T]he proof required to establish standing increases as the suit proceeds," *id.* (quoting *Davis* v. *Fed. Election Comm'n*, 554 U.S. 724, 734 (2008)), and "[a]t

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[13] In evaluating whether Ms. Chiles established Article III standing, the district court relied solely on the allegations in her verified complaint. *See* App. at 64 n.4 (construing Ms. Chiles's verified complaint, which was submitted under penalties of perjury, as an affidavit for the purpose of analyzing the *Walker* factors). Neither Ms. Chiles nor the Defendants take issue with the district court's approach, which we conclude was permissible in this case. *See Citizen Ctr.* v. *Gessler*, 770 F.3d 900, 909, 913 (10th Cir. 2014) (evaluating allegations in complaint when assessing whether plaintiff satisfied *Walker* test); *Hobby Lobby Stores, Inc.* v. *Sebelius*, 723 F.3d 1114, 1146 (10th Cir. 2013) ("[T]he government nowhere contested the factual adequacy or accuracy of [plaintiff's] allegations, and given that those allegations were established through a verified complaint, they are deemed admitted for preliminary injunction purposes."), *aff'd sub nom. Burwell* v. *Hobby Lobby Stores, Inc.*, 573 U.S. 682 (2014); *see also Hall* v. *Bellmon*, 935 F.2d 1106, 1111 (10th Cir. 1991) ("The plaintiff's complaint may also be treated as an affidavit if it alleges facts based on the plaintiff's personal knowledge and has been sworn under penalty of perjury.").

the pleading stage, general factual allegations of injury resulting from the defendant's conduct may suffice," *id.* (quoting *Lujan*, 504 U.S. at 561).[14] Applying these standards here, we discern no error in the district court's conclusion that Ms. Chiles has standing under Article III.

A

We first ask whether Ms. Chiles alleged she previously "engaged in the type of speech affected by the challenged government action."[15] *Walker*, 450 F.3d at 1089. The district court found the allegations in Ms. Chiles's complaint "met her burden of showing that she has in the past engaged in the type of speech 'affected' by the [MCTL]." App. at 64 (quoting *Peck*, 43 F.4th at 1129–30).

Defendants do not dispute Ms. Chiles is generally subject to Colorado's regulations on mental health professionals, including the MCTL. But Ms. Chiles cannot satisfy the first *Walker* factor, Defendants insist, because she has not practiced "conversion therapy" under the MCTL. Ms. Chiles has alleged she discusses her clients' bodily experiences or unwanted

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[14] Ms. Chiles moved for a preliminary injunction before Defendants filed a responsive pleading.

[15] We emphasize the threshold justiciability inquiry and the ultimate First Amendment merits analysis are not coextensive. Any conclusion that Ms. Chiles has previously "engaged in the type of speech affected by the challenged government action," *Walker*, 450 F.3d at 1089, does not bear on whether the MCTL regulates speech in violation of the First Amendment. *See Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 585 U.S. 755, 768 (2018) ("*NIFLA*"); *see also Warth* v. *Seldin*, 422 U.S. 490, 500 (1975) (explaining "standing in no way depends on the merits of the plaintiff's contention that particular conduct is illegal").

sexual attractions during therapy, which the MCTL permits. According to Defendants, there is no allegation Ms. Chiles has attempted or purported to change an individual's sexual orientation or gender identity, which the MCTL prohibits.

Ms. Chiles's pleadings are somewhat "vague" on the matter, as Defendants correctly observe. Defs.' Reply Br. at 17. But "the inquiry before the district court was—and our question is—whether Appellant[] ha[s] a personal stake in a case or controversy at the time [she] filed [her] complaint." *Rio Grande Found.*, 57 F.4th at 1162. We consider this question "in light of all the evidence we now have, construed in the light most favorable to Appellant[] and making reasonable inferences in [her] favor." *Id.* Construing Ms. Chiles's allegations under this standard, we agree with the district court the first *Walker* prong is satisfied.

A review of the verified complaint in the totality supports the conclusion that Ms. Chiles has engaged in conduct she believes the MCTL proscribes. *See Virginia* v. *Am. Booksellers Ass'n, Inc.*, 484 U.S. 383, 392 (1988) (describing the injury in fact requirement as having been met where "the law is aimed directly at plaintiffs, who, *if their interpretation of the statute is correct*, will have to take . . . compliance measures or risk criminal prosecution" (emphasis added)). For example, Ms. Chiles alleged "[m]any of her clients uphold a biblical worldview," and these clients "believe their faith and their relationships with God supersede romantic attractions and that God determines their identity according to what He has revealed in the Bible rather than their attractions or perceptions determining their identity." App. at 43–44 ¶ 110. She "does not try to help minors change

their attractions, behavior, or identity, *when her minor clients tell her they are not seeking such change*." App. at 43 ¶ 109 (emphasis added). Construed in the light most favorable to Ms. Chiles, this allegation suggests she has previously tried to help her minor clients change their sexual orientation or gender identity when they *have* told her they are seeking such a change. Before the MCTL, she "helped clients freely discuss sexual attractions, behaviors, and identity by talking with them about gender roles, identity, sexual attractions, root causes of desires, behavior and values." App. at 37 ¶ 83.

But since Colorado enacted the MCTL, Ms. Chiles claims she "has been unable to fully explore certain clients' bodily experiences around sexuality and gender and how their sensations, thoughts, beliefs, interpretations, and behaviors intersect." App. at 44 ¶ 113. Ms. Chiles has thus met her burden of providing "evidence that in the past [she] ha[s] engaged in the type of speech affected by the challenged government action." *Walker*, 450 F.3d at 1089.

B

We next consider whether Ms. Chiles has adequately stated a "present desire . . . to engage in the restricted speech." *Walker*, 450 F.3d at 1089; *see also Peck*, 43 F.4th at 1130. We have held the second prong of the *Walker* test "is not meant to be difficult to satisfy." *Rio Grande Found.*, 57 F.4th at 1163. "Even in the absence of direct evidence, circumstances from which a court can infer a present desire . . . suffice." *Id.* at 1164.

The district court concluded Ms. Chiles satisfied

this prong because she alleged wanting to "assist clients with their stated desires," which include clients "seeking to reduce or eliminate unwanted sexual attractions." App. at 65 (quoting App. at 38 ¶ 87). Defendants argue these allegations are insufficient. "The practices Ms. Chiles describes wanting to engage in while counseling children are either not prohibited by the [MCTL]," Defendants maintain, "or her allegations are too general to allow any meaningful assessment of whether they would be prohibited." Defs.' Resp. Br. at 21. In response, Ms. Chiles insists she has adequately stated a desire to help clients meet voluntary, self-selected goals, including changing their gender identity or sexual orientation. Engaging in such counseling would violate the MCTL, she claims. We agree with Ms. Chiles.

The verified complaint says Ms. Chiles seeks to "assist clients with their stated desires and objectives in counseling," and those goals sometimes include "seeking to reduce or eliminate unwanted sexual attractions, change sexual behaviors, or grow in the experience of harmony with one's physical body." App. at 38 ¶ 87. Ms. Chiles also alleged her "[c]lients who have same-sex attractions or gender identity confusion and who also prioritize their faith above their feelings are seeking to live a life consistent with their faith," App. at 44 ¶ 111, and she "wants to provide counseling, including certain types of voluntary counseling related to sexuality and gender, to minor clients and potential clients" but is prohibited from doing so by the MCTL, App. at 45 ¶¶ 116–17.

Construing the verified complaint in the light

most favorable to Ms. Chiles and drawing reasonable inferences in her favor, Ms. Chiles has satisfied the second prong of the *Walker* test. A contrary conclusion on the record before us would contravene "the leniency we generally apply to First Amendment standing inquiries." *Peck*, 43 F.4th at 1131–32; *see also id.* at 1131 ("We thus decline to require categorically that . . . First Amendment plaintiffs know exactly what they would say and when they want to say it in order to challenge a speech-restrictive law.").

C

Finally, we examine whether Ms. Chiles has satisfied the third prong of the *Walker* test, which asks whether a plaintiff has alleged "a credible threat that the statute will be enforced." *Peck*, 43 F.4th at 1132 (internal quotation marks omitted); *see also Walker*, 450 F.3d at 1089. Ms. Chiles admits Colorado has never actually enforced the MCTL. Even so, the district court properly found Ms. Chiles has shown a credible threat of enforcement.

"The mere presence on the statute books of an unconstitutional statute, in the absence of enforcement or credible threat of enforcement, does not entitle anyone to sue, even if they allege an inhibiting effect on constitutionally protected conduct prohibited by the statute." *Winsness* v. *Yocom*, 433 F.3d 727, 732 (10th Cir. 2006). Instead, "to satisfy Article III, the plaintiff's expressive activities must be inhibited by 'an objectively justified fear of real consequences.'" *Id.* (quoting *D.L.S.* v. *Utah*, 374 F.3d 971, 975 (10th Cir. 2004)). "This Court has identified 'at least three factors to be used in determining a

credible fear of prosecution: (1) whether the plaintiff showed past enforcement against the same conduct; (2) whether authority to initiate charges was not limited to a prosecutor or an agency and, instead, any person could file a complaint against the plaintiffs; and (3) whether the state disavowed future enforcement.'" *Peck*, 43 F.4th at 1132 (quoting *303 Creative LLC* v. *Elenis*, 6 F.4th 1160, 1174 (10th Cir. 2021), *overruled by* 600 U.S. 570 (2023)).

The district court found the first two factors favored Defendants. But the third factor, the court concluded, weighed heavily in support of Ms. Chiles because Colorado has never disavowed punishing those who violate the MCTL. On appeal, Defendants essentially challenge the weight assigned by the district court to the disavowal factor. They argue "[i]n the absence of the other two factors—past enforcement and broad enforcement authority like a private right of action—whether the state has disavowed future enforcement should be of little weight to a reviewing court." Defs.' Resp. Br. at 24. Otherwise, in their view, any plaintiff could establish a credible fear of enforcement "simply by showing there is a law on the books that the plaintiff may violate." Defs.' Resp. Br. at 24. We are not persuaded.

The third prong of the *Walker* test "is not supposed to be a difficult bar for plaintiffs to clear in the First Amendment pre-enforcement context." *Peck*, 43 F.4th at 1133 (collecting cases). In *Peck*, we reasoned "the state's staunch refusal to disavow prosecution has heavy weight" where "[t]here is nothing, not even their word," to prevent prosecutors from bringing criminal charges against someone who violates a state non-disclosure statute. *Id.* The focus

on whether the relevant authority has disavowed enforcement is applicable here. "[A] refusal to provide . . . an assurance" that a statute will not be enforced "undercuts Defendants' argument that [a plaintiff's] perception of a threat of prosecution is not objectively justifiable." *Id.* Reviewing *de novo*, we agree with the district court this factor supports Ms. Chiles. *See id.* at 1132–33 (finding plaintiff satisfied the third prong of the *Walker* test where the past enforcement factor "slightly" favored plaintiff, the private right of action factor did not favor plaintiff, and the credible threat factor favored plaintiff).

We conclude Ms. Chiles has shown an injury in fact for the purpose of demonstrating Article III standing to assert her pre-enforcement First Amendment challenge. We now proceed to the merits of Ms. Chiles's appeal.

III

Ms. Chiles asks us to reverse the district court's order denying her motion for a preliminary injunction. "A preliminary injunction is an extraordinary remedy, the exception rather than the rule." *U.S. ex rel. Citizen Band Potawatomi Indian Tribe of Okla.* v. *Enter. Mgmt. Consultants, Inc.*, 883 F.2d 886, 888 (10th Cir. 1989). To prevail on a preliminary injunction motion, the moving party must prove: "(1) that she's 'substantially likely to succeed on the merits,' (2) that she'll 'suffer irreparable injury' if the court denies the injunction, (3) that her 'threatened injury' (without the injunction) outweighs the opposing party's under the injunction, and (4) that the injunction isn't 'adverse to the public interest.'" *Free the Nipple-Fort Collins* v. *City of Fort Collins, Colo.*,

916 F.3d 792, 797 (10th Cir. 2019) (quoting *Beltronics USA, Inc.* v. *Midwest Inventory Distrib., LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009)). "[T]he final two factors 'merge when the Government is the opposing party.'" *Denver Homeless Out Loud* v. *Denver, Colo.*, 32 F.4th 1259, 1278 (10th Cir. 2022) (quoting *Nken* v. *Holder*, 556 U.S. 418, 435 (2009)). Here, where a requested injunction would "change[] the status quo," the preliminary injunction motion is considered "disfavored," and "the moving party faces a heavier burden on the likelihood-of-success-on-the-merits and the balance-of-harms factors."[16] *Free the Nipple-Fort*

[16] Ms. Chiles argues her preliminary injunction request should not be considered disfavored. She insists a heavier burden only applies if, unlike here, the injunction "alters the status quo *and* affords the movants all the relief they could recover at the conclusion of a full trial on the merits." Pl.'s Reply Br. at 34. Ms. Chiles makes this argument for the first time in her reply brief, so we decline to consider it. *See Wheeler* v. *Comm'r*, 521 F.3d 1289, 1291 (10th Cir. 2008) ("[I]ssues raised by an appellant for the first time on appeal in a reply brief are generally deemed waived."); *see also Silverton Snowmobile Club* v. *U.S. Forest Serv.*, 433 F.3d 772, 783 (10th Cir. 2006) (describing the "general rule that appellate courts will not entertain issues raised for the first time on appeal in an appellant's reply [brief]" (quoting *Anderson* v. *U.S. Dep't of Labor*, 422 F.3d 1155, 1174 (10th Cir. 2005)) (internal quotation marks omitted)).

Even if we reached this belated contention, we would find it unavailing. "[A] disfavored injunction may exhibit any of three characteristics: (1) it mandates action (rather than prohibiting it), (2) it changes the status quo, or (3) it grants all the relief that the moving party could expect from a trial win." *Free the Nipple-Fort Collins*, 916 F.3d at 797. Enjoining the MCTL would disturb the status quo by rendering unenforceable a state law that was "in effect for nearly 4 years before Ms. Chiles filed her Complaint in the District Court." Def's. Resp. Br. at 26; *see also Schrier* v. *Univ. of Colo.*, 427 F.3d 1253, 1260 (10th Cir. 2005) ("In

Collins, 916 F.3d at 797. To prevail, the movant thus "must make a 'strong showing' that these [factors] tilt in her favor." *Id.* (quoting *Fish* v. *Kobach*, 840 F.3d 710, 724 (10th Cir. 2016)).

"District courts have discretion over whether to grant preliminary injunctions, and we will disturb their decisions only if they abuse that discretion." *Courthouse News Serv.* v. *N.M. Admin. Off. of Cts.*, 53 F.4th 1245, 1254 (10th Cir. 2022) (quoting *Free the Nipple-Fort Collins*, 916 F.3d at 796). "A district court's decision crosses the abuse-of-discretion line if it rests on an erroneous legal conclusion or lacks a rational basis in the record." *Id.* (quoting *Free the Nipple-Fort Collins*, 916 F.3d at 796). "In reviewing 'a district court's decision to grant or deny a preliminary injunction, we thus examine the court's factual findings for clear error and its legal conclusions de novo.'" *Id.* at 1254–55 (quoting *Free the Nipple-Fort Collins*, 916 F.3d at 796–97). Ms. Chiles does not contend the district court's factual findings are clearly erroneous, so we evaluate the legal issues before us based on the findings made by the district court on the record before it.[17]

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determining the status quo for preliminary injunctions, this court looks to the reality of the existing status and relationship between the parties . . . ." (quoting 11A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2948 (2d ed. 1995)). In any event, our disposition does not depend on assigning a heavier burden to Ms. Chiles.

[17] The courts of appeal "do not sit as self-directed boards of legal inquiry and research." *Colorado* v. *U.S. Env't Prot. Agency*, 989 F.3d 874, 885 (10th Cir. 2021) (quoting *Nat'l Aeronautics & Space Admin.* v. *Nelson*, 562 U.S. 134, 147 n.10 (2011)). This accords with the "principle of party presentation," which is "a

fundamental premise of our adversarial system." *Id.* at 885. But the dissent discusses at length what appears to be independent research into various studies of sexuality, gender identity, and treatments for gender dysphoria in minors. The dissent details perceived pitfalls of peer-reviewed publications in these areas and concludes courts should "be skeptical" of such studies. Dissent at 24. We cannot agree.

Our singular task as an appellate court is to review the judgment of the district court according to the applicable standard of review. "[W]e do not find facts on appeal . . . ." *Green* v. *Post*, 574 F.3d 1294, 1304 n.9 (10th Cir. 2009). That is the work of the trial court. Here, as we discuss, the district court found conversion therapy is harmful to minors. We review that determination for clear error, meaning "we may not reverse '[i]f the district court's account of the evidence is plausible in light of the record viewed in its entirety . . . even [if] . . . had [we] been sitting as the trier of fact, [we] would have weighed the evidence differently.'" *Johnson* v. *City of Cheyenne*, 99 F.4th 1206, 1229 (10th Cir. 2024) (alterations in original) (quoting *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573–74 (1985)). Ms. Chiles does not make a clear error argument; nor does the dissent suggest the district court clearly erred. Bound by the standard of review, mindful of our limited appellate role, and guided by party presentation, we see no basis for skepticism.

Even if the dissent offers its research only "to indicate the sort of analysis that needs to be conducted by the judiciary, particularly the trial courts," that is, at best, unnecessary and at worst, risky. Dissent at 37. This risk is borne out in the dissent's independent research and analysis. For example, the dissent discusses an extra-record source—a recent article from the *New York Times*—that apparently says "medical authorities in Finland, Sweden, Denmark, and Norway, have, purportedly based on experience in those countries, restricted medical treatment (as opposed to psychotherapy) of minors to enhance gender transition." Dissent at 27–28 (citing Azeen Ghorayshi, *Youth Gender Medications Limited in England, Part of Big Shift in Europe*, N.Y. Times (April 9, 2024), https://www.nytimes.com/2024/04/09/health/europe-transgender-youth-hormone-treatments.html [https://perma.cc/D68U-EWRK]). The article differentiates between different forms of gender-affirming care

The district court found Ms. Chiles had not met her burden of showing a likelihood of success on the merits of her First Amendment free speech and free exercise claims. Reviewing each claim in turn, we agree.

A

"The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits the enactment of laws 'abridging the freedom of speech.'" *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015) (quoting U.S. Const. amend. I). "[A]s a general matter, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content." *United States* v. *Stevens*, 559 U.S. 460, 468 (2010) (quoting *Ashcroft* v. *ACLU*, 535 U.S. 564, 573 (2002)). It is well settled "if a law targets protected speech in a content-based manner," it is subject to strict scrutiny. *Animal Legal Def. Fund* v. *Kelly*, 9 F.4th 1219, 1227 (10th Cir. 2021), *cert. denied*, 142 S.

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for minors, which include puberty blockers, hormone therapy, and psychotherapy. Ghorayshi, *supra*. Finland, for example, actually "recommend[s] psychotherapy as the primary treatment for adolescents with gender dysphoria." *Id.* The questions raised in the article about the efficacy of hormone treatments administered to minors, then, do not apply to the efficacy of psychotherapy.

Why bother to clarify the record? Because the details matter. Overlooking the nuances between different types of gender-affirming care confuses the issues presented and risks undermining the integrity of judicial decision-making in these already challenging cases. We will leave it to the parties to develop the evidence and to the district court to assess its relevance and reliability.

Ct. 2647 (2022). However, "the First Amendment does not prevent restrictions directed at . . . conduct from imposing incidental burdens on speech." *Id.* (quoting *Sorrell* v. *IMS Health Inc.*, 564 U.S. 552, 567 (2011)). Under these circumstances, the law must withstand a "lower level of scrutiny." *Nat'l Inst. of Fam. & Life Advocs.* v. *Becerra*, 585 U.S. 755, 765 (2018) (*NIFLA*).

The key precedent for our purposes is *NIFLA*. There, the Supreme Court considered a challenge to a California law regulating crisis pregnancy centers, which are "pro-life (largely Christian belief-based) organizations that offer a limited range of free pregnancy options, counseling, and other services to individuals that visit a center." 585 U.S. at 761 (citation omitted). The law required crisis pregnancy centers to "disseminate a government-drafted notice on site."[18] *Id.* at 763. This notice read, in part,

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[18] The law at issue in *NIFLA* imposed notice requirements on two types of pregnancy centers: licensed pregnancy centers and unlicensed pregnancy centers. 585 U.S. at 761–62. The licensed or unlicensed distinction, without more, is immaterial for our purposes. But only *NIFLA*'s analysis of the notice requirement for licensed crisis pregnancy centers bears on this case.

In analyzing the notice requirement for unlicensed pregnancy centers, the Supreme Court observed "[t]he services that trigger the unlicensed notice . . . do not require a medical license." 585 U.S. at 777. The Court analyzed that notice requirement assuming, without deciding, it was a disclosure requirement regulating commercial speech. *See id.* at 776, 778. In the instant case, all agree the MCTL is not a disclosure law requiring "professionals to disclose factual, noncontroversial information in their 'commercial speech'" contemplated by this portion of *NIFLA*. *Id.* at 768. The Supreme Court's analysis of the notice requirement for unlicensed pregnancy centers therefore does not aid our analysis.

"California has public programs that provide immediate free or low-cost access to comprehensive family planning services (including all FDA-approved methods of contraception), prenatal care, and abortion for eligible women." *Id.*

Petitioners—crisis pregnancy centers and an organization composed of crisis pregnancy centers—sued, alleging the notice requirement violated the Free Speech Clause of the First Amendment. *Id.* at 765. The district court denied petitioners' motion for preliminary injunction, and the Ninth Circuit affirmed, holding "petitioners could not show a likelihood of success on the merits." *Id.* The Ninth Circuit concluded the notice requirement "survives the 'lower level of scrutiny' that applies to regulations of 'professional speech.'" *Id.* (quoting *Nat'l Inst. of Fam.& Life Advocs.* v. *Harris*, 839 F.3d 823, 845 (9th Cir. 2016)).

The Supreme Court reversed. The Court first observed that its "precedents have long protected the First Amendment rights of professionals." *Id.* at 771. And the Court declined to treat "professional speech as a unique category that is exempt from ordinary First Amendment principles." *Id.* at 773; *see also id.* at 768 ("This Court's precedents do not recognize such a tradition for a category called 'professional

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By contrast, *NIFLA* considered whether the notice requirement for licensed facilities was a regulation of "professional conduct . . . incidentally involv[ing] speech." *Id.* at 768. This question is at the heart of Ms. Chiles's appeal. We thus focus our analysis on the portions of *NIFLA* analyzing the notice requirement for licensed crisis pregnancy centers.

speech.'").[19]

NIFLA reaffirmed the Constitution "does not prevent restrictions directed at . . . conduct from imposing incidental burdens on speech." *Id.* at 769 (quoting *Sorrell*, 564 U.S. at 567). The Court acknowledged it has "afforded less protection for professional speech in two circumstances—neither of which turned on the fact that professionals were speaking." *Id.* at 768. "First, our precedents have applied more deferential review to some laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech'" (the first *NIFLA* context).[20] *Id.* Second, "States may

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[19] The Supreme Court clarified this point because the Third, Fourth, and Ninth Circuits had "recognized 'professional speech' as a separate category of speech that is subject to different rules." *NIFLA*, 585 U.S. at 767 (citing cases). In deciding *NIFLA*, the Ninth Circuit relied on *Pickup* v. *Brown*, 740 F.3d 1208, 1228 (9th Cir. 2014), which had held "First Amendment protection of a professional's speech is somewhat diminished." *See Nat'l Inst. of Fam. & Life Advocs.* v. *Harris*, 839 F.3d 823, 834 (9th Cir. 2016) (citing *Pickup*, 740 F.3d at 1208). The Supreme Court's decision in *NIFLA* abrogated *Pickup*. *NIFLA*, 585 U.S. at 767–68.

[20] *NIFLA* cited several cases to illustrate this first context. *See NIFLA*, 585 U.S. at 768 (citing *Zauderer* v. *Off. of Disciplinary Couns. of Sup. Ct. of Ohio*, 471 U.S. 626, 651 (1985) (holding "an advertiser's rights are adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception of consumers"); *Milavetz, Gallop & Milavetz, P.A.* v. *United States*, 559 U.S. 229, 250 (2010) (considering whether rule requiring debt relief agencies to make certain disclosures in advertisements is unjustified or unduly burdensome); *Ohralik* v. *Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (explaining "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity")).

regulate professional conduct, even though that conduct incidentally involves speech" (the second NIFLA context).[21] *Id.*

In support of the second *NIFLA* context, relevant here, the Supreme Court cited *Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.), *overruled on other grounds by Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215 (2022). *NIFLA*, 585 U.S. at 769–70.[22] In *Casey*, petitioners brought a

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[21] The dissent insists our position contravenes *NIFLA* because, in our colleague's view, we are "saying that professional speech should be treated differently from other speech." Dissent at 16. That is not what we are saying. Nor could we.

NIFLA makes clear that speech uttered by professionals has been afforded "less protection" under the First Amendment in only two circumstances. *NIFLA*, 585 U.S. at 768. "Outside of the two contexts," however, the Court has acknowledged strict scrutiny will usually apply. *See id.* at 771 (citing cases in which restrictions on speech by professionals fell "[o]utside of the[se] two contexts" and accordingly were subject to strict scrutiny). We heed the Court's instruction that the two contexts identified in *NIFLA* do not turn on the fact that "professionals were speaking." *NIFLA*, 585 U.S. at 768. Rather, 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 *NIFLA* contexts. In applying *NIFLA*, we must first ask whether the challenged regulation falls inside or outside the two contexts identified by the Court. Only by doing so may we determine the requisite level of scrutiny to apply to the MCTL.

[22] The Supreme Court marshalled *Casey* as the primary example of an incidental speech restriction falling within the second *NIFLA* context. *See NIFLA*, 585 U.S. at 768–70. However, the Court also cited *Ohralik*, 436 U.S. at 456, in support of the proposition that "under our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech." *NIFLA*, 585 U.S. at 768; *see also*

First Amendment free speech challenge to a Pennsylvania law requiring physicians to obtain informed consent from patients before they could perform an abortion. 505 U.S. at 844, 884. The Supreme Court upheld the informed consent requirement, reasoning in a joint opinion[23] that the law regulated speech "only as part of the practice of medicine, subject to reasonable licensing and regulation by the State." *Id.* at 884. "We see no constitutional infirmity," the Court held, "in the

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Ohralik, 436 U.S. at 457 (finding "[i]n-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component"). When later elaborating on this line of precedent, the Court likewise noted "[l]ongstanding torts for professional malpractice, for example, 'fall within the traditional purview of state regulation of professional conduct.'" *NIFLA*, 585 U.S. at 769 (quoting *NAACP* v. *Button*, 371 U.S. 415, 438 (1963)); *see also Button*, 371 U.S. at 419, 444 (finding state ban against "the improper solicitation of any legal or professional business" was not supported by a state "regulatory interest . . . which can justify the broad prohibitions which it has imposed").

[23] The joint opinion in *Casey* was authored by Justices O'Connor, Kennedy, and Souter. *See Planned Parenthood of Southeastern Pa.* v. *Casey*, 505 U.S. 833, 843 (1992), *overruled on other grounds by Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215 (2022). "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of five Justices, 'the holding of the Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds.'" *Marks* v. *United States*, 430 U.S. 188, 193 (1977) (quoting *Gregg* v. *Georgia*, 428 U.S. 153, 169 n.15 (1976)). "Although parts of *Casey*'s joint opinion were a plurality not joined by a majority of the Court, the joint opinion is nonetheless considered the holding of the Court . . ., as the narrowest position supporting the judgment." *June Med. Servs. L. L. C.* v. *Russo*, 140 S. Ct. 2103, 2135 n.1 (2020) (citing *Marks*, 430 U.S. at 193), *abrogated on other grounds by Dobbs*, 597 U.S. at 215.

requirement that the physician provide the information mandated by the State here." *Id.*

The Court concluded the notice requirement in *NIFLA* was unlike the informed consent requirement in *Casey*. *NIFLA*, 585 U.S. at 770. The notice requirement was "not tied to a [medical] procedure at all." *Id.* It applied "to all interactions between a covered facility and its clients, regardless of whether a medical procedure is ever sought, offered, or performed." *Id.* And it provided "no information about the risks or benefits" of any procedures a facility may provide. *Id.* The notice requirement did not qualify as a "regulation of professional conduct," the Court determined, and necessarily could not fall within the context of professional conduct regulations only "incidentally involv[ing] speech." *Id.* at 768, 770.

B

The district court held the MCTL falls within the second *NIFLA* context. In reaching that conclusion, the district court reasoned the MCTL regulates the professional conduct of mental health professionals, narrowly applies to their "therapeutic 'practice[s] or treatment[s],'" and "[a]ny speech affected by the [MCTL] is incidental to the professional conduct it regulates." *See* App. at 72, 75–76.

On appeal, Ms. Chiles acknowledges the MCTL regulates mental health professionals in Colorado. But the MCTL "regulates speech at its core," she insists, and "suppresses [her] speech directly, not incidentally." Opening Br. at 27. Defendants urge affirmance, insisting the law "regulates the practice of licensed mental health professionals, implicating speech only as part of the practice of mental health

care." Defs.' Resp. Br. at 30.

To resolve Ms. Chiles's appellate challenge, we apply "ordinary First Amendment principles," and proceed from the controlling premise that there is no tradition categorically insulating "professional speech" from First Amendment protection.[24] *NIFLA*, 585 U.S. at 768, 774. Colorado's power to regulate the counseling profession does not authorize the state to regulate all speech uttered by a counseling professional. We reject any contrary notion.

Mindful of these first principles, we proceed to examine whether the MCTL falls within the second *NIFLA* context.[25] It does. The statute is part of Colorado's regulation of the healthcare profession and, as the district court correctly found, applies to mental health professionals providing a type of prohibited treatment to minor patients. On the record before us, we agree the MCTL regulates professional conduct that "incidentally involves speech." *NIFLA*, 585 U.S. at 768. Ms. Chiles has advanced no contrary

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[24] We note the Supreme Court in *NIFLA* recognized "neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles." 585 U.S. at 773. But the Court "d[id] not foreclose the possibility that some such reason exists." *Id.* The parties do not advance any such reasons in this case, and we decline to answer this question *sua sponte*. Contrary to the dissent's assertion, no part of our holding or reasoning depends on treating professional speech as a separate category under the First Amendment.

[25] This case does not involve the first *NIFLA* context because, as we noted, the MCTL does not require professionals to disclose factual, noncontroversial information in commercial speech. *See NIFLA*, 585 U.S. at 768. No one suggests otherwise.

availing argument, as we will explain.

1

We first ask whether the MCTL regulates professional conduct. The district court concluded (1) the MCTL regulates mental health professionals acting in their professional capacity, and (2) the aspect of their professional conduct being regulated is a "therapeutic 'practice[] or treatment[].'" *See* App. at 72.

a

We first consider the district court's conclusion that the MCTL "regulates the[] professional conduct" of "specifically credentialed professionals." App. at 72. The MCTL applies to:

> licensed psychologists and psychologist candidates, licensed social workers and clinical social worker candidates, licensed marriage and family therapists and marriage and family therapist candidates, licensed professional counselors and licensed professional counselor candidates, unlicensed psychotherapists, and licensed and certified addiction counselors and addiction counselor candidates, . . . and mental health professionals who have been issued a provisional license.

Colo. Rev. Stat § 12-245-101(2). The MCTL prohibits these mental health professionals from "engag[ing] in . . . [c]onversion therapy with a client who is under eighteen years of age." Colo. Rev. Stat. § 12-245-224(1)(t)(V). From the text of the statute, it is apparent the MCTL regulates mental health

professionals practicing their profession.[26]

The MCTL falls within the more comprehensive Mental Health Practice Act, which regulates an array of conduct engaged in by mental health professionals when treating clients. *See* Colo. Rev. Stat. §§ 12-245-101–12-245-806.[27] The stated purpose of the Mental Health Practice Act is "to safeguard the public health, safety, and welfare of the people of this state" and "to protect the people of this state against the unauthorized, unqualified, and improper application" of mental healthcare. Colo. Rev. Stat. § 12-245-101(1). To that end, the Mental Health Practice Act prohibits a range of conduct by mental health professionals deemed an "improper application" of mental healthcare, such as: acting "in a manner that does not meet the generally accepted standards of the profession[]"; "perform[ing] services outside of the person's area of . . . experience"; and using "rebirthing

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[26] The dissent refers to "counseling" provided by myriad sources, including "family, friends, clergy, [and] social media." Dissent at 2. The case before us only concerns counseling provided by licensed mental health professionals.

[27] The Mental Health Practice Act, in turn, is part of Title 12 of the Colorado Revised Statutes, which regulates a broad spectrum of "Professions and Occupations." For example, Articles 100 through 170 of Title 12 regulate "Business Professions and Occupations," including accountants (Article 100), electricians (Article 115), engineers (Article 120), mortuaries (Article 135), and plumbers (Article 155). *See* Colo. Rev. Stat. §§ 12-100-101–12-170-117. Articles 200 through 315 of Title 12 regulate "Health-Care Professions and Occupations," such as dentists (Article 220), physicians assistants (Article 240), nurses (Article 255), pharmacists (Article 280), and physical therapists (Article 285). The Mental Health Practice Act, contained in Article 245 of Title 12, is among the "Health-Care Professions and Occupations" regulations.

as a therapeutic treatment," which involves "restraint[s] that create[] a situation in which a patient may suffer physical injury or death." Colo. Rev. Stat. § 12-245-224(1)(g)(I), (h), (t)(IV). The subject of these regulations is the professional care that mental health providers give their patients. That is, undoubtedly, professional conduct.

Our conclusion also finds support in the MCTL's legislative history, which the district court found instructive. In opposing Ms. Chiles's preliminary injunction motion, Defendants pointed to a statement by one of the MCTL's sponsors, Colorado Senator Stephen Fenberg, who explained Colorado enacted the MCTL "because all of the prevailing science and modern medicine tells us that not only does this practice [of conversion therapy] not work, but it . . . actually harms young people." Supp. App. at 86. The district court made a factual finding that "Colorado considered the body of medical evidence" demonstrating the harms of conversion therapy before passing the MCTL. *See* App. at 78. Ms. Chiles does not challenge this factual finding, the legislative history upon which it is based, or offer any contrary evidence. The record confirms the Colorado legislature determined the practice of conversion therapy constituted an "improper application" of professional counseling. Constitutional Law & First Amendment Scholars Amicus Br. at 22–23. And the MCTL's prohibition on the practice of conversion therapy by therapists treating minor clients "fall[s] under the . . . umbrella of professional conduct [regulations] for mental health professionals," as Defendants explain. Def's. Resp. Br. at 31.

There is a long-established history of states

regulating the healthcare professions. "[F]rom time immemorial," states have enacted regulations to "secure . . . against the consequences of ignorance and incapacity" by medical professionals. *Dent* v. *West Virginia*, 129 U.S. 114, 122 (1889); *see also Watson* v. *Maryland*, 218 U.S. 173, 176 (1910) ("It is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health. There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine."). "American laws to control the quality of medical service [date back to] the mid-1600s." Washington, California, Connecticut, Delaware, the District of Columbia, Hawaii, Illinois, Maine, Massachusetts, Michigan, Minnesota, Nevada, New Mexico, New Jersey, New York, Oregon, Pennsylvania, Rhode Island, Vermont, and Wisconsin (Twenty States) Amicus Br. at 21; *see also* One Colorado Amicus Br. at 10. This historical tradition of regulation is unsurprising because medical treatment provided to the public must fall within the accepted standard of care for the profession. *See L.W. ex rel. Williams* v. *Skrmetti*, 83 F.4th 460, 473 (6th Cir. 2023) ("State and federal governments have long played a critical role in regulating health and welfare, . . . [and] have an abiding interest 'in protecting the integrity and ethics of the medical profession . . . .'" (quoting *Washington* v. *Glucksberg*, 521 U.S. 702, 731 (1997))); *see*, *e.g.*, *Crane* v. *Johnson*, 242 U.S. 339, 340, 343 (1917) (upholding medical licensing requirement challenged by "drugless practitioner" who "does not employ either medicine, drugs, or surgery in his practice" but

instead "employ[s] faith, hope, and the processes of mental suggestion"); *Del Castillo* v. *Sec'y, Fla. Dep't of Health*, 26 F.4th 1214, 1225–26 (11th Cir. 2022) (upholding state licensing requirements for nutritionists and noting the legislature found "the *practice* of . . . nutrition counseling by unskilled and incompetent practitioners presents a danger to the public health and safety"), *cert. denied sub nom. Del Castillo* v. *Ladapo*, 143 S. Ct. 486 (2022). As the dissent appropriately puts it, "when the evidence of [a counseling method's] ineffectiveness or harm is strong enough," mental health providers "may properly be subject to sanction, from lawsuit to loss of license and perhaps more." Dissent at 3.

We affirm the district court's conclusion that the MCTL regulates the professional conduct of mental health providers in Colorado.

b

The district court next found talk therapy provided by mental health professionals is a medical treatment. According to the district court, "[w]hat licensed mental health providers do during their appointments with patients for compensation under the authority of a state license is treatment." App. at 75 (quoting *Tingley* v. *Ferguson*, 47 F.4th 1055, 1082 (9th Cir. 2022), *cert. denied*, 601 U.S. ----, 144 S. Ct. 33 (2023)); *see also* App. at 75 n.8; Supp. App. at 188 (APA Task Force Report describing "psychoanalysis and behavior therapy" as "types of therapeutic orientation"). The district court further concluded the MCTL's prohibition on administering conversion therapy to minors is a regulation of a "healthcare treatment." *See* App. at 75 (quoting *Otto* v. *City of*

Boca Raton, Fla., 41 F.4th 1271, 1292 (11th Cir. 2022) (Rosenbaum, J., dissenting)). We agree.

Conversion therapy is defined by the MCTL as "any practice or treatment" by a mental health professional "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." Colo. Rev. Stat. § 12-245-202(3.5)(a).

Ms. Chiles insists this statutory definition, which plainly says therapy is treatment, is merely a "labeling game." Opening Br. at 21 (citation omitted). Even if the government refers to talk therapy as a treatment, Ms. Chiles maintains the MCTL "regulates speech at its core." Opening Br. at 27. She explains she only uses words when counseling clients, but "Colorado cannot end-run the First Amendment" simply by relabeling her speech as conduct. Opening Br. at 16; *see also* Institute for Faith and Family Amicus Br. at 15 (contending "[t]he government plays word games, attempting to regulate speech by improperly relabeling it as conduct" (internal quotation marks and citation omitted)). She likewise "contests the conflation of her speech with 'medical treatment.'" Opening Br. at 23 n.4. In her view, "[t]he conversations she has with clients are 'not medical at all' but are 'a client-directed conversation consisting entirely of speech.'" Opening Br. at 23 n.4 (quoting *Otto* v. *City of Boca Raton, Fla.*, 981 F.3d 854, 866 n.3 (11th Cir. 2020)). Ms. Chiles compares the professional counseling services she provides to conversations a "sophomore psychology major" could have with a fellow student, which "[n]o one" would

label as medical treatment or professional conduct." Opening Br. at 23 n.4. These arguments are wholly unpersuasive.

Ms. Chiles is a licensed professional counselor, a position earned after years of advanced education and licensure. In her complaint, she distinguishes herself as a professional who treats "co-occurring clinical issues such as addictions, attachment, and . . . personality disorders." App. at 36 ¶ 83. Ms. Chiles's clients present to her with "depression, anxiety, addiction, eating disorders, and so forth" and "seek[] resolution of such turmoil" through her counseling. App. at 44 ¶ 111. Ms. Chiles is obviously treating patients, as her own allegations make clear.

Ms. Chiles does not dispute her counseling services fall under the ambit of Colorado's Mental Health Practice Act, which regulates "the *treatment* [provided] to assist individuals or groups to alleviate behavioral and mental health disorders." *See* Colo. Rev. Stat. § 12-245-202(14)(a) (emphasis added); *see also id.* § 12-245-101(1). Nor does she dispute that mental health professionals provide "therapeutic interventions" meant to safeguard patients' health. *See* American Psychological Association (APA) Amicus Br. at 21–22. Ms. Chiles describes her talk-based counseling services as providing "vital mental health care" to her clients. App. at 14 ¶ 1. "The relationship between a mental health professional and her client," Ms. Chiles says in her complaint, "has always been based on a *deeply held trust* from which a *critical therapeutic alliance* forms." App. at 14 ¶ 1 (emphasis added). Similarly, as Defendants persuasively point out, the counseling relationship between provider and patient involves special

privileges, a power differential, and a financial arrangement. Such a relationship bears no resemblance to an exchange between a "sophomore psychology major" and her peers. *See* Opening Br. at 23 n.4. Talk therapy is a treatment, not an informal conversation among friends. *See Lowe* v. *S.E.C.*, 472 U.S. 181, 232 (1985) (White, J., concurring) ("One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession.").

Ms. Chiles treats her patients in counseling sessions where she provides talk therapy. And the MCTL applies to mental health professionals while practicing their profession—which is treating patients.

2

That the MCTL is a law regulating the conduct of mental health professionals is only part of the inquiry. We still must consider whether the MCTL "incidentally involves speech," as the district court determined, or if the law regulates "speech as speech," as Ms. Chiles claims. *NIFLA*, 585 U.S. at 768, 770. "The constitutional right of free expression is powerful medicine in a society as diverse and populous as ours." *Cohen* v. *California*, 403 U.S. 15, 24 (1971). We admit it may not always be easy to "locate the point where regulation of a profession leaves off and prohibitions on speech begin." *Lowe*, 472 U.S. at 232; *see also NIFLA*, 585 U.S. at 769 ("While drawing the line between speech and conduct can be difficult, this Court's precedents have long

drawn it."). But here, the boundaries are precisely drawn and readily navigable.

As the statutory text makes plain, the MCTL regulates the provision of a therapeutic modality—carried out through use of verbal language—by a licensed practitioner authorized by Colorado to care for patients. In this way, the MCTL is unlike the notice requirement in *NIFLA*, which the Supreme Court found regulated "speech as speech." *NIFLA*, 585 U.S. at 770. Recall, the notice requirement in *NIFLA* applied in a blanket fashion to covered facilities providing pregnancy-related services. *Id.* at 763. The required notice was "not tied to a [medical] procedure at all" and "applie[d] to all interactions between a covered facility and its clients, regardless of whether a medical procedure [wa]s ever sought, offered, or performed." *Id.* at 770. Here, by contrast, the MCTL prohibits a particular mental health treatment provided by a healthcare professional to her minor patients.

The MCTL does not regulate expression. It is the practice of conversion therapy—not the discussion of the subject by the mental health provider—that is a "[p]rohibited activit[y]" under the MCTL.[28] *See* Colo.

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[28] According to the dissent, our holding today means "any speech within th[e] field [of professional counseling] can be regulated, without the usual protection of speech under the First Amendment, as incidental to that conduct." Dissent at 5. And the dissent insists deleterious consequences are sure to follow. *See*, *e.g.*, Dissent at 6 (asserting the "government could simply enact legislation prohibiting obstruction of the work of the agency and then penalize criticism of the agency by a member of the public as incidental to preventing obstruction"), 12 ("[A]ll the government needs to do to regulate speech without worrying

Rev. Stat. § 12-245-224. The MCTL rests on the very principle rightfully urged by the dissent: the government cannot restrict any speech uttered by professionals simply by relabeling it conduct.

Ms. Chiles may, in full compliance with the MCTL, share with her minor clients her own views on conversion therapy, sexual orientation, and gender identity. She may exercise her First Amendment right to criticize Colorado for restricting her ability to administer conversion therapy. She may refer her minor clients to service providers outside of the regulatory ambit who can legally engage in efforts to change a client's sexual orientation or gender identity. *See* Colo. Rev. Stat. § 12-245-217(1) (exempting "[a] person engaged in the practice of religious ministry" from complying with the Mental Health Practice Act). And once a minor client reaches the age of majority, Ms. Chiles may provide conversion therapy to that client. The only conduct prohibited is providing what the dissent agrees is a treatment to minor clients. *See* Dissent at 15.

Conant v. *Walters*, a case cited by Ms. Chiles, is instructive by contrast. *See* Opening Br. at 20–21 (citing 309 F.3d 629 (9th Cir. 2002), *cert. denied*, 540 U.S. 946 (2003)). There, a federal policy prohibited doctors from "*recommending* or prescribing" medical marijuana to patients. *Conant*, 309 F.3d at 632 (emphasis added). The Ninth Circuit held the policy did not survive First Amendment scrutiny. *Id.* at 639.

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about the First Amendment is put it within a category . . . that includes conduct and declare that any regulation of speech within the category is merely incidental to regulating the conduct."). Neither is true, as our analysis confirms.

Crucial to the Ninth Circuit's reasoning was that even the "recommendation" of marijuana to a patient was prohibited by the policy, chilling the exercise of a doctor's "right to explain the medical benefits of marijuana to patients." *Id.* at 638. Here, as Defendants explain, "a mental health professional like Ms. Chiles is free to tell any minor client that conversion therapy may serve their goals and refer the client to a religious minister who can provide that service." Def's. Resp. Br. at 46. The MCTL permits mental health professionals "to have that conversation with their minor clients" but prohibits them from providing the conversion therapy treatment itself to minors. Def's. Resp. Br. at 46. As the district court put it, "[a]ny speech affected by the [MCTL] is incidental to the professional conduct it regulates." App. at 75–76. That is correct.

Our conclusion is fully consistent with *Casey*, the sole decision the Supreme Court used as an example of a regulation within *NIFLA*'s second context. *See NIFLA*, 585 U.S. at 769–70. The informed consent requirement in *Casey* required a physician to inform a patient seeking an abortion "of the nature of the procedure, the health risks of the abortion and of childbirth, and the probable gestational age of the unborn child." *Casey*, 505 U.S. at 881 (internal quotation marks omitted). "To be sure," the joint opinion acknowledged, "the physician's First Amendment rights not to speak [were] implicated" by the informed consent law. *Id.* at 884. However, the medical professional's speech was implicated "only as part of the practice of medicine," which is, of course, "subject to reasonable licensing and regulation by the State." *Id.* Like the law in *Casey*, the MCTL

implicates mental health professionals' speech only as part of their practice of mental health treatment. Under *NIFLA*, this is precisely the type of regulation that "regulate[s] professional conduct . . . incidentally involv[ing] speech." 585 U.S. at 768; *see also Del Castillo*, 26 F.4th at 1226 (acknowledging nutritional counseling "involves some speech," but finding the state's regulation on nutritional counseling by dieticians involves speech only as "an incidental part of regulating the profession's conduct").

"The power of government to regulate the professions is not lost whenever the practice of a profession entails speech."[29] *Lowe*, 472 U.S. at 228 (White, J., concurring). Rather, "it has never been deemed an abridgement of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or

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[29] Of course, the tradition of state regulation of the professions is not limited to the medical profession. As Amici Constitutional & First Amendment Scholars point out, for instance, the Supreme Court has upheld several regulations of the legal profession, even though those regulations involve lawyers' speech. Constitutional & First Amendment Scholars Amicus Br. at 11–12; *see*, *e.g.*, *Sheppard* v. *Maxwell*, 384 U.S. 333, 363 (1966) (holding lawyers' communications to the press that "affect[] the fairness of a criminal trial [are] not only subject to regulation, but [are] highly censurable and worthy of disciplinary measures"); *Gentile* v. *State Bar of Nev.*, 501 U.S. 1030, 1072, 1075 (1991) (holding a lawyer's communications "could be limited" where the lawyer's speech presents a "substantial likelihood of material prejudice" to a pending case); *Ohralik*, 436 U.S. at 457 (holding "[i]n-person solicitation by a lawyer of remunerative employment is a business transaction in which speech is an essential but subordinate component" and is subject to a "lower[]" level of judicial scrutiny).

printed." *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). The MCTL incidentally involves speech because an aspect of the counseling conduct, by its nature, necessarily involves speech. By regulating which treatments Ms. Chiles may perform in her role as a licensed professional counselor, Colorado is not restricting Ms. Chiles's freedom of expression. In other words, Ms. Chiles's First Amendment right to freedom of speech is implicated under the MCTL, but it is not abridged.

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Ms. Chiles makes several contrary arguments, but none is availing.

First, Ms. Chiles seeks distance from *Casey*. The informed consent law in *Casey* was tied to an abortion procedure, Ms. Chiles points out. And, she reasons, abortion "is a concrete and invasive medical procedure," while counseling "involves only words and no 'scalpel,'" so "Colorado's invocation of *Casey* is inapposite." Pl.'s Reply Br. at 22 (quoting *Otto*, 981 F.3d at 865)). We cannot agree.

For one thing, nothing in *Casey* suggests the nature of the medical treatment was dispositive of the First Amendment question. *See Casey*, 505 U.S. at 884 ("[A] requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about *any* medical procedure." (emphasis added)). Nor does *NIFLA*. *See* 585 U.S. at 770 (emphasizing *Casey* "explained that the law regulated speech only 'as part of the *practice* of medicine, subject to reasonable licensing and

regulation by the State'" (quoting *Casey*, 505 U.S. at 884)). We decline Ms. Chiles's invitation to read a "concrete and invasive medical procedure" standard into the *NIFLA* analysis where none exists. *See* Pl.'s Reply Br. at 22.

Moreover, endorsing Ms. Chiles's effort to distinguish *Casey* would require us to conclude—erroneously—that mental health care is not really health care and that talk therapy is not really medical treatment. We will not engage in such misguided thinking, which minimizes the mental health profession, distorts reality, and ignores the record in this case. Mental health treatment can carry long-lasting, life-altering consequences for patients.[30] Talk therapy is no less a medical treatment than the procedures described in *Casey* simply because it is "implemented through speech rather than through scalpel." *Tingley*, 47 F.4th at 1064. And, "[t]he difference between skilled and inept talk therapy—no less than that between deft and botched surgery—can, in some cases, mean the difference between life and death." *Otto*, 41 F.4th at 1292 (Rosenbaum, J.,

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[30] *See*, *e.g.*, APA Amicus Br. at 15–16 (explaining "the reported negative social and emotional consequences" of conversion therapy include "anger, anxiety, confusion, depression, grief, guilt, hopelessness, deteriorated relationships with family, loss of social support, loss of faith, poor self-image, social isolation, intimacy difficulties, intrusive imagery, suicidal ideation, self-hatred, sexual dysfunction[,] . . . . an increase in substance abuse, ... [and] suicide attempt[s]"); The Trevor Project Amicus Br. at 9–10 ("[E]xposure to conversion therapy is a significant risk factor for suicidality."); Twenty States Amicus Br. at 5 ("[N]on-aversive, nonphysical conversion therapy . . . can cause serious harms including emotional trauma, depression, anxiety, suicidality, and self-hatred.").

dissenting). The allegations in Ms. Chiles's verified complaint—and indeed, Ms. Chiles's career as a licensed, professional counselor—plainly proceed from that very premise.

Finally, a contrary conclusion would undermine the state's ability to require its mental health professionals who engage in talk therapy to conform to the "generally accepted standards of the profession[]." Colo. Rev. Stat § 12-245-224(1)(g)(I). It would effectively "immuniz[e] talk therapy from regulation," including talk therapy that falls below the professional standard of care. Twenty States Amicus Br. at 11, 27; *see also* One Colorado Amicus Br. at 15–16. Adopting Ms. Chiles'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." Colo. Stat. Ann. § 12-245-224(1)(h), (t)(II). Such an outcome is irreconcilable with the well-settled principle that the medical profession "is obviously one of those vocations where the power of the state may be exerted to see that only properly qualified persons shall undertake its responsible and difficult duties." *Watson*, 218 U.S. at 176; *see also Lambert* v. *Yellowley*, 272 U.S. 581, 596 (1926) ("[T]here is no right to practice medicine which is not subordinate to the police power of the States.").[31]

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[31] For these same reasons, we likewise reject Ms. Chiles's identical argument about *EMW Women's Surgical Center, P.S.C.* v. *Beshear*, 920 F.3d 421 (6th Cir. 2019). That case, like *Casey*,

Second, Ms. Chiles relies on a number of cases to support reversal, but none advances her cause or meaningfully aids our analysis. Ms. Chiles cites *Holder* v. *Humanitarian Law Project*, 561 U.S. 1 (2010) for the proposition that laws appearing to regulate conduct may actually constitute speech regulations subject to strict scrutiny. *See* Opening Br. at 17 (citing *Holder*, 561 U.S. at 28). In *Holder*, the Supreme Court considered a free speech challenge to a law prohibiting materially supporting organizations identified as engaging in terrorist activity. *Holder*, 561 U.S. at 7–8. "The law here may be described as directed at conduct," the Supreme Court explained. *Id.* at 28. But "as applied to plaintiffs," the law "regulates speech." *Id.* at 27–28. Consequently, the law must be subject to a "more demanding standard"

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involved a challenge to an informed consent law applicable to doctors prior to performing an abortion. *Id.* at 424. The law directed a doctor to "display the ultrasound images for the patient; and explain, in the doctor's own words, what is being depicted by the images." *Id.* "Failure to comply with these requirements [could] result in the doctor being fined and referred to Kentucky's medical-licensing board." *Id.* The Sixth Circuit concluded the law was a "regulation of 'professional conduct . . . that incidentally involves speech" within the second *NIFLA* context and was therefore "not subject to heightened scrutiny." *Id.* at 426, 443 (quoting *NIFLA*, 585 U.S. at 768). Once again, Ms. Chiles contends the MCTL is distinguishable from the informed consent requirement in *EMW* because the latter regulated "performing an abortion," which is "separately identifiable conduct . . . involving a concrete and invasive medical procedure." Opening Br. at 27 (citations omitted). Because we reject Ms. Chiles's wholly unsupported distinction between talk-based mental health treatment and so-called "invasive" medical procedures, her attempt to distinguish *EMW* from the instant case is unavailing.

of scrutiny. *Id.*

Ms. Chiles contends *Holder* is the decisional law that resolves this appeal. So does the dissent. They insist here, as in *Holder*, what "trigger[s] coverage under the statute consists of communicating a message." *See* Dissent at 14 (quoting *Holder*, 561 U.S. at 28); Reply Br. at 12 (same). But the conduct triggering coverage under the MCTL—administering conversion therapy to minors—is not communicating a message but practicing a "treatment . . . that attempts or purports to change an individual's sexual orientation or gender identity." Colo. Rev. Stat. § 12-245-202(3.5)(a); *see also* Colo. Rev. Stat. § 12-245-224(1)(t)(V). As we have explained, Ms. Chiles may communicate whatever message she likes about any subject without triggering coverage under the statute. This difference alone is enough to distinguish the MCTL from the statute in *Holder*.

Also, as Defendants persuasively point out, *Holder*—and the other similar cases Ms. Chiles cites—are not instructive because they do not even deal with regulations of professional conduct that incidentally involve speech.[32] *See* Opening Br. at 17–

[32] We have already determined the MCTL falls within one of the two contexts identified in *NIFLA*. *See NIFLA*, 585 U.S. at 768. Cases that fall outside of the two contexts do not resolve this appeal. The statute in *Holder* regulated professional conduct, but it did not regulate professional conduct that "*incidentally involve[d] speech*." *See NIFLA*, 585 U.S. at 768, 771 (emphasis added) (acknowledging *Holder* involved "the First Amendment rights of professionals" but was "[o]utside of the two contexts" in which speech uttered by professionals has been afforded "less protection"). This distinction—misunderstood by the dissent—makes all the difference. The dissent's reliance on *Cohen* v. *California*, 403 U.S. 15 (1971) is unavailing for the same reason.

18, 21; Pl.'s 28(j) Letter at 1 (citing cases); *see*, *e.g.*, *303 Creative LLC*, 600 U.S. at 587 (finding non-discrimination law that would require business owner to provide wedding websites to same-sex couples regulates "pure speech"); *Animal Legal Def. Fund*, 9 F.4th at 1232 (concluding law prohibiting use of deception to gain access to animal facility regulates speech and was subject to strict scrutiny); *Telescope Media Grp.* v. *Lucero*, 936 F.3d 740, 750 (8th Cir. 2019) (finding law that would require videographers to make same-sex wedding videos regulates speech and is subject to strict scrutiny). These cases do not disturb our conclusion that the speech regulated by the MCTL falls within the second *NIFLA* context.[33]

Ms. Chiles also cites *Brokamp* v. *James*, 66 F.4th 374, 392 (2d Cir. 2023) in support of her contention that "laws that generally apply to counseling regulate not conduct but speech." Reply Br. at 20. *Brokamp* is at least more factually analogous. There, the Second Circuit considered a free speech challenge to state licensing requirements for mental health professionals who provide talk therapy.[34] *Brokamp*,

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See Cohen, 403 U.S. at 26 (holding "absent a . . . particularized and compelling reason for its actions, the State may not, consistently with the First and Fourteenth Amendments, make the simple public display . . . of [a] single four-letter expletive [on a shirt] a criminal offense").

[33] Nor does Ms. Chiles advance any compelling arguments that the MCTL is more akin to the regulations in these cases than the regulations in cases such as *Casey* or *EMW*.

[34] The law at issue in *Brokamp*, unlike the MCTL, was a licensing requirement. *Brokamp* v. *James*, 66 F.4th 374, 382 (2d Cir. 2023). But that is not the feature of *Brokamp* that makes it unhelpful, as we explain. As an analytical matter, we see no reason to distinguish between cases involving licensing

66 F.4th at 380–83. The Second Circuit "assume[d], without deciding," the plaintiff's counseling services "consist only of speech without any non-verbal conduct." *Id.* at 392. On this basis, it then appeared to assume, also without analysis, the regulation as applied to plaintiff could not fall within NIFLA's second context. *Id.* at 391–92. But *Brokamp* is not persuasive, particularly because our sister circuit never considered whether regulations on talk therapy can fall within the second *NIFLA* context.

We therefore reject Ms. Chiles's argument that the MCTL "suppresses [her] speech directly, not incidentally."[35] Opening Br. at 27. The MCTL

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requirements (such as *Brokamp*) and cases involving regulations of already-licensed professionals (such as this case). The parties do not argue otherwise.

[35] Ms. Chiles continues to insist strict scrutiny applies because the MCTL is "content-based." *See* Opening Br. at 29 (citing *Animal Legal Def. Fund* v. *Kelly*, 9 F.4th 1219, 1228 (10th Cir. 2021), *cert. denied*, 142 S. Ct. 2647 (2022)). The dissent echoes this point. *See* Dissent at 20 ("When the Court said [in *NIFLA*] that 'professional' speech is not excepted from 'the rule that content-based regulations of speech are subject to strict scrutiny,' the Justices undoubtedly had regulation of conversion therapy at the forefront of their minds as an application of that statement." (citing *NIFLA*, 585 U.S. at 767)). We disagree with Ms. Chiles and the dissent that the MCTL is a content-based regulation.

"Content-based regulations target speech based on its communicative content." *Animal Legal Def. Fund*, 9 F.4th at 1228 (quoting *NIFLA*, 585 U.S. at 766) (internal quotation marks omitted). "A law is content-based where it 'require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred.'" *Id.* (quoting *McCullen* v. *Coakley*, 573 U.S. 464, 479 (2014)) (internal quotation marks omitted); *see also Holder*, 561 U.S. at 27 (explaining the statute at issue "regulates speech on the basis

prohibits licensed professionals from engaging in a certain therapeutic treatment with their minor clients. The MCTL does not prohibit a mental health professional from discussing what conversion therapy is, what her views on conversion therapy are, or who

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of its content" because "Plaintiffs want to speak . . . and whether they may do so under [the statute] depends on what they say"). "As a general matter, [content-based] laws 'are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.'" *NIFLA*, 585 U.S. at 766 (quoting *Reed* v. *Town of Gilbert*, 576 U.S. 155, 163 (2015)).

As we have explained, the MCTL does not target speech based on its communicative content. And contrary to the dissent's assertion, whether Ms. Chiles's conduct is prohibited by the MCTL does not turn on what she says but on the therapy she practices. The MCTL thus does not "require[] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred." *Animal Legal Def. Fund*, 9 F.4th at 1228 (quoting *McCullen*, 573 U.S. at 479) (internal quotation marks omitted). Instead, whether Ms. Chiles's conduct complies with the statute depends on the intended effect of the therapeutic treatment being administered: the conduct is prohibited only if the therapy is intended to "change an individual's sexual orientation or gender identity." Colo. Rev. Stat. § 12-245-202(3.5)(a).

In any event, whether the MCTL is a content-based regulation is antecedent to the issue before us; it does not resolve it. In *NIFLA*, the Supreme Court began by observing the notice requirement was a content-based regulation of speech. *NIFLA*, 585 U.S. at 766 (finding the notice requirement "is a content-based regulation of speech" because it "compel[s] individuals to speak a particular message"). The Court nevertheless proceeded to consider whether the notice requirement fell within either of the two *NIFLA* contexts, which would subject it to a "lower level of scrutiny." *Id.* at 768. In other words, as the Supreme Court tells us, even a content-based regulation is subject to a lower level of scrutiny if it falls within one of the *NIFLA* contexts.

can legally provide this treatment to her minor clients. It only bars a mental health professional from engaging in the practice herself. We thus conclude, as the district court did, the MCTL is a regulation of professional conduct incidentally involving speech. *NIFLA*, 585 U.S. at 770.

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In reaching our holding, we join the Ninth Circuit in concluding a "law[] prohibiting licensed therapists from practicing conversion therapies on minors . . . . is a regulation on conduct that incidentally [involves] speech." *Tingley*, 47 F.4th at 1077, 1082–83 ("What licensed mental health providers do during their appointments with patients for compensation under the authority of a state license is treatment. . . . That some of the health providers falling under the sweep of [the law] use speech to treat [patients] is 'incidental.'"), *cert. denied*, 601 U.S. ----, 144 S. Ct. 33 (2023). We recognize the Eleventh Circuit, over dissent,[36] reached a different result about a similar law, concluding such restrictions are "content-based regulations of speech and must satisfy strict scrutiny" because "[w]hat the government calls a 'medical procedure' consists—entirely—of words." *Otto*, 981 F.3d at 865, 867–68, *en banc reh'g denied*, 41 F.4th at

[36] In dissenting from the panel majority, Judge Martin reasoned the challenged ordinance was a content-based restriction subject to strict scrutiny. *Otto* v. *City of Boca Raton, Fla.*, 981 F.3d 854, 874 (11th Cir. 2020) (Martin, J., dissenting). In her view, the challenged ordinance withstood this heightened level of scrutiny, so plaintiffs were not entitled to a preliminary injunction. *Id.*

1271.[37] We are unpersuaded by this reasoning, as our discussion confirms.

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We now consider the MCTL under rational basis review.[38] Under this standard, "this court will uphold

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[37] Judge Jordan (joined by Judges Wilson, Rosenbaum, and Jill Pryor) and Judge Rosenbaum (joined by Judge Jill Pryor) authored dissents from the denial of rehearing en banc in *Otto*. We find Judge Rosenbaum's dissent particularly persuasive.

As Judge Rosenbaum explains, "no one goes to a doctor or therapist to engage in a political, social, or religious debate; they go to obtain treatment of their health condition." *Otto* v. *City of Boca Raton, Fla.*, 41 F.4th 1271, 1285 (11th Cir. 2022) (Rosenbaum, J., dissenting) (internal quotation marks and alterations omitted). "And it is antithetical to that purpose for licensed professionals to engage in a practice on their young clients that has repeatedly been shown to be associated with more than doubling the risk of death and has not been shown to be efficacious." *Id.* at 1319. "If a state could not revoke the license of (or otherwise discipline) a professional whose inept talk therapy contributed in a significant way to, for example, clients' decisions to kill themselves, the state's police power to protect public health and safety would be effectively worthless." *Id.* at 1294. We agree with Judge Rosenbaum, and it bears repeating:

> A single young person who tries to kill themselves is one too many; it cannot be the case that thousands of kids must be sacrificed in the name of the First Amendment when laws that prohibit such practices by licensed professionals still allow anyone—including licensed professionals—to say whatever they please about such techniques both within and outside the professional-client relationship, as long as they do not practice the technique on their minor clients.

Id. at 1319.

[38] In *NIFLA*, the Supreme Court did not specify what "less protection" means, leaving open the question of what level of scrutiny—intermediate or rational basis—applies to laws falling

a government [action] if it is 'rationally related to a legitimate government purpose or end.'" *Teigen* v. *Renfrow*, 511 F.3d 1072, 1083 (10th Cir. 2007) (quoting *Christian Heritage Acad.* v. *Okla. Secondary Sch. Activities Ass'n*, 483 F.3d 1025, 1031–32 (10th Cir. 2007)). "[H]ealth and welfare laws [are] entitled to a 'strong presumption of validity'" and "must be sustained if there is a rational basis on which the legislature could have thought that [the law] would serve legitimate state interests." *Dobbs*, 597 U.S. at 301 (quoting *Heller* v. *Doe*, 509 U.S. 312, 219 (1993)).

The district court concluded the MCTL survives rational basis review. "Defendants have a legitimate

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within the two identified circumstances. *See* 585 U.S. at 768. Circuit courts are split on this issue. *Compare Cap. Assoc. Indus., Inc.* v. *Stein*, 922 F.3d 198, 208 (4th Cir. 2019) (explaining "[a]lthough the [Supreme] Court's cases have not been crystal clear about the appropriate standard of review," "[w]e think the correct reading of Supreme Court precedent . . . is that intermediate scrutiny should apply to regulations of conduct that incidentally impact speech"), *with Tingley* v. *Ferguson*, 47 F.4th 1055, 1077–78 (9th Cir. 2022) (applying rational basis review to law regulating conduct that incidentally involves speech); *see also Otto*, 981 F.3d at 861 (noting if challenged ordinances are not content-based restrictions of speech, "they receive the lighter touch of intermediate scrutiny or perhaps even rational basis review").

Here, the district court applied rational basis review. On appeal, Ms. Chiles argues only that the MCTL is subject to strict scrutiny. She does not argue, even in the alternative, that intermediate scrutiny applies if we conclude, as the district court did, the MCTL falls within the second *NIFLA* context. Therefore, given the procedural history of this case and the arguments before us on appeal, we do not disturb the district court's conclusion that rational basis review applies in the event the MCTL is subject to "less protection" under *NIFLA*. *See* 585 U.S. 768.

and important state interest," the district court found, "in the prevention of 'harmful therapy known to increase suicidality in minors'" and in "regulating the efficacy and safety of . . . the practices of mental health professionals who counsel minor clients." App. at 77 (quoting Supp. App. at 76). Because the MCTL "protect[s] minors from ineffective and harmful therapeutic modalities," it "rationally serves these legitimate and important interests." App. at 78.

In her opening brief, Ms. Chiles does not challenge the district court's ruling that the law withstands rational basis review[39] and maintains only that the law cannot survive strict scrutiny.[40] But in advancing this argument, she provides several

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[39] Ms. Chiles devotes one paragraph of her reply brief to the assertion the MCTL "cannot satisfy even rational basis review," though she does not provide the legal standard for this review or invoke plain error review. Reply Br. at 31–32. This cursory—and belated—assertion is insufficient under our precedent. *See Reedy* v. *Werholtz*, 660 F.3d 1270, 1274 (10th Cir. 2011) ("[T]he general rule in this circuit is that a party waives issues and arguments raised for the first time in a reply brief." (quoting *M.D. Mark, Inc.* v. *Kerr–McGee Corp.*, 565 F.3d 753, 768 n.7 (10th Cir. 2009))); *United States* v. *Cooper*, 654 F.3d 1104, 1128 (10th Cir. 2011) ("It is well-settled that '[a]rguments inadequately briefed in the opening brief are waived.'" (quoting *Adler* v. *Wal-Mart Stores, Inc.*, 144 F.3d 664, 679 (10th Cir. 1998)); *Bronson* v. *Swensen*, 500 F.3d 1099, 1105 ("[C]ursory statements, without supporting analysis and case law, fail to constitute the kind of briefing that is necessary to avoid application of the forfeiture doctrine."). We note, however, even if we did consider her one-paragraph argument, it would not alter our conclusion that the MCTL survives rational basis review.

[40] Because we apply rational basis review to the MCTL, we need not consider the parties' arguments regarding whether the MCTL survives strict scrutiny.

reasons the MCTL serves no legitimate governmental interest.[41] In enacting the MCTL, she contends, "Colorado's primary interest was suppressing a viewpoint with which the State disagrees"; Colorado does not "have a legitimate interest in suppressing ideas it considers harmful"; and Colorado does not have an interest in "stop[ping] clients from voluntarily seeking emotional changes that the clients believe will increase well-being solely because, in the government's eyes, such change is a bad decision." Opening Br. at 40–42 (alterations omitted). She also contends the MCTL rests on the "questionable assumption[]" that encouraging clients to change their sexual orientation or gender identity will harm them. Opening Br. at 43.

Defendants maintain Colorado has legitimate interests in maintaining the integrity of the mental health profession and protecting minors from harmful therapeutic practices. The MCTL is rationally related to these legitimate public interests, Defendants insist, because "[e]mpirical studies show that conversion therapy is both harmful and ineffective, especially for children," and "lacks clinical utility." Defs.' Resp. Br. at 50–51. By "restrict[ing] a specific therapeutic treatment that mental health professionals employ when working with children,

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[41] Whether the MCTL serves a legitimate government interest is at the heart of the rational basis inquiry. *See Teigen* v. *Renfrow*, 511 F.3d 1072, 1083 (10th Cir. 2007). For that reason, we exercise our discretion to review Ms. Chiles's arguments that the MCTL "serves no legitimate interest" as part of our scrutiny analysis, notwithstanding her failure to advance any argument in her opening brief that the MCTL fails rational basis review.

who are most vulnerable to the harms that conversion therapy presents," the MCTL "reasonably relate[s] to the state's interest in preventing harmful therapy for minors." Defs.' Resp. Br. at 50, 52.

Colorado's interest in "safeguarding the physical and psychological well-being of a minor" is undoubtedly legitimate. *New York* v. *Ferber*, 458 U.S. 747, 756–57 (1982). As is the State's "legitimate interest . . . in regulating and maintaining the integrity of the mental-health profession." *Ferguson* v. *People*, 824 P.2d 803, 810 (Colo. 1992). The only remaining question is whether the MCTL is rationally related to one of these legitimate governmental interests.

The district court made several factual findings relevant to our inquiry. First, the district court found "conversion therapy is ineffective and harms minors who identify as gay, lesbian, bisexual, transgender, or gender non-conforming." App. at 78. Second, the court found the record "amply shows that the [MCTL] comports with the prevailing medical consensus regarding conversion therapy and sexual orientation change efforts." App. at 78 n.10. Third, "Colorado considered the body of medical evidence regarding conversion therapy and sexual orientation change efforts—and their harms," the district court found, "when passing the [MCTL] and made the . . . decision to protect minors from ineffective and harmful therapeutic modalities." App. at 78. Ms. Chiles has not contended on appeal these findings are clearly erroneous. *See Courthouse News Serv.*, 53 F.4th at 1254 (explaining a district court's factual findings in resolving a motion for a preliminary injunction are reviewed for clear error). As we explain, each factual

finding is based on—and extensively supported by—the preliminary injunction record. *See* App. at 78 (citing the documentary evidence Defendants submitted with their opposition to Ms. Chiles's motion for a preliminary injunction).

First, the preliminary injunction record shows conversion therapy is harmful to minors. Dr. Judith Glassgold, a licensed psychologist and lecturer at Rutgers University, who "specialize[s] in psychotherapy with lesbian, gay, bisexual, and transgender (LGBT) issues working with children, adolescents, and adults," described in her declaration several studies documenting the harms caused by conversion therapy, including harms to minors.[42] Supp. App. at 99. "Taken as a whole," she explained, "the scientific research and professional consensus is that conversion therapy is ineffective and poses the

[42] Dr. Glassgold has also "taught graduate and supervised graduate students at Rutgers in psychology and psychotherapy, especially in the area of sexual orientation and gender, as well as in the treatment of depression, anxiety, suicidality, and trauma." Supp. App. at 99. She has "authored a number of papers, presentations, and trainings related to the harmful effects of conversion therapy as well as appropriate approaches for those distressed by their sexual orientation or who face conflicts between their religious beliefs and sexual orientation." Supp. App. at 100. In addition, she served as the Chair of the APA Task Force on Appropriate Therapeutic Responses to Sexual Orientation and wrote and edited sections of the Task Force's *Appropriate Therapeutic Responses to Sexual Orientation* report. Dr. Glassgold also served as an APA staff coordinator for the expert consensus panel that provided the basis of SAMHSA's *Ending Conversion Therapy: Supporting and Affirming LGBTQ Youth* report. Both reports are part of the preliminary injunction record.

risk[] of harm." Supp. App. at 111–12. For example,

> Those who reported undergoing [conversion therapy] efforts were more than twice as likely to report having attempted suicide and having multiple suicide attempts. Those who reported exposure to [conversion therapy] had almost 2 times greater odds of seriously considering suicide, more than 2 times greater odds of having attempted suicide, and 2½ times greater odds of multiple suicide attempts in the previous year. Green and colleagues found that youth aged 13-25 who indicated that they had been exposed to [conversion therapy] also reported that in the past 12 months they had seriously considered suicide. The researchers reported that even after controlling for other events, [conversion therapy] was the strongest predictor of multiple suicide attempts.

Supp. App. at 139.

The APA Task Force report summarizes "a systematic review of the peer-reviewed journal literature on sexual orientation change efforts (SOCE)," including verbal, non-aversive SOCE. Supp. App. at 176; *see also* Supp. App. at 133, 180, 219–20. The report concludes conversion therapy for minors "is a practice that is not supported by credible evidence[] and has been disavowed by behavioral health experts and associations." Supp. App. at 324. That is because "efforts to change sexual orientation are unlikely to be successful and involve some risk of harm, contrary to the claims of SOCE practitioners

and advocates."[43] Supp. App. at 176.

The district court's conclusion that the MCTL "comports with the prevailing medical consensus regarding conversion therapy" is likewise grounded in the preliminary injunction record. App. at 78 n.10. Dr. Glassgold described conversion therapy as "based on outdated, unscientific beliefs and false stereotypes" that "have no basis in science and have been thoroughly discredited through decades of scientific research." Supp. App. at 121. Similarly, SAMHSA reported "none of the existing research supports the premise that mental or behavioral health interventions can alter gender identity or sexual orientation" in minors and any such attempts "should not be part of behavioral health treatment." Supp. App. at 318. And these conclusions, as SAMHSA explained, were based on "consensus statements developed by experts in the field." Supp. App. at 318.

As we already discussed, the district court was aware of the MCTL's legislative history, included in the preliminary injunction record, and found Colorado considered the body of medical evidence on conversion therapy when passing the MCTL. This legislative history contains a statement from one of the sponsors of the bill, explaining,

This is simply about making sure that

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[43] The APA Task Force reported, as the dissent acknowledges, "studies . . . indicate that attempts to change sexual orientation may cause or exacerbate distress and poor mental health in some individuals, including depression and suicidal thoughts." Dissent at 32 (quoting Supp. App. at 219). In our view, the APA Task Force's conclusion supports the district court's finding that conversion therapy is harmful to minors.

> licensed practitioners in the state of Colorado are not offering a practice known as conversion therapy to young people under the age of 18. The reason is because all of the prevailing science and modern medicine tells us that not only does this practice not work, but it is not considered therapy in . . . the mainstream sense of what therapy is. In fact there are many reasons to believe that it does the opposite and it actually harms young people.

Supp. App. at 86 (citation omitted). Ms. Chiles has not disputed this legislative history or its relevance to our analysis. *See U.S. Dep't of Agric.* v. *Moreno*, 413 U.S. 528, 534 (1973) (considering legislative history in determining whether a challenged government action rationally furthers a legitimate governmental interest).

Under these circumstances, we cannot say it was clear error for the district court to conclude conversion therapy is ineffective and harmful to minors who identify as gay, lesbian, bisexual, transgender, or gender nonconforming, the MCTL comports with prevailing medical consensus regarding conversion therapy, and the Colorado legislature considered this evidence when enacting the MCTL.[44]

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[44] Amicus APA also explains conversion therapy is a "dangerous, discredited practice[] . . . . that no longer aligns with [the perspective] of mainstream mental health professionals." APA Amicus Br. at 4. According to the APA, "[m]inors who have been subjected to [conversion therapy] report more suicide attempts than those who have not," and "minors are especially vulnerable to the negative effects" of conversion therapy when

Ms. Chiles contends there is "[an]other side of the debate" on conversion therapy. Opening Br. at 41. At

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they are exposed to it at a young age. APA Amicus Br. at 20. Similarly, a 2019 report from Amicus the Trevor Project revealed "[f]orty-two percent of LGBTQ youth who underwent conversion therapy reported a suicide attempt in the past year," which is "more than twice the rate of their LGBTQ peers who did not report undergoing conversion therapy." The Trevor Project Amicus Br. at 12. And these youth are "more than three times as likely to report multiple suicide attempts in the past year" than those who did not undergo conversion therapy. The Trevor Project Amicus Br. at 13. According to the Trevor Project, "conversion therapy is a source of deep anxiety" for many LGBTQ youth, and "[n]o available research supports the claim that conversion therapy efforts are beneficial to children, adolescents, or families." The Trevor Project Amicus Br. at 15, 19 (internal quotations and citations omitted).

Unsurprisingly, then, "[e]very mainstream medical and mental health organization"—including the U.S. Surgeon General, the American Academy of Child and Adolescent Psychiatry, the American Academy of Pediatrics, and the World Health Organization—"has uniformly rejected conversion therapy as unsafe for minors and devoid of any scientific merit." The Trevor Project Amicus Br. at 26; *see also* Twenty States Amicus Br. at 6–7. And as Amici One Colorado and Twenty States contend, the MCTL "is based on the medical consensus that treatments that seek to change a minor's sexual orientation or gender identity are unnecessary, provide no therapeutic benefit, and are dangerous to the health and well-being of children and adolescents." One Colorado Amicus Br. at 2; Twenty States Amicus Br. at 2–3.

We acknowledge not all of these arguments and cited sources were before the district court, so we do not rely on them as dispositive to our legal analysis. *See United States* v. *Suggs*, 998 F.3d 1125, 1141 (10th Cir. 2021) ("[W]e are 'a court of review, not of first view.'" (quoting *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)). We note only these arguments are consistent with the evidence before the district court and further support our conclusion here.

oral argument, Ms. Chiles conceded she did not present evidence with her preliminary injunction motion or put on expert testimony to contradict the studies proffered by Defendants. *See* Oral Arg. at 10:57–11:23. Rather, she relies on her verified complaint, which Ms. Chiles claims documents the "benefits" of the counseling services she wishes to provide. In her verified complaint, Ms. Chiles cited studies and online articles stating "[s]ame-sex attractions are more fluid than fixed, especially for adolescents" and "studies on SOCE do not provide scientific proof that they are more harmful than other forms of therapy." App. at 34–35. Later, Defendants supplied additional documentary evidence in their opposition to Ms. Chiles's preliminary injunction motion. This evidence included "peer-reviewed journal literature on sexual orientation change efforts," Supp. App. at 176, and synthesized "the current state of scientific understanding of the development of sexual orientation and gender identity in children and adolescents as well as the professional consensus on clinical best practices with these populations," Supp. App. at 324. We perceive no clear error in the district court's decision to rely on Defendants' evidence about the efficacy and impact of conversion therapy, and Ms. Chiles has not attempted to argue otherwise.[45] *See United States* v. *Rico*, 3

[45] We respectfully disagree with the dissent that the existence of debate or changing professional attitudes over time regarding the efficacy and harmfulness of conversion therapy suggests there is a lack of scientific consensus on the matter. *See Tingley*, 47 F.4th at 1081 ("That expert medical organizations have changed their view over time, with additional research, is a good thing. Science, and the medical practices used to treat human conditions, evolve over time. But we still trust doctors,

F.4th 1236, 1239–40 (10th Cir. 2021) ("[W]e do not find clear error when ample evidence in the record supports the district court's factual finding.").[46]

Ms. Chiles insists the district court should have rejected the empirical studies Defendants offered, which, she claims, "focused on nonconsenting minors treated with physical, aversive techniques. . . . [that] have nothing in common with the counseling conversations that [Ms.] Chiles offers." Pl.'s Reply Br.

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and the professional organizations representing them, to treat our ailments and update their recommendations on the governing standard of care.").

[46] Even assuming, without deciding, the studies cited by Ms. Chiles are correct, this would create two permissible views of the evidence. And we cannot say the district court clearly erred by crediting the evidence proffered by Defendants. *See Att'y Gen. of Okla.* v. *Tyson Foods, Inc.*, 565 F.3d 769, 777 n.2 (10th Cir. 2009) ("[T]he district court made a choice between two permissible views of the evidence, and it is not our role to label this choice clearly erroneous."); *see also Lambert* v. *Yellowley*, 272 U.S. 581, 589–91 (1926) (upholding the constitutionality of the National Prohibition Act's limit on the prescription of spirit liquor for medical treatment and explaining Congress considered evidence that "practicing physicians differ about the value of . . . liquors for medicinal purposes, but that the preponderating opinion is against their use for such purposes").

For this reason, we also find unhelpful the dissent's discussion of the record evidence. The dissent explains "[a] vote by a professional organization" is inadequate to justify Colorado banning the use of conversion therapy on minors. Dissent at 22. Of course, the record evidence about the harms of conversion therapy consisted of much more than a mere "vote" by a single professional organization. In any event, weighing the relative strengths and weaknesses of the evidence does not comport with our circumscribed appellate role when reviewing the district court's factual findings for clear error. *See Free the Nipple-Fort Collins*, 916 F.3d at 796–97.

at 30. We disagree. Defendants' evidence indicates the APA Task Force report was based on "studies of religiously-oriented SOCE (e.g., *verbal forms*, support groups, religious efforts)," and "[i]n . . . non-experimental studies, participants perceived that they had been harmed by SOCE." Supp. App. at 133 (emphasis added); *see also* Supp. App. at 219–20 (describing reports of harm in recent studies of "nonaversive and recent approaches to SOCE"). Similarly, the SAMHSA report notes "[r]ecent research reports on religious and nonaversive efforts indicate that there are individuals who perceive they have been harmed [by these techniques]." Supp. App. at 220. Contrary to Ms. Chiles's assertions, the preliminary injunction record included studies involving non-aversive conversion therapy.[47]

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[47] The record amply describes the harms of conversion therapy based on studies involving non-aversive techniques and studies involving minors. *See* Supp. App. at 180 (describing perceived harms from "nonaversive efforts"), 249 (explaining the APA Task Force "reviewed the literature on SOCE in children and adolescents" in preparing the report), 256 ("SOCE that focus on negative representations of homosexuality and lack a theoretical or evidence base provide no documented benefits and can pose harm [to minors] through increasing sexual stigma and providing inaccurate information."). We acknowledge the dissent's point that the reports in the record do not describe studies confined *only* to talk-based conversion therapy administered only to minors. See Dissent at 34. But as counsel for Defendants explained at oral argument, "it would be unethical to engage in those sorts of studies because it would require patients to undergo a treatment that has been determined to be unsafe and ineffective." Oral Arg. at 14:58–15:58. The "dearth of available evidence" highlighted by the dissent "is precisely because it would be unethical for an

We thus have no trouble concluding the MCTL is rationally related to Colorado's interest in protecting minor patients seeking mental health care from obtaining ineffective and harmful therapeutic modalities. *See Ferber*, 458 U.S. at 756–57. Likewise, we do not disturb the district court's finding that the MCTL comports with prevailing medical consensus, so we conclude the MCTL is rationally related to Colorado's interest in ensuring its licensed mental health professionals comply with the prevailing standard of care in their field. *See Ferguson*, 824 P.2d at 810. The MCTL withstands rational basis review.[48]

Accordingly, the district court committed no abuse of discretion in concluding Ms. Chiles failed to show a likelihood of success on the merits of her First Amendment free speech claim.

IV

We turn next to Ms. Chiles's free exercise claim. Ms. Chiles also challenges the district court's ruling that she failed to demonstrate a likelihood of success on the merits of this claim. Again, we discern no error.

A

"The Free Exercise Clause of the First

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institutional review board to approve a study that required patients to undergo this treatment." Oral Arg. at 16:00–16:15.

[48] "Under the majority's position," the dissent maintains, "a state law *prohibiting* therapy that affirm[s] a youth's homosexual orientation . . . very likely would [be] upheld as constitutional" under rational basis review. Dissent at 3. Not so. The record in this case documents the harms to minors caused by conversion therapy and the prevailing professional opinion that conversion therapy is unsafe and ineffective. The record envisioned by the dissent is not before us.

Amendment, applicable to the States under the Fourteenth Amendment, provides that 'Congress shall make no law . . . prohibiting the free exercise' of religion." *Fulton* v. *City of Phila, Pa.*, 593 U.S. 522, 532 (2021) (quoting U.S. Const. amend. I). "[A] plaintiff may carry the burden of proving a free exercise violation . . . by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable.'" *Kennedy* v. *Bremerton Sch. Dist.*, 597 U.S. 507, 525 (2022). If a plaintiff makes this showing, the challenged action violates the First Amendment free exercise clause "unless the government can satisfy 'strict scrutiny' by demonstrating its course was justified by a compelling state interest and was narrowly tailored in pursuit of that interest." *Id.* "Failing either the neutrality or general applicability test is sufficient to trigger strict scrutiny." *Id.* at 526.

"[L]aws incidentally burdening religion," the Supreme Court has explained, "are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral *and* generally applicable." *Fulton*, 593 U.S. at 533 (emphasis added); *see also Church of Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 531 ("[O]ur cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."); *Fulton*, 593 U.S. at 543 (Barrett, J., concurring) ("[T]his Court [has] held that a neutral and generally applicable law typically does not violate the Free Exercise Clause—no matter how severely that law burdens religious exercise.").

Instead, "a law that is both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge." *Grace United Methodist Church* v. *City of Cheyenne*, 451 F.3d 643, 649 (10th Cir. 2006); *see also Taylor* v. *Roswell Indep. Sch. Dist.*, 713 F.3d 25, 52 (10th Cir. 2013) ("Government actions that stem from 'neutral' rules of 'general applicability' are subject to rational basis review, even if the application of the neutral rule 'has the incidental effect of burdening a particular religious practice.'" (citation omitted)).

As the party seeking a preliminary injunction, Ms. Chiles must show the MCTL is not neutral or generally applicable. *See Free the Nipple-Fort Collins*, 916 F.3d at 797 (describing moving party's burden to show a likelihood of success on the merits of a preliminary injunction motion); *see also Kennedy*, 597 U.S. at 525 (explaining "a plaintiff may carry the burden of proving a free exercise violation . . . by showing that a government entity has burdened his sincere religious practice pursuant to a policy that is not 'neutral' or 'generally applicable'"); *Tingley*, 47 F.4th at 1084–87 (concluding movant did not carry his preliminary injunction burden of showing the challenged law was not neutral and generally applicable). The district court concluded Ms. Chiles failed to meet this burden. Because Ms. Chiles failed to carry this burden, the district court held the MCTL was subject to rational basis review. *See Fulton*, 593 U.S. at 533 (explaining "laws incidentally burdening religion are ordinarily not subject to strict scrutiny under the Free Exercise Clause so long as they are neutral and generally applicable"). The district

court—in considering Ms. Chiles's free speech challenge to the MCTL—had already concluded the law survives rational basis review. And the district court likewise held Ms. Chiles failed to show a likelihood of success on the merits of her free exercise claim.

On appeal, Ms. Chiles argues the MCTL is neither neutral nor generally applicable and must satisfy strict scrutiny. We disagree.

1

"Government fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices *because of their religious nature*." *Fulton*, 593 U.S. at 533 (emphasis added). "[I]f the object of a law is to infringe upon or restrict practices because of their religious motivation, the law is not neutral . . . ." *Church of Lukumi Babalu Aye*, 508 U.S. at 533.

"To determine the object of a law, we must begin with its text, for the minimum requirement of neutrality is that a law not discriminate on its face." *Id.* "A law lacks facial neutrality if it refers to a religious practice without a secular meaning discernible from the language or context." *Id.* Here, the plain text of the MCTL shows it is neutral on its face. Ms. Chiles insists otherwise, contending the MCTL "is not neutral because it facially suppresses speech well known to be religious." Opening Br. at 34. But Ms. Chiles misunderstands the law. She argues conversion therapy is "primarily a religious practice." Opening Br. at 35 (internal quotation marks and alterations omitted). She does not contend the MCTL "*refer[s]* to a religious practice without a secular

meaning discernible." *See Church of Lukumi Babalu Aye*, 508 U.S. at 533 (emphasis added). We therefore reject her argument that the MCTL lacks facial neutrality.

Of course, "[f]acial neutrality is not determinative." *Id.* at 534. Other factors "relevant to the assessment of governmental neutrality include 'the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body.'" *Masterpiece Cakeshop, Ltd.* v. *Colo. C.R. Comm'n*, 584 U.S. 617, 639 (2018) (quoting *Church of Lukumi Babalu Aye*, 508 U.S. at 540). None of these other considerations compels a different conclusion about the MCTL's neutrality.

Ms. Chiles contends the MCTL is not neutral because it is "well[] known that counseling from the viewpoint and with the goals prohibited by the [MCTL] is primarily a religious . . . practice." Opening Br. at 35 (internal quotation marks and citation omitted). The MCTL's restrictions thus fall almost exclusively on religious counselors, she argues, and the law prevents clients with strong religious beliefs from seeking counsel that aligns with and respect their beliefs. According to Ms. Chiles, "[i]t is reasonable to infer [religious] animus from these facts." Opening Br. at 36.

We are not persuaded. Ms. Chiles has failed to show the MCTL "restricts [religious] practices *because of their religious nature*." *Fulton*, 593 U.S. at 533 (emphasis added); *see also Church of Lukumi*

Babalu Aye, 508 U.S. at 532 ("[T]he protections of the Free Exercise Clause [apply] if the law at issue . . . regulates or prohibits conduct *because it is undertaken for religious reasons*." (emphasis added)). Nothing in the record suggests the MCTL's aim is to infringe or restrict practices because of their religious motivation. *See Masterpiece Cakeshop*, 584 U.S. at 639 (describing "the historical background of the decision under challenge, the specific series of events leading to the enactment or official policy in question, and the legislative or administrative history, including contemporaneous statements made by members of the decisionmaking body" as "[f]actors relevant to the assessment of governmental neutrality" (citation omitted)). And recall, the district court made a factual finding that the MCTL targets therapeutic practices because of their *harmful effect on minors*, rather than their *religious* nature. App. at 82–83 (describing the preliminary injunction record as showing the MCTL "targets these therapeutic modalities because conversion therapy is ineffective and has the potential to 'increase [minors'] isolation, self-hatred, internalized stigma, depression, anxiety, and suicidality'" (quoting Supp. App. at 132–34)). Notably, Ms. Chiles does not challenge this finding as clearly erroneous. *See e.g.*, Opening Br. at 42 (acknowledging "Colorado might believe that volitional change in sexuality or gender identity is impossible or undesirable[,] [a]nd it might believe that those who pursue volitional change are making a mistake that may harm them"); Reply Br. at 31 (stating the Colorado legislature, in enacting the MCTL, "inferred that . . . harms might result from [conversion therapy administered through] mere

words"). Nor does Ms. Chiles meaningfully address the legislative history of the MCTL which focused, not on restricting religious practice, but on preventing the harmful impact of conversion therapy on minors.

Even assuming Ms. Chiles is correct that people with certain religious beliefs are more likely to practice and seek conversion therapy, that does not, without more, suggest the law was enacted with religion as its target.[49]

See Church of Lukumi Babalu Aye, 508 U.S. at 535 ("[A]dverse impact will not always lead to a finding of impermissible targeting. . . . [A] social harm may have been a legitimate concern of government for reasons quite apart from discrimination."). Ms. Chiles has made no contrary showing. *See Taylor*, 713 F.3d

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[49] Ms. Chiles also contends the MCTL cannot be neutral because it contains an "illusory" exemption for religious ministers who administer conversion therapy to minors. Opening Br. at 36. According to Ms. Chiles, the MTCL's exemption for religious ministers does not exempt conversations that would otherwise be prohibited by the MCTL, since the MCTL regulates only individuals who are licensed, registered, or certified by the state and thus does not apply to religious ministries at all. This argument is unavailing. For one thing, the religious ministry exemption applies to the entire Mental Health Practice Act. *See* Colo. Rev. Stat. § 12-245-217(1). And we agree with Defendants that the exemption is not illusory because it allows anyone, whether licensed with the state or not, to provide services akin to conversion therapy, so long as that is done through a religious ministry. Def's. Resp. Br. at 56–57. But again, even assuming Ms. Chiles is correct that the religious ministry exemption "has no operation," Opening Br. at 37, it does not follow that the MCTL has "as its object . . . the infringement or restriction of religious practices," *Grace United Methodist Church* v. *City of Cheyenne*, 451 F.3d 643, 649–50 (10th Cir. 2006).

at 52 ("A rule is neutral 'so long as its object is something other than the infringement or restriction of religious practices.'" (quoting *Corder* v. *Lewis Palmer Sch. Dist. No. 38*, 566 F.3d 1219, 1233 (10th Cir. 2009))); *cf. Church of Lukumi Babalu Aye*, 508 U.S. at 541–42 (finding city ordinances banning animal sacrifice were enacted "to target animal sacrifice by Santeria worshippers because of its religious motivation" where evidence demonstrated "significant hostility exhibited by residents, members of the city council, and other city officials toward the Santeria religion and its practice of animal sacrifice"). On the record before us, we agree with the district court that the MCTL is a neutral law.

2

We next consider whether Ms. Chiles has shown the MCTL lacks general applicability.

"[T]he rule that laws burdening religious practice must be of general applicability . . . is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Church of Lukumi Babalu Aye*, 508 U.S. at 542–43. It stems from "[t]he principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief." *Id.* In *Fulton*, the Supreme Court identified two ways to determine whether a law lacks general applicability. First, a law lacks general applicability "if it 'invite[s]' the government to consider the particular reasons for a person's conduct by providing 'a mechanism for individualized exemptions'" from the law's requirements. *Fulton*, 593 U.S. at 533 (quoting *Emp. Div., Dep't of Hum. Res. of Ore.* v. *Smith*, 494 U.S. 872, 884

(1990)). Second, a law is not generally applicable "if it prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Id.* at 534.

Ms. Chiles insists the MCTL is not generally applicable because it "invite[s] enforcement authorities to pass judgment and make individualized exemptions for secular counselors of whose attitudes they approve." Opening Br. at 39. She explains the MCTL explicitly allows therapy that facilitates an individual's "identity exploration and development." Colo. Rev. Stat. § 12-245-202(3.5). By allowing this therapy, she maintains, the MCTL effectively permits secular counselors to "change" their minor clients' identities from straight or cisgender to LGBT but prohibits religious counselors from "changing" their minor clients' identities from LGBT to straight or cisgender. *See* Opening Br. at 39. We are unpersuaded.

The framework advanced by Ms. Chiles does not describe "a mechanism for individualized exemptions" to the MCTL's prohibition on conversion therapy by mental health professionals. *Fulton*, 593 U.S. at 533 (quoting *Smith*, 494 U.S. at 884). As Defendants persuasively contend, the MCTL's provisions "apply equally to all licensed mental health professionals, regardless of their religious beliefs or affiliations," and "[t]here is no mechanism for the [regulatory] Boards 'to consider the particular reasons for a person's conduct' and determine that providing conversion therapy to children in a professional setting might be permissible." Def's. Resp. Br. at 60 (quoting *Fulton*, 593 U.S. at 533); *cf. Fulton*, 593 U.S. at 535–36 (provision creating a "formal system of

entirely discretionary exceptions" to a contractual non-discrimination requirement "made available . . . at the 'sole discretion' of the [enforcing body] . . . . renders the contractual non-discrimination requirement not generally applicable"). That the MCTL allows mental health professionals to administer treatments that provide "acceptance, support, and understanding for the facilitation of an individual's coping, social support, and identity exploration and development" does not mean the MCTL lacks general applicability. Colo. Rev. Stat. § 12-245-202(3.5).

Nor does Ms. Chiles advance any argument that the MCTL "prohibits religious conduct while permitting secular conduct that undermines the government's asserted interests in a similar way." *Fulton*, 593 U.S. at 534. Ms. Chiles has identified no secular activity permitted by Colorado that undermines the state's interest in protecting minors and maintaining the integrity of the mental health profession.

Therefore, the district court did not abuse its discretion in holding "Ms. Chiles has failed to meet her burden of showing the [MCTL] is not . . . generally applicable." App. at 86.

B

Because, on the record before us, we find Ms. Chiles has failed to show the MCTL lacks neutrality and general applicability, the district court did not abuse its discretion in finding the MCTL is subject to rational basis review. *See Grace United Methodist Church*, 451 F.3d at 649. And for the reasons already explained in Part III.C, the MCTL survives rational basis review. Therefore, the district court did not

abuse its discretion in holding Ms. Chiles has failed to demonstrate a likelihood of success on the merits of her free speech and free exercise claims and by extension, in denying her motion for a preliminary injunction regarding these claims. *See Denver Homeless Out Loud*, 32 F.4th at 1277 ("An injunction can issue only if each [preliminary injunction] factor is established.").

V

We **AFFIRM** the district court's denial of Ms. Chiles's motion for a preliminary injunction.

22-1445/23-1002, *Chiles v. Salazar*
HARTZ, J., dissenting.

I. PREVIEW

A.

This case presents two distinct, but intertwined, fundamental and important questions. The first, which is the one addressed in the majority opinion, is when, if ever, speech is not speech under the First Amendment. The majority opinion holds, in essence, that speech by licensed professionals in the course of their professional practices is not speech, but conduct. Because, says the majority opinion, engaging in the practice of a profession is conduct (even if the practice consists exclusively of talking), any restriction on professional speech is just incidental to the regulation of conduct. In my view, and, more importantly, in the view of the United States Supreme Court, such wordplay poses a serious threat to free speech.

The second question, which the majority opinion did not need to address because of the way it resolved the first issue, is whether a court should treat as "science" the pronouncements of prestigious persons or organizations that are not supported by sound evidence. Science has enjoyed tremendous respect because of the great advances it has made since the beginning of the scientific revolution. But it has not made those advances by respecting "authority." To give just one illustration, although Albert Einstein is widely recognized as the greatest of physicists, virtually all theoretical physicists, then and now, have rejected his views of the nature of quantum mechanics. Only in a very weak moment would a true scientist say, "I am science." The progress of science

has resulted from the creative genius of scientists whose imaginations are then tested through the scientific method. Absent such rigorous testing, their views are no more than plausible theory. To be sure, some sciences are "softer" than others. For example, I doubt that any proposition in psychology can be tested with the rigor typical in physics. But for each field, there are appropriate standards for collecting and analyzing data and experience that are objective—that is, independent of the prestige of the persons expressing a view. Applying those objective standards, whether this application be called strict review, exacting review, rigorous review, or some other term, is an essential task of the judiciary when "science" is invoked to justify restrictions on free speech.

B.

We are called on to answer these questions in the context of a most troubling issue. Many young people have suffered severe emotional distress as they struggle with resolving their sexual orientation or gender identity. In the course of that struggle they may receive a great deal of counseling, wanted or unwanted, from family, friends, clergy, social media, and otherwise. Counseling may support a transition from traditional norms or conforming to those norms.

In Colorado, and a number of other States, however, the law restricts the counseling that can be given to minors by one specific group of persons—ironically, those persons specially trained to provide psychological counseling. One would think that anyone concerned with relieving the emotional distress suffered by these young people would want to

be open to a wide variety of counseling provided by trained professionals. Of course, when experience shows that a method of counseling fails to accomplish its purpose, or even harms the patient or client, conscientious therapists should abandon the practice. And when the evidence of ineffectiveness or harm is strong enough, those who continue with the practice may properly be subject to sanction, from lawsuit to loss of license and perhaps more (just as any speech can be subject to a regulation that survives strict scrutiny). Ideology, however, cannot substitute for data and experience.

What if the shoe were on the other foot? It was not terribly long ago that the mental-health establishment declared homosexuality to be a mental disorder. A therapist who told a homosexual that he was psychologically sound and should take pride in his being different could presumably have been accused of professional malpractice. Under the majority'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. I suspect that many people are grateful that those who disagreed with the common wisdom were able to make their case and change minds. And, most relevant to the case before us, that those dissidents were able to support their views with evidence from their experience in providing therapy contrary to (condemned by?) the prevailing view. It may be comforting to think that such errors are behind us, that the march forward toward enlightenment is relentless, or at least that the elites—the decisionmakers and influential thinkers—inevitably

move in that direction. But that has not been the course of history, even recent history.

We are fortunate to belong to a society in which the freedom of speech protected by the First Amendment allows us to speak our minds free of government interference, to do so in every context, absent powerful reasons supported by historical practice and trustworthy study and experience. The issue in this case is whether to recognize an exception to freedom of speech when the leaders of national professional organizations declare certain speech to be dangerous and demand deference to their views by all members of their professions, regardless of the relevance or strength of their purported supporting evidence. As I understand controlling Supreme Court precedent, the answer is clearly *no*. And this case itself suggests the wisdom of that precedent. If that precedent is based on fear that the mandates of professional organizations are too likely to be dominated by ideology rather than evidence, this case can provide little comfort that the fear is unjustified. To be sure, the jury is out on whether the views of those organizations turn out to be correct. But there are serious questions about whether those views were based on persuasive, much less compelling, evidence that would support the restrictions on Chiles.

C.

I have no doubt of the sincerity of the views expressed by the majority opinion. And the result reached by the majority—upholding the Colorado prohibition on Chiles—may ultimately be correct. But the path taken is quite troubling. And that path contradicts directly relevant Supreme Court

authority.

The majority opinion makes several fundamental errors. First, it pays lip service to the proposition that the Supreme Court has never recognized a lesser First Amendment protection for "professional" speech. But it ignores the meaning of that statement, which is that speech cannot be treated differently just because it is uttered by a professional.

Second, in a related error, the majority opinion reads Supreme Court authority as stating that it has recognized two areas in which professional speech *is* treated differently from speech by others. But what the Court actually said is that while it has subjected regulation of speech by professionals to lesser scrutiny in two contexts, the fact that the speech was by professionals was irrelevant to the decision to apply lesser scrutiny.

Third, and most remarkable—because Supreme Court doctrine is so clearly to the contrary—the majority opinion treats speech as conduct. It does so by invoking the doctrine that in some circumstances regulation of conduct that incidentally burdens speech is subjected to lesser scrutiny. Under that doctrine, for example, a law may require real-estate brokers to pass a test showing knowledge of real-estate law, even though the law may incidentally restrict speech in that a person without a license cannot freely talk to people trying to sell or buy a home. But the majority opinion takes the incidental-burden doctrine way beyond its proper bounds.

In particular, a restriction on speech is not *incidental* to regulation of conduct when the restriction is imposed because of the expressive

content of what is said. And that is the type of restriction imposed on Chiles. The majority opinion takes a field, licensed mental-health treatment, describes it as conduct, and then says that any speech within that field can be regulated, without the usual protection of speech under the First Amendment, as incidental to that conduct. But the "conduct" being regulated here is speech itself, and it is being regulated because of disapproval of its expressive content.

A court cannot say that just because a broadly applicable law that restricts speech also restricts conduct, the restriction on speech is merely incidental to the regulation of conduct. The approach of the majority opinion would "give[] the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement. States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose invidious discrimination of disfavored subjects." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra (NIFLA)*, 585 U.S. 755, 773 (2018) (internal quotation marks omitted). I daresay any speech that a government finds offensive could be placed within a field of conduct and, under the analysis of the majority opinion, regulated as "incidental" to regulation of that field of conduct. Take criticism of a government agency as an example. Viewed from the perspective of those running an agency, criticism will often be characterized as obstructing the work of the agency. If so, the government could simply enact legislation prohibiting obstruction of the work of the agency and then penalize criticism of the agency by a member of the public as incidental to preventing

obstruction. What an opportunity for suppression of dissent this would offer. The majority opinion cannot escape the consequences of its reasoning by offering the baffling *ipse dixit* that the Colorado statute's ban on engaging in conversion talk therapy does not "restrict[] Ms. Chiles's freedom of expression." Maj. Op. at 51.

Fortunately, as will be discussed more fully later, Supreme Court doctrine already bars such efforts. Decades ago, the Court considered a prosecution for disturbing the peace. *See Cohen v. California*, 403 U.S. 15 (1971). Disturbing the peace is a legitimate crime. What the defendant did satisfied all the elements of the crime. But what he did was speech (strictly speaking, expressive conduct); he wore a shirt bearing an expletive. The Court voided the conviction under the First Amendment. More recently, some organizations and lawyers who wished to provide expert legal advice to certain terrorist groups sought to enjoin enforcement of a criminal statute prohibiting the provision of material support, including expert advice or assistance, to terrorists. *See Holder v. Humanitarian L. Project*, 561 U.S. 1 (2010). Again, what they wished to do satisfied the requirements of the criminal statute. Under the reasoning of the majority opinion in this case, the lawyers would not be entitled to protection under the First Amendment because they sought to engage in speech incidental to the conduct of aiding terrorists. But the Supreme Court held that giving legal advice to the terrorist organizations was speech protected by the First Amendment. The Court rejected their argument for an injunction against applying the statute to them only because the restriction on speech

survived the requisite scrutiny.

The majority opinion would avoid the Supreme Court doctrine by pointing out that the Colorado statute regulates a profession. But how is that relevant when the Supreme Court has declared that the First Amendment protection of speech does not care whether the speech was made by a professional? Yes, a regulation of (professional) conduct need not be subject to rigorous scrutiny under the First Amendment even though the regulation may *incidentally* regulate speech (*e.g.*, a law may deny a person a license to practice a profession if the person does not satisfy certain character, training, and education requirements even though the denial of a license may limit the person's opportunity to speak). But there is no applicable Supreme Court authority permitting regulation to escape rigorous scrutiny when, as here, it is directed at speech because of its point of view.

I proceed to explain more fully how the Supreme Court has treated professional speech and then suggest how courts should assess the quality of evidence supporting the Colorado regulations.

II. TALK THERAPY IS SPEECH

The thrust of the Supreme Court's opinion in *NIFLA* was largely devoted to addressing the fact that "[s]ome Courts of Appeals have recognized 'professional speech' as a separate category of speech that is subject to different rules." 585 U.S. at 767. The Court may have thought that it disposed of the matter when it responded: "But this Court has not recognized 'professional speech' as a separate category of speech. Speech is not unprotected merely because it is uttered

by 'professionals.'" *Id.*

The majority opinion suggests, however, that there is more to the story. It states that "[t]he Court acknowledged [in *NIFLA*] it has 'afforded less protection for professional speech in two circumstances—neither of which turned on the fact that professionals were speaking.' [585 U.S.] at 768." Maj. Op. at 32. But it ignores the Court's language after the dash. The Court's point was that the First Amendment *never* cares whether "professionals were speaking." 585 U.S. at 768. It acknowledged that there are two circumstances in which it has upheld a regulation of professional speech without subjecting that speech to strict scrutiny—the usual standard for determining whether a restriction on speech is compatible with the First Amendment. But in those two circumstances in which the speech (by professionals) has been "afforded less protection" than speech in general, the Court has followed the same rules as it would if the speech were by someone other than a professional. *Id.* In both circumstances, the reduced protection for professional speech had not "turned on the fact that professionals were speaking." *Id.* That is, in the two circumstances in which it has reduced the protection for speech made by professionals, it was applying general principles that recognized no distinction for professionals.

The Court made this point clear in discussing those two circumstances. The first type of regulation that was subjected to lesser scrutiny was "laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* But the same less-demanding standard of review applies to disclosure requirements for commercial

speech by nonprofessionals. *See Hurley v. Irish-American Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 573 (1995) ("[T]he State may at times prescribe what shall be orthodox in commercial advertising by requiring the dissemination of purely factual and uncontroversial information . . . ." (internal quotation marks omitted)); *Pac. Gas & Elec. Co. v. Pub. Utils. Comm'n of Cal.*, 475 U.S. 1, 15 n.12 (1986) ("The State, of course, has substantial leeway in determining appropriate information disclosure requirements for business corporations.").[1]

The second circumstance mentioned in *NIFLA* arises when governments "regulate professional conduct, even though that conduct incidentally involves speech." 585 U.S. at 768. The Court explained that "[t]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech, and professionals are no exception to this rule." *Id.* at 769. To illustrate this point, the Court discussed the holding in *Planned Parenthood of Southeast Pennsylvania v. Casey*, 505 U.S. at 884 (joint opinion of O'Connor, Kennedy, and Souter, JJ.), which upheld a requirement that doctors "give a woman certain information as part of obtaining her consent to an abortion." *Id.* But this requirement does not treat physicians any differently from other persons. One who touches another is liable for battery, absent

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[1] In any event, this circumstance is irrelevant to the case before us because the concern with the Colorado statute is that it suppresses speech, not that it compels speech. This distinction was the basis of the dissent in *NIFLA*, which argued that the disclosure requirement at issue did not impair the marketplace of ideas. *See* 585 U.S. at 794–95 (Breyer, J., dissenting).

consent. *NIFLA* quotes the explanation by then-Judge Cardozo that "a surgeon who performs an operation without his patient's consent commits an assault." 585 U.S. at 770 (internal quotation marks omitted). The inference is inescapable (although it escapes the majority opinion) that the Supreme Court meant what it said when it declared that in those circumstances where professional speech has been provided diminished protection, the rationale for the reduced protection had nothing to do with the fact that the speaker was a professional.[2]

Accordingly, if talk therapy is to be afforded lesser First Amendment protection than speech in general, that must be because of free-speech doctrine that also applies to nonprofessional speech. The majority opinion identifies no such doctrine. The Supreme Court in *NIFLA* said that "neither California nor the Ninth Circuit has identified a persuasive reason for treating professional speech as a unique category that is exempt from ordinary First Amendment principles." 585 U.S. at 773. I recognize that the Court did "not foreclose the possibility that some such reason exists." *Id.* But one can say with confidence that categorizing some professional speech as "a form of treatment" is not such a reason. The Ninth Circuit

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[2] The majority is simply mistaken when it claims that "nothing in *Casey* suggests the nature of the medical treatment was dispositive of the First Amendment question," Maj. Op. at 51, and then proceeds to extend the application of the *Casey* exception to treatment consisting solely of speech. Certainly as interpreted in *NIFLA*, *Casey* upheld the informed-consent requirement only for a physical intrusion on the body. Because informed consent is necessary only for physical acts, this example in *Casey* has no relevance to talk therapy.

had suggested precisely that reason, stating that when professional speech is "a form of treatment," regulation of such speech need only satisfy rational-basis review. *Nat'l Inst. of Fam. & Life Advocs. v. Harris*, 839 F.3d 823, 839 (9th Cir. 2016). Yet *NIFLA* declared that the Ninth Circuit's opinion had not "identified a persuasive reason for treating professional speech" differently. 585 U.S. at 773.

The majority attempts to sidestep this problem by using the device of defining the speech used by Chiles during therapy as "conduct." I understand the majority's argument that speech is conduct to be as follows: First, it says the treatment of mental-health disorders is conduct. After all, it reasons, the Colorado statute is part of a whole chapter regulating mental-health treatment. Then it contends that any regulation of speech used in such treatment is simply regulation "incidental" to the conduct of mental-health treatment. Although all that Chiles does in the alleged conversion therapy[3] is talk to her patient, that talk can be regulated without the usual First Amendment constraints, because it is really conduct. In the words of the majority opinion, Colorado's conversion therapy ban does not regulate Chiles's

[3] I use the term *conversion therapy* throughout this dissent because that is the term used in the Colorado statute. A better term in the homosexuality context is probably *sexual orientation change efforts* (SOCE) because it avoids any implication that homosexuality is a disorder. *See* American Psychological Association, *APA Resolution on Sexual Orientation Change Efforts* (2021). In the transgender context the comparable term is *gender identity change efforts* (GICE). *See* American Psychological Association, *APA Resolution on Gender Identity Change Efforts* (2021).

speech but instead merely "regulates the provision of a therapeutic modality—carried out through the use of verbal language—by a licensed practitioner authorized by Colorado to care for patients." Maj. Op. at 46. The Colorado statute, says the opinion, "does not regulate expression." *Id.* at 47.

In other words, according to the majority all the government needs to do to regulate speech without worrying about the First Amendment 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. But to "classify some communications as 'speech' and others as 'conduct' is to engage in nothing more than a 'labeling game.' . . . Simply put, speech is speech, and it must be analyzed as such for purposes of the First Amendment." *King v. Governor of the State of N.J.*, 767 F.3d 216, 228–29 (3d Cir. 2014) (further internal quotation marks omitted), rejected on other grounds by *NIFLA*, 585 U.S. at 767; see *Otto v. City of Boca Raton*, 981 F.3d 854, 865 (11th Cir. 2020) ("[The treatment provided by talk-based conversion therapists] is not just carried out *in part* through speech: the treatment provided by [such therapists] *is entirely* speech. If [talk-based conversion therapy] is conduct, the same could be said of teaching or protesting—both are activities, after all. Debating? Also an activity. Book clubs? Same answer." (internal quotation marks omitted).)

Fortunately, the Supreme Court has long rejected such a maneuver. More than 50 years ago a city prosecuted a young man for disturbing the peace by wearing a shirt with an offensive expletive. The Court, in *Cohen v. California*, 403 U.S. 15 (1971),

assumed that wearing the shirt satisfied all the elements of disturbing the peace. But it reversed the conviction. As the Court put it, "The only 'conduct' which the State sought to punish is the fact of communication. Thus, we deal here with a conviction resting solely upon 'speech' . . . ." *Id.* at 18. The protection of the First Amendment was not diminished just because the speech satisfied all the elements of a criminal statute generally regulating conduct. It was not enough that the speech could be classified as coming within a "modality" (namely, disturbing the peace) that included conduct. As with *Cohen*, the regulation of the "conduct" in this case "rest[s] solely upon speech," that is, "the fact of communication." *Id.* (internal quotation marks omitted).

More recently, the Supreme Court considered legislation that makes it a crime to "knowingly provide material support or resources to a foreign terrorist organization." *Holder v. Humanitarian L. Project*, 561 U.S. 1, 8 (2010) (brackets and internal quotation marks omitted). The plaintiffs challenged the law on free-speech grounds insofar as it prohibited providing training (such as training "on how to use humanitarian and international law to peacefully resolve disputes") and expert advice (such as teaching "how to petition for humanitarian relief before the United Nations") to terrorist organizations. *Id.* at 21–22. The government responded that "the only thing truly at issue in this litigation is conduct, not speech. [The statute] is directed at the fact of plaintiffs' interaction with the [terrorist groups], . . . and only incidentally burdens their expression." *Id.* at 26. The Court rejected this argument, declaring that the

statute "regulates speech on the basis of its content. Plaintiffs want to speak to the [terrorist organizations], and whether they may do so under [the statute] depends on what they say." *Id.* at 27. The government further argued that the statute "should nevertheless receive intermediate scrutiny because it generally functions as a regulation of conduct." *Id.* (emphasis removed). The Court was not persuaded, saying that the argument ran "headlong into a number of our precedents, most prominently *Cohen*, [which] also involved a generally applicable regulation of conduct, barring breaches of the peace." *Id.* at 27–28. Summarizing that decision, the Court said that "when Cohen was convicted for wearing a jacket bearing an epithet, . . . we recognized that the generally applicable law was directed at Cohen because of what his speech communicated—he violated the breach of the peace statute because of the offensive content of his particular message. We accordingly applied more rigorous scrutiny and reversed his conviction." *Id.* at 28. The Court then treated the material-support statute, as applied to the plaintiffs' wished-for conduct, as a regulation of speech subject to rigorous First Amendment review, saying that the case before it fell "into the same category" as *Cohen*: "The law here may be described as directed at conduct, as the law in *Cohen* was directed at breaches of the peace, but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Id.*[4]

[4] I should note, though, that the prohibition in *Holder* ultimately survived rigorous scrutiny, and that could also be the

That same description applies here. Even if the regulation of mental-health providers can be described generally as directed at conduct, the conduct of Chiles "triggering coverage under the statute consists of communicating a message." *Id.* Chiles wants to speak to her patients, and "whether [she] may do so . . . depends on what she says." *Id.* at 27. If her speech to a minor "provide[s] [a]cceptance, support, and understanding for the facilitation of an individual's coping, social support, and identity exploration and development," it is permitted. C.R.S. § 12-245-202(3.5)(b)(I). If, on the other hand, her speech "attempts or purports to change a [minor] individual's sexual orientation or gender identity," it is prohibited. *Id.* § 12-245-202(3.5)(a); C.R.S. § 12-245-224(t)(V). In *Holder* the Supreme Court described the protected speech as follows: "Plaintiffs want to speak to the [terrorist organizations], and whether they may do so under [the material-support statute] depends on what they say." 561 U.S. at 27. What is the difference here?

The prohibition of Chiles's speech cannot escape rigorous First Amendment scrutiny simply because the prohibition may also apply to much conduct. The majority opinion's observation that "[t]alk therapy is a treatment," Maj. Op. at 45, is therefore true, but irrelevant to whether talk therapy is speech, and, indeed, speech entitled to the full protection of the First Amendment. The label "medical treatment" has no purchase in First Amendment doctrine. As the Supreme Court said in providing First Amendment

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result of applying rigorous scrutiny in this case. *See Holder*, 561 U.S. at 28, 40.

protection to allegedly libelous speech:

> In deciding the question now, we are compelled by neither precedent nor policy to give any more weight to the epithet 'libel' than we have to other 'mere labels' of state law. Like insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business, and the various other formulae for the repression of expression that have been challenged in this Court, libel can claim no talismanic immunity from constitutional limitations. It must be measured by standards that satisfy the First Amendment.

N.Y. Times Co. v. Sullivan, 376 U.S. 254, 269 (1964) (citations omitted). The term *medical treatment* should likewise be afforded no talismanic power.

What *Cohen* and *Holder* teach is that a regulation that bars speech because of what it communicates is a direct regulation of speech, not a regulation of conduct that incidentally affects speech. Failure to recognize this is the fundamental error in the majority opinion.

The majority opinion attempts to distinguish *Holder* on the ground that it does "not even deal with regulations of professional conduct that could incidentally involve speech." Maj. Op. at 56. Insofar as the majority opinion is saying that the regulations in *Holder* did not address professional conduct, it is factually incorrect. The statute in *Holder* clearly regulated professional conduct—conduct by the attorneys who wished to assist terrorists. *NIFLA* described the statute as, in part, regulating

"organizations that provided specialized advice about international law." 585 U.S. at 771. Is the majority opinion distinguishing a statute that comprehensively regulates a profession from a statute that regulates only one aspect of professional conduct? Why should that affect the First Amendment analysis?

In any event, it is irrelevant whether *Holder* dealt with professional conduct. In full conflict with *NIFLA*, the majority opinion again appears to be saying that professional speech should be treated differently from other speech. Otherwise, why would we care whether *Holder* dealt with regulations of professional conduct? But as discussed above, *NIFLA* made clear that in the only two circumstances in which the Court has subjected regulation of professional speech to less scrutiny, its decisions did not "turn[] on the fact that professionals were speaking." 585 U.S. at 768. That is, "professional speech" is subject to the same First Amendment protections as other speech. Therefore, even if the majority were correct that *Holder* did not involve professional conduct, its holding would still be relevant and applicable to the situation before us. And that holding tells us that the government may not, under the guise of regulating mere "conduct," regulate pure speech under some kind of lesser First Amendment standard.

As for the possibility that *Holder* could be distinguished on the ground that it did not address a regulation of "conduct that [could] incidentally involve speech," Maj. Op. at 56, the majority opinion is correct that *NIFLA* states that *Holder* was "'[o]utside of the two contexts' in which" professional speech has been less protected. *Id.* n.32 (quoting 585

U.S. at 771). But it draws exactly the wrong inference from that observation. Why did the Court say that the speech in *Holder* was outside of the second context? (The first context—commercial speech—clearly did not apply.) It was not because the regulation did not generally govern conduct; the regulation prohibited providing assistance to terrorist organizations. The reason *Holder* was outside of the second context is because it did not concern merely an effect on speech that was incidental to regulation of conduct (such as a licensing requirement that a licensee be of good character, which could incidentally prevent an applicant from becoming a licensed attorney and speaking with clients). There was nothing *incidental* about the regulation of speech in *Holder*. Just as was the case in *Cohen*, and is the case here, the regulation in *Holder* was *directed at speech because of what it communicated*, and such a regulation must be tested under ordinary First Amendment scrutiny. *See Holder*, 561 U.S. at 28 ("The law here may be described as directed at conduct, as the law in *Cohen* was directed at breaches of the peace, but as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message."). Indeed, *Holder* considered and rejected the very argument that the majority now embraces—namely, that the material-support statute should be subjected to lesser scrutiny because it regulated conduct, not speech. *See Holder*, 561 U.S. at 27 ("The Government is wrong that the only thing actually at issue in this litigation is conduct . . . Plaintiffs want to speak to the [terrorist organizations], and whether they may do so under [the material-support statute] depends on what they say."). The second circumstance is not at issue

here for exactly the same reason it was not at issue in *Holder*. When *NIFLA* states that the regulation at issue in *Holder* was outside of the second context, it is declaring that a law that penalizes speech because of what it communicates is not a law that *incidentally* affects speech.

In a related argument that talk therapy is not speech, the majority opinion argues that Chiles's provision of talk therapy is not the same as speech a psychology major could have with a fellow student, because Chiles "is a licensed professional counselor, a position earned after years of advanced education and licensure." Maj. Op. at 44. My response repeats what I have already said. Is the majority stating that professional speech should be treated differently under the First Amendment from identical speech by a nonprofessional? That would fly in the face of what the Supreme Court has recently told us. "Speech is not unprotected merely because it is uttered by 'professionals.'" *NIFLA*, 585 U.S. at 767. And if mere licensing requirements for those providing "personalized services" were enough to transform protected speech into unprotected conduct, the government would have "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement. States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose invidious discrimination of disfavored subjects." *Id.* at 773 (internal quotation marks omitted). "State labels cannot be dispositive of the degree of First Amendment protection." *Id.* (brackets and internal quotation marks omitted).

The majority opinion can also find no succor in the

nonprecedential concurring opinion of three Justices in *Lowe v. SEC*, 472 U.S. 181, 232 (1985). As I read that concurring opinion, the language cited by the majority opinion is saying only that the government can deny a person a license based on character or other qualifications, even though there is an incidental impact on the person's freedom to speak (since only licensed persons are permitted to counsel clients or patients in certain ways). Also, I should note that a century-old decision cited by the majority opinion, *Crane v. Johnson*, 242 U.S. 339 (1917), did not address the First Amendment and therefore has no bearing here.

That brings us back to *NIFLA*. Its declaration that professional speech should be treated the same as any other speech compels reversal here. I have already explained the various ways in which the majority opinion misreads language in *NIFLA*. What I now turn to are parts of that opinion that address the particular issue before us and indicate substantial skepticism with respect to the type of regulation imposed here.

To begin with, it is worth noting what lower-court opinions the Supreme Court was referencing when it said that "these courts except professional speech from the rule that content-based regulations of speech are subject to strict scrutiny," 585 U.S. at 767, and then proceeded with its discussion explaining that "professional" speech must be treated the same as other speech. Two of the three opinions referenced were *King v. Governor of the State of N.J.*, 767 F.3d 216 (3d Cir. 2014) and *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). In each the circuit court was addressing the propriety of a ban on conversion

therapy through speech by licensed mental-health professionals. *See King*, 767 F.3d at 221; *Pickup*, 740 F.3d at 1221, 1229 n.5. The context was essentially identical to what we have here. When the Court said that "professional" speech is not excepted from "the rule that content-based regulations of speech are subject to strict scrutiny," 585 U.S. at 767, the Justices undoubtedly had regulation of conversion therapy at the forefront of their minds as an application of that statement. It would be passing strange for the Court to cite critically those particular cases if it thought the decisions were ultimately correct.

Further, the extended passage in *NIFLA* warning of the dangers of allowing the government to tell medical professionals what and what not to say to patients is completely inconsistent with the majority opinion's unqualified endorsement of precisely such government control. The passage goes as follows:

> The dangers associated with content-based regulations of speech are also present in the context of professional speech. As with other kinds of speech, regulating the content of professionals' speech poses the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information. Take medicine, for example. Doctors help patients make deeply personal decisions, and their candor is crucial. Throughout history, governments have manipulated the content of doctor-patient discourse to increase state power and suppress minorities:

> For example, during the Cultural Revolution, Chinese physicians were dispatched to the countryside to convince peasants to use contraception. In the 1930s, the Soviet government expedited completion of a construction project on the Siberian railroad by ordering doctors to both reject requests for medical leave from work and conceal this government order from their patients. In Nazi Germany, the Third Reich systematically violated the separation between state ideology and medical discourse. German physicians were taught that they owed a higher duty to the 'health of the Volk' than to the health of individual patients. Recently, Nicolae Ceausescu's strategy to increase the Romanian birth rate included prohibitions against giving advice to patients about the use of birth control devices and disseminating information about the use of condoms as a means of preventing the transmission of AIDS.

Id. at 771–72 (brackets, citations, and internal quotation marks omitted). Is it possible to read that paragraph and think that the Court would exempt from strict scrutiny a governmental order to mental-health professionals that they not provide conversion therapy that consists solely of talking with the patient? If, as the majority opinion argues, talk therapy is "medical treatment" the regulation of which constitutes merely regulation of professional conduct, Maj. Op. at 52, then so too is a doctor's visit involving the doctor's "giving advice to patients about the use of birth control devices" or providing

"information about the use of condoms as a means of preventing the transmission of AIDS." *NIFLA*, 585 U.S. at 772. And if, as the majority opinion says, talk therapy "can, in some cases, mean the difference between life and death," Maj. Op. at 53 (internal quotation marks omitted), so can good or bad advice as to birth control or the use of condoms to prevent AIDS. But *NIFLA* nonetheless considered the speech involved in providing such "medical treatment" to be protected by the First Amendment.

I therefore conclude that insofar as the Colorado statute prohibits conversion therapy that is limited to conversations with a patient or client, the prohibition must be subjected to close scrutiny. That should be the task of the district court in the first instance, but a few observations are in order.

III. HOW TO REVIEW THE EVIDENCE REGARDING TALK-ONLY CONVERSION THERAPY

One likely reason for the resistance to subjecting restrictions on speech by professionals to rigorous scrutiny is the view that such scrutiny is the kiss of death. After all, how often does discrimination on the basis of race survive strict scrutiny? But I would be more sanguine about the survivability of typical professional regulations. *See*, *e.g.*, *Holder*, 561 U.S. at 25–39 (upholding under rigorous scrutiny the challenged restrictions on providing legal advice to terrorists); *Williams-Yulee v. Florida Bar* 575 U.S. 433, 455 (2015) (restriction on personal solicitation of campaign contributions by judicial candidate survives strict scrutiny). For example, surely there are compelling reasons to forbid attorneys from disclosing

client confidences. And surely a lawyer should be subject to a malpractice claim for negligently misinforming a client about the statute-of-limitations deadline.

In the present context, I do not think it out of the question that the government can justify a ban on conversion therapy even if it is limited solely to speech. But there needs to be evidence, good evidence, to support that. A vote by a professional organization might be indicative that there is such evidence, but it is not a substitute. I say that partly because the briefs of appellees and several amici emphasize the official positions taken by national professional organizations. But I have no idea of the process by which those positions were arrived at or who actually made the decisions, and it really does not matter unless they are based on persuasive evidence. Consensus is irrelevant to science. A book by one great physicist reports a comment by an even greater one that makes the point: "When a book was published entitled *100 Authors Against Einstein*, [Einstein] retorted, 'If I were wrong, then one would have been enough!'" Stephen Hawking, *A Brief History of Time* 193 (1996).

The reversal of the views of the American Psychiatric Association regarding whether homosexuality is a mental disorder is illustrative. The majority opinion suggests that the reversal is not an illustration of how professional associations can go wrong but, rather, an example of how we can trust professional expertise to develop along with research discoveries. *See* Maj. Op. at 72 n.45. In my view, however, the original error is simply an illustration of what happens when ideology prevails over the scientific approach. For example, one criticism of the

declaration that homosexuality is a mental disorder was that the psychiatrists advocating that position had studied a nonrepresentative sample: they based their views on observations of their patients who were homosexual, not the general population of homosexuals. One would think that those who seek psychiatric help are more likely to have a mental disorder than others. In contrast, supporting the revised position of the APA were studies based on standardized, fairly objective tests for mental health (such as the MMPI) that indicated that "homosexual men and women were essentially similar to heterosexual men and women in adaptation and functioning." American Psychological Association, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation (Task Force Report)* 23 (2009).

The courts must exercise the utmost caution before endorsing government suppression of speech. The *NIFLA* Court warned that "when the government polices the content of professional speech, it can fail to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail. Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields." *NIFLA*, 585 U.S. at 772 (citation and internal quotation marks omitted). "The best test of truth is the power of the thought to get itself accepted in the competition of the market, and the people lose when the government is the one deciding which ideas should prevail." *Id.* (citation, brackets, and internal quotation marks omitted). Courts must be particularly wary that in a contentious and evolving field, the government and

its supporters would like to bypass the marketplace of ideas and declare victory for their preferred ideas by fiat. The courts can play a vital role in preventing this country from having a Lysenko moment.

What, then, are the courts to do in fulfilling their responsibility to police the use of expert opinion in judicial proceedings?[5] One, is to be skeptical. Not every study published in a peer-reviewed journal can be relied on. Several investigators have attempted to replicate experimental studies in the social behavioral sciences (which include psychology) with varying success, suggesting an average reproducibility rate of between 35% and 75%.[6] There

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[5] The majority opinion would have the courts do very little. The district courts would engage in perfunctory review of studies endorsed by professional organizations, and the appellate courts would defer to the district courts. *See*, *e.g.*, Maj. Op. at 68 n.43 (adopting statement in Task Force Report not supported by any sound studies relevant to this case). Such an approach has bred dismay by true scientists at the conclusions reached in the courts in a variety of contexts. The Supreme Court attempted to provide more vigorous judicial oversight of expert testimony in *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579 (1993); and Federal Rule of Evidence 702 was modified in response. But too many courts have maintained a laissez faire attitude, so Rule 702 was strengthened in the recent 2023 amendments. The approach of the majority opinion is an unfortunate step backwards.

[6] *See* Colin F. Camerer et al., *Evaluating the replicability of social science experiments in* Nature *and* Science *between 2010 and 2015*, 2 Nature Human Behavior 637, 642 (2018); *see also* Kelsey Piper, *Science has been in a "replication crisis" for a decade. Have we learned anything?*, Vox (Oct. 14, 2020), https://www.vox.com/futureperfect/21504366/science-replication-crisis-peer-review-statistics [https://perma.cc/3FYF-J968]; Alexander A. Aarts et al., *Estimating the reproducibility of psychological science*, 349 Science 943 (2015); Richard A. Klein et al., *Many Labs 2: Investigating Variation in Replicability Across Samples*

may be a number of explanations, including random variations and sloppy work. But shortcomings serious enough to warrant losing a prestigious position are not outside the realm of possibility.[7] And improper research techniques are apparently not uncommon. A 2011 study received survey responses from more than 2,000 academic psychologists at major U.S. universities about whether they had engaged in practices that the authors described as questionable research practices (which did not include research misconduct—that is, fabrication, falsification, and plagiarism); a majority reported that they had.[8] A more recent meta-analysis of such studies estimated that 12% of researchers had witnessed other researchers fabricate data, 10% had witnessed others falsify data, and 40% had witnessed other researchers engage in questionable research practices.[9] Moreover, one may question whether research that may go against the grain of prevailing opinion can get

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and Settings, 1 Advances in Methods and Practices in Psychological Science 443 (2018).

[7] *See*, *e.g.*, Nicholas Wade, *Scientist Under Inquiry Resigns From Harvard*, N.Y. Times (July 20, 2011) (behavioral psychologist), https://www.nytimes.com/2011/07/21/science/21hauser.html [https://perma.cc/BN3CW9LA]; Oliver Whang and Benjamin Mueller, *What to Know About the Stanford President's Resignation*, N.Y. Times (July 19, 2023), https://www.nytimes.com/2023/07/19/science/tessier-lavigne-resignation-research.html [https://perma.cc/6E8S-4F8S].

[8] *See* Leslie K. John et al., *Measuring the Prevalence of Questionable Research Practices With Incentives for Truth Telling*, 23 Psych. Sci. 524 (2012).

[9] *See* Yu Xie et al., *Prevalence of Research Misconduct and Questionable Research Practices: A Systematic Review and Meta-Analysis*, 27 Sci. and Eng'g Ethics (Jun. 2021).

funding, much less be published. The questionable retraction of the publication of an against-the-grain study is reported in one recent article.[10] The plausibility of that report has been increased by the response of professional psychological associations in this country to a report by Dr. Hilary Cass commissioned by England's National Health Service based on a four-year review of research on gender treatment for youth. *See* Pamela Paul, *Why Is the U.S. Still Pretending We Know Gender-Affirming Care Works?*, N.Y. Times (July 12, 2024), https://www.nytimes.com/2024/07/12/opinion/gender-affirming-care-cass-review.html [https://perma.cc/YT8L-LYY4] (reporting that "in the United States, federal agencies and professional associations that have staunchly supported the gender-affirming care model [have] greeted the Cass Review with silence or utter disregard," and concluding that "the United States continues to put ideology ahead of science").

I now turn to the Colorado statute. I begin with the ban on all treatment of minors with gender issues by licensed mental-health professionals except what is commonly known as gender-affirming care—that is, care supportive of changing gender. It is unclear whether Chiles engages in treatment of gender issues; but in any event a discussion of the debate on such treatment of minors may be helpful in assessing the prohibition on conversion therapy for those with sexual-orientation issues.

The Colorado statute prohibits any treatment of

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[10] Colin Wright, *Anatomy of a Scientific Scandal*, City Journal (June 12, 2023), https://www.city-journal.org/article/anatomy-of-a-scientific-scandal [https://perma.cc/E9MD-324F].

minors that attempts to change their gender identity. *See* C.R.S. § 12-245-202(3.5)(a); C.R.S. § 12-245-224(t)(V). The consensus view of organizations of mental-health professionals in this country is that only gender-affirming care (including the administration of drugs) should be provided to minors,[11] and that attempts to change a minor's intent to change gender identity are dangerous—significantly increasing suicidal tendencies and causing other psychological injuries.[12] The organizations insist that this view reflects the results of peer-reviewed studies.[13]

But outside this country there is substantial doubt about those studies. In the past few years there has been significant movement in Europe away from American orthodoxy. For example, medical authorities in Finland, Sweden, Denmark, and Norway have, purportedly based on experience in those countries, restricted medical treatment (as opposed to psychotherapy) of minors to enhance gender transition.[14] Most notably, the English

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[11] *See* Paul, *supra* ("[A]ll the major professional medical organizations in the United States have officially embraced [the gender-affirming-care model] in their guidelines[.]").

[12] *See*, *e.g.*, American Psychological Association, *Resolution on Gender Identity Change Efforts* 3 (2021) (asserting that gender-identity change efforts "are associated with harmful social and emotional effects for many individuals, including but not limited to, the onset or increase of . . . suicidality.").

[13] *See*, *e.g.*, *id.* (citing studies).

[14] *See* Azeen Ghorayshi, *Youth Gender Medications Limited in England, Part of Big Shift in Europe*, N.Y. Times (April 9, 2024), https://www.nytimes.com/2024/04/09/health/europe-trans

National Health Service has now greatly restricted medical treatment of minors to assist in gender transition except as part of scientific studies to test the efficacy of such treatment.[15] This decision was based on the "largest review ever undertaken in the field of transgender health care."[16] Commissioned by England's National Health Service and led by Dr. Hilary Cass, former President of the Royal College of Paediatrics,[17] its findings cast serious doubt on the current state of youth transgender medicine. The report says that youth transgender medicine is "an area of remarkably weak evidence," and that "we have no good evidence on the long-term outcomes of interventions to manage gender-related distress." *Independent Review of Gender Identity Services for Children and Young People* (the Cass Review) 13 (April 2024). It noted that "[c]linicians who have spent many years working in gender clinics have drawn very different conclusions from their clinical experience about the best way to support young people with gender-related distress." *Id.* Among other things, the report said that "the evidence does not adequately support the claim that gender-affirming treatment reduces suicide risk." *Id.* at 187.

Perhaps even more interesting for purposes of

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gender-youth-hormonetreatments.html[https://perma.cc/D68U-EWRK].

[15] *See id.*

[16] The Economist, *The Cass Review damns England's youth-gender services* (Apr. 10, 2024), https://www.economist.com/britain/2024/04/10/the-cass-review-damnsenglands-youth-gender-services [https://perma.cc/WQK8-797R].

[17] *See id.*

this case than the report itself has been the response of the mental-health professional associations in this country. As reported by a columnist for the New York Times, those organizations have expressed hostility to the Cass Review but without confronting any specific findings.[18] And one state association apparently even banned discussion of the Cass Review on its listserv.[19] These responses do not provide comfort that the organizations are motivated by science rather than ideology.

In that light, it is important to examine whether the evidence relating to conversion therapy directed at sexual preference is more settled than for that directed at gender identity. To begin with, the 2009 report of the American Psychological Association Task Force (the Task Force Report) examining conversion therapy is rather persuasive that much of the evidence that conversion therapy actually works to change sexual orientation is unreliable. The report

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[18] *See* Paul, *supra* ("[I]n the United States, federal agencies and professional associations that have staunchly supported the gender-affirming care model [have] greeted the Cass Review with silence or utter disregard.").

[19] *See* Leor Sapir, *A Consensus No Longer*, City Journal (Aug. 12, 2024), https://www.city-journal.org/article/a-consensus-no-longer [https://perma.cc/D962-7GBH] (reporting that "the Pennsylvania Psychological Association, a branch of the American Psychological Association, forbade any mention of the Cass Review on its professional listserv"); Benjamin Ryan, *The Pennsylvania Psychological Association Forbids Its Members to Mention the Cass Review*, Reality's Last Stand (Jul. 19, 2024), https://www.realityslaststand.com/p/the-pennsylvania-psychological-association [https://perma.cc/SSP4-HWNT] (copying the email sent to members, which justifies the listserv ban because the discussion causes harm to some members).

recognizes that there had been studies reporting successes but, for the most part, they suffered from "serious methodological problems." *Task Force Report* at 2. As summarized in the Executive Summary of the Task Force Report: "Few studies . . . could be considered true experiments or quasi-experiments that would isolate and control the factors that might effect a change" *Id.* "Only one of these studies actually compared people who received a treatment with people who did not and could therefore rule out the possibility that other things, such as being motivated to change, were the true cause of any change the researchers observed in the study participants." *Id.* (citation omitted). In particular, the Task Force Report pointed out the flaws in studies in which people who had been exposed to conversion therapy "are asked to recall and report on their feelings, beliefs, and behaviors at an earlier age or time and are then asked to report on these same issues at present." *Id.* at 29. The report noted that "[a]n extensive body of research demonstrates the unreliability of retrospective" studies of this type. *Id.* It mentioned some examples of potential problems, including that retrospective study designs "are extremely vulnerable to response-shift biases resulting from recall distortion and degradation," since "[p]eople find it difficult to recall and report accurately on feelings, behaviors, and occurrences from long ago and, with the passage of time, will often distort the frequency, intensity, and salience of things they are asked to recall." *Id.* Also, "[i]ndividuals tend to want to present themselves in a favorable light. As a result, people have a natural tendency to report on their current selves as improved over their prior

selves" and will "report change under circumstances in which they have been led to expect that change will occur, even if no change actually does occur." *Id.*

One chapter of the Task Force Report discusses the studies that it thought were worth examining regarding the efficacy of conversion therapy on homosexual persons (usually men).[20] As for decreasing same-sex sexual behavior, the review studies reported success rates ranging from 11% to 42% for conversion therapy. *See id.* at 38. The report summarized that no effect had been shown in the only randomized control-group trial; "[q]uasi-experimental results found that a minority of men reported reductions; and the nonexperimental studies "found that study participants often reported reduced behavior but also found that reductions . . . were not always sustained." *Id.* at 39. Regarding decreasing

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[20] One study discussed in the report was authored by Prof. Robert L. Spitzer of Columbia University, who played an important role in the decision of the American Psychiatric Association to end the categorization of homosexuality as a mental disorder. *See* John Bancroft et al., *Peer Commentaries on Spitzer*, 32 Archives of Sexual Behav. 419, 419 (2003). He interviewed 200 adult subjects who insisted that conversion therapy had worked for them. *See* Robert L. Spitzer, *Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation*, 32 Archives of Sexual Behav. 403 (2003). The study was published in 2003. In 2012, however, Prof. Spitzer apologized for the study and retracted it, explaining that he had no way of knowing whether the reports by the subjects he spoke with were credible. *See* Robert L. Spitzer, *Spitzer Reassess His 2003 Study of Reparative Therapy of Homosexuality*, 41 Archives of Sexual Behav. 757 (2012). It is unclear why this explanation would not require retraction of all studies based on interviews or surveys.

same-sex sexual attraction, the report summarized that experimental studies showed decreases for 34% of subjects or more, but none of the studies "compared treatment outcomes to an untreated control group"; one quasi-experimental study reported that 50% of participants reported reduced arousal after a year and others had comparable results; and nonexperimental studies found "reductions in participants' self-reported sexual attraction and physiological response under laboratory conditions" ranging from 7% to 100%, with an average of 58%. *Id.* at 36–37. The studies reviewed by the Task Force Report showed lesser success in increasing other-sex sexual attraction. The task force concluded: "The limited number of rigorous early studies and complete lack of rigorous recent prospective research on [conversion therapy] limits claims for the efficacy and safety of [conversion therapy] . . . . [A] small number of rigorous studies . . . [that] focus on the use of aversive treatments . . . show that enduring change to an individual's sexual orientation is uncommon and that a very small minority of people in these studies showed any credible evidence of reduced same-sex sexual attraction . . . Given the limited amount of methodologically sound research, we cannot draw a conclusion regarding whether recent forms of [conversion therapy] are or are not effective." *Id.* at 42–43.

Regarding harm from conversion therapy, the Task Force Report summarized:

> We conclude that there is a dearth of scientifically sound research on the safety of [conversion therapy]. Early and recent research studies provide no clear indication of

> the prevalence of harmful outcomes among people who have undergone efforts to change their sexual orientation or the frequency of occurrence of harm because no study to date of adequate scientific rigor has been explicitly designed to do so. . . . However, studies from both periods indicate that attempts to change sexual orientation may cause or exacerbate distress and poor mental health in some individuals, including depression and suicidal thoughts. The lack of rigorous research on the safety of [conversion therapy] represents a serious concern. . . .

Id. at 42.

The above discussion of the Task Force Report demonstrates two things that are of considerable importance to this case and cases like it. First, the mental-health community recognizes objective standards for determining the efficacy and safety of psychological therapy. The task force carefully evaluated the reliability of nearly all the studies regarding conversion therapy up to that time, and found almost all of them wanting in essential respects. I do not think that it would be an improper intrusion on that community for courts to require evidence satisfying those objective standards before deciding that the government can impose restrictions on the free speech of therapists in performing therapy. Second, the record establishes that, at least at the time of the Task Force Report, there was insufficient objective evidence to determine the efficacy and danger of conversion therapy.

It is also worth noting two important omissions

from the Task Force Report. First, there is no discussion of the proper way to evaluate whether a type of therapy should be described as malpractice. Because there were no good measures of effectiveness or harm, the task force had no occasion to weigh them against one another and determine whether conversion therapy should be prohibited. For instance, should a type of therapy be considered malpractice if the odds of success are only 15%, even if the only harm to the patient will be expenditure of time and money? *Cf.*, *e.g.*, Nadine Koslowski et al., *Effectiveness of interventions for adults with mild to moderate intellectual disabilities and mental health problems: systematic review and meta-analysis*, 209 British J. Psychiatry 469, 469 (2016) (finding that therapeutic interventions for treating mental-health problems in intellectually disabled adults had "[n]o significant effect . . . for the predefined outcome domains behavioural problems, depression, anxiety, quality of life and functioning" and that "[t]here is no compelling evidence supporting interventions aiming at improving mental health problems in people with mild to moderate intellectual disability"). Should therapy be banned for those with intellectual disabilities? How does the mental-health community evaluate psychological therapy in assessing whether a therapist has committed malpractice?

The second omission is the absence of any study (good or bad) that focuses on the type of therapy at issue in this case: talk therapy for a minor provided by a licensed mental-health professional. In fact, no study was limited to minors and no study was limited to talk therapy. Thus, even if there is some good research on the efficacy and harm of conversion

therapy in some contexts, that research may be largely irrelevant to this case. Perhaps there are good reasons to think that results for adults would apply to minors, and that the results from talk therapy would be the same as for aversion therapy. But the record does not contain any such reasons.

The Task Force Report is not the last word from the American Psychological Association. In early 2021 it adopted a resolution on Sexual Orientation Change Efforts (SOCE). *See* American Psychological Association, *APA Resolution on Sexual Orientation Change Efforts (SOCE Resolution)* (2021). The resolution firmly opposed conversion therapy. It referenced the Task Force Report regarding the effectiveness and harm of conversion therapy and "scientific evidence on SOCE published since 2009." *SOCE Resolution* at 8. The Resolution spoke with a broad brush. I doubt that the APA was thinking about the possible First Amendment implications of banning speech therapy or thought that there was any reason to address it specifically. In any event, the research it references—and that referenced by the government and its amici in their briefs to this court—has the same omission I mentioned with respect to the Task Force Report. None of the cited papers specifically studied the results of conversion therapy (1) by licensed mental-health professionals (2) limited to talk therapies (as opposed to aversive therapies) (3) provided to minors. The great bulk of the studies do not describe the therapy provided, so there is no way to know whether any of the therapy was limited to speech. Of the four studies that described the therapy as including both talk and aversion therapy, three did not distinguish between

the types of therapy in stating the results.[21] The one that did distinguish between the types of therapy found that the negative effects of aversion therapy were far greater.[22] With respect to whether the therapy was provided by a licensed professional,[23] a little less than half the cited papers did not indicate who gave the therapy, and a little more than half said that the therapy was provided by both licensed and unlicensed practitioners. Only one said the therapy was provided only by licensed psychotherapists,[24] and only one of the others gave separate results for licensed and unlicensed practitioners.[25] As for the

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[21] *See* John P. Dehlin et al., *Sexual Orientation Change Efforts Among Current or Former LDS Church Members*, 62 J. Counseling Psych. 95 (2015); Annesa Flentje et al., *Sexual reorientation therapy interventions: Perspectives of ex-ex-gay individuals*, 17 J. Gay & Lesbian Mental Health (2013); Jeanna Jacobsen & Rachel Wright, *Mental Health Implications in Mormon Women's Experiences With Same-Sex Attraction: A Qualitative Study*, 42 The Counseling Psychs. 664 (2014).

[22] *See* Kate Bradshaw et al., *Sexual Orientation Change Efforts Through Psychotherapy for LGBQ Individuals Affiliated With the Church of Jesus Christ of Latter-Day Saints*, J. Sex & Marital Therapy (May 2014).

[23] This could be a significant factor. One cited study was based on a survey which reported that 80.8% of those who had received conversion therapy received it from a religious leader. *See* John R. Blosnich et al., *Sexual Orientation Change Efforts, Adverse Childhood Experiences, and Suicide Ideation and Attempt Among Sexual Minority Adults, United States, 2016–2018*, 110 Am. J. Public Health 1024, 1026 (2020). Perhaps ironically, the Colorado statute does not apply to conversion therapy from clergy. *See* C.R.S. § 12-245-217(1) (exempting those "engaged in the practice of religious ministry" from complying with the conversion-therapy ban).

[24] *See* Bradshaw et al., *supra*.

[25] *See* Dehlin et al., *supra*.

ages of the subjects, half did not say whether any of those receiving therapy were minors and only one provided results specifically for those receiving conversion therapy as minors. None of the studies stated results for therapy of minors provided by licensed mental-health professionals that was limited to speech.[26]

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[26] The majority opinion is not disturbed by this absence of relevant studies. After all, it says, quoting Defendants' counsel at oral argument, "[I]t would be unethical to engage in those sorts of studies because it would require patients to undergo a treatment that has been determined to be unsafe and ineffective." Maj. Op. at 74 n.47. This ignores the fact that the studies in this area have generally been retrospective, examining the results after someone provided treatment. Indeed, some of these studies probably included minors who received only talk therapy from a licensed professional, but the analysis did not focus on that group. In any event, the logic of this argument is something 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."

The majority's footnote does cite the Task Force Report in support of the statutory ban. Nice try, but the support evaporates on inspection. First, the footnote cites the sentence: "Recent research reports on religious and nonaversive efforts indicate that there are individuals who perceive they have been harmed." Task Force Report at 3. There is no mention of whether the studies included minors or therapy by licensed professionals or reported the extent of harm. And, as the Task Force Report makes clear in its discussion of reports where patients felt they had benefitted from conversion therapy, such reports are entitled to little weight unless the study is properly conducted.

Next, the footnote quotes the sentence reporting that the Task Force "reviewed the literature on SOCE in children and adolescents." Task Force Report at 72. I am not sure what the majority opinion wants us to infer from that fact. Are we to defer

The purpose of the above discussion of the relevant research is not to reach any definitive conclusions about the prohibition challenged by Chiles. Rather, my purpose has been to indicate the sort of analysis that needs to be conducted by the judiciary, particularly the trial courts, which have the advantage of obtaining expert guidance in assessing the reliability and strength of expert opinion.[27] The

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to anything the Task Force concluded because it read the literature? Would that not be an abandonment of the judicial role in determining whether there is science supporting the statute?

Finally, the footnote quotes the following statement from the chapter in the report that addresses children and adolescents: "SOCE that focus on negative representations of homosexuality and lack a theoretical or evidence base provide no documented benefits and can pose harm through increasing sexual stigma and providing inaccurate information." Task Force Report at 79. I am not sure of the relevance of that statement, because nothing in the record supports an assertion that the therapy Chiles provides includes "negative treatments of homosexuality." But in any event, the statement is not supported by any referenced studies (nor am I aware of any) on talk therapy to minors by licensed professionals. It is true that no proper studies show benefits, but neither do any show that such therapy "can pose harm." The Task Force's views may well be worth consideration by mental-health therapists; but they need further support if they are to justify a restriction on First Amendment freedom.

[27] A good example of how *not* to conduct the necessary analysis is provided by footnote 17 of the majority opinion. The footnote purports to "clarify" (that is, correct) distortions in my dissent and concludes that what is happening in England and elsewhere in Europe does "not apply to the efficacy of psychotherapy." Maj. Op. at 29 n.17. That statement is mistaken in two respects. First, the studies and experience from abroad have undermined the credibility in this area of the American Psychological Association, the American Psychiatric Association, and the other national mental-health associations

burden on the district court is a heavy one, but the First Amendment protection of free speech demands no less.

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that have insisted that their gospel of aggressive treatment for gender dysphoria in minors, including the use of drugs and even surgery, is not just supported, but demanded, by science. To repeat what I said earlier in text, the Cass Review states that youth transgender medicine is "an area of remarkably weak evidence," and that "we have no good evidence on the long-term outcomes of interventions to manage gender-related distress." Cass Review at 13. I am not the only one to recognize what a radical attack has been raised against the "common wisdom" regarding the treatment of gender dysphoria in young people. The Economist headline was *The Cass Review damns England's youth-gender services*; and the one in the New York Times was *Why Is the U.S. Still Pretending We Know Gender-Affirming Care Works?* And supporting the Cass Review is the significant restriction on various treatments (still strongly advocated in this country) by the very countries where those treatments were "pioneered." I guess I do not know what "call into question" means. But I would think that anyone who has had faith in the pronouncements of the American Psychological Association, the American Psychiatric Association, and its partners on the subject should begin to view those pronouncements with skepticism. Second, the Cass Review in particular appears to question the scientific support for *all* transgender treatment of minors. To repeat a third time, the Cass Review concluded that youth transgender medicine is "an area of remarkably weak evidence" and there is "no good evidence on the long-term outcomes of interventions to manage genderrelated distress." Cass Review at 13. Some countries have not restricted psychotherapy, but that is not because of studies showing its effectiveness or lack of harm. What may well be the case—and certainly when the First Amendment right to free speech is at stake, the courts must use their resources to examine this—is that there are no good studies on the effectiveness and potential harm from either gender-affirming psychotherapy or conversion talk therapy with youth. What to do when such studies are conducted is a matter for the future.

Because I think reversal is required under the free-speech doctrine of the Supreme Court, I need not address the free-exercise-of-religion claim.

UNITED STATES COURT OF APPEAL

FOR THE TENTH CIRCUIT

KALEY CHILES,

Plaintiff – Appellant/Cross - Appellee,

v.

PATTY SALAZAR, in her official capacity as Executive Director of the Department of Regulatory Agencies; REINA SBARBARO-GORDON, in her official capacity as Program Director of the State Board of Licensed Professional Counselor Examiners and the State Board of Addiction Counselor Examiners; JENNIFER LUTTMAN, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners; AMY SKINNER, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners; KAREN VAN ZUIDEN, in her official capacity as a member of the

No. 22-1445

(D.C. No. 1:22-CV-02287-CNS-STV)
(D. Colo.)

State Board of Licensed Professional Counselor Examiners; MARYKAY JIMENEZ, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners; KALLI LIKNESS, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners; SUE NOFFSINGER, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners; RICHARD GLOVER, in his official capacity as a member of the State Board of Licensed Professional Counselor Examiners; ERKIA HOY, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners; KRISTINA DANIEL, in her official capacity as a member of the State Board of Addiction Counselor Examiners; HALCYON DRISKELL, in her official capacity as a member of the State Board of Addiction Counselor Examiners;

CRYSTAL KISSELBURGH, in her official capacity as a member of the State Board of Addiction Counselor Examiners; ANJALI JONES, in her official capacity as a member of the State Board of Addiction Counselor Examiners; THERESA LOPEZ, in her official capacity as a member of the State Board of Addiction Counselor Examiners; JONATHAN CULWELL, in his official capacity as a member of the State Board of Addiction Counselor Examiners,

Defendants – Appellees/Cross - Appellants.

INSTITUTE FOR FAITH AND FAMILY; ASSOCIATIONS OF CERTIFIED BIBLICAL COUNSELORS; INSTITUTE FOR JUSTICE; ETHICS AND PUBLIC POLICY CENTER, SSOCIATIONS OF CERTIFIED BIBLICAL COUNSELORS; ETHICS AND PUBLIC POLICY CENTER; INSTITUTE FOR

FAITH AND FAMILY; INSTITUTE FOR JUSTICE; AMERICAN ASSOCIATION OF SUICIDOLOGY; AMERICAN FOUNDATION FOR SUICIDE PREVENTION; TREVOR PROJECT, INC.; DISTRICT OF COLUMBIA; STATE OF CALIFORNIA; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MASSACHUSETTS; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF OREGON; STATE OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF WASHINGSON; ONE COLORADO; CARLOS A. BALL; ASHUTOSH BHAGWAT; MICHAEL BOUCAI; ALAN E. BROWNSTEIN; ERIN CARROLL; ERWIN CHEMERINSKY; MICHAEL C. DORF; THOMAS E.

KADRI; SUZETTE M. MALVEAUX; TONI MASSARO; NEIL RICHARDS; JOCELYN SIMONSON; SCOTT SKINNER-THOMPSON; CATHERINE SMITH; KYLE COURTENAY VELTE; ARI E. WALDMAN,

Amici Curiae.

KALEY CHILES,

Plaintiff – Appellee,

v.

PATTY SALAZAR, in her official capacity as Executive Director of the Department of Regulatory Agencies; REINA SBARBARO-GORDON, in her official capacity as Program Director of the State Board of Licensed Professional Counselor Examiners and the State Board of Addiction Counselor Examiners; JENNIFER LUTTMAN, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners; AMY SKINNER, in her official capacity as a member of the

No. 23-1002

(D.C. No. 1:22-CV-02287-CNS-STV)
(D. Colo.)

State Board of Licensed Professional Counselor Examiners; KAREN VAN ZUIDEN, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners; MARYKAY JIMENEZ, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners; KALLI LIKNESS, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners; SUE NOFFSINGER, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners; RICHARD GLOVER, in his official capacity as a member of the State Board of Licensed Professional Counselor Examiners; ERKIA HOY, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners; KRISTINA DANIEL, in her official capacity as a member of the State Board of Addiction

Counselor Examiners; HALCYON DRISKELL, in her official capacity as a member of the State Board of Addiction Counselor Examiners; CRYSTAL KISSELBURGH, in her official capacity as a member of the State Board of Addiction Counselor Examiners; ANJALI JONES, in her official capacity as a member of the State Board of Addiction Counselor Examiners; THERESA LOPEZ, in her official capacity as a member of the State Board of Addiction Counselor Examiners; JONATHAN CULWELL, in his official capacity as a member of the State Board of Addiction Counselor Examiners,

Defendants – Appellants.

ASSOCIATIONS OF CERTIFIED BIBLICAL COUNSELORS; ETHICS AND PUBLIC POLICY CENTER; INSTITUTE FOR FAITH AND FAMILY; INSTITUTE FOR JUSTICE; AMERICAN ASSOCIATION OF SUICIDOLOGY; AMERICAN

FOUNDATION FOR SUICIDE PREVENTION; TREVOR PROJECT, INC.; DISTRICT OF COLUMBIA; STATE OF CALIFORNIA; STATE OF CONNECTICUT; STATE OF DELAWARE; STATE OF HAWAII; STATE OF ILLINOIS; STATE OF MAINE; STATE OF MASSACHUSETTS; STATE OF MICHIGAN; STATE OF MINNESOTA; STATE OF NEVADA; STATE OF NEW JERSEY; STATE OF NEW MEXICO; STATE OF NEW YORK; STATE OF OREGON; STATE OF PENNSYLVANIA; STATE OF RHODE ISLAND; STATE OF VERMONT; STATE OF WASHINGSON; AMERICAN PSYCHOLOGICAL ASSOCIATION; ONE COLORADO; CARLOS A. BALL; ASHUTOSH BHAGWAT; MICHAEL BOUCAI; ALAN E. BROWNSTEIN; ERIN CARROLL; ERWIN CHEMERINSKY; MICHAEL C. DORF; THOMAS E. KADRI; SUZETTE M.

MALVEAUX; TONI MASSARO; NEIL RICHARDS; JOCELYN SIMONSON; SCOTT SKINNER-THOMPSON; CATHERINE SMITH; KYLE COURTENAY VELTE; ARI E. WALDMAN,

Amici Curiae.

JUDGMENT

Before **HARTZ**, **MORITZ**, and **ROSSMAN**, Circuit Judges.

These cases originated in the District of Colorado and were argued by counsel.

The judgment of that court is affirmed.

Entered for the Court

CHRISTOPHER M. WOLPERT, Clerk

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO
Judge Charlotte N. Sweeney

Civil Action No. 1:22-cv-02287-CNS-STV

KALEY CHILES,

Plaintiff,

v.

PATTY SALAZAR, in her official capacity as Executive Director of the Department of Regulatory Agencies; et al.,

Defendants.

ORDER

Before the Court is Plaintiff Kaley Chiles' Motion for Preliminary Injunction (ECF No. 29). Ms. Chiles is a licensed professional counselor (ECF No. 1 at 29-30 ¶ 104). Her clients include minors who identify as gay, lesbian, bisexual, transgender, or gender non-conforming (*Id.* at 31 ¶ 109). Ms. Chiles argues that Colorado's regulation of specific therapeutic practices unlawfully abridges what she can say to her minor clients (*See* ECF No. 29 at 2). It does not. As such, and for the reasons set forth below, Ms. Chiles' Motion for Preliminary Injunction (ECF No. 29) is DENIED.

I. BACKGROUND[1]

Plaintiff Kaley Chiles is a licensed professional counselor in the state of Colorado, as well as a practicing Christian (ECF No. 1 at 6, 29-30 ¶¶ 28-29, 104). Ms. Chiles' client base includes minors seeking counseling related to same-sex attraction and gender identity (*Id.* at 31 ¶ 109). As a counselor, she does not engage in "aversive techniques," and she alleges that she previously "helped clients freely discuss" sexual attractions, gender identity, gender roles, and "root causes of [their] desires [and] behavior" (*Id.* at 24-25 ¶¶ 82-83).[2] Ms. Chiles only pursues the "goals" that her clients "themselves identify and set," rather than "any predetermined goals" for clients' counseling (*Id.* at 25, 31 ¶¶ 85, 108). According to Ms. Chiles, Colorado law prohibits her from "fully explor[ing]" certain clients' "bodily experiences around sexuality and gender," including any client's discussion of their own "unwanted sexual attraction, behaviors, or identity" (*Id.* at 25-26, 32 ¶¶ 86, 88, 113). Many of Ms. Chiles' clients do not initially request counseling to eliminate their attractions or identities (*Id.* at 28 ¶ 96). Instead, discussion of clients' unwanted attractions or identities "may arise" during their

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[1] The background facts are taken predominantly from Ms. Chiles' Verified Complaint, the parties' briefs, and the briefs' supporting exhibits. *See Denver Homeless Out Loud v. Denver, Colorado*, 514 F. Supp. 3d 1278, 1285 (D. Colo. 2021), *vacated and remanded on other grounds*, 32 F.4th 1259 (10th Cir. 2022).

[2] "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" (ECF No. 45-3 at 31).

counseling with Ms. Chiles (*Id.*)

Colorado enacted its Minor Therapy Conversion Law in 2019. *See*, *e.g.*, C.R.S. §§ 12–245–202, 12–245–101. Under the Minor Therapy Conversion Law, mental health professionals may not engage in what is commonly known as "conversion therapy" for minors who identify as gay, lesbian, bisexual, transgender, or gender non-conforming (*See* ECF Nos. 1 at 5, 45 at 15). *See also*, *e.g.*, C.R.S. § 12–245–202(3.5)(a). Ms. Chiles alleges that the Minor Therapy Conversion Law prohibits her ability to assist minor clients "seeking to reduce or eliminate unwanted sexual attractions, change sexual behaviors, or grow in the experience of harmony with [their] physical bod[ies]" (ECF No. 1 at 26-27 ¶¶ 87, 91-92). Consequently, she has "intentionally avoided" certain conversations with her clients that she fears may violate the Minor Therapy Conversion Law (*Id.* at 25 ¶ 83).

Ms. Chiles sued Defendants, alleging the Minor Therapy Conversion Law violates her constitutional rights and bringing claims under the First and Fourteenth Amendments (*See generally* ECF No. 1). She filed her Motion for Preliminary Injunction in September 2022 (ECF No. 29). The Motion is fully briefed (*See* ECF Nos. 45, 49).

II. LEGAL STANDARD

A preliminary injunction is an "extraordinary remedy." *Free the Nipple-Fort Collins v. City of Fort Collins, Colorado*, 916 F.3d 792, 797 (10th Cir. 2019) (quotation omitted). To prevail on a preliminary injunction motion, the movant bears the burden of showing that four factors weigh in their favor: (1) they

are likely to succeed on the merits; (2) they will suffer irreparable injury if the injunction is denied; (3) the threatened injury outweighs the injury the injunction would cause the opposing party; and (4) the injunction would not adversely affect the public interest. *See Beltronics USA, Inc. v. Midwest Inventory Distribution, LLC*, 562 F.3d 1067, 1070 (10th Cir. 2009) (citation omitted). "An injunction can issue only if each factor is established." *Denver Homeless Out Loud v. Denver, Colorado*, 32 F.4th 1259, 1277 (10th Cir. 2022) (citation omitted). Where the government is the non-moving party, the last two preliminary injunction factors merge. *See Denver Homeless*, 32 F.4th at 1278 (citing *Nken v. Holder*, 556 U.S. 418, 435 (2009)). Preliminary injunctions changing the status quo are "disfavored," and in these instances, the moving party's burden of establishing that they are likely to succeed on the merits is heightened. *See Free the Nipple*, 916 F.3d at 797 (quotation omitted).

III. ANALYSIS

Having considered Ms. Chiles' Motion for Preliminary Injunction, the related briefing, and relevant legal authority, the Court denies Ms. Chiles' Motion.

A. Standing

Ms. Chiles argues that she has standing to pursue her claims, even though Defendants have "not yet threatened" to revoke her professional licenses (ECF No. 29 at 10). She also argues that she has third-party standing to sue on behalf of her clients (*See id.* at 20). The Defendants contend that Ms. Chiles lacks standing to bring this pre-enforcement action, and that she lacks third-party standing (*See* ECF No. 45

at 33, 48). The Court considers Ms. Chiles' standing to bring this suit herself and whether she has third-party standing to sue on behalf of her clients in turn.

1. Ms. Chiles' Standing

Ms. Chiles argues that she has standing to sue, given the gravamen of her First Amendment claims, even though Defendants have not yet enforced the Minor Therapy Conversion Law against her (ECF No. 29 at 10-11). Defendants contend that Ms. Chiles has failed to demonstrate that she intends to engage in conduct that violates the Minor Therapy Conversion Law (ECF No. 45 at 48). The Court agrees with Ms. Chiles that she has standing to sue.

For a federal court to exercise jurisdiction over a suit, the plaintiff must have standing to sue. *See*, *e.g.*, *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). Standing consists of three elements, and a plaintiff—as the party invoking federal jurisdiction—bears the burden of satisfying them. *See*, *e.g. Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). A plaintiff must have suffered an "injury in fact" that is "fairly traceable" to the defendant's challenged conduct and that is "likely to be redressed by a favorable judicial decision." *Id.* (citation omitted). If the plaintiff fails to meet this burden, "there is no case or controversy for the federal court to resolve," and the federal court cannot exercise jurisdiction over the plaintiff's claims. *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021) (quotation omitted); *see also* U.S. Const. art. III, § 2.

The analysis changes, however, in the First Amendment context. The First Amendment "creates unique interests that lead [courts] to apply the

[constitutional] standing requirements somewhat more leniently, facilitating pre-enforcement suits." *Peck v. McCann*, 43 F.4th 1116, 1129 (10th Cir. 2022) (citation omitted). One way a plaintiff may establish standing for their First Amendment claim is by "alleging a credible threat of future prosecution plus an ongoing injury resulting" from the statute's "chilling effect" on the plaintiff's desire to exercise their First Amendment rights. *Id.* (quotations omitted). To determine whether a plaintiff's pre-enforcement First Amendment claim has alleged a "chilling effect" that sufficiently demonstrates the plaintiff has suffered an injury in fact, courts consider the following:

> (1) evidence that in the past they have engaged in the type of speech affected by the challenged government action; (2) affidavits or testimony stating a present desire, though no specific plans, to engage in such speech; and (3) a plausible claim that they presently have no intention to do so because of a credible threat that the statute will be enforced.

Id. at 1129–30.

Ms. Chiles alleges that the threat of the Minor Therapy Conversion Law's enforcement has created an ongoing injury resulting from the Law's "chilling effect" (*See*, *e.g.*, ECF No. 1 at 35 ¶ 134). In her preliminary injunction motion, Ms. Chiles argues that—given the nature of her First Amendment claim—she has satisfied *Peck*'s factors to show that she has suffered an injury in fact (ECF No. 29 at 10). Therefore, the Court considers whether Ms. Chiles

has satisfied these three *Peck* factors. For the reasons set forth below, she has.

a. Past Engagement

Ms. Chiles has engaged in the type of speech affected by the Minor Therapy Conversion Law.[3] The Minor Therapy Conversion Law implicates speech that purports to "eliminate or reduce sexual or romantic attraction or feelings toward individuals of the same sex." § 12–245–202(3.5)(a). Further, the Minor Therapy Conversion law contemplates practices that provide "understanding for the facilitation of an individual's coping." *Id.* at § 12–245–202(3)(b)(I). Ms. Chiles alleges her therapeutic practices have concerned these forms of speech. For instance, she alleges that she seeks to help clients "explore certain . . . bodily experiences," including any "unwanted sexual attraction[s]" that "may arise" during her counseling sessions (ECF No. 1 at 25-26, 28, 32 ¶¶ 86, 96, 112). Therefore, she has met her burden of showing that she has in the past engaged in the type of speech "affected" by the Minor Therapy Conversion Law. *Peck*, 43 F.4th at 1129–30.

b. Present Desire

Ms. Chiles has shown that she has a present desire to engage in speech affected by the Minor Therapy Conversion Law.[4] For instance, she states in

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[3] As discussed later, the Minor Therapy Conversion Law is a professional conduct regulation that imposes an incidental burden on speech. *See Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018).

[4] Ms. Chiles did not submit an affidavit in support of her preliminary injunction motion. However, the Court construes Ms. Chiles Verified Complaint, submitted under "penalties of

the Verified Complaint that she has "intentionally avoided conversations with clients" that may be perceived as violating the Minor Therapy Conversion Law, including conversations related to her practice—counseling clients on their "sexual attractions, behaviors, and [gender] identity" (ECF No. 1 at 24-25 ¶ 83). Ms. Chiles wishes to "assist clients with their stated desires," including discussions with certain clients "seeking to reduce or eliminate unwanted sexual attractions" (*Id.* at 26 ¶ 87). Accordingly, she has established the specific content of her desired speech for future client interactions, and satisfied *Peck*'s second factor. *Cf. Peck*, 43 F.4th at 1131 (holding that "First Amendment plaintiffs generally need not state that they 'have specific plans to engage in XYZ speech next Tuesday' in order to show standing" (citation omitted)).

c. Credible Threat

In determining whether a First Amendment plaintiff has satisfied *Peck*'s third "credible threat" factor, courts consider the following:

> (1) whether the plaintiff showed past enforcement against the same conduct; (2) whether authority to initiate charges was not limited to a prosecutor or an agency and, instead, any person could file a complaint

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perjury," as an affidavit for purposes of its analysis of *Peck*'s second factor (ECF No. 1 at 45-46). *See also*, *e.g.*, *Controltec, LLC v. Anthony Doors, Inc.*, No. 06-CV-00295-MSK, 2006 WL 8460951, at *1 (D. Colo. Feb. 22, 2006) (concluding that the moving party for a preliminary injunction "must show by Verified Complaint or Affidavit" facts to establish four preliminary injunction factors).

> against the plaintiffs; and (3) whether the state disavowed future enforcement.

Peck, 43 F.4th at 1132 (quotations omitted). No one "credible threat" factor is dispositive. *See id. See also Scott v. Hiller*, No. 21-CV-02011-NYW-KLM, 2022 WL 4726038, at *6 (D. Colo. Oct. 3, 2022) ("The fact that a prosecutor had never enforced the statute at issue is not dispositive." (citing *Peck*, 43 F.4th at 1133)). In short, the plaintiff must demonstrate "an objectively justified fear of real consequences." *Peck*, 43 F.4th at 1132 (quotations omitted).

Regarding the "past enforcement" factor, Ms. Chiles has failed to identify any past enforcement against the same conduct presented in her Verified Complaint. She argues only that the Minor Therapy Conversion Law may impose "severe" sanctions if counselors violate it in the future (ECF No. 29 at 11). The "past enforcement" factor weighs against her for this reason.

Under the "prosecution" factor, Ms. Chiles admits that Defendants "are the persons empowered by Colorado to enforce" the Minor Therapy Conversion Law against her as a licensed professional counselor (ECF No. 1 at 40 ¶ 165; *see also id.* at 6-7 ¶¶ 31, 35). Therefore, the second element weighs against her. *See Peck*, 43 F.4th at 1132 (concluding second factor weighed against plaintiff where only "prosecutors c[ould] bring charges" under a statute).

Turning to whether the state has "disavowed" enforcement of the Minor Therapy Conversion Law, there is nothing in the preliminary injunction record to demonstrate that the Defendants "do not disavow an intent to prosecute" Ms. Chiles. *Peck*, 41 F.4th at

1132. Defendants' refusal to explicitly disavow enforcement of the Minor Therapy Conversion Law has "heavy weight" in the Court's assessment of Ms. Chiles' First Amendment claims. *Id.* at 1133. There is "nothing . . . to prevent [Defendants] or another [state entity] from" bringing charges in the future against Ms. Chiles under the Minor Therapy Conversion Law for statements that mirror those she has previously made to clients. *Id.*; *see also id.* at 1133 (concluding that a state's "refusal to provide such an assurance [that it will not enforce] undercu[t]" an argument that the plaintiff's "perception of a threat of prosecution is not objectively justifiable"). Therefore, the "disavowal" factor weighs in Ms. Chiles' favor.

Weighing the "credible threat" factors, Ms. Chiles has met her burden of showing that there is a credible threat that Defendants will enforce the Minor Therapy Conversion Law against her. *Peck*, 43 F.4th at 1129–30. Although only the third factor weighs in favor of Ms. Chiles, demonstrating that she suffers a credible threat of enforcement "is not supposed to be a difficult bar to clear in the First Amendment pre-enforcement context." *Id.* at 1133. *See also Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003) ("As to whether a First Amendment plaintiff faces a credible threat of prosecution, the evidentiary bar that must be met is extremely low."); *Tingley v. Ferguson*, 47 F.4th 1055, 1066–67 (9th Cir. 2022) ("The unique standing considerations in the First Amendment context tilt dramatically toward a finding of standing when a plaintiff brings a pre-enforcement challenge" (quotations omitted)). Therefore, given the absence of Defendants' explicit disavowal to enforce the Minor Therapy Conversion

Law and the "heavy weight" it places on the Court's assessment of whether Ms. Chiles' fears are credible, her fear of enforcement is "objectively justifiable" and therefore satisfies *Peck*'s "credible fear" factor. *See Peck*, 43 F.4th at 1133.

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For the reasons set forth above, Ms. Chiles has satisfied *Peck*'s three factors. She has in the past engaged in the type of speech affected by the Minor Therapy Conversion Law, demonstrated that she has a present desire to engage in speech the Minor Therapy Conversion Law affects, and that she has no intention to engage in this speech based on a "credible fear" that the Minor Therapy Conversion Law will be enforced against her. *See Peck*, 43 F.4th at 1129–30. Accordingly, she has established the injury in fact requirement, and has standing to bring this pre-enforcement First Amendment action. *See id.* at 1133; *see also Spokeo*, 578 U.S. at 338.[5]

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[5] Ms. Chiles contends that she has standing because she has satisfied *Peck*'s requirements (*See* ECF No. 29 at 10). However, *Peck* only concerned standing's injury in fact requirement—not Ms. Chiles' burden to satisfy the two remaining standing elements. *See Peck*, 43 F.4th at 1129 ("[O]nly the injury-in-fact requirement is at issue."). Nonetheless, the Court agrees with Ms. Chiles that she has met her standing burden (ECF No. 29 at 11). *See also Spokeo*, 578 U.S. at 338. As the Tenth Circuit explained in *Peck*, "the statute's alleged violation of [the plaintiff's] First Amendment rights is undisputedly traceable to the statute itself and could be redressed by [a court's] invalidation of the law." *Peck*, 43 F.4th at 1129. So too with the Minor Therapy Conversion Law's alleged chilling of Ms. Chiles' speech. Therefore, Ms. Chiles has met her burden as to the two remaining standing elements. *See Spokeo*, 578 U.S. at 338.

2. Third-Party Standing

Ms. Chiles argues that she has standing to "assert the free-speech rights" of her clients (ECF No. 29 at 20). Defendants contend that Ms. Chiles lacks third-party standing because she has not established that she "holds a close relationship" to a specific third-party minor, that there is no "demonstrated hinderance" to a potential client's ability to protect their own interest, and that Ms. Chiles has fundamentally failed to provide any details of how her clients are "impacted" by the Minor Therapy Conversion Law (ECF No. 45 at 33, 35). The Court agrees with Defendants that Ms. Chiles lacks third-party standing to sue on behalf of her clients.

The Ninth Circuit had recent occasion to address this issue in a nearly identical factual context. In *Tingley v. Ferguson*, the Ninth Circuit considered "whether [Washington] may prohibit health care providers operating under a state license from practicing conversion therapy on children." *Tingley*, 47 F.4th at 1063. The Ninth Circuit concluded that a licensed therapist seeking to enjoin Washington's conversion therapy statute lacked standing to "bring claims on behalf of his minor clients." *Id.* at 1066. The plaintiff lacked third-party standing, the Ninth Circuit reasoned, because he made only "generalized statements about the rights of his clients" being purportedly violated by Washington's conversion therapy statute. *Id.* at 1069. Although the plaintiff had a "sufficiently close relationship" with his clients, he failed to allege how Washington's law "specifically deprived" them of counseling information they sought, and as such his allegations that Washington's law affected his clients were "speculative." *Id.*

The Court finds *Tingley*'s reasoning persuasive. Ms. Chiles makes substantively the same arguments regarding her ability to sue on behalf of her clients as those the Ninth Circuit rejected in *Tingley*. For instance, Ms. Chiles contends that the Minor Therapy Conversion Law deprives her clients' "right to receive" counseling information regarding their sexual orientations or gender identities (ECF No. 29 at 20-21). Assuming Ms. Chiles had a close relationship with her clients, Ms. Chiles identifies nothing in her Verified Complaint or the preliminary injunction record that demonstrates how the Minor Therapy Conversion Law *specifically* deprives her clients of any information they seek. *See Tingley*, 47 F.4th at 1069. Moreover, *Tingley* explained, a therapist's minor clients seeking conversion therapy are free to bring their own lawsuits against conversion therapy laws, and may do so pseudonymously. *See id.*

Accordingly, the Court rejects Ms. Chiles' argument that she has standing to sue on behalf of her clients. "Without more detail about [her] clients, their desired information, or how the [Minor Therapy Conversion Law] has specifically deprived them of access to [conversion therapy] information," the Court refuses to "strain the limitations imposed on [it] by Article III to reach undeveloped claims brought on behalf" of Ms. Chiles' third-party minor clients. *Tingley*, 47 F.4th at 1069–70 (quotations omitted).

B. Preliminary Injunction & Likelihood of Success on the Merits

Because Ms. Chiles has standing to challenge the Minor Therapy Conversion Law, the Court turns to her arguments that the Minor Therapy Conversion

Law should be enjoined (*See*, *e.g.*, ECF No. 29 at 3). Regarding the likelihood of success on the merits of her constitutional claims, Ms. Chiles makes two essential arguments. First, that the Minor Therapy Conversion Law unconstitutionally regulates speech rather than conduct, and therefore violates her free speech rights (*Id.* at 13). Second, that the Minor Therapy Conversion Law violates her free exercise and due process rights (*Id.* at 22, 25). The Court considers and rejects these arguments in turn.

1. First Amendment Free Speech Claim

a. Professional Conduct Regulation

Defendants contend that the Minor Therapy Conversion Law—contrary to Ms. Chiles' argument—regulates professional conduct rather than speech. The Court agrees with Defendants that the Minor Therapy Conversion Law regulates professional conduct.

As an initial matter, the Court agrees with Defendants that the Minor Therapy Conversion Law is not so sweeping as Ms. Chiles argues (*See* ECF No. 45 at 18). For instance, she argues that "the [Minor Therapy Conversion Law] *prohibits* [her] from uttering words if those words might assist [her clients] in aligning their desires with their beliefs or their biology" (ECF No. 29 at 14 (emphasis added); *see also* ECF No. 1 at ¶ 4). But, as Defendants contend, the Minor Therapy Conversion Law imposes no prohibition on counselors' ability to assist clients with any concerns they raise regarding their sexuality or gender identity (ECF No. 45 at 19). Under the Minor Therapy Conversion Law, "conversion therapy" does *not* include "practices or treatments" that provide

"[a]cceptance, support, and understanding *for the facilitation of an individual's coping*." § 12–245–202(3.5)(b)(I) (emphasis added). Ms. Chiles is free to facilitate conversations regarding any minor clients' distresses about their sexuality or gender that "may arise" during their counseling sessions (*See* ECF No. 1 at 28 ¶ 96). *See also* § 12–245–202(3.5)(b)(I). Indeed, several of Ms. Chiles' practices are consistent with and do not violate the Minor Therapy Conversion Law (*See* ECF No. 1 at 24-25, 31 ¶¶ 82-83, 85, 108). Ms. Chiles may engage in therapeutic practices related to any minor client's distress, under the limited condition that her therapeutic assistance to a client's distress "does not *seek to change* sexual orientation or gender identity." § 12–245–202(3.5)(b)(I) (emphasis added); *see also id.* at § 12–245–202(3.5)(a) (defining "conversion therapy" as a practice that "attempts or purports to change" a client's sexual orientation or gender identity, including "efforts to *change* [a client's] behaviors or gender expressions" (emphasis added)). Simply put, the Court agrees with Defendants that the Minor Therapy Conversion Law narrowly prohibits therapeutic practices that promote particular sexual orientations or gender identities—not practices that support, facilitate, or assist minor clients' exploration of those orientations or identities (*See* ECF No. 45 at 18). *See* § 12–245–202(3.5)(b)(I) (excluding from the definition of "conversion therapy" practices that facilitate minor clients' "identity exploration and development" including "sexual-orientation-neutral interventions" so long as those practices do not "seek to change" a client's sexual orientation or gender identity).

But Ms. Chiles' challenges more than the scope of

the Minor Therapy Conversion Law's regulations. Ms. Chiles challenges what the Minor Therapy Conversion Law fundamentally regulates. In her opinion, the Minor Therapy Conversion Law regulates "pure speech," rather than professional conduct, and is therefore subject to strict scrutiny (*See* ECF No. 29 at 13, 15). Defendants argue that the Minor Therapy Conversion Law regulates professional conduct, not speech, and therefore it survives Ms. Chiles' constitutional challenge (*See* ECF No. 45 at 21). The Court agrees with Defendants.

Regulations of professional conduct are constitutionally permissible. *See*, *e.g.*, *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456–57 (1978). And "[s]tates may regulate professional conduct, even though that conduct incidentally involves speech." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (citation omitted). When a state regulates professional conduct that "incidentally involves speech," the First Amendment "afford[s] less protection" for the incidental professional speech. *Id.* (citations omitted). Although a state cannot "ignore constitutional rights" under the "guise of prohibiting professional misconduct," the First Amendment "does not prohibit restrictions directed [at] conduct from imposing incidental burdens on speech." *Id.* (citations omitted). *See also Del Castillo v. Sec'y, Fla. Dep't of Health*, 26 F.4th 1214, 1226 (11th Cir. 2022), *cert. denied sub nom. Del Castillo v. Ladapo*, No. 22-135, 2022 WL 17408180 (U.S. Dec. 5, 2022) ("Because the [statute at issue] is a professional regulation with a merely incidental effect on protected speech, it is constitutional under the First Amendment." (quotations omitted)). "[P]rofessionals are no

exception to this rule." *Id.* (citations omitted). *See also Planned Parenthood of Se. Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022) ("To be sure, [a] physician's First Amendment rights not to speak are implicated by [an informed consent statute] . . . but only as part of the practice of medicine, subject to reasonable licensing and regulation . . . ." (citations omitted)).

The Minor Therapy Conversion Law regulates professional conduct. It contemplates regulating a licensed professional counselor's therapeutic "practice[s] or treatment[s] . . . ." § 12–245–202(3.5)(a); *see also id.* at § 12–245–202(6) (defining "licensed professional counselor"). Under the Minor Therapy Conversion Law, specifically credentialed professionals and their practices are empowered to provide "[a]cceptance, support, and understanding for the facilitation" of clients' therapeutic needs, but prohibited from using their "practices or treatment" in order to "change sexual orientation or gender identity." *Id.* at § 12–245–202(3)(b)(I). A reading of the Minor Therapy Conversion Law's plain text confirms that, as Defendants argue, it is a professional regulation and "prophylactic measure[] whose objective is the prevention of harm before it occurs." *Ohralik*, 436 U.S. at 464. *See also id.* ("[The] State has a strong interest in adopting and enforcing rules of conduct designed to protect the public from harmful [professional practices] by [professionals] whom it has licensed.").

To support her argument that the Minor Therapy Conversion Law is unconstitutional, Ms. Chiles' characterizes the work she performs as a licensed

professional counselor as pure speech protected by the First Amendment—not regulable professional conduct (*See* ECF No. 29 at 13-14). To be sure, "what one thinks or believes, what one utters and says have the full protection of the First Amendment." *Speiser v. Randall*, 357 U.S. 513, 535–36 (1958) (Douglas, J., concurring). And Defendants do not—and cannot—dispute that Ms. Chiles speaks to her clients during counseling sessions (*See* ECF No. 45 at 23-24). But speech made in professional contexts is not always pure speech. *See EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421, 429 (6th Cir. 2019) ("*Casey* and [*National Institute of Family and Life Advocates*] recognize that First Amendment heightened scrutiny does not apply to incidental regulation of professional speech that is part of the [professional] practice . . . ."). As Defendants argue, speech made in a professional context—particularly in the context of licensed professional counseling—is distinguishable from, for example, political speech (ECF No. 45 at 23). Ms. Chiles admits that she is a licensed professional counselor with a graduate degree in clinical mental health, and that her speech is made in the course of her work as a professional counselor (ECF No. 1 at 29-31 ¶¶ 104, 108). "[I]t has never been deemed an abridgment of freedom of speech . . . to [regulate] a course of [professional] conduct . . . merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Ohralik*, 436 U.S. at 456 (quotations omitted).

Ms. Chiles cites *Otto v. City of Boca Raton, Florida* for the proposition that a government cannot "relabel" pure speech as conduct to avoid heightened

First Amendment scrutiny (*See* ECF No. 29 at 13-14). *See also Otto*, 981 F.3d at 865 ("The government cannot regulate speech by relabeling it as conduct."). Against a similar factual backdrop, *Otto* concluded that ordinances prohibiting "therapists from engaging in counseling . . . with a goal of changing a minor's sexual orientation" ultimately warranted strict scrutiny because the ordinances were "content-based restrictions of speech," not regulations of therapists' professional conduct. *Id.* at 859, 861. The Court finds *Otto*'s reasoning unpersuasive and therefore rejects it. Central to *Otto*'s conclusion that its conversion therapy ordinance was a content-based speech restriction was the Eleventh Circuit's prior admonishment that "the enterprise of labeling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and susceptible to manipulation." *Id.* at 861 (citing *Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293, 1308 (11th Cir. 2017) (en banc)). Perhaps. But the Eleventh Circuit's conclusion that strict scrutiny applied to the ordinances in *Otto* simply because "the ordinances depend[ed] on what [was] said" ignores that "what [was] said" depends on its professional context and whether a plaintiff is licensed to say it. *Id.* at 861. *Cf. Del Castillo*, 26 F.4th at 1225–26 ("Assessing a client's . . . needs, conducting . . . research, developing a . . . care system, and integrating information from [an assessment] are not speech. They are 'occupational conduct'. . . as part of . . . professional services." (citation omitted)).

As Defendants observe, other cases run contrary to *Otto* (*See*, *e.g.*, ECF No. 45 at 25-26). *See*, *e.g.*, *Del Castillo*, 26 F.4th at 1225 ("A statute that governs the

practice of an occupation is not unconstitutional as an abridgement of the right to free speech, so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation." (quotation omitted)). *Tingley*, in fact, reached the exact opposite conclusion as *Otto*: "What licensed mental health providers do during their appointments with patients for compensation under the authority of a state license is treatment." *Tingley*, 47 F.4th at 1082. Furthermore, *Tingley* correctly characterized the nature of professional counseling practices related to minors' sexuality and gender identity. *See Tingley*, 47 F.4th at 1083 ("The work that [a therapist] does is different than a conversation about the weather, even if he claims that all he does is 'sit and talk.'"). "That the treatment technique of talk therapy is administered through words does not somehow render it any less of a healthcare treatment technique or any less subject to government regulation in the interest of protecting the public health." *Otto v. City of Boca Raton, Fla.*, 41 F.4th 1271, 1294–95 (11th Cir. 2022)[6] (Rosenbaum, J., dissenting from the denial of rehearing en banc). Ms. Chiles errs in arguing otherwise (*See* ECF No. 29 at 15).[7]

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[6] After a three-judge panel of the Eleventh Circuit decided *Otto v. City of Boca Raton, Florida*, 983 F.3d 854 (11th Cir. 2020), the Eleventh Circuit voted against hearing the case en banc. *See Otto v. City of Boca Raton, Florida*, 41 F.4th 1271 (11th Cir. 2022).

[7] Ms. Chiles contends that her speech is not incidental to her professional conduct because Defendants cannot identify any separate conduct—other than her speech—that the Minor Therapy Conversion Law regulates (ECF No. 29 at 15). The

b. Rational Basis Review

The Minor Therapy Conversion Law is viewpoint neutral and does not impose content-based speech restrictions.[8] It is a public health law that regulates professional conduct. Any speech affected by the Minor Therapy Conversion Law is incidental to the professional conduct it regulates. *See National Institute of Family and Life Advocates*, 138 S. Ct. at

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Court rejects this argument because it rests on a flawed premise, presupposing "speech" in the context of a licensed professional counselor's work is wholly separate from the work of counseling itself. However, "[t]he practice of psychotherapy is not different from the practice of other forms of medicine simply because it uses words to treat ailments." *Tingley*, 47 F.4th at 1082.

[8] Ms. Chiles argues that the Minor Therapy Conversion Law "discriminates based on viewpoint" because it prohibits "counseling from the viewpoint" that sexuality and gender identity can "change to align with an individual's biology and beliefs" (ECF No. 29 at 20; *see also id.* at 18). Not so. As explained above, the Court agrees with Defendants that the Minor Therapy Conversion Law is a professional conduct regulation that affects all regulated counselors and prohibits therapeutic *practices* attempting to change a minor's sexual orientation or gender identity. *See* C.R.S. § 12–245–202(3.5)(a). To the extent it affects speech incidental to a practitioner's therapeutic practice, it does so in order to regulate outcome-determinative counseling for *all* clients—including heterosexual-identifying clients. Moreover, this professional regulation applies to all licensed counselors. *See Christian Legal Soc. Chapter of the Univ. of California, Hastings Coll. of the L. v. Martinez*, 561 U.S. 661, 694 (2010) ("It is, after all, hard to imagine a more viewpoint-neutral policy than one requiring *all* student groups to accept *all* comers"); *see also id.* at 699 (distinguishing "singling out" those "who hold religious beliefs" from "those who engage in discriminatory conduct based on . . . religious beliefs" and stating that "all acts of [] discrimination are equally covered [and] [t]he discriminator's beliefs are simply irrelevant") (Stevens, J., concurring).

2372. Accordingly, the Court declines Ms. Chiles' invitation to apply strict scrutiny in its analysis of her First Amendment challenge (ECF No. 29 at 25).[9]

The Court applies rational basis review to its analysis of the Minor Therapy Conversion Law. *See*, *e.g.*, *Tingley*, 47 F.4th at 1077–78 (applying rational basis review to conversion therapy law); *Otto*, 41 F.4th at 1276 ("The rational basis 'reasonableness' standard applies only to regulations of conduct that incidentally burden speech." (citing *National Institute of Family and Life Advocates*, 138 S. Ct. at 2373–74)) (Grant, J., concurring in the denial of rehearing en banc); *Ohralik*, 436 U.S. at 462. To survive the "light burden" of rational basis review, the Minor Therapy Conversion Law must be "rationally related to a legitimate state interest." *Tingley*, 47 F.4th at 1078 (quotations omitted); *see also Wilson v. Wichita State Univ.*, 662 F. App'x 626, 629 (10th Cir. 2016) ("Under the rational-basis standard, we will uphold an action so long as it is rationally related to a legitimate government purpose." (citation omitted)). Public health laws "must be sustained if there is a rational basis on which the legislature could have thought that it would serve legitimate state interests." *Dobbs*, 142 S. Ct. at 2284 (quotation omitted). "[H]ealth and welfare laws [are] entitled to a strong presumption of validity." *Id.* (citation omitted).

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[9] Because the Minor Therapy Conversion Law is a professional conduct regulation that does not discriminate on the basis of content or viewpoint, Ms. Chiles' argument that Defendants bears the burden to "justify" its content-based restrictions is of no moment, and the Court need not indulge it (ECF No. 25 at 12).

The Court agrees with Defendants that the Minor Therapy Conversion Law survives rational basis review (*See* ECF No. 45 at 27-29). First, Defendants have a legitimate and important state interest in the prevention of "harmful therapy known to increase suicidality in minors" (*Id.* at 29; ECF No. 45-1 at 5-6). *See also Tingley*, 47 F.4th at 1078 (describing state interest in "protecting . . . minors against exposure to serious harms caused by conversion therapy" as "without a doubt" a "legitimate state interest" (citations and alterations omitted)); *Otto*, 41 F.4th at 1285–86 (describing therapeutic practices that are "sexual-orientation change efforts" as "types of talk therapy that significantly increase the risk of suicide and have never been shown to be efficacious") (Rosenbaum, J., dissenting from the denial of rehearing en banc). The legitimacy and importance of the interest underpinning the Minor Therapy Conversion Law is undisputable. Surely, a state's interest in protecting the psychological and physical health of its minor population cannot be doubted. *Cf. Globe Newspaper Co. v. Superior Ct. for Norfolk Cnty.*, 457 U.S. 596, 607 (1982) ("[S]afeguarding the physical and psychological well-being of a minor . . . is a *compelling one*." (emphasis added)).

Furthermore, Defendants have a legitimate interest in "regulating and maintaining the integrity of the mental-health profession," which includes regulating the efficacy and safety of its professionals' therapeutic practices—particularly the practices of mental health professionals who counsel minor clients. *Ferguson v. People*, 824 P.2d 803, 810 (Colo. 1992). *See also Tingley*, 47 F.4th at 1078 ("[The state] also has a compelling interest in the practice of

professions within [its] boundaries . . . regulating mental health . . . and affirming the equal dignity and worth of LGBT people." (quotations omitted) (first alteration added)).

Second, the Minor Therapy Conversion Law rationally serves these legitimate and important interests. *See Dobbs*, 142 S. Ct. at 2284. As the Ninth Circuit explained in *Tingley* and its analysis of Washington's conversion therapy law, a state acts "rationally when it decide[s] to protect the physical and psychological well-being of its minors by preventing state-licensed health care providers from practicing conversion therapy on them." *Tingley*, 47 F.4th at 1078 (quotations omitted). The preliminary injunction record demonstrates that conversion therapy is ineffective and harms minors who identify as gay, lesbian, bisexual, transgender, or gender non-conforming (ECF No. 45 at 29-30, 39; *see also*, *e.g.*, ECF No. 45-1 at 22-24, 29-33). Colorado considered the body of medical evidence regarding conversion therapy and sexual orientation change efforts—and their harms—when passing the Minor Therapy Conversion Law and made the reasonable and rational decision to protect minors from ineffective and harmful therapeutic modalities (*See* ECF No. 45 at 30). *See also Tingley*, 47 F.4th at 1078–79 ("In relying on the body of evidence before it . . . [the state] rationally acted by amending its regulatory scheme for licensed health care providers to add [conversion therapy] to the list of unprofessional conduct for the health professions." (quotations omitted)).[10]

[10] Ms. Chiles argues that the medical evidence does not so readily support the Colorado legislature's concerns regarding

Therefore—and for substantially the same reasons set forth in *Tingley*—the Minor Therapy Conversion Law survives rational basis review.

Ms. Chiles argues that the Minor Therapy Conversion Law is "presumptively invalid" because—in order for it to survive her challenge—Defendants must identify "historical evidence" that a "long tradition" of similar speech restrictions exists (ECF No. 25 at 12). Again, Ms. Chiles is incorrect. As set forth above, the Minor Therapy Conversion Law is a professional conduct regulation and does not implicate legal frameworks that might otherwise apply to content-based speech restrictions under the First Amendment. *See National Institute of Family and Life Advocates*, 138 S. Ct. at 2373. On this basis, Ms. Chiles' reliance on *New York State Rifle & Pistol Association, Inc. v. Bruen* is misplaced. 142 S. Ct. 2111, 2130 (2022) ("When the government restricts *speech* [it] bears the burden of providing [the restriction's] constitutionality [by] generally

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conversion therapy (*See*, *e.g.*, ECF Nos. 25 at 5; 1 at 9-10 ¶¶ 43-44). The Court disagrees. The preliminary injunction record amply shows that the Minor Therapy Conversion Law comports with the prevailing medical consensus regarding conversion therapy and sexual orientation change efforts (*See generally* ECF No. 45-1). Moreover, even if Ms. Chiles identifies some medical evidence that runs contrary to the evidence Defendants marshal and consulted in passing the Minor Therapy Conversion Law, "the preponderating opinion in the medical community is against its use." *Tingley*, 47 F.4th at 1081 (quotations omitted). *See also id.* (affirming "the right of the government to regulate what medical treatments its licensed health care providers could practice on their patients according to the applicable standard of care and governing consensus at the time (even if not unanimous)").

point[ing] to historical evidence about the reach of the First Amendment's protections." (quotations omitted) (emphasis added)). Nonetheless, Defendants have identified a history of public health regulations with which the Minor Therapy Conversion Law is entirely consistent (See ECF No. 45 at 22-23). "It is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, *particularly those which closely concern the public health*. There is perhaps no profession more properly open to such regulation than that which embraces the practitioners of medicine." *Watson v. State of Maryland*, 218 U.S. 173, 176 (1910) (emphasis added); *see also Dent v. State of W.Va.*, 129 U.S. 114, 122 (1889) ("The power of the state to provide for the general welfare of its people authorizes it to prescribe all such regulations . . . . [a]s one means to this end it has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely."); *Tingley*, 47 F.4th at 1080 ("There is a long (if heretofore unrecognized) tradition of regulation governing the practice of those who provide health care within state border.").

Fundamentally, Ms. Chiles fails to overcome the "strong presumption of validity" the Court applies to the Minor Therapy Conversion Law. *Dobbs*, 142 S. Ct. at 2284 (citation omitted). As such, and for the reasons set forth above, she has failed to meet her burden of showing a likelihood of success on the merits of her First Amendment free speech claim. *See Beltronics*, 562 F.3d at 1070 (10th Cir. 2009).

2. First Amendment Free Exercise Claim

Ms. Chiles argues that the Minor Therapy Conversion Law violates her First Amendment free exercise rights because it is neither neutral nor generally applicable, and therefore cannot survive strict scrutiny (*See* ECF No. 29 at 22, 24). Defendants contend that the Minor Therapy Conversion law is neutral and generally applicable (*See* ECF No. 45 at 38, 40). For these reasons, Defendants argue, rational basis review applies and the Minor Therapy Conversion Law survives rational basis review (*See* ECF No. 45 at 37). For the reasons set forth below, the Court agrees with Defendants.

a. Legal Standard Governing First Amendment Free Exercise Claims

The First Amendment's Free Exercise Clause, "applicable to the States under the Fourteenth Amendment, provides that "Congress shall make no law . . . prohibiting the free exercise" of religion. *Fulton v. City of Philadelphia, Pennsylvania*, 141 S. Ct. 1868, 1876 (2021) (quotation omitted); *see also* U.S. Const. amend. I. Laws prohibiting religion's free exercise may be subject to strict scrutiny. *See Kennedy v. Bremerton Sch. Dist.*, 142 S. Ct. 2407, 2422 (2022). "But such strict scrutiny does not always apply to free-exercise claims." *Church v. Polis*, No. 20-1391, 2022 WL 200661, at *8 (10th Cir. Jan. 24, 2022), *cert. denied sub nom. Cmty. Baptist Church v. Polis*, 142 S. Ct. 2753 (2022). "[N]eutral" and "generally applicable" laws are not subject to strict scrutiny, even if they "incidentally burden[] religion." *Fulton*, 141 S. Ct. at 1876 (citation omitted); *see also Grace United Methodist Church v. City Of Cheyenne*, 451

F.3d 643, 649 (10th Cir. 2006) ("Neutral rules of general applicability normally do not raise free exercise concerns even if they incidentally burden a particular religious practice or belief." (citation omitted)); *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 531 (1993) ("[O]ur cases establish the general proposition that a law that is neutral and of general applicability need not be justified by a compelling governmental interest even if the law has the incidental effect of burdening a particular religious practice."). *Cf. Fulton*, 141 S. Ct. at 1882 ("[A] neutral and generally applicable law typically does not violate the Free Exercise Clause—no matter how severely that law burdens religious exercise." (citation omitted)) (Barrett, J., concurring).

Laws that are "both neutral and generally applicable need only be rationally related to a legitimate governmental interest to survive a constitutional challenge"—i.e., they are only subject to rational basis review. *Grace United Methodist Church*, 451 F.3d at 649 (citation omitted); *see also Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 52 (10th Cir. 2013) ("Government actions that stem from 'neutral' rules of 'general applicability' are subject to rational basis review." (citation omitted)). With this legal standard in mind, the Court proceeds in its analysis of Ms. Chiles' free exercise claim.

b. Minor Therapy Conversion Law & Neutrality

Ms. Chiles argues that the Minor Therapy Conversion Law is not neutral because it is "based on religious hostility" and "targets a religious practice" (ECF No. 29 at 22). Defendants contend that Ms.

Chiles cannot meet her burden of showing that the Minor Therapy Conversion Law is not neutral because it is "directed at a therapy practice and does not restrict religious exercise" (ECF No. 45 at 38). The Court agrees with Defendants.

A state "fails to act neutrally when it proceeds in a manner intolerant of religious beliefs or restricts practices because of their religious nature." *Fulton*, 141 S. Ct. at 1877 (citation omitted). Factors "relevant to the assessment" of government neutrality include:

- The "historical background" of the challenged decision or policy;
- Specific series of events "leading to the enactment" of the challenged policy; and
- Legislative or administrative histories

Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n, 138 S. Ct. 1719, 1731 (2018) (citation omitted).

According to Ms. Chiles, the Minor Therapy Conversion Law is not neutral because it was "well-known" at the time the Colorado General Assembly enacted the Minor Therapy Conversion Law that conversion therapy was primarily sought for religious reasons (ECF No. 29 at 22). Therefore, Ms. Chiles' argument goes, the Minor Therapy Conversion Law impermissibly burdens practitioners who hold particular religious beliefs (*See id.*). The Court disagrees. The Minor Therapy Conversion Law does not "restrict [therapeutic] practices because of their *religious* nature." *Fulton*, 141 S. Ct. at 1877 (citation omitted) (emphasis added). As Defendants argue, the Minor Therapy Conversion Law targets specific "modes of therapy" due to their *harmful* nature—

regardless of the practitioner's personal religious beliefs or affiliations (ECF No. 45 at 38). As the preliminary injunction record shows, the Minor Therapy Conversion law targets these therapeutic modalities because conversion therapy is ineffective and has the potential to "increase [minors'] isolation, self-hatred, internalized stigma, depression, anxiety, and suicidality" (ECF No. 45-1 at 36 ¶ 68; *see also id.* at 34-35 ¶ 64). Against the background of a significant body of scientific research concerning conversion therapy's historical ineffectiveness and harmfulness, the Colorado General Assembly enacted the Minor Therapy Conversion Law to eliminate the harms minor clients suffered during conversion therapy (*See*, *e.g.*, ECF No. 45-1 at 5-6 ¶ 13).

Fundamentally, the Minor Therapy Conversion Law neutrally regulates professional conduct and professional practices. For this reason, Ms. Chiles' arguments that the Minor Therapy Conversion Law is not neutral because its regulation of specific therapeutic practices incidentally burdens her—or any other practitioners'—religious beliefs is unavailing. *See*, *e.g.*, *Fulton*, 141 S. Ct. at 1876; *Grace United Methodist*, 451 F.3d at 649. The Minor Therapy Conversion law "is [not] *specifically directed* at" religious practices, nor are religious exercises its "object." *Kennedy*, 142 S. Ct. at 2442 (quotations omitted) (emphasis added); *see also Grace United Methodist*, 451 F.3d at 649–50 ("A law is neutral so long as its object is something other than the infringement or restriction of religious practices." (citation omitted)). Simply because some religious bases for conversion therapy may have been "well-known" at the time the Minor Therapy Conversion

Law was enacted does not erase its facial neutrality or the backdrop of scientific evidence considered in the Law's passage.[11] There is nothing on the Minor Therapy Conversion Law's face that "refers to a religious practice without a secular meaning discernable from the language or context." *Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 533 (1993). At bottom, the Minor Therapy Conversion Law is facially neutral, and nothing in the preliminary injunction record demonstrates that "suppression" of any religions or religious beliefs was the Minor Therapy Conversion Law's "central element." *Id.* at 534.

Ms. Chiles makes the additional argument that the Minor Therapy Conversion Law "attempt[s] to impose its views" on practitioners (ECF No. 29 at 23). Nonsense. As Defendants observe, the Minor Therapy Conversion Law exempts from its coverage forms of religious ministry (ECF No. 45 at 40). *See also* C.R.S. § 12-245-217(1) ("A person engaged in the practice of religious ministry is not required to comply with [the Minor Therapy Conversion Law]"); *Tingley*, 47 F.4th at 1085 ("The law's express protection for the practice of conversion therapy in a religious capacity is at odds

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[11] Ms. Chiles identifies herself as a "practicing Christian" (ECF No. 1 at 29-30 ¶ 104). She also notes that conversion therapy may include "techniques based in Christian faith-based methods" and is provided by practitioners who "believe in Christian faith-based methods" of counseling (*Id.* at 7 ¶ 37; *see also* ECF No. 29 at 22). The preliminary injunction does not indicate—and the Court expresses no opinion on—whether any non-Christian practitioners, or Christians with religious beliefs that are dissimilar to Ms. Chiles' beliefs, engage in professional conduct that implicates the Minor Therapy Conversion Law.

with [the plaintiff's] assertion that the law inhibits religion."). This exemption underscores that the Minor Therapy Conversion Law intends to regulate therapeutic practices and the harms that flow from these practices, not individual practitioners' religious beliefs. *See id.* For these reasons, Ms. Chiles has not met her burden of showing the Minor Therapy Conversion law is not neutral.

c. *Minor Therapy Conversion Law & General Applicability*

Ms. Chiles argues that the Minor Therapy Conversion Law is not generally applicable because it contains "vague terms" that invite "individual exemptions" regarding practitioners' conduct (ECF No. 29 at 24). Defendants contend that the Minor Therapy Conversion Law is generally applicable because it "does not contain a mechanism for individualized exemptions" and prohibits conversion therapy for any reason (ECF No. 45 at 40). The Court agrees with Defendants.

"The principle that government, in pursuit of legitimate interests, cannot in a selective manner impose burdens only on conduct motivated by religious belief is essential to the protection of the rights guaranteed by the Free Exercise Clause." *Lukumi*, 508 U.S. at 543. A law will fail the "general applicability requirement" if the law "prohibits religious conduct while permitting secular conduct . . . ." *Kennedy*, 142 S. Ct. at 2422 (quotations omitted). Further, "[a] law is not generally applicable if it invite[s] the government to consider the particular reasons for a person's conduct by providing a mechanism for individualized exemptions." *Fulton*,

141 S. Ct. at 1877 (quotations omitted). In the case of free exercise challenges based on a law's alleged system of "individualized exceptions," the law is generally applicable "as long as [it] remains exemptionless, and [therefore] religious groups cannot claim a right to exemption; however, when a law has secular exemptions, a challenge by a religious group becomes possible." *Grace United Methodist*, 451 F.3d at 650.

Ms. Chiles argues that the Minor Therapy Conversion Law impermissibly "invites enforcement authorities" to "make individualized exemptions" for secular counselors whose therapeutic practices are approved under the Law (ECF No. 29 at 24). The Court disagrees. The Minor Therapy Conversion Law is enforced against all practitioners who engage in defined forms of conversion therapy. *See* § 12-245-202. It does not invest in any agency the "sole discretion" to decide when enforcement of the Minor Therapy Conversion Law is warranted. *See Fulton*, 141 S. Ct. at 1879. Contrary to Ms. Chiles' contention that the Minor Therapy Conversion Law uses "vague terms," it clearly describes what practices do and do not violate the Law. *See id.*; *see also* § 12-245-202(3.5)(a), (b). The Minor Conversion Therapy Law's facial language does not provide a "formal and discretionary mechanism" for individual, discretionary exceptions. *See Tingley*, 47 F.4th at 1088. *Cf. Fulton*, 141 S. Ct. at 1878 ("[T]inclusion of a *formal system of entirely discretionary exceptions* in [the law] renders [its requirements] not generally applicable." (emphasis

added)).[12] And to the extent that Ms. Chiles argues that the Minor Therapy Conversion Law favors certain forms of therapeutic counseling over others, it does not. The Minor Therapy Conversion Law simply prohibits specific therapeutic practices (*See* ECF No. 29 at 24).[13] The Minor Therapy Conversion Law's prohibition on specific therapeutic practices constitutes a "limited-yes-or-no inquiry" into whether a counselor's practice violates the Law. *See Axson-Flynn v. Johnson*, 356 F.3d 1277, 1298 (10th Cir. 2004) ("[T]hat kind of limited yes-or-no inquiry is qualitatively different from [a] kind of case-by-case system . . . ."); *see also id.* ("[The] 'individualized exemption' exception is limited . . . to systems that are designed to make case-by-case determinations . . . ." (emphasis added) (citation omitted). As such, Ms. Chiles has failed to meet her burden regarding the Minor Therapy Conversion Law's general

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[12] The Court agrees with Defendants that the Minor Therapy Conversion Law's exemption of religious ministries from its prohibitions further demonstrates that the Minor Therapy Conversion Law is generally applicable and does not treat secular activity "more favorably" than religious exercise (ECF No. 45 at 41). *See Tandon v. Newsom*, 141 S. Ct. 1294, 1297 (2021). *See also Lukumi*, 508 U.S. at 543 ("[The] government . . . cannot in a selective manner *impose* burdens only on conduct motivated by religious belief . . . ." (emphasis added)); *Kennedy*, 142 S. Ct. at 2422.

[13] At one point in her preliminary injunction motion, Ms. Chiles argues that the Minor Therapy Conversion Law is overinclusive and underinclusive (ECF No. 29 at 30-32). The Court rejects this argument. The Minor Therapy Conversion Law is a neutral and generally applicable law that regulates professional conduct—not pure speech—and clearly delineates what therapeutic practices it does and does not allow. *See* § 12-245-202(3.5)(a), (b).

applicability.

d. Rational Basis Review

Ms. Chiles has failed to meet her burden of showing the Minor Therapy Conversion Law is not neutral or generally applicable. Therefore, the Court applies rational basis, rather than strict scrutiny, review. *See Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 53 (10th Cir. 2013) ("[The] District's actions were based upon neutral rules of general applicability, [and are] subject to rational basis review." (citation omitted)). As discussed above, the Minor Therapy Conversion Law is rationally related to a legitimate governmental interest and survives rational basis review. Ms. Chiles has failed to show a likelihood of success on the merits on her First Amendment free exercise claim.[14]

3. Due Process Claim

Ms. Chiles also challenges the Minor Therapy Conversion Law on due process grounds, contending that it is unconstitutionally vague and gives enforcement authorities "unfettered discretion to punish speech with which they disagree" (ECF No. 29 at 32). Defendants argue that Ms. Chiles cannot meet her burden of showing that the Minor Therapy Conversion Law violates the Fourteenth Amendment's Due Process Clause because the Law is clear

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[14] Because Ms. Chiles has failed to show a likelihood of success on the merits of her free speech and free exercise claims, the Court need not address her argument that she has a "hybrid-rights" claim triggering strict scrutiny. *See Axson-Flynn*, 356 F.3d at 1295 ("[T]he hybrid-rights theory at least requires a colorable showing of infringement of a companion constitutional right." (quotations omitted)).

and does not invite arbitrary enforcement (ECF No. 49 at 45-46). The Court agrees with Defendants.

First, the Minor Therapy Conversion Law is not unconstitutionally vague. "It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A law is unconstitutionally vague if it does not provide "a person of ordinary intelligence [with] fair notice of what is permitted" or is so "standardless" that it permits "seriously discriminatory enforcement." *United States v. Williams*, 553 U.S. 285, 304 (2008). Ms. Chiles argues that the Minor Therapy Conversion Law is unconstitutionally vague because it is ambiguous and does not precisely define its key terms (See ECF No. 29 at 33). The Court disagrees. The Minor Therapy Conversion Law defines what is—and is not—considered "conversion therapy," and what therapeutic practices violate the Law. *See* § 12-245-202(3.5)(a), (b). Colorado law elsewhere defines "gender identity" and "sexual orientation." C.R.S. § 24-34-301(3.5), (7). For these reasons, the Minor Therapy Conversion Law provides a person of ordinary intelligence with sufficient information to ably determine what is and is not permitted under the Law. *See* § 12-245-202(3.5)(a), (b). *See also Williams*, 553 U.S. at 304; *Tingley*, 47 F.4th 1055, 1089–90 (rejecting argument that the phrases "sexual orientation" and "gender identity" were unconstitutionally vague); *id.* at 1090 ("[T]he terms of the statute provide a clear, dividing line: whether change [of a minor's gender identity] is the object."); *Reynolds v. Talberg*, No. 1:18-CV-69, 2020 WL 6375396, at *9 (W.D. Mich. Oct. 30, 2020) ("Phrases

like 'sexual orientation' and 'gender identity' have also been held sufficiently definite to foreclose vagueness challenges . . . . If the phrase 'gender identity' is not too vague, then surely companion concepts like 'transgender' and 'gender expression' are not overly vague either." (citations omitted)).

Second, the Court rejects Ms. Chiles' argument that the Minor Therapy Conversion Law violates due process on the grounds that its enforcement is "left to the subjective judgments" of enforcement agencies (ECF No. 29 at 34). As discussed above in the Court's analysis of Ms. Chiles' free exercise claim, the Minor Therapy Conversion Law clearly delineates what is and is not permitted under the Law. *See* § 12-245-202(3.5)(a), (b). The Minor Therapy Conversion Law is "sufficiently definite such that it does not encourage arbitrary enforcement" against specified therapeutic practices. *Dias v. City & Cnty. of Denver*, 567 F.3d 1169, 1180 (10th Cir. 2009). Its enforcement does not require an indeterminate, "wide-ranging inquiry" that "invites arbitrary enforcement." *Johnson v. United States*, 576 U.S. 591, 597 (2015). As such, Ms. Chiles has not met her burden of showing that the Minor Therapy Conversion Law is unconstitutional under the Fourteenth Amendment's Due Process Clause.

* * *

For the reasons set forth above, Ms. Chiles has failed to meet her burden of showing a likelihood of success on the merits for all of her constitutional challenges to the Minor Therapy Conversion Law. Because a preliminary injunction "can issue only if each [preliminary injunction] factor is established,"

and Ms. Chiles has not met her burden on the "likelihood of success on the merits" factor, the Court need not determine whether she has met her burden for the remaining preliminary injunction factors. *See Denver Homeless*, 32 F.4th at 1277 (citation omitted).

The Court makes one final observation. Throughout her preliminary injunction motion, Ms. Chiles contends that she "listens and asks questions to help" her clients (ECF No. 29 at 14). According to Ms. Chiles, "[a]ll she does is talk to her clients" (*Id.* at 13). As the preliminary injunction record shows, this is disingenuous. "What licensed mental health providers do during their appointments with patients for compensation under the authority of a state license is treatment." *Tingley*, 47 F.4th at 1082. Ms. Chiles cannot seriously compare her work as a professional counselor to "book club" discussions, given especially that she claims the relationship between "a mental health professional and her client" is based on a "deeply held trust from which a *critical* therapeutic alliance forms allowing the *professional* to provide *vital mental health care* to the client" (*Cf.* ECF No. 29 at 16; ECF No. 1 at 2 ¶ 1 (emphasis added)). The therapeutic work for which she obtained a graduate degree and professional licensure is incomparable to casual conversations about *New York Times* bestsellers. *See also Tingley*, 47 F.4th at 1082–83 ("Comparing the work that licensed mental health providers do to book club discussions or conversations among friends minimizes the rigorous training, certification, and post-secondary education that licensed mental health providers endure to be able to treat other humans for compensation.").

"Children may identify as gay, straight,

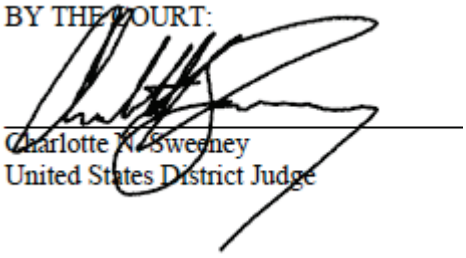
cisgender, or transgender." *Id.* at 1084. In the case of children who identify as lesbian, gay, bisexual, cisgender, transgender, or gender non-conforming, they are entitled to treatment—regardless of its outcome—that does not take a cavalier approach to their "dignity and worth." *Masterpiece Cakeshop, Ltd. v. Colorado C.R. Comm'n*, 138 S. Ct. 1719, 1727 (2018). And at the bare minimum, they are also entitled to a state's protection from therapeutic modalities that have been shown to cause longstanding psychological and physical damage.

IV. CONCLUSION

Consistent with the above analysis, Ms. Chiles' Motion for Preliminary Injunction (ECF No. 29) is DENIED.

DATED this 19th day of December 2022.

BY THE COURT:



Charlotte N. Sweeney
United States District Judge

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 22-cv-2287

KALEY CHILES,

Plaintiff,

v.

PATTY SALAZAR, in her official capacity as Executive Director of the Department of Regulatory Agencies; and
REINA SBARBARO-GORDON in her official capacity as Program Director of the State Board of Licensed Professional Counselor Examiners and the State Board of Addiction Counselor Examiners;
JENNIFER LUTTMAN, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners;
AMY SKINNER, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners;
KAREN VAN ZUIDEN, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners;
MARYKAY JIMENEZ, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners;
KALLI LIKNESS, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners;
SUE NOFFSINGER, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners;
RICHARD GLOVER, in his official capacity as a

member of the State Board of Licensed Professional Counselor Examiners;
ERIKA HOY, in her official capacity as a member of the State Board of Licensed Professional Counselor Examiners;
KRISTINA DANIEL, in her official capacity as a member of the State Board of Addiction Counselor Examiners;
HALCYON DRISKELL, in her official capacity as a member of the State Board of Addiction Counselor Examiners;
CRYSTAL KISSELBURGH, in her official capacity as a member of the State Board of Addiction Counselor Examiners;
ANJALI JONES, in her official capacity as a member of the State Board of Addiction Counselor Examiners;
THERESA LOPEZ, in her official capacity as a member of the State Board of Addiction Counselor Examiners; and
JONATHAN CULWELL, in his official capacity as a member of the State Board of Addiction Counselor Examiners;

Defendants.

VERIFIED COMPLAINT

Plaintiff Kaley Chiles submits the following Verified Complaint against Defendants:

I. INTRODUCTION

1. The relationship between a mental health professional and her client has always been based on

a deeply held trust from which a critical therapeutic alliance forms allowing the professional to provide vital mental health care to the client. The client communicates their goals, desires and objectives to the mental health professional, and the mental health professional provides counseling that aligns with the client's self-determined choices. This relationship has always been viewed as sacrosanct and inviolable. Until now.

2. With the passage of the Counseling Censorship Law (defined below), the government has interjected itself between mental health professionals and their clients as effectively as if Defendants were standing in the counselor's office with their hand over her mouth lest she dare say something contrary to the state-approved orthodoxy mandated by the law. This is repugnant to the First Amendment liberties of both counselors and their clients. Defendants' actions have caused, are causing, and will continue to cause irreparable injury to Plaintiff's fundamental liberties. Therefore, Plaintiff brings this action to challenge the constitutionality of the Counseling Censorship Law.

3. Plaintiff engages in licensed, ethical, and professional counseling that honors her clients' autonomy and right to self-determination, that permits clients to prioritize their religious and moral values above unwanted same-sex sexual attractions, behaviors, or identities, and that enables clients to choose a licensed counselor who can address their self-determined values, not values imposed by the government. Plaintiff has First Amendment rights as a licensed counselor to engage in and provide counseling consistent with her and her clients' sincerely held religious beliefs, and her clients have

First Amendment rights to receive such counseling free from Defendants' blatant and egregious viewpoint discrimination.

4. The Counseling Censorship Law prevents a minor from seeking counseling to address a conflict about, or questions concerning, her unwanted same-sex sexual attractions, behaviors, and identities and from seeking to reduce or eliminate her unwanted same-sex sexual attractions, behaviors, or identities through counseling, such as sexual orientation change efforts ("SOCE"). Thus, the law denies Plaintiff's minor clients their right to self-determination, their right to prioritize their religious and moral values, and their right to receive effective counseling consistent with their freely chosen values.

5. By prohibiting Plaintiff from counseling with clients in an effort fully to explore their sexuality (including seeking to eliminate or reduce unwanted same-sex attractions, behaviors, or identity), even when the client desires and freely consents to such counseling, the Counseling Censorship Law also violates the Plaintiff's constitutional rights.

6. The Counseling Censorship Law is also unfairly discriminatory. Plaintiff helps heterosexual clients by exploring with them their sexual attractions, behaviors and identity. But in many situations the law makes it illegal for her to provide the same help to minors with same sex attractions and/or gender identity conflicts. This is causing immediate and irreparable harm to Plaintiff and her clients.

7. By denying minors the opportunity to pursue a particular course of action that could most effectively help them address the conflict between their sincerely

held religious beliefs and their unwanted same-sex attractions, behaviors, or identity, the Counseling Censorship Law is causing those minors confusion and anxiety and infringing on their free speech and religious liberty rights.

8. Plaintiff seeks to enjoin enforcement of the Counseling Censorship Law because it violates her and her clients' rights to freedom of speech and free exercise of religion guaranteed by the First and Fourteenth Amendments to the United States Constitution.

9. Plaintiff also seeks a judgment declaring that the Counseling Censorship Law, both on its face and as applied, is an unconstitutional violation of the First and Fourteenth Amendments to the United States Constitution.

II. PARTIES

10. Plaintiff is a resident of the State of Colorado.

11. Patty Salazar ("Salazar") is the Executive Director of the Colorado Department of Regulatory Agencies.

12. The Colorado State Board of Licensed Professional Counselor Examiners shall be referred to herein as the Counselor Board. The Colorado State Board of Addiction Counselor Examiners shall be referred to herein as the Addiction Board. The Counselor Board and the Addiction Board shall be referred to jointly as the "Boards."

13. Reina Sbarbaro-Gordon ("Sbarbaro-Gordon") is the Program Director of both the Counselor Board and the Addiction Board.

14. Jennifer Luttman, Amy Skinner, Karen Van

Zuiden, MaryKay Jimenez, Kalli Likness, Sue Noffsinger, and Richard Glover are the members of the Counselor Board.

15. Erika Hoy, Kristina Daniel, Halcyon Driskell, Crystal Kisselburgh, Anjali Jones, Theresa Lopez, and Jonathan Culwell are the members of the Addiction Board.

16. All Defendants are sued in their official capacities.

17. All Defendants are for all purposes relevant to this Complaint acting under color of state law.

III. JURISDICTION AND VENUE

18. This action arises under the First and Fourteenth Amendments to the United States Constitution and is brought pursuant to 42 U.S.C. §1983.

19. This Court has jurisdiction under 28 U.S.C. §§1331 and 1343.

20. Venue is proper in this Court under 28 U.S.C. §1391(b) because a substantial part of the events or omissions giving rise to Plaintiff's claims occurred in this district.

21. This Court is authorized to grant declaratory judgment under the Declaratory Judgment Act, 28 U.S.C. §2201-02, implemented through Rule 57 of the Federal Rules of Civil Procedure, and is authorized to grant injunctive relief pursuant to Rule 65 of the Federal Rules of Civil Procedure.

22. This Court is authorized to grant Plaintiff's prayer for relief regarding costs, including a reasonable attorney's fee, pursuant to 42 U.S.C. § 1988.

IV. GENERAL ALLEGATIONS

A. THE COUNSELING CENSORSHIP LAW

23. C.R.S. § 12-245-202(3.5) states:

> (a) 'Conversion therapy' means any practice or treatment by a 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.
>
> (b) 'Conversion therapy' does not include practice or treatments that provide:
>
> (I) Acceptance, support, and understanding for the facilitation of an individual's coping, social support, and identity exploration and development, including sexual-orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practice, as long as the counseling does not seek to change sexual orientation or gender identity; or
>
> (II) Assistance to a person undergoing gender transition.

24. C.R.S. § 12-245-224(1) states in pertinent part:

> "A person licensed, registered, or certified under this article 245 violates this article 245 if the person: . . .
>
> (t) Has engaged in any of the following activities and practice: . . .

> (V) Conversion therapy with a client who is under eighteen years of age.

25. C.R.S. § 12-245-224(1)(t)(V) shall be referred to herein as the "Counseling Censorship Law" or the "Law."

B. THE COLORADO LICENSING LAWS

26. Pursuant to C.R.S. § 12-245-604(1), the Counseling Board issues licenses to qualified professional counselors.

27. Pursuant to C.R.S. § 12-245-804(1), the Addiction Board issues licenses to qualified addiction counselors.

28. Plaintiff holds a license as a licensed professional counselor issued by the Counseling Board.

29. Plaintiff holds a license as an addiction counselor issued by the Addiction Board.

30. Each of the Boards is a "regulator" as that term is used in Title 12 of the Colorado Revised Statutes. See C.R.S. § 12-20-102(14).

31. Pursuant to C.R.S. § 12-20-403, regulators, including the Boards, are authorized to initiate and carry out disciplinary procedures on account of any alleged violations of the provisions of the Counseling Censorship Law by a licensee.

32. Pursuant to C.R.S. § 12-245-225, the Boards may revoke or suspend the license of any licensee that a violates and provision of C.R.S. § 12-245-224, including violating the Counseling Censorship Law.

33. Pursuant to Administrative Procedure 10-1, the Boards delegate their authority to initiate and/or

review complaints against licensees under their jurisdiction to Sbarbaro-Gordon.

34. Pursuant to C.R.S. § 12-20-403, Salazar has authority to assign a complaint against a licensee to the appropriate regulator, assign a complaint specially for investigation, or take such other action on the complaint as appears to her to be warranted in the circumstances.

35. In summary, the Boards have issued licenses to Plaintiff. If Plaintiff were accused of violating the Counseling Censorship Law, each of the Defendants would play a role in the process of investigating the complaint against Plaintiff and taking action in response to the complaint, up to and including revoking Plaintiff's licenses.

36. The purpose of this action is to seek a declaration that the Counseling Censorship Law is unconstitutional and to enjoin the Defendants from enforcing this unconstitutional law against Plaintiff.

C. RESEARCH ON SOCE COUNSELING

37. It is well known to practitioners in the mental health field that most of those who seek counseling to change sexual orientation are motivated by religious convictions. Thus, in 2013 the American Counseling Association issued a statement declaring that "Conversion therapy as a practice is a religious, not psychologically-based, practice. . . . The treatment may include techniques based in Christian faith-based methods . . ."[1] In other words, according to the

[1] Joy S. Whitman, et al, *Ethical issues related to conversion or reparative therapy*, AMERICAN COUNSELING ASSOCIATION, https://bit.ly/3RoGkUA (last visited Sept. 1, 2022).

ACA, the practice the Counseling Censorship Law seeks to prohibit is a religious practice.

38. The Human Rights Campaign organization, which is active nationally in promoting counseling censorship laws and ordinances, in its website accuses "right-wing religious groups" of "promot[ing] the concept that an individual can change their sexual orientation or gender identity."[2]

39. In a report published in 2009, a task force of the American Psychological Association reported that "most SOCE ["sexual orientation change efforts"] currently seem directed to those holding conservative religious and political beliefs, and recent research on SOCE includes almost exclusively individuals who have strong religious beliefs."[3] The Task Force further reported that those who seek counseling with a goal of moving away from same-sex attractions are "predominately . . . men who are strongly religious and participate in conservative faiths." *Id.*

40. Leading authors in the field have made the same observation repeatedly over the last two decades. In 1999, psychology professor and prominent advocate of counseling censorship laws Douglas Haldeman wrote that "Historically, most conversion therapy occurred in religious settings." In 2004, Prof. Haldeman again wrote that "the vast majority of those seeking sexual orientation change because of internal conflict have strong religious affiliations." Douglas C. Haldeman,

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[2] Human Rights Campaign, *The Lies and Dangers of "Conversion Therapy*," https://bit.ly/3AH427V (last visited Sept. 1, 2022).

[3] American Psychological Association, *Task Force on Appropriate Therapeutic Responses to Sexual Orientation* (2009), https://bit.ly/3wMq7kq (last visited Sept. 1, 2022).

When Sexual & Religious Orientation Collide: Considerations in Working with Conflicted Same-Sex Attracted Male Clients, 32 THE COUNSELING PSYCHOLOGIST 691, 693 (2004). In an important 2016 paper, internationally prominent authors Prof. Lisa Diamond and Prof. Clifford Rosky cited multiple peer-reviewed papers to conclude that "[T]he majority of individuals seeking to change their sexual orientation report doing so for religious reasons rather than to escape discrimination." Lisa M. Diamond & Clifford J. Rosky, *Scrutinizing Immutability: Research on Sexual Orientation & U.S. Legal Advocacy for Sexual Minorities*, 52 JOURNAL OF SEX RESEARCH 1, 6 (2016).

41. In sum, through the Counseling Censorship Law, the State is not only seeking to censor and suppress ideas and personal goals with which it disagrees; it is targeting ideas and motivations well known to be primarily associated with and advocated by people of faith for reasons of faith.

42. Gender dysphoria is defined in the American Psychiatric Association's Diagnostic and Statistical Manual of Mental Disorders ("DSM-5"), in adolescents and adults, as "A marked incongruence between one's experienced/expressed gender and assigned gender [i.e., biological sex], of at least 6 months duration," along with certain other indicators, and resulting in "clinically significant distress or impairment in social, occupational, or other important areas of

42. The widely urged path of "affirming" a transgender identity for girls, for example, includes the use of puberty blockers beginning as young as eight; cross-sex hormones a few years later which

build muscle mass and causes growth of facial hair and a deepened voice; "social transition," including adoption of a male name and male pronouns and dress; breast-binding to conceal their developing female biology; and ultimately double mastectomy and hysterectomy, followed by life-long administration of cross-sex hormones.

43. It is commonly presumed that the gender affirming care model is evidence based. However, studies evaluating this are scarce and questionable. One study compared a group of waitlisted adolescents to those receiving puberty blockers and failed to show a statistically significant difference between the treated and waitlisted groups at the study end-period at 18 months. Although the authors highlighted in the abstract the small improvements in the puberty-blocked group at 12 months. Costa, R., Dunsford, M., Skagerberg, E., Holt, V., Carmichael, P., & Colizzi, M. *Psychological support, puberty suppression, and psychosocial functioning in adolescents with gender dysphoria*, THE JOURNAL OF SEXUAL MEDICINE, *12*(11) (2015), 2206. The actual conclusion demonstrated by the study was that by 18 months there were no significant differences between treated and waitlisted adolescents. Biggs, M letter to the editor regarding the original article by Costa et al: *Psychological support, puberty suppression, and psychosocial functioning in adolescents with gender dysphoria*, THE JOURNAL OF SEXUAL MEDICINE, *16*(12) (2019), 2043. More on this topic is below regarding various countries that are pulling away from gender affirming care and recognizing their haste in previously accepting it.

44. Public opinion, media attention, and legislative

advocacy appear to have swayed researchers seeking to paint gender affirming care as successful despite a lack of evidence or evidence contrary to their conclusions. Tordoff, D.M., Wanta, J.W., Collin, A., Stepney, C., Inwards-Breland, D.J., Ahrens, K., *Mental health outcomes in transgender and nonbinary youths receiving gender affirming care*, JAMA NETWORK OPEN, *5*(2), 10/13 (2022). For example, Dr. Paul Sullins points out that in the above-mentioned study, the authors "list their study's "Question" as "Is gender-affirming care for transgender and nonbinary (TNB) youths associated with changes in depression, anxiety, and suicidality?" But they don't claim this anywhere—not specifically. They reference "improvements" twice. . . but offer no statistical demonstration anywhere in the paper or the supplemental material."[4]

45. Dr. Sullins writes about his attempts to gain better access to the data and conclusions drawn by the study authors and explains, "In a March 6 email, [an author] wrote, "Although we provided the raw data in the supplement for transparency, I advise caution in interpreting these data as is." Great, I thought; I could hand off the data to someone who is better at this stuff than I am and ask what they think. Except the data wasn't actually included in the supplementary material. I asked Tordoff where it was. Radio silence. I sent a polite follow-up email. Again,

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[4] *See* Jesse Sengal, *Researchers Found Puberty Blockers and Hormones Didn t Improve Trans Kids' Mental Health at Their Clinic. Then They Published a Study Claiming the Opposite*. (Updated) April 2022, https://bit.ly/3AIhaJQ (last visited Sept. 1, 2022).

nothing." *Id.*

46. Academics and practitioners in the field have described evidence that many of these girls appear to have been strongly influenced by internet contacts, or by local friend groups. Littman, L., *Individuals treated for gender dysphoria with medical and/or surgical transition who subsequently detransitioned: A survey of 100 detransitioners*, ARCHIVES OF SEXUAL BEHAVIOR, *50*(8), 3354) (2021) and are potentially harmed by "Access to Internet sites that uncritically support their wishes." William Byne, M. D., & Bradley, S., *Report of the APA Task Force on Treatment of Gender Identity Disorder*, 15.

47. Obviously "sex reassignment surgery," which removes testicles or ovaries, permanently sterilizes the affected individual. However, it is generally recognized by practitioners that cross-sex hormones, which are increasingly prescribed even for minors, may also irreversibly sterilize a child for life. A Harvard Medical School professor and her co-authors, who are active in medically transitioning minors, admit that "cross-sex hormones . . . may have irreversible effects," and describes infertility as "a side effect" of these drugs. Guss, C., Shumer, D., & Katz-Wise, S.L., *Transgender and gender nonconforming adolescent care: psychosocial and medical considerations*, CURRENT OPINION IN PEDIATRICS, *26*(4) (2015), 424-5. Another team of prominent practitioners in the field caution that there is evidence that cross-sex hormones administered to minors will permanently and irreversibly sterilize at least some of these youths, both male and female. Yet these practitioners also recognize that "research suggest[s] some of these individuals may desire

genetic children as adults." Amy Tishelman *et al.*, *Health Care Provider Perceptions of Fertility Preservation Barriers and Challenges with Transgender Patients*, 36 JOURNAL OF ASSISTED REPRODUCTION AND GENETICS 579, 580 (2019).

48. In addition to permanent sterilization, accepting and living in a transgender identity carries a number of known likely lifetime costs and risks for a young person.

49. Any individual whose testicles or ovaries are surgically removed through so-called "sex reassignment surgery" requires life-long medical hormonal therapy. In general, the use of cross-sex hormones, once begun, will be continued for life.

50. As a result of chemical or surgical impacts on their sexual development and organs, some transgender adults experience diminished sexual response and are unable ever to experience orgasm.

51. Multiple authors have cautioned that administration of cross-sex hormones to biological males increases the individual's risk of blood clots and resulting strokes, heart attack, and lung and liver failure.

52. It is often asserted that transgender youth attempt suicide at much higher rates than the general adolescent population. This is true. But it is not true that there is any statistically significant evidence that "affirmation" in a transgender identity substantially reduces actual suicide attempts. Instead, multiple studies report that adolescents and adults who adopt and live in a transgender identity continue to suffer severely negative mental health outcomes—including

suicide and attempted suicide—throughout their lives, and this remains true even if they undergo the ultimate "gender-affirming" step of extensive surgery to reconfigure their body to conform in appearance to their desired gender identity.

53. Even advocates of medical transition recommend "delaying affirmation" because "At this time, the scientific and medical communities have not yet reached consensus regarding the appropriate treatment of prepubescent children with gender dysphoria" and note that failure to be completely affirmative to a child or adolescent's desire for transition "should not be construed as conversion therapy or an attempt to change gender identity" Byne W., *Regulations restrict practice of conversion therapy*, LGBT HEALTH, 3(2) (2016) 2.

54. A long-term study in Sweden found that even *after* sex-reassignment surgery transgender individuals exhibited a rate of completed suicide 19 times higher than the control group, suicide attempts at a 7.6 times higher rate, and hospitalization for any psychiatric condition at a 4.2 times higher rate. These researchers concluded that "[t]he most striking result was the high mortality rate in both male-to-females and female-to-males, compared to the general population." C. Dhejne *et al.*, *Long-Term Follow-Up of Transsexual Persons Undergoing Sex Reassignment Surgery: Cohort Study in Sweden*, 6 PLoS ONE, e16885, 5-6 (2011).

55. Similarly, a study in the United States found that the death rates of transgender-identifying veterans are comparable to those who suffer from schizophrenia and bipolar diagnoses, with these

individuals dying on average 20 years earlier than a comparable population.[5]

56. Many academics and practitioners and even transgender activists have observed that gender identity is not necessarily either binary or fixed for life. Indeed, in formally promulgating a rule in 2016, the United States Department of Health and Human Services defined "gender identity" as "an individual's internal sense of gender, which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth," and disparaged "the expectation that individuals will consistently identify with only one gender" as an inaccurate "sex stereotype." *Nondiscrimination in Health Programs and Activities*, 81 Fed. Reg. 31, 376 (May 18, 2016) at 31,384 and 31,468.

57. In addition, at least for pre-adolescents who experience gender dysphoria and receive therapeutic support but do not socially transition, "every follow-up study of GD children, without exception, found the same thing: Over puberty, the majority of GD children cease to want to transition." J. Cantor, *Transgender and Gender Diverse Children and Adolescents: Fact Checking of AAP Policy*, 46 JOURNAL OF SEX & MARITAL THERAPY 1, 1 (2019). In fact, multiple studies have documented that for pre-pubertal children who suffer from gender dysphoria, the very large majority—estimates range between 61%-98% percent—will grow into comfort with a gender

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[5] U.S. Dept. of Vet. Affairs, *Rates of Suicide Higher among Transgender Veterans*, https://bit.ly/3KGHh8z (last visited Sept. 1, 2022).

identity congruent with their biological sex by young adulthood, so long as they are not affirmed as children in a transgender identity. Ristori, J., & Steensma, T.D., *Gender dysphoria in childhood*, INTERNATIONAL REVIEW OF PSYCHIATRY, *28*(1), (2016) 15.

58. Pablo Expósito-Campos explains that some people who detransition conclude that "being transgender is not the reason underlying his/her distress and body discomfort" and that for some

> the decision to detransition is primarily motivated by the cessation of a transgender identity This category potentially includes anyone who identified as trans-gender, socially or medically transitioned, and later returned to identifying with his/her birth sex. The reasons behind core or primary detransitions are multifarious, and may comprise: realizing that transitioning does not alleviate GD (Dodsworth, 2020; Herzog, 2017; Lev, 2019; Marchiano, 2020), finding alternative ways to cope with GD (Herzog, 2017; Stella, 2016), mental health concerns (Post-Trans, n.d.; Stella, 2016), solving previous psychological/emotional problems that contributed to GD (Butler & Hutchinson, 2020; Stella, 2016), the remission of GD itself over time (Stella, 2016), understanding how past trauma, internalized sexism, and other psychological difficulties influenced the experience of GD (Dodsworth, 2020; Gonzalez, 2019; Herzog, 2017; McFadden, 2017; Post-Trans, n.d.; Stella, 2016; Yoo, 2018); the reconciliation with one's sexuality (Marchiano, 2020; GNC Centric, 2019; Pazos-

> Guerra et al., 2020; Post-Trans, n.d.); and a change in individual, political, social, or religious views that leads the person to question his/her trans- gender status (Dodsworth, 2020; Exposito-Campos, 2020; Herzog, 2017; Kermode, 2019; Stella, 2016; Turban & Keuroghlian, 2018).

Pablo Expósito-Campos, *A typology of gender detransition and its implications for healthcare providers*, JOURNAL OF SEX & MARITAL THERAPY, *47*(3) (2021), 270-280.

59. Another study found that reasons for detransition included (70%) realizing that one's gender dysphoria was related to other issues; (62%) health concerns; (50%) observing that transition did not help gender dysphoria; and (45%) finding alternatives to deal with gender dysphoria, with external factors such as (13%) lack of support, (12%) financial concerns, and (10%) discrimination being less common. Elie Vandenbussche, *Detransition-related needs and support: A cross-sectional online survey*, JOURNAL OF HOMOSEXUALITY *69*(9) (2021), 1607.

60. It is not surprising, therefore, that increasing numbers of young women who for a time transitioned to live in a male gender identity and underwent varying degrees of hormonal and surgical "transition" but who later regretted those decisions and reclaimed a female gender identity are speaking up. These women are publicly expressing regret about the harm done to their bodies and minds, and anger against the too-hasty counsel and medical advice they received as minors which steered them into that transgender identity and those medical choices.

61. While many of these women had previously detailed their experiences on internet blog websites pseudonymously, in recent years they have become more visible, writing under their real names, posting videos online, and forming support groups for those in similar situations.[6] In 2018, *The Atlantic* profiled several high-profile "detransitioners" who have been raising awareness of their own stories as a warning to those who are promoting or hearing only positive narratives about the impact of gender transition on affected individuals.[7]

62. For example, Max Robinson, who has been featured at length in both *The Atlantic* and *The Economist*,[8] became convinced that her internal discomfort needed to be resolved by a sex "transition" after discovering the "world of online gender-identity exploration" at age 15. A doctor prescribed cross-sex hormones for her beginning at age 16, and at age she underwent a double mastectomy. While Max was initially pleased with the results, it wasn't long before she realized that she had made a mistake and began the process of "detransitioning" at age 19. She lives with permanent physical changes—a deep voice, a beard, and a flat chest—that cannot be reversed.

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[6] See Pique Resilience Project, www.piqueresproject.com (last visited Sept. 1, 2022) and Detrans Canada, detranscanada.com (last visited Sept. 1, 2022).

[7] *See* Jesse Singal, *When Children Say They're Trans*, *The Atlantic*, July/Sept. 2018, https://bit.ly/2MoIOkg (last visited Sept. 1, 2022).

[8] See Charlie McCann, *When girls won't be girls*, The Economist, Sept. 28, 2017, https://econ.st/3cAUKSO (last visited Sept. 1, 2022).

63. Similarly, Cari Stella was prescribed cross-sex hormones by a doctor at age 17 and underwent a double mastectomy at age 20. According to Cari, from the time she first saw a therapist, no professional ever suggested or helped her explore alternatives to a "transition."[9] Already by age 22, Cari realized that she had been led into a mistake, and "detransitioned." Cari maintained a blog[10] and YouTube channel[11] reflecting on her experiences, and in a video posted in 2016 said: "I'm a real-live 22-year-old woman with a scarred chest and a broken voice and a 5 o'clock shadow because I couldn't face the idea of growing up to be a woman."

64. In the United Kingdom, 23-year-old Keira Bell successfully sued the Tavistock and Portman NHS Trust—the leading British clinic responsible for administering puberty blocking drugs—after her own experience culminated in the realization that she had been rushed "down the wrong path."[12] As a teenager, Keira went through a regimen of puberty blockers and cross-sex hormones, before undergoing a double mastectomy at age 20. She initially believed that the measures would help her achieve happiness, but "detransitioned" shortly after having the double

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[9] *See In praise of gatekeepers: An interview with a former teen client of TransActive Gender Center*, 4th Wave Now, April 21, 2016, https://bit.ly/3Q20Zgh (last visited Sept. 1, 2022).

[10] See Cari Stella, Guide on Raging Stars Blog, https://bit.ly/3q01SLB (last visited Sept. 1, 2022).

[11] See Cari Stella, YouTube, https://bit.ly/3RtH5fe (last visited Sept. 1, 2022).

[12] *See Puberty blockers: Under-16s "unlikely to be able to give informed consent,"* BBC News, Dec. 1, 2020, https://bbc.in/3ee30c2 (last visited Sept. 1, 2022).

mastectomy. Keira has become an outspoken campaigner for reform, stating that her doctors had failed her as a confused and distressed adolescent by failing to "challenge" her oversimplified desires to be male. "I think it's up to these [medical] institutions," Keira has said, "to step in and make children reconsider what they are saying, because it is a life-altering path."

65. Given Ms. Bell's experience and the experiences of many others, in July 2022 the U.K.'s National Health Service's order the Tavistock to be closed after a report found it was not safe for children.[13]

66. Similarly, authorities in Finland issued guidelines drastically reducing puberty blockers as a treatment for gender dysphoria because, as the new guidelines note, "[c]ross-sex identification in childhood, even in extreme cases, generally disappears during puberty."[14]

67. In a widely quoted press release, the National Academy of Medicine of France stated:

> When [transgender medical care is provided], it is essential to ensure medical and psychological support . . . **especially since there is no test to distinguish between persisting gender dysphoria and transient adolescent dysphoria. Moreover, the risk of over-diagnosis is**

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[13] Daily Mail, 7/28/22, https://bit.ly/3egeHPl (last visited Sept. 1, 2022).

[14] Wesley Smith, Finns Turn against Puberty Blockers for Gender Dysphoria, National Review, 7/21/21 https://bit.ly/3B4o5OO (last visited Sept. 1, 2022).

> **real, as evidenced by the growing number of young adults wishing to detransition.** It is, therefore, appropriate to extend the phase of psychological care as much as possible.[15]

Emphasis added.

68. Sweden has issued a report noting,

> The risks of puberty suppressing treatment with GnRH-analogues and gender-affirming hormonal treatment currently outweigh the possible benefits, and that the treatments should be offered only in exceptional cases. This judgement is based mainly on three factors: **the continued lack of reliable scientific evidence concerning the efficacy and the safety of both treatments, the new knowledge that detransition occurs among young adults, and the uncertainty that follows from the yet unexplained increase in the number of care seekers, an increase particularly large among adolescents registered as females at birth.**"[16]

Emphasis added.

69. Many stories similar to Ms. Bell's are coming to light as more individuals realize that they are not

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[15] National Academy of Medicine, France, 2/28/22 Press Release, https://bit.ly/3CL86Xm (last visited Sept. 1, 2022).

[16] The National Board of Health and Welfare of Sweden, *Care of children and adolescents with gender dysphoria Summary*, English translation, https://bit.ly/3B509uL (last visited Sept. 1, 2022).

alone in enduring these experiences.[17] Researchers have emphasized the need for research into the specific needs of this group *See e.g.*, Butler, C., & Hutchinson, A., *Debate: The pressing need for research and services for gender desisters/ detransitioners*, CHILD AND ADOLESCENT MENTAL HEALTH, *25*(1) (2020), 45-47; Entwistle, K., Debate: *Reality check—Detransitioner's testimonies require us to rethink gender dysphoria*, CHILD AND ADOLESCENT MENTAL HEALTH, *26*(1) (2021), 15-16; Hildebrand-Chupp, R., *More than 'canaries in the gender coal mine': A transfeminist approach to research on detransition*, THE SOCIOLOGICAL REVIEW, *68*(4) (2020), 800-816. It is not surprising, therefore, that increasing numbers of young people who struggle with questions of gender identity, and the parents of such young people, are aware that there are often grave and lasting costs resulting from adopting a transgender identity and that adoption of or attraction to a transgender identity is not necessarily fixed, unchangeable, or desirable.

70. One study claims that less than 1% of those who transition experience regret. Wiepjes, C. M., *et al.*, *The Amsterdam cohort of gender dysphoria study (1972-2015): trends in prevalence, treatment, and regrets*, THE JOURNAL OF SEXUAL MEDICINE, 15(4) (2018), 582.

However, this study suffers from significant

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[17] See Post Trans, https://post trans.com/ (last visited Sept. 1, 2022), Voices, Sex Change Regret, https://sexchangeregret.com /voices/ (last visited Sept. 1, 2022), among others. *See also* Abigail Shrier, *Irreversible Damage: The Transgender Craze Seducing Our Daughters*, Regnery Publishing (2020).

limitations that lessen the certainty of the claim of low regret in youth:

- The currently-treated populations of adolescents are very different from the population studied. All study subjects had severe gender dysphoria that began in early childhood and had no significant mental health comorbidities, which is not true of today's adolescent patients. Further, the study only evaluated those who underwent gonadectomy (surgical removal of testes/ovaries), which is not as commonly performed today, especially among gender dysphoric natal females.
- The study excluded 22% of those who started on the hormonal treatment pathway but did not proceed further with surgical removal of ovaries or testes. These individuals may have higher levels of regret than the group that proceeded to complete their medical transition as outlined in the Dutch protocol.
- The follow-up time was less than 10 years, which is when regret typically emerges in adult studies.
- 20% of study subjects dropped out of care / were lost to follow-up, which can mask regret.
- Importantly, the definition of 'regret' was exceedingly narrow. For example, neither Keira Bell [mentioned above], nor many of the regretful detransitioners from the recent research on detransition would be considered to be 'regretters' by the study.

> To qualify as a 'regretter,' one had to revert to living in their natal sex role by starting natal-sex hormone supplementation, and do so under medical supervision of the same clinic that facilitated the original transition.'[18]

71. Unfortunately, the question about whether to transition, the risk of regret and what kind of counseling should accompany such decisions, remains unanswered. Studies on the subject have a long-term reputation of being "very low quality" due to "serious methodological limitation. The "[s]tudies lacked bias protection measures such as randomization and control groups, and generally depended on self-report[ing that] may also indicate a higher risk of reporting bias within the studies." Murad, M. H., *et al.*, *Hormonal therapy and sex reassignment: A systematic review and meta-analysis of quality of life and psychosocial outcomes*, CLINICAL ENDOCRINOLOGY, *72*(2) (2010), 229. A more recent study echoes these concerns, stating that studies attempting to evaluate the success of gender affirming care model included "psychosocial aspects" were very limited in number and had "rather short follow-up periods" or "comprised a very small sample." Ruppin, U., & Pfäfflin, F., *Long-term follow-up of adults with gender identity disorder*, ARCHIVES OF SEXUAL BEHAVIOR, *44*(5) (2015), 1321. Dr. Roberto D'Angelo expounds on research being hindered by

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[18] Society for Evidence-based Gender Medicine, *Gender-Dysphoric Adolescents and Gender Transition Regret: What We Don't Know, Society for Evidence-based Gender Medicine*, November 2, 2021 https://bit.ly/3CPeDjY (last visited Sept. 1, 2022).

significant numbers of subjects lost to follow up:

- Smith *et al.* report that sex reassignment is effective, based on a study of 162 adults who had undergone SRS. They were able to obtain follow-up data from only 126 (78%) of subjects because a significant number were "untraceable" or had moved abroad.
- De Cuypere *et al.* report that sex reassignment surgery is an effective treatment for transsexuals. Of 107 patients who had undergone SRS between 1986 and 2001, 30 (28%) could not be contacted and 15 (14%) refused to participate.
- Johannson *et al.* reported good outcomes for SRS. Of 60 patients who had undergone SRS, 42 (70%) agreed to participate in the follow up research. Of the non-participants, 1 had died of complications of SRS, 8 could not be contacted and 9 refused to participate.
- Salvador *et al.* reported that SRS has a positive effect on psychosocial functioning. Only 55 of the 69 patients (80%) could be contacted as 17 were lost to follow up
- Van de Grift *et al.* reported 94–96% of patients are satisfied with SRS and have good quality of life. A total of 546 patients with Gender Dysphoria who had applied for SRS at clinics in Amsterdam, Hamburg and Ghent were contacted to complete an online survey. Only 201 (37%) responded and completed the survey.

Roberto D'Angelo, *Psychiatry's ethical involvement in gender-affirming care*, AUSTRALASIAN PSYCHIATRY,

26(5) (2018), 462.

72. It is also not surprising, and is entirely reasonable and legitimate, that some young people (and/or their parents) wish to explore whether it is possible for them to escape from gender dysphoria and achieve comfort with their own biological sex, so as to avoid all of these potentially severe lifetime costs of living in a transgender identity.

73. Dr. D'Angelo adds,

> We generally understand adolescence to be a time of identity exploration in which young people may try on various ways or being in the world. While such exploration is healthy, making permanent medical decisions on the basis of this exploration is not usually considered to be a good idea… It is the responsibility of the medical and therapeutic establishment to guard against both under-diagnosis and treatment, as well as over-diagnosis and treatment, either of which can be harmful. Gender dysphoria ought not to be any different simply because it is more politicized… **we believe there is an important human rights issue at stake here in relation to young people receiving appropriate mental health care**. This includes developing our understanding of which young people will benefit from transitioning and which young people require other forms of intervention other than gender-affirming care to address

their difficulties.[19]

Emphasis added.

74. Meanwhile, there are no statistically significant studies that demonstrate that voluntary conversational counseling which aims to help the client towards a personally chosen goal of achieving or returning to comfort with his or her own biological sex is in any way harmful to the client. In 2012 the APA reported that SOCE counseling was not shown to be effective but then explained that the very evidence they examined to draw this conclusion is comprised of "a host of methodological problems with research in this area, including biased sampling techniques, inaccurate classification of subjects, assessments based solely upon self-reports, and poor or nonexistent outcome measures." American Psychological Association, *Guidelines for psychological practice with lesbian, gay, and bisexual clients*, THE AMERICAN PSYCHOLOGIST, *67*(1) (2012), 14. To the contrary, a 2022 review concluded, "79 studies on SOCE do not provide scientific proof that they are more harmful than other forms of therapy, more harmful than other courses of action for those with SSA, or more likely to be harmful than helpful for the average client."[20]

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[19] Roberto D'Angelo, *Response to Julia Serano s critique of Lisa Littman s paper: Rapid Onset Gender Dysphoria in Adolescents and Young Adults: A Study of Parental Reports*, Sept. 27, 2018 https://bit.ly/3e8lp9X (last visited Sept. 1, 2022).

[20] Peter Sprigg, (November 2020) *No Proof of Harm: 79 Key Studies Provide No Scientific Proof That Sexual Orientation Change Efforts (SOCE) Are Usually Harmful*, Family Research Council, https://bit.ly/3Q9e07u (last visited Sept. 1, 2022).

75. Dr. Nicolas Cummings, former president of the American Psychological Association, has noted that SOCE counseling can provide enormous benefits. Nicholas A. Cummings, *Sexual reorientation therapy not unethical*, USA Today, July 30, 2013, https://bit.ly/3AEGyjM (last visited Sept. 1, 2022). Dr. Cummings noted that the State's premise for adopting the Counseling Censorship Law (i.e., the sweeping contention that must be a fraud because homosexual orientation can't be changed) is damaging and incorrect. *Id.* Dr. Cummings personally counseled countless individuals in his years of mental health practice, and he reported that hundreds of those individuals seeking to reduce or eliminate their unwanted same-sex attractions, behaviors, or identity were successful. *Id.* ("Of the patients I oversaw who sought to change their orientation, **hundreds were successful**." (emphasis added)). Dr. Cummings said that the assertion that same-sex sexual attractions, behaviors, or identity is one identical inherited characteristic is unsupported by scientific evidence and that "**contending that all same-sex attraction is immutable is a distortion of reality**." *Id.* (emphasis added).

76. Dr. Cummings went on to criticize efforts to prohibit SOCE counseling as violating the client's right to self-determination and therapeutic choice. *Id.* ("Attempting to characterize all sexual reorientation therapy as unethical violates patient choice and gives an outside party a veto over patients' goals for their own treatment.").

77. Dr. Cummings concluded that "[a] political agenda shouldn't prevent gays and lesbians who desire to change from making her own decisions." *Id.*

78. Dr. Cummings concluded by condemning political efforts to prohibit SOCE counseling as harmful to clients and counselors. *Id.* ("Whatever the situation at an individual clinic, accusing professionals from across the country who provide treatment for fully informed persons seeking to change their sexual orientation of perpetrating a fraud **serves only to stigmatize the professional and shame the patient**." (emphasis added)).

79. The American College of Pediatricians has noted that the political position statements of numerous mental health organizations discouraging SOCE have "no firm basis" in evidentiary support. American College of Pediatricians, *Legislators are Not Psychotherapists!* Jan. 27, 2014, https://bit.ly/3AFkXaP (last visited Sept. 1, 2022). The ACP noted that, "[t]he scientific literature, however, is clear: **Same-sex attractions are more fluid than fixed, especially for adolescents—many of whom can and do change**." *Id.* (emphasis added). The ACP also noted that "there is a body of literature demonstrating a variety of positive outcomes from SOCE." *Id.* Like Dr. Cummings, the ACP concluded that SOCE counseling is beneficial and that laws, such as the Counseling Censorship Law here, serve only to impose harm on minors who seek couneling. *Id.* ("Barring change therapy or SOCE will threaten the health and well-being of children wanting therapy.").

80. Whether one decides to believe conclusions drawn by certain studies, there is almost uniform consensus that the studies conducted thus far in this area of clinical practice are insufficient to draw firm conclusions (such as restricting access to care, as the

Counseling Censorship Law does), thus nullifying any arguments that one stance or the other is firmly evidence based. Almost every study and paper cited above includes notes by the authors that more exploration on this topic is needed and there is a significant lack of clarity on these matters thus far. For legislative entities to claim that restrictions on free speech are evidenced based is simply false.

D. VOLUNTARY COUNSELING PROVIDED BY PLAINTIFF

81. The above discussion uses the term sexual orientation change efforts (SOCE) and conversation therapy, because these are the labels chosen in the Counseling Censorship Law and in recent research. Thus, these terms have been the most functional search term when discussing forms of counseling alternative to the affirmative only approach. However, "[d]uring its May 27th, 2016, meeting, the board of the Alliance for Therapeutic Choice and Scientific Integrity (ATCSI) voted unanimously to endorse new terminology that more accurately and effectively represents the work of Alliance therapists who see clients with unwanted same-sex attractions. The board has come to believe that terms such as reorientation therapy, conversion therapy, and even sexual orientation change efforts (SOCE) are no longer scientifically or politically tenable."[21] The board then set forth a list of reasons this language change was chosen. *Id.*

82. Plaintiff does not engage in aversive techniques;

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[21] *See Why the Alliance Supports SAFE- Therapy* https://bit.ly/3efpp8A (last visited Sept. 1, 2022).

nor is she aware of any practitioner who engages in such practice with clients seeking to reduce or eliminate their unwanted same-sex attractions, behaviors, or identity. Plaintiff does not imply that categorical change in attractions is a therapeutic goal or create unrealistic expectations for clients. However, much of what the Counseling Censorship Law prohibits counseling is outside of this intention.

83. Plaintiff began her career focusing on trauma. This focus led her to focuses on adjacent and co-occurring clinical issues such as addictions, attachment, and then personality disorders. Subsequently, plaintiff has desired to focus on other adjacent and potentially co-occurring clinical issues like eating disorders and sexuality. Prior to the Counseling Censorship Law, Plaintiff helped clients freely discuss sexual attractions, behaviors, and identity by talking with them about gender roles, identity, sexual attractions, root causes of desires, behavior and values. Since the Counseling Censorship Law, she has continued to have these discussions freely with some clients but has intentionally avoided conversations with clients that may be perceived as violating the Law. The limitations imposed by the Law have prevented Plaintiff from being able to fully explore the topic of sexuality with minors. Thus, the minors in her care are prevented from being able to fully explore the topic with her, and potential minors seeking counseling that fully explores their sexuality are prevented from becoming clients.

84. Speech is the only tool that Plaintiff uses in her counseling with minors seeking to discuss their sexuality. (Plaintiff is not currently engaging in

discussions with minor clients if they have concerns about their sexual attractions or sexual orientation due to the Law). She sits down with her clients and talks to them about their goals, objectives, religious or spiritual beliefs, values, desires, and identity to help them (1) explore and understand their feelings and (2) formulate methods of counseling that will most benefit them.

85. Plaintiff does not begin counseling with any predetermined goals other than those that the clients themselves identify and set. This is consistent with the clients' fundamental right of self-determination.

86. Often a client does wish to address unwanted sexual attraction, behaviors, or identity or they are content with a sexual identity other than that of their biological sex When that is the case, Plaintiff focuses on helping the client and parents to heal any wounds or frustrations and to begin to work on loving and accepting the minor client despite any challenges that arise from sexual attractions, behaviors, or identity.

87. Plaintiff does not seek to "cure" clients of same-sex attractions or to "change" clients' sexual orientation; she seeks only to assist clients with their stated desires and objectives in counseling, which sometime includes clients seeking to reduce or eliminate unwanted sexual attractions, change sexual behaviors, or grow in the experience of harmony with one's physical body.

88. The only relevant considerations in Plaintiff's counseling are that same-sex attractions, behaviors, identity, or a sense that one must change one's physical body as a solution to gender dysphoria are (a) sometimes an experience over which the client has

anxiety or distress, and (b) the client seeks to eliminate that anxiety or distress.

89. These are the same relevant considerations in all forms of mental health counseling. These considerations hold regarding many things for which clients seek counseling, including many that are not mental illnesses but that nevertheless impose great stress, anxiety, confusion, or grief on the client. In fact, it is commonly understood that quality counseling that is conducted with unconditional positive regard WILL include clinician stances such as challenge and confrontation in order to assist the client in building their own sense of self that is not dependent upon the counselor's (or anyone else's) approval or affirmation.

E. VAGUENESS PROBLEMS WITH THE COUNSELING CENSORSHIP LAW

90. Because of the difficulty in measuring sexual orientation and gender identity, the prohibitions in the Counseling Censorship Law are hopelessly vague and leave Plaintiff guessing at which practices are permitted and which are prohibited.

91. The Counseling Censorship Law prohibits Plaintiff under any circumstances from engaging in any practice that seeks to reduce or eliminate same-sex sexual attractions, behaviors, or identity. This prohibition is virtually impossible for Plaintiff to comply with because it is well understood in the mental health profession that sexual orientation and gender identity are difficult to define and encompass a number of factors, including behavior, practice, identity, attractions, sexual fantasy, romantic attractions, and erotic desires.

92. The Counseling Censorship Law does not specify which clients would be classified as seeking to "change" and those that would merely be deemed to be conforming their behavior with their original "sexual orientation." As Plaintiff's clients do not always immediately present wanting to "change," she is left to guess at which point any of her counseling practices would be deemed to constitute efforts to reduce or eliminate unwanted same-sex attractions.

93. Sexual orientation is also nearly impossible to measure, and there is no agreement on whether sexual orientation is a categorical construct or exists on a continuum. A client's motives, attractions, identification, and behaviors may vary over time and circumstances with respect to one another, which makes them dynastically changing features of an individual's concept of self.

94. Despite the difficulty in measuring and defining sexual orientation and in predicting normative perceptual changes in one's sexuality over time, Plaintiff must now put her professional licenses in jeopardy when even discussing something that could be perceived as "changing" sexual orientation or identity.

95. The Counseling Censorship Law permits licensed counselors to provide counseling that provides "acceptance, support, and understanding" of a client's same-sex attractions, behaviors, or identity. This presents another major source of confusion, uncertainty, and vagueness for Plaintiff. It is impossible for Plaintiff to provide acceptance and support to a client who comes in for counseling and yet at the same time requests assistance in seeking to

eliminate unwanted same-sex attractions, behaviors, or identity.

96. Most of Plaintiff's clients do not initially request counseling specifically to reduce or eliminate unwanted same-sex attractions, behaviors, or identity. Instead, they want help and counseling to understand the sources, causes, and origins of their feelings. Moreover, these feelings may not be known or discussed during the intake process and may arise during the course of therapy for other issues. During the course of such counseling, without ever specifically setting out to reduce or eliminate unwanted same-sex attractions, behaviors, or identity, some clients will experience a change in their sexual attractions, behaviors, or identity. This is true even if they never specifically sought to experience such a change or to eliminate their unwanted feelings. Plaintiff is left to guess at whether counseling simply discussing the confusion, anxiety, conflict, or stress a client feels about their unwanted same-sex attractions, behaviors, or identity – without specifically seeking to reduce or eliminate such feelings – runs afoul of the Counseling Censorship Law' prohibitions.

97. If Plaintiff is merely counseling an individual to understand the origins of their attractions or helping them to understand and resolve the conflict with their religious beliefs, she is unable to know whether such counseling may result in a spontaneous change for the minor client, even though it was not the topic or goal of her counseling.

98. Thus, Plaintiff is left to guess at what topics are permissible when a minor client presents with

anxiety, confusion, distress, or conflict over unwanted same-sex attractions, behaviors, or identity, and the Counseling Censorship Law provides no clear guideposts on such issues.

F. INDIVIDUALIZED EXEMPTIONS IN THE COUNSELING CENSORSHIP LAW

99. The Counseling Censorship Law also establishes a system of individualized exemptions. The law permits counseling on the broad topic of sexual orientation, gender identity, and attractions, behaviors, and identities of minors seeking counseling, but it prohibits such counseling when the client desires to receive counseling to change, reduce, or eliminate same-sex attractions, behaviors, or identity.

100. However, the law permits counseling relating to change of gender identity when such a client is "undergoing gender transition."

101. Thus, the law prohibits counseling that which affirms an individual's desire to conform their gender identity with their biological identity, but it provides an individual exemption for identical counseling when a client seeks to change their gender identity and expression.

102. The law permits counseling providing acceptance and support for a client with same-sex attractions, behaviors, or identity, and it permits counseling providing acceptance and support for a client's gender identity and expression. But the law prohibits counseling providing acceptance and support for a client whose attractions, behaviors, expressions, or identity do not match her concept of self.

103. Thus, the law exempts counseling affirming a minor transitioning from one gender to another but prohibits such counseling for a client seeking to eliminate the confusion or identity that does not match his or her biological makeup.

G. PLAINTIFF'S WORK

104. Plaintiff graduated with a Master of Arts in clinical mental health in 2014. She is a licensed professional counselor and licensed addiction counselor in the state of Colorado. She is a practicing Christian. She adamantly disagrees with the proposition that a person can practice counseling while denying or omitting their philosophical and existential framework. While she does not believe it is possible to practice counseling in a philosophical vacuum, she highly respects client autonomy and therefore does not seek to impose her values or beliefs on her clients.

105. Plaintiff has engaged in providing counseling and coaching to clients, court ordered coparenting classes, parent coordinator/decision making, and court ordered substance-abuse evaluations.

106. Plaintiff currently works at Deeper Stories Counseling in Colorado Springs. Her duties include counseling assigned clients as well as supervising post-graduate clinicians. The owner of Deeper Stories allows clinicians to limit or expand caseloads depending on interest and specialties. Currently Plaintiff works with adults who are seeking Christian counseling and minors who are internally motivated to seek counseling (as opposed to being required to come to counseling by someone else.)

107. Plaintiff has worked part time at the Cascade, Colorado location of Sandstone Care since December 2018. Initially, Plaintiff worked in a program that offered 30 days of residential treatment for adolescents ranging from 13-18 years old. Plaintiff created and facilitated the "family immersion program" which included parents (and sometimes siblings) coming to the facility for a "weekend" (Thursday, Friday and Saturday) during their adolescent's stay. During these weekends, Plaintiff would see up to three families, facilitating parent groups, family groups and overseein the families' stay at the facility. On weeks the family was not present, Plaintiff would facilitate online sessions. Since 2020, all sessions have been conducted online in a different format called the "family intensive program."

108. Plaintiff is a client-directed counselor in that it is the client who sets the goals for counseling. Plaintiff does not impose an agenda on her clients; nor does she determine clients' goals for counseling. Clients set their own goals for counseling. Plaintiff only works with voluntary clients who determine the goals that they have for themselves. Plaintiff does not coerce her clients into engaging in counseling but respects her clients' right of self-determination. She treats each client with unconditional positive regard regardless of the client's personal beliefs, concept of self or feelings of wanted or unwanted same-sex attractions, behaviors, or identity.

109. Plaintiff has had minor clients with homosexual attractions or behaviors who have expressed that they are happy identifying as gay, lesbian, bi-sexual, or gender non-conforming in various ways and do not want help for changing identity, attractions, or

behavior. In such cases, Plaintiff asks if there are any other goals that the minor is interested in pursuing. In many cases, minors ask for help with social issues, family relationships, parent-child communication, or helping to facilitate the parents' coping with the sexual identity of the child. Plaintiff has helped a number of minors and parents with those goals. She does not try to help minors change their attractions, behavior, or identity, when her minor clients tell her they are not seeking such change. In her residential work as a family counselor, adolescents may still be required to attend family sessions to develop a goal despite the absence of initial therapeutic goals since this is a required part of the residential program. However, in her outpatient settings, when a minor states they do not have a therapeutic goal or wish to explore one, counseling is terminated.

110. Many of Plaintiff's clients are referred through churches or word of mouth. Many of her clients uphold a biblical worldview which includes the concepts that attractions do not dictate behavior, nor do feelings and perceptions determine identity. Clients who identify as Christians holding to a biblical worldview believe their faith and their relationships with God supersede romantic attractions and that God determines their identity according to what He has revealed in the Bible rather than their attractions or perceptions determining their identity.

111. Clients who have same-sex attractions or gender identity confusion and who also prioritize their faith above their feelings are seeking to live a life consistent with their faith. Clients who have been living a life inconsistent with their faith or values

often present with internal conflicts, depression, anxiety, addiction, eating disorders and so forth and are seeking resolution of such turmoil.

112. Plaintiff has never received any complaint or report of harm from any of her clients seeking and receiving counseling for any issue, including the many minors she has counseled.

113. Plaintiff began her career with an interest in serving underserved populations whom she perceived as having issues that are resistant to typical counseling or that prevented them from benefitting from typical talk therapy. This led her to specialize in trauma. This focus then led her to specialize also in addictions and then personality disorders. Recently she has taken more interest in specializations such as eating disorders, gender dysphoria and sexuality. However, after the mandates of the Counseling Censorship Law were imposed on her, Plaintiff has been unable to fully explore certain clients' bodily experiences around sexuality and gender and how their sensations, thoughts, beliefs, interpretations, and behaviors intersect. In other areas such as trauma, addictions, personality disorders, and eating disorders, ethical and evidenced-based practice includes the clinician sometimes expressing doubts, confronting, challenging, questioning, etc. Yet for this specific issue and clientele, it appears the clinician is limited to an "acceptance" only stance. Limiting one's counseling approach in such a one-sided way would generally be considered unethical for any of the other above-mentioned counseling challenges.

114. In addition to Plaintiff's current clients, there are potentially many future clients who will be adversely

affected by the Counseling Censorship Law. Plaintiff has periodically received requests for counseling for both matters related to sexual attractions and gender identity. The Counseling Censorship Law will prevent future clients from getting help.

H. IRREPARABLE HARM TO PLAINTIFF AND HER CLIENTS

115. Consistent with her First Amendment rights, Plaintiff wants to offer a counseling approach to clients and potential clients including minors that includes a full exploration of clients' reported orientation, identity, behaviors and feelings without the imposition of the Counseling Censorship Law's "acceptance-only" government mandate. She asks for the same freedom in discussing these topics that she would have with minor clients surrounding other controversial topics such as eating disorders, addiction, and criminal behavior.

116. Consistent with her First Amendment rights, Plaintiff wants to provide counseling, including certain types of voluntary counseling related to sexuality and gender, to minor clients and potential clients.

117. Because of the Counseling Censorship Law, Plaintiff is prohibited from offering certain types of voluntary counseling related to sexuality and gender to minor clients and potential clients.

118. Because of the Counseling Censorship Law, Plaintiff is prohibited from engaging in constitutionally protected speech, including offering certain types of counseling to clients and potential clients. The law literally prohibits her from uttering

certain words to her clients if such words are counter to the state's mandated orthodoxy.

119. Because of the Counseling Censorship Law, Plaintiff has been chilled in her constitutionally protected expression.

120. Because of the Counseling Censorship Law, Plaintiff has been and will be forced to deny voluntary counseling that fully explores sexuality and gender to her clients and potential clients in violation of her and her clients' sincerely held religious beliefs.

121. Because of the Counseling Censorship Law, Plaintiff has suffered, is suffering, and will continue to suffer ongoing, immediate, and irreparable injury to her First Amendment rights to freedom of speech.

122. Because of the Counseling Censorship Law, Plaintiff has suffered, is suffering, and will continue to suffer ongoing, immediate, and irreparable injury to her First Amendment rights to free exercise of religion.

123. Because of the Counseling Censorship Law, Plaintiff's minor clients are prohibited from receiving voluntary counseling that fully explores sexuality and gender that the clients desire to obtain from a licensed professional with expertise in this area. Plaintiff's minor clients have thus suffered, are suffering, and will continue to suffer ongoing, immediate, and irreparable injury to their First Amendment rights to receive information.

124. Because of the Counseling Censorship Law, Plaintiff's clients have suffered, are suffering, and will continue to suffer ongoing, immediate, and irreparable injury to their First Amendment rights to

free exercise of religion.

125. Plaintiff and her clients and potential clients have no adequate remedy at law to protect the ongoing, immediate, and irreparable injury to their First Amendment liberties.

V. FIRST CLAIM FOR RELIEF
(First Amendment: Free Speech)

126. Plaintiff reiterates the above allegations.

127. The Free Speech Clause of the First Amendment, as applied to the states by the Fourteenth Amendment, prohibits Defendants from abridging Plaintiff's freedom of speech.

128. The Counseling Censorship Law, on its face and as applied, are unconstitutional prior restraints on Plaintiff's speech.

129. The Counseling Censorship Law, on its face and as applied, unconstitutionally discriminate on the basis of viewpoint. The Counseling Censorship Law authorizes only one viewpoint on SOCE counseling and unwanted same-sex sexual attractions, behaviors, and identity by forcing Plaintiff to present only one viewpoint on the otherwise permissible subject matter of same-sex attractions, behaviors, or identity.

130. The Counseling Censorship Law, on its face and as applied, discriminates against Plaintiff's speech on the basis of the content of the message she offers.

131. Defendants lack compelling, legitimate, significant, or even rational governmental interests to justify the Counseling Censorship Law' infringement of the right to free speech.

132. The Counseling Censorship Law, on its face and as applied, is not the least restrictive means to accomplish any permissible government purpose sought to be served by the law. Informed consent provisions outlining the required disclosure prior to engaging in SOCE counseling with a minor would have been far less restrictive of Plaintiff's speech, and mental health counseling organizations have urged legislatures to adopt informed consent provisions.

133. The Counseling Censorship Law does not leave open ample alternative channels of communication for Plaintiff.

134. The Counseling Censorship Law, on its face and as applied, unconstitutionally chills and abridges the right of Plaintiff to freely communicate information pertaining to unwanted same-sex sexual attractions, behaviors, or identity.

135. The Counseling Censorship Law's prohibitions on licensed counselors' offering voluntary SOCE counseling that could change, reduce, or otherwise address a minor client's unwanted same-sex attractions, behaviors, or identity, which would include a referral to someone who offers SOCE counseling, on its face and as applied, abridge Plaintiff's right to offer information about such matters.

136. The Counseling Censorship Law' violations of Plaintiff's rights of free speech have caused, are causing, and will continue to cause Plaintiff and her clients to suffer undue and actual hardship and irreparable injury.

137. Plaintiff has no adequate remedy at law to

correct the continuing deprivation of her most cherished constitutional liberties.

VI. SECOND CLAIM FOR RELIEF (First Amendment: Clients' Right to Receive Information)

138. Plaintiff reiterates the above allegations.

139. The First Amendment, as applied to the states by the Fourteenth Amendment, protects an individual's freedom of speech, and the corollary to that right, the right to receive information.

140. Plaintiff's clients have sincerely held religious beliefs that shape their desire to receive SOCE counseling and the information that Plaintiff can provide on reducing or eliminating unwanted same-sex attractions, behaviors, and identity.

141. The Counseling Censorship Law prevents Plaintiff's clients from receiving SOCE counseling and deprives them of the opportunity to even obtain information about SOCE counseling from licensed counselors.

142. The Counseling Censorship Law is not supported by compelling government interests.

143. Even if the Counseling Censorship Law were supported by compelling government interest, it is not narrowly tailored to achieve that purpose and therefore violates the fundamental rights of Plaintiff's clients to receive information.

144. The Counseling Censorship Law, on its face and as applied, is not the least restrictive means to accomplish any permissible government purpose sought to be served by the law.

145. The Counseling Censorship Law' violations of the fundamental rights of Plaintiff's clients have caused, are causing, and will continue to cause undue and actual hardship and irreparable injury.

146. Plaintiff's clients have no adequate remedy at law to correct the continuing deprivation of their most cherished constitutional liberties.

VII. THIRD CLAIM FOR RELIEF
(First Amendment: Free Exercise of Religion)

147. Plaintiff reiterates the above allegations.

148. The Free Exercise Clause of the First Amendment, as applied to the states by the Fourteenth Amendment, prohibits Defendants from abridging Plaintiff's right to free exercise of religion.

149. Many of Plaintiff's clients have sincerely held religious beliefs that same-sex sexual attractions, behaviors, or identity are wrong, and they seek to resolve these conflicts between their religious beliefs and their attractions in favor of their religious beliefs.

150. Plaintiff also has sincerely held religious beliefs to provide spiritual counsel and assistance to her clients who seek such counsel. Plaintiff holds sincerely held religious beliefs that she should counsel clients on the subject matter of same-sex attractions, behaviors, or identity from a religious viewpoint that aligns with her religious beliefs and those of her clients.

151. The Counseling Censorship Law, on its face and as applied, targets Plaintiff's and her clients' sincerely held religious beliefs regarding human nature, gender, ethics, morality, and SOCE

counseling, which are informed by the Bible and constitute central components of their faith. The Counseling Censorship Law causes a direct and immediate conflict with their religious beliefs by prohibiting them from offering, referring, and receiving counseling that is consistent with their religious beliefs.

152. The Counseling Censorship Law, on its face and as applied, has impermissibly burdened Plaintiff's and her clients' sincerely held religious beliefs. Indeed, the law affirmatively compels them act in contradiction to those beliefs. The Counseling Censorship Law has also forced Plaintiff and her clients to choose between the teachings and requirements of their sincerely held religious beliefs and the value system imposed by the State.

153. The Counseling Censorship Law places Plaintiff and her clients in an irresolvable conflict between compliance with their sincerely held religious beliefs and compliance with the law.

154. The Counseling Censorship Law also put substantial pressure on Plaintiff and her clients to violate their sincerely held religious beliefs by ignoring the fundamental tenets of their faith concerning same-sex attractions, behaviors, or identity.

155. The Counseling Censorship Law, on its face and as applied, is neither neutral nor generally applicable, but rather specifically and discriminatorily targets the religious speech, beliefs, and viewpoint of those individuals who believe change is possible. The law thus expressly constitutes a substantial burden on sincerely held religious beliefs that are contrary to the

State's approved viewpoints on same-sex attractions, behavior, or identity.

156. No compelling government interest justifies the burdens Defendants impose upon Plaintiff and her clients' rights to the free exercise of religion.

157. Even if the Counseling Censorship Law were supported by compelling government interests, it is not the least restrictive means to accomplish any permissible government purpose which the Counseling Censorship Law seeks to serve.

158. The Counseling Censorship Law, both on its face and as-applied, does not accommodate Plaintiff's sincerely held religious beliefs.

159. The Counseling Censorship Law, both on its face and as-applied, specifically targets religion for disparate treatment and has set up a system of individualized exemptions that permits certain counseling on same-sex attractions, behaviors, or identity while denying religious counseling on the same subjects.

160. The Counseling Censorship Law, both on its face and as applied, constitutes a religious gerrymander.

161. The Counseling Censorship Law' violations of Plaintiff's and her clients' rights to free exercise of religion and has caused, is causing, and will continue to cause Plaintiff and her clients to suffer undue and actual hardship and irreparable injury.

162. Plaintiff has no adequate remedy at law to correct the continuing deprivation of her most cherished constitutional liberties.

VIII. FOURTH CLAIM FOR RELIEF
(Fourteenth Amendment: Due Process)

163. The Fourteenth Amendment's guarantee of Due Process prohibits the government from imposing or threatening punishment based on laws that are so vague that they do not provide fixed legal standards as to what is prohibited and what is not, and so leave room for standardless or discriminatory enforcement.

164. In fact, as detailed below, essentially all of the key terms in the Counseling Censorship Law are undefined in the law itself, and also undefined in science, and indeed have more in common with slogans than with a fixed standard identifying what counseling speech is prohibited and subject to punishment under such statute.

165. As a result, the Counseling Censorship Law is unconstitutional on its face because it does not provide adequate standards or guidelines to govern the actions of Defendants who are the persons empowered by Colorado to enforce the law. Instead, the law enables and authorizes those who are empowered to pursue enforcement actions in this highly controversial and politicized area to do so based on their personal predilections, rather than on any fixed legal standard, and likewise to pursue discriminatory enforcement.

166. The vagueness and lack of fixed legal standards in the Counseling Censorship Law is all the more impermissible because it impacts a fundamental right. Because of this vagueness and the unbounded discretion that it affords to those authorized to bring enforcement actions, counselors engaging with a client who raises concerns relating to gender identity,

same-sex attractions, or sexual behaviors must be all the more fearful that they will be accused of violating the law. As a result, consciously or unconsciously, counselors including Plaintiff inevitably engage in a degree of self-censorship that infringes the freedom of speech of both counselor and client.

167. The Counseling Censorship Law is unconstitutionally vague because it provides no standards or guidelines defining the line between speech that permissibly provides "[a]cceptance, support, and understanding for the facilitation of an individual's coping, social support, and identity exploration and development" and speech that unlawfully seeks to "change" that person's gender identity or sexual orientation.

168. Given that "development" necessarily involves "change," the purported distinction is incoherent, and thus leaves those authorized to bring enforcement actions free to do so based on their personal predilections, or for discriminatory purposes including disapproval of the beliefs, viewpoint, or messages of a particular counselor.

169. The prohibition on seeking to "change an individual's . . . gender identity" also fails to provide adequate standards or guidelines to govern the actions of those authorized to bring enforcement actions because the term "gender identity" is undefined in the law and is vague.

170. "Gender identity" has no clear definition. In a 2016 rule interpreting Section 1556 of the Patient Protection and Affordable Care Act, the Department of Health and Human Services defined "gender identity" as "an individual's internal sense of gender,

which may be male, female, neither, or a combination of male and female, and which may be different from an individual's sex assigned at birth." Nondiscrimination in Health Programs and Activities, 81 Fed. Reg. 31,376 (May 18, 2016) at 31,384.

171. A publication sponsored by the ACLU, Human Rights Campaign, and National Education Association asserts that gender identity encompasses any "deeply-felt sense of being male, female, both or neither," and can include a "gender spectrum" "encompassing a wide range of identities and expressions." *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools*, at 6-7.

172. The National Center for Lesbian Rights contends that "Gender is comprised of a person's physical and genetic traits, their own sense of gender identity and their gender expression" and similarly asserts that gender identity "is better understood as a spectrum." That source goes on to say that an individual may have an "internal sense of self as male, female, both or neither," and that "each person is in the best position to define their own place on the gender spectrum."[22] Indeed, the medical text *Principles of Transgender Medicine and Surgery*, declares that "Gender identity can be conceptualized as a continuum, a Mobius, or patchwork."[23]

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[22] Asaf Orr et al., National Center for Lesbian Rights, *Schools in Transition: A Guide for Supporting Transgender Students in K-12 Schools* 5, (2015), https://bit.ly/3KFFpwI (last visited Sept. 1, 2022).

[23] *Principles of Transgender Medicine and Surgery* 43 (Randi Ettner, Stan Monstrey & Eli Coleman 2eds., 2nd ed. 2016).

173. An individual who is unhappy with or uncertain about his or her "sense of being male, female, both or neither," or who wishes to evaluate and "define their own place on the gender spectrum," or who does not wish to live life with an identity as amorphous as a Mobius strip or a "patchwork," may well wish the aid of a professional counselor. But what conversation will comprise permissible "development" of that individual's place on that disorienting Mobius strip, and what will be condemned as an unlawful effort to "change" the individual's "gender identity," is unknowable.

174. Because the Counseling Censorship Law fails to define "gender identity," and that term has no consistent definition in the wider law or medical science, the Counseling Censorship Law leaves those authorized to bring enforcement actions free to do so based on their personal predilections, or for discriminatory purposes including disapproval of the beliefs, viewpoint, or messages of a particular counselor.

175. The prohibition on seeking to "change an individual's sexual orientation" also fails to provide adequate standards or guidelines to govern the actions of those authorized to bring enforcement actions, because the term "sexual orientation" is undefined in the law and is vague in practice. There is no agreement in the scientific literature as to the definition of "sexual orientation," or to what extent "orientations" may overlap or blend from one to another. The APA Handbook of Sexuality and Psychology cautions that "Sexual orientation is usually considered a multi-dimensional construct" in which "aspects of sexual orientation . . . are not

necessarily concordant." (556). Professors Diamond and Rosky warn that "it is important to note that sexual orientation is not easy to define or measure," and "is a multifaceted phenomenon" which cannot be simplified to mere "sexual attractions," but instead incorporates (among other components) "sexual attractions, . . . sexual behavior, and sexual identity," while "identity and behavior are structured by social context, social constraints, and social opportunities." Lisa M. Diamond & Clifford J. Rosky, *supra*, 3. This, say Diamond and Rosky, "obviously poses a problem for research on the causes of sexual orientation." *Id.* It also poses a severe problem for a counselor, therapist, or client who wishes to know what type of counseling or therapeutic goals might be condemned as seeking to change "sexual orientation."

176. Because the Counseling Censorship Law fails to define "sexual orientation," and that term has no consistent definition in the wider law or medical science, the Counseling Censorship Law leaves those authorized to bring enforcement actions free to do so based on their personal predilections, or for discriminatory purposes including disapproval of the beliefs, viewpoint, or messages of a particular counselor.

177. The Counseling Censorship Law is further impermissibly vague because it prohibits any practice that "*attempts* . . . to change an individual's sexual orientation or gender identity." The law fails to provide any standards or guidelines as to whether this refers to the subjective intent of the client, or that of the counselor, again leaving unfettered discretion on this critical question to any person authorized to bring an enforcement action and inviting

discriminatory enforcement.

178. Indeed, a client's personal intention in raising a subject relating to sexuality may or may not be known to the counselor and may change from one meeting to the next. Consequently, a counselor might face sanctions on the basis of the shifting subjective thoughts and goals of his client that are beyond the counselor's knowledge.

179. The Counseling Censorship Law further fails to provide adequate standards or guidelines to govern the actions of those authorized to bring enforcement actions because it provides no definitions of terms "gender expressions" and "identity exploration and development" and provides no information at all as to what "behaviors" a counselor may or may not help a client attempt to change.

180. In the absence of any clarity on these terms, almost any counseling conversation that relates to gender, intimate relationships, or sexuality could be accused of seeking to "change . . . sexual orientation or gender identity." Thus, the failure of the Counseling Censorship Law to define these terms additionally leaves those authorized to bring enforcement actions free to do so based on their personal predilections, or for discriminatory purposes including disapproval of the beliefs, viewpoint, or messages of a particular counselor.

181. Meanwhile, the sanctions faced by counselors for violating the Counseling Censorship Law are severe, ranging up to the revocation of her licenses, fines and the loss of her livelihood.

182. For these reasons, the Counseling Censorship

Law is so vague on its face that it deprives licensees of Due Process rights protected by the Fourteenth Amendment.

183. The deprivation of these rights constitutes irreparable injury.

IX. PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays for relief as follows:

A. That this Court issue preliminary and permanent injunctions enjoining Defendants, Defendants' officers, agents, employees, attorneys, and all other persons acting in active concert or participation with them, from enforcing the Counseling Censorship Law

B. That this Court render a Declaratory Judgment declaring the Counseling Censorship Law and Defendants' actions in applying the Counseling Censorship Law unconstitutional under the United States Constitution.

C. That this Court award Plaintiff the reasonable costs and expenses of this action, including attorney's fees, in accordance with 42 U.S.C. § 1988.

D. That this Court grant such other and further relief as this Court deems equitable and just under the circumstances.

Respectfully submitted this 5th day of September 2022.

/s/ Barry K. Arrington

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VERIFICATION

I, Kaley Chiles, am over the age of 18 and the Plaintiff in this action. The statements and allegations about me or which I make in this VERIFIED COMPLAINT are true and correct, based upon my personal knowledge (unless otherwise indicated), and if called upon to testify as to their truthfulness, I would and could do so competently. I declare under penalties of perjury, under the laws of the United States, that the foregoing statements are true and correct.

Executed this 1st day of September 2022.

Kaley Chiles

Colo. Rev. Stat. § 12-240-121

* * *

(1) "Unprofessional conduct" as used in this article 240 means:

* * *

(ee) Engaging in conversion therapy with a patient who is under eighteen years of age;

* * *

Colo. Rev. Stat. § 12-245-202

* * *

(3.5)(a) "Conversion therapy" means any practice or treatment by a 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.

(b) "Conversion therapy" does not include practices or treatments that provide:

(I) Acceptance, support, and understanding for the facilitation of an individual's coping, social support, and identity exploration and development, including sexual-orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices, as long as the counseling does not seek to change sexual orientation or gender identity; or

(II) Assistance to a person undergoing gender transition.

* * *