No. 24-539

IN THE

Supreme Court of the United States

KALEY CHILES,

Petitioner,

v.

PATTY SALAZAR, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE DEPARTMENT OF REGULATORY AGENCIES, ET AL.,

Respondents.

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

BRIEF FOR *AMICI CURIAE* AMERICANS FOR PROSPERITY FOUNDATION AND MOUNTAIN STATES LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Americans for Prosperity Foundation ("AFPF") is a 501(c)(3) nonprofit organization committed to educating and empowering Americans to address the most important issues facing our country, including civil liberties and constitutionally limited government. As part of this mission, it appears as *amicus curiae* before federal and state courts. AFPF is interested in this case because protection of the freedoms of expression and association, guaranteed by the First Amendment, is essential for an open and diverse society.

Mountain States Legal Foundation ("MSLF") is a nonprofit, public-interest law firm organized under the laws of the state of Colorado. MSLF is dedicated to bringing before the courts issues vital to the defense and preservation of individual liberties, the right to own and use property, the free enterprise system, and limited and ethical government. Since its creation in 1977, MSLF attorneys have been active in litigation regarding the proper interpretation and application of statutory, regulatory, and constitutional provisions. *See, e.g., Adarand Constructors, Inc. v. Pena*, 515 U.S. 200 (1995) (MSLF serving as lead counsel); *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023) (amicus curiae in support of petitioners).

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[1] No counsel for a party authored this brief in whole or in part and no person other than *amici* or its counsel made any monetary contributions to fund the preparation or submission of this brief. AFPF notified counsel for all parties of its intent to file this brief more than ten days before filing.

AFPF and MSLF are committed to ensuring the freedom of expression and association guaranteed by the First Amendment for all Americans, including children. Expansive development of exceptions to First Amendment protections threaten speech and encourage innovation designed to transform speech into regulable conduct.

SUMMARY OF ARGUMENT

Here we go again—hoping the third time will be the charm for closing the door on Colorado's attempts to regulate protected speech through the misuse of commercial law. Although decided under a different statute, like previous cases to come before this Court,[2] Colorado has invoked its power to regulate commercial activity to censor and compel speech. And, the Tenth Circuit has again adopted an interpretation that allows the state to dictate the only acceptable viewpoint expressive professionals may convey. Like the previous cases, the speaker here may deliver only the state's message or face the consequences.

It is well established that speech may not be regulated by relabeling it as commercial activity. But, while denying that it is playing labeling games, the lower courts' opinions are based entirely on

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[2] *See*, *303 Creative LLC v. Elenis*, 600 U.S. 570 (2023) (application of Colorado Anti-Discrimination Act, CO Rev. Stat. § 24-34-601 (2016) ("CADA") to custom website design); *Masterpiece Cakeshop v. Colorado Civil Rights Comm'n*, 584 U.S. 617, 627 (2018) (application of CADA to custom cake design).

characterizing pure speech as regulable activity or incidental to such activity. But no activity has been discerned that is not coextensive with the speech the state seeks to control. If, after silencing the speech, there is nothing left, then how can the speech be incidental to, or distinct from, activity? It cannot. They are one and the same. And if the law operates solely on identified viewpoints, then how can it regulate anything but expression?

The constitutional errors here were constructed upon the uncontroversial foundation that healthcare services can be regulated. While true, that is beside the point. Upon this anodyne basis two limited exceptions to the general prohibition against compelled speech were overlaid to create a new carve-out for speech-based professions, purportedly allowing government to dictate the viewpoint of any professional unwilling to abandon his or her profession.

The first limited exception used to crack open the regulatory door was based on mandatory consent laws. Because medical patients can be required to provide consent before being subjected to treatment that otherwise would be a battery, the customary verbal form of consent was deemed to excuse broadly regulating speech in a healthcare setting. If true, that logic would also allow the state to regulate the speech of any business that requires similar verbal consent to participate. Ski resorts, jump zones, roller rinks, or any other place where a participant must be told about risk and consent to it before participating would be in peril of censorship.

The second limited exception was based on laws that require disclosure of certain factual information

explaining the terms under which a service or product is offered—information typical to forming any binding contract. Under that theory, because limited factual information can be compelled in offering a service or product for sale, speech made in a commercial setting is deemed generally regulable.

In addition to these two exceptions, the burden of finding a legal way to speak was shifted to the speaker, relieving the government of its duty to comply with the First Amendment. The speech regulation at issue here does not apply to speakers in a non-licensed capacity. Thus, the licensed professional is deemed to have self-imposed censorship by refusing to give up speaking in a professional capacity. That compelled trade-off is used to excuse the state's efforts to mandate viewpoints. But unconstitutional conditions on protected speech are likewise unconstitutional.

Professional licensing has long been a subject of intense controversy with constitutional freedoms pitted against a variety of interests in controlling professions—ranging from the economic effects of monopoly to protecting the public from lack of expertise. But even at the high-water mark for licensing schemes, the Constitution places strict limits on government attempts to impose the viewpoint from which services may be rendered.

ARGUMENT

I. PAID EXPRESSION IS PROTECTED BY THE FIRST AMENDMENT.

The background principle against which this case must be decided is the indubitable protection of paid expression. Whether artistic, journalistic, legal,

medical, academic, or fictional—to name just a few—the fact that expression may lead to remuneration does not strip it of First Amendment protection. Nor does payment convert speech into activity. If that were so, news broadcasters' "delivery of information products" could be regulated like FedEx delivery services.[3] And lawyers could be told which legal strategies they may discuss with their clients.

The dispute here is not whether healthcare can be regulated. Starting with that question gets the wrong end of the stick. And working backwards from that faulty starting point would be the death knell for First Amendment rights in professional settings. As this Court has explained, a State's power to regulate with a view to protecting the public interest is "hardly to be doubted" but such regulation "must not trespass upon the domain set apart for free speech and free assembly." *Thomas v. Collins*, 323 U.S. 516, 532 (1945). Thus, although the State has the authority, for example, to require marriage licenses, witnesses, and signatures to recognize a lawful marriage, it does not follow that the state may dictate the content of the officiant's sermon.

Unfortunately, economic regulation targeting speech is not new, whether directly through prior restraints on publishing, indirectly through taxation, or by expansive application of the doctrine of professional speech. "As early as 1644, John Milton, in an 'Appeal for the Liberty of Unlicensed Printing,'

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[3] *See* Interstate Commerce Commission Certificate authorizing FedEx to operate as a common carrier. Available at: https://www.fedex.com/content/dam/fedex/us-united-states/shipping/images/InterstateCommerceCommissionCertificate.pdf

assailed an act of Parliament which had just been passed providing for censorship of the press previous to publication. He vigorously defended the right of every man to make public his honest views 'without previous censure'; and declared the impossibility of finding any man base enough to accept the office of censor and at the same time good enough to be allowed to perform its duties." *Grosjean v. Am. Press Co.*, 297 U.S. 233, 245–46 (1936). Labeling a regulation "economic" cannot defeat speech protections. The Louisiana surcharge tax, for example, on gross advertising receipts of newspapers with a weekly circulation of over 20,000 copies, affected only thirteen of over 120 newspapers. *Id.* at 240–41. But this Court invalidated it as a "calculated device . . . to limit the circulation of information to which the public is entitled." *Id.* at 250.

By contrast, the prospect of commercial enterprise supporting the pursuit of freedom of conscience has been with us from the beginning. Indeed, the Pilgrims themselves were both a for-profit enterprise and aiming to exercise what would later become First Amendment freedoms.[4]

Thus, the protection of expression provided by the First Amendment does not turn on whether the speaker receives a commercial benefit—even if some portion of the overall process is subject to regulation.

In examining speech-based offerings, such as movies, the Court has separated the business aspects:

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[4] *See generally* Peggy M. Baker, *The Plymouth Colony Patent: setting the stage*, Pilgrim Society & Pilgrim Hall Museum (2007), available at: https://pilgrimhall.org/pdf/The_Plymouth_Colony_Patent.pdf.

"production, distribution, and exhibition . . . conducted for private profit," from the speech element of the movie itself. *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 501 (1952). Moreover, for movies, like "books, newspapers, and magazines," being "published and sold for profit does not prevent them from being a form of expression whose liberty is safeguarded by the First Amendment." *Id*.

The question of whether commercial trappings can be used to excuse regulation of speech has been before this Court many times. *See Virginia Pharmacy Board v. Virginia Citizens Consumer Council*, 425 U.S. 748, 761 (1976) (collecting cases illustrating that "speech does not lose its First Amendment protection because money is spent to project it"). Time and again, the Court has focused on the speech element and turned aside attempts to evade the First Amendment. Thus, whether "Ms. Chiles is a licensed professional counselor, a position earned after years of advanced education and licensure. . . . who treats 'co-occurring clinical issues such as addictions, attachment, and . . . personality disorders,'" App. at 44a, has no legal significance to her speech rights. It may, as a practical matter, make her speech more valuable to her clients, but it does not make her speech less protected.

A. Viewpoint-Based Discrimination and Prior Restraints Are Presumptively Unconstitutional.

"Discrimination against speech because of its message is presumed to be unconstitutional." *Rosenberger v. Rector & Visitors of Univ. of Virginia,* 515 U.S. 819, 828 (1995). "When the government targets . . . particular views taken by speakers on a subject, the violation of the First Amendment is all the

more blatant." *Id*. at 829. The Constitution "demands that content-based restrictions on speech be presumed invalid . . . and that the Government bear the burden of showing their constitutionality." *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004) (cleaned up).

Likewise, prior restraints come to the Court bearing a strong presumption of invalidity. *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). As relevant here, the Colorado law acts as an unconstitutional prior restraint because a counselor cannot know what she may lawfully say to a client until the State's preferred viewpoint has been revealed to her by the client—at which point she is compelled to agree with it—assuming she can figure out whether the client's situation and desire for counseling are consistent with the law.

The Counseling Restriction, Section 12-245-202 (3.5) (a) prohibits in part "any practice or treatment . . . that attempts or purports to change an individual's . . . gender identity." But it does not explain what "change" means—change from what state to what other state? Is change in one direction prohibited but in another direction allowed? If the client is conflicted, may the counselor speak or not? To be sure, §§(b) I & II attempt to expand on what is allowed and what is forbidden, but whether a counselor may speak will still depend on the State's dynamic political preferences and require the law-abiding counselor to keep abreast of what the State's preferences are. Afterall, a diligent attempt to interpret the text, discerning what the State means by "change" in 2025—and therefore allows—would likely be the opposite of what the same text would have meant fifty years ago. This alone is sufficient to render the law

unconstitutional because the "First Amendment does not permit laws that force speakers to . . . seek declaratory rulings before discussing the most salient political issues of our day," such that "[p]eople of common intelligence must necessarily guess at the law's meaning and differ as to its application." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 324 (2010) (cleaned up).

Here, Colorado seeks an exemption from this two-fold presumption of unconstitutionality by imposing yet another violation of the Constitution, conditioning Ms. Chiles's license on foregoing her First Amendment rights. The Court of Appeals agreed with this approach, stating, "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." App. 47a (citing CO Rev. Stat. § 12-245-217 (1) (exempting "[a] person engaged in the practice of religious ministry" from complying with the Mental Health Practice Act)). Thus Ms. Chiles may retain her license by either foregoing her speech rights, foregoing her free exercise rights, or both; or she may sacrifice her license to exercise her rights. The state may not compel her to make that choice.

This Court has been clear that "[e]ven though government is under no obligation to provide a person, or the public, a particular benefit, it does not follow that conferral of the benefit may be conditioned on the surrender of a constitutional right." *44 Liquormart v. Rhode Island*, 517 U.S. 484, 513 (1996). This means the government cannot make a "benefit[] contingent on endorsing a particular message or agreeing not to engage in protected speech." *Id.* (citing *Knox v. Serv.*

Emps. Int'l Union, Loc. 1000, 567 U.S. 298, 309 (2012); *Speiser v. Randall*, 357 U.S. 513, 518 (1958)). Moreover, this Court has rejected the argument that retaining freedom to speak on an issue in an unpaid capacity justifies a law prohibiting the same speech in a paid capacity. *Thomas*, 323 U.S. at 524 (holding unconstitutional a prohibition on paid union organizing that "affects only the right of one to engage in the business as a paid organizer, and not the mere right of an individual to express his views on the merits of the union."). Making Ms. Chiles's ability to practice as a licensed therapist contingent on foregoing her own First Amendment rights has no footing in this Court's jurisprudence.

Moreover, while protecting the psychological states of young people can be a laudable goal, the notion that the First Amendment can be suspended because some deem the speech to be harmful to children's psyches has been rejected by this Court. In the context of violent video games, for example, the Court rebuffed "California's effort to regulate violent video games" as "the latest episode in a long series of failed attempts to censor violent entertainment for minors," *Brown v. Entm't Merch. Ass'n*, 564 U.S. 786, 804 (2011)—notwithstanding the opinion of the California Assembly that a "reasonable person, considering the game as a whole, would find [it] appeals to a deviant or morbid interest of minors," that is "patently offensive to prevailing standards in the community as to what is suitable for minors." *Id.* at 789.

Nor is it sufficient to argue that this time it's important. That argument has been rejected even in wartime. *Tinker v. Des Moines Indep. Cmty. Sch.*

Dist., 393 U.S. 503, 504 (1969); *W. Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). And in *Entertainment Merchants*, the Court explained the constitutionally significant difference between speech that falls into an historically unprotected category and allowing government to create new categories of unprotected speech. *Entm't Merchs. Ass'n*, 564 U.S. at 791 ("From 1791 to the present, the First Amendment has permitted restrictions upon the content of speech in a few limited areas, and has never included a freedom to disregard these traditional limitations.") (cleaned up). Thus, although the "Government argued . . . that it could create new categories of unprotected speech by applying a 'simple balancing test' that weighs the value of a particular category of speech against its social costs and then punishes that category of speech if it fails the test," . . . the Court "emphatically rejected that 'startling and dangerous' proposition." *Entm't Merchs. Ass'n.* 564 U.S. at 792 (quoting *United States v. Stevens*, 559 U.S. 460, 470 (2010)).

The approach taken here by Colorado violates the Constitution by imposing a viewpoint-based prior restraint the speaker cannot satisfy until the compliant viewpoint for any given client has been revealed or unless the speaker abandons professional status and speaks on disfavored topics only in a non-professional capacity.

B. Professional Speech is Protected.

Although the notion of "professional speech"—speech uttered within a professional relationship or based on expert knowledge or judgment—has been floated as a rationale for excepting speech from full First Amendment protection, "this Court has not

recognized 'professional speech' as a separate category of speech." *Nat'l Inst. of Family & Life Advocates v. Becerra ("NIFLA")*, 585 U.S. 755, 767 (2018). And speech does not lose its protection merely because it is uttered by professionals. *Id*. at 2371–72. Indeed, the Court has afforded reduced protection to "professional speech" in only two circumstances: (1) where laws require the disclosure of factual, noncontroversial information within commercial speech; and (2) where conduct is regulated and that conduct incidentally involves speech *Id*. at 2372. Both of these exceptions apply to all speakers and do not distinguish "professional speech" from speech generally.

Neither exception applies here.

C. Disclosure of Terms of Service or Regulation of the Terms on Which Service may be Provided Does Not Authorize Government to Dictate the Substance of Speech-Based Services.

The Tenth Circuit opined that "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." App. 34a. That attempt to carve out greater exceptions for professionals misapplies *NIFLA*, by imposing the very distinction between the professionals and all other speakers that *NIFLA* expressly eschewed. *NIFLA*, 585 U.S. at 768 ("This Court has afforded less protection for professional speech in two circumstances—*neither of which turned on the fact that professionals were speaking*.") (emphasis added).

But even were the first *NIFLA* exception relevant here, application would simply require the professional to disclose the circumstances of service,

such as when a client might be required to pay certain fees. *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626, 651–52 (1985). This requirement, when applied to a professional, would be merely a subcategory of generally applicable compelled disclosures in commercial advertising, *Id.* at 651, providing factual information regarding the terms on which service is to be delivered.

Instead of heeding *Button*'s, warning that "First Amendment freedoms need breathing space to survive," and therefore, "government may regulate in the area only with narrow specificity" *NAACP v. Button*, 371 U.S. 415, 433 (1963), the court instead relied on precedent regarding solicitation of employment, App. 35a, citing, *Ohralik*, 436 U.S. 447, 457 (1978) ("solicitation by a lawyer of remunerative employment is a business transaction"), or professional malpractice torts, *Id.* (citing *NIFLA*, 585 U.S. at 769 (quoting *Button*, 371 U.S. at 438, 444)). The cases cited did not bear on the substance of the professional's speech, but rather harked back to ancient limitations on how lawyers or third-parties could be compensated for litigation, and which prohibited certain fee arrangements altogether.

In *Button*, for example, this Court distinguished Virginia's attempts to prevent the NAACP from providing *pro bono* representation from the ancient common-law prohibitions on barratry, maintenance and champerty[5]. These laws historically related to types of lawsuits that were either vexatious or brought for the profit of the attorney or benefit of a

[5] *Button*, 371 U.S. at 438, n. 17 (1963) (citing 4 Blackstone, Commentaries, 134—136. *See generally* Max Radin, *Maintenance by Champerty*, 24 Cal.L.Rev. 48 (1935)).

non-party and were forbidden under the common law. Champerty, for example, was

> A bargain made by a stranger with one of the parties to a suit, by which such third person undertakes to carry on the litigation at his own cost and risk, in consideration of receiving, if he wins the suit, a part of the land or other subject sought to be recovered by the action.

The Law Dictionary, (collecting cases) [6]. Champerty thus bore some resemblance to the modern practice of contingent fee litigation but was more broadly applicable than to the attorney/client relationship.

Maintenance, by contrast, is the practice of financially supporting another person's litigation but without a direct interest in the outcome.[7]

> The distinction between champerty and maintenance lies in the interest which the interfering party is to have in the issue of the suit. In the former case, he is to receive a share or portion of what may be recovered; in the latter case, he is in no way benefited by the success of the party aided, . . . Thus every champerty includes

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[6] Available at https://thelawdictionary.org/champerty/

[7] "[M]aintenance is that against which the Star Chamber Act of 1487 and the Statute of Liveries of 1504 were specifically directed, *i.e.*, the support given by a feudal magnate to his retainers in all their suits, without any reference to their justification. This type of support became in fact one of the means by which powerful men aggrandized their estates and the background was unquestionably that of private war." Radin, *Maintenance by Champerty*, at 64.

> maintenance, but not every maintenance is champerty.

The Law Dictionary.

Barratry, by contrast, was "Vexatious persistence in, or incitement to, litigation." Thompson Reuters Glossary of Legal Terms[8].

Such practices were frowned upon under the early common law as representing misuse of litigation for personal advantage or other improper interest unrelated to the merits of the case or injury sustained. In that sense they bear some resemblance to practices that might be termed "lawfare" or "sharp practices" today, and may be more similar to Fed. R. Civ. P. 11's requirement that representations to the court are "not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation."

These ancient prohibitions are still recognized. *See In re Primus*, 436 U.S. 412, 424 n.15 (1978). But it is quite a stretch from rules regarding the form of compensation allowable for legal representation to regulating the substance of speech between therapists and their clients. The logical divide is simply too broad to leap, especially because the First Amendment counsels against the attempt. And were that approach to be accepted, the narrow and ancient regulation of the form on which legal services may be provided

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[8] Available at https://legal.thomsonreuters.com/blog/legal-glossary/#B-terms *See also* Radin, *Maintenance by Champerty*, at 64–5 ("Barratry in Scotland was understood to mean bribery of judges but in England came to be little more than habitual maintenance and, as such habitual maintenance, was a criminal offense.").

would swallow the general rule protecting speech within a professional or commercial context.

D. Incidental to What?

The *NIFLA* second category allows regulation of conduct that incidentally involves speech (or regulation of conduct where the regulation incidentally burdens speech). Some subsections of Colorado's definition of "unprofessional conduct" would properly fall into this category. For example, subsection (c) of the definitions of unprofessional conduct provides as an example, "Administering, dispensing, or prescribing any habit-forming drug or any controlled substance . . . other than in the course of legitimate professional practice." Likewise, subsection (k) includes "Engaging in a sexual act with a patient during the course of patient care or within six months immediately following the termination of the licensee's professional relationship with the patient". Although each of these sets of activities *could* involve speech, the conduct may also occur independent of speech or where any speech is incidental to it. CO Rev. Stat. § 12-240-121 (2024).

Notably, neither of these examples implicate the viewpoint of the person being regulated and thus lack an immediate red flag that the target of the regulation is speech not action. Indeed, the professional's viewpoint on these activities is neither mentioned nor necessary to ascertaining whether a violation has occurred. In addition, neither violation can occur solely by talking; some form of activity is contemplated.

Section (ee), which prohibits "conversion therapy", by contrast, is ambiguous whether it comprises action or expression or both. CO Rev. Stat. § 12-240-121

(1)(ee) (2024). Only when the exceptions are articulated is the mandated viewpoint exposed and the burden on expression made clear.[9]

The ambiguity regarding *which* viewpoint the law requires does not negate the express intent to impose some viewpoint by requiring "acceptance, support, and understanding". Thus, even if the baseline definition of conversion therapy applies to regulable conduct, the moment the State imposed a viewpoint-based prohibition or mandate, it ran afoul of the First Amendment. *R.A.V. v. St. Paul*, 505 U.S. 377, 385 (1992) ("activity can be banned because of the action it entails, but not because of the ideas it expresses—so that burning a flag in violation of an ordinance against outdoor fires could be punishable, whereas burning a flag in violation of an ordinance against dishonoring the flag is not."). Here, if one takes away the speech, then there is nothing left; or if one conforms to the mandated viewpoint, then there is no violation of the law. Therefore, there is nothing to the law but viewpoint-oriented regulation of speech.

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[9] CO Rev. Stat § 12-245-202 (2024)

(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.

II. LICENSING REGIMES ARE THE "BASTILLES OF OUR SCIENCE."[10]

Constitutional arguments are nothing new in the context of licensing regimes and have been used to challenge a range of licensing requirements that infringed paid speech based on content. *E.g., City of Lakewood v. Plain Dealer Publ'g Co*., 486 U.S. 750, 760 (1988) (holding a newsstand licensing scheme unconstitutional because "the Constitution requires that the city . . . insure that the licensing decision is not based on the content or viewpoint of the speech being considered."). Likewise, "leafletters may facially challenge licensing laws." *Id*. at 761 (citing *Talley v. California*, 362 U.S. 60 (1960); *Lovell v. Griffin*, 303 U.S. 444 (1938). In *NIFLA*, the notice requirement for licensed pregnancy-related clinics was held to be an unconstitutional content-based regulation of speech. *NIFLA*, 585 U.S. at 766. And, in *Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc*., this Court held that "the State's asserted power to license professional fundraisers carries with it (unless properly constrained) the power directly and substantially to affect the speech they utter. Consequently, the statute is subject to First Amendment scrutiny." 487 U.S. 781, 801 (1988). Thus, First Amendment protection cannot

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[10] Lewis A. Grossman, *The Origins of American Health Libertarianism*, Yale Journal of Health Policy, Law, and Ethic XIII:I 76, 96 (2013) quoting Benjamin Rush, *Lecture VI. Upon the Causes Which Have Retarded the Progress of Medicine and the Means of Promoting Its Certainty and Greater Usefulness*, Benjamin Rush, Six Introductory Lectures to Courses of Lectures Upon the Institutes and Practice of Medicine, 151–52 (1801) (spelling modernized).

be overcome simply by imposing licensing requirements on speech-based professions.

Health-care-related licensing is not an exception to First Amendment protection. *E.g.*, *NIFLA*, 585 U.S. 755. Indeed, medical licensing laws affecting a variety of rights such as speech, religion, association, contract, bodily integrity, property, and the pursuit of health have been challenged on constitutional grounds. This should come as no surprise because any licensing scheme, by design, limits the freedom of providers and patients to set the metes and bounds of the services provided and received. Ostensibly, such licensing is for the patients' protection, but when it comes to licensing that restricts speech, this Court has long held that government may not limit speech for the listener's own good. *See, e.g., Riley,* 487 U.S. at 790–91 ("the paternalistic premise that charities' speech must be regulated for their own benefit—is . . . unsound" because the "First Amendment mandates that we presume that speakers, not the government, know best both what they want to say and how to say it."); *44 Liquormart*, 517 U.S. at 503 ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good.").

The waxing and waning of medical licensing over the life of the country, with medical licensing ranging over time from almost non-existent to nearly ubiquitous, demonstrates the tension between constitutionally protected freedoms and licensing regimes. When it comes to physicians, on "the eve of the Revolution, no effective constraint on practice by

unorthodox and untrained doctors existed in the American colonies," *Grossman*, at 89.

But,

> [a]fter the signing of the Declaration of Independence, states gradually began to enact medical licensing laws in response to pressure from the growing body of regularly educated physicians. By 1800, six states had medical practice acts of some kind on the books. The 1810s saw the multiplication and strengthening of state licensing regimes-a trend that peaked with a flurry of legislative activity in the late 1810s and early 1820s. The statutes of this period generally required examination and licensing by state medical societies-societies that were, in many instances, incorporated by the same laws. By the end of 1825, eighteen of the twenty-four extant states, plus the District of Columbia, had adopted medical licensing.

Id. at 90.

These laws were resisted in part due to the founders' suspicion and opposition to monopolies.[11] And for a long period in the mid-1800s most medical licensing languished or was taken off the books

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[11] *Grossman* at 92 (""Opposition to monopolies was widespread in Revolutionary America. Indeed, the American colonists' antagonism toward English grants of trade monopolies, such as the East India Company's monopoly over tea importation to the colonies, was a significant impetus for their bid for independence.").

altogether. *Id*. at 102. The arguments made then still resonate today, including: 1) "the assertion that people have a right to decide what and what not to put into their bodies" or relatedly "the contention that each individual has a right to choose what steps to take to protect his or her physical well-being;" 2) "fundamental constitutional norms of economic liberty-namely, a prohibition against the government taking the property of one citizen and giving it to another and a ban on laws impairing the obligation of contracts;" 3) "anti-monopoly arguments [directed] not only at regular physicians' attempts to control the market for medical fees, but also at their efforts to control the marketplace of medical ideas;" 4) "the general right of free inquiry as a necessary feature of a free and democratic society"; and 5) "medical liberty arguments [that] also invoked the principle of freedom of conscience." *Grossman* 113–121.

These concerns were ascendent in antebellum America and "between 1830 and 1860, every relevant legislative action in [states with a licensing regime] (with a couple of minor exceptions) either weakened or entirely revoked medical licensing," so that "[e]ventually, . . . most states repealed their medical licensing regimes altogether." *Grossman* at 102.[12] Moreover, "States exercised virtually no licensing authority over the mere rendering of advice during either the post-colonial or Reconstruction eras." Robert Kry, *The "Watchman for Truth": Professional*

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[12] Citing William G. Rothstein, *American Physicians in the Nineteenth Century: From Sects to Science* 332–39 (1992); James H. Cassedy, *Medicine in America: A Short History* 26 (1991); James C. Whorton, *Nature Cures: The History of Alternative Medicine in America* 36 (2004).

Licensing and the First Amendment, 23 Seattle U. L. Rev. 885, 956 (2000). After the war, however, these constitutional concerns were eventually overcome and "[b]y 1901, every state and the District of Columbia had a medical licensing system of some sort." *Id*. at 129. "But there was still broad consensus that government should not discriminate against or in favor of different systems of medicine." *Id*.

This sea change did not, however, obliterate variety in therapeutic offerings nor impose conformity of viewpoint. *Id*. ("This continuing commitment to freedom of therapeutic choice is evidenced by the content of the state medical practice acts themselves."). Such respect for diversity stands in stark contrast to Colorado's efforts to impose conformity of viewpoint on licensed therapists, whose alarms at being corralled into a single approved viewpoint are nothing new. Indeed the concerns expressed at the 1834 Proceedings of the Botanic State Convention still ring true today:

> If we are distressed in body, what greater privilege can we enjoy than the free and independent right in the selection of our Physicians to relieve our maladies?"

Grossman at 126 (quoting *Proceedings of the Botanic State Convention*, 3 Thomsonian Recorder 17, 19 (1834). Indeed, the *Trickett Wendler, Frank Mongiello, Jordan McLinn, and Matthew Bellina Right to Try Act of 2017*, Public Law No: 115-176[13], is but one recent example of respecting the need for

[13] Available at: https://www.congress.gov/115/bills/s204/BILLS-115s204enr.pdf

people to direct their own lives and health in the face of governmental efforts to enforce orthodoxy.

Resolving the tension between cabining medical expertise to a privileged few and acknowledging the right of people to access information to chart their own paths should be resolved through constitutional respect for speech and inquiry and not by silencing dissenting views. The urge to empower the state to suppress non-conformists is longstanding: "If any man undertakes to pursue a practice different from what is sanctioned by the regular faculty . . . he is hunted down like a wild beast; and a hue and cry raised against him from one end of the country to the other." *Grossman*, at 107 n. 159.[14]

But, although the "hue and cry" is as old as time, it should be resisted—especially where the state is called upon to enforce it. This case raises all the concerns inherent to enforced conformity in medicine along with heightened First Amendment concerns, turning as it does on various expressions of rights of conscience and expression. Moreover, the spotty history of licensing laws is insufficient to support any claim that professional licensing can supplant the rights of the provider and patient to speak on any topic they wish.

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[14] Citing Samuel Thomson, *New Guide to Health; or, Botanic Family Physician, Containing a Complete System of Practice on a Plan Entirely New: With a Description of the Vegetables Made Use of, and Directions for Preparing and Administering Them, To Cure Disease. To Which is Prefixed a Narrative of the Life and Medical Discoveries of the Author*, at 8 (2d Ed. 1825).

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment of the Tenth Circuit.

Respectfully submitted,

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