No. 24-539

In the Supreme Court of the United States

KALEY CHILES,

Petitioner,

v.

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

Respondents.

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

BRIEF OF MEMBERS OF CONGRESS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENTS

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SEN. JEFFREY A. MERKLEY
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REP. MARK TAKANO
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Vice Chair, House Democratic Caucus
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REP. KATHERINE M. CLARK
House Democratic Whip

REP. PETE AGUILAR
Chairman, House
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REP. NANCY PELOSI
Speaker Emerita of the
House of Representatives

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SUMMARY OF THE ARGUMENT AND STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

Amici are 20 United States Senators and 167 Members of the United States House of Representatives (together, "Members of Congress"). A complete list of *amici* appears in the appendix of this brief.

The petitioner in this case has markedly reframed Colorado's law governing the licensure of psychotherapy professionals in a way that bears little resemblance to the actual legislation. As is clear from the record, the Colorado legislature requires its licensed psychotherapists to conform to accepted standards of care when providing medical care to minors. Therapists are not excused from that requirement merely because their profession is carried out by means of language. Speech is merely an incidental component of the care they provide.

The law does not prohibit Petitioner from speaking in her personal capacity. She can advocate her personal views, including those that *Amici* do not share. But when a child is entrusted to the care of a therapist and the State provides its imprimatur through licensure, the State may require the therapist to care for that child according to the standards of her profession.

As Respondents and others point out, this case can be resolved by applying the Court's precedents. This Court has long recognized salient distinctions be-

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[1] No counsel for any party authored this brief in whole or in part, and no person other than *Amici*, their counsel, and their members made a financial contribution to its preparation or submission.

tween core protected speech on the one hand and regulating professional conduct incidentally involving speech on the other. It has long permitted Legislatures to regulate the latter category more freely.

As legislators themselves, the undersigned Members of Congress offer their perspective on the long history and practice of legislatures (both federal and state) regulating medical services, including the licensure and speech of health care professionals, consistent with established standards of care. Specifically, *Amici* urge this Court to even-handedly apply a constitutional approach that would enable legislatures to make laws in conformity with established standards of care in the medical profession.

Amici also respectfully encourage the Court to consider the full legislative and medical context of similar bills—including a federal bill that is presently pending in the United States House of Representatives and Senate. These laws are aimed at halting a range of discredited practices that have long been known to cause significant and lasting psychological harm to patients, including those purported to force patients to change their sexual orientation or gender identity. These practices are not only harmful, providing them is violative of medical ethics. Licensed practitioners should not be performing them.

Petitioner ignores all of that in the hopes of making this case about "pure speech" concerning gender identity. But neither the record nor history supports Petitioner. This Court should not redraw the contours of legislative power based on Petitioner's dubious view of precedent. Adopting her imagined history would

create very real deleterious and unintended consequences for patients and legislatures alike. *Amici* urge the Court to affirm.

ARGUMENT

At the core of Legislative power is the regulation of conduct. Legislatures—from the Founding to present—have long regulated professional conduct. And although "[t]his Court's precedents do not recognize *** a category called 'professional speech,'" it has long recognized that Legislatures "may regulate professional conduct, even though that conduct incidentally involves speech." *National Institute of Family & Life Advocates* v. *Becerra*, 585 U.S. 755, 768 (2018) ("*NIFLA*") (citing *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 455–456 (1978) and *Planned Parenthood* v. *Casey*, 505 U.S. 833, 884 (1992) (joint opinion of O'Connor, Kennedy, and Souter, JJ.), overruled on other grounds sub nom. by *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215 (2022)).

That recognition belies Petitioner's insistence (at 2) that there are no "historical counseling regulations" pertinent to this case. That narrow view of history does not withstand scrutiny. As *Amici* show, there is a robust history of regulating professional conduct—including where that profession is *performed* by speech. And this Court has a long history of upholding such regulations.

Accepting Petitioner's imagined history could endanger decades of legislation designed to protect the public by holding professionals to the standards of their profession. *Amici* are concerned that Petitioner's theory would undermine a range of laws, in-

cluding those about informed consent, corporate disclosures, state bar regulations, and even false advertising. "The First Amendment does not make it . . . impossible ever to enforce laws" that hold professionals to the standards of their own profession. Cf. *National Soc. Of Pro. Eng'rs* v. *United States*, 435 U.S. 679, 697 (1978) (citation and quotation omitted). *Amici* urge the Court to affirm.

I. Legislatures have historically regulated professional conduct—including medicine—carried out by means of language to enforce compliance with professional standards.

This Court has long "afforded less protection for professional speech in two circumstances:" first, legislatures may "require professionals to disclose factual, noncontroversial information in their 'commercial speech,'" and second, legislatures may "regulate professional conduct, even though that conduct incidentally involves speech." *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. at 768. The fact that professional conduct is "carried out by language, either spoken, written, or printed" does not allow professionals to ignore the standards of their profession. See *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978) (quoting *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

This makes sense. Legislatures have a particularly strong interest in ensuring that the "stream of commercial information flow[s] cleanly as well as freely." *Virginia State Bd. of Pharmacy* v. *Virginia Citizens Consumer Council, Inc.,* 425 U.S. 748, 772 (1976). Medical practice, including the provision of medical services or advice through language, is no dif-

ferent. Like commercial speech, the "public and private benefits" of medical speech "derive from confidence in its accuracy and reliability." Cf. *Bates* v. *State Bar of Arizona*, 433 U.S. 350, 383 (1977).

Accordingly, legislatures should be able to enforce modern medical standards of care to protect trust in the accuracy and reliability of medical advice. A legislature could impose professional discipline on a doctor for prescribing a trepanation (the practice of boring holes in the skull) to treat mental illness (as was done in medieval times) as this is clearly inconsistent with modern, established standards of care. Nothing would prevent the hypothetical doctor, like Petitioner here, from advocating in their personal capacity that they disagree with the standards of care and personally support trepanations. They just cannot provide a service that is clearly inconsistent with the standards of their profession.

The public must be able to trust that when they seek treatment, their health professional will provide competent services in accordance with modern standards of medicine. Patients should have that confidence whether the service is rendered with a scalpel or through speech. Recognizing that, many state medical malpractice statutes have been interpreted to permit suits for statements made by therapists in session that "cause[a patient's] emotional or mental stress." *E.g.*, *Langner* v. *Simpson*, 533 N.W.2d 511, 518 (Iowa 1995). Talk therapy sessions are not immunized from state regulation merely because the healthcare is provided by way of language.

Legislatures have an important, enduring interest in ensuring that professional standards are followed. Because the benefits of medical speech are rooted in

accuracy, the "leeway" given speech—including misleading and false speech—in "other contexts has little force" in the context of providing medical services. Cf. *Bates*, 433 U.S at 383. Importantly, Colorado seeks to regulate only in a specific context: the provision of medical services in therapy sessions. Petitioner's conduct is restricted only insomuch as she is using language to provide treatment. Outside that context, she can advocate for a change in the law, and she can publish material attempting to change the medical standard of care. But she may not use her state licensure (and the attendant imprimatur of state sanction) to provide a course of care that not only fails to conform with the standards of her profession but is known and recognized by major medical associations to cause harm to children. See UNITED STATES JOINT STATEMENT AGAINST CONVERSION EFFORTS (Aug. 23, 2023), https://d3dkdvqff0zqx.cloudfront.net/groups/apaadvocacy/attachments/USJS-Final-Version.pdf.

II. Courts have historically upheld federal and state statutes regulating professional conduct that incidentally involves speech.

Petitioner's imagined state of the law and history ignores that legislatures have long regulated conduct incidentally involving speech—and that courts have long upheld such regulations. This Court has upheld substantively analogous statutes.

A. Legislatures have long regulated analogous professional conduct "carried out by means of lan-

guage," even though that conduct incidentally involves speech. *Ohralik* v. *Ohio State Bar Assn.*, 436 U.S. 447, 456 (1978).

1. *Ohralik* is instructive. That case involved in-person solicitation of clients by an attorney—conduct carried out entirely by language. Ohio had adopted the challenged rule out of concern that in-person solicitation of injured individuals (the day of or after an accident) "not only makes him more vulnerable to influence" but also may "distress the solicited individual." 436 U.S. at 465. This Court "agree[d]" that protection of such vulnerable individuals from harm "is a legitimate and important state interest." *Id.* 462.

This Court unanimously rejected *Ohralik's* First Amendment challenge. "[I]t has never been deemed an abridgment of freedom of speech or press 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 printed." 436 U.S. at 456 (citation omitted). "[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." *Ibid.* Solicitation by a lawyer "is a business transaction in which speech is an essential but subordinate component." *Id.* 457. Ohio's "particularly strong" interest and "special responsibility for maintaining standards among members of the licensed professions" amply justified its prohibition of such solicitation—speech notwithstanding. *Id.* 460.

Under *Ohralik*, Colorado's statute is clearly constitutional. There, as here, the State sought to protect a vulnerable population from professional conduct falling below that profession's standards. Both have

"particularly strong" (*Ohralik,* 436 U.S. at 460) interests: in Ohio, it was injured individuals; in Colorado, it is children seeking mental healthcare. There, as here, speech is "an essential but subordinate component" of the interaction. In Ohio, it was asking for legal business; in Colorado, it is providing medical treatment and advice. Thus, just as in *Ohralik*, Colorado is seeking to regulate professional conduct, even though that conduct incidentally involves speech. *Id.* 456.

2. The legal profession—in this way highly analogous to talk therapy in the medical profession—has long been regulated even though it is carried out primarily via speech. This Court has addressed the issue multiple times in *Ohralik* and elsewhere. *E.g.*, *Bates* v. *State Bar of Arizona,* 433 U.S. 350, 383 (1977). Yet ensuring that a lawyer's conduct meets the minimum standards of her profession still "falls within the State's proper sphere of economic and professional regulation." *Ohralik,* 436 U.S. at 459. State-backed professional discipline would collapse if the First Amendment immunized the act of soliciting legal advice or the act of giving legal advice. Without enforcement of minimum requirements, trust in the standards of the Bar could erode.

Providing medical advice and medical treatment is indistinguishable in many instances, especially in the mental healthcare profession. When someone—including a child along with their parents—seeks mental health treatment, they should be able to trust that the care will be provided in accordance with professional standards. Vulnerable children, such as those grappling with their sexual orientation or gender identity, have that right as much as any other person.

And in seeking that care, patients should be confident that their healthcare providers are not working to "change" them to fit the *provider's* own religious beliefs. The Colorado law does not prohibit a religious adviser from offering methods advocated by Petitioner in a nonmedical setting. But such methods are inconsistent with the standards of medical care and Colorado must be able to restrict its licensed medical practitioners from providing such harmful and substandard treatment.

B. Petitioner's expansive and unmoored view of the guarantees of the First Amendment is inconsistent with state and federal legislation addressing conduct "initiated, evidenced, or carried out by means of language." *Ohralik*, 436 U.S. at 456 (quotation omitted). Legislatures have historically regulated in analogous situations—and this Court has regularly upheld those regulations against First Amendment challenges.

1. The content of medical communications and medical advice has historically been subject of regulation even when it is carried out by means of language. For instance, the 1980 Pennsylvania law at issue in *Casey* compelled certain disclosures, including to "give certain specific information about medical procedures." *Planned Parenthood* v. *Casey*, 505 U.S. 833, 884 (1992), overruled on other grounds sub nom. by *Dobbs* v. *Jackson Women's Health Org.*, 597 U.S. 215 (2022). That, however, was "part of the practice of medicine" and "subject to reasonable licensing and regulation by the State" notwithstanding the First Amendment. *Ibid.* This Court recently reiterated *Casey* stood for exactly this proposition, i.e., that legislatures could

"regulate professional conduct, even though that conduct incidentally involves speech." *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755, 768 (2018).

2. Both Congress and the States have long legislated against unfair or deceptive trade practices, including those incidentally burdening speech. In 1935, Congress forbid unfair labor and employment conduct, which included speech such as threats of retaliation, misrepresentation, and coercion during unionizing efforts. This Court flatly rejected a First Amendment challenge to that statute, concluding that such communications were "without the protection of the First Amendment." *NLRB* v. *Gissel Packing Co.*, 395 U.S. 575, 618 (1969). Similarly, in *Giboney*, this Court addressed a 1939 Missouri law that outlawed agreements in restraint of trade, including when "the agreements and course of conduct" "were as in most instances brought about through speaking or writing." *Giboney* v. *Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). The First Amendment posed no hurdle: "it has never been deemed an abridgment of freedom of speech or press 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 printed." *Ibid.*

This Court has recognized Congress' authority to regulate what information financial professionals must provide. In the Securities Exchange Act of 1934, Congress, for example, prohibited the publication of false or misleading corporate information releases. 15 U.S.C. § 78a et seq. In enacting that legislation, the House Committee clearly stated its intent to regulate communications to ensure market efficiencies:

> Just as artificial manipulation tends to upset the true function of an open market, so the hiding and secreting of important information obstructs the operation of the markets as indices of real value. There cannot be honest markets without honest publicity. Manipulation and dishonest practices of the market place thrive upon mystery and secrecy. *** Delayed, inaccurate, and misleading reports are the tools of the unconscionable market operator and the recreant corporate official who speculate on inside information.

H.R. Rep. No.1383, 73rd Cong., 2d Sess. 11 (1934). Yet despite specifically targeting communications, this Court upheld those restrictions on deceptive commercial speech as a prime example of "communications that are regulated without offending the First Amendment." *Ohralik*, 436 U.S. at 456 (citing *Mills* v. *Electric Auto-Lite Co.*, 396 U.S. 375 (1970)).

Similarly, for nearly 150 years, the Sherman Act has permitted the government to regulate (and punish) illegal activity carried out through speech. Addressing a First Amendment challenge to an injunction under the Sherman Act, this Court explained: "While the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. Just as an injunction against price fixing abridges the freedom of businessmen to talk to one another about prices, so too the injunction in this case must restrict the Society's range of expression on the ethics of competitive bidding." *National Soc. Of Pro. Eng'rs* v. *United States*, 435 U.S. 679, 697

(1978). Colorado's law restricts Petitioner's range of expression on conversion therapy even less than the injunction upheld by this Court because Colorado's law only applies to Petitioner's provision of medical care.

Anticompetitive actions, deceptive trade practices, and untruthful commercial communications are quite similar to provision of "care" that contradicts professional standards (like that proposed by Petitioner). In both instances, legislatures are concerned with protecting public trust (in commercial activity or medical care). In both instances, the prohibited conduct is harmful to individuals (whether consumers or patients). And in neither circumstance should First Amendment protection accrue simply because language is used to carry out the course of conduct.

3. While a historical twin may be hard to find, Petitioner is simply wrong to suggest that there are no historical analogues to Colorado's statute. There are many. Legislatures have long regulated "activity deemed harmful to the public" even when "speech is a component of that activity." *Ohralik*, 436 U.S. at 456. What's more, this Court has long upheld those laws. Indeed, this brief underrepresents the breadth and consistency of precedent supporting Colorado as it focuses on opinions from this Court.

Legislatures have historically regulated licensed professions consistent with established professional standards. Colorado's statute fits into that tradition and is a permissible exercise of legislative power.

CONCLUSION

The Tenth Circuit got this right: Colorado's law "regulates professional conduct that 'incidentally involves speech.'" Pet.App.37a (quoting *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755, 768 (2018)). Under *NIFLA* and in view of the long history and tradition of legislative regulation of similar conduct, *Amici* respectfully request that this Court affirm.

Respectfully Submitted,

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APPENDIX

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APPENDIX A

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Tammy Duckworth
John Fetterman
Martin Heinrich
John Hickenlooper
Amy Klobuchar
Edward J. Markey
Jeffrey A. Merkley
Patty Murray
Alex Padilla
Jack Reed
Jacky Rosen
Bernard Sanders
Adam B. Schiff
Tina Smith
Elizabeth Warren
Ron Wyden

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Yassamin Ansari
Jake Auchincloss
Becca Balint
Joyce Beatty
Wesley Bell
Ami Bera, M.D.
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Suzanne Bonamici
Brendan F. Boyle
Shontel M. Brown
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Sylvia R. Garcia
Dan Goldman
Maggie Goodlander
Josh Gottheimer
Al Green
Pablo José Hernández
James Himes
Steven A. Horsford
Chrissy Houlahan
Jared Huffman

Glenn Ivey
Sara Jacobs
Pramila Jayapal
Hakeem Jeffries
Henry C. "Hank" Johnson, Jr.
Julie E. Johnson
Sydney Kamlager-Dove
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Ro Khanna
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Susie Lee
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Ted Lieu
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Seth Magaziner
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Lucy McBath
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Jennifer McClellan
Betty McCollum
James P. McGovern
LaMonica McIver
Gregory Meeks
Rob Menendez
Kweisi Mfume
Dave Min
Gwen S. Moore
Kelly Morrison
Jared Moskowitz
Seth Moulton
Frank J. Mrvan
Kevin Mullin
Jerrold Nadler
Richard E. Neal
Joe Neguse
Donald Norcross
Eleanor Holmes Norton

Alexandria Ocasio-Cortez
Ilhan Omar
Frank Pallone, Jr.
Jimmy Panetta
Chris Pappas
Nancy Pelosi
Scott H. Peters
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