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

AMICUS CURIAE BRIEF OF THE INSTITUTE FOR FREE SPEECH IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Institute for Free Speech is a nonpartisan, nonprofit organization dedicated to the protection of the First Amendment rights of speech, press, assembly, and petition. In addition to scholarly and educational work, the Institute represents individuals and civil society organizations in litigation securing their First Amendment liberties.[1]

SUMMARY OF ARGUMENT

Heightened scrutiny for unpopular speech and ideas means little if the government can create chutes to slide down the levels of constitutional scrutiny and then get courts to defer to suspect evidence. This Court has rejected any categorical exception from First Amendment protection for professional speech, leaving only an exception for professional conduct that incidentally affects speech. *See Nat'l Inst. of Family & Life Advocs. v. Becerra*, 585 U.S. 755, 767 (2018) ("*NIFLA*"). Colorado would here bypass First Amendment protections against content-based speech by treating Ms. Chiles's *talk* therapy as *conduct*, entirely devoid of First Amendment protection, or by claiming that the speech element of her talk therapy is only incidental to conduct. But treating talk therapy as conduct is a sleight of hand, maintained only by leading courts to focus on mental health care in general, rather than looking at the nature of and burdens on Ms. Chiles's talk therapy.

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1. No counsel for a party authored this brief in whole or part, nor did any person or entity, other than amicus or its counsel, financially contribute to preparing or submitting this brief.

Moreover, Colorado's use of the exception for conduct incidentally affecting speech would turn that pinprick of an exception into a crater in the protection against content-based speech restrictions. And it fails to include an exemption for the use of professional judgment—such as Ms. Chiles's judgment that the treatment mandated by the state would harm her particular patients.

The strict scrutiny applied to content-based restrictions on speech also requires that the government demonstrate a compelling interest in restricting the plaintiff's speech. Colorado has not produced sufficient evidence to limit core First Amendment rights. To the contrary, the evidence it relied on was contradicted by the plaintiff's, and the state's evidence was beset by methodological errors. Indeed, this case deals with a relatively new area of treatment, such that evidence is scarce and often contradictory, and theories depend on values and ideas outside the evidence. The district court here failed to properly examine the problems with the state's evidence, and the court of appeals failed to independently review the constitutional facts on appeal. For these reasons, the decision below should be reversed.

ARGUMENT

I. The Court should stop the creative use of definitions to violate First Amendment rights.

A. Ms. Chiles's talk therapy is protected speech.

Speech is inherent in *talk therapy*.[2] But the panel majority in *Chiles v. Salazar*, 116 F.4th 1178 (10th Cir. 2024), would ask us to believe that talk therapy is not speech, "[t]o know and not to know, . . . to hold simultaneously two opinions which cancel[] out, knowing them to be contradictory and believing in both of them." George Orwell, *1984* 32 (Signet 1992) (1949). But "two and two [do not make] five," *id.* at 69, and Ms. Chiles wishes to engage in what is, both constitutionally and linguistically, speech.

Just six years ago this Court warned against attempts to "mark off new categories of speech for diminished constitutional protection," particularly when such categories would exempt government restrictions on speech "from the normal prohibition on content-based restrictions." *NIFLA*, 585 U.S. at 767 (internal quotation marks omitted). Indeed, as here, that case dealt with an attempt to exempt content-based laws by claiming that they

2. *See, e.g.*, *Brokamp v. James*, 66 F.4th 374, 380 n.1 (2d Cir. 2023) ("The National Institute of Mental Health explains that 'talk therapy' is another name for 'psychotherapy,' which 'refers to a variety of treatments that aim to help a person identify and change troubling emotions, thoughts, and behaviors."); *Otto v. City of Boca Raton*, 41 F.4th 1271, 1290 (11th Cir. 2022) (Rosenbaum, J., dissenting from den. of reh'g en banc) ("Talk therapy is also known as psychotherapy.").

restricted only less-protected professional speech. This Court rejected that attempt, reminding the Ninth Circuit that there is no per se exemption to regulate "professional speech." *Id.* at 768. Any lesser protection was limited to "two circumstances": requiring that professionals "disclose factual, noncontroversial information in their 'commercial speech'," and "regulat[ing] professional conduct[] even though that conduct incidentally involves speech." *Id.* Any other exception would require "persuasive evidence . . . of a long (if heretofore unrecognized) tradition to that effect." *Id.* at 767 (ellipsis in original) (internal quotation marks omitted).

To make it apply, the panel majority analyzed the second exception for professional speech at a very general level of government regulation, in a way that "permit[s] . . . a narrow exception to swallow the rule." *City of L.A. v. Patel*, 576 U.S. 409, 424-25 (2015). Rather than analyzing whether *Ms. Chiles's talk therapy* was speech or conduct that only incidentally involved speech, the majority jumped first to Colorado's Minor Conversion Therapy Law ("MCTL"), and then all the way to Colorado's "more comprehensive Mental Health Practice Act, which regulates an array of conduct engaged in by mental health professionals when treating clients." *Chiles*, 116 F.4th at 1205. And the panel then focused on the parts of the Practice Act that are not speech-related, such as prohibiting professionals from "performing services outside of the person's area of . . . experience; and using rebirthing as a therapeutic treatment." *Id.* (cleaned up). This shift in generality is akin to asking how to groom the flocks of a Bergamasco sheepdog's coat by studying the hair of all mammals, including cats, elephants, and whales. After analyzing at too high a level of generality,

and focusing on non-speech related examples, the panel majority unsurprisingly concluded that the subject of Colorado's "regulations is . . . undoubtedly, professional conduct." *Id.*; *see also id.* at 1207-08 (rejecting free speech implications of the claim that Ms. Chiles "only uses words when counseling clients," by transforming her claims to the more generic act of "treating patients").

Having ruled that the Practice Act regulated conduct, the *Chiles* majority acknowledged that it remained to "consider whether the MCTL 'incidentally involves speech'." *Id.* at 1208. George Orwell lamented that "political speech and writing" had "largely" devolved into "the defence of the indefensible" through the ample use of "euphemism, question-begging and sheer cloudy vagueness." George Orwell, *Politics and the English Language*, Orwell Foundation (June 4, 2025), https://perma.cc/EGA8-VJP9. The panel majority cloaked the essence of talk therapy as speech in such generic euphemisms, stating that "the MCTL regulates the provision of a therapeutic modality—carried out through use of verbal language." *Chiles*, 116 F.4th at 1208. These vague phrases misleadingly focus the court's analysis away from the regulation of Ms. Chiles's speech and toward the general regulation of "which treatments Ms. Chiles may perform in her role as a licensed professional counselor." *Id.* at 1210.

Speech is the essence of Ms. Chiles's patient practice, not incidental to it. "Talk therapy" is an autology: the phrase describes the properties that it holds, namely, that it is talk. It is only through conversation that a therapist helps "a person become aware of automatic ways of thinking that are inaccurate or harmful . . . and

then [helps the person] question those thoughts"; through dialogue the therapist and patient "[i]dentify ways to cope with stress and develop problem-solving strategies"; and they "[u]se supportive counseling to explore troubling issues and receive emotional support." National Institute of Mental Health, *Psychotherapies* (June 3, 2025, 12:59 pm), https://perma.cc/FME3-LRVA. And the record establishes that Ms. Chiles "uses only talk therapy in her counseling practice," to "assist clients with their stated desires and objectives." *Chiles*, 116 F.4th at 1193; *see id.* at 1207 ("She explains she only uses words when counseling clients. . . ."). Speech is not incidental to talk therapy—without speech suffusing its every part, psychotherapy could not exist.

The *Chiles* majority attempts to save the argument that Colorado incidentally restricts Ms. Chiles's speech by pointing to *Planned Parenthood v. Casey*, 505 U.S. 833 (1992). But *Casey* only undermines the panel majority's argument. The informed-consent requirement at issue there did not prevent doctors from performing abortions (the regulated conduct). In fact, the opposite is true. The regulation *allowed* doctors to perform abortions so long as they gave prospective patients certain information for informed consent. *Id.* at 881-84. The regulation was incidental because the physician could still carry out the procedure. By contrast, the regulation here "does not facilitate informed consent to a medical procedure." *NIFLA*, 585 U.S. at 770. It targets *and prohibits* the speech that Ms. Chiles and her patients believe will help them.

A close examination of *Casey* and *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416 (1983), which the *Casey* Court relied on, reveals a further flaw in the

panel majority's decision: to survive scrutiny, a law must leave a safety valve for the physician's judgment regarding a particular patient's needs. The statute in *Casey* did not "prevent the physician from exercising his or her medical judgment," to decline the notice if "he or she reasonably believed that furnishing the information would have resulted in a severely adverse effect on the physical or mental health of the patient." *Casey*, 505 U.S. at 883-84 (internal quotation marks omitted); *see also id.* at 882 (noting that one of the "two purported flaws in the Akron ordinance . . . [was] a rigid requirement that a specific body of information be given in all cases, irrespective of the particular needs of the patient" (internal quotation marks omitted)).

No such protection for the therapist or patient exists here. Colorado claims concern about practices that "increase . . . isolation, self-hatred, internalized stigma, depression, anxiety, and suicidality" in minors. *Chiles*, 116 F.4th at 1223 (internal quotation marks omitted); *see also id.* at 1215 (noting interest in preventing suicidality). This purported solicitude for individuals experiencing gender identity issues apparently does not extend to those seeking treatment from Ms. Chiles, i.e., to individuals for whom the state's prescribed treatment—gender-affirming care—could increase their self-hatred, anxiety, depression, and suicidality.

As noted by a recent American Psychological Association task force, which collected 16 meta-analyses on the therapy relationship, "a number of relationship factors—such as agreeing on therapy goals . . . are at least as vital to a positive outcome as using the right treatment method." Tori DeAngelis, *Better relationships*

with patients lead to better outcomes, 50 Monitor on Psychology 38 (November 1, 2019), American Psychological Association (June 10, 2025, 9:56 am), https://perma.cc/H5QH-P2FY?type=image. Indeed, the task force chair explained that "[a]nyone who dispassionately looks at effect sizes can now say that the therapeutic relationship is as powerful, if not more powerful, than the particular treatment method a therapist is using." *Id.*

Colorado's law leaves no room for patients who could develop a strong therapeutic relationship with Ms. Chiles, based on a shared worldview, to pursue the therapy goals indicated by her professional opinion and the patients' desires. Even though that relationship is critical to the patient success the state purports to pursue.

The law at issue here does not fall into any recognized exception for content-based restrictions on speech, and strict scrutiny should apply.

B. Courts should not allow the government to limit First Amendment freedoms by manipulating the level of scrutiny.

The threat of hierarchical name games—manipulating definitions so that courts will analyze laws at more general, abstract levels—is a too-prevalent threat to First Amendment protection. The panel majority here bypassed the freedom of speech protection that should inhere in something called and characterized as "talk therapy" by refusing to apply the required constitutional analysis to Ms. Chiles's speech. It didn't even apply it to the slightly more general category of talk therapy. Rather, the court's analysis focused on mental health treatment

in general, or to the even more general categories of "health care" and "medical treatment." *Chiles*, 116 F.4th at 1210-1211. Such "sliding up the generality scale . . . risks denying constitutional protection" whenever individuals "draw distinctions more specific than the government's preferred level of description," and it allows courts and "civil authorities to gerrymander their inquiries based on the parties they prefer." *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n*, 584 U.S. 617, 652-53 (2018) (Gorsuch, J., concurring).

The word games here benefit the state because "[t]he more abstract the level of inquiry, often the better the governmental interest will look. At some great height, after all, almost any state action might be said to touch on 'one or another of the fundamental concerns of government.'" *Yellowbear v. Lampert*, 741 F.3d 48, 57 (10th Cir. 2014). That is, the panel heightens the perceived need for government control by casting this case as an inherent attack on the state's ability to regulate medical treatment at all, leaving us to imagine the horrors of individuals performing procedures "without clinical justification" or "outside of the provider's area of training, expertise, or competence," *Chiles*, 116 F.4th at 1211 (cleaned up). But this case is not about allowing phlebotomists to perform facial reconstructions; it is about allowing a professional to say the things she judges will best help her patients meet their goals.

Then-Judge Gorsuch raised this issue in *Yellowbear v. Lambert*, in the context of prisoner accommodations under the Religious Land Use and Institutionalized Persons Act, where the government failed to demonstrate that its interest in denying Mr. Yellowbear access to a sweatlodge

was compelling "in the context of 'the burden on *that person*.'" *Yellowbear*, 741 F.3d at 57 (emphasis in original). Similarly, in *Solantic, Ltd. Liab. Co. v. City of Neptune Beach*, 410 F.3d 1250 (11th Cir. 2005), the government attempted to justify its sign restrictions by reciting its "interests only at the highest order of abstraction, without ever explaining how they" were served by the restrictions and exemptions at issue. *Id.* at 1267.

Such manipulation of the level of scrutiny also afflicts political speech. The government may simply take a category of regulation, previously approved by this Court, and expand it to include new behavior. For example, tiring of a citizen "pressing his views with legislators," Missouri ordered him to register as a lobbyist and comply with ongoing lobbyist reporting requirements. *See Calzone v. Summers*, 942 F.3d 415, 418 (8th Cir. 2019) (en banc). One would not normally consider individuals like Calzone or Boy Scout troop members to be lobbyists merely because they meet with legislators and testify before committees, especially where no pay or money was involved. But because this Court had previously allowed limited regulation of paid lobbying in *United States v. Harriss*, 347 U.S. 612 (1954), Calzone had to challenge the law up and down state and federal courts. *See Calzone v. Summers*, 909 F.3d 940, 948-49 (8th Cir. 2018) (holding that activities were lobbying and affirming under *Harriss*), *reversed en banc*, 942 F.3d 415.[3]

3. Such attempts to control citizen communication with the government is not unique. The New York Times reviewed the story of a woman, Kat Sullivan, who "rented a billboard . . . in upstate New York to call for stronger protections against child sex abusers." Vivian Wang, *Abuse Victim's 3 Billboards Called for Stronger Laws. Then the State Showed Up* N.Y. Times, July 31,

A similar problem arises in campaign-finance cases, where courts have repeatedly turned as-applied challenges into facial challenges and then held that plaintiffs whose rights have been violated cannot meet the higher burdens for such challenges. In *Holmes v. Fed. Election Comm'n,* 875 F.3d 1153 (2017), *cert. denied* 584 U.S. 979 (2018), for example, plaintiffs challenged whether campaign contributions in an amount Congress had determined would not risk corrupting a candidate—$5,200 at that time—had to be split between the primary and general elections or could be donated all at once during the general election. *Id.* at 1159. The D.C. Circuit refused to apply the closely drawn scrutiny test for campaign contribution requirements under *Buckley v. Valeo*, 424 U.S. 1, 25 (1976), to the plaintiffs' circumstances in their as-applied challenge. Rather, it treated the case as a follow-on to the facial challenge in *Buckley* and held that since the overall contribution limits regime had been upheld under closely drawn scrutiny, it saw "no basis for requiring Congress to justify its choice concerning" the timeframe of the regime. *Holmes,* 875 F.3d at 1162.

In *Worley v. Cruz-Bustillo*, 717 F.3d 1238 (11th Cir. 2013), *cert. denied*, 571 U.S. 991 (2013), the Eleventh Circuit evaded review of Florida's political committee statutes as applied to plaintiff's circumstances at that time by converting the case to a facial challenge based on a hypothetical presented by the court at oral argument. *Id.* at 1242 n.2. The four plaintiffs had objected to the requirement that they create a political action committee before they could get together to spend $600 on radio ads

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2019 (June 10, 2025, 10:55 am), https://nyti.ms/4kFblmi. Sullivan was threatened by the "state's ethics commission . . . that she could be guilty of a misdemeanor and fined more than $40,000" for failing to register as a lobbyist.

opposing a referendum. *Id.* at 1240. To avoid mootness, they pled that "they want[ed] to do this again." *Id.* at 1242 n.2. At oral argument, the panel asked what plaintiffs would do if money were given to them, and counsel responded, "well, if someone gave them a million dollars, they would be happy to spend that." *Id.* The court used this hypothetical to determine that the plaintiffs' as-applied challenge was not sufficiently defined and "analyzed th[e] case as a facial challenge." *Id.*

In *Justice v. Hosemann*, 771 F.3d 285, 293 (5th Cir. 2014), *cert. denied*, 578 U.S. 905 (2016), the Fifth Circuit similarly converted an as-applied challenge to a facial one and then held that the challengers could not meet the more-stringent standard. *Id.* at 292-95, 300. Like the *Worley* court, the Fifth Circuit could not "find it plausible that" plaintiffs "would have capped their spending" at the level asserted in their as-applied challenge. *Id.* at 293.

Cases like these and *Chiles* show that the level of scrutiny that should be used to protect First Amendment rights is too easily manipulated: by toggling back and forth between facial and as-applied challenges, by playing with the level of abstraction at which interests or regulations are applied, or simply by playing with names. "Precision of regulation must be the touchstone in an area so closely touching our most precious freedoms," *NAACP v. Button*, 371 U.S. 415, 438 (1963), but the way courts are applying heightened scrutiny is far from it. Unless laws threaten other, additional First Amendment rights—requiring facial analysis to protect additional rights—courts should address the challenges brought before them, and they should address the burdens placed "on *that person*.'" *Yellowbear*, 741 F.3d at 57 (emphasis in original).

II. Restrictions on First Amendment rights require strong evidence to demonstrate a compelling interest

A. Colorado failed to produce evidence reliable enough to limit Ms. Chiles's protected First Amendment speech.

"In all very numerous assemblies, of whatever characters composed, passion never fails to wrest the sceptre from reason." *The Federalist* No. 55 (James Madison). Nonetheless, because "Congress is a coequal branch of government whose Members take the same oath [as judges] do to uphold the Constitution," *Nw. Austin Mun. Util. Dist. No. One v. Holder*, 557 U.S. 193, 206 (2009) (internal quotation marks omitted), and because courts are mindful of their "institutional role," *id.* at 205, courts frequently defer to Congress, as well as to other legislative bodies. Where core First Amendment freedoms are involved, and especially where the government is making content-based distinctions, however, courts should require that the state demonstrate a compelling interest for its law and that the law be narrowly tailored to serving that interest. *See Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). Demonstrating such a compelling interest necessarily requires strong evidence, not the professional consensus based on questionable research that Colorado produced here.

Many concerns combined to make Colorado's evidence too unreliable to sustain the restrictions on Ms. Chiles's protected speech: lack of legislative evidence standards, political pressures, biases, and an unreliable professional consensus.

Unlike the courts, legislative bodies do not have anything like the *Daubert* standard to ensure that decisions are based on information that is "not only relevant, but reliable." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 147 (1999). Legislatures may thus face a deluge of partially correct or incorrect information. At the same time, legislators know they must please ideologically extreme primary voters—by taking more polarized positions themselves—or risk being unseated in a primary. *See* David Brady, Hahrie Han, and Jeremy Pope, *Primary Elections and Candidate Ideology: Out of Step with the Primary Electorate?*, 32 Legislative Studies Quarterly 79, 98-99 (2007), https://www.jstor.org/stable/40263411.

Then, facing a deluge of information and pressure to take extreme positions, they must make decisions through the lenses of confirmation bias and selective information processing—"psychological tendencies" that lead individuals to accept and give greater weight to information that confirms "pre-existing biases" and beliefs, and to ignore or give less weight to information that contradicts them. *State v. Rashad*, 484 S.W.3d 849, 861-62 (Mo. Ct. App. 2016).[4]

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4. *See Carmody v. Bd. of Trs. of the Univ. of Ill.*, 747 F.3d 470, 475 (7th Cir. 2014) (noting "decades of behavioral research" about biases on decision-making like confirmation bias); Sara Gordon, *Crossing the Line: Daubert, Dual Roles, and the Admissibility of Forensic Mental Health Testimony*, 37 Cardozo L. Rev. 1345, 1376 (2016) (discussing clinical practice and noting that, "[b]ecause of the ambiguities inherent in mental health diagnosis and forensic assessment, confirmation bias may be the most common cognitive error in psychiatry" (internal quotation marks omitted)); Ginsey Kramarczyk, *The Media, A Polarized America & ADR Tools to*

The danger of poor legislative decision-making was exacerbated here by a purported consensus of professional authority, a consensus that silenced opposing views and was based on methodological flaws. The claimed consensus was introduced below by a task force report by the American Psychological Association and the testimony of a task force member. According to the district court, "the record amply shows that the [MCTL] comports with the prevailing medical consensus regarding conversion therapy and sexual orientation change efforts." *Chiles*, 116 F.4th at 1216 (internal quotation marks omitted). An expert witness for the state, the chair of the APA Task Force on whose report the court relied, *Id.* at 1217 n.42, testified that "the scientific research and professional consensus is that conversion therapy is ineffective and poses the risk[] of harm," *id.* at 1217 (alternation in original) (internal quotation marks omitted).

But there was evidence to the contrary. This case was appealed at the preliminary injunction stage, and Ms. Chiles chose to rely on her verified complaint, which "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." *Id.* at 1219 (first alteration in original) (internal quotation marks omitted). The panel majority dismissed the existence of

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Enhance Understanding of Perspectives, 19 Pepp. Disp. Resol. L.J. 127, 150-51 (2010), (discussing "universal human tendencies" that lead to "erroneous judgments," including cognitive biases like selective perception and confirmation bias); Keith Findley and Michael Scott, *The Multiple Dimensions of Tunnel Vision in Criminal Cases*, 2006 Wis. L. Rev. 291, 312-13 (2006), (noting empirical research on confirmation bias)

this evidence in a footnote, stating that this evidence would merely "create two permissible views of the evidence," *id.* at 1220 n.46, and it could not "say the district court clearly erred by crediting the evidence proffered by Defendants," *id.* The panel majority also rejected the dissent's argument "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." *Id.* at 1219 n.45.

The court of appeals failed to engage with evidence critical to preserving First Amendment freedoms in part by disregarding its own precedent regarding the independent review of constitutional facts. As this Court has explained, Courts have an "obligation" to independently review constitutional facts "because the reaches of the First Amendment are ultimately defined by the facts it is held to embrace." *Hurley v. Irish-Am. Gay, Lesbian and Bisexual Grp. of Boston*, 515 U.S. 557, 567 (1995). And the Tenth Circuit has taken an expansive view of this doctrine: "In a matter involving First Amendment rights, we review the district court's decision de novo, conducting an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." *Cressman v. Thompson*, 798 F.3d 938, 946 (10th Cir. 2015) (internal quotation marks omitted). This independent review requires that "[t]he factual findings," not just "the conclusions of law," be "reviewed without deference to the trial court." *Id.* (internal quotation marks omitted).

When perspectives are in flux and sentiments run deep, and when properly constructed studies run scarce,

such independent review is particularly appropriate. In 1966, within the lifetimes of the majority of this Court's members, Congress relied on the "expert views," *Boutilier v. Immigration & Naturalization Serv.*, 363 F.2d 488, 491 (2d Cir. 1966), of the United States Public Health Service for the conclusion "that the term 'psychopathic personality' alone was sufficient" to "exclude homosexuals" from the country, such that Congress could rely on the exclusion for psychopathic personalities without needing a separate provision to exclude them, *id.* at 493; *see also id.* at 491 (affirming individual's exclusion based on a certificate from the Public Health Service that petitioner "'was afflicted with a class A condition, namely, psychopathic personality, sexual deviate'"). In 1986, this Court upheld "the constitutionality of a Georgia law deemed to criminalize certain homosexual acts." *Obergefell v. Hodges*, 576 U.S. 644, 661 (2015) (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)). And in 1996, Congress passed a law defining marriage "as 'only a legal union between one man and one woman as husband and wife,'" and many states did the same. *Id.* at 662.

It was only 22 years ago that this Court—citing an "emerging awareness" of the constitutional protection "in matters pertaining to sex"—legalized same-sex sexual relations. *Lawrence v. Texas*, 539 U.S. 558, 572 (2003). And it was only ten years ago that this Court held that the laws "defin[ing] marriage as a union between one man and one woman" were unconstitutional. *Obergefell*, 576 U.S. at 653-54.

In *Lawrence*, Justice Scalia placed the Court's decision in the broader context of a "culture war." 539 U.S. at 602 (Scalia, J., dissenting). In *Obergefell*, the Court noted

that "substantial cultural and political developments" in "the late 20th century" had allowed "same-sex couples [to begin leading] more open and public lives and to establish families," and observed that this change had triggered "a quite extensive discussion . . . in both governmental and private sectors and . . . a shift in public attitudes toward greater tolerance." 576 U.S. at 661. Whether one speaks of culture wars or emerging awareness, law and society have been in flux.

And the mental health community has, unsurprisingly, been drawn into this flux. As noted above, it once defined same-sex attractions as a psychopathy that precluded one's presence in the country. Until 1973, the American Psychological Association included homosexuality in its Diagnostic and Statistical Manual of Mental Disorders. *Tingley v. Ferguson*, 47 F.4th 1055, 1064 (9th Cir. 2022). "Shortly thereafter the American Psychological Association declared that homosexuality is not an illness," and "many mental health providers began questioning and rejecting the efficacy and appropriateness of SOCE therapy." *Pickup v. Brown*, 740 F.3d 1208, 1222 (9th Cir. 2014). Rather, "mainstream mental health professional associations [began to] support affirmative therapeutic approaches to sexual orientation that focus on coping with the effects of stress and stigma." *Id.* And the state's expert witness in this case opined that the current "scientific research and professional consensus is that conversion therapy is ineffective and poses the risk[] of harm." *Chiles*, 116 F.4th at 1217 (alteration in original) (internal quotation marks omitted).

But Colorado's law was not just the product of fluctuating mores and professional opinion, but also of a crisis in scientific methodology. As Judge Hartz noted in

his dissent, the studies supporting the state's prescribed treatment were produced during a replication crisis in the social sciences, in which the "average reproducibility" of social science experimental studies was "between 35% and 75%." *Id.* at 1238 and 1238 n.6.[5] This reproducibility crisis means that the findings of "many individual studies, and even of groups of studies . . . cannot be replicated by subsequent researchers"—that is, even when "later scholars conduct an identical or comparable experiment, they reach different results." Joshua Silverstein, *A Critical Perspective on Formative Assessment Mandates* 77 U. Ark. Little Rock L. Rev. 189, 211 (Winter 2005). This crisis "is particularly severe in the social sciences, such as psychology." *Id.* at 212. That is, this crisis especially afflicts the studies upon which the state relies.

There are a number of possible sources for the replication crisis, "including publication bias in favor of statistically significant findings, pressure to produce research in academia, statistical issues, and questionable research practices." *Id.* One issue in psychology is the use of "insufficiently large sample sizes, which affects the reliability of statistical tests of the effects." *Id.* at 212-13 (internal quotation marks omitted). Moreover, "[e]arly studies on a topic are often less trustworthy than later work." *Id.* at 213.

Indeed, going to the relative youth of this field, the APA Task Force Report noted "a 'complete lack' of

5. *See* Melanie Fessinger, Bradley McAuliff, and Anthony Perillo, *The State of Open Science in the Field of Psychology and Law*, 49 Law & Human Behavior 54, 67 (Feb 2025), (noting few efforts "in psychology and law" to replicate studies, making it difficult to "illuminate" the extent of the problem in those fields).

'rigorous recent prospective research' on SOCE," and "that 'nonaversive and recent approaches to SOCE have not been rigorously evaluated.'" *Otto*, 981 F.3d at 868-69. In particular, it reported "mixed views" in the studies that had been conducted about "speech-based SOCE," with some participants reporting "they ha[d] been harmed and others who perceive[d] they ha[d] benefited from nonaversive SOCE." *Id.* at 869 (internal quotation marks omitted).

The Cass Report, which was "[c]ommissioned by England's National Health Service and led by Dr. Hilary Cass, former President of the Royal College of Paediatrics, . . . cast serious doubt on the current state of youth transgender medicine." *Chiles*, 116 F.4th at 1240 (Hartz, J., dissenting) (footnote omitted). The report "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.* (alteration in original) (internal quotation marks omitted). It concluded that youth transgender medicine "is an area of remarkably weak evidence," with "no good evidence on the long-term outcomes of interventions to manage gender-related distress." *Id.* (internal quotation marks omitted).

Following the Cass Report and other international scrutiny of gender-affirming care, the U.S. Department of Health and Human Resources recently completed its own review of the evidence and best practices. *See* Dep't of Health and Hum. Servs., *Treatment for Pediatric Gender Dysphoria: Review of Evidence and Best Practices* (May 1, 2025) (HHS Review), available at http://bit.ly/4jJvINS; *see id.* at 60-62 (discussing international

scrutiny). It noted "the exceptional nature of this area of medicine," where decisions whether to treat youth are "based entirely on subjective self-reports and behavioral observations, without any objective physical, imaging, or laboratory markers." *Id.* at 10. There are other areas of medicine where individuals are treated based on their own self-reporting, but it is a concern here for a number of reasons. The patients are youth, whose "attitudes, feelings, and behaviors . . . are known to fluctuate." *Id.* The gender-affirming model that the state prescribes involves treatments that are "invasive, usually irreversible, and" without good evidence that they benefit the patients. *Id.* at 21. And gender dysphoria tends to resolve on its own if no treatment is given. *Id.*

The HHS Review also raised epistemological problems with the studies supporting the gender-affirming protocols mandated by states like Colorado. "The scientific foundation for the rapid expansion of PMT [pediatric medical treatment] was largely underpinned by two Dutch studies, published in 2011 and 2014, which followed the same patient cohort." HHS Review at 57. The study was based on a biased sample: rather than using randomized methods for selecting the observation sample, it used a "retrospective selection of 70 subjects from a larger 'intent-to-treat' group of 111." HHS Review at 57. Such selection bias decreases the variation in the dependent variable to be studied, and it thus affects whether any causal effects can be determined: "When observations are selected on the basis of a particular value of the dependent variable, nothing whatsoever can be learned about the causes of the dependent variable without taking into account other instances when the dependent variable takes on other values." Gary King, Robert Keohane, and Sidney

Verba, *Designing Social Inquiry: Scientific Inference in Qualitative Research* 129 (1994).

The follow-up study had an even smaller sample size, and the ability to assess the treatment's efficacy was further diminished because the participants already suffered from only mild symptoms. *See* HHS Review at 58.

Demonstrating confirmation bias, proponents of gender-affirming care used the Dutch study to support gender-affirming care, leaving the methodological flaws "largely unacknowledged." *Id.* at 59. What's more, scientists failed to publish difficulties replicating the study's results. Results from an effort to replicate the study in the United Kingdom were delayed for five years—released only "following a complaint to the U.K. Health Research Authority." HHS Review at 103. And "similar reluctance to report on disappointing findings" may have happened in the United States and elsewhere. *Id.* at 104 (discussing other studies).

At the same time, there has been "a dearth of research on psychotherapeutic approaches to managing gender dysphoria in children and adolescents," which has been "due in part to the mischaracterization of such approaches as 'conversion therapy.'" *Id.* at 16. Indeed, the HHS Review found "evidence of extreme toxicity and polarization surrounding this field of medicine," concluding that one finds "few other areas of healthcare where professionals are so afraid to openly discuss their views." *Id.* at 21.

Disagreement—and, sadly, even attempts to silence differing viewpoints—is expected in this young discipline. In his *The Structure of Scientific Revolutions*, Thomas Kuhn wrote "that the early developmental stages of most

sciences have been characterized by continual competition between a number of distinct views of nature." Thomas S. Kuhn, *The Structure of Scientific Revolutions* 4 (3rd ed., Univ. of Chicago Press 1996).[6] At the early stages, the different views in a field were "partially derived from, and all [were] roughly compatible with" the observations of the time, and "they were all 'scientific'." *Id.* They nonetheless differed from one another because scientific theory is not wholly determined by gathered data: "An apparently arbitrary element, compounded of personal and historical accident, is always a formative ingredient of the beliefs espoused by a given scientific community at a given time." *Id.* In particular, the different theories result from "incommensurable ways of seeing the world and of practicing science in it." *Id.* The result, one that "[p]hilosophers of science have repeatedly demonstrated," is "that more than one theoretical construction can always be placed upon a given collection of data." *Id.* at 76.

Thus the belief that one "knows what the world is like" may have an "element of arbitrariness." *Id.* at 5. But

6. According to the Stanford Encyclopedia of Philosophy, "Thomas Samuel Kuhn (1922–1996) is one of the most influential philosophers of science of the twentieth century, perhaps the most influential. His 1962 book *The Structure of Scientific Revolutions* is one of the most cited academic books of all time." *Thomas Kuhn*, Stanford Encyclopedia of Philosophy (June 9, 2025, 11:47 pm), https://plato.stanford.edu/entries/thomas-kuhn/. *See also* Alexander Bird, The Structure of Scientific Revolutions *and its Significance: An Essay Review of the Fiftieth Anniversary Edition*, 63 The British Journal for the Philosophy of Science 1 (Dec 2012) (June 9, 2025, 11:50 pm), https://www.jstor.org/stable/23356448 (noting that the book "has a strong claim to be the most significant book in the philosophy of science in the twentieth century").

despite our dislike of the arbitrary, science—especially in its early stages—could not exist without it: We should not believe "that any scientific group could practice its trade without some set of received beliefs." *Id.* at 4. Such certainty about the world gives the scientific community the confidence and energy needed to proceed. And "[m]uch of the success of the enterprise derives from the community's willingness to defend" the assumption that the "community knows what the world is like." *Id.* at 5. But that also means that the community "often suppresses fundamental novelties"—suppresses theories predicated on alternative worldviews—"because they are necessarily subversive of its basic commitments." *Id.* at 5.

Thus, given that the treatment of gender dysphoria is at its early stages, early stages where the "[h]istory of science" has shown that "it is not even very difficult to invent . . . alternate[]" theories, *id.* at 76, it is not surprising that there would be dueling practices for treating it. Nor is the "toxicity and polarization" described by the HHS Review necessarily surprising, given that the opposing sides are based on "received beliefs" about the world, Kuhn at 4, and even the very existence of an alternative theory calls into question one's worldview.

While uncertainty, alternative theories, and even attempts to silence opposing views are not surprising, the First Amendment demands better evidence than that provided by Colorado to limit core First Amendment rights. The state has restricted Ms. Chiles's speech based on its content, and it therefore has the burden of demonstrating that it has a compelling interest to limit *her* speech. Colorado's evidence fails to do that, and the decisions by the courts below should be reversed for their failure to properly review that evidence.

B. Courts similarly allow inadequate evidence for restricting campaign contributions.

The panel majority below joined an unfortunately non-exclusive club in its deference to legislative decisions to limit First Amendment rights. In the campaign-finance context, similar damaging deference is seen regarding campaign contribution limits, which should be tailored to the state's interest in preventing actual and apparent corruption. *Buckley*, 424 U.S. at 26. By treating the prevention of corruption and the prevention of the appearance of corruption as separate interests, and then focusing on the latter, however, courts have left First Amendment freedoms at the mercy of popular fears, fears fed by media hype that every politician is a slip away from selling her votes and every donor is trying to buy them.

For example, this Court in *Nixon v. Shrink Mo. Gov't PAC*, 528 U.S. 377 (2000), rejected the argument that the government "must demonstrate that the recited harms are real, not merely conjectural." *Id.* at 392 (internal quotation marks omitted). The Court upheld the law after several anecdotes, concluding that a statewide referendum demonstrated the state's interest in combating the appearance of corruption, because "[a]n overwhelming 74 percent of the voters of Missouri determined that contribution limits are necessary to combat corruption and the appearance thereof." *Id.* at 394 (internal quotation marks omitted). But should popular perception really suffice to deny others their First Amendment rights, devoid of any objective evidence of actual corruption?

Other courts have used the appearance interest to deny protection for First Amendment rights. For example, in a

ruling on a contribution limits challenge, a district court in Colorado opined that it could not "discount the fact that the very first statement of the constitutional amendment, supported and adopted by a majority of Colorado voters, declare[s] that large campaign contributions to political candidates create the potential for corruption and the appearance of corruption." *Lopez v. Griswold*, Civil Action No. 22-cv-00247-JLK, 2022 U.S. Dist. LEXIS 42803, at *17 (D. Colo. Mar. 10, 2022).

An Oregon court similarly learned from *Nixon* that "strong voter support for campaign finance reform 'attest[s] to the perception' of corruption held by the voters." *In re Validation Proceeding to Determine the Regularity & Legality of Multnomah Cty. Home Rule Charter Section 11.60* ("*In re Validation Proceeding*"), 17CV18006, Opinion and Order, Upon Remand at 4 (Multnomah Cty. Circ. Ct. Aug. 23, 2021). The court upheld a campaign scheme allowing unlimited donations from some groups and no donations from others, *id.* at 2, citing the following evidence: an anecdote from a county commissioner, the opinion of the citizen-led committee that proposed the scheme, and the vote by "88.57% of voters," *id.* at 4. The court said that such a "large majority certainly attests to the wide-spread perception of corruption." *Id.*

But the information provided to the court and the voters hardly sustained any conclusion that corruption was a problem. For example, supporters of the Oregon measure cited a report by the Center for Public Integrity in the county voter pamphlet and in court filings, to the effect that "The Center for Public Integrity concluded that the political finance corruption problem was far greater in Oregon than in . . . other states." Combined

Opening Brief on Remand of These Intervenors, at 32, *In re Validation Proceeding* (Multnomah Cty. Circ. Ct. Aug. 3, 2020); *see also Multnomah County Voters' Pamphlet, Presidential General Election Nov. 8, 2016*, Multnomah County Elections Division, M-30 and M-34 (June 6, 2025, 9:45 am), https://perma.cc/MQA7-W7X2. An examination of this report, which was used to convince voters that their system was corrupt, reveals that its "F grade" was based on an assessment of "the *systems* in place to deter corruption in state government," not an any actual corruption. Lee van der Loo, *Oregon Gets F grade in 2015 State Integrity Investigation*, The Center for Public Integrity (June 6, 2025, 10:24 am), https://perma.cc/H25P-DASP. Indeed, after noting a recent, high-profile scandal that forced the governor to resign, the Center's report remarked on "Oregon's relative lack of scandal." *Id.*

Thus, as in the case below, the government in these cases has relied on uncertain, amorphous evidence to "encroach[] upon protected First Amendment interests." *McCutcheon v. Fed. Election Comm'n*, 572 U.S. 185, 197 (2014) (Roberts, C.J., controlling op.). While restrictions on campaign contributions are subject to a "lesser" standard of review, closely drawn scrutiny is still meant to be "rigorous." *Id.* And that rigorous scrutiny demands that the courts scrutinize the evidence to make sure that it is reliable enough to sustain restrictions on First Amendment rights.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision by the Tenth Circuit.

Respectfully submitted,

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