

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

**BRIEF OF AMICUS CURIAE
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SUPPORTING PETITIONER**

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INTEREST OF AMICUS CURIAE¹

Liberty Counsel is a nonprofit public interest legal organization that advances the freedom of speech, religious liberty, and the sanctity of human life. Liberty Counsel attorneys have represented clients before the United States Supreme Court, federal courts of appeals, and federal and state trial courts nationwide. Its attorneys also have spoken or testified before Congress on matters relating to government infringement on First Amendment rights.

As part of its mission, Liberty Counsel has represented or provided legal counsel to numerous licensed counselors who diagnose and treat patients with emotional and mental disorders and dysfunctions (whether cognitive, affective, behavioral, or sexual), including patients with unwanted same-sex attractions and gender dysphoria. These counselors use talk therapy, whereby the client expresses their stressor to the counselor, and then the counselor helps the client achieve their self-determined objective. Liberty Counsel has challenged several state and local laws that prohibit counselors from helping minor clients with unwanted sexual attractions, behaviors, or confusion. See, *e.g.*, *Otto v. City of Boca*

¹ On December 5, 2024, counsel for Amicus notified the parties' counsel of their intent to file this brief. Despite a two-day delay in notice to the parties, Amicus requested the parties' position on whether any party would lodge an objection to the filing of this brief. Counsel for Petitioners consented to the filing of this brief. Counsel for Respondents did not provide a position on Amicus's request. Further, no counsel for any party authored this brief in whole or in part, and no person other than Amicus or its counsel made a monetary contribution intended to fund this brief's preparation or submission.

Raton, 981 F.3d 854 (11th Cir. 2020); *Vazzo v. City of Tampa*, No. 19-14387, 2023 WL 1466603 (11th Cir. Feb. 2, 2023); *King v. Governor of the State of New Jersey*, 767 F.3d 216 (3d Cir. 2014), *cert denied sub nom.*, *King v. Christie*, 575 U.S. 996 (2015); *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014), *cert denied*, 573 U.S. 945 (2014).² Liberty Counsel therefore has a vital interest in ensuring that the First Amendment rights of licensed counselors are protected against content-based restrictions on speech such as Colo. Rev. Stat. Ann. § 12-245-224(1)(t)(V).

SUMMARY OF ARGUMENT

The decision below has deepened a circuit split over a simple question: Is talk therapy that helps a minor with unwanted same-sex attractions or gender dysphoria conduct or speech? As the petition aptly sets forth, this Court's precedents conclusively say it is the latter, see *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755, 771–772 (2018) (*NI-FLA*), and thus the Court should grant certiorari to resolve the circuit split, which has had a profound impact on both the First Amendment rights of licensed counselors and the mental health of minors.³

² See also *Mountain Right to Life, Inc. v. Becerra*, 585 U.S. 1027 (2018) (granting petition for writ of certiorari in challenge to California law that mandated crisis pregnancy centers to notify women about the availability of state-sponsored services, including abortion, and vacating Ninth Circuit decision in light of *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 585 U.S. 755 (2018)).

³ Amicus has also represented minors and their parents who have sought to receive counseling for unwanted same-sex

Amicus submits this brief because, as Judge Hartz recognized in his dissent, this case presents another important question for this Court’s consideration: “whether a court should treat as ‘science’ the pronouncements of prestigious persons or organizations that are not supported by sound evidence.” *Chiles v. Salazar*, 116 F.4th 1178, 1226 (10th Cir. 2024) (Hartz, J., dissenting). Indeed, this case illustrates a troubling trend whereby government bodies—and by extension, reviewing courts—arbitrarily rely on so-called “expert consensus” to justify infringing the First Amendment rights of persons with which the government disagrees.

Indeed, laws like Colorado’s that ban talk therapy for minors with gender dysphoria and unwanted sexual attractions exemplify the pernicious influence of the “cult of the experts,” a modern phenomenon that aims to reshape the public consciousness by positioning experts as the arbiters of truth while suppressing competing viewpoints. Drawing on the intellectual legacy of Marxist theorists like Antonio Gramsci and the Frankfurt School, today’s “experts” frequently advance ideological objectives under the guise of “science” while encouraging censorship of dissenting viewpoints.

Judicial deference to the “cult of the experts” is inconsistent with the First Amendment’s protection of free expression and the demanding evidentiary standard required by strict scrutiny. Constitutional

attractions but were prohibited from obtaining such counseling because of these counseling prohibitions. See *Doe v. Governor of New Jersey*, 783 F.3d 150 (3d Cir. 2015), *cert denied sub nom.*, *Doe v. Christie*, 136 S. Ct. 1155 (2016).

rights are not determined by a show of hands, even when it comes to purported “experts.” Therefore, the Court’s intervention is needed to clarify that courts must independently evaluate the validity of expert claims, particularly in cases that implicate fundamental constitutional rights.

ARGUMENT

I. “Scientific Consensus” Is Often Ideological, Not Empirical.

As Judge Hartz recognized in his dissent, this “[t]his case presents two distinct, but intertwined, fundamental and important questions.” *Chiles v. Salazar*, 116 F.4th 1178, 1226 (10th Cir. 2024) (Hartz, J., dissenting). The first question—whether “speech by licensed professionals in the course of their professional practices is not speech, but conduct”—is squarely presented in the petition. *Id.* Amicus suggests the “second question”—“whether a court should treat as ‘science’ the pronouncements of prestigious persons or organizations that are not supported by sound evidence”—also warrants this Court’s consideration. *Id.*

Whether courts should uncritically defer to the assertions of professional organizations and so-called experts arises within a broader phenomenon that might be called the “cult of the experts,” where credentialed elites operating as a “consensus” wield disproportionate influence over public discourse, government policy, and judicial decisions. As this case demonstrates, the elevation of experts to near-absolute authority can lead to judicial endorsement of contested, methodologically flawed, and

ideologically driven conclusions presented under the guise of scientific consensus.

A. “Cultural hegemony” and the rise of the expert class.

The rise of expert authority traces its roots to two pivotal historical developments: the Enlightenment’s embrace of rationalism and the Industrial Revolution’s demand for specialized knowledge. The Enlightenment brought a profound shift in thought, namely that empirical reasoning and scientific inquiry could unearth universal truths. See generally *Enlightenment*, Britannica (Oct. 28, 2024).⁴ The Industrial Revolution then put these ideas into practice, during which a new class of specialized knowledge was required to navigate emerging technologies. See generally *Industrial Revolution*, Britannica (Oct. 5, 2024).⁵

By the 20th century, the elevation of expertise had fully infiltrated governance. Progressive-era reformers championed technocratic approaches to public policy, arguing that scientists, economists, and other specialists were better equipped than elected officials to address society’s ills. See Thomas Leonard, *American Progressives and the Rise of Expertocracy*, History of Economics Society Meetings, Grinnell College (June 2006).⁶ This shift reflected not only a confidence in technical know-how but also a growing

⁴ Available at <https://www.britannica.com/event/Enlightenment-European-history>.

⁵ Available at <https://www.britannica.com/event/Industrial-Revolution>.

⁶ Available at <https://www.princeton.edu/~tleonard/papers/expertocracy.pdf>.

unease with the democratic process. As one commentator observed, “[t]he experts declare non-experts incapable of deliberation, excluding ordinary human beings from debate on the grounds of their alleged incompetence.” Nathan Pinkoski, *Coronavirus and the Cult of the Expertise*, *First Things* (Mar. 30, 2020).⁷ Consequently, key decisions moved away from the people and their representatives and into the hands of unelected “experts.”

The ideological framework supporting the modern “cult of the experts” finds significant influence in Marxist thought, particularly Antonio Gramsci’s theory of “cultural hegemony.” Unlike many of his contemporaries during the 1930s Stalinist era, Gramsci took a distinct approach to implementing socialism. He suggested that the path to power hinged less on seizing control of the economy and more on dominating the instruments of “cultural hegemony”—universities, the media, the arts, and the sciences.⁸ Observing that the Bolsheviks’ violent revolution in 1918 was an anomaly, Gramsci argued for a slower, more strategic “war of position.” See generally Antonio Gramsci, *The Antonio Gramsci Reader: Selected Writings 1916–1935* (David Forgacs ed., 2000). In his view, winning control over cultural

⁷ Available at <https://www.firstthings.com/web-exclusives/2020/03/coronavirus-and-the-cult-of-expertise>.

⁸ Defined simply, “cultural hegemony” refers to “domination or rule maintained through ideological or cultural means,” and “[i]t is usually achieved through social institutions, which allow those in power to strongly influence the values, norms, ideas, expectations, worldviews, and behaviors of the rest of society.” Nicki Lisa Cole, *What is Cultural Hegemony?*, ThoughtCo (Aug. 13, 2024), [thoughtco.com/cultural-hegemony-3026121](https://www.thoughtco.com/cultural-hegemony-3026121).

institutions was the most reliable route to embedding socialist ideology within society. See generally Samuel Gregg, *Marxism's Last (and First) Stronghold*, Acton Commentary (Sep. 9, 2019).⁹

Gramsci's concept of cultural hegemony is "deeply rooted in today's theory of intersectionality." Roger Kiska, *Antonio Gramsci's Long March Through History*, 29 Religion & Liberty 3 (Dec. 12, 2019).¹⁰ "It seeks to dismantle the existing cultural hegemony by ideological subversion and opposition, challenging the legitimacy of existing super-structural institutions like family, religion, and political power." *Ibid.* As Gramsci allegedly put it, "In the new order, Socialism will triumph by first capturing the culture via infiltration of schools, universities, churches, and the media by transforming the consciousness of society." *Id.* (citation omitted). In this view, experts are not mere observers but active participants in societal transformation, capable of transforming cultural norms and reshaping the public consciousness.

The above discussion is no conspiracy theory. Just last year, *The Lancet*—the world's most prestigious medical journal—published an editorial openly invoking Antonio Gramsci's theory of cultural hegemony to analyze the modern "culture wars." See Richard Horton, *Offline: We Must Engage in a War of*

⁹ Available at <https://www.acton.org/pub/commentary/2009/09/09/marxism%E2%80%99s-last-and-first-stronghold>.

¹⁰ Available at <https://www.acton.org/religion-liberty/volume-29-number-3/antonio-gramscis-long-march-through-history>.

Position, 401 Lancet 1483 (2023).¹¹ The author cited Gramsci’s concept of a “war of position” as a call to action for those “who wish to advance a more hopeful, compassionate, and liberal vision of the future” to fight back against “populists” on issues related to “race, sex, and gender.” *Id.* The explicit invocation of Gramsci’s framework by the world’s leading medical journal underscores how deeply cultural hegemony has permeated scientific discourse. It also reveals the extent to which science, medicine, and policy are shaped—not by objective inquiry—but by efforts to steer the public consciousness in a particular ideological direction.

Another influence on the rise of the expert class is the Frankfurt School, which studied the ways liberal democracies maintain control through culture and ideology. See *Critical Theory (Frankfurt School)*, Stanford Encyclopedia of Philosophy (Dec. 12, 2023). Emerging in early 20th-century Germany, this group of intellectuals—including Max Horkheimer, Theodor Adorno, and Herbert Marcuse—sought to adapt Marxist theory to the societal structures of the modern world. See generally Martin Jay, *The Dialectical Imagination: A History of the Frankfurt School and the Institute of Social Research, 1923–1950* (1996); Max Horkheimer, *Critical Theory: Selected Essays* (1982); Theodor Adorno & Max Horkheimer, *Dialectic of Enlightenment* (1997). “These men revised, repurposed, and extended classical Marxism by emphasizing culture and ideology, incorporating insights from emerging fields such as

¹¹ Available at <https://www.thelancet.com/action/showPdf?pii=S0140-6736%2823%2900900-5>.

psychoanalysis, and researching the rise of mass media and mass culture.” Allen Mendenhall, *Cultural Marxism is Real*, James G. Martin Center for Academic Renewal (Jan. 4, 2019).¹² Central to their project was the belief that intellectual elites—experts in sociology, psychology, and philosophy—were uniquely positioned to challenge and then remake power structures.

The Frankfurt School took Gramsci’s ideas a step further, critiquing liberal democracies as systems in need of expert-driven interventions to uproot entrenched “oppressions.” Their strategy? Wrap ideological objectives in the language of scientific neutrality. See generally Rolf Wiggershaus, *The Frankfurt School: Its History, Theories, and Political Significance* (1994). In doing so, they helped pave the way for governance models where experts—not elected representatives—steer policy under the guise of serving the public good.

The “cult of the experts” has been pivotal in framing contemporary debates about gender dysphoria and sexuality. Indeed, the intellectual framework for the sexual revolution (in which the Frankfurt School’s Herbert Marcuse played a significant role) is set forth in gender theory and critical pedagogy. See Mike Gonzales & Katharine C. Gorka, *How Cultural Marxism Threatens the United States—and How Americans Can Fight It* 17–18, The Heritage Foundation (Nov. 14, 2022).¹³ Gender theory, often

¹² Available at <https://www.jamesgmartin.center/2019/01/cultural-marxism-is-real/>.

¹³ Available at <https://www.heritage.org/sites/default/files/2022-11/SR262.pdf>.

referred to as gender ideology, traces its intellectual roots to Marxist-Freudian thought. See *id.* One of its key progenitors is Michel Foucault, the French post-structuralist who argued that society’s understanding of gender is a social construct imposed by oppressive forces. See *id.* Operating within the Marxist postmodern framework of “liberation,” Foucault contended that deconstructing traditional gender norms would enable greater individual autonomy and creativity in identity formation. See *id.* at 18 (citing Jay Schalin, *The Politicization of University Schools of Education: The Long March through the Education Schools*, The James G. Martin Center for Academic Renewal (Feb. 19, 2019)). Rejecting the notion of binary sex, Foucault cast doubt on the “naturalness” of gender and sex as societal constructs. *Id.* His philosophy exemplifies a form of cultural Marxism that moves beyond class struggle, recasting the “oppressed versus oppressor” dynamic in terms of sex and gender. *Id.* According to this view, liberation from societal norms and conventional understandings of gender and sex is essential to achieving true freedom. See *id.*

In short, the Marxist intellectual framework has profoundly influenced contemporary approaches to gender dysphoria and sexuality, and it arguably has provided the ideological foundation for viewpoint-based laws like Colorado’s that prohibit therapy that helps minors with unwanted same-sex attractions and gender dysphoria yet permits therapy that encourages such attractions and behaviors.

B. Relying on “scientific consensus” to justify the infringement of First Amendment-protected speech reflects a broader pattern of ideological influence in public policy.

The historical and ideological evolution of the “cult of the experts” directly informs the dynamics at play in this case and other cases in which ideology undermines biological reality and common sense. Cf. *United States v. Skrmetti*, 144 S. Ct. 2679 (2024) (granting certiorari to determine constitutionality of laws prohibiting irreversible surgeries on gender-dysphoric minors). As discussed below, Colorado’s ban on therapy for minors rests on a supposed “medical consensus,” presented as a watertight authority. See *Chiles*, 116 F.4th at 1216. But as history shows, such consensus often reflects not objective truths or science but the cultural and ideological preferences of a select group. From Gramsci’s cultural hegemony to the Frankfurt School’s emphasis on expert-driven social change, the elevation of expert authority has long been intertwined with ideological efforts to reshape Western values—and marginalize dissenting viewpoints.

To be sure, Amicus is not arguing that scientific and medical experts have no role in society. “[E]xperts can make modest contributions to public debate, helping citizens and their leaders make prudential judgments.” Pinkoski, *supra* note 7; but see F.A. Hayek, *The Intellectuals and Socialism*, in *The Intellectuals: A Controversial Portrait* 371 (George B. de Huszar ed., 1960) (reprinted from 16 U. Chi. L. Rev. 417, 421–23, 425–33 (1949)) (observing that “the scientist who takes charge of an institute or

foundation * * * or the active promoter of an organization serving a particular cause, all rapidly cease to be scholars or experts * * * solely in the light of certain fashionable general ideas”). But courts should be skeptical of “the idea of a supreme and authoritative caste of experts whose judgments are unassailable.” Pinkoski, *supra* note 7. That is because “[t]he decision to embark on the scientific enterprise is underpinned by something preceding the scientific method: the reasonable conviction that there is truth, we can know it, and, above all, that it is good to know the difference between truth and error.” Samuel Gregg, *The Specter of Scientism*, Acton Commentary (Sep. 19, 2019).¹⁴ When courts rely on “expert consensus” without scrutinizing its underpinnings, they risk enshrining ideology, not truth, into law. And as discussed below, this concern is not hypothetical; it is evident in the record before this Court.

II. The Tenth Circuit’s Reliance on an Ideologically Driven “Medical Consensus” Poses a Grave Risk for First Amendment-protected Speech and Public Health.

The Tenth Circuit agreed with the district court’s finding that “conversion therapy is ineffective and harms minors who identify as gay, lesbian, bisexual, transgender, or gender non-conforming,” that “the record ‘amply shows that the [MCTL] comports with the prevailing medical consensus regarding conversion therapy and sexual orientation change efforts,’” and that “Colorado considered the body of medical

¹⁴ Available at <https://www.acton.org/pub/commentary/2019/09/18/specter-scientism>.

evidence regarding conversion therapy and sexual orientation change efforts—and their harms * * * and made the decision to protect minors from ineffective and harmful therapeutic modalities.” *Chiles*, 116 F.4th at 1216–17 (quoting *Chiles v. Salazar*, 2022 WL 17770837, at *9 & n.10 (D. Colo. Dec. 19, 2022)).¹⁵

Put simply, the courts below relied on “the prevailing medical consensus” to justify not only violating the First Amendment rights of licensed counselors but preventing minors from *voluntarily* seeking therapy for their *unwanted* same-sex attractions and gender dysphoria. Indeed, the district court went so far as to describe such therapy as “ineffective and harmful.” *Chiles*, 2022 WL 17770837, at *9.

How could it have come to this? How could the same medical associations that condemn talk therapy as “ineffective and harmful” for minors with unwanted same-sex attractions or gender dysphoria champion interventions that involve cutting, stitching, and permanently altering children’s bodies? See Brief of American Psychological Association in Support of Petitioner at 16, 144 S. Ct. 2679 (2024) (No. 23-477) (arguing that “gender-affirming medical care * * * is effective, evidence-based, and safe”). How does a profession that claims to prioritize “do no harm” declare speech—a voluntary dialogue

¹⁵ Terms such as “conversion therapy” and “sexual orientation change efforts, or “SOCE,” are scientifically inaccurate and susceptible to exploitation. In reality, licensed counselors use mainstream therapeutic modalities to help clients identify and resolve issues that might be inhibiting desired heterosexual adaptation. This brief uses “SOCE” only where context requires.

between a counselor and client—as inherently dangerous, while endorsing the irreversible removal of healthy reproductive organs as a life-affirming act? See *id.* And how does the term “consensus”—so confidently wielded—come to mean the suppression of any perspective that challenges this narrative? See, e.g., Ryan T. Anderson & Robert P. George, *Physical Interventions on the Bodies of Children to “Affirm” their “Gender Identity” Violate Sound Medical Ethics and Should be Prohibited*, Public Discourse (Dec. 8, 2019).¹⁶

Amicus suggests an answer: The “medical consensus” is less a product of dispassionate scientific inquiry and more a reflection of cultural and ideological forces at work. As Judge Hartz astutely observed, “[c]onsensus is irrelevant to science.” *Chiles*, 116 F.4th at 1237 (Hartz, J., dissenting). Indeed, as discussed below, the supposed harms of talk therapy rest on the flimsiest of evidence—a handful of studies riddled with methodological flaws, self-reported anecdotes, and the convenient omission of any inquiry into minors who might benefit from exploring these feelings in alignment with their faith or biological sex. Yet these same medical associations enthusiastically back the administration of puberty blockers and cross-sex hormones to adolescents, despite growing international skepticism and admissions that long-term effects remain unknown. See *Chiles*, 116 F.4th at 1240 (Hartz, J., dissenting)

¹⁶ Available at <https://www.thepublicdiscourse.com/2019/12/58839/>.

(citing studies).¹⁷ But here in the United States we are told it is settled: affirming same-sex attractions and transgenderism is the only path; resolving unwanted feelings is dangerous—and forbidden. The First Amendment demands more.

A. There is no evidence-based “consensus” on therapy for minors with unwanted same-sex attractions and gender dysphoria.

As Amicus has previously argued before this Court, mental health counseling that helps a client align their feelings and behaviors with their religious beliefs and biological reality—unlike invasive medical procedures involving drugs and surgeries—is First Amendment-protected speech. See Brief of Liberty Counsel in Support of Petitioner, *United States v. Skrametti*, 144 S. Ct. 2679 (2024) (No. 23-477). And as Judge Hartz observed, to justify suppressing speech, “there needs to be evidence, good evidence, to support that.” *Chiles*, 116 F.4th at 1237 (Hartz, J., dissenting). “A vote by a professional organization might be indicative that there is such evidence, but it is not a substitute.” *Id.*

Here, the evidence cited to support prohibiting First Amendment-protected speech is ideological, not empirical. When passing the Minor Therapy Conversion Law, Colorado purportedly “considered the body of medical evidence regarding conversion

¹⁷ Indeed, Finland, Sweden, and the United Kingdom are scaling back such treatments after questioning their safety and efficacy. See Azeen Ghorayshi, *Youth Gender Medications Limited in England, Part of Big Shift in Europe*, N.Y. Times (April 9, 2024), <https://perma.cc/D68U-EWRK>.

therapy and sexual orientation change efforts—and their harms.” *Chiles*, 116 F.4th at 1217. Yet clinical and scientific evidence has consistently demonstrated that exploring a client’s unwanted same-sex attractions and behaviors through talk therapy is safe and effective. See, e.g., Paul Santero et al., *Effects of Therapy on Religious Men Who Have Unwanted Same-Sex Attraction*, 85 *Linacre Q.* 1–17 (2018); Stanton L. Jones et al., *A Longitudinal Study of Attempted Religiously Mediated Sexual Orientation Change*, 37 *J. Sex & Marital Therapy* 404 (2011); Elan Karten et al., *Sexual Orientation Change Efforts in Men*, *J. Men’s Studies* 84–102 (2010). The record shows that Colorado did not consider these studies when relying on the “medical consensus,” a fact that suggests that the legislature’s motivations were more ideological than scientific.

Consider also the pushback against such therapy. Clients seeking counseling typically hold traditional religious beliefs, and their primary goal in seeking counseling is often part of their broader desire to live consistent with their faith. See Christopher Rosik, *Motivational, Ethical and Epistemological Foundations In The Clinical Treatment Of Unwanted Homosexual Attraction*, 29 *J. Marital & Fam. Therapy* 13 (2003). Yet clinical counseling for persons with unwanted same-sex attraction or behavior is subject to fierce criticism from LGBTQ activists and their institutional allies in government, medicine, and academia. These critics purposefully ignore clinical counselors’ use of standard mental health approaches and instead categorically denunciate simple talk therapy as coercive “conversion” tactics wielded by religious fundamentalists. These false

claims are reinforced by media productions depicting torturous and abusive “conversion” sessions inflicted by sadistic “counselors.” Accord, Judith A. Reisman, *Crafting Bi/Homosexual Youth*, 14 Regent U. L. Rev. 283, 284–327 (2002) (reviewing the “evidence of widespread media and academic censorship and misrepresentation” about the so-called “gay rights” movement, which has resulted in “a controlled and distorted public debate about homosexuality”).¹⁸

Dr. Nicolas Cummings, the former president of the American Psychological Association, criticized political efforts to prohibit counseling as harmful to clients and counselors: “Whatever the situation at an individual clinic, accusing professionals from across the country who provide treatment to fully informed persons seeking to change their sexual orientation of perpetrating a fraud serves only to stigmatize the professional and shame the patient.” Nicholas A. Cummings, *Sexual Reorientation Therapy Not Unethical*, USA Today (July 30, 2013).¹⁹ Dr. Cummings further criticized political and legal efforts to prohibit counseling as violating the client’s right to self-determination and therapeutic choice: “Attempting to characterize all sexual reorientation therapy as unethical violates patient choice and gives an

¹⁸ For an example of hyperbolic media coverage, see Patrick Ryan, *What Happens in Gay Conversion Therapy?*, USA Today (July 31, 2018), <https://www.usatoday.com/story/life/movies/2018/07/31/gay-conversion-therapy-new-films-show-scary-reality/838633002/>.

¹⁹ Available at <https://www.usatoday.com/story/opinion/2013/07/30/sexual-reorientation-therapy-not-unethical-column/2601159/>.

outside party a veto over patients’ goals for their own treatment.” *Id.*

In short, Colorado’s suppression of mental health counseling that aligns a client’s feelings and behaviors with their religious beliefs and biological reality exposes the fragility of the so-called “medical consensus” on which Colorado’s ban is based. Suppressing speech requires “good evidence to support that,” *Chiles*, 116 F.4th at 1237 (Hartz, J., dissenting), yet the record reveals no credible consensus—only ideological assertions masquerading as science. Indeed, Colorado conspicuously ignored studies demonstrating the safety and efficacy of talk therapy for those seeking to address unwanted same-sex attractions in favor of politically motivated claims that stigmatize religiously motivated counseling. This is not a consensus grounded in empirical rigor; it is a manufactured narrative that marginalizes alternative perspectives. In short, it is legislative legerdemain this Court should make clear has no place under the First Amendment.

B. The studies on which Colorado’s relies are biased, methodologically flawed, and contradictory.

What is more, when subjected to objective scientific analysis and basic logical scrutiny, the “the scientific research and professional consensus” justifying Colorado’s law are exposed as misleading, ideologically biased, and methodologically flawed. *Chiles*, 116 F.4th at 1217 (citation omitted).

As with many government bodies that have enacted therapy bans, see, *e.g.*, *Otto v. City of Boca Raton*, 981 F.3d 854 (11th Cir. 2020); *Vazzo v. City of*

Tampa, No. 19-14387, 2023 WL 1466603 (11th Cir. Feb. 2, 2023), Colorado relied on the “Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation” (hereinafter “APA Report”),²⁰ published in 2009 by the American Psychological Association (APA), the self-described “leading scientific and professional organization representing psychology in the United States.”²¹

In 2007, the APA commissioned the “Task Force on Appropriate Therapeutic Responses to Sexual Orientation” to conduct a systematic review of the peer-reviewed journal literature on “sexual orientation change efforts (SOCE)” and issue a follow-up report. In August 2009, the task force released the APA Report, which it claimed was the result of “an extensive review of the recent literature on psychotherapy and the psychology of sexual orientation.” APA Report 1. The task force declared that based on its findings, “efforts to change sexual orientation are unlikely to be successful and involve some risk of harm, contrary to the claims of SOCE practitioners and advocates.” *Id.*, at v.

In striking contrast to its overall conclusion, the task force repeatedly stated throughout the APA Report that, in its “extensive review,” *id.* at 1, *it found*

²⁰ APA Task Force, *Report of the American Psychological Association Task Force on Appropriate Therapeutic Responses to Sexual Orientation*, Am. Psych. Ass’n (2009), <https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf>.

²¹ *About APA*, Am. Psych. Ass’n, <https://www.apa.org/about> (last visited Dec. 4, 2024).

no evidence of harm caused by SOCE. According to the APA Report:

- “[A] dearth of scientifically sound research [exists] on the safety of SOCE.” *Id.* at 42;
- “Early and recent research studies provide *no clear indication* of the prevalence of harmful outcomes.” *Id.* (emphasis added);
- “[T]here are no scientifically rigorous studies of recent SOCE that would enable us to make a definitive statement about whether recent SOCE is safe or harmful and for whom.” *Id.* at 83; and
- “Given the limited amount of methodologically sound research, *we cannot draw a conclusion* regarding whether *recent forms* of SOCE are or are not effective.” *Id.* at 43 (emphasis added).

In fact, the task force found *benefits* from SOCE counseling. For example, the task force expressly notes (APA Report at 3) that in some studies, individuals

- “perceived that they had benefited from SOCE”;
- “reported that SOCE was helpful—for example, it helped them live in a manner consistent with their faith”;
- “described finding a sense of community through religious SOCE and valued having others with whom they could identify”; and
- reported “positive benefits” such as “reduction of isolation, alterations in how problems are viewed, and stress reduction,” all of which “are consistent with the findings of the general mutual support group literature.”

The task force also conceded that “both early and recent studies” offered “evidence” of SOCE counseling’s *effectiveness*. APA Report 3. For example, the task force noted (*id.* at 3–4) research showing that individuals

- “modified their sexual orientation identity (e.g., individual or group membership and affiliation, self-labeling) and other aspects of sexuality (e.g., values and behavior)”;
- “through participating in SOCE, became skilled in ignoring or tolerating their same-sex attractions”; and
- “reported that they went on to lead outwardly heterosexual lives, developing a sexual relationship with an other-sex partner, and adopting a heterosexual identity.”

Even though it found “no scientifically sound studies of recent SOCE that would enable [it] to make a definitive statement about whether or not recent SOCE is safe or harmful and for whom,” the task force nevertheless gleaned “some evidence to indicate that individuals experienced harm from SOCE.” APA Report 3. But that evidence was based on “early studies” that “documented iatrogenic effects of *aversive* forms of SOCE.” APA Report 3 (emphasis added). Clinical counselors, including those who desire to provide counseling prohibited by similar bans, have soundly rejected and condemned aversive techniques for *decades*.

The APA Report thus found *no* study indicating harm caused by nonaversive therapeutic approaches such as psychodynamic therapies, cognitive-behavioral therapy, group therapy, or spiritual counseling.

Indeed, the task force even concluded that “it is still unclear which techniques or methods may or may not be harmful.” APA Report 91.

Despite Colorado’s reliance on the APA Report in purporting that counseling harms minors, the APA task force specifically noted that “sexual orientation issues in children are *virtually unexamined*.” APA Report 91 (emphasis added); *id.* at 72 (finding “a lack of published research on SOCE among children”). The task force further conceded that its findings did not include voluntary minor counseling. APA Report at 73 (“We found no empirical research on adolescents who request SOCE.”); see also *id.* at 76 (noting that its conclusions are not based on specific studies from individuals, including minors, who request counseling, and its findings were necessarily limited).

Indeed, even Judge Hartz noted “the absence of any study (good or bad) that focuses on the type of therapy at issue in this case: talk therapy for a minor provided by a licensed mental-health professional.” *Chiles*, 116 F.4th at 1243 (Hartz, J., dissenting). “Thus, even if there is some good research on the efficacy and harm of conversion therapy in some contexts, that research may be largely irrelevant to this case.” *Id.* In short, the APA Report does not support Colorado’s conclusions that counseling may put young people at risk of serious harm. Despite finding no study signifying that SOCE is harmful, the task force baselessly concluded that it “involve[s] some risk of harm, contrary to the claims of SOCE practitioners and advocates.” APA Report at v.

Moreover, the APA's methodology to evaluate beneficial change interventions stands in stark contrast to the standards assessing causality between SOCE and harm. Despite its baseless conclusions that all change interventions "involve[s] some risk of harm," APA Report at v., the task force dismissed significant research noting the SOCE's positive benefits, asserting that those studies "do not hold up under the rigor of experimentation," *id.* at 35. The task force went further, declaring that "the least rigorous studies in this body of research generally provide a more positive assessment of efficacy than do studies that meet even the most minimal standards of scientific rigor." *Id.* In the task force's view, studies supporting SOCE beneficial outcomes fell short of its exacting standards. The task force accordingly deemed those studies unworthy of examination and dismissed them for lack of scientific evidence and precision of outcome.

On the other hand, the task force applied a lenient standard when examining causal relations between SOCE and harmful outcomes. For example, the task force concludes that the absence of measurable outcomes related to positive SOCE indicates that SOCE is unlikely to produce change and is thus harmful. See APA Report at 6. But the task force shows no similar reticence to endorse same-sex "affirmative interventions" despite acknowledging that such treatment "has not been evaluated for safety and efficacy." *Id.* at 91.

This double standard reveals a glaring inconsistency in the APA's methodology, which undermines the credibility of its conclusions. By imposing exacting standards to dismiss studies showing

positive outcomes for SOCE while applying lenient criteria to infer harm, the APA task force betrays an ideologically driven agenda rather than a commitment to objective scientific inquiry. It is telling that the task force dismissed research supporting SOCE's efficacy as insufficiently rigorous yet endorsed affirmative therapies despite clearly admitting that such interventions lack rigorous evaluation for safety or effectiveness. Such selective scrutiny cannot serve as the foundation for state laws that infringe upon fundamental First Amendment rights.

III. The Decision Below Highlights the Dangers of Deferring to Questionable “Scientific Consensus” to Justify Suppressing Protected Speech.

The decision below warrants this Court's intervention to clarify the proper role of “experts” in enacting content-based speech restrictions. Judge Hartz's dissent vividly illustrates the dangers of deferring to so-called “expert consensus” without rigorous scrutiny. As he warned, courts must “exercise the utmost caution before endorsing government suppression of speech.” *Chiles*, 116 F.4th at 1238 (Hartz, J., dissenting). Echoing this Court's guidance, Judge Hartz highlighted the risk that government regulation of professional speech, particularly when premised on disputed or ideologically driven expert opinions, undermines “an uninhibited marketplace of ideas in which truth will ultimately prevail.” *Id.* (quoting *NIFLA*, *supra*, 585 U.S. at 772).

In *NIFLA*, this Court recognized that professional fields are inherently marked by “good-faith disagreements,” 585 U.S. at 772, and thus “[c]ourts must be

particularly wary that in a contentious and evolving field, the government and its supporters would like to bypass the marketplace of ideas and declare victory for their preferred ideas by fiat,” *Chiles*, 116 F.4th at 1238 (Hartz, J., dissenting). Judge Hartz aptly compared such government overreach to a “Lysenko moment,” referring to the infamous Soviet scientist whose ideological control over agricultural science suppressed dissenting views and led to disastrous consequences. 116 F.4th at 1238 (Hartz, J., dissenting); see generally Michael D. Gordin, *Lysenkoism*, Encyclopedia of the History of Science (Feb. 2022).²² The lesson of that cautionary tale: courts should scrutinize expert-driven restrictions of constitutionally protected speech, particularly when the alleged “consensus” is shaped by cultural or ideological pressures rather than empirical evidence.

The present case highlights this concern. Colorado’s ban on talk therapy for minors relies heavily on a purported “medical consensus” that such therapy is harmful and ineffective. *Chiles*, 116 F.4th at 1216–17. But the fact that a conclusion is published in a peer-reviewed journal or is endorsed by a professional association does not inherently establish the reliability or validity of the underlying evidence. See *id.* at 1238–39 (Hartz, J., dissenting). As Judge Hartz observed, studies in social and behavioral sciences frequently suffer from methodological flaws and reproducibility issues, with replication rates often ranging between 35% and 75%. See *id.* at 1239. Moreover, there is evidence of widespread

²² Available at <https://ethos.lps.library.cmu.edu/article/560/galley/463/view/>.

“questionable research practices,” including data fabrication and selective reporting, which further undermine claims of consensus. *Id.*

At bottom, this case raises profound concerns about the judiciary’s knee-jerk acceptance of the evidentiary basis for laws that infringe on First Amendment rights. Courts that defer uncritically to the “scientific consensus” or to the “medical community” risk enshrining ideological preferences as unassailable truths. As Judge Hartz emphasized, a “vote by a professional organization” may signal consensus, but it is no substitute for “good evidence” tested through the adversarial process. *Chiles*, 116 F.4th at 1237 (Hartz, J., dissenting). Here, Colorado’s reliance on the APA task force’s report to justify suppressing therapeutic speech warrants the need to reaffirm the principles articulated in this Court’s precedents: that strict scrutiny requires courts to rigorously evaluate, rather than reflexively accept, the evidence underlying laws that restrict speech. Cf. *Brown v. Ent. Merchants Ass’n*, 564 U.S. 786, 800 (2011) (rejecting the State’s proffered studies purporting to show a connection between exposure to violent video games and harmful effects on children as “not compelling”).

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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