

Speech vs. Conduct: The First Amendment and Professional Licensure



Chris S. Edwards

Attorney; Board Certified Specialist in
Appellate Practice
Wilmington and Raleigh, NC

About Me

- Attorney, Ward and Smith, P.A.
- Former clerk at the U.S. Court of Appeals for the Fourth Circuit and the U.S. District Court for the Eastern District of North Carolina
- J.D., magna cum laude, Wake Forest University School of Law
- B.A., magna cum laude, Wake Forest University

Where Are We Going?

- First Amendment Overview
- NIFLA – the case that started it all
- Proliferation of lawsuits post-NIFLA
- *Chiles v. Salazar* – Colorado minor conversion therapy case
- *Brokamp v. District of Columbia* – Chiles applied to licensure
- What does the future hold?

First Amendment: Speech Clause

**"Congress shall make no law...abridging
the freedom of speech."**

Speech Clause – Background

- One of the first ten amendments to the U.S. Constitution – “Bill of Rights”
- Originally only applied to the federal government
- **14th Amendment (1867):** “. . . nor shall any State deprive any person of life, liberty, or property, without due process of law.”
- **Selective Incorporation:** SCOTUS began applying most of the first ten amendments to the states via the 14th Amendment in 1897
- *Gitlow v. New York* (1925) – SCOTUS applied 1A speech protections to the states
- All state constitutions also include explicit speech protections

Taking on the Government

- When an individual feels that the government has violated their constitutional rights, what is their remedy? **SUE!**
- How do courts decide whether the government violated an individual's constitutional rights?
CONSTITUTIONAL SCRUTINY.

Constitutional Scrutiny

- **What is it?** A legal framework courts use to evaluate whether government limitations on rights are justified. A judicially created mechanism.
- **Why use it?** It aligns level of review with the importance of the right and the nature of the restriction.
- **What are the levels?** 1) Strict Scrutiny 2) Intermediate Scrutiny 3) Rational Basis

Strict Scrutiny

- **Trigger:** Restriction of a fundamental right (speech, religion) or discrimination of a suspect class (race, national origin, citizenship)
- **Test:** Narrowly tailored to achieve a compelling governmental interest
- **Outcome:** The Government almost always loses; regulation struck down

Intermediate Scrutiny

- **Trigger:** Laws that discriminate based on gender, sex, or marital status of parents; content-neutral speech restrictions
- **Test:** Substantially related to an important government interest
- **Outcome:** Regulation is often upheld if well-designed and not overly burdensome

Rational Basis

- **Trigger:** Economic regulations, non-suspect classifications (age, wealth, disability, income, occupation), and police power regulations
- **Test:** Rationally related to a legitimate government interest
- **Outcome:** Government almost always wins; regulation upheld

	Strict Scrutiny	Intermediate Scrutiny	Rational Basis
Trigger:	Restriction of a fundamental right (speech, religion) or discrimination of a suspect class (race, national origin, citizenship)	Laws that discriminate based on gender, sex, or marital status of parents; content-neutral speech restrictions	Economic regulations, non-suspect classifications (age, wealth, disability, income, occupation), and police power regulations
Test:	<u>Narrowly tailored</u> to achieve a <u>compelling governmental interest</u>	<u>Substantially related</u> to an <u>important government interest</u>	<u>Rationally related</u> to a <u>legitimate government interest</u>
Outcome:	The Government almost always loses; regulation struck down	Regulation is often upheld if well-designed and not overly burdensome	Government almost always wins; regulation upheld

NIFLA v. Becerra

**585 U.S. 755,
138 S.Ct. 2361 (2018)**

[BY-ND](#)

NIFLA: Background & Statutory Scheme

- **Statute:** California's "FACT Act" required clinics serving pregnant women (crisis pregnancy centers or CPCs) to post or distribute notices about abortion services or licensing status
- **Licensed CPCs:** Required to post/distribute a notice that California provides free or low-cost comprehensive family planning services, including abortion, and provide a phone number for more information
- **Unlicensed CPCs:** Required to disclose conspicuously that they are not licensed medical providers and have no licensed medical provider providing services or supervising those services

NIFLA: Case Overview

- **Parties:** Crisis pregnancy centers (licensed & unlicensed) sued the California Attorney General
- **Claim:** CPCs argued that the notices compelled speech in violation of 1A
- 9th Circuit had concluded that the licensed notice survived a lower level of scrutiny that applied to regulations of professional speech and that the unlicensed notice satisfied any level of scrutiny
- **Decision:** Decided by a 5–4 vote (**Thomas**, Roberts, Kennedy, Alito, and Gorsuch in the majority; **Breyer**, Ginsburg, Sotomayor, and Kagan dissenting)

NIFLA: SCOTUS' Reasoning

- In enforcing prohibition against laws restricting freedom of speech, precedent has distinguished between **contest-based** and **content-neutral** regulations of speech.
- Content-based restrictions target speech based on the communicative content. They are presumptively invalid; strict scrutiny applies.
- The licensed notice alters the content of the CPC's speech by compelling a particular message.
- Therefore, strict scrutiny applies; Government loses.

***NIFLA*: The "Professional Speech" Exception**

- **9th Circuit:** Applied rational basis because the notice regulates “professional speech”.
- **The Supreme Court:** SCOTUS has never recognized “professional speech” as a separate category with reduced protection.
- **“Speech is not unprotected merely because it is uttered by ‘professionals’”**
- Lower courts were wrong to apply diminished scrutiny simply because speakers are professionals offering advice.

Professional Conduct vs. Speech

- SCOTUS recognized two instances in which the Court had afforded less protection for professional speech.

First: laws requiring professionals to disclose factual, noncontroversial information in their commercial speech

Second: “States may regulate professional conduct, even though that conduct incidentally involves speech”

- **Example:** In *Planned Parenthood v. Casey*, the Court upheld a law requiring physicians to obtain informed-consent before they could provide patients with abortions.

Professional Conduct vs. Speech (Continued)

- The *Casey* Court rejected a First Amendment challenge to the informed-consent requirement explaining that the law regulated speech only “as part of the *practice* of medicine, subject to reasonable licensing and regulation by the State”.
- The Court also cited *Ohralik*, a case upholding a state law banning in-person solicitation by lawyers as an incidental burden on speech.
- But California’s law did not incidentally involve speech — it targeted speech itself by requiring clinics to promote certain messages.
- In contrast, the FACT Act compelled speech “in all interactions,” regardless of whether a medical procedure was performed.

NIFLA: Holding & Impact

- **Holding:** The Supreme Court reversed the lower court's decision holding that both the licensed and unlicensed notices are content-based and fail heightened scrutiny.
- The notice requirements were not sufficiently drawn to achieve California's stated interest of providing low-income women with information about state-sponsored services.
- **Impact:** The ruling clarified that there is no "professional speech" carve-out, fueling new First Amendment challenges against licensing boards that regulate advice or expressive activity.

Proliferation of Lawsuits Post-*NIFLA*

**Are licensing boards
regulating speech or conduct?**

Vizaline, L.L.C. v. Tracy (5th Cir. 2020)

- **Background:** Vizaline converted existing metes-and-bounds descriptions into simple maps and sold them to community banks as a low-cost survey alternative. The Mississippi board sued to enjoin practice as unlicensed surveying. Vizaline countered that creating and selling information is protected speech.
- **District Court:** Held that occupational licensing is categorically exempt from First Amendment scrutiny.
- **5th Circuit:** Reversed this decision stating NIFLA forecloses any categorical licensing exemption. Remanded; the court declined to set a scrutiny level or decide speech vs. conduct.

Otto v. City of Boca Raton (11th Cir. 2020, reh'g en banc denied 2022)

- **Background:** Licensed therapists challenged local ordinances barring SOCE talk therapy with minors.
- Panel held the ordinances content and viewpoint-based restrictions on speech. Talk therapy "consists—entirely—of words"; professional setting does not create conduct.
- **Scrutiny Level:** Strict Scrutiny was applied; evidence of harm found ambiguous and equivocal.
- **Outcome:** Ordinances struck down; en banc rehearing denied in 2022 over two dissents.

***Otto*: The En Banc Dissents**

- **Judge Rosenbaum:** Opined that talk therapy is a healthcare treatment technique, not a mere conversation and proposed a third NIFLA exception for standard-of-care regulation of treatment speech. She also warned that states would lose all power to discipline substandard talk therapy.
- **Judge Jordan:** Opined that the panel ignored clear-error review and substituted its own fact findings.
- **Impact:** *Otto* and Ninth Circuit's *Tingley* created the split that *Chiles v. Salazar* later resolved.

Del Castillo v. Florida Dep't of Health (11th Cir. 2022)

- **Background:** Heather Del Castillo challenged Florida's licensure requirement to practice as a dietitian or nutritionist on free speech grounds. She argued that the state could not prevent her from communicating her "advice" even though she was not licensed.
- **11th Circuit:** Acknowledged *NIFLA* and held that Florida law regulated professional conduct with an incidental burden on speech.
- **Scrutiny Level:** Rational Basis was applied.

Crownholm v. Moore (9th Cir. 2024)

- **Background:** Ryan Crownholm and his website MySitePlan.com challenged California's licensure requirement to practice land surveying on free speech grounds. He argued that the site plans conveyed information through language and graphics, and the state could not require him to obtain a license to communicate that data.
- **9th Circuit:** Held California's law is content-neutral and regulates plaintiff's conduct with only an incidental burden on speech.
- **Scrutiny Level:** Rational Basis was applied.
- The Supreme Court denied review in April.

360 Virtual Drone Services v. Ritter (4th Cir. 2024)

- **Background:** Michael Jones and his company 360 Virtual Drone Services, LLC challenged North Carolina's restriction on unlicensed surveying on First Amendment grounds. Jones argued that the data included in his maps was speech and the Board could not prohibit him from speaking because he did not possess a license.
- **4th Circuit:** Held that the North Carolina law is a regulation of conduct with only an incidental impact on speech.
- **Scrutiny Level:** Intermediate Scrutiny was applied with a multi-factor test.
- The Supreme Court denied review in April.

Hines v. Pardue (5th Cir. 2024)

- **Background:** Dr. Ronald Hines, a retired, Texas-licensed veterinarian provided online pet care advice, mostly over email. However, Texas (and most other states) require a physical examination before engaging in telemedicine. Dr. Hines argued this law violated the First Amendment by banning purely communicative, online advice.
- **5th Circuit:** Found in favor of Dr. Hines. Law regulated speech, not conduct.
- Texas appealed but SCOTUS denied review.

Post-NIFLA: Takeaways

- There were a mixture of lawsuits being brought by both licensed and unlicensed individuals and the scrutiny used to review these suits ranged across rational basis, intermediate scrutiny, and strict scrutiny.
- In most cases, the courts have held that these acts are regulating conduct.
- **Outliers:** The 5th Circuit in *Hines* and 11th Circuit in *Otto* found pure speech. *Vizaline* settled only that licensing gets no automatic exemption.

Chiles v. Salazar

607 U.S. ____ (2026) | Decided
March 31, 2026

Chiles v. Salazar: Snapshot

- **Decision:** Reversed and remanded; 8-1
- **Majority:** Gorsuch, J. (joined by Roberts, Thomas, Alito, Sotomayor, Kagan, Kavanaugh, and Barrett)
- **Concurrence:** Kagan, J. (joined by Sotomayor)
- **Dissent:** Jackson, J.
- **Holding:** as applied to talk therapy, the ban regulates speech by viewpoint; the scrutiny applied by the below courts was too lenient.

Chiles v. Salazar: The Question Presented

- When a licensed counselor treats clients using only conversation, does a counseling ban regulate protected speech or merely professional conduct?
- The answer sets the level of scrutiny — a demanding test versus an easy one.
- Chiles challenges the law only as applied to her voluntary “talk therapy”.

Chiles v. Salazar: The Law

- **The Law:** 2019 law bars licensed counselors from practicing “conversion therapy” on minors.
- **Prohibits:** any effort “to change” a minor’s sexual orientation or gender identity — including behaviors, gender expressions, or same-sex attraction
- **Permits:** “acceptance, support, and understanding” of identity exploration and gender transition
- **Enforcement:** Complaints trigger disciplinary review which can lead to fines, probation, or loss of license.

Chiles v. Salazar: The Parties & Posture

- **Petitioner:** Kaley Chiles was a licensed Colorado counselor providing only talk therapy.
- **Respondent:** Patty Salazar was the Executive Director of the Colorado Department of Regulatory Agencies.
- **Below:** The district court and the Tenth Circuit denied an injunction, finding conduct regulation and applying rational basis.
- **SCOTUS:** cert granted to resolve a circuit split; reversed and remanded

Chiles v. Salazar: Talk Therapy Only

- **Background:** Kaley Chiles prescribed no medication, used no devices, and employed no physical or aversive techniques. "**All Ms. Chiles offers is talk therapy.**" She did not contest banning long-abandoned, aversive physical interventions.
- **The Challenge:** Chiles' challenge was narrow— the law as applied to voluntary counseling conversations.

Chiles v. Salazar: The Circuit Split

- Lower courts splintered on the scrutiny owed to speech-based professional regulation.
- **Rational Basis:** Tenth Circuit (below); Ninth Circuit in *Tingley v. Ferguson*
- **Intermediate Scrutiny:** Other courts treated professional speech as a middle category.
- **Strict Scrutiny:** Eleventh Circuit in *Otto*
- The Court granted certiorari to resolve the conflict.

The Majority

**Justice Gorsuch, joined by Roberts,
Thomas, Alito, Sotomayor, Kagan,
Kavanaugh, and Barrett**

The First Amendment Framework

- **Content-based restrictions:** presumptively unconstitutional and trigger strict scrutiny — narrowly tailored to a compelling interest. (*Reed v. Town of Gilbert*)
- **Viewpoint discrimination:** “an egregious form” of content regulation from which government must “nearly always abstain”. (Rosenberger)
- These principles are the framework for the entire opinion.

The Narrow Exceptions

- Only a few "historic and traditional categories" escape strict scrutiny.
- **Fraud · defamation · fighting words** — each with a long historical pedigree (Alvarez)
- Even within these, a viewpoint-based line still triggers strict scrutiny. (R.A.V.)
- **Colorado's ban fits none of these categories.**

Speech is NOT "Conduct"

- **“The First Amendment is no word game.”**
- Speech does not become “conduct” or “a treatment” or “therapeutic modality” because the State labels it as such. *Cohen v. California* and *Holder v. Humanitarian Law Project* already rejected that move.
- What matters is whether the law regulates speech in the case at hand.

No "Professional Speech" Discount

- *NIFLA* reaffirmed that there is no separate category of “professional speech” with “diminished constitutional protection”.
- The Constitution “does not protect the right of some to speak freely; it protects the right of all”.
- History is littered with efforts to manipulate professional speech — to increase state power, suppress minorities, and censor unpopular ideas.

A Viewpoint-Based Law

- The law does not just regulate content. Rather, it dictates which view a counselor may voice.
- **Permitted:** affirming a client's identity, exploration, or transition
- **Forbidden:** helping a client change orientation, identity, behaviors, or attractions
- “Colorado disputes none of this; neither does the dissent” — a textbook viewpoint distinction

The *NIFLA* Exceptions Don't Fit

- **Commercial disclosure:** Colorado compels no factual, noncontroversial information — it suppresses a viewpoint
- **Incidental burden on conduct:** all Chiles does is speak, and speech is all Colorado regulates
- Neither of these recognized safe harbors apply in this case.

"Incidental" to Conduct? Fails Both Ways

- A speech restriction is permitted only if the speech is:
 - **(1) integral to separately unlawful conduct** — no; her speech has no close causal tie to any unlawful act
 - **(2) restricted for reasons unrelated to content** — no; the law trains directly on content and viewpoint
- Failing both prongs, the incidental-burden safe harbor is unavailable.

Colorado's Traditions Rejected

- **Medical licensing:** sets qualifications, not a point of view — and the first counselor-licensure bill dates only to 1976
- **Informed consent:** regulates speech incident to a procedure; compels only factual, uncontroversial disclosure
- **Malpractice:** requires exacting proof of injury — Colorado punishes the mere expression of a view

Consensus Is Not a Ceiling

- Leading authorities once classified homosexuality a disorder. (DSM, 1952)
- On the State's logic, a law then banning affirming care would likely have been upheld.
- “Medical consensus is not static; it evolves” — it cannot mark the outer boundary of what professionals may say tomorrow.

Holding & Disposition

- **Held:** as applied to talk therapy, the law regulates speech by viewpoint; the courts below failed to apply sufficiently rigorous scrutiny
- **Note for litigators:** the Court did not strike the statute or apply strict scrutiny itself
- **Reversed and remanded** for heightened scrutiny in the first instance — the statute's ultimate fate stays open

The Concurrence

**Justice Kagan, joined by
Justice Sotomayor**

Concurrence: "I Agree, But..."

- Justice Kagan agrees the law is viewpoint-based for the reasons the Court gives.
- She writes a concurring opinion to flag that a content-based but viewpoint-neutral law “would raise a different and more difficult question”
- The Court decided the easy case — and expressly did not decide on the harder one.

The Open Door for Regulators

- **Viewpoint-based** laws (like Colorado's) are “the most suspect of all speech regulations”; strict scrutiny applies.
- **Viewpoint-neutral** health rules may pose no real risk of “official suppression of ideas” — the Court has “relaxed its guard” before. (*Vidal v. Elster*)
- The same “may well be true of ... viewpoint-neutral laws regulating speech in doctors’ and counselors’ offices”.
- The question is reserved for another day.

Why Regulators Should Take Note

- In health care, the viewpoint-based / viewpoint-neutral line “could prove decisive”.
- A rule that picks a favored message is the most exposed to challenge.
- A rule that regulates a treatment without taking sides may rest on far firmer ground.

The Dissent

Justice Jackson

Subordinate to the Police Power

- “There is no right to practice medicine which is not subordinate to the police power of the States”.
(Lambert, 1926)
- States have always regulated the healthcare professions.
- First Amendment principles carry “far less salience” when a licensee’s treatment-related speech is restricted incidentally.

The Majority Asks the Wrong Questions

- Justice Jackson concedes that the law restricts speech; it is not conduct in disguise.
- **Real question:** Is speech targeted “as speech,” or restricted “incidentally” to regulating treatment?
- Talk therapy is a medical treatment; restricting it is incidental, warranting deferential review. (the *NIFLA/Casey* line)

"Playing With Fire"

- If treatment-by-speech is hard to regulate, familiar standards may become unenforceable.
- **At risk:** duties to protect client welfare, bans on “cruel” treatment, discipline for incompetence
- **Warning:** Justice Jackson fears “unprofessional and unsafe medical care administered by effectively unsupervised” providers.

Chiles Applied: Brokamp v. District of Columbia

**2026 WL 1826172 (D.D.C.) | Decided June 24, 2026
| Judge Timothy J. Kelly**

Background & the Licensure Scheme

- **Requirement:** D.C. requires a license to practice professional counseling. The definition covers counseling and psychotherapy, including cognitive behavioral therapy. This requirement also applies to out-of-state providers serving D.C. clients via telehealth. Licensure by endorsement demands a master's degree and at least five years of practice.
- **Punishment:** Unlicensed practice is a misdemeanor with jail time and fines.
- **Reciprocity:** extends to Maryland and Virginia only if reciprocated; Virginia does not.

The Parties & Posture

- **Plaintiff:** Elizabeth Brokamp was a Virginia-licensed counselor seeking to offer teletherapy to D.C. residents. The Board told her a license was required even if she disclaimed D.C. licensure.
- Brokamp sued in 2020 claiming the practice act was vague and violated the First Amendment. The vagueness claim was dismissed in 2022 while her First Amendment claims proceeded.
- COVID-era telecare waiver ended; Counseling Compact still unimplemented.
- Cross-motions for summary judgement; court found standing was established.

Step One: The Law Regulates Speech

- **Threshold Question:** Does this concern speech, or conduct that incidentally involves speech?
- Brokamp's counseling practice essentially consisted of her speaking to clients and *Chiles* already held that talk therapy qualifies as speech.
- Speech does not become conduct because the State calls it "treatment". Nor because it is delivered in the course of a licensed job.
- The District's contrary authority predated both *NIFLA* and *Chiles*.

Step One: The Conduct Line Survives

- The ruling does not disturb licensing for physical procedures or prescribing medication. The practice of medicine remains subject to reasonable licensing and regulation.
- **Cites 360 Virtual Drone:** conduct-focused where legal, health, economic, and safety consequences attach
- **Conduct-focused realms:** law, medicine, accounting, engineering; after *Chiles*, talk therapy is no longer among these.

Step Two: Which Scrutiny Applies

- Parties disputed whether content-based strict scrutiny or content-neutral intermediate scrutiny should be applied.
- The court noted Justice Kagan's concurrence flagging viewpoint neutrality as the real line.
- The court declined to resolve the question of scrutiny; assumed intermediate scrutiny applies.
- Could do so because the law fails even that lesser standard.

Step Three: No Substantial Interest Shown

- The District cited concerns regarding public health, safety, competence, and consumer protection.
- **Burden:** requires a direct causal link, not speculation/conjecture
- After full discovery, no evidence of harm from unlicensed counselors in the District was found. The legislative record showed officials found no demonstrated public need.
- Second Circuit's *Brokamp v. James* distinguished: New York made detailed findings.
- Professional organizations' institutional positions cannot define constitutional boundaries.

Step Three: Not Sufficiently Tailored

- **Less burdensome alternative:** recognize counseling licenses issued by other states
- The District's own expert conceded core requirements are largely the same across states. The District also conceded that the only barrier is Virginia's lack of reciprocity.
- The endorsement path still imposes burdens regarding degrees, experience, hours, exams, and fees.
- COVID waiver allowed for out-of-state telecare with no evidence of resulting injury.

Holding, Remedy, and What it Means for Boards

- Practice act unconstitutional as applied; overbreadth claim not reached.
- Declaratory judgment plus permanent injunction barring enforcement against her.
- First Amendment loss is irreparable injury; enforcing an unconstitutional law disserves the public.
- The vulnerability is evidentiary, not doctrinal– the District simply had no record.
- Boards should expect challenges to telehealth and out-of-state practice restrictions.

What This Means for Regulators

Practical Takeaways

The Dividing Line is Viewpoint Neutrality

- **Most exposed:** a rule that forbids or compels a particular message, or favors one side of a debate
- **More defensible:** a rule regulating a treatment, procedure, or qualification with neutrality
- This is the door that Justice Kagan's concurrence left open.

Drafting Rules That Hold Up

Do	Do NOT
• Regulate conduct, procedures & qualifications	• Prohibit or compel a particular message
• Write in viewpoint-neutral terms; tie discipline to demonstrable harm	• Permit one side of a debate while forbidding the other
• Require only factual, noncontroversial disclosures	• Assume a "treatment" label ends the inquiry

Litigation Posture & the Conduct Nexus

- Document the non-expressive conduct that the rule targets and the speech's causal tie to it.
- Frame within a recognized exception (commercial disclosure or incidental-to-conduct).
- Build harm evidence— injury, causation, breach— not just professional consensus.
- **Remember:** the “standard of care” is not a First Amendment safe harbor.

The Bottom Line

- **Majority:** speech is speech, even in a counselor's office; viewpoint-based rules face strict scrutiny
- **Concurrence:** a viewpoint-neutral health rule may yet survive — that question is reserved
- **Dissent:** warns of a deregulated medical marketplace; would defer to incidental speech limits
- **For boards:** regulate conduct and competence, not viewpoints and recall the case was remanded, not finally decided

Questions?



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