Past Event: 2026 NCSBN Annual Meeting – Speech, Conduct and Oversight: Regulatory Lessons from Chiles v. Salazar Video Transcript

Event
2026 NCSBN Annual Meeting

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- [Chris] We're going to talk a little bit today about the First Amendment. And this is going to be framed through the lens of a recent Supreme Court opinion called Chiles against Salazar. And that case, in particular, is about restrictions on what therapists can or can't say at the state level.

And I don't want to give too much away, but at the end of the conversation, I hope you take away some useful things that you can take back to your home state and can implement in your own regulatory agenda, just sort of globally. It's not going to be limited to that one case. We'll sort of talk about doctrine, the First Amendment, and how that impacts regulated professions. Also, you already saw that.

So about me. Just briefly, I'm an attorney. I'm based in North Carolina. My firm, Ward and Smith, has about 120 attorneys in North and South Carolina. Before I was a lawyer, or before I was in private practice, I was a law clerk to a judge on a federal court of appeals. That, I think, will be important, not my background, but just in general.

The federal courts. There are federal district courts. Those are the federal trial courts. Then there are 13 courts of appeals: 12 are regional, and one covers the District of Columbia. The Fourth Circuit, where I clerked, that court covers the Carolinas, Virginia, West Virginia, Maryland, and they interpret the law.

And until the Supreme Court decides to step in and change that interpretation, those courts bind the trial courts in the states that they oversee. And so that creates, in some sense, a patchwork of laws, something that can be a little bit inconsistent or a lot inconsistent over time.

So where are we going? The first probably 30% of this presentation is just going to be laying the groundwork, and that's where we talk about how courts interpret the Constitution. We talk about the First Amendment of the Constitution, because that's really what's at the heart of the discussion that we're going to have today, is what is the First Amendment?

When does it apply? How does it apply? Then we're going to talk about a Supreme Court case called the National Institute for Family and Life Advocates against Becerra. That came out of the Ninth Circuit, it

came out of California. And that case eliminated what a lot of courts had interpreted as an ability to regulate professional speech, and it takes that ability away.

Then, after NIFLA, there are a number of lawsuits that ultimately lead to the Chiles decision that we're going to discuss. And then finally, there is some breaking, cutting-edge case law coming out of the District of Columbia, and in those cases, or in that case, we'll see how Chiles has been applied. At the end of the presentation, there are going to be some practical takeaways for implementing rules, for drafting rules, for enforcing regulations, things that I hope you'll be able to take and use in your everyday practice.

So let's start with the First Amendment. First Amendment covers a lot of stuff, but importantly, it says, "Congress shall make no law abridging the freedom of speech." Now, that is one of the first 10 amendments to the Constitution. That's what we call the Bill of Rights.

The Bill of Rights, as drafted, applies only to the federal government. You see it said, "Congress shall make no law abridging the freedom of speech." After the Civil War, the states ratified the Fourteenth Amendment. The Fourteenth Amendment has this concept of liberty, of due process, explicit in it. And in the years since, the Supreme Court has started to interpret the Bill of Rights as applying to the states through the Fourteenth Amendment.

So textually, that's not the way it works, but the Supreme Court has said that states also can't limit speech by virtue of the Fourteenth Amendment. The only thing I think that hasn't been incorporated is the Third Amendment, which is the quartering of troops, which I'm not... So I guess I could go home tonight and the North Carolina's governor could put the National Guard in my house.

So all state constitutions do include explicit protections for speech, but one of the important things to take away or to understand is that state constitutions cannot restrict more than the federal constitution. So there's a federal floor, and states can be more protective, but they cannot be less protective.

And so your own state appellate courts may interpret your constitution as being more pro-free speech than the U.S. Supreme Court, but they cannot go below that standard set by the Supreme Court. So when you believe that a law abridges the freedom of speech, the way you test that is you sue the government.

You sue the person charged generally with enforcing the law, and you ask the court to declare the law unconstitutional. That then triggers a process or an analytical regime called constitutional scrutiny. Constitutional scrutiny is a fancy way of explaining how you evaluate regulations on speech, how you evaluate regulations on many other things.

And there are three levels that we're going to talk about. First, there is strict scrutiny, and things that regulate core political speech, core individual beliefs, those receive strict scrutiny. There is also rational basis scrutiny, and rational basis is more or less just anything that regulates the time, place, or manner of speech.

It's like economic interests get rational basis scrutiny. And then anything that says... For example, a noise ordinance would be a rational basis restriction on speech, because it affects only the time and the place at which you may speak. It doesn't really limit your ability to speak during hours when the public space is open. And then falling in between is this intermediate scrutiny, which is a little bit of a...it's a little bit hard to define.

The only thing that I can tell you that for sure receives intermediate scrutiny is commercial speech. And so that is regulation of lawyer advertising, the disclosure that you may have to pay some fee, even if I take your case on a contingency, that is subject to intermediate scrutiny. And we'll unpack that a little bit more as we go forward.

So when you have a regulation of core political speech, that triggers strict scrutiny, and in that case, the courts generally say that the regulation has to be narrowly tailored to further a compelling government interest. The way that this is taught in law school is that strict scrutiny is strict in name, but fatal in fact. So if you trigger strict scrutiny and there's any way to draw the regulation more narrowly, if the government's interest isn't sufficiently important, then courts generally say, "Look, that's overly broad, and we're going to strike this regulation down."

Intermediate scrutiny, that is laws that discriminate based on gender, sex, marital status, and then content-neutral speech regulations in some parts of the country. There, the regulation just has to be substantially related to an important government interest. I cannot tell you with precise terms what the difference between those two are.

It's more of a feel, and you have to really understand the law as the court is applying it, to really tell the difference between what receives intermediate and strict scrutiny. But with intermediate scrutiny, the government typically wins, but it may have to change the law.

It may have to narrow the law a little bit. Parts of the law may be struck down, but sort of the core idea will be upheld. In both strict and intermediate scrutiny, it's the government's burden to demonstrate that the law does not abridge more speech than necessary. So the government has to win by bringing forth data, arguments, what have you, to make sure that it convinces the court that it should win.

That will become important because, in a rational basis analysis, the government can just make something up, and if the government says, "We're doing this for whatever reason we want," and it's a rational basis regulation, then the government will almost always win. There are a handful of cases over the last 100 years striking down statutes, state laws, federal statutes, under rational basis.

It's a really, really, really difficult standard to meet. And so this law sort of summarizes what we just talked about: strict scrutiny, intermediate scrutiny, rational basis. And what we're really going to talk about is the difference between strict scrutiny and the lower levels of intermediate and rational basis. Because even though the Chiles case relates to what the state of Colorado eventually said was a regulation of the therapy profession, a regulation of licensed therapists, the court says, no, it triggers strict scrutiny because it restricts core speech.

And that is unlawful. So the case that started this all is NIFLA against Becerra, and this is a 2018 case. So this starts with California's FACT Act, and I don't remember what FACT Act stands for, but it's a regulation of crisis pregnancy centers.

And so crisis pregnancy centers, some actually do provide medical services to women, they're sort of like a Planned Parenthood without the abortion and the birth control portions. And then others are just unlicensed counseling centers. And California wanted to regulate both instances of crisis pregnancy centers.

Licensed CPCs, it said that you had to distribute a notice that the woman could go to a different...could go to a state-run facility and get birth control, get abortion care, what have you. Unlicensed CPCs, it required a conspicuous notice that they are not licensed medical providers.

And so the state wanted to regulate in two different ways. One is for unlicensed clinics to say, "We're not licensed, you can go somewhere else where there is a licensed medical doctor to treat you." And even in facilities that had licensed medical doctors, the impetus was to say, "Look, you can go somewhere else in California. If you're not aware that this clinic doesn't provide services you might be looking for, you can go somewhere else."

So crisis pregnancy centers under NIFLA sued Xavier Becerra, California's AG. They argued that that was a restriction on their right to free speech, and they win by a 5-4 vote at the Supreme Court. Justice Thomas writes the majority opinion. He is widely considered one of the more conservative justices on the court, and so he strikes down along with, at this point, the other Republican appointees, with the Democratic appointees dissenting 5-4.

And so the key distinction Justice Thomas draws is content-based versus content-neutral. A content-based regulation of speech is one that says you can't say a specific thing, you can't talk about a specific topic. And here it was content-based because the state wanted the CPCs, they wanted them to provide a specific content disclaimer, some sort of specifically worded notice, and that's content-based.

Content-neutral, again, that's what we call time, place, manner restrictions, which just limit when you can speak instead of what you can say. The court says that this is compelled speech because the CPCs are being required to convey a particular message, and it strikes it down.

Strict scrutiny applies, and this is not narrowly tailored to further a compelling government interest. And if you think about it, I don't think it's possible to have a situation where the state could win this, because if this is core political speech, if it's core speech, compelled speech about the services they offer, it's hard to imagine what type of regulation the state could draft, how narrowly it could tailor it to exempt the CPCs from the First Amendment, to just regulate their conduct.

So one of the things that had been applied across the country prior to NIFLA is the professional speech exception. And a lot of different circuit courts have said, "Look, if you are regulating a profession, if you're making a professional speak, then it receives less scrutiny because it's bound up in the concept of the regulated profession."

As a lawyer, the state of North Carolina can limit what I can say, and previously, in a lot of places, that would be considered to be a professional speech restriction, and it would be much easier to uphold under intermediate scrutiny. But the court says, "No, speech is not unprotected just because professionals say it."

And so you can't give professionals a lesser scrutiny than you would give just anyone in the general public. The distinction there is speech against professional conduct, and the Supreme Court has recognized two viable restrictions on professional conduct. The first is laws requiring professionals to disclose factual, non-controversial information. That goes back to my lawyer example from earlier, where the state can tell a lawyer to provide a disclaimer that says, "Hey, I am taking your case at no cost to you up front, but you still may be responsible for my fees. At the end of the day, you still may be responsible for my expenses."

That is a disclosure of factual, non-controversial information. The second is a regulation of professional conduct that has an incidental effect on speech. And this is where things get really thorny, and I think this is where a lot of cases start to disagree.

The court gives this example called Planned Parenthood against Casey. That is a case that reaffirmed Roe against Wade. That's a case that introduced the trimester framework. So many people were probably familiar with. In a separate part of that case, the court upheld a disclosure provision. It said that requiring licensed professionals to provide disclosures about alternatives to abortion, requiring licensed professionals to provide information about the developmental stage of the fetus, all of that is incidental to the practice of medicine, because that is not compelled speech.

That is just part of the practice of medicine. It's similar to obtaining informed consent, and it's similar to that sort of regulation on the practice as a whole, rather than forcing someone to say what they do, what they... forcing someone to say something they don't believe in.

So in that case, the law only incidentally involves speech, and therefore Planned Parenthood is distinguishable as only as a conduct regulation, whereas NIFLA is a speech regulation because it restricts a...because it compels speech by private actors. So the holding is the lower court's decision that licensed and unlicensed notices, they're content-based, they fail strict scrutiny, so it overturns the Ninth Circuit.

And this professional speech exemption is... Again, as I said, this is going to generate a lot of litigation across the country. So after 2018, we start to see some of these different opinions, these different lawsuits being filed and challenging the types of regulation that different states have.

The first one is Vizaline against Tracy. This is a case out of the Fifth Circuit. The Fifth Circuit is the court that covers Texas, Mississippi, and Louisiana. It sits in New Orleans. And here, the district court had enjoined a...it's a surveying requirement. The state of Mississippi wanted to regulate someone, as a surveyor, who basically just took metes and bounds descriptions of property lines and created models to explain what the property lines looked like in real life.

The state of Mississippi said, "No, that is a regulated profession. You're not a licensed land surveyor, and therefore, we're going to fine you." The district court says that's okay. The federal trial court says that's okay because it's professional speech. The Fifth Circuit vacates that opinion, reverses it, sends it back down, and says, "Hey, maybe this is okay, maybe it's not.

But you have to do more analysis than just say professional speech," and therefore the state wins. You've got to do something that is... You've got to go through a more rigorous analysis. And so this doesn't really draw out the speech conduct distinction so much. What it does is it clarifies the impact of NIFLA saying, "Look, the professional speech exception is dead, and you've got to treat this like any other speech case, and it doesn't matter that this is a licensing board."

Next case that we see is Otto against the City of Boca Raton. This is the Eleventh Circuit, so this is Florida, Georgia, Alabama. This court sits in Atlanta. In this case, it is a therapist. It's a talk therapist who wants to... I don't remember exactly what she wanted to do. I think it was more of a practice across state lines, and said, "Look, this talk therapy is speech, and therefore you can't infringe upon my right to speak."

The Otto court says, "You're exactly right. This is core speech, and therefore the restriction about you being able to talk to patients across state lines while in Florida, or being able to talk to patients in Florida while maintaining your practice outside of Florida, the state of Florida can't regulate that, or the city of Boca Raton can't regulate that."

And so it strikes down the ordinance. Now this creates the first part of what we call a circuit split, which is a reason the Supreme Court will take a case. You see here it says rehearing en banc denied. Rehearing en banc just means before the full court. Federal appellate courts sit in groups of three, and if you think that a decision is wrong, you can petition the court to hear it for the full bench, and those proceedings, in that context, they can overturn a panel decision.

Otherwise, the panel decision binds everybody on the court. So they ask the full court to overturn it, and the full court says no. But there are dissents. And so you see, people were starting to disagree about what talk therapy is, what it does, what it means. And Judge Rosenbaum, she says that talk therapy is a healthcare technique, and it's not just conversation.

And the panel had said, "No, this is just conversation. Talk therapy is nothing more than having a conversation, and it's not subject to regulation because it's just speech." Again, you've got this contrasting view that this is, in fact, healthcare, and it should be bound up in the state's ability to regulate the healthcare professions. So it should be able, the state should be able to regulate what professionals say, what licensed professionals say.

This creates the circuit split, like I said. The Ninth Circuit, which is again California, basically rejects the Eleventh Circuit's reasoning in a case called Tingley, and that creates a circuit split where we have two regional courts of appeals disagreeing with one another about how to interpret a Supreme Court opinion. And so this is starting to be, this is the beginning of the fracture that creates the Chiles decision we're going to talk about.

Then we've got Del Castillo against the Florida Department of Health. In this case, this is a dietician trying to give advice across state lines. And the state of Florida says, "You can't do that because you are a member of a regulated profession." The dietician loses. So rather than uphold, because this is... I'll be honest, it's really difficult to reconcile that case and the Otto case.

Because in Otto, you've got a therapist saying, "Look, I'm just talking." Here, the dietician comes forward and says, "Oh, well, I'm also just talking about nutrition, I'm talking about exercise, I'm talking about macros, what have you, and I'm advising my clients to go seek medical attention if they're losing weight too fast. I'm advising my clients to go seek medical attention and to supplement my advice with the advice of a doctor."

And the 11th Circuit then says, "Well, the Florida law regulates only professional conduct, even though the practice of being a dietician is necessarily a conversation between the dietician and his or her patient." So I find those hard to reconcile, but in that case, the Eleventh Circuit applies rational basis, which is, as long as there's a rational reason for this regulation, it gets upheld.

Then we see, again, this goes back to the Vizaline case, Crownholm. This is out of the Ninth Circuit, where the court is asked whether or not one of these mapping, one of these metes-and-bounds mapping businesses is a surveyor that needs to be regulated. The surveyor say, "No, because what we're producing, even though we're selling it, what we're producing is speech."

And the Ninth Circuit says, "No." So again, you're starting to see these tight distinctions between this case. And then Vizaline is not... The Fifth Circuit case that said this might be constitutional doesn't actually decide it. This is sort of a follow-on where we have another court saying, "Oh, no, this is constitutional. We are allowed to restrict licensed professions, even if what they're selling is incidentally speech, because we're regulating their conduct. We're regulating their conduct in the practice of being a surveyor."

Then we've got another case. This is out of the Fourth Circuit: North Carolina, South Carolina, Virginia, West Virginia, Maryland. And this is another of these mapping cases, where the state of North Carolina restricts the ability to use drones to map property, to create metes and bounds descriptions. And the Fourth Circuit applies a different level of scrutiny.

They apply intermediate scrutiny, a multi-factor test, and they conclude that this is only an incidental burden on speech. This is, again, the regulation of conduct as a professional rather than the regulation of a professional's speech. And finally, Hines against Pardue, which is, again, another case where it's sort of hard to reconcile. Dr.

Hines is a veterinarian. He wants to offer electronic... Basically, he emails people and says, "Look, if your dog is not eating, here's what to do." He doesn't actually practice veterinary medicine. He instead just sends advice over emails. And there's no dispute that if he were a doctor, he'd be able to provide telehealth. But because he's a vet, Texas law required him to see the dog before he could opine on the dog's health.

And so the Fifth Circuit says, "No, that's a speech-based restriction." And so what we take away from those is this is a really confusing area of the law. It's really easy, depending on how you look at a regulation, to say what is, what isn't speech, what is conduct-based, and what is not. In the context of the medical profession, doctors, nurses, is a specific regulation saying you can or can't do something.

For example, informed consent, is that speech? The court said no, because that's a regulation on the practice of medicine itself. Licensure is not speech. That's a regulation on the practice of medicine. But when you get into specific practices, you run the risk of creating content-based discrimination, and then the court may step in and say no.

And that's exactly what happens in Chiles. This is decided earlier this year. To set the background, the state of Colorado regulates conversion therapy. There are parts of this statute that are unquestionably constitutional. For example, you can't use electroshock therapy to try and provide care to a trans man or a trans boy who the parents believe should embrace their biological or their birth sex.

So you can't do something physically harmful. But Ms. Chiles, she only wanted to engage in talk therapy. She says, "Look, I'm not doing anything harmful, but as this statute applies to me, it's unlawful because it prevents me from being able to say something. It prevents me from being able to convey a message that I want to convey."

So the Supreme Court takes the case, and it says, "As applied to talk therapy, this statute violates the First Amendment." So the upshot of this entire case is that the court says you cannot specifically tell a talk therapist to not engage in conversion therapy because doing so violates his or her First Amendment rights.

This is an 8-1 decision. So it's not close, but the question presented, when a licensed counselor treats clients using only conversation, does a counseling ban regulate protected speech or merely professional conduct? The court says, again, any effort to change a minor's sexual orientation.

And so the way that this has been framed in the media, the way some of the opinions of the court describe it, Colorado allowed gender affirming care, but it banned care where you were trying to counsel a child or a person consistent with their birth sex. And so it allowed speech in one direction, and it prohibited speech in another direction.

It's definitely content-based, but it is more... It's definitely content-based. We've talked about the circuit split that got us here, which is the Tenth Circuit below the Ninth Circuit and then the Otto case out of the Eleventh Circuit.

And so the court grants cert to resolve this question. There we go. The majority says, "Look, this is a content-based restriction." Why is it content-based? It's because it triggers a specific type, or it attaches only to a specific type of content: talk therapy directed at X, directed at a patient's sexual orientation.

But beyond that, it is what the court has called an egregious form of content regulation, and that is viewpoint discrimination. Viewpoint discrimination here is gender-affirming care is bad, but...gender affirming care is okay, but conversion therapy is bad.

And so that creates not only a regulation of content, what you can or can't say, but it's the government dictating sort of winners and losers. It's the government directing the type of message you have to convey. And those almost always fail. So taking a step back, the principles here, if you're regulating conduct, that is a time, place, manner restriction, and that is generally okay.

Content-based restrictions are where you're saying you can talk about some things but not others. And then viewpoint-based discrimination is sort of the most specific, and it's treated by courts as the most offensive attack on the First Amendment, and that is you can or can't take a certain position on an issue. And so banning conversion therapy and allowing gender affirming care, in the court's mind, that is viewpoint discrimination because you're picking the winner and the loser.

You're picking the message that the state can convey. And so that is the framework for the entire opinion, is that this is viewpoint discrimination. We go back to these narrow exceptions. Fighting words, things that are meant to incite violence, imminent incitement of violence. You can restrict all of those things.

But viewpoint discrimination runs through all of those, and the court has already held that even in the context of things that could otherwise be regulated, if you discriminate on the basis of viewpoint, then it's going to be unconstitutional. So this viewpoint discrimination sort of runs through. It creates this exception to all of the caveats to the First Amendment.

The case that's cited in parentheses, R.A.V, so this is an important context, I think, for understanding the limits on viewpoint discrimination, or the power of viewpoint discrimination, rather. So R.A.V is a cross-burning case, R.A.V. against the City of St. Paul. RA.V is a 17-year-old.

He burns a cross in a black family's yard. The City of St. Paul prosecutes him under a local hate crime ordinance, and the Supreme Court vacates his conviction because it says this hate crime ordinance is viewpoint discrimination because it only applies in one direction. It doesn't apply to anybody else.

It only applies to speech that is offensive to, or that specifically attacks, minorities. That's how invidious the Supreme Court believes that viewpoint discrimination is. This is a case from the early '90s. It's one that is taught in law school, and that perplexes a lot of lawyers. But Colorado's ban on conversion therapy, it doesn't fit any of these categories.

Court says that the First Amendment is not a word game, and what it means by that is something isn't conduct just because the state says it's conduct. So the state can't define conduct, and it cannot accept speech by just saying, "Look, this is conduct. This is a conduct-based restriction."

You've got to actually look at how the restriction works in practice. There's no exception for professional speech. That is reaffirmed. But again, the court then looks at history and says, "History is littered with efforts to censor unpopular ideas," and that's the problem with professional conduct.

That's sort of the animating purpose behind the court's decision is, this is professional speech, but it's really core political speech, and that's the court...excuse me, that would be the state picking winners and losers. So this is viewpoint-based because, again, permitted is affirming a client's identity or exploration or transition, but forbidden would be helping a client identify with their birth sex.

And this is textbook viewpoint discrimination, and as the court points out in the majority opinion, there's no dispute that this is viewpoint discrimination. Even the dissent says this is viewpoint discrimination. So neither of the exceptions NIFLA recognized fit. Commercial disclosures. This is not factual, non-controversial information.

The court frames this as being very much controversial, very much a statement of opinion, and so it doesn't fit there, and it's not an incidental burden on conduct. And this is going to create future problems, incidental burden on conduct, because all a talk therapist does is speak, and since all the talk therapist does is speak, how could this not be speech?

So incidental to conduct, look there again, it fails both ways. Is it integral to unlawful conduct? It's not. And is it a restriction for a reason unrelated to conduct? The court says no, because it trains, it looks directly at the viewpoint of the speaker. So it fails both prongs.

There is no safe harbor that's been carved out under NIFLA for talk therapy. Here, I think, is something that's important to take away as regulators. Your state's history and tradition doesn't protect what is conduct versus what is speech. Colorado argued, "Look, medical licensing sets qualifications. This is just incident to having a medical license," and the Supreme Court says, "No, qualifications are different from the content of treatment sessions."

And so those are different things. Colorado tries to liken this to informed consent, and again, no, that is conduct-based because it achieves an important objective of getting the client's informed consent or the patient's informed consent before a procedure. But this is not because this is a...informed consent is a factual, non-controversial disclosure.

This, the court says, is not. And malpractice laws don't help define conduct because malpractice requires a specific injury. Meanwhile, this is just an expression of a view. Important also is that medical consensus is not the ceiling, medical consensus is not the standard.

So the court points out that the DSM once listed homosexuality as a disorder, and the court says, "Look, we can't allow the medical community's consensus on this, no matter what you're citing to, no matter

what sort of authoritative treatise or authoritative paper you're relying on. That consensus could change, the consensus can be politically motivated, and so we have to allow unpopular ideas despite being contrary to the medical consensus."

So holding a disposition, the Tenth Circuit had affirmed the regulation, had basically said, "Look, this is permissible. This is a restriction on conduct, not speech." The court reverses that.

The court says, "Yes, this is definitely a restriction on speech, not conduct." And so Ms. Chiles wins, and we're left, as of March of this year, with an opinion that basically says, "Look, if you are engaged in talk therapy, that is core speech, and it may be very difficult to regulate."

And we'll see a follow-on of how far some courts have taken that holding. But us lawyers, we always look to the next case, and the concurrence, Justice Kagan, joined by Justice Sotomayor, this sort of sets up what may or may not be permissible under the Chiles majority opinion.

So in legal parlance, you can concur in the opinion, or you concur in the judgment. Concurring in the opinion means I agree with everything the majority has said. Concurring in the judgment means I agree with the bottom line, but I disagree with the reasoning. And here's how... Here I'm writing separately to tell you how I would get to the same result. This is a concurrence in the opinion.

So she agrees that this is a viewpoint-based law, and that it discriminates on the basis of viewpoint. But she says that a content-based but viewpoint-neutral law may survive strict scrutiny. There is another case. First Amendment law sort of drapes over every type of statute you can imagine. So there's another case in the trademark context about being able to trademark the name of a living person without their consent.

It's on the next slide, but it's called Vidal against Elster. And in that case, the court says even though that is content-based, it still survives strict scrutiny. So she says that if this were just content-based but not viewpoint-based, then it may be a different question. And so you can think about that as Justice Kagan essentially saying, "Look, if you wanted to prohibit either type of therapy, not just one or the other, if you want to prohibit gender-affirming care or the same type of therapy that Ms. Chiles was performing, that might be okay because that's more of a...that does target content, but it may be easier to justify with respect to the regulation of the profession."

She calls this the easy case, and the harder case is going to be the next one. So again, Colorado's law is viewpoint-based, viewpoint-neutral. Things that don't...things that are not related to the official suppression of ideas, content-based but viewpoint-neutral, that may be okay.

That's sort of the key holding of Vidal. And Vidal was based largely on the history and tradition of what trademark laws do, the fact that trademark laws are meant to limit other people's speech. And so I expect that a viewpoint-neutral, content-based restriction would need to be something that's justified not just as a good idea for licensure or a good idea for regulation of the profession, but something that actually has a history and tradition that's rooted in a long-standing tradition about the way we regulate professions.

And that's probably enough to take it, even if content, to survive strict scrutiny. So again, viewpoint-neutral, viewpoint-based discrimination for healthcare regulators. For regulators in any profession, that may be the critical distinction. If you're targeting an unfavored or disfavored view, then it may be that you can't do that, and instead you need to go back to something that's just content-based, which is a higher level of abstraction, it's a higher level of generality.

But you need to regulate treatment without taking sides. And so that is, instead of you can do X but not Y for a specific type of treatment, it would instead be you may or may not perform a specific type of treatment. That is a...

I'm not a healthcare professional. I imagine that is a really challenging line to draw, because it seems unwise to go ahead and say, "Look, you cannot counsel anyone who is struggling with their transition, who's struggling with their biological sex, with gender dysphoria," what have you. And that's sort of the line that Justice Kagan draws.

I don't know what the next case will look like, building off of this concurrence, but it's probably going to be a much broader restriction that prevents someone from engaging in speech that they like. There is a dissent. Justice Jackson dissents, and her dissent is, depending on your view of regulators, it may be common sense that you can't be a doctor, you can't be a therapist without the state's approval.

The state has an inherent, well-grounded right to tell you that you can't practice medicine, you can't practice law, you can't do this, that, or the other if you're in a regulated profession. And she says that's enough, because your medical license, your nursing license, your license to practice law, because that's a privilege, the state can restrict what you can or can't say, inherent in the licensing of the regime itself.

For last bullet point, the First Amendment's principles are, carry far less salience when treatment is speech-related, but it's incidentally restricted. And so she views this not as a restriction on talk therapy, but as a regulation of the way therapists in Colorado may provide therapy.

And that, I think, is a...it's something we all do well to understand, to think about, but it's not an easy line to draw, and I'll concede that, whether or not you are regulating speech or whether you're regulating conduct. That's the key distinction, and that is, as you've seen, based on the post-NIFLA cases, that's an open question, and it's really confusing in courts across the country.

Not only do they disagree about what is and what is not speech, but they also disagree about how you regulate things that incidentally affect speech. Like we saw, the Eleventh Circuit used rational basis, and the Fourth Circuit uses intermediate scrutiny. Rational basis requires almost no tailoring, but if you're in a state that uses intermediate scrutiny, then you're more likely to need to really document your laws, narrowly tailor them, focus them, or your regulations or your rules, and then they will probably be upheld.

But the level of scrutiny that applies between intermediate and rational basis is a...it's a tough question, and it's one that is dispositive, even if it's not as stark as...or could be dispositive, even if it's not as stark as the difference between intermediate and strict scrutiny, which is what the restriction in Chiles got.

Justice Jackson, again, says the majority is asking the wrong question about speech incidentally regulating treatment, and talk therapy is medical treatment, and so restrictions on talk therapy should be reviewed as any restriction on medical treatment. This is the warning in the dissent, and this is, again, another important takeaway.

The dissent points out that things may be at risk, important things in regulated professions, important things in medicine, important things in nursing, like duties to collect...duties to protect client welfare, bans on cruel treatment, and discipline for incompetence. The last point, I think, is the easiest to sort of conceptually understand about discipline for incompetence.

I mean, if somebody is just not abiding by the professional standards, but it's not resulting in tangible patient harm. So think about a medical malpractice case where the doctor has done everything wrong, but the doctor didn't cause the patient's injury.

Some other freak accident did. In most of the country, the medical board, the nursing board, could still step in and say, "You messed up, even if you didn't cause specific patient harm, because you behaved incompetently. You fell below the standard of care." In certain speech-based professions, what does that look like?

Even if there's no harm to a patient, what is a regulator's ability to step in and to intervene with, for example, a talk therapist, or somebody who draws maps and should be a land surveyor?

The warning that Justice Jackson has is this is...it sort of promotes unprofessional and unsafe conduct. And so here we've got another case that was decided after Chiles. This is called Brokamp against the District of Columbia. There actually is a companion case to this that's mentioned in the slides, but I needed to bring it up. So Ms.

Brokamp is a talk therapist. She is based in Virginia, but she started practicing therapy, she started practicing remote teletherapy in the District of Columbia and in the state of New York during the pandemic. During the pandemic, both D.C. and New York had relaxed their licensing, their compact laws, and so she was allowed to do that legally.

After the pandemic subsided, they rolled those restrictions, or excuse me, they reimposed the restrictions that existed. D.C. and Virginia have essentially the same therapy licensing regimen, but D.C. doesn't recognize Virginia therapists because there's no reciprocity between the two jurisdictions.

You can't just...you can't get a license in the District just because you have a license in Virginia. So Ms. Brokamp has sued both the District of Columbia and the state of New York. She loses in New York, but in D.C... And here's the background again about unlicensed therapy.

She's practicing in Virginia, offering teletherapy in D.C. She's a Virginia-licensed counselor. She sues. She practiced all through COVID. And in the interest of time, I'll get to the spoiler alert: she wins. The federal trial court says that because talk therapy is just speech, the District of Columbia cannot prohibit her from engaging in talk therapy across jurisdictional lines without a license.

I will be transparent. I think this decision is wrong. I think it takes Chiles a step too far, and it creates talk therapy as a practice as speech. And the Supreme Court has time and time again upheld professional licensing regulations. Your state, your home state, can determine who it does and does not want to license as a therapist, as a doctor, as a lawyer.

And this, I think, sort of strikes at that proposition because now she's allowed to practice therapy in Virginia and in the District of Columbia without having a license in D.C. This is...it's not conduct. It goes back to the Supreme Court statement about talk therapy, that talk therapy is speech. Here is, I think, an important takeaway if you're going to try and impose those lines, if you want to keep particularly talk-based treatments or speech-based treatments limited to your jurisdiction.

The district court here, the trial court, it faulted the district for not having concrete evidence of harm. It said, "Look, she practiced all through COVID." There's no rash of harm across state lines during that period of time, and there aren't very many findings about why the reciprocity requirement is

necessary...excuse me, about why the reciprocity requirement or why licensure in the district is so important.

That's really important because when you get to, as you see down there, the Second Circuit ruling in Brokamp against James, New York had banned practicing therapy across state lines, but its General Assembly had made detailed factual findings about why that was appropriate.

And if you're going into a space where strict scrutiny could apply, you need those detailed findings to demonstrate why the law is necessary, to demonstrate the government's substantial interest in the outcome of the case. Court also said it wasn't necessarily narrowly tailored because there are less burdensome alternatives. The court said one of the less burdensome alternatives was simply recognizing other states' counseling licenses.

And it also faulted the district for providing an expert who admitted that counseling is essentially a national standard, and that the requirements don't vary much. This is just... This is really thorny. So want to talk about what this... Now we get to the important part: why this matters for you.

And so the dividing line is viewpoint neutrality. If you take or favor a specific viewpoint, that is very, very, very likely to be unconstitutional. And fortunately or unfortunately, in this context, viewpoint discrimination may be easy to pick out, because sometimes it's the most controversial practices.

Sometimes it's the things that regulators may feel like they need because of the standards of care that they need to regulate. Take Colorado and banning conversion therapy. Everybody agrees you can't do it in a violent way, but can you ban it by talking? And Colorado says, "No, the majority position, the consensus is that gender-affirming care is okay, but conversion therapy is harmful."

And the Supreme Court says, "That doesn't matter." It's more defensible if you focus on a specific treatment, if you focus on a specific procedure or qualification, and you can do so neutrally. You've got to have a certain credential. You've got to have... You can only provide talk therapy in certain circumstances.

And as we build out and we talk about what it requires, what the licensure requirements are, there are ways you can bake in some of these controls at a more general level that may result in, on the ground, more viewpoint-neutral, content-based restrictions that may survive under Justice Kagan's dissent.

So when you're drafting rules, you want to regulate conducts, procedures, and qualifications. You do not want to compel or prohibit a specific message. All of this may require you to... It may incidentally involve speech, and that's what's dangerous. That's the inherent danger in any type of regulation, but you want to regulate conduct, procedures, and qualifications.

And you want to write in neutral terms. The goal is to be more broad in your restrictions, and not be so granular and favor one view of an outcome over the other. And finally, if you're going to compel disclosures, they need to be factual and non-controversial. And once something is classified as a treatment, then if it is factual and non-controversial, don't let the treatment label dissuade you from regulating.

But once something is classified as a treatment, you really need to focus on whether you're regulating the way the treatment is administered, or whether you're limiting the practice of the treatment because you don't like the message. If your board gets sued, then you need to build a record. A lot of states...

North Carolina has a lot of regulations. It's sometimes hard to find. I know from my own practice, it's hard to find the justifications behind some regulations. It's important that you document why you are regulating the particular practice, and it's important that you do so by being very neutral about the message that the practice conveys. You want to build a record of harm, a record that says injury, causation, breach, here are the harms that occur from this specific treatment, from this specific practice, and you can't just rely on professional consensus.

You need an evidence-based disclosure. And the standard of care does not prevent...that does not insulate you from liability. The standard of care is a consensus, but again, the consensus is not a constitutional limitation. The consensus has to coexist with that. So the bottom line in Chiles, speech is speech, even in a counselor's office.

The dissent is worried about a deregulated medical market because it is, as you... I hope you have understood, particularly, it's why I put in the cases about surveyors. It's really hard for a non-lawyer to understand why that could ever possibly be speech. But it is.

And so think about the difference between speech and conduct, and then make sure if you have questions to consult with your inside or outside counsel about the distinction, which side of the line your regulation falls on. And be sure to build those records so that if you get sued, you'll have a defensible position to say, "Look, this is why we're regulating it. This is why this is important."

I've got about four minutes left if anybody has any questions. I know that was a lot, and I know that was dense, but I'm happy to field anything if anybody wants to ask anything. All right. Number two?

- [Woman] You talked a lot about you can't rely on professional consensus, but I wondered about evidence, science-based evidence. I think as regulators we use that a lot and expect our licensees to be science-based, not be saying Ivermectin cures COVID, that kind of thing. So I'm just wondering, is that the same to you, or is there a difference there?

- So the question, if... You're mic'd up, but I don't know if it came from behind. It didn't come from behind me. So the question is, can you do science-based? Can your restrictions be science-based? And generally, yes, but there's a caveat to that. By the time a case like Chiles reaches the Supreme Court, the Supreme Court normally throws out the district court's findings of fact.

And so at a federal trial court, you may have a detailed factual record about why this is important, and it may be science-based, and then the Supreme Court sort of has this concept, right or wrong, that it gets to find constitutional fact. And so if it thinks that it's a debatable proposition, maybe not. But it is certainly a best practice because the Supreme Court only takes 65, 70 cases a year.

It gets thousands of petitions. And so I would not treat every case as if it's going to the Supreme Court. Most, if not all, civil litigation stops at the Federal Court of Appeals if it's a First Amendment challenge. So there, your evidence-based conclusions are going to get a lot more weight. And so that's not a clear line, and it's more of a practical answer, but I hope that answers your question.

Number three.

- [Lynn] Thanks. And I know you don't have enough time, but one of the things that... By the way, Lynn Power from Newfoundland and Labrador, Canada. But what my head was circling around on is one of the things we're all debating on each country, on each side, is aesthetic services. And there is an opinion

on aesthetic services being, is it healthcare, is it not, how much consent goes in. I wonder if you think there's any interchange on this topic and any direction, because your dos and don'ts being very careful what we state.

Any thoughts?

- Aesthetic services, let me make sure I understand. Aesthetic, like an esthetician, like the Botox.

- Yeah.

- Thank you. I started with eyebrows, but I would have gotten there eventually. I think that's a much, much easier call because it's not just talk therapy. That is an actual... I mean, I hate to be sort of flipping about the distinction between talk therapy and sticking a needle into someone's forehead, but I think that's a lot easier to regulate than the content of what somebody is saying.

And then, if you want to regulate what they say, I think informed consent and disclosure requirements about... Maybe I'm not a doctor, or maybe if you want to... I guess one of the other, I guess, is it the off-label use of Botox, is that it treats migraines or that it treats headaches? I think that may be difficult.

I think there's a... I think you may be able to require the disclosure that that would be off-label use, but maybe not vouch for or against the practice, if that makes sense.

- Yeah. Too much for now, I know, but it's just that when you're starting to do the dos and the don'ts, there is a little dissenting viewpoints on this topic, and just to be careful with how something may be framed because could have fallen in that category. If it's physical, I follow you, but anyway, thank you.

- The disclosures is closer. I've got time for one more question, number seven.

- [Melissa] Good afternoon, Melissa Nunn from the Louisiana RN State Board of Nursing. For this last case that allowed for that therapist to now practice in D.C. without being licensed by the state, does the state have any ability to now go in and state their own case, or how will this play out? I'm thinking about, for us on the state level, if we went through something similar.

- So this is a federal trial court case. The state has the ability to appeal this, and so the state will take it to the District of Columbia Circuit, or the district will take it to the District of Columbia Circuit, which is one of the regional courts that oversees just D.C. And I can't really predict what... I think that the state made arguments similar to the views I expressed up here.

I think you're likely to hear those repeated, that the regulation of a licensee's ability to practice has to be different than just talk therapy in general. But that's one to watch. That was decided in June, and I should have checked the docket, but if they were going to appeal it, it should already have been appealed. And I anticipate that...

I think that's an important enough question for a state that's got far enough reaching consequences that I do anticipate they would appeal it.

- Perfect. Thank you.