A Changing Environment in the Regulation of the Practice of Medicine – the Impact of NIFLA v. Becerra

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(The opinions expressed are my own.)

National Institute of Family & Life Advocates (NIFLA) v. Becerra

First Amendment

CA FACT Act: purpose is "to ensure that California residents make their personal reproductive health care decisions knowing their rights and the health care services available to them."

Licensed covered facilities:

1. Primary purpose of providing family-planning or pregnancy related services, with certain qualifiers.
2. Federal clinics and "Medi-Cal" enrolled clinics who provide the full scope of family planning exempt.
3. Required Notice: California has public programs with immediate free or low-cost access to comprehensive family planning services. Contact XXXX.

Unlicensed covered facilities:

1. No licensed provider on staff and primary purpose is "providing pregnancy-related services," with certain qualifiers.
2. Required Notice: the facility is not licensed and has no licensed medical provider

The notice is content-based but 9th Circuit: notice regulates professional speech so strict scrutiny not needed.

CA Reproductive Freedom, Accountability, Comprehensive Care, and Transparency Act (Cal. Health & Safety Code Ann. § 123470 *et seq.* (2018))

NIFLA v. Becerra, 138 S.Ct. 2361 (2018)

National Institute of Family & Life Advocates (NIFLA) v. Becerra

…**this Court has never recognized "professional speech" as a separate category of speech** subject to different rules [than traditional First Amendment protections] . .

The Court has afforded less protection for professional speech in two circumstances –where a law requires professionals to disclose factual, noncontroversial information in their "commercial speech." . . and **where states regulate conduct that incidentally involves speech**.

NIFLA v. Becerra, 138 S.Ct. 2361 (2018)

IS IT SPEECH?

Texas – Veterinarian regulations required in-person examination

Dr. Hines was incapacitated and provided advice over the internet

5th Circuit: . . **The State only penalized him for his *communication* with the owner about the bird in which he gave a diagnosis and treatment plan. . .**

Because the act in which Dr. Hines engaged that "trigger[ed] coverage" under the physical-examination requirement was the communication of a message, **the State primarily regulated Dr. Hines' speech.**

Hines v. Pardue, 117 F.4th 769 (5th Cir. 2024)

(petition for cert filed 2/24/25)

Or IS IT Conduct?

CA: McBride v. Lawson: Because the state's licensing laws regulate conduct [the practice of medicine], the court must uphold those laws if they are "rationally related to a legitimate state interest."

"States do not lose the power to regulate the safety of medical treatments performed under the authority of a state licenses merely because those treatments are implemented through speech rather than through scalpel." (citing *Tingley*).

NY: Brokamp v. James: Content neutral. License requirement applies – regardless of what is said – only to speech having a particular purpose, focus, and circumstance. (v. DC: licensure requirement "is content-based, given that it only applies to Plaintiff's speech if she speaks about certain topics such as her clients' mental, emotional or behavioral issues.")

McBride v. Lawson, 2024 U.S. Dis. LEXIS 210217 (E.D. Cal., Nov. 18, 2024) (case dismissed upon petitioners request 1/30/25)

Tingley v. Ferguson, 47 F.4th 1055, 1064 (9th Cir. 2022) (cert. denied)

Brokamp v. James, 66 F. 4th 374, (10th Cir. 2024)

Or IS IT Conduct?

NJ: MacDonald v. Sabando: Telemedicine defined in statue includes patient consultation, follow-up and advice and is therefore treatment. Plaintiffs argue that "the conversations in which they hope to engage are not treatment. . . It makes little sense to base my decision on what [plaintiffs] define as treatment as opposed to the statute itself."
"Adopting plaintiffs' construction on the First Amendment would provide a workaround to state licensure and undermine New Jersey's interest in regulating the practice of medicine. "

WA: Wilkinson v. Wash. Med. Comm'm: The First Amendment robustly protects a doctor who publicly advocates a treatment that the medical establishment considers outside the mainstream or even dangerous. . . . If discussions between a doctor and patient do not directly implicate care of that patient, the First Amendment shields the speech.

WMV could constitutionally discipline Dr. Wilkinson for his prescribing ivermectin . . . For his failure to disclose relevant information . . And for his violation of the standard of care when directly advising a patient to shun COVID-19 vaccines. WMC could not regulate Dr. Wilkinson's speech on his website blog when he preached the same themes.

MacDonald v. Sabando, 2025 U.S. Dist. LEXIS 89616 (D. NJ., May 12, 2025) (appeal filed 06/10/2025)

Wilkinson v. Wash. Med. Comm'n, No. 40061-1-III (Wa. C. A. Div. III, Sep.16, 2025)

CHILES V. SALAZAR

Colo. Rev. Stat. § 12-245-202 (3.5).

(3.5)(a) "Conversion therapy" means any practice or treatment by a licensee, registrant, or certificate holder that attempts or purports to change an individual's sexual orientation or gender identity, including efforts to change behaviors or gender expressions or to eliminate or reduce sexual or romantic attraction or feelings toward individuals of the same sex.

(b) "Conversion therapy" does not include practices or treatments that provide:

(I) Acceptance, support, and understanding for the facilitation of an individual's coping, social support, and identity exploration and development, including sexual-orientation-neutral interventions to prevent or address unlawful conduct or unsafe sexual practices, as long as the counseling does not seek to change sexual orientation or gender identity; or

(II) Assistance to a person undergoing gender transition.

Colo. Rev. Stat. § 12-245-224(1)(t)(V).

(1) A person licensed, registered, or certified under this article violates this article if the person:

(t) Has engaged in any of the following activities and practices:

(V) Conversion therapy with a client who is under eighteen years of age;

(2019) Minor Conversion Therapy Law (MCTL)

CHILES V. SALAZAR

Kaley Chiles: Licensed professional counselor and addiction counselor; graduated in 2014 with a Master of Arts in clinical mental health. A "'practicing Christian' who works with 'adults who are seeking Christian counseling and minors who are internally motivated to seek counseling.'"

"Because of the MTCL she has been 'forced to deny voluntary counseling that fully explores sexuality and gender to her clients and potential clients in violation of her and her clients' sincerely held religious beliefs.'"

Moved for a preliminary injunction to enjoin Colorado from enforcing the MCTL.

Colorado opposed on standing and the state's "right to regulate professional conduct, even though that conduct incidentally involves speech ." (*NIFLA* – deferential view).

Both District Court and 10th Circuit found Ms. Chiles had standing, but lost on the merits.

"The power of a government to regulate the professions is not lost whenever the practice of a professional involves speech…Endorsing Ms. Chiles' effort to distinguish Casey would require us to conclude – erroneously – that mental health care is not really health care and that talk therapy is not really medical treatment. . . .A contrary conclusion would undermine the state's ability to require its mental health professionals who engage in talk therapy to conform to the 'generally accepted standards of the profession."

CHILES V. SALAZAR (S.Ct. Argument 10/07/2025)

Kaley Chiles: James Campbell, Alliance Defending Freedom

US: Hashim Moopan, Principal Dep. S.G.

CO: Shannon Stevenson, Solicitor General

Over 80 amicus briefs filed.

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Jackson: Are you (Chiles) categorizing the therapy as a medical treatment?

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Jackson: If we had a situation like this in which a state licensing board disciplined a doctor for a speech-based practice outside of the standard of care, would that doctor have a First Amendment defense?

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Thomas: So what if someone who was - - happened to be devoutly religious and actually relied more on the minster than the therapist? It would seem that that person would be equally dangerous.

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Kagan: If a doctor says, I know you identify as gay and I'm going to help you accept that, and another doctor says, I know you identify as gay and I'm going to help you to change that, and one of those is permissible and the other is not, that seems like viewpoint discrimination in the way we would normally understand viewpoint discrimination.

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Kagan: Are you saying that there's no distinction between [the law against conversion therapy] and the range of things that a doctor can tell you in her office about what kind of care is appropriate for any particular condition?

SPEECH V. CONDUCT: WHAT IS IN THE FUTURE?

1. What are the implications for SOC?

2. Is prescribing speech or conduct?

3. What about specific treatments – through conversations, emails, texts?

4. Requiring licenses for telemedicine – physician consults or aftercare?