

mentally ill and one for serious criminals” (*Hart*, p 555, citing *Crawford v. City of Bakersfield*, 944 F.3d 1070 (9th Cir. 2019), p 1078).

The court discussed its reasons for refusing to create two such tracks. Specifically, the governmental interest in the use of force is substantial when there is a significant threat of harm to others. Part of the *Graham* analysis is consideration of whether an officer is under immediate threat. In *Vos v. City of Newport Beach*, 892 F.3d 1024 (9th Cir. 2018), the court noted police officers are not obligated to put themselves in danger, regardless of whether the suspect is mentally ill. Safety of the officers and others should take priority.

Here, the court found it convincing that Mr. Hart posed an imminent threat to himself and the officers. Therefore, use of force was not objectively unreasonable, regardless of his mental illness at the time. Forensic psychiatric experts may nevertheless be asked to assess a subject’s emotional and mental state preceding and at the time of officer use of force and to provide context about a person’s behaviors. In some jurisdictions, the criminal intent of the subject preceding officer use of force is also something considered in the assessment of qualified immunity and may be a question posed to forensic evaluators.

First Amendment and Conversations between Counselors and Clients

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**State Ban on Conversion Therapy Lawfully
Regulates Professional Conduct of Mental
Health Clinicians**

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Key words: First Amendment; professional conduct; incidental regulation of speech; Article III standing; conversion therapy

In *Chiles v. Salazar*, 116 F.4th 1178 (10th Cir. 2024), the Tenth Circuit Court of Appeals considered a licensed professional counselor’s argument that a Colorado law prohibiting conversion therapy violated her First Amendment rights. The court upheld a ban on conversion therapy as a regulation of the counselor’s conduct, not speech. The court found that restrictions on professional conduct that incidentally involve speech are not violations of First Amendment rights.

Facts of the Case

In September 2022, Kaley Chiles, a practicing Christian and licensed professional counselor in Colorado, brought a pre-enforcement challenge against regulatory agencies in federal court, seeking a temporary injunction to bar enforcement of Colorado’s Minor Therapy Conversion Law (MTCL) of 2019 (Colo. Rev. Stat. § 12-245-101 and § 12-245-202 (2019)). She alleged that the MTCL violated the Free Speech and Free Exercise Clauses of the First Amendment.

The MCTL was added to Colorado’s Mental Health Practice Act in 2019. Under the MCTL, a mental health professional may not utilize conversion therapy with a client under 18 years old. Conversion therapy is a practice that attempts to modify a person’s sexual orientation or gender identity. Potential consequences of violating the MCTL include a fine and revocation of a provider’s license.

Ms. Chiles had some clients with a biblical view of sexuality, meaning their attractions and feelings do not dictate their behavior regarding their sexual orientation and gender identity. According to Ms. Chiles, her clients desire to uphold the tenets of their faith and live a life consistent with their religion. She argued that not being able to do so could lead to a variety of mental health concerns. Ms. Chiles claimed she solely implements talk therapy and she did not seek to cure or change her clients’ sexual orientation; rather, she claimed she assists clients with their desired goals of therapy, which may include modification of sexual attractions and behaviors. Additionally, she does not attempt to alter attraction or behavior if her minor clients do not express a desire for this change.

Ms. Chiles asserted she was unable to provide treatment fully exploring same-sex attraction and behavior with certain clients because of the MCTL. She maintained the MCTL restricted her freedom of expression, because the law rendered her unable to

openly discuss modification of sexual attraction and behaviors with willing clients.

Ms. Chiles moved for a preliminary injunction to seek a statement that the MCTL is unconstitutional and to end enforcement of the law. The U.S. District Court for Colorado found that Ms. Chiles had standing under Article III of the Constitution to file suit but denied her motion for preliminary injunction. She appealed, and the defendants (i.e., Colorado's Department of Regulatory Agencies Executive Director, Colorado Board of Addiction counselor examiners, and licensed professional counselors) cross-appealed to the U.S. Court of Appeals for the Tenth Circuit.

Rulings and Reasoning

The Tenth Circuit Court of Appeals agreed with the lower court that Ms. Chiles had standing to file suit under Article III and affirmed the district court's denial of Ms. Chiles's motion for preliminary injunction.

Standing is a constitutional requirement that must be met to bring a lawsuit in federal court. The Article III standing stems from Ms. Chiles's claim that the MCTL required her to alter her therapy practice to not fully explore sexuality and gender matters, thereby restricting her First Amendment right to free speech. Article III standing requires an injury to the plaintiff, the provenance of which is traced to a challenged action, and the injury can be redressed by a court's favorable action. The defendants did not contest traceability or redressability but questioned the injury (i.e., the government had restricted Ms. Chiles's practice in which she was previously able to engage). The court ultimately concluded an injury was present.

The Tenth Circuit then addressed exceptions in which professional speech is not exempt under First Amendment principles, citing *National Institute of Family & Life Advocates (NIFLA) v. Becerra*, 585 U.S. 755 (2018). Under *NIFLA*, some laws can require professionals to divulge factual information in commercial speech and professional conduct may be regulated by states even if this incidentally involves speech. Ms. Chiles's petition was viewed by the court to fall under professional conduct that could be regulated even if it involved speech. The court concurred with the district court's conclusion that the MCTL regulates professional conduct, which includes talk therapy. As speech that is incidental to professional conduct, it can be treated differently under the First Amendment.

The court ruled that the practice of conversion therapy was prohibited, not the discussion of the subject. It was not a content-based regulation of speech and therefore not subject to strict scrutiny, which is required when a law imposes on a fundamental right. The MCTL regulates professional conduct, which happens to involve speech; therefore, the court considered a lower bar of scrutiny (i.e., rational basis review) when hearing the case. The court found the MCTL was established in Colorado's legitimate interest in preserving integrity of the mental health profession and protecting children from ineffective and potentially harmful treatments.

In addition, the court noted that the MCTL did not demonstrate a lack of neutrality regarding religion, which would create the need for strict scrutiny. Specifically, the MCTL did not reference religion or a specific religious practice. The understanding that conversion therapy is commonly associated with religious practice is not enough to demonstrate a lack of neutrality regarding religion. Other factors relevant to the MCTL's neutrality included the history of conversion therapy and the events leading up to the law's implementation in Colorado. The court found the MCTL does not include individual exceptions when conversion therapy may be permissible. This law does not require strict scrutiny, because it applies equally to all individuals.

Finally, the court ruled Ms. Chiles did not demonstrate a likelihood of success based on her claims. The likelihood of success is a merits test courts use to determine the effects of a judgment should be implemented or suspended. The court affirmed the district court's decision to deny Ms. Chiles's motion for preliminary injunction.

Discussion

The *Chiles* case is important because it addressed whether regulation of therapeutic practices could unlawfully abridge clinicians' right to free speech. In this case, the court ruled that a law on MCTL lawfully regulated the professional conduct of mental health clinicians.

The *Chiles* opinion referenced several U.S. Supreme Court and other court holdings that address when exceptions to the First Amendment apply in a professional context. In *NIFLA*, the U.S. Supreme Court held that professional conduct may be regulated by the government, even if it incidentally involves

management of speech. In the present case, the court found the MCTL's prohibition on administering conversation therapy to minors *via* talk therapy does not regulate expression. Rather, it regulates a medical treatment that incidentally involves speech and as such is an exception to the First Amendment. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Court held that the practice of medicine is subject to license and regulation requirements by the state even if it incidentally involves speech.

In *Chiles*, the court discussed the difference between regulations on content-based speech versus specific professional practices. The court specified a mental health clinician may speak about conversion therapy but may not practice it. This delineates the difference between content-based speech management, which would require greater scrutiny, versus regulations addressing professional conduct incidentally involving speech.

The American Psychological Association (APA) submitted an *amicus* brief in the case for the position that conversion therapy is harmful and not supported by credible evidence. This illustrates another way that mental health clinicians can help courts to understand mental health concepts. The court cited work submitted by the APA and highlighted the lack of research demonstrating the practice's effectiveness. The court also discussed the risk of harm posed by conversion therapy by citing research showing an increased risk of suicide for individuals undergoing this practice. The MCTL was added to Colorado law because of a stated interest in ensuring mental health professionals complied with a standard of care based on updated scientific research. Various ethics codes in medical and mental health disciplines note clinicians should do no harm, and the practice of conversion therapy is contrary to that admonition. Additionally, in many cases, governmental agencies, laws, professional organizations, and licensing boards collaboratively work to guide professional conduct for the protection of society. These standards create different guidelines than would be expected for a lay person, which may ultimately include exceptions to First Amendment rights. The case has been appealed to the U.S. Supreme Court.

Independent Expert Witness Testimony in Sexually Violent Predator Trials

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In Sexually Violent Predator Act Proceedings, Evaluatees Cannot Be Compelled to Engage in Additional Evaluations Beyond State-Appointed Evaluations

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Key words: sexually violent predators (SVPs); Sexually Violent Predators Act (SVPA); expert testimony; independent forensic evaluations; prosecution experts

The California Supreme Court's decision in *Needham v. Superior Court of Orange County*, 550 P.3d 570 (Cal. 2024), addressed the scope of independent forensic evaluations under the state's Sexually Violent Predator Act (SVPA or the Act). The central question was whether the prosecution can present its own retained expert to testify on the defendant's sexually violent predator (SVP) status and, if so, under what conditions. The California Supreme Court held in a 5-2 decision that, although expert witnesses privately retained by the prosecution can testify, an SVP evaluatee cannot be compelled to undergo additional precommitment interviewing or testing beyond that which is done by state-appointed Department of State Hospitals (DSH) evaluators.

Facts of the Case

Nicholas Needham, a convicted sex offender, was referred by the District Attorney's office in Orange County for evaluation as a possible SVP under the SVPA. The Act specifies that individuals who meet SVP criteria may be civilly committed for treatment in a secure facility following completion of a prison sentence. The Act also lays out a stringent protocol for how potential SVPs are to be evaluated.

In accordance with the Act's protocol, Mr. Needham was referred to two state-appointed DSH evaluators for examination. Both evaluators initially opined Mr. Needham met SVP criteria. The District Attorney's Office thus petitioned to commit Mr. Needham as an SVP. But before the probable cause hearing, one of the evaluators submitted an updated evaluation indicating he no longer felt Mr. Needham qualified for