Do Bans on Conversion Therapy Violate the First Amendment?

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[0:00:00.3] Jeffrey Rosen: On October 7, 2025, the Supreme Court heard oral arguments in *Chiles v. Salazar*. Hello, friends! I'm Jeffrey Rosen, president and CEO of the National Constitution Center, and welcome to We the People, a weekly show of constitutional debate. The National Constitution Center is a nonpartisan nonprofit chartered by Congress to increase awareness and understanding of the Constitution among the American people.

This week, we'll recap the oral arguments in *Chiles v. Salazar* and discuss whether Colorado's ban on conversion therapy violates the First Amendment. To help us explore this important topic, we have two of America's leading scholars on the First Amendment. Stephanie Barclay is professor of law at Georgetown Law School and the faculty co-director of the Georgetown Center for the Constitution. Her research focuses on the role our democratic institutions play in protecting minority rights, especially at the intersection of free speech and religious exercise. Stephanie, it's wonderful to welcome you back to We the People.

[0:01:03.2] Stephanie Barclay: Thanks so much, Jeff. It's great to be here.

[0:01:05.2] Jeffrey Rosen: And Erwin Chemerinsky is dean of UC Berkeley School of Law and the Jesse H. Choper Distinguished Professor of Law. A leading First Amendment scholar, he's the author of 19 books, including preeminent casebooks and treatises about constitutional law, criminal procedure, and federal jurisdiction. Erwin, it's wonderful to welcome you back to We the People.

[0:01:25.6] Erwin Chemerinsky: My great pleasure. Thank you for having me.

[0:01:27.9] Jeffrey Rosen: Stephanie, let's jump right in. What is Colorado's ban on conversion therapy, and why do you believe that it violates the First Amendment?

[0:01:36.0] Stephanie Barclay: Sure. Maybe I'll begin by explaining what this case isn't about, because conversion therapy brings a lot of things to mind. But this isn't a case where we have a counselor trying to engage in discredited, coercive, or aversive techniques like shock therapy. Everyone in the case agrees that those sorts of practices have no place in modern counseling. What Ms. Chiles is trying to provide is client-directed talk therapy to help clients achieve their own stated goals. And it's only talk therapy. There's no other sort of procedure. So if a client comes to her and says, I'd like to have help reducing unwanted behaviors or finding harmony with the physical body

that I was born with, that's what Ms. Chiles' therapy is focused on providing for them. Colorado law permits counselors to speak messages supporting a gender transition, but Colorado prohibits messages supporting detransition or helping a client live at peace in their own body. And so Ms. Chiles is arguing not only is this content-based discrimination of speech, this is viewpoint-based discrimination of speech. The court has made clear in previous cases, like *NIFLA*, that simply labeling speech as a treatment in the medical context, and even if it's professional, that does not erase First Amendment protection.

[0:02:46.5] Stephanie Barclay: And so that's a reason here where I think the First Amendment likely will end up providing full First Amendment protection for Ms. Chiles. And the big problem Colorado has is that if we're in strict scrutiny or even intermediate scrutiny and they have to prove that there's some sort of harm, none of the studies or evidence that Colorado cites, and they have a lot of studies, but none of those studies are about this type of talk therapy with a licensed professional and a consenting minor who's seeking to accomplish their own goals. In fact, some studies show that that's helpful for clients. And so I think Colorado wouldn't be able to meet their burden. They didn't in the evidence they introduced below, and we're likely to see a ruling in favor of Ms. Chiles in this case.

[0:03:24.8] Jeffrey Rosen: Thank you so much for that. And Erwin, tell us why you think the Colorado ban does not violate the First Amendment.

[0:03:32.3] Erwin Chemerinsky: Thank you. I'm going to make three points. First, the case isn't ripe for review. The law was adopted in 2019. It's never been enforced. This is so like *Poe v. Ullman*, the 1961 Supreme Court case. There's a challenge to a state law that prohibited contraceptives. And the Supreme Court said the law hasn't been enforced in a century. It's not yet ripe for review. Second, states have always, through their law, set standards of medical care. This includes regulating the speech of health professionals. Doctors have to describe the side effects before a procedure or drugs. Doctors must get informed consent. There's a very famous case that said that a therapist has the duty to warn third parties. There's reason to believe that a person might be harmed. All of that is regulating speech. That's what Colorado law does. And third, the evidence is overwhelming that such therapy is ineffective and is harmful. Last year, in *United States v. Skrmetti,* the Supreme Court stressed the need for courts to defer to the judgment of state legislatures with regard to medical procedures. 25 states have adopted laws like this. I think the Supreme Court will and should defer to the Colorado legislature.

[0:04:52.5] Jeffrey Rosen: Many thanks for that and for framing the issue so well. Well, so much of this case hinges on whether a medical treatment that's purely speech should be viewed as speech or conduct. And both of you come down on opposite sides of the question. Stephanie, you address three different approaches to the speech-conduct distinction. Tell us about those and why ultimately you believe that this is speech.

[0:05:19.1] Stephanie Barclay: Yeah, so the Supreme Court has said that in contexts like the medical context, if there is speech that is incidental to some other procedure, like getting informed consent for a surgery, then that speech is bound up with conduct and that's not going to receive full First Amendment protection. But that's not what's going on here. This is not speech that is incidental to prescribing medicine or some other sort of surgery or something like that. This treatment is the speech

and that's different than the cases that the court in *NIFLA* suggested might receive lesser First Amendment protection. *NIFLA* was also professional speech in a medical context and the court provided full First Amendment protection there. Not only that, but in *NIFLA*, the court cited disapprovingly to Ninth Circuit cases that had tried to say if it is a medical treatment, if speech in the counseling context is a medical treatment, it shouldn't receive full First Amendment protection and the court didn't buy that argument in *NIFLA* and cited disapprovingly to those Ninth Circuit cases. So the court has made clear in that case and in other cases that simply labeling speech something else like treatment cannot erase the full First Amendment protected activity.

[0:06:30.2] Jeffrey Rosen: Erwin, you argue that while *NIFLA* declined to recognize a categorical professional speech exemption to the First Amendment, it did hold that communications as part of the practice of a licensed profession are constitutionally regulable. Tell us more about that.

[0:06:46.7] Erwin Chemerinsky: Yes, we're talking here about *National Institute of Family Life Advocates v. Becerra* and I think it's quite important that the Supreme Court in that case while striking down the California law was explicit that states can prescribe standards of care with regard to medical procedures. That's a 485 U.S. 769 and 770. What the state of Colorado is doing here is prescribing a standard of care for therapists. I don't see a basis for drawing this distinction between what's incidental versus what's core. The reality is that informed consent requirements are core to the medical procedure themselves. Or I'll go back to a case that I alluded to, the famous one, the *Tarasoff* case, that said that if a therapist knows that a patient is likely to harm a third person, the therapist has the duty to warn the third person. That's not incidental to the therapy. Ultimately, the state gets to prescribe the standard of care such as the malpractice laws. And that's all that Colorado is doing here prescribing the standard of care.

[0:07:56.6] Jeffrey Rosen: Stephanie, tell us how the speech conduct distinction fared in oral argument and also the *Skrmetti* analogy. Justice Jackson asked the government, I wonder why this regulation isn't the functional equivalent of *Skrmetti*.

[0:08:13.3] Stephanie Barclay: I mean, I realize that there were two different constitutional provisions at issue, but the regulations work in basically the same way and the question of scrutiny applies in both contexts. So it just seems odd to me that we might have a different result here.

[0:08:29.0] Jeffrey Rosen: Tell us about the justices' thoughts and questions around that issue.

[0:08:34.6] Stephanie Barclay: Yeah, so I don't think the arguments that my friend, Erwin, are making about distinguishing the speech as though it's something different because it's a standard of care and it's in the medical context and therefore it doesn't receive full First Amendment protection. Those didn't fare well at all. Justice Kagan wasn't even particularly moved by those arguments and I think for good reason. They asked Colorado, by your reasoning, does that mean that if we were dealing with a context where decades ago when being a gay person was viewed as a disorder, if a state had passed a law and prohibited counselors from encouraging someone to embrace their sexual identity... What if a state back then or might have passed a law prohibiting talk therapy that affirmed.

[0:09:26.9] Stephanie Barclay: Or if a state like Texas wanted to pass a law saying that counselors

can't encourage a young person to move forward with a social gender transition, would that be permissible? And Colorado said, that's right. Yes. So yes, the state could forbid a regulated licensed professional from affirming homosexuality.

[0:09:51.5] Stephanie Barclay: That would fall under the type of reasoning you're offering here. And Colorado said, that's right. So I think that was troubling for all the justices, including justices like Justice Kagan and Sotomayor, that that sort of speech from a counselor could be prohibited too under the rule that Colorado is proposing and that Erwin is defending. So I don't think that that argument will likely carry the day. Justice Kagan pointed out, she said, if we think that this is viewpoint discrimination here, and she seemed to think that there are reasons to think it is viewpoint discrimination, could we just decide the case on that basis and not make broader rulings about some of the other issues related to content-based, which is a broader category than viewpoint-based speech. The thing about *Skrmetti*, there were questions asked about this. *Skrmetti* was not dealing with a First Amendment protection or some other constitutional question. In fact, that was an antecedent issue they had to decide in the case is, was there a constitutional right that was being triggered in a heightened scrutiny way? And once the answer was no in *Skrmetti*, then the default norm is deference. But here, because there is a First Amendment right at issue, the default norm is scrutiny, not deference. And if we want to talk about double standards that Colorado was taking in *Skrmetti* versus this case, Colorado told the court in *Skrmetti* that even when forms of treatment involved heightened medical risks, the longstanding approach of states in this area has been to enable minors and their parents to make informed medical decisions.

[0:11:12.6] Stephanie Barclay: But that's precisely the type of informed medical decision Colorado is trying to take away from minors in this case, when there are therapists like Ms. Chiles who would like to help them.

[0:11:21.9] Jeffrey Rosen: Erwin, your thoughts both on the *Skrmetti* question and the distinction that Stephanie just drew, and also the question she flagged, which came up at oral argument from Justice Gorsuch, the mirror image question about whether a state in the 1970s could have passed a law prohibiting talk therapy that affirmed homosexuality.

[0:11:41.5] Erwin Chemerinsky: Let me deal with each of those. I do think there's a tension with regard to this case and *Skrmetti*. I wish we could talk about both cases outside of the culture war context. They're so much a product of the culture wars. In the context of *Skrmetti*, Chief Justice Roberts begins his opinion by stressing the importance of deference to the legislature. Justice Thomas, in his concurring opinion, talks about how there's deference to the legislature when it's making choices with regard to public health. This is a case about choice by the legislature. The only difference is that in this instance, conservatives want to strike down the regulation, whereas in *Skrmetti*, they wanted to uphold it.

[0:12:23.8] Erwin Chemerinsky: Of course, Professor Barclay is right that this is a case about the First Amendment, and *Skrmetti* wasn't the case about the First Amendment. But *Skrmetti* involved discrimination against transgender individuals, historically discreet and slim minority. I think it clearly involved sex discrimination that involved heightened scrutiny. I think the Supreme Court rejected those arguments because of the Supreme Court's underlying belief that there should be

deference to the legislature when it comes to Medicare decisions. One of the things we haven't talked about enough here is that the overwhelming consensus of medical professionals is that conversion therapy is not effective and it is harmful. And that's why the deference to the legislature is appropriate. That's why even if it is heightened scrutiny, this meets it. I think the answer to Justice Gorsuch's question is that, yes, such a law would be constitutional for the same reason that this is constitutional.

[0:13:23.0] Jeffrey Rosen: More on *Skrmetti*, both Chief Justice Roberts and Justice Kagan asked whether the law would be viewed differently if the therapy were coupled with medical procedures or prescriptions. Stephanie, your thoughts on those exchanges and whether the fact that this law is pure speech distinguishes it from *Skrmetti*.

[0:13:41.6] Stephanie Barclay: Yeah, I do think that the justices seem to think that if the speech was coupled with or bound up with some other sort of medical procedure, it would be treated differently. It would receive lesser protection. They've already affirmed that in *NIFLA*. And so part of what's going on here is that where it is pure speech, it is the speech itself that the government is trying to regulate as treatment. Then we're just in, Justice Sotomayor and Kagan even asked about this, aren't the pure speech elements something that we would protect if that's what we're dealing with? They were at least asking about that. And I think that is how the court will ultimately rule in this case. I do want to touch on the claim that Colorado is making, that Erwin was just addressing, that there's like an overwhelming medical consensus in this case. There's certainly a medical consensus that shock therapy or coercive therapy or other sorts of aversive techniques are techniques that cause harm in therapy. And no one is asking to perform those techniques in this case. And nothing that the Supreme Court does or rules about in this case will make it such that Colorado can't continue to prohibit that or the other, it's less than 25 of the states that would prohibit Ms. Chiles's type of therapy.

[0:14:50.3] Stephanie Barclay: Utah has an exemption for her therapy. Virginia has agreed in a consent decree that they're not going to apply their law in this type of context. So it's less than 25. But of the less than half of the states that have laws on the books, they can all continue to prohibit the type of behavior that we do have a medical consensus about. But what we do not have a medical consensus about is that licensed talk therapy to a consenting minor will cause harm. There are no studies or surveys that focus just on that type of therapy and find any sort of causation linked to harm. In fact, the evidence that Colorado admitted at trial below shows by their own concession that they have not proven causation. And Justice Barrett honed in on this during oral argument. She said, can you tell me your very best evidence that this particular type of therapy causes harm? And counsel for Colorado cited two studies. And on rebuttal, the counsel for Ms. Chiles pointed out those two studies conflate coercive therapy and shock therapy with this other therapy.

[0:15:49.3] Stephanie Barclay: They don't separate them out. They don't prove causation. So we don't actually have a single study or survey to back up Colorado's burden on this case. There is no medical consensus about that. And pointing to the broader consensus about other things won't allow Colorado to satisfy its burden under strict scrutiny.

[0:16:06.0] Jeffrey Rosen: Erwin, your response to Stephanie's claim that there are two studies that conflate coercive and shock therapy with consensual talk therapy, but no consensus that consensual talk therapy is harmful.

[0:16:19.0] Erwin Chemerinsky: To be clear, there is a strong consensus of medical associations, psychological associations, that conversion therapy, including talk therapy, is ineffective and harmful. We could go to the footnote that lists the many organizations. We can look at the amicus briefs that have been filed by those organizations. So there's much that we can argue about, but I don't think that we can argue that there's not a consensus among medical and psychological associations that this is harmful. We can also try to look at the studies. There's a study, for example, that shows that those who are subjected to conversion therapy are twice as likely to attempt suicide as those who have not been subjected to such therapy. And then we can get into what was the specific kind of therapy there. But there's no evidence that this therapy is effective, and there's certainly evidence that this therapy is harmful. Again, if we're going to be consistent with *Skrmetti*, it should be the judgment of the Colorado legislature that this is the type of medical practice that the state should be able to regulate.

[0:17:24.5] Jeffrey Rosen: Stephanie, your thoughts on Erwin's claims? And also, I was struck that on rebuttal, Mr. Campbell said that the law harms gender dysphoric kids because the statistics we've cited in our verified complaint indicate that 90% of young people who are struggling with gender dysphoria before puberty work their way through it and realign with their identity with their sex. But if one of these children go to a counselor, they specifically say, this is the help I want, they cannot receive that help from someone like my client.

[0:17:53.6] Stephanie Barclay: I'll address both of those things. So when Erwin says we have studies talking about increasing the suicide rate, he again is referring to studies that include things like shock therapy and coercive therapy. There are no studies that show that missed-child talk therapy to consenting minors when it's only talk therapy and it's helping the minors pursue their own goals. There are none, not a single study that shows that that increases suicide rates. There are some evidence introduced by Colorado itself that in fact this type of treatment helps those individuals live better and happier lives. Colorado's own experts said there's some evidence that some clients have had very positive results. Why is that? It goes to the second question that you were asking about, Jeff, which is that even in WPATH guidance cited by the Obama administration, it shows that for young people who are struggling with gender dysphoria, if left to go through puberty on their own, up to 90% of those individuals will come to become comfortable in the body that they were born with. So it's possible that with something like therapy that Ms. Chiles can provide, that transition and easing of having to accept the bodies they were born with might be made easier for some of these young people.

[0:19:05.3] Stephanie Barclay: So that's one option we can take. We can take a cautious approach knowing that the statistics show that a number of these individuals will ultimately work through this, or we can take a bold, moving forward, incautiously approach where we prevent anyone from offering any options to these young people and just are encouraging a life of potential medication or medical procedures. And some of these young people later detransition. And then that, like, that's, there's also suicide risks for those young people. So how taking options away for parents and young people with informed consent to make decisions about what will make the best life for them when there's no evidence of that harm is going to be helpful for the young people. I think that's a hard argument for Colorado to make. Now, Erwin referred to consensus of medical associations. What we have are some statements as amicus briefs by medical associations. That's not what's required under strict scrutiny. When you have disputes about whether or not a government policy is causing harm, the Supreme

Court's case in *Brown* says that we need evidence like studies or other things that can demonstrate causation. Justice Alito pointed out that it has often been the case, including, like, when we had a period in history that is a dark period with things like eugenics, or when we said in *Buck v. Bell* that three generations of imbeciles is enough, that medical associations have been politicized.

[0:20:22.2] Stephanie Barclay: That's one reason we don't just rely on potentially political or ideological statements from groups. We rely on hardcore data and evidence showing causation, which is absolutely lacking in this case.

[0:20:32.9] Jeffrey Rosen: Erwin, your thoughts on that evidence cited about gender dysphoria. Mr. Campbell also added that 90% of the time once people start down the path of social transition, it will lead to the route of medical transition, which the Cass report tells us comes with harm and devastation. The Cass report, of course, was crucial to the court's opinion in *Skrmetti* as well. And then your response to Stephanie's suggestion, which Justice Alito raised as well, that medical associations have been politicized from *Buck v. Bell* to today, and we should look for more neutral evidence.

[0:21:11.9] Erwin Chemerinsky: First, the Cass report specifically addresses conversion therapy and specifically says that conversion therapy should not be done. And so if the Cass report is going to be invoked, I think it very much supports Colorado's position. Second, I disagree with Professor Barclay that strict scrutiny should be the test here. As we said, the state has to be able to prescribe standards of medical care, and that includes medical care that's provided with regard to speech. Third, with regard to medical associations, I believe that expertise matters. And I believe that when virtually every reputable medical and psychological association comes to a conclusion, that that should be given weight. Of course, there are instances where medical associations, like the American Bar Association for lawyers or associations for other professionals, have been terribly wrong in the past. But because sometimes they're terribly wrong doesn't mean that they're ideological or political and they should be dismissed. Expertise matters, and the expertise here is overwhelming that conversion therapy is ineffective and harmful to minors.

[0:22:21.3] Jeffrey Rosen: Stephanie, maybe another beat on Justice Alito's pushing back on the contention that the ban was intended to enforce the professional standard of care and his citation of errors where medical professionals believe that children with Down syndrome should be placed in an institution shortly after birth. What's your sense here and in *Skrmetti* about the justices' reaction to their concerns about the politicization of medical associations?

[0:22:46.2] Stephanie Barclay: Yeah, so what I didn't hear Erwin say is that he thinks that a medical association's statements would satisfy strict scrutiny. I still hear him arguing that strict scrutiny shouldn't apply here. So I guess I'd be interested in knowing that if he agrees that if strict scrutiny applies, which I think it will, and I think there are easily six votes for that right now based on oral argument, if strict scrutiny applies, then statements by medical associations won't be enough, including for those reasons that you just pointed to, Jeff, that Justice Alito pointed out, medical associations have been concerning in other ways, including making recommendations for disabled young people and those with Down syndrome that we now view as really problematic. And that's why we have strict scrutiny to suss out, is this a valid claim? Is this a neutral claim? Or is this a politicized claim? So if strict scrutiny applies, we require more evidence than that, and Colorado doesn't have it.

Erwin talked about the Cass Report, and this is something important, Erwin, I would just encourage you to do as we continue this conversation. You keep using the label conversion therapy, which means lots of things, and it's obviously the label of Colorado's law.

[0:23:52.0] Stephanie Barclay: When the Cass Report talks about conversion therapy, it is talking about coercive therapy and aversive therapy, and it says it shouldn't be done, and we all agree it shouldn't be done, and Ms. Chiles doesn't want it to be done. But I would encourage you to make statements about her when our talk therapy that is helping a client accomplish their own goals, because the Cass Report does not say that shouldn't be done. That's not part of the Cass Report's recommendations. There are no recommendations that say that in any sort of document that has studies or evidence that Colorado is pointing to. So that's just another example of why we need to focus on the issue in this case, because what Ms. Chiles is seeking is not a facial remedy that would strike down the conversion therapy law against all of those other bad practices. Colorado's law will continue to prohibit all of those things that have actually been linked with harm. It will only be a small, as-applied, modest remedy for counselors like Ms. Chiles who want to engage in therapy to allow clients to accomplish their own goals, and it's just a very different ballgame.

[0:24:50.4] Jeffrey Rosen: Erwin, Stephanie has stressed the difference between coercive and consensual therapy several times. Your response, and might the courts applying strict or intermediate scrutiny distinguish between coercive and consensual therapy in ways that could save the Colorado law?

[0:25:12.3] Erwin Chemerinsky: I, of course, recognize the distinction that she draws. However, let me go to the points that she makes. First, with regard to medical associations, that sometimes medical associations have been wrong doesn't mean we should always dismiss the conclusions of medical associations. Expertise matters. And when every medical association comes to a conclusion, it should be given great weight. I think as part of assessing whether there's a compelling interest, the expertise of medical associations deserves some deference. And I think that here, it's together with studies. Second, if you read the Cass report, it is a categorical condemnation of conversion therapy. It doesn't say conversion therapy of this sort is fine, and conversion therapy of another sort isn't. It is much more categorical in that way. And again, I think what we're missing in this discussion is the ability of states to set a standard of cure. I don't think Justice Barrett really got at this in talking about could a state, through malpractice liability, say that this is below the standard of cure? I think the answer to that question has to be yes. Well, likewise, if a state can do it through malpractice liability, through its tort law, it should be able to do it by statute as well.

[0:26:32.9] Jeffrey Rosen: Stephanie, a question that the justices had at the end of the argument whether, if a majority of the justices conclude the law does discriminate against childs and strict scrutiny should apply, the question is should the court apply strict scrutiny on its own or send the case back to the lower courts for them to do so? Justices Sotomayor and Jackson both suggested perhaps the lower court should consider the question for the first time, and Justice Barrett indicated she might agree. Your thoughts on that question?

[0:27:03.9] Stephanie Barclay: I think that the court is likely to go on to address strict scrutiny in the first instance in a very similar way that the court did in the *Mahmoud* case. So in *Mahmoud*, which

was just last term, this is again the case where parents were asking for an opt-out for their children in pre-K and elementary school, and they had religious objections to their children being read books that were taking positions about LGBTQ issues. And the lower courts had just ruled on a preliminary issue on whether or not there was actually a burden in that case. And so the government did ask, assuming you think the lower courts got it wrong in that burden issue, can you just remand on that basis and let the lower courts address strict scrutiny in the first instance? And the Supreme Court declined that invitation in *Mahmoud* because there was a clear conflict between the law and what the parents wanted to do. There wasn't really a question about facts anymore. And so I think they thought it would be a waste of judicial resources to send it back, number one. And number two, irreparable harm was going on every day while those First Amendment rights were being denied.

[0:28:08.2] Stephanie Barclay: The exact same thing is true here. So I think that we're very likely to see the court go on to address strict scrutiny. This really affected something that Erwin said earlier about mootness, but I think the case, or ripeness, but I think the case is absolutely right because the statute squarely prohibits the exact same thing that Ms. Chiles has said she used to do, and she has it in her declaration of statement that she would continue to do. There's a direct conflict between them. Even by the end of the argument, Justice Sotomayor said, well, I guess that settles standing based on some of the concessions made by Colorado. So there's a clear conflict. Not only that, but counsel for Ms. Chiles pointed out that she has received threats about being investigated during the pendency of this case because it's not just Colorado that can file those sorts of things. It's also private parties. And some of those filings had happened during the pendency of the case. There's no question that she has standing, I don't think. There's no real question that the case is right. And there's no real question about the facts that are relevant to satisfying strict scrutiny.

[0:29:08.7] Stephanie Barclay: And again, I do not see, I don't even know if I see more than two votes for saying that there's not going to be some sort of scrutiny in this case, but we surely have six votes for strict scrutiny based on the court's previous ruling in *NIFLA*. And so unlike in *Skrmetti*, where the court said there was not a constitutional right protection based on your transgender status and there wasn't sex discrimination, and therefore there is no heightened scrutiny and we are in the default plan here, we're going to be in this heightened scrutiny land. And below, there was a trial where Colorado had the opportunity to enter evidence. Their own evidence admitted that they can't establish causation. Their own evidence didn't separate out this particular type of activity that Ms. Chiles likes to engage in. They knew that the other side was seeking strict scrutiny protection. They're on notice. There's nothing really else for the Supreme Court to do other than review that record, which is why I think they're very likely to go on and rule that not only does this receive strict scrutiny protection under the First Amendment, but that Colorado cannot satisfy that burden and did not satisfy it below.

[0:30:14.5] Jeffrey Rosen: Erwin, your thoughts on whether you think that lower courts should apply the strict scrutiny analysis in the first instance or not, and if strict scrutiny does apply, why you think the law satisfies it?

[0:30:29.4] Erwin Chemerinsky: Yes, I think I would disagree with each of the points Professor Barclay made. First, this case is distinguishable from *Mahmoud versus Taylor*. In that instance, the Supreme Court said that parents had the right to notice and opt their children out of material

inconsistent with their religion that presented gay, lesbian, transgender individuals in a favorable light. There wasn't a factual. There wasn't a scientific. There wasn't a question of expertise. So once the court said it's strict scrutiny, there wasn't any other analysis to be done as well as a compelling interest. Quite the contrary here. The more you listen to Professor Barclay, the more you hear that she believes this comes down to what are the studies and what do they show? And are they sufficient to meet strict scrutiny? If that's the question, then the lower court should have the opportunity to decide. It shouldn't be the Supreme Court on itself. Second, I think she ignores that this is a Colorado law that's never been enforced, not against anyone. It's therefore much like the *Poe versus Ullman* situation. Also, it is we don't have a developed record. We don't know what she's done or what the therapist is being potentially disciplined for.

[0:31:44.8] Erwin Chemerinsky: This is a case that calls for having a developed record. Third, *NIFLA* is clearly distinguishable. *NIFLA* said states can prescribe standards of care. That's what's been done here. I'm always uncomfortable predicting outcomes based on oral argument. I think here Justice Barrett's questioning towards the end indicates that she might be very inclined to send the case back. There's no doubt where Justice Alito stands, and I don't think it's much doubt where Justices Sotomayor and Jackson stand. I also don't find it very productive to predict because we're eating tea leaves.

[0:32:22.2] Jeffrey Rosen: Stephanie, how important is the free exercise clause in your argument? The words free exercise did not come up at all at oral argument, and in fact the word religion only came up once according to my word search of the transcript. Your brief does argue that focusing on the content of Chiles' communication discriminates on the basis of her views on professionally disfavored biblical teaching, and you think that teaching that she and her patients believe and have a constitutional belief, the right to believe and exercise. But ultimately, do you expect the free exercise claim to get any separate weight, or will it ultimately be decided as a pure speech claim?

[0:33:14.0] Stephanie Barclay: I think it will almost certainly be decided as a pure speech claim at the Supreme Court, so in this ruling. If there was a parallel universe in which the Supreme Court ruled against Ms. Chiles on speech, she still does have a free exercise claim below, so that was part of what was litigated. But the question presented before the Supreme Court only raises speech issues. But I think you're right to point out that there could be this independent basis for counselors to raise these sorts of claims in the religious exercise context. I'll just say very briefly, Erwin is right that I am pointing out the need for looking at real studies in this case, but the reason there's no factual issue, even despite that, is because the evidence that Colorado offered below before the lower court that Erwin is talking about when it had the opportunity to marshal evidence, Colorado's own evidence concedes that it cannot establish causation of harm for this type of therapy. So there is no dispute, in fact. We're done. Colorado lost under strict scrutiny, I think, with that concession alone, combined with the fact that they have no studies proving the opposite.

[0:34:18.4] Stephanie Barclay: And again, we don't need a law to be enforced in order for it to be ripe. *Susan B. Anthony* is a classic case as an example of a pre-enforcement challenge. Add to that the fact that filings have been made against Ms. Chiles by private parties during the pendency of this case, and those are other reasons why irreparable harm is ongoing, irreparable harm that I think will motivate the Supreme Court to resolve this case and to rule on the strict scrutiny issue.

[0:34:44.5] Jeffrey Rosen: Erwin, what are your thoughts about the free exercise claim, if it's raised independently?

[0:34:51.9] Erwin Chemerinsky: We haven't mentioned that the Colorado law has an exception for ministers, and also the Colorado law would permit a reference by Chiles or others to ministers. And that could be quite important if the court were to consider the free exercise claim. Also, we all know that *Employment Division v. Smith* in 1990 says that if it's a neutral law of general applicability, then it doesn't violate the free exercise clause. The Colorado law is not motivated by desire to interfere with anybody's religion, and it applies equally to all other than the exception for ministers. I also want to very much take issue with Professor Barclay says when she says there's no dispute over the facts. Colorado has conceded. There's an enormous dispute over the facts here. There is a huge dispute over whether conversion therapy is effective and whether it's harmful. And for Barclay declaring that there's no dispute of the facts doesn't deny that there is a crucial dispute. Colorado hasn't conceded that there's no evidence with regard to the effects of conversion therapy. And it's precisely because the dispute of the facts, if strict scrutiny is the test, Colorado should have the opportunity to produce the facts to show that it meets strict scrutiny.

[0:36:09.2] Jeffrey Rosen: Stephanie, first of all, maybe another beat on the free exercise claim substantively since you do articulate it, and then your thoughts on the dispute over the facts.

[0:36:20.1] Stephanie Barclay: Yeah, so there's an exception that Justice Thomas pointed out, not just for religious ministers, but also for life coaches who aren't necessarily religious. So that means if we were raising this claim in the free exercise posture, this would not be a generally applicable law because Colorado is exempting conduct that, as Justice Thomas pointed out, is just as much of a danger to its asserted interest as Ms. Chiles's therapy is. In fact, it might even be more problematic to have an unlicensed, untrained life coach running around providing this sort of therapy than someone like Ms. Chiles's. And so that undermines Colorado's claim that it's advancing this law in a generally applicable way. It doesn't matter whether they're motivated to interfere with religion. That's not the test to decide if a law is neutral and generally applicable. And so strict scrutiny would apply under the free exercise clause as well. I'm not saying that there's no dispute over any facts. I'm saying there is no dispute that Colorado has not proven causation of harm for Ms. Chiles's type of therapy. Their own evidence concedes that. And that point on which there is no dispute is fatal to Colorado's claim under strict scrutiny.

[0:37:32.2] Jeffrey Rosen: Erwin, further responses to that? And then let me ask you again about the relation between the regulated speech and medical treatment, which for you is key. You believe that if the regulated speech is attenuated from specific care sought by the patient, then it triggers heightened scrutiny. And if it's part and parcel of the delivery of treatment, then it's conduct that can be broadly regulated.

[0:37:58.2] Erwin Chemerinsky: Sure. As to the first point, Colorado very much does dispute exactly what Mr. Barclay says. Colorado claims that there is sufficient evidence to show that even just talk therapy is ineffective and harmful. We can each assert a conclusion. Professor Barclay can say there's no dispute with regard to the evidence, and I can say there's an enormous dispute with

regard to the evidence. But the point is, this is what should go back to the lower court, and the lower court should be able to answer the question about which we're making categorical statements. There's a tremendous dispute between Colorado and Ms. Giles as to what the evidence shows. What a lower court that's the ones to look at the evidence do so first. In terms of the medical treatment point, I think you're absolutely right, Jeff, that this is what the case is about. States have always been able to prescribe standards of care. These include standards of care that involve just speech. I'm going to go back to the example of the *Tarasoff* case. A therapist who learns that there's a danger to a third party has to warn the third party of that. That's speech. That's integral to what the medical care learned with regard to the patient.

[0:39:17.7] Erwin Chemerinsky: I don't understand the distinction between informed consent laws where doctors have to tell patients what the side effects are going to be, what the potential consequences are going to be. It's all about speech in this. Just calling one incidental in the other court is nothing but labels. I think what all shows is states get to prescribe the standard of medical care, and that's what Colorado is doing here.

[0:39:41.6] Jeffrey Rosen: Stephanie, on the standard of care question, you see *NIFLA* as having the court having considered and expressly rejected, as you put it, the idea that professional speech is entitled to lesser constitutional protection.

[0:39:54.0] Stephanie Barclay: Yeah, so I'll address *NIFLA* first, and then let me just give you one more citation about the factual dispute in this case. So it is true that states can set standards of care, but like in the typical malpractice context, that's actually part of the trial. If someone brings a malpractice case is to also decide, like, what is the standard of care? What are professionals doing in this context? And in addition, in a malpractice suit, one reason that there are more First Amendment protections there than in a prophylactic prior restraint, broadly worded sort of law, which is exactly what we're dealing with with Colorado's law. So in the malpractice context, the individual bringing that claim also has to prove causation and prove harm. So it's not just standard of care. It's not as though standard of care floating around in a vacuum is usually what we're dealing with. And that sort of proving of causation and harm is much more protective under the First Amendment. But counsel for Ms. Chiles pointed out there might even be under the malpractice context, maybe sometimes there could be unique First Amendment issues, because usually the standard of care and the long tradition that we have of standard of care under malpractice are broadly worded based on medical evidence and what the industry is doing.

[0:41:10.5] Stephanie Barclay: It would be weird for a new malpractice law to be passed to say it is a per se violation of standard of care to engage in this type of speech. And if we did have a malpractice new law like that, that very well might also raise First Amendment context. It's not as though just because a state has passed a tort law or someone has violated a tort law that the First Amendment has nothing to say about that. And we know that from the Supreme Court Snyder case, which 8 to 1 ruled in favor of speakers, the Westboro Baptist Church, who the jury had given an instruction that their speech was a violation of intentional infliction of emotional distress sort of standards under tort law. And that was also something that troubled the First Amendment. So standard of care is not a bulletproof safe harbor, even though generally states do have a long tradition of being able to set those and having a lot of discretion when they're providing them in neutral science-based ways. So one last

point about is there not a dispute in this case about causation. So Colorado below entered a report in evidence that says, quote, they conclude that there is a dearth of scientifically sound research on the safety of these efforts and that existing studies do not provide valid causal evidence of harm.

[0:42:23.3] Stephanie Barclay: That's at JA 253 to 54. They also say at JA 370 there's no scientifically rigorous studies that support a definitive statement about whether Ms. Chiles's type of speech, I'm bracketing that, are safe or harmful and for whom, end quote. And Colorado's expert that reviewed these studies said that they, "cannot determine causal effects or causality." That's JA 64 to 65. So on this point, Colorado's own evidence acknowledges they can't prove causation. And that's all that any appellate court ever needs on a record to decide the legal issue of how they satisfy strict scrutiny.

[0:42:58.7] Jeffrey Rosen: Erwin, responses to those points?

[0:43:01.5] Erwin Chemerinsky: Sure. As to the first, states have always, through their tort law, set the standard of care in malpractice. And I can't think of an instance where a standard of care was declared unconstitutional because it was restricting speech. And standards of care restrict speech all the time. The examples that I've mentioned, whether it's the *Tarasoff* case or informed consent laws. And if a state can set the standard of care through its tort law, it can also do so by statute. There's no reason for a distinction. And this was a point that Justice Barrett was making in oral argument. Second, this isn't a prior restraint. No one would describe what the Colorado law is as fitting within the legal definition of prior restraint, which is really about judicial orders and administrative systems. Prior restraint is just using a label to create a connotation, but that's not what this case is about. Nor is *Snyder v. Phelps* relevant to this case. It had nothing to do with professional speech. It was a claim for invasion of privacy and intentional affliction of emotional distress. I think Professor Barclay presents the record of this case in a very slanted way.

[0:44:13.9] Erwin Chemerinsky: If you read the amicus briefs in this case, they certainly suggest much more in the way of studies that show that conversion therapy is ineffective, something she has not addressed at all, and certainly there are studies that indicate that trying to change somebody's sexual orientation or gender identity are harmful. I'll agree with her that the studies often don't separate, as ideally they should, the different kinds of therapy, but that's why the case should be remanded to the lower court for having the opportunity for the state to meet the standard of review. I don't think it should be strict scrutiny, but I think even it is the state should have the opportunity to present the evidence.

[0:44:50.4] Jeffrey Rosen: Stephanie Erwin said that you haven't addressed at all the question or the claim that conversion therapy is ineffective. Could you address it, please?

[0:44:58.6] Stephanie Barclay: I appreciated Erwin said that he acknowledges that those studies that are being cited by amicus briefs are often including coercive or aversive therapy when they're saying coercion therapy is not effective. I agree that coercive and aversive therapies aren't effective and have often been harmful. So I agree about that. But some of the evidence that was introduced, including by Colorado's own evidence, shows that this type of talk therapy, which I think it's kind of pejorative to call this talk therapy conversion therapy, that they show that this type of talk therapy has had

positive benefits for patients, has allowed some of them to go on to live happier lives. It's a goal that the patient has for themselves, and they're not even necessarily trying to convert their own identity. They may very well say, I will be a gay man for the rest of my life. I just want your help changing some of these sexual behaviors or not acting on some of these sexual attractions of mine. Can you help me with that? And Colorado's law would prohibit that too. So all I'm saying is there's no evidence that that's harmful. There's evidence that in fact we're taking away an option for clients that would be beneficial for them.

[0:46:06.7] Stephanie Barclay: And none of the studies that any of the amicus briefs separate out any more than Colorado has to show harm of this particular type of talk therapy. The only thing the case is about, the only thing Ms. Chiles is asking for. And that's just what I think is important to focus on as a factual matter. The *Tarasoff* case that Erwin is citing to is a California case. It's not a US Supreme Court case. There hasn't been a US Supreme Court case that says that as long as what a state is doing is labeling something the standard of care, it gets to do whatever it wants and has wide discretion about that. And Justice Barrett had some concerns about that. She said, are you saying that if there's a context where there's medical disagreement, a state can just pick a side and say, we've decided that this is the standard of care and now we're going to shut down the debate or the ability to engage in anything else when there is disagreement about how some particular treatment is affecting people? And Colorado's lawyer struggled to answer questions about that. And that's one way that you might think about what's going on here.

[0:47:04.7] Stephanie Barclay: So the fact that states have a long tradition of setting standards of care that are based on broad practices by the industry and science, I think is true, something that will likely coincide nicely with the First Amendment, especially when malpractice laws require proof of causation and harm in order to bring a successful claim. But that sort of proof isn't required under this statute. And it is a statute that in advance is prohibiting speech before we've had any sort of showing like that, which is why that prophylactic nature of it raises different First Amendment concerns.

[0:47:37.4] Jeffrey Rosen: Erwin, on the effectiveness point, Stephanie says that there is evidence that talk therapy, as opposed to coercive therapy, has allowed some people to have happier lives. And she'd cited earlier that evidence that it could be helpful for the 90% of people who have gender dysphoria issues and then decide to live consistently with their biological sex.

[0:48:01.6] Erwin Chemerinsky: I think that Professor Barclay is doing the same thing that she was criticizing me for. And here I think she mischaracterizes the Colorado law. The Colorado law doesn't prevent the therapist from discussing sexual orientation or gender identity with patients and can explore it with the patients just in the way that she wants. What the Colorado law prevents is conversion therapy, trying to change a gay or lesbian person's sexual orientation, trying to change a transgender person's gender identity. That's what the law prohibits. And the problem with the studies that she's citing here is they don't separate the kinds of therapy. The therapy that's permitted under Colorado law, which is discussing a person's sexual orientation, gender identity, is opposed to conversion therapy. And there aren't studies that show that conversion therapy works because the reality is people's sexual orientation and gender identity is very much how they're wired. It's not going to be changed according to the studies. In terms of her point on *Tarasoff*, *Tarasoff* is widely accepted to the country, as it should be. I think all three of us probably read it in our first year towards class.

What it says is if a therapist has reason to believe that somebody is in danger, the therapist has the duty to warn that person, even though this is speech.

[0:49:19.5] Erwin Chemerinsky: Finally, I think she sets up a straw person. I am not taking the position that any standard of care that's created under any circumstances is automatically permissible. I am saying here, though, that there should be deference to Colorado in making the determination that conversion therapy is ineffective and harmful.

[0:49:38.2] Jeffrey Rosen: Well, one more beat on the speech conduct distinction, which is so crucial to the case, and then we'll sum up. Stephanie, the upshot of your argument is that the Colorado law is being applied to pure speech in a content-based manner, and any harm suffered by the patients is directly attributable to the content of Chiles' speech. Is that right? And then maybe sum up the essence of your views about the speech conduct distinction.

[0:50:02.0] Stephanie Barclay: Yeah, so it sounds like Erwin and I agree that Ms. Chiles should be able to do things like help a client decide, based on my own goals, I no longer want to engage in this sort of activity. Can you help me with that? Now, Erwin used the word explore, which the state relies on a lot too, but that's not just what Ms. Chiles would do if a client came to her and said, this is my goal. I'm not like asking you to help me think about five different goals. This is my goal. Will you help me accomplish it? My goal is to change some of my behaviors or my gender expression. I don't want to engage in a social gender transition. Or my goal is to reduce or eliminate or reduce sexual or romantic attractions. Will you help me with that? Ms. Chiles would say, yeah, I'm not like my goal isn't to try and get these people to change some core aspect of their sense or self or their identity. But if they want to do those things, I will help them. And that is precisely what Colorado prohibits. Colorado defines prohibited conversion therapy very broadly to include, "efforts to change behaviors or gender expressions or to eliminate or reduce sexual or romantic attraction or feeling towards individuals of the same sex."

[0:51:18.0] Stephanie Barclay: And Ms. Chiles is saying, yeah, I'm not like my goal isn't to try and get these people to change some core aspect of their sense or self or their identity. But if they want to do those things, I will help them. And that is precisely what Colorado prohibits, which is why I think by the end of argument, Justice Sotomayor said, well, that settles standing because there's a clear conflict between what the law prohibits and what they want to do. And on your question about the speech conduct distinction, you're right, Jeff, that I think this is going to be critical to the case. And even if we assumed that *Tarasoff* was a binding precedent from the Supreme Court that operated everywhere, still a very different case than this one, where the type of standard of care there, even if we assumed it was pure speech, if we assumed that being forced to warn someone of harm was pure speech, I think that would easily satisfy strict scrutiny because they know of bodily harm that is impending to somebody else. And the therapist is then warning about that. And so that is just an example of ways in which there needs to be a link between the speech and harm, precisely the sort of link that is missing in this case.

[0:52:20.9] Jeffrey Rosen: Thanks so much for that. Erwin, final thoughts on the speech conduct distinction and its centrality to the case?

[0:52:26.8] Erwin Chemerinsky: Sure. I just want to go to one statement that Professor Barclay made. It says, this isn't trying to change a core aspect of a person. I think that's a direct quote of her words. That's exactly what the Colorado law is prohibiting, is trying to stop therapy that changes somebody's sexual orientation or gender identity. In terms of the speech conduct distinction, my point is that states prescribe standards of cure all the time that regulates speech. We would agree that *Tarasoff* needs strict scrutiny. It's also clear that *Tarasoff* is a restriction of speech. But it's not just about *Tarasoff*. I don't understand, Professor Barclay, where the challengers approach in this case, why informed consent laws aren't unconstitutional, why the requirement to doctors provide great details to patients about side effects of medication and medical treatments don't become unconstitutional. I think that this is about the ability of the state to define the standard of medical care, and that's what Colorado is doing.

[0:53:26.3] Jeffrey Rosen: Many thanks for that. Well, it's time for closing arguments. In this vigorous civil and illuminating discussion, Stephanie, first one is to you. Tell We the People listeners why you think the Colorado law violates the First Amendment.

[0:53:40.8] Stephanie Barclay: So on the question that Erwin is raising, why should it matter that we give lesser protection to speech if it is informed consent for a surgery or if it's bound up with providing a prescription? The easy answer to that question is because the Supreme Court has said so. The Supreme Court said in *NIFLA* that those are special categories of verbal or written communication that we will treat differently. Why has the Supreme Court said so? Because in larger bodies of its precedent about the First Amendment, we have long said that speech that is merely incidental to conduct just doesn't get the same sort of protection as pure speech. And here, what we have is pure speech. That's all that's being regulated. And in fact, to know whether or not the regulation applies, you have to know what words are coming out of Ms. Chiles's mouth. Is she encouraging a gender transition? That would be allowed. Is she helping a client who does not want to move forward with a gender transition and she's helping their goal of a detransition? That isn't allowed under the law. So a therapist can encourage this sort of behavior.

[0:54:46.6] Stephanie Barclay: They can't discourage it. That's viewpoint discrimination. I think that's why Justice Kagan was asking and sort of suggesting, could we write a narrow decision that is just focused on the viewpoint discrimination at issue in this law? So, if we're dealing with pure speech, which we are, if it's not incidental to some other sort of conduct, which it's not, the Supreme Court's case law, including in situations like *NIFLA*, makes clear that we're dealing with strict scrutiny. Erwin keeps talking about the need to provide deference. We only provide deference if we're not dealing with pure speech. *Skrmetti* was not dealing with a constitutional right that required scrutiny, and we are here. I think there's good reasons why we are here, because this issue, it's easy for it to become politicized, and it's important to look at just what the facts show from the studies that Colorado itself admitted into the record below with the trial court. None of those studies are able to show any connection to harm caused by mistrial speech. In fact, what the expert that Colorado provided below said is that they haven't proven causation. The Supreme Court's case in *Brown* says that Colorado must.

[0:55:51.0] Stephanie Barclay: They have to prove causation to harm to satisfy strict scrutiny for this sort of prohibition. Again, ruling for mistrials in this case won't prohibit Colorado or any other

state in the country from prohibiting the types of therapy that really are harmful and that really have caused a lot of problems in people's lives, coercive therapy, aversive therapy, the things that we really have in our mind when we use that phrase conversion therapy. Those are not going to be allowed. They will continue to not be allowed. The modest protection that the Supreme Court is likely going to provide for mistrials will be just for this sort of talk therapy. It's true that mistrials doesn't want to change core aspects of the identity of her clients. That does not mean that Colorado's law doesn't apply, contrary to what Erwin was saying, because Colorado's law doesn't limit its definition of conversion therapy to anything that is changing a core aspect of someone's identity or who they are. It includes, again, any efforts to change behaviors or gender expression or eliminate or reduce sexual or romantic attraction. Colorado was trying to run away from that before the Supreme Court. Justice Gorsuch pointed out that they hadn't even dignified that particular argument that they made with a Roman numeral.

[0:57:08.3] Stephanie Barclay: They buried it in a footnote. They lost twice below with both of the courts below on their standing argument on slightly different grounds, but this was a late breaking argument they made at the Supreme Court. And the First Amendment says we don't actually have to just take a government say so when they say, trust us, we're going to enforce our statute differently from how it reads on the books. The Supreme Court case in Stevens says we don't have to go with government assurances like that. If the text of the law clearly conflicts with the First Amendment behavior, that's enough for us to decide the case on the merits as it is here. And I think as in *Mahmoud*, because of the admissions Colorado made below and the evidence it itself had offered to the trial court, the court will likely go on to decide in strict scrutiny and protect mistrial speech. I think that will be a good thing for clients who, as you pointed out, Jeff, very well may come to be comfortable in the bodies they were born with. Up to 90% of individuals who struggle with gender dysphoria do by evidence that the Obama administration has relied on.

[0:58:07.3] Stephanie Barclay: We should provide more options for those individuals to help them. We shouldn't take options away.

[0:58:13.2] Jeffrey Rosen: Erwin, last word in this great discussion is to you. Tell We the People listeners why you think the Colorado law does not violate the First Amendment.

[0:58:21.4] Erwin Chemerinsky: It doesn't violate the First Amendment because this is Colorado setting the standards for professional medical care. States have always been able to do this. I do think that the juxtaposition with *Skrmetti* is important because both this case and *Skrmetti* go to the question of who should be making the judgments with regard to the standard of medical care. Here, the state of Colorado has made the judgment that conversion therapy for gay, lesbian, and transgender individuals is harmful and ineffective. In *Skrmetti*, Tennessee made the judgment that providing gender-affirming care for transgender youth was harmful. The Supreme Court in *Skrmetti* stressed the need to defer to the judgment of the political process in the legislature. That's what's being urged here. Now, I agree, of course, with Professor Barclay that this case involves speech and *Skrmetti* was about equal protection. But regardless of whether you're talking about one context or the other, the underlying question is still the same. Should the legislature be able to make this judgment? In this case, I think a much stronger one for affirming the Colorado law compared to in *Skrmetti* holding the Tennessee law is that states have always been able to prescribe the standard of medical care, including

when it's regulating speech.

[0:59:37.9] Erwin Chemerinsky: *NIFLA v. Becerra* expressly said that it was not questioning the ability of states to set the standard of medical care. Professor Barclay wants to draw a distinction between when speech is incidental and speeches at the core. When you're talking about informed consent laws or the *Tarasoff* case that we were discussing, speech was at the core. So is speech here, what is being regulated, and the state should be able to do so in the same way that it regulates informed consent laws the same way that does with regard to *Tarasoff*. It's very frightening to think if the Supreme Court strikes this law down, how it will limit the ability of states to regulate medical care procedures that involve speech. The final thing that I'd say, so much of the hour of our discussion has come down to what does the evidence show. And if that's what this case is about, then it should go back to the lower courts to have the opportunity to develop and evaluate the evidence. It shouldn't be for the Supreme Court at this stage to come to that conclusion.

[1:00:36.8] Jeffrey Rosen: Thank you so much, Stephanie Barclay and Erwin Chemerinsky, for a vigorous, rigorous, and excellent discussion of the First Amendment and the Colorado law during these challenging times. A First Amendment discussion like this one is always welcome. Stephanie, Erwin, thank you so much for joining.

[1:00:56.9] Stephanie Barclay: Thank you for having us.

[1:00:58.2] Erwin Chemerinsky: Thank you so much.

[1:00:59.9] Jeffrey Rosen: This episode was produced by Bill Pollack and Griffin Ritchie. It was engineered by Bill Pollack. Research was provided by Griffin Ritchie, Anna Salvatore, Trey Sullivan, and Tristan Worsham. Friends, I'm thrilled to be launching my new book the week after next. It's called *The Pursuit of Liberty, How Hamilton vs. Jefferson Ignited the Lasting Battle Over Power in America*. It's out on October 21st. Please pre-order online. If you'd like a signed book plate, please let me know. That's jrosen@constitutioncenter.org. And always remember that the National Constitution Center is a private nonprofit. We rely on your generosity, passion, and engagement for all of our programming. Please consider donating @constitutioncenter.orgforward/donate. On behalf of the National Constitution Center, I'm Jeffrey Rosen.