Regulation Matters:
a CLEAR conversation

Episode 56: Free Speech Challenges to Licensure of Speaking Professions
August 8, 2022

Line Dempsey: Welcome back to our podcast, Regulation Matters: a CLEAR conversation. I'm your host, Line Dempsey. I'm currently the chief compliance officer with Riccobene Associates Family Dentistry here in North Carolina, and I'm also CLEAR's President-elect.

As many of you are aware, the Council on Licensure, Enforcement and Regulation, or CLEAR, is an association of individuals, agencies, and organizations that comprise the international community of professional and occupational regulation. This podcast is an opportunity for you to hear about important topics in our regulatory community.

Now for today's episode, this is a preview of a session to be offered at the Annual Educational Conference in September. This topic will address occupational licensure of speaking professions and the impact of constitutional free speech challenges on such laws. I know this is very popular right now, so joining us today are Charla Burill, Executive Director of the North Carolina Board of Dietitians and Nutrition, and Pepin Andrew Tuma, the senior director for government and regulatory affairs at the Academy of Nutrition and Dietetics. We are glad to have you with us today; welcome.

Charla Burill: Thank you. Happy to join and talk about this topic.
Pepin Tuma: Thanks a lot.

Line: Well, we are certainly glad to speak with you, and let me also thank our listeners for joining us today. Your upcoming conference session deals with navigating free speech challenges to state licensure laws. And you note that a lot of lawsuits recently in the US are drawing on the legal argument that states violate the free speech rights of unlicensed individuals by requiring that they meet minimum qualifications and obtain a license in order to practice this so called "speaking profession."

So, let's get right into it. Charla, let me start with you. So, why are dietetic boards being sued using claims that unlicensed individuals' free speech rights are being violated? What's going on with that?

Charla: Yeah, so generally those that are attacking these laws believe that these laws are content-based laws that only regulate speech and thus should be subject to heightened scrutiny under the First Amendment. So I think that there really is a misunderstanding of the profession for those that are attacking specifically dietetics and nutrition laws.

I think they really represent a low hanging fruit to those that seem to be attacking these laws. When you look at the lawsuits and those that are bringing these forward regarding dietetics and nutrition boards, often you'll hear them say that these cases are only about telling people what to buy at the grocery store, or dietetics consists of one person talking about nutrition or telling someone what to eat, so it's a profession that's nothing more than just speech.

So according to their arguments, individuals claiming the rights have been violated are only seeking to offer the same information that can easily be found in books or online, and so again it's just speech—that's all this profession is. But I think they're actually missing what the actual practice of the profession is and so that's where, I think, they've missed the point. When you look at the Florida lawsuit, and that lawsuit addresses their dietetics practice act, what the 11th circuits examined or what they're looking at is the actual practice of the profession, which is much more than speech. It involves assessing nutrition needs and status and using appropriate data, recommending appropriate dietary regimens, nutritionist support, ordering therapeutic diets, nutrition research, managing nutrition care systems. So, there's a lot more to it than just speech itself or telling people, as they say, what to buy at the grocery store.

I think it's also important to understand the roots of this profession and actually likely most health professions, as I think that's something that's also been somewhat misunderstood. If you actually look back at the roots of this profession itself, so the practice of dietetics and nutrition is actually a branch of the practice of medicine. If you look back at the earlier definitions in the 1800s even, it was defined as a branch of the practice of medicine, comprising the rules to be followed for preventing, relieving, or curing disease by diet.

And so, when you think about it that way, that the practice of dietetics and nutrition is actually a carve out of the practice of medicine, I think that gives you actually the appropriate framing when you think about these lawsuits. And then, when you think about the fact that we have a long tradition in this country of regulating the practice of medicine, to say that when we regulate the practice of dietetics and nutrition is just simply telling people what to buy at the grocery store or basic information you can get online—that's not right. It's actually in being a piece of the practice of medicine, if the practice of dietetics and nutrition violates your free speech rights, then, in turn, the practice of medicine violates your free speech rights.

Line: Well there's also been a lot of talk about professional speech doctrine, in the case of addressing free speech. So I'm not tremendously familiar with the professional speech doctrine and for our listeners maybe, Pepin, if you could maybe talk a little bit about what that is.

Pepin: Sure, and I'll talk about it first to give the definition of the professional speech doctrine as it was used by the Supreme Court recently in the NIFLA v. Becerra case because that's sort of the crux of the case. That's the case they're going to rely upon in order to overturn these licensure laws.

When talking about the professional speech doctrine, they said that courts that have used it had defined professionals as individuals who provide personalized services to clients and who are subject to a generally applicable licensing and regulatory regime. So, that's what a professional is - you provide personalized services and you're licensed by the state. And then they go on to talk about the fact that the courts who had used this professional speech doctrine - that it represented diminished constitutional protections. I think it's really important to talk about that context of it because there really are two different aspects of the professional speech doctrine as lower courts have looked at it, and it's been a little bit conflated recently, both in the Supreme Court, to some extent, but certainly in the pleadings for the Florida del Castillo case, because the professional speech doctrine is not just about, contrary to what the plaintiff's counsel says, is not just about speech that's by any professional.

The professional speech doctrine as applied in courts actually has two aspects. The first is what level—essentially it's asking what level of scrutiny should courts use to determine whether or not laws impacting professionals are constitutional or not. And there has been one aspect, one of those core groups of cases, that said when you are regulating a profession and you are creating the licensure scheme, the government cannot come in and there's no free speech issue when it comes to the regulation of these professions, and that makes sense. That's a long history of cases going all the way back to some of the medical cases, the Supreme Court in the 1800s West Virginia v. Dent that basically says it's within the government's police power to protect the health and safety of the public. So the government can do things to protect the health and safety of the public.

The real professional speech doctrine, though, the implications of the professional speech doctrine, and this is why it's important. Courts had maybe, perhaps, mistakenly applied some of those standards that they used for determining that it was okay to license the profession. And they had used those standards in deciding whether or not it was okay for the government to interfere in the professional relationship between a patient and a client, or a lawyer in a client. When I say interfere, I mean if there's a lower level of constitutional protection for professional speech, then that means that the government can go in - and we've seen in these cases - the government could go in and tell doctors in Florida that they do not have the ability to talk to their patients about guns in the house. They could force doctors in other states to provide information that is irrelevant to the care they're actually providing. Compelled speech is very particularly a crucial issue to consider.

And so really, the problem with the professional speech doctrine is that it was a little bit confusing, applied to multiple scenarios, and that, as applied, it ended up being such that the standard was able to be used for the state governments to be able to interfere in that personal-professional relationship. So that's the issue I'd say. Is the professional speech doctrine dead? Sure, under NIFLA. I am not concerned about that, because I think that it's been too bastardized and watered down by opponents of it and opponents of licensure that they're trying to make you think everything's professional

speech. I'll just say that that's sort of where we are right now. But I want to reiterate, the courts have repeatedly time and time again and historically, they've not said anywhere that when it comes to the health and safety of the public, professional speech within the confines of the regulation of the conduct of the practice of the profession can't be regulated.

And I do want to say one thing here that sometimes there's a little bit of confusion around what an occupation is versus a profession. And I think that that's an important distinction, because when you hear some of these folks talk who are suing to overturn these licensure laws, they often talk about occupations and not professions. And I think that it's an important distinction that we can go into a little bit later if we have time to do that.

Line: That's great, and I think very helpful for that. Now I know before we started the podcast we were talking a little bit about this, but the Florida lawsuit, the del Castillo vs Florida Department of Health—the groups that are suing are pretty adamant that there is a lot of new legal precedent around free speech and regulated professions. So, are they right and, if so, do they apply to licensure laws as they assert? Charla, if we start with you, and then, Pepin, I'd like your thoughts on this as well.

Charla: Yeah, I think this is already some of what Pepin was getting into and talking about the professional speech doctrine. I don't know that it's new law, but that was a clarification that the Supreme Court provided. And the case that he was referring to, I'll refer to as NIFLA - in that case the Supreme Court clarified that they've never recognized the professional speech doctrine and so, as such, licensed professionals do not lose their First Amendment rights when providing guidance or treatments to clients. What NIFLA made clear - and again this is what Pepin was already saying - is that when professionals are subject to content-based laws compelling them to say or not say something, that those laws are subject to First Amendment strict scrutiny. Those laws should be looked at much closer. Just to the professionals' speech to the public is protected under the First Amendment, so is their personalized speech to a client.

NIFLA, the case that they seem to think changed everything, basically just affirmed that there's no persuasive reason for treating professional speech as a unique category that's exempt from ordinary First Amendment principles. And as such, government regulation of licensed professional speech and practice of the profession is subject to strict scrutiny, meaning the regulation must be narrowly tailored and the government must have a compelling reason to regulate such speech. But again, I don't think that's new law; I think that's just a clarification.

What NIFLA also made clear, though, that I think is important as we go forward and as we look at the professions and whether licensing laws violate free speech or not, is that they have afforded less protection for professional speech in two circumstances. So, where a law requires professionals to disclose factual non-controversial information in their commercial speech, and the one that's more relevant here is where states regulate a professional's conduct that incidentally impacts their speech. So if we look at this del Castillo case, the appellate court recognized that the NIFLA holding made clear that the professional speech doctrine was not a valid doctrine, but recognized that it really didn't

impact their holding in that case, because what they were looking at was the regulated conduct.

And so we'll talk a little bit more about that case, I think, in a few minutes. But when they're examining what does this law do, they're examining the conduct, and all the things that are elements of that profession really are conduct with that incidental impact on speech. And so they fit into what the NIFLA case said is something that they have afforded less protection to or is examined under that lower standard of rational basis under the state's ability to protect with the health, safety and welfare of its citizens. Pepin, you want to add to that additional thoughts?

Pepin: I think you did a really great job there, and all I'd add is some around the new precedent. The way that this has been built up in tackling or trying to overturn the licensure laws, these initiatives have sort of cherry-picked various free speech cases over the last decade or so. As court watchers have identified, this Supreme Court is very interested in preserving and expanding free speech protections and in clarifying free speech doctrines. They've gone further in commercial speech and in areas of professional speech around who can make coffins in Louisiana and whether you need a license to be a tour guide in Washington, DC. So, in many different ways as court as indicated an interest in expanding free speech rights.

But, so what they've done is they've sort of cherry-picked some language from a bunch of different cases and created almost what they perceive to be a very clear path forward. But I think that cherry-picking fails to recognize some of the inherent elements that Charla was noting, which is that there's a consistent set of holdings around the ability to continue to regulate professions. For sure, there's been a lot of new legal precedent around free speech and regulated professions, but not a lot of new jurisprudence or new legal precedent specific to the question of whether professions, as opposed to occupations, are able to require a license to practice them by the state.

Charla: And I would just add, as Pepin was saying, drawing on that, on the side of those that are attacking these laws, they try to make it seem like it's very evident that what these cases hold, but of all the cases that they point to, none of them are addressing licensure laws of a profession, which I think distinguishes the different holdings on that level of, are we really examining this regulation of professional conduct? There's elements in most cases that they can apply, but none of those cases are directly on point with the discussion we're having.

Line: So I think I know the answer to this question that I'm going to ask just from our conversation right now, but this clearly isn't just about dietitians, right? Other professions—should they be concerned about what's going on? And Pepin, what are your thoughts there?

Pepin: Yeah, so I would just say yes, I think a lot of professions should be concerned about what's going on. The couple things I'll say is that the interest groups that are filing these lawsuits and have had some success in overturning, as I mentioned, some of the occupational licensure requirements in tour guides and hair breeders and coffin makers and things like that, but the dietitians is sort of, as you mentioned, Charla, the low hanging fruit, perhaps, of the professions and particularly the health care

professions. And that's because, you know, if you want to read some of the dietetic statutes not holistically, if you just want to look at certain elements of it without seeing the exemptions and the way in which states are enforcing them, I think you might see that there is some aspect of some of the wording of the statutes that might appear on their face to be potentially problematic.

And so I think dietetics provided, in some of these states, a pretty ripe opportunity for these interest groups to take the next step on their ultimate goal, which they'll freely tell you is to eliminate regulation for both professions and occupations across the country as part of their desire to minimize or remove most government regulations from both commerce and general interactions among Americans. So, I would say absolutely. We've seen recent cases in Mississippi with surveyors and in Texas with veterinarians. If you would ask me if they could have found a way to make veterinarian care about free speech, I would have not been able to come up with it, but they are smart lawyers, and so they did, and in fact they were even successful there. And so I think that anybody, any profession in which speech provides - I used to say, a significant, but - I think even a decent part of the work they do, elements of your licensure laws, if not your entire licensure laws when it comes to things like counselors, psychologists, other talking professions and that I think other professions where speech is a big piece of that aspect. I don't want to misquote him, but the lead attorney in a lot of these cases specifically said he doesn't think doctors, unless they're performing surgery, should necessarily need to be licensed. I mean that's a pretty revolutionary idea. We've been licensing doctors for a long time in this country, and there are lots of good reasons to do that, to ensure that qualified people are practicing and that incompetent people are not, and the public can differentiate. It is a revolutionary proposal that they're making, and they've had some success at it.

Line: Charla, let me ask you this, and I think this kind of touches on kind of what Pepin was getting at. Ultimately, what does it mean to practice a profession? And are you saying that practicing a profession is engaging in conduct or not? What are your thoughts there?

Charla: Well, so I want to be clear that from that NIFLA case that we know that laws regulating the speech of licensed professionals are not exempt from First Amendment scrutiny. But that holding—is that irrelevant to laws regulating the standards for entry to profession and defining the conduct that is the practice of a profession? When you look at the definition of the practice of a profession, and I think, for the most part, any true profession - Pepin was trying to distinguish there's a difference between occupations and professions. There's the learned study, the training, all those things that go into it, but when you look at the definition of the practice of a profession, what I would venture to say is that I think what you would see for most of these laws is that the profession, as defined in the practice act, involves a significant amount of conduct but only an incidental impact on speech. So is speech part of the practice of profession? Well, certainly for most professions, it is, but it's likely incident to the conduct.

So for sure, you need to look at each profession individually, but when you do, I think what you determine is, like what the 11th circuit did in the del Castillo case, that what the law's actually defining is the practice of the profession. In North Carolina, we devised for our profession here—so dietetics

and nutrition, our board—what we deemed Guideline A, and this is a guidance document for unlicensed persons that are not otherwise exempt under law. And here we emphasize that to be practicing dietetics, one has had to form a professional client relationship with the purpose of assessing individual nutritional needs and then developing a specific nutrition plan for the purpose of treating or managing a medical condition. So like Florida's law, nutrition assessment here in North Carolina involves the evaluation of nutritional needs based on many factors. In ordering of labs, nutrition counseling is not just speech, but rather it's advice or assistance to individuals or groups on nutrition intake that involves integrating information from the nutrition assessment with other information and that is consistent with therapeutic needs. It just goes back to this idea that practicing the profession, you're forming that professional client relationship; you're considering the affairs of the client; you're exercising professional judgment; you're acting in a fiduciary capacity in the sense that you have to do what's in the best interest of your client, not in the best interest of yourself.

I think all of that, in the actual practice, is all conduct that incidentally impacts speech. In my mind and I think for a lot of people, a profession that might come to mind (or did to me this morning when I was just thinking about this) was counseling. It seems to be a little maybe like low hanging fruit, like our profession, in the sense that what comes forth is speech—you're talking to someone in that setting. But when I looked at the definition of counseling in North Carolina this morning, it actually is much more. It's assisting individuals, groups and families through the counseling relationship by evaluating and treating mental disorders and other conditions, through the use of a combination of clinical, mental health, and human development principles, methods, diagnostic procedures, treatment plans and other psychotherapeutic techniques, etc. So I just get at this idea that the profession does involve speech (most professions do), but the actual regulation of what is the profession is so much more than just the speech that comes forth.

Pepin: I think that's great, Charla, and I would just add one little thing on to it just to wrap it up, which is it a person, a professional (and Justice Jackson on the Supreme Court years ago sort of gave some examples around this), a person who is a professional could very well do things in other parts of his life, where he's not acting in that professional capacity. And so you could be a doctor and practicing your profession in a clinic working with a patient, but if you go and you make a speech to a group of people talking or encouraging a certain area of medical thought to be rejected, you may not be practicing medicine, and so I think that there's a notion that I think is really important here, which is that, just because something touches on a field of medicine or a professional field doesn't mean that just because you're talking about it means that you are practicing the profession. And so, to the extent that some dietitians do in fact encourage people to buy certain products or give advice about what products to buy at a grocery store does not mean that everybody who purchases or is encouraging people to buy certain products in the grocery store —I think of Costco and the folks who sit out there recommending samples and encourage you to purchase their products, I don't think anybody could really think that that is the practice of dietetics. And that's because that key element there is the existence of a relationship with some fiduciary or quasi-fiduciary capacity. And so you know when you're in it.

This is the same sort of thing we hear all the time with the straw man arguments about Oh well, you know, this is the same sort of advice or that you could get in any book or on any TV show. And you're like “yes, true,” but when I’m reading a book or watching a doctor show on TV, I’m not thinking that these doctors know about my personal condition, are making judgments about it, and providing me with individualized advice on how to treat or manage my diseases or medical conditions.

In Kentucky, there was a case brought against a guy who was doing sort of a Dear Abby/Ann Landers type column and they tried to prosecute him for the practice of psychology. Now I admit that I have not read every pleading in that case, but I will tell you that I think you'd be pretty hard pressed to think that by writing a letter in, just a letter and they know nothing else about you other than what you've written, that somehow this person is practicing psychology in the same context or in the same way that the psychology practice act is intended to cover. And I think that's what we have to be really careful of here is not to allow the straw man arguments about the hypothetical that doesn't really exist. We need to talk about that; that's not what practicing professionals are.

I mean, Charla and I have talked about it many times—literally the word “practice” in practicing a profession implies conduct, right. There is part of that fiduciary relationship is you do not speak without processing it through the knowledge that you have accumulated over having that patient or client, their personal experience and then how it is best going to be able to be delivered and what needs to be delivered, whether it's the existence of a diagnosis, the intake of an assessment—the processing part, the use of your brain that was trained to do these things. That there is conduct.

And so I think that those are sort of the important aspects, and to that point just to underline something Charla said, I think that the NIFLA court did not really get into what I mean. They used a definition of what a profession is, but they did not get into what a good definition of what a profession is because they did leave off really important elements of professions and they sort of let it be said and I guess, for good reason, because some states have allowed this too—let professions include everything from doctors all the way down to certain occupations that like tour guides or hair braiders where there's much less of an obvious or tenable or proven connection to the protection of the health and safety of the public, which is why states are licensing professionals to begin with.

Line: Maybe I was just destined to be in regulation or a chief compliance officer because this brings up memories of mine from high school. I was sitting on the bench my senior year of the soccer team. I was their manager. I couldn't play soccer; I played baseball and basketball. And I remember the referee coming over saying, “Coach, you've got a guy here with a broken arm.” And I’m like, you know, “Is this referee a doctor?” How did he know? Of course, the guy's arm was a compound fracture. It was clear it was broken, but it's almost like we have to give that disclaimer of “well I’m not an attorney, but. . .” before we say anything.

Charla: Your story, I think that hits home. I'm like, that person wasn't practicing as a doctor. You hadn't formed that professional client relationship. That's not the practice. That's the key difference there, and that's why it's not the practice. He wasn't making a diagnosis in the context of that professional

client relationship; he's just throwing out his two cents on the fact that it looks like this guy's arm is broken. And that's not the practice of a profession.

Line: I just remember getting upset about it, because I was planning to go to medical school at that point in time, and I was like "well, you know, he's not a doctor." And sure enough, I was like "oh yeah, that's definitely broken." [laughter]
So obviously, free speech is hugely important, but Pepin, let me ask you this. Why shouldn't this be strict scrutiny?

Pepin: Let me say here I'm going to reiterate that I'm speaking in my personal capacity and not speaking on behalf of the Academy of Nutrition and Dietetics. Our views may not necessarily be the same, but I think that the key is here to get back to what I said at the very beginning, which is, when it comes to the government interfering and restricting speech, particularly the content of speech, I think that strict scrutiny, maybe, should apply. Lower levels have been problematic, and so let me explain a little bit what I mean by that. I strongly believe in free speech, very much. I think it's incredibly important; it's obviously foundational to the United States of America and our ability to be a particularly functional and free country. And from my own personal experience, I have gotten myself out of more than a few minor and major scrapes because of our trusty First Amendment and, so I think it's absolutely an essential element and strong standards within it.

But, to give you just a couple of examples. There was a case in Virginia about fortune teller regulation. And that court let us know that the county that was regulating the fortune tellers, the county, when they went to court said we don't think that fortune telling is deserving of any First Amendment protection whatsoever—nothing. The government should just be able to - you know, it's deceptive - the government should be able to shut it down.

Well, that's one side of the continuum is the government saying no, we should be able to do it - force them to say whatever we want and prevent them from saying whatever we want. That's one. And then all the way on the other side, you have the Institute for Justice and other groups that are filing these lawsuits and they're saying, in every circumstance, there should have to be the strict scrutiny—that important government interest and narrowly tailored laws to achieve it. And the problem with that is that when you have the fortune teller laws, their weak standard ended up putting us in a situation where, when the government wanted to because of the weak standard that applied to professions, when the government wanted to regulate other things like to compel speech about pregnancy clinics in the states that recognize it, the government could do that because there was a lower level of protection in certain aspects. And so, they never got to the question because it was foreclosed because they felt they could regulate anything. They never got to the question in those states that maybe there is a real role for the government to fit in because they could just find that the government could always fit in.

The problem, though, is that if you take that [idea] – that there should always be strict scrutiny anytime there's any speech anywhere, no matter what, even if it is incidental to the practice of our

profession, even incidental to that — you end up in situations like you would be where you are, in order to get to the place where they can say we don't think it's appropriate for the government to compel physicians to say certain things that they don't believe in and we don't think it's appropriate to prevent physicians from talking to their patients about guns, which is a perfectly reasonable and I think I agree with it place to get to, they would, in order to get to that place and just have their blanket strict scrutiny everywhere standard every time speech is mentioned, they end up (this may be their intention) throwing away reasonable regulations of conduct.

And so, to answer your question now in a much shorter way than I just did, I think that strict scrutiny is probably appropriate for all real, genuine speech, and so, in situations in which you have the regulation of a profession and then, for dietitians for example, once you are a dietitian and you are in a professional relationship with your patient, I absolutely think that it should be strict scrutiny for governments either compelled speech or speech that a dietitian might be prevented from sharing.

I can think of examples. A government might want to compel you to only give their messages that are contained in the dietary guidelines. Well, I can tell you a lot of our members would have big problems with some aspects of that, only narrowly saying these are the only things you can say, and that should be subjected to strict scrutiny. Or if it's preventing you from talking about something that maybe the government really, really doesn't want Americans for some reason to eat all vegetarian diets because they really like our meat industry. Well if they said you can't talk about all vegetarian diets, I think that's another issue which is just ludicrous to suggest that the government should have that role. But you only get to the place where you can make those decisions if you get to the place where you recognize that the government has that long standing role in determining what the generally applicable qualifications are in order to practice a profession.

And no one's saying here that a person - Lord knows I'm not a dietitian, and I go around talking about what people oughta eat. I have been doing it my whole life, usually mostly the nice way and encouraging way. But I think, you know, recommending and suggesting for this or against this—that's just who we are, but nobody's gonna mistake my conversation for telling somebody that starburst is the best candy in the world or that we should you know, maybe not eat as many potato chips or drink as much soda as folks do, that somehow that is actually representing the practice of profession. And I think that what we end up seeing too often is that in their attempt to "simplify" First Amendment law, what we really know is one of the biggest reasons, if not the reason, they're doing this is to get rid of the regulation that's so important for the protection of the public in the first place.

Line: Well, where do we stand with the Florida case now, Pepin, and what's next from that?

Pepin: Yeah, so the Florida three-judge panel of the 11th circuit upheld, based upon the prior precedents of the 11th circuit, which was the case about the guns that I mentioned, and based upon that precedent, they found in favor of the existing dietetics practice act.

But they found it just simply because they were bound by prior precedent to do so. Then the plaintiff's

lawyer did appeal, they sought a petition for rehearing so they tried to get the entire 11th Circuit to hear it, which they did not do. But I think this case unquestionably they're going to move to a petition for cert at the Supreme Court. I think this issue is very, very important to them personally. It's sort of one of their core beliefs and so, even though the 11th circuit I think has even set down their mandate and finished their work, I fully expect it before the end of the summer, we will see this decision being appealed to the Supreme Court. Now whether the Supreme Court chooses to take it - that'll be an interesting decision.

We're certainly at the Academy of Nutrition and Dietetics (and I look forward to working with other professions in doing so) is to clarify some of these things we've been talking about today for the Supreme Court in amicus briefs. I think that this is really an important matter. We can't let misrepresentations of professions, the nature of our profession, or the nature of licensure to be adopted by the Supreme Court if they're not truly familiar with how these things work and the historical relationships with professions to licensure.

Line: Perfect! So what happens if the Supreme Court decides occupational licensure laws, to the extent that they regulate speech, are subject to this higher level of examination called strict scrutiny? Charla, what are your thoughts there?

Charla: So if they go that route, if it gets to the Supreme Court and that ultimately becomes the holding, then professional licensure laws that are regulating entry to the profession and setting the standards for what it is to practice would be examined against that strict scrutiny standard. And under that standard, these laws have to demonstrate that they're narrowly tailored to address a compelling state interest.

With that being the standard, we're not fearful; I think there's a lot of professions that will just meet that standard even if that is the standard. I think a lot of the professional regulations out there are narrowly tailored to address a compelling state interest. I have to believe, with our long standing history in our country of regulating the practice of medicine, it would meet that definition.

But then, it's concerning when you look at the 5th Circuit case of Heinz about the practice of veterinary medicine that they're not just seeing that, but that is the question that they will be addressing I guess. It is getting pushed forward there, so you know, that is the standard that states will be held to. Now, something particular to our profession, and particularly in North Carolina, going back to that original question of why were we more susceptible to these attacks - in North Carolina, our law prior to 2018, we regulated nutrition care services, so a pretty broad definition that encompassed all levels of nutrition care. So I think it's important here to note again that, while Pepin's with the Association, I'm the director of the licensing board, so our views may be somewhat different than the professional association's. But for us, we take seriously our duty to safeguard the public health, safety, and welfare of our citizens by regulating the practice of those that are engaged in the practice of dietetics and nutrition. So when we looked at our law, this was back in like 2014 when we started considering even changing our law, we asked this question about our law and what exactly we were

regulating. And so, the question that we posed to ourselves was, are we requiring a license for services that present a demonstratable risk of harm? And, if not, then we're actually probably overregulating because we're limiting the public's access and not meeting our mission because we're limiting the public access to care by requiring a license for services that don't actually require the level of training and qualifications that our licensees have. So, after examining that, we took that opportunity to amend our law, and after multiple years of work, we narrowed our law to focus on medical nutrition therapy. So before, it was really broad and regulated all nutrition care. We narrowed that so we regulate the practice of medical nutrition therapy, a service for which we know that if you don't have adequate training, you can do serious harm.

Now, when I look at this question you asked—that if the strict scrutiny becomes a standard—I don't know that we would have met that standard before under our definition prior to 2018. But when I look at our law today, knowing that it's narrowly focused on medical nutrition therapy, and again I would note that the practice of dietetics that medical nutrition therapy and having the word medical in it and in and of itself, it stems from the practice of medicine, I have to believe that I'm confident I guess that our law would withstand that examination of whether or not it meets that standard.

I think that's something that all boards should be taking the opportunity to think about, not just because necessarily in this case even but just because you always have to keep in mind the mission of licensing boards is to protect the public. And so, whenever you're overregulating, you're not meeting your mission to the fullest extent. And so, you want to keep it really narrowly tailored. That's in line with the strict scrutiny standard, but I think it's also in the best interest of the public. And so that's work that you could be doing now, regardless of whether or not the law changes.

Pepin: Great point! I just want to add then one thing, which is that I think you're absolutely right, Charla. I would just say that, whether the things we've already seen as you noted in the Heinz case is that when the Supreme Court sort of opens a door or makes a little bit of a clarification, sometimes, what we see our circuit courts or district courts running a little bit wild. And so, even though they didn't appear to completely open up or make clear that strict scrutiny is required in the 5th Circuit, the Supreme Court didn't say that it was going to be required that certainly for the actual decision of whether a license is required to do something or not. You know already what we're seeing is courts interjecting themselves into the questions or into the licensure laws around, well is this aspect of licensure law, is the requirement that a veterinarian sees all of the animals, I was gonna say, in person, but that's not obviously the right term, is that requirement valid? And so, even if, as I expect, a lot of these laws are going to be able to be supported, I think there'll still be a lot of challenges, and there may be aspects of laws that get knocked down as courts become a little bit more aggressive and assertive and action-oriented.

Charla: Well, and I also think it's concerning - I guess it's along the lines of your point - potentially if it goes this direction, the chaos that potentially opens up to the extent that, you know, we are a country that's been developed on this dependence of being - you don't look up your dentist or your therapist or someone in terms of their qualifications and everything to see whether they are a qualified

practitioner. And to know that that's really the aim of these lawsuits—to see more deregulation in terms of the professions. Thinking deeper about what the consequences of that can look like as a country in that we just weren't built on that. We are dependent on the state saying this person's qualified to practice. We rely on that heavily in many facets of your life. I think it's just worth considering.

Line: Excellent! I think this gives us some great information, and we look forward to hearing more about this during the presentation in September at the conference. Thank you, Charla and Pepin, for speaking with us today.

Charla and Pepin: A pleasure; thank you.

Line: Well, it has certainly been our pleasure, and I'd also like to continue this conversation on CLEAR Communities. The podcast episode will be posted there, and you can reply with your comments. Now, here are a couple of questions to think about and maybe pose in the Communities. How do you view your profession or the profession you regulate? Is the regulation of a profession the regulation of conduct with an incidental impact on speech, or is it simply a content-based law regulating speech? And consider this - if your occupational licensure law was subject to strict scrutiny, meaning it must meet the test of being narrowly tailored to address a compelling state interest, would your law meet that standard? So please share your comments on CLEAR Communities.

I also want to thank our listeners for tuning in for this episode. This podcast is a great way to connect with our CLEAR audience. But I think we're also really looking forward to getting back to our in-person conference in September. That conference again will be September 14 through 17 in Louisville, Kentucky, the first time the conference has actually been held in CLEAR's home state. Conference and session details are already available online, and we hope you'll consider joining us in September.

We'll be back with another episode of Regulation Matters: a CLEAR conversation very soon. If you're new to the CLEAR podcast, please subscribe to us. You can find us on Podbean or any of your favorite podcast services. And if you've enjoyed this podcast episode, please leave a rating or comment in the app. Those reviews help us improve our ranking and make it easier for new listeners like you to find us.

Feel free to visit our website at www.clearhq.org for additional resources, as well as a calendar of upcoming online programs and events.

Finally, I'd like to thank our CLEAR staff, specifically Stephanie Thompson. She is our content coordinator and editor for this program. Once again, I'm Line Dempsey, and I look forward to speaking to you again very soon.

The audio version of this podcast episode is available at https://podcast.clearhq.org/e/free_speech_regulation.