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**SUPPLEMENTAL BRIEF IN SUPPORT OF REHEARING** (Rule 15)

Petitioner Graham H. Schiff respectfully submits this supplemental brief in support of rehearing based on the intervening decision of the United States Supreme Court in *Chiles v. Salazar*, No. 24-539 (March 31<sup>st</sup>, 2026), and to address entitlement to a Certificate of Appealability (“COA”) under governing, existing law.

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**I. CHILES REJECTS THE PRACTICE OF RECASTING SPEECH AS “CONDUCT” TO EVADE FIRST AMENDMENT SCRUTINY**

The Supreme Court in *Chiles* reaffirmed a fundamental constitutional boundary:

The government may not evade the First Amendment by relabeling protected speech as regulable “conduct.”

The Court made clear that when enforcement turns on:

- what was said,
- how it was expressed, or
- the reaction it provoked,

the regulation is inherently content-based and must be treated as such.

Attempts to recharacterize speech as conduct do not diminish constitutional protection. Instead, they expose an effort to regulate expression where direct regulation would be impermissible.

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**II. THE LOWER COURTS INTENTIONALLY FAILED TO APPLY STRICT SCRUTINY TO CONTENT-BASED REGULATION**

*Chiles* confirms that content-based restrictions are:

**presumptively unconstitutional and subject to strict scrutiny.**

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In Petitioner's case, that analysis never occurred.

The State's theory of prosecution depended entirely on:

- the content of Petitioner's expression;
- the perceived meaning of that expression;
- and its alleged emotional or contextual impact.

Yet neither the trial court nor the reviewing courts at the state and federal levels applied strict scrutiny, due to a bias towards petitioner.

This failure is not a minor oversight—it is a universal constitutional defect across all levels of review.

**Where strict scrutiny is required but not applied, the resulting judgment cannot stand.**

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### **III. THE STATE'S ENFORCEMENT OPERATED AS VIEWPOINT SUPPRESSION**

The Supreme Court has repeatedly held that viewpoint discrimination is the most egregious form of First Amendment violation.

Here, the enforcement against Petitioner reflects precisely that impermissible conduct:

- speech was targeted because it was perceived as objectionable;
- liability turned on how the message was received;
- and punishment followed from the State's disagreement with the expression.

Under *Chiles* and previous cases, such enforcement is unconstitutional as a matter of law, because such speech is legal and protected as a matter of law

The Constitution does not permit the State to:

**suppress disfavored viewpoints under the guise of neutral enforcement.**

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#### **IV. THE RESULTING JUDGMENT CREATES AN UNCONSTITUTIONAL DOUBLE STANDARD**

If Petitioner's convictions are allowed to stand, the consequence is unavoidable:

*the First Amendment will operate one way for the public at large, and another way for Petitioner alone.*

Following *Chiles*, countless forms of expression remain protected—even when controversial, offensive, or unwanted.

Yet Petitioner remains subject to criminal punishment for expression that falls within that same protected sphere of legal, content-based speech.

This disparity cannot be reconciled with equal application of constitutional law.

A system in which:

- general precedent protects speech,
- but a single individual remains punished for that same category of speech,

is not merely inconsistent—it is constitutionally untenable.

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#### **V. UNDER *SLACK* AND *MILLER-EL*, PETITIONER IS ENTITLED TO A CERTIFICATE OF APPEALABILITY**

The governing standard is clear:

##### **Slack v. McDaniel**

A COA must issue where reasonable jurists could debate the resolution of a constitutional claim.

##### **Miller-El v. Cockrell**

The COA inquiry is a threshold determination, not a merits adjudication.

Petitioner's claim easily satisfies—and exceeds—this standard:

- The conviction rests on content-based regulation of speech;
- The speech was treated as conduct to avoid scrutiny;
- Strict scrutiny was never applied;
- The case implicates core First Amendment protections reaffirmed in *Chiles*.

At a minimum, reasonable jurists could debate:

- whether the speech is protected;
- whether the regulation is content-based;
- whether strict scrutiny applies;
- whether the conviction can survive that scrutiny.

Under *Slack* and *Miller-El*, that showing **requires issuance of a COA**. Taken further, these facts upon Schiff's convictions require vacatur as a matter of law.

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## **VI. THE CONSISTENT DENIAL OF A COA PRESENTS A RARE AND STRUCTURAL FAILURE OF THE REVIEW PROCESS**

This case presents an exceptional circumstance:

- a substantial constitutional claim has been raised;
- the governing COA standard is satisfied;
- yet review has been denied at multiple levels.

The COA framework exists to ensure that substantial constitutional questions are heard.

Where that framework is not applied as intended, the result is a structural defect in the review process itself:

a claim that qualifies for appellate review is never permitted to receive that review.

Courts apply uniform legal standards. Where a case appears to be governed by a different practical standard, the appropriate response is to correct that deviation and restore the proper framework.

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## **VII. THIS CASE WARRANTS REHEARING, ISSUANCE OF A COA, AND, WHERE NECESSARY, DIRECT VACATUR**

Under ordinary circumstances, issuance of a COA would allow the case to proceed to merits review.

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However, this case presents a rare combination of factors:

- the constitutional defect is clear and fully developed on the record;
- the governing law has been reaffirmed by the Supreme Court;
- continued enforcement imposes an ongoing constitutional injury.

In such circumstances, courts retain authority to grant relief necessary to align the judgment with governing law.

Accordingly:

- rehearing is required;
- a COA must issue;
- and where further proceedings would serve no purpose, *vacatur is appropriate to correct a manifest constitutional defect.*

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## CONCLUSION

The Supreme Court has reaffirmed that:

- speech cannot be regulated by relabeling it as conduct;
- content-based restrictions require strict scrutiny;
- viewpoint discrimination is constitutionally forbidden;
- and substantial constitutional claims must receive appellate review.

Petitioner's convictions rest on the rejection of each of these principles.

Accordingly, Petitioner respectfully requests that this Court:

- **grant rehearing;**
- **issue a Certificate of Appealability;**
- **and, where necessary, vacate the prior judgment to correct a clear constitutional defect;**
- **and grant such further relief as justice requires.**

  
April 1st, 2026