No. 14-1543

In The Supreme Court of the United States

RONALD S. HINES,
DOCTOR OF VETERINARY MEDICINE,

Petitioner,

v.

BUD E. ALLDREDGE, Jr.,
DOCTOR OF VETERINARY MEDICINE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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Granting review will resolve two acknowledged splits and address occupational speech for the first time – perhaps the last major area of the First Amendment that this Court has not weighed in on. These splits exist because this Court "has yet to clarify the precise level of scrutiny with which to review government restrictions of professional speech." *Wollschlaeger v. Governor of Fla.*, 797 F.3d 859, 891 (11th Cir. 2015). Now is the time for that clarification.

The Board does not dispute the existence of the acknowledged splits. It just argues that the facts here are different. But they are not *materially* different. The fundamental issue for the splits is the Question Presented: Do restrictions on occupational speech trigger First Amendment scrutiny or rational-basis review? Answering that threshold question resolves the splits and provides the lower courts with essential guidance.

This Court will eventually have to address occupational speech, and no better vehicle will present itself. The Board does not identify any vehicle problem. The facts are simple, presumed true under Rule 12(b)(6), and consist of speech alone. If Dr. Hines's emails with pet owners do not warrant First Amendment protection, then no occupational speech does.

I. GRANTING REVIEW WILL RESOLVE TWO ACKNOWLEDGED SPLITS.

A. Review Will Resolve the Splits Over Medical Advice.

Understanding how the Petition will resolve the splits first requires understanding why the Board's framing is wrong. The Board – mirroring the decision below – states that First Amendment scrutiny does not apply to Dr. Hines's emails because the Board regulates only the *circumstances* of his speech (in-person examination required), not the *content* of what he says after the exam. Br. Opp. (Opp.) 6-7.

This is the wrong way to look at it. Restricting the circumstances under which Dr. Hines can write an email is a content-based distinction, as applied, because the restriction cannot be "justified without reference to the content" of his speech. *McCullen v. Coakley*, 134 S. Ct. 2518, 2531 (2014). The Board forbids Dr. Hines's emails fearing that his *opinion* is not *trustworthy* until he examines the animal. The Board lacks a content-neutral reason. *See, e.g.*, *Ward v. Rock Against Racism*, 491 U.S. 781, 793 (1989) (amplified sound). And this "Court has recognized that the distinction between laws burdening and laws banning speech is but a matter of degree and that the Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (internal quotation marks omitted). Thus, granting this Petition will resolve the splits over content-based burdens on medical advice.

Turning to the splits, the Board does not dispute the acknowledged split over gay-conversion therapy between *King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014), and *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2014). Opp. 15. The Ninth Circuit held that the ban on such therapy "regulates conduct." 740 F.3d at 1229. But the Third Circuit expressly split with *Pickup* because "the enterprise of labeling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and susceptible to manipulation." 767 F.3d at 228. The Board brushes off the split, stating that it "obviously is not implicated by this case involving the practice of veterinary medicine." Opp. 15.

But granting the Petition will resolve the split, which did not depend on the individualized advice being about converting homosexuals or even being psychological in nature. The salient question was whether restrictions on *words* in the form of professional advice triggered First Amendment scrutiny. That is the Question Presented here, and hence review will resolve the split between the Third and Ninth Circuits.

This Petition goes to the core of the *King*/*Pickup* split for another reason. The split is fundamentally about whether *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), controls in the occupational-speech context. The Third Circuit decided *King* under *Humanitarian Law Project*. 767 F.3d at 225-26 ("*Humanitarian Law Project* makes clear that verbal or written communications, even those that function as vehicles

for delivering professional services, are 'speech' for purposes of the First Amendment."). *Pickup* expressly held that *Humanitarian Law Project* does not control. 740 F.3d at 1229. Judge O'Scannlain dissented from denial of en banc review in *Pickup* because this Court's "implication in *Humanitarian Law Project* is clear: legislatures cannot nullify the First Amendment's protections for speech by playing this [speech/conduct] labeling game." *Pickup*, 740 F.3d at 1218 (O'Scannlain, J., dissenting from denial of rehearing en banc). Yet, the Fifth Circuit below dismissed *Humanitarian Law Project* in a perfunctory footnote, App. 11, despite it being the foundation of Dr. Hines's argument, just as it is central to his Petition, Pet. 20-24.

The Board is also wrong that the decision below can be reconciled with *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002), and the second *Wollschlaeger* opinion, 797 F.3d 859. The Board argues that *Conant* differs from the decision below because *Conant* involved a content-based distinction, as opposed to the supposedly content-neutral restriction here. Opp. 14. But the cases are *materially* the same. In *Conant*, the Controlled Substances Act ("CSA") was content-neutral and operated generally as a regulation of conduct. Here, the Veterinary Practice Act was content-neutral and operated generally as a regulation of conduct.

Similarly, both cases implicate First Amendment scrutiny because the respective statutes – while facially content-neutral – draw content-based distinctions *as applied*. In *Conant*, the DEA applied the CSA

to forbid recommending marijuana because under the statute it has no legitimate use, and hence any recommendation would be *bad* medical advice. 309 F.3d at 632-33. Here, as discussed earlier, the burdens on Dr. Hines's speech are content-based because the Board is worried that Dr. Hines will give *bad* veterinary advice without examining the pets. Thus, *Conant* and the decision below are materially the same because the government suppressed medical advice fearing that a practitioner would say something *bad* to a patient.

Yet despite these material similarities, the cases came out differently. The Ninth Circuit applied First Amendment scrutiny, and the doctors prevailed. The Fifth Circuit did not, and Dr. Hines lost. That is an outcome-determinative split, regardless of whether the Fifth Circuit or the Board will say so.

For the same reason, the decision below is in an outcome-determinative split with the Eleventh Circuit's second *Wollschlaeger* decision. *See generally* Supp. Br. In *Wollschlaeger*, Florida forbade doctors from inquiring into the gun ownership of patients because the legislature deemed those inquiries medically unnecessary. 797 F.3d at 869. The Board argues that *Wollschlaeger* is distinguishable because it was content-based on its face, *see* Opp. 13, which is true, but not germane for the purposes of this Petition. The salient fact is that both Florida and the Board here prohibit doctor-patient communications because they fear the impact of the message on the patient. The second *Wollschlaeger* opinion applied First

Amendment scrutiny. The decision below did not. The cases cannot be reconciled.

The *Wollschlaeger* opinions illustrate the chaotic effect of this Court's lack of guidance. The first *Wollschlaeger* opinion required 99 slip-opinion pages to generate a 2-1 opinion that content-based restrictions on occupational speech do not trigger First Amendment scrutiny. 760 F.3d 1195, 1218 (11th Cir. 2014) (opinion withdrawn) (free-speech rights "approach a nadir . . . when the professional speaks privately, in the course of exercising his or her professional judgment"). The second *Wollschlaeger* opinion – issued by the same panel a year later following an en banc petition – required 152 slip-opinion pages to conclude the opposite. 797 F.3d at 884 ("[A]sking questions and writing down answers constitute protected expression under the First Amendment.").

The Board elides this dramatic flip-flop and suggests that *Wollschlaeger II* is a garden-variety decision. It is not. The *Wollschlaeger* U-turn underscores the intense uncertainty that exists because this Court "has yet to clarify the precise level of scrutiny with which to review government restrictions of professional speech." *Id*. at 891. It is time to answer the Eleventh Circuit's call.

B. Review Will Also Resolve the Split Over Occupational Speech Other Than Individualized Advice.

Granting review will likely resolve the acknowledged split between the Fifth and the D.C. Circuits over occupational speech other than individualized advice – specifically, tour-guide lectures. The D.C. Circuit struck down parts of the District's tour-guide regulations under First Amendment scrutiny. *Edwards v. District of Columbia*, 755 F.3d 996, 1009 (D.C. Cir. 2014). In doing so, the panel expressly "decline[d] to follow" the Fifth Circuit's decision in *Kagan v. City of New Orleans*, 753 F.3d 560 (5th Cir. 2014), because it upheld an identical statute without applying First Amendment scrutiny.

The Board again argues that the tour-guide cases are factually different, Opp. 12, but that is irrelevant. Review will resolve the split in favor of the D.C. Circuit if First Amendment scrutiny applies to individualized medical advice, because general occupational speech such as a tour-guide lecture would be subsumed by protection for individualized advice. If, on the other hand, this Court rules that occupational licensing constitutes a blanket exception to the First Amendment, then the split is resolved in favor of the Fifth Circuit.

II. THE BRIEF IN OPPOSITION REINFORCES HOW BADLY THE DECISION BELOW CONFLICTS WITH THIS COURT'S PRECEDENT.

Dr. Hines argues in the Petition that the decision below conflicts with four decisions of this Court: (1) *Humanitarian Law Project*; (2) *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001); (3) *United States v. Stevens*, 559 U.S. 460 (2010); and (4) *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015).

The Board tries to distinguish *Humanitarian Law Project* on its facts by saying that it "was not directed at professional-client communications," Opp. 16, but that simply assumes the Board's preferred answer to the Question Presented: Occupational licensure is essentially exempt from First Amendment scrutiny. But there is nothing in *Humanitarian Law Project* remotely suggesting that. Indeed, the Board's only quote from *Humanitarian Law Project* articulates why that case is materially identical to Dr. Hines's. *Id*. at 16-17 (quoting 561 U.S. at 27-28) ("'Plaintiffs want to speak [to terrorists] and whether they may do so under [the statute] depends on what they say.'"). This quote refers to the fact that individualized advice, as opposed to general speech, triggered the statute – a distinction this Court held was content-based. That is exactly the situation here: "If [Dr. Hines's] speech to those [pet owners] imparts a 'specific skill' or communicates advice derived from 'specialized knowledge' . . . then it is barred." *Humanitarian Law Project*, 561 U.S. at 27. "On the other

hand, [Dr. Hines's] speech is not barred if it imparts only general or unspecialized knowledge." *Id.*

Humanitarian Law Project and this case are materially the same for another reason. Like the Veterinary Practice Act, the material-support provision in *Humanitarian Law Project* "*generally* functions as a regulation of conduct." *Id*. (emphasis in original). The DOJ argued that the *application* of the statute to speech alone in the form of advice should be deemed an "incidental[ ] burden[ ]" because advice in this context is analogous to conduct. *Id*. at 26. Nine Justices rejected that argument, one identical to the Fifth Circuit ruling below. Just as in *Humanitarian Law Project*, the "law here may be described as directed at conduct, . . . but as applied to [Dr. Hines] the conduct triggering coverage under the statute consists of communicating a message." *Id.* at 29.

The Board's efforts to distinguish *Velazquez*, *Stevens*, and *Reed* are similarly flawed. The Board argues that *Velazquez* involved a content-based distinction. Opp. 17. That is true, but, as explained above and in the Petition, the *application* of the Veterinary Practice Act to Dr. Hines is content-based both because the regulation of his speech cannot be justified without reference to its content, *McCullen*, 134 S. Ct. at 2531, and because the distinction between general speech and individualized advice is content-based, *Humanitarian Law Project*, 561 U.S. at 27-28.

The Board argues that *Stevens* is different because it was an overbreadth challenge, Opp. 17, but that is irrelevant. Dr. Hines relied on it for the proposition that courts have almost no authority to banish categories of speech from First Amendment scrutiny. Pet. 24. That is effectively what the Fifth Circuit did below in holding that any burden on speech created by the application of a content-neutral regulation of conduct is by definition "incidental" and does not trigger First Amendment scrutiny. Judge O'Scannlain observed in his *Pickup* dissent that "by labeling such [professional] speech as 'conduct,' the panel's opinion has entirely exempted such regulation from the First Amendment." 740 F.3d at 1215.

Finally, the Board tries to distinguish *Reed* by noting that *Reed* was about signs. Opp. 18. Again, this is true, but irrelevant. Dr. Hines cited *Reed* because it held that a content-based restriction on speech cannot be declared content-neutral simply because the government has a benign motive. Pet. 27. This Court obviously intended that principle to apply to the universe of content-based challenges; this Court did not announce a sign-specific rule, and lower federal courts have already applied *Reed* outside the sign context. *See, e.g.*, *Norton v. City of Springfield*, 612 F. App'x 386 (7th Cir. 2015) (anti-panhandling ordinance content-based under *Reed*).

III. GRANTING THE PETITION WILL NOT OPEN A CAN OF WORMS.

The Board's overarching theme is that hearing a case about occupational speech and the First Amendment will "revitalize heightened scrutiny of economic regulations under the guise of the First Amendment." Opp. 24. But recognizing that occupational-licensing laws can occasionally be applied in a manner that "strike[s] at core First Amendment interests," *Conant*, 309 F.3d at 636, is not Lochnerism. As this Court recently emphasized: although the "Constitution 'does not enact Mr. Herbert Spencer's Social Statics,' *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting)[,] [i]t does enact the First Amendment." *Sorrell*, 131 S. Ct. at 2665.

This Court has repeatedly refused to be frightened off by the specter of *Lochner* in the free-speech context. Thirty-five years ago, it articulated the modern commercial-speech test over a dissent invoking *Lochner*. *See Cent. Hudson Gas & Elec. Corp. v. Public Serv. Comm'n*, 447 U.S. 557, 589 (1980) (Rehnquist, J., dissenting).

More recently, this Court rejected concerns about *Lochner* that were raised in a dissent that expressed a free-speech theory indistinguishable from the decision below. In *Sorrell*, data miners and pharmaceutical manufacturers challenged a Vermont law that forbade them from using a physician's prescription records to market drugs. 131 S. Ct. at 2659. The six-Justice majority rejected Vermont's argument that

"heightened judicial scrutiny is unwarranted because its law is a mere commercial regulation." *Id*. at 2664. The *Sorrell* dissent mirrors the decision below, both in arguing against First Amendment scrutiny because "Vermont's statute neither forbids nor requires anyone to say anything, to engage in any form of symbolic speech, or to endorse any particular point of view, whether ideological or related to the sale of a product," *id*. at 2675 (Breyer, J., dissenting), and in warning that a failure to subordinate the First Amendment to state authority "threatens to return us to a happily bygone era when judges scrutinized legislation for its interference with economic liberty," *id*. at 2679.

Granting review in this case will not create a slippery slope to *Lochner*. Recognizing the First Amendment status of commercial speech in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1976), 39 years ago did not destroy the ability of government to protect consumers from false or misleading information. Recognizing in *Velazquez* that lawyers can have First Amendment rights in their legal arguments did not destroy law licensure. Nor did recognizing the free-speech rights of doctors in *Conant* destroy medical licensure.

Courts are capable of applying the First Amendment within its proper scope on a case-by-case basis. Unfortunately, in the occupational-speech context, courts are incapable of applying the First Amendment

consistently because this Court has yet to weigh in. That is a problem that this Court must address now.

IV. THIS COURT WILL EVENTUALLY HAVE TO ADDRESS OCCUPATIONAL SPEECH, AND NO BETTER VEHICLE WILL PRESENT ITSELF.

The Court will eventually have to address occupational speech – particularly in the dawning age of tele-practice – and no better vehicle will come along. The facts are presumed true under Rule 12(b)(6). They also have an ideal simplicity for the threshold question of whether restrictions on occupational speech elicit First Amendment scrutiny: adults emailing about cats and dogs. There is just speech and zero conduct. Procedurally, there is only one claim and no impediment to reaching it.

This Court has not seen a better vehicle for deciding the Question Presented:

- **Medical Marijuana:** *Conant* involved complex facts: doctors treating desperate, often dying patients and recommending marijuana as a last-ditch option. It was also a class action decided at summary judgment.
- **Gay-Conversion Therapy:** *Pickup* and *King* featured peculiar facts and laws: the statutes forbade *only* psychologists from engaging in conversion counseling and prohibited it *only* on minors.

- **Abortion:** *Stuart v. Camnitz*, 774 F.3d 238, 244 (4th Cir. 2014), was decided at summary judgment and involved *compelled* physician speech that was required during an actual medical procedure.
- **Psychoanalysis:** *National Association for the Advancement of Psychoanalysis v. California Board of Psychology* involved a *facial* challenge about whether California could generally require a psychologist's license for one-on-one counseling. 228 F.3d 1043 (9th Cir. 2000).
- **Tour Guides:** *Kagan* involved a disputed summary-judgment record and would not have fully addressed occupational speech because it did not involve individualized advice.

Nor is the Court likely to see a better vehicle. The only plausible case is *Wollschlaeger II*, which presently has a second en banc petition pending. But its summary judgment record is much more complex than the allegations of the Complaint here. In addition to ideological overtones, the speech occurs in the context of in-person medical conduct.

CONCLUSION

"Being a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights." *Conant*, 309 F.3d at 637.

The Petition should be granted.

Respectfully submitted,

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