No. 14-1543

In the Supreme Court of the United States

RONALD S. HINES, PETITIONER

v.

BUD E. ALLDREDGE, JR., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF IN OPPOSITION

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant Attorney General

SCOTT A. KELLER
Solicitor General
Counsel of Record

EVAN S. GREENE
Assistant Solicitor General

OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@texasattorneygeneral.gov
(512) 936-1700

QUESTION PRESENTED

Texas requires veterinarians to physically examine an animal or visit its premises before engaging in the practice of medicine with respect to that animal. The Fifth Circuit upheld the requirement as a valid exercise of Texas's regulatory authority over professionals, even though the requirement incidentally burdens Hines's ability to engage in certain "speech" constituting the practice of medicine.

The question presented is whether the Fifth Circuit correctly upheld the physical examination requirement without subjecting it to heightened First Amendment scrutiny.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Cases—Continued:

Cases—Continued:

Statutes and Rule

Miscellaneous

STATEMENT

1. Subject to limited exceptions, a person may not practice veterinary medicine in Texas without a state-issued veterinary license. Tex. Occ. Code § 801.251.[1] To obtain a license, a person must graduate from a school or college of veterinary medicine approved by the Texas State Board of Veterinary Medical Examiners, and successfully complete a licensing examination conducted by the Board. *Id.* § 801.252.

Licensed veterinarians also "may not practice veterinary medicine unless a veterinarian-client-patient relationship exists." *Id.* § 801.351(a). To establish such a relationship, a veterinarian must "possess[] sufficient knowledge of the animal to initiate at least a general or preliminary diagnosis of the animal's medical condition." *Id.* § 801.351(a)(2). A veterinarian satisfies the "sufficient knowledge" requirement if he "has recently seen, or is

---

[1] The "practice of veterinary medicine" is defined as follows:

> (A) the diagnosis, treatment, correction, change, manipulation, relief, or prevention of animal disease, deformity, defect, injury, or other physical condition, including the prescription or administration of a drug, biologic, anesthetic, apparatus, or other therapeutic or diagnostic substance or technique;
>
> (B) the representation of an ability and willingness to perform an act listed in Paragraph (A);
>
> (C) the use of a title, a word, or letters to induce the belief that a person is legally authorized and qualified to perform an act listed in Paragraph (A); or
>
> (D) the receipt of compensation for performing an act listed in Paragraph (A). *Id.* § 801.002(5).

personally acquainted with, the keeping and care of the animal by: (1) examining the animal; or (2) making medically appropriate and timely visits to the premises on which the animal is kept." *Id.* § 801.351(b). The veterinarian must also be "readily available to provide . . . follow-up medical care in the event of an adverse reaction to, or a failure of, the regimen of therapy provided by the veterinarian." *Id.* § 801.351(a)(3).

In 2005, the Texas Legislature added subsection (c) to section 801.351 to clarify that "[a] veterinarian-client-patient relationship may *not* be established solely by telephone or electronic means." Act of May 27, 2005, 79th Leg., R.S., ch. 971, § 1, 2005 Tex. Gen. Laws 3264, 3264 (emphasis added). That amendment followed and adopted a 2003 change to the Model Veterinary Practice Act of the American Veterinary Medical Association, the largest professional group for veterinarians in the United States. *See* Pet. App. 51. It was enacted "to address changes in technology that could be used to circumvent the [veterinarian-client-patient relationship]," including "instances in which veterinarians have attempted to diagnose [animals] solely over the phone." S. Research Ctr., Bill Analysis, Tex. H.B. 1767, 79th Leg., R.S. (2005).

Accordingly, a veterinarian must physically examine an animal or visit the premises where it is kept before the veterinarian may provide veterinary care in Texas. These statutes are collectively referred to as Texas's "physical examination requirement."

2. Petitioner Hines is a Texas-licensed veterinarian who has not practiced at a brick-and-mortar veterinary facility since 2002. Pet. App. 40, 42. Around that time, Hines began posting articles he had written about animal

health care on his website. Pet. App. 42. Hines started posting general writings but then turned to more targeted guidance, as Hines began providing "veterinary advice" via email and telephone in response to pet owners who contacted him with specific questions about their animals through his website. Pet. App. 42-43.

In rendering this advice, Hines would typically obtain and examine animals' medical records, evaluate other veterinarians' conflicting diagnoses, and even review the propriety of drug dosages prescribed to animals. Pet. App. 43, 47. But "he never physically examine[d] the animals that [were] the subject of his advice." Pet. App. 43. Nevertheless, Hines charged up to $58 for these services in order "to screen out the minor requests [from] the more serious ones." Pet. App. 46. Hines acknowledges that he was "practicing 'veterinary medicine'" for purposes of Texas law when he rendered this advice. Pet. App. 49.

In 2012, the Board advised Hines that his practice of treating animals via electronic means without first conducting a physical examination violated Texas law. Pet. App. 54. Hines subsequently agreed to an order suspending his veterinary license for one year, among other penalties. Pet. App. 57-58; *see also* R.121-25.[2] Hines acknowledges that he "would not have been punished" had he published only "general speech about animals that was not presented as advice for a particular animal." Pet. App. 61. Indeed, the parties' Agreed Order specified that Hines could continue publishing "general information on

---

[2] Citations to "R.*p*" refer to pages of the single-volume Fifth Circuit electronic record on appeal.

veterinary health issues" because such activity does not constitute the "practice of veterinary medicine" under Texas law. R.122.

Hines now seeks to resume providing veterinary advice to individual animal owners via electronic means without risk of further punishment. Pet. App. 60.

3. a. Hines brought this lawsuit for declaratory and injunctive relief, contending that the physical examination requirement violates his First Amendment right to the freedom of speech, and his rights to equal protection and substantive due process under the Fourteenth Amendment. Pet. App. 63-71. Respondents moved to dismiss all of Hines's claims pursuant to Federal Rule of Civil Procedure 12(b)(6). R.166-98.

b. Concluding that the physical examination requirement neither implicates fundamental rights nor creates suspect classifications, the district court disposed of Hines's due process and equal protection claims under a rational-basis analysis, holding that "[i]t is, at a minimum, rational for the state to believe that requiring a physical examination of an animal . . . would tend to prevent misdiagnosis, improper treatment, and the subsequent increased risk of zoonotic disease." Pet. App. 30; *see also* Pet. App. 33 ("[T]here is a rational relationship between the professional regulations at issue in this case and the legitimate state interest in protecting public health, safety, and welfare.").

But the district court determined that because the physical examination requirement "regulate[s] professional speech itself," Pet. App. 20, it held that the requirement must be subject to heightened scrutiny under the First Amendment, Pet. App. 20-24. The

Respondents had not developed an evidentiary record to defend the physical examination requirement under that standard, so the court denied the motion to dismiss Hines's First Amendment claims on the pleadings. Pet. App. 24-25.

Upon the Respondents' subsequent motion, the district court certified its order for interlocutory review pursuant to 28 U.S.C. § 1292(b). R.359-62. The Fifth Circuit then granted the Respondents' petition to hear the interlocutory appeal. R.366-67.

c. A unanimous panel of the Fifth Circuit reversed the district court's denial of the Respondents' motion to dismiss Hines's First Amendment claim, and it remanded the case for entry of judgment in favor of the Respondents. Pet. App. 12.

The court of appeals "beg[a]n—and end[ed]—[its] First Amendment analysis" by rejecting the district court's conclusion that the physical examination requirement directly regulates speech. Pet. App. 7-8. Recognizing that the requirement "does not regulate the content of any speech, require veterinarians to deliver any particular message, or restrict what can be said once a veterinary-client-patient relationship is established," the court of appeals held that the requirement "falls squarely within . . . long-established authority" allowing States to "regulat[e] the practice of professions" without violating the First Amendment. Pet. App. 8.

Invoking this Court's "robust line of doctrine," the court of appeals further concluded that any "incidental impact" on veterinarians' speech imposed by the physical examination requirement does not warrant heightened scrutiny because the requirement does not target speech.

Pet. App. 9 n.13 (quoting *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011) ("[T]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.")). As the court of appeals observed, "[t]he idea that content-neutral regulation of the professional-client relationship does not violate the First Amendment has deep roots, and has been embraced by many circuits." Pet. App. 9-10 (citations omitted).

The court of appeals "easily distinguish[ed]" the principal authorities Hines relied upon—*Legal Services Corporation v. Velazquez*, 531 U.S. 533, 537 (2001), and *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010). Pet App. 11 n.20. The court explained that these cases concerned "viewpoint"- and "content"-based speech regulations that "did not implicate questions of the content-neutral regulation of the practice of medicine that are relevant to this appeal." *Id.*

Finally, the court of appeals affirmed the district court's dismissal of Hines's due process and equal protection claims, holding that rational-basis review applies and that the physical examination requirement "is, at a minimum, rational." Pet. App. 11-12.

ARGUMENT

Like any licensure requirement or other generally applicable prerequisite to practicing a profession, Texas's physical examination requirement incidentally impacts "speech" to the extent that persons may not engage in the spoken aspects of practicing veterinary medicine until the prerequisite is satisfied. Following this Court's "robust line of doctrine," Pet. App. 9, the court of appeals easily

rejected Hines's First Amendment challenge to the requirement without invoking heightened scrutiny.

Hines's principal argument for granting certiorari review—that there is a circuit split regarding whether restrictions on medical advice receive First Amendment scrutiny, Pet. 6-17—is illusory. In light of the States' broad police powers, no circuit subjects content-neutral professional-licensing regulations like the physical examination requirement here to heightened scrutiny. That is so, even though these laws necessarily limit persons from "speaking" as professionals until the relevant requirements are met. On the other hand, the circuits routinely subject content-based restrictions on particular forms of professional advice to heightened scrutiny pursuant to basic First Amendment principles. There is no conflict between these two lines of cases.

At bottom, Hines and his supporting amici are seeking to revive heightened scrutiny of economic regulations under the guise of the First Amendment. But as this Court and the circuits have repeatedly recognized, determinations regarding the need for regulation across professions are best left to state legislatures. The Court should deny the petition.

I. THIS CASE DOES NOT IMPLICATE ANY CIRCUIT SPLIT.

A. No Circuit Applies Heightened First Amendment Scrutiny to a Generally Applicable Professional Licensing Regulation.

The Fifth Circuit's decision is in accord with the rulings of this Court and other circuits, which confirm that

States can enact professional licensing laws that incidentally burden speech without triggering heightened First Amendment scrutiny.

1. The Constitution "does not guarantee the unrestricted privilege to engage in a business or to conduct it as one pleases." *Nebbia v. New York*, 291 U.S. 502, 527-28 (1934) (citations omitted). To the contrary, this Court has long recognized that "the right to conduct a business, or to pursue a calling, may be conditioned." *Id.* at 528; *see also Watson v. Maryland*, 218 U.S. 173, 176 (1910) ("[I]t is too well settled to require discussion at this day that the police power of the States extends to the regulation of certain trades and callings, particularly those which closely concern the public health."). Accordingly, States have "broad power to establish standards for licensing practitioners and regulating the practice of professions." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975)). This is particularly true "in areas where there is medical and scientific uncertainty." *Gonzales v. Carhart*, 550 U.S. 124, 163 (2007) (citations omitted).

Nearly every professional endeavor, of course, involves some act of speaking. But consistent with States' broad authority to regulate professions, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *IMS Health*, 131 S. Ct. at 2664; *see also Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) ("[T]he State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity.");

Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502 (1949) ("[I]t has never been deemed an abridgment of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language.").

Justice White crystallized this line of cases in his frequently cited concurrence concerning professional speech in *Lowe v. SEC*, 472 U.S. 181 (1985). *See id.* at 228 (White, J., concurring in the judgment) ("The power of government to regulate the professions is not lost whenever the practice of a profession entails speech."). In *Lowe*, Justice White, joined by Chief Justice Burger and Justice Rehnquist,[3] opined that when the government enacts "generally applicable licensing provisions" limiting who may practice a profession or how, "it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny." *Id.* at 232. As Justice White explained, "[j]ust as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the [regulable] conduct of the profession." *Id.* On the other hand, if the government attempts to regulate communications outside "the personal nexus between professional and client," it "ceases to function as legitimate regulation of professional practice" and instead must be subject to First Amendment scrutiny. *Id.*

---

[3] The six-justice *Lowe* majority did not reach the constitutional question addressed by Justice White, having decided the case on statutory grounds. 472 U.S. at 211.

Justice White's concurrence echoed Justice Jackson's concurring opinion in *Thomas v. Collins*, 323 U.S. 516 (1945), concerning the line dividing permissible professional regulations from the abridgment of speech subject to First Amendment constraints. As Justice Jackson observed, "[T]he state may prohibit the pursuit of medicine as an occupation without its license, but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought." *Id.* at 544. Put another way, speech necessarily intertwined with "some other factor which the state may regulate"—like the pursuit of a regulable occupation—may be limited without First Amendment scrutiny. *Id.* at 547.

2. Consistent with this Court's "incidental burdens" line of authority, *IMS Health*, 131 S. Ct. at 2664, and Justice White's reasoning in *Lowe*, the circuits have uniformly held that licensing requirements and other generally applicable prerequisites to practicing a profession are not subject to heightened First Amendment scrutiny. This is so even though these requirements necessarily restrict persons from "speaking" as doctors, lawyers, accountants, or other licensed professionals.

For instance, the Fourth Circuit has repeatedly rejected First Amendment challenges to such occupational regulations without engaging in heightened scrutiny. *See Moore-King v. County of Chesterfield*, 708 F.3d 560, 569-70 (4th Cir. 2013) (rejecting First Amendment challenge to licensure, tax, and zoning regulations applicable to fortune tellers); *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 604-05 (4th Cir.

1988) (rejecting First Amendment challenge to restrictions on non-CPAs' ability to perform certain accounting tasks); *Underhill Assocs., Inc. v. Bradshaw*, 674 F.2d 293, 296 (4th Cir. 1982) (rejecting First Amendment challenge to broker-dealer registration requirement); *see also Cooksey v. Futrell*, 721 F.3d 226, 239 (4th Cir. 2013) (recognizing continued validity of the "professional speech doctrine").

The Seventh, Ninth, and Eleventh Circuits have similarly disposed of First Amendment claims challenging such laws. *See Lawline v. Am. Bar Ass'n*, 956 F.2d 1378, 1386 (7th Cir. 1992) (rejecting First Amendment challenge to rule restricting lawyers from assisting non-lawyers in the unauthorized practice of law); *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1053-56 (9th Cir. 2000) (rejecting First Amendment challenge to California's licensure scheme for mental-health professionals); *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011) (rejecting First Amendment challenge to Florida's licensure requirement for interior designers); *see also Coggeshall v. Mass. Bd. of Registration of Psychologists*, 604 F.3d 658, 667 (1st Cir. 2010) ("Simply because speech occurs does not exempt those who practice a profession from state regulation."). None of these cases subjected the occupational regulations at issue to heightened scrutiny.

Although the D.C. Circuit applied heightened scrutiny in a First Amendment challenge to the District of Columbia's tour-guide licensing scheme, it did so only after distinguishing other professional-speech cases. *Edwards v. District of Columbia*, 755 F.3d 996, 1000 n.3

(D.C. Cir. 2014). Notably, the D.C. Circuit cited with approval Justice White's concurrence in *Lowe*. *Id.* It then held that "[o]ne who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession. . . . [But] [a]ppellants do no such thing. They provide virtually identical information to each customer." *Id.* (internal quotation marks omitted). Far from questioning the professional speech doctrine, *Edwards* simply concluded that tour guides do not engage in professional speech. *Id.* (rejecting the District's argument that "the tour-guide license, like licensing schemes for lawyers and psychiatrists, is merely an occupational license"). Here, though, there is no dispute that veterinarians engage in professional speech.

3. The Fifth Circuit's holding in this case is on all fours with the "robust line of doctrine" recognizing that States may employ licensure requirements and other generally-applicable prerequisites to practicing a profession without offending the First Amendment. Pet. App. 9. As the court observed, the physical examination requirement "does not regulate the content of any speech, require veterinarians to deliver any particular message, or restrict what can be said once a veterinarian-client-patient relationship is established." Pet. App. 8.

The court recognized that the challenged laws do "prohibit[] the practice of veterinary medicine unless the veterinarian has first physically examined either the animal in question or its surrounding premises." Pet. App. 7-8. But the court correctly held that such "content-neutral regulation of the professional-client relationship

does not violate the First Amendment," notwithstanding the "incidental impact on speech" imposed by such regulations. Pet. App. 9-10. In reaching that conclusion, the court cited *IMS Health*, Justice White's concurrence in *Lowe*, Justice Jackson's concurrence in *Thomas*, and many of the circuit decisions discussed above. *Id.*

B. Content-Based Restrictions on Occupational Speech Are Subject to Heightened First Amendment Scrutiny.

1. In contrast, multiple circuits have applied heightened scrutiny to regulations that restrict the specific content of professional advice. But the physical examination requirement here does nothing of the sort.

Most recently, the Eleventh Circuit held that a Florida law restricting doctors from discussing and keeping records regarding patients' firearm ownership was aimed at stifling a "particular message," and therefore subject to heightened First Amendment scrutiny. *Wollschlaeger v. Governor of Fla.*, 797 F.3d 859, 885 (11th Cir. 2015). But the court distinguished its earlier holding in *Locke*, *see supra* p.11, confirming that generally applicable regulations governing the practice of a profession that "impose only incidental burdens on speech" do not offend the First Amendment. 797 F.3d at 884.

Similarly, the Third Circuit held that a State's ban on sexual-orientation-change-efforts counseling was a form of "content discrimination" subject to heightened First Amendment scrutiny. *King v. Governor of New Jersey*, 767 F.3d 216, 236-37 (3d Cir. 2014). As the court observed,

heightened scrutiny was necessary to protect against suppression of particular "disfavored ideas" that were unlikely to reach the general public through channels other than the professional-client relationship, *id.* at 236—a concern that does not apply to content-neutral occupational regulations like the physical examination requirement.

The Fourth, Eighth, and Ninth Circuits have all issued similar decisions subjecting content-based restrictions on occupational speech to heightened scrutiny. *Stuart v. Camnitz* applied heightened scrutiny to North Carolina's "content-based" restriction requiring physicians to utter certain speech prior to performing an abortion. 774 F.3d 238, 248 (4th Cir. 2014). *Argello v. City of Lincoln* employed heightened scrutiny to strike down a "content-based" ordinance banning persons from engaging in fortune-telling. 143 F.3d 1152, 1152-53 (8th Cir. 1998).[4] Similarly, *Conant v. Walters* applied heightened scrutiny to invalidate a federal "viewpoint"-based policy that punished doctors who suggested that marijuana could help a patient. 309 F.3d 629, 637 (9th Cir. 2002). The court distinguished its earlier opinion in *National Association for the Advancement of Psychoanalysis*, *see supra* p.11, noting that the mental-health licensure laws at issue in that case were "content-neutral" because California "did

[4] In *Moore-King*, the Fourth Circuit distinguished the Eighth Circuit's opinion in *Argello* because it involved an "outright ban[]" on fortune-telling, in contrast to the County of Chesterfield's "generally applicable licensing and regulatory regime" requiring persons seeking to open a fortune-telling business to acquire a permit, pay a license tax, and comply with certain zoning regulations. 708 F.3d at 569-70.

not attempt to dictate the content of what is said in therapy." 309 F.3d at 637 (internal quotation marks omitted).

More recently, the Ninth Circuit analyzed a ban on sexual-orientation-change-efforts therapy under the rational-basis test, as that ban regulated the "*treatment itself,*" as opposed to the content of medical advice. *Pickup v. Brown*, 740 F.3d 1208, 1230-31 (9th Cir. 2014). *Pickup* distinguished *Conant* on this basis. *Id.* at 1226-27, 1231. Reading *National Association for the Advancement of Psychoanalysis*, *Conant*, and *Pickup* together demonstrates that the Ninth Circuit is in accord with its sister circuits on this issue: content-based restrictions on professional advice warrant heightened First Amendment scrutiny; generally applicable professional regulations that incidentally burden speech do not. Any possible split between the Third Circuit (*King*) and the Ninth Circuit (*Pickup*) regarding whether bans on sexual-orientation-change-efforts therapy are content-based or content-neutral, *see* Pet. 12, 22-23, 30 n.17, obviously is not implicated by this case involving the practice of veterinary medicine.

2. The Fifth Circuit's decision in this case does not conflict with any of the circuit cases applying heightened scrutiny. As discussed above, each case involved a content-based restriction on specific professional advice.

In contrast, the physical examination requirement "does not regulate the content of any speech, require veterinarians to deliver any particular message, or restrict what can be said once a veterinarian-client-patient relationship is established." Pet. App. 8. The Fifth Circuit's decision upholding the requirement without

engaging in heightened scrutiny is consistent with this Court's authorities and the host of circuit decisions analyzing similar content-neutral professional regulations, *see supra* pp.10-12, many of which were cited in the court's opinion. Pet. App. 10 n.17.

In short, this case presents no circuit split warranting this Court's attention.

II. THE FIFTH CIRCUIT'S DECISION DOES NOT CONFLICT WITH THIS COURT'S PRECEDENT.

A. Hines also argues that the Fifth Circuit's decision conflicts with four of this Court's decisions. Pet. 20-28. As noted above, the court of appeals "easily" (and correctly) distinguished two of those cases—*Humanitarian Law Project* and *Legal Services Corp*. *See supra* p.6. And neither *United States v. Stevens*, 559 U.S. 460 (2010), nor *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), are on point.

Humanitarian Law Project involved a challenge to a "content"-based restriction in the federal material-support statute that prevented plaintiffs from providing advice on the use of international law to two designated terrorist organizations. 561 U.S. at 27. The challenged statute was not directed at professional-client communications (like those discussed in Justice White's *Lowe* concurrence), and it did not regulate the practice of a profession (like the physical examination requirement). *See id.* at 8-9. The Court applied heightened First Amendment scrutiny because the statute restricted advice based upon the message plaintiffs sought to impart. *Id.* at 27-28 ("Plaintiffs want to speak to [terrorist

organizations], and whether they may do so under [the statute] depends on what they say.").

Legal Services Corp. similarly involved a challenge to "viewpoint-based restrictions" on federally-funded lawyers' ability to challenge the validity of existing welfare laws. 531 U.S. at 536-37, 542. The restrictions prevented lawyers "from arguing to a court that a state statute conflicts with a federal statute or that either a state or federal statute . . . is violative of the United States Constitution." *Id.* at 537; *see also id.* at 544-47. As the Court concluded, the very point of the law was to suppress lawyers from advancing a message at odds with the existing welfare system. *Id.* at 549 (Congress's funding decision "cannot be aimed at the suppression of ideas thought inimical to the Government's own interest").

Thus, the laws at issue in *Humanitarian Law Project* and *Legal Services Corp*. directly restricted *what* persons could say both inside and outside of professional-client relationships. In stark contrast, the physical examination requirement simply regulates how veterinarians may practice medicine.

Stevens is inapposite. It concerned an overbreadth challenge to a federal restriction on the commercial use of certain depictions of animal cruelty. 559 U.S. at 464, 472-73. The Court held that the statute's "explicit[] regulat[ion]" of "content" could not withstand heightened scrutiny, rejecting the government's "primary submission" that depictions of animal cruelty should be categorically excluded from First Amendment protection. *Id.* at 468. In contrast here, the Fifth Circuit recognized that the physical examination requirement "does not regulate the content of any speech," so it upheld the law

as having a mere "incidental impact" on Hines's ability to practice veterinary medicine. Pet. App. 8-9. The court never suggested that professional advice is categorically unprotected by the First Amendment. *Cf.* Pet. 24; Bill Main Br. 21-24, Cato Br. 11; AAPS Br. 3-4.

Finally, *Reed* involved a First Amendment challenge to a comprehensive code governing outdoor signage, which subjected different categories of signs to different restrictions. 135 S. Ct. at 2224. Because the code was "content based on its face"—that is, it regulated groups of signs differently "depend[ing] entirely on the communicative content of the sign"—the Court concluded that strict scrutiny applied irrespective of the town's justifications and purposes for enacting the law. *Id.* at 2227. Here, the physical examination requirement regulates the "practice [of] veterinary medicine," Tex. Occ. Code § 801.351(a), not signage or any other communicative content. Hines never argued that this facially-neutral requirement has an underlying "content-based purpose," *see Reed*, 135 S. Ct. at 2227-28, and the court of appeals did not pass upon that issue. Indeed, Hines "[did] not dispute the legitimacy" of Texas's interests underlying the laws. Response Brief of Appellee Dr. Hines at 40, *Hines v. Alldredge*, No. 14-40403 (5th Cir. July 21, 2014).

Thus, none of the cases cited by Hines "implicate[d] questions of the content-neutral regulation of the practice of medicine" that are at issue in this case. Pet. App. 11 n.20.

B. Several amici have seized on Hines's petition to advance additional First Amendment theories that were not pressed by Hines or addressed by the court of appeals

below. Certiorari is not warranted to consider these theories. *United States v. Williams*, 504 U.S. 36, 41 (1992). In any event, the Fifth Circuit's decision is consistent with the authorities cited by amici.

Two amici suggest that the Fifth Circuit's decision conflicts with *United States v. O'Brien*, 391 U.S. 367 (1968), and its progeny. *See* Cato Br. 12; Consumer Action Br. 5. *O'Brien* recognized that certain forms of conduct warrant First Amendment protection, 391 U.S. at 376, but the Court has since clarified that such protection applies only to conduct that is "inherently expressive," *Rumsfeld v. Forum for Academic & Institutional Rights, Inc.*, 547 U.S. 47, 66 (2006). Regardless, Hines disavowed any expressive-conduct theory below, thus forfeiting this argument. *See* Response Brief of Appellee Dr. Hines at 12 ("There is zero conduct in this case.").

Two other amici argue that the Fifth Circuit's decision conflicts with *Riley v. National Federation of the Blind*, 487 U.S. 781 (1988). *See* Bill Main Br. 14; Pacific Legal Found. Br. 2, 8. In *Riley*, the Court invalidated a statute requiring professional fundraisers "to await a determination regarding their license application before engaging in solicitation." 487 U.S. at 801. Because the law was "directly aimed at speech," the Court subjected it to heightened First Amendment scrutiny "to ensure that the licensor's discretion [was] suitably confined." *Id.* (citing *Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 755-56 (1988)). In reaching that conclusion, the majority rejected the dissent's contention that the statute "merely license[d] a profession." *Id.* at n.13; *see also Nat'l Ass'n for Advancement of Psychoanalysis*, 228 F.3d at 1056 (noting that *Riley* involved a "content"-based restriction

on solicitation, distinct from professional-licensure regulations). Hines has never suggested that the physical examination requirement should be analyzed under *Riley*, which the Court has since characterized as a "prior restraints" case. *See Illinois, ex rel. Madigan v. Telemarketing Assocs., Inc.*, 538 U.S. 600, 606 (2003).

The Fifth Circuit's decision is also consistent with this Court's commercial-speech cases applying intermediate scrutiny to restrictions on professional advertising and solicitation. *Cf.* Bill Main Br. 21-22. These cases involve direct "content-based" restrictions on speech subject to First Amendment constraints. *See IMS Health*, 131 S. Ct. at 2667 ("Under a commercial speech inquiry, it is the State's burden to justify its content-based law as consistent with the First Amendment."); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771 (1976) (Virginia statute limiting drug-price advertising "single[d] out speech of a particular content and [sought] to prevent its dissemination completely"). The physical examination requirement, in contrast, "does not regulate the content of any speech." Pet App. 8.

Finally, the Association of American Physicians & Surgeons argues that the Fifth Circuit's decision cannot be squared with this Court's "unconstitutional conditions" doctrine. AAPS Br. 5-6. That doctrine "holds that the government may not deny a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit." *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (internal quotations marks and alterations omitted). Once again, this argument was not pressed or passed upon in the court of appeals. In any event, Hines and other

veterinarians need not relinquish any speech rights to enjoy the privilege of practicing veterinary medicine in Texas. They need only conduct initial physical examinations of animals to satisfy section 801.351 of the Texas Occupations Code, and they then they may practice their chosen profession.

III. This Case Is Not an Appropriate Vehicle to Revisit the Constitutional Status of Occupational Speech.

A. Hines's petition is premised on an allegation that there is confusion about whether restrictions on occupational speech receive First Amendment scrutiny. Pet. 17-28. As discussed above, there is no meaningful confusion among the circuits on that issue: content-based restrictions on occupational speech receive heightened scrutiny; generally applicable occupational regulations that incidentally impact speech (like the physical examination requirement) do not.

These decisions do not turn on whether professional advice is characterized as "speech" or "conduct." *See* Pet. 20-25; Bill Main Br. 15-18; Pacific Legal Found. Br. 2-3; *cf. King*, 767 F.3d at 229 ("The . . . focus on whether SOCE counseling is 'speech' or 'conduct' obscure[s] the important constitutional inquiry at the heart of this case[.]"). Professional advice is undeniably "speech," *see Humanitarian Law Project*, 561 U.S. at 27, and the court of appeals did not hold otherwise. But incidental burdens on professional advice that necessarily flow from

generally applicable occupational regulations do not trigger heightened First Amendment scrutiny.[5]

Nor did the court of appeals (or any other circuit) determine that professional speech is "outside the First Amendment." *See* Pet. 24; *see also* Bill Main Br. 21-24; Cato Br. 11; AAPS Br. 3-4. The Fifth Circuit treated occupational speech like any other form of speech that is incidentally burdened by commercial regulation. Pet. App. 9 ("The Supreme Court has long held that 'the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.'" (quoting *IMS Health*, 131 S. Ct. at 2664)).

At most, questions may persist regarding the precise form of First Amendment scrutiny that should apply to direct, content-based restrictions on professional advice. *See Wollschlaeger*, 797 F.3d at 892 (considering appropriate level of scrutiny for content-based restrictions on professional speech); *King*, 767 F.3d at 233 (same). But this case does not provide an opportunity to answer that question because this case does not involve a content-based restriction.

B. Perhaps recognizing that problem, Hines and amici suggest that the physical examination requirement and similar prerequisites to practicing a profession *are* content-based restrictions on speech. *See* Pet. 20-22; Cato

---

[5] Amici suggest that Hines's advice was not "incidental" to any conduct. Cato Br. 10-12; AAPS Br. 8. But the physical examination requirement restricts only speech that amounts to the practice of veterinary medicine. Tex. Occ. Code § 801.351(a). As applied here, Hines's advice was typically coupled with an examination of animals' medical records, and even included evaluating conflicting diagnoses and reviewing drug prescriptions. Pet. App. 43, 47.

Br. 13-16; AAPS Br. 9. But the statute regulates only the "practice [of] veterinary medicine." Tex. Occ. Code § 801.351(a). Like any generally applicable occupational regulation, it differentiates practicing a profession (which is regulated) from acting as an amateur (which is not). No case treats that distinction as a content-based restriction on speech.

When specific professional messages are targeted for censure, on the other hand, courts have routinely applied heightened First Amendment scrutiny. *See supra* pp.13-15. Unlike the restrictions at issue in those cases, the physical examination requirement is not violated based on *what* is said alone. *Cf. Humanitarian Law Project*, 561 U.S. at 27 (whether plaintiffs could speak to designated organizations "depends on what they say"). Indeed, the very advice Hines provided in violation of the requirement could have been lawfully uttered during or after a physical examination.

This case does not concern a ban on "speech [imparted] to communicate educational public policy information promoting animal rights/welfare," *see* Int'l Soc'y for Animal Rights Br. 3, or any other generalized speech about animal health, *cf.* Cato Br. 14 (Hines "can't speak on a single topic of specialized knowledge: veterinary care."); AAPS Br. 3 ("The decision below denies the right of a licensed veterinarian in Texas to engage in the same sort of speech that thousands of non-licensed citizens do without interference."). It involves an occupational regulation that, at most, incidentally burdens professional-client communications by way of regulating the practice of veterinary medicine. And Hines concedes that the advice he seeks to provide constitutes

the practice of veterinary medicine under Texas law. *See supra* p.3.

Accordingly, this case is not an appropriate vehicle to address amici's concerns about States' allegedly overbroad use of licensing statutes to regulate communications occurring outside traditional professional-client relationships. *See* Bill Main Br. 8-14; Cato Br. 16-18; Pacific Legal Found. Br. 15-20. Hines has acknowledged throughout this litigation that such speech is not restricted by the physical examination requirement because it does not constitute the practice of veterinary medicine. *See supra* pp.3-4. At the same time, unlicensed persons *are* restricted from engaging in speech that *does* constitute the practice of veterinary medicine, Tex. Occ. Code § 801.251, so Texas does not allow laypersons to speak in instances where professionals cannot, *cf.* AAPS Br. 7-9; Pacific Legal Found. Br. 3-5, 11.

C. If heightened scrutiny were applied to content-neutral occupational regulations like the physical examination requirement here, courts will be forced to re-weigh and second-guess legislative determinations regarding the need for regulation across countless professions and practices. Everything from the license itself, to rules governing the formation of client relationships, to continuing education requirements would warrant heightened scrutiny since they all incidentally burden the spoken aspects of practicing a profession.

At bottom, Hines and amici are seeking to revitalize heightened scrutiny of economic regulations under the guise of the First Amendment. They raise policy arguments against the need for the physical examination

requirement and similar occupational regulations. *See* Pet. 29-31; Cato Br. 22-30; Pacific Legal Found. Br. 20-23. But "debatable issues [respecting] business, economic, and social affairs [are best left] to legislative decision." *Dean v. Gadsden Times Publ'g Corp.*, 412 U.S. 543, 545 (1973) (per curiam) (citation omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KEN PAXTON
Attorney General of Texas

CHARLES E. ROY
First Assistant
Attorney General

SCOTT A. KELLER
Solicitor General
Counsel of Record

EVAN S. GREENE
Assistant Solicitor General

OFFICE OF THE
ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
scott.keller@
texasattorneygeneral.gov
(512) 936-1700

OCTOBER 2015