No. _____

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Petition raises a matter of first impression in this Court about occupational speech. While such speech is widespread, this Court has never squarely addressed its constitutional status. The Fifth Circuit below held that restrictions on veterinary-medical advice are *not* subject to First Amendment scrutiny. There is now a direct, outcome-determinative split of authority between the Fifth and Eleventh Circuits on the one hand, and the Third and Ninth Circuits on the other, over whether the First Amendment protects medical advice. More generally, the decision below also deepened intractable splits of authority over whether restrictions on occupational speech are *ever* subject to First Amendment scrutiny.

The Question Presented is:

Are restrictions on occupational speech subject to First Amendment scrutiny or only rational-basis review?

PARTIES TO THE PROCEEDINGS

The Petitioner is Dr. Ronald Hines, a state-licensed veterinarian from Brownsville, Texas.

The Respondents are Bud E. Alldredge, Jr., Doctor of Veterinary Medicine, in his official capacity as President of the Texas State Board of Veterinary Medical Examiners; J. Todd Henry, Doctor of Veterinary Medicine, in his official capacity as Vice President of the Texas State Board of Veterinary Medical Examiners; Joe Mac King, Doctor of Veterinary Medicine, in his official capacity as Secretary of the Texas State Board of Veterinary Medical Examiners; Richard S. Bonner, in his official capacity as a Member of the Texas State Board of Veterinary Medical Examiners; Janie Carpenter, in her official capacity as a Member of the Texas State Board of Veterinary Medical Examiners; John D. Calder, in his official capacity as a Member of the Texas State Board of Veterinary Medical Examiners; Manuela "Mamie" Salazar-Harper, in her official capacity as a Member of the Texas State Board of Veterinary Medical Examiners; David W. Rosberg, Jr., in his official capacity as a Member of the Texas State Board of Veterinary Medical Examiners; and Chad Upham, in his official capacity as a Member of the Texas State Board of Veterinary Medical Examiners.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

The Petitioner is a natural person.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner seeks a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals, App. 1, is reported at 783 F.3d 197. The order of the district court, App. 13, was not reported.

JURISDICTION

The order of the court of appeals was entered on March 27, 2015. This petition is timely filed on June 25, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The plaintiff below brought this action pursuant to 42 U.S.C. § 1983, alleging violations of the First Amendment's Free Speech Clause. The challenged statutes, Tex. Occ. Code Ann. §§ 801.351(b) and (c), are reproduced in the Appendix at 35.

STATEMENT

This Court has consistently held that restrictions on speech elicit at least intermediate scrutiny. Despite that, the Fifth Circuit below joined an aberrant line of lower-court authority rejecting First Amendment protection for occupational speech. This direct split of authority over medical advice, in addition to other splits concerning the First Amendment status of occupational speech, presents a fundamental and recurring question over which the courts of appeals are openly and intractably divided.

1. Petitioner Dr. Ronald Hines is a Texas-licensed veterinarian in Brownsville, Texas. App. 40. After retiring in 2002 due to age and disability, he began to publish pet-care articles on his website. App. 42. He was quickly inundated with requests for pet advice from around the world. App. 42-43. He spent ten years exchanging emails with hundreds of pet owners across the globe. *See id.*; App. 47.

Dr. Hines only spoke with pet owners. He never prescribed medicine. App. 2-3, 48. He never met with anyone. He never *did* anything *to* any animal. He simply wrote to adults who wanted his advice.

There are many useful things that Dr. Hines – or any veterinarian – can say without examining an animal in person. He helped people without veterinarians due either to geography or poverty. For example, he provided cat advice to Scottish missionaries in rural Nigeria. App. 45. In another example, he advised an impoverished double amputee in New

Hampshire who lived alone with his beloved but gravely ill dog. App. 45-46. Sometimes pet owners just wanted to discuss their options after receiving conflicting diagnoses from local veterinarians.

Dr. Hines shared advice mostly for free, though he sometimes charged a flat fee of $58 to those who could pay. App. 46. He worked full time, but never made more than about $3,000 per year. App. 47. If Dr. Hines could not provide helpful advice, he said so. App. 47-48. If he had charged the pet owner, he refunded the money. App. 47-48.

Upon discovering that Dr. Hines was exchanging emails with pet owners, the Texas State Board of Veterinary Medical Examiners suspended his license, fined him, and forced him to retake a portion of the veterinary-licensing exam. App. 54, 57-58. The Texas Veterinary Licensing Act requires an in-person physical exam before rendering *any* opinion about an animal. Tex. Occ. Code Ann. § 801.351(b). *See* App. 35. The statute forbids providing veterinary advice "solely by . . . electronic means." Tex. Occ. Code Ann. § 801.351(c). *See* App. 36. Dr. Hines's advice never harmed any animal, and the Veterinary Board never alleged harm. App. 48.

The Veterinary Board forbade Dr. Hines from writing pet owners with advice unless he first examines the animal in person. *See* App. 60. Complying with this requirement is a practical impossibility. Thus, there are pet owners across the globe who want to correspond with Dr. Hines but cannot, including

many who now have zero input from a veterinarian. *Id.*

2. Dr. Hines brought a First Amendment claim so he can continue offering advice to pet owners. *See* App. 63-67. He did not challenge the Veterinary Licensing Act on its face. His as-applied challenge asks whether the Veterinary Board can forbid a Texas-licensed veterinarian from *ever* providing advice without first examining the pet in person.

The Veterinary Board moved to dismiss for failure to state a First Amendment claim. The Board argued that Dr. Hines's emails with pet owners – although consisting solely of words – should be treated as occupational *conduct*, not speech, and thus subject only to rational-basis review. *See* App. 17-18.

The district court denied the motion, holding that Dr. Hines's correspondence was *speech*, not conduct, and thus the First Amendment applied: "[I]t seems – based on the fact that Hines was disciplined for professional actions that consisted only of receiving and sending emails and having phone conversations – that the regulations at issue here regulate speech itself." App. 20 (footnote omitted). Quoting *Holder v. Humanitarian Law Project*, the district court rejected the Board's argument that Dr. Hines's emails were conduct because the "'conduct triggering coverage under the statute consist[ed] of communicating a message.'" App. 20 (*quoting* 561 U.S. 1, 27 (2010) (brackets in original)). "In sum, the Court [found] that the First Amendment applies to the professional

regulations at issue in this case, and that the regulations, as applied to Dr. Hines's professional speech, are subject to heightened scrutiny and must be shown to be 'reasonable.'" App. 24. Taking the allegations of the Complaint as true, Dr. Hines "plausibly state[d] a claim that Texas's professional veterinary regulations infringe on [his] First Amendment rights." App. 25.

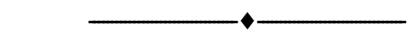
3. The Veterinary Board then sought, and the district court and Fifth Circuit granted, interlocutory review under 28 U.S.C. § 1292(b) of the Question Presented here: Do restrictions on occupational speech warrant First Amendment scrutiny or only rational-basis review? *See* App. 6-7. Interlocutory review was necessary because there was no controlling Fifth Circuit decision and pervasive disarray in the circuit case law.

The Fifth Circuit reversed. It "beg[an] – and end[ed] – [its] First Amendment analysis by recognizing the statute at issue in this case for what it is." App. 7. And what it is, according to the panel, was a "restriction on the veterinarian's medical *practice*." App. 11 (emphasis added). The panel observed that "States have broad power to establish standards for licensing practitioners and regulating the practice of professions." App. 8 (footnote omitted).

The Fifth Circuit held that the First Amendment did not apply to Dr. Hines's writings because the statute "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." App. 8. The panel adopted Justice White's concurrence in *Lowe v. SEC*, holding that "'[i]f the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny.'" App. 9 (*quoting* 472 U.S. 181, 232 (1985) (White, J., concurring)). Thus, if a licensing statute is valid on its face as a regulation of professional conduct – such as veterinary surgery or the administration of veterinary drugs – then the licensing statute can be applied to suppress significant quantities of speech – even forbidding personal emails unaccompanied by conduct – without having to withstand any level of First Amendment scrutiny.

This timely Petition followed.



REASONS FOR GRANTING THE WRIT

I. THERE IS NOW A DIRECT SPLIT AMONG FOUR CIRCUITS ABOUT WHETHER RESTRICTIONS ON MEDICAL ADVICE RECEIVE FIRST AMENDMENT SCRUTINY.

With the decision below, there is now an unambiguous, outcome-determinative four-circuit split over whether the First Amendment applies to occupational speech in the form of medical advice. The decision below also exacerbated intractable splits over whether *any* occupational speech *ever* warrants First

Amendment protection. The Third Circuit says it always does. The Fourth, Fifth, and Eleventh Circuits say never. The Eighth, Ninth, and D.C. Circuits say sometimes. Review is imperative because these fundamental disagreements are anathema to the First Amendment.

A. The Decision Below Deepens a Direct Split Over Medical Speech Between the Fifth and Eleventh Circuits on the One Hand, and the Third and Ninth Circuits on the Other.

The decision below deepened a direct split over whether restrictions on medical advice are subject to First Amendment scrutiny. The panel held that the restriction on Dr. Hines's emails "denies the veterinarian no due First Amendment right" because the impact on his speech "is incidental" to the enforcement of "'generally applicable licensing provisions.'" App. 11, 9 (*quoting Lowe*, 472 U.S. at 211 (White, J., concurring)); *see also Daly v. Sprague*, 742 F.2d 896, 898 (5th Cir. 1984) (stating "reasonable restraints on the practice of medicine and professional actions cannot be defeated by pointing to the fact that communication is involved"). Thus, restrictions on medical advice are not subject to First Amendment scrutiny because the Fifth Circuit regards occupational licensure as uniformly a regulation of conduct, not speech.

In holding that medical speech is "medical practice," App. 11, that is outside the First Amendment, the Fifth Circuit joined the Eleventh Circuit. In *Wollschlaeger v. Governor of Florida*, a two-judge majority upheld a Florida statute that forbade state-licensed physicians from asking their patients about gun issues. 760 F.3d 1195, 1204 (11th Cir. 2014). The panel held that First Amendment protections for occupational speech "approach a nadir . . . when the professional speaks privately, in the course of exercising his or her professional judgment, to a person receiving the professional's services." *Id*. at 1218. At this "end of the spectrum, there is no 'constitutional infirmity' where the speech rights of physicians are 'implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.'" *Id*. at 1219 (*quoting Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion of O'Connor, Kennedy, and Souter, JJ.)).[1]

The Fifth and Eleventh Circuits are now in a direct split with the Third, which has held that restrictions on the speech of licensed medical professionals are subject to heightened First Amendment scrutiny. *King v. Governor of N.J.*, 767 F.3d 216, 220-21

[1] Unlike in *Casey*, in which this Court held that physicians who wish to engage in the *conduct* of performing abortions must accompany that conduct with certain speech related to informed consent, the Eleventh Circuit in *Wollschlaeger* held that this principle applied even to pure speech unaccompanied by any conduct. *See* 760 F.3d at 1204.

(3d Cir. 2014). In *King*, the Third Circuit faced a challenge to a state law prohibiting the use of psychotherapy to try to change the sexual orientation of minors, as applied to a group of psychologists who engaged in nothing but talk therapy. The court emphatically rejected the proposition that psychotherapy is conduct. *Id*. at 225 ("Defendants have not directed us to any authority from the Supreme Court or this circuit that have characterized verbal or written communications as 'conduct' based on the function these communications serve."). While the court in *King* found that there was sufficient evidence for the challenged law to survive First Amendment scrutiny, its square holding that the First Amendment applies to the one-on-one speech of medical professionals is irreconcilable with the decision below or with the Eleventh Circuit's decision in *Wollschlaeger*.

The Fifth and Eleventh Circuits are also in direct conflict with the Ninth Circuit's decision in *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). There, the court examined whether the DEA's prohibition on doctors recommending medical marijuana received First Amendment scrutiny. *See id.* at 632. Like the Third Circuit in *King*, the panel rejected the proposition that free-speech guarantees do not apply in the occupational context: "Being a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights." *Id.* at 637. To the contrary, the First Amendment protects the doctor-patient relationship because an "integral

component of the practice of medicine is the communication between a doctor and a patient." *Id.* at 636.[2]

There is now a square split of authority over the First Amendment status of medical speech. In the Fifth and Eleventh Circuits, the First Amendment is at its "nadir" when medical professionals give people one-on-one advice. In the Third and Ninth Circuits, however, restrictions on such speech "strike at core First Amendment interests." *Conant*, 309 F.3d at 636. Because the level of scrutiny – rational-basis review versus heightened scrutiny – is usually outcome-determinative, the result of a First Amendment challenge to restrictions on medical speech now depends on where the claim is brought. Thus, this Court's intervention is necessary.

B. Beyond the Split Over Medical Advice, the Circuits Are Divided into Three Categories About Whether Occupational Speech Ever Receives First Amendment Scrutiny: Always, Never, and Sometimes.

Beyond the split over medical advice, there is a larger disagreement over whether restrictions on

[2] The Ninth Circuit has held that one-on-one advice by medical professionals is protected speech under the First Amendment but has refused to extend similar protections to talk therapy by licensed professionals. *Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2014). As discussed in Section B below, this creates a separate split between the Third and Ninth Circuits, in addition to the basic split about medical advice implicated by the decision below.

occupational speech ever receive First Amendment scrutiny. The circuits break down into three categories: always, never, and sometimes. Outside of medical advice, there has been litigation involving a variety of other types of occupational speech – from the aesthetic advice of interior designers to the stories told by tour guides to the prognostications of fortune tellers – which has led to deep and intractable confusion over the appropriate standard of review to apply in such cases.[3]

1. Always First Amendment Scrutiny: Third Circuit.

The Third Circuit's rule always subjects restrictions on occupational speech to First Amendment scrutiny. As discussed above, in *King*, the Third Circuit applied First Amendment scrutiny to psychotherapy. 767 F.3d at 224-25. Because psychotherapy is medical speech, and because medical speech implicates regulatory interests most heavily, the Third Circuit almost certainly applies First Amendment scrutiny to other forms of occupational speech as well.

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[3] One commentator has observed that the "regulation of professional speech is one of the least developed areas of First Amendment doctrine. The few judicial decisions that have addressed limitations on professional speech have failed to provide a comprehensive analytical framework for defining the limits on such regulation." David T. Moldenhauer, *Circular 230 Opinion Standards, Legal Ethics and First Amendment Limitations on the Regulation of Professional Speech by Lawyers*, 29 Seattle U. L. Rev. 843, 843 (2006) (footnote omitted).

Thus, the Third Circuit is in conflict with the Fourth, Fifth, and Eleventh Circuits, which, as explained below, never subject restrictions on occupational speech to First Amendment scrutiny.

King also created an acknowledged split with the Ninth Circuit over how to analyze restrictions on psychotherapy. Although the Ninth Circuit's decision in *Conant* subjected restrictions on medical speech to First Amendment scrutiny, in *Pickup v. Brown*, the Ninth Circuit upheld a statute that forbade state-licensed psychologists from using psychotherapy on minors to eliminate homosexuality. 740 F.3d 1208, 1222-23 (9th Cir. 2014). The *Pickup* panel distinguished its decision in *Conant* by holding that the psychotherapy in question was not merely medical advice, but was instead treatment. *Id*. In other words, medical *advice* is protected by the First Amendment in the Ninth Circuit, but medical treatment in the form of speech is not, which is conceptually incoherent and creates a direct conflict with the Third Circuit. *Compare id*. at 1222 *with King*, 767 F.3d at 228 (explaining that "the argument that verbal communications become 'conduct' when they are used to deliver professional services was rejected" by the Supreme Court).

2. Never First Amendment Scrutiny: The Fourth, Fifth, and Eleventh Circuits.

a. Fourth Circuit

The Fourth Circuit never subjects restrictions on occupational speech to First Amendment scrutiny.

Its rule is the one that the Fifth and Eleventh Circuits articulated in the medical cases: If speech is being regulated pursuant to occupational licensure, then First Amendment scrutiny does not apply. In *Moore-King v. County of Chesterfield*, the court ostensibly recognized that "the First Amendment Free Speech Clause affords some degree of protection to [a fortuneteller's] activities." 708 F.3d 560, 567 (4th Cir. 2013). However, the panel declined to apply actual First Amendment scrutiny to occupational speech and instead upheld restrictions on fortunetelling under the equivalent of rational-basis review because they were enacted pursuant to a "generally applicable licensing and regulatory regime." *Id*. at 569; *see also Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988) (occupational licensing does not violate free speech rights "so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation"); *Underhill Assocs., Inc. v. Bradshaw*, 674 F.2d 293, 296 (4th Cir. 1982) (under occupational licensing, "any inhibition of [First Amendment] right[s] is merely the incidental effect of observing an otherwise legitimate regulation").

Moore-King is in direct conflict with the Eighth Circuit decision in *Argello v. City of Lincoln*, 143 F.3d 1152, 1152-53 (8th Cir. 1998), which struck down restrictions on fortuneteller speech after subjecting them to First Amendment scrutiny.

b. Fifth Circuit

The Fifth Circuit has previously declined to extend First Amendment protection to occupational speech. In *Kagan v. City of New Orleans*, the Fifth Circuit held that a licensing scheme for tour guides did not implicate the First Amendment, much less violate it, even though tour guides are professional speakers. 753 F.3d 560, 561-62 (5th Cir. 2014) ("When a city exercising its police power has a law only to serve an important governmental purpose without affecting what people say as they act consistently with that purpose, how is there any claim to be made about speech being offended?"); *see also Daly*, 742 F.2d at 898 (stating "reasonable restraints on the practice of medicine and professional actions cannot be defeated by pointing to the fact that communication is involved").

Kagan represents an acknowledged split with the D.C. Circuit on whether the First Amendment applies to tour-guide licensing. *See Edwards v. District of Columbia*, 755 F.3d 996, 1009 n.15 (D.C. Cir. 2014). In striking down the District of Columbia's tour-guide licensing law, the D.C. Circuit recognized that its ruling created an express split with the Fifth Circuit, noting that "[w]e decline to follow [*Kagan*] . . . because the opinion either did not discuss, or gave cursory treatment to, significant legal issues" under the First Amendment. *Id*.

c. Eleventh Circuit

As the *Wollschlaeger* decision about medical speech reaffirmed, the Eleventh Circuit never subjects restrictions on occupational speech to First Amendment scrutiny. At the other end of the spectrum from medical advice, the Eleventh Circuit also held that the First Amendment does not apply to restrictions on the occupational speech of interior designers. Such restrictions, like any restriction on occupational speech in the Eleventh Circuit, receive only rational-basis review. *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011) (holding that interior-designer licensure "does not implicate constitutionally protected activity under the First Amendment").

3. Sometimes First Amendment Scrutiny: Eighth, Ninth, and D.C. Circuits.

a. Eighth Circuit

The Eighth Circuit applied First Amendment scrutiny in striking down restrictions on fortuneteller speech in *Argello*, which, as discussed, is in irreconcilable conflict with the Fourth Circuit's decision in *Moore-King*. *Compare* 143 F.3d at 1152, *with* 708 F.3d at 567-69. Although there is only one professional-speech decision in the Eighth Circuit, and it subjected restrictions on occupational speech to First Amendment scrutiny, the court is in the "sometimes" basket because it is difficult to predict, based solely on *Argello*, how the Eighth Circuit would handle, for example, restrictions on medical speech of the sort

addressed by the Eleventh Circuit in *Wollschlaeger* or the Ninth Circuit in *Conant*.

b. Ninth Circuit

The Ninth Circuit sometimes subjects restrictions on occupational speech to meaningful First Amendment scrutiny. As discussed, the Ninth Circuit in *Conant* and Third Circuit in *King* are in conflict with the Fifth Circuit below and the Eleventh Circuit in *Wollschlaeger* over the First Amendment status of medical advice.

The Ninth Circuit has not been consistent, however. As discussed above, the Ninth Circuit does not subject psychotherapy to First Amendment scrutiny and is in an acknowledged split with the Third Circuit on this issue. *Pickup*, 740 F.3d at 1222-23; *see also Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1053-56 (9th Cir. 2000) (perfunctorily upholding psychology licensure for psychoanalysts without deciding whether First Amendment applies and without applying true First Amendment scrutiny).

c. D.C. Circuit

As noted above, the Fifth Circuit is in an acknowledged split with the D.C. Circuit on whether the First Amendment applies to tour-guide licensing. In *Edwards*, that circuit examined a tour-guide licensing law that was materially identical to the one the Fifth Circuit found constitutional in *Kagan*. 755

F.3d at 998; *see also Kagan*, 753 F.3d at 561. The court rejected the government's argument that the tour-guide law "target[ed] . . . non-expressive conduct" and "only incidentally burden[ed] speech." *Id*. at 1000. Instead, the D.C. Circuit subjected the law to meaningful First Amendment scrutiny and ultimately struck it down because the District's purported justifications for the law were not "validated by studies, anecdotal evidence, history, consensus, or common sense." *Id*. at 1004.

Yet, as with the Eighth Circuit's fortuneteller decision, the D.C. Circuit is best classified as one that only sometimes extends First Amendment scrutiny to restrictions on occupational speech because *Edwards* on its own is insufficient to know whether the D.C. Circuit would follow, for example, *Wollschlaeger* and the Fifth Circuit below or *Conant* and *King* in a case about medical speech.

II. REVIEW SHOULD BE GRANTED TO FINALLY ADDRESS OCCUPATIONAL SPEECH AND EXPLAIN HOW THIS COURT'S FREE-SPEECH JURISPRUDENCE REQUIRES FIRST AMENDMENT SCRUTINY FOR RESTRICTIONS ON SUCH SPEECH.

This Court has never squarely addressed occupational speech – one of the only major areas of First Amendment law on which this Court has been silent. Occupational speech is conspicuously absent from

among the many areas of this Court's free-speech jurisprudence, including campaign speech,[4] protest speech,[5] student speech,[6] sign codes,[7] solicitation,[8] advertising,[9] protections for data,[10] lying,[11] video games,[12] and even animal-crush videos.[13] This persistent silence has resulted in the open and intractable splits of authority detailed above.

The lower courts that have weighed in on this issue have been guided by two sources, and which of these two sources they choose to follow decides whether they view occupational speech as protected

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[4] *E.g.*, *Citizens United v. FEC*, 558 U.S. 310 (2010); *FEC v. Wis. Right to Life, Inc.*, 551 U.S. 449 (2007); *Buckley v. Valeo*, 424 U.S. 1 (1976).

[5] *Westboro Baptist Church, Inc. v. St. David's Episcopal Church*, 519 U.S. 1090 (1997).

[6] *Morse v. Frederick*, 551 U.S. 393 (2007).

[7] *Reed v. Town of Gilbert*, 576 U.S. ___, No. 13-502 (June 18, 2015); *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490 (1981).

[8] *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978).

[9] *Thompson v. W. States Med. Ctr.*, 535 U.S. 357 (2002); *Rubin v. Coors Brewing Co.*, 514 U.S. 476 (1995); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995); *Edenfield v. Fane*, 507 U.S. 761 (1993).

[10] *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011).

[11] *United States v. Alvarez*, 132 S. Ct. 2537 (2012).

[12] *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729 (2011).

[13] *United States v. Stevens*, 559 U.S. 460 (2010). Oddly, Dr. Hines has a First Amendment right under *Stevens* to exchange graphic animal-crush videos with pet owners, but no First Amendment right under the decision below to exchange helpful emails with those same pet owners.

or unprotected – and hence determines the outcome of the case. Decisions that subject restrictions on occupational speech to First Amendment scrutiny are in harmony with the mainstream of this Court's free-speech precedent, particularly its decisions over the last fifteen years. The decisions from the Fourth, Fifth, and Eleventh Circuits that reject First Amendment scrutiny, on the other hand, constitute an anomalous line of authority based on a non-binding concurrence by Justice White from 1985 that this Court has never even mentioned, much less adopted as law.

Justice White articulated his framework for analyzing occupational speech in *Lowe v. SEC*, 472 U.S. 181, 211 (1985) (White, J., concurring). In Justice White's view, the First Amendment distinguishes between speech to the general public and individualized advice to a specific client. The former receives the full protection of the First Amendment. In the latter case, however, Justice White believed that the personal nexus between a speaker and a client implicated only the traditional police power of the states to license and regulate occupations, even for those engaged exclusively in speech. 472 U.S. at 232 ("One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession.").

The Fourth, Fifth, and Eleventh Circuits have derived two principles from Justice White's concurrence. First, individualized advice from a specialist to a client

is the equivalent of occupational conduct, not speech. *See*, *e.g.*, *Wollschlaeger*, 760 F.3d at 1217. In other words, such speech is constitutionally indistinguishable from giving an injection or performing brain surgery. Second, the justification for treating restrictions on occupational speech as restrictions on *conduct* rather than *speech* is that the government is acting out of the benign motive of protecting the public, rather than any censorial motive. *See*, *e.g.*, App. 11.

This Court should grant review because neither of these principles is remotely consistent with this Court's modern free-speech jurisprudence, which has flatly rejected both of these arguments for escaping First Amendment review. As explained below, four cases in particular – *Holder v. Humanitarian Law Project*, *Legal Services Corp. v. Velazquez*, *United States v. Stevens*, and *Reed v. Town of Gilbert* – make clear that the principles derived from Justice White's concurrence – that occupational speech is conduct and that occupational speech does not implicate the First Amendment because the government's motives are not censorial – are wrong.

A. Occupational *Speech* Cannot Be Classified as *Conduct* and Stripped of First Amendment Protection Because the Distinction Between General Speech and Occupational Speech Is Itself a Content-Based Distinction.

Contrary to Justice White's concurrence in *Lowe*, 472 U.S. at 231-32 (White, J., concurring), this Court

has rejected the argument that there is a constitutional distinction between speech to the general public and individualized speech to a particular person or group that deprives the latter of meaningful First Amendment protection. In *Holder v. Humanitarian Law Project*, this Court held that specialized technical advice from an expert to a specific person or group is fully protected speech. 561 U.S. 1, 27 (2010). There, a retired administrative law judge, doctors, and humanitarian organizations wanted to provide individualized legal and technical advice to designated terrorist groups in Turkey and Sri Lanka. *Id*. at 10. They brought suit because they feared prosecution under federal statutes that criminalize providing material support to terrorists. *Id*. at 10-11. The Department of Justice argued that individualized advice was not speech at all, but was instead conduct. *Id*. at 27.

This Court emphatically rejected the government's argument. Not only did this Court hold that the First Amendment encompasses individualized legal and technical advice, it held that drawing a distinction between general speech and individualized advice is itself a content-based distinction:

> [The statute] regulates speech on the basis of its content. Plaintiffs want to speak to [terrorist groups], and whether they may do so under [the statute] depends on what they say. If plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from "specialized knowledge"

> – for example, training on the use of international law or advice on petitioning the United Nations – then it is barred. On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecialized knowledge.

Id. at 27 (internal citations omitted).

Humanitarian Law Project stands for the commonsense point that the government cannot escape the strictures of the First Amendment simply by labeling something *conduct* when "the conduct triggering coverage under the statute consists of communicating a message." *Id*. at 28. In such situations, this Court held, the challenged law must be analyzed as a content-based restriction on speech.

Despite this Court's unequivocal holding in *Humanitarian Law Project*, lower courts have either ignored the ruling or disagreed about its significance. The split between the Third and Ninth Circuits over how to analyze restrictions on psychological therapy is essentially a fight over how to interpret *Humanitarian Law Project*. In *Pickup*, the Ninth Circuit issued an amended opinion, in response to a petition for rehearing en banc, to address *Humanitarian Law Project*. 740 F.3d at 1214. There, the panel bent over backwards to mischaracterize *Humanitarian Law Project* as a case about "political speech" by "ordinary citizens," *id.* at 1230, even though the core holding of the case was about how the distinction between general political advocacy and specialized technical advice is content-based.

Judge O'Scannlain, joined by Judges Bea and Ikuta, excoriated his court for refusing to apply *Humanitarian Law Project* to the occupational speech of psychologists. In his dissent from denial of rehearing en banc, he wrote that the "Supreme 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." *Id*. at 1218 (O'Scannlain, J., dissenting from denial of en banc review). He went on to say, accurately, that *Humanitarian Law Project* stands for the proposition that "the government's *ipse dixit* cannot transform 'speech' into 'conduct' that it may more freely regulate." *Id*. at 1216 (footnote omitted).

In *King*, the Third Circuit expressly split with the Ninth over the import of *Humanitarian Law Project*, holding: "Given that the Supreme Court [in *Humanitarian Law Project*] had no difficulty in characterizing legal counseling as 'speech,' we see no reason here to reach the counter-intuitive conclusion that verbal communications that occur during [conversion therapy] are 'conduct.'" 767 F.3d at 225. As the panel aptly put it: "[T]he argument that verbal communications become 'conduct' when they are used to deliver professional services was rejected by *Humanitarian Law Project*." *Id*. at 228.

Other circuits, including the Fifth Circuit below, have reached the outcome forbidden by *Humanitarian Law Project* – improperly re-characterizing speech as conduct – by dismissing it in a footnote as a case about content-based distinctions even though

the content-based distinction in *Humanitarian Law Project* – general speech to the public and individualized advice – is the very distinction at issue in Dr. Hines's case. App. 11.

As a result, the Fourth, Fifth, and Eleventh Circuits have done something that this Court has repeatedly warned lower courts against: create a new category of speech that – like obscenity or defamation – is outside the First Amendment. *See Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011); *United States v. Stevens*, 559 U.S. 460, 472 (2010). Even more troubling, unlike the existing categories of unprotected speech that are "long familiar to the bar," *Stevens*, 559 U.S. at 468-69, this new category of unprotected speech is unquestionably valuable to its audience. The result is unlike anything this Court has countenanced since 1976, when this Court repudiated the notion that commercial speech is outside the protection of the First Amendment. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (overruling *Valentine v. Chrestensen*, 316 U.S. 52 (1942)).

The proposition that occupational speech is speech and not a facsimile of conduct finds further support in this Court's decision in *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001). The question there was whether a federal subsidy funding legal aid for the indigent violated the First Amendment by prohibiting subsidy-funded lawyers from arguing that "existing welfare laws are unconstitutional or unlawful." *Id*. at 547. This Court invalidated that restriction, holding that the First Amendment guaranteed the right of

lawyers to render their best legal advice and argument. *Id*. at 547-48.[14] Although not an occupational-licensing case, *Legal Services Corp.* is germane here because it stands for the proposition that even the occupational speech of lawyers, at least under some circumstances, enjoys the full protection of the First Amendment.

B. The Government's Motive in Regulating Occupational Speech Does Not Remove that Speech from the First Amendment.

A second doctrinal theme in some lower-court cases is that the First Amendment does not apply to occupational speech because the government has legitimate *motives* for suppressing it. *See*, *e.g.*, *Lowe*, 472 U.S. at 232 n.10 (White, J., concurring) (restrictions on individualized advice do not trigger First Amendment scrutiny, but "denial of a license on the basis of the applicant's beliefs or political statements he had made in the past could constitute a First Amendment violation").

The Fifth Circuit, below and in the tour-guide decision in *Kagan*, characterized the challenged laws as *content-neutral* because the speaker could say

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[14] Justice Scalia's dissent argued that the government was entitled to judgment under *Rust v. Sullivan*, 500 U.S. 173 (1991), because it had merely placed a limit on a subsidized program. *See Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 552-56 (2001) (Scalia, J., dissenting). Justice Scalia did not suggest that lawyers' speech is outside the First Amendment.

whatever he or she wanted after complying with the licensing requirements. App. 9-10; *Kagan*, 753 F.3d at 562. And the Eleventh Circuit's decision in *Wollschlaeger* embodies the view that the government's motives determine the appropriate level of scrutiny. The court repeatedly stressed that the government was regulating the occupational speech of doctors as an incidental part of regulating the practice of medicine. 760 F.3d at 1217 ("the Act is a valid regulation of professional conduct that has only an incidental effect on physicians' speech").[15]

But this Court has been clear that speech does not move in and out of the First Amendment based on the government's *motive* for regulating the speech. In its most recent term, this Court made clear that the government regulates speech on the basis of content whenever it makes content-based distinctions, not when it makes content-based distinctions *plus* has an illegitimate motive. In *Reed v. Town of Gilbert*, this Court reviewed a municipal sign code that made a plethora of content-based distinctions, but that the Ninth Circuit nevertheless held to be content-neutral because " 'Gilbert did not adopt its regulation of speech because it disagreed with the message conveyed' and

[15] Dr. Hines sets aside, for the time being, the obvious problem with declaring a restriction on speech outside the First Amendment because the restriction is content-neutral. It is elementary that content-neutral restrictions on speech draw intermediate scrutiny under the reasonable time, place, and manner test. *City of Los Angeles v. Alameda Books*, 535 U.S. 425, 443 (2002).

its 'interests in regulat[ing] temporary signs are unrelated to the content of the sign.'" 576 U.S. ___, No. 13-502, slip op. at 5 (June 18, 2015) (*quoting Reed v. Town of Gilbert*, 707 F.3d 1057, 1071-72 (9th Cir. 2013) (brackets in original)).

Reversing, this Court held that content-based distinctions warrant the highest First Amendment scrutiny "regardless of the government's benign motive, content-neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Reed*, slip op. at 8 (internal quotation marks omitted). "In other words," this Court wrote, "an innocuous justification cannot transform a facially content-based law into one that is content neutral." *Reed*, slip op. at 9. Although *Reed* was about sign codes, its reasoning reinforces *Humanitarian Law Project* and strongly suggests that the lower courts cannot treat occupational speech as being effectively outside the First Amendment merely because the government has a beneficent motive and does not disagree with the speech. To the contrary, the distinction between general speech to the public and occupational speech is equivalent to the impermissible content-based distinctions that the Gilbert sign code made between different kinds of signs. To be sure, Dr. Hines is not suggesting that signs and occupational speech are identical or that restrictions on occupational speech necessarily warrant the strict scrutiny applied in *Reed*. Dr. Hines is simply making the point that this Court uses the "commonsense meaning of the phrase 'content based'" to describe the act of

making content-based distinctions to determine what is and what is not permissible to say. *Reed*, slip op. at 6.

The holding in *Reed* is completely consistent with the approach this Court took in *Humanitarian Law Project*, which held that the government was regulating *speech* because the only thing it was regulating was *speech*. 561 U.S. at 28. The legal and technical advice in *Humanitarian Law Project* was not protected because the government's motive – defeating foreign terrorists – was illegitimate or because the subject of the legal and technical advice was especially praiseworthy. Rather, the First Amendment was implicated because, in that instance, the statute was triggered by the act of speaking.

III. THIS IS THE PERFECT VEHICLE FOR RESOLVING THE SPLIT OF AUTHORITY.

This Court will not encounter a better vehicle for resolving the splits of authority about medical speech specifically and occupational speech in general. This case is at the Rule 12(b)(6) stage. The factual allegations are simple, presumed true, and an ideal foundation for analyzing occupational speech. There is nothing here but pure speech: veterinary advice in private, personal emails between Dr. Hines and individuals who sought his help. There is no accompanying conduct. If those emails are not speech, and if restrictions on them do not warrant First Amendment scrutiny, then no occupational speech does.

The procedural posture of this case is ideal, too. The decision below was an interlocutory appeal solely on the Question Presented here. It directly and clearly addressed the Question Presented and positioned the issue perfectly for review in this Court. Furthermore, as a Rule 12(b)(6) motion, this Court need not render an ultimate decision on the merits. It need only address the threshold questions of whether First Amendment scrutiny applies and what level of First Amendment scrutiny is appropriate in the occupational-speech context.

IV. THIS PETITION RAISES AN ISSUE OF NATIONAL IMPORTANCE TO THE TENS OF MILLIONS OF AMERICANS WHO NEED AN OCCUPATIONAL LICENSE TO WORK.

It is impossible to overstate the importance of occupational speech. The Question Presented affects every American. There are, roughly, 900,000 active doctors in the United States, 103,000 veterinarians, and 107,000 psychologists.[16] Everyone is at some

[16] *See* Kaiser Family Foundation, Total Professionally Active Physicians, March 2015, http://kff.org/other/state-indicator/total-active-physicians (897,420 total professionally active physicians in the United States); American Veterinary Medical Association, Market Research Statistics – U.S. Veterinarians – 2014, Dec. 31, 2014, https://www.avma.org/KB/Resources/Statistics/Pages/Market-research-statistics-US-veterinarians.aspx (102,583 total veterinarians); American Psychological Association, *How many practicing psychologists are there in the United States?*, 2014, http://www.apa.org/support/about/psych/numbers-us.aspx#answer (106,500 total practicing psychologists in the United States).

point a patient, a pet owner, or a psychotherapeutic client. More broadly, one-third of American workers are subject to occupational licensure, which translates to tens of millions of people. That number continues to grow and is up from one-twentieth in the 1950s. *See* Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. Lab. Econ. 173, 175-76 (2013). It is essential that these millions of workers, and the thousands of licensing bodies that regulate them, understand when restrictions on occupational speech trigger First Amendment scrutiny. Thus, whether the First Amendment applies to occupational speech is a question of importance to literally everyone.[17]

Occupational speech has acquired new salience as the tele-practice movement burgeons. Dr. Hines took to the Internet in 2002 because, despite his retirement and disabilities, he has valuable knowledge to share and there are many people across the country and around the world who want to speak

[17] The academic literature immediately recognized the direct and consequential split between the Third, Ninth, and Eleventh Circuits over medical speech. *See*, *e.g.*, Martha Swartz, *Are Physician-Patient Communications Protected by the First Amendment?*, 2015 Cardozo L. Rev. de novo 92 (2015). More generally, a recent exchange in the Harvard Law Review Forum examines the conceptual bases for according occupational speech either First Amendment scrutiny or rational-basis review. *See* Paul Sherman, *Occupational Speech and the First Amendment*, 128 Harv. L. Rev. F. 183 (2015); Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 Harv. L. Rev. F. 165 (2015).

with him. There are countless occupations implicated by the tele-practice movement – from doctors, lawyers, nutritionists, and psychologists to accountants and financial advisors to life coaches and personal trainers, to name just a few. Whether these people have First Amendment rights to speak to someone nearby or in the remotest corner of the earth is a matter of national importance.

In *Virginia State Board of Pharmacy*, this Court recognized that commercial speech is of great practical importance to Americans and worthy of First Amendment protection. 425 U.S. at 763. It is time for this Court to take the same step with respect to occupational speech.

CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 14-40403

RONALD S. HINES, Doctor of Veterinary Medicine,

Plaintiff-Appellee,

v.

BUD E. ALLDREDGE, JR., Doctor of Veterinary Medicine, in his official capacity as President of the Texas State Board of Veterinary Medical Examiners; J. TODD HENRY, Doctor of Veterinary Medicine, in his official capacity as Vice President of the Texas State Board of Veterinary Medical Examiners; JOE MAC KING, Doctor of Veterinary Medicine, in his official capacity as Secretary of the Texas State Board of Veterinary Medical Examiners; RICHARD S. BONNER, JR., in his official capacity as Member of the Texas State Board of Veterinary Medical Examiners; JANIE CARPENTER, in her official capacity as Member of the Texas State Board of Veterinary Medical Examiners; JOHN D. CLADER, in his official capacity as Member of the Texas State Board of Veterinary Medical Examiners; MANUELA MAMIE SALAZAR-HARPER, in her official capacity as Member of the Texas State Board of Veterinary Medical Examiners; DAVID W. ROSBERG, JR., in his official capacity as Member of the Texas State Board of Veterinary Medical Examiners; CHAD UPHAM, in his official capacity as Member of the Texas State Board of Veterinary Medical Examiners,

Defendants-Appellants.

Appeals from the United States District Court
for the Southern District of Texas

(Filed March 27, 2015)

Before: HIGGINBOTHAM, SMITH, and GRAVES, Circuit Judges.

PATRICK E. HIGGINBOTHAM, Circuit Judge:

Texas requires veterinarians to conduct a physical examination of an animal or its premises before they can practice veterinary medicine with respect to that animal. In this case, we must decide whether this requirement violates the First or Fourteenth Amendment. We conclude it offends neither.

I.

A.

Ronald Hines is a Texas-licensed veterinarian who has practiced since the mid-1960s. He worked mainly in traditional veterinary practices until he retired in 2002. After his retirement, he founded a website and began to post articles about pet health and care. These general writings soon turned to more targeted guidance and, as he acknowledged in his complaint, he began "to provide veterinary advice to specific pet owners about their pets." This advice was given via email and telephone calls, and Hines "never

physically examine[d] the animals that are the subject of his advice," though he did review veterinary records provided by the animal owners.

While the full scope of Hines's advice is not entirely clear from the record, it was "about particular animals," and included providing "qualified veterinary advice" to individuals who lack access to veterinary care, evaluating conflicting diagnoses or inappropriate drug prescriptions, and referring patients to appropriate local veterinarians. Hines charged a flat fee of fifty-eight dollars for his veterinary advice, though he would waive this fee if a pet owner could not afford to pay. He did, however, refuse to give advice if he felt that a physical examination was required, and he did not prescribe medication.

What is clear – and undisputed – is that Hines's remotely provided services constituted the practice of veterinary medicine.[1] This was a problem. Under

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[1] "Practice of veterinary medicine" means:

(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

(Continued on following page)

Texas law "[a] person may not practice veterinary medicine unless a veterinarian-client-patient relationship exists."[2] That "relationship exists if the veterinarian:"

> (1) assumes responsibility for medical judgments regarding the health of an animal and a client, who is the owner or other caretaker of the animal, agrees to follow the veterinarian's instructions;
>
> (2) possesses sufficient knowledge of the animal to initiate at least a general or preliminary diagnosis of the animal's medical condition; and
>
> (3) is readily available to provide, or has provided, follow-up medical care in the event of an adverse reaction to, or a failure of, the regimen of therapy provided by the veterinarian.[3]

In order to "possess[ ] sufficient knowledge of the animal" the veterinarian must have "recently seen, or [be] 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

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> (D) the receipt of compensation for performing an act listed in Paragraph (A).

Tex. Occ. Code § 801.002(5). Hines admits that his advice meets all four criteria.

[2] Tex. Occ. Code. § 801.351(a).

[3] *Id.*

premises on which the animal is kept."[4] That examination must be in person – the statute is explicit that "[a] veterinarian-client-patient relationship may not be established solely by telephone or electronic means."[5] We term this the "physical examination requirement."

In 2012, the Texas Board of Veterinary Medical Examiners (the "Board") informed Hines that by providing veterinary advice without a physical examination, he had violated Texas law. Hines eventually agreed to: abide by the relevant state laws, including the physical examination requirement, one year of probation; a stayed suspension of his license; a $500 fine; and to retake the jurisprudence portion of the veterinary licensing exam.

B.

Hines filed suit in federal court, seeking declaratory and injunctive relief. He argued that the physical examination requirement violates his First Amendment right to free speech as well as his rights under the Due Process and Equal Protection Clauses of the Fourteenth Amendment.[6] The Board moved to dismiss under Federal Rule of Civil Procedure 12(b)(6).

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[4] *Id.* § 801.351(b).

[5] *Id.* § 801.351(c).

[6] Hines challenges only the physical examination requirement; the Board acknowledges that to the extent that Hines wants to provide general advice without regard to any specific

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The district court granted the Board's motion in part and denied it in part. With respect to the equal protection claim, the court concluded that because the law did not discriminate on the basis of any suspect classification, the count was evaluated pursuant to rational basis review – and held that the physical examination requirement passed that deferential standard. The court dismissed Hines's substantive due process claim for similar reasons. The district court denied the motion to dismiss the First Amendment claims. It recognized that states have broad power to regulate professionals, but determined that because the physical examination requirement "regulate[s] professional speech itself," it is subject to the First Amendment. Relying on the Supreme Court's decision in *Planned Parenthood of Southeastern Pennsylvania* v. *Casey*,[7] the court concluded that "[r]egulations on speech by licensed professionals in the context of a professional relationship must . . . be more than merely rational, they must be 'reasonable.'" Judged against this standard, and assuming all allegations to be true, the district court held that Hines had stated a plausible claim that the Board had infringed his First Amendment rights.

The Board moved under 28 U.S.C. § 1292(b) to certify for interlocutory review the district court's order granting in part and reversing in part the

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animal, this would not constitute the "practice of veterinary medicine" and would not violate section 801.351.

[7] 505 U.S. 833, 884 (1992) (plurality op.).

motion to dismiss. The district court granted the motion and certified the order. We granted the Board's timely petition to hear the appeal.

II.

A.

Under section 1292(b), we have appellate jurisdiction over the order certified to the court of appeals, in this case the order addressing the Board's motion to dismiss; our review is not limited to the controlling question of law formulated by the district court in its certification order.[8] We review "de novo a district court's grant or denial of a Rule 12(b)(6) motion to dismiss, 'accepting all well-pleaded facts as true and viewing those facts in the light most favorable to the plaintiff.' "[9] If the complaint has not set forth "enough facts to state a claim to relief that is plausible on its face," it must be dismissed.[10]

B.

We begin – and end – our First Amendment analysis by recognizing the statute at issue in this case for what it is. The challenged state law prohibits

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[8] *Yamah Motor Corp., U.S.A.* v. *Calhoun,* 516 U.S. 199, 204-05 (1996).

[9] *True* v. *Robles,* 571 F.3d 412, 417 (5th Cir. 2009) (quoting *Stokes* v. *Gann,* 498 F.3d 483, 484 (5th Cir. 2007)).

[10] *Bell Atl. Corp.* v. *Twombly,* 550 U.S. 544, 570 (2007).

the practice of veterinary medicine unless the veterinarian has first physically examined either the animal in question or its surrounding premises. It 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.

States have "broad power to establish standards for licensing practitioners and regulating the practice of professions."[11] Texas's requirement that veterinarians physically examine an animal or the animal's premises before treating it (or otherwise practicing veterinary medicine) falls squarely within this long-established authority, and does not offend the First Amendment.[12]

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[11] *Gade* v. *Nat'l Solid Waste Mgm't Ass'n,* 505 U.S. 88, 108 (1992) (quoting *Goldfarb* v. *Va. State Bar,* 421 U.S. 773, 792 (1975)); *see also Graves* v. *State of Minn.,* 272 U.S. 425, 427 (1926); *Tex. Med. Providers Performing Abortion Servs.* v. *Lakey,* 667 F.3d 570, 584-85 (5th Cir. 2012) (Higginbotham, J., concurring) ("The doctor-patient relationship has long been conducted within the constraints of informed consent to the risks of medical procedures, as demanded by the common law, legislation, and professional norms.").

[12] *See, e.g., Ohralik* v. *Ohio State Bar Ass'n,* 436 U.S. 447, 456 (1978) (recognizing power of state "to regulate commercial activity deemed harmful to the public," notwithstanding that "speech is a component of that activity"); *Wollschlaeger* v. *Governor of Fla.,* 760 F.3d 1195, 1221-26 (11th Cir. 2014) (recognizing broad power of state to regulate professional conduct); *see also* Frederick Schauer, *The Boundaries of the First Amendment: A Preliminary Exploration of Constitutional Salience,* 117 Harv. L. Rev. 1765, 1783-84 (2004) (concluding that professional

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Nor does the fact that this rule may have some impact on the veterinarian's speech dictate a different result. 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."[13] Pursuant to this principle, there is a robust line of doctrine concluding that state regulation of the practice of a profession, even though that regulation may have an incidental impact on speech, does not violate the Constitution.

This principle is often linked to Justice White's concurrence in the result in *Lowe* v. *Securities & Exchange Commission.*[14] There, Justice White, joined by Chief Justice Burger and Justice Rehnquist, concluded that "[j]ust as offer and acceptance are communications incidental to the regulable transaction called a contract, the professional's speech is incidental to the conduct of the profession. If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech or the press subject to First Amendment scrutiny."[15] The idea that content-neutral regulation of the professional-client

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regulation has largely been seen as being beyond the scope of the First Amendment).

[13] *Sorrell* v. *IMS Health Inc.,* 131 S. Ct. 2653, 2664 (2011).

[14] 472 U.S. 181, 211 (1985) (White, J., concurring in the result).

[15] *Id.* at 232.

relationship does not violate the First Amendment has deep roots,[16] and has been embraced by many circuits.[17]

Our court's jurisprudence is consistent with this line of cases. In *Daly* v. *Sprague,*[18] a challenge by a state-employed doctor to the temporary removal of his clinical privileges, we held that "[s]ince the state undoubtedly possessed the power to regulate non-speech and nonassociation aspects of [the doctor's] professional actions, any incidental restrictions on his freedom of speech and association are not constitutionally invalid."[19] We were not clear whether that power stemmed from the state's role as regulator of the practice of medicine or as the plaintiff-doctor's employer, so this case does not control our decision here, but the line of precedent discussed above suggests the former explanation.

Whether Hines's First Amendment rights are even implicated by this regulation is far from certain.

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[16] *See Thomas* v. *Collins,* 323 U.S. 516, 544-45 (1945) (Jackson, J., concurring).

[17] *See, e.g., Moore-King* v. *Cnty. of Chesterfield, Va.,* 708 F.3d 560, 569-70 (4th Cir. 2013); *Locke* v. *Shore,* 634 F.3d 1185, 1191-92 (11th Cir. 2011); *Coggeshall* v. *Mass Bd. of Registration of Psychologists,* 604 F.3d 658, 667 (1st Cir. 2010); *Nat'l Ass'n for Advancement of Psychoanalysis* v. *Cal Bd. of Psychology,* 228 F.3d 1043, 1056 (9th Cir. 2000); *Lawline* v. *Am. Bar Ass'n,* 956 F.2d 1378, 1386 (7th Cir. 1992).

[18] 742 F.2d 896 (5th Cir. 1984).

[19] *Id.* at 899.

In defining the permitting practice of veterinary medicine for which its license is required, Texas only imposes a narrow requirement upon the veterinarian. But surely, if this restriction on the veterinarian's medical practice is within its scope, it is but incidental to the constraint, and denies the veterinarian no due First Amendment right.[20]

C.

The district court also dismissed Hines's equal protection and due process claims, concluding that the physical examination challenge is rationally related to a legitimate government interest. We agree.

Because Hines is not a member of a protected class, and the classification does not infringe upon fundamental constitutional rights, we apply rational basis review. "Under rational basis review, differential treatment 'must be upheld against equal protection challenge if there is any reasonably conceivable state of facts that could provide a rational basis for

[20] Contrary to Hines's assertions, two Supreme Court cases do not call this conclusion into question. In *Legal Services Corporation* v. *Velazquez,* 531 U.S. 533 (2001), the Court struck down an "impermissible viewpoint-based" regulation, *id.* at 537, which is easily distinguishable from the content-neutral conduct regulation at issue here. Similarly, in *Holder* v. *Humanitarian Law Project,* 561 U.S. 1 (2010), the Court focused on a law which "regulates speech on the basis of its content," *id.* at 27, and did not implicate questions of the content-neutral regulation of the practice of medicine that are relevant to this appeal.

the classification.'"[21] Here, the requirement that veterinary care be provided only after the veterinarian has seen the animal is, at a minimum, rational: it is reasonable to conclude that the quality of care will be higher, and the risk of misdiagnosis and improper treatment lower, if the veterinarian physically examines the animal in question before treating it.[22] The same rationality standard applies to Hines's due process claim,[23] and we reject that argument for the same reasons.

III.

We REVERSE the district court's denial of the defendants' motion to dismiss the plaintiff's First Amendment counts and AFFIRM the district court's granting of the defendants' motion to dismiss the plaintiff's Fourteenth Amendment counts. We REMAND for the entry of judgment in favor of the defendants.

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[21] *Madriz-Alvarado* v. *Ashcroft,* 383 F.3d 321, 332 (5th Cir. 2004) (quoting *FCC* v. *Beach Commc'ns,* 508 U.S. 307, 313 (1993)).

[22] While not decisive, the fact that the physical examination requirement was imposed following a change to the Model Veterinary Practice Act of the American Veterinary Medical Association further supports the conclusion that the regulation is rational.

[23] *See Dittman* v. *California,* 191 F.3d 1020, 1031 (9th Cir. 1999).

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF TEXAS BROWNSVILLE DIVISION

RONALD S. HINES, Plaintiff, VS. BUD E. ALLDREDGE, JR., *et al*, Defendants.	§ § § § § § §	CIVIL NO. 1:13-CV-56

ORDER

(Filed Feb. 11, 2014)

BE IT REMEMBERED, that on February 11, 2014, the Court **GRANTS IN PART AND DENIES IN PART** Defendants' Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6), Dkt. No. 44.

I. Factual and Procedural History

Plaintiff Ronald Hines, D.V.M. ("Hines") is a Texas-licensed veterinarian. Dkt. No. 23 at 3. Beginning in 2002, Hines began posting general articles about pet care on his website. *Id.* at 4. Shortly after he began to post these articles, Hines began to provide particularized advice to pet owners who contacted him about their pets. *Id.* at 5. In 2003, Hines began charging a fee for his advice. *Id.* at 8. Hines states that he has provided advice to various groups of people, including pet owners who have no access to conventional veterinary care, whether because of

geography or inability to pay, and pet owners who have received conflicting diagnoses. *Id.* at 6. In giving this veterinary advice, Hines reviews veterinary records and speaks with the owner of the animal by email or phone, but never physically examines the animal. *Id.* at 5. Hines does not attempt to serve as the primary veterinary care provider for the animals about which he provides advice, meaning that he does not prescribe medication, does not perform procedures, explains on his website that online advice is inherently limited, and does not provide any advice or accept payment if in his professional judgment doing so would be inappropriate. *Id.* at 9. Hines's online practice consisted of communicating with the pet owner, conducting research and reviewing records, and providing advice and recommendations by email or phone. *Id.* at 5-9.

On March 19, 2012, the Texas State Board of Veterinary Examiners informed Hines that he was in violation of a statutory provision prohibiting veterinarians from providing veterinary advice without first establishing a formal veterinarian-client-patient relationship. *Id.* at 14; Tex. Occ. Code § 801.351 (West 2005).[1] Hines's violation of this provision was based

[1] Tex. Occ. Code § 801.351(a) states that "a person may not practice veterinary medicine unless a veterinarian-client-patient relationship exists." Such a relationship only exists if the veterinarian "possesses sufficient knowledge of the animal." Tex. Occ. Code § 801.351(a)(2). Tex. Occ. Code § 801.351(b) states that "[a] veterinarian possess sufficient knowledge of the animal . . . if the veterinarian has recently seen, or is personally

(Continued on following page)

on the fact that he did not physically examine the animals about which he provided advice. At that time, Hines stopped providing veterinary advice on the Internet. Dkt. No. 23 at 14. The Board instituted disciplinary proceedings against Hines, and ultimately ordered a one-year probated suspension of Hines's veterinary license, that Hines retake a portion of the veterinary licensing exam, and a $500 fine. *Id.* at 17.

On April 8, 2013, Hines filed his Complaint for Declaratory and Injunctive Relief, Dkt. No. 1. The complaint asserts violations of the First Amendment, Fourteenth Amendment substantive due process, and Fourteenth Amendment equal protection by Defendants, all members of the Texas State Board of Veterinary Medical Examiners. Dkt. No. 23.[2] Specifically, Hines challenges the portions of Tex. Occ. Code § 801.351, and any associated regulations, that require a veterinarian to examine the animal before providing veterinary advice and that prohibit the establishment of a veterinarian-client-patient relationship by electronic means. Hines seeks a declaratory judgment that the professional regulations are

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acquainted with, the keeping and care of the animal by: (1) examining the animal; or (2) making . . . visits to the premises on which the animal is kept." Tex. Occ. Code § 801.351(c) states that "[a] veterinarian-client-patient relationship may not be established solely by telephone or electronic means."

[2] On April 23, 2013, Hines refiled his complaint in response to the Court's Order of April 22, 2013 striking the complaint. The refiled complaint, Dkt. No. 23, is identical in substance to the originally-filed complaint.

unconstitutional and an injunction preventing the Board from enforcing those statutes. *Id.* at 27.

On May 20, 2013, Defendants (collectively, "the Board") filed their Motion to Dismiss Pursuant to Federal Rule of Civil Procedure 12(b)(6). Dkt. No. 44. On June 10, 2013, Hines filed a response in opposition to the Board's motion to dismiss, and on July 1, 2013, the Board filed a reply in support of the motion. Dkt. Nos. 46, 47. On July 3, 2013, Hines filed a notice of supplemental authority, Dkt. No. 50. On July 10, 2013, the Board filed a response to Hines's supplemental authority. Dkt. No. 53.

II. Legal Standard

Pursuant to Rule 12(b)(6), a plaintiff's claim may be dismissed it if fails "to state a claim upon which relief can be granted." FED. R. CIV. P. 12(b)(6). For a complaint to be sufficient, it "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action. . . ." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). "A complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (citing *Twombly*, 550 U.S. at 570). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (citing *Twombly*, 550 U.S. at 556).

A court, in evaluating a plaintiff's complaint in light of a defendant's motion to dismiss under Rule 12(b)(6) may "begin by identifying pleadings that, because they are no more than conclusions, are not entitled to the assumption of truth." *Id.* at 679. Then the court may determine whether the plaintiff's well-pleaded facts allow the court to infer the plausibility of misconduct. *See id.* "Factual allegations must be enough to raise a right to relief above a speculative level on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Twombly*, 550 U.S. at 555 (internal citations omitted).

III. First Amendment Claims

A. Parties' Arguments

The Board first argues that the state has a well-established and broad authority to regulate professional conduct. Dkt. No. 44 at 14-16. The Board asserts that the fact that Hines's professional conduct occurred through speech does not subject the state's regulation of that conduct to greater scrutiny. *Id.* at 16-20. The Board states that for this reason, "courts have repeatedly upheld state restrictions on professional practice against First Amendment challenges." *Id.* Therefore, the Board argues, the regulations challenged by Hines are subject only to rational basis review, and clearly pass the rational basis test. *Id.* at 20, 21-22. Finally, the Board asserts that to the extent the First Amendment does apply to the

professional regulations at issue in this case, the regulations are content-neutral. *Id.* at 23-24.[3]

In response, Hines argues that his veterinary advice is protected speech, not professional conduct subject to regulation. Dkt. No. 46 at 14-20. Hines therefore argues that the restrictions on his individualized advice are subject to heightened First Amendment scrutiny. *Id.* Hines asserts that because the veterinary advice at issue is speech entitled to First Amendment protection, he has stated a claim upon which relief can be granted and the Board's motion to dismiss should be denied. *Id.* at 20.[4]

In reply, the Board reiterates that Hines's advice is professional conduct, and as such is not entitled to First Amendment protection. Dkt. No. 47 at 7. The Board further reiterates that § 801.351 is content-neutral, and that it is subject only to rational basis review.

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[3] The Board also discusses a freedom of association claim, stating that it is unclear whether Hines is actually making such a claim. Dkt. No. 44 at 25 n.4. In his response, Hines states that his complaint does not include a freedom of association claim. Dkt. No. 46 at 8 n.1. The Court therefore does not address this issue.

[4] The Court notes that Hines later filed a notice of supplemental authority, bringing the Court's attention to *Cooksey v. Futrell*, 721 F.3d 226 (4th Cir. 2013). The Court considered this supplemental authority, but found that it was not relevant, as the issue in that case was standing to bring a First Amendment claim and, further, that the plaintiff in that case was not a licensed professional. The Court therefore does not discuss *Cooksey* herein.

B. Analysis

As a general matter, states have broad power to regulate the practice of professions to promote public health, safety, and welfare. *Dent v. West Virginia*, 129 U.S. 114, 122 (1889) ("The power of the state to provide for the general welfare of its people authorizes it to prescribe . . . such regulations. . . ."); *Watson v. Maryland*, 218 U.S. 173, 176 (1910) ("It 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."). However, this power does not take professional regulations beyond the scope of the First Amendment when such regulations restrict or otherwise affect speech. *See, e.g., Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (analyzing a professional regulation with a First Amendment framework); *Daly v. Sprague*, 742 F.2d 896 (5th Cir. 1984) (discussing the First Amendment implications of professional regulation that incidentally impacted speech); *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) ("Being a member of a regulated profession does not . . . result in a surrender of First Amendment rights.").

Here, the Board correctly notes that "courts have repeatedly upheld state restrictions on professional practice against First Amendment challenges." Dkt. No. 44 at 17. The Board also cites several cases in support of the assertion that the First Amendment is not implicated when restrictions on speech are merely the incidental effect of regulating professional

conduct. *See, e.g., Daly*, 742 F.2d at 899; Dkt. No. 44 at 17. However, the Court finds unpersuasive the Board's argument that the First Amendment is not implicated by the professional regulations at issue in this case. For one, stating that professional regulations are routinely upheld when analyzed under the First Amendment is entirely different from asserting that such regulations are not subject to First Amendment scrutiny at all. Furthermore, it seems – based on the fact that Hines was disciplined for professional actions that consisted only of receiving and sending emails and having phone conversations – that the regulations at issue here regulate professional speech itself.[5] *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705, 2724 (2010) ("[T]he conduct triggering coverage under the statute consist[ed] of communicating a message."). The regulations are therefore subject to First Amendment analysis.

The next question, then, is to what level of scrutiny the professional regulations in this case are subject. More specifically: what level of scrutiny applies to professional regulations that restrict or otherwise control the speech of a licensed professional

[5] The regulations restrict, among other things, speech itself, as opposed to a regulation of professional conduct that incidentally impacts speech. For instance, prohibiting a type of veterinary treatment would not necessarily implicate the First Amendment merely because the prohibition would have the incidental effect of preventing veterinarians from prescribing that treatment. *See, e.g., Pickup v. Brown*, 728 F.3d 1042, 1055 (9th Cir. 2013).

within the context of a professional relationship? Though professional speech is entitled to some level of protection, the need for professional regulations to protect the public and the fact that professional speech is not a core First Amendment concern means that it is not entitled to robust strict-scrutiny protection. *See Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 884 (1992) ("the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.") (internal citations omitted). Speech undertaken by licensed professionals in the course of their professional duties is therefore entitled to a level of protection somewhere between minimal rational-basis standards and rigorous strict scrutiny.

The Ninth Circuit case *Pickup v. Brown* is instructive on this question. In *Pickup*, the court stated that "it [is] helpful to view this issue along a continuum." 728 F.3d 1042, 1053 (9th Cir. 2013). "At one end of the continuum, where a professional is engaged in public dialogue, First Amendment protection is at its greatest. Thus, for example, a doctor who publicly advocates a treatment . . . is entitled to robust protection under the first Amendment . . . even though the state has the power to regulate medicine." *Id.* (citing *Lowe v. Securities and Exchange Commission*, 472 U.S. 181, 232 (1985) (White, J., concurring) ("Where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular

individual . . . government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment. . . .")).[6] In the context of the instant case, Hines's practice of writing general articles about pet health and pet care and publishing them on his website would fall into this category of strongly protected speech.

However, "[a]t the midpoint of the continuum, within the confines of a professional relationship, First Amendment protection of a professional's speech is somewhat diminished." *Id.* at 1054. In support of this proposition, the *Pickup* court cited *Casey*, noting that the plurality upheld a requirement that "would almost certainly be considered impermissible compelled speech" outside the context of a professional doctor-patient relationship. *Id.* (citing *Casey*, 505 U.S.

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[6] Hines relies on *Holder v. Humanitarian Law Project* in support of his assertion that individualized advice is protected speech and that Justice White's concurrence in *Lowe v. SEC* has been superseded. The Court does not find *Holder* particularly applicable or persuasive, because the issue in that case did not involve professional regulation, which is the somewhat specialized context of the instant case, and because the First Amendment question in *Holder* turned significantly on the fact that the advice in question had been prohibited because it constituted "material support" for designated terrorist groups. *Holder v. Humanitarian Law Project*, 130 S.Ct. 2705 (2010). Though Justice White's concurrence in *Lowe* is persuasive and nonbinding, the Court does not agreed [sic] that it "squarely conflicts" with Holder or has been otherwise superseded.

833, 884 (1992)). The court noted several other examples of cases in which speech within the context of a professional is appropriately regulated, concluding that "the First Amendment tolerates a substantial amount of speech regulation within the professional-client relationship that it would not tolerate outside of it." *Id.* at 1055.[7]

Regulations on speech by licensed professionals in the context of a professional relationship must therefore be more than merely rational, they must be "reasonable." *Casey*, 505 U.S. at 884. Under a heightened scrutiny standard, such regulations must directly advance a substantial state interest and be tailored to achieve that interest. This analysis should incorporate the principle that "[w]hen professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate." *Pickup*, 728 F.3d at 1055. However, the analysis must also consider the fact that professionals are entitled to, and to some extent require, First Amendment protection for the speech that they consider necessary and appropriate in the

[7] The *Pickup* court ultimately stated that the least protected end of the continuum is regulation of professional conduct that may incidentally affect speech. *Pickup*, 728 F.3d at 1055. Given this distinction, as well as the fact that only speech is specifically at issue in this case, the Court notes that it does not address how the regulations at issue in this case apply to conduct (for example, prescribing medicine), or any First Amendment implications in that context.

practice of their profession. *See Casey*, 505 U.S. at 884; *Legal Services Corp. v. Velazquez*, 531 U.S. 533 (2001).

In sum, the Court finds that the First Amendment applies to the professional regulations at issue in this case, and that the regulations, as applied to Hines's professional speech, are subject to heightened scrutiny and must be shown to be "reasonable." Against this legal backdrop, the Court finds that Hines has alleged sufficient facts, taken as true, to state a plausible claim for relief. *Twombly*, 550 U.S. at 570. Hines alleges that he provided advice (and no more) to pet owners over the Internet and sometimes by phone, and that the professional regulations at issue in this case have prevented him from engaging in that speech. Dkt. No. 23 at 4-10. He further alleges that he exercised his professional judgment at all times when providing advice online, that he did not attempt to serve as a primary veterinary care provider, and that he was aware of and explained the limitations of online advice. *Id.* at 7-10. Hines states that when the state enacted the regulations at issue, it had no evidence that online veterinary advice was harmful to public health or to animals, or that online advice resulted in higher rates of consumer fraud. *Id.* at 12-13. Hines also asserts that "veterinarians across Texas and the United States routinely offer veterinary advice solely via electronic means,"[8] and

[8] Hines provides examples of two radio programs, in Austin, Texas, and Dallas, Texas, that provide on-air advice in response

(Continued on following page)

that there is no evidence that any animal has been harmed as a result of advice provided solely through electronic means. *Id.* at 15-16.

These allegations, taken as true, plausibly state a claim that Texas's professional veterinary regulations infringe on Hines's First Amendment rights. Based on the alleged facts, it is plausible that the regulations are not tailored to achieve a substantial state interest, and are therefore not reasonable regulations of speech within the confines of a professional relationship. Accordingly, the Court **DENIES** the Board's motion to dismiss Hines's First Amendment claims.

IV. Equal Protection Claim

A. Parties' Arguments

The Board first argues that the professional regulations at issue do not discriminate based on an inherently suspect classification, and are therefore subject only to rational basis scrutiny. Dkt. No. 44 at 27. The Board asserts that it is clearly rational "for Texas to regulate the manner in which a veterinarian establishes a relationship with his clients" in an effort to realize the state's "legitimate interest in

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to pet owners' questions about their animals, as well as a list of websites that offer veterinary advice and consultation services without requiring an examination.

promoting the public's health, safety, and welfare." *Id.* at 28.[9]

Hines argues in response that "there is no rational basis for treating him like a layperson – in other words, as someone forbidden from giving veterinary advice – simply because he is speaking to a pet owner online without first examining the animal." Dkt. No. 46 at 21. He therefore asserts that the equal protection question in this case is whether regulations "prohibiting a licensed veterinarian from ever giving advice without examining an animal" are rationally related to a legitimate governmental interest. *Id.* Hines argues that he has stated a plausible claim that no such rational relationship exists. *Id.* at 23. Though Hines agrees that the government interests in protecting public health, safety and welfare are legitimate, he argues that the regulations are not rationally related to those interests. *Id.*

In reply,[10] the Board reiterates that the regulations at issue are subject only to rational basis review.

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[9] The Board also states that "[t]o the extent the allegations in [Hines's] complaint could be construed to assert a violation of equal protection based on selective enforcement, this claim should be dismissed." Dkt. No. 44 at 29. Because Hines does not address this issue in his response, the Court assumes that he did not intend to assert such a claim and therefore does not address the issue.

[10] The Board first asserts that Hines has not established that similarly-situated individuals were treated differently, and that he has therefore failed to establish the foundation of a rational basis claim. Dkt. No. 47 at 15. However, the Board did

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Dkt. No. 47 at 15. The Board then refutes Hines's reasons why the regulations are not rationally related to a legitimate state interest. *Id.* at 17. First, the Board states that the mere fact that some veterinarians may be able to exercise their professional judgment effectively without conducting an examination does not mean that a regulation designed to protect the public from veterinarians who cannot do so is irrational. *Id.* Second, the Board questions Hines's assertion that pet owners and their animals would be better off if they could receive veterinary care over the Internet, and states that even if the assertion is occasionally true, "a legislative choice is not subject to courtroom factfinding." *Id.* at 18-19.

The Board also expands on its argument that the regulations are rationally related to the state's legitimate interest in public health, safety, and welfare, stating that a veterinarian who does not conduct an in-person examination may miss symptoms of an illness "that cannot be easily photographed, or that a layperson . . . may not notice or may think is insignificant." *Id.* at 14. The Board asserts that failure to conduct an examination may therefore

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not raise that argument in its initial motion, see Dkt. No. 44, and the Court therefore does not consider it. *See, e.g., Murthy v. Abbott Laboratories*, 847 F.Supp.2d 958, 977 n.9 (S.D. Tex. 2012) (("As Abbott did not raise its . . . insufficiency argument until its reply, and Murthy was therefore unable to respond, the Court finds that it has been waived and will not consider it when determining whether Murthy's breach of contract claim should be dismissed.").

lead to misdiagnosis or improper treatment, which in turn may lead to an increased risk of zoonotic disease. *Id.* For this reason, the Board argues that the regulations are rationally related to a legitimate state interest. *Id.*

B. Analysis

The basic mandate of the Equal Protection Clause is that similarly- situated persons should be treated alike. *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 439 (1985). However, "[u]nless a classification trammels fundamental personal rights or is drawn upon inherently suspect distinctions," the classification must only be rationally related to a legitimate state interest to be upheld. *City of New Orleans v. Dukes*, 427 U.S. 297, 303 (1976). Importantly, "'[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it.'" *Heller v. Doe*, 509 U.S. 312, 320 (1993) (citing *Lehnhausen v. Lake Shore Auto Parts Co.*, 410 U.S. 356, 364 (1973)). The state "has no obligation to produce evidence to sustain the rationality of a classification[,] and '[a] legislative choice . . . may be based on rational speculation unsupported by evidence or empirical data.'" *Id.* (quoting *FCC v. Beach Communications, Inc.*, 508 U.S. 307, 315 (1993)). When scrutinizing a classification under rational basis, the court must not substitute its own judgment for that of the legislature. *Anderson v. Winter*, 631 F.2d 1238, 1240-41 (5th Cir. 1976). Finally, "[w]hen social or economic legislation

is at issue, the Equal Protection Clause allows the States wide latitude, and the Constitution presumes that even improvident decisions will eventually be rectified by the democratic processes." *City of Cleburne*, 473 U.S. at 440.

Here, it is clear that only rational basis scrutiny applies to the classification at issue. Furthermore, the only plausible equal protection classification is between licensed veterinarians who have examined their patients and licensed veterinarians who have not.[11] The question, therefore, is whether it is treating licensed veterinarians who have conducted an examination differently from licensed veterinarians who have not done so is rationally related to a legitimate state interest.

The Court finds that such a classification is rationally related to the legitimate state interest of protecting public health, safety, and welfare. The fact that protection of public health, safety, and welfare is a legitimate government interest is well-established and undisputed. *See, e.g., St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (finding no rational relationship between the regulations at issue and the legitimate state interest of promoting public health

[11] Though Hines frames the classification as "treating [a licensed veterinarian] like a layperson," that is not an equal protection framework. Equal protection requires similarly-situated persons being treated differently; in this case, licensed veterinarians who are treated differently based on whether they have examined their patients.

and safety).[12] Furthermore, there is a rational relationship between the veterinary regulations at issue and that state interest. It is, at a minimum, rational for the state to believe that requiring a physical examination of an animal to establish a veterinarian-client-patient relationship and allow a veterinarian to treat the animal would tend to prevent misdiagnosis, improper treatment, and the subsequent increased risk of zoonotic disease. Therefore, there is a rational relationship between the regulations and the state interest in public health, safety, and welfare, and a rational justification for treating veterinarians who have conducted a recent examination differently from veterinarians who have not.

Hines asserts that the regulations "do[ ] not plausibly advance . . . Texas's interests" for two basic reasons: 1) veterinarians are capable of exercising professional judgment without examining an animal, and 2) both pet owners and their animals would be better off if Hines was able to provide veterinary advice online without conducting an examination. Dkt. No. 46 at 23. However, this argument misstates

[12] Hines relies heavily on *St. Joseph Abbey*, in which the Fifth Circuit found a statute requiring that caskets be purchased only from licensed funeral directors unconstitutional under rational basis scrutiny. However, *St. Joseph Abbey* is inapposite: first, because the *St. Joseph* decision was based on the finding that sheer economic protectionism is not a legitimate state interest, and second, because the legal backdrop made it clear that protectionism was the only plausible state interest at play. *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013).

the standard applicable here. Any argument that the legislature made a poor decision or should have enacted different regulations is irrelevant to rational basis review. *Beach Communications, Inc.*, 508 U.S. at 315 ("a legislative choice is not subject to court-room fact-finding"). The relationship between the regulations and the legitimate government interest need not be plausible, it need only be rational. The Court finds that there is a rational basis for the regulations, and therefore finds Hines has not "[pled] factual content" sufficient to plausibly state a claim on which relief can be granted. *Iqbal*, 556 U.S. at 678. Accordingly, the Court **GRANTS** the Board's motion to dismiss Hines's equal protection claim and **DISMISSES** that claim.

V. Due Process Claim

A. Parties' Arguments

The Board argues that to succeed on a Fourteenth Amendment due process claim for interference with a person's right to pursue their chosen occupation, a plaintiff must demonstrate that they have been "effectively foreclosed" from that occupation. Dkt. No. 44 at 30. Because the regulations at issue here do not prevent Hines from retaining his professional license and practicing veterinary medicine, but only prevent him from practicing without having conducted an examination of the animal, the Board argues that Hines has not been "effectively foreclosed" and cannot state a substantive due process

claim. *Id.* The Board further states that to the extent Hines's due process claim is cognizable, the regulations at issue are subject only to rational basis review, and survive that review for the reasons already stated. *Id.* at 31.

Hines first responds that the "effectively foreclosed" test does not apply to this case because it only applies where individuals are "seeking some special government privilege or access; not cases where someone faced a bar that would force them to stop practicing altogether." Dkt. No. 46 at 26. Second, Hines asserts that to the extent the test applies, he is in fact effectively foreclosed from practicing his chosen occupation. *Id.* at 26-27. Finally, Hines asserts that the question of effective foreclosure is factual and should not be decided at this stage. *Id.* at 28.

In its reply, the Board asserts that Hines has not stated a cognizable substantive due process claim, and further asserts that even if he could do so, he could not show that the regulations fail a rational basis inquiry. *Id.*

B. Analysis

To the extent that Hines's substantive due process claim is cognizable, the rational basis test applies to the regulations that allegedly violate Hines's due process rights. As discussed above, rational basis scrutiny requires only that the regulation be rationally related to a legitimate state interest. *Dukes*, 427 U.S. at 303; *Dittman v. California*, 191 F.3d 1020,

1031 (9th Cir. 1999) ("[w]here, as here, a plaintiff relies on substantive due process to challenge a legislative act that does not infringe on a fundamental right . . . we need to determine only whether the legislation has a 'conceivable basis' on which it might survive constitutional scrutiny.") (internal citations omitted).

For the reasons discussed in detail above, the Court finds that there 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. Because the Court finds that there is a rational basis for the challenged regulations, it is unnecessary to decide whether Hines could plausibly state a cognizable substantive due process claim. Accordingly, the Court **GRANTS** the Board's motion to dismiss Hines's substantive due process claim and **DISMISSES** that claim.

VI. Conclusion

For the reasons discussed above, the Court:

1. **DENIES** the Board's motion to dismiss Hines's First Amendment claim;
2. **GRANTS** the Board's motion to dismiss Hines's equal protection claim;
3. **DISMISSES** Hines's equal protection claim;
4. **GRANTS** the Board's motion to dismiss Hines's substantive due process claim;

5. **DISMISSES** Hines's substantive due process claim; and

6. **ORDERS** the parties to file a revised Joint Discovery/Case Management Plan by March 7, 2014.

SIGNED this 11th day of February, 2014.

/s/ Hilda Tagle
Hilda Tagle
Senior United States
District Judge

Relevant Statutes

TEXAS OCCUPATIONS CODE

Sec. 801.351. EXISTENCE OF VETERINARIAN-CLIENT-PATIENT RELATIONSHIP. (a) A person may not practice veterinary medicine unless a veterinarian-client-patient relationship exists. A veterinarian-client-patient relationship exists if the veterinarian:

(1) assumes responsibility for medical judgments regarding the health of an animal and a client, who is the owner or other caretaker of the animal, agrees to follow the veterinarian's instructions;

(2) possesses sufficient knowledge of the animal to initiate at least a general or preliminary diagnosis of the animal's medical condition; and

(3) is readily available to provide, or has provided, follow-up medical care in the event of an adverse reaction to, or a failure of, the regimen of therapy provided by the veterinarian.

(b) A veterinarian possesses sufficient knowledge of the animal for purposes of Subsection (a)(2) if the veterinarian has recently seen, or is 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.

(c) A veterinarian-client-patient relationship may not be established solely by telephone or electronic means.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

RONALD S. HINES, D.V.M.,)) **Plaintiff,**)) **v.**)) **BUD E. ALLDREDGE, JR., D.V.M., in his official capacity as President of the Texas State Board of Veterinary Medical Examiners; J. TODD HENRY, D.V.M., in his official capacity as Vice President of the Texas State Board of Veterinary Medical Examiners; JOE MAC KING, D.V.M., in his official capacity as Secretary of the Texas State Board of Veterinary Medical Examiners; RICHARD S. BONNER, JR., in his official capacity as Member of the Texas State Board of Veterinary Medical Examiners; JANIE CARPENTER, D.V.M., in her official capacity as Member of the Texas State Board of Veterinary Medical Examiners;**)	**CIVIL ACTION NO. 1:13-CV-56** **HILDA G. TAGLE SENIOR UNITED STATES DISTRICT JUDGE**

JOHN D. CLADER, D.V.M., in his official capacity as Member of the Texas State Board of Veterinary Medical Examiners; MANUELA "MAMIE" SALAZAR-HARPER, in her official capacity as Member of the Texas State Board of Veterinary Medical Examiners; DAVID W. ROSBERG, JR., D.V.M., in his official capacity as Member of the Texas State Board of Veterinary Medical Examiners; and CHAD UPHAM, in his official capacity as Member of the Texas State Board of Veterinary Medical Examiners,

Defendants.

COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

(Filed Apr. 23, 2013)

INTRODUCTION

1. It should not be illegal for veterinarians to give veterinary advice. This First Amendment challenge seeks to vindicate the free-speech rights of Plaintiff Dr. Ronald Hines, a 69-year-old, Texas-licensed veterinarian. Since 2002, Dr. Hines has provided – for free and for a nominal fee – veterinary

advice to pet owners across the country and around the world. For many of these pet owners, Dr. Hines is the only realistic option. Despite his good works and the absence of even an allegation that his advice has harmed any animal, the Texas State Board of Veterinary Medical Examiners suspended his license, fined him, and forced him to retake the jurisprudence portion of the veterinary licensing exam because Texas law forbids a veterinarian from giving advice unless he or she has first physically examined the animal. The State Board's actions violate the First Amendment because the Board cannot carry its burden of proving that silencing Dr. Hines is a necessary and appropriately tailored way to advance Texas's interests.

JURISDICTION AND VENUE

2. Dr. Hines brings this civil-rights lawsuit pursuant to the First and Fourteenth Amendments to the United States Constitution; the Civil Rights Act of 1871, 42 U.S.C. § 1983; and the Declaratory Judgment Act, 28 U.S.C. § 2201.

3. Dr. Hines seeks declaratory and injunctive relief against the enforcement of the Texas Veterinary Licensing Act, Tex. Occ. Code §§ 801.001 *et seq*., regulations promulgated pursuant to that Act, Tex. Admin. Code §§ 57 1.1 *et seq*., and against the practices and policies of the Texas State Board of Veterinary Medical Examiners (the "State Board"), that deny his First Amendment right to communicate his

opinions and advice on veterinary medicine to pet owners across the country and around the world without having performed recent physical examinations of those pet owners' animals.

4. This Court has subject-matter jurisdiction under 28 U.S.C. §§ 1331 and 1343.

5. Venue lies in this Court under 28 U.S.C. § 1391(b).

PARTIES

6. Dr. Ronald S. Hines is a United States citizen and resides in Brownsville, Cameron County, Texas. He is the sole owner of, and sole writer for, a website called www.2ndchance.info, which he uses as a portal for providing veterinary information and advice.

7. Defendants Bud E. Alldredge, D.V.M., David W. Rosberg, D.V.M., J. Todd Henry, D.V.M., Richard S. Bonner, Janie Carpenter, D.V.M., John D. Clader, D.V.M., Joe Mac King, D.V.M., Manuela "Maime" Salazar-Harper, and Chad Upham are members of the Texas State Board of Veterinary Medical Examiners and are sued in their official capacities.

FACTUAL ALLEGATIONS

Dr. Hines's Veterinary Background

8. Dr. Hines is a Texas-licensed veterinarian.

9. Dr. Hines graduated from Texas A&M School of Veterinary Medicine in 1966. He also has a Ph.D.

in microbiology from the Hebrew University in Jerusalem, Israel.

10. In 1966, Dr. Hines enlisted in the United States Public Health Service. He was assigned to the Division of Research Resources at the National Institutes of Health ("NIH") in Bethesda, Maryland, where he maintained primate, dog, and rodent colonies for research.

11. In 1977, Dr. Hines fell from a catwalk into machinery at an NIH facility and sustained a serious spinal cord injury. Although not fully paralyzed, Dr. Hines suffered permanent nerve damage, which has left him with lower-body numbness, caused problems with walking and his excretory functions, and rendered him highly susceptible to fatigue.

12. In 1978, the Surgeon General of the United States awarded Dr. Hines the Public Health Service Commendation Medal.

13. Dr. Hines retired from the Public Health Service in 1979 with a 100-percent disability rating.

14. In 1980, Dr. Hines opened an animal hospital in San Antonio, which he equipped to accommodate his disabilities. He continued to operate this hospital until 1990 when he sold it because he could not physically tolerate the rigors of a busy practice.

15. In 1989, Dr. Hines became one of two staff veterinarians at Sea World San Antonio, where he remained until 1992.

16. In 1992, Dr. Hines moved to Sarasota, Florida and practiced veterinary medicine there until returning to Texas in 2002.

Dr. Hines Offers Veterinary Information and Advice Online

17. In February 2002, Dr. Hines was effectively retired from the practice of veterinary medicine. His disabilities and advancing age made it too difficult to continue working in a conventional brick-and-mortar practice. From February 2006 until October 2007, he worked once a week at a Petco pet store administering vaccinations.

18. In February 2002, Dr. Hines began to use his website, www.2ndchance.info, to post general articles that he had written about pet health and pet care. Since launching his website, he has posted over two hundred articles, all of which he makes available to the world for free. His only restriction is that others may not re-post his articles on other websites without his consent because he does not want to be construed by association as endorsing any website or any particular approach to veterinary medicine.

19. Dr. Hines's articles cover typical household pets such as cats and dogs as well as more exotic animals and wildlife, which he has experience working with as a veterinarian for the NIH and Sea World.

20. After launching his website in 2002, Dr. Hines was soon inundated with emails from across

the country and around the world seeking his advice about particular animals. Dr. Hines quickly decided to use his website not only to disseminate his articles to the general public, but also to provide veterinary advice to specific pet owners about their pets.

21. This veterinary advice – which usually begins with email and may include telephone calls – between Dr. Hines and his readers about their respective animals not only provides advice to the animal owners, but also gives Dr. Hines useful feedback on his general articles, enabling him to improve them, which he does on a regular basis. This communication also allows Dr. Hines to write new articles to fulfill the unmet needs of his readers.

22. Because the animal owners to whom Dr. Hines provides advice are scattered across the country and around the world, and because Dr. Hines does not maintain a brick-and-mortar veterinary facility, he never physically examines the animals that are the subject of his advice. He does, however, frequently review veterinary records that animal owners provide him, which typically include notes concerning physical examinations.

23. Dr. Hines always requests the complete medical records from the owner's local veterinarian. Should none exist, when practicable, he attempts to find the most qualified veterinarian in the client's area and urges that they have their pet examined there. He has trusted veterinary colleagues around to the world and throughout the United States to whom

he refers these pets and asks that he receive a copy of the results of those examinations.

24. There are many instances in which it is possible for a veterinarian to give useful advice to a pet owner solely via electronic means and in which it would be needlessly expensive and time-consuming for the pet owner to bring the pet in for a physical examination.

25. Veterinarians and pet owners routinely make cost-benefit decisions about whether treatment options make financial sense for the pet owner, given the species at issue, its age, its relationship to the pet owner, etc. For example, a pet owner and veterinarian could legally and ethically euthanize a hamster rather than opt for expensive treatment even though such a decision would be completely illegal and unethical if it were a medical doctor and parent making a similar decision about a sick child.

26. Dr. Hines received, and continues to receive, five basic types of correspondence from readers of his website: (1) email from people in parts of the world where there is no ready access to trustworthy veterinary care and for whom Dr. Hines or someone like him is their only realistic option; (2) email from people in the United States and overseas who have received conflicting diagnoses from local veterinarians concerning a chronic problem and who would like Dr. Hines to offer his insights; (3) email from people in the United States and overseas who simply cannot afford conventional veterinary care and whose pets

would go without veterinary care in the absence of someone like Dr. Hines, who in such instances tries to find local veterinarians or local SPCAs able to treat the animal for free; (4) email from distressed people, frequently the elderly, who have dying pets and simply want a sympathetic ear; and (5) email from veterinarians who want to consult with Dr. Hines.

27. For example, Dr. Hines has corresponded with Scottish AIDS relief workers living in rural Nigeria about the cat that they brought with them from Scotland. This married couple does not have access to a qualified veterinarian and so they turned to Dr. Hines for help when they needed it. Without Dr. Hines, or someone like him who can provide qualified veterinary advice via the Internet, this couple's family pet would not have veterinary care.

28. In another example, a respected veterinary facility in New York City diagnosed a cat as having leg weakness due to a blood clot. Upon reviewing the cat's records, Dr. Hines found inconsistencies and suggested the cat be examined by a specific veterinarian at the Animal Medical Center in Manhattan. That veterinarian discovered that the problem was actually a leg fracture, which was successfully treated.

29. In another example, Dr. Hines helped a severely disabled New Hampshire resident. This man had lost both legs in an industrial accident and lived alone with his beloved dog. When the dog became ill, the man could not afford to pay for conventional veterinary care. Dr. Hines provided as much advice as

he could and, when it became apparent that the dog required more care than Dr. Hines could responsibly provide online, he used his personal contacts in the veterinary community to find a vet that would be willing to help this man in person at no cost.

30. In a last example, pet owners experience profound grief when their pets are incurably ill or die. Dr. Hines answers every email from grieving pet owners with a sense of empathy nurtured over a lifetime of service to people and their animals. Recently, he corresponded with a despondent elderly lady and, in addition to sharing kind words and pet photos, he explained how she could go about volunteering at an animal shelter to help other animals in need and work out her grief.

31. In November 2003, Dr. Hines decided to add a PayPal button to his website that would allow him to charge a flat fee of $8.95 for veterinary advice. Dr. Hines did this to screen out the minor requests and to identify the more serious ones, which he believed would enable him to do the most good. This fee also helped cover the cost of maintaining his website.

32. In September 2011, Dr. Hines raised the flat fee to $58, which he determined through trial and error produced the most interesting questions and gave him the opportunity to do the most good. Dr. Hines could charge more than a flat fee of $58 and make more money, but he does not want to.

33. When it appears to him that his fee is a burden to someone in need, he refunds it and charges

nothing. Dr. Hines tries to provide help to everyone who writes him, whether they can pay or not.

34. Dr. Hines had gross income from his website of $2,797.24 in 2011. This was all he made despite devoting most of his time to correspondence with animal owners across the country and around the world.

35. The most interesting cases, and the cases in which Dr. Hines believes he does the most good, involve a chronic health problem, miscommunication, and conflicting diagnoses from veterinarians in the pet owner's location. These pet owners come to Dr. Hines via the Internet to ask his advice about what they should do in light of the conflicting diagnoses. In many cases, Dr. Hines will consult veterinary journals and do independent research to try to guide the pet owner.

36. Dr. Hines has discovered many times that pets have been prescribed an inappropriate medication for their diagnosed condition or they have been prescribed the wrong dose of the correct medication. In such instances, Dr. Hines sends the pet's owner copies of the FDA guidelines and the manufacturer's dosage information. He always suggests that the pet owner return to his or her primary veterinarian and very respectfully request that the primary veterinarian review the original dosing instructions.

37. It is often the case that Dr. Hines cannot assist a pet owner because an in-person examination is necessary, because time is of the essence due to an

emergency, or because he feels that the pet's current veterinary care is excellent and most reliable under the circumstances. In such instances, Dr. Hines refunds any payments made to him, does not provide veterinary advice, and explains to the pet owner that providing advice would be inappropriate under the circumstances.

38. In many instances, Dr. Hines has instructed a pet owner to take his or her pet to a veterinary hospital immediately because Dr. Hines has recognized a serious or even life-threatening condition. Dr. Hines telephones these pet owners, rather than relying on email, and urges them to take their pets to the hospital at once.

39. Dr. Hines does not try to be a pet owner's primary veterinarian. He does not prescribe medication. His website contains a clear disclaimer explaining to pet owners the inherent limitations of providing veterinary advice via the Internet.

40. Dr. Hines has never, and would never, advise a pet owner to take any action with regard to their animal that would not otherwise be legal for the pet owner to take without Dr. Hines's advice.

41. To Dr. Hines's knowledge, no one has ever complained to him or to the State Board about veterinary advice that he has provided via the Internet.

42. Dr. Hines estimates that five percent or less of the pet owners with whom he communicates and to whom he offers veterinary advice are residents of

Texas. Forty-five percent are residents of the United States outside of Texas and the remainder are residents of foreign countries.

43. The pet owners whom Dr. Hines helps who are not residents of Texas have no connection at all with Texas and their animals have no connection with Texas.

Dr. Hines's Helpful Veterinary Advice Is a Crime

44. Under the Texas Veterinary Licensing Act, Dr. Hines is practicing "veterinary medicine" when he provides veterinary advice, whether for free or for compensation, to animal owners with whom he communicates online about their specific animals. The Act defines the "practice of veterinary medicine" as providing veterinary advice, holding oneself out as qualified and willing to provide veterinary advice, using the term "veterinarian" to describe oneself, or charging for veterinary advice. Tex. Occ. Code § 801.002(5). Dr. Hines's advice via his website meets all four separate criteria defining the "practice of veterinary medicine."

45. The crux of this case is the statutory requirement that veterinarians are permitted to render veterinary advice only in the context of a formal veterinarian-client-patient relationship. Tex. Occ. Code § 801.351(a). A veterinarian-client-patient relationship exists where the veterinarian assumes responsibility for medical judgments, possesses

adequate knowledge of the animal to provide sound advice, and is readily available for follow-up care. *Id*.

46. Texas law states that a veterinarian has "adequate knowledge" of an animal for the purposes of a veterinarian-client-patient relationship only if the veterinarian has recently examined the animal or visited the premises where it is kept. Tex. Occ. Code § 801.351(b).

47. In 2005, a statutory amendment clarified that the requirements of a formal veterinarian-client-patient relationship apply to veterinary advice communicated via the telephone or Internet by forbidding such a relationship from arising solely via electronic means. H.B. 1767, 2005 Leg., 79th Reg. Sess. (Tex. 2005) (codified as Tex. Occ. Code § 801.351I).

48. The 2005 statutory amendment does not require that the recent physical examination relate in any way to the subject of the veterinary advice in order for veterinary advice to be communicated lawfully via electronic means.

49. Violations of the Texas Veterinary Licensing Act are criminal offenses. Tex. Occ. Code § 801.504. *See also id.* §§ 801.451-61 (administrative penalties).

50. The Texas Veterinary Licensing Act does not make any exception for pet owners and their animals outside of Texas or outside of the United States to the requirement that Texas-licensed veterinarians may offer advice only after a recent physical examination.

51. The Texas Veterinary Licensing Act does not make any exception to the requirement of a recent physical examination for veterinary advice offered by Texas-licensed veterinarians in contexts in which there is no realistic alternative to the sort of online veterinary advice that Dr. Hines provides, such as when a pet owner has no access to veterinary care or cannot afford it.

52. For example, if a pet owner in Africa asks Dr. Hines for advice via the Internet because there is no ability to obtain qualified veterinary advice locally, the Texas Veterinary Licensing Act requires that pet owner and that pet to go entirely without veterinary care rather than be able to consult Dr. Hines.

53. The 2005 amendment to the Veterinary Licensing Act adopted a 2003 amendment to the Model Veterinary Practice Act of the American Veterinary Medical Association, which is the largest professional umbrella group for veterinarians in the United States.

54. When the American Veterinary Medical Association amended its Model Veterinary Practice Act in 2003, there was no evidence – and it has none now – that online veterinary advice was harming animals in Texas or anywhere else at rates beyond what would be expected in a brick-and-mortar practice setting.

55. When the American Veterinary Medical Association amended its Model Veterinary Practice Act in 2003, there was no evidence – and it has none

now – that online veterinary advice was resulting in consumer fraud in Texas or anywhere else at rates beyond what would be expected in a brick-and-mortar practice setting.

56. When the American Veterinary Medical Association amended its Model Veterinary Practice Act in 2003, there was no evidence – and it has none now – that online veterinary advice was resulting in public-health emergencies in Texas or anywhere else at rates beyond what would be expected in a brick-and-mortar practice setting.

57. When the American Veterinary Medical Association amended its Model Veterinary Practice Act in 2003, there was evidence that online veterinary information and advice, as well as the ability to obtain prescription medications for pets via the Internet, was causing pet owners to visit conventional brick-and-mortar veterinary practices less often.

58. The primary purpose and effect of the American Veterinary Medical Association's amendment to its Model Veterinary Practice Act was to protect the financial interests of conventional brick-and-mortar veterinary practices by making it more difficult for pet owners to consult with online sources of veterinary advice.

59. When Texas amended the Veterinary Licensing Act in 2005 to forbid veterinarians from creating a veterinarian-client-patient relationship solely by electronic means, it had no evidence that online veterinary advice was harming animals in

Texas or anywhere else at rates beyond what would be expected in a brick-and-mortar practice setting.

60. When Texas amended the Veterinary Licensing Act in 2005 to forbid veterinarians from creating a veterinarian-client-patient relationship solely by electronic means, it had no evidence that online veterinary advice was resulting in consumer fraud in Texas or anywhere else at rates beyond what would be expected in a brick-and-mortar practice setting.

61. When Texas amended the Veterinary Licensing Act in 2005 to forbid veterinarians from creating a veterinarian-client-patient relationship solely by electronic means, it had no evidence that online veterinary advice was resulting in public-health emergencies in Texas or anywhere else at rates beyond what would be expected in a brick-and-mortar practice setting.

62. When Texas amended the Veterinary Licensing Act in 2005 to forbid veterinarians from creating a veterinarian-client-patient relationship solely by electronic means, it had no evidence that online veterinary advice was adversely affecting the reputation of Texas's veterinary-licensing scheme or the perceived quality of care provided by Texas-licensed veterinarians.

The State Board Punishes Dr. Hines in an Arbitrary Enforcement Action

63. Ten years after Dr. Hines launched his website, the State Board informed him on March 19, 2012, that, based on an investigation of his website, he was in violation of the statutory prohibition on providing veterinary advice outside the context of a formal veterinary-client-patient relationship.

64. Dr. Hines was astonished to learn that he had been breaking the law by helping hundreds of pet owners across the country and around the world through his website.

65. Dr. Hines immediately stopped providing veterinary advice via electronic means because he feared punishment.

66. On June 13, 2012, the State Board met and determined that Dr. Hines had in fact violated Texas law by offering to provide veterinary advice without first performing a physical examination of the animal.

67. On June 26, 2012, the State Board sent Dr. Hines a proposed order that would punish him for providing veterinary advice solely via electronic means without first physically examining the animal. *See* Exhibit A.

68. The proposed order sought to impose a $1,000 fine, a one-year suspension of his Texas veterinary license, and a requirement that he retake the

jurisprudence portion of the veterinary-licensing exam. *Id*.

69. The statement of facts in the proposed order does not identify any person from anywhere in the world who complained to the State Board about any problem arising from Dr. Hines's rendering of veterinary advice via the Internet without performing a recent physical examination. *Id*.

70. The statement of facts in the proposed order does not identify any harm that any animal anywhere in the world suffered as a result of Dr. Hines's rendering of veterinary advice via the Internet without performing a recent physical examination. *Id*.

71. Veterinarians across Texas and the United States routinely offer veterinary advice solely via electronic means without ever having performed a physical examination of the animal in question. For example, in Austin, Texas, where the State Board is located, the morning show on the local Fox television station has a regular segment featuring a Texas-licensed veterinarian who takes calls from viewers and offers veterinary advice about their pets in a manner that is materially indistinguishable from what Dr. Hines has been doing with his website. Likewise, the deputy director of the Dallas Zoo and the Dallas Director of the Texas Veterinary Medical Association (both veterinarians) operate a radio program called Animals on the Air, during which they give veterinary advice to pet owners who call them on

the telephone, even though they do not physically examine any of the callers' animals.

72. Here are just some of the websites that provide veterinary advice without a recent physical examination:

a. http://www.justanswer.com/pet/;

b. http://allcreaturesnutrition.com/home;

c. http://www.tufts.edu/vet/nutrition/;

d. http://www.vmth.missouri.edu/clin.nu.htm;

e. http://www.petpoisonhelpline.com/;

f. http://www.mspca.org/vet-services/angell-poison-control/;

g. http://www.pearl.com/sip/veterinarians;

h. http://www.vetinfo.com/vets/answers/;

i. http://www.vetlive.com/;

j. http://www.wilnerveterinaryconsult.com/;

k. http://www.petmend.com/phone-internet-consultations.shtml;

l. http://petnutritionconsulting.com/;

m. http://www.vet.cornell.edu/FHC/camuti.cfm;

n. http://www.rainbowbridgevet.com/Phone.Consult.html

o. http://wizofpaws.net/laurie.coger-consultation.aspx;

p. http://www.naturalpetfamily.com/naturalpet/phone-consultations.html;

q. http://www.askariel.com/product-p/72.htm;

r. http://vet.tufts.edu/fhsa/veterinary.specialties/pain.clinic.html.

73. The State Board has no evidence that any animal anywhere in Texas or around the world has been harmed as a result of an animal owner relying on veterinary advice that was obtained solely via electronic means without a recent physical examination.

74. On July 6, 2012, Dr. Hines asked the State Board to extend the response date to the proposed order so that he could retain counsel and make an informed decision. This request was granted.

75. On September 27, 2012, Dr. Hines's counsel met with the State Board in an informal conference in which the State Board once again proposed punishment. The State Board reduced the proposed fine from $1,000 to $500, but kept the one-year suspension of his license, and the requirement that he retake the jurisprudence exam.

76. The State Board informed Dr. Hines in writing and through counsel that failure to accept the proposed punishment for his past speech on the

Internet would automatically result in formal administrative procedures for imposing punishment.

77. On November 1, 2012, Dr. Hines signed the State Board's order imposing the Board's punishment of Dr. Hines for his past speech on the Internet in the form of veterinary advice to pet owners whose pets he had not physically examined. *See* Exhibit B.

78. On March 25, 2013, at its next regular meeting, the State Board ratified the punishment of Dr. Hines and his punishment commenced. *Id*.

79. The State Board's punishment of Dr. Hines's past speech in the form of veterinary advice communicated via the Internet consisted of: (1) the suspension of his license for one year (although that suspension was probated, which means that he is still able to practice); (2) the requirement that he retake the jurisprudence portion of the veterinary licensing exam; and (3) the imposition of a $500 fine. *Id*.

80. On Tuesday, March 26, 2013, Dr. Hines retook the jurisprudence portion of the veterinary licensing exam. That same day, the State Board notified Dr. Hines that he passed the exam.

81. On Tuesday, March 26, 2013, Dr. Hines paid the $500 fine.

82. The probated suspension of his license will end on March 26, 2014. When the probated suspension ends on March 26, 2014, Dr. Hines's license will revert to its previous status and he will be authorized to practice veterinary medicine in Texas without

having to perform any further act or seek additional permission or licensure.

Dr. Hines Wants to Resume Providing Veterinary Advice via the Internet

83. Dr. Hines has stopped providing veterinary advice via his website. He has posted an explanation on his website stating that Texas law forbids him from providing online advice and that Texas has formally punished him for providing online veterinary advice in the past.

84. Dr. Hines receives regular inquiries from readers of his website who seek his veterinary advice. Many of these inquiries are from low-income Americans or people overseas who cannot afford or do not have access to qualified veterinarians.

85. Many of the animals that are the subject of these inquiries from readers across the country and around the world will get no veterinary care at all because Texas has forbidden Dr. Hines from providing such care, to the extent he can, via his website.

86. Some of the animals that are the subject of these inquiries from readers across the country and around the world are inadvertently being given an incorrect dose of a prescription medication by their primary veterinarians – an error that Dr. Hines sees frequently and is easily able to identify so that the pet owner can return to his or her primary veterinarian to have the dose adjusted. These animals will

continue to be given the wrong dose of medicine because Texas has forbidden Dr. Hines from communicating with pet owners about their animals, which in turn will prevent those pet owners from being able to communicate effectively with their primary veterinarians.

87. Animals and pet owners across the country and around the world who otherwise would have been able to benefit from Dr. Hines's veterinary advice via the Internet are harmed because Texas refuses to allow him to communicate his knowledge to willing pet owners via electronic means unless he has performed a physical examination, which is impossible as a practical matter due to the location of the animals and his physical disabilities.

88. Dr. Hines wants to continue his mission of helping animals and pet owners across the country and around the world by offering veterinary advice online via his website without a requirement that he first physically examine the animals.

89. Dr. Hines would resume providing veterinary advice online when his suspension expires if he could do so without being punished again by the State Board for communicating with pet owners across the country and around the world in the form of electronic veterinary advice without first physically examining the animals.

Injury to Dr. Hines

90. On March 25, 2013, the State Board punished Dr. Hines for rendering veterinary advice to pet owners in the United States and around the world without first physically examining those animals. That punishment consisted of a $500 fine, a probated one-year suspension of his license, and the requirement that he retake the jurisprudence portion of the veterinary licensing exam. *See* Ex. B.

91. The State Board punished Dr. Hines based solely on the fact that he engaged in prohibited communications with pet owners and not based on any evidence that Dr. Hines harmed an animal or defrauded a consumer.

92. The State Board punished Dr. Hines based on the content of his communications with pet owners in the United States and around the world. Specifically, Dr. Hines was punished for engaging in speech with pet owners in the form of veterinary advice whereas Dr. Hines would not have been punished for speech on other topics or for general speech about animals that was not presented as advice for a particular animal.

93. Dr. Hines wants to resume offering veterinary advice through solely electronic means, just as he did from February 2002 until March 2012, once the suspension of his license ends on March 26, 2014.

94. Dr. Hines will not resume offering veterinary advice through solely electronic means when his

suspension expires because he has an objectively reasonable fear of being investigated and punished again – and he expects his punishment to be more severe – based on the fact that the State Board punished him in the past.

95. This civil-rights lawsuit is not a challenge to the State Board's punishment of Dr. Hines for his communication in the past. Dr. Hines does not seek an order from this Court that would nullify or otherwise alter the State Board's punishment of Dr. Hines or compel the State Board to return the $500 fine.

96. Instead, this civil-rights action seeks only prospective declaratory and injunctive relief to prevent the State Board from being able to punish Dr. Hines again after his suspension expires on March 26, 2014.

97. But for Dr. Hines's objectively reasonable fear of additional and more severe punishment by the State Board, Dr. Hines would definitely resume offering advice for free via his website, emails, and the telephone when his suspension expires on March 26, 2014.

98. But for Dr. Hines's objectively reasonable fear of additional and more severe punishment by the State Board, Dr. Hines would definitely resume offering advice for compensation via his website, emails, and the telephone when his suspension expires on March 26, 2014.

CONSTITUTIONAL VIOLATIONS

Count I: First Amendment

Veterinary Advice Rendered Without Compensation

99. Dr. Hines re-alleges and incorporates each and every allegation set forth in paragraphs 1 through 98 of this Complaint as if fully set forth herein.

100. The Free Speech and Association Clauses of the First Amendment to the U.S. Constitution protect the right to speak and associate freely.

101. Dr. Hines's online and telephonic veterinary advice for which no compensation is received is pure speech and does not fall within any historically recognized exception to the First Amendment.

102. The application of the Texas Veterinary Licensing Act, as well as the attendant regulations and policies of the State Board, to Dr. Hines's electronic veterinary advice for which no compensation is required is a content-based restriction on his speech.

103. Defendants have no evidence that Dr. Hines's free electronic veterinary advice caused actual harm to any animal or person anywhere in the world.

104. Defendants have no evidence that any person anywhere in the world who received free online advice from Dr. Hines perceived him as being able to provide through his website the full range of

veterinary advice and services that a veterinarian is able to offer at a conventional veterinary office.

105. Defendants' censorship of Dr. Hines's free online veterinary advice – regardless of with whom he communicates and where on Earth that person is located, and regardless of whether that censorship will result in the animal getting no care – sweeps far more broadly than necessary to protect Texas's interests in the health of animals within Texas, the health and safety of the public within Texas, the protection of Texas consumers against fraud, and the need to ensure that the advice rendered by Texas-licensed veterinarians is competent.

106. Defendants' requirement that a veterinarian must always have conducted at least one recent examination – regardless of whether there is any connection between the examination and the advice being sought – before offering free advice does not advance Texas's interests in the health and safety of animals.

107. Defendants' requirement that a veterinarian must always have conducted at least one recent examination – regardless of whether there is any connection between the examination and the advice being sought – before offering free advice ignores that pet owners seeking veterinary advice are capable of making informed decisions about their pets and also ignores that those pet owners have a First Amendment interest in being able to hear advice that those pet owners deem valuable.

108. Defendants' censorship of Dr. Hines's free online veterinary advice violates the First Amendment.

109. Unless Defendants are enjoined, Dr. Hines will suffer irreparable harm in being unable to resume providing his free online advice when his license suspension expires.

Count II: First Amendment

Veterinary Advice Rendered for a Fee

110. Dr. Hines re-alleges and incorporates each and every allegation set forth in paragraphs 1 through 109 of this Complaint as if fully set forth herein.

111. The Free Speech and Association Clauses of the First Amendment to the U.S. Constitution protect the right to speak and associate freely.

112. Dr. Hines's online and telephonic veterinary advice for which compensation is received is pure speech and does not fall within any historically recognized exception to the First Amendment.

113. The application of the Texas Veterinary Licensing Act, as well as the attendant regulations and policies of the State Board, to Dr. Hines's online veterinary advice for compensation is a content-based restriction on his speech.

114. Defendants have no evidence that Dr. Hines's compensated online veterinary advice caused

actual harm to any animal or person anywhere in the world.

115. Defendants have no evidence that any person anywhere in the world who received compensated online advice from Dr. Hines perceived him as being able to provide, through his website, the full range of veterinary advice and services that a veterinarian is able to offer at a conventional veterinary office.

116. Defendants' censorship of Dr. Hines's compensated online veterinary advice – regardless of with whom he communicates and where on Earth that person is located, and regardless of whether that censorship will result in the animal getting no care – sweeps far more broadly than necessary to protect Texas's interests in the health of animals within Texas, the health and safety of the public within Texas, the protection of Texas consumers against fraud, and the need to ensure that the advice rendered by Texas-licensed veterinarians is competent.

117. Defendants' requirement that a veterinarian must always have conducted at least one recent examination – regardless of whether there is any connection between the examination and the advice being sought – before offering compensated advice does not advance Texas's interests in the health and safety of animals.

118. Defendants' requirement that a veterinarian must always have conducted at least one recent examination – regardless of whether there is any

connection between the examination and the advice being sought – before offering compensated advice ignores that pet owners seeking veterinary advice are capable of making informed decisions about their pets and also ignores that those pet owners have a First Amendment interest in being able to hear advice that those pet owners deem valuable.

119. The fact that Dr. Hines may be compensated for his veterinary advice does not strip that advice of First Amendment protection.

120. Defendants' censorship of Dr. Hines's compensated online veterinary advice violates the First Amendment.

121. Unless Defendants are enjoined, Dr. Hines will suffer irreparable harm in being unable to resume his compensated online activities when his license suspension expires.

Count III: Fourteenth Amendment Substantive Due Process

No Rational Basis for Requiring an In-Person Examination in Every Case

122. Dr. Hines re-alleges and incorporates each and every allegation set forth in paragraphs 1 through 121 of this Complaint as if fully set forth herein.

123. The substantive component of the Due Process Clause of the Fourteenth Amendment includes an unenumerated right to engage in one's chosen occupation without arbitrary and irrational interference.

124. As a Texas-licensed veterinarian, Dr. Hines has the authority under Texas law to exercise his professional judgment when rendering advice and treatment to animals.

125. It is arbitrary and irrational for Texas to presume that Dr. Hines is never capable of exercising appropriate professional judgment unless he has performed a recent physical examination of an animal.

126. It is arbitrary and irrational for Texas to forbid Dr. Hines from rendering veterinary advice to pet owners around the world and across the country who have no realistic alternative to Dr. Hines and whose animals will have to forego veterinary treatment altogether if Dr. Hines is forbidden from communicating with them.

127. It is arbitrary and irrational for Texas to forbid a qualified and duly licensed veterinarian from rendering advice to a pet owner in a jurisdiction outside of Texas in order to purportedly protect those animals because Texas has a negligible interest in protecting animals outside of Texas, particularly when those animals are not even in the United States and have absolutely no connection to the United States.

128. It is arbitrary and irrational for Texas to forbid a qualified and duly licensed veterinarian from rendering advice to a pet owner without charge because there is no consumer-protection interest at stake.

129. It is arbitrary and irrational to require that a veterinarian must have conducted at least one recent examination, regardless of the nature of that examination and regardless of whether there is any relationship between the examination and the type of advice presently being sought.

130. The primary purpose and effect of forbidding duly licensed and qualified Texas-licensed veterinarians from providing veterinary advice solely via electronic means is to protect the financial interests of brick-and-mortar veterinary practices, which is not a legitimate government interest.

131. Defendants' enforcement of the Texas Veterinary Licensing Act against Dr. Hines is an arbitrary and irrational abridgment of his liberty that violates the substantive component of the Due Process Clause of the Fourteenth Amendment.

132. Unless Defendants are enjoined, Dr. Hines will suffer irreparable harm in being unable to resume his online activities when his license suspension expires.

Count IV: Fourteenth Amendment Equal Protection

No Rational Basis for Treating All Veterinary Advice As Equally Requiring a Recent Physical Examination

133. Dr. Hines re-alleges and incorporates each and every allegation set forth in paragraphs 1 through 132 of this Complaint as if fully set forth herein.

134. The Equal Protection Clause of the Fourteenth Amendment forbids arbitrary and irrational statutory classifications.

135. It is arbitrary and irrational for Texas to treat a qualified and duly licensed veterinarian as though he or she is an unqualified and unlicensed layperson, and hence forbidden from rendering veterinary advice, in every instance in which a veterinarian concludes that it is professionally acceptable to provide veterinary advice without having performed a recent physical examination of an animal.

136. The primary effect of forbidding duly licensed and qualified Texas-licensed veterinarians from providing veterinary advice solely via electronic means is to protect the financial interests of brick-and-mortar veterinary practices.

137. Defendants' enforcement of the Texas Veterinary Licensing Act against Dr. Hines is an arbitrary and irrational abridgment of his liberty that

violates the Equal Protection Clause of the Fourteenth Amendment.

138. Unless Defendants are enjoined, Dr. Hines will suffer irreparable harm in being unable to resume his online activities when his license suspension expires.

PRAYER FOR RELIEF

A. For entry of judgment declaring that Tex. Occ. Code § 801.351; Tex. Occ. Code §§ 801.401-402; Tex. Admin. Code Title 22, Part 24, § 573.27 (Rule of Professional Conduct involving "Honesty, Integrity and Fair Dealing"); and related regulations and practices promulgated or carried out pursuant to the Texas Veterinary Licensing Act, are unconstitutional as applied and on their face to the extent that they prohibit Dr. Hines from providing veterinary advice solely through electronic means without first physically examining the animal that is the subject of that advice;

B. For entry of a permanent prospective injunction enjoining Defendants from enforcing these unconstitutional statutes, regulations, and practices against Dr. Hines and others similarly situated;

C. For an award of attorneys' fees and costs pursuant to 42 U.S.C. § 1988; and

D. For such further legal and equitable relief as the Court may deem just and proper.

Respectfully submitted,

/s/ Matthew R. Miller
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* *Motion for Pro Hac Vice filed*