No. _____

In The
Supreme Court of the United States

JOSHUA GRAY,

Petitioner,

v.

MAINE DEPARTMENT OF PUBLIC SAFETY,

Respondent.

On Petition For A Writ Of Certiorari To The Maine Supreme Judicial Court

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner Joshua Gray made comments on his Facebook page in which he criticized the conduct of employees of the Respondent Maine Department of Public Safety in a fatal shooting. When Gray later applied to that same department for a professional investigator's license, it denied his application, alleging that some of his Facebook comments criticizing its employees were inaccurate and that he thus lacked the "good moral character" required for licensure.

The question presented is:

Whether an occupational licensing board, consistent with the First Amendment, may deny an occupational license because of the content of an applicant's speech without satisfying strict scrutiny?

PARTIES TO THE PROCEEDING

Petitioner is Joshua Gray. Respondent is the Maine Department of Public Safety.

RELATED PROCEEDINGS

Gray v. Department of Public Safety, No. Ken-20-168, Maine Supreme Judicial Court. Judgment entered April 6, 2021.

Gray v. State, No. AP-19-49, Superior Court of Maine. Judgment entered May 22, 2020.

Gray v. State, No. AP-18-65, Superior Court of Maine. Judgment entered July 18, 2019.

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Joshua Gray petitions for a writ of certiorari to review the judgment of the Maine Supreme Judicial Court.

OPINIONS BELOW

The opinion of the Maine Supreme Judicial Court, Pet. App. 1a, is reported as *Gray v. Department of Public Safety*, 248 A.3d 212 (Me. 2021).

The judgments of the Superior Court of Maine, Pet. App. 22a & 133a are unreported. They are available electronically as *Gray v. State*, No. AP-19-49, 2020 WL 4517878 (May 22, 2020), and *Gray v. State*, No. AP-18-65, 2019 WL 4899250 (July 18, 2019).

The decisions of the Department of Public Safety are also unreported, but may be found at Pet. App. 26a and 144a.

JURISDICTION

The Maine Supreme Judicial Court entered its decision below on April 6, 2021. This Court, through its COVID-19 order of March 19, 2020, extended the deadline to file a petition for a writ of certiorari to 150 days from the date of the denial of rehearing. Gray timely files this petition and invokes this Court's jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The First Amendment to the United Constitution, made applicable to the states through the Fourteenth Amendment, provides that "Congress shall make no law abridging the freedom of speech." U.S. Const. amend. I.

STATEMENT

Petitioner Joshua Gray was denied an occupational license as a professional investigator because of statements he made on social media while discussing one of the most controversial issues in America today: police shootings. In the wake of a fatal police shooting in Maine that left two people dead, Gray criticized the conduct of Maine police officers. Based solely on a handful of alleged inaccuracies in Gray's criticisms, the Maine Department of Public Safety—the very agency whose officers Gray criticized—concluded that Gray lacked the undefined "good moral character" required for licensure. The Maine Supreme Judicial Court affirmed this decision, rejecting Gray's claim that denying him an occupational license based on the accuracy of his police criticisms violated his rights under the First Amendment.

That decision threatens the rights of tens of millions of Americans who require a government license to work in their chosen occupation. There are today hundreds of licensed occupations in the United States, representing nearly 20% of all American workers. Most

of these licensing laws have "good moral character" requirements. And most of these requirements, like Maine's, leave the judgment of whether an applicant has good moral character to the discretion of licensing officials. At the same time, with the rise of social media, licensing officials today have unprecedented access to license applicants' views on any number of controversial issues. As a result, the risk that officials will improperly consider those views in deciding whether to grant or deny an occupational license is greater than ever.

The decision below will only make things worse by explicitly empowering licensing boards to deny licenses to any disfavored speaker—and to their critics in particular—so long as they can find at least a handful of factual errors in their criticism. Worse, by deferring to the Department's view of which errors are big enough to undermine an applicant's moral character, the decision below makes challenging those denials all but impossible. These shortcomings would be clear First Amendment violations had Gray been sued for defamation or fired from government employment because of his speech. But because Gray was instead denied the right to earn a living in his chosen occupation, the court found no constitutional problem.

In doing so, the court decided a question of national significance in a way that split with the decisions of this Court. In *National Institute for Family and Life Advocates v. Becerra*, 138 S.Ct. 2361 (2018), this Court rejected the so-called "professional speech doctrine," under which some lower courts had applied

a reduced level of First Amendment protection to speech uttered by state-regulated "professionals." Instead, the Court reaffirmed that professional speech, however defined, has historically been subject to the same rules as any other content-defined category of speech. And those rules mean that when the government's regulation of a "profession" imposes burdens on speakers that are triggered by the content of their speech, those burdens are subject to strict scrutiny and presumptively unconstitutional. *Id.* at 2374 (collecting cases).

But *NIFLA* did not expressly resolve whether these principles apply with equal force to the government's decision to grant or deny an occupational license. As a result, as the court below observed, "[t]he pertinent standard for determining whether a regulation governing entry into a profession violates the First Amendment has become a subject of some confusion throughout the United States." Pet. App. 11a.

This Court should grant certiorari to reaffirm the central holding of *NIFLA* that there is no "professional speech" exception to the First Amendment, and to make clear that the content-based burdens occupational licensing laws place on speech are subject to the same level of scrutiny as all other content-based burdens in First Amendment law.

I. Petitioner's Speech & Initial Application Denial

Joshua Gray is a Massachusetts private investigator who wishes to expand his business into Maine. He also writes about what he perceives as abusive police practices. Relevant here, he has written extensively, and critically, about the 2017 deaths of 18-year-old Ambrosia Fagre and 25-year-old Kadhar Bailey at the hands of Maine police, a subject that was widely covered in local media. App. 41–131a; *see also* Nok-Noi Ricker, *'They killed an innocent girl': Family, friends question why police shot 18-year-old passenger*, Bangor Daily News (Feb. 25, 2017), https://bangordailynews.com/2017/02/25/news/mid-maine/mourners-ask-why-police-fatally-shot-driver-passenger/.

In 2018, Gray applied to the Maine Department of Public Safety for a professional investigator license. To qualify for a professional investigator license, an applicant must have "demonstrated good moral character." 32 M.R.S. § 8105(4). The Chief of the Maine State Police may refuse to issue a license if an applicant has "[e]ngaged in conduct that evidences a lack of ability or fitness to discharge the duty owed by the licensee to the client or the general public" or "a lack of knowledge or an inability to apply principles or skills to carry out the practice" of professional investigation. *Id.* § 8113(6).[1]

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[1] The Chief of Police may also deny a license if the applicant has violated "standards of acceptable professional conduct adopted by rule" by the Chief of the Maine State Police. *Id.*

The Chief of the Maine State Police issued the decision of the Department denying Gray's application on August 31, 2018. App. 144a. The sole basis for the denial was the Department's conclusion that Gray had made "materially false" statements on social media about the shooting.

The Department identified four categories of allegedly inaccurate statements. These included:

- Gray's statements about the identity of the officer who shot Amber Fagre, whom Gray at first misidentified. When Gray later learned that he was incorrect—an Attorney General's report concluded that the officer Gray identified had shot and killed Kadhar Bailey, but another officer on the scene had shot Amber Fagre—he posted a correction on his Facebook page. Pet. App. 4a.
- Gray's supposition that one of the officers involved in the shooting, who was then off duty, was "possibly drunk" at the time of the shooting. That officer later swore that he had "not consume[d] alcohol" on the day of the incident or at any time "during my life," Pet. App. 4–5a, though, besides this testimony, the record contains no evidence one way or the other.

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§ 8113(11); *see id.* § 8103(1-B). But no standards of conduct have been adopted by rule, so the only applicable standards are those provided by statute.

- Gray's statement that one of the officers involved in the shooting had been the subject of multiple internal affairs investigations. The commander of the Department's Office of Professional Standards (OPS), formerly the Office of Internal Affairs, reported that only one complaint had been made against the officer, which Gray initiated. Pet. App. 4–5a.
- Gray's characterization of the shooting as police having "murdered," "executed," or "killed" Amber Fagre. Pet. App. 5a.

The Department concluded that these statements about its officers brought into question Gray's "ability to competently investigate and then report investigative findings with accuracy, objectivity, and without bias." Pet. App. 144a. As a result, the Department denied Gray's application, claiming that Gray lacked the requisite "competency and fitness of character" to act as a professional investigator in Maine. *Id.*

II. Proceedings Below

Gray appealed the initial denial of his application to the Maine Superior Court. That court held that "the Department could not deprive Gray of a license for having expressed himself on social media unless the statements he made fell outside the protection of the First Amendment." Pet. App. 3–4a. The Superior Court then remanded the case to the Department to determine whether there was clear and convincing evidence that Gray made his statements on social media with

knowledge that the statements were false or with reckless disregard of their truth or falsity—the familiar "actual malice" standard announced in *New York Times Co. v. Sullivan*, 376 U.S. 254, 279–80 (1964).

On remand, the Department issued a second decision denying Gray's application, finding that Gray's allegedly erroneous statements had been made with actual malice. Pet. App. 144a. Alternatively, the Department argued that the actual malice standard did not apply because "even if Gray had the right to say the things he did, he was not entitled to a professional license if he did not meet the competency and character standards for a professional investigator." Pet. App. 5–6a.

The Department concluded that Gray had "reported erroneous, uninvestigated conclusions on social media, placing behind those conclusions 'the authority of the reputation of [Gray's] business' and of 'the private investigator license of the State of Massachusetts.'" Pet. App. 6a. Based on this speech, and nothing else, the Department also found that Gray "lacks the basic competency and requisite good moral character" to hold a professional investigator's license. *Id.*

Gray again appealed to the Superior Court. Because the appeal involved review of an administrative agency's decision, the court reviewed the Department's decision only for abuse of discretion, error of law, or findings not supported by the evidence. Under this standard, "[t]he party seeking to overturn an administrative decision must demonstrate that no competent

evidence supports the agency's decision and that the record compels a contrary result." Pet. App. 23a (cleaned up). Applying this deferential standard, the court found that the Department's finding of actual malice was supported by the administrative record, and thus affirmed the denial of Gray's application. Pet. App. 24a.

Gray then appealed to the Maine Supreme Judicial Court, which affirmed, though on different grounds. As the Department advocated, the court "conclude[d] that actual malice need not be shown" and that "the licensing standards as applied to Gray" need only be reviewed with "intermediate scrutiny." Pet. App. 3a. The court reasoned that it could apply intermediate—rather than strict—scrutiny because Gray was denied a license under a law "that does not explicitly target speech but incidentally burdens it." Pet. App. 16a. Further, in applying that standard, the court did not conduct an "independent examination of the record." Pet. App. 17a. Instead, the court held it would "accept the facts found by the Department" unless they were "unsupported by evidence in the record." *Id.*

Applying this standard, the court below agreed with the Department's finding that Gray had made "false" statements of "fact," including, specifically, Gray's statement that the Department's employees had "murdered," "executed," or "killed" a woman whom it is undisputed was shot to death by police. Pet. App. 18a. As a result, the court also agreed with the Department's conclusion that Gray "demonstrated a lack of capacity to distinguish between fact and opinion." Pet.

App. 19a. The court then found that the denial of a license on this basis satisfied intermediate scrutiny because it "does not chill any speech other than that which would, for a professional investigator, violate standards of conduct in [the] profession." Pet. App. 20a. The court thus affirmed the denial of Gray's application.

Gray then timely filed this petition.

REASONS FOR GRANTING THE PETITION

I. The Decision Below Empowers Licensing Boards Nationwide to Punish Their Critics Free from Judicial Scrutiny.

The Maine Supreme Judicial Court held that Gray may be shut out of his chosen occupation based on a handful of allegedly inaccurate statements about one of the most controversial issues in America today: police shootings. If allowed to stand, that decision sets a precedent that threatens to chill the speech of tens of millions of Americans.

Three trends show what is at stake: the explosive growth of occupational licensing, the nearly universal inclusion of vague "good moral character" requirements in licensing laws, and the widespread adoption of social media.

1. First, consider the staggering growth of occupational licensing from the last half of the 1900s to the present. Though licensure was once confined to just

a few professions, there are today hundreds of occupations licensed in at least one state. These licensed occupations range from doctors and lawyers at one end of the spectrum to shampooers and fortune tellers at the other. *See* Nev. Rev. Stat. Ann. § 644A.375 (licensing "shampoo technologists"); Mass. Gen. Laws Ann. ch. 140, § 185I (licensing fortune tellers).

As the number of occupations subject to licensure has grown, so too has the percentage of the American workforce that requires a license to work. In the 1950s, only 5% of American workers required a license from the government to work in their chosen occupation. Today, that number is nearly 25%, and "lines of work requiring an occupational license are among the fastest growing types of employment in the United States." Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 Harv. J.L. & Pub. Pol'y 209, 210 (2016).

In other words, around 30 million Americans need a government permission slip before they may earn a living in their chosen occupation, and that number will only continue to grow. This places tremendous power in the hands of licensing boards—often controlled by members of the licensed occupation—to decide who may join their ranks. And as this Court has recognized, that power alone creates the "risk of market participants' confusing their own interests with the State's policy goals." *N. C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 510 (2015).

2. The vagueness and ubiquity of "good moral character" requirements in occupational licensing laws compound the danger that licensing boards will abuse their power as gatekeepers to the marketplace.

First, as this Court recognized in its earliest examinations of "good moral character" requirements, "the term, by itself, is unusually ambiguous." *Konigsberg v. State Bar*, 353 U.S. 252, 262–63 (1957). "It can be defined in an almost unlimited number of ways[,] for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer." *Id.* at 263. "Such a vague qualification, which is easily adapted to fit personal views and predilections, can be a dangerous instrument for arbitrary and discriminatory denial of the right to practice [an occupation]." *Id.*

This danger is particularly acute in the context of administrative decisions, when government discrimination based on speech is harder to smoke out. Elena Kagan, *Private Speech, Public Purpose: The Role of Governmental Motive in First Amendment Doctrine*, 63 U. Chi. L. Rev. 413, 459–60 (1996). When "an official denies a license to a speaker under a statute specifying no standards[,] in the absence of an admission, a court cannot easily determine whether the official based her decision on the content of the speech (let alone whether she allowed impermissible motive to infect the decision)." *Id.* at 459. Indeed, that is why this Court has

long been hostile to licensing laws that place standardless discretion in the hands of administrative officials.[2]

Experience with good moral character requirements shows that this hostility is justified. Historically, good moral character requirements have been used to exclude a wide array of disfavored people from the marketplace. These groups include "not only former felons, but women, minorities, adulterers, radicals, and bankrupts." Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 Yale L.J. 491, 493 (1985). And moral character requirements have long "placed a price on nonconformist political commitments." Marcus Ratcliff, *The Good Character Requirement: A Proposal for a Uniform National Standard*, 36 Tulsa L.J. 487, 504 (2000).

Consider *Konigsberg*. In that case, Raphael Konigsberg "wrote a series of editorials for a local newspaper" harshly criticizing "among other things, this country's participation in the Korean War, the actions and policies of the leaders of the major political parties, the influence of 'big business' in American life, racial discrimination," and various decisions of this Court. 353 U.S. at 268. The state bar of California cited those

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[2] *See*, *e.g.*, *Saia v. New York*, 334 U.S. 558, 560 (1948) (facially invalidating law that gave police chief standardless discretion to permit or prohibit use of loud speakers); *see also Lovell v. City of Griffin*, 303 U.S. 444, 450–51 (1938) (same; leaflets); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150–51 (1969) (same; parades); *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 769–70 (1988) (same; newsracks).

editorials as evidence of Konigsberg's bad moral character.

This Court properly rejected California's argument, holding that Konigsberg's editorials, though harsh in their criticism, simply reflected "the ordinary give-and-take of political controversy." *Id.* These are views that citizens have a right to express. And "[g]overnment censorship" of those views "can no more be reconciled with our national constitutional standard of freedom of speech and press when done in the guise of determining 'moral character,' than if it should be attempted directly." *Id.* at 269.

Yet today opportunities for such censorship abound. That is because "[a]lmost all [licensed] occupations require good moral character or the functional equivalent." Deborah L. Rhode, *Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings*, 43 Law & Soc. Inquiry 1027, 1032 (2018). One recent nationwide study of good moral character requirements in occupational licensing laws found that all states require good moral character for at least some occupations, with a nationwide average of 49 occupations per jurisdiction. Bruce Robert Elder & Laurie Swinney, *The Good Moral Character Requirement for Occupational Licensing*, 43 Mgmt. Rsch. Rev. 717, 727 (2020). New Jersey alone imposes the requirement on 119 occupations. *Id.*

But though good moral character requirements are ubiquitous, definitions of what constitutes good or

bad character are not. The same study found that more than 70% of the states include the good moral character requirement but fail to define the requirement. *Id.* at 730. The result is that what Justice Black observed in *Konigsberg* remains true today: good moral character is largely a matter of administrative discretion. 353 U.S. at 263.

And that discretion can vary wildly. The New York bar, for example, has found that a bar applicant lacked good moral character because of the size of his student loan debt. *In re Anonymous*, 875 N.Y.S.2d 925 (App. Div. 2009) (per curiam). The District of Columbia bar, by contrast, has found that a bar applicant had sufficiently good moral character to be admitted despite having 40 felony and misdemeanor convictions, including convictions for check fraud and theft. *See In re Burke*, 775 S.E.2d 815, 817–18 (N.C. 2015). And here, straining discretion to the opposite extreme, the Department found Gray lacked good moral character based on just a handful of allegedly inaccurate statements about a matter of public concern.

Given the almost limitless discretion licensing boards hold when assessing moral character, it is unsurprising that one Michigan law school recently advised its students to avoid criticizing the bar's response to the COVID-19 pandemic, citing the potential for retaliation by the state's character and fitness committee. Artem M. Joukov & Samantha M. Caspar, *Who Watches the Watchmen? Character and Fitness Panels and the Onerous Demands Imposed on Bar Applicants*, 50 N.M. L. Rev. 383, 403 (2020). After all, unless a

licensing board admits to having considered such impermissible factors—as the California bar did in *Konigsberg*—it is impossible to know whether those factors made a difference. Faced with that danger, millions of Americans who want to enter licensed occupations may decide that it is simply not worth it to voice their political criticisms, particularly if those criticisms are aimed at their future licensing boards.

3. For those who do speak up, though, the risk of unconstitutional retaliation by state licensing boards is magnified by the rise of social media. In the 1950s, few people besides immediate friends and family were likely to know any particular license applicant's controversial political views. The California bar, for example, knew Raphael Konigsberg's only because he managed to get his views published in the newspaper.

Social media has changed all of that. Today, hundreds of millions of Americans have begun using social networking websites such as Facebook, Twitter, and Instagram. One recent survey found that 69% of American adults used Facebook, while another 23% used Twitter. Pew Research Center, *Social Media Use in 2021* (Apr. 7, 2021), https://www.pewresearch.org/internet/2021/04/07/social-media-use-in-2021/. And the amount of information social media users generate is staggering. As far back as 2013, the Library of Congress was preserving half a billion new tweets each day and had amassed an archive of more than 170 billion tweets. *See* Laurel Wamsley, *Library of Congress Will No Longer Archive Every Tweet*, NPR (Dec. 26, 2017), https://www.npr.org/sections/thetwo-way/2017/12/26/

573609499/library-of-congress-will-no-longer-archive-every-tweet.

These online records present a trove of potentially controversial statements—easily searchable by keyword—that occupational licensing boards may consider in deciding whether to grant or deny a license. Indeed, occupational licensing officials have already started taking notice. *See*, *e.g.*, *In re Traywick*, 860 S.E.2d 358, 359 (S.C. 2021) (suspending lawyer for six months based on "incendiary" Facebook posts about George Floyd and women with tattoos).

The decision below exacerbates these problems. That's because many of those controversial tweets and posts will also contain misstatements of fact. "This comports with the common understanding that some false statements are inevitable if there is to be an open and vigorous expression of views in public and private conversation, expression the First Amendment seeks to guarantee." *United States v. Alvarez*, 567 U.S. 709, 718 (2012) (citing *New York Times Co. v. Sullivan*, 376 U.S. 254, 271–72 (1964)). Yet under the decision below, these inevitable errors provide a perfect cover for viewpoint-based discrimination.

This case reflects that danger precisely. Gray spoke out on a matter of public concern—indeed, a matter that has risen to nationwide prominence: police shootings. Based on alleged errors in Gray's expressed views on this single incident, the Maine Department of Public Safety concluded that Gray lacked the requisite good moral character to be a private investigator. In

other words, the Department has adopted "[a] rule compelling the critic of official conduct to guarantee the truth of all his factual assertions," *Sullivan*, 376 U.S. at 279, as a condition of entry into his chosen occupation. And the dangers of this rule are clear:

> Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.

Id.

This Court should grant certiorari, because the 30 million other Americans who hold occupational licenses deserve to know whether, they, too, are at similar risk of being deprived of their livelihood based on stray erroneous comments in their criticism of public officials.

II. The Decision Below Conflicts with Decisions of This Court.

By reviewing Gray's claim with only intermediate scrutiny and by deferring to the Department's factual findings, the decision below conflicts with this Court's precedent. *See* Sup. Ct. R. 10(c) ("[A] state court . . . has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conficts with relevant decisions of this Court.").

1. The court below held that when the Department denied Gray an occupational license because of what he said in his Facebook posts, it imposed only an incidental burden on Gray's speech subject to intermediate scrutiny. The Department's real target, the court found, was Gray's unprofessional conduct, which was merely assessed by examining what he said:

> Here, the licensing standards, requiring good character and competency in investigating matters, do not on their face prohibit or constrain speech. The licensing statutes incidentally affect an applicant's speech, however, because determining whether an applicant meets the requirements of good character and competency may depend—as it does here—upon the applicant's communications.

Pet. App. 16–17a (citations omitted).

This Court expressly rejected that same argument in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). There, the plaintiffs—lawyers and nonprofit groups—wanted to provide expert advice on legal dispute resolution to certain designated terrorist groups, but were prohibited from doing so by a federal ban on providing "material support" to the groups. *Id.* at 7–8. When the plaintiffs challenged the law as an unconstitutional burden on speech, the Department of Justice admitted that whether the law applied depended on what the plaintiffs wished to communicate to the groups. Yet the government argued that the law "should nonetheless receive intermediate scrutiny

because it *generally* functions as a regulation of conduct." *Id.* at 27.

This Court rejected that argument, noting that it "runs headlong into a number of [this Court's] precedents." *Id.* Those cases establish that in as-applied challenges such as this one, the appropriate level of scrutiny is not determined by the general purpose of the challenged law. Instead, what matters is whether "as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Id.* at 28. If it does, that application of the law is a content-based burden on speech subject to strict scrutiny.

Here, Maine's licensing law for professional investigators, as applied to Gray, is a content-based burden on speech. The Department denied Gray's application only because of his statements about a controversial police shooting, some of which the Department judged to be false. If Gray had said different things—things the Department judged to be true—he would not have been denied a license. But whether or not the Department's judgment was reasonable, the truth or falsity of speech is a content-based distinction. *See*, *e.g.*, *United States v. Alvarez*, 567 U.S. 709 (2012). Thus, Gray's claim should have been reviewed with strict scrutiny.

By failing to do so, the court below broke with this Court's decision in *NIFLA* and reintroduced all of the confusion that decision was intended to dispel. Before *NIFLA*, lower federal courts had, for decades, been unsure about whether the First Amendment applied at

all to occupational licensing laws and the speech they regulated. Starting in the 1980s, "[s]ome Courts of Appeals [began] recogniz[ing] 'professional speech' as a separate category of speech that is subject to different rules." *NIFLA*, 138 S. Ct. at 2371. For the most part, these courts cited Justice Byron White's concurrence in *Lowe v. SEC*, in which he argued that occupational licensing laws regulate "the conduct of the profession," and any burden they impose on speech is subject only to rational-basis review. 472 U.S. 181, 233 (1985) (White, J., concurring).

But *NIFLA* rejected that argument, noting that it would "give[ ] the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." 138 S. Ct. at 2375. Instead, *NIFLA* affirmed that—with few exceptions—speech related to licensed occupations is fully protected by the First Amendment. And that means that when an application of an occupational licensing law is triggered by speech of a particular content, that application of the law must be subject to strict scrutiny and upheld only if it is narrowly tailored to serve a compelling government interest.

Other lower courts interpreting *NIFLA* agree. In *Vizaline LLC v. Tracy*, the Fifth Circuit observed that "*NIFLA* rejected the proposition that First Amendment protection turns on whether the challenged regulation is part of an occupational-licensing scheme." 949 F.3d 927, 932 (5th Cir. 2020). In *Otto v. City of Boca Raton*, the Eleventh Circuit stressed that, under *NIFLA*, "the government carries the burden of proof

and, because it bears the risk of uncertainty, ambiguous proof will not satisfy the demanding standard it must meet." 981 F.3d 854, 868 (11th Cir. 2020). And in *Pacific Coast Horseshoeing School, Inc. v. Kirchmeyer*, the Ninth Circuit held that, under *NIFLA*, if a professional regulation burdened more than just commercial advertising, it would have to satisfy strict scrutiny. 961 F.3d 1062, 1073–74 (9th Cir. 2020). In short, no other lower court has departed so dramatically from this Court's decision in *NIFLA* as did the court below.

The upshot of the court's refusal to apply strict scrutiny is to accord expansive powers to licensing boards that have been denied to all other arms of government. For example, the government as employer cannot retaliate against speakers without satisfying demanding scrutiny. *See Pickering v. Bd. of Educ. of Twp. High Sch. Dist. 205*, 391 U.S. 563, 574 (1968) ("[A]bsent proof of false statements knowingly or recklessly made by him, a teacher's exercise of his right to speak on issues of public importance may not furnish the basis for his dismissal from public employment."). Nor can the government as zoning administrator. *See*, *e.g.*, *Baker v. Coxe*, 230 F.3d 470, 475 (1st Cir. 2000). This is true even though a speaker has no independent constitutional entitlement to a government job or a zoning variance.[3]

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[3] *See Bd. of Cnty. Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) (observing that this Court has "long since rejected Justice Holmes' famous dictum, that a policeman 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman' ") (citing *McAuliffe v. Mayor of New Bedford*, 29 N.E. 517 (Mass. 1892) (Holmes, J.)).

The decision below, however, means that licensing boards have unusual powers (and licensed "professionals" have unusually circumscribed rights) under the First Amendment. That is the opposite of what *NIFLA* held, and that conflict merits this Court's review.

2. The Maine Supreme Judicial Court's decision to defer to the Department's factual findings also conflicts directly with this Court's precedent. In *Bose Corp. v. Consumers Union of U.S., Inc.*, this Court held that "in cases raising First Amendment issues an appellate court has an obligation to make an independent examination of the whole record in order to make sure that the judgment does not constitute a forbidden intrusion on the field of free expression." 466 U.S. 485, 499 (1984) (cleaned up).

This Court has undertaken just this sort of hard look at the record when reviewing the actions of occupational licensing boards. In *Ibanez v. Florida Department of Business & Professional Regulation*, 512 U.S. 136 (1994), for example, this Court overturned the decision of a state accountancy board to punish a lawyer's truthful use of the credentials Certified Public Accountant and Certified Financial Planner in her advertising material. That punishment, this Court held, violated the First Amendment because the Board had "not demonstrated with sufficient specificity that any member of the public could have been misled by Ibanez' constitutionally protected speech or that any harm could have resulted from allowing that speech to reach the public's eyes." *Id.* at 138–39. To satisfy that standard, the Board was required "to point to [some]

harm that [was] potentially real, not purely hypothetical," *id.* at 146. This showing requires real evidence; "'[m]ere speculation or conjecture' will not suffice; rather the State 'must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Id.* When the Board's "bare" record did not meet this standard, this Court did not hesitate to find its actions unconstitutional.

Indeed, this Court has undertaken this sort of hard look at the record when specifically considering an occupational licensing board's finding that an applicant lacked good moral character. In *Konigsberg*, this Court closely scrutinized the evidence that the California bar contended made Konigsberg morally unfit to practice law. When this inquiry failed to find "some authentic reliable evidence of unlawful or immoral actions reflecting adversely upon him," *id.* at 273, the Court again did not hesitate to hold the state bar's actions unconstitutional.

But the court below did not conduct this independent review or hold the Department to this evidentiary standard. Indeed, the court expressly denied any obligation to conduct "an independent examination of the record," and held that it would "accept the facts found by the Department unless they [were] unsupported by evidence in the record." Pet. App. 17a.

These holdings are in obvious and irreconcilable conflict. Had one of the officers Gray criticized sued him for defamation, the court below would have had to find that there was clear and convincing evidence that

the allegedly defamatory statements were actionable statements of fact made with actual malice and not, for example, expressions of opinion or hyperbole. But because Gray was instead denied the right to work in his chosen occupation, those presumptions are turned on their head, with the Department receiving the benefit of every doubt.

This Court should grant certiorari to reaffirm that laws regulating professionals are no different from any other law that may, in some applications, be triggered by speech. And this Court should clarify that these ordinary First Amendment principles apply with full force when the government denies an occupational license based on an applicant's speech.

III. This Case Is a Good Vehicle in Which to Resolve These Issues.

This case is a good vehicle for the Court to answer the questions presented for two reasons. First, it provides the Court with an opportunity to clarify specifically how its decision in *NIFLA* applies to the state's decision to grant or withhold an occupational license, an issue not directly addressed in that case, but which is of profound nationwide importance.

Second, the case comes to this Court with a clean record, and the Court's answer to the question presented would almost certainly be outcome determinative. The Department of Public Safety made no effort to defend its rejection of Gray's application under strict scrutiny. And this is the rare case in which the

government admits that it denied an occupational license just because of the applicant's speech. These facts present an exceptionally clean opportunity to address these issues with no ambiguity, and to provide the lower courts with the guidance they need.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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