No. 22-0427

In the Supreme Court of Texas

TEXAS DEPARTMENT OF INSURANCE AND CASSIE BROWN, IN HER OFFICIAL CAPACITY AS COMMISSIONER OF THE TEXAS DEPARTMENT OF INSURANCE,

Petitioners,

v.

STONEWATER ROOFING, LTD. CO.,

Respondent.

AMICUS CURIAE BRIEF OF INSTITUTE FOR JUSTICE IN SUPPORT OF RESPONDENT AND AFFIRMANCE

On Petition for Review from the
Seventh Court of Appeals – Amarillo
Cause No. 07-21-00016-CV

Benjamin A. Field*
(D.C. Bar No. 1046902)
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
Email: bfield@ij.org
**Pro Hac Vice* admission pending

Arif Panju
(TX Bar No. 24070380)
INSTITUTE FOR JUSTICE
816 Congress Ave. Suite 960
Austin, TX 78701
Tel: (512) 480-5936
Fax: (512) 480-5937
Email: apanju@ij.org

Counsel for *Amicus Curiae*
Institute for Justice

IDENTITTY OF PARTIES, AMICUS, AND COUNSEL

The parties and their counsel are correctly identified in the parties' briefs. Amicus Curiae, the Institute for Justice, is represented by the following counsel:

Arif Panju
(TX Bar No. 24070380)
816 Congress Ave. Suite 960
Austin, TX 78701
Tel: (512) 480-5936
Fax: (512) 480-5937
Email: apanju@ij.org

Benjamin A. Field*
(D.C. Bar No. 1046902)
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
Email: bfield@ij.org

**Pro Hac Vice* Admission Pending

TABLE OF CONTENTS

PAGE

INDEX OF AUTHORITIES

PAGE(S)

CASES

CONSTITUTIONAL PROVISIONS

CODES

RULES

OTHER AUTHORITIES

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

Founded in 1991, the Institute for Justice (IJ) is a nonprofit, public-interest legal center dedicated to defending the essential foundations of a free society: freedom of speech, private property rights, and economic and educational liberty. As part of its mission to defend freedom of speech, IJ has represented clients across the country challenging laws that restrict a wide array of occupational speech, including teletherapy, parenting advice, dietary advice, veterinary advice, and teaching trade skills. For this Court to adopt Petitioners' arguments would represent a severe threat to the constitutional protections afforded to these and countless other types of occupational speech. Instead, IJ believes, the court of appeals got this case right, and it correctly applied the First and Fourteenth Amendments to vindicate free speech rights.

[1] Pursuant to Rule 11(c) of the Texas Rules of Appellate Procedure, amicus confirms that no person or entity other than amicus made a monetary contribution to the preparation or filing of this brief.

TO THE HONORABLE SUPREME COURT OF TEXAS:

The Institute for Justice respectfully submits this amicus curiae brief in support of Respondent, pursuant to Texas Rule of Appellate Procedure 11. The Court should grant review because this case presents an important First Amendment issue that is the subject of a circuit split among federal appellate courts, *see infra* Part I, and the parties agree that the Court should decide this case on the merits, *see* Pet. for Review 1; Resp. to Pet. for Review 2. For the reasons below, the Court should affirm.

SUMMARY OF ARGUMENT

As it comes to this Court, this case presents a simple question: When a person is at her job, and she talks or writes to another person, is that speech? The court of appeals and Respondent Stonewater Roofing, Ltd. Co., offer the intuitive answer: "Yes," speech is speech, including when spoken as part of an occupation. But Petitioners (collectively, the "Government") say that the answer is "No." In their view, if the State enacts an occupational-licensing law, it can transform talking and writing into non-expressive conduct and thereby strip communication of any First Amendment protection.

The answer to the question is vitally important to the countless Americans and Texans who speak and write as part of their occupation. Ever more jobs involve communicating and advising, ranging from counselors to nutritionists to advice columnists to tour guides. All these people rely on the First Amendment to protect them, and IJ has represented them (and will continue doing so) in lawsuits to vindicate their speech rights. In those cases, the would-be censors usually argue—as the Government does here—that speaking and writing aren't actually speech when they intersect with occupational regulations. Rather, the censors argue, the speech is transformed into non-expressive conduct without any First Amendment protection. If that's right, then governments' power to ban speech is limited only by the imagination of censorious legislators in passing speech codes framed as occupational regulations.

But it's not right, and the Seventh Court of Appeals was correct to reject the Government's sweeping proposition. On the complaint that governs at this stage, this case involves *only* communication: employees of a roofing company *talking* to employees of insurance companies. As the court below correctly explained, "any conduct under the statute

consists of communicating" and "necessarily and inextricably involves speech." *Stonewater Roofing, Ltd. v. Tex. Dep't of Ins.*, 641 S.W.3d 794, 802 (Tex. App.—Amarillo 2022, pet. filed). The Government wants to ban that speech based on who is speaking (a roofing company's employees) and the topic they're discussing (insurance coverage), which makes the law at issue a content-based speech restriction. *See id.* Under decades of U.S. Supreme Court (and also Fifth Circuit) precedent, that means heightened First Amendment scrutiny applies and places the burden on the government to present evidence that its speech restrictions serve a sufficiently important governmental interest and are appropriately tailored to that interest. Whether the Government can do so is a question for summary judgment or trial. For now, it's sufficient to say that the court of appeals was correct to hold the Government to that burden of proof and to allow the case to proceed. This Court should affirm.

Our brief proceeds in three parts. First, we illustrate the importance of this issue and the wide range of occupational speech that depends on proper application of the First Amendment. Second, we explain that decades of U.S. Supreme Court precedent compel the conclusion that the court of appeals reached, and we elaborate the dire

consequences that would follow if the Government's incorrect view prevailed. Third, we briefly offer some thoughts defending the court of appeals' holding that Stonewater's vagueness claim should proceed, too.

ARGUMENT

I. COUNTLESS TEXANS, AND AMERICANS MORE BROADLY, SPEAK AS PART OF THEIR OCCUPATIONS, AND THEY RELY ON THE FIRST AMENDMENT'S PROTECTIONS.

In the modern information-age economy, ever-greater numbers of Americans (and certainly Texans) earn their living by speaking. They have sincere conversations, give honest advice, write, or draw—activity that is wholly speech. If the position urged by the Government here prevails, and it is allowed to reclassify speech as "professional conduct" at a whim, *see* Gov't Br. 1, 8, then all these people would be left open to unbridled censorship. In Part II below, we address why that result is inconsistent with decades of First Amendment precedent. But first, we illustrate the importance of this issue with examples of the vast array of people who speak for their occupation and whose rights are on the line, many of them drawn from IJ's own litigation. If the Government's view of the First Amendment here prevails, their speech would be imperiled.

1. Perhaps most relevant to this Court, IJ clients in the Fifth Circuit have successfully vindicated their First Amendment rights to speak as part of their occupation. These two cases also illustrate just how varied occupational speech can be.

In Mississippi, entrepreneurs provided computer-generated drawings to community banks based on existing legal descriptions. *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 928 (5th Cir. 2020). Even though this amounted to simple reading and drawing, the state surveying board sought to ban it and characterized the activity as non-expressive conduct: the "practice of surveying." *Id.* at 928–929. The Fifth Circuit held that the entrepreneurs' speech *was* entitled to First Amendment protection, explaining that the U.S. Supreme Court has "rejected the proposition that First Amendment protection turns on whether the challenged regulation is part of an occupational-licensing scheme" and that "First Amendment scrutiny does not turn on whether censored speakers are professionals, licensed or not." *Id.* at 932–933.

In Texas itself, a retired veterinarian offered advice about pet care over the phone or by email. *Hines v. Quillivan*, 982 F.3d 266, 269 (5th Cir. 2020). He got into tele-veterinary advice after ending his traditional

veterinary practice due to age and physical limitations, but he continued to write articles about pet health on his website and received requests for advice from readers. *Id.* As here, Texas officials sought to regulate his speech as if it were non-expressive conduct: "the practice of veterinary medicine." *Id.* (internal quotation marks and brackets omitted). The district court accepted that view, but the Fifth Circuit reversed. It held that full First Amendment scrutiny applied to the challenged regulations insofar as the government sought to restrict speech (i.e., the tele-veterinarian's verbal and written advice). *See id.* at 272 (citing *Vizaline*, 949 F.3d at 931, 934). And on remand, the district court held that because the speech restriction, as applied to the plaintiff, "represents a content-based regulation of his speech, it is subject to strict scrutiny." *Hines v. Quillivan*, No. 1:18-CV-155, 2021 WL 5833886, at *4 (S.D. Tex. Dec. 9, 2021).

2. Outside Texas and its immediate neighbors, many others who speak while engaged in all sorts of occupations have successfully asserted their First Amendment rights against government speech restrictions.

In California, an experienced farrier—for the non-equine-inclined, that's someone who cares for horse hooves—offered classes on

horseshoeing, but his ability to speak to students and teach this trade skill was blocked by state postsecondary-education regulations. *See Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1065 (9th Cir. 2020). The government argued that it regulated "only non-expressive conduct" in the form of "the execution of [an] enrollment agreement." *Id.* at 1068. The Ninth Circuit rejected that argument and held that First Amendment protections applied, irrespective of the government's labeling game. It explained that "if legislation regulates the content of the speech—when the government regulates who may speak or what we may say—then the law is ordinarily reviewed under 'strict scrutiny.'" *Id.* Because "vocational training is speech," and California's rules "regulat[ed] what kind of educational programs different institutions can offer to different students," that "regulation squarely implicate[d] the First Amendment," *id.* at 1069, and "heightened scrutiny" must be applied, *id.* at 1073.

In Charleston, South Carolina, guides wanted to offer specialized tours of the city that consisted entirely of talking to their clients and storytelling, but they ran headlong into a tour-guide licensing regime. *See Billups v. City of Charleston*, 961 F.3d 673, 676, 678 (4th Cir. 2020).

The Fourth Circuit rejected the city's argument that tour-guide speech could be recharacterized as the non-expressive conduct of "selling tour guide services." *Id.* at 683. The court explained that the regulation "undoubtedly burdens protected speech, as it prohibits unlicensed tour guides from leading paid tours—in other words, speaking to visitors," and thus impinged on an "activity which, by its very nature, depends upon speech." *Id.* The court struck down the offending ordinance because it could not satisfy even intermediate First Amendment scrutiny. *See id.* at 685. (This followed a similar case in Washington, D.C., which held that a restriction on D.C. tour guides triggered First Amendment scrutiny and so required the government to provide "evidence supporting the burdens the challenged regulations impose" and to satisfy "narrow tailoring." *Edwards v. District of Columbia*, 755 F.3d 996, 998, 1009 (D.C. Cir. 2014).)

In New York, a non-profit seeks to train non-lawyers to provide free legal advice in the sorts of debt-collection actions where unsophisticated litigants cannot afford to hire lawyers and often default. *See Upsolve, Inc. v. James*, 604 F. Supp. 3d 97, 102–103 (S.D.N.Y. 2022), *appeal pending*, No. 22-1345 (2d Cir.). The district court held that New York

could not shut down the non-profit's speech as some non-expressive "abstract practice of law." *Id.* at 112. Rather, the unauthorized-practice-of-law rules, as applied to the non-profit, triggered First Amendment strict scrutiny because the speech restriction was both content-based—the non-profit's "violation of the law 'depends on what they say' to their clients," *id.* at 114 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010))—and speaker-based, by "favoring some speakers over others," *id.* at 115 (quoting *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 140 S. Ct. 2335, 2347 (2020) (plurality opinion)). The court rejected the government's argument that the First Amendment lost force merely because the restrictions at issue were part of a licensing regime. *See id.* at 115–117. Because the regulation failed strict scrutiny as applied to the plaintiffs, the court enjoined it. *See id.* at 120–121.

The First Amendment has triumphed over the same sorts of government arguments in many other cases encompassing a broad array of occupations. That includes "end-of-life doulas" outside Sacramento who talk with clients and their families to record wishes for how a dying person would like to be remembered and to plan home funerals. *See Full Circle of Living & Dying v. Sanchez*, No. 2:20-cv-01306, 2023 WL 373681,

at *3–4, *17–18 (E.D. Cal. Jan. 24, 2023). A professional counselor in Virginia who provides remote talk therapy by video across state lines. *See Brokamp v. District of Columbia*, No. 20-CV-3574, 2022 WL 681205 (D.D.C. Mar. 7, 2022). And even a nationally syndicated parenting-advice columnist whom the Kentucky Board of Examiners of Psychology wanted to regulate for the practice of psychology. *See Rosemond v. Markham*, 135 F. Supp. 3d 574, 578 (E.D. Ky. 2015).

3. Although some courts have accepted some version of the Government's relabeling-speech-as-conduct approach, those examples only serve to illustrate how broadly censorship may creep if courts do not hold the line in giving occupational speech full First Amendment protection.

For example, the Fourth Circuit—by applying a version of the Government's analysis here (and since expressly abrogated by the Supreme Court)—permitted censorship so broad that it allowed banning fortune-telling under a municipal licensing regime for soothsayers. *See Moore-King v. County of Chesterfield*, 708 F.3d 560 (4th Cir. 2013), *abrogated by Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018). And last year, the Eleventh Circuit allowed the

government to censor a diet coach who wanted to talk to clients about health advice by demanding she be licensed as a nutritionist, accepting the government's argument that it could relabel the coach's speech as the non-expressive "practice of dietetics." *See Del Castillo v. Sec'y, Fla. Dep't of Health*, 26 F.4th 1214, 1225–26 (11th Cir. 2022) (emphasis omitted). If governments can impose a licensing regime and thereby prohibit pure speech as mundane as advising New Year's resolutioners to lay off the sweets, or telling someone that a tall-and-handsome love interest may be coming their way, then there really is no limit to permissible censorship.

In other cases, courts have weighed speech restrictions on some of the most contentious political issues of the day in the guise of occupational licensing. For instance, federal appellate courts have split on whether counselors have First Amendment protections to speak to clients about changing their sexual orientation or gender identity. *Compare Otto v. City of Boca Raton*, 981 F.3d 854, 859 (11th Cir. 2020) (striking down a ban on such speech under First Amendment strict scrutiny), *with King v. Governor of N.J.*, 767 F.3d 216 (3d Cir. 2014) (upholding speech restrictions under First Amendment intermediate scrutiny), *and Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022)

(upholding speech restrictions on ground that they did not trigger First Amendment scrutiny at all). Courts have split over whether doctors have First Amendment rights to dissent from prevailing professional opinion about COVID-19 treatments despite licensing-authority dictates to the contrary. *Compare McDonald v. Lawson*, No. 8:22-cv-01805, 2022 WL 18145254 (C.D. Cal. Dec. 28, 2022) (holding such speech did not trigger First Amendment scrutiny), *with Hoeg v. Newsom*, No. 2:22-CV-01980 WBS AC, 2023 WL 414258 (E.D. Cal. Jan. 25, 2023) (holding such speech is protected and granting preliminary injunction), *and Stock v. Gray*, No. 2:22-CV-04104, 2023 WL 2601218 (W.D. Mo. Mar. 22, 2023) (similar for pharmacists). And a regulation on how doctors speak to their patients about firearm ownership fractured the en banc Eleventh Circuit, which ultimately overturned a panel opinion to hold that such speech by licensed physicians is indeed protected by the First Amendment. *See Wollschlaeger v. Governor, Fla.*, 848 F.3d 1293 (11th Cir. 2017) (en banc). Without opining on whether the government could muster evidence to justify these sorts of controversial regulations on a full post-discovery record, we note these cases simply to highlight that speech as part of an occupation is often at the heart of the Free Speech Clause's concerns.

* * *

The above examples reflect two things. First, they illustrate the diversity of occupations in which people speak and write as part of their job and thereby rely on the First Amendment's protections against undue government intrusion. Those people give advice about pet care or legal difficulties or funeral options, draw maps, teach job skills, give tours, pen advice columns, or even read fortunes. And these are just a slice of the many, many more services that are fundamentally speech.

Second, these examples reflect that would-be censors trying to limit speech almost always invoke the same argument the Government is making to this Court now. The activity at issue may consist entirely of speaking or writing, regulators acknowledge, but they say courts should blind themselves to that reality by relabeling that speech as non-expressive "conduct."

II. THE COURT OF APPEALS' RULING WAS CORRECT AND MANDATED BY PRECEDENT, WHEREAS THE GOVERNMENT'S POSITION WOULD EVISCERATE FUNDAMENTAL FIRST AMENDMENT RIGHTS.

The Government's alchemical argument to recast speech as conduct has been rejected by the U.S. Supreme Court, which has firmly held that speech does not become non-expressive conduct just because it's part of a

profession or occupation. That conclusion follows from decades of precedent protecting occupational speech of many varieties. The court below correctly recognized this. In contrast, the Government's position before this Court not only contradicts that precedent; it would also radically transform and curtail the First Amendment's protections for speech of all sorts by giving regulators a permission slip to censor simply by implementing an occupational licensing regime.

A. The Government's Position Has Been Firmly Rejected By The U.S. Supreme Court.

1. In *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*), the Supreme Court rejected the view of some lower courts—and essentially the view that the Government proposes here—that "'professional speech'" is "a separate category of speech that is subject to different rules" than usual First Amendment scrutiny. 138 S. Ct. 2361, 2371 (2018). Those lower courts erroneously believed that the First Amendment provides fewer protections for "professionals . . . who provide personalized services to clients and who are subject to a generally applicable licensing and regulatory regime." *Id.* (internal quotation marks omitted); *cf.* Gov't Br. 8 (articulating this erroneous view). As the Supreme Court explained in rebuffing that position, "[s]peech is not

unprotected merely because it is uttered by 'professionals.'" *Id.* at 2371–72 (internal quotation marks omitted). Indeed, the Court specifically rejected the argument central to the Government's position here that regulators have carte blanche to regulate speech just because it is part of a profession that "involves personalized services and requires a professional license from the State." *Id.* at 2375. In the Court's words, that position would, impermissibly, "give[] . . . States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *Id.*

To be sure, as the Government's brief points out (at 15), *NIFLA* did nothing to upset the principle that "States may regulate professional *conduct*, even though that conduct incidentally involves speech." 138 S. Ct. at 2372 (emphasis added). But that observation simply reflects the truism that the First Amendment protects speech rather than non-expressive conduct. In other words, professionals don't get some special *extra* constitutional protection compared to non-professionals, but they don't get *less* protection. The example of professional conduct that the Court gave was obviously not speech: "perform[ing] an abortion." *Id.* at 2373. In regulating something like that, which is indisputably non-

expressive conduct, it was permissible to incidentally compel some speech to the extent necessary to "obtain informed consent" for the actual surgery because such regulation "is 'firmly entrenched in American tort law.'" *Id.* (quoting *Cruzan v. Director, Mo. Dep't of Health*, 497 U.S. 261, 269 (1990)).

There is no non-expressive conduct at issue in this case that is remotely like performing an abortion (and certainly no "firmly entrenched" tradition of compelling speech for purposes of an insurance-adjusting scheme that is less than two decades old). To the contrary, as the court of appeals explained, "any conduct" at issue "under the statute consists of communicating"; the Government "points to nothing that a public insurance adjuster does that is simply conduct"; and "[t]he business of public insurance adjusting necessarily and inextricably involves speech." 641 S.W.3d at 802. The Government's present descriptions of the activities it seeks to regulate also comprise only speech: "communicat[ing]," "inquir[ing] about claim status," "answer[ing] . . . questions," and "negotiating." Gov't Br. 5, 11 (internal quotation marks and emphases omitted). Labeling these instances of speech "*actions*" or "*act[ing]*," *id.* at 11, does nothing to change the fact that the

scheme at issue here "regulates speech as speech," *NIFLA*, 138 S. Ct. at 2374. It thus triggers heightened First Amendment scrutiny.

2. *NIFLA* did not come out of nowhere. In fact, its conclusion was foreordained by *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), a case that involved providing legal advice and which applied strict scrutiny even to a law addressing perhaps the most compelling of all governmental interests: protecting national security against terrorism. In *Humanitarian Law Project*, the federal government advocated what the Court considered an "extreme position[]" (similar to what the Government advocates here): that its material-support-for-terrorism statute could be used to censor speech without being treated as a speech regulation, simply because the statute *also* applied to non-expressive conduct. *Id.* at 25–26.

The Court firmly rejected that proposition. The human-rights-group plaintiffs "want[ed] to speak" to designated terrorist organizations, "and whether they may do so under [the challenged statute] depend[ed] on what they sa[id]." *Id.* at 27. In such cases, even if the law *also* covers conduct beyond speech, First Amendment strict scrutiny applies whenever the "conduct triggering coverage under the statue consists of

communicating a message." *Id.* at 28 (citing *Cohen v. California*, 403 U.S. 15, 16 (1971)). If that's true for a law meant to combat terrorism, it's certainly true for a law that appears geared at protecting the public-insurance-adjuster industry from competition.[2]

3. Not only did *NIFLA* and *Humanitarian Law Project* directly reject the idea that governments can transform speech into non-expressive conduct by means of definition, that maneuver is inconsistent with the broad sweep of the Supreme Court's First Amendment jurisprudence against content-based speech regulation. "Content-based laws . . . are presumptively unconstitutional" and subject to strict scrutiny. *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). That means that "a government . . . 'has no power to restrict expression because of its message, its ideas, its subject matter, or its content.'" *Id.* (quoting *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 95 (1972)).

---

[2] The Court in *Humanitarian Law Project* also dismissed the United States' suggestion "in passing" that the plaintiffs' speech was integral to criminal conduct. 561 U.S. at 27 n.5. The Government's similar argument here is equally "passing," *see* Gov't Br. 12, and should get the same treatment. Nowhere does the Government explain the non-expressive criminal conduct to which Stonewater's speech is supposedly integral. It's just again redefining speaking as the supposedly non-expressive conduct of "acting," *see id.*, precisely the argument rejected in *NIFLA* and *Humanitarian Law Project*.

Professional licensing requirements that restrict speech, like the one at issue in this case, are plainly content-based because they "appl[y] to particular speech because of the topic discussed," *id.*—here, topics related to insurance coverage. In other words, to know whether speech runs afoul of these licensing laws requires " 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred." *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)). To allow governments to evade First Amendment scrutiny of content-based speech regulations simply by labeling them licensing requirements would not only run afoul of *NIFLA* and *Humanitarian Law Project*, but decades of First Amendment precedent against regulating speech because of its subject matter.

Seeking to evade the constitutional prohibition on content-based speech restrictions, the Government baldly asserts (at 11, 13) that the regulations at issue in this case do not restrict a particular "subject matter" or "the content of speech." That is plainly false. Stonewater's employees could talk to insurance companies about the weather or the Cowboys' Super Bowl prospects without legal jeopardy. The moment the

conversation veers into its clients' insurance coverage, however, Stonewater risks running afoul of the law. The subject matter and content of its speech is entirely what determines whether the speech is illegal.

The Government suggests that isn't so because there is no specific "message the State is seeking to squash." Gov't Br. 11; *see also id.* at 17–18. But that confuses the constitutional rule against *content*-based speech restrictions with the more specific rule against *viewpoint*-based speech restrictions. The latter is "a 'more blatant' and 'egregious form of content discrimination'" that is effectively never permissible. *Reed*, 576 U.S. at 168–169 (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). "But it is well established that '[t]he First Amendment's hostility to content-based regulation extends not only to restrictions on particular viewpoints, but also to prohibition of public discussion of an entire topic.'" *Id.* at 169 (alterations in *Reed*) (quoting *Consolidated Edison Co. of N.Y. v. Public Serv. Comm'n*, 447 U.S. 530, 537 (1980)). Simply put: "A law that is content based on its face is subject to strict scrutiny regardless of the government's benign motive, content-

neutral justification, or lack of animus toward the ideas contained in the regulated speech." *Id.* at 165 (internal quotation marks omitted).[3]

B. The Court Of Appeals' Ruling Is Supported By Decades Of Precedent Protecting Occupational Speech.

NIFLA and *Humanitarian Law Project* were the natural extension of decades of Supreme Court precedents holding that speech is speech for First Amendment purposes, even if it is spoken in the course of commerce or while practicing a profession. This is clear from the Court's many, many cases applying heightened scrutiny to both "commercial speech" (really, the Court's way of saying "advertising") and speech by lawyers, doctors, and other professionals.

1. For half a century, the Supreme Court has been clear that "commercial speech"—that is, even speech that "does no more than propose a commercial transaction"—is protected by the First Amendment. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 762, 770 (1976) (internal quotation marks

[3] The Government asserts here (at 10) that its speech regulations are meant to ameliorate conflicts of interest. But that is simply the government interest that will be part of the heightened scrutiny analysis. IJ expresses no view on how this case may resolve on remand when a complete record is developed and First Amendment scrutiny is applied. But such scrutiny must be applied and the Government put to the burden of showing, with evidence, that its speech regulations serve a sufficiently important interest and are sufficiently narrowly tailored to survive that scrutiny.

omitted). *Virginia State Board of Pharmacy* held a law unconstitutional that restricted truthful advertising of pharmaceutical prices, firmly rejecting the proposition that the First Amendment's protections are limited only to political discourse. *Id.* at 762. The Court explained that a "consumer's interest in the free flow of commercial information . . . may be as keen, if not keener by far, than his interest in the day's most urgent political debate." *Id.* at 763. Such "free flow of commercial information" was "indispensable" because, under our "free enterprise economy, the allocation of our resources in large measure will be made through numerous private economic decisions," and so "[i]t is a matter of public interest that those decisions, in the aggregate, be intelligent and well informed." *Id.* at 765. The Court rejected paternalistic justifications for censorship that would have "kept" consumers "in ignorance" for their own good, explaining that the First Amendment instead commands "open . . . channels of communication." *Id.* at 770.

In the decades since, the Court has consistently reaffirmed that speech does not lose First Amendment protection simply because it is connected to commerce. Thus, in the case that established the intermediate-scrutiny test for purely commercial speech, the Court held

unconstitutional a ban on a power company's advertising. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557, 571 (1980).

The most thorough explanation came in *Sorrell v. IMS Health Inc.*, where the Court struck down a law restricting disclosure of pharmacy records about doctor prescribing. The Court explained that "[s]peech in aid of pharmaceutical marketing . . . is a form of expression protected by the Free Speech Clause of the First Amendment." 564 U.S. 552, 557 (2011). The challenged law impermissibly "disfavor[ed] marketing, that is, speech with a particular content," and also "disfavor[ed] specific speakers, namely pharmaceutical manufacturers." *Id.* at 564. Such content- and speaker-based restrictions triggered heightened First Amendment scrutiny, and the Court explained that "[l]awmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Id.* at 565–566. The very same could be said about the laws at issue here, which restrict speech by disfavored speakers (contractors and roofers) based on the content of their speech (topics related to insurance coverage).

Sorrell also firmly rejected the government's effort to recharacterize speech as non-expressive conduct just because it occurs in the commercial

context. The Court explained that, "[w]hile the burdened speech results from an economic motive, so too does a great deal of vital expression." *Id.* at 567. The challenged law triggered heightened scrutiny because—like the Texas laws at issue here—it was "directed at certain content and is aimed at particular speakers." *Id.* "An individual's right to speak is implicated"—and thus heightened scrutiny triggered—"when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated." *Id.* at 568 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984)). This case is the same, just swapping information about roof repairs for information about pharmaceutical prescribing.

To be clear, as pleaded at this stage, this is largely not a commercial-speech case. The U.S. Supreme Court has defined "commercial speech" as "speech which does no more than propose a commercial transaction." *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 422 (1993) (internal quotation marks omitted). That definition may encompass Stonewater's advertising to consumers, but it does not reach its communications with insurers. Even so, the Supreme Court's commercial-speech cases show the robust First Amendment

protection afforded even to mere advertising. And it cannot be the case that advertising for insurance adjustment would receive First Amendment protection, but the speech that actually comprises insurance adjusting receives no protection.

2. Just as the First Amendment protects speech affected by a commercial interest generally, it specifically protects speech by professionals in the practice of their occupation. The Supreme Court has been just as clear about that, for even longer than its application of the First Amendment to purely commercial advertising speech.

In occupational-speech cases like this one, the would-be censors invariably analogize to lawyer speech, as if lawyers have no free-speech rights. The Government here follows that playbook and leans heavily on the lawyer analogy and on predicting that the sky will fall if the First Amendment applies to lawyers' speech. *See* Gov't Br. 8, 12–13, 24. This is curious because case after case at the U.S. Supreme Court has held that lawyers' speech is, in fact, protected by the First Amendment. Sixty years ago, the Court applied heightened First Amendment scrutiny and struck down a ban on public-interest lawyers soliciting prospective litigants. *NAACP v. Button*, 371 U.S. 415, 444–445 (1963). The Court

explained that "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights," *id.* at 439, and that "[b]road prophylactic rules in the area of free expression are suspect," *id.* at 438. That restriction was unconstitutional because there was "no showing of serious danger," *id.* at 443, and no evidence of "substantive evils flowing from the [plaintiff's] activities, which c[ould] justify the broad prohibitions . . . imposed," *id.* at 444. In other words, real strict scrutiny applied to lawyers' speech.

In later cases, the Court went on to hold that blanket bans on attorney advertising were impermissible under heightened scrutiny. *Bates v. State Bar of Ariz.*, 433 U.S. 350, 383 (1977). And, in extending *Button*, it held that it was unconstitutional for a state to punish a lawyer for soliciting clients for public-interest organizations by mail, explaining that such a speech restriction "must withstand the exacting scrutiny applicable to limitations on core First Amendment rights." *In re Primus*, 436 U.S. 412, 432 (1978) (internal quotation marks omitted). Even when the government itself funded lawyers for indigent clients, it could not "prohibit advice or argumentation" on disfavored topics. *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547–549 (2001). And, as discussed

above, a federal court recently recognized the First Amendment rights of non-lawyers to give legal advice to individuals facing debt-collection actions. *See Upsolve*, 604 F. Supp. 3d at 102–103; *supra* pp. 9–10.

To be sure, governments may be able to regulate lawyer speech within government-created forums like courts, to regulate speech acts that have the independent legal force of a non-expressive action, or to impose ex post punishment under malpractice laws with a longstanding historical pedigree. *See, e.g.*, Paul Sherman, *Occupational Speech and the First Amendment*, 128 Harv. L. Rev. F. 183, 193 (2015). And some restrictions on the content of lawyer speech do satisfy heightened First Amendment scrutiny. For example, a ban on in-person solicitation of paying clients—involving literal ambulance-chasing to solicit a client at the hospital—survived intermediate scrutiny. *See Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 449–450, 457–468 (1978). And, as already discussed, a ban on providing legal advice to designated terrorist organizations survived strict scrutiny, *see Humanitarian Law Project*, 561 U.S. at 27–28, 40, as has speech substantially likely to prejudice a jury trial in a case where the lawyer represents a party, *see Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1075–76 (1991). In these cases,

however, the Court treated speech by lawyers as speech subject to First Amendment protection, not as non-expressive conduct simply because the speech was uttered by a professional and a licensing scheme was involved.

It's probably unsurprising that lawyers have spawned much of the litigation about occupational speech restrictions, but the Supreme Court has applied the same rigorous First Amendment scrutiny to other professions, too. Certified public accountants' free-speech rights to solicit clients in person triumphed under intermediate scrutiny. Under that standard, the government was required (and failed) to "demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree"; and, moreover, that "burden is not satisfied by mere speculation or conjecture." *Edenfield v. Fane*, 507 U.S. 761, 763, 767–777 (1993). Requiring professional charitable solicitors to obtain a license both triggered strict scrutiny and flunked it. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801–802 (1988). *Virginia Board of Pharmacy* upheld pharmacists' speech rights over the government's argument that allowing them to speak about prices would undermine their "professionalism." 425 U.S. at 766–770. And, of course, *NIFLA*

vindicated the speech rights of medical professionals and counselors, noting in particular that "[d]octors help patients make deeply personal decisions" that merit full First Amendment protection. 138 S. Ct. at 2374 (quoting *Wollschlaeger*, 848 F.3d at 1328 (W. Pryor, J., concurring)). *NIFLA* went on to discuss the analogous value of "'an uninhibited marketplace of ideas'" among professionals in occupations as varied as "nurses," "lawyers and marriage counselors," and "bankers and accountants." *Id.* at 2374–75 (quoting *McCullen*, 573 U.S. at 476).

In short: If the First Amendment applies with full force to lawyers who "have historically been officers of the courts," *Primus*, 436 U.S. at 422 (internal quotation marks omitted), and to other long-regulated professions like doctors, it certainly applies to people caught up in a licensing regime as comparatively novel as Texas's public-insurance-adjusting scheme.

C. Adopting The Government's Position Here Would Have Severe Practical Consequences, Including Opening A Split With The Fifth Circuit And Dramatically Curtailing The Speech Rights Of Texans.

Compare *NIFLA*, *Humanitarian Law Project*, and the decades of precedents protecting commercial speech and professionals' speech with the Government's position here. It contends that restricting the content

of roofers' and contractors' speech "do[es] not implicate First Amendment standards" at all. Gov't Br. 1. In the Government's view, when it "regulates . . . professions"—and even if the regulation censors what people may say based on the content of the speech or the identity of the speaker—that "regulates conduct, not speech." *Id.* at 8. As the court of appeals put it, it is irrelevant to the Government's position that all the relevant "conduct under the [challenged] statute consists of communicating." 641 S.W.3d at 802.

Not only does the Government's position starkly contradict the U.S. Supreme Court, it is also irreconcilable with the Fifth Circuit's recent application of those precedents. As elaborated above, *see supra* pp. 6–7, that court has explained that "*NIFLA* makes clear that occupational-licensing provisions are entitled to no special exception from otherwise-applicable First Amendment protections" and that "First Amendment scrutiny does not turn on whether censored speakers are professionals, licensed or not." *Vizaline*, 949 F.3d at 931, 933; *accord Hines*, 982 F.3d at 272. Directly contradicting the Government's arguments to this Court, the Fifth Circuit held in a very similar pleading-stage posture that "[w]hatever its regulatory interests might turn out to

be," a government's regulatory "requirements are not wholly exempt from First Amendment scrutiny simply because they are part of an occupational-licensing regime." *Vizaline*, 949 F.3d at 934. To embrace the Government's position, then, would contradict the federal courts in Texas. Texans who speak as part of their jobs and end up in a federal forum will enjoy the full protection of the First Amendment, while in state courts they could be exposed to content- and speaker-based censorship subject only to rational-basis review. *See* Gov't Br. 9–10.

Not only would adopting the Government's position violate U.S. Supreme Court precedent and create an untenable split with federal courts in Texas, it would have the effect of virtually stripping Texans of their free-speech rights in state courts. If the Government is right that "professional-conduct regulations . . . are not subject to First Amendment scrutiny," Gov't Br. 8, then it can effectively "choose the protection that speech receives" by "simply imposing a licensing requirement," *NIFLA*, 138 S. Ct. at 2375. After all, any speech could be characterized as being, in some sense, the "conduct" of some occupation.

To draw out the staggering implications, take the Government's view that it may transform *talking* about insurance coverage into

non-expressive conduct by labeling such speech to be " '*act[ing]*' as public insurance adjusters." Gov't Br. 11 (alterations in original). With that neat trick, university professors' lectures can be turned into "acting as instructors." Politicos' advice to candidates becomes "acting as political consultants." Writing a novel is "acting as an author." You can even play the same game to implicitly overrule U.S. Supreme Court precedents like *NIFLA* and *Button* by labeling pregnancy guidance to be "acting as a counselor" or public-interest legal advice to be "acting as a lawyer."

If the Government's view of the First Amendment prevailed, no speech would be safe so long as a legislature is willing to arm censors with a relevant occupational-licensing law. To guard against such abuse is exactly why, "[g]enerally, speakers need not obtain a license to speak" under the First Amendment. *Riley*, 487 U.S. at 802; *accord Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 167 (2002). And it is why courts have refused to allow governments to "evade the First Amendment's ordinary presumption against content-based speech restrictions by saying that the plaintiffs' speech is actually conduct," for " 'the enterprise of labeling certain verbal or written communications "speech" and others "conduct" is unprincipled and

susceptible to manipulation.' " *Otto*, 981 F.3d at 861 (quoting *Wollschlaeger*, 848 F.3d at 1308); *accord King*, 767 F.3d at 228 ("To classify some communications as 'speech' and others as 'conduct' is to engage in nothing more than a 'labeling game.' " (quoting *Pickup v. Brown*, 740 F.3d 1208, 1218 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing en banc))).

III. THE COURT OF APPEALS CORRECTLY RECOGNIZED THE DANGER OF VAGUE SPEECH REGULATIONS.

The most important issue in this case is the scope of the First Amendment's protections, but we conclude briefly with three quick points in defense of the court of appeals' ruling on the Fourteenth Amendment vagueness issue.

First, the vagueness issue goes hand in hand with the free-speech concerns raised by this case. "[W]here a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of those freedoms" because "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned v. City of Rockford*, 408 U.S. 104, 109 (1972) (internal quotation marks, alterations, and footnotes omitted); *accord Reno v. ACLU*, 521 U.S. 844, 871–872 (1997)

("The vagueness of [content-based speech] regulation raises special First Amendment concerns because of its obvious chilling effect on free speech."); *Comm'n for Law. Discipline v. Benton*, 980 S.W.2d 425, 438 (Tex. 1998) (similar).

Thus, a vague law that governs speech can have just as strong a censorious effect as a speech prohibition—if not a greater effect—because it makes people *self*-censor, perhaps more than necessary, out of fear of crossing hazy lines and triggering punishment. *Cf.* Tex. Ins. Code § 4102.206 (providing criminal penalties for violating the public-insurance-adjusting scheme). This proposition is just as true for laws that regulate licensed professionals—even the Government's favorite examples of lawyers. *See Gentile*, 501 U.S. at 1048 (bar rule governing out-of-court lawyer statements unconstitutionally vague).

One reason vague laws are unconstitutional is that they invite "arbitrary and discriminatory enforcement" by "impermissibly delegat[ing]" to enforcement officials "for resolution on an ad hoc and subjective basis." *Grayned*, 408 U.S. at 108–109. That is especially true here, where the State not only enforces these regulations itself but has also delegated to the public at large to enforce them—by voiding contracts

with roofers or contractors after services are rendered—with significant financial incentives to stretch the law. *See* Tex. Ins. Code § 4102.207.

Second, we offer the Court an outsider's view that the regulations at issue are indeed vague. IJ does not here profess any special expertise about insurance adjusting, but anybody who has had their insurance pay for a home repair (or car repair or medical treatment) knows that a big part of the process involves the repair company talking to the insurer. Texas law appears to recognize that, because the restrictions at issue here do not categorically ban conversations between contractors/roofers and insurance companies. Instead, they more nebulously prohibit "act[ing] on behalf of an insured in negotiating for or effecting the settlement of a claim or claims for loss or damage under any policy of insurance." Tex. Ins. Code § 4102.001(3)(A)(i). This is clear as mud. Is asking whether an insurance company will pay so many dollars for a roof repair "effecting [a] settlement"? If an insurance company says a particular type of repair is unnecessary based on a misapprehension of the damage, is a roofer then "negotiating" if it provides the insurer information to correct the confusion? All we can say is: Beats us.

The Government's guidance does little to resolve the confusion. *See Frequently Asked Questions: Unlicensed Individuals and Entities Adjusting Claims*, Tex. Dep't of Ins. (May 2014), *available at* https://www.tdi.texas.gov/bulletins/2014/documents/unlicensedfaq.pdf. It (not so helpfully) clarifies that "[a] roofer or contractor **may** discuss" "the amount of damage to the consumer's home, the appropriate replacement, and reasonable cost of replacement with the insurance company," as well as "its estimate for a consumer's claim"; but it may **not** "discuss insurance policy coverages and exclusions" or "advocate on behalf of a consumer." *Id.* at 1 (bolding added). If a roofer or contractor is trying to figure out with an insurance company and their mutual client whether a particular repair is necessary or will be covered by insurance, it is a mystery to us when that conversation crosses from the permissible topics to impermissible discussion of policy coverage or advocacy.

And ***third,*** we note that the Government's efforts to avoid the vagueness challenge both misunderstand the governing law and would, if adopted, transform Texas into a Wild West for vague laws. The Government tries to get out of its vagueness problem by saying (at 22) that the parties appear to agree that at least *some* of Stonewater's speech

is proscribed by the statute. It's not clear to us that that's right given how confusing the statute and guidance are. But even if that's so, it doesn't ameliorate the vagueness problem facing Stonewater: It cannot know exactly *which* parts of its speech are permitted and which are not, and so it cannot reliably conform its speech to the demands of the law.

The cases the Government cites all involve instances where *all* the speech that the challenger wished to express was clearly proscribed. *See Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 48 (2017) (challenged law "bars" challenger from "the only" thing it wished to express); *Humanitarian Law Project*, 561 U.S. at 21 ("statutory terms [were] clear in their application to plaintiffs' proposed conduct"); *Village of Hoffman Ests. v. Flipside, Hoffman Ests., Inc.*, 455 U.S. 489, 502 (1982) (challenger "had ample warning that its marketing activities required a license"). These cases stand for the unremarkable proposition that a challenger generally can't bring a vagueness claim when it isn't actually injured by the vagueness.

But where a challenger engages in some speech that clearly falls within a prohibition and some speech where the application of the law is unclear, it personally suffers two distinct constitutional injuries: a First

Amendment injury because of the censorship, and a due-process injury because of the vague line between permissible and impermissible speech. There's no reason such a challenger should have to choose between valid constitutional claims when it has standing to pursue each claim on its own behalf. If the rule were otherwise in Texas, state and local governments could insulate vague speech laws from due-process challenges just by making sure those laws clearly proscribe at least some nugget of common speech.

CONCLUSION

The judgment of the court of appeals should be affirmed.

RESPECTFULLY SUBMITTED this 8th day of May, 2023.

By: /s/ Arif Panju

Benjamin A. Field*
(D.C. Bar No. 1046902)
INSTITUTE FOR JUSTICE
901 N. Glebe Rd., Suite 900
Arlington, VA 22203
Tel: (703) 682-9320
Fax: (703) 682-9321
Email: bfield@ij.org
**Pro Hac Vice* admission pending

Arif Panju
(TX Bar No. 24070380)
INSTITUTE FOR JUSTICE
816 Congress Ave. Suite 960
Austin, TX 78701
Tel: (512) 480-5936
Fax: (512) 480-5937
Email: apanju@ij.org

Counsel for *Amicus Curiae*
Institute for Justice

CERTIFICATE OF COMPLIANCE

This brief contains 7,668 words, excluding the portions of the brief exempted by Rule 9.4(i)(1) of the Texas Rules of Appellate Procedure.

/s/ Arif Panju
Arif Panju

CERTIFICATE OF SERVICE

I certify that on this 8th day of May, 2023, I caused a true and correct copy of the foregoing to be served via the Court's electronic filing system upon the following counsel:

Judd E. Stone II
Solicitor General
Evan S. Greene
Assistant Solicitor General
Ken Paxton
Attorney General of Texas
Brent Webster
First Assistant Attorney General
Cody C. Coll
Assistant Attorney General
OFFICE OF THE ATTORNEY GENERAL
P.O. Box 12548 (MC 059)
Austin, Texas 78711-2548
Tel.: (512) 936-1700
Fax: (512) 474-2697

Counsel for Petitioners

Michael A. McCabe
Chase A. Cobern
MUNCK WILSON MANDALA LLP
12770 Coit Road
Dallas, Texas 75251
Tel: (972) 628-3600
Fax: (972) 628-3616

Counsel for Respondent

/s/ Arif Panju
Arif Panju