No. 22-135

In the Supreme Court of the United States

HEATHER KOKESCH DEL CASTILLO,

Petitioner,

v.

SECRETARY, FLORIDA DEPARTMENT OF HEALTH,

Respondent.

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

BRIEF FOR THE SAN FRANCISCO SOCIETY FOR THE PREVENTION OF CRUELTY TO ANIMALS AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[*]

The San Francisco Society for the Prevention of Cruelty to Animals (SF SPCA) is the oldest humane society west of the Mississippi River. It employs over 30 licensed veterinarians, who annually perform or oversee over 50,000 patient exams on animals in the San Francisco Bay Area. Pursuant to its mission to maximize animal welfare in California, SF SPCA is currently engaged in litigation challenging the State of California's burdensome restrictions on the provision of veterinary consultation and preventative advice through telehealth services. *See S.F. Soc'y for the Prevention of Cruelty to Animals v. Sieferman*, No. 2:21-cv-786 (E.D. Cal.). In that litigation, state licensing authorities have defended speech-suppressing regulations by seeking to resurrect a broad "professional speech" exception to the First Amendment, even though this Court has declined to treat "professional speech" as a "unique category that is exempt from ordinary First Amendment principles." *Nat'l Institute of Family & Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361, 2375 (2018). SF SPCA has a direct interest in ensuring that content-based restrictions on the speech of professionals are subject to First Amendment scrutiny so that SF SPCA's veterinarians—and all California veterinarians—can continue to carry out their lifesaving work for animals throughout California.

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[*] The parties have consented to the filing of this brief, and received timely notice of the intent to file. No counsel for a party authored this brief in whole or in part, and no such counsel, any party, or any other person or entity—other than *amicus curiae*, its members, and its counsel—made a monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Professionals do not lose their First Amendment rights by virtue of their roles as professionals. This Court has explained that professional speech—no less than other forms of speech—implicates vital First Amendment interests: "Professionals might have a host of good-faith disagreements, both with each other and with the government, on many topics in their respective fields," and "the people lose when the government is the one deciding which ideas should prevail." *NIFLA*, 138 S. Ct. at 2374-75. Accordingly, "this Court's precedents have long protected the First Amendment rights of professionals." *Id.* at 2374.

As this Court's decision in *NIFLA* made clear, "States cannot choose the protection that speech receives under the First Amendment" or exercise an "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement" on certain professions. *Id.* at 2375. For that reason, the Court declined to treat "professional speech" as a "unique category" of speech "exempt from ordinary First Amendment principles." *Id.*

Yet even after this Court's decision in *NIFLA*, federal courts around the country continue to entertain arguments that would effectively insulate *any* state regulation of professional speech so long as that regulation is promulgated pursuant to a state professional licensing scheme. The Eleventh Circuit's decision below is emblematic of that approach. It refused to assess petitioner's as-applied challenge to Florida's restraints on her speech under "ordinary First Amendment principles." *Id.* at 2375. Instead, it held that the First Amendment was entirely

inapplicable because the restrictions of which she complained were part of a professional "licensing scheme" that generally "regulated professional conduct." Pet. App. 24a. That decision warrants this Court's review for three reasons.

First, the Eleventh Circuit's decision implicates a circuit split as to how the First Amendment applies to restrictions on speech arising in the context of a professional-licensing scheme. In the Eleventh Circuit's view, the First Amendment has nothing to say about such restrictions because they are necessarily "incidental" to the scheme's overall regulation of "professional conduct." *Id.* Three other circuits have taken a different approach. Those circuits recognize that the First Amendment applies to content-based regulations of professional speech that "differentiate[ ] between speech or speakers." *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1070 (9th Cir. 2020). Where application of a regulation depends on "the content" of speech, or on "the identity of the speaker," the regulation "does more than merely impose an incidental burden on speech," and is subject to First Amendment scrutiny. *Id.*; *see also Billups v. City of Charleston*, 961 F.3d 673, 683-84 (4th Cir. 2020); *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 932-33 (5th Cir. 2020).

Second, the Eleventh Circuit's decision is wrong. The approach staked out by the Eleventh Circuit would wrongly permit state actors to escape First Amendment scrutiny of virtually any content-based restriction on a professional's speech so long as that restriction is promulgated as part of a state licensing scheme. That is precisely the result that this Court forbade in *NIFLA* when it explained that a state may not exercise "unfettered power" to curb a person's

speech "by simply imposing a licensing requirement." 138 S. Ct. at 2375. Here, analysis of petitioner's as-applied First Amendment claim required the Eleventh Circuit to ask whether petitioner's speech was restricted because of "the content" of her speech or her "identity" as a speaker. *Pac. Coast Horseshoeing Sch.*, 961 F.3d at 1070. Clearly, petitioner's speech *was* restricted on the basis of its content, and on the basis of her identity as an unlicensed dietician. Under "ordinary First Amendment principles," *NIFLA*, 138 S. Ct. at 2375, petitioner's case involves a content-based regulation of speech subject to First Amendment scrutiny.

Third, the petition presents a question that is vitally important to licensed professionals nationwide. While some courts have begun to implement the principles set forth in *NIFLA*, state licensing authorities have been slow to recognize the First Amendment rights of professionals, and they continue to advance arguments that are squarely inconsistent with this Court's decision in *NIFLA*. *Amicus* SF SPCA has experienced this problem directly. It is currently a plaintiff alongside several licensed California veterinarians in a case challenging California's regulation of veterinary telehealth services. In that case, California regulators have insisted that professional speech is generally entitled to less First Amendment protection than other kinds of speech. This Court's intervention is needed in order to reaffirm the important First Amendment principles set forth in *NIFLA*.

The petition should be granted.

ARGUMENT

I. THE CIRCUITS ARE SPLIT ON HOW TO TREAT SPEECH AND CONDUCT IN THE LICENSING CONTEXT

The decision below implicates an active circuit split as to the proper treatment of First Amendment claims challenging restrictions on occupational speech that arise from professional licensing regimes.

Petitioner was subjected to a criminal fine under Florida's Dietetics and Nutrition Practice Act ("the Act") for "providing individualized dietary advice in exchange for compensation" without a license as a dietician or nutritionist. Pet. App. 6a (citation to the record omitted). She sought a declaratory judgment that the Act is "unconstitutional to the extent that [it] prohibit[s] [her] . . . from offering individualized advice about diet and nutrition." *Id.* (citation to the record omitted) (brackets in original).

In the Fourth, Fifth, and Ninth Circuits, a court hearing petitioner's claim would have rightly held that the Act's prior restraint on individualized dietary advice is subject to First Amendment scrutiny so long as its application turns on speech—"the content" of what petitioner says, and her "identity [as a] speaker"—rather than conduct. *Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1070 (9th Cir. 2020); *see also Billups v. City of Charleston*, 961 F.3d 673, 683 (4th Cir. 2020) (explaining that the First Amendment applies where a licensing regulation "prohibits unlicensed" persons from engaging in "speech"); *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 932 (5th Cir. 2020) (rejecting the view that "occupational-licensing restrictions . . . restrict only conduct, not speech").

Yet the Eleventh Circuit refused to analyze petitioner's claim as a claim involving speech because the Act's "licensing scheme" as a whole "regulate[s] professional conduct" and "only incidentally burden[s]" speech. Pet. App. 24a. That analysis squarely contradicts published precedent in the Fourth, Fifth, and Ninth Circuits. This Court's review is needed to resolve that conflict.

A. The Fourth, Fifth, And Ninth Circuits Properly Distinguish Between Professional Speech And Conduct

As this Court recognized in *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*), state law sometimes sets forth a "content-based regulation of speech" under the rubric of professional licensing regulations. 138 S. Ct. 2361, 2371 (2018). Such regulations are subject to First Amendment scrutiny. *Id.* While the Court "has upheld regulations of professional conduct that incidentally burden speech," *id.* at 2373, a state "may not, under the guise of prohibiting professional misconduct, ignore constitutional rights," *id.* (quoting *NAACP v. Button*, 371 U.S. 415, 439 (1963)). Thus, a court analyzing a First Amendment claim that challenges the application of a licensing rule must "draw[ ] the line between speech and conduct." *Id.* Where a licensing rule "regulates speech as speech," it is subject to First Amendment scrutiny. *Id.* at 2374.

Three recent decisions in the federal courts of appeals have correctly applied this Court's decision in *NIFLA* in cases involving licensing restrictions analogous to the restriction at issue here.

1. In *Pacific Coast Horseshoeing School*, the Ninth Circuit addressed "a form of education

licensing" imposed by the State of California. 961 F.3d at 1069. That licensing rule "regulates what kind of educational programs different institutions can offer to different students." *Id.* Under this rule, private postsecondary schools in California generally may not enroll students who lack "a certificate of graduation from a school providing secondary education." *Id.* at 1066. The plaintiffs—a horseshoeing school and a prospective student at the school who lacked a high school diploma—challenged California's licensing regulation under the First Amendment. *Id.* at 1067.

The Ninth Circuit held that the plaintiffs' claim involved "speech protected by the First Amendment," and rejected the state's argument that the case involved only the regulation of conduct. *Id.* at 1069. As the Ninth Circuit explained, the school sought to "'impart[ ] a "specific skill"'" and to "'communicate[ ] advice derived from "specialized knowledge."'" *Id.* (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010)). Because an "individual's right to speak is implicated when information he or she possesses is subjected to restraints on the way in which the information might be used or disseminated," *id.* (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 568 (2011)), the state's regulation necessarily implicated the plaintiffs' First Amendment rights.

Furthermore, the Ninth Circuit recognized that California's licensing restriction on speech could not be treated as an "incidental burden" attendant to a regulation of conduct because application of the restriction turned on "the content of what is being taught" and "the identity of the speaker." *Id.* at 1070. Because California's licensing rule "differentiates

between speech or speakers," the Ninth Circuit treated it as a content-based restriction on speech. *Id.* (citing *Humanitarian Law Project*, 561 U.S. at 27-28). Accordingly, the Ninth Circuit concluded that "some form of heightened scrutiny" was required under the First Amendment. *Id.* at 1073.

2. The Fourth Circuit reached a similar result, on similar reasoning, in *Billups*. In *Billups*, a group of unlicensed tour guides presented a First Amendment challenge to a municipal ordinance prohibiting the provision of paid tours around the city of Charleston, South Carolina without a license. 961 F.3d at 676. The city defended the ordinance on the ground that "it is a business regulation governing conduct that merely imposes an incidental burden on speech." *Id.* at 682.

The Fourth Circuit disagreed. As it recognized, the Charleston ordinance "burdens protected speech" because it "prohibits unlicensed tour guides" from "speaking to visitors . . . on certain public sidewalks and streets," *id.* at 683, and an "individual's right to speak is implicated when information he or she possesses is subjected to restraints on the way in which the information might be . . . disseminated," *id.* (quoting *Sorrell*, 564 U.S. at 568). Because the business of leading visitors on paid tours "by its very nature[ ] depends upon speech or expressive conduct," the Fourth Circuit concluded that the ordinance "cannot be classified as a restriction on economic activity that incidentally burdens speech." *Id.* Accordingly, the Fourth Circuit held that the ordinance was subject to heightened scrutiny under the First Amendment. *Id.* at 684.

3. The Fifth Circuit's decision in *Vizaline* is in accord. That case concerned a First Amendment

challenge to Mississippi's occupational-licensing regime for surveyors. *See Vizaline*, 949 F.3d at 928. In *Vizaline*, the state had filed an enforcement action against the plaintiff—a company that generated property maps using satellite imagery, and sold those "visual depictions" to customers—for violation of Mississippi's laws prohibiting "the practice of surveying without a license." *Id.* at 929-30. The plaintiff sued for declaratory relief, arguing that its "dissemination of information" constituted protected speech under the First Amendment. *Id.* at 930. The district court dismissed the claim on the ground that Mississippi's occupational-licensing regulations generally "'regulate professional conduct' which 'incidentally involves speech'" because they identify "who is permitted to provide certain professional services and who is not." *Id.* (quoting district court).

The Fifth Circuit reversed. As it explained, the district court erred by assuming that "occupational-licensing restrictions—like Mississippi's surveyor regulations—restrict only conduct, not speech," and by therefore reasoning that the regulations at issue "only 'incidentally infringed upon' Vizaline's speech." *Id.* at 932 (citation omitted). The Fifth Circuit properly recognized that, under *NIFLA*, "Mississippi's surveyor requirements are not wholly exempt from First Amendment scrutiny simply because they are part of an occupational-licensing scheme." *Id.* at 934. The district court was instead required to "draw[ ] the line between speech and conduct," *id.* at 933 (quoting *NIFLA*, 138 S. Ct. at 2373), by examining "to what degree Vizaline's practice constitutes speech or conduct," *id.* at 934.

B. The Decision Below Treats The Regulation Of Professional Speech As A Regulation Of Conduct

In its decision below, however, the Eleventh Circuit deviated from the approach undertaken by the Fourth, Fifth, and Ninth Circuits. Rather than examining whether petitioner is engaged in speech or conduct when she offers "individualized advice about diet and nutrition," Pet. App. 6a (citation to the record omitted), the Eleventh Circuit looked to the licensing scheme as a whole and "conclude[d] that the . . . licensing scheme for dieticians and nutritionists regulated professional conduct and only incidentally burdened Del Castillo's speech." *Id.* at 24a. Thus, the Eleventh Circuit held that many of the activities governed by the licensing regime—"[a]ssessing a client's nutrition needs, conducting nutrition research, developing a nutrition care system, and integrating information from a nutrition assessment"—"are not speech," but are rather "occupational conduct." *Id.* at 25a. And while it conceded that the "profession also involves some speech—a dietician or nutritionist must get information from her clients and convey her advice and recommendations"—it concluded that the regulation of such speech is simply an "incidental part of regulating the profession's conduct." *Id.* at 26a.

In other words, the Eleventh Circuit treated the Act's licensing scheme as generally regulating professional "conduct," and failed to examine whether the aspect of the Act challenged by petitioner is a regulation of speech or conduct. It thereby refused to "draw[ ] the line between speech and conduct," which is the same mistake that the Fifth Circuit treated as

reversible error in *Vizaline*. 949 F.3d at 933 (citation omitted). As the Ninth Circuit explained in *Pacific Coast Horseshoeing*, courts examining whether a licensing regulation is a regulation of speech or simply a regulation of conduct that incidentally affects speech should look to whether the regulation turns on either "the content of" a communication or "the identity of the speaker." 961 F.3d at 1070. But the Eleventh Circuit never undertook that inquiry here.

As described further below, there can be no doubt that this case implicates a content-based restriction on "speech as speech," *NIFLA*, 138 S. Ct. at 2374, not a restriction on conduct that incidentally affects speech. Had the Eleventh Circuit engaged in the analysis demanded by case law in the Fourth, Fifth, and Ninth Circuits, it would have come to the conclusion that First Amendment scrutiny applies in this case.

II. THE DECISION BELOW IS WRONG

A. Petitioner Is Challenging A Content-Based Regulation Of Speech

By blurring the line between professional conduct and professional speech, the Eleventh Circuit overlooked the obvious: Petitioner's First Amendment claim targets a licensing restriction that regulates speech on the basis of its content. Petitioner seeks a declaratory judgment that the Act is unconstitutional only insofar as it "prohibit[s] [her] . . . from offering individualized advice about diet and nutrition." Pet. App. 6a (citation to the record omitted) (brackets in original). Under this Court's precedents, the Act's prohibition on the provision of

"individualized advice" is plainly a content-based restriction on petitioner's speech.

First, the Act governs speech. "An individual's right to speak is implicated when information he or she possesses is subjected to 'restraints on the way in which the information might be used' or disseminated." *Sorrell*, 564 U.S. at 568 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984), *cert. denied*, 490 U.S. 1015 (1989)). Here, petitioner possesses dietary and nutritional information that she wishes to disseminate to paying clients, and the Act prevents her from doing so.

Second, it is clear that the Act sets forth a *content-based* regulation of speech. This Court explained in *Humanitarian Law Project* that a statute which prohibits plaintiffs from "communicat[ing] advice derived from 'specialized knowledge'" necessarily "regulates speech on the basis of its content." 561 U.S. at 27. Where "the conduct triggering coverage under [a] statute consists of communicating a message," the statute functions as a content-based restriction on speech. *Id.* at 28. Again, that is manifestly the case here because petitioner was fined under the Act specifically for "providing individualized dietary advice in exchange for compensation in Florida." Pet. App. 6a (citation to the record omitted). And the fact that petitioner sought payment for her advice is of no moment because the First Amendment protects speech "even though it is carried in a form that is 'sold' for profit." *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (citing *Smith v. California*, 361 U.S. 147, 150 (1959)).

That the Act is a regulation of speech is made even more clear by the fact that it "imposes a burden based

on . . . the identity of the speaker." *Sorrell*, 564 U.S. at 567. Under the Act, *licensed* dieticians or nutritionists may provide the individualized advice for which petitioner was penalized. *See* Pet. 8 (noting respondent's position that the "sole basis" for the fine levied against petitioner was that petitioner "was not licensed to provide dietary advice" (citation omitted)). Indeed, even speakers who are not licensed as dieticians or nutritionists may provide the same advice petitioner sought to provide so long as they are engaged in the business of selling nutrition supplements. *See id.* (citing Fla. Stat. § 468.505). Yet because petitioner was unlicensed, and offering only her advice, she was targeted under the Act.

Thus, "on its face and in its practical operation, [Florida's] law imposes a burden based on the content of speech and the identity of the speaker." *Sorrell*, 564 U.S. at 567. As such, it "imposes more than an incidental burden on protected expression," and is subject to heightened scrutiny under the First Amendment. *Id.*

B. The Decision Below Conflicts With This Court's Decision In *NIFLA*

This Court's decision in *NIFLA* was emphatic: Speech proscribed by professional licensing regimes is not a special category of speech "exempt from ordinary First Amendment principles." 138 S. Ct. at 2375. Under ordinary First Amendment principles, a "content-based regulation of speech" is subject to heightened scrutiny. *Id.* at 2371. If professional speech were subject to less protection simply by virtue of the fact that it fell within the regulatory ambit of a professional licensing code, that would "give[ ] the States unfettered power to reduce a group's First

Amendment rights by simply imposing a licensing requirement." *Id.* at 2375. But "States cannot choose the protection that speech receives under the First Amendment," *id.*, and state "labels cannot be dispositive of [the] degree of First Amendment protection" that speech receives, *id.* (alteration in original) (quoting *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988)).

The Eleventh Circuit's decision flouts these principles. It assigns dispositive weight to Florida's labeling of certain speech as part of the overall "practice" of dietetics, Pet. App. 25a, allowing the Eleventh Circuit to characterize petitioner's speech as simply an aspect of "occupational conduct," *id.* That labeling game led the Eleventh Circuit to treat the Act's burdens on speech as "an incidental part of regulating [professional] conduct." *Id.* at 26a. But take away Florida's labeling and the Eleventh Circuit's reasoning falls apart, as the Fourth Circuit's decision in *Billups* recognizes: the fact that "speech or expressive conduct" might be legislatively classified as a regulated activity does not transform the actual "nature" of the activity. 961 F.3d at 683. Here, the activity for which petitioner was criminally fined—"providing individualized . . . advice," Pet. App. 6a (citation to the record omitted)—is unquestionably in the nature of speech. For example, if Florida generally prohibited (outside the realm of its licensing laws) the provision of individualized career advice, that would clearly constitute a regulation of "speech" subject to the First Amendment. *See Humanitarian Law Project*, 561 U.S. at 27.

The only difference here—and the only basis for the Eleventh Circuit's decision withholding First

Amendment scrutiny in this case—is that the burden imposed on petitioner's provision of individualized advice happens to arise in the context of a licensing scheme. Under *NIFLA*, that is not a sufficient basis for assigning a lower level of First Amendment protection to petitioner's speech. *See* 138 S. Ct. at 2375.

Nor can Florida's restriction on petitioner's speech be classified as a "regulation[ ] of professional conduct that incidentally burdens speech" simply by virtue of the fact that the restriction is part of a larger regime of professional licensing rules. *Id.* at 2373. The same was true in *NIFLA*. *See id.* at 2368-69 (noting that the restraint on speech applied to "licensed primary care or specialty clinic[s]"). Yet there, this Court noted, the restriction on speech could not properly be treated as a regulation of conduct with incidental effects on speech because the restriction was not triggered by any act of non-speech professional *conduct*, like a "medical procedure." *Id.* at 2373. So too here: Florida's restraint on petitioner's speech was not triggered by any non-communicative conduct. It kicked in solely because petitioner sought to communicate her advice. *See* Pet. App. 6a. The only "conduct" at issue in this case is that speech, which Florida has categorized as an incident of the "practice" of dietetics. But Florida's relabeling of petitioner's speech cannot control the scope of petitioner's First Amendment rights, and the Eleventh Circuit erred in holding otherwise.

This Court has already recognized that the Eleventh Circuit's approach wrongly grants state governments "unfettered power" to reclassify speech through the provisions of their licensing laws, and thereby "choose the protection that speech receives

under the First Amendment." *NIFLA*, 138 S. Ct. at 2375. The decision below effectively creates a First Amendment-free zone for anyone in the Eleventh Circuit whose speech is proscribed by a state licensing regulation. That error warrants this Court's review.

III. THE QUESTION PRESENTED IS IMPORTANT TO PROFESSIONALS THROUGHOUT THE NATION

The Eleventh Circuit's decision indicates that the key principles undergirding this Court's decision in *NIFLA* have not been evenly applied in federal courts around the country. As petitioner explains, this means that "countless people" who "earn a living by communicating their thoughts and advice via email or online conferencing" that "cross[es] state lines" will "face not only a patchwork of licensing laws" that purport to restrict their speech, but also "a patchwork of constitutional rules that determine how those laws might be enforced." Pet. 21-22.

SF SPCA is familiar with this problem. As one of California's leading non-profit providers of professional veterinary services, SF SPCA manages a team of over 30 licensed veterinarians who tend to the medical needs of tens of thousands of animals every year. Due to age, disability, transportation burdens, and financial limitations, however, many pet owners have difficulty traveling in-person to clinics in order to seek care for their pets. Sometimes the pets themselves have medical conditions—such as behavioral or mobility problems—that make in-person trips to a veterinarian painful or infeasible. SF SPCA's veterinarians—and all other veterinarians in California—could reach countless more animals if they were assured of their constitutional right to

speak in their professional capacities with their clients over the phone or by Zoom.

Yet veterinarians in the United States are inhibited by a patchwork of state regulations governing the use of telecommunications technologies to deliver veterinary advice. Some states—such as Michigan, Oklahoma, and Virginia—broadly permit the use of telecommunications technologies for veterinary consultation. *See* Mich. Admin. Code r. 338.4901a; Oklahoma Veterinary Bd., *Veterinarian FAQ: Board's Telemedicine/Telehealth Position Statement*, https://www.okvetboard.com/veterinarian-faq (last visited Sept. 12, 2022); Va. Bd. of Veterinary Medicine, *Guidance for Telehealth in the Practice of Veterinary Medicine*, Guidance Doc. No. 150-25 (eff. Sept. 17, 2020), https://www.dhp.virginia.gov/media/dhpweb/docs/vet/guidance/150-25.pdf.

Other states, including California, tightly restrict the provision of such services by prohibiting *any* veterinary "consultation" via "communication technologies," Cal. Code Regs. tit. 16, § 2032.1(f), in the absence of a hands-on physical examination of the animal patient with respect to the particular "medical condition" for which consultation is sought, *id.* § 2032.1(b)(2). Rules like these mean that even a veterinarian who has a longstanding relationship with a particular animal must set up an in-person appointment if her advice is sought for any new medical condition, and may not provide advice over the phone, by email, or by Zoom prior to such appointment. Such arbitrary, content-based restrictions on veterinary speech are all too common. *See Hines v. Quillivan*, 982 F.3d 266, 271-72 (5th Cir. 2020) (First Amendment claim concerning similar

restrictions on veterinary consultation via telemedicine in Texas).

This confusing patchwork of policies gives veterinarians different rights to engage in professional speech depending on where they live. And the situation is made even more confusing by a judicial landscape that affords only spotty protection to speech governed by professional licensing codes. Absent this Court's intervention, veterinary professionals will continue to labor under speech-restricting rules that are wrongly held exempt from First Amendment scrutiny.

Indeed, even in those circuits that have recognized and applied the principles set down in *NIFLA*, state licensing authorities continue to press arguments that are flatly inconsistent with *NIFLA*. For example, SF SPCA is currently litigating an as-applied First Amendment challenge to the California Veterinary Medical Board's restrictive regulations of veterinary consultations in the Eastern District of California. *See S.F. Soc'y for the Prevention of Cruelty to Animals v. Sieferman*, No. 2:21-cv-786 (E.D. Cal.). The Board moved to dismiss SF SPCA's complaint on the ground that such regulations are "conduct-based and unrelated to speech." *Sieferman* Mem. of Points & Authorities Supporting Def.'s Mot. Dismiss 9 (E.D. Cal. May 25, 2021), ECF No. 14-1, (citing *Pickup v. Brown*, 740 F.3d 1208, 1231 & n.7 (9th Cir.), *cert. denied*, 573 U.S. 945 (2014)); *see also id.* at 7 (arguing that "within the confines of a professional relationship, First Amendment protection of a professional's speech is . . . diminished" (quoting *Pickup*, 740 F.3d at 1228)). In support of its argument, the Board relied extensively on the Ninth Circuit's decision in *Pickup*—a decision whose

reasoning this Court expressly addressed and rejected in *NIFLA*. *See* 138 S. Ct. at 2371 (citing *Pickup* four times as an example of circuit-court case law that wrongly treated "'professional speech' as a separate category of speech that is subject to different rules").

The Eleventh Circuit's decision below and the experience of litigants like SF SPCA suggest that a profoundly flawed professional speech doctrine continues to inform First Amendment analysis in courthouses around the country, to the detriment of millions of professionals "who make a living through communication." John G. Wrench & Arif Panju, *A Counter-Majoritarian Bulwark: The First Amendment and Professional Speech in the Wake of* NIFLA v. Becerra, 24 Tex. Rev. L. & Pol. 453, 470 (2020). The question presented by the petition offers this Court the chance to reaffirm the important principles set out in *NIFLA* and resolve continuing confusion in the lower courts regarding the proper treatment of professional speech. This Court's review is warranted.

CONCLUSION

The petition for certiorari should be granted.

Respectfully submitted,

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