No. 22-135

IN THE

Supreme Court of the United States

HEATHER KOKESCH DEL CASTILLO,
Petitioner,

v.

JOSEPH A. LADAPO, IN HIS OFFICIAL CAPACITY AS SURGEON GENERAL AND SECRETARY, FLORIDA DEPARTMENT OF HEALTH,
Respondent.

On Petition For A Writ Of Certiorari To The U.S. Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

The Free Speech Clause of the First Amendment allows States to "regulate professional conduct that incidentally burdens speech." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2373 (2018). To protect the public, Florida requires professionals who wish to practice dietetics and nutrition counseling for remuneration for clients "under the direct care and supervision of a medical doctor for a disease or medical condition requiring nutrition intervention" to be licensed. Fla. Stat. § 468.505(1)(n); *see* Fla. Stat. §§ 468.501–518.

The question presented is whether the Free Speech Clause permits Florida's licensing regime as a regulation of professional conduct that incidentally involves speech.

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STATEMENT

1. In *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (*NIFLA*), this Court addressed the First Amendment free speech principles applicable to the regulation of licensed professionals. Two aspects of this Court's analysis in *NIFLA* are relevant to the petition. First, the Court rejected California's submission that a freestanding doctrine of "professional speech" immunized California's disclosure requirement for licensed crisis-pregnancy centers from First Amendment scrutiny. "Speech is not unprotected," the Court explained, "merely because it is uttered by 'professionals.'" *Id.* at 2371–72. That holding abrogated several courts of appeals cases that had recognized "'professional speech' as a separate category of speech that is subject to different rules." *Id.* at 2371.

Second, and separately, *NIFLA* reaffirmed the longstanding principle that "States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* at 2372. The Court, however, rejected the notion that California's disclosure requirement could be sustained under that doctrine because the "licensed notice" at issue "[wa]s not an informed-consent requirement or any other regulation of professional conduct." *Id.* at 2373. As a result, it was subject to heightened scrutiny. *Id.* at 2372–76.

2. As it does with many professions, Florida regulates dietetics and nutrition counseling. The Dietetics and Nutrition Practice Act, Fla. Stat. §§ 468.501–518 (the "Act"), provides that "[n]o person may engage for remuneration in dietetics and

nutrition practice or nutrition counseling or hold himself or herself out as a practitioner of dietetics and nutrition practice or nutrition counseling unless the person is licensed in accordance with the provisions of this part." *Id.* § 468.504. Under the Act, a person who knowingly engages in unlicensed "dietetics and nutrition practice or nutrition counseling for remuneration" commits "a misdemeanor of the first degree." *Id.* § 468.517(1), (2).

The Act defines "[d]ietetics" as "the integration and application of the principles derived from the sciences of nutrition, biochemistry, food, physiology, and management and from the behavioral and social sciences to achieve and maintain a person's health throughout the person's life." *Id.* § 468.503(4). It defines "[n]utrition counseling" as "advising and assisting individuals or groups on appropriate nutrition intake by integrating information from the nutrition assessment." *Id.* § 468.503(10). "Dietetics and nutrition practice," in turn, "include[s] assessing nutrition needs and status using appropriate data; recommending appropriate dietary regimens, nutrition support, and nutrient intake; ordering therapeutic diets; improving health status through nutrition research, counseling, and education; and developing, implementing, and managing nutrition care systems." *Id.* § 468.503(5). In other words, the Act regulates a range of professional conduct, such as "[a]ssessing a client's nutrition needs, conducting nutrition research, developing a nutrition care system, and integrating information from a nutrition assessment." Pet. App. 25a.

3. Petitioner Heather Kokesch Del Castillo does not have a Florida dietician or nutritionist license. Nor was she "qualified to receive a license," as "she lacked the necessary education and professional experience." Pet. App. 4a. But she operated a business in Florida, called Constitution Nutrition, focused on "[o]ne-on-one health coaching," through which she would meet with clients to "discus[s] overall health and wellness," and give them "tailored advice on dietary choices, exercise habits, and general lifestyle strategies," including to recommend vitamin supplements or a specific health goal. Pet. App. 3a. To provide this advice, she asked her clients to fill out a "health history form," seeking information "about the client's dietary health, including past serious illness or recent weight change." Pet. App. 3a–4a.

In 2017, a licensed dietician filed a complaint against petitioner with the Florida Department of Health, alleging that petitioner was providing nutritionist services without a license. Pet. App. 5a. After investigating the matter, the Department concluded that petitioner was indeed violating the Act and sent her a citation and cease-and-desist order. Pet. App. 5a–6a. Ultimately, petitioner paid $500.00 in fines and $254.09 in investigatory fees for practicing nutrition counseling without a license. Pet. App. 6a.

4. Rather than seek a license, Petitioner then sued the Department under 42 U.S.C. § 1983, arguing that the Act violated her free speech rights under the First Amendment. Pet. App. 6a. She sought injunctive relief and a declaratory judgment that the Act is "unconstitutional to the extent that [it] prohibit[s]

[her] and others similarly situated from offering individualized advice about diet and nutrition." *Id.* The parties cross-moved for summary judgment, and the district court granted the Department's motion while denying petitioner's. Pet. App. 7a. The district court relied on *Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011) to conclude that the Act was "a generally applicable professional licensing statute with a merely incidental impact on speech," and therefore rejected petitioner's First Amendment claim. Pet. App. 8a.

Petitioner appealed, arguing that the district court erred in relying on *Locke* because, in her view, *NIFLA* had abrogated *Locke*. Pet. App. 10a. The Eleventh Circuit unanimously affirmed. The court explained how in *Locke*, it had given "two reasons" for "why Florida's interior designer licensing scheme did not violate the First Amendment: the professional speech doctrine; and the licensing scheme regulated professional conduct with only an incidental effect on speech." Pet. App. 11a. Then, the court noted that *NIFLA* had abrogated only the professional-speech doctrine, while leaving intact the rule that states may regulate professional conduct with only an incidental effect on speech. Pet. App. 17a–24a. As a result, the court held that *Locke* remained good law under the court's prior-panel-precedent rule and applied it to petitioner's claim. Pet. App. 24a. As the district court did, the Eleventh Circuit held that "the Act's dietician and nutritionist licensing scheme did not violate Del Castillo's free speech rights because, like the interior designer licensing scheme in *Locke*, the Act regulated her professional conduct and had only an incidental effect on her speech." Pet. App. 11a.

While this case was pending, Florida significantly narrowed the scope of the Act. Under the amended Act, much of petitioner's practice is lawful even if she continues to refuse to obtain a license. It now exempts from the Act's licensing requirements

> [a]ny person who provides information, wellness recommendations, or advice concerning nutrition, or who markets food, food materials, or dietary supplements for remuneration, if such person does not provide such services to a person under the direct care and supervision of a medical doctor for a disease or medical condition requiring nutrition intervention, not including obesity or weight loss, and does not represent himself or herself as a dietitian, licensed dietitian, registered dietitian, nutritionist, licensed nutritionist, nutrition counselor, or licensed nutrition counselor, or use any word, letter, symbol, or insignia indicating or implying that he or she is a dietitian, nutritionist, or nutrition counselor.

Fla. Stat. § 468.505(1)(n). Apprised of this amendment, the Eleventh Circuit held that it did not moot petitioner's appeal, because she had testified that her business "had been and would continue to be open to people with underlying medical conditions like high cholesterol or food allergies if those people want health coaching." Pet. 7 n.3; *see* Pet. App. 8a n.1.

Even so, all that the Act now prohibits her from doing without a license is "giving dietetic and nutritional advice to paying clients who are under the supervision of a doctor for a disease or medical

condition requiring nutrition intervention." Pet. App. 8a n.1.

Petitioner now seeks this Court's review.

REASONS FOR DENYING THE PETITION

Petitioner contends that the Eleventh Circuit erred in rejecting her claim that the First Amendment entitles her to practice dietetics and nutrition counseling as part of a course of medical treatment without the license that Florida law requires. But she premises her petition on a mischaracterization of what the Eleventh Circuit held. It did not create "a special First Amendment rule that applies only to laws that impose a licensing requirement." Pet. 14. Rather, the Eleventh Circuit faithfully applied this Court's recognition in *NIFLA*—and many other cases—that a State may permissibly regulate speech as an incident to a regulation of conduct, including professional conduct. *See* Pet. App. 18a, 24a–27a. And that decision is consistent with the decisions of other circuits, which agree that the correct test for whether a licensing scheme comports with the First Amendment is whether it represents a regulation of speech that is incident to a regulation of conduct.

The petition should be denied.

I. THE COURTS OF APPEALS AGREE THAT STATES MAY REGULATE PROFESSIONAL CONDUCT INCIDENTALLY INVOLVING SPEECH.

Petitioner argues that the Eleventh Circuit below split with the Fourth, Fifth, and Ninth Circuits on what test to apply to First Amendment claims challenging licensing regimes such as Florida's. Pet.

16–21. Indeed, that is petitioner's sole argument for why this case merits review. Pet. 21–22. But not only are those circuits (and others) in agreement that the relevant question is whether the statute regulates professional conduct with an incidental effect on speech; the circuits are not even split on whether a statute like Florida's regulating dieticians satisfies that test.

Petitioner is incorrect that the Eleventh Circuit created a special First Amendment rule applicable solely to "occupational-licensing laws." Pet. 12. In fact, the Eleventh Circuit acknowledged that this Court in *NIFLA* had "refused to recognize professional speech as a new speech category deserving less protection." Pet. App. 18a (cleaned up). At the same time, the Eleventh Circuit correctly observed that *NIFLA* had "reaffirmed that '[s]tates may regulate professional conduct, even though that conduct incidentally involves speech.'" *Id.* (quoting *NIFLA*, 138 S. Ct. at 2372). Applying the latter, still-valid test, the Eleventh Circuit then held that Florida's licensing scheme comported with the First Amendment because it "regulated professional conduct and only incidentally burdened Del Castillo's speech." Pet. App. 24a.

Not only is that factbound holding consistent with *NIFLA* and the cases on which petitioner relies, but two other circuits have also recognized the same rule following *NIFLA*.

1. Petitioner (at 20–21) claims conflict between the decision below and *Pacific Coast Horseshoeing School, Inc. v. Kirchmeyer*, 961 F.3d 1062 (9th Cir. 2020). But that case did not involve a professional

licensing requirement at all. At issue was a California law that precluded a plaintiff from enrolling in certain post-secondary vocational courses without first completing an educational prerequisite. *Id.* at 1066–67. The Ninth Circuit rejected California's argument that the law was a mere regulation of conduct, and held that it was instead a content-based regulation of speech subject to heightened First Amendment scrutiny. *Id.* at 1072–73. That holding is consistent with the Eleventh Circuit's decision below, which held that Florida's licensing scheme, by contrast, *does* regulate conduct and regulates speech only incidentally.

The lack of any conflict is confirmed by the Ninth Circuit's subsequent decision in *Tingley v. Ferguson*, 47 F.4th 1055 (9th Cir. 2022). There, the Ninth Circuit upheld a Washington law that regulated the type of therapy a licensed health-care provider could offer. The court reasoned that the law was a valid regulation of speech incident to professional conduct. *Id.* at 1077. The court further observed that its earlier decision in *Pacific Coast*—the case petitioner claims is in conflict with the decision below—"confirm[ed]" that the rule that States may regulate "professional conduct incidentally affecting speech survives *NIFLA*." *Tingley*, 47 F.4th at 1076. That is the same rule the Eleventh Circuit applied below.

2. Petitioner also errs (at 16–18) in claiming conflict with a Fifth Circuit decision, *Vizaline, LLC v. Tracy*, 949 F.3d 927 (5th Cir. 2020). At issue there was a First Amendment challenge to a Mississippi scheme for licensing surveyors. The Fifth Circuit joined the Eleventh Circuit in concluding that this Court had

rejected the professional-speech doctrine in *NIFLA*. *Compare id.* at 932, *with* Pet. App. 16a. The Fifth Circuit also agreed with the Eleventh Circuit that in *NIFLA*, this Court had reaffirmed that "states may enact 'regulations of professional conduct that incidentally burden speech.'" *Id.* (quoting *NIFLA*, 138 S. Ct. at 2373); *see id.* at 933 n.8; *see also Tingley*, 47 F.4th at 1076–77 (reading *Vizaline* the same way). The Fifth Circuit reversed and remanded the district court's decision, which had upheld the licensing scheme based on a categorical rule that occupational-licensing schemes are immune from First Amendment challenge. *Id.* at 932–34.

Petitioner is wrong to suggest (at 18) that the Eleventh Circuit below applied the same kind of categorical rule the Fifth Circuit rejected in *Vizaline*. Instead, the Eleventh Circuit applied the same rule that the Fifth Circuit directed the district court to apply on remand: "whether, as applied to [appellant's] practice, Mississippi's licensing requirements regulate only speech, *restrict speech only incidentally to their regulation of non-expressive professional conduct*, or regulate only non-expressive conduct." *Vizaline*, 949 F.3d at 931 (emphasis added); *see Hines v. Quillivan*, 982 F.3d 266, 272 (5th Cir. 2020) (remanding for district court to perform the same analysis).

3. So too with the Fourth Circuit case on which petitioner relies. In *Billups v. City of Charleston*, 961 F.3d 673 (4th Cir. 2020), the court held that an ordinance imposing a licensing requirement for tour guides regulated speech, not conduct, and therefore was subject to heightened First Amendment scrutiny.

Id. at 682–84. In doing so, the court applied the very test that the Eleventh Circuit applied below: whether the ordinance at issue was "a business regulation governing conduct that merely imposes an incidental burden on speech" or whether it instead "directly burdens protected speech" by regulating "an activity which necessarily involves speech or expressive conduct." *Id.* at 682–83.

Petitioner's assertion (at 19) that "under the Eleventh Circuit's rule . . . *Billups* would have come out the other way" is based once again on a misunderstanding of what the Eleventh Circuit held. The Eleventh Circuit simply concluded that Florida's particular scheme for licensing regulates conduct—and regulates speech only as an incident to that conduct. Pet. App. 24a. The Eleventh Circuit did not remotely suggest that it would treat all "occupational conduct" (Pet. 19) regulations the same way. If anything, the Eleventh Circuit's fact-specific analysis of the manner in which Florida's scheme regulates the conduct of dieticians strongly suggests that it would not. *See* Pet. App. 24a–27a.

4. Decisions from two other circuits, though not discussed by petitioner, are also consistent with the decision below. In *EMW Women's Surgical Center, P.S.C. v. Beshear*, 920 F.3d 421 (6th Cir. 2019), the Sixth Circuit acknowledged that in *NIFLA* the Court had rejected the professional-speech doctrine but had reaffirmed that "'regulations of professional conduct that incidentally burden speech' receive lower scrutiny." *Id.* at 428 (quoting *NIFLA*, 138 S. Ct. at 2373); *see also Tingley*, 47 F.4th at 1077 (discussing *Beshear*). And in *Greater Philadelphia Chamber of*

Commerce v. City of Philadelphia, 949 F.3d 116 (3d Cir. 2020), the Third Circuit said that "[a]s explained by [this Court in *NIFLA*], regulations that have an incidental impact on speech are not unconstitutional violations of the freedom of speech." *Id.* at 136.

In short, petitioner is mistaken that the Eleventh Circuit's factbound application of a rule recently reaffirmed by this Court and recognized by at least five other circuits merits review.

II. THE DECISION BELOW IS CORRECT.

Review is also unwarranted because the decision below is correct.

In *NIFLA*, the Court "reaffirmed that '[s]tates may regulate professional conduct, even though that conduct incidentally involves speech.'" Pet. App. 18a (quoting *NIFLA*, 138 S. Ct. at 2372). The Court has long applied this rule to schemes that regulate the conduct of professionals. For instance, in *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978), the Court applied that principle to uphold a bar rule that precluded lawyers from conducting in-person solicitation of accident victims. *Id.* at 456-57.

That is not a "special First Amendment rule" that applies only to occupational-licensing schemes. Pet. 14. Rather, it is a specific application of a line of this Court's precedents recognizing that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949). For example, in *Rumsfeld v.*

Forum for Academic & Institutional Rights, Inc., 547 U.S. 47 (2006), the Court held that the federal government could compel universities to provide nondiscriminatory access to military recruiters without regulating speech subject to the First Amendment. The statute was permissible because it regulated conduct, and regulated speech only as an incident to that conduct. *Id.* at 62. Similarly, the Eleventh Circuit recently rejected a free speech challenge to Florida's vaccine-passport law, reasoning that "[s]tatutes that regulate non-expressive conduct do not implicate the First Amendment at all even if they incidentally burden speech." *Norwegian Cruise Line Holdings Ltd. v. State Surgeon Gen.*, --- F.4th --, 2022 WL 5240425, at *6 (11th Cir. Oct. 6, 2022) (quotation omitted).

Florida's licensing scheme fits comfortably into that framework. The Act regulates the conduct of practicing dietary and nutrition counseling, which includes "the integration and application of the principles derived from the sciences of nutrition, biochemistry, food, physiology, and management and from the behavioral and social sciences to achieve and maintain a person's health throughout the person's life." Fla. Stat. § 468.503(4). In so doing, it regulates "advising and assisting individuals or groups on appropriate nutrition intake by integrating information from the nutrition assessment," *id.* § 468.503(10); and "assessing nutrition needs and status using appropriate data; recommending appropriate dietary regimens, nutrition support, and nutrient intake; ordering therapeutic diets; improving health status through nutrition research, counseling,

and education; and developing, implementing, and managing nutrition care systems." *Id.* § 468.503(5).

As the Eleventh Circuit below correctly concluded, "[a]ssessing a client's nutritional needs, conducting nutrition research, developing a nutrition care system, and integrating information from a nutrition assessment are not speech"; that's conduct. Pet. App. 25a. And that "a dietician or nutritionist must get information from her clients and convey her advice and recommendations" does not convert that conduct into speech. Pet. App. 26a. Instead, any burden on the speech component of the advice or recommendations is only "an incidental part of regulating the profession's conduct." *Id.*

That the Act regulates conduct is confirmed by the Florida Legislature's recent decision to amend the statute. Now, the only conduct petitioner wishes to engage in that requires a license is providing professional dietary advice to someone "under the direct care and supervision of a medical doctor for a disease or medical condition requiring nutrition intervention, not including obesity or weight loss." Fla. Stat. § 468.505(1)(n). The statutory scheme is thus narrowly focused on the type of professional conduct that has direct medical effects—like Florida's scheme for licensing doctors or other health care professionals. *Cf. NIFLA*, 138 S. Ct. at 2373 (rejecting the proposition that the disclosure requirement there was incident to a medical-licensing requirement because it was not tied to a medical "procedure"). The Florida Legislature acted rationally in regulating that conduct because, as it found, "the practice of dietetics and nutrition or nutrition counseling by unskilled and

incompetent practitioners presents a danger to the public health and safety." Fla. Stat. § 468.502.

Petitioner is mistaken (at 13–14) that the Eleventh Circuit's analysis conflicts with *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). There, this Court applied heightened First Amendment scrutiny to the federal statute criminalizing the provision of material support to terrorists, 18 U.S.C. § 2339B(a)(1), because it concluded that the statute "regulates speech on the basis of content." *Id.* at 27. The Court nowhere suggested that the same rule would apply to a statute that regulated speech as an incident to conduct, and this Court's subsequent decision in *NIFLA* confirms that it does not.

Petitioner's position, if accepted, would have far-reaching consequences. Petitioner appears to submit that any professional licensing scheme is subject to challenge by unlicensed persons, armed with heightened scrutiny under the First Amendment, if any portion of that scheme can be said to "restric[t] speech" of those unlicensed persons. Pet. 2. That would throw into doubt the constitutionality of longstanding licensing schemes that have never been thought to present a general First Amendment problem, such as requirements that lawyers, doctors, and architects obtain a license before they may hold themselves out, and provide advice, as professionals.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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