No. 22-135

In The

Supreme Court of the United States

HEATHER KOKESCH DEL CASTILLO,

Petitioner,

v.

JOSEPH A. LADAPO, SECRETARY, FLORIDA DEPARTMENT OF HEALTH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

REPLY BRIEF FOR THE PETITIONER

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Petitioner Heather Kokesch Del Castillo was fined for "providing individualized dietary advice in exchange for compensation in Florida." App. 6a. And, according to both Respondent and the panel below, punishing her for giving this advice does not implicate the First Amendment. In the Eleventh Circuit, Heather's advice—unlike certain other advice—is conduct, rather than speech, and it may be freely suppressed so long as Florida chooses to sweep it within the ambit of an otherwise-valid licensing law.

This decision directly implicates an important—and, as the brief in opposition demonstrates, growing—split of authority over how to decide whether a professional regulation restricts "speech" or only "conduct." When an unlicensed person like Heather gives advice about dietary regimens in Florida, she engages only in "conduct." But if an ordinary, unlicensed person wants to give advice about diet in California, those conversations would be "speech." By contrast, if a *licensed* therapist in Florida has a conversation with a patient encouraging him to change his sexual orientation, that's "speech"—even though a licensed therapist saying those same words in California engages only in "conduct." This deep confusion over the scope of the First Amendment invites mischief, as legislators and judges alike will be tempted to wave away fundamental constitutional protections by simply declaring unwanted speech "conduct." *Cf. Pickup* v. *Brown*, 740 F.3d 1208, 1218 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing

en banc). The petition for certiorari should therefore be granted.

I. The Circuits Are Divided.

1. As illustrated in the petition, lower courts disagree about how to determine whether a professional regulation restricts "speech" or merely conduct. Some courts ask whether the conduct triggering coverage under a licensing law consists of communicating a message, while others (like the court below) ask whether the licensing law itself is generally aimed at "occupational conduct." Pet. 16–21.

The BIO tries to wave away this split by insisting that the only legal rule governing this case is the longstanding proposition that "States may regulate professional conduct even though that conduct incidentally involves speech." *Nat'l Inst. of Fam. & Life Advocates, Inc.* v. *Becerra*, 138 S. Ct. 2361, 2372 (2018) ("*NIFLA*"); BIO 7. And, it says, the only way to tell whether a given rule functions as a regulation of speech or conduct is a "factbound" and "fact-specific" inquiry unsuited for this Court's review. BIO 7, 10, 11.

This is wrong. It is of course true that states may regulate "conduct" without violating the First Amendment, but the circuit split outlined in the Petition is a split about what counts as a regulation of "conduct" in the context of licensing laws. Pet. 12–21. And, while the BIO repeatedly invokes the "factbound" nature of the decision below, the parties do not dispute those facts or how to weigh them. Instead, they dispute which of those facts matter: Is the question (as some circuits have held)

whether *as applied to Heather* the conduct triggering coverage under the regulation consisted of communicating a message or is it (as the court below held) whether the "regulation [itself] govern[s] occupational conduct with only an incidental effect on speech." App. 6a, 12a, 13a.

This is a disagreement about that legal rule, not about facts. That much is clear from the panel opinion, which was primarily concerned with whether it remained bound by the Eleventh Circuit's earlier decision in *Locke* v. *Shore*, 634 F.3d 1185 (11th Cir. 2011). App. 10a–24a. Holding that it was bound, the panel then made short work of the First Amendment claims here. App. 24a–27a. But if the analysis were truly fact-bound, one would not expect a case about interior designers to control a case about diet advice. And, indeed, the panel below did not follow *Locke*'s fact-bound analysis of interior design. It followed *Locke*'s general rule that "regulations that govern occupational conduct with only an incidental effect on speech withstand First Amendment scrutiny[,]" however they are applied in a particular instance. App. 12a–13a (quotation marks omitted).

The BIO resists the idea that the panel below applied any rule at all, insisting that the holding below represents a finding of fact that follows the same rule that applies to all speech cases rather than "a First Amendment rule applicable solely to 'occupational-licensing laws.'" BIO 7. But, as explained in the Petition, the Eleventh Circuit, sitting en banc, says otherwise. *Locke* (which controlled below) governs only laws "requiring that [people] obtain a license" and does not apply to laws that

"limit[] or restrict[] what licensed [speakers] could say." *Wollschlaeger* v. *Governor of Fla.*, 848 F.3d 1293, 1309 (11th Cir. 2017) (en banc); see also Pet. 14–15. And that is how the Eleventh Circuit applies the law. Laws that are triggered by what a licensed professional says are treated as speech restrictions. *Wollschlaeger*, 848 F.3d at 1310 (applying heightened scrutiny to restriction on the speech of licensed doctors); *accord Otto* v. *City of Boca Raton*, 981 F.3d 854, 859 (11th Cir. 2020) (applying strict scrutiny to restriction on the speech of licensed therapists). But laws that prohibit unlicensed people from "recommending appropriate dietary regimens" without a license are treated as mere restrictions on conduct. App. 25a. These are different legal rules, not disputes about underlying facts. The BIO discusses neither *Wollschlaeger* nor *Otto*, and so it paints a picture of the law of the Eleventh Circuit that cannot be squared with that court's own decisions.

2. In part because it declines to engage with the Eleventh Circuit's cases, the BIO also fails to undermine the circuit split outlined in the Petition. Pet. 16–21 (noting split with the Fourth, Fifth, and Ninth Circuits). As the Petition explains, this Court's general approach to the line between speech and conduct is to ask whether "as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." *Holder* v. *Humanitarian Law Proj.*, 561 U.S. 1, 28 (2010). And at least three Circuits have applied that rule to licensing laws that were triggered by speech. See *Billups* v. *City of Charleston*, 961 F.3d 673, 683 (4th Cir. 2020) (citing *Humanitarian Law Proj.*, 561 U.S. 1, 28 (2010)); *Vizaline, L.L.C.* v. *Tracy*, 949 F.3d

927 (5th Cir. 2020) (same); *Pac. Coast Horseshoeing School, Inc.* v. *Kirchmeyer*, 961 F.3d 1062, 1069 (9th Cir. 2020) (same).

The BIO fails to harmonize any of these cases with the rule applied below. Take the Fifth Circuit's decision in *Vizaline*. The BIO asserts that "the Eleventh Circuit [below] applied the same rule that the Fifth Circuit [applied in *Vizaline*]: '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.'" BIO 9 (quoting *Vizaline*, 949 F.3d at 931 (emphasis added by Respondent)). In other words, the BIO suggests, by acknowledging that a different rule applies when a regulation is triggered by "professional conduct[,]" the Fifth Circuit was adopting the same rule the panel applied below.

But of course not. The question posed by the Fifth Circuit, following *Humanitarian Law Project*, was what triggered the regulation "*as applied to* [a plaintiff's] practice." *Vizaline*, 949 F.3d at 931 (emphasis supplied). And, as applied here, there is no question what caused Heather to fall within the ambit of the dietician-licensing law: "providing individualized dietary advice[.]" App. 6a. Providing advice is speech: As this Court has already held, a law that, as applied, is triggered by "communicat[ing] advice" is a restriction on speech. *Humanitarian Law Proj.*, 561 U.S. at 27. But that did not matter below because the Eleventh Circuit does not ask how a licensing law is triggered in a particular application. It simply asks whether the law itself is "an otherwise

legitimate regulation . . . [of] occupational conduct." App. 24a–25a.*

The BIO fares no better when it comes to the Ninth Circuit. *Pacific Coast Horseshoeing*, it says, is distinguishable because it "did not involve a professional licensing requirement at all." BIO 7–8. This, too, is incorrect. The law challenged in that case was "a form of educational licensing by the State." *Pacific Coast Horseshoeing*, 961 F.3d at 1069. It was even a form of licensing that, at least in part, was directed at conduct like entering into "enrollment agreements" with students. *Ibid.* But that did not matter because, the Ninth Circuit explained, even "a law which 'may be described as directed at conduct' nevertheless implicates speech where 'the conduct triggering coverage under the statute consists of communicating a message[.]'" *Ibid.* (quoting *Humanitarian Law Proj.*, 561 U.S. at 28). By contrast, the opinion below hinges entirely on the legitimacy of licensing dieticians generally, even if the only thing Heather does to trigger coverage under the statute is give advice on forbidden topics. App. 24a–26a.

So too with the Fourth Circuit. The BIO's only response to that court's decision in *Billups* is to claim that "the Eleventh Circuit's fact-specific analysis" in this case means it would have reached the same outcome if faced with a licensing law for tour guides.

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* Indeed, even the BIO does not quite manage to keep up the façade that the opinion below analyzed how the law applies to Heather's particular conduct. On the very next page, it (correctly) characterizes the opinion below as "conclud[ing] that Florida's particular scheme for licensing [dieticians] regulates conduct[.]" BIO 10.

BIO 9–10. But it is unclear why. After all, if Heather is regulable because dieticians engage in the "occupational conduct" of "conducting nutrition research" as well as giving advice (App. 25a) then surely tour guides engage in the "occupational conduct" of conducting *historical* research as well as giving tours. Pet. 19. The difference is not in the facts. The difference is in cases—like *Billups*, *Pacific Coast Horseshoeing*, and *Vizaline*—that apply *Humanitarian Law Project* to licensing laws and cases—like *Locke* and the opinion below—that do not.

3. The BIO cites three additional circuit cases, but none undermines the split explained in the petition. Quite the opposite.

Begin with *Tingley* v. *Ferguson*, 47 F.4th 1055 (9th Cir. 2022), which was handed down after the petition in this case was filed. BIO 8. *Tingley* only deepens the circuit split here. In that case, the panel faced a challenge to a prohibition on talk therapy designed to change a patient's sexual orientation. 47 F.4th at 1063. And the panel held that it was bound by an earlier decision, *Pickup* v. *Brown*, 740 F.3d 1208 (9th Cir. 2014), which had upheld a "nearly identical" law against a First Amendment challenge. 47 F.4th at 1063. *Pickup* had held that the earlier law regulated conduct rather than speech, and that conclusion dictated the outcome in *Tingley*. *Id.* at 1071. This conclusion conflicts directly with the Eleventh Circuit's decision in *Otto*. *Id.* at 1077 (acknowledging that the Eleventh Circuit's decision in *Otto*, *supra*, reached a different conclusion on the same speech/conduct question).

The Ninth Circuit's reaffirmation of *Pickup* thus exacerbates the split here because *Pickup*, unlike the cases collected in the petition (Pet. 16–21), expressly refuses to apply this Court's decision in *Humanitarian Law Project*. The *Pickup* panel held that *Humanitarian Law Project* was inapplicable because it concerned only "(1) political speech (2) by ordinary citizens" not therapy conducted by licensed therapists. *Pickup*, 740 F.3d at 1230. But *Pickup*'s rejection of *Humanitarian Law Project* does not control in all licensing contexts. To the contrary—in *Pacific Coast Horseshoeing*, the Ninth Circuit specifically relied on *Humanitarian Law Project* to invalidate an application of a licensing law. *Pacific Coast Horseshoeing*, 961 F.3d at 1069.

In short, the rule in the Ninth Circuit is that (at least in the context of some forms of talk therapy) licensed professionals are entitled to less First Amendment protection than "ordinary citizens" are afforded. The rule in the Eleventh is the reverse. A law that operates as a restriction on what a *licensed therapist* may say is treated as a restriction on communicating a message. *Otto*, 981 F.3d at 861. But when an ordinary citizen like Petitioner says a licensing law prohibits her from giving advice, she is outside the First Amendment entirely. App. 25a–26a. *Tingley* cannot be squared with *Otto*, just as the opinion below cannot be squared with *Pacific Coast Horseshoeing*. That is a split of authority that warrants this Court's intervention.

Neither of the older circuit cases cited in the BIO add much to the analysis here. Take *EMW Women's Surgical Center, P.S.C.* v. *Beshear*, 920

F.3d 421 (6th Cir. 2019). There, the Sixth Circuit correctly recognized that informed consent requirements for abortions do not violate the First Amendment because the speech they compel is merely incidental to the regulation of medical conduct: the non-communicative conduct of performing abortions. This holding is no surprise, as *NIFLA* itself points to informed consent to abortion as the canonical example of a regulation of conduct with an incidental burden on speech. 138 S. Ct. at 2373. But *NIFLA* also makes clear that there is no inconsistency between this and the speech/conduct test in *Humanitarian Law Project*. To the contrary, it simply confirms that there is a distinction between laws that are triggered by performing a "medical procedure" and those that are "not tied to a procedure at all." *Id.* The former regulate conduct, while the latter regulate "speech as speech." *Id.* at 2374. And, here, the only "procedure" Heather offered her clients was "tailored advice on dietary choices, exercise habits, and general lifestyle strategies." App. 3a.

The same is true of the Third Circuit's ruling in *Greater Philadelphia Chamber of Commerce* v. *City of Philadelphia*, 949 F.3d 116 (3d Cir. 2020). In that case, the city of Philadelphia prohibited basing a newly hired employee's wage on that employee's wage history. Related to that, the city also prohibited employers from asking about prospective employees' wage history. In upholding both provisions, the Third Circuit did exactly what the Eleventh Circuit should have done here: It applied the speech/conduct test set forth in *Humanitarian Law Project*. Doing so, the Third Circuit concluded that the Philadelphia law

was triggered not by speech but by the noncommunicative conduct of setting wages.

In short, the BIO cites these cases in the hopes of persuading the Court that the circuits uniformly apply the same rule by upholding regulations of "professional conduct" and striking down regulations of speech. But instead, the cases only illustrate that the lower courts disagree about how to distinguish between regulations of "professional conduct" and regulations of "professional speech" when it comes to licensing laws. This Court should grant certiorari to resolve this split of authority.

II. This Is A Good Vehicle To Resolve An Important Question.

The BIO conspicuously refrains from making any arguments against this case's suitability as a vehicle. It does not, for example, disagree with the Eleventh Circuit's conclusion that this case is not mooted by a recent amendment to the licensing law (which now prohibits only giving advice to people who are under a doctor's care). BIO 5. But the BIO's discussion of that amendment makes clear how malleable—and, ultimately, dangerous—Florida's view of the speech/conduct distinction is.

The new amendment, the BIO contends, "confirm[s]" that "the Act regulates conduct." BIO 13. But it does not explain what makes advice "conduct" when it is communicated to someone with a medical condition. Just consider the past actions Heather has taken that would violate the law as amended: In one instance, for example, Heather "recommended health goals that fit within a list of foods to avoid provided by [her] client's doctor." App. 3a. That advice was (and

remains) illegal under Florida law, and under the rule articulated below, courts should hold that "recommend[ing] health goals" is conduct, rather than speech.

But no consistent principle tells lower courts how to distinguish between recommendations and advice that are "speech" and recommendations and advice that are "conduct." This Court has articulated a simple, administrable test that instructs courts to focus on what "trigger[s] coverage under [a] statute" in a particular instance. *Humanitarian Law Project*, 561 U.S. at 28. That was not the test applied below. If it had been, this case would have come out differently because there is no dispute that the only conduct triggering Heather's coverage under the statute was "providing individualized dietary advice." App. 6a. In lieu of that test, the Eleventh Circuit and the BIO propose no alternative, which means the label of "occupational conduct" can be affixed to any speech that a regulator would like to exempt from the First Amendment. This basic disagreement about the scope of the Constitution's protections for free speech requires this Court's review, and the petition for certiorari should therefore be granted.

Respectfully submitted,

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