No. 21-375

In the Supreme Court of the United States

JOSHUA GRAY,

Petitioner,

v.

MAINE DEPARTMENT OF PUBLIC SAFETY,

Respondent.

On Petition for a Writ of Certiorari to the Maine Supreme Judicial Court

Brief *Amicus Curiae* of the Foundation for Individual Rights in Education (FIRE) in Support of Petitioner

Eugene Volokh
Counsel of Record
FIRST AMENDMENT CLINIC
UCLA SCHOOL OF LAW
385 Charles E. Young Dr. E
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

Counsel for Amicus Curiae

Question Presented

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

Table of Contents

Table of Authorities

Cases

Statutes

Other Authorities

Interest of the *Amicus Curiae*[1]

The Foundation for Individual Rights in Education (FIRE) is a nonpartisan, nonprofit organization dedicated to protecting civil liberties at our nation's institutions of higher education. These rights include freedom of speech, freedom of press, freedom of assembly, due process, academic freedom, legal equality, and freedom of conscience.

FIRE submits this amicus brief to highlight the dangers of universities and professional boards wielding broad standards of "good moral character" in the professions to stamp out disfavored views and stifle discourse.

Summary of Argument

Nearly a quarter of American workers are in occupations subject to licensure requirements. Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL'Y 209, 210 (2016). Still more Americans are students at universities or in other programs who are seeking to become licensed professionals.

If they could lose their licenses, or be denied licenses, or be expelled from licensing programs because of their public speech on controversial issues, they would be powerfully chilled from engaging in

---

[1] No counsel for a party authored this brief in whole or part, nor did any person or entity, other than *amicus* or its counsel, make a monetary contribution to the preparation or submission of this brief. Both parties have consented to the filing of this brief. Both parties' counsel of record received timely notice of *amicus*'s intent to file the brief.

such speech. Many professionals and would-be professionals would thus feel pressured to "'steer . . . wider of the unlawful zone'" and remain silent on issues of public concern, such as police misconduct. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279 (1964) (quoting *Speiser* v. *Randall*, 357 U.S. 513, 526 (1958)). As a result, the government could indirectly silence criticism and prescribe ideological orthodoxy.

Participants in "public debate," in particular, routinely make honest mistakes, and thus utter "erroneous statement[s]." *Id.* at 279, 271. That is also true in public speech about public officials such as police lieutenants. *See id.* (holding that a police commissioner is a public official); *Coughlin* v. *Westinghouse Broad. & Cable Inc.,* 780 F.2d 340, 342 (3d Cir. 1986) (holding that even a rookie patrol officer is a public official). Were licensing boards free to deny licenses to applicants for mere errors—without having to prove "actual malice"—there would be a vast pool of errors to select from. To the chilling effect described above would then be added a broad opportunity for viewpoint-discriminatory judgment about just which errors warrant the denial of a license.

This road to censorship, paved by the decision below, is inconsistent with this Court's precedents. Those precedents have declined to recognize a general exception for "professional speech." They have rejected a balancing-of-social-values approach to recognizing new First Amendment exceptions. And they have instructed that content-based speech restrictions falling outside of the recognized exceptions are subject to strict scrutiny.

This case provides a good vehicle for diminishing the risk of such censorship, by resolving the split

among state and federal courts on the standard of review applicable to professional speech restrictions and speech-based licensing decisions. The petition for certiorari should thus be granted.

Argument

I. Lower courts are split and uncertain on the proper standard for evaluating restrictions on professional speech.

Lower courts are divided on how to evaluate professional speech restrictions, whether those restrictions threaten denial of a license, withdrawal of a license, or other disciplinary action. (Just as decisions not to hire employees based on political affiliation are subject to the same First Amendment standards as decisions to fire employees based on political affiliation, *Rutan* v. *Republican Party of Illinois*, 497 U.S. 62, 65 (1990), decisions not to license professionals based on their speech should be subject to the same First Amendment standard as decisions to withdraw a license based on speech.)

"Speech is not unprotected merely because it is uttered by professionals." *Nat'l Inst. of Fam. & Life Advocs. (NIFLA)* v. *Becerra*, 138 S. Ct. 2361, 2371-72 (2018). Though government power "to regulate the professions is not lost whenever the practice of a profession entails speech," "the principle that the government may restrict entry into professions and vocations through licensing schemes has never been extended to encompass the licensing of speech *per se* or of the press." *Lowe* v. *SEC*, 472 U.S. 181, 228, 229-30 (1985) (White, J., concurring in judgment). Yet lower courts are unclear on just which test applies to content-based restrictions on professional speech:

1. Some courts have applied strict scrutiny. *See Otto* v. *City of Boca Raton*, 981 F.3d 854, 865 (11th Cir. 2020) (as to restriction on sexual orientation conversion therapy); *Taking Offense* v. *State*, 281 Cal. Rptr. 3d 298, 316 (Cal. App. 2021) (as to law prohibiting long-term care staff from addressing facility residents by non-preferred pronouns).

2. Some courts have applied intermediate scrutiny. *See King* v. *Governor*, 767 F.3d 216, 234 (3d Cir. 2014) (as to restriction on sexual orientation conversion therapy); *AMA* v. *Stenehjem*, 412 F. Supp. 3d 1134, 1148-49 (D.N.D. 2019) (as to requirement that physicians inform patients that the effects of abortion-inducing drugs are reversible).

3. One has applied rational basis scrutiny, at least as to speech to a client. *See Pickup* v. *Brown*, 740 F.3d 1208, 1231 (9th Cir. 2014) (as to restriction on sexual orientation conversion therapy).

4. Others have declined to conclusively adopt a single standard. *See Moore-King* v. *County of Chesterfield*, 708 F.3d 560, 568 (4th Cir. 2013) (concluding that neither strict nor intermediate scrutiny is a "perfect fit" for professional licensing requirements, in that case as to fortune tellers); *Vizaline, L.L.C.* v. *Tracy*, 949 F.3d 927, 934 (5th Cir. 2020) (declining to "express [a] view on what level of scrutiny might be appropriate" for evaluating licensing requirements for land surveyors).

5. One court even went through each rung of the scrutiny ladder before an *en banc* panel finally disposed of the case without deciding conclusively on whether intermediate scrutiny or strict scrutiny should apply. *See Wollschlaeger* v. *Governor*, 760 F.3d

1195, 1218-19 (11th Cir. 2014) (applying rational basis review to a regulation prohibiting physicians from inquiring into patients' firearm ownership); *Wollschlaeger* v. *Governor*, 797 F.3d 859, 892-94 (11th Cir. 2015) (applying intermediate scrutiny); *Wollschlaeger* v. *Governor*, 814 F.3d 1159, 1190-91 (11th Cir. 2015) (applying strict scrutiny); *Wollschlaeger* v. *Governor,* 848 F.3d 1293, 1308-11 (11th Cir. 2017) (en banc) (declining to decide on a standard of review but holding that the regulations failed even under intermediate scrutiny).

Lower courts need guidance from this Court on this important question.

II. The court below erred in failing to apply strict scrutiny.

The Department's denial of Gray's license should be subject to strict scrutiny. There is no "professional speech" exception to the First Amendment. Gray's speech was not merely incidentally burdened as a part of a broader regulation of professional conduct. And the Department denied Gray's license based on the communicative impact of Gray's speech.

A. The denial of the license was not a regulation of professional conduct that only incidentally affected speech.

The court below acknowledged that there is no categorical First Amendment exception for "professional speech." Pet. 11a (citing *NIFLA*, 585 U.S. at 2371-72). But it nevertheless concluded that the Department's denial of Gray's license was a regulation of professional conduct that only incidentally impacted speech, and was thus not subject to strict scrutiny. Pet. 17a.

Yet there was no other professional conduct here to which the speech would be "incidental." Gray's speech was not "tied to [any physical] procedure." *NIFLA*, 585 U.S. at 2373; *Planned Parenthood of Se. Pa.* v. *Casey*, 505 U.S. 833, 884 (1992) (rejecting an "asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State"). It was not said pursuant to any obligation of professional conduct involving a client.

It was said to the public, and was part of public debate. It was thus fully protected by the First Amendment. *See NIFLA*, 585 U.S. at 2371 (holding that a law compelling crisis-pregnancy centers to post notices at their facilities did not fall within a First Amendment exception, though the speech was seen by clients); *Lowe*, 472 U.S. at 204 (construing a statute narrowly to avoid having it restrict dissemination of opinions about investments to the public).

B. The proper standard for evaluating this speech restriction is strict scrutiny, not intermediate scrutiny.

A restriction on conduct is treated as a speech restriction when "as applied to [the challenger] the conduct triggering coverage under the statute consists of communicating a message." *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 28 (2010). And such a restriction is treated as a "content-based regulation of speech" when the government's action "depends on what [the challenger] say[s]." *Id.* at 27.

Thus, for instance, *Cohen* v. *California,* 403 U.S. 15 (1971), "involved a generally applicable regulation of conduct, barring breaches of the peace." *Holder*, 561

U.S. at 28. But this Court "recognized that the generally applicable law was directed at Cohen because of what his speech communicated—he violated the breach of the peace statute because of the offensive content of his particular message." *Id.* at 29. And thus "when Cohen was convicted for wearing a jacket bearing an epithet," the Court applied "more rigorous scrutiny" than *United States* v. *O'Brien* intermediate scrutiny. *Id.* at 28. Today, that standard would be strict scrutiny. *See, e.g.*, *United States* v. *Playboy Entm't Group, Inc.*, 529 U.S. 803, 813 (2000) (citing *Cohen* as an example of a content-based speech restriction, and concluding that strict scrutiny should apply to such restrictions). The same approach should apply here.

It was the communicative content of Gray's speech that triggered coverage under the statutes, because the board concluded that his speech showed a lack of moral character and competency. Pet. 6a; *cf. Cohen,* 403 U.S. at 18 ("The conviction quite clearly rest[ed] upon the asserted offensiveness of the words Cohen used to convey his message to the public"). A law is "content based if it require[s] 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 (2014). That surely occurred here.

The court below believed that applying intermediate scrutiny was a "'sensible result . . . [that] fits neatly with the broad leeway that states have to regulate professions,'" while still providing speakers some measure of protection. Pet. 15a (quoting *Capital Associated Indus.* v. *Stein*, 922 F.3d 198, 209 (4th Cir. 2019)). But new First Amendment exceptions cannot be established by "ad hoc balancing of relative social costs and benefits." *United States* v. *Stevens*, 559 U.S.

460, 470 (2010). There must instead be "persuasive evidence . . . of a long (if heretofore unrecognized) tradition" of imposing content-based laws under the circumstances before a new exception is recognized. *Brown* v. *Entertainment Merchants Ass'n,* 564 U.S. 786, 792 (2011).

The Department here has offered no such evidence of a tradition of denying professional licenses based on an applicant's political speech supposedly bespeaking a lack of moral character or competence. And *amicus* is unaware of any such evidence. Rather, it has long been clear that "[g]overnment censorship can no more be reconciled with our national constitutional standard of freedom of speech and press when done in the guise of determining 'moral character,' than if it should be attempted directly." *See Konigsberg* v. *State Bar of Cal.*, 353 U.S. 252, 269 (1957) (holding that an "inference of bad moral character" could not be "drawn from" a bar applicant's editorials which "severely criticized" public officials over the Korean War").

Indeed, even when the government is controlling the speech of its own employees—people whom it pays money to do a job—such speech is still generally protected "absent proof [that the employees made the] false statements knowingly or recklessly." *Pickering* v. *Board of Ed. of Tp. High School Dist. 205, Will County*, 391 U.S. 563, 574 (1968). At least the same protection should be offered when the government licenses private businesspeople, and where the government's special interest in selecting its own paid agents is not implicated. *See Waters* v. *Churchill,* 511 U.S. 661, 671 (1994) (plurality opinion) ("[T]he government as employer indeed has far broader powers than does the government as sovereign").

Thus, because the licensing rules applied here could not be justified under any First Amendment exception, and because they "impose . . . content-based restrictions on speech," the application of the rules "can stand only if [it] survive[s] strict scrutiny." *Reed* v. *Town of Gilbert*, 576 U.S. 155, 171 (2015) (internal citations and quotations omitted). The court below erred in failing to apply strict scrutiny.

III. Any standard less protective than "actual malice" would unduly chill speech.

The decision below, if upheld, would sharply restrict public debate by the tens of millions of Americans who are subject to professional licensing rules. That is partly so because such speakers will realize that public commentary inevitably involves the risk of some error. And it is partly so because even accurate statements might be erroneously treated as falsehoods by licensing board members, or targeted for punishment because of the viewpoint they express.

This is especially likely because of the common human tendency—shared by licensing board members as well as others—to judge more harshly people whose ideological views they disagree with. A liberal board might give the benefit of the doubt to possibly inaccurate statements critical of police officers, but come down hard on possibly inaccurate claims that a police-shooting victim was a repeat violent criminal; a conservative board might do the opposite. Indeed, the board that denied Gray's license, for instance, includes two members of the state police force. 32 M.R.S. § 8103-A(3)(A). It is only human nature for them to be particularly incensed by criticisms of a police lieutenant.

The court below reasoned that, because Gray "presented as fact" certain false, uninvestigated information, the Department's "rationale for its [denial went] to the heart of professional responsibility concerns" of a profession "focused on the investigation and accurate communication of facts." Pet. 20a. Yet under this reasoning, whenever a professional opines on a breaking public controversy involving a topic within his general expertise—a controversy where facts are necessarily uncertain and limited—and his statements turn out to be false, that error can form the basis of a denial or revocation of a license.

Doctors would thus be chilled from publicly discussing how to react to a new disease, given the inevitable risk of error. *See, e.g.*, Brit McCandless Farmer, *March 2020: Dr. Anthony Fauci Talks with Dr. Jon LaPook about COVID-19,* CBS News (Mar. 8, 2021) (reporting on an interview of Dr. Anthony Fauci where he stated that there is "no reason to be walking around with a mask"). Lawyers would be chilled from publicly debating a new legal proposal, or opining on a newly filed criminal or civil case. Opening the doors to liability for these factual missteps would inhibit the lively exchange of ideas within professions and prevent the emergence of a "clearer perception . . . of truth, produced by its collision with error." *New York Times*, 376 U.S. at 279 n.19 (internal citation omitted).

And this would naturally extend to law students, medical students, and students in other institutions that prepare people for a professional career. Indeed, universities are already beginning to suppress controversial student speech on the grounds that it supposedly indicates a poor professional disposition. In *Hunt* v. *Bd. of Regents of Univ. of New Mexico*, for instance, a medical student was disciplined by the university

because it viewed his harsh criticisms of abortion to be "unprofessional." 792 F. App'x 595, 598 (10th Cir. 2019). The Tenth Circuit held that defendants were protected by qualified immunity, precisely on the view that the law here was too "unsettled" to provide adequate guidance to government officials. *Id.* at 604.

In *Ward* v. *Polite*, a student was expelled from a counseling degree program because she asked her supervisor to refer a gay client to another student counselor—something that program administrators viewed as contrary to professional ethics, even though "the school [did] not have a no-referral policy for practicum students and adhere[d] to an ethics code that permits values-based [referral]." 667 F.3d 727, 730 (6th Cir. 2012). The Sixth Circuit held that the student's case could go to the jury, because "a reasonable jury could find" that referrals were permitted, "and that the university deployed [its supposed concerns] as a pretext for punishing Ward's religious views and speech." *Id.* at 735.

Likewise, *amicus* is currently representing Kimberly Diei, a pharmacy school student who was nearly expelled for her social media posts about sex, which the school apparently viewed as "crude" and unduly "sexual" and thus inconsistent with "professionalism." Complaint, *Diei* v. *Boyd*, No. 2:21-cv-02071, ¶¶ 74, 82 (W.D. Tenn. Feb. 3, 2021). The expulsion was only reversed after a letter from *amicus, id.* ¶¶ 90, 91; Diei is now suing the university for violating her free speech rights. *Id.*

The decision below gives the green light to these sorts of restrictions, and more—restrictions that would sharply deter university professional students, lawyers, doctors, private investigators, and nearly a

quarter of all working Americans from participating in important public debates.

Conclusion

The holding of the court below endorses broad government power to punish professionals and would-be professionals for their speech—power inconsistent with this Court's decisions, and with decisions of other lower courts. Granting the petition for certiorari would let this Court clarify the standard applicable to regulations of professional speech, and forestall a regime in which professional licensing boards become the arbiters of public discourse.

Respectfully submitted,

EUGENE VOLOKH
Counsel of Record
FIRST AMENDMENT CLINIC
UCLA SCHOOL OF LAW
385 Charles E. Young Dr. E
Los Angeles, CA 90095
(310) 206-3926
volokh@law.ucla.edu

Counsel for Amicus Curiae

October 4, 2021