No. 21-375

IN THE

Supreme Court of the United States

JOSHUA GRAY,

Petitioner,

v.

MAINE DEPARTMENT OF PUBLIC SAFETY,

Respondent.

On Petition for Writ of Certiorari To the Maine Supreme Judicial Court

BRIEF OF *AMICI CURIAE* PROFESSORS MORRIS M. KLEINER & EDWARD J. TIMMONS IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Dr. Morris M. Kleiner and Dr. Edward J. Timmons are leading, widely cited scholars in the field of occupational licensing. Dr. Kleiner is Professor and AFL-CIO Chair in Labor Policy at the Humphrey School of Public Affairs at the University of Minnesota, a visiting scholar at the Federal Bank of Minneapolis and the Upjohn Institute for Employment Research, and a research associate with the National Bureau of Economic Research in Cambridge, Massachusetts. He has published numerous books and articles spanning over two decades of research, with a particular focus on occupational regulation and its impact on quality and costs. *See infra* pp. 6–7 n.2.

Dr. Timmons is Service Associate Professor of Economics and Director of the Knee Center for the Study of Occupational Regulation at the John Chambers School of Business and Economics at West Virginia University. He has written extensively on the effects of occupational regulation, and his research has been published in the Journal of Law and Economics, the British Journal of Industrial Relations, The Journal of Labor Research, among several other academic journals, as well as cited in the national press. *See id.*

Given their substantial research and advisory contributions, *amici* have a professional interest in contributing to the sound interpretation of First

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[1] All parties were timely notified and consented to the filing of this brief. Nobody other than *amici* authored this brief in any part or funded its preparation or filing.

Amendment law as applied to occupational licensing. Continuously expanding in scope and number, occupational-licensing laws require millions of American workers to secure the government's blessing before pursuing honest work in well over a thousand different vocations. In this brief, *amici* present a wealth of empirical research that further justifies the Court's review of this case, not least to clarify that government actors cannot deny a person's right to earn a living based on that person's constitutionally protected speech.

SUMMARY OF ARGUMENT

Just three terms ago, this Court emphatically rejected "diminished constitutional protection" for "professional speech." *Nat'l Inst. of Fam. & Life Advocs. v. Becerra*, 138 S. Ct. 2361, 2372 (2018) (*NIFLA*). Today's case raises inevitable and important follow-up questions, offering the Court an ideal vehicle to build upon *NIFLA* and examine the intersection of occupational licensing and the First Amendment.

In his petition, Gray identifies "[t]hree trends" at the heart of this case: "the explosive growth of occupational licensing, the nearly universal inclusion of vague 'good moral character' requirements in licensing laws, and the widespread adoption of social media." Pet. 10. Neither fluke nor fiction, Gray's identified trends find ample support in a substantial body of empirical evidence.

Extensively invoking that evidence, *amici* show how occupational licensing has indeed become one of the most significant aspects of the American labor market, with its regulatory coverage now extending to millions

of workers in well over a thousand vocations. Several studies of occupational-licensing laws, moreover, confirm both the prevalence of "good moral character" requirements and the sweeping discretion many such requirements bestow on licensing authorities. Finally, as shown by usage data, news reports, and other evidence, social media and online expression have for years been gaining in popularity and significance.

In addition to verifying Gray's "[t]hree trends," a close look at the empirical evidence also reveals that a critical assumption made by the Maine Supreme Judicial Court is not, in fact, true. Gray maintains—and *amici* agree—that his First Amendment "claim should have been reviewed with strict scrutiny." Pet. 20. Yet even under the lesser scrutiny applied below, "the statutory licensing standards, as applied in Gray's case" had to be "narrowly tailored to serve a significant governmental interest." Pet. App. 19a (quoting *Packingham v. North Carolina*, 137 S. Ct. 1730, 1736 (2017)). In applying this test on its way to ultimately ruling in Respondent's favor, the court below merely *assumed* the licensing law at issue served a governmental interest and benefited the public.

But that assumption defies reality. As empirical research repeatedly shows, occupational licensing generally confers minimal benefit on the public. Time and time again, research finds no statistically significant connection between the existence or stringency of a licensing law, on the one hand, and the safety or quality of services provided, on the other. And these findings hold true whether a licensing law contains a "good moral character" requirement or not.

What is more, the overwhelming weight of empirical evidence shows that occupational licensing imposes massive costs on individuals and society—to the tune of millions of jobs and hundreds of billions of dollars. Indeed, licensing's costs manifest in many ways, including higher prices, fewer jobs, and diminished worker mobility, to name a few.

In light of the abundant empirical evidence documenting occupational licensing's trends and effects, *amici* share Gray's concerns. The decision below, if left intact, may serve as a template for licensing authorities to deploy "good moral character" requirements to silence would-be licensees who criticize government or express "unpopular ideas or information." *NIFLA*, 138 S. Ct. at 2374 (quoting *Turner Broadcasting Sys., Inc. v. FCC*, 512 U.S. 622, 641 (1994)). And if left intact, the decision's ungrounded assumptions about licensure's public benefits may proliferate to the detriment of occupational freedom and First Amendment rights.

The Court should hear this case.

ARGUMENT

I. As occupational licensing, "good moral character" requirements, and online expression become ever more prevalent, the Court's input is needed to resolve critical First Amendment questions.

Joshua Gray, a Massachusetts professional investigator, wanted to expand his business into Maine. To do so, he needed a professional-investigator license from the Maine Department of Public Safety, which required he demonstrate "good moral character." 32 M.R.S.

§ 8105(4). But Gray's moral character fell short, the Department concluded, because of "uninvestigated" and "erroneous" statements he previously posted on Facebook. Pet. App. 6a. Upholding the Department's denial and rejecting a First Amendment challenge, the court below held that "[d]etermining whether an applicant meets the requirements of good character and competency may depend . . . upon the applicant's communications." Pet. App. 17a.

No single aspect of Gray's predicament is unique. To the contrary, this case and its grave First Amendment implications showcase the conflux of three increasingly pervasive aspects of contemporary American society: occupational licensing, "good moral character" requirements, and social-media use.

A. It is no hyperbole to say that occupational licensing—the "government licensing of jobs" that makes "working for pay in a licensed occupation [ ] illegal without first meeting government standards"—has become one of the most significant influences affecting American labor markets. Morris M. Kleiner, *Guild-Ridden Labor Markets: The Curious Case of Occupational Licensing* 1–2 (2015). In the 1950s, just five percent of workers needed government permission to earn money for their labor. Morris M. Kleiner, *Reforming Occupational Licensing Policies*, Brookings Inst. 5 (Mar. 2015), https://brook.gs/3ojmYVz. But in the decades since, licensing laws have Pac-Manned their way through the employment landscape, gobbling up trade after trade and profession after profession. Today, roughly one in four workers must obtain a government license to work in any of nearly 1100

vocations—from physicians and dentists, to upholsterers and hair braiders, to travel guides and high-school sports coaches, to horse-tooth filers and milk samplers. *See* Kleiner, *Guild-Ridden Labor Markets*, *supra*, at 1; U.S. Bureau of Labor Statistics, *Labor Force Statistics from the Current Population Survey*, https://bit.ly/2Y6vJI5 (last modified Jan. 22, 2021); Dick M. Carpenter II et al., *License to Work: A National Study of Burdens from Occupational Licensing*, Inst. for Justice 8–9, 12–13, 17 (Nov. 2017), https://bit.ly/3zRFl6k; Nat'l Conference of State Legislatures, *The State of Occupational Licensing: Research, State Policies and Trends* 2 (2017), https://bit.ly/3AZnUSA.

Occupational licensing has come under scrutiny. Scholars and commentators of varying disciplines—*amici* chief among them[2]—have raised wide-ranging,

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[2] *See, e.g.*, Kleiner, *Guild-Ridden Labor Markets*, *supra*; Robert J. Thornton & Edward J. Timmons, *The De-Licensing of Occupations in the United States*, Monthly Labor Rev., May 2015, https://bit.ly/3umpHyy; Morris M. Kleiner, *Stages of Occupational Regulation: Analysis of Case Studies* (2013); Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* (2006); Edward J. Timmons, *The Effects of Expanded Nurse Practitioner and Physician Assistant Scope of Practice on the Cost of Medicaid Patient Care*, 121 Health Policy 189 (2017); Edward J. Timmons & Robert J. Thornton, *The Effects of Licensing on the Wages of Radiologic Technologists*, 29 J. Labor Res. 333 (2008); Morris M. Kleiner & Robert T. Kudrle, *Does Regulation Affect Economic Outcomes? The Case of Dentistry*, 43 J.L. & Econ. 547 (2000).

cross-ideological critiques.[3] Even some in government have raised their eyebrows. President Biden, for instance, recently stated that "overly restrictive occupational licensing requirements can impede workers' ability to find jobs and to move between States." Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021). Similarly in 2018, the Federal Trade Commission found that "[u]nnecessary licensing restrictions erect significant barriers and impose costs that cause real harm to American workers, employers, and consumers, and our economy as a whole, with no measurable benefits to consumers or society." Karen A. Goldman, Fed. Trade Comm'n, *Policy Perspectives: Options to Enhance Occupational License Portability* 4 (2018), https://bit.ly/2YfJVhR.

Despite this scrutiny, occupational licensing's expansive reach shows little sign of receding. Indeed, occupational *de*-licensing has occurred only a few times over the past 40 years. *See* Thornton & Timmons, *The De-Licensing of Occupations*, *supra*, at 2–3, 8. Licensure's resilience results from both political and institutional factors, including "intense lobbying by associations of licensed professionals" and "the high costs of sunset reviews by state agencies charged with

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[3] *See, e.g.*, Daniel Greenberg, *Regulating Glamour: A Quantitative Analysis of the Health and Safety Training of Appearance Professionals*, 54 UIC J. Marshall L. Rev. 123 (2021); Chiara Farronato et al., *Consumer Protection in an Online World: An Analysis of Occupational Licensing* (Nat'l Bureau of Econ. Research, Working Paper No. 26601, 2020), https://bit.ly/2Y5y9X6; Ryan Nunn, *How Occupational Licensing Matters for Wages and Careers*, Brookings Inst. (Mar. 2018), https://brook.gs/3FcvMmq.

the periodic review." *Id.* at 1. To successfully de-license an occupation, moreover, state legislatures typically must either strip a licensing authority of its powers, or the authority must request self-termination. *Id.* at 2 (quoting Kleiner, *Licensing Occupations*, *supra*, at 13). And even when de-licensing proposals successfully overcome the expected "stiff resistance," a "movement to reinstitute licensing" usually follows. *Id.* at 13.

B. Occupational-licensing laws often include "good moral character" requirements. These requirements, it is said, protect the public by ensuring professional integrity—or, put more colorfully, by "eliminating the diseased dogs before they inflict their first bite." Bruce Robert Elder & Laurie Swinney, *The Good Moral Character Requirement for Occupational Licensing*, 43 Mgmt. Res. Rev. 717, 721 (2020) (quoting Donald T. Weckstein, *Recent Developments in the Character and Fitness Qualifications for the Practice of Law: The Law School Role; The Political Dissident*, 40 Bar Examiner 17, 23 (1971)). Certainly not limited to professional investigators in Maine, character requirements ("good," "moral," or both) have been imposed on a wide range of occupations, including beauticians, geologists, piano tuners, guide-dog trainers, and even vendors of erotica, to name but a few. *See* Elder & Swinney, *supra*, at 721; Deborah L. Rhode, *Moral Character as a Professional Credential*, 94 Yale L.J. 491, 499 (1985). All 50 states require good moral character for at least some occupations, with an average of 49 such occupations per state. Elder & Swinney, *supra*, at 724; *see also* Nat'l Conference of State Legislatures, *The National Occupational*

Licensing Database, https://bit.ly/3F6Vp7M (last visited Oct. 10, 2021).

Although Gray had to show "good moral character" for a license, no Maine law defined that term. Unguided by definition, the Maine Department of Public Safety determined that Gray flunked the character test because he posted a handful of "uninvestigated" and "erroneous" statements on social media. Pet. App. 6a, 18a–19a. Maine's definitionless requirement finds good company: states frequently fail to define what "good moral character" means. *See* Elder & Swinney, *supra*, at 730. This Court has long recognized that "good moral character" may be "defined in an almost unlimited number of ways[,] for any definition will necessarily reflect the attitudes, experiences, and prejudices of the definer." *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 262–63 (1957). At least one jurisdiction, in fact, outsources its character test to the general public: in Santa Barbara, hopeful massage therapists must submit written statements from "at least five (5) bona fide residents" attesting to their "good moral character." Santa Barbara, Cal., Mun. Code § 5.76.050(C).

Even when defined by law, however, the subjective nature of any character standard still endows regulators with considerable discretion. *See* Jonathan Haggerty, *How Occupational Licensing Laws Harm Public Safety and the Formerly Incarcerated*, R Street Inst. 3 (May 2018), https://bit.ly/3opkxRD. Consider, for instance, the prospective well driller in Michigan: before legally earning a living, she must convince a regulator of her "good moral character," meaning she

has a "propensity . . . to serve the public in the licensed area in a fair, honest, and open manner." Mich. Comp. L. § 338.41(1); Mich. Admin. Code § 325.1701(c). Things get even worse for certain would-be morticians in Florida, who to clear the standard "good moral character" hurdle must show they have "never demonstrated any act or nature that constitutes a lack of honesty or financial responsibility." Fla. Admin. Code § 69K-5.002(5)(c).

Finally, many good-moral-character provisions—and more as time goes on—expressly take into account prior criminal convictions. Peter Q. Blair, Jason F. Hicks, & Morris M. Kleiner, *The Historical Origins of Evolution of Criminal Records—Occupational Licensing Requirements*, Wash. Ctr. for Equitable Growth (forthcoming 2021). Although some such restrictions apply only when the crime relates to the license sought, seven states have authorized licensing boards to "generally disqualify applicants based on any felony, even if it is completely unrelated to the license." Nick Sibilla, *Barred from Working*, Inst. for Justice 1 (Aug. 2020), https://bit.ly/39UwYvW. In 33 states, moreover, applicants for certain licenses can be denied based solely on an arrest—even absent a conviction. *Id.* All told, states have imposed 27,254 occupational-licensing restrictions against those with criminal records. Michelle Natividad Rodriguez & Beth Avery, *Unlicensed & Untapped: Removing Barriers to State Occupational Licenses for People with Records*, Nat'l Emp't Law Project 6–7 (Apr. 2016), https://bit.ly/3opmgpV.

C. As occupational licensing and "good moral character" requirements continue their unrelenting march, so too do social media and online expression become more and more ubiquitous. Millions of Americans regularly use Facebook as a medium of expression and communication. Other stalwart social-media platforms like Instagram, LinkedIn, and YouTube welcome ever greater user bases. *See* Pew Research Ctr., *Social Media Use in 2021* (Apr. 7, 2021), https://pewrsr.ch/3uqbQY1. And up-and-coming apps—such as TikTok, WhatsApp, and Nextdoor—boast loyal followings. *See id.* Although particular apps may come and go, the general trend is unmistakable: between 2005 and today, social-media use among American adults has increased from five percent to over 72 percent. Pew Research Ctr., *Social Media Fact Sheet* (Apr. 7, 2021), https://pewrsr.ch/3unkkPA.

Social media, of course, is only one way in which the Internet has increased opportunities for, and access to, expression. Individuals can self-publish their views, to varying degrees of formality, with relative ease and nominal expense. Internet-enabled audio and visual conferencing connects people across the street and across the world. Unsurprisingly, COVID-19 precipitated an "inevitable surge" in digital technology use. Rahul De' et al., *Impact of Digital Surge During Covid-19 Pandemic: A Viewpoint on Research and Practice*, 55 Int'l J. Inf. Mgmt. 102171 (Dec. 2020). Indeed, during recent long periods of physical isolation, online communication has been a crucial source of connection. *See* Nicole Fullerton, *Instagram vs. Reality: The Pandemic's Impact on Social Media and Mental Health*, Penn.

Med. News (Apr. 29, 2021), https://bit.ly/3A59lvH (reporting that social media engagement increased 61 percent during the first COVID-19 wave); Minh Hao Nyugen et al., *Changes in Digital Communication During the COVID-19 Global Pandemic: Implications for Digital Inequality and Future Research*, Soc. Media + Soc'y, July-Sept. 2020, at 1, 2 (finding that survey respondents increased social media use 35 percent during the early days of the COVID-19 pandemic).

As the Internet facilitates ever more speech, government actors now have seemingly infinite annals of content to search, scrutinize, and—as the Maine Department of Public Safety did here—use to impugn a speaker's character and deny him an occupational license. This prospect has hardly gone unnoticed. For example, after law students in Michigan reportedly advocated for an emergency diploma privilege during the COVID-19 pandemic, their law school advised: "While you have every right to criticize the bar exam, the Board of Law Examiners, or the State Bar of Michigan online, it may not be a smart strategy for passing Character & Fitness with ease." Joe Patrice, *Law School Implies Diploma Privilege Advocates Could Get Dinged on Character and Fitness*, Above the Law (July 6, 2020), https://bit.ly/39RSAZW; *see also* Arterm M. Joukov & Samantha M. Caspar, *Who Watches the Watchmen? Character and Fitness Panels and the Onerous Demands Imposed on Bar Applicants*, 50 N.M. L. Rev. 383 (2020). This statement—counseling students to refrain from certain advocacy, lest it jeopardize their ability to enter a profession—embodies

growing recognition that licensing authorities enjoy tremendous power and can wield it unpredictably.

This Court recently cautioned that "regulating the content of professionals' speech pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information." *NIFLA*, 138 S. Ct. at 2374 (quoting *Turner*, 512 U.S. at 641). Yet the decision below invites licensing authorities across the country to scour social media sites and deny licenses based on speech of questionable "moral character." It may also encourage disaffected consumers, disgruntled employees, and unscrupulous competitors to "stalk" the social-media profiles of licensed professionals and report any potentially "immoral" communications to regulators. Hardly any mental effort is required to grasp how the "unusually ambiguous" concept of "good moral character"—especially when tied to fleeting utterances on social media—"can be a dangerous instrument for arbitrary and discriminatory denial" of the right to earn a living. *Konigsberg*, 353 U.S. at 262–63. After all, one may be inclined to ponder: If Gray had written a Facebook post with allegedly inaccurate facts that cast the same Maine officials in a *more positive* light than reality, would the Department of Public Safety still have denied him a license?

II. Especially in First Amendment cases, courts should not reflexively assume that occupational licensing benefits the public—because empirical evidence consistently shows the opposite.

The Maine Department of Public Safety found that Gray's "uninvestigated" and "erroneous" speech on Facebook violated the "good moral character" requirement. Pet. App. 6a, 19a. Gray claims—and *amici* agree—that his First Amendment rights were violated and that his "claim should have been reviewed with strict scrutiny." Pet. 20. Yet even the lesser scrutiny applied below still demands that "the statutory licensing standards, as applied in Gray's case" be "narrowly tailored to serve a significant governmental interest." Pet. App. 19a (quoting *Packingham*, 137 S. Ct. at 1736).

What is Maine's "significant governmental interest"? For the court below, a single conclusory sentence sufficed: "The government has a significant interest in maintaining standards of good character and competency for those who investigate and report on the intimate details of others' lives." Pet. App. 19a. Then, just a few lines later, the court breezily held that the Department's license denial was "narrowly tailored to serve the significant governmental interest in maintaining standards for licensing professional investigators." Pet. App. 20a. The court's reasoning turned on the reflexive, unsubstantiated assumption that the licensing scheme at issue necessarily produces some public benefit. But that assumption lacks any basis in fact. As shown by decades of empirical re-

search, occupational-licensing laws generally provide minimal public benefit; to the contrary, they impose significant societal costs.

A. Empirical evidence shows that occupational licensing provides minimal benefit to the public.

Legislators and regulators—and, as this case shows, even judges—conceive of occupational licensing as serving governmental interests and benefitting the public. By requiring prospective members of licensed occupations to complete trainings, pass exams, demonstrate good moral character, and meet other state-imposed requirements, licensing regimes protect the public from unqualified or disreputable practitioners, thereby ensuring safe and high-quality products and services. *See, e.g.*, Kleiner, *Reforming*, *supra*, at 5. Or so the argument goes.

Yet that oft-parroted argument crumbles in the face of reality. Empirical research consistently shows that stringent licensing standards—including for occupations subject to "good moral character" requirements—do not improve either safety or quality. A 2015 study co-authored by one *amicus*, for example, compared opticians in non-licensed states to opticians in states where a license (and often good moral character) was required. *See* Edward J. Timmons & Anna Mills, *Bringing the Effects of Occupational Licensing into Focus: Optician Licensing in the United States* 15 (Mercatus Ctr. at George Mason Univ., Working Paper, 2015), https://bit.ly/3mas1VG. The study found no significant link between licensure and improved service quality. *Id.* This finding recalls earlier research

on repairmen, which found that licensure did not meaningfully protect consumers from its stated target of "parts fraud," or substandard parts in television repair. *See* John Phelan, Fed. Trade Comm'n, *Regulation of the Television Repair Industry in Louisiana and California: A Case Study* (1974), available at https://bit.ly/39Tn8uB.

Repeating the refrain, studies analyzing consumer reviews have likewise found little or no beneficial effect on safety or service quality. One *amicus* recently examined consumer ratings of Uber rides completed in New Jersey. *See* Morris M. Kleiner, *Regulating Access to Work in the Gig Labor Market: The Case of Uber*, Emp't Research, July 2017, at 4, 5–6. Some drivers were from New Jersey, which requires no license to drive for Uber. Other drivers, by contrast, were licensed in New York City, where to secure a license they had to pay $2000, pass a medical exam, complete a defensive driving course, and pass a background check, and—among other things—"be of good moral character." N.Y.C. Mun. Code § 80-04(h)(1); *see* Kleiner, *Regulating Access*, *supra*, at 5. This great disparity in licensing standards, however, yielded no statistically significant difference in passenger ratings of quality and safety. Kleiner, *Regulating Access*, *supra*, at 5–6.

The Uber study's results exemplify a recurrent pattern. Numerous other studies of various occupations—including electricians, interior designers, and plumbers—have likewise uncovered no meaningful correlation between stringent licensing requirements, on the one hand, and improved quality or safety, on the

other. *See, e.g.*, Kleiner, *Stages*, *supra*, at 39–40, 167; *see also* The White House, *Occupational Licensing: A Framework for Policymakers* 58 (July 2015), https://bit.ly/2ZNaqvH ("Overall, the empirical research does not find large quality improvements in quality or health and safety from more stringent licensing. In fact, in only two out of the 12 studies was greater licensing associated with quality improvements."). And not only do studies show that licensure produces little or no actual benefit, but also consumers apparently do not *believe* it generates one. When asked in a survey to share their top reasons for hiring a given professional, fewer than one percent of consumers listed licensing status, choosing instead to prioritize price and online reviews. *See* Farronato et al., *supra*, at 21–22.

Somewhat relatedly, research comparing different occupations in the same state illustrates the inherently subjective and arbitrary nature of many licensing requirements. In Louisiana, for instance, emergency medical technicians can earn a license by paying $110 in fees, completing roughly 26 days of education, and passing two exams. Anyone wishing to work as an alarm installer, by contrast, must pay over $1400, complete more than 1800 days (or five years) of education and experience, and pass four exams. *See* Carpenter II et al., *supra*, at 80. Indeed, variations in training-time requirements expose the absurdity of assuming that more stringent standards necessarily lead to better service. Whereas manicurists in Alabama need approximately 750 hours of training to become licensed, Massachusetts manicurists need only 100. *Id.*

at 44, 87. Yet does anyone seriously maintain that an Alabama manicure is of precisely 7.5 times higher quality than a manicure in Massachusetts?

All told, empirical evidence lends scarcely any support to the claim that occupational licensing confers benefits on the public; commonly, the evidence affirmatively rebuts that claim.[4] The dearth of support for licensing's supposed public benefits becomes most visible in cases like Gray's—where obtaining a license requires showing "good moral character," where character is adjudged by regulators with exceedingly broad discretion, and where the fundamental right to free speech is at risk.

B. At the same time, empirical evidence shows that licensing imposes significant costs on individuals and society.

In addition to routinely documenting minimal public benefit, the empirical record also repeatedly highlights occupational licensing's staggering costs. In

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[4] Perhaps this should come as no surprise. Governments commonly adopt licensing requirements at the behest of existing practitioners of an occupation who have every incentive to limit competition. Morris M. Kleiner & Evgeny S. Vorotnikov, *At What Cost? State and National Estimates of the Economic Costs of Occupational Licensing*, Inst. for Justice 8 (Nov. 2018), https://bit.ly/3ijrWhn. Those existing practitioners, moreover, routinely comprise part or all of the licensing boards empowered to enforce the licensing requirements. *Id.*; *see also N.C. State Bd. of Dental Examiners v. FTC*, 574 U.S. 494, 505 (2015) (observing that "when the State seeks to delegate its regulatory power to active market participants, [ ] established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern").

the aggregate, licensing may cost the national economy up to $183.9 billion in misallocated resources each year. Kleiner & Vorotnikov, *supra*, at 7. Falling on both individuals and society as a whole, the principal costs of occupational licensing fit into four broad categories.

First, occupational licensing increases the price of services available to consumers. Depending on location and industry, licensing can cause prices to increase anywhere from five to 33 percent. Kleiner, *Reforming*, *supra*, at 15. Economic studies, in fact, show that occupational licensing far more often reduces employment and raises prices than it improves safety or service quality. *Id.* at 6.[5] In states with more difficult dental exams, for example, patients pay higher prices for basic dental services, without achieving any better dental outcomes. *Id.*

Second, occupational licensing reduces the total availability of service providers. Limited supply, of course, contributes to price increases—and it also can undermine the very safety and quality goals licensing professes to advance. A study of electrician licensure found that stricter requirements correlated with higher electrocution rates in the general public—presumably

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[5] Market distortion (which itself results from licensing's interference) is responsible for much of the price increases. But *government* expenditures also can play a role. As one example, Michigan spends over $150 million per year managing and enforcing its occupational-licensing programs, $24 million of which comes directly from the state's general fund. Jarrett Skorup, Mackinac Ctr. for Public Pol'y, *This Isn't Working: How Michigan's Licensing Laws Hurt Workers and Consumers* 1 (2017), https://bit.ly/3D1q7gT.

because would-be customers did more electrical work themselves. Sidney L. Carroll & Robert J. Gaston, *Occupational Restrictions and the Quality of Service Received: Some Evidence*, 47 S. Econ. J. 959, 961, 963–65 (1981). In a similar vein, the Federal Trade Commission has warned that licensing requirements for opticians could cause increased optical health problems, as increased costs may tempt individuals to wear their contact lenses too long. Maureen K. Ohlhausen et al., Fed. Trade Comm'n, *Possible Anticompetitive Barriers to E-Commerce: Contact Lenses* 19 (Mar. 2004), https://bit.ly/3m5EN7U.

Third, as Gray's inability to work in Maine aptly demonstrates, occupational licensing restricts interstate mobility. The interstate migration rate for individuals in state-licensed occupations is 36 percent lower than for individuals in non-licensed occupations. Janna E. Johnson & Morris M. Kleiner, *Is Occupational Licensing a Barrier to Interstate Migration?* 15 (Nat'l Bureau of Econ. Research, Working Paper No. 24107, 2017), https://bit.ly/3FfhHoj; *accord* Nat'l Conference of State Legislatures, *Barriers to Work: Low-Income, Unemployed and Dislocated Workers* (July 17, 2018), https://bit.ly/3olO5j2 (finding that migration rates of workers within the most licensed occupations are significantly lower than in the least licensed occupations). Not only does licensing directly restrict movement from state to state, but it also exerts related pressures on workers and markets. Licensed workers are 24 percent less likely to switch occupations than their counterparts who do not need a license from the state. Morris M. Kleiner & Ming Xu, *Occupational*

Licensing and Labor Market Fluidity 4, 37 (Nat'l Bureau of Econ. Research, Working Paper No. 27568, 2020), https://bit.ly/2YfypDc. Relatedly, "[t]he need to obtain a license in another state can sometimes even lead licensees to exit their occupations when they must move to another state." Goldman, Fed. Trade Comm'n, *supra*, at 4.

Fourth, licensing acts as a barrier to entry to all prospective workers and entrepreneurs. Standard economic models show that occupational licensing may result in up to 2.85 million fewer jobs nationwide, costing consumers $203 billion annually. Kleiner, *Reforming*, *supra*, at 6. Licensing's barrier effect, moreover, is felt disproportionately by workers at the very bottom of the economic ladder. Nat'l Conference of State Legislatures, *Barriers to Work*, *supra*. Based on a study of 102 licensed occupations, becoming a licensed worker requires on average almost twelve months of education or training, a passing score on an exam, and payment of more than $260 in fees. *Id.* Recall the Uber drivers from earlier. Does the driver licensed in New York City, who had to pay the government $2000 before earning a living, give higher quality rides than the New Jersey driver? Consumer reviews say "no." At most, the $2000 requirement merely identifies who has money to spare, prophylactically sifting out many individuals of lesser means who seek—and who may have the most pressing need—to contract with Uber.

In sum, while occupational licensing supplies at best tenuous benefits, its costs to individuals and society are compelling and clear. Such costs are particularly concerning in the First Amendment

context, where licensing may be "aimed directly at speech" and is subject to heightened constitutional scrutiny. *See, e.g.*, *Riley v. Nat'l Fed'n of the Blind*, 487 U.S. 781, 801–02 (1988) (invalidating a licensing requirement for individuals soliciting money for charity, and confirming that "a speaker is no less a speaker because he or she is paid to speak") (citing *N.Y. Times v. Sullivan*, 376 U.S. 254, 265–66 (1964)); *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 934 (5th Cir. 2020) (holding that Mississippi occupational licensing requirements were not categorically exempt from First Amendment scrutiny).

For Joshua Gray, the costs of occupational licensing are personal. The Maine Department of Public Safety denied him the ability to expand his business into another state. Why? His "uninvestigated" and "erroneous" Facebook posts apparently meant he lacked "good moral character." Pet App. 6a. In determining Gray's moral character on this basis, however, the Department stifled speech and offended the constitutional order. "[T]he best test of truth," this Court reiterated just a few terms ago, "is the power of the thought to get itself accepted in the competition of the market, and the people lose when the government is the one deciding which ideas should prevail." *NIFLA*, 138 S. Ct. at 2375 (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)). The Court should grant certiorari to again enforce that precept—this time to clarify that occupational gatekeepers may not infringe on First Amendment rights in the name of "good moral character" or phantom public benefits.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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