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

BRIEF OF *AMICI CURIAE* RODNEY A. SMOLLA, FLOYD ABRAMS, ERWIN CHEMERINSKY, WILLIAM C. BANKS, ALAN GARFIELD, CLAY CALVERT, MARC JONATHAN BLITZ, AND JARED CARTER IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

In *National Institute of Family and Life Advocates (NIFLA)* v. *Becerra*, this Court declined to treat so-called "professional speech" as a "unique category that is exempt from ordinary First Amendment principles." 138 S. Ct. 2361, 2375 (2018). In the wake of that decision, the Fourth, Fifth, and Ninth Circuits have abandoned their pre-*NIFLA* professional-speech cases to hold that ordinary First Amendment principles govern as-applied challenges to laws that regulate entry into an occupation. In the decision below, the Eleventh Circuit split from these courts to hold that its pre-*NIFLA* precedent remained good law and required it to exempt any "statute that governs the practice of an occupation" from First Amendment scrutiny, even if as applied it was triggered solely by the act of communicating a message. The question presented is:

Whether a government prohibition on communicating a message is exempt from First Amendment scrutiny simply because that prohibition flows from a statute that governs the practice of an occupation.

LIST OF *AMICI CURIAE*

The individual *amici* listed below file this brief in their individual capacities, and not as representatives of the institutions with which they are affiliated.

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INTEREST OF *AMICI CURIAE*

Amici are professors and litigators who teach and write and litigate in the field of American constitutional law, with professional interests in this Court's explication and application of the First Amendment principles germane to the regulation of expression that a state may label as speech by a "professional" subject to "licensure."

The names, titles, and affiliations of the individual *amici* are listed in the Appendix. This brief is filed in their individual capacities, not as representatives of the institutions with which they are affiliated.[1]

SUMMARY OF ARGUMENT

This Court should grant the Petition for Certiorari to reinforce and clarify its decision in *National Institute of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) (*NIFLA*), in which the Court repudiated, in no uncertain terms, the errant "professional speech doctrine" that was gaining traction among many federal circuits.

As a rose "by any other name would smell as sweet," WILLIAM SHAKESPEARE, ROMEO AND JULIET, ACT II, SC. II (1599), the professional speech doctrine by any other name is just as bitter.

In many contexts, this Court has eschewed the government's manipulation of labels as an artifice to disingenuously defeat the First Amendment rights that citizens would otherwise enjoy. Yet the Eleventh

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[1] This *amicus* brief is filed with the consent of the parties. No counsel for any party authored this brief in whole or in part, and no monetary contribution intended to fund the preparation or submission of this brief was made by any party or any party's counsel.

Circuit's decision below in *Del Castillo v. Florida Department of Health*, if allowed to stand, will accomplish precisely that result.

Florida's regulation is content based. Florida has penalized Heather Del Castillo entirely because of the content of her message. Florida's actions should therefore have been subjected to the rigors of the First Amendment's strict scrutiny test. Yet the courts below applied mere rational basis review to Florida's regulation, the standard under which the government virtually always wins. The District Court emphasized that Del Castillo charges for her counseling. The Court of Appeals affirmed, through little more than a surface recitation of a rule announcing that a "statute that governs the practice of an occupation is not unconstitutional as an abridgement of the right to free speech, so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation." This is the professional speech doctrine by another name.

At least three other federal circuits "got the memo" in *NIFLA*, overruling their own prior precedents on professional speech. Those circuits have properly understood that *NIFLA* demands more rigorous judicial scrutiny of such regulation than mere rational basis review. The Eleventh Circuit, however, has decided to adhere to its past precedent through its "incident to legitimate professional regulation" doctrine, an analysis analytically indistinguishable from the discredited doctrine of professional speech.

This Court should grant review (1) to explain that it meant what it said in *NIFLA;* (2) to resolve the conflict among the circuits; and (3) to clarify the animating First Amendment principles and doctrinal

rules surrounding professional licensure. The issues are of enormous importance, given the vast presence of licensure in the modern administrative state. To permit licensure regulation of expressive activity with no heightened First Amendment scrutiny allows the government to circumvent the First Amendment through the manipulation of labels, and acts to stifle creativity and innovation in the delivery of information on matters of public concern.

It cannot be the law that a state may simply declare someone a "professional" subject to "licensure" and, having done so, proceed to censor that person's free expression with impunity. Surely the First Amendment demands more. This case presents an ideal vehicle for this Court to address what more is demanded.

ARGUMENT

I. THE FLORIDA REGIME IS A CONTENT-BASED REGULATION OF SPEECH THAT SHOULD BE SUBJECTED TO STRICT SCRUTINY REVIEW

The Eleventh Circuit "conclude[d] that [Florida's] licensing scheme for dieticians and nutritionists regulated professional conduct and only incidentally burdened Del Castillo's speech." Pet. App'x A at 24a. The court then relied on prior Circuit precedent holding that incidental burdens on speech rights do not violate the First Amendment. *Id.* But the court erred in determining that Florida's scheme—which by its very terms regulates a dietician's "counseling" and "advising" of clients (*id.* at 25a)—merely regulates conduct.

A. On Its Face and in Its Application the Law Is Content Based and Subject to Strict Scrutiny

Florida's regulation of the speech of Heather Del Castillo is manifestly content based. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Reed v. Town of Gilbert, Ariz.*, 576 U.S. 155, 163 (2015). It is what Del Castillo *said* in her exercise of holistic health coaching that brought her within Florida's prohibition. As the Eleventh Circuit's opinion conceded, Del Castillo's communication consisted of "tailored advice on dietary choices, exercise habits, and general lifestyle strategies." Pet. App'x A at 3a. In turn, it was because, and *only because*, she provided advice on diet, exercise, and general life strategies that she triggered the Florida law defining "nutrition counseling" as "advising and assisting individuals or groups on appropriate nutrition intake by integrating information from the nutrition assessment." Fla. Stat. § 468.503.10.

As in the Vermont regime struck down by this Court in *Sorrell v. IMS Health Inc.*, the Florida law "is designed to impose a specific, content-based burden on protected expression." 564 U.S. 552, 565 (2011). "It follows that heightened judicial scrutiny is warranted." *Id.* "[B]y any commonsense understanding of the term, the ban in this case is 'content based.'" *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 429 (1993). "This commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Reed*, 576 U.S. at 163.

The presumptive baseline rule of modern First Amendment law is that content-based laws must satisfy the rigors of the strict scrutiny test. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* (citing *R.A.V. v. St. Paul*, 505 U.S. 377, 395 (1992)); *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115, 118 (1991).

B. The Courts Below Sought to Displace Strict Scrutiny Because Del Castillo Charged for Her Counseling and Was Engaged in What the Courts Regarded as Professional Conduct

The District Court below emphasized that Del Castillo remained free to provide her advice *as long as she did not charge for it*, as if Del Castillo's decision to charge her clients somehow flipped a First Amendment switch from on to off. The District Court thus emphasized that the Florida law "does not 'prohibit or limit any person from the *free* dissemination of information, or from conducting a class or seminar or giving a speech, related to nutrition.'" Pet. App'x B at 35a (emphasis supplied) (quoting § 468.505(2)).

The Court of Appeals morphed essentially the same reasoning into an artificial and mechanistic dichotomy between "speech" and "conduct." The Eleventh Circuit thus insisted that Del Castillo's activity simply was *not speech at all*, but rather "practice" or "occupational conduct." Pet. App'x A at 5a–6a. The Eleventh Circuit bluntly claimed that

"[a]ssessing a client's nutrition needs, conducting nutrition research, developing a nutrition care system, and integrating information from a nutrition assessment *are not speech*." *Id.* (emphasis supplied). While the Eleventh Circuit grudgingly admitted, as it had to admit, that Del Castillo's coaching on matters relating to nutrition, exercise, or lifestyle did involve "some speech," the court dismissed the speech content as merely "incidental" to Del Castillo's conduct. *Id.* ("The profession also involves some speech—a dietician or nutritionist must get information from her clients and convey her advice and recommendations. But, to the extent the Act burdens speech, the burden is an incidental part of regulating the profession's conduct.").

Dismissing Del Castillo's speech as mere "professional conduct" paved the way for the Court to apply lenient rational basis review to Florida's actions. To have acknowledged the reality that Del Castillo's speech was actually speech, and not mere conduct, would have triggered strict scrutiny. Thus, the Eleventh Circuit had to recast Del Castillo's speech as conduct.

The District Court's reliance on Del Castillo charging for her advice and the Eleventh Circuit's facile dismissal of Del Castillo's activity as mere conduct are both flatly inconsistent with established First Amendment principles.

C. Merely Charging for Counseling Services Does Not Displace the Strict Scrutiny Test

That Del Castillo charged for her services in no way reduces the level of First Amendment protection that her speech would otherwise enjoy. *See Va. Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425

U.S. 748, 761 (1976) (deeming it "beyond serious dispute" that "[s]peech . . . is protected even though it is carried in a form that is 'sold' for profit" (citing *Buckley v. Valeo*, 424 U.S. 1 (1976))); *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 266 (1964); *Pittsburgh Press v. Pittsburgh Comm'n on Human Relations*, 413 U.S. 376 (1973); *Smith v. California*, 361 U.S. 147 (1959); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952); *Murdock v. Pennsylvania*, 319 U.S. 105, 111 (1943).

Indeed, "the First Amendment 'right to speak would be largely ineffective if it did not include the right to engage in financial transactions that are the incidents of its exercise.'" *Luis v. United States*, 578 U.S. 5, 27 (2016) (Thomas, J., concurring in the judgment) (quoting *McConnell v. Federal Election Commission*, 540 U.S. 93, 252 (2003)).

D. Del Castillo's Counseling Constituted First Amendment Speech and not Mere Conduct

The Eleventh Circuit's superficial and mechanistic dismissal of Del Castillo as engaging in mere "conduct" is flatly contrary to the decisions of this Court delineating between speech and conduct.

The decision in *Sorrell* is particularly salient. There Vermont argued that its prohibition on sale, disclosure, and use of pharmacy records revealing the prescribing practices of individual doctors should be analyzed under ordinary rational basis review, because the Vermont law only regulated economic conduct, and not speech. This Court unequivocally rejected Vermont's characterization. It is true, the Court in *Sorrell* observed, "that restrictions on protected expression are distinct from restrictions on economic activity or, more generally, on

nonexpressive conduct." *Sorrell*, 564 U.S. at 567. It is also true, the Court continued, "that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Id.* In roundly rejecting Vermont's argument, however, the Court in *Sorrell* repeatedly emphasized that the information at issue was indeed speech, and not mere conduct, because it was the *subject* of the message conveyed that triggered application of the ban. *Id.* at 566–70. As the Court explained: "[I]f the acts of 'disclosing' and 'publishing' information do not constitute speech, it is hard to imagine what does fall within that category, as distinct from the category of expressive conduct." *Id.* at 570 (quoting *Bartnicki v. Vopper*, 532 U.S. 514, 527 (2001)).

"Taken together, these cases suggest that occupational speech should be treated just like any other content-defined category of speech." Paul Sherman, *Commentary, Occupational Speech and the First Amendment*, 128 Harv. L. Rev. 183, 192–93 (2015).

II. REVIEW IS WARRANTED TO CLARIFY THAT HEIGHTENED FIRST AMENDMENT SCRUTINY MAY NOT BE AVOIDED BY SIMPLY IMPOSING A LICENSING REQUIREMENT AND LABELING THE REGULATION INCIDENTAL TO THAT LICENSURE.

Once Del Castillo's counseling is properly treated as expressive conduct falling within the shelter of the First Amendment, the next error in the Eleventh Circuit's path to rational basis review is the supposition that Del Castillo's expressive conduct is

disqualified from heightened First Amendment protection because it is speech falling within the ambit of the activities of a "professional" who is subject to "licensure." *See* Pet. App'x A at 26a. And therein rests the most profound rationale supporting the grant of the Petition for Certiorari. Despite its studied attempt at camouflage, the Eleventh Circuit in reality adhered to the "professional speech doctrine" that this Court discredited in *NIFLA*.

The decision in *NIFLA* was rendered against a backdrop of a growing number of decisions from various federal circuits recognizing a discrete category of expression labeled "professional speech." Those decisions were all variants of the same leitmotif, holding that "'professional speech'" was a separate category of speech subject to diminished First Amendment protection. *NIFLA*, 138 S. Ct. at 2371 (citing *King v. Governor of New Jersey*, 767 F.3d 216, 232 (3d Cir. 2014); *Pickup v. Brown*, 740 F.3d 1208, 1227–29 (9th Cir. 2014); *Moore-King v. County of Chesterfield*, 708 F.3d 560, 568–70 (4th Cir. 2013)).

The Court in *NIFLA* observed that "[t]hese courts define 'professionals' as individuals who provide personalized services to clients and who are subject to 'a generally applicable licensing and regulatory regime.'" *NIFLA*, 138 S. Ct. at 2371 (quoting *Moore-King*, 708 F.3d at 569). In turn, the Court in *NIFLA* noted, "'Professional speech' is then defined as any speech by these individuals that is based on '[their] expert knowledge and judgment,' *NIFLA*, 138 S. Ct. at 2371 (quoting *Moore-King*, 708 F.3d at 232), "or that is 'within the confines of [the] professional relationship,'" *NIFLA*, 138 S. Ct. at 2371 (quoting *Pickup*, 740 F.3d at 1228). And "[s]o defined, these courts except professional speech from the rule that

content-based regulations of speech are subject to strict scrutiny." *NIFLA*, 138 S. Ct. at 2371.

The Court in *NIFLA* proceeded to reject the claim that it had "recognized 'professional speech' as a separate category of speech." *Id.* The Court repudiated the reasoning of the federal circuits that had endorsed the doctrine, flatly declaring that "[s]peech is not unprotected merely because it is uttered by 'professionals.'" *Id.* at 2371–72.

Finally, and most importantly, this Court in *NIFLA* rejected the entire lynchpin of the analysis the Eleventh Circuit would later adopt in *Del Castillo*, which would permit states to accomplish an end-run around the First Amendment merely by imposing a licensing requirement. The Court in *NIFLA* correctly refused to treat licensure as a talisman working voodoo to undermine constitutional protection of free speech. The Court in *NIFLA* saw that under any such logic, state law would trump the First Amendment, not the other way around:

> All that is required to make something a "profession," according to these courts, is that it involves personalized services and requires a professional license from the State. *But that gives the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement.* States cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose invidious discrimination of disfavored subjects.

138 S. Ct. at 2375 (emphasis added, citations omitted).

It is simply impossible to juxtapose the reasoning of the Eleventh Circuit in *Del Castillo* with the reasoning of this Court in *NIFLA* and arrive at any conclusion other than that the Eleventh Circuit misapprehended and misapplied *NIFLA*. The Eleventh Circuit has allowed Florida to do what *NIFLA* forbids—reduce a group's First Amendment rights *simply by imposing a licensing requirement*.

There may, of course, be rules restricting the expression of licensed professionals that will withstand heightened First Amendment scrutiny. The confidentiality rules requiring lawyers to refrain from revealing the confidences of clients are undoubtedly justified by compelling governmental interests. But the point of *NIFLA* is that the mere existence of a licensure scheme does not provide the government with a free pass from First Amendment protections. *See* Sherman, *Occupational Speech*, *supra*, 28 Harv. L. Rev. at 193 ("Laws that require an occupational license in order to provide advice to a client about a specific subject impose a direct, not incidental, burden on speech based on the content of that speech. Such content-based burdens on speech are subject to strict scrutiny.").

III. REVIEW IS WARRANTED TO RESOLVE CIRCUIT CONFLICTS

The Eleventh Circuit's decision is in direct conflict with the decisions of federal Circuits that have correctly apprehended the meaning of *NIFLA*, often overruling their own prior precedents, to now apply heightened First Amendment protection to what they previously would have dismissed as mere professional speech.

In *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927 (5th Cir. 2020), for example, the Fifth Circuit struck down Mississippi's occupational licensing regime for surveyors. Vizaline's business was to generate simple maps using existing legal property descriptions and sell those visual depictions to customers. Mississippi sought to penalize the Vizaline company for engaging in the occupation of surveying without a license. The District Court in *Vizaline* adopted reasoning identical to the Eleventh Circuit's reasoning in *Del Castillo* below, holding that this Court's decision in *NIFLA* did not involve occupational-licensing restrictions on who may engage in a profession. *Id.* at 932 (summarizing the District Court's holding). The District Court's view was that "occupational-licensing restrictions—like Mississippi's surveyor regulations—restrict only conduct, not speech." *Id.* The District Court held that Mississippi's regulations only incidentally infringed upon Vizaline's speech because they merely determined who may engage in certain speech, and applied no First Amendment scrutiny to the surveyor-licensing requirements. *Id.*

The Fifth Circuit reversed. Had the Fifth Circuit analyzed the matter in the same way that the Eleventh Circuit analyzed the challenge in *Del Castillo*, the Fifth Circuit would of course have *affirmed*. Thus, the Eleventh Circuit and Fifth Circuit are in direct and irreconcilable conflict. The Fifth Circuit got the matter right—holding that the District Court's "analysis runs afoul of *NIFLA*." *Id.* The Fifth Circuit correctly realized that Mississippi was simply claiming an unfettered right to restrict commercial speech, in direct conflict with *NIFLA*'s mandate that states may not reduce a group's First Amendment rights "by simply imposing a licensing

requirement." *Id.* In reaching this conclusion, the Fifth Circuit held that *NIFLA* abrogated a prior Fifth Circuit precedent, *Hines v. Alldredge*, 783 F.3d 197 (5th Cir. 2015), which had applied a professional speech rationale. A subsequent panel of the Fifth Circuit in another case similarly held that *NIFLA* had abrogated *Alldredge*. *See Hines v. Quillivan,* 982 F.3d 266, 270 (5th Cir. 2020).

The Eleventh Circuit's decision in *Del Castillo* also conflicts with the decision of the Fourth Circuit in *Billups v. City of Charleston,* 961 F.3d 673 (4th Cir. 2020). The case involved a challenge to a Charleston, South Carolina ordinance, under which anyone seeking to work as a paid tour guide through Charleston's historic districts was required to first obtain a license. Acquiring a license entailed passing a 200-question written examination on Charleston's history, architecture, and historic preservation efforts. The Fourth Circuit rejected Charleston's argument that the ordinance was "exempt from First Amendment scrutiny because it merely regulates the commercial transaction of selling tour guide services — not the speech of the tour guides." *Id.* at 683. The Fourth Circuit found it unnecessary to decide whether the Charleston ordinance was a content-based or content-neutral regulation of speech, holding that even if it were deemed content-neutral and subject only to intermediate scrutiny, the Ordinance would violate the First Amendment. *Id*. at 685–89.

The Eleventh Circuit's decision in *Del Castillo* similarly conflicts with the decision of the Ninth Circuit in *Pacific Coast Horseshoeing School, Inc. v. Kirchmeyer*, 961 F.3d 1062, 1069 (9th Cir. 2020). The case posed a First Amendment challenge brought by a full-time horseshoeing school to a California

educational licensing regime imposing an "ability to benefit" requirement on schools. California argued that mere rational basis review was appropriate, because no First Amendment review was triggered. California thus maintained that the "ability-to-benefit requirement is a consumer-protection provision that regulates only non-expressive conduct—namely, the execution of the enrollment agreement between a private postsecondary school and a prospective student." *Id.* at 1068. Relying on *NIFLA*, the Ninth Circuit rejected California's claim. Holding that although the California law was "a form of education licensing by the State, the First Amendment deprives the states of 'unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement.'" *Id.* at 1169 (quoting *NIFLA,* 138 S. Ct. at 2375).

The Ninth Circuit also correctly held that the California law could not be reconciled with this Court's holding in *Sorrell*. *Pacific Coast Horseshoeing*, 961 F.3d at 1073. In both *Sorrell* and the case before it, the Ninth Circuit held, "a violation occurs because of who the listener is and the message the speaker seeks to convey." *Id.* (citing *Sorrell*, 564 U.S. at 564–65).

On top of these conflicts, lower courts have particularly struggled with how to apply *NIFLA* to certain recurring conflicts, such as litigation over the regulation of Sexual Orientation Change Efforts, rendering the law in that arena in turmoil. Clay Calvert, *Testing the First Amendment Validity of Laws Banning Sexual Orientation Change Efforts on Minors: What Level of Scrutiny Applies After Becerra and Does A Proportionality Approach Provide A Solution*?, 47 Pepp. L. Rev. 1, 26 (2019) (collecting

cases and concluding, "*Becerra* leaves anti-SOCE law jurisprudence—particularly regarding First Amendment scrutiny—in turmoil").

IV. REVIEW IS WARRANTED TO RESOLVE CONSTITUTIONAL ISSUES OF COMPELLING NATIONAL IMPORTANCE

A. Licensing Regimes are Ubiquitous in the Modern Administrative State

The stakes posed by this conflict among the Circuits are high. For if the Eleventh Circuit's analysis proliferates, governments will almost always win. As this Court has candidly acknowledged, "[g]iven the standard of review, it should come as no surprise that the Court hardly ever strikes down a policy as illegitimate under rational basis scrutiny." *Trump v. Hawaii*, 138 S. Ct. 2392, 2420 (2018).

This Court has long recognized the ubiquitous presence of licensure schemes in the modern administrative state, and the power government exerts over individual autonomy through the exercise of such administrative schemes. *See Goldberg v. Kelly*, 397 U.S. 254, 263 n.8 (1970) (citing Charles Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, 74 Yale L.J. 1245, 1255 (1965)); Charles Reich, *The New Property*, 73 Yale L.J. 733 (1964).

Licensure has grown with the administrative state. In the 1950s less than 5% of the workforce was licensed; today licensure applies to roughly one in every four workers. Bradley Copeland, *Occupational Licensing and the First Amendment*, 31 Geo. Mason U. Civ. Rts. L.J. 181, 186 (2021) (citing U.S. Department of the Treasury Office of Economic Policy

et al., *Occupational Licensing: A Framework for Policymakers* 4 (2015)); MORRIS M. KLEINER & ALAN B. KRUEGER, THE PREVALENCE AND EFFECTS OF OCCUPATIONAL LICENSING 10 (National Bureau of Economic Research 2008).

In *NIFLA* the Court recognized the vast reach of the professional speech doctrine as a governmental device for exercising leverage over the expressive freedom of citizens engaging in a seemingly limitless array of occupations. "As defined by the courts of appeals, the professional-speech doctrine would cover a wide array of individuals—doctors, lawyers, nurses, physical therapists, truck drivers, bartenders, barbers, and many others." *NIFLA*, 138 S. Ct. at 2375 (citing Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. Va. L. Rev. 67, 68 (2016)).

License regulators abhor a vacuum, purporting to expand licensure even to occupations so improbable as fortune-telling. *See Moore-King*, 708 F.3d at 568–70; Nicole Brown Jones, Comment, *Did Fortune Tellers See This Coming? Spiritual Counseling, Professional Speech, and the First Amendment*, 83 Miss. L.J. 639 (2014).

B. Courts Should Not Countenance Reasoning by Labeling

Permitting the Eleventh Circuit's reasoning to stand will introduce an errant strain of constitutional interpretation into the federal system. That errant strain will warp and distort existing precedent articulating the proper divide between conduct entirely unprotected by the First Amendment and expression properly subjected to heightened First Amendment review.

As Justice Jackson recognized in his concurring opinion in *Thomas v. Collins*, 323 U.S. 516 (1945), there is, to be sure, inherent tension between the claims of states of a right to require professional licensure, and the claims of individuals to speak on matters of public concern. A state may require a license to practice law, but not to author a law review article. A state may require a license to practice medicine, but not to speak on medical matters. *Id.* at 544 (Jackson, J., concurring).

To recognize that heightened scrutiny is warranted when the government subjects persons to licensure does not mean that all such regulation will fail. As many commentators have observed, in certain settings the government may well have persuasive arguments justifying such regulation. *See* Eugene Volokh, *Speech As Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1343 (2005); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 946 (2007); Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. Pa. L. Rev. 771, 844–45 (1999); Claudia E. Haupt, *Professional Speech*, 125 Yale L.J. 1238, 1241 (2016). Yet the fundamental question remains: "How should free speech law deal with realms of human action where government's presence is necessary to assure individuals' health and safety but possibly dangerous to their intellectual liberty and autonomy?" Marc Jonathan Blitz*, Free Speech, Occupational Speech, and Psychotherapy*, 44 Hofstra L. Rev. 681, 687 (2016).

Rational basis review is insufficiently robust to accomplish the task of separating the protected from the unprotected. The First Amendment has come a long way since *Thomas* was decided in 1945, and tools such as the heightened scrutiny standards that apply to content based regulation of speech now provide more well-developed methodology for resolving the tensions that Justice Jackson intuitively anticipated.

Among other things, the Court has eschewed mechanistic approaches to resolving First Amendment conflicts, including a refusal to embark on the invention of new categories of expression that are exempted wholesale from First Amendment shelter. "The First Amendment's guarantee of free speech does not extend only to categories of speech that survive an ad hoc balancing of relative social costs and benefits." *United States v. Stevens*, 559 U.S. 460, 470 (2010). "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs." *Id.* Before upending that balance, more is required than to "chaw over a lot of gold-leaf distinctions." MARK TWAIN, THE ADVENTURES OF HUCKLEBERRY FINN 203 (1885) (Houghton Mifflin Riverside Editions 1958).

The norm for determining whether a law goes beyond the mere regulation of conduct and triggers heightened First Amendment scrutiny because it implicates regulation of speech is well established. Among the leading cases is *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). The case arose from a challenge to a federal statute forbidding "material support" to terrorist organizations. The Court in *Humanitarian Law Project* rejected the position of the Government "that the only thing truly at issue in this

litigation is conduct, not speech." *Id.* at 26. The Court held that the government was wrong because whether or not the plaintiffs could communicate with the groups they sought to engage "depends on what they say." *Id.* at 27. In *Holder* the Court ultimately sustained the regulation, in a rare example of a content-based regulation satisfying strict scrutiny. But the point for purposes of the Petition here is that the strict scrutiny test was *applied*.

In contrast, the rationale advanced by Florida and endorsed by the Eleventh Circuit does not authentically grapple with the test established in *Humanitarian Law Project,* or the holding in *NFILA*, or the professional speech conundrum. It instead avoids the problem by restating it in different terms. *Cf. Carson ex rel. O. C. v. Makin*, 142 S. Ct. 1987, 2000 (2022) ("Maine's formulation does not answer the question in this case; it simply restates it.").

As the Court has recognized in many settings, First Amendment analysis should not be reduced to semantic wordplay. *See Agency for Int'l Dev. v. Alliance for Open Society Int'l, Inc.*, 570 U.S. 205, 215 (2013) ("[T]he definition of a particular program can always be manipulated to subsume the challenged condition. We have held, however, that 'Congress cannot recast a condition on funding as a mere definition of its program in every case, lest the First Amendment be reduced to a simple semantic exercise'" (quoting *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001))).

The decisions of the Court have repeatedly warned against subordinating constitutional standards to state-law labels such as "occupational conduct" or "licensing." "[A] State cannot foreclose the exercise of

constitutional rights by mere labels." *NAACP v. Button,* 371 U.S. 415, 429 (1963); *see also Bd. of County Comm'rs, Wabaunsee County, Kansas v. Umbehr*, 518 U.S. 668, 679 (1996) ("And that bright-line rule would leave First Amendment rights unduly dependent on . . . state law labels."). When constitutional rights are at stake, it is wrong to "exalt form over substance." *Escobedo v. Illinois*, 378 U.S. 478, 486 (1964). Rather, "regard must be had, as in other cases where constitutional limits are invoked, not to mere matters of form, but to the substance of what is required." *Crowell v. Benson*, 285 U.S. 22, 53 (1932); *see also Pickup v. Brown*, 740 F.3d 1208, 1218 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing en banc) ("The Supreme Court's implication in *Humanitarian Law Project* is clear: legislatures cannot nullify the First Amendment's protections for speech by playing this labeling game.")).

C. Rational Basis Review for All Licensure Decisions is in Tension with First Amendment Principles Against Prior Restraints

The extent to which prior restraint doctrines should or should not be brought to bear on licensure regimes regulating speech is unsettled in First Amendment law. Claudia E. Haupt, *Licensing Knowledge*, 72 Vand. L. Rev. 501, 554 (2019). The Ninth Circuit, in an opinion invoking an early version of the professional speech doctrine, held in a two-sentence analysis that "licensing laws are not a prior restraint on speech." *Nat. Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1056 (9th Cir. 2000). Yet it is not at all clear that this analysis, rendered on the fly, can withstand

this Court's later rebuff of the professional speech doctrine in *NIFLA*, or that it is consistent with prior restraint principles more generally. *See* Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885, 890 (2000) ("Professional licensing laws applied to individuals who render advice present a conflict between the states' traditional authority to regulate professions and the First Amendment prohibition on prior restraints of speech.").

This Court has recognized that licensing the content of expression does indeed trigger the First Amendment's heavy presumption against prior restraints. *Freedman v. Maryland*, 380 U.S. 51, 56 (1965) ("'Any system of prior restraints of expression comes to this Court bearing a heavy presumption against its constitutional validity.'" (quoting *Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 70 (1963))). The Court has recognized that this presumption "derives from an appreciation of the character of the evil inherent in a licensing system." *Thornhill v. Alabama*, 310 U.S. 88, 97 (1940). Indeed, the recognition that heavy-handed licensure is an affront to freedom of speech is among the most ancient antecedents to the First Amendment, tracing its lineage to John Milton. *Id.* ("The power of the licensor against which John Milton directed his assault by his 'Appeal for the Liberty of Unlicensed Printing' is pernicious not merely by reason of the censure of particular comments but by reason of the threat to censure comments on matters of public concern. It is not merely the sporadic abuse of power by the censor but the pervasive threat inherent in its very existence.").

At the very least, the gravitational pull of the heavy presumption against prior restraint stands as yet another powerful justification warranting this Court's review of whether mere rational basis review can possibly be the appropriate constitutional standard.

D. Mechanistic Application of Professional Speech Rationales Will Exert a Chilling Effect on Innovation that Deserves First Amendment Protection

The issues posed by this Petition invoke a recurring theme in constitutional law, calling for mediation between the marketplace of ideas and the marketplace for goods and services. *See* Rodney A. Smolla, *Information, Imagery, and the First Amendment: A Case for Expansive Protection of Commercial Speech*, 71 Tex. L. Rev. 777 (1993); David E. Bernstein, *The Due Process Right to Pursue A Lawful Occupation: A Brighter Future Ahead?*, 126 Yale L.J. Forum 287, 303 n.9 (2016) ("An emerging issue, meanwhile, is whether the First Amendment provides robust protection against occupational restrictions that impinge on freedom of speech.").

Strict scrutiny review of restraints on so-called professional speech will increase the free flow of information and lower barriers to entry, both of which provide consumers with superior alternatives at a lower cost. Copeland, *Occupational Licensing*, *supra*, 31 Geo. Mason U. Civ. Rts. L.J. at 183–84. Two recent decisions of Federal District Courts, both in conflict with *Del Castillo*, provide illuminating examples.

In *Upsolve, Inc. v. James*, No. 22-CV-627 (PAC), 2022 WL 1639554 (S.D.N.Y. May 24, 2022), the District Court for the Southern District of New York

rejected an assertion that no First Amendment issues were implicated by the State of New York's efforts to prevent a non-profit from using non-lawyer volunteers to help New Yorker's facing debt collection avoid default. Invoking what was essentially the professional speech doctrine, New York argued that it had the right to license lawyers, and was merely policing the unauthorized practice of law. Relying on *Humanitarian Law Project* and *NIFLA*, the District Court refused to accept New York's simplistic assertion "that generally applicable professional licensing regimes—and the speech that they burden—are outside of the First Amendment." *Id.* at *12. The Court instead correctly perceived that licensure regimes are not invisible to the First Amendment, and held that, as applied to the specific program at issue, would likely violate that Amendment, justifying a preliminary injunction. *Id.* at *16–17.

Similarly, in *Brokamp v. District of Columbia*, No. CV 20-3574 (TJK), 2022 WL 681205 (D.D.C. Mar. 7, 2022), a professional counselor in Virginia sought to counsel clients in the District of Columbia through internet video. The District of Columbia sought to prevent this, claiming that it violated its licensure requirements. The District Court denied a motion to dismiss a First Amendment challenge to the licensure rule, soundly recognizing that "[t]he licensing requirement regulates counseling, which is speech, not conduct." *Id.* at *1. And the District's characterization of the licensing requirement as a professional regulation, the Court held, "cannot lower that bar." *Id.* The Court concluded "[b]ecause the District's licensing requirement is content-based regulation of speech, strict scrutiny applies, and

Plaintiff has *adequately* alleged that the requirement does not survive such scrutiny." *Id.*

Challenges to professional licensure regimes are likely to accelerate as the internet impacts traditional conceptions of professionalism and licensure. As the quantity of information stored on the internet is increasing exponentially, many now have access to the expert information that was once the exclusive provenance of licensed professionals who charged well for their services. *See generally* RICHARD SUSSKIND & DANIEL SUSSKIND, THE FUTURE OF THE PROFESSIONS 256 (2022).

Some of the regulations brought to bear against these innovations, like some of the regulations that have long applied to many learned professions, will pass heightened First Amendment scrutiny. Some will not. Protection of free speech, however, demands that the regulations not receive a free pass.

CONCLUSION

Amici respectfully urge the Court to grant the Petition for Certiorari.

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