

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 *AMICUS CURIAE*
PROFESSOR MORRIS M. KLEINER
IN SUPPORT OF PETITIONER**

JOSEPH S. DIEDRICH

Counsel of Record

HUSCH BLACKWELL LLP

33 E. Main St., 300

Madison, WI 53703

(608) 255-4440

joseph.diedrich

@huschblackwell.com

REBECCA C. FURDEK

HUSCH BLACKWELL LLP

511 N. Broadway, 1100

Milwaukee, WI 53703

(414) 273-2100

Counsel for Amicus Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii
INTEREST OF *AMICUS CURIAE* 1
SUMMARY OF ARGUMENT..... 2
ARGUMENT..... 4
I. Occupational licensing has become one of the most significant forces influencing American labor markets. 4
II. Licensing laws vary widely from state to state and occupation to occupation, thereby impeding economic mobility. 8
III. The current circuit split leaves millions of Americans in licensed occupations with different protections for professional speech based solely on their location. 14
CONCLUSION 15

TABLE OF AUTHORITIES

	<u>Page(s)</u>
<u>Cases</u>	
<i>N.C. State Bd. of Dental Exam’rs v. F.T.C.</i> , 574 U.S. 494 (2015).....	7
<i>Nat’l Inst. of Family and Life Advocates v. Becerra</i> , 138 S. Ct. 2361 (2018).....	passim
<i>Riley v. Nat’l Fed’n of the Blind of N.C., Inc.</i> , 487 U.S. 781 (1988).....	2, 15
<u>Statutes and Ordinances</u>	
N.Y.C. Mun. Code § 80-04(h)(1)	9
<u>Other Authorities</u>	
Alicia Plemmons & Edward Timmons, <i>Occupational Licensing: A Barrier to Opportunity and Prosperity, in Regulation and Economic Opportunity: Blueprints for Reform</i> (eds. Adam Hoffer & Todd Nesbit) (2020)	10
Bradley Copeland, <i>Occupational Licensing and the First Amendment</i> , 31 Geo. Mason U. Civ. Rts. L.J. 181 (2021).....	8
Daniel J. Smith, <i>Occupational Licensing in Alabama</i> , 27 Labour & Industry 77 (2017).....	22
Dick M. Carpenter II et al., <i>License to Work: A National Study of Burdens from Occupational Licensing</i> , Inst. for Justice (2d ed. 2017) ..	13, 15, 17
Drew Desilver, <i>American Unions Membership Declines as Public Support Fluctuates</i> , Pew Research (Feb. 20, 2014)	7

Eugene Volokh, <i>Speech as Conduct, “Situation-Altering Utterances,” and the Uncharted Zones</i> , 90 Cornell L. Rev. 1277 (2005)	9
Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021).....	10
Janna E. Johnson & Morris M. Kleiner, <i>Is Occupational Licensing a Barrier to Interstate Migration?</i> , Nat’l Bureau of Econ. Research, Working Paper No. 24107 (2017)	5, 18, 21
Jing Cai & Morris M. Kleiner, <i>The Labor Market Consequences of Regulating Similar Occupations: The Licensing of Occupational and Physical Therapists</i> , 41 J. Labor Research 352 (2020)	6
Karen A. Goldman, <i>Policy Perspectives: Options to Enhance Occupational License Portability</i> , Fed. Trade Comm’n (2018)	10, 18
Maureen Dowd, <i>Mr. Smith Went to Washington...With Dimmers</i> , N.Y. Times (Aug. 26, 2020).....	15
Morris M. Kleiner & Evan J. Soltas, <i>A Welfare Analysis of Occupational Licensing in U.S. States</i> , Rev. Econ. Studies (forthcoming, 2022)	9
Morris M. Kleiner & Evgeny S. Vorotnikov, <i>At What Cost? State and National Estimates of the Economic Costs of Occupational Licensing</i> , Inst. for Justice (Nov. 2018)	7
Morris M. Kleiner & Maria Koumenta, <i>Grease or Grit? International Case Studies of Occupational Licensing and its Effects on Efficiency and Quality</i> (forthcoming, 2022).....	9

Morris M. Kleiner & Ming Xu, <i>Occupational Licensing and Labor Market Fluidity</i> , Nat'l Bureau of Econ. Research Working Paper No. 7568 (2020)	18
Morris M. Kleiner & Robert T. Kudrle, <i>Does Regulation Affect Economic Outcomes? The Case of Dentistry</i> , 43 J.L. & Econ. 547 (2000)	11
Morris M. Kleiner, <i>Guild-Ridden Labor Markets: The Curious Case of Occupational Licensing</i> (W.E. Upjohn Institute for Employment Research) (2015)	4
Morris M. Kleiner, <i>Licensing Occupations: Ensuring Quality or Restricting Competition?</i> (2006)	10, 11
Morris M. Kleiner, <i>Reforming Occupational Licensing Policies</i> , Brookings Inst. (Mar. 2015).....	5, 13, 17, 21
Morris M. Kleiner, <i>Regulating Access to Work in the Gig Labor Market: The Case of Uber</i> , Emp't Research, July 2017.....	14
Morris M. Kleiner, <i>Stages of Occupational Regulation: Analysis of Case Studies</i> (2013).....	10
Morris M. Kleiner, <i>Why License a Florist?</i> , N.Y. Times (May 29, 2014)	5
Nat'l Conf. of State Legislatures, <i>The Evolving State of Occupational Licensing</i> (2d ed. Nov. 2019)	19, 20
Nat'l Conf. of State Legislatures, <i>The State of Occupational Licensing: Research, State Policies and Trends</i> (2017).....	5, 6, 21, 22

Nat'l Conference of State Legislatures, <i>Barriers to Work: Low-Income, Unemployed and Dislocated Workers</i> (July 17, 2018)	18
<i>Occupational Licensing: A Framework for Policymakers</i> , The White House (July 2015)	13
Paul Sherman, <i>Occupational Speech and the First Amendment</i> , 128 Harv. L. Rev. F. 183 (2005) ..	8, 22
Press Release, <i>DOD Releases Military Spouse Licensure Report</i> , U.S. Dep't of Def. (Feb. 24, 2020)	19
Press Release, <i>Union Members – 2021</i> , Bureau of Labor Statistics (Jan. 20, 2022)	7
Robert J. Thornton & Edward J. Timmons, <i>The De-licensing of Occupations in the United States</i> , Monthly Labor Rev., May 2015.....	11
Robert Kry, <i>The “Watchman for Truth”: Professional Licensing and the First Amendment</i> , 23 Sea. U. L. Rev. 885 (2000)	8
Suzanne Hultin, <i>The National Occupational Licensing Database</i> , Nat'l Conf. of State Legislatures (Mar. 1, 2022)	16
Testimony of Patti Morrow, <i>U.S. House Committee on Small Business Committing Hearing on Contracting and Workforce</i> (Mar. 26, 2014)	15
U.S. Dep't of Def., <i>Military Spouse Licensure: State Best Practices and Strategies for Achieving Reciprocity</i> (Nov. 2019).....	20, 23
U.S. Dep't of Treasury & U.S. Dep't of Def., <i>Supporting Our Military Families: Best Practices for Streamlining Occupational Licensing Across State Lines</i> (Feb. 2012)	20

INTEREST OF *AMICUS CURIAE*¹

Dr. Morris M. Kleiner is a distinguished and widely cited scholar 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. Dr. Kleiner received his Ph.D. in economics from the University of Illinois, Urbana-Champaign.

Given his substantial and ongoing academic contributions in this field, *amicus* has a professional interest in contributing to the sound interpretation of First Amendment law as applied to occupational licensing. In this brief, *amicus* presents an array of empirical research in support of granting the Petition. This evidence contextualizes the magnitude of occupational licensing as a labor market force impacting nearly 1100 occupations, the variation in licensing laws from state to state and occupation to occupation, and the effect of leaving the current circuit split intact on millions of professionals.

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

SUMMARY OF ARGUMENT

This Court has long recognized that “a speaker is no less a speaker because he or she is paid to speak.” *Riley v. Nat’l Fed’n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988). And when that paid speaker is a government-licensed professional, this Court affirmed just four terms ago that “[s]peech is not unprotected merely because it is uttered by ‘professionals.’” *See Nat’l Inst. of Family and Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018) (*NIFLA*). Despite *NIFLA*’s clear language, however, a circuit split has left millions of professionals with varying levels of First Amendment protection to pursue—and speak within—their chosen occupations. Today’s case presents this Court with an ideal vehicle to build upon *NIFLA* and provide additional, valuable clarity on the intersection of occupational licensing and the First Amendment.

The cross-country regulatory rollercoaster Heather Kokesch Del Castillo unwittingly rode is far from unique. Instead, her experience aptly illustrates the circuit split’s importance for millions of everyday Americans. A vast body of empirical evidence—much of it resulting from decades of study by *amicus* and his peers—shows how occupational licensing has become one of the most significant aspects of the American labor market. Licensing’s regulatory coverage, in fact, now extends to millions of individuals in nearly 1100 vocations.

On top of that, occupational-licensing laws vary significantly, both from state to state and occupation to occupation. This significant variation acts as a barrier to interstate mobility, as workers find it more difficult

to cross state lines for better employment opportunities.

Furthermore, as this case exemplifies, millions of Americans engage in speech as a core part of their professions. Thus, many occupational-licensing laws necessarily regulate speech “uttered by professionals.” *NIFLA*, 138 S. Ct. at 2371–72. And many of those professions are regulated by occupational-licensing laws that vary significantly from state to state. *NIFLA* ensures that the First Amendment protects speech both in and outside the workplace. However, the Eleventh Circuit applies a constitutional standard inconsistent with the multiple sibling circuits that have ruled on the issue following *NIFLA* and with *NIFLA* itself. In at least the Eleventh Circuit so far, occupational licensing gives state regulators a tool to cancel an individual’s hopeful entrance into—or continued employment in—a wide range of occupations by criminalizing their speech. Such “unfettered power to reduce a group’s First Amendment rights by simply imposing a licensing requirement” is precisely the result this Court cautioned against in *NIFLA*. 138 S. Ct. at 2375.

As it stands, the burgeoning circuit split leaves millions of Americans with different legal rights to pursue their chosen occupations—and to engage in speech as part of those occupations—based solely on their zip codes. But the First Amendment should apply equally everywhere: in California, in Florida, and in every other state.

The Court should hear this case.

ARGUMENT

I. Occupational licensing has become one of the most significant forces influencing American labor markets.

Occupational licensing—the “government licensing of jobs” that makes “working for pay in a licensed occupation [] illegal without first meeting government standards”—is one of the most significant influences affecting American labor markets today. See Morris M. Kleiner, *Guild-Ridden Labor Markets: The Curious Case of Occupational Licensing* 1 (W.E. Upjohn Institute for Employment Research) (2015) <https://bit.ly/3qllBFJ>. In the 1950s, just five percent of workers needed a government permission slip to earn money for their labor. See Morris M. Kleiner, *Reforming Occupational Licensing Policies*, Brookings Inst. 5 (Mar. 2015), <https://brook.gs/3ojmYVz>. In the decades since, however, the number of new licensing laws has “explo[ded]” to create a “national patchwork of stealth regulation” that tightly restricts “labor markets, innovation, and worker mobility.” See Nat’l Conf. of State Legislatures, *The State of Occupational Licensing: Research, State Policies and Trends* 5 (2017), <https://bit.ly/3St5cvI> [hereinafter NCSL, *State of Occupational Licensing*]; see also Morris M. Kleiner, *Why License a Florist?*, N.Y. Times (May 29, 2014), <https://nyti.ms/3P2W6mw>.

Today, roughly one in four workers must obtain a government license to work in nearly 1100 occupations. See 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/3RsaZRs>; Kleiner, *Guild-Ridden Labor Markets*, *supra*, at 1; NCSL, *State of Occupational Licensing*, *supra*, at 2. Just in the 2020 legislative session alone, multiple occupations were newly licensed, ranging from estheticians in Connecticut to music therapists in Virginia. See Jing Cai & Morris M. Kleiner, *The Labor Market Consequences of Regulating Similar Occupations: The Licensing of Occupational and Physical Therapists*, 41 J. Labor Research 352, 353 (2020).

Occupational licensing affects far more workers than another well-known, significant labor market institution: union membership. In its heyday during the 1950s, the union participation rate in the private sector was 35%. Drew Desilver, *American Unions Membership Declines As Public Support Fluctuates*, Pew Research (Feb. 20, 2014), <https://pewrsr.ch/3PW0DI4>. But that number has since plummeted to just over six percent in the private sector—far below the approximately 25% of individuals working in licensed occupations. See Press Release, *Union Members – 2021*, Bureau of Labor Statistics (Jan. 20, 2022), <https://bit.ly/3QMSdDP>. In Florida, where Del Castillo resides, 3.5 times more workers are subject to occupational-licensing laws than belong to a union. See Morris M. Kleiner & Evgeny S. Vorotnikov, *At What Cost? State and National Estimates of the Economic Costs of Occupational Licensing*, Inst. for Justice 28 (Nov. 2018), <https://bit.ly/3qvEbeh>.

Many occupational-licensing laws necessarily regulate speech “uttered by professionals.” *NIFLA*, 138 S. Ct. at 2365; see Bradley Copeland, *Occupational*

Licensing and the First Amendment, 31 Geo. Mason U. Civ. Rts. L.J. 181, 182 (2021). “[M]illions of Americans,” after all, “earn their living in occupations that consist primarily, if not entirely, of speech.” Paul Sherman, *Occupational Speech and the First Amendment*, 128 Harv. L. Rev. F. 183, 183 (2005) <https://bit.ly/3TNjjN8>; *see also* Copeland, *supra*, at 182. When a professional “does no more than render advice to a client, the government’s interest in protecting the public from fraudulent or incompetent practice is quite obviously directed at the expressive component of the professional’s practice”—and, hence, First Amendment concerns arise. *See* Robert Kry, *The “Watchman for Truth”: Professional Licensing and the First Amendment*, 23 Sea. U. L. Rev. 885, 893 (2000); *see also* Eugene Volokh, *Speech as Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1346 (2005) (“When the government restricts professionals from speaking to their clients, it’s restricting speech, not conduct. And it’s restricting the speech precisely because of the message that the speech communicates, or because of the harms that may flow from this message.”).

Although policymakers and scholars—*amicus* chief among them—have criticized occupational-licensing’s proliferation,² it remains exceedingly “rare for an

² *See, e.g.*, Morris M. Kleiner & Maria Koumenta, *Grease or Grit? International Case Studies of Occupational Licensing and its Effects on Efficiency and Quality* (forthcoming, 2022); Morris M. Kleiner & Evan J. Soltas, *A Welfare Analysis of Occupational Licensing in U.S. States*, Rev. Econ. Studies (forthcoming, 2022); Exec. Order No. 14036, 86 Fed. Reg. 36987 (July 9, 2021); Alicia (footnote continued)

occupation to become deregulated by a government agency.” Kleiner, *Licensing Occupations*, *supra*, at 12-13. A 2015 study found only eight examples of occupational *de*-licensing over 40 years. See Robert J. Thornton & Edward J. Timmons, *The De-Licensing of Occupations in the United States*, *Monthly Labor Rev.*, May 2015, <https://bit.ly/3TWZByE>. The recalcitrance of occupational-licensing laws should surprise no one. To *de*-license an occupation, a state legislature generally must either strip a licensing board of its authority, or the board itself must voluntarily request relinquishment of its authority. *Id.* at 2 (citing Kleiner, *Licensing Occupations*, *supra*, at 13). Such proposals typically receive “stiff resistance,” especially from the already-licensed workers who benefit from limited competition. Thornton & Timmons, *supra*, at 13. Already-licensed workers, in fact, often comprise the very boards empowered to enforce licensing laws—a reality this Court observed “may blend with private anticompeti-

Plemmons & Edward Timmons, *Occupational Licensing: A Barrier to Opportunity and Prosperity*, in *Regulation and Economic Opportunity: Blueprints for Reform* (eds. Adam Hoffer & Todd Nesbit) (2020); Karen A. Goldman, *Policy Perspectives: Options to Enhance Occupational License Portability* 4, Fed. Trade Comm’n (2018), <https://bit.ly/2YfjVhR>; Kleiner, *Guild-Ridden Labor Markets*, *supra*; Morris M. Kleiner, *Stages of Occupational Regulation: Analysis of Case Studies* (2013), <https://bit.ly/3D8ap7a>; Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* (2006), <https://bit.ly/3AWo8er>; 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 & Robert T. Kudrle, *Does Regulation Affect Economic Outcomes? The Case of Dentistry*, 43 *J.L. & Econ.* 547 (2000).

tive motives in a way difficult even for market participants to discern.” *N.C. State Bd. of Dental Exam’rs v. F.T.C.*, 574 U.S. 494, 505 (2015).

II. Licensing laws vary widely from state to state and occupation to occupation, thereby impeding economic mobility.

Occupational-licensing laws—including the many that necessarily regulate speech “uttered by professionals,” *NIFLA*, 138 S. Ct. at 2365—vary widely. These variations include (1) state-by-state variations in whether a license is required at all for a particular occupation; (2) state-by-state variations in requirements to become licensed for a particular occupation; and (3) within a state, occupation-by-occupation variations in requirements to become licensed. Separately and together, these variations impede economic mobility by restricting interstate and occupational mobility—especially for military families.

A. *First*, the majority of licensed occupations are licensed in some, but not all, states. Although nearly 1100 occupations are licensed in at least one state, fewer than 60 occupations (or about five percent) are licensed in all states. *See Occupational Licensing: A Framework for Policymakers* 7, The White House (July 2015), <https://bit.ly/3wtrG6y>. A recent study of 102 lower-income occupations revealed that only 23 of the 102 occupations were licensed by 40 states or more. *See* Dick M. Carpenter II et al., *License to Work: A National Study of Burdens from Occupational Licensing*, Inst. for Justice 6 (2d ed. 2017), <https://bit.ly/3KPDw0Q.6>. To the contrary, some occupations are only licensed in one state, such as home entertainment installers in

Connecticut or florists in Louisiana. *Id.* at 56, 80. States also vary widely in the number of occupations they subject to licensing laws; for example, Wyoming licenses only 26 occupations, while Louisiana and Washington each license 77. *See id.* at 6. And the share of the workforce that is licensed varies, too; Iowa leads the nation with 33.3% of its workforce licensed, while only 12.4% of South Carolina's is licensed. *See Kleiner, Reforming, supra*, at 8-9.

Amicus recently examined consumer ratings of Uber rides begun 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, <https://bit.ly/3D6Dekq>. 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.

For another everyday example of the inconsistency of licensing across states, move from the inside of an Uber driver's car to the inside of your home. Only three states and the District of Columbia require hopeful interior designers to first secure a license. Carpenter II et al., *supra*, at 15. Yet these four of 51 jurisdictions' requirements for licensure are shockingly stringent:

hopeful designers must devote an average of 2200 days—nearly *six years* of their career—to a combination of education and apprenticeship, pay an average of \$1265 in fees, and pass a national exam. And for what? When former President Obama and his family sought to redesign the White House living quarters, for example, they did not hire a government-licensed designer who would have spent years, thousands of dollars, and time preparing for an exam in order to earn that credential. Testimony of Patti Morrow, *U.S. House Committee on Small Business Committing Hearing on Contracting and Workforce* (Mar. 26, 2014), <https://bit.ly/3POy5A6>. Rather, they hired a famous—and unlicensed(!)—interior designer from California, Michael Smith, whose prior clients included the likes of Shonda Rhimes and Steven Spielberg. *See id.*; *see also* Maureen Dowd, *Mr. Smith Went to Washington... With Dimmers*, *N.Y. Times*, (Aug. 26, 2020), <https://nyti.ms/3dUpnCS>. No one could suggest with a straight face that the White House received low-quality services because Smith, a widely-celebrated designer, lacked a government-issued license.

Second, among states that *do* license a given occupation, their respective requirements often differ substantially. These differences can relate to educational attainment (degree or coursework); experience level (time spent practicing, apprenticing, observing); examination (required or not, and difficulty); and existence and amount of fees (for application, for license, for renewal); among other requirements (such as demonstrating “good moral character”). *See* Suzanne Hultin, *The National Occupational Licensing Data-*

base, Nat'l Conf. of State Legislatures (Mar. 1, 2022), <https://bit.ly/3AMj2mi>. For example, whereas Nevada requires approximately 900 days of education and experience to become a licensed barber, New York requires only about 54 days. Carpenter II et al., *supra*, at 148. In roughly half of the 102 lower-income occupations analyzed in one recent study, the difference between the most and least stringent education and experience requirements is more than 1000 days—or nearly *three years*. *Id.* at 7.

Third, even within a given state, requirements for a license often vary significantly from one occupation to the next. In Michigan, for example, it takes 1460 days (nearly three years) to become an athletic trainer, but only 26 days (1.78% of that amount of time) to become an emergency medical technician (EMT). Kleiner, *Reforming, supra*, at 11. In Utah, a prospective transit bus driver must devote 365 days of experience to become licensed; a prospective taxi driver or chauffeur, by contrast, needn't devote even one. *See* Carpenter II et al., *supra*, at 133.

All told, many individuals in many lines of work must first obtain a government-issued license to earn money for their labor. But that general statement comes with sometimes mind-boggling nuance. For any specific individual, whether she needs a license—and what she needs to do to obtain and maintain it—depends entirely on her location and occupation. Someone similarly skilled could be just a few miles away across a state line or in a marginally different occupation and not need a license at all—or, instead face a significantly higher regulatory burden.

B. Occupational licensing’s proliferation and variation restrict economic mobility. In a well-functioning market, individuals can move to where their skills command higher pay. But licensing make this difficult. The interstate migration rate for individuals in state-licensed occupations is 36% lower than for individuals in non-licensed occupations. Johnson & Kleiner, *supra*, at 15; 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). At its worst, the state-by-state variation “may even lead licensees to abandon an occupation when moving to another state.” Goldman, *supra*, at 1.

Relatedly, licensing reduces cross-occupation mobility by lessening the incentives workers may have to leave occupations where opportunities are declining. One recent study found that licensed professionals are 24% less likely than their non-licensed counterparts to switch occupations in a given year. See Morris M. Kleiner & Ming Xu, *Occupational Licensing and Labor Market Fluidity* 4, 37, Nat’l Bureau of Econ. Research Working Paper No. 7568 (2020), <https://bit.ly/2YfypDc>. Perhaps unsurprisingly, the variation in licensing laws “disproportionately affect[s] low-income workers for whom the costs—e.g., for educational, training and licensing fees—represent a larger share of their income than they do for higher-income workers.” Nat’l Conf. of State Legislatures, *The Evolving State of Occupational*

Licensing, (2d ed. Nov. 2019), <https://bit.ly/3PYtJGx> [hereinafter NCSL, *Evolving State*].

The challenges licensing presents to interstate mobility are particularly acute for military families like Del Castillo’s. Military spouses face a 24% unemployment rate, which is much greater than the general population. See Press Release, *DOD Releases Military Spouse Licensure Report*, U.S. Dep’t of Def. (Feb. 24, 2020), <https://bit.ly/3As8Pdo>. Two primary factors contribute to this high rate. First, military spouses are “10 times more likely to move across state lines than their civilian counterparts.” U.S. Dep’t of Treasury & U.S. Dep’t of Def., *Supporting Our Military Families: Best Practices for Streamlining Occupational Licensing Across State Lines* 7 (Feb. 2012), <https://bit.ly/3wpfrHV>. And second, a disproportionately high number of military spouses—34%—work in licensed occupations. See U.S. Dep’t of Def., *Military Spouse Licensure: State Best Practices and Strategies for Achieving Reciprocity* 5 n.1 (Nov. 2019), <https://bit.ly/3pLW8VK>. Occupational licensing’s negative effects, in short, disproportionately burden America’s military families.

In sum, the variation in licensing laws “restricts worker mobility—which is costly not only for workers, but also for employers, consumers, and the economy at large.” NCSL, *Evolving State*, *supra*, at 9. In fact, one study found that occupational licensing may result in up to 2.85 million fewer jobs nationwide, costing American consumers \$203 billion annually. Kleiner, *Reforming*, *supra*, at 6; see also Johnson & Kleiner, *supra*, at 25 (finding that occupational licensing’s

mobility-restricting effects result in hundreds of millions of dollars of lost earnings).

III. The current circuit split leaves millions of Americans in licensed occupations with different protections for professional speech based solely on their location.

As explained, occupational licensing is a major force influencing American labor markets. Legislatures have historically shown little interest in reducing the burden of licensure or stopping its proliferation. At the same time, different states regulate different occupations differently, perpetuating a “patchwork of stealth regulation.” NCSL, *State of Occupational Licensing*, *supra*, at 5. Both the proliferation of, and variation in, occupational-licensing laws impede interstate mobility and dampen economic opportunity. Indeed, as “occupational licensing [] expand[s] to more and more professions,” it “denie[s] [] occupational choice” especially to those already less fortunate, thereby serving to calcify existing inequalities. Daniel J. Smith, *Occupational Licensing in Alabama*, 27 *Labour & Industry* 77, 81 (2017).

As Del Castillo learned the hard way, the patchwork of inconsistent licensing laws necessarily regulates speech “uttered by professionals.” *NIFLA*, 138 S. Ct. at 2365. “[M]illions of Americans” like her “earn their living in occupations that consist primarily, if not entirely, of speech.” Sherman, *supra*, at 183. To ensure this state-by-state patchwork does not impact speech in a myriad of unpredictable ways, enter the First Amendment—or at least one would think.

Not necessarily so. Circuit courts are split over whether and how First Amendment scrutiny applies to professional speech. Absent a nationwide constitutional standard, however, the existing “patchwork of stealth regulation,” NCSL, *State of Occupational Licensing, supra*, at 5, subjects the speech of “millions of Americans” to varying burdens depending on where they live and how they earn their living, Sherman, *supra*, at 183. Indeed, a speech-dependent professional like Del Castillo might need a license in some states but not others. The requirements for licensure might be stricter in some states than in others. And, to top it off, one state’s law might be unconstitutional while another state’s might be just fine—not because those respective state’s laws are different, but because of a circuit split.

Left intact, the circuit split will give “millions of Americans”—including a disproportionate number of military spouses, U.S. Dep’t of Def., *Spouse Licensure, supra*, at 5 n.1—different legal rights to pursue their chosen occupations based solely on their zip codes. But “a speaker is no less a speaker because he or she is paid to speak.” *Riley*, 487 U.S. at 801. The Court should grant certiorari to once again enforce that precept—and to clarify that it carries exactly the same meaning in California, in Florida, and in every other corner of the country.

CONCLUSION

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

Respectfully submitted,

JOSEPH S. DIEDRICH

Counsel of Record

HUSCH BLACKWELL LLP

33 E. Main St., 300

Madison, WI 53703

(608) 255-4440

joseph.diedrich

@huschblackwell.com

REBECCA C. FURDEK

HUSCH BLACKWELL LLP

511 N. Broadway, 1100

Milwaukee, WI 53703

(414) 273-2100

Counsel for Amicus Curiae

September 14, 2022