No. 24-539

IN THE

Supreme Court of the United States

KALEY CHILES,

Petitioner,

v.

PATTY SALAZAR, IN HER OFFICIAL CAPACITY AS EXECUTIVE DIRECTOR OF THE COLORADO DEPARTMENT OF REGULATORY AGENCIES, ET AL.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

AMICUS CURIAE BRIEF OF LAND-SURVEYOR AND CIVIL-ENGINEER TRADE ASSOCIATIONS IN SUPPORT OF RESPONDENTS

JENS B. KOEPKE
Counsel of Record
COMPLEX APPELLATE LITIGATION GROUP LLP
355 South Grand Avenue
Suite 2450
Los Angeles, CA 90017
(213) 878-0404
jens.koepke@calg.com

STEVE HIRSCH
COMPLEX APPELLATE LITIGATION GROUP LLP
96 Jessie Street
San Francisco, CA 94105
(415) 649-6700

Counsel for Amici Curiae

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INTERESTS OF THE *AMICI CURIAE*[1]

Amici are trade associations that represent land surveyors and civil engineers, as well as their licensing boards, throughout the country. In every State, land surveyors are subject to licensing and regulatory regimes, which ensure that those who practice surveying in that State have the requisite training, knowledge, and expertise to perform the work competently. These licensing regimes protect the public from the financial and safety perils that arise from the unlicensed, unregulated practice of surveying.

Land surveying and its licensing provide a good illustration of the more typical scenario in which professional-speech restrictions and litigation arise. Indeed, there are two petitions for certiorari pending before this Court challenging surveyor-licensing regulatory schemes.[2] This case, on the other hand, is atypical of professional regulation.

Thus, in writing its opinion here, this Court should bear in mind the impact its decision will have on the myriad and longstanding professional-licensing regimes in every State in the country. And this Court

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[1] No counsel for any party authored this brief in whole or in part, no party or party's counsel made a monetary contribution intended to fund the preparation or submission of this brief, and no person or entity—other than amici curiae, their members, and their counsel—made a monetary contribution to the preparation or submission of this brief.

[2] *See Crownholm v. Moore*, No. 23-15138, 2024 WL 1635566 (9th Cir. Apr. 16, 2024), *pet. for cert. docketed*, No. 24-276 (Sept. 11, 2024) (*Crownholm*); *360 Virtual Drone Servs. LLC v. Ritter*, 102 F.4th 263 (4th Cir. 2024), *pet. for cert. docketed*, No. 24-279 (Sept. 11, 2024) (*360 Virtual*).

should explicitly clarify and state that typical licensing/regulatory regimes (particularly in technical professions) do not trigger any constitutional scrutiny (or at best minimal scrutiny), because they are directed at professional conduct, not speech, and are not directed at the viewpoint of the professionals' speech. Any restriction on the professionals' speech is only incidental, and thus no heightened scrutiny should be applied.

Amicus curiae American Council of Engineering Companies (ACEC) is a nonprofit trade association that acts as the national voice for engineering and land-surveying firms throughout the country, primarily through advocacy, education, and research. It consists of a federation of fifty-one state and metropolitan member organizations, including amicus curiae ACEC California and amicus curiae ACEC Colorado. Its members provide consulting services for all phases of planning, designing, and constructing projects (public works, residential, commercial, and industrial). Amicus curiae the California & Nevada Civil Engineers & Land Surveyors, Inc. (CELSA) is the premier employer trade association in Northern California and Northern Nevada representing employers who engage in field and construction survey work. Amicus curiae California Geotechnical Engineering Association is the leading association dedicated to advancing geoprofessionals and related businesses serving California. Amicus curiae National Society of Professional Surveyors is the voice of the professional surveying community in the United States and its territories, representing professional surveyors in both public and private practice. Amicus curiae National Society of Professional Engineers, founded in 1934,

represents licensed professional engineers across all disciplines and industries, and advances public health, safety, and welfare by promoting ethical, competent engineering practice and sound public policy affecting the profession. Amicus curiae National Council of Examiners for Engineering and Surveying (NCEES) is a nonprofit organization made up of engineering and surveying licensing boards from all U.S. States and territories. Since its founding in 1920, NCEES has been committed to advancing licensure for engineers and surveyors to safeguard the health, safety, and welfare of the U.S. public.

SUMMARY OF ARGUMENT

The public routinely relies on professional services—legal, medical, technical—and justifiably expects that those professionals will be trained and have specialized expertise so that they can provide those services competently. Recognizing the potential harm to the public from untrained, incompetent individuals attempting to perform professional services, all States have longstanding licensing and regulatory regimes covering a gamut of professions.

In *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755 (2018) (*NIFLA*), this Court held that "professional speech" is not exempted from First Amendment protection. But how professional-speech restrictions should be viewed, and what level of scrutiny should be given to them, is still evolving.

For several reasons, this case has the potential for upending the longstanding regulation and licensing of professionals (particularly in technical professions):

- The activities of most professionals (like land surveyors, engineers, architects, accountants, etc.) primarily involve conduct, not speech. Although the products of these professionals' services may involve some speech, the core of the professional activity is conduct, and thus should not trigger First Amendment scrutiny. For example, land surveyors physically measure and locate property boundaries and elevations using specialized equipment. Architects and engineers draw blueprints. Accountants create financial statements. By contrast, much of Petitioner's "talk therapy" is accomplished directly through speech and thus is not typical of most professions.

- The longstanding licensing/regulatory regimes created by every State in the country typically are not directed at or triggered by the content of the professional's speech, but rather by the professional's conduct. Thus, any restriction on the professional's speech is incidental to the State's need to protect the public by regulating the professional's conduct.

- Here, Petitioner's challenge and Colorado's regulation are tied up with the public controversy and debate over conversion therapy. The activities of most professionals (particularly technical professionals) rarely, if ever, involve a public debate about a controversial social or religious issue. Thus, almost all professional licensing and regulatory schemes are not triggered by the content or viewpoint of the professionals' speech, but instead by the need to safe-

> guard the public from untrained and incompetent performance of professional services. Accordingly, most professional regulations should not face heightened constitutional scrutiny.

Land surveyors provide a good example of the more typical professional regulations. The work that land surveyors do is critical to building homes, commercial buildings, roads, and bridges, and other elements of the built environment, as well as demarcating key natural features of the land, like rivers and bays. If the surveying work is done by an untrained and unlicensed individual, the result can be unsafe roads and bridges, and property-line and ownership disputes, causing unnecessary litigation and added public and private expense. That's why all States require that land surveyors be licensed, after completing the proper training, obtaining the requisite knowledge, and then proving that they have the skill to do surveying properly.

But these longstanding and widespread licensing/regulatory regimes for land surveyors are under attack. Two petitions for certiorari are pending before this Court, where the petitioners are seeking to invalidate surveyor-licensing statutes on First Amendment grounds. *See Crownholm*, 2024 WL 1635566, at *1, *2; *360 Virtual*, 102 F.4th at 278.

In this case, this Court must answer several legal questions that could directly impact the continued vitality of the nation's ubiquitous professional licensing/regulatory regimes. As applied to land surveying and a host of other technical professions, an overly broad interpretation of what constitutes speech (versus conduct) or an overly narrow interpretation of

what counts as a merely incidental speech restriction could fatally undermine the protections built into the professional-licensing regimes on which every member of the public relies.

Accordingly, regardless of how this Court resolves the certified question in this unique and atypical professional-speech case, amici respectfully suggest that this Court's opinion explicitly make the following points:

- First, the typical professional licensing and regulatory regime (particularly in technical professions) is not subject to First Amendment scrutiny (or is subject at most to rational-basis review), because such regimes target conduct (not speech) and are not viewpoint-based regulations.
- Second, to the degree that a typical professional regulation does impact professional speech, that regulation usually should be seen as a merely incidental restriction on speech and thus subject only to rational-basis review.

ARGUMENT

I. Since most professional activity is primarily conduct, most professional licensing and regulatory statutes fall on the conduct side of the speech/conduct threshold and thus do not trigger First Amendment scrutiny.

Whether to afford First Amendment protections and what level of scrutiny should apply depends on "all the circumstances of the case" and the nature of the speech involved. *Snyder v. Phelps*, 562 U.S. 443, 451-52 (2011); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 582-83 (2011) (Breyer, J., dissenting) ("[T]his Court has distinguished for First Amendment purposes among different contexts in which speech takes place.").

This context-sensitive approach also applies to the threshold question of whether the government restriction impacts conduct or speech.

Most activities of most professionals, particularly in technical professions, involve conduct rather than speech. The work of land surveyors is illustrative. Using both traditional and advanced technological tools, as well as math and science, land surveyors locate and determine property lines, and measure the angles and elevations of property. Those measurements and determinations are then used in constructing both housing and commercial buildings, as well as roads, pipelines, and bridges. Land surveyors also conduct topographic and geodetic surveys to locate natural and man-made land features such as rivers, hills and buildings, which are used to determine ri-

parian and tidal boundaries, or for environmental assessments and planning. Sometimes surveyors create survey products, including maps, reports, and drawings that reflect their work, as well as property descriptions for deeds. These products are then filed with public entities and relied on to determine property ownership and rights.

Thus, the work of land surveyors is and should be seen as conduct. Of course, the end product provided to the client or to a governmental body—e.g., a map or drawing of a particular property—arguably involves speech; and the surveyor's products must be communicated to clients or governments via speech. But treating a land surveyor's work as "speech" for First Amendment purposes would do great mischief to the constitutional conduct-speech distinction.

Not surprisingly, this Court long ago held that "it has never been deemed an abridgment of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447 (1978) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

Likewise, most professional activity consists of "conduct [that] was in part initiated, evidenced, or carried out by means of language." *Ohralik*, 436 U.S. at 456. Take engineers, architects, accountants, appraisers, chiropractors, pharmacists, veterinarians, and many more. Doing the preparatory work and then creating a floor plan, financial statement, or appraisal must be seen as conduct (not speech). The work of these technical professionals is centered on

the services and expertise they provide their clients—namely, conduct. Equating a land surveyor's plot plan preparation with speech subject to strict scrutiny risks constitutionalizing every building permit, blueprint or financial statement created across the many licensed professions, particularly technical ones. As we will explore later, the work of these technical professionals, at most, only incidentally involves speech.

Of course, there are some professionals, such as therapists or lawyers, much of whose work may involve speech. Whether Petitioner's use of certain treatment modalities is conduct or speech may be a closer call (mainly because so much of a therapist's work is verbal). Even so, medical treatments (like conversion therapy) ordinarily should be seen as conduct, not speech. This is even more true when a State has followed the consensus in a profession and determined that certain professional practices, including those involving speech, fall below the standard of care for that profession. *See* Resp. Br. 3-9, 11-15, 17-37.

Moreover, using another more speech-centric profession like the law as an example, there can be little doubt that bar associations and States have the authority to put content-neutral restrictions on licensed lawyers' brief-writing (such as ethical rules imposing a duty of candor to the court), even though that activity is made up of written speech. In fact, Justice White explained that the "power of government to regulate the professions is not lost whenever the practice of a profession entails speech," and chose the legal profession as "the most obvious example of a 'speaking profession' that is subject to governmental licensing." *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring).

Thus, Petitioner's unique situation should not obstruct this Court's view of the reality that most professional activity falls easily on the conduct side of the conduct-speech dividing line.

This Court should elucidate and clarify that almost all daily activities by most professionals (particularly technical professionals) count as conduct, not speech. Therefore, most ordinary professional regulations should not be subject to First Amendment scrutiny.

II. Most professional licensing and regulatory statutes impose speech restrictions that are at most incidental.

In *NIFLA*, this Court acknowledged that "States may regulate professional conduct, even though that conduct incidentally involves speech." *NIFLA*, 585 U.S. at 768; *accord Sorrell*, 564 U.S. at 567 ("It is also true that the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech.").

One can debate whether Colorado's restrictions on therapists' use of certain conversion therapies or treatments only poses an incidental restriction on speech.

But most professional licensing and regulatory statutes, particularly with technical professions, do fall (at most) in that incidental-restriction category, if they restrict speech at all.

Land surveyors, again, provide a good example. As explored in more detail below, requiring that a plot plan submitted to governmental authorities be

drafted by a licensed surveyor is critical so that current and future landowners, neighbors, contractors, architects, and others can reasonably rely on where the boundaries of the property and any structures on that property are. The fact that such a requirement might curtail the ability of an unlicensed and untrained individual to create a site plan must be seen as an incidental restriction on that individual's speech, at most (if that can be seen as applying to speech at all). The real target of such a requirement is not the unlicensed surveyor's speech, but the conduct of performing surveying work without a license.

Yet if this Court defines or interprets incidental restrictions on speech in a very narrow fashion, a host of professional licensing and regulatory statutes around the country could be challenged and invalidated, and the public's welfare will be imperiled. Put another way, this Court's holding or language in its opinion here could result in future courts finding that the indirect burdens on speech created by the typical licensing/regulatory statute are more than incidental, triggering an unnecessarily strict standard of review.

This is not a hypothetical concern. Two certiorari petitions are pending before this Court where the Courts of Appeals applied *NIFLA* and this Court's other precedents to find that licensing statutes for land surveyors were constitutional and imposed merely incidental burdens on the speech of unlicensed individuals selling surveying services. *See Crownholm*, 2024 WL 1635566, at *1, *2; *360 Virtual*, 102 F.4th at 278. Those petitioners are, in part, arguing that such licensing schemes exact more than incidental restrictions on their speech. *See Crownholm* Cert. Pet. at 33-38.

In fact, these unlicensed individuals have filed an amicus brief in this case, which takes direct aim at surveyor licensing schemes as violating the First Amendment. Parties in Other First Amendment Cases Amicus Br. 17-20.

But subjecting ordinary professional regulatory programs to heightened First Amendment scrutiny—because they count as non-incidental speech restrictions—"would transfer from legislatures to judges the primary power to weigh ends and to choose means, threatening to distort or undermine legitimate legislative objectives." *Sorrell*, 564 U.S. at 585 (Breyer, J., dissenting). That is because, whenever there is heightened scrutiny, judges (rather than legislatures) must analyze all the competing interests and make a determination.

But the policy-balancing, fact-finding, expert consultation, and compromises that legislatures engage in before they create professional regulations is a job that judges and courts are not well-suited for, and which falls outside the traditional separation of powers in our tripartite system of government.

This Court should make clear that, even if some professional licensing and regulatory statutes might be seen as governing speech (most do not), those statutes normally create at most incidental restrictions on professional speech.[3]

III. States have long recognized the dangers to the public of letting professions go unregulated or unlicensed.

The services that professionals provide touch the lives of the general public almost every day. Most people regularly rely on professional services. Not surprisingly, the public has come to expect that those professions have established standards of training and expertise that ensure basic competence—and hopefully excellence.

Given the ubiquitous and vital role that professional services play in people's lives, it is no surprise that every State and the federal government have established licensing and regulatory schemes for all professions.

Again, land surveying provides a good example. "All 50 states and the District of Columbia require surveyors to be licensed before they can provide their services to the public." U.S. Bureau of Lab. Stat., *How*

[3] Another circumstance *NIFLA* identified where professional speech is afforded less First Amendment protection involves laws "that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *NIFLA*, 585 U.S. at 768. The parties agree that this exception is not implicated here. Pet. App. 37a n.25. However, it must be noted that if this Court takes an overly narrow view of what counts as factual, noncontroversial information, it could carve a fatal loophole in many professional licensing and regulatory regimes.

to Become a Surveyor, Occupational Outlook Handbook (last modified Apr. 18, 2025), bit.ly/3Z7XAmJ. Some of these licensing regimes have existed for centuries.

California, for example, has regulated land surveyors for more than a century, and in 1891 enacted a law establishing a licensing scheme for land surveyors. *See* Cal. Bus. & Prof. Code §§ 8700-8805. North Carolina's colonial-era legislature passed a law in 1777 establishing a process for appointing county land surveyors, rules for performing land surveys, and penalties for surveyors who failed to comply. The Acts of Assembly of the State of North Carolina, ch. I, §§ IXIV, 1777 N.C. Sess. Laws 42, 42-47. North Carolina also enacted a licensing regime for land surveyors in 1921. Act of Feb. 25, 1921, ch. 1, §§ 1-17, 1921 N.C. Sess. Laws 47, 47-53.

To be licensed, land surveyors must pass examinations testing their fundamental knowledge of surveying, mathematics, and basic science, as well as their ability to apply that knowledge in practice. This helps to ensure that individuals performing land surveying have the necessary specialized training and expertise, and have demonstrated competency and knowledge of relevant state laws.

This Court expressly noted, while upholding a professional regulation, the importance of state licensing schemes: "Our cases reflect the fact that the Constitution gives the States broad latitude to decide that particular functions may be performed only by licensed professionals, even if an objective assessment might suggest that those same tasks could be performed by others." *Planned Parenthood of Se. Pa. v.*

Casey, 505 U.S. 833, 885 (1992), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 231-32 (2022). More recently, *NIFLA* relied on *Casey* and cited this principle. 585 U.S. at 769-70.

Even Petitioner acknowledged in her brief that professional regulations are not viewpoint-based, but focused on " 'ensuring the professional is qualified,' " and that licensing schemes "likewise [are] tied to objective, nonideological measures, such as continuing-education requirements, sufficient practice hours, and ongoing competence." Pet. Br. 9-10.

Although the reasons for licensing and regulating land surveyors may seem obvious, the dangers of unlicensed surveying deserve mention. Indeed, amici have been on the front lines seeing the perils of unlicensed surveying work:

- A few years ago, a licensed civil engineer who was the construction inspector for a new highway off-ramp shared concerns about the project with an officer of amicus CELSA. The engineer noticed that the off-ramp looked very steep, making rollovers more likely. The road contractor had used a "stakeless" computer model with GPS to determine the grade of the off-ramp—without any actual, physical construction stakes being set by a licensed land surveyor to determine the proper grade. Despite the contractor's insistence that the model was correct, a licensed land survey verified that the "stakeless" grading was wrong. The contractor was instructed to build the improvements according to the construction stakes. If the off-

ramp had been constructed solely based on the stakeless model—without a land surveyor—the slope would have been built incorrectly and would have put the public at risk of injury and death.

- Another recent example at an Air Force base also involved a construction contractor's use of "stakeless" grading. The inspector (a licensed civil engineer) wanted to check the "stakeless" model with actual construction stakes. The staking—conducted by a survey crew supervised by a licensed land surveyor—revealed that the road was built with an incorrect slope. The inspector directed the contractor to correct the road so that it was built according to the engineer's design. Without that correction, the slope would have caused water to pool on the road. The standing water would have posed a safety hazard and also would have caused the road to deteriorate more quickly than normal, increasing taxpayer costs.[4]

- Property owners also are harmed by unlicensed land surveying. After the 2017 wildfires in Northern California, it was common for architects and others to prepare site plans for houses based only on assessors' office data and other information, without using a land surveyor to

[4] In another instance, a member of amicus ACEC California had to explain to a contractor why an entire subdivision was sloped. It turned out that the contractor had made an error using stakeless grading and that the model was tilted, which the contractor realized only after the entire site was graded. The site then had to be re-graded at significant expense.

lay out the location of a house's foundation. When the contractors hired an ACEC member firm to set stakes for these houses, the firm found that, contrary to the architect's site plan, the foundations of many of these houses did not actually fit on the property. Sometimes the architect then had to redesign a house to make it fit, causing the property owner to incur additional costs.

- In Florida, a new house had to be torn down because, due to unlicensed surveying, it was built too close to a neighbor's home, violating the county's zoning requirements and posing a fire danger. *See Homebuilder Demolishes House Built Too Close to Neighbor*, WFTV 9 (Oct. 20, 2020), https://tinyurl.com/429n7dnv.

Surveying errors also can diminish the value of a client's property, create disputes with neighbors, and burden the courts with unnecessary litigation. Indeed, "[a]ny mistake by a surveyor in performing a survey or in stating its results may cause persons relying thereon to suffer considerable financial loss." 117 A.L.R.5th 23, § 2[a] (2004); *see also Kent v. Bartlett*, 49 Cal. App. 3d 724, 726-27 (1975) (erroneous survey led to encroachment of retaining wall and driveway on neighbor's property); *Roberts v. Karr*, 178 Cal. App. 2d 535, 540-41 (1960) (landowners harmed by surveyor's error in measuring elevation of land).

If professional licensing and regulatory schemes, particularly those governing technical professions, are struck down by overly broad First Amendment

rulings, the dangers and risks to the public from unlicensed professional work (like land surveying) will worsen.

For this reason, it is critical that, in this opinion, this Court narrowly define what constitutes speech (rather than conduct) in the professional context. And this Court should expressly clarify that almost, if not all, state schemes for licensing and regulating technical professions do not trigger heightened First Amendment scrutiny, but rather create only incidental restrictions on speech.

IV. Most professional regulations cannot be seen as content-based, much less as viewpoint-based, and most professional activity has nothing to do with any controversial issues.

NIFLA also emphasized that this Court's precedents "distinguish between content-based and content-neutral regulations of speech." *NIFLA*, 585 U.S. at 766. And *NIFLA* explained that one of the constitutionally acceptable restrictions on professional speech involves "laws that require professionals to disclose factual, noncontroversial information in their 'commercial speech.'" *Id.* at 768. Both holdings were based on the principle that a government's speech restriction that does not hinge on the viewpoint expressed by the speaker should be subject to lower or minimal constitutional scrutiny.

Unlike Petitioner's conversion-therapy work, most professionals' work involves conveying factual noncontroversial information, not viewpoints about any controversial social issues. Land surveyors' plot plans and construction stakes are not tied up in some hot-

button social issue or related to the free exercise of religion. An architect's floor plans or foundation schematics are not expressions of opinion and do not trigger any heated public debate; they are simply technical products meant to comply with codes and laws.

For that reason, most, if not all, regulation and licensing of professionals are not triggered by the content or viewpoint of the professionals' speech. Thus, most professional licensing and regulatory schemes cannot and should not be seen as content-based speech restrictions and should not face heightened scrutiny.

One can debate whether Colorado's therapists regulation here was primarily triggered by the political controversy surrounding conversion therapy, which might be seen as targeting the content of therapists' speech, or instead by Colorado's stated desire to protect minors' health from the use of discredited treatments (including some using speech) that fall below a therapist's standard of care, which is content neutral. Resp. Br. 17-33, 37-40. What is not debatable, though, is that Colorado's regulation is not at all typical of professional regulation around the country.

If, in this case, this Court takes too broad a view of what counts as a content-based professional regulation or licensing scheme, it could cripple those longstanding regimes in professions that never come within shouting distance of a controversial social or religious issue.

Using the First Amendment to strike down economic and consumer-protection regulation of professions—regulations that legislatures long would have

thought themselves free to enact—will endanger the American public, not protect their freedom of speech.

The United States' amicus brief supporting Petitioner recognizes the importance of safeguarding professional regulatory regimes from overreaching First Amendment scrutiny:

> States may still regulate professional speech based on its connection to separate regulated conduct or for reasons unrelated to its content (or if it is otherwise historically recognized as unprotected).

U.S. Amicus Br. 3.

Likewise, Iowa and twenty other States supporting Petitioner emphasize that "many professional-licensure requirements and other professional-practice prerequisites designed to protect the public from incompetence are undeniably constitutional," and give the example of States' law- and medical-licensure requirements, which are not " 'directed at' " speech content and therefore "do not trigger First Amendment scrutiny even though they may incidentally burden speech." Iowa et al. Amicus Br. 2, 9.

Licensing and regulatory statutes for land surveyors (and most professionals) are also not triggered by the content of the professionals' speech, nor by any social or religious controversy. Instead, those statutes are directed at protecting the public by ensuring that the professionals are trained and have the proper education and expertise to provide competent services to landowners and public agencies.

CONCLUSION

Regardless of how this Court ultimately rules on Colorado's statute, amici respectfully suggest that this Court should explicitly state the following in its opinion: Typical professional licensing/regulatory statutes are normally not covered by the First Amendment because they restrict conduct (not speech) and are viewpoint neutral. Those statutes place, at most, incidental burdens on professional speech, and thus are subject to only minimal constitutional scrutiny.

Respectfully submitted,

JENS B. KOEPKE
Counsel of Record
COMPLEX APPELLATE
LITIGATION GROUP LLP
355 South Grand Avenue
Suite 2450
Los Angeles, CA 90017
(213) 878-0404
jens.koepke@calg.com

STEVE HIRSCH
COMPLEX APPELLATE
LITIGATION GROUP LLP
96 Jessie Street
San Francisco, CA 94105
(415) 649-6700

Counsel for Amici Curiae

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