No. 24-__

In the Supreme Court of the United States

KEITH PARDUE, IN HIS OFFICIAL CAPACITY AS VICE PRESIDENT OF THE TEXAS STATE BOARD OF VETERINARY MEDICAL EXAMINERS; ET AL., PETITIONERS

v.

RONALD S. HINES, DOCTOR OF VETERINARY MEDICINE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Dr. Ronald S. Hines seeks to maintain an exclusively online veterinary practice, using his website to receive medical records and exchange emails with animal owners so he may provide veterinary care. This practice runs afoul of Texas law. Section 801.351 of the Texas Occupations Code generally requires a veterinarian to physically examine an animal *before* providing care for that animal. Hines brought this lawsuit contending that Texas's physical-examination requirement violates the First Amendment of the U.S. Constitution, as applied to the States through the Fourteenth Amendment. Contrary to a recent decision from the Texas Supreme Court about how to assess First Amendment challenges to professional regulations, the Fifth Circuit agreed, holding that the challenged statute "primarily regulated Dr. Hines's speech," thus warranting heightened First Amendment scrutiny.

Accordingly, the questions presented are:

(1) Whether professional conduct regulations that incidentally burden speech are subject to heightened First Amendment scrutiny.

(2) Assuming heightened scrutiny applies, whether Texas's physical-examination requirement satisfies it.

PARTIES TO THE PROCEEDING

Petitioners Keith Pardue, in his official capacity as Vice President of the Texas State Board of Veterinary Medical Examiners; Sandra "Lynn" Criner, Doctor of Veterinary Medicine, in her official capacity as Secretary of the Texas State Board of Veterinary Medical Examiners; Michael White, Doctor of Veterinary Medicine, in his official capacity as a Member of the Texas State Board of Veterinary Medical Examiners; Samantha Mixon, Doctor of Veterinary Medicine, in her official capacity as a Member of the Texas State Board of Veterinary Medical Examiners; Randall Skaggs, Doctor of Veterinary Medicine, in his official capacity as a Member of the Texas State Board of Veterinary Medical Examiners; Raquel Oliver, in her official capacity as a Member of the Texas State Board of Veterinary Medical Examiners; Sue Allen, Licensed Veterinary Technician, in her official capacity as a Member of the Texas State Board of Veterinary Medical Examiners; Victoria Whitehead, in her official capacity as a Member of the Texas State Board of Veterinary Medical Examiners; Steven Golla, Doctor of Veterinary Medicine, in his official capacity as President of the Texas State Board of Veterinary Medical Examiners, were defendants-appellees in the court of appeals.

Respondent Ronald S. Hines, Doctor of Veterinary Medicine, was plaintiff-appellant in the court of appeals.

RELATED PROCEEDINGS

Hines v. Quillivan, No. 1:18-CV-155, U.S. District Court for the Southern District of Texas. Judgment entered June 11, 2019.

Hines v. Quillivan, No. 19-40605, U.S. Court of Appeals for the Fifth Circuit. Judgment entered December 2, 2020.

Hines v. Pardue, No. 1:18-CV-155, U.S. District Court for the Southern District of Texas. Judgment entered August 15, 2023.

Hines v. Pardue, No. 23-40483, U.S. Court of Appeals for the Fifth Circuit. Judgment entered September 26, 2024.

Pardue v. Hines, No. 24A613, U.S. Supreme Court. Application to extend time to file a petition for writ of certiorari granted December 20, 2024.

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PETITION FOR A WRIT OF CERTIORARI

This case asks whether Dr. Hines, a licensed veterinarian, may use the First Amendment to override Texas law establishing minimum standards for the practice of veterinary medicine. Texas law does not target his speech: the State does not, for example, compel or ban the communication of any message, idea, opinion, or advice, much less require professionals to convey controversial government speech. Texas law instead requires veterinarians to physically examine animals before prescribing care for those animals, just as the American Veterinary Medical Association recommends.

Before this Court decided *National Institute of Family and Life Advocates v. Becerra*, 585 U.S. 755 (2018) ("*NIFLA*"), Texas could establish and implement such a commonsensical requirement. Indeed, in a pre-*NIFLA* decision, the Fifth Circuit rejected Hines's First Amendment challenge to the very Texas statutes at issue here, holding that Texas's requirement did *not* regulate Hines's speech. Following *NIFLA*, however, the Fifth Circuit changed course, holding that Texas now must satisfy heightened First Amendment scrutiny because—regardless of whether the State's law is directed at the content of Hines's speech—the relevant requirement can be triggered by a veterinarian's act of speaking. Thus, although there is no First Amendment right to, for example, prescribe medicine, heightened scrutiny applies because Hines also sends emails to animal owners about their animals' prescriptions.

Texas appreciates *NIFLA* and agrees with its holding regarding *speech*. That case, however, did not overturn a century of precedent upholding the States' authority to regulate professional *conduct*. *NIFLA* involved a California law that compelled crisis pregnancy centers to

disseminate the State's message regarding the availability of subsidized abortions. The Court correctly applied heightened scrutiny to such a content-based compulsion of highly controversial speech. But the Court also reaffirmed that, as here, States may continue to regulate professional conduct even if such laws incidentally involve speech.

Under the Fifth Circuit's view, however, a host of professional-licensure and practice prerequisites may have to survive heightened scrutiny because virtually every professional speaks as part of his or her practice. As demonstrated here, that rule may well spell the end for many laws that protect the public from professional incompetence. The Fifth Circuit's decision also conflicts with post-*NIFLA* decisions from three other circuits that continue to defer to State professional-regulatory requirements that, like those here, are not directed at speech content. The Fifth Circuit's decision additionally conflicts with the analysis in a recent decision from the Texas Supreme Court—meaning that Texas laws may stand or fall depending not on what they say, but in which court system they are challenged.

The federalism implications are profound. The Court should grant certiorari and hold that professional-*conduct* regulations are not subject to heightened First Amendment scrutiny even if they sometimes incidentally touch on acts of speaking. And if heightened scrutiny does apply, the Court should grant certiorari to demonstrate how to correctly apply that scrutiny.

OPINIONS BELOW

The opinion of the court of appeals is reported at 117 F.4th 769 (Pet.App.1a-40a) ("*Hines III*"). The opinion of the district court is reported at 688 F. Supp.3d 522 (Pet.App.41a-98a).

JURISDICTION

The Fifth Circuit entered its judgment on September 26, 2024. No petition for rehearing was filed. The petitioners invoke this Court's jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Pertinent constitutional provisions and the Texas Occupations Code provision at issue, Tex. Occ. Code §801.351, are set forth in the appendix to this brief. Pet.App.99a-100a.

STATEMENT

I. Texas's Physical-Examination Requirement

Subject to limited exceptions, a person may not practice veterinary medicine in Texas without a veterinary license. Tex. Occ. Code §801.251. The "[p]ractice of veterinary medicine" is defined as:

> (A) the diagnosis, treatment, correction, change, manipulation, relief, or prevention of animal disease, deformity, defect, injury, or other physical condition, including the prescription or administration of a drug, biologic, anesthetic, apparatus, or other therapeutic or diagnostic substance or technique;
>
> (B) the representation of an ability and willingness to perform an act listed in Paragraph (A);
>
> (C) the use of a title, a word, or letters to induce the belief that a person is legally authorized and qualified to perform an act listed in Paragraph (A); or

> (D) the receipt of compensation for performing an act listed in Paragraph (A).

Id. §801.002(5). To obtain a veterinary license, a person must graduate from an approved school or college of veterinary medicine and successfully complete a licensing examination conducted by the Texas State Board of Veterinary Medical Examiners ("Board"). *Id.* §801.252.

Licensed veterinarians also "may not practice veterinary medicine unless a veterinarian-client-patient relationship exists." Pet.App.100a. To establish that relationship, a veterinarian must "possess[] sufficient knowledge of the animal to initiate at least a general or preliminary diagnosis of the animal's medical condition." *Id.* A veterinarian satisfies the "sufficient knowledge" requirement if he "has recently seen, or is personally acquainted with, the keeping and care of the animal by: (1) examining the animal; or (2) making medically appropriate and timely visits to the premises on which the animal is kept." *Id.* The veterinarian must also be "readily available to provide . . . follow-up medical care in the event of an adverse reaction to, or failure of, the regimen of therapy provided by the veterinarian." *Id.*

In 2005, the Texas Legislature added subsection (c) to section 801.351 to clarify that "[a] veterinarian-client-patient relationship may *not* be established solely by telephone or electronic means." Act of May 27, 2005, 79th Leg., R.S., ch. 971, §1, 2005 Tex. Gen. Laws 3264, 3264 (cleaned up). That amendment followed and adopted a 2003 change to the Model Veterinary Practice Act of the American Veterinary Medical Association, the largest professional group for veterinarians in the United

States. ROA.30.[1] It was enacted "to address changes in technology that could be used to circumvent" the veterinarian-client-patient relationship, including "instances in which veterinarians have attempted to diagnose [animals] solely over the phone." S. Comm. on Nat. Res., Bill Analysis, Tex. H.B. 1767, 79th Leg., R.S. (2005).

Accordingly, a veterinarian must physically examine an animal or visit the premises where it is kept, as is medically appropriate under the circumstances, before the veterinarian may provide veterinary care to that animal. These provisions collectively are referred to as Texas's "Physical-Examination Requirement."

II. Procedural History

A. *Hines I*

Hines is a Texas-licensed veterinarian who has not practiced at a brick-and-mortar facility since 2002. ROA.21-23. Around that time, Hines began posting articles he had written about animal health care on his website. ROA.23. He started posting general writings but then turned to more targeted guidance, as Hines began providing "veterinary advice" via email and telephone in response to people who contacted him with specific questions about their animals through his website. ROA.23.

In rendering this advice, Hines typically would obtain and examine animals' medical records, evaluate other veterinarians' conflicting diagnoses, and even review the propriety of drug dosages prescribed to animals. ROA.24-27. But Hines concedes that "he never physically examined the animals that were the subject of

[1] "ROA" refers to the paginated record on appeal on file with the Fifth Circuit.

his advice." ROA.24. Nevertheless, Hines charged up to $58 for these services "to screen out the minor requests [from] the more serious ones." ROA.26. Hines acknowledges that he was "practicing 'veterinary medicine'" under Texas law. ROA.28.

In 2012, the Board advised Hines that his practice of treating animals without first conducting a physical examination violated Texas law. ROA.31. Hines subsequently agreed to an order suspending his veterinary license for one year, among other penalties. ROA.32, 34, 62-66. But the parties' agreed order made clear that Hines could continue publishing "general information on veterinary health issues that are not targeted at any individual patient" because such activity does not constitute the "practice of veterinary medicine." ROA.63. Although he accepted the punishment for his prior conduct, Hines wanted to resume providing individualized veterinary advice without complying with the Physical-Examination Requirement. ROA.35.

So, in 2013, Hines brought a lawsuit contending that the Physical-Examination Requirement violated his First Amendment right to freedom of speech, and his rights to equal protection and due process under the Fourteenth Amendment. ROA.35. Upon the Board's motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the district court disposed of the Fourteenth Amendment claims under a rational-basis analysis, concluding that "[i]t is, at a minimum, rational for the state to believe that requiring a physical examination of an animal . . . would tend to prevent misdiagnosis, improper treatment, and the subsequent increased risk of zoonotic disease." ROA.225. But the district court determined that because the Physical-Examination Requirement "regulate[s] professional speech itself,"

ROA.218, it must be subject to heightened scrutiny under the First Amendment, ROA.218-22. The Board had not developed an evidentiary record to defend the Physical-Examination Requirement under that standard, so the court denied the Board's motion to dismiss Hines's First Amendment claim. ROA.221-22. Upon the Board's motion, the district court certified its order for interlocutory review, ROA.229-32, and the Fifth Circuit granted the Board's petition to hear the interlocutory appeal, ROA.234-35.

The Fifth Circuit then reversed the district court's denial of the Board's motion to dismiss Hines's First Amendment claim and remanded the case for dismissal. The court "beg[a]n—and end[ed]—[its] First Amendment analysis" by rejecting the district court's conclusion that the Physical-Examination Requirement regulates speech. *Hines v. Alldredge*, 783 F.3d 197, 201 (5th Cir. 2015) ("*Hines I*"). Recognizing that the requirement "does not regulate the content of any speech, require veterinarians to deliver any particular message, or restrict what can be said once a veterinary-client-patient relationship is established," the court held that the requirement "falls squarely within . . . long-established authority" allowing States to "regulat[e] the practice of professions" without violating the First Amendment. *Id.* Invoking this Court's "robust line of doctrine," the Fifth Circuit further concluded that any "incidental impact" on veterinarians' speech imposed by the Physical-Examination Requirement does not warrant heightened scrutiny because the requirement does not target speech. *Id.* & n.13 (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011) ("[T]he First Amendment does not prevent restrictions directed at

commerce or conduct from imposing incidental burdens on speech.")).

This Court subsequently denied Hines's petition for certiorari. *Hines v. Alldredge*, 577 U.S. 1006 (2015).

B. *Hines II*

After the Fifth Circuit's decision in *Hines I*, Hines remained prohibited from providing individualized veterinary advice solely through electronic means. ROA.40. He brought the present action contending that this Court's decision in *NIFLA* "adopted the precise occupational-speech argument and case law that Dr. Hines proffered to the Fifth Circuit, but which [that court had] rejected" in *Hines I*. ROA.20. Accordingly, Hines "refile[d] the same lawsuit" asserting that "there has been an outcome-determinative change in constitutional law." ROA.20, 47-50.[2]

In *NIFLA*, pro-life crisis pregnancy centers challenged the constitutionality of California's FACT Act, which required licensed pregnancy centers to disseminate and post a government-crafted notice regarding the availability of publicly subsidized abortions. 585 U.S. at 761-63. The Court found that the required notice was a "content-based regulation of speech" that compelled people to "speak a particular message." *Id.* at 766. The Court distinguished cases like *Zauderer v. Office of Disciplinary Counsel of Supreme Court of Ohio*, 471 U.S. 626 (1985), and *Ohralik v. Ohio State Bar Association*, 436 U.S. 447 (1978), because California compelled speech that was highly

[2] Hines's suit also included a new Fourteenth Amendment equal-protection claim that was dismissed and no longer is part of this case. *Hines v. Quillivan*, 982 F.3d 266, 272-76 (5th Cir. 2020) ("*Hines II*").

controversial and the law at issue could in no way be described as regulating mere conduct, *NIFLA*, 585 U.S. at 768-69. Accordingly, the Court applied heightened First Amendment scrutiny and held that the law was not narrowly tailored to meet California's stated objectives. *Id.* at 773-75. The Court explained that if a State enacts a content-based regulation of speech, as California undisputedly had, the speech does not receive less protection merely because it is made in a professional context. *Id.* at 766-68. The Ninth Circuit (and other circuits) had applied a lower standard of scrutiny under the so-called "professional-speech" doctrine, and the Court rejected that approach. *Id.* at 773.

At the same time, *NIFLA* reaffirmed that "States may regulate professional conduct, even though that conduct *incidentally* involves speech." *Id.* at 768 (emphasis added). While the Court acknowledged that "drawing the line between speech and conduct can be difficult," it confirmed that its "precedents have long drawn it." *Id.* at 769. *NIFLA* then reiterated that, under longstanding doctrine, States may restrict speech "as part of [regulating] the *practice* of [a profession]" without triggering First Amendment scrutiny. *Id.* at 770. This principle contrasts with regulating "speech as speech," which California attempted to do via the FACT Act. *Id.*

Here, the Board moved to dismiss Hines's new *NIFLA*-based complaint, ROA.443-69, and the district court granted the motion in its entirety, ROA.592-608. As for the First Amendment claim, the court rejected Hines's argument that *NIFLA* abrogated the Fifth Circuit's decision in *Hines I*. As the court explained, "an examination of *NIFLA* confirms that the Supreme Court's decision not only turned on a fundamentally

different standard under First Amendment law that was not at issue in *Hines I*, but also that the Supreme Court reaffirmed the legal principles on which the Fifth Circuit relied" in *Hines I*. ROA.599. After all, *NIFLA* involved "a content-*based* regulation" of professional speech, ROA.600, whereas *Hines I* concerned a professional-conduct regulation that incidentally affected speech, ROA.601 (recognizing that "*NIFLA* confirmed that states may regulate professional conduct in a manner that incidentally burdens speech"). The district court thus concluded that *Hines I* remained good law and "foreclose[d] the re-urged First Amendment claim." ROA.601.

While Hines's appeal was pending, the Fifth Circuit issued *Vizaline, LLC v. Tracy*, 949 F.3d 927 (5th Cir. 2020), which addressed a First Amendment challenge to Mississippi's surveyor-licensure requirements. *Vizaline* held that the district court had erred "by categorically exempting occupational-licensing requirements from First Amendment scrutiny" without determining whether the challenged laws restricted conduct or content. *Id.* at 934. The court also clarified that "to the extent [*Hines I*] relied on the professional speech doctrine, its reasoning ha[d] been abrogated by *NIFLA*." *Id.* As explained above, however, *Hines I* did *not* rely on the professional-speech doctrine, by name or in practice, when it upheld the Physical-Examination Requirement. It instead concluded that the challenged laws were directed at professional conduct—not content. *Supra* pp. 7-8.

Nonetheless, concluding that it was "[b]ound by *Vizaline* . . . [and] no longer bound by *Hines I*," the Fifth Circuit held in *Hines II* that "Hines' First Amendment claims may be entitled to greater scrutiny than *Hines I*

allowed." *Hines II*, 982 F.3d at 272. Recognizing that *Vizaline* had "declined to give an opinion" regarding whether the Physical-Examination Requirement "would have been upheld under the proper conduct-versus-speech analysis," however, *Hines II* remanded for the district court to determine whether Texas laws "regulate only speech, restrict speech only incidentally to their regulation of non-expressive professional conduct, or regulate only non-expressive conduct." *Id.*

C. *Hines III*

Following remand and discovery, the parties cross-moved for summary judgment on Hines's remaining First Amendment claim. ROA.1151-573, 1574-2354. The evidence submitted in connection with those motions included email correspondence reflecting representative examples of Hines's veterinary telemedicine practice, Pet.App.50a-65a—which Hines had maintained during this litigation despite alleging that he had "ceased" such activity to comply with Texas law, ROA.35; *see also* ROA.1246, 1248. The district court also considered two experts' opinions regarding the scope and effect of Hines's practice, Pet.App.50a-65a, including testimony that Hines potentially had harmed animals on several occasions, *see* ROA.1432, 1434, 1439, 1441.

On the merits of Hines's First Amendment claim and the conduct-versus-speech inquiry required by *Hines II*, the district court recognized that, "[a]s a general matter, the Examination Requirement expressly concerns only conduct." Pet.App.77a. But the court concluded that, when applied to Hines, the requirement "primarily regulates his speech" because the "activity that triggers the Board's enforcement of the Examination Requirement is his communication with pet owners." Pet.App.79a.

Applying intermediate scrutiny, the court held that the evidence conclusively demonstrated that the Physical-Examination Requirement is targeted to prevent "a credible risk of real harm" to animals and that the requirement "is narrowly tailored to the government's asserted interests." Pet.App.91a-97a. Indeed, "[t]he data that veterinarians obtain through physical examination of an animal typically cannot be secured by any other means." Pet.App.96a. Accordingly, the court granted the Board's motion for summary judgment and upheld the challenged laws. Pet.App.97a.

On appeal, the Fifth Circuit reversed in *Hines III*. Like the district court (following *Hines II*), the Fifth Circuit concluded that "the physical-examination requirement primarily regulates Dr. Hines's speech—and not merely incidentally to his conduct." Pet.App.14a. According to the court, because "the regulation *only* kicked in when Dr. Hines began to share his opinion with his patient's owner"—as opposed to when Hines engaged in preparatory "conduct" like reviewing medical records—the challenged law "primarily regulated Dr. Hines's speech." Pet.App.16a-17a. But unlike the district court, the Fifth Circuit held that the law could not survive intermediate scrutiny despite Texas's "significant" interest in protecting animal welfare and two experts' opinions regarding the importance of a veterinary physical examination. Pet.App.18a-32a.[3] Consequently, the court directed the district court to enter judgment for Hines. Pet.App.32a.

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[3] In her concurring opinion, Judge Ramirez explains that she would have applied strict scrutiny to the Physical Examination Requirement. Pet.App.33a-40a.

REASONS FOR GRANTING THE PETITION

The Court was right to hold in *NIFLA* that California could not evade First Amendment scrutiny for a law requiring speakers to convey an ideologically charged message merely because those speakers happened to be professionals. But that is not what this case is about. Instead, requiring a veterinarian to physically inspect a sick animal before treating it is a regulation of professional conduct, even if it incidentally covers some speech. The Fifth Circuit's contrary analysis conflicts with decisions from this Court, other federal appellate courts, and the Texas Supreme Court. This case, moreover, is an ideal vehicle to address confusion in the lower courts and reiterate important federalism principles.

I. The Fifth Circuit's Decision Deepens a Conflict of Authority.

Certiorari is warranted because *Hines III* conflicts with precedent. In fact, *Hines III* conflicts with *Hines I*. Absent review, litigants in Texas will also bring constitutional challenges to Texas laws regulating the professions in federal courts rather than Texas courts. Only this Court can bring uniformity to the law.

A. *Hines III* conflicts with longstanding precedent from this Court.

1. "[I]t has been the practice of different states, from time immemorial, to exact in many pursuits a certain degree of skill and learning upon which the community may confidently rely." *Dent v. West Virginia*, 129 U.S. 114, 122 (1889). Accordingly, for over a century, the Court has recognized States' "compelling interest in the practice of professions within their boundaries" and their corresponding "broad power to establish standards for licensing practitioners and regulating the practice of

professions." *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992). Indeed, it is black-letter law that "[t]he Due Process Clause imposes only broad limits . . . on the exercise by a State of its authority to regulate its economic life, and particularly the conduct of the professions." *Friedman v. Rogers*, 440 U.S. 1, 18 n.19 (1979). Courts therefore ordinarily uphold professional regulations so long as "there is any reasonably conceivable state of facts that could provide a rational basis" for the challenged restriction. *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993). Or as the Court put it in *Dent*, "[i]t is only when [professional-licensure requirements] have no relation to such calling or profession . . . that they can operate to deprive one of his right to pursue a lawful vocation." 129 U.S. at 122.

Texas's Physical-Examination Requirement easily falls within the State's broad authority to regulate the practice of medicine. Working in tandem with the State's licensure requirement, Tex. Occ. Code §801.251, the Physical-Examination Requirement restricts a veterinarian from "practic[ing] veterinary medicine" and treating a sick animal until the veterinarian establishes "a veterinarian-client-patient relationship" by physically examining the animal or its premises, as is "medically appropriate" under the circumstances, Pet.App.100a. Subsection (c) ensures that the relationship may not be established "solely by telephone or electronic means." *Id.* The Fifth Circuit twice has held that the requirement is, "at a minimum, rational[ly]" designed to improve the "quality of care" for animals. *Hines I*, 783 F.3d at 203; *accord Hines II*, 982 F.3d at 275-76.

Because a substantive due process challenge is a dead end, Hines argues for heightened scrutiny by rebranding his veterinary practice as "speech" protected by the

First Amendment. ROA.47. Practicing almost any profession, however, could be labeled speech. Doctors convey diagnoses, lawyers provide advice, engineers display building plans, and countless other professionals "speak" as part of their practices but cannot do so without first securing licensure and complying with other prerequisites designed to ensure competency. Yet "it has never been deemed an abridegment of freedom of speech . . . to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949); *accord Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 47 (2017); *Rumsfeld v. FAIR., Inc.*, 547 U.S. 47, 62 (2006). That is why Texas may criminalize the *acts* of conspiracy, Tex. Penal Code §15.02(a), and bribery, *id.* §36.02(a), without inviting First Amendment scrutiny, *cf. IMS Health*, 564 U.S. at 567.

To determine whether the First Amendment applies to a challenged professional regulation, the Court thus focuses on the regulation's target. *See NIFLA*, 585 U.S. at 769. Conduct regulations do not trigger any form of heightened scrutiny because "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *IMS Health*, 564 U.S. at 567. Or as *Ohralik* explains, "the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity." 436 U.S. at 456. It follows that "speech which, in its effect, is tantamount to legitimately proscribable nonexpressive conduct may itself be legitimately proscribed, punished, or regulated incidentally to the constitutional enforcement of generally applicable statutes." *Rice v. Paladin Enters., Inc.*, 128

F.3d 233, 243 (4th Cir. 1997). And the Court has "rejected the view that an apparently limitless variety of conduct can be labeled 'speech.'" *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (quotation marks omitted)).

2. Texas's Physical-Examination Requirement falls on the conduct-regulation side of the conduct-versus-content line. The "[p]ractice of veterinary medicine" restricted by the challenged laws is defined as "the diagnosis, treatment, correction, change, manipulation, relief, or prevention of animal disease, deformity, defect, injury, or other physical condition, including the prescription or administration of a drug, biologic, anesthetic, apparatus, or other therapeutic or diagnostic substance or technique." Tex. Occ. Code §801.002(5)(A). This describes prototypical professional conduct—i.e., a set of skilled actions, like "treat[ing] . . . disease" and "administ[ering] . . . a drug." *Id.* That some of these actions might be carried out, in part, by means of language—like ultimately "diagnos[ing]" a condition following an examination, *id.*—does not transform the Physical-Examination Requirement into a speech restriction, *Giboney*, 336 U.S. at 502.

What matters is that the challenged laws do not target or otherwise restrict the communication of any particular "message," "idea[]," or "subject matter." *Barr v. Am. Ass'n of Pol. Consultants, Inc.*, 591 U.S. 610, 618 (2020) (plurality op.); *see also Police Dep't of City of Chi. v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). The laws instead define the scope of practicing veterinary medicine, for which licensure and conducting a physical examination are required. As such, they regulate *who* may practice

veterinary medicine (a licensee) and *when* it may be practiced (after a physical exam). That's what the Fifth Circuit had concluded in *Hines I*. 783 F.3d at 202. But the Physical-Examination Requirement "does *not* regulate the content of any speech, require veterinarians to deliver any particular message, or restrict what can be said once a veterinary-client-patient relationship is established." *Id.* at 201 (emphasis added).

3. *NIFLA* only confirms that *Hines I* was correctly decided. The Court principally held that, notwithstanding States' professional-licensing authority, content-based regulations targeting speech itself are subject to First Amendment scrutiny. 585 U.S. at 767 ("Speech is not unprotected merely because it is uttered by 'professionals.'"). There was no question, however, that California's FACT Act was a content-based restriction directed at speech: it required pregnancy centers to post a controversial, ideologically charged, government-crafted notice about the availability of publicly funded abortions. *Id.* at 766. The target of the law was not conduct, with incidental implications for speech. Instead, California targeted speech itself. The Court concluded that no precedent exempted "professional speech" from First Amendment protection. *Id.* at 767-68. The Court thus applied heightened scrutiny and held that California's justifications for the compelled-speech requirement were inadequate. *Id.* at 773-75.

At the same time, *NIFLA* reaffirmed that "States may regulate professional conduct, even though that conduct incidentally involves speech." *Id.* at 768. To illustrate "the line between speech and conduct," the Court used "torts for professional malpractice" as an example of appropriate "state regulation of professional conduct." *Id.* at 769 (citing *NAACP v. Button*, 371 U.S. 415, 438

(1963)). Such common-law torts do not trigger First Amendment scrutiny—even though they might be implicated by a professional's bad advice or other act of speaking—because the laws do not target speech. That was in contrast with California's FACT Act, which "regulate[d] speech as speech" by requiring professionals to post a specific message. *NIFLA*, 585 U.S. at 770.

Like the common-law torts referenced in *NIFLA*, the Physical-Examination Requirement establishes a standard of care and serves as a prophylactic measure to prevent professional misconduct. And like such torts, the requirement does not compel or restrict any speech content. *Supra* pp. 16-17. It applies to all veterinary care, whether rendered through the use of language or not. Put different, its requirements regulate speech only "as part of the *practice* of medicine, subject to reasonable licensing and regulation by the State." *NIFLA*, 585 U.S. at 770 (citation omitted).

4. Relying on its decision in *Vizaline*, *supra* pp. 10-11, the Fifth Circuit accepted Hines's argument that *NIFLA* implicitly overruled *Hines I*, Pet.App.7a-8a. The court conceded that the "relevant First Amendment doctrine . . . [had been] developed in contexts very different from professional licensing," Pet.App.11a-12a, but concluded that its job was "to determine whether the physical-examination requirement *primarily* affect[ed] Dr. Hines's speech . . . or his conduct by looking at what 'trigger[ed] coverage under the statute,'" Pet.App.14a. If, according to the court, Hines's triggering "course of action involved speech," then the law needed to satisfy heightened First Amendment scrutiny. Pet.App.15a.

Applying that standard, the court held that the Physical-Examination Requirement "primarily regulated Dr. Hines's speech" because the specific acts that triggered

coverage under the statute involved Hines's email exchanges with animal owners. Pet.App.14a-17a. Because the regulation purportedly "*only* kicked in" when Hines shared his medical opinions with others via email—as opposed to when Hines engaged in preparatory "conduct" like reviewing animal owners' communications and related medical records—the court concluded that the challenged laws regulate speech. Pet.App.16a. It reached that conclusion despite acknowledging that "the substance" of Hines's opinions was immaterial and did not determine whether he had violated the challenged laws. Pet.App.16a. What mattered, instead, the court reasoned, was that Hines was penalized for communicating *something* without first conducting a physical exam. *See* Pet.App.16a-17a ("Because the act in which Dr. Hines engaged that 'triggered coverage' under the physical-examination requirement was the communication of a message, the State primarily regulated Dr. Hines's speech." (cleaned up)). Consequently, the court applied heightened scrutiny and invalidated the Physical-Examination Requirement notwithstanding Texas's "significant" interests underlying the laws. Pet.App.19a.

The Fifth Circuit's analysis cannot be squared with this Court's precedent. Practically every professional endeavor boils down to a course of action involving speech. In fact (as is common), Hines's actions involved both conduct and words that were inextricably intertwined. After all, his communication of "individualized diagnoses and treatment plans" to clients (words) derived directly from his initial "viewing [of] charts" and "consider[ation] [of] different medical reports" (conduct). Pet.App.15a-16a. It makes no sense that the State may regulate the beginning part, but not the ending part, of Hines's course of

action. As one district court has explained, criticizing *Hines III*:

> Clients come to veterinarians with the expectation that those veterinarians will communicate their diagnoses and advice, not that they will form professional opinions but keep them to themselves—or begin the treatment without further discussion. The same is true of doctors, lawyers and many others who provide professional services to specific patients or clients. In this way, the Fifth Circuit's reasoning lacks a workable limiting principle. It effectively defines every professional service as speech warranting heightened scrutiny.

McBride v. Lawson, No. 2:24-cv-01394-KJM-AC, 2024 WL 4826378, at *9 (E.D. Cal. Nov. 19, 2024).

NIFLA requires no such thing. Indeed, *NIFLA* preserved States' authority to regulate "professional conduct that incidentally burden[s] speech," such as through laws that establish malpractice standards. 585 U.S. at 769-70. In so holding, the Court cited *Giboney*, which instructs courts *not to do* what the Fifth Circuit did. *Compare Giboney*, 336 U.S. at 498 (explaining that First Amendment protection does *not* extend "to speech or writing used as an integral part of conduct in violation of a valid criminal statute"), *with* Pet.App.16a (holding that the First Amendment covers Hines because the regulation "*only* kicked in when [he] began to share his opinion with his patient's owner").

The Fifth Circuit attempted to distinguish *Giboney* by pointing out that it involved criminal laws, as opposed to occupational regulations like those at issue here. Pet.App.12a-13a & n.36. But that is not a material distinction. If anything, imposing criminal liability

ordinarily triggers the "greatest" threat to the exercise of First Amendment rights. *Sanders Cnty. Republican Cent. Comm. v. Bullock*, 698 F.3d 741, 745 (9th Cir. 2012); *see also, e.g.*, *City of Houston v. Hill*, 482 U.S. 451, 459 (1987); *Ashcroft v. ACLU,* 542 U.S. 656, 674 (2004) (Stevens, J., concurring). In all events, a person who violates the Physical-Examination Requirement *is* subject to a criminal penalty under Texas law. Tex. Occ. Code §801.504(a).

Hines III also relied on *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) ("*HLP*"), to support its analysis, Pet.App.12a. But the federal material-support statute at issue in *HLP* outright *banned* "communicating a message" based on "specific skill" or "specialized knowledge" to designated terrorist organizations. *HLP*, 561 U.S. at 27-28. The very point of the law was to suppress certain speech that the government did not want terrorists to hear. *See id.* at 27 (observing that "plaintiffs' speech [was] *not* barred if it impart[ed] only general or unspecialized knowledge" (emphasis added)). *Hines I* rightly distinguished *HLP* because it involved a "content"-based application that "did not implicate questions of [Texas's] content-neutral regulation of the practice of medicine" at issue here. 783 F.3d at 202 n.20.

B. *Hines III* also conflicts with other circuits.

Post *NIFLA*, three other circuits have continued to apply the correct analysis, upholding laws that are directed at professional conduct rather than content or "speech as speech." *Cf. NIFLA*, 585 U.S. at 770.

In *Capital Associated Industries, Inc. v. Stein*, the Fourth Circuit upheld North Carolina statutes barring corporations from practicing law despite the challenged statutes' incidental effect on speech. 922 F.3d 198 (4th Cir. 2019). The court explained that "North Carolina's

ban on the practice of law by corporations fits within *NIFLA*'s exception for professional regulations that incidentally affect speech" because the laws "don't target the communicative aspects of practicing law, such as the advice lawyers may give to clients," but instead "focus more broadly on the question of who may conduct themselves as a lawyer." *Id.* at 207-08. Consequently, the laws' "effect [on speech] is merely incidental to the primary objective of regulating the conduct of the profession." *Id.*

The Fourth Circuit employed a similar analysis to uphold North Carolina's licensure requirement for land surveyors. As the court explained, "the challenged portions of the Act prevent an unlicensed and untrained person who is not acting under the supervision of a licensed surveyor from selling two- or three-dimensional maps or models of areas of land that contain measurable data. This is conduct that classically falls under the surveying profession." *360 Virtual Drone Servs., LLC v. Ritter*, 102 F.4th 263, 278 (4th Cir. 2024), *petition for cert. filed*, Sept. 11, 2024 (24-279).

The Ninth Circuit reached the same result in *Crownholm v. Moore*, No. 23-15138, 2024 WL 1635566 (9th Cir. Apr. 16, 2024), *petition for cert. filed*, Sept. 11, 2024 (24-276). There, plaintiffs challenged California's land-surveyor licensure requirement, contending that it unconstitutionally applied to restrict speech—namely, plaintiffs' ability to convey site plans to clients. *Id.* at *1-2. The court rejected plaintiffs' claim because the challenged laws were directed at the act of land surveying without a license, including "assess[ing] . . . clients' needs, access[ing] Geographic Information System . . . information and 'other publicly available imagery,' and us[ing] a computer-aided design program to electronically draft site plans," as opposed to specific content, like

"site plans depicting . . . certain types of properties." *Id.* at *2. As the court reasoned, "to the extent Plaintiffs' activity has some expressive component, the Act's effect on this component is merely incidental to its primary effect of regulating Plaintiffs' unlicensed land surveying activities." *Id.*

The Eleventh Circuit similarly continues to uphold occupational regulations that do not target speech content, as exemplified in its decision rejecting a First Amendment challenge to Florida's licensure requirement for dieticians. *See Del Castillo v. Sec'y, Fla. Dep't of Health*, 26 F.4th 1214, 1225-26 (11th Cir. 2022) ("[T]he Act's licensing scheme for dieticians and nutritionists regulated professional conduct and only incidentally burdened Del Castillo's speech."). In upholding the challenged laws, *Del Castillo* did what *NIFLA* instructs courts to do: it examined whether the laws were directed at conduct or content. *Id.* And the court concluded that "[a]ssessing a client's nutrition needs, conducting nutrition research, developing a nutrition care system, and integrating information from a nutrition assessment" are examples of "occupational conduct"—"not speech." *Id.* That practicing the profession also "involves some speech," such as "convey[ing] . . . advice and recommendations," was of no moment because the burden on such speech "is an incidental part of regulating the profession's conduct." *Id.* at 1226.

The division of authority is apparent. The Fifth Circuit reads *NIFLA* to cover State laws that other courts would hold—also applying *NIFLA*—are not covered. It's no answer, moreover, that Hines was seeking as-applied relief. *Cf.* Pet.App.12a. Each of these other cases involved as-applied challenges, too. *Capital Assoc.*, 922 F.3d at 204; *360 Virtual Drone Servs.*, 102 F.4th at 270;

Crownholm, 2024 WL 1635566, at *1; *Del Castillo*, 26 F.4th at 1219.

C. *Hines III* additionally conflicts with a recent decision of the Texas Supreme Court.

The conflict here is especially serious because the Fifth Circuit and the Texas Supreme Court now disagree about the correct standard. Texas plaintiffs thus presumably will bring suit in federal court because it is easier to for them to win there. Only certiorari can resolve this conflict. *See, e.g.*, Stephen M. Shapiro, et al., Supreme Court Practice 259 (10th ed. 2013).

In *Texas Department of Insurance v. Stonewater Roofing, Ltd. Co.*, the Texas Supreme Court considered a First Amendment challenge to Texas's public-insurance-adjuster licensing laws. The court rightly followed *NIFLA* and assessed "whether the challenged statutes [we]re directed at protected speech." 696 S.W.3d 646, 654 (Tex. 2024). Observing that the laws require licensure to "act[] on behalf of an insured . . . in negotiating for or effecting . . . the settlement of a [property insurance] claim," the court held that the laws "target[] nonexpressive commercial activities, not speech." *Id.* at 656. Recognizing that "'negotiating for' and 'effecting' a settlement can involve communicative endeavors," the court nonetheless concluded that "speech is not remotely the defining characteristic of the public insurance adjuster's job." *Id.* at 657. Put another way, that "[s]peech may be an adjunct to the [professional] relationship" being regulated does not trigger First Amendment protection when the challenged laws "can[not] be fairly characterized as limiting, proscribing, prescribing, or otherwise regulating protected speech." *Id.* at 658.

This case cannot be squared with the Fifth Circuit's analysis in *Hines III*. Like the licensure law upheld by

the Texas Supreme Court, the Physical-Examination Requirement limits *who* may practice veterinary medicine and *when* it may be practiced. And like that licensure law, it does not compel or suppress any speech content. Had the Fifth Circuit focused on the regulatory object of the Physical-Examination Requirement—rather than the fact that Hines's coverage-triggering act happened to involve sending emails—the law would not have been subject to heightened First Amendment scrutiny.

II. The Questions are Important.

The questions here are also of weighty significance. One of the most critical aspects of a State's police power is the ability to protect the public from dangerous professional services. Every State thus bars lawyers from engaging in legal malpractice, just as every State requires doctors and other health professions to perform competently. Yet such longstanding regulations of professional conduct necessarily touch on speech. The federalism implications of *Hines III* are thus staggering. Additionally, this issue is recurring throughout the country. The need for clarity warrants review.

A. *Hines III* undermines federalism.

1. Under the Constitution's allocation of powers, the States enjoy primacy with respect to lawmaking. *See, e.g.*, *Bond v. United States*, 572 U.S. 844, 854 (2014). Because policy is primarily made at the State rather than federal level, and because States often disagree about what the best policy is, there is no uniform rule for a great many issues. *See, e.g.*, *Dobbs v. Jackson Women's Health Org.*, 597 U.S. 215, 338 (2022) (Kavanaugh, J., concurring) (explaining that States are regularly free to address for themselves "difficult questions of … social and economic policy"). There is much wisdom in this.

Because every State is accountable to its own citizens, policy can be better tailored to the needs of different places. *See, e.g.*, *Berger v. N.C. State Conf. of the NAACP*, 597 U.S. 179, 192 (2022). Policy experimentation is also possible. *Id.*

One of the most important things that States do is protect the public in commercial transactions. *See, e.g.*, *Edenfield v. Fane*, 507 U.S. 761, 769 (1993). Because professional conduct is—almost by definition—beyond the knowledge of laymen, States have a particularly important role ensuring that professionals do their jobs well. *Supra* pp. 13-14. That is why States impose malpractice liability and licensing requirements. Absent such protections, there is a significant risk of harm to individuals.

There are ongoing policy debates about the correct amount of professional regulation and the unavoidable trade-offs that such regulation imposes. Different States will draw the policy line at different places. But since "time immemorial," *Dent*, 129 U.S. at 122, the Court has had "little trouble" recognizing and crediting States' "compelling interest" in regulating the practice of professions within their borders, *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 625 (1995). *NIFLA* clarified, correctly, that States' regulatory authority is not endless—a State may not use the power to regulate professional conduct as a backdoor to regulate speech as speech. But "[t]he First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech . . . and professionals are no exception to this rule." *NIFLA*, 585 U.S. at 769.

2. How to regulate professional conduct—a traditional power of the States—is a question that cries out for federalism. The Fifth Circuit's rule, by contrast,

threatens to nationalize a huge number of policy questions that historically have been decided by the States. Although the line between conduct and content may be "difficult" to draw in some cases, *id.*, the Fifth Circuit's analysis appears to leave the States little room, if any, to continue their longstanding efforts to protect citizens.

If the Fifth Circuit's triggering-act analysis stands, nearly every professional-licensure requirement and practice prerequisite arguably may be subject to heightened First Amendment scrutiny because the rendition of professional services almost always involves a "course of action involv[ing] speech." Pet.App.15a. Not only would licensed practitioners potentially be able to undo public-safety laws, like continuing-education requirements and the Physical-Examination Requirement here, but amateurs who wish to practice professions also may be able to mount successful challenges to licensure requirements themselves. Because heightened scrutiny would apply, States would bear the costly and "demanding" burden of justifying every challenged regulation. *United States v. Virginia*, 518 U.S. 515, 533 (1996).

That will often spell the end of the challenged law. *See, e.g., City of Dallas v. Stanglin*, 490 U.S. 19, 23 (1989) ("The dispositive question in this case is the level of judicial 'scrutiny' to be applied."). For example, here, the Fifth Circuit invalidated the Physical-Examination Requirement despite recognizing Texas's "significant" interests in protecting animal welfare and preventing the spread of zoonotic disease. Pet.App.19a. In doing so, the court overrode the best-practice recommendation of the American Veterinary Medical Association, *supra* pp. 4-5, and disregarded testimony from two experts who explained the "critical" importance of the physical examination in the diagnostic process and who further opined

that Hines's telemedicine practice likely harmed animals, Pet.App.21a-26a. The court instead focused on the lack of evidence of actual harm to animals, Pet.App.22a-26a, ignoring the fact that veterinary telemedicine has been illegal in Texas for over twenty years. Absent correction from this Court, other critical professional laws could suffer a similar fate under the Fifth Circuit's test.

3. This case is especially important to Texas—home to more than 30 million people—because of the conflict between the Fifth Circuit's decision and the Texas Supreme Court's decision. For all the reasons explained, that split by itself warrants the Court's review. But it is particularly important because, unfortunately, the Fifth Circuit has all but created a road map for litigants wishing to challenge professional-conduct laws. Rather than litigating in Texas court where *Stonewater Roofing* governs, plaintiffs who wish to challenge a wide range of laws that have not been challenged before may well turn to the federal courts in the first instance.

That is backwards. First Amendment challenges to state laws ordinarily should be heard in State court. *See, e.g.*, *Zauderer*, 471 U.S. at 638 n.8. Only State courts have authority to give definitive interpretations of those laws. Otherwise, federal courts will be forced to make *Erie* guesses, certify questions, or abstain. The Court itself witnessed this problem recently in *Free Speech Coalition v. Paxton* (23-1122), where the absence of a State-court decision respecting various provisions of Texas law required the Court to pose questions about the meaning of that law. Texas courts are better able to decide such questions.

B. This issue is recurring.

Because State-level regulation of professions is ubiquitous, it also should come as no surprise to the Court

that the constitutional issue here frequently recurs. Under the Fifth Circuit's expansive analysis, moreover, the Court should expect even more challenges. Since *NIFLA*, challengers have attempted to leverage the Court's analysis beyond the Court's holding. Petitions from two of those cases (*Crownholm* and *360 Virtual Drone Servs.*) are before this Court, reiterating the importance of the questions presented.[4]

III. This Petition is an Ideal Vehicle.

This case also cleanly presents the constitutional question and does not present any vehicle problems.

There is no question that this case implicates a split of authority. As shown above, the result here would have been different if this case had been litigated in the Texas judiciary—or in the Fourth, Ninth, or Eleventh Circuits. *Supra* pp. 21-25. Those courts correctly hold that *NIFLA* should be limited to content-based restrictions directed at professional speech. This case also demonstrates the confusion *NIFLA* is sewing. Before *NIFLA*, the Physical-Examination Requirement was upheld as a professional-conduct regulation; after *NIFLA*, the same laws were invalidated as a regulation of Hines's speech. Likewise, the challenged law plainly targets conduct—a requirement to physically inspect an animal before treating it has nothing to do with speech. This petition thus is the ideal vehicle to explore the line between speech and conduct and the relationship between *NIFLA* and the pre-*NIFLA* precedent.

This case also arrives at the Court on a fully developed summary-judgment record and the Fifth Circuit

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[4] If the Court decides to grant the petition in either *Crownholm* or *360 Virtual Drone Services*, petitioners ask the Court to hold this case for reconsideration pending the Court's ultimate decision.

remanded with instructions to enter judgment in favor of Hines. There is no question about jurisdiction or standing, nor any prospect that subsequent proceedings on remand may change the character of the litigation. Instead, this is a clean vehicle that tees up the question and will allow the Court to distinguish *NIFLA* without, on the one hand, undermining that precedent or, on the other, nullifying the Court's longstanding body of law recognizing State authority to regulate professions within their borders. The Court thus should grant review to protect federalism and respect the States' police powers.

IV. The Court Should Review the Entire Case.

Finally, Texas does not believe that heightened scrutiny is warranted here for the reasons given above. That is Texas's first question presented. In case it ultimately disagrees with Texas, however, the Court should also grant certiorari regarding the correct application of heightened scrutiny, i.e., Texas's second question presented. When the Court grants certiorari regarding one part of a case, it "often also grant[s] certiorari on attendant questions that … are sufficiently connected to the ultimate disposition of the case that the efficient administration of justice supports their consideration." *City & Cnty. of San Francisco v. Sheehan*, 575 U.S. 600, 619-20 (2015) (Scalia, J. concurring in part).

Every State regulates professional competency. If the Court (erroneously) were to agree with the Fifth Circuit respecting the correct constitutional standard of scrutiny, even more litigation across the country would result regarding State measures to ensure such competency. The district court concluded that even if heightened scrutiny applies, Texas satisfies it. The Fifth Circuit disagreed. A decision from this Court reiterating the district court's analysis would provide significant

guidance to courts and prevent unnecessary confusion and attendant litigation. This is a concrete, as-applied challenge with a complete record, thus providing the Court with an ideal vehicle to provide that guidance.

The State's interest in ensuring the well-being of animals is apparent. Requiring veterinarians to physically examine animals directly furthers that interest by ensuring that the veterinarian "localize[s]" the nature of any problem or abnormality, thereby preventing the veterinarian from pursing diagnostics that could be needless or even harmful. ROA.1300, 1361. States would benefit from knowing—if heightened scrutiny applies—whether such a nexus between interest and means is sufficient and, if not, what more must be done.

Additionally, principles of Article III counsel strongly in favor of reviewing the entire "[c]ase[]" or "[c]ontrovers[y]," U.S. Const. art. III, §2, rather than just part of it, *see, e.g.*, Benjamin B. Johnson, *The Origins of Supreme Court Question Selection*, 122 COLUM. L. REV. 793, 863 (2022). The district court has entered a final judgment in favor of the State, and the Fifth Circuit has ordered the district court to enter final judgment in favor of Hines. Given this case's posture, the Court should grant review and determine to whom final judgment lawfully belongs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 2025

APPENDIX

APPENDIX TO
PETITION FOR A WRIT OF CERTIORARI

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APPENDIX A

United States Court of Appeals
for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
September 26, 2024
Lyle W. Cayce
Clerk

No. 23-40483

RONALD S. HINES, DOCTOR OF VETERINARY MEDICINE,

Plaintiff—Appellant,

versus

KEITH PARDUE, *in his official capacity as Vice President of the Texas State Board of Veterinary Medical Examiners*; SANDRA "LYNN" CRINER, *Doctor of Veterinary Medicine, in her official capacity as Secretary of the Texas State Board of Veterinary Medical Examiners*; MICHAEL WHITE, *Doctor of Veterinary Medicine, in his official capacity as a Member of the Texas State Board of Veterinary Medical Examiners*; SAMANTHA MIXON, *Doctor of Veterinary Medicine, in her official capacity as a Member of the Texas State Board of Veterinary Medical Examiners*; RANDALL SKAGGS, *Doctor of Veterinary Medicine, in his*

official capacity as a Member of the Texas State Board of Veterinary Medical Examiners; RAQUEL OLIVER, *in her official capacity as a Member of the Texas State Board of Veterinary Medical Examiners*; SUE ALLEN, *Licensed Veterinary Technician, in her official capacity as a Member of the Texas State Board of Veterinary Medical Examiners*; VICTORIA WHITEHEAD, *in her official capacity as a Member of the Texas State Board of Veterinary Medical Examiners*; STEVEN GOLLA, *Doctor of Veterinary Medicine, in his official capacity as President of the Texas State Board of Veterinary Medical Examiners*,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Texas
USDC No. 1:18-CV-155

Before WILLETT, WILSON, AND RAMIREZ, *Circuit Judges*.

DON R. WILLETT, *Circuit Judge*:

Dr. Ronald S. Hines is a retired, physically disabled, Texas-licensed veterinarian who enjoys spending his golden years giving online pet-care advice to animal lovers around the world—often for free. Dr. Hines does not physically examine animals, perform surgeries, apply casts, splints, or bandages, administer vaccinations, or prescribe prescription medication. He merely sends emails. This would be no problem if the patients were people instead of pets. For humans, Texas law allows telemedicine without first requiring a face-to-face examination to establish a physician-patient relationship. Not so with animals, which require an in-

person visit. Exam free telehealth, turns out, is fine for your Uncle Bernard, but not for your Saint Bernard.

No one ever complained about Dr. Hines's online pet-care advice or alleged that it harmed a single animal. However, because Dr. Hines does not physically examine animals before sharing his expertise, the State of Texas considered some of his emails criminal offenses, going so far as penalizing him with a year of probation, fining him $500, and forcing him to retake the jurisprudence section of the veterinary licensing exam. In 2013, Dr. Hines challenged the physical-examination requirement on First Amendment grounds. Over the last decade, his case has been before our court twice—and now, a *third* time.[1] After we remanded this case nearly four years ago, the district court granted summary judgment for the State.[2] Dr. Hines appealed.

Today, we uphold Dr. Hines's First Amendment rights. We specifically conclude that the State of Texas is directly regulating Dr. Hines's speech and that this regulation fails to survive even intermediate scrutiny. We accordingly REVERSE and REMAND with instructions to enter judgment for Dr. Hines.

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[1] *Hines v. Alldredge (Hines I)*, 783 F.3d 197 (5th Cir. 2015); *Hines v. Quillivan* (*Hines II*), 982 F.3d 266 (5th Cir. 2020).

[2] In 2023, the enforcement authority for the laws at issue changed to the Texas Department of Licensing and Regulation. Act of June 18, 2023, 88th Leg., R.S., ch. 1103, § 2 (codified at TEX. OCC. CODE § 801.022(a)). The commissioners of the Texas Department of Licensing and Regulation are therefore "automatically substituted" for the members of the Texas State Board of Veterinary Medical Examiners. FED. R. APP. P. 43(c)(2).

I

A

Dr. Hines is a veterinarian licensed by the State of Texas. He also holds a Ph.D. in microbiology. After obtaining his veterinary license in 1966, Dr. Hines worked in various roles across the country and around the world researching and working with animals. He worked as a veterinarian for almost four decades, including time spent on animal research.

In 1977, Dr. Hines suffered a fall that injured his spine, rendering him totally disabled according to the Department of Veterans Affairs. In 2002, Dr. Hines retired from his full-time practice of veterinary medicine because the rigors of daily practice had become too cumbersome. Around that time, he launched a website to share articles about veterinary care. Readers began emailing Dr. Hines, seeking advice about their pets or animals they found. Dr. Hines responded to readers' questions from his home in Brownsville, Texas. About half of these emails came from readers outside the United States and most came from outside Texas. At some point, Dr. Hines started charging a flat fee to cover expenses and to screen trivial inquiries, but he helped correspondents for free if they could not pay and refunded fees when he could not help. Dr. Hines requested that readers submit an electronic form with information about their animal and submit "photographs and lab work" for his review. In answering questions, he "always requested complete medical records from the owner's local veterinarian," and if none existed, he referred owners to a local veterinarian and urged them to have their pet physically examined.

In 2012, the Texas State Board of Veterinary Medical Examiners informed Dr. Hines that his wholly electronic

veterinary practice violated Texas law. The law at issue requires veterinarians to establish a veterinarian client-patient relationship (VCPR) before engaging in the practice of veterinary medicine.[3] Under the statute, a VCPR exists if, as relevant here, "the veterinarian . . . possesses sufficient knowledge of the animal to initiate at least a general or preliminary diagnosis of the animal's medical condition."[4] A veterinarian can establish the sufficient-knowledge requirement in two ways: "(1) examining the animal; or (2) making medically appropriate and timely visits to the premises on which the animal is kept."[5] The VCPR "may not be established solely by telephone or electronic means."[6]

The State concluded that because Dr. Hines's advice constituted the practice of veterinary medicine, and because Dr. Hines never physically examined the animals that were the subject of his advice—facts that Dr. Hines concedes—he had not established a VCPR and thus violated the law. In response, Dr. Hines put a disclaimer on his website, informing readers that he could not "engage[] in the 'practice' of veterinary medicine as defined by Texas law," meaning that he

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[3] The statute defines "practice of veterinary medicine" as "the diagnosis, treatment, correction, change, manipulation, relief, or prevention of animal disease, deformity, defect, injury, or other physical condition, including the prescription or administration of a drug, biologic, anesthetic, apparatus, or other therapeutic or diagnostic substance or technique." TEX. OCC. CODE § 801.002(5)(A).

[4] *Id.* § 801.351(a)(2).

[5] *Id.* § 801.351(b).

[6] *Id.* § 801.351(c).

could not offer "specific diagnosis [or] treatment," among other things.

But this did not satisfy the State. So, in 2013, Dr. Hines and the State entered into an agreed order, "formally reprimanding [Dr. Hines], imposing a year of probation, fining him $500, and forcing him to retake the jurisprudence section of the veterinary licensing exam."

About two weeks later, Dr. Hines sued the State, alleging that the physical-examination requirement violated his First Amendment rights.

B

Over the last decade, this lawsuit has braved an extensive procedural journey. We recount here the relevant portions related to Dr. Hines's First Amendment claim.

The State moved to dismiss the First Amendment claim under Federal Rule of Civil Procedure 12(b)(6), arguing that the physical-examination requirement did not implicate the First Amendment. The district court denied the motion and granted the State's unopposed motion to certify the question to our court for interlocutory appeal.

We reversed.[7] The panel concluded that the physical-examination requirement did not "regulate the content of any speech, require veterinarians to deliver any particular message, or restrict what can be said once a [VCPR] is established."[8] So it decided that the physical-examination requirement fell "squarely within [the State's] long-established authority" to regulate professional conduct and thus did not offend the First

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[7] *Hines I*, 783 F.3d at 203.

[8] *Id.* at 201.

Amendment.[9] On remand, the district court entered final judgment for the State.

Three years later, after the Supreme Court held in *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*)[10] that professional speech— like all other speech—is subject to traditional First Amendment scrutiny, Dr. Hines renewed his suit against the State. The district court again dismissed Dr. Hines's claim, concluding that *NIFLA* did not abrogate *Hines I*, which "require[d] dismissal."[11]

But while Dr. Hines's appeal was pending before our court, we issued an opinion in *Vizaline, L.L.C. v. Tracy*, which held that *Hines I*'s "reasoning does not survive *NIFLA*."[12] And we clarified that the "relevant question" was whether "[the State]'s licensing requirements regulate only speech, restrict speech only incidentally to their regulation of non-expressive professional conduct, or regulate only non-expressive conduct."[13] So "[b]ound by *Vizaline*" and "no longer bound by *Hines I*," we concluded that Dr. Hines's First Amendment claim "may be entitled to greater judicial scrutiny than *Hines I* allowed."[14] We reversed and remanded for the district

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[9] *Id.*; *see also id.* at 202 n.20 (describing the physical-examination requirement as a "content-neutral conduct regulation").

[10] 585 U.S. 755, 766–68 (2018).

[11] *Hines v. Quillivan*, 395 F. Supp. 3d 857, 864 (S.D. Tex. 2019).

[12] 949 F.3d 927, 928 n.1 (5th Cir. 2020).

[13] *Hines II*, 982 F.3d at 272 (citing *Vizaline*, 949 F.3d at 931).

[14] *Id.*

court to make the initial evaluation of whether Dr. Hines's "conduct or speech [wa]s being regulated."[15]

On remand, the parties cross-moved for summary judgment.[16] The district court granted the State's motion and denied Dr. Hines's. It made three key determinations that are before us on appeal: The law (1) regulates Dr. Hines's speech, rather than his conduct; (2) does so in a content-neutral way, warranting intermediate scrutiny; and (3) survives intermediate scrutiny because it was "narrowly tailored to the [State's] substantial interests, which [were] unrelated to the suppression of speech."[17]

II

We review summary judgment de novo.[18] Summary judgment is warranted if "no genuine dispute as to any material fact" exists and "the movant is entitled to judgment as a matter of law."[19] When parties file-cross motions for summary judgment, we review "each party's motion independently, viewing the evidence and

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[15] *Id.* (citation omitted).

[16] At the Rule 12(b)(6) stage, the district court concluded that the law was a content-based restriction on Dr. Hines's speech, requiring discovery to develop the record for strict-scrutiny analysis. *See Hines v. Quillivan*, No. 1:18-CV-155, 2021 WL 6618658, at *10 (S.D. Tex. July 29, 2021), *report and recommendation adopted*, 2021 WL 5833886 (S.D. Tex. Dec. 9, 2021).

[17] *Hines v. Pardue*, 688 F. Supp. 3d 522, 546–57 (S.D. Tex. 2023).

[18] *Catalyst Strategic Advisors, L.L.C. v. Three Diamond Cap. SBC, L.L.C.*, 93 F.4th 870, 874 (5th Cir. 2024).

[19] FED. R. CIV. P. 56(a).

inferences in the light most favorable to the nonmoving party."[20]

III

At the threshold, we face two thorny First Amendment questions. First, does the State's physical-examination requirement regulate Dr. Hines's speech directly, as Dr. Hines argues, or only incidentally to the law's general regulation of his conduct, as the State counters? Second, if it regulates his speech, does it do so in a content-based way, as Dr. Hines contends? The answers to these questions dictate, in turn, the applicable level of scrutiny.[21] Our precedents mandate that we apply intermediate scrutiny only if the law regulates his speech in a content-neutral way.[22] But if the law is a content-based

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[20] *Ford Motor Co. v. Tex. Dep't of Transp.*, 264 F.3d 493, 498 (5th Cir. 2001).

[21] *See Tex. Ent. Ass'n v. Hegar*, 10 F.4th 495, 509 (5th Cir. 2021) (noting that the content-neutrality "determination dictates the level of scrutiny the challenged restriction must meet in order to pass muster").

[22] *See NIFLA*, 585 U.S. at 768 ("States may regulate professional conduct, even though that conduct incidentally involves speech."); *Vizaline*, 949 F.3d at 933 (citing *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 567 (2011) (explaining that "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech")); *Tex. Ent. Ass'n*, 10 F.4th at 509 ("[C]ontent neutral restrictions are generally subject only to intermediate scrutiny."). We acknowledge that the Fourth Circuit, on the other hand, has held that intermediate scrutiny applies even when regulations only incidentally impact speech. *See Cap. Associated Indus., Inc. v. Stein*, 922 F.3d 198, 208 (4th Cir. 2019) ("We think the correct reading of Supreme Court precedent, however, is that intermediate scrutiny should apply to regulations of conduct that incidentally impact speech."). But because our

regulation of Dr. Hines's speech, we apply strict scrutiny.[23]

IV

First things first, we must determine what the physical-examination requirement primarily regulates. The State does not dispute that Dr. Hines's speech is implicated. It contends that the physical-examination requirement restricts Dr. Hines's speech incidentally to the general regulation of conduct. So, we consider whether the requirement regulates Dr. Hines's speech directly or only incidentally to the regulation of his conduct. On the one hand, all Dr. Hines does is send emails—pure speech. But on the other, the law regulates his speech as part of the practice of veterinary medicine.[24]

A

The First Amendment prohibits laws "abridging the freedom of speech."[25] In the Supreme Court's jurisprudence since the adoption of that Amendment in 1791, however, the Court has held that the First Amendment does not protect *all* forms of speech and

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precedent—and that of the Supreme Court—suggests otherwise, we apply intermediate scrutiny only if the law regulates speech directly (and in a content-neutral way), not merely incidentally.

[23] *See, e.g., Tex. Ent. Ass'n*, 10 F.4th at 509 ("Content based restrictions on protected First Amendment expression are presumptively unconstitutional and subject to strict scrutiny.").

[24] We are mindful that under "[Supreme Court] precedents, [s]tates may regulate professional conduct, even though that conduct incidentally involves speech." *NIFLA*, 585 U.S. at 768.

[25] U.S. CONST. amend. I. The First Amendment applies to the states via incorporation into the Fourteenth Amendment. *See Stromberg v. California*, 283 U.S. 359, 368 (1931).

does protect some expressive conduct.[26] Still, neither the Supreme Court—nor our court—has suggested heightened protection for speech regulated only incidentally to a generally applicable regulation of conduct.[27]

As noted above, circuit courts have, until recently, applied the so-called professional-speech doctrine to licensing regulations like this one. These courts, including our own,[28] treated laws regulating professionals' speech as a separate category from non-professional speech, entitling them to less protection and exempting them from traditional First Amendment scrutiny.[29] The Supreme Court, however, rejected this doctrine in *NIFLA*,[30] and instructed courts to apply the "traditional conduct-versus-speech dichotomy."[31] But "[a]s it stands today, the relevant First Amendment doctrine is a mind-numbing morass of tangled

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[26] *See, e.g., Counterman v. Colorado*, 600 U.S. 66, 73–74 (2023) (finding no protection for true threats); *Brandenburg v. Ohio*, 395 U.S. 444, 447–49 (1969) (per curiam) (finding no protection for incitement); *Chaplinsky v. New Hampshire*, 315 U.S. 568, 573 (1942) (finding no protection for fighting words); *Texas v. Johnson*, 491 U.S. 397, 406 (1989) (protecting flag burning); *Police Dep't of Chi. v. Mosley*, 408 U.S. 92, 99 (1972) (protecting picketing); *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642 (1943) (protecting refusal to salute the flag).

[27] *See supra* note 22.

[28] *Hines I*, 783 F.3d at 202 (adopting the professional-speech doctrine).

[29] *See NIFLA*, 585 U.S. at 768 (collecting cases).

[30] *See id.* ("Speech is not unprotected merely because it is uttered by 'professionals.'").

[31] *Vizaline*, 949 F.3d at 932 (citing *NIFLA*, 585 U.S. at 771–75).

precedents developed in contexts very different from professional licensing."[32]

The "notoriously foggy"[33] speech–conduct dichotomy makes "finding the line between speech and conduct . . . not as simple as asking whether the prohibition is literally one against verbal or written 'speech,' on the one hand, or one against 'conduct' (i.e., nonverbal action) on the other."[34] In as-applied challenges[35]—especially those involving "generally applicable regulation[s] of conduct," such as the regulation here—a particular act constitutes protected speech, rather than unprotected conduct, if that act "consists of communicating a message."[36]

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[32] *Tex. Dep't of Ins. v. Stonewater Roofing, Ltd. Co.*, --- S.W.3d ----, No. 22-0427, 2024 WL 2869414, at *16–17 (Tex. June 7, 2024) (YOUNG, J., concurring).

[33] *Jenevein v. Willing*, 493 F.3d 551, 562 (5th Cir. 2007).

[34] *360 Virtual Drone Servs. LLC v. Ritter*, 102 F.4th 263, 274 (4th Cir. 2024).

[35] Dr. Hines's complaint states both as-applied and facial challenges to the physical-examination requirement. On appeal, Dr. Hines disclaimed his facial challenge. Accordingly, we evaluate only his as-applied challenge. *See United States v. Perez*, 43 F.4th 437, 443 (5th Cir. 2022) (recognizing that "circuit practice" requires us to address an as-applied challenge before a facial challenge).

[36] *Holder v. Humanitarian L. Project (HLP)*, 561 U.S. 1, 27–28 (2010) (concluding that a law barring communications to certain groups when it "imparts a 'specific skill' or communicates advice derived from 'specialized knowledge'" functioned as a regulation of speech, not conduct); see *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389 (1992) ("[W]ords can in some circumstances violate laws directed not against speech but against conduct."). Admittedly, in *Giboney v. Empire Storage & Ice Co.*, the Court rejected the idea that free speech protection extends "to speech or writing used as an integral part of conduct in violation of a valid criminal statute," 336 U.S. 490, 498 (1949), and emphasized that "[i]t has never been

For example, a generally applicable regulation proscribing breaching the peace regulated speech, rather than conduct, when an individual was arrested and convicted for wearing a jacket that said "F*** the Draft" inside a courthouse.[37] The Supreme Court found the conviction to "clearly rest[] upon the asserted offensiveness of the words [the plaintiff] used to convey his message to the public."[38] Because "[t]he only 'conduct' which [California] sought to punish [wa]s *the fact of communication*," the Supreme Court applied First Amendment scrutiny and reversed the conviction.[39]

In another (and more apt) example, a law proscribing support for "the humanitarian and political activities of" two designated terrorist organizations, which "generally function[ed] as a regulation of conduct," regulated speech because as "applied to [the] plaintiffs[,] the conduct triggering coverage under the statute consist[ed] of *communicating a message*"—individualized legal advice.[40] As the court recognized,

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deemed an abridgement of freedom of speech . . . 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," *id*. at 502. But there, the case involved expressive conduct that violated *criminal* law, not speech that violated occupational regulations, as occurred here.

[37] *Cohen v. California*, 403 U.S. 15, 16 (1971) (asterisks substituted).

[38] *Id*. at 18.

[39] *Id*. (emphasis added).

[40] *HLP*, 561 U.S. at 10, 26–28; *id*. at 61 (BREYER, J., dissenting) ("[T]he majority properly rejects . . . that the plaintiffs' speech-related activities amount to 'conduct' and should be reviewed as such.").

whether the plaintiffs could speak with designated terrorist organizations "depend[ed] on what they [said]" because the regulation barred certain forms of speech—including "speech to those groups [that] impart[ed] a 'specific skill' or communicate[d] advice derived from 'specialized knowledge.'"[41]

Our goal then is to determine whether the physical-examination requirement *primarily* affects Dr. Hines's speech ("communication of a message") or his conduct by looking at what "trigger[s] coverage under the statute."[42]

B

As explained below, the physical-examination requirement primarily regulates Dr. Hines's speech—and not merely incidentally to his conduct.

The State contends that the law is primarily a conduct regulation because the definition of practicing veterinary medicine applies to a "set of skilled actions"—that is, conduct. But calling an act "speech" or "conduct" (or "actions") does not make it speech or conduct for First Amendment analysis.[43] Indeed, the Supreme Court has been clear: "State labels cannot be dispositive of [the] degree of First Amendment Protection."[44] It is a

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[41] *Id.* at 27.

[42] *See id.* at 28; *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 47 (2017).

[43] *See Tex. Dep't of Ins.*, 2024 WL 2869414, at *17 (YOUNG, J., concurring) ("[C]onduct and speech are not hermetically sealed categories.").

[44] *NIFLA*, 585 U.S. at 773 (original alteration omitted) (quoting *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796 (1988)); *see also id.* ("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

court's duty to consider a "restriction's effect, as applied, in a very practical sense"[45]—not to follow whatever label a state professes. If courts were required to accept a governmental actor's speech-or-conduct designation, we would be compelled to forgo our solemn duty to "assess[] the First Amendment interest at stake and weigh[] it against the public interest allegedly served by the regulation."[46] This means we must determine from the evidence, rather than the parties' labels, whether Dr. Hines's course of action involved speech.[47]

The State identified Dr. Hines's provision of "individually tailored diagnostic services and veterinary medical advice for specific animals" as practicing veterinary medicine.[48] Dr. Hines was penalized specifically for engaging in the practice of veterinary medicine without first establishing VCPRs in person.[49] But in detailing the specific acts that constituted the practice of veterinary medicine in violation of the physical-examination requirement, the State pointed to Dr. Hines's email exchanges in which he communicated individualized diagnoses and treatment plans with various animal owners.

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disfavored subjects." (internal quotation marks and citation omitted)).

[45] *Thomas v. Collins*, 323 U.S. 516, 536 (1945).

[46] *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975).

[47] *See Freedom Path, Inc. v. IRS*, 913 F.3d 503, 508 (5th Cir. 2019) (stating that an as applied challenge considers the "application" of a statute "to the particular circumstances of an individual" (citation omitted)).

[48] TEX. OCC. CODE § 801.002(5).

[49] *Id.* §§ 801.351, .401, .402(4).

For example, Dr. Hines was contacted by an owner whose bird had managed to remove a splint on its leg only a week after its placement by a local veterinarian. The bird owner, who was concerned that the bird's legs were crossing and that this might inhibit its mobility, attached a video of the bird to the email she sent Dr. Hines. Dr. Hines wrote back and informed the owner that a splint was necessary to ensure the bird's full recovery, and he instructed the owner on how to make a splint and how to apply and adjust it. The State concluded, based on the conclusions of its investigator and experts, that Dr. Hines had engaged in the practice of veterinary medicine without establishing a VCPR by communicating (via email) an individualized diagnosis and treatment plan to the bird owner.

Critically, not *all* of Dr. Hines's conduct was barred. Indeed, the State did not find Dr. Hines's review of the owner's email or video or the substance of his diagnosis and treatment plan violative of the physical-examination requirement; the State did not penalize Dr. Hines for viewing charts or considering different medical reports. And the State did not penalize him for applying a splint or administering medicine—nor could they. Instead, the State only penalized him for his *communication* with the owner about her bird in which he gave a diagnosis and treatment plan. In effect, the regulation *only* kicked in when Dr. Hines began to share his opinion with his patient's owner—as is the case with all of Dr. Hines's alleged violations of the physical-examination requirement.[50] Because the act in which Dr. Hines

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[50] *Cf. Chiles v. Salazar*, --- F.4th ----, No. 12-1445, 2024 WL 4157902 (10th Cir. Sept. 12, 2024) (holding that a Colorado law banning "conversion therapy" for minors regulated conduct and only incidentally burdened a therapist's speech). Given our analysis

engaged that "trigger[ed] coverage" under the physical-examination requirement was the communication of a message, the State primarily regulated Dr. Hines's speech.[51]

V

Regrettably, the Supreme Court's content-neutrality jurisprudence is not much clearer than its speech-conduct jurisprudence.[52] And here, "content neutrality is

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in today's case, we are hesitant to embrace *Chiles's* threshold conclusion that conduct, and not speech, was the target of the Colorado law. Regardless, even if correct, *Chiles* is inapposite. Colorado's conversion-therapy law, unlike Texas's pet-telehealth law, regulates the *substance* of the medical care, not the *form* or *manner* of the care. Moreover, the "conversion therapy" law aims to restrict any counselors engaged in providing such therapy, regardless of how they provided that care; Dr. Hines's speech, by contrast, is the *only* part of his practice that is regulated.

[51] *See Cohen*, 403 U.S. at 18; *HLP*, 561 U.S. at 28. We previously characterized the physical-examination requirement as a conduct regulation in *Hines I*, and the State contends this characterization controls. *See* 783 F.3d at 201–202, 202 n.20. But *Hines I* merely described the physical-examination requirement in general terms. Here, Dr. Hines brings an as-applied challenge, which tests the "particular application" of the physical examination requirement to Dr. Hines. *City of Los Angeles v. Patel*, 576 U.S. 409, 415 (2015). The Supreme Court "has often held that a valid statute was unconstitutionally applied in particular circumstances because it interfered with an individual's exercise of [free speech] rights." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971). The physical-examination requirement's general nature does not demonstrate whether the requirement regulates Dr. Hines's speech or conduct here.

[52] The Court itself has often been divided over this question. *See, e.g., McCullen v. Coakley*, 573 U.S. 464, 499 (2014) (SCALIA, J., concurring in the judgment) (noting that "the Court is divided 5–to–4" on the issue of content neutrality); Ci*ty of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 86–106 (2022) (THOMAS,

far from clear."[53] Indeed, we are divided on the issue,[54] "and the parties vigorously dispute the point."[55]

These questions do not need a definitive answer today,[56] however, because the law cannot withstand even *intermediate* scrutiny—the lowest tier of scrutiny available for our analysis based on the facts in this case.[57] Accordingly, we assume without deciding that the law regulates Dr. Hines's speech in a content-neutral manner, meaning we apply intermediate rather than strict scrutiny.

A

"[T]o survive intermediate scrutiny, a restriction on speech or expression must be 'narrowly tailored to serve

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GORSUCH, and BARRETT, JJ., dissenting on the content-neutrality issue).

[53] *McCullen*, 573 U.S. at 499 (SCALIA, J., concurring in the judgment).

[54] *See post*, at 29 (RAMIREZ, J., concurring).

[55] *McCullen*, 573 U.S. at 499 (SCALIA, J., concurring in the judgment).

[56] *Id.* (collecting cases); *see also Sorrell*, 564 U.S. at 571. The concurrence would decide this issue today, deeming the physical-exam requirement a content-based regulation of Dr. Hines's speech that is subject to strict scrutiny. *Post*, at 29. But since Texas's requirement fails even intermediate scrutiny, *post*, at 28—we need go no further.

[57] *McCullen*, 573 U.S. at 498 (2014) (SCALIA, J., concurring in the judgment) ("[W]here a statute challenged on First Amendment grounds 'fail[s] even under the [less demanding] test,'" we need not "parse the differences between . . . two [available] standards." (quoting *McCutcheon v. FEC*, 572 U.S. 185, 199 (2014) (plurality opinion))); *see also Recht v. Morrisey*, 32 F.4th 398, 410 (4th Cir. 2022) ("After all, if you can't ski a blue run successfully, you obviously can't tackle a double black diamond.").

a significant governmental interest.'"[58] A content-neutral regulation will satisfy this test "if it furthers an important governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest.'"[59] While not as exacting as strict scrutiny, intermediate scrutiny is no gimme for the government: "[I]ntermediate scrutiny is still tough scrutiny, not a judicial rubber stamp."[60] "[T]he burden of justification is demanding and it rests *entirely* on the State."[61]

B

We first address the State's asserted interests.

While we assume that the State's interests are significant in the abstract, we conclude that the State has failed to show that the harms it seeks to address with the physical-examination requirement are real. And even assuming the State could make this showing, the physical-examination requirement doesn't alleviate those harms in a "direct and material way."[62]

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[58] *City of Austin*, 596 U.S. at 76 (citing *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)).

[59] *Nat'l Press Photographers Ass'n v. McCraw*, 90 F.4th 770, 793 (5th Cir. 2024) (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 662 (1994)).

[60] *Cablevision Sys. Corp. v. F.C.C.*, 597 F.3d 1306, 1323 (D.C. Cir. 2010) (KAVANAUGH, J., dissenting).

[61] *United States v. Virginia*, 518 U.S. 515, 533 (1996) (emphasis added).

[62] *See Turner Broad. Sys.*, 512 U.S. at 664.

The State asserts four interests: "protecting animal welfare, promoting public confidence in professional licensure, maintaining minimum standards of care, and preventing the spread of zoonotic disease." Dr. Hines conceded before the district court that these interests are significant—at least in the abstract—and he does not argue that the interests relate to the suppression of speech. So we assume that the State's interests are significant.

But that does not end the inquiry. We must still examine whether the physical-examination requirement "will in fact advance those interests."[63] "When the Government defends a regulation on speech as a means to redress past harms or prevent anticipated harms, it must do more than simply 'posit the existence of the disease sought to be cured.'"[64] Rather, "[i]t must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way."[65]

The State's defense of the physical-examination requirement focuses exclusively on its interest in animal welfare.[66] So we consider whether the alleged harms to animal welfare are real, and if so, whether the statute alleviates those alleged harms.

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[63] *Id.*

[64] *Id.* (internal quotation marks and citation omitted).

[65] *Id.*

[66] Although the State mentions its other three interests in passing, it provides no argument on the means-end fit. Because the burden of justifying the law rests solely with the State, it has at the very least failed to meet its burden under the other three interests if it has not forfeited the argument.

1

First, the State has failed to show that the alleged harms to animal welfare in the context of the physical-examination requirement are real.

The State alleges that the physical-examination requirement protects animal welfare by reducing the risk that veterinarians will misdiagnose—and thereby harm—animals. In other words, the harm the State seeks to address is misdiagnosis by veterinarians who conduct telemedicine without first performing a physical exam.

To meet its burden to show that the harm it alleges is real, the State may rely on empirical data, anecdotal evidence, and studies.[67] "The evidence on which it relies need not 'exist pre-enactment.' It may also 'pertain[] to different locales altogether.' This requirement may also be satisfied with 'history, consensus, and simple common sense.'"[68] But it cannot rely on "mere speculation or conjecture."[69]

As evidence of harm, the State presented a literature review, expert testimony, anecdotal evidence, and expert analysis of Dr. Hines's conduct. Dr. Hines argues that this evidence is little more than conjecture. Although we acknowledge that, in some cases, states may enact prospective regulations,[70] and we acknowledge that the State's concerns for animal welfare are legitimate, we

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[67] *Edenfield v. Fane*, 507 U.S. 761, 771 (1993).

[68] *Pub. Citizen Inc. v. La. Att'y Disciplinary Bd.*, 632 F.3d 212, 221 (5th Cir. 2011) (citations omitted).

[69] *Edenfield*, 507 U.S. at 770.

[70] *See Turner Broad. Sys.*, 512 U.S. at 664 (finding states may pass legislation to "prevent anticipated harms").

agree with Dr. Hines that the State has failed to show sufficiently "real" harm as required by our precedents.

We address each category of the State's evidence in turn.

First consider the State's expert testimony. The State's first expert, Dr. Carly Patterson, testified to the general benefits of a physical exam. She explained that "[t]he physical exam is the cornerstone of all veterinary care" because "[w]ithout it, veterinarians are left to aimlessly pursue diagnostics that might be needless and in the worst case scenario, completely circumvent the actual problem at hand, resulting in the death of the patient."[71] Because, in her view, the physical exam "is what helps [veterinarians] localize the actual nature of the problem," she testified that "[i]n the absence of a physical exam," a veterinarian "cannot proceed forward with a logical and defensible plan for [a] veterinary patient." She also testified that in-person exams are "critical" because "pet owners can't speak for the pet themselves," and "even diligent pet owners may miss the subtle clues that only a physical exam can provide."

To support her opinion, she testified about two studies. The first was a study of "one hundred apparently healthy dogs," in which a physical exam revealed "anomalies warranting additional assessment." The study's authors "concluded that physical exam abnormalities are common in apparently healthy older dogs, and the veterinarian is instrumental in health screening by way of the history and physical exam." The second study was similar. It looked at "one hundred apparently healthy cats ages 6 years and older[, and]

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[71] Although, notably, the State doesn't point to *any* deaths that have occurred from a telemedicine misdiagnosis.

found that less than half of the cats had an ideal body condition, a majority of the cats had gingivitis, and 11% of the cats had a heart murmur auscultated." The study's authors again "emphasized the need for regular health checks in apparently healthy older cats due to the physical exam abnormalities and additional focused diagnostic tests."

Dr. Patterson also provided anecdotal evidence. She pointed to five cases from her own practice, which according to the State, "illustrate the importance of the physical exam—and particularly, how telemedicine alone would have been insufficient to treat these patients." In each case, Dr. Patterson testified that the animal presented with certain symptoms that might have suggested one diagnosis, but the physical exam revealed problems that she opined could not be discovered without a physical exam. Thus, in her opinion, based on these anecdotes, while telemedicine may have "certain distinct advantages for monitoring patients or fielding specific follow-up questions after a diagnosis is made," "it [cannot] substitute for [a patient] history and physical exam."

The State's second witness, Dr. Lori Teller, testified about her and Dr. Patterson's joint assessment of Dr. Hines's conduct. They reviewed "representative examples of [Dr.] Hines's telemedicine practice and assessed it for potential harm." Their review revealed "at least five instances where [Dr.] Hines was practicing veterinary medicine and thus subject to the" physical-examination requirement. They agreed that in these five instances, his correspondence did not meet "the accepted standard of care." Dr. Teller testified that Dr. Hines "most likely" or "potentially" left these animals in a "worse position."

The State's expert testimony at least establishes that a physical exam *can* detect conditions that may not have otherwise been discovered. But neither expert identified any evidence of actual harm caused by telemedicine without a prior physical examination.

Before the district court, the State relied on a literature review conducted by Dr. Teller. The State does not press this evidence before us now, likely because the review didn't find *any* evidence of actual harm. It found "no published reports of veterinarians providing inadequate or substandard care via virtual care." And it found no "studies comparing in clinic visits with telehealth visits to determine if there is concordance between the findings of those exams." Although it mentions "risks of missed diagnoses" as a "concern[]," a hypothetical concern—even if seemingly significant—is insufficient to identify a "real harm."

Dr. Patterson's anecdotes fare no better. We agree with Dr. Hines that these anecdotes are "*guesses* about what would have happened after telemedicine that never occurred" rather than evidence of real harm. Like Dr. Patterson's testimony about the benefits of the physical exam, the anecdotes at most establish that a physical exam can help veterinarians detect ailments that they *may* have missed over a telemedicine appointment. A *missed* diagnosis does not actively harm the animal; a *misdiagnosis*, on the other hand, might (neither of which Dr. Hines has done, according to the record).

The expert testimony about Dr. Hines's conduct is the least compelling. Dr. Hines has been answering emails for nearly *twenty* years. And yet, Dr. Teller could not provide a *single* instance where Dr. Hines's emails harmed an animal. Indeed, she testified that Dr. Hines only "potentially" or "'likely' harmed animals," and she

admitted multiple times that "it is unknown if Dr. Hines'[s] actions caused harm." This testimony cannot be characterized as anything more than conjecture and speculation.

The State has effectively proven that veterinarians believe that a physical exam is helpful[72] and that telemedicine should be used only as a follow up to the in-person exam. Indeed, a physical exam seems to be a plus factor to a veterinarian's analysis—a check for physical ailments or physical manifestations of ailments that may not be readily apparent to a pet's owner. These are risks that an individual knowingly chooses to forego by choosing a telemedicine appointment for their animal.

But proving that a physical examination is helpful is not enough. The State has failed to meet its burden of proving that misdiagnoses from telemedicine are a real harm in this case. The State emphasizes that the physical exam reduces the *risk* of misdiagnosis from telemedicine without an exam and argues that it can enact prophylactic rules before the harm occurs. Both are true, and the State's interest in reducing misdiagnoses is legitimate. But the State cannot meet its burden of proving real harm by pointing to "risks" of harm—or

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[72] The literature review also pointed to a survey of Portuguese veterinarians, in which "most participants acknowledged that the service provided by teleconsultations is complementary to that of physical consultations but stressed the need for having a face-to-face interaction before resorting to telematic means." Again, this doesn't say anything about whether using telemedicine without a physical exam would cause *harm*. *See Pub. Citizen Inc.*, 632 F.3d at 222 (noting that survey responses the State relied on "fail[ed] to point to any specific harms or to how they will be alleviated by [the challenged regulation]").

hypothetical concerns—that, according to the evidence, have never materialized.[73]

The district court faulted Dr. Hines for failing to provide "any controverting evidence," so it concluded "no genuine issue exists on the matter." But it is the *State's* burden to prove real harm,[74] and it has failed to do so here.

2

Even if the harms alleged by the State were real, as the State contends, the law suffers from a fatal defect: The State fails to prove that the law "alleviate[s] these harms in a direct and material way."[75]

The first problem with the State's chosen means is apparent on the face of the statute itself. There are two ways a vet can establish the VCPR, and one of them doesn't require a physical exam *at all*. To recap, a veterinarian must first establish a VCPR before

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[73] *See, e.g., Junior Sports Mags. Inc. v. Bonta*, 80 F.4th 1109, 1117 (9th Cir. 2023) ("To start with the obvious, a state may not restrict protected speech to prevent something that does not appear to occur . . . . And if the state cannot cite a single case of a minor in California unlawfully buying a gun, then an advertisement about firearms logically could not have contributed to such a sale."); *McCraw v. City of Oklahoma City*, 973 F.3d 1057, 1071–72 (10th Cir. 2020) ("Critically, this record is devoid of evidence that accidents involving vehicles and pedestrians on medians in Oklahoma City is an actual issue, as opposed to a hypothetical concern."); *IMS Health Inc. v. Sorrell*, 630 F.3d 263, 276 (2d Cir. 2010), *aff'd*, 564 U.S. 552 (2011) ("Vermont's own expert was unaware of any instance in which a detailing interaction caused a doctor to prescribe an inappropriate medication.").

[74] *See Virginia*, 518 U.S. at 533.

[75] *See Turner Broad. Sys.*, 512 U.S. at 664

practicing veterinary medicine.[76] The VCPR exists "if the veterinarian: . . . possesses sufficient knowledge of the animal."[77] And "[a] veterinarian possesses sufficient knowledge of the animal . . . if the veterinarian has recently seen, or is personally acquainted with, the keeping and care of the animal by: (1) examining the animal; *or* (2) making medically appropriate and timely visits to the premises on which the animal is kept."[78] But the VCPR cannot "be established solely by telephone or electronic means."[79]

The State does not explain how the law alleviates the harm of misdiagnoses from telemedicine without a physical exam when the VCPR can also be established by a visit to the premises *without* a physical exam. Although the State's experts testified that the premises-visit option is *typically* used for herd animals, she conceded it is not so limited, testifying that the "premises" visited "could be the premises on which a dog is kept." Nor does the plain text provide this limitation.[80] And furthermore, the State fails to explain why a "recent[]" physical examination—which has no definition—is sufficient to establish a VCPR. For example, why would a "recent" physical examination in the last year or two provide any better insight into an animal's condition than a real-time

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[76] TEX. OCC. CODE § 801.351(a).

[77] *Id.* § 801.351(a)(2).

[78] *Id.* § 801.351(b) (emphasis added).

[79] *Id.* § 801.351(c).

[80] *See id.* § 801.351(b).

telehealth appointment without a preceding physical examination?[81]

If that weren't enough, the State's looser approach to *human* welfare undercuts the State's insistence on a physical exam to advance animal welfare. After all, the State of Texas allows exam-free telemedicine for babies and noncommunicative adults—those who, like animals, cannot communicate with their physicians. How can the State insist a hands-on exam is necessary to protect animals while conceding a hands-on exam is unnecessary to protect humans?[82] Put differently, why does Texas mandate tougher telehealth rules for veterinarians treating animals than for physicians treating people?[83] The State does not say.

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[81] *See id.* § 801.351(b).

[82] "If a pediatrician can use telemedicine to treat a three-month old infant—based upon medical records, the parent's description of external symptoms and a visual examination of the child—the Court cannot adduce why a veterinarian cannot do the same for a dog, cat, or hamster." *Hines II*, 982 F.3d at 279 (ELROD, J., concurring in part and dissenting in part) (quoting *Hines v. Quillivan*, No. CV B-18-155, 2019 WL 13036103, at *15 (S.D. Tex. Feb. 19, 2019), *report and recommendation adopted in part, rejected in part*, 395 F. Supp. 3d 857 (S.D. Tex. 2019), *aff'd in part, rev'd in part and remanded*, 982 F.3d 266 (5th Cir. 2020)).

[83] *See Hines II*, 982 F.3d at 280 (ELROD, J., concurring in part and dissenting in part) ("Babies and other non-communicative adults were intentional beneficiaries of Texas's expansion of telemedicine, not the subjects of unwitting overinclusion. Texas has never shown a preference for animals over humans that would support requiring higher standards for animals' medical treatment. *Cf. Strickland v. Medlen*, 397 S.W.3d 184, 185 (Tex. 2013) (WILLETT, J.) (holding that dog owners could not recover non-economic damages for loss of companionship under Texas tort law because '[p]ets are property in the eyes of the law.').").

C

The law suffers from one final defect: It is not narrowly tailored.

In making this determination, we consider whether the physical examination requirement "burden[s] substantially more speech than is necessary to further the government's legitimate interests."[84] At this stage, we consider "the availability and efficacy of 'constitutionally acceptable less restrictive means' of achieving the [state's] asserted interests," while keeping in mind that the regulation does not have to be the least restrictive means of advancing the State's interest.[85]

Dr. Hines proposed a number of less restrictive alternatives. But the district court failed to address any of them. And the State contends that it did not have to reject alternatives *at all* because "the Board was obligated to enforce the Physical Examination Requirement adopted by the Legislature." It cites no authority for this proposition. The burden rests with the State to prove that "it seriously undertook to address the problem with less intrusive tools readily available to it,"[86] and that burden often falls on the State officials that are sued.[87] In the alternative, the State contends that its experts rejected Dr. Hines's less-restrictive

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[84] *Turner Broad. Sys.*, 512 U.S. at 662 (quoting *Ward*, 491 U.S. at 799).

[85] *Id.* (citation omitted).

[86] *McCullen*, 573 U.S. at 494.

[87] *See, e.g., Nat'l Press Photographers Ass'n*, 90 F.4th at 793–94 (suit against McCraw in his official capacity as the Director of the Texas Department of Public Safety). And here, the Board is represented by the Texas Attorney General, the State's chief legal officer.

alternatives. But its argument—and the expert testimony on which it relies—is unpersuasive.

Take one example. Dr. Hines proposed that the State could "instruct veterinarians not to give veterinary advice without a physical exam if, in the speaker's professional judgment, he or she cannot provide useful help." Dr. Hines alleges that he already does this. The State provided no answer to why this alternative wouldn't work other than reasserting that the requirement is in the statute, and the Board "[has] to enforce the statute." But, in fact, based on Dr. Teller's testimony, veterinarians already do this when performing telemedicine. When asked about her practices for conducting telemedicine, Dr. Teller responded that after she establishes a VCPR by a physical exam or a visit to the premises, "[she] would determine if [she could] provide follow-up care via telemedicine or if [she] needed to see that patient, do a physical[,] or make a visit to the premises," "based on what [she] already knew about the client and about the patient." And as Dr. Hines suggests, veterinarians are required to use their professional judgment in many contexts. The State does not explain why this rule wouldn't work the same way for establishing a VCPR in the first instance, as Dr. Hines suggests. Nor did the State have any answer to Dr. Hines's similar proposal that the State could require "a trip to the veterinarian only when reasonable under the circumstances," or require consent from owners before performing telemedicine without a physical exam.

The State's contention that "at present, there is *no alternative* to the physical exam that outweighs the risks of causing animal harm or death from an improper diagnosis and treatment plan" rings hollow because as

explained above, the statute itself provides an alternative. The VCPR can be *established*—and not just *maintained*—by a visit to the premises without a physical exam. And the veterinarian need never lay eyes on the animal during the visit.

Although the law does not have to be the *least* restrictive means to pass intermediate scrutiny, it must still be a close fit, and the State must show that it doesn't "regulate expression in such a manner that a substantial portion of the burden on speech does not serve to advance its goals."[88] If Dr. Hines has never actually harmed any animal—and the State provides zero evidence that he has—then the heavy burden on his speech doesn't advance the State's interest in animal welfare.[89]

A physical-examination requirement may be an efficient and effective way to protect animal welfare by reducing the risk of missed diagnoses, and "[w]here certain speech is associated with particular problems, silencing the speech is sometimes the path of least resistance. But by demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily 'sacrific[ing] speech for efficiency.'"[90] The State has failed to carry its burden of showing the necessary narrow tailoring here.

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[88] *Ward*, 491 U.S. at 799.

[89] *See also McCullen*, 573 U.S. at 493–94 ("The point is not that Massachusetts must enact all or even any of the proposed measures discussed above. The point is instead that the Commonwealth has available to it a variety of approaches that appear capable of serving its interests, without excluding individuals from areas historically open for speech and debate.").

[90] *Id.*

VI

The State of Texas has failed to meet its burden under intermediate scrutiny. Accordingly, we REVERSE the district court's judgment and REMAND with instructions to enter judgment for Dr. Hines.

IRMA CARRILLO RAMIREZ, *Circuit Judge*, concurring:

While I agree that the case should be reversed and remanded with instructions to enter judgment in favor of Dr. Hines, I write separately because the physical examination requirement, as applied to him, is a content-based speech restriction that does not survive strict scrutiny.

I

Deciding whether a restriction is content neutral or content based is no simple task, as "not all content-based regulations are alike." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 429 (1992) (Stevens, J., concurring in the judgment). In this third iteration of the case, the district court first found that the PER, "[a]s applied to [Dr.] Hines, . . . regulate[d] speech" in a "content-based" manner, *Hines v. Quillivan*, No. 1:18-CV-155, 2021 WL 6618658, at *10 (S.D. Tex. July 29, 2021), *report and recommendation adopted*, 2021 WL 5833886 (S.D. Tex. Dec. 9, 2021), then later concluded that it represented a content-neutral regulation of speech. *Hines v. Pardue*, 688 F. Supp. 3d 522, 550–52 (S.D. Tex. 2023). "Th[is] determination dictates the level of scrutiny the challenged restriction must meet in order to pass muster"—if content based, then strict scrutiny applies; if content neutral, then intermediate scrutiny applies. *Tex. Ent. Ass'n, Inc. v. Hegar*, 10 F.4th 495, 509 (5th Cir. 2021); *see also SDJ, Inc. v. City of Houston*, 837 F.2d 1268, 1274 (5th Cir. 1988) ("Our task in setting the level of review is to strike for that point of equilibrium that vindicates [F]irst [A]mendment values at the least cost to a state's decisional arrangements.").

A

"Regulations which permit the Government to discriminate on the basis of the content of [a] message cannot be tolerated under the First Amendment." *Regan v. Time, Inc.*, 468 U.S. 641, 648–49 (1984). If a speech regulation "require[s] 'enforcement authorities' to 'examine the content of the message that is conveyed to determine whether' a violation has occurred," then it is content based. *McCullen v. Coakley*, 573 U.S. 464, 479 (2014) (quoting *FCC v. League of Women Voters of Cal.*, 468 U.S. 364, 383 (1984)). Put differently, when someone wishes to speak and their ability to do so "depends on what they say," the applicable speech regulation is content based. *Holder v. Humanitarian L. Project (HLP)*, 561 U.S. 1, 27 (2010); *see also Hill v. Colorado*, 530 U.S. 703, 738 (2000) (Souter, J., concurring) ("The effect of speech is a product of ideas and circumstances . . . . The question is simply whether the ostensible reason for regulating the circumstances is really something about the ideas."). As long as the enforcing authority need not examine what the speech expresses to determine whether a violation has occurred, then the regulation is content neutral. *McCullen*, 573 U.S. at 479.

McCullen concerned a law that stated:

> No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius of 35 feet of any portion of an entrance, exit or driveway of a reproductive health care facility or within the area within a rectangle created by extending the outside boundaries of any entrance, exit or driveway of a reproductive health care facility in straight lines to the point where such lines

> intersect the sideline of the street in front of such entrance, exit or driveway.

MASS. GEN. LAWS. ANN. ch. 266, § 120E½(b) (West 2013). Because the law only applied to "reproductive health care facilit[ies]," *i.e.*, "place[s], other than within or upon the grounds of a hospital, where abortions are offered or performed," *id.* § 120E½(a), the plaintiffs contended it was content based as applied[1] because "virtually all speech affected by the [law] [wa]s speech concerning abortion, *McCullen*, 573 U.S. at 479. But the Court disagreed, stating that the law was content neutral because whether the plaintiffs violated it "'depend[ed]' not 'on what they sa[id],' but simply on where they sa[id] it." *Id.* (citation omitted) (quoting *HLP*, 561 U.S. at 27). The plaintiffs could violate the law, the Court found, "merely by standing in a buffer zone, without displaying a sign or uttering a word." *Id.* at 480. Therefore, the law was content neutral.

Here, it is the interaction between the PER and the statutory definition of practicing veterinary medicine as applied to Dr. Hines that he challenges as a content-based restriction on his speech. To determine whether Dr. Hines engaged in the practice of veterinary medicine, the State examined his words. Where Dr. Hines's communications conveyed general information regarding veterinary care that was not tailored to a specific animal, the State found that Dr. Hines had not engaged in the practice of veterinary medicine. Where he had communicated veterinary-care information tailored to a specific animal, however, the State drew the opposite conclusion. Whether the PER regulated Dr.

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[1] By the time *McCullen* reached the Supreme Court, only as-applied challenges remained. *See id.* at 475.

Hines's speech required the State to inspect his specific writings, so as applied, the PER is a content-based speech regulation. *See McCullen*, 573 U.S. at 479.

For example, a pigeon's owner contacted Dr. Hines about advice he had received for applying a wrap to the pigeon's wounded wing. Dr. Hines wrote back with advice about the pigeon's wing and how to assess the wrap. Because Dr. Hines communicated veterinary advice specific to this pigeon, the State determined that he had practiced veterinary medicine. By contrast, when a dog owner wrote to Dr. Hines about the dog's persistent itching and barking, Dr. Hines responded with several differential diagnoses and generally referred the dog owner to recommendations for various anti-flea and anti-tick products. Because Dr. Hines had only communicated general information not tailored to the owner's dog, the State determined that Dr. Hines had not practiced veterinary medicine.

Because the determination of whether Dr. Hines violated Texas law "depend[ed] on what [he] sa[id]"—that is, whether his communications constituted personalized advice—the PER is a content-based speech restriction. *See HLP*, 561 U.S. at 27.

B

The State contends the PER is content neutral under *City of Austin v. Reagan National Advertising of Austin, LLC* and *Ward v. Rock Against Racism*. Both concerned *facial* challenges, however. *See City of Austin v. Reagan Nat'l Advert. of Austin, LLC*, 596 U.S. 61, 76 (2022) ("[T]he City's ordinance is facially content neutral."); *Ward v. Rock Against Racism*, 491 U.S. 781, 790, 803 (1989) (finding the "content-neutral" ordinance "valid on its face"). Here, Dr. Hines brings an *as-applied* challenge. This distinction matters because the analyses

in *City of Austin* and *Ward* generally center on the text and enactment history, respectively, of the regulation being challenged. *See City of Austin*, 596 U.S. at 69; *Ward*, 491 U.S. at 791. By contrast, the analysis in *McCullen* centers on the *implementation* of the regulation by the enforcing authority, which is more apt for the fact-specific nature of as-applied challenges such as Dr. Hines's.[2] *See United States v. Marcavage*, 609 F.3d 264, 273 (3d Cir. 2010) ("A facial attack tests a law's constitutionality based on its text alone and does not consider the facts or circumstances of a particular case. An as-applied attack, in contrast, does not contend that a law is unconstitutional as written but that its application to a particular person under particular

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[2] While the test from *McCullen* does not apply exclusively to as-applied challenges, *see, e.g., League of Women Voters*, 468 U.S. at 383, its contextual utility appears greater since as-applied challenges examine the "implementation" of the law while facial challenges examine the "text" of that law, *see Whole Woman's Health All. v. Hill*, 937 F.3d 864, 875 (7th Cir. 2019). As *McCullen* demonstrates, whether a law is content based or content neutral *as applied* may turn on whether the content of the speech must be examined to determine if that law has been violated. *See* 573 U.S. at 464. Without a framework to analyze whether a regulation has been implemented in a content-based way, broad yet facially neutral regulations could be enacted and then enforced based on content, only to have those regulations face relaxed scrutiny in as-applied challenges. *See Hoye v. City of Oakland*, 653 F.3d 835, 854 (9th Cir. 2011) ("Courts must be willing to entertain the possibility that content-neutral enactments are enforced in a content-discriminatory manner. If they were not, the First Amendment's guarantees would risk becoming an empty formality, as government could enact regulations on speech written in a content-neutral manner so as to withstand judicial scrutiny, but then proceed to ignore the regulations' content-neutral terms by adopting a content-discriminatory enforcement policy.").

circumstances deprived that person of a constitutional right." (citation omitted)).

But even assuming *arguendo* that the PER is content neutral under *City of Austin* and *Ward*, it may nevertheless be content based under *McCullen*.[3] A law may be facially content neutral yet content based in application. *See, e.g., Ness v. City of Bloomington*, 11 F.4th 914, 923–24 (8th Cir. 2021) (finding a speech restriction content based as applied even when assuming its facial content neutrality arguendo); *see also* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1286–94 (2005) (discussing "content-based as applied" laws).

Here, the PER, on its face, is a generally applicable conduct regulation. This does not mean the PER is automatically content neutral as applied to Dr. Hines, however. *See, e.g., HLP*, 561 U.S. at 26–27 (finding that even though a law's prohibition "most often does not take the form of speech at all," it may still be a content-based speech restriction as applied). Irrespective of the PER's facial nature, the PER has been enforced against Dr. Hines in a content-based manner.

The State also contends that the PER is content neutral because it need not decide on whether it agrees with the contents of Dr. Hines's advice. But content-based and viewpoint-based discrimination are not the

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[3] The State does not cite, and we cannot find, authority holding that *City of Austin* and *Ward* are the exclusive tests for determining content neutrality.

same.[4] While viewpoint discrimination is "a particularly 'egregious form of content discrimination,'" *Vidal v. Elster*, 602 U.S. 286, 293 (2024) (quoting *Rosenberger*, 515 U.S. at 829), not all content discrimination is viewpoint discrimination, *Reed v. Town of Gilbert*, 576 U.S. 155, 168–69 (2015). *See also, e.g., Iancu v. Brunetti*, 588 U.S. 388, 420 (2019) (Sotomayor, J., concurring in part and dissenting in part) (describing the breach-of-the-peace statute in *Cohen v. California* as "viewpoint-neutral content discrimination"). Because the PER, operating in conjunction with the definition of practicing veterinary medicine, "singles out specific subject matter"—*i.e.*, veterinary advice specifically concerning the animals of Dr. Hines's clients—"for differential treatment," the PER is a content-based speech restriction even though "it does not target viewpoints within that subject matter." *Reed*, 576 U.S. at 169.

II

Strict scrutiny requires the State to show that the PER is "'narrowly tailored' to 'further compelling governmental interests.'" *McDonald v. Longley*, 4 F.4th 229, 246 (5th Cir. 2021) (quoting *Johnson v. California*, 543 U.S. 499, 505 (2005)).

Since "[s]trict scrutiny is 'the most demanding test known to constitutional law,'" *Russell v. Lundergan-*

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[4] "Viewpoint discrimination exists 'when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.'" *Heaney v. Roberts*, 846 F.3d 795, 802 (5th Cir. 2017) (quoting *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995)). Because it is "uniquely harmful to a free and democratic society," *Nat'l Rifle Ass'n of Am. v. Vullo*, 602 U.S. 175, 187 (2024), viewpoint discrimination is "presumptively unconstitutional," *Chiu v. Plano Indep. Sch. Dist.*, 339 F.3d 273, 284 (5th Cir. 2003).

Grimes, 784 F.3d 1037, 1050 (6th Cir. 2015) (quoting *City of Boerne v. Flores*, 521 U.S. 507, 534 (1997)), the showing the State must make is sizable. *See R.A.V.*, 505 U.S. at 382 ("Content-based regulations are presumptively invalid."). The State attempts to satisfy its burden with a single sentence: "[I]f the Court determines that strict scrutiny applies, the [PER] would meet it for the same reasons that it satisfies intermediate scrutiny." This conclusory assertion does not suffice to show that the PER is narrowly tailored to the compelling governmental interests asserted by the State. *See Brown v. Ent. Merchs. Ass'n*, 564 U.S. 786, 799–800 (2011). Considering strict scrutiny's "heavy thumb on the scale in favor of the individual right in question," *Heller v. District of Columbia*, 670 F.3d 1244, 1282 (D.C. Cir. 2011) (Kavanaugh, J., dissenting), the State has not met its burden.

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Because the PER requires the State to examine the content of the messages Dr. Hines communicated to determine whether a violation has occurred, the PER is a content-based restriction of Dr. Hines's speech, and strict scrutiny applies. The State failed to satisfy strict scrutiny.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION

RONALD S. HINES, Plaintiff, VS. KEITH PARDUE, *et al.*, Defendants.	CIVIL ACTION NO. 1:18-CV-155

ORDER AND OPINION

Plaintiff Ronald S. Hines is a Texas veterinarian who wishes to provide veterinary advice to pet owners worldwide without having to physically examine their animals. In 2013, the Texas State Board of Veterinary Medical Examiners disciplined Hines for this practice. The Board found that Hines violated Texas law by practicing veterinary medicine without first conducting a physical examination of the animal. Since then, Hines has spent over a decade challenging the law, arguing that these statutory requirements violate his First Amendment right to free speech.[1]

[1] Hines filed suit against numerous individual members of the Board. A suit against government employees in their official capacity is "to be treated as a suit against the entity" that employs the defendants. *See Kentucky v. Graham*, 473 U.S. 159, 166 (1985). Three of the named defendants—Jessica Quillivan, Carlos Chacon, and George Antuna—no longer serve on the Board. The new Board members—Steven Golla, Raquel Olliver, and Victoria Whitehead—

Hines and the Board have cross-moved for summary judgment. Based on the record and the applicable law, the Court agrees with Hines that he has standing to bring his lawsuit. The Court finds, however, that the statutory requirements that he challenges represent a content-neutral regulation of Hines's speech, and that the summary judgment evidence conclusively demonstrates that the Board has met its burden under intermediate scrutiny to support the law's continued enforcement. As a result, Hines is not entitled to any of the relief that he seeks in this lawsuit.

I. Factual Background and Procedural History

A. Texas Veterinary Law

Texas law defines veterinary medicine as "the diagnosis, treatment, correction, change, manipulation, relief, or prevention of animal disease, deformity, defect, injury, or other physical condition, including the prescription or administration of a drug, biologic, anesthetic, apparatus, or other therapeutic or diagnostic substance or technique." TEX. OCC. CODE ANN. § 801.002(5)(A). An individual may not practice veterinary medicine without obtaining a license, which requires passing the state licensing exam. *Id.* at §§ 801.251–801.252. A person who provides veterinary care without being licensed commits a Class A misdemeanor, punishable by no more than one year of imprisonment, a fine of up to $4,000, or both. *Id*. at § 801.504(a)–(b); TEX. PENAL CODE ANN. § 12.21.

A licensed veterinarian in Texas "may not practice veterinary medicine unless a veterinarian-client-patient relationship exists". TEX. OCC. CODE ANN. § 801.351(a).

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have been substituted in as proper defendants. *See* FED. R. CIV. P. 25(d).

Establishing such a relationship requires that the veterinarian:

1) assumes responsibility for medical judgments regarding the health of an animal and a client, who is the owner or other caretaker of the animal, agrees to follow the veterinarian's instructions;
2) possesses sufficient knowledge of the animal to initiate at least a general or preliminary diagnosis of the animal's medical condition; and
3) is readily available to provide, or has provided, follow-up medical care in the event of an adverse reaction to, or a failure of, the regimen of therapy provided by the veterinarian.

Id. at § 801.351(a)(1)–(3). In the current case, the second element proves critical. Under state law, a veterinarian can only possess "sufficient knowledge of the animal" by either "examining the animal; or making medically appropriate and timely visits to the premises on which the animal is kept." *Id.* at § 801.351(b)(1)–(2). Texas law expressly precludes a veterinarian from establishing the veterinarian-client-patient relationship "solely by telephone or electronic means." *Id.* at § 801.351(c). Together, this set of rules represents the "Examination Requirement" that Hines challenges.

B. Hines's Veterinary Practice

In 1966, Hines graduated from Texas A&M University with a doctorate in veterinary medicine. (Hines Decl., Doc. 83-1, ¶ 2) "[S]oon after," he obtained his Texas veterinary license, which he holds to this day. (*Id.*) Over the next four decades, he worked for animal hospitals, SeaWorld, and the National Institutes of Health. (*Id.* at ¶¶ 4, 6) In 2002, he retired from active

practice because the long-term effects of a spinal injury left him unable to "be on [his] feet all day" and "made it too hard to keep up daily veterinary practice." (*Id.* at ¶¶ 5, 7)

Unable to maintain a veterinary practice in person, Hines created a website called 2ndchance.info, where he posted articles he wrote about pets and pet care. (*Id.* at ¶ 8) He created the website because he desired to "help animals" and was concerned that "people around the world do not have access to the type of sophisticated veterinary services available in North America." (Hines 1st Dep., Doc. 82-1, 11, 23:6–22)

Readers of his website began to reach out to him with questions about issues or symptoms facing their pets. In response, Hines "would tell them what their choices might be, and [] would tell them what [he] had done in that situation in the past, and what [he] might do in that situation in the future." (*Id.* at 15, 41:21–24) In general, he "offered them an opinion based on [his] prior experience," but "never offered to treat their pet" and never prescribed medication for an animal. (*Id.* at 29, 96:22–24; id. at 32, 109:5–8)

At some point, he began charging readers $8.95 in exchange for the personalized veterinary advice, and at some point, requested only donations. (*Id.* at 19, 54:19–23; Hines Decl., Doc. 83-1, ¶ 10) He estimates that between 2000 and 2020, he received inquiries from hundreds and perhaps thousands of people, but he never generated more than a thousand dollars in a single year. (Hines 1st Dep., Doc. 82-1, 18, 53:1–5; *id.* at 29, 96:7–16)

C. *Hines I*

In 2012, the Texas State Board of Veterinary Medical Examiners initiated disciplinary proceedings against Hines, alleging that he was providing veterinary care

without satisfying the Examination Requirement. Hines waived a formal adjudicative hearing and, in March 2013, entered into an Agreed Order through which he agreed to discipline, but "without admitting the truth" of the Board's findings and conclusions. (Agreed Order, Doc. 83-8) He accepted a year of probation and a $500 fine, and agreed to retake the jurisprudence section of the veterinary licensing exam.

In April 2013, Hines sued the members of the Board in their official capacity. *See Hines v. Alldredge*, Civil Action Case No. 1:13-cv-056 (S.D. Tex. 2013). He alleged that by enforcing the Examination Requirement, the Board violated his First Amendment right to free speech, as well as his Fourteenth Amendment rights to equal protection of the law and to engage in one's chosen occupation without arbitrary and irrational interference.

After the Board moved to dismiss Hines's Complaint, the Court dismissed Hines's equal protection and substantive due process claims, but denied the motion as to Hines's First Amendment claim. The Board then filed an unopposed Motion to Certify for Interlocutory Appeal, which the Court granted.

On appeal, the Fifth Circuit affirmed the dismissal of the equal protection and substantive due process claims, but reversed as to the First Amendment claim. *See Hines v. Alldredge* (*Hines I*), 783 F.3d 197, 201 (5th Cir. 2015). The court reasoned that because "[s]tates have 'broad power to establish standards for licensing practitioners and regulating the practice of professions'", the "requirement that veterinarians physically examine an animal or the animal's premises before treating it (or otherwise practicing veterinary medicine) falls squarely within this long-established authority, and does not offend the First Amendment."

Id. (quoting *Gade v. Nat'l Solid Wastes Mgmt. Ass'n*, 505 U.S. 88, 108 (1992)). In doing so, the Fifth Circuit relied on "the professional speech doctrine", which "'except[s]' from normal First Amendment scrutiny regulations of speech by 'professionals.'" *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 928 n.1, 931 (5th Cir. 2020) (quoting *Nat'l Inst. of Fam. & Life Advocs. v. Becerra* (*NIFLA*), 138 S. Ct. 2361, 2371 (2018)).

As the Fifth Circuit concluded that Hines failed to state a claim under the First Amendment, on remand, this Court entered Final Judgment in the Board's favor as to all of Hines's causes of action. (Final Judgment, 1:13-cv-056, Doc. 72)

D. *Hines II*

In June 2018, the U.S. Supreme Court issued *National Institute of Family & Life Advocates v. Becerra*. In that case, the Supreme Court expressly rejected the professional speech doctrine, explaining that it had not previously "recognized 'professional speech' as a separate category of speech" and that "[s]peech is not unprotected merely because it is uttered by 'professionals.'" *NIFLA*, 138 S. Ct. at 2371–72.

Later that year, motivated by the *NIFLA* decision, Hines filed the current lawsuit to reurge his cause of action under the First Amendment. Hines argued that *NIFLA* abrogated *Hines I*, and that he presented a valid free speech claim. In addition, he alleged anew his claim under the Equal Protection Clause, based on changes to Texas law that allowed doctors to perform telemedicine without first physically examining human patients.

The Board again moved to dismiss, and the Court granted the motion in its entirety, dismissing Hines's causes of action. (Order, Doc. 40 (adopting Report and Recommendation (Doc. 30) in part))

Hines appealed. While his appeal was pending, the Fifth Circuit issued *Vizaline, L.L.C. v. Tracy*, in which the Fifth Circuit "recognize[d] that, to the extent [Hines I] relied on the professional speech doctrine, its reasoning ha[d] been abrogated by *NIFLA*." *Vizaline*, 949 F.3d at 934.

After issuing *Vizaline*, the Fifth Circuit resolved Hines's appeal: "Bound by *Vizaline*, we are no longer bound by *Hines I*." *Hines v. Quillivan* (*Hines II*), 982 F.3d 266, 272 (5th Cir. 2020). The court affirmed the dismissal of Hines's equal protection claim, but noted that because of *Vizaline*, "Hines' First Amendment claims may be entitled to greater judicial scrutiny than *Hines I* allowed." *Id.* The court remanded for this Court "to make the initial evaluation of whether conduct or speech is being regulated." *Id.* Specifically, the Fifth Circuit instructed this Court to determine whether the Examination Requirement "regulate[s] only speech, restrict[s] speech only incidentally to [] regulation of non-expressive professional conduct, or regulate[s] only non-expressive conduct." *Id.* (quoting *Vizaline*, 949 F.3d at 931).

E. *Hines II* on Remand

1. Motion to Dismiss

On remand, a Magistrate Judge obtained additional briefing from the parties and ultimately recommended the denial of the Board's motion to dismiss Hines's First Amendment claim. (R&R, Doc. 65) Adopting the Report and Recommendation, this Court explained that "as applied to Hines, [the Examination Requirement] regulates his alleged speech." (Order, Doc. 68, 4) In addition, this Court found that the Board's "application of the statute is content-based" and subject to strict scrutiny. (*Id.* at 6 (relying on *Holder v. Humanitarian*

L. Project (*HLP*), 561 U.S. 1 (2010))) Based on these conclusions, the Court denied the Board's motion to dismiss.

2. Motions for Summary Judgment

The parties engaged in discovery and now move for summary judgment. (Hines's MSJ, Doc. 83; Board's MSJ, Doc. 82) In addition to filing responses and replies, the parties submitted additional briefing regarding specific issues that the Magistrate Judge identified, such as whether Hines has "a First Amendment right to offer personalized veterinary advice in a jurisdiction where he is not a licensed veterinarian". (Order, Doc. 86, 1; see Board's Response to Hines's MSJ, Doc. 84; Hines's Response to Board's MSJ, Doc. 85; Hines's MSJ Reply, Doc. 87; Board's MSJ Reply, Doc. 88; Board's Supp., Doc. 90; Hines's Supp., Doc. 91)

In December 2022, the Magistrate Judge issued a Report and Recommendation (Doc. 92), recommending that the competing summary judgment motions be granted in part and denied in part. The Magistrate Judge distinguished between Hines's communications with pet owners in Texas, in other states, and in other countries. He concluded that to the extent that Hines provided veterinary advice to pet owners in other states, he engaged in the unlicensed practice of veterinary medicine, making his speech incidental to criminal conduct and thus unprotected by the First Amendment. (*Id.* at 34) On the other hand, when Hines provided veterinary advice to pet owners in Texas, he could not be engaged in the unlicensed practice of medicine because he is licensed in this state. And as to his communications with individuals in other countries, the Board lacks the authority to discipline him for the unlicensed practice of veterinary medicine in foreign jurisdictions. (*Id.* at 33,

47) Based on these findings, the Magistrate Judge applied a First Amendment analysis to Hines's communications with pet owners in Texas and foreign countries.

The Magistrate Judge concluded that as applied to Hines, the Examination Requirement regulated pure speech and did so based on the content of the communications. As a result, the Magistrate Judge applied strict scrutiny and concluded that the challenged regulation was not narrowly tailored to the compelling interests that the Board asserted. (R&R, Doc. 92, 43–46) The Magistrate Judge recommended that a permanent injunction issue to prevent enforcement of the Examination Requirement as to Hines and to the extent that he practices veterinary medicine without a physical examination in Texas and in foreign countries.

The parties timely filed objections and responses to the Report and Recommendation. (Hines's Objs., Doc. 95; Board's Objs., Doc. 96[2]; Hines's Response to Board's Objs., Doc. 97; Board's Response to Hines's Objs., Doc. 98) Based on the objections, the Court reviews the Report and Recommendation *de novo*. *See* 28 U.S.C. § 636(b)(1); FED. R. CIV. P. 72(b)(3). The Court sustains the objections to the extent that the Report and Recommendation is inconsistent with the findings of fact and conclusions of law within this Order and Opinion.

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[2] Due to a technical error, the Board filed its objections one day after the deadline. The Board promptly reached out to opposing counsel and to this Court regarding the error. The Court finds that good cause justifies the late filing and considers the objections timely filed.

3. Hines's Communications with Animal Owners

With their respective summary judgment motions, the parties have submitted substantial evidence, including deposition testimony from various witnesses, declarations, expert opinions, and some of Hines's communications with pet owners. In particular, with respect to the Court's analysis of whether Hines engaged in speech or conduct, the summary judgment record includes representative examples of his emails with pet owners. In addition, the Board presents the expert opinions of Dr. Carly Patterson and Dr. Lori Teller, who opine regarding whether Hines's communications represented the practice of veterinary medicine and whether Hines provided appropriate veterinary advice to pet owners. Hines also deposed Kandace Van Vlerah, a senior investigator with the Board and the Board's representative pursuant to Federal Rule of Civil Procedure 30(b)(6). *See* FED. R. CIV. P. 30(b)(6) (A "named organization must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf".). Van Vlerah offered insight into how the Board determines which communications represent the practice of veterinary medicine, and testified as to whether Hines engaged in the practice of veterinary medicine in specific instances.[3] Based on this summary judgment evidence,

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[3] The Board objects to various exhibits that Hines offered with his Motion for Summary Judgment. (Board's Response to Hines's MSJ, Doc. 84, 10) First, the Board objects to portions of Van Vlerah's deposition testimony in which she testified regarding whether Hines practiced veterinary medicine in specific instances. The Board argues that such testimony exceeded the scope of the deposition notice under Rule 30(b)(6). While the Board correctly notes that the deposition notice does not expressly request

and in addition to the factual findings previously noted in this Order and Opinion, the Court makes the following findings.

a. Hines Practicing Veterinary Medicine

With respect to the following six examples, at least one of the Board's experts opined that Hines practiced veterinary telemedicine through his communications with animal owners.[4]

i. Iranian Pigeon (July 2021)[5]

Mohammad Reza Koohpaee, a man living in Iran, emailed Hines about a pigeon that he found in a parking

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testimony on this subject, several of the topics, such as Topics 1– 2 and 6, when construed broadly, encompass such testimony—if only to provide context for discussing the enumerated subject matters. The Court overrules the objections to the specified Van Vlerah deposition excerpts. Second, the Court sustains the foundation and hearsay objections to Exhibit 16, and sustains the relevance and hearsay objections to Exhibits 18 through 22.

[4] In all of these specific instances, the parties agree that Hines communicated solely via email, making his provision of medical advice the practice of veterinary *tele*medicine. The parties also agree that Hines did not physically examine or visit the premises of any of these animals, either before or after his communications.

[5] With respect to the specific instances described in this Order and Opinion, Hines's communications all occurred between 2020 and 2022. Hines did not produce earlier communications, testifying that the email account he uses to exchange emails with pet owners "has a rather low data cap," so when it becomes full, he deletes older emails, including emails from pet owners. (Hines 1st Dep., Doc. 82-1, 17, 49:1–4) The Board requests "an adverse inference due to spoliation," as Hines acknowledges deleting emails after the filing of this lawsuit. (Board MSJ, Doc. 84, 16 n.10) Courts draw an adverse inference against "a party who intentionally destroys important evidence in bad faith". *Whitt v. Stephens Cnty.*, 529 F.3d 278, 284 (5th Cir. 2008). For electronically stored information, courts require a finding "that the party acted with the intent to

lot. (Iranian Pigeon Emails, Doc. 83-11, 18) Koohpaee wrote that on the advice of "a vet friend", he had wrapped the pigeon's injured wing with a "figure eight style wrap." (*Id.* at 19) Koohpaee asked if the wing could heal and how long to use the bandage. (*Id.*)

In response, Hines attached a diagram and wrote that a hard spot that Koohpaee identified on the pigeon's left wing was "probably a healing fracture." (*Id.*) Hines told him that the local veterinarian "gave [] good advice", and commented that the pigeon "will never fly normally again" but could live a happy life as Koohpaee's pet or in a park where people routinely feed pigeons. (*Id.*) He added that pigeons often have mites, lice, and pigeon flies, and that the best treatment was using a saltshaker to sprinkle carbaryl powder mixed with powdered corn starch on the pigeon's feathers. (*Id.*)

Dr. Patterson opined that Hines was practicing veterinary medicine by "recommending specific bandages and dietary management" for the bird. (Patterson Supp. Report, Doc. 83-12, 6) She opined that Hines was "only making an estimated guess based on very limited information from a layperson." (*Id.* at 5) Van Vlerah also testified that Hines was practicing veterinary medicine because he was "providing treatment recommendations regarding the injury of an

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deprive another party of the information's use in the litigation." *Eagan v. Walgreen Co.*, No. 21-20352, 2022 WL 683636, at *3 (5th Cir. Mar. 8, 2022) (quoting FED. R. CIV. P. 37(e)(2)). In the present matter, the Court finds that no evidence indicates that Hines intentionally deleted emails to prevent the Board or the Court from viewing evidence. In addition, neither party argues that Hines's communications with animal owners before 2020 differed materially from his communications between 2020 and 2022. As a result, the Court declines to apply an adverse inference due to spoliation against Hines.

animal -- or bird." (Van Vlerah Dep., Doc. 83-15, 18, 51:13–18) And Dr. Teller agreed because Hines "recommended a specific course of treatment for Reza's pigeon and even provided him with a diagram showing the location of the likely injury." (Teller Report, Doc. 82-1, 250)

ii. Iranian Bird (August 2021)

Mali Zia, who lives in Iran, sent Hines a picture of a bird's broken leg. (Iranian Bird Emails, Doc. 83-11, 13–15) Zia reported that she found the bird when it was three weeks old, had been feeding it, and had "broke[n] her leg accidentally" when giving the animal a chance to fly. (*Id.* at 15) Zia reported that a local doctor had tied up the bird's leg, a picture of which she attached. She asked Hines, "Is there any chance for her?" (*Id.*)

Hines responded that "[i]t appears from your photograph that the broken bone has now healed in the wrong position." (*Id.* at 42) He explained that fixing the bone would "require cutting the bone if possible and putting it in a proper splint." (*Id.*) He advised Zia that a hand surgeon or jewelry maker in Iran would be in the best position to help, as they would have the tools necessary to make the splint. (*Id.*)

Zia replied with an x-ray of the bird's leg, noting that she could not move the bird into a good position. (*Id.* at 2–3) She also reported that she could not sleep at night because she blamed herself for breaking the bird's leg. (*Id.* at 2)

Hines responded that the x-ray showed the bird's bones were too soft and that it was calcium deficient. (*Id.* at 20) He recommended that Zia add crushed calcium carbonate, like Tums, to the bird's diet. (*Id.*) Hines told Zia the calcium deficiency probably caused the leg to break and reassured her that "it was not [her] fault!"

(*Id.*) Hines finished the email by saying, "This is what needs to be done:", but the email cuts off at that point. (*Id.*)

After reviewing these communications, Dr. Patterson opined that Hines was practicing veterinary medicine by "detailing a fracture management plan" for Zia's bird. (Patterson Supp. Report, Doc. 83-12, 6) Van Vlerah agreed, reasoning that Hines was "diagnosing a calcium deficiency and he is also recommending treatment with the use of calcium supplements." (Van Vlerah Dep., Doc. 83-15, 19, 52:13–15) And Dr. Teller reached the same conclusion, explaining that Hines "reviewed photos and an x-ray and diagnosed the bird with calcium deficiency. He recommended a specific course of treatment for the bird's calcium deficiency." (Teller Report, Doc. 82-1, 252)

Dr. Teller also concluded that Hines "potentially left [the] bird in a worse position by failing to refer Mali to a local veterinarian, disparaging the quality and competency of Iranian veterinarians, diagnosing calcium deficiency and prescribing calcium based on an image taken before Mali gave the bird 2-3 weeks of Osteocare Calcium (and without reviewing the newest imaging), and seemingly giving her a treatment plan that was cut off in the documents produced during discovery." (*Id.* at 253)

iii. Cat From Unknown Location (April 2022)

Yael Rosen, from an unknown location, emailed Hines about her five-year-old seal point Ragdoll cat named Sofia. (Unknown Cat Emails, Doc. 83-11, 45) A local veterinarian conducted blood tests on Sofia, removed fluid from the cat's chest, and diagnosed it with heart failure. (*Id.*) Rosen listed the medications that the

cat was receiving and asked if Sofia should be seen by a veterinary cardiologist. (*Id.*)

Hines identified several possibilities for Sofia's symptoms, including cardiomyopathy, feline infections peritonitis, and lymphoma. (*Id.*) He provided links to various articles on his website about each disease. (*Id.*) And he added that if Sofia was suffering from cardiomyopathy, he would recommend giving the cat "a human taurine supplement". (*Id.*)

Dr. Patterson opined that Hines was practicing veterinary medicine by recommending the taurine supplement for the cat. (Patterson Supp. Report, Doc. 83-12, 10–11) Dr. Teller agreed, as Hines "provided differential diagnoses for Yael's cat and provided several treatment plans", and because Hines "recommended taurine without indicating the strength, dosage, frequency, and length of time to administer, nor the route of administration and potential side-effects." (Teller Report, Doc. 82-1, 255)

Dr. Teller also concluded that when advising the cat's owner, "Hines had no basis for eliminating other possible differential diagnoses" and "insufficient information to determine that the cat was taurine-deficient." (*Id.*) Instead, a "physical examination was necessary first" to "eliminat[e] differential diagnoses." (*Id.*) Dr. Teller opined that Hines "most likely left [the] cat in a worse position by failing to instruct Yael to go to the veterinary cardiologist and providing differential diagnoses and treatment plans that could only be eliminated with laboratory results and imaging." (*Id.*)

iv. Indian Puppy (May 2022)

Uday Bhaskar, who lives in India, emailed Hines about a two-month-old puppy that was run over by a car tire. (Indian Puppy Emails, Doc. 83-11, 43) Bhaskar

wrote that the puppy could not move one of its legs and appeared to be in pain. (*Id.*) He asked Hines if he could "advise any first aid or course of treatment as" he did not "have any vet within a range of 25 km." (*Id.*)

Hines informed Bhaskar that there was little he could do to help. (*Id.*) Hines stated that if the problem was "just one leg, then the leg is probably broken." (*Id.*) He wrote that the treatment for such an injury was stainless steel rods or external supports, but that any external supports would need to be frequently changed for a growing dog. (*Id.*) He also wrote that if both rear legs were problematic, then the puppy's spine was likely broken, and no treatment option existed "for that in dogs or humans." (*Id.*)

Dr. Patterson opined that Hines was practicing veterinary medicine by "advising a specific prognosis" for the dog's injuries. (Patterson Supp. Report, Doc. 83-12, 5) She expressed concern as to whether the dog had suffered internal or neurological injuries that could also be causing the symptoms. (*Id.*) Van Vlerah similarly testified that Hines was practicing veterinary medicine because he was "providing treatment recommendations and a potential diagnosis." (Van Vlerah Dep, Doc. 83-15, 14, 44:23–25) And Dr. Teller agreed, explaining that Hines was practicing veterinary medicine because he "provided a differential diagnosis that Uday's puppy either had a broken leg or back, and made a prognosis (which is incorrect) that there is no treatment for a broken back." (Teller Report, Doc. 82-1, 247)

Dr. Teller also opined that Hines "potentially left the puppy in a worse position than when he found it by failing to refer Uday to a local veterinarian, failing to provide Uday with emergency first aid advice, providing Uday with possibly a false prognosis, providing Uday with an

incomplete differential diagnosis, suggesting a treatment plan for Uday that was not indicated, and finally by ignoring Uday's follow up email seeking clarification and offer to send photos of the puppy." (*Id.* at 248)

v. New Hampshire Dog (November 2021)

Anne Broussard, a woman living in New Hampshire, emailed Hines about her 19-month-old Japanese Chin dog, which had received a Cytopoint injection to prevent scratching. (N.H. Dog Emails, Doc. 83-11, 26) After receiving the shot, the dog slept 60 to 90 minutes each night before waking up, shaking and barking frantically, and scratching the floor repeatedly before falling back asleep. (*Id.*) Broussard advised that these behaviors were new, and she wondered if they were side effects from the shot. (*Id.*)

Hines wrote back that the dog's behavior "might be related to an antibiotic resistant staphylococcus skin infection, exposure to fleas, a dietary allergy or even mange mites", and that it was "extremely unusual for Apoquel and Cytopoint not to stop itching due to environmental allergies". (*Id.*) He provided a link to an article on his website as to the best products to prevent fleas and mites, and explained that a "skin culture would tell you if staph is involved and which antibiotics work best to cure it." (*Id.*) He added that "all those decisions need to be made in consultation with your local veterinarians." (*Id.*)

Van Vlerah testified that Hines engaged in the practice of veterinary medicine in this communication, as he was "providing a diagnosis and treatment recommendations." (Van Vlerah Dep, Doc. 83-15, 17, 47:11–12)

In contrast, Dr. Patterson opined that Hines was not practicing veterinary medicine in this email exchange. (Patterson Supp. Report, Doc. 83-12, 7–8) She did not explain how she came to this conclusion or what separated this email from the others where she thought he did practice veterinary medicine.

vi. British Bird (June 2022)

Helen Scott, a woman living in the United Kingdom, emailed Hines about a young great tit bird in her care. (British Bird Emails, Doc. 83-11, 49) Scott noted that a local veterinarian had splinted the bird's injured leg, but the bird had managed to remove the splint. (*Id.*) She attached a video of the bird and expressed concern that the uninjured leg would cross the injured leg and inhibit the bird's motion. (*Id.*)

In response, Hines explained that the bird would need both legs in tape shackles "for a while". He provided a link to an article he had written about curing spraddle leg in birds. (*Id.*) He added, "But we still need to talk about how that is safely done and for that I need your telephone number." (*Id.*)

The next day, Hines sent a follow up email, noting that the bird appeared to be fully grown, which "makes matters worse." (*Id.* at 11) He explained that Scott did "not need a veterinarian" but instead "an arborist because bones assume the same position a shrub or tree assumes if it is held at a certain angle." (*Id.*) He suggested that Scott undertake "the construction of some very light weight wire device that can slowly be adjusted to guide the bones to a more proper angle", and included a diagram that he had drawn for the device. (*Id.* at 11–12)

Dr. Patterson opined that Hines was practicing veterinary medicine because he was recommending a

treatment plan for the bird. (Patterson Supp. Report, Doc. 83-12, 4) She expressed concern that Hines may have estimated the bird's age incorrectly and that Scott would be unable to construct the device correctly. (*Id.*) Dr. Teller agreed, as Hines "recommended a specific course of treatment for Helen's great tit and even provided her with a diagram of how to construct the device." (Teller Report, Doc. 82-1, 245–46)

Dr. Teller also opined that Hines "most likely left the bird in a worse position" through his veterinary advice. (*Id.* at 246) She explained that Hines and Scott disagreed on the bird's likely age, with Scott estimating that the bird was five to six weeks old, while Hines believed the bird to be fully grown. (*Id.* at 245–46) According to Dr. Teller, "Hines's tape shackles treatment plan appears to be premised on the belief that Helen's bird is fully grown". (*Id.* at 246) Given the uncertainty about the bird's age, a "physical examination was necessary before embarking on a specific course of treatment". (*Id.* at 245) Ultimately, Dr. Teller concluded Hines "should have referred Helen back to her treating veterinarian or to a veterinary specialist in the U.K." where she lived, instead of telling her to "contact a male watch maker for tiny tools, an arborist to ascertain the shape of local shrubs, and . . . construct tape shackles based on a diagram he drew". (*Id.* at 246 (emphasis in original))

b. Hines Not Practicing Veterinary Medicine

As to the following two examples, the Board's experts opined that Hines did not engage in the practice of veterinary medicine through his communications with the animal owners.

i. West Virginia Dog (November 2020)

Linda Riley, a woman living in West Virginia, emailed Hines about her seven-year-old golden retriever. (W.V. Dog Emails, Doc. 83-11, 28–29) Her dog received a Cytopoint injection for excessive itching and scratching, but the problem only worsened. (*Id.* at 28) Riley added that the dog began throwing up a few days after receiving the shot, and the local veterinarian gave the dog hydration and a corticosteroids shot. (*Id.*) Riley noted that the dog continued to suffer from diarrhea, despite being placed on a bland diet. (*Id.*)

Hines responded with a series of questions:

> Did your vet run any laboratory tests and if so might you know the results? You mentioned that "nothing has returned to baseline". Are the corticosteroids helping? Was it a long-term steroid shot like Depo? It's not that I want to interfere, it's just that I would like to make some sense out of all the data that folks like you are willing to share with me.

(*Id.*) He wrote that Riley should consider contacting the manufacturer of Cytopoint and asking for their advice, noting that some manufacturers cover the veterinary costs associated with their medications' side effects. (*Id.*)

Riley replied, explaining that her local veterinarian did not think her dog's symptoms were related to the injection because the adverse reaction was not close enough in time. (*Id.* at 27) She added that her dog experienced cycles of throwing up and having diarrhea, followed by periods of being able to keep food down and maintaining normal bowel movements. (*Id.*) She also wrote that no blood work had been performed. (*Id.*) And she informed Hines that she had adopted a new puppy before the golden retriever's symptoms began, and the

local veterinarian thought that the new puppy might be a cause of her dog's health issues. (*Id.* at 28)

Hines continued the exchange, asking if her dog had a history of intermittent diarrhea and if Riley had ever noticed extraneous things in her dog's stools, like leaves or food wrappers. (*Id.* at 27) He asked a series of questions, such as whether her dog was small for a golden retriever and whether the dog was a pure breed. (*Id.*) He also noted that the new puppy could be a source of intestinal parasites. (*Id.*) Hines explained that Riley would need to make sure that her dog had no other health issues that would predispose it to suffering from diarrhea, such as inflammatory bowel disease. (*Id.*) And he added that blood tests could reveal more information, but explained that if the dog was "already on the road to recovery," the tests "might already be normal or close to it." (*Id.*)

Dr. Patterson opined that Hines was not practicing veterinary medicine in this email exchange. (Patterson Supp. Report, Doc. 83-12, 8) She did not explain how she came to this conclusion or what separated this email from others where she thought Hines practiced veterinary medicine.

ii. Dog From Unknown Location I (March 2022)

Cathy Armstrong, from an unknown location, emailed Hines about her Australian cattle dog. (Unknown Dog I Emails, Doc. 83-11, 30) She wrote that her dog's energy level waned after it received Cytopoint injections for itching. (*Id.*) The dog eventually died of a brain cancer, and Armstrong believed that the Cytopoint injections "either caused or made the tumor worse." (*Id.*)

Hines responded, expressing condolences and inquiring where Armstrong lived and whether the dog

had also received oral Apoquel. (*Id.*) He wrote that he believed that the manufacturer of Cytopoint should place "an age warning" on the medication, notifying pet owners of the risks associated with the treatment. (*Id.*)

Dr. Patterson opined that Hines was not practicing veterinary medicine in this email exchange. (Patterson Supp. Report, Doc. 83-12, 10) She did not explain how she came to this conclusion or what separated this email from the others where she thought he did practice veterinary medicine. In her deposition, Dr. Patterson admitted that it was sometimes difficult for her to determine if Hines was practicing veterinary medicine. (Patterson Dep., Doc. 83-13, 13, 72:3–15)

Van Vlerah also testified that Hines's communication did not represent the practice of veterinary medicine, categorizing the email as "just a simple conversation between [Hines] and Cathy Armstrong in regards to Cytopoint injections." (Van Vlerah Dep., Doc. 83-15, 21, 54:20– 22)

c. Hines's Other Communications with Animal Owners

With respect to the following three examples, the Board's experts did not provide any opinions as to whether Hines engaged in the practice of veterinary medicine through his communications with the animal owners. The Court includes these examples to demonstrate additional exchanges between Hines and animal owners that the Board does not appear to contend represent the practice of veterinary medicine. The Examination Requirement would not apply to Hines in connection with these types of communications.

i. Florida Dog (March 2021)

Amy Pentkowski, from Florida, emailed Hines about her sister's dog, Zippy. (Fla. Dog Emails, Doc. 83-11, 47)

Pentkowski asked Hines if he would "go forward with radiation and/or chemo" if Zippy was his dog. (*Id.*) She attached a veterinarian's report, which indicated that Zippy had an anal sac carcinoma and that the local veterinarian was not recommending surgery or radiation. (*Id.* at 50–51)

Hines replied that based on the tumor's "difficult location", he "would just keep Zippy comfortable." (*Id.* at 47) He explained that he could not think "of any place more difficult to get to surgically or as unlikely to remove all the cancer" and that he was worried about the chances that Zippy would be unable "to defecate or urinate after such a surgery". (*Id.*) Hines added that the choice was ultimately about what Pentkowski's "sister and her family members are capable and willing to agree to." (*Id.*)

ii. Glasgow Cat (April 2021)

Marie Shannon, from Glasgow, Scotland, emailed Hines about her cat, named Butterfly, who had accumulated fluid in her chest. (Glasgow Cat Email, Doc. 83-11, 4) The record contains Hines's response, but not Shannon's initial email.

Hines began by writing that a "big problem" for him in helping Shannon was that he did not have access to "Butterfly's radiologist's report or her laboratory blood analysis report." (*Id.*) He identified several possible causes of fluid in the chest, including heart issues, cancers, and mutant coronaviruses. (*Id.*) He expressed that was he was "disappointed in the University of Glasgow that they are not treating this as a crisis situation and are making you wait until Monday" to be seen. (*Id.*) He recommended that Shannon ask her local veterinarian to measure Butterfly's systolic blood pressure and oxygen saturation levels because "an

extremely low blood protein level and/or anemia might also exhibit the symptoms" she described. (*Id.*) He added that Butterfly should be tested for feline leukemia. (*Id.*)

iii. Dog From Unknown Location II (March 2022)

Keitheley Wilkinson, from an unknown location, emailed Hines about a 10-year-old female terrier mix that she owned and that had died a month earlier after being diagnosed with lymphoma. (Unknown Dog II Emails, Doc. 83-11, 37–41) Wilkinson informed Hines that "a canine organophosphate test [] showed a lowered cholinesterase level." (*Id.* at 40) She indicated that the dog was allergic to the Kikuyu grass in the area where they lived, and that the dog likely ate some of the grass, which contained an herbicide, glufosinate-ammonium. (*Id.* at 38) Wilkinson inquired about the relationship between the herbicide and the lowered cholinesterase levels, as well as any possible links between the herbicide and canine cancers. (*Id.* at 38–39)

In response, Hines asked if the dog had been diagnosed with a T lymphocyte lymphoma or a B lymphocyte lymphoma and whether the lymphoma was "specific enzyme positive." (*Id.* at 36) Wilkinson answered that a local veterinarian would charge $500 to run the necessary tests to find out. (*Id.* at 35) She asked Hines if the test was "absolutely necessary to assess the findings of the dog's organophosphate findings". (*Id.*) Hines responded: "No. Do not order that test." (*Id.*) He added, "No information exists as to any connection between exposure to herbicides and insecticides in dogs and the particular lymphocyte involved." (*Id.*)

Wilkinson wrote back, thanking Hines and noting that she would "wait for [his] assessment on the findings already given to" him. (*Id.*) Hines followed up by writing

that the active ingredient had not been linked to cancers "of any kind," but that it was "conceivable" that it contributed to the dog's chronic gastroenteritis. (*Id.* at 34) He also noted that Wilkinson had reported that the dog had received Cytopoint injections, which "reduce interleukin 31 levels," and that such reduction "contributes to the growth of follicular lymphoma" in humans. (*Id.* at 35) He clarified that this effect was related solely to T-cell origin lymphomas, which explained his initial interest in whether the lymphomas were T-cell or B-cell. (*Id.*)

II. Standard of Review

"Summary Judgment is appropriate when the pleadings, affidavits, and other summary judgment evidence show that no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *Triple Tee Golf, Inc. v. Nike, Inc.*, 485 F.3d 253, 261 (5th Cir. 2007) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)). A genuine issue of material fact exists "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986).

The burden is on the moving party to identify "those portions of the record it believes demonstrate the absence of a genuine issue of material fact." *Triple Tee Golf*, 485 F.3d at 261. If the moving party makes this showing, the burden shifts to the nonmoving party, which "must go beyond the pleadings and designate specific facts showing that there is a genuine issue for trial." *Little v. Liquid Air Corp.*, 37 F.3d 1069, 1075 (5th Cir. 1994) (citing *Celotex*, 477 U.S. at 325)). The Court "must draw all reasonable inferences in favor of the nonmoving party, and it may not make credibility

determinations or weigh the evidence." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000).

"In cases involving cross-motions for summary judgment, 'the motions are reviewed independently, with evidence and inferences taken in the light most favorable to the nonmoving party.'" *Express Oil Change, L.L.C. v. Miss. Bd. of Licensure for Pro. Eng'rs & Surveyors*, 916 F.3d 483, 487 (5th Cir. 2019) (quoting *White Buffalo Ventures, LLC v. Univ. of Tex. at Austin*, 420 F.3d 366, 370 (5th Cir. 2005)). In a nonjury case, "[i]f a trial on the merits will not enhance the court's ability to draw inferences and conclusions, then a district judge properly should 'draw [] inferences without resort to the expense of trial.'"[6] *Matter of Placid Oil Co.*, 932 F.2d 394, 398 (5th Cir. 1991) (quoting *Nunez v. Superior Oil Co.*, 572 F.2d 1119, 1124 (5th Cir. 1978)).

III. Analysis

The parties' cross-motions for summary judgment center around two disputes. First, the parties dispute whether Hines has standing to challenge the Examination Requirement without proof that his speech was chilled. Second, as to the First Amendment claim, the parties present competing analyses. Hines contends that as applied to him, the Examination Requirement regulates pure speech based on its content, is subject to strict scrutiny, and does not survive such demanding review. In the alternative, he argues that the Examination Requirement regulates his speech incidentally to conduct, triggers intermediate scrutiny,

[6] Neither Hines nor the Board has demanded a jury trial.

and fails to satisfy that standard as well.[7] The Board, on the other hand, contends that the Examination Requirement regulates only Hines's non-expressive conduct and does not implicate any form of heightened review. In the alternative, the Board argues that the Examination Requirement regulates his speech incidentally to conduct, requiring the application of intermediate scrutiny, which the law survives. Finally, the Board argues that even if the Examination Requirement does regulate pure speech, the regulation is content neutral and survives both intermediate and strict scrutiny.

The Court will address each issue in turn.

A. Standing

The Board contends that Hines lacks standing to challenge the Examination Requirement because his speech was never chilled.

"To have standing, a plaintiff must (1) have suffered an injury in fact, (2) that is fairly traceable to the challenged action of the defendant, and (3) that will likely be redressed by a favorable decision." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020), as revised (Oct. 30, 2020) (citing *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992)). Based on the record in the case, the

[7] In his Motion for Summary Judgment, Hines also appears to challenge the Examination Requirement as "overbroad, vague, and underenforced in the real world." (Hines MSJ, Doc. 83, 22) After the Board contended that Hines's Complaint did not include such allegations, Hines replied that he did not present these issues as "separate claims", but merely as part of the tailoring analysis. (Hines's MSJ Reply, Doc. 87, 20) Based on this reply, the Court does not reach whether the Examination Requirement would survive a constitutional challenge for vagueness, overbreadth, or selective enforcement.

Court concludes that Hines meets all three elements to establish standing.

1. Injury in Fact

Hines alleges a pre-enforcement challenge to the Examination Requirement, claiming that the Texas law violates his First Amendment rights. "A plaintiff bringing such a challenge need not have experienced 'an actual arrest, prosecution, or other enforcement action' to establish standing." *Barilla v. City of Houston*, 13 F.4th 427, 431 (5th Cir. 2021) (quoting *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014)). In a First Amendment challenge, a "plaintiff has suffered an injury in fact if he (1) has an 'intention to engage in a course of conduct arguably affected with a constitutional interest,' (2) his intended future conduct is 'arguably . . . proscribed by [the policy in question],' and (3) 'the threat of future enforcement of the [challenged policies] is substantial.'" *Speech First*, 979 F.3d at 330 (quoting *Susan B. Anthony List*, 573 U.S. at 161–64 (alterations in original)). To establish these three elements, a plaintiff's "theory of standing" can rely on his "future speech [being] chilled" by an unconstitutional law. *Seals v. McBee*, 898 F.3d 587, 593 n.13 (5th Cir. 2018), as revised (Aug. 9, 2018). Alternatively, a plaintiff may base his "theory of standing" solely on a "credible threat of future prosecution". *Id.*

Hines readily satisfies the first two elements. He has continued emailing pet owners and does not intend to stop. (*See, e.g.*, Hines Decl., Doc. 83-1, ¶ 12) And in 2013, this behavior— namely, emailing pet owners veterinary advice without conducting a physical examination—led to disciplinary action against him. His intended conduct arguably implicates his First Amendment rights, demonstrating that he intends to engage in conduct

affected by a constitutional interest, and that the Examination Requirement proscribes such conduct.

As to the third element, a sufficiently substantial threat of enforcement exists to support standing. "[W]here 'the State has not disavowed any intention of invoking' the challenged law, plaintiffs are 'not without some reason in fearing prosecution'". *Barilla*, 13 F.4th at 432 (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 302 (1979)). For this reason, "[p]ast enforcement of speech-related policies can assure standing", while "a lack of past enforcement does not alone doom a claim of standing". *Speech First*, 979 F.3d at 336; *see also Susan B. Anthony List*, 573 U.S. at 164 (finding the threat of future enforcement "substantial" given the "history of past enforcement"); *Seals*, 898 F.3d at 592 (finding standing where the state "ha[d] disavowed [the plaintiff's] prosecution" for violating the contested law but "concede[d] that [the plaintiff] actually violated the statute and [wa]s legally subject to prosecution").

In this case, the Board has confirmed that it still enforces the statute. (Van Vlerah Dep., Doc. 83-15, 13, 39:6–8) And the Board disciplined Hines in 2013 for violating it. (*See* Agreed Order, Doc. 83-8) While it is true that the Board has not attempted to discipline Hines during the pendency of litigation or during the three years between his two lawsuits, this inaction alone does not defeat standing. *See Meltzer v. Bd. of Pub. Instruction of Orange Cnty.*, 548 F.2d 559, 571 n.25, 573 (5th Cir. 1977), *on reh'g*, 577 F.2d 311 (5th Cir. 1978) (concluding that a case or controversy existed despite the non-enforcement of the statute at issue during the seven-year litigation). The law's continuing force and Hines's continuing violation of the statute suffice to

establish a credible threat of prosecution. Hines has thus established that he suffered an injury in fact.

The Board argues that because Hines alleges in his Complaint that his speech was chilled, and the summary judgment record indicates that he has continued to email pet owners, he cannot establish standing. The law, however, allows Hines to establish standing with or without a chilling effect. "Chilling a plaintiff's speech is a constitutional harm adequate to satisfy the injury-in-fact requirement." *Hous. Chron. Publ'g Co. v. City of League City*, 488 F.3d 613, 618 (5th Cir. 2007). But even if a regulation does not chill speech, a credible threat of enforcement alone can support standing. *See Seals*, 898 F.3d at 593 n.13 (noting that the court "need not opine on" the plaintiff's chilling "theory of standing . . . because Seals faces a credible threat of future prosecution based on his past violation"). In the present case, as Hines brings a pre-enforcement challenge, he must prove a credible threat of enforcement regardless of whether he alleges his speech was chilled. *Compare Speech First*, 979 F.3d at 330 (requiring a credible fear of prosecution to substantiate a chilling injury in fact), *with Seals*, 898 F.3d at 593 n.13 (requiring a credible fear of enforcement only to support standing). He has done so.

The Board also contends that to the extent that the summary judgment record establishes that Hines's activity was not chilled—i.e., that he has continued to engage in the practice of veterinary medicine without physically examining the animal patient—he engaged in a fraud on the court by alleging a fact that he knew could not be supported. The Court is not persuaded. "To establish fraud on the court, 'it is necessary to show an unconscionable plan or scheme which is designed to improperly influence the court in its decision.'" *First*

Nat'l Bank of Louisville v. Lustig, 96 F.3d 1554, 1573 (5th Cir. 1996) (quoting *Rozier v. Ford Motor Co.*, 573 F.2d 1332, 1338 (5th Cir. 1978)). Fraud on the court "only" includes "the most egregious conduct, such as bribery of a judge or members of a jury" and "fabrication of evidence". *Rozier*, 573 F.2d at 1338. "Less egregious misconduct, such as nondisclosure to the court of facts allegedly pertinent to the matter before it, will not ordinarily rise to the level of fraud on the court". *Id.* In the present case, while it is true that Hines alleges that his speech was chilled, but discovery has demonstrated that he has continued to communicate with pet owners, this discrepancy does not amount to the fabrication of evidence or similarly "egregious" conduct necessary to show a fraud on the court.

The Court concludes that Hines has alleged an injury in fact.

2. Traceability

Standing also requires "a causal connection between the injury and the conduct complained of" to ensure the injury is "fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court." *Bennett v. Spear*, 520 U.S. 154, 167 (1997). "[A]n injury resulting from the application or threatened application of an unlawful enactment remains fairly traceable to such application". *Fed. Election Comm'n v. Cruz*, 142 S. Ct. 1638, 1647 (2022).

Here, the Board acknowledges that it enforces the Examination Requirement and has enforced this statute in the past against Hines. Hines can sue the members of the Board in their official capacity because they have "'some connection with the enforcement of the act' in question", are "'specially charged with the duty to

enforce the statute' and" are "threatening to exercise that duty." *Tex. Dem. Party v. Abbott*, 978 F.3d 168, 179 (5th Cir. 2020) (quoting *Okpalobi v. Foster*, 244 F.3d 405, 414–15 (5th Cir. 2001)). As a result, Hines has demonstrated an alleged injury that is fairly traceable to the Board's conduct.[8]

3. Redressability

Finally, redressability ensures it will "be likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision." *Bennett*, 520 U.S. at 167.

Hines seeks a declaratory judgment that "Tex. Occ. Code § 801.351; Tex. Occ. Code §§ 801.401-02; Tex. Admin. Code Title 22, Part 24, § 573.27 (Rule of Professional Conduct involving 'Honesty, Integrity and Fair Dealing'); and related regulations and practices promulgated or carried out under the Texas Veterinary Licensing Act are unconstitutional as applied and on their face to the extent that they prohibit Dr. Hines from providing veterinary advice solely through electronic means without first physically examining the animal that is the subject of that advice". (Complaint, Doc. 1, 34) In addition, he requests an injunction preventing the Board from enforcing those "unconstitutional statutes, regulations, and practices against Dr. Hines". (*Id.*) Granting Hines his requested relief and enjoining the Board from enforcing the statutes will redress any

[8] On July 27, 2023, the Board informed the Court that effective September 1, 2023, the Board's rulemaking and enforcement powers will transfer to the Texas Department of Licensing and Regulation. (Advisory, Doc. 100) The Board suggests that this change in Texas law will render Hines's lawsuit moot. (*Id.*) The Court, however, need not reach that issue, as jurisdiction currently exists in this lawsuit.

suppression of Hines's speech stemming from the laws' enforcement. The injunction will relieve the threat of criminal prosecution and administrative penalties. *See Ctr. for Individual Freedom v. Carmouche*, 449 F.3d 655, 661 (5th Cir. 2006) ("Potential enforcement of the statute caused the [] self-censorship, and the injury could be redressed by enjoining enforcement".).

The Board challenges redressability on the grounds that other provisions of Texas law prohibit Hines's intended conduct. For example, the Board cites to Section 573.24(a) of Title 22 of the Texas Administrative Code, construing that regulation as impliedly requiring veterinarians to conduct a physical examination of the animal to be treated. This provision, contends the Board, would authorize the requirement of a physical examination even if the Court enjoined enforcement of the specific laws that Hines challenges.[9] This argument fails, however, because Hines has sought a declaratory judgment that any statute, regulation, or rule that prohibits him from offering personalized veterinary advice to pet owners without a prior physical examination is unconstitutional and cannot be enforced against him. As a result, the requested relief would redress Hines's injuries as to any Texas law that prohibits his activity with respect to pet owners.

For these reasons, Hines has satisfied the elements of injury in fact, traceability, and redressability. He

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[9] The Court notes that this line of reasoning cuts against the Board's argument that Hines does not face a credible threat of prosecution. The Board is arguing that even if the Court enjoined enforcement of the Examination Requirement, the Board could, and presumably would, enforce an analogous requirement through other regulations.

possesses standing to pursue his claims against the Board.

B. First Amendment Analysis

Satisfied that Hines has standing to pursue his lawsuit, the Court turns to its central mandate: determining whether the Examination Requirement "regulate[s] only speech, restrict[s] speech only incidentally to [the] regulation of non-expressive professional conduct, or regulate[s] only non-expressive conduct." *Hines II*, 982 F.3d at 272 (quoting *Vizaline*, 949 F.3d at 931) (cleaned up).

Previously, in its Order denying the Board's motion to dismiss, the Court concluded that the Examination Requirement represented a content-based regulation of Hines's speech. (Order, Doc. 68) Now, upon further consideration of the issue, and with the benefit of additional briefing and discovery in this case, the Court reaffirms that the challenged statute regulates Hines's speech, but finds that the regulation is content neutral and subject to intermediate scrutiny.

1. Speech Versus Conduct

"The First Amendment, applicable to the States through the Fourteenth Amendment, prohibits laws that abridge the freedom of speech." *NIFLA*, 138 S. Ct. at 2371. In cases brought under the Free Speech Clause, a court at times must initially determine whether the challenged law abridges the freedom of speech or merely impacts an individual's non-expressive conduct. A court's conclusion on this threshold question impacts the standard, if any, that the state must satisfy to justify the law's continued enforcement. For example, some laws affect only an individual's non-expressive conduct and do not present First Amendment concerns. *See, e.g., United States v. Hansen*, 143 S. Ct. 1932, 1946 (2023) (noting

that laws prohibiting "smuggling noncitizens into the country", "providing counterfeit immigration documents", and "issuing fraudulent Social Security numbers to noncitizens" restrict "nonexpressive conduct—which does not implicate the First Amendment at all"). In those cases, the court does not analyze the state's motivation in passing the law or the statute's breadth. At the other end of the spectrum, some laws directly prohibit certain communications or compel individuals or organizations to disseminate a particular message. *See, e.g.*, *HLP*, 561 U.S. at 27–28 (concerning a law that banned speech amounting to "material support" of terrorist organizations); *NIFLA*, 138 S. Ct. at 2369 (involving a law requiring pregnancy crisis centers to inform patients about public programs offering abortion services). In those instances, if the regulation is content based—i.e., if it "target[s] speech based on its communicative content"—the law is "presumptively unconstitutional and may be justified only if the government proves that" the challenged regulation is "narrowly tailored to serve compelling state interests." *NIFLA*, 138 S. Ct. at 2371 (quoting *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015)). On the other hand, if the law regulates speech in a neutral fashion, the state must satisfy intermediate scrutiny, which generally requires the state to show that the regulation is "sufficiently drawn to achieve" a "substantial" interest. *NIFLA*, 138 S. Ct. at 2375.[10]

Some cases rest in between regulating pure speech and solely regulating non-expressive conduct. For example, a law may focus only on an individual's non-

[10] Courts have applied varying iterations of intermediate scrutiny to different types of speech, as discussed *infra* Part III.B.3.

expressive conduct, but still have an impact on the individual's speech. *See, e.g.*, *id.* at 2373 (noting that a law requiring physicians to obtain informed consent prior to abortion procedures regulated speech incidentally to professional conduct—namely, performing the procedure). In such circumstances, courts also apply intermediate scrutiny. *See Cap. Associated Indus., Inc. v. Stein*, 922 F.3d 198, 209 (4th Cir. 2019) (finding "intermediate scrutiny is the appropriate standard for reviewing conduct regulations that incidentally impact speech" (citing *Ohralik v. Ohio Bar Ass'n*, 436 U.S. 447, 460 (1978))).

As a general matter, regulations of conduct prescribe what a person "must *do*". *Rumsfeld v. F. for Acad. & Institutional Rts., Inc.*, 547 U.S. 47, 60 (2006) (emphasis in original). In *Rumsfeld*, the Court concluded that a law requiring law schools to give military recruiters equal access to on-campus recruiting events regulated conduct and not speech, reasoning that the law affected "what law schools must *do*—afford equal access to military recruiters—not what they may or may not *say*." *Id.* (emphasis in original); *see also id.* at 62 (noting that laws prohibiting racial discrimination in hiring "will require an employer to take down a sign reading 'White Applicants Only'" but that "hardly means that the law should be analyzed as one regulating the employer's speech rather than conduct"); *Hansen*, 143 S. Ct. at 1946.

At times, laws focus on conduct, but impose an incidental impact on speech. For example, the Supreme Court has explained that a price regulation such as "a law requiring all New York delis to charge $10 for their sandwiches" would regulate conduct by dictating how much money a deli owner could charge. *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 47 (2017).

Such a law, however, would also affect the deli operators' speech by changing the price listed on the menu or changing how employees communicated about those prices. This impact would only "indirectly dictate the content of that speech" because "the law's effect on speech would be only incidental to its primary effect on conduct". *Id.*

In other cases, courts have concluded that regulations that directly dictate the content of speech can nevertheless represent only the regulation of conduct with an incidental impact on speech. Informed consent requirements represent such an example. Those regulations require doctors to communicate specific information to patients before a procedure. Even though such regulations mandate specific messages, courts consider them as laws regulating "speech only 'as part of the practice of medicine, subject to reasonable licensing and regulation by the State.'" *NIFLA*, 138 S. Ct. at 2373 (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992), *overruled on other grounds by Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228 (2022)) (emphasis in original).

Turning to the present matter, the Court must consider whether the Examination Requirement regulates only Hines's speech, only his non-expressive conduct, or his non-expressive conduct with an incidental restriction on his speech. As a general matter, the Examination Requirement expressly concerns only conduct. A veterinarian must establish a veterinarian-client-patient relationship before providing veterinary advice to animal owners. And to establish a veterinarian-client-patient relationship, the veterinarian must conduct a physical examination of the animal or visit the premises where the animal is kept. The physical

examination or site visit represents pure non-expressive conduct.

But Hines presents an as-applied challenge. As a result, the Court examines the statute in relation to the facts of this particular case, and not whether the law would be constitutional as applied to every action taken by every veterinarian in Texas. *See HLP*, 561 U.S. at 28 (considering the law at issue as applied to the plaintiffs, even though the law was generally directed at conduct); *Foti v. City of Menlo Park*, 146 F.3d 629, 635 (9th Cir. 1998) ("An as-applied challenge contends that the law is unconstitutional as applied to the litigant's particular speech activity, even though the law may be capable of valid application to others."). Courts first consider the statute's "primary effect". *Expressions Hair Design*, 581 U.S. at 47. But even when a law generally regulates conduct, if the state directs the law at an individual because "of what his speech communicate[s]", the law is considered to regulate speech. *See HLP*, 561 U.S. at 28 (citing *Cohen v. California*, 403 U.S. 15 (1971)). As a result, "a statute or a rule may be held constitutionally invalid as applied when it operates to deprive an individual of a protected right although its general validity as a measure enacted in the legitimate exercise of state power is beyond question." *Boddie v. Connecticut*, 401 U.S. 371, 379 (1971).

Hines argues that as applied to him, the Examination Requirement regulates his speech. He points out that his sole interaction with animal owners consists of email exchanges. He neither physically examines the animal nor visits the premises on which the animal is kept. At most, he reviews the animal's medical records, pictures, or videos that the owner provides to him.

Given the nature of Hines's interaction with pet owners, the Court agrees that the Examination Requirement primarily regulates his speech. In an as-applied challenge, the key to determining when the government is regulating speech and when it is regulating conduct is to look at what "trigger[s] coverage under the statute". *HLP*, 561 U.S. at 28. If it is "communicating a message", then the statute as applied to the plaintiff regulates speech. *Id.* While Hines may engage in some conduct, such as reviewing an animal's medical records or reaching a diagnosis based on those medical records and his professional experience, his activity that triggers the Board's enforcement of the Examination Requirement is his communication with pet owners. The Board claims that "words, alone, can constitute[] conduct". (Board's Objs., Doc. 96, 4 (emphasis in original)) But while that statement may be valid in some circumstances, the position does not hold true here. It is Hines's communication with pet owners that subjects him to potential discipline. His emails trigger the government's application of the law. And those communications represent speech.

The Board also argues that the Examination Requirement concerns solely conduct because Hines "would be subject to disciplinary action for failing to perform a physical examination prior to diagnosing an animal—even if he never communicated that diagnosis to the pet owner." (Board's Objs., Doc. 96, 7) This statement sweeps too broadly. For example, Hines could access and review information about a specific animal via the internet. He could mentally apply his experience and knowledge to reach a specific diagnosis, technically engaging in veterinary medicine as defined by Section 801.002(5) of the Texas Occupation Code. But

considering such conduct the unlawful practice of veterinary medicine or as conduct subject to professional discipline would be inconsistent with basic First Amendment principles against criminalizing thought. *See Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 253 (2002) ("First Amendment freedoms are most in danger when the government seeks to control thought or to justify its laws for that impermissible end."); *see also Ex parte Harrington*, 499 S.W.3d 142, 148 (Tex. App. Houston—[14th Dist.] 2016, pet. ref'd) ("An offense must have an *actus reus*." (citing *Ramirez-Memije v. State*, 444 S.W.3d 624, 627 (Tex. Crim. App. 2014))). The Board's statement reflects only that in a normal context, a veterinarian's conduct—e.g., physically examining an animal and reaching a diagnosis—and the veterinarian's speech—i.e., communicating the diagnosis to an animal owner—go hand in hand. This scenario may lead to the conclusion that as generally applied, the Examination Requirement could be viewed as regulating conduct with an incidental burden on speech. But when applying the Examination Requirement to Hines, the Board focuses on his speech with animal owners. Ultimately, were Hines to merely review an animal's medical records and reach a diagnosis, but not subsequently communicate with the pet owner, the Board almost certainly would have no cause to enforce the Examination Requirement against him.

On this issue of conduct versus speech, Hines correctly analogizes to the Supreme Court's analysis in *HLP*. That case concerned an as-applied challenge to a prohibition on providing terrorist groups "material support", defined as any "service, including . . . training, expert advice or assistance". 18 U.S.C. § 2339A(b)(1). The statute further defined "training" as "instruction or

teaching designed to impart a specific skill, as opposed to general knowledge", and defined "expert advice or assistance" as "advice derived from scientific, technical or other specialized knowledge." *Id.* at § 2339A(b)(2)–(3). In defense of the statute's constitutionality, the government argued that the material support provision only regulated speech incidentally to conduct. The Supreme Court, however, disagreed, explaining that while the material support ban could "be described as directed at conduct, . . . as applied to plaintiffs the conduct triggering coverage under the statute consist[ed] of communicating a message." *HLP*, 561 U.S. at 28. As applied to the plaintiffs, the Supreme Court concluded, the material support ban restricted their speech. In the same manner, Hines wishes to provide veterinary advice to pet owners by communicating with them via email, and it is this activity that leads the Board to threaten disciplinary action against him. Although the Examination Requirement is generally directed at conduct, as applied to Hines's activities, the Board is directing the Examination Requirement to prohibit his speech.

2. Content Neutral Versus Content Based

Having concluded that the Examination Requirement, as applied to Hines, regulates his speech, the Court must consider whether the law is content neutral or content based. This analysis determines whether the state must satisfy intermediate or strict scrutiny to defend the regulation. *See City of Austin v. Reagan Nat'l Advert. of Austin, LLC* (*Reagan Nat'l II*), 142 S. Ct. 1464, 1475 (2022) (concluding that intermediate scrutiny applies to a content-neutral regulation); *Reed*, 576 U.S. at 165 (applying strict scrutiny to a content-based regulation).

"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*, 576 U.S. at 163. The court must "consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *Id.* (quoting *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011)). Even when a law is facially neutral, a court may find it content based if the law "cannot be 'justified without reference to the content of the regulated speech'" or if the law was "adopted by the government 'because of disagreement with the message [the speech] conveys'". *Id.* (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)) (alteration in original). On the other hand, the state may examine the speech at issue if necessary to apply neutral regulations, without triggering strict scrutiny. *Reagan Nat'l*, 142 S. Ct. at 1472–73. The *Reed* decision does not stand for the proposition that strict scrutiny automatically applies if, in order to determine how to apply a regulation, a "reader must ask: who is the speaker and what is the speaker saying". *Id.* at 1471 (quoting *Reagan Nat'l Advert. of Austin, Inc. v. City of Austin* (*Reagan Nat'l I*), 972 F.3d 696, 706 (5th Cir. 2020)).

Based on these principles, the Court concludes that to the extent that the Examination Requirement affects Hines's speech, it does so neutrally.[11] The Board's

[11] In *Hines I*, the Fifth Circuit also concluded that the Examination Requirement represented a content-neutral regulation. *See Hines I*, 783 F.3d at 201–02. The parties contest whether this finding survived *NIFLA*. (See Board's Response to Hines's MSJ, Doc. 84, 12 (arguing that "the Fifth Circuit already ruled that the physical examination requirement is content neutral" (emphasis in original)); Hines's MSJ Reply, Doc. 87, 11 (contending that the Fifth Circuit's reasoning on the issue "was squarely

enforcement of the Examination Requirement does not depend on what veterinary advice Hines provides to the pet owner. In that respect, the Examination Requirement remains agnostic. For example, the State has not deemed certain veterinary advice acceptable, and other forms of advice harmful, disfavored, or disagreeable. The Examination Requirement applies neutrally to all forms of veterinary care and veterinary speech.

Hines correctly notes that the Board must analyze his communications with pet owners to determine whether he has violated the Examination Requirement. But this fact does not render the regulation content based. The Supreme Court has explained that its "precedents and doctrines have consistently recognized that restrictions on speech may require some evaluation of the speech and nonetheless remain content neutral." *Reagan Nat'l II*, 142 S. Ct. at 1473. For example, in examining regulations differentiating between signs advertising on-premises and off-premises businesses, the Supreme Court explained that "enforcing the [] challenged sign code provisions requires reading a billboard to determine whether it directs readers to the property on which it stands or to some other, offsite location." *Id.* at 1472. Despite the need to analyze the substance of the billboard, such a regulation was not "content-based" because "[a] sign's substantive message itself is

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rejected within *NIFLA*'s rejection of the professional speech doctrine")) Given the Court's independent finding that the Examination Requirement is content neutral, the Court need not reach whether the Fifth Circuit's resolution of the content-based versus content-neutral analysis in *Hines I* rested on the professional speech doctrine and has been, as a result, undermined by *NIFLA*.

irrelevant to the application of the provisions". *Id.* The Supreme Court analogized to regulations of solicitations, explaining that "[t]o identify whether speech entails solicitation, one must read or hear it first." *Id.* at 1473. Nevertheless, solicitation restrictions represent content-neutral regulations, "so long as they do not discriminate based on topic, subject matter, or viewpoint." *Id.*

The same can be said of the Examination Requirement. The Board must review Hines's emails to determine whether they represent the practice of veterinary medicine, akin to reviewing billboards to view the content of the advertisements or reading a communication to determine whether it represents a solicitation. If the Board finds that one of Hines's emails does not constitute the practice of veterinary medicine, the Board has no basis to discipline him for sending that email. On the other hand, if the Board concludes that a message contains veterinary advice, the Board applies the Examination Requirement to determine whether Hines established the required veterinarian-client-patient relationship before engaging in the practice of veterinary medicine. In conducting this analysis, however, the Board does not determine whether it agrees with the content of Hines's messages or approves of the topics or subject matter discussed. The substance of Hines's veterinary advice proves irrelevant to the application of the Examination Requirement. The Board merely reviews the emails to gauge whether Hines, before engaging in those communications, must satisfy that requirement.

Hines's specific communications with animal owners, and the Board's position as to those communications, demonstrates this principle. As previously described in this Order and Opinion, Hines's emails with animal

owners vary in terms of substance and length. (*See supra* Part I.E.3) The Board has not taken the position that Hines engaged in the practice of veterinary medicine in each of those communications, or that he had to satisfy the Examination Requirement before engaging in any of those email exchanges. On the contrary, the Board expressly acknowledges that some of those communications do not represent the practice of veterinary medicine. To reach that conclusion, however, the Board had to examine the emails— not to determine whether it agreed with or approved the veterinary advice, but solely to gauge whether the communication amounted to veterinary advice. The need for this review does not transform the Examination Requirement into a content-based regulation.

Hines essentially proposes a test that automatically applies strict scrutiny whenever the state must review an individual's communications to determine whether to apply a regulation. But accepting this approach not only runs contrary to the applicable law, it leads to unreasonable results. For example, his position would require the application of strict scrutiny to the threshold requirement that veterinarians be licensed. Texas requires that veterinarians obtain and maintain a veterinary license. *See* TEX. OCC. CODE ANN. § 801.251. An unlicensed individual cannot establish a valid veterinarian-client-patient relationship, even if the individual has physically examined the animal at issue. To determine whether an individual has provided veterinary advice without a license, the Board at times would have to analyze the individual's communications with the pet owner. Based on the need for this review, Hines's position would automatically subject the license requirement to strict scrutiny. But the Court is unaware

of any judicial decision requiring a state to satisfy strict scrutiny to justify a licensing requirement for veterinarians. *Cf. Brokamp v. James*, 66 F.4th 374, 393 (2d Cir. 2023) (finding that a state licensing requirement for mental health professionals was content neutral and thus subject to intermediate scrutiny because the "license requirement applies—regardless of what is said").

A similar result occurs with the legal practice. As with veterinary medicine, states restrict who may practice law. A person cannot engage in the practice of law without a law license, and in most states, such as in Texas, a person cannot obtain a license without passing the bar exam. Tex. Rules Govern. Bar Adm'n R. II(6) (2021). For the state to determine whether an unlicensed individual has engaged in the unauthorized practice of law by providing legal advice to other persons, the state must analyze the individual's communications. Under Hines's analysis, the need to review those communications would render the statute a content-based restriction of the individual's speech. Of course, courts have rejected this position. *See Osborne v. Travis Cnty.*, 638 Fed. App'x 290, 293 (5th Cir. 2016) (finding that requiring individuals to pass the bar exam to practice law did not present "a plausible constitutional violation", despite the plaintiff's attempt to frame the regulation as violating the First Amendment right to free speech); *see also Doyle v. Palmer*, 365 F. Supp. 3d 295, 304 (E.D.N.Y.), *aff'd*, 787 F. App'x 794 (2d Cir. 2019) (finding New York's sponsor affidavit requirement for bar admission did not violate the plaintiff's free speech rights).

In light of Hines's unworkable test, and because the Board does not restrict Hines's speech based on

viewpoint or on the topics or subject matter discussed when providing veterinary advice, the Court concludes that the Examination Requirement represents a content-neutral regulation of speech.[12] As a result, the Court will apply intermediate scrutiny.

3. Intermediate Scrutiny

In constitutional law, "intermediate scrutiny" ordinarily requires a challenged law to be "substantially related to an important governmental objective." *Clark v. Jeter*, 486 U.S. 456, 461 (1988) (describing the intermediate scrutiny standard in a claim under the Equal Protection Clause); *see also NIFLA*, 138 S. Ct. at 2375 (requiring the government to show a regulation is "sufficiently drawn to achieve" a "substantial" interest to survive intermediate scrutiny).

In the context of the Free Speech Clause, courts have applied varying iterations of intermediate scrutiny to different types of speech. These standards are similar, with some distinctions. For example, regulations of expressive conduct are "sufficiently justified if" the regulation: (1) "is within the constitutional power of the Government"; (2) "furthers an important or substantial governmental interest"; (3) "the governmental interest is unrelated to the suppression of free expression"; and (4) "the incidental restriction on alleged First Amendment freedoms is no greater than is essential to the furtherance of that interest." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). When analyzing restrictions on commercial speech, courts require that

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[12] In light of this conclusion, the Court need not consider the Board's position that if the Examination Requirement represented a content-based regulation, the Court should "recognize a new category of content-based speech that is not subject to strict scrutiny." (Board's Response to Hines's MSJ, Doc. 84, 14)

the government: (1) "assert a substantial interest to be achieved by restrictions on commercial speech"; (2) show that "the restriction [] directly advance[s] the state interest involved"; and (3) that the "speech restrictions [are] 'narrowly drawn'". *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 564–65 (1980) (quoting *In re Primus*, 436 U.S. 412, 438 (1978)); *see also Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 623–24 (1995). With respect to the second prong of the *Central Hudson* standard, the government cannot rely on "mere speculation or conjecture", but must show evidence of "real" harm that the restriction materially alleviates. *Edenfield v. Fane*, 507 U.S. 761, 770–71 (1993).

Courts also apply intermediate scrutiny to time, place, or manner restrictions effectuated through content-neutral regulations. *See Reagan Nat'l II*, 142 S. Ct. at 1475 (describing the inquiry for time, place, or manner restrictions as "intermediate scrutiny"). "A content-neutral regulation will be sustained under the First Amendment if it advances important governmental interests unrelated to the suppression of free speech and does not burden substantially more speech than necessary to further those interests." *NetChoice, L.L.C. v. Paxton*, 49 F.4th 439, 482 (5th Cir. 2022) (quoting *Turner Broad. Sys., Inc. v. F.C.C.* (*Turner II*), 520 U.S. 180, 189 (1997)); *see also Reagan Nat'l Advert. of Austin, Inc. v. City of Austin* (*Reagan Nat'l III*), 64 F.4th 287, 293 (5th Cir. 2023) (explaining that under "intermediate scrutiny" any "restriction on speech or expression must be narrowly tailored to serve a significant governmental interest" (cleaned up)).

In the present matter, at the motion to dismiss stage, the Board presented its alternative argument that if intermediate scrutiny applied, the *O'Brien* test would

control because the Examination Requirement regulated only conduct. (Board R&R Objs., Doc. 66, 8–9) But this position suffers from two deficiencies. First, the Court has determined that as applied to Hines, the Examination Requirement regulates pure speech, rendering the *O'Brien* test for expressive conduct inapplicable. In addition, courts appear to apply the *O'Brien* test only where the action at issue was not written or spoken word. *See, e.g., Texas v. Johnson*, 491 U.S. 397, 403 (1989) (flag burning); *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 286 (5th Cir. 2001) (school uniforms). This Court has located no Supreme Court or circuit precedent applying *O'Brien* to a regulation that applied to a profession and that affected both conduct and speech. And the parties did not cite any.

In their summary judgment briefing, the parties predominantly rely on the *Central Hudson* standard, as applied in *Sorrell v. IMS Health Inc.* (*See, e.g.,* Board's MSJ, Doc. 82, 27; Hines's Response to Board's MSJ, Doc. 85, 19) But *Sorrell* concerned commercial speech, as did *Central Hudson*. *See Sorrell*, 564 U.S. at 557 (involving a challenge to a state law "restrict[ing] the sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors"); *Central Hudson*, 447 U.S. at 559–61 (concerning a ban on commercial advertising by electric utilities). In the present case, neither party contends that Hines proposes a commercial transaction in connection with his communication of veterinary advice. As a result, the *Central Hudson* standard proves a poor fit.

Ultimately, the Court concludes that the Examination Requirement, which represents a content-neutral regulation, should be analyzed as a time, place,

or manner restriction. While the Examination Requirement may not resemble a typical time, place, or manner restriction on speech, the nature in which the Board applies the Examination Requirement to Hines best represents a restriction on the manner in which he may engage in veterinary medicine—i.e., by first physically examining the animal. As a result, to pass constitutional muster, the Examination Requirement must "advance[] important governmental interests unrelated to the suppression of free speech and [] not burden substantially more speech than necessary to further those interests." *NetChoice*, 49 F.4th at 482. The Board also must demonstrate that the Examination Requirement is "narrowly tailored to serve a significant governmental interest". *Reagan Nat'l III*, 64 F.4th at 293 (cleaned up). "[T]he government's burden . . . 'is not satisfied by mere speculation or conjecture; rather, a governmental body seeking to sustain a restriction . . . must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree.'" *Sarre v. City of New Orleans*, 420 F. App'x 371, 375 (5th Cir. 2011) (quoting *Fane*, 507 U.S. at 770–71).

Hines concedes that the Board's asserted interests—public and animal health and safety, public confidence in licensure, maintaining minimum standards of care, and preventing the spread of zoonotic diseases—are "substantial". (Hines's Response to Board's MSJ, Doc. 85, 19) He also does not present evidence that the Examination Requirement was created or applied to him specifically to suppress speech. As a result, no genuine dispute of material fact exists as to the importance of the government's interests or as to the requirement that the asserted interests be unrelated to the suppression of speech.

Instead, Hines contends that the Examination Requirement does not "directly advance" a "real harm" because the Board cannot prove his advice harmed any animals.[13] Effectively, he argues that the Examination Requirement is insufficiently tailored to survive intermediate scrutiny. *See, e.g., Turner Broad. Sys., Inc. v. F.C.C.* (*Turner I*), 512 U.S. 622, 664 (1994) (analyzing whether the legislature's "recited harms [were] real" and were materially alleviated by the challenged law as part of the tailoring analysis).

a. Real Harm

The Board must first demonstrate that the Examination Requirement addresses a real harm. The government cannot rely on "mere speculation or conjecture". *Fane*, 507 U.S. at 770. Evidence of real harm can include "studies", "anecdotal evidence", or instances of the plaintiff's "own conduct". *Id.* at 771. Courts view such evidence in light of "common sense". *Went For It*, 515 U.S. at 628 (quoting *Burson v. Freeman*, 504 U.S. 191, 211 (1992)). While a legislature cannot conjure harms out of whole cloth to justify legislation, lawmakers can enact statutes to proactively prevent identified harms. *See Turner I*, 512 U.S. at 665 ("Sound policymaking often requires legislators to forecast future events and to anticipate the likely impact of these events based on deductions and inferences for which complete empirical support may be unavailable."); *see*

[13] Hines bases this argument on commercial speech caselaw, specifically the second prong of the *Central Hudson* test. (*See, e.g.*, Hines's MSJ Resp., Doc. 85, 19 (relying on *Sorrell*)) While the Court finds the specific iteration of intermediate scrutiny from *Central Hudson* inapplicable, courts have applied the "real harm" inquiry to time, place, or manner restrictions that regulated speech neutrally. *See, e.g., Sarre*, 420 F. App'x at 375–76.

also Free Speech Coal., 535 U.S. at 264 (O'Connor, J., concurring) ("[T]his Court's cases do not require Congress to wait for harm to occur before it can legislate against it.").

In the present case, the Board relies on three primary types of evidence. First, the Board presents studies emphasizing the importance of the Examination Requirement. The literature indicates that veterinary telemedicine creates "risks of missed diagnoses" and, as a result, experts question whether states should allow the virtual creation of a veterinary-client-patient relationship. (Literature Rev., Doc. 82-1, 364) In one survey of veterinarians, "most participants acknowledged that the service provided by teleconsultations is complementary to that of physical consultations but stressed the need for having a face-to-face interaction before resorting to telematic means." (*Id.*; *see also id.* at 366 ("Veterinarians with exotic animal practices . . . recogni[z]e the advantages of teleconsulting and the potential benefit for situations with a recent hands-on examination of the patient, but they have concerns about establishing a direct relationship with a client and providing care to the patient without a physical exam".))

Second, the Board presents an expert, Dr. Carly Patterson, who opines on the importance of the physical examination, describing it as the "cornerstone of all veterinary care." (Patterson Report, Doc. 82-1, 114) "Without it," she continues, "veterinarians are left to aimlessly pursue diagnostics that might be needless and in the worst case scenario, completely circumvent the actual problem at hand, resulting in the death of the patient." (*Id.*) In her report, she presents five cases from her professional experience in which the physical

examination yielded critical information that telemedicine alone would fail to capture. (*Id.* at 119–22) For example, she details her treatment of a two-year-old Schnauzer brought in for "waxing and waning shifting leg lameness." (*Id.* at 122) Dr. Patterson notes, "The history and description of clinical signs from the owner sounded very much like an immune-mediated polyarthritis case, but the physical exam informed us otherwise." (*Id.*) Upon further examination, "[t]he dog had palpable cervical pain on neurologic examination and the Neurology Section recommended advanced imaging (MRI) of her neck for potential neurologic causes of spinal pain." (*Id.*) She concludes that "had [she] not performed a comprehensive physical examination with neurologic assessment, [she] would have missed an important component of establishing the dog's diagnosis." (*Id.*) The other four examples provide similar instances in which the physical examination revealed important information that the veterinarian could not obtain solely from verbal or written communications with the pet owner.[14]

Finally, the Board submits the opinions of another expert, Dr. Lori Teller, who reviewed Hines's emails with pet owners and opines that Hines "likely" harmed animals through his veterinary advice. She provides specific examples of deficiencies in Hines's communications with various animal owners, concluding that with respect to Rosen's cat and Scott's bird, Hines's advice likely left each animal in a "worse position". And Dr. Patterson likewise testified that Hines's advice could

[14] Consistent with Dr. Patterson's views, Hines's own website includes a term of use that reads: "Dear Viewer, There is no substitute for direct, hands-on examination of your pet." (Terms of Use, Doc. 82-1, 379)

have harmed the Unknown Cat, the Indian Pigeon, and the British Bird. (Patterson Dep., Doc. 82-1, 216, 213:19–25; *id.* at 217, 214: 1–2)

Taken together, the evidence on which the Board relies demonstrates the materiality and substantive reality of the harms that the Board fears. The scholarly literature evidences a concern that telemedicine without a prior physical exam can result in misdiagnoses. While experts in the field may disagree about the need for a physical examination, the debate alone does not negate the potential harm. Legislatures may assess competing evidence and make reasonable decisions to prevent harm. *See Turner I*, 512 U.S. at 665. In addition, the submitted expert opinions reveal multiple concrete examples when a veterinarian would have reached the wrong diagnosis and incorrect treatment plan absent a physical examination of the animal. Common sense instructs that treating an animal incorrectly causes harm—both by failing to treat the animal's true ailment and by subjecting it to the additional risks from unnecessary treatment. And another expert opines that in specific cases involving Hines, his diagnoses without a physical examination likely resulted in improper treatment plans.

Critically, Hines presents no controverting evidence. He challenges the sufficiency of the Board's evidence, but submits no competing expert testimony or any empirical data of his own. Instead, he relies primarily on the argument that the Board presents only possible harms that could have occurred, without identifying any actual harm. But, while it is true that no evidence conclusively reveals that an animal has suffered harm by receiving veterinary care without the benefit of a physical examination, the Board need not "wait for harm

to occur before it can legislate against it." *Free Speech Coal.*, 535 U.S. at 264 (O'Connor, J., concurring). The scientific literature and expert testimony demonstrate a credible risk of real harm. And the absence of any controverting evidence means that no genuine issue exists on the matter. The Court finds that the summary judgment evidence proves an actual harm that is not "merely conjectural".

b. Material Alleviation

For a regulation to be sufficiently drawn under intermediate scrutiny, the government must demonstrate that the "restriction will in fact alleviate" the real harm "to a material degree." *Fane*, 507 U.S. at 771. Importantly, the regulation need not be the least speech-restrictive means of achieving the government's interest. *Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 477 (1989). "Rather, the requirement of narrow tailoring is satisfied so long as the . . . regulation promotes a substantial government interest that would be achieved less effectively absent the regulation." *Reagan Nat'l III*, 64 F.4th at 293 (quoting *Rock Against Racism*, 491 U.S. at 799). For example, the Supreme Court has concluded that time-limited bans on soliciting accident victims and their relatives materially alleviate the harm of privacy intrusion and harm to the legal profession's reputation. *Went For It*, 515 U.S. at 626–28; *see also Moore v. Morales*, 63 F.3d 358, 363 (5th Cir. 1995) (reaching a similar conclusion as to a Texas Penal Code provision prohibiting such solicitation, as applied to attorneys); *Pub. Citizen Inc. v. La. Att'y Disciplinary Bd.*, 632 F.3d 212, 225–26 (5th Cir. 2011) (finding that a rule of professional conduct restricting attorneys' use of "a nickname, moniker, motto or trade name that states or implies an ability to obtain results in a matter"

materially addresses the harm resulting from "misleading lawyer advertising" (cleaned up)). In *Moore*, the accident victims' ability to opt out of such solicitation communications did not preclude the government's ability to show material alleviation because when seeking to alleviate a harm, the government "is not required to employ the least restrictive means in promoting its interest." *Moore*, 63 F.3d at 363.

Applying these principles to the challenged regulation in this lawsuit, the Court finds that the Examination Requirement is narrowly tailored to the government's asserted interests. By imposing the Examination Requirement to establish a veterinary-client-patient relationship, Texas law ensures that veterinarians possess information that proves important in many cases involving veterinary care. The data that veterinarians obtain through the physical examination of an animal typically cannot be secured by any other means.

Moreover, Texas law carves out "emergency situation[s]" in which veterinarians cannot perform a physical examination in a timely fashion. In such circumstances, "a veterinarian may, after determining the nature of the emergency and the condition of the animal, issue treatment directions to a non-veterinarian by means of telephone, electronic mail or messaging, radio, or facsimile communication", without having to physically examine the animal beforehand. 22 TEX. ADMIN. CODE § 573.10(j). Through this provision, Texas recognizes the potential benefits of telemedicine, but tailors it to cases where the preferred approach—i.e., veterinary care after a physical examination—is impractical. Accordingly, the Court finds that the

Examination Requirement materially alleviates a real harm.

Because the Examination Requirement is narrowly tailored to the Board's substantial interests, which are unrelated to the suppression of speech, the Court finds that based on the applicable law and the record in this case, the Examination Requirement withstands intermediate scrutiny.[15]

IV. Conclusion

For the reasons stated above, the Board may continue to enforce the Examination Requirement without violating Hines's free speech rights. Based on this conclusion, Hines is not entitled to injunctive relief.[16]

It is:

ORDERED that Plaintiff Ronald S. Hines's Motion for Summary Judgment (Doc. 83) is **DENIED**;

ORDERED that Defendants' Motion for Summary Judgment (Doc. 82) is **GRANTED** on the grounds explained in this Order and Opinion; and

ORDERED that Plaintiff Ronald S. Hines's claims based on the First Amendment to the United States Constitution are **DISMISSED WITH PREJUDICE**.

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[15] The Court notes that application of the *O'Brien* or *Central Hudson* standard would lead to the same conclusion— i.e., the Board has demonstrated that the Examination Requirement satisfies the iteration of the intermediate scrutiny standard that these cases establish.

[16] In addition, the Court's conclusion renders it unnecessary to reach the Board's argument that Hines's conduct is speech integral to a crime and, as a result, unprotected. The Court thus need not consider the sections of the Report and Recommendation distinguishing between Hines's communications with individuals in Texas, other states, and foreign countries.

The Court will separately issue a Final Judgment in accordance with this Order and Opinion.

Signed on August 15, 2023.

/s/ Fernando Rodriguez, Jr.
FERNANDO RODRIGUEZ, JR.
UNITED STATES DISTRICT JUDGE

APPENDIX C

First Amendment to the United States Constitution:

First Amendment provides:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

APPENDIX D

Texas Occupations Code § 801.351

Existence of Veterinarian-Client-Patient Relationship:

(a) A person may not practice veterinary medicine unless a veterinarian-client-patient relationship exists. A veterinarian-client-patient relationship exists if the veterinarian:
  (1) assumes responsibility for medical judgments regarding the health of an animal and a client, who is the owner or other caretaker of the animal, agrees to follow the veterinarian's instructions;
  (2) possesses sufficient knowledge of the animal to initiate at least a general or preliminary diagnosis of the animal's medical condition; and
  (3) is readily available to provide, or has provided, follow-up medical care in the event of an adverse reaction to, or a failure of, the regimen of therapy provided by the veterinarian.

(b) A veterinarian possesses sufficient knowledge of the animal for purposes of Subsection (a)(2) if the veterinarian has recently seen, or is personally acquainted with, the keeping and care of the animal by:
  (1) examining the animal; or
  (2) making medically appropriate and timely visits to the premises on which the animal is kept.

(c) A veterinarian-client-patient relationship may not be established solely by telephone or electronic means.

Acts 1999, 76th Leg., ch. 388, Sec. 1, eff. Sept. 1, 1999.
Amended by:

Acts 2005, 79th Leg., Ch. 971 (H.B. 1767), Sec. 1, eff. September 1, 2005.