No. 24-920

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,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF IN RESPONSE

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QUESTION PRESENTED

This is an as-applied challenge in which Texas is forbidding a retired veterinarian from exchanging emails with pet owners about their pets. The Question Presented is:

If an occupational regulation is triggered by communicating a message, does First Amendment scrutiny apply?

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INTRODUCTION

Texas' first Question Presented is not properly formulated. It asks "[w]hether professional conduct regulations that incidentally burden speech are subject to heightened First Amendment scrutiny." Pet. I. As worded, that question assumes away the key issue by characterizing the challenged application of Texas law as an *incidental* burden on speech. But the split is about how to distinguish between regulating speech and regulating conduct with an incidental effect on speech. The Fifth Circuit below used the correct test and concluded that, as applied, the Veterinary Practice Act is regulating Dr. Hines' speech, not his conduct (with an incidental effect on his speech). Because Texas is regulating speech, heightened First Amendment scrutiny applies. Pet. App. 17a. Other courts apply different tests. Thus, the correct first Question Presented is whether occupational regulations, when triggered solely by communicating a message, restrict speech or conduct.

As to a properly worded version of the first Question Presented, however, Texas makes some good points. There *is* a square, outcome-determinative split. This case *is* an appropriate vehicle for resolving an important disagreement. And Dr. Hines would benefit from a uniform national rule because he emails with pet owners around the country (indeed, around the world). Respondent thus does not oppose review of the first issue, correctly understood.[1]

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[1] Respondents that would benefit from a uniform rule sometimes acquiesce in a grant of certiorari. See, *e.g.*, Br. for Resp't 8,

That said, the decision below, although the minority view within the split, is plainly the correct one. The Fifth Circuit applied this Court's simple, intuitive rule for identifying when regulations regulate speech, not conduct: "Because the act in which Dr. Hines engaged that 'trigger[ed] coverage' under the [statute] was the communication of a message, the State primarily regulated Dr. Hines's speech." Pet. App. 16a–17a. (quoting *Holder* v. *Humanitarian Law Project*, 561 U.S. 1, 28 (2010)). The real basis of the split is the failure of *other* Courts of Appeals—the Fourth, Ninth, Tenth, and Eleventh Circuits—to consistently apply this straightforward rule to speech that the government restricts through occupational licensure. Instead, the other circuits employ a needlessly complex, multi-factor test (the Fourth), or they play word games by defining speech as "incidental" to "conduct" even when no conduct is involved (the Ninth, Tenth, and Eleventh). The Fifth Circuit resolved Dr. Hines's case correctly, so he does not need further review.

As to the first Question Presented, because Dr. Hines does not seek review yet acknowledges that Texas' petition makes a valid case for a grant, he will use this response to help the Court better understand the split of authority so it can best determine the right path forward. That includes addressing the Court's recent decision to review the Tenth Circuit's opinion in *Chiles* v. *Salazar*, a case involving restrictions on a counselor who engages in "conversion therapy" that

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Beard v. *Comm'r*, 566 U.S. 971 (2012) (No. 10-1553); Br. for Resp't 1–2, *Georgia* v. *Public.Resource.Org, Inc.*, 590 U.S. 255 (2020) (No. 18-1150); Br. for Resp't 7, *Spector* v. *Norwegian Cruise Line Ltd.*, 545 U.S. 119 (2005) (No. 03-1388).

aims to change a client's sexual orientation or gender identity entirely through speech. *Chiles* v. *Salazar*, No. 24-539, 2025 WL 746313 (U.S. Mar. 10, 2025). Texas ignored the conversion-therapy cases in its petition, but they are part of the split, and Dr. Hines will explain how the Court's eventual merits decision in *Chiles* may or may not resolve the split completely.

Dr. Hines will conclude by explaining that there is no need to grant review on the second Question Presented. That simply asks the Court to determine whether the panel below properly applied heightened First Amendment scrutiny to the record. That is pure error correction and quintessentially not what the Court does.

STATEMENT

Dr. Hines is a retired, disabled veterinarian in Brownsville, Texas. He left his brick-and-mortar practice in 2002 when providing care every day was no longer physically viable. But, like many retirees, he had a lifetime's worth of knowledge to share. After posting articles about pet care on his website, Dr. Hines began to receive questions from people across the country and around the world who could not afford a veterinarian or who had no access to one. So he answered them, doing his best to offer helpful advice, careful to say when he couldn't.[2]

In 2012, despite receiving no complaints, Dr. Hines discovered that talking about how to help pets,

[2] Eventually, Dr. Hines started charging some correspondents nominal sums, not to run a practice, but just to screen out trivial inquiries.

strays, and wild animals had amounted to a decade-long crime spree, at least in the eyes of Texas. The Texas Board of Veterinary Medical Examiners punished Dr. Hines for offering advice without, as the Texas Veterinary Practice Act requires, first examining the animals in person.

In 2013, at age 69, Dr. Hines sued. Although the Veterinary Practice Act often regulates veterinary conduct, such as performing surgery or prescribing medication, Dr. Hines argued that the law applied to him as a content-based restriction on pure speech. Because, put simply, he doesn't *do* anything. He doesn't perform surgery or prescribe medication. He doesn't examine animals. He just sits at home at his computer sharing his advice with grown adults who want to hear it. And whether he is allowed to speak depends on the content of what he says. If he discusses football, the weather, or even animals in general, that is fine. But if he gives advice about a specific animal, that is forbidden. That prohibition is a direct regulation of speech, not a regulation of conduct with an "incidental" effect on speech. There is no conduct for his speech to be incidental to. There is only speech.

As obvious as that may seem, Texas has fought Dr. Hines for the last 13 years through three trips to the Fifth Circuit, insisting his speech is not protected by the First Amendment. This long campaign has been a microcosm of the fractured debate in the Courts of Appeals about whether, and how, the First Amendment

applies when the government uses occupational-licensing laws to regulate speech.[3]

The professional-speech doctrine is in force. In 2015, in a perfunctory opinion, the Fifth Circuit directed dismissal of Dr. Hines' First Amendment claim, holding that, if a licensing statute generally regulates conduct writ large, then any as-applied restriction on speech "is but incidental to the constraint, and denies the veterinarian no due First Amendment right." *Hines* v. *Alldredge*, 783 F.3d 197, 202 (5th Cir. 2015) ("*Hines I*"). Notably, *Hines I* relied on Justice White's concurrence in *Lowe* v. *SEC*, which most clearly set forth what came to be known as the professional-speech doctrine—the idea that speech subject to occupational licensure was outside the protection of the First Amendment. *Id.* at 201–02 (quoting 472 U.S. 181, 232 (1985) (White, J., concurring)); see also, *e.g.*, *Serafine* v. *Branaman*, 810 F.3d 354, 359 (5th Cir. 2016) (explaining that the professional-speech doctrine is based on the *Lowe* concurrence).

This Court abolishes the professional-speech doctrine. Then in 2018, *NIFLA* v. *Becerra* abolished the professional-speech doctrine. See 585 U.S. 755, 767 (2018) ("Speech is not unprotected merely because it is uttered by 'professionals.'"). So Dr. Hines sued again, arguing that *NIFLA* had abrogated *Hines I*. The Fifth Circuit agreed and remanded for consideration of whether Texas' application of the physical-examination requirement operated as a restriction on speech itself or as a regulation of conduct with an

[3] A chart at the end of this brief lists the *eleven* rulings Dr. Hines has received on whether his speech is protected by the First Amendment.

incidental effect on speech. *Hines* v. *Quillivan*, 982 F.3d 266, 272 (5th Cir. 2020) ("*Hines II*").

Dr. Hines finally wins in a decision that announces a clear, simple rule based on this Court's precedent. After briefing on the speech-or-conduct question, discovery, and summary judgment, Dr. Hines went back up to the Fifth Circuit, which ruled for him in the principal opinion below. *Hines* v. *Pardue*, 117 F.4th 769 (5th Cir. 2024) ("*Hines III*"). *Hines III* applied the simple rule from *Humanitarian Law Project* to occupational licensing. In distinguishing speech regulation from conduct regulation, that simple rule states: Even if the statute "may be described as directed at conduct," the government is regulating speech when "as applied to plaintiffs the conduct triggering coverage under the statute consists of communicating a message." 561 U.S. at 28. Thus, even though the Veterinary Practice Act "may be described as directed at conduct," Dr. Hines' "conduct triggering coverage under the statute consisted of communicating a message"—emailing advice about specific animals. *Id.* *Hines III* thus properly held that Texas was regulating Dr. Hines' speech directly and that, on the record, Texas couldn't satisfy any level of heightened First Amendment scrutiny. *Hines III*, App. 17a, 32a.

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Now 82 and near the end of his 13-year quest to vindicate his First Amendment rights, Dr. Hines is at the Court's disposal. He will explain below why the

split is more complicated than Texas suggests and how this case fits in with *Chiles*, the conversion-therapy case the Court has already decided to hear. If the Court believes that this case will help resolve the genuine and serious split that Texas identifies, Dr. Hines does not oppose review. The record is ideal for explaining the distinction in the occupational-licensing context between regulating speech and regulating conduct with an incidental effect on speech. If, however, the Court wishes to deny Texas' petition and send Dr. Hines back to Brownsville for good, that would be fine too.

QP 1: THE SPLIT IS REAL AND THIS CASE IS AN APPROPRIATE VEHICLE, BUT WHAT TO DO DEPENDS ON *CHILES*.

I. The split is real and worse than Texas acknowledges.

To help the Court decide whether to grant review on the first Question Presented (as properly reformulated), Dr. Hines begins where the parties agree. Despite this Court's clear holding in *NIFLA* that there is no professional-speech doctrine, there is still an outcome-determinative split between the decision below and the three specific decisions from other Courts of Appeal that Texas identifies. *See* Pet. 21–24. The split is in fact worse than Texas describes, involving more Courts of Appeals and more fact-patterns, including the conversion-therapy cases.

A. Yes, Dr. Hines' case would have come out differently under the Fourth, Ninth, and Eleventh Circuit cases in Texas' petition.

Let's start with the decision below. The Fifth Circuit correctly followed this Court's precedents and held that, irrespective of any occupational-licensing regime, "a particular act constitutes protected speech, rather than unprotected conduct, if that act 'consists of communicating a message.'" App. 12a. That is a simple, intuitive test—if what you say, and not what you do, gets you in trouble, then the government is regulating speech directly, not incidentally while regulating conduct.

Texas is correct, however, that this case would have come out differently under the tests used in certain occupational-licensing cases in the Fourth, Ninth, and Eleventh Circuits. The Fourth Circuit held that communicating a message—in that case, sharing maps—is the professional "conduct" of surveying after balancing "a variety of factors." *360 Virtual Drone Servs. LLC* v. *Ritter*, 102 F.4th 263, 274 (4th Cir. 2024), petition for cert. filed, Sept. 9, 2024 (No. 24-279). That court then employed what it called a "loosened intermediate-scrutiny test for professional-conduct[]-focused regulations," and upheld the restriction on the mapmaker's speech. *Id.* at 276. Dr. Hines likely would have lost under that test.

The Eleventh Circuit played a labeling game in a case about nutrition advice. That court held that communicating a message about the right kind of diet is the "conduct" of dietetics, subject only to rational-basis review. *Del Castillo* v. *Sec'y, Fla. Dep't of Health*,

26 F.4th 1214, 1225–26 (11th Cir. 2022).[4] Dr. Hines would have lost under this test.

The Ninth Circuit also ruled in an unpublished decision that making and selling maps is the professional "conduct" of surveying, though not based on a multi-factor test. Instead, that court "solved" the First Amendment problem by relabeling speech (mapmaking) as conduct. *Crownholm* v. *Moore*, No. 23-15138, 2024 WL 1635566, at *2 (9th Cir. Apr. 16, 2024), petition for cert. filed, Sept. 9, 2024 (No. 24-276). Further, unlike the Fourth Circuit but like the Eleventh, the Ninth Circuit applied no First Amendment scrutiny, only the rational-basis test. Dr. Hines would have lost under this test.[5]

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[4] Strictly speaking, because the Ninth and Eleventh Circuits went on to conclude that the challenged licensing laws incidentally affected speech, it is not clear why they applied rational-basis review rather than, like the Fourth Circuit in *Ritter*, some kind of intermediate scrutiny under *United States* v. *O'Brien*, 391 U.S. 367 (1968). The bigger problem, however, is their conclusions that the state was not directly regulating speech.

[5] Dr. Hines does not agree that the Fifth Circuit below split with the Supreme Court of Texas. Contra Pet. 24–25. *Stonewater Roofing* turned on agency relationships, not speech per se. *Tex. Dep't of Ins.* v. *Stonewater Roofing Co.*, 696 S.W.3d 646, 656 (Tex. 2024), reh'g denied (Sept. 27, 2024). The Supreme Court of Texas remains very much open to the idea that occupational regulations can abridge the freedom of speech. See *id.* at 669–70 (Young, J., concurring) ("[I]t is not clear that *Del Castillo* is exactly right. . . . '[T]he traditional conduct-versus-speech dichotomy' remains the doctrinally mandated way to determine whether such a requirement violates the First Amendment.'").

B. The four conversion-therapy cases, which Texas refuses to mention, are also part of the split.

Texas is deliberately silent on the 2–2 split over conversion therapy. This strategic choice is likely why Texas made the odd move of illustrating the Ninth Circuit's position with *Crownholm*, an unpublished case about surveying licensure, rather than *Tingley* v. *Ferguson*, the published conversion-therapy case with which the Court is very familiar. 47 F.4th 1055 (9th Cir. 2022). The cases are the same in reasoning and outcome.

In Part III below, Dr. Hines will explain why Texas is strategically silent on conversion therapy and how that should affect the Court's analysis now that *Chiles* has been granted. But for now, it is enough to note that the split of authority over the conversion-therapy cases is part of the overall split on the First Amendment and occupational licensing. As the Court knows from the grant in *Chiles*, modern conversion therapy "seeks to change an individual's sexual orientation or gender identity" solely through speech. *Tingley*, 47 F.4th at 1063. In recent years, at least 20 jurisdictions have classified "conversion therapy" as "unprofessional conduct" that can subject "licensed health care providers" to professional discipline. *Id.* at 1064–65. In response, some courts, like the Ninth Circuit in *Tingley* and the Tenth Circuit in *Chiles*, have held that the First Amendment does not apply to speech in the form of "conversion therapy" because the words themselves are "treatment," and thus should be considered speech "incidental" to the occupational conduct of practicing therapy. *Id.* at 1081–

83. Other courts, like the Eleventh Circuit in *Otto* v. *City of Boca Raton*, have refused to play the labeling game with conversion therapy, holding that "the treatment . . . *is entirely* speech," "[s]peech is speech, and it must be analyzed as such for the purposes of the First Amendment." 981 F.3d 854, 865–66 (11th Cir. 2020) (cleaned up).[6] See also *King* v. *Governor of N.J.*, 767 F.3d 216, 224–25 (3d Cir. 2014) (treating conversion therapy as protected speech, not conduct).

This conversion-therapy split presents the same fundamental question as the split Texas identifies: How should courts distinguish between regulating speech and regulating conduct? And the tests in the conversion-therapy cases would have determined the outcome here. Dr. Hines would have lost under *Tingley* (Ninth) and *Chiles* (Tenth) and would have won under *King* (Third) and *Otto* (Eleventh).[7]

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[6] That irreconcilable cases like *Otto* and *Del Castillo* exist in the same circuit only underscores the extent to which courts do not understand how to apply the First Amendment in the context of occupational licensing.

[7] This case is actually distinguishable from *Tingley* and *Chiles* because Dr. Hines' emails are not themselves treatment. They are *advice* about treatment that the *recipient* of the email might perform or have performed on an animal. Even so, these cases resurrected the professional-speech doctrine in effect, if not name, so the Ninth and Tenth Circuits probably would have held that sending an email is "the practice of veterinary medicine" and ruled against Dr. Hines anyway.

II. This case is an appropriate vehicle for resolving an important question.

Texas is also correct (for the reasons listed at Pet. 29–30) that this case is a clean vehicle for resolving a properly formulated question about the circuit split. There is one claim, and it turns on whether heightened First Amendment scrutiny applies. If the Fifth Circuit is right about the test, Dr. Hines wins. If it is wrong, he loses.

The facts may also be the cleanest way to answer the question. Dr. Hines sits in his den and sends emails from his computer. If *that* is conduct, then that resolves all the cases identified above in the split.

Dr. Hines likewise agrees that the first Question Presented is important, though not for the reasons Texas asserts. See Pet. 25–28. Nothing about this case will limit the government's ability to regulate actual conduct such as surgery, distributing drugs, building a bridge, or flying a plane. Nor will the test below result in heightened First Amendment scrutiny for speech that truly is incidental to conduct. *NIFLA* defined incidental speech as speech that is "tied to" contemporaneous conduct, such as "an informed-consent requirement" that needs to be met immediately prior to surgery. 585 U.S. at 770. Dr. Hines' speech is not incidental to conduct because there is no conduct, much less contemporaneous conduct, that his speech is "tied to." Finally, this case also will not disturb torts for professional malpractice, which are a historically well-grounded remedy, like proscriptions against defamation and fraud. This case asks whether the government can impose broad prophylactic restrictions

on speech without satisfying the First Amendment, not whether people can be held accountable for tortious speech that is proven harmful after the fact.

Ultimately, this case is important because the sort of speech subject to occupational licensure is important. The people who want Dr. Hines' advice *really care* about helping the animals they love. People who want personal advice about their medical care, diet, mental health, or sexuality *really care* about what they learn. *Wollschlaeger* v. *Governor of Fla.*, 848 F.3d 1293, 1328 (11th Cir. 2017) (W. Pryor, J. concurring) ("Doctors help patients make deeply personal decisions, and their candor is crucial."). And, at bottom, Texas is arguing that, whenever the legislature subjects speech to occupational licensure, the government can forbid conversations between adults without having to satisfy any First Amendment scrutiny.

This case is also important because this is the 21st century. Dr. Hines was ahead of his time in 2002 when he started using the internet. Since then, technology has made it possible for strangers to instantaneously connect across state lines and international borders. Dr. Hines routinely communicates with people in places without veterinarians, where none are nearby, or where none are affordable. (One of the most surreal aspects of this case has been the State of Texas' insistence that Dr. Hines not give advice to people like a Good Samaritan in India who was trying to help a stray dog that was run over.) Closer to home, take teletherapy in the D.C. area. Suppose a person named Jim lives in Dupont Circle but works for one of the defense contractors in Arlington. Suppose Jim sees a Virginia therapist after work at her office in

Arlington. But if Jim works from home in D.C. on Wednesdays, he can't do a teletherapy session over Zoom unless his therapist is also licensed in D.C. where Jim's home is. Should D.C. be able to prohibit that private Zoom conversation without *any* First Amendment scrutiny? All that's to say, the First Amendment is central to the modern world. It cuts through these legal questions with that simple answer that, if an occupational regulation is triggered by communicating a message, the First Amendment applies and grown adults can talk to each other unless the government has a compelling reason to stop them.

Last, this case is important because occupational licensure is pervasive and trending toward ubiquity. A major reason the Court rejected the professional-speech doctrine in *NIFLA* is that more and more speech is falling under the auspices of occupational licensing. Texas' preferred rule would "give[] the States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *NIFLA*, 585 U.S. at 773. And it's not as if the government will always wield that power carefully: Beyond the cases discussed, governments have tried to use occupational-licensing laws to silence a Dear Abby style newspaper column on parenting (unlicensed psychology),[8] a diabetic's paleo health blog (unlicensed dietetics),[9] speech to the dying (illegal funeral directing),[10] expert testimony in court

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[8] *Rosemond* v. *Markham*, 135 F. Supp. 3d 574 (E.D. Ky. 2015).

[9] *Cooksey* v. *Futrell*, 721 F.3d 226 (4th Cir. 2013).

[10] *Richwine* v. *Matuszak*, 707 F. Supp. 3d 782 (N.D. Ind. 2023), appeal docketed, No. 24-1081 (7th Cir. Jan. 19, 2024); *Full*

(unlicensed engineering),[11] public criticism of local traffic lights (more unlicensed engineering),[12] and even—repeatedly—fortunetelling.[13]

Some cases—like the conversion-therapy cases or *NIFLA* itself, which involved government-mandated messages about abortion—have cultural, religious, or political overtones. In those cases, the importance of the First Amendment is obvious. But in this and most other cases, where there is no clear ideological valence, the government is still making value judgments about what information is trustworthy, who should be allowed to talk, and who should be allowed to listen. And that limits freedom of speech. Consider the record below. Texas retained two prominent veterinarians to scrutinize Dr. Hines' emails to determine whether what he says is good or bad, right or wrong. The panel below justly rejected that tactic as missing the point. The First Amendment means grown adults can talk privately and freely about things that matter, absent a compelling reason rooted in objective evidence to stop them. Having an occupational license doesn't mean the government gets to demand your private emails (and destroy privacy on the other end) so experts can speculate about whether your

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Circle of Living & Dying v. *Sanchez*, 2023 WL 373681 (E.D. Cal. Jan. 24, 2023).

[11] *Nutt* v. *Ritter*, 707 F. Supp. 3d 517 (E.D.N.C. 2023).

[12] *Järlström* v. *Aldridge*, 366 F. Supp. 3d 1205 (D. Or. 2018).

[13] *Moore–King* v. *County of Chesterfield*, 708 F.3d 560 (4th Cir. 2013), *abrogated by NIFLA*, 585 U.S. at 767; *Argello* v. *City of Lincoln*, 143 F.3d 1152 (8th Cir. 1998).

correspondence squares with whatever the experts consider orthodox in the field.

And the line between ideological and non-ideological cases can be hotly contested. Texas strategically omitted the conversion-therapy cases from its petition because it no doubt considers those to be "ideological" cases in which First Amendment scrutiny is appropriate. Texas wants its petition to be about supposedly non-ideological goals such as enforcing standards of care and malpractice. But, of course, that distinction itself is fraught. Colorado and Washington don't think they're being ideological in prohibiting conversion therapy. They think they're enforcing value-neutral standards of care and malpractice as part of licensing healthcare professionals. They say that conversion therapy is professional malpractice because there is "evidence that demonstrated a scientifically credible proof of harm to minors from conversion therapy." *Tingley*, 47 F.4th at 1078 (cleaned up). Whatever the First Amendment rule for occupational licensure, it can't turn on whether one side is being too "ideological." See Pet. App. 39a (Ramirez, J., concurring) (remarking that Texas' law merits strict scrutiny "even though 'it does not target viewpoints . . . .'").

That brings us to the grant in *Chiles*.

III. Granting review here depends on how the Court anticipates addressing *Chiles*.

Texas' petition checks the boxes for a writ of certiorari. But the Court isn't considering the petition on a blank slate. The question now is whether granting review makes sense after the grant in *Chiles*, one of the conversion-therapy cases. It probably depends on whether one reads the conversion-therapy cases as a split unto themselves (as Texas does) or as just one aspect of the larger split over occupational licensure and the First Amendment. And, of course, how the parties characterize the split in their merits briefing may influence how the Court views the split, which, in turn, may influence the Court's ultimate holding.

There are two ways to look at the *Chiles* grant: (A) the conversion-therapy split is about the test the Court will use in all occupational-licensing cases to distinguish regulating speech and regulating conduct or (B) the split is about ideologically motivated, viewpoint-specific restrictions on speech. If the Court foresees *Chiles* following path (A), then review here isn't necessary. If, on the other hand, the Court finds (B) more likely, then *Chiles* will leave the split unresolved as to most cases, like Dr. Hines', that do not involve viewpoint-specific speech restrictions on hot-button issues.

A. If *Chiles* is about the test that applies to all occupational-licensing cases to distinguish regulating speech from regulating conduct, then *Chiles* likely resolves the whole split.

As noted above, the conversion-therapy cases involve profound philosophical disagreements over the appropriate way for families to deal with the sexualities and gender identities of minors. But the First Amendment question that *Chiles* presents isn't special. It is, fundamentally, the same question presented by all of the cases in the occupational-licensure split, including this one. Is the right First Amendment test the simple one from *Humanitarian Law Project* that the Fifth Circuit used below? Namely, the First Amendment applies if the regulation is triggered by communicating a message.

Alternatively, the rule across the board might be that simply practicing a profession means that restrictions on speech are treated as incidental to professional conduct. That would seem to run into *NIFLA*'s abolition of the professional-speech doctrine, but the *Chiles* panel did take this approach in concluding that "[t]he power of the government to regulate the professions is not lost whenever the practice of a profession entails speech." *Chiles* v. *Salazar*, 116 F.4th 1178, 1210 (10th Cir. 2024); see *id.* at 1209–10 (relying on the Eleventh Circuit's *Del Castillo* opinion).

Nothing about *Chiles* depends on it being about conversion therapy. And whatever First Amendment test the Court adopts, the test should be the same

whether the message is about conversion therapy or, since Texas would consider it the practice of veterinary medicine, the right diet for someone's cat. If the Court expects *Chiles* to be briefed and decided on what the right test is for all occupational-licensing cases, then granting review here isn't necessary.[14]

B. But if *Chiles* is about ideological, viewpoint-based restrictions on speech, then much of the split may remain intact, and review may still make sense here or in another pending petition.

Of course, one cannot readily assume that the parties and the Court will resolve *Chiles* by focusing on a test about the speech/conduct distinction that will apply in all occupational-licensing contexts.

The other possible ground is reading the statute at issue in *Chiles* as a facial, viewpoint-specific restriction on speech. The statute makes it unlawful for psychological counselors to have conversations with minors that aim to "change an individual's sexual orientation or gender identity," but allows conversations that aim at "[a]cceptance, support, and understanding for" being gay or identifying with the opposite gender. Compare Colo. Rev. Stat. § 12-245-202(3.5)(a), with *id.* § 12-245-202(3.5)(b)(I)–(II). And, perhaps even more specifically, the statute can be read as a viewpoint-specific restriction that embodies an

[14] To be clear, Dr. Hines' view that the First Amendment *applies* to restrictions on conversion therapy is not a view about whether the evidence has been sufficient in any particular case to restrict conversion therapy under heightened scrutiny.

ideological worldview that some Americans intensely oppose on moral and religious grounds.

Texas seems to think the conversion-therapy cases should be resolved on this viewpoint-specific ground. That is obviously why Texas didn't mention them in its petition. Texas' analysis of *NIFLA* indicates that the State believes that the First Amendment is vital in the occupational-licensing context—if the government has an ideological motive. The petition agrees that the First Amendment applies when occupational "regulations [are] targeting speech itself" by restricting permissible speech to "controversial, ideologically charged, government-crafted" messages. Pet. 17. Texas similarly joined an amicus brief in support of certiorari in the Ninth Circuit's *Tingley* case consistent with this view: "Washington's ban target[s] speech based on its communicative content" because "it outlaws speech that affirms biological conformity but permits speech that affirms biological disunity." Amicus Br. of Idaho et al. 15, *Tingley* v. *Ferguson*, No. 22-942 (Apr. 26, 2023) (cleaned up). Elsewhere, that amicus brief condemned Washington's conversion-therapy law "because regulable conduct is not its object." *Id.*

Texas can speak for itself in its reply, but it no doubt envisions the Court issuing a ruling in *Chiles* to the effect of "First Amendment scrutiny applies when an occupational-licensing statute restricts speech based on ideological viewpoint." Texas then wants the Court to resolve the other cases in the split, including this one, based on a rule to the effect of "First

Amendment scrutiny does not apply when regulable conduct is the object, even if the law is triggered by speech."[15]

Of course, what may ultimately matter is how Ms. Chiles and the State of Colorado present their case on the merits. The scope of the parties' arguments frequently defines the scope of this Court's analysis. And it is hard to predict how Ms. Chiles will argue her case. On the one hand, Ms. Chiles framed her cert petition broadly around the speech/conduct distinction when she urged the Court to adopt the *Humanitarian Law Project* rule and cited Dr. Hines's case and *Chiles* as part of the same split. Pet. 19, 21–27, *Chiles* v. *Salazar*, No. 24-539 (Nov. 8, 2024).

On the other hand, Ms. Chiles' Question Presented focused on the ideological aspect of her case and her reply tacked in that direction. Consider the Question Presented: "Whether a law that censors certain conversations between counselors and their clients based

[15] To again be technical in the footnotes, Texas seems to want a sort of pre-*Reed* spin on *Ward* v. *Rock Against Racism*, in which a law is content based *only* when it was "adopted by the government 'because of disagreement with the message [the speech] conveys.'" *Reed* v. *Town of Gilbert*, 576 U.S. 155, 164 (2015) (quoting *Ward* v. *Rock Against Racism,* 491 U.S. 781, 791 (1989)). Dr. Hines doesn't think this makes sense and not just because the Court would have to overrule *Reed* and *NIFLA*. Even if Texas isn't regulating Dr. Hines' speech because it disagrees with a specific point he wants to make, the State wants to stop him from speaking because it doesn't trust him to say something useful unless he examines an animal in person first. This is still a content-based restriction entitled to full First Amendment protection, just as Texas would be regulating content if it forbade a journalist from writing anything about the war in Ukraine, regardless of viewpoint, without physically going to Kiev.

on the viewpoints expressed regulates conduct or violates the Free Speech Clause." *Id.* at i. And again from her preamble to the Question Presented: "A practicing Christian, Chiles believes that people flourish when they live consistently with God's design, including their biological sex. Many of her clients seek her counsel precisely *because* they believe that their faith and their relationship with God establishes the foundation upon which to understand their identity and desires." *Id.* Similarly in reply, Ms. Chiles emphasizes this "viewpoint-based" framing, when she distinguishes "[l]icensing laws, like the one in *Del Castillo*, [that] regulate *who* can speak, not what they can say." Cert. Reply 1, 3, *Chiles* v. *Salazar,* No. 24-539 (Jan. 15, 2025). (Mr. Tingley, represented by the same counsel, pivoted similarly in reply, distinguishing between "challenges to licensing laws" and "challenge[s to licensing] laws that censored speech based on viewpoint." Cert. Reply 6, *Tingley* v. *Ferguson*, No. 22-942 (July 21, 2023).) Justice Thomas' dissent from denial of cert in *Tingley* likewise emphasized viewpoint (although it certainly acknowledged the speech/conduct problem too). 144 S. Ct. 33, 34 (2023).

If *Chiles* is (or is likely to be) resolved on ideological viewpoint grounds, it may make sense to take a non-ideological case like this one (or one of the pending petitions on mapmaking). The risk of resolving *Chiles* solely on viewpoint grounds is that Texas, along with other governments across the country, will interpret that to mean that the First Amendment applies to occupational licensure *only when* the statute makes facial, viewpoint-specific distinctions. That, after all, is Texas' position now. Of course, there is no basis in this Court's jurisprudence for that position.

The Court has always maintained that viewpoint discrimination is an "egregious form of content discrimination," not the minimum for the First Amendment to apply. *Rosenberger* v. *Rectors & Visitors of Univ. of Va.*, 515 U.S. 819, 829–30 (1995). Yet, in the unsettled realm of free speech and occupational licensing, governments have argued and Courts of Appeals have accepted the proposition that restrictions based on content—not allowing Dr. Hines to speak in the form of individualized veterinary advice, for example—are not in fact content-based restrictions that trigger First Amendment scrutiny as long as there isn't the additional sin of viewpoint discrimination.

So what to do? If the Court concludes that reviewing the decision below on the merits is the cleanest way to resolve the split of authority beyond the conversion-therapy/viewpoint-specific context, Dr. Hines does not oppose that. Now in his 80s, he has defended his free-speech rights for more than a decade not just for his own sake, but because he wants to ensure that younger veterinarians and anyone with valuable knowledge can share it in the internet age with full First Amendment protection. He will see that long journey through to the end if the Court believes this is the right case to settle the issue.

Another approach would be to deny Texas' petition as too far ahead of the Court's merits docket, decide *Chiles*, and then, if anything remains of the split after *Chiles*, decide a future case when an appropriate post-*Chiles* petition comes along. Or the Court could hold Texas' petition pending resolution of *Chiles* and decide what to do.

A final option might be to grant review in one of the pending petitions about mapmaking, which present the split on the right test to use when occupational-licensing laws restrict speech. In Dr. Hines' view, both were wrongly decided because they failed to employ the correct test the Fifth Circuit used below.

REASONS FOR DENYING QP 2

There is no reason to grant the second Question Presented. It asks the Court to review the record below for error correction based on a law-review article questioning the Court's entire method of reviewing cert petitions. If the Court grants the first Question Presented and affirms that the Fifth Circuit applied the correct First Amendment test, there is no reason for the Court to second guess the Fifth Circuit's application of heightened scrutiny on the particular record. If the Court concludes that the panel below applied the wrong test, it should simply remand to have the lower court apply the correct test in the first instance.

Anyway, the Fifth Circuit's application of heightened scrutiny was very much correct. Here are just a few record reasons why prohibiting Dr. Hines from answering questions about animals (even without a physical examination) does not advance an important state interest:

- Neither of Texas' experts could identify an animal harmed by Dr. Hines.
- An exhaustive review by one of those *State* experts found no evidence that veterinary

telemedicine has ever harmed any animal anywhere.

- That same expert has a call-in radio show where she gives exactly the same sort of advice as Dr. Hines, apparently to no ill effect.

- Texas allows these sorts of conversation in *human* telemedicine, which was enough for Judge Elrod in *Hines II* to conclude that the censoring Dr. Hines might fail even the rational-basis test. 982 F.3d at 276 (Elrod, J., dissenting in part).

See Br. for Dr. Hines 31–46, *Hines III*, No. 23-40483 (5th Cir. Oct. 10, 2023) (explaining these and other reasons that Texas failed heightened scrutiny), *available at* 2023 WL 6930397.

CONCLUSION

As to an appropriately phrased QP 1, the Court could grant the petition or deny it. Dr. Hines is comfortable with either path. The petition should be denied as to QP 2.

Respectfully submitted,

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