No. 24-920

# In the Supreme Court of the United States

KEITH PARDUE, VICE PRESIDENT, TEXAS STATE BOARD OF VETERINARY MEDICAL EXAMINERS, ET AL.,

*Petitioners*,

v.

RONALD S. HINES

*Respondent.*

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

## BRIEF OF *AMICI CURIAE* THE AMERICAN VETERINARY MEDICAL ASSOCIATION AND TEXAS VETERINARY MEDICAL ASSOCIATION IN SUPPORT OF PETITIONERS

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## INTEREST OF *AMICI CURIAE*[1]

*Amici curiae* are the American Veterinary Medical Association ("AVMA") and Texas Veterinary Medical Association ("TVMA"), which are non-profit associations that represent veterinarians in all disciplines and specialties. The AVMA, established in 1863, is the national voice for the veterinary profession. The Association has more than 108,000 members, representing about 75% of U.S. veterinarians. The TVMA, established in 1903, represents more than 4,000 licensed veterinarians practicing in Texas. The TVMA is one of the largest state veterinary medical associations in the U.S. and a recognized leader nationally on important issues affecting the veterinary profession.

*Amici* have a significant interest in the development and enforcement of the rules of professional conduct for veterinarians. Accordingly, *amici* have grave concerns about re-characterizing and invalidating conduct-based regulations of professional conduct for veterinarians, along with other professions. For this reason, *amici* submit this brief to explain the importance of the in-person examination requirement for regulating the practice of veterinary medicine, the importance of the State's Petition for all professions and consumers in all states, and why conduct-based regulations should not be misconstrued and improperly subject to heightened First Amendment scrutiny.

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[1] Pursuant to Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than *amici curiae*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. The parties received timely notice of the intent of *amici curiae* to file this brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The U.S. Court of Appeals for the Fifth Circuit distorted this Court's ruling in *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755 (2018) ("NIFLA") to undercut the ability of states to regulate professional conduct in their jurisdictions. This case involves a conduct-based regulation that all Texas veterinarians must follow when delivering veterinary care, *i.e.*, the requirement that a veterinarian conduct an in-person physical examination or premises visit before diagnosing or treating any animal. By wrongly finding that the physical examination requirement that applied to Dr. Hines's practice somehow *primarily regulated his speech*, the court held that the regulation must satisfy heightened scrutiny to survive Dr. Hines's First Amendment challenge. The Fifth Circuit, therefore, has thrown into question not only this safeguard against veterinary malpractice, but many other types of professional *conduct-based* regulations. The magnitude of this Petition cannot be overstated.

In this case, Dr. Hines, who holds a license to practice veterinary medicine under the laws of Texas, was practicing veterinary medicine by diagnosing companion animals and providing treatment plans to their owners—in Texas and in other states and countries, including without a veterinary license in those jurisdictions. He provided each of these services remotely, without adhering to Texas's requirement that before diagnosing, treating, or prescribing medicine for an animal, or performing any other act for which a veterinary license is required, he must first establish a veterinary-client-patient-relationship ("VCPR") in person—not "solely by telephone or electronic means."

Tex. Occ. Code at §801.351(c). This in-person VCPR requisite—which the federal government and nearly all states require for veterinarians—is important to the systematic health and welfare protection of all animals, from household pets to working farm animals to livestock essential to America's food supply.

Despite the fact that the VCPR is solely a physical, conduct-based regulation, the Fifth Circuit held it primarily regulates Dr. Hines's speech. It reasoned that, because all Dr. Hines does is communicate with clients—not physically engage with them or their animals—the VCPR is turned into a restriction on his speech. Presumably, the same could be said of other provisions in the veterinary code, including the basic requirement that Dr. Hines have a veterinary license to practice veterinary medicine in Texas. The lesson from this ruling, therefore, is any regulation on professional conduct that may impact the advice a person communicates to a client regulates speech and is now subject to heightened scrutiny. Many professionals, including veterinarians, lawyers, physicians, therapists, engineers, and pharmacists, among others, communicate professional advice to clients. The Fifth Circuit's ruling threatens the ability of all states and professional licensing boards to develop important, commonsense standards of practice and police its members to promote professional integrity, and with it, the public's health, safety, and welfare.

Given the widespread implication of the Fifth Circuit's ruling, it should not surprise the Court that this case is not an isolated occurrence. Many people who have violated state professional regulations are now raising *NIFLA*-inspired First Amendment challenges to invalidate content-neutral, conduct-based rules as

applied to their situations. These cases, as discussed below, have arisen over the unauthorized practice of law, providing land-surveying services without a license, an auctioneer licensing regime, and providing death-related services without a funeral director's license, among many others. *See, e.g.*, *360 Virtual Drone Servs. LLC v. Ritter*, 102 F.4th 263 (4th Cir. 2024) (involving land surveying regulations and listing other cases). The response from the courts shows a clear Circuit split as well as broad confusion over the impact of *NIFLA* on these cases. The Circuits have issued divergent rulings on both how to determine which rules regulate conduct versus speech and the corresponding level of constitutional scrutiny to apply.

*Amici* respectfully request that this Court grant the Petition. The Court's guidance on the proper application of *NIFLA* to ordinary conduct-based professional regulations is desperately needed. The veterinary profession, like others, must be able to regulate the practice and enforce rational, conduct-based rules because these regulations are critical for protecting the integrity of the profession and the professional advice and services provided to consumers.

## ARGUMENT

### I. THE COURT SHOULD GRANT THE PETITION TO RESOLVE THE CIRCUIT SPLIT OVER THE IMPACT OF *NIFLA* ON STATE PROFESSIONAL REGULATORY REGIMES

*NIFLA* has created a firestorm of litigation that is resulting in a patchwork of rulings, with the Circuits (and district courts) struggling to determine how they are to assess traditional, conduct-based professional

regulations under this Court's First Amendment jurisprudence. *NIFLA*, though, was inapposite to these cases; it addressed a state law that *compelled* speech by requiring licensed and unlicensed health care facilities to post *content-specific* notices regarding pregnancy-related services. *See* 585 U.S. at 774. The Court explained that "[s]peech is not unprotected merely because it is uttered by 'professionals,'" and that the same heightened scrutiny for this compelled, content-based regulation applied to non-professional speech as well as "organizations that provide[] specialized advice." *Id*. at 767, 771. Thus, *NIFLA* stands for the premise that there are no *additional* protections for regulations of professional speech. It did not alter which rules are considered conduct-based or the level of scrutiny to be applied to such conduct-based regulations. Yet, these are the precise questions at the heart of the post-*NIFLA* Circuit split.

As here, some federal courts have given short shrift to the Court's reaffirmation in *NIFLA* that the First Amendment does not prevent states from regulating professional *conduct*—statements which directly cautioned against the body of case law this case represents. The Court clarified that the issue of compelled speech in *NIFLA* was "not tied to a procedure at all"—which clearly the VCPR is—and that states maintain the authority to regulate "the *practice*" of a profession without triggering heightened First Amendment scrutiny. *Id*. at 770 (emphasis in original). Although there are various types of regulations that implicate speech differently, the Court identified at least two types of professional regulations that were not implicated by *NIFLA*: (1) laws that impose content-based requirements on professionals to dis-

close "factual, noncontroversial information," including informed-consent laws, and (2) regulations of professional conduct that, as here, primarily regulate conduct even if they incidentally affect speech. *Id.* at 768. This case falls within this second safe haven.

Indeed, before *NIFLA*, the Fifth Circuit had no problem ruling that the VCPR is a conduct-based regulation subject to rational-basis scrutiny. *See Hines v. Alldredge*, 783 F.3d 197 (5th Cir. 2015). It properly found the VCPR "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. And, it concluded that "the requirement that veterinary care be provided only after the veterinarian has seen the animal is, at a minimum, rational." *Id.* at 203. *NIFLA* should not have changed this analysis or outcome, yet, after *NIFLA*, the Fifth Circuit reversed course, holding that, as applied to Dr. Hines' telemedicine practice, the VCPR "primarily regulates [his] speech." *Hines v. Pardue*, 117 F.4th 769, 777 (5th Cir. 2024). It reasoned that the trigger for the Board's enforcement was "his communication with pet owners"—even though the real trigger for his violation was engaging in the practice of veterinary medicine without establishing an in-person VCPR. *Id.* at 778. His communication with pet owners was incidental to the fact that he violated the veterinary code.

There are several aspects of the Fifth Circuit's opinion that underscore the need for this Court's review. First, the Fifth Circuit asserted this case presents unsettled, "thorny First amendment questions" as to whether and how *NIFLA* changed the assessment of conduct-based professional regulations such

as the VCPR. *Id.* at 774. It further stated that when trying to make such an assessment, "[r]egrettably, the Supreme Court's content-neutrality jurisprudence is not much clearer than its speech-conduct jurisprudence," and pondered applying intermediate or strict scrutiny. *Id.* at 778. The concurrence added fuel to this confusion, calling the VCPR a full *content-based* restriction on speech requiring *strict scrutiny*—presumably no different than the content-specific posting in *NIFLA*—because the Board "examined his words" to determine whether he engaged in acts of veterinary medicine. *Id.* at 785, 787 (Ramirez, J., concurrence).

It is uncontroverted that if Dr. Hines was merely providing his clients with general information about veterinary medicine—not diagnosing and providing treatment plans specific to an individual animal—he would not be practicing medicine under the laws of Texas and would not need to establish a VCPR. The fact that the Board looked at his communications to determine whether his conduct fell within its jurisdiction and to prove his violation of the VCPR does not mean this rule regulated his speech. Otherwise, this Court's affirmation in *NIFLA* that states have the authority to regulate the *practice* of a profession without triggering heightened First Amendment scrutiny would ring hollow. Many violations of professional conduct as with other laws that become evident when a person communicates with a client—including practicing veterinary medicine without a license—would be subject to heightened scrutiny and often struck down. The Court should resolve this confusion.

Second, this ruling deepens a Circuit split. As the Petition explains, several other Circuits have upheld comparable conduct-based restrictions on professional

conduct in response to other post-*NIFLA* challenges to state regulatory authority. *See* Pet. at *21. The first ruling was in the Fourth Circuit, which upheld laws governing the unlicensed practice of law, explaining that professional regulations over providing legal advice and services do not regulate just the communicative aspects of speech, but who may conduct themselves as a lawyer. *See Capital Associated Indus., Inc. v. Stein*, 922 F.3d 198 (4th Cir. 2019). However, the Fourth Circuit also expressed confusion as to the level of scrutiny to apply to such conduct-based regulations incidentally impacting speech under *NIFLA*, stating the Court's precedent is not "crystal clear about the appropriate standard of review," but it cannot "be greater than intermediate scrutiny." *Id*. at 208-209.

Since *Stein*, the Circuits have further split on the proper level of scrutiny to apply in these cases. In upholding North Carolina's licensure requirement for land surveyors, the Fourth Circuit recently clarified it would apply "a more relaxed form of intermediate scrutiny that mandates only that the restriction be 'sufficiently drawn' to protect a substantial state interest." *Ritter*, 102 F.4th at 271. It also observed that several other circuits "post-*NIFLA* have applied rational basis review." *Id*. at 276. In one such case, the Eleventh Circuit properly explained that *NIFLA* did not change the previous analysis for professional regulations that incidentally affect speech. *See Del Castillo v. Sec'y, Fla. Dep't of Health*, 26 F.4th 1214 (11th Cir. 2022) (upholding regulations of nutrition counseling). The Ninth Circuit has also continued to apply "rational basis review" for this same reason. *Crownholm v. Moore*, No. 23-15138, 2024 WL 1635566 (9th Cir. Apr. 16, 2024), *petition for cert. filed*, Sept. 11, 2024 (24-276); *see also Loan Payment Admin. LLC v.*

*Hubanks*, 821 Fed. Appx. 687, 689 (9th Cir. 2020) (*NIFLA* "is not an 'intervening controlling authority'" precluding rational-basis review). The Court should resolve these Circuit splits.

Third, allowing the Fifth Circuit ruling to stand would create a pathway for individuals to flout state professional regulations, as people violating state regulatory regimes are now regularly citing *NIFLA* in an effort to avoid punishment. *See, e.g.*, *McBride v. Lawson*, No. 2:24-CV-01394-KJM-AC, 2024 WL 4826378 (E.D. Cal. Nov. 19, 2024) (Oregon physician challenging a California law requiring doctors to obtain California licenses to communicate with people in California); *Upsolve, Inc. v. James*, 604 F. Supp. 3d 97, 113 (S.D.N.Y. 2022) (stating the ability to discipline those who provide legal advice without a lawyer's license has been "called into serious doubt by *NIFLA*"); *Richwine v. Matuszak*, 707 F. Supp. 3d 782 (N.D. Ind. 2023) (subjecting funeral-director licensing regime under *NIFLA* to strict scrutiny because "[a]ll [unlicensed counsellors] do is speak"); *McLemore v. Gumucio*, No. 3:23-CV-01014, 2024 WL 3873415 (M.D. Tenn. Aug. 19, 2024) (upholding auctioneer's licensing regime); *Fink v. Kirchmeyer*, 720 F. Supp. 3d 780 (N.D. Cal. 2024) (same for private investigators); *Polaski v. Lee*, No. 7:24-CV-4-BO-BM, 2024 WL 5121029 (E.D.N.C. Dec. 16, 2024) (unauthorized practice of law). In fact, the case at bar is already causing puzzlement in the federal judiciary. *See McBride*, 2024 WL 4826378 at *9 (rejecting the Fifth Circuit's reasoning here as "lack[ing] a workable limiting principle").

The Court should grant the Petition to clear up this widespread confusion, resolve this Circuit split, and clarify that the rational-basis test remains the

level of scrutiny for conduct-based professional regulations. Heightened First Amendment scrutiny must remain reserved for only those situations where a professional regulation has more than an incidental impact on a person's speech.

## II. THIS CASE IS THE IDEAL VEHICLE FOR RESOLVING THE CIRCUIT SPLIT AND REAFFIRMING THE AUTHORITY OF STATES TO REGULATE PROFESSIONAL CONDUCT

This case provides the Court with a clean opportunity to settle the existing Circuit split and confusion over the impact *NIFLA* has, if any, on a state's authority to regulate professional conduct because it involves a purely conduct-based regulation: requiring a veterinarian to conduct an in-person physical examination or premises visit as a predicate to providing animal-specific care. It does not mandate or compel the speech of a veterinarian on any topic, including his or her professional opinions. Thus, it represents the basic floor for state regulation that should not have First Amendment implications—before or after *NIFLA*.

To be sure, the VCPR is purely conduct-based and important to achieving the State's objective of safeguarding pets, farm animals, and livestock, as the Fifth Circuit originally held. *See Hines*, 783 F.3d at 203. The Texas Legislature adopted the current version of the VCPR in 2005 to make explicit under the Veterinary Licensing Act that a "person may not practice veterinary medicine unless a veterinarian-client-patient relationship exists." Tex. Occ. Code § 801.351(a). The Legislature recognized that the VCPR "is one of the cornerstones of the veterinary profession," and it was "important to address changes in

technology that could be used to circumvent the VCPR [because] there have been instances in which veterinarians have attempted to diagnose the animal solely over the phone." Tex. Sen. Research Ctr., Bill Analysis H.B. 1767, 79th Leg., 2005 Reg. Sess., May 19, 2005. Accordingly, the VCPR states that to practice veterinary medicine with regard to any specific animal or group of animals, the veterinarian must have conducted a physical exam of the animal or made "medically appropriate and timely visits to the premises on which the animal is kept." Tex. Occ. Code § 801.351(b). The Legislature also clarified that the VCPR "may not be established solely by telephone or electronic means." Tex. Occ. Code § 801.351(c).

This in-person assessment does not regulate, or attempt to regulate, the content of any speech or medical opinion by any veterinarian. It states only what a veterinarian must *do* before providing veterinary medical services, regardless of whether or how that care is communicated. The purpose of the in-person exam is to inform a veterinarian's diagnosis in ways that cannot be replicated through telemedicine. Only through a physical exam can a veterinarian "gather[] data from the animal patient by use of sight, sound, touch, smell, and through use of specialized instrumentation." Letter from California Veterinary Medical Association to Jessica Sieferman, Executive Officer of California Veterinary Medical Board, regarding Comment on Telemedicine Proposal, Jan. 25, 2021, at 2.[2] In some instances, a physical exam may

[2] Reliance on a veterinarian's senses of sight, sound, touch, or smell and basic instrumentation such as an ophthalmoscope and stethoscope may be the only "specialized instrumentation" available because advanced diagnostic tools such as CT scans or

be the only way to identify a hidden ailment (*e.g.* palpation[3] identifying cancerous abdominal mass in a dog or cat), learn about environmental factors that may cause or contribute to illness (*e.g.* environmental bacteria that may cause mastitis—inflammation of the mammary gland—in dairy cattle), or differentiate a diagnosis by ruling out potential disorders that all could explain the same set of symptoms. These situations cannot be reliably described over the phone or captured on video—by an owner, rancher or farmer.

The concern is that depending on owners to convey this information may lead to missed diagnoses, misdiagnoses, and unnecessary or harmful treatment—all of which can harm an animal. *See* Patricia Lopes, *Animals Conceal Sickness Symptoms in Certain Social Situations*, ScienceDaily, June 18, 2014.[4] Studies have shown that even well-intentioned owners are not suited to accurately assist veterinarians; they often underestimate or incorrectly recognize or report health problems. *See, e.g.,* Jo Ireland, et al., *Compari-*

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MRIs, or a dedicated team of medical specialists, are not as widely available or cost-effective for use with animals as they are with humans. *See, e.g.,* Canine Medical Imaging, Ultrasound, MRI, X-Rays, Radiographs, GoodVets, *at* https://www.goodvets.com/services/dogs/canine-ultrasound-mri-x-rays-medical-imaging (comparing diagnostic imaging options for dogs and recognizing that the most effective tools may be prohibitively expensive).

[3] Palpation is a method of feeling with the fingers or hands during a physical examination. The veterinarian touches and feels the animal's body to examine the size, consistency, texture, location, and tenderness of an organ or body part.

[4] https://www.sciencedaily.com/releases/2014/06/140618071928.htm

*son of Owner-reported Health Problems with Veterinary Assessment of Geriatric Horses in the United Kingdom*, Equine Veterinary J. (2011)[5] (finding horse owners under-reported many clinical signs of disease detected by veterinary examination); Anna K. Hielm-Björkman, et al., *Reliability and Validity of a Visual Analogue Scale Used by Owners to Measure Chronic Pain Attributable to Osteoarthritis in Their Dogs*, 72 Am. J. Veterinary Research 601 (2011)[6] (dog owners under-recognized pain). Even something as apparent as a cat coughing may be overlooked or confused by owners as innocuous "coughing up a hairball" when it may indicate a serious medical problem. Malcolm Weir & Earnest Ward, *Coughing in Cats*, VCA Animal Hosp.[7] (explaining for cats "coughing is most often a sign of an inflammatory problem affecting the lower respiratory tract, especially some form of bronchitis").

The VCPR, therefore, has major significance to the health of pets, working animals and livestock, as well as humans. It protects nearby animals (on a farm) from infectious disease, the human food supply from contamination, the overuse of anti-microbial medications in animals, and the public from zoonotic diseases that may be transmitted from animals to people such as rabies or the avian flu. When it comes to protecting the food supply, in-person visits help protect entire animal agriculture-related industries with significant financial and trade implications for people, businesses, and the State. It also reflects the reality that veterinary medicine is different from human medicine

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[5] https://pubmed.ncbi.nlm.nih.gov/21696434/#affiliation-1

[6] https://pubmed.ncbi.nlm.nih.gov/21529210/

[7] https://vcahospitals.com/know-your-pet/coughing-in-cats

where patients can talk with a doctor remotely to facilitate diagnosis and treatment.

For these reasons, nearly all states and the federal government have in-person VCPR requirements comparable to the Texas rule. *See, e.g.*, Veterinarian-Client-Patient Relationships: Prescribing/Dispensing Animal Drugs and Telemedicine, U.S. Food & Drug Admin.[8] ("[A] valid VCPR cannot be established solely through telemedicine (*e.g.*, photos, videos, or other electronic means that do not involve examination of the animal(s) or timely visits to the premises.)").[9]

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[8] https://www.fda.gov/animal-veterinary/product-safety-information/veterinarian-client-patient-relationships-prescribingdispensing-animal-drugs-and-telemedicine

[9] *See* Ala. Code § 34-29-61(19); Ariz. Rev. Stat. § 32-2201(25); Ark. Code Ann. § 17-101-102(11); Cal. Code Regs. tit. 16, § 2032.1(b); Colo. Rev. Stat. Ann. § 12-315-104(19); Ga. Code Ann. § 43-50-3(29); 225 Ill. Comp. Stat. 115/3; Ind. Code § 25-38.1-1-14.5; Iowa Admin. Code 811-12.1(169); Kan. Stat. Ann. § 47-816(n); Ky. Rev. Stat. Ann. § 321.185(1); La. Admin. Code. tit. 46, pt. LXXXV, § 700; Me. Stat. tit. 32, § 4877; Md. Code Regs. 15.14.01.03(B)(14); 256 Mass. Code Regs. 2.01; Minn. Stat. § 156.16(12); Miss. Code. Ann. § 73-39-53(v); Mo. Rev. Stat. § 340.200(23); Mont. Admin. R. 24.225.301(11); Neb. Rev. Stat. § 38-3316; Nev. Admin. Code § 638.0197(1); N.M. Stat. Ann. § 61-14-2(N); N.C. Gen. Stat. Ann. § 90-181(7a); N.D. Cent. Code § 43-29-01.1(9); Ohio Rev. Code Ann. § 4741.04; Okla. Stat. tit. 59, § 698.2(13); Or. Admin. R. 875-005-0005(14); S.C. Code Ann. Regs. 120-1(C); Tenn. Code Ann. § 63-12-103(17); Utah Code Ann. § 58-28-102(19); Vt. Stat. Ann. tit. 26, § 2433(a); Wash. Admin. Code § 246-933-200(1); W. Va. Code § 30-10-3(w); Wis. Stat. Ann. § 89.02(8); Wyo. Rules & Regs. 251.0001.9 § 3(b). Some states have adopted physical exam or premises visit requirements in the specific context of proscribing or dispensing veterinary drugs. *See* Fla. Stat. § 474.214(1)(y); 49 Pa. Code § 31.21; R.I. Gen. Laws Ann. § 21-31.1-2(13); S.D. Codified Law § 39-18-34.1.

Thus, the in-person VCPR is the exact type of regulation states and the federal government have long been able to impose without heightened First Amendment scrutiny. It is a common, longstanding regulation of professional conduct that is central to properly practicing veterinary medicine and safeguarding the public. As the Court explained in *NIFLA,* areas of professional malpractice "'fall within the traditional purview of state regulation of professional conduct.'" 585 U.S. at 769 (quoting *NAACP v. Button*, 371 U.S. 415, 438 (1963)). So too must conduct-based rules that protect against such malpractice.

This Petition also presents distinct issues from other post-*NIFLA* challenges, including the Court's recent grant of certiorari in *Chiles v. Salazar*, 116 F.4th 1178 (10th Cir. 2024), *petition for cert. granted*, Mar. 10, 2025 (24-539). Granting the Petition, therefore, would allow the Court to give proper effect to its statements in *NIFLA* that states have the authority to issue conduct-based professional regulations unencumbered by the First Amendment.

## III. THE COURT SHOULD TAKE THIS OPPORTUNITY TO REPUDIATE USING "AS APPLIED" FIRST AMENDMENT CHALLENGES TO FLOUT STATE PROFESSIONAL REGULATORY REGIMES

It also is important for the Court to grant the Petition to make sure actors cannot improperly leverage "as-applied" First Amendment challenges to circumvent important professional conduct-based regulations. In these cases, as here, individuals charged with violating professional conduct rules are asserting they are exempt from following the rules because all they were doing was "speaking" to people—for example,

when providing veterinary advice without establishing a VCPR, medical advice in states where they were not licensed, legal advice without a law license at all, or advice to clients on various other topics reserved for other types of licensed professionals. These as-applied challenges are dangerous and should be repudiated.

In this case, the thrust of Dr. Hines's argument is that when he engages in acts of veterinary medicine on the telephone or through an email, he "only speaks" and engages in no conduct. As discussed above, this premise is entirely false. Wherever, whenever, and however a person engages in "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 of technique," the person is *practicing* veterinary medicine. Tex. Occ. Code § 801-002(5). Dr. Hines is no differently situated from a First Amendment perspective than any veterinarian who communicates advice to a client in an office, on a ranch, or on a farm after diagnosing in-person the animal or other representative animals in a herd. The VCPR does not convert acts of veterinary practice into speech merely because a veterinarian does them while speaking to a client—regardless of whether that communication takes place on site, online or by telephone. This holding is legally wrong and would have serious adverse ramifications.

In particular, the Court should be concerned with the implications of giving First Amendment "get-out-of-jail-free" cards for unlawfully engaging in professional misconduct. Here, the Fifth Circuit ruling incentivizes providing owners of pets, farm animals, and

livestock with uninformed veterinary medical advice. The court found strange solace that Dr. Hines dispensed his veterinary medical advice without doing any of the actions that help ensure the reliability of his diagnoses and treatment plans: "Dr. Hines does not physically examine animals, perform surgeries, apply casts, splints, or bandages, administer vaccinations, or prescribe prescription medication. He merely sends emails." *Hines*, 117 F.4th at 771. The lesson from this ruling, therefore, is: do not take any *action* that might subject one to the rules of professional conduct; just provide "top-of-the-head" opinions. That is a recipe for giving bad veterinary care and harming animals. Ironically, this case also raises questions as to whether such an "as-applied" defense could be raised in a subsequent malpractice claim given that liability is a form of regulation. *Cf. Kurns v. R.R. Friction Prods. Corp.*, 565 U.S. 625, 637 (2012).

In many of the other post-*NIFLA* cases where people have raised "as-applied" defenses to violations of state professional regulatory regimes, they did not possess the proper license at all. For example, in *Richwine*, the plaintiffs were counselling people about methods and alternatives for the final disposition of human remains without a funeral license. *See* 707 F. Supp. 3d at 803. They argued that because "[a]ll [they] do is speak" that regulatory regime should not be applied to them. *Id.* Similarly, in *Upsolve*, individuals providing legal counseling to debtors without a law license said licensing requirements for lawyers should not apply to them because they were giving only "out-of-court verbal advice." 604 F. Supp. 3d. at 112. As the Petition points out, many of the recent post-*NIFLA* challenges to professional rules of conduct have asserted similar "as-applied" challenges. Pet. at 23. The

federal district courts in both of these cases, as with the Fifth Circuit here, invoked *NIFLA* to impose heightened First Amendment scrutiny and grant the "as-applied" challenges, thereby creating an existential threat to state professional regulatory regimes.

Until now, there has been a clear demarcation for when a professional license is needed. Traditionally, licensure is needed when providing information specific to the client, as contrasted with general information. Here, if Dr. Hines's activities were limited to posting articles on his website and providing general information to people by phone or emails, he would not be engaging in professional conduct governed by the Texas Occupations Code and would not have to satisfy the VCPR requirement. *See* AVMA Guidelines for the Use of Telehealth in Veterinary Practice, Am. Veterinary Med. Ass'n, at 4[10] (knowledge from an in-person examination enables a veterinarian to bridge the gap between "general advice . . . not intended to diagnose, prognose, treat, correct, change, alleviate, or prevent animal . . . physical or mental conditions" and care for specific animal patients).

Once Dr. Hines crossed the line and provided advice to specific pet owners about their pets, the relationship and obligations changed. This same line is true for other professions. *See, e.g.,* Tex. Discpl. R. Prof'l Conduct Rules 1.02–.06 (a professional relationship commences when a lawyer begins to provide advice specific to a client); *Vizaline, LLC v. Tracy*, 949 F.3d 927, 928-29 (5th Cir. 2020) (denying application

[10] https://www.avma.org/sites/default/files/2021-01/AVMA-Veterinary-Telehealth-Guidelines.pdf

of the regulations governing licensed surveyors because plaintiffs were not engaging in covered conduct, and imposing such restrictions would violate free speech rights). This delineation guards against ill-informed services and prevents unlicensed individuals from taking advantage of vulnerable people—no matter how those services are provided or communicated.

It is imperative that the Court grant the Petition so it can reinforce the line between general and professional conduct and allow states to take proper actions against those who ignore whichever professional standards they choose not to follow. These "as applied" challenges are not narrow exceptions for special circumstances. They are creating gaping holes in state regulatory enforcement regimes across professions.

## IV. SUBJECTING CONDUCT-BASED REGULATIONS TO HEIGHTENED SCRUTINY UNDERMINES STATES FROM PROTECTING AGAINST PROFESSIONAL MISCONDUCT

Finally, this case demonstrates the adverse impact of subjecting conduct-based professional regulations to heightened scrutiny, particularly when the rule involves nuanced practice issues courts may not fully appreciate. Here, the Fifth Circuit held the VCPR could not survive intermediate scrutiny, even though it earlier held that the VCPR is rationally related to a legitimate government interest. It made several fundamental legal and factual errors of broad concern, along with clear misjudgments, in giving insufficient attention to important veterinary medical concepts.

In holding the State failed to show a significant government interest being protected by the in-person

VCPR requirement, the court established a legal standard for heightened scrutiny wholly inconsistent with this Court's jurisprudence: the harms from the lack of a physical exam must be "real" and have occurred. *Hines*, 117 F.4th at 780. It suggested that the State's extensive "literature review, expert testimony, anecdotal evidence, and expert analysis of Dr. Hines's conduct" could not satisfy this new standard because it did not show the risks "materialized." *Id.* at 782. This standard directly contradicts this Court's rulings that states can enact regulations to "prevent anticipated harms" and must be corrected. *Turner Broad Sys., Inc. v. FCC*, 512 U.S. 622, 664 (1994).

The Fifth Circuit also skewed its analysis by claiming the only risk associated with the lack of an in-person examination is *missing* a diagnosis—not *misdiagnosing* an animal or instructing an owner to engage in improper treatment. It then set aside the State's evidence of missed diagnoses by inexplicably concluding that missing a diagnosis does not harm an animal. *See Hines*, 117 F.4th at 782 ("A *missed* diagnosis does not actively harm the animal; a *misdiagnosis*, on the other hand, might.") (emphasis in original). That is simply not true. A missed diagnosis or misdiagnosis are often semantic variations without medical distinctions. For example, a missed diagnosis or misdiagnosis can equally fail to identify a cancer that condemns an animal to death, a racehorse's lameness that can cause catastrophic injury to a rider, or highly pathogenic avian influenza that allows it to spread to other animals and potentially humans. Missing a foreign

animal disease, for example, could devastate the multibillion dollar Texas cattle industry and more.[11]

The Fifth Circuit also demonstrated a fundamental misunderstanding of the delivery of veterinary care for herd animals or animals treated as a group. When holding the in-person examination requirement was not narrowly tailored to "alleviate these harms in a direct and material way," *id*. at 783, the court focused not on the importance of the in-person examination, but the alternative method for establishing an in-person VCPR and then demonstrated complete disregard or misunderstanding for how these provisions actually work in the delivery of veterinary services.

The code provides that a veterinarian who already has "sufficient knowledge of the animal" can provide remote veterinary services as appropriate to the medical context if needed. Tex. Occ. Code § 801.351(a). This knowledge must still be achieved in person by having "recently seen" the animal, or with herd animals, such as livestock and poultry, made "medically appropriate and timely visits" to the facility where the animal is housed. Tex. Occ. Code § 801.351(b).

In misinterpreting this statute, the court isolated the words "recent," "timely," and "premises" to suggest the in-person requirement was open-ended and meaningless. *Hines*, 117 F.4th at 783-784 (positing the visit may be "in the last year or two"). They are not. The veterinary provisions for establishing a VCPR by in-person visits are not social visits. The veterinarian ex-

[11] In 2022, the cattle, poultry and dairy industry in Texas combined for $24 billion in sales *See* Texas AG Stats, Texas Dep't of Agric., *at* https://texasagriculture.gov/About/Texas-Ag-Stats.

amines the animal or, with herd animals that are often treated as a group, representative animals and, if necessary, conducts or gathers samples for diagnostics. Equally as important, the veterinarian assesses the client and the client's employees to determine their capabilities and knowledge of animal husbandry, animal disease and overall level of sophistication relative to the type and number of animals under their care, their ability to appropriately describe and relay information, and evaluates the facilities for the ability to safely handle animals for varying types of treatments or procedures.

The rule also requires these visits to be "medically appropriate" and sufficiently "timely" such that it gives the veterinarian "sufficient knowledge of the animal" for addressing the medical issue at hand. If the last physical examination or premises visit does not provide such information, the veterinarian must physically reexamine the animal or return to the premises to conduct an appropriate evaluation. These critically important and equally rigorous in-person provisions complement each other. *See* Lori M. Teller & Heather K. Moberly, *Veterinary Telemedicine: A Literature Review*, Vol. 5 Veterinary Evid. No. 4, 18 (2020).[12]

Thus, in subjecting the VCPR to heightened scrutiny, the Fifth Circuit glossed over and failed to properly assess why and how veterinarians actually establish the VCPR and why the state requires it. Besides, it is uncontroverted that Dr. Hines neither saw the animals nor made visits to the premises, making this objection immaterial to his "as applied" challenge.

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[12] https://veterinaryevidence.org/index.php/ve/article/view/349

The issues the Petition raises are vast and profound—both for assuring reliable veterinary care for America's animals and for the ability of States to regulate all types of professional conduct—and have divided the Circuits with respect to whether and how to apply *NIFLA* to cases where people have admittedly violated conduct-based professional rules. The Court should grant the Petition to resolve this split, correct the errors below, and instruct the federal courts on the proper standards and levels of scrutiny that are to be applied in these post-*NIFLA* First Amendment cases.

## CONCLUSION

For these reasons, *amici curiae* respectfully request that this Court grant the Petition and determine that the state regulation at issue here does not violate Respondent's First Amendment rights.

Respectfully submitted,

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