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

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

REPLY IN SUPPORT OF PETITION

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Hines agrees that the Board's petition presents "a square, outcome-determinative split" and that this case is "an appropriate vehicle for resolving" that split. Resp.1. As he concedes, "Texas is correct . . . that this case would have come out differently under the tests used in certain occupational-licensing cases in the Fourth, Ninth, and Eleventh Circuits." Resp.8. Additionally, although Hines disagrees in a footnote (at 9 n.5), the Fifth Circuit's decision runs headlong into a recent Texas Supreme Court holding that a similar professional-licensure requirement does *not* implicate the First Amendment. *See* Pet.24-25. Recognizing this case's certworthiness, Hines thus does not oppose review of the first question in the Board's petition. *See* Resp.3.

The Board nonetheless files this reply to address three issues raised in Hines's response.

First, the Court's recent grant of certiorari in *Chiles v. Salazar*, No. 24-539, is irrelevant. Texas nowhere claims that laws regulating the content and viewpoint of speech should escape ordinary First Amendment scrutiny merely because a professional is speaking. *Chiles* is such a case because it addresses a law regulating what a counselor can say as part of therapy, including what viewpoints can be expressed. Here, however, the Physical Examination Requirement requires only that a veterinarian physically inspect an animal as part of diagnosing and treating the animal. This conduct requirement is agnostic about the content of speech.

Second, the Fifth Circuit's decision absolutely "will limit the government's ability to regulate actual conduct." *Contra* Resp.12. Because physically examining animals is conduct, a law requiring such physical examination necessarily is a regulation of conduct. The Fifth Circuit's contrary view cannot be squared with this Court's

precedent respecting States' authority to regulate the professions and is a direct threat to federalism.

And *third*, the Court should grant both questions presented. If the Court ultimately concludes that the Physical Examination Requirement warrants heightened scrutiny, the Court should provide guidance regarding how to apply such scrutiny. As the American Veterinary Medical Association and Texas Veterinary Medical Association explain, the federal government and nearly every State have laws like this one. Because this case comes to the Court with a complete summary-judgment record, it is an ideal vehicle for the Court to provide needed guidance to lawmakers and courts across the country.

I. *Chiles* Presents a Different Question.

Although he does not oppose certiorari, Hines wonders "whether granting review makes sense after the grant in *Chiles*, one of the conversion-therapy cases." Resp.17. It does. *Chiles* raises a distinct question and involves a manifestly different statute from the Physical Examination Requirement at issue here.

In *Chiles*, a practicing Christian counselor challenged a Colorado law prohibiting mental-health professionals from engaging in counseling conversations with minors "that attempt[] or purport[] to change an individual's sexual orientation or gender identity." Colo. Rev. Stat. §12-245-202(3.5)). That same Colorado law, however, expressly *permits* professionals to engage in talk therapy that "provide[s] . . . [a]cceptance, support, and understanding for the facilitation of an individual's coping, social support, and identity exploration and development . . . as long as the counseling does not seek to change sexual orientation or gender identity." *Id.*

On its face, the statute at issue in *Chiles* regulates *what* a counselor can say: She may promote exploration

with respect to certain gender-identity viewpoints but not others. Nevertheless, despite that viewpoint discrimination, the Tenth Circuit held that Colorado's law "regulates professional conduct," not speech. *Chiles v. Salazar*, 116 F.4th 1178, 1204 (10th Cir. 2024). Noting that the Tenth Circuit's decision split with the Third and Eleventh Circuits, which had applied heightened First Amendment scrutiny to similar viewpoint-based statutes,[1] Chiles's petition advanced the following question: "Whether a law that *censors certain conversations* between counselors and their clients *based on the viewpoints expressed* regulates conduct or violates the Free Speech Clause." Petition at i, *Chiles v. Salazar*, No. 24-539 (cert. granted Mar. 10, 2025) (emphases added).

The Physical Examination Requirement, by contrast, merely requires a veterinarian to physically "examin[e]" an animal before providing any medical care for that animal. Pet.App.100a. The law does not censor what a veterinarian can say—much less does it discriminate based on a speaker's viewpoint. Instead, the Physical Examination Requirement works in tandem with Texas's other licensure requirements to ensure, as a matter of professional *conduct*, that animals receive proper *care*. *See, e.g.*, *Hines v. Alldredge* ("*Hines I*"), 783 F.3d 197, 201 (5th Cir. 2015) ("The challenged state law . . . 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

[1] *See King v. Governor of N.J.*, 767 F.3d 216, 229 (3d Cir. 2014) (holding that "the verbal communications that occur during … counseling are not 'conduct,' but rather 'speech' for purposes of the First Amendment."); *Otto v. City of Boca Raton*, 981 F.3d 854, 865-66 (11th Cir. 2020) (concluding that the challenged bans "target a message: the advice that therapists may give their clients").

established."); Am. Veterinary Med. Ass'n Amicus Br. 10-15 (explaining why laws like Texas's regulate conduct and so present a different question than *Chiles*).

The Fifth Circuit, however, held that the Physical Examination Requirement warrants heightened First Amendment scrutiny because the specific act that "trigger[ed] coverage" involved the use of words—namely, Hines's email exchanges with animal owners. Pet.App.14a-17a. It so held, despite acknowledging that "the substance" of Hines's communications did not determine whether he violated the requirement. Pet.App.16a. Consequently, the Board's petition asks whether a professional-conduct regulation warrants First Amendment scrutiny simply because the law can be triggered when a veterinarian conveys a diagnosis without first physically examining an animal.

The Board thus did not "ignore[]" *Chiles* and other similar therapy cases. *Contra* Resp.3. Cases about laws regulating the content or viewpoint of speech—as opposed to cases about conduct regulations that apply irrespective of content or viewpoint—are not part of the same split. Even Hines recognizes (as he must) that this case does not implicate viewpoint discrimination. Resp.22-23. In other words, cases like *Chiles* are not distinct because of their "clear ideological valence." *Contra* Resp.15. A law forbidding a nutritionist from encouraging clients to eat ice cream while allowing promotion of broccoli would raise the same category of First Amendment concern as in *Chiles*. Instead, the distinction between the *Chiles* category of cases and this petition's category is that cases like *Chiles* involve direct, message-based restrictions on speech, whereas the Physical Examination Requirement involves a conduct regulation that at most sometimes incidentally affects speech.

The Board therefore is not contending that occupational-licensure requirements are categorically exempt from First Amendment scrutiny. *Cf.* Resp. 13-14. To take one example, a licensure requirement designed "to impose invidious discrimination of disfavored subjects" surely would implicate the First Amendment. *Nat'l Inst. of Fam. & Life Advocs. v. Beccera*, 585 U.S. 755, 773 (2018) (citing *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 423-24 n.19 (1993)). But the Physical Examination Requirement does no such thing. *See* Resp.22 (acknowledging that the law does not make "facial, viewpoint-specific distinctions").

Because *Chiles* involves a different type of statute and a fundamentally distinct question presented, it is irrelevant here. As Hines acknowledges (at 2), "Texas' petition makes a valid case for a grant." The truth of that acknowledgment does not depend on the separate circuit split that the Court will resolve in *Chiles*.[2]

II. The Fifth Circuit's Decision Is Wrong.

As the petition explains, the Fifth Circuit's decision conflicts with this Court's longstanding precedent respecting States' authority to regulate the practice of professions. *See* Pet.13-21. Because the Physical Examination Requirement is directed at conduct—requiring a physical exam before a veterinarian treats an animal,

[2] At a bare minimum, the Court should hold this case for *Chiles*. If the Court affirms the Tenth Circuit's rule that viewpoint-based restrictions on speech can be regulated as conduct, then *a fortiori* the Fifth Circuit erred here. And if the Court reverses the Tenth Circuit's decision on the ground that Colorado's law discriminates based on content or viewpoint, then the Fifth Circuit also erred. Given, however, the categorical difference between the questions presented, the better path is for the Court to grant this petition to resolve this separate, conceptually distinct circuit split.

Pet.App.100a—it should have been upheld notwithstanding any incidental burden (if any) imposed on Hines's speech. After all, "the First Amendment does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech." *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 567 (2011).

Hines insists (at 2, 6) that the Fifth Circuit employed the "simple" and "straightforward" rule from *Holder v. Humanitarian Law Project* ("*HLP*"), 561 U.S. 1 (2010), requiring application of heightened scrutiny when someone is punished for "communicating a message." But the material-support statute at issue in *HLP* prevented speakers from conveying *particular content*—"specific skill[s]" or "specialized knowledge"—to terrorist organizations. *Id.* at 27. The "plaintiffs' speech" in *HLP* thus was "*not* barred if it impart[ed] only general or unspecialized knowledge." *Id.* (emphasis added). This case is nothing like *HLP*. Indeed, the first time Hines's claim reached the Fifth Circuit, the court easily distinguished *HLP* because it involved a *content-based* application of law that turned on *what* someone said, whereas this case involves "the *content-neutral* regulation of the practice of medicine." *Hines I*, 783 F.3d at 202 n.20 (emphasis added).

The Physical Examination Requirement has not changed since *Hines I*. But despite continuing to recognize that violating this provision of Texas law does *not* turn on the "substance" of a veterinarian's advice, Pet.App.16a, the Fifth Circuit now believes that heightened scrutiny applies because Hines happened to be sending emails when he violated the challenged law, Pet.App.14a-17a. Such an about-face from *Hines I* cannot be squared with this Court's precedent upholding the

States' broad power to regulate professional conduct. The Fifth Circuit got it right the first time.

Hines also suggests (at 4) that the Physical Examination Requirement necessarily regulates speech because he engages in "no conduct for his speech to be incidental to." But the statute applies to the "[p]ractice of veterinary medicine," which includes "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). That is quintessential professional conduct. Hines's own "individualized diagnoses and treatment plans" also derived from "viewing charts" and "considering different medical reports"—more conduct. Pet.App.15a-16a. By any measure, physically examining an animal by means of touching it to evaluate potential ailments is conduct, not speech.

Although agreeing with the Board that other courts would decide this same case differently, Hines also attacks the reasoning of the courts that share Texas's view of the law. For example, he disparages (at 8-9) the Eleventh Circuit's rule as a "labeling game" and accuses the Ninth Circuit of "relabeling speech . . . as conduct." Such merits arguments widely miss the mark. A regulation of conduct does not become a regulation of speech merely because the doer of that conduct later uses words to communicate the conduct's results. Surveying lands to draw property lines or formulating dietary plans based on a patient's unique physiological profile are acts, not words. Not only does this fundamental distinction track reality, but without it, the separate concepts of professional-

conduct regulation and professional-speech regulation would collapse into each other.

Hines also says that malpractice rules fall outside of the Fifth Circuit's analysis because they are old. *See* Resp.12 (asserting that "this case also will not disturb torts for professional malpractice, which are a historically well-grounded remedy"). But the scope of malpractice is not so limited. As new technologies develop, what constitutes malpractice also changes. There is no reason in law or logic that Texas cannot define failure to physically examine a patient as malpractice, which is effectively what the State has done with the Physical Examination Requirement. Hines dislikes how States use their police powers, but such authority is at the heart of sovereignty. It speaks volumes that the word "federalism" never appears in Hines's response.

At bottom, Hines cannot escape that "the Fifth Circuit's reasoning . . . effectively defines every professional service as speech." *McBride v. Lawson*, No. 2:24-cv-01394-KJM-AC, 2024 WL 4826378, at *9 (E.D. Cal. Nov. 19, 2024). Because that cannot be squared with the States' "broad power to establish standards for licensing practitioners and regulating the practice of professions," *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975), the Court should grant certiorari and reverse.

III. The Court Should Review the Entire Case.

Because the Court could conclude that the Physical Examination Requirement and many similar laws nationwide trigger heightened First Amendment scrutiny, the Court should also grant certiorari regarding the proper application of such scrutiny.

In holding that the Physical Examination Requirement fails intermediate scrutiny, the Fifth Circuit rejected the views of the Texas Legislature, "nearly all

states and the federal government," two testifying experts, and the American Veterinary Medical Association and Texas Veterinary Medical Association, all of whom recognize that requiring veterinarians to physically examine animals "has major significance" to the health of animals and public safety. Am. Veterinary Med. Ass'n Amicus Br.13-14 & n.9. Because animals cannot explain why they are suffering or the nature of their pain, it is necessary to physically examine them to identify potential causes. Indeed, "[s]tudies have shown that even well-intentioned owners are not suited to accurately assist veterinarians; they often underestimate or incorrectly recognize or report health problems." Am. Veterinary Med. Ass'n Amicus Br.12.

Given the undeniable importance of the State's interest in ensuring animal welfare, the Court should grant both questions presented to provide guidance to governments everywhere about what is required to satisfy heightened scrutiny, should it apply. Historically, courts have reviewed regulation of professional conduct like the Physical Examination Requirement deferentially under a rational-basis standard. If that historical understanding changes, lawmakers and courts nationwide would be well served by an explication from this Court of how heightened scrutiny works in this context.

Hines says little in response. He does not identify cases from this Court applying the heightened scrutiny the Fifth Circuit invoked to laws like the Physical Examination Requirement. Instead, he largely observes (at 25-26) that Texas's experts below did not identify any particular harmed animals. But that observation ignores that very little telemedicine for animals occurs precisely because it has been broadly illegal for decades. Furthermore, his arguments about how much States can rely on

predicted harms are the sort the Court should address to provide clarity to lawmakers across the country as they design laws to shield animals from harm.

CONCLUSION

The Court should grant the petition.

Respectfully submitted.

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