No. 25-138

IN THE
Supreme Court of the United States

MARGO ROMAN,

Petitioner,

v.

MASSACHUSETTS BOARD OF REGISTRATION IN VETERINARY MEDICINE,

Respondent.

On Petition for a Writ of Certiorari to the Massachusetts Supreme Judicial Court

BRIEF IN OPPOSITION

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QUESTION PRESENTED

A Massachusetts occupational licensing board suspended petitioner Margo Roman's veterinary license after she dispensed medical advice to human clients. Dr. Roman sought judicial review of her suspension in state court on several state-law grounds, but she did not advance any free speech or other federal constitutional arguments during those proceedings. Nevertheless, Dr. Roman now asks this Court to decide whether the state board's disciplinary decision was consistent with the First Amendment. The question presented, as framed by the petition, is:

Whether a state occupational licensing board is entitled to apply a lower standard of constitutional scrutiny to speech that is neither commercial nor incidental to conduct simply because the speaker was subject to professional licensure.

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INTRODUCTION

The single question presented in the petition is not properly before this Court. Petitioner never raised any constitutional claims in the state-court proceedings below—much less the free speech claim she now asks this Court to decide. Indeed, petitioner's counsel expressly acknowledged at oral argument in the Massachusetts Supreme Judicial Court (SJC) that petitioner "obviously" did not "argue First Amendment" in the briefing to that court.[1] As a result, the SJC did not analyze or decide any First Amendment question, and its decision does not contribute to any split of authority on the proper application of the First Amendment to the speech of licensed professionals. There is thus no reason for this Court to grant plenary review. Nor is there any reason to hold the petition pending a decision in *Chiles v. Salazar* (No. 24-539). Because petitioner waived any First Amendment claim below, any change or clarification in First Amendment jurisprudence in *Chiles* would have no bearing on the SJC's decision. The petition should accordingly be denied.

STATEMENT

I. Statutory Background

All veterinarians practicing in Massachusetts must hold a license issued by the Commonwealth's Board of Registration in Veterinary Medicine (Board). Mass. Gen. Laws ch. 112, §§ 55, 59; 256 Code Mass. Regs. § 3.01 *et seq*. The Board, like other occupational licensing bodies in the Commonwealth, oversees the

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[1] Oral Arg. at 9:41–9:45, *Roman v. Bd. of Registration in Veterinary Med.*, No. SJC-13653 (Feb. 7, 2025), https://www.youtube.com/watch?v=oDbLuPW-vLk.

discipline of the professionals it regulates. *See Kippenberger v. Bd. of Registration in Veterinary Med.*, 864 N.E.2d 515, 517 (Mass. 2007). As relevant here, the Board "may discipline" a licensed veterinarian if it determines, "after an opportunity for an adjudicatory proceeding," that the veterinarian has "engaged in conduct which places into question the holder's competence to practice the profession," including by "practicing [her] profession beyond the authorized scope of [her] license." Mass. Gen. Laws ch. 112, § 61(1).

A veterinarian sanctioned by the Board may seek judicial review of the Board's final decision in the SJC. The veterinarian's petition is first heard by a single justice of that court (Single Justice), who, acting as a trial judge, reviews the Board's decision under the standards set forth in the Massachusetts Administrative Procedure Act. *See* Mass. Gen. Laws ch. 112, § 64; *id.* ch. 30A, § 14(7); Mass. R. Civ. P. 1; *see also, e.g., Weinberg v. Board of Registration in Med.*, 824 N.E.2d 38, 42 (Mass. 2005). Like its federal analogue, the state APA allows the Single Justice to set aside the Board's decision if it was, among other things, based upon an error of law; unsupported by substantial evidence; unconstitutional; or arbitrary, capricious, and an abuse of discretion. Mass. Gen. Laws ch. 30A, § 14. A veterinarian who does not prevail before the Single Justice may appeal to the full SJC. *See, e.g.*, *Weinberg*, 824 N.E.2d at 42.

II. Factual Background

Petitioner Margo Roman is a licensed veterinarian who owns and operates Main Street Animal Services of Hopkinton (MASH), a Massachusetts veterinary clinic. Pet. App. 2a.

Before the events giving rise to this case, Dr. Roman was the subject of several prior Board disciplinary proceedings. In 2008, she entered a consent agreement and paid a $100 fine after a Board investigator concluded she had failed to properly store and secure drugs. Pet. App. 139a. The following year, she entered another consent agreement and paid another $100 fine after an inspection found that she had not separated expired controlled substances for disposal. Pet. App. 139a–140a. Later, in 2016, the Board imposed a six-month probation and a $1,000 fine after finding, among other things, that Dr. Roman's physical examination of a particular animal fell below the standard of veterinary care. Pet. App. 140a; *see* SJC Record App., vol. X, at 12–19. And in 2018, Dr. Roman entered another consent agreement and accepted a two-year probation to resolve charges of inadequate recordkeeping. Pet. App. 140a–141a; *see* SJC Record App., vol. X, at 21–23. The probation was extended beyond its initial two-year term when Dr. Roman failed to comply with its conditions. Pet. App. 141a; *see* SJC Record App., vol. X, at 24–25.

On March 16, 2020—while still subject to her most recent probation—Dr. Roman engaged in the unauthorized professional practice at issue in this case. Using MASH's email account and referring to herself by her title, Dr. Roman sent the human owners of the clinic's animal patients an email entitled "Update on Coronavirus Precautions at MASH." Pet. App. 2a–3a (capitalization omitted); *see* Pet. App. 191a–195a.

The first part of that email described MASH's pandemic operations. It explained that MASH would remain open unless directed otherwise and informed clients about new procedures—like virtual visits and no-

contact prescription pickups—that MASH would employ in light of the pandemic. Pet. App. 2a; 191a–193a. The first portion of the email also asked clients to take certain precautions when interacting with MASH, such as avoiding visits to the clinic when sick. *Id.*

The email then transitioned to a second part, captioned "Additional information to protect yourselves." Pet. App. 2a–3a; *see* Pet. App. 193a–195a. Here, Dr. Roman encouraged the human owners of her veterinary patients to purchase ozone generators for their homes, claiming that "ozone is . . . a possible cure for the coronavirus." Pet. App. 2a; *see* Pet. App. 193a. Dr. Roman further claimed that ozone "reduces pain and infection" and "floods the body with life-saving oxygen and helps both the animal and humans." Pet. App. 2a; *see* Pet. App. 193a. This portion of the email also detailed other "recommended remedies for th[e] coronavirus," including "arsenicum 30 C" and other dietary, nutritional, and homeopathic treatments for humans. Pet. App. 2a–3a; *see* Pet. App. 193a–195a.

III. Procedural Background

A. The Board's Decision

After receiving a complaint about Dr. Roman's provision of medical advice to human clients, the Board issued an order to show cause alleging that Dr. Roman had practiced her profession beyond the scope of her license. Pet. App. 4a. Disciplinary proceedings ensued. The Board received extensive written submissions from Dr. Roman—who was represented by counsel throughout the process—and heard arguments from the parties at a formal hearing. *Id.* A hearing officer subsequently issued a tentative decision sustaining the charges. *Id.* Dr. Roman lodged 25 objections to the

tentative decision, but the Board overruled them and adopted the tentative decision as its final decision. Pet. App. 5a.

The Board's final decision did not decide any First Amendment issues, because Dr. Roman did not press any such issues before the Board. She had, at an earlier stage in the proceedings, argued in a motion to dismiss that the disciplinary proceedings violated her rights under the First Amendment and its state counterpart, although she cited no federal case law in support of that argument. SJC Record App., vol. I, at 72–87. As the Board explained, however, she had abandoned those arguments by the time she lodged her objections to the hearing officer's tentative decision. Pet. App. 73a (noting that Dr. Roman "does not make a First Amendment or free speech argument in the Objections").

As a result, the Board's final decision focused solely on a state-law question: whether Dr. Roman had practiced her profession outside the scope of her license in violation of Mass. Gen. Laws. ch. 112, § 61(1), with reference to relevant state statutory definitions regarding the practice of veterinary medicine. Pet. App. 20a–98a. The Board answered that question in the affirmative. Pet. App. 94a. As the Board found, Dr. Roman had cloaked herself in the authority of her veterinary license when dispensing medical advice to her clients: she had, the Board explained, "disseminated [that] advice as a veterinarian, from her veterinarian email account, to her veterinary clients." Pet. App. 130a (quotation marks omitted); *accord, e.g.*, Pet. App. 48a (finding that, "in sending the March 16 email to her clients," Dr. Roman was "holding herself out" as

a veterinarian). At the same time, the Board explained, Dr. Roman had exceeded the scope of that license: "the March 16 email contained health recommendations for *humans*, [but Dr. Roman] is licensed as a *veterinarian*." Pet. App. 122a (emphasis in original). Based on these findings, the Board concluded that Dr. Roman had violated § 61(1). Pet. App. 114a.

The Board then reviewed the aggravating and mitigating factors to determine the appropriate penalty. On the one hand, the Board found that there was no evidence of ill-will or that anyone had been harmed in reliance on the email's recommendations. Pet. App. 95a. On the other hand, the Board explained that Dr. Roman had a history of prior discipline and was, at the time of the relevant conduct, already on probation for failure to comply with the terms of a prior disciplinary agreement. Pet. App. 96a. Weighing the nature of the violation, as well as these mitigating and aggravating factors, the Board imposed a license suspension of at least two years, effective November 1, 2023. Pet. App. 96a–97a.[2]

B. The Single Justice's Decision

Dr. Roman petitioned the Single Justice of the SJC to review the Board's decision. Although state law explicitly authorized Dr. Roman to challenge the Board's decision on the ground that it was "[i]n violation of constitutional provisions," Mass. Gen. Laws ch. 30A, § 14(7); *see id.* ch. 112, § 64, she elected not to advance

[2] On November 13, 2025, the Board granted Dr. Roman's request to lift the suspension and restored her license to active status. *See* Pet. App. 97a (permitting Dr. Roman to seek reinstatement after two years).

any First Amendment or other constitutional argument. Indeed, her state-court petition—which functioned as both her complaint and opening brief—did not so much as mention the phrases "First Amendment" or "free speech" or the federal cases on which she now relies. *See generally* App., *infra*, at 1a–34a.[3] Her reply brief was similarly silent on these issues. *See* App., *infra*, at 35a–50a.

Instead, Dr. Roman argued that the Board committed reversible error by (1) erroneously concluding that her March 16 email constituted "practicing medicine" within the meaning of state law; (2) ignoring the confusion of the pandemic's earliest days; and (3) relying on irrelevant findings of fact to support the suspension. App., *infra*, at 13a–28a (Errors Committed by the Board). In other words, Dr. Roman's petition for judicial review argued solely that the Board's decision, including its chosen sanction, "was based upon an error of [state] law," "was arbitrary or capricious, an abuse of discretion, and otherwise not in accordance with [state] law," or "was unsupported by substantial evidence." App., *infra*, at 28a–32a (Grounds for Relief).

Consistent with Dr. Roman's framing of the issues, the Single Justice's opinion did not analyze the constitutionality of the Board's decision but addressed only the Board's compliance with state law. And as a matter of state law, the Single Justice held, the Board's decision was consistent with the relevant statutes and supported by substantial evidence in the record. Pet.

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[3] Dr. Roman's filings before the Single Justice are not available online and so are reproduced in an appendix to this brief for the Court's convenience.

App. 12a–19a. In particular, the Single Justice explained, the Board properly found that Dr. Roman had "held herself out" as a veterinarian when she "sent [an] email from the veterinary practice's email account, to the practice's clients, while referring to herself within the email as a doctor." Pet. App. 16a. And the Board properly found that Dr. Roman "acted outside the scope of conduct permitted by" her license, which authorizes "the care and treatment of nonhuman animals," not the provision of "therapeutic advice to humans." Pet. App. 16a–17a. Accordingly, the Single Justice upheld the Board's decision.

C. The Full Supreme Judicial Court's Decision

Dr. Roman appealed to the full SJC, which affirmed the Single Justice's judgment.

Like her briefing before the Single Justice, Dr. Roman's opening brief to the full SJC did not develop any First Amendment argument. Indeed, once again her brief did not even use the terms "First Amendment" or "free speech" at all. *See generally* Roman SJC Br., *available at* https://bit.ly/Roman-Opening.[4] Nor did she cite a single federal case, apart from a parenthetical reference to this Court's decision in *Motor Vehicle Manufacturers Ass'n v. State Farm Mutual Automobile Insurance*, 463 U.S. 29, 50 (1983), which was cited for a mundane proposition of administrative law. Roman SJC Br. 39 n.8. Instead, Dr. Roman's opening brief repeated her claims that the Board's decision was arbitrary and capricious and "rested on errors of

[4] The SJC docket, with links to the parties' briefs, is also available through a search for "SJC-13653" at https://www.ma-appellatecourts.org/docket.

[state] law." Roman SJC Br. 3 (Table of Contents), 31–48.

In her reply brief, Dr. Roman used the phrase "First Amendment" for the first time before any Massachusetts court, but she did so only in a footnote stating that the Board's attempt "to regulate even 'professional speech' *may* raise serious constitutional concerns." Roman SJC Reply 13 n.5, *available at* https://bit.ly/Roman-Reply (emphasis added). In the main text immediately preceding that footnote, Dr. Roman had written that she "accepts that licensed professionals may be subject to limitations on their speech under certain circumstances" but argued that the statutory section at issue, Mass. Gen. Laws ch. 112, § 61(1), "does not empower the Board to regulate veterinarians' speech as broadly as it did here." Roman SJC Reply 13. The reply brief did not further develop this reference to the First Amendment or offer any other argument about the First Amendment standards that the court should apply.[5]

To the extent her briefs had not already made it clear enough, Dr. Roman's counsel confirmed at oral argument that Dr. Roman was waiving any free speech claim. During a colloquy with the SJC, counsel conceded: "We didn't argue First Amendment, obviously, in our brief." Oral Arg., *supra*, note 1, at 9:41–9:45.

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[5] Underscoring the silence in Dr. Roman's briefs, a group of amici supporting Dr. Roman *did* argue that the Board's decision was "contrary to the First Amendment." SJC Veterinarians and Medical Professionals Amicus Br. 15, *available at* https://bit.ly/Roman-Amicus. But the SJC "ordinarily do[es] not consider an argument made by an amicus that is not made by a party." *Police Dep't of Salem v. Sullivan*, 953 N.E.2d 188, 191 n.6 (Mass. 2011).

Unsurprisingly, given this backdrop, the SJC did not undertake a First Amendment analysis in its opinion. Instead, it ruled on the questions of state-law statutory interpretation and agency discretion that Dr. Roman presented to it. First, it held that "the board committed no error of law in determining that by sending the March 16 e-mail message, Roman practiced veterinary medicine." Pet. App. 7a. Second, it concluded that "the board did not commit legal error by finding that Roman practiced her profession beyond the authorized scope of her license [in violation of] Mass. Gen. Laws ch. 112, § 61(1), nor was that finding arbitrary or capricious." Pet. App. 8a. And third, it determined that "the sanction imposed by the board" was not "arbitrary, capricious, and excessively punitive." Pet. App. 10a.

In the course of rejecting Dr. Roman's arguments of legal error and arbitrary and capricious action, the SJC disagreed factually with her assertion that the Board had "improperly targeted [her] because it disapproved of her speech." Pet. App. 9a. The SJC explained that "the issue before the board was not whether the treatments she recommended were effective against COVID-19; it was whether, while practicing as a veterinarian, she could make such recommendations to her human clients." Pet. App. 10a. According to the SJC, the Board "neither erred nor acted arbitrarily and capriciously by determining that she could not." *Id.* In this discussion of the factual record regarding the Board's motivations, the SJC cited in passing a prior opinion in which it had stated that "licensed professionals are subject to regulation" and so "may be subject to restrictions related to speech." Pet. App. 9a. But it did not resolve any issue of First

Amendment law—because, again, Dr. Roman did not present any First Amendment claim. *See id.*

REASONS FOR DENYING THE PETITION

The Court should deny the petition because Dr. Roman failed to preserve the sole question she now asks this Court to decide. Dr. Roman did not press any First Amendment claims before the Single Justice or the full SJC—indeed, her counsel expressly disclaimed any First Amendment argument below. Her current contentions are therefore waived: this Court does not review issues "raised for the first time in the petition for certiorari," *United States v. Ortiz*, 422 U.S. 891, 898 (1975), and, more specifically, "has almost unfailingly refused to consider any federal-law challenge to a state-court decision unless the federal claim was either addressed by or properly presented to the state court that rendered the decision [this Court has] been asked to review." *Howell v. Mississippi*, 543 U.S. 440, 443 (2005) (quotation marks omitted).

For the same reason, the SJC's decision does not contribute to any conflict of authority regarding the application of the First Amendment to speech by licensed professionals. Given Dr. Roman's waiver of any free speech claims, the court below did not undertake any First Amendment analysis, and so it did not deepen any putative split.

By the same token, there is no reason to hold this petition pending a decision in *Chiles v. Salazar* (No. 24-539). Petitioner identifies three other petitions being held for *Chiles*, but all involved First Amendment claims squarely raised in the lower courts. Here, by contrast, the decision in *Chiles* would provide no fur-

ther guidance to the SJC, because any First Amendment claim was and would remain waived before that court—including on remand after vacatur.

I. Petitioner Failed to Preserve the Only Question Presented.

"[D]ue regard for the appropriate relationship of this Court to state courts requires [this Court] to decline to consider and decide questions . . . not urged or considered there." *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434 (1940). In other words, this Court "will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision [the Court has] been asked to review." *Adams v. Robertson*, 520 U.S. 83, 86 (1997)

That principle disposes of petitioner's request for review. Petitioner faults the SJC for "applying a lower level of First Amendment scrutiny" to her case, Pet. 16, but the SJC in fact applied *no* constitutional scrutiny because petitioner advanced no constitutional challenge in that court. The record makes this clear: the phrases "First Amendment" and "Free Speech" do not appear in either of the judicial opinions below. *See* Pet. App. 1a–11a (SJC Opinion), 12a–19a (Single Justice Opinion); *see also Adams*, 520 U.S. at 86 ("When the highest state court is silent on a federal question before us, we assume that the issue was not properly presented, and the aggrieved party bears the burden of defeating this assumption[.]") (citation omitted).

The absence of any First Amendment analysis in the SJC's decision is no surprise. As petitioner's counsel acknowledged, petitioner "didn't argue First Amendment, obviously, in [her] brief" to the SJC. Oral

Arg., *supra*, note 1, at 9:41–9:45; *see also supra*, at 8–11. And her underlying petition to the Single Justice (which acts as the complaint in these professional licensure cases) likewise failed to advance any First Amendment or Free Speech claim. *See supra*, at 6–8.

A review of the cases that feature in the petition further establishes petitioner's waiver. Petitioner now argues (Pet. 13–16) that *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), and *National Institute of Family & Life Advocates v. Becerra*, 585 U.S. 755 (2018) ("*NIFLA*"), decide this case in her favor. But those cases are conspicuously absent from the briefing below. Petitioner did not cite *Humanitarian Law Project* at all. *See generally* App., *infra*, at 1a–50a; Roman SJC Br.; Roman SJC Reply. And she cited *NIFLA* only once, in a reply-brief footnote suggesting that the Board's decision "*may* raise serious constitutional concerns." Roman SJC Reply 13 n.5 (emphasis added); *cf. Town of Boxford v. Mass. Highway Dep't*, 940 N.E.2d 404, 412 n.21 (Mass. 2010) (claim waived when raised for first time in reply brief); *Bos. Edison Co. v. Mass. Water Res. Auth.*, 947 N.E.2d 544, 549 n.3 (2011) ("[A]rguments relegated to a footnote do not rise to the level of appellate argument."). That petitioner's state-court briefing ignored the cases she now describes as decisive confirms petitioner's failure to preserve the question presented.

Accordingly, any First Amendment claim or defense that may have been available to petitioner in challenging the Board's disciplinary action is undeveloped and waived. "In our adversarial system of adjudication, we follow the principle of party presentation"—*i.e.*, courts rely on "parties represented by competent counsel" to "advanc[e] the facts and argument

entitling them to relief." *United States v. Sineneng-Smith*, 590 U.S. 371, 375–376 (2020) (brackets and quotation marks omitted). Petitioner, represented by counsel, made a strategic decision not to advance a First Amendment claim, and that choice now limits the review available in this Court. *See Ortiz*, 422 U.S. at 898 (declining to consider an issue "raised for the first time in the petition for certiorari"); *see also Hemphill v. New York*, 595 U.S. 140, 148 (2022) (noting this Court does not review federal-law challenges to a state-court decision unless the federal claim was "brought to the attention of the state court with fair precision and in due time") (citations omitted).

Petitioner's entire argument to the contrary hinges on a single sentence in the SJC opinion that does not mention the First Amendment at all. Pet. 10–11 (citing Pet. App. 9a). While the SJC referred to the boundaries that can be placed on a licensed professional's speech, it did so in the context of responding to petitioner's argument that the Board had acted arbitrarily and capriciously, not in the context of any First Amendment claim. *See* Pet. App. 9a–10a. The SJC's focus in that paragraph was responding to a factual allegation that the Board "disapproved" of petitioner's position on the medical uses of ozone—an allegation the SJC found unsupported by the factual record. Pet. App. 9a. The SJC's passing citation to an earlier opinion—which petitioner now claims was a "thorough[] and specific[] reject[ion]" of petitioner's "free speech argument," Pet. 11—did not purport to resolve any First Amendment claim because, again, there was none made.

Petitioner had every opportunity to raise a First Amendment argument in the proceedings below. She

declined. As a result, the SJC's decision rested solely on state-law grounds, and petitioner may not now ask this Court to pass upon federal constitutional issues.

II. The Decision Below Does Not Contribute to Any Conflict of Authority.

Because petitioner did not properly raise, and the SJC did not address, any First Amendment claim, the decision below does not "deepen an entrenched conflict of authority" on how the First Amendment applies to professional speech. Pet. 20.

As just discussed, the SJC said nothing about the First Amendment in its opinion. Petitioner faults the SJC for relying on "standards never articulated or adopted by this Court," Pet. 11, but she declined to frame her challenge in constitutional terms or to present a First Amendment argument for the SJC's consideration. Consequently, the SJC's analysis was based only on state law. For example, the court parsed different portions of Dr. Roman's email solely to determine whether Dr. Roman had strayed beyond the scope of her license within the meaning of a state statute, Mass. Gen. Laws ch. 112, § 61(1). Even the statement in the SJC's opinion on which petitioner rests her entire petition, *see* Pet. 10–11 (citing Pet. App. 9a), was made in the context of a state-law arbitrary-and-capricious argument—not a federal constitutional claim. In short, the standards the SJC applied, and the line-drawing it undertook, were geared toward purely state-law questions, not any standards of federal constitutional review.

As a result, petitioner's claimed conflict of authority regarding how different circuits are applying *NI-*

FLA (*see* Pet. 20–25) is a red herring. The SJC's opinion does not contribute to any confusion about the standards that should be applied under *NIFLA*, because the court did not purport to apply *NIFLA* (or any other First Amendment decision) to the facts of this case. Again, that is no surprise: petitioner did not ask it to.

This case provides no insight into how lower courts are addressing the question purportedly presented by this petition because—as a result of petitioner's own strategic choices—that question was never presented to the SJC.

III. There is No Reason to Hold this Petition Pending a Decision in *Chiles*.

Petitioner closes with an alternative request that the Court hold her petition pending decision in *Chiles*. *See* Pet. 35–36. But doing so would be inappropriate and fruitless. As discussed above, petitioner never put a First Amendment claim or defense before the Single Justice or the SJC, and the court below did not resolve any free speech question. Therefore, vacating and remanding this case for reconsideration in light of *Chiles* would be a pointless exercise: like this Court and other appellate courts, the SJC does not typically review waived claims. *See, e.g., Cooper v. Reg'l Admin. Judge of Dist. Ct. for Region V,* 854 N.E.2d 966, 971 (Mass. 2006) ("[T]he petitioner's equal protection claim is waived because it was not adequately raised below."); *Weinberg*, 824 N.E.2d at 46 ("[A]ll of [the respondent's] due process, privacy, and First Amendment claims are waived, as they were not raised properly or preserved below.").

As already discussed, petitioner cannot seriously dispute that she waived the question presented several times over. She did not preserve that question before the Board; as the Board noted, she abandoned any First Amendment claim prior to its final decision. Pet. App. 73a; *see Lincoln v. Pers. Adm'r of Dep't of Pers. Admin.*, 733 N.E.2d 76, 80 n.6 (Mass. 2000) (an "argument [that] was not raised with the [administrative agency] . . . is . . . waived"). Nor did she advance a First Amendment argument before the Single Justice. *See Friedman v. Bd. of Registration in Med.*, 561 N.E.2d 859, 862 (Mass. 1990) (declining to consider "claim of board's bias" because it "was not raised before the single justice"). And petitioner failed to press a First Amendment argument before the full court, referencing the First Amendment for the first time in a footnote to her reply brief and expressly disclaiming any First Amendment argument at oral argument. *See* Oral Arg., *supra*, note 1, at 9:41–9:45; *see also Town of Boxford*, 940 N.E.2d at 412 n.21 (claim raised for first time in reply waived); *Bos. Edison*, 947 N.E.2d at 549 n.3 (claim raised in footnote waived).

Thus, the outcome of any vacatur and remand would simply be for the SJC to note that the First Amendment claim was waived, and then to decide this case as it did before—on non-constitutional, state-law grounds. In other words, holding the case would serve no purpose, because a GVR will not change the result.

Petitioner identifies three other petitions that are being held for *Chiles*, Pet. i, 3, 12, 35–36, but petitioner's waiver makes this case different. All three of those other petitions involve First Amendment questions that were briefed and argued below. *See* Pet. App. at 1a, *Crownholm v. Moore*, No. 24-276 (noting

that plaintiffs had "filed suit under 42 U.S.C. § 1983, raising constitutional challenges to the California Professional Land Surveyors' Act"); Pet. App. at 2a, *360 Virtual Drone Servs. LLC v. Ritter*, No. 24-279 ("Plaintiffs sued various members of the Board in their official capacities, arguing that the restriction on their ability to offer these services without first obtaining a surveyor's license violates their First Amendment rights."); Pet. App. at 3a, *Hines v. Pardue*, No. 24-920 ("Dr. Hines challenged the physical-examination requirement on First Amendment grounds.")

At bottom, petitioner is trying to use this Court's grant of certiorari in *Chiles* as an eleventh-hour opportunity to revive waived claims. The Court should not reward that gamesmanship and deprive the Commonwealth of the finality to which it is entitled. Petitioner had full and fair opportunity—through multiple levels of state-court review, all while represented by counsel—to raise her First Amendment arguments. She chose not to do so. The result of that strategic choice is that the SJC's decision rests entirely on state-law grounds, and no First Amendment question is properly before this Court. The Court should deny the petition in the ordinary course—without holding it for *Chiles*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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