No. 25-138

IN THE

Supreme Court of the United States

DR. 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

REPLY BRIEF FOR THE PETITIONER

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Introduction

The opposition brief is wrong to portray this case as presenting no federal question and resting only on state-law grounds. The Supreme Judicial Court of Massachusetts ("SJC") expressly passed upon the federal First Amendment issue when it relied on its own First Amendment precedent, *Schoeller v. Board of Registration of Funeral Directors & Embalmers*, 977 N.E.2d 524 (2012), to affirm discipline "for the statements that [Dr. Roman] made while practicing her profession," and to declare that "licensed professionals … may be subject to restrictions related to speech." App. 9a.

That is constitutional reasoning, not a purely state-law holding. It embraces a professional-speech premise that cannot be squared with this Court's decisions in *National Institute of Family & Life Advocates v. Becerra* ("*NIFLA*"), 585 U.S. 755 (2018), and *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010), and it deepens acknowledged conflicts over whether professional status permits diminished scrutiny of noncommercial, non-incidental speech.

The petition for certiorari should be granted. At a minimum, the Court should hold this petition for *Chiles v. Salazar* (No. 24-539), then grant, vacate, and remand (GVR) for reconsideration in light of that decision.

Argument

A. The SJC "Passed Upon" the Federal Question

Where even the opposition brief appears to recognize that the merits of Dr. Roman's petition warrant this Court's review, the procedural question for the Court is whether the federal question was "pressed or passed upon below." *United States v. Williams*, 504 U.S. 36, 41 (1992). It was passed upon here.

The final decision of the Board of Registration in Veterinary Medicine ("Board") directly addressed Dr. Roman's First Amendment contention that the proceedings "stifle[d] free speech and chill[ed] innovation": it asserted that "there are limits on her free speech as a licensed professional engaged in a regulated business activity," invoking a diminished-rights rationale for licensed professionals. App. 71a, 74a. The SJC affirmed on the same constitutional premise, citing *Schoeller* for the premise that licensed professionals may face "restrictions related to speech," and holding that the Board "properly disciplined Roman for the statements that she made while practicing her profession." App. 9a.

Williams makes clear that this Court may review a federal question "not pressed so long as it has been passed upon." 504 U.S. at 41. The SJC's reliance on *Schoeller* — a case in which the SJC itself analyzed at length First Amendment limits on a licensing board's professional speech restrictions — demonstrates that the SJC adopted a constitutional rule diminishing protection for professional speech and applied it here

to sustain discipline for speech as speech. That squarely "pass[es] upon" the federal question whether noncommercial, non-incidental speech loses full First Amendment protection merely because the speaker is licensed and speaking in a professional capacity. *See Virginia Bankshares, Inc. v. Sandberg*, 501 U.S. 1083, 1099 n.8 (1991) (review appropriate where the lower court passed on the issue presented).

The opposition's assertion that the SJC decided only "state-law statutory interpretation and agency discretion" is not accurate. Opp. at 10. The SJC's decision reflects constitutional reasoning interwoven with the SJC's disposition: the court rejected Dr. Roman's argument that the Board "disapproved of her speech," invoked *Schoeller*'s First Amendment rationale for restricting professional speech, and expressly affirmed discipline for "the statements" she made in her professional capacity. App. 9a.

Where a state court's reasoning is "interwoven with federal law," this Court presumes a federal basis absent a clear and "plain statement" of an adequate and independent state ground. *Michigan v. Long*, 463 U.S. 1032, 1040–41 (1983). There is no such clear statement here. To the contrary, the SJC's *Schoeller*-based analysis negates any suggestion that its judgment rests on independent state grounds. Under *Long* and *Williams*, this case is properly before the Court.

B. The SJC's Ruling Conflicts with NIFLA and Holder and Exacerbates the Existing Split on Professional Speech

The SJC's conclusion that licensed professionals "may be subject to restrictions related to speech" — and its affirmance of the Board's discipline "for the statements" Dr. Roman made in her professional role — not only "passed upon" the federal question. It also cannot be reconciled with *NIFLA* and *Holder*. *NIFLA* rejected a freestanding "professional speech" carveout to the First Amendment, warning that content regulation of professionals' speech risks suppression of disfavored ideas. 585 U.S. at 771–773. *Holder* likewise explained that a law is content based—and triggers strict scrutiny—when "the conduct triggering coverage under the statute consists of communicating a message" and "depends on what they say." 561 U.S. at 27–28.

The SJC's express reliance on a diminished-rights professional-speech rationale contradicts those fundamental principles and aligns with the very approach *NIFLA* rejected. That conflict is live and consequential here. As the petition explains, courts are divided over professional-speech limits and whether states may recharacterize speech as "conduct" or otherwise apply lowered scrutiny in licensed settings. This case presents those questions cleanly and without the vehicle problems that often complicate professional speech cases.

C. The Opposition's Preservation and Waiver Arguments Do Not Defeat Review

The opposition's basis for denial rests almost exclusively on waiver, contending that waiver exists because Dr. Roman did not develop a First Amendment argument in her opening SJC brief, and because of a passing comment of prior counsel at oral argument. That does not bar review. The "pressed or passed upon" standard "operates (as it is phrased) in the disjunctive, permitting review of an issue not pressed so long as it has been passed upon," *Williams*, 504 U.S. at 41. The SJC passed upon the federal question here by invoking *Schoeller*'s First Amendment reasoning and affirming discipline "for the statements" Dr. Roman made in her professional capacity. App. 9a. Under *Williams* and *Virginia Bankshares*, that is enough.

Respondent's reliance on the passing remark by prior counsel does not establish waiver for another, more fundamental reason: the professional-speech question was squarely before the SJC. Not only was this question both raised in Dr. Roman's reply brief and the sole focus of the amicus brief—as the Board is forced to concede, Opp. at 9, 9 n.5—it was a repeated substantive topic raised by the Justices of the SJC at oral argument. Indeed, counsel opened oral argument by stating that she intended to focus on three arguments, one of which was "that the Board has demonstrated, whether they intended to or not, their

real intent to silence [Dr. Roman] for the content of a statement she made within that email."[1]

The SJC then repeatedly questioned counsel for both Dr. Roman and the Board on matters directly implicating the professional-speech issue. To counsel for Dr. Roman, Justice Gaziano raised the key question directly: "So it's your view that it's the message, not the messenger, that's the issue here?" (8:56–9:02). Justice Kafker then explored the commercial speech exception: "[Dr. Roman] is saying [to her clients] 'tell [the ozone generator retailer] I told you to do this.' Is that [because] she has some kind of financial relationship?" (10:35–10:42).

Likewise, in colloquies with counsel for the Board, the Court repeatedly probed the bounds of the professional-speech issue. Justice Kafker: "My understanding, again, I may be oversimplifying it, [the Board's] saying everything she said about the animals is fine. Everything she said about the people is no good because she can't give any medical advice to people?" (17:35–17:42). Justice Gaziano: "The thing that's striking to me, it seems that this is content-based, in that had she said 'wear a mask and socially distance,' the government would be A-okay with that. Because she said 'this alternative type of treatment,' then she's in violation." (23:41–24:04). Justice Georges: "Justice Gaziano started this with the content-based component to this. If you're saying that it hadn't anything to do with the content and that she

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[1] Oral Arg. at 1:57-2:04, *Roman v. Bd. of Registration in Veterinary Med.,* No. SJC-13653 (Feb. 7, 2025), https://www.youtube.com/watch?v=oDbLuPW-vLk.

just can't give, or any vet can't give, human advice independently, what are we telling the vets to say . . . ?" (26:06–26:26). Justice Kafker: "But again, she's a champion of homeopathic medicine and she's using that in her email to her clients. Is [there] some way we can distinguish this from, you know [advice to] 'take good care of yourself?'" (29:14–29:31).

This sustained engagement by multiple Justices with content-based professional-speech questions explains why the SJC felt compelled to address the free speech issue in its decision and to cite *Schoeller* to justify its rationale. The decision's reliance on *Schoeller* to sustain discipline "for the statements" that Dr. Roman made confirms that the SJC "passed upon" the federal question, defeating Respondent's waiver narrative and foreclosing any adequate-and-independent-state-ground characterization. This Court reviews judgments, not briefing choices. Where a state court's rationale adopts a rule of federal law that directly conflicts with this Court's decisions, the absence of talismanic incantations in a party's brief is no bar to review.

This record also confirms that there is no basis under *Michigan v. Long* to recharacterize the SJC's decision as resting on an adequate and independent state ground. To the contrary, the SJC's analysis "fairly appears" to rest on and be interwoven with federal First Amendment premises. *Long*, 463 U.S. at 1042. The SJC did not include a "plain statement" that its decision turned on independent state grounds. *Id.* Instead, it relied on *Schoeller* — an express First Amendment case — to justify restrictions "related to speech." App. 9a. Under *Long*, review is proper.

Although the opposition cites *Adams v. Robertson* in support of its waiver contention, this reliance is similarly misplaced. *Adams* explains that when a state high court is silent on a federal question, this Court presumes the issue was not properly presented. 520 U.S. 83, 86 (1997). Yet as demonstrated above, the SJC was far from silent. It affirmatively grappled with the constitutional issues at oral argument, quoted *Schoeller* in its decision, and used that premise to uphold discipline for "the statements" Dr. Roman made. App. 9a.

Finally, the opposition brief's invocation of the party-presentation principle, Opp. at 13, does not change that conclusion. This Court has long recognized that the disjunctive nature of the "pressed or passed upon" standard allows it to correct erroneous federal premises adopted by state courts and used to sustain judgments. *Williams*, 504 U.S. at 41; *Virginia Bankshares*, 501 U.S. at 1099 n.8. That is especially appropriate where, as here, the SJC embedded a professional-speech limitation in its reasoning to affirm discipline of a licensed professional for speech as speech.

D. The Decision Below Cannot Be Sustained on Adequate and Independent State-Law Grounds

The opposition brief's attempt to recast the SJC's opinion as a purely state-law exercise in scope-of-license and arbitrariness review fails for the same reason. The SJC did not merely parse Massachusetts statutes. It invoked a First Amendment principle from *Schoeller*—that licensed professionals may be subject to "restrictions related to speech"—and applied it to

conclude that the Board "properly disciplined Roman for the statements that she made while practicing her profession." App. 9a. That constitutional premise is neither independent of nor ancillary to the judgment; it is an integral part of the rationale. Under *Long*, the absence of a plain statement of independence means the judgment is reviewable in its own right, and at a minimum warrants a GVR in light of any clarification the Court provides in *Chiles*.

E. This Case Is an Excellent Vehicle for Review

This case is a clean vehicle for review, as it involves pure speech. The two-year suspension the Board levied against Dr. Roman arose from a single email. There is no commercial speech issue. There is no conduct to disentangle from speech. The Board repeatedly stated that the "truth" of the statements was irrelevant, underscoring that liability turned on content and viewpoint, not deception or effect. App. 59a, 127a–128a. In short, Dr. Roman's fate turned on what she said, to whom she said it, and on which topic.

As if to remove any doubt on that front, the Board affirmatively distinguished what it deemed permissible human-directed communications — operational updates and hygiene protocols at the clinic — from forbidden human-directed "recommendations" about topics and messages it disfavored. App. 121a–122a, 124a; *see also* App. 109a–112a (quoting the email's human-directed content and cataloging federal agency statements about ozone). The Board stressed that the "issue … was not whether the treatments she recommended were effective," but

whether she could "make such recommendations to her human clients." App. 10a. The Board approved the first part of the email as "within the scope of her practice" and condemned the second part as "well beyond that scope," overtly drawing a proscriptive line based entirely on subject matter and message. App. 9a–10a; 182a–183a.

The SJC then embraced a professional-speech rationale and affirmed the Board's discipline "for the statements" Dr. Roman made while acting as a professional. App. 9a–10a. That posture squarely presents the question of whether a state may dilute First Amendment protection for noncommercial, non-incidental speech simply because the speaker is licensed and speaking in a professional capacity.

That is paradigmatic impermissible content-based regulation because the discipline turned on the "topic discussed or the idea or message expressed." *Reed v. Town of Gilbert*, 576 U.S. 155, 163 (2015). It is also paradigmatic impermissible viewpoint-based regulation. The Board's analysis disparaged certain of Dr. Roman's views about ozone and other approaches to COVID-19, while accepting other human-directed communications about pandemic operations and hygiene. App. 110a–112a, 121a–122a, 124a. The Board further emphasized that "even if what [Dr. Roman] said … about ozone is true," her statements would *still* be sanctionable because of their message and audience. App. 128a. This "depends on what [she] say[s]" framework is precisely what *Holder* subjects to strict scrutiny, 561 U.S. at 27–28, and what *NIFLA* forbids states to dilute by invoking licensure.

If the Court prefers to resolve the professional speech issue in *Chiles* first, this case should be held and then followed by GVR. Respondent's suggestion that a remand would be futile because of waiver is incorrect. As explained above, the SJC adopted and then applied its own First Amendment premise to sustain the judgment below. If *Chiles* clarifies the governing standard, the SJC will have to revisit its conclusion that licensed professionals may be subject to "restrictions related to speech," and that it was lawful to discipline Dr. Roman "for the statements" on that diminished-rights rationale. App. 9a. A remand would have meaningful and substantive consequences here.

F. Mootness Is No Barrier

Dr. Roman's two-year suspension carried (and continues to carry) concrete adverse collateral professional consequences for her. Yet even if it did not, this matter fits comfortably within the well-established exception for matters "capable of repetition, yet evading review," as explained in more detail in the petition. That is particularly true given the relatively short duration of most professional suspensions (and the fact that Massachusetts law expressly prohibits stays of professional suspensions pending appeal, Mass. Gen. Laws ch. 112, § 64), the length of time required to litigate such an appeal, and the Board's position that it could again sanction materially similar speech by Dr. Roman in future. App. 97a; *see also* App. 5a (noting no evidence that anyone followed the email's guidance); App. 95a–97a (sanction discussion). The SJC's decision continues to

govern all licensed Massachusetts professionals, and chills their speech. The controversy remains live.

Conclusion

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held for *Chiles* and then granted, vacated, and remanded.

Respectfully submitted,

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