No. 14-1543

In the

Supreme Court of the United States

RONALD S. HINES,

Petitioner,

v.

BUD E. ALLDREDGE, JR., et al.,

Respondents.

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

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF PETITIONER

DEBORAH J. LA FETRA
TIMOTHY SANDEFUR*
*Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: tsandefur@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation

QUESTION PRESENTED

Are restrictions on occupational speech subject to First Amendment scrutiny or only rational-basis review?

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—Continued

Page

TABLE OF AUTHORITIES

Page

Cases

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

State Statute

Rule of Court

TABLE OF AUTHORITIES—Continued

Page

Miscellaneous

TABLE OF AUTHORITIES—Continued

Page

TABLE OF AUTHORITIES—Continued

Page

IDENTITY AND INTEREST OF AMICUS CURIAE

Pursuant to Supreme Court Rule 37.2(a), Pacific Legal Foundation (PLF) respectfully submits this brief amicus curiae in support of the petition for certiorari.[1] PLF is widely recognized as the most experienced nonprofit legal foundation representing the views of thousands of supporters nationwide who believe in limited government and economic liberty. PLF litigates on behalf of clients, and participates as amicus curiae, in many cases involving the free speech rights of businesses and entrepreneurs. *See*, *e.g.*, *Liberty Coins LLC v. Porter*, 135 S. Ct. 950 (2015); *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014); *Nike, Inc. v. Kasky*, 539 U.S. 654 (2003); *Young v. Ricketts*, No. 15-1873 (8th Cir. pending). PLF attorneys have also published extensively on the need for full First Amendment protection for commercial and business-related speech. *See*, *e.g.*, Timothy Sandefur, *The Right to Earn a Living* 191-212 (2010); Deborah J. La Fetra, *Kick It Up a Notch: First Amendment Protection for Commercial Speech*, 54 Case W. Res. L. Rev. 1205 (2004). PLF believes its legal expertise and public

---

[1] Pursuant to this Court's Rule 37.2(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

policy experience will assist this Court in its consideration of this petition.

SUMMARY OF REASONS FOR GRANTING THE PETITION

The First Amendment rights of professionals communicating with clients—a crucial matter to countless citizens who depend on such communications daily to make potentially life-altering decisions—has been directly addressed in only a single opinion from this Court: Justice White's concurrence in *Lowe v. SEC*, 472 U.S. 181, 211-36 (1985). Relying almost exclusively on that opinion, lower courts have struggled to devise a theory of "professional" or "occupational speech" (terms never used by this Court). Their conflicting opinions have resulted in anomalous consequences and debilitating uncertainty about how to locate what Justice White called the "point" at which "a measure is no longer a regulation of a profession but a regulation of speech." *Id.* at 230 (White, J., concurring).

In addition to the need for resolution of the circuit conflicts, this Court should grant the petition to address the conflicting precedents for several reasons. First, the "professional speech" doctrine allows the government to label speech an "activity" subject to restriction, which this Court has declared improper. *See*, *e.g.*, *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 798 (1988). Classifying professional speech as conduct, regulation of which is subject only to the rational basis test, has the perverse consequence of allowing government to abridge speech by people whose business consists *solely* of speech, such as tour guides. *See, e.g.*, *Kagan v. City of New Orleans, La.*, 753 F.3d 560, 561-62 (5th Cir. 2014), *cert. denied*, 135

S. Ct. 1403 (2015) (tour guides were not entitled to *any* First Amendment protection against a city ordinance that forced them to get government pre-approval before speaking); *cf. Edwards v. District of Columbia*, 755 F.3d 996, 1000 (D.C. Cir. 2014) (assuming that restrictions on tour-guide speech is subject to rational basis review, but finding restriction unconstitutional). Yet that holding conflicts with the rule in other cases that the business of furnishing speech—such as selling books or tattooing—receives full First Amendment protection. *See*, *e.g.*, *Memoirs v. Massachusetts*, 383 U.S. 413, 415 (1966) (book publisher was entitled to full First Amendment protection); *Wexler v. City of New Orleans*, No. Civ.A. 03-990, 2003 WL 1903294, at *3 (E.D. La. Apr. 15, 2003) (sidewalk book sellers entitled to First Amendment protection); *Jucha v. City of N. Chicago*, 63 F. Supp. 3d 820, 829 (N.D. Ill. 2014) ("the business of tattooing is protected by the First Amendment to the same extent as the tattoo itself."); *Coleman v. City of Mesa*, 284 P.3d 863, 870 (Ariz. 2012) (tattoo parlors protected by First Amendment).

Second, the "professional speech" theory developed by lower courts has the bizarre consequence that speech by *non*-professionals often receives *more* legal protection than speech on the same subject by educated, experienced professionals who are experts on the subject. The government could not prohibit a layman from advising a friend about a medical condition without satisfying strict scrutiny, even though she lacks any knowledge of medicine—but a licensed physician who advises the same person about the same condition would receive reduced First Amendment protection in the Third Circuit, *see King v. Governor of the State of New Jersey*, 767 F.3d 216, 232

(3d Cir. 2014), *cert. denied*, 135 S. Ct. 2048 (2015), and no First Amendment protection at all in the Fifth and Ninth Circuits. *Daly v. Sprague*, 742 F.2d 896, 898 (5th Cir. 1984); *Pickup v. Brown*, 740 F.3d 1208, 1225-26 (9th Cir.), *cert. denied*, 134 S. Ct. 2871 (2014).

Complicating this anomaly still further, some circuits hold that professional speech receives *greater* protection when the speaker exercises "professional judgment," *Stuart v. Camnitz*, 774 F.3d 238, 255 (4th Cir. 2014), *cert. denied sub nom. Walker-McGill v. Stuart*, No. 14-1172, 2015 WL 1331672 (U.S. June 15, 2015), and that "[t]he government's regulatory interest is less potent in the context of a self-regulating profession like medicine." *Id.* at 248. The circuit split is sharply drawn by the Eleventh Circuit's declaration that First Amendment protections "approach a nadir . . . when [a] professional . . . exercis[es] his or her professional judgment," *Wollschlaeger v. Governor of Florida*, 760 F.3d 1195, 1218 (11th Cir. 2014), while the Ninth Circuit holds that "professional speech may be entitled to 'the strongest protection our Constitution has to offer!'" *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (quoting *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995)).

The "professional speech" doctrine inherently discriminates against speech based solely on its content and the identity of the speaker, which triggers strict scrutiny in every other context. *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2227 (2015), explained that any effort to classify speech by reference to content, and to burden speech that falls into a disfavored category, is a content-based restriction subject to strict scrutiny. And *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2665 (2011), held that any effort

to restrict speech based on the speaker's "economic motive" is an identity-based restriction, also subject to strict scrutiny. Yet some lower courts have done the opposite, and used the "professional" label to reduce or eliminate First Amendment protections *solely* in consequence of the speaker's identity and the content of the speech. *See*, *e.g.*, *Pickup*, 740 F.3d at 1231 (rational basis review applies to restrictions on speech by professionals); *King*, 767 F.3d at 233 ("speech occurring as part of . . . counseling is professional speech . . . [and] receives diminished protection.").

Courts are unable even to precisely define "professional speech." Justice White's concurring opinion in *Lowe* described it as speech that is "incidental to the conduct of the profession," 472 U.S. at 232, but lower courts also apply the doctrine to professions such as fortune-telling and psychotherapy, in which speech *is* the profession, and not merely "incidental" to it. *See*, *e.g.*, *Moore-King v. Cnty. of Chesterfield, Va.*, 708 F.3d 560, 569 (4th Cir. 2013); *Nat'l Ass'n for Advancement of Psychoanalysis v. California Bd. of Psychology*, 228 F.3d 1043, 1054 (9th Cir. 2000).

The need for this Court's clarification will only increase over time. As the nation's economy becomes increasingly service-oriented, and communications technology becomes increasingly pervasive, the dividing line between *speech* and *activity*—already a "rough" one in Justice White's day, *Lowe*, 472 U.S. at 231 (quoting *Thomas v. Collins,* 323 U.S. 516, 544 (1945) (Jackson, J., concurring))—will only become more blurred. Especially given the advent of "telemedicine" technologies that promise innovative solutions to America's health care crisis—but which

are burdened by regulations that abridge the free speech of physicians—this Court's guidance regarding the standard of scrutiny applicable to burdens on professional speech is essential.

ARGUMENT

I

THERE IS ESSENTIALLY NO CONTROLLING PRECEDENT ON THE FIRST AMENDMENT PROTECTION OF OCCUPATIONAL SPEECH—LEAVING LOWER COURTS IN NEED OF GUIDANCE

"The regulation of professional speech is one of the least developed areas of First Amendment doctrine." David T. Moldenhauer, *Circular 230 Opinion Standards, Legal Ethics and First Amendment Limitations on the Regulation of Professional Speech by Lawyers*, 29 Seattle U. L. Rev. 843 (2006). There are "few judicial decisions" to guide lower courts on the question, *id.*—in fact, there only two, and they are only concurrences: Justice Jackson's in *Collins*, 323 U.S. at 545-48, and Justice White's (concurring in the result) in *Lowe*, 472 U.S. at 211-36. Given the critical importance of professional speech, such a dearth of precedent makes a grant of certiorari imperative.

In *Collins*, the Court invalidated a statute that forced a labor union organizer to obtain a state license. The state argued that the requirement did not restrict

speech, but only regulated the activity of union organizing. This Court rejected that fallacious distinction. "These rights of assembly and discussion are protected by the First Amendment," the Court observed. 323 U.S. at 533. The state's effort to characterize union organizing as conduct instead of speech would, if adopted, force speakers "to hedge and trim [and]. . . take care in every word." *Id.* at 535-36. Justice Jackson, concurring, acknowledged that the distinction between speech and activity is often a "rough" one "which is more shortly illustrated than explained." *Id.* at 544, but he suggested no principles for distinguishing them.

In an opinion concurring in the result in *Lowe,* Justice White (joined by Justice Rehnquist and Chief Justice Burger) sought to provide a clearer distinction between speech and business activity. When there is a "personal nexus between professional and client," and the professional "purport[s] to be exercising judgment on behalf of [an] . . . individual with whose circumstances he is directly acquainted," he wrote, that speech qualifies as activity the state may regulate. 472 U.S. at 232. Justice White found it unnecessary to decide what level of scrutiny should apply, however, because that case did not involve any "personal nexus," but only pure speech. *See id.* at 233.

Although Justice White took his inspiration from Justice Jackson's *Collins* concurrence, his observations about "professional speech" (a term he did not employ) actually conflict with both the majority and concurring opinions in *Collins*: both the majority and Justice Jackson took it for granted in *Collins* that where an occupation consists of speech, heightened First Amendment scrutiny should apply *across the board*.

Collins concluded that, however "rough" the distinction between speech and professional activity might be, the overlap provides the activity with *greater* constitutional protection—it does *not* cause the speech to receive *less* protection. *See id.* at 541.

That rule was followed in *Riley*, 487 U.S. at 798, which held that professional solicitors were entitled to "exacting First Amendment scrutiny" notwithstanding the fact that speaking was their business. The Court rejected the dissent's argument that the commercial aspect of solicitation should reduce the level of scrutiny. *See id.* at 796 ("[W]e do not believe that the speech retains its commercial character when it is inextricably intertwined with otherwise fully protected speech."). Similarly, this Court consistently applies strict scrutiny in cases involving newspaper publishers, filmmakers, and other professional speakers. *See*, *e.g.*, *Memoirs*, 383 U.S. at 415 (book publisher); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495, 497 (1952) (film distributor). *Cf. Dex Media W., Inc. v. City of Seattle*, 696 F.3d 952, 957-65 (9th Cir. 2012) (phone book is fully-protected, non-commercial speech, notwithstanding commercial Yellow Pages, because presence of commercial elements cannot reduce First Amendment protections). Justice White's conclusion that where speech is intertwined with an activity, any restriction on that speech is "not subject to scrutiny as a regulation of speech," *Lowe*, 472 U.S. at 233, directly conflicts with these and other rulings. *See further* Paul Sherman, *Occupational Speech and the First Amendment*, 128 Harv. L. Rev. F. 183, 188-91 (2015).

Moreover, his discussion of the factors that constitute "professional speech" was *obiter dicta* even

within his concurrence. Because Justice White found that Mr. Lowe was not acting as a professional adviser but only "publish[ed] investment advice for the benefit of any who would purchase [his] publications," 472 U.S. at 233, he concluded that Lowe's speech was entitled to strict scrutiny. It was accordingly unnecessary to discuss the state's power to regulate "professional speech." His words on that subject were therefore unnecessary to his conclusion.

Justice Jackson's concurrence in *Collins* and the *dicta* in Justice White's opinion concurring in the result in *Lowe* are the only two opinions from this Court to discuss whether speech by a professional may be restricted by the state as part of a regulation of the profession. Although this Court has decided cases involving *commercial* speech by professionals—that is, *advertising*—it has never directly resolved that issue.

II

LOWER COURT DECISIONS ON "PROFESSIONAL SPEECH" ARE IN DISARRAY

Lower courts, relying on the *Lowe* concurrence, have struggled to explain when and how First Amendment scrutiny applies to laws that restrict speech by professionals. The results are conflicting and incoherent.

First, as Petitioner explains, the Fifth and Eleventh Circuits hold that only rational basis scrutiny applies to restrictions on professional speech, while the Third and Ninth Circuits hold that heightened scrutiny applies. *See* Petition for Certiorari at 7-17.

To cite just two examples of this conflict, the Eighth Circuit ruled in *Argello v. City of Lincoln*, 143 F.3d 1152 (8th Cir. 1998), that a prohibition on fortune-telling was "a content-based regulation of speech" subject to strict scrutiny. The fortune-tellers' commercial motive—the fact that "speech itself is what the 'client' is paying for," *id.* at 1153—did not lessen the protections of the First Amendment. But the Fourth Circuit in *Moore-King* upheld a law that required fortune-tellers to obtain licenses before practicing their trade. Because fortune-tellers provide "personalized advice in a private setting to a paying client," 708 F.3d at 569, the court classified it as "activity," not speech, and applied only rational basis review. *Id.* at 570.

In *Nat'l Ass'n for Advancement of Psychoanalysis*, the Ninth Circuit upheld a prohibition on the practice of psychotherapy as a mere regulation of "activity" rather than speech, despite the fact that the practice of psychology consists exclusively of communication. 228 F.3d at 1055-56. Relying on the *Collins* concurrence—and in direct conflict with *Argello*—it differentiated the licensing of psychologists from a burden on speech on the grounds that psychologists charge fees. *Id.* at 1055. Yet as First Amendment scholar Eugene Volokh observes, "[t]his . . . can't be the right distinction . . . : If speech is protected from a content-based ban, then it's also normally protected from a content-based requirement that all people who engage in such speech for money be licensed and trained." *Speech As Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1348 n.352 (2005).

Second, the "professional speech" doctrine has the bizarre consequence that speech by people who *lack* education and training, and speak on matters about which they may know little, often receives *more* constitutional protection than speech by educated, trained, licensed professionals. Under this doctrine, a law forbidding a layman from advising someone to buy a stock or to take a medicine would be subject to strict scrutiny—and likely held unconstitutional—but a law that bars a stockbroker or a physician from providing the same advice to the same person would be subject only to rationality review. An unlicensed person who posts diet and exercise recommendations on a website is simply exercising his First Amendment rights, *cf. Cooksey v. Futrell*, 721 F.3d 226, 241 (4th Cir. 2013)—but Dr. Hines, an educated, licensed veterinarian, against whom there is no allegation of wrongdoing, may not tell people on the phone how to rid their dogs of fleas.

This anomaly has resulted in still further conflict between the circuits. Some courts hold that speech by professionals exercising their judgment should receive *more* protection, not less. For example, when physicians challenged the federal government's threat to prosecute them if they recommended medical marijuana to patients, one district court ruled that their speech was "part of [their] practice" and "may be subject to 'reasonable . . . regulation.'" *Pearson v. McCaffrey*, 139 F. Supp. 2d 113, 121 (D.D.C. 2001) (citation omitted). The Ninth Circuit disagreed, and applied strict scrutiny, because "professional speech may be entitled to 'the strongest protection our Constitution has to offer.'" *Conant*, 309 F.3d at 637.

The Fourth Circuit, too, held that in professional speech cases, "the government's regulatory interest is less potent in the context of a self-regulating profession like medicine," *Camnitz*, 774 F.3d at 248, and that courts should be more skeptical of government interference with the "independent medical judgment that professional status implies." *Id.* at 253. Yet other courts have held that the First Amendment's protections "approach a nadir . . . when [a] professional . . . exercis[es] his or her professional judgment." *Wollschlaeger*, 760 F.3d at 1218. *See also Texas Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575 (5th Cir. 2012) (restrictions on doctors' speech subject to "the antithesis of strict scrutiny.").

Another, related conflict is found comparing the Ninth Circuit's decision in *Pickup*, 740 F.3d 1208, *cert. denied*, 134 S. Ct. 2871, with the Third Circuit's in *King*, 767 F.3d 216, *cert. denied*, 135 S. Ct. 2048.

Pickup held that certain kinds of psychotherapy were "conduct," not speech—notwithstanding that the conduct consisted solely of communication and efforts at persuasion—and that regulation of it was subject only to rational basis review. 740 F.3d at 1230-31. *King* sternly criticized that holding—noting it had been "rejected" in this Court's precedents, 767 F.3d at 228, and warning that there is no principled way to "label[] certain verbal or written communications 'speech' and others 'conduct.'" *Id.* Trying to do so would be "nothing more than a 'labeling game.'" *Id.* A psychology student, for example, who suggests ways a classmate might resolve a personal problem would obviously be engaged in pure speech, not "conduct"—and "it would be strange indeed" if the

same words, uttered for the same reason, suddenly become "conduct" when spoken by licensed psychologists. *Id.*

Finally, courts have not even reached consensus on how to identify "professional" speech, as opposed to ordinary speech taking place within a business transaction, or the business of simply providing information. It is unclear whether "professional speech" includes an information provider who forms no fiduciary relationship with a customer, or a professional when acting outside the scope of his employment. Some scholars argue that a fiduciary relationship must exist before speech qualifies as "professional," and others contend that a principal-agent relationship is enough. *Compare* Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 Seattle U. L. Rev. 885, 964-65 (2000) (professional speech requires fiduciary relationship), *with* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. Pa. L. Rev. 771, 772 (1999) (professional speech is speech that "offer[s] specific knowledge and expertise.").

Note the confusion in *Tepeyac v. Montgomery Cnty.*, 779 F. Supp. 2d 456, 467 (D. Md. 2011), for instance, where the District Court struggled with the "difficult[y]" of defining professional speech "with precision," and noted that "the concurrences of Justices White and Jackson suggest that speech may be labeled 'professional speech' when it is given in the context a quasi-fiduciary—or actual fiduciary—relationship." *Id.* at 467. But the court did not determine whether "a third element: [that] speech must occur . . . in connection with the performance of a service for

money," was also necessary. *Id.* at 467 n.8. Nor did it define "quasi-fiduciary."

This lack of definition is particularly problematic in cases involving professionals' freedom to speak regarding political controversies or disputes within the profession. Justice Jackson warned in *Collins* that government's power to regulate medicine should not be taken as license to "make it a crime . . . to . . . urg[e] persons to follow or reject any school of medical thought," 323 U.S. at 544 (Jackson, J., concurring), yet some states have done exactly this. In *Wollschlaeger*, the state barred physicians from discussing with patients the subject of gun ownership—a matter of public concern. 760 F.3d at 1237. In conflict with that, the Ninth Circuit held in *Conant*, 309 F.3d at 637, that doctors cannot be barred from speaking to patients regarding marijuana use, another matter of public concern. And in *King* and *Pickup*, states used their regulatory authority to proscribe a particular school of psychotherapeutic thought, on the grounds that it was only an "activity."

"Allowing the state to *require* . . . professionals to state one side of the controversy as fact, when clearly no consensus exists, is troubling . . . . [Government] should 'respect [professional] discretion in this area by not requiring [them] to disclose a statement about the science when there is more than one school of thought.'" Sonia M. Suter, *The First Amendment and Physician Speech in Reproductive Decision Making*, 43 J.L. Med. & Ethics 22, 29 (2015) (citation omitted). Yet the professional speech doctrine allows states to override professional judgment and enforce politically-charged schools of thought, in just the way Justice Jackson warned about. This Court's guidance is

essential to safeguard the rights of professionals to use their judgment and speak.

III

PROFESSIONAL SPEECH IS INCREASINGLY CENTRAL TO THE NATIONAL ECONOMY AND ESPECIALLY TO MEDICAL PRACTICE

A. Lack of Guidance from This Court Encourages States to Classify Speech as "Conduct" And Restrict It in Violation of The First Amendment

Speech and professional "conduct" often overlap. The precedent that has developed in the absence of this Court's guidance applies maximal scrutiny to speech, but minimal scrutiny to "occupations," even when occupations consist *entirely* of speech.

For example, in *Kagan*, 753 F.3d 560, *cert. denied*, 135 S. Ct. 1403, the Fifth Circuit ruled that tour guides—whose business consists *solely* of communication—were just engaged in a business, and therefore a licensing requirement (*i.e.*, a prior restraint on speech) was subject to rational basis review. The D.C. Circuit held a virtually identical restriction unconstitutional—but it, too, considered the law simply "a restriction on conduct instead of a content-based restriction on speech." *Edwards*, 755 F.3d at 1000. Yet there is no principled distinction between a licensing requirement for tour guides and the licensing law for solicitors in *Riley*, 487 U.S. at 798, or union organizers in *Collins*, 323 U.S. at 544, both of which were subject to strict scrutiny. This Court has held that people's speech rights are not diminished when they are paid to speak, *see*, *e.g.*, *Riley*, 487 U.S.

at 796; *Sorrell,* 131 S. Ct. at 2664, but the "professional speech" doctrine permits just that.

In *Janson v. LegalZoom.com, Inc.*, 802 F. Supp. 2d 1053, 1063 (W.D. Mo. 2011), the court held that a business that helped people fill out their own legal documents was practicing law without a license—despite the fact that customers "never believed that they were receiving legal advice." The mere communication of information was forbidden. Likewise, in *Kansas City Premier Apartments, Inc. v. Missouri Real Estate Comm'n*, 344 S.W.3d 160 (Mo. 2011), *cert. denied*, 132 S. Ct. 1075 (2012), the court ruled that a website that published information about apartments for rent was engaged in the practice of real estate brokerage and that the state could forbid such communication by people lacking a state license. And *Wang v. Pataki*, 396 F. Supp. 2d 446, 451 (S.D.N.Y. 2005), upheld a licensing requirement for "apartment information vendor[s]," defined as any company that "furnish[es] information concerning the location and availability of real property." The furnishing of information is quintessential First Amendment activity—even if done for a fee*, see Sorrell*, 131 S. Ct. at 2667—so these licensing requirements were plainly prior restraints on speech. But both courts regarded them only as restrictions on business activity, and upheld them. By contrast, in *ForSaleByOwner.com Corp. v. Zinnemann*, 347 F. Supp. 2d 868, 879 (E.D. Cal. 2004), and *Skynet Corp. v. Slattery*, No. 06-cv-218-JM, 2007 WL 817638, at *4 (D.N.H. Mar. 13, 2007), courts ruled that websites that furnished information about for-sale-by-owner properties were fully protected by the First Amendment.

Many states require private investigators to obtain licenses, but define "private investigator" so broadly as to encompass pure speech. Nevada, for example, defines an investigator as anyone paid to "furnish . . . information" about the "identity, habits, conduct . . . honesty . . . trustworthiness," etc., of "any person." Nev. Rev. Stat. § 648.012 (2014). This is quintessential First Amendment activity, yet state officials, relying on this statute, even prosecuted a man for testifying in state court, on the grounds that his doing so constituted unlicensed private investigation. *State v. Tatalovich*, 309 P.3d 43 (Nev. 2013). In 2012, the Missouri Supreme Court acknowledged that private investigator licensing laws raise "serious constitutional questions," *Gurley v. Missouri Bd. of Private Investigator Exam'rs*, 361 S.W.3d 406, 412 (Mo. 2012), and sought to avoid those questions by construing the statute to apply only to "commercial enterprise[s]." *Id.* at 413. But this does not solve the problem, because furnishing information for money is still fully protected by the First Amendment. *Sorrell*, 131 S. Ct. at 2665; *Simon & Schuster, Inc. v. Members of New York State Crime Victims Bd.*, 502 U.S. 105, 115-18 (1991).

Perhaps the most extreme recent instance of a restriction on professional speech is Kentucky's effort to stop newspaper columnist John Rosemond from publishing a parenting-advice column. *Rosemond v. Markham*, No. 3:13-cv-00042-GFVT-EBA (E.D. Ky. Complaint filed July 16, 2013). Rosemond is a licensed family counselor in his home state of North Carolina, but he does not have a Kentucky psychologist license. In 2013, that state's Board of Examiners of Psychology issued him a cease and desist order because he printed a "Dear Abby"-style column answering a letter from a

parent located in Kentucky. It is unimaginable that the First Amendment could tolerate a licensing law that forbids a person from publishing an advice column answering reader letters in a newspaper. But such censorship efforts are the consequence of the lack of clear guidance from this Court as to the level of scrutiny that applies when government regulates occupational speech. The current "professional speech" doctrine allows states to indulge in "labeling game[s]," *King*, 767 F.3d at 228 (citation omitted), and restrict speech by calling it activity.

B. Prohibitions on Medical Communication Hinder the Development of Technologies That Could Drastically Improve the Provision of Medical Care to Those in Need

Justice Brandeis once observed that "[a] statute valid when enacted may become invalid by change in the conditions to which it is applied." *Nashville, C. & St. L. Ry. v. Walters*, 294 U.S. 405, 415 (1935). As the United States moves steadily toward a service- and information-based economy, the question of professional speech will only become more critical.

Internet and smart-phone users now routinely use technology to run businesses that consist solely of *communication* to facilitate economic transactions, resulting in complicated legal disputes over whether that technology qualifies as the "practice" of the trade in question, or is only a means of communication. "With the immense increase in communication that the Internet affords, bloggers and users of social media are more willing and able to share advice, opinions, and information with each other," which "entails the

proliferation of certain types of speech that were usually the subject of stringent government control." Stephen A. Meli, Note, *Do You Have a License to Say That? Occupational Licensing and Internet Speech*, 21 Geo. Mason L. Rev. 753, 788 (2014).

According to the Census Bureau, Internet-based services generated $443 billion in revenue in 2013.[2] These statistics necessarily understate the value because Internet-based businesses often involve new services that cannot be fully understood in dollar figures—and much of this business consists of communicating information.

For example, some new smart-phone apps monitor users' medical conditions and warn them when they need care. *See* Eric J. Topol, *The Future of Medicine Is in Your Smartphone*, Wall St. J., Jan. 9, 2015.[3] Some help diabetics track their glucose levels. *See* Ryan A. Ristau, et al., *Evaluation and Evolution of Diabetes Mobile Applications: Key Factors for Health Care Professionals Seeking to Guide Patients*, 26 Diabetes Spectrum 211, 211-15 (2013). Others tell users when they need to apply more sunscreen. D.B. Butler, et al., *Smartphone Mobile Application Delivering Personalized, Real-time Sun Protection Advice: A Randomized Clinical Trial*, 151 JAMA Dermatol. 497, 497-504 (2015).

This technology cannot be characterized as merely the passive provision of information, like books or

---

[2] *E-Stats 2013: Measuring the Electronic Economy*, http://www.census.gov/econ/estats/e13-estats.pdf.

[3] http://www.wsj.com/articles/the-future-of-medicine-is-in-your-smartphone-1420828632.

newspapers, because the technology tailors the information and recommendations to the user's specific needs. But it also cannot be characterized as the practice of medicine, since it consists of computerized algorithms that suggest courses of action, rather than a human doctor exercising judgment to prescribe treatment. "Unlike publication of static information, online information is increasingly interactive, customized, and personal," write attorney Tracy Miller and bioethicist Dr. Arthur R. Derse. "These practices have blurred the distinction between the provision of information and the practice of medicine, a distinction essential to oversight of medical practice." *Between Strangers: The Practice of Medicine Online*, 21 Health Affairs 168, 175 (2002). Yet as Miller and Derse note, the only guidance available from this Court regarding the constitutionality of that "oversight" is the 30-year-old dicta in the *Lowe* concurrence.

The provision of medical services over the internet or through other communications technology—"telemedicine"—is among the most promising of the "information economy" developments. It can bring much-needed medical care within the reach of those who cannot afford to travel to visit doctors, particularly in cases requiring special expertise. *See* Amar Gupta & Deth Sao, *The Constitutionality of Current Legal Barriers to Telemedicine in the United States: Analysis and Future Directions of Its Relationship to National and International Health Care Reform*, 21 Health Matrix 385, 391 (2011). A broad coalition of doctors and policy makers support the expansion of telemedicine. But licensing laws that, like the one involved in this case, restrict the communication of medical information, have proven a substantial barrier. *See* Robert Kocher, *Doctors Without State*

Borders: Practicing Across State Lines, HealthAffairs Blog (Feb. 18, 2014) ("state medical licensure is a vestigial system that imposes significant costs on society without furnishing any kind of commensurate benefit.").[4]

The 2015 report of the American Telemedicine Society found that state licensing laws are "a patchwork of conflicting and disparate requirements" that bar patients "from fully taking advantage of telemedicine." Latoya Thomas & Gary Capistrant, American Telemedicine Association, *State Telemedicine Gaps Analysis: Physician Practice Standards and Licensure* 1 (May 2015).[5] Some states even forbid doctors from consulting other doctors across state lines. *Id.* at 9.

While states have a substantial interest in protecting consumers through medical regulation, many state regulations exist solely for anti-competitive reasons. *See* Paul Spradley, *Telemedicine: The Law Is the Limit*, 14 Tul. J. Tech. & Intell. Prop. 307, 319-20 (2011) ("The 'unspoken heart' of the medical licensure issue is trade protectionism . . . . The emergence of telemedicine will only aggravate the selfish interests of those who support trade protectionism."). The reason for strict scrutiny of laws restricting speech is to prevent the government from restricting speech in the service of such improper motives. The First Amendment accordingly requires government to satisfy

---

[4] http://healthaffairs.org/blog/2014/02/18/doctors-without-state-borders-practicing-across-state-lines/.

[5] http://www.americantelemed.org/docs/default-source/policy/50-state-telemedicine-gaps-analysis--physician-practice-standards-licensure.

the demanding burden of strict scrutiny when it restricts the free flow of information, including medical information. *See Sorrell*, 131 S. Ct. at 2664; *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 370 (2002); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770 (1976).

Ordinarily, a state law restricting the communication of specific types of information would be subject to strict scrutiny, *Reed*, 135 S. Ct. at 2227, and a state law restricting communication by particular speakers would also be subject to strict scrutiny. *Sorrell*, 131 S. Ct. at 2665. Also, a law that bars people from speaking when speaking is their business would be subject to strict scrutiny. *Riley*, 487 U.S. at 796. Yet, thanks to the lack of guidance from this Court on the question of "professional speech," the communication that takes place between patients and doctors duly trained and licensed to engage in the medical profession is typically categorized as "professional speech," and restrictions on it are subjected to *no meaningful First Amendment scrutiny at all*.

Under the current incoherent doctrine, a state law prohibiting people in other states from furnishing information about sexual health to minors violates the First Amendment, *Am. Booksellers Found. v. Dean*, 342 F.3d 96, 98 (2d Cir. 2003), and a medical textbook publisher cannot be held liable when advice in a textbook proves harmful to a reader who follows it, because that would be "inconsistent with fundamental free speech principles." *Jones v. J.B. Lippincott Co.*, 694 F. Supp. 1216, 1217 (D. Md. 1988). Yet a Texas veterinarian *can be criminally prosecuted* if he tells a person on the telephone "Your cat's digestive problems

might improve if you feed her a special cat food available at Petsmart," without first physically examining the cat—and this provision of information is deemed, at least by the Fifth Circuit, beyond the protections of the First Amendment.

CONCLUSION

This Court's guidance is essential to resolving these conflicts and anomalies. While states obviously have an important interest in regulating the medical profession, state lawmakers need to know how far they can go in regulating a profession before they intrude on the fundamental right of freedom of speech. The petition for certiorari should be *granted*.

DATED: July, 2015.

Respectfully submitted,

DEBORAH J. LA FETRA
TIMOTHY SANDEFUR*
*Counsel of Record
Pacific Legal Foundation
930 G Street
Sacramento, California 95814
Telephone: (916) 419-7111
Facsimile: (916) 419-7747
E-mail: tsandefur@pacificlegal.org

Counsel for Amicus Curiae Pacific Legal Foundation