No. 14-1543

In The Supreme Court of the United States

RONALD S. HINES,
DOCTOR OF VETERINARY MEDICINE,

Petitioner,

v.

BUD E. ALLDREDGE, Jr.,
DOCTOR OF VETERINARY MEDICINE, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF OF *AMICI* BILL MAIN, TONIA EDWARDS, JOHN ROSEMOND, STEVE COOKSEY, AND EVA LOCKE IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTEREST OF THE *AMICI CURIAE*

The right to free speech guaranteed by the First Amendment is critical for every American. In today's age of instant, wide-reaching communication, the efforts of government to censor speech that touches, even tangentially, on regulated occupations threatens to strip citizens of their First Amendment rights. This brief is filed on behalf of Bill Main, Tonia Edwards, John Rosemond, Steve Cooksey, and Eva Locke.[1] Each of the *amici* is a citizen of the United States who has suffered from government efforts – in the form of licensing regimes purporting to regulate occupational conduct – to stifle his or her speech. The *amici's* cases illustrate the real impact of occupational licensing on millions of Americans and the inconsistent manner in which lower courts have attempted to address those issues.

Tonia Edwards and Bill Main own and operate "Segs in the City," a Segway-rental and tour business with operations in Washington, D.C. and nearby cities. In Washington D.C., however, it was "illegal to talk about points of interest or the history of the city while escorting or guiding a person who paid you to do so — that is, unless you pay the

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[1] Counsel of record for all parties received notice at least 10 days prior to the due date of the *amici curiae's* intention to file this brief and the parties have consented to the filing of this brief. In accordance with Rule 37.6, the undersigned states that no counsel for a 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 *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

government $200 and pass a 100-question multiple-choice exam." *Edwards v. District of Columbia*, 755 F.3d. 996, 998 (D.C. Cir. 2014). After they challenged D.C.'s tour guide licensing scheme, the D.C. Circuit Court of Appeals held that such tour guide regulations sought to restrict speech, were not narrowly tailored to achieve their purpose, and less restrictive means existed to meet the city's goals. *Id.* at 998, 1008-09. The D.C. Circuit sustained the challenge to D.C.'s tour guide laws on both an as-applied and facial basis. *Id.* at 1009.

Eva Locke is an interior designer in Florida. Florida law requires interior designers to obtain a state license, which requires six years of interior design education and internship with a licensed designer. *See Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011). Practicing interior design in Florida without a license is a criminal offense. *See* Fla. Stat. §§ 481.223(2) and 775.082(4)(a). After Ms. Locke challenged this restraint on her right to speak, the Eleventh Circuit Court of Appeals held that Florida could constitutionally prevent Ms. Locke from speaking concerning interior design issues because the Florida licensing regime effectively applied to conduct, not speech. 634 F.3d. at 1191.

John Rosemond is a resident of North Carolina with a master's degree in psychology and is a licensed "psychological associate" in North Carolina, authorizing him to use the term "psychologist" to describe himself. Mr. Rosemond also is a nationally syndicated columnist who has written an advice column on parenting for 37 years. His weekly newspaper column on parenting appears

in more than 200 outlets nationwide and is now the longest running column in America written by a single author. In 2013, the Kentucky Board of Examiners of Psychology ("Kentucky Board") issued a cease and desist letter demanding that Mr. Rosemond no longer describe himself as a psychologist in his column and cease providing individually tailored responses to reader questions. After Mr. Rosemond filed suit in federal court to challenge the Kentucky Board's censorship effort, the Kentucky Board dropped its efforts to preclude or modify Mr. Rosemond's column.

Steve Cooksey is a North Carolina resident who had been diagnosed with Type II diabetes. After adopting a low-carbohydrate "Paleo" diet, modeled on the diet of our Stone Age ancestors, he lost 78 pounds, freed himself of medicine and doctors, and normalized his blood sugar. In December 2011, Mr. Cooksey started an advice column on his blog to answer reader questions about his struggle with Type II diabetes and his experiences with the Paleo diet. In January 2012, however, the North Carolina Board of Dietetics/Nutrition (the "North Carolina Board") informed Mr. Cooksey that he could not give readers personalized advice on diet, whether for free or for compensation, because doing so constituted the unlicensed practice of dietetics. *See Cooksey v. Futrell*, 721 F.3d 226, 230-31 (4th Cir. 2013). In May 2012, Mr. Cooksey brought suit challenging the North Carolina Board's effort to censor him. After the district court dismissed his complaint on standing grounds, in June 2013, the Court of Appeals for the Fourth Circuit concluded that North

Carolina's efforts to silence Mr. Cooksey presented a viable cause of action as an effort to censor his speech that must be addressed on the merits. *Id.* at 238-40. Following that decision, the North Carolina Board revised its rules to clarify that speech like Mr. Cooksey's did not violate the law.

SUMMARY OF THE ARGUMENT

The fundamental issue in this case is how courts are to evaluate statutes and regulations that restrict speech under the guise of occupational licensing. This Court previously granted *certiorari* in *Lowe v. Sec. & Exch. Comm'n,* 469 U.S. 815 (1984) to address this question, but left it unanswered. Subsequent development in the lower courts has resulted in an intractable conflict among the circuit courts as to what level of First Amendment review, if any, applies to restrictions of "occupational" speech.[2] Although this case concerns medical speech in the context of Petitioner's online veterinary advice, the standard set by the Court likely will be applied to all occupational speech. Approximately one-third of all Americans now work in an occupation that requires a state license, and millions more engage in speech that might loosely relate to those licensed occupations. The state's ability to restrict such

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[2] Although *amici* use the term "occupational speech," many occupational licensing schemes are applied to individuals who are not engaged in the trade regulated by the state. Rather, they may have engaged in speech tangentially related to the regulated trade or otherwise threatened a monopoly enjoyed by the licensed occupation. *Amici* use the term to signify both such speech and the speech of workers actually licensed by a state.

speech is critical to everyone. This is especially so in the internet age of instant, free-wheeling communication. The Court's ruling will determine if States may prevent their residents from publishing an advice column, creating internet blogs concerning their diet or exercise programs, or providing travel guides or local tours.

Many lower courts are applying incorrect standards of review to evaluate speech restrictions imposed by state licensure regimes. To evade the application of strict scrutiny – or in many cases even intermediate scrutiny – those courts have attempted to craft rules from *United States. v. O'Brien*, 391 U.S. 367 (1968) and Justice White's concurrence in *Lowe v. Sec. & Exch. Comm'n*, 472 U.S. 181, 211 (1985) (White, J., concurring). These courts generally have opined that (1) occupational licensing speech restrictions deserve only rational basis review because the restrictions apply to conduct, or (2) individualized, "professional" speech is not entitled to strict First Amendment review. Those conclusions incorrectly deny strict First Amendment review to constitutionally protected speech. The Court should grant *certiorari* to clarify that speech is not conduct and that any effort to restrain occupational speech is subject to strict First Amendment scrutiny.

ARGUMENT

The First Amendment provides that "Congress shall make no law … abridging the freedom of speech…" U.S. Const. amend. I. In keeping with the First Amendment's essentiality to

Americans' freedom, this Court has emphasized repeatedly the necessity to strictly scrutinize laws impinging on the freedom of speech. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97 (1988) (content-based restrictions on speech subject to strict scrutiny); *United States v. Playboy Entm't Group.*, 529 U.S. 803, 813 (2000) (same); *see also* Rodney A. Smolla, *Smolla & Nimmer on Freedom of Speech* § 2:12 at 2-14 (3d ed. 2013) ("The Court consistently refuses to adopt an absolutist position in most areas, yet it also tends to devise doctrines tailored to specific topic areas that are highly protective of freedom of speech, requiring much more than a mere `reasonable basis' for any governmental action abridging speech."). The Court has recognized the protected nature of political and commercial speech, but has left open the proper interpretive rules to address government censorship of "occupational" or "professional" speech. *See, e.g., Citizens United v. Fed. Election Comm'n*, 558 U.S. 310 (2010) (political speech through corporations); *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2672 (2011) (commercial speech).

Resolution of this issue is of critical importance because occupational licensing schemes apply to tens of millions of American workers and indirectly impact millions more. Moreover, the issue has resulted in conflicting lower court authority, some of which threatens to create new, easily abused exceptions to the First Amendment.

I. This Court Previously Recognized the Importance of the Question Presented

In *Lowe v. SEC,* the Court had an opportunity to address occupational speech in the analogous context of investment advisors. 472 U.S. at 188-89 ("We granted certiorari to consider the important constitutional question whether an injunction against the publication and distribution of petitioners' newsletters is prohibited by the First Amendment.")(*citing Lowe v. SEC,* 469 U.S. 815 (1984)). In *Lowe*, the Court examined an injunction barring the publication of investment advice and commentary in a securities newsletter. 472 U.S. at 183. But the Court ultimately declined to reach the First Amendment issue, instead ruling that the publications at issue were permitted by an exception to the statute at issue. The important First Amendment issue in *Lowe* remains open and has since resulted in a split of lower court authority. *See* App. Br. at 6 - 16. After twenty years of conflicting development in the lower courts, the Court now has the opportunity to clarify that First Amendment scrutiny applies to occupational speech restrictions.[3] Only after proper clarification of that question will

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[3] Many of the prior "professional" speech cases have involved controversial subjects. *See, e.g., Pickup v. Brown,* 740 F.3d 1208, 1229 (9th Cir. 2014) (sexual orientation therapy); *Wollschlaeger v. Governor of Fla.*, 760 F.3d 1195 (11th Cir. 2014) (concerning prohibition on doctors asking their patients about gun ownership). Those cases provided a poor framework for deciding significant issues of national importance. This case, which is free from such controversial subject matter, is a more appropriate vehicle for answering the issue left unanswered in *Lowe*.

the nation's courts be equipped to evaluate occupational licensing schemes that threaten the speech of millions of Americans.

II. The Question Presented Is of Critical Importance and Broad Application

A. Occupational Licensing Applies to Approximately One-Third Of The U.S. Population, and Impacts Everyone

Approximately thirty percent of American workers are subject to occupational licensure.[4] That number is up from five percent in the 1950s and continues to grow. *See* Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. 173, 175-76 (2013) ("Kleiner 2013"). Occupational licenses are not mere state-sponsored certifications signaling some level of training or competence.[5] Occupational licensing regimes typically criminalize the practice or teaching of an occupation without the state-approved license. As

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[4] Melissa S. Kearney, Brad Hershbein & David Boddy, *Nearly 30 Percent of Workers in the U.S. Need a License to Perform Their Job: It Is Time to Examine Occupational Licensing Practices*, BROOKINGS.EDU, Jan. 27, 2015, available at http://www.brookings.edu/blogs/up-front/posts/2015/01/26-time-to-examine-occupational-licensing-practices-kearney-hershbein-boddy.

[5] Many states offer certificates intended to signal competence in a chosen field. Such certification programs, however, typically are voluntary.

such, they operate as a complete bar to the regulated occupation and, in many cases, are used to preclude speech related to the field of such occupations.

Occupational licensing is usually characterized as an exercise of a state's police power to protect the health and welfare of its citizens. But as the Court has acknowledged in other contexts, occupational licensing often is advocated by trade groups to limit competition. *See, e.g., N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101 (2015) (holding that state dentistry board is not immune from antitrust laws after dentists sought to exclude nondentists from the teeth whitening market). By making it more difficult to enter an occupation, licensing can affect employment in licensed occupations, wages of licensed workers, the prices for their services, and worker economic opportunity more broadly. *See* Kleiner 2013.[6] Some studies suggest that occupational licensing has reduced employment and increased prices and wages of licensed workers more than it has improved the quality and safety of services. *Id.* Not surprisingly, the entry requirements for an occupational license frequently appear to have little or no correlation with any potential harm to consumer safety.[7] In

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[6] *See also* Morris M. Kleiner, et al., *Relaxing Occupational Licensing Requirements: Analyzing Wages and Prices for a Medical Service*, NAT'L BUREAU OF ECON. RES. No. 19906 (Feb. 2014).

[7] The inefficiency of occupational licensing has become an issue of bipartisan concern. *See* Randal Meyer, *Licensing Requirement Reform: Something We Can All Agree On*, TOWNHALL.COM (Feb. 2015); Adam Ozimek, *The Obama*

many states, interior designers, barbers, cosmetologists, and manicurists all face greater average licensing requirements than do emergency medical technicians.[8]

Although most commonly understood and encountered in the professional context, occupational licensing has a significant bearing on workers of all skill levels, and extends far beyond the occupations of doctors and lawyers. Today, occupational licensing has expanded to include investment advisors, emergency medical technicians, bartenders, auctioneers, security guards, tour guides, mechanics, nail technicians, fortune tellers, cosmetologists, personal/athletic trainers, and, in one state, florists.[9] In total, one or more states

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Administration Goes After Bad Labor Market Regulations, FORBES.COM, Jan. 27, 2015.

[8] *See supra* note 4.

[9] *See, e.g.,* Alabama Athletic Trainers Licensure Act, Ala. Code § 34-40-2 (LexisNexis 1993) (defining "athletic trainer" as "a person licensed by the Alabama Board of Athletic Trainers"); Alaska Stat. § 18.08.082 (2010) (providing for the regulation of training and requirements for emergency medical technicians); La. Rev. Stat. Ann. § 3:3804 (2008) (providing for the regulation of retail florists); Maine Uniform Securities Act, Me. Rev. Stat. tit. 32 § 16403 (2005) ("It is unlawful for a person to transact business in this State as an investment advisor unless the person is licensed under this chapter as an investment advisor"); Mass. Ann. Laws ch. 140, § 185I (LexisNexis 1981) (stating that "no person shall tell fortunes for money unless a license therefor has been issued by the local licensing authority"); Motor Vehicle Service and Repair Act, Mich. Comp. Laws § 257.1305 (LexisNexis 1975) (stating that "a person shall not engage in the business or activity of a specialty or master mechanic unless the person is certified pursuant to this act"); Barbers and Cosmetologists Act, N.M. Stat. Ann. § 61-17A-5

require a license to engage in over 800 professions, including at least 102 low-wage, non-professional occupations.[10] Virtually every American is affected by these licensure regimes.

B. The Internet Has Changed How We Communicate

The proliferation of occupational licensing has coincided with the growth of the internet and an explosion of citizen speech having instant, worldwide reach. *See, e.g., Citizens United*, 558 U.S. at 315 (discussing the impact of "rapid changes in technology" and "the creative dynamic inherent in the concept of free expression"). As a result, occupational licensing requirements potentially apply to millions of people, many of whom will be

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(LexisNexis 2013) (making it illegal to practice as a barber, cosmetologist, manicurist-pedicurist, esthetician or electrologist without a license); NYC Admin. Code § 20-243 (2009), *available at* http://www.nyc.gov/html/dca/downloads/pdf/sightseeing_guide_law_rules.pdf (making it unlawful "for any person to act as a guide without a license therefor from the commissioner"); Tex. Occ. Code § 1702.102 (2007) (requiring security services contractors to be licensed); Va. Code Ann. § 54.1-603 (2010) (stating that "no person or firm shall sell at auction without being licensed by the Board"); Liquor Control Act, Wash. Rev. Code § 66.20.310 (2014) (requiring a permit for alcohol servers at retail licensed premises).

[10] Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* (2006) available at http://dx.doi.org/10.17848/9781429454865; Dick M. Carpenter, *et. al*, *License to Work: A National Study of Burdens of Occupational Licensing*, INST. FOR JUST. (2012), available at https://www.ij.org/licensetowork.

unaware that their speech could subject them to criminal sanctions in states where their advice might be read or viewed. As shown by the *amici's* individual circumstances, conflict between regulators and citizens exercising their rights to speak are occurring on an increasing basis. It is critical, therefore, that both the public and the thousands of licensing bodies understand when occupational licensing restrictions trigger First Amendment scrutiny.

Because many licensed occupations touch on activities engaged in and discussed on a daily basis by normal Americans (including parenting, relationships, diet, law, and health), conflict is inevitable. Today, like Mr. Rosemond and his syndicated column, persons engaged in pure speech may find themselves subjected to licensing requirements or criminal penalties in states that they have never physically entered. Individuals from around the world regularly communicate through email, blogs, online forums, instant messaging, twitter, YouTube and myriad other forms of internet communications. One need spend only a few minutes on YouTube to find thousands of hours of videos dedicated to teaching math, auto repair, diet, parenting, mental health, personal training, psychology, travel guides, or medical advice.[11] Each

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[11] See, *e.g.*, Khan Academy, *Adding and Subtracting Fractions*, YOUTUBE (Jan. 8, 2007), https://www.youtube.com/watch?v=52ZlXsFJULI (teaching math calculations); LexiYoga, *4 Yoga Poses to Reduce Belly Fat*, YOUTUBE (Jan. 25 2011), https://www.youtube.com/watch?v=VTJHsQWNRrg (providing personal training advice); Scotty Kilmer, *Fixing Burning*

of these fields involve an occupation regulated in at least one (and often every) state. In many instances, the dissemination of such videos could be construed to violate occupational licensing requirements.

Most occupational licensing cases begin simply: a licensed stakeholder reports someone to a regulatory authority, usually because they dislike something that was said. This is exactly what happened to two of the *amici*. Shortly after he spoke at a nutritional seminar for diabetics at a local church, Mr. Cooksey received threatening letters from the North Carolina Board informing him he was under investigation and demanding that he alter his website. 721 F.3d at 231. Mr. Rosemond, whose syndicated column was published in three Kentucky newspapers, received cease and desist letters from the Kentucky Board after a local psychologist complained about statements in one of his columns. Kentucky's effort to restrict Mr. Rosemond's speech could just as easily have been targeted against *Washington Post* advice columnist Carolyn Hax[12], television star Mehmet Oz[13], or any

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Smells on Your Car, YOUTUBE (Apr. 28, 2015), https://www.youtube.com/watch?v=jw0Z3djwWgg (giving auto repair advice).

[12] "Carolyn Hax" is a syndicated, *Washington Post* advice column that originated in 1997 in which the author dispenses advice to readers concerning marital, mental health, and relationship issues. Many of the columns are today derived from live internet "chats" and focus on specific reader questions. *See* Carolyn Hax, *Advice Columnist Carolyn Hax Takes Your Questions and Tackles Your Problems*, WASHPOST.COM, http://www.washingtonpost.com/pb/people/carolyn-hax/.

other radio, television, or internet speaker. First Amendment jurisprudence should reflect the modern realities of freewheeling, widespread communications by strictly scrutinizing restrictions of occupational speech.

III. Resolution of the Question Presented Is Critical Because Lower Courts Are Applying Incorrect and Inconsistent Rules

This Court consistently has held that speakers need not obtain a license to speak. If Dr. Hines' internet advice were viewed simply as speech, Texas' attempt to prevent him from speaking on his website or through email likely would be found to violate the First Amendment. *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 802 (1988). Whether speech that is alleged to be subject to occupational licensing is reviewed as speech results in dramatically different outcomes. Although engaged in the exact same type of speech, *amici* Edwards and Main remain free to conduct their Segway tour business; while Candance Kagan is barred from conducting tours in New Orleans, with or without Segways. *Cf. Kagan v. City of New Orleans*, 753 F.3d 560, 561 (5th Cir. 2014) and *Edwards v. District of Columbia*, 755 F.3d. at 998. Like the District of Columbia, New Orleans required tour guides to

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[13] Mehmet Oz is a heart surgeon who hosts a "health-centric" television series, The Dr. Oz Show. The Dr. Oz Show disclaims any doctor-patient relationship and asserts that it is not providing medical advice. *See The Dr. Oz Show*, *Frequently Asked Questions*, *http://www.doctoroz.com/frequently-asked-questions* (posted on Sept. 7, 2011).

obtain a license "to charge for tours to 'the City's points of interest and/or historic buildings, parks or sites, for the purpose of explaining, describing or generally relating the facts of importance thereto.'" *Kagan v. City of New Orleans*, 753 F.3d 560 at 561. Unlike the D.C. Circuit, however, the Fifth Circuit refused to apply First Amendment scrutiny to the New Orleans tour guide licensing scheme and upheld this barrier and precondition to Ms. Kagan's speech.

The Fifth Circuit held below that Dr. Hines' speech was subject to a lower level of scrutiny as "professional" speech. App. at 23. In rejecting the strict scrutiny otherwise applied by this Court to restrictions on speech, the Fifth Circuit held that restrictions on "professional" speech need be only "reasonable." *Id.* In doing so, it followed a Ninth Circuit case that held that professional speech is not really speech, but conduct. App. at 20-23 (*citing Pickup v. Brown*, 728 F.3d 1042, 1055 (9th Cir. 2013)). The Fifth Circuit thus adopted one of the two methods in which lower courts have attempted to carve a new exception to the First Amendment: (1) reclassifying speech as conduct, and (2) treating one-to-one speech as unworthy of Constitutional protection. The Court should resolve the split of authority and clarify that all occupational *speech* restrictions require strict First Amendment scrutiny.

A. The Court Should Clarify That Speech Is Not Conduct

Some courts have argued that speech in a regulated occupation is not speech, but conduct. *See,*

e.g., Pickup v. Brown, 740 F.3d 1208, 1229 (9th Cir. 2014) (holding that the psychotherapy in question was not merely medical advice, but was instead treatment); *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011) (holding that interior designer licensure "does not implicate constitutionally protected activity under the First Amendment").[14] These courts generally point to *United States v. O'Brien* to justify this distinction. *United States v. O'Brien*, 391 U.S. 367 (1968).

In *O'Brien*, the Court considered whether a protestor's burning of his draft card was protected "speech" under the First Amendment or "conduct" prohibited by the Universal Military Training and Service Act of 1948 (the "UMTSA"). *Id.* at 376-77, 382. In determining that the UMTSA properly regulated conduct, with only incidental impact on speech, the Court opined "that when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* (internal citations omitted).

The Court has since emphasized, however, that distinguishing between "regulation of speech" and "regulation of conduct" is a practical inquiry that cannot be divorced from the underlying action. If the purported "conduct" that triggers punishment

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[14] These decisions are in direct conflict with the Third Circuit and the inconsistent positions in the Eighth, Ninth and D.C. Circuits. *See* App. Br. at 6 – 17.

under a law involves communicating a message, then the law is a regulation of speech and must be analyzed as one. *See generally Holder v. Humanitarian Law Project*, 561 U.S. 1, 27 (2010) (holding that the provision of material support by means of speech could not be considered solely conduct).

In 2010, in *Holder v. Humanitarian Law Project*, the Court considered whether an activity most easily characterized as counseling violated federal law prohibiting "material support" to terrorist organizations. *Id.* (discussing 18 U.S.C. § 2339A(b)(1) (2012). In determining the proper standard of review, the Court examined whether the provision of "material support" to particular groups in the form of speech was conduct or speech. *Id.* The government argued that the statute barred only conduct, but the Court concluded that the government was "wrong that the only thing actually at issue . . . [was] conduct" and, thus, incorrect in arguing that intermediate scrutiny was the appropriate standard of review. *Id.* at 27. Instead, the Court concluded that an activity consisting of speaking and writing is expressive and, therefore, more demanding scrutiny must be applied. *Id.* at 28. In other words, the question is not whether a law, in the abstract, is aimed at "speech" or "conduct." The Court specifically rejected the application of the intermediate test it promulgated in *O'Brien*, which applies only to "regulations of noncommunicative conduct." *Id.* The inquiry is whether the law's application to a particular individual is triggered by what that individual *says* instead of simply what that individual does. *See also Cohen v. California*,

403 U.S. 15 (1971) (generally applicable statute nonetheless subject to strict scrutiny where implicated as a result of defendant's speech).

As recently noted by the Third Circuit, if a state may restrict speech by labeling it as conduct, states will have nearly unfettered ability to impose prior restraints on speech. *See King v. Governor of N.J.*, 767 F.3d 216, 228 (3d Cir. 2014) ("[T]he enterprise of labeling certain verbal or written communications speech and others 'conduct' is unprincipled and susceptible to manipulation."). As the Third Circuit concluded, "speech is speech, and it must be analyzed as such for purposes of the First Amendment." *Id.* at 229.

This case provides an appropriate vehicle for clarifying the confusion caused by erroneous interpretations of *O'Brien* and Justice White's concurrence in *Lowe*. Unlike in *O'Brien*, Dr. Hines did not burn his veterinary degree or engage in any non-communicative conduct whatsoever. Like the *amici*, Dr. Hines engaged only in speech, largely through email and other internet communications.[15] Even if the Texas legislature intended to regulate only conduct, its veterinary licensing law is being applied to bar speech. In such circumstances, strict First Amendment review should be necessary.

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[15] Thus, this case also is analogous to the case of Ms. Edwards and Mr. Main (*amici* herein) in *Edwards v. District of Columbia.*, 755 F.3d 996 (D.C. Cir. 2014). Although D.C.'s tour guide license requirement made no reference to the content of a tour guide's speech, the law was triggered by *amici's* speech, as shown by both the text and the practical operation of the requirement.

B. The Court Should Clarify That The Constitutional Protection Of Speech Does Not Depend On The Number Of Listeners

Some courts have concluded that advice given to a particularized listener is not entitled to First Amendment protection. *See, e.g., Locke v. Shore*, 634 F.3d at 1191 ("There is a difference, for First Amendment purposes, between regulating professionals' speech to the public at large versus their direct, personalized speech with clients."); *Accountant's Soc'y of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988) (refusing to apply First Amendment scrutiny to regulation of non-CPA accountants based on "personal nexus between professional and client"). As with the "conduct" rationale discussed above, this theory was derived by a number of lower courts in an attempt to discern a governing rule from Justice White's concurrence in *Lowe v. SEC,* 472 U.S. 181, 211 (1985) (White, J., concurring). *See*, *e.g.*, *Wollschlaeger v. Governor of Fla.*, 760 F.3d 1195, 1217 (11th Cir. 2014) (holding that state had broad power to regulate professional conduct).

In his *Lowe* concurrence, Justice White stated that one "who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession." 472 U.S. at 232.[16] This

[16] Justice White's apparent concerns are echoed in the Ninth Circuit's and other courts' reluctance to "imbue certain

language is the source of the "professional nexus" and "speech as conduct" exceptions to the First Amendment crafted by lower courts. The efforts to discern a rule from Justice White's concurrence, however, ignore significant aspects of his opinion. Most significantly, Justice White recognized that the Court's conclusion in *Lowe* revealed an underlying conviction that the underlying statute violated the First Amendment:

> One does not have to read the Court's opinion very closely to realize that its interpretation of the Act is in fact based on a thinly disguised conviction that the Act is unconstitutional as applied to prohibit publication of newsletters by unregistered advisers. Indeed, the Court tips its hand when it discusses the Court's decisions in *Lovell v. City of Griffin*, 303 U.S. 444 (1938), and *Near v. Minnesota ex rel. Olson*, 283 U.S. 697 (1931). The Court reasons that given these decisions, which forbade certain forms of prior restraints on speech, the 76th Congress could not have intended

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professions – *i.e.* clinical psychology and psychiatry – with 'special First Amendment protection merely because they use the spoken word as therapy." *King v. Governor of the State of New Jersey*, 767 F.3d at 228. But treating "speech as speech" does not require courts to strike down all occupational licensing regimes; it merely requires that the proper standard of review be applied. Nor is there any debate that the fiduciary nature of most professional relationships leaves ample room for regulation of such professions through mandated standards, malpractice, and professional discipline. None of those, however, require prior restraints on speech.

> to enact a licensing provision for investment advisers that would include persons whose advisory activities were limited to publishing.

Id. at 226-27 (White, J., concurring). He concluded that preventing unlicensed persons from publishing investment advice "is a direct restraint on freedom of speech and of the press subject to the searching scrutiny called for by the First Amendment." *Id.* at 233.

The Court has never adopted a "professional" speech exception to the First Amendment. *See Stuart v. Huff,* 834 F. Supp. 2d 424, 431 (M.D.N.C. 2011) (noting that "the phrase has been used by Supreme Court justices only in passing" and collecting cases); *see also* Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 834-49 (1999). To the contrary, the Court has held repeatedly that speech by professionals is entitled to First Amendment review. *See, e.g., Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 622–24 (1995) (determining that the First Amendment applied to a state regulation on attorney advertising); *Ohralik v. Ohio State Bar Ass'n,* 436 U.S. 447, 454–59 (1978) (concluding that the First Amendment applied to a state restriction on in-person solicitation by attorneys); *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 758–61 (1976) (reasoning that the First Amendment applied to a professional

regulation prohibiting price advertising by pharmacists).[17]

Speech does not lose First Amendment protections based on the number of listeners. *McCullen v. Coakley*, 134 S. Ct. 2518, 2536 (2014) ("In the context of petition campaigns, we have observed that 'one-on-one communication' is 'the most effective, fundamental, and perhaps economical avenue of political discourse.'")(quoting *Meyer v. Grant*, 486 U.S. 414, 424 (1988)). In *Rust v. Sullivan*, 500 U.S. 173 (1991), the Court hypothesized that "traditional relationships such as that between doctor and patient should enjoy protection under the First Amendment from Government regulation, even when subsidized by the Government." *Id.* at 200. *See also Keller v. State Bar of Ca.,* 496 U.S. 1, 13-14 (1990) (state could not compel members of the state bar to fund "activities of an ideological nature"). The Court also has noted in a case involving pure commercial speech by attorneys (e.g. advertising) that "[s]peech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by [professionals] ... the strongest protection our Constitution has to offer." *Fla. Bar v. Went For It, Inc.,* 515 U.S. 618, 634 (1995) (citing *Gentile v. State*

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[17] *But see, Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (First Amendment rights of doctors implicated by mandatory abortion disclosures, but only as part of practice of medicine subject to reasonable licensing and regulation). The statute at issue in Casey did not require doctors to adopt the mandated language as their own, only to provide it to patients as part of their informed consent duty. *Id.*

Bar of Nev., 501 U.S. 1030 (1991); *In re Primus*, 436 U.S. 412 (1978)).

The cases of the *amici* show that the one-to-one nature of most professional relationships has not proven to be a real boundary limiting the "professional speech" exception to the First Amendment. State licensing bodies have used the individualized speech rationale to impose prior restraints of speech by tour guides, diet bloggers, and newspaper columnists. *See supra* at 1-4,12. The *amici* cannot be understood to have taken "the affairs of a client personally in hand [or purported] to exercise judgment on behalf of the client in light of the client's individual needs and circumstances." *Lowe v. S.E.C.*, 472 U.S. at 232. As the efforts to censor the *amici* show, any rule attempting to limit First Amendment protection to particular subsets of occupational speech will be abused.

C. Occupational Speech Is Worthy of Protection

The standard applied by this Court to First Amendment challenges to "professional" speech regulation will be applied, inevitably, to all other occupations regulated by any state. Speech that touches on areas of commerce regulated by state authorities is worthy of vigorous First Amendment protection. *Amici* do not suggest that states may not reasonably regulate legal, medical or other occupations, but care should be taken to ensure that such regulation is not used improperly to censor lawful speech. Non-commercial, occupational speech should be accorded full First Amendment protection.

Under the view espoused by Texas and adopted by the Fifth Circuit below, occupational speech restrictions should be treated as conduct, or unprotected "individualized professional" speech, and subjected only to rational basis review. If that view were adopted by the Court, speech that generally is recognized as benign (or even beneficial) would receive less First Amendment protection than speech that is commonly recognized as offensive, distasteful or salacious. *See, e.g., Reno v. Am. Civil Liberties Union*, 521 U.S. 844 (1997) (striking down Communications Act as violative of the First Amendment); *Elonis v. United States*, 135 S. Ct. 2001 (2015) (threatening rap lyrics posted on the internet). There is no principled basis to conclude that the First Amendment was intended to provide citizens more freedom to publish menacing lyrics than dieting or parental advice. Speech is speech; laws that are applied to effectuate prior restraints on speaking deserve the same degree of scrutiny as laws regulating what may or may not be said.

CONCLUSION

For the foregoing reasons, *amici* respectfully ask this Court to grant the Writ of Certiorari.

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