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 CURIAE* CATO INSTITUTE AND MACKINAC CENTER FOR PUBLIC POLICY IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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

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INTEREST OF *AMICI CURIAE*[1]

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to promote the principles of limited constitutional government that are the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*. The present case centrally concerns Cato because it involves government infringement on both the freedom of speech and the right to earn an honest living.

The Mackinac Center for Public Policy is a Michigan based, nonprofit, nonpartisan research and educational institute advancing policies fostering free markets, limited government, personal responsibility, and respect for private property. The Center is a 501(c)(3) organization founded in 1988.

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[1] Pursuant to this Court's Rule 37.2(a), *amicus*, Cato Institute, gave timely notice to all parties of its intent to file this brief, and *amici* have submitted to the Clerk letters of consent from all parties to the filing of this brief. Pursuant to this Court's Rule 37.6, *amici* state that this brief was not authored in whole or in part by counsel for any party, and that nobody other than *amici*, it members, or its counsel made a monetary contribution intended to fund its preparation or submission.

STATEMENT

Under Texas law, a "person may not practice veterinary medicine unless a veterinarian-client-patient relationship exists." Tex. Occ. Code Ann. § 801.351(a) (§ 801.001 *et seq*. "Licensing Act"). Establishing such a relationship requires, in part, that the veterinarian, "possesses sufficient knowledge of the animal to initiate at least a general or preliminary diagnosis of the animal's medical condition," which requires that the veterinarian "has recently seen, or is personally acquainted with, the keeping and care of the animal by: (1) examining the animal; or (2) making medically appropriate and timely visits to the premises on which the animal is kept." *Id*. at § 801.351(a), (b) ("Physical Examination Requirement"). In 2005, Texas amended the Licensing Act to prohibit establishing a veterinarian-client-patient relationship by telephone or electronic means. *Id*. at 801.351(c). Violations of the Licensing Act are criminal offenses. *Id*. at §§ 801.504.

Dr. Ronald S. Hines, a retired, Texas-licensed veterinarian, published pet-care articles on his website. Tex. App. 40, 42. He also posted responses to questions he received by e-mail and provided individualized advice by e-mail or telephone, such as referring pet owners to examining veterinarians, offering insights into conflicting diagnoses received from local veterinarians, and consulting with treating veterinarians. App. 42-43, 45. He did not

prescribe medicine and did not try to be an animal's primary veterinarian. App. 48. In 2012, ten years after Dr. Hines launched his website, the Texas State Board of Veterinary Medical Examiners ("Board") informed Dr. Hines that he had violated the Licensing Act by speaking about the care of specific animals without physically examining them first. App. 54. The Board punished Dr. Hines, including suspending his license for a year. App. 57. Dr. Hines wishes to resume providing veterinary advice via the internet. App. 60.

The Fifth Circuit held that Texas's ban on Dr. Hines's speech "denies the veterinarian no due First Amendment right." *Hines v. Alldredge*, 783 F.3d 197, 202 (5th Cir. 2015).

SUMMARY OF ARGUMENT

Texas has made it a criminal offense for a licensed veterinarian to provide veterinary advice over the telephone or via electronic means unless the veterinarian has first physically examined the animal. Although telephones have been available for over a century, Texas did not criminalize providing veterinary advice by telephone until 2005. The Fifth Circuit upheld this newfangled restraint on veterinary speech by relying on the concurrence in *Lowe v. S.E.C.*, 472 U.S. 181 (1985), for the notion that professional speech is necessarily incidental to

the conduct of a profession and thus any limitation on that speech must be incidental as well. The Fifth Circuit is not alone in assuming away, under the guise of regulating professional conduct, a professional's right to speak.

This Court has previously recognized that the First Amendment applies to lawyers when speaking within their professional capacities, *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010); and several courts of appeals have recognized First Amendment protection for other occupational speech, both professional and non-professional. *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (applying First Amendment scrutiny to physicians' communications to patients); *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014) (applying First Amendment scrutiny to licensing of tour guides).

Nonetheless, the court below upheld a content-based restraint on speech simply because a veterinarian spoke within the context of his occupation. This broad holding, if allowed the stand, would silence the voices of a broad spectrum of speakers who currently provide individualized advice by electronic means and would bear most heavily on members of society who, due to physical or economic constraints, obtain professional services remotely that they are unable to obtain in person.

ARGUMENT

I. THIS COURT SHOULD GRANT THE PETITION TO RESOLVE THE CIRCUIT SPLIT REGARDING FIRST AMENDMENT PROTECTION OF PROFESSIONAL SPEECH

This Court has recognized that the First Amendment reaches professional speech and has held that even content-neutral incidental restrictions on speech are subject to intermediate scrutiny. *See, e.g., Holder*, 561 U.S. 1; *Turner Broad. Sys., Inc. v. F.C.C.*, 520 U.S. 180, 189, 217 (1997) (citing *United States v. O'Brien*, 391 U.S. 367, 377 (1968)).

The circuits, however, are in disarray when it comes to professional speech. The split can be traced to a conflation of terms in the concurrence in *Lowe*, 472 U.S. 181, which used the terms "incidental effects" on speech and "incidental" speech, apparently interchangeably. The predictable effect on the lower courts is that some circuits, including the court below, rely on the *Lowe* concurrence for the proposition that individualized advice by a licensed professional has no First Amendment protection because the speech is merely "incidental" to regulable conduct. The court below thus concluded that any *restraint* is but "incidental" to valid regulation of conduct, and accordingly, applied rational basis review.

Other circuits take a different approach, presuming the First Amendment extends to professional speech.

A. Justice White's Concurring Opinion in *Lowe* Has Been Erroneously Invoked to Bypass First Amendment Protection for Licensed Professionals

The court below relied on the *Lowe* concurrence to hold that even if the Physical Examination Requirement restricts Dr. Hines's speech, that restriction is merely incidental and denies him no First Amendment right. This misapplication of an "incidental" restriction flows directly from the conflation of terms in the *Lowe* concurrence, which has had far-reaching implications on First Amendment doctrine regarding professional speech.

Lowe was decided on statutory grounds. *Id.* at 211. The concurrence, however, focused on whether the limitations on professional speech imposed by the statute at issue, the Investment Advisors Act of 1940,[2] conflicted with the First Amendment. *Id.* at 228 (addressing "a collision between the power of government to license and regulate those who would pursue a profession or vocation and the rights of

[2] § 203(c) of the Investment Advisers Act of 1940, 54 Stat. 850, 15 U.S.C. § 80b-3(c).

freedom of speech and of the press guaranteed by the First Amendment.").

Justice White sought to resolve the tension between three principles: (1) that "[t]he power of government to regulate the professions is not lost whenever the practice of a profession entails speech," *Id*. (citing *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)); (2) that "the principle that the government may restrict entry into professions and vocations through licensing schemes has never been extended to encompass the licensing of speech," *Id*. at 229-30 (citing *Thomas v. Collins*, 323 U.S. 516 (1945)); and (3) that a legislature's characterization of its legislation does not determine the point at which professional regulation becomes regulation of speech. *Id*. at 230.

Justice White identified "the point where regulation of a profession leaves off and prohibitions on speech begin" as the point at which an advisor "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances," thus creating a "personal nexus between professional and client." *Id*. at 232. Under the *Lowe* concurrence, if there is no personal nexus between the professional and client, then First Amendment protections apply. If not, then things get murky and require a second analytical step to determine whether there is incidental speech or an

incidental restriction. The two discrete concepts—incidental speech and incidental restriction—have been merged to oust the First Amendment from the regulation of professional speech.

In the *Lowe* concurrence, the term "incidental" is used in two distinct contexts. First, it is used in the context of "*incidental effects* on otherwise protected expression" or "*incidental impact* on speech." *Id.* at 230, 232. (emphasis added). In this context, speech retains its First Amendment protection—no right is lost. The only issue is whether the *burden* on speech is incidental to the recognized right.

The second context in which the term incidental is used pertains to speech that is "incidental to the regulable transaction," or "incidental to the conduct of the profession." *Id.* at 232. In this context, speech would have no protection—all rights are lost because the *speech* is deemed to be merely incidental to nonspeech activity.

Some circuits, including the court below, focus on the second use of "incidental," interpreting the *Lowe* concurrence to mean that limitations on professional speech within an otherwise valid professional licensing scheme are *per se* "incidental" to the nonspeech aspects of the professional's actions and thus do not implicate the First Amendment. *Hines*, 783 F.3d at 202 ("Whether Hines's First Amendment rights are even implicated by this regulation is far

from certain."). *See also Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011) (holding that a licensing requirement for interior designers regulated only personal speech between the designers and their clients, and thus the regulation governed occupational conduct, not speech). Under this interpretation, any professional speech that is directed toward a client is incidental to nonspeech conduct, and thus has no First Amendment protection—never had and never will. The outcome of such an interpretation is curious, where, as here, there is no such "nonspeech" conduct.

Others circuits recognize that obtaining a license does not deprive a professional of First Amendment rights. *Mezibov v. Allen*, 411 F.3d 712, 718 n.2 (6th Cir. 2005) (holding that "attorneys clearly retain some First Amendment rights outside of the courtroom"); *Stuart v. Camnitz,* 774 F.3d 238, 251 (4th Cir. 2014) *cert. denied sub nom. Walker-McGill v. Stuart,* No. 14-1172, 2015 WL 1331672 (U.S. June 15, 2015) ("Though physicians and other professionals may be subject to regulations by the state that restrict their First Amendment freedoms when acting in the course of their professions, professionals do not leave their speech rights at the office door"); *Conant*, 309 F.3d at 637 ("Being a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment Rights.").

This approach is consistent with this Court's longstanding view that, "the rights of free speech and a free press are not confined to any field of human interest," *Thomas*, 323 U.S. at 531; and professional speech may be entitled to "the strongest protection our Constitution has to offer," *Florida Bar v. Went for It, Inc.*, 515 U.S. 618, 634 (1995).

The Court should clarify that speech does not become "incidental" to professional conduct, losing its First Amendment protection, solely by virtue of being uttered by a licensed professional.

B. What Is Incidental Speech Anyway? Can Pure Speech Be Incidental If There Is No Nonspeech Conduct?

Recall this exchange from a popular 1990s television show:

> *Rachel: I will have the (speaks softly) side salad.*
> *Waiter: And what will that be on the side of?*
> *Rachel: I don't know. Why don't you just put it right here next to my water?*

Friends, S02x05 (Season 2, Episode 5) – "The One with Five Steaks and an Eggplant," aired 10/19/95. Rachel Green simply wants a small salad (because

she's broke), while the waiter insists that this "side" salad be "incidental" to some main course.

The lower court's holding similarly depends upon the notion that professional speech is incidental to the conduct of the profession and thus has no First Amendment protection. Here, Dr. Hines communicated with pet owners over the telephone and via e-mail. Nevertheless, the state asserts that Dr. Hines's speech must be incidental to nonspeech activity—but what activity? Telephones are made for talking. E-mail is made for writing. It is true that these communications devices *could* be used to perform certain actions, like issuing a prescription or purchasing medicine for delivery to a client. But Dr. Hines does not do any of those things; nor does the state claim that any such regulable activity is at issue. It is solely Dr. Hines's communications with pet owners that the state seeks to ban even though there is no "main course" conduct for Dr. Hines's pure speech "side salad" to accompany.

Even if there were regulable conduct associated with Dr. Hines's speech, the First Amendment would still apply to his pure speech interaction with pet owners. The Ninth Circuit's decision in *Conant*, 309 F.3d 629, is instructive. There, the issue was whether the First Amendment extended to a physician's recommendation to a particular patient of the use of medical marijuana where federal law prohibited aiding and abetting the actual

distribution and possession of marijuana. *Id.* at 632. The court distinguished between the protected doctor-patient communications, in which the doctor discussed the merits of a marijuana therapy program, and the regulable conduct of actually prescribing marijuana or assisting the patient in obtaining it. *Id.* at 634-35. Such a distinction would be equally applicable here—if Dr. Hines actually issued prescriptions or engaged in any other regulable activity, which he does not.

C. Even Incidental Restrictions on Speech Are Reviewed Under the Intermediate Scrutiny Test

Even if the lower court's hall-of-mirrors approach were accepted and pure speech could be deemed incidental to non-existent conduct, any content-neutral restriction on that speech would still be subject to intermediate scrutiny—not the rational basis review applied by the court below. *See Turner Broad. Sys., Inc.*, 520 U.S. at 189, 217 (citing *O'Brien*, 391 U.S. at 377).

Here, the restriction is complete, not incidental. But even if Dr. Hines's speech could be combined in the same course of conduct with nonspeech, the state's interest in regulating the nonspeech element could only justify incidental limitations on his First Amendment freedoms. *O'Brien*, 391 U.S. at 376. The

expressive components of the conduct could only be regulated so long as the law or regulation is content-neutral, "advances important governmental interests unrelated to the suppression of free speech, and . . . does not burden substantially more speech than necessary to further those interests." *Time Warner Entm't Co., L.P. v. United States*, 211 F.3d 1313, 1318 (D.C. Cir. 2000) (quoting *Turner Broad. Sys., Inc.*, 520 U.S. at 189).

Here, the lower court did not analyze whether an important governmental interest exists and did not examine the extent of the speech that is burdened. Instead, it assumed that any burden must be incidental simply because the speaker is a licensed professional.

D. The Physical Examination Requirement Imposes a Content-Based Restriction that Is Subject to Review

The lower court upheld the Physical Examination Requirement in part because it presumed that the regulation was content-neutral. *Hines*, 783 F.3d at 201 ("It does not regulate the content of any speech, require veterinarians to deliver any particular message, or restrict what can be said once a veterinary-client-patient relationship is established."). In doing so, the lower court conflated viewpoint-based restrictions with content-based

restrictions, *Id.* at 202 n.20; and thus made the very analytical error that this Court warned against in *Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 2229-30 (2015) (identifying "two distinct but related limitations that the First Amendment places on government regulation of speech," discrimination among viewpoints and prohibition of public discussion of an entire topic).

Dr. Hines does not contend that the Physical Examination Requirement is viewpoint-based, nor does the text of the regulation censure any particular point of view. Because the Physical Examination Requirement precludes Dr. Hines from speaking only on the topic of pet care, however, it is indisputably content based and presumptively invalid. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382, (1992) ("Content-based regulations are presumptively invalid.").

Dr. Hines could, for example, without running afoul of the regulation, discuss weather, sports, or movies with prospective clients; he just can't speak on a single topic of specialized knowledge: veterinary care. This is the very definition of a content-based restriction.

This Court addressed a similar attempt to restrict communication of specialized knowledge in *Holder*, holding that the First Amendment protects "advice or assistance derived from scientific,

technical or other specialized knowledge," as content-based speech because application of the restriction depended on what the plaintiffs would say. 561 U.S. at 12-13.

If, as here, a law singles out and suppresses speech according to its subject matter, it is content-based on its face, suppressing not any particular viewpoint on the subject, but suppressing them all. *Reed,* 135 S. Ct. at 2229-30. In *Reed*, the Court analogized the City of Gilbert's categorization of signs based on content to a law banning "the use of sound trucks for political speech—and only political speech," which "would be a content-based regulation, even if it imposed no limits on the political viewpoints that could be expressed." *Id.* A law that bans the use of sound trucks for political speech is no different than the Texas law upheld below, which bans the use of a telephone or the internet for veterinary speech. Both laws isolate a particular subject matter for regulation; and both laws restrict the medium through which speech on that subject may be communicated. Accordingly, both laws are content-based regulations of speech.

"Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." *Id.* at 2227. This "common sense meaning" of content-based includes no exception for laws enacted with a "benign motive, content-neutral

justification, or lack of animus toward the ideas" that the government wishes to burden. *Id.* at 2227-28. Thus, a content based restriction cannot stand simply because the government has proclaimed a content-neutral purpose for the regulation. *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642-43 (1994) (citing *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221, 231-32 (1987) ("Nor will the mere assertion of a content-neutral purpose be enough to save a law which, on its face, discriminates based on content."). Indeed, this Court expressly rejected that approach in *Reed,* 135 S. Ct. at 2228-29.

Thus, because all content-based regulations of speech are subject to strict scrutiny, *id.* at 2228, this Court should clarify that the lower court's application of rational basis review to regulation of veterinary speech was improper and that First Amendment scrutiny should have been applied.

II. THE LOWER COURT'S HOLDING IS OVERBROAD AND WILL SILENCE A BROAD RANGE OF PROFESSIONALS

The decision below not only failed to apply heightened scrutiny to the content-based restrictions on Dr. Hines's speech, it actually presumed the constitutionality of the restraint simply because Dr. Hines is a licensed professional. Such an approach is

overbroad and prone to limiting more than just veterinary speech.

For example, numerous professionals around the country, in a variety of disciplines, provide individualized advice via electronic means to questioners who submit queries by telephone or e-mail. The professionals may respond on-line, via e-mail, or over the air in a radio broadcast. The areas of expertise span the traditional professions—from health care to financial advice to pet care consultations.

For example, Dr. Sanjay Gupta, accepts questions via e-mail regarding health that he answers on-line.[3] Similarly, for over thirty years, Dr. Drew Pinsky, a practicing internist and addictionologist with training in psychology, has been accepting—and answering—questions about relationships, sexuality, and drug addiction problems on Loveline Radio (Westwood One).[4] The Mutual Fund Show, which broadcasts on numerous radio stations across the country, also accepts individual questions on-line and provides feedback from a financial advisor.[5] Car Talk, which broadcasts across the country on NPR, accepts mechanical questions about automobiles on-

[3] Health Matters with Dr. Sanjay Gupta, http://www.everydayhealth.com/conditions/sanjay-gupta

[4] Dr. Drew, http://www.lovelineshow.com/pg/jsp/loveline/abouttheshow.jsp

[5] The Mutual Fund Show, https://www.mutualfundstore.com/mutual-fund-show

line as well as by telephone. Reponses are provided during the weekly radio show as well as on-line in the *Dear Car Talk* blog.[6] And, Warren Eckstein not only hosts a radio program regarding pet care, he also accepts requests for consultation via e-mail or fax and responds to questions via telephone.[7]

These are but a few examples of professionals providing advice via e-mail, internet, or telephone, whose contributions to their clients' well-being would be quashed were the lower court's sweeping holding used to invite and uphold other regulation of professional speech.

A. The Physical Examination Requirement is Overbroad

The Physical Examination Requirement sweeps up speech that is well within the ordinary practice of medicine by forbidding communication between doctors and clients who are well-equipped to receive telephonic advice.

For example, under the Physical Examination Requirement, a veterinarian could provide advice over the telephone to a rancher about a cow that the veterinarian had examined, or any other cow within

[6] http://www.cartalk.com/content/our-show
[7] Dr. Eckstein and the Pet Show, http://thepetshow.com/consultations/

an area, such as a barn, that the veterinarian had visited. But, if the cow were to have a calf out on the range, and there was a problem with the offspring, the rancher could not call the veterinarian for immediate advice regarding the young animal—even if the veterinarian had seen the mother the preceding day and was well acquainted with the rancher's methods—because the calf would neither be the animal that the veterinarian had examined nor would the range be a location that the veterinarian had visited. For a rancher who must contend with dozens of births in a short time period, and the associated veterinarian whose young animal patients could number in the hundreds and be spread over a variety of locations, prohibiting such communication between a licensed veterinarian and an animal owner sweeps too broadly.

The statute is overbroad on another front, similar to the tour guide regulation that the District of Columbia Circuit held to be overbroad in *Edwards*, 755 F.3d 996. In *Edwards*, the District of Columbia made it illegal to talk about points of interest in the city while escorting a person who paid you to do so, without first paying $200 and passing a 100-question examination. *Id*. at 998. The court held that this licensing scheme was contrary to the First Amendment in part because it was overbroad, giving the example that an unlicensed person would be forbidden from lecturing to a tour group, even if the tour group had a fully licensed guide. *Id*. at 1008.

The Physical Examination Requirement is similarly overbroad. For example, if a veterinarian arranged with a colleague to care for his patients while he was on vacation, leaving full records and notes for the colleague's reference, that colleague (a fully licensed veterinarian in his own right) could not rely on those records to respond to inquiries from pet owners without subjecting the clients to the expense and burden of an in-person examination first. The regulation thus sweeps up communications even where there has been a physical examination by the animal's primary veterinarian who has provided guidance as to its care.

B. The Physical Examination Requirement Is Under-Inclusive

The Physical Examination requirement is also fatally underinclusive, suggesting that "the asserted interests either are not pressing or are not the real objects animating the restriction on speech." *Glickman v. Wileman Bros. & Elliott, Inc.*, 521 U.S. 457, 493 (1997).

The Physical Examination Requirement prohibits any veterinarian from dispensing advice, regardless how limited, over the telephone without performing a physical examination first. It is under inclusive because the requirement does not apply to non-veterinarians or to veterinarians who have visited

the premises on which the animal is kept (even if the veterinarian did not examine the specific animal in question), leading to potentially perverse results.

For example, if a prospective client with a sick puppy were to call a veterinarian's office to find out whether the pet's symptoms merit an office visit and whether any action should be taken in the meantime, under the Physical Examination Requirement, the veterinarian could not respond to the prospective client by saying, "That sounds serious. You should come in right away and in the meantime, wrap the puppy in a warm blanket and don't let him drink any water." The receptionist (or the client's neighbor), however, could render this advice without running afoul of the statute. Moreover, the veterinarian could render the otherwise prohibited advice *if* he had visited the client's house recently to examine the mother dog—even if he had never seen the puppy.

This dichotomy undermines the state's professed interest in preventing a veterinarian from giving an animal owner a false sense of security leading to the spread of zoonotic diseases, because it prohibits veterinary advice from veterinarians who are qualified to provide it, but allows the same advice from non-veterinarians or from veterinarians who arbitrarily fulfill the requirements by, for example, visiting a mother dog who subsequently has puppies

at home (but not a mother cow who subsequently has a calf out on the range).

III. THIS CASE RAISES AN ISSUE OF NATIONAL IMPORTANCE BECAUSE COMMUNICATIONS TECHNOLOGY CAN PROVIDE BENEFITS TO THE MOST VULNERABLE MEMBERS OF SOCIETY AND EXCLUSION HURTS THEM MOST

A. The Poor, Aged, Disabled, and Geographically Isolated Stand to Gain the Most from Telephonic and Internet-Based Veterinary Advice

This case is of national importance because the holding below will have the effect of precluding the most vulnerable members of society from benefiting from advances in technology, burdening both speaker and listener.

Dr. Hines retired in 2002 after his age and disabilities made it too difficult for him to remain in practice. App. 42. By providing veterinary advice via telephone and e-mail, Dr. Hines has been able to continue applying his decades of experience despite his physical limitations. App. 42-47.

Even more importantly, clients who lack access to primary veterinary care have benefited from Dr. Hines's technology-assisted approach. His clients have included an impoverished double-amputee who lived alone in New Hampshire with his dog, and Scottish missionaries in a remote region of Nigeria. App. 45-46. Indeed 95% of Dr. Hines's patients are not in Texas. App. 48-49. These disabled and geographically remote clients could not travel to him, nor could he travel to them. Requiring Dr. Hines to travel to remote areas to perform a physical examination of an animal, whose owner is equally incapable of traveling to Dr. Hines, poses an insurmountable impediment to providing advice to clients with the fewest options—often precluding them from receiving any care for their pets at all.

Well-heeled pet owners in suburban settings may have no difficulty complying with Texas's regulation before receiving veterinary advice for their pets. By contrast, the burden of travelling to a veterinarian's office for the aged or disabled or those who live in remote areas is burdensome at best and prohibitive at worst. The Physical Examination Requirement effectively eliminates the option of receiving veterinary advice for pet owners with restricted mobility and resources, particularly if the distance to the nearest veterinarian's office is great. The requirement denies the most vulnerable members of society access to information they are entitled to receive under the First Amendment at a time when

advances in communications technology should make such access easier.

B. The First Amendment Protects Listeners' Right to Hear the Message

The decision below is hostile to the right of Dr. Hines's clients to hear his advice, perhaps even more so than to Dr. Hines's right to speak it. This Court has long recognized that consumers of information have a First Amendment right to receive information. *Red Lion Broadcasting Co. v. F.C.C.*, 395 U.S. 367, 390 (1969) ("It is the right of the viewers and listeners, not the right of the broadcasters, which is paramount"); *Associated Press v. United States*., 326 U.S. 1, 28 (1945) (recognizing the vital interest in "the dissemination of news from as many different sources, and with as many different facets and colors as is possible"). This is particularly true for medical information. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing the right of patients to receive medical advice regarding contraception).

For example, in *Virginia St. Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Court affirmed that purchasers of prescription drugs have the right under the First Amendment to "receive information that pharmacists wish to communicate to them through advertising and other promotional

means, concerning the prices of such drugs." 425 U.S. 748, 753-54 (1976). In *Virginia St. Bd. of Pharmacy*, it was undisputed that "the State has a strong interest in maintaining [the] professionalism" of pharmacists, *Id.* at 766; but the consumer's interest in the free flow of commercial information trumped the State's right to license and regulate pharmacists.

Similarly here, the right of client pet owners to receive advice from Dr. Hines is superior under the First Amendment to the State's right to regulate the practice of veterinary medicine. Moreover, in many cases, Dr. Hines was providing only a "second opinion," essentially checking another veterinarian's work or resolving conflicts between two primary veterinarians' advice. These types of consultations are often necessary to protect the public from abusive practices, and are thus squarely within the right of the public to gather and compare information from a variety of sources recognized in *Virginia St. Bd. of Pharmacy* and *Associated Press*.

C. The First Amendment Does Not Allow the State to Keep People in the Dark for Their Own Good

The State professes that receiving pet care advice from a veterinarian who has not performed a physical examination of the animal "could give the

animal owner a false sense of security." Case No. 14-40403 (5th Cir.), Appellant's Br. 23. The State's concern about the listener's reaction does not excuse violating the First Amendment rights of both speaker and listener.

It is well established that the government cannot preclude speech because it fears the listener's response to truthful information. *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2670-71, (2011) ("'[F]ear that people would make bad decisions if given truthful information' cannot justify content-based burdens on speech."); *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 374, (2002) ("[F]ear that people would make bad decisions if given truthful information about compounded drugs" did not justify restrictions); *Virginia St. Bd. of Pharmacy,* 425 U.S. at 769–770 (holding that fear that if people received price advertising from pharmacists, then they would destroy the pharmacist-customer relationship by going from one pharmacist to another was insufficient to justify a ban on such advertising.)

This Court has held that "[t]he First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good." *44 Liquormart, Inc. v. Rhode Island,* 517 U.S. 484, 503, (1996). Here, the state seeks to keep pet owners in the dark unless they, or Dr. Hines, are able to undertake a potentially arduous—and wholly

unnecessary, journey. The state has not established that a physical examination would have affected any of Dr. Hines's advice or the well-being of any animal belonging to one of Dr. Hines's clients. App. 55. Instead, the state's position is based entirely on speculative harms. Under this Court's decisions, that is not enough. *See, e.g.*, *United Mine Workers of Am., Dist. 12 v. Illinois State Bar Ass'n*, 389 U.S. 217, 222, (1967) (citing *Schneider v. State*, 308 U.S. 147 (1939); *Cantwell v. State of Connecticut*, 310 U.S. 296 (1940) ("We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purpose of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.").

The state has presented a cavalcade of uglies—from misdiagnosis or improper treatment to the spread of zoonotic diseases. But during the ten years in which Dr. Hines has been exchanging emails with pet owners around the world, not a single example of such a catastrophe has even been alleged. App. 48, 575, 63. This will not do. Under this Court's precedent, speculation that harm could occur does not suffice to justify a restriction on speech. *See, e.g.*, *United Mine Workers of Am., Dist. 12*, 389 U.S. at 225 (holding that the First Amendment gave union right to hire attorney and finding that, "[i]n the many years the program has been in operation, there

has come to light, so far as we are aware, not one single instance of abuse, of harm to clients, of any actual disadvantage to the public or to the profession"); *Edenfield v. Fane*, 507 U.S. 761, 771 (1993) (holding as unconstitutional a statute banning accountants' in-person solicitation because there was no evidence solicitation created the "dangers of fraud, overreaching, or compromised independence that the [government] claim[ed] to fear"). Thus the state's confection of reasons to justify the statute is not enough to overcome Dr. Hines's right to speak.

D. The Physical Examination Requirement Erects a *de Facto* Geographic Limitation on Speech That Is Contrary to the Public's Interest in the Receipt of Diversified and Timely Information

The Physical Examination Requirement imposes a *de facto* geographic limitation on speech. Because the veterinarian must either be in the same location as the animal or must have visited the place in which the animal is housed, the geographic reach of a veterinarian's advice is limited to the reach of the veterinarian's physical body.

Even for a veterinarian with a national reputation and unlimited resources, it would be infeasible to physically reach all prospective

patients, potentially creating a burden on society when specialized skill is needed most.

Take for example the case of a Texas veterinarian who specializes in a new strain of animal virus. That nationally-recognized expert could present a webcast on the new strain of virus without running afoul of the Physical Examination Requirement. If, however, conscientious farmers across the nation who watched the webcast were to examine their livestock and identify certain animals that seemed to exhibit symptoms of the new virus, the regulation would prevent those farmers from taking photographs of their animals and sending them via e-mail to the specialist for advice. In the event of quick-spreading disease, where the Texas expert was the only expert in the country, impeding timely advice could be devastating—and would be wholly unnecessary.

If such a scenario seems unlikely, consider mad cow disease, which was first reported in the United States in 1996, required widespread culling of cattle in the U.K., and has infected at least 200 human beings;[8] or the avian flu, which, "[s]ince its widespread re-emergence in 2003 and 2004, … has spread from Asia to Europe and Africa and has become entrenched in poultry in some countries, resulting in millions of poultry infections, several

[8] http://modernfarmer.com/2014/06/man-dies-mad-cow-disease-texas/

hundred human cases, and many human deaths."[9] The right of the public to timely and diversified information regarding issues of health and economics should not be held hostage to an anti-competitive measure that places a *de facto* geographic limitation on the provision of patient-specific advice.

CONCLUSION

The Physical Examination Requirement of the Texas Veterinary Licensing Act is a content-based restriction on speech. The Court should take this opportunity to review its constitutionality by granting the petition.

[9] World Health Organization, *Avian Influenza Fact Sheet*, http://www.who.int/mediacentre/factsheets/avian_influenza/en/ (last visited July 23, 2015).

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