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 *AMICUS CURIAE* ASSOCIATION OF AMERICAN PHYSICIANS AND SURGEONS, INC., IN SUPPORT OF PETITIONER

ANDREW L. SCHLAFLY
939 Old Chester Rd.
Far Hills, NJ 07931
(908) 719-8608
aschlafly@aol.com

Counsel for Amicus Curiae

QUESTION PRESENTED

Are restrictions on pure speech by a licensed professional subject to First Amendment scrutiny, or only rational-basis review?

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INTERESTS OF *AMICUS CURIAE*[1]

Since 1943, *Amicus* Association of American Physicians and Surgeons, Inc. ("AAPS") has been a membership organization dedicated to preserving the ethical standards of the Oath of Hippocrates and the sanctity of the patient-physician relationship. AAPS has filed numerous *amicus curiae* briefs in noteworthy cases like this one. *See, e.g., Stenberg v.*

[1] No counsel for a party authored this brief in whole or in part. No person or entity other than *Amicus*, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. *Amicus* files this brief with the required ten-day prior written notice, and with the written consent by all parties as filed concurrently with this brief.

Carhart, 530 U.S. 914, 933 (2000) (citing an AAPS *amicus* brief).

AAPS has a direct and vital interest in this case by virtue of the goals of its members to obtain protection by the First Amendment for their speech.

SUMMARY OF ARGUMENT

Talk is no less protected by the First Amendment when the speaker is a licensed professional, in this case a veterinarian. Yet the decision below approved of censorship by the State of Texas of a professional's mere talk, verbal and electronic, without any showing by the State of a substantial or compelling interest. The ruling below impermissibly narrows the scope of the First Amendment with respect to speech by a professional. This Court should grant the petition for *certiorari*.

Professionals, including veterinarians and physicians, have as much of a right to free speech under the First Amendment as anyone else. U.S. CONST. amend. I. This fundamental right is not waived by virtue of obtaining a license from the State. The notion that a State can deprive someone of his First Amendment rights based on his occupation was advanced by Justice Oliver Wendell Holmes more than a century ago. *McAuliffe v. Mayor, etc., of New Bedford*, 155 Mass. 216, 220 (1892) ("The petitioner may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.") That view has since been thoroughly rejected; no professional can be properly required to forgo First Amendment rights in order to pursue his profession.

While expressed with different terminology, the decision below implicitly revived the discredited notion that a State can condition a privilege, which here is the licensure of a veterinarian, on deprivation of free speech rights, to prevent him from helping pet owners by phone and email. The ruling did this by declaring that the infringement on free speech is outside of First Amendment scrutiny because the speech is somehow incidental to conduct. But the only conduct associated with the speech at issue here was picking up a phone or touching some keys on a keypad. Texas is, without question, regulating pure speech by the professional Dr. Ronald Hines in interfering with his conversations and emails with many pet owners outside of Texas.

The decision below denies the right of a licensed veterinarian in Texas to engage in the same sort of speech that thousands of non-licensed citizens do without interference. Pet owners freely receive information and advice from many who are less informed than Dr. Hines, and yet the Fifth Circuit held that Dr. Hines has no First Amendment rights to do likewise. The victims of this censorship extend far beyond the gagged speaker, Dr. Hines, to harm a national and even worldwide audience that would benefit immensely from what he has to say.

Robust First Amendment rights are central to our basic freedoms and prosperity. The First Amendment rights of the most highly trained members of our society, veterinarians and physicians, should not be reduced to something less than the free speech rights of the uninformed. In sacrificing the First Amendment rights of veterinarians on the altar of the regulatory state, the Fifth Circuit panel

infringed both on rights of professionals and on rights of the public to hear their informed remarks.

The decision below "decided an important federal question in a way that conflicts with relevant decisions of this Court." S. Ct. Rule 10(c). The petition for *certiorari* should therefore be granted.

ARGUMENT

I. THE FIFTH CIRCUIT CATEGORICALLY EXCLUDED PURE SPEECH BY A LICENSED PROFESSIONAL FROM THE FIRST AMENDMENT, IN AN ERROR OF NATIONAL IMPORTANCE.

This Court has been clear that there should not be any new categorical exclusions of speech carved out from the protections of the First Amendment. *See, e.g.*, *Brown v. Entm't Merchs. Ass'n*, 131 S. Ct. 2729, 2734 (2011) ("new categories of unprotected speech may not be added to the list" of historic exclusions from the First Amendment, such as obscenity and fighting words) (citing *United States v. Stevens*, 559 U.S. 460 (2010)). *See also R. A. V. v. St. Paul*, 505 U.S. 377, 393 (1992) (declining to expand the categorical exclusions from the First Amendment, and limiting the rationale for an exclusion to when there is a "particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey") (emphasis in original). The speech at issue here, consisting of mere emails and phone conversations with pet owners, does not implicate concerns justifying a categorical exclusion from First Amendment protections.

Ignoring the clear rulings by this Court against expanding categorical exclusions from the First Amendment, the decision below nevertheless carved out a new category of speech to ban: professional speech offered freely over the telephone and by email. Such speech, in this case mere advice for pet owners, is freely given every day by non-professionals, and no one seriously doubts their First Amendment right to do so. But the court below denied to Dr. Hines the right of free speech that is fully available to everyone else.

The Fifth Circuit ruled that the State can elude the First Amendment by conditioning a professional's ability to work on his obedience to the State in what he says on the telephone and in emails. (Pet. App. 2-3, 10-11) This implicitly revived for the regulatory state a new version of Justice Holmes' discredited view about the State being able to deny someone the pursuit of his occupation based on his exercise of free speech. *See Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668, 674 (1996) ("[P]recedents have long since rejected Justice Holmes' famous dictum, that a policeman 'may have a constitutional right to talk politics, but he has no constitutional right to be a policeman.'") (quoting *McAuliffe*, 155 Mass. at 220). The panel below ruled, in effect, that Dr. Hines may have a constitutional right to speak, but he does not have a constitutional right to be a veterinarian. But such reasoning is not good law.

"[O]ur modern 'unconstitutional conditions' doctrine holds that the government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected ... freedom of speech' even if he has no entitlement to that benefit." *Umbehr*,

518 U.S. at 674-75 (quoting *Perry* v. *Sindermann*, 408 U.S. 593, 597 (1972)). The State cannot properly condition Dr. Hines' license on his compliance with censorship by the State of his telephone conversations and emails. It is contrary to the rulings of this Court for the Fifth Circuit to circumvent the First Amendment and chill free speech by taking action against someone's professional license based on truthful statements that he makes to help others for free.

The court below suggested that its novel interpretation of the First Amendment is "consistent" with a concurrence by Justice White in *Lowe* v. *Securities & Exchange Commission*, in which he wrote that "generally applicable licensing provisions limiting the class of persons who may practice the profession … [is not] a limitation on freedom of speech or the press subject to First Amendment scrutiny." *Lowe v. SEC*, 472 U.S. 181, 211 (1985) (White, J., concurring, joined by Burger, C.J., and Rehnquist, J.). But that minority view in narrowing the scope of the First Amendment did not command a majority of the Court in 1985, and would not support the holding below that the State may revoke someone's professional license based on what he says for free over the phone or in an email. Justice White's concurrence in no way justifies giving a blank check to the State to censor professionals with a penalty of license revocation based on their exercise of their right to free speech. If others can give free advice to a pet owner, then so can a professional without interference by the State.

After all, "[t]he First Amendment involves not only the right to speak and publish but also the right

to hear, to learn, to know." *Kleindienst v. Mandel*, 408 U.S. 753, 771 (1972). A narrowing of free speech rights available to the speaker, Dr. Hines, infringes on the First Amendment rights of his audience, the pet owners. The decision below contravenes precedents of this Court, placing the public – even patients – at risk of losing their rights too.

The national importance of this issue of censorship by the State of speech is self-evident. *See, e.g.*, *Kiaaina v. Jackson*, 851 F.2d 287, 290 (9th Cir. 1988) ("important First Amendment issues national in scope" have national significance). Dr. Hines was using his First Amendment rights to help pet owners nationwide; the infringement on his speech by Texas harms those pet owners and chills speech by others. The petition for *certiorari* should be granted, in order to reverse the error below.

II. IN CONFLICT WITH *SORRELL V. IMS HEALTH* AND OTHER RULINGS OF THIS COURT, THE DECISION BELOW DECIDED AN IMPORTANT FEDERAL QUESTION.

The decision below commits a fundamental error by allowing a State to censor speech based on the identity of the speaker. The First Amendment does not permit this. If a homeless person can say it, then so can a highly trained professional. By upholding a State regulation of speech based on the identity of the speaker, the Fifth Circuit panel ruled contrary to precedents of this Court. *See, e.g.*, *Citizens United v. FEC*, 558 U.S. 310, 365 (2010) ("We return to the principle established in *Buckley* and *Bellotti* that the Government may not suppress political speech on the basis of the speaker's corporate identity.").

The decision below evaded application of the First Amendment by relying on a statement of this Court that "'the First Amendment does not prevent restrictions directed at commerce or conduct from imposing ***incidental burdens on speech***.'" (Pet. App. 9, quoting *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011), emphasis added). But this exception to the First Amendment applies only when the speech is directly connected with conduct that may be properly regulated, such as a ban on race-based hiring that implicitly prevents employers from posting signs welcoming applicants of only one race. *IMS Health*, 131 S. Ct. at 2664-65. In those situations the prohibited speech is genuinely incidental to the conduct that is regulated.

Here, in contrast, there is no conduct other than the speech itself by Dr. Hines, particularly when he is speaking for free. The State is not arguing that its censorship of his speech is justified by its concern about how Dr. Hines types on his keyboard or enters a number on his telephone. The State is prohibiting his speech itself, and not any conduct other than the speech. When Dr. Hines spoke for free, there was not even any commercial transaction; this was only speech and clearly not "incidental to" any conduct that arguably may be regulated.

In placing this pure speech outside of the protection of the First Amendment, the court below ignored the holding in *Sorrell* that a law which "imposes a burden based on the content of speech and the identity of the speaker" is fully subject to the First Amendment. *IMS Health*, 131 S. Ct. at 2665. Yet this is precisely what the State is doing in censoring Dr. Hines' advice to pet owners over the

telephone and by email, while allowing identical advice about pets to be given by non-licensed residents. The State's censorship is certainly based on "the identity of the speaker," because licensed veterinarians are prohibited by Texas from saying what anyone else can say. Moreover, Texas does target its ban based on the content of speech, in allowing generalized comments by Dr. Hines but prohibiting specific advice. Censorship based on content and the identity of the speaker is what the First Amendment prohibits, particularly where, as here, the speech is not incidental to any conduct.

As Justice Kennedy wrote in concurrence to a 9-0 decision invalidating a New York statute that required criminals to pay to their victims the proceeds from the sales of their writings about their crimes:

> Here, a law is directed to speech alone where the speech in question is not obscene, not defamatory, not words tantamount to an act otherwise criminal, not an impairment of some other constitutional right, not an incitement to lawless action, and not calculated or likely to bring about imminent harm the State has the substantive power to prevent. ***No further inquiry is necessary to reject the State's argument that the statute should be upheld***.

Simon & Schuster, Inc. v. Members of the N.Y. State Crime Victims Bd., 502 U.S. 105, 124 (1991) (Kennedy, J., concurring, emphasis added). The speech at issue here easily passes that test for coverage by the First Amendment.

The precedents of this Court preclude the narrowing of the First Amendment by the ruling below. In light of the importance of the First Amendment issues at stake, the decision below must be reversed.

CONCLUSION

For the foregoing reasons, the petition for *certiorari* should be granted.

Respectfully submitted,

ANDREW L. SCHLAFLY
939 OLD CHESTER RD.
FAR HILLS, NJ 07931
(908) 719-8608
aschlafly@aol.com

Counsel for Amicus Curiae

Dated: July 28, 2015