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

SUPPLEMENTAL BRIEF OF PETITIONER

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Pursuant to Supreme Court Rule 15.8, Petitioner Dr. Ronald Hines respectfully files this Supplemental Brief in support of his Petition for a Writ of Certiorari.

Last week, the Eleventh Circuit altered, but did not undermine, Dr. Hines's Petition for review in this Court by issuing a decision in *Wollschlaeger v. Governor of Florida* that dramatically switched sides in the split of authority over whether restrictions on the one-on-one advice of medical professionals is subject to First Amendment scrutiny. No. 12-14009, 2015 U.S. App. LEXIS 13070 (11th Cir. July 28, 2015). The *Wollschlaeger* majority and dissenting slip opinions needed 152 pages to address the First Amendment implications of restrictions on medical advice, underscoring the extreme confusion that prevails as a result of the various splits of authority and the absence of a controlling occupational-speech decision by this Court. Review should be granted because, as the *Wollschlaeger* majority recognized, this Court "has yet to clarify the precise level of scrutiny with which to review government restrictions of professional speech," which has forced lower courts to "proceed via inference from the known to the unknown." 2015 U.S. App. LEXIS 13070, at *65.

The Eleventh Circuit's sudden switching of sides does not affect the overall balance of the splits of authority that Dr. Hines identified in his Petition. Under the old *Wollschlaeger* opinion, the Eleventh Circuit was in harmony with the Fifth Circuit below and one line of Ninth Circuit cases that *does not*

subject restrictions on medical speech in the form of psychotherapy to First Amendment scrutiny. Under that decision, the Eleventh Circuit was also in conflict with the Third Circuit and another line of Ninth Circuit case law that *does* generally subject restrictions on medical speech to First Amendment scrutiny.

Under the new *Wollschlaeger* opinion, the Eleventh Circuit is now in direct conflict with the Fifth Circuit below and the line of Ninth Circuit cases that *does not* subject restrictions on psychotherapy to First Amendment scrutiny. The Eleventh Circuit is also now in harmony with the Third Circuit and the Ninth Circuit line that *does* regard medical speech to be within the First Amendment. Thus, the new *Wollschlaeger* opinion does not represent an emerging consensus, and review remains necessary for the same reasons outlined in the Petition.

In Part I below, Dr. Hines explains why the Eleventh Circuit is in a square conflict with the Fifth Circuit over whether restrictions on medical advice ever elicit First Amendment scrutiny. In Part II, Dr. Hines discusses how the new majority opinion in *Wollschlaeger* has brought the Eleventh Circuit into harmony with the Third Circuit (where once there was a conflict) but created a conflict with the Ninth Circuit decisions about restrictions on psychotherapy.

I. THE FIFTH CIRCUIT IS NOW IN IRRECONCILABLE CONFLICT WITH THE ELEVENTH CIRCUIT.

As discussed on page 8 of the Petition, the Fifth Circuit's holding below concerning medical speech was consistent with the law of only one other circuit: the Eleventh. That circuit had held, in its original *Wollschlaeger* opinion, that individualized medical advice does not receive First Amendment scrutiny. The panel explained that "there is no 'constitutional infirmity' where the speech rights of physicians are 'implicated . . . as part of the practice of medicine, subject to reasonable licensing and regulation by the State.'" 760 F.3d 1195, 1219 (11th Cir. 2014) (quoting *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion)). Thus, under the original *Wollschlaeger* opinion, as long as the government was seeking to regulate a profession, restrictions on occupational speech were "incidental" by definition and hence immune to First Amendment scrutiny.

This is the exact doctrine announced by the Fifth Circuit below. According to the panel, the law challenged by Dr. Hines "falls squarely within" the government's "broad power to establish standards for licensing practitioners" and "does not offend the First Amendment." Pet. App. at 8.

Following this initial Eleventh Circuit ruling, the physician plaintiffs in *Wollschlaeger* then sought rehearing en banc. On July 28, 2015, the original panel vacated its decision and "replaced it with one that,

unlike the original opinion, subjects [the law] to First Amendment scrutiny." *Wollschlaeger v. Governor of Fla.*, 2015 U.S. App. LEXIS 13070, at *93 (Wilson, J., dissenting).

The new *Wollschlaeger* decision rejects the complete absence of First Amendment scrutiny for restrictions on medical advice that characterizes both the original *Wollschlaeger* opinion and the Fifth Circuit decision below. The new Eleventh Circuit test for whether First Amendment scrutiny applies to restrictions on medical advice can be summarized as follows: (1) if a restriction is "regulating professional *conduct* with an incidental effect on speech," then there is no First Amendment scrutiny; (2) but a "law regulating protected *speech* . . . 'must survive the level of scrutiny demanded by the First Amendment.'" 2015 U.S. App. LEXIS 13070, at *49 (quoting *Lowe v. SEC*, 472 U.S. 181, 211-36 (1985) (White, J., concurring in the result)).

The *Wollschlaeger* majority does not specify what precise factors distinguish a regulation of *conduct* with an *incidental effect* on speech from a regulation of protected speech. But the three things the court finds to be speech – keeping records about gun ownership, asking questions about gun ownership, and not saying anything that might harass a gun-owning patient – involve only speech and no conduct. For instance, one of the challenged provisions in *Wollschlaeger* prohibited physicians from recording information in a patient's medical record about gun ownership. In the new opinion, the majority held that

First Amendment scrutiny applies to this provision because "[i]t would seem . . . under almost any measure . . . that asking questions and writing down answers constitute protected expression under the First Amendment." *Id.*, at *47. Thus, the rule in the Eleventh Circuit is essentially the rule from *Holder v. Humanitarian Law Project* that Dr. Hines discusses extensively in his Petition on pages 21-24: when "the conduct triggering coverage under [a] statute consists of communicating a message . . . we must [apply] a more demanding standard" of scrutiny. *Id.*, at *48-49 (alterations in original) (quoting *Humanitarian Law Proj.*, 561 U.S. 1, 28 (2010)).

By switching sides, the Eleventh Circuit is now in an irreconcilable, outcome-determinative split with the Fifth Circuit over the First Amendment status of medical advice. In the decision below, the Fifth Circuit held that Dr. Hines's emails with pet owners – asking questions and writing down answers about pets – receive no First Amendment protection. Pet. App. at 9. According to the panel below, the government's *de facto* ban on such emails has only "an incidental impact on speech" as part of the general regulation of veterinary practice. *Id*. Yet had Dr. Hines written those emails within the Eleventh Circuit, any restrictions on them would be subject to First Amendment scrutiny because there is no material difference between having a conduct-free medical conversation about guns and having a conduct-free medical conversation about pets. Thus, substantively identical medical speech is within the

First Amendment in the Eleventh Circuit but outside the First Amendment in the Fifth Circuit.

This new split between the Fifth and Eleventh Circuits impacts a vast swath of medical speech involving tens of millions of Americans. When coupled with the split examined below in Part II and the other splits over occupational speech addressed on pages 10-17 of the Petition, it becomes apparent that review of the Question Presented is necessary to resolve pervasive, intractable disagreements in the case law about how the First Amendment applies to the use of occupational-licensing laws to regulate speech.

II. THIS CASE PROVIDES THE PERFECT OPPORTUNITY TO RESOLVE THE REMAINING SPLITS OF AUTHORITY AND SUPPLY THE CONSTITUTIONAL GUIDANCE FROM THIS COURT THAT, AS NOTED BY THE *WOLLSCHLAEGER* MAJORITY, IS ABSENT.

The sprawling length of the new *Wollschlaeger* opinion vividly illustrates the pervasive disarray in the lower-court case law as a result of the many splits of authority. Review in this Court is necessary because the six major medical-speech decisions of the lower courts – the Fifth Circuit's decision below, the two *Wollschlaeger* opinions, *Conant*, *Pickup*, and *King*, *infra* – have failed to set forth a shared, coherent approach to restrictions on medical advice specifically (and occupational speech more generally). The three judges in *Wollschlaeger* required 152 pages in

the new opinion to elucidate various theories of occupational speech – including the majority opinion's novel four-box matrix, Slip Op. at 49 – because this Court "has yet to clarify the precise level of scrutiny with which to review government restrictions of professional speech," which has forced lower courts to "proceed via inference from the known to the unknown." 2015 U.S. App. LEXIS 13070, at *65.

The result of this disarray is that the Eleventh Circuit's switching of sides does not affect the overall balance of disagreement among the lower courts. By vacating its earlier opinion and substituting a new one with the opposite holding, the Eleventh Circuit simply traded a direct split with the Third Circuit and one line of Ninth Circuit cases for a split with the Fifth Circuit and another line of Ninth Circuit cases. There is no emerging consensus, and review by this Court remains just as necessary.

The new opinion in *Wollschlaeger* did not split only with the Fifth Circuit below when the Eleventh Circuit switched sides. The Eleventh Circuit also switched which line of Ninth Circuit cases it agrees with.

The Ninth Circuit has two incompatible rules. Under one rule, restrictions on medical advice receive First Amendment scrutiny under *Conant v. Walters*, 309 F.3d 629, 636-37 (9th Cir. 2002). Whereas the old *Wollschlaeger* opinion was in conflict with *Conant*, the new opinion agrees with *Conant*. *Compare Wollschlaeger I*, 760 F.3d at 1218 (First Amendment

protections for professional advice "approach a nadir . . . when the professional speaks privately, in the course of exercising his or her professional judgment, to a person receiving the professional's services.") *with 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.").

The Eleventh Circuit has traded its previous conflict with *Conant* for a new conflict with the line of cases following the Ninth Circuit's second rule: restrictions on medical speech in the form of words (i.e., psychotherapy) are not subject to First Amendment scrutiny. *Pickup v. Brown*, 740 F.3d 1208, 1231 (9th Cir. 2014); *see also Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1053-55 (9th Cir. 2000) (suggesting that the First Amendment applies but not applying actual First Amendment scrutiny to psychoanalysts' challenge to psychology licensure).

Under *Pickup*, the distinction between words constituting protected medical advice and words constituting unprotected medical treatment in the form of words is essentially a matter of legislative and judicial *ipse dixit*, not constitutional principle. Indeed, Judge O'Scannlain dissented vociferously from denial of rehearing en banc because there was no basis in the case law of his own court or of this Court for such a distinction. 740 F.3d at 1218 (O'Scannlain, J., dissenting from denial of en banc review) (noting that the Ninth Circuit's previous decisions in *NAAP* and

Conant "counsel against" adopting *Pickup*'s "speech/conduct distinction"). Judge O'Scannlain rightly concluded that this Court's decision in *Humanitarian Law Project* was dispositive: restrictions on psychotherapy are restrictions on speech that warrant First Amendment scrutiny because all a psychotherapist does is communicate a message. *Id.* at 1216-18.

Pickup would have come out differently under the test just announced by the Eleventh Circuit. As explained in the new *Wollschlaeger* decision, a restriction on medical speech that does not involve any conduct triggers First Amendment scrutiny. 2015 U.S. App. LEXIS 13070, at *46-47. Thus, in the Eleventh Circuit, the restrictions on psychotherapy at issue in *Pickup*, which involved only talking and no conduct, would now be subject to First Amendment scrutiny.

And just as the Eleventh Circuit traded its earlier harmony with the Fifth Circuit for a split, it has also traded its earlier split with the Third Circuit for harmony. In *King v. Governor of New Jersey*, the Third Circuit considered an identical statute to the one in *Pickup* and expressly rejected the *Pickup* panel's analysis of the First Amendment. 767 F.3d 216, 227 n.13 (3d Cir. 2014) ("We are not persuaded" by the Ninth Circuit's reasoning). Thus, the Eleventh Circuit is now in harmony with *King* and in conflict with *Pickup* for precisely the same reasons that *King* is in an acknowledged split with *Pickup*.

In sum, the Eleventh Circuit's switching of sides has moved the chess pieces around, but has not

ameliorated the intractable conflict in the case law concerning the First Amendment status of restrictions on medical speech. Given that this Court has yet to squarely address occupational speech, and given that medical speech specifically (and occupational speech more generally) affects all Americans, Pet. at 29-31, Dr. Hines continues to urge that review be granted.

CONCLUSION

Granting review will resolve two distinct splits concerning medical speech. First, review will resolve the split over whether restrictions on medical speech ever warrant First Amendment scrutiny (and, more broadly, whether restrictions on occupational speech ever warrant such scrutiny). Second, review will also resolve the split among the Third, Ninth, and Eleventh Circuits over whether there is an exception to First Amendment scrutiny for medical speech that is deemed "conduct" even in the absence of any actual conduct.

The Petition for Writ of Certiorari should be granted.

Respectfully submitted,

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