No. 21-375

IN THE

Supreme Court of the United States

JOSHUA GRAY,

Petitioner,

v.

MAINE DEPARTMENT OF PUBLIC SAFETY,

Respondent.

On Petition for Writ of Certiorari to the Maine Supreme Judicial Court

BRIEF OF THE CATO INSTITUTE AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether an occupational licensing board, consistent with the First Amendment, may deny an occupational license based on the content of an applicant's speech without satisfying strict scrutiny.

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INTEREST OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies works to restore limited constitutional government, which is the foundation of liberty. Toward those ends, Cato publishes books and studies, conducts conferences, and produces the annual *Cato Supreme Court Review*. This case interests Cato because it threatens the fundamental right to speak out on issues of public importance, as well as the right to work in one's chosen occupation free of unlawful governmental interference.

INTRODUCTION AND SUMMARY OF ARGUMENT

In February 2017, three police officers in Maine shot and killed 25-year-old Kadhar Bailey and 18-year-old Amber Fagre. Nok-Noi Ricker, 'They Killed an Innocent Girl': Family, Friends Question Why Police Shot 18-Year-Old Passenger," *Bangor Daily News*, Feb. 25, 2017, https://bit.ly/2YoISft. Joshua Gray, a long-established private investigator in Massachusetts, publicly condemned the shooting on social media, calling it an avoidable result of police recklessness. He went on to say that one of the officers was "possibly drunk" and that he had "murdered" the woman in question.

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[1] Rule 37 statement: All parties were timely notified and consented to the filing of this brief. No part of this brief was authored by any party's counsel, and no person or entity other than *amicus* funded its preparation or submission.

Gray eventually applied for a license to operate as a private investigator in Maine. But in retaliation for his prior comments, he was denied a license to work in his chosen profession by the Maine Department of Public Safety, the very agency he criticized. The Department argues that Gray's comments "demonstrated a pattern of reckless disregard for the truth," and thus that he is incompetent and lacking the requisite moral character to operate as a private investigator in the state of Maine.

Gray challenged the denial in state court as a violation of his freedom of speech under the First and Fourteenth Amendments. On appeal, the Maine Supreme Judicial Court ultimately upheld the denial under intermediate scrutiny, reasoning that the restriction was narrowly tailored to serve a significant governmental interest. The lower court did not apply strict scrutiny because it found the restriction to be a legitimate regulation of *conduct* that only incidentally burdened Gray's speech.

This Court should grant this petition and reverse the Maine Supreme Judicial Court's decision for three reasons: 1) the decision below empowers state licensing boards to circumvent the First Amendment and retaliate against disfavored speech using the cover of moral character requirements; 2) discussions of police violence are a matter of public policy that deserve the full ambit of First Amendment protection; and 3) this case provides an opportunity to clarify how First Amendment principles apply to professional speech in the context of licensing restrictions, which lower courts have struggled with in the wake of this Court's decision in *Nat'l Inst. of Family & Life Advocates v. Becerra (NIFLA),* 138 S. Ct. 2361 (2018).

ARGUMENT

I. GOOD CHARACTER REQUIREMENTS ENABLE STATE LICENSING BOARDS TO AVOID THE FIRST AMENDMENT AND RETALIATE AGAINST SPEECH WITH WHICH THEY DISAGREE

Speech does not lose First Amendment protection due to its commercial or professional nature. *See NIFLA*, 138 S. Ct. at 2374–75 ("As with other kinds of speech, regulating the content of professionals' speech 'pose[s] the inherent risk that the Government seeks not to advance a legitimate regulatory goal, but to suppress unpopular ideas or information.'") (citing *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 641 (1994)). Strict scrutiny applies when challenging content-based regulations of professional speech. *Id.* at 2374. Regulation of speech is content-based if the law applies to speech because of the message expressed. *Reed v. Town of Gilbert*, 576 U.S. 155, 171 (2015). Strict scrutiny also applies to regulations of professional conduct that incidentally burden speech when the conduct triggering application of the restriction consists of communicating a message. *Holder v. Humanitarian Law Project*, 561 U.S. 1, 27–28 (2010); *see also Cohen v. California*, 403 U.S. 15, 16 (1971) (applying heightened scrutiny to reverse Cohen's conviction under a generally applicable law against breaching the peace). Content-based restrictions are presumptively unconstitutional unless the government can show that the law is narrowly tailored to serve a compelling state interest. *Ashcroft v. ACLU*, 542 U.S. 656, 660 (2004).

The Court has only applied intermediate scrutiny to uphold content-based regulations of professional speech in two types of cases. *See*, *e.g.*, *Zauderer v. Office of Disciplinary Counsel of S. Ct.*, 471 U.S. 626, 651–53 (1985) (upholding a law requiring attorneys who advertised their services on a contingency-fee basis to disclose the possibility of additional fees); *Planned Parenthood v. Casey*, 505 U.S. 833, 884 (1992) (upholding an informed-consent law requiring doctors to convey certain information to patients as a part of obtaining consent to perform an abortion). *Zauderer* involved compelled disclosure of "purely factual and uncontroversial information" regarding terms of service in commercial advertising. 471 U.S. at 651. And *Casey*'s informed-consent provision was upheld as a regulation of conduct that only incidentally burdened speech. 505 U.S. at 884.

Although this case does not fit neatly with either *Zauderer* or *Casey*, the court below applied intermediate scrutiny to uphold the denial of licensure. Gray was not engaged in commercial advertising when he spoke out against the police. He was also not compelled to disclose purely factual or uncontroversial information. And, unlike in *Casey*, the state cannot reasonably characterize denying Gray's private investigator license as a regulation of conduct only incidentally burdensome to speech. Indeed, this case is more akin to the generally applicable content-based restrictions found unconstitutional in *Cohen* and *Holder* because the "conduct" in question consists of publicly communicating a message of which the state does not approve.

Furthermore, the argument that the state was merely regulating professional *conduct* and not disfavored speech fails because the state was not regulating conduct within Maine when it decided to deny Gray's private eye license based on old tweets. Gray was not yet an investigator in Maine. Nor had he applied for licensure until long after those statements. From the comfort of his home in another state, Gray publicly criticized the police agency in Maine responsible for issuing the license that he now seeks. The Department deemed Gray morally incompetent in retaliation for communicating on social media what they considered "materially false" statements about the officers involved in the shooting. Gray is now barred from operating as a private eye in Maine despite having numerous years of training and practical experience as one in his home state of Massachusetts. Thus, the good moral character requirement functions not as a regulation of professional conduct in this case, but as end-run around the First Amendment, enabling retaliation against Gray for uttering a disfavored message.

However, "[t]he truth is rarely pure and never simple." Oscar Wilde, *The Importance of Being Earnest*, act 1, sc. 1 (1895), https://bit.ly/2WI1hDm (last visited Oct. 4, 2021). Restrictions based on the purported truth or falsity of speech are exactly the sort of content-based distinction that should subject the Department's denial to strict scrutiny. *See, e.g.*, *United States v. Alvarez*, 567 U.S. 709, 752 (2012) ("[I]t is perilous to permit the state to be the arbiter of truth.). Truth and falsity, particularly in the context of freedom of expression, are malleable concepts that legislators and reviewing courts simply

can't decide for the rest of the population. *See* Leonard Levy, *Legacy of Suppression* 6 (1960) ("Freedom of speech could not become a civil liberty until the truth of men's opinions . . . was regarded as relative. . . .); *see also* Alexander Bickel, *The Morality of Consent* 77 (1975) ([T]he theory of the truth of the marketplace, determined ultimately by a count of noses—this total relativism—cannot be the theory of our Constitution."). President John F. Kennedy once praised the proverbial marketplace of ideas in America, "[w]e are not afraid to entrust the American people with unpleasant facts, foreign ideas, alien philosophies, and competitive values. For a nation that is afraid to let its people judge the truth and falsehood in an open market is a nation that is afraid of its people." John F. Kennedy, "Remarks on the 20th Anniversary of the Voice of America" (Feb. 26, 1962) https://bit.ly/3uIIJiL).

If the Department may deny Gray the right to work as a private investigator for criticizing the police on Twitter—whether those criticisms are grounded in fact or merely opinion—we have indeed become a nation that fears information in the hands of its people. To Gray and countless others seeking occupational licensing to make a living, "[a] lifetime of good citizenship is worth very little" if it cannot withstand the suspicions triggering application of arbitrarily defined and selectively enforced good moral character requirements. *See Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 273–74 (1957). But states are not the arbiters of moral turpitude. Moral character requirements allow state licensing boards to act as such, giving them the power to circumvent the First Amendment and this Court's precedents.

II. POLICE VIOLENCE IS A MATTER OF PUBLIC POLICY AND DISCUSSION OF SUCH IMPORTANT ISSUES DESERVES FULL FIRST AMENDMENT PROTECTION

The Court has stressed the dangers inherent in content-based regulations of commercial speech that restrict the flow of information, particularly when speech concerns topics of public health. *NIFLA*, 138 S. Ct. at 2374; *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566 (2011) ("A 'consumer's concern for the free flow of commercial speech often may be far keener than his concern for urgent political dialogue.' That reality has great relevance in the fields of medicine and public health, where information can save lives.") (quoting *Bates v. State Bar of Ariz.*, 433 U.S. 350, 364 (1977)).

Americans thus have an important public-policy-related interest in the free flow of information regarding police shootings. The Court should consider that the American Public Health Association, the American Medical Association, and numerous other organizations and scholars have come to recognize police violence as a public-health crisis. American Public Health Association, *Addressing Law Enforcement Violence as a Public Health Issue* (2018), https://bit.ly/3ilnjTN (last visited Oct. 2, 2021); Len Strazewski, "Why Police Brutality Is a Matter of Public Health," American Medical Association, Jun. 8, 2020, https://bit.ly/3iokscZ; *see also* Osagie K. Obasogie & Zachary Newman, *Police Violence, Use of Force Policies, and Public Health*, 43 Am. J. L. & Med. 279 (2017) (examining American police violence through the lens of public health), https://bit.ly/3A4hS1E. A recent study estimates that

55 percent of deaths resulting from police violence went underreported between 1980 and 2018. Inst. for Health Metrics and Evaluation, *Fatal Police Violence By Race and State in the USA, 1980–2019: A Network Meta-Regression*, https://bit.ly/3uEXWBE. This amounts to over 17,000 unaccounted killings at the hands of police. *Id.* The study also found that black people were 3.5 times more likely to be killed by police than the average white person and that black deaths went underreported at a disproportionately higher rate than the national average. *Id.*

The Department's denial of Gray's license thus does not protect the public from the nefarious practice of unlicensed work by morally incompetent private investigators. Denial here serves only to curtail the free flow of information on an important matter of public policy. It also chills the speech of any prospective licensee who might otherwise criticize the police or the state generally. This leaves the people of Maine worse off and demonstrates the steep societal cost of arbitrary licensing laws. For example, what happens when an individual in Maine seeks to hire a private eye to investigate a member of the police or a member of the very board that has absolute authority to deny private investigator licenses under a nebulous "good moral character" requirement? The only licensed investigators left in this scenario are those beholden to the state or those too fearful to criticize it. In the marketplace of information, such a failure leaves consumers in the dark—a textbook example of market failure. Indeed, the Constitution protects professional speech from government interference so that we may avoid these sorts of pitfalls.

Unless this Court provides meaningful review and clarifies the bounds of First Amendment protection in professional speech, state licensing boards will continue using good moral character requirements to circumvent the First Amendment and curtail the free flow of information in all sorts of professions beyond just private eye work. Weaponizing good moral character requirements to chill speech critical of occupational licensing boards already occurs in the legal profession. Alex Morey, "FIRE Objects After Wayne State Law School Says Students Can't Criticize Bar Exam," Foundation for Individual Rights in Education, July 14, 2020, https://bit.ly/2Y7hWR3 ("[W]hile you have every right to criticize the bar exam, the Board of Law Examiners, or the State Bar of Michigan online, it may not be a smart strategy for passing Character & Fitness with ease."); *see also* Artem M. Joukov & Samantha M. Caspar, *Who Watches the Watchmen? Character and Fitness Panels and the Onerous Demands Imposed on Bar Applicants*, 50 N.M. L. Rev. 383 (2020) (discussing the onerous requirements of proving good moral character and the limitless amount of information that a panel may rely upon to deny or delay admission to state bars).

If licensing boards may punish prospective lawyers and private investigators for speaking out against perceived injustice by arbitrarily withholding professional licensing, what hope do those in professions less intimately involved with public discourse have? A florist might be denied the right to arrange and sell flowers because she once questioned the benefit of occupational licensing in floristry. A prospective barber might be denied a license to cut

hair merely for complaining of the minimum hours required to become a licensed barber. Indeed, if the decision below stands, professionals in every field subject to good moral character requirements will think twice before commenting on public affairs. The First Amendment was meant to protect against this sort of chilling effect on free expression.

III. THIS CASE AFFORDS AN OPPORTUNITY TO CLARIFY *NIFLA*'S APPLICATION TO PROFESSIONAL SPEECH

NIFLA dispelled any doubt as to whether professional speech is entitled to First Amendment protection, but left open the question of *how much* protection. 138 S. Ct. at 2372–75. In its wake, lower courts struggled to consistently apply First Amendment principles to professional speech. *See, e.g.*, *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 928–29 (5th Cir. 2020) ("While we hold the district court erred by categorically exempting occupational-licensing requirements from First Amendment scrutiny, we express no view on what level of scrutiny might be appropriate."); *Otto v. City of Boca Raton*, 981 F.3d 854, 859–68 (11th Cir. 2020) (applying strict scrutiny to a law prohibiting sexual orientation change therapies because the ordinance imposed content and viewpoint based restrictions on speech).

This case now affords the Court an opportunity to clarify *NIFLA*'s application to professional speech in the context of good moral character requirements and occupational licensing. As increasingly more occupations become subject to good moral character requirements, and as we increasingly come to share our most intimate thoughts and opinions on social

media, the issue before the Court in this case will continually resurface. *See* Deborah L. Rhode, *Virtue and the Law: The Good Moral Character Requirement in Occupational Licensing, Bar Regulation, and Immigration Proceedings*, 43 Law & Soc. Inquiry 1027, 1032 (2018) ("Almost all occupations require good moral character or the functional equivalent."). Thus, clarifying how the First Amendment applies to professional speech and good moral character requirements now will prevent a bevy of cases from inundating the Court's future dockets.

Indeed, the Court has already applied a heightened level of scrutiny to strike down denial of licensure when the licensing board admitted to relying on impermissible factors in determining an applicant lacked moral character. *See Konigsberg*, 366 U.S. at 37. The Court should expound on *Konigsberg* to hold that strict scrutiny applies when application of a good moral character requirement to professional conduct is based on the professional's communication of a disfavored message. When the professional "conduct" triggering application of the good moral character requirement consists entirely of conveying a message—regardless of whether that message is true or false or if it is uttered by an individual working in an occupation subject to a state licensing regime—application of the requirement is driven by an impermissible motive to punish disfavored speech and should thus be subject to strict scrutiny under the First Amendment.

CONCLUSION

For the foregoing reasons and those offered by petitioner, this Court should grant the petition, reverse the decision below, and clarify that *NIFLA* applies to professional speech and good moral character requirements in occupational licensing.

Respectfully submitted,

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