NO. 21-2875

In The
United States Court of Appeals
For The Eighth Circuit

DYLAN BRANDT, *et al.*,

***Plaintiffs – Appellees*,**

v.

LESLIE RUTLEDGE, *et al.*,

***Defendants – Appellants*.**

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF ARKANSAS NO. 4:21-CV-00450-JM, THE HONORABLE JAMES M. MOODY, JR.

BRIEF FOR THE INSTITUTE FOR JUSTICE AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES

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COPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate procedure 26.1, *amicus curiae* the Institute for Justice does not have a parent corporation, and no publicly held corporation owns any portion of their stock.

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INTEREST OF *AMICUS CURIAE*[1]

The Institute for Justice (IJ) is a nonprofit, public-interest law firm dedicated to defending the foundations of a free society. As part of its mission to defend freedom of speech, the Institute has challenged laws across the country that regulate a wide array of occupational speech, including teletherapy, parenting advice, dietary advice, and veterinary advice. Amicus believes that its experience will help the Court understand the wider repercussions of this case and the importance of affirming the First Amendment ruling below.

INTRODUCTION

Although this case arises out of public debate over the appropriate medical treatment for transgender minors, the First Amendment issues raised by HB 1570's prohibition on physician referrals for gender-affirming care have repercussions far beyond that narrow context. Indeed, these First Amendment issues arise whenever government licensing boards regulate speech based on its content. Thus, as examples drawn from the Institute for Justice's own litigation show, this Court should be mindful that the government's arguments in defense of HB 1570 have

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[1] No party's counsel authored this brief in whole or in part. No one other than *amicus* Institute for Justice contributed money for this brief's preparation or submission. *See* Fed. R. App. P. 29(a)(4)(E).

Amicus sought the parties' consent to file this brief. Counsel for the parties have stated that they do not oppose the filing of this brief.

implications for countless occupations from doctors to engineers to diet coaches and more. Affirming the First Amendment ruling below will ensure that speakers in those occupations continue to enjoy the constitutional protection to which they are entitled.

On the merits, the court below got the First Amendment analysis exactly right. HB 1570 prohibits Arkansas doctors from advising their patients on where or from whom they may receive gender-affirming medical treatment. Telling people where they can get the medical treatment they seek is speech within the scope of the First Amendment's protection. By prohibiting referrals for gender-affirming medical treatment—but not referrals for other medical treatment—Arkansas has singled out that speech for regulation based on its content. The referral prohibition is thus a content-based regulation on speech and, like all such regulations, is subject to strict scrutiny. And the trial court correctly concluded that here, at the preliminary injunction stage, the government has not established that it has any likelihood of satisfying that most demanding standard of scrutiny. Thus, the trial court correctly enjoined the referral prohibition, and this Court should affirm that ruling.

ARGUMENT

I. The government's argument threatens the First Amendment rights of countless Americans.

On the government's view, the plaintiffs' First Amendment arguments should fail because their speech isn't speech at all—it is instead the "conduct" of "practicing a profession." In other words, the government asks this Court to adopt a rule of law under which the scope of the First Amendment is limited by the scope of a state's occupational-licensing laws. As discussed below in part II, this argument is wrong. But more than wrong, it is dangerous.

A rule that exempted the "practic[e] of a profession" from First Amendment scrutiny (even when that "practice" consists of nothing more than communicating a message) would eliminate the free-speech rights of countless Americans. More activities than ever before are now the conduct of a licensed profession: The proportion of the American workforce that is required to hold an occupational license quadrupled between the 1950s (when less than 5% of U.S. workers needed a license to do their jobs[2]) and 2017 (when nearly 22% did[3]). For context, the share of the workforce that is licensed is now roughly twice as large as the share that is

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[2] Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. Labor Econ. S173, S176 (2013).

[3] See U.S. Dep't of Labor, Bureau of Labor Statistics, *Labor Force Statistics From the Current Population Survey* (Table 49) (2017), https://www.bls.gov/cps/aa2017/cpsaat49.pdf.

unionized.[4] A rule that exempted licensed work from First Amendment protection would give countless government agencies unchecked power to silence speech on a wide array of topics.

And experience teaches that these agencies would not hesitate to use their power to silence speech, advice, and even public advocacy on the topics within their ambit. Consider the case of retired engineer Wayne Nutt. *Nutt v. Ritter*, No. 7:21-cv-00106-M (E.D.N.C. filed June 9, 2021), *available at* https://ij.org/wp-content/uploads/2021/06/NC-Engineering-Complaint.pdf. For most of his career, Nutt lawfully practiced engineering in North Carolina, without a license, under the state's "industrial exemption." But when Nutt testified as an expert witness in a lawsuit, the state's engineering board accused him of the unlicensed "practice" of engineering. And North Carolina is not the only state to apply its engineering statute to public advocacy; the state of Oregon did the same when it accused engineer Mats Järlström of the unlicensed practice of engineering after Järlström emailed the state's board with concerns about the state's timing formula for traffic lights. *See Järlström v. Aldridge*, No. 3:17-cv-00652-SB, 2017 WL 6388957 (D. Or. Dec. 14, 2017).

The Kentucky Board of Examiners of Psychology took a similar tack when it sent a cease-and-desist letter to syndicated newspaper columnist John Rosemond

[4] See *id.* (Table 40), https://www.bls.gov/cps/aa2017/cpsaat40.pdf.

after he published an advice column in a Kentucky newspaper in which he offered advice to parents struggling with their teenage son. *See Rosemond v. Markham*, 135 F. Supp. 3d 574 (E.D. Ky. 2015). As here, the government argued that advice tailored to an individual's personal parenting situation was the unlicensed practice of a profession that could be regulated without considering the First Amendment.

State surveying boards in North Carolina and Mississippi have taken similar action against companies that produce maps or take aerial photographs of property. *See* Institute for Justice, *Mississippi Startup Files First Amendment Countersuit Against State Licensing Board*, July 10, 2018, https://ij.org/press-release/mississippi-startup-files-first-amendment-countersuit-against-state-licensing-board/ (last visited Dec. 13, 2021); *North Carolina Drones*, https://ij.org/case/north-carolina-drones/ (last visited Dec. 13, 2021). In both cases, the state has argued that creating these images is the unlicensed "practice of surveying," even though the maps and photos do not establish official property lines or have any other independent legal effect.

Other examples abound. In North Carolina, the state's dietetics board went through diet blogger Steve Cooksey's website with a red pen, specifying on a line-by-line basis which portions of his low-carb diet advice were the illegal, unlicensed practice of dietetics. *Cooksey v. Futrell*, 721 F.3d 226, 229–30 (4th Cir. 2013). Further south, the state of Florida conducted a sting operation against diet coach

Heather Del Castillo after receiving a complaint that she had been offering dietary advice to willing clients. *See Del Castillo v. Philip*, No. 3:17-cv-722-MCR-HTC (N.D. Fla. filed July 17, 2019), *available at* https://ij.org/wp-content/uploads/2017/10/FL-Diet-Speech-Opinion.pdf. And even advice about animals isn't safe—in Texas, the state argued (unsuccessfully) that retired veterinarian Ron Hines may not offer any individualized advice about any animal, even to pet owners outside the United States, unless he has first physically examined the animal. *See Hines v. Quillivan*, No. 1:18-CV-155, 2021 WL 5833886 (S.D. Tex. Dec. 9, 2021) (holding, on remand from the Fifth Circuit, that the physical-examination requirement, as-applied to Hines, was an unconstitutional content-based restriction on speech).

In each of these cases, the government argued—or is still arguing—that the plaintiff's speech is the "conduct" of practicing a profession, and thus receives no First Amendment protection. But if that were true, then there would be no limits to what could be cast out from the scope of the First Amendment. *Nat'l Inst. of Fam. & Life Advocs. v. Becerra* (*NIFLA*), 138 S. Ct. 2361, 2375 (2018) (rejecting the argument that states hold "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement"). That is because all speech can be characterized, in some sense, as conduct. University professors engage in the conduct of "instructing." Political consultants engage in the conduct of "strategizing." Stand-up comedians engage in the conduct of "inducing

amusement." But this does not affect the level of First Amendment protection these speakers enjoy. And for good reason. Indeed, as one circuit aptly described it, "To classify some communications as 'speech' and others as 'conduct' is to engage in nothing more than a labeling game." *King v. Governor of New Jersey*, 767 F.3d 216, 228 (3d Cir. 2014), *abrogated on other grounds by NIFLA*, 138 S. Ct. 2361 (2018).

The trial court was correct to reject that labeling game, and this Court should affirm its ruling.

II. Supreme Court precedent establishes that physician referrals are speech, and content-based restrictions on referrals must be reviewed with strict scrutiny.

HB 1570 prohibits health-care providers from providing certain kinds of medical treatments, but it also prohibits providers from even telling their clients about places where those treatments might be available—even if they would occur outside of Arkansas, where they remain legal. The trial court's First Amendment analysis, though brief, was correct in concluding that HB 1570's referral prohibition was a content-based restriction on speech subject to strict scrutiny. Simply put, giving people advice about where they can legally obtain something is speech, and the government bears a heavy burden if it seeks to silence that speech.

The government's response is two-fold. First, the government reiterates its claim that Arkansas's referral prohibition is a regulation of conduct, not speech.

Relatedly, the government argues that any speech the law does regulate is merely incidental to the law's regulation of the "conduct" of practicing medicine. But these arguments cannot be squared with binding precedent from the U.S. Supreme Court.

To begin, the government's arguments are foreclosed by the Supreme Court's recent ruling in *National Institute of Family & Life Advocates v. Becerra* (*NIFLA*), 138 S. Ct. 2361 (2018). That case involved the so-called "professional speech doctrine" under which some circuits had held that speech "within the confines of the professional relationship" was exempt "from the rule that content-based regulations of speech are subject to strict scrutiny." *Id.* at 2371 (cleaned up). This doctrine was explicitly premised on the notion—pressed by the government here—that such speech is a form of professional conduct. *See, e.g.*, *Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2014), *abrogation recognized by Pac. Coast Horseshoeing Sch., Inc. v. Kirchmeyer*, 961 F.3d 1062, 1068–69 (9th Cir. 2020). But the Supreme Court expressly rejected that doctrine, reaffirming that speech is speech—and subject to ordinary First Amendment rules—even if it occurs in a professional-client relationship. *NIFLA*, 138 S. Ct. at 2371–72.[5]

[5] The Supreme Court's rejection of this "professional conduct" argument largely tracks the arguments advanced against it in the first instance by Judge O'Scannlain. *See Pickup*, 740 F.3d at 1215 (O'Scannlain, J., dissenting from denial of rehearing en banc).

Applying those ordinary First Amendment rules here, HB 1570's referral prohibition is a content-based ban on speech, not a mere restriction on professional conduct. The appropriate test for distinguishing speech from conduct is set forth, most recently, in *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010). There, the Supreme Court held that whenever the "conduct" triggering the application of a law consists of speech with a particular message, that law must be treated as a content-based restriction on speech. *Id.* at 6–11.

Holder's facts are instructive. In that case, the U.S. Supreme Court considered the constitutionality of a federal law that forbade speech in the form of individualized legal and technical advice to designated foreign terrorist groups. The plaintiffs—lawyers and nonprofit groups—wished to provide these groups with training "on how to use humanitarian and international law to peacefully resolve disputes" and "how to petition various representative bodies such as the United Nations for relief." *Id.* at 9, 14–15. They wanted, in other words, to give individualized advice solely through the spoken word. They were prevented from doing so, however, because speech in the form of advice was illegal.

Under federal law, the plaintiffs were prohibited from providing terrorist groups with "material support or resources." *Id.* at 12. That term was defined to include both "training," defined as "instruction or teaching designed to impart a specific skill, as opposed to general knowledge," and "expert advice or assistance,"

defined as "advice or assistance derived from scientific, technical or other specialized knowledge." *Id.* at 12–13. The plaintiffs challenged that prohibition as a violation of the First Amendment. *Id.* at 24–39.

Just as in this case, the government defended the law by arguing that the proscribed speech was merely conduct—specifically the conduct of providing "material support" to terrorist groups—and therefore the law only incidentally burdened the plaintiffs' expression. *Id.* at 26–27. But the U.S. Supreme Court *unanimously* rejected that argument, holding that the material-support prohibition was a content-based regulation of speech subject to heightened scrutiny.[6] *Id.*

Most importantly, and in sharp conflict with the government's argument here, the Court took a commonsense approach to determining whether the First Amendment was implicated, concluding that the material-support prohibition was a content-based restriction on speech because the plaintiffs were allowed to communicate some things to designated terrorist groups but not other things:

> [The material-support prohibition] regulates speech on the basis of its content. Plaintiffs want to speak to [designated terrorist organizations], and whether they may do so under [the law] depends on what they say. If plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from "specialized knowledge"—for example, training on the use of international law or advice on petitioning the United Nations—then it

[6] Although only six justices joined the majority opinion in *Holder*, all nine justices agreed that, as applied to the plaintiffs in that case, the material-support prohibition was a restriction on speech, not conduct. *See id.* at 26–28; *id.* at 45 (Breyer, J., dissenting).

> is barred. On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecialized knowledge.

Id. at 27 (citations omitted).

This analysis applies directly to the First Amendment claim in this case. Plaintiff physicians wish to talk with their minor patients, and "whether they may do so . . . depends on what they say." *Id.* at 27. Under the law, physicians may advise their patients on where they may seek any manner of medical treatment, except for the gender-affirming medical treatment they want. Under *Holder*, that is a content-based restriction on speech and thus is subject to strict scrutiny.

The government's attempts to avoid this conclusion all fail. The government makes passing reference to the Supreme Court's rulings in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), and *Zauderer v. Office of Disciplinary Counsel of the Supreme Court of Ohio*, 471 U.S. 626 (1985), hinting—though never really arguing—that these cases provide a basis for upholding the referral prohibition. But the Supreme Court expressly discussed and distinguished both those cases in *NIFLA*, and neither of them applies here. 138 S. Ct. at 2372–74. Instead, those cases concern the issue of compelled speech by physicians or other professionals—informed consent requirements in *Casey*, and compelled disclosures in *Zauderer*. In neither case did the government seek to *prohibit* speech—to prevent people who had conveyed the mandatory information

from then saying other things *in addition*. HB 1570 does that, and therefore it must be analyzed as what it is: a prohibition on speech, not a compelled disclosure.

Similarly, though the government finds it "telling[]" that the trial court did not discuss *Rust v. Sullivan*, 500 U.S. 173 (1991), that omission is unsurprising because *Rust* has no relevance here. In that case, the Supreme Court upheld a prohibition on the recipients of federal funding using that money to provide counseling concerning or referrals for abortion services. But that decision has nothing to do with prohibitions on speech generally, and instead holds only that "the Government may choose not to subsidize speech." *Id.* at 200. Here, by contrast, the referral prohibition is not a condition of receiving government subsidies. It is simply a ban on speech.

In short, Arkansas's referral prohibition is a content-based restriction on speech and must be analyzed as such. At this stage, the trial court correctly held that the government had produced no evidence sufficient to carry its heavy burden under strict scrutiny.

III. The government's argument would reduce constitutional protection for all sides of the debate over the appropriate treatment for transgender minors.

Amicus recognizes, of course, that this case arises in a context where tempers run hot and where both sides believe themselves to be in the right not only legally but morally. It is one thing, after all, to say that Americans have a First

Amendment right to speak publicly about traffic-light timing (*see supra* 4). It is quite another to say they have a First Amendment right to advise young people about how to go out of state to receive treatments that the government believes are dangerous.

But the controversial nature of this dispute makes the proper resolution of the First Amendment claim more important, not less. A ruling that empowers Arkansas officials to prohibit licensed professionals from disseminating the advice at issue here would necessarily empower officials elsewhere to prohibit advice on other topics.

Again, this danger is not hypothetical. If Arkansas can prohibit doctors from recommending gender-affirming treatments, then the federal government could prohibit them from recommending marijuana. *Cf. Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002). Florida could prohibit them from asking whether a patient owns guns. *Cf. Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293 (11th Cir. 2017) (en banc). And states like California could enact laws that mirror Arkansas's by prohibiting advice that is *critical* of gender-affirming treatments.[7]

[7] Indeed, *amicus* recently filed a substantially similar version of this brief in the Ninth Circuit in a case where California urges similarly erroneous speech/conduct analysis in support of a law prohibiting doctors from counseling patients *against* gender-transition therapies. *See Tingley v. Ferguson*, No. 3:21-CV-05359, 2021 WL 3861657 (W.D. Wash. Aug. 30, 2021), *appeal filed*, No. 21-35815 (9th Cir. Sept. 28, 2021).

To be sure, many Americans will find some of these laws congenial, just as many other Americans find them morally abhorrent. (Few Americans, one imagines, support them all.) But the First Amendment means that one's right to hear particular advice does not hinge on which side of a culture-war dispute one's state legislature falls on. Instead, speakers are free to advise as they see fit, and listeners are free to seek out or reject that advice as they choose, subject to only those limitations that satisfy the demands of First Amendment scrutiny.

CONCLUSION

This Court should affirm the trial court's ruling enjoining HB 1570's referral prohibition.

Date: January 19, 2022

Respectfully Submitted,

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I hereby certify that this 19th day of January, 2022, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will send notification of such filing to any CM/ECF participants.

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