Case No. 19-60053

In the United States Court of Appeals for the Fifth Circuit

VIZALINE, L.L.C.; BRENT MELTON,

PLAINTIFFS – APPELLANTS,

V.

SARAH TRACY, P.E., BILL MITCHELL, P.E./P.S.; JOSEPH FRANKLIN LAUDERDALE, P.E./P.S.; JOSEPH E. LAUDERDALE, P.E./P.S.; STEVEN A. TWEDT, P.E.; DOCTOR DENNIS D. TRUAX, P.E.; RICHARD THOMAS TOLBERT, P.S.; JOE W. BYRD, P.S.; SHANNON D. TIDWELL, P.S.,

DEFENDANTS – APPELLEES.

On Appeal from the United States District Court for the Southern District of Mississippi Northern Division

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SUPPLEMENTAL CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Case 19-60053, *Vizaline, L.L.C., et al v. Sarah Tracy, P.E., et al*

The undersigned counsel of record certifies that the following listed persons and entities as described in Local Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

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Amicus Cato Institute is a Kansas nonprofit corporation. *Amicus* Mississippi Justice Institute is a Mississippi nonprofit corporation. *Amicus* Pelican Institute is a Louisiana nonprofit corporation. None of *amici* has any parent companies, subsidiaries, or affiliates. None of *amici* issues shares to the public.

/s/ Ilya Shapiro

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IDENTITY AND INTEREST OF *AMICI CURIAE*[1]

The **Cato Institute** is a nonpartisan public policy research foundation that advances individual liberty, free markets, and limited government. Cato's Robert A. Levy Center for Constitutional Studies helps restore the principles of constitutionalism that are the foundation of liberty. Toward those ends, Cato conducts conferences and publishes books, studies, and the annual *Cato Supreme Court Review*.

The **Mississippi Justice Institute** (MJI) is a nonprofit, public interest law firm and the legal arm of the Mississippi Center for Public Policy, an independent, nonprofit, public policy organization dedicated to advancing the principles of limited government, free markets, strong families, individual liberty, and personal responsibility. MJI represents Mississippians whose state or federal constitutional rights have been threatened by government actions. MJI's activities include litigation on behalf of individuals, intervening in cases important to public policy, participating in regulatory and rule-making proceedings, and filing amicus briefs to offer unique perspectives in Mississippi and federal courts.

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[1] No one other than *amici* and their counsels wrote any part of this brief or paid for its preparation or submission. The parties have consented to this filing.

The **Pelican Institute** is a nonpartisan research and educational organization—a think tank—based in New Orleans. It is the leading voice for free markets in Louisiana. The Institute's mission is to conduct research and pursue advocacy that advances sound policies based on free enterprise, individual liberty, and constitutionally limited government.

This case concerns *amici* because it threatens the basic First Amendment right to speak without getting the government's permission.

INTRODUCTION AND SUMMARY OF ARGUMENT

Under Mississippi law, the practice of surveying is limited to individuals who possess a professional license from the state. Miss. Code Ann. § 73-13-73. The term "surveying" is broadly defined as "[l]ocating, relocating, establishing, reestablishing, laying out or retracing any property boundary or easement" and "[c]reating, preparing or modifying electronic or computerized data, including land information systems and geographic information systems, relative to the performance" of these activities. Miss. Code Ann. § 73-13-71(a), (d).

Vizaline, LLC, is a Mississippi startup that uses public information to create line drawings of legal property descriptions on satellite photographs as a cost-effective and user-friendly way for its clients, typically

small community banks, to visualize their property boundaries and identify any issues that should be investigated with a formal survey. In this way, Vizaline provides "specialized advice" to its clients using "existing data and information (generated by licensed surveyors) . . . to create and disseminate new information." Compl. 13-14, ECF No. 1-1.

Although Vizaline does not hold itself out to be a professional surveyor and has never once conducted a survey, Mississippi's Board of Licensure for Professional Engineers and Surveyors (the "Board") nevertheless determined that Vizaline's services constituted the unlicensed practice of surveying and filed a lawsuit accusing Vizaline of violating state licensing laws. Vizaline counterclaimed seeking to vindicate the First Amendment right to use public information to advise their clients about their property portfolios. The case was removed to the federal district court below, which concluded that the licensing restrictions only "incidentally infringed" upon Vizaline's speech and therefore did not "trigger First Amendment scrutiny." ROA.295.

The Board's lawsuit is a plain violation of Vizaline's First Amendment rights. Advice about descriptions of publicly available legal property boundaries clearly communicates a message and thus implicates the

First Amendment. Vizaline's speech to its clients is just that: speech. As the Supreme Court recently recognized, such speech is not unprotected merely because it is uttered by "professionals." *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361, 2371–72 (2018). Requiring a license to speak to clients about publicly available information imposes a burden on Vizaline's speech based both on the content of the speech and the identity of the speaker. The First Amendment prevents states from fashioning a favored meaning of a term like "surveyor" to stop innovative companies from exercising their speech rights.

The Board's actions are yet another instance of an unelected state board overreaching its authority for protectionist purposes. In such situations, courts must apply meaningful scrutiny to the application of overly broad licensing laws, especially when licensing boards have perverse incentives to silence industry competitors and stifle innovation.

Put simply, no one should need a license to use public information to draw lines on maps for willing customers. *Amici* urge the Court to reverse the district court's holding that states can prevent people from us-

ing and disseminating public information unless they first acquire a license. Such a conclusion is out of step with the Supreme Court's free-speech jurisprudence and cannot be squared with the First Amendment.

ARGUMENT

I. STATES CANNNOT PREVENT INDIVIDUALS FROM ENGAGING IN OTHERWISE PROTECTED SPEECH MERELY BECAUSE THEY DO NOT HAVE A GOVERNMENT-ISSUED PROFESSIONAL LICENSE

A. The Use and Dissemination of Public Information, Even for Profit, Is Speech Protected by the First Amendment

The Supreme Court has firmly established that creating and disseminating information—even for profit—is speech protected by the First Amendment. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570 (2011) ("the creation and dissemination of information are speech within the meaning of the First Amendment."); *see also Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 (1988) ("It is well settled that a speaker's rights are not lost merely because compensation is received; a speaker is no less a speaker because he or she is paid to speak.").

The Supreme Court has also expressly rejected the proposition that professional licensure that affects speech is "devoid of all First Amendment implication." *Riley,* 487 U.S. at 801 n.13. Just last year, in *National*

Institute of Family & Life Advocates ("NIFLA") v. Becerra, 138 S. Ct. 2361, 2371–72 (2018), the Court reaffirmed that "[s]peech is not unprotected merely because it is uttered by 'professionals.'" Justice Thomas, writing for the majority, reasoned that if "professional speech" were not constitutionally protected, that would give "States unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *Id.* at 2375. *NIFLA* rightly pointed out that "[s]tates cannot choose the protection that speech receives under the First Amendment, as that would give them a powerful tool to impose 'invidious discrimination of disfavored subjects.'" *Id.* (quoting *Cincinnati v. Discovery Network, Inc.*, 507 U. S. 410, 423–24, n. 19 (1993)). After all, if licensure itself eliminated First Amendment protection, states would be able to suppress information about numerous matters of public concern.

Consequently, while states might "have broad power to establish standards for licensing practitioners and regulating the practice of professionals," *Grade v. Nat'l Solid Waste Mgmt. Ass'n*, 505 U.S. 88, 108 (1992) (quoting *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975)), they "may not, under the guise of prohibiting professional misconduct, ignore constitutional rights," including the First Amendment right to use and

disseminate information. *NAACP v. Button*, 371 U. S. 415, 439 (1963). The Supreme Court has recognized that First Amendment protections are triggered when information individuals possess is subjected to "restraints on the way in which the information might be used" or disseminated. *Sorrell*, 564 U.S. at 568 (quoting *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 32 (1984)). Therefore, Mississippi's restrictions on Vizaline's use of public information to advise their clients affect the free flow of information and are subject to First Amendment scrutiny.

Mississippi's Board of Licensure for Professional Engineers and Surveyors (the "Board") has essentially prohibited the use of public information in a way that differs from the state's preferred meaning of "surveying" and restricted Vizaline from disseminating that information to its clients through user-friendly visual representations. To be clear, Vizaline does *not* create entirely new information out of thin air, nor does it acquire information by conducting a survey. Vizaline simply takes existing information of legal property descriptions that licensed surveyors have *already* ascertained and uses digital geospatial visualization tools to create "new" information via drawings and pictures that are easier for its clients to understand. Compl. 13–14, ECF No. 1-1.

The creation and dissemination of information is a quintessential First Amendment activity—even if done for profit. *Sorrell*, 564 U.S. at 570; *Riley*, 487 U.S. at 801. And Vizaline's use and dissemination of publicly available information are speech clearly within the meaning of the First Amendment. Even if Vizaline's speech is considered "professional" in nature, this Court is still compelled to follow the Supreme Court's recent ruling in *NIFLA* and scrutinize restraints on that speech the same way it would any other speech restraints—by applying strict scrutiny. Establishing that the First Amendment protects Vizaline's speech should be the end of the inquiry, because the state has made no effort to satisfy strict scrutiny—or any level of heightened scrutiny.

B. Licensing Restrictions on the Use and Dissemination of Public Information Are Content- and Speaker-Based Speech Restrictions Subject to Judicial Review

As the Supreme Court emphasized in *Reed v. Town of Gilbert*, it is unconstitutional to restrict what individuals can say based on who they are or what message they want to express. 135 S. Ct. 2218 (2015). Such content- or speaker-based regulations on speech warrant the highest level of First Amendment scrutiny, a standard that applies with equal force to speech by professionals. *Riley*, 487 U.S. at 796; *NIFLA*, 138 S. Ct.

at 2371–72. Indeed, there is a long line of cases in which the Court has consistently applied heightened scrutiny to content-based laws regulating the noncommercial speech of professionals, including to lawyers, *see Reed*, 135 S. Ct. at 2229 (discussing *Button*, 371 U.S. at 438); *In re Primus*, 436 U.S. 412, 432 (1978); professional fundraisers, *see Riley*, 487 U.S. at 798; and professional organizations that provided specialized advice, *see Holder v. Humanitarian Law Project*, 561 U.S. 1, 27–28 (2010). Likewise, the Court has applied strict scrutiny to speaker-based restrictions on professional speech. *See Sorrell*, 564 U.S. at 565–66.

Here, the Board's regulation of Vizaline's speech is content-based in at least two ways. First, it is subject-matter based because it prohibits Vizaline from receiving payment for speech about publicly available descriptions of property boundaries rather than speech about any other subject. As the Supreme Court has held, "[g]overnment regulation of speech is content based if . . . [it] defin[es] regulated speech by particular subject matter." *Reed*, 135 S. Ct. at 2227.

Second, Mississippi's licensing regime unconstitutionally distinguishes between two different types of speech. The speech restrictions apply to individual advice but *not* to general advice. For example, if

Vizaline offered generalized advice about how to create user-friendly visual representations of legal property boundaries during a public demonstration, its speech would be legal. But because Vizaline offers individualized advice directly to its clients, its speech is considered illegal. This distinction between generalized and individualized advice cannot be squared with the Supreme Court's free-speech jurisprudence.

For example, the Court in *Holder* established that the act of distinguishing between generalized and individualized advice is itself a content-based distinction that automatically triggers strict scrutiny. 561 U.S. at 27 (concluding that a speech restriction is content-based where speech that "imparts a 'specific skill' or communicates advice derived from 'specialized knowledge' . . . is barred," but speech that "imparts only general or unspecialized knowledge" is not). When professionals like Vizaline disseminate information—even publicly available information—to clients, they are necessarily communicating advice through individualized, specialized knowledge. Under *Holder*, Mississippi's licensing scheme is thus a textbook example of a content-based speech restriction.

Mississippi's licensing law also imposes a speaker-based restriction because it only prohibits speech by individuals to whom the Board has

not given a license. Nothing in the Mississippi Code suggests that any non-professional would be prevented from using and disseminating the same public information that Vizaline uses and disseminates. In truth, anyone with the proper sophistication could use geospatial imaging technology to create visualizations of publicly available property descriptions. Yet the Board still singled out Vizaline, because the company offers a cost-effective alternative to traditional surveying. As the Supreme Court has recognized, "[s]peech restrictions based on the identity of the speaker are all too often simply a means to control content." *Citizens United v. FEC*, 558 U. S. 310, 340 (2010). And courts should be "deeply skeptical of laws that 'distinguis[h] among different speakers, allowing speech by some but not others.'" *NIFLA*, 138 S. Ct. at 2378 (quoting *Citizens United*, 558 U.S. at 340). Indeed, that is exactly what is happening here, and this Court should be equally skeptical of the Board's application of the state's surveyor-licensing requirements to Vizaline's speech.

Moreover, it is irrelevant whether Mississippi's licensing regulations are content-neutral on their face (which they are not). Even facially content-neutral laws must be "justified without reference to the content of speech," *Reed*, 135 S. Ct. at 2227, but these laws cannot be justified

without reference to that content. In practice, the regulation of pure professional speech can never be content-neutral because the value of professional advice inherently depends on its content and who is giving it. Mississippi Code §§ 73-13-73 and 73-13-95 are characteristically content- and speaker-based because they (1) limit Vizaline's use of publicly available descriptions of property via visualization technology (content-based) and (2) Vizaline's ability to advise its clients on a particular subject because it does not possess a surveyor license (speaker-based). Such restrictions raise serious First Amendment concerns.

C. Mississippi's Licensing Regulations Do More Than "Incidentally" Infringe Upon Vizaline's Speech

The district court below wrongly concluded that Mississippi's licensing restrictions only "incidentally infringed" upon Vizaline's speech and therefore do "not trigger First Amendment scrutiny." ROA.295. Such a conclusion directly conflicts with the Supreme Court's recent decision in *NIFLA*, which indicated that restrictions on professional speech are only immune from First Amendment scrutiny when states "regulate professional *conduct* that *incidentally* burden[s] speech." 138 S. Ct. at 2373 (emphasis added).

It is well settled that certain regulations "fall within the traditional purview of state regulation of professional conduct." *See Button*, 371 U.S. at 438. However, many professions involve both speech and conduct. For example, a financial advisor might invest client funds from an account over which he or she has discretionary authority. This activity is plainly conduct and any regulation would, at most, incidentally burden the advisor's speech. But that financial advisor might also advise clients to reduce their exposure to emerging markets and make certain investments. Directly advising a client about investments in this way is *pure* speech. Any regulation on this kind of specialized technical advice surely imposes a direct—not merely incidental—burden on the financial advisor's speech.

In *Holder*, the Supreme Court explicitly recognized that this kind of advice from an expert to a specific person or group is fully protected speech. 561 U.S. at 27. The government there argued that individualized advice was not speech at all but was instead conduct. *Id.* The Court emphatically rejected that argument, holding that the government was regulating the organization's speech because the only thing it was regulating was speech, not conduct. *Id.* at 28. In other words, the law at issue in

Holder implicated the First Amendment because it was triggered by the act of speaking itself. Mississippi's regulations here work the same way.

To be sure, restrictions on professional speech are not so easily dismissed—as the district court below would insist—as being simply "incidental" to conduct. After all, the entire purpose of this kind of regulation is to control both the content and the provider of the speech, not just their conduct. As Professor Eugene Volokh has put it:

> When the government restricts professionals from speaking to their clients, it's restricting speech, not conduct. And it's restricting the speech precisely because of the message that the speech communicates, or because of the harms that may flow from this message. The restriction is not a "legitimate regulation of professional practice with only incidental impact on speech"; the impact on the speech is the purpose of the restriction, not just an incidental matter.

See Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1346 (2005).

The incidental burden exception discussed in *NIFLA*, and referenced by the district court below, simply does not apply when the professional conduct being regulated is pure speech. 138 S. Ct. at 2374 (finding the licensed notice did not regulate professional conduct but rather regulated "speech as speech."). This is not to say that the government can

never regulate professional speech as incidental to conduct. It can, for example, require doctors who perform abortions (which is a form of non-expressive professional conduct) to make certain factual disclosures to their patients. *Id*. at 2373 (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992)). Or, a government restriction on who may write prescriptions—itself a form of speech—is a valid regulation of speech incidental to conduct. The state's interest in regulating this class of persons is not directed at the expressive content of the prescription but rather at the non-expressive legal right created by it. Such speech is directly tied to a non-expressive function and is merely incidental to the professional service (the medical procedure or proscription) provided.

In contrast, the licensing regulations here are aimed at regulating *pure* speech. After all, Vizaline's services are "not tied to a procedure at all." *Id.* at 2374. All Vizaline does is use preexisting geospatial information to advise banks about their property portfolios. The only "conduct triggering coverage under the statute consists of communicating a message," *Holder*, 561 U.S. at 28, so Mississippi cannot regulate under the guise of regulating professional speech incidental to conduct. Vizaline's speech is not merely "incidental to" its professional conduct: the only

"conduct" in which Vizaline engages is speech. Accordingly, the narrow exception discussed in *NIFLA* does not apply because Vizaline's advice to its clients, which Mississippi seeks to regulate, is again pure speech.

D. Calling Vizaline's Speech a "Practice" or "Occupation" Does Not Change the First Amendment Analysis

Mississippi defines "surveying" as the "[l]ocating, relocating, establishing, reestablishing, laying out or retracing any property boundary or easement" and "[c]reating, preparing or modifying electronic or computerized data, including land information systems and geographic information systems, relative to the performance" of these activities. Miss. Code Ann. § 73-13-71(a), (d). Under the Board's exceedingly broad application, it determined Vizaline's services constituted "surveying." Mississippi's surveyor licensure could theoretically be construed so broadly that it would likely cover almost anyone—including mainstream technology companies like Google Maps, Uber, and Zillow—who uses geospatial information to superimpose lines on satellite images. But the Board has not dared to regulate those companies, despite the fact they perform many of the same functions as Vizaline. Instead, the Board targeted Vizaline because it provides a valuable service to its clients by using publicly available geospatial information to compete with actual surveyors.

As the Supreme Court recognized in *NIFLA*, the mere fact that a licensing board can call an activity a "profession" does not change the First Amendment analysis. 138 S. Ct. at 2361, 2375; *see also 44 Liquormart v. Rhode Island*, 517 U.S. 484, 513 (1996) ("That the State has chosen to license its liquor retailers does not change the [First Amendment] analysis."). Allowing states to block speech in this manner would give them "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement." *Id.* And "[s]tate labels cannot be dispositive of [the] degree of First Amendment protection." *Riley*, 487 U.S. at 796 (citing *Bigelow v. Virginia*, 421 U.S. 809, 826 (1975)).

Moreover, *Holder* stands for the proposition that the government cannot escape First Amendment scrutiny simply by labeling something conduct when "the conduct triggering coverage under the statute consists of communicating a message." 561 U.S. at 28*; see also Pickup v. Brown*, 740 F.3d 1042, 1208, 1218 (9th Cir. 2013) (O'Scannlain, J., dissental) ("The Supreme Court's implication in [*Holder*] is clear: legislatures cannot nullify the First Amendment's protections for speech by playing this labeling game."). The Board's attempt here to encompass Vizaline's

unique activities in its definition of "surveying" is not, by itself, dispositive. The First Amendment bars states from rewriting the dictionary and fashioning favored meanings of terms like "surveying" just to stop innovative companies, like Vizaline, from exercising their speech rights.

II. COURTS MUST APPLY MEANINGFUL SCRUTINY WHEN UNELECTED REGULATORY BOARDS USE LICENSING LAWS TO SILENCE PROFESSIONALS, ESPECIALLY WHEN THOSE BOARDS HAVE PERVERSE INCENTIVES TO STIFLE COMPETITION

A. Courts Have Increasingly Applied Meaningful Scrutiny in Cases Where Licensing Boards' Motivations Are Pretextual and Anti-Competitive

Even though this is a freedom-of-speech case, the court below refused to subject Mississippi's protectionist licensing scheme to heightened judicial scrutiny. This is contrary to how this and other federal courts have treated even non-speech-related protectionist schemes under rational-basis review. Increasingly, courts have applied at least *some* level of meaningful scrutiny when licensing requirements appear to serve pretextual or otherwise anti-competitive goals rather than legitimate public health and safety concerns. *See*, *e.g.*, *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015) (holding that "market-participant" state licensing boards cannot exclude non-dentist teeth whiteners from the market merely because they threatened dentists' monopoly on

teeth whitening services); *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013) (striking down "rules . . . granting funeral homes an exclusive right to sell caskets" and concluding that "mere economic protection of a particular industry" is not "a legitimate governmental purpose.); *Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (striking down a Tennessee law requiring casket sellers to be licensed funeral directors because "protecting a discrete interest group from economic competition is not a legitimate governmental purpose").

The facts surrounding this case shed light on the Board's pretextual and protectionist motivations. As described above, Vizaline simply uses publicly available information about legal property boundaries to provide its clients with user-friendly and cost-effective drawings of their small properties, valuable information that would otherwise require a cost-prohibitive survey. Compl. 13–14, ECF No. 1-1. While Vizaline's services do not clearly fall under Mississippi's surveyor-licensing laws, they do provide a cheaper alternative to traditional surveying. As a result, the Board, which consists of a group of state-licensed engineers and surveyors selected from lists approved by those professions' trade associations, views Vizaline as a competitor that should be pushed out of the market.

Despite Mississippi's official state policy of "increas[ing] economic opportunities . . . by promoting competition" and requiring that any new occupational regulations be "the least restrictive regulation necessary to protect consumers," the Board has nevertheless gone out of its way to target Vizaline with broad regulations that simply should not apply. *See* Miss. Code. § 73-47-7. Occupational Board Compliance Act of 2017. This is yet another instance of a licensing board's engaging in cartel-like behavior to protect industry insiders.

To be sure, this kind of professional licensure abuse is nothing new. It is well established that many licensing rules exist merely to limit competition and benefit those already practicing in a profession. *See* Paul J. Larkin, Jr., *Public Choice Theory and Occupational Licensing*, 39 Harv. J.L. & Pub. Pol'y 227 (2016) (discussing economist George Stigler's conclusion that "[i]ncumbent business support licensing requirements because licensing protects incumbents against competition"); *see also* Dick Carpenter et al., Inst. for Justice, *License to Work: A National Study Of Burdens From Occupational Licensing* 25, 29–30 (2012), https://ij.org/wp-content/uploads/2015/04/licensetowork1.pdf (arguing that licensing re-

quirements are frequently created by practitioners to keep out competition); Richard B. Freeman, *The Effect of Occupational Licensure on Black Occupational Attainment*, in Occupational Licensure & Regulation 166, 175 (1980) (concluding that licensing laws have historically been used to deliberately exclude marginalized social groups from the market).

In response to mounting evidence of licensing boards' cartel-like behavior, courts, including this one, have been increasingly willing to apply meaningful scrutiny in cases where boards' motivations are likely pretextual and anti-competitive. In *St. Joseph Abbey*, this Court looked past the state's proffered justifications and determined that "neither precedent nor broader principles suggest that mere economic protectionism of a particular industry is a legitimate governmental purpose." 712 F.3d at 222. A "State Board cannot escape the pivotal inquiry of whether there is," at the very least, some "rational basis" for its actions. *Id.* at 223. Similarly, in *Greater Houston Small Taxicab Co. Owners Ass'n v. City of Houston*, this Court noted that "*Craigmiles* and other cases confirm that naked economic preferences are impermissible to the extent that they harm consumers." 660 F.3d 235, 241 (5th Cir. 2011). As the Court later put it:

"The great deference due state economic regulation does *not* demand judicial blindness to the history of a challenged rule or the context of its adoption nor does it require courts to accept nonsensical explanations for regulation." *St. Joseph Abbey*, 712 F.3d at 226 (emphasis added).

Other circuits have joined the chorus in scrutinizing state regulations motivated by mere economic protectionism. *See*, *e.g.*, *Merrifield v. Lockyer*, 547 F.3d 978, 991 n.15 (9th Cir. 2008) ("We conclude that mere economic protectionism for the sake of economic protectionism is irrational with respect to determining if a classification survives rational basis review. . . . [E]conomic protectionism for its own sake, regardless of its relation to the common good, cannot be said to be in furtherance of a legitimate governmental interest.").

Even the Supreme Court has weighed in on the matter. In *Dental Examiners*, a licensing board composed of practicing dentists sought to exclude non-dentist teeth whiteners from the market. 135 S. Ct. 1101. The Court found that the board had purely protectionist motivations. 135 S. Ct. at 1116 ("After receiving complaints from other dentists about the nondentists' cheaper services, the Board's dentist members—some of

whom offered whitening services—acted to expel the dentists' competitors from the market."). The Court held that the board was not immune from liability under federal antitrust law. *Id.* at 1117. This case stands for the proposition that "[s]tate agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing." *Id.* at 1114. And in such situations, licensing boards' actions should be subject to a higher-level judicial scrutiny.

These cases illustrate the importance of courts' applying some level of scrutiny where regulatory actions are pretextual or motivated by nothing more than mere economic protectionism. *See* Bernard H. Siegan, *Economic Liberties and The Constitution* 318–19 (1980) (summarizing constitutional support for judicial review of economic legislation and noting the "judicial purpose of providing a forum for persons aggrieved by government and serving as a check on the other branches"). While licensing regulations might be necessary in some cases to protect public health and safety by regulating who can practice in a profession, the central purpose of these regulations—erecting barriers to market entry—cannot be an end in itself. Courts must, at the very least, invalidate regulations that are justified only by the desire to restrict competition. Given the Board's

perverse incentives to restrict competition, its application of the state licensing laws deserve rigorous review. The Board simply does not have the legal authority to stop a business because it might present fair market competition for board members and other industry insiders.

B. Meaningful Scrutiny Is Especially Important in Cases Where Licensing Laws Are Used to Silence Competitors and Stifle Innovation

The potential for regulations to run afoul of the Constitution is further heightened when professional licensing laws are applied to individuals who are paid for their advice rather than their goods or labor. In such instances, state licensing boards determine not only who can practice in a certain profession, but also the ideas that the individuals in the profession can express. Meaningful scrutiny is especially important in situations where, like here, a state licensing board has used economic regulations to silence industry competitors. Indeed, several circuit courts have already dealt with cases in which restrictive professional licensing laws were used against individuals who speak for a living.

In *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014), the D.C. Circuit struck down as unconstitutional a municipal law that required for-hire tour guides to take a qualifying history exam before

they could be licensed to give tours. While the District's regulation was directed at economic activity, not necessarily speech, the court still found that it implicated a constitutional interest. In applying intermediate scrutiny, the *Edwards* court moved away from the deference that standard of review typically affords to state action.

In *Cooksey v. Futrell*, 721 F.3d 226 (4th Cir. 2013), a state board ordered a blogger to stop giving advice about the low-carb "Paleo" diet because he was not a licensed dietitian. Although the Fourth Circuit did not reach the free-speech question itself, it nevertheless reprimanded the district court for erring in not analyzing the blogger's claims under a First Amendment framework. It also dismissed the state's argument that First Amendment "principles do not apply here because the Act 'is a professional regulation that does not abridge the freedom of speech protected under the First Amendment.'" *Id.* at 239 (quoting Appellees' Br. 26). The court applied the "chilling doctrine" to find that the blogger suffered cognizable injuries, both a "chilling effect" and "threat of prosecution," that were "caused directly by the actions of the State Board." *Id.* at 238.

These cases serve as cautionary tales of what happens when restrictive licensing laws are used against individuals who speak for a living.

Courts should be vigilant in scrutinizing licensing regulations, like those at issue here, which are used to silence competitors and stifle innovation. That is not to say that applying meaningful scrutiny would necessarily require the wholesale invalidation of an entire licensing scheme because some of its applications infringe on the freedom of speech. In the First Amendment context, invalidation is necessary only where "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 559 U.S. 460, 470 (2010) (quoting *Wash. State Grange v. Wash. State Republican Party*, 552 U.S. 442, 449, n. 6 (2008)). In practice, most licensing regulations will not have enough applications that are triggered solely by speech to justify wholesale invalidation. But for those that impermissibly burden protected speech, courts should not hesitate to meaningfully scrutinize their application—and strike them down if necessary.

Even if this Court determines that the Mississippi licensing regulations do not warrant strict or intermediate scrutiny, it should still apply some level of meaningful scrutiny. After all, every constitutional case deserves meaningful judicial review. As the Supreme Court pointed out in

Stevens: "The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs. Our Constitution forecloses any attempt to revise that judgment simply on the basis that some speech is not worth it." *Id.*

CONCLUSION

For the foregoing reasons, *amici* urge this Court to reverse the district court's determination that states can restrict individuals' use and dissemination of public information unless they first acquire a license.

Respectfully submitted,

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Certificate of Filing and Service

On May 1, 2019, I filed this *Brief of the Cato Institute, et al., as Amici Curiae* using the CM/ECF System, which will send a Notice of Filing to all counsel of record.

s/ Ilya Shapiro

Certificate of Compliance

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,161 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).
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