NO. 14-585

In the
Supreme Court of the United States

CANDANCE KAGAN, ET AL.,

PETITIONERS,

v.

CITY OF NEW ORLEANS, LOUISIANA,

RESPONDENT.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

BRIEF OF INTERNATIONAL ASSOCIATION FOR HEALTH COACHES AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The International Association for Health Coaches ("IAHC") is a membership-based organization dedicated to supporting the development and advancement of Health Coaches throughout the world. A Health Coach is a wellness guide and supportive mentor who motivates clients to cultivate positive lifestyle choices while empowering them to take responsibility for their own health. The IAHC seeks to make health coaching an integral part of healthcare worldwide, and supports its members through advocacy and effective communication about the occupation.

Health Coaches have a modest scope of practice. Unlike licensed healthcare providers, they do not diagnose disease, provide curative treatments, or administer medical care. They serve as support mechanisms, not medical fiduciaries. Their function is to assist in implementing the health and wellness recommendations made by an individual's medical professionals by guiding clients on how to maintain an active lifestyle, adhere to a healthy diet, manage stress, and combat food cravings, among other responsibilities.

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[1] Pursuant to Sup. Ct. R. 37.2(a), *amicus* timely notified the parties in writing of its intent to file this brief. All parties consented through blanket consent statements filed with the Clerk or through correspondence with *amicus* counsel that accompanies this brief. No counsel for any party authored this brief in whole or in part, and no person or entity, other than *amicus* or its counsel, made a monetary contribution intended to fund the preparation or submission of this brief.

This case is important to the IAHC because Health Coaches, much like the tour guides at issue in this case, depend on their speech to earn a living. Yet, many Health Coaches practice in states with restrictive dietetics and nutrition practice laws and licensing schemes. These laws and licensing requirements have created uncertainty regarding what Health Coaches and others can and cannot say in their chosen wellness occupations. Moreover, the IAHC is concerned that in some states these laws and licensing requirements are being employed not for any legitimate government purpose but as an improper form of economic protectionism.

The Fifth Circuit's decision in this case brushes aside the important First Amendment concerns implicated by the protectionist licensing scheme adopted by the City of New Orleans. In doing so, it deepens existing divisions in the lower courts over how the First Amendment should be applied to occupational licensing requirements. The IAHC submits this brief to explain the importance of these issues to individuals within the fields of dietetics and nutrition, including Health Coaches, and to urge the Court to grant the petition for certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Court should grant certiorari because the petition raises an important and recurring issue of First Amendment law on which the lower courts are deeply divided. *See* Pet. 7–13 (identifying two independent splits in lower court authority). Moreover, the question presented is of significant practical importance to occupations across the

Nation, including the growing numbers of successful Health Coaches. As described in more detail below, the First Amendment rights of Health Coaches are often limited by overly restrictive occupational licensing schemes that, as enforced, serve no appropriate government purpose. This case presents an ideal opportunity for the Court to provide much-needed clarity in this important area of law.

ARGUMENT

I. Occupational Licensing Requirements That Unduly Restrict A Speaker's Ability To Provide Individualized Advice Raise Significant First Amendment Concerns.

For an increasing number of Americans, occupational licensing laws are an everyday reality. Whereas only five percent of American workers were subject to licensing requirements in the 1950s, today "nearly a third of American workers need a state license to perform their job legally, and this trend toward licensing is continuing." Aaron Edlin & Rebecca Haw, *Cartels By Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093, 1096 (2014).

At its core, licensing is a means for the government to protect public health and safety by policing who may enter an occupation. Yet, as the occupations subject to licensure laws have proliferated, the means of occupational licensing—erecting barriers to entry—have at times become an ends in themselves. *See id.* at 1095–96 (noting that "[l]icensing boards are largely dominated by active members of their respective industries who meet to

agree on ways to limit the entry of new competitors"). Responding to this concern, courts have appropriately recognized that when occupational licensing requirements serve protectionist goals, rather than legitimate public health and safety interests, they are unconstitutional. *See Craigmiles v. Giles*, 312 F.3d 220, 224 (6th Cir. 2002) (striking down 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"). As this Court has held, "where simple economic protectionism is effected by state legislation, a virtually *per se* rule of invalidity has been erected." *Philadelphia v. New Jersey*, 437 U.S. 617, 624 (1978).

The potential for regulatory mischief is heightened when occupational licensing laws are applied to individuals who are paid for what they have to say, rather than the goods they produce or the labor they provide. In such instances, state licensing boards determine not only who can practice in an occupation, but also the ideas that individuals both inside *and outside* the occupation can express. This inevitable collision between free speech and the power of government to regulate occupations raises important First Amendment concerns.

The constitutionally suspect tour guide licensing scheme at issue in this case is, unfortunately, not an anomaly. As the history of dietetics regulation shows, licensing schemes are often employed to impose undue burdens on free speech without serving any legitimate government purpose.

For the first two hundred years of our nation's history, the notion that state governments could criminalize an individual's advice concerning what kinds of food to eat would have seemed outrageous. That all changed beginning in the mid-1980s, when the American Dietetic Association ("ADA") spearheaded campaigns in dozens of states to license the occupation of dietetics and render it illegal for individuals to offer nutrition advice without proper credentials. *See* Carole Sugarman, *Licensing Nutrition Advisers*, Wash. Post, May 5, 1985, at G1. Organizations like the National Nutritional Foods Association raised anticompetitive concerns, recognizing that "highly restrictive bills could create a monopoly for one school of traditional nutrition thought, limiting the free market and consumer choice." *Id.* Those concerns were well placed because, as the Association noted, the "primary intent" of these laws was "not to protect the public, but to give clout and recognition to a single segment of dietitians, increasing their chances of obtaining reimbursement from insurance companies." *Id.*

As a consequence of the ADA's efforts, it is currently illegal in twenty-one states for a person to provide individualized nutrition counseling unless licensed or exempt. *See* Center for Nutrition Advocacy, Overview of Laws, *available at* http://www.nutritionadvocacy.org/laws-state. Because Health Coaches primarily guide clients in one-on-one sessions, they have become targets of unauthorized practice laws even when they do not hold themselves out to be licensed professionals.

That is particularly troubling because there is no evidence that the health coaching industry poses any threat to public health and safety. To the contrary, many of the nation's foremost experts in prevention and evidence-based medicine have recognized that health coaching can serve a vital role in improving health outcomes and lowering healthcare expenditures. For instance, the U.S. Preventive Services Task Force recently released a recommendation statement advocating for healthcare practitioners to "offer[] or refer[] adults who are overweight or obese and have additional cardiovascular disease (CVD) risk factors to intensive behavioral counseling interventions to promote a healthful diet and physical activity for CVD prevention." Michael L. LeFevre, *Behavioral Counseling to Promote a Healthful Diet and Physical Activity for Cardiovascular Disease Prevention in Adults with Cardiovascular Risk Factors: U.S. Preventive Services Task Force Recommendation Statement*, 161 Ann. Intern. Med. 587, 587 (2014). The Task Force also found "adequate evidence that the harms of behavioral counseling interventions are small to none." *Id.* at 588. Despite the absence of any evidence that health coaching poses risks of harm to the public, however, Health Coaches still must be careful to comply with the regulations promulgated by state dietetics licensing boards.

II. The Lower Courts Need Guidance Over How To Address The First Amendment Issues Often Implicated By Occupational Licensing Laws.

Fortunately, just as most tour guides do not live in a state of perpetual fear that they will be thrown in jail for practicing their occupation, the vast majority of Health Coaches are usually able to provide basic nutritional and wellness advice to clients without government intrusion. Nevertheless, significant First Amendment abuses can and do occur. To ensure that those abuses are properly addressed, it is important for affected parties to be able to seek and obtain meaningful relief from the courts. Unfortunately, as the petition explains in more detail, the lower courts are in disarray.

A recent case decided in the Fourth Circuit, *Cooksey v. Futrell*, 721 F.3d 226 (4th Cir. 2013), serves as a cautionary reminder of what can happen when restrictive occupational licensing laws are deployed against individuals who speak for a living. After suffering a near-diabetic coma, plaintiff Steve Cooksey was advised by licensed dieticians to eat a diet low in fats and high in carbohydrates. *Id.* at 229–30. After conducting his own independent research, however, Cooksey came to the conclusion that the dieticians' advice was wrong; instead, he adopted a low-carbohydrate diet commonly known as the "Paleolithic diet" because it emulates what Stone Age humans ate before the advent of agriculture. *Id.* at 230. Once he switched to the Paleolithic diet, Cooksey lost 78 pounds, his blood sugar normalized, and he was no longer insulin-dependent. *Id.*

After his remarkable health transformation, Cooksey decided to create a website that would serve as a forum for others to learn more about his diet and exercise habits. *Id.* The website contained three main features: (1) a "Dear Abby"-style advice column, in which Cooksey fielded questions from visitors; (2) a free dietary mentoring section; and (3) a fee-based health coaching service, in which Cooksey provided individualized advice and moral support, including phone calls and emails. *Id.* at 230 & n.2. Notably, in a disclaimer on his website, Cooksey disclosed that he was not a licensed medical professional and had no formal medical training or special dietary qualifications. *Id.* at 230.

Two years after launching his website, Cooksey was reported to the North Carolina Board of Dietetics/Nutrition ("the Dietetics Board") after he expressed a dissenting viewpoint at a local nutritional seminar for diabetics. *Id.* The Executive Director of the Dietetics Board informed Cooksey that he and his website were under investigation and that the Board could seek an injunction against him for violating North Carolina's Dietetics/Nutrition Practice Act. *Id.* at 230–31. That statute, which was enacted in 1991, makes it unlawful for any unlicensed person to engage in "the practice of dietetics/nutrition" and imposes criminal penalties for violations. N.C. Gen. Stat. §§ 90-365(1), 90-352(2), 90-366. The statute does not distinguish between paid and unpaid advice, nor is nutritional advice dispensed to family or friends exempted.

After conducting its investigation, the Dietetics Board sent Cooksey printouts of his website, which it

had revised with a red pen to indicate "areas of concern." *Cooksey*, 721 F.3d at 232. The gist of the Dietetics Board's red-pen review was that, while Cooksey could provide his general views on dietary issues, he could not convey any individualized advice or provide personal guidance. Fearing civil and criminal action, Cooksey reluctantly edited his website to comply with the red-pen review. *Id.* at 231. The Dietetics Board approved Cooksey's alterations, but "reserve[d] the right to continue to monitor th[e] situation." *Id.* at 232.

Cooksey filed suit in federal court, seeking a declaratory judgment that the Act was unconstitutional and a preliminary injunction to prevent the Dietetics Board from enforcing the Act and its attendant regulations. *Id.* at 233. Applying rational-basis review "[b]ecause the speech at issue is restricted as a professional regulation," the district court dismissed Cooksey's claims and held that "voluntarily removing parts of one's website in response to an inquiry from a state licensing board is not a sufficient injury to invoke Article III standing." *Cooksey v. Futrell*, No. 3:12cv336, 2012 WL 4756065, at *3 (W.D.N.C. Oct. 5, 2012). On appeal, the Fourth Circuit reversed. *Cooksey*, 721 F.3d at 229. The court of appeals concluded that the Dietetics Board's red-pen review—which it likened to "markings on a high school term paper"—would be "likely to deter a person of ordinary firmness from the exercise of First Amendment rights" and thus had an "objectively reasonable chilling effect on his speech." *Id.* at 236 (internal quotation marks omitted).

In that case, the Fourth Circuit got it right: restrictive dietetic practice laws, and the threat of legal action from a state agency, can compel Health Coaches like Steve Cooksey to remain silent. But numerous other courts—including the district court in *Cooksey* and the lower courts here—have either doubted whether the First Amendment applied at all or subjected licensing laws to mere rational-basis review. Neither of those approaches comport with this Court's precedents. *See Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 n.13 (1988) (rejecting notion that occupational licensing laws are "devoid of all First Amendment implication" or "subject only to rationality review").

If Steve Cooksey's "Dear Abby"-style blog can be criminalized, in theory there is no reason why the wide-ranging advice dispensed in Dear Abby's newspaper column would fare any better. After all, Dear Abby periodically recommends to her readers healthy recipes they should try or ways they can improve their health—precisely the kinds of advice that the State Board found to be illegal in Cooksey's blog. *See, e.g.*, Abigail Van Buren, *More than 100 tasty recipes in cookbooklets*, Chicago Sun Times, May 8, 2013, at 40 ("Remember, 'an apple a day keeps the doctor away,' and this recipe requires five or six of them. (Think of the fiber!)"); Abigail Van Buren, *With weight comes guilt*, Kansas City Star, Jun. 3, 2008, at E7 ("To 'spend' calories rather than wearing them, a change in diet and a program of regular exercise are necessary."). Sometimes, her advice goes much further. *See, e.g.,* Abigail Van Buren, *Moody husband may be diabetic*, Chicago Sun-Times, Nov. 6, 2014, at 28 (speculating that

reader's easygoing husband who becomes hypercritical around dinnertime may be hypoglycemic or pre-diabetic); Abigail Van Buren, *Mom fears her past will haunt daughter*, Chicago Sun-Times, Aug. 6, 2014, at 35 (advising reader on how long after the "sell-by" date it is safe to consume milk and eggs).

If it seems farfetched to suggest that newspaper columnists might next be targeted by state licensing boards, consider the recent example of John Rosemond. Rosemond is a licensed family psychologist who writes a nationally syndicated column on parenting. In May 2013, the Kentucky Board of Examiners of Psychology ("Board of Examiners") sent Rosemond a cease-and-desist letter in response to one of his columns in which he advised two concerned parents to take away certain privileges from their unruly teenager until his grades and behavior improved. *See* Matthew Barakat, *Parenting Columnist Targeted by Ky. Board Sues*, Associated Press, July 16, 2013.

The Board of Examiners accused Rosemond of engaging in the unauthorized practice of psychology. According to the Board, it was immaterial that Rosemond was a licensed psychologist in North Carolina; because the column also ran in Kentucky, where he was *not* licensed, his speech was illegal. *Id*. The Board's actions were precipitated by a complaint from a retired Kentucky psychologist, who believed that North Carolina's licensing standards were not as strict as Kentucky's. *Id*.

Under the Board of Examiners' logic, to avoid running afoul of unauthorized practice laws,

Rosemond would need to be licensed in every state where his syndicated column was published (comprising some 200 newspapers). Plainly, the Board's proposed balkanization of Rosemond's speech would entirely subvert the purpose behind the First Amendment, which "embodies our profound national commitment to the free exchange of ideas." *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (internal quotation marks omitted). Rosemond's lawsuit against the Board of Examiners' censorship efforts is pending in the Eastern District of Kentucky. *See Rosemond v. Markham*, No. 3:13-cv-00042-GFVT (E.D. Ky. filed July 16, 2013).

While Steve Cooksey and John Rosemond may seem like extreme examples, First Amendment abuses will inevitably become more commonplace if occupational licensing trends continue. Without further guidance from this Court, the lower courts will remain hopelessly divided on the crucial issues at stake in this case.

III. The Court Should Grant Certiorari To Provide The Lower Courts With Much-Needed Guidance In This Unsettled Area Of First Amendment Law.

As occupational licensing requirements become more prevalent, there is a significant risk that they will be used for inappropriate purposes that intrude on constitutionally protected liberties. This case provides an excellent opportunity for the Court to address this important, recurring issue and to clarify the extent to which the First Amendment protects unlicensed occupational speech.

First, this case presents a clean vehicle for the Court to address the question presented. It was decided below on cross-motions for summary judgment, with an uncomplicated record and no factual disputes. *See* Pet. App. 9a ("the facts are not in dispute"). Accordingly, because the issues to be resolved will not turn on contested facts, the case provides the Court with a favorable avenue to clarify the proper constitutional analysis that should apply when determining whether an occupational licensing requirement impermissibly infringes on First Amendment rights.

Second, this case concerns relatively neutral subject matter—the tour guide industry—that will allow the Court to address the question presented in a context relatively untainted by political controversy. In contrast, much of the recent First Amendment litigation concerning occupational speech has involved hot-button social issues that the Court will not need to grapple with here. *Cf. King v. Governor of N.J.*, 767 F.3d 216, 221 (3d Cir. 2014) (free speech challenge to New Jersey statute prohibiting licensed counselors from engaging in "sexual orientation change efforts" with a client under the age of eighteen); *Wollschlaeger v. Governor of Fla.*, 760 F.3d 1195 (11th Cir. 2014) (free speech challenge to Florida statute requiring health care practitioners to refrain from asking questions about a patient's firearm ownership).

Third, although the question presented is of great practical importance, there are often strong incentives to avoid litigation. As this Court has previously recognized, individuals subjected to First

Amendment abuses are often deterred from challenging unconstitutional laws because the path of least resistance is to cease the offending speech rather than face punishment. *See Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988) ("[S]elf-censorship" is "a harm that can be realized even without an actual prosecution").

The chilling effects are even more pronounced when, as here, the regulated speech concerns not merely matters of conscience, but one's ability to earn a living. Many unlicensed speakers who are silenced by unauthorized practice laws will find it better to comply with state licensing boards than to face the threat of civil and criminal sanctions that will deprive them of their primary means of subsistence.

This reluctance to challenge occupational regulations is compounded by the fact that licensure laws disproportionately impact low-income individuals and the politically disfavored—many of whom lack sufficient resources to pay for the formal training and fees that the licensing process demands. *See, e.g.*, Maya N. Federman, et al., *The Impact of State Licensing Regulations on Low-Skilled Immigrants: The Case of Vietnamese Manicurists*, 96 Am. Econ. Rev. 237 (2006); Stuart Dorsey, *The Occupational Licensing Queue*, 15 J. Hum. Resources 424 (1980). As a result, the primary victims of occupational licensing laws are often incapable of affording counsel when their speech is unconstitutionally curtailed. When powerful state boards are arrayed against them, many would-be litigants may not even realize they have any recourse to challenge occupational licensing laws in the first

place. As a result, unlicensed occupational speech cases are far less likely to ever reach this Court as compared to other types of First Amendment cases.

In short, this factually straightforward case presents a rare and ideal opportunity for the Court to resolve a deep circuit split while clarifying an important area of First Amendment law that ordinarily evades this Court's review. The Court should take advantage of this opportunity by granting certiorari.

CONCLUSION

This Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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