

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
BROWNSVILLE DIVISION**

RONALD S. HINES, D.V.M.,

Plaintiff,

v.

JESSICA QUILLIVAN, D.V.M.,
in her official capacity as President of the
Texas State Board of Veterinary Medical
Examiners, et al.,

Defendants.

Civil Action No. 1:18-CV-00155

**AMICI CURIAE BRIEF OF AMERICAN VETERINARY MEDICAL ASSOCIATION
AND TEXAS VETERINARY MEDICAL ASSOCIATION
IN SUPPORT OF DEFENDANTS**

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INTEREST OF AMICI CURIAE¹

Amici are the American Veterinary Medical Association (“AVMA”) and Texas Veterinary Medical Association (“TVMA”), which are non-profit associations that represent veterinarians in all disciplines and specialties.

American Veterinary Medical Association (“AVMA”), established in 1863, is the national voice for the veterinary profession. The Association has more than 97,000 members, representing about 75% of U.S. veterinarians.

The TVMA, established in 1903, represents more than 4,000 licensed veterinarians practicing in Texas. The TVMA is one of the largest state veterinary medical associations in the U.S. and a recognized leader nationally on important issues affecting the veterinary profession.

Amici have a significant interest in the development and enforcement of rules of professional conduct for veterinarians. Accordingly, *Amici* submit this brief to explain the importance of Tex. Occ. Code § 801.351 in regulating the practice of veterinary medicine in Texas and why this regulation does not offend constitutionally protected free speech.

SUMMARY OF THE ARGUMENT

To protect animal health and welfare, Texas, most other states, and the federal government have enacted the threshold requirement that, in order to practice veterinary medicine with regard to a specific animal or group of animals, the veterinarian must conduct an initial physical exam of the animal or “medically appropriate and timely visits to the premises on which the animal is kept.” Tex. Occ. Code § 801.351(b). Under this rule, the veterinarian must establish this veterinarian-client-patient-relationship (“VCPR”) in person—not “solely by telephone or

¹ No counsel for a party authored this brief in whole or in part; and no party, party’s counsel, or other person or entity—other than *amici curiae* or its counsel—contributed money that was intended to fund preparing or submitting the brief.

electronic means”—before he or she can diagnose, treat, or prescribe medicine for the animal, or perform any other act for which a veterinary license is required. Tex. Occ. Code at §801.351(c). As the Fifth Circuit has already recognized in this case, Texas’s VCPR law “does not regulate the content of any speech, require veterinarians to deliver any particular message, or restrict what can be said once a veterinarian client-patient relationship is established.” *Hines v. Alldredge*, 783 F.3d 197, 201 (5th Cir. 2015) [hereinafter “*Hines I*”]. It solely regulates conduct.

Here, the Fifth Circuit has remanded this case to ensure the foundations for this earlier ruling were not disturbed by *Vizaline, L.L.C. v. Tracy*, 949 F.3d 927 (5th Cir. 2020) or *National Institute of Family & Life Advocates v. Becerra*, 138 S. Ct. 2361 (2018) [hereinafter “*NIFLA*”]. They have not. These cases stand for the fact that the mere inclusion of the VCPR in the veterinary professional code does not exempt it from First Amendment scrutiny; the court must assess whether the VCPR governs conduct or content-based speech and apply the proper constitutional standard for whether it violates the First Amendment. As indicated, the VCPR states only what a veterinarian must do before providing veterinary medical services, just as a veterinarian is required to obtain a veterinary medical license. It does not regulate, or attempt to regulate, the content of any speech or medical opinion by a veterinarian. It is subject to a rational basis review, just as with countless other content-neutral rules of professional conduct veterinarians, lawyers and other licensed professionals in Texas and other states must follow.

As detailed below, veterinary boards across the country have found the VCPR’s in-person requirement essential for ensuring that veterinarians can reliably diagnose and treat animals, whether household pets, working farm animals or livestock. This in-person relationship protects the welfare of the animal being treated, other animals in close proximity (as on a farm), the public food supply from potential contamination, and the public from zoonotic diseases that

may be transmitted from animals to people. It also reflects the reality that the practice of veterinary medicine is markedly different from the practice of human medicine where patients may be able to rely on a phone call to have a full and frank conversation with their doctor about proper diagnosis and treatment. Finally, undermining this content-neutral rule on free speech grounds threatens the ability of all professional licensing boards to develop standards and police members to promote public health and welfare. For these reasons, *amici* respectfully urge the Court to grant Defendant’s Motion to Dismiss.

ARGUMENT

I. TEXAS’S VCPR IN-PERSON PHYSICAL EXAM OR VISIT REQUIREMENT REGULATES PROFESSIONAL CONDUCT, NOT SPEECH

The VCPR requirement for an in-person exam or medically appropriate and timely visit to the premises applies to all acts of veterinary medicine governed by the Texas Occupations Code. These acts include “the diagnosis, treatment, correction, change, manipulation, relief, or prevention of animal disease, deformity, defect, injury, or other physical condition, including the prescription or administration of a drug, biologic, anesthetic, apparatus, or other therapeutic or diagnostic substance of technique.” Tex. Occ. Code § 801-002(5). The thrust of Dr. Hines’s argument here is that when he engages in these acts on the telephone or through an email, he “only speaks and engages in no conduct.” Pl. Br. at *12. This premise is false. Wherever, whenever, and however a person engages in these acts, including diagnosing and treating animals, the person is *practicing* veterinary medicine. The VCPR neither converts these acts to speech, nor controls the content of the veterinarian’s speech when engaging in these acts—regardless of whether he or she does so in an office, on site, online or by telephone.

In *NIFLA*, the U.S. Supreme Court reaffirmed that the First Amendment does not prevent States from regulating professional conduct. *See* 138 S. Ct. at 2372. *NIFLA* states that, as in other

cases, only “*content-based* laws” of professional conduct that regulate speech are subject to heightened scrutiny, including when they involve “organizations that provide[] specialized advice.” *Id.* at 2374 (emphasis added). The Court clarified that professional regulations that are not content-based, such as the VCPR, are still subject to less constitutional protection, even if they incidentally involve speech. *See id.*² Specifically, the Court in *NIFLA* identified at least two kinds of content-neutral professional regulations that are still subject to rational basis review: (1) laws requiring professionals to disclose “factual, noncontroversial information in their ‘commercial speech;’” and, as here, (2) regulations of professional conduct that may incidentally involve speech. *Id.* at 2372. *NIFLA*, therefore, does not change the rational basis legal standard the Fifth Circuit applied in *Hines I* or the outcome of *Hines I*. It is still “reasonable to conclude that the quality of care will be higher, and risk of misdiagnosis and improper treatment lower, if the veterinarian physically examines the animal in question before treating it.” *Hines I*, 783 F.3d at 203. Legally, *NIFLA* has no impact on this case.

Dr. Hines also cannot find solace in the facts of *NIFLA*. First, *NIFLA* involved a statute that legislatively *compelled* speech by requiring *specific content* for notices that licensed and unlicensed facilities providing pregnancy-related services had to post. *See* 138 S. Ct. at 2369. First, the Court found the statute was purely a “content-based” regulation of speech that did not involve any “regulation of professional *conduct*.” *Id.* at 2373 (emphasis added). Second, the Court found these required notices, which concerned medical procedures the facilities at issue often did not provide, different in kind from the “factual and uncontroversial” commercial disclosures or conduct regulations incidentally involving speech for which it has traditionally

² *See also Vizaline, L.L.C. v. Tracy*, 949 F.3d 927, 932 (5th Cir. 2020) (“Instead of recognizing a new category of unprotected speech, the [*NIFLA*] Court adhered to the traditional conduct-versus-speech dichotomy.”).

“applied a lower level of scrutiny.” *Id.* at 2369, 2373. Third, *NIFLA* does not, as Dr. Hines suggests, change the application of *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) to the case at bar. *Holder* was well-known to the Fifth Circuit when it upheld the VCPR because the “trigger” event, which *Holder* focuses on, for the VCPR is engaging in an act of veterinary medicine—not speech. Put simply, *NIFLA* does nothing to alter the Fifth Circuit’s conclusion that the VCPR is content-neutral and a valid exercise of regulating professional conduct.

Vizaline also provides no support to Dr. Hines; it actually underscores the fallacy of his position that engaging in regulated conduct by phone or email exempts him from the regulations. There, *Vizaline* was accused of the unlicensed practice of surveying because it converted metes-and-bounds descriptions of real property into simple maps. *See Vizaline*, 949 F.3d at 928-29. However, the company did not purport to establish metes-and-bounds descriptions of real property or market its maps as a substitute for such surveys. *See id.* at 929. It would be as if a non-veterinarian summarized articles about pet care and provided them to customers. The question there was whether applying the regulations governing licensed professionals to someone not engaging in any covered conduct violates that person’s First Amendment rights to free speech. The courts there were not looking at regulated conduct by a licensed professional.

Here, Dr. Hines is admittedly practicing veterinary medicine by diagnosing and treating animals over the phone and through emails. *See Hines I*, 783 F.3d at 199 (“What is clear—and undisputed—is that Hines’s remotely provided services constituted the practice of veterinary medicine.”). Much like with lawyers, if Dr. Hines’s activities were limited to posting articles on his website and providing general information to people on the phone or through emails, then he would not be engaging in the type of professional conduct governed by the Texas Occupations Code and would not have to satisfy the VCPR requirement. But, his activities were not so

limited. Once he provided “veterinary advice to specific pet owners about their pets,” *id.*, the relationship changed and the VCPR was required—again, just as providing specific legal counsel to a client triggers the attorney-client privilege (which, unlike here, directly restricts the ability of lawyers to communicate certain information). This time-honored distinction between specific advice and general speech protects clients and advances important public policy goals.

Indeed, since *NIFLA* the Federal courts have upheld laws, like the VCPR, that regulate the conduct of a profession or business because they fit “within *NIFLA*’s exception for professional regulations that incidentally affect speech.” *Capital Associated Indus., Inc. v. Stein*, 922 F.3d 198, 207-08 (4th Cir. 2019), *cert. denied*, 140 S. Ct. 666 (2019) (rejecting post-*NIFLA* a First Amendment challenge to state laws prohibiting corporations from engaging in practice of law).³ As the Fourth Circuit explained, “[b]ans on discrimination, price regulations, and laws against anticompetitive activities all implicate speech—some may implicate speech even more directly than licensing requirements. But the Supreme Court has analyzed them all as regulations of conduct.” *Id.* at 208.⁴ As in *Stein*, the Texas VCPR does not “target communicative aspects” of the profession. *Id.* It does not mandate or otherwise compel the speech of a veterinarian on any topic, including the veterinarian’s professional opinions. It is a content-neutral rule with the “primary objective of regulating the conduct of the profession.” *Id.* Accordingly, this Court should find that even if Texas’s conduct-based VCPR law incidentally burdens a veterinarian’s speech, which is debatable, it plainly satisfies constitutional muster under the First Amendment.

³ See also *Loan Payment Admin. LLC v. Hubanks*, 821 Fed. Appx. 687, 689 (9th Cir. 2020) (stating “the Supreme Court’s recent decision in [*NIFLA*] is not an ‘intervening controlling authority’ that precludes the application” of a rational-basis test for regulations regarding mortgage provider solicitation letters to potential customers).

⁴ See *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1150–51 (2017); *Rumsfeld v. Forum for Acad. & Inst. Rights, Inc.*, 547 U.S. 47, 62 (2006); *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949).

II. A PHYSICAL EXAM OR VISIT TO ESTABLISH A VCPR IS A RATIONAL RULE THAT PROTECTS ANIMALS AND THE PUBLIC

As the Fifth Circuit concluded in *Hines I*, “the requirement that veterinary care be provided only after the veterinarian has seen the animal is, at a minimum, rational.” 783 F.3d at 203. The Texas Legislature adopted the current VCPR requirement in 2005 to make explicit under the Veterinary Licensing Act that a “person may not practice veterinary medicine unless a veterinarian-client-patient relationship exists.” Tex. Occ. Code § 801.351(a). In doing so, the Legislature recognized the VCPR “is one of the cornerstones of the veterinary profession.” Tex. Sen. Research Ctr., Bill Analysis H.B. 1767, 79th Leg., 2005 Reg. Sess., May 19, 2005. It governs a veterinarian’s professional relationship with animal owners across a broad spectrum of circumstances, from owners of companion animals (*e.g.* dog or cat) to owners of animals that contribute to the food supply (*e.g.* cow or chicken). This degree of importance to the profession made it “important to address changes in technology that could be used to circumvent the VCPR [because] there have been instances in which veterinarians have attempted to diagnose the animal solely over the phone.” *Id.* The Legislature acted by clarifying that the VCPR “may not be established solely by telephone or electronic means.” Tex. Occ. Code § 801.351(c).

A. Texas’s VCPR Safeguards Animal Health and Public Welfare

The rationale behind Texas’s VCPR, as the statute’s text makes plain, is to ensure a veterinarian “possesses sufficient knowledge of the animal” to provide its owner with competent veterinary care services. Tex. Occ. Code § 801.351(a). In general, such knowledge may be obtained only through a physical exam of the animal or a medically appropriate and timely visit to the premises on which the animal is kept. Tex. Occ. Code § 801.351(b). This in-person knowledge enables a veterinarian to bridge the gap between “general advice . . . not intended to diagnose, prognose, treat, correct, change, alleviate, or prevent animal . . . physical or mental

conditions” and care for specific animal patients. AVMA Guidelines for the Use of Telehealth in Veterinary Practice, Am. Veterinary Med. Ass’n, at 4⁵; *see also* Tex. Occ. Code § 801.002(5)(A).

An initial in-person assessment facilitates and informs the veterinarian’s diagnosis of an animal patient in ways that cannot be replaced by asking questions of an owner by phone or email, or even examining a pet through photos or video conferencing. “Veterinarians are trained to form at least a preliminary diagnosis through both client communication and in-person physical examination of the animal patient. During a physical exam, the veterinarian gathers data from the animal patient by use of sight, sound, touch, smell, and through use of specialized instrumentation.” Letter from California Veterinary Medical Association to Jessica Siefertman, Executive Officer of California Veterinary Medical Board, regarding Comment on Telemedicine Proposal, Jan. 25, 2021, at 2 [hereinafter “CVMA Telemedicine Comment”].⁶ In many cases, a physical exam may be the only way to identify a potentially hidden ailment (*e.g.* palpation⁷ identifying cancerous abdominal mass in a dog or cat), learn information about environmental factors that may cause or contribute to illness (*e.g.* environmental bacteria that may cause mastitis—inflammation of the mammary gland—in dairy cattle), or differentiate a diagnosis by ruling out multiple possible disorders that all could explain a set of symptoms. These situations

⁵ <https://www.avma.org/sites/default/files/2021-01/AVMA-Veterinary-Telehealth-Guidelines.pdf>

⁶ Reliance on a veterinarian’s senses of sight, sound, touch, or smell and basic instrumentation such as an ophthalmoscope and stethoscope may be the only “specialized instrumentation” available because advanced diagnostic tools such as CT scans or MRIs, or a dedicated team of medical specialists, are not as widely available or cost-effective for use with animals as they are with humans. *See, e.g.*, Canine Medical Imaging, Ultrasound, MRI, X-Rays, Radiographs, GoodVets, at <https://www.good-vets.com/services/dogs/canine-ultrasound-mri-x-rays-medical-imaging> (comparing diagnostic imaging options for dogs and recognizing that the most effective tools may be prohibitively expensive).

⁷ Palpation is a method of feeling with the fingers or hands during a physical examination. The veterinarian touches and feels the animal’s body to examine the size, consistency, texture, location, and tenderness of an organ or body part.

cannot be adequately described over the phone or captured on video. Also, because animals instinctively hide indications of illness or weakness to protect themselves, such as from potential predators, relying on owners to gather and convey limited information may lead to missed diagnoses, misdiagnoses, and unnecessary or harmful treatment options. *See* Patricia Lopes, *Animals Conceal Sickness Symptoms in Certain Social Situations*, ScienceDaily, June 18, 2014.⁸ Owners may also not be forthcoming about conditions in their home or on their farm.

Studies have shown that even well-intentioned owners are not suited to accurately assist veterinarians; they often underestimate or incorrectly recognize or report health problems. *See, e.g.,* Jo Ireland, et al., *Comparison of Owner-reported Health Problems with Veterinary Assessment of Geriatric Horses in the United Kingdom*, *Equine Veterinary J.* (2011)⁹ (finding horse owners under-reported many clinical signs of disease detected by veterinary examination); Anna K. Hielm-Björkman et al., *Reliability and Validity of a Visual Analogue Scale Used by Owners to Measure Chronic Pain Attributable to Osteoarthritis in Their Dogs*, *72 Am. J. Veterinary Research* 601 (2011)¹⁰ (dog owners under-recognized pain). Even something as apparent as a cat coughing may be overlooked or confused by owners as innocuous “coughing up a hairball” when it may indicate a serious medical problem. Malcolm Weir & Earnest Ward, *Coughing in Cats*, *VCA Animal Hosp.*¹¹ (explaining for cats “coughing is most often a sign of an inflammatory problem affecting the lower respiratory tract, especially some form of bronchitis”).

Texas’s VCPR requirement avoids placing responsibility on the animal owner—who is not a licensed professional—to overcome such obstacles and effectively sort and communicate

⁸ <https://www.sciencedaily.com/releases/2014/06/140618071928.htm>

⁹ <https://pubmed.ncbi.nlm.nih.gov/21696434/#affiliation-1>

¹⁰ <https://pubmed.ncbi.nlm.nih.gov/21529210/>

¹¹ <https://vcahospitals.com/know-your-pet/coughing-in-cats>

all of the medically relevant information a veterinarian would gather, both in quality and quantity, from an in-person evaluation. It establishes a practical means to reduce the potential for a veterinarian to misdiagnose or entirely miss a diagnosis of an animal's condition based on the absence or miscommunication of medically relevant information. As the California Veterinary Medical Association explained in opposition to a proposal to allow establishing a VCPR solely through electronic means:

Because telemedicine does not involve an in-person physical exam, it limits a veterinarian in gathering information about the animal patient. This limitation, and the inevitable guesswork produced thereby, will result in a greater frequency of error than when diagnosis and treatment are performed in concert with a physical exam. Put simply, the sole or primary use of telemedicine will produce inaccurate diagnoses and treatment plans, higher rates of unnecessary prescriptions, and delays in correct therapy. It can lead to prolonged patient suffering, greater expense and confusion for the client, and diminished trust in the veterinarian.

CVMA Telemedicine Comment, *supra*, at 2; *see also Hines v. Quillivan*, 982 F.3d 266, 274 (5th Cir. 2020) (hereinafter "*Hines II*") (reaffirming that "it was rational for the state legislature to conclude that an in-person examination of an animal reduces 'the risk of misdiagnosis and improper treatment'") (quoting *Hines I*, 783 F.3d at 203)).

Ensuring a veterinarian's competent diagnosis of an animal also takes on greater significance given the direct connection to zoonotic diseases that can sicken humans and to the human food supply. Each year, *billions* of animals are consumed in the United States. The meat and poultry industry, in particular, is the largest segment of U.S. agriculture, with meat production totaling 52 billion pounds in 2017 and poultry production totaling 48 billion pounds in 2017. *See* The United States Meat Industry at a Glance, N. Am. Meat Inst.¹² Veterinarians play an invaluable role in maintaining a healthy, safe, and wholesome food supply. A major

¹² <https://www.meatinstitute.org/index.php?ht=d/sp/i/47465/pid/47465>

responsibility of veterinarians is protecting the food supply, for example against drug residues (including antimicrobial residues) and disease. “Antimicrobials are powerful tools in the life-and-death fight against disease,” but must be used in an appropriate and judicious manner. Antimicrobial Use and Antimicrobial Resistance, *Am. Veterinary Med. Ass’n*.¹³ An in-person physical exam or visit can help deter misuse and overuse of antibiotics. *See* Lori M. Teller & Heather K. Moberly, *Veterinary Telemedicine: A Literature Review*, Vol. 5 *Veterinary Evid.* No. 4 (2020), at 1¹⁴ (“As we have learned from human health care providers, we must be aware there could be a tendency to overprescribe antimicrobials in a virtual visit compared to an in-person visit.”). This requirement helps ensure America’s food supply remains “among the safest in the world.” *Food and Food Animals*, *Ctrs. for Disease Control & Prevention*.¹⁵

B. Texas’s VCPR Reflects Mainstream Professional Requirements, Including Key Differences Between Animal and Human Health

Given the importance of the VCPR to animal and human health and welfare, the federal government along with most states have comparable in-person requirements that a veterinarian physically examine an animal or visit the premises on which the animal is kept in order to establish a VCPR.¹⁶ These laws are consistent with, and sometimes directly cite to, principles

¹³ <https://www.avma.org/resources-tools/one-health/antimicrobial-use-and-antimicrobial-resistance>

¹⁴ <https://www.veterinaryevidence.org/index.php/ve/article/view/349>

¹⁵ <https://www.cdc.gov/drugresistance/food.html>

¹⁶ *See* Ala. Code § 34-29-61(19); Ariz. Rev. Stat. § 32-2201(25); Ark. Code Ann. § 17-101-102(11); Cal. Code Regs. tit. 16, § 2032.1(b); Colo. Rev. Stat. Ann. § 12-315-104(19); Ga. Code Ann. § 43-50-3(29); 225 Ill. Comp. Stat. 115/3; Ind. Code § 25-38.1-1-14.5; Iowa Admin. Code 811-12.1(169); Kan. Stat. Ann. § 47-816(n); Ky. Rev. Stat. Ann. § 321.185(1); La. Admin. Code. tit. 46, pt. LXXXV, § 700; Me. Stat. tit. 32, § 4877; Md. Code Regs. 15.14.01.03(B)(14); 256 Mass. Code Regs. 2.01; Minn. Stat. § 156.16(12); Miss. Code. Ann. § 73-39-53(v); Mo. Rev. Stat. § 340.200(23); Mont. Admin. R. 24.225.301(11); Neb. Rev. Stat. § 38-3316; Nev. Admin. Code § 638.0197(1); N.M. Stat. Ann. § 61-14-2(N); N.C. Gen. Stat. Ann. § 90-181(7a); N.D. Cent. Code § 43-29-01.1(9); Ohio Rev. Code Ann. § 4741.04; Okla. Stat. tit. 59, § 698.2(13); Or.

developed by *amicus* AVMA.¹⁷ Under AVMA guidelines, a VCPR “can exist only when the veterinarian has performed a timely physical examination of the patient(s) or is personally acquainted with the keeping and care of the patient(s) by virtue of medically appropriate and timely visits to the operation where the patient(s) is(are) kept.” Principles of Veterinary Medical Ethics of the AVMA, Am. Veterinary Med. Ass’n.¹⁸

The federal government uses the in-person VCPR requirement as part of its regulation over the use of animal drugs, as well as human drugs by veterinarians. *See* 21 C.F.R. § 530.3(i); 9 C.F.R. § 107.1(a)(1). The U.S. Food and Drug Administration (“FDA”) has authority to define how a VCPR is established and applied for any use of an FDA-approved human drug in animals including over-the-counter (“OTC”) human drugs,¹⁹ any use of an approved animal drug that differs from its approved labeling (“Extra Label Drug Use”),²⁰ use of compounded drugs by veterinarians, and a veterinarian’s authorization of a veterinary feed directive (“VFD”).²¹ The FDA, similar to Texas, has stated the “VCPR cannot be *established* solely through telemedicine” or other electronic means. Letter from U.S. Food and Drug Administration to American

Admin. R. 875-005-0005(14); S.C. Code Ann. Regs. 120-1(C); Tenn. Code Ann. § 63-12-103(17); Utah Code Ann. § 58-28-102(19); Vt. Stat. Ann. tit. 26, § 2433(a); Wash. Admin. Code § 246-933-200(1); W. Va. Code § 30-10-3(w); Wis. Stat. Ann. § 89.02(8); Wyo. Rules and Regs. 251.0001.9 § 3(b). Some states have adopted physical exam or premises visit requirements in the specific context of proscribing or dispensing veterinary drugs. *See* Fla. Stat. § 474.214(1)(y); 49 Pa. Code § 31.21; R.I. Gen. Laws Ann. § 21-31.1-2(13); S.D. Codified Law § 39-18-34.1.

¹⁷ *See* Conn. Gen. Stat. § 20-202(2); Haw. Rev. Stat. § 471-10(b)(12); N.H. Code Admin. R. Vet 501.02.

¹⁸ <https://www.avma.org/resources-tools/avma-policies/principles-veterinary-medical-ethics-avma>

¹⁹ *See* 21 U.S.C. § 360b(a)(5); 21 C.F.R. § 530.2; 21 C.F.R. § 530.3(a).

²⁰ *See The Ins and Outs of Extra-Label Drug Use in Animals: A Resource for Veterinarians*, U.S. Food & Drug Admin., at <https://www.fda.gov/animal-veterinary/resources-you/ins-and-outs-extra-label-drug-use-animals-resource-veterinarians>.

²¹ *See* 21 C.F.R. § 558.6(b).

Veterinary Medical Association regarding VCPR Questions, Apr. 6, 2017, at 2 (emphasis in original). Telemedicine may be used only to maintain an existing federal VCPR. *See id.*²² The U.S. Department of Agriculture (“USDA”), which regulates veterinary biological products, has defined a VCPR using the same language as the FDA. *See* 9 C.F.R. § 107.1(a)(1). The FDA’s decision and ability to distinguish between animal and human health requirements is telling given the agency’s unique role in approving human drugs and the use of animal drugs.

In this regard, any decision to allow telemedicine for human health has no impact on the decision to require a VCPR for animal health. Among the many differences between animal and human health care, animals cannot communicate symptoms or ailments even if inclined to do so. “When veterinary telehealth discussions arise, frequent comparisons are made to paediatrics, especially to the care of infants and toddlers because neither they nor animals can reliably communicate their feelings or complaint.” Teller & Moberly, *supra*, at 7. The American Academy of Pediatrics, though, discourages telemedicine use in certain situations because children cannot “verbalize and explain symptoms.” Gregory P. Connors et al., *Nonemergency Acute Care: When It’s Not the Medical Home*, Pediatrics (2017), at 6.²³ The American Telemedicine Association similarly suggests telemedicine is inappropriate for children under age

²² Due to the COVID-19 pandemic, the FDA announced a temporary suspension of enforcement of the animal examination and premises visit VCPR requirements governing Extra Label Drug Use and VFD drugs, but the agency reiterated that under normal circumstances “the Federal VCPR definition cannot be met solely through telemedicine.” CVM GFI #269 - Enforcement Policy Regarding Federal VCPR Requirements to Facilitate Veterinary Telemedicine During the COVID-19 Outbreak, U.S. Food & Drug Admin. (Mar. 2020), *available at* <https://www.fda.gov/regulatory-information/search-fda-guidance-documents/cvm-gfi-269-enforcement-policy-regarding-federal-vcpr-requirements-facilitate-veterinary>.

²³ <https://pediatrics.aappublications.org/content/139/5/e20170629>

two. See S. David McSwain et al., *American Telemedicine Association Operating Procedures for Pediatric Telehealth*, *Telemedicine & E-Health* (Sept. 2017).²⁴

Concerns similar to those in animal care and pediatrics also exist for human adults, namely that “limitations of what can be done in a virtual physical examination . . . could lead to misdiagnoses or poor quality of care.” Lori Uscher-Pines et al., *Access and Quality of Care in Direct-to-Consumer Telemedicine*, *Telemedicine & E-Health* (Apr. 2016); see also Eli Sprecher & Jonathon A. Finkelstein, *Telemedicine and Antibiotic Use: One Click Forward or Two Steps Back?*, *Pediatrics* (2019) (“Despite general excitement about new technologies, we read these data with some concern about the quality of diagnosis for specific conditions and about antibiotic use [for young children] that may not always be consistent with evidence-based standards.”). “[D]espite telehealth’s promise, we are already seeing unintended consequences for patients, clinicians, and society.” Lisa S. Rotenstein & Lawrence S. Friedman, *The Pitfalls of Telehealth – And How to Avoid Them*, *Harv. Bus. Rev.*, Nov. 20, 2020; see also Paul Bernstein et al., *Urgent and Non-emergent Telehealth Care for Seniors: Findings from a Multi-site Impact Study*, *J. of Telemedicine & Telecare* (Nov. 2020) (“While recent COVID-19 events have put telehealth in the national spotlight, research on outcomes and utilization trends remains limited. The results are still mixed as to whether telehealth is effective.”).²⁵

The Texas Legislature had the benefit of considering telemedicine experiences and other state and federal laws when it amended the VCPR law in 2005. The Legislature appreciated the “real world” differences between animal and human health care and the important public policy

²⁴ <https://www.liebertpub.com/doi/10.1089/tmj.2017.0176>

²⁵ See also Jeremy D. Young et al., *Telehealth: Exploring the Ethical Issues*, 19 *DePaul J. Health Care L.* 1, 5 (2017) (“Technology should enable and enhance the doctor-patient relationship by making communication more open, accessible and convenient. A purely telemedicine-driven practice can be alienating to some, and practitioners should be cognizant of this fact.”).

considerations above in affirming the in-person physical exam or medically appropriate and timely visit requirement for the practice of veterinary medicine. *Cf. Hines II*, 982 F.3d at 275 (“it is rational to distinguish between humans and animals based on the species’ differing capabilities”). In stating the VCPR “may not be established *solely* by telephone or electronic means,” the Legislature did not ban the practice of telemedicine. Tex. Occ. Code § 801.351(c) (emphasis added). Rather, the Legislature found that telemedicine could be used for enhancing an existing VCPR. It appreciated that “telemedicine is a tool, and as such, it is not appropriate for every healthcare issue, situation, client, or animal.” Teller & Moberly, *supra*, at 18.

III. INVALIDATING TEXAS’S VCPR IN-PERSON RULE ON FREE SPEECH GROUNDS WOULD UNDERMINE COUNTLESS OTHER RULES OF PROFESSIONAL CONDUCT

The Court should not accept Plaintiff’s invitation to misapply the First Amendment to invalidate content-neutral rules of professional conduct; doing so would improperly call into question the constitutionality of myriad other professional regulations in Texas and other jurisdictions. As discussed, most states and the federal government have adopted laws comparable to Texas that require a physical exam or premises visit to establish a valid VCPR. Therefore, with respect to VCPR laws alone, dozens of carefully developed regulations could be subject to a constitutional challenge for allegedly infringing upon veterinarians’ free speech. Texas’s veterinary telemedicine regulation would be nullified even though “in no apparent instance have the courts intimated that the regulation of veterinarians is, by its nature, outside the scope of permissible legislative or administrative activity.” Donald M. Zupanec, *Validity, Construction, and Effect of Statutes or Regulations Governing Practice of Veterinary Medicine*, 8 A.L.R.4th 223 (originally published in 1981).

The impact of such a ruling could also extend to other laws regulating professional conduct, most directly those regulations that also require the professional’s physical presence

when rendering services. For example, various state regulations require licensed professionals who render professional services in a supervisory capacity to be physically present and available. *See, e.g.*, Tex. Occ. Code § 265.002(a) (requiring supervising dentist to be “physically present in the dental office when the dental assistant performs a delegated dental act”); Tex. Occ. Code § 402.255(b) (requiring individual licensed to fit and dispense hearing instruments, when supervising a temporary training permit holder, to “provide direct supervision by being located on the premises and available to the temporary training permit holder for prompt consultation”); Tex. Occ. Code § 601.002(3) (requiring supervising medical radiologic technologist or practitioner to be “physically present during the performance of the radiologic procedure”).

Also, other content-neutral rules of professional conduct would similarly be subject to Plaintiff’s First Amendment line of attack. For example, as alluded to above, the Texas Disciplinary Rules of Professional Conduct, which regulate the practice of law, detail the client-lawyer relationship. These rules, similar to the VCPR, provide that a professional relationship commences when a lawyer begins to provide advice specific to a client. These rules additionally compel a lawyer’s speech on numerous matters, such as the client’s legal options, fees or potential conflicts of interest, while barring speech on other matters, such as counseling the client on engaging in criminal or fraudulent activity. *See* Tex. Discpl. R. Prof’l Conduct Rules 1.02–.06. Other professional conduct rules circumscribe lawyer communications (*i.e.* speech) about legal services. *See id.* at Rules 7.01–.04. The list goes on.

The Court should recognize that giving any credence to Plaintiff’s First Amendment argument would introduce chaos into rules of professional conduct—for veterinarians and many other regulated professions. Free speech protections are important and robust, but they cannot override the rational, content-neutral regulation of professional conduct.

CONCLUSION

For these reasons, the Court should grant Defendant's Motion to Dismiss.

Respectfully submitted,

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Dated: June 1, 2021

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2021, I electronically filed the foregoing Brief of Amicus Curiae American Veterinary Medical Association using the CM/ECF system. Counsel for all parties to the case are registered CM/ECF users and will be served by the CM/ECF system.

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