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1. *Tex. Dep't of Ins. v. Stonewater Roofing, Ltd. Co., 2024 Tex. LEXIS 440*

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Tex. Dep't of Ins. v. Stonewater Roofing, Ltd. Co.

Supreme Court of Texas

October 26, 2023, Argued; June 7, 2024, Opinion Delivered

No. 22-0427

Reporter
2024 Tex. LEXIS 440 *

Texas Department of Insurance and Cassie Brown, in her Official Capacity as Commissioner of the Texas Department of Insurance, Petitioners, v. Stonewater Roofing, Ltd. Co., Respondent

Notice: PUBLICATION STATUS PENDING. CONSULT STATE RULES REGARDING PRECEDENTIAL VALUE.

Prior History: [*1] On Petition for Review from the Court of Appeals for the Seventh District of Texas.

Core Terms

regulation, contractor, insurance adjuster, licensing, insured, insurance claim, negotiating, vagueness, insurance company, nonexpressive, profession, settlement, adjuster, prohibits, incidental, repair, customers, nutrition, facial, challenges, advertise, as-applied, courts, cases, communicating, homeowners, expressive conduct, motion to dismiss, dual-capacity, contracting

Counsel: For Cassie Brown, in her Official Capacity as Commissioner of The Texas Department of Insurance, Petitioner: Warren Kenneth Paxton, Mr. William Macdaniel, Ms. H. Melissa Mather, Mr. Brent Webster, Mr. Evan S. Greene.

For Smolla, Rodney A., Amicus Curiae: Mr. Vince Eisinger, Mr. Christopher Knight.

For Texas Association of Public Insurance Adjusters, Amicus Curiae: Mr. Kelly Dean Utsinger.

For Stonewater Roofing, Ltd. Co., Respondent: Ms. Ericha Ramsey Brown, Mr. Chase Cobern, Mr. Michael A. McCabe.

For Texas Civil Justice League, Amicus Curiae: Mr. George S. Christian.

For American Property Casualty Insurance Association, National Association of Mutual Insurance Companies, and Insurance Council of Texas, Amicus Curiae: Mr. Steven J. Badger.

For National Association of Public Insurance Adjusters and the Coalition Against Insurance Fraud, Amicus Curiae: Christopher Jake Posey.

For Institute for Justice, Amicus Curiae: Benjamin A. Field, Mr. Arif Panju, Mr. Jeffrey Rowes.

For Texas Department of Insurance, Petitioner: Warren Kenneth Paxton, Mr. Evan S. Greene, Mr. William Macdaniel, Ms. H. Melissa Mather, Mr. Brent **[*2]** Webster.

Judges: JUSTICE DEVINE delivered the opinion of the Court, in which Chief Justice Hecht, Justice Lehrmann, Justice Busby, Justice Bland, Justice Huddle, and Justice Young joined. JUSTICE BLACKLOCK filed an opinion concurring in the judgment, in which Justice Boyd joined. JUSTICE YOUNG filed a concurring opinion.

Opinion by: John P. Devine

Opinion

Insurance adjusters investigate and help effectuate the settlement of insurance claims. The Texas Insurance Code regulates three kinds of adjusters: public, independent, and company.[1] Public insurance adjusters represent the insured in the claims-settlement process; the others work on behalf of the insurer.[2] Public insurance adjusters, like the others, must be licensed

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[1] *See* *Tex. Ins. Code §§ 4101.001-4102.208*.

[2] *Compare id.* *§§ 4102.001(3)* (defining "public insurance adjuster"), *.002* (general exemptions), *with id.* *§§ 4101.001(a)(1)* (defining "adjuster" as including both independent contractors and insurance company employees), *.002* (general exemptions).

and are prohibited from acting as both contractor and adjuster in connection with a claim for loss or damage to covered real or personal property.[3] Texas is among more than forty states with similar regulations.[4]

In this declaratory judgment action, a roofing contractor that is not a licensed public insurance adjuster sued to invalidate Texas's licensing and dual-capacity regulations, alleging the laws violate free speech and due process rights guaranteed by **[*3]** the *First* and *Fourteenth Amendments of the United States Constitution*. In the trial court, the state regulator prevailed on a *Rule 91a* motion to dismiss, which asserted that (1) the *First Amendment* is inapplicable because the challenged laws regulate professional conduct, not speech, and (2) the roofer failed to state cognizable void-for-vagueness claims under the *Fourteenth Amendment's Due Process Clause*. We agree on both counts.

The challenged statutes do not regulate or restrict speech but, rather, representative capacity with a nonexpressive objective: employment to "act[] on behalf of an insured in negotiating for or effecting the settlement of a claim[.]"[5] *Sections 4102.051(a)* and *4102.163(a) of the Insurance Code* are conventional licensing regulations that are triggered by the role a person plays in a nonexpressive commercial transaction, not what any person may or may not say. The statutes are also clear enough in proscribing the roofer's alleged conduct to preclude both its as-applied and facial vagueness challenges. We therefore reverse the court of appeals' contrary judgment and render judgment dismissing the roofer's claims.

I. Background

In 2003, the Legislature adopted laws governing "public insurance adjusters" to close a gap in the regulatory scheme and address concerns that unscrupulous contractors were preying on unwary Texans in the aftermath **[*4]** of catastrophic weather events.[6] Now codified as *Chapter 4102 of the Insurance Code*, the Public Insurance Adjusters Act defines the profession of "public insurance adjuster" as:

> (A) a person who, for direct, indirect, or any other compensation:
>
> (i) acts on behalf of an insured in negotiating for or effecting the settlement of a claim or claims for loss or damage under any policy of insurance covering real or personal property; or
>
> (ii) on behalf of any other public insurance adjuster, investigates, settles, or adjusts or advises or assists an insured with a claim or claims for loss or damage under any policy of insurance covering real or personal property; or
>
> (B) a person who advertises, solicits business, or holds himself or herself out to the public as an adjuster of claims for loss or damage under any policy of insurance covering real or personal property.[7]

Like other insurance adjusters,[8] a person employed or seeking employment as an insured's representative in the settlement of a property-damage claim must be licensed.[9]

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[3] *See id. §§ 4102.051*, *.158*, *.163*; *cf. id. §§ 4101.001(a)*, *.051*, *.251*.

[4] *See infra* note 17.

[5] *See Tex. Ins. Code § 4102.001* (defining "public insurance adjuster").

[6] *See* Act of June 1, 2003, 78th Leg., R.S., ch. 207, § 3.02, 2003 Tex. Gen. Laws 962, 964-76 (regulating "public insurance adjusters" effective June 11, 2003) (current version at *Tex. Ins. Code §§ 4102.001-.208*); S. Comm. on Bus. & Com., Bill Analysis, Tex. S.B. 127, 78th Leg., R.S. (2003); H. Rsch. Org., Bill Analysis, Tex. S.B. 127, 78th Leg., R.S. (2003).

Laws regulating insurer-side adjusters had already been in effect for three decades at that point. Act of May 26, 1973, 63d Leg., R.S., ch. 407, §§ 1-23, 1973 Tex. Gen. Laws 1045 (regulating insurance "adjusters") (current version at *Tex. Ins. Code §§ 4101.001-.251*). Those laws have been amended and expanded from time to time and are now codified as *sections 4101.001 through 4101.251 of the Insurance Code*.

[7] *Tex. Ins. Code § 4102.001(3)*. "'Person' includes an individual, firm, company, association, organization, partnership, limited liability company, or corporation." *Id. § 4102.001(2)*.

[8] *See id. §§ 4101.001(a)*, *.051*.

[9] *Id. § 4102.051(a)*. Beyond the general exemptions set out in *section 4102.002*, the following are specifically excused from the licensing requirement: (1) licensed attorneys with sufficient

To secure a license to adjust insurance claims on an insured's behalf, a person must have sufficient experience or training in the assessment of property values and losses; be sufficiently **[*5]** informed about the terms and effects of typical insurance contracts; and successfully pass an examination of the applicant's technical competence, basic knowledge of relevant topics, and understanding of governing law and ethical standards.[10] Unlicensed persons may not advertise, solicit business, or hold themselves out to the public as an insurance adjuster.[11]

Certain conflicts of interest are also prohibited.[12] Among them, a contractor, even if licensed as a public insurance adjustor, "may not act as a public adjuster or advertise to adjust claims for any property for which the contractor is providing or may provide contracting services[.]"[13] In other words, a person may not serve in a dual role—as both contractor and adjuster—in connection with property subject to an insurance claim or falsely advertise an ability to do so. A person violating the statute is subject to administrative, criminal, and civil penalties.[14]

Stonewater Roofing, Ltd. is a professional contractor that provides roofing services to residential and commercial customers. Stonewater is not licensed as a public insurance adjuster but reportedly claims to have extensive experience in facilitating **[*6]** settlement of insurance claims.[15] Website advertising describes Stonewater as an "Insurance Specialist[]" and "The Leader In Insurance Claim Approval" with "a system" it has "developed" to "help[] [its] customers settle their insurance claims as quickly, painlessly and comprehensively as possible." The roofer also touts itself as "highly experienced with the insurance claims process," having "done thousands of roof restorations due to insurance claims over the years." Along those lines, the company's customer contracts specifically "authorize" Stonewater "to negotiate on [the customer's] behalf with [the] insurance company and upon insurance approval to do the work specified."

After a dissatisfied commercial customer sued Stonewater for alleged violations of Chapter 4102, Stonewater filed a collateral declaratory-judgment suit against the Texas Department of Insurance and its Commissioner[16] (collectively, TDI) to invalidate the licensing requirement in *section 4102.051(a)* and the dual-capacity prohibition in *section 4102.163(a)*.[17]

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training or experience in assessment of property values and losses; and (2) "a person licensed as a general property and casualty agent or personal lines property and casualty agent under Chapter 4051 while acting for an insured concerning a loss under a policy issued by that agent." *Id.* *§ 4102.051(b)*.

[10] *Id.* *§§ 4102.053*, *.057*.

[11] *Id.* *§§ 4102.001(3)(B)*, *.051(a)*.

[12] *Id.* *§§ 4102.158*, *.163(a)*; *see id.* *§§ 4102.151-.164* (setting out other prohibited conduct).

[13] *Id.* *§ 4102.163(a)*; *accord id.* *§ 4102.158* (prohibiting a licensed public adjuster from engaging in conflicts of interest, including "participat[ing] directly or indirectly in the reconstruction, repair, or restoration of damaged property that is the subject of a claim adjusted by the license holder").

[14] *Id.* *§§ 4102.201-.208*; *see* *Tex. Bus. & Com. Code § 17.50* (consumer remedies under the *Texas Deceptive Trade Practices—Consumer Protection Act*).

[15] When reviewing a motion to dismiss under *Rule 91a*, we take all pleaded facts as true. *See* *Tex. R. Civ. P. 91a(1)*.

[16] Commissioner Cassie Brown was automatically substituted as a defendant when her predecessor, Kent Sullivan, ceased to hold office. *See* *Tex. R. App. P. 7.2(a)*.

[17] "[I]n so many things, Texas stands alone," *Texas v. EPA, 829 F.3d 405, 431 (5th Cir. 2016)*, but not here: the vast majority of other states have comparable public insurance adjuster regulations. *See* *Ariz. Rev. Stat. Ann. §§ 20-321(1)*, *20-321.01*; *Cal. Ins. Code §§ 15006*, *15007*, *15028*; *Colo. Rev. Stat. §§ 10-2-103(8.5)*, *10-2-417(6)(a)*, *(g)*, *(h)*; *Conn. Gen. Stat. §§ 38a-723*, *38a-725*; *Del. Code Ann tit. 18, §§ 1750(4)*, *1751(a)*, *1758(b)(6)*; *Fla. Stat. §§ 626.112(1)(a)*, *.852(2)*; *.854(1)*, *.869*, *.8795*; *Ga. Code Ann. §§ 33-23-1(13)*, *33-23-4(a)(4)*, *33-23-43.8(k)*; *Haw. Rev. Stat. §§ 431:9-105*, *431:9-201(a)*; *Idaho Code §§ 41-5802(6)*, *41-5803*; *215 Ill. Comp. Stat. §§ 5/1510*, *5/1515*; *Ind. Code §§ 27-1-27-1(g)*, *27-1-27-2*, ***27-1-27-15***; *Iowa Code §§ 522C.2*, *522C.4*; ***Kan. Stat. Ann. §§ 40-5502(l)***, *40-5503*; *Ky. Rev. Stat. Ann. §§ 304.9-020(20)*, *304.9-430(1)*, *304.9-4331(6)*; *La. Stat. Ann. §§ 22:1692(7)-(8)*, *22:1693*, *22:1706*; *Me. Stat. tit. 24-A, §§ 1402(1)*, *1411*; *Md. Code Ann., Ins. §§ 10-401(g)*, *10-403*; *Mass. Gen. Laws. ch. 175, § 172*; *Mich. Comp. Laws § 500.1222*, *500.1224(4)*, *500.1227*; *Minn. Stat. §§ 72B.02(6)*, *72B.03*, *72B.135(4)*; *Miss. Code Ann. §§ 83-17-501(e)*, *83-17-503*; *Mo. Rev. Stat. §§ 325.010(2)*, *325.015*, *325.055*; *Mont. Code Ann. §§ 33-17-102(1)*, *(21)*, *33-17-301*; *Neb. Rev. Stat. §§ 44-9203(9)*, *44-9204*, *44-9217*; *Nev. Rev. Stat. §§ 684A.020*, *684A.030(2)*, *684A.040*; *N.H. Rev. Stat. Ann. §§ 402-D:2(III)*, *402-D:3*, *402-D:17*; *N.J. Stat. Ann. §§ 17:22B-2*, *17:22B-3*; *N.M. Stat. Ann.*

Stonewater contends that these provisions, both facially and as applied to the roofer's alleged conduct, infringe speech protected by the First Amendment and are void for vagueness under the Fourteenth Amendment's due process clause.[18]

After **[*7]** answering, TDI filed a Rule 91a dismissal motion,[19] arguing that Stonewater's constitutional claims have no basis in law because the statutes (1) regulate professional conduct, which is not protected by the First Amendment, and (2) clearly proscribe Stonewater's alleged conduct, precluding its Fourteenth Amendment as-applied and facial vagueness challenges as a matter of law. The trial court sided with TDI and dismissed the suit.

The court of appeals reversed and remanded.[20] First, the court held that the regulations trigger First Amendment scrutiny because "[t]he business of public insurance adjusting necessarily and inextricably involves speech" and "any conduct under the statute consists of communicating."[21] Going beyond the scope of the Rule 91a motion, the court further concluded that the regulations are subject to strict scrutiny as both content-and speaker-based speech restrictions.[22] In the alternative, the court determined that the First Amendment would still require intermediate scrutiny "even if these prohibitions restrict speech only incidentally in the regulation of non-expressive professional conduct."[23] Second, the court held that Stonewater's vagueness challenges survived because (1) TDI's dismissal motion "failed to fully develop its argument" on the roofer's **[*8]** facial vagueness challenge and (2) the Public Insurance Adjusters Act does not "clearly proscribe[]" Stonewater's alleged website and contract statements, which do not equate to "advertising or soliciting oneself as an adjuster of claims" or as "acts on behalf of an insured in negotiating for or effecting the settlement of a claim."[24]

We granted TDI's petition for review to address questions about the proper construction and constitutional implications of state statutes regulating public insurance adjusters.[25]

II. Discussion

Rule 91a authorizes dismissal of a cause of action that "has no basis in law or fact."[26] TDI's dismissal motion alleged that Stonewater's First and Fourteenth Amendment claims are legally unsound. Under Rule 91a, "a cause of action has no basis in law if the allegations, taken as true, together with inferences

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§§ 59A-13-2(A)(6), 59A-13-3, 59A-13-13; N.Y. Ins. Law §§ 2101(g)(2), 2108; N.C. Gen. Stat. §§ 58-33A-5(7), 58-33A-10; N.D. Cent. Code §§ 26.1-26.8-02(5), 26.1-26.8-03, 26.1-26.8-15; Ohio Rev. Code Ann. §§ 3951.01(B), 3951.02; Okla. Stat. tit. 36, §§ 6202(2), (4), 6207, 6220.1(A); Or. Rev. Stat. §§ 744.502(1), 744.505; 63 Pa. Stat. §§ 1601, 1602, 1605(d); 27 R.I. Gen. Laws §§ 27-10-1.1(i), 27-10-1.2; S.C. Code Ann. §§ 38-48-10, 38-48-20, 38-48-130; Tenn. Code Ann. §§ 56-6-902(8), 56-6-903; Utah Code Ann. §§ 31A-26-102(5), (8), 31A-26-201, 31A-26-312; Vt. Stat. Ann. tit. 8, §§ 4791(4), 4793; Va. Code Ann. §§ 38.2-1845.1, 38.2-1845.2, 38.2-1845.12(C); Wash. Rev. Code §§ 48.17.010(1)(b), 48.17.060; W. Va. Code §§ 33-12B-1(i), 33-12B-2; Wis. Stat. §§ 629.01(1), (5), 629.02, 629.10; Wyo. Stat. Ann. §§ 26-9-202(a)(xxiii), 26-9-203.

Some states permit similar conflicts of interest with disclosure to the insured or on the principal's written consent. *See* Haw. Rev. Stat. § 431:9-244(e); Idaho Code §§ 41-5815(4), 41-5818; 215 Ill. Comp. Stat. 5/1575(d), 5/1590; IOWA ADMIN. CODE r. 191-55.14(4), 191-55.17; Kan. Stat. Ann. §§ 40-5514(d), 40-5516; ***MD. CODE ANN., INS. §§ 10-411***, ***10-414***; Mont. Code Ann. 33-17-302(4); Nev. Rev. Stat. § 684A.165; N.Y. Ins. Law § 2108(s)(2); N.C. Gen. Stat. §§ 58-33A-65(d), 58-33A-80(d); Tenn. Code Ann. § 56-6-917(d).

[18] *See* U.S. Const. amends. I, XIV. Stonewater's live petition generally asserts that the laws also violate "corresponding provisions" of the Texas Constitution but only prays for a declaration that the laws violate the United States Constitution.

[19] *See* Tex. R. Civ. P. 91a (mandating early dismissal if a cause of action has no basis in either law or fact).

[20] 641 S.W.3d 794, 803, 805 (Tex. App.—Amarillo 2022).

[21] *Id.* at 802.

[22] *Id.*

[23] *Id.* at 803.

[24] *Id.* at 804-05.

[25] To aid the Court, various amici curiae have submitted briefs weighing in on the debate and supporting one side or the other: American Property Casualty Insurance Association; Coalition Against Insurance Fraud; Institute for Justice; Insurance Council of Texas; National Association of Mutual Insurance Companies; National Association of Public Insurance Adjusters; Prof. Rodney A. Smolla; Texas Association of Public Insurance Adjusters; and Texas Civil Justice League.

[26] Tex. R. Civ. P. 91a(1).

reasonably drawn from them, do not entitle the claimant to the relief sought."[27] In addressing that question, "the court may not consider evidence" and "must decide the motion based solely on the pleading of the cause of action, together with any pleading exhibits permitted by Rule 59."[28] Whether a defendant is entitled to dismissal on the pleadings is a legal question we review de novo.[29] The issues here **[*9]** are whether Stonewater's pleadings state cognizable speech and due process claims under the *First* and *Fourteenth Amendments*. We agree with the trial court that they do not.

A. *First Amendment*: Free Speech

The *First Amendment*, applied to states through the *Fourteenth Amendment*, prohibits laws abridging freedom of speech.[30] As one of "our most cherished liberties,"[31] the right to speak or not speak is afforded robust protection. Except for certain categories of historically unprotected speech,[32] the government cannot "restrict expression because of its message, its ideas, its subject matter, or its content" unless the regulations survive an exacting standard of judicial scrutiny.[33] The government has a much freer hand in regulating commerce and conduct;[34] such laws generally do not offend the *First Amendment* and are often upheld under rational-basis review.[35]

In the procedural posture of this case, the appropriate degree of judicial scrutiny is not our concern. Nor are we tasked with determining whether the challenged statutes pass constitutional muster. As framed by the *Rule 91a* motion, the question is more limited and more fundamental: whether the *First Amendment* applies at all. The answer depends on whether the challenged statutes are directed at protected **[*10]** speech (as Stonewater contends) or not (as TDI maintains).

Construing the statutory language under well-established principles,[36] we have little trouble

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[27] *Id.*

[28] *Tex. R. Civ. P. 91a(6)*.

[29] *City of Dallas v. Sanchez, 494 S.W.3d 722, 724 (Tex. 2016)*.

[30] *U.S. Const. amends. I*, *XIV*; *see Reed v. Town of Gilbert, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015)*.

[31] *Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 381, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973)*.

[32] Among the "historic and traditional categories" of constitutionally proscribable speech are obscenity, defamation, fraud, incitement, and speech integral to criminal conduct. *United States v. Stevens, 559 U.S. 460, 468, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010)* (collecting cases and quoting *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127, 112 S. Ct. 501, 116 L. Ed. 2d 476 (1991)* (Kennedy, J., concurring)).

[33] *Reed, 576 U.S. at 163* (quoting *Police Dep't of Chi. v. Mosley, 408 U.S. 92, 95, 92 S. Ct. 2286, 33 L. Ed. 2d 212 (1972)*); *Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2346, 207 L. Ed. 2d 784 (2020)* (plurality op.) ("Content-based laws are subject to strict scrutiny."); *see Texas v. Johnson, 491 U.S. 397, 404-06, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)* (expressive conduct with sufficient communicative elements is subject to heightened *First Amendment* scrutiny); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 561-66, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)* (heightened, but less than strict, judicial scrutiny applies to regulation of otherwise lawful "speech proposing a commercial transaction" (quoting *Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455-56, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978)*)); *cf. Hill v. Colorado, 530 U.S. 703, 725-26, 120 S. Ct. 2480, 147 L. Ed. 2d 597 (2000)* (content-neutral time, place, and manner speech regulations must be "narrowly tailored" to "governmental interests that are significant and legitimate").

[34] *See, e.g., Gade v. Nat'l Solid Wastes Mgmt. Ass'n, 505 U.S. 88, 108, 112 S. Ct. 2374, 120 L. Ed. 2d 73 (1992)* (observing that states "'have broad power to establish standards for licensing practitioners and regulating the practice of professions'" (quoting *Goldfarb v. Va. State Bar, 421 U.S. 773, 792, 95 S. Ct. 2004, 44 L. Ed. 2d 572 (1975)*)).

[35] *See, e.g., Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 769, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018)* (laws directed at commerce or conduct typically do not implicate the *First Amendment*); *FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 313-14, 113 S. Ct. 2096, 124 L. Ed. 2d 211 (1993)* (regulations in areas of social and economic policy that neither employ a "suspect" classification nor infringe on constitutional rights will be upheld against equal protection challenge if there is a rational basis for the classification); *Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483, 488, 75 S. Ct. 461, 99 L. Ed. 563 (1955)* (applying rational-basis review to an economic regulation under the *Due Process Clause*); *see also, e.g., Bd. of Trs. of Univ. of Ala. v. Garrett, 531 U.S. 356, 367, 121 S. Ct. 955, 148 L. Ed. 2d 866 (2001)* (upholding law on rational-basis review); *Heller v. Doe by Doe, 509 U.S. 312, 320, 113 S. Ct. 2637, 125 L. Ed. 2d 257 (1993)* (same).

[36] *See Aleman v. Tex. Med. Bd., 573 S.W.3d 796, 802 (Tex.*

concluding that sections 4102.051(a) and 4102.163(a) do not regulate speech protected by the First Amendment. The parties' debate about that matter rests largely on a misreading of the public adjuster laws, and TDI wins the day because those statutes operate much more narrowly than Stonewater fears.

Section 4102.051(a)'s licensing requirement does not, by its own terms, regulate protected expression: "A person may not act as a public insurance adjuster in this state or hold himself or herself out to be a public insurance adjuster in this state [without a license]."[37] Section 4102.051(a) prescribes what a person *must do*: get a license. The bare mandate of a license pertains to status or capacity, neither of which is speech. Section 4102.051(a) also prohibits holding oneself out as a public insurance adjuster if unlicensed, which involves expression. But there is no question that if the State may permissibly require a license to engage in the profession, it may permissibly prohibit false commercial speech about the same.[38]

The same is true for section 4102.163(a)'s dual-capacity prohibition. **[*11]** Whether licensed or not, "[a] contractor may not act as a public adjuster or advertise to adjust claims for any property for which the contractor is providing or may provide contracting services."[39] This is not a speech constraint. Section 4102.163(a) dictates what a contractor *may not do*: undertake a business engagement giving rise to a conflict of interests.[40] Regulated persons are permitted to provide either contracting services or adjusting services but not both types of services for the same property on the same claim. Section 4102.163(a) compels an economic choice about which line of business to pursue; it does not purport to dictate, proscribe, or otherwise limit expression. Like the licensing requirement, the dual-capacity prohibition circumscribes nonexpressive commercial activity. The provision's only speech-related aspect prohibits advertising that is illegal under the statute and, therefore, not protected by the First Amendment.[41]

None of this is genuinely contested. The nub of the dispute concerns the scope of the defined profession itself, which in turn determines whether the licensing and dual-capacity laws apply to a commercial engagement. In section 4102.001(3), the Public Insurance Adjusters Act subjects a person to regulation as **[*12]** a "public insurance adjuster" if that person "[1] for direct, indirect, or any other compensation . . . [2] acts on behalf of an insured [3] in negotiating for or effecting [4] the settlement of a claim or claims for loss or damage under any policy of insurance covering real or personal property."[42] Stonewater construes

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2019) ("Statutory interpretation involves questions of law that we consider de novo[.]"); *see also* City of Austin v. Quinlan, 669 S.W.3d 813, 821 (Tex. 2023) (statutory terms carry their common, ordinary meaning absent a statutory definition or an absurd result); El Paso Educ. Initiative, Inc. v. Amex Props., LLC, 602 S.W.3d 521, 531-32 (Tex. 2020) ("[W]e read the statute to give effect to every word."); Lippincott v. Whisenhunt, 462 S.W.3d 507, 509 (Tex. 2015) ("Our objective in construing a statute is to give effect to the Legislature's intent, which requires us to first look to the statute's plain language."); *cf.* Antonin Scalia & Bryan A. Garner, READING LAW: THE INTERPRETATION OF LEGAL TEXTS 247-51 (2012) (even if a statute is ambiguous, the "constitutional doubt" canon reflects "a judicial policy" that "[a] statute should be interpreted in a way that avoids placing its constitutionality in doubt").

[37] Tex. Ins. Code § 4102.051(a).

[38] *See, e.g.*, In re R.M.J., 455 U.S. 191, 203, 102 S. Ct. 929, 71 L. Ed. 2d 64 (1982) (inherently misleading or false advertising is not protected by the First Amendment and "may be prohibited entirely"); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 563-64, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980) ("The government may ban . . . commercial speech related to illegal activity."); Pittsburgh Press Co. v. Pittsburgh Comm'n on Hum. Rels., 413 U.S. 376, 389, 93 S. Ct. 2553, 37 L. Ed. 2d 669 (1973) ("Any First Amendment interest which might be served by advertising an ordinary commercial proposal and which might arguably outweigh the governmental interest supporting the regulation is altogether absent when the commercial activity itself is illegal and the restriction on advertising is incidental to a valid limitation on economic activity.").

[39] Tex. Ins. Code § 4102.163(a).

[40] The Act underscores the conflicting interests that arise in a dual-capacity situation by recognizing the existence of a fiduciary relationship between the insured and a public insurance adjuster with respect to the proceeds of any funds the latter receives or holds on a claim. *Id.* § 4102.111(a) ("All funds received as claim proceeds by a license holder acting as a public insurance adjuster are received and held by the license holder in a fiduciary capacity. A license holder may not divert or appropriate fiduciary funds received or held.").

[41] *See supra* note 38 and accompanying text.

[42] Tex. Ins. Code § 4102.001(3)(A)(i). The defined profession also extends to other activities, including "a person who advertises, solicits business, or holds himself or herself out to the public as an adjuster of claims," but whether those additional activities are within the statute's scope turns entirely

"negotiating for or effecting" as entirely communicative and thus dispositive of the definition's expressive aim. But this selective reading of the statutory language misses the forest for the trees. The gravamen of the defined profession is the *role* a person *plays* in a *nonexpressive* commercial transaction, not what anyone may or may not *say*. Giving effect to all of its language, section 4102.001(3) targets nonexpressive commercial activities, not speech.

As defined, the profession's actuating activity and dominant focus is employment in a representative (or agency) capacity.[43] Under state law, assuming authority to act "on behalf of" someone else gives rise to a status of legal significance that carries material consequences for the principal and imposes corresponding burdens on the agent.[44] Status and capacity are not speech. Regulation of agency capacity may not invariably suffice **[*13]** to place a professional regulation beyond First Amendment scrutiny, but our conclusion that such scrutiny is not required here is sealed by the profession's notably discrete objective: settlement of a claim under an insurance contract. In this context, "settlement" refers to "payment, satisfaction, or final adjustment" of an insurance claim,[45] which is not speech.

It is true that "negotiating for" and "effecting" a settlement can involve communicative endeavors.[46] And it is true that both theactuating activity (representative capacity) and the commercial objective (settlement of an insurance claim) may be manifested or carried out by those activities. But under a plain reading of the statute, speech is not remotely the defining characteristic of the public insurance adjuster's job.

In fact, settling a property-loss claim implicates a great deal of nonexpressive activity that the Public Insurance Adjusters Act regulates only in the context of an agency relationship: evaluating insurance coverage, assessing property value, assessing property damage, and calculating repair costs.[47] When an agency

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on subsection (3)(A)(i)'s definition. *See id.* § 4102.001(3)(A)(ii) (including in the definition a person employed to adjust, advise, or assist in the adjustment of an insurance claim on behalf of a public insurance adjuster), (3)(B) (extending the definition to a person publicly claiming to be an insurance adjuster).

[43] The statute's emphasis on an actor's capacity is confirmed by the Act's exemptions, which exclude from the regulation's ambit certain transaction participants when they are acting in other capacities. *Id.* § 4102.002.

[44] *See, e.g.,* Biggs v. U.S. Fire Ins. Co., 611 S.W.2d 624, 629 (Tex. 1981) (holding that an agent acting within the scope of apparent authority binds the principal); *see also* Lesley v. Veterans Land Bd. of State, 352 S.W.3d 479, 490 (Tex. 2011) ("A fiduciary duty . . . for agent and principal . . . 'requires a party to place the interest of the other party before his own[.]'" (quoting Crim Truck & Tractor Co. v. Navistar Int'l Transp. Corp., 823 S.W.2d 591, 594 (Tex. 1992))); Johnson v. Brewer & Pritchard, P.C., 73 S.W.3d 193, 200 (Tex. 2002) ("[A]gency is also a special relationship that gives rise to a fiduciary duty. . . . 'The agreement to *act on behalf of the principal* causes the agent to be a fiduciary, that is, a person having a duty, created by his undertaking, to act primarily for the benefit of another in matters connected with his undertaking.'" (emphasis added) (quoting ***Restatement (Second) of Agency § 13, cmt. a*** (Am. L. Inst. 1958))); ***Restatement (Third) of Agency § 1.01, cmt. e*** (Am. L. Inst. 2005) ("[An] agent owes a fiduciary obligation to the principal.").

[45] BLACK'S LAW DICTIONARY at 1650 (11th ed. 2019); *see, e.g.,* EBS Sols., Inc. v. Hegar, 601 S.W.3d 744, 758 (Tex. 2020) (when construing a statute, undefined terms carry their ordinary meaning as informed by the context of the statute as a whole).

[46] Neither "negotiating" nor "effecting" is necessarily nor unfailingly communicative. "Effect" means "[t]o bring about; to make happen," BLACK'S LAW DICTIONARY at 651, and in this context could include myriad nonexpressive actions such as signing or exchanging settlement documents, accepting payments as the insured's representative, and assessing property values, property losses, and repair costs. "Negotiate" can encompass both expressive and nonexpressive activities. "Negotiating" may refer to "communicat[ing] with another party for the purpose of reaching an understanding" or "bring[ing] about by discussion or bargaining." *Id.* at 1248. The term may also refer to "transfer[ing] (an instrument) by delivery or indorsement" including under circumstances "whereby the transferee becomes its holder." *Id.* Section 4102.001(3)'s use of the linking word "for" suggests the first usage: communication, discussion, or bargaining to reach a settlement. But the second usage would also fall under the broader term "effecting," given that a public insurance adjuster's status as the insured's agent enables the adjuster to receive and hold funds for the insured's benefit as a fiduciary. *See supra* note 40.

[47] *See* Tex. Ins. Code §§ 4102.053(a)(6)-(7) (a public insurance adjuster license may only be issued to a resident applicant with "sufficient experience or training relating to the assessment of: (A) real and personal property values; and (B) physical loss of or damage to real or personal property that may be the subject of insurance and claims under insurance" and who "is sufficiently informed as to the terms and effects of the types of insurance contracts that provide coverage on real

relationship **[*14]** has been established, communicating with the insurer and insured and advocating for coverage would also fall under the umbrella of a public insurance adjuster's job. But whether expressive elements are encompassed or not, "negotiating" and "effecting" are merely incidental to the nonexpressive commercial activities delimiting the profession. The *First Amendment* does not reach those activities even though they may be evidenced or effectuated by speech.[48] As the Supreme Court recently reaffirmed: "'[T]he *First Amendment* does not prevent restrictions directed at commerce or conduct from imposing incidental burdens on speech,' and professionals are no exception to this rule."[49]

Incorporating *section 4102.001(3)*'s definition of the profession, neither *section 4102.051(a)* nor *section 4102.163(a)* purports to regulate what a person may or may not say or to whom they may or may not speak.[50] None of the challenged statutes is activated by what a person says about property subject to an insurance claim or to whom they say it but, rather, activities undertaken in the settlement of an insurance claim under the auspices of a commercial representative relationship. Properly construed, *sections 4102.001(3)*, *4102.051(a)*, and *4102.163(a)* apply based only on the legal status or relationship a person holds **[*15]** or seeks to secure with respect to the insured in a nonexpressive transaction. Speech may be an adjunct to the regulated relationship, but none of these provisions can be fairly characterized as limiting, proscribing, prescribing, or otherwise regulating protected speech.[51] Any incidental impact on speech is not sufficient to bring the *First Amendment* into play.[52]

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and personal property"), *.054(a)(6)-(7)* (same for a nonresident applicant).

[48] *See* *Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 502, 69 S. Ct. 684, 93 L. Ed. 834 (1949)*; *see also* *R.A.V. v. City of St. Paul, 505 U.S. 377, 389, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992)* ("[W]ords can in some circumstances violate laws directed not against speech but against conduct (a law against treason, for example, is violated by telling the enemy the Nation's defense secrets)[.]").

[49] *Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 769, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018)* (citations omitted) (quoting *Sorrell v. IMS Health Inc., 564 U.S. 552, 567, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011)*); *compare* *Rumsfeld v. F. for Acad. & Inst'l Rts. (FAIR), 547 U.S. 47, 62, 126 S. Ct. 1297, 164 L. Ed. 2d 156 (2006)* (explaining that regulation of nonexpressive activity need not be analyzed as a speech regulation despite incidentally compelling speech), *with* *Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 456-57, 98 S. Ct. 1912, 56 L. Ed. 2d 444 (1978)* (noting that communications incident to conduct may be regulated "without offending the *First Amendment*," but because "commercial speech" was an "essential" component of the activity being regulated—a lawyer's in-person solicitation of business—the *First Amendment* was implicated under a lower level of judicial scrutiny "commensurate with its subordinate position in the scale of *First Amendment* values").

[50] *See* *FAIR, 547 U.S. at 60-62* (finding the *First Amendment* inapplicable to a law regulating what a person "must *do*" instead of "what they may or may not *say*"); *see* *Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 796-97, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988)* ("[T]he *First Amendment* guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say.").

[51] The *First Amendment* precedent Stonewater relies on is readily distinguishable as involving laws plainly directed at regulating communicative content. *See, e.g.*, *Barr v. Am. Ass'n of Pol. Consultants, Inc., 140 S. Ct. 2335, 2346, 207 L. Ed. 2d 784 (2020)* (plurality op.) (statutory exception from robocall restriction favoring debt-collection speech over all other speech, including political speech, was "about as content-based as it gets"); *Becerra, 585 U.S. at 762-66* (laws compelling dissemination of government-drafted notices were "content-based" because they altered the content of speech); *Reed v. Town of Gilbert, 576 U.S. 155, 164, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015)* (sign code that subjected ideological signs, church direction signs, and political signs to differing restrictions was a facially content-based speech regulation); *Sorrell, 564 U.S. at 563-64* (restrictions on the sale, disclosure, and use of prescriber-identifying information that applied only to pharmaceutical manufacturers and marketers and not "a wide range of other speakers" were "on [their] face" "content-and speaker-based rules"); *Holder v. Humanitarian L. Project, 561 U.S. 1, 27, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010)* (statute's "material support" prohibition extended to giving advice based on "specialized knowledge," but not "general . . . knowledge," to designated terrorist organizations, so liability "depend[ed] on what they say"); *FCC v. League of Women Voters of Cal., 468 U.S. 364, 375-76, 104 S. Ct. 3106, 82 L. Ed. 2d 278 (1984)* (law restricting "the expression of editorial opinion on matters of public importance").

[52] *See* *FAIR, 547 U.S. at 61-62* (law that neither dictated the content of speech nor prohibited speech regulated only conduct and did not abridge *First Amendment* rights even though ordinarily accompanied by speech). In urging that the *First Amendment* applies to "regulation of conduct that incidentally impacts speech," Stonewater conflates incidental speech impacts with conduct that is "inherently expressive" and tantamount to "symbolic speech." *See* *id. at 65-66*. The distinction between the two concepts is elucidated in *FAIR*, which involved a federal law limiting higher-education funding

We therefore hold that Stonewater has not stated a cognizable *First Amendment* claim and the trial court properly sustained TDI's *Rule 91a* challenge.

B. *Fourteenth Amendment*: Vagueness

The "[v]agueness doctrine is an outgrowth not of the *First Amendment*, but of the *Due Process Clause*,"[53] which is applicable to the states through the *Fourteenth Amendment*.[54] In its second issue, TDI argues, as it did in its *Rule 91a* dismissal motion, that Stonewater's facial vagueness claim has no basis in law because its as-applied vagueness claim fails as a matter of law. That is, because *sections 4102.051(a)* and *4102.163(a)* clearly proscribe Stonewater's alleged actions, the roofer cannot mount a successful facial attack on those statutes.

The court of appeals declined to consider the merits of Stonewater's facial vagueness claim on the basis that (1) TDI's dismissal motion did not "fully develop its argument on this point" **[*16]** and (2) it was therefore unclear whether "the trial court necessarily considered Stonewater's facial vagueness claim as part of the as-applied claim."[55] We disagree with that assessment. TDI's dismissal motion pointedly tethered the merits of a facial attack to the merits of Stonewater's as-applied challenge; the trial court's dismissal order just as clearly rendered a final judgment dismissing all claims; and the viability of both claims is properly before us on appeal. Even so, our analysis is focused on the effect of vagueness as applied to Stonewater's alleged conduct because that is how TDI's *Rule 91a* motion framed the issues.

An as-applied challenge, as the name suggests, asserts that a statute is unconstitutional in its particular application to the challenger even if it operates constitutionally in other applications.[56] Although "a plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others,"[57] Stonewater disputes that its facial vagueness claim hinges on the validity of its as-applied challenge. Stonewater contends that controlling precedent relaxes the general rule "when the assertedly vague statute **[*17]** has the potential to affect *First Amendment* freedoms,"[58] and because the public adjuster statutes do just that, "the potential to chill some protected expression" permits Stonewater to complain about vagueness as applied to others regardless of any constitutional infirmity as applied to Stonewater.[59]

Even if a relaxed standard applies in free speech cases—which TDI contests, but we need not decide[60]—

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to those institutions affording military recruiters access to students on par with other recruiters. *Compare id. at 61-62, 65* (holding that any speech compelled by that statute was incidental to the law's regulation of conduct, so the law did not "impermissibly regulate[] *speech*"), *with id. at 65-68* (determining that the regulated conduct was not "inherently expressive" for purposes of *O'Brien*'s intermediate scrutiny standard while explaining that "*First Amendment* protection [extends] only to conduct that is inherently expressive" (citing *United States v. O'Brien, 391 U.S. 367, 376, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968)*)). Because this case does not involve inherently expressive conduct, *O'Brien* and its progeny have no bearing on the issues before us.

[53] *United States v. Williams, 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)*; *see U.S. Const. amend. V* ("No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .").

[54] *Welch v. United States, 578 U.S. 120, 124, 136 S. Ct. 1257, 194 L. Ed. 2d 387 (2016)*; *see* U.S. CONST. amend. XIV, § 1 ("[N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .").

[55] *See 641 S.W.3d 794, 804-05 (Tex. App.—Amarillo 2022)*.

[56] *In re Commitment of Fisher, 164 S.W.3d 637, 656 n.17 (Tex. 2005)*.

[57] *Vill. of Hoffman Ests. v. Flipside, Hoffman Ests., Inc., 455 U.S. 489, 495, 102 S. Ct. 1186, 71 L. Ed. 2d 362 (1982)*.

[58] *Comm'n for Law. Discipline v. Benton, 980 S.W.2d 425, 438 (Tex. 1998)*.

[59] *See id.* (when *First Amendment* rights are implicated, a relaxed rule "'is deemed justified since the otherwise continued existence of the statute in unnarrowed form would tend to suppress constitutionally protected rights'" (quoting *Gooding v. Wilson, 405 U.S. 518, 521, 92 S. Ct. 1103, 31 L. Ed. 2d 408 (1972)*)).

[60] *Compare Holder v. Humanitarian L. Project, 561 U.S. 1, 20, 130 S. Ct. 2705, 177 L. Ed. 2d 355 (2010)* (explaining the difference between *First Amendment* overbreadth and due process vagueness in addressing the lower court's improper consideration of "facts not before it" in evaluating an as-applied vagueness claim: "'[A] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others,'" and "[t]hat rule makes no exception for conduct that is in the form of speech," so "a plaintiff whose speech is clearly proscribed

we have already determined that sections 4102.051(a) and 4102.163(a) do not implicate First Amendment rights. That being so, we must first examine the law as applied to Stonewater's conduct before considering other hypothetical applications of the law.[61] And if Stonewater's as-applied claim fails, so too does its facial vagueness claim.[62]

Under settled principles, a vague statute offends due process in two ways. First, it fails to give fair notice of what conduct may be punished, forcing ordinary people to guess at the statute's meaning.[63] Second, the statute's language is so unclear that it invites arbitrary or discriminatory enforcement.[64] Stonewater asserts that the Public Insurance Adjuster Act's licensing and dual-capacity provisions flunk the due-process inquiry for both reasons.

"The **[*18]** degree of vagueness that the Constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depends in part on the nature of the enactment."[65] More leeway is allowed for economic regulations because the "subject matter is often more narrow, and because businesses . . . can be expected to consult relevant legislation in advance of action."[66] Statutes authorizing criminal penalties, like this one,[67] carry qualitatively more severe consequences, so "fair notice" may warrant more precision than when only civil penalties are at stake.[68]

Although "a more stringent vagueness test" may also apply when a statute interferes with freedom of speech,[69] that is not the case here. But even if it were, "perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."[70] Due process is satisfied so long as the prohibition is "set out in terms that the ordinary person exercising ordinary common sense can sufficiently understand and comply with."[71] "Because we are concerned with whether an enactment gives 'fair notice to those to whom [it] is directed,'" the "ordinary person" standard refers to those persons subject to regulation—in **[*19]** this case, contractors and public insurance

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cannot raise a successful vagueness claim under the Due Process Clause of the Fifth Amendment for lack of notice. And he certainly cannot do so based on the speech of others. Such a plaintiff may have a valid overbreadth claim under the First Amendment" but not a vagueness claim (quoting Vill. of Hoffman Ests., 455 U.S. at 495)), *with* Benton, 980 S.W.2d at 438 (applying the relaxed rule for considering facial-vagueness challenge to law impinging freedom of speech), *and* State v. Doyal, 589 S.W.3d 136, 144-45 & n.33 (Tex. Crim. App. 2019) (concluding that Johnson v. United States, 576 U.S. 591, 135 S. Ct. 2551, 192 L. Ed. 2d 569 (2015), "appears to have disavowed" *Holder* "without naming [it]" by broadly stating that despite "'statements in some of our opinions . . . our *holdings* squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp'" (quoting Johnson, 576 U.S. at 602)). *But see* Doyal, 589 S.W.3d at 168-70 (Yeary, J., dissenting) (stating that *Holder*'s "clear holding" had not been repudiated *sub silentio* and expressing skepticism that the majority's analysis "reflects an accurate statement of the law").

[61] *See* Vill. of Hoffman Ests., 455 U.S. at 495; *accord* Ex parte Barton, 662 S.W.3d 876, 885 (Tex. Crim. App. 2022) ("[B]ecause § 42.07(a)(7) does not regulate speech and therefore does not implicate the free-speech guarantee of the First Amendment, Appellant, in making his [facial] vagueness challenge to that statutory subsection, was required to show that it was unduly vague as applied to his own conduct." (citation and quotation marks omitted)).

[62] Holder, 561 U.S. at 20; Vill. of Hoffman Ests., 455 U.S. at 495.

[63] Holder, 561 U.S. at 18.

[64] Vill. of Hoffman Ests., 455 U.S. at 498.

[65] *Id.*

[66] *Id.* (footnote omitted).

[67] Tex. Ins. Code § 4102.206(a) ("A person commits an offense if the person violates this chapter. An offense under this subsection is a Class B misdemeanor.").

[68] Vill. of Hoffman Ests., 455 U.S. at 499.

[69] Holder, 561 U.S. at 19, 21 (quoting and applying Village of Hoffman Estates, 455 U.S. at 499, in a dubious tone).

[70] *Id.* (quoting United States v. Williams, 553 U.S. 285, 304, 128 S. Ct. 1830, 170 L. Ed. 2d 650 (2008)).

[71] Broadrick v. Oklahoma, 413 U.S. 601, 608, 93 S. Ct. 2908, 37 L. Ed. 2d 830 (1973) (quoting U.S. Civ. Serv. Comm'n v. Nat'l Ass'n of Letter Carriers, AFL-CIO, 413 U.S. 548, 578-79, 93 S. Ct. 2880, 37 L. Ed. 2d 796 (1973)); *see* United States v. Davis, 588 U.S. 445, 451, 139 S. Ct. 2319, 204 L. Ed. 2d 757 (2019) ("Vague laws contravene the 'first essential of due process of law' that statutes must give people 'of common intelligence' fair notice of what the law demands of them." (quoting Connally v. Gen. Constr. Co., 269 U.S. 385, 391, 46 S. Ct. 126, 70 L. Ed. 322 (1926)).

adjusters.[72]

Stonewater alleges that it "regularly communicates directly with the customer's insurer" to provide factual information about repairs and to respond to requests for information about property damage, the scope of necessary repair work, estimated costs, and repair methods. The statute does not prohibit a contractor like Stonewater from talking to its customers or an insurer about repairs that are subject to a pending insurance claim and providing information of this nature. TDI's formal guidance confirms this understanding, stating that contractors may "discuss" and "answer questions about" topics like "the amount of damage to the consumer's home," "the appropriate replacement," "reasonable cost of replacement," "estimate for a consumer's claim," "the scope of work in [a] repair estimate," or "supplements and clarifications concerning the revised estimate."[73] The statute does not prohibit contractors from sharing their knowledge and expertise about repairs. Indeed, the foregoing is the type of information that would be pertinent any time damaged property needs repair, not just in the context of an insurance claim.

But TDI's formal guidance is oversimplified in stating that the Public Insurance Adjusters Act prevents contractors from "discuss[ing] insurance policy coverages and exclusions" or "advocat[ing] on behalf of a consumer."[74] The Act constrains such activities only in connection with engagement as the insured's representative or agent in the claims-settlement process. Because the statute is implicated only by the role a person plays in the settlement transaction, we understand the formal guidance as referring to the possibility that communications of the described nature can evidence a prohibited engagement,[75] not that the Public Insurance Adjusters Act regulates such communications for all purposes.[76]

In this case, the regulated relationship is what proves problematic for Stonewater under the allegations in the pleadings, which we take as true under *Rule 91a*. Although Stonewater is not a licensed public insurance adjuster, its form contracts expressly authorize it to "negotiate" with the insurance company "on the customer's behalf" and perform construction work "upon insurance approval." Stonewater's **[*21]** website messaging also describes the roofer as "The Leader In Insurance Claim Approval," a "Trusted Roofing and Insurance Specialist[]," "highly experienced with the insurance claims process," and the developer of "a system which helps [its] customers settle their insurance claims as quickly, painlessly and comprehensively as possible." These contracting and advertising activities, viewed together or in their respective buckets, fall plainly within the scope of a "public insurance adjuster" as statutorily defined and regulated.

As TDI says, Stonewater's form contract practically recites the statutory definition of the profession. Not only does the contractual engagement run afoul of *section 4102.051(a)*'s licensing requirement, it also squarely invokes *section 4102.163(a)*'s dual-capacity prohibition by contracting for authority to both negotiate settlement of a claim *and* perform the ensuing repair work. *Sections 4102.051(a)* and *4102.163(a)* do not merely prohibit the actual conduct; they also prohibit a person from illegally claiming an ability to engage in that conduct and agreeing to provide prohibited services.[77] The website statements are less explicitly proscribed, but the messaging, which is the sum of its parts,

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[72] *Comm'n for Law. Discipline v. Benton, 980 S.W.2d 425, 437 (Tex. 1998)* (quoting *Grayned v. City of Rockford, 408 U.S. 104, 112, 92 S. Ct. 2294, 33 L. Ed. 2d 222 (1972)*); *see id.* (framing the inquiry as "whether the ordinary lawyer, with the benefit of guidance provided by case law, court rules, and the lore of the profession, could understand and comply with [the law]" (quoting *Howell v. State Bar of Tex., 843 F.2d 205, 208 (5th Cir. 1988)* (quotation marks omitted)).

[73] *See* **[*20]** TEX. DEP'T OF INS., *Frequently Asked Questions: Unlicensed Individuals and Entities Adjusting Claims* at 1 (2014), https://www.tdi.texas.gov/bulletins/2014/documents/unlicensedfaq.pdf.

[74] *Id.*

[75] *Cf. R.A.V. v. City of St. Paul, 505 U.S. 377, 389, 112 S. Ct. 2538, 120 L. Ed. 2d 305 (1992)* (observing that words can sometimes violate laws directed at conduct).

[76] Whether and to what extent such communications are subject to regulation under other law is outside the scope of this opinion.

[77] *Tex. Ins. Code §§ 4102.001(3)* (defining the profession in terms of an agreement to be paid for such services), *.051(a)* (prohibiting unlicensed persons from holding themselves out as a public insurance adjuster), *.163(a)(1)* ("A contractor may not act as a public adjuster or advertise to adjust claims for any property for which the contractor is providing or may provide contracting services, regardless of whether the contractor [is a licensed public insurance adjuster].").

describes conduct an ordinary industry **[*22]** participant exercising common sense would understand to violate section 4102.051(a)'s prohibition on an unlicensed person acting, advertising, or holding itself out as an insurance adjuster. The touchstone is fair notice, not an exhaustive articulation of prohibited conduct,[78] and the challenged provisions of the Public Insurance Adjusters Act easily surpass that threshold to survive Stonewater's as-applied challenge. Accordingly, both the as-applied and facial vagueness claims fail as a matter of law. We therefore need not, and do not, consider whether the statutes might be vague as applied to hypothetical situations not before us.

III. Conclusion

Stonewater failed to state cognizable First and Fourteenth Amendment speech and vagueness claims. Because the trial court properly granted TDI's Rule 91a dismissal motion, we reverse the court of appeals' judgment and render judgment dismissing the case.

John P. Devine

Justice

OPINION DELIVERED: June 7, 2024

Concur by: James D. Blacklock; Evan A. Young

Concur

JUSTICE BLACKLOCK, joined by Justice Boyd, concurring in the judgment.

The challenged statute, which regulates "public insurance adjusting," prohibits a contractor like Stonewater from "act[ing] on behalf of an insured in negotiating for or effecting the settlement **[*23]** of a[n] [insurance] claim." *See* Tex. Ins. Code §§ 4102.001(3)(A)(i), 4102.051(a). The statute also prohibits Stonewater from holding itself out as authorized to take such actions on an insured's behalf. *Id.* § 4102.001(3)(B). These prohibitions are remarkably narrow. To the extent there is any doubt about their scope, I would construe them narrowly in order to avoid difficult constitutional questions about their compliance with the First Amendment. *See* Paxton v. Longoria, 646 S.W.3d 532, 539 (Tex. 2022).

As the Court correctly observes, Chapter 4102 of the Insurance Code does not regulate the content of Stonewater's speech. It regulates only the agency relationship between parties in a commercial transaction. I do not agree with the Court's characterization of the transaction as "nonexpressive." *Ante* at 14. Negotiation of a settlement is surely expressive. But Chapter 4102 does not prohibit a contractor from negotiating with an insurance company regarding settlement of an insured homeowner's claim for repairs. Instead, the statute merely prohibits the contractor from *acting as an insured's agent*—"act[ing] on behalf of an insured"—in those negotiations. Chapter 4102 thus regulates the legal consequences of the contractor's speech, not the content of that speech. It does so by prohibiting the contractor's speech, whatever **[*24]** it may be, from binding the insured or speaking for the insured. For this reason, I agree with the Court that, properly and narrowly construed, Chapter 4102 does not abridge anyone's freedom of speech. *See* U.S. Const. amend. I.

The reason Stonewater's free-*speech* claim fails is very simple, and we need not comb through a rat's nest of U.S. Supreme Court precedent to find it. The statute does not prohibit Stonewater from *saying* anything to insurance companies—other than "I am negotiating or settling this claim as an agent for the insured," or an equivalent statement suggesting that the contractor is authorized to "act[] on behalf of [the] insured." Tex. Ins. Code § 4102.001(3)(A)(i). Any such statement would be false, of course, because the Legislature has outlawed such an agency relationship due to understandable concerns about the conflicts of interest that can arise between a contractor and a homeowner when an insurance company is paying for home repairs.[1]

[78] *See* United States v. Nat'l Dairy Prods. Corp., 372 U.S. 29, 32, 83 S. Ct. 594, 9 L. Ed. 2d 561 (1963) ("The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.").

[1] In a general sense, the homeowner and the contractor are aligned; both want the house to be fixed and both want the insurance company to pay for it. But conflicts of interest regarding the details can arise, of course. For example, the contractor may prefer the approach to fixing the house that maximizes its profit, but the insured may be better off with a different approach.

The constitutional right of free speech is not violated when the government prohibits a party from misrepresenting its lawful role in a commercial transaction.[2] That is all this statute does with respect to Stonewater's speech, as far as I can tell. The contractor cannot tell the insurance **[*25]** company, falsely, that it has legal authority to act on the insured's behalf. *Id.* Likewise, the contractor cannot lead the insured to believe, falsely, that the contractor has legal authority to act on the insured's behalf. *Id.* *§ 4102.001(3)(B)*. Otherwise, the contractor can talk freely with both the insurance company and the homeowner about anything they would like to talk about.

Crucially, the contractor and the insurance company are free to talk all day long about the negotiation and settlement of an insured's claim, as long as the contractor does not "*act[] on behalf of* an insured in negotiating for or effecting the settlement." *Id.* *§ 4102.001(3)(A)(i)* (emphasis added). This statute does not prohibit contractors from *speaking* with insurance companies about the scope of insurance coverage or about the details or costs of the work the contractor is doing and the insurance company is funding. Instead, the statute only prohibits a contractor from *acting* in a representative capacity, "on behalf of an insured." *Id.* As long as any understanding worked out between the contractor and the insurance company must be independently authorized by the insured—and as long as all involved know that the contractor is never **[*26]** "act[ing] on behalf of" the insured—then nothing in this statute prohibits contractors like Stonewater from haggling with an insurance company over the details of construction costs and insurance coverage. Few homeowners want to be deeply involved in such conversations, and nothing in *Chapter 4102* prohibits contractors from discussing these things with insurance companies so the homeowner does not have to.

The one aspect of Stonewater's practice that runs afoul of the statute is its explicit promise to negotiate claims *on behalf of* homeowners. This is exactly what the statute prohibits, verbatim. Quite obviously, however, the Constitution is not offended by the statute's requirement that Stonewater refrain from falsely holding itself out as authorized to serve as the insured's commercial agent when the law prohibits such an agency relationship because of the clear potential for conflicts of interest.

Again, the statute prohibits Stonewater only from *acting* "on behalf of" the insured in the negotiation or settlement of a claim. Stonewater and other contractors are perfectly free to *speak to* the insurance company about the negotiation or settlement of a claim—or about anything else. And Stonewater **[*27]** is free to tell homeowners that it can make their lives much easier by dealing with the insurance company regarding the claim, just as many helpful contractors (who want to please their customer and get paid by the insurance company) often do. What Stonewater may not tell homeowners is that it will act on their behalf—as their agent—to negotiate and settle their claim for them, which is something it lacks the lawful authority to do.

Apart from the question of its agency relationship with the insured, nothing else Stonewater has said or claims it wants to say is prohibited by this statute. I see no reason Stonewater cannot advertise that it has experience dealing with insurance companies and helping homeowners manage the insurance claim process. I do not necessarily read the Court's opinion to suggest otherwise, but to the extent it does, *ante* at 25-26, I disagree. The only speech prohibited by the statute would be the false statement or suggestion that the contractor is authorized to act as the insured's agent in the negotiation or settlement of a claim. If the Department of Insurance has interpreted the statute to prohibit any more than this, it has done so in error.

I do not join the **[*28]** Court's opinion, but I agree with its observation that the Department of Insurance only "wins the day because [Chapter 4102] operate[s] much more narrowly than Stonewater fears." *Ante* at 12. Although Stonewater's constitutional claims fail, its effort to establish the legality of its business model succeeds in many respects.[3] If the Legislature had prohibited contractors from helping their customers by speaking with insurance companies about the many questions of coverage and cost that often arise during home repairs, then this would be a much different case, one in which the *First-Amendment* question might very well resolve in favor of Stonewater and its homeowner-customers.

* * *

[2] *See, e.g.*, *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)* (holding that "[f]or commercial speech to come within [the *First Amendment*], it at least must concern lawful activity and not be misleading").

[3] I agree with the Court that Stonewater's "void-for-vagueness" claim fails. If properly and narrowly construed as described above, the statute is perfectly clear.

The Court's opinion engages much more than I do with the notoriously labyrinthine case law on the doctrinal dichotomy between speech and conduct. Justice Young rightly calls the precedent a "mind-numbing morass." *Post* at 2 (Young, J., concurring). I do not criticize the Court for engaging with the law on the terms offered by the parties. Even so, my preference is to decide this case without perpetuating and deepening the mind-numbing morass. The way judges explain their decisions in free-speech cases need not always deal so **[*29]** heavily in the doctrinal mumbo jumbo with which courts have long obscured the simple and beautiful words of the *First Amendment*.

I respectfully concur in the Court's judgment.

James D. Blacklock

Justice

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JUSTICE YOUNG, concurring.

I join the opinion of the Court but write separately to emphasize my understanding of two points with significance for future cases.

First, the federal *due-process clause* (or the *Texas due-course clause*) is generally satisfied when the State rationally regulates professional conduct to ensure competence and safeguard public safety. Stonewater does not challenge the statutory licensure and conflict-of-interest requirements on due-process grounds but as violations of the *First Amendment's* free-speech clause. Because of the Court's narrow statutory construction, any *speech* that that the statute touches is only incidental to *conduct*, the regulation of which is of even less concern to the *First Amendment* than it is to the *due-process clause*. I agree with the Court, therefore, that today's case turns out to be easier than it might first have appeared. But I emphasize that, to benefit from today's holding, it is not enough for the State to *call* something conduct. The State wins today despite, not because of, its overweening **[*30]** theory of what constitutes "conduct" that it may subject to professional regulation.

Second, I am concerned about what comes next. Not every case will be so easy. It will not be possible or proper to construe every statute that regulates professions as only incidentally burdening speech and targeting only non-expressive conduct. What then? As it stands today, the relevant *First Amendment* doctrine is a mind-numbing morass of tangled precedents developed in contexts very different from professional licensing. There is just enough of a whiff of original meaning to disguise a stew of ad hoc conclusions—the way that heavy sauces can fool diners into enjoying meat that sat for hours out in the sun.

The doctrine as we have it seems poorly equipped to address legitimate public-licensing regulation that *does* affect speech or expressive conduct more than "incidentally." The outcome is basically determined at the first move: if conduct, the regulation survives; if speech, it is doomed. Worse, the conduct-speech dichotomy is, to put it mildly, rather malleable. The *First Amendment* can surely be obeyed with better rationales—and recent cases provide some reason for hope that the U.S. Supreme Court will clarify and rationalize **[*31]** its jurisprudence. If so, the speech implications for professional licensure will likewise become clearer.

I

The State's theory of its authority to impose professional licenses without violating the *First Amendment* is too vast.

A

The normal framework for challenging professional licensure sounds in due process. "Competence" and "public safety" are the kinds of neutral criteria that the police power allows the State to invoke to defend regulations like licensing regimes. "[T]he state may have an interest in shielding the public against the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency. A usual method of performing this function is through a licensing system." *Thomas v. Collins, 323 U.S. 516, 545, 65 S. Ct. 315, 89 L. Ed. 430 (1945)* (Jackson, J., concurring). Stonewater does not contend that the statutory provisions it challenges fail this constitutional requirement. We must assume that the licensing and conflict-of-interest provisions are important and rational measures to protect the public, and indeed various amici have explained in detail why this is so. *See, e.g.*, Brief for American Property Casualty Insurance Association et al. as Amici Curiae 15-17 (highlighting the risks to the public of unlicensed and unregulated contractors pocketing money from settled insurance claims).

Legislation must satisfy **[*32]** not only due process, of course, but also every other constitutional requirement. And with the expansion of professional licensing to a greater number of professions, challenges like this one increasingly sound in free speech. *Asserting* that a licensure requirement burdens protected speech does not make it so, but neither is it inherently implausible. Imagine licensing not just the structural engineer who will ensure that a new cathedral does not collapse, but also the bishop who will preach in it. Or not just the truck driver who transports stacks of hot-off-the-press newspapers, but the journalists who write the articles printed in them. Likewise for poets, painters, political consultants, and on and on. Would such licenses satisfy the free-speech clause (and perhaps other clauses)?

The scope of the State's theory is not entirely clear. But, as I understand it, that theory encompasses examples like these by converting speech into conduct, much as nominalizations convert verbs into nouns: the "act" of doing a job that involves speech, especially when it is a *paid* "act." Under this view, only "conduct" is reached—"journalism" becomes the "act" of taking money from employers to produce **[*33]** news articles for those employers, for instance. The State's theory seems to be that it gets to decide who is competent to undertake *conduct* and can impose a licensure requirement without offending—or even implicating—the free-speech clause. The State's argument appears to at least agree that "pure speech" cannot be nominalized into mere conduct to evade *First-Amendment* review—but I am not sure the State truly concedes that any profession involves "pure speech." It describes "prototypical professional conduct" as "taking defined *actions* on behalf of a client in exchange for payment."

The problem, therefore, is not that the State denies that expression is protected. Rather, it is how broadly the State may seek to define "conduct." And the more broadly one defines "conduct"—using the formula "*acting* as [fill-in-the-blank]"—the less room there is for speech. The less speech, the less likely that any regulation is subject to an exacting judicial inquiry. Thus, even accepting the true rule that the *First Amendment* permits only incidental burdens on speech without heightening the scrutiny, the effect of that rule depends entirely on what we *classify* as speech, conduct, expressive, non-expressive, and the like.

Said differently, **[*34]** it is understandable—in the context of someone being *paid* to do a job, after all—to regard the resulting work as just paid-for conduct rather than something that implicates the *First Amendment*. In many contexts that is true enough. But in others, it is just a way to subtly erase the role of the *First Amendment*. Jack Phillips was *paid* to make cakes—and so the State of Colorado did not think it was a big deal to demand that he toe the line, despite the expressive nature of the custom cakes that he designed to convey deep meaning. *See* *Masterpiece Cakeshop, Ltd. v. Colo. Civ. Rts. Comm'n, 584 U.S. 617, 138 S. Ct. 1719, 201 L. Ed. 2d 35 (2018)*; *see also* *303 Creative LLC v. Elenis, 600 U.S. 570, 143 S. Ct. 2298, 216 L. Ed. 2d 1131 (2023)* (protecting a graphic-design maker from being compelled to create expressive designs when the designer disagrees with the messages the designs convey).

Our conduct-speech dichotomy lends itself to confusion and abuse because conduct and speech are not hermetically sealed categories. Burning a piece of cloth is conduct; banning the burning of cloth in public spaces regulates that conduct. But banning burning pieces of cloth in public only if the cloth has alternating red and white stripes and a blue field studded with fifty white stars is to regulate conduct that is imbued with speech. *See* *Texas v. Johnson, 491 U.S. 397, 109 S. Ct. 2533, 105 L. Ed. 2d 342 (1989)*. I make such elementary points precisely because the State's theory—and I guess I cannot **[*35]** blame it for trying—seems largely to elide, or at least downplay, these fundamental principles. Its focus is on "acting" in a given way, transforming it into "conduct" that can be regulated, period.

I understand the Court to reject the State's blunt theory, too. The most important word of the most important sentence in the opinion, to me, is "nonexpressive": "The gravamen of the defined profession is the *role* a person *plays* in a *nonexpressive* commercial transaction, not what anyone may or may not *say*." *Ante* at 14. Without the word "nonexpressive," I do not see why the State could not require licenses and impose restrictions (like those here) for portraitists, political consultants, journalists, ministers of the Gospel, and so many others, including as to the parts of their jobs that only convey messages.

The Court also, however, emphasizes that, in this case, "the profession's actuating activity and dominant focus is employment in a representative (or agency) capacity." *Id.* Although I join the Court's opinion, I do so only on the understanding that this sentiment, which is sprinkled throughout, is understood to address *nonexpressive* conduct. To be honest, I doubt that "representative **[*36]** (or agency) capacity," by itself,

has anything to do with the First Amendment analysis. Speech and expressive conduct are no less protected because they are made on behalf of another or for compensation. "[T]he First Amendment extends to all persons engaged in expressive conduct, including those who seek profit (such as speechwriters, artists, and website designers)." 303 Creative, 600 U.S. at 600. "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." Riley v. Nat'l Fed'n. of the Blind of N.C., Inc., 487 U.S. 781, 801, 108 S. Ct. 2667, 101 L. Ed. 2d 669 (1988).

Agency, in my view, is therefore all but irrelevant to the First Amendment analysis—except that it is too easily looked upon to abridge First-Amendment rights. Regulating *expressive* conduct taken "in a representative (or agency) capacity" is subject to no less scrutiny than the same conduct taken in a non-representative or non-agency capacity. It is not the details of the commercial relationship that matter, but whether *expression* is at the core of the undertaking.

Because the Court concludes that the statute, as construed, regulates *non*expressive conduct, there is no option but to reverse. As I describe below, however, a harder case will come to us, sooner or later. It could even come in this context—the legislature **[*37]** could, for example, amend the law at issue in a way that really does constrict speech.

B

Today's narrow statutory construction allows the State to bar Stonewater from undertaking Stonewater's desired conduct—adjusting insurance claims while financially benefiting from that work in a different capacity. But today's construction allows Stonewater to do quite a lot that the government may want to forbid—including discussing, in detail, the damage and costs of repair with the insurance company. *See ante* at 24 (opinion of the Court); *ante* at 2-3 (Blacklock, J., concurring in the judgment). This narrow construction avoids serious constitutional problems.

Even if the legislature amends the law to impose greater restrictions on parties like Stonewater, any burdens on speech may still be merely incidental to the conduct that the Court describes. The vast majority of states, as the Court observes, *see ante* at 2, 6 n.17, do what the two challenged statutes do here: (1) require that insurance adjusters be licensed and (2) prevent conflict-of-interest problems by prohibiting dual-capacity arrangements (preventing the same actor from being both a contractor and an insurance adjuster).

The State's argument **[*38]** about why its regulation is permissible, even with a less narrowly construed statute, emphasizes cases like the Eleventh Circuit's decision in Del Castillo v. Secretary, Florida Department of Health, 26 F.4th 1214 (11th Cir. 2022). That case upheld a Florida law that regulates the practice of nutrition and dietetics, including "advising and assisting individuals or groups on appropriate nutrition intake by integrating information from the nutrition assessment." Fla. Stat. § 468.503(10). Del Castillo alleged that the law violated her First Amendment free-speech rights. The Eleventh Circuit held that "[a]ssessing a client's nutrition needs, conducting nutrition research, developing a nutrition care system, and integrating information from a nutrition assessment are not speech. They are 'occupational conduct'; they're what a dietician or nutritionist does as part of her professional services." Del Castillo, 26 F.4th at 1225-26. The court therefore concluded that the licensing scheme for dieticians and nutritionists regulated professional conduct and only incidentally burdened speech. Id. at 1226. The First Amendment, it held, did not require heightened scrutiny. *Id.*

If a dietician's "advising" or "counseling" people about nutrition is not speech, then public insurance adjusting is not either. Like providing nutrition and diet counseling, public insurance adjusters must **[*39]** engage mainly in *conduct* for which communicating with an insurer is only incidental. The Court recognizes the important conduct involved in settling an insured's claim: "evaluating insurance coverage, assessing property value, assessing property damage, and calculating repair costs" and ultimately "payment, satisfaction, or final adjustment" of the damage claim. *Ante* at 15-16. Stonewater's position certainly does not lack force, but especially as the Court construes the statute, communicating the value of the claim to the insurer is not remotely the defining characteristic of a public insurance adjuster's job. It is as incidental to professional conduct as speech can be—far more incidental than communicating a diet and nutrition plan formulated according to professional standards, which is why the Eleventh Circuit reached the result it did in Del Castillo. In other words, if the dietician's job is mainly to *figure out* what the health and nutrition needs of a client are, the public insurance adjuster's primary role is to *figure out* what a proper insurance claim is in light of a damage-causing event.

Assessing the constitutionality of the specific provisions Stonewater challenges—*Insurance Code §§ 4102.051(a)* and *4102.163(a)*—is therefore **[*40]** straightforward. *Section 4102.051(a)* bars an individual from acting or holding himself out as a public insurance adjuster without a license. The first half of this prohibition is constitutional under the analysis laid out above. I agree with the Court and with Justice Blacklock that the latter part of this prohibition is constitutional too—holding oneself out as an adjuster restricts speech, but it merely bars *false* commercial statements, which the Constitution does not protect. *Ante* at 12-13 (opinion of the Court); *ante* at 3 (Blacklock, J., concurring in judgment); *see, e.g., Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563-64, 566, 100 S. Ct. 2343, 65 L. Ed. 2d 341 (1980)*.

In my view, at least as to *this* case, the Court correctly concludes that there is no colorable basis for a constitutional challenge. To prevail, the State does not *need* such an overreaching theory.

II

On the other hand, it is not clear that *Del Castillo* is exactly right. Really, *no* speech interests are involved in a dietician giving nutrition advice and counseling? That work is nothing but *nonexpressive conduct*?

Is the conduct—speech divide even the right line to look for—does it ask the right questions? Current *First Amendment* doctrine does not, formally at least, care too much about the context in which speech is infringed, including if it is a statute imposing **[*41]** professional-licensure requirements that does so. "[T]he traditional conduct-versus-speech dichotomy" remains the doctrinally mandated way to determine whether such a requirement violates the *First Amendment*. *Vizaline, L.L.C. v. Tracy, 949 F.3d 927, 932 (5th Cir. 2020)* (citing *Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 585 U.S. 755, 771-75, 138 S. Ct. 2361, 201 L. Ed. 2d 835 (2018)* (*NIFLA*)).

In cases like this one that challenge a professional-licensure regime, therefore, courts must ask whether the regulation burdens (1) speech, (2) conduct, or (3) speech incidental to conduct. The answer to this question may raise additional questions—if the answer is conduct, for example, whether it is inherently *expressive* conduct. The Court today concludes that *this* case is easy. Even so, drawing the line is often hard. *Del Castillo* strikes me as harder than today's case—but even assuming that case got it just right, cases pushing the line are coming.

A

When they come, how will courts react? One problem is that drawing the line is somewhat questionable. The "enterprise of labeling certain verbal or written communications 'speech' and others 'conduct' is unprincipled and susceptible to manipulation." *King v. Governor, N.J., 767 F.3d 216, 228 (3d Cir. 2014)*, *abrogated on other grounds by NIFLA, 585 U.S. 755*. The Eleventh Circuit—which decided *Del Castillo*—has made the exact same observation. *Wollschlaeger v. Governor, Fla., 848 F.3d 1293, 1308 (11th Cir. 2017)* (en banc) (quoting *King, 767 F.3d at 228*); *see also, e.g., Otto v. City of Boca Raton, 981 F.3d 854, 865 (11th Cir. 2020)*. If courts must decide these cases by drawing **[*42]** this line, and if drawing this line is a manipulable exercise, then it may turn out that *First Amendment* jurisprudence *does* care an awful lot about the context in which a challenge arises, even if the formal doctrine purports to be the same always and everywhere.

The importance of protecting speech means that courts should be wary of this conduct-speech dichotomy, and particularly of too quickly or without rigorous reasons concluding that a regulation touches just conduct. It is precisely because the doctrine formally does not distinguish among contexts that a lack of discipline in this area is troubling. If it is comparatively easy to hold that any professional licensure is "just conduct," what will stop regulation of the same "conduct" *outside* that regulatory context? Justice Cardozo wrote of "the tendency of a principle to expand itself to the limit of its logic." Benjamin N. Cardozo, *The Nature of the Judicial Process* 51 (1921). Where is the limit here, exactly, that does not threaten individual liberties more generally? This concern is one of the reasons why I observed above that it is a mistake to be led into thinking that there is any lesser protection for those who are engaged in remunerative **[*43]** conduct in an "agency" or "representative" capacity.

B

The distinction between speech and conduct is also significant because it dictates the appropriate level of scrutiny that courts must apply. A regulation invites strict scrutiny, which is typically fatal, when the regulation

"'targets speech based on its communicative content'—that is, if it 'applies to particular speech because of the topic discussed or the idea or message expressed.'" *City of Austin v. Reagan Nat'l Advert. of Austin, LLC, 596 U.S. 61, 69, 142 S. Ct. 1464, 212 L. Ed. 2d 418 (2022)* (alteration omitted) (quoting *Reed v. Town of Gilbert, 576 U.S. 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015)*). Regulation of a different profession—one that involves expressive conduct (perhaps the legal or medical professions)—might demand *O'Brien*'s intermediate scrutiny, which is sometimes fatal but possible to survive. *See United States v. O'Brien, 391 U.S. 367, 88 S. Ct. 1673, 20 L. Ed. 2d 672 (1968)*. Or we may apply no scrutiny under the *First Amendment* at all when, as here, the target is legitimately seen as *nonexpressive* conduct. *See, e.g., Hines v. Alldredge, 783 F.3d 197, 201-02 (5th Cir. 2015)* (citing *Lowe v. SEC, 472 U.S. 181, 211, 105 S. Ct. 2557, 86 L. Ed. 2d 130 (1985)* (White, J., concurring in the result)), *abrogated on other grounds by NIFLA, 585 U.S. 755*. In such cases, only rational-basis review under the *due-process clause* remains—and it is rare indeed for a governmental action to succumb to that level of scrutiny.

Combining the conduct-speech dichotomy's apparent malleability with the all-but-determinative level of scrutiny yields serious problems for courts, **[*44]** the other branches of government, and the regulated public. Public suspicion that courts work backwards—that they categorize laws so that the desired level of scrutiny applies, not the other way around—could follow from a perception, whether fair or not, that this endeavor lends itself both to inconsistent categorization (speech, expressive conduct, neither) and to wildly divergent results based on the chosen categorization. At the least, the very risk of inconsistency makes the whole endeavor open to the charge.

I am hardly alone in wondering if the tiers of scrutiny are moored in the Constitution's text and original meaning. Jurists from every perspective have expressed concern. "[T]he label the Court affixes to its level of scrutiny in assessing whether the government can restrict a given right—be it 'rational basis,' intermediate, strict, or *something* else—is increasingly a meaningless formalism. As the Court applies whatever standard it likes to any given case, nothing but empty words separates our constitutional decisions from judicial fiat." *Whole Woman's Health v. Hellerstedt, 579 U.S. 582, 136 S. Ct. 2292, 2326-27, 195 L. Ed. 2d 665 (2016)* (Thomas, J., dissenting) (emphasis added). Compounding the problem, judges treat the tiers of scrutiny as "guidelines informing [their] **[*45]** approach to the case at hand, not tests to be mechanically applied." *Williams-Yulee v. Fla. Bar, 575 U.S. 433, 457, 135 S. Ct. 1656, 191 L. Ed. 2d 570 (2015)* (Breyer, J., concurring). "Such an amorphous inquiry risks . . . judges upholding or invalidating . . . laws at will—without respect to the original public meaning of the" relevant constitutional provision. *United States v. Jimenez-Shilon, 34 F.4th 1042, 1051-52 (11th Cir. 2022)* (Newsom, J., concurring).

Scholars have reasonably doubted whether the tiers of scrutiny "have [any] basis in the text or original meaning of the Constitution. They emerged as a political solution invented by the justices to navigate internal factions at the Supreme Court, and they do not withstand critical analysis even on their own terms." Joel Alicea & John D. Ohlendorf, *Against the Tiers of Constitutional Scrutiny*, 41 Nat'l Affs. 72, 73 (2019). Using tiers of scrutiny to "displace longstanding national traditions as the primary determinant of what the Constitution means" is troubling at best. *United States v. Virginia, 518 U.S. 515, 570, 116 S. Ct. 2264, 135 L. Ed. 2d 735 (1996)* (Scalia, J., dissenting).

Today's Supreme Court—some Justices more than others—appears to have found new doubts about the proper role of the tiers of scrutiny. *See, e.g., N.Y. State Rifle & Pistol Ass'n v. Bruen 597 U.S. 1, 142 S. Ct. 2111, 213 L. Ed. 2d 387 (2022)*; *Students for Fair Admissions, Inc. v. President & Fellows of Harv. Coll., 600 U.S. 181, 143 S. Ct. 2141, 216 L. Ed. 2d 857 (2023)* (Thomas, J., concurring). Indeed, the *Bruen* majority claimed that its new text, history, and tradition test "comports" and "accords with" how the Court protects free-speech rights. *597 U.S. at 24-25*. That is at least partially true. The Court has looked at history to define **[*46]** categories of unprotected or lesser-protected speech. *See Tingley v. Ferguson, 144 S. Ct. 33, 35, 217 L. Ed. 2d 251 (2023)* (Thomas, J., dissenting from denial of certiorari) ("Accordingly, the Court has instructed that states may not 'impose content-based restrictions on speech without "persuasive evidence . . . of a long (if heretofore unrecognized) tradition" to that effect.'" (quoting *NIFLA, 585 U.S. at 767*)). In other contexts too, like the religion clauses, the Court has construed the scope of the asserted right "by 'reference to historical practices and understandings.'" *Kennedy v. Bremerton Sch. Dist., 597 U.S. 507, 510, 142 S. Ct. 2407, 213 L. Ed. 2d 755 (2022)* (quoting *Town of Greece v. Galloway, 572 U.S. 565, 576, 134 S. Ct. 1811, 188 L. Ed. 2d 835 (2014)*).

But the Supreme Court has continued to embrace

balancing tests to determine whether a regulation imposed on protected speech is constitutional—and so, therefore, do the lower courts. Decreasing the role of these balancing tests and increasing consideration of the history of regulating certain professions, at least as a first step and in this kind of context, might bring the judicial approach to *First Amendment* challenges to professional-licensure regulations more in line with how we assess due-process claims. After all, *that* doctrine is the one under which professional-licensure challenges have traditionally been raised. The U.S. Supreme Court has said that "the *Due Process Clause* specially protects those fundamental **[*47]** rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg, 521 U.S. 702, 720-21, 117 S. Ct. 2258, 117 S. Ct. 2302, 138 L. Ed. 2d 772 (1997)* (internal quotation marks omitted). Perhaps a similar inquiry as a starting point might be a good first step in isolating novel licensure regimes that warrant *First Amendment* scrutiny from those that have clear historical roots such that heightened scrutiny would be more problematic (or more needed).

Whether a better and clearer approach to assessing *First Amendment* challenges will emerge, even in limited contexts like professional licensure, remains to be seen. I reserve further thoughts for future cases, if they come. This Court, like all courts, must of course follow the Supreme Court's *First Amendment* guidance, and I hope that Court will continue to refine its jurisprudence in this area. But it is for this Court to determine the proper analytical framework for cases that arise under the *Texas Constitution's free-speech clause*, *see* *Tex. Const. art. I, § 8*—if parties raise, research, preserve, and press contentions under that provision, which Stonewater did not.

Evan A. Young

Justice

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