Examining the Veterinary Client-Patient Relationship in the United States: Why the Abolition of the In-Person Examination Requirement Is Warranted

Jeffrey P. Feldmann*

"If a pediatrician can use telemedicine to treat a three-month old infant—based upon medical records, the parent's description of external symptoms and a visual examination of the child—the Court cannot adduce why a veterinarian cannot do the same for a dog, cat, or hamster."[1]

I. INTRODUCTION

According to the American Veterinary Medical Association (AVMA), there were at least 144 million companion animals in the United States as of 2018.[2] In the same year, the United States Department of Agriculture (USDA) estimated there were nearly ninety-four million beef and dairy cattle across the country.[3] The AVMA estimates there are 121,461 licensed veterinarians qualified to attend to those animals.[4] Given the disparity between the total number of animals requiring care and the relatively small number of veterinarians who can provide that care, some commentators speculate—now in part due to COVID-19—that there is a veterinarian shortage in the United States.[5] The veterinary industry

* Suffolk University Law School, J.D. 2023; Virginia Tech, B.S. 2012. I would like to thank my sister and brother-in-law for providing me the topic and foundation for this Note; this simply would not have been possible without you. Thank you to the *Suffolk University Law Review* for all of your hard work and efforts on our journal. To my family, friends, and TJB, this life change would be impossible without your support.

1. Hines v. Quillivan, 982 F.3d 266, 279 (5th Cir. 2020) (Elrod, J., concurring and dissenting).

2. *See U.S. Pet Ownership Statistics*, AM. VETERINARY MED. ASS'N, https://www.avma.org/resources-tools/reports-statistics/us-pet-ownership-statistics [https://perma.cc/7SYL-3VG7] (estimating companion pet count via proprietary formula). Most communities do not have data on the number of pets in their respective community; therefore, the survey data is based on sampling and resembles estimates. *See id.* Based on survey sampling, the calculation took the total number of households and multiplied it by the number of pet-owning households. *See id.* Companion animals include dogs, cats, birds, and horses. *See id.* (listing animals included in study).

3. *See Overview of U.S. Livestock, Poultry, and Aquaculture Production in 2017*, U.S. DEP'T OF AGRIC., https://www.aphis.usda.gov/animal_health/nahms/downloads/Demographics2017.pdf [https://perma.cc/LX58-XVAY] (quantifying inventory of cattle and calves in United States).

4. *See U.S. Veterinarians 2020*, AM. VETERINARY MED. ASS'N (Jan. 1, 2021), https://www.avma.org/resources-tools/reports-statistics/market-research-statistics-us-veterinarians [https://perma.cc/5TB2-A5K5] (aggregating number of veterinarians in United States). The total veterinarian count includes active AVMA members and nonmembers, excluding nonmembers born before 1950 and nonmembers who received their veterinary degree prior to 1976. *See id.*

5. *See* Alec Snyder, *Covid-19 Pandemic Magnifies Workforce Crisis in Veterinary Field*, CNN (June 20, 2021), https://www.cnn.com/2021/06/20/us/vet-tech-shortage-burnout/index.html [https://perma.cc/CXY9-AZ-

continually grapples with how to maintain quality care for animals—both production and companion—while also providing improved access to care for animals and their owners.[6]

Before a veterinarian can provide care for an animal, irrespective of the animal's classification, the veterinarian must establish a veterinary client-pet relationship (VCPR).[7] Generally, a VCPR can only be established through an in-person, physical examination.[8] The Code of Federal Regulations codified what constitutes a valid VCPR; though, states are free to adopt—or not to adopt—that language in their respective veterinary practice acts.[9] Many states have elected to adopt the model language and adapt their statutes according to their jurisdictional needs, while other states have simply adopted the AVMA and federal government language in its entirety.[10] Some states appear to have no statute at all.[11] Further, because VCPR language also governs veterinarians' ability to prescribe

---

C7] (discussing causes of perceived veterinary shortage); Matthew Salois & Gail Golab, *Are We in a Veterinary Workforce Crisis?*, AM. VETERINARY MED. ASS'N (Sept. 15, 2021), https://www.avma.org/javma-news/2021-09-15/are-we-veterinary-workforce-crisis [https://perma.cc/C986-3SQQ] (attributing problem to lack of veterinary technicians and corresponding productivity decline during COVID-19); Jon Andreassi, *Veterinarians Impacted by Pandemic, Labor Shortage*, OBSERVER-REP. (Aug. 31, 2022), https://observer-reporter.com/news/localnews/veterinarians-impacted-by-pandemic-labor-shortage/article_1c8e0e5a-ea33-11eb-be15-6b0ac9670eb6.html [https://perma.cc/T9GU-LACT] (describing anecdotal evidence of COVID-19 causing labor shortage); *see also* Kristi Reimer Fender, *Study: Is There a Veterinarian Shortage? Yes. Could We Fix It Immediately? Yes.*, DVM360 (Sept. 18, 2019), https://www.dvm360.com/view/study-there-veterinarian-shortage-yes-could-we-fix-it-immediately-yes [https://perma.cc/MG5G-ATS3] (describing study performed attributing veterinarian shortage to lack of school enrollment).

6. *See* Salois & Golab, *supra* note 5 (enumerating problems and solutions to perceived workforce crisis). The AVMA has proposed that better leveraging of technologies, like telehealth, support workflow and allow talented employees to perform the work they are qualified to do. *See id.*; *see also* Amanda Radke, *Rural Communities Desperate for Large Animal Veterinarians*, BEEF MAG. (May 26, 2021), https://www.beefmagazine.com/farm-life/rural-communities-desperate-large-animal-veterinarians [https://perma.cc/G7A9-C444] (discussing struggle livestock producers have in finding veterinarians).

7. *See* 21 C.F.R. § 530.3 (2023) (defining VCPR).

8. *See id.* (enumerating elements of valid VCPR). A VCPR can exist only when the veterinarian has recently seen and is personally acquainted with the keeping and care of the animal by virtue of the examination of the animal. *See id.*; *see also Veterinarian-Client-Patient Relationship (VCPR) FAQ*, AM. VETERINARY MED. ASS'N, https://www.avma.org/resources-tools/pet-owners/petcare/veterinarian-client-patient-relationship-vcpr-faq [https://perma.cc/D8FQ-2NRY] (discussing how VCPR established and maintained). Many, but not all, states explicitly have the in-person requirement present in their veterinary practice acts. *See Veterinarian-Client-Patient Relationship (VCPR) FAQ, supra*; *see also Principles of Veterinary Medical Ethics of the AVMA*, AM. VETERINARY MED. ASS'N (Aug. 2019), https://www.avma.org/resources-tools/avma-policies/principles-veterinary-medical-ethics-avma#III [https://perma.cc/5VZ6-WWNJ] [hereinafter *Principles*] (detailing veterinarians' ethical obligation to provide care under valid VCPRs).

9. *See supra* note 8 (explaining VCPR requirements and state discretion under veterinary practice acts).

10. *See* AM. VETERINARY MED. ASS'N DIV. OF STATE ADVOC., VCPR STATE LAWS (2020), https://www.avma.org/sites/default/files/2020-11/VCPR-State-Chart-NOV-2020.pdf [https://perma.cc/LG3E-S-KND] (listing VCPR statutes and corresponding language by state where present); *see also Does the State or Federal VCPR Definition Apply to a Lawful VFD in My State?*, U.S. FDA (Sept. 28, 2021), https://www.fda.gov/animal-veterinary/development-approval-process/does-state-or-federal-vcpr-definition-apply-lawful-vfd-my-state [https://perma.cc/T6TQ-V65Y] [hereinafter *Does the State or Federal VCPR Definition Apply*] (providing VCPR statute by state).

11. *See supra* note 10 (noting variability in state definitions of VCPR language).

medication for their clients, any change to a state's VCPR definition implicates prescribing habits and access to pharmaceutical treatments.[12]

Ronald Hines, a retired veterinarian from Texas, has been at the forefront of questioning the constitutional validity of VCPR law since 2014.[13] Hines mounted multiple constitutional challenges to VCPR limitations in Texas, including that: Electronically delivered veterinary advice is protected free speech under the First Amendment; the requirement to examine an animal in person to establish a VCPR violates the Equal Protection Clause of the Fourteenth Amendment because it treats veterinarians who practice telemedicine differently than veterinarians who do not; and the requirement to examine an animal in person to establish a VCPR violates equal protection under the Fourteenth Amendment because it treats veterinarians differently from medical doctors.[14] Courts rejected these claims, reasoning that the burdens on professional speech arising under VCPR laws are incidental and do not violate the First Amendment, and that subjecting veterinarians to different telehealth laws than human doctors does not violate Equal Protection.[15] Though not yet proliferate, there is pending litigation in California on First Amendment and equal protection grounds akin to Ronald Hines's constitutional challenges, thus indicating VCPR issues are poised to gain further traction as veterinary boards, veterinarians, and legislators weigh how to balance VCPR and telehealth moving forward.[16] Future litigation could continue

12. *See* 21 C.F.R. § 530.3 (defining extralabel drug use in tandem with VCPR); *id.* § 558.6 (explaining requirements for veterinary prescription, including valid VCPR); *see also Does the State or Federal VCPR Definition Apply*, *supra* note 10 (tabulating VCPR laws for all states in drug prescription context).

13. *See* Hines v. Alldredge, No. 13-CV-56, 2014 U.S. Dist. LEXIS 200791, at *2-4 (S.D. Tex. Feb. 11, 2014) (introducing Hines and summarizing First and Fourteenth Amendment claims), *aff'd in part and rev'd in part*, 783 F.3d 197 (5th Cir. 2015).

14. *See id.* at *3-4 (enumerating constitutional arguments); Hines v. Alldredge, No. 13-CV-56, 2014 U.S. Dist. LEXIS 194733, at *3-4 (S.D. Tex. Mar. 27, 2014) (summarizing Hines's First Amendment claims), *certifying questions to*, 783 F.3d 197 (5th Cir. 2015); Hines v. Alldredge, 783 F.3d 197, 200 (5th Cir. 2015) (detailing appeal of Hines's initial First Amendment and Fourteenth Amendment claims); Hines v. Quillivan, 395 F. Supp. 3d 857, 863 (S.D. Tex. 2019) (renewing Hines's First Amendment and Fourteenth Amendment claims), *aff'd in part and rev'd in part*, 982 F.3d 266 (5th Cir. 2020); Hines v. Quillivan, 982 F.3d 266, 270-71 (5th Cir. 2020) (detailing appeal of Hines's renewed First and Fourteenth Amendment claims); *see also* Donald M. Zupanec, Annotation, *Validity, Construction, and Effect of Statutes or Regulations Governing Practice of Veterinary Medicine*, 8 A.L.R.4th 223, at 7 (2021) (summarizing Hines's claims).

15. *See* Hines v. Alldredge, 2014 U.S. Dist. LEXIS 200791 at *21 (denying equal protection claim and finding First Amendment claim valid); Hines v. Alldredge, 2014 U.S. Dist. LEXIS 194733 at *2 (affirming valid First Amendment claim); Hines v. Alldredge, 783 F.3d 197 at 202-03 (overturning district court on First Amendment claim); Hines v. Quillivan, 395 F. Supp. 3d 857 at 864, 866-67, 870 (finding renewed First Amendment claim not foreclosed but no valid equal protection claim); Hines v. Quillivan, 982 F.3d 266 at 272, 276 (remanding to district court to determine First Amendment and upholding denial of equal protection).

16. *See* Complaint & Demand for Jury Trial at 10-28, S.F. Soc'y for the Prevention of Cruelty to Animals et. al. v. Sieferman, No. 21-CV-00786 (E.D. Cal. May 3, 2021) [hereinafter *SFSPCA v. Sieferman*] (alleging California's VCPR laws violate First and Fourteenth Amendments); *see also* Jennifer Fiala, *Calls to Expand Veterinary Telemedicine Clash with Regulations*, VETERINARY INFO. NETWORK (May 7, 2021), https://news.vin.com/default.aspx?pid=210&Id=10237164 [https://perma.cc/JEH5-7G84] [hereinafter Fiala, *Calls to Expand Telehealth*] (detailing challenges to VCPR in multiple states); Jennifer Fiala, *Florida Is Ground Zero in Veterinary Telemedicine Battle*, VETERINARY INFO. NETWORK (Apr. 1, 2021), https://news.vin.com/default.aspx?pi-

to target VCPR law—partly motivated by COVID-19 and the advent of telemedicine—as veterinarians, animal owners, legislators, and regulators attempt to find the balance between efficient access to care and the provision of quality patient care.[17]

This Note examines the development of VCPR law, the incorporation—or lack thereof—of telehealth into VCPR law across the United States, and considers VCPR's effect on access to care.[18] After discussing the state of the veterinary industry and the regulatory scheme of veterinary medicine, Part II assesses VCPR laws across the United States, establishing that there is general uniformity from state to state.[19] In Part II, this Note juxtaposes human medicine's widespread acceptance of telehealth to establish valid doctor-patient relationships with the relative absence of such acceptance of telehealth in veterinary medicine to establish valid VCPRs.[20] Part III then discusses and analyzes existing litigation concerning VCPR law and telehealth measures in the Fifth Circuit and in California.[21] This Note concludes by proposing more widespread adoption of telemedicine as a means to establish a VCPR in order to improve access to quality care for veterinarians, clients, and patients more closely aligned with human medicine.[22]

II. HISTORY AND BACKGROUND

A. Industry Background

Between 1994 and 2020, the veterinary industry in the United States experienced considerable growth as evidenced by industry expenditures rising from approximately $17 billion to over $123 billion.[23] The spending increase is

d=210&Id=10172345 [https://perma.cc/D35K-WKY5] [hereinafter Fiala, *Florida Ground Zero*] (discussing lobbying efforts in Florida to change VCPR and telehealth laws); Jennifer Fiala, *Oregon Regulators Propose Rules for Veterinary Telemedicine*, VETERINARY INFO. NETWORK (Dec. 18, 2019), https://news.vin.com/default.aspx?pid=210&Id=9437765 [https://perma.cc/N3E7-HNHB] [hereinafter Fiala, *Oregon Regulators*] (noting Oregon regulatory push for VCPR and telehealth changes).

17. *See supra* note 16 and accompanying text (describing rising prominence of telehealth issue within veterinary industry).

18. *See infra* Part II (explaining history and development of VCPR law).

19. *See infra* Part II (outlining variable VCPR laws across United States).

20. *See infra* Part II (discussing telehealth in human medicine and veterinary medicine).

21. *See infra* Part III (analyzing case law and constitutional challenges to existing VCPR laws).

22. *See infra* Part IV (advocating for strict VCPR laws and expansion of telehealth laws more akin to human medicine).

23. *See* Luiz Fernando Bimbatti Mattos, *Private Mergers and Acquisitions in the United States: A High-Level Overview of Veterinary Health Industry Deals and Its Recent Consolidation Wave*, 11 J. ANIMAL & ENV'T L. 28, 41 (2019) (describing industry expenditures in 1994); *see also Pet Industry Market Size & Ownerships Statistics*, AM. PET PRODUCTS ASS'N, https://www.americanpetproducts.org/press_industrytrends.asp [https://perma.cc/JC6F-3JLD] (listing veterinary expenditure statistics from 2021). In 2021, consumers spent $50 billion on pet food; $29.8 billion on supplies and over-the-counter medicine; $34.3 billion on veterinary care and product sales; and $9.5 billion on other services, including barding, grooming, insurance, training, pet sitting, and walking services. *See Pet Industry Market Size & Ownerships Statistics*, *supra.*

attributable to a corresponding growth in pet ownership, which has grown from 56% of U.S. households owning a pet in 1988 to 70% of households owning a pet in 2020.[24] Beyond the increase in pet ownership creating demand for services, other factors contributing to the overall expansion of the veterinary industry include technological advancements, minimal regulation as compared to human medicine, and the parallel growth of pet insurance to match pet ownership.[25] As the veterinary marketplace expands, so expands the number of investors entering the market, which in turn increases competition affecting prices, notably creating industry consolidation.[26] Such sustained growth creating market consolidation is illustrated by the acquisition of VCA, Inc. (VCA) by Mars, Inc. (Mars).[27] The natural consequence of market consolidation is a rise in prices for care primarily provided by corporate players, which inevitably results in local, rural, and family-owned veterinary clinics being frozen out of the market.[28]

Beyond market consolidation, the veterinary industry appears to be plagued by a general shortage in veterinarians themselves.[29] Industry actors posit various theories as to the underlying cause of the purported shortage, but the reality seems to be a combination of several factors, including: enrollment availability in veterinary schools; the coupling of low pay with inadequate career prospects; the rise in demand for services as a result of increased pet ownership creating lack of productivity; and the exacerbation of all such factors by COVID-19.[30]

---

24. *See Pet Industry Market Size & Ownerships Statistics*, *supra* note 23 (detailing pet ownership statistics since 1988). First performed by the American Pet Products Association in 1988, the survey now shows roughly 90.5 million households own at least one pet. *See id.*; *see also* Bimbatti Mattos, *supra* note 23, at 42-43 (attributing growth across veterinary industry to corresponding growth in pet ownership).

25. *See* Bimbatti Mattos, *supra* note 23, at 43 (elaborating on growth factors contributing to veterinary industry expansion). The bond between humans and pets is the fundamental reason for the industry boom. *See id.*

26. *See id.* at 43-44 (explaining consolidation of veterinary industry). The increase in technology and healthcare for pets has resulted in a corresponding increase in a pet's life expectancy, resulting in substantial demand for services. *See id.* at 43.

27. *See id.* at 44-45 (describing Mars's acquisition of VCA). The Mars acquisition of VCA in 2017 was the largest transaction in the veterinary industry, and it resulted in the combined entity owning roughly 6.5% of the total veterinary market in North America, comprised of roughly 30,000 total animal hospitals. *See id.* at 44-46 (noting Mars acquisition's effect on veterinary industry).

28. *See id.* at 43-44 (explaining impact of market consolidation on smaller clinics). When veterinary corporations are the primary provider of veterinary services in the market, they cause downstream effects on technology, pricing, and the manner in which other independent veterinarians operate. *See id.* at 51 (noting basic effects of consolidation).

29. *See supra* note 5 (describing general labor shortage in veterinary industry).

30. *See* Fender, *supra* note 5 (explaining study involving veterinary school attendance). A veterinary economist, Dr. James Lloyd, examined Indeed's veterinary job postings and compared the number of openings to the number of veterinarians likely seeking employment, as reported by the AVMA, and determined that there were 1.7 positions per candidate. *See id.* The total number of open positions exceeded 2,000 when Dr. Lloyd added in government, large animal medicine, industry, and academia. *See id.* He then compared these numbers to school acceptance rates and determined that veterinary schools could admit more students to fill remaining jobs. *See id.*; *see also* Snyder, *supra* note 5 (focusing on veterinary technicians to demonstrate worker shortage). A rise in pet adoption during COVID-19 has strained veterinary clinics and has further exacerbated the shortage of veterinary technicians due to low pay and poor career prospects. *See* Snyder, *supra* note 5. Despite at least two

The veterinary industry reckoned with the labor shortage long before COVID-19, particularly in rural areas, but the pandemic's impact has prompted renewed interest in providing better access to health care for animals and their owners.[31] One oft-proposed solution in the endeavor to improve access to care both during the pandemic and beyond: telemedicine.[32]

---

fewer years of school than veterinarians, veterinary technicians are experiencing high "burn out" such that half the population leave the profession entirely within five years. *See id.* Veterinarians themselves then must compensate for the technician shortage in order keep up with general demand. *See id.*; *see also* Andreassi, *supra* note 5 (describing impact of shortage resulting from pandemic). When COVID-19 hit, there was a boom in pet adoption, which elevated demand and levels of stress in an already emotionally driven profession; many veterinarians realized they could make more money with less stress in different professions. *See* Andreassi, *supra* note 5. An AVMA study showed that male veterinarians are twice as likely to die by suicide, as compared to the general population, while female veterinarians are over three times as likely. *See id.*

31. *See* Radke, *supra* note 6 (highlighting effect of labor shortage on rural communities). Animal owners in rural communities are struggling to find veterinarians if they do not already have a longstanding, established relationship with one. *See id.* Rural areas are heavily disadvantaged as fewer veterinarians must cover larger geographical areas—a problem the pandemic has further uncovered. *See id.*; *see also* Grace Connatser, *Many Midwestern Communities Suffer from Veterinary Clinic Shortages*, WISC. STATE FARMER (June 2, 2021), https://www.wisfarmer.com/story/news/2021/05/12/many-midwestern-communities-suffer-veterinary-clinic-shortages/7053276002 [https://perma.cc/P4C6-4ZNG] (detailing study performed in 2019 before COVID-19 showing veterinary shortages). The Department of Agriculture found over five hundred counties in forty-four states had veterinarian shortages in 2019. *See* Connaster, *supra.* Independent clinics are going away with the prominence of corporate clinics, resulting in rural veterinarians needing to cover larger areas and being unable to adequately address emergency situations. *See id.* Part of the problem is a lack of students with backgrounds in agriculture or rural medicine, and student debt also creates a barrier to practicing veterinary medicine. *See id.*

32. *See* Mary Margaret McEachern Nunalee & G. Robert Weedon, *Modern Trends in Veterinary Malpractice: How Our Evolving Attitudes Toward Non-Human Animals Will Change Veterinary Medicine*, 10 ANIMAL L. 125, 139 (2004) (discussing advantages of telemedicine in 2004). Telemedicine provides easier access to qualified medical professionals, which improves quality of care for both veterinarian and client. *See id.*; *see also Telehealth and the VCPR,* AM. VETERINARY MED. ASS'N, https://www.avma.org/resources-tools/practice-management/telehealth-telemedicine-veterinary-practice/telehealth-and-vcpr [https://perma.cc/MW8F-JLMF] (describing interplay between VCPR and telehealth). A VCPR cannot be established solely through telemedicine. *See Telehealth and the VCPR*, *supra.* Without an established VCPR, a veterinarian can only provide general advice. *See id.*; *see also Veterinary Telehealth: The Basics*, AM. VETERINARY MED. ASS'N, https://www.avma.org/resources-tools/practice-management/telehealth-telemedicine-veterinary-practice/veterinary-telehealth-basics [https://perma.cc/2HA7-8U4G] [hereinafter *Telehealth Basics*] (discussing and defining telehealth). The rise of digital communications has spurred telehealth. *See Telehealth Basics*, *supra*; *see also Coronavirus (COVID-19) Update: FDA Helps Facilitate Veterinary Telemedicine During Pandemic*, U.S. FDA (Mar. 24, 2020), https://www.fda.gov/news-events/press-announcements/coronavirus-covid-19-update-fda-helps-facilitate-veterinary-telemedicine-during-pandemic [https://perma.cc/6PR5-WPL4] (explaining temporary permission to establish VCPR via telehealth during COVID-19). The FDA does not intend to enforce the animal examination and premises portion of the VCPR requirements relevant to the FDA regulations governing extralabel drug use in animals and animal feed drugs. *See Coronavirus (COVID-19) Update: FDA Helps Facilitate Veterinary Telemedicine During Pandemic*, *supra.* The owner of a sick dog could share a video with the veterinarian who could then prescribe drugs not approved for use in dogs or for that illness. *See id.*; *see also* Fiala, *Calls to Expand Telehealth*, *supra* note 16 (explaining COVID-19 catalyst for telemedicine movement). Since 2018, the American Association of Veterinary State Boards (AAVSB) has promoted the establishment of VCPR online. *See* Fiala, *Calls to Expand Telehealth*, *supra* note 16; *see also* Jennifer Fiala, *AAVSB Aims to Usher Telehealth into Veterinary Medicine*, VETERINARY INFO. NETWORK (Sept. 27, 2018), https://news.vin.com/default.aspx?pid=210&Id=8735-786 [https://perma.cc/AQ3F-KH87] [hereinafter Fiala, *Usher Telehealth*] (describing AAVSB promotion of telemedicine for establishing VCPR). The AAVSB advocated for telemedicine to be available to establish VCPR much in the same way as human medicine. *See* Fiala, *Usher Telehealth*, *supra*; *see also* Fiala, *Oregon Regulators*, *supra* note 16 (describing Oregon regulation aimed at expanding telehealth). The change to Oregon regul-

B. Regulatory Background

1. Defining VCPR

The three federal components veterinarians must meet to establish a valid VCPR are: (1) to engage with the client to assume responsibility for making clinical judgments about patient health with the owner's agreement; (2) to have sufficient knowledge of the patient by virtue of patient examination to establish a preliminary diagnosis; and (3) to provide for any necessary follow-up evaluation or care.[33] A veterinarian must initially meet such requirements through an in-person examination.[34] In order for a veterinarian to render any treatment, the veterinarian must obtain informed consent from the animal's owner.[35] State statutory language is generally adopted from AVMA principles, though states may adopt the federal language or modify it to better suit local conditions.[36]

---

ation, proposed in 2019, would permit telemedicine at the "discretion of the veterinarian," even if the veterinarian has not examined the patient in person. *See* Fiala, *Oregon Regulators*, *supra* note 16; *see also* Andrea De La Cerda, *The Rapid Rise of Veterinary Telehealth*, DVM360 (July 29, 2020), https://www.dvm360.com/view/the-rapid-rise-of-veterinary-telehealth [https://perma.cc/CG44-LKYS] (discussing COVID-19's impetus for telemedicine). COVID-19 provides veterinary clinics with an opportunity to use telemedicine as a test case, potentially laying the foundation for a permanent adoption as part of their business models. *See* De La Cerda, *supra*; *see also* Sully Barrett, *Vet Telehealth Surges as First US Pets Test Positive for Coronavirus*, CNBC (Apr. 23, 2020), https://www.cnbc.com/2020/04/23/vet-telehealth-surges-as-first-us-pets-test-positive-for-coronavirus.html [https://perma.cc/JY4R-5N8X] (describing telehealth lag prior to COVID-19). A December 2019 study of seventy-six veterinarians revealed a lack of knowledge and utilization of telehealth and telemedicine. *See* Barrett, *supra*; *see also* James R. Embrey Jr., *Telemedicine and Telehealth Litigation Risk Rises as Demand Soars*, PHYSICIANS PRAC. (July 26, 2021), https://www.physicianspractice.com/view/telemedicine-telehelath-litigation-risk-rises-as-demand-soars [https://perma.cc/5PRM-L795] (noting growth of telemedicine prior to COVID-19). Prior to COVID-19, demand for telehealth services was rising. *See* Embrey Jr., *supra*. With the prominence of telehealth, so goes a prominence in litigation. *See id.*

33. *See* 21 C.F.R. § 530.3(h)(i)(1)-(3) (2023) (defining federal VCPR requirements). Though the regulation refers to VCPR being established for extralabel drug use, this definition serves as the basis for all federal VCPR definitions. *See id.*; *see also* Lindsay Tate Ratliff Porter, Note*, Judicious Use of Antibiotics: Biting the Hand that Feeds Us*, 58 U. LOUISVILLE L. REV. 235, 239 (2019) (describing federal components of establishing VCPR).

34. *See supra* notes 7-8 and accompanying text (defining VCPR).

35. *See* 21 C.F.R. § 530.3(h)(i)(1) (alluding to consent requirement). The animal owner, or some other authorized caretaker, must agree to follow the veterinarian's instructions. *See id.*; *see also* Akisha R.N. McGee, *Detailed Discussion of Veterinarian Client Issues*, MICH. ST. UNIV. ANIMAL LEGAL & HIST. CTR. (2006), https://www.animallaw.info/article/detailed-discussion-veterinarian-client-issues [https://perma.cc/37UA-HZ-2S] (describing informed consent requirement, among other VCPR requirements). Informed consent is vastly different from informed consent in the human medicine context because the patient in a VCPR context is unable to make the decision themselves, whereas a human can. *See* McGee, *supra*. Informed consent in the VCPR context is more akin to informed consent in the human medicine context with respect to minors. *See id.*

36. *See* Tate Ratliff Porter, *supra* note 33, at 239 (noting state flexibility with VCPR requirements). The federal government defers to state legislatures to adapt their respective VCPR requirements to local conditions, while state licensing boards provide oversight to ensure compliance with those requirements. *See id.*; *see also Does the State or Federal VCPR Definition Apply*, *supra* note 10 (enumerating VCPR requirement by state). In instances where applicable state VCPR requirements do not sufficiently include key elements of a valid VCPR as defined by 21 C.F.R. § 530.3(i), the veterinarian prescribing the animal feed drug must issue such drug in accordance with that regulation. *See* Tate Ratliff Porter, *supra* note 33, at 239; *see also Principles*, *supra* note 8 (discussing local value of AVMA adoption). Local and state veterinary associations have a large role in monitoring veterinarian conduct. *See Principles*, *supra* note 8. The AVMA suggests that local and state veterinary

2. Basic Origins of the VCPR

The Judicial Council of the AVMA, in conjunction with the University of Iowa College of Medicine, developed the first Model Veterinary Practice Act (MVPA) in the 1960s.[37] The AVMA revised the MVPA in 2003 by adding language to emphasize that veterinarians must practice medicine in accordance with a valid VCPR, including the in-person examination requirement.[38] State legislatures, with insight from veterinary licensing boards, may codify AVMA principles into their state statutes to ensure the law provides practicing veterinarians with adequate oversight and protection.[39] The AVMA's general influence demonstrates that state regulation of the veterinary industry was more a result of organization within the profession itself, rather than organic legislative or regulatory agency action.[40] The FDA then adopted the AVMA's recommended VCPR language as a requirement to establish a veterinary feed directive (VFD), to permit the extralabel use of prescription drugs, and to operate as a simple baseline method for assessing veterinarian misconduct.[41]

---

associations consider adopting its principles, or a similar code as a guide for their activities, including discussions of ethical issues in their continuing education programs. *See id.*

37. *See Model Veterinary Practice Act*, AM. VETERINARY MED. ASS'N, https://www.avma.org/resources-tools/avma-policies/model-veterinary-practice-act [https://perma.cc/M5GR-KZUY] (describing origins of MVPA which contributed to development of VCPR).

38. *See 2019 Model Veterinary Practice Act*, AM. VETERINARY MED. ASS'N (Jan. 2021), https://www.avma.org/sites/default/files/2021-01/model-veterinary-practice-act.pdf [https://perma.cc/DKS8-KK3R] (enumerating recommended VCPR language). The MVPA is reviewed every five years, and the current review began in 2016. *See id.* (explaining MVPA's review period). Revisions to the MVPA occurred in 2003, 2012, and 2017 to adapt to changes in the professional, technological, and societal contexts. *See id.*

39. *See id.* (denoting general influence and use of AVMA principles). The MVPA acts as a guide for legislatures who desire to amend future acts under their state's code of laws. *See id.* The AVMA often provides guidance for veterinarians to aid compliance with the MVPA. *See id.*

40. *See id.* (explaining MVPA language intended for legislative use); *see also* Mark Cushing & Charlotte Lacroix, *The State of the VCPR*, TODAY'S VETERINARY BUS. (Aug. 2018), https://todaysveterinarybusiness.com/the-state-of-the-vcpr [https://perma.cc/AFS9-8ZC9] (explaining origination of VCPR). Creation of a VCPR for nondrug-related purposes was not driven by independent action of legislators, but of organized veterinary medicine. *See* Cushing & Lacroix, *supra* (opining on roots of VCPR enactment). Historically, VCPRs were rarely mentioned in veterinary medical association meetings or state veterinary board meetings. *See id.* When states considered veterinary practice acts, most established a framework to decide what licensed veterinarians are permitted to do. *See id.* The reason might have been because creating working relationships between pet owners or producers was simply not top of mind for those pet owners or farmers. *See id.*

41. *See* Cushing & Lacroix, *supra* note 40 (explaining initial impetus for Congress to enact VCPR). The VCPR was incorporated by state legislators or state boards as part of practice acts, and then it was adopted by Congress to establish FDA guidelines for VFDs and extralabel use of prescription drugs. *See id.*; *see also* Veterinary Feed Directive, 80 Fed. Reg. 31707, 31715-16 (Oct. 1, 2015) (explaining VCPR's requirements relating to VFD). The FDA requires that any veterinarian issuing a VFD comply with any state-defined VCPR requirement or, if absent, the federal VCPR definition. *See* Veterinary Feed Directive, 80 Fed. Reg. at 31715. The FDA revised the VCPR definition in 2013 to appropriately defer to state organizations responsible for licensing veterinarians but did not intend to undo the original requirement of a valid VCPR to issue VFD. *See id.* at 31716.

3. VFD Regulation

A VFD is the manner through which a veterinarian is able to prescribe and distribute drugs to animals via their feed and drinking water.[42] Once a valid VCPR is established and the VFD drug prescribed in accordance with FDA conditions, owners or caretakers are authorized to administer the prescribed drug through the animals' dietary intake.[43] Prior to the enactment of the VCPR, farmers could treat their animals on their own, without having to establish a VCPR.[44] Scholars have considered altering the VCPR on the federal level with respect to VFDs because it creates burdensome challenges on the veterinarians who provide the care, including exposure to liability.[45] The FDA has even proposed eliminating the VCPR framework as the screening means for VFDs, though no such change to the framework has materialized.[46] In considering such changes, the FDA cited regional and geographical variation as one of the principle reasons for doing so.[47]

---

42. *See* Tate Ratliff Porter, *supra* note 33, at 237-38 (describing function and definition of VFDs). The Animal Drug Availability Act (ADAA) created a new category for certain drugs used in animal feed and drinking water known as VFD drugs. *See id.* at 237. VFDs include most antibiotics fed to livestock. *See id.* at 238.

43. *See id.* at 237-38 (explaining functional requirements of VFD and VCPR). A VFD is a licensed veterinarian's written authorization that the drug can be administered through that animals' feed, so long as it complies with the approved use conditions set by the FDA. *See id.*

44. *See id.* at 239-40 (denoting VCPR requirement compared to prior lack of VCPR requirement). In order for veterinarians to prescribe medicated feeds, the farmer must establish a VCPR, whereas prior to VFDs, a farmer could treat solely according to their own knowledge and experience. *See id.* The time elapsed in needing to satisfy the VCPR requirement creates risk of pathogen outbreaks before the entire herd can be treated. *See id.*

45. *See id.* at 241 (explaining burdens VCPRs create on VFD process). Even though public feedback indicated the burdensome nature of the FDA's original definition of VFD, the FDA revised the final policy in 2017 to incorporate the VCPR, effectively rendering a stricter regulation. *See id.* at 238. The duplicative nature of having to comply with both state and federal VCPR standards disincentivizes farmers to actually prescribe antibiotics administered through feeds. *See id.* at 240. In the VFD context, the VCPR can create inefficiencies and expense due to the formalities of acquiring it prior to prescribing antibiotics including excessive amounts of paperwork. *See id.* at 240-41; *see also supra* note 13 and accompanying text (establishing potential liability and sanctions for VCPR violations); Cox v. Tenn. Bd. of Veterinary Med. Exam'rs, No. M2010-01582-COA-R3-CV, 2011 Tenn. App. LEXIS 570, at *28-29, *31 (Tenn. Ct. App. Oct. 21, 2011) (holding veterinarian below standard of care when prescribing medications without in-person examination); United States v. Franck's Lab, Inc., 816 F. Supp. 2d 1209, 1212 (M.D. Fla. 2011) (discussing requirement to distribute certain drugs only to veterinarians with established VCPR).

46. *See* Lisa Heinzerling, *The FDA's Continuing Incapacity on Livestock Antibiotic*s, 33 STAN. ENV'T L.J. 325, 332 (2014) (noting previous effort by FDA to eliminate VCPR). Instead of applying the federal VCPR framework, the FDA has proposed relying on state-by-state veterinary practicing requirements. *See id.* One previously proposed modification would have shifted FDA language from veterinary "supervision" to "oversight" of animals subject to VFDs, while other proposed changes concern reporting and recordkeeping requirements. *See id.*; *see also* 21 C.F.R. § 558.6(b)(1) (2023) (enumerating no such "supervision" or "oversight" requirement); 21 C.F.R. § 530.3(i) (2023) (requiring veterinarians available for "followup" under valid VCPRs).

47. *See* Heinzerling, *supra* note 46, at 345 (describing FDA's reasoning in proposing elimination of federal VCPR definition). The FDA claims that eliminating the federal framework for VCPRs would "enable the veterinary profession and individual states to adjust the specific criteria for VCPR to appropriately align with current practice standards, technological and medical advances, and other regional considerations." *Id.* Heinzerling, a legal scholar, notes that the FDA has not explained how eliminating the federal VCPR requirement would further "regional considerations," particularly the lack of veterinarians able to serve remote areas where livestock

4. State VCPR Laws

There exists across state VCPR laws a ubiquity of some variation of an in-person exam requirement, which is reflected in the majority of states mirroring the federal VCPR definition as defined within the VFD regulatory framework.[48] Arizona, Arkansas, and California, among other states, have all adopted the federal language.[49] Pennsylvania and Oregon deviate somewhat from the federal definition.[50] Generally, there are subtle differences in that some states require "having seen" or "having been acquainted" with an animal to establish a VCPR, while some require a veterinarian to have "examined" or "physically examined" an animal.[51] Other states deviate from the federal code by establishing a temporal requirement on when an animal was "last seen" as a means of maintaining a VCPR.[52] The two biggest outliers in the United States are Virginia and Oklahoma, which afford veterinarians significantly more flexibility in how they may

producers reside. *See id.* Heinzerling further argues that eliminating the federal VCPR requirement would create holes in protection provided by veterinary oversight. *See id.* at 346.

48. *See* ALA. CODE '§ 34-29-61 (2022); ARIZ. REV. STAT. ANN. § 32-2201 (2022); ARK. CODE ANN. § 17-101-102 (2022); CAL. CODE REGS. tit. 16, § 2032.1 (2022); *id.* § 2032.15; COLO. REV. STAT. § 12-315-104 (2022); FLA. STAT. § 474.202 (2022); GA. CODE ANN. § 43-50-3 (2022); HAW. REV. STAT. § 329-1 (2022); IDAHO ADMIN. CODE r. 24.38.01.150 (2023); 225 ILL. COMP. STAT. ANN. 115/3 (LexisNexis 2022); IND. CODE § 25-38.1-1-14.5 (2022); IOWA ADMIN. CODE r. 811-12.1(169) (2023); KAN. STAT. ANN. § 47-816 (2022); KY. REV. STAT. ANN. § 321.185 (LexisNexis 2022); LA. ADMIN. CODE tit. 46, § 700 (2022); ME. STAT. tit. 32, § 4877 (2023); MD. CODE REGS. 15.14.01.03 (2022); 256 MASS. CODE REGS. 2.01 (2022); MINN. STAT. § 156.16 (2022); MISS. CODE. ANN. § 73-39-53 (2022); MO. REV. STAT. § 340.200 (2022); MONT. ADMIN. R. 24.225.301 (2023); NEB. REV. STAT. ANN. § 38-3316 (LexisNexis 2022); NEV. ADMIN. CODE § 638.0197 (2022); N.H. CODE ADMIN. R. ANN. Vet 501.01 (2023); N.J. ADMIN. CODE § 13:44-4.1 (2023); N.M. CODE R. § 16.25.9.8 (2023); N.C. GEN. STAT. § 90-181 (2022); N.D. CENT. CODE § 43-29-01.1 (2021); OHIO REV. CODE ANN. § 4741.04 (2022); OKLA. STAT. tit. 59, § 698.2 (2022); OR. ADMIN. R. 875-005-0005 (2022); 49 PA. CODE § 31.21 (2023); 21 R.I. GEN. LAWS § 21-31.1-2 (2022); S.C. CODE ANN. REGS. 120-1 (2022); S.D. CODIFIED LAWS § 39-18-34.1 (2022); TENN. CODE ANN. § 63-12-103 (2022); TEX. OCC. CODE ANN. § 801.351 (2022); UTAH CODE ANN. § 58-28-102 (2022); VT. STAT. ANN. tit. 26, § 2433 (2022); 'VA. CODE ANN. § 54.1-3303 (2022);; WASH. ADMIN. CODE § 246-933-200 (2022); W. VA. CODE § 30-10-3 (2022); WIS. STAT. § 89.02 (2022); 251-9 WYO. CODE R. § 9-3 (2022).

49. *See* ARIZ. REV. STAT. ANN. § 32-2201; ARK. CODE ANN. § 17-101-102; CAL. CODE REGS. tit. 16, § 2032.1; *id.* § 2032.15.

50. *See* OR. ADMIN. R. 875-005-0005 (enumerating Oregon's VCPR requirements); 49 PA. CODE § 31.21 (setting forth Pennsylvania's VCPR requirements). In Oregon, the veterinarian need only have sufficient knowledge of the animal to generate an initial diagnosis, which means that the veterinarians have seen the animal within the last year. *See* OR. ADMIN. R. 875-005-0005. Pennsylvania's VCPR differs slightly and is established by virtue of the animal being "under the veterinarian's care," meaning that the veterinarian has made timely visits to the premises where the animal is kept. *See* 49 PA. CODE § 31.21.

51. *See* Ali McIntyre, *The Basics About Telemedicine and the VCPR*, VETERINARY VIRTUAL CARE ASS'N, (Oct. 28, 2020), https://vvca.org/the-basics-about-telemedicine-and-the-vcpr/ [https://perma.cc/5GDV-YYJ9] (categorizing variability of in-person examination requirement within state VCPR language); *see also* Cushing & Lacroix, *supra* note 40 (listing VCPR law state-by-state).

52. *See* McIntyre, *supra* note 51 (categorizing "last seen" variant of in-person examination requirement); *see also* Cushing & Lacroix, *supra* note 40 (listing VCPR laws state-by-state).

initially establish a VCPR, altering the typical in-person examination to take telemedicine into account.[53]

C. Telemedicine in Animal and Human Medicine

1. Telemedicine and Its Adoption in Veterinary Care

Telehealth and telemedicine—terms frequently used interchangeably—generally refer to the remote delivery of health information, education, or care through electronic means.[54] It is a tool, or use of a tool, to augment the practice of medicine generally limited to diagnosing and prescribing in a follow-up context, as no physical examination occurs.[55] While practitioners have widely adopted telemedicine in human medicine, slow adoption persists in veterinary medicine.[56]

In 2016, the AVMA and the North American Veterinary Community (NAVC) began to consider telemedicine more seriously, notably its interplay with veterinarians establishing legitimate VCPRs.[57] The primary impetus for this contemplation is reflected in the ubiquitous adoption of telemedicine in human medicine

53. *See* OKLA. STAT. TIT. 59, § 698.2 (defining VCPR in Oklahoma); *id.* § 698.11 (permitting VCPR established through telemedicine); VA. CODE ANN. § 54.1-3303 (providing method for establishing VCPR in Virginia). For the purposes of prescribing certain controlled substances, a prescriber may establish a legitimate VCPR through face-to-face, two-way, real-time communications. *See* OKLA. STAT. TIT. 59, § 698.11 (authorizing VCPR via telemedicine for prescribing); *see also* VA. CODE ANN. § 38.2-3418.16 (2021) (providing Virginia state law definition of telemedicine services).

54. *See* Tara Sklar & Christopher T. Robertson, *Telehealth for an Aging Population: How Can Law Influence Adoption Among Providers, Payers, and Patients?*, 46 AM. J.L. & MED. 311, 311 (2020) (defining telehealth). Telehealth refers to the practice of evaluating, diagnosing, and treating patients at a distance using telecommunications. *See id.*; *see also* Jeremy Sherer & Amy Joseph, *Physician Law Evolving Trends and Hot Topics: Telehealth*, 32 HEALTH LAW. 20, 20 (2020) (noting telemedicine and telehealth used interchangeably); Watson et al., *A Survey of Knowledge and Use of Telehealth Among Veterinarians*, BMC VETERINARY RSCH. (Dec. 30, 2019), https://bmcvetres.biomedcentral.com/articles/10.1186/s12917-019-2219-8 [https://perma.cc/YX89-GPN4] (defining telemedicine). The AVMA defines telemedicine as a subcategory of telehealth involving the digital exchange of information from a distance regarding a patient's health status within an existing VCPR. *See* Watson et al., *supra*; *see also Telehealth Basics*, *supra* note 32 (providing AVMA definition of telemedicine).

55. *See* Sklar & Robertson, *supra* note 54, at 311-12 (noting telehealth expansively defined). Telehealth includes conducting online appointments, obtaining test results through a website, asking questions via email, and communicating with providers through video, text message, or mobile apps. *See id.* at 312.

56. *See id.* at 311-12 (explaining prevalence of telehealth in human medicine); Cushing & Lacroix, *supra* note 40 (noting telemedicine adoption in veterinary medicine lags human medicine). Traditional policy for telehealth is to increase access to healthcare, especially for rural populations. *See* Sklar & Robertson, *supra* note 54, at 311-12. The FCC also created a commission to ensure that gaps in broadband would not hinder telehealth availability. *See id.*; *see also* Fiala, *Calls to Expand Telehealth*, *supra* note 16 (discussing expansion of telemedicine and VCPR due to COVID-19).

57. *See Practical Approach for Telehealth Legislation*, VETERINARY INNOVATION COUNCIL, (2017), [https://perma.cc/DZ7J-FYVU] (implying lagging telemedicine adoption in veterinary care); Cushing & Lacroix, *supra* note 40 (noting AVMA's involvement in the push). The NAVC advocates for, and outlines several principles aimed toward, expanded telemedicine usage while also advocating for practice standards developed through legislation. *See Practical Approach for Telehealth Legislation, supra.*

and the general opportunity telemedicine presents.[58] States were initially reticent to accept digital health care for humans but have since readily adopted it, and veterinary medicine could follow a similar path.[59] Nevertheless, other than Oklahoma, states have not legislated to allow for telemedicine as a means to initially establish a valid VCPR.[60]

COVID-19 presented a unique test case for states to experiment with their respective VCPR laws by allowing veterinarians more latitude to establish VCPR through telemedicine.[61] Numerous states took action to address the problems COVID-19 presented: Seventeen states at least temporarily suspended restrictions on creating VCPRs through telemedicine; ten states directly encouraged veterinarians to utilize telemedicine where a valid VCPR had already been established; and three states extended the timeline of a valid VCPR from twelve months to eighteen months.[62]

58. *See Practical Approach for Telehealth Legislation*, *supra* note 57 (marking experience and success of telemedicine in human medicine). Veterinary telemedicine can learn from the two decades of success with telemedicine in human health care. *See id.*; *see also* Sherer & Joseph, *supra* note 54, at 24 (stating telemedicine available method to establish client-patient relationship in human medicine). All fifty states permit establishment of client-patient relationship in human medicine via telemedicine. *See* Sherer & Joseph, *supra* note 54, at 24; *see also* Sklar & Robertson, *supra* note 54, at 313 (explaining cost benefits of telehealth). Telehealth may reduce health care expenditures by replacing in-person visits with remote ones. *See* Sklar & Robertson, *supra* note 54, at 313; *see also Veterinary Telehealth Market Size Worth $417.1 Million by 2028*, GRAND VIEW RSCH., INC. (Feb. 24, 2021), https://www.prnewswire.com/news-releases/veterinary-telehealth-market-size-worth-417-1-million-by-2028-grand-view-research-inc-301234260.html [https://perma.cc/2CX6-DJHK] (illustrating size of veterinary telehealth market and business opportunity presented). The global veterinary telehealth market is expected to grow at a compound annual growth rate of 19.5%, with the market set to reach $417 million by 2028. *See Veterinary Telehealth Market Size Worth $417.1 Million By 2028*, *supra*.

59. *See* Sherer & Joseph, *supra* note 54, at 24 (explaining telehealth initially litigated heavily before adopted widely). Historically, the question was whether a physician-patient relationship could be established via telehealth. *See id.*; *see also* Clint J. Gardner, *Board Telemedicine/Telehealth Position Statement*, OKLA. VETERINARY BD. (Oct. 5, 2018), https://www.okvetboard.com/controlled-drug-information/51-news/latest-news/95-board-telemedicine-telehealth-position-statement [https://perma.cc/2SQ2-XDCU] (noting Oklahoma board's reasons for expanding telemedicine use).

60. *See supra* note 53 and accompanying text (explaining Oklahoma statutes allow telemedicine to establish valid VCPR).

61. *See* Barrett, *supra* note 32 (discussing surge of telehealth to render animal care during COVID-19); *Coronavirus (COVID-19) Update: FDA Helps Facilitate Veterinary Telemedicine During Pandemic*, *supra* note 32 (discussing FDA approval for veterinarians to utilize telemedicine to establish VCPR). The FDA noted that they need to provide technological latitude for veterinarians to not only pets, but also production animals as well. *See Coronavirus (COVID-19) Update: FDA Helps Facilitate Veterinary Telemedicine During Pandemic*, *supra* note 32. In order to encourage the use of telemedicine, at least temporarily, the FDA suspended the in-person examination requirement relevant to extralabel drug use and VFDs. *See id.*; *see also* Ali McIntyre, *VCPR Changes Since COVID*-19, VETERINARY VIRTUAL CARE ASS'N (Nov. 4, 2020), https://vvca.org/vcpr-changes-since-covid-19 [https://perma.cc/CFN2-YCJ9] (noting various state responses to COVID-19).

62. *See* McIntyre, *supra* note 61 (explaining state action taken to address VCPR limitations during COVID-19). The ten states that encouraged use of telemedicine reflected their governmental belief that telemedicine was good medicine. *See id.* There is concern over whether states will revert to pre-COVID-19-era regulations. *See id.*

2. Widespread Adoption of Telemedicine in Human Medicine

In human medicine, a physician-patient relationship can be established via telehealth in all fifty states.[63] Concerns with telehealth in human medicine tend to err toward liability, access, and regulatory consistency.[64] Such concerns do not center around restricting usage of telemedicine, but rather promoting expansive use.[65] This access-first approach to telemedicine promotes utilitarian ideals of ensuring quality access to health care for the greatest number of patients.[66] Recent legal challenges have generally only considered whether restrictions on certain treatments via telemedicine are unconstitutional, exemplifying the enduring view that telemedicine is necessary to provide adequate healthcare.[67]

D. Constitutional Challenges to VCPR Law

1. Ronald Hines's Litigation

Ronald Hines delivered veterinary care remotely and electronically for several years after posting general information on his website about his veterinary

63. *See* Sherer & Joseph, *supra* note 54, at 24 (stating availability of telemedicine to establish client-patient relationship in every state). As technology develops, the question becomes more about which electronic method is most sufficient to establish client-patient relationships. *See id.*

64. *See* Hana Sahdev, *Can I Skype My Doctor? Limited Medicare Coverage Hinders Telemedicine's Potential to Improve Health Care Access*, 57 B.C. L. REV. 1813, 1816 (2016) (noting fundamental question remaining in telemedicine after widespread adoption). As more people became insured under the Affordable Care Act, the issue became not whether telemedicine should be used, but whether patients are actually accessing care for which they have coverage. *See id.* Regulatory policies, such as lack of Medicare reimbursement, often hinder access and innovation on the telehealth front. *See id.* at 1845; *see also* Hudson Worthy, Note, *The New Norm in Healthcare: Telehealth*, 15 CHARLESTON L. REV. 549, 568 (2021) (discussing potential problems with telehealth). Another issue with telehealth is what standard of care applies, which manifests in the form of and is exacerbated by inconsistent local practices. *See* Worthy, *supra,* at 568.

65. *See infra* note 67 and accompanying text (noting litigation focuses on ensuring expansive access to telehealth and telemedicine).

66. *See* Joseph Kvedar et al., *Connected Health: A Review of Technologies and Strategies to Improve Patient Care with Telemedicine and Telehealth*, 33 HEALTH AFF. 194, 195 (2014) [https://perma.cc/2RXZ-BS9K] (discussing merits of broadened usage of telehealth and telemedicine). Electronic health care delivery expands access to high-quality care for larger populations while also reducing costs. *See id.*; *see also* Sklar & Robertson, *supra* note 54, at 312 (noting goals of telehealth). The typical policy goal met by telehealth is providing access to healthcare for remote and rural populations. *See* Sklar & Robertson, *supra* note 54, at 312. Sklar and Robertson suggest that beyond just rural populations, telehealth should also be available to aging populations where the limitation is not just geography, but mobility or financing. *See id.* at 313-14; *see also* Johanna D. Hollingsworth, Note, *Is There a Doctor in the House?: How Dismantling Barriers to Telemedicine Practice Can Improve Healthcare Access for Rural Residents*, 62 HOW. L.J. 653, 663-65 (2019) (discussing benefits of telemedicine). Patients who treat their diseases remotely save money on transportation, and remote monitoring decreases required resources for hospitals. *See* Hollingsworth, *supra,* at 665.

67. *See* Whole Woman's Health All. v. Rokita, 553 F. Supp. 3d 500, 573-75 (S.D. Ind. 2021) (finding restriction on telemedicine for abortion patients unconstitutional); Am. Coll. of Obstetricians & Gynecologists v. U.S. FDA, 472 F. Supp. 3d 183, 222-24 (D. Md. 2020) (finding requirement on in-person dispensation of abortion medication unconstitutional despite telemedicine availability); *see also* U.S. DEP'T OF HEALTH & HUM. SERVS., REPORT TO CONGRESS: E-HEALTH AND TELEMEDICINE (2016), https://aspe.hhs.gov/system/files/pdf/20-6751/TelemedicineE-HealthReport.pdf [https://perma.cc/8U4D-N7VL] (noting importance of telemedicine and telehealth in providing access to care for more patients).

services.[68] He provided general veterinary advice to pet owners who did not have access to veterinary care—due to geographic limitations or inability to pay—and those who had received conflicting diagnoses in the care they did receive.[69] Eventually, the Texas State Board of Veterinary Examiners notified Hines that he violated Texas's VCPR requirement by providing advice without first having established a valid VCPR via in-person examination.[70]

Combating potential fines and a temporary license suspension, Hines argued that veterinary advice delivered electronically is protected free speech rather than professional conduct subject to regulation.[71] He also argued there was no rational basis for treating him as a layperson such that regulations prohibiting a licensed veterinarian from giving advice without examining an animal are not rationally related to a legitimate government interest because VCPR policy is not geared toward protecting public health, safety, and welfare, and thus fails equal protection.[72] The court rejected this equal protection argument, holding that the in-person examination requirement is rationally related to legitimate public health, safety, and welfare interests; and, the court held that the VCPR law was subject to heightened scrutiny under First Amendment analysis because it was at least plausible that the regulation did not achieve a substantial state interest.[73] After the court granted an interlocutory appeal on the First Amendment claim, the Fifth Circuit reversed, ruling that states have broad power to establish standards for licensed professions like veterinarians and the in-person examination requirement fell within the scope of that authority.[74] The court reasoned that state

68. *See* Hines v. Alldredge, No. 13-CV-56, 2014 U.S. Dist. LEXIS 200791, at *2-3 (S.D. Tex. Feb. 11, 2014) (describing facts leading to lawsuit), *aff'd in part and rev'd in part*, 783 F.3d 197 (5th Cir. 2015). Hines did not attempt to serve as the primary veterinary care provider for those animals he provided advice. *See id.* He did not prescribe any medication, nor did he accept payment for any of the general advice he provided. *See id.* at *3.

69. *See id.* at *2 (noting Hines's goals in providing advice to those who could not easily access it).

70. *See id.* at *3 (describing proceedings brought against Hines). Due to Hines's purported statutory violation, he ceased providing veterinary advice over the internet. *See id.*

71. *See id.* at *4 (noting potential punishment Hines faced). The Veterinary Board of Examiners ordered a one-year suspension of Hines' veterinary license, demanded he retake a portion of the veterinary licensing exam, and imposed a five-hundred dollar fine. *See id.* at *3-*4.

72. Hines v. Alldredge, 2014 U.S. Dist. LEXIS 200791, at *13-14 (explaining Hines's equal protection arguments). A layperson in this litigation refers to someone prohibited from giving veterinary advice. *See id.* at *14. The Board argued that the regulation was only subject to rational basis review and that a regulation designed to protect the public from receiving advice from veterinarians who are not permitted is not irrational. *See id.* at *14-15. Further, the Board argued that even if owners and their pets would be better off receiving advice over the internet on occasion, legislative choices, such as the in-person examination requirement, are not subject to court factfinding. *See id.* at *15.

73. *See id.* at *11-12, *17 (explaining analysis of First Amendment claims). The court denied the Board's motion to dismiss for failure to state a claim, finding that Hines plausibly alleged that the regulations were not tailored to achieve a substantial state interest. *See id.* at *13.

74. *See* Hines v. Alldredge, No. 13-CV-56, 2014 U.S. Dist. LEXIS 194733, at *4-5 (S.D. Tex. Mar. 27, 2014) (explaining interlocutory appeal), *certifying questions to*, 783 F.3d 197 (5th Cir. 2015). At the time, the Fifth Circuit had not yet addressed the question of when the First Amendment protected professional speech. *See id.* at *4. Under rational basis scrutiny, the First Amendment claim may be dismissed upon a finding that there is a rational basis for the regulation. *See id.* at *5. If the appeal is not dismissed, the court will likely have

regulation of veterinarians under VCPR law is merely an incidental burden on speech and does not violate the First Amendment.[75]

In 2017, Texas enacted a new law permitting human doctors to create a valid "practitioner-patient" relationship using telemedicine.[76] In light of this change, Hines mounted new, altered challenges to the in-person examination requirement under the VCPR law.[77] Relying on *National Institute of Family & Life Advocates v. Becerra*[78], Hines revamped his First Amendment claim, arguing that professional speech is not a separate category of speech and, thus, warrants the same protection as private speech.[79] The district court rejected this argument, reasoning that *Becerra* addressed a different standard and did not concern instances where content-based professional regulation incidentally burdened professional conduct.[80]

Hines also refined his equal protection claim, arguing that the in-person requirement amounts to unequal treatment of similarly situated persons because medical doctors do not require in-person exams to establish legitimate patient-doctor relationships.[81] Although the district court acquiesced that human and animal doctors are similarly situated with respect to telemedicine, the court reasoned that a rational basis exists for differentiating requirements for establishing valid client-patient relationships because animals cannot speak for themselves nor communicate their knowledge of their anatomy adequately; thus, the state's interest in promoting proper veterinary care and preventing zoonotic disease is legitimate.[82] Further, the court stated that greater protection for animals means

---

determined it can rule on whether the regulations meet the required level of scrutiny. *See id.*; Hines v. Alldredge, 783 F.3d 197, 201-02 (5th Cir. 2015) (holding in-person examination regulation does not violate First Amendment).

75. *See* Hines v. Alldredge, 783 F.3d at 201 (finding incidental burden on professional speech insufficient to violate Constitution).

76. *See* TEX. OCC. CODE § 111.005 (2022) (enumerating method for human doctors to establish practitioner-client relationship).

77. *See* Hines v. Quillivan, 395 F. Supp. 3d 857, 860-63 (S.D. Tex. 2019) (describing advent of telemedicine impetus for second lawsuit), *aff'd in part and rev'd in part*, 982 F.3d 266 (5th Cir. 2020). Part of the reason Hines mounted a renewed challenge was because human doctors do not have an in-person examination requirement. *See id.* at 860.

78. 138 S. Ct. 2361 (2018).

79. *See* Hines v. Quillivan, 395 F. Supp. 3d at 863 (explaining *Becerra* ruling "breathes life" into Hines's First Amendment claim). Hines conceded that if *Becerra* did not abrogate his initial case, then the free-speech claim would fail. *See id.* at 864.

80. *See id.* at 865-66 (explaining district court's rejection of Hines's renewed First Amendment claim). *Becerra* did not make any statement that directly controverted the Fifth Circuit's ruling in Hines's initial case, reaffirming the Fifth Circuit's sound reasoning. *See id.* at 865. The Supreme Court in *Becerra* essentially held that lower levels of scrutiny apply to laws that regulate professional speech. *See id.*; *see also* Nat'l Inst. of Fam. & Life Advoc. v. Becerra, 138 S. Ct. at 2370 (setting forth reasoning).

81. *See* Hines v. Quillivan, 395 F. Supp. 3d at 867-68 (explaining Hines's arguments for violation of equal protection). The initial equal protection claim turned on differences between licensed veterinarians who have performed in-person examinations and those who have not, whereas Hines's new argument was based on distinctions between licensed veterinarians and medical doctors. *See id.* at 867.

82. *See id.* at 869 (expounding district court's rejection of Fourteenth Amendment claim). Though veterinarians and medical doctors have important professional differences across their respective practices, the court

greater protection for humans, and therefore, a higher level of protection for animals is not irrational.[83]

On appeal, the Fifth Circuit relied on precedent from *Vizaline, L.L.C. v. Tracy*[84] holding that First Amendment claims may be subject to greater scrutiny than Hines's initial claim allowed, and reversed and remanded to the district court for evaluation of whether it is Hines's conduct or speech that is being regulated.[85] The Fifth Circuit upheld the district court's equal protection ruling reasoning that over- and underinclusive classifications can survive strict scrutiny as different policies in human and animal medicine are logical rather than artificial, and thus are not per se irrational.[86] The court also reasoned that the physical examination requirement for veterinarians is not a protectionist measure designed to stop veterinarians from competing with human doctors as the services are not fungible with one another; that human doctors are not deriving from the regulation any sort of shifting economic benefit; and, that it is customary in technology-based economies for industries to change gradually.[87]

The dissent reasoned that the State had failed to demonstrate a rational basis for treating Hines, who the majority conceded was similarly situated for equal protection purposes, differently than medical doctors.[88] Judge Elrod articulated that the State's reasons for disparate treatment—including that animals cannot communicate, that humans have a superior knowledge of their anatomy, and that the distinction prevents spread of zoonotic diseases—were insufficient to

found them similarly situated with respect to telemedicine. *See id.* at 868. The court found a rational basis supports disparate treatment because direct communication between patients and medical doctors reduces risks inherent in providing advice without physical examination, whereas direct communication in veterinary care is impossible. *See id.* at 869.

83. *See* Hines v. Quillivan, 395 F. Supp. 3d 857, 870 (S.D. Tex. 2019) (enumerating further reasoning for rejecting equal protection claim), *aff'd in part and rev'd in part*, 982 F.3d 266 (5th Cir. 2020).

84. 949 F.3d 927 (5th Cir. 2020).

85. *See* Hines v. Quillivan, 982 F.3d 266, 271-72 (5th Cir. 2020) (explaining precedent established in *Vizaline*). *Vizaline* established that general licensing requirements are not automatically immune from First Amendment scrutiny and that the court must conduct a proper conduct-versus-speech analysis. *See id.* at 271; *see also Vizaline*, 949 F.3d at 934 (recognizing *Becerra* abrogated Hines's reliance on professional speech).

86. *See* Hines v. Quillivan, 982 F.3d at 274-75 (explaining reasoning for upholding district court's equal protection ruling). The Constitution does not require perfect policies to achieve legitimate state interests, and any legislature's choice of means will not be held irrational if the one choice is, in fact, rational. *See id.* at 275.

87. *See id.* at 276 (discussing further why differing treatment of human doctors and veterinarians does not violate equal protection). Distinguishing Hines's case from *St. Joseph Abbey*, the court reasoned that services offered by the similarly situated doctors and veterinarians are not interchangeable; whereas the state-licensed funeral homes could raise prices due to the regulations disallowing the abbey to set prices, the VCPR's in-person exam requirement does not permit human doctors to directly affect the prices veterinarians may charge. *See id.*; *see also* St. Joseph Abbey v. Castille, 712 F.3d 215, 226 (5th Cir. 2013) (discussing how pricing scheme creates economic inequity).

88. *See* Hines v. Quillivan, 982 F.3d at 276-77 (Elrod, J., concurring and dissenting) (detailing disagreement). Because the majority conceded veterinarians are similarly situated, Hines must only plausibly allege the state lacks a rational basis for prohibiting veterinarians from using telemedicine in the same way as doctors. *See id.* at 277 (Elrod, J., concurring and dissenting). Judge Elrod would have reversed and remanded the district court's ruling on the equal protection claim. *See id.* (Elrod, J., concurring and dissenting).

establish a rational basis.[89] Further, Judge Elrod posited that Texans have never shown a preference for animals over humans that would support imposing higher standards for an animal's treatment than a human's treatment.[90]

The most recent development occurred in early December 2021, where on remand and after receiving briefs from the parties on the surviving First Amendment claim, the magistrate judge recommended the board's motion to dismiss be denied.[91] The judge reasoned that the in-person examination requirement represents a content-based regulation of speech subject to strict scrutiny.[92] The district court adopted the magistrate judge's recommendation, thus, Hines's First Amendment challenge remains intact.[93]

2. Pending Litigation in California

Litigation resembling Hines's First Amendment and equal protection claims has arisen in California.[94] In 2021, the San Francisco Society for the Prevention of Cruelty to Animals (SFSPCA) sued the California State Veterinary Board, in part arguing that the prohibition on telehealth as a means to establish a VCPR restricts free speech.[95] The complaint alleged that veterinarians choosing to speak to pet owners via telecommunications depends on what they actually say

89. *See id.* at 277, 279-80 (Elrod, J., concurring and dissenting). Judge Elrod noted concretely that the State failed to state a rational basis for its disparate regulation at this stage of litigation. *See id.* at 277 (Elrod, J., concurring and dissenting).

90. *See id.* at 280 (Elrod, J., concurring and dissenting) (noting reasons why regulation should fail rational basis). In cases where the state provides a theoretically plausible basis for disparate treatment, but the plaintiff successfully undermines the logic rendering that legislation rational, the claim should proceed to the evidentiary stage. *See id.* at 278 (Elrod, J., concurring and dissenting). Judge Elrod found that Hines offered sufficient context that "belie[d] the rationality" of the basis for differential treatment. *See id.* at 279 (Elrod, J., concurring and dissenting). Babies and other noncommunicative adults are intentional beneficiaries of the regulation allowing telemedicine to establish patient-client relationships, thus Judge Elrod reasoned that it is "simply not rational to allow telemedicine without a physical examination for babies but deny the same form of telemedicine for puppies on the ground that puppies cannot speak." *See id.* at 279-80 (Elrod, J., concurring and dissenting).

91. *See* Hines v. Quillivan, No. 18-CV-155, 2021 U.S. Dist. LEXIS 235684, at *3-4 (S.D. Tex. Dec. 9, 2021) (explaining magistrate judge issued opinion upon remand from Fifth Circuit). The magistrate judge requested the parties brief the issue on whether the board's application of the in-person exam requirement regulated speech or conduct. *See id.* at *3.

92. *See id.* at *4 (explaining magistrate judge's conclusion). The magistrate judge compared Hines's case to *Holder v. Humanitarian Law Project*, analyzing whether Hines's actions triggering his discipline constituted speech or conduct. *See id.* at *6; s*ee also* Holder v. Humanitarian L. Project, 561 U.S. 1, 28 (2010). The court reasoned that because Hines's conveyance of veterinary advice via oral and written means consisted of communicating messages, the regulation restricts speech, not conduct. Hines v. Quillivan, No. 18-CV-155, 2021 U.S. Dist. LEXIS 235684, at *7-8; *see also Holder*, 561 U.S. at 27 (reasoning restriction on communicating specialized knowledge content-based regulation).

93. *See* Hines v. Quillivan, 2021 U.S. Dist. LEXIS 235684, at *10 (adopting magistrate judge's conclusion and denying motion to dismiss).

94. *See supra* note 16 and accompanying text (introducing California litigation).

95. *See SFSPCA v. Sieferman*, *supra* note 16, at 24 (explaining how restriction on telemedicine abridges free speech). The complaint alleges that the plaintiff veterinarians are unable to engage in verbal consultation with a human client regarding the health of an animal patient, except under restricted circumstances, and plaintiff pet owners have a First Amendment right to receive information. *See id.*

to the pet owners, thus, a rule restricting such communication is a content-based restriction.[96] Relying on *Becerra*, the SFSPCA argued that there is no persuasive reason for treating professional speech as a category exempt from First Amendment principles.[97] As such, content-based laws are subject to strict scrutiny and fail to achieve the compelling interest of public health because they apply to all specialties and situations, including situations where an initial in-person examination is unnecessary or dangerous.[98]

The SFSPCA also made an equal protection argument, arguing that justifying the telemedicine restriction on grounds that animals cannot speak for themselves is insufficient because telemedicine can still be used to establish a valid client-patient relationship in human medicine for infants and adults with communicative impairments.[99] Therefore, anatomical differences do not prevent clients from adequately communicating symptoms in many instances.[100] The SFSPCA further pointed out that it is inconclusive whether a veterinarian could obtain sufficient knowledge of an animal to form a VCPR through remote technology, despite the regulations themselves.[101]

Hines and *SFSPCA* are two of the most prominent legal and constitutional challenges to state VCPR laws.[102] The constitutional arguments in the two challenges ring similar in that California's ruling has the potential to either provide a foundation for VCPR law amendments across the United States or could follow

---

96. *See id.* at 24-25 (arguing restriction on veterinary speech content-based). The plaintiffs argue that veterinarians want to speak to pet owners electronically, and whether they are permitted to do so depends on what they say; therefore, the rule regulates speech. *See id.* at 25.

97. *See id.* at 25 (explaining precedent established in *Becerra* for First Amendment violation); *see also* Nat'l Inst. of Fam. & Life Advoc. v. Becerra, 138 S. Ct. 2361, 2375 (2018) (holding no unique professional speech category). The Supreme Court has made clear that states do not have "unfettered power to reduce a group's First Amendment rights by simply imposing a licensing requirement" under the guise of professional regulations. *See Becerra*, 138 S. Ct. at 2375. The Supreme Court has thus declined to draw particular rules for "content-based regulations of . . . professional speech." *See id.* at 2374.

98. *See SFSPCA v. Sieferman*, *supra* note 16, at 26 (arguing requirement of in-person examination fails strict scrutiny). The SFSPCA posited that the restriction fails even intermediate scrutiny, as California's restrictions target professional speech as speech, not conduct. *See id.* The SFSPCA also contends there is no governmental interest in restricting truthful advice provided by veterinarians. *See id.*

99. *See id*. at 27-28 (explaining equal protection argument based on distinction of those who can or cannot speak). The complaint alleges that California favors health care providers who provide advice to humans (who can speak) over veterinarians who provide care to animals (who cannot speak), even though in many instances human health care providers are providing care to those who require adult consent. *See id.* at 26. These irrational distinctions undermine any purported rationale for restricting remote technologies as a medium. *See id.* at 27.

100. *See id.* at 28 (arguing anatomical differences insufficient to draw regulatory distinction between non-communicative animals and humans). Veterinary clients can still adequately communicate their animals' symptoms. *See id.*

101. *See id.* at 11 (noting California administrative judge kept question open regarding sufficiency of knowledge in remote technology context). The question remains open whether a veterinarian could obtain "sufficient knowledge" of an animal to form a VCPR through "remote video, telemetry, [or] other technology," though the legislation said otherwise. *See id.* (quoting Dodd v. Cal. Veterinary Med. Bd., No. A124052, 2009 WL 4643931, at *6 (Cal. Ct. App. Dec. 8, 2009)).

102. *See* Fiala, *Calls to Expand Telehealth*, *supra* note 16 (describing prominence of *Hines* and SFSPCA).

the Fifth Circuit in *Hines* and maintain the status quo.[103] Regardless, the prominence of telehealth is poised to continue raising VCPR law questions, while laying the groundwork for further differing constitutional arguments.[104]

III. ANALYSIS

A. Telemedicine Should Be as Available in Veterinary Medicine as Human Medicine

Telemedicine in human medicine has consistently expanded for decades.[105] Animal medicine, however, has lagged in adopting telemedicine, though it is especially needed in rural, remote areas where access to care is far more limited than urban areas.[106] This is the same problem human medicine faced before its fairly rapid and ubiquitous adoption of telemedicine.[107] The goal was to expand access to health care for more people, and the law should provide for the same solution for animals.[108]

The COVID-19 pandemic essentially served as a trial run for states that expanded telehealth measures.[109] Seventeen states temporarily suspended restrictions on creating a VCPR through telemedicine and, ostensibly, there is no evidence of an increase in negative outcomes.[110] In a profession constantly grappling with labor shortages and access to quality veterinary care outside large urban areas, telemedicine should be more readily accepted in the community.[111] A global pandemic should not be required to demonstrate that the profession is

103. *See id.* (noting SFSPCA litigation modeled after *Hines*). Jeff Rowes, Hines's attorney, noted that the SFSPCA's case is modeled after *Hines*. *Id.*

104. *See supra* note 16 and accompanying text (describing potential litigatory traction resulting from telehealth prominence); *see also* Hines v. Quillivan, No. 18-CV-155, 2021 U.S. Dist. LEXIS 235684, at *10 (S.D. Tex. Dec. 9, 2021) (denying Board's motion to dismiss and keeping renewed First Amendment argument alive).

105. *See supra* note 66 and accompanying text (discussing expansion-first view of telemedicine in human medicine).

106. *See supra* note 6 and accompanying text (noting need to leverage technology to provide expanded access to care for veterinary clients).

107. *See supra* note 64 and accompanying text (indicating primary concern with telehealth in human medicine expansion); *see also* Hollingsworth, *supra* note 66, at 655-57 (outlining rural and remote populations requiring access to healthcare). Various forms of legislation were enacted around 2009 to expand the use of telemedicine and provide access for rural and remote populations. *See* Hollingsworth, *supra* note 66, at 656. Reimbursement, licensure, and adequate technology, like broadband, limited telemedicine's use, not the establishment of a doctor-client relationship. *See id.* at 657.

108. *See supra* note 56 and accompanying text (juxtaposing widespread adoption in human medicine with slow adoption in veterinary medicine).

109. *See* McIntyre, *supra* note 61 (discussing certain states' suspension of in-person examination requirement during COVID-19).

110. *See id.* (utilizing existing data to refute notion telemedicine results in bad outcomes). The Veterinary Virtual Care Association has strong data showing that there have been no documented complaints of negligent use of telemedicine to establish VCPRs during the COVID-19 suspension. *See id.* Other jurisdictions are instructive; Ontario has no restriction on telemedicine and the veterinary medical board has never received a complaint of a harmed or killed animal resulting from a VCPR established via telemedicine. *See id.*

111. *See supra* note 5 and accompanying text (discussing labor shortage across veterinary industry).

equipped to handle the expansion of the telemedicine.[112] Further, by broadening the means through which veterinarians can provide care, the impact of labor shortages will be at least somewhat obviated.[113]

B. More States Should Follow Oklahoma's Lead

Oklahoma is the only state in the United States to have legislated for the establishment of VCPR through electronic means.[114] Nothing suggests that humans or animals receive lower quality care or experience more negative outcomes due to a provider-patient relationship initially established through telemedicine.[115] Oklahoma typifies many large rural states and therefore, should serve as a legislative example for other rural states.[116] The more rural the state, the bigger the impact telemedicine could have on its patient population, animals, and humans alike.[117] Like human medicine, the removal of barriers to telehealth services in veterinary medicine would improve access to care overall.[118]

C. Telemedicine Does Not Drastically Alter the Standard of Care

Even if legislation for VCPR law expansion to include telehealth suddenly boomed, regulations would still require veterinarians to maintain the same standards of care.[119] If properly codified, veterinarians using telehealth technologies must still take appropriate steps to establish VCPRs, and must conduct all appropriate evaluations and patient history consistent with traditional standards of care for the particular patient presentation.[120] If the standard of care for a veterinarian utilizing telemedicine remains consistent with the in-person standard of care, it stands to reason that the care rendered to the animal will not be of any

112. *See supra* note 31 and accompanying text (explaining areas where limitation on telemedicine harmful).

113. *See supra* note 32 and accompanying text (proposing telemedicine expansion may help alleviate plaguing veterinary industry).

114. *See* OKLA. STAT. tit. 59, § 698.2 (2022) (defining VCPR in Oklahoma); *id.* § 698.11 (expanding VCPR to telemedicine so veterinarians can establish electronically).

115. *See supra* note 57 and accompanying text (discussing NAVC advocating for telehealth with practice standards developed via legislation).

116. *See* McIntyre, *supra* note 61 (noting origin of Oklahoma VCPR law); OKLA. STAT. tit. 59, § 698.2 (defining VCPR in Oklahoma); *id.*§ 698.11 (allowing VCPR established via telemedicine); Gardner, *supra* note 59 (explaining benefit of telehealth to people in remote areas). Oklahoma expanded telemedicine to establish a VCPR for the same reason as humans—to increase access. *See* Gardner, *supra* note 59; *see also* Sklar & Robertson, *supra* note 54, at 312 (noting effort to provide telehealth for remote populations).

117. *See* Sklar & Robertson, *supra* note 54, at 312 (discussing impact telehealth has on rural populations). The traditional policy for telehealth is to increase access to care for remote patients in rural areas. *See id.*

118. *See id.* (noting opportunity telehealth provides for multiple populations). "Beyond rural and remote populations, there is a growing effort to provide telehealth for all patients at the times and place of their choosing." *Id.*

119. *See Practical Approach for Telehealth Legislation, supra* note 57 (enumerating suggestions for adoption of telehealth with human medicine statutes providing basis).

120. *See* Gardner, *supra* note 59 (noting standard of care maintained irrespective of means through which VCPR established).

lesser quality.[121] The same issue faced the human medical profession when telemedicine rose to prominence, and the underlying determination was that the care rendered would not be inadequate or create such negative outcomes to vitiate telemedicine's efficacy.[122] Thus, the reticence to adopt telemedicine as a widespread practice to establish VCPR is unfounded because standards for veterinary medicine would not be drastically altered, nor would they result in correspondingly bad outcomes for patients or clients.[123]

D. The Fifth Circuit Ruled Incorrectly on the Equal Protection Claim in Hines

Hines stands on its own as the most prominent constitutional challenge to state VCPR law.[124] Hines even sent a writ of certiorari to the Supreme Court, though it was denied.[125] That such a question reached the Fifth Circuit demonstrates there is a legitimate argument as to whether the in-person examination requirement to establish a VCPR is unconstitutional.[126] Notably, the First Amendment argument has achieved more success than the equal protection argument, though the equal protection claim has merits.[127]

Because the Fifth Circuit correctly held that doctors and veterinarians were similarly situated, the court should not have summarily dismissed the equal protection claim.[128] The court reasoned that the restriction on establishing a VCPR through telemedicine was rationally related to the state interest in preventing

121. *See id.* (describing veterinarian's role in upholding high medical standards). The veterinarian must employ sound professional judgment to determine whether using telehealth is suitable each time veterinary services are provided and only furnish medical advice or treatment via telemedicine when it is medically appropriate. *See id.*; *see also* Watson et al., *supra* note 54 (noting positive outcomes for pets during telehealth visits). Comparing various vital signs showed visits to healthcare facilities actually created stress and anxiety in animal patients as compared to telehealth visits, emphasizing that telehealth can help reduce negative outcomes. *See* Watson et al., *supra* note 54.

122. *See supra* note 66 and accompanying text (discussing aim of telemedicine expansion and associated benefits).

123. *See* Watson et al., *supra* note 54 (listing different methods to address rural and urban animal populations); Hollingsworth, *supra* note 66, at 663-65 (noting benefits of access to telehealth for humans); Sahdev, *supra* note 64, at 1822-23 (discussing benefits of access to healthcare via telemedicine). Herd animals can be equipped with monitoring sensors, while small animals in more urban areas can utilize videoconferencing telehealth. *See* Watson et al., *supra* note 54, at 6. Babies and other noncommunicative adults are intentional beneficiaries of Texas's expansion of telemedicine, not the subjects of unwitting overinclusion. *See* Hines v. Quillivan, 982 F.3d 266, 280 (5th Cir. 2020) (Elrod, J., concurring and dissenting) (comparing animals to babies).

124. *See supra* note 103 and accompanying text (explaining Hines's attorney agreeing SFSPCA modeled after *Hines* and no other challenge).

125. *See* Hines v. Alldredge, 783 F.3d 197 (5th Cir. 2015), *cert. denied,* 577 U.S. 1006 (2015) (mem.) (denying writ of certiorari without explanation).

126. *See* Hines v. Quillivan, No. 18-CV-155, 2021 U.S. Dist. LEXIS 235684, at *10 (S.D. Tex. Dec. 9, 2021) (finding Texas statute represents content-based regulation of speech subject to strict scrutiny).

127. *See id.* at *3 (explaining denial of equal protection claim and reversal of original First Amendment claim).

128. *See* Hines v. Quillivan, 982 F.3d at 275-76 (Elrod, J., concurring and dissenting) (explaining equal protection analysis). The court reasoned that applying a different approach for similarly situated doctors and veterinarians is not per se irrational. *See id.* at 275. The court essentially punted to the legislature in its avoidance of making "hasty policy change." *See id.* at 276 (Elrod, J., concurring and dissenting).

zoonotic disease.[129] The obvious irony in that reasoning is that if the in-person examination requirement were actually rationally related to the state's interest in preventing zoonotic disease, the act of forcing pet owners to obtain an in-person examination, creating exposure of that animal to other humans, would increase the potential spread of zoonotic disease—failing to meet that state interest.[130] If telemedicine were permitted as a means to initially establish VCPR, veterinarians could examine animals that might actually have zoonotic disease, while exposing fewer humans to that disease.[131] At minimum to this end, the Fifth Circuit's reasoning is weak.[132]

Further, dissenting Judge Elrod properly pointed out that the law should not show a preference for animals over humans that supports higher standards for an animal's treatment.[133] That disparate treatment of animals and humans undergirds the equal protection argument Hines attempted to make.[134] If doctors can electronically establish doctor-patient relationships with infants—who cannot speak for themselves and require symptoms to be conveyed by adults who can speak—then veterinarians can surely establish VCPR electronically for animal owners whose animals also cannot speak.[135] Judge Elrod merely pointed out a simple yet obvious argument—that there is no difference between an infant and a puppy, and there is no logical reason for disparate treatment of veterinarians to establish valid VCPRs by electronic means.[136]

---

129. *See* Hines v. Quillivan, 982 F.3d 266, 279 (5th Cir. 2020) (Elrod, J., concurring and dissenting) (explaining illogical application of zoonotic reasoning). If a pediatrician can use telemedicine to treat a three-month-old infant based on medical records and a visual examination, there is no reason why a veterinarian cannot do the same for a dog, cat, or hamster. *See id.* at 279 (Elrod, J., concurring and dissenting).

130. *See* St. Joseph Abbey v. Castille, 712 F.3d 215, 226 (5th Cir. 2013) (noting logical limit of rational basis test). The rational basis test is deferential but does not require courts to accept "nonsensical explanations for regulation." *Id.*; *see supra* note 129 and accompanying text (noting illogic).

131. *See* Hines v. Quillivan, 982 F.3d at 279 n.5 (Elrod, J., concurring and dissenting) (asserting rationale not based in reality). It is illogical that telemedicine can improve human health by suppressing zoonotic disease because the restriction on telemedicine does not require a veterinarian to inspect an animal for disease as veterinarians may establish a VCPR simply by visiting an animal's "premises." *See id.* (Elrod, J., concurring and dissenting).

132. *See id.* at 280 (Elrod, J., concurring and dissenting) (reaffirming poor reasoning on equal protection claim). The rationale is further betrayed by the fact that medical doctors establishing a doctor-patient relationship are not required to physically examine human subjects because of the risk human-to-human diseases pose to human health. *See id.* at 279 n.5 (Elrod, J., concurring and dissenting).

133. *See id.* at 279-80 (Elrod, J., concurring and dissenting) (explaining dissent and obvious illogic).

134. *See id.* at 279 (Elrod, J., concurring and dissenting) (detailing Hines's arguments and explaining support). Hines offered context that belies the rationality of disparate treatment of veterinarians and doctors. *See id.*

135. *See* Hines v. Quillivan, 982 F.3d 266, 279 (5th Cir. 2020) (Elrod, J., concurring and dissenting) (explaining agreement with magistrate judge's recommendation).

136. *See id.* at 279-80 (Elrod, J., concurring and dissenting) (quoting Hines). Judge Elrod reinforced the idea that "it is simply not rational to allow telemedicine without a physical examination for babies but deny the same form of telemedicine for puppies on the ground that puppies cannot speak." *Id.* at 279 (Elrod, J., concurring and dissenting).

E. The First Amendment Claim Necessarily Continues

The First Amendment claims in *Hines* have survived, and the court is properly considering them given the precedent established in *Vizaline* and *Holder*.[137] As the *Vizaline* court reasoned, the question turns on whether the regulated act is conduct or speech, rather than if the state was regulating the practice of a profession.[138] In *Hines*'s most recent ruling, the district court clarified that because the restriction on Hines' speech was content-based, strict scrutiny will apply.[139] Therefore, it is plausible that restricting Hines from delivering advice electronically without first establishing a valid VCPR may violate the First Amendment.[140] Established precedent makes clear that Hines should be permitted to at least give general advice electronically without an in-person examination of the animals.[141]

F. SFSPCA's Case Outlook

The SFSPCA's arguments mirror Hines's.[142] Though California is not the Fifth Circuit, it seems probable that the SFSPCA's equal protection claim will be improperly dismissed as it was in *Hines*, with the First Amendment argument surviving.[143] Fortunately, the regulation of professional speech under First Amendment analysis continues to present itself to courts and is poised to soon be answered by *Hines* and the SFSPCA case.[144]

Even if the courts rule the in-person examination requirement is not an unconstitutional restriction on free speech, the equal protection claims should still hold

137. *See id.* at 271-72 (relying on *Vizaline* maintaining Hines's First Amendment claim). Licensing regulations are not automatically immune from First Amendment scrutiny. *See id.* (Elrod, J., concurring and dissenting); *see also* Holder v. Humanitarian L. Project, 561 U.S. 1, 27 (2010) (differentiating between specialized and generalized speech). Specialized speech would be barred, whereas general and unspecialized knowledge would not be. *See Holder*, 561 U.S. at 27.

138. *See* Hines v. Quillivan, 982 F.3d at 272 (remanding for determination on conduct versus speech regulation).

139. *See* Hines v. Quillivan, No. 18-CV-155, 2021 U.S. Dist. LEXIS 235684, at *10 (S.D. Tex. Dec. 9, 2021) (finding application of statute to Hines content-based regulation of speech).

140. *See id.* at *9-10 (analogizing Hines's renewed claims to *Holder*). The judge noted that the application of the statute turns on the content of the communications. *See id.* at *10. Per Texas law, Hines would be permitted to communicate general information about animals, but not specific treatment falling within the ilk of licensing regulations. *See id.* (explaining permitted communications).

141. *See id.* (describing permissible activities Hines can engage in).

142. *See supra* note 103 and accompanying text (explaining Hines's attorney agrees SFSPCA modeled after *Hines*).

143. *See* Hines v. Quillivan, 2021 U.S. Dist. LEXIS 235684, at *10 (explaining why First Amendment claim survives).

144. *See id.* at *11 (adopting magistrate judge's recommendation of First Amendment claim); *SFSPCA v. Sieferman*, *supra* note 16, at 25-26 (discussing why telemedicine restriction fails strict scrutiny under First Amendment). Requiring in-person examinations fails to further any compelling governmental interest, and is thus not narrowly tailored, because it unnecessarily hinders advice that would provide healthcare to animals. *See SFSPCA v. Sieferman*, *supra* note 16, at 25-26.

more sway.[145] Courts thus far have simply sidestepped the fundamental question, which asks what legal basis there is to treat animals differently from humans who cannot speak.[146] Judge Elrod said it best by very matter-of-factly comparing an animal to an infant.[147] If doctors can establish valid doctor-patient relationships with babies electronically, states should not restrict veterinarians from establishing VCPR electronically with puppies.[148]

G. Further Legal Challenges and State Legislation

If Hines's and the SFSPCA's legal challenges fail, which the courts have thus far indicated is likely, limited alternatives remain for veterinarians.[149] First, veterinarians in states other than Texas and California can mount similar legal challenges against their respective veterinary oversight boards.[150] Considering the unfirm ground on which the Fifth Circuit's reasoning for denying the equal protection claim rests, focusing on expansive equal protection arguments may yield different results if asserted in other jurisdictions.[151] Veterinarians, therefore, ought to consider bringing more suits in other states that have an in-person examination requirement.[152]

Should future suits follow Hines's, demonstrating continued reticence to make this type of policy change, veterinarians can turn to their state legislatures.[153] Oklahoma has legislated for the use of telemedicine as a means to establish VCPR, while states like Virginia have taken a more incremental approach.[154] If pressure from veterinarians and associated advocacy groups increases, states can follow Oklahoma's and Virginia's lead to legislate for more

145. *See* Hines v. Quillivan, 982 F.3d 266, 276 (5th Cir. 2020) (explaining denial of equal protection claim). The court stated that because different governing boards and rulemaking bodies govern the professions, it was sensible for telemedicine regulations to be suitable for human medicine, yet not constitutionally required for veterinary medicine. *See id.* Further, the court stated the distinction between doctors and veterinarians is a "logical" one, rather than "artificial," and pointed to "species' differing capabilities." *See id.* at 275.

146. *See id.* at 275-76 (denying equal protection claim).

147. *See id.* at 279 (Elrod, J., concurring and dissenting) (opining no difference between treatment of animals and humans who cannot speak); *see also* St. Joseph Abbey v. Castille, 712 F.3d 215, 226 (5th Cir. 2013) (explaining rational basis application).

148. *See* Hines v. Quillivan, 982 F.3d at 280 (Elrod, J., concurring and dissenting).

149. *See supra* notes 73-76 (discussing various denials of Hines's original claims); *SFSPCA v. Sieferman*, *supra* note 16, at 27-28 (arguing similar equal protection claims to Hines).

150. *See* Hines v. Quillivan, 982 F.3d at 266 (noting Hines's claims); *SFSPCA v. Sieferman*, *supra* note 16, at 4 (arguing other states give veterinarians broad authority to give advice electronically).

151. *See supra* notes 136 and accompanying text (discussing Judge Elrod's dissent in *Hines* finding logical flaws in denying VCPR claims).

152. *See SFSPCA v. Sieferman*, *supra* note 16, at 4 (stating in arguments other states give veterinarians broad authority to give advice electronically).

153. *See* Hines v. Quillivan, 982 F.3d 266, 276 (5th Cir. 2020) (noting courts reluctant to make hasty policy changes); Gardner, *supra* note 59 (rationalizing for VCPR established through telemedicine); *see also* Fiala, *Calls to Expand Telehealth*, *supra* note 16 (theorizing veterinary industry ready for expansive telemedicine use).

154. *See supra* note 53 and accompanying text (explaining Oklahoma VCPR legislation compared to Virginia's); Gardner, *supra* note 59 (discussing Oklahoma legislature's reasoning in expanding telemedicine use).

widespread use of telemedicine for veterinarians, as every state has for human doctors.[155]

IV. CONCLUSION

As labor shortages plague the veterinary profession, easing restrictions on telemedicine is an immediate action states can take to cushion the impact from the lack of qualified veterinarians. COVID-19 provided an unexpected opportunity for the industry to test telemedicine in that a healthy share of states across the United States suspended the in-person examination requirement to establish a VCPR. Despite the serendipitous circumstances allowing for more expansive use of telemedicine, ostensibly there were no notable increases in negative outcomes for animals. Thus, lawmakers, veterinary oversight boards, and legislatures should consider COVID-19's test case and expand telemedicine use.

Irrespective of the use case the pandemic provided, the constitutional challenges Hines and the SFSPCA mounted demonstrate the veterinary profession is poised to adopt telemedicine as a means to establish VCPRs. The Fifth Circuit's nonsensical reasoning in rejecting Hines's equal protection claim illustrates the fragile legal basis for denying veterinarians the same expansive enjoyment of telemedicine as a means to establish valid doctor-patient relationships that human doctors have. Though Hines's First Amendment claim survives, it seems improbable that courts will view the in-person requirement to establish VCPR as an unlawful abridgement of free speech. It also seems likely, then, that the SFSPCA's litigation will follow a similar track as *Hines* considering *Hines* serves as their model.

Should Hines and the SFSPCA fail in their legal challenges, the alternative is to turn to state legislatures. Because states were willing to suspend the in-person requirement, at least temporarily, veterinarians and various advocacy groups should urge state legislatures to follow Oklahoma and allow telemedicine as means to establish VCPRs. Given that courts, like the Fifth Circuit, may be hesitant to make "hasty policy change," legislatures should exercise their power to shed the in-person examination requirement, improving access to quality care. Expansive telemedicine use would help blunt the impact labor shortages continue to have and would help address health care access issues, as the understaffed veterinarians could provide care more easily to more patients. The law was quick to allow telemedicine as a means to establish valid doctor-patient relationships for humans, and the law is more than equipped to do so for veterinarians to establish valid VCPRs for animals.

155. *See supra* note 53 and accompanying text (describing states legislating for more widespread telemedicine use).