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Return Fire: An En Banc Hearing in *Wollschlaeger v. Governor of Florida* Is Necessary to Protect the First Amendment Rights of Physicians

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RETURN FIRE: AN EN BANC HEARING IN *WOLLSCHLAEGER v. GOVERNOR OF FLORIDA* IS NECESSARY TO PROTECT THE FIRST AMENDMENT RIGHTS OF PHYSICIANS

Abstract: In 2014, in *Wollschlaeger v. Governor of Florida*, the U.S. Court of Appeals for the Eleventh Circuit held that a Florida ban on physician speech about firearm ownership was a valid regulation of professional conduct. The court reasoned that because the speech took place within the physician-patient relationship it should be treated as professional conduct that may be regulated by the state and not subject to First Amendment scrutiny. This Comment argues that the Eleventh Circuit mischaracterized the speech as conduct and that an en banc hearing should be granted to reverse this decision to avoid a negative impact on physicians' First Amendment rights.

INTRODUCTION

Florida Governor Rick Scott signed the Firearm Owners' Privacy Act ("the Act") into law on June 2, 2011.¹ The Act restricts licensed health care practitioners' ability to record information about patients' firearm ownership, ask patients about firearm ownership, discriminate against a patient on the basis of firearm ownership, or harass a patient about firearm ownership.² The Florida legislature passed the Act in reaction to complaints of discrimination against patients who refused to answer questions about gun ownership.³ Supporters of the Act believe it protects the privacy of patients who exercise their right to bear arms, whereas opponents argue that the Act harms patient privacy

¹ *Wollschlaeger v. Farmer (Wollschlaeger I)*, 814 F. Supp. 2d 1367, 1371 (S.D. Fla. 2011). The Act created Florida statute section 790.338, entitled "Medical privacy concerning firearms; prohibitions; penalties; exceptions" and codified at FLA. STAT. §§ 790.338, 381.026. See FLA. STAT. § 790.338 (2012); FLA. STAT. § 381.026 (2012); *Wollschlaeger I*, 814 F. Supp. 2d at 1371. The Act also amended section 456.072, entitled "Grounds for discipline; penalties; enforcement." See FLA. STAT. § 456.072 (2012); *Wollschlaeger v. Governor of Fla. (Wollschlaeger III)*, 760 F.3d 1195, 1204 (11th Cir. 2014).

² FLA. STAT. § 790.338; see *Wollschlaeger I*, 814 F. Supp. 2d at 1371.

³ *Wollschlaeger v. Farmer (Wollschlaeger II)*, 880 F. Supp. 2d 1251, 1256 (S.D. Fla. 2012); see Fla. Health & Human Servs. Comm., H.R. Staff Analysis, H.R. 0155C, at 2 (Apr. 7, 2011) (ECF No. 20–3) (describing an incident in Ocala, FL where a pediatrician asked a patient's mother about firearms in the home, the mother refused to respond due to privacy concerns, and the pediatrician then advised her that she had 30 days to find a new pediatrician for her child); Fla. Judiciary Comm., H.R. Staff Analysis, H.R. 0155E, at 2 (Apr. 12, 2011) (ECF No. 20–4) ("Florida law does not contain any provision that prohibits physicians or other medical staff from asking a patient whether he or she owns a firearm or whether there is a firearm in the patient's home.").

by impacting the patient-physician relationship.⁴ Supporters of the Act believe that gun ownership is not a public health issue, whereas opponents believe it is.⁵

In 2011, in *Wollschlaeger v. Farmer (Wollschlaeger I)*, Healthcare practitioners brought suit in the U.S. District Court for the Southern District of Florida, challenging the constitutionality of the Act in 2011 on First Amendment grounds.⁶ Although states have authority to regulate the professions, when those regulations impact the content of a professional's speech the First Amendment may be implicated.⁷ In 2014, in *Wollschlaeger v. Governor of Florida (Wollschlaeger III)*, the U.S. Court of Appeals for the Eleventh Circuit ruled 2–1 that Florida's ban on physician speech was a valid regulation of professional conduct that did not have more than an incidental effect on physicians' speech.⁸ This meant that the Act did not violate the First Amendment rights of physicians.⁹

This Comment argues that the Eleventh Circuit mischaracterized the speech in *Wollschlaeger III* as well as the impact its decision has on First Amendment rights of professionals.¹⁰ This Comment further argues that an en banc hearing should be granted to reverse this decision.¹¹ Part I of this Comment provides background on First Amendment jurisprudence as well the procedural history of *Wollschlaeger III*.¹² Part II contrasts and compares the majority's and dissent's use of supporting cases.¹³ Finally, Part III argues that the

⁴ Gayland O. Hethcoat II, *In the Crosshairs: Legislative Restrictions on Patient-Physician Speech About Firearms*, 14 DEPAUL J. HEALTH CARE L. 1, 8–9 (2011) (“[S]upporters argue that firearm ownership is a fundamental right . . . and generally a private matter . . . [O]pponents of the statute disagree Rather than safeguard patient’s privacy interests, they contend, the statute violates them by cutting into the patient-physician relationship.”).

⁵ *Id.* (noting that supporters and opponents cannot agree whether firearm ownership is a public health issue).

⁶ 814 F. Supp. 2d at 1373; Complaint for Declaratory and Injunctive Relief at 2–4, *Wollschlaeger II*, 880 F. Supp. 2d 1251 (No. 11CV22026) (challenging the “Physician Gag Law” to protect the First Amendment rights of Florida healthcare practitioners).

⁷ See *Wollschlaeger II*, 880 F. Supp. 2d at 1262 (explaining that permissible state regulations govern the access or practice of a profession and do not burden or prohibit truthful, non-misleading speech that occurs within the scope of the profession and receives First Amendment protection); Nat’l Ass’n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1054 (9th Cir. 2000) (holding in part that a state’s police power allows it to regulate and license professions within the state “especially when public health concerns are affected”).

⁸ 760 F.3d at 1203, 1230 (vacating the injunction against enforcement of the Act because there was no violation of physician’s First Amendment rights).

⁹ *Id.* at 1217 (holding that the Act did not facially violate the First Amendment because it was a regulation of professional conduct with no more than an incidental effect on physician’s speech).

¹⁰ See *infra* notes 80–97 and accompanying text.

¹¹ See *infra* notes 80–97 and accompanying text.

¹² See *infra* notes 15–44 and accompanying text.

¹³ See *infra* notes 45–79 and accompanying text.

majority misapplies the label of “conduct” to the physician speech in question and that an en banc hearing should be granted to reverse this holding.¹⁴

I. THE FIRST AMENDMENT, PHYSICIAN SPEECH, AND *WOLLSCHLAEGER*

This Part provides background on First Amendment jurisprudence as related to physician speech as well the procedural history of the Eleventh Circuit’s decision in *Wollschlaeger III*.¹⁵ Section A describes the type of speech that is protected by the First Amendment and the distinction that the courts make between conduct and speech in First Amendment jurisprudence.¹⁶ Section B lays out the procedural history of *Wollschlaeger III*.¹⁷

A. *First Amendment Jurisprudence and Professional Speech*

The First Amendment states that Congress “shall make no law . . . abridging the freedom of speech.”¹⁸ The most fundamental, and often most challenging, question to First Amendment analysis is whether “speech” is even present.¹⁹ There are three main types of speech recognized by the Court: (1) speech that is part of the “public discourse”—also known as “political speech”; (2) commercial speech; and (3) unprotected speech.²⁰ Each is subject to a different level of scrutiny.²¹ The determination of which category of speech is at

¹⁴ See *infra* notes 80–97 and accompanying text.

¹⁵ See *infra* notes 18–44 and accompanying text.

¹⁶ See *infra* notes 18–34 and accompanying text.

¹⁷ See *infra* notes 35–44 and accompanying text.

¹⁸ U.S. CONST. amend. I.

¹⁹ See R. George Wright, *What Counts As “Speech” in the First Place?: Determining the Scope of the Free Speech Clause*, 37 PEPP. L. REV. 1217, 1218 (2010). At least one scholar argues that the search for a “set of words that are both a precise equivalent to the meaning of ‘speech’ in our sense, and also easy to apply judicially” is futile. See *id.* at 1223. When faced with cases that demonstrate the overlap between speech and conduct, some courts simply assume speech has occurred and avoid addressing the constitutional question altogether. See *id.* at 1227.

²⁰ *McCutcheon v. FEC*, 134 S. Ct. 1434, 1462 (2014) (Thomas, J., concurring) (“Political speech is ‘the primary objective of First Amendment protection’ and ‘the lifeblood of a self-governing people.’” (quoting *FEC v. Colo. Republican Fed. Campaign Comm.*, 533 U.S. 431, 465–66 (2001) (Thomas, J., dissenting))); *United States v. Alvarez*, 132 S. Ct. 2537, 2544 (2012) (delineating unprotected categories of speech as incitement, obscenity, defamation, speech integral to criminal conduct, “fighting words”, child pornography, fraud, true threats, and “speech presenting some grave and imminent threat the government has the power to prevent”); *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n*, 447 U.S. 557, 561 (1980) (defining commercial speech as “expression related solely to the economic interests of the speaker and its audience”).

²¹ See Robert A. Sedler, *The “Law of the First Amendment” Revisited*, 58 WAYNE L. REV. 1003, 1009–10 (2013); Martha Swartz, *Physician-Patient Communication and the First Amendment After Sorrell*, 17 MICH. ST. U.J. MED. & L. 101, 105 (2012). Political speech receives the highest amount of protection under the First Amendment: strict scrutiny. See Swartz, *supra*, at 101, 105. When applying strict scrutiny, courts will uphold a regulation only if it is “necessary to serve a compelling state interest” and narrowly drawn to achieve that end. Jennifer L. Pomeranz, *Compelled Speech under the Commercial Speech Doctrine: The Case of Menu Label Laws*, 12 J. HEALTH CARE L. & POL’Y 159,

issue—and therefore which standard of review to use—is likely to determine the outcome a case.²²

Although it is well established that states have authority to regulate the professions, it remains an open question as to which constitutional standard courts should apply when determining whether a regulation of professional speech is valid.²³ Until recently, courts have treated professional speech as

169–70 (2009); see *McCullen v. Coakley*, 134 S. Ct. 2518, 2530 (2014) (explaining that to satisfy strict scrutiny, a regulation “must be the least restrictive means of achieving a compelling state interest”); *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (explaining that to pass strict scrutiny, the regulation in question must be “justified by a compelling government interest” and “narrowly drawn to serve that interest”).

Commercial speech is understood as speech that involves the exchange of goods or services for a profit and is either subject to “intermediate scrutiny” or rational basis review. See Victor Brudney, *The First Amendment and Commercial Speech*, 53 B.C. L. REV. 1153, 1154–61 (2012) (providing a definition of commercial speech that includes “narrow” commercial speech and “enriched” commercial speech); Sedler, *supra*, at 1052–53 (2013); Swartz, *supra*, at 105–06. To survive intermediate scrutiny a state must show that the regulation “directly advances” a “substantial” government interest and that the regulation is narrowly tailored to achieve that interest. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2674 (2011); *Cent. Hudson*, 447 U.S. at 566. To survive rational basis review, the regulation must be “rationally related” to a “legitimate” government interest. See *City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432, 440 (1985).

Unprotected speech is outside the bounds of the First Amendment and includes unlawful verbal acts, obscenity, child pornography, and government speech. Sedler, *supra*, at 1009–10. Criminal acts such as bribery or perjury are not protected by the First Amendment. *Id.* at 1010. This concept of unprotected speech, however, only applies to activity that is “otherwise unlawful and does not involve the expression of an idea or the discussion of matters of public interest.” *Id.* at 1012. The Court has held that the First Amendment does not allow the government to enact viewpoint-based regulations simply by calling them regulations of unprotected speech. See *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384–90 (1992); see also Sedler, *supra*, at 1010 (proposing that the safe-harbor of unprotected “verbal acts” should not be available to the government for regulating harmful expression that is not otherwise unlawful); Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, “Situation-Altering Utterances,” and the Uncharted Zones*, 90 CORNELL L. REV. 1277, 1310–11 (2004–05) (arguing that courts should subject content-based speech restrictions to “serious First Amendment analysis” instead of “dodg[ing] this analysis by simply relabeling the speech as ‘conduct’”).

²² See *Alvarez*, 132 S. Ct. at 2552 (explaining that strict scrutiny implies “near-automatic condemnation” and rational basis review implies “near automatic approval” of the regulation at issue). But see Sedler, *supra* note 21, at 1030–31 (arguing that the standard of review has limited analytical significance in First Amendment law because the Court’s application of the relevant First Amendment principle, doctrine, or precedent, such as the content neutrality principle, to the facts of the instant case controls the outcome).

²³ *Wollschlaeger III*, 760 F.3d at 1217; see *Barsky v. Bd. of Regents*, 347 U.S. 442, 449 (1954) (holding that it is elemental that a state has power to establish and enforce standards of conduct which extends to regulating the health professions); *Nat’l Ass’n for the Advancement of Psychoanalysis*, 228 F.3d at 1054 (holding in part that a state’s police power allows it to regulate and license professions within the state “especially when public health concerns are affected”); Swartz, *supra* note 21, at 110; *supra* note 7 and accompanying text (describing that the First Amendment may be implicated by regulations that impact the content of a professional’s speech). There is currently a circuit split regarding the appropriate standard of review for regulations of professional speech. See Michael Scott Leonard, ‘*Conversion Therapists’ Seek to Stay N.J. Ban Pending Supreme Court Appeal*, WESTLAW J. HEALTH

commercial speech, applying either intermediate scrutiny or rational basis review.²⁴ Regulations on physicians' speech, in turn, have been subjected to the same level of scrutiny as regulations on commercial speech.²⁵

When speech involves conduct or when speech is considered conduct in and of itself, it is difficult to know whether to apply First Amendment analysis and protections.²⁶ Conduct generally receives no protection under the First Amendment's right to free speech.²⁷ Expressive conduct provides a major exception to this general rule; expressive conduct resembles speech and does receive some First Amendment protection.²⁸ Conversely, some activity that literally involves speech, known as "speech as conduct," loses its First Amendment protections because it is considered conduct.²⁹

The conduct-speech distinction is particularly influential when considering regulations of professional speech because it gives a framework for determining whether or not the activity should receive First Amendment protec-

L., Oct. 1, 2014, available at 2014 WL 4851992 (explaining that some courts apply intermediate scrutiny when reviewing laws that limit professional speech while others apply rational basis review).

²⁴ See *King v. Governor of N.J.*, 767 F.3d 216, 234 (3d Cir. 2014) (reasoning that because "commercial and professional speech share important qualities," intermediate scrutiny is the appropriate standard to use when analyzing whether a regulation of professional speech infringes a professional's First Amendment right to free speech); Swartz, *supra* note 21, at 105–06, 110 ("[C]ourts generally have treated professional communication during the provision of professional services as commercial speech, affording it less protection than that afforded to political speech."). The *King* court found it persuasive that both commercial speech and professional speech were valuable because of their "informational function" and both occurred in industries traditionally subject to government regulation. See 767 F.3d at 234.

²⁵ See Swartz, *supra* note 21, at 113.

²⁶ Volokh, *supra* note 21, at 1278–81 (describing situations in which the line between speech and conduct become blurred because of harm that stems from the speech); see also Edward J. Eberle, *The Architecture of First Amendment Free Speech*, 2011 MICH. ST. L. REV. 1191, 1216 (2011) ("The difficult questions of Free Speech involve behavior with elements of both communicative and non-communicative qualities."); Richard A. Seid, *A Requiem for O'Brien: On the Nature of Symbolic Speech*, 23 CUMB. L. REV. 563, 564 (1993) (explaining that the relationship between First Amendment and conduct that occurs with speech is complex). The Court has never proposed a "fully satisfactory" test for defining the boundary between speech and non-communicative conduct. Charles W. "Rocky" Rhodes, *The First Amendment Structure for Speakers and Speech*, 44 SETON HALL L. REV. 395, 429 (2014).

²⁷ See Kristie LaSalle, *The Other 99% of the Expressive Conduct Doctrine: The Occupy Wall Street Movement and the Importance of Recognizing the Contribution of Conduct to Speech*, 18 TEX. J. C.L. & C.R. 1, 13–14 (2012) (describing that the government's police power traditionally allows it to regulate the conduct of citizens, except for actions such as "expressive conduct" which are deserving of First Amendment protections).

²⁸ See *id.* But see *United States v. O'Brien*, 391 U.S. 367, 376 (1968) ("We cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea."). The Court has never proposed a "fully satisfactory" test for defining the boundary between speech and non-communicative conduct. Rhodes, *supra* note 26, at 429.

²⁹ Volokh, *supra* note 21, at 1281.

tions.³⁰ There are three categories of activity by professionals that fall along the speech-conduct continuum: (1) actual conduct; (2) professional speech; and (3) protected speech.³¹ Actual conduct, such as administering medicine to a patient, is outside the purview of the First Amendment and may be regulated by the government.³² Protected speech, such as a published article written by a doctor on a topic of health, may not be licensed or regulated by the government.³³ There is disagreement, however, about whether or not professional speech, such as a physician's recommendation to a patient to make a lifestyle change such as eating less red meat, should be subject to government regulation as conduct or protected under the First Amendment as speech.³⁴

B. From the Florida Legislature to the Courtroom

Four days after Governor Scott signed the Act into law, healthcare practitioners filed a 42 U.S.C. § 1983 action seeking the Act's repeal.³⁵ In *Wollschlaeger I*, practitioners challenged the Act on the basis that it violated their First and Fourteenth Amendment rights.³⁶ The State defended the Act as di-

³⁰ See Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885, 896–97 (2000) (explaining how the conduct-speech distinction guides First Amendment analysis of professional speech). *But see* Volokh, *supra* note 21, at 1346 (arguing that the "conduct-speech" distinction is "more misleading than helpful" when determining the appropriate First Amendment standard of review for government regulation of professional speech).

³¹ Kry, *supra* note 30, at 896–97 (listing the three categories of professional activity and their treatment under the First Amendment).

³² *Id.* at 896 (noting that actual conduct does not receive First Amendment protections because it is nonexpressive).

³³ *Pickup v. Brown*, 740 F.3d 1208, 1227 (9th Cir. 2013) ("[W]here a professional is engaged in a public dialogue, First Amendment protection is at its greatest."); Kry, *supra* note 30, at 896–97.

³⁴ See *King*, 767 F.3d at 224–25 (ruling that speech used as part of mental health treatment is speech, not conduct, and thus subject to a First Amendment analysis); *Pickup*, 740 F.3d at 1228–29, 1232 (holding that the statute prohibiting licensed mental health providers from providing sexual orientation change efforts therapy to children did not violate provider's First Amendment rights); Kry, *supra* note 30, at 896 (suggesting that professional speech that occurs in the course of professional conduct should be subject to state regulation); Volokh, *supra* note 21, at 1346 (arguing that the purpose of professional speech regulations is to limit the speech and its message and not simply to regulate professional practice).

³⁵ *Wollschlaeger III*, 760 F.3d at 1205; see Complaint, *supra* note 6, at 4, 23. Section 1983 provides a remedy for citizens who have had their rights violated by a federal, state, or local government official by allowing them to bring a civil action. See 42 U.S.C. § 1983 (2012). The ensuing legal battle between the State of Florida and physicians practicing in Florida was quickly dubbed "Docs v. Glocks." See Editorial, *Doctor Gag Law Indefensible*, ST. PETERSBURG TIMES, Sept. 16, 2011, at A14.

³⁶ 814 F. Supp. 2d at 1373; Complaint, *supra* note 6, at 23–24 (arguing that the Act infringed upon plaintiffs' freedom to communicate with and counsel patients about topics such as limiting health risks associated with firearm ownership; failed to give plaintiffs adequate notice of the conduct prohibited by such Act; and curtailed plaintiffs' freedom to receive information about firearms as part of their own preventative medical care).

rected at preventing harassment and discrimination.³⁷ On June 2, 2012, the U.S. District Court for the Southern District of Florida granted practitioners' motion for summary judgment and permanently enjoined the State of Florida from enforcing the contested provisions of the Act.³⁸ The court held that the provisions violated the First Amendment rights of the practitioners.³⁹ The State appealed.⁴⁰

In 2014, in *Wollschlaeger III*, a panel from the Eleventh Circuit reversed the district court's grant of summary judgment.⁴¹ The majority held that "[t]he Act is a valid regulation of professional conduct" that has "only incidental effect on physicians' speech" and thus is not subject to First Amendment scrutiny.⁴² The dissent argued that the Act is a "gag order" that chills practitioners' speech, infringes upon their First Amendment rights, and should be subject to at least intermediate scrutiny.⁴³ On August 15, 2014, petitioners filed a petition for rehearing en banc, arguing that the majority erred in its holding that the speech at issue was professional conduct and thus not subject to protection under the First Amendment.⁴⁴

³⁷ *Wollschlaeger I*, 814 F. Supp. 2d at 1372. The State also argued that the Act violated residents' Second Amendment rights. *Id.* The district court rejected the State's contention that this case concerned a Second Amendment issue because the statute in question did not prevent Florida residents from owning or using firearms. *Id.* at 1374. Although both supporters and opponents of the Act call attention to the Second Amendment, both scholars and the court understand that the Second Amendment is "analytically irrelevant" to the discussion of the Act's constitutionality. *See id.*; Hethcoat, *supra* note 4, at 10 (arguing that discussions of the Second Amendment have been "mostly symbolic" because Florida has not done anything to infringe Second Amendment rights); Paul Sherman & Robert McNamara, Op-Ed, *Censorship in Your Doctor's Office*, N.Y. TIMES, Aug. 1, 2014, at A17 (opining that the *Wollschlaeger III* ruling was, at most, a symbolic victory for gun rights), available at <http://www.nytimes.com/2014/08/02/opinion/censorship-in-your-doctors-office.html>, archived at <http://perma.cc/MLJ9-JMWH>.

³⁸ *Wollschlaeger II*, 880 F. Supp. 2d at 1270. This ruling followed one from September 14, 2011 in which the district court granted practitioners' motion for preliminary injunction. *See Wollschlaeger I*, 814 F. Supp. 2d at 1384.

³⁹ *Wollschlaeger II*, 880 F. Supp. 2d at 1261 (holding the provisions imposed a content-based restriction of practitioners' speech about firearms). The district court also held that the four challenged provisions of the Act were void for vagueness. *Id.* at 1268. At issue also was the question of whether or not the practitioners had standing to sue. *Id.* at 1257. The district court held that the practitioners had standing. *Id.* at 1259.

⁴⁰ *See Wollschlaeger III*, 760 F.3d at 1203. The State challenged the following holdings: justiciability of plaintiffs' claims, determination of the challenged provisions to be content-based speech restriction and not regulation of professional conduct, and unconstitutional vagueness of the challenged provisions. *See id.* at 1207.

⁴¹ *Id.* at 1203, 1230. This decision also vacated the permanent injunction granted two years earlier. *See id.*

⁴² *Id.* at 1217; *see LaSalle, supra* note 27, at 13–14 (stating that under its police power, the government may regulate conduct).

⁴³ *Wollschlaeger III*, 760 F.3d at 1230 (Wilson, J., dissenting).

⁴⁴ Petition For Rehearing En Banc at 3–4, *Wollschlaeger III*, 760 F.3d 1195) (No. 12-14009) (asserting that "the holding [from *Wollschlaeger III*] that the state can regulate speech by recharacterizing it as 'conduct' is contrary to Supreme Court precedent"); Brief of the American Bar Association

II. GETTING TO MAYBE: THE *WOLLSCHLAEGER III* MAJORITY AND DISSENT'S DIFFERING INTERPRETATIONS OF EXISTING PRECEDENT

This part discusses the U.S. Court of Appeals for the Eleventh Circuit's holding and the dissent's reasoning in *Wollschlaeger III*.⁴⁵ In particular, the section also discusses two cases: first, the 1985 U.S. Supreme Court decision in *Lowe v. SEC* and second, the 2013 U.S. Court of Appeals for the Ninth Circuit decision in *Pickup v. Brown*.⁴⁶ Both of these cases are fundamental to the reasoning in the majority and dissenting opinions in *Wollschlaeger III*.⁴⁷ Section A discusses the majority's holding and the dissent's reasoning in *Wollschlaeger III*.⁴⁸ Section B covers the *Wollschlaeger III* court's application of precedent to the Firearm Owners' Privacy Act.⁴⁹

A. Majority Holding and Dissent's Reasoning

The majority in *Wollschlaeger III* held that the Act is a "valid regulation of professional conduct" that protects patient privacy and limits abuse of the physician-patient relationship.⁵⁰ Of particular importance to the majority in determining whether the physician behavior at issue is protected speech under the First Amendment was the concept of "personal nexus."⁵¹ The majority held that when a physician speaks to a patient within the confines of a personal nexus, he or she can be said to be taking part in professional conduct that may be regulated by the state.⁵² The majority also held that the Act placed only an incidental burden on physician speech because the state is free to regulate

as Amicus Curiae in Support of Petition for Rehearing En Banc of Plaintiffs-Appellees, Dr. Bernd Wollschlaeger, et. al. at 5, *Wollschlaeger III*, 760 F.3d 1195 (No. 12-14009) (urging the Eleventh Circuit to grant an en banc hearing to reverse the *Wollschlaeger III* decision that the ABA considers to not follow existing Supreme Court precedent).

⁴⁵ See *infra* notes 50–79 and accompanying text.

⁴⁶ See *infra* notes 50–79 and accompanying text.

⁴⁷ See *infra* notes 50–79 and accompanying text.

⁴⁸ See *infra* notes 50–59 and accompanying text.

⁴⁹ See *infra* notes 60–79 and accompanying text.

⁵⁰ 760 F.3d 1195, 1203, 1217 (11th Cir. 2014) (allowing ban on physicians' speech about firearms during the course of professional conduct because such speech does not implicate the First Amendment).

⁵¹ See *id.* at 1218 (citing *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring)) (describing that a "personal nexus" between a physician and patient exists when a physician provides health care services in which he or she exercises judgment on behalf of a patient with whom he or she is familiar).

⁵² See *id.* at 1218–19 (explaining the *Lowe* reasoning that communications within a personal nexus constitute conduct that may be regulated by the state). This is in contrast to when a physician speaks publically, such as at a medical conference, and his or her speech is protected to the full extent possible under the First Amendment. See *id.* at 1218.

medical practice, which often necessarily involves physician speech.⁵³ To the majority, the Act simply codifies that “the practice of good medicine does not require interrogation about irrelevant, private matters,” such as firearm ownership.⁵⁴ The majority conceptualizes the Act as just another regulation doctors must consider when providing patient care to avoid a malpractice suit or discipline by the state.⁵⁵

The dissent viewed the physicians’ behavior at issue as speech and argued that the Act is a content-, speaker-, and viewpoint-based restriction of this speech that was passed to silence Florida doctors’ message about firearm safety.⁵⁶ The dissent argued that this regulation does not survive intermediate scrutiny.⁵⁷ The dissent also argued that the Act is not necessary to protect the rights Florida claims it was protecting in passing the law.⁵⁸ The dissent characterized the majority opinion as modifying the level of scrutiny that historically has been applied to content-based restrictions on the basis that the speech occurs in private within a professional relationship.⁵⁹

B. Precedent as Applied by the Wollschlaeger III Court

The majority in *Wollschlaeger III* interpreted precedent broadly to support labeling physicians’ speech as conduct that could be regulated by the state, whereas the dissent read both cases narrowly.⁶⁰ Despite reaching different con-

⁵³ See *id.* at 1203. The majority also notes that “for millennia” physicians have been subject to professional codes of conduct that define for the profession the standard of good practice of medicine. See *id.*

⁵⁴ See *id.*

⁵⁵ See *id.* at 1216–17. The majority notes that doctors are bound to provide patient care that is in accordance with the regulations within the state in which they practice. See *id.* The majority also emphasized that the Act does not alter doctors’ routine behavior of assessing whether or not a decision relevant to patient care constitutes malpractice. See *id.* at 1216.

⁵⁶ See *id.* at 1230–31, 38 (Wilson, J., dissenting) (“[T]he perceived problem with doctors’ truthful, non-misleading message regarding firearm safety was that it was working, so the message was silenced.”). The dissenting judge believes that physicians, despite the personal nexus with patients, have a First Amendment right to convey messages to their patients, about firearms or other topics. See *id.* at 1230.

⁵⁷ See *id.* at 1239 (suggesting that in lieu of a choice between conduct and speech, the appropriate choice for the court to make was between intermediate scrutiny and strict scrutiny, although the Act would fail under both standards).

⁵⁸ See *id.* at 1230–31 (articulating State’s contention that the law was passed to protect privacy rights of firearm owners, the right of firearm owners to be free from discrimination and harassment, and the right of firearm owners to access medical care); see also *supra* note 3 and accompanying text (describing Florida’s legislature’s motivation for passing the statute).

⁵⁹ See *Wollschlaeger III*, 760 F.3d at 1236–37; see also *United States v. Alvarez*, 132 S. Ct. 2537, 2543–44 (2012) (explaining that content-based restrictions on speech are presumed invalid); *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010) (stating that if a challenged regulation is related to expression, then a more demanding standard than that put forth in *O’Brien* is required).

⁶⁰ Compare *Wollschlaeger III*, 760 F.3d at 1217–20 (majority opinion) (using *Lowe* theory of personal nexus to support holding that speech that occurs within personal nexus is conduct that may

clusions about the behavior at issue, and subsequently the validity of the Act, both the majority and the dissent used Justice Byron White's concurring opinion in *Lowe* as a starting point for their analyses.⁶¹ In his concurring opinion, Justice White discussed the continuum of speech and where along this continuum speech may be regulated.⁶² The continuum ranges from speech that occurs wholly within a profession and may be regulated by the state to that which occurs outside of the profession, in other words publicly, and is protected by the First Amendment.⁶³ The distinguishing factor between the two kinds of speech for Justice White is the personal nexus between professional and client, within which speech by a professional can be construed as "incidental to the conduct of the profession."⁶⁴

The majority in *Wollschlaeger III* accepted Justice White's analysis, whereas the dissent interpreted the opinion more narrowly.⁶⁵ The majority in *Wollschlaeger III* adopted Justice White's analysis wholly and rested its analysis on this concept of "personal nexus" as begetting conduct that may be regulated by the state.⁶⁶ The dissent in *Wollschlaeger III*, on the other hand, interpreted *Lowe* as demonstrating that a law that regulates professional conduct and also burdens speech may only escape traditional First Amendment scrutiny when certain factors are met.⁶⁷ The dissent argued that the majority construed

be regulated freely by the state), and *Pickup v. Brown*, 740 F.3d 1208, 1228 (9th Cir. 2013) (ruling that challenged law was a regulation of professional conduct based on the idea of personal nexus from *Lowe*), with *Wollschlaeger III*, 760 F.3d at 1239 (Wilson, J., dissenting) (arguing that *Lowe* stands for the proposition that regulations of professional conduct that burden speech are free from First Amendment scrutiny only when certain factors are met).

⁶¹ See *Wollschlaeger III*, 760 F.3d at 1217–18 (majority opinion); *id.* at 1239–40, 1250 (Wilson, J., dissenting). In *Lowe*, the Supreme Court considered whether the petitioners, who were not registered as investment advisers, could be enjoined from publishing investment advice and commentary in securities newsletters. See 472 U.S. at 183.

⁶² See *Lowe*, 472 U.S. at 232 (White, J., concurring) (discussing the location of the tipping point between regulating a profession and limiting free speech of professionals).

⁶³ See *id.* (suggesting that speech that occurs within a profession is part of the practice of that profession and as such may be regulated by the state when it issues licenses to people to practice that profession).

⁶⁴ See *id.* (arguing that absence of a personal nexus between professional and client demonstrates that the professional is not currently engaging in professional speech, thus state regulation becomes a restriction on a citizen's ability to speak, which implicates the First Amendment, instead of a restriction on how a state-licensed professional may conduct him or herself with a client).

⁶⁵ See 760 F.3d at 1218 (majority opinion) (quoting at length from Justice White's concurrence in *Lowe*); *id.* at 1240 (Wilson, J., dissenting) ("*Lowe* established only that the existence of a professional relationship is a *necessary* condition if a law burdening speech is to evade First Amendment scrutiny. Nothing in *Lowe* implied that such a condition was *sufficient* to support this conclusion.>").

⁶⁶ See *id.* at 1218–19 (majority opinion) (stating that the Act regulates physician speech "within the confines of the physician's examination room" where the personal nexus is strongest and that despite restrictions on physicians' ability to ask about fire ownership, the Act merely "defin[es] the practice of good medicine, in the context of the very private, physician-patient relationship").

⁶⁷ See *id.* at 1239 (Wilson, J., dissenting). The four factors that must be present, according to the dissent, in order to escape First Amendment scrutiny are: (1) the law is a licensing scheme for a pro-

Lowe too broadly and overemphasizes the personal nexus concept.⁶⁸ The dissent read *Lowe* to establish that the personal nexus between professional and client is necessary, but not, as the majority held, sufficient, to exempt the speech from First Amendment scrutiny.⁶⁹

Second, both the majority and dissent also used a discussion of professional speech found in *Pickup*, a 2013 decision by the Ninth Circuit, in which the court considered whether a legislature could avoid First Amendment scrutiny by classifying the speech in question as conduct.⁷⁰ To the *Wollschlaeger III* majority, doctors' speech about firearms is medical conduct and escapes First Amendment scrutiny just as the treatment in *Pickup* did.⁷¹ In particular, the majority uses *Pickup* as an example of another court applying Justice White's reasoning from *Lowe* to uphold a regulation of professional conduct that is not a licensing scheme.⁷² The majority calls attention to the reasoning from *Pickup* that doctors are often held liable for giving negligent medical advice.⁷³ As a state-regulated profession, doctors cannot argue that they have a First Amendment right to provide advice to patients that goes against the accepted standard of care.⁷⁴ As such, the *Wollschlaeger III* court used *Pickup* to conclude that there is a significant amount of speech regulation that is allowed within a professional relationship that would never be allowed outside of it.⁷⁵

The dissent highlighted that the Ninth Circuit in *Pickup* distinguished several types of professional speech: a professional's public speech, a professional's speech within a professional relationship with a client, and a profes-

fession; (2) the impact on speech, felt only by unlicensed practitioners, is incidental to the state's goal of regulating the profession; (3) the law is content-neutral; and (4) the speech of unlicensed individuals is not proscribed outside the confines of a professional-client relationship. *See id.*

⁶⁸ *See id.* at 1240 (noting the "faulty logic" behind the majority's reasoning that if a person who operates outside of a professional relationship has First Amendment protection, then a person who operates within a professional relationship has no First Amendment protection).

⁶⁹ *See id.*

⁷⁰ *See id.* at 1223–25 (majority opinion); *id.* at 1246–48 (Wilson, J., dissenting); *Pickup*, 740 F.3d at 1227–29. The challenged statute regulated what a healthcare provider could say to a patient, specifically prohibiting healthcare providers from engaging in therapy with a minor to attempt to alter the minor's sexual orientation. *Pickup*, 740 F.3d at 1215. The court upheld the statute as a valid regulation of professional conduct stating that the statute bans a form of treatment, which is conduct, and not physicians' ability to discuss, for example, the pros and cons of that treatment. *See id.* at 1229, 1231–32.

⁷¹ *Wollschlaeger III*, 760 F.3d at 1217 (majority opinion).

⁷² *See id.* at 1225.

⁷³ *Id.* at 1217.

⁷⁴ *See id.*; *Pickup*, 740 F.3d at 1228. The majority continues: "when professionals, by means of their state-issued licenses, form relationships with clients, the purpose of those relationships is to advance the welfare of the clients, rather than to contribute to public debate." *See Wollschlaeger III*, 760 F.3d at 1223; *Pickup*, 740 F.3d at 1229–29.

⁷⁵ *See Wollschlaeger III*, 760 F.3d at 1223.

sional's conduct that is carried out through speech.⁷⁶ The dissent disagreed with the majority's binary representation of First Amendment protection for speech within and without professional relationships.⁷⁷ To the *Wollschlaeger III* dissent, doctors' speech about firearms is speech about a topic related to the practice of medicine, if not simply public speech, and should be subject to at least intermediate scrutiny.⁷⁸ The dissent characterized the majority's holding in *Wollschlaeger III* as "lump[ing] all speech . . . into one, unprotected category" of speech that occurs within a professional relationship.⁷⁹

III. EN BANC HEARING NECESSARY TO PROTECT FIRST AMENDMENT RIGHTS OF PHYSICIANS

An en banc hearing should be granted by the U.S. Court of Appeals for the Eleventh Circuit to reverse its 2014 decision in *Wollschlaeger III*.⁸⁰ The en banc hearing is needed because the court mischaracterized the behavior in question as conduct and because of the consequences of the *Wollschlaeger III* decision on the First Amendment rights of professionals.⁸¹

The *Wollschlaeger III* court mischaracterized physician speech as conduct, which ignores precedent and creates a dangerous categorical exception to the First Amendment.⁸² The majority argued that a physician's inquiry about

⁷⁶ See *id.* at 1240 (Wilson, J., dissenting); *Pickup*, 740 F.3d at 1227–29. In *Pickup*, the speech was the functional equivalent of therapy, and thus fell into the third category, which receives the least amount of First Amendment protection in that it is not subject to scrutiny because professional conduct may be regulated by the state. See *Wollschlaeger III*, 760 F.3d at 1247–48; *Pickup*, 740 F.3d at 1230.

⁷⁷ See *Wollschlaeger III*, 760 F.3d at 1240.

⁷⁸ See *id.* at 1247–48, 1270.

⁷⁹ See *id.* at 1247 (arguing that the majority disregarded the nuances between public speech, which is subject to First Amendment scrutiny; speech about medically-related topics, also known as professional speech; and speech that is the "functional equivalent of a medical procedure," which may be regulated by the state as conduct).

⁸⁰ See *Wollschlaeger v. Governor of Fla. (Wollschlaeger III)*, 760 F.3d 1195, 1249 (11th Cir. 2014) (Wilson, J., dissenting) (warning of the consequences of the *Wollschlaeger III* decision); Petition For Rehearing En Banc, *supra* note 44, at 12 (explaining that the *Wollschlaeger III* decision wrongly creates a categorical exception to the First Amendment); *infra* notes 82–92 and accompanying text.

⁸¹ See 760 F.3d at 1237–38 (Wilson, J., dissenting); Petition For Rehearing En Banc, *supra* note 44, at 3–5; *infra* notes 93–97 and accompanying text.

⁸² See 760 F.3d at 1203 (majority opinion); *supra* notes 18–22 and accompanying text. The majority labels physician speech, which includes written and verbal communication, as conduct and avoids a discussion of whether or not the Firearm Owners' Privacy Act would pass constitutional muster as a regulation of speech. See *Wollschlaeger III*, 760 F.3d at 1203; see also Holder v. Humanitarian Law Project, 561 U.S. 1, 27–28 (2010) (rejecting government's argument that the Court should apply a more lenient standard of review to challenged law that prohibited legal counseling because it functioned as a regulation of conduct); *King v. Governor of N.J.*, 767 F.3d 216, 225–26 (3d Cir. 2014) (reasoning that the *Holder* Court's determination that legal counseling was speech was dispositive on issue of whether a physician's counseling was speech or conduct).

firearms is “the opening salvo in an attempt to treat any issues raised by the presence of firearms” and refused to distinguish between such physician speech and the resulting physician conduct (treatment).⁸³ Existing precedent suggests that the government may not escape First Amendment review of a regulation aimed at limited speech by arguing that the regulation applies to conduct only.⁸⁴ Analysis such as this that reduces First Amendment analysis to a “semantic exercise” has been rejected by the Supreme Court.⁸⁵ Most recently, in 2014, just months after the *Wollschlaeger III* decision, in *King v. Governor of New Jersey*, the U.S. Court of Appeals for the Third Circuit struck down such an argument when it held that a physician’s verbal communications do not become conduct when they are used as a vehicle for mental health treatment.⁸⁶ The court in *King* noted that defendants were unable to provide any binding precedent that characterized verbal communications as conduct based on its function.⁸⁷

The Eleventh Circuit’s acceptance of this semantic argument creates a dangerous categorical exception to First Amendment scrutiny.⁸⁸ To justify it’s labeling of physician speech as conduct, the majority relies heavily on Justice White’s concurrence in the 1985 U.S. Supreme Court decision *Lowe v. SEC*.⁸⁹ The majority reads *Lowe* broadly as holding that where a “personal nexus” exists, the physician is participating in professional conduct that may be regulated by the state.⁹⁰ Labeling physician speech as conduct opens it up to state regulation, which in *Wollschlaeger III* amounted to removing First Amendment

⁸³ See *Wollschlaeger III*, 760 F.3d at 1224 (“Although the Ninth Circuit chose to draw a bright line between the recommendation at issue in *Conant* and the therapy at issue in *Pickup*, we do not find such a line here . . .”).

⁸⁴ Petition For Rehearing En Banc, *supra* note 44, at 4, 5–9 (reviewing existing precedent both from Supreme Court and the Eleventh Circuit).

⁸⁵ *Id.* at 9 (“[T]he Supreme Court repeatedly has rejected an analysis that reduces the ‘First Amendment . . . to a simple semantic exercise . . .’” (citing *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 547 (2001)); see *Holder*, 561 U.S. at 26–28 (rejecting that the issue in the litigation was conduct, not speech, despite litigants portraying the statute in question as directed only at conduct).

⁸⁶ *King*, 767 F.3d at 225 (“[W]e see no reason here to reach the counter-intuitive conclusion that the verbal communications that occur during . . . counseling are ‘conduct.’”). Compare *Wollschlaeger III*, 760 F.3d at 1224 (“When a physician enters a patient’s firearm ownership status into the patient’s medical records . . . this is part and parcel with the physician’s treatment of the patient.”), with *King*, 767 F.3d at 229 (“Simply put, speech is speech, and it must be analyzed as such for the purposes of the First Amendment.”).

⁸⁷ *King*, 767 F.3d at 225.

⁸⁸ See Petition For Rehearing En Banc, *supra* note 44, at 12 (noting that the *Wollschlaeger III* decision creates a “broad new categorical exception to the First Amendment”); Brief of the American Bar Association as Amicus Curiae, *supra* note 44, at 5–6 (“The panel decision also upholds an impermissible restriction by carving out a new category of expression that is afforded no First Amendment protection . . .”).

⁸⁹ See *Wollschlaeger III*, 760 F.3d at 1218; *supra* notes 50–52 and accompanying text (discussing the use of the *Lowe* decision by the *Wollschlaeger III* majority).

⁹⁰ See *Wollschlaeger III*, 760 F.3d at 1218.

protections from all physician speech about firearms that was not relevant to a patient's care.⁹¹ The Supreme Court generally rejects such attempts to add categorical exceptions to the First Amendment.⁹²

If the *Wollschlaeger III* decision stands and is not reviewed en banc, it will invite more regulation of physician and professional speech.⁹³ The categorical exception created by *Wollschlaeger III* allows Florida to ban speech about *any* topic so long as it says it is irrelevant to the practice of medicine.⁹⁴ Under this reasoning, First Amendment scrutiny would not apply to a regulation that prohibited physician speech within the context of the physician-patient relationship on such topics as the Affordable Care Act, Medicare, Medicaid, or even abortion.⁹⁵ The door that the Eleventh Circuit has opened in *Wollschlaeger III*, which allows Florida to pass these types of regulations, must be closed before the speech of all professionals is under attack.⁹⁶ To

⁹¹ See Petition For Rehearing En Banc, *supra* note 44, at 12–13 (“It is particularly dangerous that the majority exempts doctor-patient communications from First Amendment scrutiny . . .”); Brief of the American Bar Association as Amicus Curiae, *supra* note 44, at 10 (“The panel decision upholds this speech restriction by carving out a new category of speech that is afforded no First Amendment protection, namely speech between regulated professionals and their patients or clients that does not meet a vague legislatively-set ‘relevance’ test.”).

⁹² See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2734 (2011) (explaining that the Court does not have “freewheeling authority to declare new categories of speech outside the scope of the First Amendment” (quoting *United States v. Stevens*, 559 U.S. 460, 472 (2010))). *But see* Ronald K.L. Collins, Symposium, *Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 417–22 (2013) (listing forty-eight categories of unprotected expression).

⁹³ See 760 F.3d at 1249 (Wilson, J., dissenting) (warning that after this decision, *all* private speech from professionals to patients is subject to regulation by the state and need not meet First Amendment scrutiny); *First Amendment—Eleventh Circuit Upholds Florida Law Banning Doctors from Inquiring About Patients’ Gun Ownership When Such Inquiry is Irrelevant to Medical Care—Wollschlaeger v. Governor of Florida*, 760 F.3d 1195 (11th Cir. 2014), 128 HARV. L. REV. 1045, 1045, 1049 [hereinafter *Eleventh Circuit Upholds Florida Law*] (arguing that if the *Wollschlaeger III* decision is followed it would fundamentally alter both American citizenship and the rights afforded to doctors as professionals).

⁹⁴ See 760 F.3d at 1250 (“If States can declare, without scrutiny, that questioning about firearms is bad medicine, then States can declare, without scrutiny, that discussions about any topic are bad medicine that can be eliminated from the doctor-patient relationship.”); *Eleventh Circuit Upholds Florida Law*, *supra* note 93, at 1054 (“*Wollschlaeger* handed the state a ‘new and powerful tool to silence expression’—one far more powerful than that constructed in *Pickup* itself . . .” (quoting *Pickup v. Brown*, 740 F.3d 1208, 1216 (9th Cir. 2013) (O’Scannlain, J., dissenting from denial of rehearing en banc))).

⁹⁵ See *Wollschlaeger III*, 760 F.3d at 1238 (lamenting similar laws to the Act that could be passed to further restrict physician speech to patients); Petition for Rehearing En Banc, *supra* note 44 at 14 (“The majority opinion opens the door for interest groups to push legislation to silence professional advice they find inconvenient.”).

⁹⁶ See *Wollschlaeger III*, 760 F.3d at 1238, 1250 (expressing concern over the leeway the *Wollschlaeger III* decision gives state governments to proscribe speech of physicians on contentious topics); Brief of the American Bar Association as Amicus Curiae, *supra* note 44, at 1–2 (“By extension, the precedential force of the panel decision could reach speech by other regulated professionals (such as attorneys), to limit counseling their clients unless the discussion meets a vague ‘relevance’ test set

avoid this situation, the Eleventh Circuit must grant an en banc hearing and reverse its decision in *Wollschlaeger III*.⁹⁷

CONCLUSION

Doctors have a First Amendment right to communicate with their patients. Although a state may regulate the professions generally, those regulations need to be subject to First Amendment scrutiny in order to protect the First Amendment rights of physicians and other professionals. Physician speech may not simply be labeled conduct in order to evade First Amendment scrutiny. The Eleventh Circuit should grant an en banc hearing in *Wollschlaeger III* to protect the First Amendment rights of physicians.

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by government officials.”); *Eleventh Circuit Upholds Florida Law*, *supra* note 93, at 1054 (declaring that doctors are only the beginning of the dispute over professional regulation and First Amendment rights of professionals).

⁹⁷ See Petition For Rehearing En Banc, *supra* note 44, at 15 (requesting that the Eleventh Circuit hold an en banc hearing and affirm the previous injunction of the Act); Brief of the American Bar Association as Amicus Curiae, *supra* note 44, at 15 (asking the Eleventh Circuit to hold an en banc hearing to reverse the *Wollschlaeger III* decision and conform the panel opinion to the existing precedent).