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We Need Professional Help: Advocating for a Consistent Standard of Review When Regulations of Professional Speech Implicate the First Amendment

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WE NEED PROFESSIONAL HELP: ADVOCATING FOR A CONSISTENT STANDARD OF REVIEW WHEN REGULATIONS OF PROFESSIONAL SPEECH IMPLICATE THE FIRST AMENDMENT

Abstract: The circuits are split as to what level of scrutiny should be applied to challenged regulations of professional speech. In the past two years, the Third and Fourth Circuit Courts of Appeals have applied intermediate scrutiny to regulations of professional speech, whereas the Ninth Circuit Court of Appeals has applied rational basis review. The Eleventh Circuit Court of Appeals first applied rational basis review, but then changed its approach in 2015 and applied intermediate scrutiny. This Note argues for the adoption of intermediate scrutiny as the appropriate standard with which to analyze regulations of professional speech. Intermediate scrutiny is the only standard that effectively balances the government's interests with the First Amendment speech rights of professionals. In doing so, this Note explores the genesis of the professional speech doctrine as well as the implications of withholding First Amendment protections from professional speech.

INTRODUCTION

On August 19, 2013, Governor Chris Christie of New Jersey signed a bill that prohibited licensed therapists in the state of New Jersey from using sexual orientation change efforts, also known as conversion therapy, to treat minors.[1] Conversion therapy seeks to eliminate or reduce same-sex attractions in homosexual people and often involves prayer and psychological counsel-

[1] *See* N.J. STAT. §§ 45:1-54 to -55 (2015); *Christie Signs Bill Banning Gay Conversion Therapy in New Jersey*, CBS NEWS (Aug. 19, 2013, 2:02 PM), http://www.cbsnews.com/news/christie-signs-bill-banning-gay-conversion-therapy-in-new-jersey/ [http://perma.cc/79L8-P9GM] [hereinafter *Christie Signs Bill*]. New Jersey was the second state to pass such a bill after California passed a similar one that became effective in January of 2013. *Christie Signs Bill*, *supra*; *see* CAL. BUS. & PROF. CODE § 865 (West 2015); N.J. STAT. §§ 45:1-54 to -55; King v. Christie, 981 F. Supp. 2d 296, 302 (D.N.J. 2013), *aff'd sub nom.* King v. Governor of N.J., 767 F.3d 216, 246 (3d Cir. 2014), *cert. denied*, 135 S. Ct. 2048 (2015); Geoffrey A. Fowler, *California Bill Bans Gay-Conversion Therapy*, WALL ST. J. (Aug. 30, 2012, 10:32 PM), http://www.wsj.com/articles/SB10000872396390444914904577622153696305504 (reporting on the California legislature passing the first law in the United States that banned conversion therapy with minors).

ing.[2] In the signing note, Governor Christie reflected that "[g]overnment should tread carefully into this area and I do so here reluctantly."[3]

California and the District of Columbia have passed similar laws prohibiting the use of conversion therapy with minors.[4] Recently, however, the Oklahoma legislature considered a bill that would shield sexual orientation change therapy from state intervention.[5] Although the American Psychiatric Association declassified homosexuality as a mental disorder more than forty years ago, conversion therapy still has supporters in conservative and religious communities.[6]

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[2] *See* Barry S. Anton, *Proceedings of the American Psychological Association for the Legislative Year 2009*, 65 AM. PSYCHOL. 385, 464 n.1 (2010) (defining "sexual orientation change efforts" as referring to any attempt at changing sexual orientation, including behavioral or psychoanalytic techniques and medical or religious approaches); Associated Press, *Oklahoma: Bill Intended to Protect 'Conversion Therapy' Advances*, N.Y. TIMES (Feb. 24, 2015), http://nyti.ms/1A4vUcZ [https://perma.cc/PR9M-XNA6] [hereinafter *Bill Intended to Protect Conversion Therapy*] (describing conversion therapy as involving a range of practices, including prayer or psychological counseling, aimed at reducing or removing same-sex attraction). Advocates for children's rights and gay rights consider conversion therapy a form of child abuse. *See* AM. PSYCHOLOGICAL ASS'N, REPORT OF THE TASK FORCE ON APPROPRIATE THERAPEUTIC RESPONSES TO SEXUAL ORIENTATION 86 (2009), https://www.apa.org/pi/lgbt/resources/therapeutic-response.pdf [https://perma.cc/AA4Z-LLGC] (noting concerns with providing sexual orientation change therapy to minors, in particular the serious ethical and human rights concerns about involuntary treatment); *Christie Signs Bill*, *supra* note 1 (reporting that the Assemblyman who sponsored the bill in the New Jersey Legislature described conversion therapy as "an insidious form of child abuse").

[3] N.J. Governor Chris Christie, Governor's Statement upon Signing Assembly Bill No. 3371 (Aug. 19, 2013), http://www.state.nj.us/governor/news/news/552013/pdf/20130819a_A3371.pdf [http://perma.cc/CP7U-U5VH]; *see Christie Signs Bill*, *supra* note 1 (quoting Governor Christie's language from the signing note that accompanied his approval of the legislation). New Jersey has stood strongly behind the bill and has successfully defended it against appeal. *See King*, 981 F. Supp. 2d at 302–03 (recounting initial challenge to bill by licensed therapists and holding that bill was constitutional).

[4] *See* CAL. BUS. & PROF. CODE § 865 (prohibiting conversion therapy with minors); D.C. CODE § 7-1231.14a (2015) (same); Aaron C. Davis, *D.C. Bans Gay Conversion Therapy of Minors*, WASH. POST (Dec. 2, 2014), http://www.washingtonpost.com/local/dc-politics/dc-bans-gay-conversion-therapy/2014/12/02/58e6aae4-7a67-11e4-84d4-7c896b90abdc_story.html [http://perma.cc/7ZPN-LYHX].

[5] *See* H.B. 1598, 55th Leg., 1st Sess. (Okla. 2015) (making it expressly legal for a mental health provider to use sexual orientation change efforts on minors); *Bill Intended to Protect Conversion Therapy*, *supra* note 2. Republican Representative Sally Kern, who authored the bill, contends that it was about protecting the rights of parents and therapists. *See Bill Intended to Protect Conversion Therapy*, *supra* note 2 (reporting that an Oklahoma bill approved by the Children, Youth and Family Services Committee would protect the practice of conversion therapy and allow parents access to it for minors). The bill died without coming to a House vote. *See* Stephen Peters, *Okla. Pro-Conversion "Therapy" Bill Dies on State House Floor*, HUM. RIGHTS CAMPAIGN BLOG (Mar. 12, 2015), http://www.hrc.org/blog/entry/oklahoma-pro-conversion-therapy-bill-dies-on-state-house-floor [http://perma.cc/AS9A-WBPM].

[6] *See* John J. Conger, *Proceedings of the American Psychological Association, Incorporated, for the Year 1974: Minutes of the Annual Meeting of the Council of Representatives*, 30 AM. PSYCHOL. 620, 620–51 (1975) (supporting the American Psychiatric Association's removal of homosexuality from its official list of mental disorders); *see also* Anton, *supra* note 2, at 464 n.1 (ex-

The national debate over sexual orientation change therapy highlights a difficult legal question: should legislatures be able to curtail the speech of therapists, who are licensed professionals, on a single topic in order to protect minors from treatment that the medical community does not support?[7] Some believe that legislatures should have the power to limit speech in this way.[8] Would the answer change, however, if the question was instead: should legislatures be able to curtail the speech of doctors, who are licensed professionals, on a single topic in order to protect minors from preventative medicine that the medical community supports?[9]

The Florida legislature did not think so.[10] On June 2, 2011, Florida Governor Rick Scott signed into law a bill that restricted licensed health care practitioners' ability to ask patients questions about firearm ownership.[11] Supporters of the law do not believe gun ownership is a public health issue

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plaining the American Psychological Association's position on homosexuality and noting that conversion therapy is supported by faith-based groups).

[7] *See* Lowe v. SEC, 472 U.S. 181, 228 (1985) (White, J., concurring) (concluding that government's prerogative to regulate occupations exists even when an occupation involves speech); Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1054 (9th Cir. 2000) (explaining that a state's police power allows it to regulate and license professions within the state); Diahann DaSilva, Note, *Playing a 'Labeling Game': Classifying Expression as Conduct as a Means of Circumventing First Amendment Analysis*, 56 B.C. L. REV. 767, 796 (2015) (arguing that speech of therapists should receive First Amendment protection and that a ban on conversion therapy would withstand such an inquiry); *Christie Signs Bill*, *supra* note 1 (describing the passage of a law banning conversion therapy in New Jersey and the Governor's reluctance to regulate on that topic).

[8] *See* Jacob M. Victor, *Ending 'Gay Conversion' for Good*, N.Y. TIMES (Feb. 12, 2014), http://nyti.ms/1g8SGKS [http://perma.cc/K62U-2D2E] (arguing that conversion therapy should be outlawed through laws that prevent deceptive practices).

[9] *Cf.* Wollschlaeger v. Governor of Fla. (*Wollschlaeger III*), 797 F.3d 859, 869 (11th Cir. 2015) (addressing question of whether a ban on physician speech about firearms was constitutional); Editorial, *Doctor Gag Law Indefensible*, ST. PETERSBURG TIMES (Sept. 15, 2011, 7:19 PM), http://www.tampabay.com/opinion/editorials/doctor-gag-law-indefensible/1191767 [http://perma.cc/B3NF-4UJQ] (arguing that Florida should not be permitted to prevent doctors from discussing gun ownership with patients).

[10] *See Wollschlaeger III*, 797 F.3d at 869–70 (recounting Florida's passage of a law that restricts what Florida health care professionals may say to their patients about firearms).

[11] Wollschlaeger v. Farmer (*Wollschlaeger I*), 814 F. Supp. 2d 1367, 1371 (S.D. Fla. 2011), (granting plaintiff's motion for a preliminary injunction). The law created Florida statute section 790.338, entitled "Medical privacy concerning firearms; prohibitions; penalties; exceptions." *See* FLA. STAT. § 381.026 (2012); *id.* § 790.338 (2012); *Wollschlaeger I*, 814 F. Supp. 2d at 1371. The law also amended FLA. STAT. § 456.072, entitled "Grounds for discipline; penalties; enforcement." *See* FLA. STAT. § 456.072; *Wollschlaeger III*, 797 F.3d at 869 (explaining the codification of the Florida law). The law 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. FLA. STAT. § 790.338; *see Wollschlaeger I*, 814 F. Supp. 2d at 1371.

and stand behind the law as a protection of patient privacy.[12] The medical community, however, considers gun ownership to be an important public health issue that should be addressed as part of routine preventative care.[13]

Regardless of how one would answer these questions, one thing is clear: these laws implicate the First Amendment rights of professionals because they constrain "professional speech," or what professionals may say to clients in the course of their provision of individual services.[14] Addressing this First Amendment issue can be difficult because topics that implicate professional speech rights, such as conversion therapy and gun ownership, are often fraught with partisan rhetoric and ideals that cloud the debate.[15] Yet states must find a way to balance the right of professionals to advise their clients with the interest the state has in protecting its citizens and regulating professional industries.[16]

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[12] 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) (explaining that supporters and opponents of the law disagree on whether gun ownership is a public health issue).

[13] *See* Christine S. Moyer, *Public Health Approach: Physicians Aim to Prevent Gun Violence*, AM. MED. NEWS (Sept. 10, 2012), http://www.amednews.com/article/20120910/health/309109949/2/ [http://perma.cc/NBR4-N2TV] (describing the medical community's efforts to reduce injuries caused by firearms through preventative care). The American Medical Association ("AMA") encourages health practitioners to ask parents about firearm ownership as part of helping parents to childproof their home. *See Wollschlaeger III*, 797 F.3d at 901 (Wilson, J., dissenting) (recounting AMA policy that encourages members to ask patients about firearms in the home as part of ensuring the home is a safe place for children).

[14] *See Lowe*, 472 U.S. at 232 (White, J., concurring) (describing continuum of professional speech, which implicates the First Amendment, and professional conduct, which does not); *Wollschlaeger III*, 797 F.3d at 883–85 (providing a framework for determining whether a challenged professional regulation implicates the First Amendment).

[15] *See* Janet L. Dolgin, *Physician Speech and State Control: Furthering Partisan Interests at the Expense of Good Health*, 48 NEW ENG. L. REV. 293, 302 & n.59, 342 (2014) (explaining that laws limiting physician speech about firearms and abortion were part of and reflected America's "culture wars"). For example, most of the case law and literature about professional speech addresses physician speech related to the reproductive rights of women, a notoriously partisan topic. *See id.* at 295–300; Daniel Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PA. L. REV. 771, 835 (1999) (explaining that the U.S. Supreme Court's albeit sparse treatment of professional speech has largely centered on physician's speech about abortion and contraception). *See generally* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) (abortion); Stuart v. Camnitz (*Stuart II*), 774 F.3d 238, 247 (4th Cir. 2014) (same), *cert. denied*, 135 S. Ct. 2838 (2015); Centro Tepeyac v. Montgomery County, 722 F.3d 184, 189 (4th Cir. 2013) (women's reproductive health clinic). Yet, the concept of professional speech and the First Amendment rights associated with such speech extend far beyond these narrow, divisive topics. *See* Robert Kry, *The "Watchman for Truth": Professional Licensing and the First Amendment*, 23 SEATTLE U. L. REV. 885, 886–88, 891–97 (2000) (describing the wide range of professions regulated by states, the ways in which those professions are regulated, and when professional speech implicates the First Amendment).

[16] *Compare* Pickup v. Brown, 740 F.3d 1208, 1229 (9th Cir. 2013) (holding that California could ban conversion therapy on the theory that it was conduct and was therefore outside the purview of the First Amendment), *cert. denied*, 134 S. Ct. 2871 (2015), *with King*, 767 F.3d at 229,

Courts have provided little clarity as to the extent to which the First Amendment rights of professionals should be protected or balanced against the interests of the state.[17] The U.S. Supreme Court has not provided much guidance on how to balance these competing interests.[18] In the past two years, several circuits have tackled the issue of professional speech, with varying results.[19] Some courts have held that professional advice does not even qualify as speech under the First Amendment, while others have found that professional advice receives the heightened First Amendment protection of intermediate scrutiny.[20]

This Note argues that courts should apply intermediate scrutiny to professional speech regulations.[21] Part I discusses general First Amendment principles that are relevant to understanding the nuances of recent federal appellate decisions on professional speech and the contours and history of the professional speech doctrine.[22] Part II analyzes those recent federal appellate decisions on professional speech that have created a circuit split on the issue of what level of scrutiny to apply to regulations of professional speech.[23] Part III argues that all regulations of professional speech are con-

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233 (holding that a New Jersey law banning conversion therapy banned speech and needed to survive intermediate scrutiny review in order to be constitutional).

[17] *See King*, 767 F.3d at 235 n.19 (explaining the varying approaches circuit courts have taken on the issue of professional speech); Michael Scott Leonard, *'Conversion Therapists' Seek to Stay N.J. Ban Pending Supreme Court Appeal (C.A.3)*, WESTLAW J.: WESTLAW HEALTH DAILY BRIEFING, Oct. 1, 2014, 2014 WL 4851992 (reporting on circuit split regarding the appropriate standard of review for regulations of professional speech*)*.

[18] *See Casey*, 505 U.S. at 884; *Lowe*, 472 U.S. at 232 (White, J., concurring); Thomas v. Collins, 323 U.S. 516, 545, 548 (1945) (Jackson, J., concurring); Petition for Writ of Certiorari at 20–21, Doe *ex rel.* Doe v. Governor of N.J., 783 F.3d 150 (3d. Cir. 2015) (No. 14-1941) [hereinafter *Doe* Petition for Writ of Certiorari] (laying out the conflict among the circuits on the level of constitutional scrutiny to apply to professional speech); Petition for Writ of Certiorari at 17, Hines v. Alldredge, 783 F.3d 197 (5th Cir. 2015) (No. 14-40493) [hereinafter *Hines* Petition for Writ of Certiorari] (attesting that the U.S. Supreme Court has never "squarely addressed" professional speech).

[19] *See Wollschlaeger III*, 797 F.3d at 896 (holding that regulation of professional speech should be subject to intermediate scrutiny); *King*, 767 F.3d at 234 (holding that professional speech was speech that should be subject to intermediate scrutiny); Wollschlaeger v. Governor of Fla. (*Wollschlaeger II*), 760 F.3d 1195, 1217 (11th Cir. 2014) (holding that professional speech was conduct that could be fairly regulated by the state when the regulation had only an incidental effect on speech), *vacated*, 797 F.3d 859; *Pickup*, 740 F.3d at 1231 (holding that professional speech was conduct and upholding challenged law under rational basis review); Moore-King v. County of Chesterfield, 708 F.3d 560, 569–70 (4th Cir. 2013) (holding that professional speech doctrine allowed court to uphold county's reasonable licensing scheme because it had only an incidental effect on speech).

[20] *See Wollschlaeger III*, 797 F.3d at 896 (applying intermediate scrutiny to speech); *King*, 767 F.3d at 234 (same); *Wollschlaeger II*, 760 F.3d at 1217 (applying rational basis review to conduct); *Pickup*, 740 F.3d at 1222, 1231 (same).

[21] *See infra* notes 173–221 and accompanying text.

[22] *See infra* notes 29–104 and accompanying text.

[23] *See infra* notes 105–172 and accompanying text.

tent-based, and that courts should therefore apply intermediate scrutiny to regulations of professional speech.[24]

I. Giving Professional Advice: Professional Speech and the First Amendment

This Part explains First Amendment jurisprudence that relates to understanding the concept of professional speech and then discusses the few U.S. Supreme Court cases that have touched upon the professional speech doctrine.[25] Section A discusses the different levels of review a court may apply in First Amendment challenges to regulations of speech.[26] Section B discusses *Reed v. Town of Gilbert*, a 2015 U.S. Supreme Court case involving the First Amendment.[27] Section C covers what is meant by professional speech and the professional speech doctrine and provides a brief history of the doctrine's evolution.[28]

A. When and How the First Amendment Protects Speech

The First Amendment states that Congress "shall make no law . . . abridging the freedom of speech."[29] The most fundamental inquiry in a First Amendment case is whether speech is present at all.[30] Where a court finds that speech is not present for the purposes of the First Amendment, it may circumvent a First Amendment analysis.[31] Non-expressive conduct generally

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[24] *See infra* notes 173–223 and accompanying text.

[25] *See infra* notes 29–104 and accompanying text.

[26] *See infra* notes 29–63 and accompanying text.

[27] *See infra* notes 64–73 and accompanying text

[28] *See infra* notes 74–104 and accompanying text.

[29] U.S. Const. amend. I.

[30] *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, 1223 (2010) (stating that searching 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). The conduct-speech distinction is particularly influential when considering regulations of professional speech because it gives a framework for determining whether the activity should receive First Amendment protection. *See* Kry, *supra* note 15, at 896–97. *But see* Eugene Volokh, *Speech as Conduct: Generally Applicable Laws, Illegal Courses of Conduct, "Situation-Altering Utterances," and the Uncharted Zones*, 90 Cornell L. Rev. 1277, 1346 (2005) (suggesting that the "conduct-speech" distinction is "more misleading than helpful" when determining what standard of review to use for government regulation of professional speech that implicate the First Amendment).

[31] *See* Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2664 (2011) (explaining that the First Amendment does not prohibit restrictions directed at conduct that have an incidental effect on speech); Rumsfeld v. Forum for Acad. & Institutional Rights, Inc., 547 U.S. 47, 66 (2006) (stating that only conduct that has an expressive element has received First Amendment protection); 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. on C.L. & C.R. 1, 13–14, 42–43, 46 (2012) (explaining that states may regulate conduct through the

receives no protection under the First Amendment's right to free speech.[32] For example, conduct such as administering medicine to a patient or performing a surgery is understood to be outside the purview of the First Amendment and may be regulated by the government.[33] The inquiry becomes more difficult when the conduct in question involves speech, such as therapy or a medical screening that involves talking.[34] The boundaries between speech and conduct remain very unclear.[35]

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use of their police power). "Speech" is understood in First Amendment jurisprudence to encompass both literal speech and actions that convey a message, also known as expressive conduct. *See* Virginia v. Black, 538 U.S. 343, 358 (2003) (affirming that the First Amendment protects both "actual speech" and "symbolic or expressive conduct"). *See generally* United States v. Eichman, 496 U.S. 310 (1990) (protecting flag burning under the First Amendment); Spence v. Washington, 418 U.S. 405 (1974) (protecting peace symbols affixed to flags under the First Amendment); Tinker v. Des Moines Indep. Cmty. Sch. Dist., 393 U.S. 503 (1969) (protecting wearing black arm bands as a form of protest under the First Amendment).

[32] *See Sorrell*, 131 S. Ct. at 2664 (distinguishing laws that restrict "protected expression" from laws that restrict "nonexpressive conduct," explaining that the latter restrictions may have an incidental effect on speech without implicating the First Amendment); *Rumsfeld*, 547 U.S. at 66 (holding that conduct with no expressive content falls outside the purview of the First Amendment); LaSalle, *supra* note 31, at 13–14 (mentioning that states may legitimately regulate nonexpressive conduct under their police power).

[33] Kry, *supra* note 15, at 896. *But see Pickup*, 740 F.3d at 1229 (holding that sexual orientation change therapy delivered only with speech was conduct for the purposes of constitutional analysis).

[34] *See* Patrick Bannon, Note, *Intermediate Scrutiny vs. the "Labeling Game" Approach:* King v. Governor of New Jersey *and the Benefits of Applying Heightened Scrutiny to Professional Speech*, 23 J.L. & POL'Y 649, 678–80 (2015) (setting out the problems with labeling behavior as "speech" or "conduct" in terms of recent court cases involving professional speech); DaSilva, *supra* note 7, at 781–92 (describing the difficulty courts have had with classifying counseling as conduct or speech by addressing recent federal appellate court cases and their modes of analysis). Professional speech illustrates the shortcomings of the conduct-speech distinction because it falls squarely in the cross-section between speech and conduct. *See* Bannon, *supra*, at 658–59 (describing courts' arbitrary use of "conduct" and "speech" labels to achieve their judicial ends). *Compare Wollschlaeger II*, 760 F.3d at 1217 (holding that a law banning physician speech about firearms regulated conduct), *and King*, 981 F. Supp. 2d at 317 (district court decision holding that a ban on conversion therapy was a ban on conduct, not speech), *with Wollschlaeger III*, 797 F.3d at 886 (concluding that a law banning physician speech about firearms regulated speech and implicated the First Amendment), *and King*, 767 F.3d at 228–29 (holding that ban on conversion therapy regulated speech, not conduct, and must be analyzed under the First Amendment).

[35] *Compare Wollschlaeger III*, 797 F.3d at 885–86 (parsing through each regulation at issue to determine whether it implicates speech or conduct and concluding that three of the four challenged provisions regulated speech and required First Amendment protection of some kind), *and King*, 767 F.3d at 229 (holding that "speech is speech" and concluding that a ban on conversion therapy implicated the First Amendment), *with Wollschlaeger II*, 760 F.3d at 1217 (holding that asking a patient questions constituted physician conduct that fell outside the purview of First Amendment protections), *and Pickup*, 740 F.3d at 1229 (concluding that that sexual orientation change therapy delivered with speech was conduct that could be regulated without implicating the First Amendment). The U.S. Supreme Court has failed to introduce a "fully satisfactory" test for determining where the line between speech and non-communicative conduct lies. Charles W. "Rocky" Rhodes, *The First Amendment Structure for Speakers and Speech*, 44 SETON HALL L. REV. 395, 429 (2014).

If a court determines speech to be present, there are three categories of protection it can apply to regulation of that speech: rational basis review, intermediate scrutiny, and strict scrutiny.[36] Rational basis review requires that the regulation in question be "rationally related to a legitimate government interest."[37] This is the default standard of review for courts, and is very deferential to a legislature's choices for solving problems.[38] States frequently request that courts apply rational basis review to a challenged law.[39] Rational basis review presents little to no obstacle for challenged laws, as they are rarely struck down by the standard.[40] Because rational basis review represents such a deferral to state interests, it is not applied to content-based restrictions.[41] This is because of the inherent danger of allowing content-based restrictions to go unchecked by the judiciary.[42]

Intermediate scrutiny requires a state to show that the challenged regulation directly advances a substantial government interest and that the regu-

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[36] *See* David T. Hardy, *The Right to Arms and Standards of Review: A Tale of Three Circuits*, 46 CONN. L. REV. 1435, 1437–38 (2014) (reviewing the levels of scrutiny applied by courts); *see also* Martha Swartz, *Physician-Patient Communication and the First Amendment After* Sorrell, 17 MICH. ST. U. J. MED. & L. 101, 105 (2012) (describing the different approaches a court can take when analyzing speech).

[37] City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432, 440 (1985) (articulating rational basis review standard); Zauderer v. Office of Disciplinary Counsel of the Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985) (applying rational basis review to First Amendment challenge to compelled commercial speech where state's interest was in curing consumer deception).

[38] *See* United States v. Alvarez, 132 S. Ct. 2537, 2552 (2012) (explaining that rational basis review implies "near automatic approval" of the regulation at issue); Stephen M. Rich, *Inferred Classifications*, 99 VA. L. REV. 1525, 1534 n.35 (2013) (describing rational basis review as "the default mode of deferential review" when a court confronts a constitutional issue).

[39] *See Stuart II*, 774 F.3d at 245 (noting that North Carolina requested the court to apply rational basis review to the challenged statute); *Pickup*, 740 F.3d at 1231 & n.7 (holding in favor of the government and applying rational basis review to challenged regulation); *see also* Ysursa v. Pocatello Educ. Ass'n, 555 U.S. 353, 359–60 (2009) (applying rational basis review); *City of Cleburne*, 473 U.S. at 442 (applying rational basis review in the context of an equal protection challenge, holding that the standard required only that the statute be "a rational means to a legitimate end").

[40] *See Alvarez*, 132 S. Ct. at 2552 (explaining that rational basis review implies "near-automatic approval" of the regulation at issue); United States v. Sahhar, 917 F.2d 1197, 1201 n.5 (1990) (referring to rational basis review as a "judicial rubber stamp").

[41] *See Sorrell*, 131 S. Ct. at 2664 (explaining that the First Amendment requires "heightened scrutiny" when speech is regulated based on the disagreement with the message conveyed); DaSilva, *supra* note 7, at 779 (stating that strict scrutiny applies to content-based restrictions on speech); *see also City of Cleburne*, 473 U.S. at 440 (explaining that discriminatory statutes would be subject to heightened scrutiny).

[42] *See* Erwin Chemerinsky, *Content Neutrality as a Central Problem of Freedom of Speech: Problems in the Supreme Court's Application*, 74 S. CAL. L. REV. 49, 50 (2000) (explaining that content-based regulations run the risk of "targeting particular messages" and "attempting to control thoughts" by regulating speech on a certain topic); *see also* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2229 (2015) (referencing the "danger of censorship" that content-based statutes pose).

lation is not more extensive than necessary to serve that interest.[43] In First Amendment law, courts apply intermediate scrutiny to content-neutral regulations, as well as time, place, and manner regulations.[44] In addition, most commercial speech, which is speech that involves the exchange of goods or services for a profit, is analyzed using intermediate scrutiny.[45]

Strict scrutiny is the highest amount of protection afforded under the First Amendment.[46] When applying strict scrutiny, courts will uphold a regulation only if it "furthers a compelling interest" and is "narrowly tailored to achieve that interest."[47] Strict scrutiny is generally applied to regulations of public discourse or political speech because free speech is of central importance to the success of the United States as a functioning democracy.[48] For example, published articles written by a professional that are disseminated publicly or speeches by professionals given publicly are generally insulated against regulation by the government.[49] Any attempts by the gov-

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[43] *See* Turner Broad. Sys. v. FCC, 520 U.S. 180, 213 (1997) (articulating intermediate scrutiny standard of review); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980) (same).

[44] Jay D. Wexler, *Defending the Middle Way: Intermediate Scrutiny as Judicial Minimalism*, 66 GEO. WASH. L. REV. 298, 317 (1998). Intermediate scrutiny takes several forms, one example of which is the test articulated by the U.S. Supreme Court in 1980, in *Central Hudson Gas & Electric v. Public Service Commission of New York*, which set forth a four-prong analysis. *See* 447 U.S. at 566. If the speech "concerns lawful activity," a court "ask[s] whether the asserted governmental interest is substantial." *Id.* If yes, a court next "determine[s] whether the regulation directly advances the governmental interest asserted, and whether it is not more extensive than is necessary to serve that interest." *Id.*

[45] *See King*, 767 F.3d at 234 (explaining that commercial speech is reviewed using the intermediate scrutiny test from *Central Hudson*); Robert A. Sedler, *The "Law of the First Amendment" Revisited*, 58 WAYNE L. REV. 1003, 1052–53 (2013); Swartz, *supra* note 36, at 105–06 (explaining that commercial speech is generally analyzed under the *Central Hudson* test of intermediate scrutiny); S. Elizabeth Wilborn, *Teaching the New Three Rs—Repression, Rights, and Respect: A Primer of Student Speech Activities*, 37 B.C. L. REV. 119, 126 (1995) (noting that commercial speech receives less protection than political speech).

[46] *See* Swartz, *supra* note 36, at 105–06.

[47] *Reed*, 135 S. Ct. at 2231 (enunciating the strict scrutiny standard); *see also* 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").

[48] *See* McCutcheon v. Fed. Election Comm'n, 134 S. Ct. 1434, 1464 (2014) (Thomas, J., concurring) (characterizing the protection of political speech as the "primary objective" of the First Amendment and "the lifeblood of a self-governing people"); Swartz, *supra* note 36, at 105 (explaining that the First Amendment protects political speech because of how it relates to citizens' right to participate in a democracy); Lieutenant Colonel Jeremy S. Weber, *Political Speech, the Military, and the Age of Viral Communication*, 69 A.F. L. REV. 91, 96 (2013) (describing protection of political speech as "the heart of the First Amendment").

[49] *See* Kry, *supra* note 15, at 896–97. First Amendment protection is strongest when a professional is engaged in public dialogue. *Pickup*, 740 F.3d at 1227–28.

ernment to regulate this public discourse would be subject to strict scrutiny.[50]

In select situations, a court will find that speech occurred, but not extend any First Amendment protection.[51] Where the challenged regulation impacts unlawful verbal acts, obscenity, child pornography, or government speech, there is no First Amendment protection provided because these are considered categories of unprotected speech.[52] The U.S. Supreme Court has explicitly rejected attempts to add new categories of unprotected speech to those that have been delineated previously and are rooted in history.[53]

The threshold determination courts make when considering which level of scrutiny to apply to a First Amendment challenge is whether a regulation is content-based or content-neutral.[54] In order to determine whether a challenged regulation is content-based or content-neutral, a court considers whether any speech has been proscribed because of the message the speech conveys.[55]

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[50] *See* Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 759 (1985) (reaffirming that speech on issues of public concern is "entitled to special protection"); *Lowe*, 472 U.S. at 232 (White, J., concurring) ("Where the personal nexus between professional and client does not exist . . . it becomes regulation of speaking or publishing as such, subject to the First Amendment's command that 'Congress shall make no law . . . abridging the freedom of speech, or of the press.'"); N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964) (explaining that the First Amendment demonstrates a strong appreciation of and commitment to protecting public discourse).

[51] *See* Sedler, *supra* note 45, at 1009–10; *see also* New York v. Ferber, 458 U.S. 747, 765–66 (1982) (holding that the production and distribution of child pornography does not receive First Amendment protection); Miller v. California, 413 U.S. 15, 23 (1973) (holding that obscenity does not receive First Amendment protection).

[52] *See Alvarez*, 132 S. Ct. at 2544 (listing categories of unprotected speech); Sedler, *supra* note 45, at 1009–10. In addition to these categories of unprotected speech, criminal acts such as bribery or perjury are not protected by the First Amendment. Sedler, *supra* note 45, 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 government cannot avoid First Amendment scrutiny by making the expression of an idea or discussion of a topic unlawful. *See id.*

[53] *See* United States v. Stevens, 559 U.S. 460, 472 (2010) (explaining that courts do not have "freewheeling authority to declare new categories of speech outside the scope of the First Amendment"). *But see* Ronald K.L. Collins, *Exceptional Freedom—The Roberts Court, the First Amendment, and the New Absolutism*, 76 ALB. L. REV. 409, 416–22 (2013) (listing forty-eight categories of unprotected expression).

[54] *See* City of Ladue v. Gilleo, 512 U.S. 43, 59 (1994) (O'Connor, J., concurring) (explaining that the "normal" First Amendment inquiry begins with a determination of whether a regulation is content-based or content-neutral); Chemerinsky, *supra* note 42, at 49–50 (explaining that the distinction between content-based and content-neutral laws has evolved to become the determinative issue in nearly every free speech case); *see also Reed*, 135 S. Ct. at 2232 (explaining that content-based distinctions are subject to strict scrutiny and content-neutral distinctions are subject to a lower level of judicial scrutiny).

[55] *See Reed*, 135 S. Ct. at 2227 (stating that a regulation is content-based if it "applies to particular speech because of the topic discussed or the idea or message conveyed" and that laws that are content-neutral on their face are content-based if they were passed because of government

A content-based statute differentiates permissible speech from impermissible speech on the basis of message and is presumptively invalid.[56] An example of a content-based statute is a ban on advocacy of illegal conduct.[57] Content-based statutes that regulate speech are generally subject to strict scrutiny.[58] This reflects the collective judgment that laws that restrict speech on the basis of content are more likely to be harmful than laws that do not differentiate based on message.[59] In contrast, content-based statutes that regulate commercial speech are subject to heightened scrutiny.[60]

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disagreement with the messaged conveyed); DaSilva, *supra* note 7, at 778–79 (describing how courts analyze content-based and content-neutral statutes). The decision of whether a regulation is content-based or content-neutral, however, can be difficult. *See* Turner Broad. Sys. v. FCC, 512 U.S. 622, 642 (1994) (observing that the initial determination of whether a regulation is content-based or content-neutral can be difficult). For years, the Court has been criticized for its "unprincipled, unpredictable and deeply incoherent" application of the content-neutrality principle. *See* Leslie Kendrick, *Content Discrimination Revisited*, 98 VA. L. REV. 231, 232–33 & n.3 (2012).

[56] *See Reed*, 135 S. Ct. at 2226 (describing content-based laws as "presumptively unconstitutional"); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) (explaining that content-based regulations are presumed to be invalid); *Nat'l Ass'n for the Advancement of Psychoanalysis*, 228 F.3d at 1055 (explaining that the most important inquiry in determining whether a law is content-based is whether it was passed because of agreement or disagreement with the message conveyed). *But see* B. Jessie Hill, Casey *Meets the Crisis Pregnancy Centers*, 43 J.L. MED. & ETHICS 59, 60 (2015) (explaining that there are specific contexts in which "traditional First Amendment interests in open, free, and robust communication are more limited" and the government is given more freedom to regulate).

[57] *See* Brandenburg v. Ohio, 395 U.S. 444, 448–49 (1969) (holding that law prohibiting advocacy of criminal conduct violated the First Amendment); Eugene Volokh, *Content Discrimination and the First Amendment (Including the "Secondary Effects" Doctrine)*, VOLOKH CONSPIRACY (June 21, 2010, 12:36 PM), http://volokh.com/2010/06/21/content-discrimination-and-the-first-amendment-including-the-secondary-effects-doctrine/ [http://perma.cc/9HPQ-UUSX] (reviewing classic examples of content-based laws).

[58] *See Reed*, 135 S. Ct. at 2227 (holding that content-based laws are subject to strict scrutiny); *Alvarez*, 132 S. Ct. at 2543–44 (explaining that content-based restrictions on speech are presumed invalid). *But see Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring) (explaining that content-discrimination "cannot and should not *always* trigger strict scrutiny"); *id.* at 2237–38 (Kagan, J., concurring) (drawing on rationales for First Amendment protection to conclude that not all content-based laws, particularly those that are not viewpoint-based, should always be subject to strict scrutiny).

[59] *Cf.* Chemerinsky, *supra* note 42, at 50 ("Content-based restrictions risk the government targeting particular messages and attempting to control thoughts on a topic by regulating speech.").

[60] *See Sorrell*, 131 S. Ct. at 2664 (explaining that the First Amendment requires "heightened scrutiny" whenever a regulation targets speech because of disagreement with the message conveyed). In *Sorrell*, the Court distinguished content-based commercial speech as requiring a higher level of scrutiny than other commercial speech. *Id.* at 2667–68. The Court did not say whether the "heightened scrutiny" it used in *Sorrell* was intermediate scrutiny, strict scrutiny, or something in between. *See id.*; Agatha M. Cole, Note, *Internet Advertising After* Sorrell v. IMS Health*: A Discussion on Data Privacy & the First Amendment*, 30 CARDOZO ARTS & ENT. L.J. 283, 307–08 (2012) (stating that it is "unclear" how the "heightened scrutiny" standard used in *Sorrell* compares to rational basis review, intermediate scrutiny, and strict scrutiny); *see also Sorrell*, 131 S. Ct. at 2679 (Breyer, J., dissenting) (describing the majority as applying a "unforgiving brand of intermediate scrutiny"). Varying interpretations of the *Sorrell* standard of scrutiny have been evi-

A content-neutral statute differentiates neither on the basis of viewpoint nor on the basis of speaker.[61] Example of content-neutral statutes are bans on all loudspeakers or on sleeping in public parks.[62] Content-neutral statutes that regulate commercial speech are subject to rational basis review when the government has an interest in preventing consumer deception.[63]

B. Evolving Doctrine: Reed v. Town of Gilbert*'s Impact on First Amendment Rights*

In 2015, in *Reed v. Town of Gilbert*, the U.S. Supreme Court held that a law which "singles out specific subject matter for differential treatment" is content-based, and thus automatically subject to strict scrutiny analysis.[64] In *Reed*, the Court considered a challenge to a town's sign ordinance that imposed more restrictions on a certain category of signs.[65] The Court held the

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dent in judicial decisions. *Compare Wollschlaeger III*, 797 F.3d at 912 (citing *Sorrell* as applying intermediate scrutiny), *with Wollschlaeger I*, 814 F. Supp. 2d at 1377 (citing *Sorrell* for the proposition that strict scrutiny applied to the challenged regulation of professional speech).

[61] *See* Hill v. Colorado, 530 U.S. 703, 723 (2000) (explaining that regulation court held to be content-neutral did not restrict speech based on viewpoint or subject-matter and applied equally to the members of the general public).

[62] *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 289, 295 (1984) (holding that regulation prohibiting camping in specific parks was not in violation of the First Amendment); Kovacs v. Cooper, 336 U.S. 77, 87–89 (1949) (holding that ban on loudspeakers was constitutional); Volokh, *supra* note 57 (providing examples of content-neutral statutes).

[63] *See Zauderer*, 471 U.S. at 651 (explaining that although disclosure requirements may silence some protected commercial speech, a company's First Amendment rights are "adequately protected as long as disclosure requirements are reasonably related to the State's interest in preventing deception"); Jennifer M. Keighley, *Can You Handle the Truth? Compelled Commercial Speech and the First Amendment*, 15 U. PA. J. CONST. L. 539, 556–59 (2012) (discussing scope of *Zauderer* decision).

[64] *See Reed*, 135 S. Ct. at 2230, 2232–33; *see also* Norton v. City of Springfield, 612 F. App'x 386, 387 (7th Cir. 2015) (concluding that the *Reed* majority opinion "effectively abolishes any distinction between content regulation and subject-matter regulation"); Appellees' Submission Requested by the Court at 1, *Wollschlaeger III*, 797 F.3d 859 (No. 12-14009) [hereinafter Appellees' Submission] (observing that the U.S. Supreme Court held in *Reed* that content-based laws are subject to strict scrutiny, "without qualification"). The *Reed* holding has begun to ripple through the circuit courts. *See Norton*, 612 F. App'x at 386–87 (recounting request for supplemental briefs on *Reed*, granting petition for rehearing, and applying *Reed* to the challenged ordinance); Appellees' Submission, *supra*, at 1 (recounting court's request for supplementary briefing on whether the *Reed* holding requires application of strict scrutiny to regulation of professional speech).

[65] *See Reed*, 135 S. Ct. at 2224 (citing PLANNING DEP'T, TOWN OF GILBERT, LAND DEVELOPMENT CODE, ch. 1, § 4.402 (2005), *available at* http://www.gilbertaz.gov/home/showdocument?id=9660 [http://perma.cc/NJ65-5QTW]) (categorizing signs by information conveyed and applying different restrictions to each category)). The category that was more restricted was entitled "Temporary Directional Signs Relating to a Qualifying Event." *See id.* The petitioners in *Reed* were members of a church that used signs to inform the public of the time and location of services, which changed each week. *See id.* at 2225.

ordinance to be a content-based regulation of speech and subjected the ordinance to strict scrutiny.[66]

Displaying the nuance of the issues raised by *Reed*, six of the Justices wrote or joined concurring opinions.[67] Justice Stephen Breyer rejected a one-size-fits-all approach to First Amendment jurisprudence and argued that a category like "content discrimination" cannot always require a strict scrutiny analysis.[68] Justice Breyer cautioned that the Court had "gone too far" in holding that content discrimination "triggers" a strict scrutiny analysis.[69] He reasoned that most government activities involve speech and are regulated.[70] These regulations of speech necessarily require content discrimination, but do not require the full protections afforded by the strict scrutiny analysis.[71] To hold otherwise is "a recipe for judicial management of ordinary government regulatory activity."[72] Justice Breyer offered a solution: use a content discrimination analysis as a supplement to a basic First Amendment analysis, which looks to the proportionality between regulatory objectives and harm to First Amendment interests.[73]

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[66] *See id.* at 2224. The Court held that a regulation is content-based if it "applies to particular speech because of the topic discussed or the idea or message conveyed." *Id.* at 2227. The Court also held that laws that are content-neutral on their face, but were adopted because of government disagreement with the message conveyed are considered content-based. *See id.* The Court held that both sets of content-based laws must withstand strict scrutiny to survive. *See id.*

[67] *See id.* at 2233 (Alito, J., concurring); *id.* at 2234 (Breyer, J., concurring); *id.* at 2236 (Kagan, J., concurring); *see also Doe* Petition for Writ of Certiorari, *supra* note 18, at 12 (observing that the majority rule announced in *Reed* has "no exceptions" and that other justices "who were not prepared to go as far" wrote concurring opinions). Justice Samuel Alito was joined in his concurring opinion by Justice Anthony Kennedy and Justice Sonia Sotomayor. *Reed*, 135 S. Ct. at 2233 (Alito, J., concurring). Justice Alito offered examples of rules pertaining to signs that would not be considered content-based to disabuse plaintiffs and municipalities of the notion that the *Reed* opinion leaves them unable to regulate signage. *See id.* at 2233–34. Justice Stephen Breyer wrote a concurring opinion. *Id.* at 2234 (Breyer, J., concurring). Justice Elena Kagan wrote a concurring opinion in which Justice Ruth Bader Ginsburg and Justice Breyer joined. *Id.* at 2236 (Kagan, J., concurring).

[68] *See Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring). Justice Breyer also joined Justice Kagan's concurring opinion in which she came to the same conclusion. *See id.* at 2234, 2238 (Kagan, J., concurring) (explaining that strict scrutiny is not required for subject-matter regulation that does not raise the possibility of viewpoint discrimination).

[69] *Id.* at 2234 (Breyer, J., concurring); *see also* Adam Liptak, *Court's Free-Speech Expansion Has Far-Reaching Consequences*, N.Y. TIMES (Aug. 17, 2015), http://www.nytimes.com/2015/08/18/us/politics/courts-free-speech-expansion-has-far-reaching-consequences.html [https://perma.cc/KL8D-KNW6] (reporting that some view the *Reed* decision, if read literally, as "destabliz[ing] First Amendment law" and possibly requiring courts to "water down the potency of strict scrutiny").

[70] *See Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring).

[71] *See id.* at 2234–35 (offering as examples securities regulations, regulations on prescription drug labeling, regulations requiring doctor-patient confidentiality, and signage requirements at petting zoos).

[72] *Id.* at 2234.

[73] *See id.*

C. Professional Speech and the "Professional Speech Doctrine"

The concept of who professionals are is fairly expansive.[74] A professional is defined in layman's terms as someone whose job requires "special education, training, or skill."[75] State legislatures or the federal government institute the requirements for professions, typically through licensing schemes.[76] States are allowed to license the professions under their police power.[77] Such professional licensing laws determine who may enter a profession, who may remain practicing within that profession, and what constitutes appropriate practice of that profession.[78] Common examples of professionals who are required to have a license to practice in certain states include doctors, attorneys, and accountants.[79] It is less common knowledge that state and federal

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[74] *See* Kry, *supra* note 15, at 886–88 (describing professionals as those licensed by the state to practice a particular occupation). The U.S. Supreme Court and circuit courts have ruled in many instances on cases implicating the free speech rights of professionals. *See, e.g.*, Fla. Bar v. Went for It, Inc., 515 U.S. 618, 620 (1995) (lawyers); Edenfield v. Fane, 507 U.S. 761, 763 (1993) (accountants); Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 784 (1988) (fundraising professionals); *Lowe*, 472 U.S. at 183 (financial advisors); *Stuart II*, 774 F.3d at 242 (doctors); *King*, 767 F.3d at 220 (licensed counselors); *Moore-King*, 708 F.3d at 563, 565 (fortune-tellers); Locke v. Shore, 634 F.3d 1185, 1189 (11th Cir. 2011) (interior designers).

[75] *Professional*, MERRIAM-WEBSTER, http://www.merriam-webster.com/dictionary/professional [http://perma.cc/FH6D-MZ49] (defining professional as "relating to a job that requires special education, training, or skill").

[76] *See, e.g.*, MASS. GEN. LAWS ch. 112 (2015) (laying out regulatory scheme for occupations affecting public health); VA. CODE ANN. § 54.1-100 (2014) (stating that the Virginia may impose regulations on professions to protect the public interest when a profession involves specialized skills and the public would benefit from assurances of professional ability); WASH. REV. CODE § 18 (2014) (articulating regulations for professions such as accountants, embalmers, midwifery, and others). Historically, occupational licensing has largely been left to the states. *See* Dent v. West Virginia, 129 U.S. 114, 122 (1889) (observing that "from time immemorial" states have imposed occupational licensing requirements in order to protect the public); Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. 173, 175 (2009) (describing results of survey aimed at understanding occupational licensing schemes in the United States).

[77] Watson v. Maryland, 218 U.S. 173, 176 (1910) ("It is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings . . . ."); Betancur v. Fla. Dep't of Health, 296 F. App'x 761, 763 (11th Cir. 2008) (stating that states may regulate professions under their police power); *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").

[78] *See Stuart II*, 774 F.3d at 247 (describing the types of laws states may enact to regulate the professions); *see, e.g.*, ALASKA STAT. § 08.04.450 (2014) (describing instances which would necessitate revocation of a license to practice accounting in Alaska); N.Y. CT. R. § 1500.23 (McKinney 2015) (making continuing legal education mandatory for barred attorneys in New York); R.I. GEN. LAWS § 5-34-15 (2009) (declaring that a practical nurse may be licensed to practice in the state of Rhode Island in one of two ways: either by examination or by endorsement).

[79] *See* MASS. GEN. LAWS ch. 112 § 2 (describing registration of physicians in order to be licensed by the state to practice medicine); WASH. REV. CODE § 18.04.015 (describing the purpose of regulating accountants); *Fla. Bar*, 515 U.S. at 620 (denying First Amendment challenge to state bar association regulation of lawyers' speech); *Wollschlaeger III*, 797 F.3d at 869 (rejecting phy-

governments together license about five hundred different occupations, including barbers, real estate brokers, electricians, and even interior designers.[80]

Because clients rely on professionals to perform tasks for them that require specialized knowledge or skills, licensing ensures that professionals actually possess such specialized knowledge or skills.[81] Clients must be able to trust that the professional they hire is qualified to give advice or perform tasks necessary to that profession.[82] In fact, the primary reason that states have an interest in regulating professions is to protect their citizens from misinformation or malpractice—in the case of advice-driven professions such as law or medicine—as well as protecting citizens' health, safety, and welfare, in the case of potentially hazardous professions such as electricians or engineers.[83]

When used by lower courts and scholars, the term "professional speech" generally refers to "personalized" speech by a professional that occurs "in the context of a fiduciary-type relationship" between a professional and that professional's client.[84] The most important aspect of professional

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sicians' First Amendment challenge to state regulation prohibiting speech with patients about firearm ownership); Accountant's Soc'y of Va. v. Bowman, 860 F.2d 602, 603 (4th Cir. 1988) (affirming lower court's ruling that state's regulation of professional speech of accountants who were not Certified Public Accountants was constitutional).

[80] Kry, *supra* note 15, at 886; *see* 49 U.S.C. §§ 401–465 (2012) (covering regulation of pilots); CAL. BUS. & PROF. CODE §§ 5800–5812 (West 2011) (covering business and professional codes for licensed interior designers in California); *Locke*, 634 F.3d at 1189–91 (holding that licensing statute covering interior designers in Florida did not implicate free speech rights). It is estimated that licensing laws affect around one-third of the American workforce. Kry, *supra* note 15, at 886.

[81] *See Lowe*, 472 U.S. at 232 (White, J., concurring) (explaining what it means to "engage[] in the practice of a profession"); DEP'T OF THE TREASURY ET AL., OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS 11 (2015), https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembargo.pdf [https://perma.cc/2YWV-WNCD] (describing the benefits of occupational licensing); Kry, *supra* note 15, at 887 (explaining general characteristics of what an occupational licensing scheme requires).

[82] See Kry, *supra* note 15, at 887–88 (explaining that the most common justification for professional licensure is to protect the public because professional-client relationships often have an informational asymmetry that may make it hard for the client to make informed decisions).

[83] *See id.*; *see, e.g.*, S.C. CODE ANN. § 40-1-10 (2011) (explaining that protecting the public interest is the sole purpose of enacting regulations on professions); VA. CODE ANN. § 54.1-100 (2014) (describing rationale for imposing regulations on professionals in that state); WASH. REV. CODE § 18.04.015 (2015) (explaining that purpose of regulation of accounts is to protect the public interest).

[84] David T. Moldenhauer, *Circular 230 Opinion Standards, Legal Ethics and First Amendment Limitations on the Regulation of Professional Speech by Lawyers*, 29 SEATTLE U. L. REV. 843, 891–92 (2006); *see Wollschlaeger III*, 797 F.3d at 887 (defining professional speech as "speech uttered by a professional in furtherance of his or her profession and within the confines of a professional-client relationship"); *King*, 767 F.3d at 232 (defining professional speech as speech "used to provide personalized services to a client based on the professional's expert knowledge and judgment"); *Moore-King*, 708 F.3d at 569 (defining professional speech as speech through which a professional "purports to exercise judgment on behalf of the client in the light of the cli-

speech is the context within which it occurs: a relationship between a trusted professional and a client.[85] This understanding of professional speech grew out of Justice Byron White's concurring opinion to the U.S. Supreme Court's 1985 decision in *Lowe v. SEC*, in which he used the term "personal nexus" to describe the hallmark of professional speech.[86]

The professional speech doctrine operates at the juncture of state power to regulate professionals and the free speech rights of those professionals.[87] It has been used to support the constitutionality of state regulation of professions that impacts speech.[88] The professional speech doctrine is one of the least developed areas in First Amendment jurisprudence.[89] The few times the

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ent's individual needs and circumstances" (quoting *Accountant's Soc'y of Va.*, 860 F.2d at 604)); Kry, *supra* note 15, at 907–11 (defining professional speech as "truly personalized" advice that is "characteristic dependent" and "person-to-person").

[85] *See Lowe*, 472 U.S. at 228 (White, J., concurring) (conceiving of the "personal nexus" between professional and client as the touchstone of when professional speech receives First Amendment protections); Halberstam, *supra* note 15, at 834 (describing how the presence of a professional relationship "triggers a contextual First Amendment review" that is focused on the social relationship).

[86] *See Lowe*, 472 U.S. at 232 (White, J., concurring); *Accountant's Soc'y of Va.*, 860 F.2d at 604 (stating that Justice White's concurrence in *Lowe* "provides sound, specific guidelines" for determining the point at which a regulation stops being a regulation of a profession and becomes a regulation of speech).

[87] Nicole Brown Jones, Note, *Did Fortune Tellers See This Coming? Spiritual Counseling, Professional Speech, and the First Amendment*, 83 MISS. L.J. 639, 649 (2014) (stating that the professional speech doctrine is used "when there is a 'collision between the power of government to license and regulate those who would pursue a profession . . . and the rights of freedom of speech'" (quoting *Lowe*, 472 U.S. at 228 (White, J., concurring))).

[88] *See Lowe*, 472 U.S. at 228 (White, J., concurring) ("The power of government to regulate the professions is not lost whenever the practice of a profession entails speech."); *Moore-King*, 708 F.3d at 569 (explaining that under the professional speech doctrine the government may license and regulate professionals without implicating the First Amendment); Kry, *supra* note 15, at 891 (describing that a court's determination that a professional regulation controls conduct and not speech leads to the conclusion that the regulation is valid).

[89] Jones, *supra* note 87, at 649. The phrase "professional speech doctrine" has been used in only eight published cases to date. *See King*, 767 F.3d at 231–32 (discussing professional speech doctrine when holding that licensed counselors do not receive full protection of First Amendment when providing services to clients); *Centro Tepeyac*, 722 F.3d at 189 (reiterating holding from *Moore-King* that professional speech doctrine allows the government to license and regulate professionals without implicating the First Amendment); Cooksey v. Futrell, 721 F.3d 226, 239 (4th Cir. 2013) (holding that professional speech doctrine was irrelevant to determining Article III standing of appellant); *Moore-King*, 708 F.3d at 569 (applying professional speech doctrine analysis to spiritual counselor's First Amendment challenge of a state regulation); Tepeyac v. Montgomery County, 5 F. Supp. 3d 745, 748, 760–61 (D. Md. 2014) (citing *Lowe*, 472 U.S. at 232 (White, J., concurring)) (analyzing when professional speech doctrine applies in dispute about county ordinance that compelled Limited Service Pregnancy Resource Center to post sign saying that there was not a licensed medical professional on staff); Stuart v. Loomis (*Stuart I*), 992 F. Supp. 2d 585, 587–88, 596 & n.20 (M.D.N.C. 2014) (discussing contours of professional speech doctrine in case about compelled physician speech related to abortion), *aff'd*, 774 F.3d 238; Kagan v. City of New Orleans, 957 F. Supp. 2d 774, 780 n.18 (E.D. La. 2013) ("Because the

U.S. Supreme Court has confronted regulations of professional speech, it has struggled with balancing the state's need to regulate against the freedoms guaranteed by the Constitution.[90] With such minimal guidance, lower courts have failed to establish a workable analytical framework for reviewing restrictions on professional speech.[91]

The genesis of the professional speech doctrine was Justice Robert H. Jackson's concurring opinion to the U.S. Supreme Court's 1944 decision in *Thomas v. Collins*.[92] In *Thomas*, the Court addressed a state's enforcement of a professional registration requirement to a union leader who spoke publicly to a group of workers.[93] Justice Jackson described the state as standing firm on its right to regulate the professions and the union leader as asserting his right to peaceably address a public gathering.[94] At times, these two rights may overlap, yet Justice Jackson still saw a distinction between the two.[95] Justice Jackson concluded that a state owes a duty to its citizens to protect them from untrustworthy or incompetent people, which is usually done by regulating professions with a licensing scheme, but that there is no such duty to protect citizens from particular messages, which would be accomplished by disallowing public speech on particular topics.[96]

The next major development in the professional speech doctrine came in 1985, when the U.S. Supreme Court in *Lowe v. SEC* considered whether proscribing the speech of a formerly licensed professional implicated the

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Court concludes that the City's licensing scheme is content neutral, the Court need not decide whether the professional speech doctrine, if one exists in the Fifth Circuit, applies.").

[90] Stuart v. Huff, 834 F. Supp. 2d 424, 431 (M.D.N.C. 2011) (stating that the meaning of "professional speech" is unclear and observing that the U.S. Supreme Court has only used the phrase "in passing"). The U.S. Supreme Court has only used the term "professional speech" in two opinions, both of which were dissents. *See* Garcetti v. Ceballos, 547 U.S. 410, 446 (2006) (Breyer, J., dissenting) ("[T]he speech at issue is professional speech—the speech of a lawyer."); *Edenfield*, 507 U.S. at 779 (O'Connor, J., dissenting) ("But even if I agreed that the States may target only professional speech that directly harms the listener, I still would dissent in this case.").

[91] *See* Halberstam, *supra* note 15, at 834–35 (noting the lack of consistent methodology across courts for assessing professional speech regulations); Moldenhauer, *supra* note 84, at 843 (observing that courts have been unable to provide a framework for assessing regulations of professional speech).

[92] *See Thomas*, 323 U.S. at 545, 548 (Jackson, J., concurring) (stating that speech at issue was public speech, not the practice of a vocation, and thus fully protected by the First Amendment); *Moore-King*, 708 F.3d at 568 (observing that the professional speech doctrine has been recognized by the U.S. Supreme Court "at least since" *Thomas*); Jones, *supra* note 87, at 649 (stating that the professional speech doctrine was first recognized in *Thomas*); Kry, *supra* note 15, at 897–98 (describing *Thomas* as the beginning of a line of cases concerning the professional speech doctrine).

[93] *Thomas*, 323 U.S. at 520–21.

[94] *Id.* at 544 (Jackson, J., concurring).

[95] *Id.* ("[T]he state may prohibit the pursuit of medicine as an occupation without its license, but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought.").

[96] *Id.* at 545.

First Amendment.[97] In his concurring opinion, Justice White declared that the government does not relinquish its power to regulate the professions simply because the practice of a profession might include speech.[98] He noted that there is a certain point at which a law stops being a regulation of a profession and becomes a regulation of speech and asserted that it is the role of the courts to determine where along the continuum of speech that point lies.[99] The continuum ranges from professional speech—speech that occurs between a professional and client within the "personal nexus"—to public speech—speech that occurs outside of the personal nexus and professional advice-giving role and is protected by the First Amendment.[100] For Justice White, the distinguishing factor between the two kinds of speech was the "personal nexus" between professional and client, within which speech by a professional can be construed as "incidental to the conduct of the profession."[101]

Finally, in 1992, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the U.S. Supreme Court addressed professional speech in the context of a dispute about Pennsylvania's abortion statute's informed consent requirement as well as four other parts of the statute.[102] The plurality addressed the First Amendment challenge in just three sentences.[103] The plurality conceded that the regulation implicated physician's First Amendment right not to speak, but said that it did so "only as part of the practice of medicine, subject to reasonable licensing and regulation by the State."[104]

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[97] *Lowe*, 472 U.S. at 183–85, 188–89. The Court heard a challenge to an injunction against the publication and distribution of newsletters containing investment advice by an investment adviser whose registration had been revoked by the SEC. *See id.*

[98] *Id.* at 228 (White, J., concurring) ("The power of government to regulate the professions is not lost whenever the practice of a profession entails speech.").

[99] *Id.* at 230–32 (stating that "at some point, a measure is no longer a regulation of a profession, but a regulation of speech," beyond which point the statute would be subject to First Amendment scrutiny, and that it is the job of the Court to establish a principle by which to determine whether a challenged law regulates speech or conduct).

[100] *See id.* at 232.

[101] *See id.*

[102] *See Casey*, 505 U.S. at 881, 884 (plurality opinion) (rejecting First Amendment challenge to Pennsylvania's informed consent abortion law); *see also King*, 767 F.3d at 230 (noting the briefness with which the *Casey* plurality dealt with the plaintiff's First Amendment claim).

[103] *See Casey*, 505 U.S. at 884 (plurality opinion).

[104] *Id.* Courts have interpreted this part of the *Casey* opinion to support both sides of the discussion as to whether or not professional speech should receive First Amendment protection. *Compare Stuart II*, 774 F.3d at 247, 249 (drawing support for holding that individuals do not abandon their First Amendment rights when practicing a profession from *Casey*), *with Wollschlaeger II*, 760 F.3d at 1219 ("[T]here is no 'constitutional infirmity' where the speech rights of physicians are 'implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State.'" (quoting *Casey*, 505 U.S. at 884 (plurality opinion))).

II. A DIFFERENCE OF PROFESSIONAL OPINIONS: CIRCUITS SPLIT ON WHAT LEVEL OF SCRUTINY SHOULD APPLY TO PROFESSIONAL SPEECH

Currently, the Third, Fourth, Ninth, and Eleventh Circuit Courts of Appeals are split as to what level of scrutiny should apply to professional speech.[105] Without a clear framework for analyzing regulations of professional speech, professionals are at the mercy of the local courts and their individual analyses and interpretations.[106] Because the U.S. Supreme Court has never directly addressed the level of scrutiny to apply to regulations of professional speech, this issue is ripe for review.[107]

This Part discusses the cases that created the circuit split over what level of scrutiny applies to professional speech.[108] Section A covers two recent decisions from the Ninth Circuit and the Eleventh Circuit that applied rational basis review to challenged regulations of professional speech.[109] Section B discusses three recent decisions from the Eleventh, Third, and Fourth Circuits that applied intermediate scrutiny to challenged regulations of professional speech.[110] Section C discusses the arguments for strict scrutiny and the possible influence of the 2015 U.S. Supreme Court case, *Reed v. Town of Gilbert*, on regulations of professional speech.[111]

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[105] *See* Leonard, *supra* note 17. *See generally* Wollschlaeger v. Governor of Fla. (*Wollschlaeger III*), 797 F.3d 859 (11th Cir. 2015) (applying intermediate scrutiny); Stuart v. Camnitz (*Stuart II*), 774 F.3d 238 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2838 (2015) (applying intermediate scrutiny); King v. Governor of N.J., 767 F.3d 216 (3d. Cir. 2014) (applying intermediate scrutiny), *cert. denied*, 135 S. Ct. 2048 (2015); Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2013), *cert. denied*, 134 S. Ct. 2871 (2015) (applying rational basis review); Moore-King v. County of Chesterfield, 708 F.3d 560 (4th Cir. 2013) (applying an unclear level of scrutiny).

[106] *See Hines* Petition for Writ of Certiorari, *supra* note 18, at 29–31 (describing the lack of clarity on First Amendment protection of professional speech as "an issue of national importance"); Petition for Writ of Certiorari at 28, *King*, 767 F.3d 216 (No. 14-672) [hereinafter *King* Petition for Writ of Certiorari] ("This conflict touches upon a critical question implicating the very livelihood of licensed professionals and determining what protection doctors and counselors, as well as lawyers, accountants, and other professionals, receive for the speech occurring as part of the practice of their profession."); Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 183 (2015), http://harvardlawreview.org/2015/03/occupational-speech-and-the-first-amendment/ [http://perma.cc/6PJ5-US7K] (observing that the U.S. Supreme Court's failure to directly address the topic of professional speech has had "profound consequences").

[107] *See Hines* Petition for Writ of Certiorari, *supra* note 18, at i (presenting question about what the appropriate level of judicial review for regulations of professional speech is and noting that the Court has "never squarely addressed [the] constitutional status" of professional speech).

[108] *See infra* notes 112–172 and accompanying text.

[109] *See infra* notes 112–135 and accompanying text.

[110] *See infra* notes 136–165 and accompanying text.

[111] *See infra* notes 166–172 and accompanying text.

A. Conduct, Not Speech: Providing Minimal Protection to Professional Speech

Although to some courts "[i]t is clear that individuals do not surrender their First Amendment rights entirely when they speak as professionals," other courts have chosen to offer essentially no protection to speech that occurs in the context of a professional relationship.[112] This section discusses two recent federal appellate cases that applied rational basis review to regulations of professional speech.[113]

The Ninth Circuit, in its 2013 decision in *Pickup v. Brown*, and the Eleventh Circuit, in its 2014 decision in *Wollschlaeger v. Governor of Florida* ("*Wollschlaeger II*"), used the professional speech doctrine to apply rational basis review to regulations of professional speech.[114] The courts were able to apply rational basis review because they identified the behavior at issue as conduct, not speech.[115] According to the dissent in *Wollschlaeger II*, however, rational basis review erodes the First Amendment rights of professionals because it simply does not provide enough protection for speech that conveys a message that is being silenced or compelled by the government.[116]

In *Pickup*, the Ninth Circuit explicitly applied rational basis review to a regulation of professional speech.[117] *Pickup* concerned a First Amendment challenge to a statute that prohibited healthcare providers from engaging in

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[112] *Compare* Stuart v. Loomis (*Stuart I*), 992 F. Supp. 2d 585, 596 (M.D.N.C. 2014) ("[J]ust what 'professional speech' means and whether it receives a different degree of protection under the First Amendment is not particularly clear. Nonetheless, it is clear that individuals do not surrender their First Amendment rights entirely when they speak as professionals."), *aff'd*, 774 F.3d 238, *with* Wollschlaeger v. Governor of Fla. (*Wollschlaeger II*), 760 F.3d 1195, 1219–20 (11th Cir. 2014) (holding that the challenged law prohibiting physicians from asking patients about firearm ownership was a regulation of professional conduct that did not run afoul of the First Amendment), *vacated*, 797 F.3d 859, *and Pickup*, 740 F.3d at 1222 (holding that the challenged law prohibiting conversion therapy was a regulation of professional conduct that did not violate the First Amendment rights of licensed therapist).

[113] *See infra* notes 114–135 and accompanying text.

[114] *See Wollschlaeger II*, 760 F.3d at 1217 (holding that the challenged act was a valid regulation of professional conduct, and not speech, and thus merited no First Amendment protection); *Pickup*, 740 F.3d at 1227–31 (concluding that the challenged act regulated conduct, and not speech, and did not implicate the First Amendment).

[115] *See Wollschlaeger II*, 760 F.3d at 1217 (holding that the challenged law was appropriate); *Pickup*, 740 F.3d at 1231 (holding that rational basis review applied to the challenged law because the law regulated only treatment, which the court found to be conduct, not speech).

[116] *See Wollschlaeger II*, 760 F.3d at 1231, 1239–42 (Wilson, J., dissenting) (explaining that the majority should have weighed the interests of the state against the rights of the physicians instead of refusing to apply First Amendment protection to the speech).

[117] *Pickup*, 740 F.3d at 1231 (holding that the challenged law was "subject only to rational basis review and must be upheld if it bears a rational relationship to a legitimate state interest"). The Ninth Circuit is the only circuit court to explicitly apply rational basis review in a First Amendment analysis of a regulation of professional speech. *See King*, 767 F.3d at 235 n.19 (noting that *Pickup* was the only Ninth Circuit court to explicitly apply a rational basis test).

sexual orientation change therapy with minors.[118] The Ninth Circuit upheld the statute as a valid regulation of professional conduct.[119] The majority applied rational basis review to the regulation and chose to uphold it because it bore a rational relationship to the legitimate state interest of protecting the well-being of minors.[120] The majority never discussed whether it found the statute to be content-based or content-neutral.[121]

The Ninth Circuit's decision drew a vigorous dissent questioning the court's choice to be so deferential in its review of the law.[122] The dissent in *Pickup* disagreed with the majority's conclusion that the challenged law regulated only conduct.[123] It noted that the federal courts have never exempted state professional regulations of speech from First Amendment protection.[124] The dissent also argued that the majority's holding carved out

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[118] *Pickup*, 740 F.3d at 1221–22; *see* CAL. BUS. & PROF. CODE § 865 (West 2015).

[119] *Pickup*, 740 F.3d at 1229, 1231–32 (stating that the statute bans a form of treatment, which is conduct, and not physicians' abilities to discuss, for example, the pros and cons of that treatment). The majority specifically noted that "doctor-patient communications *about* medical treatment receive substantial First Amendment protection." *Id.* at 1227; *see also* Sonia M. Suter, *The First Amendment and Physician Speech in Reproductive Decision Making*, 43 J.L. MED. & ETHICS 22, 29 (2015) (describing the *Pickup* court's choice to classify the statute as conduct).

[120] *Pickup*, 740 F.3d at 1231–32 (reasoning that rational basis review applied because the law regulated only treatment and that any effect the law had on speech was merely incidental); Brian McGinnis, *Not Strictly Speaking: Why State Prohibitions Against Practicing Sexual Orientation Change Efforts on Minors Are Constitutional Under First Amendment Speech Principles*, 67 RUTGERS U. L. REV. 243, 269 (2015) (explaining the Ninth Circuit's rationale that significantly more regulation is permitted within the professional-client relationship because the First Amendment's priority is protecting public discourse, and professionals who speak subject to a state license do not participate in the public debate). The majority applied the analysis from the U.S. Supreme Court's 1985 decision in *Lowe v. SEC* to conclude that the law regulated only conduct. *See Lowe*, 472 U.S. at 232 (White, J., concurring) (laying out continuum framework for regulations of professional speech); *Pickup*, 740 F.3d at 1229; Suter, *supra* note 119, at 29 n.135 (noting that the *Pickup* court issued two opinions, and relied heavily in the second and final opinion on the *Lowe* framework).

[121] *Pickup*, 740 F.3d at 1231 (stating that because the law regulated only treatment, no precedent required the court to conduct an analysis of the regulation in terms of content or viewpoint discrimination).

[122] *Id.* at 1217 (O'Scannlain, J., dissenting) (stating that when a law prohibits professionals from communicating a message, the court should subject the law to "*some level of scrutiny* under the First Amendment"). The Third Circuit was also confused by the Ninth Circuit's decision. *See King*, 767 F.3d at 226 n.12 ("It is not entirely clear why, or on what authority, the original *Pickup* opinion concluded that rational basis is the proper standard of review for a regulation of professional conduct that has an incidental effect on professional speech.").

[123] *Pickup*, 740 F.3d at 1215–18 (O'Scannlain, J., dissenting). The dissent specifically took issue with the majority's use of labels to avoid First Amendment scrutiny. *See id.* at 1215, 1218 (arguing that the regulation at issue targeted speech and that the majority could not exempt that speech from First Amendment protection simply by labeling it "conduct"); Bannon, *supra* note 34, at 658–59 (describing the "labeling game" approach in which courts can arbitrarily label a verbal communication "conduct" or "speech" to subject the communication to either rational basis review or strict scrutiny).

[124] *See Pickup*, 740 F.3d. at 1218 (O'Scannlain, J., dissenting).

professional regulations as an exception to the First Amendment, something that went against existing U.S. Supreme Court precedent.[125]

In *Wollschlaeger II*, the Eleventh Circuit held that a law preventing physician speech about firearms did not violate the doctors' First Amendment rights.[126] The law at issue in *Wollschlaeger II* was the Florida's Firearm Owners' Privacy Act, which restricted health care practitioners' ability to ask or record information about patient firearm ownership.[127] A majority of the panel held that the challenged law was a regulation of professional conduct, and thus was neither subject to First Amendment scrutiny nor in violation of the First Amendment rights of physicians.[128]

The majority did not explain what level of scrutiny it applied to the regulation in question, and it did not explain whether it found the regulation to be content-based or content-neutral.[129] The majority based its conclusion that the challenged law regulated conduct on the concept of "personal nexus" from Justice White's concurrence in the 1985 U.S. Supreme Court case *Lowe v. SEC*, which held that professional conduct occurs when a "personal nexus" exists between professional and client.[130] The majority concluded

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[125] *Id.* at 1218–21 ("But as to the threshold issue—may California remove from the First Amendment's ambit the speech of certain professionals when the State disfavors its content or its purpose?—the Supreme Court has definitively and unquestionably said 'No.'"); DaSilva, *supra* note 7, at 792 & n.181 (reiterating dissent's argument that the First Amendment does not make an exception for professional regulations and citing examples of cases in which professional regulation was not held to be outside the First Amendment). The U.S. Supreme Court has generally rejected attempts to carve out other categories of speech from the First Amendment. *See* Brown v. Entm't Merchs. Ass'n, 131 S. Ct. 2729, 2759 (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))).

[126] *See Wollschlaeger II*, 760 F.3d at 1230–31, 1236 (Wilson, J., dissenting) (lamenting the majority's choice to uphold a law that is content-based, speaker-based, and viewpoint-based).

[127] FLA. STAT. § 790.338 (2012); *see* Wollschlaeger v. Farmer (*Wollschlaeger I*), 814 F. Supp. 2d 1367, 1371 (S.D. Fla. 2011).

[128] *Wollschlaeger II*, 760 F.3d at 1217, 1220 ("We find that the Act is a valid regulation of professional conduct that has only an incidental effect on physicians' speech. As such, the Act does not facially violate the First Amendment.").

[129] *See King*, 767 F.3d at 235 n.19 (pointing out that the *Wollschlaeger II* majority does not explain what level of scrutiny applied, if it applied one at all); *Wollschlaeger II*, 760 F.3d at 1217–26 (classifying banned physician speech as conduct and omitting any mention of whether the challenged regulation is content-based or content-neutral); *id.* at 1236, 1242, 1249 (Wilson, J. dissenting) (characterizing the statute in question as content-based and characterizing the majority's approach as rational basis review); *Wollschlaeger v. Governor of Florida*, 128 HARV. L. REV. 1045, 1048 & n.27 (2015), http://harvardlawreview.org/2015/01/wollschlaeger-v-governor-of-florida/ [http://perma.cc/2GCJ-PVYL] (observing that the Eleventh Circuit in *Wollschlaeger II* did not use a content-neutrality analysis and did not explain what level of scrutiny it applied, which was described by the dissent as rational basis review).

[130] *See Lowe*, 472 U.S. at 232 (White, J., concurring) (proposing that where a "personal nexus" exists between professional and client, a professional can be said to be "engaging in the practice of the profession," not "speaking" as understood by the First Amendment); *Wollschlaeger II*, 760 F.3d at 1217–18 (using Justice White's concept of "personal nexus" and his related continu-

that the challenged law furthered the governmental interests of protecting patient privacy and limiting abuse of the physician-patient relationship, and had only an "incidental effect on physicians' speech."[131]

The dissent in *Wollschlaeger II* vehemently disagreed with the majority's application of what it perceived to be rational basis review to a content-based regulation of speech.[132] The dissent criticized the majority for modifying the level of scrutiny that historically has been applied to content-based restrictions and argued that the challenged law should have been subject to at least intermediate scrutiny.[133] The dissent viewed the physician's behavior at issue as speech and argued that the law is a content-based, speaker-based, and viewpoint-based restriction of this speech that was passed to limit Florida doctors' message about firearm safety.[134] The dissent concluded that the law would not have survived intermediate scrutiny because the regulation was not necessary to protect the rights Florida claimed it was protecting in passing the law.[135]

B. A Delicate Balance: The Duty to Regulate Versus the Right to Speak

Some courts have been more protective of professionals' First Amendment rights by applying intermediate scrutiny to professional speech regulations.[136] In 2015, the Eleventh Circuit vacated its *Wollschlaeger II* opinion and substituted a new opinion ("*Wollschlaeger III*"), in which it applied intermediate scrutiny.[137] The Third Circuit applied intermediate

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um framework to justify conclusion that challenged law regulated conduct). 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. *See Lowe*, 472 U.S. at 232 (White, J., concurring); *Wollschlaeger II*, 760 F.3d at 1217–18.

[131] *Wollschlaeger II*, 760 F.3d at 1217.

[132] *Id.* at 1230, 1236 (Wilson, J., dissenting) (describing challenged Act as a "gag order" that chills practitioners' speech and warning that the majority's modification of the level of scrutiny applicable to content-based regulations was "startling and dangerous" (quoting Stevens, 559 U.S. at 470)).

[133] *Id.* 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).

[134] *See Wollschlaeger II*, 760 F.3d at 1230–31 (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 dissent argued 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.*

[135] *See id.* at 1230–31, 1239, 1258–60 (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).

[136] *See Wollschlaeger III*, 797 F.3d at 896 (applying intermediate scrutiny to regulation of professional speech); *Stuart II*, 774 F.3d at 244–45 (same); *King*, 767 F.3d at 234 (same).

[137] *See Wollschlaeger III*, 797 F.3d at 869, 896 (noting that in applying intermediate scrutiny to a regulation of professional speech, the Eleventh Circuit was "in good company" (citing *Stuart II*, 774 F.3d. at 248; *King*, 767 F.3d at 235; *Pickup*, 740 F.3d at 1227–28)).

scrutiny in 2014 in *King v. Governor of New Jersey*.[138] The Fourth Circuit chose to apply "heightened intermediate scrutiny" to a content-based regulation of professional speech that was challenged in 2014 in *Stuart v. Camnitz*.[139]

In 2015, the Eleventh Circuit sua sponte vacated its original opinion in *Wollschlaeger II*, in which it applied rational basis review, and substituted a new opinion, *Wollschlaeger III*, in which it applied intermediate scrutiny.[140] In a 2–1 decision, the court held that the Firearm Owners' Privacy Act was a permissible regulation of physician speech.[141] In reaching this conclusion, the court critically examined each provision of the law at issue to determine whether it regulated speech or conduct, concluding that three of the four challenged provisions related to speech.[142] The court rejected outright the Florida's contention that *Lowe* stands for the proposition that professional regulation impacts only conduct and thus falls outside the purview of the First Amendment.[143] It then applied an intermediate scrutiny analysis to each of the provisions that regulated speech.[144] Although the court agreed that the regulations in question were content-based, it found intermediate scrutiny to be appropriate because of the state's deeply rooted interest in protecting the pub-

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[138] *See King*, 767 F.3d at 234 (reasoning that 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).

[139] *See Stuart II*, 774 F.3d at 245 (agreeing with the lower court that the appropriate standard of review was the "heightened intermediate scrutiny standard used in certain commercial speech cases" (citing *Stuart I*, 992 F. Supp. 2d at 600)).

[140] *See Wollschlaeger III*, 797 F.3d at 868, 896 (declaring that intermediate scrutiny was the correct standard for a regulation of professional speech (citing *Stuart II*, 774 F.3d. at 248; *King*, 767 F.3d at 235; *Pickup*, 740 F.3d at 1227–28)). The court had before it a motion for en banc review, which it declared moot after issuing this new opinion. *See* Petition for Rehearing En Banc at 3, *Wollschlaeger III*, 797 F.3d 859 (No. 12-14009) [hereinafter *Wollschlaeger III* Petition for Rehearing En Banc]. *See generally* Petition for Rehearing En Banc, *Wollschlaeger II*, 760 F.3d 1195 (No. 12-14009) [hereinafter *Wollschlaeger II* Petition for Rehearing En Banc] (requesting the Eleventh Circuit to rehear, and reverse, *Wollschlaeger II* en banc).

[141] *See Wollschlaeger III*, 797 F.3d at 869 (holding that the challenged regulation is a constitutional restriction of physician speech).

[142] *See id.* at 886 (concluding that the record-keeping, inquiry, and harassment provisions of the challenged law regulated a significant amount of protected speech, whereas the discrimination provision regulated only conduct); *see also* FLA. STAT. § 790.338(1) (record-keeping); *id.* § 790.338(2) (inquiry); *id.* § 790.338(5) (harassment); *id.* § 790.338(6) (discrimination).

[143] *See Wollschlaeger III*, 797 F.3d at 884 (noting that Florida relied on Justice White's concurring opinion in *Lowe* but concluding that no part of *Lowe* supports "the idea that the entire category of professional regulation touches on only conduct, and thus lies beyond the reach of the First Amendment").

[144] *See id.* at 896 (explaining that the challenged regulation is valid if it "'directly advances' a 'substantial' state interest, and 'is not more extensive than is necessary to serve that interest'" (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 566 (1980))).

lic.[145] The court concluded that the challenged law withstood the test of intermediate scrutiny and upheld the law.[146]

Despite the substantive changes to the majority opinion in *Wollschlaeger III*, the decision still drew an emphatic dissent.[147] The dissent primarily disagreed with how the majority applied intermediate scrutiny and argued that the regulation could withstand neither intermediate nor strict scrutiny.[148] In particular, the dissent took issue with the majority's holding that the challenged law directly advanced a state interest and was not more extensive than necessary to serve that interest.[149] The dissent declared that the regulation was designed simply to stop a political message and was not effective in relation to any of the State's purported interests.[150]

In *King*, the Third Circuit considered a First Amendment challenge to a similar regulation to the one at issue in *Pickup* that prohibited licensed counselors from engaging in sexual orientation change efforts with minors.[151] The court held that the speech that occurs during therapy or counseling is speech protected by the First Amendment.[152] This speech, howev-

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[145] *See Wollschlaeger III*, 797 F.3d at 892 ("When the state seeks to regulate speech by professionals in a context in which the state's interests in regulating for the protection of the public is more deeply rooted, a lesser level of scrutiny applies."). The plaintiffs in *Wollschlaeger III* had asked the court to apply strict scrutiny. *See id.* at 895. Strict scrutiny is the traditional standard applied to content-based laws. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015) (holding that content-based laws are subject to strict scrutiny); *see also* Catherine L. Fisk & Erwin Chemerinsky, *Political Speech and Association Rights After* Knox v. Seiu, Local 1000, 98 CORNELL L. REV. 1023, 1089 (2013) ("The Supreme Court repeatedly has said that content-based restrictions on free speech must meet strict scrutiny . . . .").

[146] *See Wollschlaeger III*, 797 F.3d at 896–900. The court held that "protecting the public by regulating the medical profession so as to safeguard patient privacy" was a substantial state interest. *See id.* at 897. It then held that the challenged law directly advanced the substantial state interest and that it was "precisely tailored" to the state's substantial interest. *See id.* at 900.

[147] *See id.* at 901–34 (Wilson, J., dissenting) (dissenting on the basis that the challenged law did not withstand intermediate scrutiny).

[148] *See id.* at 901, 907–09 (explaining that the challenged regulation is unconstitutional under both strict and intermediate scrutiny).

[149] *See id.* at 920 (articulating intermediate scrutiny standard and explaining that the challenged law fails under two of the three prongs of the test).

[150] *See id.* at 902, 933.

[151] *See* N.J. STAT. §§ 45:1-54 to -55 (2015); *King*, 767 F.3d at 220; *see also* Bannon, *supra* note 34, at 676 (noting how the Third Circuit recognized that professional speech regulations "reveal the uncomfortable tension" between the state's police power and professional speech rights). The statutes at issue included legislative findings as to the deleterious impact of conversion therapy on minors as well as a prohibition that forbids licensed counselors from attempting conversion therapy with minors. *See* N.J. STAT. § 45:1-54 (legislative findings); *id.* § 45:1-55 (prohibition of conversion therapy).

[152] *King*, 767 F.3d at 224–26, 229 (rejecting the argument that speech that occurs in the course of treatment is conduct and asserting that "[s]peech is speech, and it must be analyzed as such for the purposes of the First Amendment"). Here, the court departed from *Pickup* and *Wollschlaeger II*, which both determined that the behavior in question was conduct. *See Wollschlaeger II*, 760 F.3d at 1217 (declaring that challenged law was a valid regulation of professional con-

er, does not receive the full protection of the First Amendment.[153] The court relied on the state's power to regulate certain professions in order to protect its citizens from untrustworthy or incompetent professionals.[154] The court also noted the imbalance of knowledge that often exists in a professional-client relationship and the trust of the client that follows.[155]

The court, perhaps most importantly, held that professional speech is subject to only intermediate scrutiny.[156] In reaching this conclusion, the court compared professional speech to commercial speech, which enjoys the same limited protection.[157] Both commercial speech and professional speech are valuable because of their "informational function," and both have traditionally been subject to government regulation.[158] The court specifically noted, however, that a regulation of professional speech that is not enacted to protect citizens from "harmful or ineffective" professional services would receive stricter scrutiny.[159] In so holding, the court found that the regulation at issue both directly advanced a substantial state interest and was not more extensive

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duct); *Pickup*, 740 F.3d at 1222 (holding that challenged law was a regulation of professional conduct).

[153] *King*, 767 F.3d at 229. In contrast, the court noted that when a professional speaks publicly, he or she enjoys the full protection of the First Amendment. *See id.* at 232 ("[W]hen a professional is speaking to the public at large or offering her personal opinion to a client, her speech remains entitled to the full scope of protection afforded by the First Amendment."). The court defined professional speech, which may be regulated, as speech that occurs when a professional is providing a client with personalized services based on the professional's expertise. *See id.*

[154] *Id.* at 232; Martha Swartz, *Are Physician-Patient Communications Protected by the First Amendment?*, 2015 CARDOZO L. REV. DE NOVO 92, 98 http://www.cardozolawreview.com/content/denovo/SWARTZ.denovo.36.pdf [http://perma.cc/HS5U-NSKT] (explaining that the Third Circuit afforded professional speech "diminished" First Amendment protection because the professionals were "state-licensed professionals within the confines of a professional relationship" (quoting *King*, 767 F.3d at 224)).

[155] *King*, 767 F.3d at 232; Bannon, *supra* note 34, at 676 (stating that the *King* court needed to be careful not to "undermine" New Jersey's interest in protecting its citizens from professionals whose "'specialized knowledge' put them in a position of authority" (citing *King*, 767 F.3d at 232)).

[156] *See King*, 767 F.3d at 233–34, 236–37 ("[W]e have serious doubts that anything less than intermediate scrutiny would adequately protect the First Amendment interests inherent in professional speech."); *see also* Sherman, *supra* note 106, at 198 (describing the *King* decision as "without question, the most protective occupational-speech decision ever issued by a federal appellate court").

[157] *King*, 767 F.3d at 234 (explaining that the U.S. Supreme Court has "repeatedly emphasized that commercial speech enjoys only diminished protection" and stating belief that professional speech is similar to commercial speech and thus should also garner only intermediate scrutiny).

[158] *Id.*

[159] *Id.* at 235 ("Because the State's regulatory authority over licensed professionals stems from its duty to protect the clients of these professionals, a state law may be subject to strict scrutiny if designed to advance an interest unrelated to client protection.").

than necessary to serve that interest, and thus succeeded the First Amendment challenge.[160]

In late 2014, in *Stuart v. Camnitz*, the Fourth Circuit applied intermediate scrutiny when it considered a First Amendment challenge that—like *King*, *Pickup*, and the *Wollschlaeger* cases—involved professional speech in the context of the medical profession.[161] *Stuart* involved a First Amendment challenge to a North Carolina abortion statute that had a "display of real-time view" requirement.[162] The court determined that the display of real-time view requirement constituted a content-based regulation of physicians' speech and held that the regulation had to satisfy at least intermediate scrutiny to survive.[163] The court conceded that abortion may be a special scenario when it comes to applying constitutional principles, yet it could not go so far as to say that abortion is so special a case that it would nullify any First Amendment rights enjoyed by doctors.[164] Because the court concluded that the regulation failed intermediate scrutiny, it declined to expand its holding to state whether or not the regulation at issue required application of strict scrutiny instead.[165]

C. Professionals Are People, Too: Applying Strict Scrutiny Standard to Professional Speech

Although no circuit court has yet held that strict scrutiny applies to professional speech regulations, many plaintiffs and scholars have argued for

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[160] *See id.* at 235, 237–40. States have a strong interest in protecting the public from professionals who provide "harmful or ineffective" services. *Id.* at 235.

[161] *See Stuart II*, 774 F.3d at 250 ("[The intermediate scrutiny standard] seeks to 'ensure not only that the State's interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message.'" (quoting Sorrell v. IMS Health, Inc. 131 S. Ct. 2653, 2664 (2011))).

[162] *See* N.C. GEN. STAT. § 90-21.85 (2011); *Stuart II*, 774 F.3d at 242–43; *see also* Scott Gaylord, Casey *and the First Amendment: Revisiting an Old Case to Resolve a New Compelled Speech Controversy*, 66 S.C. L. REV. 951, 953 (2015) (observing that it was "surprising" that physicians seeking to stop enforcement of the speech-and-display requirement challenged the law on the basis of doctors' First Amendment rights instead of solely basing the claim on a woman's Fourteenth Amendment due process right). The statute, entitled "Display of real-time view requirement," required doctors to perform an ultrasound in the days leading up to an abortion and to display the ultrasound to the patient while also describing to the patient what the ultrasound showed. *See* N.C. GEN. STAT. § 90-21.85.

[163] *See Stuart II*, 774 F.3d at 245; Gaylord, *supra* note 162, at 953 (observing that the *Stuart II* court found the disclosures made pursuant to the speech-and-display requirement to be "ideological speech" that required First Amendment protection despite "convey[ing] only factual information").

[164] *See Stuart II*, 774 F.3d at 255–56 (concluding that abortion is not a unique enough situation to distort the rights of professionals to speak to their patients).

[165] *Id.* at 247 n.3 (explaining why the court did not address plaintiff's claims that the display of real-time view requirement discriminated on the basis of viewpoint and thus required strict scrutiny analysis).

this approach.[166] The application of strict scrutiny to regulations of professional speech would recognize professional speech as akin to political speech, which traditionally has been closely guarded by the First Amendment.[167] Under that rubric, just as content-based laws targeting what an individual says are presumed invalid, so, too, would content-based laws that target what a professional says when interacting with a client.[168]

Recently, some have argued that the U.S. Supreme Court's 2015 decision in *Reed v. Town of Gilbert* requires the application of strict scrutiny to content-based regulations of professional speech.[169] They argue that *Reed* requires, without exception, the application of strict scrutiny whenever a chal-

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[166] *See Wollschlaeger III*, 797 F.3d at 894 (recounting plaintiff's argument for strict scrutiny); *Stuart II*, 774 F.3d at 245 (explaining that plaintiffs argued for strict scrutiny); *King*, 767 F.3d at 236 (rejecting plaintiff's argument that challenged law should be subject to strict scrutiny); *Pickup*, 740 F.3d at 1231 n.7 (acknowledging plaintiff's request for strict scrutiny); *Moore-King*, 708 F.3d at 567 (explaining that plaintiff argued for strict scrutiny); DaSilva, *supra* note 7, at 769–70 (arguing that strict scrutiny should apply to regulations that restrict what licensed counselors say to their patients); Sherman, *supra* note 106, at 192–93 (arguing that strict scrutiny should apply to content-based professional speech regulations); Briella N. Kovalchek, Note, *Do Actions Speak Louder Than Words?: An Analysis of Conversion Therapy as Protected Speech Versus Unprotected Conduct*, 16 RUTGERS J. L. & RELIGION 428, 439 (2015) (arguing that strict scrutiny should apply to regulations that restrict what licensed counselors say to their patients).

[167] *See* Robert Post & Amanda Shanor, *Adam Smith's First Amendment*, 128 HARV. L. REV. F. 165, 170 (2015), http://harvardlawreview.org/2015/03/adam-smiths-first-amendment/ [http://perma.cc/N5J7-KCKV] (describing that basic First Amendment doctrine guards "the right to participate in the 'public discourse'" (quoting Snyder v. Phelps, 562 U.S. 443, 460 (2011))); Sherman, *supra* note 106, at 196–97 (arguing that because the First Amendment should be "understood as a broad, libertarian protection for the right to communicate on the topics of one's choice," regulations of professional speech should be treated the same way as regulations of political speech). Courts' reluctance to apply "traditional First Amendment principles" to professional speech has resulted in claims that they have created an exception to the First Amendment out of whole cloth. *See* Sherman, *supra* note 106, at 191–92 (explaining that Justice White's rule from *Lowe* essentially creates a categorical exception for professional speech); *see also Lowe*, 472 U.S. at 232 (White, J., concurring) (proposing framework for professional speech regulations whereby speech that occurs within the "personal nexus" is treated as professional conduct and speech that occurs outside of the "personal nexus" is treated as speech for the purposes of the First Amendment). The U.S. Supreme Court has declared that courts may not create such exceptions. *See Brown*, 131 S. Ct. at 2734 (explaining that courts do not have "freewheeling authority to declare new categories of speech" that are exempt from the First Amendment (quoting United States v. Stevens, 559 U.S. 460, 472 (2010))). *But see* Collins, *supra* note 53, at 417–22 (enumerating nearly fifty categories of unprotected expression).

[168] *See* Sherman, *supra* note 106, at 192–93 (arguing that professional speech should be treated the same as other "content-defined categor[ies] of speech" by subjecting regulations of professional speech to strict scrutiny).

[169] *See Reed*, 135 S. Ct. at 2227 (proposing blanket application of strict scrutiny to content-based laws); Appellees' Submission, *supra* note 64, at 2, 4 (arguing that *Reed* requires application of strict scrutiny to the challenged content-based regulation in *Wollschlaeger III*); *Doe* Petition for Writ of Certiorari, *supra* note 18, at 8 (asking the Court to grant certiorari to a case similar to *King* in order to apply strict scrutiny per the *Reed* holding and to overturn the Third Circuit's use of intermediate scrutiny).

lenged law is content-based.[170] Because "content-based" was determined by the Court to include "subject-matter regulation," all regulations targeting the topic of professional speech would be subject to strict scrutiny as content-based laws.[171] It is unclear if any challenged regulations of professional speech could be upheld under a strict scrutiny standard.[172]

III. JUST WHAT THE DOCTOR ORDERED: IMPOSE INTERMEDIATE SCRUTINY ON CONTENT-BASED REGULATIONS OF PROFESSIONAL SPEECH

The collection of case law that has amassed over the past several decades provides no cohesive framework for determining which regulations of professional speech violate the First Amendment.[173] Professional speech

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[170] Appellees' Submission, *supra* note 64, at 2, 4 (calling for the Eleventh Circuit to apply strict scrutiny to the challenged regulation in *Wollschlaeger III* in light of *Reed*); *see Reed*, 135 S. Ct. at 2227 (holding that content-based laws are subject to strict scrutiny).

[171] *See Reed*, 135 S. Ct. at 2227 (describing a content-based law as one that "applies to particular speech because of the topic discussed or the idea or message expressed"); Appellees' Submission, *supra* note 64, at 3–4 (describing the holding in *Reed* and concluding that the challenged law is content-based because "it restricts the speech of a single group (doctors) on a single topic (firearms)").

[172] *Compare* Appellees' Submission, *supra* note 64, at 9 (arguing that the law challenged in *Wollschlaeger III* does not serve a compelling state interest and thus cannot withstand strict scrutiny), *with* Appellants' Memorandum Addressing the Impact of Reed v. Town of Gilbert, Arizona at 12–15, *Wollschlaeger III*, 797 F.3d 859 (No. 12-14009) [hereinafter Appellants' Memorandum] (arguing that the law challenged in *Wollschlaeger III* could withstand strict scrutiny).

[173] *See* Stuart v. Camnitz (*Stuart II*), 774 F.3d 238, 255 (4th Cir. 2014), *cert. denied*, 135 S. Ct. 2838 (2015) (explaining that in the area of professional regulation and professional expression, there are few absolutes); King v. Governor of N.J., 767 F.3d at 235 n.19 (3d Cir. 2014) (demonstrating confusion among the federal courts about what level of scrutiny to apply to regulations of professional speech), *cert. denied*, 135 S. Ct. 2048 (2015); Jones, *supra* note 87, at 649 (noting that the First Amendment jurisprudence on professional speech has been minimally developed). The recent case law on the professional speech rights of physicians demonstrates this point. *Compare* Wollschlaeger v. Governor of Fla. (*Wollschlaeger II*), 760 F.3d 1195, 1217–19 (11th Cir. 2014), *vacated*, 797 F.3d 859 (11th Cir. 2015) (holding that the state could prohibit physician speech on certain topics without implicating their First Amendment rights and declining to apply intermediate or strict scrutiny to such a regulation), *with Stuart II*, 774 F.3d at 244–45 (applying intermediate scrutiny to First Amendment challenge of compelled physician speech). Part of the difficulty concerning regulations of professional speech is that there are two overlapping issues at play: (1) whether professional speech is speech or conduct, and (2) what level of scrutiny to apply if it is a regulation of speech. *See King*, 767 F.3d at 229 ("[S]peech is speech, and it must be analyzed as such for purposes of the First Amendment."); *Wollschlaeger II*, 760 F.3d at 1217–18 (labeling the speech in question as conduct that could be regulated by the state). Existing precedent suggests that the government may not escape First Amendment review of a regulation aimed at limiting speech by arguing that the regulation applies to conduct only. *Wollschlaeger II* Petition for Rehearing En Banc, *supra* note 140, at 4–9 (reviewing existing precedent). In addition, a court's task in navigating the professional speech doctrine is further complicated by the partisan interests at play in many of the challenged regulations. *See* Dolgin, *supra* note 15, at 302 & n.59 (observing that professional speech regulations concerning firearms and abortion developed as part of America's "culture wars"). *See generally* Wollschlaeger v. Governor of Fla. (*Wollschlaeger III*), 797 F.3d 859, 908 (11th Cir. 2015) (Wilson, J., dissenting) (expressing that the chal-

rights are a growing issue in the United States, and it would be shortsighted to accept an ad hoc, unwieldy jurisprudence that has decided the First Amendment rights of professionals based on polarizing issues.[174] In a dispute like the present one where the goalposts are always moving, the best—and perhaps only viable—outcome is to have the highest court issue an opinion as to the correct level of scrutiny to apply to professional speech.[175]

This Part argues that intermediate scrutiny should apply to all content-based regulations of professional speech.[176] Section A argues that all regulations of professional speech are content-based and thus should be treated with higher scrutiny than rational basis review.[177] Section B explains why strict scrutiny, the level of review favored by plaintiffs, is not the appropriate standard of review for content-based regulations of professional speech.[178] Section C argues that intermediate scrutiny is the appropriate standard of review for content-based regulations of professional speech.[179]

A. All Regulations of Professional Speech Are Content-Based

All regulations of professional speech are content-based because they are focused on altering the content of what a professional conveys or does not convey to a client.[180] Licensed professionals provide personalized ad-

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lenged law limited speech about guns because the legislature wanted to limit physicians' messages on the topic); *Stuart II*, 774 F.3d at 245 (discussing the purpose of the challenged regulation as sending a message to patients that abortion was a disfavored course of action); *King*, 767 F.3d at 220, 236 (upholding law banning conversion therapy but making clear that First Amendment scrutiny was required to ensure the state was not merely regulating professional speech to limit "politically-disfavored messages").

[174] *See Wollschlaeger III*, 797 F.3d at 903 (Wilson, J., dissenting) (describing gun ownership as a public health issue and rejecting majority's choice to uphold a law banning physician-patient speech about gun ownership); *Stuart II*, 774 F.3d at 245 (applying a heightened level of scrutiny to determine the rights of professionals where a pro-life law is implicated); Pickup v. Brown, 740 F.3d 1208, 1222 (9th Cir. 2013) (allowing government regulation to trump free speech rights of the minority of professionals who practice conversion therapy), *cert. denied*, 134 S. Ct. 2871 (2015).

[175] *See Hines* Petition for Writ of Certiorari, *supra* note 18, at i (presenting the question of whether regulations of professional speech are subject to First Amendment heightened scrutiny or rational basis review); *King* Petition for Writ of Certiorari, *supra* note 106, at 7, 20.

[176] *See infra* notes 180–221 and accompanying text.

[177] *See infra* notes 180–191 and accompanying text.

[178] *See infra* notes 192–203 and accompanying text.

[179] *See infra* notes 204–221 and accompanying text.

[180] *See Wollschlaeger II*, 760 F.3d at 1263–64 (Wilson, J., dissenting); *see also Pickup*, 740 F.3d at 1217–18 (O'Scannlain, J., dissenting) (explaining that the law in question is silencing a particular message that doctors wish to communicate to their patients). More generally, all regulations of professional speech could be construed as subject-matter regulation, which would make them content-based regulations. *See* Reed v. Town of Gilbert, 135 S. Ct. 2218, 2230, 2232–33 (2015) ("[A] speech regulation targeted at specific subject matter is content-based . . . ."); *see also* Norton v. City of Springfield, 612 F. App'x 386, 387 (7th Cir. 2015) (concluding that *Reed* "effectively abolishes any distinction between content regulation and subject-matter regulation").

vice to clients in the context of a professional relationship.[181] Professionals provide a critical source of information for their clients through a relationship that frequently has significant knowledge asymmetries.[182] As soon as a professional begins to offer advice to a client, states have an interest in what the professional says.[183]

State legislatures have used their regulatory powers in order to control the words and thoughts of professionals whose work impacts topics of serious concern to the legislatures, such as abortion, gun ownership, and gay rights.[184] Regulations of professional speech like these, and others on less inflammatory topics, specifically target the content of the speech and the message conveyed by that content.[185] The express purpose of regulations of professional speech is to control what messages professionals convey to their clients.[186]

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[181] *See* Lowe v. SEC, 472 U.S. 181, 232 (1985) (White, J., concurring) (describing "personal nexus" as a hallmark of professional speech); *Wollschlaeger III*, 797 F.3d at 885 (using framework from *Lowe* as basis for determining whether challenged provisions regulated conduct or speech).

[182] *See Wollschlaeger III*, 797 F.3d at 868–69 (recounting the power imbalance between doctors and their patients that exists in an examination room because of the doctor's specialized knowledge); *King*, 767 F.3d at 234 (describing value of professional speech to listeners and society because of the informational function it serves); *see also* Rob Atkinson, *An Elevation of Neo-Classical Professionalism in Law and Business*, 12 GEO. J.L. & PUB. POL'Y 621, 696 (2014) (explaining that the imbalance of knowledge between professionals and clients can give professionals an opportunity to exploit their clients and thus professionals may need to be regulated).

[183] *See King*, 767 F.3d at 234 (describing the traditional power of the states to regulate professions); Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology, 228 F.3d 1043, 1054 (9th Cir. 2000) (describing the state's power to regulate the professions using its police power); *see also King*, 767 F.3d at 232 (arguing that restricting a state's ability to regulate professionals would undermine its authority to protect the public).

[184] *See* Dolgin, *supra* note 15, at 302–28, 342 (discussing recent laws limiting professional speech as reflecting America's "culture wars" on topics such as gun ownership and abortion); *see, e.g.*, *Wollschlaeger III*, 797 F. 3d at 869 (assessing law passed by the Florida legislature that limits the content of questions a physician may ask a patient to only those that do not include inquiries about firearm ownership); *King*, 767 F. 3d at 237, 240 (considering a challenge to a New Jersey law that prohibited licensed therapists from practicing conversion therapy with minors); *Pickup*, 740 F.3d at 1231–32 (considering a challenge to a California law that prohibited licensed therapists from engaging in sexual orientation change efforts with minors).

[185] *See* CAL. BUS. & PROF. CODE § 865 (West 2013) (prohibiting conversion therapy with minors); N.J. STAT. § 45:1-55 (2013) (same); *Wollschlaeger III*, 797 F.3d at 908 (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. That is classic viewpoint discrimination."); *Stuart II*, 774 F.3d at 245 (holding that the display of real-time view requirement regulated expressive conduct because there was a clear message conveyed in requiring a woman seeking an abortion to have a sonogram).

[186] *See, e.g.*, CAL. BUS. & PROF. CODE § 865 (prohibiting conversion therapy with minors); FLA. STAT. § 790.338 (2012) (prohibiting physicians from inquiring into patient firearm ownership except when relevant to patient's medical care); N.J. STAT. § 45:1-55 (prohibiting conversion therapy with minors).

Content-based restrictions on speech are generally subject to either intermediate scrutiny or strict scrutiny.[187] One exception to applying strict scrutiny to content-based restrictions of speech has been in the area of professional speech regulation.[188] This may be due to the fact that this speech occurs in an area that is already so highly regulated by the state, and that regulatory structure creates the illusion that the speech falls outside the bounds of the First Amendment.[189] This illusion should not be enough to strip professionals of their First Amendment rights when they interact with clients.[190] Instead, courts should acknowledge the reality that professional speech exists in a highly regulated area by applying intermediate scrutiny, which effectively balances the important interests of the state against the individual rights of professionals.[191]

B. Why Strict Scrutiny Offers Too Much Protection for Professional Speech

Plaintiffs in professional speech cases commonly request that courts apply strict scrutiny to content-based regulations of professional speech.[192] When applying strict scrutiny, courts uphold a regulation only if it "furthers a compelling governmental interest and is narrowly tailored to [achieve] that end."[193] It is possible that plaintiffs request strict scrutiny in part because it implies "near-automatic condemnation" of a regulation.[194] Despite

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[187] *See Reed*, 135 S. Ct. at 2227 (applying strict scrutiny to content-based regulation of speech); Sorrell v. IMS Health, Inc., 131 S. Ct. 2653, 2667 (2011) (applying heightened scrutiny to content-based regulation of commercial speech).

[188] *See Wollschlaeger III*, 797 F.3d at 896 (applying intermediate scrutiny to content-based regulation of professional speech); *Stuart II*, 774 F.3d at 245 (same); *King*, 767 F.3d at 234 (same).

[189] *See Stuart II*, 774 F.3d at 247 (illustrating the different kinds of regulations states may enact to regulate the professions); *Nat'l Ass'n for the Advancement of Psychoanalysis*, 228 F.3d at 1054 (describing the states' police power and states' ability to regulate the professions).

[190] *See Wollschlaeger III*, 797 F.3d at 902 (Wilson, J., dissenting) (explaining that doctors have a First Amendment right to convey messages to patients).

[191] *See id.* at 896 (majority opinion) (utilizing intermediate scrutiny analysis for professional speech); *King*, 767 F.3d at 237 (same).

[192] *See Wollschlaeger III*, 797 F.3d at 894 (explaining plaintiff's contention that the challenged regulation should be subject to strict scrutiny); *Stuart II*, 774 F.3d at 245 (stating that the plaintiffs argued that the challenged law should be subject to strict scrutiny); *King*, 767 F.3d at 236 (rejecting plaintiff's argument that challenged law should be subject to strict scrutiny); *Pickup*, 740 F.3d at 1231 n.7 (acknowledging plaintiff's request that the court apply strict scrutiny to the challenged law); Moore-King v. County of Chesterfield, 708 F.3d 560, 567 (4th Cir. 2013) (explaining that the plaintiff argued that the challenged law should trigger strict scrutiny review).

[193] *Reed*, 135 S. Ct. at 2231 (articulating strict scrutiny standard); *see also* 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").

[194] United States v. Alvarez, 132 S. Ct. 2537, 2552 (2012); *see Reed*, 135 S. Ct. at 2234 (Breyer, J., concurring) (referring to strict scrutiny as "almost certain legal condemnation"); Wil-

these repeated requests, to date no court has applied strict scrutiny to a regulation of professional speech.[195]

In 2015, in *Reed v. Town of Gilbert*, the U.S. Supreme Court may have opened the door to a broader application of strict scrutiny.[196] In *Reed*, the Court drew a firm line in insisting that all content-based regulations should be subject to strict scrutiny.[197] Traditionally, courts apply strict scrutiny to content-based restrictions because of the high value placed on free public discourse.[198] This rationale does not apply to professional speech, which cannot be described as speech in the public discourse.[199]

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liams-Yulee v. Fla. Bar, 135 S. Ct. 1656, 1665–66 (2015) (reiterating that it is rare for a law regulating speech to survive strict scrutiny analysis); Geoffrey R. Stone, *Content-Neutral Restrictions*, 54 U. CHI. L. REV. 46, 53 (1987) (asserting that the application of strict scrutiny "almost invariably" results in the challenged law being found unconstitutional); Adam Winkler, *Fatal in Theory and Strict in Fact: An Empirical Analysis of Strict Scrutiny in Federal Courts*, 59 VAND. L. REV. 793, 815 (2006) (concluding based on empirical analysis that when strict scrutiny is applied in free speech cases, few laws survive).

[195] *See Stuart II*, 774 F.3d at 245 (applying intermediate scrutiny to First Amendment challenge to compelled physician speech); *Wollschlaeger II*, 760 F.3d at 1217–18 (applying rational basis review); *Pickup*, 740 F.3d at 1231 (applying rational basis review).

[196] *See Reed*, 135 S. Ct. at 2230, 2232–33 (holding that content-based regulations of speech are subject to strict scrutiny); *Norton*, 612 F. App'x at 387 (asserting that *Reed* "effectively abolishes any distinction between content regulation and subject-matter regulation"); Appellees' Submission, *supra* note 64, at 2, 4 (arguing that *Reed* requires that application of strict scrutiny to the challenged content-based regulation in *Wollschlaeger III*); *Doe* Petition for Writ of Certiorari, *supra* note 18, at 8 (asking the Court to grant certiorari in order to apply strict scrutiny per the *Reed* holding and to overturn the Third Circuit's use of intermediate scrutiny).

[197] *See Reed*, 135 S. Ct. at 2231–32. *But see* Post, *supra* note 167, at 181–82 (arguing that there is no single First Amendment doctrine that can be applied to all speech).

[198] *See Reed*, 135 S. Ct. at 2227 (applying strict scrutiny to content-based regulation of speech); Post, *supra* note 167 at 179 (describing rationale behind applying strict scrutiny to content-based restrictions). To police the content of messages in the public forum would be to rob people of their right to speak freely, which is the cornerstone of democracy. *See* Post, *supra* note 167 at 179 (arguing that the wariness with which courts approach content-based restrictions is demonstrative of the equality of messages and voices that makes up a democracy).

[199] *See* Hill, *supra* note 56, at 62 (distinguishing professional speech from public discourse); Post, *supra* note 167, at 179 (stating that professional speech "by definition lies outside of public discourse"). Courts have recognized that some professional speech has ideological aspects, particularly in the case of abortion. *See Stuart II*, 774 F.3d at 245; Gaylord, *supra* note 162, at 953 (characterizing the speech in question in *Stuart II* as "ideological speech" requiring First Amendment protection despite "convey[ing] only factual information"). Yet, licensed professionals cannot claim a right to freely state their opinions when their ability to speak to clients at all relies entirely on the state's power to license them to do so. *See* Post, *supra* note 167, at 179, 181 (asking whether people would want the professional-client relationship to be based on political equality of speech instead of restrictions set by state standards). The same could be said of commercial speech. *See id.* at 181–82 (arguing that "First Amendment doctrine is plural" such that principles that protect free speech in a public forum by an individual would not apply to commercial speech or professional speech).

In the case of professional speech, courts have generally rejected strict scrutiny because it offers too much protection to the speech.[200] In an area such as professional regulation that has traditionally been left to the states, to remove a considerable portion of their power is not only unnecessary, but also unprecedented.[201] To a certain extent, professionals should expect to be regulated by the state because the state already licenses their profession and authorizes them to practice at all.[202] The solution is not to disregard the state's interest in regulating professionals, but instead to balance the interests of the state in protecting its citizens against the First Amendment rights of professionals.[203]

C. Intermediate Scrutiny Balances a Professional's First Amendment Rights with the State's Interests in Protecting Citizens' Safety and Welfare

The appropriate approach for content-based regulations of professional speech is the proportionality approach of intermediate scrutiny.[204] Three federal appellate courts that have been presented with the issue of First Amendment protection of professional speech have selected intermediate scrutiny, intuiting that it strikes the right balance in this heavily regulated area of speech.[205] Under this approach, the burden on the speech in question

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[200] *See Stuart II*, 774 F.3d at 244–45 (applying intermediate scrutiny instead of strict scrutiny); *King*, 767 F.3d at 236 (refusing to apply strict scrutiny); *Pickup*, 740 F.3d at 1231 n.7 (same); *Moore-King*, 708 F.3d at 567–69 (same). *But see* Appellees' Submission, *supra* note 64, at 1 (describing Eleventh Circuit's request for supplementary briefing on whether the *Reed* holding requires application of strict scrutiny to regulation of professional speech).

[201] *See Stuart II*, 774 F.3d at 244–45; *King*, 767 F.3d at 236; *Pickup*, 740 F.3d at 1231 n.7; *Moore-King*, 708 F.3d at 567–9; *see also Nat'l Ass'n for the Advancement of Psychoanalysis*, 228 F.3d at 1054 (describing state's police power to regulate the professions).

[202] *See* Kry, *supra* note 15, at 886; *see, e.g.*, ALASKA STAT. § 08.04.450 (2015) (describing revocation of a license to practice accounting); MASS. GEN. LAWS. ch. 112 § 2 (2015) (describing licensing of physicians); R.I. GEN. LAWS § 5-34-15 (2015) (describing licensing of practical nurses).

[203] *See Wollschlaeger III*, 797 F.3d at 896–901 (applying intermediate scrutiny standard to challenged regulation of professional speech); *King*, 767 F.3d at 234–36 (holding that intermediate scrutiny applied to challenged regulation of professional speech because of state interest in regulation and need to protect professionals' First Amendment rights).

[204] *See Wollschlaeger III*, 797 F.3d at 892 (reasoning that U.S. Supreme Court precedent indicates the application of intermediate scrutiny in situations where "the State seeks to regulate speech by professionals in a context in which the State's interest for the protection of the public is more deeply rooted"); *King*, 767 F.3d at 234, 236 (applying intermediate scrutiny analysis and "doubt[ing] that anything less than intermediate scrutiny would adequately protect the First Amendment interests inherent in professional speech"); Post, *supra* note 167, at 178 (rejecting strict scrutiny approach to content-based regulations of professional speech because professional speech is not part of the public discourse and because such an approach would be unworkable given the current regulatory framework).

[205] *See Wollschlaeger III*, 797 F.3d at 896 (analyzing the limited existing precedent and concluding that intermediate scrutiny was the correct standard of review to apply); *King*, 767 F.3d at 235 (applying intermediate scrutiny to professional speech by analogy to commercial speech).

is weighed against the state's regulatory objectives.[206] This approach neither gives legislatures free rein to dictate what professionals may say, nor does it completely disregard the complex and vast regulatory structure surrounding licensed professions.[207] Instead, it respects that professionals have a right to speak and that states have a right, even a duty, to regulate the professions in order to protect the public.[208]

A similar approach has been taken already in commercial speech cases.[209] Commercial speech is a useful analog to professional speech because both areas of speech are highly regulated by the government.[210] In addition, both commercial speech and professional speech serve an "informational function."[211] When a court addresses a content-based regulation of commercial speech, it weighs the state's interest in regulating the commercial

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[206] *See Reed*, 135 S. Ct. at 2235–36 (Breyer, J., concurring) (describing proportionality approach to the First Amendment). *But see* Appellees' Submission, *supra* note 64, at 3 (applying *Reed* to a challenged regulation of professional speech and arguing that *Reed*'s blanket prohibition against content-based regulations of speech nullifies any inquiry into the state's purpose in enacting the regulation).

[207] *See Wollschlaeger II*, 760 F.3d at 1249–50 (Wilson, J., dissenting) (stating that the holding, in which the majority applied rational basis review to a challenged regulation of professional speech, gave too much power to legislatures); Post, *supra* note 167, at 178 (arguing that professional speech inherently falls outside the scope of public discourse and thus should not be regulated the same way core First Amendment speech would be).

[208] *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992) ("To be sure, the physician's First Amendment rights not to speak are implicated, but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State."); *King*, 767 F.3d at 234 (explaining that states traditionally have power to regulate professions); *Nat'l Ass'n for the Advancement of Psychoanalysis*, 228 F.3d at 1054 (describing the state's power to regulate the professions using its police power); Stuart v. Loomis (*Stuart I*), 992 F. Supp. 2d 585, 596 (M.D.N.C. 2014) ("[I]t is clear that individuals do not surrender their First Amendment rights entirely when they speak as professionals."), *aff'd*, 774 F.3d 238.

[209] *See Sorrell*, 131 S. Ct. at 2668 (explaining that "heightened scrutiny" ensures that "the State's interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message"); Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 561–62 (1980) (recognizing the First Amendment value of commercial speech, but refusing to grant the same protections as political speech because commercial speech was traditionally subject to government regulation).

[210] *See Stuart II*, 774 F.3d at 245, 248 (affirming lower court's choice to borrow an intermediate scrutiny standard from commercial speech because professional speech displayed similar traits, such as being already subject to regulation); *King*, 767 F.3d at 234 (explaining that intermediate standard is the appropriate standard of review to apply to professional speech because, like commercial speech, it "occurs in an area traditionally subject to government regulation" (quoting *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 562)); *Wollschlaeger II*, 760 F.3d at 1241–42 n.11 (Wilson, J., dissenting) ("The [physician] speech then seems to fall under the rubric of commercial speech, subject to intermediate scrutiny.").

[211] *See Wollschlaeger III*, 797 F.3d at 890 (describing informational value of professional speech and comparing it to informational value of commercial speech); *King*, 767 F.3d at 234 (explaining that both commercial speech and professional speech are "valuable to listeners" because of the information they convey).

speech against the actor's right to speak freely.[212] Applying the same approach to professional speech ensures not only that the state's interests in regulating the speech are "proportional to the . . . burdens" on professionals, but also that the laws that are allowed to regulate professional speech do not "suppress . . . disfavored" opinions or messages.[213]

The recent U.S. Supreme Court opinion in *Reed* does not disclose the application of intermediate scrutiny to content-based regulations of professional speech.[214] *Reed* discusses what constitutes a content-based regulation and reiterates longstanding precedent that content-based regulations of core First Amendment speech should be subject to strict scrutiny.[215] The opinion is silent on the threshold question of whether professional speech is categorically different from other types of speech.[216] Additionally, the opinion is

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[212] *See Sorrell*, 131 S. Ct. at 2667–68 (applying *Central Hudson* test for intermediate scrutiny to challenged content-based regulation of commercial speech); *Wollschlaeger III*, 797 F.3d at 890 (describing the state's interest in safety of the public and the public's interest in information as the two competing interests considered when analyzing professional and commercial speech).

[213] *See Sorrell*, 131 S. Ct. at 2668 (explaining that "heightened scrutiny" ensures that "the State's interests are proportional to the resulting burdens placed on speech but also that the law does not seek to suppress a disfavored message"). For example, in *King*, the court explained that professional speech receives less protection under the First Amendment because of the state's interest in protecting its citizens from "harmful or ineffective" professional practices, which was the same reason the law in question was passed. *See* 767 F.3d at 236–37 (concluding that the challenged regulation did not trigger strict scrutiny analysis because, although it was content based, it did not discriminate based on content in an impermissible manner).

[214] *See* Appellants' Memorandum, *supra* note 172, at 10, 11 (expressing that *Reed* does not address what standard of scrutiny to apply to professional speech and arguing that *Reed* cannot require strict scrutiny for such regulations because it did not overrule *Casey*, which is the last time the Court spoke on the subject of professional speech); Post, *supra* note 167, at 178 (asserting that professional speech is not public discourse and does not need to be protected in the same way as political speech).

[215] *See Reed*, 135 S. Ct. at 2227 (explaining that a regulation is content-based if it "applies to particular speech because of the topic discussed or the idea or message conveyed" and that content-based laws are subject to strict scrutiny). If the U.S. Supreme Court has made anything clear in the last twenty years, it is that content-based regulations are presumptively invalid. *See* Ysura v. Pocatello Educ. Ass'n, 555 U.S. 353, 358 (2009) ("Restrictions on speech based on its content are 'presumptively invalid' and subject to strict scrutiny."); City of Los Angeles. v. Alameda Books, Inc., 535 U.S. 425, 434 (2002) ("If the regulation were content based, it would be considered presumptively invalid and subject to strict scrutiny."); Hill v. Colorado, 530 U.S. 703, 769 (2000) ("The Court time and again has held content-based or viewpoint-based regulations to be presumptively invalid."); R.A.V. v. City of St. Paul, 505 U.S. 377, 382 (1992) ("Content-based regulations are presumptively invalid."). It is within this existing framework that the commercial speech exception to this rule was articulated. *See Sorrell*, 131 S. Ct. at 2664, 2667 (finding that heightened scrutiny applied to content-based regulation of commercial speech and noting that "[i]n the ordinary case" a finding that a law is content-based "is all but dispositive").

[216] Appellants' Memorandum, *supra* note 172, at 6–7 (noting that *Reed* neither discussed how different categories of speech, such as commercial or government speech, should be treated, nor did it speak to whether professional speech was a separate category); *cf.* Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447, 455–56 (1978) (reiterating the "'commonsense' distinction" the Court has made between commercial speech, "which occurs in an area traditionally subject to government

startlingly broad and attempts to apply a one-size-fits-all approach despite the nuances of First Amendment doctrine.[217]

First Amendment principles and common sense require the application of intermediate scrutiny to regulations of professional speech.[218] The application of rational basis review to regulations of professional speech is inappropriate because such regulations are inherently content-based.[219] The application of strict scrutiny to regulations of professional speech is inappropriate because it treats professional speech like political speech, an unnecessary departure from the traditional approach to First Amendment categories.[220] Only intermediate scrutiny strikes the right balance between the duty the government has to keep the public safe and the right professionals have to offer their professional opinions.[221]

CONCLUSION

Professionals are an important part of the fabric of every community because they provide necessary—even lifesaving—services. When regulations of professionals restrict what they may say to clients or compel them to convey a message to a client, however, the First Amendment rights of professionals are implicated. Because any regulation of professional speech is necessarily content-based, when reviewing such a regulation, a court must apply some level of judicial scrutiny. To resolve the circuit split between the Third, Fourth, Ninth, and Eleventh Circuit Courts of Appeals, the U.S. Supreme

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regulation, and other . . . speech" (quoting Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 771 n.24 (1976))).

[217] *See Reed*, 135 S. Ct. at 2227 (holding that content-based laws are subject to strict scrutiny); *id.* at 2235 (Breyer, J., concurring) (arguing that content discrimination "cannot and should not *always* trigger strict scrutiny"); *id.* at 2239 (Kagan, J., concurring) (arguing that the Court would regret the *Reed* opinion); *see also* Cal. Outdoor Equity Partners v. City of Corona, No. 15-cv-03172, 2015 WL 4163346, at *10 (C.D. Cal. July 9, 2015) ("*Reed* is most notable for what it is not about, and what it does not say."); Appellants' Memorandum, *supra* note 172, at 8 (noting that two district courts have recently held that *Reed* does not apply to commercial speech).

[218] *See Wollschlaeger III*, 797 F.3d at 896 (reasoning to an intermediate standard of review based on the limited existing U.S. Supreme Court precedent); *Stuart II*, 774 F.3d at 245, 248 (approving of the choice to borrow an intermediate scrutiny standard from commercial speech cases).

[219] *See Reed*, 135 S. Ct. at 2230, 2232–33 (establishing that content-based distinctions include ones made on the basis of topic or subject); *Alvarez*, 132 S. Ct. at 2543–44 (explaining that content-based restrictions on speech are presumed invalid).

[220] *See Ohralik*, 436 U.S. at 455–56 (observing approvingly the "'commonsense' distinction" the Court makes between commercial speech and other types of speech, on the basis that commercial speech has historically been regulated by the states (quoting *Va. State Bd. of Pharm.*, 425 U.S. at 771 n.24)); Post, *supra* note 167, at 178 (rejecting strict scrutiny approach to content-based regulations of professional speech because professional speech is inherently different from political speech, to which traditional First Amendment principles apply).

[221] *See Wollschlaeger III*, 797 F.3d at 896–901 (applying intermediate scrutiny standard); *King*, 767 F.3d at 234–36 (concluding that intermediate scrutiny applied to challenged regulation of professional speech).

Court should establish that the appropriate framework for reviewing professional speech is intermediate scrutiny, because it is the only standard that effectively balances the important state interest of protecting citizens' health and welfare with the First Amendment speech rights of professionals. To allow any lower standard of scrutiny, or none at all, raises the potential for legislatures to control the speech of professionals on any number of topics. To insist upon a higher standard of scrutiny risks depriving the states of an important part of their police power and disrupting existing professional regulation schemes. The U.S. Supreme Court has left the professional speech doctrine sitting in the waiting room for years. It is time for the Court to call its name and give it the treatment it deserves: intermediate scrutiny.

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