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**INTERMEDIATE SCRUTINY VS.
THE “LABELING GAME” APPROACH:
KING V. GOVERNOR OF NEW JERSEY AND THE
BENEFITS OF APPLYING HEIGHTENED SCRUTINY TO
PROFESSIONAL SPEECH**

*Patrick Bannon**

In previous cases dealing with First Amendment challenges to laws regulating the speech of professionals, the Supreme Court has failed to articulate a coherent “professional speech doctrine,” neither fully defining the term nor identifying the appropriate level of scrutiny. A trio of recent appellate court decisions—Pickup v. Brown in the Ninth Circuit, Wollschlaeger v. Governor of Florida in the Eleventh Circuit and King v. Governor of New Jersey in the Third Circuit—highlight the problems caused by this ambiguity and lack of guidance. All three courts upheld the laws challenged in the respective cases but all applied different reasoning in coming to their conclusions. The Ninth and Eleventh Circuits labeled the regulated verbal communications “conduct” and applied rational basis review. The Third Circuit, however, applied an intermediate level of scrutiny, recognizing that First Amendment rights were implicated.

This Note argues that the intermediate scrutiny standard articulated by the Third Circuit in King resolves the ambiguity created by the Supreme Court in its professional speech cases and forecloses the possibility that courts will be able to label the verbal communications of professionals as either speech or conduct without any doctrinal basis for doing so. This Note concludes that an intermediate scrutiny approach ultimately provides greater protection for the interests at stake in laws regulating professional speech—interests such as the First Amendment rights of professionals, the right of patients and clients to receive beneficial information, and the responsibility of the state to protect its citizens through its police powers.

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INTRODUCTION

In September of 2012, California passed Senate Bill 1172 (“SB 1172”) which stated that “[u]nder no circumstances shall a mental health provider engage in sexual orientation change efforts with a patient under 18 years of age.”¹ The statute defined sexual orientation change efforts (“SOCE”) as “any practices . . . that seek to change an individual’s sexual orientation.”² In enacting the law, the legislature relied upon publications by medical organizations like the American Medical Association, the American Psychological Association, and the American Psychiatric Association,³ which not only denounced the legitimacy of SOCE as a medical practice but also warned of the serious harms associated with it—harms which include depression, suicidality, and substance abuse.⁴ California recognized its “compelling interest in protecting the physical and psychological well-being of minors, including lesbian, gay, bisexual, and transgender youth” and targeted the statute specifically to prevent their “exposure to the serious harms caused by [SOCE].”⁵ SB 1172 immediately incited a First Amendment challenge and the Ninth Circuit’s reasoning in upholding the law as a valid regulation of professional conduct demonstrates the problems surrounding laws restricting the speech of professionals. This Note will discuss the ambiguity surrounding challenges to laws that regulate the speech of physicians and will argue that the Supreme Court’s failure to fully articulate a “professional speech doctrine” has caused confusion among lower courts with the potential for problematic consequences.

In two separate cases filed in the Eastern District of California—*Welch v. Brown*⁶ and *Pickup v. Brown*⁷—SOCE practitioners, SOCE patients and their parents, and SOCE

¹ CAL. BUS. & PROF. CODE § 865.1 (West 2014).

² *Id.* § 865.

³ See S.B. 1172, 2011–2012 Sess., § 1 (b)–(d), (g) (Cal. 2012).

⁴ *Id.* § 1 (b), (d).

⁵ *Id.* § 1 (n).

⁶ *Welch v. Brown*, 907 F. Supp. 2d 1102 (E.D. Cal. 2012).

⁷ *Pickup v. Brown*, No. 2:12-CV-02497-KJM-EFB, 2012 WL 6021465 (E.D. Cal. Dec. 4, 2012).

advocacy organizations⁸ claimed that, because SOCE consisted only of verbal communications between the physicians and patients, SB 1172 violated their First Amendment rights. In *Welch*, Judge William Shubb granted a preliminary injunction, holding that the SB 1172 should be subjected to strict scrutiny, and that it would likely not satisfy that standard.⁹ Conversely, in *Pickup v. Brown*, Judge Kimberly Mueller denied a preliminary injunction,¹⁰ holding that SB 1172 regulated conduct,¹¹ that rational basis should apply,¹² and that the law would satisfy that standard.¹³ The judges ultimately came to opposite conclusions, but both significantly began their analysis by characterizing the verbal communications in question as either speech or conduct, a characterization which determined the standard of review.

The Ninth Circuit, in *Pickup v. Brown*,¹⁴ combined the cases and ultimately affirmed the ruling of Judge Mueller, denying the injunction on the same grounds.¹⁵ Judge Diarmuid O’Scannlain, however, rejected the panel’s reasoning and argued that the court should apply a heightened standard of review as speech rights were implicated.¹⁶ Judge O’Scannlain criticized the panel’s holding and warned of the problematic¹⁷ consequences that would result if courts could label the verbal communication of physicians as either conduct or speech without any “principled doctrinal basis” for

⁸ In *Welch*, plaintiffs included two SOCE practitioners and a former SOCE patient who had intended to become a SOCE practitioner. *Welch*, 907 F. Supp. 2d at 1106. In *Pickup*, plaintiffs included SOCE practitioners, SOCE patients and their parents, and two SOCE advocacy organizations—The National Association for Research and Therapy of Homosexuality (“NARTH”) and the American Association of Christian Counselors (“AACC”). *Pickup*, 2012 WL 6021465, at *1.

⁹ *Welch*, 907 F. Supp. 2d at 1105.

¹⁰ *Pickup*, 2012 WL 6021465, at *1.

¹¹ *Id.* at 9.

¹² *Id.* at 12.

¹³ *Id.*

¹⁴ *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013).

¹⁵ *Id.* at 1222.

¹⁶ *Id.* at 1218 (“SB 1172 prohibits certain ‘practices’ . . . but with regard to [plaintiffs], those laws targeted speech. Thus, the First Amendment still applies.”).

¹⁷ *Id.* at 1221.

doing so.¹⁸ As indicated by the conflicting positions taken by Judges Shubb and Mueller, this “labeling game”¹⁹ would allow courts to “declare . . . categories of speech outside the scope of the First Amendment” and also permit them to undermine the ability of the states to regulate harmful practices like SOCE by subjecting statutes like SB 1172 to the difficult strict scrutiny standard.²⁰

In the past, the Supreme Court has considered challenges to laws regulating the verbal communications of physicians and other professionals, but it has never espoused a coherent professional speech doctrine. The Court has neither provided a definition of “professional speech” nor identified the applicable standard of review for laws regulating it, resulting in confusion among lower courts. The Fourth Circuit, in *Moore-King v. County of Chesterfield, VA.*, stated that “[u]nder the professional speech doctrine, the government can license and regulate those who would provide services to their clients for compensation without running afoul of the First Amendment.”²¹ The court used this understanding of the “professional speech doctrine” in applying rational basis review to a spiritual advisor’s First Amendment challenge to a zoning ordinance that prohibited her practice.²² The Middle District of North Carolina, however, ruled that “what ‘professional speech’ means and the degree of protection it receives” has not been defined, as “the phrase has been used by Supreme Court justices only in passing.”²³ The court ultimately applied strict scrutiny and enjoined the enforcement of an informed consent abortion statute that required physicians to display an ultrasound to a woman seeking an abortion and describe the images in detail.²⁴ Scholars discussing the contours of the Supreme Court’s amorphous “professional speech” jurisprudence have defined the term as speech “uttered in the course of professional

¹⁸ *Id.* at 1215–16.

¹⁹ *Id.* at 1218.

²⁰ *Id.* at 1221 (citations omitted).

²¹ *Moore-King v. Cnty. of Chesterfield, Va.*, 708 F.3d 560, 569 (4th Cir. 2013) (applying rational basis review to a spiritual advisor’s First Amendment free speech challenge to a zoning ordinance that prohibited her practice).

²² *Id.* at 572.

²³ *Stuart v. Huff*, 834 F. Supp. 2d 424, 431 (M.D.N.C. 2011).

²⁴ *Id.* at 432.

practice,²⁵ but they have also recognized that the Supreme Court's treatment of such speech is "undoubtedly incomplete."²⁶ This lack of guidance allows lower courts to arbitrarily characterize the verbal communications of professionals as either speech or conduct, characterizations which result in either the application of strict scrutiny or rational basis review.

Pickup v. Brown, and two other recent federal appellate court decisions—*Wollschlaeger v. Governor of Florida*²⁷ and *King v. Governor of the State of New Jersey*²⁸—all demonstrate this problem and reveal the benefits that would accompany a more coherent professional speech doctrine. In *Wollschlaeger v. Governor of Florida*, physicians and physician-advocacy groups challenged a Florida statute prohibiting "irrelevant inquiry and record-keeping by physicians regarding firearms."²⁹ Prompted by an incident in which a pediatrician terminated a professional relationship with a mother who refused to answer routine questions regarding firearms,³⁰ the Florida legislature argued that the law was necessary to prevent harassment of firearm owners and preserve their access to health care.³¹ The plaintiffs argued that the statute violated their First Amendment rights as it constituted a "speaker- and content-based restriction[] on speech."³²

²⁵ See David Halberstam, *Commercial Speech, Professional Speech, and the Constitutional Status of Social Institutions*, 147 U. PENN. L. REV. 771, 843 (1999). Halberstam's analysis of the Court's professional speech jurisprudence has been influential and other academics have adopted his definition of professional speech as well. See Jennifer M. Keighley, *Physician Speech and Mandatory Ultrasound Laws: The First Amendment's Limit on Compelled Ideological Speech*, 34 CARDOZO L. REV. 2347, 2368 (2013) (recognizing that Halberstam's article was the first to address "the First Amendment's interaction with professional speech"); Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 947 (2007) (explicitly adopting Halberstam's definition of professional speech).

²⁶ Post, *supra* note 25, at 952.

²⁷ *Wollschlaeger v. Governor of Florida*, 760 F.3d 1195 (11th Cir. 2014).

²⁸ *King v. Governor of New Jersey*, 767 F.3d 216 (3d Cir. 2014).

²⁹ *Wollschlaeger*, 760 F.3d at 1203.

³⁰ *Id.* at 1204 n.2.

³¹ *Id.* at 1204.

³² *Id.* at 1205. See also Brief for Appellees Dr. Bernd Wollschlaeger, et al., 760 F.3d 1195 (11th Cir. 2014) (No. 12-14009-FF), 2012 WL 5457590, at *14

Nevertheless, the Eleventh Circuit found the act “a legitimate regulation of professional *conduct*.”³³ Mirroring the Ninth Circuit in *Pickup*, and relying on the Ninth Circuit’s reasoning, the court upheld the statute without applying any heightened First Amendment scrutiny.³⁴ In a lengthy dissent, Judge Charles Wilson criticized the majority opinion, arguing that the statute proscribed First Amendment protected speech and that the court should therefore subject the law to at least intermediate scrutiny.³⁵ Unlike his dissenting counterpart in *Pickup*, Judge Wilson analyzed the statute on the merits under the intermediate scrutiny standard, by which the statute could not pass constitutional muster.³⁶

In *King v. Governor of the State of New Jersey*, the Third Circuit heard a challenge to a statute similar to the statute at issue in *Pickup*.³⁷ New Jersey Assembly Bill 3371 (“A3371”) prohibited licensed mental health providers from engaging in SOCE with persons under age eighteen.³⁸ Plaintiffs³⁹ brought a First Amendment challenge using the same rationale as the plaintiffs in *Pickup*.⁴⁰ The Third Circuit, however, agreed with the plaintiffs that the law regulated speech—not conduct—for purposes of the First Amendment.⁴¹ The court then concluded that the First Amendment did not fully protect the “speech that occurs as part of a licensed profession”⁴² and that intermediate scrutiny should apply.⁴³ After a thorough analysis of the SOCE law, the Third Circuit held that the statute satisfied the standard as it “directly

(describing that speaker- and content-based restrictions on speech are forbidden by the First Amendment unless they can satisfy strict scrutiny).

³³ *Wollschlaeger*, 760 F.3d at 1203 (emphasis added).

³⁴ *See id.* at 1217.

³⁵ *Id.* at 1230 (Wilson, J., dissenting).

³⁶ *Id.*

³⁷ *See King v. Governor of New Jersey*, 767 F.3d 216, 220 (3d Cir. 2014).

³⁸ *Id.* at 221.

³⁹ Plaintiffs included two SOCE practitioners and the same two organizations who challenged California’s SB 1172 in *Pickup*—NARTH and the AACC. *Id.*

⁴⁰ *See id.* at 222.

⁴¹ *Id.* at 229.

⁴² *Id.*

⁴³ *Id.* at 237.

advance[d]” the state’s “stated interest” and that it was no “more extensive than necessary to protect that interest.”⁴⁴ Significantly, the Third Circuit provided a clear definition of the bounds of professional speech and clearly identified intermediate scrutiny as the appropriate standard of review.⁴⁵

This Note will examine these three opinions in an attempt to demonstrate the problems that emerge from the Supreme Court’s “undoubtedly incomplete”⁴⁶ definition of professional speech. Ultimately, this Note concludes that the definition and intermediate scrutiny standard adopted by the Third Circuit in *King* resolve this problematic ambiguity in a way that better protects the interests at stake in professional speech cases. Part I will provide an overview of the Supreme Court’s professional speech jurisprudence. This part will address the Supreme Court’s failure to articulate any definition of professional speech, and will also address the Court’s concomitant lack of guidance to lower courts on the proper standard to apply in First Amendment challenges to laws implicating professional speech. This Note will focus primarily on the cases relied upon by the Third, Ninth, and Eleventh Circuits in their respective opinions. Part II will then discuss *Pickup*, *Wollschlaeger*, and *King* in greater depth and assess the merits of each court’s rationale. Part III will then propose a solution for the current problems with the professional speech doctrine: the intermediate scrutiny standard adopted in *King*, and advocated by Judges O’Scannlain and Wilson. This part will first address the speech/conduct dichotomy that emerges from the Supreme Court’s professional speech jurisprudence and discuss the problems that this dichotomy creates. Part III will then demonstrate the benefits of the intermediate scrutiny standard as articulated by the Third Circuit. By clearly defining professional speech and articulating the standard by which it is to be judged the Third Circuit’s approach better protects the interests at stake in professional speech cases and, as a result, the values underlying the First Amendment.

⁴⁴ *Id.* at 239–40 (citations omitted).

⁴⁵ *Id.*

⁴⁶ Post, *supra* note 25, at 952.

I. SUPREME COURT TREATMENT OF PROFESSIONAL SPEECH

The Supreme Court has addressed professional speech but has never defined the term or established a legal standard of review for analyzing restrictions on its content.⁴⁷ The Third, Ninth, and Eleventh Circuits all looked to a similar collection of cases in which the Supreme Court dealt with professional speech, but their analyses differed and at times conflicted with one another. The circuit courts privileged some of the cases, downplayed the significance of others, and, in some instances, ignored cases completely. The fact that three different circuits, in cases dealing with very similar First Amendment challenges, not only failed to apply a single standard, but also failed to determine which precedent should govern, only demonstrates how little guidance the Supreme Court's professional speech jurisprudence provides.⁴⁸

A. *Lowe v. S.E.C. and the "Origins" of the Professional Speech Doctrine*⁴⁹

*Lowe v. S.E.C.*⁵⁰ dealt with S.E.C. restrictions on a person's ability to provide investment advice without being registered under the Investment Advisers Act of 1940.⁵¹ In this case, the S.E.C. revoked the petitioner Lowe's registration and prohibited him from associating with any investment adviser.⁵² The S.E.C. then filed a complaint arguing that Lowe's publishing of an investment newsletter—after his license had been revoked—violated the Act

⁴⁷ See Halberstam, *supra* note 25, at 843–49.

⁴⁸ See Stuart v. Huff, 834 F. Supp. 2d 424, 431 (M.D.N.C. 2011) (“Just what ‘professional speech’ means and the degree of protection it receives is even less clear; the phrase has been used by Supreme Court justices only in passing.”). The discussion below is not comprehensive with regard to the Supreme Court's treatment of professional speech, but it does present some of the cases that the circuit courts found applicable.

⁴⁹ See Keighley, *supra* note 25, at 2368 (“Justice White's concurrence in *Lowe* is often invoked as setting forth the contours of the ‘professional speech doctrine,’ to the extent that such a doctrine exists.”).

⁵⁰ *Lowe v. S.E.C.*, 472 U.S. 181 (1985).

⁵¹ *Id.* at 183.

⁵² *Id.*

and their revocation order.⁵³ As Justice Stevens framed the issue in his majority opinion, “[t]he question is whether [Lowe and other petitioners] may be permanently enjoined from publishing nonpersonalized investment advice and commentary in securities newsletters because they are not registered as investment advisers under § 203(c) of the Investment Advisers Act.”⁵⁴ The majority expressly declined to address the First Amendment question, deciding the case on statutory grounds, and thus finding no reason to resolve any lurking constitutional infirmity.⁵⁵ Justice White, joined by Justices Rehnquist and Burger, disagreed with the majority’s narrow construction of the statute⁵⁶ and framed the issue as a constitutional one, involving “a collision between the power of government to license and regulate those who would pursue a profession or vocation and the rights of freedom of speech and of the press guaranteed by the First Amendment.”⁵⁷ The three justices concurred in the result—refusing to enjoin Lowe and others—but did so on the grounds that enjoining the petitioners “from publishing . . . [was] inconsistent with the First Amendment.”⁵⁸ In coming to this conclusion, Justice White took a contextual approach, arguing that in cases involving regulations restricting professional speech, courts should look to the relationship that exists between the professional and the client.⁵⁹

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ *Id.* at 211. Justice Stevens concluded that the petitioners could not be permanently enjoined because the publications fell within a “statutory exclusion” to the Investment Advisers Act. *Id.*

⁵⁶ *Id.* at 226 (White, J., concurring) (“[T]he Court’s zeal to avoid the narrow constitutional issue presented by the case leads it to adopt a construction of the Act that, wholly unnecessarily, prevents what would seem to be desirable and constitutional applications of the Act—a result at odds with our longstanding policy of construing securities regulation enactments broadly and their exemptions narrowly in order to effectuate their remedial purposes.”).

⁵⁷ *Id.* at 228.

⁵⁸ *Id.* at 211.

⁵⁹ *Id.* at 232. *See also* Halberstam, *supra* note 25, at 834–35 (arguing that the Supreme Court cases which have dealt with professional speech, including *Lowe v. S.E.C.*, “may be read as having applied a contextual approach centered around the roles of speaker and listener”).

Justice White acknowledged the “power of the government to regulate the professions” even when “the practice of a profession entails speech,”⁶⁰ but he also recognized that at a certain point a legitimate regulation of a profession will restrict speech so much that it violates the First Amendment.⁶¹ Justice White maintained that the “professional’s speech [was] incidental to the conduct of the profession” when that professional was “engaging in the practice of [that] profession.”⁶² According to Justice White, therefore, “generally applicable licensing provisions . . . [could not] be said to [create] a limitation on freedom of speech or the press subject to First Amendment scrutiny.”⁶³ On the other hand, when “the personal nexus between professional and client [did] not exist” government regulation became “a regulation of speaking or publishing . . . subject to the First Amendment.”⁶⁴ Despite this attempt to establish a line between the type of professional relationship in which the speech is protected and the type in which it is merely incidental to conduct, the Supreme Court has not used the *Lowe* concurrence to establish a coherent professional speech doctrine.⁶⁵

This ambiguity has allowed for the development of Judge O’Scannlain’s “labeling game” problem, by which courts can arbitrarily use the speech/conduct dichotomy to subject the verbal communications to either strict scrutiny or rational basis review. Neither Judge O’Scannlain nor the panel in *Pickup* cited *Lowe*, but *King* and *Wollschlaeger* rely upon it heavily in their analysis,⁶⁶ and in *Wollschlaeger* both the majority and dissent use it to support

⁶⁰ *Lowe*, 472 U.S. at 229.

⁶¹ *Id.* at 230 (“At some point, a measure is no longer a regulation of a profession but a regulation of speech or of the press; beyond that point, the statute must survive the level of scrutiny demanded by the First Amendment.”).

⁶² *Id.* at 232.

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ See Keighley, *supra* note 25, at 2367–69 (arguing that, despite its prevalence in subsequent cases, Justice White’s concurrence has not allowed for the creation of a coherent “professional speech doctrine”).

⁶⁶ See *Wollschlaeger v. Governor of Florida*, 760 F.3d 1195 (11th Cir. 2014); *King v. Governor of the State of New Jersey*, 767 F.3d 216, 229 (3d Cir. 2014).

opposite conclusions. The majority held that because the questioning and record keeping prohibited by the Florida statute all took “place entirely within the confines of the physician-patient relationship, where the ‘personal nexus between professional and client’ is strong,” they constituted only conduct.⁶⁷ Judge Wilson, on the other hand, argued that such a reading of Justice White’s rationale problematically espouses “the far broader principle that the right of the professional to speak is lost whenever he is practicing his profession”—a principle *Lowe* itself explicitly rejects.⁶⁸ Despite the *Lowe* concurrence’s impact on “professional speech” jurisprudence, Justice White’s rationale permitted the development of the “labeling game” approach, providing courts and legislatures with the ability to insulate laws regulating verbal communication from any First Amendment scrutiny by merely identifying a professional relationship and then labeling the communications within that relationship as “conduct.”⁶⁹

B. Planned Parenthood v. Casey and the Compelled Speech Abortion Cases

The Supreme Court’s treatment of professional speech in the medical context has appeared almost exclusively in abortion cases.⁷⁰ The First Amendment implications of these decisions, however, have often been overshadowed by the other aspects of the Court’s abortion cases.⁷¹ In two cases from the 1980’s, *City of Akron v. Akron Center for Reproductive Health, Inc.*⁷² and

⁶⁷ *Wollschlaeger*, 760 F.3d at 1226 (quoting *Lowe*, 472 U.S. at 232 (White, J., concurring in the result)).

⁶⁸ *Id.* at 1240 n.9 (Wilson, J., dissenting)

⁶⁹ This point is discussed below in Part III.

⁷⁰ Halberstam, *supra* note 25, at 835 (“In the Supreme Court, the most sustained discussion about speech in the professions has centered around physicians’ speech on the subject of contraception and abortion.”).

⁷¹ *Id.* As Halberstam notes, the Supreme Court generally focused its attention on the issue of whether the patient is exercising a fundamental right and the issue of whether “a physician’s constitutional rights are to be subsumed under the rights of the patient” *Id.* The Court does not discuss the First Amendment implications at all in *City of Akron* and *Thornburgh* and dismisses them in a single paragraph in *Casey*.

⁷² *City of Akron v. Akron Ctr. for Reprod. Health, Inc.*, 462 U.S. 416, 442

Thornburgh v. American College of Obstetricians and Gynecologists,⁷³ the Court invalidated statutory provisions that required physicians to recite certain information in order to obtain a patient's "informed consent" to an abortion. In neither opinion, however, did the majority address the First Amendment issues and instead struck down the provisions on the ground that they were designed not to "inform" but rather to "persuade" a patient to withhold her consent.⁷⁴ A few years later, in *Planned Parenthood*

(1983), *overruled by* *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992). The ordinance stated:

[T]he woman must be orally informed by her attending physician of the status of her pregnancy, the development of her fetus, the date of possible viability, the physical and emotional complications that may result from an abortion, and the availability of agencies to provide her with assistance and information with respect to birth control, adoption, and childbirth.

Id. (internal quotations and citation omitted). The ordinance further stated:

[T]he attending physician must inform [the woman] of the particular risks associated with her own pregnancy and the abortion technique to be employed . . . [and] other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term.

Id. (internal quotations and citation omitted).

⁷³ *Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 760 (1986) *overruled by* *Casey*, 505 U.S. 833. The statute in *Thornburgh* required that the physician tell the patient five separate pieces of information before "informed consent" could be obtained:

(a) the name of the physician who will perform the abortion, (b) the fact that there may be detrimental physical and psychological effects which are not accurately foreseeable, (c) the particular medical risks associated with the particular abortion procedure to be employed, (d) the probable gestational age, and (e) the medical risks associated with carrying her child to term.

Id. (internal quotations and citation omitted).

⁷⁴ *City of Akron*, 462 U.S. at 444 (holding that the statute "extend[ed] the State's interest in ensuring 'informed consent' beyond its permissible limits"); *Thornburgh*, 476 U.S. at 765 ("The scope of the information required and its availability to the public belie any assertions by the Commonwealth that it is advancing any legitimate interest.").

of *Southeastern Pennsylvania v. Casey*, the Court finally addressed the First Amendment concerns in the informed consent statutes and held that, despite the physicians' First Amendment rights, the State had the power to regulate their speech so long as the regulation was "reasonable."⁷⁵

Although *Casey* acknowledged that statutes regulating physicians' professional speech implicate the First Amendment, the decision has caused confusion both because of the Court's cursory treatment of the issue and because of the lack of guidance it ultimately provided.⁷⁶ The following is the entirety of the Justice O'Connor's treatment of the First Amendment issue, including the precedent cited to support her reasoning:

All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, see *Wooley v. Maynard*, 430 U.S. 705, 97 S. Ct. 1428, 51 L.Ed.2d 752 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, cf. *Whalen v. Roe*, 429 U.S. 589, 603, 97 S. Ct. 869, 878, 51 L.Ed.2d 64 (1977). We see no

⁷⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion). *Casey* explicitly overruled the parts of *Akron* and *Thornburgh* which conflicted with this holding. *Id.* at 882 (plurality opinion) ("To the extent *Akron I* and *Thornburgh* find a constitutional violation when the government requires, as it does here, the giving of truthful, nonmisleading information about the nature of the procedure, the attendant health risks and those of childbirth, and the 'probable gestational age' of the fetus, those cases go too far, are inconsistent with [*Roe v. Wade*'s] acknowledgment of an important interest in potential life, and are overruled.").

⁷⁶ See Halberstam, *supra* note 25, at 773. ("The passage [dealing with the First Amendment issue] tells us the physicians enjoy First Amendment rights but provides little guidance about the weight given to the First Amendment interests involved."); see also Keighley, *supra* note 25, at 2351-61 (2013) (suggesting that the Court's cursory treatment of the First Amendment question could have resulted from a lack of attention given to issue in the briefs of both the parties and the amici).

constitutional infirmity in the requirement that the physician provide the information mandated by the State here.⁷⁷

This brief treatment of the physicians' First Amendment challenge—despite its recognition that compelled speech in the medical profession is constitutionally permissible—still failed to articulate a clear professional speech doctrine.⁷⁸ The Court acknowledged that the First Amendment rights of professionals are diminished when they speak “as part of the practice of medicine,” but the opinion also implies that the verbal communications in question are speech—not conduct—and that the restrictions on those communications must be “reasonable.”⁷⁹

As with *Lowe*, lower courts have found *Casey* to be a necessary part of their professional speech analysis, but they have disagreed as to how *Casey* characterizes professional speech, and what standard of review the case proposes. The Ninth Circuit found *Casey* to suggest that, in certain instances of professional speech,

⁷⁷ *Casey*, 505 U.S. at 884. Academics have noted that much of the confusion surrounding this passage comes from the Court's choice of precedent. See Post, *supra* note 25, at 946 (“The passage is puzzling because *Wooley* is a precedent in which the Court applied strict First Amendment scrutiny to a state statute that compelled ideological speech, whereas *Whalen* upheld a New York statute requiring physicians to disclose prescriptions for certain drugs, holding in the page cited that “[i]t is, of course, well settled that the State has broad police powers in regulating the administration of drugs by the health professions. Exactly how the strict First Amendment standards of *Wooley* are meant to qualify the broad police power discretion of *Whalen* is left entirely obscure.”); Halberstam, *supra* note 25, at 773–74 (“The application of *Wooley* would demand a compelling governmental interest to overcome the physician's First Amendment rights, or at least a substantial interest that was unrelated to the content of the speech. It would require that the regulation be narrowly tailored to that interest as well. The passage cited from *Whalen*, on the other hand would appear to import only the basic due process limitations on nonspeech regulations of professionals. To fuse these two models in a shorthand formulation provides little indication of how to resolve any professional's First Amendment claim other than the precise one at issue in *Casey*.”).

⁷⁸ Keighley, *supra* note 25, at 2354 (“The joint opinion's brief treatment of the First Amendment issues raised by the Pennsylvania statute provides minimal information about how the Court views the interplay between the state's ability to regulate the medical profession and physicians' First Amendment rights.”).

⁷⁹ *Casey*, 505 U.S. at 884.

First Amendment protection is merely diminished, not eliminated.⁸⁰ The Eleventh Circuit, on the other hand, used the plurality's reasoning to support its conclusion that the act in question regulated professional conduct and therefore did not "offend the First Amendment."⁸¹ The Third Circuit determined that, "to the extent that *Casey* applied rational basis review," it was nevertheless inapplicable to New Jersey's A3371, as the law was "a prohibition of speech, not a compulsion of truthful factual information."⁸²

C. *Holder v. Humanitarian Law Project and the Protection of Speech*

In *Humanitarian Law Project*, the Supreme Court addressed a federal statute⁸³ that banned providing "material support or resources to certain foreign organizations that engage in terrorist activity."⁸⁴ A group of U.S. citizens and human rights organizations challenged the statute on First Amendment free speech grounds.⁸⁵ The plaintiffs stated that they wanted to "provide support for the humanitarian and political activities" of two groups designated as terrorist organizations by the Secretary of State.⁸⁶ Because this support would come in the form of "legal training" and "political advocacy" and would be undertaken entirely through verbal communication, the plaintiffs claimed that the statute violated their First Amendment rights.⁸⁷ The majority rejected both the Government's argument that the statute regulated only conduct and the plaintiffs' argument that the statute banned "pure political

⁸⁰ *Pickup v. Brown*, 740 F.3d 1208, 1228–29 (9th Cir. 2013).

⁸¹ *Wollschlaeger v. Governor of Florida*, 760 F.3d 1195, 1220 (11th Cir. 2014).

⁸² *King v. Governor of New Jersey*, 767 F.3d 216, 236 (3d Cir. 2014) (citing *Zauderer v. Office of Disciplinary Counsel of Sup. Ct. of Ohio*, 471 U.S. 626, 650–51 (1985)).

⁸³ 18 U.S.C. § 2339B(a)(1) (2014).

⁸⁴ *Holder v. Humanitarian Law Project*, 561 U.S. 1, 7 (2010) (internal quotations and citation omitted).

⁸⁵ *Id.*

⁸⁶ *Id.* at 10.

⁸⁷ *Id.*

speech.”⁸⁸ The Court applied strict scrutiny but still found that the statute survived this standard.⁸⁹ The Court, however, explicitly limited its holding to the facts before it and recognized that other applications of the same statute or other statutes “relating to speech and terrorism” may not meet the high standard the Court applied.⁹⁰

Humanitarian Law Project fits somewhat uncomfortably with professional speech cases because it does not look at the relationship between a professional and a client. Although the plaintiffs were legal professionals and human rights workers looking to provide legal and humanitarian counseling,⁹¹ the Court did not apply Justice White’s “personal nexus” analysis. Unsurprisingly, therefore, the Court did not rely upon any of the previous professional speech rationales and not all of the appellate court cases discussed above found it applicable.⁹² Judge O’Scannlain⁹³ and the *King* panel found the case relevant in the professional speech context, however, because it “makes clear that verbal or written communications, even those that function as vehicles for delivering professional services, are ‘speech’ for purposes of the First Amendment.”⁹⁴ According to this rationale, Courts cannot simply call verbal or written communication “conduct” for the purposes of their analyses and apply rational basis review—or no review at all—whenever they find a professional-client relationship without subverting the core free-speech principles of *Humanitarian Law Project*.⁹⁵

⁸⁸ *Id.* at 25–26.

⁸⁹ *Id.* at 39.

⁹⁰ *Id.*

⁹¹ *Id.* at 10.

⁹² Neither the majority nor the dissent in *Wollschlaeger* mentioned the case and the panel in *Pickup* immediately dismissed it as inapposite. See *Pickup v. Brown*, 740 F.3d 1208, 1230 (9th Cir. 2013) (“In sharp contrast, *Humanitarian Law Project* pertains to a different issue entirely: the regulation of (1) political speech (2) by ordinary citizens.”).

⁹³ *Pickup*, 740 F.3d at 1218 (O’Scannlain, J., dissenting from the order denying rehearing en banc) (“The Supreme Court’s implication in *Humanitarian Law Project* is clear: legislatures cannot nullify the First Amendment’s protections for speech by playing this labeling game.”).

⁹⁴ *King v. Governor of New Jersey*, 767 F.3d 216, 225–26 (2014).

⁹⁵ *Pickup*, 740 F.3d at 1220–21 (O’Scannlain, J., dissenting from the order denying rehearing en banc).

D. The Commercial Speech Doctrine

While the Supreme Court has failed to fully articulate a “professional speech” doctrine, it has developed a commercial speech doctrine which is considerably more defined.⁹⁶ The Court’s commercial speech jurisprudence becomes important in the context of professional speech as *King* relies upon it heavily in adopting its intermediate scrutiny standard.⁹⁷ In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, the Supreme Court held that commercial speech, defined as speech “which does no more than propose a commercial transaction” is still entitled to First Amendment protection.⁹⁸ The Court justified protecting this speech on the grounds that commercial speech, even in the form of advertising, serves “the particular consumer’s interest in the free flow of commercial information.”⁹⁹ This interest, according to the Court, may “may be as keen, if not keener by far, than [the consumer’s] interest in the day’s most urgent political debate.”¹⁰⁰ In *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*, the Court more clearly recognized that commercial speech is provided “a lesser protection” than “other constitutionally guaranteed expression” and is only protected if it is “neither misleading nor related to unlawful activity.”¹⁰¹ To defend a statute regulating commercial speech

⁹⁶ For a detailed discussion of the historical development of the commercial speech doctrine, see Halberstam, *supra* note 25, at 779–92.

⁹⁷ See *King*, 767 F.3d at 234 (“In explaining why [intermediate scrutiny] is appropriate, we find it helpful to compare professional speech to commercial speech.”). *Stuart v. Huff*, 834 F. Supp. 2d 424, 431 (M.D.N.C. 2011) (“To the extent that there is some commercial or professional speech involved here, it is intertwined with non-commercial speech and thus entitled to the full protection of the First Amendment.”). See also Keighley, *supra* note 25, at 2365–66 (analyzing the analogy to commercial speech and reflecting on its relevance in a discussion of professional speech).

⁹⁸ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 761 (1976) (invalidating a Virginia statute which prohibited pharmacists from advertising drug prices on the grounds that it violated the First Amendment by suppressing the free flow of prescription drug information).

⁹⁹ *Id.* at 763–64.

¹⁰⁰ *Id.* at 763.

¹⁰¹ *Cent. Hudson Gas & Elec. Corp. v. Pub. Servs. Comm’n of N.Y.*, 447

against the court's intermediate scrutiny standard, "[t]he state must assert a substantial interest to be achieved by [the restriction]" and "[t]he limitation on expression must be designed carefully to achieve the State's goal."¹⁰²

Given the lack of Supreme Court guidance regarding professional speech and the apparent confusion among circuits, the Third Circuit turned to the Court's commercial speech jurisprudence, ultimately concluding "that professional speech should receive the same level of First Amendment protection as that afforded to commercial speech."¹⁰³ Significantly, however, the Third Circuit did not contend that commercial speech and professional speech were the same type of expression, but merely stressed that the same considerations that caused the Supreme Court to protect commercial speech with intermediate scrutiny were present in the professional speech context.¹⁰⁴ First of all, professional speech, like commercial speech, "occurs in an area traditionally subject to government regulation,"¹⁰⁵ a fact which supports providing it with "diminished [First Amendment] protection."¹⁰⁶ Secondly, "professional speech, like commercial speech, serves as an important channel for the communication of information that might otherwise never reach the public."¹⁰⁷ Providing some First Amendment protection, therefore, "facilitates the 'the free flow of commercial information,' in which both the

U.S. 557, 557 (1980).

¹⁰² *Id.* at 564. The Court would go on to state:

Compliance with [the intermediate scrutiny standard] may be measured by two criteria. First, the restriction must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose. Second, if the governmental interest could be served as well by a more limited restriction on commercial speech, the excessive restrictions cannot survive.

Id.

¹⁰³ *King v. Governor of New Jersey*, 767 F.3d 216, 235 (3d Cir. 2014).

¹⁰⁴ *Id.* at 234–35.

¹⁰⁵ *Id.* at 234 (quoting *Cent. Hudson Gas & Elec. Corp.*, 447 U.S. at 564).

¹⁰⁶ *Id.*

¹⁰⁷ *Id.*

intended recipients and society at large have a strong interest.”¹⁰⁸ The Third Circuit clearly distinguishes between the two categories of speech, and academics have warned about the problems of conflating the two,¹⁰⁹ but by recognizing the similarities between them, the court used the much more coherent commercial speech doctrine to adopt an intermediate scrutiny standard for professional speech.¹¹⁰

II. RECENT CIRCUIT COURT PROFESSIONAL SPEECH CASES

Despite the many times that the Supreme Court has dealt with cases involving a First Amendment challenge to the verbal communications of professionals, and despite the considerable body of law surrounding commercial speech, the Court has failed to adequately address professional speech. The trio of recent appellate court decisions introduced above—*Pickup v. Brown*, *Wollschlaeger v. Governor of Florida*, and *King v. Governor of the State of New Jersey*—demonstrate the confusion that this ambiguity has caused, and also reveal some of the problematic consequences that can result. With no definition of professional speech and no clear standard of review, lower courts and legislatures are free to continue to play the dichotomous “labeling game” that was of so much concern to Judge O’Scannlain. A more in-depth discussion of *Pickup* and *Wollschlaeger* will demonstrate some of the confusion and hint at some of its consequences, and a discussion of the Third Circuit’s formulaic approach in *King* will reveal how the introduction of an intermediate scrutiny standard can resolve the issues the “labeling game” creates.

A. *Pickup v. Brown*

As discussed in the Introduction, in *Pickup v. Brown*¹¹¹ the Ninth Circuit considered a First Amendment challenge to

¹⁰⁸ *Id.* at 233 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 763–64 (1976)).

¹⁰⁹ See Post, *supra* note 25, at 980 (urging that the “analogy to commercial speech should not be pressed too far”).

¹¹⁰ *King*, 767 F.3d at 235.

¹¹¹ *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013).

California Senate Bill 1172 (“SB 1172”), which prohibited “state-licensed mental health provider[s]” from engaging in SOCE with patients under eighteen.¹¹² The Ninth Circuit, having combined two district court cases which reached conflicting conclusions, ultimately held that SB 1172 regulated conduct and did not violate the First Amendment rights of the plaintiffs.¹¹³

The court began its analysis by determining whether the prohibition on SOCE constituted a regulation of conduct or speech.¹¹⁴ Relying upon two prior Ninth Circuit opinions—*National Association for the Advancement of Psychoanalysis v. California Board of Psychology* (“NAAP”) and *Conant v. Walters*¹¹⁵—the court concluded that, although “communication that occurs during psychotherapy does receive some constitutional protection . . . it is not immune from regulation.”¹¹⁶ Then, turning to *Casey* and *Lowe*, the court conceptualized a “continuum” along which it could identify the First Amendment rights of

¹¹² CAL. BUS. & PROF. CODE § 865 (West 2012).

¹¹³ *Pickup*, 740 F.3d at 1222.

¹¹⁴ *Id.* at 1225. As a preliminary matter, the court noted that SB 1172 did not do any of the following: (a) “Prevent mental health providers from communicating with the public about SOCE;” (b) “Prevent mental health providers from expressing their views to patients, whether children or adults, about SOCE, homosexuality, or any other topic;” (c) “Prevent mental health providers from recommending SOCE to patients, whether children or adults;” (d) “Prevent mental health providers from administering SOCE to any person who is 18 years of age or older;” (e) “Prevent mental health providers from referring minors to unlicensed counselors, such as religious leaders;” (f) “Prevent unlicensed providers, such as religious leaders, from administering SOCE to children or adults;” (g) “Prevent minors from seeking SOCE from mental health providers in other states.” *Id.* at 223.

¹¹⁵ *Pickup*, 740 F.3d at 1225. *See Nat’l Ass’n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1056 (9th Cir. 2000) (holding that California’s psychologist licensing laws did not violate physicians’ First Amendment rights, even though “some speech interest may be implicated” as the laws represented a valid, content neutral exercise of the state’s police power); *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002) (enjoining a statute which threatened professional sanction for a physician who recommended the use of a controlled substance for medical purposes on the grounds that the “enforcement policy threatens to interfere with expression protected by the First Amendment”).

¹¹⁶ *Pickup*, 740 F.3d at 1227.

professionals.¹¹⁷ The court stated that “[a]t one end of the continuum, where a professional is engaged in a public dialogue, First Amendment protection is at its greatest.”¹¹⁸ The court characterized this speech as “outside the doctor-patient relationship” and considered professionals engaging in it as “constitutionally equivalent to soapbox orators and pamphleteers.”¹¹⁹ The court then identified an intermediate point “within the confines of the professional relationship,” where the “First Amendment protection of a professional’s speech is somewhat diminished.”¹²⁰ In these intermediate situations, according to the court, “the First Amendment tolerates a substantial amount of speech regulation.”¹²¹ At the far end of the continuum, the court identified the “regulation of professional *conduct*, where the state’s power is great, even though such regulation may have an incidental effect on speech.”¹²² Such regulation is “subject to only rational basis review and must be upheld if it bears a rational relationship to a legitimate state interest.”¹²³

In concluding that SB 1172 only regulated professional conduct, the court reasoned that SOCE constituted a medical treatment, not an expressive communication, and “the fact that speech may be used to carry out [SOCE did] not turn the regulation of conduct into a regulation of speech.”¹²⁴ Relying on its own precedents in *NAAP* and *Conant*, and explicitly rejecting the applicability of *Humanitarian Law Project*,¹²⁵ the court concluded that “the First Amendment does not prevent a state from regulating treatment even when the treatment is performed through speech alone.”¹²⁶ Any effect SB 1172 “may have [had] on free speech

¹¹⁷ *Id.* at 1227–29.

¹¹⁸ *Id.* at 1227.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 1228.

¹²¹ *Id.*

¹²² *Id.* at 1229.

¹²³ *Id.* at 1231.

¹²⁴ *Id.* at 1229.

¹²⁵ *Id.* (“Plaintiffs contend that *Holder v. Humanitarian Law Project* supports their position. It does not.”).

¹²⁶ *Id.* at 1230.

interests [was] merely incidental” and did not alter the analysis.¹²⁷

When the court issued its order denying rehearing en banc, Judge O’Scannlain wrote a lengthy dissent in which he rejected the court’s rationale, arguing that the panel’s opinion “contravenes recent Supreme Court precedent, ignores established free speech doctrine, misreads [Ninth Circuit] cases, and . . . insulates from First Amendment scrutiny California’s prohibition—in the guise of a professional regulation—of politically unpopular expression.”¹²⁸ Judge O’Scannlain rejected the panel’s continuum as establishing a problematic speech/conduct dichotomy without providing any “principled doctrinal basis” for navigating it.¹²⁹ He further contended that the panel’s labeling of certain verbal communications as “conduct” had the effect of creating “a potentially broad exception to the First Amendment for certain categories of speech.”¹³⁰ He argued that *Humanitarian Law Project* clearly provided that “legislatures [could not] nullify the First Amendment’s protections for speech by playing [this] labeling game.”¹³¹ Judge O’Scannlain declined to assess the merits of the statute according to a more heightened First Amendment scrutiny,¹³² and concluded by warning that the panel’s “labeling game” approach would leave whole categories of speech, and perhaps disfavored speech in general, exempted from First Amendment protection.¹³³ Although not discussed by Judge O’Scannlain, this labeling game could also undermine the state’s ability to protect its citizens against harmful practices like SOCE by characterizing verbal communications as speech and applying strict scrutiny, a problem illustrated in *Welch v. Brown*.

¹²⁷ *Id.* at 1231.

¹²⁸ *Id.* at 1215 (O’Scannlain, J., dissenting from the order denying rehearing en banc).

¹²⁹ *Id.* at 1215–16.

¹³⁰ *Id.* at 1221.

¹³¹ *Id.* at 1218.

¹³² *Id.* at 1221.

¹³³ *Id.* at 1221 n.12 (“If a state may freely regulate speech uttered by professionals in the course of their practice without implicating the First Amendment, then targeting disfavored moral and political expression may only be a matter of creative legislative draftsmanship.”).

B. *Wollschlaeger v. Governor of Florida*

In *Wollschlaeger v. Governor of Florida*,¹³⁴ the Eleventh Circuit dealt with a different type of statute than that at issue in *Pickup* or *King*, but one which involved a very similar analysis. In 2011, Florida passed the “Firearm Owners Privacy Act” (“FOPA”) which prohibited licensed “health care practitioner[s]” and licensed “health care facilit[ies]” from asking questions about and keeping records on their patients’ firearm ownership.¹³⁵ A group of plaintiffs, including individual physicians, the Florida Chapters of the American Academy of Pediatrics, the American Academy of Family Physicians, and the American College of Physicians, challenged the law on First Amendment grounds.¹³⁶ The Southern District of Florida granted the plaintiffs’ motion for a preliminary injunction¹³⁷ and, in a subsequent proceeding, granted the plaintiffs’ motion for summary judgment.¹³⁸ The District Court concluded that the Act “impose[d] restrictions on the content of

¹³⁴ *Wollschlaeger v. Governor of Florida*, 760 F.3d 1195 (11th Cir. 2014).

¹³⁵ FLA. STAT. § 790.338 (2011). The Act contained several provisions that were also included in the Florida Patient’s Bill of Rights and Responsibilities. *Id.* § 381.026. Four provisions of FOPA were at issue. *Id.* The first—the record keeping provision—prohibited licensed practitioners from “intentionally enter[ing] any disclosed information concerning firearm ownership into the patient’s medical record if the practitioner knows that such information is not relevant to the patient’s medical care or safety, or the safety of others.” *Id.* § 790.338. The second—the inquiry provision—prohibited licensed practitioners “from making a written inquiry or asking questions concerning the ownership of a firearm or ammunition by the patient or by a family member of the patient, or the presence of a firearm in a private home or other domicile of the patient or a family member of the patient.” *Id.* The third—the discrimination provision—prohibited licensed practitioners from “discriminat[ing] against a patient based solely upon the patient’s exercise of the constitutional right to own and possess firearms or ammunition.” *Id.* The fourth—the harassment provision—prohibited licensed practitioners “from unnecessarily harassing a patient about firearm ownership during an examination.” *Id.*

¹³⁶ *Wollschlaeger*, 760 F.3d at 1203.

¹³⁷ *Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367, 1380, 1384 (S.D. Fla. 2011).

¹³⁸ *Wollschlaeger v. Farmer*, 880 F. Supp. 2d 1251, 1255 (S.D. Fla. 2012).

practitioners' speech" and that therefore strict scrutiny should be applied.¹³⁹

The Eleventh Circuit majority, on the other hand, concluded that all four challenged provisions were "valid regulations of professional conduct" with "only an incidental effect on physicians' speech."¹⁴⁰ Balking at the District Court's standard of review, the court held that because the challenged provisions regulated only medical treatment and not speech, they did not violate the plaintiffs' First Amendment rights.¹⁴¹ Relying primarily on *Lowe* and *Casey*, the majority focused initially on the physician-patient relationship and applied Justice White's reasoning that First Amendment protections diminish when a "personal nexus between professional and client" exists.¹⁴² The majority cited with favor the Ninth Circuit's continuum analysis in *Pickup* and ultimately adopted its reasoning.¹⁴³ Although the majority discussed an intermediate point on the continuum of professional speech, it failed—like the Ninth Circuit panel—to fully define it or identify the standard by which it could be reviewed.¹⁴⁴ The majority ultimately held that the Act did "not facially violate the First Amendment."¹⁴⁵

¹³⁹ *Wollschlaeger*, 814 F. Supp. 2d at 1380.

¹⁴⁰ *Wollschlaeger*, 760 F.3d at 1217.

¹⁴¹ *Id.*

¹⁴² *Id.* at 1218 (quoting *Lowe v. S.E.C.*, 472 U.S. 181, 232 (1985) (White, J., concurring)) ("These protections are at their apex when a professional speaks to the public on matters of public concern; they approach a nadir, however, when the professional speaks privately, in the course of exercising his or her professional judgment, to a person receiving the professional's services.").

¹⁴³ *Id.* at 1225 ("*Pickup* is instructive as a recent example of a court applying Justice White's reasoning in *Lowe* in conjunction with *Casey* to uphold a regulation of professional conduct with incidental effect on speech, outside of the context of a license requirement.").

¹⁴⁴ *Id.* at 1223 (citing *Pickup v. Brown*, 740 F.3d 1208, 1228 (9th Cir. 2013)) ("The Ninth Circuit placed the requirement that health care providers communicate certain information to patients that was challenged in *Casey* 'at the midpoint of the continuum' noting that the speech at issue took place 'within the confines of a professional relationship.'").

¹⁴⁵ *Id.* at 1217. As the Third Circuit noted in *King* when it discussed *Wollschlaeger*, the majority does "not explicitly identify the level of scrutiny [it applies]." *King v. Governor of the State of New Jersey*, 767 F.3d 216, 235 n.19

Judge Wilson penned a lengthy dissent, arguing that the court should apply either intermediate scrutiny or even strict scrutiny to the Florida statute.¹⁴⁶ He began by stating that the majority incorrectly used *Lowe* to contend that, as long as a person is “operating within the confines of [a professional] relationship,” her speech can be regulated without First Amendment protection.¹⁴⁷ The majority impermissibly extended *Lowe* in a way foreclosed by subsequent cases, including *Humanitarian Law Project*.¹⁴⁸ Judge Wilson also rejected the court’s use of *Pickup*, claiming that the majority used the case to establish the problematic speech/conduct dichotomy.¹⁴⁹ Judge Wilson highlighted the way in which the majority glossed over *Pickup*’s recognition of a “midpoint [on] the [professional speech] continuum,” one which it recognized from its reading of *Casey*.¹⁵⁰ The court engaged in the same type of “labeling game” as the Ninth Circuit in *Pickup*, despite the fact the SOCE could be considered a medical treatment—albeit a harmful one—while firearm inquiries and record keeping certainly could not.¹⁵¹ As such, the court should have adopted an intermediate

(3d Cir. 2014). The majority found FOIA to be a “valid regulation of professional conduct” but did not address whether it applied rational basis or no review at all. *Wollschlaeger*, 760 F.3d at 1217. Judge Wilson, however, understood the majority to have applied rational basis review in its analysis. *Id.* at 1239–40 (Wilson, J., dissenting).

¹⁴⁶ *Wollschlaeger*, 760 F.3d at 1256 (Wilson, J., dissenting).

¹⁴⁷ *Id.* at 1240 (“*Lowe* established only that the existence of a professional relationship is a necessary condition if a law burdening speech is to evade First Amendment scrutiny. Nothing in *Lowe* implied that such a condition was sufficient to support this conclusion.”).

¹⁴⁸ *Id.* at 1241. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2677 (2011) (applying heightened First Amendment scrutiny to a Vermont statute restricting the sale, disclosure, and use of pharmacy records); *Florida Bar. v. Went For It, Inc.*, 515 U.S. 618, 623–34 (1995) (applying intermediate scrutiny to a Florida statute prohibiting members of the Florida bar from sending direct-mail solicitations to victims for 30 days after an accident or disaster); *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010) (applying heightened scrutiny to a statute that prohibited providing “material support” to terrorist organizations when that support comes in the form of humanitarian and legal advocacy).

¹⁴⁹ *Wollschlaeger*, 760 F.3d at 1247 (Wilson J., dissenting).

¹⁵⁰ *Id.* (citing *Pickup v. Brown*, 740 F.3d 1208, 1228 (9th Cir. 2013)).

¹⁵¹ *Id.* at 1248.

Here, in stark contrast to *Pickup* where all of the burdened

scrutiny standard, as FOPA implicated the plaintiffs' First Amendment rights.¹⁵²

Judge Wilson's dissent, in addition to criticizing the majority's rationale, reflects Judge O'Scannlain's concern regarding the potential consequences of a holding that eliminates professional speech from any First Amendment review.¹⁵³ Judge Wilson contended that the majority's holding created "a new category of speech immune from First Amendment review" in direct contradiction of Supreme Court precedent.¹⁵⁴ The result, according to Judge Wilson, is far worse than Judge O'Scannlain warned in *Pickup*, however, as the majority's holding, instead of merely creating a "labeling game" with the potential for abuse, forced all speech within a professional relationship into a category of "conduct" that receives no First Amendment protection.¹⁵⁵

speech was the functional equivalent of providing a drug, none of the speech burdened by the Act fits in that exceedingly narrow category. Asking irrelevant questions about firearm ownership, recording the answers, or harassing a patient based on firearm ownership—by persistently and irritatingly discussing the subject—is nothing like giving a patient a drug or performing SOCE therapy.

Id. Wilson recognizes here that, although he does use *Pickup* to support his position, he makes "no comment as to whether *Pickup* was correctly decided."

Id. His concern is rather with discrediting the majority's reliance on it in supporting its position. *Id.*

¹⁵² *Id.* at 1230–31.

¹⁵³ See *id.* at 1248 n.16 (stating that he shares Judge O'Scannlain's concern that the ability to label speech within a professional relationship as conduct would exempt regulations from any First Amendment protection).

¹⁵⁴ *Id.* at 1237. Judge Wilson also asserted that as a result of the court's holding "all speech between professionals and patients/clients—so long as it occurs within the confines of a one-on-one professional relationship—can be burdened by States without scrutiny." *Id.*

¹⁵⁵ *Id.* at 1248 n.16 ("The Majority proves the point by explaining that the line between unprotected conduct and protected speech in the professional setting is not clear here and indeed cannot be found. Shockingly, the Majority turns the absence of a clear dividing line between these very different categories of speech into an invitation for States to regulate all of it without scrutiny. If the court in *Pickup* erred, it did so by putting too much speech into the unprotected category. . . . The Majority has multiplied that error many times over.").

C. *King v. Governor of the State of New Jersey*

In *King v. Governor of the State of New Jersey*, the Third Circuit dealt with a First Amendment challenge to a statute similar to California’s SB1172.¹⁵⁶ New Jersey’s Assembly Bill A3371 (“A3371”) prohibited persons “licensed to provide professional counseling” in the state from “engag[ing] in sexual orientation change efforts with a person under 18 years of age.”¹⁵⁷ The New Jersey legislature relied upon the same medical publications cited by the California legislature and also expressly tailored the statute to protect minor patients.¹⁵⁸ Doctors involved with SOCE and other advocacy groups challenged the statute, claiming that A3371 violated their First Amendment free speech rights.¹⁵⁹ The District of New Jersey, relying heavily on the reasoning in *Pickup*,¹⁶⁰ rejected the plaintiffs’ First Amendment claims, saying that the statute regulated conduct and withstood rational basis review.¹⁶¹ The Third Circuit affirmed the decision of the District Court and upheld the statute, but concluded—unlike the courts in *Pickup* and *Wollschlaeger*—that the statute restricted speech and intermediate scrutiny should therefore apply.¹⁶²

The Third Circuit began its analysis by addressing whether the ban on SOCE—a “‘talk therapy’ that is administered wholly through verbal communication,”—constituted a restriction on

¹⁵⁶ Compare *Pickup v. Brown*, 740 F.3d 1208, 1224–25 (9th Cir. 2013) (plaintiffs arguing that California’s prohibition on performing SOCE on minors violated their free speech rights); with *King v. Governor of New Jersey*, 767 F.3d 216, 220 (3d Cir. 2014) (plaintiffs arguing that New Jersey’s prohibition on performing SOCE on minors violated their free speech rights).

¹⁵⁷ N.J. STAT. ANN. §§ 45:1-55 (West 2013).

¹⁵⁸ *Id.*

¹⁵⁹ *King*, 767 F.3d at 220–21. The plaintiffs in the case were Tara King, Ed. D., individually and on behalf of her patients; Ronald Newman, Ph.D., individually and on behalf of his patients; the National Association for Research and Therapy of Homosexuality (“NARTH”); and the American Association of Christian Counsellors. *Id.*

¹⁶⁰ See *King v. Christie*, 981 F. Supp. 2d 296, 317–19 (D.N.J. 2013) (finding support for the conclusion that A3371 regulates conduct from the Ninth Circuit’s analysis in *Pickup*).

¹⁶¹ *Id.* at 303.

¹⁶² *King*, 767 F.3d 216, 224 (3d Cir. 2014).

speech or a regulation of conduct.¹⁶³ Phrased differently, the court began by asking “whether verbal communications become ‘conduct’ when they are used as a vehicle for mental health treatment.”¹⁶⁴ The court looked first to *Humanitarian Law Project* and disagreed with the Ninth Circuit as to its applicability. The court held, citing the reasoning of Judge O’Scannlain, that *Humanitarian Law Project* rejected “the argument that verbal communications become ‘conduct’ when they are used to deliver professional services” and that “the enterprise of labeling certain verbal or written communications ‘speech’ and others ‘conduct’ is unprincipled and susceptible to manipulation.”¹⁶⁵ The court considered the verbal SOCE communications to be “speech for the purposes of the First Amendment” and rejected the “labeling game” approach taken by the Ninth Circuit and the District Court.¹⁶⁶

The court next turned to the question of “the level of First Amendment protection afforded to speech that occurs as part of the practice of a licensed profession.”¹⁶⁷ The court first recognized, citing *Lowe* and *Casey*, that regulations that restrict “what a professional can and cannot say” reveal the uncomfortable tension between the police powers of the state and the First Amendment rights of professionals.¹⁶⁸ Although the court could not characterize the verbal communications in SOCE as conduct, it also could not undermine New Jersey’s interest in protecting the general public from those whose “specialized knowledge” puts them in a position of authority—one which actors could use to

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.* at 228 (“[W]hat the Supreme Court did *not* do [in *Humanitarian Law Project*] was reclassify this communication as ‘conduct’ based on the nature or function of what was communicated.”).

¹⁶⁶ *Id.* at 229.

¹⁶⁷ *Id.* Significantly, the court recognized here that the approach taken by the district court and the Ninth Circuit—the approach which characterized verbal communications as conduct—problematically “obscured [this] important constitutional inquiry.” *Id.* Because those courts held that the statutes merely regulated conduct, they never needed to decide the level of First Amendment scrutiny that should be applied to the statutes.

¹⁶⁸ *Id.* at 229–33.

manipulate and harm others if gone unchecked.¹⁶⁹ The court concluded, therefore, “that a licensed professional does not enjoy the full protection of the First Amendment when speaking as part of the practice of her profession.”¹⁷⁰

Having decided that the type of professional speech that occurs in SOCE does not deserve full First Amendment protection, the court addressed whether it should receive “some lesser degree of protection or no protection at all.”¹⁷¹ Comparing professional speech to commercial speech,¹⁷² the court concluded that intermediate scrutiny was the appropriate standard of review.¹⁷³ The court held that “a prohibition of professional speech is permissible only if it ‘directly advances’ the State’s substantial interest in protecting clients from ineffective or harmful professional services and is ‘not more extensive than necessary to serve that interest.’”¹⁷⁴

Once it had defined professional speech and articulated the applicable standard of scrutiny, the court evaluated the New Jersey

¹⁶⁹ *Id.* at 232 (“To handcuff the State’s ability to regulate a profession whenever speech is involved would therefore unduly undermine its authority to protect its citizens from harm.”).

¹⁷⁰ *Id.* In coming to this conclusion, the court relied heavily on the interpretations of *Lowe* and *Casey* in *Moore-King*, *Pickup*, and *Wollschlaeger*. *Id.* at 231–32. Although the court disagreed with many aspects of these other circuit court opinions, it did agree with the courts’ analyses regarding the diminished First Amendment protection for professional speech. *Id.* at 231. The Third Circuit did not ultimately agree that the finding of a “personal nexus between professional and client” meant that First Amendment protection disappeared, but it did recognize that such a nexus meant that First Amendment protection would be lessened. *Id.* at 232. (“We believe a professional’s speech warrants lesser protection only when it is used to provide personalized services to a client based on the professional’s expert knowledge and judgment.”).

¹⁷¹ *Id.* at 233–37.

¹⁷² *Id.* at 233–35 (“We believe that commercial and professional speech share important qualities and, thus, that intermediate scrutiny is the appropriate standard of review for prohibitions aimed at either category.”).

¹⁷³ *Id.* at 235.

¹⁷⁴ *Id.* (citing *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm. of N.Y.*, 447 U.S. 557, 566 (1980)). The court recognized that the Fourth, Ninth, and Eleventh Circuits had all come to different conclusions about which standard of review to apply, but argued that Supreme Court precedent dictated that a more heightened scrutiny than rational basis should apply. *Id.* at 236.

statute's constitutionality.¹⁷⁵ The court found a compelling interest in protecting minors from harmful or ineffective practices and found that the statute directly advanced this interest.¹⁷⁶ The court cited the legislative record—which contained widespread public condemnation of SOCE by “reputable professional and scientific organizations”—as evidence of SOCE’s ineffectiveness and potential harmfulness.¹⁷⁷ The court then concluded that the statute was not “more extensive than necessary to protect [the State’s] interest.”¹⁷⁸ Having subjected the statute to intermediate scrutiny, the court then held that A3371 was a constitutionally “permissible prohibition¹⁷⁹ of professional speech.”

The Third Circuit’s formulaic approach in *King* accomplished what the Supreme Court had failed to do in previous cases. The court presented an articulable definition of professional speech and clearly identified intermediate scrutiny as the applicable standard of review. This approach can better guide lower courts dealing with statutes regulating professional speech and avoid the pitfalls of the “labeling game” approach.

III. INTERMEDIATE SCRUTINY

A. *The Problems of the Speech/Conduct Dichotomy*

The reasoning used by the Ninth Circuit in *Pickup* and the Eleventh Circuit in *Wollschlaeger* permits courts to arbitrarily label verbal communications as either speech or conduct.¹⁸⁰ As

¹⁷⁵ *Id.* at 237–40.

¹⁷⁶ *Id.* at 237–38.

¹⁷⁷ *Id.* at 238.

¹⁷⁸ *Id.* at 239. The court rejected the plaintiffs’ arguments that the statute was overly burdensome and recognized that the state “is not required to employ the least restrictive means conceivable” as long as it “demonstrate[s] narrow tailoring of the challenged regulation to the asserted interest.” *Id.* (citing *Greater New Orleans Broad. Ass’n, Inc. v. United States*, 527 U.S. 173, 188 (1999) (citations omitted)). Because A3371 had a “scope . . . in proportion to the interest served,” it demonstrated a sufficient degree of narrow tailoring to survive intermediate scrutiny. *Id.*

¹⁷⁹ *Id.* at 240.

¹⁸⁰ *Pickup v. Brown*, 740 F.3d 1208, 1222 (9th Cir. 2013); *Wollschlaeger v. Governor of Florida*, 760 F.3d 1195, 1203 (11th Cir. 2014).

Judge O’Scannlain noted, the method provides “no principled doctrinal basis” for establishing the dichotomy and no “criteria” by which later courts could navigate it.¹⁸¹ According to Judge O’Scannlain, the Supreme Court had previously “warned . . . inferior courts against arrogating to themselves ‘any freewheeling authority to declare new categories of speech outside the scope of the First Amendment.’”¹⁸² In his estimation, the Ninth Circuit in *Pickup*—and the Eleventh Circuit in *Wollschlaeger*—did exactly that, allowing future courts to find that “speech, uttered by professionals to their clients, does not actually constitute ‘speech’ for the purposes of the First Amendment.”¹⁸³ Although Judge O’Scannlain primarily discussed the panel’s contravention of governing Supreme Court precedent and its misreading of applicable Ninth Circuit precedent,¹⁸⁴ his dissent also demonstrates a concern for the practical consequences of the panel’s decision.¹⁸⁵ The “labeling game” approach—ultimately rejected by the Third Circuit—creates categories of speech exempt from First Amendment protection and impermissibly gives courts and legislatures the power to restrict both socially useful and politically unpopular speech by formulating the restriction as a “professional regulation.”¹⁸⁶ Similarly, by “labeling” those same communications as speech deserving of full First Amendment protection, courts may undermine the state’s ability to fully and

¹⁸¹ *Pickup*, 740 F.3d at 1215 (O’Scannlain, J., dissenting from the denial of rehearing en banc).

¹⁸² *Id.* at 1221 (citing *United States v. Alvarez*, 132 S. Ct. 2537, 2547 (2012)).

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 1218 (“[T]o justify its purported speech/conduct dichotomy in the context of the professions, the panel instead invokes our decisions in [*NAAP* and *Conant*], as well as scattered citations of non-authoritative cases. Supreme Court precedent, however, as well as *NAAP* and *Conant* themselves, do not dictate such conclusion—rather, they counsel against it.”).

¹⁸⁵ *Id.* at 1215.

¹⁸⁶ *Id.* Once again, Judge Wilson criticizes the majority and the Florida legislature for this very reason. *Wollschlaeger v. Governor of Florida*, 760 F.3d 1195, 1231 (11th Cir. 2014) (Wilson, J., dissenting) (“The poor fit between what the Act actually does and the interests it purportedly serves belies Florida’s true purpose in passing this Act: silencing doctors’ disfavored message about firearm safety.”).

legitimately exercise its police powers.¹⁸⁷

According to Judge O'Scannlain, the Ninth Circuit's lack of a "principled doctrinal basis" for its holding only exacerbates the problems associated with the speech/conduct dichotomy.¹⁸⁸ The panel does illustrate a continuum along which courts can consider "the First Amendment rights of professionals," but, as both the Third Circuit and Judge Wilson recognized, this continuum lacks a clear method of application.¹⁸⁹ The Third Circuit expressly declined to adopt the Ninth Circuit's three categories as it found that the intermediate category and the conduct category usually become conflated.¹⁹⁰ Judge Wilson, after declining to comment on whether *Pickup* was correctly decided,¹⁹¹ noted that he shared Judge O'Scannlain's "concern that the difference between the intermediate category . . . and the unprotected category . . . may prove to be illusory."¹⁹² The Third Circuit's holding in *King* forecloses these concerns by clearly defining professional speech and explicitly adopting the intermediate scrutiny standard of review.

B. *The Benefits of Intermediate Scrutiny*

As Justice White noted in *Lowe*, cases that deal with regulations of professional speech involve a collision of interests.¹⁹³ In the three cases discussed above the following three interests emerge: (a) the state's interest in regulating professions, especially professions "which closely concern the public

¹⁸⁷ *King v. Governor of New Jersey*, 767 F.3d 216, 229 (3d Cir. 2014).

¹⁸⁸ *Pickup*, 740 F.3d at 1215 (O'Scannlain, J., dissenting from the denial of rehearing en banc).

¹⁸⁹ See *King*, 767 F.3d at 232 n.15; *Wollschlaeger*, 760 F.3d at 1248 n.16 (Wilson, J., dissenting).

¹⁹⁰ *King*, 767 F.3d at 232 n.15.

¹⁹¹ *Wollschlaeger*, 760 F.3d at 1248 & n.16 (Wilson, J., dissenting).

¹⁹² *Id.* 1248 n.16.

¹⁹³ *Lowe v. S.E.C.* 472 U.S. 181, 228 (1985) (White, J., concurring) ("This issue involves a collision between the power of government to license and regulate those who would pursue a profession or vocation and the rights of freedom of speech and of the press guaranteed by the First Amendment.").

health;”¹⁹⁴ (b) the patients’ First Amendment interests in receiving beneficial information;¹⁹⁵ and (c) the physicians’ First Amendment interests in their own speech rights.¹⁹⁶ Preserving physicians’ speech rights also has the subsequent benefit of advancing the values that the First Amendment is meant to protect—values such as autonomy and democratic self-governance. The intermediate scrutiny standard better protects these values by preventing courts and legislatures from playing problematic “labeling games” with regard to professional speech regulations. State legislatures retain their ability to protect the public from harmful and ineffective practices, but the courts can still protect the First Amendment interests at stake in a doctor-patient relationship.

The states’ ability to regulate the professions under their police powers is well established and is not challenged in any of the cases discussed above.¹⁹⁷ The “labeling game” approach, however, significantly threatens this power by allowing courts to characterize the verbal communications of professionals as “speech” deserving of full First Amendment protection. This characterization can result in the invalidation of statutes that ultimately serve the state’s interests in protecting its citizens. In *Welch v. Brown*, the Eastern District of California subjected SB 1172 to strict scrutiny and enjoined its enforcement.¹⁹⁸ Although

¹⁹⁴ *King*, 767 F.3d at 229 (citing *Watson v. State of Maryland*, 218 U.S. 173, 176 (1910)). The Supreme Court in *Watson* found this principle “too well settled to require discussion.” *Watson*, 218 U.S. at 176.

¹⁹⁵ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976) (recognizing that First Amendment protection extends to both the source and the recipients of speech); see also *King*, 760 F.3d at 1258 (Wilson, J., dissenting) (arguing that the majority’s holding violates patients’ First Amendment rights to receive potentially beneficial information from their physicians).

¹⁹⁶ *Wollschlaeger*, 760 F.3d at 1258 (Wilson, J., dissenting) (“Doctors thus have a significant interest in speaking freely, making inquiries, and recording patients’ answers.”).

¹⁹⁷ See *King*, 767 F.3d at 229 (citing *Watson v. State of Maryland*, 218 U.S. 173, 176 (1910)).

¹⁹⁸ *Welch v. Brown*, 907 F. Supp. 2d 1102, 1117 (E.D. Cal. 2012) (enjoining the enforcement of SB 1172 as it lacked content and viewpoint neutrality and likely could not withstand strict scrutiny) *rev’d sub nom.* *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013).

the Ninth Circuit reversed this decision, the District Court's reasoning demonstrates how a failure to fully define professional speech and identify a standard of review can ultimately undermine an important state interest—here, the protection of vulnerable youth subjected to the dangers associated with SOCE.¹⁹⁹ The California legislature, in enacting SB 1172, relied upon “the well-documented, prevailing opinion of the medical and psychological community that SOCE had not been shown to be effective and that it create[d] a potential risk of harm to those who experience[d] it.”²⁰⁰ The *Welch* court acknowledged this evidence in its opinion, but relied upon it only to support its holding that the statute lacked content neutrality.²⁰¹ The Third Circuit, on the other hand, considered almost identical evidence in its determination that A3371 directly advanced the state's interest in protecting minors from the harms of SOCE.²⁰² Laws like SB 1172 and A3371 reflect

¹⁹⁹ Interestingly, the District Court relied upon the same Supreme Court and Ninth Circuit authority in concluding that strict scrutiny should apply. The court argued that “[t]he lower levels of review contemplated in *Lowe* and *Casey* thus do not appear to apply if a law imposes restrictions on a professional's speech.” *Welch*, 907 F. Supp. 2d at 1110. The court also used the reasoning in *NAAP* and *Conant* to conclude that strict scrutiny should apply, diverging from the Ninth Circuit's rationale in its determination that the statute lacked content and viewpoint neutrality. *Id.*

²⁰⁰ *Pickup v. Brown*, 740 F.3d 1208, 1223 (9th Cir. 2013). The legislature cited directly “position statements, articles, and reports” published by the American Psychological Association, the American Psychiatric Association, the American School Counselor Association, the American Academy of Pediatrics, the American Medical Association, the National Association of Social Workers, the American Counseling Association, the American Psychoanalytic Association, the American Academy of Child and Adolescent Psychiatry, and the Pan American Health Organization, all of which affirmed the inefficacy of SOCE and some of which warned about its potential dangers. S.B. 1172, 2011-2012 Sess. (Cal. 2012); *see also supra*, Part II.A.

²⁰¹ *Welch v. Brown*, 907 F. Supp. 2d 1102, 1116 (E.D. Cal. 2012) (“The Legislature's findings and declarations . . . bring SB 1172 within the content-based exception” wherein “intermediate scrutiny does not apply.”), *rev'd sub nom.* *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013).

²⁰² *King*, 767 F.3d at 238–39 (“We conclude that New Jersey has satisfied [its burden to establish that A3371 directly advances the state's interest]. The legislative record demonstrates that over the last few decades a number of well-known, reputable professional and scientific organizations have publicly condemned the practice of SOCE, expressing serious concerns about its

the legislatures' reaction to the weight of medical evidence condemning a harmful medical practice, and the intermediate scrutiny standard allows for courts to uphold those laws, even if speech rights are implicated, so long as they "directly advance" a state interest and "are not more extensive than necessary."²⁰³

Conversely, the intermediate scrutiny standard also allows for courts to ensure that states do not abuse their police powers by enacting statutes that purport to "prohibit the provision of harmful or ineffective professional services" but instead serve "to inhibit politically-disfavored messages."²⁰⁴ In his *Wollschlaeger* dissent, Judge Wilson recognized the importance of the state's asserted interests in defending FOPA.²⁰⁵ He argued, however, that the state offered "no evidence to show that those rights [were] under threat" or that FOPA "either directly or materially" advanced the interests proposed.²⁰⁶ This disconnect between the asserted interest and the advancement of that interest led Judge Wilson to conclude that "Florida's true purpose in passing" FOPA was to "[silence] doctors' disfavored message about firearm safety."²⁰⁷ Unlike Judge O'Scannlain, who declined to assess the merits of SB 1172 under any level of scrutiny,²⁰⁸ Judge Wilson applied the intermediate

potential to inflict harm.").

²⁰³ See *id.* at 237 ("The New Jersey legislature has targeted SOCE counseling for prohibition because it was presented with evidence that this particular form of counseling is ineffective and potentially harmful to clients."); see also, Janet L. Dolgin, *Physician Speech and State Control: Furthering Partisan Interests at the Expense of Good Health*, 48 NEW ENG. L. REV. 293, 322–28 (2014) (providing a more in depth analysis of the medical evidence supporting California's SB 1172).

²⁰⁴ *King*, 767 F.3d at 236.

²⁰⁵ *Wollschlaeger v. Governor of Florida*, 760 F.3d 1195, 1230–31 (11th Cir. 2014) (Wilson, J., dissenting) ("The State's asserted interests in protecting the rights of firearm owners, including their privacy rights, their rights to be free from harassment and discrimination, and their ability to access medical care, are incredibly important.").

²⁰⁶ *Id.* at 1231.

²⁰⁷ *Id.*

²⁰⁸ *Pickup v. Brown*, 740 F.3d 1208, 1221 (9th Cir. 2013) (O'Scannlain, J., dissenting from the denial of rehearing en banc). Although no Judge applies intermediate scrutiny to SB 1172, the Third Circuit's review of A3371 certainly mirrors what that application would entail, especially considering the depth with which the Third Circuit analyzed the *Pickup* opinion. See *King*, 767 F.3d at 224–

scrutiny standard and found that each challenged provision failed to survive the inquiry.²⁰⁹ Mirroring the Third Circuit's reasoning in adopting the intermediate scrutiny standard, Judge Wilson concluded his First Amendment analysis by recognizing that "[i]ntermediate scrutiny standards ensure not only that the State's interests are proportional to the resulting burdens placed upon speech but also that the law does not seek to suppress a disfavored message."²¹⁰

In a similar way, the intermediate scrutiny standard also protects the First Amendment rights of patients. As the Supreme Court noted in *Virginia State Board of Pharmacy*, both the source and the recipient of communication are afforded the protection of the First Amendment.²¹¹ The "labeling game" approach undermines this interest by potentially limiting the beneficial information a patient can receive from her doctor, even when the limitation does not advance any government interest. Judge Wilson addressed this point directly in his dissent when he recognized that FOPA burdens a patient's right to receive information about the dangers of firearms by prohibiting "even the opening question in the firearm conversation."²¹² The intermediate standard more adequately protects the patient's First Amendment right to receive information that may ultimately prove beneficial. In the medical context this is especially significant as the information being restricted is often information that is unavailable elsewhere and can potentially be life-saving.²¹³ The standard ultimately ensures that if courts or legislatures limit that right, the limitation "directly advances" a government interest and "is not more extensive than necessary."²¹⁴

For this same reason, intermediate scrutiny also serves to better protect the First Amendment rights of medical professionals as it

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²⁰⁹ *Wollschlaeger*, 760 F.3d at 1257–67 (Wilson, J., dissenting).

²¹⁰ *Id.* at 1267 (quoting *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2688 (2011)).

²¹¹ *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976).

²¹² *Wollschlaeger*, 760 F.3d at 1257 (Wilson, J., dissenting).

²¹³ *Id.*

²¹⁴ *King*, 767 F.3d at 239 (citation omitted).

permits courts to assess the proportionality of the state's interests and the subsequent First Amendment burdens. According to the Supreme Court, the practice of medicine is "subject to reasonable licensing and regulation by the state,"²¹⁵ but, as the Ninth Circuit noted in *Conant*, "being a member of a regulated profession does not . . . result in a surrender of First Amendment rights."²¹⁶ Both the panel in *Pickup* and the majority in *Wollschlaeger* use the "personal nexus" analysis from *Lowe* to categorically remove physicians' verbal communications from the realm of First Amendment protection.²¹⁷ An intermediate scrutiny standard prevents this from happening arbitrarily,²¹⁸ and in the process preserves important First Amendment values that are enhanced by physicians' speech, even when that speech occurs pursuant to the physician-patient relationship.

First, providing physicians with First Amendment protection—even diminished First Amendment protection—effectively promotes the liberty theory of the First Amendment.²¹⁹ According to the liberty theory, "the free speech clause protects . . . an arena of individual liberty from certain types of governmental restrictions. Speech is protected not as a means to a collective good but because of the value of speech conduct to the individual."²²⁰

²¹⁵ *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992).

²¹⁶ *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002).

²¹⁷ *Pickup v. Brown*, 740 F.3d 1208, 1229 (9th Cir. 2013) ("At the other end of the continuum, and where we conclude that SB 1172 lands, is the regulation of professional conduct, where the state's power is great, even though such regulation may have an incidental effect on speech."); *Wollschlaeger*, 760 F.3d at 1217 ("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.").

²¹⁸ *Pickup*, 740 F.3d at 1215 (O'Scannlain, J., dissenting from the denial of rehearing en banc) (arguing that the panel's "labeling game" approach was only exacerbated by the lack of a "principled doctrinal basis" for adopting and applying it).

²¹⁹ See Keighley, *supra* note 25, at 2373–74 (arguing that the liberty theory should restrict the state's ability to compel physicians' speech in the context of informed consent abortion statutes, especially when the speech compelled does no more than espouse the state's ideological beliefs).

²²⁰ Edwin Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 966 (1978).

Under this theory “free speech . . . has constitutional value because of its important role in protecting an individual’s autonomy and right of self-definition.”²²¹ Although the Third Circuit did not address this idea in its adoption of intermediate scrutiny, the standard more effectively protects it. For example, as Judge Wilson noted in his dissent, FOPA prevented physicians from engaging in speech consistent both with their own beliefs and with established medical authority, all pursuant to a legislative interest in inhibiting a disfavored political message.²²² Because the majority adopted the “labeling game” approach and characterized the physicians’ verbal communications as conduct, the plaintiffs were prevented from speaking—a direct contravention of their autonomy interests—even though the statute did not directly advance an important state interest.²²³ Medical professionals may only receive diminished First Amendment protection, but, by preventing courts and legislatures from eliminating that protection entirely, the intermediate scrutiny standard promotes the physicians’ liberty and autonomy interests.

Providing physicians with First Amendment protection also promotes the democratic self-governance theory of the First Amendment.²²⁴ This theory “is premised on the belief that free expression is necessary for the proper functioning of government and democracy.”²²⁵ It is pursuant to this theory that the Supreme Court held that commercial speech receives First Amendment

²²¹ Keighley, *supra* note 25, at 2373.

²²² *Wollschlaeger*, 760 F.3d at 1233 (Wilson, J., dissenting).

²²³ *Id.*

²²⁴ See Keighley, *supra* note 25, at 2371 (2013) (“A more persuasive rationale for extending the First Amendment to physician speech can be found in the democratic self-government theory.”); Post, *supra* note 25, at 974 (arguing that the First Amendment that has been extended to commercial speech should be extended to the speech of physicians, as the same interests are served by both).

²²⁵ Clay Calvert et al., *Conversion Therapy and Free Speech: A Doctrinal and Theoretical First Amendment Analysis*, 20 WM. & MARY J. WOMEN & L. 525, 565 (2014); see also Keighley, *supra* note 25, at 2371–72 (“Under this theory, the First Amendment’s scope should be interpreted in light of the amendment’s ultimate goal: a well-informed citizenry that can make wise voting decisions, thus ensuring the success of democratic self-government.”).

protection, albeit diminished protection.²²⁶ As Dean Post notes, “[a] commercial advertisement is constitutionally protected not so much because it pertains to the seller’s business as because it furthers the societal interest in the ‘free flow of commercial information.’”²²⁷ Despite the fact that the physician-patient engagement generally takes place in a private sphere, Dean Post argues “[t]hat there is significant precedent . . . for the extension of First Amendment value to speech that is not in itself public discourse, but that is nevertheless constitutionally understood as communicating information necessary to ‘enlighten public decisionmaking in a democracy.’”²²⁸ Physician speech is significant in this context, even within a physician-patient relationship, as it can contribute to how members of the public “think about the provision of medical care generally.”²²⁹ As opposed to the “labeling game” approach, the Third Circuit’s intermediate scrutiny standard, premised on the protections the Supreme Court provided for commercial speech, allows for the “content of physician-patient communications” to contribute to the “formation of public opinion” and the promotion of the First Amendment’s democratic self-governance function.²³⁰

CONCLUSION

The Third Circuit’s approach in *King* can bring much needed consistency and stability to an important area of constitutional jurisprudence now characterized by confusion and ambiguity. By foreclosing the dichotomy between speech and conduct, the

²²⁶ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756 (1976); see also Post, *supra* note 25, at 974 (internal quotation marks omitted) (“[T]he extension of First Amendment protection to commercial speech is justified principally by the value to consumers of the information such speech provides.”).

²²⁷ Post, *supra* note 25, at 974 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 764 (1976)) (internal quotation marks omitted).

²²⁸ *Id.* at 976 (quoting *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 765 (1976)).

²²⁹ *Id.* at 978.

²³⁰ *Id.* at 974.

intermediate scrutiny approach can better protect the states' interest in prohibiting potentially harmful or ineffective professional practices, and at the same time decrease the potential for state legislatures to inhibit disfavored political messages. The approach can also better protect the patient's and physician's First Amendment rights and the values that those rights advance. This dichotomy has allowed courts to insulate categories of speech from First Amendment protection by characterizing as "conduct" verbal communications from professionals to clients and patients. The approach can also, as evidenced in Judge Wilson's dissent, force state lawmakers to more carefully draft legislation that may implicate the First Amendment rights of professionals. Although *King* does not bind any of the other circuits, the implicit benefits of the Third Circuit's approach may persuade other circuits to follow suit.

The Supreme Court will ultimately decide how to define professional speech and will decide the standard by which regulations restricting such speech will be scrutinized. The Third Circuit's formulaic analysis, however, especially when considered alongside that of the Ninth and Eleventh Circuits, may convince the Court to adopt the intermediate scrutiny standard moving forward. As cases like *Wollschlaeger* and *Pickup* demonstrate, the application of rational basis review to statutes that regulate the communications of professionals runs the serious risk of under-protecting both socially valuable and politically disfavored speech. As *Welch v. Brown* clearly shows, the application of strict scrutiny, and the subsequent over-protection of those communications, can leave states unable to protect their citizens from harmful professional practices. The problem with the labeling game approach is not only that it allows these outcomes, but that it allows them to happen arbitrarily, as the contours of professional speech are difficult to identify. The Third Circuit's approach provides clarity and, more significantly, principle, to this difficult area of the law and the Supreme Court would be wise to adopt it as their own approach to professional speech moving forward.