FIRST AMENDMENT — ELEVENTH CIRCUIT UPHOLDS FLORIDA LAW BANNING DOCTORS FROM INQUIRING ABOUT PATIENTS' GUN OWNERSHIP WHEN SUCH INQUIRY IS IRRELEVANT TO MEDICAL CARE. — *Wollschlaeger v. Governor of Florida*, 760 F.3d 1195 (11th Cir. 2014).

Over the past two years, courts have begun to address a vital question at the heart of the First Amendment: what level of scrutiny should apply when states restrict a doctor's speech to a patient? In *Pickup v. Brown*,[1] the Ninth Circuit upheld a ban on sexual orientation conversion therapy (SOCT) as applied to minors, exempting from First Amendment protection all medical speech classifiable as treatment.[2] One year later, in *King v. Governor of New Jersey*,[3] the Third Circuit upheld a parallel ban, this time applying intermediate First Amendment scrutiny.[4] Last year, in *Wollschlaeger v. Governor of Florida*,[5] the Eleventh Circuit provided its answer. Upholding a Florida law banning doctors from questioning patients about firearm ownership, the court held that because the ban restricts only speech uttered by a doctor in the examination room, it is exempt from First Amendment scrutiny.[6] In June, the Supreme Court denied certiorari in *Pickup*,[7] leaving it to the circuits, for now, to develop a doctrinal answer to this emerging question. It is thus critical that other circuits recognize the problems at the heart of the Eleventh Circuit's approach: *Wollschlaeger* not only removes First Amendment protection from an unprecedented amount of speech, but does so on the basis of a problematic normative premise — that doctors have no "generalized interest in being able to speak freely" to their patients within the context of the doctor-patient relationship on subjects irrelevant to medical care.[8] If allowed to flourish, this premise could lead not only to the vast expansion of government power over professional speech, but to a fundamental alteration of American citizenship.

In 2011, Florida passed the Firearm Owners' Privacy Act,[9] subjecting doctors to disciplinary measures for, inter alia, making a "verbal or

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[1] 728 F.3d 1042 (9th Cir. 2013), *amended on denial of reh'g*, 740 F.3d 1208 (9th Cir. 2014).

[2] *See id.* at 1048, 1056; *Pickup*, 740 F.3d at 1222, 1231.

[3] No. 13-4429, 2014 WL 4455009 (3d Cir. Sept. 11, 2014).

[4] *Id.* at *13, *24. A regulation survives intermediate scrutiny only if it "'directly advances' [a] 'substantial' government interest and is 'not more extensive than is necessary to serve that interest.'" *Id.* at *13 (quoting Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n, 447 U.S. 557, 566 (1980)).

[5] 760 F.3d 1195 (11th Cir. 2014).

[6] *See id.* at 1225.

[7] Pickup v. Brown, 134 S. Ct. 2871 (2014) (mem.).

[8] *Wollschlaeger*, 760 F.3d at 1215.

[9] Act of June 2, 2011, 2011 Fla. Laws 1176 (codified at FLA. STAT. §§ 381.026, 456.072, 790.338 (2014)).

written inquiry" into patients' firearm ownership when doctors do not "in good faith believe[]" such inquiries to be "relevant to the patient's medical care or safety, or the safety of others."[10] Citizens and legislators had complained that doctors were repeatedly asking about gun ownership, orally and in questionnaires,[11] in part as a result of the American Medical Association's suggestion in its policy guides that such questions were important to child safety and public health.[12]

Four days after Governor Rick Scott signed the Act into law, a group of medical professionals filed suit, alleging that the Act facially violated the First and Fourteenth Amendments as a content-based, overbroad, and unconstitutionally vague restriction on speech.[13] The district court agreed and enjoined enforcement of the law,[14] and the State appealed, arguing that the Act was a permissible regulation of professional conduct, not speech, and thus exempt from First Amendment scrutiny.[15]

The Eleventh Circuit reversed. Judge Tjoflat,[16] writing for a two-judge majority, upheld the Act as a permissible regulation of professional conduct with only incidental effects on speech. After finding that the plaintiffs had standing,[17] the majority synthesized the State's concerns into an interest in protecting patients' privacy.[18] Given this interest and the power imbalance inherent in the doctor-patient rela-

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[10] FLA STAT. § 790.338(2); *see id.* § 456.072(nn). The Act also bans physicians from entering information on gun ownership into a patient's medical records if they "know[]" such information is similarly irrelevant, *id.* § 790.338(1), from discriminating against patients on the basis of firearm ownership, *id.* § 790.338(5), and from "unnecessarily harassing" patients about the same, *id.* § 790.338(6).

[11] One legislator suggested such questions constituted "a political . . . attack on the constitutional right to own a . . . firearm." *Wollschlaeger*, 760 F.3d at 1232 (Wilson, J., dissenting) (omissions in original) (internal quotation marks omitted).

[12] *See id.* at 1230, 1232–33. Some Floridians further claimed that their doctors had terminated service when they refused to answer such questions. *Id.* at 1204 n.2 (majority opinion). Though the Act bans discrimination, however, it "does not alter existing law regarding a physician's authorization to choose his or her patients." FLA. STAT. § 790.338(4).

[13] *Wollschlaeger*, 760 F.3d at 1205.

[14] *See* Wollschlaeger v. Farmer, 880 F. Supp. 2d 1251, 1270 (S.D. Fla. 2012). After establishing that the plaintiffs had standing, *id.* at 1259, the district court found the Act an impermissible content-based regulation of physicians' speech, *id.* at 1267, and found the relevancy requirement inscrutably vague, *id.* at 1268.

[15] *Wollschlaeger*, 760 F.3d at 1207. The State also argued that the Act should survive First Amendment scrutiny as a regulation narrowly tailored to the government's interests, which included "patient privacy, protecting Second Amendment rights, preventing barriers for firearm owners to receive medical care, and preventing harassment and discrimination of firearm-owning patients." *Id.* The State also renewed its argument that the plaintiffs lacked standing. *See id.*

[16] Judge Tjoflat was joined by Judge Coogler, sitting by designation from the United States District Court for the Northern District of Alabama.

[17] *See Wollschlaeger*, 760 F.3d at 1208–13.

[18] *See id.* at 1213–17.

tionship,[19] the court found that the Act "merely reaffirms" the "commonsense proposition" that "the practice of good medicine should not require inquiry into private matters" irrelevant to medical care.[20] The court then extended this logic beyond inquiry to all speech: "Insofar as [doctors] claim a generalized interest in being able to speak freely to their patients, such conversation (if not relevant to medical care) is outside the boundaries of the physician-patient relationship."[21]

Having described the Act as a presumptively reasonable regulation of conduct, the court then found that the Act does not impermissibly restrict protected speech. The court began by explaining that the Act's restrictions on a doctor's ability to engage in "unrestricted debate" on matters of "public concern"[22] solely affect speech uttered "within the confines of the physician's examination room, where the physician exercises his or her judgment to deliver professional treatment and advice to a particular patient . . . in private."[23] Because the First Amendment concerns implicated by professional speech in this context "approach a nadir,"[24] the Act's impact on protected speech is merely incidental[25]: it "implicates physicians' speech only 'as part of the prac-

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[19] *See id.* at 1214–15. The court found that, because a patient must rely on a doctor's expertise and discretion, and because some rural areas might have only one doctor, a doctor occupies a special position from which unwanted questions might reasonably be perceived as coercive. *See id.*

[20] *Id.* at 1215.

[21] *Id.*

[22] *Id.* at 1221. The court conceded that debate on firearms might indeed be a "matter of public concern" as that concept was understood in *Snyder v. Phelps*, 131 S. Ct. 1207 (2011). *See Wollschlaeger*, 760 F.3d at 1221.

[23] *Wollschlaeger*, 760 F.3d at 1219.

[24] *Id.* at 1218.

[25] *Id.* at 1225. As precedent, the court cited Justice White's concurrence in *Lowe v. SEC*, 472 U.S. 181 (1985), which suggested that the state could regulate speech incidental to the "practice of a profession" with no First Amendment barrier provided that a "personal nexus between professional and client" could be found, *id.* at 211 (White, J., concurring in the result) (upholding a restriction on what advice unlicensed investment advisers could offer clients). *See Wollschlaeger*, 760 F.3d at 1218. Such a nexus would be "at its most significant" within an examination room. *Id.* at 1219. Similarly, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), the Supreme Court found "no constitutional infirmity," *id.* at 884 (opinion of O'Connor, Kennedy, and Souter, JJ.), when a requirement that doctors inform patients about the risks of abortion "implicated [physicians' speech rights], but only as part of the practice of medicine," *id.* (citation omitted).

The majority then addressed the argument that *Lowe* merely permitted licensing regimes regulating entry into a profession to evade First Amendment scrutiny, and thus could not be used to justify direct regulations of professional speech. *See Wollschlaeger*, 760 F.3d at 1221–25. The court pointed to two cases, *Casey* and *Pickup*, in which other courts had upheld internal regulations of doctors' speech. Though there was ambiguity as to whether *Casey* had exempted its regulation from First Amendment scrutiny altogether, *Casey* nevertheless demonstrated that a regulation of medical speech could reach beyond the licensing stage, *see id.* at 1222–23, and though *Pickup*'s exemption was limited, the treatment/speech line was hardly clear: an inquiry into firearm ownership could be the "opening salvo in an attempt to treat" medical issues related to firearms, *id.* at 1224.

tice of medicine.'"[26] The court thus conducted no content- or viewpoint-neutrality inquiry[27] and upheld Florida's ban.[28]

Judge Wilson filed a vehement dissent. The majority had upheld not only a clear restriction of *speech*, rather than a mere regulation of professional *conduct*, but also a content-, speaker-,[29] and viewpoint-discriminatory[30] one: Florida's ban silenced doctors on a single topic to prevent them from communicating an unpopular message to Florida's citizenry.[31] More dangerously, the majority reached this result not after subjecting the Act to First Amendment scrutiny, but by issuing a new rule, unsupported by precedent,[32] that *all speech* within "the confines of a one-on-one professional relationship" between doctors and patients was, and would now be, exempted from First Amendment scrutiny.[33] Rejecting this withdrawal of protection, the dissent would

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[26] *Wollschlaeger*, 760 F.3d at 1220 (quoting *Casey*, 505 U.S. at 884 (opinion of O'Connor, Kennedy, and Souter, JJ.)).

[27] The majority did not expressly articulate the level of scrutiny it applied, but the dissent described it as "rational-basis review." *Id.* at 1249 (Wilson, J., dissenting).

[28] The majority also rejected the plaintiffs' vagueness challenge. *See id.* at 1226–30 (majority opinion). The plaintiffs argued that it was unclear what sort of inquiry would be "relevant" to medical care, in particular because physicians had a general belief — which they considered to be held in good faith — that all such inquiries were relevant, yet such an interpretation would render the Act meaningless. *See id.* at 1227. Judge Tjoflat held that an ad hoc showing of relevance, "based on the specifics of [each] patient's case," *id.* at 1228, would be required: the doctors' general belief that such inquiries were relevant would not suffice under the Act. *See id*. He further held that the Act was not vague in its treatment of relevance, as it clearly applied to "physicians who wish to pursue an agenda unrelated to medical care or safety." *Id.* at 1229.

[29] *See id.* at 1236 (Wilson, J., dissenting) ("The Act proscribes speech about one topic (firearms) by one group of speakers (medical professionals).").

[30] *See id.* at 1239 ("[T]he legislative history confirms that the purpose of the Act was to silence firearm-safety messages . . . perceived as 'political attacks' and as part of a 'political agenda' . . . .").

[31] *See id.* at 1231 ("The poor fit between what the Act actually does and the interests it purportedly serves belies Florida's true purpose in passing [it]: silencing doctors' disfavored message about firearm safety. This, the State cannot do.").

[32] The dissent argued that the Supreme Court had "consistently subject[ed] content-, speaker-, and viewpoint-based restrictions to at least intermediate . . . scrutiny," *id.* at 1236, and had tolerated carve-outs in this fabric of protection only based on historical evidence of proscription — evidence lacking in the context of physicians' speech, *id.* at 1236–37 (citing United States v. Alvarez, 132 S. Ct. 2537, 2544 (2012) (plurality opinion)). Further, the majority's suggestions notwithstanding, no case had ever previously permitted direct regulation of medical speech without First Amendment scrutiny. *See id.* at 1239–48. *Lowe* merely permitted the state to regulate speech "as a consequence of a professional licensing scheme," *id.* at 1241, and only when the regulation was content neutral, *see id.* at 1239–41, and *Casey* stated that "First Amendment rights . . . [were] implicated" by the challenged regulation therein, *id.* at 1245 (omission in original) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.)) (internal quotation marks omitted). *Pickup*, too, was inapposite: *Pickup* exempted from scrutiny only speech classifiable as treatment, and speech could not possibly be both irrelevant to medical care and itself medical treatment. *See id.* at 1247–48.

[33] *Id.* at 1237. The majority, addressing the dissent's fears, had noted emphatically that it was not creating a rule "whereby any law burdening speech — such as a law barring doctors from discussing the Affordable Care Act . . . will avoid First Amendment scrutiny so long as the law ap-

have invalidated the law under either intermediate or strict scrutiny.[34]

Wollschlaeger serves as the Eleventh Circuit's contribution to an emerging judicial inquiry: what degree of First Amendment scrutiny should apply when a state restricts a doctor's speech to a patient? Exempting virtually all speech uttered in the examination room from First Amendment scrutiny, in part on the basis of the normative premise that doctors have no expressive interest in speaking to patients on subjects irrelevant to medical care, *Wollschlaeger* should be understood as a deeply problematic contribution to this emerging body of opinions. If followed, it would do more than simply permit the state to regulate a vast amount of speech with no meaningful judicial check: it would fundamentally alter a doctor's status as a professional citizen.

Nearly two years ago, in *Pickup*, the Ninth Circuit considered to what degree a doctor's speech to a patient is protected by the First Amendment. Faced with a ban on the application of SOCT to minors, a ban supported by California's interest in "protecting the well-being" of those minors,[35] but nevertheless directly regulating a doctor's speech, the court created a First Amendment bifurcation: speech that could be classified as medical treatment would receive no First Amendment protection, permitting the state wide latitude to regulate dangerous or ineffective therapies,[36] but speech merely related to medical care or unrelated altogether would retain intermediate First Amendment protection.[37] Dissenting from a denial of rehearing en banc, Judge O'Scannlain, reserving judgment on the merits, lambasted

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plies within the confines of a one-on-one professional relationship." *Id.* at 1225 n.17 (majority opinion). The dissent, however, found nothing in the majority's reasoning or rhetoric to support this disclaimer: "Under the Majority's new exception," "[s]tates are left free to eliminate all irrelevant speech from a doctor's office, all relevant speech from a doctor's office, or just that speech which conflicts with the State's preferred viewpoints." *Id.* at 1237 (Wilson, J., dissenting).

[34] *Id.* at 1237 (Wilson, J., dissenting). The dissent did not decide which level of scrutiny would apply. *See id.* Instead, Judge Wilson acknowledged that a regulation of speech might be justified by many of the State's claimed interests, *see id.* at 1231, but determined Florida had produced at best anecdotal evidence that doctors' speech had contributed to any of these harms, *see id.* at 1256–58. Even intermediate scrutiny required more than a mere anecdotal showing. *Id.* at 1265. The dissent also addressed the plaintiffs' vagueness challenge. *See id.* at 1267–70. The dissent suggested that the Act's "good faith" language could be read, on its face, to permit doctors to make inquiries "as a matter of course," yet the "legislative history" suggested it was precisely these inquiries the Act sought to ban, as the majority itself held. *Id.* at 1268; *see also id.* at 1228 (majority opinion). Thus, doctors would be left completely uncertain when a belief in medical relevance would be in "good faith," resulting in a chilling effect that would prevent them from conveying "potentially lifesaving medical information." *Id.* at 1231 (Wilson, J., dissenting).

[35] Pickup v. Brown, 740 F.3d 1208, 1231 (9th Cir. 2014).

[36] *See id.* at 1229–30.

[37] The court emphasized that California did not "[p]revent mental health providers from expressing their views to patients, whether children or adults, about [SOCT], homosexuality, or any other topic," *id.* at 1223, and that a regulation of such speech, unlike the present regulation, would receive intermediate scrutiny: "[W]ithin the confines of a professional relationship, First Amendment protection of a professional's speech is somewhat diminished," *id.* at 1228.

the construction of this exemption.[38] Nevertheless, the court's decision constituted a sincere attempt to balance the State's needs against a doctor's rights: in applying intermediate scrutiny to much of a doctor's speech, the court implicitly recognized that doctors have some right to speak freely to their patients on subjects of political or moral concern.

One year later, the majority in *Wollschlaeger* eviscerated this balance.[39] Approaching the question of how much First Amendment protection to afford to medical speech, the court eschewed *Pickup*'s treatment/speech dichotomy in favor of a blanket context-based withdrawal of protection: if a regulation restricts only speech uttered "within the confines of the physician's examination room,"[40] its "burden . . . on speech is . . . incidental to its legitimate regulation of the practice of medicine."[41] In other words, in the Eleventh Circuit, the First Amendment now ends at the examination room door.[42]

Of course, the *Wollschlaeger* court disclaimed this broad reading of its rule.[43] Invoking the limitation of Florida's ban to medically irrelevant speech,[44] the majority suggested its holding might similarly be limited — or at least reasonable — because it did no more than recognize the "common-sense" normative "proposition" that doctors have no "generalized interest in being able to speak freely to their patients . . . [on subjects] not relevant to medical care."[45] Even if one accepts that the court's holding is indeed so limited,[46] analysis of this supposedly

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[38] *Id.* at 1216 (O'Scannlain, J., dissenting from denial of rehearing en banc) (arguing that the court had handed the State "a new and powerful tool to silence expression based on a political or moral judgment about the content and purpose of the communications").

[39] *See* Jennifer Keighley, *Physician Conduct? Or Speech? Or Both?*, BALKINIZATION (Oct. 15, 2014, 8:30 AM), http://balkin.blogspot.com/#3639781212226886059 [http://perma.cc/4XC-D3PP].

[40] *Wollschlaeger*, 760 F.3d at 1219.

[41] *Id.* at 1225.

[42] The majority stressed that "physicians . . . remain largely free . . . to discuss firearm safety" with patients, *id.* at 1224, yet, insofar as this statement is true, it does not alter the decision's breadth. *Wollschlaeger*'s rule would remove protection from this speech as surely as it removed protection from the speech actually banned. *See id.* at 1253 (Wilson, J., dissenting). A court's deference to the legislature is not rendered less deferential because the government stays its hand.

[43] *See id.* at 1225 n.17 (majority opinion).

[44] *See id.* at 1215.

[45] *Id.*; *see also id.* at 1255 (Wilson, J., dissenting) ("Perhaps the Majority's holding only stands for the proposition that *irrelevant* speech can be purged from a profession under the guise of regulating conduct.").

[46] The dissent argued that this limiting principle was both legally and practically irrelevant to the opinion: on its face, the court's rule extended to all speech in the examination room, *id.* at 1237 (Wilson, J., dissenting), and the majority's deference to the government's conception of relevance would permit the state to define any speech it wished to ban as medically "irrelevant," *id.* at 1255. Indeed, doctors did not accept that their inquiries, even when asked as a matter of course, were irrelevant, *see id.*; they were arguably not claiming the personal right to speak freely on irrelevant topics so much as the right to communicate truthful, relevant speech without undue state intervention. *See id.* at 1244 ("[T]he Act . . . prohibits licensed medical professionals from . . . making inquiries . . . that they believe will improve the well-being of their patients."); *cf.* Robert Post, *A Doc-*

limiting principle reveals not the reasonableness of the court's rule, but its unprecedented breadth and problematic normative implications.

To understand the breadth of the court's withdrawal of protection, it is first necessary to understand what the court, and Florida, mean by "irrelevant." Seeking to define the medical relevance requirement for purposes of the petitioners' vagueness challenge, the court explained that "[i]f . . . the physician seeks firearm information to suit *an agenda* unrelated to medical care or safety, he or she would not be making a 'good faith' inquiry."[47] There is little mystery as to what "agenda" means: it is the court's, and the legislature's, pejorative term for a doctor's desire to communicate a political opinion to her patients.[48] Indeed, the majority not only referred to the banned speech as animated by a political agenda, but also went so far as to acknowledge that speech on firearms may indeed be speech on a "matter of public concern."[49] To the court, then, "irrelevant speech" is not simply irrelevant: it is political speech or speech on a matter of public concern — speech that *Pickup* excluded from its sphere of First Amendment exemption, and crucially, speech that precedent holds receives the *highest* degree of protection under the First Amendment.[50]

Analyzing the *Wollschlaeger* court's supposedly limiting principle, then, reveals the opinion's problematic breadth: *Wollschlaeger* removes *all* protection from even the *most* protected form of communicative speech[51] simply on the basis of where and by whom it is uttered. More troublingly for purposes of precedent, the court, in emphasizing

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tor Has Limited First Amendment Rights, N.Y. TIMES: ROOM FOR DEBATE (Aug. 21, 2014, 2:03 PM), http://www.nytimes.com/roomfordebate/2014/08/20/when-do-doctors-have-the-right-to-speak/a-doctor-has-limited-first-amendment-rights [http://perma.cc/9LKZ-CH6S] (suggesting that "politicized" laws that "prevent[] doctors from communicating relevant knowledge" to their patients "frustrate[] an underlying purpose of the First Amendment"). These criticisms are important, and they illuminate many of the problems with the court's rule, yet so too do they elide the problem this comment seeks to explicate: it is in accepting the court's limiting principle — not rejecting it as illusory — that the unprecedented breadth of *Wollschlaeger* and its effects on expression become clear.

47 *Wollschlaeger*, 760 F.3d at 1228 (emphasis added).

48 The dissent is explicit on this point: the "agenda" the legislature sought to curb constituted "irritating politicking on the subject of firearm ownership." *Id.* at 1248 (Wilson, J., dissenting); *see also id.* at 1231 (writing that the Act "proscribe[s] . . . political discussions between private citizens").

49 *Id.* at 1221 (majority opinion).

50 *See* Snyder v. Phelps, 131 S. Ct. 1207, 1215 (2011) ("[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." (quoting Connick v. Myers, 461 U.S. 138, 145 (1983) (internal quotation marks omitted)) (internal quotation marks omitted)); Citizens United v. FEC, 130 S. Ct. 876, 898 (2010) ("[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence.").

51 This speech is protected for a reason. *See Snyder*, 131 S. Ct. at 1207 ("The First Amendment reflects 'a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.'" (quoting N.Y. Times Co. v. Sullivan, 376 U.S. 254, 270 (1964))); *Citizens United*, 130 S. Ct. at 898 (finding such debate "a precondition to enlightened self-government and a necessary means to protect it"); *cf. Wollschlaeger*, 760 F.3d at 1231 (Wilson, J., dissenting) (noting that patients will "now . . . know less" about firearm safety).

the ban's limitation to irrelevant speech, seems to have removed protection in part *because*, not *in spite* of the fact that the speech is communicative expression on a matter of public concern. Thus, whereas *Pickup* exempted speech because it had the characteristics of therapy,[52] *Wollschlaeger* exempted speech from any First Amendment protection in part because it had the expressive characteristics of *speech*.[53]

More problematic than the breadth of the court's rule is the normative premise its so-called limiting principle reveals: that it is mere "common sense" that a doctor, as a professional, has no right to express to a patient her religious, political, or moral beliefs — all irrelevant to medical care — no matter how central those beliefs may be to her citizenship. On the one hand, this premise is flawed in and of itself: it reflects a highly regimented[54] vision of American professionalism that the High Court has increasingly disclaimed, that a person's expressive life may be — even *must be* — firmly separated from her professional one.[55] On the other hand, even those who would agree with this bi-

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[52] *See* Pickup v. Brown, 740 F.3d 1208, 1231 (9th Cir. 2014) ("[T]alk therapy . . . stands on the same First Amendment footing as other forms of medical or mental health treatment.").

[53] *Wollschlaeger*, 760 F.3d at 1221 ("[T]he privacy of a physician's examination room is not an appropriate forum for unrestricted debate . . . ."). To be fair, the majority suggested *Pickup*'s line between treatment and speech is an amorphous, and thus expansive one, ostensibly mitigating the critical weight of this comparison. *See id.* at 1224 (suggesting an inquiry about gun ownership could be the "opening salvo" in a course of treatment). Yet though this criticism of *Pickup* may be apt in theory, the majority's use of it in *Wollschlaeger* to vastly expand *Pickup*'s zone of unprotected speech was highly problematic. *See id.* at 1248 n.16 (Wilson, J., dissenting). First, *Pickup* hardly went out of its way to carve out a category of protected speech related to treatment only to have it erased: to explode this dichotomy is to abandon the limiting principle that, to the *Pickup* court, likely made its approach reasonable in the first place. And second, however broadly one construes *Pickup*'s rule, speech "irrelevant to medical care" cannot plausibly be categorized as treatment.

[54] *Cf.* Poe v. Ullman, 367 U.S. 497, 514 (1961) (Douglas, J., dissenting) ("Of course a physician can talk freely and fully with his patient without threat of retaliation by the State. The contrary thought . . . has the cast of regimentation about it, a cast at war with the philosophy and presuppositions of this free society.").

[55] The Court has held, albeit for purposes of interpreting the Religious Freedom Restoration Act, that the fact that a corporation seeks profit does not mean it cannot engage in religious exercise, and that for the State to impose that rigid subdivision on citizens by conditioning the benefits of incorporation on the renunciation of expressive rights is problematic, *see* Burwell v. Hobby Lobby Stores, Inc., 134 S. Ct. 2751, 2767 (2014) ("[The state] would put . . . merchants to a difficult choice: either give up the right to seek judicial protection of their religious liberty or forgo the benefits . . . of operating as corporations."); *id.* at 2771, just as the Court has refused to remove First Amendment protection from commercial communication in part because of a rejection of the argument that such speech is categorically distinct from noncommercial expression, *see* Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2671 (2011) ("The commercial marketplace, like other spheres of our social and cultural life, provides a forum where ideas and information flourish." (quoting Edenfield v. Fane, 507 U.S. 761, 767 (1993)) (internal quotation mark omitted)). Regardless of one's opinion of the merits of these cases, *cf. Hobby Lobby*, 134 S. Ct. at 2787 (Ginsburg, J., dissenting) (speaking of the effect of the majority's accommodation on "third parties"), and conceding that they addressed distinct legal questions from that in *Wollschlaeger*, they nevertheless reflect an aspirational vision of American citizenship in which a citizen need not, and the state may not, draw impermeable lines between professional, commercial, and expressive existence, dividing citi-

furcated vision of professional and expressive speech — who would choose it as their own standard — should balk at the court's decision, in eliminating protection from such speech, to impose this vision on all doctors. Doctors surely have some right to define and delineate the boundaries of their own professional and expressive lives.[56] As all people do throughout their careers, a doctor must decide how important it is for her to communicate her personal beliefs to clients, what she is willing to risk in order to do so, and whether she is willing to pay the market price for her choice.[57] This right of expressive self-definition is not absolute,[58] yet it demands *some* recognition. In failing to accord any value to a doctor's nonmedical expression to a client, the *Wollschlaeger* court effected a broad transformation of a doctor's rights as a citizen through a simple, unexamined admonishment: it is not a doctor's job to talk to her patients about politics.

Perhaps to many this criticism sounds idealistic: conceptions of citizenship notwithstanding, the intimacy of a doctor's office is no place for political speech.[59] Yet it is vital to recognize that in exempting this speech from scrutiny, the *Wollschlaeger* court did more than just deny the expressive rights of doctors: it handed the state — the very entity the First Amendment cautions the court to distrust[60] — the power to

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zenship into non-overlapping zones and, on the basis of this regimentation, withdrawing all protection for expression the moment a citizen travels from one zone to the other.

[56] *Cf.* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 851 (1992) ("These matters, involving the most intimate and personal choices a person may make in a lifetime, . . . are central to the liberty protected by the Fourteenth Amendment.").

[57] *Cf. Wollschlaeger*, 760 F.3d at 1230 (Wilson, J., dissenting) ("Indeed, some doctors believed these conversations [about gun safety] to be so important that they were willing to lose the business of patients who refused to engage.").

[58] This comment does not suggest that the recognition of a doctor's speech rights should in all cases prevent a state from restricting them. A state may have legitimate purposes sufficient to justify a restriction, pursuant to some form of First Amendment scrutiny. *See* Laurence H. Tribe, *The First Amendment Should Protect Disfavored Viewpoints*, N.Y. TIMES: ROOM FOR DEBATE (Aug. 20, 2014), http://www.nytimes.com/roomfordebate/2014/08/20/when-do-doctors-have-the-right-to-speak/the-first-amendment-should-protect-disfavored-viewpoints [http://perma.cc/N83V-ZNBG] (acknowledging states' interests in "protect[ing] patient safety and privacy," but rejecting the absence of scrutiny in *Pickup* and *Wollschlaeger*). The court's error was not in recognizing these interests but in applying no scrutiny and thus clearing the way for the state to use these interests as smokescreens through which to effect "politically motivated discrimination against disfavored viewpoints." *Id.*; *see also Wollschlaeger*, 760 F.3d at 1238 (Wilson, J., dissenting).

[59] *Cf.* William M. Sage, *Unpacking the Regulation of "Professional Speech,"* BALKINIZATION (Oct. 13, 2014, 10:30 AM), http://balkin.blogspot.com/2014/10/unpacking-regulation-of-professional.html [http://perma.cc/AR3A-NSWX] ("The fiduciary bond between a professional and a client often depends on verbal interaction to build intimacy and trust . . . ."). Indeed, even some scholars who would likely reject the withdrawal of scrutiny in *Wollschlaeger* might nevertheless accept the normative premise therein. *See, e.g.*, Post, *supra* note 46 (rejecting a doctor's "personal First Amendment rights to speak as she wishes" but suggesting she may act as a "constitutional spokeswoman" for her patients' "right[] . . . to be informed").

[60] *See* Citizens United v. FEC, 130 S. Ct. 876, 898 (2010) (stating that the First Amendment is "[p]remised on mistrust of governmental power").

censor a doctor's expression with almost complete judicial deference. Even those who would agree with the court's premise, then, should recognize the independent normative dangers of its rule[61]: *Wollschlaeger* handed the state a "new and powerful tool to silence expression"[62] — one far more powerful than that constructed in *Pickup* itself.

There is no question that the *Wollschlaeger* court faced a difficult question: with what doctrinal frame should courts balance a doctor's expressive rights against the regulatory interests of the state? The answer to this question is not obvious: though *Pickup*, *Wollschlaeger*, and *King* offer valuable insights,[63] the ultimate determination is beyond the scope of this comment. Nevertheless, it is imperative that future courts recognize not just the precedential flaws but also the normative dangers lurking in *Wollschlaeger*'s answer. The blurred lines between citizenship and professionalism in American society are not inconveniences to be erased by the state[64]: they are a vital element of American citizenship — and not only for doctors. There is a reason that the American Bar Association has petitioned the Eleventh Circuit for en banc review of *Wollschlaeger*.[65] When it comes to professional regulation, doctors are not the end but the beginning, the canary in the coal mine for the rest of us.

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[61] *See* Keighley, *supra* note 39 (noting that *Wollschlaeger*'s breadth gives states the power to "regulate medicine based on ideological motivations"); *accord* Tribe, *supra* note 58.

[62] Pickup v. Brown, 740 F.3d 1208, 1216 (9th Cir. 2014) (O'Scannlain, J., dissenting from denial of rehearing en banc).

[63] *Pickup* and *Wollschlaeger* each relied, in part, on the so-called distinction between professional, or occupational, conduct and speech — with each constructing different theories as to how speech might travel from one category to the other: in *Pickup*, on the basis of its status as treatment, in *Wollschlaeger*, on the basis of its utterance in the examination room. In *King*, the Third Circuit rejected this dichotomy between professional conduct and speech as largely "illusory," King v. Governor of N.J., No. 13-4429, 2014 WL 4455009, at *7 (3d Cir. Sept. 11, 2014), agreeing with the *Pickup* dissent's critique; it then applied intermediate scrutiny to a regulation of professional speech within the examination room, *see id.* at *15 ("Intermediate scrutiny is necessary to ensure that State legislatures are regulating professional speech to prohibit the provision of harmful or ineffective professional services, not to inhibit politically-disfavored messages."). *King* thus aptly rejected the *Pickup* and *Wollschlaeger* rules as either inadministrable or normatively problematic. Whether or not intermediate scrutiny will prove to be the ideal frame, *King* is certainly the most speech-protective and effectively balanced decision thus far.

[64] *Cf.* McCullen v. Coakley, 134 S. Ct. 2518, 2540 (2014) ("[T]he prime objective of the First Amendment is not efficiency."); Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 869 (1992) (opinion of O'Connor, Kennedy, and Souter, JJ.) ("Liberty must not be extinguished for want of a line that is clear.").

[65] *See* Brief of the American Bar Association as *Amicus Curiae* in Support of Petition for Rehearing *En Banc* of Plaintiffs-Appellees, *Wollschlaeger*, 760 F.3d 1195 (No. 12-14009). The court's normative understanding of professionalism could as easily extend to a variety of professions — including law — and, indeed, a limitation of the court's rule to doctors presents its own doctrinal problems. *See Citizens United*, 130 S. Ct. at 899 ("Speech restrictions based on the identity of the speaker are all too often simply a means to control content.").