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The First and Fourteenth Amendments enshrine significant constitutional protections against unfair infringement of individual rights by state and federal regulations.1 When state legislation attempts to regulate a First Amendment right, courts invoke the Fourteenth Amendment to determine an act’s validity under the Due Process Clause.2 In Wollschlaeger v. Governor of Florida,3 the United States Court of Appeals for the Eleventh Circuit examined whether Florida’s Firearm Owners Privacy Act (“the Act”) violated the First and Fourteenth Amendments by restricting a physician’s inquiry into a patient’s gun ownership.4 The court held that any restrictions on speech were merely incidental to the Act’s otherwise legitimate regulation of

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2 See U.S. CONST. amend. XIV, § 1. The amendment provides, in pertinent part, “No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law...” Id.
3 760 F.3d 1195 (11th Cir. 2014).
professional medical conduct.\(^5\)

On June 2, 2011, Florida Governor Rick Scott signed the Act.\(^6\) The Florida legislature had responded to complaints about physicians frequently overstepping professional boundaries when inquiring into their patients' firearm ownership; the legislature thus codified a formal scheme of enforcement.\(^7\) The Act intends to protect patients from irrelevant and unnecessary inquiry by physicians into their private, non-medical matters.\(^8\) It enforces purported standards of good medical care and establishes that an “inquiry or record-keeping regarding firearms” falls outside the parameters of those standards.\(^9\)

Just four days after Governor Scott signed the Act into law, Dr. Bernd Wollschlaeger and several other physicians and health care organizations (“Respondents”) jointly filed a complaint against the State of Florida, alleging that “the

\(^5\) Wollschlaeger, 760 F.3d at 1203.
\(^6\) Wollschlaeger, 760 F.3d at 1203-05 (describing formal introduction and creation of the Act). The Act states, in pertinent part, that licensed health care practitioners and facilities “may not intentionally enter information concerning a patient’s ownership of firearms into the patient’s medical record that the practitioner knows is not relevant to the patient’s medical care or safety, or the safety of others.” FLA. STAT. § 790.338(1) (2014) (emphasis added). Moreover, the Act states that health care practitioners “shall respect a patient’s right to privacy and should refrain from inquiring as to whether a patient or his or her family owns firearms, unless the practitioner or facility believes in good faith that the information is relevant to the patient’s medical care or safety, or the safety of others.” Id. at § 790.338(2) (emphasis added). Furthermore, the Act holds that practitioners “may not discriminate against a patient on the basis of firearm ownership.” Id. at § 790.338(5). Lastly, it states that practitioners “should refrain from unnecessarily harassing a patient about firearm ownership.” Id. at § 790.338(6).
\(^7\) Wollschlaeger, 760 F.3d at 1203-05. If a practitioner violates one of the provisions of the Act, the practitioner faces disciplinary measures including “fines, restriction of practice, return of fees, probation, or suspension or revocation of his or her medical license.” FLA. STAT. § 456.072(2) (2014). A practitioner becomes subject to an investigation under the Act either at the discretion of the Department of Health or by means of a citizen complaint. Id.
\(^8\) Wollschlaeger, 760 F.3d at 1203. The Act is based on the premise that “when a patient enters a physician’s examination room, the patient is in a position of relative powerlessness,” and sets forth that “the practice of good medicine does not require interrogation about irrelevant, private matters.” Id. But see Heidi L. Behforouz, Rethinking the Social History, 371 N. ENG. J. MED. 1277 (2014) (acknowledging complex social factors contribute to the effectiveness of medical care). Rather than ignoring or preventing inquiry into certain areas, it may be advisable for practitioners to obtain a comprehensive social history to assess a patient’s social environment and design a course of medical care accordingly. Id.
\(^9\) Wollschlaeger, 760 F.3d at 1203-04. Analogous to holding physicians liable for malpractice, the Act sets up a scheme of administrative discipline. Id. Malpractice also often involves physicians speaking to patients. Id. at 1217.
inquiry, record-keeping, discrimination, and harassment provisions of the Act facially violate" the First and Fourteenth Amendments. The Respondents claimed that the Act imposed an "unconstitutional, content-based restriction on speech," was "overbroad," and "unconstitutionally vague." The United States District Court for the Southern District of Florida preliminarily enjoined enforcement of the specific provisions of the Act in question and eventually entered a judgment permanently enjoining enforcement.

The District Court rejected the State’s argument that the Act "constitute[s] a permissible regulation of professional speech or occupational conduct that imposed a mere incidental burden on speech." Despite recognizing that the State has an interest in protecting its citizens' Second Amendment rights, the District Court held that this interest was not relevant in the context of this case. The District Court found that the Act was not the least restrictive means of achieving the State’s interests in protecting patient privacy and regulating professional conduct because it addressed speech directly. Based on these findings, the District Court granted Respondents’ motion for summary judgment and permanently enjoined enforcement of the inquiry, record-keeping, harassment, and discrimination provisions of the Act.

10 Wollschlaeger, 760 F.3d at 1205.
11 Id.
12 Id. See Wollschlaeger v. Farmer, 880 F. Supp. 2d 1251, 1267-69 (S.D. Fla. 2012); Wollschlaeger v. Farmer, 814 F. Supp. 2d 1367, 1384 (S.D. Fla. 2011). On the merits of the case, the District Court found that the Act placed an impermissible content-based restriction on practitioners' speech with regard to firearms, and rejected the State’s argument that the Act’s restrictions were merely incidental. Wollschlaeger, 880 F. Supp. 2d at 1261-62. The Court then determined that while the State has an interest in protecting its citizens’ Second Amendment rights, such a right is "irrelevant" to the Act and is not a "legitimate or compelling interest." Id. at 1264. Because the Act lacked "narrow specificity," the court held that it was not the least restrictive means of achieving the State’s interests, and thus did not pass constitutional muster. Id. at 1265-67.
13 Wollschlaeger, 760 F.3d at 1206 (quoting Wollschlaeger, 880 F. Supp. 2d at 1262).
14 Id. The District Court noted that, "because the State acted on the basis of purely anecdotal information and provided no evidence that discrimination or harassment based on firearm ownership is pervasive . . . " the State’s interest in protecting its citizens’ right is not a "legitimate or compelling interest." Id. (quoting Wollschlaeger, 880 F. Supp. 2d at 1264). However, the District Court conceded that the State has "legitimate – but perhaps not compelling – interests in protecting patients’ privacy regarding their firearm ownership or use and in the regulation of professions." Id. at 1205 (quoting Wollschlaeger, 880 F. Supp. 2d at 1265).
15 Id. at 1206 (citing Wollschlaeger, 880 F. Supp. 2d at 1267). Accordingly, the District Court held that "the balance of interests tip significantly in favor of safeguarding practitioners' ability to speak freely to their patients." Id. (quoting Wollschlaeger, 880 F. Supp. 2d at 1267).
16 Wollschlaeger, 760 F.3d at 1207 (citing Wollschlaeger, 880 F. Supp. 2d at 1262).
On appeal, the State contended that the District Court erred in its disposition, because the Act does not entirely prohibit physicians from asking patients about their firearm ownership.\textsuperscript{17} Rather, physicians may engage in such conduct “when it is relevant to patients’ care,” thus rendering the Act “a regulation of professional conduct that imposes only incidental burdens on speech.”\textsuperscript{18} In response, the Respondents argued that the Act should not be understood as a regulation of professional medical conduct “because all four challenged provisions were enacted in response to—and were intended to prohibit—communications regarding firearm safety.”\textsuperscript{19} The Respondents argued that the Act, which constitutes an infringement on free speech, should be subjected to strict scrutiny.\textsuperscript{20} Nevertheless, the Eleventh Circuit held that the Act is a valid regulation of professional conduct with merely incidental effects on physicians’ speech.\textsuperscript{21}

Courts have consistently recognized and addressed the complicated issues arising from statutes restricting professional speech.\textsuperscript{22} While professional speech

\textsuperscript{17} Id. Instead, the State argues, the Act should be considered “a mere recommendation that physicians refrain from irrelevant inquiry and record keeping about firearms . . .” \textit{Id.}

\textsuperscript{18} Id. Even if the Act imposes a more significant burden on speech, the State argues, “the Act should be upheld as a valid restriction on commercial speech because the Act is narrowly tailored to further substantial governmental interests in patient privacy, protecting Second Amendment rights, preventing barriers for firearm owners to receive medical care, and preventing harassment and discrimination of firearm-owning patients.” \textit{Id.}

\textsuperscript{19} Id. at 1208.

\textsuperscript{20} Wolschlaeger, 760 F.3d at 1208. The Act “cannot be justified by any of the State’s proffered interests,” and “in any case is not the least restrictive means of accomplishing the State’s objectives.” \textit{Id.} See Lawrence v. Texas, 539 U.S. 558, 600 (2013) (describing strict scrutiny analysis, including necessity of compelling government interest, least restrictive means); Washington v. Glucksberg, 521 U.S. 702, 721 (1997) (including strict scrutiny in due process analysis is essential when fundamental right involved). Strict scrutiny is a means of judicial review that courts apply when a law abridges a fundamental right or involves a suspect classification. \textit{Lawrence}, 539 U.S. at 586. The law in question passes strict scrutiny when the court finds that the legislature passed the law to accomplish a compelling government interest, and that the law is narrowly tailored to achieve that interest. \textit{Id.} at 593. \textit{See also} Gregory P. Magarian, \textit{Substantive Due Process as a Source of Constitutional Protection for Nonpolitical Speech}, 90 MINN. L. REV. 247, 249 (2005) (contending Amendments I & XIV establish two-fold constitutional protection for nonpolitical speech).

\textsuperscript{21} Wolschlaeger, 760 F.3d at 1217.

receives traditional First Amendment protection, such protection does not completely bar the government from regulating professional conduct. Different levels of protection apply depending on the audience, the speech's public or private nature, and the existence of personalized speech tailored to a specific client. The test to determine where a regulation falls on this spectrum requires finding a "personal nexus between professional and client" through which the professional exercises judgment "on behalf of the client in light of the client's individual needs and circumstances."

Courts have addressed the issue of professional communications with greater specificity within the context of the medical profession. While communications between physicians and patients receive significant First Amendment protections, these communications are nevertheless subject to government regulation when the speech

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23 Lowe, 472 U.S. at 228. "The power of government to regulate the professions is not lost whenever the practice of a profession entails speech." Id. See also Went For It, 515 U.S. at 634-35 (describing ways in which judicial scrutiny varies in relation to types of professional speech).

24 See Locke, 634 F.3d at 1191 (citing Accountant's Soc. of Va. v. Bowman, 860 F.2d 602, 604-05 (4th Cir. 1988)). "A statute that governs the practice of an occupation is not unconstitutional as an abridgement of the right of free speech, so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation." Bowman, 860 F.2d at 604. See also Pickup, 740 F.3d at 1227-29 (establishing "continuum" along which First Amendment rights of professionals should be measured).

25 Lowe, 472 U.S. at 232. Where a professional "takes the affairs of a client personally in hand," such conduct falls within the purview of professional conduct. Id. As such, any speech exercised in the course of this conduct is merely "incidental." Id. Conversely, [where the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted, government regulation ceases to function as legitimate regulation of professional practice with only incidental impact on speech; it becomes regulation of speaking or publishing as such, subject to the First Amendment.]

Id.

26 See generally Casey, 505 U.S. at 884 (discussing how compulsory disclosure of information within professional context of medical practice is permissible); Pickup, 740 F.3d at 1227-30 (holding statute in question regulated specific conduct, immunizing incidental speech from constitutional protection); Conant v. Walters, 309 F.3d 629, 632-39 (2002) (rejecting constitutionality of statute abridging physicians' speech based on content and viewpoint).
relates to the administering of medical treatment.\textsuperscript{27} Physicians, due to state licensure requirements, are subjected to state regulations relating to compliance with standards of treatment.\textsuperscript{28} The scope of the State’s regulatory power, however, is not boundless and must nevertheless pass constitutional muster.\textsuperscript{29}

Statutes aiming to suppress particular content or viewpoints traditionally do not benefit from First Amendment immunity.\textsuperscript{30} Instead, courts utilize an intermediate

\begin{quote}\textsuperscript{27} \textit{Pickup}, 740 F.3d at 1227. Government regulations concerning the doctor-patient relationship may be evaluated along a continuum, to determine whether the statute regulates speech or conduct. \textit{Id}. At the end of the continuum where First Amendment protection is greatest, the professional is engaged in public speech, which typically occurs outside of the doctor-patient relationship. \textit{Id}. at 1227-28. The midpoint of the continuum covers speech and conduct within the confines of the professional relationship, and features diminished First Amendment protection where speech and conduct are inseparable in the context of professional practice. \textit{Id}. at 1228-29. Finally, at the end of the continuum covering specific professional conduct tailored to the needs and interests of the individual client, First Amendment protection is weakest. \textit{Id}. at 1229.

\textsuperscript{28} See \textit{Locke}, 634 F.3d at 1191. “If the government enacts generally applicable licensing provisions limiting the class of persons who may practice the profession, it cannot be said to have enacted a limitation on freedom of speech . . . subject to First Amendment scrutiny.” \textit{Id}. \textsuperscript{30}See \textit{Conant}, 309 F.3d at 637 (holding that states have an interest in insuring doctors do not encourage illegal behavior). “Being a member of a regulated profession does not . . . result in a surrender of First Amendment rights.” \textit{Id}. See also Paula Berg, \textit{Toward a First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice}, 74 B.U. L. REV. 201, 249 (1994) (warning about danger of political interference with free flow of information between doctor and patient). Not only is it potentially dangerous for doctors to have their conversations censored, but also just as harmful for patients to not hear all of their options in order to form an informed decision. \textit{Id}. at 244. The opposite is also true; compelling physicians to speak and requiring them to recite messages could influence patient’s privacy and control over their own medical decisions. \textit{Id}. at 250.

\textsuperscript{30} See \textit{United States v. Alvarez}, 132 S. Ct. 2537 (2012) (plurality opinion) (holding Stolen Valor Act violated the First Amendment). See generally \textit{Sorrell v. IMS Health, Inc.}, 131 S. Ct. 2653 (2011) (invalidating statute restricting marketing content from specific speakers). The Supreme Court considered whether a Vermont law restricted the “sale, disclosure, and use of pharmacy records that reveal the prescribing practices of individual doctors.” \textit{Id}. at 2659. The Vermont law was designed to prevent this information from being used for marketing purposes by pharmacies or pharmaceutical manufacturers. \textit{Id}. The Court held that the law must be held to heightened scrutiny because “speech in aid of pharmaceutical marketing” is speech protected by the First Amendment. \textit{Id}. See also \textit{United States v. Stevens}, 559 U.S. 460 (2010) (holding that content-based restriction on depictions of animal cruelty violates First Amendment). Content-based restrictions will rarely be permissible, and are presumptively invalid. See, e.g., \textit{United States v. Playboy Entm’t Grp., Inc.}, 529 U.S. 803, 818 (2000); R.A.V. v. City of St. Paul, 505 U.S. 377,
scrutiny analysis to resolve potential free speech infringements when regulations address specific topics or specific speakers. When a regulation imposes limitations based on the content of the speech or the identity of the speaker, for example, the burden no longer presumes itself to be incidental to an otherwise legitimate objective, and the regulation instead becomes subject to constitutional examination. Content-based restrictions on speech fall under especially high scrutiny when the content sought to be abridged is of great public interest. Nevertheless, some content-based restrictions are permitted but are confined to “the few historic and traditional categories of expression long familiar to the bar.”

In Wollschlaeger v. Governor of Florida, the Eleventh Circuit’s majority opinion determined that the Act legitimately regulates professional conduct, while having only an incidental effect on speech, and thus failed to violate the First Amendment. The court


32 See Sorrell, 131 S. Ct. at 2665. See also Stevens, 559 U.S. at 470. “Our Constitution forecloses any attempt to revise [First Amendment protection] simply on the basis that some speech is not worth it.” Id.

33 See Snyder v. Phelps, 131 S. Ct. 1207, 1216 (2011). Speech of “public concern” is that which relates to “any matter of political, social, or other concern to the community.” Id. (quoting Connick v. Myers, 461 U.S. 138, 146 (1983)) (internal quotations omitted).

34 Alvarez, 132 S. Ct. at 2544. Examples of these traditional exceptions include “obscenity, defamation, speech integral to criminal conduct, so-called ‘fighting words,’ child pornography, [and] fraud.” Id. See also Chaplinsky v. New Hampshire, 315 U.S. 568, 572 (1942). These areas of speech are “of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.” Id.

35 See Wollschlaeger, 760 F.3d 1195.
stated that physicians should not be required to inquire into the private matters of patients unless such inquiry is relevant. Although the Act inevitably relates to physician speech, the Eleventh Circuit adhered to established precedent that a statute governing professional or occupational conduct does not amount to an unconstitutional curtailment of speech as long as the speech restriction remains incidental to an otherwise legitimate regulation. Moreover, the court found that each provision of the Act exclusively regulates conduct occurring within the privacy of the physician-patient relationship, creating a personal nexus through which a physician exercises professional judgment tailored to a patient's personal circumstances. Since the speech in question occurs in the context of a professional medical relationship, the court drew a distinction between treatment and communication per se, and held that a physician's inquiry into a patient's firearm ownership should be considered the first step in a course of treatment rather than a form of independent speech. The regulated physician speech occurs

36 Id. at 1215. Respecting patient privacy is one of the fundamental principles of the Hippocratic Oath and the American Medical Association's Declaration of Professional Responsibility. Id. The Court found the Act to be in accordance with this notion, as it "serves the important purpose of protecting the privacy rights of patients who do not wish to answer questions about irrelevant and private matters." Id. "Protect the privacy and confidentiality of those for whom we care and breach that confidence only when keeping it would seriously threaten their health and safety or that of others." Declaration of Professional Responsibility Medicine's Social Contract With Humanity, 1 (Dec. 4, 2001).

37 Wollschlaeger, 760 F.3d 1195 at 1223 (quoting Locke, 643 F.3d at 1191). The court recognized that "to define the standards of good medical practice and provide for administrative enforcement of those standards is well within the State's long-established authority to regulate the professions." Id. at 1217 (citing Barsky, 347 U.S. at 449).

38 Wollschlaeger, 760 F.3d 1195 at 1220. See Lowe, 472 U.S. at 232 (White, J., concurring) (describing "personal nexus" test to determine whether speech is incidental to occupational regulation). The inquiry, record-keeping, discrimination, and harassment provisions of the Act all fall within the scope of the "personal nexus" test from Lowe because of the nature of the physician-patient relationship, within "the confines of the examination room" and as such, each provision's apparent restriction of physician speech is incidental to the legitimate regulation of physician conduct. Wollschlaeger, 760 F.3d 1195 at 1219.

39 Id. at 1220. Compare Conant, 309 F.3d at 632 (holding regulation preventing physicians from recommending medical marijuana in violation of First Amendment) with Pickup, 740 F.3d at 1226 (rejecting First Amendment challenge to statute regulating physician speech in direct patient care). The court analogized the prohibited firearm inquiry with that of a physician asking a patient about his or her smoking history, where the inquiry becomes an attempt to dissuade the patient from smoking as a course of medical treatment. Wollschlaeger, 760 F.3d at 1224. Under the Act, physicians may nevertheless "discuss firearm safety, make recommendations with regard to firearm safety, and express opinions about firearms" with patients, but such communication may not take the form of inquiry or harassment. Id. at 1224. This type of "counseling . . . maintains patients' right to privacy regarding firearms and at the same time enables physicians to advise patients on safe practices." Id. at 1225.
entirely within the purview of the physician-patient relationship, and therefore the majority confirmed that any resulting abridgment of speech is entirely incidental to the Act's legitimate regulation of professional medical conduct.  

The dissenting opinion argued that the Act should be held invalid because it proscribes both topic and speaker-specific speech, which is traditionally analyzed under First Amendment intermediate scrutiny. Courts have traditionally acknowledged the necessity of a free flow of information between physician and patient to assure accurate diagnoses and comprehensive treatment, but the dissent suggested that the Act directly prohibits this type of communication by targeting physicians as specific speakers. Additionally, the dissent argued that the specific content of the restricted speech in question, firearm ownership, constitutes a matter of public concern, a category of content that has traditionally received greater protection. The dissent then examined the implied effects of the Act and argued that while the law aims to prevent physician interference with the right to bear arms, the Act's inevitable effect abridges physician speech. In reaching this conclusion the dissent showed that despite good intentions, the law supports actual viewpoint discrimination and suppression of content-based

40 Id. at 1226 (citing Law, 472 U.S. at 232 (White, J., concurring)).
41 Id. at 1230, 1241 (citing Sorrell, 131 S. Ct. at 2667-71). The dissent suggests that the Court's primary error in its majority opinion is that it ignores precedent that speaker and content-based restrictions on speech be subjected to heightened judicial scrutiny. Id. at 1236. In Sorrell, the Supreme Court established that when a statute burdens "disfavored speech" by "disfavored speakers," heightened scrutiny is warranted due to the potential First Amendment risks. Wollschlaeger, 760 F.3d at 1236 (quoting Sorrell, 131 S. Ct. at 2663-64). Historically, content-based restrictions on speech have been allowed only in very limited circumstances. See generally Alvarez, 132 S. Ct. at 2544 (enumerating the limited categories of content-based speech with permissible restrictions); Stevens, 559 U.S. at 470 (warning of the dangers of adopting "free floating tests for First Amendment coverage").
42 Wollschlaeger, 760 F.3d at 1237. In the provision of good medical care, a physician "must know all that a patient can articulate in order to identify and treat disease; barriers to full disclosure would impair diagnosis and treatment." Id. (quoting Trammel v. United States, 445 U.S. 40, 51 (1980)).
43 Id. at 1238. See supra note 32. The dissent insists that both firearm safety and the regulation of health care are matters of "political, social, or other concern to the community" and should thus receive greater protection from the courts. Wollschlaeger, 760 F.3d at 1238 (quoting Snyder, 131 S. Ct. at 1216). Nevertheless, the majority ignores this need for greater protection by upholding the Act, effectively eliminating important speech from the physician-patient relationship. Id.
44 Id. at 1233. See also Sorrell, 131 S. Ct. at 2663 (stating "inevitable effect of a statute on its face" may be evaluated). Supporters of the Act argue that physicians' inquiry will interfere with a patient's exercise of his or her rights by causing the patient to question his or her firearm ownership, and should thus be restricted. Wollschlaeger, 760 F.3d at 1238. Such restriction amounts, according to the dissent, to "classic viewpoint discrimination." Id.
speech per se, unable to pass constitutional muster under the intermediate scrutiny test.\textsuperscript{45}

The majority opinion in \textit{Wollschlaeger} improperly departed from recent precedent by sidestepping the requisite First Amendment analysis of content and speaker-specific speech restrictions.\textsuperscript{46} By arriving at its holding that physician speech is analogous to commercial speech falling within the purview of state regulation, the majority expressly ignored the Supreme Court's determination in \textit{Sorrell v. IMS Health, Inc.}, requiring heightened judicial scrutiny in instances of targeted speech restrictions.\textsuperscript{47} While courts have held such content and speaker-based restrictions on speech to be presumptively invalid, the \textit{Wollschlaeger} majority completely overlooked this precedent by concluding that the Act satisfactorily regulated professional conduct.\textsuperscript{48}

The majority's decision opens the door to political interference from the free flow of information between physicians and patients, an essential component to competent medical care.\textsuperscript{49} The Act pertains to the heavily politicized issue of gun ownership and is an attempt by the Florida legislature to impose political interests on the medical profession.\textsuperscript{50} Speech within the physician-patient context deserves First Amendment protection because the untrammeled exchange of information ensures the best possible medical care.\textsuperscript{51} Restraining physicians from communicating certain types

\textsuperscript{45} Id. at 1239 (quoting \textit{Sorrell}, 131 S. Ct. at 2664). \textit{See supra} note 29 and accompanying text (discussing the potential impact of censored discussions in physician-patient communication). \textit{See also} \textit{Playboy, Inc.}, 529 U.S. at 818 (holding restrictions on content based speech will rarely be permissible); \textit{R.A.V.}, 505 U.S. at 382 (establishing content-based restrictions are “presumptively invalid”).

\textsuperscript{46} \textit{See supra} note 29 and accompanying text (noting constitutional provisions place limitations on government’s power to regulate professional conduct).

\textsuperscript{47} \textit{See Sorrell}, 131 S. Ct. at 2664. “The First Amendment requires heightened scrutiny whenever the government creates a regulation of speech because of a disagreement with the message it conveys.” \textit{Id.} The dissent in \textit{Wollschlaeger} asserted that “the word ‘whenever’ does not invite any exceptions, but the Majority creat[ed] one anyway.” \textit{Wollschlaeger}, 760 F.3d at 1236.

\textsuperscript{48} \textit{See supra} note 36 (defending patient privacy about unrelated and irrelevant matters and doctors’ duty under oath). \textit{See also} \textit{Playboy Enter’ns}, 529 U.S. at 818; \textit{R.A.V.}, 505 U.S. at 382.

\textsuperscript{49} \textit{See Berg}, \textit{supra} note 29, at 201 (warning against political interference with free flow of information in practice of medicine).

\textsuperscript{50} \textit{Id.} Over time, government regulations have “overtly politicized the practice of medicine, restricting access to medical information and directly manipulating the content of doctor-patient discourse.” \textit{Id.}

\textsuperscript{51} \textit{See id.} at 238-39. On the issue of receiving unbiased medical advice as part of an autonomous patient approach to medical treatment, Berg writes:

Government regulations that confine patients’ knowledge to only state-approved treatments sabotage the constitutional right to make autonomous
of information to patients significantly impairs the physicians' ability to provide comprehensive care as well as the patients' ability to make fully informed health care decisions, and such restriction may even pose threats to public safety as a whole depending on the nature of the information. By implicitly inserting a policy decision concerning firearm ownership into the practice of medicine, the majority's decision upholding the Act allowed the Florida legislature to become a third member of the physician-patient relationship.

From a general perspective, the majority's opinion falls within a broader scheme of courts equating physician-patient speech with commercial speech, a category that traditionally receives a moderate amount of First Amendment immunity. Under this line of interpretation, courts have drawn no distinctions between the rights afforded to physician-patient communications and the rights afforded to speech used in selling and advertising pharmaceuticals. In Sorrell, the Supreme Court modified their interpretive approach, adding the caveat that restrictions on commercial speech must nevertheless withstand heightened scrutiny if the restriction is content or speaker-specific. The court's expansion of First Amendment protections for physician-patient speech represented an appropriate and necessary shift in precedent, because unlike general commercial speech, the free flow of communication between doctor and patient is integral to the practice of good medical care. Notwithstanding this unequivocal medical decisions and chart the course of one's health care. Indeed, preserving and protecting patients’ ability to acquire complete medical information may be the most effective means of promoting sound health care decisions, and the best defense against the imposition of state medicine.

Id.

52 Wollschlaeger, 760 F.3d at 1237 (quoting Trammel, 445 U.S. at 40, 51 (1989). See also Berg, supra note 29, at 243-44 (discussing patient’s First Amendment interest in free flow of information between patient and doctor).

53 Wollschlaeger, 760 F.3d at 1213-14 (noting limitations on unnecessary collection of patient information on sensitive topics unrelated to healthcare). Berg, supra note 29, at 244.


55 See Swartz, supra note 31, at 103 (describing Supreme Court’s post-Sorrell use of heightened judicial scrutiny).

56 See supra note 47 (discussing Sorrell’s holding requiring a heightened level of scrutiny for first amendment issues). See also Swartz, supra note 31, at 104. The restriction on speech may overcome the heightened scrutiny analysis if the reviewing court finds that the regulation is necessary to achieve a compelling governmental interest, and is narrowly tailored to achieving that end. Id.

57 See Swartz, supra note 31, at 104-05. Physicians are “trained professionals with a fiduciary responsibility to their patients...” and as such should be distinguished from “businesses selling
expansion of constitutional protection, the *Wollschlaeger* majority chose not to analyze the Act under heightened scrutiny, concluding instead that any restrictions on speech imposed by the Act were permissible, as its true purpose was to legitimately regulate conduct within the medical profession. By ending their analysis at this conclusion, the majority adopted a critical misunderstanding of *Sorrell* had the majority followed through with a heightened scrutiny analysis, as the dissent did, the majority would have discovered that the Act could not pass constitutional muster.

In *Wollschlaeger*, the Eleventh Circuit Court of Appeals grappled with the issue of whether a Florida law preventing irrelevant inquiry by physicians into their patients’ firearm ownership amounted to a First Amendment violation. The majority held that any infringement on speech resulting from the Act came secondary to the state’s primary objective: regulating the conduct of practitioners in the medical profession. The dissent, however, took issue with the Act’s provisions, arguing that the speech restrictions were both content and speaker-based and violated the First Amendment. In light of recent precedent, set by the Supreme Court in *Sorrell*, the majority’s decision represents a critical error in application of judicial scrutiny. While states may establish and regulate standards of professional conduct in licensed industries like medicine, such regulations improperly abridge free speech when they discriminate against certain viewpoints or speakers. By failing to apply heightened scrutiny to its analysis of the Act, the Eleventh Circuit wrongly diverged from precedent and permitted unconstitutional suppression of physician-patient speech.

"products." *Id.* at 104. Dialogue between doctor and patient should be “one that is neither scripted nor prevented by the government.” *Id.* at 105.

58 *Wollschlaeger*, 760 F.3d 1195 at 1225-26.

59 *Id.* at 1270-71. See also Swartz, *supra* note 31, at 104 (arguing under higher standard of review, more likely that laws will be successfully challenged).

60 See *supra* note 4 and accompanying text (summarizing fundamental question at issue).

61 See *supra* note 39 and accompanying text (describing importance of professional context in which the restricted speech occurs).

62 See *supra* note 44 and accompanying text (applying facts of instant case to precedent which rejects speaker and viewpoint discrimination).

63 See *supra* note 47 and accompanying text (displaying majority opinion’s departure from recent precedent).

64 See *supra* note 47 (noting state regulations nevertheless bound by constitutional considerations).