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ARE PHYSICIAN-PATIENT COMMUNICATIONS PROTECTED BY THE FIRST AMENDMENT?

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INTRODUCTION

In the past several years, a number of states have enacted laws restricting physicians' rights to speak freely with their patients.[1] These laws go beyond informed consent laws enacted in most states in the 1960s and 1970s.[2] While the informed consent laws require physicians to provide certain categories of information to patients prior to invasive treatment—such as the nature of the risks and benefits entailed—these new laws either prohibit physicians from discussing certain topics or mandate that they provide specific information to their patients that is only questionably supported by medical evidence.[3] In the past several years, a number of federal appellate courts have disagreed about the appropriate level of legal protection that should apply to this type of speech.[4] Obviously, the lower the level of First Amendment protection, the more likely a court will uphold a law that restricts a physician's communications with her patients. Since the Third, Fourth, Fifth, Eighth, Ninth, and Eleventh Circuits have issued conflicting opinions on

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[1] *See, e.g.*, ARIZ. REV. STAT. ANN. § 36-2153 (2015) (requiring physicians to inform women seeking abortions of the medically unsubstantiated "fact" that it may be possible to reverse the effects of a medication abortion; on Mar. 30, 2015, the Governor approved recent amendments, sections A.2.(h) and A.2.(i), to the statute); CAL. BUS. & PROF. CODE § 865.2 (West 2014) (prohibiting mental health professionals from practicing "conversion therapy" with minors, which attempts to change a minor's sexual orientation); FLA. STAT. ANN. § 790.338 (West 2011) (prohibiting physicians from asking patients about gun ownership); MO. ANN. STAT. § 571.012 (West 2014) (prohibiting all licensed health care professionals from inquiring as to whether a patient owns or has access to a firearm and from recording such information in a patient's record); N.J. STAT. ANN. § 45:1-54 (West 2015) (prohibiting mental health professionals from practicing "conversion therapy" with minors); N.Y. PUB. HEALTH LAW § 2997-c2 (McKinney 2015) (requiring physicians to discuss end of life care with patients who are "terminally ill"); 58 PA. CONS. STAT. ANN. § 3222.1(b)(11) (West 2014) (requiring physicians to sign confidentiality agreements before obtaining information about fracking chemicals when treating patients with conditions potentially related to fracking chemicals); S.D. CODIFIED LAWS § 34-23A-10.1 (2011) (requiring physicians to provide controversial information to women seeking abortions about her "existing relationship with [an] unborn human being [that] enjoys protection under the United States Constitution and under the laws of South Dakota"); VA. CODE ANN. § 32.1-229(7) (West 2014) (requiring physicians to tell mammography patients with dense breast tissue that their condition may hide cancer and other abnormalities); H.R. 15, 82d Leg. Reg. Sess. (Tex. 2011) (requiring physicians to perform sonograms on women seeking abortions and to provide detailed information about the fetal characteristics). *See also* N.C. GEN. STAT. ANN. § 90-21.85(b) (2011) (requiring physicians to perform ultrasounds on women seeking abortions to display the image and to describe the fetus, even if the woman actively averts her eyes), *invalidated by* Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014).

[2] *See, e.g.*, Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972) (setting forth the standard for the types of information a physician must provide a patient prior to treatment so that a patient can make an informed decision about whether to proceed with the recommended treatment).

[3] *See supra* note 1.

[4] Wollschlaeger v. Governor of Florida, 760 F.3d 1195 (11th Cir. 2014); Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014); King v. Governor of New Jersey, 767 F.3d 216, 237 (3d Cir. 2014); Pickup v. Brown, 728 F.3d 1042, 1055 (9th Cir. 2013); Texas Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 576 (5th Cir. 2012); Planned Parenthood Minn. v. Rounds, 653 F.3d 662, 683 (8th Cir. 2011) *opinion vacated in part on reh'g en banc*, 662 F.3d 1072 (8th Cir. 2011) *and on reh'g en banc in part*, 686 F.3d 889 (8th Cir. 2012).

this issue, the matter is poised for review by the United States Supreme Court.

I. LAWS RESTRICTING PHYSICIANS' ABILITY TO COMMUNICATE FREELY WITH THEIR PATIENTS

In a spate of recent cases, states have attempted to restrict physician-patient communications. Some of the laws prevent physicians from discussing certain topics with their patients. In 2011, the Florida legislature passed a law that prohibits physicians from asking patients about their gun ownership as part of a preventive health questionnaire.[5] In 2012, Pennsylvania passed a law that prevents physicians who treat patients suffering from injuries caused by fracking chemicals from revealing the chemical content of the chemicals.[6] Laws in both California and New Jersey prohibit physicians and other health care professionals from using language intended to change their minor patients' sexual orientation (known as "conversion therapy").[7]

On the other hand, numerous states have enacted laws that compel, rather than prohibit, physician speech. Several states force physicians to provide female patients with specific state-mandated information prior to performing abortions, some of which is not supported by medical evidence (mandated abortion information).[8] Some states also require that physicians perform medically unnecessary ultrasounds before performing an abortion, along with directing physicians to provide specific information in conjunction with the procedure.[9]

The federal appellate courts have promoted two different theories to support the regulation of physician communications with their patients. The first posits that speech used in such communication is part of the "business of medicine" and therefore subject only to the limited protection afforded to commercial speech.[10] The second posits that the

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5 FLA. STAT. ANN. § 790.338 (West 2011), *invalidated by* Wollschlaeger v. Farmer, 880 F. Supp. 2d 1251 (S.D. Fla. 2012) *rev'd in part, vacated in part sub nom.* Wollschlaeger v. Governor of Florida, 760 F.3d 1195 (11th Cir. 2014). At least twelve other states have introduced similar legislation. Mobeen H. Rathore, *Physician "Gag Laws" and Gun Safety*, 16 AMA JOURNAL OF ETHICS 4:284-288 (April 2014), *available at* http://journalofethics.ama-assn.org/2014/04/pfor2-1404.html. At least two states have enacted such legislation as of the date of this article—Montana (MONT. CODE ANN. § 50-16-108 (West 2013)) and Missouri (MO. ANN. STAT. § 571.012 (West 2014)).

6 58 PA. CONS. STAT. ANN. § 3222.1(b)(11) (West 2012). Although a physician has challenged the Pennsylvania law, no court has issued a decision regarding its constitutionality under the First Amendment.

7 CAL. BUS. & PROF. CODE § 865.2 (West 2012); N.J. STAT. ANN. § 45:1-54 (West 2013).

8 *See, e.g.*, S.D. CODIFIED LAWS § 34-23A (West 2011); TEX. HEALTH & SAFETY CODE ANN. § 171.012(a)(4)(c) (West 2013).

9 *See, e.g.*, N.C. GEN. STAT. ANN. § 90-21.85(a)(1) (West 2011), *invalidated by* Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014).

10 See Martha Swartz, *Physician-Patient Communication and the First Amendment After*

speech is part of patient treatment and therefore is actually *conduct* that only incidentally implicates speech and therefore is subject to diminished protection under the First Amendment.[11]

Among those courts that find physician-patient communication to be a form of commercial speech, some have concluded that it is deserving merely of the type of protection that is afforded to commercial advertising, in which a speech-restricting statute will be upheld as long as the mandated speech is "truthful, non-misleading and relevant" (low level commercial standard).[12] Others, concerned that the speech-restricting statutes were aimed at the *content* of physician speech, have applied an "intermediate" level of scrutiny to their statutory analysis, somewhere between the low commercial standard and strict scrutiny.[13]

II. FEDERAL APPELLATE COURT DECISIONS INTERPRETING LAWS RESTRICTING PHYSICIAN SPEECH

A. *District Courts Apply Strict Scrutiny*

At least three federal district courts, in reviewing the Florida gun law, the Texas mandated abortion information law, and the California conversion therapy law, respectively, found that because the laws tried to regulate the *content* of physician speech, as opposed to merely regulating the time or place where the speech occurred, the laws were subject to strict scrutiny.[14] Strict scrutiny requires a court to find a

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Sorrell, 17 MICH. ST. U. J. MED. & L. 101 (2012).

[11] Pickup v. Brown, 728 F. 3d 1042, 1055 (9th Cir. 2013).

[12] *See, e.g.*, Texas Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 576 (5th Cir. 2012) (vacating the district court's preliminary order enjoining the Texas statute requiring physicians to disclose to women seeking abortions the sonogram and fetal heartbeat results and to require women to complete a form indicating that she has received such information.); Planned Parenthood Minn. v. Rounds, 653 F.3d 662, 683 (8th Cir. 2011) *opinion vacated in part on reh'g en banc*, 662 F.3d 1072 (8th Cir. 2011) *and on reh'g en banc in part*, 686 F.3d 889 (8th Cir. 2012) (striking down the district court's order enjoining the South Dakota statute that had required physicians to advise women seeking abortions that the "the abortion will terminate the life of a whole, separate, unique, living human being" and further requiring doctors to advise the woman that she "has an existing relationship with [an] unborn human being [that] enjoys protection under the United States Constitution and under the laws of South Dakota").

[13] *See, e.g.*, King v. Governor of New Jersey, 767 F.3d 216, 237 (3d Cir. 2014); Stuart v. Camnitz, 774 F.3d 238, 250 (4th Cir. 2014).

[14] Wollschlaeger v. Farmer, 880 F. Supp. 2d 1251 (S.D. Fla. 2012) *rev'd in part, vacated in part sub nom.* Wollschlaeger v. Governor of Florida, 760 F.3d 1195 (11th Cir. 2014); Texas Med. Providers Performing Abortion Servs. v. Lakey, 806 F. Supp. 2d 942, 970 (W.D. Tex. 2011), *vacated in part,* 667 F.3d 570 (5th Cir. 2012); Welch v. Brown, 907 F. Supp. 2d 1102 (E.D. Cal. 2012) *rev'd sub nom.* Pickup v. Brown, 728 F.3d 1042 (9th Cir. 2013), *rev'd sub nom.* Pickup v. Brown, 740 F.3d 1208 (9th Cir. 2014). In *Texas Medical Providers*, the Texas district court wrote:

> [I]n the context of abortion, the speech between physician and patient, taken as a

statute invalid unless the state can demonstrate that it is "justified by a compelling government interest and is narrowly drawn to serve that interest."[15] "Strict scrutiny is a 'demanding standard' and '[i]t is rare that a regulation restricting speech because of its content will ever be permissible.'"[16] Applying this "demanding standard," the Florida gun law, the Texas mandated abortion information law, and the California conversion therapy law were all enjoined.[17]

B. *Fifth and Eighth Circuits Apply Low Commercial Standard ("Truthful, Non-misleading and Relevant"[18])*

However, none of the appellate courts reviewing the district court decisions that addressed the level of First Amendment protection that should be afforded to physician-patient communications agreed with the district courts. In *Texas Medical Providers*, the Western District of Texas found that the Texas statute requiring physicians to perform an ultrasound on a woman seeking an abortion, in order to make audible the heart auscultation sounds of the fetus for the woman to hear, and to explain the ultrasound's results, were medically unnecessary.[19] It also found that the forced conversation between the physician and patient regarding the sonogram violated the physicians' First Amendment rights.[20] However, on appeal, the Fifth Circuit reversed the district court's decision since it considered the information that physicians were forced to provide to be "truthful, non-misleading, and relevant disclosures" and part of the "state's reasonable regulation of medical practice."[21] As a result, it found that the forced conversation did not fall "under the rubric of compelling ideological speech that triggers First Amendment strict scrutiny."[22]

The Fifth Circuit's conclusion was shared by the Eighth Circuit in *Planned Parenthood Minnesota v. Rounds*, when it reviewed a South Dakota statute that required physicians to inform women seeking abortions "[t]hat the pregnant woman has an existing relationship with that unborn human being and that the relationship enjoys protection

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whole, implicates a variety of medical, ethical, legal, practical, and commercial concerns. Because these concerns are all closely related, the Court finds any commercial speech involved is "inextricably intertwined" with the non-commercial components, such that strict scrutiny is appropriate.

806 F. Supp. 2d at 970.

15 Brown v. Entm't Merchants Ass'n, 131 S. Ct. 2729, 2738 (2011).

16 *Welch*, 907 F. Supp. 2d at 1117 (quoting *Brown*, 131 S. Ct. at 2738).

17 *Wollschlaeger*, 880 F. Supp. 2d at 1270; *Texas Med. Providers*, 806 F. Supp. 2d at 977–78.

18 *Texas Med. Providers*, 667 F.3d at 576.

19 *Texas Med. Providers*, 806 F. Supp. 2d at 975.

20 *Id.*

21 *Texas Med. Providers*, 667 F.3d at 576.

22 *Id.* (citation and internal quotation marks omitted).

under the United States Constitution and under the laws of South Dakota" and "[t]hat by having an abortion, her existing relationship and her existing constitutional rights with regards to that relationship will be terminated[.]"[23] Concluding that the state "can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion" and that it was unlikely that Planned Parenthood could show that the information physicians were forced to provide was untruthful, misleading, or irrelevant, the Court vacated the district court's injunction.[24]

C. *Ninth and Eleventh Circuits View Physician Speech as Conduct*

Unlike the Fifth and Eighth Circuits, the Ninth and Eleventh Circuits concluded that physician communication with their patients was part of treatment. Therefore, the Ninth and Eleventh Circuits classified physicians' speech as "conduct" only insubstantially connected with speech.[25]

In *Pickup v. Brown*, after reviewing the California law banning "conversion therapy"[26] for minors, the Ninth Circuit concluded that speech aimed at changing a patient's sexual orientation was *conduct*, rather than pure speech, since it is part of the administration of treatment.[27] Since the court concluded that speech involved in conversion therapy was actually conduct, it applied the rational basis test; finding that the state law was "rationally related to the legitimate government interest of protecting the well-being of minors," it upheld the law.[28]

Along the same lines, in *Wollschlaeger v. Governor of Florida*, the Eleventh Circuit found that the Florida gun statute "governs occupational conduct, and not a substantial amount of protected speech . . . [and a]ny burden the Act places on speech is thus incidental to its legitimate regulation of the practice of medicine."[29] Referring to

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23 Planned Parenthood Minn. v. Rounds, 530 F.3d 724, 726 (2008) (citing S.D. CODIFIED LAWS § 34-23A-10.1 (7)(1)(c)–(d)).

24 *Id.* at 735, 737–38.

25 Pickup v. Brown, 728 F.3d 1042, 1055 (9th Cir. 2013); Wollschlaeger v. Governor of Florida, 760 F.3d 1195, 1225 (11th Cir. 2014).

26 *Pickup*, 728 F.3d at 1048 ("[Sexual Orientation Change Efforts (SOCE)], sometimes called reparative or conversion therapy, began at a time when the medical and psychological community considered homosexuality an illness. SOCE encompasses a variety of methods, including both aversive and non-aversive treatments, that share the goal of changing an individual's sexual orientation from homosexual to heterosexual.").

27 *Id.* at 1053–54. The court envisioned First Amendment protection running along a continuum, with public dialogue receiving the greatest protection, speech "within the confines of a professional relationship" at the midpoint of the continuum, and conduct appearing at the other end of the continuum. *Id.* at 1054.

28 *Id.* at 1057.

29 *Wollschlaeger*, 760 F.3d at 1225 (citation and internal quotation marks omitted).

the Ninth Circuit's decision in *Pickup* as an "instructive" example, the Eleventh Circuit upheld the Florida law that prohibited physicians from inquiring about gun ownership as part of their preventive health discussions with patients.[30] The court did so notwithstanding the American Medical Association's policy encouraging "members to [] inquire as to the presence of household firearms as a part of childproofing the home[.]"[31] Since the court concluded that such an inquiry was "a private matter irrelevant to medical care," and "not part of the practice of good medicine," it decided that it should be "subject to reasonable licensing and regulation."[32]

D. *Third and Fourth Circuits Propose "Heightened Intermediate" Standard*

Unlike the Fifth, Eighth, Ninth, and Eleventh Circuits, the Third and Fourth Circuits have acknowledged that the statutes they reviewed involved the regulation of the *content* of speech, and therefore the court applied a standard of review that was more protective than the low commercial standard, though not as protective as strict scrutiny.[33]

In *King v. Governor of New Jersey*, after reviewing a New Jersey statute banning conversion therapy for minors, the Third Circuit rejected the reasoning of both the federal district court in New Jersey and the Ninth Circuit, which had found conversion therapy to constitute conduct, rather than speech.[34] The Third Circuit concluded that the First Amendment protected speech used in performing such therapy, holding that "speech is speech, and it must be analyzed as such for purposes of the First Amendment."[35] However, the court went on to say that "certain categories of speech receive lesser protection."[36] For example, professional speech deserved only diminished First Amendment protection since the therapists are speaking as "state-licensed professionals within the confines of a professional relationship."[37] The court's "diminished" or "intermediate" standard permitted the New Jersey law to survive since the statute was shown to "directly advance[]

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30 *Id.*

31 Prevention of Firearm Accidents in Children, AMERICAN MEDICAL ASSOCIATION, Policy H-145.990, *available at* https://www.ama-assn.org/ssl3/ecomm/PolicyFinderForm.pl?site=www.ama-assn.org&uri=/resources/html/PolicyFinder/policyfiles/HnE/H-145.990.HTM.

32 *Wollschlaeger*, 760 F.3d at 1219–20.

33 In the case before the Third Circuit, the statute banned conversion therapy for minors. King v. Governor of New Jersey, 767 F.3d 216 (3d Cir. 2014). In the case before the Fourth Circuit, the statute forced physicians to display sonograms to patients seeking abortions. Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014).

34 *King*, 767 F.3d at 226, 229.

35 *Id.* at 229.

36 *Id.*

37 *Id.* at 224.

the State's substantial interest in protecting its citizens from harmful or ineffective professional services."[38]

Like the Fifth Circuit, the Fourth Circuit in *Stuart v. Camnitz*, recently reviewed a North Carolina statute that required physicians to perform ultrasounds on all women seeking abortions, to display the ultrasound image to the patients, and to provide them with state-mandated information, whether or not the women wanted to hear or see the information.[39] The Fifth and Eighth Circuits had previously upheld similar mandated abortion-information-related statutes because they applied the "misleading, non-truthful, irrelevant" standard to the states' informational requirements.[40] In other words, because they determined that the information required to be conveyed was not misleading, the fact that physicians were being forced to convey it did not violate the physicians' First Amendment rights.[41]

Departing from their fellow Circuits, the Fourth Circuit concluded that a higher, "heightened intermediate" standard of review was necessary because, even if the compelled speech was factual, the state was nevertheless imposing these requirements on physicians, and the requirements amounted to "[t]ransforming the physician into the mouthpiece of the state[, which] undermines the trust that is necessary for facilitating healthy doctor-patient relationships and, through them, successful treatment outcomes."[42]

Significantly, not only did the Fourth Circuit apply this heightened standard to the law's requirement that physicians convey certain state-mandated information to their patients, but it applied the same standard to the state's requirement that the physician *display the sonogram image*.[43] Thus, ironically, while the Ninth Circuit found therapists' *speech* to patients during treatment to be *conduct*—virtually exempt from protection under the First Amendment—the Fourth Circuit found physicians' *conduct in displaying the ultrasound* to be *speech*, deserving of heightened protection under the First Amendment.

III. WHAT IS THE DISAGREEMENT AMONG FEDERAL APPELLATE COURTS?

The disagreement among these federal appellate courts centers on

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38 *Id.*

39 Stuart v. Camnitz, 774 F.3d 238, 242 (4th Cir. 2014).

40 Texas Med. Providers Performing Abortion Servs. v. Lakey, 667 F.3d 570, 576 (5th Cir. 2012); Planned Parenthood Minn. v. Rounds, 653 F.3d 662, 683 (8th Cir. 2011) *opinion vacated in part on reh'g en banc*, 662 F.3d 1072 (8th Cir. 2011) *and on reh'g en banc in part*, 686 F.3d 889 (8th Cir. 2012).

41 *See supra* note 40.

42 Stuart v. Camnitz, 774 F.3d at 253.

43 *Id.* at 245.

whether physicians' communications with their patients during treatment is more like *conduct* that is not constitutionally protected or more like constitutionally protected *speech*. Even those courts that view physicians' communication with their patients as constitutionally protected speech disagree as to the level of constitutional protection that such communication deserves. Should such speech receive the minimal protection under the First Amendment that generally applies to commercial speech, the maximum protection that is afforded to political speech, or protection that lies somewhere in between?

A. *What Level of Constitutional Protection Does a Physician's Communication with Her Patients Deserve?*

Traditionally, regulations aimed at restricting the *content* of speech are analyzed using strict scrutiny.[44] On the other hand, conduct (that is not aimed at expressing a viewpoint) is offered no First Amendment protection; thus, it is crucial to determine whether professional speech used during treatment is transformed into something other than protected speech merely by virtue of its use as a means of treatment.

Conversion therapy, according to the Ninth Circuit, was conduct performed *through* speech.[45] The Ninth Circuit observed, "it has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed."[46] Since it concluded that "the First Amendment does not prevent a state from regulating treatment even when that treatment is performed through speech alone," it upheld the California law banning the treatment.[47]

However, as the Third Circuit pointed out, the U.S. Supreme Court, in *Holder v. Humanitarian Law Project*, noted that speech that is part of a program involving the provision of training and advice is nevertheless considered speech, not conduct, and therefore is protected under the First Amendment.[48] In *Humanitarian*, the plaintiffs argued that a federal statute prohibiting the provision of "material support" to designated terrorist organizations violated their First Amendment rights by preventing them from providing legal training to a listed

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44 Wollschlaeger v. Farmer, 880 F. Supp. 2d 1251, 1262 (S.D. Fla.), citing Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1258 (11th Cir. 2005) ("Rather, content-based statutes that ban or burden constitutionally protected speech are subject to strict scrutiny.").

45 Pickup v. Brown, 728 F. 3d 1042, 1056 (9th Cir. 2013) ("SB 1172 regulates only treatment, and nothing in *NAAP* requires us to analyze a regulation of treatment in terms of content and viewpoint discrimination.").

46 *Id.* at 1055 (citation omitted).

47 *Id.* at 1056.

48 Holder v. Humanitarian Law Project, 561 U.S. 1, 28 (2010).

organization and, as a result, should be analyzed using strict scrutiny.[49] Although the Court concluded that prohibiting the particular type of speech at issue did not violate the plaintiffs' First Amendment rights, it rejected the government's attempt to classify the provision of advice and counseling as *conduct*.[50] Instead, it described the activity as "communicating a message" and acknowledged that the statute was aimed at restricting the plaintiff's speech based on the content of the speech.[51]

If professional speech is viewed as speech rather than conduct, the question is whether it should be afforded the minimal protection provided by the low commercial standard—that is, if the government can show that the required speech is truthful, non-misleading, and relevant, the statute will be upheld—or the intermediate standard advocated by the Third and Fourth Circuits.[52]

Under the "intermediate" standard, a statute restricting physician-patient communication would be upheld if it is shown to "directly advance[] a substantial governmental interest and that the measure is drawn to achieve that interest."[53] This position views speech employed in the course of a professional relationship as being subject to regulation under the state's licensing authority because it is a form of commercial speech. That is, it is part of the practice, or the "business," of medicine. Applying this standard, the Third Circuit, in *King*, upheld the New Jersey state statute banning conversion therapy for minors[54] and the Fourth Circuit, in *Stuart*, rejected the North Carolina statute forcing physicians to display ultrasounds to patients seeking abortions, as well as to convey certain state-prescribed information to those patients.[55]

None of the federal appellate courts considered the possibility of applying strict scrutiny to the speech-restricting statutes before them. The closest any appellate courts have come to acknowledging that it might be appropriate to apply strict scrutiny to physician-patient communications was in *King*'s and *Stuart*'s dicta.[56]

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49 *Id.* at 10–11.

50 *Id.* at 27.

51 *Id.* at 28.

52 Stuart v. Camnitz, 774 F.3d 238, 248 (4th Cir. 2014) ("heightened intermediate" scrutiny); King v. Governor of New Jersey, 767 F.3d 216, 224 (3d Cir. 2014) ("intermediate" scrutiny).

53 *See, e.g.*, *Stuart*, 774 F.3d at 250 (citing Sorrell v. IMS Health Inc., 131 S. Ct. 2653, 2667–68 (2011)). The Third Circuit applied essentially the same test when it upheld the statutory banning of conversion therapy: "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.'" *King*, 767 F.3d at 235 (citing Central Hudson Gas & Elec. Corp. v. Pub. Servs. Comm'n of N.Y., 447 U.S. 557, 566 (1980)). Whether there is a significant difference between a measure "drawn to achieve [a] substantial state interest" (*Stuart*) and a measure that is "not more extensive than necessary to serve that interest" (*King*), is arguable.

54 *King*, 767 F.3d at 235.

55 *Stuart*, 774 F.3d at 256.

56 *King*, 767 F.3d at 235; *Stuart,* 774 F.3d at 248.

Although the *King* court concluded that strict scrutiny was not applicable to the state statute banning conversion therapy for minors because the state had an "interest" in protecting its citizens from "ineffective or harmful professional services," it noted that a "state law may be subject to strict scrutiny if designed to advance an interest unrelated to client protection."[57] While the *Stuart* court similarly refused to apply strict scrutiny to the ultrasound statute, it did so after concluding that "the outcome is the same whether a special commercial speech inquiry or a stricter form of judicial scrutiny is applied."[58]

If strict scrutiny had been applied to state statutes restricting physician speech, it is possible that the Florida gun law, the Texas ultrasound law, and the South Dakota mandated abortion information laws would have been overturned because the states in each case might have had difficulty proving that the laws were enacted to protect citizens from "ineffective" or "harmful" professional services, as opposed to promoting a certain governmental viewpoint.

IV. A STANDARD OF STRICT SCRUTINY SHOULD BE APPLIED TO PHYSICIAN-PATIENT COMMUNICATIONS

There is no question that good communication between physicians and patients is valuable and should be encouraged; it can improve treatment adherence[59] and can be associated with lower malpractice risk.[60] There is also no question that physicians are already constrained in the manner in which they communicate with their patients by their professional ethical obligations, as well as by the "privilege of self-regulation granted by society."[61] The question raised by the cases discussed in this article is the extent to which the First Amendment prevents the government from imposing additional regulations on the content of physicians' communications with their patients.

The argument that should be raised was actually made in *Conant v. Walters*, an earlier Ninth Circuit decision involving a federal policy that would have revoked the Drug Enforcement Administration (DEA) licenses of physicians who recommended the use of marijuana by their patients.[62] Due to the special relationship between physicians and patients, one that has as its foundation in confidence and trust, the court concluded that this type of professional speech should be entitled "to the

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57 *King*, 767 F.3d at 235.

58 *Stuart*, 774 F.3d at 248 (citing *Sorrell*, 131 S. Ct. at 2667).

59 Scott A. Bull et al., *Discontinuation of Use and Switching of Antidepressants: Influence of Patient-Physician Communication*, 288 JAMA 1403 (2002).

60 Wendy Levinson et al., *Physician-Patient Communication: The Relationship with Malpractice Claims Among Primary Care Physicians and Surgeons*, 277 JAMA 553 (1997).

61 LOIS SNYDER, AMERICAN COLLEGE OF PHYSICIANS ETHICS MANUAL 9–10 (6th ed. 2012).

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

strongest protection our Constitution has to offer."[63]

The Fourth Circuit made a similar observation when it rejected North Carolina's statute that forced physicians to describe ultrasound results to women undergoing abortions.[64] Inserting the state's directives into the communications between a physician and her patient would undermine the trust upon which that relationship is based.[65]

Physician communication is unlike other communication because of the nature of the physician-patient relationship. Patients are generally in emotionally vulnerable positions when they consult with physicians, and physicians are both ethically and legally obliged to keep their discussions with patients confidential. Patients' ability to make informed decisions about their health is dependent on physicians' abilities to communicate with them in a manner in accordance with their professional training. A physician's obligation to provide accurate and complete information is already constrained by both the potential for malpractice suits by her patients and potential disciplinary action by state medical boards. Within those parameters, a physician's right to communicate with her patients should receive wide latitude. As a result, a better approach to the regulation of physician-patient communication would be to apply strict scrutiny to any governmental regulation that aims to restrict physicians' communications with their patients.

CONCLUSION

The extent to which communications between physicians and their patients should be protected by the First Amendment has been the subject of several recent appellate court opinions. While at least two district courts concluded that such communications were deserving of the highest level of protection—, any regulations should be subject to strict scrutiny—no appellate courts have agreed with that position. Rather, three varying standards of protection have been suggested by the appellate courts: The Ninth and Eleventh Circuits have concluded

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63 *Id.* at 636–37 (9th Cir. 2002) (The court concluded: "An integral component of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients. That need has been recognized by the courts through the application of the common law doctor-patient privilege. The doctor-patient privilege reflects the imperative need for confidence and trust inherent in the doctor-patient relationship . . . . Being a member of a regulated profession does not, as the government suggests, result in a surrender of First Amendment rights. To the contrary, professional speech may be entitled to the strongest protection our Constitution has to offer.") (citations and internal quotation marks omitted).

64 Stuart v. Camnitz, 774 F.3d 238 (4th Cir. 2014).

65 *Id.* at 253–54 (The court noted: "The patient seeks in a physician a medical professional with the capacity for independent medical judgment that professional status implies. The rupture of trust comes with replacing what the doctor's medical judgment would counsel in a communication with what the state wishes told. It subverts the patient's expectations when the physician is compelled to deliver a state message bearing little connection to the search for professional services that led the patient to the doctor's door.").

that such communications are more like conduct than speech and as such are deserving of minimal protection.[66] The Fifth and Eighth Circuits have concluded that the communications should be treated like ordinary commercial speech and as such, any required restrictions should be upheld as long as they result in the conveyance of information that is "truthful, non-misleading and relevant."[67] Finally, the Third and Fourth Circuits, while finding the communications to be a type of commercial speech, concluded that they should receive heightened protection; therefore, any regulations of such communications based on their content should be subject to "intermediate scrutiny."[68]

None of the appellate courts have accepted physicians' arguments that, due to the special relationship between physicians and their patients, as well as the professional ethical obligations on physicians that already constrain the manner in which they communicate with their patients, any restrictions on physicians' discussions with their patients should be subject to strict scrutiny. Yet that is precisely what this author suggests.

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66 *See supra* Part II.C.
67 *See supra* Part II.B.
68 *See supra* Part II.D.