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If it Quacks Like a Duck: Reviewing Health Care Providers' Speech Restrictions Under the First Prong of Central Hudson

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If it Quacks Like a Duck: Reviewing Health Care Providers' Speech Restrictions Under the First Prong of Central Hudson

Keywords

Medical personnel & patient -- Law & legislation, Commercial speech, Health care industry -- Law & legislation, United States. Constitution. 1st Amendment, All Other Health and Personal Care Stores, Central Hudson Gas & Electric Corp. v. Public Service Commission of New York (Supreme Court case), Freedom of speech -- United States, Sexual reorientation programs -- Law & legislation, Medical laws & legislation -- United States

IF IT QUACKS LIKE A DUCK: REVIEWING HEALTH CARE PROVIDERS' SPEECH RESTRICTIONS UNDER THE FIRST PRONG OF *CENTRAL HUDSON*

SHAWN L. FULTZ*

The First Amendment protects the speech of health care providers. This protection can limit states' abilities to protect patients from harmful therapies involving speech, such as sexual orientation change efforts. Because providers' speech is more similar to commercial speech than traditional political discourse, it is possible to create a First Amendment review analysis that better balances states' police powers with providers' First Amendment rights. Under a "single-prong" approach, the first prong of Central Hudson can be used to identify quackery, which is analogous to false or misleading commercial speech and would therefore be outside the protection of the First Amendment. Because health care must be tailored to individual patients, restrictions on speech that survive the first prong of Central Hudson would be subject to strict scrutiny in order to leave the therapeutic decision to the provider and her patient, and maintain consistency with current jurisprudence.

This Comment examines litigation from California's attempted ban on sexual orientation change therapy to illustrate the conflicts created by the current approach to First Amendment review of health care provider speech. This Comment then demonstrates the benefit of the proposed single-prong approach, including how it simultaneously protects patients from harm while protecting health care providers' speech.

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"I felt dirty about [my homosexual orientation]. I felt like a cancer with a boil that someone is trying to lance out. I felt and still feel like a failure. . . . The counseling helped for a while but after that it reinforced the self-loathing and internalized homophobia. . . . It increased my self-loathing greatly."¹

"These practices have no basis in science or medicine and they will now be relegated to the dustbin of quackery"²

1. Ariel Shidlo & Michael Schroeder, *Changing Sexual Orientation: A Consumers' Report*, 33 PROF'L PSYCHOL.: RES. & PRAC. 249, 254 (2002) (alterations in original) (quoting one client who had undergone conversion therapy).

2. See Wyatt Buchanan, *State Bans Gay-Repair Therapy for Minors*, S.F. GATE, Sept. 29, 2012, <http://www.sfgate.com/news/article/State-bans-gay-repair-therapy-for-minors-3906032.php> (quoting California Governor Jerry Brown's statement to the San Francisco Chronicle on signing Senate Bill 1172 banning conversion therapy).

INTRODUCTION

Conversion therapy, a type of sexual orientation change therapy,³ refers to talk therapy directed at changing the sexual orientation of lesbian, gay, bisexual, transgender, or queer (LGBTQ) clients to a heterosexual orientation. A procedure advocated for largely by conservative religious branches,⁴ scientific evidence demonstrates it to be harmful as well as ineffective at changing an individual's sexual orientation.⁵ These concerns prompted California to enact Senate Bill 1172 ("SB 1172"),⁶ making it unprofessional conduct for mental health providers to try to change the sexual orientation of LGBTQ youth.⁷ This statute was immediately challenged in two separate suits on grounds that it restricted providers' freedom of speech.⁸ Both cases were appealed to the U.S. Court of Appeals for the Ninth Circuit after judges in the same district court issued conflicting opinions: a preliminary injunction against SB 1172 was issued in *Welch v. Brown*,⁹ but not in *Pickup v. Brown*,¹⁰ decided a day later.

The different outcomes in the district court cases resulted primarily from whether SB 1172 was considered a content-based restriction on health care providers' speech requiring strict scrutiny, as in *Welch*,¹¹ or as a restriction on professional conduct subject to rational basis review, as in *Pickup*.¹² The Ninth Circuit, in a consolidated appeal, held that SB 1172 regulated professional conduct and not speech and was therefore only subject to rational

3. See Karolyn Ann Hicks, Comment, "Reparative" Therapy: Whether Parental Attempts To Change a Child's Sexual Orientation Can Legally Constitute Child Abuse, 49 AM. U. L. REV. 506, 515 (1999) (discussing other approaches to changing sexual orientation, such as electrical shock therapy, chemical aversive therapy, and hormone therapy).

4. See Buchanan, *supra* note 2 (stating that proponents of the controversial therapy are often religious, prompting gay rights activists to refer to the therapy as an attempt to "pray away the gay").

5. See *infra* Part I.D.

6. 2012 Cal. Stat. ch. 835 (codified at CAL. BUS. & PROF. CODE § 865 (West 2013)).

7. CAL. BUS. & PROF. CODE § 865.2. The statute only addressed sexual orientation change efforts targeted at minors in order to protect this vulnerable group from this dangerous therapy. *Id.* § 865.1.

8. Complaint, *Pickup v. Brown*, No. 2:12-CV-02497-KJM-EFB, 2012 WL 6021465, (E.D. Cal. Dec. 4, 2012) (No. 2:12-CV-02497), 2012 WL 5981507; Complaint for Injunctive and Declaratory Relief, *Welch v. Brown*, 907 F. Supp. 2d 1102, (E.D. Cal. 2012) (No. CIV. 212-2484), 2012 WL 4762008.

9. *Welch v. Brown*, 907 F. Supp. 2d 1102, 1122 (E.D. Cal. 2012), *rev'd sub nom.* *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013).

10. *Pickup v. Brown*, No. 2:12-CV-02497-KJM-EFB, 2012 WL 6021465 (E.D. Cal. Dec. 4, 2012), *aff'd*, 728 F.3d 1042 (9th Cir. 2013).

11. *Welch*, 907 F. Supp. 2d at 1109, 1111.

12. *Pickup*, 2012 WL 6021465, at *9.

basis review.¹³ In part because this distinction between conduct and speech is often dispositive, this Comment advocates for a new approach to First Amendment review of laws affecting health care providers' speech. It argues that the First Amendment does not bar states from protecting their citizens from quackery—health care practices that lack scientific support.¹⁴ By applying a similar approach to what the Supreme Court uses to justify a lesser level of First Amendment protection for commercial speech, this Comment demonstrates that courts can weed out quackery while protecting legitimate health care speech. By first determining whether the restricted speech is analogous to truthful and non-misleading commercial speech before applying strict scrutiny, courts will be able to use this “single-prong” approach to protect freedom of speech while also balancing the states' interest in preventing harm to citizens.

Part I explains the states' role in regulating health care and explores the current approach to First Amendment protection of speech. This exploration focuses on health care providers and the commercial speech doctrine. This part also introduces conversion therapy and the California statute, SB 1172.

Part II demonstrates that under the current approach, the California statute is likely to be ruled unconstitutional if considered a restriction on speech—a prototypical example of the flaws that exist with the current approach. Thereafter, it fashions an approach that both protects freedom of speech and patients by applying to the health care field the reasoning and concepts the Supreme Court has used in connection to commercial speech. Applying the first prong of the test articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,¹⁵—determining whether the restricted speech is truthful and non-misleading—and then applying strict scrutiny, will enable courts to weed out quackery. Subsequently, this Part argues that SB 1172 would be a constitutional restriction on speech under this proposed single-prong approach. Finally, this Comment concludes that the proposed single-prong approach provides sufficient protection for this special category of speech without trampling the states' interest in protecting their citizens from harm.

13. *Pickup*, 728 F.3d at 1056. The decision ultimately reversed the District Court in *Welch v. Brown* but upheld *Pickup v. Brown*.

14. For a larger discussion of the definition of quackery, see Stephen Barrett, *Quackery: How Should It Be Defined?*, QUACKWATCH, <http://www.quackwatch.org/01QuackeryRelatedTopics/quackdef.html> (last updated Jan. 17, 2009).

15. 447 U.S. 557 (1980).

I. BACKGROUND

While much of health care is regulated through the federal government's commerce and spending powers,¹⁶ this Comment focuses on state-level regulations of health care providers. This Part explains the role of states in the regulation of health care to protect individuals from harm, as well as the role of the First Amendment in commercial speech and in the health care setting. Finally, this Part discusses conversion therapy, California's attempt at banning sexual orientation change therapies through SB 1172, and the related legal challenges.

A. *States Regulate Health Care Under Their Police Powers*

The states' police powers provide the authority to enact and enforce measures to protect the health, safety, and well-being of their citizens.¹⁷ States have a long history of using this power to regulate medicine in order to protect the public.¹⁸ States have used this police power to regulate professions, including health care, predominately through licensure.¹⁹ In *Watson v. Maryland*,²⁰ decided in 1910, the Supreme Court recognized the states' interest in regulating health care.²¹ In affirming a conviction for practicing medicine without a license, the Court noted that regulating a profession for the protection of the public health was a valid exercise of state police powers.²² States can require training and set specific educational standards as conditions for licensure.²³ This control over the

16. See generally *Abigail Alliance for Better Access to Developmental Drugs v. Eschenbach*, 495 F.3d 695, 703–06 (D.C. Cir. 2007) (detailing the history of drug regulation in the United States, culminating in the Food, Drug and Cosmetic Act of 1938 and subsequent amendments). Only when “interstate commerce began its great expansion after the Civil War did the need for Federal rule-making become widely realized.” *Id.* at 704; see also *Gonzales v. Oregon*, 546 U.S. 243, 250–51 (2006) (discussing the federal regulation of medications under the Controlled Substances Act).

17. 39 AM. JUR. 2D *Health* § 1 (2012); see also 39A C.J.S. *Health and Environment* § 1 (2012) (“[T]here is no public policy more important than the protection of citizens from practices which may injure their health.”).

18. See, e.g., *Watson v. Maryland*, 218 U.S. 173, 176 (1910) (recognizing the well-settled principle that states historically have had the power to regulate the health profession); *Pearson v. McCaffrey*, 139 F. Supp. 2d 113, 121 (D.D.C. 2001) (discussing states' authority to regulate speech within the doctor-patient relationship (citing *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977))).

19. 53 C.J.S. *Licenses* § 8 (2012).

20. 218 U.S. 173.

21. See *id.* at 176 (noting that “[d]ealing . . . with the lives and health of the people” justifies states' involvement in regulating the health profession).

22. *Id.* at 178.

23. 53 C.J.S. *Licenses*, *supra* note 19, § 8.

educational and training requirements determines who can enter a profession and allows the state to prevent harm to its citizens.²⁴

In addition to controlling who can enter a profession, states' police powers allow restrictions on licensed professionals when necessary to protect the welfare and safety of society.²⁵ In 1935, in *Semler v. Oregon State Board of Dental Examiners*,²⁶ the Supreme Court upheld state sanctions against a dentist for advertising.²⁷ The Court noted that states' authority to regulate the medical profession through licensing and licensing boards was "not open to dispute."²⁸ The Court further held that ensuring the competence of individual dentists as well as protecting the public from being "prey[ed] upon . . . through alluring promises of physical relief" was within the state's authority.²⁹ Ten years later, Justice Jackson, in his concurrence to the Court's reversal of a contempt conviction in *Thomas v. Collins*,³⁰ articulated that state licensing authority allowed the state to protect citizens from incompetent professionals.³¹

State licensing authority covers a wide range of health care professions. For example, in *Williamson v. Lee Optical of Oklahoma, Inc.*,³² the Court upheld restrictions on opticians as within the state's power, despite opticians' tangential impact on health.³³ Likewise, in *National Ass'n for Advancement of Psychoanalysis v. California Board of Psychology*,³⁴ the Ninth Circuit upheld a challenge to the licensing of psychoanalysts who only practiced talk therapy—finding licensing within the state's authority.³⁵ The court also held that state licensure

24. *See id.* § 1 (explaining that engaging in an activity without a license would be illegal).

25. *See, e.g., Albany Surgical, P.C. v. Dep't of Cmty. Health*, 572 S.E.2d 638, 642–43 (Ga. Ct. App. 2002) (noting the test for reasonableness of restrictions is the impact upon the professional and the public).

26. 294 U.S. 608 (1935).

27. *Id.* at 609, 611, 613. At this time, the Court did not recognize First Amendment protection of advertising; First Amendment protection of advertising did not develop until 1976. *See infra* Part I.C.

28. *Semler*, 294 U.S. at 611.

29. *Id.* at 612; *see also* *Watson v. Maryland*, 218 U.S. 173, 176 (1910) (stating that it is well established that states' police powers extend to the regulation of certain professions, "particularly those which closely concern the public health"); *cf. Linder v. United States*, 268 U.S. 5, 18 (1925) (recognizing that control of the medical practice is a state power rather than a federal power).

30. 323 U.S. 516 (1945).

31. *Id.* at 545 (Jackson, J., concurring).

32. 348 U.S. 483 (1955).

33. *See id.* at 490 (explaining that because eyeglass frames are used in conjunction with lenses which pertain to vision, selling such frames enters the "field of health").

34. 228 F.3d 1043 (9th Cir. 2000).

35. *Id.* at 1054.

did not violate the psychoanalysts' First Amendment rights.³⁶ The court noted that the licensing laws did not restrict the content of therapy, or the therapeutic modalities used, and were therefore content neutral.³⁷

In addition to licensure provisions, the state also has responsibility for determining professional standards.³⁸ These standards are usually set through the state licensing authority within each profession.³⁹ For health care, those standards must be "grounded in the methods and procedures of science."⁴⁰ When a professional violates the standards, the licensing authority can impose sanctions such as suspending or revoking a license in order to protect public health and safety.⁴¹ Courts have upheld the compelling interest in protecting the quality of health care.⁴² Like the licensing provisions that can prevent an incompetent provider from entering the profession, sanctioning providers who have violated professional standards may prevent future harm. However, the sanctions usually come after at least some harm has already occurred to a client or patient.⁴³

Aside from regulating professionals through licensure and professional standards, courts have recognized the role of states in directly regulating medical practice. For example, in *Oregon v. Ashcroft*,⁴⁴ the Ninth Circuit upheld an injunction preventing the U.S. Attorney General from enforcing an interpretative federal rule stating that physicians who assisted suicides consistent with state law

36. *See id.* (noting that speech used to treat patients received some First Amendment protection but was not "immune from regulation").

37. *See id.* at 1055–56 (explaining additionally that no speech is being suppressed because of its message).

38. *See, e.g.,* *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 460 (1978) (noting the state's strong interests in regulating the conduct of lawyers (citing *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955))).

39. *See, e.g.,* *Semler v. Or. State Bd. of Dental Exam'rs*, 294 U.S. 608, 611 (1935) (reciting the well-accepted proposition that a state may regulate certain professional requirements, such as requiring licenses or establishing an administrative board).

40. *Armstrong v. State*, 989 P.2d 364, 380 (Mont. 1999) (explaining that the legislature has "no interest, much less a compelling one" in prohibiting a medical practice the medical authority has deemed without risk).

41. 53 C.J.S. *Licenses*, *supra* note 19, § 82 (discussing a states' discretionary power to impose sanctions through licensing authorities).

42. *See, e.g.,* *Caddy v. State*, 764 So. 2d 625, 629 (Fla. Dist. Ct. App. 2000) (declaring the State's compelling interest in "protecting the mental health of its citizens" and "protecting the integrity of the medical profession").

43. Another approach to protecting the quality of health care that is only applicable after the harm has occurred is tort law. *See* ROBERT C. POST, *DEMOCRACY, EXPERTISE, AND ACADEMIC FREEDOM: A FIRST AMENDMENT JURISPRUDENCE FOR THE MODERN STATE* 53 (2012) (stating that malpractice is one "vehicle for law to incorporate and enforce pertinent disciplinary standards").

44. 368 F.3d 1118 (9th Cir. 2004), *aff'd sub nom.* *Gonzalez v. Oregon*, 546 U.S. 243 (2006).

were in violation of the Controlled Substance Act.⁴⁵ The court explained that physician-assisted suicide is a medical practice that is appropriately regulated by the state.⁴⁶ The court stated that the principle of federalism requires state, not federal, direct control over medicine.⁴⁷ In affirming the Ninth Circuit, the Supreme Court in *Gonzales v. Oregon*⁴⁸ reiterated that the principle of federalism gives states “great latitude” in protecting their citizens.⁴⁹ Both federalism and the police powers of licensure and professional standards provide states with multiple tools to regulate health care.

B. Health Care Providers’ Speech Is Protected by the First Amendment

The First Amendment to the U.S. Constitution prohibits the government from restricting the freedom of speech.⁵⁰ However, the Supreme Court has not interpreted this as a blanket prohibition on speech restrictions and treats various types of speech differently. For example, truthful speech proposing a commercial transaction receives an intermediate level of scrutiny.⁵¹ On the other hand, strict scrutiny is applied when examining the constitutionality of a restriction on an individual’s speech, often considered potential political speech, requiring that any restriction be narrowly tailored and further a compelling government interest.⁵² This section discusses the role of the First Amendment in protecting health care providers’ speech. Courts treat speech that occurs between a health care provider and a patient in the course of providing professional services like the speech of individuals.

In relation to individuals’ speech, government restrictions based on content or viewpoint are rarely constitutional; it is well established

45. *Id.* at 1120 (referring to the Controlled Substances Act of 1970, 21 U.S.C. §§ 801–904 (2000)).

46. *See id.* at 1126 (citing *Washington v. Glucksberg*, 521 U.S. 702 (1997), a case in which the Supreme Court refused to find a liberty interest protected by the Due Process Clause in committing suicide and, as such, a state ban on assisted suicide was upheld as being rationally related to a government interest).

47. *See id.* at 1124 (“The Supreme Court has made the constitutional principle clear . . .”).

48. 546 U.S. 243 (2006).

49. *Id.* at 270 (internal quotation marks omitted). The Court also noted Congressional affirmation of the principle that regulation of medical practice is under state authority when it drafted the Controlled Substances Act’s preemption provision. *Id.* at 270–71.

50. U.S. CONST. amend. I.

51. *See infra* Part I.C.

52. *See, e.g.*, *Consol. Edison Co. of N.Y., Inc. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 530, 532, 540 (1980) (applying strict scrutiny to a regulation that forbids privately owned public utility companies from including political inserts in its customers’ bills).

that the government cannot restrict speech because of its message.⁵³ The Supreme Court has even described the prohibition on government restriction of speech because of its content as “axiomatic.”⁵⁴ For example, in *Rosenberger v. Rector & Visitors of University of Virginia*,⁵⁵ the Supreme Court examined the constitutionality of the university’s refusal to reimburse a student organization for publication of a newspaper because of the newspaper’s religious nature.⁵⁶ The Court found this refusal constituted a viewpoint-based restriction because the university reimbursed publications that discussed religion as a subject but not publications that were religiously oriented.⁵⁷ The Court held that the university’s withholding of funds to the student organization violated the students’ freedom of speech.⁵⁸ It also noted that restrictions that target a particular viewpoint are “presumed to be unconstitutional.”⁵⁹ In general, the government cannot restrict speech based on the opinion or perspective of the speaker.⁶⁰ On the other hand, reasonable time, place, and manner restrictions on speech are permissible,⁶¹ provided they are narrowly tailored to serve a legitimate state interest.⁶²

Despite this general rule, the government may have some leeway in regulating speech that is “incidental to the conduct of [a] profession.”⁶³ Justice White defined a professional as someone who serves an individual client by exercising judgment on that client’s behalf.⁶⁴ The individual relationship between the professional and that individual client is what permits regulation of professional speech.⁶⁵ Without this relationship, the speech could not be

53. See *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (distinguishing between regulations that restrict activity because of its message and regulations that limit the “time, place and manner”).

54. *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828 (1995) (citing *Police Dep’t v. Mosley*, 408 U.S. 92, 96 (1972)).

55. 515 U.S. 819.

56. *Id.* at 822–23.

57. *Id.* at 831.

58. *Id.* at 837.

59. *Id.* at 828 (citing *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 641–43 (1994)).

60. See *id.* at 829 (finding that settled principles of law “provide [a] framework forbidding the State to exercise viewpoint discrimination”).

61. See *Grayned v. City of Rockford*, 408 U.S. 104, 115 (1972) (giving the example that the government could prevent two parades from marching at the same time).

62. See *id.* at 116–17 (“The crucial question is whether the manner of expression is basically incompatible with the normal activity of a particular place at a particular time.”).

63. *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring in judgment).

64. *Id.*

65. *Id.*

regulated as “incidental” to the professional conduct and would be subject to full First Amendment protection.⁶⁶

Despite this potential leeway, most attempts at restricting health care providers’ speech have not survived constitutional challenge. In 1945, Justice Jackson’s concurrence first discussed the protection of health care providers’ speech in *Thomas v. Collins*,⁶⁷ where the Court overturned a contempt conviction.⁶⁸ Justice Jackson noted that while states could use their licensing authority to limit who could enter a profession, they could not limit what those people said in their professional capacity.⁶⁹ Nevertheless, legislatures have repeatedly tried to regulate health care provider speech on certain controversial topics where there is legitimate scientific debate, including the medicinal use of marijuana, firearms, and abortion.⁷⁰ While courts have often upheld restrictions on health care provider speech related to abortion, they have not taken the same approach with speech on the other topics.

1. *Medical marijuana*

In 1996, in response to the legalization of medical marijuana in Arizona and California, the federal government issued a policy stating that physicians “recommending or prescribing” medical marijuana would lose their authority to prescribe controlled substances.⁷¹ This policy was challenged on First Amendment grounds in federal courts in both the District of Columbia and California, and concluded with different outcomes.

In *Pearson v. McCaffrey*,⁷² the U.S. District Court for the District of Columbia upheld the federal policy as not infringing on physicians’ First Amendment right to freedom of speech.⁷³ The court ruled that this was not a content-based speech restriction because physicians were free to discuss the benefits of medical marijuana with patients.⁷⁴

66. *Id.*; see also *infra* notes 240–241 and accompanying text.

67. 323 U.S. 516 (1945).

68. See *id.* at 540 (determining that the lower court’s contempt order was inappropriate because the Texas statute that the petitioner had allegedly violated was applied in a way that impermissibly restrained free speech and assembly).

69. *Id.* at 544 (Jackson, J., concurring) (“[B]ut I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought.”).

70. The importance of this fact will be addressed in Part II.B *infra*.

71. BARRY R. MCCAFFREY, OFFICE OF NAT’L DRUG CONTROL POLICY, THE ADMINISTRATION’S RESPONSE TO THE PASSAGE OF CALIFORNIA PROPOSITION 215 AND ARIZONA PROPOSITION 200 (1996), available at <https://www.ncjrs.gov/txtfiles/215rel.txt>.

72. 139 F. Supp. 2d 113 (D.D.C. 2001).

73. *Id.* at 116, 119–22, 125.

74. See *id.* at 120 (relying on the government’s position during oral arguments that federal law did not prohibit discussing medical marijuana).

The court found the act of recommending was conduct akin to prescribing because, under the law of some states, a physician's recommendation could be used to purchase medical marijuana.⁷⁵ The court further justified the distinction between speech discussing the benefits of marijuana use and the act of recommending marijuana by pointing to the long history of state regulation of medicine,⁷⁶ the state's authority to reasonably regulate speech that is part of the practice of medicine,⁷⁷ and the lack of First Amendment protection for speech used to commit a crime.⁷⁸

In *Conant v. McCaffrey*,⁷⁹ the district court issued a permanent injunction against the federal government's policy⁸⁰ reasoning that a physician's recommendation to use marijuana could potentially result in the patient petitioning the government to legalize marijuana.⁸¹ The court also noted the importance of protecting patients' ability to participate in the "marketplace of ideas," including discussions about the regulation of marijuana.⁸² On appeal, the Ninth Circuit affirmed in *Conant v. Walters*.⁸³ In addition to reiterating the First Amendment analysis, the appellate court also stressed the importance of open communication between patients and physicians.⁸⁴ Rather than using a history of state regulation to justify restrictions, the Ninth Circuit instead stated "professional speech may be entitled to 'the strongest protection our Constitution has to offer.'"⁸⁵

2. Firearms

In 2011, a group of physicians challenged Florida's Firearm Owners' Privacy Act, a law restricting physicians' ability to inquire

75. *Id.* at 120–21.

76. *Id.* at 121 (citing *Whalen v. Roe*, 429 U.S. 589, 603 n.30 (1977)).

77. *Id.* (citing *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 884 (1992) (plurality opinion)).

78. *See id.* (summarizing cases that hold that the First Amendment is not a criminal defense). Despite the state law authorizing use of medical marijuana, its use is still a federal crime under the Controlled Substances Act. *Id.*

79. No. C 97-00139 WHA, 2000 WL 1281174 (N.D. Cal. Sept. 7, 2000), *aff'd sub nom.* *Conant v. Walters*, 309 F.3d 629 (9th Cir. 2002).

80. *Id.* at *16.

81. *See id.* at *14–15 (describing several doctor recommendations that could lead to a legitimate response including enrolling in an experimental trial or traveling to a country where marijuana use is legal).

82. *See id.* at *14 (explaining how restricting the capability of a doctor to communicate with a patient about medical marijuana prevented the patient from participating in the public discourse on the subject).

83. 309 F.3d 629, 639 (9th Cir. 2002).

84. *See id.* at 636 (referencing the doctor-patient privilege recognized in the Federal Rules of Evidence).

85. *Id.* at 637 (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995)).

about ownership of firearms.⁸⁶ The U.S. District Court for the Southern District of Florida rejected the state's argument that the law protected the Second Amendment rights of gun owners.⁸⁷ Instead, the court's decision focused on the law's impact on the free speech rights of health care providers.⁸⁸ In granting the preliminary injunction against enforcement of the relevant act, the court identified the value of not restricting speech within the doctor-patient relationship.⁸⁹ When later granting the permanent injunction, Judge Cooke again observed that the restriction was not a regulation of speech incidental to professional conduct but rather a restriction on truthful, non-misleading speech.⁹⁰ Because the Supreme Court had applied strict scrutiny in *Sorrell v. IMS Health, Inc.*⁹¹ to evaluate a content-based restriction on pharmaceutical companies' commercial speech, the district court had applied strict scrutiny to the Firearm Owners' Privacy Act at the preliminary injunction stage.⁹² Judge Cooke went on to state that the level of scrutiny to apply to professional speech is "an unsettled question of law."⁹³ However, in that case the level of scrutiny did not matter because the Florida law failed under either level of scrutiny because the state had not demonstrated a problem that needed to be addressed and because the statute did not address the type of problem postulated.⁹⁴

3. *Abortion*

A larger area of case law exploring the First Amendment protection of health care providers' speech is in regard to abortion.

86. *Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367, 1373 (S.D. Fla. 2011).

87. *Id.* at 1374 (holding that the Second Amendment right to "keep arms" was categorically distinct from the rights at issue in Florida's Firearm Owner's Privacy Act (citing *District of Columbia v. Heller*, 554 U.S. 570, 582–83 (2008))).

88. *See id.* at 1374, 1377–83 (applying strict scrutiny to determine plaintiffs' likelihood of success on the merits).

89. *See id.* at 1374 (emphasizing the importance of "the free flow of truthful, non-misleading information within the doctor-patient relationship" (citing *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011); *Trammel v. United States*, 445 U.S. 40, 51 (1980); *Conant*, 309 F.3d at 636)).

90. *Wollschlaeger v. Farmer*, 880 F. Supp. 2d 1251, 1262 (S.D. Fla. 2012). Regulations of speech incidental to professional conduct "govern the access or practice of a profession; they do not burden or prohibit truthful, non-misleading speech within the scope of the profession." *Id.*

91. 131 S. Ct. 2653 (2011); *see also infra* notes 167–175 and accompanying text (discussing *Sorrell*).

92. *Wollschlaeger*, 880 F. Supp. 2d at 1262.

93. *See id.* at 1262–63 (noting that in *Gentile v. State Bar of Nev.*, 501 U.S. 1030, 1074 (1991), the Supreme Court held that a lawyer's speech related to pending cases could receive less protection than freedom of speech by the press).

94. *Id.* at 1264–67.

Here the Supreme Court has been more deferential to state restrictions, sometimes by reframing the constitutional question so as to avoid triggering review under the First Amendment, and sometimes by simply dismissing the argument without significant analysis.⁹⁵

In *Rust v. Sullivan*,⁹⁶ the Supreme Court upheld federal restrictions on family-planning funds awarded under Title X of the Public Health Service Act.⁹⁷ By casting the case as simply a restriction on the allowable scope of a government-funded project, the Court avoided addressing whether the restriction violated the physicians' freedom of speech.⁹⁸ Under the statute, health care providers employed under the Title X program remained free to advocate for, recommend, or provide abortion services outside the Title X project.⁹⁹ However, the Court avoided examining whether the government had committed viewpoint discrimination by funding one viewpoint but not another.¹⁰⁰

Further, the Court has been reluctant to address First Amendment implications regarding the doctor-patient relationship. The Court stated that the Title X program did not infringe upon the doctor-patient relationship enough to require addressing whether that relationship enjoyed First Amendment protection when funded by the government.¹⁰¹ The Court relied partly on the argument that the doctor-patient relationship within the Title X program was not "sufficiently all encompassing" as to replace the traditional doctor-patient relationship.¹⁰² In his dissent, Justice Blackmun objected to imposing restrictions on speech within the doctor-patient relationship, even when the relationship was limited to family-planning services.¹⁰³ In addition to citing the physicians' ethical responsibility to offer all appropriate therapeutic options,¹⁰⁴ he highlighted the "unique relationship of trust" that occurs between

95. See *infra* notes 96–111 and accompanying text (outlining cases that have taken these approaches).

96. 500 U.S. 173 (1991).

97. *Id.* at 203 (referring to Pub. L. 91-572, § 6(c), 84 Stat. 1506 (1970) (codified as amended at 42 U.S.C. §§ 300 to 300a-6 (2012))).

98. See *id.* at 194 ("This is not a case of the Government 'suppressing a dangerous idea,' but of a prohibition on a project grantee or its employees from engaging in activities outside of the project's scope.").

99. See *id.* at 198–99 (differentiating between the employees' time working on the project, and their time as private citizens).

100. See *id.* at 194 (explaining that this might invalidate multiple governmental programs).

101. *Id.* at 200.

102. *Id.*

103. *Id.* at 213, 218–19 (Blackmun, J., dissenting).

104. See *id.* at 214 (referencing two medical societies and a presidential commission).

patients and doctors.¹⁰⁵ He went on to remind the majority of its previous warnings that speech restrictions on the practice of medicine “cannot endure.”¹⁰⁶

The Supreme Court has also upheld compelled speech related to abortion. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*,¹⁰⁷ the Court upheld a provision of a law that required physicians to provide informed consent as specified by the State.¹⁰⁸ The Court dismissed the physicians’ First Amendment claim against compelled speech because the impacted speech was “part of the practice of medicine, subject to reasonable licensing and regulation by the State.”¹⁰⁹

The same reasoning was later used by the U.S. Court of Appeals for the Eighth Circuit to uphold a South Dakota abortion statute requiring physicians to disclose an increased statistical risk of suicide and suicide attempts in women who undergo abortions.¹¹⁰ The Eighth Circuit noted that the First Amendment would protect individuals from compelled speech, but would not protect physicians compelled to give “truthful, nonmisleading information,” even if that information might make a patient choose to forego an abortion.¹¹¹ The court described this requirement as a valid use of regulatory authority and not compelled speaking of the “State’s ideological message.”¹¹² The only way to show the speech violated the First Amendment would be if it was untruthful, misleading, or irrelevant to deciding whether to have an abortion.¹¹³

105. *See id.* at 218 (noting that patients put “complete confidence, and often their very lives, in the hands of” physicians).

106. *Id.* (citing *Planned Parenthood of Cent. Mo. v. Danforth*, 428 U.S. 52, 67 n.8 (1976)).

107. 505 U.S. 833 (1992).

108. *See id.* at 881–87 (plurality opinion) (analyzing the informed consent requirement and determining it was not an undue burden on constitutionally protected abortion rights).

109. *Id.* at 884. Other courts have noted the lack of emphasis the Supreme Court placed on this argument. *See, e.g., Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575 (5th Cir. 2012) (“The three sentences with which the Court disposed of the First Amendment claims are, if anything, the antithesis of strict scrutiny.”); *Summit Med. Ctr. of Ala., Inc. v. Riley*, 274 F. Supp. 2d 1262, 1269 (M.D. Ala. 2003) (mentioning the “brief fashion” with which the Supreme Court dismissed the First Amendment claim).

110. *See Planned Parenthood Minn., N.D., S.D. v. Rounds*, 686 F.3d 889, 893 (8th Cir. 2012) (en banc) (finding that, as established by *Casey*, the state’s “suicide advisory” rule is subject to “reasonable licensing and regulation by the state”).

111. *Id.* Interestingly, the court requires more than eleven pages to explain why the disclosure is truthful and non-misleading. *Id.* at 893–905.

112. *Id.* at 893.

113. *Id.*

Governmental efforts to restrict health care providers' speech have consistently failed strict scrutiny.¹¹⁴ However, for speech related to abortion, courts have avoided analyzing the health care providers' speech under the First Amendment or found other ways to uphold statutes compelling or restricting speech.

C. *The Commercial Speech Doctrine*

Unlike individuals' speech, commercial speech has only received First Amendment protection for approximately forty years.¹¹⁵ Furthermore, it receives less First Amendment protection than non-commercial speech.¹¹⁶ In health care, the commercial speech doctrine has been applied primarily in the area of advertising.¹¹⁷

The first case to provide First Amendment protection to commercial speech was the 1976 case *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*¹¹⁸ There, the Court examined the constitutionality of a Virginia statute that designated advertising prescription drug prices as unprofessional conduct.¹¹⁹ The Court rejected Virginia's claim that advertising drug prices would lead to cost-cutting measures and endanger customers, deeming the claim "highly paternalistic."¹²⁰ The Court went on to note that the First Amendment prevents the government from choosing between the "dangers of suppressing information, and the dangers of its misuse if it is freely available."¹²¹ In saying this, the Court established that the First Amendment protects commercial speech because customers can only make the best decisions when they are well informed.¹²² At the same time, the Court noted that

114. Except for the medical marijuana cases and *Rust v. Sullivan*, which involved federal laws, these cases were challenges to states' restrictions on speech. The Supreme Court has not applied the First Amendment differently when restrictions are based on states' police powers as compared to federal law.

115. The Court's earlier approach to commercial speech failed to provide any First Amendment protection whatsoever. See *Valentine v. Chrestensen*, 316 U.S. 52, 54–55 (1942) ("We are equally clear that the Constitution imposes no such restraint on government as respects purely commercial advertising.").

116. See *infra* notes 125–135 and accompanying text (detailing the current First Amendment commercial speech doctrine).

117. In fact, the most recent pronouncement from the Court in the realm of commercial speech came in the health care field, in which the Court struck down a Vermont statute restricting the sale, disclosure and use of pharmacy records for marketing purposes. *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011).

118. 425 U.S. 748 (1976).

119. *Id.* at 752–54.

120. *Id.* at 770.

121. *Id.*

122. See *id.* (explaining that by providing open access to non-harmful information, people will then have the necessary information they need to pursue their own best interests).

commercial speech could be regulated through time, place, and manner restrictions and likely could be restricted if the speech was deceptive.¹²³ In his concurrence, Justice Stewart elaborated that there is less tolerance for inaccurate information in commercial speech because, unlike the press which may need to rely on multiple sources to verify a statement, a commercial advertiser is well-positioned to provide accurate information.¹²⁴

The current approach to First Amendment protection of commercial speech was articulated in *Central Hudson Gas & Electric Corp. v. Public Service Commission of New York*,¹²⁵ where the Court overturned a New York Public Service Commission's regulation that prohibited advertising by an electrical utility.¹²⁶ The Court justified subjecting restrictions of commercial speech to a lower level of constitutional scrutiny because of the "common-sense distinction" between commercial and non-commercial speech and because commercial transactions are traditionally regulated by the government.¹²⁷ In the commercial arena, the First Amendment balances the listener's need for information against the government's interest in regulating the commercial speaker.¹²⁸

In *Central Hudson*, the Court devised a four-prong analysis for restrictions on commercial speech. First, to receive protection, the commercial speech must not be false, misleading, or propose an illegal transaction.¹²⁹ Misleading commercial speech can be banned because it is "more likely to deceive the public than to inform it."¹³⁰ The second prong requires the government to demonstrate a substantial interest in regulating the commercial speech.¹³¹ To survive the third prong, the regulation must directly advance the government's interest.¹³² Finally, the restriction must be no more extensive than necessary to serve the government's interest.¹³³ When

123. *Id.* at 771.

124. *Id.* at 777 (Stewart, J., concurring).

125. 447 U.S. 557 (1980).

126. *Id.* at 570-72.

127. *Id.* at 562-63 (internal quotation marks omitted).

128. *See id.* at 563 (stating that the conveyance of information through advertising is why the commercial message receives First Amendment protection); *see also* POST, *supra* note 43, at 42-43 (2012) (explaining that the First Amendment usually protects the voice of the speaker, while lower levels of protection for commercial speech are justified by the Court's focus on protecting the listener).

129. *Cent. Hudson*, 447 U.S. at 566.

130. *Id.* at 563. The Court notes that First Amendment protection of commercial speech arises out of the "informational function of advertising." *Id.* (citing *First Nat'l Bank of Bos. v. Bellotti*, 435 U.S. 765, 783 (1978)).

131. *Id.* at 566.

132. *Id.*

133. *Id.*

commercial speech is false or misleading, it receives no First Amendment protection and is examined under rational basis review.¹³⁴ If, on the other hand, it is not false or misleading, the speech receives protection under intermediate scrutiny through application of the second, third, and fourth prongs.¹³⁵

The Supreme Court has continued to rely on the First Amendment to protect consumers in commercial speech cases. In *City of Cincinnati v. Discovery Network, Inc.*,¹³⁶ the Court overturned a city ordinance banning commercial news racks except those containing newspapers.¹³⁷ The majority held that because the ordinance only banned news racks with a specific type of content, it was a content-based restriction.¹³⁸ Additionally, the content of the news racks had no differential impact on safety,¹³⁹ and it was not a reasonable time, place, or manner restriction because the ordinance differentiated between news racks based solely on content.¹⁴⁰

In his *Discovery Network* concurrence, Justice Blackmun noted that he had concurred in *Central Hudson* only because the commercial speech restrictions had targeted the substantial government interest of protecting consumers.¹⁴¹ He did not think commercial speech was inherently less deserving of protection under the First Amendment.¹⁴² He felt that the source of protection for commercial speech was the listener's interest, which allowed for only "certain *specific*" types of regulations.¹⁴³ Justice Blackmun was concerned because *Central Hudson* left open the possibility that a narrowly drawn restriction on truthful speech could survive the Court's four-prong test.¹⁴⁴ He chided the majority for not using this case to address that loophole by

134. See *In re R.M.J.*, 455 U.S. 191, 203 (1982) (explaining that misleading commercial speech can be subject to "appropriate restrictions" or a complete ban); see also, *1-800-411-Pain Referral Serv., LLC v. Tollefson*, 915 F. Supp. 2d 1032, 1051, 1055 (D. Minn. 2012) (finding the statutory provision at issue was prohibiting commercial speech that was "inherently misleading" and therefore the statute did not violate the First Amendment).

135. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 433–34 (1993) (Blackmun, J., concurring) (describing the "lesser protection" that courts should provide to commercial speech that is not false or misleading).

136. 507 U.S. 410.

137. *Id.* at 431.

138. *Id.* at 429.

139. See *id.* at 430 (noting that there was no concern about "secondary effects").

140. *Id.*

141. See *id.* at 434–35 (Blackmun, J., concurring) (arguing that the *Central Hudson* majority opinion was not consistent with the Court's prior cases).

142. *Id.* at 433.

143. *Id.* at 433–34.

144. See *id.* at 435 (noting that the majority opinion in *Central Hudson* specifically stated that a restriction in advertising encouraging electricity use might survive scrutiny if sufficiently narrowly-tailored).

unequivocally stating that truthful and non-misleading commercial speech should receive full protection under the First Amendment.¹⁴⁵

In *44 Liquormart, Inc. v. Rhode Island*,¹⁴⁶ the Court reiterated the distinction between regulations that address false or misleading commercial speech and regulations restricting truthful commercial speech when it overturned Rhode Island's ban on advertising the prices of alcoholic beverages.¹⁴⁷ The Court reaffirmed that the state's ability to regulate commercial speech arises out of the authority to regulate commercial transactions and the state's interest in protecting consumers from harm.¹⁴⁸ The Court applied intermediate scrutiny, rather than rational basis review, when it analyzed these bans on truthful commercial speech because the restrictions were less likely to protect consumers and more likely used to support a governmental policy that could be implemented without banning speech.¹⁴⁹

1. *Commercial speech of professionals*

The commercial speech doctrine has primarily been applied to the speech of health care providers and other professionals in the area of advertising and soliciting business.¹⁵⁰ In fact, as discussed above, the first case to recognize First Amendment protection of commercial speech, *Virginia State Board of Pharmacy*, arose from restrictions on pharmacists advertising brand name drug prices.¹⁵¹

A year later, in *Bates v. State Bar of Arizona*,¹⁵² the Supreme Court overturned a ban on legal services advertising.¹⁵³ The Court rejected the state's arguments that advertising prices would have an effect on professionalism¹⁵⁴ or quality of services.¹⁵⁵ The Court did not reject the state's theory that harm from deceptive advertising might not be sufficiently restrained by after-the-fact consumer actions because those consumers might not have the requisite legal expertise to judge

145. *See id.* at 436 (finding intermediate scrutiny only appropriate for speech restrictions aimed at protecting consumers from "misleading or coercive speech, or a regulation related to the time, place, or manner of commercial speech").

146. 517 U.S. 484 (1996).

147. *Id.* at 501, 516.

148. *Id.* at 499, 502.

149. *Id.* at 502-03 (citing *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 n.9 (1980)).

150. In general, the Supreme Court treats the speech of professionals including doctors, lawyers, financial advisors and pharmacists the same. Therefore, this section will use cases from a variety of professions.

151. *See supra* notes 118-124 and accompanying text for a full discussion of this case.

152. 433 U.S. 350 (1977).

153. *Id.* at 384.

154. *Id.* at 368.

155. *Id.* at 378.

the quality of services.¹⁵⁶ However, the Court did reject the argument that the burden of preventing this harm through oversight of advertising would be so burdensome on the state as to justify a complete ban.¹⁵⁷ Again the Court noted that restrictions on false or misleading advertising, illegal transactions advertising, and time, place, and manner advertising restrictions were permissible.¹⁵⁸

The following year, the Court upheld disciplinary actions against a lawyer for soliciting business through in-person contact, holding that the punishment did not violate the First Amendment. In *Ohralik v. Ohio State Bar Ass'n*,¹⁵⁹ the Court distinguished the solicitation at issue from the advertising in *Bates* because solicitation of business was a “transaction in which speech is an essential but subordinate component.”¹⁶⁰ The Court explained that states have the power to make conduct illegal, even when that conduct involves speech, without violating the First Amendment.¹⁶¹

The Court returned to pharmacist advertising in *Thompson v. Western States Medical Center*,¹⁶² where it struck down provisions of the Food and Drug Administration Modernization Act of 1997¹⁶³ that prohibited pharmacies from advertising details about compounding services.¹⁶⁴ While the Court recognized the government’s interest in preserving the drug-approval process, it noted that there were several less-restrictive approaches available such as limiting the quantity of compounded drugs a pharmacy could sell.¹⁶⁵ The Court’s opinion was particularly worried with Congress’s choice to restrict speech over other approaches, stating “[i]f the First Amendment means anything, it means that regulating speech must be a last—not first—resort.”¹⁶⁶

156. *Id.* at 379.

157. *Id.*

158. *Id.* at 383–84 (citing *Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 771–72 (1976); *Pittsburgh Press Co. v. Pittsburgh Comm’n on Human Relations*, 413 U.S. 376, 388 (1973)).

159. 436 U.S. 447 (1978).

160. *Id.* at 457.

161. *See id.* at 456 (providing examples that “illustrate[] that the State does not lose its power to regulate commercial activity deemed harmful to the public whenever speech is a component of that activity”).

162. 535 U.S. 357 (2002).

163. Pub. L. No 105-115, § 127(a), 111 Stat. 2296, 2328, *invalidated by Thompson*, 535 U.S. 357.

164. *Thompson*, 535 U.S. at 360, 377. Compounding allows a pharmacist to create a patient-tailored medication where one may not be commercially available because of allergies to a component of the commercially available drug or to alter the flavor to make a drug more palatable for children. *Id.* at 360–61, 377.

165. *See id.* at 370–72 (discussing other potential regulations that would prevent pharmacists from becoming large-scale drug manufacturers).

166. *Id.* at 373.

In *Sorrell v. IMS Health Inc.*,¹⁶⁷ the Supreme Court suggested for the first time that restrictions on commercial speech should be subject to heightened First Amendment scrutiny, rather than the intermediate level articulated in *Central Hudson*.¹⁶⁸ *Sorrell* involved marketing speech of pharmaceutical companies.¹⁶⁹ The Supreme Court affirmed a U.S. Court of Appeals for the Second Circuit decision overturning a Vermont statute that restricted the sale and use of pharmacies' prescribing records for marketing purposes.¹⁷⁰ Because the statute only restricted the use of the records for pharmaceutical marketing, and not for purposes such as research, the Court held that it was a content-based speech restriction requiring heightened scrutiny.¹⁷¹ The Court acknowledged that content-based restrictions might be permissible under the commercial speech doctrine, but found that Vermont had not shown a neutral justification for the content-based restriction.¹⁷² Interestingly, the Court did not examine the *Central Hudson* factors.¹⁷³ Justice Breyer, writing for the dissent, observed that the majority's heightened scrutiny analysis was stricter than the approach taken in *Central Hudson* and that content-based restrictions of commercial speech had never received greater scrutiny than other restrictions on commercial speech.¹⁷⁴ Justice Breyer concluded that the statute was constitutional under *Central Hudson's* intermediate scrutiny test.¹⁷⁵

In *United States v. Caronia*,¹⁷⁶ the Second Circuit returned to the four-prong test established in *Central Hudson* but suggested that content-based restrictions might be subject to heightened scrutiny.¹⁷⁷ Relying partly on *Sorrell*, a divided panel vacated a criminal conviction for conspiracy to introduce a misbranded drug into interstate commerce.¹⁷⁸ The court found that Caronia was prosecuted for his speech promoting the off-label use of a drug.¹⁷⁹ After establishing

167. 131 S. Ct. 2653 (2011).

168. *Id.* at 2659.

169. *Id.*

170. *Id.* at 2659, 2672.

171. *Id.* at 2663–64.

172. *Id.* at 2672.

173. *See id.* at 2663–64 (deciding that the government regulation restricting speech was content-based, and therefore subject to heightened scrutiny); *see also* *United States v. Caronia*, 703 F.3d 149, 164 (2d Cir. 2012) (indicating that the Supreme Court did not determine the level of heightened scrutiny (i.e., intermediate or strict) to apply in *Sorrell*).

174. *Sorrell*, 131 S. Ct. at 2677 (Breyer, J., dissenting).

175. *Id.* at 2679.

176. 703 F.3d 149 (2d Cir. 2012).

177. *Id.* at 164.

178. *Id.*

179. *Id.* at 162.

that the prohibition on off-label promotion by pharmaceutical companies and their agents was a content-based restriction, the court applied heightened scrutiny.¹⁸⁰ Unlike the Supreme Court in *Sorrell*, the Second Circuit explicitly applied the *Central Hudson* criteria and held that this speech restriction failed both the third and fourth prongs.¹⁸¹ The dissenting judge would have held that Caronia was not prosecuted for his speech, but even if he were, the restriction on speech would have been constitutional under *Central Hudson*.¹⁸²

In summary, while not initially recognizing protection for commercial speech under the First Amendment, the Supreme Court has acknowledged some level of commercial speech coverage for approximately forty years.¹⁸³ The Court developed the current commercial speech doctrine more fully in *Central Hudson*.¹⁸⁴ Under the four-prong test, government restrictions on false or misleading speech must only satisfy rational basis review, while restrictions on truthful speech are subjected to intermediate scrutiny.¹⁸⁵ However, several recent cases suggest that content-based restrictions on commercial speech may be subject to even higher levels of scrutiny.¹⁸⁶

D. Conversion Therapy and SB 1172

Until 1973, the American Psychiatric Association (APA) classified homosexuality as a mental disorder.¹⁸⁷ Since the APA removed homosexuality from the Diagnostic and Statistical Manual of Mental Disorders (DSM-III), mainstream mental health organizations' and the general public's views on homosexuality have changed.¹⁸⁸ Despite

180. *Id.* at 164–65.

181. *Id.* at 166–67.

182. *Id.* at 172, 181 (Livingston, J., dissenting).

183. *See* Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc., 425 U.S. 748, 770 (1976) (holding that commercial speech is protected by the First Amendment because customers can only make the best decision when well-informed).

184. *See* Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y., 447 U.S. 557, 563–66 (1980) (expanding the commercial speech analysis by adopting a four-factor test).

185. *Id.* at 566.

186. *See, e.g., Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2664 (2011) (holding that the Vermont statute was a content-based speech restriction requiring heightened scrutiny); *Caronia*, 703 F.3d at 164–65 (applying heightened scrutiny after establishing that the prohibition on off-label promotion by pharmaceutical companies and their agents was a content-based restriction).

187. Laura A. Gans, *Inverts, Perverts, and Converts: Sexual Orientation Conversion Therapy and Liability*, 8 B.U. PUB. INT. L.J. 219, 221–22 (1999) (discussing how homosexuality was historically considered an illness).

188. *See, e.g., "Therapies" to Change Sexual Orientation Lack Medical Justification and Threaten Health*, PAN AM. HEALTH ORG., http://new.paho.org/hq/index.php?option=com_content&view=article&id=6803&Itemid=1926 (last updated May 18, 2012, 6:43 AM) [hereinafter "*Therapies*"] (calling homosexuality a "natural variation of human

this progress, a small group of therapists, led by the National Association for Research and Therapy of Homosexuality (NARTH), have continued to advocate conversion therapy for homosexual clients.¹⁸⁹

Most authorities have concluded that conversion therapy is ineffective.¹⁹⁰ The study most frequently cited to support the effectiveness of conversion therapy¹⁹¹ was retracted by its author, Dr. Robert Spitzer, for methodological flaws.¹⁹² Dr. Spitzer's original study used structured interviews to report that the majority of the 200 self-selected individuals gave "reports of change from a predominantly or exclusively homosexual orientation before therapy to a predominantly or exclusively heterosexual orientation in the past year."¹⁹³ As part of his retraction, Dr. Spitzer also issued an apology to "any gay person who wasted time and energy . . . because they believed that I had proven that reparative therapy works."¹⁹⁴

While conversion therapy has not been demonstrated to be effective, its harms have been documented. In addition to anecdotal reports of patients attempting suicide as a result of undergoing conversion therapy,¹⁹⁵ researchers have published larger studies on

sexuality"); see also Lydia Saad, *U.S. Acceptance of Gay/Lesbian Relations Is the New Normal*, GALLUP (May 14, 2012), <http://www.gallup.com/poll/154634/Acceptance-Gay-Lesbian-Relations-New-Normal.aspx> (presenting polling results showing fifty-four percent of American adults consider gay relationships morally acceptable).

189. See, e.g., *About NARTH*, NAT'L ASSOC. FOR RES. & THERAPY HOMOSEXUALITY, <http://www.narth.com/menus/mission.html#!about2/c1vor> (last visited Nov. 19, 2013) (describing NARTH as a "professional and scientific organization dedicated to the service of persons who experience unwanted homosexual (same-sex) attractions").

190. See, e.g., *APA Reiterates Position on Reparative Therapies*, 36 PSYCHIATRIC NEWS 34 (2001), <http://psychnews.psychiatryonline.org/newsarticle.aspx?articleid=103194> (encouraging additional research into the risks and benefits of conversion therapy).

191. Robert L. Spitzer, *Can Some Gay Men and Lesbians Change Their Sexual Orientation? 200 Participants Reporting a Change from Homosexual to Heterosexual Orientation*, 32 ARCHIVES SEXUAL BEHAV. 403 (2003).

192. Robert L. Spitzer, *Spitzer Reassesses His 2003 Study of Reparative Therapy of Homosexuality*, 41 ARCHIVES SEXUAL BEHAV. 757, 757 (2012). Spitzer felt the fatal flaw in his study was the inability to validate the subjects' reported sexual orientation. *Id.* Other perceived flaws were that most subjects were not a representative sample of patients but instead were involved in "transformational ministries," and bisexuality was not considered a valid sexual orientation. B.A. Robinson, *An Analysis of Dr. Spitzer's 2001 Study About Whether Adults Can Change Sexual Orientation*, ONT. CONSULTANTS ON RELIGIOUS TOLERANCE, http://www.religioustolerance.org/hom_spit.htm (last updated Oct. 6, 2012).

193. Spitzer, *supra* note 191, at 403.

194. Spitzer, *supra* note 192, at 757. It is interesting to note that Spitzer does not acknowledge that conversion therapy can harm clients, only that it may have been a waste of their time. See *id.* (apologizing to any member of the gay community who wasted time undergoing conversion therapy without acknowledging the associated harms).

195. See, e.g., Darin Squire, *My Ex Ex-Gay Story*, NEW DIRECTIONS MINISTRIES OF CAN., <http://www.newdirection.ca/my-ex-ex-gay-story> (last updated Apr. 1, 2013)

the array of physical and psychological harms that can be suffered by conversion therapy patients.¹⁹⁶ Individuals who have undergone conversion therapy report a variety of harms, including suicide attempts, heavy substance abuse, and risky sexual activity.¹⁹⁷ Psychological harms included depression and suicide attempts when the patient failed to change sexual orientation.¹⁹⁸ Social harms included problems with romantic relationships, difficulties maintaining lasting interpersonal relationships, and family strife.¹⁹⁹ Additionally, because patients frequently undergo conversion therapy due to religious concerns, failed therapy can lead to “(a) complete loss of faith, (b) sense of betrayal by religious leaders, (c) anger at clinicians who introduced punitive and shaming concepts of God, and (d) excommunication.”²⁰⁰

In addition to the harm individuals undergoing therapy experience, conversion therapy can cause hardship for entire families. Parents with no mental health expertise are often the force compelling minors to enter conversion therapy.²⁰¹ While parents have a right to oversee the upbringing of their children,²⁰² the availability of an ineffective therapy aimed at changing an immutable characteristic misleads parents by perpetuating their false belief that homosexuality is changeable.²⁰³ The belief in the mutability of sexual orientation leads some parents to question their role in their child’s sexual orientation and can contribute to parental rejection of the child.²⁰⁴ Reaction to this parental rejection may ultimately lead to the child’s homelessness, prostitution, substance abuse, or HIV

(describing the author’s difficulty reconciling his homosexuality with New Direction’s reparative therapy leading him to attempt suicide).

196. See Shidlo & Schroeder, *supra* note 1, at 253 (noting psychological harm including suicidal gestures, social and interpersonal harms from difficulty with interpersonal relationships, and physical harms from unsafe sex and substance abuse).

197. *Id.*

198. *Id.* at 254. Other psychological harms reported included blaming all the hardship in their lives on their sexual orientation and the development of psychological impotence and other sexual dysfunctions. *Id.* at 255.

199. *Id.* Some individuals also reported being encouraged by their therapist to blame their parents for their sexual orientation further straining family relationships. *Id.*

200. *Id.* at 256.

201. See Sonia Renee Martin, Note, *A Child’s Right to be Gay: Addressing the Emotional Maltreatment of Queer Youth*, 48 HASTINGS L.J. 167, 174 (1996) (discussing the role of parents in seeking therapy to help their homosexual children become heterosexual).

202. See, e.g., *Meyer v. Nebraska*, 262 U.S. 390, 400 (1923) (upholding parents’ right to hire a German teacher for their children).

203. See, Martin, *supra* note 201, at 174 (attributing parents’ belief in the mutability of homosexuality as one factor influencing rejection of their gay children).

204. *Id.*

infection.²⁰⁵ Ongoing conflict between parents and gay youth is also a frequent cause of youth suicide.²⁰⁶ The harms associated with conversion therapy have led some authors to argue that conversion therapy administered to children should constitute child abuse, allowing states to use their police powers to prosecute parents.²⁰⁷ Other authors have argued for tort causes of action against conversion therapists.²⁰⁸

No mainstream medical organization supports conversion therapy. In 2000, the APA reaffirmed its 1973 declassification of homosexuality as a mental disorder and reiterated its earlier position questioning conversion therapy.²⁰⁹ The APA recommends that “ethical practitioners refrain from attempts to change individuals’ sexual orientation, keeping in mind the medical dictum to first, do no harm.”²¹⁰ The Pan American Health Organization has declared conversion therapy dangerous for patients and recommends that such therapies should be discouraged and providers subjected to sanctions.²¹¹ Other organizations have acknowledged the harm and stopped providing reparative therapy.²¹²

On September 29, 2012, California Governor Jerry Brown signed Senate Bill 1172 out of concern over the ineffectiveness and potential harms of conversion therapy.²¹³ Senate Bill 1172 amended California’s Business and Professions Code to ban all mental health providers from providing conversion therapy to a patient less than eighteen years of age and defines any attempted conversion therapy as unprofessional conduct subject to discipline by the appropriate licensing authority.²¹⁴ However, the law does not ban religious

205. *See id.* at 176–78 (reviewing the evidence of harmful outcomes in gay youth).

206. *See id.* at 175 (citing a 1989 U.S. Department of Health and Human Services report).

207. *See generally* Hicks, *supra* note 3, at 526 (arguing that under New York state law parents could be prosecuted because a “reasonably prudent parent” would not have a child receive a dangerous therapy).

208. *See* Gans, *supra* note 187, at 221 (discussing how patients can use negligent malpractice and intentional infliction of emotional distress claims against conversion therapists, but arguing for a lower threshold of proof in these types of cases).

209. *APA Reiterates*, *supra* note 190.

210. *Id.*

211. “*Therapies*,” *supra* note 188.

212. *See* Wendy Gritter, *A Letter to Ex-Gay Survivors*, NEW DIRECTION MINISTRIES OF CAN., <http://www.newdirection.ca/a-letter-to-ex-gay-survivors> (last visited Nov. 19, 2013) (acknowledging that people have been harmed by New Direction’s “ex-gay theology,” and stating that New Direction is now purporting that people can be homosexual and Christian).

213. Buchanan, *supra* note 2.

214. CAL. BUS. & PROF. CODE § 865. SB 1172 bans “sexual orientation change efforts” to include “any practices” that seeks to change sexual orientation. *Id.* § 865(b)(1). The statute does not ban therapies aimed at helping minors accept

counseling aimed at changing sexual orientation.²¹⁵ California was the first state to attempt such a ban.²¹⁶ New Jersey subsequently passed a similar ban.²¹⁷ Several other states are considering similar legislation.²¹⁸

Senate Bill 1172 was challenged almost immediately. Plaintiffs in *Welch v. Brown*, a suit initiated two days after Governor Brown signed the bill into law, charged that the law violated the First Amendment right to freedom of speech for individual conversion therapists and a mental-health-professions student.²¹⁹ A similar case, *Pickup v. Brown*, was filed by NARTH, individual therapists, and parents of conversion therapy patients three days later.²²⁰

Two judges from the U.S. District Court for the Eastern District of California ultimately came to opposing conclusions on the cases challenging SB 1172. In *Welch*, Judge Shubb granted a preliminary injunction after determining that the law was a content- and viewpoint-based restriction of speech.²²¹ The judge stated that the regulation was unlikely to survive strict scrutiny because the government had only shown that conversion therapy “may” harm minors, and such level of review requires that the government show that the therapy directly causes harm to minors.²²² Simultaneously, a request for a preliminary injunction was denied in *Pickup*, where Judge Mueller ruled that the law did not restrict expressive

their sexual orientation. *Id.* § 865(b)(2). Although this could include practices such as electroshock and hormone therapy, this Comment focuses on conversion therapy as that is the practice where a First Amendment challenge is relevant.

215. *See id.* § 865(a) (leaving religious positions out of the definition of mental-health provider).

216. Buchanan, *supra* note 2.

217. Act Concerning the Protection of Minors from Attempts to Change Sexual Orientation, 2013 N.J. Sess. Laws ch. 150 (codified at N.J. STAT. ANN. § 45:1-55 (West 2013)); *see also* Zack Ford, *Chris Christie Signs New Jersey Bill Banning Ex-Gay Therapy for Minors*, THINK PROGRESS (Aug. 19, 2013, 9:11 AM), <http://thinkprogress.org/lgbt/2013/08/19/2486811/chris-christie-signs-new-jersey-bill-banning-ex-gay-therapy-for-minors> (quoting Governor Chris Christie’s statement that he “does not believe in conversion therapy”).

218. *See* H.B. 154, 188th Leg. (Mass. 2013) (Massachusetts); S.B. 4840, 2013 Reg. Sess. (N.Y. 2013) (New York); Daniel Reynolds, *Pa. Reps. to Propose Bill Banning “Ex-Gay” Therapy for Youth*, ADVOCATE.COM (Sept. 17, 2013), <http://www.advocate.com/politics/politicians/2013/09/17/pa-reps-propose-bill-banning-ex-gay-therapy-youth> (Pennsylvania). Ohio is also considering a ban. Katie McDonough, *Ohio May be Next State to Ban Gay Conversion Therapy*, SALON (Oct. 7, 2013, 12:53 PM), http://www.salon.com/2013/10/07/ohio_may_be_next_state_to_ban_gay_conversion_therapy.

219. Complaint, *Welch v. Brown*, *supra* note 8, ¶¶ 77–92.

220. Complaint, *Pickup v. Brown*, *supra* note 8, ¶¶ 1–12.

221. *Welch v. Brown*, 907 F. Supp. 2d 1102, 1121–22 (E.D. Cal. 2012), *rev’d sub nom.* *Pickup v. Brown*, 728 F.3d 1042 (9th Cir. 2013).

222. *See id.* at 1119–20 (pointing out that the American Psychiatric Association Report relied on by legislators stated that the authors could not conclude harm would occur and also noting that the studies had focused on harm to adult but not minor patients).

conduct.²²³ The act also did not discipline a provider who informed a minor patient that they would benefit from conversion therapy; providers would only be disciplined for actually providing such therapy to a minor.²²⁴

Both cases were appealed to the Ninth Circuit, which in a consolidated appeal affirmed *Pickup* and reversed *Welch*.²²⁵ Relying primarily on *National Ass'n for the Advancement of Psychoanalysis* and *Conant*, the court held that the statute at issue regulated professional conduct, not speech, and was therefore permissible.²²⁶ The court noted that while most medical treatment involves some degree of speech, the First Amendment would not protect a doctor trying to treat a patient with a banned medication.²²⁷ The court also cited the well-settled principle that the First Amendment does not protect criminal conduct that is “merely . . . carried out” through speech.²²⁸

II. THE COMMERCIAL SPEECH DOCTRINE IS A MORE APPROPRIATE APPROACH FOR EXAMINING RESTRICTIONS ON HEALTH CARE PROVIDERS' SPEECH

If the Ninth Circuit had determined that SB 1172 was a restriction on speech instead of conduct, the court likely would have ruled that SB 1172 was an unconstitutional viewpoint-based restriction under a traditional strict scrutiny analysis and current case law. The Ninth Circuit previously ruled in *Conant* that a federal restriction on health care providers recommending medical marijuana was an unconstitutional viewpoint-based restriction.²²⁹ In *National Ass'n for the Advancement of Psychoanalysis*, the Ninth Circuit upheld California's restrictions on licensing mental health providers in part because the restrictions were content neutral—they did not restrict the content of therapy or the use of specific types of

223. *Pickup v. Brown*, No. 2:12 02497 KJM EFB, 2012 WL 6021465, at *7, *26 (E.D. Cal. Dec. 4, 2012), *aff'd*, 728 F.3d 1042 (9th Cir. 2013).

224. *See id.* at *9 (distinguishing SB 1172 from the medical marijuana policy at issue in *Conant* and the Florida firearms law in *Wollschlaeger*, both of which penalized speech based on the topic).

225. *Pickup v. Brown*, 728 F.3d 1042, 1061 (9th Cir. 2013), *rev'g Welch v. Brown*, 907 F. Supp. 2d 1102 (E.D. Cal. 2012), and *aff'g Pickup v. Brown*, Civ. No. 2:12 02497 KJM EFB, 2012 WL 6021465 (E.D. Cal. Dec 4, 2012).

226. *Id.* at 1055–57.

227. *See id.* at 1055 (explaining that such reasoning would restrict states' power to regulate medical care).

228. *Id.* (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502 (1949)).

229. *See Conant v. Walters*, 309 F.3d 629, 639 (9th Cir. 2002) (affirming a permanent injunction against a state statute that regulated doctor-speech based on the meanings attributed by listeners).

therapy.²³⁰ Based partly on the results of these cases, at least one prominent constitutional scholar believed the Ninth Circuit was going to find this law unconstitutional.²³¹

The Supreme Court would also likely find SB 1172 unconstitutional if the law is viewed as a restriction on speech and not conduct. In *Rosenberger*, the Supreme Court held that a restriction prohibiting student religious newspapers was an unconstitutional viewpoint-based restriction.²³² Unlike the restrictions on discussing abortion in a federally funded family planning program clinic in *Rust v. Sullivan*, which were ruled constitutional,²³³ the restrictions in SB 1172 are not limited to health care provided solely as part of government-funded services.²³⁴ Because SB 1172 is a content-based restriction on speech, the Court would likely apply heightened scrutiny as it did in *Sorrell*, where the Court invalidated a content-based restriction because it did not have a neutral justification.²³⁵ Therefore, SB 1172 would likely be invalidated as an unconstitutional restriction on health care providers' speech.

However, standard strict scrutiny is not the appropriate test to use for restrictions on health care providers' speech. Because health care providers' speech is more akin to commercial speech than to the speech of private citizens, it should only be subject to strict scrutiny if it is not false or misleading. The Supreme Court's reasoning for

230. See *Nat'l Ass'n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1055–56 (9th Cir. 2000) (noting that, although the statute may implicate speech interests, it neither “dictate[s] what can be said” between doctors and patients nor suppresses speech based on message).

231. Eugene Volokh, *District Judges Split on Whether California Ban on Sexual Orientation Change Therapy for Minors Is Constitutional*, VOLOKH CONSPIRACY (Dec. 5, 2012 10:18 AM), <http://www.volokh.com/2012/12/05/district-judges-split-on-whether-california-ban-on-sexual-orientation-change-therapy-for-minors-is-constitutional> (opining that the approach in *Welch* is more in line with precedent in the Ninth Circuit).

232. See *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 829 (1995) (“The government must abstain from regulating speech when . . . the opinion or perspective of the speaker is the rationale for the restriction.”).

233. See *Rust v. Sullivan*, 500 U.S. 173, 177–79 (1991) (explaining that the restrictions on discussing abortion in a federally funded family planning clinic was appropriate because it was intended to ensure that government funds would only be used to support preventative family planning services, infertility services, and other related medical, informational, and educational activities).

234. See *id.* at 198–99 (explaining that the restriction on speech is not applicable to speech outside the federally funded project).

235. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2672 (2011) (discussing the permissibility of content-based restrictions in the commercial speech setting, while noting that Vermont has not demonstrated a neutral justification). It appears that this was the first time that content-neutrality was discussed in the setting of commercial speech restrictions. See *United States v. Caronia*, 703 F.3d 149, 163 (2d Cir. 2012) (explaining that *Sorrell* provided guidance to the Circuit Court that was not available to the District Court that ruled prior to the *Sorrell* decision).

refusing to apply First Amendment protection to false or misleading commercial speech under the first prong of *Central Hudson* also applies to health care speech that lacks any scientific support.²³⁶ This single-prong approach will allow courts to weed out quackery—health care speech lacking any legitimate scientific support.²³⁷ However, unlike typical commercial speech analysis, the remaining prongs of *Central Hudson* would not apply to health care speech that has some scientific support. Unlike speech within the commercial arena, health care therapies need to be tailored to the individual patient.²³⁸ Legislatures do not have the expertise to make those determinations, which is why professionals in the field usually set their own standards.²³⁹ Therefore, health care providers' speech that is not false or misleading continues to require full First Amendment protection in order to protect the doctor-patient relationship from inappropriate government interference.

A. *The Rationale for Reduced First Amendment Protection of Commercial Speech Also Applies to Health Care Providers' Speech*

The same reasoning courts have employed to justify using intermediate scrutiny for commercial speech, and refraining from applying First Amendment protection to false or misleading commercial speech, applies in the health care setting. Commercial speech serves a different purpose than political speech, which is why the former does not receive full First Amendment protection. In political discourse, the First Amendment is most concerned with allowing everyone to participate, a concept that Yale Law Professor and First Amendment scholar Robert Post calls democratic legitimization.²⁴⁰ The premise is that false (or bad) ideas will be drowned out by the true (or good) ideas, but everyone will feel heard and engaged in the democratic process.²⁴¹

Courts have justified applying lower levels of First Amendment protection for commercial speech because such speech is not

236. See *infra* Part II.A (noting that the state may regulate health care speech in the same manner it regulates commercial speech because the same justification underlies both: protecting the consumer by preventing harm).

237. See *infra* Part II.B (arguing that health care speech lacking legitimate scientific support should be treated analogous to false and misleading speech under the commercial speech doctrine).

238. See *infra* Part II.C.

239. See *supra* notes 38–43 and accompanying text.

240. See POST, *supra* note 43, at 1–25 (rejecting First Amendment philosophy that emphasizes protections only in the context of voting and instead embracing the idea that “First Amendment coverage should extend to all efforts deemed normatively necessary for influencing public opinion”).

241. *Id.* at 21.

necessary to the open marketplace of ideas nor central to political discourse.²⁴² The Supreme Court's commercial speech jurisprudence is based on protecting the consumer rather than the speaker.²⁴³ The Court developed the first prong of *Central Hudson* because false or misleading commercial speech could deceive the listener.²⁴⁴ The Court reiterated the state's ability to regulate commercial speech in *44 Liquormart*, stating that this authority arose out of the interest in protecting the listener.²⁴⁵

Intermediate scrutiny is applied to commercial speech because the government traditionally regulates commercial transactions; therefore, the government has a stronger interest in regulating commercial speech in general.²⁴⁶ Because the state can regulate harmful commercial activity, the state can regulate that activity even when speech is a component of the activity.²⁴⁷ In his dissent in *Central Hudson*, Justice Rehnquist went so far as to argue for no First Amendment protection for the utility company's speech because the utility was a highly regulated, state-created monopoly.²⁴⁸ He went on to comment that from the perspective of the First Amendment, the utility is more like a "state-controlled enterprise than is an ordinary corporation."²⁴⁹ As such, the state should have more leeway in regulating the speech of the utility it controls.²⁵⁰

As previously discussed, in some cases the Court has also upheld restrictions on commercial speech, noting the importance of

242. See *id.* at 40–42 (noting that commercial speech is only useful to the listener when it is "reliable, rather than misleading, information").

243. See *id.* at 42–43 (explaining that the First Amendment usually serves to protect the voice of the speaker, while lower levels of protection for commercial speech are justified by the Court's focus on protecting the listener).

244. See *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 563 (1980) (stating the government can go as far as banning deceptive speech (citing *Friedman v. Rogers*, 440 U.S. 1, 13, 15–16 (1979))).

245. See *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502 (1996) (calling protecting consumers the "typical" reason behind greater governmental regulation of commercial speech).

246. See *Cent. Hudson*, 447 U.S. at 562 (describing the level of protection for commercial speech as a function of both the nature of the expression and governmental interest being regulated); see also *44 Liquormart*, 517 U.S. at 499, 502 (distinguishing commercial speech as an area where the government has more freedom to regulate, but preventing the government from enacting an all-out ban on truthful commercial speech); *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 428 (1993) (requiring the government to make a showing to ban commercial speech beyond merely classifying commercial speech as "low value").

247. See *Ohralik v. Ohio State Bar Ass'n*, 436 U.S. 447, 456 (1978) (explaining that conduct can be made illegal even if the conduct is carried out through speech).

248. See *Cent. Hudson*, 447 U.S. at 584 (Rehnquist, J., dissenting) (describing the law at issue as an economic regulation).

249. *Id.* at 587.

250. See *id.* (arguing that a state should have "broad discretion" to regulate what statements a public utility can make).

preventing harm before it occurs. In *Bates*, the Court did not substantively address the argument that “[a]fter-the-fact action by the consumer” may not provide adequate protection against deceptive advertising.²⁵¹ Instead, the Court rejected this argument because it contradicted others put forth by the state and because it would not have justified a complete ban on advertising simply to avoid the burden of disciplining lawyers who advertised deceptively.²⁵² In *Ohralik*, the Court noted the state’s strong interest in preventing harm before it occurred when the state prohibited in-person solicitation of businesses by lawyers.²⁵³ In health care, as in the commercial arena, it is important to prevent harm before it occurs. This is one justification for states’ control over the licensing of health care providers.²⁵⁴

Health care therapies, including talking therapies, do not take place in the marketplace of ideas and therefore do not require the same level of First Amendment protection as public speech. Like commercial transactions and the electrical utility company in *Central Hudson*, health care is highly regulated by the states.²⁵⁵ In health care, the state’s interest is not to allow everyone to participate; this is clear from the fact that not everyone is permitted to enter the profession. State licensing authorities can limit who can practice health care²⁵⁶ and can set educational requirements.²⁵⁷ Furthermore, they can discipline, and even bar from practicing, those providers who deviate from the established standards of care.²⁵⁸ A provider’s treatment of a patient with therapy is a medical intervention for which any speech that may be involved is only incidental to the purpose of treatment. Even psychotherapy, which may consist entirely of speech, does not receive special First Amendment protection; the purpose of psychotherapy is not speech—it is relieving emotional suffering.²⁵⁹ Simply having a “kernel of

251. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 379 (1977) (discussing the difficulty a layman might have in evaluating the quality of a lawyer’s services).

252. See *id.* (commenting that each deceptive lawyer will be outnumbered by “thousands of others” who are not deceptive).

253. See *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 464 (1978) (describing the restrictions as “prophylactic measures whose objective is the prevention of harm before it occurs”).

254. See *supra* notes 19–24 and accompanying text (detailing how states are empowered to issue licenses and establish standards to regulate health care practice for the protection of public health).

255. See *supra* Part I.A.

256. 53 C.J.S. *Licenses*, *supra* note 19, § 8.

257. *Id.*

258. *Id.* § 82.

259. See *Nat’l Ass’n for the Advancement of Psychoanalysis v. Cal. Bd. of Psychology*, 228 F.3d 1043, 1054 (9th Cir. 2000) (noting that communications made

expression” in an activity such as therapy does not demand full First Amendment coverage.²⁶⁰ The speech in therapy or other health care settings is not the kind of speech envisioned as protected by the First Amendment, which is instead typically thought of as providing protection for political speech.²⁶¹ Health care or therapeutic speech does not serve the role of political discourse in the marketplace of ideas; therefore, First Amendment protection for health care speech should focus on the listener, not the speaker.²⁶²

Admittedly, there are nuances to this approach. Some speech between health care providers and patients would fall outside a therapeutic purpose and could qualify as political discourse. For example, a health care provider’s speech to a patient explaining that a therapy is not currently available would be protected under the marketplace of ideas theory because it might lead the patient to lobby the legislature for increased research funding to demonstrate the utility of the therapy.²⁶³ Robert Post gives the additional example of a dentist who writes a book encouraging the removal of mercury fillings, which would be protected speech under the marketplace of ideas, while the same dentist’s advice to an individual patient would not be protected.²⁶⁴

Like Post’s dentist who provided individual advice, the health care provider’s speech to patients as part of treatment exists outside the marketplace of ideas, and therefore does not require full First Amendment protection. Thus, the same reasoning the Supreme Court has used to justify reduced scrutiny for commercial speech also applies to speech in the health care setting.

B. *The First Prong of Central Hudson Weeds Out Quackery*

By applying the first prong of *Central Hudson* to regulations of health care providers’ speech, courts can weed out quackery. Under

during psychoanalysis are protected by the Constitution, but may still nevertheless be regulated in furtherance of important state interests).

260. *Id.* (quoting *City of Dallas v. Stanglin*, 490 U.S. 19, 25 (1989)).

261. *See* POST, *supra* note 43, at 42–43 (arguing that expert knowledge, like commercial speech, serves the rights of the listener, not the rights of the speaker).

262. *See id.* at 24 (differentiating between the First Amendment’s role in public discourse of protecting the rights of the speaker and its role in protecting the “dignity of the targets of speech” outside public discourse).

263. *See* *Conant v. Walters*, 309 F.3d 629, 634 (9th Cir. 2002) (listing the district court’s finding that physician speech could lead to a patient petitioning the government for a change in marijuana laws).

264. *See* POST, *supra* note 43, at 12–13 (explaining why the dentist would have First Amendment protection against malpractice claims from a patient who relied on her advice in the book, but not against a claims from a patient who relied on individual advice).

that prong, courts evaluate whether the commercial speech being regulated is false or misleading and therefore not protected by the First Amendment.²⁶⁵

The First Amendment protects false speech in political discourse.²⁶⁶ False commercial speech, however, does not receive this level of protection.²⁶⁷ The fact that a commercial speaker can easily determine whether his speech is factually correct, unlike the press or a private citizen who may need to use multiple sources to verify the truth of a statement, justifies government restrictions on false or misleading commercial speech.²⁶⁸ The government can even go so far as to ban deceptive commercial speech.²⁶⁹ Allowing these restrictions on false or misleading commercial speech serves the state's interest in preventing fraud.²⁷⁰

The interest in preventing fraud in health care is just as strong as—or stronger than—the state's interest in the commercial speech realm.²⁷¹ Health care fraud carries not only the risk of economic harm, but can result in physical and mental harm as well.²⁷² Thus, the same reasoning courts have used to support restrictions on false or misleading commercial speech is applicable to restrictions on health care providers' speech in order to prevent fraud.

Still, the question remains: how should courts evaluate whether or not the health care providers' speech is false or misleading? The answer lies in the health care setting's analogy to false and misleading speech—whether the speech lacks legitimate scientific support. Health care services without some scientific support have no therapeutic potential. Administering these unsubstantiated services

265. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980).

266. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974) (“Under the First Amendment there is no such thing as a false idea.”).

267. *See Cent. Hudson*, 447 U.S. at 563 (stating that there is no constitutional barrier to restricting inaccurate commercial messages).

268. *See Va. State Bd. of Pharm. v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 777 (1976) (Stewart, J., concurring) (noting that the principles behind libel may allow the government to protect the public from false advertising because commercial advertisers are better positioned to verify the truth of their speech).

269. *Cent. Hudson*, 447 U.S. at 563 (citing *Friedman v. Rogers*, 440 U.S. 1, 13, 15–16 (1979)).

270. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 502 (1996).

271. 39A C.J.S. *Health & Environment* § 1 (2003) (“[T]here is no public policy more important than the protection of citizens from practices which may injure their health.”).

272. *See Rooting Out Health Care Fraud Is Central to the Well-being of Both Our Citizens and the Overall Economy*, FED. BUREAU OF INVESTIGATION, <http://www.fbi.gov/about-us/investigate/white-collar/health-care-fraud> (last visited Nov. 19, 2013) (describing health care fraud as costing the U.S. economy approximately \$80 billion a year and noting that fraudulent providers are putting patients at risk).

is the health care equivalent of fraud, which is the harm the first prong of *Central Hudson* aims to avoid.

Courts are able to evaluate relevant evidence and determine if there is any legitimate scientific support for the restricted speech. This approach is already used in the methodology for determining whether to admit scientific evidence laid out in *Daubert v. Merrell Dow Pharmaceuticals, Inc.*²⁷³ While admitting or rejecting expert testimony is different than making a constitutional determination, the same *Daubert* factors can be used. In *Daubert*, the Court first defined scientific knowledge as more than a belief or speculation.²⁷⁴ Scientific knowledge must be “ground[ed] in the methods and procedures of science.”²⁷⁵ The Court then stated that in choosing to allow expert scientific testimony, judges must determine whether the methodology used to develop the scientific testimony is valid.²⁷⁶ The Court delineated four factors judges could consider, including whether: the science can be tested,²⁷⁷ it is published in peer-reviewed literature,²⁷⁸ there is knowledge of error rates,²⁷⁹ and the science has gained “general acceptance.”²⁸⁰ The Court expanded on the importance of acceptance in the scientific community by stating “a known technique which has been able to attract only minimal support within the community, may properly be viewed with skepticism.”²⁸¹

Courts can also rely on experts in the relevant discipline. In his dissent in *Brown v. Entertainment Merchants Ass’n*,²⁸² a case involving restrictions on the sale of violent video games to minors, Justice Breyer noted that while most judges, including himself, lacked scientific expertise, public health professionals who had that expertise found a significant risk from violent video games.²⁸³ Robert Post argues that courts should use the methods of a scientific

273. 509 U.S. 579 (1993).

274. *Id.* at 590.

275. *Id.*

276. *See id.* at 592–93 (instructing judges to do a “preliminary assessment” of the scientific validity).

277. *See id.* at 593 (stating the testing of hypotheses is the basis of the scientific method).

278. *See id.* (describing the aspect of submitting for peer review, even if not published, as “a component of ‘good science’”).

279. *See id.* at 594 (citing cases examining the error rate of voice identification techniques).

280. *Id.*

281. *Id.* (citation omitted) (internal quotation marks omitted).

282. 131 S. Ct. 2729 (2011).

283. *See id.* at 2769 (Breyer, J., dissenting) (quoting position statements from several public health, medical, and psychological associations).

discipline to evaluate the validity of that discipline's knowledge.²⁸⁴ Only that discipline's methodology can determine the validity of work within the field.²⁸⁵ The Supreme Court recognized this in *School Board v. Arline*,²⁸⁶ when it endorsed the idea that courts should defer to public health officials in determining whether a contagious disease created a risk to others, rather than making an independent determination.²⁸⁷

In *Daubert*, the Supreme Court expressed its confidence that judges could make these scientific validity evaluations of experts.²⁸⁸ Its confidence was well-founded as, on remand, the Ninth Circuit used the criteria to determine that the plaintiffs' experts did not qualify as scientific experts.²⁸⁹ The Ninth Circuit relied on several factors including that the experts had not submitted their research for peer review during the more than ten years of litigation, had not been doing the research prior to being hired for litigation, and in one case, had made an assertion without a testable hypothesis.²⁹⁰

The fact that courts have acknowledged the presence of scientific controversy—demonstrating at least some evidence of legitimate scientific support—in several of the health care First Amendment cases previously discussed is further evidence that courts are capable of determining what constitutes legitimate scientific debate.²⁹¹ For instance, in his *Conant* concurrence, Judge Kozinski used over two

284. See POST, *supra* note 43, at 54–59 (arguing that applying the disciplinary methods by which the expert knowledge is defined is the only way to judicially protect “democratic competence”).

285. See *id.* (using the example of a dental regulation and asserting that “[a] court will have no option but to apply the authoritative methods and truths of medical service in order to determine whether prohibiting the dentist’s advice will trigger First Amendment review”).

286. 480 U.S. 273 (1987).

287. See *id.* at 287–88 (adopting the American Medical Association’s position with respect to how a district court should make factual determinations when considering discrimination claims of a person with a contagious disease).

288. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 592–93 (1993) (suggesting several criteria by which a judge can make this determination, including whether the theory or technique has been tested, whether it has been peer reviewed, and what the rate of error is).

289. See *Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1322 (9th Cir. 1995) (ruling testimony for the plaintiffs was inadmissible because necessary changes to meet the evidentiary standard would “undermine any attempt to show that these findings were ‘derived by the scientific method’” (quoting *Daubert*, 509 U.S. at 590)).

290. *Id.* at 1318–19.

291. See *supra* Part I.B (discussing the Court’s experiences adjudicating laws related to the use of cannabis for therapeutic purposes, the doctor-patient privilege in inquiring about owning firearms, and informing individuals about the increased risk of suicide for those who get abortions).

pages to discuss the science behind medical marijuana.²⁹² He noted the presence of a “genuine difference of expert opinion” with significant evidence on both sides of the debate.²⁹³ Similarly, in another case, the Eighth Circuit took eleven pages to explore the scientific uncertainty surrounding abortion and the increased risk of suicide in order to affirm the validity of disclosure language required by a South Dakota statute.²⁹⁴

Similar to identifying whether commercial speech is false or misleading, courts can determine if health care therapies have any legitimate scientific support using the same approach used to evaluate potential expert scientific testimony. The theories lacking legitimate scientific support would, like false or misleading commercial speech, lack First Amendment protection. However, speech with some scientific support would continue to receive First Amendment protection.

C. Health Care Providers’ Speech Surviving the First Prong of Central Hudson Should Be Subject to Strict Scrutiny

If a court finds that the regulations on health care speech are truthful and non-misleading under the first prong of *Central Hudson*, traditional strict scrutiny would be the appropriate test to apply. Applying strict scrutiny would continue to protect the doctor-patient relationship from inappropriate state intervention. While the arguments likening such speech to commercial speech might suggest that intermediate scrutiny would be appropriate for examining restrictions on truthful and non-misleading health care providers’ speech, the risk of the government suppressing this truthful speech demands the highest level of First Amendment protection.²⁹⁵ Under the alternative, intermediate scrutiny, the government could restrict truthful and non-misleading health care providers’ speech if those restrictions directly advanced a substantial government interest and were no more extensive than necessary.²⁹⁶

292. See *Conant v. Walters*, 309 F.3d 629, 641–43 (9th Cir. 2002) (Kozinski, J., concurring) (referencing the various studies conducted by the National Institute of Medicine, National Academy of Sciences and the federal government on the scientific evidence behind the therapeutic application of cannabis).

293. *Id.* at 643.

294. See *Planned Parenthood Minn., N.D., S.D. v. Rounds*, 686 F.3d 889, 893–905 (8th Cir. 2012) (en banc) (evaluating the term “increased risk” within the vast array of peer-reviewed medical literature discussing abortion and suicide rates).

295. See *Conant*, 309 F.3d at 637 (emphasizing that professional speech requires the highest level of First Amendment protection (quoting *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618, 634 (1995))).

296. *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm’n of N.Y.*, 447 U.S. 557, 566 (1980).

There are several reasons intermediate scrutiny would not provide sufficient protection. First, patients and providers need open communication,²⁹⁷ without which providers may not have all the information necessary to treat the patient.²⁹⁸ The importance of open communication is demonstrated by the presence of the doctor-patient privilege, which exists under common law and allows patients to speak openly with their doctor without fearing the doctor will be called to testify against them.²⁹⁹ Second, patients need to be able to trust their provider.³⁰⁰ This trust is essential because patients look to their providers for expert judgment upon which they can rely.³⁰¹ Third, providers need to be able to offer all appropriate therapies to individual patients.³⁰²

In addition, the unique nature of the relationship between doctor and patient, a defining feature of the health care profession, requires that the health care provider be able to give individualized advice.³⁰³ Patients may have different goals, such as prolonging life or reducing pain and suffering, and these goals may require diverse treatments.³⁰⁴ Additionally, patients may respond to treatments differently or require adjustments in their treatments.

It is not appropriate for legislatures to make broad determinations regarding which scientifically supported potential therapies are appropriate for individual patients. Most legislators lack health care expertise, which is why professional standards are set by the state licensing authority and not by the legislature.³⁰⁵ As previously

297. See *Conant*, 309 F.3d at 636 (describing open communication as an “integral component” of medicine).

298. *Id.* (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980)).

299. See *id.* (explaining that the importance of this privileged communication is such that it has been adopted by the courts in common law and through the rules of evidence (citing FED. R. EVID. 501)).

300. See *Rust v. Sullivan*, 500 U.S. 173, 218 (1991) (Blackmun, J., dissenting) (noting that patients put “complete confidence, and often their very lives” in the hands of physicians).

301. See POST, *supra* note 43, at 45 (asserting malpractice liability enforces “expert pronouncements”).

302. See *Rust*, 500 U.S. at 214 (Blackmun, J., dissenting) (calling it an ethical responsibility).

303. See *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring in the result) (defining a professional as one who works directly with a client on that client’s behalf).

304. See *Rust*, 500 U.S. at 214 (Blackmun, J., dissenting) (asserting that patient autonomy is only enabled when patients have the information necessary to make an autonomous choice).

305. See *Semler v. Or. State Bd. of Dental Exam’rs*, 294 U.S. 608, 611 (1935) (commenting that state regulation occurs through administrative boards).

discussed, it takes training and expertise in a discipline to critically evaluate the quality of work in that discipline.³⁰⁶

As an example of the potential problem in applying only intermediate scrutiny, a court might find that the federal government's restriction on recommending medical marijuana could be a restriction that is no more extensive than necessary to directly advance the government's substantial interest in reducing illegal drug use. This would allow the legislature to prevent a physician from recommending medical marijuana for an end-stage AIDS patient with severe weight loss and lack of appetite or a cancer patient with uncontrollable pain in a state where such use is legal under state law.³⁰⁷

Therefore, while the similarities to commercial speech might suggest that intermediate scrutiny is appropriate for truthful and non-misleading health care providers' speech, intermediate scrutiny does not provide sufficient protection. Applying strict scrutiny to truthful and non-misleading speech would be in line with the general approach the Supreme Court has taken with health care provider speech in the past.³⁰⁸ In addition, applying strict scrutiny would be consistent with the Court's recent approach to content-based restrictions on commercial speech as articulated in *Sorrell*.³⁰⁹ For these reasons, speech that survives the first prong of *Central Hudson* should continue to be analyzed under traditional strict scrutiny.

D. Senate Bill 1172 Would Be Upheld Under this "Single-Prong" Approach

When examined under this proposed single-prong approach, SB 1172 would be upheld as a constitutional exercise of the state's police powers for protecting the health and well-being of minors even if it is viewed as a restriction on speech. Under the first prong analysis of *Central Hudson*, the "therapeutic" speech affected by SB 1172 would be found false and misleading. Conversion therapy would fail this analysis on several of the *Daubert* criteria.³¹⁰ First, conversion therapy

306. See POST, *supra* note 43, at 54–59 (examining how courts would determine whether homeopathic medicine is a scientific discipline).

307. See *Marijuana*, AM. CANCER SOC'Y, <http://www.cancer.org/treatment/treatmentsandsideeffects/complementaryandalternativemedicine/herbsvitaminsandminerals/marijuana> (last updated July 13, 2012) (explaining that marijuana is used for pain and appetite stimulation for people with AIDS or cancer).

308. See *supra* Parts I.B.1 and I.B.2 (exploring the protections the Supreme Court has afforded regarding medical marijuana and firearms).

309. See *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653, 2672 (2011) (finding Vermont's restrictions on the sale of prescribing data for pharmaceutical marketing purposes as an unconstitutional content-based restriction subject to heightened scrutiny).

310. See *supra* notes 273–281 and accompanying text for a discussion of the *Daubert* criteria.

lacks general acceptance; it is not supported by any mainstream medical or psychological organization.³¹¹ Instead, supporters of conversion therapy are primarily religious groups.³¹² The Supreme Court has previously been suspicious of scientific support put forward only by church-based scientific organizations.³¹³ The only reportedly professional association supporting conversion therapy is NARTH. However, few people consider NARTH a legitimate scientific organization.³¹⁴ Second, conversion therapy has never been proven effective in a methodologically valid study,³¹⁵ but it has been demonstrated as harmful.³¹⁶ As a result, there are few primary research publications supporting conversion therapy in the scientific literature outside those published by NARTH-affiliated authors.³¹⁷

Given the lack of general acceptance of conversion therapy as a legitimate therapeutic approach and the lack of supportive evidence in the scientific literature, courts will likely be skeptical about its

311. See *supra* notes 209–212 and accompanying text (arguing that experts have found conversion therapy harmful to patients).

312. See, e.g., *The Truth About “Converting” Gay People*, OUTFRONT MINN., <http://www.outfront.org/library/exgay/facts> (last visited Nov. 19, 2013) (describing these “ex-gay” groups as being “religious-based” or “quasi-mental-health” groups); see also Hicks, *supra* note 3, at 508 (discussing religious approaches used in addition to therapy to attempt to change sexual orientation). Exodus International, one of the largest Christian-based organizations advocating conversion therapy recently issued an apology to the gay community and then shut down a few hours later. Ed Payne, *Group Apologizes to Gay Community, Shuts Down “Cure” Ministry*, CNN (July 8, 2013, 2:04 PM), <http://www.cnn.com/2013/06/20/us/exodus-international-shutdown>.

313. See *Edwards v. Aguillard*, 482 U.S. 578, 601–02 (1987) (Powell, J., concurring) (discussing the lack of scientific methodology evidence and the groups’ reliance on church doctrine in declaring themselves creation scientists).

314. See, e.g., Ryan Lenz, *NARTH Becomes Main Source for Anti-Gay “Junk Science,”* INTELL. REP., Spring 2012, at 2, available at <http://www.splcenter.org/get-informed/intelligence-report/browse-all-issues/2012/spring/queer-science> (“In fact, every major American medical authority has concluded that there is no scientific support for NARTH’s view, and many have expressed concern that reparative therapy can cause harm.”).

315. See *supra* notes 190–192 and accompanying text (noting that the most commonly cited study was retracted by its author).

316. See *supra* notes 194–208 and accompanying text (describing the documented harms of conversion therapy).

317. For example, a search of PubMed for the term (“sexual orientation”) AND (“change efforts” OR “change therapy” OR “conversion therapy”) revealed 10 studies, only one of which is primary research on homosexual patients. [http://www.ncbi.nlm.nih.gov/pubmed/?term=\(%22sexual+orientation%22\)+AND+\(%22change+efforts%22+OR+%22change+therapy%22+OR+%22conversion+therapy%22\)](http://www.ncbi.nlm.nih.gov/pubmed/?term=(%22sexual+orientation%22)+AND+(%22change+efforts%22+OR+%22change+therapy%22+OR+%22conversion+therapy%22)) (last accessed Sept. 26, 2013). PubMed is the U.S. National Library of Medicine’s link to more than 23 million citations from biomedical literature. *PubMed Help*, PUBMED.GOV, <http://www.ncbi.nlm.nih.gov/books/NBK3827/#pubmedhelp.FAQs> (last visited Nov. 19, 2013). The primary author of the article, *Retrospective Self-reports of Changes in Homosexual Orientation: A Consumer Survey of Conversion Therapy Patients*, Dr. Joseph Nicolosi, is a member of the Board of Directors of NARTH. *NARTH Officers and Board Members*, NAT’L ASSOC. FOR RES. & THERAPY OF HOMOSEXUALITY, <http://www.narth.com/2011/11/narth-officers#!ourteam/cqn6> (last visited Nov. 19, 2013).

validity.³¹⁸ If courts apply the professional practices of mainstream psychology, as Robert Post argues they should, they will likely determine that NARTH “does not itself produce constitutionally valuable knowledge” and would therefore find the organization’s evidence invalid.³¹⁹

Under this single-prong approach, once courts have determined that conversion therapy is not a legitimate therapeutic approach, SB 1172 would only be subject to rational basis review.³²⁰ Under rational basis review, a statute is constitutional if it is rationally related to a legitimate state interest.³²¹ Protecting minors from harm is a legitimate state interest.³²² Banning conversion therapy for minors is rationally related to that legitimate interest because the harms of conversion therapy have been demonstrated.³²³ Therefore, because SB 1172 is rationally related to a legitimate state interest, it would be a constitutional exercise of the state’s police powers under rational basis review.

CONCLUSION

Giving full First Amendment coverage to health care providers’ speech has served to protect the doctor-patient relationship from attempted content- and viewpoint-based restrictions. This approach has worked well for speech supported by some scientific evidence, even when there is a lack of scientific consensus. However, when that speech involves quackery, the traditional use of strict scrutiny can undermine the states’ attempts at using their police powers to protect citizens.

The same reasoning and approach the Supreme Court has used for analyzing commercial speech under the First Amendment should apply to health care providers’ speech within the doctor-patient relationship. Using the first prong of *Central Hudson*, this single-prong approach allows courts to identify the health care equivalent of

318. See *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 594 (1993) (listing “general acceptance” as one criteria courts should consider in determining whether proposed scientific testimony is valid).

319. See POST, *supra* note 43, at 56–57 (describing how courts might use “‘established’ scientific discipline” to determine that astrological advice and homeopathic medicine do not require First Amendment protection).

320. See *City of Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410, 443–44 (1993) (Rehnquist, C.J., dissenting) (summarizing the Court’s history of commercial speech jurisprudence).

321. Cf. *Armour v. City of Indianapolis*, 132 S. Ct. 2073, 2080 (2012) (defining rational basis review in the equal protection setting).

322. See *Brown v. Entm’t Merchs. Ass’n*, 131 S. Ct. 2729, 2736 (2011) (explaining that the State possesses the authority and power to protect children from harm).

323. See *supra* notes 194–208 and accompanying text for a discussion of the harms of conversion therapy.

false and misleading commercial speech—quackery. Therefore, for the same reasons false and misleading commercial speech is excluded from First Amendment protection, quackery should be excluded from such protection. This approach provides a better balance between protecting the First Amendment rights of providers as speakers (and therefore patients as listeners) with the right of States to use their police powers to protect citizens from harm.

California's attempt at banning conversion therapy for minors with SB 1172 provides a case to demonstrate the benefits of this approach. Under traditional strict scrutiny, SB 1172 would likely be ruled unconstitutional if viewed as a restriction on speech. If SB 1172 was ruled unconstitutional, mental health providers would be allowed to continue to provide conversion therapy and harm patients. Under the proposed single-prong approach, SB 1172 would be upheld as constitutional, thereby preventing these harms.

The approach articulated here fits within the broader scheme of First Amendment jurisprudence. First Amendment protection of political speech serves to protect the speaker in the marketplace of ideas, where society's interest is in making sure all voices are heard.³²⁴ Commercial speech and—as this Comment argues—health care providers' speech are permissibly regulated under the First Amendment in order to protect the listener.³²⁵ This protection serves the societal interest in health care: finding the "truth" in diagnosis and treatment for the individual patient while preventing quackery from harming patients.

324. See POST, *supra* note 43, at 24 (noting that the First Amendment is meant to protect the autonomy of the speaker in public discourse).

325. See *id.* (arguing for the government's role in properly adjudicating and legislating First Amendment issues to protect both the speaker and the targeted).