RECORD NO. 12-14009-FF

In The
United States Court of Appeals
For The Eleventh Circuit

DR. BERND WOLLSCHLAEGER, *et al.*,

Plaintiffs – Appellees,

versus

GOVERNOR OF THE STATE OF FLORIDA, *et al.*,

Defendants – Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

EN BANC BRIEF OF *AMICUS CURIAE* INSTITUTE FOR JUSTICE IN SUPPORT OF APPELLEES

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IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DR. BERND WOLLSCHLAEGER, ET AL.
Appellees,

v. Case No. 12-14009-FF

GOVERNOR STATE OF FLORIDA, ET AL.
Appellants.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure Rule 26.1 and Eleventh Circuit Rule 26.1-1, Amicus provides the following certificate of interested persons:

1. The Honorable Marcia G. Cooke, U.S. District Judge

Defendants/Appellants:

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30. American Academy of Pediatrics, Fla. Chapter

31. American College of Physicians, Fla. Chapter

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66. American Academy of Family Physicians

67. American Academy of Orthopaedic Surgeons

68. American Academy of Pediatrics

69. American Association of Suicidology

70. American Bar Association

71. American College of Obstetricians and Gynecologists

72. American Congress of Obstetricians and Gynecologists

73. American College of Preventative Medicine

74. American College of Surgeons

75. American Medical Association

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83. Doctors for Responsible Gun Ownership

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85. Florida Public Health Association

86. Institute for Justice

87. Law Center to Prevent Gun Violence

88. National Rifle Association

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* = no longer involved in representation

I hereby certify pursuant to 11th Circuit Rule 26.1-3(b) that no publicly traded company or corporation has an interest in the outcome of the case or appeal.

Dated: April 26, 2016.

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INTEREST OF THE AMICUS

The Institute for Justice ("IJ") is a non-profit, public-interest law firm headquartered in Arlington, Virginia. As the nation's leading law firm for liberty, IJ provides *pro bono* representation on behalf of clients nationwide whose core liberties have been infringed by the government. IJ litigates regularly in the area of the First Amendment, and in particular, has significant institutional knowledge regarding the intersection of the First Amendment and the regulation of licensed occupations. Accordingly, the regulation of medical professionals that is at issue in this case is of keen interest to IJ and its members.

No party or counsel for a party contributed money intended to fund the preparation and submission of this brief. No person or party other than amicus, its members, or its counsel contributed money that was intended to fund preparing or submitting this brief.

STATEMENT OF THE ISSUES

Amicus Institute for Justice urges the Court to reject the ruling of the panel majority and affirm the district court for two reasons. First, the panel opinion errs by announcing a complex new doctrine of "professional speech" that is irreconcilable with *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S. Ct. 2705 (2010). The majority holds that certain kinds of individualized advice from a specialist to a layperson are a distinct type of speech entitled to reduced

constitutional protection. This holding conflicts directly with the unanimous ruling in *Humanitarian Law Project* that such advice receives full First Amendment protection. Second, the Court should reject the panel majority's finding that the government has a compelling interest in suppressing truthful speech about lawful conduct (such as refraining from gun possession) if the conduct is related to a fundamental right and the court fears that a perceived "power disparity" between the speaker and listener will render the speaker more persuasive. In rejecting the majority's ruling, this Court should not adopt the dissent's erroneous conclusion that laws that impose licensure requirements on speech evade First Amendment review.

STATEMENT OF FACTS

As Appellees do, *amicus* adopts the statement of facts in Judge Wilson's dissent in the second panel opinion. *See* Pet. for Reh'g En Banc at 3 (Aug. 15, 2014).

SUMMARY OF THE ARGUMENT

The Supreme Court has articulated a set of clear rules that apply to restrictions like the one at issue in this case. But the panel's opinions—both the majority and dissent—have disregarded these principles and, as a result, suffer from several major errors of First Amendment law.

First, the panel majority's "professional speech" exception to the First Amendment is foreclosed by the Supreme Court's free-speech jurisprudence. Specifically, the panel majority's reasoning that "professional speech" is subject to reduced scrutiny, *Wollschlaeger v. Governor of the State of Florida*, 814 F.3d 1159 (11th Cir. 2015), is wholly incompatible with the Supreme Court's ruling in *Holder v. Humanitarian Law Project* that restrictions on professional advice are subject to strict scrutiny. 561 U.S. 1 (2010). The conflict with Supreme Court precedent is particularly glaring here, in light of *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), which held that *all* content-based restrictions on speech, such as the law at issue in this case, are subject to strict scrutiny. Rather than apply *Humanitarian Law Project* and *Reed*, the panel majority bases its opinion on Justice White's non-binding concurrence in *Lowe v. S.E.C.*, 472 U.S. 181, 228-230, 105 S. Ct. 2557, 2582-2583 (1985) (White, J., concurring in result). And in so doing, the panel majority adopts a view of the First Amendment that has never been mentioned, much less adopted by the Supreme Court. But the Supreme Court has been clear that the federal courts may not carve out exceptions to the First Amendment unless the speech sought to be barred meets certain specific criteria. *See United States v. Stevens*, 559 U.S. 460, 130 S. Ct. 1577 (2010). The panel majority did not even engage in this required analysis, much less demonstrate that it has been satisfied.

Second, the panel majority's recognition of a compelling governmental interest in suppressing speech where there is a "significant power imbalance" between a speaker and listener is unprecedented and deeply dangerous to First Amendment law. Under this view of the First Amendment, the government may regulate speech that it does not like, wherever it determines that the speech may be particularly persuasive in light of the relationship between the speaker and the listener. Such a restriction on speech is precisely what the First Amendment is intended to protect against. Indeed, a long line of Supreme Court precedent affirms the unconstitutionality of regulations that draw distinctions based on the identity of the speaker or the nature of the speech. Therefore, the panel majority erred because it disregarded this axiomatic principle of First Amendment law.

Finally, although the panel dissent correctly concludes that Florida's law is unconstitutional, the dissent wrongly (and dangerously) concludes that laws that require a license to speak evade First Amendment scrutiny altogether. As a result, the panel dissent introduces an unprecedented wrinkle into First Amendment law, conditioning the applicability of First Amendment protection on the question of whether the speaker has a license. This view of the First Amendment has no basis in Supreme Court jurisprudence. Moreover, there is no need for the panel dissent to make any such pronouncement in this case, as the law at issue impacts only licensed professionals.

ARGUMENT AND AUTHORITIES

I. The U.S. Supreme Court's Precedent Forecloses the Creation of a Separate Category of "Professional Speech."

The panel majority's extensive discussion of the so-called "professional speech" doctrine was erroneous. Specifically, the panel reasoned that the speech at issue in this case was "professional speech" and therefore entitled to only reduced First Amendment protection. This view, however, is squarely at odds with the Supreme Court's most recent precedent, which forecloses the creation of a separate category of "professional speech." As explained in greater detail in Section I.A., *Humanitarian Law Project* held that pure speech between a professional and client received the full protections of the First Amendment. Moreover, as discussed in Section I.B., the panel majority's apparent embrace of Justice White's concurrence in *Lowe* lacks any basis in—and in fact has been repeatedly rejected by—previous rulings of the Supreme Court.

A. The Panel Majority's Suggestion That There Exists a "Professional Speech" Exception to the First Amendment is Directly at Odds with *Humanitarian Law Project*.

The panel majority's ruling is irreconcilable with *Humanitarian Law Project*, which held that pure speech between a professional and a client is subject to strict scrutiny. Moreover, extensive Supreme Court precedent in addition to *Humanitarian Law Project* clearly illustrates that the majority erred by purporting to create a new First Amendment exception for individualized expert advice.

The premise of the majority's analysis is that individualized professional advice constitutes a distinct First Amendment category. *Wollschlaeger v. Governor, State of Florida*, 814 F.3d 1159, 1187 (11th Cir. 2015) ("First, we must examine what constitutes professional speech."). According to the majority, "the doctrinal category of 'professional speech,'" *id.*, applies to speech "uttered in furtherance of the practice of medicine and within the confines of a fiduciary relationship." *Id.* at 1189. Thus, the majority held that a doctor's discussion of guns with a patient is professional speech.

The majority deemed it necessary to categorize the speech at issue here as *professional* because the majority believed that distinct, doctrinally important considerations arise in the professional-speech context that justify reducing the standard of review. And although the majority purported to apply strict scrutiny, the opinion is clear that professional speech warrants *at most* the intermediate scrutiny that applies to commercial speech. *Wollschlaeger*, at 814 F.3d 1159, 1190 ("a lesser level of scrutiny applies . . . [when] the state seeks to regulate speech by professionals in a context in which the State's interest in regulating for the protection of the public is more deeply rooted.") The majority thus concluded that "the restriction at issue here fits cleanly within" the professional-speech doctrine because "courts have long recognized the authority—duty, even—of States to regulate the practice of professions to 'to shield[] the public against the

untrustworthy, the incompetent, or the irresponsible.'" *Id*. at 1191 (quoting *Thomas v. Collins*, 323 U.S. 516, 545, 65 S. Ct. 315, 329 (1945) (Jackson, J., concurring) (alteration in original)). In fact, in explaining why intermediate scrutiny was the appropriate standard, the majority even suggested that the intermediate scrutiny of the commercial-speech test was *too* rigorous for restrictions on professional speech. *Id*. at 1181.

The professional-speech doctrine announced by the panel majority conflicts fatally with the Supreme Court's ruling in *Humanitarian Law Project*—its most recent and most authoritative pronouncement on the analysis of restrictions on individualized technical advice. In that case, the Supreme Court unanimously held that restrictions on individualized technical advice were a form of content-based regulation that trigger strict scrutiny. *Humanitarian Law Project*, 560 U.S. at 28, 130 S. Ct. at 2724. Thus, the holding in *Humanitarian Law Project* cannot be reconciled with the panel majority's conclusion that a professional-speech doctrine even exists, much less that restrictions on professional speech warrant, at most, intermediate scrutiny.

In *Humanitarian Law Project*, the Supreme Court considered the constitutionality of a federal law that prohibited anyone from providing "material support" to designated foreign terrorists in the form of (among other things) "training" or "expert advice or assistance." 561 U.S. at 8-9, 130 S. Ct. at 2712-

2713. The plaintiffs consisted of "two U.S. citizens and six domestic organizations" with special expertise that wished to provide technical "train[ing] [to] members of [the Kurdistan Workers' Party (PKK)] on how to use humanitarian and international law to peacefully resolve disputes" and to "teach[] PKK members how to petition various representative bodies such as the United Nations for relief." *Id.* 561 U.S. at 10, 14-15, 130 S. Ct. at 2716-2717. The "material support" at issue, in other words, was privately communicated technical advice from a specialist to a layperson. *See id.*

Humanitarian Law Project sets forth the Supreme Court's position that there is nothing special about, and strict scrutiny applies to, restrictions on speech in the form of individualized, privately communicated technical advice between a specialist to a layperson. Indeed, the Supreme Court held that the distinction between generalized speech to the public and individualized advice was itself a content-based distinction triggering strict scrutiny:

> [The material-support prohibition] regulates speech on the basis of its content. Plaintiffs want to speak to [designated terrorist organizations], and whether they may do so under [the law] depends on what they say. If plaintiffs' speech to those groups imparts a "specific skill" or communicates advice derived from "specialized knowledge . . . . then it is barred. On the other hand, plaintiffs' speech is not barred if it imparts only general or unspecialized knowledge.

Humanitarian Law Project, 561 U.S. at 27, 130 S. Ct. at 2723-24 (citations omitted). The speech in *Humanitarian Law Project* is materially identical to the

speech here: a technical specialist (doctor) engaged in speech of a particular content (about gun ownership) to a layperson (patient). Accordingly, *Humanitarian Law Project* provides the most analogous application of the First Amendment in a "pure speech" case such as this one.

Likewise, *Humanitarian Law Project* is also controlling to the extent the panel distinguishes between regulations of professionals' speech and professionals' conduct. Indeed, the panel majority's professional-speech doctrine essentially adopts the government's failed argument in *Humanitarian Law Project*, in which DOJ asserted that intermediate scrutiny was appropriate because the *purpose* of the law was to protect the public by regulating the conduct of specialists. Despite this, the panel majority reasons here that intermediate scrutiny is appropriate because the *purpose* of the challenged statute is to regulate the medical profession and the physician has a fiduciary obligation to the patient. This holding is thus directly at odds with the Supreme Court's ruling in *Humanitarian Law Project*, which clearly established that the purpose of the law in question has no bearing on the level of constitutional scrutiny it must satisfy when, as here, the law is triggered by speech.

This interpretation of *Humanitarian Law Project* is reinforced by the Supreme Court's ruling in *Reed v. Town of Gilbert*, which emphasized forcefully that the legislature's laudable *purpose* does not allow a law to escape strict scrutiny because "[i]nnocent motives do not eliminate the danger of censorship presented

by a facially content-based statute." 135 S. Ct. 2218, 2229 (2015). Thus, the premise of the panel majority's analysis—that regulations of "professional speech" are subject to diminished scrutiny—has not just been rejected by the Supreme Court, it has been rejected *repeatedly*.

The Supreme Court's analysis in *Reed* undermines the idea of a professional-speech doctrine in a second way. In *Reed*, the Supreme Court not only confirmed that strict scrutiny applies to *content-based* restrictions on speech, it specifically warned that government must not be allowed to evade strict scrutiny by using *speaker*-based laws to control content. *Id.* at 2230–31. The professional-speech doctrine announced by the panel, though, would seem to allow exactly that. Here, the distinction drawn by Florida law is undeniably speaker-based: One class of people (licensed physicians) may not make inquiries about firearms, while essentially everyone else can.[1]

[1] The government does not argue that this incorrect; only that it is irrelevant. Indeed, in Appellants' brief *en banc*, the government attempts to evade the obvious implications of *Reed*, by arguing that content-based restrictions on speech—and, presumably by extension, all other infringements on speech, including viewpoint-based restrictions and compelled speech—are *per se* constitutional as long as they are imposed on "professional speech occurring within the physician-patient relationship."

B. The Panel's Application of Justice White's *Lowe* Concurrence Finds no Support in Supreme Court Precedent.

These repeated rejections of the basic ideas behind a professional-speech exception to the First Amendment must be weighed against whatever support for such an exception can be found in the Supreme Court's jurisprudence. And that support is scanty: The single strongest statement in support of the panel majority's proposed doctrine is Justice White's three-judge concurrence in *Lowe v. S.E.C.*, 472 U.S. 181, 228–30, 105 S. Ct. 2557, 2582-2583 (1985) (White, J., concurring in result). But the analysis in Justice White's concurrence has never even been cited by the Supreme Court. Indeed, just three years after *Lowe*, the Supreme Court implicitly rejected it, making clear that it had never decided that occupational licensure is "devoid of all First Amendment implication" or "subject only to rationality review." *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 801 n.13, 108 S. Ct. 2667, 2680 n.13 (1988).

This lack of support in the existing doctrine for a professional-speech exception matters because the Supreme Court has made abundantly clear that lower courts do not have carte blanche to create new exceptions to the First Amendment. *See United States v. Stevens*, 559 U.S. 460, 130 S. Ct. 1577 (2010). *Stevens* involved a federal law criminalizing the sale or possession of depictions of unlawful animal cruelty, *id.* at 559 U.S. 464–65, 130 S. Ct. at 1582-1583, a ban which the government defended by arguing that such depictions are analogous to

child pornography and should be similarly outside the protections of the First Amendment. *Id.* at 559 U.S. at 468-69, 130 S. Ct. at 1584-1585. The Supreme Court rejected this argument, holding that federal courts do not simply have a "freewheeling authority to declare new categories of speech outside the scope of the First Amendment," *id*. at 559 U.S. at 472, 130 S. Ct. at 1586, on the basis of "an ad hoc balancing of relative social costs and benefits." *Id.* at 559 U.S. at 470, 130 S. Ct. at 1585. Instead, the appropriate inquiry is whether the given category of speech has historically been treated as unprotected. *Id.*; *accord Brown v. Ent. Merchants Ass'n*, 564 U.S. 786, 791, 131 S. Ct. 2729, 2734 (2011) ("[N]ew categories of unprotected speech may not be added to the list by a legislature that concludes certain speech is too harmful to be tolerated."). Despite its lengthy explanation of the scope of the professional-speech doctrine, the panel never even mentions the *Stevens* test, much less points to historical evidence sufficient to meet it.[2]

[2] Likewise, Second Amendment amici in this case ignore these precedents entirely, and urge this Court to do the same, in arguing that the speech in this case is entitled to reduced protection. Indeed, Second Amendment amici do not cite a single First Amendment case decided after the mid-1990s. Rather, Second Amendment amici essentially argue that this Court should disregard several decades of Supreme Court and First Amendment precedent, and instead rely on outdated case law and the scholarly work of Robert Post. These sources, however, provide little more than an obsolete snapshot of a theory of the First Amendment that simply cannot be squared with the Supreme Court's modern case law.

II. The Government Never Has an Interest Under Any Standard of Review, Much Less a Compelling Interest Under Strict Scrutiny, in Suppressing Speech Because it Might Be Persuasive.

The Supreme Court's ruling in *Reed* reaffirmed a long line of precedent that First Amendment protections are at their zenith when the permissibility of speech depends on the nature of the speech or the identity of the speaker. The panel majority disregarded this principle, and in so doing, introduced a serious and dangerous error into the law of the First Amendment. But the majority further erred in its application of judicial scrutiny.

Purporting to apply strict scrutiny in the alternative, the majority held that the government has a compelling interest in regulating the discussion of guns by doctors because the imbalance of power between a doctor and a patient may make the doctor's views especially persuasive. This is anathema to the First Amendment and threatens to undermine the bedrock of free-speech jurisprudence. The Supreme Court has made it absolutely clear that the government has no authority to suppress or manipulate a speaker's truthful message about lawful conduct simply because the government fears the speaker may persuade the listener.

It is well settled that content-based restrictions on speech are "presumptively unconstitutional" and survive only if the government "proves" that its restrictions "are narrowly tailored to serve compelling state interests." *Reed*, 135 S. Ct. at 2226. This is the highest burden in constitutional law, because content-based

restrictions are a means to shape beliefs and behavior by manipulating or suppressing messages the government does not want citizens to hear. "Ceding to any government the power to police expression on the basis of its message poses the most obvious threat to Americans' most fundamental liberties: the freedom of speech and the freedom of conscience." *Dana's R.R. Supply v. Florida*, 807 F.3d 1235, 1248 (11th Cir. 2015). "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein." *W. Va. State Bd. of Educ. v. Barnette*, 319 U.S. 624, 642, 63 S. Ct. 1178, 1187 (1943).

The panel majority's strict-scrutiny analysis turns these venerable propositions on their head, treating the possible *persuasiveness* of speech as a harm the government has a *compelling* interest in preventing through enforced silence. In the majority's view, there is something special about the nature of the speaker-listener relationship here—namely, a doctor-patient relationship—that supplies a compelling reason for regulation. *See, e.g.*, *Wollschlaeger*, 814 F.3d at 1197-98. But even if it were true that doctors are particularly persuasive based on their expertise and position of trust, the government never has an interest, under any standard of review, in suppressing truthful speech about lawful conduct simply because citizens may be persuaded. *See, e.g.*, *44 Liquormart v. Rhode Island*, 517

U.S. 484, 518, 116 S. Ct. 1495, 1515-1516 (1996) ("[When] the government's asserted interest is to keep legal users of a product or service ignorant in order to manipulate their choices . . . such an interest is *per se* illegitimate.") (Thomas, J., concurring).

The Supreme Court has consistently rejected the proposition that the government ever has the authority to regulate speech about lawful conduct to equalize speakers and listeners to diminish the former's persuasiveness. *See, e.g.*, *Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 131 S. Ct. 2653 (2011). In *Sorrell*, Vermont forbade drug marketers from using data of a physician's prescribing habits when making an in-office presentation to a physician.[3] The Supreme Court held that the suppression of speech due to its supposedly pressure-laden persuasiveness "is contrary to basic First Amendment principles." *Id.* at 564 U.S. at 576, 131 S. Ct. at 2670. "Speech remains protected even when it may 'stir people to action,' 'move them to tears,' or 'inflict great pain.'" *Id.* (quoting *Snyder v. Phelps*, 562 U.S. 443, 460, 131 S. Ct. 1207, 1220 (2011)). In short, "the fear that speech might persuade provides no lawful basis for quieting it." *Id.*

Ultimately, the error in the panel majority's strict-scrutiny discussion is the same as the error in the panel's professional-speech discussion: It assumes that

[3] As in the panel majority opinion, Vermont in *Sorrell* relied on statements in the legislative record suggesting that "'unwanted pressure occurs' when doctors learn that their prescription decisions are being 'monitored'" by drug marketers. *Id.* at 564 U.S. at 576, 131 S. Ct. at 2670.

government has a freer hand to regulate pure speech where the speaker may be particularly influential. But, as this case clearly demonstrates, the conversations that happen between a doctor and her patient—or a lawyer and his client, or any other professional and her customers—frequently have political salience. And it is not difficult to imagine the invidious consequences of allowing the majority opinion to stand: Legislatures may want to restrict the way lawyers talk to their clients about marriage, lest clients be persuaded to exercise their fundamental right to marry in a way the legislature does not like. Legislatures may want to restrict the way psychologists talk to their patients about abortion, lest patients be persuaded to exercise their right to abortion in a way the legislature does not like. Legislatures may want to restrict the way financial advisors talk about taxes, lest their customers be persuaded to vote (or not vote) for tax reform. The list goes on.

III. However This Court Resolves This Case, It Should Not Craft a Rule That Protects Only the Speech of Licensed Speakers.

For the reasons discussed above, this Court should reject the panel majority's reasoning and strike down Florida's law. In doing so, however, this Court should not affirm Judge Wilson's erroneous suggestion that laws which require speakers to obtain a license are immune from First Amendment scrutiny. *See Wollschlaeger*, 760 F.3d 1195 (11th Cir. 2014) (Wilson, J., dissenting). That doctrinally flawed conclusion would allow for sweeping restrictions on speech, and it has been rejected by several other federal courts accordingly.

Any interpretation of the First Amendment that requires a speaker to have a license—and thus does not protect a speaker until *after* a license has been obtained—introduces a harmful threshold for First Amendment applicability. As a practical matter, such an interpretation will mean that all unlicensed individuals are subject to censorship on any topic the legislature deems to be within the purview of a licensed profession. In other words, under the dissent's view of the First Amendment, the government is empowered to silence speech it disagrees with, or to compel speech it prefers, depending on the context and content of the speech and the credentials of the speaker. In contrast with the dissent, other federal courts have rejected this license-dependent application of the First Amendment and held that where licensure is a prerequisite to speech, the First Amendment indeed applies. *See, e.g.*, *Edwards v. District of Columbia*, 755 F.3d 996 (D.C. Cir. 2014) (applying the First Amendment to strike down a licensing requirement for tour guides in the District of Columbia); *Rosemond v. Markham*, 2015 WL 5769091, Civ. No. 13-42-GFVT (E.D. Ky. Sept. 30, 2015) (applying strict scrutiny under the First Amendment to strike down a state law requiring a psychology license to provide parenting advice in a Dear Abby-style newspaper column).

Even if the dissent were correct that licensing is immune from First Amendment scrutiny (and it is not),[4] it is unnecessary to reach this conclusion

[4] *See Riley*, 487 U.S. at 801 n.13.

here. None of the aggrieved parties in this case are unlicensed persons whose rights to speak (or not speak) are threatened because they are not properly licensed. The law applies only to licensed physicians. Accordingly, this case is a particularly inappropriate vehicle for announcing a new rule of law that would drastically curtail First Amendment protection for unlicensed speakers.

CONCLUSION

The panel majority's ruling is fundamentally flawed because it adopts a novel and erroneous application of the First Amendment in an otherwise simple case. Rather than try to parse which restrictions amount to "professional speech," or which restrictions equalize the power between the speaker and the listener, the Supreme Court has articulated clear, straightforward rules: Content-based restrictions on speech are subject to strict scrutiny, and the government cannot justify its restrictions on speech by asserting that the speech will be dangerously persuasive to its listeners. The panel majority abandons both of these rules in favor of a needlessly complex analysis that conflicts with Supreme Court precedent and will cause tremendous problems in future First Amendment cases in this Circuit. For these reasons, this Court should affirm the ruling of the District Court.

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I hereby certify that on this 26th day of April, 2016, I caused this *En Banc* Brief of *Amicus Curiae* Institute for Justice in Support of Appellees to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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I further certify that on this 26th day of April, 2016, I caused the required number of bound copies of the foregoing *En Banc* Brief of *Amicus Curiae* Institute for Justice in Support of Appellees to be filed via UPS Next Day Air with the Clerk of this Court and for one copy of the same to be served, via U.S. Mail, to all case participants, at the above listed addresses.

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