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COMMENT

A "LICENSE TO KALE"— FREE SPEECH CHALLENGES TO OCCUPATIONAL LICENSING OF NUTRITION AND DIETETICS

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I. INTRODUCTION: A "LICENSE TO KALE"[1]

Food and diet are popular and ubiquitous topics.[2] The internet and exponential expansion of the diet industry have made obtaining and sharing nutrition information increasingly simple.[3] Despite the availability of information, however, over 70% of Americans are considered overweight or obese, and obesity related illnesses are among the top causes of death in the United States.[4] With so much information readily available and the

1. This is play on words referencing the Eon Productions film, *License to Kill*, starring Timothy Dalton as James Bond. A "license to kill" is a unique character trait associated with the film character James Bond, which references the permission to act with deadly force granted only to specific secret agents. *See* MGM, Inc. v. Am. Honda Motor Co., 900 F. Supp. 1287, 1296 (C.D. Cal. 1995) (describing the character trait of "license to kill" as unique to the film character James Bond). Kale is a cruciferous vegetable rich in vitamin K that might be specifically discussed by a licensed and registered dietitian during a one-on-one nutrition consultation with a person taking blood thinning or anticoagulant medication. Cristina Leblanc et al., *Avoidance of Vitamin K-Rich Foods is Common Among Warfarin Users and Translates into Lower Usual Vitamin K Intakes*, 116 J. ACAD. NUTRITION & DIETETICS 1000, 1000–01 (2016); The Nutrition Source, *Kale*, HARV. SCH. OF PUB. HEALTH, https://www.hsph.harvard.edu/nutritionsource/food-features/kale/ [https://perma.cc/34LQ-66J9]. This Comment proposes licensure laws regulating the practice of nutrition and dietetics should be enacted by State legislatures and upheld by the judiciary. Where James Bond was permitted to use deadly force with a "license to kill," states must have the choice to specifically enact nutrition licensing laws giving state identified nutrition professionals a "license to kale."

2. The United States weight-loss market accounted for $72 billion in 2018. *The U.S. Weight Loss & Diet Control Market*, MKT. RSCH. (Feb. 2019), https://www.marketresearch.com/Marketdata-Enterprises-Inc-v416/Weight-Loss-Diet-Control-12225125/ [https://perma.cc/PF6K-6CWV].

3. *See* Susannah Fox, *The Social Life of Health Information, 2011*, PEW RSCH. CTR. (May 12, 2011), https://www.pewresearch.org/fact-tank/2014/01/15/the-social-life-of-health-information/ [https://perma.cc/KC4A-8GEN] (showing almost 60% of U.S. adults access health information online). The global weight loss and weight management market accounted for $168.95 billion in 2016 and is projected to reach $278.95 billion by 2023. *Weight Loss and Weight Management-Global Market Outlook (2017-2023)*, ORBIS RESEARCH (Nov. 1, 2017), https://www.orbisresearch.com/reports/index/weight-loss-and-weight-management-global-market-outlook-2017-2023 [https://perma.cc/UYX4-242K].

4. CTRS. FOR DISEASE CONTROL & PREVENTION, SELECTED HEALTH CONDITIONS AND RISK FACTORS, BY AGE: UNITED STATES, SELECTED YEARS 1988–1994 THROUGH 2015–2016 (2017), https://www.cdc.gov/nchs/data/hus/2017/053.pdf [https://perma.cc/V3RM-CT4P]. Overweight is defined as having a body mass index (BMI) of 25.0 to 29.9, and obese is defined as having a BMI of 30.0 or greater. BMI is measured as "a person's weight in kilograms divided by the square of [their] height in meters." *About Adult BMI*, CTRS. FOR DISEASE CONTROL & PREVENTION, https://www.cdc.gov/healthyweight/assessing/bmi/adult_bmi/index.html [https://perma.cc/69KP-CPLE]. BMI is moderately correlated with body fat measurements obtained from more direct body fat estimation measures. *Id.*

"Weight of the Nation"[5] generating such a high demand,[6] consumers may be unsure about who and what to rely on to receive competent and efficacious nutrition advice.[7] This is further complicated for people with diet related comorbidities, who especially require safe, evidence-based information and consultation to prevent harm, which in some situations may include death.[8]

Given the stakes involved and the potential for harm, it may not be a shock to learn that giving specific nutrition advice to someone with a disease or medical condition could be against the law if you don't have a license to do so.[9] Professional licensing laws regulating the practice of medical professions like nutrition and dietetics are of utmost importance—these laws are designed to protect the public from the harm caused by inaccurate, uninformed, and inefficacious medical information.[10] Medical licensing laws protect the public through several different mechanisms. Most notably, these laws may enact practice exclusivity, which allows only qualified medical practitioners meeting state-specific education and experience levels to lawfully practice the profession within the state and use certain professional titles.[11] Any unlicensed but practicing individuals, or those who are inappropriately using covered titles, are violating the law and

5. National Institutes of Health, *NIH and the Weight of the Nation*, U.S. DEP'T OF HEALTH & HUMAN SERV., https://www.nih.gov/health-information/nih-weight-nation [https://perma.cc/6PPC-SX92].

6. *See* Crescent B. Martin et al., *Attempts to Lose Weight Among Adults in the United States, 2013–2016*, NAT'L CTR. FOR HEALTH STAT. 5 (July 2018), https://www.cdc.gov/nchs/products/databriefs/db313.htm [https://perma.cc/WWM8-ZQJY] (finding among U.S. adults who reported trying to lose weight during the past twelve months, over 62% tried eating less food, over 50% tried increasing fruit and vegetable intake, and over 42% tried eating less junk or fast food).

7. Wendy Phillips & Pepin Andrew Tuma, *Consumer Protection Through Professional Regulation*, 119 J. ACAD. NUTRITION & DIETETICS 1561, 1561 (2019).

8. *Id.*

9. *See, e.g.*, FLA. STAT. ANN. § 468.504 (West 2019) ("No person may engage for remuneration in dietetics and nutrition practice or nutrition counseling or hold himself or herself out as a practitioner of dietetics and nutrition practice or nutrition counseling unless the person is licensed in accordance with the provisions of this part."); Phillips & Tuma, *supra* note 7, at 1561–62 (explaining the need for providing reliable information on safe therapies and practices to help people avoid the dangers of receiving unscientific or medically unnecessary treatment). *But see* Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 183 (2015) (suggesting an occupational licensure law providing practice exclusivity for psychologists as creating "outrageous" situations).

10. *See* FLA. STAT. ANN. § 468.502 (finding the unskilled and incompetent nutrition counseling or practice of nutrition and dietetics is a danger to public health and safety).

11. *See* Phillips & Tuma, *supra* note 7, at 1562–63 (explaining the different levels of state dietetic licensure laws and how licensure with practice exclusivity provides the greatest amount of consumer protection).

subject to legal penalties such as injunctions, fines, and criminal charges.[12] Licensing laws may also limit the professional titles individuals can use when representing themselves, like licensed dietitian (LD), certified dietitian (CD), and certified nutritionist (CN).[13]

A. *Free Speech Challenges to Nutritional Licensure: Lack of Guidance Creates Legal Uncertainty*

Healthcare professionals are required by statute to apply for and maintain a license to practice in most states.[14] While these statutes often provide exceptions for other similarly situated medical providers whose scope of practice naturally overlaps, an anticipated consequence of these licensing statutes is the prohibition of practice for unlicensed individuals.[15] For nutrition and dietetics, that might mean if an unlicensed practitioner creates a diet plan specifically to treat a disease or medical condition of another person, they are breaking the law.[16] Inevitably, tensions arise for those people who want to represent themselves with protected nutrition credentials, or whose unlicensed advice or scope of practice "creeps"[17] into

12. *See* Kokesch Del Castillo v. Philip, No. 3:17-CV-722-MCR-HTC, 7 (N.D. Fla. Jul. 17, 2019) (listing the possible penalties for violating the dietetic licensure statute include imprisonment and fines).

13. *See* Phillips & Tuma, *supra* note 7, at 1562–63 (indicating statutes protecting only the use of certain protected titles as providing the lowest level of consumer protection).

14. Currently forty-seven states, the District of Columbia, and Puerto Rico have licensure statutes governing nutrition and dietetic practice or the use of the professional titles "dietitian" and "nutritionist." *See Academy of Nutrition and Dietetics: Licensure Statutes and Information by State*, EAT RIGHT PRO (July 2, 2018), https://www.eatrightpro.org/advocacy/licensure/licensure-map [https://perma.cc/WB74-MN64] (providing a map detailing the different levels of licensure statutes provided across the fifty states and the District of Columbia); *Academy of Nutrition and Dietetics: Licensure Information by State*, EAT RIGHT PRO (Sept. 22, 2019), [https://perma.cc/Y8Q3-X262].

15. *See* Academy of Nutrition and Dietetics, *Consumer Protection Through Professional Regulation*, *Issue Brief for Academy Members*, EAT RIGHT PRO (Nov. 2018) [https://perma.cc/CU4Z-L383] (describing the flexibility of dietetic licensure laws, which often permit non-dietitian medical professionals, such as nurses and pharmacists, to legally provide nutrition information that falls within their scope of practice, training, and qualifications).

16. *See* FLA. STAT. ANN. § 468.504 (West 2019) ("No person may engage for remuneration in dietetics and nutrition practice or nutrition counseling or hold himself or herself out as a practitioner of dietetics and nutrition practice or nutrition counseling unless the person is licensed in accordance with the provisions of this part.").

17. In a medical setting, scope of practice defines the duties an individual health care provider is permitted to perform in a specific profession. *Assessing Scope of Practice in Health Care Delivery: Critical Questions in Assuring Public Access and Safety*, FED'N OF STATE MED. BDS. 4 (2005), https://www.fsmb.org/siteassets/advocacy/policies/assessing-scope-of-practice-in-health-care-delivery.pdf [https://perma.cc/H8P2-YETC]. "Scope creep" occurs when a medical professional performs duties outside their defined scope of practice; duties performed by a different and more appropriately

the statutorily protected zone.[18] These situations create opportunity for litigation and licensing laws have been challenged on a variety of legal grounds, but only a few cases have specifically dealt with First Amendment challenges to nutrition and dietetics.[19]

Available scholarly legal literature specifically addressing nutrition and dietetics licensing is scarce.[20] There is also a notable lack of general judicial direction regarding occupational licensing from the Supreme Court.[21] A lack of legal literature, judicial direction, and on-point caselaw, combined with perhaps a misunderstanding of the medical implications of the nutrition profession, have led courts to primarily compare challenges to nutrition licensure statutes to challenges of similar laws governing non-medical professions.[22] Given the unique aspects of medical professions and their particular impact on society, disastrous consequences could arise from not applying the most appropriate caselaw.[23] This Comment seeks to address the gap of knowledge surrounding nutrition licensure statutes,

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qualified professional. Academy of Nutrition and Dietetics, *Licensure and Professional Regulation of Dietitians*, EAT RIGHT PRO (2019), https://www.eatrightpro.org/advocacy/licensure/professional-regulation-of-dietitians [https://perma.cc/BL7H-PG5P].

18. *See* Kokesch Del Castillo v. Philip, No. 3:17-CV-722-MCR-HTC, 2–3 (N.D. Fla. Jul. 17, 2019) (describing the underlying plaintiff's background as a holistic health coach undisputedly did not satisfy the state licensure law, but nevertheless the plaintiff challenged the law as a violation of her free speech rights).

19. *Id.* at 3; *see also* Cooksey v. Futrell, 721 F.3d 226, 234 (4th Cir. 2013) (holding the plaintiff's underlying First Amendment rights were sufficiently chilled by the state board of dietetics and nutrition as to warrant his legal action "ripe for adjudication"); Ohio Bd. of Dietetics v. Brown, 614 N.E.2d 855, 860 (Ohio Ct. App. 1993) (holding the plaintiff's underlying due process and freedom of religion claims as meritless, and his actions were in violation of the state nutrition licensure statute); Strandwitz v. Ohio Bd. of Dietetics, 614 N.E.2d 817, 824 (Ohio Ct. App. 1992) (holding the two clinical nutritionists were not exempt from the state licensing requirements governing the practice of dietetics).

20. *See* Stephen A. Meli, Comment, *Do You Have a License to Say That? Occupational Licensing and Internet Speech*, 21 GEO. MASON L. REV. 753, 754 (2014) (arguing speech including nutrition advice should not be considered as engaging in professional speech).

21. Justice White's concurring opinion in *Lowe v. S.E.C.* is one of the few resources from the Supreme Court discussing occupational licensing. Sherman, *supra* note 9, at 184 (citing Lowe v. S.E.C., 472 U.S. 181, 211 (1985)).

22. *See* Kevin Dayratna et al., *Reforming American Medical Licensure*, 42 HARV. J.L. & PUB. POL'Y 253, 257–58 (2019) (indicating a large focus on occupational licensing has been on non-health care professions).

23. *See* Graves v. Minnesota, 272 U.S. 425, 429 (1926) (holding statutes governing "locomotive engineers and barbers . . . involve very different considerations from those relating to such professions . . . requiring a high degree of scientific learning" such as "statutes regulating the practice of medicine"); Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psych., 228 F.3d 1043, 1055 (9th Cir. 2000) (holding the state's interest in regulating mental health more compelling than its interest in regulating attorney solicitation, given the safety and health implications of the profession).

putting aside any merited criticisms of occupational licensing in general,[24] and establish why licensing laws governing medical professions like nutrition and dietetics is, at minimum, a unique category worthy of continued licensing.[25] The purpose of this Comment is to provide the following: (1) a foundation for understanding what nutrition and dietetics is; (2) why nutrition licensing statutes exist; (3) how free speech challenges to licensing laws have be made and interpreted; and (4) why medical occupational licensing statutes should ultimately be enacted and upheld.

B. *Comment Roadmap: Piecing Together the Puzzle to Arrive at Medical Nutrition Therapy Incidentally Implicating Free Speech*

This Comment is separated into two main subsequent parts and a conclusion. The first part begins with a history of the nutrition and dietetics profession, focusing on defining the medical nutrition therapy framework, a general review of licensing statutes, and the different types of nutrition and dietetic licensing. The second part is the crux of the Comment and focuses on analyzing free speech challenges to medical occupational licensure, with an emphasis on nutrition and dietetics. Within, an argument is made for distinguishing medical licensure from non-medical licensure. Two landmark Supreme Court cases are analyzed to interpret the central issue involved in free speech challenges to licensure in general. A novel approach to interpreting these free speech challenges is then described and demonstrated using prior case law, and then again specifically with nutrition and dietetic case law. Practical recommendations are then discussed for continued enactment and enforcement of nutrition licensure laws before the

24. *See* Dayratna et al., *supra* note 22, at 253 (indicating the shortage of qualified physicians in the United States is partially attributed to the restrictions imposed by medical licensure processes); Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1104–06 (2014) (arguing licensing laws unfairly restrict competition and providing examples describing the potential problems of State regulation); MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 8 (2006) (suggesting restriction of lower-skilled applicants to practice through licensing laws has an uncertain effect on quality of service).

25. *See* Dent v. West Virginia, 129 U.S. 114, 122–23 (1889) (emphasis added) ("Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a *knowledge of the properties of vegetable and mineral substances*, but of the human body in all its complicated parts, and their relation to each other, as well as their influence upon the mind . . . . Every one may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect.").

overall conclusion. Ultimately, this Comment argues that nutritional licensing laws which define medical nutrition therapy as the framework used to diagnose and treat comorbidities only implicate free speech incidentally, and merit at most rational basis scrutiny.

II. HISTORY OF DIETETICS AND BACKGROUND OF NUTRITION AND DIETETICS LICENSURE

A. *Nutrition and Dietetics in the United States and the Medical Nutrition Therapy Framework*

Dietetics has been informally recognized for centuries since the times of Hippocrates and Plato, who each documented the vital relationship between food and health.[26] The United States was and has been largely influenced by the steady shaping of the food and nutrition profession, which started prominently in the United States Army.[27] The nutrition and dietetics profession began during the Spanish American War in 1898, when "dietists" were responsible for managing wounded patients' dietary intakes to help improve recovery.[28] Nutrition subsequently played a key role during World War I and II when dietitians from the American Red Cross were hired as staff at military hospitals; dietetics have been a mainstay in the United States Military ever since.[29] Key dietetic leaders would eventually meet and develop the American Dietetic Association (now the Academy of Nutrition and Dietetics) in 1917, the first major nutrition and dietetic organization in the United States.[30]

26. PK Skiadas & JG Lascaratos, *Dietetics in Ancient Greek Philosophy: Plato's Concepts of Healthy Diet*, 55 EUR. J. OF CLINICAL NUTRITION 532, 532 (2001).

27. Academy of Nutrition and Dietetics, *Academy History Timeline*, EAT RIGHT PRO (2019), https://www.eatrightpro.org/history-timeline [https://perma.cc/WQ4Z-HSCS].

28. LIEUTENANT COLONEL RICHARD F. LYNCH, THE PAST, PRESENT, AND FUTURE OF ARMY DIETETICS 5 (1989).

29. Karen Stein, *The Academy's Military Roots Visualized*, 114 J. ACAD. NUTRITION & DIETETICS 2023, 2032, 2034 (2014).

30. *Id.* at 2023.

1. Occupational Licensing Academic and Professional Experience Most Commonly Required for Registered Dietitians

In the United States, registered dietitians[31] are recognized as the foremost food and nutrition experts.[32] Registered dietitians are the most commonly cited nutrition professionals permitted by states to practice nutrition and dietetics, and nutrition licensing laws often model their academic and professional experience requirements.[33] Registered dietitians are required to have, at minimum: a bachelor's degree from an accredited university; completed coursework approved by the Accreditation Council for Education in Nutrition and Dietetics (ACEND) of the Academy of

31. The correct spelling of dietitian, whether it is with a "t" or a "c" "has been a long-standing matter for the profession of dietetics." Wendy Marcason, *Dietitian, Dietician, or Nutritionist?*, 115 J. ACAD. NUTRITION & DIETETICS 484, 484 (2015). Dietician, spelled with a "c", is still a dictionary-recognized alternate and admittedly a logical option considering the spelling of other professions with the "cian" suffix (for example: physician, mathematician, musician, politician, electrician, statistician, etc.). However, the International Committee of Dietetic Associations (ICDA) standardized dietetic information under the International Standard Classification of Occupations in 1967 and "adopted the spelling *dietitian* at the request of the international dietetic community" as the correct and preferred spelling. *Id.* The internationally accepted spelling requested by professionals in the field of dietetics is dietitian, spelled with a "t." In respect to that community and to avoid confusion, dietitian will be used in this Comment except when necessary to quote or cite an authority.

32. Committee on Nutrition Services for Medicare Beneficiaries, *The Role of Nutrition in Maintaining Health in the Nation's Elderly: Evaluating Coverage of Nutrition Services for the Medicare Population*, 8 (2000) (determining registered dietitians are "the single identifiable group [of health-care professionals] with standardized education, clinical training, continuing education, and national credentialing requirements necessary to be directly reimbursed as a provider of nutrition therapy"); Academy of Nutrition and Dietetics, *What Is a Registered Dietitian Nutritionist*, EAT RIGHT PRO, https://www.eatrightpro.org/about-us/what-is-an-rdn-and-dtr/what-is-a-registered-dietitian-nutritionist [https://perma.cc/TKZ4-VAE2] [hereinafter *What Is a Registered Dietitian Nutritionist*].

33. Of the forty-seven states, District of Columbia, and Puerto Rico that have licensure statutes governing nutrition and dietetic practice or regulate the use of the professional titles "dietitian" and "nutritionist," all of them cite registered dietitians as a medical professional credential authorized to practice or use the titles. *See Consumer Protection Through Professional Regulation*, *supra* note 15 (providing a map detailing the different levels of licensure statutes provided across the 50 states and the District of Columbia); Academy of Nutrition and Dietetics, *supra* note 14. The Certified Nutrition Specialist (CNS) and Diplomate of the American Clinical Board of Nutrition (DACBN) are two other less common professional credentials that have been cited as authorized to practice by state nutrition and dietetic licensure statutes. *See* FLA. STAT. ANN. § 468.509 (West 2019) (listing registered dietitians, registered dietitian nutritionists, certified nutrition specialists, and diplomates of the American Clinical Board of Nutrition as meeting the qualifications of the nutrition and dietetics licensure statute). The CNS is administered by the Board for Certification of Nutrition Specialists as part of the American Nutrition Association, and the DACBN is administered by the American Clinical Board of Nutrition. *About the BCNS*, AM. NUTRITION ASS'N, https://theana.org/certify/aboutBCNS [https://perma.cc/MKC8-FPSX]; *Welcome to the ACBN*, AM. CLINICAL BD. OF NUTRITION, https://www.acbn.org/index.html [https://perma.cc/FJ6G-YJQR].

Nutrition and Dietetics (AND); performed 1200 supervised practice hours, typically done in a dietetic internship; passed the national registration exam administered by the Commission on Dietetic Registration (CDR), and satisfied recurring professional education requirements.[34] Both federal and state governments select the criteria to obtain a license to practice medical nutrition therapy.[35]

2. Medical Nutrition Therapy: The Framework Dietitians Use to Diagnose and Treat Medical Comorbidities

Medical nutrition therapy is defined as "nutritional diagnostic, therapy, and counseling services for the purpose of disease management which are furnished by a registered dietitian or nutrition professional [for the purpose of managing disease]."[36] This practice method involves the systematic application of the Nutrition Care Process framework: an interconnected, multi-step, evidence-based, and individualized nutrition care treatment to manage a person's nutrition-related comorbidities.[37] The Nutrition Care Process steps involve: (1) gathering, analyzing, and interpreting relevant data; (2) selecting a nutrition diagnosis based on identified nutrition problems, etiologies, and clinical signs and symptoms; (3) determining achievable and measurable goals and their associated nutrition prescription and interventions to resolve the nutrition diagnosis; and (4) examining progress and results of nutrition interventions and implementing reassessment as needed.[38] The Nutrition Care Process is evidence-based[39]

34. *What is a Registered Dietitian Nutritionist*, *supra* note 32.

35. *See* Phillips & Tuma, *supra* note 7, at 1561 (reporting state nutrition licensure statutes almost uniformly mirror the qualifications required to be a registered dietitian nutritionist, and reporting Medicare requires similar qualifications for providing medical nutrition therapy); 42 U.S.C. § 1395x(vv)(2) (2018) (defining the academic and experience requirements for a "registered dietitian or nutrition professional" under Medicare).

36. 42 U.S.C. § 1395x(vv)(1) (2018); *see also* NEV. REV. STAT. ANN. § 640E.050 (West 2019) ("'Medical nutrition therapy' means the use of nutrition services by a licensed dietitian to manage, treat or rehabilitate a disease, illness, injury or medical condition of a patient.").

37. *See* William L. Swan et al., *Nutrition Care Process and Model Update: Toward Realizing People-Centered Care and Outcomes Management*, 117 J. ACAD. NUTRITION & DIETETICS, 2003, 2003 (2017) (describing the Nutrition Care Process as a four-step interconnected model using standardized terminology to describe and document individualized nutrition care, consisting of nutrition assessment/reassessment, diagnosis, intervention, and monitoring and evaluation).

38. *Id.* at 2004–09.

39. Specifically, the Nutrition Care Process is supported through the use of the Evidence Analysis Library, a repository of updated and relevant nutrition research. Academy of Nutrition and Dietetics, *About the Evidence Analysis Library*, EAT RIGHT, https://www.andeal.org/about [https://perma.cc/2NSJ-NESC]; *see* INSTITUTE OF MEDICINE, CROSSING THE QUALITY CHASM: A NEW

and provides a consistent, quality based care to improve patient health outcomes.[40]

B. *Background and Justification for Medical Licensing Laws Generally: Protecting the Public*

Occupational licensing is state regulation of the entry into and practice of a given profession.[41] Licensing laws require individuals to meet state-established minimum competency levels for education and experience in order to receive a license to practice in the state.[42] The statute often creates a licensing board to oversee the occupation's regulation, responsible for evaluating qualifications of professional applicants, establishing a code of professional ethics, forming criteria required for relicensing, and imposing penalties for violating the statute.[43]

The ability to enact licensing laws has historically been attributed to fall within states' sovereign police power.[44] *Caveat emptor* predominantly regulated the medical profession prior to licensing laws emerging in the late 1800s.[45] States began recognizing the increased need to protect public health, and by 1905 almost all states had enacted a medical licensing scheme regulating who could practice medicine.[46] Similar laws regulating other professions emerged after a line of cases decided by the Supreme Court held in favor of such laws, and the establishment of licensing boards to enforce

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HEALTH SYSTEM FOR THE 21ST CENTURY, at 10 (William C. Richardson et al. eds., 2001) (emphasizing evidence-based practice is essential for delivering quality health care in a safe, effective, patient-centered, timely, efficient, and equitable manner).

40. *See* Kyle L. Thompson, et al., *Nutrition Care Process Chains: The "Missing Link" between Research and Evidence-Based Practice*, 115 J. ACAD. NUTRITION & DIETETICS, 1491, 1491 (2015) (detailing the framework and chains incorporated within the Nutrition Care Process, which establish the critical link between research and the measurable quality of nutrition care provided).

41. Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSPS. 189, 191 (2000).

42. *Id.*

43. *Id.*; *see* FLA. STAT. ANN. §§ 468.517–18 (West 2019) (describing the board's power to deny licensure to applicants, impose penalties on current licensees, and identify individuals in violation of the statute generally).

44. *See* N.C. Bd. of Dental Exam'rs v. F.T.C., 574 U.S. 494, 1119 (2015) (Alito, J., dissenting) (detailing the history of state regulation over the practice of medicine and the establishment of medical boards as falling with the states' sovereign police power); Paul J. Larkin Jr., *Public Choice Theory and Occupational Licensing*, 39 HARV. J.L. & PUB. POL'Y 209, 279–80 (2016) (detailing the history of judicial review of economic legislation enacted pursuant to state police powers).

45. Michelle Poncetta, Note, *Against Licensing Non-Invasive Complementary and Alternative Treatments: An Ineffective and Harmful Measure for Consumer Protection*, 11 GEO. J.L. & PUB. POL'Y 661, 663–64 (2013).

46. PAUL STARR, THE SOCIAL TRANSFORMATION OF AMERICAN MEDICINE 110 (1982).

them.[47] Occupational licensing laws have been enacted rapidly since, however, a significant focus has been on non-health care professions.[48]

State licensing for nutrition and dietetics is relatively new in comparison to other medical licensing schemes.[49] The justification for such schemes, however, is essentially the same and medical licensing statutes are justified primarily for several compelling reasons. First, citizens deserve to have access to competent, safe, ethical, and efficacious medical information and therapies.[50] Second, citizens should have access to a state-specific list of statutorily qualified individuals who possess the standardized education and experience the state has deemed necessary for professionals who wish to practice in the state.[51] Finally, medical licensure statutes protect the public against people who offer unscientific, non-validated and harmful advice, which if unchecked could lead to dangerous health outcomes and potentially unnecessary and expensive products and services.[52]

47. *See* N.C. State Bd. of Dental Exam'rs, 574 U.S. at 519–20 (Alito, J., dissenting) (describing the timeline of significant holdings related to the states' ability to license physicians and to staff state licensing boards); *see also* Dent v. West Virginia, 129 U.S. 114, 118 (1889) (holding the state-licensure law a valid exercise of state authority because it was made to ensure the profession of medicine could be trusted by the community to practice with a certain level of skill, knowledge, and qualifications); Hawker v. New York, 170 U.S. 189, 195 (1898) (holding "it is not the province of the courts" to question state legislature's determinations regarding established qualifications specified in state licensure laws).

48. *See* KLEINER, *supra* note 24, at 1 (indicating only 4.5% of the U.S. labor force was governed by state licensing laws in the 1950s); Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. S173, S176 (2013) (estimating 29% of workers required licensing as of 2008, with future growth expected).

49. "Texas was the first state to enact a licensing scheme for nutrition and dietetics, in 1983." Sherman, *supra* note 9, at 192, n65; Licensed Dietician Act, 68th Leg., R.S., ch. 307, 1983 Tex. Gen. Laws 1617, [https://perma.cc/48NF-YGYM] (current version at TEX. OCC. CODE ANN. §§ 701).

50. *See* ALA. CODE ANN. § 34-34A-2 (West 2019) ("It is the purpose of this chapter to protect the health, safety, and welfare of the public by providing for the licensing and regulation of persons engaged in the practice of dietetics and nutrition.").

51. *See* TEX. OCC. § 701.1511 ("The department shall prepare a registry of licensed dietitians and provisional licensed dietitians and make the registry available to the public, license holders, and appropriate state agencies."); MD. CODE ANN., HEALTH OCC. § 5-205 (West 2013) ("[T]he [State] Board shall: (1) Keep a list of all dietitian-nutritionists who are currently licensed[.]").

52. *See* D.C. CODE ANN. § 3-1205.01 (West 2015) ("A license issued pursuant to this chapter is required to practice . . . dietetics[.]"); *see also* Grp. Health Ass'n v. Moor, 24 F. Supp. 445, 446 (D.D.C. 1938) ("It is evident that the purpose of the statute was to protect the public from quacks, from the ignorant and incompetent.").

C. *The Different Licensing Laws Currently Enacted for Nutrition and Dietetics in the United States and What They Do to Protect the Public*

State regulation of nutrition and dietetics, not to be confused with the registration or credentialing often required for medical professionals, has generally been crafted to provide one of three degrees of regulation.[53] The highest degree of regulation, often simply called licensure, establishes three components: (1) *practice exclusivity*, which completely proscribes unlicensed individuals from providing the nutrition and dietetics services defined in the statute's scope of practice; (2) *state certification*, where a state agency provides a state license to individuals meeting specific qualifications; and (3) *title protection*, which prohibits unlicensed individuals from using titles specified in the statute.[54] The next degree of regulation requires both state certification and title protection, but not practice exclusivity.[55] Finally, the lowest degree of regulation provides only title protection and fails to establish either practice exclusivity or any specified qualifications required for practicing in the State.[56]

Each degree of regulation has associated implications on the ability to practice nutrition and dietetics. Licensure, which includes practice exclusivity, provides the most public protection to state communities, workplaces, and individuals by establishing an objective standard for the education and experience required for professionals to convey nutrition

53. *See* Kleiner & Krueger, supra note 48, at S175 (describing the three forms of regulation typically observed with occupational licensing as licensure, certification, and registration); Phillips & Tuma, *supra* note 7, at 1562 (describing how state regulation of nutrition and dietetics generally takes one of three forms: licensure, state certification, or title protection only).

54. *See* Phillips & Tuma, *supra* note 7, at 1562 (referencing the figure depicting the differing degrees of regulation, indicating "licensure with practice exclusivity" as the broadest type).

55. *See id.* at 1562 (defining state certification regulations as providing state recognition to certain practitioners and establishing title protection, but not prohibiting unqualified people from practicing within the state).

56. *See id.* (describing title protection regulations currently enacted in three states); CAL. BUS. & PROF. CODE § 2585 (West 2019) ("Any person representing himself or herself as a registered dietitian shall meet one of the following qualifications[.]"); COLO. REV. STAT. ANN. § 6-1-707 (West 2019) ("A person engages in a deceptive trade practice when, in the course of such person's business, vocation, or occupation, such person: . . . Claims either orally or in writing to be a 'dietitian', 'dietician', 'certified dietitian', or 'certified dietician' or uses the abbreviation 'C.D.' or 'D.' to indicate that such person is a dietitian, unless such person [meets state specified qualifications.]"); VA. CODE ANN. § 54.1-2731 (West 2017) ("No person shall hold himself out to be . . . a dietitian or nutritionist unless such person" meets state specified qualifications. "The restrictions of this section apply to the use of the terms 'dietitian' and 'nutritionist' as used alone or in any combination with the terms 'licensed,' 'certified,' or 'registered,' as those terms also imply a minimum level of education, training and competence.").

advice, consultations, and interventions within state borders.[57] The statute by its nature limits the variety of individuals permitted to practice within the state; individuals who do not meet the established standards for professional competence violate state law if they practice without a license.[58] Licensure is often criticized as the state limiting market competition and infringing upon citizen's freedom of speech.[59] State certification statutes without practicing exclusivity ensure certified individuals using state-specified titles have specific qualifications; however, uncertified individuals may still practice nutrition and dietetics within the state as long as they do not represent themselves with the state-regulated titles.[60] State certification statutes provide a diminished level of consumer protection—requiring consumers to bear the burden of determining the credibility of uncertified individuals—but allow more individuals to practice nutrition and dietetics.

Finally, title protection without established standards of practice provides minimal consumer protection in exchange for greater ability to practice within the state; use of certain titles is regulated but there are no associated standards established for using those titles, requiring consumers to determine for themselves whether the nutrition provider has satisfactory experience and qualifications.[61] Some states currently have no nutrition licensing law in place, which allows maximum flexibility for individuals who want to practice nutrition and dietetics, but provides zero consumer protection. Anyone can represent themselves within the state as having the same credentials that are regulated in other states to bolster the appearance

57. *See* NEV. REV. STAT. ANN. § 640E.010 (West 2021) ("The Legislature hereby declares that the practice of dietetics is a learned profession affecting the safety, health and welfare of the public and is subject to regulation to protect the public from the practice of dietetics by unqualified and unlicensed persons and from unprofessional conduct by persons licensed to practice dietetics.").

58. *See id.* § 640E.370 ("A person who violates any provision of this chapter or any regulation adopted pursuant thereto is guilty of a misdemeanor.").

59. *See* Edlin & Haw, *supra* note 24, at 1095–96 (comparing state professional licensing boards to cartels and arguing such boards should not be exempt from the Sherman Act); Sherman, *supra* note 9, at 183–84 (advocating occupational speech licensing laws should be challenged as violations of free speech and subject to strict scrutiny analysis).

60. *See* WASH. REV. CODE ANN. § 18.138.020 (West 2021) (limiting the ability for people to represent themselves as a certified dietitian or nutritionist unless certified by the State, and limiting the use of the designations, "'Certified dietitian,' 'certified dietician,' 'certified nutritionist,' 'D.,' 'C.D.,' or 'C.N.'").

61. *See* VA. CODE ANN. § 54.1-2730 (West 2021) ("Nothing in this chapter shall preclude or affect in any fashion the ability of any person to provide any assessment, evaluation, advice, counseling, information or services of any nature that are otherwise allowed by law[.]").

of their qualifications, even if those representations are unsubstantiated or invalid.[62]

III. FREE SPEECH CHALLENGES TO NUTRITION AND DIETETICS LICENSURE

Enactment of occupational licensure laws is not without limitation. State police power is necessarily bound, to a varying degree, when in conflict with the Federal or State Constitution or other federal law.[63] However, successful challenges under such grounds to state licensing schemes are difficult to maintain.[64] Complicating matters, the Supreme Court has historically expressed hesitancy to disturb state legislative decisions regarding management of medical professions and professionals.[65] This hesitancy is understandable, as medical professions have a considerable impact on the public that other professions do not.[66] However, the lack of guidance has led lower courts to rely on case law regarding licensure of non-medical professions when considering modern challenges to nutrition licensure statutes, rather than cases involving medical professions.[67] Given the fundamental differences behind the rationale for establishing licensing schemes for medical professions versus other professions, and the relevant

62. *See* MICH. COMP. LAWS ANN. § 333.183a (repealed 2014) (previously establishing a state certification statute governing nutrition and dietetics); *see also Consumer Protection Through Professional Regulation*, EAT RIGHT 1, 3 (Nov. 2018), https://www.eatrightpro.org/-/media/eatrightpro-files/advocacy/licensure/consumerprotectionissuebrief.pdf?la=en&hash=06D3D9A14B389986FC17071E2E4ABDD6AAAA1B5F [https://perma.cc/B3CG-8PAZ] (depicting Michigan, Arizona, and New Jersey as not having any statutes regulating nutrition and dietetic practice).

63. *See* U.S. CONST. amend. X ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."); Gregory v. Ashcroft, 501 U.S. 452, 457 (1991) ("The Constitution created a Federal Government of limited powers. . . . The States thus retain substantial sovereign authority under our constitutional system.").

64. *See* Larkin Jr., *supra* note 44, at 280 (indicating Supreme Court precedent does not favor challengers of occupational licensing laws if challenging on federal constitutional grounds).

65. *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2382 (2018) (Breyer, J., dissenting) ("Even during the *Lochner* era, when this Court struck down numerous economic regulations concerning industry, this Court was careful to defer to state legislative judgments concerning the medical profession.").

66. *See* Graves v. Minnesota, 272 U.S. 425, 429 (1926) (holding statutes governing "locomotive engineers and barbers . . . involve very different considerations from those relating to such professions . . . requiring a high degree of scientific learning," such as "statutes regulating the practice of medicine").

67. *See generally* Kokesch Del Castillo v. Philip, No. 3:17-CV-722-MCR-HTC (N.D. Fla. Jul. 17, 2019) (citing cases involving interior designers and tour guides along with cases involving physicians and medical clinics).

history establishing medical licensure as the foundation for occupational licensing, reliance on non-medical case law is misapplied when used exclusively.[68]

Legal challenges to occupational licensing of nutrition and dietetics have recently been brought under the Free Speech Clause of the First Amendment.[69] Analyzing Supreme Court and select lower court cases considering challenges specifically to medical licensing schemes helps elucidate how courts should interpret such challenges to nutrition and dietetics licensure, as the Supreme Court has not yet explicitly done so.[70]

A. *Framing the Free Speech Issue: Occupational Licensure Only Incidentally Implicates Free Speech*

The Free Speech Clause of the First Amendment, applicable to the States via the Fourteenth Amendment, provides "Congress shall make no law . . . abridging the freedom of speech."[71] But freedom of speech is not absolute. Speech merits less protection when it is incidental to the regulation of professional conduct.[72] Outside of these exceptions and categories of speech historically exempt from First Amendment protection, content-neutral and content-based laws regulating speech are subject to heightened scrutiny.[73] Content-neutral laws impose a burden on speech

68. *See* Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psych., 228 F.3d 1043, 1054 (9th Cir. 2000) (holding the State's interest in regulating mental health is more compelling than its interest in regulating attorney solicitation, "given the health and safety implications" of the profession).

69. *See* Rodney A. Smolla, *Professional Speech and the First Amendment*, 119 W. VA. L. REV. 67, 68 (2016) (reviewing the surge of First Amendment challenges and the development of the "professional speech" doctrine prior to *Becerra*).

70. *See* Carl H. Coleman, *Regulating Physician Speech*, 97 N.C. L. REV. 843, 848 (2019) (indicating "lower courts have adopted a hodgepodge of approaches" considering the lack of Supreme Court guidance); Sherman, *supra* note 9 (describing the lack of Supreme Court direction as having profound and conflicting consequences on lower court rulings).

71. U.S. CONST. amend. I; U.S. CONST. amend. XIV.

72. *See* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992) (holding a physician's right not to speak is implicated only to the extent the speech is "part of the practice of medicine, subject to reasonable licensing and regulation by the State").

73. *See* United States v. Stevens, 559 U.S. 460, 468–69 (2010) (listing "permitted restrictions upon the content of speech" as "including obscenity, defamation, fraud, incitement, and speech integral to criminal conduct") (citations omitted); Nat'l Inst. of Fam. & Life Advocs.. v. Becerra, 138 S. Ct. 2361, 2371 (2018) (distinguishing content-based regulations of speech as requiring strict scrutiny analysis); Turner Broad. Sys., Inc. v. FCC, 512 U.S. 622, 662 (1994) (holding intermediate scrutiny appropriately "applicable to content-neutral [free speech] restrictions that impose an incidental burden on speech").

without regard to specific views or ideas and are subject to intermediate scrutiny.[74] Content-based laws "are presumptively unconstitutional" and subject to strict scrutiny, as such laws usually grant the power to suppress speech with specific content or speech representing a particular point of view.[75]

An important distinction to make when considering free speech challenges to occupational licensure is the level of scrutiny applied.[76] A long line of Supreme Court precedent has firmly held the entry into a medical profession, gated by a state occupational licensing statute, is absolutely subordinate to the control of the State pursuant to the exercise of its police powers.[77] Licensing laws in this vein may then at most should only inhibit free speech incidentally as part of an otherwise legitimate licensing scheme, meriting rational basis review, if held to implicate free

74. *Turner Broad. Sys., Inc.*, 512 U.S. at 643 (1994); *see also* United States v. O'Brien, 391 U.S. 367, 375, 377 (1968) (holding governmental regulation sufficiently justified when incidentally restricting free speech if it "furthers an important or substantial governmental interest . . . no greater than is essential" and if the interest is "unrelated to the suppression of free expression"). The United States Court of Appeals for the District of Columbia Circuit recently applied *O'Brien* in a First Amendment challenge to a licensing scheme regulating tour guides. Edwards v. D.C., 755 F.3d 996 (D.C. Cir. 2014). This appears to be the first application of the *O'Brien* test to an occupational licensing statute aimed at regulating professional conduct which incidentally impacts free speech. While the *O'Brien* test is applied to laws which seek to control conduct that communicates—which necessarily involves speech and non-speech components—this is likely not an appropriate instance to use it. *See O'Brien*, 391 U.S. at 376 (rejecting the argument that conduct can be classified only as speech when made symbolically to express an idea). The regulated conduct typically at issue in occupational licensing schemes is generally not regulated because of its expressive nature, if such a nature exists at all, therefore the *O'Brien* test may be misapplied if used to evaluate similar challenges to occupational licensure. *See* Clark v. Cmty. for Creative Non-Violence, 468 U.S. 288, 294 (1984) (holding the *O'Brien* test applicable when evaluating regulations of symbolic expression, or "conduct that is intended to be communicative").

75. Reed v. Town of Gilbert, 576 U.S. 155, 163 (2015); *see Turner Broad. Sys., Inc.*, 512 U.S. at 642 (holding the "principal inquiry" in deciding whether a regulation is content-neutral or content-based "is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys") (quoting Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989))); R.A.V. v. St. Paul, 505 U.S. 377, 386 (1992) ("The government may not regulate [speech] based on hostility—or favoritism—towards the underlying message expressed.").

76. Wollschlaeger v. Governor of Fla., 760 F.3d 1195, 1239–40 (11th Cir. 2014) (Wilson, J., dissenting) (distinguishing the level of First Amendment scrutiny applied to licensing laws which regulate entry into a profession and may prompt at most rational basis scrutiny versus laws that regulate speech once a professional is licensed, which should require more heightened scrutiny).

77. *See* Goldfarb v. Va. State Bar, 421 U.S. 773, 792 (1975) ("States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions."); Lambert v. Yellowley, 272 U.S. 581, 596 (1926) ("[T]here is no right to practice medicine which is not subordinate to the police power of the states.").

speech at all.[78] However, once the state licenses a professional a more complicated analysis ensues, possibly requiring intermediate or strict scrutiny analysis.[79]

The importance of determining when speech is made incidental to professional conduct, and thus meriting less First Amendment protection, climaxed after the Supreme Court's holding in *National Institute of Family and Life Advocates v. Becerra*.[80] By rejecting the professional speech doctrine,[81]

78. *See Becerra*, 138 S. Ct. at 2372 ("[U]nder our precedents, States may regulate professional conduct, even though that conduct incidentally involves speech."); Lowe v. S.E.C., 472 U.S. 181, 232 (1985) (White, J., concurring) (concluding licensing provisions do not place a limitation on freedom of speech when there is a "personal nexus between the professional and client" because "the professional's speech is incidental to the conduct of the profession"); Locke v. Shore, 634 F.3d 1185, 1191 (11th Cir. 2011) (holding occupational licensing statute is not unconstitutional as a violation of free speech "so long as any inhibition of that right is merely the incidental effect of observing an otherwise legitimate regulation" (quoting Accts. Soc. of Va. v. Bowman, 860 F.2d 602, 604 (4th Cir. 1988))); Lawline v. Am. Bar Ass'n, 956 F.2d 1378, 1386 (7th Cir. 1992) (holding generally applicable licensing schemes limiting persons who may practice the profession do not enact a limitation on the freedom of speech subject to First Amendment scrutiny).

79. *See Becerra*, 138 S. Ct. at 2374 (holding the professional speech doctrine is not a recognized category of speech protected by the First Amendment outside of permissibly regulated commercial speech and professional conduct that incidentally involves speech, rendering such speech is subject to more heightened scrutiny).

80. Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361 (2018). *See id.* at 2371 (rejecting the notion of "'professional speech' as a separate category of speech that is subject to different [First Amendment] rules").

81. Until *Becerra*, "professional speech" was established as a new category of speech subject to lesser First Amendment scrutiny, recognized in at least the Third, Fourth, and Ninth Circuits. *See* King v. Governor of N.J., 767 F.3d 216, 232 (3d Cir. 2014) (applying the professional speech doctrine in holding "a licensed professional does not enjoy the full protection of the First Amendment when speaking as part of the practice of her profession"); Moore-King v. Cnty. of Chesterfield, 708 F.3d 560, 568–70 (4th Cir. 2013) (holding "[u]nder the professional speech doctrine, the government can license and regulate" fortune tellers "without running afoul of the First Amendment"); Pickup v. Brown, 740 F.3d 1208, 1227–29 (9th Cir. 2014) (establishing different levels of scrutiny for professional speech when made to the public, when made "within the confines of a professional relationship," and when made incidentally as part of professional conduct). However, the Supreme Court in *Becerra* explicitly rejected to recognize professional speech as a separate, special category of speech without further justification for such a distinction, specifically abrogating *King*, *Moore-King*, and *Pickup*. *See Becerra*, 138 S. Ct. at 2371, 2375 (holding none of the Court's precedents recognize professional speech as a separate category of speech warranting lesser First Amendment scrutiny and the government failed to provide any compelling reason to do so but remained open to "the possibility that such reason exists"). Professional speech prior to *Becerra* was deemed any speech made by professionals based on their expert judgment and knowledge, with professionals defined as those who provide personalized services and are subject to a state regulated licensing scheme. *Id.* at 2371–72. This category was created drawing significantly from the logic espoused in Justice Jackson's and White's concurrences and because of the lack of guidance since *Thomas* and *Lowe*. *See King*, 767 F.3d at 231 (explaining "the Fourth Circuit drew heavily from the concurrences in *Thomas* and *Lowe* in holding that

the Court firmly established that speech made outside of what is incidental to professional conduct is subject to heightened scrutiny.[82] Determining when speech becomes merely incidental to professional conduct is further compounded when a profession is largely based on speech.[83] For nutrition and dietetics, licensure both regulates the entry into the profession while simultaneously imposing practice exclusivity, prohibiting non-licensed professionals from engaging in medical nutrition therapy, which necessarily involves speech.[84] No clear standard has been identified or offered to determine at what point any speech becomes "professional conduct" for medical professions, subject to the state's police powers under a licensing scheme.[85]

'professional speech' does not receive full protection under the First Amendment"). *See generally* Thomas v. Collins, 323 U.S. 516 (1945); Lowe v. S.E.C., 472 U.S. 181 (1985). Important to note was the limited applicability of the professional speech analysis to free speech challenges. Professional speech focused on the speech made by professionals who were already licensed and later subjected to a statute impacting their free speech rights, rather than statutes establishing a state regulated licensing requirement that incidentally implicates speech. *See Becerra*, 138 S. Ct. at 2371, 2376 (analyzing the two different plaintiff's challenges separately, as the statute in question both implicated facilities employing licensed providers and facilities employing only unlicensed providers).

82. *Becerra*, 138 S. Ct. at 2371–72. The Court also recognized commercial speech as another category receiving more deferential review. *See id.* at 2372 (citing Zauderer v. Off. of Disciplinary Couns. of Sup. Ct. of Ohio, 471 U.S. 626, 651 (1985), Milavetz, Gallop & Milavetz, P.A. v. United States, 559 U.S. 229, 250 (2010), and Ohralik v. Ohio State Bar Ass'n, 436 U.S. 447 (1978)).

83. *See* Thomas v. Collins, 323 U.S. 516, 544 (1945) (Jackson, J., concurring) (distinguishing the difference between the state's exercise of the power to mandate professional licensure against the state's ability to regulate anyone's speech to the general public); *Lowe*, 472 U.S. at 233 (White, J., concurring) (suggesting the application of a licensure law to unlicensed professionals who publicly publish articles would be "a direct restraint on freedom of speech"); Smolla, *supra* note 69, at 106 (opining on instances in which professional licensing statutes would violate the First Amendment); Sherman, *supra* note 9, at 199 (criticizing licensing statutes which impose a burden on speech but might be upheld as otherwise valid licensing laws).

84. *See* Swan et al., *supra* note 37, at 2008 (describing steps which incidentally require speech while providing medical nutrition therapy through the Nutrition Care Process as including but not limiting to: client interviewing, communicating and collaborating with the client on the nutrition care plan, checking client understanding, and communicating during monitoring and evaluation); Coleman, *supra* note 70, at 844 (including counseling on diet and lifestyle changes for patients with heart disease as a communicative medical intervention).

85. *See Brown*, 740 F.3d at 1218 (O'Scannlain, J., dissenting from the denial of rehearing en banc) (criticizing the majority for providing "no principled doctrinal basis for its dichotomy" in holding certain verbal communication by mental health providers as professional conduct, and questioning: "By what criteria do we distinguish between utterances that are truly 'speech,' on the one hand, and those that are, on the other hand, somehow 'treatment' or 'conduct'?"); *Becerra*, 138 S. Ct. at 2384–85 (holding permissible the regulation of professional conduct that incidentally implicates speech, such as "part of the *practice* of medicine, subject to reasonable licensing and regulation by the State" (emphasis added) (quoting Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 884 (1992))).

1. History Distinguishes Medical Professions in Particular as Subject to State Licensing Because of Their Impact on Public Safety

Occupational licensing statutes governing medical professions, enacted pursuant to state police power, have been held constitutionally valid for over a century.[86] But the origins of legal challenges to these statutes allege violations of due process, not free speech.[87] Despite this, the Court's guidance provided in these challenges helps identify why medical licensing, to include nutrition and dietetic licensure, is a unique category worthy of state regulation.[88]

Analyzing the evolution of judicial review on the limitations of state police power often starts with the landmark case *Lochner v. New York*.[89] The Court in *Lochner* considered a New York law that limited the total number of hours a baker could work to sixty hours per week, enacted for the health, safety, and general welfare of bakers in the baking industry.[90] Unpersuaded by the State's offered rationale, the Court held the statute an unconstitutional use of the State's police power, as it deprived bakers of the right to contract and did not substantially involve the safety, welfare, or morals of the general public.[91] *Lochner* was decided in 1905 and would serve

86. *See* Dent v. West Virginia, 129 U.S. 114, 122–23 (1889) (holding occupational licensing of physicians as a constitutionally valid use of state police power). *Dent* is commonly cited as the first Supreme Court case dealing with medical occupational licensing. *See* Ray A. Brown, *Police Power—Legislation for Health and Personal Safety*, 4 HARV. L. REV. 866, 875 (1929) (citing *Dent* as the earliest case holding state police power regulating health and public safety through occupational licensing valid, and specifically noting "not a single dissenting vote has been cast" in the seven cases before the Court dealing with occupational licensing of medical professions).

87. *See* Larkin Jr., *supra* note 44, at 282–84 (detailing the origin of judicial review of state police powers stems from due process challenges to economic legislation like occupational licensing statutes).

88. *See Dent*, 129 U.S. at 127, 128 (holding state regulation and licensing of physicians in order to protect public health and safety as a reasonable limitation to the constitutional right to pursue an occupation); Hawker v. New York, 170 U.S. 189, 195 (1898) ("It is, no one can doubt, of high importance to the community that health, limb, and life should not be left to the treatment of ignorant pretenders and charlatans." (quoting Eastman v. State, 10 N.E. 97 (1887))); Reetz v. Michigan, 188 U.S. 505, 506 (1903) (holding in the opening line of the opinion, "The power of a state to make reasonable provisions for determining the qualifications of those engaging in the practice of medicine, of those [engaging] in the practice of medicine, and punishing those who attempt to engage therein in defiance of such statutory provisions, is not open to question."); Larkin Jr., *supra* note 44, at 2877–79 (describing the existence of both pre and post-*Lochner* rulings upholding state occupational licensing statutes for medical professions and noting this consistency at least distinguishes medical licensure as "unique" and "particularly well fit for regulation").

89. Lochner v. New York, 198 U.S. 45 (1905); *See* Larkin Jr., *supra* note 44, at 248 (explaining *Lochner* is a common starting point for most reviews of economic legislation).

90. *Lochner*, 198 U.S. at 52, 53.

91. *Id.* at 57.

as the premier example of the judicially imposed limits to state police power until the New Deal era of cases arrived.[92]

The Court changed views on the limits to state police power—perhaps in light of the Great Depression and the state and federal government's attempts to revitalize the economy—almost thirty years after *Lochner* in a line of cases starting with *Nebbia v. New York*.[93] In *Nebbia*, New York imposed price fixing on the minimum and maximum prices for selling milk, to protect both farmers from economic losses and the public from potential decreases in quality control that might result if farmers became unable to finance the safe production and handling of milk.[94] The Court, noting the long history of state regulation of the milk industry as significant, deviated from *Lochner* and held under a rational basis review the statute did not violate due process.[95] Since *Nebbia*, the Court has been reluctant to reconsider the limitations to a state's police power and has not returned to a *Lochner*-era type of review.[96]

The *Lochner* and post-*Lochner* cases pose an insightful timeline to consider in the backdrop of the then-decided medical licensure cases.[97] The Court

92. *See* Larkin Jr., *supra* note 44, at 251 (naming *Lochner* the "poster boy" of the Court's stance on state police power until cases arising from the New Deal arrived).

93. Nebbia v. New York, 291 U.S. 502 (1934); Larkin Jr., *supra* note 44, at 251–52.

94. *Nebbia*, 291 U.S. at 516–17 (explaining the essential impact milk had on public health and the economic prosperity of New York State, and the difficulties experienced by farmers in preventing bacterial contamination amidst the economic downturn).

95. *Id.* at 537 ("The courts are without authority either to declare such policy, or, when it is declared by the legislature, to override it. If the laws passed are seen to have a reasonable relation to a proper legislative purpose, and are neither arbitrary nor discriminatory, the requirements of due process are satisfied, and judicial determination to that effect renders a court functus officio.").

96. *See* Larkin Jr., *supra* note 44, at 248, 255 (describing the last seventy years of Supreme Court holdings as "construing the external limitations on Congress's power . . . rather than analyzing whether there are internal limitations governing how far a particular grant of authority may reach").

97. *See* Dent v. West Virginia, 129 U.S. 114, 128 (1889) (upholding a generally applied state license requirement for physicians); Hawker v. New York, 170 U.S. 189, 200 (1898) (holding valid the moral qualifications requirement of a state license requirement for physicians); Reetz v. Michigan, 188 U.S. 505, 506 (1903) (upholding the state's creation of a licensing board to enforce identified requirements of the state physician licensing statute); Watson v. Maryland, 217 U.S. 173, 177 (1910) ("It is too well settled to require discussion at this day that the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health."); Graves v. Minnesota, 272 U.S. 425, 429 (1926) (upholding the state licensing requirement for dentists); Williamson v. Lee Optical of Okla. Inc., 348 U.S. 483, 488 (1955) (stating "[t]he day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought" in holding permissible a state statute regulating the conduct of optometrists, ophthalmologists, and opticians).

held unanimously in favor of the State's enactment of occupational licensing in a series of challenges during the years leading up to *Lochner*, holding such laws and the establishment of state licensing boards to enforce them as constitutional.[98] Despite the Court's holding in *Lochner*, challenges to state occupational licensing statutes around that time continued to be viewed as a valid exercise of state police power.[99] This trend expectedly continued after the Court's holding in *Nebbia*.[100] This consistency is revealing of the unique nature of medical licensing: cases decided in the wake of *Lochner* but before *Nebbia* were not interpreted differently from the pre-*Lochner* line, despite the stark interpretive differences observed in *Lochner* and *Nebbia*.[101] As such, the Court's holdings from *Dent v. West Virginia*,[102] *Reetz v. Michigan*,[103] and the cases that followed are "still good law" with respect to the validity of occupational licensing of medical professions.[104] The direct applicability of these cases may be duly limited due to their holdings being decided on different constitutional grounds. But the Supreme Court's unflinchingly rigid language in these cases is highly persuasive and cannot be ignored by courts considering similar challenges to occupational licensing brought under the First Amendment.

First, in *Dent*, the Court considered a due process challenge to West Virginia's licensing statute regulating the qualifications required to receive a

98. *See Dent*, 129 U.S. at 128 (holding in favor of state licensing of physicians sixteen years before *Lochner*); *Hawker*, 170 U.S. at 200 (holding in favor of the state license requirement for physicians seven years before *Lochner*); *Reetz*, 188 U.S. at 506 (holding valid the state's creation of a licensing board two years before *Lochner*); Brown, *supra* note 86, at 875 (highlighting "not a single dissenting vote has been cast" in the seven cases decided by the Supreme Court dealing with occupational licensing of medical professions).

99. *See Watson*, 217 U.S. at 177 (holding in favor of a state licensing requirement for physicians five years after *Lochner*); *see also Grave*, 272 U.S. at 429 (holding in favor of the state licensing requirement for dentists twenty-one years after *Lochner* and eight years before *Nebbia*).

100. *See Williamson*, 348 U.S. at 487, 490 (holding valid the state licensing requirement differentiating permissible conduct between optometrists, ophthalmologists, and opticians twenty-one years after *Nebbia*).

101. Larkin Jr., *supra* note 44, at 280 (describing the timeline of pre- and post-*Lochner* rulings as demonstrating the unique consistency of the Supreme Court in holding the enactment of medical licensing statutes as a valid use of state police power).

102. Dent v. West Virginia, 129 U.S. 114 (1889).

103. Reetz v. Michigan, 188 U.S. 505 (1903).

104. *Dent*, 129 U.S. at 121 ("But there is no arbitrary deprivation of such right where its exercise is not permitted because of a failure to comply with conditions imposed by the state for the protection of society."); *Reetz*, 188 U.S. at 506 (discussing the validity of using state powers to create a licensure board); Larkin Jr., *supra* note 44, at 279 (explaining the remaining validity of these cases).

state certificate to practice medicine.[105] The Court specifically noted the unique characteristics of the medical profession and why state regulation was particularly needed, stating:

> Few professions require more careful preparation by one who seeks to enter it than that of medicine. It has to deal with all those subtle and mysterious influences upon which health and life depend, and requires not only a knowledge of the properties of vegetable and mineral substances, but of the human body in all its complicated parts . . . . Every[one] may have occasion to consult him, but comparatively few can judge of the qualifications of learning and skill which he possesses. Reliance must be placed upon the assurance given by his license, issued by an authority competent to judge in that respect.[106]

The Court further explained that such licensing was subject to change in anticipation of future knowledge requiring it, specifically noting "*the properties of vegetable and mineral substances"* and the agencies by which the human system is affected.[107] Concluding, the Court held the licensing requirement lacked all intent to deprive citizens of any rights.[108] Two years before *Lochner* the Court decided *Reetz*.[109] In *Reetz*, the Court quickly established *Dent* as controlling precedent, holding at the onset "[t]he power of a state to make reasonable provisions for determining the qualifications of those engaging in the practice of medicine, and punishing those who attempt to engage therein in defiance of such statutory provisions, *is not open to question*."[110] Applying *Dent* to the challenge at hand, the Court considered the establishment of a state licensing board to discharge the state's licensing duties as a valid exercise of due process.[111]

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105. *Dent*, 129 U.S. at 121.

106. *Id.* at 122–23.

107. *See id.* at 123 (explaining "the same reasons which control in imposing conditions, upon compliance with which the physician is allowed to practice in the first instance, may call for further conditions as new modes of treating disease are discovered, or a more thorough acquaintance is obtained of the *remedial properties of vegetable and mineral substances*, or a more accurate knowledge is acquired of the human system and of *the agencies by which it is affected*") (emphasis added).

108. *See id.* ("We perceive nothing in the statute which indicates an intention of the legislature to deprive one of any of his rights. No one has a right to practice medicine without having the necessary qualifications of learning and skill[.]").

109. Reetz v. Michigan, 188 U.S. 505 (1903).

110. *See id.* at 506 (emphasis added) (citing *Dent* and *Hawker* approvingly).

111. *See id.* at 508 ("It follows that any legal proceeding enforced by public authority, whether sanctioned by age and custom, or newly devised in the discretion of the legislative power, in furtherance

The cases post-*Lochner* contain equally powerful and illuminating language and perhaps are more persuasive given the Court's opinion in *Lochner*.[112] The Court held in favor of another challenge to state licensing of physicians in *Watson v. Maryland*[113] only five years after *Lochner*. In *Watson*, the state licensing statute was challenged as a violation of equal protection because the statute permitted exceptions to certain classes of individuals but not others.[114] The post-*Lochner* Court maintained the same view of medical licensing statutes, holding "the police power of the states extends to the regulation of certain trades and callings, particularly those which closely concern the public health. There is perhaps *no profession more properly open to such regulation* than that which embraces the practitioners of medicine."[115] The Court explained the medical community's link to public health clearly warranted state regulation to ensure only qualified professionals were permitted to practice.[116] Given the clear delineation of duties split between the legislature enacting such regulations and the judiciary consistently recognizing this power as permissible, the Court's opinion was resultingly concise in holding the statute did not deny equal protection of the law.[117] The Court extended this holding to dentistry in *Graves v. Minnesota*.[118] In doing so, the Court reiterated the vital link between safeguarding public health and the power of the state to regulate medical professions, explaining "it has been the practice of different States, *from time immemorial*, to exact in many pursuits a certain degree of skill and

of the general public good, which regards and preserves these principles of liberty and justice, must be held to be due process of law.") (quoting Hurtado v. California, 110 U.S. 516, 537 (1884)).

112. *See* Lochner v. New York, 198 U.S. 45, 57 (1905) (holding the state insufficiently justified the use of police power to regulate the baking industry by unreasonably favoring one group of individuals over another).

113. Watson v. Maryland, 218 U.S. 173 (1910).

114. *See id.* at 178–79 (including exceptions for individuals providing gratuitous services, residents or students working under physician supervision, any physician from another state who was consulting with an in-state physician, chiropodists, midwives, physicians treating in-state patients but residing out-of-state, and commissioned surgeons of the Army, Navy, or Marines).

115. *Id.* at 176–77 (emphasis added).

116. *See id.* at 178–79 ("Dealing, as its followers do, with the lives and health of the people, and requiring for its successful practice general education and technical skill, as well as good character, [medicine] is obviously one of those vocations where the power of the state may be exerted to see that only properly qualified persons shall undertake its responsible and difficult duties.").

117. *See id.* ("Conceding the power of the legislature to make regulations of this character . . . the details of such legislation rest primarily within the discretion of the state legislature. . . . This subject has been so frequently and recently before this court as not to require an extended consideration.").

118. Graves v. Minnesota, 272 U.S. 425 (1926).

learning upon which the community may confidently rely."[119] In upholding the constitutionality of the statute, the Court notably explained the different facets each occupation entailed must be considered when evaluating the permissibility of the state statutory schemes of different professions.[120] The Court explicitly clarified "employments or trades of locomotive engineers and barbers[] . . . [manifestly] involve very different considerations from those relating to such professions as dentistry requiring a high degree of scientific learning."[121] In *Williamson v. Lee Optical of Oklahoma Inc.*,[122] the Court further explained the legislative consideration of these factors merits significant leniency. In *Williamson*, the Court considered an Oklahoma statute which required a prescription from an optometrist or ophthalmologist in order for an optician to fit or duplicate lenses for eyewear.[123] The district court found the statute "neither reasonably necessary nor reasonably related to the end" of protecting public health and welfare.[124] The Supreme Court overruled the district court, citing the responsibility of the judiciary necessitates deference be given to the legislature to "balance the advantages and disadvantages" of the regulation, despite it producing obvious duplicative and illogical results.[125] Reflecting on its history, the Court explained, "The day is gone when this Court uses the Due Process Clause of the Fourteenth Amendment to strike down state laws, regulatory of business and industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought."[126] The Court ultimately held this challenge in the same vein as challenges to other occupational licensing statutes and rejected the notion that it was a violation of due process.[127]

The timeline and language of these cases highly suggests free speech challenges by unlicensed individuals to nutrition and dietetic licensing

119. *Id.* at 112.

120. *See id.* at 429 (holding the "statutes regulating the practice of medicine or dentistry" contained similar provisions to other state statutory schemes, but each occupation necessarily requires different considerations when evaluating their constitutional validity).

121. *Id.*

122. Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955).

123. *See id.* at 486 (explaining the differences between an optician, ophthalmologist, and optometrist).

124. *Id.*

125. *See id.* at 487–88 (opining on the legislature's rationale behind the statute, which seemingly instituted a "needless, wasteful requirement in many cases").

126. *See id.* at 488 (citing *Nebbia v. New York* as supporting precedent).

127. *See id.* at 491 (explaining "[i]t seems to us that this regulation is on the same constitutional footing as the denial to corporations of the right to practice dentistry").

statutes, as a baseline, are unlikely to succeed.[128] First, the applicability of physician specific precedent to nutrition and dietetics is seamless, given nutrition was specifically noted by the Court as an aspect of the practice of medicine and the same rationale and deference was extended to statutes regulating dentists.[129] Next, medical licensing is unique as there are patently different considerations for enacting statutes to regulate medical versus non-medical professions, suggesting medical professions have a stronger tie to public health and safety with respect to licensing as an exercise of state police power.[130] Finally, this precedent supports specifically giving significant deference to the legislature in enacting these laws, as the regulation of these professions is clearly within the control of the states.[131] The only facet these cases do not clearly indicate, which is of key importance to a free speech challenge, is the point where speech by anyone on any medical topic becomes regulable professional conduct.[132]

2. Interpreting *Thomas* and *Lowe* to Separate Speech from Conduct: "Some Other Factor" and "Personal Nexus"

An essential step in analyzing the breadth and constitutionality of an occupational licensing law in a free speech context is determining if state regulation is only incidentally impacting speech by regulating professional

128. *See* Larkin Jr., *supra* note 44, at 280 (indicating federal constitutional challenges to occupational licensing laws are unlikely to be successful).

129. *See* Dent v. West Virginia, 129 U.S. 114, 122–23 (1889) (explaining "the properties of vegetable and mineral substances" and the agencies by which the human system is affected, are areas in which may require more regulation in the future as more knowledge is learned about these topics); Graves v. Minnesota, 272 U.S. 425, 429 (1926) (extending to dentistry the holding of such occupational licensing as a valid use of state police power).

130. *See Graves*, 272 U.S. at 429 (holding "employments or trades of locomotive engineers and barbers[] . . . [manifestly] involve very different considerations from those relating to such professions as dentistry requiring a high degree of scientific learning"); Watson v. Maryland, 218 U.S. 173, 178–79 (1910) (explaining the significant link medical occupations have on "the lives and health of the people" makes such occupations "obviously one of those vocations where the power of the state may be exerted to see that only properly qualified persons shall undertake its responsible and difficult duties").

131. *See Watson*, 218 U.S. at 177 (explaining "the details of such legislation rest primarily within the discretion of the state legislature"); *Williamson*, 348 U.S. at 488 (deferring to the legislature to "balance the advantages and disadvantages" of laws enacted pursuant to state police powers).

132. *See* Reetz v. Michigan, 188 U.S. 505, 506 (1903) (emphasis added) (holding "[t]he power of a state to make reasonable provisions for determining the qualifications of those engaging in the *practice of medicine* . . . is not open to question" but not identifying what constitutes practicing medicine); *Graves*, 272 U.S. at 429 (holding in favor of "statues regulating the practice of medicine or dentistry" but not defining the scope of what that practice entails).

conduct.[133] Unfortunately, the Supreme Court has provided minimal guidance as to how, if at all, occupational licensing statues specifically implicate free speech rights.[134] For many years, the concurring opinions of Justice Jackson in *Thomas v. Collins*[135] and Justice White in *Lowe v. S.E.C.*[136] provided the only insight as to how to balance occupational licensing against freedom of speech.[137] While they are not majority opinions, their insight is highly persuasive when considered with historical case holdings for medical licensure.[138] By combining the concurrences in *Thomas* and *Lowe*, and with the aforementioned historical deference to state police power, the line differentiating between regulations of speech and regulations of professional conduct for medical professions becomes more clear.[139] When this framework is then applied to nutrition and dietetics licensure, the outcome for many free speech challenges should be holding such laws as within the power of the States to enact and enforce because occupational licensing only incidentally implicates speech.

In *Thomas*, Texas law regulating labor union activities required union organizers to register with the Secretary of State and obtain an organizer's

133. *See* Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2373 (2018) (holding permissible the regulation of professional conduct when it incidentally implicates speech).

134. *See* Lawline v. Am. Bar Ass'n, 956 F.2d 1378, 1386 (7th Cir. 1992) (holding a licensing statute limiting persons who may practice law did not limit freedom of speech and was therefore not subject to First Amendment scrutiny), *cert. denied*, 510 U.S. 992 (1993); Sherman, *supra* note 9, at 184–86 (reporting Justice White's concurring opinion in *Lowe v. S.E.C.* as one of the few resources from the Supreme Court discussing occupational licensing); Smolla, *supra* note 69, at 68 (conveying the provisional nature of the professional-speech doctrine).

135. Thomas v. Collins, 323 U.S. 516 (1945).

136. Lowe v. S.E.C., 472 U.S. 181 (1985).

137. *See* Sherman, *supra* note 9, at 185–86 (discussing Justice White's reliance on Justice Jackson's prior opinion in *Thomas*); Smolla, *supra* note 69, at 75 (citing *Thomas v. Collins* as an early free speech case discussing the state's power to regulate professional speech).

138. Justice Jackson was not joined in his concurrence in *Thomas*. Justice White's concurrence in *Lowe* was joined by Chief Justice Burger and Justice Rehnquist. Despite not being majority opinions, lower courts have ruled in favor of upholding licensing statutes citing Justice White's opinion, which draws heavily on Justice Jackson's opinion. *See* Wollschlaeger v. Governor of Fla., 848 F.3d 1293, 1308–09 (11th Cir. 2017) (citing Justice White's reasoning in *Lowe* as highly persuasive authority when discussing the difference between regulations of speech and regulations of professional conduct); *see also* Serafine v. Branaman, 810 F.3d 354, 359–60 (5th Cir. 2016) (describing several circuit courts as embracing Justice White's concurrence in *Lowe* when applying the professional speech doctrine).

139. *See Thomas*, 323 U.S. at 544 (Jackson, J., concurring) (distinguishing between the state's exercise of the power to mandate professional licensure against the state's ability to regulate anyone's speech to the general public); *Lowe*, 472 U.S. at 233 (White, J., concurring) (suggesting the application of a licensure law to unlicensed professionals who publicly publish articles would be "a direct restraint on freedom of speech").

card prior to soliciting others to become members of the union.[140] Thomas, a union leader in several nationally prominent union organizations, traveled to Texas to speak to a group of non-unionized plant employees and solicit their membership.[141] Thomas did not register with the state and was subsequently arrested and charged with violating the Texas statute.[142] The Texas Supreme Court upheld the statute as a valid exercise of state police power, as the statute was "for the protection of the general welfare of the public . . . with special reference to safeguarding laborers from imposture when approached by an alleged organizer."[143] The Texas Supreme Court held the state could indirectly interfere with freedom of speech to a limited extent if "reasonably necessary for the protection of the general public."[144] The registration requirement in question did not impose a general free speech restraint but rather regulated the business and economic activities of unions whose agents were operating on its behalf.[145]

The United States Supreme Court specifically rejected this interpretation on writ of certiorari, holding the danger presented by Thomas speaking did not outweigh the restrictions placed on the exercise of his First Amendment rights.[146] The majority held because Thomas did not speak for renumeration, he was not subject to the licensing requirement.[147] The Court explained the "requirement that one must register before he undertakes to make a public speech to enlist support for a lawful movement is quite incompatible with the requirements of the First Amendment" but once the speaker "undertakes the collection of funds or securing subscriptions, he enters a realm where a reasonable registration or identification requirement may be imposed."[148]

In his concurring opinion, Justice Jackson sought to reconcile where to further draw the line between the "two well-established, but at times overlapping, constitutional principles" at issue in the case; specifically, when might the state legitimately regulate the conduct of professional organization

140. *Thomas*, 323 U.S. at 519 n.1.

141. *Id.* at 521.

142. *Id.* at 523.

143. *Id.* at 524.

144. *Id.* at 525.

145. *Id.*

146. *Id.* at 537 (holding "[a] restriction so destructive of the right of public discussion, without greater or more imminent danger to the public interest than existed in this case, is incompatible with the freedoms secured by the First Amendment").

147. *Id.* at 540.

148. *Id.*

members versus when regulation impermissibly infringes on free speech.[149] Justice Jackson thought speech must be associated with "some other factor which the state may regulate so as to bring the whole within official control" under a licensing statute.[150] He illustrated the lack of such a distinguishing factor to separate the two principles, stating "the state may prohibit the pursuit of medicine as an occupation without its license but 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."[151] Using the underlying case as an example, Justice Jackson further explained the state "may regulate one who makes a business or a livelihood of soliciting funds or memberships for unions. But I do not think it can prohibit one, even if he is a salaried labor leader, from making an address to a public meeting of workmen[.]"[152]

In *Lowe v. S.E.C.*, the Securities and Exchange Commission sought action against a former investment adviser, Lowe, who after losing his registration continued providing non personalized investment advice in published newsletters.[153] Such publications by Lowe were allegedly in violation of the Investment Advisers Act of 1940.[154] The majority held the non-personalized nature of the writings, as offered to the general public and not to any one client in particular, did not fall within the Act's definition of an investment adviser and were therefore excluded from the Act's registration requirement.[155]

While the majority opinion was more mindful of the First Amendment implications on freedom of the press, Justice White's concurrence focused on the impact of the licensing requirement on the freedom of speech.[156] The crux of the issue, in Justice White's view, was the vital difference between speech made to the public at large and speech made incidentally as part of conduct in the profession.[157] Justice White, drawing specifically on

149. *Id.* at 544 (Jackson, J., concurring).

150. *Id.* at 547 (Jackson, J., concurring).

151. *Id.* at 544. Justice Jackson also illustrated, "A state may forbid one without its license to practice law as a vocation, but I think it could not stop an unlicensed person from making a speech about the rights of man or the rights of labor, or any other kind of right, including recommending that his hearers organize to support his views." *Id.*

152. *Id.* at 544–45.

153. Lowe v. S.E.C., 472 U.S. 181, 183–184 (1985).

154. *Id.* at 184.

155. *Id.* at 210, 211.

156. *Id.* at 228–29 (White, J., concurring).

157. *Id.* at 232 (White, J., concurring).

Justice Jackson's concurrence in *Thomas*, who classified the establishment of a "personal nexus between the professional and client" in which the professional "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client" as the point where professional speech becomes professional conduct, appropriately regulable under state licensing schemes.[158] Government regulation infringes on free speech when the personal nexus is absent and the speaker is not "exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted."[159] In *Lowe*, seeking to prevent the unregistered former investment adviser from publishing general investment advice for public benefit, even for compensation, would be "a direct restraint on freedom of speech . . . subject to the searching scrutiny" of the First Amendment.[160]

The concurring opinions from *Thomas* and *Lowe* are insightful for several reasons. First, both opinions support the view that the state may license individuals whose conduct is clearly in accordance with a professional discipline, with few limitations or implications regarding the First Amendment—in line with pre- and post-*Lochner* holdings.[161] Next, both opinions suggest a difference between speaking to the public versus speaking privately on an individualized basis, with public speech perhaps meriting more First Amendment protection.[162] Justice Jackson in *Thomas* also identified receiving compensation as a critical distinction when speaking, signaling the speech in that context tends to be more akin to

158. *Id.* (White, J., concurring).

159. *Id.* (White, J., concurring).

160. *Id.* at 233 (White, J., concurring).

161. *See* Thomas v. Collins, 323 U.S. 516, 544–45 (1945) (Jackson, J., concurring) ("So the state to an extent not necessary now to determine may regulate one who makes a business or a livelihood of soliciting funds or memberships for unions."); Lowe v. S.E.C., 472 U.S. 181, 232 (1985) (White, J., concurring) (holding a professional licensing statute may not abridge speech "[w]here the personal nexus between professional and client does not exist, and a speaker does not purport to be exercising judgment on behalf of any particular individual with whose circumstances he is directly acquainted."); Smolla, *supra* note 69, at 79 ("[T]he opinions posit that there is no First Amendment impediment to government requiring a license for certain professional activity.").

162. *See Thomas*, 323 U.S. at 45 (Jackson, J., concurring) ("But I do not think . . . [the state] can prohibit one, even if he is a salaried labor leader, from making an address to a public meeting of workmen, telling them their rights as he sees them and urging them to unite in general or to join a specific union."); *Lowe*, 472 U.S. at 232 (White, J., concurring) ("One who takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client in the light of the client's individual needs and circumstances is properly viewed as engaging in the practice of a profession . . . the professional's speech is incidental to the conduct of the profession.").

professional conduct; receiving remuneration for providing professional services.[163] Finally and most importantly, both opinions strongly support the notion that "the distinguishing factor was whether the speech in any particular case was 'associat[ed] . . . with *some other factor* which the state may regulate so as to bring the whole within official control'" of the state.[164]

Given the nature of the opinions, however, their guidance is potentially limited in applicability to medical professions by some factors. Both opinions were not the majority, rendering the opinions not binding precedent in all occupational licensing cases that include medical licensing challenges.[165] Further, neither case dealt specifically with medical licensure and neither opinion discusses the exhaustive range of their logical and legal conclusions.[166]

Despite this, the ideas from both opinions are uniquely helpful in medical challenges because of the clarity by which their conclusions can aid courts in determining "[the] rough distinction" between whether a state licensing scheme "operates as a regulation of speech or of professional conduct" in medical licensure challenges.[167] Principally, the considerations of both (1) "*some other factor* . . . the state . . . [can] regulate," and (2) establishing "the personal nexus between the professional and client" are particularly instructive, because there is one commonality to all medical professions that

163. *See Thomas*, 323 U.S. at 545 (Jackson, J., concurring) ("The modern state owes and attempts to perform a duty to protect the public from those who seek for one purpose or another to obtain its money. When one does so through the practice of a calling, the state may have an interest in shielding the public against untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency . . . through a licensing system.").

164. *Lowe*, 472 U.S. at 231 (White, J., concurring) (emphasis added) (quoting *Thomas*, 323 U.S. at 547 (Jackson, J., concurring)).

165. Justice Jackson was not joined in his concurrence in *Thomas*. Justice White's concurrence in *Lowe* was joined by Chief Justice Burger and Justice Rehnquist. Despite not being majority opinions, lower courts have ruled in favor of upholding licensing statutes citing Justice White's opinion, which draws heavily on Justice Jackson's opinion. *See* Wollschlaeger v. Governor of Fla., 848 F.3d 1293, 1308, 1309 (11th Cir. 2017) (citing Justice White's reasoning in *Lowe* as highly persuasive authority when discussing the difference between regulations of speech and regulations of professional conduct); *see also* Serafine v. Branaman, 810 F.3d 354, 359 (5th Cir. 2016) (describing several circuit courts as embracing Justice White's concurrence in *Lowe* when applying the professional speech doctrine).

166. Justice Jackson did illustrate his reasoning using a legal and medical example, which could indicate he was mindful to the most commonly licensed professions of the period that heavily relied on speech to accomplish required professional conduct. *See Thomas*, 323 U.S. at 544 (Jackson, J., concurring) ("[T]he state may prohibit the pursuit of medicine as an occupation without its license but 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.").

167. *Id.* at 544 (Jackson, J., concurring); *Lowe*, 472 U.S. at 231 (White, J., concurring).

state governments regulate that can help identify where speech ends and when professional conduct begins: the diagnosis and treatment of a disease or medical condition.[168]

B. *Illustrating the Utility of* Thomas *and* Lowe *to Distinguish Speech from Licensed Conduct*

Drawing the line at the point speech becomes professional conduct has not been clearly or easily determinable for licensable occupations, despite being a practice "long familiar to the bar."[169] But the point is clearly one the judiciary must decide, given the potential chilling effect government regulation can have on free speech rights.[170] Perhaps the most important determination is the point at which speech by unlicensed individuals becomes regulated professional conduct requiring a license by a state occupational licensing statute, yet no clear guidance currently exists to help make this determination.[171] For free speech challenges to medical licensing statutes, using the *some other factor* and *personal nexus* framework from *Thomas*

168. *Lowe*, 472 U.S. at 232 (White, J., concurring); s*ee* Nat'l. Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2373 (2018) (holding permissible the regulation of professional conduct that incidentally implicates speech, such as "part of the *practice* of medicine, subject to reasonably licensing and regulation by the State") (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 884 (1992)).

169. United States v. Stevens, 559 U.S. 460, 468 (2010) (quoting Simon & Schuster Inc. v. Members of N.Y. State Crime Victims Bd., 502 U.S. 105, 127 (1991) (Kennedy, J., concurring in judgment)). The Court admits specifically defining "professional speech" is difficult. *Becerra*, 138 S. Ct. at 2375 (citing Brown v. Ent. Merch. Ass'n, 564 U.S. 786, 791 (2011)).

170. *See* Marbury v. Madison, 5 U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *Thomas*, 323 U.S. at 529 ("[T]he duty our system places on this Court [is] to say where the individual's freedom ends and the State's power begins."); *Lowe*, 472 U.S. at 230 (White, J., concurring) ("Although congressional enactments come to this Court with a presumption in favor of their validity, Congress' characterization of its legislation cannot be decisive of the question of its constitutionality where individual rights are at issue."). The Court has reiterated several dangers associated with government regulation of speech, including the suppression of unpopular ideas or information, and the negative impact of the marketplace of ideas by which professionals and others communicate and share independent ideas. *Becerra*, 138 S. Ct. at 2374–75; Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 356 (2010) ("When Government seeks to use its full power, including the criminal law, to command where a person may get his or her information or what distrusted source he or she may not hear, it uses censorship to control thought. This is unlawful. The First Amendment confirms the freedom to think for ourselves.").

171. *See* Paul Sherman, *Occupational Speech and the First Amendment*, 128 HARV. L. REV. F. 183, 184 (2015) ("Until recently, the only significant Supreme Court guidance on occupational-speech licensing came from . . . *Lowe v. SEC*. Since that case, there have only been only a handful of lower-court rulings . . . and an equally scant amount of scholarly literature.").

and *Lowe* can help identify the judicially-determinable point where speech becomes regulable conduct.[172]

1. Satisfying *Some Other Factor* and *Personal Nexus* for Medical Occupational Licensing

Satisfying *some other factor* for medical occupational licensing is simple. If the rich history of enacting such statutes is not enough support, state government's role in health care is.[173] Satisfying the *personal nexus* requirement is slightly more challenging, but the diagnosing and treatment of diseases or medical conditions seems precisely what Justice White had in mind.[174] Diagnosing and treating diseases or medical conditions is inextricably tied to state government regulation of health care and health insurance, as the health and welfare of society requires health care providers to make the determinations necessary for diagnosis and treatment of comorbidities.[175] Medical diagnoses are required and reported through medical coding to track disease status, monitor communicable diseases, communicate with health insurance providers, and various other functions regulable by state governments.[176] The historical precedent supporting medical licensure, and state government's involvement in health care, makes clear that they get to choose—through occupational licensing—who diagnoses and treats their citizens.

172. *See* Riley v. Nat'l Fed'n of the Blind of N. Carolina, Inc., 487 U.S. 781, 802 (1988) (holding "[g]enerally, speakers need not obtain a license to speak. However, that rule is not absolute."); Pickup v. Brown, 740 F.3d 1208, 1218 (9th Cir. 2014) (O'Scannlain, J., dissenting from the denial of rehearing en banc) (questioning, "by what criteria do we distinguish between utterances that are truly 'speech,' on the one hand, and those that are, on the other hand, somehow 'treatment' or 'conduct'?").

173. RICHARD D. REMINGTON ET AL., THE FUTURE OF PUBLIC HEALTH 172 (1988) (describing states as "the principal government entity responsible for protecting the public's health in the United States.").

174. *See Lowe*, 472 U.S. at 232 (White, J., concurring) (explaining the *personal nexus* as the point when the professional "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client").

175. REMINGTON ET AL., *supra* note 173, at 172.

176. *See International Statistical Classification of Diseases and Related Health Problems (ICD)*, WORLD HEALTH ORG., https://www.who.int/standards/classifications/classification-of-diseases [https://perma.cc/S84Y-5VDC] (listing the purposes and uses of ICD codes, to include identifying health trends and defining "the universe of diseases, disorders, injuries, and other related health conditions"); Peggy Dotson, *CPT® Codes: What Are They, Why Are They Necessary, and How Are They Developed?*, 2 ADVANCES IN WOUND CARE 583, 584 (2013) (describing the Current Procedural Terminology (CPT) coding system as "the preferred system for coding and describing healthcare services and procedures in federal programs (Medicare and Medicaid) and throughout the United States by private insurers and providers of healthcare services").

2. Using Diagnosis and Treatment of a Disease or Medical Condition as the *Personal Nexus* Marks the Line Where Speech Becomes Incidental to Licensable Conduct

Courts have struggled with identifying a generally applicable point at which speech becomes professional medical conduct subject to an occupational licensing statute.[177] Satisfying Justice White's *personal nexus* is the key point in that determination. Analyzing past legal challenges helps identify that diagnosis or treatment of a disease or medical condition is the best approach to meeting the criterion. *King v. Governor of New Jersey*[178] serves as an example.[179] In *King*, the Third Circuit considered a free speech challenge to a New Jersey law proscribing licensed counselors from engaging in sexual orientation change efforts (SOCE) therapy with minor clients.[180] The United States District Court for the District of New Jersey initially held SOCE as professional conduct, rendering it subject to state regulation with no associated First Amendment protection.[181] The Third Circuit rejected this notion, observing the lack of Supreme Court authority available to help ascertain whether SOCE, which essentially is purely speech in the form of talk therapy, could or should be classified as conduct and not speech.[182] The Third Circuit then cited *Holder v. Humanitarian Law Project*[183] as justification for why such a holding by the district court was incorrect, as the Supreme Court in *Holder* held legal counseling was speech and not conduct even when used to deliver professional services, rejecting

177. *See Pickup*, 740 F.3d at 1218 (O'Scannlain, J., dissenting from the denial of rehearing en banc) (criticizing the majority for providing "no principled doctrinal basis for its dichotomy" in holding certain verbal communication by mental health providers as professional conduct); *See* King v. Governor of N.J., 767 F.3d 216, 228 (3d Cir. 2014) (questioning the utility of the district court's suggested approach of using the application of methods, practices, and procedures, to determine whether speech is professional conduct).

178. King v. Governor of N.J., 767 F.3d 216 (3d Cir. 2014).

179. *Id.* at 231. The Ninth Circuit's holding in *Pickup v. Brown* is very similar with the district court's holding in *King*; however, *King* is used for simplicity as it admittedly draws heavily from *Pickup*. *Pickup*, 740 F.3d at 1208; *see King*, 767 F.3d at 226 (explaining "the District Court relied heavily on the Ninth Circuit's recent decision in *Pickup*").

180. *See King*, 767 F.3d at 221 (explaining the challenge was brought by counselors seeking to utilize SOCE therapy, but also was challenged via third-party claims representing the plaintiff's affected minor patients).

181. *Id.* at 223–24 (reviewing the district court holding which reasoned SOCE counseling was conduct, receiving no First Amendment protection).

182. *See id.* at 224–25 ("Defendants have not directed us to any authority from the Supreme Court or this circuit that have characterized verbal or written communications as 'conduct' based on the function these communications serve.").

183. Holder v. Humanitarian L. Project, 561 U.S. 1 (2010).

the underlying defendant's arguments to the contrary.[184] Later in the *King* opinion, the Third Circuit would hold the statute valid when applying the professional speech doctrine, which would later be rejected in *Becerra*.[185]

By focusing on where the Third Circuit believed the district court erred, it appeared to have missed what it was doing correctly: citing appropriate case law and attempting to define the point at which speech becomes licensable conduct.[186] The district court sought out similar case precedent in *Pickup*—which dealt with the identical professional field and topic—rather than deciding *Holder* was binding.[187] Citing *Holder* as binding authority is misapplied in this instance because doing so fails to consider the crucial element necessary for making a judicial determination between speech and conduct, which lies at the fundamental difference separating medical professions from non-medical professions.[188] As explained by Justice White, the point speech becomes professional conduct is establishing the *personal nexus*, when the professional "takes the affairs of a client personally in hand and purports to exercise judgment on behalf of the client."[189] The district court attempted to define what that *personal nexus* could be by explaining:

184. *Id.* at 27, 28. The Third Circuit also cited *Planned Parenthood of Southeastern Pa. v. Casey* as an example authority of when a state law regulated speech and not treatment or conduct. *See King*, 767 F.3d at 230–31 (citing *Casey* as supporting authority). While the Third Circuit indicated a plurality supported this holding, the Supreme Court itself in *Becerra* explicitly indicates the joint opinion from *Casey* is an example of when such a statute is a permissible regulation of professional conduct which incidentally implicates speech, not when a statute regulates speech rather than conduct. *See Becerra*, 138 S. Ct. at 2373 (citing *Casey* as supporting authority for when "[s]tates may regulate professional conduct, even though that conduct incidentally involves speech," and later explaining, "[t]he joint opinion explained that the law regulated speech only 'as part of the *practice* of medicine, subject to reasonable licensing and regulation by the State.'") (emphasis in original).

185. *King*, 767 F.3d at 240. *But see Becerra*, 138 S. Ct. at 2371–72 (abrogating *King*).

186. *See* King v. Christie, 981 F.Supp.2d 296, 309–10 (D.N.J. 2013) (holding *Pickup* as persuasive authority due to its similar fact pattern and attempting to classify SOCE as professional conduct).

187. *See id.* at 313 (explaining "[a]lthough the *Pickup* decision is not binding on [the district court], given the relevance of this opinion, and the dearth of decisions from the Third Circuit or other jurisdictions addressing the interplay between constitutionally protected speech and professional counseling, [the court would] turn to the Ninth Circuit's decision where appropriate").

188. *See* Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psych., 228 F.3d 1043, 1054–55 (9th Cir. 2000) (holding the State's interest in regulating mental health as more compelling than its interest in regulating attorney solicitation, given the safety and health implications of the profession).

189. Lowe v. S.E.C., 472 U.S. 181, 232 (1985) (White, J., concurring).

> [T]he line of demarcation between conduct and speech is whether the counselor is attempting to communicate information or a particular viewpoint to the client or whether the counselor is attempting to apply methods, practices, and procedures to bring about a change in the client—the former is speech and the latter is conduct.[190]

The district court reached this conclusion after appropriately considering precedent permitting state occupational licensing and aptly considering the implication of holding SOCE as speech; it would mean "any regulation of professional counseling necessarily implicates fundamental First Amendment speech rights."[191]

The Third Circuit, elucidates the shortcomings of the district court's suggestion for the *personal nexus* in *King*.[192] As the Third Circuit demonstrates, the analysis considering whether the speaker "is attempting to apply methods, practices, and procedures" fails to differentiate between speech made by unlicensed versus licensed individuals:

> For instance, consider a sophomore psychology major who tells a fellow student that he can reduce same-sex attractions by avoiding effeminate behaviors and developing a closer relationship with his father. Surely this advice is not "conduct" merely because it seeks to apply "principles" the sophomore recently learned in a behavioral psychology course. Yet it would be strange indeed to conclude that the same words, spoken with the same intent, somehow become "conduct" when the speaker is a licensed counselor. That the counselor is speaking as a licensed professional may affect the level of First Amendment protection her speech enjoys, but this fact does not transmogrify her words into "conduct."[193]

However, the district court's suggested analysis breaks down, utilizing the diagnosis and treatment of a disease or medical condition as the *personal nexus*

190. *Christie*, 981 F.Supp.2d at 319.

191. *See id.* (citing Williamson v. Lee Optical of Okla., Inc., 348 U.S. 483 (1955); Watson v. Maryland, 218 U.S. 173, 176 (1910); Dent v. West Virginia, 129 U.S. 114 (1889)) (explaining that holding SOCE as speech "runs counter to the longstanding principle that a state generally may enact laws rationally regulating professionals, including those providing medicine and mental health services").

192. *See* King v. Governor of N.J., 767 F.3d 216, 228 (3d Cir. 2014) (applying the district court's proffered analysis to produce unreliable results, suggesting "[t]o classify some communications as 'speech' and others as 'conduct' is to engage in nothing more than a 'labeling game'") (citing Pickup v. Brown, 740 F.3d 1208, 1218 (9th Cir. 2014) (O'Scannlain, J., dissenting from the denial of rehearing en banc)).

193. *King*, 767 F.3d at 228.

succeeds.[194] As applied to the Third Circuit's analogies, the sophomore psychology major is likely not attempting to diagnose or treat their fellow student's disease or medical condition. Doing so would violate of the state occupational licensing statute regulating the practice of psychologists.[195] The fact that a licensed professional might speak the same words in any instance is not alone determinative; only when speech is made in making a diagnosis or treating a disease or medical condition does it become professional conduct subject to state regulation.[196] Turning to the underlying case in *King*, the talk therapy of SOCE was meant to be used as a therapeutic intervention to alter sexual orientation.[197] However, the New Jersey legislature demonstrated that "being lesbian, gay, or bisexual is not a disease, disorder, illness, deficiency, or shortcoming," and "major professional associations of mental health practitioners and researchers in the United States have recognized this fact for nearly 40 years."[198] As such, engaging in SOCE would not only be inappropriate professional conduct by attempting to diagnosis and treat an unrecognized disease or medical condition as the *personal nexus*, it would also go against the state's legislative guidance as the *other factor*. Such speech by unlicensed individuals would violate state licensing of counselors, and licensed counselors wishing to engage in SOCE could become subject to a professional malpractice suit or adverse action by the State Board of Psychological Examiners.[199]

Another example to demonstrate the utility of the suggested *other factor/personal nexus* approach for medical cases is showing how it might have been applied in *Becerra*.[200] In the case, a group of licensed and unlicensed

194. Utilizing the state's regulation of the health care profession as the *other factor* and diagnosing and treating a disease or medical condition as the *personal nexus* may together be referred to as "the *other factor/personal nexus* approach" for this analysis.

195. *See* N.J. STAT. ANN. § 45:14B-6 (West 2019) (explaining psychology students are only exempt from licensure when practicing "under qualified supervision in a training institution or facility recognized by the board").

196. *See id.* § 45:14B-2 (West 2019) (defining the practice of psychology and professional psychological services).

197. *King*, 767 F.3d at 221.

198. *See id.* (citing N.J. STAT. ANN. § 45:1–54).

199. Indeed, the fact SOCE cannot be used to diagnose or treat a recognized medical condition—which in turn suggests it lacks indicia of professional conduct—makes it more akin to a doctor failing to obtain informed consent before operating; a common ground for a malpractice suit "firmly entrenched in American tort law." Nat'l Inst. of Fam. & Life Advocs. v. Becerra, 138 S. Ct. 2361, 2373 (2018).

200. *See id.* at 2373–74 (explaining the unlicensed notice was not defended on any other grounds than commercial speech under *Zauderer*).

crisis pregnancy centers, which offer a range of pregnancy-related services, challenged a California statute that required them to provide certain notices on-site and on all advertising materials.[201] As the Court noted when addressing the unlicensed notice, several of the services provided by unlicensed facilities triggered the required notice but did not require a medical license to perform.[202] Applying the *other factor/personal nexus* approach incidentally supports holding these instances as speech and not conduct; the listed services provided by the unlicensed clinics not used to diagnose or treat pregnancy—the medical condition at issue—are used or made *pre*-diagnosis or *pre*-treatment for pregnancy.[203] Under the *other factor/personal nexus* approach, the Court did not and need not analyze whether the statute incidentally impacted speech by regulating professional conduct because there was no personal nexus established through the diagnosis and treatment of a disease or medical condition.[204]

While drawing the line at the point speech becomes professional conduct has previously not been clearly or easily determinable for licensable occupations, utilizing the *other factor/personal nexus* approach for cases dealing with occupational licensure of medical professions appears to provide some general utility when using the diagnosis and treatment of a disease or medical

201. *Id.* at 2370. The Freedom, Accountability, Comprehensive Care, and Transparency Act (FACT Act) required licensed clinics to "notify women that California provides free or low-cost services, including abortions, and give them a phone number to call," and required unlicensed clinics to "notify women that California has not licensed the clinics to provide medical services." *Id.* at 2368.

202. *Id.* at 2377. An unlicensed facility was identified as providing at least two of the four requirements:

> (1) The facility offers obstetric ultrasounds, obstetric sonograms, or prenatal care to pregnant women. (2) The facility offers pregnancy testing or pregnancy diagnosis. (3) The facility advertises or solicits patrons with offers to provide prenatal sonography, pregnancy tests, or pregnancy options counseling. (4) The facility has staff or volunteers who collect health information from clients.

Id. at 2370.

203. *See id.* at 2377 (listing the services provided by unlicensed clinics including collecting health information, advertising pregnancy options counseling, and providing "over-the-counter pregnancy testing" as services not requiring a California medical license to provide).

204. *See id.* at 2372 (explaining the statute regulating the unlicensed notice was not defended because "[s]tates may regulate professional conduct, even though that conduct incidentally involves speech."); Lowe v. S.E.C., 472 U.S. 181, 232 (1985) (White, J., concurring) (concluding licensing provisions do not limit on freedom of speech when "the professional's speech is incidental to the conduct of the profession").

condition as the *personal nexus*.[205] Even when applied in *King* to psychology, a field necessarily utilizing speech to facilitate professional conduct, the *other factor/personal nexus* approach clearly identified when speech became professional conduct. When applied to nutrition and dietetics licensing cases, the result is expectedly similar.

3. Applying the Diagnosis and Treatment of a Disease or Medical Condition *Other Factor/Personal Nexus* Approach to Nutrition and Dietetics Licensing Cases

Occupational licensing statutes governing nutrition and dietetic practice have only recently been challenged on free speech grounds.[206] While generally one "need not obtain a license to speak," a necessary limit exists when speech is incidental to the regulation of professional conduct.[207] Regulation for medical professions, including nutrition and dietetics, is especially warranted because of the close ties to the health and welfare of the public.[208] When applying the *other factor/personal nexus* approach to nutrition, the line between general speech about nutrition versus speech incidental to regulated professional conduct can easily be drawn at the

205. *See* Pickup v. Brown, 740 F.3d 1208, 1215–16 (9th Cir. 2014) (O'Scannlain, J., dissenting from the denial of rehearing en banc) (criticizing the majority for providing "no principled doctrinal basis for its dichotomy" in holding certain verbal communication by mental health providers as professional conduct, questioning "by what criteria do we distinguish between utterances that are truly 'speech,' on the one hand, and those that are, on the other hand, somehow 'treatment' or 'conduct'?").

206. Two federal cases have been reported over the past eight years. Kokesch Del Castillo v. Philip, No. 3:17-CV-722-MCR-HTC (N.D. Fla. Jul. 17, 2019); Cooksey v. Futrell, 721 F.3d 226, 229 (4th Cir. 2013). *Kokesch Del Castillo v. Philip* was appealed to the Eleventh Circuit with an opinion still pending at the time of this Comment's publication.

207. *See* Riley v. Nat'l Fed'n of the Blind of N.C., Inc., 487 U.S. 781, 802 (1988) (holding "[g]enerally, speakers need not obtain a license to speak. However, that rule is not absolute."); *Becerra*, 138 S. Ct. at 2373 (holding permissible the regulation of professional conduct when it incidentally implicates speech).

208. *See Kokesch Del Castillo*, No. 3:17-CV-722-MCR-HTC at 16 n.23 (describing how "improper dietary advice can harm different groups of people" by explaining "a carbohydrate-restricted diet, without supplemental folic acid intake, presents increased risks of birth defects to women who are pregnant or who may become pregnant"); Rabia Bushra et al., *Food-Drug Interactions*, 26 OMAN MED. J. 77, 78 (2011) (describing the pharmacokinetic and pharmacodynamic principles involved in food-drug interactions needed to be accounted for in patients taking medicines, such as grapefruit inhibition of cytochrome P450, the food contraindications associated with anticonvulsants and antihypertensive medications, the impact of a high fiber diet on drugs like Simvastatin, the influence tyramine-containing foods has on monoamine oxidase inhibitor function, and a multitude of other examples).

provision of medical nutrition therapy.[209] This is clearly demonstrated by applying the *other factor/personal nexus* approach to two federal cases which considered free speech challenges to nutrition and dietetics licensure: *Cooksey v. Futrell*[210] and *Kokesch Del Castillo v. Philip*.[211]

In *Cooksey*, the underlying plaintiff was hospitalized from a diabetic coma and diagnosed with Type II diabetes.[212] Cooksey subsequently changed his diet and began an exercise regimen, resulting in weight loss and blood sugar normalization.[213] He later created a website to share his experiences on his successful weight loss and lifestyle changes. He also offered meal plans and recipes, a question and answer column, personal dietary mentoring, and a fee-based life coaching service.[214] Cooksey was eventually reported to the North Carolina Dietetics/Nutrition licensing board, which claimed Cooksey "was engaging in the unlicensed practice of dietetics" and instructed him to make various changes to his webpage to comply with the state licensing statute.[215] Cooksey complied out of "fear of civil and criminal action against him," removing his fee-services, placing a disclaimer on his homepage, and stopping his question and answer component.[216] Cooksey then sued the State Board, alleging it violated his First Amendment rights.[217] The district court dismissed Cooksey's complaint for lack of standing and ripeness, claiming that he suffered no injury because he voluntarily made the changes to his website.[218] The Fourth Circuit reversed and held the State Board's actions had "a non-speculative and objectively reasonable chilling effect" on Cooksey's speech and his claim on its merits was "irrelevant to the standing analysis."[219] Further, Cooksey's claim was

209. *See* 42 U.S.C. § 1395x(vv)(1) (2018) (defining medical nutrition therapy as "nutritional diagnostic, therapy, and counseling services for the purpose of disease management which are furnished by a registered dietitian or nutrition professional . . . pursuant to a referral by a physician").

210. Cooksey v. Futrell, 721 F.3d 226 (4th Cir. 2013).

211. Kokesch Del Castillo v. Philip, No. 3:17-CV-722-MCR-HTC (N.D. Fla. Jul. 17, 2019).

212. *Cooksey*, 721 F.3d at 229.

213. *Id.* at 230. Cooksey described his dietary changes as adopting a "paleolithic diet," a diet low in carbohydrates and high in fat. *Id.* Cooksey alleged this diet is in contrast with the diet recommended to him by a licensed dietitian. *Id.* at 229–30.

214. *Id.* at 230. The website entertained approximately 20,000 visitors in December 2011 and January 2012. *Id.*

215. *Id.*

216. *Id.* at 232. The disclaimer explained he "was not a licensed medical professional and did not have any formal medical education or special dietary qualifications." *Id.* at 230.

217. *Id.* at 232–33.

218. *Id.* at 233.

219. *Id.* at 236, 239.

ripe because he did not obtain clear guidance on how he could further operate his website without violating the statute.[220] The State Board later issued guidelines "allowing people to give ordinary diet advice" without a license, settling the case.[221]

The State Board guidelines in *Cooksey* make applying the *other factor/personal nexus* approach seamless because the State Board clarified what did and did not constitute the diagnosis or treatment of a disease or medical condition by further defining medical nutrition therapy in the licensing statute—the defined *personal nexus*.[222] Defining medical nutrition therapy and including statutory definitions of permissible practices provided the *personal nexus* framework by which nutrition speech became regulated professional conduct.[223] Cooksey's ordinary information about grocery shopping is no more an attempt to diagnose or treat Type II diabetes than a general nutrition article discussing the benefits of eating fruits and vegetables; neither falls under the statutory definition of medical nutrition therapy, which is "[t]he provision of nutrition care services for the purpose of managing or treating a medical condition."[224]

Kokesch Del Castillo v. Philip further elaborates how defining medical nutrition therapy essentially helps adopt the *other factor/personal nexus* approach.[225] In *Del Castillo*, the plaintiff was a health coach operating a business in California called Constitution Nutrition.[226] Del Castillo later moved to Florida and continued to operate her business, which offered to review the client's medical history, provide individualized diet and advice, and provide motivational interviewing and goal setting for a fee.[227] But due to the different licensing statutes in California and Florida, Del Castillo was unlawfully practicing nutrition and dietetics once her business began

220. *See id.* at 241 (holding Cooksey's claims were ripe because no "clarification of the conduct that [he] can engage in" without being subject to "threat of penalty" was provided by the State Board).

221. *See* J. Justin Wilson, *Victory for 'Caveman' Blogger in Free Speech Fight*, INST. FOR JUST. (Feb. 18, 2015), https://ij.org/press-release/north-carolina-free-speech-release-2-18-2015/ [https://perma.cc/F3CM-69GF] ("All [Cooksey] wanted to do was give adults advice on what they should buy at the grocery store . . . . These new guidelines make clear that [Cooksey] can provide that advice to anyone who wants to hear it[.]").

222. N.C. GEN. STAT. ANN. § 90-352(3)(a) (West 2019).

223. *See id.* § 90-368(12) (exempting "[a]ny individual who provides nutrition information, guidance, encouragement, individualized nutrition recommendations, or weight control services that do not constitute medical nutrition therapy as defined" in the statute).

224. *Id.* § 90-352(3)(a).

225. Kokesch Del Castillo v. Philip, No. 3:17-CV-722-MCR-HTC (N.D. Fla. Jul. 17, 2019).

226. *Id.* at 2.

227. *Id.* at 2 n.3.

operating in Florida.[228] Del Castillo was fined by the State Licensing Board and later brought an action alleging the licensing statute was a violation of "her First Amendment right to freedom of speech."[229] The United States District Court for the Northern District of Florida held the state statute was a valid occupational licensing scheme that has an incidental impact on speech.[230] The district court distinguished *Holder* and held the Supreme Court's ruling in *Becerra*, which held "[s]tates may regulate professional conduct, even though that conduct incidentally involves speech" was controlling and in line with Eleventh Circuit precedent.[231]

Del Castillo is notable because Florida's licensing statute does not explicitly define medical nutrition therapy.[232] However, the application of the *other factor/personal nexus* approach helps elucidate why Del Castillo's nutrition services were classified as professional conduct in violation of the statute. Del Castillo specifically offered individualized health information to her clients, based on health history and established goals.[233] In contrast, the plaintiff in *Cooksey* only sought to offer general nutrition information on grocery shopping—which would not expectedly vary from customer to customer.[234] Del Castillo's services established a personal nexus as the professional provider of medical nutrition therapy by going beyond just generalized advice and instead providing fee-based and tailored nutrition interventions to treat individuals diagnosed medical conditions or diseases as determined by their collected health history.[235] The Florida statute may be improved by clearly defining what constitutes medical nutrition therapy

228. *Id.* at 3, n.7; *see* Academy of Nutrition and Dietetics, *Licensure Information by State*, EAT RIGHT PRO, [https://perma.cc/Y8Q3-X262] (identifying California as not having practice exclusivity but Florida as having it).

229. *Kokesch Del Castillo*, No. 3:17-CV-722-MCR-HTC at 4.

230. *See id.* at 12–13 (considering *Locke* binding and holding the statute was "a generally applicable professional licensing law with a merely incidental impact on protected speech").

231. *Id.* at 26, 28–29.

232. *See* FLA. STAT. ANN. § 468.503 (West 2019) (defining only "dietetics and nutrition practice").

233. *Kokesch Del Castillo*, No. 3:17-CV-722-MCR-HTC at 2 n.3.

234. *See id.* at 28 (citation omitted) (distinguishing the present case from another dealing with tour guides who "provide virtually identical information to each customer"); Lowe v. S.E.C., 472 U.S. 181, 233 (1985) (White, J., concurring) (suggesting the attempt to prevent the publishing of general investment advice for public benefit would be "a direct restraint on freedom of speech . . . subject to the searching scrutiny" of the First Amendment).

235. *See* 42 U.S.C. § 1395x(vv)(1) (2018) (defining medical nutrition therapy as "nutritional diagnostic, therapy, and counseling services for the purpose of disease management which are furnished by a registered dietitian or nutrition professional").

in order to provide clarity to unlicensed individuals and potentially avoid future challenges.

As *Cooksey* and *Del Castillo* demonstrate, applying the *other factor/personal nexus* approach to nutrition and dietetics cases can help individuals and courts determine the point at which ordinary speech becomes regulable professional conduct for nutrition and dietetics. State statutes defining medical nutrition therapy significantly help in the application by defining the *personal nexus*, as does defining specific instances where unlicensed individuals may engage in speech thought to possibly implicate the statutorily defined scope of practice.

C. *Recommendations for Legislatures and Courts to Consider When Reflecting on Their Nutrition Occupational Licensing Statutes*

Clearly the value and importance of nutrition and dietetics to public safety and welfare is predominant, given forty-seven states, Washington D.C., and Puerto Rico have enacted occupational licensing laws for it.[236] However, there are notable differences among how each statute is written, resulting in varying degrees of licensing.[237] These differences result in a lack of uniform language for defining what medical nutrition therapy is, create a lack of uniform education and experience requirements, and limits license reciprocity between states. Differing language for each state may also distort the line between what is permissible for anyone to say about nutrition versus what constitutes medical nutrition therapy, which might be subject to a licensing requirement.[238] Without reciprocity, already licensed practitioners in one state encounter delays in obtaining a new state license or are limited in transferring and obtaining a license in another state altogether, inhibiting potential state market growth from providers located out-of-state or disproportionately affecting transient groups like military members and their families.[239] State legislatures seeking to offer clear language and

236. Academy of Nutrition and Dietetics, *Licensure Information by State*, EAT RIGHT PRO, [https://perma.cc/Y8Q3-X262].

237. Phillips & Tuma, *supra* note 7 (describing state regulation of nutrition and dietetics generally takes one of three forms: licensure, state certification, or title protection only).

238. *See* N.C. GEN. STAT. ANN. § 90-352(3)(a) (West 2019) (defining medical nutrition therapy as "[t]he provision of nutrition care services for the purpose of managing or treating a medical condition"); *cf.* NEV. REV. STAT. ANN. § 640E.050 (West 2019) ("'Medical nutrition therapy' means the use of nutrition services by a licensed dietitian to manage, treat or rehabilitate a disease, illness, injury or medical condition of a patient.").

239. *See* N.C. GEN. § 93B-15.1 ("An occupational licensing board shall issue a temporary practice permit to a military-trained applicant or military spouse licensed, certified, or registered in

professional qualification standards in their statutes should consider defining medical nutrition therapy based on the language and qualifications adopted in Medicare and other state statutes which define it with specificity.[240] Further, states should consider seeking professional organizations like the Academy of Nutrition and Dietetics, who have developed a Model Practice Act to help standardize nutrition and dietetics licensure laws.[241] Similarly established statutes can help improve the possibility of reciprocity between states, alleviating burdens on transient populations and improving the state's ability to attract nutrition and dietetic practitioners, as needed.[242]

The need is paramount for a defined but malleable framework for reviewing occupational licensing statutes regulating the multitude of medical professions currently requiring a license, given the implications such statutes may have on free speech rights.[243] Courts should consider reviewing the concurring opinions from *Thomas* and *Lowe* and adopt the suggested *other factor/personal nexus* approach.[244] As demonstrated, medical professions

another jurisdiction while the military-trained applicant or military spouse is satisfying the requirements for licensure . . . if that jurisdiction has licensure, certification, or registration standards substantially equivalent to the standards . . . in this State."); *see* UT SUP. CT. R. 14-805(a)(2) (West 2019) (allowing active-duty military spouses temporary admission to the State Bar during the period the active-duty spouse is stationed in the state).

240. 42 U.S.C. § 1395x(vv)(1) (2018) (defining medical nutrition therapy as "nutritional diagnostic, therapy, and counseling services for the purpose of disease management which are furnished by a registered dietitian or nutrition professional"); *id.* § 1395x(vv)(2) (defining the academic and experience requirements for a "registered dietitian or nutrition professional" under Medicare). A suggested definition for medical nutrition therapy might combine Medicare's definition with Nevada's statutory definition: "'Medical nutrition therapy' is the nutritional diagnostic, therapy, and counseling services" used by a registered dietitian or other nutritional professional licensed by this statute, to "treat or rehabilitate a disease, illness, injury, or medical condition of a patient." *See id.* § 1395x(vv)(1) (defining medical nutrition therapy); NEV. REV. § 640E.050 (defining medical nutrition therapy).

241. *See* E-mail from Pepin Andrew Tuma, Senior Dir., Government and Regulatory Affairs, Academy of Nutrition and Dietetics, to Author (Jan. 10, 2021, 10:46 PM CST) (on file with author).

242. *See* N.C. GEN. § 93B-15.1 ("An occupational licensing board shall issue a temporary practice permit to a military-trained applicant or military spouse licensed, certified, or registered in another jurisdiction while the military-trained applicant or military spouse is satisfying the requirements for licensure . . . if that jurisdiction has licensure, certification, or registration standards substantially equivalent to the standards . . . in this State.").

243. *See* Pickup v. Brown, 740 F.3d 1208, 1215 (9th Cir. 2014) (O'Scannlain, J., dissenting from the denial of rehearing en banc) (criticizing the majority for providing "no principled doctrinal basis for its dichotomy" in holding certain verbal communication by mental health providers as professional conduct, questioning "by what criteria do we distinguish between utterances that are truly 'speech,' on the one hand, and those that are, on the other hand, somehow 'treatment' or 'conduct'?").

244. *See* Thomas v. Collins, 323 U.S. 516, 547 (1945) (Jackson, J., concurring) (emphasis added) (explaining the distinguishing factor was whether the speech in any particular case was associated with

constitute, at least, a unique sect of professional occupations that deserve careful consideration when occupational licensing laws are challenged.[245] Using the diagnosis and treatment of a disease or medical condition as the *personal nexus* appears to help distinguish speech from professional conduct for medical professions, aiding courts in judicially determining that point in future cases.

IV. CONCLUSION

The ubiquity of nutrition's importance to life is clearly evident: everyone needs to eat. But not everyone is qualified to give tailored nutrition advice to people with nutritional implicated diseases and medical conditions. Professional licensing laws are enacted to regulate the practice of medical fields like nutrition and dietetics to protect the public from the harm caused by inaccurate, uninformed, and inefficacious medical information. These statutes by their nature incidentally impact free speech when enacting practice exclusivity for professions necessarily utilizing speech to carry out professional conduct like medical nutrition therapy. The three aforementioned issues should be considered when medical licensing statutes are enacted and/or challenged on free speech grounds.

First, the history of occupational licensing for medical professions is a deeply rooted doctrine. The language from these historic Supreme Court cases is indicative of how lower courts should interpret challenges to medical occupational licensing statutes like those for nutrition and dietetics. The medical profession is, at least, very unique in how inexplicably tied it is to the health and welfare of the public—the bedrock on which state police power is built.

Second, courts should consider the concurring opinions from *Thomas* and *Lowe* when analyzing these challenges, given how other courts have

"*some other factor* which the state may regulate so as to bring the whole within official control" of the state); Lowe v. S.E.C., 472 U.S. 181, 232 (1985) (White, J., concurring) (quoting *Thomas* and suggesting the establishment of a *personal nexus* approach).

245. *See* Graves v. Minnesota, 272 U.S. 425, 429 (1926) (holding statutes governing "locomotive engineers and barbers . . . involve very different considerations from those relating to such professions . . . requiring a high degree of scientific learning" such as "statutes regulating the practice of medicine"); Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Bd. of Psych., 228 F.3d 1043, 1054 (9th Cir. 2000) (holding the State's interest in regulating mental health more compelling than its interest in regulating attorney solicitation, given the safety and health implications of the profession); Larkin Jr., *supra* note 44, at 279–80 (describing the timeline of pre- and post-*Lochner* rulings as demonstrating the unique consistency of the Supreme Court in holding the enactment of medical licensing statutes as a valid use of state police power).

struggled with defining the *personal nexus*; precisely where to draw the line between when any speech on a medical topic becomes professional conduct, subject to an occupational licensing statute. When applied to medical licensing cases, using the diagnosis and treatment of a disease or medical condition as the *personal nexus* in the *other factor/personal nexus* approach satisfies the confusion free-speech challenges create in this area.

Third, utilizing the *other factor/personal nexus* approach appears to apply best when licensure statutes specifically define the *personal nexus* like nutrition and dietetics statutes often do. The professional framework nutrition professionals utilize when providing nutrition-related care—medical nutrition therapy—defines when the *personal nexus* is established, firmly marking the line where speech becomes incidental to professional conduct. Legislatures should strive to precisely define what constitutes medical nutrition therapy in their nutrition and dietetics licensure statutes and attempt to similarly define the *personal nexus* for statutes regulating other medical professions. Including a definition provides both licensed and unlicensed individuals clarity on when speech is an incidental component of professional medical conduct, as well as aid courts if free speech challenges arise in the future. States should strive to adopt similar language for licensing statutes, such as the Academy of Nutrition and Dietetics Model Practice Act for nutrition and dietetics specifically, and establish a consistent minimum standard for professional competencies required to practice. These both will help enable interstate reciprocity, decrease the likelihood of transient populations encountering different standards when crossing state lines, and potentially help in uniformly addressing the national overweight and obesity epidemic.

Ultimately, the enactment of occupational licensing statutes for nutrition and dietetics is a constitutionally permissible and appropriate scheme, utilizing state police power to necessarily protect the public from potentially incompetent, untrustworthy, unskilled providers attempting to treat patients with diet related comorbidities. States have, and should continue to have, the authority to grant a "license to kale."