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# The Absurd Logic Behind Florida's Docs vs. Glocks Law

The Second Amendment trumps all other amendments.

By Dahlia Lithwick and Sonja West

Gun-rights advocates have made a lot of claims over the years about the broad scope of their constitutional rights. They say, in effect, that the Second Amendment means they can [buy virtually any gun they want and take it pretty much anywhere](#). But in an ongoing legal battle in Florida, they lay claim to a newfangled Second Amendment right—the right not to have anyone talk to gun owners about their guns. Specifically, gun advocates don't want doctors discussing guns, or the potential harms those guns may cause, with their patients. And while mere talk about guns might seem to have nothing to do with the right to keep or bear arms, the advocates contend that the Constitution is on their side. Last month, for the third time in the same suit, a federal court of appeals agreed.

This very bizarre case is filed under the name of *Wollschlaeger v. Governor of the State of Florida*, although First and Second amendment buffs may recognize it under the cutesy nickname Docs vs. Glocks. It started when some gun owners (and [the National Rifle Association](#)) told Florida legislators that their doctors were harassing them by asking about gun safety. The legislators responded by passing a law that bars health care workers from discussing or recording anything about their patients' gun ownership or safety practices that could be deemed in bad faith, irrelevant, or harassing. (Twelve other states have considered enacting similar legislation, but only Florida has actually passed such a law.)

The result was the [Firearms Owners' Privacy Act](#). The law provides that licensed health care practitioners and facilities: “may not intentionally enter” information concerning a patient's ownership of firearms into the patient's medical record that the practitioner knows is “not relevant to the patient's medical care or safety, or the safety of others,” and “shall respect a patient's right to privacy and should refrain” from inquiring as to whether a patient or their family owns firearms, unless the practitioner or facility believes in good faith that the “information is relevant to the patient's medical care or safety, or the safety of others.” Violations of the act could lead to disciplinary action including fines and suspension, or revocation of a medical license. Proponents of such laws say these doctor-patient dialogues violate the patients' Second Amendment rights.

If something seems amiss to you about this argument, you're not alone. A group of three doctors, the Florida Pediatric Society, and the Florida Academy of Family Physicians, joined by the Brady Campaign and the American Civil Liberties Union, filed suit, claiming that the gun-talk ban violates the physicians' free speech rights. As their complaint points out, restrictions on speech (such as this one) that only apply to a particular subject matter are generally recognized as being the worst kind of First Amendment violation—a content-based regulation. In order for the government to enact a content-based regulation on speech, it must show that the law serves a “compelling” interest. The doctors explain, however, that in light of the connection between guns and injuries, accidents, and suicides, this law actually stops doctors from addressing an **incredibly serious health-related topic**. Doctors discuss with patients (or, in the case of pediatricians, the parents of patients) the use of seat belts, bike helmets, condoms, and cleaning products in the home. Is there any reason—let alone a compelling one—to prohibit them from discussing one of the leading causes of injury and suicide?

In 2011, the U.S. District Court for the Southern District of Florida agreed with the physicians and issued an order enjoining the state's enforcement of the law. U.S. District Judge Marcia Cooke found that the law's vague wording “fails to provide any standards for practitioners to follow.” She added that while the law purported to protect the Second Amendment rights of gun owners who felt harassed and bullied by doctors inquiring about gun safety in the home, the law itself “simply does not interfere with the right to keep and bear arms.” The absence of any Second Amendment harm seems clear, as **Eugene Volokh has noted**, because the doctors aren't taking away patients' guns, or even threatening to take away patients' guns. They are merely talking to their patients about injury and guns. As Volokh notes: “Even if the doctor's speech is mistaken ... ‘harassing,’ or not sufficiently ‘relevant,’ no amount of my doctor's speech will cause my gun to disappear.”

In other words, there is no Second Amendment problem here, because everybody who wants to do so can keep on keeping and bearing arms. There is, on the other hand, a significant First Amendment problem, because the state is prohibiting doctors from talking about one, and only one, topic with their patients. And there certainly isn't any reason to think that this is a case where the Second Amendment should trump the First.

On appeal, however, the 11<sup>th</sup> U.S. Circuit Court of Appeals didn't think the argument was so simple. In fact, in a very unusual move, the **same three-judge panel has ruled three times against the doctors**. After the panel issued its first decision, the typical process would be to pass the contentious case on to the entire 11<sup>th</sup> Circuit for en banc review. These judges, however, did not do that; instead they **have now issued three separate decisions** in the matter. With each new take on the case, they increased the degree of constitutional scrutiny under which the law could be reviewed yet always concluded (by the same 2–1 margin) that the law is constitutional. **This week the doctors again petitioned the 11<sup>th</sup> Circuit** to hear the case en banc.

At **first, the appeals court said the law was simply a valid regulation of doctors' professional speech**, which can be regulated more than ordinary speech. (There are valid reasons to make sure quacks and liars aren't practicing medicine.) In the second pass (in

July), the court applied a more rigorous, **intermediate scrutiny standard** and found the law was still permissible. Then, this past December the same court again issued yet another decision stating that even if examined under strict scrutiny, the law is constitutional because the government has a compelling interest in “protecting the right to keep and bear arms” as set forth in the Second Amendment.

And here is where the panel opinion gets superweird. According to the appeals court, when doctors talk about guns, it threatens the right to gun ownership because there is a power differential between the doctors and their patients. The state is simply trying to protect these vulnerable gun owners, according to the majority of the panel, “from irrelevant questioning about guns that could dissuade them from exercising their constitutionally guaranteed rights, questions that a patient may feel they cannot refuse to answer, given the significant imbalance of power between patient and doctor behind the closed doors of the examination room.”

In other words, the doctor (who is not the state, by the way) infringes on her patients’ Second Amendment rights by merely using her powers to *explain* to them that guns can be dangerous and should be hidden from small children. The doctor’s questions and comments are coercive to the point of creating a Second Amendment violation because doctors have power. Why do doctors have power over their patients? Well, generally it’s because they know things—like facts—the very knowledge that makes most patients prone to deferring to their doctors. This is why we go to doctors for medical advice and not, say, the DMV.

But according to the appellate court panel, all this patients-listening-to-doctors madness raises a “compelling” constitutional concern. Because being told by their doctors that guns can be dangerous might make some patients think twice about their guns. And that moment of doubt—whether or not it actually affects the patient’s gun ownership—nonetheless “chills the patient’s exercise of his rights and that is sufficient.”

Stop for a moment and consider that the Second Amendment injury here lies not in the possibility that a physician can do anything to take away anyone’s gun, but in the outside chance that she will use her *knowledge of actual medical evidence* to suggest that *guns can kill people* and her patient might listen to her. This is literally an argument for a constitutional right not to learn stuff from people who know stuff because you might then feel bad about the stuff you own.

Oh, but wait, there’s more. The court also held that gun owners have a privacy right not to be asked about their guns, stating that: “The right to privacy in one’s status as a firearm owner is sacrosanct and thus compelling.” The reference to privacy in the context of doctor visits is odd, considering that physicians routinely ask about such private topics as drug and alcohol use, condom use, physical or sexual abuse, and other sensitive topics. Of course, no one is being forced to reveal anything and certainly not publicly. In fact, there are strict laws requiring medical information to be kept private. Yet the 11<sup>th</sup> Circuit is concerned nonetheless about security breaches and concluded that Florida has a compelling reason to

limit “what information gets into patients’ medical records that could one day fall into the wrong hands or be used for purposes of harassment.”

Now the obvious comparison in this case is to abortion scripts. Many states mandate that clinicians provide certain information—much of it incorrect—to women seeking an abortion. Many of these laws have been **successfully challenged on the premise that physicians should not be forced to warn patients about abortion**. The facts of those cases are the flip side to the Florida gun cases, because in those cases physicians are being commandeered by the state to provide patients with demonstrably false information (such as telling patients about a link between abortion and breast cancer, even though no such link exists). Abortion scripts involve forcing the doctors to say things they think are false or irrelevant. The gag rule in Florida prohibits doctors from talking with their patients about real and relevant concerns. Both cases represent an interference in the physician’s ability to practice medicine, the free speech rights of doctors, and a state intrusion into a doctor-patient relationship.

But perhaps most of all, the interminable Docs vs. Glocks saga reveals that even for small-government conservatives, when it comes to the Second Amendment, and seemingly only the Second Amendment, more government regulation is king, so long as that regulation doesn’t diminish the right to bear arms but merely the right to talk about it. It likewise further confirms that gun advocates see the Second Amendment as more than simply a constitutional right, but as a super-constitutional right, with the power to trample all other rights that might fall in its path.