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Docs v. Glocks: Speech, Guns, Discrimination, and Privacy – Is Anyone Winning?

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DOCS V. GLOCKS: SPEECH, GUNS, DISCRIMINATION, AND PRIVACY—IS ANYONE WINNING?

*Marla Spector Bowman**

Abstract

Americans discuss some of the most intimate details of their lives within the small confines of their neighborhood doctor's office. Many Americans, however, may be taken aback if their physician asked them whether they owned a firearm during a routine physical examination. Although most Americans might not consider firearms education to be their physician's primary purpose, a significant number of doctors in Florida, and throughout the medical community, consider promoting firearms safety a part of practicing preventative medicine.

When a group of Florida legislators saw this behavior as a threat to the Second Amendment, gun owner access to healthcare, and patient privacy, they took action and passed the Firearm Owners' Privacy Act (FOPA). FOPA effectively prohibits doctors from asking patients about gun ownership, recording patient gun ownership information, or discriminating against patients who own guns. When physicians challenged FOPA as a violation of the First Amendment, the "Docs v. Glocks" controversy was born. At first, a federal district court ruled for the doctors and enjoined FOPA's enforcement on First Amendment grounds. But then, the U.S. Court of Appeals for the Eleventh Circuit reversed this ruling (twice).

While the Eleventh Circuit's second opinion still leaves plenty of room for dismay over the manner in which physicians' freedom of expression has been limited, instead of focusing on the First Amendment, this Note seeks to focus on what FOPA's enforcement means for Florida and the rest of the country. Focusing on the antidiscrimination and privacy concerns that motivated the passage of FOPA, this Note concludes that the law accomplishes very little. This is because there is

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no substantial evidence that gun owner discrimination is preventing gun owners from accessing healthcare. Further, if such discrimination did exist, it would be extremely difficult to prove even with the help of laws like FOPA. In addition, gun owner information that may be stored in a physician’s computer is no safer under FOPA than it was under the privacy laws that already protect medical information recorded by physicians.

Both sides in this controversy—doctors and gun owners—are misled in their opinion of the harm or benefit created by FOPA. The resources and energy spent arguing over NRA-propagated gun owner discrimination claims and the value of gun ownership information that is privately stored in a physician’s computer could be better spent on other issues such as preventing mentally ill individuals from accessing firearms.

After providing a history of FOPA and discussing its failings from a discrimination and privacy standpoint, this Note will highlight some of the progress being made with regard to firearms legislation in hopes that it will encourage such productive activity that helps promote public safety while simultaneously protecting the constitutional right to bear arms. Gun ownership and gun safety do not have to be at odds with each other; they are actually quite compatible.

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INTRODUCTION

On June 2, 2011, Florida Governor Rick Scott signed the Firearm Owners' Privacy Act (FOPA) into law.¹ The law effectively prohibits doctors from asking patients whether they own a gun.² The Florida Legislature set out to create a law that would prevent doctors from discriminating against gun owners³ while protecting the privacy interests of gun-owning patients.⁴ The legislature, however, only succeeded at chilling the speech of physicians while not actually preventing physicians from refusing to treat patients who own guns.⁵

This chilling effect inevitably led physicians to challenge FOPA as a violation of the First Amendment. The media has cleverly titled this litigation “Docs v. Glocks,”⁶ but the litigation really pits the First Amendment against the Second Amendment. Because the U.S. Supreme Court has yet to clarify the level of scrutiny that should be applied to laws that restrict professional speech,⁷ this has allowed for vastly different interpretations of FOPA under the guise of First Amendment jurisprudence.⁸ While this strongly suggests that the Supreme Court should help clarify this area of the law so that the speech rights of professionals will be less malleable within the hands of the lower courts, this Note intends to address what the enforcement of FOPA means for physicians in the meantime.

1. STATE OF FLA. HOUSE JUDICIARY COMMITTEE, FINAL BILL ANALYSIS, H.B. 2011-155, at 2 [hereinafter FINAL BILL ANALYSIS]; *Wollschlaeger v. Governor of Fla. (Wollschlaeger IV)*, No. 12–14009, 2015 WL 453045, at *2 (11th Cir. July 28, 2015); see also Emily Miller, *MILLER: “Docs v. Glocks” Showdown in Florida*, WASH. TIMES (Aug. 5, 2013), <http://www.washingtontimes.com/news/2013/aug/5/docs-vs-glocks-showdown-in-florida/>.

2. FLA. STAT. § 790.388 (2014).

3. *Id.* § 790.388(5) (“A health care practitioner . . . may not *discriminate* against a patient based solely upon the patient’s exercise of the constitutional right to own and possess firearms or ammunition.” (emphasis added)).

4. *Wollschlaeger IV*, 2015 WL 453045 at *1. According to FOPA’s sponsor, Representative Jason Brodeur, patients are worried that with the passage of the Affordable Care Act “Washington, D.C., is going to know whether or not they own a gun and so [the law] is really just a privacy protection.” Aaron Sharockman, *Florida Lawmaker Suggests Doctors Can Use Gun Information Against You*, POLITIFACT FLA. (Feb. 1, 2011), <http://www.politifact.com/florida/statements/2011/feb/01/jason-brodeur/florida-lawmaker-suggests-doctors-can-use-gun-info/> (internal quotation marks omitted).

5. *Wollschlaeger v. Farmer (Wollschlaeger I)*, 814 F. Supp. 2d 1367, 1381 (S.D. Fla. 2011) (“[T]he law does not prevent a physician from terminating the doctor-patient relationship if a patient refuses to answer questions regarding firearm ownership” and thus “[t]he antidiscrimination provision therefore provides only remote, if any, support for the State’s asserted purpose.”).

6. See, e.g., Miller, *supra* note 1.

7. *Wollschlaeger IV*, 2015 WL 453045 at *20–21.

8. See *infra* Sections I.C–I.D.

Many doctors—pediatricians and mental health professionals in particular—find firearm ownership to be a relevant factor in providing preventative medical care.⁹ If a doctor knows that a patient or a parent of a minor patient owns a gun, then the doctor can provide proper instruction on how to safely store the weapon to avoid injuries, especially to children. It is not uncommon for doctors practicing preventative medicine to ask patients a variety of health and safety questions about the presence of chemicals, swimming pools, drugs, tobacco, alcohol, and guns in the home.¹⁰ In addition, gun ownership may be especially relevant to a physician if a patient suffers from mental illness.¹¹

The state's desire to eliminate gun-related conversations between doctors and their patients directly contradicts two other Florida statutes that support just the opposite. Florida has two relevant laws that seem to promote the proactive steps doctors were taking to encourage firearm safety before the passage of FOPA. First, Florida Statute § 790.25 encourages firearm safety and prevents firearms from getting into the hands of mentally incompetent individuals.¹² Second, Florida Statute § 790.174(1) provides that a person who reasonably knows a minor may gain access to a firearm “shall keep the firearm in a securely locked box or container or in a location which a reasonable person would believe to be secure.”¹³ Further, Florida Statute § 790.174(2) states that a violation of § 790.174(1) is a second-degree misdemeanor.¹⁴

9. See *Wollschlaeger v. Farmer (Wollschlaeger II)*, 880 F. Supp. 2d 1251, 1268 (S.D. Fla. 2012), *rev'd sub nom. Wollschlaeger IV*, 2015 WL 453045; First Amended Complaint for Declaratory and Injunctive Relief, *Wollschlaeger v. Scott*, at 14–15, 18–21 (No. 11-CV-22026), 2011 WL 4074922 (S.D. Fla. June 24, 2011) [hereinafter First Amended Complaint].

10. First Amended Complaint, *supra* note 9, at 32.

11. *Id.* at 15 (“Consultations regarding firearm safety are also a routine part of adult medical care, help adult patients minimize health [sic] hazards, and are particularly important in the context of treating mental health conditions.”). Yet just because a doctor has recorded a patient’s gun ownership information, this does not mean it can be used to protect the health and safety of the patient, her family and friends, or the community. See *infra* Part III (discussing FOPA, mental health, and medical privacy laws).

12. Florida Statute § 790.25 states that “[t]he Legislature finds as a matter of public policy . . . that it is necessary to promote firearms safety and to curb and prevent the use of firearms . . . by incompetent persons” and then lists “[a] person who has been adjudged mentally incompetent” as an individual unauthorized to carry a firearm.

13. FLA. STAT. § 790.174(1) (2014).

14. *Id.* § 790.174(2) (“It is a misdemeanor of the second degree . . . if a person violates [790.174](1) by failing to store or leave a firearm in the required manner and as a result thereof a minor gains access to the firearm, without the lawful permission of the minor’s parent or the person having charge of the minor, and possesses or exhibits it, without the supervision required by law.”). In addition, the legislature has found that:

It certainly seems that doctors who ask patients about firearm ownership are attempting to promote the goals of Florida Statutes §§ 790.25 and 790.174 by advising patients on safely storing firearms and keeping them away from minors and individuals suffering from mental illness. At the same time, many patients may certainly wonder what qualifies a medical doctor as an appropriate person to give advice on firearm safety. While this Note will not delve into that question further, it will explore the affect of FOPA and what its enforcement means for physicians and patients.

This Note will focus on whether FOPA truly serves as a means of both preventing gun owner discrimination and protecting the privacy and Second Amendment interests of gun-owning patients. While some scholars have discussed “Docs v. Glocks” from a First Amendment perspective,¹⁵ none have actually looked at a doctor’s right to discriminate against a gun owner or the actual value of a patient’s gun ownership information in the hands of a physician. Among other things, this Note attempts to fill that void and predict how this issue may play out on a national stage as other states adopt similar legislation.

As firearms become an increasingly polarizing issue in the United States, the question of whether gun owners need protection from discrimination becomes increasingly relevant. In addition, as mental health and gun ownership become increasingly intertwined,¹⁶ it is

a tragically large number of Florida children have been accidentally killed or seriously injured by negligently stored firearms; that placing firearms within the reach or easy access of children is irresponsible, encourages such accidents, and should be prohibited; and that legislative action is necessary to protect the safety of our children.

Id. § 790.173(1).

15. See, e.g., Gayland O. Hethcoat II, *In the Crosshairs: Legislative Restrictions on Patient-Physician Speech About Firearms*, 14 DEPAUL J. HEALTH CARE L. 1 (2011); Michelle Foody, Note, *Docs Versus Glocks: N.R.A Takes Aim at Florida Physician’s Freedom of Speech: Leaving Patients’ Health, Safety, and Welfare at Risk*, 2013 CARDOZO L. REV. DE NOVO 228; Erika Manderscheid, Comment, *Return Fire: An En Banc Hearing in Wollschlaeger v. Governor of Florida Is Necessary to Protect the First Amendment Rights of Physicians*, 56 B.C. L. REV. E. SUPP. 123 (2015); Recent Cases, *First Amendment—Eleventh Circuit Upholds Florida Law Banning Doctors from Inquiring About Patients’ Gun Ownership When Such Inquiry Is Irrelevant to Medical Care.—Wollschlaeger v. Governor of Florida*, 760 F.3d 1195 (11th Cir. 2014), 128 HARV. L. REV. 1045 (2015).

16. Mass shootings by individuals suffering from mental illness are nothing new, but they are gaining increased national attention and are perhaps becoming more frequent. In the Sandy Hook massacre, Adam Lanza—suffering from mental illness—shot and killed his mother, twenty first-graders, and six women. Alison Leigh Cowan, *Adam Lanza’s Mental Problems ‘Completely Untreated’ Before Newtown Shootings, Report Says*, N.Y. TIMES (Nov. 21, 2014), <http://www.nytimes.com/2014/11/22/nyregion/before-newtown-shootings-adam-lanzas-mental-problems-completely-untreated-report-says.html>. The prevalence of mental illness among those

important to clarify a doctor's role in managing a patient's health as it relates to gun ownership.

In summary, this Note attempts to answer two pressing questions: (1) whether physicians can discriminate against gun owners; and (2) whether the collection of gun ownership information from patients actually helps physicians promote public safety despite privacy concerns related to the collection of this information. This Note then shifts its focus to highlight legislation that works in tandem to promote the interests of gun owners and gun safety advocates in hopes that this will encourage further cooperation between those on both sides of this increasingly divisive issue.

Part I of this Note will discuss the history and expansion of the "Docs v. Glocks" controversy from FOPA's passage in the Florida Legislature to its challenge in the U.S. District Court for the Southern District of Florida and eventual appeal to the U.S. Court of Appeals for the Eleventh Circuit. Part II will delve into whether doctors can discriminate against patients for exercising their right to bear arms. Part III will discuss privacy issues and legislation that controls how a doctor may utilize recorded patient gun ownership information. This Note will conclude by drawing attention to the real issues relating to guns and mental health that FOPA and the surrounding "Docs v. Glocks" controversy failed to address or remedy in light of other small improvements in this area.

I. FOPA AND ITS PROGENY

When Amber Ullman took her infant daughter to the pediatrician, she likely never thought her doctor would ask whether she owned a firearm;

who carry out mass shootings remains a pressing national issue deserving of concerted attention. On September 16, 2013, Aaron Alexis, who was experiencing delusions that he was being controlled by low-frequency electromagnetic waves, shot and killed twelve individuals and wounded four others at the Washington Navy Yard. Greg Bothelo & Joe Sterling, *FBI: Navy Yard Shooter "Delusional," Said "Low Frequency Attacks" Drive Him to Kill*, CNN (Sept. 26, 2013, 12:25 PM), <http://www.cnn.com/2013/09/25/us/washington-navy-yard-investigation>. In Aurora, Colorado, James Holmes, a psychiatric patient at the University of Colorado, shot and killed twelve people and injured fifty-eight in a movie theater. CNN Wire Staff, *Colorado Movie Shooting Suspect Charged with Murder*, CNN (July 31, 2012, 11:30 AM), <http://www.cnn.com/2012/07/30/us/colorado-theater-shooting/>. It is also hard to forget Jared Loughner, who shot nineteen individuals including Congresswoman Gabrielle Giffords on January 8, 2011 while Loughner was suffering from schizophrenia. Dennis Wagner, *Records Detail Shooter's Agitation Before Ariz. Rampage*, USA TODAY (Mar. 27, 2013, 10:47 PM), <http://www.usatoday.com/story/news/nation/2013/03/27/gabby-giffords-shooting-records/2024589/>.

This all certainly begs the question: How can we stop this? Does the collection of gun ownership information from patients enable doctors to step in to prevent these tragedies? See *infra* Part III (discussing the privacy of medical records and the limited exceptions for doctors to reveal confidential patient information). What interests are superior—the privacy interests of gun owners, or those concerned with public safety?

nor did she think this incident would lead to reactionary legislation in the form of FOPA. Yet, both of these things happened, and eventually, this innocuous doctor's visit led to four conflicting federal court opinions that highlight the unsettled nature of professional speech restrictions under the First Amendment. This Part details the progression of FOPA from its passage by the Florida Legislature to the Eleventh Circuit's reversal of the district court's enjoinder of the statute. As this Note explains below, FOPA and its subsequent litigation was fueled more by politics than purpose, and could have easily been avoided in favor of more pressing public concerns regarding firearms safety.

A. *The Ocala Story*

The motivation for FOPA derived from an incident at a pediatrician's office in Ocala, Florida in 2010.¹⁷ When Amber Ullman brought her four-month-old daughter to the pediatrician for an examination, she probably never expected Dr. Chris Okonkwo to inquire about whether she kept a gun in her home.¹⁸ After Ullman refused to answer the question, Dr. Okonkwo finished the examination and informed Ullman that she had thirty days to find a new pediatrician.¹⁹ Ullman felt the doctor's question was invasive and personal, but Dr. Okonkwo claimed the question was asked to determine the need to advise parents about gun safety in a home with children.²⁰ He equated this to asking parents whether they have a pool in their home to decide whether to advise them about water safety for their children.²¹ Despite the fact that Dr. Okonkwo had been asking these firearms related questions for two to three years,²² the incident with Ullman developed into a firestorm of controversy that ultimately led to the passage of FOPA.

Dr. Okonkwo said that Ullman's status as a gun owner did not drive his decision to cease treating Ullman's daughter but rather that her failure to answer his question demonstrated that they could not develop a relationship of trust essential to dealing with important health issues in the future.²³ The Florida Legislature, however, viewed this incident as a physician discriminating against a gun owner; a matter that needed to be addressed with legislation.²⁴

17. FINAL BILL ANALYSIS, *supra* note 1, at 2.

18. Fred Hiers, *Family and Pediatrician Tangle over Gun Question*, Ocala.com (July 24, 2010, 11:52 AM), <http://www.ocala.com/article/20100724/ARTICLES/7241001>.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.*

24. *See* FINAL BILL ANALYSIS, *supra* note 1, at 2.

B. Legislative Action

In response to the Ocala incident, Florida Representative Jason Brodeur filed House Bill 155, which would eventually become the Firearms Owners' Privacy Act.²⁵ According to Brodeur, "the purpose of the bill [was] to protect families from being denied treatment for refusing to answer questions about guns in their home."²⁶ The relevant portions of FOPA read as follows:

(1) A health care practitioner . . . may not intentionally enter any disclosed information concerning firearm ownership into the patient's medical record if the practitioner knows that such information is not relevant to the patient's medical care or safety, or the safety of others.

(2) A health care practitioner . . . shall respect a patient's right to privacy and should refrain from making a written inquiry or asking questions concerning the ownership of a firearm Notwithstanding this provision, a health care practitioner or health care facility that in good faith believes that this information is relevant to the patient's medical care or safety, or the safety of others, may make such a verbal or written inquiry. . . .

. . . .

(5) A health care practitioner . . . may not discriminate against a patient based solely upon the patient's exercise of the constitutional right to own and possess firearms or ammunition.²⁷

Before passing FOPA, the Florida Legislature recognized that professional medical groups—including the American Medical Association (AMA)—"encourage[their] members to inquire as to the presence of household firearms as a part of childproofing the home and to educate patients to the dangers of firearms to children."²⁸ Despite this encouragement, under FOPA, physicians may be fined up to \$10,000 or have their medical license suspended or revoked for asking firearms

25. *Id.* at 1.

26. Katie Moisse, *A Crime for Doctors to Ask About Guns?*, ABC NEWS (Jan. 27, 2011), http://abcnews.go.com/Health/w_ParentingResource/pediatricians-parents-guns-home/story?id=12770294.

27. FLA. STAT. § 790.388 (2014)

28. FINAL BILL ANALYSIS, *supra* note 1, at 2; *see also* Wollschlaeger v. Governor of Fla. (*Wollschlaeger IV*), No. 12-14009, 2015 WL 453045, at *29 (11th Cir. July 28, 2015) (Wilson, J., dissenting) (discussing the AMA's stance on this issue).

related questions.²⁹ The Florida Legislature also acknowledged that “Florida’s statutes do not currently contain any provisions that dictate when physicians and patients can terminate a doctor-patient relationship.”³⁰ Thus, while FOPA can attempt to prevent physicians from asking patients whether they own a gun, physicians still have full discretion to terminate doctor-patient relationships as long as they give patients notice and a reasonable opportunity to find a new physician.³¹ Consequently, it may be difficult for gun owners to prove that a doctor possessed the discriminatory intent prohibited by Florida Statute § 790.388(5) when terminating the patient relationship.³² Thus, § 790.388(5) really only prevents physicians from providing gun owners with subpar care as compared to non-gun-owning patients, a violation that may be equally difficult to prove.

Furthermore, the Florida House of Representatives Criminal Justice Subcommittee acknowledged that FOPA “may be subject to challenge as violating one’s First Amendment right to freedom of speech” and that “[a] regulation that abridges speech because of the content of the speech is subject to the strict scrutiny standard of judicial review.”³³ Even with these concerns about FOPA’s potential infringement on the First Amendment rights of physicians, Florida Governor Rick Scott signed FOPA into law on June 2, 2011.³⁴ Days later, physicians and physician’s interest groups filed a complaint in the U.S. District Court for the Southern District of Florida challenging FOPA as a violation of the First and Fourteenth Amendments and seeking to enjoin FOPA’s enforcement.³⁵

29. FINAL BILL ANALYSIS, *supra* note 1, at 3. These looming consequences inevitably have a chilling effect on physician speech. *See, e.g.*, First Amended Complaint, *supra* note 9, ¶¶ 71–88, at 22–34. Under Brodeur’s original authorship, a physician could be fined up to \$5 million for a violation of FOPA. H.B. 155, 2011 Leg., Reg. Sess. (Fla. 2011) (original filed version, Jan. 10, 2011).

30. FINAL BILL ANALYSIS, *supra* note 1, at 4.

31. *Id.*; *see* FLA. STAT. § 790.338(4) (2014) (“A patient’s decision not to answer a question relating to the presence or ownership of a firearm does not alter existing law regarding a physician’s authorization to choose his or her patients.”). *But see id.* § 395.1041 (requiring physicians to provide all patients with medical treatment in an emergency situation).

32. *See* *Wollschlaeger v. Farmer (Wollschlaeger I)*, 814 F. Supp. 2d 1367, 1381 (S.D. Fla. 2011) (“[T]he State’s interest in preventing discrimination is dubious, as the State itself acknowledges that the law does not prevent a physician from terminating the doctor-patient relationship if a patient refuses to answer questions regarding firearm ownership.”).

33. STATE OF FLA. HOUSE CRIMINAL JUSTICE SUBCOMMITTEE, STAFF ANALYSIS, H.B. 2011-155, at 5.

34. FINAL BILL ANALYSIS, *supra* note 1, at 2.

35. Complaint for Injunctive and Declaratory Relief, *Wollschlaeger v. Scott* (No. 11-CV-22026) 2011 WL 2177374.

C. Challenge in the Southern District

The Honorable Marcia G. Cooke, granted plaintiffs motion for a preliminary injunction in *Wollschlaeger v. Farmer (Wollschlaeger I)* on September 14, 2011³⁶ and permanently enjoined the state from enforcing certain sections of FOPA in *Wollschlaeger II* on June 29, 2012.³⁷ The First Amendment analysis performed by Judge Cooke in *Wollschlaeger I and II* contrasts greatly with that performed by the Eleventh Circuit in *Wollschlaeger v. Governor of Florida (Wollschlaeger III)*,³⁸ which completely evades the First Amendment altogether,³⁹ and the court's second opinion after a rehearing in *Wollschlaeger IV*,⁴⁰ which crafts an entirely new model for analyzing restrictions on professional speech.⁴¹

In her analysis for the preliminary injunction in *Wollschlaeger I*, Judge Cooke immediately set aside the State's argument that the case presents a Second Amendment issue stating, "[a] practitioner who counsels a patient on firearm safety, even when entirely irrelevant to medical care or safety, does not affect nor interfere with the patient's right to continue to own, possess, or use firearms."⁴²

Shifting her focus to the First Amendment, Judge Cooke proceeded to look at FOPA's legislative history and came to "the conclusion that the law places restrictions on a particular subject matter" and thus falls into the realm of a content-based speech restriction.⁴³ As such, she reviewed FOPA under a "strict scrutiny" standard.⁴⁴ The State argued that lesser scrutiny should be applied because FOPA was a restriction on professional speech.⁴⁵ Typically, courts have applied less scrutiny to professional speech.⁴⁶ In deciding to grant plaintiffs preliminary

36. *Wollschlaeger I*, 814 F. Supp. 2d at 1367, 1371.

37. *Wollschlaeger v. Farmer (Wollschlaeger II)*, 880 F. Supp. 2d 1251, 1270 (S.D. Fla. 2012), *rev'd sub nom. Wollschlaeger v. Governor of Fla. (Wollschlaeger IV)*, No. 12-14009, 2015 WL 453045 (11th Cir. July 28, 2015).

38. *Wollschlaeger v. Governor of Fla. (Wollschlaeger III)*, 760 F.3d 1195 (11th Cir. 2014), *vacated and superseded on reh'g, Wollschlaeger IV*, 2015 WL 453045.

39. *See id.* at 1217.

40. *Wollschlaeger IV*, 2015 WL 453045.

41. *Id.* at *17-21.

42. *Wollschlaeger v. Farmer (Wollschlaeger I)*, 814 F. Supp. 2d 1367, 1374 (S.D. Fla. 2011).

43. *Id.* at 1378.

44. *Id.* at 1377.

45. *Id.* at 1379.

46. *Id.*; Martha Swartz, *Physician-Patient Communication and the First Amendment After Sorrell*, 17 MICH. ST. U. J. MED. & L. 101, 103-04 (2012) ("Historically, courts gave no special consideration to the fact that regulations affecting physician speech were content or speaker-based since the courts never afforded special protection to content-based or speaker-based regulations in the commercial context."). *But see id.* ("However, the U.S. Supreme Court in *Sorrell v. IMS*

injunction, Judge Cooke elaborated on the applicability of strict scrutiny in evaluating the constitutionality of FOPA based on the U.S. Supreme Court's recent decision in *Sorrell v. IMS Health Inc.*,⁴⁷ and determined that plaintiffs met all of the requirements for the preliminary injunction.⁴⁸

In deciding whether to grant plaintiffs requested permanent injunction in *Wollschlaeger II*, Judge Cooke once again noted that FOPA “simply does not interfere with the right to keep and bear arms” and, therefore, she could not justify Second Amendment protection as a compelling interest to justify the law.⁴⁹

From a First Amendment perspective, Judge Cooke “note[ed] that which constitutional standard should be applied in professional speech cases is still an unsettled question of law.”⁵⁰ Yet, despite this uncertainty, she decided that FOPA could not stand under strict scrutiny or rational basis review.⁵¹ The State had a great deal of difficulty supporting even a rational basis for the law, and Judge Cooke noted several times that the State provided no supporting evidence that Florida physicians were discriminating against gun owners or invading their privacy.⁵²

In regard to gun owner discrimination, Judge Cooke recognized “that the law does not prevent a physician from terminating a doctor-patient relationship if a patient refuses to answer questions regarding firearm ownership.”⁵³ As a result, she determined that “[t]he antidiscrimination provision therefore provides only remote, if any, support for the State’s asserted purpose” of preventing gun owner discrimination.⁵⁴

Judge Cooke reasoned that the State’s concern over the privacy of patients’ medical information as it relates to gun ownership was legitimate but not compelling due to the fact that there are already privacy

Health Incorporated, for the first time, suggested that a higher standard of scrutiny should be applied to regulations of commercial speech that are content-based or speaker-targeted.”)

47. 131 S. Ct. 2653 (2011); *Wollschlaeger I*, 814 F. Supp. 2d at 1377–80.

48. *Wollschlaeger I*, 814 F. Supp. 2d at 1384.

49. *Wollschlaeger v. Farmer (Wollschlaeger II)*, 880 F. Supp. 2d 1251, 1264 (S.D. Fla. 2012), *rev’d sub nom. Wollschlaeger v. Governor of Fla. (Wollschlaeger IV)*, No. 12–14009, 2015 WL 453045 (11th Cir. July 28, 2015).

50. *Id.* at 1262–63.

51. *Id.* (“I need not decide which standard applies because the State would not prevail under either test.”).

52. *Id.* at 1256 (“It does not appear that the Florida legislature relied on any studies, research, or statistics on physicians’ practices or patients’ experiences on this issue.”); *id.* at 1264 (“The State provides little more than anecdotal information, however, to support its contention that individuals are suffering harassment and discrimination on the basis of firearm ownership.”); *id.* at 1266 (“I recognize that the State may have, in the abstract, a legitimate interest in protecting patients’ privacy regarding their firearm ownership or use. The State, however, fails to provide any evidence that the confidentiality of this information is at risk.”).

53. *Id.* at 1264–65.

54. *Id.* at 1265.

laws in place to protect this information.⁵⁵ Judge Cooke also determined that the State's general interest in regulating the medical profession was legitimate but not compelling enough to override the First Amendment interests of the plaintiff physicians.⁵⁶

With the State unable to “provide[] any evidence—beyond a handful of anecdotes—to show that any real barriers actually exist” to gun owners seeking medical attention,⁵⁷ Judge Cooke found that FOPA could not stand. She held that the State was permanently enjoined from enforcing §§ 790.338(1), (2), (5), and (6), as well as any part of FOPA that would provide for a punishment based on a violation of the unenforceable provisions.⁵⁸ Florida Governor Rick Scott and the Florida Department of Health quickly appealed Judge Cooke's decision to the Eleventh Circuit Court of Appeals.⁵⁹

D. Both Eleventh Circuit Opinions

The Eleventh Circuit first heard oral arguments on this matter in July of 2013⁶⁰ and ruled in *Wollschlaeger III* on July 24, 2014.⁶¹ But then, after a rehearing, the court vacated *Wollschlaeger III* and released *Wollschlaeger IV* almost a year later on July 28, 2015.⁶² While *Wollschlaeger II* at the district level determined that FOPA could not survive any level of scrutiny,⁶³ *Wollschlaeger III* characterized FOPA as a permissible regulation of professional conduct that only incidentally burdens speech.⁶⁴ In the aftermath, *Wollschlaeger IV* addressed the First Amendment more thoroughly by crafting a new model for analyzing professional speech restrictions and found FOPA constitutional under intermediate scrutiny.⁶⁵ The disparity between *Wollschlaeger II, III*, and *IV* suggests a strong need for the U.S. Supreme Court to resolve the issue of what standard should be applied to regulations that restrict professional speech.

55. *Id.*

56. *Id.* at 1266.

57. *Id.*

58. *Id.* at 1270.

59. Zachary Fagenson, *Appeals Court Hears Arguments in Florida's "Docs v. Glocks" Case*, REUTERS (July 18, 2013, 7:56 PM), <http://www.reuters.com/article/2013/07/18/us-usa-florida-guns-idUSBRE96H1J920130718>.

60. Miller, *supra* note 1.

61. *Wollschlaeger v. Governor of Fla. (Wollschlaeger III)*, 760 F.3d 1195 (11th Cir. 2014), vacated and superseded *on reh'g*, *Wollschlaeger v. Governor of Fla. (Wollschlaeger IV)*, No. 12-14009, 2015 WL 453045 (11th Cir. July 28, 2015).

62. *Wollschlaeger IV*, 2015 WL 453045.

63. *Wollschlaeger II*, 880 F. Supp. 2d at 1263.

64. *Wollschlaeger III*, 760 F.3d at 1217, 1225.

65. *Wollschlaeger IV*, 2015 WL 453045 at *17-21, *28.

Wollschlaeger III practically ignored the First Amendment altogether by characterizing FOPA as a permissible restriction on professional conduct, not speech.⁶⁶ Judge Gerald Tjoflat’s majority opinion effectively created a bubble void of First Amendment rights for physicians within the confines of an examination room; within this realm, it seemed that *all* physician speech could be controlled as a regulation of professional conduct.⁶⁷ His reasoning seemed to create a slippery slope that would allow for unlimited state control over conversations in any regulated fiduciary relationship, undermining the foundational principles of the First Amendment.⁶⁸ As will be described below, the *Wollschlaeger IV* opinion backpedals from the over breadth of *Wollschlaeger III* by creating a more nuanced model to govern professional speech restrictions.

Ironically, because FOPA prohibits irrelevant conversations,⁶⁹ Judge Charles Wilson’s dissent in *Wollschlaeger III* argued that it implicates the conversations least worthy of state regulation or intrusion—these are the conversations least likely to impact patient health.⁷⁰ Irrelevant conversations by their very nature do not involve actual medical treatment or conduct. Perhaps noting this schism, Judge Tjoflat attempted to correct for it with the model he created in *Wollschlaeger IV*, which further justifies his conclusion based on the fiduciary relationship that exists between doctors and their patients—regardless of the topic of conversation.

After a rehearing, the Eleventh Circuit in *Wollschlaeger IV* once again concluded that FOPA is not a violation of the First Amendment.⁷¹ But its means of reaching that conclusion in *Wollschlaeger IV* barely resembles its analysis in *Wollschlaeger III*. In *Wollschlaeger IV*, Judge Tjoflat proposed a two-dimensional model of professional speech.⁷² This model focuses on whether speech is by a professional in furtherance of the profession and the relationship between the professional and the listener.⁷³ Using these two factors, Judge Tjoflat determined that

66. *Wollschlaeger III*, 760 F.3d at 1217, 1225.

67. *See id.* at 1219–20.

68. Judge Charles Wilson’s dissent in *Wollschlaeger III* stated that he “[did] not . . . identify a slippery slope” but rather the court’s “decision brings us to the bottom of that slope. All private speech from professional to patients/clients is, after today, subject to regulation without scrutiny”—the slope had already been slipped down. *Id.* at 1249 (Wilson, J., dissenting).

69. *See* FLA. STAT. § 790.388(2) (2014).

70. *Wollschlaeger III*, 760 F.3d at 1217, 1253–54 (Wilson, J., dissenting). He made the same argument in *Wollschlaeger IV*. *Wollschlaeger IV*, 2015 WL 453045, at *43 (11th Cir. July 28, 2015) (Wilson, J., dissenting).

71. *Wollschlaeger IV*, 2015 WL 453045, at *28.

72. *Id.* at *19–21.

73. *Id.* at *17–18.

professional speech can fall into four categories: (1) speech related to the profession that is addressed to the public; (2) speech related to the profession that is addressed to a client in private; (3) private speech with a client that is unrelated to the profession; and (4) public speech that is unrelated to the profession.⁷⁴

Using this paradigm, Judge Tjoflat concluded that a state's interest in regulating professional speech is "strongest when a professional speaks in furtherance of his profession and weakest when a professional speaks irrelative to his profession."⁷⁵ A state's interest is also at its peak when "speech occurs within the confines of a relationship of trust and confidence," such as the fiduciary relationship that exists between a doctor and her patient.⁷⁶ This concept may be best illustrated by the figure below.

Type of Speech	<i>Speech Related to the Profession</i>	<i>Speech Unrelated to the Profession</i>
<i>Private/Fiduciary Speech</i>	State's interest is highest	Intermediate state interest
<i>Public Speech</i>	Intermediate state interest	State's interest is lowest

In creating this model, Judge Tjoflat acknowledged that the Supreme Court's guidance in regard to professional speech restrictions has been limited but that his model aligns with what little guidance the Court has given.⁷⁷ Because the Supreme Court has been silent on what level of scrutiny should be applied to a law like FOPA, Judge Tjoflat used his model and other supportive cases to infer that FOPA involves irrelevant speech within a fiduciary relationship, thus warranting intermediate scrutiny.⁷⁸

Intermediate scrutiny requires the court to consider whether FOPA "directly advances a substantial State interest, and is not more extensive than is necessary to serve that interest."⁷⁹ Judge Tjoflat concluded that

74. *Id.* at *18.

75. *Id.* at *19.

76. *Id.*

77. *Id.* at *20–21.

78. *Id.* at *21–25.

79. *Id.* at *25 (quoting *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of N.Y.*, 447 U.S. 557, 566 (1980)) (internal quotation marks omitted).

Florida has a substantial interest in protecting gun owners from discrimination and an invasion of privacy, and that these interests are directly advanced by FOPA.⁸⁰ Unlike Judge Cooke at the district level who harped on the State's lack of evidentiary support that such discrimination or privacy concerns existed,⁸¹ Judge Tjoflat determined that "peer-reviewed studies" and "extensive surveys" were unnecessary to support the State's "commonsense conclusion" that gun owners needed the protections provided by FOPA.⁸² He further determined that FOPA was narrowly tailored and not more extensive than needed to serve the State's interest.⁸³ In conclusion, despite the fact that Judge Cooke determined that FOPA could not stand even under rational basis review—the lowest level of scrutiny—Judge Tjoflat determined that the law could withstand intermediate scrutiny and was not a violation of the First Amendment.⁸⁴

E. *Expansion of Similar Legislation*

Now that FOPA has received a constitutional stamp of approval from the Eleventh Circuit, such legislation may be more likely to develop in other states. The National Rifle Association (NRA) began lobbying for state legislatures to pass laws similar to FOPA in 2006, but it had been unsuccessful until Florida passed FOPA in 2011.⁸⁵ Montana adopted similar legislation in 2013,⁸⁶ and other states may be inclined to do the same in light of the Eleventh Circuit's recent *Wollschlaeger IV* ruling.

With support from the NRA, legislation similar to FOPA was introduced in the legislatures of Virginia, West Virginia, Alabama, North Carolina, Minnesota, Oklahoma, and South Carolina.⁸⁷ In 2006, legislation similar to Florida's was introduced in Virginia and West Virginia but failed to become law in those states.⁸⁸ A similar bill was

80. *Id.* at *25–26.

81. *See supra* note 52 and accompanying text.

82. *Wollschlaeger IV*, 2015 WL 453045, at *27.

83. *Id.* at *28.

84. *Id.*

85. *See Foody, supra* note 15, at 255.

86. *See, e.g., Montana and Florida Curtail Doctor's Speech*, LAW CENTER TO PREVENT GUN VIOLENCE (Aug. 27, 2013), <http://smartgunlaws.org/montana-and-florida-curtail-doctors-speech/> (explaining Montana's adoption of a weaker version of FOPA); *see also* Lindsey Gordon, *Gun Owners Get More Privacy When Seeking Healthcare Thanks to New Law*, KXLF.COM (Oct. 1, 2013, 11:46 PM), <http://www.kxlf.com/news/gun-owners-get-more-privacy-when-seeking-healthcare-thanks-to-new-law/> (detailing Montana's adoption of a new law prohibiting doctors from conditioning treatment on a patient's cooperation in answering questions about gun ownership).

87. *See Foody, supra* note 15, at 255–56.

88. *Id.* at 255.

introduced again in West Virginia in 2011 but did not make it out of the house.⁸⁹ In 2011, similar bills in Alabama, North Carolina, and Minnesota also failed.⁹⁰ In response to an announcement by President Barack Obama in January 2013 “that the Affordable Care Act does not prohibit doctors from asking their patients about guns in their homes,” legislation that would ban physician inquiries about firearms was introduced in Oklahoma and South Carolina.⁹¹

Perhaps noting the litigation involving FOPA, Montana worded its similar law in a manner intended to avoid implicating the First Amendment.⁹² The Montana law focuses more on preventing doctors from discriminating against gun owners than restricting physician speech about guns. The Montana law reads:

- (1) No health care provider or health care facility may:
 - (a) refuse to provide health care to a person because the person declines to answer any questions concerning the person’s ownership, possession, or use of firearms; or
 - (b) inquire about a person’s ownership, possession, or use of firearms as a condition of receiving healthcare.⁹³

Thus, under the Montana law, physicians can ask patients whether they own a gun—there is no restriction on physician speech—but they cannot terminate their relationships with patients based on their answers or decision not to disclose. The Montana law essentially replaces Florida’s controversial limit on professional speech with a limit on a physician’s discretion to terminate a patient relationship based on the patient’s failure to answer firearms related questions. The Montana law, however, may have the same negligible impact as FOPA because doctors can generally terminate a patient relationship without cause and it may be difficult for a patient to prove a doctors discriminatory intent.⁹⁴

Recognizing the growing trend of this type of legislation, the American Bar Association (ABA) passed a resolution opposing laws like

89. *Id.*

90. *Id.* at 255–56.

91. *Id.* at 256 (internal quotation marks omitted).

92. See H.B. 459, 63rd Leg., Reg. Sess. (Mont. 2013); see also Gordon, *supra* note 86.

93. MONT. CODE ANN. 50-16-108 (2013).

94. See Laura A. Dixon, *Terminating Patient Relationships*, DOCTORS CO., http://www.thedoctors.com/knowledgecenter/patientsafety/articles/CON_ID_000326 (last visited July 1, 2015) (documenting that the nation’s largest physician-owned medical malpractice insurer maintains “[i]t is an acceptable practice to end a patient relationship under most conditions”); FLA. STAT. § 790.388(4) (2014) (“A patient’s decision not to answer a question relating to the presence or ownership of a firearm does not alter existing law regarding a physician’s authorization to choose his or her patients.”).

FOPA:

[T]he American Bar Association opposes governmental actions and policies that limit the rights of physicians . . . to inquire of their patients whether they possess guns and how they are secured in the home or to counsel their patients about the dangers of guns in the home and safe practices to avoid those dangers.⁹⁵

Judge Wilson’s *Wollschlaeger IV* dissent explicitly recognized the ABA’s stance on this issue.⁹⁶

The Eleventh Circuit’s decision in *Wollschlaeger IV* may influence other states to adopt legislation similar to FOPA under the assumption that such restrictions can pass constitutional muster. With this in mind, the next two Parts will consider the impact and effectiveness of FOPA from a discrimination and privacy perspective.

II. SO . . . WHEN CAN DOCTORS ACTUALLY DISCRIMINATE?

The oddity of FOPA is that it succeeded at chilling the speech of physicians, but never really achieved Florida’s goal of preventing doctors from discriminating against gun owners.⁹⁷ This certainly begs the question: Can doctors discriminate against gun owners? This Part will argue that the answer to this question is *yes*, doctors can most likely get away with discriminating against gun owners. This answer depends somewhat on whether the doctor is a state actor—whose discriminatory conduct may be challenged as a violation of Equal Protection—or a private doctor subject to state legislation similar to FOPA and other federal laws. Either way, plaintiffs will face an uphill battle in proving a physician’s discriminatory intent, especially given the general discretion in patient selection that the physicians maintain. While the State failed to provide any significant evidence of discrimination against gun owners in *Wollschlaeger II*,⁹⁸ in the event that such conduct occurs or becomes a growing trend, there is little to protect gun owners from such prejudice.

95. AM. BAR ASS’N HOUSE OF DELEGATES, RESOLUTION 111, at 1 (2011), available at www.americanbar.org/content/dam/aba/administrative/house_of_delegates/resolutions/2012_hod_annual_meeting_111.authcheckdam.doc.

96. *Wollschlaeger v. Governor of Fla. (Wollschlaeger IV)*, No. 12–14009, 2015 WL 453045, at *30 n.2 (11th Cir. July 28, 2015) (Wilson, J., dissenting).

97. *Wollschlaeger v. Farmer (Wollschlaeger II)*, 880 F. Supp. 2d 1251, 1264–65, 1266–67 (S.D. Fla. 2012), *rev’d sub nom. (Wollschlaeger IV)*, 2015 WL 453045 (11th Cir. July 28, 2015).

98. See *supra* note 52 and accompanying text.

A. State Actors

This Section looks at how gun owner discrimination may play out among state-actor physicians, such as doctors working at a Veteran's Affairs Hospital or a state university clinic. If patients were to claim gun owner discrimination against these state actors, their claim would likely rest on an Equal Protection argument.⁹⁹ Gun ownership, as a factor that a doctor may account for in determining whether to treat a patient, is unique in the sense that gun ownership is an affirmative choice protected as a fundamental right under Substantive Due Process, but there is no corollary protection from discrimination for exercising that right under Equal Protection.¹⁰⁰ Gun owners are unlikely to be considered a suspect class in an Equal Protection analysis, therefore, discrimination against a gun owner would only need to have a rational basis.¹⁰¹

Gun ownership as a fundamental right under Substantive Due Process was only recently established in *District of Columbia v. Heller*¹⁰² and *McDonald v. City of Chicago*.¹⁰³ Thus the Court has not had much time (or perhaps the opportunity)¹⁰⁴ to grant certiorari on an appropriate case to consider whether gun owners facing discrimination based on state action deserve to be protected with strict scrutiny under Equal Protection. As guns become an increasingly polarizing issue, gun owners may start to develop claims against state actors for discrimination.

When state action impacts a suspect class under Equal Protection, the Court applies strict scrutiny, which means that the government must justify the action based on a compelling state purpose.¹⁰⁵ Because gun owners are unlikely to be characterized as a suspect class,¹⁰⁶ any state

99. They could likely also rely on any laws discussed in Section II.B, but Equal Protection would not allow patients to challenge the discriminatory conduct of the private doctors described in that Section. Part II maintains this important distinction by discussing these issues separately.

100. See ERWIN CHERMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES 943, 945 (4th ed. 2011).

101. The Court's default test for a suspect class asks whether the discriminated-against group of people represents a "discrete and insular minority." *United States v. Carolene Prods. Co.*, 303 U.S. 144, 152–53 n.4 (1938).

102. 554 U.S. 570 (2008).

103. 130 S. Ct. 3020 (2010); see also CHERMERINSKY, *supra* note 100, at 941–45.

104. The Court has probably not addressed discrimination against gun owners because it is not yet a pervasive issue in American society.

105. CHERMERINSKY, *supra* note 100, at 686–87.

106. The Supreme Court typically considers three factors in determining if a class of people is suspect: (1) whether the group has suffered a history of intentional discrimination; (2) whether the group is being discriminated against based on an immutable characteristic that cannot be controlled, such as race; and (3) whether the group subject to discrimination lacks political power. CHERMERINSKY, *supra* note 100, at 688; see also *City of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 440–41, 445 (1985); *Massachusetts Bd. of Retirement v. Murgia*, 427 U.S. 307, 313 (1976); Ann M. Reding, Note, *Lofton v. Kearney: Equal Protection Mandates Equal Adoption*

action that has a discriminatory effect on gun owners would be analyzed under a rational basis review. The rational basis test places a lower burden on states. States must prove only that a regulation is rationally related to a legitimate government purpose.¹⁰⁷ Even at this lower level of scrutiny, it seems that it would be nearly impossible for a state physician to have an actual rational basis for discriminating against a gun owner.¹⁰⁸ Thus, if a state-actor doctor were to refuse to treat a patient because the doctor learned that the patient owned a gun, it seems that the state would have a hard time justifying the doctor's discrimination as rational.

But this may not be detrimental to the state because a patient-plaintiff would also have a hard time proving that a doctor actually terminated a patient relationship because the patient was a gun owner—a doctor can generally decline to treat a patient without cause, except in emergency situations.¹⁰⁹ It remains unclear whether a court would consider a state doctor to have a rational basis under Equal Protection for terminating a relationship with a patient who declined to answer questions about gun ownership, thus hurting the vital trust needed between doctors and their patients—the rationale given by Dr. Okonkwo in *Ocala*.¹¹⁰

Thus, it seems that physicians working for a state or for the federal government may most likely discriminate against gun owners as long as they avoid explicitly refusing to treat patients because they own a gun. This requirement of proof of intent has created difficulties for suspect classes attempting to bring claims for health care discrimination as

Rights, 36 U.C. DAVIS L. REV. 1285, 1301 (2003). Given that Florida failed to provide evidence of gun owner discrimination in *Wollschlaeger II*, it seems unlikely that gun owners could establish a history of such discrimination. Gun owners would also have a struggle arguing that their choice to own firearms—although protected by the Constitution—is in any way an immutable characteristic. Lastly, powerful lobbying organizations like the NRA would certainly make it difficult for gun owners to argue that they lack political power.

107. CHEMERINSKY, *supra* note 100, at 686, 688.

108. It is important to point out that a physician's right to refuse to give treatment based on a moral objection is a highly contested and controversial area of the law. *See generally* Jill Morrison & Micole Allekotte, *Duty First: Towards Patient-Centered Care and Limitations on the Right to Refuse for Moral, Religious or Ethical Reasons*, 9 AVE MARIA L. REV. 141 (2010) (arguing that “it is ethically improper for medical practitioners to use their position of influence that results from superior scientific knowledge to impose their moral preferences on a patient”); Rachel Reibman, Comment, *The Patient Wanted the Doctor to Treat Her in the Closet, but the Janitor Wouldn't Open the Door: Healthcare Provider Rights of Refusal Versus LGB Rights to Reproductive and Elder Healthcare*, 28 TEMP. J. SCI. TECH. & ENVTL. L. 65 (2009). This author is unaware of any doctors refusing to treat gun-owning patients based on a moral objection, but this is certainly a possibility given the increasingly controversial nature of gun ownership.

109. *See supra* note 31.

110. *See supra* Section I.A. This is the specific type of patient termination the Montana Legislature is trying to avoid with Montana Statute 50-16-108 (2013).

well.¹¹¹ If a suspect class can barely overcome the hurdle of proving a physician's intent, it seems even less likely that gun owners, a non-suspect class, would be able to overcome that same challenge.

B. *Private Actors*

This Section contemplates discrimination against gun owners by private physicians, such as those in a family medical practice, who receive federal funding in the form of Medicare or Medicaid payments, and by physicians who receive no federal funding whatsoever, such as a plastic surgeon whose work is not subsidized by the government. Gun owners seeking protection from discrimination must rely on state laws like Florida Statute § 790.388(5) to protect their interests because there is no federal law to prevent private or state doctors from discriminating against gun owners. Even if such a federal law existed, similar laws to protect suspect classes have failed to truly eliminate disparate medical treatment for those groups, making it unlikely that a law to protect gun owners would have any real impact.¹¹² The U.S. Commission on Civil Rights, a bipartisan agency created by Congress, has found that “unequal access to health care is a nationwide problem that primarily affects women and people of color.”¹¹³

Section 601 of Title VI states that “[n]o person in the United States shall, on the ground of *race, color, or national origin*, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”¹¹⁴ This law prevents private entities that receive federal

111. See Mary Crossley, *Infected Judgment: Legal Responses to Physician Bias*, 48 VILL. L. REV. 195, 287–91 (2003) (discussing the Supreme Court's requirement for proof of intentional discrimination when minority groups receive disparate medical treatment and the heavy burden this creates for harmed plaintiffs because a lot of discrimination in the medical field results from subconscious biases); see, e.g., *id.* 195–96 (listing examples of disparate medical treatment for different groups of people); Barbara A. Noah, *Racist Health Care?*, 48 FLA. L. REV. 357, 358–63 (1996) (discussing data from a study finding “a tendency of health care providers to pursue less aggressive therapies for African-American patients who did seek medical care”); see also Vernellia R. Randall, *Eliminating Racial Discrimination in Health Care: A Call for State Health Care Anti-Discrimination Law*, 10 DEPAUL J. HEALTH CARE L. 1, 5–9 (2006) (discussing the institutional racism of the U.S. health care system and the federal government's failure to provide a true remedy for groups subjected to discrimination). See generally MICHAEL BYRD & LINDA A. CLAYTON, *AN AMERICAN HEALTH DILEMMA: A MEDICAL HISTORY OF AFRICAN AMERICANS AND THE PROBLEM OF RACE, BEGINNINGS TO 1900* (Routledge, 2000) (offering a lengthy discussion of the scientific racism that permitted racial disparities in health care).

112. See Randall, *supra* note 111, at 8–9.

113. U.S. COMM'N ON CIVIL RIGHTS, *THE HEALTH CARE CHALLENGE: ACKNOWLEDGING DISPARITY, CONFRONTING DISCRIMINATION, AND ENSURING EQUITY*, at i, vii (Sept. 1999), available at <http://www.law.umaryland.edu/marshall/usccr/documents/cr12h34z.pdf>.

114. 42 U.S.C. § 2000d (2012) (emphasis added).

funding, such as Medicare or Medicaid payments, from discriminating against individuals based on inherent characteristics, such as race. But Title VI makes no mention of preventing discrimination against gun owners.

Even if gun owners were added into Title VI, it is very difficult for the current groups protected under Title VI to recover damages because the Court requires proof of intentional discrimination—data supporting an aggregate effect of disparate medical treatment is insufficient.¹¹⁵ It is often challenging for patients to prove that a doctor intentionally discriminated against them because of their race despite significant evidence to support the idea that doctors treat patients differently because of their race.¹¹⁶

In *Guardians Association v. Civil Service Commission*,¹¹⁷ the Court addressed the issue of “whether the private plaintiffs . . . need[ed] to prove discriminatory intent to establish a violation of Title VI of the Civil Rights Act of 1964.”¹¹⁸ The Court determined that “compensatory relief should not be awarded to private Title VI plaintiffs; unless discriminatory intent is shown, declaratory and limited injunctive relief should be the only available private remedies for Title VI violations.”¹¹⁹ The Court reasoned that “Title VI does not of its own force proscribe unintentional racial discrimination”¹²⁰ The Court determined that victims of intentional discrimination at the hands of an entity receiving federal funding should certainly be awarded just compensation.¹²¹ The Court concluded by stating, “discriminatory intent is not an essential element of a Title VI violation, but that a private plaintiff should recover only injunctive, noncompensatory relief for a defendant’s unintentional violations of Title VI.”¹²²

115. See *supra* note 111 and accompanying text. If gun owners were considered a “class” worthy of Title VI protection, they may be able to seek injunctive relief against discriminating physicians without being required to show discriminatory intent. See *Guardians Ass’n v. Civil Serv. Comm’n*, 463 U.S. 582, 607 (1983). The real challenge would be proving intentional discrimination in order to receive money damages.

116. See Crossley, *supra* note 111, at 211–17, 223–29 (detailing how doctors treat medical conditions differently based on the race and gender of the patient). Discrimination in Title VI situations typically involves a lack of access to equal quality healthcare; whereas the discrimination gun owners would likely face is an outright denial of treatment or access to healthcare services.

117. 463 U.S. 582 (1983).

118. *Id.* at 584.

119. *Id.*

120. *Id.* at 590.

121. *Id.* at 597–98.

122. *Id.* at 607.

This holding was further supported in the later case of *Alexander v. Sandoval*,¹²³ which addressed “whether private individuals may sue to enforce disparate-impact regulations promulgated under [§ 602 of] Title VI of the Civil Rights Act of 1964.”¹²⁴ *Alexander* recognized that the Court’s previous opinions may have left uncertainty in the interpretation of Title VI and thus set out to clarify the law.¹²⁵ The Court stated that “private individuals may sue to enforce § 601 of Title VI and obtain both injunctive relief and damages” and that “it is . . . beyond dispute—and no party disagrees—that § 601 [of Title VI] prohibits only intentional discrimination.”¹²⁶ The main clarification *Alexander* provides is that while § 602 of Title VI allows for regulations that prohibit activities with a disparate impact on racial groups, these regulations do not carry over into a private right of action under § 601.¹²⁷ Thus, while § 602 allows for the creation of disparate-impact regulations, it does not create a private right of action to enforce them under § 601.¹²⁸ The Court in *Alexander* concluded by stating that “[n]either as originally enacted nor as later amended does Title VI display an intent to create a freestanding private right of action to enforce regulations promulgated under § 602.”¹²⁹

With the holdings from *Guardians* and *Alexander* in mind, it is difficult to see how the groups currently protected under Title VI could prove intentional discrimination and recover damages. The challenge would be equally great if gun owners were ever extended Title VI protection. Such discrimination is often difficult to detect and even more difficult to prove beyond aggregate effects.

Given that no such Title VI protection currently exists for gun owners, private doctors receiving federal funding can almost certainly discriminate against gun-owning patients—even if the patient could prove discriminatory intent. It follows that there would be nothing to prevent private physicians who do not receive any federal funding from discriminating against gun owners as well.

In considering these issues, it is critical to remember that there is no significant evidence to support the idea that gun owners are actually being denied medical treatment because of their choice to own firearms.¹³⁰ While it may be unjust or irrational for doctors to refuse to treat patients because they are exercising their Second Amendment right to bear arms, such refusals seem to be limited and generally unsupported by fact. At

123. 532 U.S. 275 (2001).

124. *Id.* at 278.

125. *Id.* at 279.

126. *Id.* at 279–80.

127. *Id.* at 281–82, 293.

128. *Id.* at 286, 289, 291.

129. *Id.* at 293.

130. *See supra* note 52 and accompanying text.

most, such incidents are rare and have no proven negative impact on individual gun owners in need of medical attention. At the moment, it seems that there is very little to prevent a doctor from discriminating against a gun owner, but this is balanced out by the fact that no such discrimination is generally occurring.

III. PRIVACY: ARE DOCTORS REPORTING GUN OWNERSHIP INFORMATION TO THE GOVERNMENT?

During oral argument for *Wollschlaeger III* Judge Tjoflat expressed concerns about whether physicians would provide the federal government with information about patients who own guns.¹³¹ Judge Tjoflat expressed his concerns over the creation of a national gun registry by stating, “It goes to Uncle Sam in Washington. You understand my concern You can put it in a computer and spit out everybody who owns a gun.”¹³² Jason Brodeur, the Florida Representative who proposed FOPA, was also “concerned about doctors asking patients about guns in the home and then allowing that information to get into the hands of the government,” particularly in light of the passage of a national healthcare system under the Affordable Care Act.¹³³ Appellees responded to these concerns by stating that they were unaware of any state or federal provision that required physicians to provide the federal government with lists of gun owners and that medical records are protected by strict privacy laws.¹³⁴

Even with these strict privacy laws already in place, Florida passed FOPA to alleviate concerns over the privacy of patient’s gun ownership information in the hands of physicians.¹³⁵ The plaintiff doctors seemed to highly value this information as part of practicing preventative medicine and as serving some sort of public good.¹³⁶ Both sides, however, may be

131. Jay Weaver, *No Decision in Round Two of ‘Docs v. Glocks’ in Miami Federal Appeals Court*, MIAMI HERALD (July 18, 2013), <http://www.miamiherald.com/2013/07/18/3505391/its-round-two-of-docs-vs-glocks.html>.

132. Curt Anderson, *Court Hears State Appeal Seeking to Reinstate Gun Discussion Law in ‘Docks v. Glocks’ Case*, STAR TRIBUNE (July 18, 2013, 4:40 PM), <http://www.startribune.com/politics/national/216006601.html> (internal quotation marks omitted). It is currently illegal for the federal government to maintain a digital, national gun registry. Melissa Block, *The Low-Tech Way Guns Get Traced*, NPR (May 20, 2013, 5:11 PM), <http://www.npr.org/2013/05/20/185530763/the-low-tech-way-guns-get-traced> (discussing the federal ban on the creation of a digital, electronic gun registry and explaining the not-so-tech-savvy process the Bureau of Alcohol, Tobacco, and Firearms uses to trace a gun).

133. Sharockman, *supra* note 4.

134. Anderson, *supra* note 132.

135. *See supra* note 4 and accompanying text.

136. *See First Amended Complaint, supra* note 9, at 2. As noted above, advising patients on firearms safety seems to be a proactive step towards realizing the goals of Florida Statute

exaggerating the situation into a far bigger problem or necessity than it actually is.

As for the state's privacy concerns, both Florida and federal privacy laws protect a patient's medical records with certain limited exceptions. There is currently no exception that specifically allows a doctor to release information pertaining to a patient's gun ownership. Under Florida Statute § 456.057(7) medical "records may not be furnished to, and the medical condition of a patient may not be discussed with, any person other than the patient . . . except upon written authorization from the patient."¹³⁷ In 1996, Congress passed the Health Insurance Portability and Accountability Act (HIPAA), which also protects patient information.¹³⁸ Pursuant to HIPAA, the Department of Health and Human Services promulgated the Privacy Rule, which states that "[a] covered entity or business associate may not use or disclose protected health information."¹³⁹

There are limited exceptions to these confidentiality laws, but certainly nothing that would allow the federal government to compile this information in order to create a digital gun registry as suggested by Judge Tjoflat during oral argument.¹⁴⁰ One exception to patient-psychiatrist confidentiality in Florida is found in Florida Statute § 456.059. Under this provision, a psychiatrist may "disclose patient communications to the extent necessary to warn any potential victim or to communicate the threat to a law enforcement agency" after a "patient has made an actual threat to physically harm an identifiable victim" and the psychiatrist has made a clinical judgment that the patient is capable of committing the

§ 790.173(1) (2014) (noting that "a tragically large number of Florida children have been accidentally killed or seriously injured by negligently stored firearms").

137. FLA. STAT. § 456.057(7)(a) (2014).

138. *HIPAA and Disclosures Under Florida State Law*, UNIV. OF FLA.: HEALTH INFO. PRIVACY, http://privacy.health.ufl.edu/faq/hipaa_disclosures.shtml (last visited July 1, 2015) (The HIPAA "Privacy Rule prohibits health care providers from using or disclosing a patient's protected health information (PHI) without written authorization from the patient except for treatment, payment and health care operations"); *id.* ("The Privacy Rule provides an extensive list of permitted disclosures, however, where state laws provide greater privacy protections or privacy rights with respect to patients' PHI, state laws will apply, overriding HIPAA."); *id.* ("The Privacy Rule provides exceptions . . . includ[ing] but . . . not limited to, reporting certain injuries to law enforcement officials, reporting child abuse or vulnerable adult abuse, reporting the occurrence of certain diseases to public health officials, and complying with court orders and subpoenas.").

139. 45 C.F.R. § 164.502 (2014); *see also Your Health Information Privacy Rights*, U.S. DEPT. FOR HEALTH AND HUMAN SERVICES: OFFICE OF CIVIL RIGHTS 1, 1, *available at* http://www.hhs.gov/ocr/privacy/hipaa/understanding/consumers/consumer_rights.pdf (last visited July 1, 2015) ("Generally, your health information cannot be used for purposes not directly related to your care without your permission.").

140. *See supra* notes 131–32 and accompanying text.

threatened action.¹⁴¹ In such a situation, depending on the nature of the patient's threat, it may be necessary for a physician to release details regarding the patient's gun ownership to law enforcement. However, the release of such information does not allow the state to prevent a patient from purchasing a firearm until the patient has been adjudged mentally incompetent or has been committed under the Baker Act¹⁴²—thus, said patient's right to bear arms may remain intact despite the physician's report to law enforcement.

Florida Statute § 790.25 prohibits mentally incompetent individuals from carrying a firearm and Florida has other regulations that prevent a person adjudged mentally incompetent from purchasing a firearm.¹⁴³

141. FLA. STAT. § 456.059(2)–(3) (2014); This Florida law resembles a California Supreme Court ruling that provides the following:

When a therapist determines, or pursuant to the standards of his profession should determine, that his patient presents a serious danger of violence to another, he incurs an obligation to use reasonable care to protect the intended victim against such danger. The discharge of this duty may require the therapist to take one or more of various steps, depending upon the nature of the case. Thus it may call for him to warn the intended victim or others likely to apprise the victim of the danger, to notify the police, or to take whatever other steps are reasonably necessary under the circumstances.

Tarasoff v. Regents of Univ. of Cal., 551 P.2d 334, 340 (Cal. 1976). But Florida has generally interpreted a physician's duty to warn more narrowly than the California Supreme Court. *E.g.*, *Boynton v. Burglass*, 590 So. 2d 446, 447–48 (Fla. Dist. Ct. App. 1991) (declining to extend California's *Tarasoff* duty to Florida); *id.* at 450 (“To impose a duty to warn or protect third parties would require the psychiatrist to foresee a harm which may or may not be foreseeable, depending on the clarity of his crystal ball. Because of the inherent difficulties psychiatrists face in predicting a patient's dangerousness, psychiatrists cannot be charged with accurately making those predictions and with sharing those predictions with others. Therefore, we decline to charge Dr. Burglass with such a duty.”). *See generally* Ben “Ziggy” Williamson, Note, *The Gunslinger to the Ivory Tower Came: Should Universities Have a Duty to Prevent Rampage Killings?*, 60 FLA. L. REV. 895, 898 (2008) (exploring whether universities have a duty to “identify and thwart” potential student-shooters).

142. FLA. STAT. § 790.25(2)(b). The Florida Mental Health Act, FLA. STAT. § 394.451–47891, commonly known as the Baker Act, is a Florida law that allows for mentally unstable individuals to be admitted for mental health examinations on a voluntary or involuntary basis with attorney representation. *History of the Baker Act – It's Development and Intent*, FLA. DEP'T CHILD. & FAMS. 1 (May 2002), <http://www.dcf.state.fl.us/programs/samh/MentalHealth/laws/histba.pdf>; *see also* *Possession of Firearms by People with Mental Illness*, NAT'L CONFERENCE OF STATE LEGISLATURES (Jan. 2013), <http://www.ncsl.org/research/civil-and-criminal-justice/possession-of-a-firearm-by-the-mentally-ill.aspx> (listing each state's rules regarding whether mentally incompetent individuals can own firearms).

143. Before an individual can purchase a firearm in Florida, the state conducts a background check pursuant to the Florida Department of Law Enforcement's (FDLE) Firearm Purchase Program to check for, among other things, previous adjudications of mental defectiveness or commitments to mental institutions. FLA. STAT. § 790.065(2)(a)(4) (2014); *Firearm Purchase*

That being said, a doctor of a mentally incompetent patient cannot release or use information about that patient's status as a gun owner unless there is an actual threat and an identifiable victim as described in Florida Statute § 456.059, or there is a court ordered subpoena.¹⁴⁴

While the value of recorded patient gun ownership information for physicians may be questionable given the limited circumstances when it may be utilized, the threat posed by the collection of this information is equally dubious. It is hard to see a substantial reason to trust laws like HIPAA to protect medical records, but not trust these laws to protect gun ownership information stored in exactly the same manner and with the same protections.

CONCLUSION

It is difficult to ascertain how many lives are saved or injuries are prevented when a doctor gives a patient advice on how to properly store a firearm. It is equally difficult to determine if any public good is served by doctors maintaining records of patients who own guns given the extremely narrow set of circumstances when this information can be revealed. There is also not enough evidence to support the idea that gun owners are facing discrimination that impacts their ability to seek medical care.

Program, FLA. DEP'T LAW ENFORCEMENT, <http://www.fdle.state.fl.us/Content/getdoc/a6ab812a-94c0-46fd-914b-aae73a15109b/Home.aspx> (last visited July 1, 2015). If an individual has been "[a]djudicated mentally defective by a court of law, or involuntarily committed by a judge," then the FDLE will not clear that person to purchase a firearm. *Potential Reasons for Conditional Non-Approval, Non-Approval, Pending Non-Approval and Conditional Approval*, FLA. DEP'T LAW ENFORCEMENT, <http://www.fdle.state.fl.us/Content/getdoc/c088443b-8d75-43d1-a8ed-2b1b9611bd9e/FAQs3.aspx> (last visited July 1, 2015). The FDLE's Firearm Purchase Program serves the same purpose as FBI's National Instant Criminal Background Check System (NICS) but on a state level. *Firearm Purchase Program*, FLA. DEP'T LAW ENFORCEMENT, <http://www.fdle.state.fl.us/Content/getdoc/64e4b93a-fde0-4fd8-abe3-1540ae464c99/FAQs1.aspx> (last visited July 1, 2015). Unfortunately, states often do a poor job of turning over vital background check information, such as the fact that an individual has been adjudged mentally incompetent, to the NICS system, which many states rely on exclusively for gun purchase background checks. This flaw in the system may allow a mentally incompetent individual who cannot purchase a gun in Florida to purchase a gun in another state or to seek a federal gun license. *See Fatal Gaps: Can Dangerous People Buy Guns in Your State?*, MAYORS AGAINST ILLEGAL GUNS 2, 16, 19 (Nov. 2011), <http://everytown.org/article/closing-the-gaps/>; *Florida Mental Illness Gun Control Bill Passes*, HUFFINGTON POST MIAMI (Apr. 30, 2013, 3:37 PM), http://www.huffingtonpost.com/2013/04/30/florida-guns-mentally-ill_n_3187474.html (discussing failures to report mental health records to the NICS). While there is certainly an issue with mentally incompetent individuals being able to purchase guns due to flaws in the background check system, doctors' collection of patient gun ownership information does not seem to resolve this problem.

144. *See* FLA. STAT. § 456.057(7)(a)(3) (2014); *supra* text accompanying note 138.

Given that the benefits of FOPA seem negligible, it is more a matter of pride than purpose, and that the court's approval of the law rests on shaky, untested First Amendment grounds, it seems that Florida's resources and time could be better spent on other gun related matters. The state's efforts might be better spent improving reporting of mental incompetency to the Florida Department of Law Enforcement (FDLE) and National Instant Criminal Background Check System (NICS).¹⁴⁵ Mental health and guns are becoming increasingly intertwined,¹⁴⁶ and rather than pitting physicians against gun owners, Florida's legislators should instead focus their efforts on promoting public safety in this realm.

Fortunately, Florida is making some progress toward limiting mentally ill individuals' access to firearms. Until recently, Florida law only prevented an individual who had been *involuntarily* "Baker Acted" from purchasing a firearm.¹⁴⁷ On June 28, 2013, Governor Rick Scott signed House Bill 1355 into law.¹⁴⁸ This new law eliminates a gap that allowed individuals who were *voluntarily* committed under the Baker Act to continue to purchase firearms.¹⁴⁹ Now, if Floridians want to purchase a firearm after being committed under the Baker Act, they must seek approval from both a judge and a physician in order to have their name removed from the FDLE's list of individuals suffering from mental illness.¹⁵⁰ The NRA supported this Florida legislation, and a spokesperson for the group said, "Everyone should support" a "bill [that] will prevent dangerous people with mental illness from being able to buy guns."¹⁵¹

At the same time, while this law will prevent individuals committed under the Baker Act from purchasing new firearms, it does not remove firearms the individual already possesses.¹⁵² In these scenarios, it does not seem like a doctor's knowledge that a patient owns a firearm has

145. See *supra* note 143.

146. See *supra* note 16.

147. *Florida Mental Illness Gun Control Bill Passes*, *supra* note 143. Only 1% of all patients committed under the Baker Act are involuntarily committed. *Id.* Under the previous state of the law, most individuals could continue to purchase firearms after voluntarily committing themselves. Under this new law, all patients committed under the Baker Act will have their names added to the FDLE's mental competency database and the NICS. *Id.*

148. Rochelle Koff, *Gov. Scott Signs Bill to Ban Gun Sales to Mentally Ill*, TAMPA BAY TIMES (June 28, 2013, 6:54 PM) <http://www.tampabay.com/blogs/the-buzz-florida-politics/gov-scott-signs-bill-to-ban-gun-sales-to-mentally-ill/2129141>; see FLA. STAT. § 790.065(b)(ii) (2014).

149. Koff, *supra* note 148.

150. *Id.*

151. *Id.* (internal quotation marks omitted) ("91 percent of NRA members said they support laws to keep guns out of the hands of people with mental illnesses.").

152. *Firearm Prohibition for Certain Individuals with Mental Illness*, FLA. DEP'T CHILD. & FAMS. 2-3 (Mar. 6, 2014), <http://www.dcf.state.fl.us/programs/samh/MentalHealth/laws/HB1355-Saleanddeliveryoffirearms.pdf>.

much value if patients are allowed to continue to own firearms after being committed under the Baker Act—the only limit seems to be that such patients cannot purchase new firearms without court approval. Perhaps this is the next area in need of legislation.¹⁵³ If a mentally ill individual cannot purchase new firearms because it is a threat to public safety, then any firearms already in that individual's possession should be considered equally threatening to the public.

With these small improvements in mind, it is time to move forward. From a public policy standpoint, FOPA's enforcement or enjoinder has few benefits or repercussions, and the act is a prime example of reactionary, jump-the-gun (pun intended) legislation based on twisted facts and insufficient research. Nothing can be resolved if both sides continue to waste resources on issues like FOPA where neither side can really win when they "win." Restricting physician speech is not the answer, nor is allowing such speech the real solution; the path to reducing gun violence and increasing gun safety can only be found when everyone metaphorically "puts their guns down" and starts having a real conversation about these issues.

153. It is certainly a big step to suggest that the government confiscate any form of property, let alone firearms. But there must be a middle ground here where an individual's ability to *purchase* and *possess* firearms can be limited on a case-by-case basis given that individual's mental condition, criminal history, and likelihood of suffering from the same episode that created a need for detention under the Baker Act in the first place.