



## Perspective

### ***Wollschlaeger v. Governor of Florida* — The First Amendment, Physician Speech, and Firearm Safety**

Wendy E. Parmet, J.D., Jason A. Smith, J.D., and Matthew J. Miller, M.D., Sc.D.

**O**n June 21, 2016, the full 11th Circuit Court of Appeals will hear arguments in *Wollschlaeger v. Governor of Florida*, which challenges a Florida law regulating physicians' speech related to

patients' gun ownership. A decision by the court on the merits will most likely have broad implications both for states' ability to regulate physicians' speech and physicians' efforts to protect patients from firearm-related injuries, which in 2014 in the United States, included more than 33,000 deaths, most of which (21,334) were suicides.<sup>1</sup>

The evidence that the presence of a gun in the home increases the risk of death, especially by suicide, for all household members provides an empirical basis for the recommendation issued by several medical societies, including the American Medical Association, the American College of Physicians, and the American Academy of Pediatrics, that physicians discuss firearm safety with their patients

(or in the case of children, with patients' parents or guardians). Every U.S. case-control study, for example, has shown that the presence of a gun in the home is a strong risk factor for suicide — a risk assumed by the gun owner and imposed on other household members — with the odds of suicide, on average, more than three times as high in homes with guns as in those without guns.<sup>2</sup> For children, the risk of suicide increases approximately fivefold and is related to how safely household firearms are stored. For children 15 years of age or younger, the relative risk of suicide is so high, and firearm ownership so widespread, that the population attributable risk of suicide associated with guns is greater than that associ-

ated with major depression.<sup>3</sup> Despite these risks and professional recommendations to counsel patients about firearm safety, most physicians, including those who routinely encounter suicidal patients, rarely, if ever, conduct such counseling.<sup>4</sup>

Florida's Firearm Owners' Privacy Act (FOPA) was enacted in 2011 in response to concerns raised by some patients whose physicians asked them about gun ownership (Fla. St. 381.026, 456.072, 790.338). The law prohibits physicians from intentionally entering into a patient's record information about firearm ownership that "is not relevant to the patient's medical care or safety, or the safety of others"; prohibits physicians from asking patients (or for minors, patients' parents) about firearm ownership unless they believe "in good faith" that "information is relevant to the patient's medical care or safety, or the safety of others"; prohibits physicians from discriminating against

patients on the basis of firearm ownership; and prohibits physicians from “unnecessarily harassing a patient about firearm ownership during an examination.” Physicians who violate FOPA may be disciplined. The law also bars insurers from denying coverage, increasing premiums, or “otherwise discriminat[ing]” against gun owners.

Shortly after FOPA was enacted, several physicians and physician organizations sued, claiming the law violated the First Amendment. Although the trial court agreed, in three separate decisions (each of which was later withdrawn), a 3-judge panel of the Court of Appeals voted 2 to 1 to uphold the Act (see table). In each decision, the panel found that the plaintiffs had standing to sue and that FOPA’s provisions regarding the questioning of patients and the recording of information were enforceable. In affirming standing, the judges also seemed to accept that the legislature had determined that routinely asking patients about gun ownership was not relevant to patient care.

Although each of the opinions reached the same conclusions, they used different reasoning re-

garding the application of the First Amendment to physicians’ speech. In its first decision, the panel decided that because FOPA’s effect on speech was only incidental to the regulation of the practice of medicine, the First Amendment did not apply. In its second opinion, the court decided that laws regulating speech that occurs in the course of the physician–patient relationship are subject to an intermediate level of First Amendment scrutiny, which requires courts to ask whether the law directly advances a substantial state interest. Although intermediate scrutiny is usually a difficult test for states to pass, and Florida presented only anecdotal evidence in support of FOPA, the panel found that the law directly advances the state’s substantial interest in protecting patient privacy, facilitating access to care, and preventing discrimination.

In its third decision, the panel concluded that it need not determine the applicable level of scrutiny because FOPA would survive even strict scrutiny, the most stringent form of review. State laws almost never pass this test. The panel found that FOPA did so,

however, on the grounds that it was narrowly tailored to protect patients’ Second Amendment rights. As the court saw it, physician counseling may be so persuasive as to deter patients from exercising their right to own guns. But this perspective is based on both a misunderstanding of the Second Amendment — it doesn’t protect anyone from hearing information about the risks of firearms — and a misunderstanding of the goal of engaging patients in discussions about household firearms, which is to reduce the risk of injury by making the home safer; that goal can be accomplished either by removing all guns from the home (safest) or by getting patients to store their household firearms more safely. Moreover, studies to date, as limited as they are, suggest that gun owners so counseled are more likely to change storage practices than to remove guns from their homes. In fact, of the few studies of the effectiveness of firearm-safety counseling by physicians, several suggest that such counseling, especially when accompanied by provision of free safety devices, is likely to promote safer firearm storage. (Recommendations

Decisions on the Firearm Owners Privacy Act (FOPA) and First Amendment Analyses to Date.

Case	Decision	First Amendment Analysis	Outcome
<i>Wollschlaeger v. Farmer</i> , 880 F.Supp.2d 1251 (S.D. Fla. 2011)	Permanent injunction and summary judgment granted for plaintiffs	Strict scrutiny applied	Pending
<i>Wollschlaeger v. Governor of Florida</i> , 760 F.3d 1195 (11th Cir. 2014)	2-to-1 vote lifting injunction and reversing summary judgment	FOPA regulates conduct, not speech; First Amendment is not implicated	Vacated by 11th Circuit Court, 2015
<i>Wollschlaeger v. Governor of Florida</i> , 797 F.3d 859 (11th Cir. 2015)	2-to-1 vote lifting injunction and reversing summary judgment	Intermediate scrutiny under First Amendment applied; FOPA survives	Vacated by 11th Circuit Court, 2015
<i>Wollschlaeger v. Governor of Florida</i> , 814 F.3d 1159 (11th Cir. 2015), rehearing en banc granted	2-to-1 vote lifting injunction and reversing summary judgment	FOPA survives either intermediate or strict scrutiny	Vacated by 11th Circuit Court en banc, 2016

tions to remove firearms from the home have, in general, been less successful than those promoting continued ownership with safe firearm storage.)

The case is now before the full Eleventh Circuit court. The ramifications of a decision on the First Amendment issues are apt to be broad. Missouri and Montana already have laws similar to FOPA, which was strongly supported by the National Rifle Association; and in 2011 the West Virginia legislature considered a law that defined physicians' questions about gun ownership as gross negligence. If FOPA is upheld, other states may enact laws regulating physicians' speech pertaining to firearms. If so, physicians' ability to counsel patients about gun safety will be significantly compromised.

States may also feel freer to enact other laws regulating physicians' speech. Already, Pennsylvania, Ohio, Colorado, and Texas have laws requiring physicians to keep confidential information they obtain from drilling companies about the chemicals used in fracking, and several states require physicians to provide women with

medically questionable information prior to an abortion. All such laws threaten the physician-patient relationship, which relies on truthful communication and physicians' freedom to counsel patients in order to arrive at shared therapeutic goals. Often, such counseling requires physicians to present information that may, at first, be unwelcome or contrary to patients' immediate desires; it may also require physicians to attempt to change patients' behavior. By limiting physicians' communication with patients, laws such as FOPA undermine physicians' ability to protect their patients' health. FOPA's vagueness as to when gun-related speech is relevant further impedes both doctor-patient relationships and physicians' ability to preserve patients' health.

By rejecting the plaintiffs' First Amendment claims, the panel decisions jeopardized physicians' ability to counsel patients about the importance of gun safety and potentially other important issues. By applying intermediate scrutiny with a rigor and respect for medical expertise that were lacking in the panel's decisions, the full court

can safeguard physicians' ability to speak truthfully to patients, without compromising the state's ability to regulate the practice of medicine.

Disclosure forms provided by the authors are available with the full text of this article at NEJM.org.

From the School of Law (W.E.P.) and the Department of Health Sciences (M.J.M.), Northeastern University, Boston; and the Department of Nursing and Health Sciences, California State University, East Bay, Hayward (J.A.S.).

This article was published on May 18, 2016, at NEJM.org.

1. Centers for Disease Control and Prevention, National Center for Injury Prevention and Control. Web-based Injury Statistics Query and Reporting System (WISQARS) home page (<http://www.cdc.gov/injury/wisqars/index.html>).
2. Anglemyer A, Horvath T, Rutherford G. The accessibility of firearms and risk for suicide and homicide victimization among household members: a systematic review and meta-analysis. *Ann Intern Med* 2014; 160:101-10.
3. Brent DA, Baugher M, Bridge J, Chen T, Chiappetta L. Age- and sex-related risk factors for adolescent suicide. *J Am Acad Child Adolesc Psychiatry* 1999;38:1497-505.
4. Roszko PJD, Ameli J, Carter PM, Cunningham RM, Ranney ML. Clinician attitudes, screening practices, and interventions to reduce firearm-related injury. *Epidemiol Rev* 2016;38:87-110.

DOI: 10.1056/NEJMp1605740

Copyright © 2016 Massachusetts Medical Society.