

CARDOZO LAW REVIEW  
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**DOCS VERSUS GLOCKS: N.R.A. TAKES AIM AT FLORIDA  
PHYSICIANS' FREEDOM OF SPEECH: LEAVING PATIENTS'  
HEALTH, SAFETY, AND WELFARE AT RISK**

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## INTRODUCTION

On July 21, 2010, a young mother in Ocala, Florida brought her four-month-old daughter to see their family pediatrician, Dr. Chris Okonkwo, for her shots and a routine wellness check-up.<sup>1</sup> During the course of the examination, Dr. Okonkwo asked the mother of his patient a simple question—a question regularly asked of parents of young children in pediatric check-ups: “Do you keep a gun in the house?”<sup>2</sup> In doing so, he unwittingly sparked sudden media attention<sup>3</sup> and inspired speeches on the floor of the Florida House of Representatives,<sup>4</sup> eventually culminating in the Governor of Florida signing into law an unprecedented bill,<sup>5</sup> which limits doctors ability to ask patients or their guardians questions regarding their gun ownership, and has since spawned six other state legislatures to introduce similar proposals.<sup>6</sup>

Upon the woman’s refusal to answer and claim that her privacy rights were invaded by the question, Dr. Okonkwo advised the mother of three that she had thirty days to find a new pediatrician and was not

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<sup>1</sup> Fred Hiers, *Family and Pediatrician Tangle Over Gun Question*, STAR-BANNER, July 23, 2010, [available at](http://www.ocala.com/article/20100723/news/100729867/1402/news?p=1&tc=pg) <http://www.ocala.com/article/20100723/news/100729867/1402/news?p=1&tc=pg>; *see also* CS/CB/HB 155, Final Bill Analysis, June 28, 2001, at 2 *available at* <http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0155z.JDC.DOCX&DocumentType=Analysis&BillNumber=0155&Session=2011>.

<sup>2</sup> *See* Hiers, *supra* note 1.

<sup>3</sup> *Id.*

<sup>4</sup> *See* Final Bill Analysis, *supra* note 1.

<sup>5</sup> Press Release, Senator Greg Evers, The Florida Senate, Legislation to Protect Second Amendment Rights Signed into Law: House Bill 155 and House Bill 45 Signed by Governor Rick Scott (June 2, 2011), [available at](http://www.gregevers.com/releases/06032011_LegSignedIntoLaw.htm) [http://www.gregevers.com/releases/06032011\\_LegSignedIntoLaw.htm](http://www.gregevers.com/releases/06032011_LegSignedIntoLaw.htm).

<sup>6</sup> *See infra* notes 185–191 and accompanying text.

welcome back at Children's Health of Ocala, where he was the medical director.<sup>7</sup> The inflammatory inquiry arose as part of a series of health and safety questions routinely asked in doctors' offices nationwide—often tailored by the physician depending upon the patient—in order to provide preventative care, as well as health and safety guidance.<sup>8</sup>

This Note argues that the resulting legislation, an undeniably controversial<sup>9</sup> Florida statute entitled “Medical Privacy Concerning Firearms,” created by the Firearm Owners' Privacy Act (“the Act”),<sup>10</sup> cannot withstand a First Amendment challenge under existing United States Supreme Court jurisprudence. Under Supreme Court case law, the First Amendment right to freedom of speech<sup>11</sup> routinely trumps innumerable state statutes, regulations, and ordinances that control, burden, or suppress communication based upon content.<sup>12</sup> Thus, not surprisingly, shortly after the Act's passage, it was challenged in the District Court for the Southern District of Florida.<sup>13</sup> The plaintiff physicians in that case won a preliminary injunction against the government, barring the Act's enforcement.<sup>14</sup> The following year, the preliminary injunction became permanent pursuant to a subsequent

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<sup>7</sup> Dr. Okonkwo explained later to the *Star-Banner* newspaper that the doctor-patient relationship requires trust and if parents refuse to answer basic safety questions, they certainly will not trust one another regarding larger health issues either. See Hiers, *supra* note 1; Final Bill Analysis, *supra* note 1. The court, in issuing the preliminary injunction, explained in the Background section that the State's legislative history points to the law being passed “in reaction to an incident in Ocala.” *Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367, 1372 (S.D. Fla. 2011).

<sup>8</sup> For instance, Dr. Okonkwo asks young drivers about cell phone use while driving and asks parents of young children if they have a swimming pool, so he can provide advice to prevent accidental drowning. See Hiers, *supra* note 1.

<sup>9</sup> In a physician-penned essay, it was argued that the law places limits on prevention, which is routinely taught in medical schools. The physician also pointed out the law places her pediatrician colleagues “in a legal predicament,” as the “law conflicts with accepted medical practices,” such that doctors now worry they risk a malpractice claim if they fail to ask about gun ownership or access and a patient is then subsequently injured by a firearm in the home. Erin N. Marcus, *Gun Query Off Limits For Doctors in Florida*, N.Y. TIMES, Aug. 9, 2011, at D5.

<sup>10</sup> CS/CS/HB 155; codified at Fla. Stats. §§ 790.338, 381.026, 456.072, 395.1055.

<sup>11</sup> The First Amendment to the United States Constitution provides that “Congress shall make no law [] abridging the freedom of speech.” U.S. CONST. amend. I, § 1.

<sup>12</sup> See, e.g., *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011) (invalidating the Vermont Prescription Confidentiality Law which forbid the disclosure of prescriber-identifying information as an unconstitutional content- and speaker-based restriction); *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729 (2011) (finding that a California state statute restricting the sale of violent video games to minors was a content-based burden on freedom of speech lacking a compelling government interest and, as such, was unconstitutional); *Boos v. Barry*, 485 U.S. 312 (1988) (striking down a District of Columbia provision forbidding the display of signs criticizing foreign governments within 500 feet of embassies as a content-based restriction lacking sufficient tailoring); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976) (holding that a Virginia statute restricting pharmacists from disclosing certain drug pricing information violated the First Amendment).

<sup>13</sup> Complaint for Declaratory and Injunctive Relief, *Wollschlaeger v. Scott*, 814 F. Supp. 2d 1367 (S.D. Fla. 2011) (No. 11-22026-Civ).

<sup>14</sup> *Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367 (S.D. Fla. 2011).

district court opinion issued in June 2012.<sup>15</sup> The State promptly appealed the district court's decision to the Eleventh Circuit, where the case remains pending, having heard oral arguments July 18, 2013.<sup>16</sup>

The district judge's opinions granting preliminary and permanent injunctions conform to the existing Supreme Court standard for First Amendment challenges. Under this current standard, the Supreme Court's analysis of content-based suppression of speech places the crux of the examination upon the purported government interest and the degree to which the law is tailored to further that government interest or goal.<sup>17</sup>

However, this Note argues that the standard ought to be recalibrated in cases such as this one, where the speech being "chilled" would potentially benefit the *health, safety, or welfare* of the would-be listener or recipient of the information. That health, safety, or welfare factor, rather than falling into a free-floating policy rationale, or being just one of many "considerations,"<sup>18</sup> should carry actual analytic weight in the adjudicative standard going forward for any free speech case where a cognizable value of the communication exists for the would-be recipient.

The standard First Amendment analysis, when facing a government entity attempting to restrict speech based upon content, requires the court to subject the statute to strict judicial scrutiny.<sup>19</sup> The Supreme Court's current strict-scrutiny standard of review examines whether there is a compelling government interest at stake—requiring proof that the suppression of speech is necessary to that interest—and demands that the statute be narrowly drawn towards furthering or protecting that interest.<sup>20</sup> As such, and at issue here, the government's interest ought to be further subjected to an examination of the suppressed speech from the viewpoint of the deprived recipient, when a lack of such information affects the health, safety, and welfare of the listener—especially here, where such information is beneficial to the welfare of vulnerable children.

Applying this Note's proposed additional inquiry to the Firearm Owners' Privacy Act would further eviscerate any purported Second Amendment "compelling interest," and significantly strengthen the case

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<sup>15</sup> *Wollschlaeger v. Farmer*, 880 F. Supp. 2d 1251 (S.D. Fla. 2012).

<sup>16</sup> *Wollschlaeger v. Farmer*, 880 F. Supp. 2d 1251 (S.D. Fla. 2012), *appeal docketed sub nom.*, *Wollschlaeger v. Governor State of Florida*, No. 12-14009 (11th Cir. Aug. 2, 2012); *see also* Jay Weaver, *No decision in round two of 'Docs vs. Glocks' in Miami federal appeals court*, MIAMI HERALD, July 18, 2013.

<sup>17</sup> *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 395 (1992).

<sup>18</sup> Judge Cooke, in balancing the interests, includes the potential harm to the listener as part of the "considerations" that ultimately favor upholding the physicians' "ability to speak freely to their patients." *Wollschlaeger*, 880 F. Supp. 2d at 1267.

<sup>19</sup> *Id.*; *see also* *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2738 (2011).

<sup>20</sup> *Brown*, 131 S. Ct. at 2738.

for facial unconstitutionality of the Act. A possible criticism, of course, is that the standard requires the Court to make an overly value-laden judgment, given that the basic theory of First Amendment jurisprudence is antithetical to the idea of the government evaluating or weighing the content of various communications.<sup>21</sup> However, this proposed standard for triggering highly-valued speech worthy of the utmost protection is limited to rare instances implicating the listener's health, safety, and welfare. In fact, the health, safety, and welfare principal is already invoked often, as courts frequently are called upon to delineate between what does and does not establish a cognizable threat to citizens under a state's police power. Further, free speech jurisprudence itself has morphed into a hierarchy of speech based upon "value," with political and religious speech being treated as "high value" speech compared to "low value" false statements or pornography.<sup>22</sup>

Part I of this Note provides background on the Act at issue, its legislative history, the current status of the Supreme Court's free speech jurisprudence, and it also introduces the constitutional interests at stake. Part II considers the constitutionality of the Act under the existing First Amendment standard and addresses the State's assertions under the Second Amendment. Part III proposes that the Court's standard ought to be recalibrated, taking into account the would-be listeners' cognizable interest in the information. Part III goes on to legitimate the proposal by reconciling this new examination standard with existing free speech jurisprudence and justifications, along with a brief exposition of the likeness between the Note's proposal and the doctrine of informed consent.

## I. BACKGROUND

### A. *An Act Relating to the Privacy of Firearm Owners*

The Firearm Owners' Privacy Act is the hotly contested Florida statute—now dubbed the "Physician Gag Law"—which rests at the forefront of the so-called "Docs v. Glocks" litigation.<sup>23</sup> Originating in the Florida House of Representatives, House Bill 155 became Florida Statute Section 790.338 under the pen of Governor Rick Scott on June 2, 2011<sup>24</sup>—despite the vehement opposition of many physicians'

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<sup>21</sup> Cf. T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* 326 (1970) (arguing that the Court should not be making "value judgments" on the content of the expressed speech, as a "role foreclosed to it by the basic theory of the First Amendment").

<sup>22</sup> ERWIN CHEMERINSKY, *CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES* 986–87, (3rd ed. 2006).

<sup>23</sup> Nathan Koppel, *Florida Judge Sides With Physicians in 'Docs v. Glocks' Case*, WALL STREET JOURNAL LAW BLOG, Sept 15, 2011, <http://blogs.wsj.com/law/2011/09/15/florida-judge-sides-with-physicians-in-docs-v-glocks-case/>.

<sup>24</sup> See Press Release, *supra* note 5. The NRA hailed the legislation as "pro-gun," explaining

groups. By signing the House and Senate supported bill, the Tea Party<sup>25</sup> backed Governor ushered the Firearm Owner's Privacy Act into law.<sup>26</sup> The National Rifle Association of America ("NRA")—in particular its lobbyist arm the Institute for Legislative Action<sup>27</sup>—was a driving force behind the enactment of the legislation, sending out notices urging members to contact the Governor in support of the Bill, which it explained "would STOP pediatricians from invading privacy rights" of their firearm-owning patients.<sup>28</sup> The NRA lauded the Act, arguing that the Act provided NRA members protection against discrimination and intrusive inquiries due to their firearm ownership.<sup>29</sup> Further, and most

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that HB 155 "stops pediatricians from invading privacy rights of gun owners and bringing anti-gun politics into medical examining rooms." The press release goes on to admit that the law is being challenged in court. *See* Press Release, Institute for Legislative Action, National Rifle Association of America, 2011 Florida Legislative Session Ends With Three Pro-Gun Bills Signed into Law (June 30, 2011), <http://www.NRAILA.org/Legislation/Read.aspx?id=7096>.

<sup>25</sup> The American Tea Party is a relatively recent political phenomenon. Begun in 2009, the grassroots movement purports to be anti-government and proved instrumental to the Republicans' success in the 2010 mid-term elections. *See generally* *Tea Party Movement*, N.Y. TIMES, [http://topics.nytimes.com/top/reference/timestopics/subjects/t/tea\\_party\\_movement/index.html?line=nyt-classifier](http://topics.nytimes.com/top/reference/timestopics/subjects/t/tea_party_movement/index.html?line=nyt-classifier) (last visited June 25, 2013). The American Tea Party Patriots claim to be a non-partisan grassroots movement, the impetus for which was "excessive government spending and taxation." *See, e.g.,* *Mission*, GREENWICH TEA PARTY, <http://www.greenwichteparty.com/Mission.html> (last visited June 25, 2013). One of their core values is listed as "Constitutionally Limited Government," insisting that they "support the personal liberty of the individual, within the rule of law." *See* Mission Statement and Core Values, Tea Party Patriots: Official Home of the American Tea Party Movement, *available at* [https://docs.google.com/View?id=dhsxmzm7\\_19fcdzskg5](https://docs.google.com/View?id=dhsxmzm7_19fcdzskg5) (last visited June 25, 2013). Scott ran on a Tea Party-endorsed platform of fiscal conservatism and radical budget cuts, winning the gubernatorial race despite his lack of political experience. *See* Don Van Natta & Gary Fineout, *Sinking Poll Numbers May Put Florida in Play*, N.Y. TIMES, June 28, 2011, at A12. However, by May 2011, one month before signing the Firearm Owners' Privacy Act into law, Scott had the lowest approval rating of any governor, at only 29%, mirrored by an almost-as-dire 35% approval rating of Florida State Legislature. Press Release, Quinnipiac University Polling Institute, Florida Voters Turn Thumbs Down on Gov. Scott 2-1, Quinnipiac University Poll Finds; Voters Say Property Insurance is Getting Worse (May 25, 2011).

<sup>26</sup> *Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367 (S.D. Fla. 2011).

<sup>27</sup> The Institute for Legislative Action is the lobbyist arm of the NRA, with a staff of over eighty employees and a team consisting of full-time lobbyists "defending Second Amendment issues on Capitol Hill, in state legislatures and in local government bodies." *About NRA-ILA*, NAT'L RIFLE ASS'N OF AMERICA, INST. FOR LEGIS. ACTION, <http://www.nraila.org/about-nra-ila.aspx> (last visited June 25, 2013). It involves itself with any issue, directly or indirectly, affecting firearm owners, often alerting its members and supporters when legislation is pending, urging them to respond "with individual letters, faxes, e-mails and calls to their elected representatives to make their views known." *Id.*

<sup>28</sup> The e-mail categorizes HN 155 as a "Second Amendment bill" and warns members that "[t]he American Academy of Pediatrics and the Florida Pediatric Society are reported to be waging a campaign to get Governor Scott to veto HB 155" and encourages them to e-mail the Governor, urging him to sign the bill. *See* Letter from Marion P. Hammer, USF Executive Director, to USF & NRA Members and Friends, Urgent Alert- Contact Florida Governor Rick Scott Today! (May 26, 2011).

<sup>29</sup> Proposed Intervener National Rifle Association's Motion to Intervene and Incorporated Memorandum of Law, *Wollschlaeger v. Scott*, 814 F. Supp. 2d 1367 (S.D. Fla. 2011) (No. 11-22026-Civ), 2011 WL 4074925; *see also* Order Denying National Rifle Association's Motion to

tellingly for the purposes of a freedom of speech claim, the NRA assured its members the Act would preemptively discourage doctors from even asking any such firearm-related questions at all.<sup>30</sup> Meanwhile, similar NRA-backed bills were introduced in 2011 in the legislatures of Alabama, Minnesota, North Carolina, Oklahoma, and West Virginia.<sup>31</sup>

Four days after the Governor put pen to paper, several Florida physicians and physician interest groups challenged the constitutionality of the statute under the First and Fourteenth Amendments, seeking declaratory and injunctive relief in the District Court for Florida's Southern District.<sup>32</sup> Throughout the course of the litigation, the plaintiffs have based their challenge upon three grounds: facial unconstitutionality under the freedom of speech doctrine, overly vague statutory language,<sup>33</sup> and overly broad potential applicability.<sup>34</sup>

Turning to the statutory text itself, embodied in the provision "Medical privacy concerning firearms; prohibitions; penalties; and exceptions," the challenged (and thus relevant) portions prescribe that a health care practitioner "may not intentionally enter any disclosed information concerning firearm ownership into the patient's medical record if the practitioner knows such information is not relevant to the patient's medical care, or safety, or safety of others;" "should refrain from making a written inquiry or asking questions concerning the ownership of a firearm" unless he or she "in good faith believes that this information is relevant to the patient's medical care or safety, or the safety of others;" "shall respect a patient's legal right to own or possess

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Intervene, *Wollschlaeger v. Scott*, 814 F. Supp. 2d 1367 (S.D. Fla. 2011) (No. 11-22026-Civ.), 2011 WL 2672250 (denying the Motion to Intervene on the grounds that the NRA failed to show that the Governor and other existing defendants will not adequately represent their interests, as evidenced by the fact that Governor Scott himself signed the bill at issue into law).

<sup>30</sup> See Hammer Letter, *supra* note 28.

<sup>31</sup> See *infra* notes 174–84 and accompanying text.

<sup>32</sup> Complaint for Declaratory and Injunctive Relief, *Wollschlaeger v. Scott*, 814 F. Supp. 2d 1367 (S.D. Fla. 2011) (No. 11-CV22026-Civ.), 2011 WL 2177374; see also Brief for Appellees, *Wollschlaeger v. Governor, State of Fla.*, No. 12-14009 (11th Cir. 2012).

<sup>33</sup> *Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367, 1377 (S.D. Fla. 2011). The vagueness doctrine, which rests upon fundamental due process concerns, will render a statute facially void if the law, as written, does not clearly delineate between proscribed conduct and that which is acceptable. See CONSTITUTIONAL LAW 1116 (Stone et al., eds., 6th ed., 2009). In the First Amendment context, vagueness is of particular concern, as it implicates "sensitive areas of basic First Amendment freedoms," and a lack of clarity may cause would-be speakers to "steer far wider of the unlawful zone"—in effect chilling constitutionally protected speech. See *Grayned v. City of Rockford*, 408 U.S. 104, 108–09 (1972); *Baggett v. Bullitt*, 377 U.S. 360, 372 (1964); *Cramp v. Bd. of Pub. Instruction*, 368 U.S. 278, 287 (1961); see also *CHEMERINSKY*, *supra* note 22, at 941–42.

<sup>34</sup> *Wollschlaeger*, 814 F. Supp. 2d at 1377. An overbreadth challenge, although lacking "an exact definition," generally requires proving that the law is substantially overbroad and as applied in numerous situations, will "significantly compromise recognized First Amendment protections." *City Council of L.A. v. Taxpayers for Vincent*, 466 U.S. 789, 800–01 (1984); see generally Richard Fallen, Jr., *Making Sense of Overbreadth*, 100 YALE L. J. 853 (1991).

a firearm and should refrain from unnecessarily harassing a patient about firearm ownership.”<sup>35</sup> A limited exemption is granted for an emergency medical technician or paramedic who “in good faith, believes that information regarding the possession of a firearm by the patient or the presence of a firearm in the home” is “necessary to treat a patient during the course and scope of a medical emergency or that the presence or possession of a firearm would pose an imminent danger or threat to the patient or others.”<sup>36</sup> The statute provides that any violation of subsections (1)-(4) is grounds for disciplinary action by the Florida State Medical Board under Florida Statutes Section 456.072(2) and Section 395.1055.<sup>37</sup>

The Attorney General of Florida, in opposition to the injunction, put forth a narrow reading of the statute in an attempt to salvage it. The State argued that the law did not actually forbid physicians from questioning their patients<sup>38</sup> and that the statutory language was not an outright proscription on doctors’ speech.<sup>39</sup> Further, the State urged that the Act should be read reasonably by the court, as not putting any burden on conversations between a doctor and his patient, but instead as only applicable to forced disclosures of information by patients.<sup>40</sup>

On September 14, 2011, District Court Judge Marcia G. Cooke issued an order granting the plaintiffs’ preliminary injunction based upon the statute’s facial unconstitutionality under the First Amendment.<sup>41</sup> The court rejected the State’s reading of the statute as merely a recommendation for physicians, reasoning it would create an absurd result in which penalties clearly delineated in the statute would cease to carry any functional value.<sup>42</sup> Once Judge Cooke categorized the Act as burdening doctors’ speech based upon content, the Judge found the Act could not survive strict scrutiny: the Second Amendment and patients’ privacy rights justifications were insufficiently “compelling” government interests, and the State failed to prove the statute was

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<sup>35</sup> FLA. STAT. ANN. §§ 790.338 (1), (2), (6) (2011).

<sup>36</sup> FLA. STAT. ANN. § 790.338(3) (2011).

<sup>37</sup> FLA. STAT. ANN. § 790.338(8) (2011). “Grounds for discipline; penalties; enforcement (1) The following acts shall constitute grounds for which the disciplinary actions specified in subsection (2) may be taken . . . (nn) Violating any of the provisions of s. 790.338.” FLA. STAT. ANN. § 456.072(1). The statute also provides that when the Board finds any person guilty on the grounds, the Board may, amongst others penalties, suspend or permanently revoke the offender’s license or impose an administrative maximum fine of \$10,000 for each offense. FLA. STAT. ANN. §§ 456.072(2)(b) & (d) (2011).

<sup>38</sup> Response of Defendants to Motion for Preliminary Injunction, *Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367 (S.D. Fla. 2011) (No. 1:11-cv-22026-MGC), 2011 WL 4074928; *see also* Brief for Appellees, *Wollschlaeger v. Governor, State of Fla.*, No. 12-14009 (11th Cir. 2012).

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> *Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367, 1377 (S.D. Fla. 2011).

<sup>42</sup> *Id.* at 1376.



narrowly tailored, and necessary, to serve those interests.<sup>43</sup>

The injunction became permanent on June 29, 2012, by order of Judge Cooke, who reiterated much of her earlier opinion and summarily rejected the State's new attempt to "recast" the statute as "a run-of-the-mill anti-discrimination law."<sup>44</sup>

### *B. The Supreme Court's Jurisprudence of First Amendment Freedom of Speech*

The text of the First Amendment may be sparse, but the language "Congress shall make no law [] abridging the freedom of speech, or of the press"<sup>45</sup> has successfully invalidated countless state statutes.<sup>46</sup> In particular, the constitutionality of a statute that implicates freedom of speech often hinges upon its potential for the suppression of speech based on content, which triggers strict scrutiny.<sup>47</sup> So deep does this principle run and so fiercely protected is the free speech doctrine, that in the recently decided case of *United States v. Stevens*, the Supreme Court held that the State's suggestion of analyzing content-based speech rights under a mere balancing test was "startling and dangerous. . . . The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs."<sup>48</sup>

While the freedom of speech is not an absolute right, the categories of unprotected speech—those that have been deemed as lacking in any social value or importance and therefore fall "outside" the area of protected speech<sup>49</sup>—are limited and drawn narrowly,<sup>50</sup> to include obscenity, incitement, and fighting words.<sup>51</sup>

Additionally, amongst the universe of protected speech, the Supreme Court has essentially stratified expression by *value*, articulating that not all speech is of equal importance under the First

<sup>43</sup> *Id.* at 1380–83; *see also* *Wollschlaeger v. Farmer*, 880 F. Supp. 2d 1251 (S.D. Fla. 2012) (holding that the statute failed to survive under either strict scrutiny or a somewhat less demanding standard urged by the State and thus declining to decide exactly which standard applies).

<sup>44</sup> *Wollschlaeger*, 880 F. Supp. 2d at 1256; *see also* Response of Defendants to Motion for Summary Judgment, *Wollschlaeger v. Farmer*, 880 F. Supp. 2d 1251 (S.D. Fla. 2012), 2011 WL 4074928.

<sup>45</sup> U.S. CONST. amend. I, § 1.

<sup>46</sup> *See, e.g.*, cases cited *supra* note 12 and accompanying text.

<sup>47</sup> *Ashcroft v. ACLU*, 535 U.S. 564, 573 (2002) (explaining that, in general, "the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content").

<sup>48</sup> *United States v. Stevens*, 130 S. Ct. 1577, 1585 (2010).

<sup>49</sup> *Roth v. United States*, 354 U.S. 476 (1957); *see also* *Chaplinsky v. New Hampshire*, 315 U.S. 568, 571–72.

<sup>50</sup> *Chaplinsky*, 315 U.S. at 571–72.

<sup>51</sup> *Brown v. Entm't Merch. Ass'n*, 131 S. Ct. 2729, 2733 (2011).

Amendment.<sup>52</sup> The Court recognizes that certain speech, such as speech “on matters of public concern,” political expression, and religious speech is entitled to greater protection, as “high” value speech.<sup>53</sup> On the opposite end of the spectrum, speech determined to be “low” valued speech includes, for example, false statements of fact,<sup>54</sup> commercial advertising and communications,<sup>55</sup> and pornography.<sup>56</sup> All other speech is accorded full protection by the Court, so long as it does not fall into the delineated categories of “low value” expression.<sup>57</sup>

Further, a statute resulting in content-based burdening of speech is presumptively invalid and, as such, is subject to strict scrutiny, meaning the State must prove a compelling government interest and that the statute is drawn narrowly to address that interest.<sup>58</sup> The Supreme Court has maintained that “[i]t’s rare that a regulation restricting speech because of its content will ever be permissible.”<sup>59</sup> As such, the Government bears the burden of pointing to an “actual problem” that must be rectified,<sup>60</sup> and proving that the resulting government infringement of one’s right to free speech is necessary to the solution.<sup>61</sup> A state may not suppress the dissemination of information because it is “fearful of that information’s effect upon its disseminators and its recipients.”<sup>62</sup> Offensive opinions, or unwelcome speech, are nevertheless still protected forms of expression—unpopular communications are often those most in need of constitutional

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<sup>52</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

<sup>53</sup> *Id.* at 758–59.

<sup>54</sup> *N.Y. Times v. Sullivan*, 376 U.S. 254 (1964). Professor Nimmer argues that the *N.Y. Times* decision involved a “balancing process” by weighing “competing policy considerations” in the Court’s categorical assignments. See Melville B. Nimmer, *The Right to Speak from Times to Time: First Amendment Theory Applied to Libel and Misapplied to Privacy*, 56 CAL. L. REV. 935, 942–43 (1968).

<sup>55</sup> *Ohralik v. Ohio State Bar Ass’n*, 436 U.S. 447, 456 (1978) (describing commercial expression as receiving “limited measure of protection, commensurate with its subordinate position in the scale of First Amendment values”).

<sup>56</sup> CONSTITUTIONAL LAW, *supra* note 33, at 1129.

<sup>57</sup> David A. Strauss, *Freedom of Speech & the Common-Law Constitution*, in *ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA* 33, 37 (Lee C. Bollinger & Geoffrey R. Stone, eds., 2002).

<sup>58</sup> *R.A.V. v. City of St. Paul*, 505 U.S. 377, 395 (1992); see also *Gitlow v. New York*, 268 U.S. 652, 666 (1925) (holding that the First Amendment right to free speech is a fundamental personal right as defined by the due process clause of the Fourteenth Amendment; as such it is applicable to both federal and state governmental action alike); *Malloy v. Hogan*, 378 U.S. 1, 10–11 (1964) (holding that the same standard applies to both federal and state encroachment upon “personal rights”).

<sup>59</sup> *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2738 (2011) (quoting *United States v. Playboy*, 529 U.S. 803, 818 (2000)).

<sup>60</sup> See *Playboy*, 529 U.S. at 822–23.

<sup>61</sup> *R.A.V.*, 505 U.S. at 395.

<sup>62</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 773 (1976).

protection.<sup>63</sup> Notably, the Supreme Court has stressed repeatedly that “distinction between laws burdening and laws banning speech is but a matter of degree.”<sup>64</sup>

A state will often, in an attempt to salvage its statute, argue the canon of constitutional avoidance—a tool of statutory interpretation whereby ambiguous language will be reasonably construed, or limited, to avoid unconstitutional results.<sup>65</sup> However, this requires that the statute be “readily susceptible” to a narrower construction.<sup>66</sup> Particularly within the arena of free speech, the Supreme Court has repeatedly declined to “rewrite” the law under the guise of reinterpretation.<sup>67</sup>

The Supreme Court’s historically hard-line approach to any suppression of speech based on content is writ large in the 2011 decisions of *Brown v. Entertainment Merchants Association*<sup>68</sup> and *Sorrell v. IMS Health, Inc.*<sup>69</sup> In *Brown*, the Supreme Court struck down as unconstitutional a California statute restricting the sale of violent video games to minors. Despite studies suggesting a connection between exposure to these graphic games and their harmful effects on children, the Court nevertheless concluded “ambiguous proof will not suffice.”<sup>70</sup> Nor was the government’s interest in protecting children from depictions of violence found sufficiently compelling to justify burdening speech because “there are all sorts of ‘problems’ . . . that cannot be addressed by governmental restriction of free expression.”<sup>71</sup> The Court rejected the State’s argument that its statute was a justifiable aid to parental authority, explaining that punishing third parties for conveying otherwise-protected speech to minors, of which parents may not approve, is not a valid exercise of a state’s police power.<sup>72</sup>

Likewise, the Supreme Court in *Sorrell* struck down on First Amendment grounds a Vermont statute, the Prescription Confidentiality Law, which restricted the release or sale of physicians’ prescribing preferences and information to drug marketers.<sup>73</sup> Ironically, the State’s purported justifications for the statute—which ultimately proved

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<sup>63</sup> “[I]f it is the speaker’s opinion that gives offense, that consequence is a reason for according it constitutional protection.” *FCC v. Pacifica Found.*, 438 U.S. 726, 745 (1978).

<sup>64</sup> *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011) (quoting *Playboy*, 529 U.S. at 812) (further stating that “Government’s content-based burdens must satisfy the same rigorous scrutiny as its content-based bans”).

<sup>65</sup> See *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009); see also *United States v. Stevens*, 130 S. Ct. 1577, 1591–92 (2010).

<sup>66</sup> *Virginia v. Am. Bookseller’s Ass’n, Inc.*, 484 U.S. 383, 397 (1988).

<sup>67</sup> *Reno v. ACLU*, 521 U.S. 844, 884 (1997) (quoting *Virginia*, 484 U.S. at 397); see also *Stevens*, 130 S. Ct. at 1591–92.

<sup>68</sup> *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729 (2011).

<sup>69</sup> *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653 (2011).

<sup>70</sup> *Brown*, 131 S. Ct. at 2739.

<sup>71</sup> *Id.*

<sup>72</sup> *Id.* at 2740.

<sup>73</sup> *Sorrell*, 131 S. Ct. at 2660 (emphasis added).

unpersuasive—were protection of doctors who may have “felt coerced and harassed”<sup>74</sup> and safeguarding medical privacy,<sup>75</sup> (not unlike Florida’s justifications for the Firearm Owners’ Privacy Act, ostensibly enacted to shield gun owners from physician-harassment and protect their privacy rights).<sup>76</sup> As the Court explained “[a] physician’s office is no more private and is entitled to no greater protection.”<sup>77</sup> Finding the law burdened speech based upon the content and the speaker, the Court determined it simply could not survive the stringent strict scrutiny standard.<sup>78</sup>

### C. Legislative History of the Bill

The Final Analysis of the Privacy of Firearm Owners Act reveals that the bill grew out of the incident described above in the Introduction in which a pediatrician, as part of his routine wellness check-up examination, asked his patient’s mother about guns in her home “in an effort to provide safety advice” and in conjunction with other preventative health and safety questions.<sup>79</sup> Upon her refusal to answer, as she felt that her privacy had been invaded, the doctor advised her she had thirty days to find a new pediatrician.<sup>80</sup> This occurrence, along with other anecdotal stories and comments from legislators who had “heard about” this type of discrimination,<sup>81</sup> purportedly formed the bedrock of the statute.<sup>82</sup>

The legislative history locates the purpose squarely within the realm of content-based suppression, a motive that further implicates viewpoint-based discrimination. The House of Representatives Staff Analysis from the Criminal Justice Subcommittee reveals that in an earlier draft of the statute there was a narrow category of exceptions for “permissible” inquiry, which were not a violation of Section 790.338.<sup>83</sup>

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<sup>74</sup> *Id.* at 2669.

<sup>75</sup> *Id.* at 2659.

<sup>76</sup> Response of Defendant’s to Motion for Preliminary Injunction, *Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367 (S.D. Fla. 2011) (No 1:11-cv-22026-MGC).

<sup>77</sup> *Sorrell*, 131 S. Ct. at 2670; *see also* *Erznoznik v. Jacksonville*, 422 U.S. 205, 209 (1975) (rejecting the State’s justification for suppression of speech based on privacy rights of individuals, limiting such exceptions to instances where “the speaker intrudes on the privacy of the home,” or where “the degree of captivity makes it impractical for the unwilling viewer or auditor to avoid exposure”).

<sup>78</sup> *Sorrell*, 131 S. Ct. at 2672.

<sup>79</sup> CS/CB/HB 155, Final Bill Analysis, June 28, 2001, at 2, *available at* <http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0155z.JDC.DOCX&DocumentType=Analysis&BillNumber=0155&Session=2011>.

<sup>80</sup> *Id.*

<sup>81</sup> *See* Response of Defendants to Motion for Preliminary Injunction, *Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367 (S.D. Fla. 2011) (No. 1:11-cv-22026-MGC), 2011 WL 4074928 (citing Audio CD: Regular Session House Floor Debate on HB 155, at 13:40, Florida House of Representatives, “House Floor Debate,” (remarks of Rep. Brodeur) (April 26, 2011)).

<sup>82</sup> *See* *Wollschlaeger v. Farmer*, 880 F. Supp. 2d 1251, 1256 (S.D. Fla. 2012).

<sup>83</sup> CS/HB 155 Privacy of Firearms Owners, House Representatives Staff Analysis, March 9,

However, these exceptions “do not apply to inquiries made due to a person’s general belief that firearms or ammunition are harmful to health or safety.” Such a differentiation, by singling-out and burdening speech based upon the speaker’s gun-control beliefs suggest an underlying attempt to restrict physicians based not only on the *content* of their speech, but further on their *viewpoint*.

In fact, the legislative history even reveals an anticipatory awareness of possible free speech constitutional challenges to the proposed bill.<sup>84</sup> Yet despite the documented recognition of a potential constitutional infirmity, House Bill 155 sailed through the legislature. The Privacy of Firearm Owners bill navigated the House Criminal Justice Subcommittee, the Health and Human Services Committee, and the Judiciary Committee before easily passing the House Vote with 88 Yeas to 30 Nays, and emerged from the Senate vote two days later with 27 Yeas to 10 Nos.<sup>85</sup>

#### *D. The Physicians’ and Patients’ Interests*

While initially a doctor’s need to discuss gun ownership with patients, or their parents, may seem out of place and unnecessary, deeper analysis proves it to be indispensable. In fact, the American Academy of Pediatrics (AAP) and the American Academy of Family Physicians (AAFP) both recommend doctors provide health and safety guidance, engaging patients or their guardians in discussions meant to serve as preventative care.<sup>86</sup> The AAP Committee on Injury and Poison Prevention urged pediatricians and health care professionals to include questions about gun ownership and safety when taking a patient’s history, having found that loaded and unlocked firearms “represent a serious danger to children and adolescents.”<sup>87</sup> In November 2011, the American Medical Association (AMA) passed Resolution 201 in response to the Florida Act, adopting an official policy to “vigorously and actively” oppose any law or restriction on doctors’ ability to freely

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2011 at 4, available at <http://www.myfloridahouse.gov/Sections/Documents/loaddoc.aspx?FileName=h0155a.CRJS.DOCX&DocumentType=Analysis&BillNumber=0155&Session=2011>.

<sup>84</sup> *Id.*

<sup>85</sup> CS/CS/HB 155-Privacy of Firearm Owners, Selected Bill Detail, Florida House of Representatives, (last visited Sept 26, 2011), available at <http://www.myfloridahouse.gov/Sections/Bills/billsdetail.aspx?BillId=44993&SessionIndex=-1&SessionId=66&BillText=&BillNumber=155&BillSponsorIndex=0&BillListIndex=0&BillStatuteText=&BillTypeIndex=0&BillReferredIndex=0&HouseChamber=B&BillSearchIndex=0>.

<sup>86</sup> See Wollschlaeger v. Farmer, 814 F. Supp. 2d 1367, 1373 (S.D. Fla. 2011).

<sup>87</sup> *Firearm-Related Injuries Affecting the Pediatric Population*, Committee on Injury and Poison Prevention, American Academy of Pediatrics, 105 PEDIATRICS 888, 893 (2000) (finding that “[b]ecause firearm-related injury to children is associated with death and severe morbidity and is a significant public health problem, child health care professionals can and should provide effective leadership in efforts to stem this epidemic”).

inquire about and discuss firearm safety with their patients.<sup>88</sup>

Preventative care and anticipatory guidance routinely fall within the purview of modern medical practice and scientific studies suggest that guns in the home pose a quantifiable danger and health risk.<sup>89</sup> Moreover, the presence of children in the home does not necessarily lead parents to engage in safer firearm storage. One study by Dr. Susan Connor, published in the official journal of the American Academy of Pediatrics (AAP), found that in homes containing both children and firearms, only twenty percent reported having their guns locked or locked up.<sup>90</sup> As such, Dr. Connor concluded that “one-size-fits-all interventions” were ineffectual and that physicians tailoring their messages to patients and their families was necessary.<sup>91</sup>

A subsequent follow-up study to Dr. Connor’s work, also published by the AAP, went on to conclude that physicians should engage in a “tailored safe storage counseling approach,” which ought to include not only inquiries into ownership, but also information about the types of guns present.<sup>92</sup> Researchers have found that even brief office counseling by a family physician causes significant positive effects: patients who received verbal counseling on firearm safety practices from their doctor were three times more likely to make safety changes, compared to firearm-owning peers who were denied such physician counseling.<sup>93</sup>

A 2002 survey conducted by state health departments in conjunction with the U.S. Centers for Disease Control and Prevention estimated that in the State of Florida alone there were roughly 248,430 children and youths being raised in a household with at least one loaded gun, and that about half of those were in fact living with a loaded, *and unlocked*, firearm.<sup>94</sup> Nationwide, the survey found roughly 1.6 million

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<sup>88</sup> *Resolution 201: Government Interference in Patient Counseling*, American Medical Association 2011 Annual Meeting, Resolutions 431, (2011) available at <http://www.ama-assn.org/assets/meeting/2011a/a11-resolutions.pdf>; see also *Government Interference in Patient Counseling*, H-373.995, House of Delegates, American Medical Association.

<sup>89</sup> David Hemenway, *Risks and Benefits of a Gun in the Home*, AM. J. OF LIFESTYLE MED., Feb 2, 2011, at 7. (“The evidence is overwhelming that a gun in the home is a risk factor for completed suicide and that gun accidents are most likely to occur in homes with guns.”).

<sup>90</sup> Susan M. Connor, *The Association Between Presence of Children in the Home and Firearm-Ownership and-Storage Practices*, 115 PEDIATRICS e38, e41 (2005).

<sup>91</sup> *Id.* at e42.

<sup>92</sup> Robert H. DuRant et al., *Firearm Ownership and Storage Patterns Among Families With Children Who Receive Well-Child Care in Pediatric Offices*, 119 PEDIATRICS e1271, e1277 (2007) (concluding that gun storage decisions are influenced by a multitude of factors, including the type of firearm owned, the family’s socialization with guns, and the age of the children in the home).

<sup>93</sup> Teresa L. Albright & Sandra K. Burge, *Improving Firearm Storage Habits: Impact of Brief Office Counseling by Family Physicians*, 16 J. AM. BOARD. FAM. MED. 40 (2003).

<sup>94</sup> Catherine A. Okoro et al., *Prevalence of Household Firearms and Firearm-Storage Practices in the 50 States and the District of Columbia: Findings From the Behavioral Risk Factor Surveillance System*, 2002, 116 PEDIATRICS e370, e373 table 2 (2005) (The purpose of

children reside in homes with at least one firearm stored “in the least safe manner.”<sup>95</sup> The researchers concluded that attempts at counseling parents by physicians, especially pediatricians, would be a viable option in the interest of protecting “the most vulnerable segments of our population—children and youth, persons with depressive symptoms, and those who have threatened suicide.”<sup>96</sup>

## II. ANALYSIS

### *A. The Act’s Unconstitutionality Under Current Free Speech Doctrine*

Applying the current Supreme Court standard for First Amendment suppression of speech based upon content, the Privacy of Firearm Owners Act does not withstand strict scrutiny. The holdings of the District Court Judge accurately reflected this conclusion, first issuing a preliminary injunction,<sup>97</sup> and in response to cross-motions for summary judgment, finally declaring the State permanently enjoined from enforcing the statute.<sup>98</sup> While the Judge did note the chilling effect could ultimately harm the patient,<sup>99</sup> the opinion remained primarily concerned with the *speakers’* right to free speech, rather than recognize a legally cognizable right for the would-be *listeners* to receive such valuable information as this Note proposes.

The full scope of the ongoing gun-control debate is beyond the scope of this Note, but nonetheless, it is important to stress just how real, and preventable, gun-related injuries in the home can be. One study funded by the Centers for Disease Control and Prevention and authored by a group of physicians found that the use of various safe storage methods for guns in the home resulted in a significant drop in the risk of unintentional or self-inflicted injury and death among children and adolescents.<sup>100</sup> Further, this study concluded that programs and policies which focus on preventing children’s gun access by urging the public to keep their household guns locked and unloaded “deserve

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this health survey from the BRFSS, conducted by trained interviewers, was to identify, state by state, estimates of behaviors tied to the leading causes of death in the United States. 2002 was the first year that questions regarding firearm storage were added, due to their “interest in firearm-related injuries.”). *Id.* at e371.

<sup>95</sup> *Id.* at e374.

<sup>96</sup> *Id.*

<sup>97</sup> After deciding that the statute’s restriction of medical practitioners’ speech was content-based, the court determined the State’s interests in protecting the privacy rights of firearm owners was insufficiently compelling to justify burdening protected expression. *Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367, 1379, 1381 (S.D. Fla. 2011). Further, the court ruled it was likely to fail strict judicial scrutiny because the statute is not the least restrictive means in furtherance the State’s interest. *Id.* at 1381.

<sup>98</sup> *Wollschlaeger v. Farmer*, 880 F. Supp. 2d 1251, 1269 (S.D. Fla. 2012).

<sup>99</sup> *Id.* at 1267.

<sup>100</sup> Grossman et al., *Gun Storage Practices and Risk of Youth Suicide and Unintentional Firearm Injuries*, 293 J. AM. MED. ASS’N 707 (2005).

further attention” as one strategy in the quest for firearm injury prevention.<sup>101</sup> While the effectiveness of counseling and public education campaigns promoting safe storage has not yet yielded conclusive statistical data, one study conducted in North Carolina suggested the importance of tailoring the discussion based upon the individual’s situation and level of risk.<sup>102</sup> The necessity of this unrestricted dialogue between the doctor and patient undercuts the viability of an alternative scenario in which the doctor lectures generally about gun safety without making any meaningful inquiries.<sup>103</sup>

The Florida Attorney General initially<sup>104</sup> offered two purported justifications for the statute: (1) the protection of the privacy rights of patients and patients’ families, and (2) the Second Amendment rights of Floridians, which are allegedly burdened by these inquiries from physicians.<sup>105</sup> The State analogized the challenged Act to another Florida statute that forbids an employer from violating the privacy rights of its employees, customers, or invitees by inquiring about the presence of firearms in their vehicles parked in its parking lot.<sup>106</sup> While the portions regarding the privacy rights of the employees survived scrutiny in the Florida district courts, the section of the statute applicable to the customers was enjoined as unconstitutional.<sup>107</sup>

The asserted state interest in safeguarding individuals’ privacy rights is fatally flawed. For example, it failed to salvage the statute at issue in *Sorrell*, despite Vermont asserting the purported privacy rights of physicians.<sup>108</sup> The Supreme Court bristled at the State using privacy rights to try to justify a suppression of speech, summarily rejecting this argument as a “manipulation” to reinforce “just those ideas the

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<sup>101</sup> *Id.*

<sup>102</sup> Tamera Coyne-Beasley et al., *Love Our Kids, Lock Your Guns: A Community-Based Firearm Safety Counseling & Gun Lock Distribution Program*, 155 ARCH PEDIATRIC ADOLESCENT MED. 659 (2001). The importance of a dialogue is further supported by Donald Braham and Dan M. Kahan’s explanation of “culturally partisan forms of trust.” They propose that an individual’s risk beliefs are heavily influenced by information from those they trust, relying upon others to “tell them which risk claims are serious and which specious.” Donald Braham & Dan M. Kahan, *Overcoming the Fear of Guns, the Fear of Gun Control, and the Fear of Cultural Politics: Constructing a Better Gun Debate*, 55 EMORY L.J. 569, 576 (2006).

<sup>103</sup> Plaintiff’s Complaint for Declaratory and Injunctive Relief at 12, *Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367 (S.D. Fla. 2011) (No. 11-22026-civ).

<sup>104</sup> At the summary judgment stage, the State asserted a third justification, arguing the bill is an anti-discrimination bill, to protect gun owners from their doctors. *See Wollschlaeger v. Farmer*, 880 F. Supp. 2d 1251, 1256 (S.D. Fla. 2012).

<sup>105</sup> Response of Defendants to Motion for Preliminary Injunction, *Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367 (S.D. Fla. 2011) (No. 11-22026-civ).

<sup>106</sup> FLA. STAT. § 790.251 (4)(b) (2008).

<sup>107</sup> *Florida Retail Fed’n, Inc. v. Attorney Gen. of Florida*, 576 F. Supp. 2d 1281 (N.D. Fla. 2008), *final judgment entered*, 576 F. Supp. 2d 1301 (N.D. Fla. 2008).

<sup>108</sup> *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2762 (2011); *see also Cox Broad. Corp. v. Cohn*, 420 U.S. 469 (1975) (analyzing the collision of claims of privacy and those of the free press).



government prefers.”<sup>109</sup> The infirmity lay mostly in the statute’s limited proscriptions, confining its non-disclosure provision to certain speakers with particular purposes, while allowing all others access to unrestricted disclosures.<sup>110</sup> Likewise, in the statute at issue in this case, doctors are only barred from inquiries surrounding firearm ownership, while all other private personal matters remain fair game for questioning.

*B. The Limits of Second Amendment Jurisprudence and  
Accompanying Interests*

The Supreme Court held in 2010 that the constitutional right to keep and bear arms was “fundamental to *our* scheme of ordered liberty,”<sup>111</sup> and as such the Second Amendment was just as applicable to the states as the federal government.<sup>112</sup> Underscoring its 2008 holding in *District of Columbia v. Heller*, in which the Court struck down a city-wide ban on household possession of firearms,<sup>113</sup> the *McDonald* Court again rejected an attempt to outlaw handgun possession, this time striking down a state statute due to its conclusion that gun possession for self-defense was a protected right.<sup>114</sup> However, this right was promptly cabined by the Court, as remaining subject to restrictions on the manner of possession.<sup>115</sup> Though recent Second Amendment jurisprudence may call into question a state-based attempt at strict firearm prohibitions, it should not be read to undermine the constitutionality of Florida’s existent gun-control safe storage measures, which are permissible “manner” restrictions.<sup>116</sup>

Given the judicially and statutorily circumscribed scope of the Second Amendment, relying on the right to keep and bear arms as a valid justification for the Florida Privacy of Firearm Owners Act is subject to two fatal infirmities. While the Second Amendment right to arms remains alive and well, those rights are unaffected by the Act in question—and nevertheless, the health, safety, and welfare of the patients ought to trump any Second Amendment questions. First, the physicians’ mere inquiries and recording of patients’ firearm ownership

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<sup>109</sup> *Sorrell*, 131 S. Ct. at 2762.

<sup>110</sup> *Id.*

<sup>111</sup> *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3034 (2010) (quoting *Duncan v. LA.*, 391 U.S. 145, 149 (1968)).

<sup>112</sup> *McDonald*, 130 S. Ct. at 3042.

<sup>113</sup> *D.C. v. Heller*, 554 U.S. 570 (2008).

<sup>114</sup> *McDonald*, 130 S. Ct. at 3036.

<sup>115</sup> *Id.* at 3047 (reinforcing the idea that holding the states as subject to the Second Amendment “does not imperil every law regulating firearms” and should not be read to “cast doubt on [] longstanding regulatory measures.”).

<sup>116</sup> *See id.* “Safe Storage of firearms required,” requiring that a person who knows or reasonably should know that a minor is likely to gain access to their firearms, must keep the firearms in a “securely locked box or container” or to employ a trigger lock. Failure to comply is a misdemeanor in the second degree. *See* FLA. STAT. § 790.174 (2012).

in their medical charts does nothing to forbid or interfere with firearm ownership. An inquiry into ownership, household possession, and safe storage of firearms are all permissible limitations on a right that has already been statutorily confined in scope by the State of Florida.<sup>117</sup> Second, the physicians themselves are not government actors, nor are they reporting any such findings to any government agency or body such that this information would have any practical effect upon an individual's right to purchase, license, or possess a firearm.

Interestingly, despite the Bill receiving the endorsement of Governor Scott, it is arguably at odds with the Tea Party's own foundational tenets. The "grassroots organization" articulates its philosophy as being "powered by activism and civic responsibility at the local level," while pushing for limited government involvement or infringement of any personal liberties.<sup>118</sup> The Act, both in theory and in its operative effect, is a government-centered burdening of health care professionals' personal right to free speech and ability to exercise their own independent best judgment in the practice of medicine. It seems at odds with the Tea Party's own Mission Statement,<sup>119</sup> for a legislature to impede doctors acting at an individualized, local level to promote the health and safety of their patients.

### III. PROPOSAL

#### *A. Recalibrating Free Speech Doctrine to Protect Listeners' Rights in the Interest of Health, Welfare, and Safety*

This Note argues that another factor ought to be incorporated into the Supreme Court's established First Amendment standard. When the content of the curtailed or chilled speech implicates the health, safety, or welfare of the would-be recipient, an additional inquiry ought to be made into the substantiality of its deprivation and the likelihood of the free exchange of such speech preventing a "substantive evil."<sup>120</sup>

This Note's proposal is neither an unjustified augmentation nor a radical break from the past evolution of First Amendment jurisprudence. An examination into the potential effect of the content of speech on one's safety isn't foreign to the First Amendment free speech inquiry. As Justice Holmes famously opined while rejecting a free speech defense for one convicted of advocacy of illegal action, the First Amendment will not protect a man who falsely shouts fire in a crowded theater if the content of his words "may bring about the substantive

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<sup>117</sup> See FLA. STAT. § 790.174 (2012).

<sup>118</sup> Mission Statement and Core Values, *supra* note 25.

<sup>119</sup> *Id.*

<sup>120</sup> *Schenck v. United States*, 249 U.S. 47, 52 (1919).

evils that Congress has a right to prevent.”<sup>121</sup>

Congress has formally recognized the danger to citizens in unfettered gun ownership, having passed numerous acts regulating firearms. One such example of congressional legislation, the Brady Handgun Violence Prevention Act, contains, among its many other restrictions, a bar on minors accessing or possessing firearms.<sup>122</sup>

Ironically, the Florida State Legislature made history in 1989, as the first state to enact safe-storage laws—later followed by over a dozen states—in the interest of protecting children from guns in the home.<sup>123</sup> The Florida Legislature enacted these gun control laws upon finding that “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.”<sup>124</sup> The existence of such a law serves as clear evidence of the State’s own willingness to burden or restrict gun ownership when it comes to a child’s safety. It further undercuts any argument by Florida that child health, safety, and welfare are not compelling interests at issue here. Indeed, physicians are doing nothing more than inquiring as to whether their patients are aware of, and complying with, Florida State Law.

Moreover, Florida’s own Constitution injects a statutory qualification on the rights of gun ownership, emphasizing that such a right is not absolute. The present text of the Florida Constitution states “[t]he right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed, *except that the manner of bearing arms may be regulated by law.*”<sup>125</sup>

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<sup>121</sup> *Schenck v. United States*, 249 U.S. 47, 52 (1919) (rejecting a First Amendment defense for a World War I protestor convicted under the 1917 Espionage Act for printing and circulating a tract in opposition to the draft, as advocacy of illegal action). Although this concept owes its origin to *Schenck*, the “clear and present danger” test remained somewhat amorphous until 1969, when the Supreme Court pronounced that advocacy of illegal action meant speech “directed to inciting or producing imminent lawless action and is likely to incite or produce such action.” *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). However, in 1978, the Court again addressed “Mr. Justice Holmes’ test,” explaining that it cannot be applied mechanically, but instead requires “a court to make its own inquiry into the imminence or magnitude of the danger said to flow from the particular utterance.” *Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 842–43 (1978).

<sup>122</sup> 18 U.S.C.A. § 922 (x)(1)(2).

<sup>123</sup> MARK V. TUSHNET, *OUT OF RANGE: WHY THE CONSTITUTION CAN’T END THE BATTLE OVER GUNS* 99 (2007).

<sup>124</sup> FLA. STAT. § 790.174 (2012) (requiring that a person “who knows or reasonably should know that a minor is likely to gain access to the 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 or shall secure it with a trigger lock”).

<sup>125</sup> FLA. CONST. Art I, § 8(a) (2008) (emphasis added).

The State, in its defense of the statute, quietly pronounced in a footnote that the right to “keep” arms is the “primary constitutional right at issue in this litigation.”<sup>126</sup> As such, this Note would be remiss to ignore the Second Amendment argument percolating beneath the surface of this legal controversy.

As it stands now, such laws promoting safe gun storage alone may be insufficient to protect the populace due to the difficulty and ineffectiveness of enforcing compliance with such laws—violations only come to light after some horrific accident.<sup>127</sup> Likewise, a doctor truly concerned with a patient’s best interests would certainly prefer to prevent a firearm-related tragedy, rather than be faced with the task of treating its victim after-the-fact.<sup>128</sup> Recalling that First Amendment jurisprudence categorically rejects the use of free speech as a defense to the advocacy of illegal action, the Court should embrace the doctors’ advocacy of patients’ lawful adherence to their gun storage laws—a course of conduct in which the State has a statutorily-proscribed, vested interest.

*B. Supreme Court Jurisprudence Dealing with Past Statutes Burdening Listeners’ Access to Valuable Information*

This Note advocates further protection of, and judicial inquiry addressing, the *listener’s* right to receive information<sup>129</sup>—depending upon the value of the information to health, safety, or welfare—as a possible countervailing factor against the government’s requisite “compelling interest.”

In *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.* the Supreme Court struck down a state statute that forbid licensed pharmacists from advertising or disclosing to the consuming public the price of prescription drugs.<sup>130</sup> The Court recognized the constitutionally cognizable rights of the *listener*, articulating that First Amendment protection extends to “the communication, to its source and to its recipients both.”<sup>131</sup> This

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<sup>126</sup> Response of Defendants to Motion for Preliminary Injunction, *Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367 (S.D. Fla. 2011) (No. 11-cv-22026), 2011 WL 4074928.

<sup>127</sup> TUSHNET, *supra* note 123, at 99.

<sup>128</sup> Plaintiff Doctor Schaechter asserted in the Complaint that “anticipatory safety guidance regarding firearms” could potentially prevent gun-related tragedies in the home and that many parents follow her advice in the interest of protecting their children. Complaint for Declaratory and Injunctive Relief at 22, *Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367 (S.D. Fla. 2011) (No. 11CV22026), 2011 WL 2177374.

<sup>129</sup> Laurent Sacharoff, *Listener Interests in Compelled Speech Cases*, 44 CAL. W. L. REV. 329, 382–83 (2008) (arguing for the protection of “listener’s interests in hearing speech” as a sufficient justification for First Amendment rights in the context of compelled-disclosure cases).

<sup>130</sup> *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748 (1976).

<sup>131</sup> *Id.* at 756.

expanded the reach of First Amendment protection to include the right to “receive information and ideas,” underscoring the fact that freedom of speech “necessarily protects the right to receive.”<sup>132</sup>

The Supreme Court in *Virginia State Board of Pharmacy* went so far as to include, albeit in a footnote, that in First Amendment cases when the recipients have a “great need” for the information being suppressed, it would make their case stronger, rather than weaker.<sup>133</sup> While the Court did not pursue this line of reasoning further within the body of the opinion, its inclusion and acknowledgement indicates a willingness to evaluate the need—or value—of the information to the recipient within the analysis. Further, the rights of the would-be recipient are no less infringed given that one could potentially *ask for* the information or speech that the statute chilled.<sup>134</sup>

Another Virginia statute was struck down in the seminal Supreme Court decision of *National Association for Advancement of Colored People (NAACP) v. Button*, a civil-rights era case decided in 1963.<sup>135</sup> At issue was Chapter 33 of the Code of Virginia, which forbade “the improper solicitation of any legal business or professional business,” which was construed by the Virginia Supreme Court of Appeals as applicable to the NAACP’s “activities.”<sup>136</sup> Those “activities,” in reality, amounted to assisting and encouraging minorities to pursue anti-discrimination litigation for the purpose of not only vindicating the legal rights of its members, but also aiming to advance a marginalized group through access to the judicial system.<sup>137</sup> The Code provision was challenged by the NAACP under the Fourteenth Amendment’s due process guarantee and was declared unconstitutional for its fatal flaws of over-breadth and vagueness, and improperly burdening the freedoms of expression and association.<sup>138</sup> The Court declared that the NAACP staff and attorneys, ostensibly acting in violation of Chapter 33, were protected under the First and Fourteenth Amendments.<sup>139</sup>

Under the proposed value-of-information analysis, the Court’s decision would have articulated a cognizable right for the NAACP’s would-be litigants, the recipients of the organization’s references, guidance and legal assistance, to receive such a valuable form of

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<sup>132</sup> *Id.* at 757 (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762–63 (1972)); *see also* *Griswold v. Connecticut*, 381 U.S. 479, 482 (1965) (“The right of freedom of speech and press includes not only the right to utter or to print but . . . the right to receive.”).

<sup>133</sup> *Id.* at 757 n.15.

<sup>134</sup> *Id.* (explaining that “[w]e are aware of no general principle that freedom of speech may be abridged when the speaker’s listeners could come by his message by some other means, such as seeking him out and asking him what it is”).

<sup>135</sup> *NAACP v. Button*, 371 U.S. 415 (1963).

<sup>136</sup> *Id.* at 419.

<sup>137</sup> *Id.* at 431.

<sup>138</sup> *Id.* at 432, 437.

<sup>139</sup> *Id.* at 437.

speech. Instead, the Court in a broader, largely policy-based discussion recognized the value of the NAACP's activities to an unrepresented minority with otherwise limited access to the court system, and saw that Chapter 33 was a potential "weapon of oppression," implicating "the civil rights of Negro citizens."<sup>140</sup> Here, while the decision rested upon the doctrines of vagueness and over-breadth, the substantial interest burdened by the State was the *welfare* of these would-be litigants. Therefore, the cognizable harm wasn't limited to the NAACP staff and its lawyers being silenced and excluded from litigation-assistance. This Note proposes a formal recognition, incorporation, and weighing of the value of the communicated information—and the potential harm inherent in its denial—to the welfare of the individual recipients as well as the welfare of the community as a whole.

In *Texans Against Censorship, Inc. v State Bar of Texas*, a non-profit company and a group of attorneys sought declaratory relief under the First Amendment against the enforcement of Texas State disciplinary rules that restricted attorney advertising and communications, arguing that the overly broad, ambiguous statutory language chilled non-commercial attorney speech, such as newsletters, informative advertisements, and political communications.<sup>141</sup> While the District Court chose to adopt a narrower reading of the statute, it admitted that some communications from the plaintiffs, such as an informative newsletter to the community containing articles implicating "public health and safety" might now be questionable under the new law.<sup>142</sup> The District Court refused to analytically separate this valuable, non-commercial speech from its commercial aspect, ultimately upholding the vast majority of the challenged rules and regulations as constitutional.<sup>143</sup> But had the court given substantive, analytic weight to the public's interest in receiving such potentially valuable information, the government's purported interest in regulating attorney speech would be significantly undercut.

The Ninth Circuit has shown solicitude for this analysis, particularly in *Conant v. Walters*, a 2002 decision affirming an injunction barring enforcement of a federal drug statute against physicians who recommend medicinal marijuana within the context of a bona-fide doctor-patient relationship.<sup>144</sup> Physicians and physicians' groups, as well as a patients' organization and individual patients,

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<sup>140</sup> *Id.* at 434–36.

<sup>141</sup> *Texans Against Censorship, Inc. v. State Bar of Texas*, 888 F. Supp. 1328 (E.D. Tex. 1995).

<sup>142</sup> *Id.* at 1346.

<sup>143</sup> *Id.*

<sup>144</sup> See *Conant v. Walters*, 309 F.3d. 629, 636 (9th Cir. 2002) (recognizing that the government regulations in question "strike at core First Amendment interests of doctors *and patients*") (emphasis added).

sought the injunction, each claiming injury.<sup>145</sup> In affirming the injunction, the majority opinion focused on the First Amendment freedom of speech interest and the inherent need for trust in the doctor-patient relationship, reflected in the common law doctrine of doctor-patient privilege.<sup>146</sup>

The crux of the *Conant* opinion, however, examined the burden at issue from a particular viewpoint—the doctor’s recommendation, rather than the interest of the patient as recipient.<sup>147</sup> Judge Kozinski’s concurrence reconfigured the analysis by recognizing that the real interest-at-issue belonged to the patients as the would-be recipients and the State (when facing a federal statute), rather than the physicians.<sup>148</sup>

This additional examination, lending weight to the would-be listener’s interest in unrestricted reception of valuable information, might even have been enough to shift the result of the 1991 Supreme Court case of *Rust v. Sullivan*.<sup>149</sup> In a 5–4 decision, the Court upheld regulations promulgated by the Secretary of Health and Human Services denying any Title X funding—intended to provide federal funding for family-planning services<sup>150</sup>—to a health care provider, private or otherwise, that discusses, provides counseling or gives referrals for abortion, even upon a specific request from the patient herself.<sup>151</sup> These restrictions were challenged under the First and Fifth Amendments by grantees and doctors, suing both on their own behalf and their patients.<sup>152</sup> The Court upheld the regulations as a permissible condition placed upon the health care providers, who are “voluntarily employed” under the Title X federal funds.<sup>153</sup> However, if the analysis shifts to the perspective of the interests of patients who visit these clinics, and the value of the communication to them, the result arguably kaleidoscopically changes. The governmental restriction of poor Title X

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<sup>145</sup> *Id.* at 633.

<sup>146</sup> *Id.* at 636–37. The court also recognized that “an integral part of the practice of medicine is the communication between a doctor and a patient. Physicians must be able to speak frankly and openly to patients.” *Id.* at 636.

<sup>147</sup> *Id.* at 637–38.

<sup>148</sup> *Id.* at 640.

<sup>149</sup> *Rust v. Sullivan*, 500 U.S. 173 (1991).

<sup>150</sup> The language of Section 1008 of Title X of the Public Health Service Act reads that “[n]one of the funds appropriated under this subchapter shall be used in programs where abortion is a method of family planning.” See 42 U.S.C. § 300a-6. Eighteen years later, in 1988, the Secretary promulgated these new regulations, interpreting the statute to mean a “Title X project may not provide counseling concerning the use of abortion as a method of family planning or provide referral for abortion.” 42 CFR § 59.8(a)(1) (1989). Further, a Title X funded-project may not include a health care provider “whose principal business is the provision of abortions” on any furnished referral list. 42 CFR § 59.8(a)(3).

<sup>151</sup> See *Rust*, 500 U.S. at 180.

<sup>152</sup> *Rust*, 500 U.S. at 181.

<sup>153</sup> The majority decision hinges upon the fact that the health care professionals are essentially “employees” of the government and therefore their freedom of speech may be permissibly abridged within the confines of their Title X employment. *Id.* at 198–99.

clinics patients' access to valuable and pertinent medical information implicates women's health, safety, and welfare. As the dissent articulated, the suppressed information is of "vital importance to the listener;" conversations which unfold between a doctor and patient often surround vital, health-related decisions which require patients to have confidence and trust in their physician's skill and judgment.<sup>154</sup> In fact, this Note's proposal is not irreconcilable with the majority reasoning in *Rust*, and if infused into the analysis, could be enough to tip the balance away from the government interest.

Likewise, in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the State Statute at issue compelled a physician to inform patients of the risks associated with abortion and to provide information on alternatives, whether the patient requested it or not.<sup>155</sup> A plurality of the Supreme Court upheld the statutory scheme against a challenge mounted on behalf of physicians and abortion clinics,<sup>156</sup> rather than any would-be patients. Nevertheless, the Court made a reasoned inquiry into "the woman's interest," but recognized that abortion is a unique medical procedure with far-reaching implications for others, and society in general, beyond the individual's own choice.

Further, in the seminal 2010 Supreme Court decision *Citizens United v. Federal Election Commission*,<sup>157</sup> the majority opinion lent support to the listeners' interests perspective on burdened speech,<sup>158</sup> striking down a regulation that forbid corporations from advocating for a candidate within thirty days before a primary and sixty days before a general election. The Court rejected the governmental suppression of corporations' speech, predicated on the assumption that such a restriction may prevent "voices and viewpoints from reaching the public."<sup>159</sup> The Court's analysis focused on the constitutional evil in government attempts to prevent the listening public from freely receiving information from certain sources or to control what the public may see or hear.<sup>160</sup>

While the Florida Statute at issue does not forbid patients at their own behest from seeking out advice or counseling on firearm safety from their doctors, the potential deprivation of such beneficial speech nevertheless ought to constitute a cognizable injury to the would-be listener. As the Supreme Court had explained in the past, the free flow

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<sup>154</sup> *Id.* at 218.

<sup>155</sup> *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992). The challenged provisions stem from the amended Pennsylvania Abortion Control Act of 1982. *See* 18 PA. CONS. STAT. § 3203–20 (1990).

<sup>156</sup> *See Casey*, 505 U.S. at 845.

<sup>157</sup> *Citizens United v. Fed. Election Commission*, 130 S. Ct. 876 (2010).

<sup>158</sup> Kathleen M. Sullivan, *Two Concepts of Free Speech*, 124 HARV. L. REV. 143, 174 (2010).

<sup>159</sup> *Citizens United*, 130 S. Ct. at 907.

<sup>160</sup> *Id.* at 908.



of information “has great relevance in the fields of medicine and public health, *where information can save lives.*”<sup>161</sup>

*C. Theories, Justifications, and Rationales Underlying  
Freedom of Speech*

One of the classic theories for why we regard the freedom of speech as a fundamental right worth protecting is the argument that it facilitates the discovery of truth through the exposition of conflicting ideas,<sup>162</sup> even when the listener does not initially welcome the words. Justice Oliver Wendell Holmes famously argued for this theory in a dissenting Supreme Court opinion, referring to this open exchange as the “marketplace of ideas.”<sup>163</sup> Erwin Chemerinsky has suggested that John Stuart Mill also supported this explanation when he wrote that the “peculiar evil of silencing the expression of an opinion is that it is robbing the human race . . . —those who dissent from the opinion, still more than those who hold it.”<sup>164</sup> That rationale reinforces this Note’s proposal, in recognizing the undeniable and unquantifiable inherent value of certain speech, in particular for its intended audience. A pronounced inquiry into the benefit of the speech to the audience finds significant support in this foundational theory of First Amendment protection. As such, regardless of possible patients’ disagreement about a gun-safety dialogue with their health professionals, the marketplace of ideas suggests the exchange itself has value.

The argument for giving due consideration to the listeners’ interest receives further support from the “liberty theory” justification for freedom of speech, which argues that respect for an individual’s autonomy necessitates freedom from government interference.<sup>165</sup> The listener has a right to the free flow of information and should not be prevented from “receiving or using otherwise available information.”<sup>166</sup> This liberty theory supports the view that speakers and listeners have separable constitutional claims, depending upon whom the government restricts.<sup>167</sup>

Moreover, Supreme Court free speech jurisprudence has created

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<sup>161</sup> *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011) (emphasis added).

<sup>162</sup> CHEMERINSKY, *supra* note 22, at 926–27.

<sup>163</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>164</sup> CHEMERINSKY, *supra* note 22, at 927 (quoting JOHN STUART MILL, ON LIBERTY 76 (1859)).

<sup>165</sup> The liberty theory argument rests upon “respect for individual integrity and autonomy” as “the foundation of first amendment freedom of speech.” EDWIN C. BAKER, HUMAN LIBERTY & FREEDOM OF SPEECH 59 (1989); *see also* Sullivan, *supra* note 158, at 143, 145 (discussing that under a model of free speech founded on the interest in political liberty, the government should not interfere with individual decision-making, instead allowing for the free exchange—and evaluation—of ideas).

<sup>166</sup> *Id.* at 68.

<sup>167</sup> *Id.*

another compelling distinction—at least in defamation cases involving private figures—between speech implicating “matters of public concern” as opposed to “matters of purely private concern,” the former of which deserving greater protection.<sup>168</sup> The Court has gone so far as to see such speech as having a higher “constitutional value.”<sup>169</sup> Chemerinsky suggests that one way to approach this question of public concern involves determining what “people, in their enlightened best interest, should want to know about.”<sup>170</sup> While such a determination might sometimes prove problematic for courts,<sup>171</sup> in situations implicating the health, safety, and welfare of the listener or the listener’s family—under which gun safety would certainly qualify—the question should be beyond peradventure.<sup>172</sup>

Another categorical delineation cabins certain speech as either of high or low value depending upon the underlying subject matter implicated.<sup>173</sup> High value speech, which requires the utmost protection, encompasses religion, political speech, and the creative arts, whereas low-value speech—accordingly entitled to less protection—includes commercial speech and sexually-oriented speech.<sup>174</sup>

#### *D. Listeners’ Interests Examined Through the Lens of Informed Consent*

The value this Note places upon the conversations and free exchange of gun-safety information is reinforced when viewed through the lens of the doctrine of informed consent.<sup>175</sup> One rationale for the necessity of informed patient consent operates under the assumption that information conveyed directly to patients on an individual level by

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<sup>168</sup> *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749 (1985).

<sup>169</sup> *Id.* at 761.

<sup>170</sup> CHEMERINSKY, *supra* note 22, at 1053.

<sup>171</sup> *Id.*

<sup>172</sup> The physician plaintiffs opposing this statute also offered anecdotal evidence of the interest and receptiveness of many of their patients to inquiries about firearm safety. Plaintiff Doctor Wollschlaeger asserted that his patients and parents have appreciated learning how they can minimize risks of injury, and plaintiff Doctor Schaechter added that, in her experience, many parents engage her in discussion and do in fact heed her advice. Complaint for Declaratory and Injunctive Relief at 21–22, *Wollschlaeger v. Farmer*, 814 F. Supp. 2d (S.D. Fla. 2011) (No. 11CV22026).

<sup>173</sup> *See, e.g.*, CHEMERINSKY, *supra* note 22, at 986. Professor Chemerinsky maintains that these low-value categories of protected speech are essentially drawn from value judgments made by the Supreme Court. *Id.* at 987.

<sup>174</sup> *Id.* at 986.

<sup>175</sup> *See, e.g.*, *Karp v. Cooley*, 493 F.2d 408, 419–20 (5th Cir. 1975) (explaining that the long-standing common law doctrine of informed consent requires a patient be given the chance to make a knowledgeable and informed decision, and rests upon respect for the patient as a free individual). The doctrine has been applauded as positively increasing doctor-patient communication as well as the individual’s sense of autonomy and integrity. *See Susan K. Gauvey et al., Informed and Substitute Consent to Health Care Procedures: A Proposal for State Legislation*, 15 HARV. J. ON LEGIS. 431, 438 (1978).

their physicians will influence their personal decisions.<sup>176</sup> Informed consent underscores the notion that the patient is the ultimate arbiter, having had unfettered access to all reasonably relevant information.<sup>177</sup> Such communications, to function optimally, require participatory, two-way conversations between the doctor and his patient.<sup>178</sup> Doctors, as information conveyors, are in a unique position of respect and authority,<sup>179</sup> potentially lending added credibility and effectiveness<sup>180</sup> to the exchange of important gun-safety information and guidance.

By intruding on the long-established sanctity of the patient-physician relationship, the Act, while purporting to protect patient privacy, actually reduces patient autonomy, through a State-mandated reduction of information available for transmission between doctor and patient.<sup>181</sup> This statutory imposition chips away at an individual patient's own decision-making authority,<sup>182</sup> which is in and of itself a cognizable interest worth protecting.

Notably, the independent development of both informed consent law and the First Amendment reflect a gradual rejection of a paternalist model of government functions over time, and towards an embrace of personal autonomy.<sup>183</sup> Just as the government ought not interfere with communications between private entities under an anti-paternalistic justification for the free speech doctrine by allowing for individuals to arrive at opinions without censorship,<sup>184</sup> the doctrine of informed consent likewise reflects a respect for individual autonomy and unfettered free choice. We value free speech not only because we wish to protect the rights of the speaker, but also because we recognize a value to the listener, and to society as a whole, from access to ideas and

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<sup>176</sup> Wendy E. Parmet & Jason A. Smith, *Free Speech & Public Health: A Population-Based Approach to the First Amendment*, 39 LOY. L.A. L. REV. 363, 376–77 (2006).

<sup>177</sup> See generally *McQuitty v. Spangler*, 410 Md. 1, 20–21 (2009).

<sup>178</sup> R. S. DOWNIE, CAROL TANNAHILL & ANDREW TANNAHILL, *HEALTH PROMOTION: MODELS AND VALUES* 48 (2d ed. 1996).

<sup>179</sup> *Id.*

<sup>180</sup> Studies suggest that information coming from doctors on an individual-level can influence their patients' decisions. See Parmet, *supra* note 176, at 376. However, the relative impact of "individually-targeted information" depends upon the relationship between doctor and patient and the level of "influence, trust, and expertise associated with the speaker." *Id.* at 377. In sum, these assertions underscore of the value of gun-safety information to the would-be listeners, who may no longer receive such unrestricted counseling from pediatricians whom they trust.

<sup>181</sup> Lindsey Murtagh & Matthew Miller, *Censorship of the Patient-Physician Relationship: A New Florida Law*, 36 J. AM. MED. ASS'N 1131 (arguing that the law amounts to "mandated prioritization" as "[t]his censorship—heavily lobbied for by the National Rifle Association—essentially requires clinicians to put political groups' interests ahead of patients' interests.").

<sup>182</sup> *Id.*

<sup>183</sup> CHEMERINSKY, *supra* note 22, at 929.

<sup>184</sup> See Sullivan, *supra* note 158, at 155–58 (discussing the liberty model for free speech through the Supreme Court's seminal decision in *Citizens United v. Federal Election Commission*). Sullivan interprets the majority opinion as supporting a liberty model, as the Court shapes it into "a negative theory that focuses on the interests of listeners." *Id.* at 174.

information. As such, in a context such as this one, where the value is substantial, it ought to play an active role in the Court's First Amendment analysis.

*E. Applicability and Implications Beyond the State of Florida*

Although this Note addresses the controversy as it stands in Florida, similar legislation has been proposed in five other states thus far. In 2006, proposed legislation almost identical to the Florida Act was introduced in the Virginia<sup>185</sup> and West Virginia State Legislatures,<sup>186</sup> both of which failed at the time. The Virginia Bill was approved by the House of Delegates, 88 to 11, but was subsequently defeated in a Senate committee by a mere three votes.<sup>187</sup> At that time, an article appeared in the official journal of the American Academy of Pediatrics warning that bills of this ilk were "likely to reappear" and this may be a first of many future attempts.<sup>188</sup> As predicted, an almost-identical bill was introduced to the House Judiciary Committee in West Virginia during the 2011 session, although it did not survive beyond the House.<sup>189</sup> In response, the NRA's Institute of Legislative Action promised that the NRA, along with "law-abiding gun owners," will "revisit [this] important issue[] again in the future."<sup>190</sup> A similar bill sponsored by the NRA in 2011<sup>191</sup> was introduced to the House of Representatives in Alabama<sup>192</sup> and North Carolina.<sup>193</sup> Likewise, in Minnesota, a bill was introduced in 2011 but failed to move out of Committee prior to adjournment of the

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<sup>185</sup> The Virginia Bill would have established it as "unprofessional conduct" for medical professionals to make an oral or written inquiry regarding patients' possession, ownership, or storage of firearms for the purpose of patient counseling or gathering statistics. See "HB1531: Unprofessional conduct; practice of the healing arts," Professions and Occupations, 2006 Session Summary, Virginia Division of Legislative Services, at 152.

<sup>186</sup> The West Virginia version would have amended Section 30-3-14 of the Code of West Virginia, dealing with discipline of physicians, again making "oral or written inquiry of a patient about possession, ownership or storage of firearms" an actionable offense, potentially triggering a disciplinary proceeding. See H.B. 4845, West Virginia Legislature, 2006 Sessions.

<sup>187</sup> See 2006 Session Summary, *supra* note 185.

<sup>188</sup> Jon S. Vernick et al., *Counseling About Firearms: Proposed Legislation Is a Threat to Physicians and Their Patients*, 118 PEDIATRICS 2168 (2008).

<sup>189</sup> HB 3085, 80th Leg., 2nd Sess. (W.V. 2011)

<sup>190</sup> *West Virginia: 2011 Legislative Wrap-Up*, NRA-ILA: INSTITUTE FOR LEGISLATIVE ACTION (Sept. 21, 2011), <http://www.nraila.org/legislation/state-legislation/2011/9/west-virginia-2011-legislative-wrap-u.aspx?s=privacy&st=&ps=>.

<sup>191</sup> *Three NRA-Sponsored Bills are on the Move in the Alabama Legislature*, NRA-ILA: INSTITUTE FOR LEGISLATIVE ACTION (April 25, 2011), <http://www.nraila.org/legislation/state-legislation/2011/4/three-nra-sponsored-bills-are-on-the-move.aspx?s=privacy&st=&ps=> (last visited Feb. 12, 2012).

<sup>192</sup> HB 516, Alabama Leg., 2011 Session. The Bill passed the House Public Safety and Homeland Security Committee before ultimately being pulled due to protests from physicians. See NRA-ILA, *supra* note 190.

<sup>193</sup> SB 765, "No Firearms Questions During Medical Exams," North Carolina Senate, 2011 Session.

House Legislative Session.<sup>194</sup>

Indeed, in January of 2013, President Obama announced 23 Executive Actions aimed at reducing gun violence, one of which will “[c]larify that the Affordable Care Act does not prohibit doctors from asking their patients about guns in their homes.”<sup>195</sup> Shortly thereafter, Republicans reintroduced bills forbidding such inquiries in to the 2013 legislative sessions of the Oklahoma Senate<sup>196</sup> and South Carolina House of Representatives.<sup>197</sup>

As the 2006 article predicted, “the NRA has a history of very successful multistate legislative strategies.”<sup>198</sup> After the Virginia and West Virginia bills failed, the authors cautioned “health care providers should remain prepared to respond to similar state legislative initiatives in the future,” recognizing the possibility of an emboldened NRA spreading its lobbying efforts.<sup>199</sup> As such, given the powerful political forces at work, while Florida was the first state to enact this legislation, it may not be the last.

#### CONCLUSION

The Supreme Court’s current First Amendment right of free speech jurisprudence subjects any governmental burdening of speech based upon content to strict scrutiny. This analysis limits the examination to whether the state has proven a compelling interest and has narrowly drawn the statute, as necessary to the solution.<sup>200</sup> Absent from this analysis is any examination into the potential value of speech to the would-be listener, who is effectively denied information otherwise communicated. In the case of speech possessing some measure of quantifiable value to the listener’s health, safety, or welfare, the detriment to the recipient ought to play an active role in the constitutional standard.

Given the statistical support buttressing the medical community’s assertion that household gun ownership coupled with improper storage, particularly when not locked or unloaded, poses a major, quantifiably proven danger to health and safety of members of the household, the deprivation of such information ought to actively figure into a court’s analysis of the constitutionality of the Privacy of Gun Owners’ Act.

While the physician plaintiffs rightly won their permanent

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<sup>194</sup> H.F. 1717, Minnesota, 87th sess. (2011)

<sup>195</sup> Press Release, Now is the Time: Gun Violence Reduction Executive Actions, The White House, Jan. 16, 2013, [http://www.whitehouse.gov/sites/default/files/docs/wh\\_now\\_is\\_the\\_time\\_actions.pdf](http://www.whitehouse.gov/sites/default/files/docs/wh_now_is_the_time_actions.pdf).

<sup>196</sup> HB 2022, Oklahoma Leg., 2013 Session.

<sup>197</sup> H. 3416, South Carolina Leg., 2013 Session.

<sup>198</sup> See Vernick, *supra* note 188.

<sup>199</sup> *Id.*

<sup>200</sup> See, e.g., *Brown v. Entm’t Merch. Ass’n*, 131 S. Ct. 2729, 2738 (2011).

injunction based upon facial unconstitutionality at the district court level, the outcome on appeal in the Eleventh Circuit remains unknown. Formally adopting the additional factor proposed by this Note into the strict scrutiny standard for content-based suppression of free speech implicating the listener's health, safety, or welfare would, in effect, make the District Court's ruling appellate-proof, while simultaneously providing necessary reinforcement against possible, future state legislative attempts at First Amendment encroachment of this ilk.