Written by **Bob Adelmann** on August 3, 2015

Celebrating Second Amendment Victory May Be Premature

Last Friday the NRA's Institute for Legislative Action (NRAILA) chortled that "anti-gun doctors may need to get their own blood pressure checked after the U.S. Court of Appeals for the Eleventh Circuit again upheld Florida's Firearm Owners' Privacy Act."

The ruling was the second one for the court and was decided by a three-judge panel, with one of them writing a lengthy and blistering critique of the majority opinion.

At issue is the law passed overwhelmingly in June 2011 by the state of Florida which, on the surface, seemed tame enough:

> [The law] provides that [any] licensed practitioner or facility may not record firearm ownership information in [a] patient's medical record … unless [that] information is relevant to [the] patient's medical care or safety, or safety of others….
>
> [It] provides that [the] patient may decline to provide information regarding ownership or possession of firearms….
>
> [It] provides for disciplinary action [fines up to $10,000 and possible loss of license to practice medicine].

Four days after the bill was signed into law by Governor Rick Scott, opponents filed suit claiming the law violated physicians' First Amendment rights. Included among the plaintiffs were the Brady Campaign and the ACLU.

A year later U.S. District Court Judge Marcia Cooke threw out the law, ruling that it "aims to restrict a practitioner's ability to provide truthful, non-misleading information to a patient … that, while perhaps not relevant to a patient's medical safety at the time, [would] inform the patient about general concerns that may arise in the future."

Florida, with the help of the NRAILA, appealed to the 11th Circuit which reversed Cooke's decision, raising the decibel level considerably, including at the editorial desk of the *New York Times*. In an opinion piece entitled "Censorship in Your Doctor's Office," they said:

> Opponents of Florida's law, including the Brady Campaign to Prevent Gun Violence, believe that asking patients about gun ownership is a legitimate means of promoting public health by giving doctors the opportunity to share firearms-safety tips.
>
> Proponents of the law, the National Rifle Association among them, believe that whether a person owns guns is none of his doctor's business.

And then, in a remarkable admission of common sense, the editorial agreed with the NRA:

> The N.R.A. may well be right. Many patients probably prefer not to discuss their gun ownership

> with their doctor, just as others may not want to discuss their sexual activity or alcohol intake, particularly if they believe the doctor's inquiries are motivated more by a political agenda than by medical necessity. But the First Amendment generally doesn't let the government outlaw the asking of annoying questions. Instead, people can refuse to answer or decline to associate with those who insist on asking such questions.
>
> The theory behind Florida's law, by contrast, is that patients faced with questions about guns will be too cowed by their physician's power and prestige to talk back or even just find a different doctor. That's hardly a flattering view of gun owners, whom we generally believe to be made of sterner stuff.

In the original reversal of Cooke's decision, the three-member panel looked only at Florida's power to regulate professional conduct, in this case "professional speech," in order to "shield the public against the untrustworthy, the incompetent, or the irresponsible." It didn't look at either First or Second Amendment issues raised by the new law, only that "the state made the commonsense determination that inquiry about firearm ownership, a topic which many of its citizens find highly private, falls outside the bounds of good medical care to the extent the physician knows such inquiry to be entirely irrelevant to the medical care or safety of a patient."

Last month, however, the three-judge panel decided on its own to revisit its original decision, coming to the same conclusion but only after considering those First and Second Amendment issues. It decided, two to one, that the physician's First Amendment rights had to give a little to protect his patient's Second Amendment rights. It argued:

> The Act seeks to protect patient privacy by restricting irrelevant inquiry and record-keeping by physicians on the sensitive issue of firearm ownership. The Act does not prevent physicians from speaking with patients about firearms generally.
>
> Nor does it prohibit specific inquiry or record-keeping about a patient's firearm ownership status when the physician determines in good faith, based on the circumstances of that patient's case, that such information is relevant to the patient's medical care or safety, or the safety of others.
>
> Rather, the Act codifies the commonsense conclusion that good medical care does not require inquiry or record-keeping regarding firearms when unnecessary to a patient's care — especially not when that inquiry or record-keeping constitutes such a substantial intrusion upon patient privacy.
>
> Given this understanding of the Act, and in light of the longstanding authority of States to define the boundaries of good medical practice, we hold that the Act is, on its face, a permissible restriction of physician speech.

In its review of the decision, the *Harvard Law Review* concluded that the 11th Circuit panel's decision was "deeply problematic" and that if the ruling were allowed to stand "it would do more than simply permit the state to regulate a vast amount of speech with no meaningful judicial check: it would fundamentally alter a doctor's status as a professional citizen."

The dissenting judge, Circuit Judge Charles Wilson, called the majority's second rendering of the decision nothing more than a "gag order," writing:

> The holding reached today is unprecedented, as it essentially says that all licensed professionals have no First Amendment rights when they are speaking to their clients or patients in private. This in turn says that patients have no First Amendment rights to receive information from licensed

professionals — a frightening prospect.

Wilson may be overstating his objection for the sake of emphasis, but it's more than likely that the decision will be reviewed by the full 11th District Court. If the court fails to reverse (which would reinstate Cooke's original decision to vacate the Florida law), the *Times* wants the Supreme Court to accept the case for review in order to "make clear that the protections of the Second Amendment do not trump those of the First Amendment."

This would put the Supreme Court justices into a pickle when weighing which amendment carries more weight: the First Amendment guaranteeing the right to the freedom of expression, or the Second Amendment guaranteeing the right to keep and bear arms and preventing those exercising that right from being pressured into revealing that they are doing so.

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