



US Supreme Court

The Supreme Court is staying out of an interesting free speech debate about the power of school officials to discipline students for things they write or say away from school.

On February 29, the justices let stand the suspension of a Mississippi high school student who posted a rap song online that criticized two coaches over allegations they behaved inappropriately toward female students.

Student Taylor Bell recorded the song at a professional studio over winter break and then posted it on his Facebook page in February 2011. Bell sued after Itawamba Agricultural High School in Fulton, Mississippi, suspended him for seven days. Lower courts upheld the suspension, saying it made no difference where Bell made and distributed the song.

The case is *Bell v. Itawamba School Board*.

In a brief filed in December, rap performers including T. I., Big Boi and Killer Mike, urged the Court to hear the case. The rappers argued that rap music is a political and artistic juggernaut that deserves attention and First Amendment protection.

“The government punished a young man for his art—and, more disturbing, for the musical genre by which he chose to express himself,” their brief said.

The case dates back to December 2010, when several female students told a fellow student, aspiring rapper Taylor Bell, that two of their coaches were allegedly engaging in highly inappropriate sexual behavior—allegations that the girls eventually affirmed in sworn affidavits.

Convinced that any report of this misconduct to school officials would fall on deaf ears, Bell posted a rap song to Facebook and YouTube that identified the coaches by name and lambasted their behavior. Drawing on

the long tradition of social protest in rap music, as well as the profane and violent rhetoric that is common to the genre, the song takes (metaphorical) aim at the coaches.

“Looking down girls’ shirts, drool running down your mouth,” Bell sings of the coaches. “Going to get a pistol down your mouth.”

Bell, who had a nearly spotless disciplinary history, recorded the song away from school during winter break, and he never played it or performed it on campus. Nevertheless, school officials—who did not investigate or deny the allegations against the coaches—eventually learned about the song and suspended Bell, forcing him to attend an “alternative” school for six weeks. During the disciplinary process, administrators never notified police. They never bothered to search Bell’s locker.

In other words, nobody at the school appeared to believe that the song was a threat. Even one of the coaches identified in the song said he thought it was “just a rap.”

And yet after Bell appealed his punishment, arguing that his song was being misrepresented, the school board upheld his suspension on the grounds that he had “threatened, harassed, and intimidated” school employees. The school board’s decision was later upheld by the Fifth Circuit Court of Appeals in a divided opinion.

Judge Rhesa Hawkins Barksdale, writing for the majority, said the song was “incredibly profane and vulgar” and contained “numerous spelling and grammatical errors.”

“If there is to be education,” Judge Barksdale wrote, “such conduct cannot be permitted.”

A dissenting judge, James L. Dennis, said the issues addressed by Bell were exactly the sort of thing that the First Amendment was designed

to protect. “It bears mentioning,” Judge Dennis added, “that the school board has never attempted to argue that Bell’s song stated any fact falsely.” Indeed, he wrote, “four different female students submitted sworn affidavits detailing the sexual harassment they endured at the hands of the coaches.” Reported in: *New York Times*, February 29; cnn.com, February 18.

The Supreme Court declined November 9 to rule on whether the government needs a warrant to collect cellphone location information, dealing a setback to data privacy advocates.

Attorneys for Quartavious Davis, who was convicted of a string of robberies partly because of phone location data, had appealed the case after a lower court ruled against Davis. Law enforcement used records from Davis’s cellphone carrier, MetroPCS, to establish where he was during a crime spree in Florida in 2010. He was convicted and sentenced to almost 162 years in prison.

Davis’s attorneys asked a federal appeals court to throw out his conviction, arguing that collecting the cellphone location data without a warrant violated his privacy rights under the US constitution.

The Stored Communications Act allows law enforcement to use either a warrant or a court order to gather cellular location data, and in Davis’s case a court order was used. His attorneys argued the constitution required the stronger protection of a warrant.

A panel of judges in the US Court of Appeals for the Eleventh Circuit agreed in 2014, though they let the conviction stand because police had collected the data in good faith at the time. But the government then asked all the Circuit to hear the case *en banc*, and they ruled that collecting the records was constitutional.



Cellphones can be tracked based on which base stations they connect to. The technique is not as precise as GPS (Global Positioning System) but can establish a subscriber's general whereabouts at a given time.

The digital rights organization Electronic Frontier Foundation said it was disappointed that the Supreme Court declined to hear the case but that it expects the court to look at the issue soon in another case. For the moment, there is no clear legal standard on whether a warrant is required. Two federal appellate courts have ruled that no warrant was necessary, but a third appeals court said that warrants are required. That divergence of views normally is enough to create a so-called "split" in the appellate courts, which would necessitate Supreme Court intervention to resolve the conflict. But the Court of Appeals for the Fourth Circuit, which ruled in favor of privacy, set aside its decision and agreed to rehear the issue.

That means there's no split in the circuits, and courts in the majority of the nation are free to rule as they see fit on the issue.

"As the government is able to track the routes we take through our lives with greater and greater precision, the question of whether the Fourth Amendment protects this sensitive and private information is one we should all be concerned with," EFF Senior Staff Attorney Jennifer Lynch said in an emailed statement.

Cell-site tracking has become extremely important to crime fighting in the wake of the high court's 2012 ruling that police need a warrant to place GPS trackers on vehicles. Equally important, in all the cases on the cell-site location tracking, the government argues that cell-site records are not constitutionally protected. Instead, the authorities maintain that they are business records that the

telecommunications firms may hand over if the government asserts that reasonable grounds exist to believe the data is relevant to an investigation.

That position is based on Supreme Court precedent dating to the 1979 case of *Smith v. Maryland*. That case has justified the legal underpinnings for the National Security Agency's telephone metadata snooping program—the program NSA whistleblower Edward Snowden exposed.

In Davis's petition to the justices, his attorneys at the American Civil Liberties Union said that 1970s precedent is outdated.

"It is virtually impossible to participate fully in modern life without leaving a trail of digital breadcrumbs that create a pervasive record of the most sensitive aspects of our lives. Ensuring that technological advances do not 'erode the privacy guaranteed by the Fourth Amendment' requires nuanced applications of analog-age precedents," the petition said. Reported in: *PC World*, November 10; *arstechnica.com*, November 9.

It looked like the ten-year copyright clash between Google and the Authors Guild was finished when a unanimous appeals court ruled in October that the tech giant's scanning of 20 million books was fair use. But the Authors Guild has now asked the Supreme Court to reconsider the appeals court ruling, which affirmed the book scanning was "transformative" and praised Google's contribution to research and data mining.

The Guild, which represents various writers who are unhappy with the book scanning, filed the appeal December 31. The Guild doesn't want to shut down the scanning, but instead wants Google to pay copyright fees. At stake, the Guild claims, is the right of authors to determine what becomes of their works in the digital age.

In a press release the Guild argued that this is an important case for Supreme Court review because there are circuit splits in several areas of fair use law and others need clarification. The Supreme Court has not heard a fair use case in over twenty years, and the fair use law has transformed greatly in that time.

"Google copied books illegally—without permission, and because it could. It was inconvenient for it to seek permission, so it's that simple," said Mary Rasenberger, executive director of the Authors Guild and a copyright attorney.

"Its actions cannot be justified after the fact just because Google Books uses the books to provide a research service in addition to the many other uses it has made for profit."

"Even so," she added, "we're not asking for Google Books to be shut down. All we're asking is for authors to be compensated, if they wish, for the value their works bring to Google. We want to make that very clear.

"Our members are some of the biggest users of Google Books.

"It is crucial to set proper boundaries for fair use," Rasenberger continued. "If the Second Circuit's expansive view of fair use is not checked, the exception will swallow the rule in no time. We have become spoiled by the riches of a well-functioning copyright system, and so we take it for granted. Let's not now create a society that favors only sponsored or independently wealthy writers."

The decade-long copyright infringement case challenged Google for its mass digitization of millions of books, which it used, among other things, to create a search engine "Google Books." The Guild has argued that Google's scanning and mass copying project was not fair because Google simply sought to profit from use of authors' books, using the books



to enrich its search capabilities and competitive edge, and ultimately its corporate value.

Like any corporate use that merely reproduces entire works without any new copyright creation, Google should have sought permission first, the Guild contends.

A Guild victory appears unlikely given that the October ruling by the Second Circuit Court of Appeals was unanimous, and affirmed a famous earlier Supreme Court case about fair use. The top court, which accepts less than 1 percent of all appeals, may also refuse to hear the case.

On February 1, bestselling authors, book publishers, rights organizations, and copyright experts from around the world filed briefs with the Supreme Court supporting the Authors Guild's petition.

Authors and dramatists adding their names to the *amicus* brief filed include Stephen Sondheim, Margaret Atwood, Tony Kushner, J. M. Coetzee, Malcolm Gladwell, Douglas Wright, Michael Frayn, Marsha Norman, and Yann Martel. Major publishers Elsevier and Hachette were among those filing a separate brief, while other briefs came from the Copyright Alliance and the Copyright Clearance Center, among others.

"The court of appeals subordinated the very right that lies at the heart of copyright—the right to reproduce," said the publishers' brief.

The brief submitted by a group of international authors' and publishers' organizations directly questioned the lower-court ruling at the heart of the Guild's petition to the Supreme Court, stating that it "made no effort to engage in any 'case-by-case' analysis of the vast spectrum of books that Google copied cover-to-cover, nor even to categorize the different types of works involved, in order to assess the differential impact of the copying

on different categories of authors and publishers."

The brief filed by publishers posed a question fundamental to the Guild's petition: "If Google can copy every book in our great libraries, so may others, eliminating the 'exclusive right' at the heart of the incentives to create afforded by the Framers and Congress."

Joining the Copyright Clearance Center in its brief were the International Federation of Reproduction Rights Organisations, based in Brussels, and Marybeth Peters. As US Register of Copyright from 1994 through 2010, Peters helped shape copyright law—and in the process educated courts, the Congress, and the American public on its role. The copyright group's brief contends that "Google built its database by systematically copying millions of copyrighted books in their entirety." Reported in: *fortune.com*, December 31; *authorsguild.org*, December 31, February 2.

SCHOOLS Lynnville, Tennessee

A US district court judge in Tennessee ruled in late December that a Lynnville student had a constitutionally protected right to wear a pro-LGBT-rights shirt bearing the message "Some People Are Gay, Get Over It"—which her principal had difficulty getting over.

The case, *Young v. Giles County Board of Education*, was made substantially easier by the school board's decision not to bother putting up a defense, which made Judge Kevin H. Sharp's ruling a foregone conclusion. Still, portions of Sharp's opinion are worth noting for their future application in other student-speech cases.

First and most importantly, a school cannot manufacture its own "disruption" by overreacting to speech. The

Supreme Court's *Tinker* standard says that substantially disruptive speech can be banned or punished. But the judge noted that the only "disruption" was caused by the principal's own decision to humiliate Richland High School senior Rebecca Young by reprimanding her in front of a crowded school cafeteria. (The school told Rebecca's parents, by way of a disturbingly ungrammatical letter, that the shirt was proscribed to protect Rebecca from being bullied. They just didn't say that the bullying would be by the principal.)

Second, a public school can never restrict discussion of only one side of a contested issue. The judge wrote that both Principal Micah Landers and his boss, Phillip J. Wright, justified the ban on the grounds that references to LGBT rights are "sexual." But by selectively enforcing the school's prohibition on sexual messages only against gay-rights advocacy, the school crossed the constitutional line of "viewpoint discrimination."

Rebecca Young's case is reminiscent of a recent controversy in Chesnee, South Carolina, over a student's insistence on wearing a T-shirt—"Nobody knows I'm a lesbian"—that her school attempted to ban as disruptive. In both instances, it appears that students collectively shrugged at the message while school authority figures freaked out. In the South Carolina case, the school backedpedaled and rescinded the ban after acknowledging that the shirt did not in fact provoke any disruptive student reactions—only adult ones.

Just as the consensus now seems established that Confederate flag apparel can be excluded from school in anticipation of disruption, there is growing agreement that LGBT rights are fair game for debate even on school grounds during school time:



In 2008, a Florida judge struck down a Pensacola-area school's ban on logos including rainbows, pink triangles and the words "gay pride" or "GP," which students began wearing in defense of a classmate bullied for being a lesbian. In Ohio, a school district capitulated in the face of likely defeat in a First Amendment lawsuit and allowed a Waynesville high-schooler to continue wearing his "Jesus Is Not A Homophobe" T-shirt, which the district had characterized as "indecent and inappropriate in a school setting."

A Naperville, Illinois, student won the right to wear a T-shirt with the slogan "Be happy, not gay," over objections that the shirt would disrupt school activities by provoking bullying. In a contrary view that appears based on the especially harsh language of the shirt, however, a federal appeals court sided with a California high school that banned a T-shirt reading, "I WILL NOT ACCEPT WHAT GOD HAS CONDEMNED . . . HOMOSEXUALITY IS SHAMEFUL," which the judges classified as a "verbal assault" intruding on the rights of LGBT students to feel safe. Reported in: splc.org, December 31.

COLLEGES AND UNIVERSITIES Fairfax, Virginia

A federal district court has struck down a student conduct policy that allows a Virginia university to punish students for speech that causes distress or emotional discomfort.

The US District Court for the Eastern District of Virginia ruled against a George Mason University speech code, arguing the policy was overbroad and would allow the university to punish students for speech that is offensive or disagreeable.

Under student conduct policy 2013.9.B, which has now been

changed, the university identified a true threat, in part, as communicating "in a manner likely to cause causes [*sic*] injury, distress, or emotional or physical discomfort."

A former George Mason student filed a lawsuit after he was expelled from the university in December 2014 for violating two student conduct regulations. In particular, the university found the unnamed former student to be in violation of policies relating to threats and sexual misconduct.

The suit claims the university deprived "John Doe" of his rights without due process and violated his free speech rights. In the opinion, authored by US District Court Judge T.S. Ellis III, the court granted summary judgment to the student in both claims.

School officials found John Doe violated a student policy against threats when he sent a text message to his former girlfriend saying he would buy a gun and shoot himself in the chest if she did not respond, according to the opinion.

Ellis wrote that although the first part of policy 2013.9 prohibits true threats—which are not protected by the First Amendment—the second part of the policy could block speech that is merely disagreeable or offensive, and thus constitutionally protected. That part of the policy does not include a "reasonable person" limitation—meaning a reasonable person must find the speech threatening—and uses vague terms such as "distress" and emotional discomfort to describe speech that could be prohibited.

Ellis wrote that the school's policy is so broad that it would allow the university to punish a student for racist comments found offensive by another student. Brent Ericson, an assistant dean of students and director of the Office of Student Conduct, had

said in a deposition that a student who says that African Americans should not be allowed to enroll at the university could be punished under the code if an African American student is distressed by the comments.

"Yet, it is well established that racist speech, even on a university campus, is constitutionally protected," Ellis wrote.

Ellis cited the US Court of Appeals for the Fourth Circuit case *Iota XI Chapter Of Sigma Chi Fraternity v. George Mason University*, in which the appeals court ruled that while a university has an interest in providing "an educational environment free of discrimination and racism," they should do so without silencing viewpoint-based speech.

In the landmark 1969 US Supreme Court case *Tinker v. Des Moines Independent Community School District*, the Court ruled that student speech must "materially and substantially interfere" with a school's educational operation if it is to be censored. George Mason's defense argued that the student conduct policy was justified under the *Tinker* standard.

But the *Tinker* case applied to K-12 schools and Ellis wrote that there are "many differences" between colleges and public secondary schools and elementary schools.

"In short, controversial and sometimes offensive ideas and viewpoints are central to the educational mission of universities," Ellis wrote, summarizing the Fourth Circuit case *Kim v. Coppin State College*. "It follows that university students cannot thrive without a certain thickness of skin that allows them to engage with expressions that might cause 'distress' or 'discomfort,' which is precisely the type of speech that Code 2013.9B seeks to suppress."

The opinion said that a similar policy was already deemed unconstitutional in *McCauley v. University of the*



Virgin Islands, a case decided by the Court of Appeals for the Third Circuit in 2010. In the case, the Third Circuit found the university's speech code, which restricts speech that may "frighten, demean, degrade, or disgrace," was overbroad and covered much more speech than necessary to cause a threat.

Similar to University of the Virgin Islands' policy, George Mason's policy uses subjective terms and covers all speech, Ellis wrote—something that would cause students to speak less for fear of violating the policy. The plaintiff's text message, Ellis wrote, was not classified as a true threat because it did not aim to harm somebody else or to cause a panic.

School administrators also argued the threat of suicide required the university to take action due to its responsibility to the safety and well-being of students. However, the judge found that the discipline was based on the distress caused to the recipient of the message, not on Doe's intent to harm himself.

The judge directed the university and John Doe to find a "proper remedy" to resolve the case. Reported in: splc.org, March 4.

SURVEILLANCE Washington, DC

A federal judge has ordered an immediate halt to the National Security Agency's controversial phone records collection program, ruling that the program violates the Constitution.

US District Court for Washington, DC, Judge Richard Leon's decision to end the collection was a victory for the plaintiffs in the case and for civil liberties groups who have been asserting that the program was unconstitutional since it was first exposed by Edward Snowden in 2013. But while the ruling is important in principle for what it says about the legality

of the program, its practical significance is minimal since it only applies to the two plaintiffs who brought suit against the NSA—Larry Klayman, a conservative legal activist, and his business.

Even that victory is minor since the NSA's collection program was already set to end on November 29. The ruling is significant anyway, however, because it's so rare that a judge ever enjoins the NSA from spying. This decision could set a precedent for other cases, according to David Greene with the Electronic Frontier Foundation.

"In effect, it only requires them to stop doing very little of what they do," says Greene, senior staff attorney and civil liberties director for the Electronic Frontier Foundation. "But the opinion is very broad-reaching. And because the NSA makes many of the same arguments to justify all of its mass spying programs, it's really significant when a judge rejects them."

Last May, different judges with the Second Circuit Court ruled that the program is illegal. Following that ruling, lawmakers passed a bill to halt the collection program, but they gave the NSA a 180-day grace period to replace it with a new system. Under that new system, phone companies will retain customer call records instead. The government will still be able to access the records by obtaining a court order from the Foreign Intelligence Surveillance Act any time it wishes to view them, but this would limit access only to records that are relevant to a national security investigation.

The NSA's phone records collection program began around May 2006 and allowed the spy agency to collect millions of phone records for customers of Verizon and other US phone companies. It's not known exactly how many records the spy agency has collected in the nine years it has been

operating, but the records include numbers dialed and received, as well as the date, time, and duration of the calls. Reported in: wired.com, November 9.

PROFESSIONAL SPEECH Tallahassee, Florida

On December 14, a three-judge panel of the US Court of Appeals for the Eleventh Circuit panel handed down a third opinion in *Wollschlaeger v. Governor*, the Florida "Docs vs. Glocks" case challenging a Florida law that limits doctors' conversations with patients about guns. The first opinion in the case held that the law wasn't really a speech restriction, because it just regulated the practice of medicine. The second opinion, issued after a petition for rehearing, changed course and held that the law was a speech restriction, but that—as a restriction on professional-client speech—it had to be judged under "intermediate scrutiny," which it passed.

Then the panel asked for further briefing in light of *Reed v. Town of Gilbert*, a 2015 Supreme Court decision that had to do with content-based sign restrictions, but that the panel thought might be relevant to content-based restrictions on professional-client speech. The court concluded that, after *Reed*, such restrictions might be subject to strict scrutiny. But it didn't decide whether that was so, or whether a more pro-government standard of review should be applied, because the panel concluded by a 2-1 vote that the Florida doctor speech restriction passed even strict scrutiny, usually a difficult standard to satisfy.

Strict scrutiny is the standard for evaluating content-based speech restrictions generally, and not just doctor-patient or professional-client speech restrictions. The decision risks



undermining free speech rights more broadly. In fact, much of the argument that the Eleventh Circuit panel accepted is structurally very similar to arguments used for restrictions on “hate speech,” campus speech codes and the like.

The statute provides that a doctor may not ask questions (in writing or orally) “concerning the ownership [or home possession] of a firearm or ammunition by the patient or by a family member,” unless the doctor “in good faith believes that this information is relevant to the patient’s medical care or safety, or the safety of others.” And, according to the panel majority, “relevant” here means relevant based on “some particularized information about the individual patient, for example, that the patient is suicidal or has violent tendencies.”

A doctor thus may not ask all patients, or all patients with children, whether they own guns, whether on an intake questionnaire or in person, even if the doctor believes that this information would indeed be useful in giving general advice about safe gun storage, the supposed dangers of any gun ownership, and the like.

It also bans doctors from “intentionally enter[ing] any disclosed information concerning firearm ownership into the patient’s medical record if the practitioner knows that such information is not relevant to the patient’s medical care or safety, or the safety of others,” with the same interpretation of “relevant.”

Third, it provides that patients may “decline to answer or provide any information regarding ownership [or home possession] of a firearm,” though such a refusal “does not alter existing law regarding a physician’s authorization to choose his or her patients.” Nonetheless, it provides that doctors “may not discriminate against a patient based solely upon

the patient’s exercise of the constitutional right to own and possess firearms or ammunition.” This suggests that doctors may turn away patients for refusing to answer questions about guns (so long as they are “relevant” based on “some particularized information about the individual patient”), but may not turn away patients for answering the questions with “yes, I own a gun.”

Finally, the statute bans doctors “from unnecessarily harassing a patient about firearm ownership during an examination.” This means, according to the panel majority, that a doctor “should not disparage firearm-owning patients, and should not persist in attempting to speak to the patient about firearm ownership when the subject is not relevant [based on the particularized circumstances of the patient’s case, such as the patient’s being suicidal] to medical care or safety.”

These are content-based restrictions on what a speaker can say, and the Eleventh Circuit evaluated them under “strict scrutiny”—a deliberately demanding standard in free speech case law, which is only very rarely satisfied, and which requires that the government show that the law is “narrowly tailored” to a “compelling government interest.”

The first compelling government interest on which the panel majority relied is “protect[ing] the right to keep and bear arms” that is secured by the Second Amendment. But a doctor’s questioning, however annoying, can’t actually deny anyone the Second Amendment right to keep and bear arms. The Second Amendment, like almost all constitutional rights, only protects people from government intrusion. That’s why, for instance, an employer’s firing an employee for owning a gun at home isn’t a Second Amendment violation; indeed, most

state statutes (including Florida’s statutes) don’t even ban such firing.

But even if one views the Second Amendment discussion as shorthand for an asserted interest in protecting people’s gun possession against (some) private restrictions, here no doctor’s speech has any power to take away any guns. Even if the doctor’s speech is mistaken “harassing,” or not sufficiently “relevant,” no amount of a doctor’s speech will cause a patient’s gun to disappear.

The panel majority concluded that the government protects the right to keep and bear arms by “protecting patients from irrelevant questioning about guns that could dissuade them from exercising their constitutionally guaranteed rights, questions that a patient may feel they cannot refuse to answer, given the significant imbalance of power between patient and doctor behind the closed doors of the examination room.”

But why is there a compelling government interest in preventing speech on the grounds that it can dissuade people “from exercising their constitutionally guaranteed rights”? Persuasion and dissuasion are usually seen as constitutionally protected advocacy, and not things that the government has a compelling interest in stopping. Moreover, the statute is not at all limited to attempted dissuasion using factually inaccurate arguments; it applies to speech without regard to its factual accuracy.

Because the panel majority applied the general First Amendment test, its reasoning would set a precedent for many other restrictions. Indeed, the opinion would validate many arguments already urged to restrict “hate speech,” justify campus speech codes and the like. Free speech being trumped by the supposed need to protect other constitutional rights is precisely the argument given for



restrictions on supposedly bigoted speech, on the theory that bigoted speech undermines the Fourteenth Amendment right to equal protection.

Of course, as critics of such restrictions point out, bigoted speech isn't really government action denying equal protection; at most, it can help persuade people to have bad opinions. There really is no constitutional conflict. But the *Wollschlaeger* panel seems perfectly willing to see First Amendment rights trumped, in the absence of any real constitutional conflict, to protect Second Amendment rights against mere private "dissuading."

"We must . . . place the doctors' right to question their patients on the scales against the State's compelling interest in fully effecting the guarantees of the Second Amendment," wrote the panel majority. We must place students' right to express racist, religiously biased, sexist, anti-gay, etc. views against the State's compelling interest in fully effecting the guarantees of the Equal Protection Clause, say those who want to ban "hate speech."

The panel also focused on the "imbalance of power" between doctor and patient. Black or gay or Muslim students, supporters of campus speech codes argue, lack power compared to the white or heterosexual or Christian majority; therefore, the speech of the powerful should be restricted to protect the powerless.

The panel majority's argument that the patient is the doctor's "captive audience" may have similarly dangerous implications. Once it's accepted that it's permissible to restrict speech about guns when the audience is "captive," exactly that argument would be used—because it often has been used—to support campus speech codes and similar restrictions.

The panel majority also reasoned that the Florida law is backed by a compelling interest in protecting "the

privacy of gun owners' status as such from inclusion in their medical records." But the legislature didn't just enact a narrow law banning doctors from recording gun owners' status. Instead, it also limited doctors' conversations with patients even if the results are never entered into records.

And beyond this, Florida law allows doctors to ask all sorts of private questions, including questions about the exercise of constitutional rights: "Are you sexually active?" "Are you using contraceptives?" "What kinds of contraceptives are you using?" "Do you want to have children at some point?" "Have you ever been pregnant?" "How many sexual partners have you had in the past year?" "Are you engaging in anal sex?" "How much television do your children watch?" "Do your children play violent video games?" Some doctors likely do ask some such questions, on a relatively blanket basis. The questions are at least as intrusive as questions about guns; indeed, many people find some such information more private than gun ownership.

Yet the legislature didn't seem to take the view that Floridians need to be protected against those supposed "intrusions on privacy." The normal ways of dealing with intrusive questions—such as saying "I'd rather not talk about this with you," something people can say even to doctors—seem to be quite sufficient when it comes to private information such as this. Why aren't they sufficient when it comes to guns?

This selective targeting of questions about guns—when other, likely quite common, questions about private matters aren't restricted—suggests that this law isn't really about protecting privacy as such. Rather, it's about preventing doctors from spreading what many gun rights supporters see as unsound anti-gun propaganda.

But this can't be a permissible basis for the government restricting doctors' speech unless the speech is itself so unreasonable and harmful as to constitute malpractice, something to which this law is not at all limited. Reported in: *Washington Post*, December 16.

TEXTING

San Francisco, California

A San Francisco Superior Court judge has ruled that police officers who sent racist and homophobic text messages can't be fired because the city missed a deadline.

Judge Ernest Goldsmith said that California's Peace Officer Bill of Rights bars San Francisco from taking action against the officers after a one-year statute of limitations. "It is not in the public interest to let police misconduct charges languish," he said. "The public has a right to have accusations against police officers be promptly adjudicated."

The messages came out in court documents as part of a federal corruption investigation in February 2014. However, lawyers for the accused police officers say the San Francisco Police Department first learned about the texts in December 2012. But it wasn't until April 2015 that Police Chief Greg Suhr moved to fire eight of the officers and discipline the other six.

An attorney for the city said that police officials couldn't act on the messages without jeopardizing the corruption case against former officer Ian Furfinger, who was sentenced in February to almost four years in prison. Furfinger was found to have taken cash during searches of drug dealers' homes.

The judge disagreed, saying the text messages weren't related to the facts of the Furfinger case and that the city could have begun a probe



after Furminger was indicted in February 2014.

The messages included remarks calling African Americans “monkeys” and talk about killing “half-breeds.” Other messages said “we celebrate whiteness” and suggested African American women “should be spayed.”

Police Chief Suhr said he’ll appeal Goldsmith’s ruling.

“We’re confident in our position that we acted in a timely fashion and that the criminal case appropriately took precedence,” Suhr said. “Anybody capable of the reprehensive texts that these guys sent should not be police officers, and we will work for that to be the case.”

The fourteen officers were originally suspended without pay, but Goldsmith ruled in May that they must be put on paid leave. Three of the eight officers the city wants to fire have resigned, although one of them, Michael Celis, is seeking to return to duty after learning about the statute of limitations issue.

“The public has a right to have police officers not express themselves in this way and not think in this way—no one is saying differently,” said Tony Brass, a lawyer representing Celis. “The important thing is that these officers only texted that kind of material because that’s what their sergeant wanted. . . . That was his code to be in a club that officers had to be in if they were going to be successful.”

“The fact that San Francisco is forced to retain police officers that demonstrated explicit racism will have ramifications for the reputation of the department, the fair administration of justice, and the trust of the community SFPD serves,” said District

Attorney George Gascón. Reported in: arstechnica.com, December 22.

TRADEMARK Washington, DC

The US Court of Appeals for the Federal Circuit ruled December 22 that the Lanham Act, which was invoked to deny Asian-American music group The Slants a registered trademark, violates the First Amendment by conditioning government benefits on the viewpoint of a trademark seeker.

As the court stated, “It is a bedrock principle underlying the First Amendment that the government may not penalize private speech merely because it disapproves of the message it conveys.” Indeed—it should be up to the public, not the government, to drive bad ideas from the marketplace.

The Slants specialize in “Chinatown dance pop” and have released albums entitled “Slanted Eyes, Slanted Hearts” and “The Yellow Album.” Simon Shiao Tam, The Slants’ founder and bassist, has explained that the band selected its name in order to “take on these stereotypes that people have about us, like the slanted eyes, and own them.”

The Slants applied to register their name as a trademark to get the considerable legal and financial benefits that registration provides. The government denied them a trademark based on the Lanham Act, a law that allows the US Patent and Trademark Office (PTO) to deny registration to trademarks that it determines to be “disparag[ing],” or otherwise “offensive” or “immoral” to a “substantial composite” of an affected group. The Slants appealed that decision to the US Court of Appeals for the Federal Circuit, and the ALCU filed

an *amicus* brief saying that the band has every right to register its name.

The government’s stance in the appeal was that trademark registration is government speech, and as a result, the First Amendment doesn’t apply (it only protects private expression from government interference).

The government’s position rests on the Supreme Court’s recent ruling in *Walker v. Sons of Confederate Veterans*. In that case, the court held that Texas’s specialty license plate program, which allowed private groups to submit and fund license plate designs, was “government speech” and thus the state could deny plate designs.

The Supreme Court’s narrow decision was based on the fact that license plates have traditionally been used by states to transmit their own messages. For example, Texas issues specialty plates that say “Keep Texas Beautiful” and “Read to Succeed.” Furthermore, license plates are often closely associated with the state, namely because they always carry a state’s name. And, like dollar bills and IDs, the state actually prints and issues license plates.

But those things are not true in the case of trademark registration. The government has not traditionally spoken through registered trademarks, and the public does not generally attribute trademarks to the government. While it is true that the government maintains some control over registering trademarks, it can’t be right that by making a list of private speech, the government suddenly gets to claim the speech as its own and thus deny constitutional rights to private speakers. Reported in: aclu.org, October 2, December 22.