When the First and Second Amendments Collide: The Free Speech Implications of West Virginia's Business Liability Protection Act of 2018

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WHEN THE FIRST AND SECOND AMENDMENTS COLLIDE: THE FREE SPEECH IMPLICATIONS OF WEST VIRGINIA'S BUSINESS LIABILITY PROTECTION ACT OF 2018

Alex A. Tsiatsos

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West Virginia's "Business Liability Protection Act" of 2018 purports to protect property owners, employers and others from claims related to firearms stored inside the vehicles of employees and customers parked on business property. The Act, in part, does what its title claims. As long as the employee or customer securely stores his or her guns as provided in the Act, the employer or property owner is immune from related civil liability.

But the Act does more than that. In fact, it creates a new cause of action against property owners. If a property owner merely asks whether a firearm is locked in a customer's or employee's car, the Act authorizes the Attorney General and private parties to sue the property owner for as much as $5,000 per violation and attorney's fees.2

Few issues are as divisive as the issue of gun rights. There is no doubt that West Virginia is a strongly pro-gun state. Even as school shootings prompt national discussions of stricter gun laws elsewhere, West Virginia citizens overwhelmingly support the fullest expression of their Second Amendment
rights. And the West Virginia Legislature has every right to fully protect its citizens’ rights to travel with their firearms. But it cannot do so by restricting the right to speak freely. The importance of gun rights makes discussion of guns a matter of national importance and intense public debate. By threatening to punish speech about guns, the West Virginia Legislature has violated the First Amendment to the United States Constitution.

Part I of this Article will begin by examining the Business Liability Protection Act (“BLPA”) itself. Part II will examine similar (but importantly different) laws passed by other states. Part III of the Article will survey the First Amendment issues implicated by the BLPA. In applying First Amendment jurisprudence to the language of the BLPA, Part IV argues that the BLPA is unconstitutional as currently written. This Article then concludes by analyzing the potential severability of the unconstitutional portions of the BLPA.

I. WEST VIRGINIA’S 2018 BUSINESS LIABILITY PROTECTION ACT

The BLPA revised the existing version of West Virginia Code section 61-7-14 which allowed property owners to prohibit guns onto their property. The previous version stated, in part:

Notwithstanding the provisions of this article, any owner, lessee or other person charged with the care, custody and control of real property may prohibit the carrying openly or concealing of any firearm or deadly weapon on property under his or her domain: Provided, That for purposes of this section “person” means an individual or any entity which may acquire title to real property.  

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4 See District of Columbia v. Heller, 554 U.S. 570, 636 (2008); Patrick J. Charles, The Second Amendment in the Twenty-First Century: What Hath Heller Wrought?, 23 WM. & MARY BILL RTS. J. 1143, 1144 (2015) (“With Heller having answered the question jurisprudentially by placing the right to keep and bear arms alongside other individual rights, the discourse has now shifted towards the Second Amendment’s proper place in American society, and there is no shortage of viewpoints.”).

The former section also authorized criminal penalties for failure to comply and set forth certain exceptions for hunters, target-shooters traveling from shooting practice, law enforcement officers, on-duty Division of Correction employees, United States armed forces, reservists, and National Guards.  

The new law, effective as of June 8, 2018, still allows property owners to prohibit openly carried or concealed firearms on their property, but it drastically rewrites the former statute by essentially creating a blanket exception for firearms kept securely in vehicles in parking lots. Now, property owners cannot prohibit “any customer, employee, or invitee from possessing any legally owned firearm, when the firearm is (A) lawfully possessed; and (B) locked inside or locked to a private motor vehicle in a parking lot; and (C) when the customer, employee, or invitee is lawfully allowed to be present in that area.”

The next subsection of the BLPA creates a new prohibition—essentially a gag rule against merely asking if a customer, employee, or invitee has a gun. Subsection (d)(2)(A)–(C) states:

(2) No owner, lessee, or other person charged with the care, custody, and control of real property may violate the privacy rights of a customer, employee, or invitee, either (A) by verbal or written inquiry, regarding the presence or absence of a firearm locked inside or locked to a private motor vehicle in a parking lot; or

6 Specifically, the previous section provided as follows:

Any person carrying or possessing a firearm or other deadly weapon on the property of another who refuses to temporarily relinquish possession of the firearm or other deadly weapon, upon being requested to do so, or to leave the premises, while in possession of the firearm or other deadly weapon, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000 or confined in jail not more than six months, or both: Provided, That the provisions of this section do not apply to a person as set forth in subdivisions (3) through (7), inclusive, section six of this article while the person is acting in an official capacity; and to a person as set forth in subdivisions (1) through (8), inclusive, subsection (b) of said section, while the person is acting in his or her official capacity: Provided, however, That under no circumstances, except as provided for by the provisions of paragraph (1), subdivision (2), subsection (b), section eleven-a of this article, may any person possess or carry or cause the possession or carrying of any firearm or other deadly weapon on the premises of any primary or secondary educational facility in this state unless the person is a law-enforcement officer or he or she has the express written permission of the county school superintendent.

Id. § 61-7-14 (previous version).

7 The bill’s history and effective date are available at http://www.wvlegislature.gov/Bill_Status/bills_history.cfm?INPUT=4187&year=2018&sessiontype=RS.

8 W. Va. Code Ann. § 61-7-14(b). The Act does not apply to property which is also the property owner’s primary residence, id. § 61-7-14(a)(1), and the bill does not apply to vehicles which are owned by the employer and used by the employee in the course of his or her employment.

Id. § 61-7-14(a)(2).

9 Id. § 61-7-14(d)(1)(A)–(C).
(B) by conducting an actual search of a private motor vehicle in a parking lot to ascertain the presence of a firearm within the vehicle.

(C) Furthermore, no owner, lessee, or other person charged with the care, custody, and control of real property may take any action against a customer, employee, or invitee based upon verbal or written statements of any party concerning possession of a firearm stored inside a private motor vehicle in a parking lot for lawful purposes; except upon statements made pertaining to unlawful purposes or threats of unlawful actions involving a firearm made in violation of § 61-6-24 of this code.  \(^\text{10}\)

To enforce this new rule, the BLPA allows the Attorney General “to enforce the provisions of subsection (d) of this section” by seeking either injunctive relief or “[c]ivil penalties of no more than $5,000 for each violation of subsection (d) and all costs and attorney’s fees associated with bringing the action” or both.  \(^\text{11}\)

While the Attorney General is required to bring such actions in Kanawha County, the BLPA further allows any “customer, employee, or invitee aggrieved under the authority of subsection (d) of this section” to bring a private action in the county where the alleged violator resides or has a principal place of business or where the alleged violation occurred.  \(^\text{12}\) In such private actions, the plaintiff would be able to recover the same injunctive relief and civil penalties ($5,000 per violation) available to the Attorney General.  \(^\text{13}\) The prevailing party in such private actions is entitled to an award of attorney’s fees.  \(^\text{14}\)

II. SIMILAR LAWS IN OTHER STATES

West Virginia is not the first state to pass a law protecting gun owners’ rights to keep guns in their cars. Several other states have passed similar laws,

\(^{10}\) Id. § 61-7-14(d)(2)(A)–(C). Subsection (d)(3) also prevents an employer from conditioning employment upon (A) the fact that an employee or prospective employee holds or does not hold a concealed carry license or (B) an agreement prohibiting an employee or prospective employee from keeping a firearm locked inside his car pursuant to the Act. Id. § 61-7-14(d)(3).

\(^{11}\) Id. § 61-7-14(f)(1)–(3).

\(^{12}\) Id. § 61-7-14(f)(1)–(4).

\(^{13}\) Id.

\(^{14}\) Id. In contrast, the award to the Attorney General of attorney’s fees under § 61-7-14(f)(2) does not seem to depend on whether the Attorney General is the prevailing party. In addition, the Act prevents employers from conditioning employment on the employee’s holding a firearms license. It also prevents property owners from prohibiting customers, employees, or invitees from entering a business parking lot while carrying a legal firearm, for a lawful purpose, which is out of sight within the customer’s, employee’s, or invitee’s private motor vehicle. Id. § 61-7-14(d)(3)–(4).
sometimes referred to as "parking lot" laws. While the laws vary substantially by state, they generally offer some degree of protection for employees or customers who bring guns onto parking lots, and they partly immunize property owners and businesses for acts stemming from guns kept in locked vehicles on their property.

Two other states have enacted statutes punishing a property owner from even asking about guns. Florida's statute contains language similar, in relevant part, to West Virginia's BLPA. For example, Florida, too, prevents employers from "violat[ing] the privacy rights of a customer, employee, or invitee by verbal or written inquiry regarding the presence of a firearm inside or locked to a private motor vehicle in a parking lot . . ." And the Florida law similarly enforces that right through authorized action by its attorney general and private plaintiffs.

Florida's law has been tested in federal court, although not on First Amendment grounds. In Florida Retail Federation, Inc. v. Attorney General of Florida, an association of Florida retailers challenged the law on multiple other grounds, including because it treated businesses differently based on whether their employees had concealed carry permits. If a business happened to have a worker with a concealed carry permit, the law required the business to allow customers to bring guns in the parking lot. However, if the business did not

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16 See, e.g., OKLA. STAT. tit. 21, § 1289.7a (2004) (amended through 2012) and § 1290.22 (amended through 2017); ALASKA STAT. § 18.65.800 (2005); KY. REV. STAT. ANN. §237.106 (West 2006); MISS. CODE ANN. § 45-9-55 (2006); LA. STAT. ANN. § 32:292.1 (2008); ARIZ. REV. STAT. ANN. § 12-781 (2009); IDAHO CODE § 5-341 (2009); UTAH CODE ANN. § 34-45-103 (West 2009) (amended through 2014) and § 34-45-104 (West 2009); ME. STAT. tit. 26, § 600 (2011); TEX. LAB. CODE ANN. § 52.061 (West 2011) (amended in 2016); IND. CODE ANN. § 34-28-7-2 (West 2012) (amended through 2017); ALA. CODE § 13A-11-90 (2013); TENN. CODE ANN. § 39-17-1313(b) (West 2013) (amended through 2014); GA. CODE ANN. § 16-11-135 (West 2016); OHIO REV. CODE ANN. § 2923.1210 (West 2017); WIS. STAT. ANN. §175.60 (West 2017). I have attempted to list the states in this footnote by order of first enactment, although the statutory cross-referencing and legislative history sometimes make that order uncertain. The statutes listed in this note are current as of June 4, 2018.

17 FLA. STAT. ANN. § 790.251 (West 2008).
18 Id. § 790.251(4)(b).
19 Id. § 790.251(6). The Florida statute expressly authorizes fee shifting in cases brought by private plaintiffs, and incorporates a general statute relating to actions by the attorney general which also allows fee shifting and awards up to $10,000 per violation. Id. § 760.51.
happen to have an employee with a concealed carry permit, then the business
was not required to permit guns in the parking lot.21

By treating businesses differently without a rational basis for doing so,
the Court found that the law violated both the Equal Protection Clause in the
Fourteenth Amendment to the United States Constitution as well a component of
due process.22 However, the Court upheld other portions of the statute under the
same equal protection and due process challenges,23 and it rejected challenges to
the law on the grounds that it was an unconstitutional taking under the Fifth
Amendment or preempted by federal workplace safety laws.24

While the Court did not expressly mention the First Amendment or
consider any speech-related issue, it did very briefly mention the provision of the
law prohibiting businesses from asking about whether an employee has a gun in
his or her car. The Court stated merely that “[t]his ban on inquiries, on the use
of statements, and on searches is a corollary to the provision on securing a gun in
a vehicle. The ban’s constitutional fate is the same as that of the underlying
provision.”25 It does not appear that the parties to the case specifically raised First
Amendment challenges.26

North Dakota, too, prevents public or private employers from making “a
verbal or written inquiry regarding the presence of a firearm inside or locked
to a private motor vehicle in a parking lot.”27 While there is no express provision
for attorney general enforcement in the statute, the North Dakota law does permit
private civil actions in which attorney’s fees and court costs, as well as “all
reasonable personal costs and losses suffered by the aggrieved person,” may be

21 Id. at 1291.

22 Id. at 1288 (“[W]hether viewed under the Equal Protection Clause or as a component of due
process, a state must not treat like-situated individuals or businesses differently without an
adequate basis.”). A discussion of the standards governing the Equal Protection Clause and
substantive due process are outside of the scope of this paper.

23 Id. at 1293–96.

24 Id. at 1289, 1298. Parking lot laws have also been challenged in other states, but apparently
not on First Amendment grounds. See, e.g., Ramsey Winch Inc. v. Henry, 555 F.3d 1199 (10th Cir.
2009) (rejecting a Fifth Amendment takings challenge to Oklahoma’s parking lot law).

25 Fla. Retail Fed’n, Inc., 576 F. Supp. 2d at 1293. As will be discussed infra, this dictum
stands in contrast to the Supreme Court’s recognition of more robust First Amendment rights.

26 See Motion for Prelim. Inj. Request for Expedited Hearing and Mem. of Law at 9, Fla. Retail
Fed’n, Inc. v. Attorney Gen. of Fla., 576 F. Supp. 2d 1281 (N.D. Fla. 2008); Amicus Curiae Brief
by The Brady Center to Prevent Gun Violence, Id. at 16; Society for Human Resource Management
(“SHRC”), HR Florida State Counsel’s ("HR Florida"), Human Resource Association of Broward
Counties (“HRABC”), Human Resource Management Association of Palm Beach County
(“HRPABC”), and HR Tampa’s Brief as Amici Curiae in Support of Pl.’s Motion for Prelim. Inj.,
Id. at 24-2.

recovered by the prevailing party.\textsuperscript{28} As of this writing, there are no reported decisions under the North Dakota statute.\textsuperscript{29}

In addition, states have restricted questions about guns in contexts other than employment situations. The Florida Legislature passed a law preventing doctors from asking their patients whether they had any guns in their homes.\textsuperscript{30} As will be discussed in Section IV, the Florida law generated litigation which is particularly relevant to West Virginia’s BLPA.

### III. FIRST AMENDMENT BACKGROUND

The First Amendment of the United States Constitution states that “Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.”\textsuperscript{31} The principles behind the First

\textsuperscript{28} Id. § 62.1-02-13(5).

\textsuperscript{29} With respect to other states, one author notes that a pre-passage version of Alabama’s law would have prevented employers from asking about guns in their employees’ cars. However, the enacted version apparently omitted that language. Aaron L. Dettling, \textit{An Analysis of Act 283: Alabama’s New Gun Legislation}, 74 ALA. LAW 305, 308 (2013) (“The Senate version of SB286, which later became Act 283, clearly prohibited employers from asking employees whether they had a firearm in the car. That probatory language didn’t make it into the final version of Act 283, but some other slippery language did. Section 4(c) of the Act does not expressly prohibit inquiries about firearm possession, but says that ‘[i]f an employer believes that an employee presents a risk of harm to himself/herself or to others, the employer may inquire as to whether the employee possesses a firearm in his or her private motor vehicle.’ This language is awkward. From a textual standpoint, there is nothing in Act 283 that prohibits an employer from asking its employees any questions about gun ownership or possession, so language expressly authorizing the employer to ask the question if a specific condition is met would appear to be nothing more than sheer dictum.’”).

\textsuperscript{30} FLA. STAT. ANN. § 790.338(2) (West 2011) (stating that a health care practitioner “should refrain from making a written inquiry or asking questions concerning the ownership of a firearm or ammunition by the patient or by a family member of the patient, or the presence of a firearm in a private home or other domicile of the patient or a family member of the patient” unless the provider believes that such information is relevant, and subjecting medical providers to disciplinary action for violations of that requirement).

\textsuperscript{31} U.S. CONST. amend. I. West Virginia’s Constitution contains its own free speech guarantees. W. VA. CONST. art. III, § 7. However, the West Virginia Supreme Court of Appeals defers, as it must, to United States Supreme Court precedent in First Amendment cases. See State ex rel. McGraw v. Imperial Mktxg., 472 S.E.2d 792, 805 n.43 (1996); see also Pushinsky v. W. Va. Bd. of Law Exam’rs, 266 S.E.2d 444, 449 (W. Va. 1980) (“The First Amendment to the United States Constitution and Article III, Section 7 of the West Virginia Constitution are virtually identical in pertinent parts. Both constitutional provisions prohibit the making of any law abridging the freedom of speech or of the press. For purposes of this opinion, we use the First Amendment to the United States Constitution and Article III, Section 7 of the West Virginia Constitution interchangeably. Article I, Section 1 of the West Virginia Constitution recognizes that the United States Constitution shall be the supreme law of the land. Accordingly, the decisions of the United
Amendment are among our most cherished constitutional liberties. Freedom of speech is "indispensable to the discovery and spread of political truth" and equally indispensable to the continued growth of our free society. In fact, freedom of speech constitutes the "indispensable condition of nearly every other right or liberty."

First Amendment jurisprudence is both highly philosophical and fact specific, making it a particularly difficult area of law to succinctly summarize. This Article will not discuss the many different areas of First Amendment law largely unrelated to the BLPA. However, a background discussion of some of

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32 It is not easy to trace the origins of the First Amendment's freedom of speech guarantees. Debates concerning the Bill of Rights are limited and unclear. See, e.g., Gertz v. Robert Welch, Inc., 418 U.S. 323, 383–84 (1974) ("The debates in Congress and the States over the Bill of Rights are unclear and inconclusive on any articulated intention of the Framers as to the free press guarantee. We know that Benjamin Franklin, John Adams, and William Cushing favored limiting freedom of the press to truthful statements, while others such as James Wilson suggested a restatement of the Blackstone standard. Jefferson endorsed Madison's formula that 'Congress shall make no law . . . abridging the freedom of speech or the press' only after he suggested: ‘The people shall not be deprived of their right to speak, to write, or otherwise to publish anything but false facts affecting injuriously the life, liberty, or reputation of others . . .’"). While in other areas of law it is often possible to learn from English antecedents, with respect to Freedom of Speech, antecedent English speech laws are often drastically dissimilar. See, e.g., SIR WILLIAM BLACKSTONE, III COMMENTARIES ON THE LAWS OF ENGLAND 1663 (Cooley ed., 1884) (noting principles of English law antithetical to American freedom of speech principles, such as imprisonment for slander and the "more heinous" case of "scandalum magnatum"—slander against "great officer[s] of the realm."). Of course, the lack of similar English antecedents may be exactly the point of the First Amendment.


34 Roth v. United States, 354 U.S. 476, 488 (1957) ("The fundamental freedoms of speech and press have contributed greatly to the development and well-being of our free society and are indispensable to its continued growth.").

35 Munroe v. Cent. Bucks Sch. Dist., 805 F.3d 454, 465 (3d Cir. 2015) (citing Palko v. Connecticut, 302 U.S. 319, 327 (1937) (which characterized freedom of thought and speech as "the matrix, the indispensable condition, of nearly every other form of freedom" and which was overruled on other grounds)); Am. Civil Liberties Union of Idaho, Inc. v. City of Boise, 998 F. Supp. 2d 908, 918 (D. Idaho 2014) ("The Constitution protects the rights of all citizens. Freedom of speech may be the most important right to protect in order to maintain our republic.").

36 R.A.V. v. City of St. Paul, 505 U.S. 377, 426 (1992) (Stevens, J., concurring) ("Few dividing lines in First Amendment law are straight and unwavering, and efforts at categorization inevitably give rise only to fuzzy boundaries."); Wollschlaeger v. Governor of Fla., 848 F.3d 1293, 1300 (11th Cir. 2017) ("Despite its majesty— or maybe because of it—the freedom of speech clause of the First Amendment sometimes proves difficult to apply.").

37 The First Amendment to the United States Constitution is applicable to the States through the Fourteenth Amendment. See Reed v. Town of Gilbert, 135 S. Ct. 2218, 2226–27 (2015).
the main areas of First Amendment law will help frame the subsequent analysis of the West Virginia law.

From the heyday of the Warren Court’s free speech decisions through the present, the Supreme Court has not hesitated to strike down state laws inconsistent with the First Amendment.\(^{38}\) Perhaps the most familiar principle of the Supreme Court’s First Amendment jurisprudence is that courts treat laws governing speech differently depending on the nature of the regulation.\(^{39}\) If the law is aimed at the content of the speech, courts apply the highest level of scrutiny—often referred to as strict scrutiny.\(^{40}\) Under the First Amendment, a state “has no power to restrict expression because of its message, its ideas, its subject matter, or its content” and “[c]ontent-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests.”\(^{41}\) A law is considered content-based if it “applies to particular speech because of the topic discussed or the idea or message expressed.”\(^{42}\) The Court has held that this “commonsense meaning of the phrase ‘content-based’ requires a court to consider whether a regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys.”\(^{43}\)

Viewpoint discrimination—“[w]hen the government targets not subject matter, but particular views taken by speakers on a subject”—is “an egregious

\(^{38}\) For a summary of the famous free speech decisions of the Warren Court, see Suzanna Sherry, *All the Supreme Court Really Needs to Know It Learned from the Warren Court*, 50 VAND. L. REV. 459, 460 (1997) (“The paradigmatic protection of individual liberty is the Free Speech Clause of the First Amendment, which first received its most expansive interpretations at the hands of the Warren Court.”). With respect to the Roberts Court’s free speech jurisprudence, see Joel M. Gora, *Free Speech Matters: The Roberts Court and the First Amendment*, 25 J.L. & POL’Y 63 (2016). However, despite the First Amendment’s extensive treatment since the Warren Court it is not surprising that some speech issues may have thus far escaped constitutional review. See, e.g., District of Columbia v. Heller, 554 U.S. 570, 625–26 (2008) (“Other provisions of the Bill of Rights have similarly remained unilluminated for lengthy periods. This Court first held a law to violate the First Amendment’s guarantee of freedom of speech in 1931, almost 150 years after the Amendment was ratified[.]”).


\(^{40}\) Whether a court uses strict scrutiny or a lower form of scrutiny is not always clear. See, e.g., Becerra, 138 S. Ct. at 2371–78 (making clear that content-based regulations are subject to strict scrutiny, finding that the regulations at issue were content based, but then apparently deciding the case on the bases of intermediate or “heightened” scrutiny); see also Rodney A. Smolla, 1 SMOLLA & NIMMER ON FREEDOM OF SPEECH § 2:62 (2018). For purposes of this article, it will prove easier to focus on the nature of the law—and whether it is content-based or content-neutral.

\(^{41}\) Reed, 135 S. Ct. at 2226 (citations omitted).

\(^{42}\) Id. at 2227 (citations omitted).

\(^{43}\) Id. (citations omitted).
form of content discrimination.” The Supreme Court has held that “[t]he government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.”

While a law can be content-based on its face, it can also be content-based, despite being facially neutral, if the law “cannot be ‘justified without reference to the content of the regulated speech,’” or if it was “adopted by the government ‘because of disagreement with the message [the speech] conveys.’” Both types of content-based laws must satisfy the strict scrutiny standard.

Courts have subjected a wide variety of laws governing content-based speech to strict scrutiny. Some examples include: laws governing flag burning; laws governing sexually explicit programming; laws which treat signs differently based on whether they are directional, political or ideological; and rules prohibiting utility companies from including political messages in their billing statements.

Political speech, in particular, is at the very core of First Amendment rights. Laws that discriminate against political speech are subject to strict scrutiny, and courts have suggested that political speech may be afforded additional protections beyond that. In any event, it is clear that “speech on

45 Id. (citations omitted).
46 Reed, 135 S. Ct. at 2227 (citations omitted).
47 Id.
48 United States v. Eichman, 496 U.S. 310, 315 (1990) (“Although the Flag Protection Act contains no explicit content-based limitation on the scope of prohibited conduct, it is nevertheless clear that the Government’s asserted interest is ‘related “to the suppression of free expression”’ and concerned with the content of such expression.’”) (citations omitted).
50 Reed, 135 S. Ct. at 2231–32.
52 Citizens United v. Fed. Election Comm’n, 558 U.S. 310, 340 (2010) (“[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence. Laws that burden political speech are ‘subject to strict scrutiny’ . . .’) (citations omitted).
53 McIntyre v. Ohio Elections Comm’n, 514 U.S. 334, 347 (1995) (“When a law burdens core political speech, we apply ‘exacting scrutiny,’ and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest.”) (citations omitted); Ark. Writers’ Project, Inc. v. Ragland, 481 U.S. 221, 237 (1987) (Scalia, J., dissenting) (citing majority opinions in other cases in which political speech has been “accorded special protection”) (“invalidating ban on editorializing by recipients of grants from the Corporation for Public Broadcasting, in part on ground that political speech ‘is entitled to the most exacting degree of First Amendment protection’”) (citing FCC v. League of Women Voters of Cal., 468 U.S. 364, 375–76 (1984)); Connick v. Myers, 461 U.S. 138, 143–46 (1983) (discussing history of First Amendment protection for political speech by public employees); Red Lion Broad. Co. v. FCC, 395 U.S. 367 (1969)
public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection.”\textsuperscript{54} Speech is deemed to be a public issue when it can “be fairly considered as relating to any matter of political, social, or other concern to the community” or when “it is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public.”\textsuperscript{55}

Determining that laws are content-based and thus subject to strict scrutiny is the first part of a content-focused analysis. Next, courts must determine whether the law is “narrowly tailored to serve compelling state interests.”\textsuperscript{56} While the governmental interests are as varied as the laws in question, courts often assume that the interest is compelling with little discussion in order to proceed to the “narrowly tailored” analysis.\textsuperscript{57}

For a law to be narrowly tailored it cannot be overinclusive—that is, it cannot “unnecessarily circumscribe protected expression.”\textsuperscript{58} A law prohibiting certain speech must target only speech that is the legitimate subject of the prohibition, and no other speech. For example, New York’s Son of Sam Law, which sought to ensure that crime victims were compensated from the perpetrator’s sale of literary rights related to depictions of the crime, was overinclusive because it would have applied “to works on any subject, provided that they express the author’s thoughts or recollections about his crime, however tangentially or incidentally.”\textsuperscript{59}

Similarly, recognizing that “the First Amendment needs breathing space,” the Supreme Court has analyzed speech-restricting laws using the doctrine of “overbreadth.”\textsuperscript{60} The doctrine recognizes that “the possible harm to

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(upholding FCC’s “fairness doctrine,” which imposes special obligations upon broadcasters with regard to “controversial issues of [public] importance”).
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\textsuperscript{54} Snyder v. Phelps, 562 U.S. 443, 452 (2011) (citation omitted).
\textsuperscript{55} Id. at 453 (citations omitted). \textit{But see} id. at 452 (“‘Not all speech is of equal First Amendment importance,’ however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous.”) (citations omitted).
\textsuperscript{56} Reed v. Town of Gilbert, 135 S. Ct. 2218, 2231 (2015) (citations omitted).
\textsuperscript{57} Id. at 2231 (“Assuming for the sake of argument that those [aesthetic appeal and traffic safety] are compelling governmental interests, the Code’s distinctions fail as hopelessly underinclusive.”); First Nat’l Bank of Bos. v. Bellotti, 435 U.S. 765, 795 (1978) (“Assuming, arguendo, that protection of shareholders is a ‘compelling’ interest under the circumstances of this case, we find ‘no substantially relevant correlation between the governmental interest asserted and the State’s effort’ to prohibit appellants from speaking.”) (citation omitted); Wollschlaeger v. Governor of Fl., 848 F.3d 1293, 1312 (11th Cir. 2017) (“We accept that the protection of Second Amendment rights is a substantial government interest, but nevertheless conclude that FOPA’s record-keeping, inquiry, and anti-harassment provisions fail to satisfy heightened scrutiny.

\textsuperscript{58} Republican Party of Minn. v. White, 536 U.S. 765, 775 (2002) (citation omitted).
\textsuperscript{60} Broadrick v. Oklahoma, 413 U.S. 601, 611–13 (1973).
society in permitting some unprotected speech to go unpunished is outweighed by the possibility that protected speech of others may be muted and perceived grievances left to fester because of the possible inhibitory effects of overly broad statutes.”61 In short, “a law may be invalidated as overbroad if a ‘substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.’”62

But at the same time, to be narrowly tailored, a law cannot be underinclusive, either. That is, a law can’t be “regarded as protecting an interest of the highest order, and thus asjustifying a restriction on truthful speech, when it leaves appreciable damage to that supposedly vital interest unprotected.”63 In part, this is because underinclusiveness “diminish[es] the credibility of the government’s rationale for restricting speech.”64 For example, a law that prohibits the sale of violent video games to children on the grounds that violent imagery is detrimental to children is underinclusive because the law does not restrict the many other types of expression which expose children to such violent imagery.65

Essentially, to pass strict scrutiny under the First Amendment, laws that target content-based speech must be precisely tailored—neither too broad nor too narrow.66 But despite the often stringent judicial analysis of speech regulations, laws regulating the content of speech may still prohibit certain categories of speech, for example: incitement,67 threats,68 false statements of defamatory fact

61 Id. at 612.
62 United States v. Stevens, 559 U.S. 460, 473 (2010) (citation omitted). Some courts consider overbreadth and overinclusivity together, and it often makes sense to do so. See, e.g., Clear Channel Outdoor, Inc. v. Town Bd. of Windham, 352 F. Supp. 2d 297, 304 (N.D.N.Y. 2005) (“[A] statute is unconstitutionally over broad, or overinclusive, if it includes within its prohibitions constitutionally protected conduct.”). Technically, courts seem more often to utilize the overbreadth doctrine (as opposed to the doctrine of overinclusivity) to analyze questions of litigant standing and the manner in which the law may be challenged.
66 Republican Party of Minn. v. White, 416 F.3d 738, 751 (8th Cir. 2005) (discussing core, political speech).
67 Brandenburg v. Ohio, 395 U.S. 444, 447 (1969) (noting “the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.”).
(e.g., libel and slander),\textsuperscript{69} obscenity,\textsuperscript{70} and child pornography.\textsuperscript{71} But while laws may restrict the content of speech which falls within those categories, the laws must still do so without engaging in viewpoint discrimination. That is, the "content discrimination" must be related to the nature of their "proscribable content" generally without picking sides.\textsuperscript{72} For example, while "the government may proscribe libel[,] . . . it may not make the further content discrimination of proscribing only libel critical of the government."\textsuperscript{73}

When the law regulating speech is content neutral—for example, when it merely regulates the time, place or manner of the speech without regard to content—the law is subject to a lower level of scrutiny. The government need only show that the law "be narrowly tailored to serve the government’s legitimate, content-neutral interests."\textsuperscript{74} But the "narrowly tailored" requirement doesn’t mean that the government must choose the least restrictive means of regulation. Rather, it is enough that the regulation "promotes a substantial government interest that would be achieved less effectively absent the regulation" without burdening substantially more speech than is necessary.\textsuperscript{75}

While First Amendment cases often involve state action and criminal penalties, the Amendment also applies to speech which is subject to civil tort damages.\textsuperscript{76} The BLPA contains both state-action and private-action tort elements. While it expressly authorizes civil suits,\textsuperscript{77} it also expressly authorizes enforcement (and collection of penalties) by the West Virginia Attorney General,\textsuperscript{78} a state official under the West Virginia Constitution.\textsuperscript{79}

\textsuperscript{69} Gertz v. Robert Welch, Inc., 418 U.S. 323, 345–46 (1974) ("For these reasons we conclude that the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual.").

\textsuperscript{70} Miller v. California, 413 U.S. 15, 23 (1973) ("This much has been categorically settled by the Court, that obscene material is unprotected by the First Amendment.") (citations omitted).

\textsuperscript{71} Ashcroft v. Free Speech Coal., 535 U.S. 234, 240 (2002) ("As a general rule, pornography can be banned only if obscene, but under Ferber, pornography showing minors can be proscribed whether or not the images are obscene . . .").

\textsuperscript{72} R.A.V., 505 U.S. at 383–84.

\textsuperscript{73} Id. at 384.

\textsuperscript{74} Ward v. Rock Against Racism, 491 U.S. 781, 798 (1989).

\textsuperscript{75} Id. at 799 (citing United States v. Albertini, 472 U.S. 675, 689 (1985)).


\textsuperscript{77} W. VA. CODE ANN. § 61-7-14(f)(3) (West 2018).

\textsuperscript{78} Id. § (f)(1)–(2).

\textsuperscript{79} W. VA. CONST. art. VII, § 1. Whether the Attorney General will pay that money into the State Treasury or not is an open question. No specific statute currently requires it, and a proposed bill which would have required it was vetoed by the Governor. See H.B. 4009, 2018 Leg., Reg. Sess. (W. Va. 2018) (vetoed 2018), (last accessed Mar. 21, 2019). This author’s discussion with
Finally, given the specific speech at issue in the BLPA, one more point is worth mentioning. Although declarative sentences are often the subject of First Amendment cases, the specific sentential function of the speech is irrelevant: the First Amendment protects speech in the form of questions, too, such as the ones penalized by the BLPA.80

While First Amendment jurisprudence contains many other, often complicated themes, this brief overview has attempted to outline the themes necessary to analyze West Virginia’s 2018 BLPA: what type or part of speech does the law target, and can the government justify doing so?

IV. THE BLPA’S SPEECH RESTRICTIONS VIOLATE THE FIRST AMENDMENT

To review, the BLPA prohibits speech by employers and property owners. Specifically, it prohibits one type of speech: speech about guns. Under the BLPA, if an employer or property owner asks whether an employee or customer has a gun in his or her car, the employer or property owner is subject to $5,000 in fines per violation, civil actions by the state Attorney General and civil suits from aggrieved private parties.

There can be no doubt that the BLPA, on its face, discriminates against speech based on its content.81 The Act does not try to hide this fact by pretending to be content neutral. It punishes speech about guns and only speech about

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80 Wollschaeger v. Governor of Fla., 848 F.3d 1293, 1300–01 (11th Cir. 2017) (finding that the First Amendment protects questions by doctors to patients concerning firearms in the patients’ homes); Reporters Comm. for Freedom of the Press v. American Tel. & Tel. Co., 593 F.2d 1030, 1051 (D.C. Cir. 1978) (noting that there is a “freedom to gather information [which is] guaranteed by the First Amendment”); A. Michael Froomkin, The Death of Privacy?, 52 STAN. L. REV. 1461, 1508 (2000) (“[B]oth the Supreme Court and appellate courts have interpreted the First Amendment to encompass a right to gather information.”); Helen Norton, You Can’t Ask (or Say) That: The First Amendment and Civil Rights Restrictions on Decisionmaker Speech, 11 WM. & MARY BILL RTS. J. 727, 760 n.139, 778, (2003) (“Speech that takes the form of a question is still speech for First Amendment purposes. Questions, of course, seek to elicit information, and the First Amendment protects information gathering.”); Tung Yin, How the Americans with Disabilities Act’s Prohibition on Pre-Employment-Offer Disability-Related Questions Violates the First Amendment, 17 LAB. LAW. 107, 114–15 (2001) (“The fact that the interviewer is asking a question, as opposed to making a statement, does not strip the speech of First Amendment protection. The view that presupposes that the First Amendment protects only the making of assertions as opposed to inquiries has not been accepted by courts.”) (citations omitted).

81 Reed v. Town of Gilbert, 135 S. Ct. 2218, 2227 (2015) (“This commonsense meaning of the phrase ‘content based’ requires a court to consider whether a regulation of speech ‘on its face’ draws distinctions based on the message a speaker conveys. Some facial distinctions based on a message are obvious, defining regulated speech by particular subject matter, and others are more subtle, defining regulated speech by its function or purpose. Both are distinctions drawn based on the message a speaker conveys, and, therefore, are subject to strict scrutiny.”) (citations omitted).
governments. Therefore, because the BLPA is content based, uncontroverted Supreme Court precedent requires the BLPA to pass strict scrutiny.

And, indeed, the BLPA is likely to pass the first step of strict scrutiny: it serves a compelling state interest. A citizen’s right to lawfully possess a firearm is a core Second Amendment right, and the state has a compelling interest to protect its citizens’ constitutional rights. The United States Court of Appeals for the Eleventh Circuit reached a similar conclusion in *Wollschlaeger v. Governor of Florida.* As referenced above, *Wollschlaeger* involved a Florida law which prevented physicians from asking their patients whether they had guns in their houses. Such questions had become a routine part of doctor visits when the physician suspected risk factors related to guns. However, some patients did not welcome the questions, and, based on their complaints, the Florida legislature passed the Florida’s Firearm Owners’ Privacy Act. Among its other provisions, the Florida law stated that a medical professional “should refrain from making a written inquiry or asking questions concerning the ownership of a firearm or ammunition by the patient or by a family member of the patient, or the presence of a firearm in a private home” unless the medical professional believes in good faith that the information concerning firearms “is relevant to the patient’s medical care or safety, or the safety of others.”

While the Florida law did not contain express civil penalties or authorize suits against doctors for asking such questions, it did make asking questions about firearms in violation of the Act “grounds for disciplinary action.” Florida’s professional discipline statutes, which were implicated by the Act, provided for penalties up to $10,000 per violation and the possibility of permanent license revocation, but Florida’s Board of Medicine promulgated regulations suggesting lesser disciplinary outcomes—penalties up to $1,000 and possible suspension.

In a lawsuit brought by a physician and physicians’ interest groups challenging the Florida law, the Court of Appeals for the Eleventh Circuit had no difficulty in reaching its initial finding that Florida’s desire to protect its citizens’ Second Amendment rights from “private encumbrances” served a

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82 *Wollschlaeger v. Governor of Fla.*, 848 F.3d 1293, 1307 (11th Cir. 2017) (discussing restrictions on questions about firearms by physicians and stating, “[i]n cases at the margin, it may sometimes be difficult to figure out what constitutes speech protected by the First Amendment. But this is not a hard case in that respect. We conclude . . . that the record-keeping, inquiry, and anti-harassment provisions of [the Florida Firearm Owners’ Privacy Act] constitute speaker-focused and content-based restrictions on speech.”).
83 *Id.* at 1312.
84 *Id.* at 1301–02.
85 *Id.* at 1302.
86 *Id.* at 1302–03 (quoting FLA. STAT. § 790.338(2) (West 2018)).
87 *Id.* at 1303 (quoting FLA. STAT. § 790.338(8) (West 2018)).
88 *Id.*
substantial state interest.\textsuperscript{89} West Virginia’s BLPA is similar. The text of the bill is designed on its face to protect the Second Amendment rights of employees and customers.\textsuperscript{90} The NRA, undoubtedly the nation’s leading Second Amendment advocate, favorably summarized the bill as follows:

House Bill 4187, sponsored by Delegate Geoff Foster (R-Putnam), allows lawful owners of firearms to transport or store the firearms in locked, privately-owned motor vehicles without fear of civil liability, criminal liability or employer retribution. Throughout the country, many employers and business owners have adopted “No Firearms” policies that extend beyond the physical workplace or building to include parking lots—areas often accessible to the general public and not secure. In order to comply with these policies, many law-abiding gun owners must choose between protecting themselves during their commutes and being subject to termination by their employer. The fundamental right to self-defense should not stop simply because you park your car in a publicly accessible parking lot owned by your employer or a business owner.\textsuperscript{91}

The limited legislative history of the bill also makes clear that the purpose was to protect Second Amendment rights.\textsuperscript{92} Therefore, because the BPLA serves a compelling state interest, it seems likely to satisfy the first prong of the strict scrutiny test.

However, the BLPA fails the second prong: it is not narrowly tailored. Again, Wollschlaeger is instructive. Florida wanted to prevent doctors from harassing their patients concerning firearm ownership, so it passed a law punishing doctors who ask such questions. But the Wollschlaeger court found that the law already allowed a patient to “decline to answer or provide any information regarding ownership of a firearm . . . or the presence of a firearm in

\textsuperscript{89} Id. at 1312. ("The first interest asserted by the state officials is protecting, from 'private encumbrances,' the Second Amendment right of Floridians to own and bear firearms. We accept that the protection of Second Amendment rights is a substantial government interest . . . "). Although the Wollschlaeger majority found that the Florida law served a compelling state interest, it did not decide whether the law should be subject to strict scrutiny. Rather, it found that the Florida law could not even pass intermediate or heightened scrutiny, and it expressly left undecided the issue of whether strict scrutiny should apply. \textit{Id}.

\textsuperscript{90} W. VA. CODE ANN. § 61-7-14 (West 2018).


\textsuperscript{92} \textit{See WV House Bill 4187 – Business Liability Protection Act, House 3rd Reading, Vote, Passage, \textsc{You}t\textsc{ube}} (Feb. 27, 2018), https://www.youtube.com/watch?v=2HCcLvj73K0 (comments of Delegate Foster at roughly the 5:00 and 36:00 marks).
the domicile of the patient or a family member of the patient.”93 As a result, “any patients who have privacy concerns about information concerning their firearm ownership [could] simply refuse to answer questions on the topic.”94 Because the interest (patient privacy with respect to firearms) was already protected by the patient’s right to decline to answer, the part of the statute punishing doctors for asking questions about firearms was unnecessarily overbroad.

Similarly, West Virginia’s BLPA contains sufficient protections for employees and customers without punishing speech. The BPLA expressly prevents employers and property owners from taking any adverse action against their customers or employees based on whether they have firearms in their cars.95 In light of those protections, there is no need to also punish the employer or property owner’s speech—such punishment is overbroad because it is not needed to accomplish the legitimate goals of the legislation.96

The BLPA is overbroad in another way recognized by the Supreme Court, as well.97 Presumably, many employers and employees would not object to questions about firearms in their vehicles. Indeed, many people would welcome the chance to speak about firearms and to engage in civic-minded discussions about gun rights and the Second Amendment. However, the BLPA’s provisions are so broad that they chill speech even in contexts where the goal of the Act—preventing harassment about guns—is not implicated.98

93 Wollschlaeger, 848 F.3d at 1314 (quoting Fla. STAT. § 790.338(4) (West 2018)).
94 Id.
95 W. VA. CODE ANN. § 61-7-14(d)(2)(C) (West 2018) (“No owner, lessee, or other person charged with the care, custody, and control of real property may take any action against a customer, employee, or invitee based upon verbal or written statements of any party concerning possession of a firearm stored inside a motor vehicle in a parking lot for lawful purposes, except upon statements made pertaining to unlawful purposes or threats of unlawful actions involving a firearm made in violation of § 61-6-24 of this code.”). Furthermore, “[N]o owner, lessee, or other person charged with the care, custody, and control of real property may prohibit or attempt to prevent any customer, employee, or invitee from entering the parking lot of the person’s place of business because the customer’s, employee’s, or invitee’s motor vehicle contains a legal firearm being carried for lawful purposes that is out of view within the customer’s, employee’s, or invitee’s motor vehicle.” Id. § 61-7-14(d)(4).
96 Although the BLPA, by its express terms, prohibits employers and property owners from asking questions, it does so by virtue of its subsequent penalties. Therefore, it likely would not be found to be deemed a “prior restraint”—a concept more often applied to gag orders or injunctions and speech subject to prior approval by the authorities. See, e.g., Alexander v. United States, 509 U.S. 544, 548-49 (1993); Neb. Press Ass’n v. Stuart, 427 U.S. 539, 559 (1976) (“[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.”).
98 Id. (discussing a law banning depiction of violence in video games marketed to children) (“[T]he Act’s purported aid to parental authority is vastly overinclusive. Not all of the children who are forbidden to purchase violent video games on their own have parents who care whether they purchase violent video games. While some of the legislation’s effect may indeed be in support of what some parents of the restricted children actually want, its entire effect is only in support of
Although not expressly mentioning the concept of "underinclusivity," the Wollschlaeger court effectively also performed an underinclusivity analysis of the Florida law. The court considered pre-existing Florida law, which allowed a doctor to terminate his or her relationship with a patient, in light of the anecdotes in the legislative record that gave rise to the Florida law in the case before it.\(^9\) Those anecdotes suggested that some doctors "threatened to end the physician-patient relationship or to refuse treatment if questions about firearm ownership were not answered."\(^10\) Yet, the new Florida law—while preventing doctors from asking their patients about firearms—did not prevent doctors from terminating the relationship if the patient failed to answer.\(^11\) On this point, the Court stated, "[o]ne would think that, if the prevention of such conduct was the goal, the Florida Legislature would have prohibited doctors and medical professionals from terminating their professional relationships with patients who decline to answer questions about firearm ownership. That would certainly be a less speech-restrictive solution."\(^12\) Because the Florida Legislature didn't take the obvious step that would have addressed the problem that it purportedly intended to remedy, the law was underinclusive and therefore not narrowly tailored.\(^13\)

Similarly, the BLPA is underinclusive, but in a more direct way. If the BLPA intends to prevent infringement of the Second Amendment rights of customers and employees, it does not go far enough because it only applies to some customers and employees, and only to some property owners and employers. For example, while the law protects those customers and employees who commute to work or travel to business properties by car, it provides no protection to those customers and employees who walk or bike to work or other businesses.\(^14\) In fact, the law retains penalties against persons (not otherwise authorized by statute) who carry firearms into areas of the property, other than the parking lot, where the firearm is prohibited.\(^15\) West Virginia's law is also underinclusive because it does not apply to employers whose business location is "the primary residence of the property owner."\(^16\) Thus, if your employer

\(^9\) Wollschlaeger, 848 F.3d at 1315.
\(^10\) Id.
\(^11\) Id.
\(^12\) Id.
\(^13\) Id.
\(^14\) See generally W. VA. CODE ANN. § 61-7-14 (West 2018).
\(^15\) Id. § 61-7-14(c).
\(^16\) Id. § 61-7-14(a)(1).
worked from home, you could not bring your firearm to his or her house even if it would be locked in your car.\textsuperscript{107}

The BLPA’s “underinclusiveness raises serious doubts about whether the government is in fact pursuing the interest it invokes, rather than disfavoring a particular speaker or viewpoint.”\textsuperscript{108} There can be little doubt that the BLPA favors one viewpoint over another: it favors a pro-gun rights point of view by mandating silence and acceptance of firearms in parking lots.\textsuperscript{109} The viewpoint espoused in the BLPA is undoubtedly popular in West Virginia, and West Virginia legislators, like anyone else, may have legitimate reasons for favoring a pro-gun viewpoint over another. But the First Amendment prohibits this sort of viewpoint discrimination because the government can’t choose which particular messages speakers are allowed to convey: “above all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”\textsuperscript{110}

In short, the BLPA targets speech based on its content, if not its viewpoint; and, because the BLPA is both overbroad and underinclusive, it is not narrowly tailored and thus fails strict scrutiny. But because BLPA claims are likely to arise in the employer-employee context, one other theme of First Amendment jurisprudence is worth mentioning. The Supreme Court has considered free speech arising in the employer-employee context.\textsuperscript{111} Those cases often arise when a public-sector employee has been treated adversely based on something he or she said. The fact that the employee is a public-sector employee is critical in these cases since the discharge by his or her public sector employer is then a matter of government action.

The decisions in employer-employee free speech cases often turn, in part, on whether speech is a matter of public concern or purely private concern. Courts apply a different, more-forgiving standard in such cases, often balancing the competing employer interests and ultimately upholding the discharge while

\textsuperscript{107} In correspondence about this article, Professor Robert M. Bastress notes that the home is often treated differently out of concern for individual privacy interests. That is a fair point. But it is perhaps also fair to note that a homeowner voluntarily abandons at least some aspects of homeplace privacy when he or she turns his or her home into a business. See, e.g., Avrich v. State, 936 So.2d 739 (Fla. Dist. Ct. App. 2006) (“Based on the record before us, it is evident that the defendant made telephone calls to the victim’s business telephone line, located in the victim’s home where he conducted his business. Although the victim may enjoy a reasonable expectation of privacy in his home, that expectation is not extended to his business.”).


\textsuperscript{109} The \textit{Wollschlaeger} court chose not to address whether Florida’s similar law constituted viewpoint discrimination. Wollschlaeger v. Governor of Fla., 848 F.3d 1293, 1307 (11th Cir. 2017) (“Even if the restrictions on speech can be seen as viewpoint neutral—a point we need not address—that does not mean that they are content-neutral.”).

\textsuperscript{110} Police Dep’t of Chicago v. Mosley, 408 U.S. 92, 95 (1972) (citations omitted).

rejecting claims of First Amendment violations. Therefore, although BLPA speech cases may arise in the employer-employee context, it seems fair to say that those cases will not be like those public-sector workplace speech cases considered by the Supreme Court. Rather, the speech concerns under the BLPA have to do with whether the state (through the attorney general) or a private party (authorized by state statute) may punish an employer’s speech about the issue of guns. The classic, content-based government restriction authorized by the BLPA is squarely within the mainline of First Amendment strict-scrutiny precedent.

Moreover, while some workplace speech may be of such private concern that First Amendment concerns are not implicated, speech about firearms and Second Amendment rights—which state legislative action has sought to prevent—is undoubtedly of public concern.

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112 Id. In order to obtain First Amendment protection, the speaker must have been speaking as a private citizen, and not as an employee in the exercise of his official duties. See, e.g., Garcetti v. Ceballos, 547 U.S. 410, 411 (2006) ("So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively."). The author thanks Professor Bastress for raising this point and for the specific citation.

113 But see Norton, supra note 80, at 728 (reviewing laws prohibiting employers from asking questions which might elicit information that could be used to discriminate against the applicant) (noting that "[e]xcept for a few cases involving discriminatory advertisements, these provisions’ free speech implications have received relatively little attention to date"). While some authors suggest that laws penalizing employers from asking such questions may violate the First Amendment, see Yin, supra note 80, at 109, the fact that these laws have not been addressed extensively by the courts is surprising. The Supreme Court’s recent decision in National Institute of Family & Life Advocates v. Becerra, which weakens if not eliminates any special exception for so-called professional speech, may serve to highlight this anomaly. See generally Nat’l Inst. of Family & Life Advocates v. Becerra, 138 S. Ct. 2361 (2018). In any event, it may be possible to draw the following distinction between the BLPA (which prohibits questions about guns) and the various federal statutes (which prohibits questions about disabilities, for example): a person’s disability in the context of a job application seems to be more a matter of private concern, whereas an employer or property owner’s desire to ask about firearms is more a matter of public debate and concern. This is not completely satisfactory, however. The reasoning behind this article implies that employer questions, not falling under one of the traditional, rare exceptions to the First Amendment’s free speech guarantees, should be protected.

114 See supra notes 77–78.

115 Snyder v. Phelps, 562 U.S. 443, 452 (2011) ("Not all speech is of equal First Amendment importance, however, and where matters of purely private significance are at issue, First Amendment protections are often less rigorous.") (citations and internal punctuation omitted).

116 D.C. v. Heller, 554 U.S. 570, 636 (2008); Hoofnagle v. Smyth-Wythe Airport Comm’n, 2016 WL 3014702, at *4 (W.D. Va. May 24, 2016) ("The subject matter of the email was gun control, and it was drafted in response to a political solicitation. Although the defendants assert that Hoofnagle’s interest in guns is strictly personal, courts regularly conclude that speech about the gun control debate constitutes a matter of public concern."); Charles, supra note 4, at 1144 ("With Heller having answered the question jurisprudentially by placing the right to keep and bear
V. CONCLUSION

If this Article has correctly identified a constitutional violation in the BLPA, the preferred solution is further legislative action. The Legislature could simply repeal subsection (d)(2)(A) of the BLPA, the section of the Act which penalizes speech.\textsuperscript{117} By taking such action within its policy-making prerogative, the Legislature would reaffirm West Virginians’ rights both to bear arms and speak freely.

It is also worth considering potential court challenges to the BLPA. The Act does not contain a non-severability clause. Therefore, if a court finds the speech penalties contained in subsection (d)(2)(A) unconstitutional, they are presumptively severable.\textsuperscript{118}

A court conducting a severability analysis would be asked to determine whether the remainder of the Act “reflects the legislative will, is complete in itself, is capable of being executed independently of the rejected portion, and in all other respects is valid.”\textsuperscript{119} Within that analysis, the Supreme Court of Appeals has held that “[t]he most critical aspect of severability analysis involves the degree of dependency of statutes.”\textsuperscript{120} If the valid and invalid statutory provisions “are so connected and interdependent in subject matter, meaning, or purpose as to preclude the belief, presumption or conclusion that the Legislature would have passed the one without the other, the whole statute will be declared invalid.”\textsuperscript{121}

Even without the speech penalties, the BLPA undoubtedly reflects the legislative will to protect West Virginians’ Second Amendment rights. The Act

\textsuperscript{117} This solution would cure the free speech violation. Whether the statute violates principles of equal protection or due process are topics outside of the scope of this paper. See, e.g., Fla. Retail Fed’n, Inc. v. Att’y Gen. of Fla., 576 F. Supp. 2d 1281 (N.D. Fla. 2008).

\textsuperscript{118} See, e.g., Syl. Pt. 4, State v. Stamm, 664 S.E.2d 161, 163 (W. Va. 2008) (“A statute may contain constitutional and unconstitutional provisions which may be perfectly distinct and separable so that some may stand and the others will fall; and if, when the unconstitutional portion of the statute is rejected, the remaining portion reflects the legislative will, is complete in itself, is capable of being executed independently of the rejected portion, and in all other respects is valid, such remaining portion will be upheld and sustained.”) (citations omitted). Even if the statute contained a non-severability clause, such a clause would only serve as a non-binding presumption. See, e.g., Syl. Pt. 4, Louk v. Cormier, 622 S.E.2d 788, 791 (W. Va. 2005) (“A non-severability provision contained in a legislative enactment is construed as merely a presumption that the Legislature intended the entire enactment to be invalid if one of the statutes in the legislation is found unconstitutional. When a non-severability provision is appended to a legislative enactment and this Court invalidates a statute contained in the enactment, we will apply severability principles of statutory construction to determine whether the non-severability provision will be given full force and effect.”).

\textsuperscript{119} Louk, 622 S.E.2d at 803–04.

\textsuperscript{120} Id. at 804.

\textsuperscript{121} Syl. Pt. 9, Robertson v. Hatcher, 135 S.E.2d 675, 677 (W. Va. 1964).
prohibits vehicle searches and adverse action against customers and employees who want to travel with their firearms safely locked in their cars. That is the core purpose of the Act according to the Act’s sponsors and advocates.\textsuperscript{122} And the Act accomplishes that purpose through an otherwise valid\textsuperscript{123} and independently executable system of anti-harassment and anti-discrimination provisions which do not depend upon Subsection (d)(2)(A)’s penalties.

Guns are very important to West Virginians, "[b]ut the profound importance of the Second Amendment does not give the government license to violate the right to free speech under the First Amendment."\textsuperscript{124} In its desire to protect its citizens’ Second Amendment rights by passing the BLPA, the West Virginia Legislature violated its citizens’ First Amendment rights. But there is no reason why it has to be this way. West Virginia citizens should be able to enjoy the full expression of their speech rights and gun rights without sacrificing one for the other.

\begin{itemize}
\item \textsuperscript{122} See \textit{supra} notes 91–92 and accompanying text.
\item \textsuperscript{123} See \textit{supra} note 118.
\item \textsuperscript{124} Wollschaeger v. Governor of Fla., 848 F.3d 1293, 1327 (11th Cir. 2017) (Pryor, J., concurring). Statements in Judge Pryor’s concurrence in \textit{Wollschaeger} concerning the importance of the doctor-patient candor were cited favorably by the Supreme Court in \textit{National Institute of Family & Life Advocates v. Becerra}, 138 S. Ct. 2361, 2374 (2018).
\end{itemize}