

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION  
CIVIL ACTION NO. 11-CV-22026-COOKE/TURNOFF

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**DR. BERND WOLLSCHLAEGER, et al.** )

Plaintiffs, )

v. )

**RICK SCOTT, *In his official capacity as*** )  
***Governor of the State of Florida, et al.*** )

Defendants. )

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**PLAINTIFFS' MOTION FOR A PRELIMINARY INJUNCTION  
AND ACCOMPANYING MEMORANDUM OF LAW**

Since taking effect on June 2, 2011, the Physician Gag Law (CS/CS/HB 155, “An act relating to the privacy of firearm owners”) has severely curtailed the ability of Florida health care practitioners to communicate with their patients about firearm safety. Because the law is unconstitutional under the First Amendment and causes immediate and irreparable injury, Plaintiffs Dr. Bernd Wollschlaeger, Dr. Judith Schaechter, Dr. Tommy Schechtman, Dr. Stanley Sack, Dr. Shannon Fox-Levine, Dr. Roland Gutierrez, American Academy of Pediatrics, Florida Chapter (“FAAP”), American Academy of Family Physicians, Florida Chapter (“FAFP”), and American College of Physicians, Florida Chapter, Inc. (“FACP”) (collectively, “Plaintiffs”) respectfully request that, for the reasons set forth below, the Court enter a preliminary injunction enjoining enforcement of the law.<sup>1</sup> A Proposed Order is attached as Exhibit A.

#### **MEMORANDUM IN SUPPORT OF PRELIMINARY INJUNCTION**

The Physician Gag Law is unconstitutional on its face for at least three reasons. First, as a content-based restriction on speech, it is presumptively invalid. Defendants (collectively, “the State”) cannot carry their burden of proving the law is “the least restrictive means of advancing a compelling government interest.” *Solantic, LLC v. City of Neptune Beach*, 410 F.3d 1250, 1258 (11th Cir. 2005). The law’s stated purpose, protecting “privacy” regarding firearm ownership, is not a compelling government interest. Nor is the law the least speech-restrictive means of furthering that interest. That interest could be advanced by, for example, strengthening already-existing confidentiality protections for patient information. Instead, the law seeks to protect the few who might be offended by a practitioner’s question about firearms by restricting

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<sup>1</sup> Plaintiffs are simultaneously filing today a First Amended Complaint revising the parties to the suit. The plaintiffs now include six individual physicians and three organizations collectively representing the interests of approximately 11,400 Florida health care practitioners. Following discussions with counsel for the defendants, the defendants named in the First Amended Complaint are the Surgeon General, Secretary of Health Care Administration, and members of the Board of Medicine. Many of the defendants are physicians who, in their individual capacities, are members of the plaintiff organizations and may personally agree with the Plaintiffs’ positions in this case. All of the state official defendants are sued exclusively in their official capacities.

practitioners' questions for *all* patients. The First Amendment forbids such a legislative choice.

Second, the Physician Gag Law is unconstitutionally vague. A statute is unconstitutional if it is "so vague that [persons] of common intelligence must necessarily guess at its meaning." *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1310 (11th Cir. 2009). Because this law threatens harsh sanctions while defining none of its critical terms, it denies the individual Plaintiffs and the members of the Plaintiff organizations ("practitioners") adequate notice of what conduct is prohibited and chills their constitutionally protected speech regarding firearm safety. The law thus violates practitioners' free speech and due process rights, as well as their patients' First Amendment right to receive such information. *See Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756–57 (1976).

Third, the Gag Law is unconstitutionally overbroad. If "a substantial number of [a law's] applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep," the entire statute is invalid. *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010). Even assuming the law has some legitimate applications, they are far outnumbered by unconstitutional ones.

As demonstrated below, Plaintiffs also suffer an immediate and irreparable injury as a result of the law. The law is curtailing practitioners' communication with patients on a daily basis. Moreover, the State has no legitimate interest in enforcing an unconstitutional law, and thus the balance of harms tips sharply in Plaintiffs' favor. Finally, a preliminary injunction will serve the public interest. The law causes immediate and irreparable harm to the First Amendment rights of practitioners and also reduces the quality of preventive care received by patients across Florida, raising their risk of injury or death.

## **I. BACKGROUND**

### **A. Physicians Routinely Provide Essential Safety Guidance to Patients Regarding Firearm Safety.**

In practicing preventive medicine, practitioners routinely counsel patients, parents, and

other caregivers about minimizing a panoply of risks to patients' health, including household chemicals, swimming pools, bicycles, automobiles, drugs, alcohol, tobacco—and firearms. FAAP Decl. ¶¶ 10, 13; FACP Decl. ¶ 8; FAFP Decl. ¶ 9.<sup>2</sup> Practitioners, even those who are themselves gun owners, are acutely aware of the risks posed by unsecured guns in homes, especially for minors and those suffering from depression or dementia.<sup>3</sup>

For these reasons, Plaintiffs view firearm safety as an important public health issue, and believe “the preventable loss of life and injury and the resulting pain, suffering, and consumption of human, economic, and healthcare resources demand that firearm injuries should be considered a public health issue requiring immediate attention.” FACP Decl. ¶ 11. FAAP, FACP and FAFP all encourage their members to advise families about firearm safety when guns are in the home, and FAAP and FACP specifically recommend *asking* patients and their families about gun ownership, in order to tailor anticipatory guidance to patients' circumstances.<sup>4</sup>

**B. The Physician Gag Law Prevents Physicians and Patients from Discussing Essential Firearm Safety Guidance.**

Signed into law on June 2, 2011, the Physician Gag Law apparently was prompted by a single incident in which, allegedly, a mother was offended by a pediatrician's question about gun ownership in a routine safety screening, refused to answer it, and was given 30 days to find a new pediatrician. *See* Manheim Decl., Ex. 3,<sup>5</sup> Health & Human Servs. Comm. Report, at 2 (Apr. 7, 2011 ) (citing Ex. 2, Fred Hiers, *Family and pediatrician tangle over gun question*, Ocala Star-

<sup>2</sup> Among pediatricians, preventive counseling is especially important because unintentional injuries are the leading of cause of death and morbidity among children older than 1 year, adolescents, and young adults. FAAP Decl., Ex. 2 at 12, *A Guide to Safety Counseling in Office Practice*.

<sup>3</sup> *See* FACP Decl., Ex. 2 at 8 (relating troubling statistics on injuries and deaths from firearm-related accidents); FAAP Decl. ¶ 5, 14 (same); Schaechter Decl. ¶¶ 5-7 (describing experience with such accidents); Welty ¶ 4 (same). Of injury-related deaths, firearms claim more lives than all injury sources except motor vehicles. Teresa L. Albright, M.D., & Sandra K. Burge, Ph.D., “Improving Firearm Storage Habits: Impact of Brief Office Counseling by Family Physicians,” 16 *J. Am. Board of Family Practice* 1, 40 (Jan.–Feb. 2003).

<sup>4</sup> FACP Decl. at ¶ 10 & Ex. 2 at 2, 8; FAAP Decl. ¶¶ 11, 18 & Ex. 2 at 12–13, 16, 19; FAFP Decl. ¶ 10 & Ex. 2 at 4.

<sup>5</sup> Hereinafter, all citations to “Ex. \_\_\_” refer to the Manheim Declaration, except where otherwise noted.

Banner, July 23, 2010); *see also* Ex. 1 (reproducing law in full). A committee considering the bill noted that “professional medical groups have adopted policies that encourage or recommend that physicians ask patients about the presence of a firearm in the home” and “educate patients to the dangers of firearms to children,” and determined that it should no longer “be an accepted practice for a doctor to inquire about a patient’s firearm ownership.” Ex. 3 at 2.

The Physician Gag Law severely curtails communications between practitioners and their patients on the subject of firearm safety in several ways.<sup>6</sup> First, it directs practitioners to “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.” Fla. Stat. §§ 790.338(2), 381.026(4)(b)(8) (the “no-inquiry provision”). It further prohibits practitioners from “intentionally enter[ing] any disclosed information concerning firearm ownership into the patient’s medical record.” *Id.* § 790.338(1) (the “no-recording provision”). Neither provision contains an exception for patients who *welcome* the inquiry or the recording of such information.

Both provisions do contain exceptions for when a practitioner believes in good faith that the information is “relevant to the patient’s medical care or safety, or the safety of others,” but the law provides no guidance as to that standard’s meaning. *Id.* § 790.338(1)–(2). The Ocala incident giving rise to the law, however, lends credence to doctors’ fears that the law prohibits such inquiries in routine preventive care. That concern is heightened by another provision applicable to emergency medical technicians, specifying that their similar “relevance” exception

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<sup>6</sup> The challenged provisions apply to a “health care practitioner licensed under chapter 456 or a health care facility licensed under chapter 395.” Fla. Stat. §§ 790.338(1)–(2), (5)–(6); 381.026(4)(b)(8), (10)–(11). Because restrictions on facilities, in turn, restrict practitioners within the facilities, Plaintiffs challenge the provisions in their entirety, including the restrictions on facilities. *See* Amd. Cmpl. ¶ 62; Schaechter Decl. ¶ 16 (employer forbade questionnaires with firearm-related questions after law’s passage). To simplify, Plaintiffs refer to the law as applying to “practitioners.”

applies only if “necessary to treat a patient during...a *medical emergency*” or if a “firearm would pose an *imminent danger or threat*.” *Id.* § 790.338(3) (the “EMT provision”) (emphases added).

The Physician Gag Law also prohibits “unnecessarily harassing a patient about firearm ownership during an examination,” *see id.* §§ 790.338(6), 381.026(4)(b)(11) (the “harassment provision”), and “discriminat[ing] against a patient based solely upon the patient’s exercise of the constitutional right to own and possess firearms or ammunition,” *id.* §§ 790.338(5), 381.026(4)(b)(10) (the “discrimination provision”). The law does not define either “discrimination” or “harassment,” let alone “unnecessary harassment.”

Practitioners accused of violating these inscrutable provisions face disciplinary proceedings and sanctions including reprimands, license revocation, and fines up to \$10,000 per offense.<sup>7</sup> An investigation can harm practitioners’ reputations and careers, even if they are eventually vindicated. Schaechter Decl. ¶ 23.<sup>8</sup> The Board of Medicine already has determined that violations of the Physician Gag Law will be adjudicated under existing disciplinary guidelines for failure to comply with a legal obligation, *see* Ex. 5, Florida Board of Medicine Rules/Legislative Committee, Meeting Report, at 3 (June 2, 2011), so the Board can adjudicate violations of the law immediately without taking additional implementing action.

## II. ARGUMENT

In deciding whether to grant a preliminary injunction, courts consider whether: (1) the movant has established a substantial likelihood of success on the merits; (2) irreparable injury will be suffered in the absence of relief; (3) the threatened injury outweighs any harm the relief would inflict on the non-movant; and (4) entry of such relief would serve the public interest. *See, e.g., Siebert v. Allen*, 506 F.3d 1047, 1049 (11th Cir. 2007). The required strength of the

<sup>7</sup> *See* Fla. Stat. §§ 790.338(8), 395.1055, 456.072(1)(mm)-(2).

<sup>8</sup> *See also* Edwards Decl. ¶ 15; Goodman Decl. ¶ 12; Schechtman Decl. ¶ 13; Leland Decl. ¶ 11; Fox-Levine Decl. ¶ 18; Wollschlaeger Decl. ¶ 11; Welty Decl. ¶ 13.

“possibility of success on the merits will vary according to the court’s assessment of the other factors,” *Schiavo ex rel. Schindler v. Schiavo*, 403 F.3d 1223, 1232 (11th Cir. 2005); only a “substantial case on the merits” is required if the equities weigh heavily in the movant’s favor, *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986). Plaintiffs satisfy all four prongs.

**A. Plaintiffs’ Claims Have a Substantial Likelihood of Success on the Merits.**

As a content-based restriction on speech, the Physician Gag Law is presumptively invalid, subject to strict scrutiny, and unconstitutional unless it is “the least restrictive means of advancing a compelling government interest.” *Solantic*, 410 F.3d at 1258. Yet the law neither furthers a compelling state interest, nor is the least restrictive means of advancing that interest. The law is also unconstitutionally vague and overbroad and chills protected speech. Plaintiffs, therefore, have a “substantial likelihood” of success on the merits.

**1. The Physician Gag Law Is a Content-Based Restriction on Protected Speech Subject to Strict Scrutiny.**

The Physician Gag Law defies the fundamental tenet that, “[a]bove 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.” *Id.* at 1259 (quoting *Police Dep’t of Chicago v. Mosley*, 408 U.S. 92, 95 (1972)). “Content-based regulations are presumptively invalid,” *id.* (quoting *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992)), and “the Government bears the burden to rebut that presumption,” *Stevens*, 130 S. Ct. at 1584 (quoting *United States v. Playboy Entm’t Grp., Inc.*, 529 U.S. 803, 817 (2000)). Content-based restrictions must pass strict scrutiny. *Solantic*, 410 F.3d at 1267. The Physician Gag Law utterly fails.

To begin, there is no question that the First Amendment protects the exchange of information between practitioner and patient concerning firearm safety. Courts have recognized such protection, including, in particular, the gathering of information from the patient in order to provide medical care. *See, e.g., Sorrell v. IMS Health Inc.*, No. 10-779, slip op. at 11 (U.S. June

23, 2011) (noting that “consumer’s concern for the free flow of...speech...has great relevance in the fields of medicine and public health, where information can save lives” (internal quotation omitted)); *Conant v. Walters*, 309 F.3d 629, 636 (9th Cir. 2002) (The “doctor-patient privilege reflects ‘the imperative need for confidence and trust’ inherent in the doctor-patient relationship and recognizes that ‘a physician must know all that a patient can articulate in order to identify and to treat disease; barriers to full disclosure would impair diagnosis and treatment.’” (quoting *Trammel v. United States*, 445 U.S. 40, 51 (1980))). And, just as the First Amendment protects practitioners’ acquiring information from their patients, so, too, does it protect patients’ right to receive information and medical advice from their doctors. *See Va. State Bd.*, 425 U.S. at 756–57 (“[T]he protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both. . . . [F]reedom of speech ‘necessarily protects the right to receive.’” (quoting *Kleindienst v. Mandel*, 408 U.S. 753, 762-63 (1972))).

The Physician Gag Law is subject to strict scrutiny because it restricts this protected speech based on its content. A speech restriction is considered content-neutral only if it “places no restrictions on—and clearly does not prohibit—either a particular viewpoint or any subject matter,” *Burk v. Augusta-Richmond Cnty.*, 365 F.3d 1247, 1253 (11th Cir. 2004) (quoting *Hill v. Colorado*, 530 U.S. 703, 723 (2000)), and if it “is ‘justified without reference to the content of the regulated speech,’” *DA Mortg., Inc. v. City of Miami Beach*, 486 F.3d 1254, 1266 (11th Cir. 2007) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)).

The Physician Gag Law singles out, and specifically curtails, speech concerning a particular “subject matter”—firearm safety—by a particular group of speakers—health care practitioners—precisely because the Florida Legislature determined that “it should [no longer] be an accepted practice for a doctor to inquire about a patient’s firearm ownership.” Ex. 4,

Judiciary Comm. Report, at 2 (Apr. 12, 2011); *see* Fla. Stat. §§ 790.338(1)–(2), (5)–(6); 381.026(4)(b)(8), (10)–(11). Moreover, it does so precisely because groups such as the American Medical Association and the American Academy of Pediatrics were encouraging their members to “educate patients to the dangers of firearms to children.” Ex. 4, at 2. The First Amendment forbids such legislation that seeks to suppress speech for its viewpoint. *See Sorrell*, slip op. at 9 (holding that statute “designed...to target [particular] speakers and their messages for particular disfavored treatment...‘goes beyond mere content discrimination, to actual viewpoint discrimination’” (quoting *R.A.V.*, 505 U.S. at 391)).

## 2. The Physician Gag Law Cannot Survive Strict Scrutiny.

The Eleventh Circuit applies “the most exacting scrutiny to regulations that suppress, disadvantage, or impose differential burdens on speech because of its content.” *Solantic*, 410 F.3d at 1258 (quoting *Turner Broad. Sys., Inc. v. FCC*, 512 U.S. 622, 642 (1994)). Because strict scrutiny applies here, the State bears the burden of showing the law “constitutes the least restrictive means of advancing a compelling government interest.” *Id.* “Few laws survive such scrutiny,” *Burk*, 365 F.3d at 1255—and the Physician Gag Law cannot.

### a. The State Lacks a Compelling State Interest.

The State bears the burden of showing that the law “advanc[es] a *compelling* government interest”—not simply a “substantial” interest. *Solantic*, 410 F.3d at 1258 (emphasis added). Furthermore, an abstract interest in “protecting privacy” is insufficient. *See id.* at 1268 (rejecting supposed compelling state interest “offered only at the highest order of abstraction”). As the Supreme Court explained in *California Democratic Party v. Jones*, 530 U.S. 567 (2000), the “determination [as to whether an interest is compelling] is not to be made in the abstract, by asking whether fairness, privacy, etc., are highly significant values; but rather by asking whether the *aspect* of fairness, privacy, etc., addressed by the law at issue is highly significant.” *Id.* at

584. Thus, in *Jones*, the Court held that California’s asserted interest in protecting the privacy of voters’ party affiliations could not “conceivably be considered a ‘compelling’ one,” because “[i]f such information were generally so sacrosanct, federal statutes would not require a declaration of party affiliation as a condition of appointment to certain offices.” *Id.* at 585.

The sole interest purportedly advanced by the Physician Gag Law, to protect the “privacy of firearm owners,” does not rise to the level of a compelling state interest, because this aspect of privacy also is not “sacrosanct,” *see id.* Both Florida and the federal government regulate firearms, including gun purchases and carrying. Before purchasing a firearm from a licensed gun dealer, Florida residents must submit a wide range of personal information and undergo a background check. Fla. Stat. § 790.065; 18 U.S.C. § 922(t). Likewise, carrying a concealed firearm requires obtaining a license. *See id.* §§ 790.01, 790.06.<sup>9</sup> It is thus impossible legally to purchase a firearm from a gun dealer or to choose to carry it concealed “anonymously” in Florida.<sup>10</sup> “Privacy” in such ownership is therefore insufficiently “sacrosanct” for its protection to constitute a compelling state interest.

The State’s asserted “compelling state interest” in securing the privacy of firearm ownership is further undermined by its purporting to protect the “privacy” of gun owners *only* with respect to a single class of already-confidential communications. The law applies *only* to practitioners—anyone else can ask about firearm ownership—whose communications with patients are *already* made confidential and protected against disclosure under both state and

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<sup>9</sup> Furthermore, Florida law even dictates how residents must store their firearms within their own homes. *See* Fla. Stat. § 790.174(1) (person who has stored a firearm “and who knows or reasonably should know that a minor is likely to gain access to the firearm” “shall keep the firearm in a securely locked box or container or in a location which a reasonable person would believe to be secure or shall secure it with a trigger lock”). Ironically, then, the Physician Gag Law inhibits practitioners from giving advice that would help patients avoid committing a crime.

<sup>10</sup> Many States maintain state-wide registries of handguns and their owners. *See, e.g.,* Cal. Penal Code § 11106; 430 Ill. Comp. Stat. 65; Mass. Gen. Laws ch. 140, §§ 121-131P. Although gun owners have brought numerous challenges to such laws, courts have repeatedly rejected them. *See, e.g., Heller v. District of Columbia*, 698 F. Supp. 2d 179, 189–93 (D.D.C. 2010); *Justice v. Town of Cicero*, 577 F.3d 768, 774 (7th Cir. 2009).

federal law.<sup>11</sup> *FCC v. League of Women Voters*, 468 U.S. 364, 396 (1984) (“[T]he substantiality of [the government’s] asserted interest is dubious” where the statute “provides only ineffective or remote support for the government’s purpose.”) (internal quotation omitted).

Finally, the State’s purported interest in protecting the “privacy” of firearm ownership is particularly weak because many, if not most, patients might, if given the choice, actually *prefer* to be asked and to disclose such information in order to obtain the most thorough or efficient preventive care.<sup>12</sup> As to those patients who would be offended by such questions, the Supreme Court has “often had occasion to repeat” that the fact that a listener “may find speech offensive is not a sufficient reason for suppressing it.” *Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 118 (1991) (internal quotations omitted). While the State sometimes may have an interest in giving effect to a would-be listener’s *decision* not to hear a speaker’s message, the State cannot restrict speech on the *assumption* that *all* would-be listeners do not wish to hear the message. *Martin v. City of Struthers*, 319 U.S. 141, 143-44 (1943) (holding that, notwithstanding interest in protecting against intrusion, ordinance restricting canvassing impermissibly “substitutes the [community’s] judgment...for the judgment of the individual householder” and interferes with the right to decide whether to receive the message).

**b. The Physician Gag Law Is Not the Least Restrictive Means of Accomplishing the State’s Purported Aims.**

Even if the State’s interest in protecting the privacy of gun owners were compelling, the law still would not survive strict scrutiny, because the Physician Gag Law is plainly not the least restrictive means of furthering the State’s purported ends. A content-based restriction on speech,

<sup>11</sup> See 42 U.S.C. §§ 1320d-1 to d-7 (restricts access to patient identifiable health information and protects from disclosure any information given by patient to practitioner either orally or in writing); Fla. Stat. § 456.057(7)(a), (8).

<sup>12</sup> In Plaintiffs’ and their members’ experience, many patients and parents are unaware of basic firearm safety measures and express appreciation at learning how they can minimize the risks of physical injury and death stemming from their ownership of firearms. See, e.g., Gutierrez Decl. ¶ 8; King Decl. ¶ 7; Sack Decl. ¶ 8; Wollschlaeger Decl. ¶ 9; Welty Decl. ¶ 8. In contrast, patients who do not own or ever encounter firearms may prefer that their practitioners’ preventive care advice focus on other topics applicable to their circumstances.

such as the Physician Gag Law, must be both “narrowly tailored to promote a compelling Government interest” and the least restrictive means of accomplishing the State’s ends: “If a less restrictive alternative would serve the Government’s purpose, the legislature *must* use that alternative.” *Playboy*, 529 U.S. at 813 (emphasis added). In other words, “regulating speech must be a last—not first—resort.” *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 1507 (2002).

A prohibition against practitioners *asking* about gun ownership is, without question, more speech-restrictive than necessary to protect gun owners’ right to privacy in that information. To the extent gun owners wish to maintain their privacy, they may decline to *answer* any such “inquiries” put to them. And, of course, if patients decline to answer such inquiries, their medical records will not reflect whether or not they own firearms. To the extent the Legislature might be concerned about the *consequences* of patients’ declining to answer questions about firearms, the Legislature should pass laws narrowly tailored to address those consequences.<sup>13</sup>

For the many patients who *would* appreciate such questions, the no-inquiry and no-recording provisions are particularly overly restrictive. The law contains no carve-out or defense on the ground that a patient or the patient’s parent consented to the inquiry or recording. Instead, the law enforces a blanket ban that effectively presumes that patients do *not* want to hear such questions—an unacceptable presumption under the First Amendment. *See, e.g., Watchtower Bible & Tract Soc’y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150, 168 (2002) (in striking down ordinance criminalizing door-to-door advocacy without a permit, rejecting purported interest in protecting residents’ privacy in part because “the resident’s unquestioned right to refuse to engage in conversation with unwelcome visitors...provides ample protection for the unwilling listener”); *Playboy*, 529 U.S. at 824 (striking down statute barring potentially offensive programs

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<sup>13</sup> If, for example, gun owners were afraid that medical records reflecting gun ownership might be used in one or another type of governmental proceeding, the Legislature could strengthen non-disclosure prohibitions without restricting any speech at all. *Cf.* Fla. Stat. §§ 456.057(7)(a), (8).

because opt-in system of household-by-household blocking was feasible).

The Physician Gag Law is also not the least restrictive means of accomplishing the purported aims of the harassment and discrimination provisions. A statute is not the least restrictive means of accomplishing the State's ends when, as here, the State "could, for example, target only offensive behavior or the manner of delivery of speech without regard to viewpoint or subject matter." *Burk*, 365 F.3d at 1255. Instead of establishing and imposing vague and undefined prohibitions on "harassment" or "discrimination" with respect to the subject matter of firearms, the Legislature could define "harassment" and "discrimination" by reference to specific *conduct* that the Legislature seeks to prohibit, and bar that conduct. *See Sorrell*, slip op. at 19–20 (expressing doubt that "concern for 'a few' physicians who may have 'felt coerced and harassed by...marketers'" could ever "sustain a broad content-based rule" since "endur[ing] speech they do not like...is a necessary cost of freedom," and ruling against state for failing to explain "why remedies other than content-based rules would be inadequate").<sup>14</sup>

### 3. The Physician Gag Law Is Unconstitutionally Vague.

In addition to failing strict scrutiny, the Physician Gag Law is unconstitutionally vague and therefore violates the Due Process Clause of the Fourteenth Amendment. "[A] statute[,] which either forbids or requires the doing of an act in terms so vague that [persons] of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law," because it "fail[s] to put potential violators on notice that certain conduct is prohibited...and provide explicit standards for those who apply the law." *Harris*, 564 F.3d at 1310 (internal quotations omitted). "[V]agueness of [a content-based] regulation raises special First Amendment concerns because of its obvious chilling effect on free speech," *Reno v.*

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<sup>14</sup>The Court reached these conclusions in *Sorrell* in the context of evaluating a restriction on commercial speech. Slip op. at 16. Though the Florida statute is not subject to the lower standard of scrutiny applicable to restrictions on commercial speech, *Sorrell* makes clear the Florida statute would not withstand even that lesser scrutiny.

*ACLU*, 521 U.S. 844, 871–72 (1997), and “a more stringent vagueness test should apply.” *Vill. of Hoffman Estates v. The Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982).

The Physician Gag Law does not meet this stringent standard. The statute’s no-inquiry and no-recording provisions entirely fail to give practitioners notice regarding when they may ask patients about firearms or record such information. The provisions sweepingly bar recording *any* information or making *any* “written inquiry or asking questions concerning the ownership of a firearm.” Fla. Stat. § 790.338(1)-(2). Although the statute carves out an undefined exception for when the practitioner believes in good faith “that this information is relevant to the patient’s medical care or safety, or the safety of others,” *id.*, the law provides no guidance on what standard of “relevance” is intended. In light of the dangers posed by firearms, many practitioners believe that information is *always* “relevant” to a patient’s care, including as part of routine preventive medicine.<sup>15</sup> Plaintiffs recognize, however, that such a reading would render the statute largely meaningless and thus would not address the objected-to circumstances in Ocala. *See In re Davis*, 565 F.3d 810, 823 (11th Cir. 2009) (“We cannot read statutory language in a way that renders it wholly meaningless or nonsensical.”). Thus, practitioners reasonably fear the law requires some higher, unspecified level of connection to the specific patient’s care.

It is all the more unsettling to practitioners that the law’s only concrete indication of the required degree of “relevance” sets a high bar indeed—one of “medical emergency” or “imminent danger or threat,” as described in the EMT provision. Fla. Stat. § 790.338(3). This “imminent danger or threat” standard plainly would *not* be met by inquiring about firearms as a preventive measure as part of a standard set of screening questions given to all patients. *See, e.g.,* Schechtman Decl. ¶ 11. While the no-inquiry and no-recording provisions possibly may not

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<sup>15</sup> *See, e.g.,* Schachter Decl. ¶¶ 11, 13, 17; Leland Decl. ¶ 7; Welty Decl. ¶¶ 4, 11; Wollschlaeger Decl. ¶¶ 8-9.

be construed to require precisely the same relevance standard as the EMT provision, there is no way to know how, as between these extremes, the other standards will be construed.

The “harassment” and “discrimination” provisions likewise are void for failing to give practitioners sufficient notice of the prohibited conduct. Such provisions, if well defined, might constitute a permissible, less-speech-restrictive alternative to protect the rights of patients who do not wish to answer questions about gun ownership. But the Physician Gag Law fails to define either of the operative words—“unnecessarily harassing” or “discriminate.” *See Fla. Stat. §§ 790.338(5)–(6)*. Practitioners are left to guess what conduct is prohibited and, in particular, to guess what patients might regard as “harassment.” “This is not permissible under the First Amendment.” *Conant*, 309 F.3d at 639 (striking down statute criminalizing speech by doctors that “the patient believes to be a recommendation of marijuana”); *see id.* (citing *Thomas v. Collins*, 323 U.S. 516, 535 (1945) (striking down statute that put speaker “wholly at the mercy of the varied understanding of his hearers”)). The discrimination provision is similarly unclear. Although one might have expected, in light of the statute’s origin with the Ocala incident, that this provision was intended to prohibit doctors from ending relationships with patients based on their refusal to answer questions about gun ownership, another provision of the statute makes explicit that the statute does *not* alter the rule that a doctor is free to cease providing services to a patient for any reason, if the patient has sufficient time to find a new doctor. *See Fla. Stat. § 790.338(4)*; *see also Ex. 4*, at 4 n.10 (describing this “existing law”). Thus, practitioners are left to guess what activity *would* be prohibited by the discrimination provision.

Because the law is vague and leaves practitioners to “guess at its meaning,” it “violates the first essential of due process of law.” *Harris*, 564 F.3d at 1310. This due process violation is all the more grave because hanging in the balance are not only \$10,000 fines and professional

licenses, but also the well-being of patients, who will suffer most from the law's chilling effect.

#### 4. The Physician Gag Law is Unconstitutionally Overbroad.

Even assuming that certain applications of the Physician Gag Law to abusive conduct would be constitutionally permissible, the law is nevertheless void because “a substantial number of its applications are unconstitutional, judged in relation to the statute’s plainly legitimate sweep.” *Stevens*, 130 S. Ct. at 1587 (quoting *Wash. State Grange v. Wash. State Republican Pty.*, 552 U.S. 442, 449 n.6 (2008)); *Weaver v. Bonner*, 309 F.3d 1312, 1318 (11th Cir. 2002). The overbreadth doctrine “prohibits the [State] from banning [even] unprotected speech if a substantial amount of protected speech is prohibited or chilled” as a result. *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 255 (2002).

The Physician Gag Law is plainly overbroad under this standard. In addition to prohibiting alleged abusive or wrongful conduct by *errant* physicians, the law also broadly regulates and restricts *every* practitioner’s speech on the subject of firearms, affecting practitioners’ routine patient interactions daily. Indeed, on its face, the law appears to preclude even *consented-to* inquiries or recording of information. Plaintiffs’ experience demonstrates that, while they have asked numerous patients each day about gun ownership, and engaged in discussions about safe storage practices with many of those, they have rarely if ever had a patients object to the question.<sup>16</sup> Indeed, the legislative history reflects only a single incident that the Legislature believed to be inappropriate. *See* Ex. 3 at 2; Ex. 4 at 2. The statute is presently curtailing many, many more constitutionally protected exchanges than the few situations in which the statute might potentially constitutionally be applied, assuming any exist.<sup>17</sup>

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<sup>16</sup> *See, e.g.*, Sack Decl. ¶ 8 (stating that patients have “nearly always expressed gratitude” for discussing firearms); Gutierrez Decl. ¶ 8 (noting that prior to passage of statute, “patients’ parents have never expressed anything but gratitude” for discussing firearms); Schaechter Decl. ¶ 11 (stating that “[p]arents often say they are glad to talk about guns and feel empowered that they are protecting their children when they follow my advice”); Edwards Decl. ¶ 13.

<sup>17</sup> *See, e.g.*, Fox-Levine Decl. ¶ 14 (noting that in the first two weeks the law was in effect, 125 of her patients who

**B. Plaintiffs Will Suffer Irreparable Injury If This Court Does Not Grant a Preliminary Injunction.**

Infringement of the right to free speech is an irreparable injury. Chilled speech, “because of [its] intangible nature, [can]not be compensated for by monetary damages; in other words plaintiffs [can]not be made whole.” *KH Outdoor, LLC v. Trussville*, 458 F.3d 1261, 1272 (11th Cir. 2006) (quoting *Ne. Fla. Chapter of the Ass’n of Gen. Contractors v. Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990)). Even “temporary infringement of First Amendment rights constitutes a serious and substantial injury.” *Id.* The Physician Gag Law is already restricting practitioners’ speech and infringing patients’ rights to receive that speech. Without a preliminary injunction, the law will continue inflicting these irreparable injuries.<sup>18</sup>

Because the Physician Gag Law is so vague, and practitioners cannot be sure what it forbids, they have interpreted the law in multiple ways. Although the precise harm varies, practitioners are suffering an immediate deprivation of their First Amendment rights.

Some practitioners have ceased all routine counseling on firearm safety. For example, Dr. Wollschlaeger previously asked all of his patients to fill out a preventive-health-related questionnaire that included questions about the presence of guns in the home and whether they were safely locked, but he has deleted these questions from his questionnaire since the Physician Gag Law was enacted. Wollschlaeger Decl. ¶¶ 6-8, 11-14. Dr. Wollschlaeger is now refraining from discussing firearms as part of his standard preventive counseling. *Id.* ¶¶ 13-14.

Other practitioners have eliminated a question about firearms from their intake or well-child-visit questionnaire but are continuing at least some oral counseling regarding firearms.

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would previously have been asked about the presence of firearms were *not* asked that question); Wollschlaeger Decl. ¶ 15 (noting that in the first two weeks, 63 new patients were given intake questionnaire from which questions regarding firearms had been removed, and none were given oral counseling regarding firearm safety “unless they presented with a medical condition or situation calling for immediate action”).

<sup>18</sup> Plaintiffs FAAP, FAFP, and FACP do not claim independent injuries but instead seek to vindicate the rights of their members, who are immediately and irreparably injured by the Physician Gag Law. *See* Amd. Cmpl. ¶ 5; *see also* FAAP Decl. ¶¶ 22, 28; FACP Decl. ¶¶ 12, 18; FAFP Decl. ¶¶ 12, 17.

*See, e.g.*, Fox-Levine Decl. ¶¶ 12-15; Schaechter Decl. ¶¶ 9, 15-18. Intake questionnaires enable “efficiently customize[d] preventive counseling,” Schaechter Decl. ¶ 9, and can be an invaluable tool if a patient subsequently develops a psychiatric condition, since a patient’s prior response to an intake questionnaire may be the most reliable source of information, Wollschlaeger ¶ 14.<sup>19</sup> Some practitioners have gone even further in order to eliminate any written record of consultations with patients about firearms, including refraining from making notations in patients’ medical records, or reserving such notations for emergency situations or exigent circumstances. King Decl. ¶ 13; Goodman Decl. ¶ 10; Edwards Decl. ¶ 14.

Finally, many practitioners are curtailing the questions they previously orally asked regarding firearms in various ways. *See, e.g.*, Goodman Decl. ¶ 10. Some are declining to follow up when patients fail to respond to, or refuse to answer, a question about firearms, whereas they previously would have been sure to provide such patients with anticipatory safety guidance regarding firearms. Gutierrez Decl. ¶ 17; Sack ¶ 11; Schechtman Decl. ¶ 15; Schaechter Decl. ¶¶ 14-15. For example, Dr. Gutierrez is now ceasing to offer the specific advice that firearms and ammunition should be stored in locked, separate locations to parents who assert that firearms safety is not a medical issue. Gutierrez Decl. ¶¶ 12-13, 17. Other practitioners are reframing their questions into hypotheticals, briefly informing patients that *if* they own firearms, they should store them securely—a method of counseling the physicians believe to be less effective. *See, e.g.*, Sack Decl. ¶¶ 11-12; Fox-Levine Decl. ¶¶ 15-16 (noting she believes “such censored advice is a poor substitute for the in-depth and specific preventive healthcare information [she] gave before”); King Decl. ¶ 12 (noting she believes this more “passive and generic” approach to be “far less effective than my previous, patient-specific

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<sup>19</sup> Notably, Dr. Schaechter did not herself choose to give up using her written questionnaire, but was instead instructed to do so by her employer—a licensed “facility” likewise in peril of sanctions under the Physician Gag Law—in order to “protect” the facility and its staff from being accused of violating this law. Schaechter Decl. ¶ 16.

counseling”). Finally, some practitioners now feel they must limit their uncensored advice to families they already know well. Fox-Levine Decl. ¶ 17; Edwards Decl. ¶¶ 14-15.

Although Plaintiffs believe that educating patients about firearm safety is a critical part of preventative medicine and that asking questions about the presence of firearms is critical to effective education,<sup>20</sup> they are self-censoring themselves due to the reasonable fear that they may be subject to complaints and disciplinary sanctions. Because the “relevance” standards of the no-inquiry and no-recording provisions are undefined, neither practitioners nor patients have any basis for knowing what conduct violates the prohibitions. Several patients have expressed their understanding that the law prohibits practitioners from asking about gun ownership in safety screening checklists. Gutierrez ¶¶ 12-13; Goodman Decl. ¶ 11. The law’s vaguely worded harassment and discrimination provisions also will invite complaints against practitioners based on conduct they believe in their medical judgment to be wholly appropriate. The likelihood that a patient will file a complaint against a practitioner, combined with the law’s harsh penalties, make the threat to practitioners both real and immediate, and has already led them to curtail their exercise of their First Amendment rights.<sup>21</sup>

Importantly, the harms caused by this statute are not limited to the practitioners themselves. When practitioners self-censor, their patients, too, are deprived of their First

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<sup>20</sup> Schaechter Decl. ¶¶ 11, 13, 16-17; Goodman Decl. ¶¶ 6, 9; Leland Decl. ¶ 7; Schechtman Decl. ¶¶ 11, 14; Welty Decl. ¶ 4; Wollschlaeger Decl. ¶¶ 8-9.

<sup>21</sup> The fear that patients may make complaints to the Board of Medicine is an imminent one, making reasonable practitioners’ decision to self-censor. *Cf. ACLU v. The Florida Bar*, 999 F.2d 1486, 1493 (11th Cir. 1993) (finding justiciable controversy in pre-enforcement challenge both because plaintiffs “alleged an actual and well-founded fear that the law will be enforced against them” and therefore reasonably decided to self-censor and because “the alleged danger of this statute is, in large measure one of self-censorship; a harm that can be realized without an actual prosecution” (quoting *Virginia v. Am. Booksellers Ass’n, Inc.*, 484 U.S. 383, 393 (1988) (emphasis added in *Florida Bar*))). Practitioners reasonably fear that patients will bring complaints against them claiming violations of the statute: Because of the publicity surrounding passage of this law, many members of the public are aware of it—as evidenced by the fact that physicians, who never before have had a patient object to a question about firearms, have received hostile reactions related to their asking about firearms in the weeks since the passage of the law. Gutierrez ¶¶ 12-13 (to firearm question on questionnaire by two parents of patients); *see also* Goodman Decl. ¶ 11.

Amendment right to hear such censored information, should they so desire. *See Va. State Bd.*, 425 U.S. at 756–57. In Plaintiffs’ and their members’ experience, many patients and parents are unaware of basic firearm safety measures and express appreciation at learning how they can minimize the risks of physical injury and death stemming from their ownership of firearms.<sup>22</sup> When these physicians forsake such guidance, the risk of firearm injuries for their patients increases.<sup>23</sup>

Plaintiffs, their members, and their patients thus will be irreparably harmed because the Physician Gag Law silences physicians and prevents patients from receiving desired safety information. These abridgments of their First Amendment free speech rights weigh heavily in favor of enjoining the law’s enforcement. *See KH Outdoor*, 458 F.3d at 1272.

**C. This Deprivation of Plaintiffs’ First Amendment Rights Outweigh Any Purported Harm to the State.**

The irreparable harms faced by practitioners and their patients through enforcement of the Physician Gag Law’s unconstitutional restrictions on free speech greatly outweigh any conceivable harm a preliminary injunction would impose on the State. *See KH Outdoor*, 458 F.3d at 1272. Indeed, the State has “no legitimate interest in enforcing an unconstitutional ordinance” and thus an injunction preventing enforcement of the Physician Gag Law does not harm it at all. *Id.* In light of the irreparable harms to practitioners and their patients, and the lack

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<sup>22</sup> Gutierrez Decl. ¶ 8; King Decl. ¶ 7; Sack Decl. ¶ 8; Wollschlaeger Decl. ¶ 9; Welty Decl. ¶ 8.

<sup>23</sup> For this reason, some practitioners have decided to continue their practices unchanged, fearful of the potentially devastating professional consequences. For example, Dr. June Leland treats home-bound veterans, some elderly. Leland Decl. ¶ 2. Despite the troubling statistics regarding suicide among the elderly, no patient of hers has committed suicide with a gun—a record she attributes to “robust screening practices.” *Id.* ¶¶ 6, 10. Although she is aware of the potentially “painful, intimidating, and expensive” Board investigation process due to the experience of others she knows, as well as the “devastating” possibility of losing her license, she is continuing in her safety practices—“in fear of the possible repercussions”—because she “could not tolerate it if someone was injured by a gun in the home of one of my patients because I had failed to ask appropriate questions or provide counseling about firearms during my patient visits.” *Id.* ¶¶ 11-12. Similarly, Dr. Welty plans to continue her practice of asking and counseling patients about firearm ownership (due in part to her experience treating a family in which the mother and daughter were shot and killed in a murder-suicide), despite her fear that “any day” a patient could chose to file a complaint against her, causing a “severe impact” on her practice and patient relationships. Welty Decl. ¶¶ 4, 12-14.

of any harm to the State by precluding enforcement of an unconstitutional statute, the balance of equities heavily favors granting a preliminary injunction.

**D. Entering a Preliminary Injunction Against Enforcement of the Physician Gag Law Furthers the Public Interest.**

Preliminarily enjoining the Physician Gag Law would also undoubtedly further the public interest. First, “it is always in the public interest to protect First Amendment liberties,” and, for the reasons already given, enjoining the law’s unconstitutional speech restrictions would prevent violations of practitioners’ and their patients’ First Amendment rights. *KH Outdoor*, 458 F.3d at 1272 (quoting *Joelner v. Vill. of Wash. Park*, 378 F.3d 613, 620 (7th Cir. 2004)); *Suntrust Bank v. Houghton Mifflin Co.*, 268 F.3d 1257, 1276 (11th Cir. 2001) (“the public interest is always served [by] promoting First Amendment values”). Indeed, “[t]he public interest does not support the [State’s] expenditure of time, money, and effort in attempting to enforce a [statute] that may well be held unconstitutional.” *KH Outdoor*, 458 F.3d at 1272 (internal quotation omitted).

Enjoining enforcement of the Physician Gag Law also furthers the public interest by improving the care practitioners can provide to Florida patients. Practitioners believe the new speech restrictions—particularly the restriction on asking questions—have diminished the efficacy of their preventive care, *see, e.g.*, Sack Decl. ¶ 12; Fox-Levine Decl. ¶ 16, and some have ceased all such routine guidance, *see, e.g.*, Wollschlaeger Decl. ¶¶ 11–14. For each day this statute remains in effect, more patients and parents will go to checkups and *not* receive preventive care that could prevent death or grievous injury. Granting a preliminary injunction would allow practitioners to exercise their best medical judgment.

**III. Conclusion**

For the foregoing reasons, Plaintiffs request that this Court enter a preliminary injunction enjoining Defendants from enforcing CS/CS/HB 155, the Physician Gag Law, as set forth in Plaintiffs’ Proposed Order.

This 24th day of June, 2011.

Respectfully submitted,

/s/Edward M. Mullins

Edward M. Mullins  
Hal M. Lucas (of counsel)  
Florida Bar Nos. 0863920 & 0853011  
Astigarraga Davis Mullins & Grossman, P.A.  
701 Brickell Avenue, 16<sup>th</sup> Floor  
Miami, Florida 33131-2847  
Tel: (305) 372-8282  
Fax: (305) 372-8202  
[emullins@astidavis.com](mailto:emullins@astidavis.com)

-and-

Bruce S. Manheim, Jr.  
Douglas H. Hallward-Driemeier  
Augustine M. Ripa  
Julia M. Lewis  
(Pro hac vice applications pending)  
ROPES & GRAY LLP  
700 12th Street NW, Suite 900  
Washington D.C. 2005  
Tel: (202) 508-4600  
Fax: 202 383 8332  
[bruce.manheim@ropesgray.com](mailto:bruce.manheim@ropesgray.com)

-and-

Jonathan E. Lowy  
Daniel R. Vice  
(Pro hac vice applications pending)  
BRADY CENTER TO PREVENT GUN  
VIOLENCE  
Legal Action Project  
1225 Eye Street NW, Suite 1100  
Washington, DC 20005  
Tel: (202) 289-7319  
Fax: (202) 898-0059  
[jlowy@bradymail.org](mailto:jlowy@bradymail.org)

*Counsel for Plaintiffs*

**CERTIFICATE OF SERVICE**

I HEREBY CERTIFY that on June 24, 2011, the foregoing document was electronically filed with the Clerk of the Court using CM/ECF. I also certify that a true and correct copy of the foregoing document is being served this day on the following attorneys, in the manner specified:

Chesterfield Smith, Jr., Esq., Chief, State Programs Litigation  
Jason Vail, Assistant Attorney General  
Office of the Attorney General  
Suite PL 01, The Capitol  
Tallahassee, Florida 32399-1050

*Counsel for Defendants  
via Electronic Mail and regular U.S. Mail*

By: /s/ Edward M. Mullins  
Edward M. Mullins (Fla. Bar No. 863920)