IN THE
UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No 1:11-cv-22026-MGC

DR. BERND WOLLSCHLAEGER, et al.

Plaintiffs,

vs.

FRANK FARMER, in his official capacity as Surgeon General of the State of Florida, et al.,

Defendants.

Amicus Curiae Memorandum of the American Civil Liberties Union of Florida, The Broward County Medical Association, the Broward County Pediatric Society, the Palm Beach County Medical Society, the University of Miami School of Law Children and Youth Clinic, Children's Healthcare Is a Legal Duty, Inc., and the Early Childhood Initiative Foundation in Support of the Plaintiffs' Motion for a Preliminary Injunction

---

Thomas R. Julin, Jamie Z. Isani & Patricia Acosta
Fla. Bar Nos. 325376, 728861 & 614599

Hunton & Williams LLP
Sabadell Financial Center
1111 Brickell Avenue
Suite 2500
Miami, FL 33131
305.810.2516 fax 1601
tjulin@hunton.com

Gerald E. Greenberg & Gordon M. Mead, Jr.
Fla. Bar Nos. 440094 & 049896

Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.
Museum Tower, Suite 2200
150 West Flagler Street
Miami, Florida 33130
305.789.3200 Fax 3395
GGreenberg@stearnsweaver.com

Randall C. Marshall
Fla. Bar No. 181765

Cooperating Attorneys
ACLU Foundation of Florida, Inc.
4500 Biscayne Blvd Ste 340
Miami, FL 33137
786-363-2700 Fax 1108
rmarshall@aclufl.org

Attorneys for the Amici Curiae

TABLE OF CONTENTS

TABLE OF CITATIONS iii

INTRODUCTION 1

INTERESTS OF THE AMICI CURIAE AND PERTINENT FACTS 2

The Broward County Medical Association 2

The Broward County Pediatric Society 2

The Palm Beach County Medical Society 3

The Child Health Care Organizations 3

The ACLU of Florida 4

ARGUMENT 5

I. The Statute is an Unconstitutional Prior Restraint on Speech 5

A. The Law is a Prior Restraint on Speech Protected by the First Amendment 5

1. The Law Restrains the Speech in Which the Plaintiffs Engage 5

2. The Restrained Speech is Protected by the First Amendment 8

a. Inquires are Protected by the First Amendment 9

b. Harassment Considered "Unnecessary" by Some is Protected by the First Amendment 10

B. The State's Justifications for the Law are Insufficient 12

1. Licensing Does Not Provide a Justification for Imposition of this Prior Restraint 13

2. The Law Cannot Survive Strict Scrutiny 16

a. The Law is Unnecessary to Protect Second Amendment or Putative Privacy Interests 17

b. Protecting Patients From Harassment is Not a Compelling Government Interest 19

II. The Statute Infringes on Patients' Right to Receive Information from their Doctors.....19

CONCLUSION.....20

CERTIFICATE OF SERVICE vii

SERVICE LIST viii

TABLE OF CITATIONS

Cases

44 Liquormart, Inc. v. Rhode Island,
517 U.S. 484 (1996).....13

Board of County Commissioners v. Umbehr,
518 U.S. 668 (1996).....14

Board of Education, Island Trees Union Free School District Number 26 v. Pico,
457 U.S. 853 (1982).....20

CBS Broadcasting, Inc. v. Cobb,
470 F. Supp. 2d 1365 (S.D. Fla. 2006).....9

CBS Inc. v. Smith,
681 F. Supp. 794 (S.D. Fla. 1988).....9

Cantwell v. Connecticut,
310 U.S. 296 (1940).....9

Central Hudson Gas & Electric Corp. v. Public Serv. Commission,
447 U.S. 557 (1980).....13

Clean-Up '84 v. Heinrich,
759 F.2d 1511 (11th Cir. 1985).....9

Cohen v. California,
403 U.S. 15 (1971).....17

Connick v. Myers,
461 U.S. 138 (1983).....12

Edenfield v. Fane,
507 U.S. 761 (1993).....13

Erznoznik v. City of Jacksonville,
422 U.S. 205 (1975).....17

Florida Bar v. Went For It, Inc.,
515 U.S. 618 (1995).....13

Gomez v. Village of Pinecrest,
41 So. 3d 180, 185 (Fla. 2010).....6

Greater New Orleans Broadcasting Association v. United States,
527 U.S. 173 (1999).....13

Griswold v. Connecticut,
381 U.S. 479 (1965).....20

Kleindienst v. Mandel,
408 U.S. 753 (1972).....20

Lamont v. Postmaster General,
381 U.S. 301 (1965).....19

Locke v. Shore,
634 F.3d 1185 (11th Cir. 2011) 16

Lorillard Tobacco Co. v. Reilly,
533 U.S. 525 (2001).....20

Lowe v. SEC,
472 U.S. 181 (1985).....15

Marsh v. Alabama,
326 U.S. 501 (1946).....20

Martin v. Struthers,
319 U.S. 141 (1943).....20

McDonald v. City of Chicago,
130 S. Ct. 3020 (2010).....17

Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Rev.,
460 U.S. 575 (1983).....12

Murdock v. Pennsylvania,
319 U.S. 105 (1943).....9

Planned Parenthood of Southeastern Pennsylvania v, Casey,
505 U.S. 833 (1992).....14

Procunier v. Martinez,
416 U.S. 396 (1974).....20

Red Lion Broadcasting Co. v. FCC,
395 U.S. 367 (1969).....20

Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Board,
502 U.S. 105 (1991).....12

Snyder v. Phelps,
131 S. Ct. 1207 (2011).....8, 10, 11

Sorrell v. IMS Health Inc.,
No. 10-779, 2011 WL 2472796 (June 23, 2011).....12, 13, 18, 19

Spence v. Washington,
418 U.S. 405 (1974).....17

Stanley v. Georgia,
394 U.S. 557 (1969).....20

Thomas v. Collins,
323 U.S. 516 (1945).....14, 15, 16, 20

Thompson v. Western States Medical Center,
535 U.S. 357 (2002).....13

United States v. Playboy Entertainment Group, Inc.,
529 U.S. 803 (2000).....12

Velasquez v. Legal Services Corp.,
531 U.S. 533 (2001).....14

Velez v. Miami-Dade County Police Department,
934 So. 2d 1162 (Fla. 2006)).....6

Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.,
425 U.S. 748 (1976).....19

Watchtower Bible & Tract Society of N.Y., Inc. v. Village of Stratton,
536 U.S. 150 (2002).....9

Zauderer v. Office of Disciplinary Counsel,
471 U.S. 626 (1985).....14

Statutes & Laws

Fla. Stat. § 381.026(4)(b)8.....1

Fla. Stat. § 456.072(1)(mm).....9

Fla. Stat. § 790.338(2).....1, 5, 17

Fla. Stat. § 790.338(3).....1

Fla. Stat. § 790.338(4).....17

Fla. Stat. § 790.338(5).....17

Fla. Stat. § 790.338(6).....1, 8, 17

Fla. Stat. § 790.338(7).....17

Chapter 2011-112, Laws of Florida.....1

Other Authorities

Mart, Susan Nevelow, *The Right to Receive Information*,
95 Law Libr. J. 175 (2003) 19

INTRODUCTION

The amici curiae filing this brief, although supportive of the plaintiffs' request for a preliminary injunction, have a different perspective on the constitutional issues raised by chapter 2011-112, Laws of Florida (referred to herein as "the law).[1] While the plaintiffs maintain that all inquiries to patients regarding firearms or ammunition are relevant to medical care or safety, the amicus curiae are prepared for purposes of their argument presented here to agree with the State, and to accept the suggestions of the Court at the preliminary injunction hearing that in many instances inquiries to patients about firearms and ammunition have little, if anything, to do, with a patient's medical care or safety. These inquiries often are made in connection with the intake of patients to obtain general information about the patient and then to engage the patients in political discussions relating to gun ownership instead of to advise the patients regarding medical care or safety. The amici also are willing to accept for the purpose of their argument that the law is crystal clear in that it targets all such general inquiries for suppression. The amici curiae filing this brief also accept that when medical personnel engage their patients in such political discussions, some patients, including especially guns owners, may regard the communications as unnecessary harassment and that the State reasonably can interpret that law as prohibiting such communications. In essence, the amici curiae proceed on the assumption that the statute is not a

[1] The law, through enactment of sections 790.338(2) and (6), Florida Statutes, restrains health care practitioners, facilities and providers from asking about ownership of firearms 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 a patient, except when such inquiries are believed in good faith to be relevant to the patient's medical care or safety. The law also imposes similar restrictions on speech through enactment of section 381.026(4)(b)8. (amending the Florida Patient's Bill of Rights and Responsibilities), and section 790.338(3) (restricting speech of emergency medical technician or paramedics acting under the supervision of an emergency medical services medical director). The same arguments regarding the constitutionality of sections 790.338(2) and (6) are applicable to these other aspects of the law.

dead letter, that it will be effective to ban substantial speech, and that the plaintiffs and their members would be punished for violation of the statute if they continued with business as usual.

INTERESTS OF THE AMICI CURIAE AND PERTINENT FACTS

The amici curiae are the following organizations.

The Broward County Medical Association

The Broward County Medical Association unites 1,500 allopathic and osteopathic physicians, of all specialties, toward the fulfillment of a common goal: Providing access to healthcare of the highest quality for the residents of Broward County. It seeks to maintain the integrity of medical practice and care delivery for Broward citizens and to act as an advocate for the interests of the patients and its physician membership.

From BCMA's perspective, the legislative assault on the free speech rights of its members could not have come at a worse time. In the course of the past few years, the healthcare delivery system has created an environment that has made it difficult for physicians to practice medicine. It is critical for physicians to be able to communicate with their patients without legislative interference. As physician rights are eroded they become alienated, disenfranchised and disempowered so that the well being of patients. In 2008, the BCMA, adopted the first Bill of Rights and Responsibilities in the United States for physicians and medical staffs. Among other things it states physician have the right to care for patients without compromise, to freely advocate for patient safety, and to care for our own well being. It also provides physicians have a responsibility to advocate for patients in jeopardy.

The Broward County Pediatric Society

The Broward County Pediatric Society was formed on December 7, 2000, to serve as a resource for community leaders in helping shape decisions that affect the health, safety and well-

being of children and their families. Its mission it to be the recognized leader and advocate for healthcare initiatives and policies that improve services and access to health care for newborns, infants and children in Broward County. The Society has approximately 100 pediatricians and pediatric subspecialists as members. The legislation at issue appears to have been specifically targeted at pediatricians who ask questions of their young patients about firearms in their homes.

The Palm Beach County Medical Society

The Palm Beach County Medical Society has been a trusted leader in addressing health care issues facing physicians since 1919. The Society listens to physician's ideas and concerns and represent their interests with elected officials and healthcare organizations. It brings top quality educational programs to physicians and staff and offers quality services to help physician's practices run more efficiently and economically.

PBCMS also represents the best interests of physicians and patients in legislative and regulatory issues at local, state, and national.

The Children and Youth Care Groups

CHILD is a non-profit organization with members in 45 states dedicated to protecting children from medical neglect. CHILD believes that a child's right to health and safety should take precedence and that children deserve equal protection of the law. CHILD has a particular concern about public policies that allow child abuse, neglect, or endangerment and opposes the Physician Gag Law because the law would prohibit physicians from providing optimal health care for children by giving unconstrained advice on the health risks of guns.

The Early Childhood Initiative Foundation is an organization aimed toward providing "universal readiness" or making available affordable high quality health, education, and nurturing for all of the Miami-Dade County's community of approximately 160,000 children

between birth and age five. Under the leadership of its president, David Lawrence, Jr., the Initiative works toward the social, physical, emotional and intellectual growth of all children so that they are ready and eager to be successful in the first grade and, indeed, life.

The Children and Youth Clinic is an in-house legal clinic, staffed by faculty and students at the University of Miami School of Law, which advocates for the rights of children in abuse and neglect, medical care, mental health, disability, and other legal proceedings. The Children and Youth Clinic works to ensure that children are treated with dignity and respect by public health, education, child welfare and juvenile justice systems that are charged with their care, schooling, protection, safety and treatment.

The children's advocacy organizations have a strong interest in permitting physicians to warn families with children about the dangers of guns as part of their preventative health care efforts, but the interest goes beyond even that. These organizations, and much more importantly, the children whose interests they represent, have a strong interest in receiving any and all information about gun safety and in having as many people as possible hear that message.

The ACLU of Florida

The American Civil Liberties Union (ACLU) is our nation's guardian of liberty, working daily in courts, legislatures and communities to defend and preserve the individual rights and liberties guaranteed to all people in this country by the Constitution and laws of the United States. Since its founding in 1920, the nonprofit, nonpartisan ACLU has grown to an organization of over 500,000 members and supporters, with offices in almost every state. The ACLU of Florida, with headquarters in Miami, is the local affiliate of the national organization.

The ACLU is the nation's oldest and largest defender of freedom of speech and expression for all persons and all points of view.

ARGUMENT

I.

The Statute is an Unconstitutional Prior Restraint on Speech

The law at issue does not apply generally to all persons. It singles out, for different treatment, health care practitioners, facilities, and providers licensed by the state. It also does not restrain all speech that is believed not to be relevant to patient medical care and safety or all speech that is harassing of patients. Instead, it singles out on the basis of content, irrelevant inquiries and unnecessary harassment that relates to the ownership of guns and ammunition. These features of the law transform it from a mere regulation of the practice of medicine or a prohibition on harmful conduct into a classic prior restraint of speech. The licensed status of these specific citizens does not provide any justification for the imposition of the prior restraint at issue. Moreover, the supposed privacy interests of patients is not at all protected by the statute. Instead, the supposed privacy interest is being inappropriately manipulated to advance the State's desire to suppress speech with which it disagrees.

A. The Law is a Prior Restraint on Speech Protected by the First Amendment

The law applies to two types of speech in which the plaintiffs are engaged – unrestrained inquiry into gun and ammunition ownership unrelated to medical care and safety and unnecessary harassment of patients who decline to answer such questions.

1. The Law Restrains the Speech in Which the Plaintiffs Engage

The parties are in agreement that section 790.338(2) commands that health care practitioners, facilities and providers not ask questions of their patients regarding gun and ammunition ownership when they do not regard such inquiries as relevant to the patients medical care or safety. Specifically, the State asserts, that the act provides "physicians should refrain

from asking about firearm ownership."[2] (DE-49 at 5). More pointedly, the State acknowledges that the law would "apply in situations (such as those that animated passage of the act, discussed below) where no relevant basis for the question exists." (DE-49 at 7). The situation referenced in this passage is the July 21, 2010, exchange between Amber Ullman and Dr. Chris Okonkwo. While plaintiffs maintain that inquiries about gun ownership *always* bears on medical care and safety, acceptance of this argument may render the statute a nullity unless the Court were to accept the plaintiffs' contention that the statute is so vague that they cannot reasonably ascertain what speech is prohibited and what speech is allowed.[3] It is a fundamental law of statutory construction that statutes should not be read to accomplish nothing. When a court interprets a statute, "it must give full effect to all statutory provisions. Courts should avoid readings that would render part of a statute meaningless." *Gomez v. Village of Pinecrest*, 41 So. 3d 180, 185 (Fla. 2010) (quoting *Velez v. Miami-Dade County Police Dep't*, 934 So. 2d 1162, 1165 (Fla. 2006)). Amici curiae believe that questions concerning gun ownership at times, such as the incident in Ocala (DE-49 at 7), fairly can be regarded in good faith by a reasonable practitioner as not relevant to medical care or safety. Indeed, the record developed by the parties appears to support the proposition that doctors commonly ask irrelevant questions about guns. For

[2] The fact that section 790.338(2) does not directly command speakers not to ask questions of their patients and instead directs that they "should refrain" from asking specified questions is of no moment, because the practitioner, facility or provider who does not refrain from making such inquiries will be in violation of the statute and subject to the sanctions provided by sections 456.072(1)(mm) and 790.338(8).

[3] For purposes of this argument, the amici curiae accept the State's position that the statute can survive plaintiffs' vagueness attack. This is not, however, to say that the amici curiae agree with the State's argument. The subjective standards used by the law do make ascertainment of its reach difficult, and the severe sanctions on the licensed professional who misinterprets the statute makes credible the plaintiffs' arguments that the statute chills significant speech that the Legislature did not intend to reach and that the Legislature constitutionally may not reach.

example, the lead plaintiff, Dr. Wollschlaeger, states in his declaration, that "I generally use . . . patient questionnaires as the basis for taking an in-depth, individualized patient history." (DE-23 ¶ 7). He goes on to state that before passage of the law "I included questions about firearm ownership." (DE-23 ¶ 8). He does not reserve these inquiries for patients who have been the victims of violence, who have young children, or who have mental disabilities. His practice was to propound these questions indiscriminately to *all* patients.

At the preliminary injunction hearing, the Court recognized that the question may have no relevance to many patients. The Court propounded these rhetorical remarks:

> On a regular medical visit, hi, I'm Marcia Cooke. I'm here to talk to you about my flu. What's the issue about the gun?
>
> * * *
>
> I am Marcia Cook, I have a three-year-old and I have a seven-year-old. Well, Ms. Cooke, have you thought about appropriate firearm safety? This is when the question would come. Why would you have it as an initial screening question?

(Transcript at 8). The Court also expressly suggested that the standard questionnaire commonly used by doctors in their initial screening of patients is "overbroad" in the sense that it seeks to illicit information *not* relevant to medical care and safety. (DE-13). These amici curiae accept this statement for this brief but note that it makes clear that this statute has a very real and immediate impact on a substantial amount of speech by many healthcare practitioners and providers. It subjects them to discipline if they continue to engage in the use of their preliminary screening questionnaires or if they follow up with further oral questions on the same topic.

The State points out that the law does not preclude doctors "from providing firearm safety information to patients by, for example, providing a pamphlet (or other written information) or giving verbal advice explaining the risks associated with firearms and the safety precautions persons who own firearms should take." (DE-49 at 5). It does not dispute, however,

that it acts as an effective ban on inquiries into gun and ammunition ownership other than those relevant to medical care and safety. So a threshold issue in the case must be whether the asking of questions is itself protected by the First and Fourteenth Amendments.

The State contends that the prohibition in the law against irrelevant inquiries does not prohibit a practitioner who wishes to lecture a patient on the perils of gun ownership from doing so. Yet, the State also makes clear that it would regard section 790.338(6) as prohibiting such lecturing as unnecessary harassment. The State makes this clear in its assertion that the law "would apply in situations (such as those that animated the passage of the act, discussed below) . . . where the patient refuses to answer and the physician continues to make inquiry in bad faith and to harass or discriminate." (DE-49 at 7). Again, the referenced "situation" is the Ocala incident in which the doctor makes an initial inquiry about gun ownership and then follows with further inquiries or arguments with respect to ownership.[4] Thus, the statute provides an effective restraint on precisely the type of speech in which the plaintiffs wish to engage.

2. The Restrained Speech is Protected by the First Amendment

With it clear that the law prohibits speech in which the plaintiffs engage – the unrestrained making of inquiries concerning the ownership of a firearm or ammunition that are not relevant to medical care or safety and the unnecessary harassment of patients who refuse to answer such questions – the next issue for the Court is whether such speech is protected by the

[4] While the plaintiffs themselves may contend that the sort of patient screening and lecturing in which they engage is not harassment of any sort, it is plain from the history of the statute and the arguments of the State that it is precisely the sort of inquiring and unnecessary harassment targeted by the law. Of course, one person may well view delivery of a given message as of vital importance to the Republic, while another considers it nothing but harassment. This is why the law violates the First Amendment not only through what it clearly does prohibit, but also by chilling of speech that the State never intended to reach. *See Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011) (holding that "outrageous" is a "highly malleable standard"

First Amendment. Both types of speech in fact are afforded the highest protection.

a. Inquires are Protected by the First Amendment

The asking of a question conveys to the listener that the questioner wants an answer. Other times it conveys that the questioner would like the listener to take certain action or that the questioner holds certain beliefs. It does not necessarily convey why the question has been posed or the significance that the answer might have, but it is beyond dispute that the asking of a question is a critically important form of speech that enables communication. A law banning a reporter from asking sources questions about a topic deemed off-limits by the state would cripple freedom of the press. A law prohibiting citizens from asking each other whether they support particular political candidates, hold religious beliefs, advocate particular practices or standards, or own guns would destroy the freedom of speech secured by the First Amendment.

The right of one citizen to ask another citizen a question is the basis of numerous decisions of the Supreme Court, the Eleventh Circuit, and this Court. *See, e.g., Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Vill. of Stratton*, 536 U.S. 150 (2002) (protecting right to ask for contributions); *Cantwell v. Connecticut*, 310 U. S. 296 (1940) (invalidating licensing of solicitations); *Murdock v. Pennsylvania*, 319 U. S. 105, 108 (1943) (same); *Clean-Up '84 v. Heinrich*, 759 F.2d 1511 (11th Cir. 1985) (Hatchett, J.) (protecting the right to ask a voter to sign a petition); *CBS Broad., Inc. v. Cobb*, 470 F. Supp. 2d 1365 (S.D. Fla. 2006) (invalidating on First Amendment grounds statute that interferes with solicitations); *CBS Inc. v. Smith*, 681 F. Supp. 794, 802 (S.D. Fla. 1988) (recognizing the First Amendment right to ask question regarding how one voted). Although each case involves questions being asked in a different context than that here, they all recognize the fundamental speech value that questions have. In

---

which created an "unacceptable" risk that it would stifle public debate).

Watchtower, *Cantwell*, and *Murdock*, the Court afforded First Amendment protection to go to the private home of another citizen and ask for a contribution to a religious cause. In *Clean-Up '84*, the court recognized a First Amendment right to ask other citizens near polling places to sign a political petition. In *Cobb* and *Smith*, this Court recognized the right of journalists to approach voters at polling places to ask for whom they had cast their votes. From the privacy of the residential home to the public setting of a polling place, a citizen's right to ask questions is protected.

Until the enactment of the law at issue, no State in the Union had passed legislation to prohibit a doctor from asking a patient a question that is *not* relevant to the patient's medical care or safety. It is unique in its approach and frightening in precisely what it purports to do – to stop one citizen from asking a question of another about a topic that the State has deemed to be off limits. If such a law is permissible, then so too might be a law prohibiting a doctor from asking a patient to contribute to a religious cause, to sign a political petition, or to say for whom he or she cast his or her vote in the prior election. And this would be true even though all other citizens clearly enjoy constitutional protection against the making of such inquiries in all other settings just as they enjoy the right to ask others about their gun ownership.

b. Harassment Considered "Unnecessary" by Some is Protected by the First Amendment.

In order to determine whether unduly harassing speech is protected by the First Amendment, the Court need look no further than the Supreme Court's last term and its decision in *Snyder v. Phelps*, 131 S. Ct. 1207 (2011). *Snyder* arose from a tort action against picketers at military funerals who communicated their belief that God hates the United States for its tolerance of homosexuality, particularly in the military. The picketers peacefully displayed signs stating, for example, "Thank God for Dead Soldiers," "Fags Doom Nations," "America is Doomed,"

"Priests Rape Boys," and "You're Going to Hell." The father of a deceased solider whose funeral was being picketed in this fashion sued the picketers on various tort theories, and a jury returned a verdict in his favor for millions of dollars. The picketers asserted that their harassing speech involved a matter of public concern and this shielded it from tort liability.

In a decision by Chief Justice Roberts, the Supreme Court ruled in favor of the picketers. It explained initially that the "Speech deals with matters of public concern when it can 'be fairly considered as relating to any matter of political, social, or other concern to the community.'" *Id.* at 1216 (citation omitted). The Court further explained that the "arguably 'inappropriate or controversial character of a statement is irrelevant to the question. . . .'" *Id.* (citation omitted). Firearm and ammunition ownership is a quintessential matter of public concern. This is reflected not only in the campaigns waged by such groups as the American Academy of Pediatrics and the debate that led to the enactment of the law at issue, but also by the attempted intervention of the National Rifle Association in these proceedings. (DE-50-1 at 18 & n.11) (discussing the national debate that has taken place).

When speech involves a matter of public concern, as here, it "cannot be restricted simply because it is upsetting or arouses contempt. 'If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit expression of an idea simply because society finds the idea itself offensive or disagreeable.'" *Snyder*, 131 S. Ct. at 1219 (citation omitted). The Court in *Snyder* vacated the jury's verdict although it had found, and the Supreme Court accepted, that the speech at issue fairly could be characterized as "outrageous" and "intentionally inflicting emotional distress." *Id.*

The statute here at issue is not limited in its application to speech that traditionally has been defined as tortious or that has been recognized as inflicting the sort of injury that would

give rise to common law damage actions or otherwise be restrained. Instead, its subjects to punishment inquiries about firearm and ammunition ownership that may be entirely irrelevant to medical care or safety and unnecessary harassment on the same topic. Consequently, the speech engaged in by the plaintiffs is protected by the First Amendment even if it were not characterized as involving a matter of public concern. In *Connick v. Myers*, 461 U.S. 138, 147 (1983), the Supreme Court held that government employees could not be subjected to discipline by their employers if their speech involved a matter of public concern, but the Court also was careful to explained that, "We in no sense suggest that speech on private matters falls into one of the narrow and well-defined classes of expression which carries so little social value, such as obscenity, that the State can prohibit and publish such expression by all persons in its jurisdiction."

B. The State's Justifications for the Law are Insufficient.

When a statute prohibits protected speech on the basis of its content and by the identity of the speaker, it is subject to strict scrutiny. "Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *United States v. Playboy Entm't Group, Inc.*, 529 U.S. 803, 812 (2000). "Lawmakers may no more silence unwanted speech by burdening its utterance than by censoring its content." *Sorrell v. IMS Health Inc.*, No. 10-779, 2011 WL 2472796 at *8 (June 23, 2011) (*citing Simon & Schuster, Inc. v. Members of N.Y. State Crime Victims Bd.*, 502 U.S. 105, 115 (1991) (content-based financial burden); *Minneapolis Star & Tribune Co. v. Minnesota Comm'r of Rev.*, 460 U.S. 575 [(1983)] (speaker-based financial burden)). "In the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory." *Sorrell*, 2011 WL 2472796 at *13.

The State offers the Court one argument for not applying strict scrutiny (DE-49 at 11)

and several arguments regarding why the law should survive whatever scrutiny is applied (DE-49 at 14). Neither position has any merit.

1. Licensing Does Not Provide a Justification for Imposition of this Prior Restraint

The primary justification of the law advocated is that it should be viewed as nothing more than a regulation of the medical profession and not as a restriction on speech at all. Such regulation, the State contends, may be upheld under the Fourteenth Amendment due process clause as long as it serves any rational basis. Government attempts to uphold speech restrictions on licensees under the rational basis standard routinely have been rejected when the speech restriction did not bear a reasonable relationship to the purpose of the licensing scheme. In *Sorrell*, for example, pharmacies were required to be licensed by the State to ensure that they employ persons with proper training and skills to fill prescriptions. The imposition of the license provided no justification for lessening the First Amendment scrutiny imposed by a law that prohibits pharmacies from publishing for marketing purposes information that they learned from prescriptions about the drugs that doctors prescribe. *Sorrell*, 2011 WL 2472796. The same was true in many other prior decisions involving government licensees.[5] Similarly, when the government employs or contracts with private parties, it may not use the employment or contract to impose restraints on the speech of the recipients unrelated to the purpose for which they have been retained. *See, e.g., Velasquez v. Legal Servs. Corp.*, 531 U.S. 533 (2001) (lawyers retained to represent the poor cannot be prohibited from advising clients regarding suits against the

[5] *See, e.g., Thompson v. Western States Medical Center*, 535 US 357 (2002) (pharmacies); *Fla. Bar v. Went For It, Inc.*, 515 U.S. 618 (1995) (lawyers); *Greater New Orleans Broad. Ass'n v. United States*, 527 U.S. 173 (1999) (broadcasters); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (liquor stores); *Edenfield v. Fane*, 507 U.S. 761 (1993) (accountants); *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980)

government); *Bd. of County Comm'rs v. Umbehr*, 518 U.S. 668 (1996) (government contractors cannot be terminated for speech unrelated to their role as contractors). *Planned Parenthood of Southeastern Pennsylvania v, Casey*, 505 U.S. 833 (1992), is an example of a case where the state imposes regulations affecting speech that *are* directly related to the purpose of a license. They required physicians to "provide information about the risks of abortion, and childbirth" to women seeking abortions. Moreover, the law in *Casey* compelled, rather than restrained speech. The government's burden to justify compelled speech is significantly lower than its burden to ban speech. *See, e.g., Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 651 (1985) (disclosure requirements are allowed if "reasonably related to the State's interest in preventing deception of consumers").

Healthcare practitioners, facilities, and providers all are required to hold a license, the license allows them to engage in a profession, and the state imposes a whole host of conditions that must be met to obtain and maintain such a license. *See generally* Chapters 456-68, Florida Statutes. The State plainly has the power to regulate healthcare practitioners in order to protect public health. Such regulation, however, "must not trespass upon the domains set apart for free speech." *Thomas v. Collins*, 323 U.S. 516, 532 (1945). Justice Jackson, concurring in *Thomas*, a case that challenged imposition of a licensing requirement on paid labor organizers, made an observation particularly apropos to this case. He wrote:

> A state may forbid one without its license to practice law as a vocation, but I think it could not stop an unlicensed person from making a speech about the rights of man or the rights of labor, or any other kind of right, including recommending that his hearers organize to support his views. Likewise, *the state may prohibit the pursuit of medicine as an occupation without its license, but I do not think it could make it a crime publicly or privately to speak urging persons to follow or reject any school of medical thought.*

(public utility).

Id. at 544 (Jackson, J., concurring) (emphasis added). Yet, this is precisely what the State of Florida has done through the challenged laws – it has prohibited healthcare providers from making inquiries of patients and unnecessarily harassing patients regarding matters that the provider regards of importance. This, the State, may not do.

"The very purpose of the First Amendment is to foreclose public authority from assuming a guardianship of the public mind through regulating the press, speech, and religion. In this field every person must be his own watchman for truth, because the forefathers did not trust any government to separate the true from the false for us." *Thomas,* 323 U.S. at 545.

In *Lowe v. SEC,* 472 U.S. 181 (1985), the majority of the Supreme Court read the Investment Advisers Act of 1940 narrowly so that it would not prohibit "nonpersonalized investment advice and commentary in securities newsletters" unless the author was registered as an investment adviser under the act. This allowed the Court to avoid the issue of whether the First Amendment would prohibit such a burden from being imposed on speech.[6] But a concurrence in *Lowe* gave the licensing/First Amendment problem close consideration relevant here. Justice Byron White, in an opinion joined by Chief Justice Warren Burger, and Justice William Rehnquist, concluded the Act *did* apply to the newsletters at issue and so proceeded to analyze the circumstances under which a licensing requirement can be used to lessen the First Amendment scrutiny that a speech restriction imposes. The concurrence looked to the aforementioned comments of Justice Jackson in *Thomas,* 323 U.S. at 548, and concluded from this that the First Amendment prohibits the government from requiring a speaker to obtain a license in order to communicate general information to potential investors that is unrelated to a

[6] The breadth of the statute at issue here prevents the Court from avoiding the constitutional issues that it raises. The statute here clearly prohibits speech in which the

specific fiduciary undertaking. Again, this is precisely what the State of Florida has done in enacting a law that directs healthcare personnel to refrain from making inquiries that are *not* relevant to medical matters that for which a patient goes to see a doctor. It has ordered that when the doctors steps out of their role as healthcare providers and into their roles as ordinary citizens, they then must forfeit the First Amendment rights that they otherwise would enjoy and it has attempted to use its power to regulate the medical profession as justification for this result. This argument makes no logical sense and it has no basis in case law.

This also is not a case like *Locke v. Shore*, 634 F.3d 1185 (11th Cir. 2011), where the State simply has prescribed conditions on a license that are reasonably related to the practice of a profession and that has nothing more than an incidental impact on the speech rights of the licensed professional. The statute at issue in *Locke* simply prohibited unlicensed persons from providing interior design advice to clients. It did not prohibit licensed interior designers from speaking with their clients about matters wholly unrelated to interior design or require interior designers to obtain a license as a condition precedent to their communicating with clients regarding matters irrelevant to interior designing. This is a case where the Legislature specifically has targeted speech that is *unrelated* to the practice of medicine for suppression.

2. The Law Cannot Survive Strict Scrutiny

The State describes the interests that justify the law as "the constitutional rights of . . . patients to freely exercise their right to keep and bear arms" and "privacy interests under Florida laws that make firearm ownership confidential." (DE-49 at 13-14).

---

plaintiffs engage.

a. The Law is Unnecessary to Protect Second Amendment or Putative Privacy Interests

To begin, "it is clear that the Framers and ratifiers of the Fourteenth Amendment counted the right to keep and bear arms among those fundamental rights necessary to our system of ordered liberty." *McDonald v. City of Chicago*, 130 S. Ct. 3020, 3042 (2010). The right protects citizens against both federal and state laws that impose restrictions on that right. *Id.* at 3050. The Second Amendment imposes no restriction on the right of private actors, such as health care practitioners, facilities, and providers to make inquiries of their fellow citizens regarding their ownership of firearms or ammunition, to harass their fellow citizens regarding their ownership of firearms or ammunition, or to take action that would be discriminatory on the basis of firearm or ammunition ownership.

Sections 790.338(2) and (6) do nothing to prohibit discrimination on the basis of firearm or ammunition ownership,; they merely prohibit communications related to those topics. To the extent that the State has an interest in prohibiting discrimination, it has done so through sections 790.338(4), (5) and (7).

Sections 790.338(2) and (6) do shield patients from speech that some may regard as objectionable, but shielding citizens from speech that is objectionable is neither a compelling, substantial, nor legitimate role for the State of Florida to play. "Much that we encounter offends our esthetic, if not our political and moral, sensibilities. Nevertheless, the Constitution does not permit government to decide which types of otherwise protected speech are sufficiently offensive to require protection for the unwilling listener or viewer." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 210–211 (1975); *see also Cohen v. California*, 403 U.S. 15, 21 (1971) (the burden normally falls upon the viewer to "avoid further bombardment of [his] sensibilities simply by averting [his] eyes"); *Spence v. Washington*, 418 U. S. 405, 412 (1974) ("'It is firmly settled that

under our Constitution the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers'") (quoting *Street v. New York,* 394 U.S. 576, 592 (1969)).

The law also cannot be justified on the basis that the State has an interest in protecting patients against inquiries into or harassment regarding matters that bear on their exercise of their constitutional rights generally because the law is not drawn in a manner to achieve either of this objective. It does not prohibit doctors from inquiring about religion, political views, sexual practices, race, or other matters that involve the exercise of constitutional rights or that may be irrelevant to medical care or safety. A regulation of speech cannot survive First Amendment scrutiny where it is not "drawn to serve" the interest for which it was enacted. *Sorrell,* 2011 WL 2472796 at *13. Given that the State does not generally confine the scope of inquiries a doctor can make about the exercise of constitutional rights, the State cannot justify the burden that the statute places on the expression of healthcare practitioners, facilities, and providers.

It also is significant that the statute is applicable solely to those in the healthcare field. Numerous other professionals such as lawyers, engineers, real estate brokers, and financial advisers remain free under this statutory scheme to make inquiries of their clients regarding their firearm and ammunition ownership and to harass them about it. Such underinclusiveness of a scheme of regulation shows that the objective of the State is simply to suppress the viewpoint of those who are the target of the regulation rather than to advance any legitimate interest that the State might have in protecting the privacy of gun owners. In *Sorrell*, the Supreme Court held similar underinclusiveness of a state restriction on speech was fatal to its defense. "Privacy," Justice Kennedy wrote, "is a concept too integral to the person and a right too essential to freedom to allow its manipulation to support just those ideas the government prefers." *Id.* at *18.

b. Protecting Patients From Harassment is Not a Sufficient Government Interest

In *Sorrell*, the defendants argued that a speech restraint could be upheld because it had been enacted to protect doctors from unnecessary harassment. *Sorrell*, 2011 WL 2472796 at *15 ("The State . . . contends that § 4631(d) protects doctors from 'harassing sales behaviors'"). The Court accepted that the restrained speech in fact allowed the unnecessary harassment of doctors to take place, but rejected this as a legitimate basis for upholding the challenged law. "Many are those who must endure speech they do not like," Justice Kennedy wrote for the Court, "but that is a necessary cost of freedom." *Id.* The *Sorrell* decision also questioned the State's need to protect doctors from harassing salespeople in light of the fact that doctors who felt harassed simply could decline to see them. *Id.* ("Doctors who wish to forego detailing altogether are free to give 'No Solicitation' . . .instructions to their office managers"). So, too, a patient is free to walk out of the office of a doctor who makes unwanted inquiries or who engages in what the patient deems to be harassing speech. The State's argument that the statute is needed to protect patients from harassment not only fails under strict scrutiny, but lacks even a rational basis.

II.

The Statute Infringes on Patients' Right to Receive Information from their Doctors

The challenged law infringes not only on the rights of the practitioners, facilities, and providers, but also on the rights of the patients. *See generally* Susan Nevelow Mart, *The Right to Receive Information*, 95 Law Libr. J. 175 (2003). "[W]here a speaker exists . . . the protection afforded is to the communication, to its source and to its recipients both." *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 757 (1976). In *Lamont v. Postmaster General*, 381 U. S. 301 (1965), the Supreme Court upheld the First Amendment rights of citizens to receive political publications sent from abroad. In *Kleindienst v. Mandel*,

408 U. S. 753, 762-763 (1972), the Court referred to a First Amendment right to "receive information and ideas," and held that freedom of speech "'necessarily protects the right to receive.'" In *Procunier v. Martinez*, 416 U. S. 396, 408-409 (1974), where censorship of prison inmates' mail was under examination, the Court found it unnecessary to assess the First Amendment rights of the inmates themselves, for it was reasoned that such censorship equally infringed the rights of noninmates to whom the correspondence was addressed.[7]

If there is a right to ask a question or to engage in what the State considers for some to be "unnecessary harassment," there is a reciprocal right of the patient to hear the question that would have been asked or the supposed harassment that would have been attempted. This is particularly critical for children, who face a heightened risk of harm from improperly secured firearms and who would not even know what to ask about gun safety unless guided by a physician. The physicians' declarations in this case make clear that they have substantially curtailed their questioning about gun ownership and advice about gun safety in the wake of the passage of the law. *E.g.*, D.E. 17 ¶¶ 27-28; D.E. 18 ¶ 17; D.E. 19 ¶ 16; D.E. 21 ¶¶ 15-21; D.E. 22 ¶ 15; D.E. 23 ¶¶ 11, 14; D.E. 24 ¶¶ 11, 13. This curtailment of gun-related speech has deprived patients, including families, of the right to hear the physicians' queries and advice concerning firearm and ammunition ownership.

CONCLUSION

The Court should grant the preliminary injunction.

---

[7] *See also Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565 (2001); *Board of Ed., Island Trees Union Free School Dist. No. 26 v. Pico*, 457 US 853 (1982); *Red Lion Broadcasting Co. v. FCC*, 395 U. S. 367, 390 (1969); *Stanley v. Georgia*, 394 U. S. 557, 564 (1969); *Griswold v. Connecticut*, 381 U. S. 479, 482 (1965); *Marsh v. Alabama*, 326 U. S. 501, 505 (1946); *Thomas v. Collins*, 323 U. S. 516, 534 (1945); *Martin v. Struthers*, 319 U. S. 141, 143 (1943).

Respectfully submitted,

Hunton & Williams LLP

By s/ Thomas R. Julin

Thomas R. Julin, Jamie Z. Isani & Patricia Acosta
Florida Bar Nos. 325376, 728861 & 614599
1111 Brickell Avenue - Suite 2500
Miami, FL 33131
305.810.2516 fax 1601
tjulin or jisani or pacosta@hunton.com

Stearns Weaver Miller Weissler Alhadeff & Sitterson, P.A.

By s/ Gerald E. Greenberg

Gerald E. Greenberg & Gordon M. Mead, Jr.
& Julie Fishman Berkowitz
Fla. Bar Nos. 440094, 049896, 017293
Museum Tower, Suite 2200
150 West Flagler Street
Miami, Florida 33130
305.789.3200 Fax 3395

Cooperating Attorneys ACLU Foundation of Florida, Inc.

By s/ Randall C. Marshall

Randall C. Marshall
Fla. Bar No. 181765
4500 Biscayne Blvd Ste 340
Miami, FL 33137
786-363-2700 Fax 1108

CERTIFICATE OF SERVICE

I hereby certify that on July 19, 2011, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of records or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notice of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Thomas R. Julin
Thomas R. Julin

SERVICE LIST

Wollschlaeger v. Scott
Case No. 1:11-cv-22026-MGC
United States District Court, Southern District of Florida

Augustine Ripa
Ropes & Gray, LLP
700 12th Street, NW
Suite 900
Washington, DC 20005-3948
202-508-4600
Email: Augustine.Ripa@ropesgray.com
[via CM/ECF]

Bruce Manheim
Ropes & Gray, LLP
700 12th Street, NW
Suite 900
Washington, DC 20005-3948
202-508-4600
Email: bruce.manheim@ropesgray.com
[via CM/ECF]

Daniel R. Vice
Legal Project of the Brady Center to Prevent Gun Violation
1225 Eye Street, NW
Suite 1100
Washington, DC
202-289-7319
Email: dvice@bradymail.org
[via CM/ECF]

Dennis Gary Kainen
Weisberg & Kainen
1401 Brickell Avenue
Suite 800
Miami, FL 33131-3554
305-374-5544
Fax: 358-8565
Email: dennis@weisbergandkainen.com
[via CM/ECF]

Douglas Hallward-Driemeier
Ropes & Gray, LLP
700 12th Street, NW
Suite 900
Washington, DC 20005-3948
202-508-4600
Email: Douglas.Hallward-Driemeier@ropesgray.com
[via CM/ECF]

Hal Michael Lucas
Astigarraga Davis Mullins & Grossman, P.A.
701 Brickell Avenue
16th Floor
Miami, FL 33131
305-372-8282
Fax: 305-372-8202
Email: hlucas@astidavis.com
[via CM/ECF]

Jonathan E. Lowy
Center to Prevent Handgun Violence
1225 Eye Street NW
Suite 1100
Washington, DC 20005
202-289-5765
Fax: 898-0059
[via CM/ECF]

Julia Lewis
Ropes & Gray, LLP
700 12th Street, NW
Suite 900
Washington, DC 20005-3948
202-508-4600
Email: julia.lewis@ropesgray.com
[via CM/ECF]

Edward Maurice Mullins
Astigarraga Davis Mullins & Grossman
701 Brickell Avenue
16th Floor
Miami, FL 33131-2847
305-372-8282
Fax: 372-8202
Email: emullins@astidavis.com
[via CM/ECF]