No. 12-14009

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DR. BERND WOLLSCHLAEGER, ***et al.*****,**
Plaintiffs-Appellees,
v.
GOVERNOR OF THE STATE OF FLORIDA, ***et al.*****,**
Defendants-Appellants.

On Appeal from the United States District Court
for the Southern District of Florida

EN BANC BRIEF OF *AMICUS CURIAE* MOMS DEMAND ACTION FOR GUN SENSE IN AMERICA IN SUPPORT OF PLAINTIFFS-APPELLEES AND AFFIRMANCE

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, Moms Demand Action for Gun Sense in America discloses it is a part of a non-profit organization, Everytown for Gun Safety, which has no parent corporations and issues no stock. Accordingly, no publicly held corporation owns 10% or more of its stock.

Pursuant to Eleventh Circuit Rule 26.1-1, the undersigned counsel certifies that, in addition to the persons and entities identified in the petition for rehearing en banc and subsequent briefs, the following persons and entities have an interest in the outcome of this matter:

Amicus Curiae:

Moms Demand Action for Gun Sense in America

Everytown for Gun Safety Action Fund

Everytown for Gun Safety Support Fund

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Dated: April 27, 2016

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INTEREST OF THE *AMICUS CURIAE*

Formed in the wake of the Sandy Hook Elementary shooting, Moms Demand Action for Gun Sense in America ("Moms Demand Action") is a grassroots movement of American mothers fighting for public safety measures that respect the Second Amendment and protect people from gun violence. Part of Everytown for Gun Safety ("Everytown"), the nation's largest gun-violence-prevention organization, Moms Demand Action promotes firearm safety nationwide by engaging in community education and political advocacy.

The leading cause of unintentional child gun deaths—and, accordingly, a top concern of Moms Demand Action—is unsafe firearm storage in the home. In a first-of-its-kind analysis in 2014, Moms Demand Action and Everytown determined that more than two-thirds of fatal, unintentional shootings of children could be avoided if firearms were stored responsibly out of children's reach. *See* Moms Demand Action & Everytown for Gun Safety, *Innocents Lost: A Year of Unintentional Gun Deaths* (2014) (hereinafter "*Innocents Lost*"). And Moms Demand Action has launched a campaign to reduce unintentional child gun deaths by educating communities about safe firearm storage practices and encouraging public discussion of the subject. *See* BeSmartForKids.org, a campaign to reduce child gun deaths; *see also* Press Release, Moms Demand Action, *Two Hundred Unintentional Child Shootings This Year* (Sept. 23, 2015), *available at* http://every.tw/1Sy8wPB.

Over 2 million American children live in households with unsecured guns—

and 1.7 million live in homes that contain guns that are both loaded and unlocked. Shuster *et al.*, *Firearm Storage Patterns in U.S. Homes with Children*, 90 Am. J. Pub. Health 4 (Apr. 2000); Okoro *et al.*, *Prevalence of Household Firearms and Firearm-Storage Practice in the 50 States and the District of Columbia*, 116 Pediatrics 3 (Sept. 1, 2005). Each year, nearly 100 children 17 and under are killed in unintentional shootings, and the vast majority of these deaths take place in the victim's own home or that of a relative or friend. *See* Center for Disease Control and Prevention, *Fatal Injury Reports, National and Regional, 1999-2014*, *available at*: http://1.usa.gov/1ni8EV8; *Innocents Lost* at 3; *see also, e.g.*, Grossman, Reay, & Baker, *Self-inflicted and unintentional firearm injuries among children and adolescents: the source of the firearm*, 153 Archives of Pediatric & Adolescent Med. 875 (1999) (concluding that most guns involved in child and adolescent suicides and accidental injuries came from the victim's home that of a friend or relative). *Amicus*'s research established that over two-thirds of these tragedies could have been avoided through safe firearm storage. *Innocents Lost* at 3.

The members of Moms Demand Action—indeed, all parents—are directly affected by preventable firearm deaths. *Amicus* believes it essential to educate patients about safe firearm storage so that families can choose to implement best practices at home. Doctors—in particular, pediatricians—are at the front lines of educational efforts because they are often parents' primary reliable source of child safety information.

Florida's Firearm Owners Privacy Act (the "Act") restricts doctors' ability to

ask patients about firearm ownership and provide objective, factually accurate information on gun safety, and is therefore a direct obstacle to this important educational project. This cannot be squared with the First Amendment, which protects not only doctors' right to speak, but also parents' "right to receive information and ideas." *Bd. of Educ. v. Pico ex rel. Pico*, 457 U.S. 853, 867, 102 S. Ct. 2799, 2808 (1982) (plurality op.) (citation omitted).

Amicus respectfully urges this Court to affirm the district court's judgment and ensure that the First Amendment rights of parents—and all who would welcome information about gun safety—are protected.[1]

STATEMENT OF THE ISSUES

1. What level of scrutiny applies to the record-keeping, inquiry, anti-discrimination, and anti-harassment provisions of the Act, Fla. Stat. Ann. § 790.338(1), (2), & (5), and are those provisions constitutional under the appropriate level of scrutiny?[2]

2. Is the Act's anti-harassment provision, Fla. Stat. Ann. § 790.338(6),

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[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to fund preparing or submitting this brief. No person—other than *amicus curiae* and its counsel—contributed money that was intended to fund preparing or submitting this brief. *See* Fed. R. App. P. 29(c)(5).

[2] *Amicus* recognizes that with respect to the anti-harassment provision, this Court requested briefing on vagueness. *Amicus* addresses that issue in Part IV and also maintains that the provision is a facially content-based restriction on doctor-patient communications that is unconstitutional under the First Amendment, *see infra* Parts II-III.

unconstitutionally vague?

SUMMARY OF ARGUMENT

I. The doctor-patient relationship is a critical means for a populace overwhelmed by a torrent of behavioral messages to receive accurate, unbiased public health information. Parents, in particular, rely on their pediatricians for medically sound advice for raising healthy, safe children. Studies show that when doctors make routine inquiries about firearm ownership and provide follow-up counseling about safe storage, families store their guns more safely.

II. The Act's inquiry, record-keeping, anti-discrimination, and anti-harassment provisions are all subject to strict scrutiny because they place content-based restrictions on accurate information that patients receive from their doctors. The First Amendment protects patients' right to receive this essential information. The inquiry, record-keeping, and anti-harassment provisions explicitly restrict speech on the basis of content; and the anti-discrimination provision, read against the statute as a whole, is also aimed at suppressing speech on the basis of content. These regulations are therefore subject to strict scrutiny. *See Reed v. Town of Gilbert* 135 S. Ct. 2218, 2228 (2015).

The State's arguments that these provisions are subject to lesser scrutiny fail: *First*, even assuming that *doctors*, as professionals, have diminished First Amendment rights, *patients'* right to receive accurate information applies fully in this context. *Second*, the Supreme Court has rejected the argument that the government may restrict

speech to protect supposedly vulnerable listeners. And *third*, even assuming that the Supreme Court applied lesser scrutiny to the informed consent provision at issue in *Planned Parenthood of Southwestern Pennsylvania v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (1992), that is not dispositive because *Casey* addressed a law *requiring*—rather than, as here, *prohibiting*—the disclosure of truthful information to patients.

III. The inquiry, record-keeping, anti-discrimination, and anti-harassment provisions fail strict, or even intermediate, scrutiny, most obviously because they are insufficiently tailored to the government's claimed interests. The Supreme Court has repeatedly held that laws that curtail the speech available to a general audience in order to protect a minority of unwilling listeners sweep too broadly under the First Amendment.

IV. The Act's anti-harassment provision is also unconstitutionally vague. The provision requires doctors to guess at where to draw the line between inquiries and counseling that make a particular patient uncomfortable but are medically necessary and inquiries and counseling that constitute "unnecessary harassment." It therefore gives insufficient notice of what is prohibited, and it is invalid under the Due Process Clause.

ARGUMENT AND AUTHORITIES

The Act places content-based restrictions on doctor-patient communications and thereby infringes listeners' rights by depriving them of truthful, lifesaving health and safety information. The State maintains that the Act is simply a "reasonable

regulation" of the practice of medicine that this Court should treat deferentially. State Br. 34-44. But this position ignores a fundamental principle of the First Amendment: "[T]he Constitution protects the right to receive information and ideas." *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S. Ct. 1243, 1247 (1969). Neither the State nor any of its *amici* have ever even *acknowledged* this principle, much less attempted to explain why the First Amendment permits legislatures to place content-based limitations on accurate health and safety information that patients receive from their doctors.

The Act's content-based restrictions on the communication of truthful, non-misleading information are subject to strict scrutiny. And the Act cannot survive strict—or even intermediate—scrutiny. Under well-established Supreme Court precedent, a law that restricts the information *willing* listeners may receive in order to protect a minority of *unwilling* listeners is invalid. This Court should therefore hold the Act unconstitutional.

I. THE DOCTOR-PATIENT RELATIONSHIP PROVIDES PARENTS WITH VITAL HEALTH AND SAFETY INFORMATION, INCLUDING INFORMATION ABOUT FIREARM SAFETY.

Speech between doctors and patients is a vital means of communicating trustworthy, research-based information about health and safety to patients within a crowded marketplace of ideas. This function is particularly important in the case of child health and safety.

A. Candid, Politically Unrestricted Communications from Doctors Are Essential to Patients.

Patients rely on their doctors for information and advice that will allow them to make optimal decisions about medical treatment and their lifestyles in general. *See* Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. Ill. L. Rev. 939, 978 (2007) (observing that patients "wish to receive knowledge that our doctors can uniquely provide, so that we can decide for ourselves what our medical care ought to be"). Indeed, in a world in which citizens are inundated with advertising, opinions ventilated on the Internet, and other messages aimed at influencing behavior, there is a pressing need for accurate, unbiased health information. In the words of a leading public health law scholar, "[t]he population must at least be aware of the health consequences of risk behaviors to make informed decisions." Lawrence O. Gostin, *Public Health Law* 333 (2d ed. 2008). "The citizenry is bombarded with behavioral messages that affect its health—by the media and entertainment, trade associations and corporations, religious and civic organizations, and family and peers. Public health officials strive to be heard above the din of conflicting and confusing communications." *Id.*

Indeed, doctor-patient communications are often patients' sole reliable source of information based on research and the consensus of the medical community. As the Third Circuit has observed, "professionals have access to a body of specialized knowledge. . . . [T]his information . . . will often be communicated to [citizens]

directly by a licensed professional during the course of a professional relationship. Thus, professional speech . . . serves as an important channel for the communication of information that might otherwise never reach the public." *King v. Governor of New Jersey*, 767 F.3d 216, 234 (3d Cir. 2014); *see also Conant v. Walters*, 309 F.3d 629, 644 (9th Cir. 2002) (Kozinski, J., concurring) ("[W]ord-of-mouth and the Internet are poor substitutes for a medical doctor; information obtained from chat rooms and tabloids cannot make up for the loss of individualized advice from a physician with many years of training and experience."); Post, *Informed Consent*, 2007 U. Ill. L. Rev. at 977 ("[W]e regard private, professional communication between doctors and patients as a significant source of expert, dependable information.").

This information is no less essential because it may at times provoke discomfort or touch on private subjects. Often, the content of doctor-patient communications may be unwelcome. Doctors frequently counsel patients that they should lose weight or exercise more; or that pleasurable habits, such as smoking, drinking excessive alcohol, or eating rich foods, are unhealthy. To provide sound advice, doctors also must frequently ask questions concerning private, sensitive subjects such as sexual behavior and domestic abuse. But doctors are guided in their actions by the medical community's consensus about appropriate care. Patients visit their doctors with the expectation that doctors will tell them what is good for them, not what they want to hear.

B. Parents In Particular Rely On Their Doctors For Accurate Health And Safety Information About Raising Their Children.

Visits to the pediatrician are often parents' primary source of reliable information about how to raise safe and healthy children. Pediatricians inform new parents what sleeping practices minimize the risk of crib death; what foods babies should avoid; and how to "babyproof" the child's home. As the children grow, these conversations move to topics such as using gates at staircases to prevent falls; swimming pool safety; and proper storage of dangerous chemicals. Storing firearms safely out of reach of curious children is a logical and important part of this dialogue.

C. Studies Demonstrate That Doctor-Patient Communications About Firearm Safety Lead To Better Storage Practices.

Several studies show that when doctors inquire about firearm ownership and provide brief follow-up counseling, patients are significantly more likely to store firearms safely. One found that this approach led to a 21.4% increase in safe storage practices among patients receiving counseling. Shari L. Barkin et al., *Is Office-Based Counseling About Media Use, Timeouts, and Firearm Storage Effective?*, 122 Pediatrics 15 (2008). Another found that after a single instance of verbal counseling by a family doctor (or counseling coupled with a brochure), families were three times more likely to make a safe change in firearm storage habits. Teresa Albright & Sandra Burge, *Improving Firearm Storage Habits: Impact of Brief Office Counseling by Family Physicians*, 16 J. Am. Bd. of Family Prac. 40, 44 (2003); *see also* Tamera Coyne-Beasley et al., *"Love Our Kids, Lock Your Guns," A Community-Based Firearm Safety Counseling and Gun Lock*

Distribution Program, 155 Archives of Pediatric & Adolescent Med. 659, 663 (2001) (concluding that tailored physician counseling can improve rate of safe firearm storage). And research conducted by *amicus* showed that more than two-thirds of fatal, unintentional shootings of children could be avoided if gun owners stored firearms responsibly. *See Innocents Lost* at 6. Thus, the American Academy of Pediatrics recommends inquiries about firearm ownership as part of routine pediatric care. *See* American Academy of Pediatrics, *How Pediatricians Can Advocate for Children's Safety in Their Communities*, *available at* http://bit.ly/1RHF63O. Pediatricians' information about firearm safety—if parents receive it—will save children's lives.

II. STRICT SCRUTINY APPLIES TO THE ACT'S INQUIRY, RECORD-KEEPING, ANTI-DISCRIMINATION, AND ANTI-HARASSMENT PROVISIONS BECAUSE THEY PLACE CONTENT-BASED RESTRICTIONS ON ACCURATE HEALTH AND SAFETY INFORMATION PATIENTS RECEIVE FROM THEIR DOCTORS.

Strict scrutiny applies to the Act's inquiry, record-keeping, anti-discrimination, and anti-harassment provisions because they place content-based restrictions on speech of great First Amendment value: truthful, literally lifesaving information that patients would otherwise receive from their doctors.

A. The First Amendment Protects the Right to Receive Information, Including Within the Doctor-Patient Relationship.

The First Amendment protects listeners' right to receive information just as strongly as it protects speakers' right to disseminate it. *See, e.g.*, *Lorillard Tobacco Co. v. Reilly*, 533 U.S. 525, 565, 121 S. Ct. 2404, 2427 (2001) ("[A] speech regulation cannot

unduly impinge on . . . the adult listener's opportunity to obtain information."); *Pico*, 457 U.S. at 866-67, 102 S. Ct. at 2808 ("[T]he Constitution protects the right to receive information and ideas.") (citing *Stanley*, 394 U.S. at 564, 89 S. Ct. at 1247); *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 756, 96 S. Ct. 1817, 1823 (1976) ("[T]he protection afforded [by the First Amendment] is to the communication, to its source and to its recipients both."); *Martin v. City of Struthers*, 319 U.S. 141, 143, 63 S. Ct. 862, 863 (1943) (freedom of speech "embraces the right to distribute literature and necessarily protects the right to receive it") (citation omitted).

This principle extends to the doctor's office. As demonstrated, patients rely on their doctors for valuable public health information. Patients' interest in receiving this information merits constitutional protection. As the Supreme Court affirmed in *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 566, 131 S. Ct. 2653, 2664 (2011), safeguarding the flow of information is particularly important "in the fields of medicine and public health, where information can save lives." *See also Rust v. Sullivan*, 500 U.S. 173, 200, 111 S. Ct. 1759, 1776 (1991) (recognizing argument that "[the relationship] between doctor and patient should enjoy protection under the First Amendment," and upholding regulations because they "do not significantly impinge upon [that] relationship").

B. The Act's Inquiry, Record-Keeping, Anti-Discrimination, and Anti-Harassment Provisions Are Content-Based Regulations of Speech Subject to Strict Scrutiny.

The Act's inquiry, record-keeping, anti-discrimination, and anti-harassment provisions are all content-based regulations of valuable speech that receive strict scrutiny.

The Inquiry Provision: The Act's inquiry provision, Fla. Stat. Ann. § 790.338(2), provides that doctors "shall respect a patient's right to privacy and should refrain from making a written inquiry or asking questions *concerning the ownership of a firearm or ammunition* . . . ." Fla. Stat. Ann. § 790.338(2) (emphasis added). The Act expressly distinguishes between inquiries and questions concerning firearm ownership and inquiries and questions on other topics, and limits only the former. This is quintessential content discrimination, subject to strict scrutiny. *See Reed*, 135 S. Ct. at 2227 ("Government regulation of speech is content based if a law applies to particular speech because of the topic discussed . . . .").

The inquiry provision will chill—if not suppress entirely—doctor-patient communications about firearm safety. The Act threatens doctors who violate the provision with disciplinary action. *See* Fla. Stat. Ann. § 790.338(8) (providing that "[v]iolations of the provisions of subsections (1)-(4) constitute grounds for disciplinary action"); Fla. Stat. Ann. § 456.072(1)(nn) (providing that "[v]iolating any of the provisions of § 790.338" is grounds for discipline). Although the Act elsewhere provides that firearm-related inquiries are permissible when "a health care

practitioner . . . in good faith believes that this information is relevant to the patient's medical care or safety," Fla. Stat. Ann. § 790.338(2), this will not eliminate the Act's chilling effect: The "good faith" determination can only be made *post hoc*, by a court or disciplinary board, and cannot provide a clear, *ex ante* safe harbor for physician speech. In consequence, doctors will take the safe course and refrain from routine inquiries and follow-up conversations on the topic. In turn, a substantial number of gun-owning patients—those who give doctors no specific reason to raise the issue—will never receive the counseling and information that their doctors would otherwise have provided. [3]

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[3] *Amicus curiae* the National Rifle Association ("NRA") suggests that the Act's inquiry provision is merely precatory and that it therefore "cannot possibly violate the First Amendment." NRA Br. 3-15. As an initial matter, the provision is not precatory: it provides that doctors "*shall* respect a patient's right to privacy" and then specifies that in order to obey this command, doctors "should refrain" from inquiries about firearm ownership. Fla. Stat. Ann. § 790.338(2). The obvious import of this language is that the legislature deems inquiries about firearm ownership to be violations of patient privacy exposing doctors to punishment.

In any event, the assertion that only "enforceable" laws that prohibit speech can violate the First Amendment, NRA Br. 14, is simply wrong. It is established, for example, that the government may violate the First Amendment by "deny[ing] a benefit to a person on a basis that infringes his constitutionally protected freedom of speech even if he has no entitlement to that benefit." *United States v. Am. Library Ass'n, Inc.*, 539 U.S. 194, 210, 123 S. Ct. 2297, 2307 (2003) (citation and alterations omitted). And relevant here, a nominally precatory government action that, by design and in practical effect, chills protected speech violates the First Amendment. *See Bantam Books, Inc. v. Sullivan*, 372 U.S. 58, 66-67, 83 S. Ct. 631, 637-38 (1963) (finding a First Amendment violation because, "though the Commission is limited to informal sanctions[,] . . . the record amply demonstrates that the Commission deliberately set about to achieve the suppression of publications deemed 'objectionable' and succeeded in its aim").

The Record-Keeping Provision: The record-keeping provision is similarly content-based on its face. It provides that "[a] health care practitioner . . . may not intentionally enter any disclosed information *concerning firearm ownership* into the patient's medical record if the practitioner knows that such information is not relevant to the patient's medical care or safety, or the safety of others." Fla. Stat. Ann. § 790.338(1) (emphasis added). Like the inquiry provision, the record-keeping provision singles out one topic—firearm ownership—for unfavorable treatment.

This provision will also chill doctor communications to patients about firearm safety. Even setting aside the inquiry provision, doctors will be less likely to initiate discussions about firearm ownership when they know they cannot record information they learn in the patient's medical record without some immediate reason to believe that the information is relevant to the patient's medical care. Moreover, because a patient's medical record will not contain any information about firearm ownership unless the doctor had prior reason to believe it relevant, the doctor may not later recall that the patient owns a gun and will therefore not engage in firearm safety counseling at a time when it *becomes* relevant. For example, a family practitioner who, in conformity with the record-keeping provision, omits a notation that a couple owns firearms from the wife's medical record is less likely to provide appropriate safe storage counseling when that woman later has a child.

The Anti-Discrimination Provision: The Act's anti-discrimination provision is also a content-based law aimed at suppressing speech. The anti-discrimination provision

mandates that doctors "may not discriminate against a patient based solely upon the patient's exercise of the constitutional right to own and possess firearms or ammunition." Fla. Stat. Ann. § 790.338(5). Read in the context of the statute as a whole, this provision targets firearm-related speech for suppression. The statute separately, explicitly provides that the Act "does not alter existing law regarding a physician's authorization to choose his or her patients." Fla. Stat. Ann. § 790.338(4). The anti-discrimination provision, read against this background—as it must be, *see FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133, 120 S. Ct. 1291, 1301 (2000); *Larimore v. State*, 2 So. 3d 101, 106 (Fla. 2008)—does not ban discriminatory conduct. If the provision is not to become a nullity, *see Duncan v. Walker*, 533 U.S. 167, 174, 121 S. Ct. 2120, 2122 (2001) ("It is our duty to give effect, if possible, to every clause and word of a statute." (internal quotation marks omitted)); *Larimore*, 2 So. 3d at 106 (same), the only plausible reading is that it reaches verbal communications perceived as disfavoring gun owners, as indeed the legislative history indicates, *see* Joint Statement of Undisputed Facts, *Wollschlaeger v. Farmer*, No. 1:11-CV-22026 (S.D. Fla. Nov. 11, 2011), Dkt. 87 ("Statement of Facts"), at ¶¶ 3-10 (describing legislature's focus on incidents in which doctors asked patients about, and made recommendations regarding, firearm ownership). The anti-discrimination provision is therefore not analogous to the anti-discrimination laws cited by the State, all of which actually target discriminatory conduct, rather than speech. *See* State Br.

33. It is instead a content-based regulation of speech that will further chill doctor-patient communications about gun safety.

The Anti-Harassment Provision: The anti-harassment provision also facially discriminates against firearm-related speech. It provides that doctors "shall respect a patient's legal right to own or possess a firearm and should refrain from unnecessarily harassing a patient *about firearm ownership* during an examination." Fla. Stat. Ann. § 790.338(6) (emphasis added). Although harassment may take the form of words *or* conduct, *see* Black's Law Dictionary, at 733 (10th ed. 2014) (defining harassment as "[w]ords, conduct, or action . . . that . . . annoys, alarms, or causes substantial emotional distress . . . and serves no legitimate purpose"), the statute makes plain that this provision targets speech and does so in a content-based fashion. Indeed, the fact that the provision bars "unnecessar[y] harass[ment]" of a patient "about" gun ownership demonstrates both: Speech, unlike conduct, is naturally understood to be "about" a specific subject matter, and discussions "about" only one subject—"firearm ownership"—are targeted. The phrase "during an examination" reinforces that reading—it is difficult to imagine what annoying or alarming *conduct* "about firearm ownership" might take place within the confines of a doctor's examination.[4]

[4] *Amicus* the NRA argues that the anti-harassment provision is only precatory. For the reasons stated with respect to the similarly worded inquiry provision, this argument fails. *See supra* at 13 n.3.

The anti-harassment provision is "presumptively invalid" under *R.A.V. v. City of St. Paul*, 505 U.S. 377, 394, 112 S. Ct. 2538, 2549 (1992), because it regulates harassing speech on the basis of content. Moreover, the anti-harassment provision will impermissibly chill *legitimate* doctor-patient communications about firearm safety because a prudent doctor, anxious to avoid liability for "unnecessarily harassing" patients with firearm-related inquiries, will curtail conversations about guns with her patients when they display any discomfort. *See also infra* Part IV.

C. Under *Reed v. Town of Gilbert*, Strict Scrutiny Applies to These Provisions; At a Minimum, Intermediate Scrutiny Applies.

All four of these content-based provisions are subject to strict scrutiny. In *Reed v. Town of Gilbert*, the Supreme Court held, without qualification, that "strict scrutiny applies . . . when a law is content based on its face." 135 S. Ct. at 2228. Accordingly, the inquiry, record-keeping, and anti-harassment provisions should be subjected to strict scrutiny.

Further, as *Reed* teaches, "strict scrutiny applies . . . when the purpose and justification for [a] law are content based," regardless of whether the law is facially content-based. 135 S. Ct. at 2228; *see also R.A.V.*, 505 U.S. at 382, 112 S. Ct. at 2542 ("The First Amendment generally prevents government from proscribing speech, or even expressive conduct, because of disapproval of the ideas expressed.") (citations omitted). The "purpose and justification" of the anti-discrimination provision, as the legislative history demonstrates, *see* Statement of Facts ¶¶ 3-10, are content-based: the

legislature wished to prevent doctors from making firearm-related inquiries that some patients perceived as harassing and discriminatory. Strict scrutiny therefore applies to the Act's anti-discrimination provision.

The State claims that *Reed* does not compel the application of strict scrutiny in this case because the Act regulates "professional speech," which it claims is always subject to a lesser degree of scrutiny when a professional counsels a client. State Br. 35-44. This argument is misguided.

The Supreme Court has not applied uniform rules to professional speech depending on whom the professional happens to be addressing at a given moment. Instead, it has applied different levels of scrutiny depending on the First Amendment interests at stake. So, for example, a restriction on solicitation of clients by attorneys was subjected to strict scrutiny in *NAACP v. Button*, 371 U.S. 415, 434, 438, 83 S. Ct. 328, 338, 341 (1963), because it was aimed at suppressing political expression and activity, *id.* at 429, 83 S.Ct. at 336. On the other hand, restrictions on solicitation of clients by attorneys have been subjected to intermediate scrutiny when the solicitation's purpose was simply to drum up business. *See, e.g.*, *Zauderer v. Office of Disciplinary Counsel*, 471 U.S. 626, 644, 105 S. Ct. 2265, 2278 (1985).

This case implicates First Amendment interests of a very high order. At stake is patients' right to receive truthful, empirically-based health and safety information that reflects the consensus of the medical community. In the health care context, "information can save lives." *Sorrell*, 564 U.S. at 566, 131 S. Ct. at 2664. The

communications at issue here are therefore of greater First Amendment value than commercial speech, which simply "disseminat[es] information as to who is producing and selling what product, for what reason, and at what price," *Va. Bd. of Pharmacy*, 425 U.S. at 765, 96 S. Ct. at 1827, and which receives intermediate scrutiny, *see Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n of New York*, 447 U.S. 557, 566, 100 S. Ct. 2343, 2351 (1980). This speech should be fully protected.[5]

The additional reasons proffered by the State and its *amici* for providing lesser protection are all flawed. *First*, even supposing that *doctors'* speech rights are somehow diminished because of their professional status, *see* State Br. 36, that would not mean that *patients'* First Amendment right to hear this information can be discounted. In *Procunier v. Martinez*, 416 U.S. 396, 94 S. Ct. 1800 (1974), the Supreme Court repudiated the idea that any reduced First Amendment protection afforded to a speaker also negates the First Amendment rights of the speaker's audience. The Court "reject[ed] any attempt to justify censorship of inmate correspondence merely by reference to certain assumptions about the legal status of prisoners." *Id.* at 409, 94 S. Ct. at 1809. "*Both parties* to the correspondence have an interest in" their

[5] It is therefore irrelevant that some lower courts have held that *Reed* does not alter the level of scrutiny for content-based regulations of commercial speech. State Br. 43-44. Even if these decisions are correct, this case does not involve "commercial" speech; it involves speech of an altogether different, and more valuable, nature.

communication, the Court held, and invalidated the regulations at issue. *Id.* at 408, 413-14, 94 S. Ct. at 1809, 1811-12.

Second, the First Amendment protections applicable here are not weakened because patients are supposedly "vulnerable." State Br. 48; *see also* Second Amendment Foundation Br. 26-32. The Supreme Court has explicitly rejected the argument that "anxi[ety]" about "whether doctors have their patients' best interests at heart" can justify a content-based limitation on speech. *Sorrell*, 564 U.S. at 576, 131 S. Ct. at 2670. And even while recognizing that "[p]ersons who are attempting to enter health care facilities—for any purpose—are often in particularly vulnerable physical and emotional conditions," *Hill v. Colorado*, 530 U.S. 703, 729, 120 S. Ct. 2480, 2496 (2000), the Supreme Court has subjected laws establishing "buffer zones" outside of abortion clinics to careful First Amendment scrutiny and upheld them only where the laws—unlike the Act—are content-neutral, *id.* at 719-25, 120 S. Ct. at 2491-94; *see also McCullen v. Coakely*, 134 S. Ct. 2518, 2529-34 (2014) (finding "buffer zone" law content-neutral but striking it down as insufficiently tailored); *R.A.V.*, 505 U.S. at 394-95, 112 S. Ct. at 2549 (rejecting argument that content-based limitation on fighting words is justified by need to "protect against the victimization of a person or persons who are particularly vulnerable because of their membership in a group that historically has been discriminated against") (citation omitted).

Moreover, any supposed "power imbalance between patient and doctor," State Br. 49 (quoting *Wollschlaeger v. Governor of the State of Florida*, 814 F.3d 1159, 1197 (11th

Cir. 2015), *reh'g en banc granted, opinion vacated* (Feb. 3, 2016)), would cut *against* allowing the State legislature to regulate the content of what doctors tell their patients. Without medical training or public health expertise, patients are generally ill-equipped to second-guess doctors' communications. It is therefore essential that legislatures be precluded from distorting the content of doctor-patient communications on ideological grounds.

Third, because of the important listeners' rights at stake, *Casey*, upon which the State and *amici* rely, *see* State Br. 36, 38-39; NRA Br. 15-20; Second Amendment Foundation Br. 6-7; Unified Sportsmen Br. 16-19, is not dispositive of the standard of scrutiny applicable here. The *Casey* plurality did not specify what level of scrutiny it applied to the informed consent provision at issue there. *See* 505 U.S. at 884, 112 S. Ct. at 2825. But at any rate, *Casey* addressed a law *requiring*—rather than, as here, *prohibiting*—the disclosure of "truthful, nonmisleading information" to patients. *Id.* at 882, 112 S. Ct. at 2823. The law in *Casey* therefore did not infringe patients' right to receive information. Just as the Court applied different levels of scrutiny in *NAACP v. Button* and in *Zauderer*, the analysis and result in *Casey* do not dictate an identical approach here. *See 44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501, 116 S. Ct. 1495, 1507 (1996) (op. of Stevens, J.) (explaining that a law that "requires the disclosure of beneficial . . . information," is less suspect under the First Amendment than a law that "entirely prohibits the dissemination of truthful, nonmisleading . . .

messages," and that the latter is therefore subject to more rigorous review than the former).

For the foregoing reasons, strict scrutiny should be applied to the Act's inquiry, record-keeping, anti-discrimination, and anti-harassment provisions. At a minimum, however, intermediate scrutiny should apply. Any lesser degree of scrutiny would effectuate nothing short of a radical rewriting of the First Amendment, not to mention the basic doctor-patient compact. If rational-basis scrutiny were applied, sellers of products that might be the subject of future doctor-patient health conversations would be well-advised to lobby for identical legislation, making discussions of tobacco, alcohol, fast food, family planning, and so on, all subject to the risk of reprisal. The cumulative effect would reduce doctors from trusted advisers to mere merchants of medical services.

III. ALL FOUR PROVISIONS ARE UNCONSTITUTIONAL BECAUSE THEY IMPROPERLY LIMIT THE SPEECH AVAILABLE TO WILLING LISTENERS IN ORDER TO PROTECT A MINORITY OF UNWILLING LISTENERS.

Under strict scrutiny, the State must establish that the inquiry, record-keeping, anti-discrimination, and anti-harassment provisions of the Act "further[] a compelling governmental interest and [are] narrowly tailored to that end." *Reed*, 135 S. Ct. at 2231. "That is a demanding standard," and "[i]t is rare that a regulation restricting speech because of its content will ever be permissible." *Brown v. Entm't Merchants Ass'n*, 564 U.S. 786, 799, 131 S. Ct. 2729, 2738 (2011) (citation omitted). The Act is

not such a rare bird. Moreover, even if intermediate scrutiny were to apply, the Act would still be invalid—most obviously because it violates the First Amendment rule that the government may not restrict speech in order to protect a minority of listeners when that will prevent the public at large from receiving the speaker's message.[6]

In order to satisfy intermediate scrutiny, the state must show that the Act "directly advances" a "substantial" government interest, and is "not more extensive than is necessary to serve that interest." *Central Hudson Gas & Elec. Corp.*, 447 U.S. at 566, 100 S. Ct. at 2351. As an initial matter, the State's cited interests are constitutionally suspect. The State argues, in essence, that it has a valid interest in protecting citizens' right to bear arms; and that citizens' exercise of this right will be deterred if doctors engage patients in conversations about firearms. State Br. 45-49. One need not doubt the legitimacy, as a general matter, of the State's interest in furthering citizens' Second Amendment rights to be skeptical of this argument. The State assumes that gun owners will be able to exercise fully their right to bear arms only if they are not engaged by medical professionals in discussions of firearm safety. But this Court should "view as dubious any justification that is based on the benefits of public ignorance." *Bates v. State Bar of Arizona*, 433 U.S. 350, 375, 97 S. Ct. 2691, 2704 (1977); *see also Va. Pharmacy Bd.*, 425 U.S. at 770, 96 S. Ct. at 1829 ("There is, of

[6] *Amicus* here focuses on the Act's curtailment of listeners' rights, but the Act fails intermediate scrutiny for the additional reasons laid out in Judge Wilson's second dissenting opinion. *See Wollschlaeger v. Governor of Florida*, 797 F.3d 859, 919-30 (11th Cir. 2014) (Wilson, J., dissenting).

course, an alternative to this highly paternalistic approach. That alternative is to assume that this information is not in itself harmful, that people will perceive their own best interests if only they are well enough informed . . . ."); *Whitney v. California*, 274 U.S. 357, 377, 47 S. Ct. 641, 649 (1927) (Brandeis, J., concurring) ("If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence.").

But even if the State's asserted interest in protecting gun-owning patients from truthful information were presumed valid, the Act still would fail the final requirement of intermediate scrutiny: that the law be "not more extensive than is necessary to serve [the asserted government] interest." *Central Hudson*, 447 U.S. at 566, 100 S. Ct. at 2351. The Supreme Court has repeatedly made clear that a speech regulation fails this tailoring requirement when it restricts the speech available to the general public in order to protect the sensibilities of a minority of unwilling listeners.

In *Martin v. City of Struthers*, for example—one of the earliest cases to recognize the First Amendment rights of listeners—the Court struck down a citywide ordinance prohibiting door-to-door distribution of leaflets. The Court recognized that the ordinance's purpose was "the protection of the householders from annoyance, including intrusion upon the hours of rest." 319 U.S. at 144, 63 S. Ct. at 864. Notwithstanding the validity of this interest, however, the Court held that the city could not make the decision on behalf of all householders that they would receive no

leaflets, "whether particular citizens want that protection or not." *Id.* at 143, 63 S. Ct. at 863.

Since *Martin*, the Supreme Court has reaffirmed this basic principle again and again. *See, e.g.*, *Reno v. ACLU*, 521 U.S. 844, 874, 117 S. Ct. 2329, 2346 (1997) (holding that the Communications Decency Act failed the First Amendment's tailoring requirement because it suppressed "a large amount of speech that adults have a constitutional right to receive and to address to one another"); *Bolger v. Youngs Drug Prods. Corp.*, 463 U.S. 60, 74, 103 S. Ct. 2875, 2884 (1983) ("The level of discourse reaching a mailbox simply cannot be limited to that which would be suitable for a sandbox."). Tellingly, in *Lorillard Tobacco*, 533 U.S. at 561, 121 S. Ct. at 2425, the Court—applying intermediate scrutiny—found a ban on tobacco advertising aimed at children to lack "a reasonable fit between the means" employed and the goal of reducing juvenile tobacco use. "[A]dults have [an] interest in receiving truthful information about tobacco products," the Court found, and the law in question, "[i]n some geographical areas, . . . would constitute nearly a complete ban on the communication of truthful information about smokeless tobacco and cigars to adult consumers." *Id.* at 562, 564, 121 S. Ct. at 2425, 2426. It is impermissible to place broad restrictions on speech that is valuable and informative to many members of the community in order to protect a minority of listeners.

Again, this rule does not change because of the supposed vulnerability of the minority of listeners. In *Lorillard*, the Court rejected the argument that the aim of

protecting children—an inherently vulnerable audience—from tobacco advertising saved the overbroad law at issue there. Indeed, the Supreme Court has *never* upheld a content-based regulation of speech on the theory that it protects a "captive" or vulnerable audience, not even when the listener is targeted in the privacy of her own home. *See Frisby v. Schultz*, 487 U.S. 474, 487-88, 108 S. Ct. 2495, 2504 (1988) (upholding a law prohibiting picketing on residential streets only after finding it content-neutral); *see also supra* Part II.C (discussing *Hill v. Colorado* and related precedents). "[T]he 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, 95 S. Ct. 2268, 2273 (1975).

These concerns are salient here because many patients welcome inquiries and information about firearm safety from their doctors. In one study, 70% of gun owners said "no" when asked if they were bothered by inquiries about gun storage and safety by their doctors. Albright & Burge, *Improving Firearm Storage Habits*, at 44. More generally, survey data show that citizens overwhelmingly favor safe gun storage practices and strongly support laws requiring such practices. *Everytown Poll Memo: Gun Storage and Child Access Prevention*, at 2-3 (June 23, 2014). Support for these measures is almost as strong among gun owners as it is among members of the public at large. *See id.* It follows that the Act chills the flow of information about safe gun storage to a substantial number of listeners who, indeed, would very often welcome it.

It takes little imagination to think of less restrictive means of attaining the Florida legislature's ends. Most obviously, the legislature could have passed a law requiring doctors to cease inquiries about and discussions of firearms when a patient indicates that she does not want to engage in conversation on this topic. Time and again, the Supreme Court has indicated that the proper way to protect unwilling listeners is to allow them to choose not to hear the offending speech. In *Martin*, for example, the Court explained that the proper course was to "leav[e] to each householder the full right to decide whether he will receive strangers as visitors." 319 U.S. at 147, 63 S. Ct. at 865. Similarly, in *Reno*, the Court held that rather than penalizing content-providers for making available indecent material on the Internet, an appropriate means to achieve the government's goal of protecting children would be to enable each household to control whether particular messages are received. 521 U.S. at 877, 117 S. Ct. at 2347.

The Act's inquiry, record-keeping, anti-discrimination, and anti-harassment provisions place sweeping, content-based restrictions on communications between doctors and their patients in response to the complaints of a few isolated individuals. The Supreme Court's precedents establish that the Florida legislature's response to this perceived problem lacks the "reasonable fit between the means and the ends of the regulatory scheme" that the First Amendment requires. These provisions are therefore unconstitutional.

IV. THE ACT'S ANTI-HARASSMENT PROVISION IS UNCONSTITUTIONALLY VAGUE.

The Act's anti-harassment provision is also unconstitutionally vague. The provision bans "*unnecessarily* harassing a patient about firearm ownership." Fla. Stat. Ann. § 790.338(6) (emphasis added). The qualifier "unnecessarily" is especially insidious, because it leaves doctors to guess at where the line might be between "[n]ecessarily harassing" a patient about firearm safety in the course of providing sound medical advice, and "unnecessarily" raising the topic. A prudent doctor, in order to avoid running afoul of this provision, will curtail conversations about firearm safety with patients. "The vagueness of [a content-based regulation of speech] raises special First Amendment concerns because of its obvious chilling effect on free speech." *Reno*, 521 U.S. at 871-72, 117 S. Ct. at 2344; *see also Kolender v. Lawson*, 461 U.S. 352, 358, 103 S. Ct. 1855, 1858-59 (1983) (holding that when a statute "suppress[es] First Amendment liberties," the concerns with adequate notice and arbitrary enforcement that animate the constitutional prohibition on vague statutes have particular force). The anti-harassment provision is therefore unconstitutional under the Due Process Clause.

CONCLUSION

The Court should affirm the district court's judgment and injunction.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FRAP 29(d) and FRAP 32(a)(7)(B). This brief contains 6,999 words.

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CERTIFICATE OF SERVICE

I hereby certify that, on April 27, 2016, the foregoing Brief of *Amicus Curiae* was served via Electronic Case Filing (ECF) on all counsel of record as indicated below, and that twenty paper copies were delivered to the Court.

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