No. 12-14009

In the United States Court of Appeals for the Eleventh Circuit

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DR. BERND WOLLSCHLAEGER, *et al.*,
Plaintiffs/Appellees,

v.

GOVERNOR, STATE OF FLORIDA, *et al.*,
Defendants/Appellants.

EN BANC REPLY BRIEF OF APPELLANTS

ON APPEAL FROM THE
UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

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***SUPPLEMENTAL* CERTIFICATE OF INTERESTED PERSONS**

Pursuant to Federal Rule of Appellate Procedure 26.1 and the rules of this Court, Defendants/Appellants submit the following additions to the certificate of interested persons contained in Appellants' En Banc Brief:

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ARGUMENT

I. PLAINTIFFS' CHALLENGE IS NON-JUSTICIABLE.

Before the Court may consider the merits, it must determine whether a justiciable controversy exists. There is none. Because Plaintiffs have not carried their burden to show a credible threat of prosecution, they lack standing to assert their First Amendment and vagueness claims. Even if Plaintiffs had standing to bring their First Amendment claim, their failure to seek an advisory opinion on whether the Act prohibits their planned conduct requires that claim to be dismissed as unripe.

A. Plaintiffs Cannot Manufacture Standing by Ignoring the Board's Position that the Act Does Not Prohibit Their Planned Conduct.

Plaintiffs' standing hinges on the assertion that they are engaging in self-censorship out of fear that the Board will enforce the Act and discipline Plaintiffs for the actions they wish to undertake. *See, e.g.*, DE 105:6. But the Board has never threatened Plaintiffs with discipline, and it repeatedly has disavowed before the district court and before this Court that it may discipline these Plaintiffs for such actions. The Board's position, based on the plain language of the Act, renders Plaintiffs' subjective fear of prosecution unreasonable and leaves them without standing to challenge the Act.

Where self-censorship is the asserted basis for standing, "'[i]f no credible threat of prosecution looms, the chill is insufficient to sustain the burden that

Article III imposes.'" *Wilson v. State Bar of Ga.*, 132 F.3d 1422, 1428 (11th Cir. 1998) (quoting *N.H. Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996)). Here, there is no credible threat of enforcement because the Board does not view Plaintiffs' planned conduct as violating the Act.

To recap, Plaintiffs claim that the Act prevents them from undertaking four kinds of activities:

- "asking patients about firearm ownership,"
- "following-up on routine questions regarding firearm ownership,"
- "providing patient intake questionnaires that include questions about firearms," and
- "orally counseling patients about firearm safety."

DE 105:6. There is no dispute that the American Academy of Pediatrics, American College of Physicians, and the American Academy of Family Physicians all "recommend that physicians counsel families about firearm safety" and that, to facilitate such counseling, the American Academy of Pediatricians and its Florida chapter (a Plaintiff in this action) "recommend that physicians incorporate questions about firearms into the patient history process." Appellees' En Banc Br. at 3-4. Thus, consistent with these recommendations, the Plaintiff physicians "make these inquiries and record information about firearms as a matter of routine preventative medicine." Appellees' En Banc Br. at 4.

Plaintiffs have never articulated a plausible theory that makes these actions violations of the Act, nor have they suggested that the Board would conclude otherwise. The Act explicitly allows physicians to ask about firearms if the physician "in good faith believes that this information is relevant to the patient's medical care" or the "safety" of the patient or others. Fla. Stat. § 790.338(2). Whether the information is "relevant"—and thus, may be a proper subject of inquiry—is committed entirely to the physician's "good faith" professional judgment. *See id.* Similarly, physicians cannot be punished for recording firearms information unless they "know[] that such information is not relevant to the patient's medical care or safety." *Id.* § 793.338(1). If Plaintiffs believe that such inquiries and counseling are "a matter of routine preventative medicine," Plaintiffs' actions do not violate the Act, regardless of whether they make a "prior individualized determination that the inquiry is relevant to the health or safety of the specific patient or others." *See* Appellees' En Banc Br. at 4. The Board's position on this issue has been repeated time and again throughout this case. *See* DE 49:1-2, 4-7, 10-11, 18; DE 71:2; DE 93:1-2, 5-7, 8-9; Appellants' Initial Br. at 15, 17-25; Appellants' Reply Br. at 1-6; *cf. Wilson*, 132 F.3d at 1428-29 ("Moreover, the record indicates that the State Bar has repeatedly and consistently taken the position that the amendments have no application to the types of

scenarios the disbarred attorneys have posed.").[1]

Plaintiffs' response focuses primarily on inconsistency regarding whether the Board views provisions of the Act as mandatory or hortatory. *See* Appellees' En Banc Br. at 32-36. Such an inconsistency would be relevant if Plaintiffs

[1] Plaintiffs cherry-pick excerpts from the briefing in an attempt to show the Board has been inconsistent about whether routine inquiries and counseling violate the Act, while ignoring clear statements of the Board's interpretation. *See* Appellees' En Banc Br. at 16-17, 33. For example, Plaintiffs' excerpts from the response to the preliminary injunction motion ignore this clear statement:

> [N]othing in the act penalizes a physician who asks about firearm ownership, or who records firearm ownership in medical records, in good faith; and nothing in the act prohibits the provision of firearm safety information . . . .
>
> Because the act does not prevent physicians from conveying information about firearm safety, does not impede the ability of patients to receive such information, and does not prevent inquiry about firearm ownership and recording such information where relevant, the court should deny the request for a preliminary injunction.

DE 49:1-2. Even if Plaintiffs were right that Appellants' filings have been inconsistent on this point in any meaningful way, it would be irrelevant to whether they had standing when they filed their complaint. *See Lujan v. Defenders of Wildlife*, 504 U.S. 555, 570 n.4, 112 S. Ct. 2130, 2140 n.4 (1992) (rejecting proposition that post-complaint developments could create standing); *see also Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 460 (5th Cir. 2005) ("The party invoking the jurisdiction of the court cannot rely on events that unfolded after the filing of the complaint to establish its standing."); *Park v. Forest Serv. of U.S.*, 205 F.3d 1034, 1037 (8th Cir. 2000) ("We do not think, however, that the actual use of checkpoints in 1997, 1998, and 1999 is relevant on the issue of standing because all of these events occurred after [the plaintiff] filed her original complaint.") (quoted with approval in *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1275 (11th Cir. 2003)).

planned to ask for irrelevant firearms information, knowingly record such information, or harass or discriminate against their patients—that is, engage in conduct covered by the Act. Because the Board has always maintained Plaintiffs' conduct is *not* covered by the Act, it does not matter if the Board might or might not seek to discipline those who, unlike Plaintiffs, engage in actions covered by the Act. *See also supra* at 4 n.1 (noting that post-complaint developments are irrelevant to whether standing existed at the time of the complaint).

Absent any evidence of a credible threat that the Board is poised to discipline Plaintiffs for their planned conduct, Plaintiffs speculate that the Board will "likel[y]" decide that Plaintiffs' planned conduct violates the Act when new members are appointed at some future date. Appellees' En Banc Br. at 34. Standing requires more than speculation about what might happen in the future. There must be a "real and immediate" threat of injury. *City of Los Angeles v. Lyons*, 461 U.S. 95, 102, 103 S. Ct. 1660, 1666 (1983). Plaintiffs offer no evidence—*none*—to support their claim that after years of telling federal courts that Plaintiffs' conduct does not violate the Act, the Board would reverse course and seek to punish Plaintiffs' conduct. Even if they could, such a threat would hardly be "immediate."

Strangely, Plaintiffs seek support from a case that did not involve standing at all. In *United States v. Stevens*, the Supreme Court addressed the validity of a

statute criminalizing the creation, sale, or possession of a depiction of animal cruelty. 559 U.S. 460, 464-65, 130 S. Ct. 1577, 1582 (2010). Standing was not an issue in the case because Stevens had already been criminally charged with violating the statute, convicted, and sentenced, and he was challenging the conviction on direct appeal. 559 U.S. at 466-67, 133 S. Ct. 1583. Seeking to avoid a claim of overbreadth, the government asked the Court to disregard the breadth of the statute's plain language and confine its enforcement of the statute to depictions of "extreme" cruelty. 559 U.S. at 480, 130 S. Ct. at 1591. The Court refused to defer to this construction, noting that the government had previously promised not to apply it to cases such as Stevens's, and that the statute did not include any qualifier as to the severity of animal cruelty covered by the law. *See* 559 U.S. at 465 n.1, 480, 130 S. Ct. at 1582 n.1, 1591. Thus, not only did *Stevens* not involve standing, the case presented a clear history of the government enforcing the statute in a way it had previously committed not to.

All that remains is Plaintiffs' attempt to bolster their standing claim by asserting the hypothetical potential for reputational harm stemming from meritless patient-initiated complaints under the Act. *See* Appellees' En Banc Br. at 34-35. Like their claim of future policy changes by the Board, the assertion of potential patient complaints is mere speculation, not a "real and immediate" threat of harm. Moreover, this argument ignores the standing requirement that any injury must be

"fairly traceable to [an] action of the defendant, and not the result of the independent action of some third party not before the court." *DiMaio v. Democratic Nat'l Comm.*, 520 F.3d 1299, 1302 (11th Cir. 2008) (quoting *Lujan*, 504 U.S. at 560-61, 112 S. Ct. at 2130). According to Plaintiffs themselves, a physician may be harmed by a patient's complaint, regardless of any action the Board takes. *See* Appellees' En Banc Br. at 14. Under such circumstances, the harm flows from the complaining patient, not the Board.

Because such a theory would eviscerate the "credible threat of prosecution" standard, it is hardly surprising that neither of the cases Plaintiffs cite supports the argument. In *Meese v. Keene*, the Supreme Court found that the plaintiff had demonstrated more than a subjective chill to his First Amendment rights. 481 U.S. 465, 473-74, 107 S. Ct. 1862, 1867-68 (1987). The films the plaintiff wished to exhibit had *already* been classified as political propaganda by the Department of Justice. 481 U.S. at 470, 107 S. Ct. at 1865; *cf.* 481 U.S. at 475-76, 107 S. Ct. at 1868 (discussing *Lamont v. Postmaster Gen.*, 381 U.S. 301, 85 S. Ct. 1493 (1965), and explaining that "[t]he necessity of going on the record as requesting [political literature classified as communist political propaganda] constituted an injury to Lamont in his exercise of First Amendment rights"). Moreover, the asserted reputational harm was neither speculative nor hypothetical in light of detailed affidavits establishing a direct "risk of injury to his reputation and [] an impairment

of his political career." *Keene*, 481 U.S. at 474-75, 107 S. Ct. at 1867-68. The reputational harm in *Keene* "involved 'more than a subjective chill' based on speculation about potential governmental action." *Clapper v. Amnesty Int'l USA*, 133 S. Ct. 1138, 1153 (2013) (distinguishing *Keene*). In both cases, it was the *government's* actions enforcing the law that gave rise to the injury in fact. Here, by contrast, Plaintiffs advance the novel claim that the potential for a private citizen's complaint to a government enforcement authority gives rise to standing to sue the government.

In light of the Board's repeated insistence, grounded on the Act's plain language, that the Act does not prohibit Plaintiffs' conduct, there can be no "objectively reasonable" fear of prosecution. *Wilson*, 132 F.3d at 1428. This Court should dismiss the case in its entirety for lack of standing.

B. Plaintiffs' First Amendment Claim Is Unripe.

Even if Plaintiffs have standing to pursue their First Amendment claim, the claim is rendered unripe by their failure to obtain an advisory opinion that would have clarified that the Board does not view their proposed actions as violations of the Act.

In assessing First Amendment claims for ripeness, this Court has held that "where the application of certain challenged rules is less than obvious," the plaintiff should use an available advisory opinion procedure prior to filing suit.

Harrell v. Fla. Bar, 608 F.3d 1241, 1262-63 (11th Cir. 2010); *see also Pittman v. Cole*, 267 F.3d 1269, 1277-81 (11th Cir. 2001). And Florida law provides such a procedure. *See* Fla. Stat. § 120.565(1). A declaratory statement issued by an agency under Section 120.565(1) "'enable[s] members of the public to definitively resolve ambiguities of law arising in the conduct of their daily affairs or in the planning of their future affairs' and '[] enable[s] the public to secure definitive *binding* advice[2] as to the applicability of agency-enforced law to a particular set of facts.'" *Citizens of State ex rel. Office of Pub. Counsel v. Fla. Pub. Serv. Comm'n & Utils., Inc.*, 164 So. 3d 58, 62 (Fla. 1st DCA 2015) (quoting *Fla. Dep't. of Bus. & Prof'l Regulation, Div. of Pari-Mutuel Wagering v. Inv. Corp. of Palm Beach*, 747 So. 2d 374, 382 (Fla. 1999)) (emphasis added).

Notably, Plaintiffs' en banc brief fails to respond on this point. Although Plaintiffs quote *Harrell* in support of their claim that they did not need to seek an advisory opinion, they rely on the portion of the opinion relating only to the ripeness of the plaintiff's vagueness claims, not his First Amendment claims. *See* Appellees' En Banc Br. at 37 (quoting and citing pages 1258 and 1259 of *Harrell*); *see also Harrell*, 608 F.3d at 1259 (explaining that the plaintiff's First Amendment

[2] Plaintiffs incorrectly assert that an opinion issued under Section 120.565(1) would be non-binding. *See* Appellees' En Banc Br. at 37.

claim "embodies a constitutional theory that is markedly different from his void-for-vagueness challenge, [ ] and it yields a different justiciability calculus") (citing *Rios v. Lane*, 812 F.2d 1032, 1039 (7th Cir. 1987) (noting that First Amendment claims and void-for-vagueness due process claims are "completely distinguishable from [one another] and not dependent upon" the same considerations)). Appellants recognize that *Harrell* does not require plaintiffs to seek an advisory opinion before asserting a vagueness claim. For that reason, Appellants did not argue that the vagueness claim is unripe. *See* Appellants' En Banc Br. at 28-30.

As for the First Amendment claim, however, enforcing the ripeness requirement to seek an opinion letter makes good sense here. Plaintiffs claim concern that the Board will interpret the as-yet unenforced Act to punish them for what they view as routine and necessary medical care. Their concern is based only on their mistaken reading of the Act and a subsequently corrected, non-binding letter from the Board's Executive Director. When a lawyer "rush[ed] into federal court to seek an injunction" based on a nonbinding letter from the Alabama Bar's general counsel without obtaining the Bar Disciplinary Commission's "formal position," a unanimous panel of this Court vacated a preliminary injunction and remanded to dismiss the claims against the Bar as unripe. *Pittman*, 267 F.3d at 1280, 1282.

As *Pittman* recognizes, the "basic rationale" of the ripeness doctrine is that courts should permit "agencies to formulate final policies without judicial interference." *Id.* at 1282. A State agency loses that ability when a plaintiff "jump[s] the gun," *id.* at 1279, in filing suit. *See id.* at 1281. Such litigation requires courts to "speculate" about how the agency would enforce the rule and "prematurely and perhaps unnecessarily reach[] constitutional issues." *Id.* at 1280. That is exactly what has happened here. Rather than using the advisory opinion procedure to allow the Board to clarify the law's application to the Plaintiffs' planned actions outside the litigation context, Plaintiffs immediately brought suit to obtain a potentially unnecessary, and unprecedented, First Amendment ruling.

To be sure, the First Amendment issues addressed in the briefs are interesting, important, and ripe for discussion in the faculty lounge. But until the Board is given an opportunity through the advisory opinion procedure to alleviate or confirm Plaintiffs' fears about how it, the sole enforcement authority, will enforce the Act, the First Amendment claim is not ripe for adjudication in this Court.

Because Plaintiffs still have not availed themselves of the advisory opinion procedure, their First Amendment claim is unripe and must be dismissed.

II. THE ACT'S ANTI-DISCRIMINATION PROVISION DOES NOT IMPLICATE THE FIRST AMENDMENT BECAUSE ANY EFFECT UPON SPEECH IS MERELY INCIDENTAL TO THE ACT'S REGULATION OF PROFESSIONAL CONDUCT.

Rather than responding to Appellants' arguments as to why the Act's anti-discrimination provision is a valid regulation of professional conduct, Plaintiffs instead attack the Act in its entirety as a monolithic regulation of speech, rely on cases that do not in any way address anti-discrimination regulations,[3] and ignore Appellants' citations to cases recognizing that anti-discrimination laws, like the provision at issue here, are generally considered regulations of conduct. *See* Appellees' En Banc Br. at 38-46.

If this Court reaches the merits, it should uphold subsection (5) of the Act as a legitimate regulation of professional conduct because, by its plain terms, it addresses the professional *conduct* of health care providers—that is, "discriminat[ion] against a patient based solely upon the patient's exercise of the constitutional right to own and possess firearms or ammunition." Fla. Stat. § 790.338(5). As this Court noted in *Locke v. Shore*, "[t]here is a difference, for First Amendment purposes, between regulating professionals' speech to the public at large versus their direct, personalized speech with clients." 634 F.3d 1185, 1191

[3] *See* Appellees' En Banc Br. at 39 (discussing *Legal Servs. Corp. v. Velazquez*, 531 U.S. 533, 121 S. Ct. 1043 (2001); *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328 (1963)); *id.* at 41 (discussing *Holder v. Humanitarian Law Project*, 561 U.S. 1, 130 S. Ct. 2705 (2010)). None of these cases address anti-discrimination provisions.

(11th Cir. 2011). Just like the law at issue in *Locke*, the Act's anti-discrimination provision "governs the practice of an occupation," and any resulting inhibition of speech is merely an "'incidental effect of observing an otherwise legitimate regulation.'" *Locke*, 634 F.3d at 1191 (quoting *Accountant's Soc. of Va. v. Bowman*, 860 F.2d 602, 604 (4th Cir. 1988)).

Moreover, anti-discrimination provisions like subsection (5) are generally recognized as targeting conduct, not speech. "Provisions like these are well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination, and they do not, as a general matter, violate the First or Fourteenth Amendments." *Hurley v. Irish-Am. Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572, 115 S. Ct. 2338, 2346 (1995); *see also Wisconsin v. Mitchell*, 508 U.S. 476, 487, 113 S. Ct. 2194, 2200 (1993) (noting cases upholding federal and state antidiscrimination laws against First Amendment challenges); *Roberts v. U.S. Jaycees*, 468 U.S. 609, 628, 104 S. Ct. 3244, 3255 (1984).

Finally, in Part II.B. of their brief, Plaintiffs assert that Appellants are advancing a "fallback" argument that any speech regulated by the Act is commercial in nature. Appellees' En Banc Br. at 46. Appellants actually do not make that argument. Rather, Appellants argue that any speech at issue is professional speech occurring within the confines of the unique relationship

between a physician and patient, and therefore, like commercial speech, it is subject to a lesser degree of First Amendment protection. *See* Appellants' En Banc Br. at 36, 40-41. Accordingly, Appellants will not address Plaintiffs' argument regarding commercial speech because it is not relevant to the issues presented.

III. TO THE EXTENT THE ACT IMPLICATES SPEECH PROTECTED BY THE FIRST AMENDMENT, IT SATISFIES ANY LEVEL OF CONSTITUTIONAL SCRUTINY.

To the extent the Act implicates physicians' First Amendment rights, under *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791 (1992), the Act is subject to—at most—intermediate scrutiny. *See* Appellants' En Banc Br. at 34-44. However, the Act's challenged provisions withstand any level of constitutional scrutiny because the Act narrowly advances compelling state interests. If this Court reaches the merits, it should reverse the district court's judgment and uphold the challenged provisions.

A. Regulation of Professional Speech Within the Context of a Physician-Patient Relationship Triggers, at Most, Intermediate Scrutiny.

In *Casey*, the Supreme Court addressed the First Amendment rights of physicians and applied a level of scrutiny that was markedly less than strict. *See* Appellants' En Banc Br. at 38-39. Specifically, the plurality opinion explained that physician speech that is "part of the practice of medicine" is "subject to reasonable licensing and regulation by the State." *Casey*, 505 U.S. at 884, 112 S. Ct. at 2824

(plurality op.). Although Plaintiffs try to distinguish *Casey* on the basis that the challenged law "require[ed] physicians to *provide* information," while the Act here is "*blocking* physician speech," Appellees' En Banc Br. at 44 (emphases in original), the Supreme Court has recognized the "constitutional equivalence of compelled speech and compelled silence," *Riley v. Nat'l Fed'n of the Blind of N.C., Inc.*, 487 U.S. 781, 796-97, 108 S. Ct. 2667, 2677 (1988) ("There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." (emphasis in original)). If Plaintiffs are correct and the Act implicates the First Amendment rights of physicians, then *Casey* directly rejects their contention that strict scrutiny applies.

Plaintiffs attempt to avoid *Casey* by cabining the Act into strict scrutiny review under *Reed v. Town of Gilbert, Ariz.*, __ U.S. __, 135 S. Ct. 2218 (2015). But any speech implicated here by the Act occurs within the unique context of the physician-patient relationship. It is nothing like the speech at issue in *Reed,* which addressed a town's sign code that imposed "stringent restrictions" on the "display of outdoor signs anywhere within the Town." *Id.* at 2224. Further, *Reed* is fully consistent with the conclusion that *Casey* calls for, at most, intermediate scrutiny

in this case. *See* Appellants' En Banc Br. at 40-44. Nothing in *Reed*, which dealt with a clearly content-based speech restriction applying to signage in traditional public fora, supports the conclusion that the Court sought to sweep away decades of precedent, including *Casey*, and subject a wide range of laws to strict scrutiny.[4]

Moreover, Plaintiffs' reliance on *NAACP v. Button*, 371 U.S. 415, 83 S. Ct. 328 (1963), as an example of the application of strict scrutiny to a content-based regulation of professional speech does not bear the weight they place upon it. In *Button*, the challenged statute banned "the improper solicitation of any legal or professional business." 371 U.S. at 419, 83 S. Ct. at 330-31. Importantly, the Court recognized that the NAACP's solicitation efforts had a significant political dimension:

> In the context of NAACP objectives, litigation is not a technique of resolving private differences; it is a means for achieving the lawful

[4] "The Supreme Court has not always been consistent in its decisions or in its instructions to lower courts. There are, however, some things the Court has been perfectly consistent about, and one of them is that 'it is [that] Court's prerogative alone to overrule one of its precedents.'" *Evans v. Sec'y, Fla. Dep't of Corr.*, 699 F.3d 1249, 1263 (11th Cir. 2012) (quoting *United States v. Hatter*, 532 U.S. 557, 567, 121 S. Ct. 1782, 1790 (2001)); *id.* at 1263-64 (current Supreme Court doctrine binds this Court even if a prior case "looks dead," "cannot be squared with" subsequent cases, or is "increasingly wobbly [and] moth-eaten" (internal quotation marks omitted)); *see also Rodriguez de Quijas v. Shearson/Am. Express, Inc.*, 490 U.S. 477, 484, 109 S. Ct. 1917, 1921-22 (1989) ("If a precedent of this Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions.").

> objectives of equality of treatment by all government . . . . *It is thus a form of political expression.* Groups which find themselves unable to achieve their objectives through the ballot frequently turn to the courts. . . . *And under the conditions of modern government, litigation may well be the sole practicable avenue open to a minority to petition for redress of grievances*.

Button, 371 U.S. at 429-30, 83 S. Ct. at 336 (emphasis added). As applied to the NAACP's efforts to solicit prospective litigants, the statute therefore infringed upon the organization's free speech and association rights. 371 U.S. at 437, 83 S. Ct. at 340. The overriding political nature of the expressive activity at issue in *Button* justified the application of strict scrutiny.

Beyond that, *Button* predates *Casey* by almost three decades. Yet not even one of the five separate opinions generated in *Casey* cited *Button*, signifying that *Button* had no relevance to the issue of professional speech between a physician and a patient. This Court should adhere to *Casey*, which directly addresses the First Amendment implications of physician-patient speech.

For similar reasons, *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 112 S. Ct. 2538 (1992), is inapposite. *R.A.V.* held invalid an ordinance criminalizing the display of a symbol or object "which one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." 505 U.S. at 380, 112 S. Ct. at 2541. The case in no way addressed professional speech between a physician and a patient. Moreover, *R.A.V.*

was issued exactly one week before *Casey*, yet the latter's plurality opinion made no reference to it.[5] If *R.A.V.* were relevant to addressing the First Amendment implications of regulations of physician speech, then certainly the Supreme Court would have relied upon it in *Casey*.

Because any speech implicated by the Act is professional speech occurring privately within the confines of a physician-patient relationship, the challenged provisions are subject to the same diminished level of First Amendment scrutiny as was the law in *Casey*. At most, intermediate scrutiny should apply. *Cf. Tex. Med. Providers Performing Abortion Servs. v. Lakey*, 667 F.3d 570, 575 (5th Cir. 2012) (discussing *Casey* and noting the Court applied "the antithesis of strict scrutiny" to the First Amendment claim); *see also King v. Governor of New Jersey*, 767 F.3d 216, 234 (3d Cir. 2014) ("We believe that commercial and professional speech share important qualities and, thus, that intermediate scrutiny is the appropriate

[5] *R.A.V.* was cited only once in one of the five *Casey* opinions—Justice Scalia's opinion concurring in the judgment in part and dissenting in part—for the proposition that "a law of general applicability which places only an incidental burden on a fundamental right does not infringe that right." *Casey*, 505 U.S. at 988, 112 S. Ct. at 2878 (citing *R.A.V.*, 505 U.S. at 389-90, 112 S. Ct. at 2546-47) (Scalia, J., concurring in the judgment in part and dissenting in part, joined by Rehnquist, C.J., and White and Thomas, JJ.).

standard of review for prohibitions aimed at either category."); *Stuart v. Camnitz*, 774 F.3d 238, 248 (4th Cir. 2014) ("[T]he confluence of these factors points toward borrowing a heightened intermediate scrutiny standard used in certain commercial speech cases.").

But this Court need not determine which level of scrutiny applies because, as detailed below, the Act satisfies any level of heightened scrutiny. *See Sorrell v. IMS Health Inc.*, 564 U.S. 552, 571, 131 S. Ct. 2653, 2667 (2011) (declining to decide which level of scrutiny applies when the issue was not outcome-determinative).

B. The Act Satisfies Any Level of Heightened Scrutiny.

The Act passes muster under any level of constitutional scrutiny because it imposes modest restrictions that narrowly serve four compelling interests: (1) the protection of the fundamental right to keep and bear arms, as guaranteed by the Florida and federal Constitutions, from private encumbrances; (2) the protection of patient privacy; (3) the elimination of barriers to health care; and (4) the prevention of discrimination and harassment in the provision of health care services. *See* Appellants' En Banc Br. at 44-52.

1. The Act serves compelling state interests that are supported by the legislative record.

Plaintiffs attempt to downplay the compelling state interests served by the Act by characterizing them as 1) "too abstract," and 2) not responsive to any "actual problem in need of solving." Appellees' En Banc Br. at 54-55 (internal quotation marks omitted). But "States adopt laws to address the problems that confront them." *Burson v. Freeman*, 504 U.S. 191, 207, 112 S. Ct. 1846, 1856 (1992) (plurality op.). And Plaintiffs cannot avoid the substantive record evidence detailing "actual" and non-"abstract" constituent experiences and concerns that confronted the Legislature when it was considering passage of the Act. *See* Appellants' En Banc Br. at 2-4, 49-50.

Plaintiffs urge that "secondhand anecdotes" are insufficient for legislatures to rely upon, citing *Consolidated Edison Co. of New York v. Public Service Commission of New York*, 447 U.S. 530, 100 S. Ct. 2326 (1980). *See* Appellees' En Banc Br. at 55. But this case is entirely unlike *Consolidated Edison Co.*, where the Supreme Court dealt not with a record of well-documented anecdotal evidence demonstrating a palpable government interest, but rather a record that affirmatively *contradicted* the government's asserted compelling interest. In *Consolidated Edison Co.*, the New York Public Service Commission forbade utility companies from including in customers' electric bills "inserts discussing controversial issues

of public policy." 447 U.S. at 532, 100 S. Ct. at 2330. The Commission issued its order after an electric company began placing inserts that advocated for the development of nuclear power. 447 U.S. at 532-33, 100 S. Ct. at 2330. To justify its prohibition before the Court, the Commission argued, among other things, that the prohibition "would prevent ratepayers from subsidizing the costs of policy-oriented bill inserts." 447 U.S. at 543, 100 S. Ct. at 2336. As the Court noted, however, the Commission had expressly based its order on a captive-audience rationale and disclaimed any concern with a subsidy problem. "Accordingly," the Court observed, "there is no basis on this record to assume that the Commission could not exclude the cost of these bill inserts from the utility's rate base." *Id.*

Here, unlike in *Consolidated Edison Co.*, the record of anecdotal evidence indisputably is what prompted the Legislature to act, and it provides ample evidence of the palpable concerns that the Act addresses. As Appellants have previously argued, this record of anecdotal evidence far exceeds the "history, consensus, and 'simple common sense'" upon which States successfully have relied in defending speech restrictions in the face of strict scrutiny. *See* Appellants' En Banc Br. at 50 (quoting *Fla. Bar v. Went for It, Inc.*, 515 U.S. 618, 628, 115 S. Ct. 2371, 2378 (1995)).

The Act's goals are not only substantiated; they are compelling. The Act shields patients who own firearms from purposely irrelevant record-keeping,

questioning, discrimination, and harassment, and thereby furthers the State's compelling interest in protecting citizens' fundamental right to keep and bear arms for defense of self and State. The government has a compelling interest in protecting fundamental rights from private encumbrances. *See, e.g.*, *Burson*, 504 U.S. at 199, 211, 112 S. Ct. at 1851-52, 1857-58 (plurality op.) (upholding an election-day solicitation restriction because it narrowly advanced government's compelling interest in protecting citizens' right to vote); *accord Coleman v. DeWitt*, 282 F.3d 908, 913 (6th Cir. 2002) ("Protecting the ability to exercise a fundamental right [from private interference] is a compelling state interest that would survive strict scrutiny even if it were required.").

Additionally, the Act advances the State's compelling interest in patient privacy by safeguarding patients' gun ownership and possession from the chilling effect of record-keeping and disclosure. Although Plaintiffs repeat the district court's characterization of information about firearms ownership as "not sacrosanct," Appellees' En Banc Br. at 56 (internal quotation marks omitted), this is contradicted by the fact that Florida recognizes the information as such. In Florida, with few exceptions, it is a felony to compile a list of firearm owners. Fla. Stat. § 790.335(2) ("No state governmental agency or local government, special district, or other political subdivision or official, agent, or employee of such state or other governmental entity *or any other person, public or private*, shall

knowingly and willfully keep or cause to be kept any list, record, or registry of privately owned firearms or any list, record, or registry of the owners of those firearms." (emphasis added)). This prohibition exists to "[p]rotect the privacy rights of law-abiding firearm owners," *id.* § 790.335(1)(b)2., because such records could be used "for profiling, harassing, or abusing law-abiding citizens based on their choice to own a firearm," *id.* § 790.335(1)(a)2. *See also id.* § 790.335(1)(a)3. That Florida regulates the purchase of firearms through licensing and background checks in no way diminishes the fundamental nature of its citizens' right to keep and bear arms, nor does it diminish the State's compelling interest in protecting the privacy rights of those who choose to exercise that fundamental right.

The State likewise has a compelling interest in ensuring that patients have access to health care services without discrimination or harassment. As noted above, the legislative record was replete with instances of constituent concerns over firearms-related inquiries by physicians, including one instance where a pediatrician terminated a relationship with a family due to a mother's refusal to answer a firearm inquiry and another instance where a family was falsely advised that Medicaid required patients to answer questions about firearms. *See* Appellants' En Banc Br. at 2-4.

Appellees argue that the Act's goal of health care access is less weighty than that advanced by the abortion clinic buffer zones upheld in *Hill v. Colorado*, 530

U.S. 703, 120 S. Ct. 2480 (2000), and *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 114 S. Ct. 2516 (1994). *See* Appellees' En Banc Br. at 58. Yet Appellees have it exactly backwards. Harassment and discrimination *by doctors in the examination room* present far more of a barrier to health care access than does harassment outside by third parties. It thus defies logic to assert that the State has less of an interest in preventing harassment and discrimination by doctors than it does in protecting patients from third-party protests.

Finally, and related to all of these above interests, the Act furthers the State's compelling interest in regulating the medical profession by reinforcing the appropriate bounds of the doctor-patient relationship. The medical profession is like no other. Physicians are called upon to render care and offer advice during some of the most vulnerable moments of a person's life. This can "vest physicians with immense authority and power in the eyes of patients." Paula Berg, *Toward A First Amendment Theory of Doctor-Patient Discourse and the Right to Receive Unbiased Medical Advice*, 74 B.U. L. Rev. 201, 225 (1994). In light of this, the State's interest in regulating the medical profession is uniquely compelling.

2. The Act is narrowly tailored.

In confronting the problem before it, Florida's Legislature carefully crafted the Act to strike a balance between the fundamental rights guaranteed by the First and Second Amendments. *Cf. Burson*, 504 U.S. at 211, 112 S. Ct. at 1857-58

(plurality op.) ("Here, the State, as recognized administrator of elections, has asserted that the exercise of free speech rights conflicts with another fundamental right, the right to cast a ballot in an election free from the taint of intimidation and fraud. . . . Given the conflict between these two rights, we hold that [the challenged law] does not constitute an unconstitutional compromise.").

Rather than "prohibit[ing] all inquiries and recording of information," Appellees' En Banc Br. at 67, the Act addresses only knowingly irrelevant record-keeping, inquiry unsupported by a "good faith" belief that it is relevant, "unnecessar[y]" harassment, and discrimination. Fla. Stat. § 790.338. By those means, it is "precisely tailored to the State's compelling interests." *Wollschlaeger v. Governor of Fla.*, 814 F.3d 1159, 1198 (11th Cir. 2015). Because the Act advances compelling state interests "and it does so through means narrowly tailored to avoid unnecessarily abridging speech," *Williams-Yulee v. Fla. Bar*, __ U.S. __, 135 S. Ct. 1656, 1666 (2015), it withstands strict scrutiny (and necessarily, any lower level of scrutiny).

Curiously, Plaintiffs argue that the Act cannot be narrowly tailored because other laws—and also the Act itself, by empowering patients to remain silent—advance aims similar to those advanced by the challenged provisions. *See* Appellees' En Banc Br. at 66-67. In essence, this boils down to an assertion that the government cannot act where existing laws address similar problems. This assertion misses the

mark. Frequently, when a legislature addresses a serious problem, there already are laws on the books that could be marshalled to address an aspect of the problem. For example, in *Hill*, existing state laws against trespass, assault, and battery—and portions of the challenged buffer-zone legislation that prohibited physically obstructing patient ingress and egress—were sufficient to protect the free physical travel of patients to and from abortion clinics. *Hill*, 530 U.S. at 755, 120 S. Ct. at 2510 (Scalia, J., dissenting) (noting that a separate provision of the challenged law already prohibited physical obstruction); 530 U.S. at 777, 120 S. Ct. at 2522 (Kennedy, J., dissenting) (pointing to state criminal and tort law against battery, as well as the challenged law's physical-obstruction prohibition). Yet the Court recognized that the buffer zone was needed to address a similar but distinct goal: protecting those with "particularly vulnerable physical and emotional conditions" from, *inter alia*, "unwanted encounters." 530 U.S. at 729, 120 S. Ct. at 2496. Likewise, in *Madsen*, the Court recognized that where previous solutions aimed at a problem have failed, the State may craft a new solution. *See Madsen*, 512 U.S. at 770, 114 S. Ct. at 2527 (noting the failure of a prior, narrower court order aimed at protecting clinic access).

In like manner, while the Act does indeed recognize the right of patients to refuse to answer firearm-related inquiries, and while state and federal laws address various aspects of patient and gun-owner privacy, these provisions do not confront

the related but different evils that the Act's other provisions address—those caused by deliberately irrelevant inquiries, record-keeping, harassment, and discrimination by doctors. Just because different laws may advance similar interests does not mean that they advance the same ones in the same way. *See Williams-Yulee*, 135 S. Ct. at 1672 ("Although the Court has held that contribution limits advance the interest in preventing *quid pro quo* corruption and its appearance in political elections, we have never held that adopting contribution limits precludes a State from pursuing its compelling interests through additional means."). Here, Florida identified distinct evils that required distinct remedies, and it prescribed a narrowly drawn cure.

IV. THE ACT'S ANTI-HARASSMENT AND DISCRIMINATION PROVISIONS ARE NOT UNCONSTITUTIONALLY VAGUE.

Finally, the Act's anti-harassment and discrimination provisions are reasonably clear as to what conduct is addressed.[6]

The Anti-Harassment Provision

Subsection (6) provides that "during an examination," health care providers should not "unnecessarily harass[]" patients who keep or own firearms. Fla. Stat. § 790.338(6). Plaintiffs fault the provision for failing to define the term

[6] This Court's en banc briefing order, which focused the issues to be addressed, addressed only subsection (6) with regards to the vagueness claim, and Appellants briefed that issue accordingly. However, because Plaintiffs included subsection (5) in their vagueness argument, Appellees' En Banc Br. at 79-85, Appellants' reply on this point will address both provisions.

"unnecessarily harassing." Appellees' En Banc Br. at 80. But "[t]here is no requirement . . . that statutes define every factual situation that may arise." *United States v. Biro*, 143 F.3d 1421, 1430 (11th Cir. 1998) (citing *Boyce Motor Lines v. United States*, 342 U.S. 337, 340-41, 72 S. Ct. 329, 330-31 (1952)). And that is particularly true here where the term, read in context of the entire Act, is reasonably clear. *Cf. Am.-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 610 (6th Cir. 2005) ("[T]he term 'unnecessarily interfere,' when taken in context, does not lead to vagueness problems.").

As the panel majority noted, subsection (6) contains a temporal limitation indicating that non-objectionable exam-room harassment would be of the type occurring "during an examination" and related to the purpose of the exam. *Wollschlaeger*, 814 F.3d at 1181. Further, the plain meaning of the term "harass," when read in the context of the Act, "communicates that physicians should not disparage firearm-owning patients, and should not persist in attempting to speak to patients about firearm ownership when the subject is not relevant to medical care or safety." *Id.* at 1181-82.

Moreover, "'[t]hat there may be marginal cases in which it is difficult to determine the side of the line on which a particular fact situation falls is no sufficient reason to hold the language too ambiguous to define [the targeted conduct].'" *Biro*, 143 F.3d at 1430 (quoting *United States v. Petrillo*, 332 U.S. 1, 7,

67 S. Ct. 1538, 1542 (1947)) (upholding against vagueness challenge a statute that included the term "primarily useful"). And any such marginal cases could be addressed through an advisory opinion from the Board under Section 120.565(1), Florida Statutes, "to gauge the application of [the provision] to specific situations." *Mason v. Fla. Bar*, 208 F.3d 952, 959 n.4 (11th Cir. 2000) (noting that availability of an advisory opinion process "bolster[ed] [the challenged rule's] validity).

The Anti-Discrimination Provision

Subsection (5) prohibits "discriminat[ion] against a patient based solely upon the patient's exercise of the constitutional right to own and possess firearms or ammunition." Fla. Stat. § 790.338(5). Contrary to Plaintiffs' assertion, Appellees' En Banc Br. at 85, they are not left guessing as to what conduct is prohibited. As the district court noted, "discrimination" is a term that has an "ordinary meaning that [is] readily clear to persons of common intelligence." DE 105:22.

* * *

Because the Act's anti-harassment and discrimination provisions both make the targeted conduct reasonably clear, they fully comport with the requirements of due process. This Court should uphold the provisions if it reaches the merits.

CONCLUSION

This Court should vacate and remand, with instructions to dismiss the case for lack of jurisdiction. If this Court reaches the merits, it should reverse the judgment of the district court and remand with instructions to enter judgment in favor of Defendants.

Dated: May 11, 2016

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the applicable type-volume limitation under Rule 32(a)(7) of the Federal Rules of Appellate Procedure and 11th Circuit Rule 32-4. According to the word-processing software's word count, there are 7,026 words in the applicable sections of this brief. I also certify that this brief complies with the applicable type-style requirements limitation under Rule 32(a)(5) and (6). The brief was prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14-point, Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 2016, the foregoing brief was filed with the Clerk of Court via the CM/ECF system, causing it to be served on the following registered counsel of record:

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