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

DR. BERND WOLLSCHLAEGER, et al.

Plaintiffs,

v.

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

Defendants.

FIRST AMENDED COMPLAINT
FOR DECLARATORY AND INJUNCTIVE RELIEF

INTRODUCTION

1. This action seeks to protect the rights that Florida healthcare practitioners have under the First Amendment of the U.S. Constitution to engage in open and free exchanges of information and advice with their patients about ways to reduce the safety risks posed by firearms. This action also seeks to protect the First Amendment rights of patients throughout Florida to receive such information and advice from their physicians. The Florida law challenged in this action—hereinafter, the "Physician Gag Law"—chills this speech and would punish health care professionals simply for asking questions of, and providing information to, their patients about firearm safety. By severely restricting such speech and the ability of physicians to practice such preventive medicine, the Florida statute could result in grievous harm to children, adolescents, adults, and the elderly. The First Amendment does not permit such a

gross and content-based intrusion on speech and, accordingly, the Court should declare the Physician Gag Law unconstitutional and enjoin its enforcement.

2. The practice of medicine requires a free and open exchange of questions, answers, and information between a patient and health care practitioner. Indeed, for that reason, both state and federal law protect the confidentiality of such conversations. Physicians and other health care professionals must engage in highly personal exchanges with their patients about private, confidential topics so patients understand the risks to themselves, their families, and their children arising from personal decisions they make and private conduct they engage in within their homes. The Physician Gag Law directly interferes with, and intrudes upon, health care practitioners' ability to engage fully in these consultations by severely restricting inquiries about a significant and preventable risk to patients, the risk of injury or death posed by the presence of firearms in the home.

3. Specifically, the Physician Gag Law expressly restricts health care practitioners, in certain vaguely-defined circumstances, from asking patients questions related to gun safety or recording information from those conversations in patients' medical records, on penalty of harsh disciplinary sanctions, including fines and permanent revocation of their licenses to practice medicine. Moreover, the statute prohibits "unnecessar[y] harass[ment]" and "discrimination" on the basis of a patient's possession or ownership of a firearm. It defines neither of those terms, however, leaving the definitions to the eye of the beholder. As a result, some health care practitioners who are simply following established protocol by informing patients how they may limit the lethal risks posed by firearms may be hauled before a disciplinary board (*i.e.*, Florida's Board of Medicine) because a patient who categorically objects to *any* discussion or inquiry regarding such risks claims to be offended.

4. Thus, beyond establishing express prohibitions on protected speech, the Physician Gag Law is also so vague, and its sanctions so severe, that it chills health care practitioners' discussions of gun safety with their patients even in situations arguably permitted by the law. Fearing the prospect of professionally devastating public disciplinary proceedings, practitioners are left to assume the law's vague speech prohibitions will be construed to prohibit their speech regarding how patients can best minimize the risks of injury and death associated with gun ownership. As an immediate and direct consequence, healthcare practitioners are compelled to self-censor their speech. In addition to depriving physicians and other health care practitioners of their First Amendment right to freedom of speech, the Physician Gag Law also deprives patients of their First Amendment right to receive potentially life-saving information regarding safety measures they can take to protect their children, families, and others from injury or death resulting from unsafe storage or handling of firearms.

5. The First Amendment does not permit the State of Florida to require practitioners to conform their communications with their patients to the state's preferences. By restricting the free and open exchange of information between a physician and patient in this manner, the Physician Gag Law violates the First and Fourteenth Amendments to the U.S. Constitution. Accordingly, Dr. Bernd Wollschlaeger, Dr. Judith Schaechter, Dr. Tommy Schechtman, Dr. Stanley Sack, Dr. Shannon Fox-Levine, and Dr. Roland Gutierrez, on their own behalf, as well as the Florida Chapter of the American Academy of Pediatrics ("FAAP"), the Florida Chapter of the American Academy of Family Physicians ("FAFP"), and the Florida Chapter of the American College of Physicians ("FACP") (collectively, "Plaintiffs") on behalf of their more than 11,000 collective members (collectively, "health care practitioners" or "practitioners"), and on behalf of their patients, herewith seek declaratory and injunctive relief prohibiting

enforcement of the provisions of Florida Statutes sections 381.026, 395.1055, 790.338 and 456.072 amended or created by CS/CS/HB 155, entitled "An act relating to the privacy of firearm owners" (the "Physician Gag Law"). Plaintiffs have sustained immediate and irreparable harm to their free speech rights from these provisions and, therefore, seek a declaration that the Physician Gag Law is unconstitutional and an injunction against its enforcement.

JURISDICTION AND VENUE

6. This action is brought pursuant to 42 U.S.C. § 1983 to redress the deprivation, under color of state law, of rights secured by the Constitution of the United States.

7. This Court has jurisdiction over this action under 28 U.S.C. § 1331 (federal question), and it may issue a declaratory judgment and grant further relief pursuant to 28 U.S.C. §§ 2201 and 2202.

8. Venue appropriately lies in this District pursuant to 28 U.S.C. § 1391.

9. The Physician Gag Law constitutes an immediate infringement of the free speech rights of Plaintiffs, their members, and their patients. Therefore, an actual and justiciable controversy exists between Plaintiffs and Defendants.

10. Plaintiffs have standing to bring this action.

PARTIES

11. Plaintiff Dr. Bernd Wollschlaeger is a physician specializing in family medicine and addiction medicine. He is licensed to practice medicine in Florida and is Board-certified in Family Medicine and Addiction Medicine. He resides in Miramar, Florida and practices medicine from an office located in North Miami Beach, Florida, in Miami-Dade County. He is a member of FAFP and currently serves on its Board of Directors.

12. Plaintiff Dr. Judith Schaechter is a physician specializing in pediatric medicine. She is licensed to practice medicine in Florida and is Board-certified in Pediatric Medicine. She resides in Miami Beach, Florida, and practices medicine in Jackson Memorial Hospital in the City of Miami, Florida, in Miami-Dade County. She is a member of FAAP and is Chair of FAAP's Child Safety Committee.

13. Plaintiff Dr. Tommy Schechtman is a physician specializing in pediatric medicine. He is licensed to practice medicine in Florida and is Board-certified in Pediatric Medicine. He resides and practices medicine in Palm Beach Gardens, Florida, in Palm Beach County. He is a member of FAAP, serves on its Board of Directors, and is Secretary of FAAP.

14. Plaintiff Dr. Stanley Sack is a Board-certified pediatrician and a member of FAAP who is licensed to practice medicine in Florida. He practices medicine in Key West, Florida, in Monroe County.

15. Plaintiff Dr. Shannon Fox-Levine is a Board-certified pediatrician and member of FAAP who is licensed to practice medicine in Florida. She resides and practices medicine in Wellington, Florida, in Palm Beach County.

16. Plaintiff Dr. Roland Gutierrez is a Board-certified pediatrician and a member of FAAP who is licensed to practice medicine in Florida. He resides and practices medicine in Palm Beach Gardens, Florida, in Palm Beach County.

17. Plaintiff American Academy of Pediatrics, Florida Chapter, also known as the Florida Pediatric Society, is a non-profit professional organization of pediatricians and pediatric specialists, incorporated under the laws of Florida, with over 1,600 members throughout the State of Florida, including Miami-Dade County. The mission of FAAP and its members is to improve access to, and the quality of, heath care for infants, children, and young adults in

Florida. FAAP promotes the health and welfare of, and advocates for, Florida's infants, children and young adults.

18. Plaintiff American Academy of Family Physicians, Florida Chapter, also known as the Florida Academy of Family Physicians, Inc., is composed of more than 4,000 family medicine physicians, residents, and medical students throughout the State of Florida, including Miami-Dade County. Incorporated under the laws of Florida, FAFP works to advance the specialty of family medicine by promoting excellence and improvement in the health care of all Floridians, including helping all Floridians understand that having a family physician is vital to their health. FAFP also acts as a voice for family medicine, engaging in advocacy on key issues among patients and the medical community.

19. Plaintiff American College of Physicians, Florida Chapter, Inc. is the Florida Chapter of the American College of Physicians ("ACP"), a national organization of internists, who are physicians specializing in the prevention, detection, and treatment of illnesses in adults. Incorporated in Florida, FACP has approximately 5,800 members across the State of Florida, including Miami-Dade County. The mission of FACP is to enhance the quality and effectiveness of health care by fostering excellence and professionalism in the practice of medicine. FACP's goals in furtherance of this mission include establishing and promoting the highest clinical standards and ethical ideals; serving as the foremost comprehensive education and information resource for all internists; advocating responsible positions on behalf of its members; and promoting research to enhance the quality of practice, the education, and continuing education of internists. FACP also cooperates with ACP in publishing, promoting, and disseminating practice guidelines, policy statements, and academic and professional literature relating to best practices in internal medicine.

20. Defendant Frank Farmer is sued in his official capacity as the State Surgeon General of Florida. Under Florida law, Mr. Farmer's responsibilities include leading the Florida Department of Health ("Department") and regulating physicians and other health professionals as authorized by law. *See* Fla. Stat. §§ 20.43, 381.026, 456.072, 456.073, 790.338. The Department has investigative and disciplinary powers and may impose penalties for violations of the Physician Gag Law under Florida law. *Id.*

21. Defendant Elizabeth Dudek is sued in her official capacity as Secretary of Health Care Administration of the State of Florida. Under Florida law, Ms. Dudek is the head of the Agency for Health Care Administration ("Agency"), and her responsibilities include health facility licensure and inspection, regulatory promulgation and enforcement power with respect to health care facilities and their staff, and enforcement and investigation of consumer complaints related to health care facilities. *See* Fla. Stat. §§ 20.42, 381.026, 395.1055, 790.338. These responsibilities include regulatory and enforcement powers with respect to the Physician Gag Law, which itself explicitly references the Agency's regulatory and enforcement power. *See* Fla. Stat. § 790.338 (citing *id.* § 395.1055 (allowing Agency to promulgate and enforce rules ensuring that "[l]icensed facilities are established, organized, and operated consistent with established standards and rules")); *see also id.* § 395.003(5)(a) (adherence to the patients' bill of rights—amended by the Physician Gag Law—"shall be a condition of licensure").

22. Defendant George Thomas, of Bradenton, Florida, is sued in his official capacity as Chair and Member of the Board of Medicine ("Board") of the Florida Department of Health. Under Florida law, Board members' responsibilities include the promulgation of rules that govern Florida medical practice as well as various investigatory, enforcement, and disciplinary powers concerning physicians and other health professionals. *See* Fla. Stat. §§ 458.307, 458.309,

458.331, 456.072, 790.338. The Board has the power to investigate alleged violations of the Physician Gag Law and to impose penalties for violations. *Id.*.

23. Defendant Jason Rosenberg, of Gainesville, Florida, is sued in his official capacity as Vice-Chair and Member of the Board.

24. Defendant Zachariah P. Zachariah, of Fort Lauderdale, Florida, is sued in his official capacity as 1st Vice-Chair and Member of the Board.

25. Defendant Elisabeth Tucker, of Pensacola, Florida, is sued in her official capacity as 2nd Vice-Chair and Member of the Board.

26. Defendant Trina Espinola, of St. Petersburg, Florida, is sued in her official capacity as Member of the Board.

27. Defendant Merle Stringer, of Panama City, Florida, is sued in his official capacity as Member of the Board.

28. Defendant James Orr, of Bonita Springs, Florida, is sued in his official capacity as Member of the Board.

29. Defendant Gary Winchester, of Tallahassee, Florida, is sued in his official capacity as Member of the Board.

30. Defendant Nabil El Sanadi, of Fort Lauderdale, Florida, is sued in his official capacity as Member of the Board.

31. Defendant Robert Nuss, of Jacksonville, Florida, is sued in his official capacity as Member of the Board.

32. Defendant Onelia Lage, of Miami, Florida, is sued in her official capacity as Member of the Board.

33. Defendant Fred Bearison, of Valrico, Florida, is sued in his official capacity as Member of the Board.

34. Defendant Donald Mullins, of Orlando, Florida, is sued in his official capacity as Consumer Member of the Board.

35. Defendant Brigitte Rivera Goersch, of Orlando, Florida, is sued in her official capacity as Consumer Member of the Board.

36. Defendant Bradley Levine, of Pompano Beach, Florida, is sued in his official capacity as Consumer Member of the Board.

FACTUAL BACKGROUND

A. Preventive Medicine: The Importance of Safety Counseling

37. Intentional injury, resulting from behavior designed to hurt oneself or others, is a major health hazard for children and adults of all ages. Suicide is a particularly significant risk about which physicians and other health care practitioners must routinely counsel patients. In the United States, suicide is the third-leading cause of death among individuals aged 15 to 24 and is the second-leading cause of death among adults aged 25 to 34. Centers for Disease Control and Prevention ("CDC"), *Suicide: Facts at a Glance* (Summer 2010), available at http://www.cdc.gov/violenceprevention/pdf/Suicide_DataSheet-a.pdf (last visited June 15, 2011). The highest rate of suicide for women occurs among those aged 45 to 54; and, for men, the highest rate is among those aged 75 or older. *Id.* Firearms frequently are used in such suicides and suicide attempts.

38. Unintentional injury is also a health hazard for patients of all ages, and, indeed, is the leading cause of death and morbidity among children older than one year, adolescents, and young adults. CDC, *10 Leading Causes of Death by Age Group* (September 3, 2010), available

at http://www.cdc.gov/injury/wisqars/images/Death_by_Age_2007.gif (last visited June 23, 2011). Such injuries arise from many causes, including falls, burns, poisoning, choking, drowning, recreational activities, sports—and accidents involving firearms.

39. When unintentional injuries and intentional injuries are combined, the resulting statistics paint an even more tragic picture. Of injury-related deaths, firearms claim more lives than all injury sources except motor vehicles. Teresa L. Albright, M.D., & Sandra K. Burge, Ph.D., "Improving Firearm Storage Habits: Impact of Brief Office Counseling by Family Physicians," 16 *J. Am. Board Family Practice* 1, 40 (January–February 2003).

40. In light of these risks, prevention of intentional and unintentional injury is a life-long aspect of preventive care, stretching from before birth through to old age. Preventive care is a pillar of the practice of medicine. In a modern rendition of the Hippocratic Oath, administered across the country, a physician swears to "prevent disease whenever I can, for prevention is preferable to cure." Dr. Louis Lasagna, "Would Hippocrates Rewrite His Oath?," *New York Times Magazine* (June 28, 1964). Along with preventing the onset of disease, a crucial element of practicing medicine is the prevention of intentional and unintentional physical injuries. Health care practitioners play a key role in counseling patients, their parents, and other caregivers about the risks of injuries and best practices to minimize those risks. *See* American Medical Association ("AMA"), *Principles of Medical Ethics* (2001) ("A physician shall continue to study, apply, and advance scientific knowledge, maintain a commitment to medical education, [and] *make relevant information available to patients*, colleagues, and the public...." (emphasis added)).

41. To those ends, the American Academy of Pediatrics ("AAP") and FAAP recommend preparing a child-safe home before a child is born, and that pediatricians'

anticipatory guidance on household safety issues begin after an infant is 2 days old. Such anticipatory guidance on minimizing these risks is a major component of well-child care and preventive medicine, and is recommended by AAP as an integral part of the medical care provided for all infants, children, and adolescents. Indeed, AAP has established a nation-wide initiative, The Injury Prevention Program ("TIPP"), with the aim of helping health care professionals counsel parents and children about adopting behaviors that can prevent injuries and has published age-specific clinical guidance on injury prevention for pediatricians. This recommended counseling covers topics including, among others, installation of car seats and seat-belt use; poisoning, suffocation, burn, and choking hazards; helmet use and other bicycle safety measures; fire and water safety; and sports safety. Injury prevention continues into adulthood and beyond for the elderly.

42. To provide such meaningful preventive care and counseling, health care practitioners must be able to make "inquiries" of their patients. Such counseling, to be effective, requires a back-and-forth exchange between patient and practitioner. In an exam room, patient care is by definition personal; assessment of health, safety, and risk, as well as management of the same, is customized for each patient. It would be poor practice to provide anything less, and health care practitioners are not effective when they simply lecture their patients or hand them a pamphlet. Rather, practitioners converse with their patients, in an attempt to cultivate a relationship of trust, honesty, and collaboration. As stated in AMA policy, "From ancient times, physicians have recognized that the health and well-being of patients depends upon a collaborative effort between physician and patient." *Fundamental Elements of the Patient-Physician Relationship*, Policy E-10.01 (adopted June 1990); *see also* AMA, *The Patient-Physician Relationship*, Policy E-10.015 (adopted June 2001) ("The relationship between patient

and physician is based on trust...."). This is as true for adolescent diabetes management as it is for child safety regarding firearm access.

B. Safety Counseling About Firearms

43. As Plaintiffs and health care practitioners everywhere are well aware, firearms contribute to both intentional and unintentional injuries and deaths for patients of every age. Every year, thousands of Americans are seriously injured or killed when a child finds a gun and accidentally pulls the trigger, an argument between acquaintances or family members spins out of control, or a depressed teenager or adult becomes suicidal. Suicide attempts committed with guns are fatal more than 90% of the time. Use of a firearm is the most common method of suicide among men—55.7%. CDC, *Suicide: Facts at a Glance*, *supra.*

44. Firearms pose particular risks in households with children. According to the most recent data sets published by the CDC, every day in America 38 children and teens are injured by firearms, and 8 are killed by firearms. *WISQARS Nonfatal Injury Reports*, http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html (last visited June 16, 2011); *WISQARS Injury Mortality Reports, 1999 – 2007*, http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html (last visited June 16, 2011). One third of U.S. homes with children younger than eighteen have a firearm. More than 40% of gun-owning households with children store their guns unlocked, and one quarter of those homes store them loaded. Renee Johnson, M.P.H., Tamera Coyne-Beasley, M.D., M.P.H. & Carol W. Runyan, Ph.D., "Firearm Ownership and Storage Practices, U.S. Households, 1992-2002," 27 *Am. J. Preventive Med.* 173-82, 179 (2004). Other studies estimate that 20% to 50% of handguns are stored loaded and unlocked. Teresa L. Albright, M.D., & Sandra K. Burge, Ph.D., "Improving Firearm Storage Habits: Impact of Brief Office Counseling by Family Physicians," 16 *J. Am. Board Family Practice* 1, 40 (January–February 2003).

45. Each year, Florida children are harmed when they or other children gain access to firearms that have not been stored properly. In a mere two-month span last year, four Florida children died from injuries accidentally inflicted by firearms. In one incident, an 11-year-old boy died after accidentally being shot in the face by his little brother; the boys had been sent to the parking lot outside their home to retrieve a hat from their father's truck, and, while searching for it, the 10-year-old found a gun and shot and killed his brother. Janie Campbell, "Boy Accidentally Kills Brother With Dad's Gun," *NBC Miami*, February 28, 2010. In another, a 2-year-old girl accidentally shot herself with a .380 caliber semi-automatic handgun she found on the nightstand next to her mother's bed. Steve Nichols, "Arrest in toddler's accidental shooting," *Fox 13 Pinellas*, March 27, 2010. A 15-year-old boy was shot once in the head by another minor inside a home. Anika Myers Palm, "15-year-old boy accidentally shot in head in gun-playing incident," *Orlando Sentinel*, February 8, 2010. And a 17-year-old accidentally shot his friend at home while twirling a handgun on his finger. Associated Press, "Florida Teen Accidentally Shoots Friend While Twirling Gun," *Fox News*, March 6, 2010. From 1999 to 2007, 1,195 children and teens in Florida were shot and killed with firearms.

46. Anticipatory safety guidance regarding firearms is thus a crucial part of the practice of preventive medicine in Florida. It also achieves concrete results: one study showed that, after a single instance of verbal counseling, more than 58% of patients reported making changes to their gun storage habits. Albright & Burge, 16 *J. Am. Board Family Practice* at 44 (January–February 2003).

47. Accordingly, counseling on firearm safety is recommended as part of AAP's TIPP Program. AAP and FAAP specifically urge practitioners to ask parents about firearm ownership and inform parents about the dangers of firearms in and outside the home. AAP and FAAP

recommend that pediatricians incorporate questions about firearms into the patient history process and support the education of physicians and other professionals to increase understanding of the effects of firearms and help reduce the morbidity and mortality associated with their use. Both AAP and FAAP also encourage health care practitioners to document injury-prevention counseling in a patient's medical chart.

48. AAP and FAAP also recommend that health care practitioners tailor their recommendations to patients' circumstances. *See* H. Garry Gardner and the Committee on Injury, Violence, and Poison Prevention, "Office-Based Counseling for Unintentional Injury Prevention," 119 *Pediatrics* 202 (Jan. 2007) (describing measures appropriate to infants, preschool-aged children, school-aged children, and adolescents, with regard to risks posed by sleep environments, choking, traffic, poisons, falls, burns, water and drowning, sports, and firearms). For parents of preschool-aged children, because of the dangers that in-home firearms, particularly handguns, pose to young children, AAP and FAAP recommend that parents should be advised to keep handguns out of places where children live and play. If parents choose to keep a firearm in the home, the unloaded gun and ammunition must be kept in separate locked cabinets.

49. For parents of school-aged children, AAP and FAAP recommend advising parents that, in addition to removing firearms from the home environment where children explore and play, parents should also ask whether there is a gun in any home that their children visit. If parents choose to keep a firearm in the home, the unloaded gun and ammunition must be kept in separate locked cabinets.

50. With respect to adolescents, AAP and FAAP recommend that health care practitioners inform parents that in-home firearms are particularly dangerous during adolescence

because of the potential for impulsive, unplanned use by teens resulting in suicide, homicide, or serious unintentional injuries. They recommend that firearms, and especially handguns, should be kept out of the home for parents of adolescents at risk of suicide. If parents choose to keep a firearm in the home, the unloaded gun and ammunition must be kept in separate locked cabinets. Parents should ask whether there is a gun in any home that teenagers visit.

51. The AMA has also adopted a policy that it "supports increasing efforts to reduce pediatric firearm morbidity and mortality by encouraging its members to (a) inquire as to the presence of household firearms as part of childproofing the home; (b) educate patients to the dangers of firearms to children; (c) encourage patients to educate their children and neighbors as to the dangers of firearms; and (d) routinely remind patients to obtain firearm safety locks, to store firearms under lock and key, and to store ammunition separately from firearms[.]" AMA, *Prevention of Firearm Accidents in Children*, Policy H-145.990, Res. 165, I-89 (all AMA policies available via http://search0.ama-assn.org/search/pfonline/?chkALL=ALL&query= (last visited June 17, 2011)). At its annual meeting on June 18-19, 2011, the AMA recently reaffirmed its policies concerning the importance of communications about firearms between physicians and patients. *See* AMA, "Resolution 201," *House of Delegates Handbook*, at 367 (2011), available at http://www.ama-assn.org/assets/meeting/2011a/handbook-addendum-combined.pdf (last visited June 23, 2011); *see also* AMA, Report of Reference Committee, at 13–14 (2011), available at http://www.ama-assn.org/assets/meeting/2011a/b-annotated-a-11.pdf (last visited June 22, 2011).

52. Consultations regarding firearm safety are also a routine part of adult medical care, help adult patients minimize heath hazards, and are particularly important in the context of treating mental health conditions. The American Psychiatric Association ("APA") has

recommended that "health professionals and health systems should ask about firearm ownership whenever clinically appropriate in the judgment of the physician." APA, Position Statement No. 200107 (approved Oct. 2001) (all APA position statements available via http://www.psych.org/Departments/EDU/Library/APAOfficialDocumentsandRelated/PositionStatements.aspx?mode=1 (last visited June 21, 2011)).

53. These recommendations are derived from medical and scientific studies, and Plaintiffs and their members view them as a key part of minimizing risks that firearms pose to the health of children, adolescents, adults, and their family members. Indeed, the preventable loss of life and injury and the resulting pain, suffering, and consumption of human, economic, and healthcare resources *demand* that firearm injuries should be considered a public health issue requiring immediate attention.

54. Plaintiffs and their members counsel their patients regarding these preventive measures as part of the recommended anticipatory safety guidance and medical care. Such consultations frequently involve engaging patients in a dialogue about the preventive measures, both in order to inculcate and reinforce physicians' medical advice and in order to tailor this advice to the patients' particular circumstances. In addition, in an attempt to further reinforce such guidance, AAP has produced literature available for distribution by Florida health care practitioners, including fact-sheets patients can take home with them describing how to mitigate the risks posed by firearms.

55. This aspect of preventive care—counseling patients on firearm safety—also directly assists Florida parents in complying with Florida's firearms laws, including a law passed by the Florida Legislature specifically to protect children. Florida law requires that a person who has stored a firearm, "and who knows or reasonably should know that a minor is likely to gain

access to the firearm" "shall keep the firearm in a securely locked box or container or in a location which a reasonable person would believe to be secure or shall secure it with a trigger lock." Fla. Stat. § 790.174(1). Failure to secure a firearm in this fashion is a misdemeanor. *Id.* § 790.174(2). The Florida Legislature passed this law upon "find[ing] that a tragically large number of Florida children have been accidentally killed or seriously injured by negligently stored firearms; that placing firearms within the reach or easy access of children is irresponsible, encourages such accidents, and should be prohibited; and that legislative action is necessary to protect the safety of our children." *Id.* § 790.173(1).

LEGAL BACKGROUND

A. Restrictions on Speech Established by the Physician Gag Law

56. Despite the vital importance of preventive medicine involving firearm safety, the Physician Gag Law establishes severe restrictions on health care practitioners' speech on the subject matter of firearms. The law, entitled "An act relating to the privacy of firearm owners," purports to protect the "privacy" of Florida firearm owners. *See* Fla. Stat. §§ 381.026, 395.1055, 790.338, 456.072 (all amended or created by CS/CS/HB 155). It does not advance firearms' owners' rights or privacy interests under the Second Amendment to the U.S. Constitution. In fact, both the State of Florida and the federal government regulate firearms, including gun purchases and carrying. *See* Fla. Stat. § 790.065; 18 U.S.C. § 922(t). Before purchasing a firearm from a licensed gun dealer, Florida residents must submit to a criminal background check in which they must reveal their "name, date of birth, gender, race, and social security number or other identification number" and show "proper identification including an identification containing a photograph of the potential buyer or transferee." Fla. Stat. § 790.065. Those who own firearms cannot carry them concealed on their person without first obtaining a

license to do so from the State. *See id.* §§ 790.01, 790.06. It is thus impossible legally to purchase a firearm from a gun dealer or to choose to carry it concealed "anonymously" in Florida.

57. The state's purported interest in securing the privacy of firearm ownership is also undermined by the fact that the law targets exchanges between a doctor and patient, which are already protected under both state and federal law. In recognition that patients and their health care providers exchange vast quantities of highly confidential information, the Health Insurance Portability and Accountability Act of 1996 restricts access to patient identifiable health information and protects from disclosure any information given by a patient to a health care practitioner, whether given orally or recorded in writing. *See* 42 U.S.C. §§ 1320d-1 to d-7. Florida law likewise protects the confidentiality of information given by patients during the course of medical treatment as well as medical records reflecting such information. Fla. Stat. § 456.057(8) and § 456.057(7)(a).

58. Thus, rather than furthering a right to *bear* arms, the Physician Gag Law restricts *discussion* of firearms in at least four ways. First, the Physician Gag Law restricts health care practitioners from "making a written inquiry or asking questions concerning" particular subjects: "the ownership of a firearm or ammunition by the patient or by a family of a member of the patient," and "the presence of a firearm in a private home or other domicile of the patient or a family member of the patient." Fla. St. §§ 790.338(2), 381.026(4)(b)(8). The law carves out an exception if the practitioner or facility "in good faith believes that this information is relevant to the patient's medical care or safety, or the safety of others." *Id.* §§ 790.338(2), 381.026(4)(b)(8).

59. Second, the Physician Gag Law restricts practitioners from writing information on the subject of "firearm ownership" in patients' medical records, thus restricting written

communication among practitioners within a health care facility on the subject of preventive care related to firearm ownership. The statute prohibits health care practitioners and facilities from "intentionally enter[ing] 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. § 790.338(1).

60. The Physician Gag Law's third main restriction on health care practitioners' speech is its prohibition of "unnecessarily harassing" patients on the subject of "firearm ownership." *See* Fla. Stat. § 790.338(6), 381.026(4)(b)(11). Although the provision does not define "harassment," under any natural reading of the statute (however narrow or broad), the provision's context suggests such "harass[ment]" would largely or entirely consist of a practitioner's speech regarding firearms directed to a patient.

61. Fourth, the Physician Gag Law prohibits "discriminat[ion]" "based solely upon the patient's exercise of the constitutional right to own and possess firearms or ammunition." *See* Fla. Stat. §§ 790.338(5), 381.026(4)(b)(10). Because the meaning of this prohibition in the context of a statute otherwise exclusively addressed to *speech* about firearm safety is wholly unclear, it imposes a further burden on, and further serves to restrict, practitioners' speech directed to patients regarding the subject matter of firearms.

62. Each of these four main provisions of the Physician Gag Law applies not only to "[a] health care practitioner licensed under chapter 456," but also to "a health care facility licensed under chapter 395." *See* Fla. St. §§ 790.338(1)–(2), (5)–(6); 381.026(4)(b)(8), (10)–(11). This further restriction on such licensed "facilities" in turn restricts the speech of practitioners working within those facilities.

B. Provisions Governing Enforcement of the Physician Gag Law

63. The Physician Gag Law subjects health care practitioners and facilities accused of violating the statute to disciplinary proceedings and potentially harsh penalties, such as investigation and enforcement of sanctions by the Department or applicable professional board, including the Board of Medicine for practitioners under its jurisdiction. *See* Fla. Stat. §§ 790.338(8), 395.1055, 456.072(1)(mm), 456.072(2). These sanctions include, but are not limited to, revocation of their licenses to practice medicine, imposition of administrative fines of up to $10,000 per count or offense, return of fees collected, issuance of letters of reprimand, and compulsory remedial medical education. *See, e.g.*, *id.* § 456.072(2).

64. The disciplinary proceedings and penalties to which the Physician Gag Law subjects health care practitioners for their speech about gun safety are otherwise reserved for egregious professional misconduct—such as obtaining a license through bribery, making fraudulent representations related to the practice of medicine, and filing false complaints against other practitioners. *See* Fla. Stat. § 456.072.

65. These disciplinary provisions are especially imposing to healthcare practitioners since, with respect to the provisions restricting questions and notations about firearms, the Physician Gag Law does not specify what constitutes "relevan[ce] to the patient's medical care or safety, or the safety of others" for purposes of the statute. As a consequence, practitioners are left uncertain as to those situations in which they are prohibited from making inquiries of their patients regarding the presence or ownership of a firearm, or entering such information into patients' records. Indeed, by their literal terms, these provisions prohibit either inquiring or recording information even if the patient *consents*.

66. In this context, another provision of the Physician Gag Law, governing emergency medical technicians ("EMTs"), sets a particularly high standard for "relevance." The statute authorizes EMTs to inquire about a patient's possession of a firearm or the presence of a firearm in the home, but only if the EMT "in good faith believes that [such] information ... is necessary to treat a patient during the course and scope of a medical emergency or that the presence or possession of a firearm would pose an imminent danger or threat to the patient or others." Fla. Stat. § 790.338(3).

67. The statute nowhere specifies whether the standard for "relevance" that would permit a health care practitioner to make an inquiry about, or record information regarding, the presence or ownership of guns in the home is similarly limited to circumstances where such information relates to a "medical emergency" or "imminent danger or threat." Some practitioners may take the view that, because they believe questions directed to preventive medicine are always relevant, the statute should be regarded as a virtual nullity. Other practitioners, skeptical that a court would construe a legislative provision as meaningless, reasonably fear that a court would construe the safe harbor as requiring a higher showing of relevance. Even if the general safe harbor were ultimately held not to require the same standard of relevance as the EMT provision, practitioners reasonably fear that the statute will be construed to preclude making routine inquiries regarding firearm ownership as part of their practice of preventive medicine.

68. The same dynamic applies to the Physician Gag Law's provision barring physicians from "unnecessarily harassing" patients about firearm ownership. Although some patients might perceive as "harassment" an inquiry that another patient welcomes, the Physician Gag Law provides no guidance regarding what kind of conduct would subject a practitioner or

facility to disciplinary proceedings for having engaged in harassment. Any individual patient who feels "harassed" by a practitioner's questions related to gun safety can report a practitioner for violating the Physician Gag Law.

69. On June 2, 2011, the Rules/Legislative Committee of the Board of Medicine met and determined that a violation of the Physician Gag Law, HB 155, would fall under "current disciplinary guidelines" for a "failure to comply with a legal obligation," meaning that no further Board action was required to implement the law. Meeting Report, Florida Bd. of Med. Rules/Legislative Committee Meeting, June 2, 2011, at 3, available at http://www.doh.state.fl.us/mqa/medical/min_06-02-11Rules.pdf (last visited June 19, 2011). The risk of enforcement is therefore immediate.

HARM TO PLAINTIFFS, THEIR MEMBERS, AND THEIR PATIENTS

70. The Physician Gag Law expressly prohibits health care practitioners from making certain inquiries to patients on the subject of firearm safety, expressly prohibits them from writing certain notes in patients' charts regarding their consultations on this topic, and has an immediate restrictive effect on Plaintiffs' and their members' exercise of their constitutional right to speak freely to their patients, in the exercise of their best medical judgment, regarding safe gun ownership. Preventing health care practitioners from counseling their patients on all aspects of the recommended safety guidance also deprives patients of their right to hear such information. Such counseling by practitioners can make a significant positive impact on patients' firearm storage habits. The absence of those efforts increases the risk of further injuries and loss of lives.

71. The Physician Gag Law's ambiguous provisions regarding "relevance" and its undefined prohibitions against "harassment" and "discrimination" based on gun ownership have

a chilling effect on health care practitioners' speech on the subject of firearm safety. Plaintiffs and their members do not view their counseling as "harassment" or "discrimination." Nevertheless, one patient may regard as "harassment" an inquiry and discussion of gun safety that another patient would welcome. Indeed, on its face, the law would appear to preclude inquiring about gun ownership or recording information about firearm ownership even if the patient consented. The Physician Gag Law's provisions and prohibitions are so vague, overbroad, and ambiguous, and its penalties are so harsh, that prudent practitioners are limiting their efforts to counsel patients about firearms.

72. The Physician Gag Law's harsh penalties contribute to its chilling effect. The process of public investigation before the Department or an applicable professional board, usually reserved for egregious cases of misconduct, is so harmful to medical professionals' reputations that even practitioners who are eventually vindicated are irreparably harmed; the harm commences along with the mere investigation. For example, many accrediting organizations and job applications require physicians to disclose whether they have ever been reported to their state medical boards—regardless whether they were ultimately vindicated. The threat posed by the spectre of being reported under this vague, overbroad, and ambiguous statute, which can be done by any individual patient, is thus sufficient to cause health care practitioners to limit their speech to patients with respect to firearms.

73. The chill on health care practitioners' speech has been immediate. As a result of the Physician Gag Law, Plaintiffs Dr. Bernd Wollschlaeger, Dr. Judith Schaechter, Dr. Tommy Schechtman, Dr. Stanley Sack, Dr. Shannon Fox-Levine, and Dr. Roland Gutierrez have each already been forced to curtail or eliminate entirely aspects of their practice of preventive health care since the enactment of the Physician Gag Law on June 2, 2011.

A. Irreparable Harm Sustained by Dr. Wollschlaeger and His Patients

74. Although Dr. Wollschlaeger considers anticipatory guidance regarding safe firearm practices to be a key part of preventive health consultations, in light of the significant health risks posed by firearms to his patients, he has eliminated provision of such guidance as part of his standard care for patients as a result of the Physician Gag Law. His new patients are asked to complete a questionnaire that includes, among others, questions aimed at uncovering specific risk factors. Dr. Wollschlaeger uses patients' answers on the questionnaire as the basis for taking a more in-depth, individualized patient history, and for tailoring his preventive care guidance to the patient's needs. Prior to passage of the Physician Gag Law, this questionnaire contained questions inquiring whether the patient had a gun in the home and whether it was safely locked. The questionnaire also included—and to this day includes—dozens of other questions about the patient's health history and preventive care topics such as seat belts, bike helmets, breast and testicular self-exams, exercise, diet, smoking, safe sex, and illicit drugs, among others. In addition to asking on the written questionnaire, Dr. Wollschlaeger previously also routinely orally asked patients about firearm ownership and safe firearm storage if access to guns could potentially result in harm to the patient or others—for example, where patients had children at home; were suffering from addiction, depression, or suicidal ideations; had an unstable family environment; or were involved in a domestic violence situation. Thus, before the enactment of the Physician Gag Law, if he were treating children and learned from their mother that their father owned guns and had an explosive temper, he would make inquiries of the father regarding firearms safety as a preventive health measure. He frequently shared with adult patients and minor patients' parents that he himself is a gun owner and concealed weapon permit-holder, and he explained to them the steps he takes to ensure his gun is properly secured.

He also discussed with them how to secure their guns from inadvertent use by third parties, how to avoid accidental discharge, and how to keep guns out of children's access. Heretofore, it had also been his practice to document in children's charts that their parents have been asked a question on the topic of firearms as part of their preventive health screening, and the questionnaire, including the patient's response to the question about firearms, became a part of a patient's record. Despite the fact that Dr. Wollschlaeger considers this anticipatory guidance regarding safe firearm practices to be a key part of preventive health consultations, the possibility of having to appear before the Florida Board of Medicine based on a complaint that he violated the Physician Gag Law has caused and will continue to cause Dr. Wollschlaeger to refrain from discussing firearms as part of his standard preventive counseling as a precautionary measure, and he has removed the question about firearms from his questionnaire. He has taken these precautions because of the devastating damage to his professional reputation and business, as well as expense and personal stress, that would result if Board of Medicine proceedings were brought against him.

75. In Dr. Wollschlaeger's experience, many patients and parents are unaware of how to use child safety mechanisms and lock boxes and the importance of separately storing guns and ammunition. Such patients and parents have been appreciative of learning more regarding how they can minimize the risks of physical injury and death stemming from their ownership of firearms. But Dr. Wollschlaeger no longer will ask about firearms on his preventive-care questionnaire, nor discuss firearm safety with patients as part of his standard preventive counseling, for fear of being accused of violating the Physician Gag Law—thus increasing the risk of firearm injuries for his patients and others in their households. In the two weeks from the signing of the Physician Gag Law on June 2, 2011 to June 16, 2011, Dr. Wollschlaeger saw

approximately 63 new patients who were given the intake questionnaire from which the questions about firearms had been removed. Dr. Wollschlaeger did not orally ask any of these 63 patients about firearms, or give them his standard preventative counseling regarding firearms, unless they presented with a medical condition or situation calling for immediate action.

B. Irreparable Harm Sustained by Dr. Schaechter and Her Patients

76. Dr. Schaechter has also been forced to curtail her speech with patients on the subject of firearms as a result of the Physician Gag Law. Dr. Schaechter routinely screens her patients for firearm safety risks during their annual visits for well-child care. And, as she does with respect to other aspects of her patients' care, she records information regarding firearm ownership in her patients' medical records. She views doing so as important, because such records communicate to a limited number of doctors within her practice the discussion that took place with the patient or parent; the records document the preventive care that was given; and they allow her, as a child grows older, to look back and know what topics she may need to verify, cover again, or expand upon. She is afraid the Physician Gag Law could be interpreted as allowing doctors to ask about guns only if they believe a danger to the patient is imminent—an interpretation that would preclude this aspect of standard preventive care for her patients. Nevertheless, because she believes in good faith that such questions are relevant to her patients' health care, she is continuing to ask these routine screening questions following the law's enactment, despite her immediate fear that a patient, spurred by this law, may as a result make a report against her to the Board of Medicine. Because of this fear that she may be accused of violating the Physician Gag Law, she has, however, decided that she will now alter her practice with respect to patients' parents who avoid answering or respond with hostility to questions regarding firearms. Whereas before this law was passed she would have asked parents follow-up

questions if they avoided answering or responded with hostility to questions about firearms, she will now forgo such follow-up questions, for fear of being accused by the patient of violating this law—despite the fact that such counseling on this subject may be necessary to protect the patient's safety.

77. In addition to this change to her practices that she herself chose, Dr. Schaechter has also been forced by her employer to abridge her speech in a second respect. Prior to passage of the Physician Gag Law, she used a written questionnaire completed by both patients' parents and adolescent patients in connection with annual well-child visits. Among many other questions on other topics, the questionnaire contained two questions regarding firearms—whether the patient had access to weapons including firearms, and whether the patient carried weapons including firearms—which Dr. Schaechter would use to determine which patients most needed preventive counseling regarding firearm safety. Although Dr. Schaechter initially intended to continue using this written questionnaire following passage of the Physician Gag Law, on June 10, 2011, her employer instructed all of its physicians in clinical practice to cease using all pre-printed written materials containing questions about firearms, stating it was doing so in order to protect both the institution—a licensed "facility" subject to the Physician Gag Law—and the physicians from being accused of violating the Physician Gag Law. Dr. Schaechter would prefer to continue using the questionnaire, but, at her employer's instruction, has ceased using the written questionnaire as of June 10, 2011.

78. Dr. Schaechter's experience has been that asking about firearms in the home prompts discussions with patients and parents. She believes that, following these counseling sessions, many parents take her advice and implement measures that can prevent accidents, because they want to protect their children. Sadly, however, she has also many patients to

gunshot wounds, including in incidents where guns found in a child's home or belonging to a family member inflicted the wounds. Dr. Schaechter views these injuries as preventable. She is concerned that undermining anticipatory safety guidance regarding firearms may lead to more preventable deaths and grievous injuries to patients.

C. Irreparable Harm Sustained by Dr. Schechtman and His Patients

79. Dr. Schechtman will continue in his practice of routinely asking his patients questions regarding firearm safety and recording related information in their medical records, because he believes in good faith that such questions and information are relevant to his patients' medical care. Like Dr. Schaechter, however, as a result of the Physician Gag Law, Dr. Schechtman will refrain from asking follow-up questions when patients or their parents seem upset by his initial screening question. Although he previously did ask patients and their parents such follow-up questions due to the possibility of firearms in such households and the need for preventive guidance regarding safely storing them, Dr. Schechtman is now concerned that such follow-up questions will lead to his being accused of violating the Physician Gag Law. Even though Dr. Schechtman will censor his own speech to this extent as a result of the enactment of the Physician Gag Law, he remains extremely concerned that a patient or parent, prompted by the law, will file a complaint against him with the Board of Medicine based simply on the fact that he has asked a standard screening question regarding the presence of firearms in the patient's household.

80. Dr. Schechtman has also found in his experience that his patients' level of knowledge regarding firearm safety varies. He believes that his practice of providing preventive guidance on firearm safety has been informative, has changed behavior, and has reduced the risk of serious injury or death for many of his patients. He has occasionally had experience in the

past with patients becoming upset by follow-up questions when patients did not respond to a question regarding firearm safety on a written questionnaire that he gives patients, which asks about firearms among many other risk factors. Recently, a patient became upset when a nurse practitioner in his practice asked the patient a follow-up question in response to the patient's failure to respond to the question about firearms. Because of the enactment of the Physician Gag Law, Dr. Schechtman will now refrain from asking such follow-up questions in similar circumstances, out of the fear that he will be accused of violating the law.

D. Irreparable Harm Sustained by Dr. Sack and His Patients

81. Prior to passage of the Physician Gag Law, Dr. Sack would begin his firearm safety counseling by asking patients whether there was a firearm in the home; if so, he went on to engage the patient in a dialogue about firearm safety. Since passage of the Physician Gag Law, Dr. Sack has altered his practice in two significant ways. First, Dr. Sack no longer asks patients about the presence of firearms in the home. Instead, he frames his discussion in hypothetical terms, stating that, *if* patients were to have firearms in the home, Dr. Sack would advise them to take certain precautionary measures. Dr. Sack believes this method of framing his advice in generic, hypothetical terms not tailored to the patient's circumstances is a less effective means of counseling patients than asking each one about guns in the home and thereby initiating a productive dialogue on the subject. Moreover, Dr. Sack's revised approach forces him to waste time discussing home firearm safety with patients and families who do not have firearms in their homes. Second, since passage of the Physician Gag Law, Dr. Sack feels restrained from pursuing follow-up questions or offering emphatic advice to patients regarding firearm safety in cases in which the patient exhibits particular sensitivity to the subject, for fear that the patient may later assert that Dr. Sack violated the new law by improperly asking

irrelevant questions or harassing the patient about firearms. The Physician Gag Law therefore has forced Dr. Sack to alter his practice in ways that he believes reduce his effectiveness for his patients.

82. Dr. Sack is concerned that the manner in which he has had to alter his firearms safety counseling, foregoing asking patients whether they keep firearms in the home, is not as effective as the personalized counseling he was able to provide previously. Prior to passage of the recent Physician Gag Law, Dr. Sack found that patients and their parents often engaged in a dialogue with him about firearms safety when asked, and nearly always expressed gratitude for the counseling he provided on firearms safety as well as other preventive injury topics. Based on these interactions, Dr. Sack believes that many parents are unaware of either how to store firearms properly or the importance of proper storage. Dr. Sack believes that his modified firearms safety counseling practices may be less effective at reaching such parents and convincing them to remedy unsafe situations. Since the signing of the Physician Gag Law on June 2, 2011 through June 16, 2011, Dr. Sack's modification of the manner in which he provides firearms counseling has affected at least three patients and families he has seen during well-child checkups in which he refrained from asking about firearm ownership directly and was not able to engage patients' families in a personalized, interactive dialogue on the issue.

E. Irreparable Harm Sustained by Dr. Fox-Levine and Her Patients

83. Dr. Fox-Levine used to depend heavily on a computerized intake questionnaire to determine the unique health and safety risks affecting each individual patient. Shortly before passage of the Physician Gag Law and due to its likely passage, she revised the form to omit completely the questions about gun ownership and storage of guns and ammunition, because she had previously had patients who questioned why she was asking about gun safety, and she was

nervous a patient who heard about the legislation might file a complaint against her with the Board of Medicine. She continues to be afraid to use the questionnaire, for fear of violating the law or having a patient accuse her of harassment. Without the questionnaire to tell her which patients might be at risk from guns, and to remind her to discuss firearms safety, many of her patients and their parents now leave her office without a sufficient understanding of the grave risks posed by firearms and the knowledge to mitigate those risks. She still advises some of her patients about safe firearm practices, because she feels that it is vitally important to their health and well-being, but is extremely careful about how she words her advice, keeping it very brief and phrasing it in a hypothetical fashion. She feels that such censored advice is a less effective substitute for the in-depth and specific preventive healthcare information that she gave before the existence of the law.

84. Plaintiff Dr. Fox-Levine believes the Physician Gag Law has adversely affected the quality of care that she is able to give her patients, because it has prevented her from providing what she believes to be the most effective, patient-specific counseling regarding mitigating the potential health risks associated with firearms. In the two weeks from the signing of the Physician Gag Law on June 2, 2011 to June 16, 2011, Dr. Fox-Levine's elimination of the firearm question from the preventive health questionnaire she employs during well-child visits, and the concomitant provision of less patient-specific preventive care with respect to firearms, has affected her treatment of 125 of her patients.

F. Irreparable Harm Sustained by Dr. Gutierrez and His Patients

85. Dr. Gutierrez has also been forced to censor himself because of the Physician Gag Law. Preventive health and safety counseling is also an essential part of Dr. Gutierrez's practice, and he routinely counsels patients about effective ways to minimize a variety of health and safety

risks and to prevent injuries or the onset or worsening of diseases. Depending on the particular patient's age and circumstances, this counseling addresses a large range of topics, including cigarette smoking, diet, substance abuse, seatbelt use, unprotected sex, household chemicals, swimming pool safety, and firearm safety. As part of his practice of preventive medicine, particularly during well-child visits, Dr. Gutierrez uses a patient questionnaire that asks about a list of risks, which a patient fills out before meeting with him. This questionnaire informs Dr. Gutierrez on the topics most relevant for discussion during the visit. One question on the questionnaire asks whether the patient has a firearm in his or her home. If a patient or parent answers this question in the affirmative, Dr. Gutierrez's practice is to counsel the parent regarding the need to store the firearm in a locked location, separate from any ammunition. After the passage of the Physician Gag Law, Dr. Gutierrez is extremely nervous about using this questionnaire and talking to his patients about firearms. Dr. Gutierrez recognizes that the law contains a "good faith" exception, and believes his questions indeed to be relevant to his patients' medical care. He is nevertheless afraid that some patients—or the Board of Medicine—may disagree or consider such discussions "harassment" under the law, in a particular case. Although apprehensive of the risks of doing so, Dr. Gutierrez is continuing to use the general questionnaire for now. He has decided, however, that he will not ask any follow up questions or attempt to engage in any further discussion with a patient who is not initially inclined to answer the question concerning firearms on the questionnaire, for fear of being reported under the Physician Gag Law. He feels that such censored advice is a less effective substitute for the in-depth and specific preventive health information that he gave before the existence of the law.

86. Dr. Gutierrez's fear that he is in imminent danger of being reported to the Board of Medicine for continuing to use his questionnaire and counseling patients on firearm safety is

in part based on at least two recent interactions in which patients' parents have refused to answer the question regarding firearm ownership, stating that such questions are now "forbidden." When he responded by generally stating that the reason physicians ask these questions and provide anticipatory guidance is to prevent injuries and death, Dr. Gutierrez was met with angry reactions from these patients' parents. Prior to passage of the Physician Gag Law, Dr. Gutierrez would have proceeded to advise these patients that firearms and ammunition should be stored separately, and would have engaged in a more detailed discussion about firearm safety, but did not do so in these situations because of his fear that these patients' parents would report him to the Board of Medicine for "harassment" or simply for asking the question.

87. In Dr. Gutierrez's experience, until very recently, his patients' parents had never expressed anything but gratitude for his counseling them on the subject of firearms, just as they sometimes expressed appreciation for advice on how to keep their children safe from other risks. Based on what parents have said to him, Dr. Gutierrez believes that some of his patients' parents are unaware of the importance of safely storing firearms. He believes his counseling on this subject helps reduce the risk of injuries or even death for his patients and their family members, and he believes it would be a violation of his Hippocratic Oath *not* to give such counseling. Nevertheless, given the risk of being accused of violating the Physician Gag Law, Dr. Gutierrez will not follow up in his attempts to provide counseling on firearms to patients who, like two patients he has seen after the law passed, either decline to answer the firearm question or react with hostility to the question.

88. Members of FAAP, FAFP, and FACP, including Dr. Wollschlaeger (FAFP), Dr. Schaechter (FAAP), Dr. Schechtman (FAAP), Dr. Sack (FAAP), Dr. Fox-Levine (FAAP), Dr. Gutierrez (FAAP), Dr. Lance Goodman (FAAP), Dr. Elizabeth King (FAAP), Dr. Lisa A.

Cosgrove (FAAP), Dr. N. Lawrence Edwards (FACP), Dr. Stuart Himmelstein (FACP), and Dr. Robert Raspa (FAFP), have, as a result of the Physician Gag Law, limited, modified, or ceased altogether speech they would otherwise engage in with patients as part of their medical care, including, in some cases, ceasing to record in patients' confidential medical records information regarding firearms that, prior to the law's passage, they would have recorded. In anticipation of these harms, Plaintiffs FAAP, FAFP, and FACP submitted a letter to Florida Governor Rick Scott on May 27, 2011, formally requesting that he veto the Physician Gag legislation since it is unconstitutional. Notwithstanding that request, Governor Scott signed the Physician Gag Law into law on June 2, 2011. As a result, Plaintiffs and their members have sustained and are continuing to sustain immediate and irreparable harms.

CLAIM FOR RELIEF

COUNT I: VIOLATION OF 42 U.S.C. § 1983

89. Plaintiffs reallege and incorporate by reference the preceding allegations in paragraphs 1 through 88 as though fully set forth herein.

90. The First Amendment to the U.S. Constitution provides that "Congress shall make no law . . . abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." The First Amendment is applicable to the States under the Fourteenth Amendment to the U.S. Constitution.

91. The Fourteenth Amendment provides that "[n]o state shall . . . deprive any person of life, liberty, or property, without due process of law."

92. The Physician Gag Law violates the First and Fourteenth Amendments:

(a) By abridging the freedom of Plaintiffs Dr. Wollschlaeger, Dr. Schaechter, Dr. Schechtman, Dr. Sack, Dr. Fox-Levine, Dr. Gutierrez, and the members of FAAP, FAFP,

and FACP, to communicate with and to counsel their patients, using their best medical judgment in practicing preventive medicine, regarding minimizing the risks associated with firearms;

(b) By failing to give Plaintiffs Dr. Wollschlaeger, Dr. Schaechter, Dr. Schechtman, Dr. Sack, Dr. Fox-Levine, Dr. Gutierrez, and the members of Plaintiffs FAAP, FAFP, and FACP adequate notice of the conduct prohibited under the Physician Gag Law; and

(c) By abridging the freedom of Plaintiffs' and their members' patients to receive such information as part of their preventive care.

PRAYER FOR RELIEF

WHEREFORE, Plaintiffs respectfully request that this Court enter judgment in their favor and that the Court:

(A) Declare that the Physician Gag Law violates the First and Fourteenth Amendments to the Constitution of the United States;

(B) Preliminarily and permanently enjoin Defendants from enforcing the Physician Gag Law;

(C) Award Plaintiffs the costs incurred in pursuing this action, including attorneys' fees pursuant to 42 U.S.C. § 1988, and reasonable expenses; and

(D) Grant such other and further relief as the Court deems proper.

This 24th day of June, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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

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