UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 11-22026-Civ-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.
_____/

PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

The combined effect of the opposition briefs filed by Defendants ("the State") (DE 49) and the Physician Gag Law's principal supporter—amicus National Rifle Association ("NRA") (DE 50-1)—is to prove Plaintiffs' case. As discussed in Plaintiffs' opening brief, among the law's many fatal flaws is that the scope of its speech prohibitions is inscrutable. As conclusive evidence of that point, the State and NRA construe the law in wholly inconsistent ways, even disagreeing on whether the statute's most fundamental provisions establish legal prohibitions punishable through disciplinary action or are merely hortatory exhortations.

Even more disturbing, the State's brief presents Janus-like self-contradiction as to the statute's meaning. It asserts that doctors need not worry as long as they act in good faith—but then warns of discipline if doctors engage in conduct similar to the "incidents" cited by legislators during the law's consideration. Those "incidents" are indistinguishable from routine preventive medical care provided by doctors in accordance with the guidelines of national medical organizations. The individual Plaintiffs and the organizational Plaintiffs' members cannot take comfort in the State's empty assurances.

The State's brief is otherwise most telling for its omissions. It does not dispute Plaintiffs' factual record or that the law is content-based and viewpoint-discriminatory. Nor does it cite any law in Florida or elsewhere imposing any similar and unprecedented restrictions on physicians. Instead, the State's brief confirms that the Physician Gag Law is an unconstitutional restraint on protected speech, and its enforcement should be preliminarily enjoined. The NRA's submissions only provide further support for that conclusion.

ARGUMENT

I. Plaintiffs Have Standing to Challenge the Physician Gag Law.

Only the NRA contests Plaintiffs' standing to bring this suit. That challenge is premised on the untenable proposition that Plaintiffs have no objectively reasonable fear of disciplinary

sanctions because the statute's provisions are just unenforceable *recommendations*. *See* NRA Br. 3-4.[1] Even if the NRA's construction could be squared with the statute's text and evident legislative intent (it cannot, *see infra* at 10), Plaintiffs still have standing since the governmental body charged with enforcing the law has stated a contrary view. The objective reasonableness of Plaintiffs' fear of sanctions is conclusively demonstrated by the Board of Medicine's description of the Physician Gag Law as "prohibit[ing practitioners] from inquiring about the ownership of firearms" and "establish[ing] grounds for discipline" if that prohibition is violated.[2] The law has already forced Plaintiffs to censor their speech -- an irreparable harm that certainly establishes their standing to bring this action.

"[I]t is well-established that an actual injury can exist when the plaintiff is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences. In such an instance…, the injury is self-censorship." *Harrell v. The Florida Bar*, 608 F.3d 1241, 1254 (11th Cir. 2010) (internal quotation marks omitted). Plaintiffs in a pre-enforcement challenge must demonstrate only that (1) they "seriously wish[] to engage in expression that is at least arguably forbidden by the…law"; (2) that the applicable "rules are at least arguably vague"; and (3) that "there is at least some minimal probability that the challenged rules will be enforced if violated." *Id.* at 1254, 1260 (internal quotations and citations omitted).

All three criteria are easily met here. First, Plaintiffs plainly do wish to engage in speech that is "at least arguably" forbidden by the law. They ask patients about the presence of firearms in their homes as part of routine preventive care, and they record that information in patient

[1] For convenience, we use the following abbreviations: "Mot." (Plaintiffs' motion for a preliminary injunction and supporting memorandum); "Opp." (State's opposition); and "NRA Br." (NRA *amicus* brief).
[2] Letter from Joy A. Tootle, Exec. Dir., Board of Medicine, June 14, 2011, available at ftp://ftppub.doh.state.fl.us/pub/medicine/Special/Letter-JuneMessage.pdf (last visited July 6, 2011) ("Tootle Letter"). The State does not adopt the NRA's limiting construction, implicitly admitting Plaintiffs' fears are well founded.

records. Since passage of the law, some plaintiffs now refrain from doing so.[3] Second, the statute's vagueness, *see* Mot. 12-15; *infra* at 9-13, has been confirmed by the State's and NRA's inability to articulate a consistent, coherent meaning for the statute. Third, there is, without question, "at least some minimal probability that the challenged rules will be enforced if violated," *Harrell*, 608 F.3d at 1260. On the very day the Physician Gag Law was signed by Governor Scott, the Board of Medicine ("BOM") declared that violations of the law will be adjudicated under existing disciplinary guidelines for failure to comply with a legal obligation.[4] Shortly thereafter, the BOM notified Florida physicians that the law had "take[n] effect upon becoming law" and that it "establishes grounds for discipline." Tootle Letter, *supra*, at 2; *see Harrell*, 608 F.3d at 1257 ("If a challenged law or rule was recently enacted, or if the enforcing authority is defending the challenged law or rule in court, an intent to enforce the rule may be inferred."). Plaintiffs need not expose themselves to potential disciplinary proceedings or wait until the law is actually enforced against them to substantiate their reasonable fear and consequent self-censorship. *See Bloedorn v. Grube*, 631 F.3d 1218, 1228 (11th Cir. 2011). Plaintiffs have standing to challenge the Physician Gun Law.

II. Plaintiffs' Claims Have a Substantial Likelihood of Success on the Merits.

A. The Physician Gag Law Is Subject to, and Fails, Strict Scrutiny.

1. The Physician Gag Law Is A Viewpoint-Based Restriction And Is Not Subject to Lesser Scrutiny as Regulating "Professional Speech."

As demonstrated in Plaintiffs' opening brief, the Physician Gag Law is a viewpoint-discriminatory, content-based restriction on speech and is, therefore, presumptively invalid and subject to strict scrutiny. Mot. 6-8. The NRA makes a passing suggestion that the statute is neutral as to the physician's viewpoint, NRA Br. 10-11 n.9. Yet, the State's and the NRA's own memoranda, and the legislative history on which they rely, disprove that contention. The

[3] *See, e.g.*, Wollschlaeger Decl. ¶¶ 6-9, 11, 13-16; Fox-Levine Decl. ¶¶ 9-13, 15-17, 19; Sack Decl. ¶¶ 7, 9-15.
[4] *See* 6/23/11 Manheim Decl. Ex. 5, Fla. Bd. of Med. Rules/Leg. Comm., Meeting Rpt., at 3 (June 2, 2011).

legislators who spoke in favor of the bill made clear it was intended to counter a perceived "anti-gun 'political agenda,'" NRA Br. 10 n.9 (quoting statement by Rep. Brodeur), or what one legislator called "a political . . . attack on the constitutional right to own a possessive firearm," Opp. 7 n.6 (citing statement of Rep. Artiles); NRA Br. 11 n.10 (same).[5] The legislative reports singled out the AAP's policy of encouraging pediatricians to "incorporate questions about guns into their patient history taking." 6/23/11 Manheim Dec. Ex. 3, at 2 (Health & Human Servs. Comm. Report)*; cf.* NRA Br. 12 (mischaracterizing AAP's policy of encouraging questions about firearm possession as reflecting an "ideological…agenda" of "hostil[ity] to firearms"). The State highlights for condemnation an incident in which "a pediatrician asked [a patient's parent] if he owned a firearm and…instructed [him] to remove it from his home." Opp. 7. It is plain that the law's purpose is to "discourag[e] practitioners from [allegedly] irrelevant inquiries about firearms" and to prevent physicians from "proselytiz[ing] in their examination rooms on their patients' time," NRA Br. 12—outright viewpoint discrimination.

The State cannot reasonably contend that the law can pass strict scrutiny. Instead, it asserts that a less-demanding, undefined degree of scrutiny applies because "plaintiffs' speech…is a form of 'professional speech' which can be abridged as long as 'any inhibition of the right is merely the incidental effect of observing an otherwise legitimate regulation.'" Opp. 12 (quoting *Locke v. Shore*, 634 F.3d 1185, 1191 (11th Cir. 2011)). *Locke* and the other cases the State cites are inapposite; they do not concern laws that, on their face, are content-based speech restrictions such as the statute at issue here. As Supreme Court has made clear, all viewpoint-discriminatory speech restrictions—regardless of what "category" of speech—are subject to strict scrutiny. *See R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992) (applying strict

[5] A partial transcription of the cited comments from the legislative debates is being provided, for the Court's convenience. 7/8/11 Manheim Decl. ¶¶ 9-20.

scrutiny to strike down content-based law penalizing "fighting words" ordinarily not protected by First Amendment).

Specifically, the professional regulation cases upon which the State relies simply affirm a State's authority to impose licensing and supervision requirements on professions. But such licensing restrictions on occupational conduct, such as the practice of law, *Wilson v. State Bar of Ga.*, 132 F.3d 1422 (11th Cir. 1998), interior design, *Locke*, 634 F.3d 1185, or chiropractics, *Shultz v. Wells*, Civ. Action No. 2:09cv646-WKW, 2010 WL 1141452 (M.D. Ala. Mar. 3, 2010), are permissible only so long as any limitation on free speech "'is merely the 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)). In *Wilson*, for example, the Eleventh Circuit upheld state bar rules prohibiting disbarred attorneys who worked in law offices from contacting clients. The rules were akin to a licensing requirement aimed at "preventing the unauthorized practice of law is a law office by the suspended lawyer," and therefore "govern[ed] occupational conduct," not speech. 132 F.3d at 1429 (internal quotations omitted).[6]

As Justice Jackson wrote in his oft-cited concurrence in *Thomas v. Collins*, the purpose of professional regulations is to "shield[] the public against the untrustworthy, the incompetent, or the irresponsible, or against unauthorized representation of agency. " 323 U.S. 516, 544-45 (1945). The Physician Gag Law is plainly *not* designed for this purpose. It is not a licensing requirement primarily regulating *conduct*, nor is it designed to prevent practice by the unlicensed or licensed practitioners' exceeding their licenses' bounds. In fact, the State itself acknowledges

[6] *See also Locke*, 634 F.3d at 1191 (upholding interior design licensing statute as a "generally applicable licensing provision[] limiting the class of persons who may practice the profession" not implicating "a substantial amount of protected speech" (quoting *Lowe v. SEC*, 472 U.S. 181, 232 (1985) (White, J., concurring))); *Shultz*, 2010 WL 1141452, at *9-10 (upholding prohibition on chiropractors practicing in other health practitioners' fields without a license because it did not target protected speech); *Nat'l Ass'n for Advancement of Psychoanalysis v. Cal. Board of Psychology*, 228 F.3d 1043, 1055-56 (9th Cir. 2000) (upholding that California's psychology licensing laws); *Accountant's Soc.*, 860 F.2d at 604 (upholding ban on use of term "public accountant" by non-certified accountants).

firearm safety as an appropriate area of preventive care, *see* Opp. 1, 10, 13, and it does not deny that gun safety guidance as part of patients' preventive care mitigates significant risks posed by unsecured guns in the home. Rather, the Physician Gag Law was passed for unconstitutional ideological reasons—to combat a perceived anti-gun "political agenda [that] has been moved into the examination rooms of some of the doctors of our state," NRA Br. 10 n.9 (quoting Rep. Brodeur).

Neither the State nor the NRA cites a single case upholding a content-based ban on speech within a legitimate, licensed professional-client relationship. The State may impose reasonable requirements on *entrance* into a profession, but the First Amendment forbids viewpoint-discriminatory restrictions on speech *within* the lawful practice of an occupation in an effort "to exclude certain vital theories and ideas." *Legal Services Corp. v. Velazquez*, 531 U.S. 533, 548 (2001) (holding that attorney-client communications are "constitutionally protected expression" and therefore First Amendment barred Congress from prohibiting recipients of Legal Services Corporation funds from representing clients in challenges to welfare law).[7] As the Supreme Court reiterated just last month, a law that "imposes a burden based on the content of speech and the identity of the speaker" "imposes more than an incidental burden on protected expression" and warrants "heightened scrutiny," even if lesser scrutiny might be appropriate absent viewpoint discrimination. *Sorrell v. IMS Health Inc.*, No. 10-779, ___S. Ct.___, 2011 WL 2472796, at *10, *12 (June 23, 2011).[8]

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[7] *See also Conant v. Walters*, 309 F.3d 629, 636-37 (9th Cir. 2002) (noting that "[b]eing a member of a regulated profession does not . . . result in a surrender of First Amendment rights" and enjoining law punishing physicians for recommending medical marijuana because it "str[uck] at core First Amendment interests of doctors and patients").

[8] To save the statute, the NRA claims that a captive audience "doctrine" supports such sweeping speech restrictions. NRA Br. 14-15. To the contrary, the Supreme Court has repeatedly described captive audiences to make the opposite point: In a democracy, "we are often 'captives' outside the sanctuary of the home and subject to objectionable speech." *Rowan v. U.S. Post Office Dep't*, 397 U.S. 728, 738 (1970). The existence of a captive audience has not saved even *content-neutral* speech restrictions, *Madsen v. Women's Health Center, Inc.*, 512 U.S. 753 (1994) (upholding limited noise restrictions, but striking down overbroad speech restrictions), let alone

The State's reliance on *Planned Parenthood v. Casey*, Opp. 12, is also misplaced. *Casey* upheld a statute requiring physicians to advise patients about risks associated with abortion. 505 U.S. 833, 881-87 (1992). The plurality concluded that, because the law required *disclosure* of truthful, non-misleading medical information and did "not prevent the physician from exercising his or her medical judgment," *id.* at 884, it was not unconstitutional.[9] Here, rather than requiring physicians to *provide* information relevant to a medical procedure, the State is *blocking* communications due to their content and perceived viewpoint. That it cannot do.[10]

2. The State's Brief Confirms the Law Fails Strict Scrutiny.

The State cannot reasonably attempt to defend the law under strict scrutiny, and nothing in its brief even implicitly suggests the law should survive such exacting review. Neither the State nor the NRA points to any analogous content-based speech restriction—regarding firearms or any other subject matter—that has been upheld against a First Amendment challenge.[11]

The State's reference to certain Florida statutes that also purport to protect "privacy" interests in the ownership or carrying of firearms cannot overcome the fact that firearm ownership is highly regulated and that such "privacy in firearm ownership" is not sufficiently "sacrosanct" to serve as a *compelling* government interest justifying a broad content-based restriction on speech, *see* Mot. 8–10. The State suggests the law "balances conflicting constitutional rights," but the Physician Gag Law has nothing to do with gun owners'

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overbroad, content-based speech restrictions like the Physician Gag Law. *See also Carey v. Brown*, 447 U.S. 455, 460-62, 471 (1980) (striking down content-based statute prohibiting non-labor picketing in front of residences); *Sorrell*, 2011 WL 242796, at *14 (striking down content-based statute prohibiting distribution of pharmacy records, reasoning that "[m]any are those who must endure speech they do not like, but that is a necessary cost of freedom").

[9] *See Planned Parenthood v. Rounds*, 530 F.3d 724, 734-35 (8th Cir. 2008) (*Casey* held that a State "can use its regulatory authority to require a physician to provide truthful, non-misleading information relevant to a patient's decision to have an abortion.").

[10] *See Conant*, 309 F.3d at 636-38; *Trammel v. United States*, 445 U.S. 40, 51 (1980) (A "physician must know all that a patient can articulate" because "barriers to full disclosure would impair diagnosis and treatment.").

[11] The State adverts to a case declining to enjoin certain provisions of a statute governing employees' storage of firearms in their vehicles at their place of employment. Opp. 4 (citing *Florida Retail Fed. Inc. v. Attorney General*, 576 F. Supp. 2d 1281 (N.D. Fla. 2008)). The *Florida Retail* court did not even mention the First Amendment, and thus reviewed the law only under the lowest standard of review, rational basis. *See id*. at 1287-88.

constitutional right to keep and bear arms. No court has held that the Second Amendment creates a constitutional right to "*privacy*" regarding firearm ownership.[12] There is, therefore, nothing to be "balanced" against Plaintiffs' well-established First Amendment rights.

The State also argues the law is "narrowly drawn" to "focus[] *solely* on conduct respecting a patient's right to decline to answer a question about *firearm ownership*." Opp. 10. But that account of the law's scope is woefully incomplete and inaccurate. A fairer description reveals the statute is far broader than necessary to further any such interest, even assuming that interest were sufficient. According to the State's own description of the law, it prohibits practitioners from even *asking* about gun ownership in "their regular practice…as a component of their efforts to educate patients/parents about a variety of environmental hazards" or recording the patient's responses in such circumstances. Opp. 8. Even assuming the State would have a compelling interest in forcing doctors to cease their speech once a patient initially declined to respond to a question, that would not justify a wholesale ban on *asking* the question in routine interviews when, as the State admits, "some patients welcome questions about firearm ownership and a discussion of firearm safety." *Id.* Nor would it justify a ban on recording answers to routine safety questionnaires in the medical files of those patients who have no objection.[13]

The NRA argues that the law is narrowly tailored because it is not a "blanket ban" on physician discussions of firearm safety. NRA Br. 13. But "[i]t is of no moment that the statute does not impose a complete prohibition"; "[t]he Government's content-based burdens must satisfy the same rigorous scrutiny as its content-based bans." *United States v. Playboy*

[12] Furthermore, it cannot conceivably interfere with gun owners' rights merely to inform them regarding safety measures required under Florida law. *See* Fla. Stat. § 790.174(1) (requiring safe gun storage to protect children).
[13] The State curiously suggests that the provision in Section 790.338(4) that a patient "may decline" to answer an inquiry about firearm ownership implies that patients can waive the prohibitions on inquiry or recordation in paragraphs (1) and (2). To the contrary, paragraph (4) states only that, even in circumstances in which the State would permit the practitioner to ask about firearm ownership, the patient may refuse to answer—changing nothing with respect to the prohibition on inquiry or recordation where the vague "relevance" exceptions do not apply.

Entertainment Group, Inc., 529 U. S. 803, 812 (2000). Thus, the State must demonstrate that the Physician Gag law is the "least restrictive means" of advancing its compelling interest, *Solantic v. City of Neptune Beach*, 410 F.3d 1250, 1258 (11th Cir. 2005). It fails to do so.

B. The Physician Gag Law Is Unconstitutionally Vague.

The State cannot say what the law means with any clarity, and it disagrees entirely with the NRA -- the law's self-proclaimed biggest proponent about what the law prohibits. *See* Mot. 12–13. A law that is so unclear and requires Plaintiffs to guess at its meaning cannot pass muster under the Constitution.

Setting side its disagreements with the NRA, the State itself says self-contradictory things about a central question raised by Plaintiffs: whether asking routine questions to all patients as part of a standard preventive screening intake interview or written questionnaire, and recording the answers to such questions, is permissible in the absence of particularized reason for concern with respect to a specific patient. *See* Mot. 13-14. The State first states that "the act essentially codifies what is a standard and accepted practice, i.e., physicians may ask any questions that they in good faith believe are relevant to their patient's care." Opp. 5-6. Because leading medical organizations recommend that doctors make it a standard practice to ask about gun ownership as part of preventive care for their patients, *see, e.g.*, Cosgrove Decl. ¶¶ 18–19, that statement at first blush appears to confirm that the act "codifies" that "standard and accepted practice." But, only a page later, the State fully reverses course. It states the inquiry prohibition "appl[ies] in situations (such as those that animated the passage of the Act, discussed below) where no relevant basis for the question exists." Opp. 7. The State then describes "incidents" indistinguishable from routine preventive care screening interviews and deems the "regular practice...[of] ask[ing] about firearm ownership as a component of [physicians'] efforts to

educate patients/parents about a variety of environmental hazards" to be analogous to "these types of incidents" the law was meant to proscribe. *Id*. at 7-8.

The State's stark inability to answer such a fundamental question about the Physician Gag Law is not a defect in briefing. Rather, it is a defect in the law itself, which fails to give any definition to the meaning of medical "relevance" even though legislators were plainly attempting to bar physicians from asking questions that they and leading medical associations *do* think are medically relevant. And, of course, the examples are quite clear that follow-up discussion after an objection would be deemed verboten "harassment," which fails constitutional muster as well.

These internal contradictions are only exacerbated by the further contradictions between the State and NRA. The NRA asserts the no-inquiry provision is not a prohibition at all, but only hortatory in nature. It claims that the common meaning of "should," as used in subsection 790.338(2), is not as a command but a suggestion. NRA Br. 5. But, as numerous courts have observed, depending on the context, the word "should" *can* impose a mandatory rule of conduct.[14] The NRA's construction cannot be squared with the statutory text, which makes clear that a violation of the purportedly "hortatory" subsection (2) can be the basis of disciplinary proceedings, *see* Fla. Stat. § 790.338(8). Moreover, the NRA does not even attempt to reconcile its view with the BOM's letter to physicians instructing them that, under the law, "[a] health care provider or facility *is prohibited from* inquiring about the ownership of firearms or ammunition unless the information is relevant to the patient's medical care or safety, or the safety of others." Tootle Letter, *supra*, at 2. Nor can the NRA's construction be squared with the legislative

[14] *See, e.g., United States v. Anderson*, 798 F.2d 919, 924 (7th Cir.1986) ("We note that the word 'should' is defined as 'the past tense of shall,' (Webster's New World Dictionary at 1349 (1962)) and as listed in Roget's Thesaurus means 'be obliged, must...have to.' The common interpretation of the word 'should' is 'shall' and thus...imposes a mandatory rule of conduct"); *United States v. Gondek*, 65 F.3d 1, 3 (1st Cir. 1995) (interpreting "should" in the Sentencing Guidelines as "shall" because "[n]o qualification is stated or suggested") (superseded by statute); *United States v. Alexander*, 100 F.3d 24, 27 (5th Cir. 1996) (same) (superseded by statute); *see also Dallio v. Spitzer*, 343 F.3d 553, 562 (2d Cir. 2003) ("the word 'should' is legally variable").

examples that inspired the law. *See supra* at 4; 7/8/11 Manheim Decl. ¶¶ 9-20 (attached as Exhibit "A").

Admitting that the Physician Gag Law does not define key terms or explain what specific conduct it prohibits, the State nevertheless claims the law is not impermissibly vague because it "includes only terms with ordinary meanings." Tellingly, the State then looks to other Florida statutes in which the Legislature felt a need to define such terms in the context of the relevant statute. Opp. 14-16. A review of those definitions shows that such "ordinary meanings" are elusive.

First, with respect to the aforementioned vagueness regarding what level of "relevance" is required, the State wholly misconstrues Plaintiffs' argument and purports to respond to an argument that the phrase "in good faith" is vague. *See* Opp. 16. As is plain from Plaintiffs' submission, however, the constitutional problem Plaintiffs have identified is that "the law provides no guidance on what standard of '*relevance*' is intended." Br. 13 (emphasis added). The State offers no response.[15]

Second, the State's attempt to point to Florida statutes that define the terms "harassment" and "discrimination" in wholly different contexts cannot clarify what the Physician Gag Law proscribes. Indeed, rather than explaining what the legislature intended here, the other statutes underscore the multiple interpretations to which the law's undefined terms are susceptible.[16] Moreover, the State fails to note other Florida statutes that adopt entirely different definitions of

[15] The NRA's argument that the *mens rea* element in the Physician Gag Law mitigates its vagueness, NRA Br. 17, is misplaced because, here, the very *mens rea* requirement itself is vague: Practitioners do not know what they need to "believe in good faith" to be true in order not to violate the statute.

[16] Even the very statutes the State invokes so demonstrate: One defines harassment as conduct "which *causes* substantial emotional distress" (apparently irrespective of the harasser's intent), while another defines it as conduct "*intended* to cause substantial emotional distress." Opp. 15 (citing Fla. Stat. §§ 843.20(2)(a)(a), 817.568(1)(c)) (emphases added). Whether the Physician Gag Law hinges on perceived harassment or intended harassment is among the critical questions the statute leaves unanswered.

"harassment."[17] More fundamentally, the State fails to grapple with the fact that, if the harassment provision were construed consistent with other statutory definitions to mean intentional infliction of emotional distress, then the statute would not capture the "incidents" the State acknowledges the legislature intended to prohibit, none of which would satisfy so demanding a standard. But Plaintiffs are left to guess at what standard *is* intended.

Likewise, the State's efforts to explain "discrimination" fail. *See* Opp. 15-16. Grasping at straws, the State urges that the statute prohibits "treating a person differently based on…gun ownership." Opp. 16. Yet there is no evidence the Legislature intended to adopt this amorphous "different treatment" standard, and, tellingly, the State offers no examples of what form such discrimination might take. Furthermore, such a standard would itself be unconstitutionally vague; a person of common intelligence could not know what conduct constitutes "different treatment" in this context, especially given that refusing to treat a patient is not prohibited, so long as the patient is given sufficient time to find another doctor, *see* Opp. 9.[18]

At bottom, the statutory definitions the State cites merely serve to highlight the Physician Gag Law's deficiencies, since those laws actually do define the conduct they prohibit.[19] The mere fact that a term *can* be defined, does not mean that it has, in context, a sufficiently definite meaning to avoid the problem of unconstitutional vagueness. Indeed, the NRA cites a definition of "harass" as meaning to "annoy," NRA Br. 19, but the Supreme Court has held unconstitutionally vague an ordinance prohibiting conduct "annoying" to specified persons

[17] *See, e.g.*, Fla. Stat. § 1006.147 (defining "harassment" as "any threatening, insulting, or dehumanizing gesture, use of data or computer software, or written, verbal, or physical conduct" that places a student or school employee "in reasonable fear of harm to his or her person or damage to his or her property"; "interfer[es] with [his or her] educational performance, opportunities, or benefits"; or "substantially disrupt[s] the orderly operation of a school").
[18] For example, would providing firearm safety counseling or handing out safety pamphlets only to patients who own guns constitute "different treatment" in violation of the statute? The answer is unclear.
[19] *See* Opp. 15 n.15 (describing, at length, specific activities enumerated as "discrimination" in Florida statutes regarding age discrimination (Fla. Stat. § 112.044), housing discrimination (Fla. Stat. § 760.23), and AIDS discrimination (Fla. Stat. § 760.50)); *id*. at 15 (noting two Florida statutes that explicitly define "harass").

because, despite the clear meaning of "annoying," "[c]onduct that annoys some people does not annoy others." *Coates v. City of Cincinnati*, 402 U.S. 611, 613-614 (1971). That is precisely the problem here, where, as the State concedes, "some patients welcome questions about firearm ownership and a discussion of firearm safety, [while] others find it unreasonable and intrusive." Opp. 8. Because the Physician Gag Law fails to give practitioners sufficient "notice [of what] conduct is prohibited" or "provide explicit standards for those who apply the law," it violates due process. *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1310 (11th Cir. 2009).

C. The Physician Gag Law Is Unconstitutionally Overbroad.

The State's contention that the Physician Gag Law is not overbroad because "no speech is prohibited or chilled" by the law, Opp. 16, defies both Plaintiffs' undisputed factual record as well as the plain language of the statute, which, although vague, outright prohibits some speech—as the State itself admits, *see* Opp. 10 (under the act "physicians are told they should generally 'refrain' from asking about firearm ownership"). For the reasons given in Plaintiffs' motion, Mot. 15, the law is unconstitutionally overbroad because "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." *United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (internal quotation marks omitted).[20]

II. The Plaintiffs Will Suffer Irreparable Injury If This Court Does Not Grant a Preliminary Injunction.

The State does not address or attempt to distinguish the cases cited by Plaintiffs demonstrating that infringement of First Amendment rights is a serious and irreparable harm warranting issuance of a preliminary injunction. *See* Mot. 16. Nor does the State address the evidence Plaintiffs presented establishing that the Physician Gag Law in fact already has

[20] The NRA, though not the State, contends that the overbreadth doctrine is unavailable to Plaintiffs because they "*do* contend to have been harmed by the act." NRA Br. 16. The NRA's objection is meritless, as *Stevens* itself makes clear: Where a party brings only a facial challenge, as Plaintiffs do here, they may rely on the overbreadth doctrine. *See Stevens*, 130 S .Ct. at 1587 n.3 (rejecting similar argument based on *Broadrick v. Oklahoma*, 413 U.S. 601 (1973), because the defendant, like Plaintiffs here, had not raised an as-applied challenge to the statute); *see also id*. at 1593-94 (Alito, J., dissenting) (describing at greater length the similar *Broadrick* argument the Court rejected).

inhibited physicians' transmission of safety counseling to their patients, Mot. 16-19. Instead, the State asserts that the Physician Gag Law "does not prohibit protected speech," or in any event "cannot be said to inhibit the transmission of any safety message." Opp. 16-17. To the extent the State is contending that there is no First Amendment harm because practitioners are free to give "everyone…the firearms lecture," NRA Br. 15 (quoting Rep. Brodeur), limiting physicians to giving an indiscriminate lecture to patients rather than engaging them in a discussion tailored to their individual circumstances impermissibly restricts and undermines the effectiveness of practitioners' speech, *see* Mot. 16-19—precisely what the State set out to do, *see supra* at 3–4.

Second, the State argues that even if the Gag Law inhibits' physicians' speech, it does not do so "to any greater degree that the minimal harm found acceptable" in *Casey*. Opp. 17. As set forth above in Part II.A.1., *supra*, however, *Casey* has no bearing on the analysis here because *Casey* addressed a state-imposed requirement to *provide* truthful, non-misleading information—not a content-based *restriction* on such speech. Moreover, even under the inapposite *Casey* standard, the State's contention that the Physician Gag Law "poses no material interference with the provision of medical care," Opp. 17, is untenable in light of the evidence Plaintiffs have adduced showing the law's significant impact on physicians and their patients. *See* Mot. 16-19.

Finally, the State argues that Plaintiffs' objectively reasonable fear of professional discipline amounts only to a "subjective concern based on a serious misreading of the act." Opp. 17. As set forth in Part II.B., *supra*, however, neither the Physician Gag Law itself nor the State offers any clear account of the law's prohibitions, and the State's brief in fact seems to contradict the very guidance sent to physicians by the Board of Medicine. *See supra* at 10. Thus, even as the State accuses Plaintiffs of conjuring unwarranted "subjective concerns," the State provides further basis for objectively reasonable fear that the law bars Plaintiffs' protected speech.

III. This Deprivation of Plaintiffs' First Amendment Rights Outweighs Any Purported Harm to the State, and a Preliminary Injunction Will Further the Public Interest.

The State's argument regarding the balance of harms serves only to underscore that there simply are no actual harms to the State at issue. The State offers no explanation, let alone a case or even constitutional citation, regarding the scope or origin of the alleged "constitutional right to privacy" in firearm ownership that would be impaired, Opp. 17, nor explains how treating physicians would infringe that right, given that patients are free to decline to answer any question about firearms. With respect to the discrimination provision, the State has not even tried to explain what form this discrimination might take, *see supra* at 11-12, and therefore has identified no harm. The harassment provision likewise fails to describe the speech and conduct prohibited. *Supra* at 12. *If* as, as the State asserts, harassment is intended to capture only conduct "intended to cause substantial emotional distress" or "serv[ing] no legitimate purpose," Opp. 14–15 (internal quotation marks and italics omitted), Florida law already prohibits such conduct.[21] As the State has not established harm to its interests, the balance of harms tips in Plaintiffs' favor.

The State and NRA also fail to address Plaintiffs' argument that enjoining enforcement of the Physician Gag Law would further the strong public interests in freedom of speech and public health, *see* Mot. 20. The State's unfounded platitudes regarding "protect[ing] fundamental constitutional rights in the context of firearm ownership," Opp. 18, plainly lack serious weight.

CONCLUSION

For the foregoing reasons, as well as those set forth in Plaintiffs' Motion and Accompanying Memorandum of Law, Plaintiffs respectfully request that the Court preliminarily enjoin the challenged provisions of the Physician Gag Law.

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[21] *See, e.g.*, *McAlpin v. Sokolay*, 596 So. 2d 1266, 1269 (Fla. Ct. App. 1992) (describing elements of intentional infliction of emotional distress against doctor); *see also R.J. v. Humana of Fla., Inc.*, 652 So. 2d 360, 363 (Fla. 1995) (noting such actions are exempt from rule requiring physical impact to recover for emotional injuries); Fla. Stat. § 458.331(1)(k) (providing that "making deceptive, untrue, or fraudulent representations in or related to the practice of medicine or employing a trick or scheme in the practice of medicine" is grounds for discipline).

Dated: July 8, 2011

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 8, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF filing system. I also certify that the foregoing document is being served this date on all counsel of record or pro se parties on the Service List below in the manner specified, either via transmission of Notices of Electronic Filing generated by the CM/ECF system or; in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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SERVICE LIST

Wollschlaeger, et al. v. Scott, et al.
Case No.: 11-22026-Civ-COOKE/TURNOFF
United States District Court, Southern District of Florida

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No.: 11-22026-Civ-COOKE/TURNOFF

DR. BERND WOLLSCHLAEGER, et al.,

Plaintiffs,

vs.

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

Defendants.
_____/

DECLARATION OF BRUCE MANHEIM, JR. IN SUPPORT OF PLAINTIFFS' REPLY MEMORANDUM IN SUPPORT OF THEIR MOTION FOR A PRELIMINARY INJUNCTION

I, Bruce Manheim, Jr., hereby declare as follows:

1. I am a member of the bar of both the State of California and the District of Columbia. I am a partner at the law firm of Ropes & Gray, LLP, which represents the Plaintiffs in the above-captioned action.

2. I have personal knowledge of the facts presented in this Declaration based upon my review of documents and recordings relating to this litigation. I respectfully submit this Declaration in support of Plaintiffs' Reply Memorandum in Support of their Motion for a Preliminary Injunction.

3. In their opposition to Plaintiff's Motion for a Preliminary Injunction, Defendants reference sections of the April 26, 2011 House Floor Debate on HB 155; the April 27-28, 2011 Senate Floor Debate; the April 5, 2011 House Health & Human Services Committee Hearing;

and the March 8, 2011 House Criminal Justice Subcommittee Committee Hearing on HB 155. *See* Opp. 7-8.

4. I obtained a copy of the recording of the referenced sections of the House Floor Debate from counsel for the State Defendants, via counsel for the NRA, upon request.

5. I obtained a copy of the recording of the Senate Floor Debate directly from the Senate archives, via co-counsel Edward Mullins' office.

6. The House Health & Human Services Committee Hearing and the House Criminal Justice Subcommittee Committee Hearing are available via online podcasts at the following links:

http://www.myfloridahouse.gov/sections/Committees/-committeesdetail.aspx?SessionId=70&CommitteeId=2593

http://www.myfloridahouse.gov/sections/Committees/-committeesdetail.aspx?SessionId=70&CommitteeId=2614

7. A CD containing a true and correct copy of the recorded sections of the House Floor Debate and the Senate Floor Debate referenced by Defendants will be filed conventionally. The CD contains three audio files: House Floor Debate, Senate Floor Debate A, and Senate Floor Debate B. The CD does not contain a copy of the full recording of the April 27-28, 2011 Senate Floor Debate, but only the portions cited by Defendants in their Opposition.

8. These portions of the recordings and podcasts referenced by Defendants have been transcribed by staff at Ropes & Gray, under my supervision, who made a good faith effort to truthfully and accurately reflect the content of the recordings.

9. Defendants state thus in their Opposition: "During legislative hearings on the proposed bill, a Florida state representative spoke about an appointment for his daughter at which a pediatrician asked him if he owned a firearm and was instructed to remove it from his home." Opp. 7 (citing Audio CD: Regular Session House Floor Debate on HB 155, held by the Florida House of

Representatives (Apr. 26, 2011) at 26:20 (remarks of Rep. Artiles) ("House Floor Debate") (on file with the Florida House of Representatives Office of the Clerk)).

10. The following is a true and accurate transcription of the portion of the recorded House Floor Debate, at 26:20 on the audio file, described in the preceding paragraph: "Uh, there was a question earlier today, uh how many times this occurred, and this occurred to me. When visiting my daughter's pediatrician, uh, basically I was asked if I owned a firearm. After I was asked if I owned a firearm he asked me to remove my firearm from my home. This, at no point in time did he ask me if I owned a pool, if my child had a child restraint seat, a chainsaw, or anything of the sort that are the leading causes of death for children in the state of Florida and in the United States. This is purely a political, a political, and an attack on the constitutional right to own a possessive firearm disguised as a safety concern, and that is a problem. It happened to me, and has happened over and over in the state of Florida. People are not reporting it, but it's happening, and that's why I support this bill."

11. Defendants state thus in their Opposition: "Another state representative related that he heard from citizens about a mother who was separated from her children during an office visit while a pediatrician interrogated them about firearm ownership; he also heard about a family receiving treatment under Medicaid who was told by a physician that answering questions about firearms was mandatory for those receiving government-subsidized health care." Opp. 7-8 (citing *Id.* at 13:40 (remarks of Rep. Brodeur)).

12. The following is a true and accurate transcription of the portion of the recorded House Floor Debate, at 13:40 on the audio file, described in the preceding paragraph: "**Question**. (Bullard) Knowing that you don't need uh, that many to denote a violation of civil rights, I just want to make sure that we have uh, for me, just clarity on uh this being just a one time sort of shot in the dark instance, or was this a few times over course of a year, is this something that we're looking at

uh two, three hundred cases, is this an epidemic, those are the kinds of things I want to look at before I vote on a bill, so I need some clarification. **Answer.** (Brodeur, at 14:15) … A lot of this stems where there's a well-documented case in Ocala in which a physician declined to, um uh provide care for a family because they owned a firearm. The issue originally, uh a- actually, came from the panhandle in which a family was told that it's a Medicaid necessity in order to a- to answer a firearms question, which of course it's not. We want to stop instances like that. There are other instances that I think we all received on email about two, three hours ago, of a mother who was separated from her children while medical personnel not only interrogated the children about gun ownership but put that in their medical record. These kinds of things happen all the time, uh and, they, the the defense is used that we're following the American Academy of Pediatrics website, or guidelines, uh and it happens constantly and it, it, it doesn't need to happen, and, again it's this is a protection of civil rights."

13. Defendants state thus in their Opposition: "A state senator reported multiple incidents, including cases of doctors refusing to provide medical care to children unless their parents answered questions about guns." Opp. 8 (citing Audio CD: Regular Session Senate Floor Debate, held by the Florida Senate (Apr. 27-28, 2011) at 4:33, 9:44 (remarks of Sen. Evers) (discussing incidents in Orlando, Pace, and elsewhere) ("Senate Floor Debate") (on file with the Florida Senate Office of the Secretary). *See also* Committee Hearing on HB155, held by the Health & Human Services Committee (Apr. 5, 2011) (Remarks of Rep. Brodeur) at 37:37 (discussing incidents in Ocala and elsewhere) ("House H&HS Comm. Hearing") (available at http://www.myfloridahouse.gov/sections/Committees/-committeesdetail.aspx?SessionId=70&CommitteeId=2593); Committee Hearing on HB155, held by the Criminal Justice Subcommittee (Mar. 8, 2011) (testimony of Marion Hammer, NRA) at 1:27:55 (family with a foster child was told by doctor that Medicaid would not pay for treatment if parents

didn't answer gun questions) ("House Crim. Justice Subcomm. Hearing") (available at http://www.myfloridahouse.gov/sections/Committees/-committeesdetail.aspx?SessionId=70&CommitteeId=2614); *id.* at 1:29:00 (parents feared that doctor would report them to social services if they admitted to owning a gun)).

14. Our audio files of the Senate Floor Debate appear to be arranged differently than those used by Defendants, such that the citations 4:33 and 9:33 do not meaningfully correspond in our version to the comments by Sen. Evers referred to in the preceding paragraph. The following is a true and accurate transcription of the recorded Senate Floor Debate containing Sen. Evers' remarks, appearing at 11:44 of Senate Floor Debate A, presumably one of the two sections described in the preceding paragraph: "Members, I had no idea uh the end of November that I would be filing a bill like this. But when your constituents, your own constituents, call you and tell you that there's a problem, you have to listen to the folks that elect you to, to represent them here in Tallahassee. You know, a lot's been said that there was folks in Orlando and even farther south, well, mine wasn't from Orlando or farther south, it was from Pace, Florida, the center and heart of my district. And when this goes on in the center and heart of my district, and it affects my people, then I have a problem with it. That's the reason for the bill…."

15. The following is a true and accurate transcription of the recorded Senate Floor Debate containing Sen. Evers' remarks, appearing at 26:32 of Senate Floor Debate B, presumably the second of the two sections described in Paragraph 13: [In response to question at 26:03, "Senator Evers, I wonder if you could, uh, I mean there's been a lot of kind of hearsay about uh this doctor or that doctor, said, uh or this person who went to a pediatrician, saying that uh they were asked about this. Uh do you have uh any data, or information, uh or a study that was done to show that pediatricians all over the state of Florida are uh intervening in a way that would be inappropriate with their patient?"] "Senator Rich, all I can do is, is give you the fact

that 58.3% of statistics is speculation anyway, and uh that's my determination, and uh also the fact that one of my own personal constituents called me on the first week of December of whatever the first meeting that we had down here and told me that a doctor had refused care upon a nine year old, um, that was in their custody, uh, because they wanted to know if they had a firearm in their home."

16. The following is a true and accurate transcription of the portion of the recorded House H&HS Committee Hearing containing Rep. Brodeur's remarks described in Paragraph 13: "**Question**. …there's an indication that health care, health insurance companies were providing, uh being provided information from physicians, and then property insurance companies were somehow getting that information and raising property insurance rates, is that addressed in the strike-all? **Answer.** Yes, ins- uh the the strike-all says that you cannot share that information. Legally you couldn't share that information to begin with. What I think has been the concern, where this issue originally stemmed from, was you have a number of Medicaid patients who are going to providers and uh someone in Senator Evers' district had brought up the uh had been told that it was a Medicaid requirement that they disclose this and so folks don't understand what, where the information is going. A lot of times now in the er-, uh age of the growing age of electronic medical records this information's being entered into a computer, and individuals don't know where the information's going and so while it may not have been allowed on the back end, this provides patients a lot of confidence and comfort that it's not going anywhere from, from there. **Question**. And has there ever been any reported injury or harm from a doctor asking a patient specifically about gun ownership? **Answer.** Uh there this uh the incidences widely reported is that of the Ullman family who was denied care based on their, their uh uh ownership, um as this information has come out there have been more reports, but um we don't

see a uh, we don't see actual, I don't know of any incidence of actual harm other than the denial of care, and that could be a big deal for a lot of folks."

17. The following is a true and accurate transcription of the portion of the recorded House Criminal Justice Subcommittee Committee Hearing containing Marion Hammer's testimony at 1:27:55 described in Paragraph 13: "One family, with a foster child, was told by the pediatrician's office that Medicaid would not pay claims if they didn't answer gun questions. Every single day in Florida physicians are violating patients' privacy rights and people are furious. Questioning patients about gun ownership to satisfy a political agenda and withholding medical care when patients are most vulnerable needs to stop. Patients are telling us that they're afraid to stand up to their doctors. They fear retaliation for refusing to answer."

18. The following is a true and accurate transcription of the portion of the recorded Committee Hearing containing Marion Hammer's testimony at 1:29:00 described in Paragraph 13: "I have many cases that I can share with you. One father feared the doctor would retaliate and call social services because the anti-gun doctor thinks the gun in the home creates a dangerous environment for a child. That's one of the reasons that social services knocks on doors. Another family wrote, that because their pediatrician's office manager told them they were required by Florida law to ask gun questions, that they would have to answer the questions and maybe give up their guns. There are many many cases that I could tell you about that have, have come to our attention but most people won't allow us to use their case, won't allow us to use their name, or where they live, because they're afraid of retaliation and that they won't be able to have a doctor treat their child. But I'm going to tell you about one incident and I'm going to call it a hypothetical…a child doesn't get examined when a mother refuses to answer whether they have

a gun in their home; the doctor's office sent them a bill, and then sent collectors after them when they refused to pay."

19. Defendants state thus in their Opposition: "Another incident occurred in a state representative's home town, where his constituents urged him to take up the issue with the Florida Legislature." Opp. 8 (citing Audio CD: Regular Session House Floor Debate on HB 155, held by the Florida House of Representatives at 28:15 (Apr. 26, 2011)).

20. The following is a true and accurate transcription of the portion of the recorded House Floor Debate containing Baxley's remarks described in the preceding paragraph: "Thank you Mr. Speaker. Uh I want to thank the sponsor for this good bill, as I devote, as I uh debate in favor of it. Uh, this actually started around an incident in my own hometown, and I had many of my own constituents ask me to rebalance this equation. I thank you for challenging this, I also have a son that's a psychiatrist. So I'm very interested in this balance being correct, and I applaud the NRA, uh the FMA, and especially you our dear sponsor, for finding the right balance to control this issue and protect freedom. Thank you sir."

I declare that the foregoing is true and correct and have executed this Declaration under penalty of perjury under the laws of the United States of America, 28 U.S.C. §1746, this 8th day of July 2011.

Bruce Manheim, Jr.