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David J. Smith, Clerk
United States Court of Appeals for the 11th Circuit
56 Forsyth Street, N.W.
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Re: No. 12-14009-W, *Wollschlaeger v. Governor, State of Florida*

Dear Mr. Smith:

Plaintiff-Appellees ("Plaintiffs") submit this letter in response to the Court's request for supplemental letter briefs addressing whether any of the provisions of the Firearm Owners' Privacy Act ("FOPA") challenged by Plaintiffs is severable if others are struck down. For the reasons set forth below, they are not severable.[1] The challenged provisions of FOPA are parts of a single legislative act, adopted by the Florida legislature as a package, with a shared unconstitutional purpose. In enacting FOPA, the Florida legislature indisputably intended to chill speech by health care practitioners about firearms—and indeed a particular viewpoint on the same—with which the legislature disagreed. The State's unconstitutional intent in passing FOPA, to chill doctors' speech, taints and thus renders unconstitutional all the challenged provisions, including the anti-discrimination provision. Under both federal constitutional law and state law principles of severability, none of the challenged provisions can be severed and upheld apart from the others. As the Supreme Court repeatedly has made clear, including just last month in *Whole Woman's Health v. Hellerstedt*, this Court should not engage in "quintessentially legislative work" in an effort to save provisions of a facially invalid statute. 136 S. Ct. 2292, 2319 (2016).

I. Principles of First Amendment Law Establish that None of the Challenged Provisions Can Be Severed and Sustained

[1] Plaintiffs lack standing to challenge other provisions of FOPA and thus express no view as to whether they are severable from the ones Plaintiffs have challenged.

A. The Legislature's Intent to Silence Speech is Central to First Amendment Analysis and Taints All Four Challenged Provisions

In the First Amendment context, the government's motive in enacting a law matters and is often dispositive of the constitutional analysis when, as here, the purpose is to discriminate against a speaker based on viewpoint. As the Supreme Court noted in *Sorrell v. IMS Health*, 564 U.S. 552, 566, 131 S. Ct. 2653, 2664 (2012), "[t]he First Amendment requires heightened scrutiny whenever the government creates 'a regulation of speech because of disagreement with the message it conveys.'" *Id.* (citation omitted). Like FOPA, the statute at issue in *Sorrell* (a Vermont law restricting the sale, disclosure and use of pharmacy records by "detailers" employed by pharmaceutical manufacturers) was content- and speaker-based on its face—which was alone sufficient to require heightened scrutiny, *see R.A.V. v. City of St. Paul*, 505 U.S. 377, 382, 112 S. Ct. 2538, 2542 (1992) ("Content-based regulations are presumptively invalid.").

In conducting that heightened scrutiny, the Supreme Court probed the legislative record to identify the State's purpose in enacting the law. For, as the Court noted, "[j]ust as the 'inevitable effect of a statute on its face may render it unconstitutional,' a statute's stated purposes may also be considered." *Sorrell*, 564 U.S. at 565, 131 S. Ct. at 2663 (citation omitted). Indeed, the Court went so far as to explain that even when a statute "appear[s] *neutral* as to content and speaker, its *purpose to suppress speech* and its unjustified burdens on expression would render it unconstitutional." *Id.* at 566, 131 S. Ct. at 2664 (emphasis added). The Vermont legislature's findings "explained that detailers . . . convey[e]d messages that 'are often in conflict with the goals of the state,'" *id.* at 565, 131 S. Ct. at 2663 (quoting legislative findings), and "*given the legislature's expressed statement of purpose*" the Supreme Court held the challenged provision viewpoint discriminatory. *Id.* at 565, 131 S. Ct. at 2663-64 (emphasis added). The legislative committee reports accompanying FOPA similarly disclose the State's viewpoint discriminatory purpose, singling out for criticism AAP and AMA recommendations that doctors ask all of their patients about firearm ownership as part of preventative medicine, D87¶4—questioning described elsewhere in the legislative record as a "political attack" on gun ownership. *E.g.*, *id.* ¶5 (legislature characterizing gun-related inquiries); *see also* Pls. Br. 5-9, 51-52.

Heffernan v. City of Paterson, 136 S. Ct. 1412 (2016), decided just months ago, likewise confirms that the State's *motive* to chill speech or activity protected by the First Amendment renders otherwise permissible government action unconstitutional. The plaintiff in *Heffernan* was demoted from police detective to patrol officer because the police chief and his supervisors believed, albeit

mistakenly, he was supporting a particular candidate for mayor. *Id.* at 1416. The Supreme Court held that the city's unconstitutional motive—to punish Heffernan for engaging in political activity protected by the First Amendment—rendered the demotion unconstitutional, regardless of "whether Heffernan did or did not in fact engage in political activity." *Id.* at 1418. In other words, the "police department's *reason for taking* action" itself is what caused the First Amendment harm. *Id.* (emphasis added).

1. The Legislature's Purpose in Enacting FOPA Was the Unconstitutional Intent to Chill Doctors' Speech About Firearms

The State's improper motive—to silence doctors' speech about firearms that the legislature perceived as a "political attack" on firearm ownership—is fatal to all of the challenged provisions of FOPA. *See* Pls. Br. 5-9, 72-77 (describing legislative record and arguing that anti-harassment and anti-discrimination provisions were motivated by intent to silence doctors).

The State has acknowledged that the legislature enacted FOPA specifically to address perceived concerns arising out of a handful of anecdotal incidents. *See* State Br. 2-4 (describing incidents in legislative record and stating FOPA was enacted to "address constituents' complaints"). Setting aside incidents that FOPA does not even address—like falsely telling patients that Medicaid requires them to disclose gun ownership—and conduct that FOPA expressly permits—like doctors terminating the doctor-patient relationship based on a patient's refusal to disclose gun ownership, Fla. Stat. §790.338(4)—the referenced incidents only involved doctors *asking questions* about firearms, which some patients and the legislature found objectionable. *See id.*; *see also* D87¶¶3, 5, 7, 8, 10. Legislative committee reports single out as problematic medical association recommendations that doctors ask patients or "inquire" about the presence of firearms in the home as a matter of course. D20-3:2; *see also* Pls. Br. 5-6 (citing legislative committee reports). These committee reports highlight that it was the mere *asking of a question* by doctors which prompted the legislature to act, noting that the Ocala incident "led many to question whether it should be an accepted practice for a doctor *to inquire about* a patient's firearm ownership." D20-3:2 (emphasis added); *see also* D20-4:2 (same). An NRA representative testifying before the legislature about FOPA likewise singled out the "*questioning* [of] patients about gun ownership" as part of an anti-gun "political agenda" by practitioners that "needs to stop." D87¶10 (emphasis added) (citation omitted). In short, the Florida legislature intended to silence doctors' speech about firearms because it disagreed with doctors' perceived message. That impermissible purpose animated all the challenged provisions and renders them all unconstitutional.

2. The Legislature's Intent to Chill Doctors' Speech Extends to the Anti-Discrimination Provision

At oral argument, some members of the Court posed a hypothetical scenario in which the anti-discrimination provision was narrowed to prohibit only discriminatory *conduct* against a patient and only when such conduct is based *solely* on the fact that the patient owned a gun. As Plaintiffs' counsel responded (and as argued in Plaintiffs' brief at 38-46), construing the anti-discrimination provision in that manner is contrary both to the legislative intent and to the construction of the anti-discrimination provision which the State itself has advanced during this litigation. That response goes directly to the severability question the Court has posed. The Court cannot rewrite the anti-discrimination provision, or "sever" the provision from the legislature's unconstitutional purpose, in order to save it.

As Judge Wilson previously explained, the legislature enacted the anti-discrimination provision to provide "reinforcement of the other provisions prohibiting doctors from *saying* and *writing* certain things," not to address concerns about discriminatory conduct of which there was absolutely no evidence in the legislative record. Op. II 87 n.6 (Wilson, J., dissenting) (emphasis added). Judge Wilson observed that the State "*explicitly acknowledge[d]* that the legislative history provides examples of what constitutes discrimination," *id.* at 86-87 (emphasis added), yet there is "absolutely no evidence" that doctors are refusing to treat, or providing worse treatment for, patients "unless patients give up their arms," *id.* at 136; *see also* D105:16 (District Court noting that the State has offered "no evidence" to suggest a widespread problem of discrimination or harassment); Pls. Br. 77-78, 84-85 (discussing same). As Judge Wilson concluded, the anti-discrimination provision "must [be] view[ed]" as targeting expression in light of FOPA's purpose and legislative history, and the State's "assertions that [the] legislative history is illustrative of what constitutes 'discrimination.'" Op. II 87 n.6 (Wilson, J., dissenting).

The State's own characterization of FOPA throughout this litigation confirms that FOPA's primary purpose, including the anti-discrimination provision, was to restrict *speech*, not hypothetical conduct. In the State's first responsive filing before the District Court, it described FOPA as "address[ing] only the collection and recording of a single piece of personal and highly confidential information: the ownership of a firearm," and, significantly, noted "[s]imilarly, the act's prohibitions against harassment, and discrimination if the patient declines to answer are *merely incidental* and *arise from the state's reasonable regulation of professional speech*." Resp. to Pls.' Mot. for Prelim. Inj.,

D49:13 (emphasis added). The State noted further that "[r]ead as a whole, the act envisions that its disciplinary provisions (as to harassing inquiries about firearms ownership and discrimination) . . . *would only apply* in situations (such as those that animated the passage of the act) . . . where the patient refuses to answer and the physician continues to *make inquiry* in bad faith *to harass or discriminate*"—tellingly revealing that the so-called "harassment" and "discrimination" targeted by FOPA was allegedly harassing or discriminatory *speech*. *Id.* at 7 (emphasis added). The State's characterization in its opening *en banc* brief of a legislator's discussion of the Ocala incident as the kind of "discrimination" FOPA addresses, *see* State Br. 3; Pls. Br. 73 (discussing same), confirms its acknowledgment in the District Court that the legislature regarded the anti-discrimination provision as "incidental" to the anti-inquiry and anti-recording provisions, Resp. to Pls.' Mot. for Prelim. Inj., D49:13. *See* Defs.' Second Am. Mot. for Sum. J. D93:13 (describing provisions as "working in tandem").

The Court therefore cannot save the anti-discrimination provision in order to address an imaginary problem that the State admits the legislature was not even trying to solve, s*ee* Pls. Br. 59-61 (discussing lack of record evidence of the existence of discrimination or harassment on the basis of firearm *ownership*), or reward a legislature for enacting legislation with an unconstitutional intent.

B. As a Matter of Substantive First Amendment Law, the Court Should Not Struggle to Narrow an Overbroad Statute to Save it

First Amendment overbreadth principles further counsel against the Court straining to narrow FOPA to save it from its own infirmities, including by saving the anti-discrimination provision. As the Supreme Court has long recognized, "[i]n the First Amendment context . . . a law may be invalidated as overbroad if 'a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.'" *United States v. Stevens*, 559 U.S. 460, 473, 130 S. Ct. 1577, 1587 (2010) (internal quotation marks and citation omitted). As discussed in Section I.A., *supra*, all of FOPA's provisions collectively chill protected speech and were adopted with that unconstitutional purpose. That is reason enough for the Court to invalidate all the provisions on their face, as the Supreme Court has done often when confronted with wholesale infringement of First Amendment rights. *See, e.g.*, *id.* at 481, 130 S. Ct. at 1592; *Bd. of Airport Comm'rs v. Jews for Jesus, Inc.*, 482 U.S. 569, 575-76, 107 S. Ct. 2568, 2572-73 (1987); *Keyishian v. Bd. of Regents*, 385 U.S. 589, 604, 609-10, 87 S. Ct. 675, 684, 687 (1967).

While the Court may "impose a limiting construction on a statute," it may do so only if the statute "is 'readily susceptible' to such a construction." *Stevens*, 559

U.S. at 481, 130 S. Ct. at 1591-92 (quoting *Reno v. ACLU*, 521 U.S. 844, 884, 117 S. Ct. 2329, 2950 (1997)). FOPA, however, "provides no guidance what ever for limiting its coverage," *Reno*, 521 U.S. at 884, 117 S. Ct. at 2350. Nor has the State been able to offer a consistent interpretation of FOPA generally or its anti-discrimination provision in particular, as discussed in Plaintiffs' brief at 16-17, 19-20, 83. While some questions at oral argument suggested the anti-discrimination provision could be limited to acts like terminating the doctor-patient relationship, the legislative record makes no reference of any doctor terminating a doctor-patient relationship on the basis of gun ownership. The State repeatedly has confirmed the legislature intended FOPA to address the circumstances identified in the legislative history, which makes this Court's speculation about additional legislative purposes, in an effort to save a narrowed statute, inappropriate. Indeed, as discussed below, to the extent the legislative history addresses doctors' freedom to choose their patients, it reaffirms doctors' freedom of association. *See infra* Section II.B. While one could conceive hypothetical factual scenarios under which the anti-discrimination provision could apply constitutionally, that would require rewriting the statute, which this Court plainly cannot do. *See Stevens*, 559 U.S. at 481, 130 S. Ct. at 1592 (noting that the Court "will not rewrite a . . . law to conform it to constitutional requirements" (quoting *Reno*, 521 U.S. at 884, 117 S. Ct. at 2329)); *id.* (judicial rewriting of statutes would "sharply diminish Congress's 'incentive to draft a narrowly tailored law in the first place'" (quoting *Osborne v. Ohio*, 495 U.S. 103, 121, 110 S. Ct. 1691, 1702-03 (1990))); *Reno*, 521 U.S. at 884, 117 S. Ct. at 2350 (declining "to 'dra[w] one or more lines between categories of speech covered by an overly broad statute, when Congress has sent inconsistent signals as to where the new line or lines should be drawn' because doing so 'involves a far more serious invasion of the legislative domain'" (quoting *United States v. Nat'l Treasury Emps. Union*, 513 U.S. 454, 478-79, 115 S. Ct. 1003, 1019 (1995))).

C. As a Matter of Constitutional Severability Law, the Court Should Not Strain to Sever Parts of an Unconstitutional Statute Where Doing So Would Require Speculation About Legislative Intent

Constitutional severability principles require the same result, especially where, for the reasons discussed in Section I.B., *supra*, narrowly construing the anti-discrimination provision would require the Court to engage in judicial legislation and speculate as to the Florida legislature's intent. For example, in *National Treasury Employees Union*, 513 U.S. at 463, 115 S. Ct. at 1019, the Supreme Court ruled unconstitutional under the First Amendment a subsection of the Ethics in Government Act prohibiting receipt of honoraria by government employees, where the honoraria lacked a nexus with the recipient's official duties. The Court rejected as impermissible "judicial legislation" the Government's

suggestion that it save the unconstitutional provision by "crafting a nexus requirement for the honoraria ban." *Id.* at 479, 115 S. Ct. at 1019. The Court explained that it could not be sure that any limiting construction "would correctly identify the nexus Congress would have adopted in a more limited honoraria ban." *Id.* "[T]the task of drafting a narrower statute" is for the legislature, not the Court. *Id.*

The same principles govern severability analysis as applied to "narrowing" an unconstitutionally overbroad statute. In *Randall v. Sorrell*, 548 U.S. 230, 236-37, 126 S. Ct. 2479 (2006) (plurality opinion), the Supreme Court refused to sever some of the Vermont Campaign Finance Reform Act's contribution limit provisions. Severing some provisions, the Court held, would have required it to rewrite the statute or "to foresee which of many different possible ways the legislature might respond to the constitutional objections." *Id.* at 262, 126 S. Ct. at 2500. Instead, the Court chose to "leave[] the legislature free to rewrite" the challenged provisions to address the "constitutional difficulties" identified. *Id.*

Whole Woman's Health, which was decided after oral argument in this case, further counsels against this Court attempting to save any of FOPA's provisions. In *Whole Woman's Health*, the Supreme Court refused to sever certain provisions of a facially unconstitutional statute regulating facilities that provide abortions, even though the statute had a severability clause, which FOPA does not. 136 S. Ct. at 2318-19. The Court noted that severability clauses are "not grounds for a court to 'devise a judicial remedy that entails quintessentially legislative work'" and "[s]uch an approach would inflict enormous costs on both courts and litigants, who would be required to proceed in this manner whenever a single application of a law might be valid." *Id.* at 2319 (internal citations omitted). The same reasoning applies forcefully here.

As *Whole Woman's Health* illustrates, courts should avoid severing provisions from a facially unconstitutional law that the legislature intended to apply as a package. *Id.* The Texas statute at issue in *Whole Woman's Health* was "meant to require abortion facilities to meet the integrated surgical-center standards—not some subset thereof." *Id.* Because enforcing only certain provisions would not cause the facilities to meet surgical-center standards, as the legislature intended, it was not necessary for the court to consider all of the individual regulations and determine which ones were severable. *Id.* at 2319-20. The lesson of *Whole Woman's Health* is clear. The Court should not engage in judicial legislation, and attempt to disentangle any single challenged provision from the other provisions that the legislative history indicates, and the State admits,

were intended to function as a whole when that package was enacted for an improper purpose. *See supra* Section I.A.2.

II. Principles of Florida Law Confirm that the Challenged Provisions of FOPA Cannot Be Severed In Order to Save Them

A. Under Florida Law the Legislature's Intent is the Touchstone of Statutory Construction and of Severability Analysis

Just as legislative intent governs the constitutional inquiry under substantive First Amendment law, it also controls the Court's construction of FOPA and the severability analysis under Florida law and therefore requires the same result. The Florida Supreme Court has called it a "fundamental rule of statutory construction that legislative intent is the polestar by which the court must be guided," and that such intent "must be given effect even though it may contradict the strict letter of the statute." *State v. Webb*, 398 So. 2d 820, 824 (Fla. 1981) (cited in Pls. Br. 31-32).

Legislative intent is likewise the touchstone of severability analysis under Florida law. Under the well-established test set out by the Florida Supreme Court, a statute is not severable unless four conditions are met:

> (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1269 n.16 (11th Cir. 2005) (adopting severability test established in *Cramp v. Board of Public Instruction of Orange County*, 137 So. 2d 828 (Fla. 1962)). Severability is not permitted when "the taint of an illegal provision has infected the entire enactment, requiring the whole unit to fail." *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1347-48 (11th Cir. 2004) (quoting *Schmitt v. State*, 590 S.2d 404, 414 (Fla. 1991)). "[T]he key determination is whether the overall legislative intent is still accomplished without the invalid provisions." *State v. Catalano*, 104 So. 3d 1069, 1080-81 (Fla. 2012). However, in "striving to show great deference to the Legislature" the Court should "not legislate and sever provisions that would effectively expand the scope of the statute's intended breadth." *Id.* at 1081.

While severability clauses have been found to indicate a legislative intent to preserve the legislation without the invalid portions, *see, e.g.*, *Scott v. Roberts*, 612

F.3d 1279, 1298 (11th Cir. 2010), as mentioned *supra*, neither the enrolled bill, CS/CS/HB 155 (June 2, 2011), nor any of the chapters in which FOPA is codified, Fla. Stat. §§790.338, 381.026, 456.072, contains a severability clause.

B. Since The Legislature's Intent was Constitutionally Impermissible, the Court Cannot Sever a Single Provision In Order to Sustain It, Because The Severed Provision Would Lack Any Legislative Intent

As discussed in Sections I.A.1-2, *supra*, all four of FOPA's challenged provisions were motivated by a constitutionally impermissible legislative intent. An effort to narrow and sever one provision of FOPA would amount to judicial legislation, because it would adopt a statute that the legislature did not adopt and there is no reason to believe it would have adopted under the third prong of the *Cramp* test. This Court's inquiries regarding the anti-discrimination provision, which focused on narrowing the provision to apply only to conduct like terminating the doctor-patient relationship, demonstrate the insurmountable problems in trying to sever it.

As discussed in Section I.A.2, *supra*, there is no indication in the legislative history that the legislature sought to prevent this type of conduct in passing FOPA. To the contrary, the Florida legislature never has adopted a law that restricts physicians' freedom to decide who they will treat as patients; indeed, FOPA's legislative history reflects that the legislature was focused specifically on *preserving* that right under Florida law. The House of Representatives Staff Analysis specifically noted that the physician-patient relationship is "generally considered a private relationship and contractual in nature" and that "Florida's statutes do not currently contain any provisions that dictate when physicians and patients can terminate a doctor-patient relationship." D20-3:3-4 (citing AMA Code of Medical Ethics, Op. 9.12, *Patient-Physician Relationship: Respect for Law and Human Rights*). Moreover, as to the one circumstance of a doctor terminating his patient addressed in the legislative history, the House Report's description of the effect of the bill specifically noted that a patient's right to decline to answer questions about gun ownership "does not alter existing law regarding a physician's authority to choose patients." *Id.* at 6; D20-4:3-4, 6 (same). And the only express reference to the doctor-patient relationship in FOPA—Fla. Stat. §790.338(4)—clarifies that the doctor's right to terminate the relationship remains unchanged. Thus, imputing to the anti-discrimination provision a scope that would *limit* the doctor's freedom of association, in a manner the legislature has never done and legislative history (and statutory text) indicates the legislature did not intend to do in FOPA, would be precisely the kind of

"expand[ing] the scope of the statute's extended breadth" through severance that the Florida courts have rejected. *Catalano*, 104 So. 3d at 1081.

To construe the anti-discrimination provision to reach the type of conduct identified by the Court at oral argument effectively would draft a new statute never contemplated by the legislature. If Florida wishes, for the first time ever, to restrict doctors' ability to terminate relationships with their patients, such a dramatic change in the law should be made by the state legislature, and not a federal court. *See supra* Section I.B.; *see also Lawnwood Med. Ctr., Inc. v. Seeger*, 990 So. 2d 503, 518 (Fla. 2008) (finding statute could not be severed where it would not be "an act complete in itself, once the invalid portions are severed, that would accomplish what the Legislature so clearly intended"); *Solantic*, 410 F.3d at 1268-69 n.16 (invalidating entire sign code where exemptions were found unconstitutional, noting that it was "not clear that the legislature would have enacted the sign code . . . even without the exemptions").

As in *National Treasury Employees Union*, narrowing and severing the anti-discrimination provision to disassociate it from the unconstitutional legislative intent that animated its passage would raise "independent constitutional concerns" about the new statute's application. 513 U.S. at 479. For example, doctors sometimes will terminate the doctor-patient relationship if the patient refuses to comply with the doctor's recommendation that the patient be vaccinated. If a doctor terminates the relationship because the patient refuses to comply with the doctor's recommendation that guns be stored locked and unloaded, the question would arise whether that would violate the anti-discrimination provision. Under Florida law, which makes legislative intent the "polestar" of statutory construction, *Webb*, 398 So. 2d at 824, it would be impossible to know whether the severed provision would prohibit terminating the relationship in those circumstances, because there is no legislative intent to consult. The legislative intent was the constitutionally impermissible one of silencing the physician's speech, and there is no legislative intent to which the courts could look in such a situation. Severing the anti-discrimination provision would thus entail impermissible judicial legislation, providing a new, judicially crafted intent for a provision that was never intended by the legislature to act as a stand-alone prohibition.

For all of the aforementioned reasons, the provisions of FOPA cannot be severed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

On July 25, 2016, the undersigned caused the foregoing document to be filed electronically by using the Court's CM/ECF system. All parties are represented by registered CM/ECF users and will be served by the appellate CM/ECF system.

/s/ Douglas H. Hallward-Driemeier
Douglas H. Hallward-Driemeier