NO. 12-14009

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DR. BERND WOLLSCHLAEGER, *et al.*,

Plaintiffs-Appellees,

v.

GOVERNOR STATE OF FLORIDA, *et al.*,

Defendants-Appellants.

Appeal from the United States District Court for the Southern District of Florida
Case No. 1:11-cv-22026-MGC (Honorable Marcia G. Cooke)

EN BANC BRIEF OF AMICUS CURIAE NATIONAL RIFLE ASSOCIATION OF AMERICA, INC. IN SUPPORT OF APPELLANTS AND REVERSAL

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus Curiae National Rifle Association of America, Inc., has no parent corporations. It has no stock, and no publicly held company owns 10% or more of its stock.

Pursuant to 11th Cir. R. 26.1-1, the undersigned counsel certifies that, in addition to the persons and entities identified in the petition for rehearing en banc and subsequent briefs, the following persons may have an interest in the outcome of this case:

Marra, William C., Counsel for the National Rifle Association of America, Inc.

March 26, 2016

s/ Charles J. Cooper
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STATEMENT OF THE ISSUES

1. What level of scrutiny applies to the record-keeping and inquiry provisions of the Firearm Owners' Privacy Act ("the Act"), FLA. STAT. § 790.338(1) and (2), and are those provisions constitutional under the appropriate level of scrutiny?
2. What level of scrutiny applies to the Act's anti-discrimination provision, FLA. STAT. § 790.338(5), and is that provision constitutional under the appropriate level of scrutiny?
3. Is the Act's anti-harassment provision, FLA. STAT. § 790.338(6), unconstitutionally vague?

INTEREST OF AMICUS CURIAE

The National Rifle Association of America, Inc. ("NRA") is the Nation's foremost and oldest defender of Second Amendment rights. The NRA is also a strong supporter of First Amendment rights, as demonstrated by its participation in cases such as *McConnell v. FEC*, 540 U.S. 93, 124 S.Ct. 619 (2003). The NRA championed the Act in response to its Florida members' experiences being asked intrusive questions about gun ownership during visits to the doctor's office. The

NRA and its members have a strong interest in the Act's validity. The parties have consented to the filing of this brief.[1]

SUMMARY OF ARGUMENT

The Firearm Owners' Privacy Act is a modest regulation of the medical profession that does not infringe upon First Amendment rights.

With respect to the inquiry and anti-harassment provisions, this is an easy case of statutory interpretation, not a hard case of constitutional law. Those provisions simply contain a non-binding declaration of Florida's preference that doctors "should" refrain from asking or harassing patients about firearm ownership. And if there is any doubt about the conclusion that these provisions are hortatory, the Court must interpret the Act to avoid raising any question as to its constitutionality. Because these provisions do not abridge speech, they do not violate the First Amendment.

Even if the Court strains to read all the Act's provisions as mandatory rather than precatory, they are constitutional. The record-keeping and inquiry provisions are, consistent with long-standing Supreme Court precedent, reasonable regulations of the medical community, and they further a range of compelling

[1] No party's counsel authored this brief in whole or in part, no party or party's counsel contributed money that was intended to fund preparing or submitting this brief, and no person—other than the NRA, its members, or its counsel—contributed money that was intended to fund preparing or submitting this brief.

interests related to the provision of medical care. The run-of-the-mill anti-discrimination provision regulates conduct, not speech, and it is just as constitutional as a law prohibiting discrimination on the basis of race, gender, religion, or disability. Finally, the anti-harassment provision is not vague; indeed, both this Court and the Florida Supreme Court have already upheld anti-harassment laws against vagueness challenges.

ARGUMENT

I. The Inquiry and Anti-Harassment Provisions Do Not Violate the First Amendment Because They Do Not Prohibit Speech.

The District Court made a dispositive error when it interpreted the Act to *prohibit* doctors from asking and harassing patients about firearm ownership. The Act's inquiry and anti-harassment provisions are precatory, not mandatory. Because those provisions do not abridge speech, they do not implicate, let alone violate, the First Amendment.

A. The Plain Text of the Provisions Makes Clear They Prohibit Nothing.

The inquiry provision provides that a health care practitioner "*shall* respect a patient's right to privacy and *should* refrain from making a written inquiry or asking questions concerning the ownership of a firearm or ammunition . . . ." FLA. STAT. § 790.338(2) (emphasis added). The anti-harassment provision similarly provides that a practitioner "*shall* respect a patient's legal right to own or possess a firearm and *should* refrain from unnecessarily harassing a patient about firearm

ownership during an examination." *Id.* § 790.338(6) (emphasis added). Plaintiffs challenge only the "should" provisions, i.e., that practitioners "should refrain" from inquiring and harassing patients about firearms.

1. The inquiry and anti-harassment provisions are precatory rather than mandatory because they provide that practitioners "should"—not that they "shall" or "must"—refrain from inquiring or harassing about firearm ownership. Indeed, the Executive Director of Florida's Board of Medicine—the entity charged with enforcing the Act—has stated that the inquiry provision simply recommends a course of action.[2]

The District Court held that "[t]he word 'should' can impose a mandatory rule of conduct" because a definition of "should" is "the past tense of shall." *Wollschlaeger v. Farmer*, 814 F. Supp. 2d 1367, 1376 (S.D. Fla. 2011) (quotation marks omitted). But there is no reason for the Legislature to have used the past tense in a statute addressing future conduct. Furthermore, Florida courts have rejected this "extremely doubtful synonymy of 'should' and 'shall.' " *State v. Thomas*, 528 So. 2d 1274, 1275 (Fla. Dist. Ct. App. 1988). They have recognized that the "[t]he word 'should' is used in a regular, persuasive sense, as a recommendation, not as a mandate," *id.* (quotation marks omitted), and that "[u]se

[2] *See* Letter From Joy A. Tootle, Executive Director of Florida Board of Medicine, to Doctor (July 18, 2011), Doc. 71-3, *Wollschlaeger v. Farmer*, No. 11-22026 (S.D. Fla. July 19, 2011).

of the word ‘should’ indicates to us that the [law] is discretionary rather than mandatory in nature,” *University of S. Fla. v. Tucker*, 374 So. 2d 16, 17 (Fla. Dist. Ct. App. 1979). Thus although “ ‘should’ retains its arcane, schoolmarm meaning as a past tense of ‘shall,’ its modern usage is as the weaker companion to the obligatory ‘ought.’ ” *Thomas*, 528 So. 2d at 1275.

Courts outside Florida have likewise held that the “common meaning of ‘should’ suggests or recommends a course of action, while the ordinary understanding of ‘shall’ describes a course of action that is mandatory.” *United States v. Maria*, 186 F.3d 65, 70 (2d Cir. 1999). *See also, e.g.*, *Secretary of the Interior v. California*, 464 U.S. 312, 322 n. 9, 104 S.Ct. 656, 662 n.9 (1984); *Correa-Rivera v. Holder*, 706 F.3d 1128, 1131–32 (9th Cir. 2013); *Monahan v. Dorchester Counseling Ctr., Inc.*, 961 F.2d 987, 995 (1st Cir. 1992).

2. Even if “should” is “a word of many meanings whose construction is often dependent on the context in which it appears,” *Bryan v. United States*, 524 U.S. 184, 191, 118 S.Ct. 1939, 1945 (1998) (quotation marks omitted), in *this context*, the word is plainly precatory. The clearest proof: although the inquiry and anti-harassment provisions use “should,” those same subsections modify another clause with the plainly mandatory “shall.” The District Court’s equation of “should” with “shall” violates the elementary rule that courts must “refrain from concluding here that the differing language in the two subsections has the same

meaning in each." *Russello v. United States*, 464 U.S. 16, 23, 104 S.Ct. 296, 300 (1983). *See also Maddox v. State*, 923 So. 2d 442, 446 (Fla. 2006) ("[T]he legislative use of different terms in different portions of the same statute is strong evidence that different meanings were intended." (quotation marks omitted)). And there is no reason why the Legislature would have used the present tense of "shall" to modify some sub-clauses and the past tense for others.

Consistent with plain English and ordinary statutory interpretation, courts routinely hold that when "should" and "shall" appear together, "should" must be given a precatory rather than mandatory meaning. The District Court did not grapple with any of these decisions, and they are fatal to its holding.

To discuss just a few such cases, the Tenth, Eighth, Sixth, and Second Circuits have all held that when a text pairs "should" with "shall" or "must," the former is precatory and the latter is mandatory. The Tenth Circuit held that where a statute uses both "should" and "shall" in the same section, "[t]he term 'should' indicates a recommended course of action, but does not itself imply the obligation associated with 'shall. ' " *Qwest Corp. v. FCC,* 258 F.3d 1191, 1200 (10th Cir. 2001). The Eighth Circuit held that where a contract uses "should" in one portion but "shall" elsewhere, the "should" provision "contains purely precatory language and no terms that suggest that such agreement is mandatory." *Union Elec. Co. v. Consolidation Coal Co.*, 188 F.3d 998, 1001 (8th Cir. 1999). The Sixth Circuit

held that "use of the mandatory 'shall' eight words before 'should' . . . indicates that Congress apprehended a distinction between the two terms and evinced its intent to make [the provision qualified by 'should'] hortatory . . . [and] advisory . . . ." *United States v. Rogers*, 14 F. App'x 303, 305 (6th Cir. 2001). And the Second Circuit "decline[d] to equate 'should' with 'shall' or 'must' " where the document used "should" in the provision under review but "in at least sixteen places other than [that] section, [the author] knew how to employ mandatory language" by using words like "must." *Burke v. Kodak Ret. Income Plan Comm.*, 336 F.3d 103, 108–09 (2d Cir. 2003).

The case books are filled with cases recognizing that when a text pairs "should" with "shall" or "must," "should" has a precatory meaning. *See, e.g.*, *United States Cellular Corp. v. City of Wichita Falls*, 2003 WL 21246125, at *7 (N.D. Tex. Apr. 21, 2003); *Harris Cty. Hosp. Dist. v. Shalala*, 863 F. Supp. 404, 410 (S.D. Tex. 1994); *Tubelite Architectural Prods. v. United States*, 706 F. Supp. 46, 48 (Ct. Int'l Trade 1989); *Record Steel & Constr., Inc. v. United States*, 62 Fed. Cl. 508, 515 (2004); *Louisiana Seafood Mgmt. Council v. Louisiana Wildlife & Fisheries Comm'n*, 715 So. 2d 387, 394 (La. 1998); *Magnuson v. County of Grand Forks*, 97 N.W.2d 622, 624 (N.D. 1959); *Stewart v. Chevron Chem. Co.*, 762 P.2d 1143, 1145–46, 111 Wash.2d 609, 613–14 (Wash. 1988); *Tucker*, 374 So. 2d at 17 (holding, where one subsection of a rule used "should" and another used "shall,"

that "[u]se of the word 'should' indicates to us that the [provision] is discretionary rather than mandatory in nature"). *See also Mallard v. United States District Court*, 490 U.S. 296, 301–02, 109 S.Ct. 1814, 1818–19 (1989); *Crockett Tel. Co. v. FCC*, 963 F.2d 1564, 1570 (D.C. Cir. 1992).

The District Court's decision stands athwart this entire body of case law. It ignores the common meaning of "should." And it violates basic principles of statutory interpretation. It should be rejected.

B. Other Provisions of the Act Confirm That the Inquiry and Anti-Harassment Provisions Are Precatory.

The District Court and Plaintiffs have attempted to "manufacture ambiguity where none exists," *United States v. Culbert*, 435 U.S. 371, 379, 98 S.Ct. 1112, 1116 (1978), by appealing to other provisions of the Act, including its penalty provisions. But these other provisions confirm rather than undermine that the "should" provisions are precatory.

1. The District Court held that the provisions are mandatory because the Act "provide[s] for disciplinary action in the case of violations or noncompliance . . . ." *Wollschlaeger*, 814 F. Supp. 2d at 1376. The Act contains two relevant penalty provisions, but neither comes close to establishing that the inquiry and anti-harassment provisions are mandatory.

First, Subsection 8 of the principal section of the Act provides that "[v]iolations of the provisions of subsections (1)–(4) constitute grounds for

disciplinary action . . . .” FLA. STAT. § 790.338(8). Of course, Subsection 2 contains *both* mandatory and precatory provisions: practitioners “shall” (i.e. must) respect their patients’ privacy but only “should” (i.e. are encouraged to) refrain from asking questions about firearm ownership. There is no anomaly with interpreting the “should” provision of Subsection 2 as precatory because the penalty provision of Subsection 8 still applies to the mandatory command in Subsection 2.

The Act’s second penalty provision provides that “[v]iolating any of the provisions of § 790.338” is grounds for discipline. *Id.* § 456.072(1)(nn). This general penalty provision does not mean *every single sub-clause of every single subsection* of Section 790.338 must be construed as mandatory and penal, notwithstanding plain language to the contrary.[3] Interpreted according to its plain language, the statute makes perfect sense: The penalty provision applies when someone violates the Act’s mandatory prohibitions; otherwise, it does not apply. Any apparent anomaly (and there is none) with the penalty provisions would simply be “the linguistic price paid for having a single statutory provision that covers . . . different kinds” of situations. *Robers v. United States*, 134 S.Ct. 1854, 1858 (2014). The penalty provision is no warrant for the Court to rewrite the

[3] The District Court’s reading of the statute bizarrely suggests that even Section 790.338(8)—the Act’s other penalty provision—is somehow a mandatory prohibition.

statute, for "the law does not require legislators to write extra language specifically exempting, phrase by phrase, applications in respect to which a portion of a phrase is not needed." *Id.*

2. Plaintiffs have also argued that the inquiry provision is mandatory because it provides that, "[n]otwithstanding this provision," a practitioner who "in good faith believes that this information is relevant to the patient's medical care or safety, or the safety of others, may make such a verbal or written inquiry." FLA. STAT. § 790.338(2). This statement is entirely consistent with interpreting the inquiry provision as precatory. It simply reflects the Legislature's desire to withdraw its *recommendation* (as opposed to its *command*) that doctors should refrain from inquiring about firearm ownership when such questions are medically relevant. "Should" means "should," and the other provisions of the Act do not make it otherwise.

C. Constitutional Avoidance and Respect for the Vertical Separation of Powers Compel This Court To Interpret the Provisions as Precatory.

The foregoing demonstrates that the inquiry and anti-harassment provisions are unambiguously hortatory. At a minimum, however, the Act is *not* unambiguously *mandatory*—and this premise is all that is necessary to save the inquiry and anti-harassment provisions from invalidation.

When a "statute is found to be susceptible of more than one construction," one of which would "raise a multitude of constitutional problems, the other

[construction] should prevail." *Clark v. Martinez*, 543 U.S. 371, 380–81, 385, 125 S.Ct. 716, 726, 724 (2005). Florida courts apply a particularly robust version of the canon of constitutional avoidance: they are "*obligated* to construe statutes in a manner that avoids a holding that a statute may be unconstitutional." *State v. Giorgetti*, 868 So. 2d 512, 518 (Fla. 2004) (emphasis added). The Florida Supreme Court has emphasized its "*duty* to save Florida statutes from the constitutional dustbin whenever possible," and it has "done so regularly and with statutes that required far more rewriting than the present sections." *Doe v. Mortham*, 708 So. 2d 929, 934 (Fla. 1998). If the Court concludes that the inquiry and anti-harassment provisions are unconstitutional if they are mandatory, the Court "must" interpret them as precatory. *Giogetti*, 868 So.2d at 518.

The posture of this case makes restraint particularly appropriate. Plaintiffs bring a pre-enforcement challenge to a State law that has not yet been interpreted by the State courts. "[W]hen considering a facial challenge [under the First Amendment] it is necessary to proceed with caution and restraint, as invalidation may result in unnecessary interference with a state regulatory program." *Erznoznik v. City of Jacksonville*, 422 U.S. 205, 216, 95 S.Ct. 2268, 2276 (1975). And "[i]n the absence of a limiting construction from a state authority, [a federal court] must 'presume any narrowing construction or practice to which the law is fairly susceptible.' " *Brown v. City of Pittsburgh*, 586 F.3d 263, 274 (3d Cir. 2009)

(quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 770 n.11, 108 S.Ct. 2183, 2151 n.11 (1988)). This Court has previously narrowly construed a Florida law to avoid constitutional concerns, *Pine v. City of W. Palm Beach*, 762 F.3d 1262, 1271 (11th Cir. 2014), and it must do so again here. In the highly unlikely event that Florida courts later adopt an expansive interpretation of the Act, this Court can reconsider whether the Act, as authoritatively construed, is constitutional.

D. The Purpose and Legislative History of the Act Confirm that Its Core Provisions Are Precatory.

Plaintiffs have also argued that because the purpose of some legislators was supposedly to stop practitioners from asking and harassing patients about firearms, the Act should be interpreted as mandatory, notwithstanding its plain language. But "even the most formidable argument concerning the statute's purposes could not overcome the clarity [of] the statute's text." *Kloeckner v. Solis*, 133 S.Ct. 596, 607 n.4 (2012). Moreover, "no legislation pursues its purposes at all costs . . . and it frustrates rather than effectuates legislative intent simplistically to assume that *whatever* furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525–26, 107 S.Ct. 1391, 1393 (1987). We can speculate about why the Act included only hortatory language—perhaps the Act was part of a larger legislative compromise (it was supported by the NRA and the

Florida Medical Association)[4]—but we need not speculate about the meaning of the statute the Legislature actually enacted.

In all events, the legislative history confirms that "should" is precatory, not mandatory. The Act went through the legislative process as House Bill 155. The Senate considered a competing version, Senate Bill 432. Importantly, initial versions of both the House and Senate bills clearly *prohibited* any inquiry into firearm ownership: they stated that "[a] verbal or written inquiry by a [practitioner] regarding the ownership of a firearm by a patient . . . *violates* the privacy of the patient," and they identified a punishment for that violation.[5] But lawmakers then amended the mandatory prohibition to a precatory suggestion. In other words, they knew what a mandatory provision looked like and chose not to adopt it.

E. Because the Inquiry and Anti-Harassment Provisions Do Not Prohibit Any Speech, They Cannot Possibly Violate the First Amendment.

Precatory statements of policy like the inquiry and anti-harassment provisions do not prohibit any speech and thus cannot violate the First Amendment. When evaluating whether a law comports with the First Amendment,

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[4] *See* HEALTH & HUMAN SERVS. COMM., COMM. MEETING REP. 4–5 (Apr. 5, 2011), http://goo.gl/O8s5dE.

[5] *See* S.B. 432 § 790.338(1)(a), (2)(a), Florida House of Representatives, CS/CS/CS/SB 432—Privacy of Firearm Owners, http://goo.gl/CX2XOV (click on the link "Original Filed Version"); H.B. 432 § 790.338(1)(a), (2)(a), Florida House of Representatives, CS/CS/HB 155—Privacy of Firearm Owners, http://goo.gl/OIqwCx (click on the link "Original Filed Version").

the Supreme Court has asked whether "the *enforceable* portion of the ordinance [that] deals . . . with speech" conflicts with the First Amendment. *City of Houston v. Hill*, 482 U.S. 451, 460, 107 S.Ct. 2502, 2508 (1987) (emphasis added). A law does not violate the freedom of speech when it "does not prohibit speech" and "does not prohibit any form of conduct that is apparently intended to convey a message." *City of Chicago v. Morales*, 527 U.S. 41, 52–53, 119 S.Ct. 1849, 1857 (1999) (plurality opinion of Stevens, J.). *See also Moore-King v. County of Chesterfield*, 708 F.3d 560, 570 n.3 (4th Cir. 2013) (regulations do not violate the First Amendment if they "do not prohibit any speech at all"). Here, the inquiry and anti-harassment provisions are not enforceable against Plaintiffs or anyone else, and thus they cannot violate the First Amendment. *Cf. Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 20, 101 S.Ct. 1531, 1541 (1981) (statute "intended to encourage, rather than mandate" the provision of better healthcare services is precatory rather than mandatory and creates no enforceable rights).

Nor has Florida violated the First Amendment by exercising its sovereign right to express its views on important matters of medical and public policy. As explained below, Florida's statements are consistent with States' longstanding authority to regulate the medical profession. They are also consistent with the well-established premise that the Government "has the right to speak for itself" and "is entitled to say what it wishes, and to select the views that it wants to express."

Pleasant Grove City v. Summum, 555 U.S. 460, 467–68, 129 S.Ct. 1125, 1131 (2009) (quotation marks omitted). Indeed, "[i]t is the *very business* of government to favor and disfavor points of view." *Id.* at 468, 129 S.Ct. at 1131 (quotation marks omitted). Florida has done nothing more than express its views on a subject (the regulation of the medical profession) that falls well within its power and ken. In doing so, it has not violated the First Amendment.

II. The Inquiry and Record-Keeping Provisions Are Constitutional Even If They Prohibit Some Speech.

Even if the Court decides the inquiry and anti-harassment provisions prohibit speech, the entire Act still survives First Amendment scrutiny. Part II of this brief discusses the record-keeping and inquiry provisions, Part III discusses the anti-discrimination provision, and Part IV discusses the anti-harassment provision.

A. The Inquiry and Record-Keeping Provisions Are Valid So Long As They Are "Reasonable."

1. This Court need not search for the appropriate standard of scrutiny for the record-keeping and inquiry provisions because the Supreme Court has already decided the question: Florida's regulations of the medical profession are valid so long as they are "reasonable." *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 884, 112 S.Ct. 2791, 2824 (1992) (opinion of O'Connor, Kennedy, & Souter, JJ.). *Casey* involved, in relevant part, a challenge to a state law requiring physicians to provide women with certain information before performing an

abortion. The plaintiffs argued in *Casey*, much like Plaintiffs argue here, that the law was subject to strict scrutiny,[6] but the Court rejected that argument. It held instead that physicians' "First Amendment rights" were "implicated, but only as part of the practice of medicine, subject" not to strict scrutiny but rather "to reasonable licensing and regulation by the State." *Casey*, 505 U.S. at 884, 112 S.Ct. at 2824. The Court had no trouble upholding the regulation, finding "no constitutional infirmity in the requirement that the physician provide the information mandated by the State here." *Id.* Four other Justices—without expressing any disagreement with the joint opinion on this point—would have expressly applied rational basis review to sustain the challenged provision. *Id.* at 967–68, 112 S.Ct. at 2867–68 (Rehnquist, C.J., concurring in judgment in part and dissenting in part, joined by White, Scalia, and Thomas, JJ.). The holding of the *Casey* plurality is binding on this Court. *Marks v. United States*, 430 U.S. 188, 193, 97 S.Ct. 990, 993 (1977).

Casey's reasonableness test is appropriate because the Act only regulates doctor speech "during an examination," FLA. STAT. § 790.338(6), and within the context of the doctor-patient relationship. In other words, the Act only regulates a physician insofar as she "takes the affairs of a client personally in hand" and while

[6] Brief for Petitioners and Cross-Respondents, *Casey*, 505 U.S. 833, 112 S.Ct. 2791 (1992) (No. 91-744), 1992 WL 551419, at *54.

she "is properly viewed as engaging in the practice of a profession." *Lowe v. SEC*, 472 U.S. 181, 232, 105 S.Ct. 2557, 2584 (1985) (White, J., concurring).

2. *Casey*'s reasonableness test is consistent with States' centuries-old power to regulate the medical profession and the Supreme Court's longstanding deference to State regulations of the medical field. "Since colonial times, the regulation of professions has been seen as a state activity in the United States."[7] "Physician licensure appeared first in the United States in the seventeenth century and was nearly universal by the beginning of the nineteenth."[8] Although State licensing laws declined during the early nineteenth century,[9] State regulation of the medical profession saw a comeback in the mid- to late-nineteenth century, as States sought to regulate more robustly the content of medical advice that practitioners delivered to patients. Starting with Texas's adoption of a licensure law in 1873, every State soon reintroduced physician licensure regimes.[10] These efforts imposed a particular view of what medical advice doctors could communicate to patients by excluding

[7] Edward P. Richards, *The Police Power & the Regulation of Medical Practice: A Historical Review & Guide for Medical Licensing Board Regulation of Physicians in ERISA-Qualified Managed Care Organizations*, 8 ANNALS OF HEALTH L. 201, 202 (1999).

[8] Timothy Stoltzfus Jost, *Oversight of the Quality of Medical Care: Regulation, Management, or the Market?*, 37 ARIZ. L. REV. 825, 827 (1995).

[9] Richards, *supra* n.6, at 206.

[10] Jost, *supra* n.7, at 828.

"graduates of substandard medical schools or . . . untrained lay healers" and by "protect[ing] the public from practitioners of the healing arts . . . ."[11]

The Supreme Court approved these State efforts. In 1889, the Court upheld States' power to require medical licenses, regulate the profession "for the protection of society," and more generally "prescribe all such regulations as in its judgment will secure or tend to secure [the public] against the consequences of ignorance and incapacity, as well as of deception and fraud." *Dent v. West Virginia*, 129 U.S. 114, 122, 9 S.Ct. 231, 233 (1889). Since then, the Court has consistently afforded great deference to a State's determination of what constitutes the appropriate practice of medicine, holding that "there is no right to practice medicine which is not subordinate to the police power of the states." *Lambert v. Yellowley*, 272 U.S. 581, 596, 47 S.Ct. 201, 214 (1926).

Casey's reasonableness test is echoed in Court decisions like *Crane v. Johnson*, which upheld restrictions on doctors who practiced healing through "the processes of mental suggestion and mental adaptation," i.e., through speech. 242 U.S. 339, 340, 37 S.Ct. 176, 176 (1917). Similarly, in *Graves v. Minnesota*, the Court upheld State efforts to regulate dentistry, emphasizing that "the State is primarily the judge of regulations required in the interest of public safety and welfare," and that such regulations "may only be declared unconstitutional where

[11] *Id.*

they are arbitrary or unreasonable attempts to exercise the authority vested in it in the public interest." 272 U.S. 425, 428, 47 S.Ct. 122, 123 (1926). *See also Barsky v. Board of Regents of Univ. of NY*, 347 U.S. 442, 449, 74 S.Ct. 650, 654 (1954) (regulation of public health "is a vital part of a state's police power" and "[t]he state's discretion in that field extends naturally to the regulation of all professions concerned with health").

Today, States exercise this police power to restrict or compel the whole gamut of speech by physicians. "Without so much as a nod to the First Amendment, doctors are routinely held liable for malpractice for speaking or for failing to speak."[12] For example, "[d]octors commit malpractice for failing to inform patients in a timely way of an accurate diagnosis, for failing to give patients proper instructions, for failing to ask patients necessary questions, or for failing to refer a patient to an appropriate specialist."[13] Likewise, "physicians must comply with disease control reporting laws and must assist in the investigation of disease outbreaks,"[14] and "many physicians have lost their licenses and even been jailed for violating the terms of the controlled substances laws."[15]

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[12] Robert Post, *Informed Consent to Abortion: A First Amendment Analysis of Compelled Physician Speech*, 2007 U. ILL. L. REV. 939, 950–51 (2007) (footnotes omitted).

[13] *Id.* (footnotes omitted).

[14] Richards, *supra* n.6, at 211.

[15] *Id.* at 220.

If the Court were to subject the Act to heightened scrutiny, it would effectively constitutionalize the entire law of medical malpractice. After all, Florida heavily regulates speech incidental to medical practice, such as by prohibiting speech consisting of "diagnosis, treatment, operation, or prescription for any . . . physical or mental condition" without the State's prior permission, FLA. STAT. § 458.305(3), by prohibiting doctors from referring patients to entities in which they have an investment interest, *id.* § 456.053(5)(a), and by prohibiting doctors from providing patients with information about their treatment when patients "refuse this information," *id.* § 381.026(4)(b)(3). Are those restrictions, too, subject to heightened scrutiny?

If the Court were to invalidate Florida's attempt to keep politics out of the examination room, it would simply take the power to regulate the medical profession away from State legislatures and give it instead to Federal courts. The Court would thus plunge headlong into complex and often heated debates over medical policy.

B. The Inquiry and Record-Keeping Provisions Survive Any Form of Scrutiny.

Florida's law survives First Amendment scrutiny because it is a reasonable regulation of the medical profession. *Casey*, 505 U.S. at 884, 112 S.Ct. at 2824. But the Act is valid even if intermediate or strict scrutiny applies.

The Act furthers several compelling State interests intimately connected with the medical profession and public health. First, the Act facilitates the exercise of Second Amendment rights by protecting citizens who choose to exercise those rights from discrimination and harassment in the provision of medical care. Second, the Act serves the State's interest in protecting the privacy of patients' exercise of Second Amendment rights. Third, the Act serves the State's compelling interest in reducing the likelihood that individuals will suffer discrimination and harassment in the provision of medical care. And fourth, the Act serves the State's important interest in regulating the medical profession.

All of these interests are intimately connected to public health. Even the interests tied to the Second Amendment protect public health because they (1) strengthen the integrity of the doctor-patient relationship by taking politics out of the examination room and (2) stymie politicized efforts to deter people who wish to own arms for public-safety reasons. Just as the restriction on lawyer speech in *Gentile v. State Bar of Nevada*, 501 U.S. 1030, 1075, 111 S.Ct. 2720, 2745 (1991), furthered the constitutionally-guaranteed right to a fair trial, the regulation here validly furthers not only Second Amendment rights but also public safety and the integrity of the doctor-patient relationship.

Against the backdrop of acrimony between patients and physicians over the issue of firearm ownership and statements by some medical organizations

condemning guns and gun ownership, the Act *fosters* rather than interferes with the doctor-patient relationship. Patients now have reason to believe that doctors who ask patients about gun ownership and record the answers in patients' medical records are motivated by their good faith medical judgment, not by an ideological or other non-medical agenda. And by clarifying that doctors cannot discriminate against patients on account of answers they give to such questions, the Act makes it more likely that patients will participate in the conversation.

The Act also does not "burden substantially more speech than necessary to further those interests." *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189, 117 S.Ct. 1174, 1186 (1997). The record-keeping provision prohibits recording information about firearm ownership only "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) (emphasis added), and thus permits such record-keeping whenever the practitioner knows or even simply believes that the information is medically relevant. Similarly, even if the inquiry provision is interpreted to be mandatory, it permits inquiry about firearm ownership whenever the practitioner "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). These provisions leave a doctor free to ask *every* patient about firearm ownership and record the answer if that doctor (e.g., a pediatrician) in good faith believes that the

information is relevant to every patient's medical care or safety. Interpreting the Act to require anything more would add requirements to the Act that it does not contain and would run counter to the requirement to interpret the Act to avoid constitutional issues.

Within the confines of the examination room, the Act not only permits medically-relevant *questions*, it also permits doctors under all circumstances to have *discussions* about firearm safety with their patients. And, of course, the Act does not prohibit doctors from speaking in public about firearm safety.

The District Court held that the Act's inquiry and record-keeping provisions are unnecessary because "a patient may decline to answer or provide any information regarding firearm ownership or possession." *Wollschlaeger*, 880 F. Supp. 2d 1251, 1267 (S.D. Fla. 2012). But the Supreme Court has long acknowledged the same power imbalance between doctor and patient that led the Florida Legislature to conclude that the mere right not to answer was insufficient protection for its compelling interests: "comparatively few can judge of the qualifications of learning and skill which [the physician] possesses[,]" *Dent*, 129 U.S. at 122–23, 9 S.Ct. at 233, and the State thus has a strong interest in protecting both the "psychological" and "physical . . . well-being of the patient held 'captive' by medical circumstance," *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 768, 114 S.Ct. 2516, 2526 (1994).

Finally, the District Court faulted the State for relying on "anecdotal information" to support its stated interests, *Wollschlaeger*, 880 F. Supp. 2d at 1264, but nothing more was required, particularly in light of the slight imposition the Act imposes on physicians' First Amendment rights. Even when "applying strict scrutiny," the Supreme Court has "permitted litigants . . . to justify [speech] restrictions based solely on history, consensus, and simple common sense." *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 628, 115 S.Ct. 2371, 2378 (1995) (quotation marks omitted).

III. The Anti-Discrimination Provision Is Valid and Not Subject to Heightened Scrutiny.

The anti-discrimination provision provides that a health care practitioner "may not discriminate against a patient based solely upon the patient's exercise of the constitutional right to own and possess firearms or ammunition." FLA. STAT. § 790.338(5). Unlike the inquiry and anti-harassment provisions, the anti-discrimination provision is plainly mandatory: practitioners "may not" discriminate.

It is too late in the day for Plaintiffs to argue that anti-discrimination laws violate the First Amendment. This argument was made time and again by opponents of laws prohibiting discrimination on the basis of race or gender, and the Supreme Court has rejected the argument time and again. Anti-discrimination laws do not violate the First Amendment because they are "directed at conduct

rather than speech." *R.A.V. v. City of St. Paul*, 505 U.S. 377, 389, 112 S.Ct. 2538, 2546 (1992). For this reason, "[i]nvidious private discrimination . . . has never been accorded affirmative constitutional protections." *Hishon v. King & Spalding*, 467 U.S. 69, 78, 104 S.Ct. 2229, 2231 (1984) (quotation marks omitted). Thus a State does not run afoul of the First Amendment when it enacts a ban on race-based hiring that requires employers to remove a "White Applications" only sign, *Rumsfeld v. Forum for Acad. & Institutional Rights, Inc.*, 547 U.S. 47, 62, 126 S.Ct. 1297, 1308 (2006), because "words can in some circumstances violate laws directed not against speech but against conduct," and "acts are not shielded from regulation merely because they express a discriminatory idea or philosophy," *R.A.V.*, 505 U.S. at 389–90, 112 S.Ct. at 2547.

And, of course, the First Amendment does not limit States to prohibiting discrimination solely on the basis of race, gender, or religion. Laws that prohibit discrimination on a range of characteristics—including but not limited to "deafness, blindness or any physical or mental disability or ancestry"—are "well within the State's usual power to enact when a legislature has reason to believe that a given group is the target of discrimination." *Hurley v. Irish-American Gay, Lesbian & Bisexual Grp. of Boston*, 515 U.S. 557, 572, 115 S.Ct. 2338, 2346 (1995). Likewise, anti-discrimination laws may apply to highly-regulated

professions like the legal profession, *Hishon*, 467 U.S. at 78, 104 S.Ct. at 2235, and the medical profession.

The anti-discrimination provision is constitutional without regard to the standards of scrutiny because it simply does not implicate the First Amendment. "[I]t has never been deemed an abridgement of freedom of speech or press to make a course of conduct illegal merely because the conduct was in part initiated, evidenced, or carried out by means of language, either spoken, written, or printed." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S.Ct. 684, 691 (1949). Just as a prohibition on discrimination on the basis of race should *not* "be analyzed as [a law] regulating the employer's speech rather than conduct," *Rumsfeld*, 547 U.S. at 62, 126 S.Ct. at 1308, so too the Act's prohibition against discrimination on the basis of those who exercise Federal and State constitutional rights regulates conduct, not speech.

The District Court applied strict scrutiny, but its analysis was misguided. Citing *R.A.V. v. City of St. Paul*, the District Court thought that the anti-discrimination provision was subject to strict scrutiny because it was a content-based discrimination on speech. *See Wollschlaeger*, 880 F. Supp. 2d at 1261. But *R.A.V.* made clear that its decision did not implicate anti-discrimination laws like Title VII, even if they might otherwise discriminate on the basis of "content," because "a particular content-based subcategory of a proscribable class of speech

can be swept up incidentally within the reach of a statute directed at conduct rather than speech." *R.A.V.*, 505 U.S. at 389, 112 S.Ct. at 2546. The Supreme Court has since made clear that *R.A.V.* does not affect the constitutionality of anti-discrimination laws. *Rumsfield*, 547 U.S. at 62, 126 S.Ct. at 1308; *Wisconsin v. Mitchell*, 508 U.S. 476, 487, 113 S.Ct. 2194, 2200 (1993).

Even if heightened scrutiny applies, the anti-discrimination law easily survives. "The Florida legislature passed the Act in response to complaints from constituents that medical personnel were asking unwelcome questions regarding firearm ownership, and that constituents faced harassment or discrimination on account of their refusal to answer such questions or simply due to their status as firearm owners." *Wollschlaeger v. Governor of Florida*, 2015 WL 8639875, at *2 (11th Cir. Dec. 14, 2015). The Legislature had before it ample evidence of firearm owners being targeted by medical professionals in Florida. These incidents include the following:

- "[A] pediatrician, during a routine visit, asked a patient's mother whether she kept any firearms in her home." When the "mother refused to answer," the "pediatrician then terminated their relationship and advised the mother that she had 30 days to find a new doctor." *Id.* at *2 n.2.

- "[P]hysicians refused to provide medical care to a nine-year-old 'because they wanted to know if [the child's family] had a firearm in their home.' " *Id.*

- "[D]uring an appointment with [a legislator's] daughter, a pediatrician asked that the legislator remove his gun from his home." *Id.*

- "[A] healthcare provider falsely told [a patient] that disclosing firearm ownership was a Medicaid requirement." *Id.*

- A mother "was separated from her children while medical staff asked the children whether the mother owned firearms." *Id.*

Florida was entirely justified in protecting its citizens from discrimination on the basis of whether or not they exercise their constitutional right to keep and bear arms.

IV. The Anti-Harassment Provision Is Not Unconstitutionally Vague.

The anti-harassment provision is not unconstitutionally vague because, as discussed *supra* Part I, the provision does not actually prohibit any speech. A law is unconstitutionally vague when "it fails to give ordinary people fair notice of the conduct it punishes, or [is] so standardless that it invites arbitrary enforcement." *Johnson v. United States*, 135 S.Ct. 2551, 2556 (2015). Because the anti-harassment provision does not punish or require anything—it simply announces Florida's policy that physicians "should" refrain from harassing patients—there is no question about whether it affords "fair notice of the conduct it punishes."

Even if the anti-harassment provision were construed as a prohibition, it is still not unconstitutionally vague. The Supreme Court made clear in *Johnson* that laws that "use terms like 'substantial risk,' 'grave risk,' and 'unreasonable risk' " are usually not unconstitutionally vague when they "gaug[e] the riskiness of conduct in which an individual defendant engages on a particular occasion." *Id.* at

2561. The world, after all, "is full of instances where a man's fate depends on his estimating rightly . . . some matter of degree." *Id.* (quotation marks omitted). Here, the anti-harassment provision measures real-world conduct against a well-established standard, and it is therefore constitutional.

Neither "unnecessarily" nor "harass" is vague, either standing alone or coupled together. This Court has previously rejected a vagueness to a statute prohibiting telephone calls made with the intent to "harass" someone. *United States v. Eckhardt*, 466 F.3d 938, 944 (11th Cir. 2006). The Court emphasized that the public "need not guess what terms such as 'harass' and 'intimidate' mean" because their meaning " 'can be ascertained fairly by reference to judicial decisions, common law, dictionaries, and the words themselves because they possess a common and generally accepted meaning.' " *Id.* (quoting *United States v. Bowker*, 372 F.3d 365, 381 (6th Cir. 2004)). The Florida Supreme Court has likewise rejected a vagueness challenge to a statute making it a crime to "harass[ ] another person." *Bouters v. State*, 659 So. 2d 235, 236 (Fla. 1995).

The District Court agreed that "harass" is not vague, but it held that by adding the modifier "unnecessarily," the Legislature inserted "an adverb that renders [the provision] vague." *Wollschlaeger*, 880 F. Supp. 2d at 1268. It is hard to see how inserting an adverb that further *narrows* the scope of a non-vague statute can somehow render the Act vague. And the use of "unnecessarily" to

modify "harass" is no more vague than the use of "substantial," "grave," or "unreasonable" to modify "risk," all of which the Supreme Court said just last Term in *Johnson* do not render a statute vague. Unsurprisingly, another court of appeals has already rejected a vagueness challenge to the adverb "unnecessarily." *American-Arab Anti-Discrimination Comm. v. City of Dearborn*, 418 F.3d 600, 610 (6th Cir. 2005) ("unnecessarily interfere").

The District Court held that the anti-harassment provision was vague because it "begs the question—is there conduct that would be permissible because it constitutes necessary harassment?" *Wollschlaeger*, 880 F. Supp. 2d at 1269. There is no support for the District Court's novel proposition that whether a law is unconstitutionally vague turns on whether the opposite of that law is vague. And it is easy to see how harassment about firearm ownership could be *necessary*, such as "if a patient is suicidal." *Wollschlaeger*, 2015 WL 8639875, at *14. The District Court's counterfactual cannot create vagueness where none exists.

CONCLUSION

The Court should uphold the Act and reject Plaintiffs' First Amendment and vagueness challenges.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the type-volume limitation set forth in Fed. R. App. P. 32(a)(7)(B). This brief contains 6,989 words.

March 26, 2016

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CERTIFICATE OF SERVICE

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