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 UNIFIED SPORTSMEN OF FLORIDA, INC., SUPPORTING APPELLANTS AND REVERSAL

Stephen P. Halbrook
3925 Chain Bridge Road, Suite 403
Fairfax, Virginia 22030-3940
Tel: (703) 352-7276
Fax: (703) 359-0938
Email: protell@aol.com

Counsel for Amicus Curiae

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Amicus Curiae Unified Sportsmen of Florida, Inc., has no parent corporations. It has no stock, and thus 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 Appellants' opening brief, the following persons may have an interest in the outcome of this case.

Unified Sportsmen of Florida, Inc.

Stephen P. Halbrook, Counsel for Unified Sportsmen of Florida, Inc.

March 24, 2016

/s/ Stephen P. Halbrook
Stephen P. Halbrook
Counsel for *Amicus Curiae*
Unified Sportsmen of Florida, Inc.

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STATEMENT OF ISSUES

This Court has directed counsel to focus on the following issues:

1. What level of scrutiny applies to the record-keeping and inquiry provisions of the Act, Fla. Stat. §§ 790.338(1) & (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 THE AMICUS[1]

Unified Sportsmen of Florida, Inc. ("USF") is a non-profit membership organization incorporated under the laws of Florida with its principal place of business in Tallahassee, Florida. USF has thousands of members throughout Florida who were deeply concerned about the politicization of medical care and with the privacy of their medical records, and who thus strongly supported the Firearm Owners' Privacy Act. USF Executive Director Marion Hammer, who is

[1] No party's counsel authored this brief in whole or in part. No party or party's counsel, and no person other than the amicus, its members, or its counsel, contributed money that was intended to fund preparing or submitting this brief, except that the National Rifle Association of America, Inc., contributed money that was intended to fund preparing or submitting this brief.

credited with heading the creation of the Eddie Eagle GunSafe® Program,[2] testified in support of the enactment before the Senate Health Regulation Committee, the Senate Judiciary Committee, and the House Health and Human Services Committee.[3]

The purpose of USF is to promote and support the legitimate ownership and use of firearms, hunting, and related sports; the conservation of our natural resources; and the firearms rights of all law-abiding citizens in Florida as guaranteed in the United States and Florida Constitutions. USF has previously sought to protect such rights in litigation both as a party and as an amicus curiae.

The parties have consented to the filing of this brief. This brief is being filed on motion pursuant to 11th Cir. R. 35-9.

SUMMARY OF ARGUMENT

The Firearm Owners' Privacy Act is a reasonable regulation of the medical profession that passes muster under the First Amendment under any standard of review. It allows physicians wide discretion when the subject of firearms

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[2] The program "teaches children that if they find a gun in an unsupervised situation, they should: STOP! Don't Touch. Leave the Area. Tell an Adult. . . . Since [1988], it has reached more than 21 million children in all 50 states, Canada and Puerto Rico." http://www.homesafetyacademy.com/eddie-eagle-is-at-homesafety-academy/.

[3] Ms. Hammer also actively supported the bills in the public forum. *E.g.*, Hammer, "Let doctors treat illness, not guns," Tallahassee.com, Jan. 20, 2011. Reprinted in http://www.tallahasseegunforum.com/forum/showthread.php?23578-Marion-Hammer.

ownership may be medically relevant, but when not relevant, it promotes values related to informed consent, privacy, and the exercise of constitutional rights by the patient.

First, in regulating the medical profession, the State has a strong interest in ensuring the existence of the informed consent of the patient for medical treatment, which also concerns whether a physician's advice is actually "medical" advice. The record-keeping, inquiry, and anti-discrimination provisions of the Act remind physicians that informed consent requires warning patients of adverse outcomes to their recommendations, which means that political agendas claiming only a positive outcome with no negative outcome should not be touted as medical advice in the first place.

Secondly, it has been argued that the privacy rights of firearm owners are inconsequential in the context of generating firearm-related "medical" records because the laws of the State of Florida and the United States require that persons who purchase firearms and obtain permits to carry firearms must identify themselves for background checks and the like, and hence have little privacy rights. To the contrary, both State and federal laws strictly protect the privacy interests of firearm owners, even requiring in some cases the destruction of the records on such persons and prohibiting any system of registration of firearm owners. The Act here seeks to address the unprecedented phenomenon of a private

entity attempting essentially to register firearm owners in the course of a professional relationship.

Third, the admonition that a physician "should refrain from unnecessarily harassing a patient about firearm ownership during an examination" sets an extraordinarily easy standard for compliance compared to other statutes concerning harassment, because such other statutes do not have the additional element that harassment be "unnecessary." Given this difficult-to-prove element, this provision is not unconstitutionally vague in any manner.

ARGUMENT

Introduction

Florida has a compelling State interest in regulating the practice of medicine. The record-keeping and inquiry provisions, and the anti-discrimination provision, reasonably protect the rights of patients and are constitutional under any level of scrutiny. The anti-harassment provision, which actually allows harassment if necessary, is not unconstitutionally vague.

The Firearm Owners' Privacy Act, Fla. Stat. § 790.338,[4] provides that a health care practitioner or a health care facility: (1) may not enter disclosed information about firearm ownership in a patient's medical record if the practitioner knows it is not relevant to the patient's medical care or safety, or the

[4] These provisions are substantially repeated in Florida Patient's Bill of Rights and Responsibilities, Fla. Stat. § 381.026(4)(b)(8).

safety of others, and (2) "shall" respect a patient's right to privacy and "should" refrain from enquiring about the presence in the home of a firearm by the patient or a family member, unless he or she in good faith believes that it is relevant to the patient's medical care or safety, or the safety of others.[5] *Id*.

Section § 790.338 further provides that (4) a patient may decline to answer or provide any information about the presence of a firearm in the domicile by the patient or a family member, but that such decision "does not alter existing law regarding a physician's authorization to choose his or her patients."[6] Moreover, (8) violations of the above provisions constitute grounds for disciplinary action. *Id*.

Finally, the practitioner (5) may not discriminate against a patient based solely upon the patient's exercise of the constitutional right to possess firearms, and (6) "shall" respect a patient's legal right to possess a firearm and "should" refrain from unnecessarily harassing a patient about firearm ownership during an examination.[7] *Id*.

Violation of any provision of § 790.338 is grounds for disciplinary action. Fla. Stat. § 456.072(1)(nn). "The statute is not a strict liability statute; findings as

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[5] Further, (3) an emergency medical technician may enquire about firearms if he or she, in good faith, believes that it is necessary to treat a patient in a medical emergency or that the firearm would pose an imminent danger or threat to the patient or others. *Id*.

[6] This provision is substantially repeated in Fla. Stat. § 381.026(4)(b)(9).

[7] These provisions are substantially repeated in Fla. Stat. § 381.026(4)(b)(10) & (11).

to an enumerated act and as to penalties are expressly permissive rather than mandatory." *Castellon v. Florida Dept. of Health*, 130 So.3d 748 (Fla. 3d DCA 2014).

Further, the statute's clear distinction between "shall" and "should" demonstrates that the latter is not mandatory and cannot be the basis of a violation. *See Sloban v. Florida Bd. of Pharmacy*, 982 So.2d 26, 33 (Fla. 1st DCA 2008) ("Here, the context in which 'may' is used . . . does not permit us to read it as 'shall.'"). "Initially, it should not be forgotten that because professional disciplinary statutes are penal in nature, they must be strictly construed with any ambiguity interpreted in favor of the licensee." *Cone v. State, Dept. of Health*, 886 So.2d 1007, 1011 (Fla. 1st DCA 2004).

I. THE FIREARM OWNERS' PRIVACY ACT IS A REGULATION OF THE PRACTICE OF MEDICINE THAT IS CONSISTENT WITH THE FIRST AMENDMENT UNDER ANY STANDARD OF REVIEW

The practice of medicine, which involves much speech, is pervasively regulated. "'Practice of medicine' means the diagnosis, treatment, operation, or prescription for any human disease, pain, injury, deformity, or other physical or mental condition." Fla. Stat. § 458.305(3). The practice of medicine without a license is a crime. § 458.327(1)(a). Medical practitioners are subject to numerous regulations that impact their speech, such as the Florida Patient's Bill of Rights and Responsibilities, § 381.026.

The Firearm Owners' Privacy Act is simply an additional manner in which patients' rights are protected. A corollary of the admonition that a physician "should" refrain from enquiring about firearms in the home is the directive that a physician may not enter disclosed information about firearm ownership in a patient's medical record. § 790.338(1) & (2). Similarly, corollaries of the non-discrimination provision are that the patient's constitutional right to possess a firearm is to be respected and that the patient should not be unnecessarily harassed on the subject. § 790.338(5) & (6).

Imagine a political movement among certain physicians who seek to diminish voting among minorities as somehow a health issue, and who enquire whether their patients vote, advise them that it is unsafe to society, record their voting behavior in the medical records, and harass patients who vote. In an earlier epoch of racial discrimination, this would not be a far-fetched example.[8] Regulation of such activities to the extent they purported to be the practice of medicine would surely not violate the First Amendment. The Act here simply seeks to protect a different constitutional right,[9] while at the same time

[8] Hence the need for provisions like this: "A patient has the right to impartial access to medical treatment or accommodations, regardless of race, national origin, religion, handicap, or source of payment." § 381.026(4)(d)(1).

[9] "The right of the people to keep and bear arms in defense of themselves and of the lawful authority of the state shall not be infringed . . . ." Fla. Const., Art. I, § 8. "[T]he right of the people to keep and bear arms, shall not be infringed." U.S. Const., Amend. II.

encouraging physicians to stick to the practice of medicine when acting in the course of the professional relationship.

In this case, the State has briefed the broad issues involving the validity of the Act generally under the First Amendment. The following expands on an issue raised by the parties but not analyzed extensively – the extent to which the Act is justified under requirements that physicians obtain the informed consent of patients for medical treatment, including the regulation of purported "medical" advice that is not medical at all.

The State of Florida has a valid interest in ensuring that physicians obtain an informed consent in treating patients. That getting an informed consent involves words does not mean that the First Amendment prohibits the State from regulating the practice of medicine to ensure minimum standards. To the extent a physician seeks to give essentially political advice as if it is medical advice and thus to discourage a patient's exercise of a constitutional right, the physician has a responsibility to give unbiased advice about the alternatives. A physician cannot get an informed consent by touting one viewpoint and rejecting another on matters about which medical science is silent and social science is not one-sided.

The Florida Medical Consent Law codifies standards for informed consent by providing that no recovery shall be allowed against a physician in an action "for treating, examining, or operating on a patient without his or her informed consent"

where the action of the physician in obtaining the consent "was in accordance with an accepted standard of medical practice among members of the medical profession with similar training and experience in the same or similar medical community" as that of the physician in question, and either one of the following: (a) from the information provided by the physician, a reasonable individual "would have a general understanding of the procedure, the medically acceptable alternative procedures or treatments, and the substantial risks and hazards inherent in the proposed treatment or procedures" which are recognized by other physicians "in the same or similar community who perform similar treatments or procedures"; or (b) under the circumstances, "the patient would reasonably . . . have undergone such treatment or procedure had he or she been advised" by the physician in accord with (a). Fla. Stat. § 766.103(3).[10]

The charade that promoting an anti-Second Amendment agenda can be "an accepted standard of medical practice among members of the medical profession with similar training and experience in the same or similar medical community" is exposed when it is made clear that such viewpoints are not part of medical training and experience and there is no such accepted standard of medical practice. Even if the issue is somehow a topic for medical treatment, the physician would have to

[10] See also § 381.026(4)(b)(3) ("A patient has the right to be given by his or her health care provider information concerning diagnosis, planned course of treatment, *alternatives*, *risks*, and prognosis") (emphasis added).

render objective advice about the alternatives in order to obtain an informed consent.

The Consent Law further provides that a written consent that meets the above requirements and is signed by a person who is "mentally and physically competent" establishes "a rebuttable presumption of a valid consent." § 766.103(4). Of the physicians who pursue an anti-Second Amendment agenda under the pretension of rendering medical advice, how many advise patients that not having a firearm in the home could render the patient defenseless in the event of a burglary, home invasion, or attempted rape? And how many obtain a written consent with objective warnings to patients agreeing to undergo the "treatment" of removing firearms from their homes and becoming defenseless?

Under the statute, "no presumption of a valid consent will arise unless the consent is an informed consent." *Parikh v. Cunningham*, 493 So.2d 999, 1001 (Fla. 1986), quoting *Valcin v. Public Health Trust*, 473 So.2d 1297, 1302 (Fla. 3d DCA 1984). In *Valcin*, "the alleged oral assurance of one hundred per cent effectiveness" of a bilateral tubal ligation was held to support a woman's "claims that her written consents to the surgery were fraudulently induced by this false assurance and/or were procured without the divulgence of necessary information, and that therefore, the surgery was performed without her informed consent." *Id*.

at 1300. Unreasonable assurances of safety by being defenseless, and of inexorable danger by having a firearm in the house, fall into the same mold.

The State has a valid interest in protecting the integrity of the practice of medicine by mandating standards, regardless of whether enforced by the licensing board or through civil damages actions. Here, the State found that some physicians with a political agenda, under the guise of the practice of medicine, were giving false assurances, refusing to divulge countervailing information, and hence were not obtaining an informed consent when advocating that patients give up firearms as a "health" measure.

Nothing in the First Amendment prohibits the State from regulating the practice of medicine, including requirements that physicians obtain an informed consent for medical procedures – or as here, regulating the charade of non-medical advice as if it is medical advice, without any pretense of the kind of warnings that would be required for an informed consent.

Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 881 (1992), upheld a statute requiring that a physician inform a woman seeking an abortion of the nature of the procedure, the health risks of the abortion and of childbirth, and the likely gestational age of the unborn child. "[A]s with any medical procedure, the State may require a woman to give her written informed consent to an abortion." *Id*. (citation omitted). The State may also, as here,

determine that a political position is not a medical procedure and restrict a physician in pretending that it is.

The required speech in *Casey* was intended to reduce the risk that a woman seeking an abortion may "discover later, with devastating psychological consequences, that her decision was not fully informed. If the information the State requires to be made available to the woman is truthful and not misleading, the requirement may be permissible." *Id*. at 882. Here, the State intended to reduce the risks posed by a political agenda posing as medical advice that, if followed, could lead to adverse personal consequences about which patients are not informed.

Casey further upheld the requirement that doctors provide information about the consequences of an abortion to the fetus, "even when in so doing the State expresses a preference for childbirth over abortion." *Id*. at 883. The State's expressed preference for recognition of Second Amendment rights here, which could just as well favor voting rights or any other rights that are under fire, is equally valid.

There was an exception in the Pennsylvania statute to the required informed consent if the physician reasonably believed that furnishing the information would adversely affect the patient's health, allowing the exercise of medical judgment. *Id*. at 883-84. The statute here has similar exemptions in allowing the physician to

record information about firearms if relevant to the patient's care or safety, to enquire about firearms for the same purpose, and even to harass a patient about firearms if necessary.

Turning to the First Amendment, *Casey* noted that "a requirement that a doctor give a woman certain information as part of obtaining her consent to an abortion is, for constitutional purposes, no different from a requirement that a doctor give certain specific information about any medical procedure." *Id*. at 884. Thus, "the physician's First Amendment rights not to speak are implicated, . . . but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State . . . ." *Id*. (citations omitted).[11] The same justification exists for the law at issue here, which if it implicates the right to speak, does so only as part of the practice of medicine.

Casey ended by upholding certain recordkeeping provisions under which "the identity of each woman who has had an abortion remains confidential." *Id*. at 900. Recordkeeping provisions "that are reasonably directed to the preservation of maternal health and that properly respect a patient's confidentiality and privacy are

[11] In so holding, the Court rejected petitioners' argument that: "In violation of the First Amendment, the biased counseling provisions force the physician to communicate the state's ideology." Brief for Petitioners Planned Parenthood *et al.*, Nos. 91-744, 91-902, 1992 WL 12006398, *53. The Court further did not accept the argument that the statute "is subject to exacting First Amendment scrutiny" and must be "narrowly tailored" to promote a compelling governmental interest. *Id*. at *54.

permissible." *Id*. at 900, quoting *Planned Parenthood of Central Mo. v. Danforth*, 428 U.S. 52, 80 (1976). The provision here limiting recordkeeping about a patient's firearms is equally permissible to protect the patient's confidentiality and privacy.

Imagine what *Casey* would say about a statute admonishing that a patient not be "unnecessarily harassed" about getting or not getting an abortion. No doubt exists that it would be upheld.

Moreover, the state has an interest in restricting the practice of medicine outside of one's expertise, not to mention quackery and crackpot "medicine."[12] *See Cone v. State, Dept. of Health*, 886 So.2d 1007, 1011, 1009-1010 (Fla. 1st DCA 2004) (the Board of Osteopathic Medicine may discipline a physician for acts occurring in the course of a different specialty of medicine in another jurisdiction). It goes without saying that "gun advice" is not a field of medicine.

Moreover, standards based on general recognition in the field pervade health care. "A drug is effective within the meaning of [the Federal Food, Drug, and Cosmetic Act] if there is general recognition among experts, founded on substantial evidence, that the drug in fact produces the results claimed for it under prescribed conditions." *United States v. Rutherford*, 442 U.S. 544, 555 (1979)

[12] "A quack is defined as 'an ignorant or fraudulent pretender to medical skill' . . . ." *Brinkley v. Fishbein*, 110 F.2d 62, 64 (5th Cir. 1940) (purported physician who performed "an operation for transplanting goat glands in men for the purpose of sexual rejuvenation").

(Laetrile not found to be safe and effective). As in that case, here the State may protect patients "from the vast range of self-styled panaceas that inventive minds can devise." *Id*. at 558. That would include, as here, protecting patients from self-styled panaceas of a political movement touting an anti-Second Amendment agenda under the guise of the practice of medicine.

No end exists to what it would require to get an informed consent to rote "medical" advice to refrain from exercise of Second Amendment rights. Whether a constitutional provision is "good or bad" involves all kinds of political and philosophical issues, but assuredly not medical issues. A medical license is not a permit to propagate a one-dimensional constitutional viewpoint under the guise that it is the practice of medicine. Recall that the "practice of medicine" is defined as "the diagnosis, treatment, operation, or prescription for any human disease, pain, injury, deformity, or other physical or mental condition." § 458.305(3).

Physicians are not licensed to give professional opinions on, much less to harass patients by reason of, gun ownership. "Medical literature addressing the subject of gun violence . . . noticeably lacks dialogue on the question of whether physicians are properly the persons to be imparting gun information to patients." Frederick A. Paola, M.D., J.D., "Physicians, Firearm Counseling, and Legal Liability," 94:1 *Southern Medical Journal* 88 (2001). Does a physician who informs patients that the risk of harm with gun ownership outweighs the benefits

meet the standard of care and provide the basis for an informed consent? How would a physician evaluate published claims that a gun is more likely to injure or kill a member of a household, or would be an effective protection against violent intrusion or deadly force in the home? Consider:

> Kellermann *et al.* have argued that the family gun is more likely to kill you or someone you know than to be used in self-defense. However, criminologist Kleck has estimated that there were 2.5 million episodes of defensive gun use per year in the United States during the period 1988 to 1993, of which about 400,000 "were claimed by the [defensive gun users] to have certainly or almost certainly save a life."

Id. at 89 (citations omitted).

As Dr. Paola comments: "Certainly, the argument that a patient would find such information relevant as she weighs the risks and benefits of gun ownership – and consequently that the counseling physician omitting such information had not met the standard of care – would not be a difficult one to make." *Id*. at 89.

In a medical negligence claim, Dr. Paola continues, a victim of a rape or robbery who gave up her gun on a physician's advice could argue that "but for the physician's advice, she would have been armed at the time of the attack, and her being armed would have prevented the injury." *Id*. at 90. The intervening criminal act would not break the causation where "the physician's negligent counseling created a foreseeable risk that the patient would be the victim of a crime by impairing her ability to defend herself." *Id*.

Despite all of the above, the Act does not generally regulate speech on the subject. It only admonishes against unnecessarily harassing patients, restricts recordkeeping that violates patient privacy, and prohibits discrimination. Patients see physicians for medical advice and treatment, not to be harangued about politics or to have their exercise of constitutional rights recorded in medical records. To the extent a physician's First Amendment right to speak is implicated at all, it is "only as part of the practice of medicine, subject to reasonable licensing and regulation by the State . . . ." *Casey*, 505 U.S. at 884.

II. STATE AND FEDERAL LAWS ON FIREARM OWNERSHIP STRICTLY PROTECT PRIVACY RIGHTS AND DO NOT SANCTION ENTRY OF SUCH OWNERSHIP INTO PATIENT RECORDS

State and federal firearm laws provide numerous provisions designed to protect the privacy of gun owners from governmental intrusion. Until recent times, it was unprecedented for private actors to demand and keep records of gun ownership by other private actors, under the guise of rendering professional services by the former to the latter. The Act's provisions, particularly the directive that a physician may not enter disclosed information about firearm ownership in a patient's medical record, § 790.338(1), sought to address this threat.

The district court underrated the public interest in protecting the privacy of firearm ownership by stating: "Information regarding firearm ownership is not sacrosanct; federal and state statutes regulate firearm ownership, possession, and

sale, and require firearm owners to provide personal information in certain circumstances as a condition for obtaining a firearm or certain licenses." *Wollschlaeger v. Farmer*, 880 F. Supp.2d 1251, 1265 (S.D. Fla. 2012). That disregards the strong protections for privacy in those federal and state laws.

The lower court further remarked: "If a patient discloses whether she owns or possesses a firearm and the practitioner includes that information in her file, state and federal laws pertaining to the confidentiality of medical records will protect that information." *Id*. at 1266. Whether such laws "will" protect that information may be wishful thinking. The Act is designed as an additional guard to see that they do so.

Fla. Stat. § 790.335(1)(a)(2) articulates adverse consequences to maintaining records on gun owners that could apply as well to private parties as to government:

> A list, record, or registry of legally owned firearms or law-abiding firearm owners is not a law enforcement tool and can become an instrument for profiling, harassing, or abusing law-abiding citizens based on their choice to own a firearm and exercise their Second Amendment right to keep and bear arms as guaranteed under the United States Constitution. Further, such a list, record, or registry has the potential to fall into the wrong hands and become a shopping list for thieves.[13]

[13] These adverse consequences are founded in practice and history, including the use of registration to deprive citizens of their rights. *E.g*., *Watson v. Stone*, 4 So. 2d 700, 703 (Fla. 1941) (Buford, J., concurring) (gun licensing law "was passed for the purpose of disarming the negro laborers . . . . The statute was never intended to be applied to the white population").

State and local governments are prohibited from keeping "any list, record, or registry of privately owned firearms or any list, record, or registry of the owners of those firearms." § 790.335(2). Moreover, certain firearm records required to be kept "shall not, at any time, be electronically transferred to any public *or private entity, agency, business, or enterprise . . . .*" § 790.335(3)(f)(3) (emphasis added). In addition, "Personal identifying information of an individual who has applied for or received a license to carry a concealed weapon or firearm . . . is confidential and exempt from" disclosure. § 790.0601(1).

Federal laws also provide strict privacy protections regarding gun ownership. Nothing in the Patient Protection and Affordable Care Act "shall be construed to authorize or may be used for the collection of any information relating to – (A) the lawful ownership or possession of a firearm or ammunition . . . ." 42 U.S.C. § 300gg-17(c)(2). But that does not suffice to prevent the misuse of records generated by physicians on gun ownership by their patients. The Act here provides additional protection.

The Brady Handgun Violence Prevention Act, P.L. 103-159, 107 Stat. 1536, (1993), established the National Instant Criminal Background Check System (NICS) to determine whether persons may lawfully receive firearms from licensed dealers. The Act provides that no federal agency may "require that any record" generated by NICS "be recorded at or transferred to a facility owned, managed, or

controlled by the United States or any State or political subdivision thereof." § 103(i)(1). It also prohibits any federal department from using NICS "to establish any system for the registration of firearms, firearm owners, or firearm transactions," except regarding ineligible persons. § 103(i)(2).

When a person clears the background check, NICS provides the dealer with a unique number for the transfer and then must "destroy all records of the system with respect to the call (other than the identifying number and the date the number was assigned) and all records of the system relating to the person or the transfer." 18 U.S.C. § 922(t)(2).

Similarly, the Firearms Owners' Protection Act of 1986 prohibits any rule under which gun sale records may "be recorded at or transferred to" a federal or state facility, and further prohibits "any system of registration of . . . firearms owners . . . ." 18 U.S.C. § 926(a). In passing this law, Congress found that "the rights of citizens" under the Second, Fourth and Fifth Amendments required greater protection. § 1(b)(1), P.L. 99-308, 100 Stat. 449.

Privacy rights of gun owners, like those of other groups, may also be found in the First Amendment right of association. *National Rifle Ass'n v. City of South Miami*, 774 So. 2d 815 (Fla. 3rd DCA 2000), quashed an order that NRA and Unified Sportsmen of Florida must reveal the identities of certain of their members. Filing the lawsuit did not mean that the Association's "have waived

their privacy rights concerning the members' names." *Id*. at 816, citing *NAACP v. Alabama*, 357 U.S. 449, 462 (1958). The cited case upheld the right not to disclose membership in the NAACP. "Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident beliefs." *Id*. at 462.

By analogy, imagine a political movement among some physicians to discourage patients from being members of associations such as the NRA or the NAACP on the basis that it was somehow against the public health, and entering disclosed information about such memberships in a patient's medical record. No question would exist that the State could restrict any abuses under its authority to regulate the medical profession and to protect constitutional rights.

Here, it is not enough that patients may refuse to disclose gun ownership. The potential for intimidation by a physician, who holds a one-sided relationship of power over a patient, is legitimately restricted by the directive not to record firearm ownership in medical records when not actually relevant in a medical context.

In sum, the firearms laws of both Florida and the United States regarding background checks and similar subjects may require the confidential identification of persons wishing to acquire or carry firearms. However, these laws include strict privacy protections, often including the destruction of the records once the person's qualifications are established. These laws in no way sanction the

legitimacy of physicians including information about firearms ownership into the medical records of patients outside of any medical context.

III. THE ADMONITION THAT A PHYSICIAN SHOULD REFRAIN FROM UNNECESSARILY HARASSING A PATIENT ABOUT FIREARM OWNERSHIP DURING AN EXAMINATION IS NOT VAGUE

The admonition in § 790.338(5) that a physician "should refrain from unnecessarily harassing a patient about firearm ownership during an examination" sets an extraordinarily easy standard for compliance compared to other statutes concerning harassment. A physician "should," not "shall," refrain from "unnecessarily" harassing – not just "harassing" – a patient about gun ownership, and only "during an examination" at that. While provisions in other areas of the law require a showing only of harassment, this requires in addition that the harassment be "unnecessary," which imposes a heavy burden on anyone alleging unnecessary harassment, and allows wide latitude to the physician to provide explanations.

The term "harassment" is ubiquitous in Florida law, from the prohibition on "sexual harassment" in the executive department, Fla. Stat. § 110.1221, to the ban on "bullying and harassment" in the public schools. § 1006.147. To suggest that that term is vague would be to overturn entire areas of the law governing minimum standards of conduct.

Florida's general statute making harassment a crime provides an ordinary definition of the term: "'Harass' means to engage in a course of conduct directed at a specific person which causes substantial emotional distress to that person and serves no legitimate purpose." Fla. Stat. § 784.048(1)(a). The Florida Supreme Court rejected a claim that this creates a subjective standard under which "an unduly sensitive victim may suffer such distress from entirely innocent contact," holding that it "creates a 'reasonable person' standard" and "is not impermissibly vague." *Bouters v. State*, 659 So.2d 235, 238 (1995), *cert. denied*, 516 U.S. 894 (1995).[14]

Similarly, it is an offense to make "obscene or harassing telephone calls." F.S. § 365.16(1)(c). While the words "offend" and "annoy" in a prior version were held vague, the law was upheld under the First Amendment as applied "to calls made to a listener with the intent to abuse, threaten, or harass where the listener has a reasonable expectation of privacy." *Gilbreath v. State*, 650 So.2d 10, 11 (Fla. 1995), citing *Frisby v. Schultz*, 487 U.S. 474, 484-85 (1988).

Similarly, *United States v. Eckhardt*, 466 F.3d 938, 943 (11th Cir. 2006), *cert. denied*, 549 U.S. 1230 (2007), agreed that the federal telephone harassment

[14] *See Slack v. Kling*, 959 So.2d 425 (Fla. 2d DCA 2007) ("In determining if an incident causes substantial emotional distress, courts use a reasonable person standard, not a subjective standard"; two phone messages did not suffice).

statute "prohibit[s] communications intended to instill fear in the victim, not to provoke a discussion about political issues of the day." It continued that the law:

> provided sufficient notice of its prohibitions because citizens need not guess what terms such as "harass" and "intimidate" mean. . . . "[T]he meaning of the words used to describe the [impermissible] conduct 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. at 944 (citation omitted).

Here, a mere showing of harassment is insufficient – the harassment must be "unnecessary," which would require a substantial showing far more serious than simple harassment, and would allow a physician to show that it was necessary using a full array of explanations. Even then, the Act only states that a physician "should refrain" from such, rendering it a mere admonition. The provision is simply not vague under any standard.

CONCLUSION

This Court should uphold the constitutionality of the Firearm Owners' Privacy Act and reverse the judgment of the district court.

Dated March 24, 2016

Respectfully submitted,

/s/ Stephen P. Halbrook
3925 Chain Bridge Road, Suite 403
Fairfax, Virginia 22030-3940
Tel: (703) 352-7276
Fax: (703) 359-0938
Email: protell@aol.com

Counsel for Amicus Curiae
Unified Sportsmen of Florida, Inc.

CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in FED. R. APP. P. 32(a)(7)(B). This brief contains 5,699 words.

March 24, 2016

/s/ Stephen P. Halbrook

Counsel for Amicus Curiae

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on this 24th day of March, 2016, I caused this *Certificate of Interested Persons and Corporate Disclosure Statement* to be filed electronically with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

Edward M. Mullins
ASTIGARRAGA DAVIS MULLINS & GROSSMAN, P.A.
701 Brickell Avenue, 16th Floor
Miami, Florida 33131-2847
Telephone: (305) 372-8282

Jonathan E. Lowy
BRADY CENTER TO PREVENT GUN VIOLENCE
840 First Street NE, Suite 400
Washington, D.C. 20002
Telephone: (202) 370-8104

Douglas H. Hallward-Driemeier
Mariel Goetz
ROPES & GRAY LLP
2099 Pennsylvania Ave., NW

Washington, D.C. 20006
Telephone: (202) 508-4600

Erin R. Macgowan
Alexandra L. Roth
ROPES & GRAY LLP
Prudential Tower
800 Boylston Street
Boston, Massachusetts 02199-3600
Telephone: (617) 951-7000

Counsel for Petitioners

Pam Bondi
Allen C. Winsor
Timothy Osterhaus
Jason Vail
Diane G. DeWolf
Rachel E. Nordby
Office of the Attorney General
PL01 – The Capitol
Tallahassee, Florida 32399-1050

Counsel for Respondents

/s/ Stephen P. Halbrook
Counsel for Amicus Curiae
Unified Sportsmen of Florida, Inc.