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VIA CM/ECF FILING

David J. Smith
Clerk of Court
United States Court of Appeals
For the Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, GA 30303

Re: *Dr. Bernd Wollschlaeger, et al v. Governor of the State of Florida, et al.*
Case No. 12-14009

Dear Mr. Smith:

On June 23, 2016, the Court directed the parties to file simultaneous letter briefs addressing whether the provisions of the Firearms Owners' Privacy Act are severable. In response to the Court's question, Defendants/Appellants submit that any invalid provision is indeed severable. As detailed below, Florida law favors severability, and severance is appropriate in this case. The Act's provisions are functionally independent, and any invalid provision can easily be severed without disrupting the operation or integrity of the remaining provisions. If the Court determines that any provision of the Act is invalid, the Court should apply the doctrine of severability and uphold all remaining valid provisions of the Act.

A. Florida law favors severability.

Severability of a state statute is a matter of state law. *Leavitt v. Jane L.*, 518 U.S. 137, 139, 116 S. Ct. 2068, 2069 (1996). And Florida law "clearly favors" severability. *Coral Springs St. Sys., Inc. v. City of Sunrise*, 371 F.3d 1320, 1347 (11th Cir. 2004); *Hershey v. City of Clearwater*, 834 F.2d 937, 939 (11th Cir. 1987).

This strong presumption in favor of severability exists because the core purpose of the doctrine is to preserve the operation of legislative enactments where possible. *Ray v. Mortham*, 742 So. 2d 1276, 1281 (Fla. 1999). As the Florida Supreme Court has explained, severability is grounded in the "respect of the judiciary for the separation of powers, and is 'designed to show great deference to the legislative prerogative to enact laws.' " *Id.* at 1280 (quoting *Schmitt v. State*, 590 So. 2d 404, 415 (Fla. 1991)). To that end, the doctrine " 'recognizes that federal courts have an affirmative duty to preserve the validity of legislative enactments when it is at all possible to do so.' " *Coral Springs St. Sys., Inc.*, 371 F.3d at 1347-48 (quoting *Fla. Outdoor Advert. v. City of Boynton Beach*, 182 F. Supp. 2d 1201, 1209 (S.D. Fla. 2001)); *see Frazier ex rel. Frazier v. Winn*, 535 F.3d 1279, 1283 (11th Cir. 2008) ("We owe the work of the elected representatives of the people of Florida respect; and we will invalidate no more of the statute than we must.").

B. Severance is appropriate under Florida's multi-prong analysis.

Plaintiffs/Appellees ("Plaintiffs") challenge the constitutionality of four provisions of section 790.338, Florida Statutes, which was enacted as part of Florida's Firearms Owners' Privacy Act. Should the Court determine that any of the challenged provisions are invalid, it should apply the doctrine of severability and uphold the remainder of the Act. Under Florida's severability analysis, the Act's provisions are functionally independent, and any invalid provision can easily be severed without disrupting the operation or integrity of the remaining valid provisions.

In Florida, "[t]he severability of a statutory provision is determined by its relation to the overall legislative intent of the statute of which it is a part, and whether the statute, less the invalid provisions, can still accomplish this intent." *Martinez v. Scanlan*, 582 So. 2d 1167, 1173 (Fla. 1991) (quoting *E. Air Lines, Inc. v. Dep't of Revenue*, 455 So. 2d 311, 317 (Fla. 1984)). To aid in addressing whether a legislative enactment is severable, the Florida Supreme Court has articulated a multi-prong analysis:

> (1) whether the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void; (2) if the good and bad features are not inseparable and if the Legislature would have passed one without the other; and (3) whether an act complete in itself remains after the invalid provisions are stricken.

Fla. Hosp. Waterman, Inc. v. Buster, 984 So. 2d 478, 493 (Fla. 2008) (citing *Moreau v. Lewis*, 648 So. 2d 124, 128 (Fla. 1995)). Notably, under this analysis, the burden is on the *challenging party* to establish that the law would not have been enacted without the invalid language. *See Ray*, 742 So. 2d at 1281, 1283 (rejecting attempt to place burden on State defendant to prove that law would have been adopted without the invalid provision because the burden of proof "is properly on the challenging party"); *id.* at 1284 ("[The challengers] have failed to establish that the voters' purpose in passing the amendment was only to limit terms of federal officeholders and the voters would not have approved the term limits amendment if only state officeholders had been included.").

Applied to the Act, all three prongs support severability. Severing any of the challenged provisions would not have any adverse effect on the remaining portions and, instead, would leave intact a complete and workable statute. Moreover, because each provision addresses distinctly separate legislative purposes, Plaintiffs cannot satisfy their burden to establish that the Legislature would not have enacted the Act without the challenged provisions.

The Act in its entirety: 1) creates section 790.338, Florida Statutes, relating to medical privacy concerning firearms, 2) amends Florida's Patient's Bill of Rights and Responsibilities, codified at section 381.026, Florida Statutes, to include four provisions addressing medical privacy concerning firearms (adapted from sections 790.338(2) & (4)-(6)), and 3) amends section 456.072, Florida Statutes, to include a violation of 790.338 as grounds for discipline by the Board of Medicine. Ch. 2011-112, Laws of Fla.

Substantively, section 790.338 contains eight subsections, four of which Plaintiffs challenge as unconstitutional restrictions on physician speech: the record-keeping provision at subsection (1), the inquiry provision at subsection (2), the discrimination provision at subsection (5), and the harassment provision at subsection (6). DE 15:¶¶58-62. As for the remaining provisions, subsection (3) addresses emergency medical technicians and paramedics, subsection (7) applies to insurance companies, subsection (4) provides that a patient may refuse to answer questions regarding firearms, and subsection (8) provides that violations of subsection (1)-(4) constitute grounds for disciplinary action. Fla. Stat. §§ 790.338(3)-(4), (7)-(8).

Each provision of section 790.338 not only expresses a different legislative purpose, but also operates independently from the other provisions. For that reason, the first and third prongs of the severability analysis weigh in favor of severability. The four challenged provisions are not so inextricably intertwined as to prohibit severability in this case. Specifically, the four challenged subsections address separate and distinct subjects—purposely irrelevant record-keeping, Fla. Stat. § 790.338(1), inquiries made without a good faith belief of relevancy to medical care or safety, *id.* § 790.338(2), discrimination based solely upon a patient's ownership or possession of firearms, *id.* § 790.338(5), and unnecessary harassment about firearm ownership during an examination, *id.* § 790.338(6). The Legislature's purpose in enacting any one of these four provisions can still be accomplished in the absence of the other three provisions. As for the remaining subsections of section 790.338, they likewise address distinct subject matter and are not dependent on any of the four challenged provisions. *Id.* § 790.338(3)-(4), (7)-(8); *see also* DE 105:23-24 (applying severability to uphold subsections (3), (4), and (7) because they "are separable in substance from the invalid portions of the law" and "it cannot be said that the legislature would never have passed these subsections without the invalid portions of the law").

As for the second prong of the analysis, Plaintiffs cannot satisfy their burden to establish that the Legislature would not have passed the law without the challenged provisions. The Legislature structured the Act to address various legislative purposes, and

there is no indication that the Act's passage depended on any one of the challenged provisions. *Frazier*, 535 F.3d at 1283 ("Because nothing indicates that the Florida legislature would have declined to enact the Pledge Statute absent the provision which we see as unconstitutional, we conclude that the invalid 'standing at attention' provision may be severed."). The second prong therefore supports severance here.

Finally, although the Legislature did not include a severability clause in the Act, the lack of one is not determinative in the analysis. *Buster*, 984 So. 2d at 493 ("Although section 381.028 does not contain a severability clause, this does not affect our ability to sever the unconstitutional portions of the statute." (citing *Ray*, 742 So. 2d at 1280)). Rather, what is determinative is that all three prongs of the analysis weigh in favor of severability. Accordingly, should the Court determine that any provision of the Act is invalid, it should afford deference to the "work of the elected representatives of the people of Florida," *Frazier*, 535 F.3d at 1283, and uphold all remaining valid portions of the Act.

Sincerely,

Rachel Nordby
Counsel for Defendants/Appellants

cc: Counsel of record (through CM/ECF)

AFFIRMATIVE ACTION/EQUAL OPPORTUNITY EMPLOYER