IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
Case No.: 12-14009
D.C. Docket No.: 1:11-cv-22026-MGC

DR. BERND WOLLSCHLAEGER, DR. JUDITH SCHAECHTER, DR. TOMMY SCHECHTMAN, AMERICAN ACADEMY OF PEDIATRICS, FLORIDA CHAPTER, AMERICAN ACADEMY OF FAMILY PHYSICIANS, FLORIDA CHAPTER, AMERICAN COLLEGE OF PHYSICIANS, FLORIDA CHAPTER, INC., ROLAND GUTIERREZ, STANLEY SACK, SHANNON FOX-LEVINE,
Plaintiffs-Appellees,

vs.

GOVERNOR OF THE STATE OF FLORIDA, et al.,
Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Florida

EN BANC BRIEF OF AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PLAINTIFFS-APPELLEES DR. BERND WOLLSCHLAEGER, ET AL. AND AFFIRMANCE

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DOCKET NO.: 12-14009
WOLLSCHLAEGER, ET AL. V. GOVERNOR OF FLORIDA, ET AL.

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and 11th Cir. R. 26.1, *amicus curiae* American Bar Association ("ABA") discloses that it is an Illinois nonprofit corporation, has no parent corporation, and does not issue shares of stock. ABA is a national organization representing its more than 400,000 attorney members, law student members, and non-lawyer "associates" in related fields.[*]

On behalf of *amicus curiae*, American Bar Association, the undersigned certifies that the Certificate of Interested Persons and Corporate Disclosure Statement included within Defendants-Appellants' *En Banc* Brief is complete.

/s/ Paulette Brown
Paulette Brown

[*] No party's counsel authored this brief, and no party, its counsel, or other person contributed money intended to fund this brief's preparation or submission, other than ABA and its members.

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STATEMENT OF THE ISSUES

1. Whether the restrictions on physician speech in the Firearm Owners' Privacy Act, Fla. Stat. § 790.338, violate the First Amendment.

IDENTITY AND INTEREST OF *AMICUS CURIAE*

Pursuant to Federal Rule of Appellate Procedure 29(b) and 11th Cir. R. 35-9, the ABA respectfully submits this brief, accompanied by a motion for leave to participate as *amicus curiae*, in support of Plaintiffs-Appellees and affirmance of the judgment below.[1]

Founded in 1878, the ABA is one of the largest voluntary professional membership organizations and is the leading association of legal professionals in the United States. Its more than 400,000 members practice in all fifty states and other jurisdictions. They include attorneys in private law firms, corporations, non-profit organizations, government agencies, and prosecutor and public defender offices, as well as judges, legislators, law professors, law students, and non-lawyer "associates" in related fields.[2]

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[1] No party's counsel authored this brief in whole or in part. No person or entity other than *amicus curiae*, its members, and its counsel contributed money intended to fund the preparation or submission of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the view of any judicial member of the ABA. No member of the Judicial Division Council participated in the adoption or endorsement of the positions in this brief, nor was it circulated to any member of the Judicial Division Council before filing.

The ABA has a significant interest in this case. The State of Florida has passed a statute barring doctors from asking patients questions about firearm ownership that Florida deems not "relevant" to medical care, to combat what some perceived as doctors' expression of a particular political viewpoint. Florida now defends the Act on the novel and sweeping ground that speech that takes place within a professional-client relationship is entitled to lesser protection under the First Amendment. A decision upholding that rationale would allow States to bar not only doctors but also other professionals, including lawyers, from expressing to their clients any viewpoint with which the State disagrees. Such a rule would strike at the very heart of the attorney-client relationship and violate basic First Amendment principles.

More specifically, in 2012 the ABA adopted a policy opposing "governmental actions and policies that limit the rights of physicians and other health care providers to inquire of their patients whether they possess guns and how they are secured in the home or to counsel their patients about the dangers of guns in the home and safe practices to avoid those dangers."[3] The accompanying report noted that legislation limiting the right of health care professionals to ask their patients such questions interferes with preventive care duties that are a

[3] ABA Policy # 111 (Aug. 2012), *available at* http://www.americanbar.org/content/dam/aba/directories/policy/2012_hod_annual_meeting_111.doc

foundation of modern medicine, and violates the First Amendment rights of both health care practitioners and their patients.

Based on its enduring belief in the crucial importance of protecting First Amendment rights, including the right to open and unfettered dialogue between members of regulated professions such as doctors and attorneys and their patients or clients, and for the reasons stated below, the ABA urges this Court to affirm.

SUMMARY OF ARGUMENT

The Firearm Owners' Privacy Act (the "Act") is subject to strict scrutiny because it silences truthful and vital speech on the basis that the State disagrees with the message it conveys. There is no doubt that discussions between doctors and patients concerning gun safety can save lives. The State's assertion that this subject is "irrelevant" to patient care is nothing more than a determination by the State that it does not like doctors' message. That is classic viewpoint discrimination. Accordingly, the Act must be subject to the strictest scrutiny.

The State argues that the Act should receive lessened scrutiny because it regulates so-called "professional speech." But a viewpoint-discriminatory law is not somehow less pernicious because it affects speech by a professional to her client. On the contrary, much speech by professionals—whether by a lawyer to her client or a doctor to his patient—falls at the core of the First Amendment. The government should not, under the guise of regulating the profession, be permitted

to silence a perceived "political agenda" of which it disapproves. That is the central evil against which the First Amendment is designed to protect.

Finally, the Act fails either strict or intermediate scrutiny because it is not drawn in a manner that directly advances a substantial governmental interest. The Act does not, as the State claims, protect against impairment of the Second Amendment right to bear arms. Nor does it protect against any real prospect that patients' privacy rights will be violated. Rather, the Act does one thing: It silences truthful information about gun safety that the State characterizes as an "anti-gun" message with which the State disagrees. It therefore cannot withstand review.

ARGUMENT

I. THE ACT SILENCES DOCTORS' TRUTHFUL AND IMPORTANT SPEECH ABOUT GUN SAFETY TO SUPPRESS A DISFAVORED VIEWPOINT AND IS THUS SUBJECT TO STRICT SCRUTINY

Gun-related deaths and injuries, especially to children, are a serious public health issue. To help prevent such tragedies, the American Medical Association has adopted a policy encouraging "members to inquire as to the presence of household firearms as a part of childproofing the home." Prevention of Firearm Accidents in Children, AMA Policy H-145.990. As explained at greater length in Appellees' brief and Judge Wilson's panel dissents, many Florida doctors did so. After some patients complained that they were uncomfortable being asked such questions, Florida enacted the Firearm Owners' Privacy Act. Among other things,

the Act bars doctors from asking patients about firearm ownership unless the doctor has a "good faith" belief that the information is "relevant" to the patient's or others' medical care or safety, Fla Stat. § 790.338(2) (the "inquiry provision"), and from recording such information in a patient's medical records if the doctor "knows that such information is not relevant," *id.* § 790.338(1) (the "record-keeping provision").

In other words, the Act bars doctors from taking the very first step and starting a conversation with their patients about firearm safety unless they can satisfy a vague standard of "relevance." As noted, the AMA and many doctors believe that such information is always relevant, and many doctors thus ask about firearm ownership as a matter of course when taking a patient's initial history. Although it is unclear what the statute means by "relevant," it is clear that Florida has interpreted relevance more narrowly than has much of the medical profession. The panel majority thus construed the statute to mean that a doctor must have "particularized information about the patient"—such as suicidal tendencies or an inclination toward violence—that would make information about gun ownership "relevant." [12/14/15 Op. 30-32.] Absent such "particularized information," a doctor is proscribed from asking his patients about firearms. The result, as Judge Wilson explained, is that many doctors will be deterred from initiating discussions

with their patients about gun safety—even when those patients are perfectly willing to have such discussions.

There is no doubt that such discussions save lives. Before adopting its policy opposing limits on doctors' right to speak to patients about guns, the ABA conducted an extensive review of the empirical evidence demonstrating the major public health problem caused by unsafe gun storage in the home and the benefits of counseling patients on gun security and storage. The data set out in ABA Report #111 demonstrate the need for and importance of such counseling:

- "[O]ne-third of U.S. homes with children younger than eighteen have a firearm, and more than 40% of gun-owning households with children store their guns unlocked, with one-quarter of those homes storing them loaded." ABA Report #111 at 2.[4]
- "Unintentional injury is a health hazard, and is the leading cause of death among children older than one year, adolescents, and young adults." *Id.*[5]
- According to the Centers for Disease Control and Prevention, "every day in America, thirty-eight children and teens are injured by firearms and eight are killed by firearms." *Id.*[6]

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[4] Renee Johnson, M.P.H. et al., *Firearm Ownership and Storage Practices, U.S. Households, 1992-2002*, 27 AM. J. PREVENTIVE MED. 173, 179 (2004); *see also* Teresa L. Albright, M.D. & Sandra K. Burge, Ph.D., *Improving Firearm Storage Habits: Impact of Brief Office Counseling by Family Physicians*, 16 J. AM. BOARD FAMILY PRACTICE 1, 40 (Jan.-Feb. 2003).

[5] Centers for Disease Control and Prevention, *10 Leading Causes of Death by Age Group* (Sept. 3, 2010) *available at*: http:// http://www.cdc.gov/injury/wisqars/pdf/death_by_age_2007-a.pdf

[6] Centers for Disease Control and Prevention, *WISQARS Nonfatal Injury Reports*, *available at*: http://webappa.cdc.gov/sasweb/ncipc/nfirates2001.html; *WISQARS*

(footnote continued on next page)

- "Suicide is the third leading cause of death among individuals aged 15 to 24 and is the second leading cause of death for individuals aged 25 to 34. Firearms are frequently used in suicide and suicide attempts," and are the most common suicide method among adult men. "[S]uicide attempts committed with firearms are fatal more than 90% of the time." *Id.*[7]
- "Intentional and unintentional injury related deaths caused by firearms claim more lives than all injury sources except motor vehicles." *Id*.[8]
- "Children aged 5 to 14 years in the United States are 11 times more likely to be killed accidentally with a gun than similarly aged children in other developed countries." *Id*. at 4.[9]
- "[S]afety counseling . . . is also shown to have concrete results. One study showed that after a single instance of verbal counseling, more than 58% of patients reported making changes to their gun storage habits." *Id.* at 2.[10]

Yet the State of Florida has barred doctors from initiating such counseling on the ground that it is not "relevant" to patients in general, instead apparently requiring that doctors have some unspecified ground for believing that it is relevant

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Injury Mortality Reports, 1999-2007, *available at*: http://webappa.cdc.gov/sasweb/ncipc/mortrate10_sy.html

[7] Centers for Disease Control and Prevention, *Suicide: Facts at a Glance* (Summer 2010), *available at* http://www.cdc.gov/violenceprevention/pdf/suicide-datasheet-a.pdf

[8] Teresa L. Albright, M.D. & Sandra K. Burge, Ph.D., *Improving Firearm Storage Habits: Impact of Brief Office Counseling by Family Physicians*, 16 J. AM. BOARD FAMILY PRACTICE 1, 40 (Jan.-Feb. 2003).

[9] Erin G. Richardson & David Hemenway, *Homicide, Suicide, and Unintentional Firearm Fatality: Comparing the United States With Other High-Income Countries, 2003*, J. TRAUMA, INJURY, INFECTION, & CRITICAL CARE at 1 2010.

[10] Teresa L. Albright, M.D. & Sandra K. Burge, Ph.D., *Improving Firearm Storage Habits: Impact of Brief Office Counseling by Family Physicians*, 16 J. AM. BOARD FAMILY PRACTICE 1, 44 (Jan.-Feb. 2003).

to a particular patient. That thwarts the purpose of preventive care, which requires doctors to ask questions of their patients on "a broad range of topics . . . related to known risk factors" to understand the risks they are running and the advice they need. ABA Report #111 at 1. To take an obvious example, doctors regularly ask patients about smoking without any basis to believe that smoking-cessation counseling would be relevant to a particular patient; they must first know whether the patient smokes to make that determination.

In fact, Florida's determination that doctors' speech about guns is not "relevant" to patient care is nothing more than a determination that it does not like the message doctors are conveying. The State all but admits that, acknowledging that the Act was passed to stop doctors from advancing a perceived anti-gun "political agenda." Fla. Br. 4 (quoting from testimony before legislature that "[q]uestioning patients about gun ownership to satisfy a political agenda … needs to stop"); *id.* at 3 (quoting legislator who perceived doctor's counseling about gun safety as "a political … attack on the constitutional right to own a … firearm").

Indeed, the very justifications the State proffers in the Act's defense reveal that its purpose and effect are to silence the expression of a disfavored "political" viewpoint. The State contends that doctors' questions somehow burden the right to keep and bear arms. Fla. Br. 45.

Put differently, the State is concerned that doctors may persuade patients to store their firearms differently or remove them from the home. As Judge Wilson explained, "the perceived problem with doctors' truthful, non-misleading message regarding firearm safety was that it was working, so the message was silenced. This is classic viewpoint discrimination." [7/28/15 dissent at 94.]. Consequently, the Act is subject to the "most exacting scrutiny." *Turner Broad. Sys., Inc. v. F.C.C.*, 512 U.S. 622, 642, 114 S. Ct. 2445, 2459, 129 L. Ed. 2d 497 (1994); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 565-66, 570-71, 131 S. Ct. 2653, 2664, 2667, 180 L. Ed. 2d 544 (2011).

II. VIEWPOINT-BASED SPEECH RESTRICTIONS ARE NOT SUBJECT TO LESSENED SCRUTINY SIMPLY BECAUSE THEY AFFECT "PROFESSIONAL SPEECH"

The State contends that the Act's provisions should receive lessened scrutiny, arguing that "[b]ecause any speech implicated . . . by the challenged provisions occurs within the confines of the unique professional relationship between a physician and a patient, it is subject to reasonable regulation by the State." Fla. Br. 34. The State thus asserts an astonishingly broad authority to prohibit the expression of disfavored ideas by a professional to her client.

The State is wrong, and such prohibitions are pernicious, because they impermissibly intrude on the professional-client relationship—which requires a free and open exchange of ideas and information to function—and flout basic First

Amendment values. Speech by professionals is not speech of lower value, "afforded a lesser degree of First Amendment protection" (*id.* at 36); it can be at the very core of the First Amendment. Simply put, States should not be permitted to suppress ideas of which they disapprove simply because those ideas are expressed by licensed professionals in the course of practicing their profession. Could they do so, the implications would extend far beyond this case and threaten irreparable damage to the attorney-client, as well as the doctor-patient, relationship. Indeed, the Supreme Court has never recognized "professional speech" as a category of lesser protected expression, and has repeatedly admonished that no new such classifications be created. *United States v. Stevens*, 559 U.S. 460, 130 S. Ct. 1577, 176 L. Ed. 2d 435 (2010); *United States v. Alvarez*, 132 S. Ct. 2537, 183 L. Ed. 2d 574 (2012).

"It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys." *Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 828, 115 S. Ct. 2510, 2516, 132 L. Ed. 2d 700 (1995). And "[w]hen the government targets not subject matter, but particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant . . . . The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction." *Id.* at 829, 115 S. Ct. at 2516. The suppression of a

disfavored viewpoint is the core evil against which the First Amendment is designed to protect.

Just last year, the Supreme Court reiterated in no uncertain terms that content-based—and, *a fortiori*, viewpoint-based—speech restrictions are subject to strict scrutiny. *See Reed v. Town of Gilbert, Ariz.*, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015). "Content-based laws . . . are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Id.* at 2226. Likewise, even facially content-neutral laws must satisfy strict scrutiny if they were "adopted by the government because of disagreement with the message the speech conveys." *Id.* at 2227 (internal quotation marks and brackets omitted). Indeed, "[g]overnment discrimination among viewpoints—or the regulation of speech based on the specific motivating ideology or the opinion or perspective of the speaker—is a more blatant and egregious form of content discrimination." *Id.* at 2230 (citations and quotations omitted).

Here, as already explained, the Act is both content- and viewpoint-based: It singles out speech by doctors on one topic (gun ownership) in order to suppress a particular viewpoint on that topic (that gun owners should consider removing guns from their homes or securing them more safely) because State legislators disapprove of that viewpoint. Such content- and viewpoint based-restrictions "are

presumptively invalid." *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 382, 112 S. Ct. 2538, 2542, 120 L. Ed. 2d 305 (1992). "[C]ontent-based restrictions on speech . . . can stand only if they survive strict scrutiny, which requires the Government to prove that the restriction furthers a compelling interest and is narrowly tailored to achieve that interest." *Reed*, 135 S. Ct. at 2231 (citations and quotations omitted); *see also Ward v. Rock Against Racism*, 491 U.S. 781, 791, 109 S. Ct. 2746, 2754, 105 L. Ed. 2d 661 (holding that, in determining content-neutrality, the principal inquiry is "whether the government has adopted a regulation of speech because of disagreement with the message it conveys.").

In advocating for lesser scrutiny, the State relies heavily on cases addressing restrictions on commercial speech, which typically receive intermediate scrutiny. Fla. Br. 36-37; *see, e.g.*, *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624, 115 S. Ct. 2371, 2376, 132 L. Ed. 2d 541 (1995) (upholding a 30-day bar on lawyers' direct-mail solicitation of accident victims). Even in the commercial speech context, however, the Supreme Court has suggested—without holding—that viewpoint discrimination warrants strict scrutiny. *See Sorrell v. IMS Health, Inc.*, 564 U.S. 552, 131 S. Ct. 2653, 180 L. Ed. 2d 544 (2011). *Sorrell* struck down a Vermont law restricting pharmaceutical manufacturers from using data regarding doctors' prescribing habits to market drugs. *Id.* at 557, 131 S. Ct. at 2659. The Court noted that "[t]he First Amendment requires heightened scrutiny whenever

the government creates a regulation of speech because of disagreement with the message it conveys." *Id.* at 566, 131 S. Ct. at 2664 (internal quotation marks omitted). While observing that "[i]n the ordinary case it is all but dispositive to conclude that a law is content-based and, in practice, viewpoint-discriminatory," the Court did not reach the question whether a different standard applied to commercial speech because it found that the Vermont law failed even intermediate scrutiny. *See id.* at 571, 131 S. Ct. at 2667.

In any event, even if "[p]ure commercial advertising" may receive "a lesser degree of protection under the First Amendment," *Went For It*, 515 U.S. at 635, 115 S. Ct. at 2381, only a small subset of speech by professionals is commercial speech—"speech proposing a commercial transaction" and "related solely to the economic interests of the speaker and its audience." *Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of N.Y.*, 447 U.S. 557, 561-62, 100 S. Ct. 2343, 2349, 65 L. Ed. 2d 341 (1980) (internal quotation marks omitted). "Speech by professionals obviously has many dimensions. There are circumstances in which we will accord speech by attorneys on public issues and matters of legal representation the strongest protection our Constitution has to offer." *Went For It*, 515 U.S. at 634, 115 S. Ct. at 2381; *see also NAACP v. Button*, 371 U.S. 415, 438-39, 83 S. Ct. 328, 340-41, 9 L. Ed. 2d 405 (1963) (holding that notwithstanding the

State's "interest in the regulation of the legal profession," "a State may not, under the guise of prohibiting professional misconduct, ignore constitutional rights").

Here, far from being "pure commercial advertising," the speech the Act suppresses falls at the core of the First Amendment's protections. It is truthful speech on a matter of public concern and a matter central to preventative health-care—stopping death and injury from unsafe storage of firearms. It expresses a particular viewpoint on that matter with which the State disagrees. And its suppression harms both doctors and the patients who would benefit from their message. In that way, it is like the attorney speech in *Legal Servs. Corp. v. Velazquez*, in which the federal government attempted to bar Legal Services lawyers from challenging the validity of welfare laws. The Court in *Velazquez* never hinted that such speech should receive lesser protection because it was "professional speech"; rather, the speech "implicat[ed] central First Amendment concerns." 531 U.S. 533, 547, 121 S. Ct. 1043, 1052, 149 L. Ed. 2d 63 (2001). And even though the government was funding the speech in *Velazquez*, the government could not condition that funding in a way that "suppress[ed] . . . ideas thought inimical to the Government's own interest." *Id.* at 549, 121 S. Ct. at 1052.

The State also relies on the plurality opinion in *Planned Parenthood of S.E. Pa. v. Casey*, 505 U.S. 833, 112 S. Ct. 2791, 120 L. Ed. 2d 674 (1992), which rejected (in three brief sentences) a First Amendment challenge to a law requiring

doctors to provide their patients with truthful information about the risks of abortion and childbirth. *Id.* at 884, 112 S. Ct. at 2824. But a requirement that a doctor provide certain information that a State reasonably deems necessary to informed consent to a medical procedure, cannot be compared to a ban on doctors' asking their patients certain questions for fear that they will use them as a springboard to disseminate a perceived "anti-gun" message.

Because the constitutional concerns raised by the suppression of ideas inimical to the government are equally pressing when professional speech is at issue, this Court should apply the same level of scrutiny it would apply to any other law that suppresses speech on the basis of the speaker's viewpoint. Absent a showing that it is acting in the least restrictive fashion to advance a compelling interest, the government should not be permitted to silence speech—including speech between professionals and their clients—because the government disagrees with its message.

III. THE ACT FAILS EITHER STRICT OR INTERMEDIATE SCRUTINY

As demonstrated above, the Act's restrictions on physician speech should be subject to strict scrutiny. But even if this Court were to apply intermediate scrutiny, the Act would fail. Even under intermediate scrutiny, the State has the burden to "show at least that the statute directly advances a substantial governmental interest and that the measure is drawn to achieve that interest."

Sorrell, 564 U.S. at 572, 131 S. Ct. at 2667-68. Here, the State cannot make that showing.

The State asserts that the inquiry and record-keeping provisions of the Act directly advance the State's interests in protecting its citizens' Second Amendment rights and safeguarding "the privacy of individuals' gun ownership." Fla. Br. 45-48. Protecting Second Amendment rights is surely a substantial interest, and we will assume for the sake of argument that keeping gun ownership private is also a substantial interest. But the Act is not drawn in a manner that directly advances those interests.

The State argues that doctors' questions about gun ownership "impair the full exercise" of patients' Second Amendment rights. Fla. Br. 45. But they do not. Patients remain entirely free to exercise their Second Amendment rights.[11] Doctors cannot force patients to relinquish their guns. The State's apparent concern is that doctors' message about gun safety may persuade some gun owners to remove guns from their homes. But hearing truthful information about gun safety, and even being persuaded by that information, does not impair anyone's Second Amendment rights, just as hearing truthful information about the proper way to

[11] Curiously, the State's own public policy requires the safe storage of firearms, § 790.174, Fla. Stat., presenting the question of how the State could simultaneously mandate the safe storage of firearms and believe counseling on the subject constitutes a sufficient evil to justify the Act.

converse with others does not impair anyone's First Amendment rights. That a message is effective is not a justification for silencing the message.

Indeed, the Supreme Court has repeatedly invalidated government attempts to suppress truthful speech on the paternalistic ground that such speech might cause hearers to act in a way that the government believes is not in their best interest. *See Sorrell*, 564 U.S. at 577, 131 S. Ct. at 2670-71; *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 116 S. Ct. 1495, 134 L. Ed. 2d 711 (1996) (paternalistic prohibition on liquor advertisements intended to discourage drinking held invalid); *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S. Ct. 2691, 53 L. Ed. 2d 810 (1977) (viewing as "dubious any justification that is based on the benefits of public ignorance"); *Linmark v. Township of Willingboro*, 431 U.S. 85, 97 S. Ct. 1614, 52 L. Ed. 2d 155 (1977) (paternalistic ban on "For Sale" signs in order to prevent flight of white homeowners held invalid). The best means to protect the public's interest "is to open the channels of communication rather than to close them." *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 770, 96 S. Ct. 1817, 1829, 48 L. Ed. 2d 346 (1976).

It is similarly unclear how the Act advances patients' privacy interests in any significant way. Protections against disclosure of medical records already exist. *See, e.g.*, Health Insurance Portability and Accountability Act of 1996, 29 U.S.C. §1181 *et seq*. (barring health care providers from disclosing patients' medical

information except to an enumerated list of entities); Fla. Stat. § 456.057(7)(a) (requiring that patient medical records be kept confidential and limiting instances where records can be shared with third parties). Nor is there any evidence in the record, even anecdotal evidence, that patients' gun ownership has been improperly disclosed through their medical records. To the extent that the State's concern is that patients should be permitted to keep gun ownership private from their doctors, it makes little sense. Doctors routinely ask patients about matters they likely wish to keep private, such as sexual activity and drug or alcohol use. Patients who do not want to disclose such matters to their doctors cannot be compelled to do so. But, as Judge Wilson explained, the very reason that the confidentiality of medical records is so vigorously protected is to ensure an open flow of information between doctor and patient, so that the doctor can best address the patient's needs.

The Supreme Court has made clear that courts should ask whether the government's "stated interests are . . . the actual interests served by the restriction," and should not accept pretextual justifications. *Edenfield v. Fane*, 507 U.S. 761, 768, 113 S. Ct. 1792, 1798, 123 L. Ed. 2d 543 (1993) (striking down a ban on speech by Florida certified public accountants soliciting work from new clients where State's asserted justification was pretextual and true purpose was to favor entrenched accounting firms). Here, the ill fit between the Act's purported objectives and its actual provisions merely confirms the Act's actual purpose: to

suppress what was perceived as an unpopular anti-gun "political agenda." Regardless of the level of scrutiny applied, the State cannot articulate a sufficient justification for silencing a disfavored "political" viewpoint in this manner.

Indeed, if the State were permitted to do what it has done here, the consequences would be far-reaching. With only the most tenuous pretext, the government could intervene into any professional-client relationship and manipulate that relationship to further the government's agenda and suppress opposing viewpoints. That would not only constitute a gross infringement on the professional's right to speak and the client's right to listen—damaging the professional's ability to effectively serve the client's needs—but would also impermissibly distort the broader marketplace of ideas. This Court should hold that States cannot engage in such viewpoint discrimination simply because the speaker is a doctor talking to his patient or a lawyer talking to her client.

CONCLUSION

The American Bar Association, as *amicus curiae*, respectfully requests the Court affirm the district court's decision.

Dated: April 27, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 29(d), 11th Cir. R. 35-9, Fed. R. App. P. 32(a)(7)(B), and this Court's En Banc Briefing Notice, because this brief contains 4,591 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman.

/s/ Paulette Brown
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 27th day of April 2016, I caused the foregoing to be electronically filed using the Court's CM/ECF system, which will provide service on all counsel of record, including those identified below, via Notice of Docket Activity generated by CM/ECF:

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