Case No. 12-14009

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

DR. BERND WOLLSCHLAEGER, *et al.*,
Plaintiffs/Appellees/Petitioners,

vs.

GOVERNOR OF THE STATE OF FLORIDA, *et al.*,
Defendants/Appellants/Respondents.

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

BRIEF *AMICUS CURIAE* OF AMERICAN MEDICAL ASSOCIATION, AMERICAN ACADEMY OF PEDIATRICS, AMERICAN ACADEMY OF CHILD AND ADOLESCENT PSYCHIATRY, AMERICAN ACADEMY OF FAMILY PHYSICIANS, AMERICAN OSTEOPATHIC ASSOCIATION, AMERICAN COLLEGE OF PHYSICIANS, AMERICAN COLLEGE OF SURGEONS, AMERICAN COLLEGE OF OBSTETRICIANS AND GYNECOLOGISTS, AND AMERICAN CONGRESS OF OBSTETRICIANS AND GYNECOLOGISTS SUBMITTED IN SUPPORT OF PLAINTIFFS/APPELLEES AT THE REHEARING *EN BANC* AND URGING AFFIRMANCE

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Certificate of Interested Persons and Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure Rule 26.1 and Eleventh Circuit Rule 26.1-1, American Medical Association, et al, amici provides the following certificate of interested persons and corporate disclosure statement:

1. The Honorable Marcia G. Cooke, U.S. District Judge

Defendants/Appellants:

2. Armstrong, John H., present Fla. Surgeon General and Secretary of the Department of Health
3. Averoff, Magdalena, Fla. Board of Medicine Member
4. Bearison, Fred, Fla. Board of Medicine Member
5. Di Pietro, Nina, former Fla. Board of Medicine Member
6. Dolin, Gary, Fla. Board of Medicine Member
7. Dudek, Elizabeth, Secretary of the Agency for Health Care Administration
8. El Sanadi, Nabil, Fla. Board of Medicine Member
9. Espinola, Trina, Fla. Board of Medicine Member
10. Farmer, Frank, former Fla. Surgeon General and Department Secretary

11. Fernandez, Bernardo, Fla. Board of Medicine Member

12. Ginzburg, Enrique, Fla. Board of Medicine Member

13. Goersch, Brigitte Rivera, Fla. Board of Medicine Member

14. Lage, Onelia, former Fla. Board of Medicine Member

15. Levine, Bradley, Fla. Board of Medicine Member

16. Lopez, Jorge J., Fla. Board of Medicine Member

17. Mullins, Donald, Fla. Board of Medicine Member

18. Nuss, Robert, Fla. Board of Medicine Member

19. Orr, James, Fla. Board of Medicine Member

20. Philip, Celeste, Interim Fla. Surgeon General and Secretary of the Department of Health

21. Ramesh, Seela, Fla. Board of Medicine Member

22. Romanello, Nicholas, Fla. Board of Medicine Member

23. Rosenberg, Steven, Fla. Board of Medicine Member

24. Rosenberg, Jason, Fla. Board of Medicine Member

25. Scott, Rick, Governor of Florida

26. Shugarman, Richard G., Fla. Board of Medicine Member

27. Stringer, Merle, Fla. Board of Medicine Member

28. TerKonda, Sarvam, Fla. Board of Medicine Member

29. Thomas, George, Fla. Board of Medicine Member

30. Tootle, Joy, Fla. Board of Medicine Member

31. Tucker, Elisabeth, Fla. Board of Medicine Member

32. Winchester, Gary, Fla. Board of Medicine Member

33. Zachariah, Zachariah, Fla. Board of Medicine Member

Plaintiffs/Appellees:

34. American Academy of Family Physicians, Fla. Chapter

35. American Academy of Pediatrics, Fla. Chapter

36. American College of Physicians, Fla. Chapter

37. Fox-Levine, Shannon

38. Gutierrez, Roland

39. Sack, Stanley

40. Schaechter, Judith

41. Schechtman, Tommy

42. Wollschlaeger, Bernd

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58. Hallward-Driemeier, Douglas

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61. Lowy, Jonathan

62. Lucas, Hal*

63. Macgowan, Erin

64. Manheim, Bruce*

65. Mullins, Edward

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Amici and Others:

70. ACLU Foundation of Florida, Inc.

71. Alachua County Medical Society

72. American Academy of Child and Adolescent Psychiatry

73. American Academy of Family Physicians

74. American Academy of Orthopaedic Surgeons

75. American Academy of Pediatrics

76. American Association of Suicidology

77. American Bar Association

78. American College of Obstetricians and Gynecologists

79. American Congress of Obstetricians and Gynecologists

80. American College of Preventative Medicine

81. American College of Surgeons

82. American Medical Association

83. American Psychiatric Association

84. American Public Health Association

85. American Professional Society on the Abuse of Children

86. Broward County Medical Association, The

87. Broward County Pediatric Society, The

88. Center for Constitutional Jurisprudence (CCJ)

89. Children's Healthcare Is a Legal Duty, Inc. (CHILD)

90. Citizens Committee for the Right to Keep and Bear Arms

91. Doctors for Responsible Gun Ownership (DRGO)

92. Early Childhood Initiative Foundation

93. Everytown for Gun Safety Action Fund

94. Everytown for Gun Safety Support Fund

95. Florida Public Health Association, The

96. Institute for Justice

97. Law Center to Prevent Gun Violence

98. Moms Demand Action for Gun Sense in America

99. Marion B. Brechner First Amendment Project for Leave to File Amicus Curiae

100. National Rifle Association (NRA)

101. Pacific Legal Foundation

102. Palm Beach County Medical Society

103. Second Amendment Foundation, LLC

104. Suicide Awareness Voices of Education

105. University of Miami School of Law Children and Youth Clinic

106. Unified Sportsmen of Florida, Inc.

107. Arnold & Porter, LLP

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143. Skaggs, J. Adam

144. Taylor, Charlotte H.

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149. Weinstein-Tull, Justin S., Counsel for APHA et al.

* = no longer involved in representation

Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, *amici* state that they have no parent corporation and no corporation, publicly held or otherwise, owns 10% or more of any of their stock.

Rule 29(c)(5) Statement

No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money that was intended to preparing or submitting this brief. No person – other than *amici*, their members, or their counsel – contributed money that was intended to fund preparing or submitting this brief.

S/Richard H. Levenstein
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Attorney for *Amici Curiae*

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Statement of Identity and Interest of *Amici* and of Source of Authority to File Brief

Amici are professional associations of physicians, residents and medical students. *Amicus* the American Medical Association is the largest such association in the United States. The remaining *amici* are national specialty medical societies that represent their members in matters of public concern. All *amici* have members who practice in Florida and whose ability to practice medicine is detrimentally affected by Florida's Firearm Owners' Privacy Act ("FOPA"), Fla. Stat. § 790.338.

Amici file this brief to protect the First Amendment rights of their members. Even more importantly, though, *amici* file this brief to ensure that their members' patients can receive the full medical care they deserve.

Pursuant to Local Rule 35-9, *amici* have moved for leave to file this brief.

Statement of the Issues

FOPA restricts the ability of physicians to communicate freely with their patients on the issues of firearm possession and safety and to make notations in their medical records regarding these subjects. This case will decide whether FOPA violates the First and Fourteenth Amendments to the United States Constitution. Per this Court's memorandum of February 26, 2016, this brief will discuss -- (a) how the record-keeping provision of

FOPA, Fla. Stat. § 790.388(1), burdens the practice of medicine, and how it fails to advance the legitimate interests of the State of Florida; (b) how the inquiry provision of FOPA, Fla. Stat. § 790.388(2), burdens the practice of medicine, and how it fails to advance the legitimate interests of the State of Florida; (c) how the anti-discrimination provision of FOPA, Fla. Stat. § 790.338(5), burdens the practice of medicine; and (d) what practical difficulties physicians face in discerning how the anti-harassment provision of FOPA, Fla. Stat. § 790.338(6), is to be applied.[1]

Statement of Facts

In 1989, the American Medical Association ("AMA") enacted Health Policy H-145.990, which states as follows:

> **Prevention of Firearm Accidents in Children**
>
> Our AMA (1) supports increasing efforts to reduce pediatric firearm morbidity and mortality by encouraging its members to (a) inquire as to the presence of household firearms as a part of childproofing the home; (b) educate patients to the dangers of firearms to children; (c) encourage patients to educate their children and neighbors as to the dangers of firearms; and (d) routinely remind patients to obtain firearm safety locks, to store firearms under lock and key, and to store ammunition separately from firearms; (2) encourages state medical societies to work with other organizations to increase public education about firearm safety; and (3) encourages organized medical staffs and other physician organizations, including state and local medical

[1] This Court's memorandum also highlighted the question as to the proper level of scrutiny to be applied to FOPA. *Amici* believe FOPA should be tested under strict scrutiny. However, following *Wollschlaeger v. Farmer*, 880 F.Supp.2d 1251 (M.D.Fla. 2012) ("*Wollschlaeger I*"), at 1263, *amici* assert that FOPA cannot withstand either strict or intermediate First Amendment scrutiny. The choice between those two levels of constitutional scrutiny will not be otherwise addressed in this brief.

> societies, to recommend programs for teaching firearm safety to children.[2]

This and similar policies of the AMA and other medical associations memorialize a part of the duty of preventive care that physicians owe their patients. Depending on the circumstances, physicians may owe non-pediatric patients a similar educational obligation. State *En Banc* Brief, n. 4. Such counseling is facilitated through routine questioning about, *inter alia*, poisonous chemicals in the home, swimming pools, or alcohol or tobacco usage. *Wollschlaeger I*, 880 F.Supp.2d at 1257.

Notwithstanding their obviously salutary purposes, those policies relating solely to firearm safety represent the supposed danger against which the Florida Legislature determined its citizenry needed protection. *See* Judge Wilson's dissents in *Wollschlaeger v. Governor of Florida*, 760 F.3d 1195, 1230 (11th Cir. 2014) ("*Wollschlaeger II*"), and *Wollschlaeger v. Governor of Florida*, 797 F.3d 859, 901-902 (11th Cir. 2015) ("*Wollschlaeger III*").

The signature "incident" upon which the Florida Legislature relied to justify FOPA was a dispute between a mother in Ocala, Florida and her pediatrician about firearms possession. After the mother refused to answer the pediatrician's question as to whether there were firearms in the house,

[2] Found at https://searchpf.ama-assn.org/SearchML/searchDetails.action?uri=%2FAMADoc%2Fhod.xml-0-547.xml. `

the pediatrician terminated their relationship and advised her she had 30 days to find a new doctor. State *En Banc* Brief, at 2.

FOPA has led Florida physicians, including the individual plaintiffs, to self-censor their patient communications, *Wollschlaeger I*, 880 F.Supp.2d at 1257 – thereby abridging the guidance due their patients under AMA Policy H-145.990 and similar medical standards.

Amici further adopt the facts stated in Judge Wilson's dissenting opinions in *Wollschlaeger II*, 760 F.3d at 1232, 1257-1259, and in *Wollschlaeger III*, 797 F.3d at 901-902, 906, 920-922.

Summary of the Argument

The Supreme Court has ruled that under either strict or intermediate scrutiny a statute restricting speech must be founded on genuine state interests threatened with real harm, not unbounded speculation arising from imaginary or superficial grievances. Moreover, the statute must materially advance those interests, without disproportionately injuring free expression.[3] FOPA fails on all counts.

Unfettered communication by physicians regarding patients' possession of firearms provides real and substantial benefits to patients. Physicians have expertise in mental and physical childhood development.

[3] As pointed out below, when content-based restrictions are at issue, as in this case, the State's failure to justify the restrictions as necessary protections for compelling state interests may by itself doom those restrictions, even without considering the burden on expression. *Wollschlaeger I*, 880 F.Supp.2d at 1262.

They are trained, both in medical schools and through practical experience, to recognize when children are likely to become curious about unusual objects in the home, such as firearms, and when children will have the physical capacity to explore such objects. They are also expert in detecting psychological states of older children or of adults, which could lead to improvident action involving firearms. In such circumstances, physicians may be able to counsel their patients about dangers of which the patients might be unaware or dangers of which the patients may know at some level but which the patients may be unwilling to confront without professional counseling.

Furthermore, restraints on counseling about firearms affect more than the immediate dangers associated with the firearms themselves. Any politically created inhibition on patient/physician communications undermines the trust which lies at the cornerstone of medical practice.

By contrast, the discussions physicians have with their patients do not threaten those patients' rights of gun ownership. The Second Amendment protects citizens against governmental confiscation of their firearms. The concerns expressed by the State about physicians' making inquiries or including notations in their patient records are far-fetched. Nothing about such actions will bring patients' firearms ownership into "the public eye" or

have a "chilling effect" on the right to bear arms. (State *En Banc* Brief at 46-47). The likelihood that information resulting from these inquiries will fall prey to "unauthorized distribution and access" (State *En Banc* Brief at 48) is exceedingly remote. Moreover, whatever that likelihood may be, it is no greater for firearms information than for any other information provided to physicians – strong evidence that FOPA was passed merely to advance the State's political agenda.

Furthermore, any intrusion on patient privacy engendered through physician inquiries about firearm possession is *de minimis*. Those inquiries are a part of routine questioning on similar subjects related to patient safety and well-being. Medical care regularly invokes vastly more intrusive interactions between physicians and patients than communications about firearms ownership. The supposed fear of a loss of privacy is actually a screen used to advance a political agenda at the expense of First Amendment rights.

In short, FOPA significantly impinges on important interests of physicians and their patients, and it provides no real protection to legitimate state interests. It is censorship, imposed for purely political motives. The thoughtful opinion of the court below should be affirmed.

Argument and Citations of Authority

I. FOPA's Record-Keeping Provision Substantially Limits Communications, but it does Little or Nothing to Protect Legitimate State Interests.

The record-keeping provision of FOPA, Fla. Stat. § 790.338(1), is as follows:

> "A [physician] may not intentionally enter any disclosed information concerning firearm ownership into the patient's medical record if the [physician] knows that such information is not relevant to the patient's medical care or safety, or the safety of others."

Maintenance of accurate and complete medical records, by memorializing patient history, diagnosis, and treatment, serves (at least) four important functions: (1) it facilitates a physician's continuing care to a patient, (2) it allows other health care professionals to care for the patient, (3) it protects the physician against accusations, by the patient or by others, of improper care, and (4) it facilitates scrutiny by others, such as a medical licensing board, hospital review committee, or even the judicial system, of the physician's conduct. Thus, medical records may be used by the physician who created them, and they may also be used by others. The importance of such records is not disputed.

The effect of § 790.338(1) will be to make physicians think twice about their personal liability if the subject of firearms ownership is included in a patient's medical record, a consideration which could jeopardize patient

health or safety. While FOPA states that it will only apply to those situations in which the physician knows the record keeping is irrelevant to the patient's care or safety (or the safety of others), there will inevitably be grey areas. What a physician may have known can be the subject of after-the-fact second guessing, however much deference the statute may afford the physician. Circumstances will arise in which a physician is unsure about whether information can legally be included in the medical record, and in such circumstances some physicians will decide in favor of exclusion, even if inclusion would be medically warranted. B. Kuehn, "Battle over Florida Legislation Casts a Chill over Gun Inquiries," 313 *JAMA* 1893 (2015) (recounting personal experiences of Florida physicians affected by FOPA). However, what may at one time seem medically irrelevant may later be found to impact patient care. *Wollschlaeger I*, 880 F.Supp.2d at 1267.

Notably, the chill on physicians' medical record-keeping affects more than the physicians themselves. FOPA's restriction infringes the First Amendment rights of those patients who would prefer to have their physicians err on the side of including arguably irrelevant information in their records, rather than the reverse. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1972) (noting that

Freedom of Speech protects the right to receive information as well as the right to promulgate it).

The State argues that physician records of patients' firearm ownership, being electronically stored, are "especially vulnerable to unauthorized distribution and access." State *En Banc* Brief at 48. Such concern, however, is based on extreme speculation, unsupported by the record or by a realistic evaluation of medical practice. *Wollschlaeger I*, 880 F.Supp.2d at 1264 ("The State's arguments rest on a legislative illusion").

Physicians are legally and ethically bound to preserve patient confidences. *Wollschlaeger I*, 880 F.Supp.2d at 1267. There is no reason to suspect that physician records pertaining to firearms ownership are or will be a target for computer hackers. Even if such records were hacked, it is hard to see how or why they would be used for harassment.

It may be that the "wrong hands" contemplated by the panel majority in *Wollschlaeger II* and *III* refer to those of the Federal Government. Under this scenario, the United States might require physicians to submit information regarding firearm ownership as a first step toward imposing restrictions on firearms or even their confiscation. While possible, it is wildly improbable. No case authority has been proffered, by the State or by the *Wollschlaeger II* and *III* panel majority, which would suggest that fear of

a theoretical law – unpopular to a certain segment of the population and never even introduced for legislative consideration – could justify a government restriction on private communications.

The Supreme Court is clear that, under intermediate or strict scrutiny, states may impose a restriction on expressive communications *only if* such a restriction substantially and directly preserves a genuine government interest. Thus, *Central Hudson Gas & Electric Corp. v. Public Services Commission*, 447 U.S. 557, 564 (1980), states: "[T]he restriction [of communications] must directly advance the state interest involved; the regulation may not be sustained if it provides only ineffective or remote support for the government's purpose." *Accord*, *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 572 (2011) ("State must show that the statute directly advances a substantial governmental interest," with proof needed beyond "a few" anecdotal stories), (*Turner Broadcasting System, Inc. v. FCC*, 512 U.S. 622, 644 (1994) (advancement of state's interest must be "real, not merely conjectural"), and *Florida Bar v. Went For It, Inc.*, 515 U.S. 618, 624-626 (1995) (threat to state interests must be "real" and not based on "mere speculation or conjecture").

FOPA's record-keeping provision fails the "genuine government interest" test. Moreover, the provision substantially burdens the freedom of

expression necessary to medical practice. The provision is therefore unconstitutional.

II. FOPA's Inquiry Provision Substantially Limits Communications, but it does Little or Nothing to Protect Legitimate State Interests.

The inquiry provision of FOPA, Fla. Stat. § 790.338(2), is as follows:

> "A [physician] … should refrain from making a written inquiry or asking questions concerning the ownership of a firearm or ammunition by the patient or by a family member of the patient, or the presence of a firearm in a private home or other domicile of the patient or a family member of the patient. Notwithstanding this provision, a [physician 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."

Again, the legal standard is whether this provision directly advances a substantial government interest without excessively limiting communications (here, speech). And again, the State has the burden of showing an evidentiary justification for the law, based on more than "ineffective or remote support" or "'a few' anecdotal stories."

As noted *supra* at 2-3, the medical profession has overwhelmingly determined that questions and counseling about firearms safety should be a standard part of preventive care. Physicians are trained to counsel their patients about such matters. B. Kuehn, "Battle over Florida Legislation Casts a Chill over Gun Inquiries," 313 *JAMA* 1893 (2015).

Thus, medical school curricula must include "content and clinical experiences related to … each phase of the human life cycle … and preventive … care." Medical students must learn to recognize "opportunities for health promotion" and recognize "the health-related impact on patients of behavioral … factors." Liaison Committee on Medical Education, *Functions and Structure of a Medical School* (2016), available at http://lcme.org/publications/. *See also*, American Osteopathic Association, *Accreditation of Colleges of Osteopathic Medicine* (2015), available at http://www.osteopathic.org/inside-aoa/accreditation/COM-accreditation/Documents/COM-accreditation-standards-current.pdf.

Physicians also have practical expertise in mental and physical childhood development. They can advise their patients that a small child can become rambunctious or curious. They can warn parents, who might otherwise be surprised, that their apparently placid toddler could easily seek and obtain access to unsecured firearms. Likewise, physicians are expert in detecting psychological states of older children and of siblings (not to mention adults), which could lead to improvident actions involving firearms. *Guidelines for Adolescent Health Care* (American College of Obstetricians & Gynecologists, 2d Ed. 2011); "Policy Statement: Children and Guns," American Academy of Child & Adolescent Psychiatry (2013). In such

circumstances, physicians may be able to counsel their patients about dangers of which the patients might be unaware or of dangers which the patients may know at some level but which the patients may be unwilling to confront without professional probing. J. Palfrey," Preventing Gun Deaths in Children," 368 *N Engl. J Med.* 401 (2013).

The State observes that physicians occupy a position of trust and authority with their patients (which the State characterizes as a "significant power imbalance"). State *En Banc* Brief at 49. Thus, the professional advice physicians give about firearm safety may carry real weight; it should not be gagged. Of course, patients may disregard or reject their physicians' advice, but that should be the choice of the patients, not the result of state mandated censorship. M. Rathore, "Physician 'Gag Laws' and Gun Safety," 16 *AMA Journal of Ethics* 284 (2014).

Effective medical care requires unfettered communications between physicians and their patients. Physicians who care for children routinely inquire about firearm ownership on intake forms during "well-child" visits, along with a host of questions on a variety of topics. There is no way for the physician to know, during this initial questioning, which answers will prove irrelevant to a patient's medical care and which will prove lifesaving. "[T]here may be cases where, unless the practitioner makes an initial inquiry

about firearms (albeit with no good faith basis, at the time of the questioning, that it is relevant), the patient may not know to raise the issue herself and may not receive appropriate, possibly-saving, information about firearm safety." *Wollschlaeger I*, 880 F.Supp.2d at 1267. The chill on physician communications infringes the First Amendment rights of all patients who would welcome their physician's advice but will not receive it on account of FOPA. *Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council*, 425 U.S. 748 (1972).

Furthermore, the deleterious consequences of limiting speech about firearms will inevitably impact other aspects of patient care. For example, physicians are regularly called upon to counsel about or prescribe treatments with potentially unpleasant consequences for their patients. Medications have side effects; surgery may risk complications. Thus, medicine is not always a straightforward process. Physicians must know as many of the facts as possible before recommending (or not recommending) a treatment option. *See Trammel v. United States*, 445 U.S. 40, 51 (1980) (a physician must know "all that a patient can articulate"). Patients must believe in their physician's absolute honesty and fidelity when relying on their medical advice. The exchange of information must not be limited, as without a sense of complete openness the practice of medicine is compromised.

The AMA *Code of Medical Ethics*,[4] which is the most widely recognized standard of ethical medical conduct in the United States and which is regularly cited as authoritative by the judicial system,[5] recognizes these core principles as the basis of effective medical practice. Thus, Ethical Opinion E-10.01,[6] entitled "Fundamental Elements of the Patient-Physician Relationship," states the following:

> From ancient times, physicians have recognized that the health and well-being of patients depends upon a collaborative effort between physician and patient. Patients share with physicians the responsibility for their own health care. The patient-physician relationship is of greatest benefit to patients when they bring medical problems to the attention of their physicians in a timely fashion, provide information about their medical condition to the best of their ability, and work with their physicians in a mutually respectful alliance. … The patient has the right to receive information from physicians and to discuss the benefits, risks, and costs of appropriate treatment alternatives.

Likewise, Ethical Opinion E-10.015, entitled "The Patient-Physician Relationship," observes: "The relationship between patient and physician is based on trust." Ethically, physicians "must recognize responsibility to patients first and foremost." While physicians also have responsibilities "to

[4] The *Code of Medical Ethics* can be found on the AMA website at http://www.ama-assn.org/ama/pub/physician-resources/medical-ethics/code-medical-ethics.page.

[5] *E.g.*, *National Federation of Independent Business v. Sebelius*, 132 S.Ct. 2566, 2611 (2012) (Ginsberg, J., concurring in part and dissenting in part); *Baze v. Rees*, 553 U.S. 35, 64 (2008) (Alito, J., concurring); *Gonzales v. Oregon*, 546 U.S. 243, 286 (2003) (Thomas, J., dissenting); *Ferguson v. City of Charleston*, 532 U.S. 67 (2001); *Vacco v. Quill*, 521 U.S. 793, 801 (1997); *Washington v. Glucksberg*, 521 U.S. 702, 731 (1997); *Cruzan v. Missouri Dep't. of Health*, 497 U.S. 261 (1990); *Bates v. State Bar of Arizona*, 433 U.S. 350, 369-370, n. 20 (1977); *Roe v. Wade*, 410 U.S. 113, 144 n. 9 (1973).

[6] Ethical opinions and reports of the AMA Council on Ethical and Judicial Affairs are a part of the *Code of Medical Ethics*. Ethical opinions are designated by the letter "E" followed by a number indicating where the opinion is catalogued within the *Code of Medical Ethics.*

society" and "to self," patient care is "paramount." AMA *Principles of Medical Ethics*, Preamble and Principle VIII.

It is certainly true that physicians should respect the right of patients to make their own medical choices. *E.g.*, Principle of Medical Ethics IV[7] and Ethical Opinion 10.01(3). However, FOPA only detracts from that goal, as it prevents doctors from making fully informed recommendations and prevents patients from making fully informed choices. *See* L. Murtagh, "Censorship of the Patient-Physician Relationship: A New Florida Law," 306 *JAMA* 131 (2011) (describing the ethical dilemma physicians face in complying with FOPA). When, as a result of legal pressures, physicians must restrict their patient communications, FOPA inherently creates distrust. Physicians cannot fully respect their patients' rights if they must simultaneously attend a boundary imposed by political, not medical, considerations.

Conversely, patients are astute observers of their physicians' speech and conduct. They will know when their physicians are being "straight" with them and when their advice is guarded. See, B. Cooke, *et al.*, "Firearms Inquiries in Florida: 'Medical Privacy' or Medical Neglect?" 40 *J. Am. Acad. Psychiatry Law* 399, 403 (2012) (Noting probable disinclination

[7] The *Principles of Medical Ethics*, which are somewhat distinct from the opinions and reports of the AMA Council on Ethical and Judicial Affairs, are also part of the *Code of Medical Ethics*.

of patients to seek counseling from their physicians when their physicians deliberately avoid topics). The ability to create a feeling of mutual respect and trust depends on human interactions, developed with a sense of openness. *See*, L. Snyder, "American College of Physicians Ethics Manual (6th Ed.), 156 *Annals of Internal Medicine* 73, 78 (2012) ("Physicians must strive to create an environment in which honesty can thrive").

A politically motivated legal restriction on physician speech with a patient, such as that mandated under FOPA, undermines the needed respect and trust. It would be the most commonplace of reactions for patients to distrust physicians who are lacking in candor. Further, if physicians are guarded in one aspect of their patient relationships, it is natural for patients to suspect they may be untrustworthy in others. In such a circumstance, patients and physicians will be unable to collaborate on an optimal course of treatment. A patient's distrust can lead to a dangerous deferral or even complete foregoing of needed medical care.

Furthermore, the legislative record nowhere demonstrates a need to restrict physicians' communications. Notwithstanding a lapse of 22 years between the adoption of AMA Policy H-145.990 and the enactment of FOPA, the State has been able to cite to only a handful of isolated, anecdotal incidents to justify its opposition to that policy. No one was more than

temporarily deprived of medical care, no one suffered adverse medical effects, and no patients actually answered any questions unrelated to their medical condition. Likewise, nothing suggests that physicians violated patient confidences, that they improperly disclosed information about their patients' gun ownership, or that they subjected patients to personal expressions about gun control, outside the boundaries of Policy H-145.990. There was no evidence that physicians undertook punitive measures relating to patients' provision or withholding of firearms information. A few "feathers" may have been ruffled, but that is all.[8]

In *Wollschlaeger v. Governor of Florida*, 2015 U.S. App. LEXIS 21573 (11th Cir. 12/14/ 2015) ("*Wollschlaeger IV*"), the panel majority defended FOPA as a protection against "irrelevant questioning about guns that could dissuade [patients] from exercising their constitutionally guaranteed rights." This purported justification flies in the face of *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 577 (2011), which held that "the fear that speech might persuade provides no lawful basis for quieting it." Thus, a concern that physicians might cause patients to reconsider their gun

[8] The "Ocala mother" incident is not to the contrary. No one can objectively parse the context of that interaction. Did the mother react antagonistically when questioned about her firearm ownership, or did she politely explain that this was a touchy subject, which she considered an unreasonable invasion of privacy? Was the physician dogmatic and belligerent? Was he, instead, properly cognizant of his patient's dignity but simply felt that the patient/physician relationship was so disrupted that it would be in everyone's interest if the patient saw another physician, with whom she could establish better rapport? The details are all-important to a full understanding of what transpired, but they are unknowable.

ownership has little or nothing to do with the preservation of these patients' Second Amendment rights. Any interest the State of Florida may purport to have in shielding patients from their physicians' advice is not a lawful one.

Nothing in the legislative record suggests that, politics aside, firearm possession is more deserving of protection against obtrusive questions from physicians or against computer hacking than myriad other topics, such as sexual practices or illegal drug usage. The legislature's under-inclusiveness (not to mention legislators' attempts to defend against "a political … attack" and the explicit testimony of the National Rifle Association lobbyist – *see* State *En Banc* Brief at 3-4) leaves little doubt that FOPA was enacted to silence speech which might draw a political viewpoint into question, rather than to protect patient confidences.

Amici echo Judge Wilson's observation:

> The available evidence does establish two things: first, the healthcare of everyone who is happy to answers their doctors' inquiries about firearms may suffer as a result of [FOPA]; second the First Amendment rights of everyone who welcomes their doctors' inquiries and information on firearms have been infringed.

Wollschlaeger III, 797 F.3d at 920-921.

III. FOPA's Anti-Discrimination Provision Substantially Limits Communications, but it does Little or Nothing to Protect Legitimate State Interests.

The anti-discrimination provision of FOPA, Fla. Stat. § 790.338(5), is as follows:

> "A [physician] may not discriminate against a patient based solely upon the patient's exercise of the constitutional right to own and possess firearms or ammunition."

The legislative record illustrates how this provision will chill the Freedoms of Speech and of Association. *See* State *En Banc* Brief at 2-4. Consider, for example, the Ocala mother. Suppose the scenario were slightly changed, and the mother did tell her physician that she owned firearms and the relationship then deteriorated to the point where the physician determined that an effective patient-physician had become impossible. This would impose an impossible dilemma for the physician. Should the physician be forced to retain this mother (and her child) as patients, even if other physicians were readily available? The answer is no. The necessary trust between physician and patient would be lacking.

Being forced to speak or to associate is as much an affront to the First Amendment as being prohibited from speaking or associating. *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995); *Riley v. National Federation of the Blind of North Carolina*, 487

U.S. 78, 796-797 (1988). The FOPA anti-discrimination provision would thus abridge this physician's First Amendment freedoms.[9]

The result might be different if there were substantial evidence in the legislative record that Florida patients were being regularly deprived of medical care on account of physicians' discrimination against firearm owners – or even if a reasonable inference could be drawn to that effect. Of course, there is no such evidence and no such inference can be drawn. *Wollschlaeger I*, 880 F.Supp.2d at 1264. Indeed, AMA Ethical Opinion E-9.12, entitled "Patient-Physician Relationship: Respect for Law and Human Rights," provides that, while the relationship between patient and physician should generally be a consensual undertaking, physicians may not decline to accept patients because of "any … basis that would constitute invidious discrimination."

Likewise, the result might be different if § 790.338(5) were narrowly drawn to cover only situations tangential to First Amendment freedoms. For example, if the legislative record showed that physicians were charging higher fees to patients who owned firearms than those who did not and the statute specifically prohibited such conduct, the constitutional considerations

[9] Fla. Stat. § 790.338(4) preserves "existing law" regarding a physician's "authorization to choose his or her patients" if a patient chooses not to answer a question relating to firearm ownership or possession. That, however, is an arguably different scenario from § 790.338(5), which pertains to actual ownership or possession of firearms (not simply a refusal to answer questions). *But see, Wollschlaeger I*, 880 F.Supp.2d at 1264-1265 (observing that the State had interpreted FOPA so as to allow physicians to terminate the doctor-patient relationship if a patient refused to answer questions regarding firearm ownership).

would be different. Of course, that is not this case either. Section 790.338(5) remedies no genuine evil but seeks merely to placate perceived political wounds.

Section 790.338(5) sweeps broadly to restrict First Amendment rights, because that is its purpose. The State *En Banc* Brief, at 30-34, has it directly backwards: FOPA's anti-discrimination provision is directed against the rights of speech and association; any regulation of professional conduct is merely incidental.

IV. FOPA's Anti-Harassment Provision Lacks an Ascertainable Meaning in the Context of Medical Practice.

The anti-harassment provision of FOPA, Fla. Stat. § 790.338(6), is as follows:

> "A health care practitioner licensed under chapter 456 or a health care facility licensed under chapter 395 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."

Some measure of disagreement can at times be expected between patients and physicians. In fact, it may be a required part of medical practice.

As noted *supra* at 15, the practice of medicine is "a collaborative effort." While the physician has to respect the patient's autonomy, the physician is not expected to be a pushover either. A measure of skeptical inquiry might well be appropriate.

For example, a family physician could have a conversation along the following lines with a patient:

> "Every time you come to see me you promise to quit smoking, but you never do. This doesn't just affect you; it affects your children, and they're my patients, too. What you say doesn't cut it anymore. I don't want your promises; I want your action."

Perhaps this could be characterized as "harassment." Would it be "unnecessary harassment?" This would be a matter of subjective judgment; one could only guess as to where the line should be drawn.

Now consider the almost identical conversation concerning the family's firearms:

> "Every time you come to see me you promise to secure those firearms, but you never do. This doesn't just affect you; it affects your children, and they're my patients, too. What you say doesn't cut it anymore. I don't want your promises; I want your action."

Again, no standards could be set to determine whether such a statement would be unnecessary harassment. The only salient difference between these situations is that the first scenario involves socially uncontroversial statements, whereas the second is politically charged.

A physician would have no way to determine whether the physician's statements crossed into forbidden territory. The alternatives would be to risk violating the law or to curb her speech – an unconstitutional choice. *Hynes v. Borough of Oradell*, 425 U.S. 610, 620 (1976) (void for vagueness

doctrine applies with particular force when it inhibits speech). As observed in *Sorrell v. IMS Health*, 564 U.S. at 575: "Many are those who must endure speech they do not like, but that is a necessary cost of freedom."

Conclusion

FOPA seriously intrudes on the practice of medicine, without furthering legitimate State interests. Judge Wilson said it well: "Doctors' jobs are hard enough when the State does not enact laws that force them to think twice about asking questions and providing information that may save lives." *Wollschlaeger III*, 797 F.3d at 933.

For these reasons, *amici* urge this Court to find the record-keeping provision, the inquiry provision, the anti-discrimination provision and the anti-harassment provision of FOPA unconstitutional and to affirm the court below.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B) because this brief contains 5,719 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using WordPerfect x7 in 14-point Times New Roman.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing brief has been delivered to a third-party carrier for express delivery to the following attorneys on April 26, 2016:

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An electronic version of the same was delivered to the Clerk and served electronically via the Court's CM/ECF system. In addition, 20 copies were sent by overnight courier, next business day delivery, to the Clerk of Court.

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