Case No. 12-14009-FF

UNITED STATES COURT OF APPEALS
ELEVENTH CIRCUIT

DR. BERND WOLLSCHLAEGER, *et al.*,
Plaintiffs/Appellees,
vs.
GOVERNOR STATE OF FLORIDA, *et al.*,
Defendants/Appellants.

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Amicus Curiae **EN BANC BRIEF** of ACLU Foundation of Florida, Inc., Alachua County Medical Society, Broward County Medical Association, Broward County Pediatric Society, Palm Beach County Medical Society, Florida Public Health Association, University of Miami School of Law Children & Youth Clinic, Early Childhood Initiative Foundation, and the Marion B. Brechner First Amendment Project in Support of Plaintiffs/Appellees and AFFIRMANCE

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

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CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Eleventh Circuit Rule 26.1, amici curiae hereby state that the Certificate of Interested Persons and Corporate Disclosure Statement filed by Appellants with their *En Banc* Brief was complete, with the exception of the following persons or entities:

Carlton Fields Jorden Burt LLP, counsel for *amicus* American Bar Association

Marion B. Brechner First Amendment Project, *amicus curiae*

Mead, Grace L., counsel for *amici curiae*

None of the amici curiae have any parent corporation and none are publicly held corporation that owns 10% or more of its stock or states that there is no such corporation.

s/Thomas R. Julin
Thomas R. Julin

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## INTRODUCTION

The three-judge panel in this case issued three lengthy opinions, *Wollschlaeger v. Governor,* 760 F.3d 1195 (11th Cir. 2014) ("*Wollschlaeger I")*, *vacated,* 797 F.3d 859 (11th Cir.) ("*Wollschlaeger II")*, *vacated,* 814 F.3d 1159 (11th Cir. 2015) ("*Wollschlaeger III"), vacated and reh. en banc granted,* No. 12–14009 (11th Cir. Feb. 3, 2016) (en banc), each taking a wholly different approach to determining whether a law that prohibits healthcare practitioners from discussing firearms with patients when such discussions are *irrelevant* to patient health or safety survives the First Amendment. The pendulum has swung from the initial majority opinion, concluding that the law had only an incidental impact on speech rights and therefore applying only rational basis review, to the first opinion on rehearing, applying intermediate scrutiny, to the most recent majority opinion, conceding that strict scrutiny might be required and holding that the law could survive even this daunting test. *Amici* fear this most recent opinion is the most dangerous because if courts are willing to uphold viewpoint-based speech regulations under strict scrutiny, the effect will be wholesale destruction of the First Amendment restriction on legislative discretion to control speech. Speech rights will be won or lost at the ballot box. The First Amendment is intended to protect against the tyranny of the majority. The *amici* are fearful of what legislatures may do next. If the Court concludes that the State of Florida can

legislate in order to suppress their viewpoint regarding firearm ownership and ammunition, they expect that the heavy hand of the censor will be felt by all manner of professionals on a very wide range of topics.

## THE INTERESTS AND AUTHORITY TO FILE OF THE AMICI

The *amici curiae* have obtained the consent of their governing officials or boards to file this brief. Their identities and interests are as follows:

### The ACLU of Florida

The American Civil Liberties Union (ACLU) is our nation's guardian of liberty, working daily in courts, legislatures, and communities to defend and preserve the individual rights and liberties guaranteed to all people in this country by the U.S. Constitution. Since 1920, the nonprofit, nonpartisan ACLU has grown to over 500,000 members and supporters. The ACLU of Florida, with headquarters in Miami, is the local affiliate of the national organization.

### The Medical Societies

The Alachua County Medical Society represents more than 1,000 physicians, residents and students in Alachua, Levy, Dixie, and Gilchrist Counties. The Broward County Medical Association (BCMA), established 1926, advocates for physicians' rights and unites 1,500 allopathic and osteopathic physicians, of all specialties. The BCMA authored the United States' first and only "*Physician and Medical Staff Bill of Rights and Responsibilities*" as a model of physician free

speech and autonomy for the practice of medicine. The *Physician Bill of Rights* was introduced and referred in 2015 to the American Medical Association (AMA) to be a part of the AMA national policy. The Broward County Pediatric Society has approximately 100 pediatricians and pediatric subspecialists as members. The Palm Beach County Medical Society has been a trusted leader in addressing healthcare issues facing physicians since 1919. The Florida Public Health Association was founded in 1931 to advance public health through advocacy, education, and networking. All five medical societies have joined this brief to protect their members' speech rights at this critical time when healthcare reform is at the forefront of the nation's political agenda. The medical societies recognize individual patients' rights but also individual physicians' rights to free speech and autonomy so they can freely advocate and care for their patients. The medical societies also recognize a right of free speech to the physician as an individual without fear of government retaliation or restrictions. The medical societies fear that restrictions to physician's autonomy and free speech not only will reduce access, availability, and the quality of medical care, but will violate the basic rights of any individual physician to "freely advocate for patients" and free speech. They fear that if the state can censor questions regarding firearm and ammunition ownership, it may impose additional speech restrictions that have nothing to do with the practice of medicine and everything to do with a political agenda and

furthermore interfere with physician rights and the practice of medicine — and causing harmful downstream consequences.

The Children and Youth Care Groups

Two of the *amici curiae* are organizations that advocate for the health and well-being of children. The Early Childhood Initiative Foundation is an organization aimed toward providing "universal readiness" or making available affordable high-quality health, education, and nurturing for all of the Miami-Dade County's community of approximately 160,000 children between birth and age five. Under its president, David Lawrence, Jr., the Initiative works toward the social, physical, emotional, and intellectual growth of all children so that they are ready and eager to be successful in the first grade and throughout life. The Children and Youth Clinic is an in-house legal clinic, staffed by faculty and students at the University of Miami School of Law, which advocates for the rights of children in abuse and neglect, medical care, mental health, disability, and other proceedings. These organizations all have a strong interest in ensuring that doctors, like other citizens, remain free to question their patients about firearm and ammunition ownership – regardless of whether the inquiries are part of a preventative healthcare regimen or simply the expression of a viewpoint.

The Marion B. Brechner First Amendment Project

The Marion B. Brechner First Amendment Project is a nonprofit,

nonpartisan organization at the University of Florida. Directed by attorney Clay Calvert, the Project is dedicated to contemporary issues of freedom of expression.

## AUTHORSHIP & FUNDING OF THE BRIEF

No party's counsel authored this brief or contributed money intended to fund preparation or submission of this brief; and no person, other than the *amici curiae*, their members or counsel, contributed money intended to fund the preparation or submission of the brief.

## STATEMENT OF THE ISSUES & ANSWERS

The questions the parties have been directed to address should be answered as follows:

Question 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?

Answer 1:

> **Strict scrutiny.** Because these provisions are content-based and speaker-based restrictions on speech, they must be subjected to strict scrutiny and found unconstitutional because they do not serve compelling governmental interests and are more restrictive of speech than necessary to advance the interests for which they were enacted.

Question 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?

Answer 2:

> **Strict scrutiny.** Because this provision was enacted as part of a state law that that was enacted to burden the speech of particular speakers about a specific subject, it should be subjected to strict scrutiny and invalidated because it serves no compelling purpose.

Question 3:

> Is the Act's anti-harassment provision, Fla. Stat. § 790.338(6), unconstitutionally vague?

Answer 3:

> **Yes**. The term "unnecessarily harassing" fails to provide a person of ordinary intelligence fair notice of what is prohibited, and is so standardless that it authorizes and encourages seriously discriminatory enforcement.

## SUMMARY OF ARGUMENT

Point I. Contrary to the defendants' argument, this case is ripe for review. The Court should re-evaluate its ripeness jurisprudence, however, and use this case to clarify that First Amendment challenges under 42 U.S.C. § 1983 are typically, if not always, ripe.

Point II. The Act is not a regulation of professional speech. It specifically applies solely to speech that is not relevant to patient health and safety. The Court therefore need not determine whether anything less than strict scrutiny applies here. As a content- and speaker-based regulation of speech, the Court must apply strict scrutiny. The Act cannot withstand that analysis.

Point III. If the Act is regarded as a regulation of professional speech and

if the Court concludes that intermediate scrutiny should govern, the Act still should be invalidated because the State failed to show that the Act will directly and materially advance a substantial government interest or that the Act is properly tailored to serve the purposes for which it was enacted.

## ARGUMENT

### I.

### This Case is Ripe for Review

Before addressing the merits, the amici wish to address an important justiciability issue raised by the defendants and that has been raised frequently in other First Amendment challenges in section 1983 cases before this Court. The amici believe that this is an issue that the *en banc* Court should address not only because the defendants raise it, but also because it could resolve inconsistencies found in various decisions of this Court, not only in this case, but in others too.[1]

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[1] *See, e.g,, Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach,* 727 F.3d 1349 (11th Cir. 2013) (holding First Amendment challenge to ordinance designating synagogue as historic **was ripe**); *Harrell v. The Florida Bar,* 608 F.3d 1241, 1247 (11th Cir. 2010) (holding Fourteenth Amendment facial vagueness challenge **was ripe** with respect to five of the nine Florida Bar rules, and eight of nine First Amendment challenges **were not ripe**); *Beaulieu v. City of Alabaster,* 454 F.3d 1219, 1227-28 (11th Cir. 2006) (holding First Amendment challenge to political sign permitting ordinance **was ripe**); *Nat'l Adver. Co. v. City of Miami,* 402 F.3d 1335, 1339 (11th Cir. 2005) (holding First Amendment challenge to billboard permitting ordinance **was not ripe**); *Granite State Outdoor Adver., Inc. v. City of Clearwater,* 351 F.3d 1112 (11th Cir. 2003) (holding challenge to billboard ordinance **was ripe**); *Pittman v. Cole*, 267 F.3d 1269, 1283 (11th Cir. 2001)

The defendants contend in Point I of their brief that the plaintiffs lack standing and the case is not ripe for review in reliance on this Court's decision in *Harrell v. The Florida Bar*, 608 F.3d 1241 (11th Cir. 2010). In that case, the panel acknowledged that exhaustion of administrative remedies is not required before a section 1983 challenge can be brought, as the Supreme Court held in *Patsy v. Board of Regents*, 457 U.S. 496 (1982), but also held that a section 1983 claim must be ripe in order to satisfy the case or controversy requirement of article III as well as prudential considerations. *Harrell* explained the ripeness "requirement, which goes to the question of fitness for judicial review, is not a form of administrative exhaustion, but rather a requirement that 'an administrative action must be final before it is judicially reviewable.'" *Harrell,* 608 F.2d at 1262 (*citing Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570, 1574 n. 8 (11th Cir. 1989) (*quoting Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 192 (1985)). As can be seen from this statement of the law, the Court has adopted a fine line between the two principles – a line that is too fine in

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(holding First Amendment challenge to Bar ethical rule **was not ripe**); *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta,* 219 F.3d 1301, 1315 (11th Cir. 2000) (holding First Amendment challenge to outdoor festival permitting ordinance **was ripe**); *Digital Props., Inc. v. City of Plantation,* 121 F.3d 586, 589 (11th Cir. 1997) (holding First Amendment challenge to adult bookstore permitting ordinance **was not ripe**); *Int'l Soc'y for Krishna Consciousness v. Eaves*, 601 F.2d 809 (5th Cir. 1979) (holding First Amendment challenge to ordinance regulating literature distribution at airport **was ripe**).

the view of the *amici* and a line which should now should be drawn more boldly so that the principle established in *Patsy* is not destroyed.

The plaintiff in *Patsy* alleged that Florida International University, her employer, denied her employment opportunities on the basis of her race and sex. *Patsy,* 457 U.S. at 496. The district court dismissed her claim because she had not exhausted administrative remedies and the former Fifth Circuit affirmed. *Patsy v. FIU,* 612 F.2d 946 (5th Cir. 1980). Justice Marshall, writing for the majority, brushed FIU's argument for affirmance aside, pointing out that "we have on numerous occasions rejected the argument that a § 1983 action should be dismissed where the plaintiff has not exhausted state administrative remedies." *Patsy,* 457 U.S. at 500. He wrote that the cases could not be distinguished factually, as had been argued, and emphasized that "this Court has stated *categorically* that exhaustion is not a prerequisite to an action under § 1983." *Id.* at 501 (emphasis added). He further explained that "'[t]he very purpose of § 1983 was to interpose the federal courts between the States and the people, as guardians of the people's federal rights – to protect the people from unconstitutional action under color of state law, 'whether that action be executive, legislative, or judicial.'" *Id.* at 503 (1982) (*quoting Mitchum v. Foster*, 407 U.S. 225, 242 (1972) (*quoting Ex parte Virginia*, 100 U.S. 339, 346 (1880)).

Three years after *Patsy,* the Supreme Court reviewed a Fifth Amendment

takings claim in *Williamson County* and overturned the verdict because the plaintiff had not obtained a final decision regarding the application of the zoning ordinance to its property or used Tennessee procedures for obtaining just compensation. *Id.* at 186. Although it appeared as though the Court was requiring exhaustion of administrative remedies, the Court held exhaustion of administrative remedies is "conceptually distinct . . . from the question whether an administrative action must be final before it is judicially reviewable." *Id.* at 192.

The *Williamson County* decision has been the subject of harsh criticism. It has been described as "quite wrong" in its invocation of ripeness concepts to avoid federal issues,[2] as establishing a "special rule" for section 1983 takings cases,[3] and as doctrinally confused from the start.[4] Chief Justice Rehnquist questioned the

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[2] Henry Paul Monaghan, *State Law Wrongs, State Law Remedies, And The Fourteenth Amendment*, 86 COLUM. L. REV. 979, 989 (1986) ("No authority supports use of ripeness doctrine to bar federal judicial consideration of an otherwise sufficiently focused controversy simply because corrective state judicial process had not been invoked").

[3] *Id.* at 989; *see also* Brian W. Blaesser, *Closing The Federal Courthouse Door On Property Owners: The Ripeness And Abstention Doctrines In Section 1983 Land Use Cases*, 2 HOFSTRA PROP. L.J. 73, 135 (1988-89) ("use of the ripeness . . . to dismiss constitutional claims brought by property owners . . .was never intended by Congress").

[4] Michael M. Berger & Gideon Kanner, *Shell Game! You Can't Get There from Here: Supreme Court Ripeness Jurisprudence in Takings Cases at Long Last Reaches the Self-Parody Stage*, 36 THE URBAN LAWYER. 671,673 (2004); J. David Breemer, *You Can Check Out But You Can Never Leave: The Story of the San Remo Hotel-The Supreme Court Relegates Federal Takings Claims to State Courts*

logic of *Williamson County*, noting that "the Court has not explained why we should hand authority over federal takings claims to state courts, based simply on their relative familiarity with local land-use decisions and proceedings, while allowing plaintiffs to proceed directly to federal court in cases involving, for example, challenges to municipal land-use regulations based on the First Amendment." *San Remo Hotel, LP v. City and County of San Francisco*, 545 US 323, 350 (2005) (Rehnquist, C.J., concurring in the judgment, joined by O'Connor, Kennedy and Thomas) (*citing Renton v. Playtime Theatres, Inc.*, 475 U. S. 41 (1986); *Young v. American Mini Theatres, Inc.*, 427 U. S. 50 (1976)).

More importantly, as Chief Justice Rehnquist recognized, *Williamson* plainly did not overrule *Patsy's* holding that exhaustion of administrative remedies is not required in section 1983 cases. *Williamson County* involved a situation where the plaintiff had not yet had his property taken without just compensation because the local authorities had not finally decided to do so.

Nevertheless, this Court has extended *Williamson County* to apply in cases such as *Greenbriar, Ltd. v. City of Alabaster*, 881 F.2d 1570 (11th Cir. 1989), which was not a takings case. The case did involve a claim of injury to property rights. But even this limited "extension is improper [and] courts must cease . . .

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*Under a Rule Intended to Ripen the Claims for Federal Review*, 33 BOSTON COLL. ENVTL. AFFAIRS L. REV. 247,283-298 (2006).

because there is no authority for this trend, and it amounts to a jurisdictional coup d'etat that illegally rescinds § 1983 for property owners."[5] This Court also has extended *Williamson County* to section 1983 cases that claim constitutional injuries wholly unconnected to property rights, including First Amendment cases.[6]

That extension is even more unwarranted. The plaintiffs here claim a state statute has deterred them from engaging in speech protected by the First Amendment, not interference with any property right. In the First Amendment context, the United States Supreme Court has held that the mere passage of laws that discriminate against viewpoints can chill speech and cause the targets of those laws to self-censor. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."). That injury occurs as soon as the law is in the books, which makes First Amendment disputes generally, and this dispute particularly, ripe.

Indeed, in *Temple B'Nai Zion, Inc. v. City of Sunny Isles Beach*, 727 F.3d 1349, 1357 (11th Cir. 2013) (Wilson, J., Tjoflat & Coogler, JJ., concurring), this Court recognized the problem with applying *Williamson County* ripeness principles

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[5] J. David Breemer, *Ripeness Madness: The Expansion of Williamson County's Baseless "State Procedures" Takings Ripeness Requirement to Non-Takings Claims*, 41 THE URBAN LAWYER 615, 618 (2009).

[6] *See* note 1 *supra*.

to First Amendment cases. It held: "Although we agree that '[t]he *Williamson County* ripeness test is a fact-sensitive inquiry that may, when circumstances warrant, be applicable to various types of land use challenges,' *Murphy [v. New Milford Zoning Comm'n,* 402 F.3d 342, 350 (2d Cir. 2005)], we think it an inappropriate tool for the specific facts presented here." *Id.*

It also is an inappropriate tool for the specific facts presented in this case.[7] Simply deciding a given First Amendment case on its facts is not, however, sufficient to resolve the difficulties that district courts and litigants have had with section 1983 First Amendment claims. The time has come for the *en banc* Court to clear away the ripeness confusion that has existed in section 1983 First Amendment cases in this Circuit and to hold unequivocally, as have other circuits,[8] that those claims are by their nature ripe. This is not to say that the claims by their

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[7] The law at issue prohibits ongoing, noncommercial communications between healthcare practitioners and patients. They obviously could not seek advisory opinions to guide all conceivable interactions of this type.

[8] *Roman Catholic Bishop of Springfield v. City of Springfield*, 724 F.3d 78, 92 (1st Cir. 2013) ("While constitutional challenges to land use regulations may implicate *Williamson County's* ripeness doctrine in some cases, we find no such necessary implication here"); *Dougherty v. Town of N. Hempstead Bd. of Zoning Appeals*, 282 F.3d 83, 90 (2d Cir. 2002) (declining to apply *Williamson County* to First Amendment retaliation claim, in part because the plaintiff "suffered an injury at the moment the defendants revoked his permit, and [the plaintiff's] pursuit of a further administrative decision would do nothing to further define his injury"); *Peachlum v. City of York*, 333 F.3d 429, 434 (3d Cir. 2003) ("A First Amendment claim, particularly a facial challenge, is subject to a relaxed ripeness standard").

nature have merit. But the Court should not continue to apply a form of ripeness analysis rooted in takings cases now frequently invoked by defendants in First Amendment cases, which leads to unpredictable and inconsistent results within the Eleventh Circuit,[9] and that regularly results in infliction of irreparable First Amendment injury by effectively barring facial challenges necessary to prevent unconstitutional statutes from chilling speech.

II.

The Act Must be Subjected to Strict Scrutiny and Invalidated

The Act unquestionably targets speech that is *irrelevant* to patient medical care or safety, or the safety of others, such as doctors' and patients' political views on gun ownership. Plaintiffs maintain they do not engage in such speech, but are chilled from engaging in speech that is *relevant* to patient medical care or safety, or the safety of others, including routine inquiry and recording of information about patient firearm and ammunition ownership. As a consequence, the panel focused its efforts primarily on determining whether this chilling impact violates the First Amendment, while entirely ignoring the direct impact of the Act. The majority and dissent in its previous opinions both focused on a wholly unnecessary and deeply protracted analysis of the proper level of scrutiny for a statute that chills "professional speech."

[9] *See* note 1 *supra*.

Other courts have struggled with this question in cases involving regulations that – unlike the Act – actually sought to regulate the conduct of the medical profession, rather than prohibiting healthcare practitioners from engaging their patients in discussions on a topic unrelated to the patient health or safety that the State would prefer to silence. For instance, both the Third and Ninth Circuits have addressed laws that prohibited mental healthcare professionals from engaging in sexual orientation change efforts (SOCE). *King v. Gov. of N.J.*, 767 F.3d 216 (3d Cir. 2014); *Pickup v. Brown*, 740 F.3d 1208 (9th Cir. 2013). In *Pickup*, the Ninth Circuit concluded that the restriction on a particular course of treatment was a regulation of conduct, with only an incidental effect on speech, and thus subject only to rational basis review.[10] 740 F.3d at 1231. In *King*, by contrast, the Third Circuit found the verbal communications that occur during SOCE are professional speech subject to intermediate scrutiny.[11] 767 F.3d at 235-36.

*Amici* accept the holding in *Pickup*, that as licensed professionals, they are

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[10] The Fifth Circuit similarly held a Texas law requiring veterinarians to conduct a physical examination of an animal before practicing veterinary medicine with respect to the animal was a regulation of professional conduct with only an incidental effect on speech. *See Hines v. Alldredge*, 783 F.3d 197 (5th Cir. 2015).

[11] *King* cited *Moore-King v. County of Chesterfield, Va.,* 708 F.3d 560 (4th Cir. 2013), in which the Fourth Circuit upheld licensing requirements for fortune tellers as "professional speech," holding that a state's regulation of a profession raises no First Amendment problem where it amounts to "generally applicable licensing provisions" affecting those who practice the profession.

subject to state regulation of the conduct of their medical practice, and the state may proscribe a course of treatment, consistent with the First Amendment. Had the State of Florida made a determination that gun ownership is *never* relevant to a patient's treatment (contrary to the teachings of numerous medical authorities), the analysis would be different. But the State did not proscribe inquiry regarding gun ownership based on a medical judgment that such discussion is harmful to patient care. Instead, it prohibited the discussion of gun ownership when the topic is concededly *irrelevant* to patient care, based on a political preference to shield gun owners from any dialog regarding gun safety or other firearm-related issues.

As the Supreme Court held in *Agency for International Development v. Alliance for Open Society International*, 133 S. Ct. 2321 (2013) (hereinafter *AID*), even where the government has broad power to impose conditions on licensing or funding, it may not impose conditions that are unrelated to the objective of the program in order to leverage a government license or funding for political or ideological purposes. *AID* involved Congressional funding of efforts by nongovernmental organizations to fight the spread of HIV/AIDS around the world. *Id.* at 2324-25. The act authorizing this spending provided (1) the funds could not be used to promote or advocate the legalization or practice of prostitution or sex trafficking and (2) no funds could be used by an organization that does not have a policy explicitly opposing prostitution and sex trafficking. *Id.* Organizations

eligible to receive the funds challenged the latter condition as violating their First Amendment rights. *Id.* at 2326.

The Supreme Court, in a seven-justice majority opinion authored by Chief Justice Roberts, agreed with the plaintiffs. The Court recognized that Congress has broad spending powers and that if a party objects to a condition on the receipt of federal funding, "its recourse is to decline the funds." *Id.* at 2328. Similarly, states have broad authority to impose conditions on the receipt of a license to practice medicine (or many other professions), and the recourse of those who oppose submission to the conditions is to reject the license. The *AID* opinion noted, however, that "the Government 'may not deny a benefit to a person on a basis that infringes his constitutionally protected . . . freedom of speech even if he has no entitlement to that benefit.'" *Id.* (citation omitted). The same principle applies to government issuance of licenses to professionals.

"[T]he relevant distinction that has emerged," the Supreme Court held, "is between conditions that define the limits of the government spending program – those that specify the activities Congress wants to subsidize – and conditions that seek to leverage funding to regulate speech outside the contours of the program itself." *Id.* The Court conceded that the "line is hardly clear." *Id.* at 2328. It concluded that the challenged condition – requiring the recipients to adopt a policy opposing prostitution – imposed an unconstitutional condition on recipients'

speech unrelated to the program because it not only controlled speech in conjunction with recipients' fulfillment of the government program, it also controlled the speech of recipients when they were acting *outside* the program by compelling them to adopt the government's viewpoint. *Id.* at 2332.

Similar to government funding of programs, state licensing of professionals provides tempting opportunities for legislators to restrict or compel speech through conditions outside the purpose of the licensing program: in essence "leveraging" a government license improperly. In this case, the record reflects that the Florida Legislature first considered the law at issue at the behest of the National Rifle Association (NRA). It was not proposed by any medical association or group concerned with patient health. Instead, the NRA, as an advocacy organization, proposed the law after it learned that doctors routinely ask their patients about firearm and ammunition ownership in order to engage them in a discussion of the dangers they create. The NRA's concern about this questioning was understandable in light of the fact that doctors regularly see first-hand the harmful effects of unregulated distribution of firearms and often advise patients not only about firearm safety, but also their support of gun restrictions.

The record before this Court is clear that the legislature shared the NRA's viewpoint against gun restrictions and adopted the law not due to a belief that the restriction was needed to advance the goals of medical licensing, but rather to

suppress political opposition to gun control. This was made clear by the language of the act, which solely bans communications with patients that are irrelevant to the good faith delivery of medical care. Just as the law requiring *AID* fund recipients to endorse a government viewpoint even when they were not fulfilling their government-funded missions, the Florida law restricts inquiries made of patients when doctors are *not* inquiring for medical purposes. This type of speech restriction cannot, under *AID*, be characterized as a simple license-defining regulation. It instead is a leveraging of regulation to impose a content- and viewpoint-based restriction on speech that, contrary to the majority's conclusion, cannot satisfy strict scrutiny.

The political purpose behind the Act is further evidenced by the fact that the state did not prohibit healthcare practitioners from inquiring, recording information, discriminating, or harassing patients on *any* topic irrelevant to patient medical care or safety, perhaps on a theory that irrelevant discussion is wasteful of patient time. Instead, the State targeted a single subject and a particular viewpoint, seeking to silence healthcare practitioners who may seek to engage patients in a debate on which the State has taken a side. When the State targets a specific group of speakers and a narrow type of speech for exclusion from records, inquiries, discrimination and harassment, the State reveals that its objective is not to improve the delivery of professional services, but to attack those whose speech advocates a

particular political viewpoint or to place a certain subject off limits. "Content-based laws—those that target speech based on its communicative content—are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015).

The panel in this case ultimately concluded that this type of content-, speaker-, and viewpoint-based speech restriction arguably must be subject to strict scrutiny, but then went on to conclude that the restriction survives strict scrutiny because it protects patients' "from irrelevant questioning about guns that could dissuade them from exercising their constitutionally guaranteed rights." *Wollschlaeger III,* 814 F.3d at 1186 & 1193. This ignores that "Speech remains protected even when it may 'stir people to action,' 'move them to tears,' or 'inflict great pain.'" *See Sorrell*, 131 S. Ct. at 2670 (citations omitted). So, for example, one may have a constitutional right to obtain an abortion, but a state may not prohibit those who oppose abortion from attempting to dissuade others from exercising that right through annoying or even highly offensive means which do not physically interfere with the exercise of the right. *See, e.g., McCullen v. Coakley*, 134 S. Ct. 2518 (2014).

The panel watered down the concept of strict scrutiny beyond any recognition, and the result is frightening, but predictable: legislatures will have

carte blanche to enact restrictions on speech with which they disagree. The panel's opinion already has been cited as authority for upholding a law on the other side of the political spectrum, requiring crisis pregnancy centers (which disfavor abortion) to notify clients regarding the availability of free or low-cost public family planning services, including abortion. *A Woman Friend's Pregnancy Res. Clinic v. Harris*, 2015 WL 9274116, at *19-24 (E.D. Cal. Dec. 21, 2015), *appeal pending*, No. 15-17517 (9th Cir.) (oral argument set for June 14, 2016). Like the majority, the *Woman Friend's* court concluded that even if the law at issue were subjected to strict scrutiny, it would survive. *Id.* at *22-24. This decision shows that if courts are willing to uphold viewpoint-based speech regulations under a weak type of strict scrutiny, the contours of the First Amendment will vary depending on who controls the legislature. In California, the liberals would get their way (for now). In Florida, the conservatives would get their way (for now). In both states, the people would lose their First Amendment rights, and we all would be worse for it.

The *amici* in this case represent thousands of healthcare practitioners and concede that the recording of information about patient firearm ownership, and inquiries into firearm and ammunition ownership, often have no relevance to medical care or safety, or the safety of others. The *amici* have asserted from the outset of this litigation that they regularly engage their patients for political rather than medical care or safety purposes in discussions of firearm ownership. They

further admit that many of their patients, like the very patient whose experience in Ocala led to adoption of the Act, regard this as unnecessary harassment due to the patients' strong conviction that healthcare practitioners ought not be asking them about this particular topic or recording information about this topic. DE-67.

The overbreadth doctrine entitled the plaintiffs "to challenge [the] statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Okla.*, 413 U.S. 601, 612 (1973). A law is "unconstitutional on its face if it prohibits a substantial amount of protected expression." *Ashcroft v. Free Speech Coal.,* 535 U.S. 234, 244 (2002) (holding Child Pornography Prevention Act of 1996 was overbroad because it proscribed a significant universe of speech that was neither obscene nor child pornography).

The majority recognized that the plaintiffs had advanced an overbreadth attack, but then rejected it on the illogical ground that the Act does not prohibit a substantial amount of speech because "it only burdens speech that, as judged by the physician in good faith, lacks a sufficient nexus to the medical care or safety of a particular patient." *Wollschlaeger III,* 814 F.3d at 1201. The fact that physicians believe their speech has no such nexus has nothing whatsoever to do with the amount of protected speech the statute prohibits. The majority accepted that

physicians routinely engaged in the speech restricted by the Act, and the *amici* also have shown that thousands of additional healthcare practitioners did as well. The majority had no basis to conclude that the Act does not prohibit a substantial amount of protected speech. It prohibits thousands of daily inquiries, notations, and even debates.

The majority also rejected the plaintiffs' overbreadth challenge, relying on *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975), a case that did not involve a First Amendment challenge, let alone an overbreadth challenge, and the *ipse dixit* that "no one argues that concededly irrelevant speech lies within the scope of good medical practice." *Wollschlaeger III,* 814 F.3d at 1201. The issue is not whether the speech restricted by the Act is within good medical practice; the issue is whether speech prohibited by the Act, which is fully protected by the First Amendment, is "substantial" when "judged in relation to the statute's plainly legitimate sweep," *U.S. v. Stevens,* 559 U.S. 460, 473 (2010) (quotes omitted), and the record here shows that it is.

## III.

## If Not Subjected to Strict Scrutiny, the Act Must be Subjected to Intermediate Scrutiny and Invalidated

Even if the Court were to conclude that the Act is a regulation of professional speech, such restrictions must, at a minimum, survive intermediate scrutiny to pass constitutional muster. The Act does not satisfy that standard.

This Court's sister Circuits have correctly explained that "[b]eing a member of a regulated profession does not . . . result in a surrender of First Amendment rights."[12] "[P]hysician speech is entitled to First Amendment protection because of the significance of the doctor-patient relationship,"[13] and laws that either restrict what physicians can say to patients, or compel physicians to say things they otherwise would not, can significantly harm patients, medical providers, and the medical profession.[14] In light of the "core First Amendment values of the doctor-patient relationship,"[15] courts have correctly recognized that subjecting laws regulating professional speech to "anything less than intermediate scrutiny" would not "adequately protect the First Amendment interests inherent in professional speech," *King*, 767 F.3d at 236.

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[12] *Conant v. Walters*, 309 F.3d 629, 637 (9th Cir. 2002) (citations omitted); *accord Stuart v. Camnitz*, 774 F.3d 238, 247 (4th Cir. 2014) (physicians do not "simply abandon their First Amendment rights when they commence practicing a profession"), *cert. denied sub nom. Walker–McGill v. Stuart*, 135 S. Ct. 2838 (2015); *King*, 767 F.3d at 236; *Pickup*, 740 F.3d at 1227 ("doctor-patient communications about medical treatment receive substantial First Amendment protection") (emphasis omitted).

[13] *Conant*, 309 F.3d at 636.

[14] *See, e.g.*, *Stuart*, 774 F.3d at 253-55. *Cf.* Zita Lazzarini, *South Dakota's Abortion Script—Threatening the Physician-Patient Relationship*, 359 N. Eng. J. Med. 2189, 2191 (2008) (legislative interference with physician-patient communications "detracts from the essential trust between patients and their physicians").

[15] *Conant*, 309 F.3d at 637.

The Fourth Circuit in *Stuart* addressed a North Carolina statute that compelled physicians who provide abortions to display an ultrasound image and describe it in detail to a woman seeking an abortion, even if she did not want to see the image or hear the doctor describe it, and even if she were to "avert[] her eyes and cover[] her ears while her physician—a person to whom she should be encouraged to listen—recites information to her." 774 F.3d at 242. The court acknowledged that the statute implicated the government's interest in regulating the medical profession, but explained that "[t]he government's regulatory interest is less potent in the context of a self-regulating profession like medicine." *Id.* at 248 (citation omitted). The court held that regulations of professional speech "must satisfy at least intermediate scrutiny to survive," *id.* at 245, and—placing particular emphasis on the fact that the speech mandate, like the Act here, "markedly depart[s] from standard medical practice," *id.* at 254—concluded that the law could not pass that test, *id.* at 256.[16]

[16] Judge Wilson suggested that laws *compelling* physician speech might receive less rigorous scrutiny than laws *restricting* such speech. *Wollschlaeger II,* 797 F. 3d at 916 (Wilson, J., dissenting). This is incorrect. "There is certainly some difference between compelled speech and compelled silence, but in the context of protected speech, the difference is without constitutional significance, for the First Amendment guarantees 'freedom of speech,' a term necessarily comprising the decision of both what to say and what *not* to say." *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 796-97 (1988) (emphasis in original).

The Ninth Circuit applied equally rigorous scrutiny to a professional speech regulation in *Conant*, where it addressed a federal policy designed to prevent physicians from speaking to patients about the medical use of marijuana. 309 F.3d at 632. Recognizing that "[a]n integral component of the practice of medicine is the communication between a doctor and a patient," *id.* at 636, and that the challenged policy interfered with such communications in a manner that departed from "the traditional role of medical professionals," the court applied heightened scrutiny and upheld the district court's injunction against the policy, *id.* at 638 (quotation marks and citation omitted). And in *King*, the Third Circuit similarly held that regulations of professional speech must be subjected to heightened scrutiny, explaining that "[w]ithout sufficient judicial oversight, legislatures could too easily suppress disfavored ideas under the guise of professional regulation." 767 F.3d at 236 (citing *Pickup*, 740 F.3d at 1215 (O'Scannlain, J., dissenting from denial of rehearing en banc)). As the court explained, at a minimum,"[i]ntermediate scrutiny is necessary to ensure that State legislatures are regulating professional speech to prohibit the provision of harmful or ineffective professional services, not to inhibit politically-disfavored messages."[17] *Id.*

[17] As the Third Circuit recognized, intermediate scrutiny sets the floor, not the ceiling, for the standard of review applicable to regulations of professional speech. *See King*, 767 F.3d at 235. Since the sole reason for subjecting professional speech regulations to intermediate rather than strict scrutiny is the

*Planned Parenthood v. Casey* is not to the contrary. 505 U.S. 833, 884 (1992). In *Casey*, physician-plaintiffs challenged a series of Pennsylvania regulations, including an informed consent provision that required, *inter alia*, that physicians inform patients of the availability of state-printed information about abortion and its alternatives. *Id.* at 881. The Supreme Court addressed the plaintiffs' substantive due process challenge to that provision in significant detail, ultimately determining that the requirements did not unduly burden women's access to abortion because the information at issue was "truthful and not misleading." *Id* at 882. By contrast, the Court's discussion of the plaintiffs' separate First Amendment claim was brief. In a single, three-sentence paragraph the Court stated:

> All that is left of petitioners' argument is an asserted First Amendment right of a physician not to provide information about the risks of abortion, and childbirth, in a manner mandated by the State. To be sure, the physician's First Amendment rights not to speak are implicated, *see Wooley v. Maynard*, 430 U.S. 705 (1977), but only as part of the practice of medicine, subject to reasonable licensing and regulation by the State, *cf. Whalen v. Roe*, 429 U.S. 589, 603 (1977). We see no constitutional infirmity in the requirement that the physician provide the information mandated by the State here.

*Id.* at 884.

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state's interest in protecting public health and patient welfare, a professional speech regulation "designed to advance an interest unrelated to client protection" would be subjected to strict scrutiny. *Id.*

The Fourth Circuit cautioned against "read[ing] too much" into *Casey*'s abbreviated First Amendment discussion, because it "hardly announces a guiding standard of scrutiny" for regulations of professional speech. *Stuart*, 774 F.3d at 249. Nevertheless, the two interests identified in *Casey* (the physician's speech interests and the government's regulatory interests) are the precise interests courts have balanced in reasoning that professional speech regulations must be subjected to at least intermediate scrutiny. *See id.* at 248-49. In short, "[a] heightened intermediate level of scrutiny is thus consistent with Supreme Court precedent and appropriately recognizes the intersection . . . of regulation of speech and regulation of the medical profession[.]"[18] The Act cannot survive intermediate scrutiny for all of the reasons eloquently set forth in both of Judge Wilson's dissenting opinions to the panel majority's first two opinions. *Wollschlaeger I,* 760 F.3d at 1230 (Wilson, J., dissenting); *Wollschlaeger II,* 797 F.3d at 901 (Wilson, J., dissenting).

## CONCLUSION

The Court should affirm the judgment of the district court.

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[18] *Stuart*, 774 F.3d at 249; *Pickup*, 740 F.3d at 1228 (situating *Casey* at the "midpoint" of a continuum of professional speech); *Conant*, 309 F.3d at 636 (citing *Casey* for the proposition that "[t]he Supreme Court has recognized that physician speech is entitled to First Amendment protection because of the significance of the doctor-patient relationship"); *Greater Baltimore Center for Pregnancy Concerns, Inc. v. Mayor and City Council of Baltimore*, 683 F.3d 539, 554 (4th Cir. 2012) (*Casey* applied "intermediate scrutiny to disclosure requirements under Pennsylvania's abortion law"), *vacated on reh'g en banc on other grounds*, 721 F.3d 264 (4th Cir. 2013).

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

Undersigned counsel hereby certifies that this brief complies with the requirements of FRAP Rule 32(a)(7)(B)(i) inasmuch as the brief, exclusive of the Certificate of Interested Persons and Corporate Disclosure Statement, Certificate of Service, Table of Contents, Table of Citations and Authorities, and this Certificate, is 6,932 words and is printed in 14-point Times New Roman proportionally spaced typeface.

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