**No. 12-14009-FF**

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**IN THE**
**UNITED STATES COURT OF APPEALS**
**FOR THE ELEVENTH CIRCUIT**

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DR. BERND WOLLSCHLAEGER, *et al.*,
*Plaintiffs-Appellees*,

v.

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

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On Appeal from the U.S. District Court for the Southern District of Florida
Case No. 1:11-cv-22026-MGC (Hon. Marcia G. Cooke)

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# EN BANC BRIEF OF AMICI CURIAE AMERICAN PUBLIC HEALTH ASSOCIATION, AMERICAN ASSOCIATION OF SUICIDOLOGY, SUICIDE AWARENESS VOICES OF EDUCATION, AND LAW CENTER TO PREVENT GUN VIOLENCE IN SUPPORT OF APPELLEES AND AFFIRMANCE

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**CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to 11th Circuit Rule 26.1-1, the undersigned counsel certifies that, in addition to the persons and entities identified in the briefs submitted to date in this appeal, the following persons may have an interest in the outcome of this case:

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## STATEMENT OF THE ISSUE

The Firearm Owners' Privacy Act chills speech by doctors that would provide patients with truthful, potentially lifesaving information about firearm safety. Does this law violate the patients' First Amendment right to receive information?

## INTEREST OF AMICI

Amici are not-for-profit organizations united by a commitment to protecting the American public's health, safety, and well-being. Each organization is dedicated to preventing violence, injury, and suicide by making sure the public is informed as to the risks associated with keeping a firearm in the home.

The American Association of Suicidology ("AAS") seeks to understand and prevent suicide. Founded in 1968, AAS is a membership organization for all those involved in suicide prevention and intervention, or touched by suicide. AAS leads the advancement of scientific and programmatic efforts in suicide prevention through research, education and training, the development of standards and resources, and survivor support services.

The American Public Health Association ("APHA") champions the health of all people and all communities. APHA speaks out for public health issues and a science-backed approach to public health policy. It has a 140-plus year perspective and brings together 25,000 members from all fields of public health.

Suicide Awareness Voices Of Education ("SAVE") was one of the nation's first organizations dedicated to the prevention of suicide and was a co-founding member of the National Council for Suicide Prevention. SAVE is one of today's leading national not-for-profit organizations with staff dedicated to prevent suicide. Its work is based on the foundation and belief that through awareness and education, the stigma of suicide and brain illnesses can be reduced and suicide can be prevented.

The Law Center To Prevent Gun Violence ("Law Center") is a national nonprofit organization focused on providing comprehensive legal expertise in support of gun violence prevention and the promotion of smart gun laws. The Law Center was formed by attorneys in the wake of an assault weapons massacre at a downtown office building in San Francisco in 1993. The organization remains dedicated to preventing the loss of lives caused by gun violence by providing in-depth legal expertise and information on America's gun laws. As an *amicus*, the Law Center (formerly Legal Community Against Violence) has provided informed analysis in a variety of firearm-related cases, including *District of Columbia v. Heller*, 554 U.S. 570, 128 S. Ct. 2783 (2008), and *McDonald v. City of Chicago*, 561 U.S. 742, 130 S. Ct. 3020 (2010).

No party's counsel authored the brief in whole or in part. No party, party's counsel, or other person contributed money that was intended to fund preparing or submitting the brief.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The parties and the State's amici focus on whether Florida's Firearm Owners' Privacy Act violates the First Amendment rights of doctors and other health care providers. This Gag Rule subjects doctors to discipline if, among other things, they inquire into a patient's firearm ownership and storage or "unnecessarily harass[]" patients regarding firearm ownership. Fla. Stat. Ann. § 790.338(6). Amici agree with Appellees that the Gag Rule chills doctors' speech and cannot survive any level of constitutional scrutiny. But Amici concentrate here on the First Amendment rights of a different group: the patients deprived of critical information about gun safety they otherwise would have received.

The Supreme Court has repeatedly emphasized that the First Amendment protects not only the right to speak, but also "'the right to receive information and ideas.'" *Bd. of Educ., Island Trees Union Free Sch. Dist. No. 26 v. Pico*, 457 U.S. 853, 866-67, 102 S. Ct. 2799, 2808 (1982) (quoting *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S. Ct. 1243, 1247 (1969)). *See also, e.g.*, *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council, Inc.*, 425 U.S. 748, 756-57, 96 S. Ct. 1817, 1823 (1976). The Gag Rule not only violates the First Amendment rights of doctors, but also the First Amendment rights of patients to obtain information about firearm safety. The State cannot avoid the violation by pointing to vague

guidance as to how the Board intends to enforce the Rule. That presents a classic "chilling effect" scenario.

The risks presented by the Gag Rule are grave. Study after study has demonstrated the devastating effects firearms have on public health in this country. Guns in the home increase the risks of suicide, homicide, and death from unintentional shooting. Guns in the home increase the risk that intimate partner violence will result in death. Perhaps most troubling, children and adolescents with access to guns are in much greater danger than those without such access. These statistics, and the tragedy that underlies each number, reveal what is at stake when doctors are prevented from asking patients whether they have access to guns and how those guns are stored or secured.

This Court should affirm the injunction entered by the district court to protect patients' right to receive that information and the public health benefits that come with it.

## ARGUMENT

### I. FLORIDA'S GAG RULE VIOLATES PATIENTS' FIRST AMENDMENT RIGHT TO RECEIVE INFORMATION FROM THEIR DOCTORS ON FIREARM SAFETY

It is well established that the First Amendment puts the right to receive information on equal footing with the right to disseminate it. *See* 1 Smolla & Nimmer on Freedom of Speech § 2:73 ("While we usually think of the First

Amendment as empowering speakers to speak, it might well be understood as embracing a concomitant right of listeners to listen, viewers to view, or readers to read."). Prospective speakers and prospective listeners alike have an interest in the free flow of discourse unimpeded by government interference or preference. This right extends to protect Florida patients who, but for the Gag Rule, would have received potentially lifesaving information from their doctors.

### A. The First Amendment Right to Receive Information Is Firmly Grounded in Supreme Court Precedent

The Supreme Court's recognition of listeners' rights dates at least to *Martin v. City of Struthers*, 319 U.S. 141, 63 S. Ct. 862 (1943). *See also* Susan Nevelow Mart, *The Right to Receive Information*, 95 LAW LIBR. J. 175 (2003) (tracing the history of the doctrine). In *Martin*, the plaintiff successfully challenged a local ordinance preventing door-to-door distribution of handbills. The Supreme Court explained that the First Amendment "embraces the right to distribute literature, and *necessarily protects the right to receive it*." 319 U.S. at 143, 63 S. Ct. at 863 (internal citation omitted, emphasis added). *See also Thomas v. Collins*, 323 U.S. 516, 534, 65 S. Ct. 315, 324 (1945) (holding that state law requiring labor organizers to register inhibited plaintiff organizer's right to speak and workers' right "to hear what he had to say").

The Court pulled on that thread in *Lamont v. Postmaster General*, 381 U.S. 301, 85 S. Ct. 1493 (1965). *Lamont* involved a federal statute that required the

postal service not to deliver any "communist political propaganda" from foreign countries unless the intended recipient affirmatively responded to a notice and consented to delivery. *Id.* at 302-05, 85 S. Ct. at 1494-96. The Supreme Court held that this violated the First Amendment "on the narrow ground that the addressee in order to receive his mail must request in writing that it be delivered," which was "an unconstitutional abridgement of the *addressee's* First Amendment Rights." *Id.* at 306-07, 85 S. Ct. at 1496 (emphasis added).

Justice Brennan highlighted that reasoning in a concurrence. He agreed with the Court's decision because "the addressees assert[ed] First Amendment claims in their own right: they contend[ed] that the Government is powerless to interfere with the delivery of the material because the First Amendment 'necessarily protects the right to receive it.'" *Id.* at 307-08, 85 S. Ct. at 1497 (Brennan, J., concurring) (quoting *Martin*, 319 U.S. at 143, 63 S. Ct. at 863). Justice Brennan's concurrence also elaborated on the constitutional underpinnings of the right to receive information. Citing examples from elsewhere in the Court's precedent, he observed that "the protection of the Bill of Rights goes beyond the specific guarantees to protect . . . those equally fundamental personal rights necessary to make the express guarantees fully meaningful." *Id.* This included, in his view, the right to receive information:

> The dissemination of ideas can accomplish nothing if otherwise willing addressees are not free to receive and

> consider them. It would be a barren marketplace of ideas that had only sellers and no buyers.

*Id.* *See also Griswold v. Connecticut*, 381 U.S. 479, 482-83, 85 S. Ct. 1678, 1680-81 (1965) (right to receive information is essential to ensure that Government does not "contract the spectrum of available knowledge" because without "peripheral rights the specific rights would be less secure").

By 1969, the Court saw it as "well established that the Constitution protects the right to receive information and ideas . . . regardless of their social worth." *Stanley v. Georgia*, 394 U.S. 557, 564, 89 S. Ct. 1243, 1247 (1969). The same year, in upholding the FCC's "fairness doctrine" for allocating broadcast time, the Court cited "the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experiences." *Red Lion Broad. Co. v. FCC*, 395 U.S. 367, 390, 89 S. Ct. 1794, 1807 (1969). And in *Kleindienst v. Mandel*, 408 U.S. 753, 92. S. Ct. 2576 (1972), the Court reaffirmed the right to receive information in a suit by a group of American professors challenging the State Department's refusal to issue a temporary visa to a Marxist scholar. The professors argued that the visa denial violated their First Amendment rights because they were deprived of the opportunity to "hear [the scholar's] views and engage him in a free and open academic exchange." *Id.* at 760, 92 S. Ct. at 2580. Although the Court ultimately declined to hold that the professors' interest was strong enough to *compel* the State Department to grant the visa, it confirmed that

the Government's actions abridged the professors' First Amendment right to receive information. *Id.* at 764-65, 92 S. Ct. at 2582-83. *See also Procunier v. Martinez*, 416 U.S. 396, 408-09, 94 S. Ct. 1800, 1809 (1974) (recognizing that censoring letters written by prisoners implicated the First Amendment rights of those to whom the letters would have been sent), *overruled on other grounds by Thornburgh v. Abbott*, 490 U.S. 401, 109 S. Ct. 1874 (1989).

Another leading case, *Virginia Board of Pharmacy*, 425 U.S. at 756-57, 96 S. Ct. at 1823, involved a Virginia statute barring pharmacies from advertising drug prices. The Court held that the consumers who brought the suit had a First Amendment interest based on the right to receive information: "where a speaker exists, as is the case here, the protection afforded is to the communication, to its source and to its recipients both." *Id.* at 756, 96 S. Ct. at 1823. Simply put, "If there is a right to advertise, there is a reciprocal right to receive the advertising." *Id.* at 757, 96 S. Ct. at 1823.

The Court cemented the right to receive information in *Pico*, 457 U.S. at 866-67, 102 S. Ct. at 2808, where it recognized the interest of students challenging a school board's decision to remove certain books from school libraries. As the Court explained, the right to receive information "is an inherent corollary of the rights of free speech and press that are explicitly guaranteed by the Constitution, in two senses." *Id.* at 867, 102 S. Ct. at 2808. It "follows ineluctably from the

*sender's* First Amendment right to send" and it "is a necessary predicate to the *recipient's* meaningful exercise of his own rights" as a citizen. *Id.*

Since *Pico*, the First Amendment right to receive information has been recognized over and over again. *See, e.g.*, *Reno v. American Civil Liberties Union*, 521 U.S. 844, 874, 117 S. Ct. 2329, 2346 (1997) (right to receive pornography); *Metro Broad., Inc. v. FCC*, 497 U.S. 547, 567, 110 S. Ct. 2997, 3010 (1990) ("public's right to receive a diversity of views" in broadcasts), *overruled on other grounds by Adarand Constructors, Inc. v. Pena*, 515 U.S. 200, 115 S. Ct. 2097 (1995); *McCarthy v. Fuller*, 810 F.3d 456, 462-63 (7th Cir. 2015), *cert. denied*, *Fuller v. Langskenkamp*, No. 15-1212, 2016 WL 1222544 (Apr. 25, 2016) (readers' interest in viewing speech posted on defendant's website); *Doe v. City of Albuquerque*, 667 F.3d 1111, 1118-19 (10th Cir. 2012) (public's right to access public library); *Conn. Bar Ass'n v. United States*, 620 F.3d 81, 90-91 (2d Cir. 2010) (debtor's interest in receiving information from bankruptcy attorney); *Neinast v. Bd. of Trs.*, 346 F.3d 585, 591 (6th Cir. 2003) (public's right to access public library); *Willis v. Town of Marshall*, 426 F.3d 251, 259-60 (4th Cir. 2005) (right to listen to public music performances); *Kreimer v. Bureau of Police*, 958 F.2d 1242, 1255 (3d Cir. 1992) (same). In short, the right to receive information is now firmly embedded in our understanding of the First Amendment.

### B. Florida's Gag Rule Abridges the Right to Receive Information

Florida's Gag Rule inhibits doctors' speech concerning firearm safety. It chills not only questions about gun ownership, but also warnings about the risks associated with guns and instructions for ensuring that guns are stored and used safely. Because doctors never communicate this information, patients do not receive it, and the Gag Rule infringes upon the patients' First Amendment right to receive information.

The Ninth Circuit's *Conant* decision illustrates how that analysis applies here. In 1996, the citizens of both California and Arizona passed ballot initiatives allowing patients to use and doctors to recommend marijuana for medical purposes without penalty under state law. *Conant v. Walters*, 309 F.3d 629, 632 (9th Cir. 2002). This, of course, did not supersede federal drug laws prohibiting the use of marijuana, so the federal government announced a policy under which any doctor who recommended or prescribed marijuana would lose his or her license to prescribe controlled substances. *Id.*

California patients eligible for medical marijuana and doctors who treated eligible patients sued to enjoin the policy. They took issue with the policy only insofar as it would penalize doctors who merely *recommended* that their patients use marijuana for medical purposes. *Id.* at 633. The district court agreed this was a problem under the First Amendment and issued an injunction under which the

federal government could not initiate a criminal investigation or "revok[e] any physician class member's DEA registration merely because the doctor makes a recommendation for the use of medical marijuana based on sincere medical judgment." *Id.* at 634 (quoting the district court).

The Ninth Circuit affirmed the injunction. The court recognized that the conduct protected by the injunction was not (at least not necessarily) criminal. Recommending medical marijuana was not itself a crime, and the injunction was drawn to allow discipline for any doctor who *intended* to incite illegal use and therefore could be guilty of aiding and abetting. *Id.* at 634-36. The government's effort to punish doctors for speech outside of that narrow category would "strike at core First Amendment interests of doctors *and patients*." *Id.* at 636 (emphasis added). The government could not justify its policy by arguing that "a doctor-patient discussion about marijuana might lead the patient to make a bad decision." *Id.* at 637. As the Supreme Court has made clear, it is anathema to the First Amendment to assume that patients will make bad decisions if given truthful information. *See id.* (citing *Thompson v. W. States Med. Ctr.*, 535 U.S. 357, 373-75, 122 S. Ct. 1497, 1507-08 (2002) (striking down statute barring advertisement of compounded drugs)); *see also Va. Bd. of Pharmacy*, 425 U.S. at 770, 96 S. Ct. at 1829 (First Amendment requires courts to "assume that [] information is not in itself harmful, that people will perceive their own best interests if only they are

well enough informed, and that the best means to that end is to open the channels of communication rather than to close them”).

Judge Kozinski’s concurrence in *Conant* highlighted the significance of the patients’ interests. He agreed that the impact on doctors’ First Amendment rights justified the injunction. But that was not “the fulcrum of th[e] dispute” because it was the patients “denied information crucial to their well-being” who would bear the brunt of the federal government’s policy. *Conant*, 309 F.3d at 639-40. Judge Kozinski noted the number of reputable medical professionals and organizations who had concluded that marijuana was a suitable choice for certain patients not responding to conventional treatment. *Id.* at 640-43. Regardless whether this conclusion was correct, it was sufficiently credible that affected patients and their families deserved “candid and reliable information about” medical marijuana. *Id.* at 643. Indeed, citing the Supreme Court cases discussed above, Judge Kozinski concluded that the patients had a First Amendment right to receive that information. *Id.* As he put it, “the right to hear and the right to speak are flip sides of the same coin,” with the right to receive information “no less protected by the First Amendment than the right to speak.” *Id.* But his insight was more practical:

> In this case, for instance, it is perfectly clear that the harm to patients from being denied the right to receive candid medical advice is far greater than the harm to doctors from being unable to deliver such advice. While denial of the right to speak is never trivial, the simple fact is that if the injunction were denied, the doctors would be

> able to continue practicing medicine and go on with their lives more or less as before. It is far different for patients who suffer from horrible disabilities . . . .

*Id.* at 643-44.

The Florida Gag Rule creates the same problem. Like the policy found unconstitutional in *Conant*, the Gag Rule deprives patients of truthful, evidence-based information concerning the risks of gun ownership and unsafe gun storage, thereby exposing them to harm that could otherwise be avoided. And, as in *Conant*, suppressing this information affects patients to a much greater extent than it does doctors. The harm to a doctor barred from offering his or her best professional advice is significant, but it pales in comparison to the devastation wrought when a family loses a child because they were not counseled about gun safety.

Focusing on patients' interests also highlights the flaws in the State's justification for the Gag Rule. The State asserts four interests: (1) protecting the right to keep and bear arms; (2) protecting patient privacy; (3) eliminating barriers to healthcare; and (4) regulating professions to protect the public. (En Banc Br. of Appellants 45-49.) But those interests serve only the limited group of patients who favor the Gag Rule. Not one serves the many patients who want their doctors to advise them on firearm safety. For those patients, the Gag Rule infringes the First Amendment right to receive information to no end whatsoever. In fact, for those

patients, the law affirmatively undermines the State's stated interest in eliminating barriers to healthcare and protecting the public; by preventing doctors from inquiring about patients' gun safety practices, the Gag Rule inhibits access to high-quality healthcare services and endangers the public. In this sense, the Florida Gag Rule is even more troublesome than the medical marijuana policy in *Conant*. Whereas the government in *Conant* sought to protect *all* patients from what it viewed was a medically unadvisable state drug law, Florida has acted to serve only the select class of patients who would object to their doctor's firearm-related advice, at the expense of others who affirmatively want or would be happy to receive this information.

The First Amendment stands for the principle that the public benefits from more, not less, truthful information. It "precludes the government from keeping consumers in ignorance of truthful information because it thinks it knows better than they do what is good for them." Kathleen M. Sullivan, *Two Concepts of Freedom of Speech*, 124 HARV. L. REV. 143, 158 (2010); *see also Sorrell v. IMS Health Inc.*, 564 U.S. 552, 577, 131 S. Ct. 2653, 2671 (2011) ("The First Amendment directs us to be especially skeptical of regulations that seek to keep people in the dark for what the government perceives to be their own good."). This is true for patients purchasing pharmaceutical drugs. *See Thompson*, 535 U.S. at 373-75, 122 S. Ct. at 1507-08; *Va. Bd. of Pharmacy*, 425 U.S. at 769-70, 96 S. Ct.

at 1829-30. It is true for patients who might do better with alternative treatments. *See Conant*, 309 F.3d at 637. And it is true for patients who face health and safety risks they may not be aware of or may need assistance evaluating.

Existing law does not authorize doctors to *force* patients to give up their guns, and the district court's injunction will not give them that power. Nor will every patient who receives information about gun safety from his or her doctor forego keeping a gun in the house. But truthful information about the very real risks of gun ownership will allow each patient to make better-informed decisions in this area. Under the First Amendment, patients have the right to receive this information from their doctors and decide what to do with it.

### C. The Gag Rule Has No "Safe Harbor" Sparing Patients from Its Chilling Effect on the Flow of Information from Their Physicians

The panel opinion concluded that the Gag Rule withstands scrutiny in part because it allows doctors to ask questions about firearm ownership when that information is "relevant." *See Wollschlaeger v. Governor of the State of Florida*, 814 F.3d 1159, 1179-80 (11th Cir. 2015). The State offers similar assurances that the law creates a "safe harbor" for doctors because it "expressly authorizes firearm-related inquiries that doctors in good faith believe to be relevant." (*See* En Banc Br. of Appellants 24-25.) But that ignores the "obvious chilling effect" of requiring doctors to think twice about whether something might later be deemed "relevant" before talking to their patients about guns. *See Reno*, 521 U.S. at 871-

72, 117 S. Ct. at 2344. The ambiguity of the Gag Rule imposes an impermissible restriction on the flow of safety information to patients.

That is a significant issue because the law provides no guidance regarding what the State considers "relevant." A doctor may be aware that her patient, who does not present signs of suicidal ideation or violent tendencies, has a small child. As explained below, studies show that a large percentage of families with small children do not practice safe gun storage and that many children are killed or injured each year due to improperly stored guns. Is having a small child sufficient to make a patient's gun ownership "relevant"? The answers to that question and others are far from clear under either the Gag Rule or the panel majority's analysis.

This lack of clarity presents serious concerns for patients seeking advice from their doctors concerning gun safety. Doctors should be permitted to ask patients with children about gun ownership and follow up with counseling on the importance of gun safety because "safe storage of firearms and ammunition helps to insulate children against unintentional firearm injuries." Eric J. Crossen et al., *Preventing Gun Injuries in Children*, 36 PEDIATRICS REV. 43, 47-48 (2015). Similarly, it can be critical for doctors to provide timely counseling about the close association between successful suicide and guns to patients who have family members presenting a suicide risk. Catherine W. Barber & Matthew J. Miller,

*Reducing a Suicidal Person's Access to Lethal Means of Suicide*, 47 AM. J. PREV. MED. S264, S267 (2014).

### D. Doctors Should Be Permitted and Encouraged to Counsel Patients in a Persistent and Determined Manner Where Appropriate

The Gag Rule's directive to physicians to "refrain from unnecessarily harassing a patient about firearm ownership," Fla. Stat. § 790.338(6), similarly prevents patients from receiving effective health counseling from their doctors. The State asserts that this provision is merely "hortatory," and, in light of the inquiry provision's "safe harbor," meant to be "narrowly construed." (En Banc Br. of Appellants 25.) However, the statutory text offers no support for the State's assertions. The harassment provision, like the rest of the statute, is vague because it fails to advise doctors when their speech becomes "harassing."

This ambiguity poses serious problems for patients seeking to obtain information from their doctors regarding gun safety. Counseling patients is a core component of medical practice, as doctors are professionally responsible for ensuring that their patients are informed of the health risks associated with certain behaviors. Physician counseling can, in some instances, reduce or eliminate the risk of firearm injury or death. Counseling and intervention is effective, however, only when it is done at the right time and in the right manner. When the doctor is a skilled communicator, the likelihood that a patient will follow medical treatment or prevention recommendations prescribed by their doctor meaningfully increases.

Kelly B. Haskard Zolnierek & M. Robin DiMatteo, *Physician Communication and Patient Adherence to Treatment: A Meta-Analysis*, 47 MED. CARE 826, 827 (2009). Sometimes, it can be critical for doctors to be persistent when questioning or counseling patients about gun safety practices.

Persistence is often important when it comes to entrenched but dangerous patient beliefs, such as fear of vaccinations, or behaviors, such as smoking. Concerns about the safety of vaccines have led numerous parents to refuse vaccination for their children in recent years despite overwhelming medical and scientific consensus that vaccines are safe and beneficial. Joan Gilmour et al., *Childhood Immunization: When Physicians and Parents Disagree*, 128 PEDIATRICS 167, 168 (2011). Doctors confronting a parent resistant to vaccinations are advised to "provide full information in clear language about the risks and benefits of immunization" and to compromise with parents if needed when they believe that some vaccination is preferable to none. *Id.* at 171. Similarly, doctors report that persistence often pays off in convincing patients to stop smoking. As one doctor explained, "delivering this message time and time again to the same patient can feel frustrating, but," by her count, "20 percent of her patients will quit, at least in part, because of her persistent counsel." Jessica Pupillo, *FPs Offer Tips on How to Motivate Smokers to Quit*, AAFP (Nov. 17, 2011), http://www.aafp.org/news/health-of-the-public/20111116smokeout.html.

Physicians counseling patients on safety risks associated with guns in the home should be permitted to use persistent and direct communication strategies when appropriate, just as they are encouraged to use persistence when counseling patients on vaccinations or smoking, without fear that they are crossing the fine line into "harassment."

## II. GUNS IN THE HOME INCREASE THE RISK OF SUICIDE, HOMICIDE, AND DEATH FROM UNINTENTIONAL SHOOTING

Ensuring that patients may receive gun safety information from doctors is especially important in light of the strong empirical links between gun ownership and gun injury. As described below, gun ownership is associated with increased rates of unintentional injury and death, increased rates of suicide, and increased chances that intimate partner violence will result in death. Gun ownership is also associated with increased rates of suicide and unintentional death and injury in children and adolescents. Many guns stored in the home are unlocked and accessible and make it too easy for children to injure themselves or other children, unintentionally or intentionally.

Doctors are capable of effectively counseling their patients to practice gun safety. A study on firearm storage counseling by family physicians found that 64% of participants who received verbal firearm storage safety counseling from their doctors improved their gun safety by the end of the study. Teresa L. Albright & Sandra K. Burge, *Improving Firearm Storage Habits: Impact of Brief Office*

*Counseling by Family Physicians*, 16 J. OF THE AM. BD. OF FAMILY PRACTICE 40, 40, 42 (2003). Controlling for demographics, the study showed that participants who received counseling from their doctors were three times more likely to increase their gun safety than participants who received no counseling. *Id.* at 40, 44.

That study, read in concert with the empirical connection between gun ownership and gun injury set out below, demonstrates the damage that Florida's Gag Rule will cause. Preventing doctors from counseling their patients on gun safety deprives Florida residents of the opportunity to reduce the incidence of child and adult gun injuries.

### A. Guns in the Home Increase the Risk of Unintentional Death and Injury

Many Americans die of gun injuries each year. Between 1965 and 2000, over 60,000 Americans died from unintentional firearm injuries. DAVID HEMENWAY, PRIVATE GUNS, PUBLIC HEALTH 27 (2004). The number of persons accidentally injured by firearms is far greater than the number unintentionally killed: the rate of unintentional, firearm-related injuries is almost thirteen times that of unintentional deaths. Joseph L. Annest et al., *National Estimates of Nonfatal Firearm-Related Injuries: Beyond the Tip of the Iceberg*, 273 J. OF THE AM. MED. ASSOC. 1749, 1751 (1995).

Household gun ownership is strongly correlated with gun fatality. A study of the nearly 30,000 unintentional firearm-related deaths in the United States between 1979 and 1997 found a statistically significant association between gun availability and the rate of unintentional firearms deaths across all age groups. Matthew Miller et al., *Firearm Availability and Unintentional Firearm Deaths*, 33 ACCIDENT ANALYSIS & PREVENTION 477, 477 (2001). Compared to states with the fewest guns, states with the most guns have, on average, nine times the rate of unintentional firearm deaths—results that hold across race and gender and that control for urbanization, poverty, and regional location. *Id.*; *see also* HEMENWAY, *supra*, at 28-29 (concluding that between 1991 and 2000, the risk of unintentional firearm fatalities was 10 times greater in high gun-ownership states than in low gun-ownership states).

Another study of gun deaths that used nationally representative mortality data found that persons who died from an unintentional shooting were more than three times as likely to have had a gun in their home compared with the control group. Douglas J. Wiebe, *Firearms in U.S. Homes as a Risk Factor for Unintentional Gunshot Fatality*, 35 ACCIDENT ANALYSIS & PREVENTION 711, 713-14 (2003). Having more than one gun in the home increases the risk of unintentional death even further. *Id.*

Too often, children suffer the unintended consequences of home gun ownership. "Children and teens in the United States are killed with handguns more often than with all other weapons combined." VIOLENCE POLICY CTR., KIDS IN THE LINE OF FIRE: CHILDREN, HANDGUNS, AND HOMICIDE (2001), http://www.vpc.org/studies/fireintr.htm. In 2013-2014, homicide from firearms was the third leading cause of death for persons 15 to 24 years of age. CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., WEB-BASED INJURY STATISTICS QUERY AND REPORTING SYSTEM ("WISQARS"), LEADING CAUSES OF DEATH REPORTS, 2014, http://webappa.cdc.gov/sasweb/ncipc/leadcaus10_us.html (last visited April 25, 2016).

Poor gun safety practices contribute significantly to child gun injury. Only one-third of families with children that also own a firearm report safe firearm storage practices. Robert H. DuRant et al., *Firearm Ownership and Storage Patters Among Families with Children Who Receive Well-Child Care in Pediatric Offices*, 119 PEDIATRICS 1271, 1275 (2007). That is particularly troubling in light of the fact that children usually know where to find their parents' guns and will handle them even after receiving gun safety instructions. In one 2006 study, 73% of children under age 10 reported knowing the location of their parents' firearms, and 36% admitted they had handled the weapons. Frances Baxley & Matthew Miller, *Parental Misperceptions About Children and Firearms*, 160 ARCHIVES OF

PEDIATRIC & ADOLESCENT MED. 542, 543-44 (2006). It is therefore unsurprising that 89% of unintentional shooting deaths of children occur in the home and that most of these deaths occur when children are playing with a loaded gun in their parents' absence. Guohua Li et al., *Factors Associated with the Intent of Firearm-Related Injuries in Pediatric Trauma Patients*, 150 ARCHIVES OF PEDIATRIC & ADOLESCENT MED. 1160, 1162 (1996).[1]

### B. Guns in the Home Increase the Risk of Suicide

In addition to increasing the risk of unintentional death and injury, guns in the home increase the risk of suicide. In 2013, suicide was the tenth leading cause of death in the United States, and more suicides were committed with a firearm than by all other methods combined. JIAQUAN XU ET AL., CTRS. FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., NATIONAL VITAL STATISTICS REPORTS, DEATHS: FINAL DATA FOR 2013, at 5(2016), http://www.cdc.gov/nchs/data/nvsr/nvsr64/nvsr64_02.pdf. Of the 32,000 people,

[1] Access to firearms in the home also increases the risk of intentional shootings by children and adolescents. A study of 37 school shootings in 26 states found that, in nearly two-thirds of the cases, the shooter got the gun from his or her home or that of a relative. U.S. SECRET SERV., U.S. DEP'T OF THE TREASURY, AN INTERIM REPORT ON THE PREVENTION OF TARGETED VIOLENCE IN SCHOOLS 6 (2000). A more recent study suggests that this statistic has not changed in recent years; of the sixteen K-12 school shootings between 2012 and 2014 in which the source of the firearm used was known or reported, ten of the shooters (63%) used a gun obtained from home. *See Analysis of School Shootings*, EVERYTOWN FOR GUN SAFETY 3 (Dec. 9, 2014), http://everytownresearch.org/documents/2015/04/analysis-of-school-shootings.pdf.

on average, who died from a firearm-related injury each year between 2010 and 2012, 62% committed suicide. Katherine A. Fowler et al., *Firearm Injuries in the United States*, 79 PREVENTIVE MED. 5, 6 (2015).

Most firearm-related suicides happen in the home. Linda L. Dahlberg et al., *Guns in the Home and Risk of a Violent Death in the Home: Findings from a National Study*, 160 AM. J. EPIDEMIOLOGY 929, 929 (2004). Virtually all controlled studies to examine the issue have found that occupants of homes with guns are at a significantly increased risk of suicide compared with occupants of homes without guns. *See* Andrew Anglemyer et al., *The Accessibility of Firearms and Risk for Suicide and Homicide Victimization Among Household Members*, 160 ANNALS OF INTERNAL MED. 101, 105 (2014).

One well-known analysis found that homes in which a suicide had occurred were 4.8 times more likely to contain a firearm than similarly situated neighborhood homes that had not experienced a suicide. Arthur L. Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 NEW ENG. J. MED. 467, 470 (1992). Homes where a firearm was stored loaded carried an even greater suicide risk. *Id.* Homes with handguns were associated with a suicide risk almost twice as high as homes with long guns. *Id.*

Another series of studies found that average suicide rates are higher in states with higher rates of household firearm ownership. Fotios C. Papadopoulos et al.,

*Preventing Suicide and Homicide in the United States: The Potential Benefit in Human Lives*, 169 PSYCHIATRY RESEARCH 154 (2009); Matthew Miller et al., *Household Firearm Ownership and Suicide Rates in the United States*, 13 EPIDEMIOLOGY 517 (2002). That relationship persists even after controlling for differences among states in poverty, urbanization, unemployment, mental illness, and alcohol or drug abuse. Matthew Miller et al., *Household Firearm Ownership and Rates of Suicide Across the 50 United States*, 62 J. TRAUMA: INJURY, INFECTION, & CRITICAL CARE 1029 (2007). A 2013 study showed that the aggregate number of people residing in the 16 high-gun ownership states and 6 low-gun ownership states is approximately equal, and the suicide attempt rates are similar, but almost twice as many adults (11,428) completed suicide in the high-gun ownership states compared with the low-gun ownership states (6,038). Matthew Miller et al., *Firearms and Suicide in the United States: Is Risk Independent of Underlying Suicidal Behavior?* 178 AM. J. EPIDEMIOLOGY 946, 949, 951 (2013).

Suicide attempts by firearm are far more lethal than other methods of attempted suicide. One study found that more than 90% of all suicide attempts with a firearm, if serious enough to require hospital treatment, result in death. Suicide attempts by jumping, by comparison, carry a 34% fatality rate; suicide attempts by drug poisoning carry a two percent fatality rate. Matthew Miller et al.,

*The Epidemiology of Case Fatality Rates for Suicide in the Northeast*, 43 ANNALS OF EMERGENCY MED. 723, 726 (2004).

Tragically, suicide by children is often committed with a firearm. In 2010 alone, 748 children ages 10 through 19 committed suicide using a firearm. In the same year, over 40% of all suicides in adolescents 15 through 19 years of age were committed with a firearm. CENTERS FOR DISEASE CONTROL AND PREVENTION, U.S. DEP'T OF HEALTH & HUMAN SERVS., WISQARS, LEADING CAUSES OF DEATH REPORTS, 2010, http://webappa.cdc.gov/sasweb/ncipc/leadcaus10_us.html.

As with adults, suicides among children are strongly associated with the presence of a gun in the home of the victim. *See generally* Matthew Miller et al., *Household Firearm Ownership and Suicide Rates in the United States*, 13 EPIDEMIOLOGY 517 (2002); Arthur L. Kellermann et al., *Suicide in the Home in Relation to Gun Ownership*, 327 NEW ENG. J. MED. 467 (1992). For adolescents, "the more guns in the home, the more likely suicide by firearms was to occur." David A. Brent et al., *Firearms and Adolescent Suicide: A Community Case-Control Study*, 147 AM. J. DISEASES OF CHILD 1066, 1068 (1993).

The association between guns in the home and child suicide has been confirmed by a number of studies. One study found that adolescent suicide victims were more than twice as likely as suicide attempters to have had a gun in their home. David A. Brent et al., *The Presence and Accessibility of Firearms in the*

*Homes of Adolescent Suicides*, 266 J. AM. MED. ASSOC. 2989 (1991). Another found that firearms were 2.7 times more likely to have been present in the homes of adolescent suicide victims as compared to psychiatric inpatients who had attempted or considered suicide. David A. Brent et al., *Risk Factors for Adolescent Suicide: A Comparison of Adolescent Suicide Victims with Suicidal Inpatients*, 45 ARCHIVES OF GEN. PSYCHIATRY 581, 585 (1988).

### C. Guns in the Home Increase the Risk of Serious Injury or Death from Domestic Violence

Preventing doctors from asking their patients about gun ownership significantly curtails their ability to counsel women in abusive relationships. It prevents doctors from fully evaluating the risks of injury and death to women in abusive relationships and consequently prevents doctors from alerting those women to the increased risks of death and injury posed by guns in the house.

Death by domestic violence is a very real risk for women. Women in the United States are murdered by intimate partners or former partners approximately nine times more often than they are murdered by strangers. Jacquelyn C. Campbell et al., *Intimate Partner Homicide: Review and Implications of Research and Policy*, 8 TRAUMA, VIOLENCE, & ABUSE 246, 247 (2007) (analyzing 2004 Bureau of Justice statistics). The Centers for Disease Control and Prevention's National Violence Against Women Survey estimates that approximately 5.3 million intimate partner violence victimizations occur among U.S. women ages 18 and older every

year. U.S. DEP'T OF HEALTH AND HUMAN SERVS., COSTS OF INTIMATE PARTNER VIOLENCE AGAINST WOMEN IN THE UNITED STATES 19 (2003).

Firearms play a leading role in these tragic statistics. From 1990 to 2005, over two-thirds of female intimate partner homicide victims were killed by guns. JAMES A. FOX & MARIANNE W. ZAWITZ, BUREAU OF JUSTICE, U.S. DEP'T OF JUSTICE, HOMICIDE TRENDS IN THE UNITED STATES 102 (2007), http://bjs.ojp.usdoj.gov/content/pub/pdf/htius.pdf. Of women killed by their husbands, 69% were killed by guns. *Id.* As these numbers suggest, firearms are the most common weapon used in intimate partner homicides. *Id.*

The mere presence of or access to a firearm dramatically increases the risk that a woman in an abusive relationship will be killed by intimate partner violence. An abusive partner's access to a firearm increases the risk of homicide eightfold for women in physically abusive relationships. *See* Jacquelyn C. Campbell et al., *Risk Factors for Femicide in Abusive Relationships: Results from a Multisite Case Control Study*, 93 AM. J. OF PUB. HEALTH 1089, 1092 (2003). And because firearms are so deadly, domestic violence incidents involving firearms are twelve times more likely to result in a death compared to non-firearm abuse incidents. *See* Shannon Frattaroli & Jon S. Vernick, *Separating Batterers and Guns: A Review and Analysis of Gun Removal Laws in 50 States*, 30 EVALUATION REV. 296, 297 (2006).

Guns in abusive homes may also be used to threaten, intimidate, and coerce domestic violence victims. Those threats may leave lasting psychic scars that can contribute to post-traumatic stress disorder. Emily F. Rothman et al., *Batterers' Use of Guns to Threaten Intimate Partners*, 60 J. AM. MED. WOMEN'S ASS'N 62, 66 (2005).[2]

Doctors can help women protect themselves from intimate partner violence by informing women of the risks they face. If a doctor learns, through a full assessment of a patient's life circumstances, that the patient is at high risk for homicide because someone abusing the patient using a gun, the doctor can recommend that the patient leave the relationship or seek help. *See* Jacquelyn C. Campbell et al., *The Danger Assessment: Validation of a Lethality Risk Assessment Instrument for Intimate Partner Femicide*, 24 J. OF INTERPERSONAL VIOLENCE 653, 655 (2009).

These recommendations are crucial because women in abusive relationships often underestimate their risk of being killed by their partners. *Id.* at 670. Doctors can help inform a woman's understanding of her own risks, *id.*, which may encourage at-risk women to attempt to lower their risk levels by seeking shelter,

[2] Women rarely use guns in the home to protect themselves from their abusers. A gun kept in the home is 22 times more likely to be used in an unintentional shooting, a criminal assault or homicide, or an attempted or completed suicide than to be used to injure or kill in self defense. *See* Arthur L. Kellermann et al., *Injuries and Deaths Due to Firearms in the Home*, 45 J. TRAUMA 263, 265 (1998).

applying for a protective order, or engaging in safety planning with a social worker.

## CONCLUSION

For these reasons and those stated in Appellees' brief, the judgment of the district court should be affirmed.

Respectfully submitted,

April 27, 2016

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**CERTIFICATE OF COMPLIANCE**

I hereby certify that this brief contains no more than 7,000 words, as required by Federal Rules of Appellate Procedure 29(d) and 32(a). It contains 6,973 words, exclusive of the corporate disclosure statement, tables, and certificates.

DATED: April 27, 2016

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## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system on April 27, 2016. I certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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