IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
CASE NO. 11-22026-CIV-COOKE

DR. BERND WOLLSCHLAEGER, et al,

Plaintiffs,

vs.

FRANK FARMER,
In his official capacity as
Surgeon General of the
State of Florida, et al,

Defendants.

Wednesday, July 13th, 2011
10:21 a.m.
Miami, Florida

Pages 1 through 54

TRANSCRIPT OF EVIDENTIARY HEARING
BEFORE THE HONORABLE MARCIA G. COOKE
UNITED STATES DISTRICT JUDGE

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WEDNESDAY, JULY 13th, 2011

(Court was called to Order.)

COURTROOM DEPUTY: Judge, we have our evidentiary hearing on this morning on Case Number 11-22026-CIV-COOKE.

THE COURT: There's been some change in the case captions, but I'll go through that in just a moment. Our system isn't on. There it goes.

For the record, appearing on behalf of the plaintiff?

MR. MANHEIM: Your Honor, Ed Mullins from the law firm of Astigarraga & Davis. I'm here with -- co-counsel will introduce themselves.

MR. HALLWARD-DRIEMEIER: Your Honor, Doug Hallward-Driemeier from the law firm of Ropes & Gray.

MR. MANHEIM: Your Honor, Bruce Manheim. Also --

THE COURT: A little bit slower, Counsel. My ears don't hear that fast. Who was the second person?

MR. MANHEIM: Bruce Manheim. Ropes & Gray.

MR. VICE: Daniel Vice with the Brady Center to Prevent Gun Violence.

MR. KAINEN: Dennis Kainen, Weisberg & Kainen.

THE COURT: Okay. And appearing on behalf of the defendant.

MR. VAIL: Jason Vail, Your Honor, for the defendant.

MR. THOMPSON: Good morning, Your Honor, I'm David Thompson of Cooper and Kirk for Amicus NRA.

THE COURT: All right. Counsel, you may be seated.

I'm going to start with the plaintiffs first. This is your motion for preliminary injunction. Who will be arguing for plaintiff?

MR. HALLWARD-DRIEMEIER: I will, Your Honor, Doug Hallward-Driemeier.

THE COURT: If you would step forward to the microphone, please.

MR. HALLWARD-DRIEMEIER: Good morning, Your Honor. May it please the Court.

I think the state's own brief in opposition to the motion for preliminary injunction validates the constitutional challenge that the plaintiffs have brought in this case.

The government's brief confirms that the plaintiffs have a reasonable fear of discipline if they continue engaging in the very speech that they did engage in, and in some cases still engage in before enactment of the law.

The state's brief confirms that the law is viewpoint discriminatory, that it was enacted because some patients and some legislators disagreed with what they regarded as doctors' antigun speech.

THE COURT: My question, then, would be, so?

MR. HALLWARD-DRIEMEIER: Excuse me?

THE COURT: So? Just because we don't like it doesn't make it unconstitutional.

MR. HALLWARD-DRIEMEIER: That's exactly correct, Your

Honor. It's not the fact that the doctors disagree with the law. It's the fact that the law was enacted because the state disagreed with the doctors' speech. And that type of viewpoint discriminatory restriction on speech is impermissible absent --

THE COURT: It may have been that -- the initial idea behind it. The question is, does the legislature, resulting from what you believe to be the discriminatory intent of the Florida legislature, create a constitutional burden on speech?

And that's what I want to know. You said that the legislation is subject to a strict scrutiny standard because it's content based, the state saying it's a reasonable regulation of speech based upon regulating the medical industry.

So let's go there. You know, people can -- reasonable minds can disagree about whether this was the reasonable use of the state's resources, whether this was something they should have engaged in.

What I need to determine is, is the legislation, itself, an unconstitutional burden on speech.

MR. HALLWARD-DRIEMEIER: Thank you, Your Honor. And you're correct that the defendants have relied on cases relating to the state's permissible regulation of professions.

Importantly, those cases, including the *Locke* case in the Eleventh Circuit which related to interior design

individuals. Or the *Lowe v. S.E.C.* case, the state relies on the concurring opinion of Justice White there which related to investment advisers, confirmed that that doctrine is restricted in two different ways that make it inapplicable here.

First of all, as Justice White made clear, as does the *Locke* decision, those cases confirm that the state may restrict access to a profession to ensure that those who practice the profession are qualified to do so.

So it is a restriction on access to the profession entry. It is not -- those cases do not stand for the proposition that the state may regulate the speech that those professionals engage in, in the course of that dialogue carrying out their profession.

Likewise, what the cases made clear is that the restriction must be -- that the restriction on speech must only be merely incidental to the state's other regulatory purposes.

Here, the statute --

THE COURT: So where would you put *Casey* in that?

MR. HALLWARD-DRIEMEIER: Well, *Casey* is distinct, Your Honor, because there *Casey* -- the legislature was requiring that doctors provide truthful nonmisleading information to their patients. It was not a restriction or prohibition on doctors engaging in truthful nonmisleading

speech, which is what we have here.

The closest case to this --

THE COURT: What can't you do now that you could do before? What would be the restriction on your clients' ability to that in a conversation with his or her patient?

MR. HALLWARD-DRIEMEIER: Well, the first and foremost is that, as recommend by national professional associations, the AAP, the AMA, the ACP, the plaintiffs had, before enactment of the law, routinely asked their patients to answer a screening questionnaire that was meant to help to identify and tailor the areas of relevant discussion for the doctor with the patient and included asking the patients whether there was a gun in the home.

And the doctors have ceased -- many of them have ceased doing so. That is --

THE COURT: But given the exceptions in the law, there would be no reason for the doctor to cease asking those kind of questions when he or she has -- and I think there are six or seven exceptions in the statute.

You think the person's mental health is affected; you think there might be issues related to safety; you're a paramedic and you respond to a situation and you want to make sure you're not walking in where there's active gun play.

What -- what -- what's different now?

Is it just some general screening along with, you

know, how many times I eat red meat with how many guns I own?

MR. HALLWARD-DRIEMEIER: Consistent with the recommendations of the national associations, doctors do engage in preventive medicine. The first step of that is to find out from their patients what are the areas of concern. If a doctor --

THE COURT: But that -- if you are -- if you -- if it's appropriate for you to have a firearm, meaning you're not one of the precluded classes, you do everything you're supposed to do. On a regular medical visit, hi, I'm Marcia Cooke. I'm here to talk to you about my flu. What's the issue about the gun?

MR. HALLWARD-DRIEMEIER: Well, Your Honor, what the medical associations have determined is that the danger of an improperly stored firearm in the home is a critical safety concern to especially children, but also others in various --

THE COURT: I am Marcia Cooke, I have a three-year-old and I have a seven-year-old. Well, Ms. Cooke, have you thought about appropriate firearm safety? That is when the question would come. Why would you have it as an initial screening question?

MR. HALLWARD-DRIEMEIER: Well --

THE COURT: And why does that somehow affect your client's ability to give adequate medical care across the board?

And, given that, where is your content-based speech being precluded?

MR. HALLWARD-DRIEMEIER: Well, Your Honor, first of all, let's -- I want to make sure that we're on same page.

That the state construes the statute to preclude asking the question as part of that initial screening questionnaire. The state says that the law was intended to prohibit the kind of incidents that gave rise to its enactment.

They go through the legislative history in which legislators point to the *Ocala* incident and some others. And then they say it's clear that the plaintiffs engage in this very kind of speech because they --

THE COURT: I understand what you're saying you think might happen. But I'm looking at paragraph one:

"A health care professional licensed under this chapter may not intentionally enter any disclosed information concerning firearm ownership into the patient's medical record, if the practitioner knows that such information is not relevant to the patient's medical care or safety, or the safety of others."

So the information that you just described, parent with small children, you'd be able to do that. Reminding the person, you have your guns under lock and key. That seems to be permissible. And then you go through the other ones where

you're allowed. Respect the patient's privacy and refrain from making a written inquiry or concerning question -- the ownership of a firearm -- notwithstanding this provision, a health care professional that in good faith believes that the information is relevant to the patient's medical care or safety, or the safety of others, may make such verbal or written inquiry.

MR. HALLWARD-DRIEMEIER: Well, Your Honor, what I understand from your question is that you and my clients are in agreement. That this type of inquiry is relevant. And -- but the problem --

THE COURT: Wait, wait, wait. No. If it's relevant to the medical care.

MR. HALLWARD-DRIEMEIER: If it's relevant to the medical care, that preventative medicine is part of a doctor's provision of medical care. And so asking the question in order to know whether to provide the very kind of advice that Your Honor alluded to is relevant to the medical care that the AMA --

THE COURT: What's relevant about you asking me about my gun when I come in because I had a cold?

MR. HALLWARD-DRIEMEIER: Well, Your Honor, where it typically arises is when patients -- when children are brought in by their parents for well visits or other type of treatment and the doctor goes through a variety of questions to ensure

that the patient is not exposed to unnecessary risk.

It's preventative care --

THE COURT: Does that mean that you're going to give them information about violent videos that you think might be harmful to a child? Are you going to ask them to disclose whether or not -- how they store their power tools? Where is this going?

MR. HALLWARD-DRIEMEIER: Well, the questionnaire does, in fact, include a wide variety of questions, including pools, poisons, child safety seats in cars. There are any number of areas in which doctors will inquire in order to tailor and focus their --

THE COURT: So what about --

MR. HALLWARD-DRIEMEIER: -- discussions.

THE COURT: -- this statute would prevent you from asking the parent of minor children how you're storing firearms?

MR. HALLWARD-DRIEMEIER: As construed by the state, by the defendants in this case, it's subsection 2 of Section 790338.

As Your Honor noted, there is an exception in that provision for where the doctor in good faith believes it is relevant to the provision of medical care. The state, however, does not construe that exception as encompassing the type of inquiry that we've just been discussing.

And I would point the Court to the government's brief on pages 7 and 8. And if I could just sort of walk through how it's clear from the government's brief that they view that type of inquiry as prohibitive.

They say at the outset on the top of page 7 that the Act's disciplinary provisions were intended -- would only apply or were intended to apply in situations such as those that animated the passage of the Act that are discussed below.

In the following two paragraphs, the state discusses some of the incidents that were referenced in the legislative history, both in the committee reports and in the core speeches.

In particular, it cites the *Ocala* incident, quote, unquote, but others as well, that are in many instances indistinguishable from that type of inquiry. Patient with a child comes in. The doctor asks, do you have a gun in the home? The patient objects to that question.

And then on page --

THE COURT: And under the law, if the patient objects to the question and doesn't answer, the inquiry goes on, correct? You continue to check the boxes. And the only thing the statute would say is that you, medical care professional, can't refuse to treat that person because they won't engage in that dialogue with you.

MR. HALLWARD-DRIEMEIER: Well, two points, Your

Honor. I don't think that that's correct in two regards.

First, is that the statute by its terms prohibits the asking of the question. The question cannot be asked if it is not relevant. And as the state construes that requirement of relevance, it would not include the type of routine preventative medicine screening questionnaire that we've been discussing.

And that's clear on page 8 where the state says that the plaintiffs' amended complaint confirms that these types of incidents occur. And that while some patients welcome questions about firearm ownership and a discussion of firearm safety, others find it unreasonable and intrusive.

And then they discuss in the next paragraph -- the next sentence, rather, that plaintiffs assert that it is their regular practice to ask about firearm ownership as a component of educating patients about environmental hazards.

It's precisely that type of routine preventive medicine questionnaire that the statute is intended to prohibit the plaintiffs from engaging in.

THE COURT: So maybe it's the other way around. Maybe the questionnaire is overbroad and not the statute.

MR. HALLWARD-DRIEMEIER: Well, Your Honor, the -- interestingly, the state starts by saying that the statute is meant only to codify the accepted practice. Well, the accepted practice is that which is spelled out by the national

medical associations, which is that preventative medicine -- not just the treatment of an actual injury after it has occurred, but preventative medicine, making sure that patients understand the risks and avoid them is a critical part of a doctor's profession.

And it relates, as I said, not only to firearms. It relates to the risks of smoking, or -- as Your Honor mentioned before -- poisons, pools, a whole host of threats.

The threat of firearms, however, is particularly acute for children. And if you read the declarations of the plaintiffs, they go through in heart-wrenching detail some of the stories where a child found the loaded gun that was kept in the bedside stand for purposes of safety, and instead, it's used to unintentionally kill a sibling.

Those types of risks to the health and welfare of their patients are critical to doctors. That is recognized by national medical associations --

THE COURT: But I don't understand why you wouldn't be able to ask that question of a parent with small children under the statute.

MR. HALLWARD-DRIEMEIER: Well, Your Honor --

THE COURT: What about the statute prohibits you from engaging in that sort of speech?

MR. HALLWARD-DRIEMEIER: It is the statute as construed by the state.

We agree --

THE COURT: But show me what -- where they construed it that way. It may have been --

MR. HALLWARD-DRIEMEIER: It's on page 8.

THE COURT: -- the incidents that may have caused this to come to the state's attention. But does anything in their brief say these are the type of situations that we think would result in a violation of this statute and expose the practitioner or the facility to disciplinary action?

Because, unless I'm incorrect, other than disciplinary action by the medical board, are there other sanctions that the doctor or facility would be subject to if they ask this --

MR. HALLWARD-DRIEMEIER: It's discipline, which is very significant. It could lead to loss of license. But other types of discipline, even short of that, would be devastating to the practice of a doctor.

So -- and if -- again, I'll go back to page 8, Your Honor. Because after the government points to these incidents that gave rise to the legislation and the government has said that it was -- that the purpose of the statute was that it would apply in situations such as those incidents that gave rise to the legislation, then on page 8, they clarify that the conduct that the plaintiffs are engaged in, including asking -- making it their regular practice to ask about firearm

ownership as a component of preventative medicine is what was intended to be prohibited.

THE COURT: So tell me what the doctors are saying it would prevent them from doing? And who are the people that they would be unable to reach out to?

You've already said small children. That seems to fall under paragraph 2.

Where's this big category of patients that remain underserved or exposing themselves to risk by virtue of a doctor not saying or doing something?

MR. HALLWARD-DRIEMEIER: Well, again, as I read the paragraph on page 8, the government is saying -- perhaps the government will clarify.

I think that one of the problems with this statute, we've complained of from the outset, is its vagueness. And these terms are not defined in any way. It's clear that the legislators intended to prohibit precisely that type of routine questionnaire with respect to children.

THE COURT: That may have been what they talked about, but what did they write?

MR. HALLWARD-DRIEMEIER: Well, they -- they don't write anything. That's part of the problem.

THE COURT: Well, the word "relevant" is used throughout the statutes. You don't have to -- that's not a word that we routinely define in statutory construction,

relevant. It's given its ordinary meaning.

MR. HALLWARD-DRIEMEIER: Well, Your Honor, what we have in the brief of the state is the construction that is given it by the entity charged under state law with enforcing it. The Board of Medicine, the defendants against whom we ask the Court to order that they cannot enforce this statute against our -- our clients when they present that questionnaire, that screening questionnaire to their patients. The Board of Medicine has said that they view that as a violation of the law.

THE COURT: Counsel, I'm looking at page 6 of the defendant's response. And it says, "The only prohibition in the Act against communicating or receiving information arises when patients exercise their right to decline to answer questions about their ownership possession of firearm. The act codifies the right of patients to decline to answer such questions."

MR. HALLWARD-DRIEMEIER: Well, Your Honor, that is -- simply cannot be square with the language of the statute, which makes clear that not only --

THE COURT: Well, they are citing from paragraph 4.

MR. HALLWARD-DRIEMEIER: Certainly paragraph 4 does establish that the plaintiff is free to ask the question, even when the state would permit a doctor to ask it. Even where the state permits a doctor to ask question about firearm

ownership because the state deems it relevant, the patient is still free to decline to answer and the doctor has to respect that.

Now, notably, one point Your Honor suggested that the doctor couldn't do would be to terminate the doctor-patient relationship --

THE COURT: On the basis of that question/answer only.

MR. HALLWARD-DRIEMEIER: In fact, the state makes clear that the doctor can terminate the doctor-patient relationship on the basis of refusal to answer that question. That's codified in the statute in Section 4. And the state repeats that on several occasions, including on page 9, the top of page 9.

THE COURT: Well, doesn't it say in paragraph 5, a health care professional licensed under this chapter may not discriminate against a patient based solely upon the patient's exercise of the constitutional right to own and possess firearms or ammunition?

MR. HALLWARD-DRIEMEIER: And, again, Your Honor, one of the constitutional failings of the statute is it doesn't tell us what kind of discrimination, what kind of conduct would constitute the prohibited discrimination. As you assumed and I, likewise, assumed in light of the *Ocala* incident that gave rise to the legislature's concern, one

thing I would have thought for sure that it would prohibit as discrimination is terminating the doctor-patient relationship on the basis of a refusal to answer.

But the state makes clear -- and this is in -- it's the last sentence of subsection 4, immediately above. The patient's decision not to answer does not alter existing law regarding a physician's authorization to choose his or her patients.

And the legislative history, the committee reports make clear, but, likewise, the statute's own brief at -- on page 9 makes clear that because this is a private contractual relationship, the doctor is free to terminate this relationship with the patient on the basis of their refusal to answer the question, as long as the doctor gives them at least 30 days, a reasonable period to find another caregiver.

So what we would have assumed --

THE COURT: And that's permissible now under Florida regulations of health care professionals?

MR. HALLWARD-DRIEMEIER: Right.

THE COURT: So what would this law change?

MR. HALLWARD-DRIEMEIER: Well, part of the problem is it's clearly intended to change something, but we don't know what. The antidiscrimination provision, the antiharassment provision are nowhere spelled out what it is that they're intended to prohibit.

The anti -- for the antiharassment provision, for example, the state cites to statutory definitions of harassment that are themselves inconsistent. Is the harassment in question what is perceived as harassment by the patient? Or what was intended as harassment by the doctor? That question is unresolved.

At one point in its brief the state refers to "harassing inquiries," making clear that on the state's view asking the question in a situation that the state does not regard as -- as relevant, is deemed harassment.

Well, that's not harassment under other statutory definitions of the term.

THE COURT: The person who would be enforcing this legislation would be patients, correct?

MR. HALLWARD-DRIEMEIER: The patients would initially bring the complaint to the board, yes.

THE COURT: Complaint. And the health care professional would be able to enumerate his or her reasons for why they asked the question, correct, in front of a disciplinary board?

MR. HALLWARD-DRIEMEIER: Well, of course the doctor has no idea what view the board will take of what is harassment or what is discrimination or what is relevant because those terms are not spelled out.

THE COURT: And how is that different from any other

discipline that the board may take on an issue related to the regulation of the profession?

MR. HALLWARD-DRIEMEIER: Well, as the doctor's declarations make clear, Your Honor, even the fact that one would have been brought before the board could prevent the doctor from getting any other job, could have effects on not just their reputation, but their continued ability to practice their profession. Not, perhaps, as a legal matter, but because they have to declare this in any application they would make to a new job, insurance consequences of such a complaint having been filed against them.

That itself is sufficient threat that the doctors are self-censoring. They're declining to engage in constitutionally protected speech because the state is holding this sword above their heads, but without any guidance as to what these critical statutory terms mean.

And that is --

THE COURT: So what would you have the state do? Why would this be different from other statutes that use the word "relevant," "discriminate," "harassment"?

Why are these words not just subject to their ordinary statutory meaning?

MR. HALLWARD-DRIEMEIER: Well, as we pointed out, terms such as "annoy," the Supreme Court has held in context can be unconstitutionally vague because it seems to leave to

the listener subjective perception what is or is not annoying.

And likewise, here, the state acknowledges that some patients welcome these inquiries because it gives rise to a discussion that the patients find helpful to ensuring the safety of their children.

THE COURT: Is there anything about this statute that would prevent a health care professional from ordering brochures from a gun safety group and just putting it in his or her lobby? And if the patient wanted to pick it up, they would have content information, I'm certain, given the harm that you've described of the pediatric dangers of firearms.

That there must be some association or group within the medical care community that's prepared pamphlets, distributions, or things that can be given to parents so, hey, take this home with you. You don't have to engage in a discussion. You're not restricted.

If the parent has the brochure and they say, hey, Dr. Smith, I picked up this brochure, I'm concerned about gun locks. Do you know who I could talk to?

MR. HALLWARD-DRIEMEIER: Well, Your Honor, the statute would not prohibit the provision of an undistinguished brochure, just pick it up in the lobby or handing it to them.

But what it does prohibit is the effective communication between the doctor and patient that is tailored specifically to the patient's circumstances. And that is

something that -- especially where that prohibition is adopted precisely because of the viewpoint that the speaker is perceived to have, is constitutionally impermissible. The First Amendment prohibits the state from relegating the speech to a less effective means in that fashion.

THE COURT: Counsel, how would your argument be different if this legislation was ordered in a different way? For example, that paragraphs 2, 3, 4, 5, and 6 -- 7 is another interesting one, it relates to insurance -- that if those paragraphs were there and paragraph 1 wasn't, how is that --

MR. HALLWARD-DRIEMEIER: Well, I think that paragraph 1 and paragraph 2, likewise, inform and really to some extent are what contribute to the vagueness and chilling effect of subsections 5 and 6. Because we know -- and the state verifies in its response, here, that the antiharassment and antidiscrimination provisions are really meant to get at and preclude the doctor's speech; what the state refers to as harassing inquiries.

So Provision One about recording the information for the doctor's own future reference or for communication among the doctors in a small practice, that communication, like the communication between doctor and patient, even including a willing patient, a patient who would welcome the inquiry and the opportunity to engage in the discussion --

THE COURT: But I don't see how that's precluded

under the language in paragraph 1. I mean, the state can say and do whatever it wants in terms of legislative hearing, but that's not what they wrote.

MR. HALLWARD-DRIEMEIER: Again, what subsection 1 prohibits is the recording of the information, which is clearly communications --

THE COURT: It doesn't prohibit it. Only prohibits it if it's not relevant to the medical care or safety.

MR. HALLWARD-DRIEMEIER: Well, again, we get to the ambiguity --

THE COURT: And every situation you've described to me relates to care and safety.

MR. HALLWARD-DRIEMEIER: Well, I'm very heartened to hear that Your Honor agrees with my patients -- my clients --

THE COURT: Well, you've used -- the major one you've used is a parent with children.

MR. HALLWARD-DRIEMEIER: Right. And we can talk about others. Many of the other plaintiffs and member of the plaintiffs' organizations engage in this type of inquiry with respect to their older patients who may be starting to suffer some -- some decline in their --

THE COURT: Parent safety. You have a patient that you think maybe -- some form of senior dementia or Alzheimer's or some sort of mental health reason. That would seem to be captured by the statute.

MR. HALLWARD-DRIEMEIER: One of the doctors described, as well, he would ask the question when they start to have some impairments in their mobility. So they could, if relevant, engage in discussions about handling of firearms for hunting and the like.

THE COURT: So wouldn't the question be, Mr. Jones, I've seen that you've developed -- I'm going to use the example Parkinson's, that may affect your ability to handle firearms. Do you have firearms at your home? That seems to be relevant to the patient's care. And if the person says listen, Doc, I don't want to talk to you about that, all you have to do then is cease the conversation, right?

You've given the person the information, they've said they're no longer a willing hearer. You proceed to the rest of his or her medical care.

MR. HALLWARD-DRIEMEIER: I actually don't agree, Your Honor. It would certainly not be our position that the state can force the doctor to cease the conversation at that point. They --

THE COURT: No. I'm saying the patient has decided that he or she wants to cease the conversation.

MR. HALLWARD-DRIEMEIER: Well, the patient has decided at that point that they don't care to provide information.

What the state suggests in its brief and what

certainly the statute does nothing to dispel is that in the perception of the hearer, a follow-up comment along the lines of, well, the reason that I asked you that is because firearms are -- are extremely dangerous if not stored properly in "X" and "Y" conditions.

And that may be perceived, as the state rightly points out, as harassment by some patients. And, in fact, some of the declarations discuss incidents in which patients have reacted in fairly hostile ways to that type of follow-up inquiry.

Clearly not harassment under a definition --

THE COURT: But that's not the law's problem. That's the patient's -- that's the hearer's problem.

MR. HALLWARD-DRIEMEIER: Well, no, Your Honor, that's not true because harassment in the statute appears to be in the eye of the beholder. And that's the *Kahn* v. *Thomas* case that the Court makes clear that that is a constitutional infirmity. Where the speaker has to self-censor because they're concerned about how the listener might react to the question.

In the *Sorrell* case in the Supreme Court, just last month, *IMS v. Sorrell*, the state tried to defend its prohibition on pharmaceutical marketing detailers discussing with doctors their prescribing habit, that some doctors found this to be harassing.

And the Supreme Court said that is not a permissible justification under the First Amendment. The state cannot -- certainly can't prohibit the conversation or the inquiry with somebody who may well be willing and eager to have the discussion simply because some people may find it offensive. Nor can you, because of this self-censoring chilling effect, tell a doctor, go ahead and ask the question, but do so at your peril. Because if there is a patient who finds it offensive, they're going to be able to make a charge against your license.

And doctors, rightly -- just testimony, my mother was a nurse. She retired from her profession because someone filed a complaint against her license. The declarations of our plaintiffs demonstrate that they similarly fear complaints against their licenses is the equivalent of the death knell of their practice because of the harm to their reputation, the harm to their professional standing, the fact that they wouldn't necessarily be able to get another job.

And that's all because it's all in the eye of the beholder whether it's regarded as harassing or not. The state can't put that power in the listener over the speech of the doctors.

THE COURT: Counsel, anything else before I hear from the defendants?

MR. HALLWARD-DRIEMEIER: I will reserve, I hope, some

opportunity to respond to their comments. But, thank you, Your Honor.

THE COURT: Okay. Counsel for defendants.

MR. VAIL: Good morning, Your Honor. This is Jason Vail from the attorney general's office on behalf of the defendant.

THE COURT: You, in your papers, specifically say that this is a licensing regulation requirement for which there is some lower standard of scrutiny. But I am unable to discern from your papers what that lower standard of scrutiny might be.

MR. VAIL: I believe --

THE COURT: You're saying it's not strict. It's this regulation licensing requirement. And where does that come in the First Amendment pantheon of determining whether or not the statute is an unconstitutional restriction of First Amendment speech?

MR. VAIL: Well, I apologize for not elucidating on that issue, Your Honor. We believe that it would be a rational basis test. Because this -- this Act simply regulates professional conduct in the workplace.

It, as you've noted, does not prohibit the plaintiffs from delivering their firearm safety message, nor does it prohibit asking a question about firearm ownership the way the statute is crafted.

If there is any impact on speech at all, it is constitutionally permissible and it is de minimis as speech restrictions are permissible in federal antidiscrimination law.

The object of the statute is three-fold. First, it recommends to practitioners that they refrain from asking about firearm ownerships in most cases, but it does not prohibit it. It reaffirms the patient's right to decline to answer. And it prohibits discrimination.

THE COURT: Was there anything that prohibited this before? What about prior practice of medical professionals made the state think that somehow people weren't being -- receiving medical treatment or were being harassed by their doctors because they were asked about firearms?

MR. VAIL: Well, the Counsel for the plaintiffs has mentioned the *Ocala* incident which the mother of a young child went in for a well baby visit, was asked a screening question by the physician about whether she owned firearms. She declined to answer the question. She didn't want to reveal that, as a matter of privacy, and the doctor basically fired her as a patient. Terminated the patient-doctor relationship with her. And that began the conversation in the legislature. And they considered many different ways --

THE COURT: But if that's the state's concern, that people who answer a question or refuse to answer a question

are not going to have medical care available to them, this statute doesn't prohibit that.

MR. VAIL: Well, it doesn't prohibit the termination of the relationship. What it simply does is it reaffirms the patient's right to decline to answer the question. They always have that right. But the doctor-patient relationship isn't necessarily one of equals.

THE COURT: But now what you've done is -- oh, you've made it one of equals because now you're saying in addition to declining the question, you, the patient, can now haul the lawyer (sic) up in front of the medical board.

MR. VAIL: Well, in most cases. The way the statute is crafted --

THE COURT: Let's look at the incident that you describe in your brief. If this individual was concerned enough about he or she went to their state legislature and managed to work hard enough to get a law passed, why wouldn't this be the kind of individual subjectively that would take his or her medical care professional in front of the state board, causing that person possible loss of license, insurance, ability to practice?

MR. VAIL: Under the -- the legislature decided that they didn't want to interfere with the rights of the physicians to terminate the relationship with the patients if there was a refusal to answer.

After much debate they decided they didn't want to do that. They wanted to craft a bill that took everybody's interests into account and yet provide a protection for patients who happen to own firearms from being discriminated against in the medical setting, in the provision of medical care. That's what this statute is designed to do.

THE COURT: So you may not have necessarily restricted the ability of the individual health care practitioner to speak, but you may have created consequences so onerous that the health care professional chooses not to speak, and isn't that the plaintiffs' argument? By placing this choice, this burden of saying I choose not to speak even though you tell me I can, because the potential consequences are so grave, I won't do it.

MR. VAIL: Well, their fears have to be objectively reasonable. And if you read the statute and you understand how it operates, their concerns about having their licenses pulled or being subjected to disciplinary practices -- or proceedings are not objectively reasonable.

This statute is carefully crafted so that it does not interfere with the professional judgment of the practitioner. As you noted, Your Honor, there are virtually no times when it would be unreasonable for a practitioner somehow to answer the question. The standard is good faith. It's a subjective standard. In order to subject the practitioner to discipline,

there would have to be a showing that that particular act by the professional -- there was no likelihood that they acted in good faith. And that's so --

THE COURT: Tell me why the rational basis test is the appropriate analysis to use, as opposed to the strict scrutiny test.

MR. VAIL: Well, that's the test that was used in *Locke*, and in the accountant's case, in *Wilson*, as well as *Planned Parenthood v. Casey*, for example.

This is very similar to *Planned Parenthood v. Casey*. In that case the physicians advocated a right not to speak when a state statute required them to give certain information. The legislature mandated that they give that information regardless of whether they wanted to or not. And the Supreme Court said that that was perfectly appropriate and did not infringe upon their First Amendment rights.

Here we have the flip side of that. We have simply said -- if you read the statute at its most extreme -- and I'm not saying this is how it's written, but this is how the plaintiffs think it's written. Even if it prohibited asking a question about firearm ownership, that would be permissible under *Casey*. That's simply a fact that the legislature may have said could not be obtained.

In fact, that particular prohibition is -- it's common in federal antidiscrimination law. You've got Title

VII, for example, where you've got hostile work environment claims which are predicated, in part, often on speech.

THE COURT: But that's a claim based upon telling a person that they should not do something they should not be doing in the first place, not a situation where you are anticipating that the delivery of what could be positive information for the benefit of the client can result in disciplinary action against a speaker.

MR. VAIL: Well, this -- assuming that it is a prohibition, the prohibition against asking particular questions is constitutionally permissible. And you find it embedded in federal antidiscrimination law.

For example, there is a -- I have a code section here, C.F.R. code section, it's 29 C.F.R. 1604.7. It deals with sex discrimination in employment.

And the section says, in pertinent part, "Any pre-employment inquiry in connection with the prospective employment which expresses directly or indirectly any limitation, specification, or discrimination as to sex shall be unlawful unless based upon a bona fide occupational qualification."

That particular section has been interpreted by the Eighth Circuit, for one, as prohibiting questions about pregnancy and child bearing in the employment context. You cannot ask a woman if she's pregnant. You can't ask her about

child bearing questions. You can't ask her if she plans to have children. The Eighth Circuit in *King v. Trans World Airlines* considered that to be per se violation.

That's no different than the assumed effect of this particular statute. In the employment context, in the workplace context, speech may be limited because it is through speech that the professional delivers, in part, their services to their patients. Speech is behavior in that context. And because it is behavior, the courts have held that it could be prohibited or curtailed in some way.

And here we have a very de minimis curtailment if it is, in fact, a curtailment. It's simply narrowly focused on the gathering of a particular piece of information. And yet the way the statute is crafted, it does not prohibit the firearms and safety conversation that the plaintiffs want to have with their patients.

As you noted, Your Honor, in your questions, there are many ways to get to that conversation. And the patient can have the conversation or not, and that's what the statute is urging doctors to recognize, that the patients have a right not to have this conversation. That's all the statute's really intended to do.

THE COURT: Counsel, the plaintiffs make much of the fact that the statute is overbroad and vague. What would be your arguments on that point?

MR. VAIL: Well, as far as vagueness goes, I think your questions pointed out very clearly that these terms that are used in the statute are used all the time in law. They don't need to be defined. Everyone knows what they mean.

The term "relevance" is understood by all lawyers and all judges, and is easily understood by laymen, as well.

"Harass," itself, is a term that's commonly used. There was a recent Eleventh Circuit case on harassment which upheld the telephone -- federal telephone harassment statute. That's *United States v. Eckhardt,* 466 F.3d 938. And it said that the telephone harassment statute provided sufficient notices of its prohibitions because citizens need not guess what terms such as "harass" and "intimidate" mean.

My colleagues have gone throughout U.S. code and found at least 296 uses of the term "harass" and "harassment," so it's a commonly used term.

The same with discrimination. I don't believe that Title VII, for example, defines discrimination. It simply forbids it. You have other discrimination statutes, as well like the ADA, the rehabilitation act. You have Florida Statute 760 which prohibit discrimination in employment based on race, color, religion. And I think in our times, it's a little odd to argue no one understands what discrimination means.

The plaintiffs have argued that harassment or

discrimination is something in the eyes of the beholder. I think that's the question that has been confronted by the federal courts, for example, in Title VII where the test is an objective test. You look at the facts and circumstances of the behavior, say, in a hostile work environment claim and determine whether the reasonable person would consider it to be harassment, not the subjective feelings of the complainant. And while the statute in question here does not specifically call for such an interpretation, that is a perfectly plausible one. And I'm certain that the Florida courts would place such an interpretation on the words as used in this statute.

As for overbreadth, this particular statute does not reach a substantial amount of protected conduct, if at all, if at all, when we don't --

THE COURT: And -- but don't you think the issue and what the -- what the plaintiffs are complaining of is that you have chosen -- when I say "you," I'm meaning the royal you in terms of the statute, not you personally -- that the statute has chosen to single out a portion of a doctor's conversation with a patient and to make that -- the potential of that discussion the ability for this doctor to be facing disciplinary proceedings?

MR. VAIL: Well, the violation of practice acts -- the practice acts require physicians to do a lot of different things. That's so -- it would not potentially be unusual that

they would face professional discipline for the violation of this statute. But the way it's worded, it's intended to provide the widest latitude possible to the professional judgment of the medical practitioner.

As the -- for example, the interest of providing information to children, asking the screening question to the parents of children, we don't believe that would be prohibited. If that's what the plaintiffs want to do, if that's what the associations recommend about the standard of practice, I don't see how they do not have a good faith belief that the question in that context is relevant. And I do not see how it would be relevant in most any other context.

THE COURT: And how is that then communicated to the disciplinary board such that you don't have the board thinking that the doctor should be brought up on whatever is the equivalent of charges for the board?

MR. VAIL: Well, the board hasn't met to determine how they want to interpret this statute. When they do, I'm sure we will discuss it. The interpretation that we place upon it in the attorney general's office.

THE COURT: Do you think that given the fact that there's been no actual board charges, and the board hasn't promulgated any rules or guidance, that this lawsuit might be premature?

MR. VAIL: Well, I certainly think it is. There are,

say -- there are certainly many different ways the board could choose to interpret this statute. Many of them which could be constitutional. And I think that if there is a problem with their interpretation, it would have to come as applied challenge, rather than as a facial challenge in this instance.

THE COURT: Thank you, very much.

Let me hear a response from the plaintiff.

MR. HALLWARD-DRIEMEIER: Thank you, very much, Your Honor. I think that there are a number of points I want to make in response to defense counsel's argument.

And the first is, Your Honor asked the question about the proper standard of scrutiny. And I think that that really does go directly to one of the critical issues here.

The Supreme Court has said that content-based and certainly viewpoint-based restrictions on speech are presumptively illegal and can only be sustained if they satisfy the demanding requirements of strict scrutiny, a compelling state interest, and no greater restriction on speech than necessary to further that.

In the *R.A.V.* case, and again in the *Sorrell* case last month, the Court confirmed that even speech that might in other context be entitled to less first moment protection. In *R.A.V.*, it was actually fighting words, which is otherwise not protected at all under the First Amendment. But where the legislature singles out that speech because of its content and

viewpoint, that is presumptively illegal and subject to strict scrutiny.

And because, similarly, this doctor's speech was singled out because of its perceived viewpoint, it is subject to that strict scrutiny. And the state has not even attempted to say that it satisfies that demanding test.

With respect to the professional speech cases, again, I would call Your Honor's attention to Justice White's words in his concurring opinion in the *Lowe* decision, in which he says that the principle that the government may restrict entry into professions and vocations through licensing schemes has never been extended to encompassing the licensing of speech.

In other words, while the state may regulate who is entitled to hold themselves out to practice a profession, once they have been so licensed, the state cannot say, but don't engage -- don't say that. And we see a couple of Supreme Court cases -- well, at least one Supreme Court case, but also court of appeals cases that apply that in very analogous circumstances to this case.

The *Velazquez* decision in which the court struck down the restrictions on the speech that lawyers could engage in on behalf of their clients that Congress had said that lawyers -- and that was even government-funded lawyers. So there the government probably had a lot greater latitude. Here, we're not talking about government-funded speech at all. But even

in that context, the Court said that it was impermissible for the legislature to single out and prohibit certain types of speech. In that case, it was a legal challenge to the welfare laws.

In the *Conant* case, which is even more apropos to this because it involved the speech between doctors and their patients, the Ninth Circuit struck down a federal prohibition on doctors counseling their patients with respect to the possible medical benefits of marijuana use.

And that, again, the government tried to defend as permissible regulation of the profession, that professionals don't have as much right to speak. And the Ninth Circuit resoundingly rejected that. They recognized the critical importance of the honest and open dialogue between doctor and patient and that the government could not limit that.

Even though, obviously, the government can restrict entry into the profession there is no case that we are aware of in which a powerful lobbying interest has been able to say to doctors, just don't say that to your patients. Or in this case, don't start that discussion by asking the question to determine whether it's a relevant subject of further discussion.

If the Court were to uphold that, who knows what the end is. Is it the tobacco industry? What other industries that would lobby for similar prohibition?

THE COURT: See, Counsel, what I'm hearing here is not a constitutional nature of the statute, but how it came to be. And that may be something that some people may not like, it just doesn't make it unconstitutional.

MR. VAIL: In -- in the --

THE COURT: And wait a minute. Wait a minute.

There may be the case -- there may be the case that some other group takes up a cause that might be an unconstitutional -- and I haven't decided in this case, obviously, that might be an unconstitutional intrusion on speech. But that alone, how it came to be in and of itself, does not make it unconstitutional.

MR. HALLWARD-DRIEMEIER: Well, there's no question but that the statute singles out a particular class of speakers and a particular -- speech of a particular content for restriction.

Anyone else in the state of Florida can ask anyone about their ownership or the presence of a gun in their home. No one else is prohibited from doing so, only doctors. And they are only prohibited asking about this particular danger, guns. It is that content, that speech by that narrow group of people, doctors, that are singled out for restriction. And it is precisely because of the content of that speech.

And it was -- and, again, it's in -- I mean, the purpose of the legislation, as evident on its face, is to

prevent doctors from asking that question.

I wanted to go back to the structure of the statute and whether the statute actually acts as a prohibition. Because at one point I heard government counsel indicate that subsection 2 is not a prohibition, but merely a recommendation.

That cannot be squared with the language of the statute. The statute, although it employs the word "should," is clearly using that in a prescriptive manner. Because --

THE COURT: Where do you see that it's prescriptive?

MR. HALLWARD-DRIEMEIER: Well, it's prescriptive because if it were not prescriptive, the last sentence of subsection 2 and the entirety of subsection 3 would be superfluous. Because the last sentence of subsection 2 and the entirety of subsection 3 carve out exceptions to the prohibition.

And so the last sentence of subsection 2 starts with the words "notwithstanding this provision, a practitioner who in good faith believes the information to be relevant may make such a verbal or written inquiry."

And otherwise -- in other words, in the absence of that belief in relevance to medical care, the doctor may not make the inquiry.

And, likewise, with respect to subsection 3 --

THE COURT: But how is that different from any other

thing related to the doctor-patient relationship? Unless you believe it's relevant to the patient's health care or the safety of the patient or others, why would a doctor ask about it?

MR. HALLWARD-DRIEMEIER: And, again, our -- my clients certainly believe that it is relevant to their patient's care. The problem is that the state has put, in the eye of the beholder, the patient, because some patients may regard this as intrusive and irrelevant, that those patients can file complaints against my clients.

And, likewise --

THE COURT: What about the state's argument -- I'm interrupting, I know, but it is of a concern because this is the end result that you say that makes this statute so bad for your client. What about the state's argument that this may not be a facial constitutional attack, but an applied attack based upon a particular doctor or health care facility?

MR. HALLWARD-DRIEMEIER: Well, we know, Your Honor, that the Board of Medicine has already taken certain steps to render this provision enforceable against doctors.

At its meeting in June, the Board of Medicine declared that it would be enforceable under the provisions related to violation of a legal duty.

We also know that the Board of Medicine has sent out a letter to all doctors in the state advising them that the

statute does prohibit the inquiry about gun ownership in certain circumstances and that violation of that prohibition is subject to discipline.

So there is a very real threat that violation of the statute would be disciplined. And we also know that the disciplinary proceedings are triggered by complaints filed by patients. And we have declarations by our plaintiffs, our clients, who indicate that given the hostile reaction that they have had by some patients at just the perceived effrontery of asking this question, that they are likely to be brought before the Board of Medicine. So we know that.

And we also know that this is ripe -- Your Honor asked a question about ripeness at the end -- because the plaintiffs are currently self-censoring. And they're self-censoring because they have a very reasonable and objectively reasonable apprehension that the speech that they engage in or would otherwise engage in would be prohibited under the statute.

And, again, we know that the state's brief does nothing to allay those concerns because the state's brief says that precisely these types of routine inquiries are what the statute was meant to prohibit.

THE COURT: All right. Thank you, Counsel. Anyone who wants to file any supplemental materials, I'm going to ask that you do so by Tuesday, July 19th. Tuesday, July 19.

Thank you, everyone. Court's in recess until one o'clock.

(Proceedings were adjourned at 11:24 a.m.)

* * *

I certify that the foregoing is a correct transcript from the record of proceedings in the above matter.

Date: Thursday, July 14th, 2011

s/ JUDITH M. SHELTON, CERTIFIED REALTIME REPORTER
Signature of Court Reporter

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