IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 1:11-CV-22026-COOKE/TURNOFF

DR. BERND WOLLSCHLAEGER, *et al.*,

Plaintiffs,

v.

FRANK FARMER, *et al.*,

Defendants.
_____/

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION FOR SUMMARY JUDGMENT AND ACCOMPANYING MEMORANDUM OF LAW

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The Firearm Owners' Privacy Act (CS/CS/HB 155, "An act relating to the privacy of firearm owners") severely curtails the ability of Florida health care practitioners to communicate with their patients about firearm safety in violation of the First and Fourteenth Amendments to the United States Constitution. *See* Order Granting Pls.' Mot. for Prelim. Inj. ("PI Order") (DE 80). Because Plaintiffs are entitled to judgment in their favor as a matter of law, Defendants' Motion for Summary Judgment should be denied and Plaintiffs' Motion for Summary Judgment should be granted. *See Hughes Network Sys., Inc. v. InterDigital Comm's Corp.*, 17 F.3d 691, 694 (4th Cir. 1994) ("[I]f a plaintiff truly suffers an irreparable harm that plainly results from the activities of the opposing party, the prospects for gaining summary judgment should be *at least* as favorable as the prospects for obtaining a preliminary injunction." (emphasis added)).

Defendants' Motion for Summary Judgment does not raise any arguments that undermine the Court's prior analysis in the PI Order. Defendants' Motion does, however, rely heavily on an argument that their extensive briefing has never previously suggested: that the Firearm Owners' Privacy Act is merely a content-neutral anti-discrimination and anti-harassment law that only incidentally burdens speech, and therefore it is no different than Title VII and the Americans with Disabilities Act ("ADA").[1] That argument represents yet another baseless twist in the State's ever-changing story about what the Act does or does not do, and the Court should reject it. In fact, the Court has *already* implicitly rejected it. *See* PI Order 20 ("a less restrictive alternative [to the Firearm Owners' Privacy Act] would be a law proscribing harassment and discrimination in a content-neutral manner."). Obviously, this Court already has found,

[1] Defendants expand upon this argument in their Opposition to Plaintiffs' Motion for Summary Judgment. (DE 98). In addition to the discussion below, Plaintiffs will further elaborate on this issue in their forthcoming Reply to Defendants' Opposition to Plaintiffs' Motion for Summary Judgment.

correctly, that the Act is not content-neutral. Indeed, in claiming here that the statute does not *actually* restrict the speech at issue, Defendants are effectively trifling with Plaintiffs' core First Amendment rights. The State enacted this statute to curtail what it perceived as objectionable speech by practitioners; the statute—on its face—prohibits such speech and has had the desired chilling effect on Plaintiffs. Yet Defendants now assert that Plaintiffs' First Amendment claims cannot be adjudicated by this Court because that chill is merely subjective and unreasonable. Such antics belie the plain language of the statute and its legislative history, and seek to permanently silence Plaintiffs at the hands of this unconstitutional statute while sidestepping any judicial inquiry.[2] That tactic must fail.

I. PLAINTIFFS HAVE STANDING TO CHALLENGE THE ACT AND THEIR CLAIMS ARE RIPE

As the Court has held, Plaintiffs have standing to challenge the Act due to its chilling effect on their free speech rights; nothing in Defendants' Motion warrants a reversal of the Court's ruling. *See* PI Order 7-10 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)). Plaintiffs' claims also satisfy a ripeness analysis, which requires the Court "to evaluate both the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration." *Coal. for the Abolition of Marijuana Prohibition v. City of Atlanta*, 219 F.3d 1301, 1315 (11th Cir. 2000) (citations omitted). Indeed, Plaintiffs' claims are ripe for review for many of the same reasons Plaintiffs have standing[3]—as the Court implicitly recognized. *See* PI Order 9-10. "[I]t is well-established that an actual injury can exist when the plaintiff is chilled from exercising her right to free expression or forgoes expression in order to

[2] In contrast to the Defendants' gamesmanship in this litigation, the importance of the free flow of information regarding firearm safety remains a deadly serious issue. *See* Schechtman Decl., attached hereto as Ex. 1 (stating that a named Plaintiff's teenage patient was recently killed in household firearm accident).

[3] The doctrines of standing and ripeness overlap significantly and, "in cases involving pre-enforcement review, the standing and ripeness inquiries may tend to converge." *Elend v. Basham*, 471 F.3d 1199, 1205 (11th Cir. 2006). In First Amendment cases, the Eleventh Circuit applies the "doctrine most permissively." *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. 2011); *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1258 (11th Cir. 2011).

avoid enforcement consequences. In such an instance, the injury is self-censorship." *Harrell v. The Fla. Bar*, 608 F.3d 1241, 1254 (11th Cir. 2010) (citation omitted). Here, "[t]he law personally affects Plaintiffs because they are currently engaging in self-censorship to avoid potential disciplinary action. This injury is actual." PI Order 7.[4]

Plaintiffs' self-censorship is the result of the chilling effect of the Act's provisions that ban certain categories of speech, and that self-censorship constitutes an immediate injury to core First Amendment rights. For example, the law "bans inquiries regarding firearms" and prohibits "record[ing] such information in [a] patient's medical record" absent a good faith belief that the information is medically relevant. PI Order 11. In response to these provisions, "Plaintiffs have provided evidence that they and other physicians began self-censoring themselves shortly after the law went into effect." *Id.* at 7. Specifically, after the passage of the Act, Plaintiffs no longer asked patients about firearm ownership, followed up on routine questions about firearms, provided intake questionnaires that include questions about firearms, or counseled patients about firearm safety. *Id.* at 8; Joint Statement of Undisputed Facts ("JSUF") ¶¶ 32–38 (DE 87).

Defendants nonetheless contend that Plaintiffs' self-censorship is "wholly subjective and not objectively reasonable," and therefore it cannot constitute an injury to establish standing. *See* Defs. 2d. Am. Mot. for Summ. J. 8 ("DMSJ") (DE 93). In support of their theory, Defendants argue that Plaintiffs "face no credible threat of enforcement of the statute." *Id.* at 9. Defendants make essentially the same arguments in asserting that Plaintiffs' claims are not ripe, adding that because no agency has issued an interpretation of the Act or promulgated disciplinary guidelines, Plaintiffs' self-censorship is not reasonable. *See* DMSJ 7–9.

[4] Moreover, the Act, by chilling Plaintiffs' speech, also implicates "patients' freedom to receive information about firearm safety, which the First Amendment [also] protects." PI Order 5 (citations omitted).

Defendants made those arguments on the preliminary injunction motion, and the Court rejected them because nothing in the record suggests that the State will hesitate to enforce the statute if a patient files a complaint. *See* PI Order 8-10. The Court should reject those arguments again here. There is unquestionably "at least some minimal probability that the challenged rules will be enforced if violated." *Harrell*, 608 F.3d at 1260 (citation omitted). Indeed, the mere fact that the State is defending this recently-enacted law in the case at bar suggests that "the State intends to enforce the rule." PI Order 10.[5] Further, the Executive Director of the Board of Medicine has stated that the Firearm Owners' Privacy Act "prohibits" practitioners from inquiring about firearm ownership or entering information about firearm ownership into a medical record unless it is relevant to the patient's care. *See* JSUF ¶ 13. And on the same day Governor Scott signed the Act, the Board of Medicine's Rules Committee declared that violations of the law will be adjudicated under *existing disciplinary guidelines for failure to comply with a legal obligation. See Id.* at ¶ 12; *see also* Fla. Stat. § 456.072(1)(k) (2011) (providing that failure of a licensee to comply with a legal obligation is grounds for professional discipline); Fla. Admin. Code § 64B8-8.001(g) (2011) (providing range of disciplinary measures for violating § 456.072(1)(k)).[6]

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[5] In fact, after the Court issued the injunction, Florida Governor Rick Scott vowed to appeal the decision. *See Judge Enjoins Florida Gun Law; Governor Vows Appeal*, Busines Law Weekly (Sept. 15, 2011), available at http://businesslawdaily.net/2011/09/15/judge-enjoins-florida-gun-law-governor-vows-appeal/ (last visited November 30, 2011).

[6] Although not cited in their motion or accompanying memorandum, Defendants offer a declaration from Edward Tellechea—counsel to the Board of Medicine—purportedly supporting their argument that Plaintiffs' self-censorship is unreasonable. Mr. Tellechea states that the Board must "promulgate administrative rules containing [ ] disciplinary guidelines" before imposing discipline, and that (because of the Court's PI) the Board "is not in the rulemaking process for the creation of disciplinary guidelines for violations of [the Firearm Owners' Privacy Act]." *See* Tellechea Decl. at 1 (DE 92-1). Notably, neither Mr. Tellechea nor the Defendants explicitly state that the Board *cannot* currently impose discipline for violation of the Firearm Owners' Privacy Act. But, to the extent they seek to imply as much, they ignore a key catch-all provision that already specifies a range of disciplinary measures for "any offense not specifically listed" in the Board's disciplinary guidelines. *See* Fla. Admin. Code § 64B8-8.001(g) (2011). Indeed, this is the very provision the Board's Rules Committee has already stated applies to violations of the statute, and could apply regardless of that statement. As a result, no temporary procedural obstacles prevent the Board of Medicine from enforcing the Firearm Owners' Privacy Act now. And, even if there were a

Additionally, Plaintiffs' speech is chilled even if the relevant authorities do not actually impose a disciplinary sanction. The mere threat that a patient will file a complaint and the possibility that the Board will conduct an investigation chills Plaintiffs' speech because both are sufficient to damage Plaintiffs' reputation and professional standing. *See* Pls.' Supp. Statement of Undisputed Facts ("PSSUF") ¶ 2; *see also* PI Order 9. Plaintiffs' declarations confirm that the statute has caused them to alter or halt their speech regarding gun ownership and Defendants have submitted no facts to the contrary. *See* PSSUF ¶ 3.

Defendants' assertion that the statute does not implicate the speech at issue and thus Plaintiffs' self-censorship is "objectively unreasonable," *see* DMSJ 8, is unpersuasive. That contention runs counter to the Act's plain language and legislative history, and even Defendants' own statements. *See, e.g.*, Def. Resp. to Mot. for Prelim. Inj. 1, 7–9 (DE 49) (stating that the statute intended to address types of events that gave rise to statute). The statute must not be interpreted here in such a way that it has no meaning or is insignificant, as the State purports to do in furtherance of its standing and ripeness arguments, while the Plaintiffs' speech is chilled. PI Order 9 (citing *Myers v. TooJay's Mgmt. Corp.*, 640 F.3d 1278, 1285 (11th Cir. 2011) ("[A] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant") (quoting *Corley v. United States*, 556 U.S. 303 (2009))). Notably, in the most recent round of briefing, Defendants appear to have abandoned their assertion that the anti-inquiry provision is merely hortatory. *See* Def. Supp. Br. 2-3 (DE 71). Although they continue to refer to that provision as a "recommendation," *see* DMSJ 13, Defendants now refer to the anti-harassment provision, which uses the same "should refrain" formulation, as a "prohibition[]," as a "proscription[]," and as a "direct[ive]." *Id.* at 13, 16, 17.

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temporary respite from enforcement, that would not undermine this Court's ability to adjudicate Plaintiffs' claims. *See Fla. ex rel. McCollum v. U.S. Dept. of Health & Human Servs.*, 716 F. Supp.2d 1120, 1149 (N.D. Fla. 2010) (finding claims ripe even though challenged provisions would not take effect until 2014).

Clearly, then, Plaintiffs are entirely reasonable to fear that the anti-inquiry provision constitutes an enforceable "prohibition" against asking about gun ownership in certain circumstances.

The good faith exception present in some of the Act's provisions does not undermine Plaintiffs' standing or render the case un-ripe for review.[7] Prior to the Acts' passage, many physicians routinely inquired as to the presence and storage of firearms in patients' homes—and recorded related information—without a particularized determination that such information was contemporaneously "relevant" to the patient's health or safety. JSUF ¶¶ 18, 29, 30-34. Consistent with the recommendations of leading medical associations, Plaintiffs would instead make screening inquiries and record information about firearms in *all* circumstances. *See* JSUF ¶¶ 16-17, 29-30. That speech is at least arguably within the scope of the Act, as recognized by the Court. PI Order 11 (stating that even though the law may not be interpreted to prevent "practitioners from providing unsolicited information regarding firearm safety, *the law arguably burdens practitioners' speech*") (emphasis added).

Defendants are wrong when they blithely suggest, DMSJ 8-9, that Plaintiffs' only avenue of relief is to engage in conduct that appears on its face to violate the statute, subject themselves to disciplinary proceedings before the Board, and then seek judicial review under administrative procedures. That argument turns core First Amendment protections on their head and would ensure the permanent chill on the First Amendment rights of those Plaintiffs who are understandably unwilling to take that risk and are instead engaging in self-censorship. Plaintiffs need not expose themselves to potential disciplinary proceedings or wait until the law is actually enforced against them to substantiate the reasonableness of their self-censorship. *See Bloedorn v. Grube*, 631 F.3d 1218, 1228 (11th Cir. 2011).

[7] Notably, the anti-harassment and anti-discrimination provisions neither define those terms nor contain a good faith exception. S*ee* Fla. Stat. §§ 790.338(5)-(6). Plaintiffs' speech is thus independently chilled for fear of violating these provisions from the subjective view of each individual patient. *See* PSSUF ¶¶ 2-3.

Plaintiffs have demonstrated that (1) they "seriously wish[] to engage in expression that is at least arguably forbidden by the . . . law"; (2) that the applicable "rules are at least arguably vague"; and (3) that "there is at least some minimal probability that the challenged rules will be enforced if violated." *Harrell*, 608 F.3d at 1254, 1260 (internal quotations and citations omitted); *see infra* Section III.; Am. Compl. ¶ 4 (DE 15); PI Reply 2 (DE 58)**;** PI Order 7, 9–10. Accordingly, as the Court has already held, Plaintiffs suffer an actual injury to First Amendment rights due to the chilling effect of the Act and have standing.[8] For largely the same reasons, Plaintiffs' claims are also ripe. Indeed, in a facial challenge such as this, "a purely legal claim is *presumptively ripe* for judicial review." *Harris v. Mexican Specialty Foods, Inc.*, 564 F.3d 1301, 1308 (11th Cir. 2009).[9]

II. THE FIREARM OWNERS' PRIVACY ACT IS A CONTENT-BASED RESTRICTION ON PROTECTED SPEECH THAT DOES NOT MEET STRICT SCRUTINY AND IS THEREFORE UNCONSTITUTIONAL ON ITS FACE.

As the Court previously recognized, the statute is a content-based speech restriction that fails strict scrutiny and it is, therefore, unconstitutional.

A. The Firearm Owners' Privacy Act Is A Content-Based Speech Restriction.

Defendants appear to concede that both the anti-inquiry and anti-recording provisions of the Firearm Owners' Privacy Act impose content-based restrictions on free speech. *See* DMSJ 17–18 (arguing that only the anti-discrimination and anti-harassment provisions "are not 'content based'"). Indeed, the Court has already held that all of the challenged provisions, including the anti-discrimination and harassment provisions, are content-based restrictions on free speech that,

[8] Although Defendants do not challenge this point, the Court also specifically held that Plaintiffs meet the causation and redressability requirements for standing. PI Order 10.

[9] Plaintiffs assert, and the Court has held, that the enjoined provisions of the Act are unconstitutional on their face because they are content based restrictions that fail to meet strict scrutiny. PI Order 15**.** The Act is also unconstitutionally vague and overbroad on its face. *See infra* Sections III, IV. Both Defendants and Amicus have repeatedly agreed that Plaintiffs assert a facial challenge to the Act. *See* Def. Resp. to Mot. for Prelim. Inj. 1, 2, 4, 10, 17 (DE 49); *see also* Nat. Rifle Ass'ns Br. Opposing Pls.' Mot. For Prelim. Inj. ("NRA Brief") at 2, 5, 7, 8, 16, 19 (DE 50-1).

on their face, "place[] restrictions on a practitioner's freedom to inquire about or discuss a particular subject matter"—firearms. PI Order 11; *see also id.* at 12 (noting that practitioners' speech is burdened because they now self censor on the topic of firearms for fear that patient may interpret such discussion as "*unnecessarily harassing*") (emphasis added); *id.* at 19 ("the State has proscribed harassment and discrimination with respect to the subject of firearm ownership only. For example, a practitioner would remain in compliance with Fla. Stat. § 790.338 (2011) if she harassed or discriminated against a patient because of her use of alcohol or tobacco, or her sexual behavior."); *id.* at 21 (enjoining all challenged provisions because they fail to meet strict scrutiny).

Yet, Defendants now attempt to segregate the anti-discrimination and anti-inquiry provisions from the remainder of the statute and argue that these provisions are constitutional because they are "not unlike" Title VII, the ADA, and other anti-discrimination laws; that they are content-neutral (not content-based) with only incidental restrictions on speech; and that, even if they are content-based restrictions, the anti-discrimination and anti-harassment provisions can be saved by a limiting construction. Those arguments are without merit and should be flatly rejected.

i. The Anti-Discrimination and Anti-Harassment Provisions Are Content-Based Speech Restrictions Subject To Strict Scrutiny.

Defendants claim that the anti-harassment and anti-inquiry provisions are content-neutral because they *might* also be applied to non-expressive, physically harassing conduct. *See* DMSJ 17–18. But, as this Court previously concluded, the statute targets speech—not conduct. Notably, Defendants fail to offer a single example of non-expressive conduct that these provisions might prohibit or were intended to prohibit. *See id.* As the Court recognized, "[t]he 'current situation' that the State legislature intended to change through this law's passage was

practitioners' practice of *asking about firearm ownership. . .*" and that "policies encouraging and recommending that physicians *ask* about firearms [is] an aspect of the problem that the law would rectify." PI Order 12 (citations omitted). Moreover, the Act was designed to counter a specific viewpoint—a perceived anti-gun *message* conveyed by practitioners, a message seen as "a political . . . attack on the constitutional right to own a possessive firearm." *Id.* at 12–13; JSUF ¶ 5. In fact, "[s]tatements by certain members of the Florida legislature similarly evidence concern or disagreement with health practitioners' firearm safety *message*." PI Order 12–13; *see also* JSUF ¶¶ 3-10 (emphasis added). These are the hallmarks of a content-based, viewpoint discriminatory law restricting *speech*. Indeed, the only discriminatory *conduct* that was identified in the legislative history or that is addressed in the legislation—ending the physician/patient relationship—is expressly *permitted* under the statute.

The legislative history contains no indication that the Florida legislature sought to target "non-expressive, physically harassing conduct" towards a firearm-owning patient.[10] *See* DSMJ 17 (citing *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 215 (3d Cir. 2001)). Defendants have repeatedly asserted that the statute was intended as a response to events that involved only verbal or expressive behavior. *See* Def. Resp. to Mot. for Prelim. Inj. 7–8 (DE 49); *see also* JSUF ¶¶ 2-10.[11] As such, the anti-harassment provision is most naturally read as prohibiting purportedly "harassing" speech, and the Defendants have echoed that interpretation previously.

[10] A court may look to the law's legislative history and intended purpose when determining whether it discriminates against a particular viewpoint, as well as when construing the statute's operative terms. *See Dolan v. Postal Serv.*, 546 U.S. 481, 486 (2006) (statutory interpretation requires courts to "rea[d] the whole statutory text, conside[r] the purpose and context of the statute, and consul[t] any precedents or authorities that inform the analysis"); *Sorrell*, 131 S.Ct. at 2663 ("Any doubt that § 46331(d) imposes an aimed content-based burden on detailers is dispelled by the record and by formal legislative findings.")

[11] The legislative history refers to the following incidents: (1) a physician in Ocala who *asked* a patient's mother whether there were firearms in the home and, when the mother refused to answer, *advised* her to find a new pediatrician, JSUF ¶ 3 (emphasis added); (2) a representative who was *asked by* his daughter's pediatrician if he owned a firearm and *was asked* to remove the firearm from the home, JSUF ¶ 5; (3) a family who *was told* (incorrectly) that answering questions about firearms was a requirement to receive Medicaid, JSUF ¶ 6; and (4) children who were *"interrogated"* about gun ownership, JSUF ¶ 6. Additionally, legislative committees noted that professional groups have adopted written policies encouraging it members *to inquire* and *to educate*. JSUF ¶ 4.

See Def. Resp. to Mot. for Prelim. Inj. at 7–8 (DE 49) (arguing that Plaintiffs' declarations confirm "that these types of [prohibited] incidents occur" because Dr. Schaechter "would continue to press patients for information about firearm ownership despite their unwillingness to discuss the subject" and Dr. Schechtman "persisted when patients declined to answer").[12]

Similarly, Defendants have failed to identify examples of non-expressive conduct on which the anti-discrimination provision is focused, rather than speech. Defendants have contended only that "[d]iscrimination by definition means treating a person differently based on a specific factor—in this case gun ownership"; they have not identified what "treating a person differently" entails, let alone what type of conduct would constitute non-expressive conduct outside the ambit of physician's free speech rights. *See Id.* at 16. Moreover, the parties agree that the statute does not prohibit the ultimate discriminative conduct in this context: *ending* a doctor-patient relationship because of the patient's firearm ownership. *See* PI Order 17 ("the State itself acknowledges that the law does not prevent a physician from terminating the doctor-patient relationship if a patient refuses to answer questions regarding firearm ownership."); *see also* Def. Resp. to Mot. for Prelim. Inj. 9.[13] This statute improperly targets speech, as this Court has already found.

ii. Title VII And The ADA Are Inapposite To This Case.

Defendants claim that the Firearm Owners' Privacy Act is merely a content-neutral anti-discrimination and anti-harassment law like Title VII and the ADA. The comparison is specious. The legislative history and plain text of Title VII and the ADA illustrate that they were enacted for the purpose of preventing discriminatory *conduct* against individuals within classes that had

[12] *See also* NRA Brief 12 (DE 50-1) (stating that the Act's purpose is to "discourag[e] practitioners from irrelevant inquiries about firearms and from harassing patients on the subject" and to prevent physicians from "proselytiz[ing] in their examination rooms on their patients' time").

[13] The NRA acknowledges that, by making an "express reservation" the Act makes clear that the privilege to cease providing services to a patient for any reason "does *not* constitute forbidden 'discrimination.'" NRA Brief 18 n.17.

suffered documented, widespread, and pervasive discrimination. In contrast, the Firearm Owners' Privacy Act was intended to shield the so-called "privacy" of firearm owners from *speech* with which the State disagrees, even when that speech is welcomed by the doctors' patients. The Firearm Owners' Privacy Act's first four provisions restrict *only* speech, and it is these four provisions which are singled out as grounds for disciplinary action. *See* Fla. Stat. § 790.338(1)-(4), (8). Additionally, it is clear that these four provisions effectuate the purpose of the Act, as illustrated by the titles of the bill and § 790.338—"An Act relating to the *privacy* of firearm owners" and "Medical *privacy* concerning firearms," respectively. *See* JSUF ¶ 2 (emphasis added). Here, the anti-discrimination and anti-harassment provisions are supportive of the anti-speech purpose. In contrast, Title VII does not prohibit mere speech. Inquiries about certain subjects—such as an applicant's pregnancy—constitute only *evidence* of a discriminatory motive behind an adverse employment *decision*. *See Ford v. St. Elizabeth Hospital*, No. 92-CV-511, 1993 WL 330036, *3-6 (N.D.N.Y. Aug. 20, 1993); *Barbano v. Madison Cnty.*, 922 F.2d 139, 141-46 (2d Cir. 1990).

Similarly, the ADA represents comprehensive legislation that targets extensively documented and widespread discriminatory *conduct* against persons with disabilities incident to employment (Title I of the ADA), public services, programs and activities (Title II), and public accommodations (Title III). *See* 42 U.S.C. §§ 12101 *et seq.*; *Tenn. v. Lane*, 541 U.S. 509, 516–17 (2004). Of these three Titles, only Title I prohibits disability-related inquiries. *See* 42 U.S.C. §§ 12112; *see also Harrison v. Benchmark Elecs. Huntsville, Inc.*, 593 F.3d 1206, 1213–14 (11th Cir. 2010) (noting that the inquiry-restriction was enacted in an effort to prevent "employers from using pre-employment medical inquiries 'to exclude applicant with disabilities . . . before their ability to perform the job was even evaluated'" (citing H.R.Rep No. 101-485, pt. 2 at 1)).

The ADA does not take aim at disfavored speech. Rather, the ADA is "a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities." 42 U.S.C. § 12101. The ADA's incidental proscription on speech serves merely to facilitate the reduction of widespread, pervasive, discriminatory *conduct* against disabled persons by making such conduct more difficult. The reverse is true of the Firearm Owners' Privacy Act, under which disfavored speech is the primary target.

These differences notwithstanding, Defendants maintain that if the challenged provisions of the Firearm Owners' Privacy Act "are constitutionally infirm, all similar federal anti-discrimination law is equally suspect." DMSJ 16–17. The Court should not be misled by this hyperbole. For the reasons above, this Act and the speech-repressive purposes behind it are easily distinguishable from Title VII and the ADA. Moreover, Defendants argue from a mistaken premise: it is "not necessarily [the case] that anti-discrimination laws are categorically immune from First Amendment challenge when they are applied to prohibit speech solely on the basis of its expressive content." *See Saxe*, 240 F.3d at 206-09 (citations omitted); *see also DeAngelis v. El Paso Mun. Police Officers Ass'n*, 51 F.3d 591, 596-97 (5th Cir. 1995) ("Where pure expression is involved, Title VII steers into the territory of the First Amendment. . . [, and] [w]hen Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech."); *see also Weller v. Citation Oil & Gas Corp.*, 84 F.3d 191, 195 n. 5 (5th Cir. 1996). [14] But, whether the ADA or Title VII may, in certain applications, raise First

[14] Furthermore, cases upholding Title VII harassment awards emphasize that: (1) individuals have the right to be free from harassing or discriminatory speech *within the workplace* or other protected environment (*e.g.*, a school); (2) the speech at issue amounted to discriminatory conduct, not just speech; (3) Title VII is a time, place and manner regulation of speech; (4) employees are a captive audience; and (5) Title VII is narrowly drawn and serves a compelling government interest. *See Baty v. Willamette Inds., Inc.*, 172 F.3d 1232, 1246-47 (10th Cir. 1999), *overruled on other grounds, Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101 (2002) ; *Robinson v. Jacksonville Shipyards, Inc.*, 760 F. Supp. 1486, 1534–36 (M.D. Fla. 1991); *Saxe*, 240 F.3d at 206–09 ("Certainly, preventing

Amendment concerns is simply inapposite to the case at bar. Where, as here, a statute targets free speech with a series of content-based and viewpoint discriminatory restrictions, such restrictions are unconstitutional unless they pass strict scrutiny.

iii. A Limiting Construction Cannot Render The Anti-Discrimination And Harassment Provisions Constitutional.

Defendants also implore the Court to place a "limiting construction" on the anti-harassment and anti-discrimination provisions to save them from being declared unconstitutional. *See* DMSJ 19. Again, Defendants miss the mark. Defendants claim that the Eighth Circuit placed a similar "limiting construction" on a Title VII "hostile environment claim . . . so as not to [prohibit] speech that might otherwise be protected." *See id.* at 18–19 (citing *Watson v. CEVA Logistics U.S., Inc.*, 619 F.3d 936, 941–43 (8th Cir. 2010)). But what the Defendants describe as a "limiting construction" is merely the legal framework the Eighth Circuit has adopted for analyzing a hostile work environment claim pursuant to Title VII and the Missouri Human Rights Act. *See Watson*, 619 F.3d at 941–43. *Watson* did not address the constitutionality of the statutes at issue and, in fact, does not use the phrase "limiting construction" at all. *Id.* at 936-45. And *Watson*'s standard would not solve the problem. Defendants' proposed standard simply reiterates the undefined terms "harassment or discrimination" and adds that it "was sufficiently severe or pervasive to alter his or her ability to access medical care." DMSJ 19. In other words, if a patient felt a doctor's counseling about the dangers of firearms was unwelcome and sufficiently so that it made the patient uncomfortable to go to the doctor, the doctor could face disciplinary charges. That is precisely the construction of the statute that this Court found constitutionally intolerable. *See* PI Order 9, 11-12, 16-17.

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discrimination in the workplace—and in the schools—is not only a legitimate, but a compelling, government interest."). None of these characteristics applies to the anti-discrimination and anti-harassment provisions at issue here.

B. The Firearm Owners' Privacy Act Fails Strict Scrutiny Because It Neither Furthers A Compelling State Interest Nor Is The Least Restrictive Means Of Advancing The States' Purported Interest.

i. The Firearm Owners' Privacy Act Does Not Advance A Compelling State Interest.

The challenged provisions of the Firearm Owners' Privacy Act do not advance a compelling state interest and, therefore, must be declared unconstitutional. As the Court previously recognized, the State does not have a compelling interest in "protecting patients from inquiries regarding firearm ownership," "assuring the privacy of [information about firearm ownership] from physicians," "preventing practitioners from harassing or discriminating against a patient based on firearm ownership," or imposing content-based speech restrictions as a regulation of "professional speech." PI Order 13–17. And ,"[a] practitioner who counsels a patient on firearm safety, even when entirely irrelevant to medical care or safety, does not affect nor interfere with the patient's right to continue to own, possess, or use firearms." *Id.* at 6-7. The Court also recognized that Defendants have provided no evidence that harassment or discrimination of patients is so "widespread or pervasive" as to establish a compelling state interest. *See id.* at 16.

Defendants attempt to resurrect a variety of "compelling interests," but they offer no new evidence or arguments warranting a reversal of the Court's previous conclusions. They claim that the Firearm Owners' Privacy Act prevents physicians from interfering with patients' Second Amendment rights, claiming it is "a fundamental right" that the government has a compelling interest in protecting. *See* DMSJ 11–14; *see also* Def. Resp. to Mot. for Prelim. Inj. at 2 n.1 (DE 49) ("[t]he right to 'keep arms' is highlighted because it is the primary constitutional right at issue in this litigation."). The Court has properly rejected that claim, and the new cases cited by

Defendants for the proposition are inapposite.[15] *See* PI Order 6-7 ("A practitioner who counsels a patient on firearm safety, even when entirely irrelevant to medical care or safety, does not affect nor interfere with the patient's right to continue to own, possess, or use firearms.")

Defendants also reiterate their claim that the government has a compelling interest in protecting the privacy of firearm owners from physicians. *Id.* at 16. And, again, Defendants cite a handful of Florida statutes that limit access to firearm ownership information. *See* DMSJ 12–13; *see also* Def. Resp. to Mot. for Prelim. Inj. 2–4 (DE 49). But the Court has already rejected Defendants' reliance on those statutes; firearm ownership is "heavily regulate[d]," and a variety of Florida statutes require residents to provide personal information before they can purchase firearms. PI Order 16. Information about firearm ownership is not "sacrosanct" so the government's interest in protecting that information is less than compelling.[16] *Id.*

Finally, Defendants claim that the government has a wide-ranging "compelling interest in the regulation of professions." DMSJ 14. As the Court recognized, the State does have broad authority to regulate *entry* into a profession and to impose *incidental* burdens on speech; the State is not, however, permitted to impose content-based speech restrictions on all professionals under the guise of regulating "professional speech." PI Order 13–15; *Sorrell v. IMS Health, Inc.*, 131 S. Ct. 2653, 2664 (2011). Nor is the "compelling interest" test satisfied merely because the content-based speech restrictions are imposed on regulated professionals. *See, e.g.*, *Sorrell*, 131 S. Ct. at 2667–71 (analyzing thoroughly state's interest in content-based speech restrictions on regulated professionals).

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[15] Indeed, three of the four cases do not address content-based speech restrictions at all, *see, e.g.*, *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984) (noting that statute at issue "does not aim at the suppression of speech, [and it] does not distinguish between prohibited and permitted activity on the basis of viewpoint"), and none of the cases upholds a content-based speech restriction to protect an individual's Second Amendment Rights.

[16] Furthermore, Defendants fail to "explain why existing laws are insufficient to achieve the government's asserted interests in protecting patient privacy." PI Order 19 (noting that "State and federal laws protect as confidential patients' medical records") (citing Health Ins. Portability and Accountability Act of 1996, 42 U.S.C. § 1320d, *et seq.*; Fla. Stat. § 456.057).

ii. The Statute Also Fails Strict Scrutiny Because It Is Not the Least Restrictive Means of Achieving the Government's Purported Interest.

Even if the Florida legislature had a compelling interest in passing the law, Defendants cannot show that it constitutes the least restrictive means of achieving that interest. Defendants—who bear the burden here, *see U.S. v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 823 (2000)—claim only that one provision is an "acceptable means of furthering Florida's interest in protecting the privacy of firearms owners." DSMJ 14 (citing the anti-inquiry provision, § 790.338(2)). Although Defendants sparsely assert that "allowing the patient to conceal his membership in the protected class" satisfies the least restrictive means test, they fail to cite any case law supporting this proposition. *See* DMSJ 14. They also ignore the fact that there are several less restrictive means of achieving the statute's purported interest. *See* Pl. Mot. for Prelim. Inj. 10–12 (DE 16); *Playboy Entm't Grp., Inc.*, 529 U.S. at 823 ("It [is] for the Government, presented with a plausible, less restrictive alternative, to prove the alternative to be ineffective. . ."). Specifically, Defendants fail to "show that Plaintiffs' proposed least restrictive alternative is less effective than enforcing the Firearm Owners' Privacy Act." PI Order 18 (citing *Ashcroft v. Civil Liberties Union*, 542 U.S. 656, 666 (2004)). And in addition to existing laws that already protect patients' medical records, "Section 790.338(4) . . . provides that a patient may decline to answer questions about firearm ownership. This provision likely provides an effective means to protect patients' privacy." PI Order 18–19. As the Court stated, "[p]lacing the decision-making authority in the hands of the patient is likely to be a less restrictive alternative to prohibiting practitioners' speech." *Id.* at 18. Nor have Defendants addressed Plaintiffs' proposed alternative of a statute "that targets only offensive behavior or the manner of delivery of speech *without regard to subject matter*," which "would have the same beneficial effect as the State hopes to achieve with the anti-harassment and anti-discrimination provisions."

Id. at 19; *see also R.A.V. v. St. Paul*, 505 U.S. 377, 393-94 (1992). And if a patient is permitted to decline to answer the question posed to them, then there can be no resulting discrimination. PI Order 17; *see also supra* Section II.A.i. Thus, Defendants have not met their burden of establishing that the Firearm Owners' Privacy Act employs the least restrictive means of achieving the Act's purported compelling interest.

iii. Unlike The ADA And Title VII, Defendants Fail To Demonstrate A Compelling Interest In Restricting Plaintiffs' Speech.

Defendants' attempts to analogize the Firearm Owners' Privacy Act with the ADA and Title VII, *see* DMSJ 13, 15–16, do not change the fact that this statute neither advances a compelling state interest nor is the least restrictive means of doing so. Conversely, the federal anti-discrimination statutes do advance a compelling interest, supported by thorough Congressional record illustrating widespread and pervasive discrimination against entire classes of people. *See* 42 USC § 12101 (listing Congress's findings, including that "historically, society has tended to isolate and segregate individuals with disabilities, and, . . . such forms of discrimination against individuals with disabilities continue to be a serious and pervasive social problem"); *see also Lane*, 541 U.S. at 516; *Nev. Dept. of Human Res. v. Hibbs*, 538 U.S. 721, 730 (2003) ("The long and extensive history of sex discrimination prompted us to hold that measures that differentiate on the basis of gender warrant heightened scrutiny."); *Frontiero v. Richardson*, 411 U.S. 677, 684 (1973) (noting that "[t]here can be no doubt that our Nation has had a long and unfortunate history of sex discrimination" and "women still face pervasive, although at times more subtle, discrimination in our educational institutions, in the job market and, perhaps most conspicuously, in the political arena").

That record simply does not exist here, and Defendants' assertion that such discrimination against firearm owners is similarly pervasive is mere speculation.[17] Notably, if the Court were to accept the Defendants' most recent interpretation *de jour* of the Act—allowing both routine inquiries about firearms as part of safety screening and preventive medicine *and* allowing practitioners to stop seeing patients who object to firearms counseling—then arguably *none* of the incidents identified in the legislative history actually illustrates the problematic conduct that purportedly justifies the statute. Because of the paucity of any evidence that the Act responds to a pervasive problem, the Firearm Owners' Privacy Act cannot satisfy the demanding requirements of strict scrutiny and is unconstitutional on its face.

III. THE FIREARM OWNERS' PRIVACY ACT IS UNCONSTITUTIONALLY VAGUE.

Defendants' Motion for Summary Judgment does not address the fact that the Firearm Owners' Privacy Act is unconstitutionally vague. Am. Compl. ¶¶ 3, 4, 71, 72 (DE 15); Pl. Mot. for Prelim. Inj. 2, 12-15 (DE 16); Pl. Mot. For Summ. J. 17-19 (DE 86). The Court has previously held that it need not reach this issue because the Act is an unconstitutional content-based speech restriction that fails strict scrutiny. *See* PI Order 10. However, even if the Firearm Owners' Privacy Act survived strict scrutiny, it would be unconstitutionally vague because it "fail[s] to put potential violators on notice that certain conduct is prohibited . . . and provide[s] explicit standards for those who apply the law." *Harris*, 564 F.3d at 1310-1311 (internal quotations omitted); see Pl. Mot. For Summ. J. 17-19 (DE 86). As a result, practitioners are left

[17] Similarly, Defendants argue that the government has a broad, compelling interest in protecting fundamental rights like the right to bear arms. *See* DMSJ at 11-12. In each case Defendants cite, however, the Court concluded that the government had a compelling interest because it sought to eradicate long-standing, pernicious social ills in the United States. *See, e.g.*, *Roberts*, 468 U.S. at 626 (describing "barriers to economic advancement and political and social integration that have historically plagued certain disadvantaged groups, including women."); *Bob Jones Univ. v. United States*, 461 U.S. 574, 604 (1983) (noting that "racial discrimination in education . . . [has] prevailed, with official approval, for the first 165 years of this Nation's history.").

to "guess at its meaning," which "violates the first essential of due process of law." *Harris*, 564 F.3d at 1310.

IV. THE FIREARM OWNERS' PRIVACY ACT IS UNCONSTITUTIONALLY OVERBROAD.

Defendants' Motion for Summary Judgment similarly ignores that the Firearm Owners' Privacy Act is unconstitutionally overbroad.[18] *See* PI Order 10; Am. Compl. ¶ 71, 72 (DE 15); Pl. Mot. for Prelim. Inj. 2, 15 (DE 16); Pl. Mot. For Summ. J. 19–20 (DE 90). As explained in Plaintiffs' motion for summary judgment, the law is overbroad because "a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep." Pl. Mot. For Summ. J. 19–20; *see also United States v. Stevens*, 130 S. Ct. 1577, 1587 (2010) (citation omitted); *Weaver v. Bonner*, 309 F.3d 1312, 1318 (11th Cir. 2002). Defendants' brief virtually concedes the Act's unconstitutional overbreadth. The most Defendants can muster in defense of the anti-harassment and anti-discrimination provisions is that "not all" of what the provisions prohibit "involv[es] speech." DMSJ 17 ("The plain language of these provisions does not *limit* their application *only* to speech-based discrimination and harassment"). Of course, under the First Amendment, a Plaintiff need not show that "all" applications of the law are unconstitutional or that the statute "only" prohibits speech. It is enough that the unconstitutional applications are "substantial … in relation to the statute's plainly legitimate sweep." *Stevens*, 130 S. Ct. at 1587 (citations omitted). Here, they are not.

[18] As discussed above, *see supra* II.A.iii, Defendants do imply that a limiting construction may be placed to combat the Act's overbreadth. DMSJ 18-19. In imploring the Court to place such a limiting construction on the anti-harassment and anti-discrimination provisions, Defendants cite only to *Saxe*, 240 F.3d at 214–18. In *Saxe*, however, the court concluded that the statute remained unconstitutionally overbroad even with a limiting construction. *See Saxe*, 240 F.3d at 214–18. Defendants do not cite to any case in which a court saved an analogous statute by employing a limiting construction. *See supra* II.A.iii. Thus, to the limited extent Defendants assert that the Firearm Owners' Privacy Act is not unconstitutionally overbroad because a limiting construction could be placed upon it, this argument fails.

V. THE COURT CANNOT PRESERVE MERE PHRASES OF THE INQUIRY-RESTRICTION OR HARASSMENT PROVISIONS.

Defendants also argue that the Court should preserve certain phrases within the inquiry-restriction and harassment provisions while striking down the remainder of each provision. *See* DMSJ 9–10 (practitioners "shall respect a patient's right to privacy" and "shall respect a patient's legal right to own and possess a firearm"). Contrary to their assertion, Plaintiffs have alleged injury as a result of the entirety of both provisions, and the Court has already ruled that both provisions have injured Plaintiffs. Pl. Am. Compl. ¶¶ 70–88; PI Order 10, 21-22. Additionally, the Florida Supreme Court has stated that severability is possible only when:

> (1) the unconstitutional provisions can be separated from the remaining valid provisions, (2) the legislative purpose expressed in the valid provisions can be accomplished independently of those which are void, (3) the good and the bad features are not so inseparable in substance that it can be said that the Legislature would have passed the one without the other and, (4) an act complete in itself remains after the invalid provisions are stricken.

Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1269 (11th Cir. 2005) (citation omitted). The small phrases that Defendants suggest keeping are intertwined with the other language in their respective provisions, and those phrases cannot be read or upheld in isolation. Nor can some parts of a statute be excised if removing them would "pose a critical problem" to the remaining provisions, or if the statute would be "so transform[ed] . . . that [the legislature] likely would not have intended the Act as so modified to stand." *United States v. Booker*, 543 U.S. 220, 249, 260 (2005). Here, Defendants' proposal would indeed "pose a critical problem"—it would render the provisions even *more* unconstitutionally vague—and must be rejected.

CONCLUSION

For the foregoing reasons, Plaintiffs request that this Court enter summary judgment in favor of Plaintiffs, enter a declaratory judgment that the challenged provisions are unconstitutional, and permanently enjoin Defendants from enforcing the challenged provisions.

This 1st day of December, 2011.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 1, 2011, I electronically filed the foregoing document with the Clerk of the Court using the CM/ECF filing system. I also certify that the foregoing document is being served this date on all counsel of record or pro se parties on the Service List below in the manner specified, either via transmission of Notices of Electronic Filing generated by the CM/ECF system or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

By: /s/ *Edward M Mullins*
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SERVICE LIST
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Case No.: 11-22026-Civ-COOKE/TURNOFF
United States District Court, Southern
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EXHIBIT 1

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO.: 1:11-CV-22026-COOKE/TURNOFF

DR. BERND WOLLSCHLAEGER, *et al.*,

Plaintiffs,

v.

FRANK FARMER, *et al.*,

Defendants.
_____/

DECLARATION OF DR. TOMMY SCHECHTMAN

I, Dr. Tommy Schechtman, declare as follows:

1. My name is Tommy Schechtman. I am a pediatrician who resides and practices medicine in Palm Beach Gardens, Florida. I received my medical degree from the University of Texas Medical Branch at Galveston and have been practicing medicine for approximately 25 years. I am licensed to practice medicine in Florida, and I am certified by the American Board of Pediatrics in General Pediatrics. I am also a member of the Florida Chapter of the American Academy of Pediatrics ("FAAP").

2. A tragic incident involving the accidental shooting death of a patient in my practice recently came to my attention.

3. Around 9:30 a.m. on November 22, 2011, Matthew Sylvester, a 16 year-old boy and resident of North Palm Beach, Florida, was accidentally shot in the head with a .22 caliber rifle in the garage of a single-family home in Palm Beach Gardens, Florida. Sylvester died at St. Mary's Medical Center in West Palm Beach two days later.

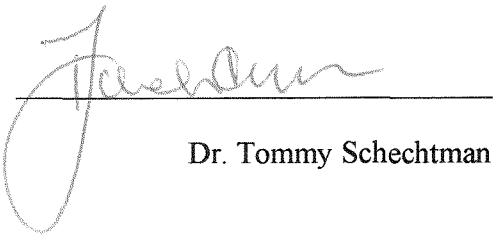
4. On the morning of the shooting, Sylvester was visiting the Palm Beach Gardens home. Three other teenage boys, all aged 16 to 19, were also at the house. No parent was present in the home at the time of the shooting.

5. Two of the teenagers were inspecting a rifle in the garage of the house when the firearm accidentally discharged and Sylvester was fatally wounded by a gunshot to the head.

6. Matthew Sylvester's death is a terrible reminder of the dangers posed by firearms in the home that are not safely stored, and the great need for physicians to counsel patients and their parents on firearm safety and the steps that they can take to mitigate such risks. Even if families are cognizant of the need to engage in safe firearm practices in their own homes, they may not realize the potential risks presented by the presence of firearms in the homes of their children's friends.

3. Attached as Exhibit A is a true and correct copy of an article further describing the accidental shooting and resulting death of Matthew Sylvester titled "North Palm teen who died of accidental gunshot wound remembered for 'great smile,'" written by Cynthia Roldan and Julius Whigham II and published on November 25, 2011 on The Palm Beach Post News website, available at http://www.palmbeachpost.com/news/north-palm-teen-who-died-of-accidental-gunshot-1994071.html (last accessed November 29, 2011).

I declare under penalty of perjury that the foregoing is true and correct.



Dr. Tommy Schechtman

Executed on November 30, 2011.

EXHIBIT A

The Palm Beach Post

North Palm teen who died of accidental gunshot wound remembered for 'great smile'

By **CYNTHIA ROLDAN AND JULIUS WHIGHAM II**

Palm Beach Post Staff Writers

Updated: 8:13 p.m. Friday, Nov. 25, 2011
Posted: 9:35 a.m. Friday, Nov. 25, 2011

Pam Way remembers Matthew Sylvester often stopping by her Jupiter home to pick up tackle before heading to the Juno Beach Pier to fish with her son, Nicholas.

"They fished together all the time," Way said this afternoon. "He was a great kid. He was always so polite.

"A lot of kids would come with Nick and grab stuff out of the garage and take off, and I'd never know they were here. I always knew he was here. He always said hi."

On Thursday night, two days after he was critically wounded in an accidental shooting, Sylvester died at St. Mary's Medical Center in West Palm Beach, the Palm Beach County Sheriff's Office said.

Sylvester, who was 16 years old and lived in North Palm Beach, passed away at 7:23 p.m. Thursday, said Teri Barbera, spokeswoman for the sheriff's office. He had been listed in critical condition since the shooting.

The teen was shot in the head with a .22-caliber rifle Tuesday morning at a home in Cabana Colony, a neighborhood of single-family homes east of Alternate A1A and north of The Gardens mall.

Four young men, ages 16-19, were at the home in the 3000 block of Bahama Road around 9:30 a.m. Two apparently were in the garage inspecting a rifle, said Capt. Don DeLucia, spokesman for Palm Beach County Fire-Rescue.

The firearm accidentally discharged, Barbera said.

Sylvester did not live at the house and no parent was in the home at the time of the shooting.

Sylvester's friends have shared their sympathies in a public event page on the social networking website Facebook, where the first comment on his passing was posted at about 8 p.m. Thursday.

Way said her son met Sylvester a few years ago while fishing at the pier.

"Other people at the pier are heartbroken because he was such a fixture there," she said. "It's been very hard for all the kids.

"All I can say is he was a great kid. He had a great smile. His whole face lit up when he smiled."

Staff writer Alexandra Seltzer contributed to this report.