Case Number: 16-1432

United States Court of Appeals

FOR THE FIRST CIRCUIT

SISTER MARY ROSE REDDY; SUE CLIFTON; JENNIFER ROBIDOUX; JOAN ESPINOLA; TERRY BARNUM; JACKIE PELLETIER; and BETTY BUZZELL,

Plaintiffs- Appellants

v.

JOSPEH FOSTER, *et al*.

Defendants-Appellees

On Appeal from the United States District Court for the District of New Hampshire

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BRIEF OF APPELLANTS

Filed on behalf of Plaintiffs-Appellants: Sister Mary Rose Reddy; Sue Clifton; Jennifer Robidoux; Joan Espinola; Terry Barnum; Jackie Pelletier; and Betty Buzzell

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

SECONDARY SOURCES

STATUTE AT ISSUE IN THIS CASE

N.H. Rev. Stat. Ann. § 132:37 *et. seq*

132:37 Definitions

In this subdivision:

I. "Reproductive health care facility" means a place, other than within or upon the grounds of a hospital, where abortions are offered or performed.

II. "Patient escort services" means the act of physically escorting patients through the buffer zone to the reproductive health care facility and does not include counseling or protesting of any sort during such escort service.

132:38 Prohibited Acts

I. No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius up to 25 feet of any portion of an entrance, exit, or driveway of a reproductive health care facility. This section shall not apply to the following:
   a. Persons entering or leaving such facility
   b. Employees or agents of such facility acting within the scope of their employment for the purpose of providing patient escort services only
   c. Law enforcement, ambulance, firefighting, construction, utilities, public works and other municipal agents acting within the scope of their employment
   d. Persons using the public sidewalk or the right-of-way adjacent to such facility solely for the purpose of reaching a destination other than such facility

II. Reproductive health care facilities shall clearly demarcate the zone authorized in paragraph I and post such zone with signage containing the following language:

Reproductive Health Center
Patient Safety Zone
No Congregating, Patrolling, Picketing, or Demonstrating Between Signs Pursuant to RSA 132:38

III. Prior to posting the signage authorized under paragraph II, a reproductive health care facility shall consult with local law enforcement and those local authorities with responsibilities specific to the approval of locations and size of the signs to ensure compliance with local ordinances.

IV. The provisions of this section shall only be effective during the facility's business hours.

132:39 Enforcement; Civil Fine

I. Prior to issuing a citation for a violation of this section, a police officer or any law enforcement officer shall issue one written warning to an individual. If the individual fails to comply after one warning, such individual shall be given a citation. Failure to comply after one warning shall be cause for citation whether or not the failure or subsequent failures are contemporaneous in time with the initial warning.

II. Any person who violates this subdivision shall be guilty of a violation and shall be charged a minimum fine of $100. In addition, the attorney general or the appropriate county attorney may bring an action for injunctive relief to prevent further violations of this subdivision.

III. This section shall not apply unless the signage authorized in RSA 132:38, II was in place at the time of the alleged violation.

132:40 Severability

If any provision of this subdivision or the application thereof to any person or circumstance is held invalid, such invalidity shall not affect other provisions or applications of this subdivision which can be given effect without the invalid provision or application, and to this end the provisions of this subdivision are declared to be severable.

REASONS WHY ORAL ARGUMENT SHOULD BE HEARD

This case involves a recently enacted New Hampshire law that the District Court acknowledges can be used to ban the Plaintiffs-Appellants' free speech in a matter of "minutes" at the discretion of private clinics hostile to their views, but for which the District Court claimed Plaintiffs lack sufficient threat of injury to give them standing to sue. Because of the extraordinary effect of this law on fundamental First Amendment rights, oral argument will assist the Court's review. For this reason, the Plaintiffs-Appellants request oral argument pursuant to L.R. 34.0.

JURISDICTIONAL STATEMENT

I. JURISDICTION OF THE DISTRICT COURT

The District Court for the District of New Hampshire had subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1331 because it is a civil action against local governmental entities and officials based on claims arising under the United States Constitution, particularly the First and Fourteenth Amendments. The District Court also had subject matter jurisdiction pursuant to 28 U.S.C. § 1343(a)(4) because this is a civil action to secure equitable or other relief under an Act of Congress providing for the protection of civil rights under the Civil Rights Act, 42 U.S.C. § 1983.

II. JURISDICTION OF THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

This Court has jurisdiction over this appeal because the District Court issued its final order granting the Defendants' Motions to Dismiss and for Judgment on the Pleadings on March 31, 2016, which was corrected on April 1, 2016. It is from this Final Judgment that this appeal is taken. 28 U.S.C. § 1291. This appeal was timely filed pursuant to Fed. R. App. P. 4 on April 18, 2016.

STATEMENT OF ISSUE

In 2014, the New Hampshire legislature enacted a law giving private abortion facilities the power to draw zones on the public sidewalk in which free speech is banned. The District Court noted they may do so in a matter of "minutes" and "for any reason or for no reason at all." Addendum ("Add.") 22–23 & n.11. In these areas, the Plaintiffs-Appellants engage in "sidewalk counseling," that is, conversations and leafleting to persuade women to chose alternatives to abortion.

The sidewalk counselors challenged the Act on its face, both for conferring broad discretion on private parties to suppress speech in public fora, and for failing to satisfy the narrow tailoring test required by *McCullen v. Coakley*, 134 S. Ct. 2518 (2014). The District Court dismissed the case for lack of standing because zones have not yet been drawn. Yet the Supreme Court and this Court have long recognized that speech restrictions are subject to pre-enforcement facial challenges. *See, e.g., Van Wagner Boston, LLC v. Davey*, 770 F.3d 33, 35–36 (1st Cir. 2014).

The question presented is:

Did the District Court err when it dismissed the complaint for lack of standing, even though it acknowledged that the statute lets private facilities ban the sidewalk counselors' speech in a matter of minutes and for any reason, and even though the government failed to satisfy the narrow tailoring test required by *McCullen* before it authorized the instant creation of these zones?

STATEMENT OF THE CASE

INTRODUCTION

Through its Reproductive Health Care Facilities Act, the New Hampshire legislature took the unprecedented step of granting private abortion facilities the power to ban speech on the public sidewalk by Plaintiffs-Appellants, who offer their pro-life message by "sidewalk counseling." The District Court observed, correctly, that the statute allows the private facilities to erect speech bans in "minutes," without police approval, "for any reason or for no reason at all." Add. 22–23 & n.11. The Supreme Court, in contrast, recently struck down a statute banning speech in similar zones where the government failed to prove the statute was necessary. *McCullen*, 134 S. Ct. at 2541.

Despite this novel restriction, the District Court held that the sidewalk counselors lack imminent injury and standing to challenge the Act on its face. This Court recognizes that a plaintiff need not wait until her speech is banned. *See, e.g., Van Wagner Boston, LLC* 770 F.3d at 35–36. The government may not delegate to private parties on one side of a contentious debate the authority to ban the speech of their ideological opponents in a matter of minutes, and then claim the targets of such a law face no impending injury. This Court should reverse and remand the District Court's dismissal order.

PROCEDURAL HISTORY

Plaintiffs-Appellants Sister Mary Rose Reddy, Sue Clifton, Jennifer Robidoux, Joan Espinola, Terry Barnum, Jackie Pelletier, and Betty Buzzell engage in close, personal conversations and leafleting on the sidewalk outside various reproductive health clinics throughout the State of New Hampshire (this activity is referred to herein as "sidewalk counseling" and the Plaintiffs-Appellants will be referred to collectively herein as "sidewalk counselors").

On June 10, 2014, New Hampshire enacted the Reproductive Health Care Facilities Act ("The Act"). The Act vests reproductive health care facilities with the authority to create 25-foot speech free "buffer zones" around the entrances, exits, and driveways of abortion facilities. N.H. Rev. Stat. Ann. § 132:37 *et. seq.* Specifically, the Act prohibits the sidewalk counselors from being within the buffer zones, including public sidewalks, and therefore bans them from engaging in speech and expressive activities therein.

On July 7, 2014, three days before the Act went into effect, the sidewalk counselors filed a Verified Complaint with the District Court for the District of New Hampshire against the Attorney General of New Hampshire Joe Foster and various other governmental defendants granted enforcement power by the Act (hereinafter, collectively, "the government"). Joint Appendix 1 ("J.A."). The Verified Complaint sought to enjoin enforcement of the Act on its face under the

Free Speech and Free Press Clauses of the First Amendment, and the Due Process and Equal Protection Clauses of the Fourteenth Amendment, and also brought pre-enforcement as-applied challenges. J.A. 1–23.

The court granted the sidewalk counselors' motion for a temporary restraining order against the City of Concord and the Town of Derry, while the other government Defendants stipulated to refrain from enforcing the Act until the Court ruled on the sidewalk counselors' motion for a preliminary injunction. D. Ct. ECF No. 9. The parties submitted evidence, including government proffered affidavits from abortion facility directors. J.A. 35–45.

On July 23, 2014, the Court issued an order reflecting an agreement by the parties and the Court. J.A. 69. Under this order, if the abortion facilities drew zones, they would not be enforceable until the Court had a chance to hear and rule on the motion for preliminary injunction. *Id*. The order also reflected the government's agreement to notify the sidewalk counselors if they knew that any abortion facility intended to draw a zone. J.A. 72 at ¶ 3. On March 19, 2015, the Court administratively denied the parties' remaining motions for procedural purposes, without prejudice, specifying that the substantive terms of the July 23, 2014 order remained in place. D. Ct. ECF No. 57.

A bill was considered in the New Hampshire Legislature to repeal the Act, during the consideration of which at least one of the government's affiants in this

case (*see* D. Ct. ECF No. 37) testified against repeal. J.A.100–05. After passing the House by a large margin, the repeal attempt failed in a 12–12 tie in the Senate, and the government asked the court to lift the stay. D. Ct. ECF No. 64. The Court lifted the stay without vacating the other terms of the July 23, 2014 order that pertained to zones not being enforced until a preliminary injunction motion was heard. *See* Text Only Docket Entry, D. Ct. ECF (July 23, 2015), *and* D. Ct. ECF No. 49 (July 23, 2014) (reflecting Aug. 28, 2015, modification which struck only paragraph 1 on page 3 of the July 23, 2014 order pertaining to the stay, not the other paragraphs restricting the enforceability of zones when drawn). The Attorney General renewed his motion to dismiss the complaint, and various of the municipal defendants moved for judgment on the pleadings. D. Ct. ECF Nos. 63, 75, 77. The Court heard oral argument on these motions on February 16, 2016. *See* Text Only Feb, 17, 2016); JA 155 (transcript of oral argument). Thereafter, the court requested supplemental legal memoranda. D. Ct. ECF No. 79.

The court issued its final order on March 31, 2016. D. Ct. ECF No. 83. It granted, without prejudice, the Attorney General's renewed motion to dismiss the action and the government Defendants' motions for judgment on the pleadings. Add. 35–36. The Court held that Appellants' injuries were not sufficiently imminent to confer Article III standing due to the fact that speech-restrictive zones had not yet been drawn, even though they could be drawn in "minutes." Add. 27–

28; *id.* at 22. Final Judgment was corrected on April 1, 2016. Add. 1. The sidewalk counselors filed their Notice of Appeal on April 18, 2016, appealing the Order and Corrected Final Judgment. D. Ct. ECF No. 86.

STATEMENT OF FACTS

The Act, N.H. Rev. Stat. Ann. § 132:37 *et seq*., designates a fixed area with a radius of up to 25 feet around "any portion of an entrance, exit, or driveway of a reproductive health care facility." § 132:38(I). After the buffer zones are demarcated and cautionary signage is erected, no person may "knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility." *Id*. The Act defines "reproductive health care facility" as "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." § 132:37(I). Anyone who violates the Act "shall be guilty of a violation and shall be charged a minimum fine of $100." § 132:39(II). Additionally, "the attorney general or the appropriate county attorney may bring an action for injunctive relief to prevent further violations." *Id*.

"[T]he Act imposes little impediment to a zone's creation." Add. 21. Indeed, the District Court concluded that the Act does not require abortion facilities to obtain the approval of the local police prior to drawing the buffer zones. Add. 21–23 at n. 10–11. The Act does require abortion facilities to "consult" with local police, but not to obtain their approval to create the Act's

speech-banning zones. § 132:38(III). Rather, consultation is "to ensure compliance with all local ordinances" pertaining to "location and size of the signs" that warn the public that speech is prohibited within the zones. *Id*. Further, all of the County, City, and Town Defendant-Appellees, who would actually be consulted pursuant to the Act, concurred with the plain reading of the statute that local authorities have no veto power over the creation of no-speech zones. Add. 21–22 n.10. The District Court considered, and rejected, the Attorney General's "curious suggestion" to the contrary as being inconsistent with the text of the Act. *Id*.

The abortion facilities' creation of zones "could be a brief affair, as plaintiffs point out, leading to posted signs within hours—if not minutes." Add. 22. The Act also imposes no standard limiting when a facility may create a no-speech zone, or what justification it might have for doing so, as long as it does so within the physical parameters set forth in the Act. § 132:38(III). "[T]he lack of any restrictions on, or conditional criteria for, the consultation/demarcation/signage requirements means that, conceivably, a clinic could establish a maximum size buffer zone (that is, a zone with a 25-foot radius) in a very short amount of time for any reason or for no reason at all." Add. 23 at n.11.

The 25-foot radius that the Act authorizes would create zones far larger than 50-feet in length per clinic. This is because the Act specifies that the radius is to be drawn outwards from the edge of curb cuts for driveways, which themselves fall

inside the zones, and because zones can be drawn on each of multiple entrances. § 132:38(I). The Greenland and Manchester facilities, for example, boast lengthy driveways, and the buffer zones encompass well over fifty feet of length of public sidewalks and ways. J.A. 60 at ¶ 12; 67 at ¶ 13. For the same reason, the Concord facility buffer zone encompasses 100 feet or more of the public sidewalk. J.A. 54 at ¶ 13.

In passing the Act, the New Hampshire legislature claimed to be serving the general interests of preventing crimes, violence, and obstruction of public rights of way: "to regulate the use of public sidewalks and streets adjacent to reproductive health care facilities"; "to promote the free flow of traffic on streets and sidewalks"; to "reduce disputes and potentially violent confrontations requiring significant law enforcement services"; to "protect property rights"; and to "secure a citizen's right to seek reproductive health care services." J.A. 33 at ¶¶ II. To justify these interests, the Act itself does not provide specific evidence of actual instances of crimes, violence, or obstruction, the prosecution of such activities, or the persistence of the problems despite prosecution. §§ 132:37–132:40. In fact, just days after the Act was to go into effect, the Town of Greenland submitted an affidavit that it had no actual instances necessitating creation of such zones. J.A. 45 at ¶ 3.

The Plaintiffs-Appellants sidewalk counselors are residents of the State of New Hampshire who regularly appear before local reproductive health facilities to engage in peaceful prayer, leafleting, sidewalk counseling, and pro-life advocacy. J.A. 46–47 at ¶¶ 1–5; 52–53 at ¶¶ 1–4; 58–59 at ¶¶ 1–5; 65 at ¶¶ 2–6. During sidewalk counseling, they seek to have calm, individual conversations with the women entering or leaving the clinics, providing them with pamphlets describing local pregnancy resources and peacefully expressing a message of care and support. J.A. 47 at ¶ 5; 53 at ¶ 3; 59 at ¶¶ 3–4; 65–66 at ¶¶ 6–7. The sidewalk counselors consider it essential to their message to convey gentleness through close, calm, personal conversations with those entering and exiting the abortion facility, rather than to merely express their opposition to abortion or to be seen as protesting. J.A. 49 at ¶ 23; 55 at ¶ 22; 61 at ¶¶ 23–24; 67 at ¶ 17; *cf. McCullen*, 134 S. Ct. at 2536 ("Petitioners believe that they can accomplish this objective only through personal, caring, consensual conversations."). Zones authorized by the Act would make it difficult, if not impossible, for the sidewalk counselors to engage in close, personal conversations with the women and to engage effectively in sidewalk counseling. J.A. 50 at ¶¶ 28–29; 54 at ¶ 13; 60 at ¶ 12; 67 at ¶ 13.

SUMMARY OF THE ARGUMENT

The sidewalk counselors have standing to bring their facial challenges to the Act. As the District Court acknowledged, abortion facilities can create zones banning the sidewalk counselors' speech in "minutes," and "in a very short amount of time for any reason or for no reason at all." Add. 22–23 & n.11. Yet somehow the District Court held that the sidewalk counselors do not face a "certainly impending" threat. If a threat to free speech is minutes away, it is necessarily certainly impending.

Moreover, the Supreme Court has affirmed that a threat creating standing can be characterized either as "certainly impending" or under the longstanding "significant risk" of injury standard. *Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2341 (2014). The District Court imposed too strict of an interpretation of these cases, and disregarded this Court's significant precedent saying that a free speech challenger need not wait to sue until a law is enforced against her. *See, e.g., Van Wagner Boston, LLC*, 770 F.3d at 35–36 (recognizing standing to challenge a law giving standardless discretion over speech even when all prior permit requests had been granted); *New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 10 (1st Cir. 1996) (recognizing standing where a "credible threat of prosecution exists").

The sidewalk counselors' standing to sue is also apparent given the facial nature of their claims. In an unprecedented fashion, the Act grants authority to ban speech not to local police but to private abortion facilities themselves that are antagonistic to the sidewalk counselors' viewpoint. The sidewalk counselors have challenged this grant of authority on its face, and the delegation of authority occurred in July 2014 when the law went into effect. The sidewalk counselors have standing to challenge this novel authority, which can be exercised against them in "minutes," because "governmental grants of power to private actors are constitutionally problematic," *Hill v. Colorado*, 530 U.S. 703, 734 n.43 (2000) (internal quotations and citations omitted), and constitutional concerns are exacerbated when private entities are given discretion to suppress speech on the public sidewalk. *See First Unitarian Church of Salt Lake City v. Salt Lake City Corp.*, 308 F.3d 1114, 1133 (10th Cir. 2002) (striking down a city's attempt to give a church authority to ban speech in a traditional public forum).

The sidewalk counselors' standing to challenge the Act on its face when it is in force is also apparent under *McCullen*, which requires the government to show evidence that (1) an actual problem exists and (2) it tried, but failed, to resolve it by other means, such as banning obstruction or violence directly instead of banning speech. 134 S. Ct. at 2537–41. The government had to satisfy this standard when it put the Act into effect and granted the authority to create no-speech zones in 2014,

not sometime in the future. The government's failure to satisfy *McCullen* is something the sidewalk counselors can challenge on the face of the Act now. For example, the Third Circuit recently reversed dismissal of a challenge to a buffer zone law and remanded the case to require the government to satisfy *McCullen*. *See Bruni v. City of Pittsburgh*, No. 15-1755, 2016 WL 3083776, at *13 (3d Cir. June 1, 2016) (reversing lower court's denial of plaintiff's facial challenge to City's buffer-zone ordinance, holding that "*McCullen* require[s] the sovereign to justify its regulation of political speech by describing the efforts it had made to address the government interests at stake by substantially less-restrictive methods or by showing that it seriously considered and reasonably rejected 'different methods that other jurisdictions have found effective'").

STANDARD OF REVIEW

This appeal raises only "pure (or nearly pure) questions of law," so it is reviewed *de novo*. *Valentin v. Hosp. Bella Vista*, 254 F.3d 358, 363 (1st Cir. 2001). In such cases, the court "take[s] as true all well-pleaded facts in the plaintiffs' complaint[ ], scrutinize[s] them in the light most hospitable to the plaintiffs' theory of liability, and draw[s] all reasonable inferences therefrom in the plaintiffs' favor." *Fothergill v. United States*, 566 F.3d 248, 251 (1st Cir. 2009).

In the context of a Rule 12(b)(1) motion, the Court may "consider material outside [of] the pleadings." *Gonzales v. United States*, 284 F.3d 281, 288 (1st Cir.

2002) (citing *Heinrich v. Sweet*, 44 F. Supp. 2d 408, 412 (D. Mass. 1999)). Specifically, the Court can look beyond the pleadings to "evidence from other sources, such as affidavits or depositions." Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure: Civil*, 5C Fed. Prac. & Proc. Civ. § 1363 (3d ed.) (Apr. 2016 update). The Court's jurisdictional inquiry may be based "on any ground made apparent by the record (whether or not relied on upon by the lower court)." *Aguilar v. United States Immigration and Customs Enforcement Div. of Dept. of Homeland Sec.*, 510 F.3d 1, 8 (1st Cir. 2007). "Where [the] facts [in the plaintiff's complaint] are illuminated, supplemented, or even contradicted by other materials in the district court record, [the court] need not confine [its] jurisdictional inquiry to the pleadings, but may consider those other materials." *Van Wagner Boston, LLC*, 770 F.3d at 36 (quoting *Aguilar v. U.S. ICE*, 510 F.3d, 1, 8 (1st Cir. 2007)).

ARGUMENT

I. The Sidewalk Counselors Have Standing To Challenge A Law In Which Their Speech Can Be Banned In "Minutes."

The sidewalk counselors have standing to bring their facial constitutional challenges to the Act because the Act can be imposed against them in a matter of "minutes." Add. 22. To establish standing, an injury must be "concrete, particularized, and actual or imminent; fairly traceable to the challenged action; and redressable by a favorable ruling." *Clapper v. Amnesty Int'l USA*, 133 S. Ct

1138, 1147 (2014) (quoting *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010)).

A. A speech ban that can be imposed in minutes is imminent under any formulation of that standard.

Imminence is the requirement raised by this case. *Clapper* said, in the "especially rigorous" context of challenging a federal statute, that imminence requires the injury to be "certainly impending." 133 S. Ct at 1143, 1147. The District Court here relied heavily on this formulation to deem the sidewalk counselors' claims as not imminent, simply because a zone has not yet been drawn, *even though one can be drawn in minutes*. In doing so, the District Court applied an unduly strict standard.

Since *Clapper*, the Supreme Court has clarified, in a free speech case against a *state law*, that imminence can be described either under the "certainly impending" standard *or* the more familiar formulation that there exists a "'substantial risk' that the harm will occur." *Susan B. Anthony List*, 134 S. Ct. at 2341 (quoting *Clapper*, 133 S. Ct. at 1147, 1150 n.5). If, as here, free speech can be banned on the public sidewalk in minutes, at the sole discretion of one's political opponents, there is substantial risk that it will.

Thus, although this Court noted that *Clapper* "left open the question whether the previously-applied 'substantial risk' standard is materially different from the 'clearing impending' requirement," *Blum v. Holder*, 744 F.3d 790, 799 (1st Cir.

2014), that "open" question was closed by *Susan B. Anthony List*: the "substantial risk" standard is still good law. The District Court also relied on this Court's precedent in *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34, 46 (1st Cir. 2011), for the proposition that standing requirements apply in every case. That is true, but it does not make the requirements stricter than they are.

B. The imminence of the Act's speech bans is not speculative.

The District Court misapplied *Clapper* and *Blum*, both of which actually demonstrate that the sidewalk counselors here have standing. In *Clapper*, the Supreme Court ruled that Amnesty International lacked standing to challenge § 1881(a) of the Foreign Intelligence Surveillance Act, because their "argument rest[ed] on their highly speculative fear" of five "highly attenuated . . . possibilities" about whether they would even engage in communications that might trigger surveillance after multiple contingencies came to fruition. 133 S. Ct. at 1148. The Court explained that Amnesty's multi-layered speculative theory of liability kept their injury from being "certainly impending" for purposes of Article III standing. *Id*. at 1143.

Here there is no speculation or conjecture that the sidewalk counselors face a ban on their speech. Only one action needs to happen, not several, and it can happen "in minutes," or "in a very short amount of time," according to the District Court's own reckoning. Add. 22–23 & n.11. This is not highly speculative. It is

positively likely. The government has given this speech-banning authority to the sidewalk counselors' avowed ideological opponents, and has allowed the abortion facilities to exercise it "for any reason or no reason at all." Add. 23 at n.11. The abortion facilities concur: they call the Act "a very useful tool for the clinic to have in its toolbox," J.A. 42 at ¶ 6, insisting they need the ability it gives them to draw zones "quickly." J.A. 39 at ¶ 11. There is also no speculation, as existed in *Clapper*, that once the zones are created they will, in fact, ban actual speech in which the sidewalk counselors actually engage. The sidewalk counselors' verified statements that they do speak in the zones around abortion facilities is not contradicted in the record. And as discussed in section II. below, the authorization of this constitutionally suspect power itself, in 2014, is sufficient to sustain a facial challenge regardless of how many minutes it is away from being enforced. Thus the Act's injury to the sidewalk counselors is imminent and certainly impending.

The District Court should have applied *Susan B. Anthony List*, where the Supreme Court recognized standing to challenge a state statute criminalizing certain political statements, where the injury could be triggered by *private citizens* filing a complaint. *Susan B. Anthony List*, 134 S. Ct. at 2338 ("any person" may bring a complaint). In these circumstances, the Supreme Court held that a "substantial risk" of injury to free speech suffices to establish standing. *Id.* at 2341.

C. *Clapper* and *Blum* hinged on federal separation of powers and government disavowal, neither of which are present here.

This case is more akin to *Susan B. Anthony List* than to *Clapper* and *Blum*. *Susan B. Anthony List* recognized standing to challenge to a state law triggered by private citizens, comparable to the Act here. *Clapper*, however, emphasized that it was applying an "especially rigorous" standing rule because it involved a federal separation of powers context, where the federal court is asked to enjoin a federal statute authorizing federal executive branch activities. 133 S. Ct at 1147. This is not true here where a state law is being challenged under the First Amendment. *Blum*, too, was a challenge to a federal statute, unlike the present case.

Blum is inapplicable for an additional reason: the challengers in that case based their fear of prosecution on a theory of liability that the government expressly disavowed, which is not the case here. *Blum* said the plaintiffs' fear of prosecution under that federal law was "based on speculation that the Government will enforce the Act pursuant to interpretations it has never adopted and now expressly rejects." 744 F.3d at 803. Specifically, in *Blum* "[t]he Government has affirmatively represented that it [did] not intend to prosecute such conduct because it does not think that it [was] prohibited by the statute." *Id*. at 798. There is no government disavowal here. The statute says clearly on its face that zones ban even being in the zones—and speaking—when abortion facilities demarcate them. The Cities and Towns all insist that they have no veto power over the drawing of zones

and will consider them instantly in force once they are demarcated. Add. 21–22 at n.10; 23 at n.11.

To the extent that the Attorney General waited until oral argument to make the what the District Court called a "curious suggestion" that somehow local police can veto zones under the Act, Add. 23 n.11, the suggestion is both wrong and irrelevant. The Cities and Towns are the ones who would withhold such theoretical approval, and they all conceded they have no such authority to do so, making the zones enforceable against the sidewalk counselors the instant they are drawn. *Id.* The District Court also correctly rejected the Attorney General's suggestion as inconsistent with the plain text of the Act. *Id.* at 21–22 n.10. In short, *Blum*'s disavowal reasoning serves only to highlight the imminence of the harm here.

D. Sidewalk counselors need not subject themselves to prosecution.

As shown by *Susan B. Anthony List*, 134 S. Ct. at 2341, the line of cases applying the "substantial risk" formulation of imminence is still good law. But the District Court allowed its erroneous application of *Clapper* and *Blum* to eclipse this Court's precedent recognizing that a plaintiff need not first subject herself to prosecution prior to challenging a statute that violates her free speech rights. *NH Right to Life PAC*, 99 F.3d at 13. Indeed, where a "credible threat of prosecution exists," a plaintiff may bring a pre-enforcement challenge even without a history of enforcement. *Id*. at 14. Here the District Court itself acknowledged that under the

Act speech bans can be in force against the sidewalk counselors in "minutes." Add. 22. To hold that a speech ban that can be imposed immediately fails to satisfy the imminence requirement for standing is, in effect, to require a plaintiff to subject herself to actual prosecution before bringing suit. This conclusion by the District Court was legal error.

The District Court relied heavily on the fact that zones have not yet been drawn. But this fact is insufficient to deny the imminent threat of a speech ban because such zones can be created "in minutes" and "in a very short amount of time for any reason or for no reason at all." Add. 22–23 at n.11. Moreover, the record reflects that the decision not to create zones yet was an arrangement by the abortion facilities with the Attorney General, made only until this litigation is no longer pending. This was stated by the government's own affiants, an abortion facility director, in her testimony to the New Hampshire legislature against a bill that would have repealed the Act. J.A. 103 (testimony by Jennifer Frizzell, whose affidavit the state submitted below at D. Ct. ECF No. 37 (July 22, 2014)). This suggests that the lack of speech bans thusfar is a mere litigation tactic, and if this Court affirms dismissal, the facilities will quickly impose them. That likelihood itself demonstrates a sufficient imminence of injury to the sidewalk counselors.

Additionally, from the filing of the case until its dismissal, the sidewalk counselors were protected from the zones both by a temporary restraining order

and by the Court's July 23, 2014 stay order, under which zones were robbed of their immediate enforceability even if they were drawn. J.A. 71–72 at ¶¶ 1–4. This demonstrates the sidewalk counselors' standing rather than undermining it. If a temporary court order changes a litigant's legal status to protect her from injury, her safety cannot itself be used to show that she has no standing to seek the benefit of a more permanent court order.

E. The Act chills the sidewalk counselors' speech by creating a "negotiation" tool the clinics say they will use as a threat now.

The Act also creates a chill on the sidewalk counselors' speech. Affiants for the government testified that the broad conferral of power delegated by the Act is a "useful tool" enabling clinic staff in "negotiating" with the plaintiffs and those who hold similar views. J.A. 42 at ¶ 6. This statement expresses a present intent, even before zones are drawn, to use the threat of immediately banning the sidewalk counselors' speech as leverage in "negotiating" so that the counselors stop their existing activities (activities which must be legal in themselves, otherwise the clinic could simply call the police to stop them). But First Amendment rights cannot be sacrificed as a bartering chip for one side of a contentious public debate; they are instead "the matrix, the indispensable condition, of nearly every other form of freedom." *McGuire v. Reilly*, 386 F.3d 45, 64 (1st Cir. 2004) (quoting *Palko v. Connecticut*, 302 U.S. 319, 327 (1937) (internal citations omitted)).

II. The Sidewalk Counselors Have Standing To Facially Challenge The Act's Novel Delegation Of Speech-Banning Authority Given To Private Parties.

The sidewalk counselors have standing to bring a facial challenge to the Act's delegation of speech-banning authority to private parties, to use against them in "minutes" and "for any reason or for no reason at all." Add. 22–23 & n.11. Such authority was delegated when the Act became law, even if it has not yet been exercised, and so a facial challenge is cognizable at this time.

City streets and sidewalks "have immemorially been held in trust for the use of the public, and, time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Perry Educ. Ass'n v. Perry Local Educator's Ass'n*, 460 U.S. 37, 45 (1983) (quoting *Hague v. CIO*, 307 U.S. 496, 515). In these areas, the Supreme Court has long recognized that "governmental grants of power to private actors are constitutionally problematic," especially when regulations "allow[] a single, private actor to unilaterally silence a speaker even as to willing listeners." *Hill*, 530 U.S. at 734 n.43 (citing *Reno v. ACLU*, 521 U.S. 844, 880 (1997)). "What the First Amendment precludes the government from commanding directly, it also precludes the government from accomplishing indirectly." *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 77–78 (1990).

The Supreme Court's standing jurisprudence takes into consideration the "threats" of "undetectable content-based censorship" on speech. *Van Wagner*, 770 F.3d at 37. A scheme that gives an entity standardless authority to ban speech is one that hides whether the entity has done so in a manner that violates the First Amendment. Under such a scheme, abortion clinics may ban speech for discriminatory reasons, such as "permitting favorable, and suppressing unfavorable, expression." *Van Wagner*, 770 F.3d at 37 (quoting *City of Lakewood v. Plain Dealer Publ'g Co.*, 486 U.S. 750, 758 (1988)). "[A] critical element of the heckler's veto is the obligation of the state not to allow public opposition to shut down a speaker." Cheryl A. Leanze, *Heckler's Veto Case Law as a Resource for Democratic Discourse*, 35 Hofstra L. Rev. 1305, 1313 (2007). "[T]he danger of censorship and of abridgment of our precious First Amendment freedoms is too great where officials have unbridled discretion over a forum's use." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975). *See also Sanjour v. E.P.A.*, 56 F.3d 85, 97 (D.C. Cir. 1995) (striking down a regulation on employee speech that "vest[ed] essentially unbridled discretion in the agency to make the determination on the basis of the viewpoint expressed by [an] employee"). Speech restrictions must be analyzed for the "substantial risk of excising certain ideas or viewpoints from the public dialogue." *Nat'l Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 736 (1st Cir. 1995) (quoting *Turner Broad. Sys., Inc. v. F.C.C.*, 512

U.S. 622, 642 (1994)). The danger these courts recognize in granting unbridled discretion over speech to government officials is even greater when the authority is placed into the hands of private parties in a controversial public debate.

This Court recognizes plaintiffs' ability to bring a facial challenge to a statute allowing constitutionally suspect discretion over speech, even before it has been enforced. In *Van Wagner*, this Court held that an advertising company had standing to facially challenge a law giving the Massachusetts Department of Transportation discretionary authority to issue permits for advertisements, even though it had submitted *over seventy* permits and every one of them had been approved. 770 F.3d at 37–38. Rejecting the government's suggestions that the threats to speech "are only theoretical," this Court held that Article III standing was amply satisfied merely by the fact that the permitting scheme *could be used* to restrict the advertising company's speech. *Id.* at 40.

The Act here gives rise to standing for a facial challenge for the same reason, and it raises even more grave concerns. The District Court observed what is apparent from the face of the Act: that it can be imposed to ban the sidewalk counselors' speech "in minutes," and that the private entities can create those speech bans "for any reason or for no reason at all." Add. 22–23 & n.11. This puts the sidewalk counselors at continual risk of having their speech banned, which is no less of a threat than that faced by the advertiser in *Van Wagner* whose speech

had been approved over seventy times and prohibited not once. As this Court explained in *Van Wagner*, the problem is not simply the actual abuse of power "*but the pervasive threat inherent in its very existence that constitutes the danger to freedom of discussion*." 770 F.3d at 40 (emphasis in original) (quoting *City of Lakewood*, 486 U.S. at 757). Moreover, the risk to the sidewalk counselors is more urgent than the one faced in *Van Wagner* because it is not a neutral government official with a record of allowing free speech to whom the Act gives unfettered discretion—it is a private entity ideologically hostile to the sidewalk counselors themselves. These private entities, the District Court acknowledged, are empowered to ban the sidewalk counselors' speech "for any reason or for no reason at all," which necessarily includes the simple reason of disagreeing with the sidewalk counselors' viewpoint. Add. 23 n.11. The facilities can ban speech at their whim, with no procedural safeguard to ensure that they will not do so unless the ban satisfies constitutional limits.

The District Court declined to follow *Van Wagner* by making an inadequate distinction, noting that the unfettered discretion in *Van Wagner* existed as a "prior" restraint on speech in the form of a permit scheme. Add. 28. But the technical structure of a speech ban does not negate the standing of someone imminently faced with its discriminatory application. First of all, the Act's zones are in fact "prior" restraints, in that once they are drawn they ban speech prior to the speech

occurring. Moreover, the underlying First Amendment considerations that led this Court to allow a facial challenge in *Van Wagner* apply equally here. In both cases, facial claims against unconstitutional discretion were sufficiently pled. In both cases, the discretion had not yet been exercised. In both cases, the official possessing the discretion could exercise it imminently, conferring standing on the speaker. Here the situation is even worse because the speech ban can be imposed in mere minutes, and has been granted to the sidewalk counselors' ideological opponents. In fact, if Massachusetts had granted discretion over Van Wagner's billboard speech *to a competing billboard company*, that would have exacerbated the risk to Van Wagner's speech; it would not have undermined the company's standing.

The constitutional flaw in creating standardless discretion over free speech—and in giving private parties the power to suppress constitutional rights—is in no way limited to the "prior restraint" structure of a speech regulation. The Tenth Circuit vindicated a court challenge to a law granting private authority over free speech in *First Unitarian Church of Salt Lake City*. That case involved a land grant to a church wherein the city retained a public easement for traditional public sidewalk access, but the City tried to endow the church with the authority to restrict speech on that sidewalk. 308 F.3d at 1118–19. The court held that the

government "may not provide a public space or passage conditioned on a private actor's desire that that space be expression-free." *Id*. at 1132.

Similarly, the Fourth Circuit struck down a statute giving local residents *de facto* veto power over the landfill permitting process "uncontrolled by any standard or rule prescribed by legislative action," because the action would be "subservient to selfish or arbitrary motivations or the whims of local taste." *Geo-Tech Reclamation Indus., Inc. v. Hamrick*, 886 F.2d 662, 665–66 (4th Cir. 1989) (citation and internal quotation marks omitted). Also, a District Court in Michigan struck down a city resolution granting a public sidewalk area to a Planned Parenthood abortion facility where sidewalk counselors used the area to speak. *Thomason v. Jernigan*, 770 F. Supp 1195 (E.D. Mich. 1991).

The Supreme Court also rejected a private party veto over First Amendment rights in *Larken v. Grendel's Den, Inc.*, 459 U.S. 116, 125 (1982), where it struck down a Massachusetts statute vesting churches and schools with the authority to block the construction of liquor stores within a 500-foot radius. *Id*. Although the Court struck down that statute under the Establishment Clause, the underlying concerns were parallel: namely, that the statute was "standardless, calling for no reasons, findings, or reasoned conclusions." *Id. Cf. Eubank v. City of Richmond*, 226 U.S. 137, 143 (1912) (striking down a statute that enabled 2/3 of property

owners to order a street committee to demarcate a line infringing on the right to private property).

The unique character of this Act, creating standardless discretion to instantly ban speech, and giving it to private entities ideologically hostile to the sidewalk counselors, shows that the sidewalk counselors face an imminent threat of harm giving them standing to facially challenge that law.

III. The Government's Failure To Satisfy The Supreme Court's Recent Ruling In *McCullen* Was Present When the Act Was Enacted And Can Be Challenged Facially Now.

Standing also exists to challenge the Act due to the First Amendment's requirement that to enact a law authorizing zones that ban speech, the government must first satisfy narrow tailoring analysis. *See McCullen*, 134 S. Ct. at 2534. This flaw existed when the Act became law, because the New Hampshire legislature did not cite any of the specific evidence required by *McCullen* to show that actual problems make the speech bans necessary and that any purported issues were unsolvable by other methods the state attempted to use. In fact, the town of Greenland's police chief's affidavit demonstrates the opposite. J.A. 44–45. Therefore, the sidewalk counselors may bring a facial challenge to the Act.

The District Court erred by demanding that speech-ban zones be drawn before the sidewalk counselors may develop sufficient facts to challenge the Act. Add. 20 (declaring that the court needed to wait until zones are drawn because "the

court would have before it sufficient factual developments to conduct a proper review as undertaken in *McCullen*"). This reasoning mistakes as-applied challenges for facial challenges. By definition, a facial challenge to a law does not involve any history of the law's application. In *Van Wagner* the advertising company had over seventy speech permits approved and none rejected, yet the court recognized that "Van Wagner has standing to mount a facial challenge." 770 F.3d at 42. In the First Amendment context, a facial challenge can be successful as long as the law "does not survive the narrow-tailoring inquiry, even though that ordinance might seem to have a number of legitimate applications." *Cutting v. City of Portland*, 802 F.3d 79, 86 (1st Cir. 2015) (citing *McCullen*, 134 S. Ct. 2518)).

The District Court also misapplied *McCullen*, which requires a government to show that it first tried to solve the alleged problems before resorting to a law that bans speech. The Supreme Court struck down the Massachusetts law because "the Commonwealth has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it. Nor has it shown that it considered different methods that other jurisdictions have found effective." *McCullen*, 134 S. Ct. at 2539. The government bears the burden of proving that the requirement of narrow tailoring is met. *See Bd. of Trs. of State Univ. of N.Y. v. Fox*, 492 U.S. 469, 480 (1989) ("[S]ince the State bears the burden of justifying its restrictions, it must affirmatively establish the reasonable fit we require") (internal citation omitted).

The evidentiary showing imposed on the government in *McCullen* pertains to what the government tried to do *before* it authorized speech bans. There is no need to wait until zones are drawn to try this case, because the zones can be drawn in minutes, and government is not the one that draws them anyway. All of the evidence about whether *McCullen* has been satisfied before speech is banned on the public sidewalk is evidence about what *the government* has done: whether it has passed laws and sought injunctions against obstruction and crime, prosecuted those laws, and seen the problems persist despite prosecution. Only the government can do these things. But under the Act the government relinquished its authority over the creation of zones, letting abortion facilities create them without *McCullen* having been satisfied. The government also relinquished its authority over what size a particular zone will be. Thus when the District Court indicated a zone needed to be drawn to know its size and consider the Act's constitutionality, it overlooked the underlying facial constitutional flaw in the Act's allowance for zones to be created at maximum length with no *McCullen* showing whatsoever. That length includes not only a 25-foot in radius zone, but the fact that it can be drawn beyond the edge of driveways that themselves are 10, 20, or 30 feet wide. J.A. 54 at ¶ 13; 60 at ¶ 12; 67 at ¶ 13.

The government had to comply with *McCullen* before the Act became law in 2014. That is when the Act authorized zones to ban the sidewalk counselors'

speech. That is what the sidewalk counselors challenge on its face in this lawsuit. "[T]he First Amendment interest in promoting free speech is so great that the government may not pass unnecessarily sweeping restrictions on speech and then force those burdened by them to challenge every problematic application." *Cutting*, 802 F.3d at 86 (citing *McCullen*, 134 S. Ct. at 2534). Instead, they can bring facial challenges when, as here, there is a substantial risk of harm. Just as the plaintiff in *Van Wagner* did not need to wait until facts were developed by having an actual permit denied to have standing to challenge the law on its face, so the District Court should not have required the sidewalk counselors first to prove facts from an applied ban in order to bring their facial challenge. It violates the imminence requirement for standing in the First Amendment context to require a plaintiff facing a burden that is mere minutes away to wait and file a lawsuit after their speech has been banned in an as applied context.

The Third Circuit recently recognized the force of *McCullen* on abortion facility buffer zone laws in *Bruni*. There, too, the District Court had dismissed the complaint, but the Court of Appeals reversed the dismissal and declared that the government must meet the evidentiary burden set forth in *McCullen*. 2016 WL 3083776 at *13. *Bruni* held that *McCullen*'s standards apply and require government satisfaction in the face of a First Amendment claim regardless of technical differences between buffer zone laws, such as the fact that the Pittsburgh

law only authorized zones of 15-feet in radius. *Id.* at *10. The court found that the City "may not forego a range of alternatives – which would burden substantially less expression than a blanket prohibition on Plaintiffs' speech in a historically-public forum – without a meaningful record demonstrating that those options would fail to alleviate the problems meant to be addressed. . . Pittsburgh has not met that burden." *Id*. at *12.

This Court recently emphasized the importance of putting the government to its constitutional burden of proof when it struck down a Maine statute that prohibited any person from standing, sitting, staying, driving, or parking on median traffic strips throughout the city. *Cutting*, 802 F.3d at 91. In holding that the law failed to accomplish the City's "concededly legitimate purpose of protecting public safety," this Court noted that "the City did not try—or adequately explain why it did not try—other, less restrictive means of addressing the safety concerns it identified." *Id*. at 91; *see also Casey v. City of Newport, R.I.*, 308 F.3d 106, 115 (1st Cir. 2002) (holding that a city's no-amplification restriction was not narrowly tailored because "[n]either in the district court's opinion nor in the record is there any explanation of why. . . enforcement of the City's noise ordinance [] would not have achieved the City's interests as effectively as the amplification ban, while substantially diminishing the burden on speech").

At any moment, the private abortion facilities can draw zones banning the sidewalk counselors' speech. The government did not satisfy *McCullen* before passing the Act, and abortion facilities do not have it within their power to satisfy *McCullen* even if the Act required them to do so, which it does not. The sidewalk counselors who face this imminent threat can challenge it facially now, because the Act's constitutional flaws existed from the time it became law.

CONCLUSION

For the reasons stated above, Plaintiffs-Appellants respectfully request that this Court reverse the District Court's order granting the government's motions for dismissal on the basis of standing, and remand for further proceedings.

Dated: August 1, 2016

Respectfully submitted,

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ADDENDUM

TABLE OF CONTENTS

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Mary Rose Reddy et al.

v.

Joseph Foster et al.

Civil No. 14-cv-299-JL
Opinion No. 2016 DNH 074P

CORRECTED OPINION AND ORDER

This civil rights action implicates a party's standing to challenge a recently-enacted law prior to its enforcement. The plaintiffs allege that they engage in peaceful expressive activities[1] outside of clinics that provide abortion services in New Hampshire. A recently-enacted New Hampshire law permits such clinics to create so-called "buffer zones" around the clinic entrances. N.H. Rev. Stat. Ann. §§ 132:37-40. Plaintiffs allege that this law violates their rights to freedom of speech, freedom of the press, due process, and equal protection under the United States and New Hampshire Constitutions. It does so, they argue, by unlawfully restricting their ability to engage in peaceful prayer,

[1] As explained infra Part I, in the context of a motion to dismiss for lack of subject-matter jurisdiction, see Fed. R. Civ. P. 12(b)(1), the court "treat[s] all well-pleaded facts as true and indulg[es] all reasonable inferences in favor of the plaintiff." Aversa v. United States, 99 F.3d 1200, 1210 (1st Cir. 1996).

leafleting, and sidewalk counseling in those quintessential public fora, the city street and sidewalk.

The Attorney General of the State of New Hampshire, a defendant in his official capacity, moved to dismiss this action pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure, arguing that the plaintiffs lack standing to bring it. The Attorney General contends that the plaintiffs failed to allege any actual injury because the statute in question has not been enforced against them and, as written, cannot be enforced against them absent the demarcation of a buffer zone -- a condition precedent that has not been fulfilled even now, almost 21 months after the law's effective date. This absence of any injury means the plaintiffs lack standing, the Attorney General concludes, and accordingly strips this court of subject-matter jurisdiction over the action. See U.S. Const. art. III, § 2, cl. 1.

Having already answered the complaint, various of the municipal defendants[2] move for judgment on the pleadings, see Fed. R. Civ. P. 12(c), challenging the court's subject-matter

[2] The Counties of Cheshire, Merrimack, Hillsborough, and Rockingham, the Cities of Concord and Keene, and the Town of Greenland, have so moved. The City of Manchester has not weighed in.

jurisdiction on the same grounds as the Attorney General. They also contend that the plaintiffs fail to state a claim against them, see id. Rule 12(b)(6), and raise the spectre of unjoined but indispensable parties, see id. Rules 12(b)(7), 19.

After hearing oral argument and considering the parties' submissions, the court grants defendants' motions to dismiss because plaintiffs' suit is premature. Plaintiffs have not demonstrated that they suffered any cognizable injury attributable to the defendants or that threatened enforcement of the statute chilled their speech. Lacking subject-matter jurisdiction over this action, the court accordingly dismisses the plaintiffs' claims without prejudice.

I. Applicable legal standard

"[F]ederal courts are courts of limited jurisdiction. They possess only that power authorized by Constitution and statute . . . ." United States v. Coloian, 480 F.3d 47, 50 (1st Cir. 2007) (quoting Kokkonen v. Guardian Life Ins. Co. of Am., 511 U.S. 375, 377 (1994)). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." Steel Co. v. Citizens for a Better Env't, 523 U.S. 83, 94 (1998) (quoting Ex parte McCardle, 7

Wall. 506, 514 (1869)). When the court's jurisdiction is challenged, as it is here, "the burden lies with the plaintiff[s], as the part[ies] invoking the court's jurisdiction, to establish that it extends to [their] claims." Katz v. Pershing, LLC, 672 F.3d 64, 70 (1st Cir. 2012) (citing Kokkonen, 511 U.S. at 377).

In evaluating a motion to dismiss for lack of subject-matter jurisdiction under Rule 12(b)(1), this court must "accept as true all well-pleaded factual averments in the plaintiff[s'] complaint and indulge all reasonable inferences therefrom in [their] favor." Katz, 672 F.3d at 70. Unlike in the Rule 12(b)(6) context, where doing so would require conversion of this motion into one for summary judgment, see Trans-Spec Truck Serv., Inc. v. Caterpillar Inc., 524 F.3d 315, 321 (1st Cir. 2008), in the Rule 12(b)(1) context, the court may "consider whatever evidence has been submitted, such as the . . . exhibits submitted in this case." Aversa, 99 F.3d at 1210.

II. Background

A. The Act

The law challenged here, entitled "An Act Relative to Access to Reproductive Health Care Facilities" and codified at N.H. Rev. Stat. Ann. § 132:37-40, went into effect on July 10, 2014. The Act provides that, with limited exceptions:

> No person shall knowingly enter or remain on a public way or sidewalk adjacent to a reproductive health care facility within a radius up to 25 feet of any portion of an entrance, exit, or driveway of a reproductive health care facility.

N.H. Rev. Stat. Ann. § 132:38, I. Under the Act, a "reproductive health care facility" is "a place, other than within or upon the grounds of a hospital, where abortions are offered or performed." Id. § 132:37, I. Importantly, the Act requires that such facilities "shall clearly demarcate the zone authorized in paragraph I and post such zone with signage," id. § 132:38, II, and that, prior to doing so, they "shall consult with local law enforcement and those local authorities with responsibilities specific to the approval of locations and size of the signs to ensure compliance with local ordinances," id. § 132:38, III.

Section 132:39 contains the Act's enforcement mechanisms, but provides that they "shall not apply unless the signage authorized in RSA 132:38, II was in place at the time of the alleged violation." Id. § 132:39, III. Once that signage is in place, "a police officer or any law enforcement officer shall issue one written warning to an individual" who violates § 132:38, I, "[p]rior to issuing a citation." Id. § 132:39, I. "If the individual fails to comply after one warning, such individual will be given a citation," id., which carries "a

minimum fine of $100," id. § 132:39, II. The Act also authorizes the New Hampshire Attorney General or appropriate County Attorney to "bring an action for injunctive relief to prevent further violations." Id.

B. The plaintiffs

The plaintiffs in this case are individuals who engage in expressive activities, such as prayer, leafleting, sidewalk counseling, and advocacy outside of four New Hampshire clinics that provide abortion services -- specifically, those in Manchester, Concord, Keene, and Greenland. Compl. ¶ 5. For example, some of the plaintiffs engage in sidewalk counseling outside of Planned Parenthood's clinic in Manchester. There, they attempt to engage in calm conversations with those entering and leaving the clinic, hand out rosaries and cards, or simply hold up signs. Compl. ¶¶ 61-62, 65, 67. Others pray -- aloud or silently -- on the sidewalks outside that location. Compl. ¶¶ 64, 67.

Still others of the plaintiffs engage in similar activities outside of the Concord Feminist Health Center, the Joan G. Lovering Health Center in Greenland, and the Planned Parenthood

clinic in Keene.[3] Compl. ¶¶ 75, 80-81, 86. The parties do not dispute that the plaintiffs have engaged in and, since the filing of this lawsuit, continue to engage in these and similar activities near these locations.

C. Procedural history

Plaintiffs filed this action on July 7, 2014, three days before the Act went into effect, and shortly after the Supreme Court struck down Massachusetts's buffer zone statute in McCullen v. Coakley, 134 S. Ct. 2518 (2014). As did the plaintiffs in McCullen, they seek to enjoin enforcement of the Act, alleging that it violates their rights under the First and Fourteenth Amendments, both on its face and as applied to them. See id. at 2528. They immediately moved for a preliminary injunction and, until that motion could be decided, a temporary restraining order. After a discussion with counsel, the court granted plaintiffs' motion for a temporary restraining order against the City of Concord and the Town of Derry, and denied it

[3] Plaintiffs originally alleged that some of their number engaged in similar activities outside of the Planned Parenthood in Derry. Compl. ¶ 68. The parties have since stipulated that the Derry Planned Parenthood clinic does not offer abortion services, and on those grounds, the plaintiffs voluntarily dismissed the Town of Derry from this action. See Notice of Voluntary Dismissal of the Town of Derry (document no. 48).

as moot against the other defendants, who agreed to abstain from enforcing the Act until the court rendered a decision on the motion for a preliminary injunction. Order of July 9, 2014 (document no. 9) at 2-4.

The parties agreed to a stay of the case shortly thereafter, in part to allow the legislature to reconsider the Act in light of the Supreme Court's decision in McCullen. See Order of July 23, 2014 (document no. 49). As a condition of the stay, the defendants agreed not to enforce the Act against the plaintiffs and to notify the plaintiffs if they learned that a clinic intended to post the signage that is a prerequisite to enforcement under § 132:38, II. Id. at 3-4. In light of the agreed-upon stay, the court administratively denied the parties' various pending motions -- for preliminary injunction (document no. 2), to stay the case (document no. 25), and to dismiss the case (document no. 26) -- though allowed for those motions to be reinstated upon the request of any party. Order of March 19, 2015 (document no. 57).

The parties diligently filed status reports during the course of the stay. The New Hampshire legislature did reconsider the Act during the 2015 legislative session; the House voted to repeal it, but the repeal bill was ultimately tabled by the Senate. See Motion to Lift Stay and Modify July

23, 2014 Order (document no. 64) ¶¶ 1-2. In August 2015, the defendants asked the court to lift the stay. See id. Plaintiffs agreed, with the understanding that certain provisions of the stay would remain in effect -- specifically, that the defendants would not enforce the Act against the plaintiffs and would notify the plaintiffs and the court should they learn that any clinic intended to post the pre-enforcement signage required by § 132:38, II. Id. ¶ 4. The court granted that request, see Order of August 27, 2015, the Attorney General renewed his motion to dismiss the complaint, see document no. 63, and various of the municipal defendants moved for judgment on the pleadings, see document nos. 75, 77. The court held oral argument on defendants' motions on February 16, 2016.[4]

III. Analysis

Resolution of this motion turns on whether the plaintiffs have suffered an injury sufficient to give them standing to seek relief. Article III of the United States Constitution "limits the jurisdiction of federal courts to 'Cases' and

[4] At oral argument, the court concluded that its analysis would benefit from additional argument applying Supreme Court and Court of Appeals precedent that had previously gone unaddressed. Order of February 17, 2016 (document no. 79). Pursuant to that order, those parties submitted supplemental memoranda. See documents nos. 80, 81.

'Controversies.'" Lujan v. Defenders of Wildlife, 504 U.S. 555, 559 (1992) (quoting U.S. Const. art. III, § 2, cl. 1). "[W]hether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Article III . . . is the threshold question in every federal case, determining the power of the court to entertain the suit." Warth v. Seldin, 422 U.S. 490, 498 (1975). To answer that question in the affirmative "requires that the party invoking federal jurisdiction have standing -- the 'personal interest that must exist at the commencement of the litigation.'" Davis v. F.E.C., 554 U.S. 724, 732 (2008) (quoting Friends of the Earth, Inc. v. Laidlaw Envtl. Servs. (TOC), Inc., 528 U.S. 167, 189 (2000)).

"[A] plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." Id., 554 U.S. at 734 (internal quotations omitted). "The existence of federal jurisdiction . . . depends on the facts as they exist when the complaint is filed." Lujan, 504 U.S. 555, 571 n.4, (quoting Newman-Green, Inc. v. Alfonzo-Larrain, 490 U.S. 826, 830 (1989)). To meet this burden, a plaintiff must show:

> (1) it has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of

> the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Friends of the Earth, 528 U.S. at 180-81. These "constitutional requirements apply with equal force in every case." Nat'l Org. for Marriage v. McKee, 649 F.3d 34, 46 (1st Cir. 2011). Defendants contend, and the court ultimately agrees, that the plaintiffs in this action fail to make the first of these showings. Plaintiffs challenge the Act as unconstitutional both on its face and as applied to the plaintiffs in this action. As discussed in more detail below, the plaintiffs lack standing to make either challenge to the Act. In the absence of a showing by the plaintiffs that they have suffered an injury in fact, actual or imminent, resulting from the actions of the defendants, the court grants defendants' motions to dismiss without prejudice.

A. Facial challenge

As discussed supra, to establish a case and controversy, plaintiffs must demonstrate that their injury is "concrete and particularized and actual or imminent, not conjectural or hypothetical." Friends of the Earth, 528 U.S. at 180-81. "'Allegations of possible future injury' are not sufficient" to constitute injury in fact. Clapper v. Amnesty Int'l. USA, 133 S. Ct. 1138, 1147 (2013) (quoting Whitmore v. Arkansas, 495 U.S.

149, 158 (1990)). The Supreme Court has, however, "given a special gloss" to this requirement so as to allow, under certain circumstances, facial challenges to laws that burden expression protected by the First Amendment. Van Wagner Boston LLC v. Davey, 770 F.3d 33, 37 (1st Cir. 2014).

The plaintiffs assert standing to challenge the Act as invalid on its face under two theories particular to this context. As discussed more fully below, plaintiffs lack standing under either of them. First, they claim standing to bring a pre-enforcement facial challenge because a credible threat that the Act will be enforced against them causes them to self-censor their speech, thus unconstitutionally chilling said speech. They lack standing under this theory because the absence of any buffer zone -- the creation of which is a necessary but unfulfilled condition for enforcement of the Act -- negates the imminence of the risk that the Act will be enforced against the plaintiffs.

Second, plaintiffs claim they have standing because they have pleaded that the Act unconstitutionally delegates unbridled discretion to the clinics to demarcate buffer zones. They draw this argument from the holdings of prior restraint cases, specifically Van Wagner, 770 F.3d 33 (1st Cir. 2014), but fail to supply convincing support that having alleged undue

discretion in the complaint creates standing outside of the prior restraint context. Accordingly, plaintiffs lack standing to challenge the Act as facially unconstitutional.

1. Threat of enforcement

The plaintiffs' first claim mounts a pre-enforcement First Amendment challenge.[5] "Pre-enforcement First Amendment challenges . . . occupy a somewhat unique place in Article III standing jurisprudence." Nat'l Org. for Marriage, 649 F.3d at 47. This is because, as the parties acknowledge, "the government has not yet applied the allegedly unconstitutional law to the plaintiff, and thus there is no tangible injury. However, in these circumstances the Supreme Court has recognized 'self-censorship' as 'a harm that can be realized even without an actual prosecution.'" Id. (quoting Virginia v. Am.

[5] Though this discussion necessarily contemplates how the statute could be applied to the plaintiffs, the cases that delineate the contours of pre-enforcement challenges such as this one, in the First Amendment context, address such challenges as facial. See, e.g., Susan B. Anthony List v. Driehaus, 134 S. Ct. 2334, 2340 n.3 (2014) (plaintiffs' as-applied claims "better read as facial objections"); Clapper, 133 S. Ct. at 1146 (addressing a facial challenge); New Hampshire Right to Life Political Action Committee v. Gardner, 99 F.3d 8, 10 (1st Cir. 1996) (concluding that plaintiff had "standing to mount a pre-enforcement facial challenge to the statutory cap."). This court accordingly does likewise.

Booksellers Ass'n, 484 U.S. 383, 393 (1988). As the First Circuit Court of Appeals has further explained:

> [I]n challenges to a state statute under the First Amendment[,] "two types of injuries may confer Article III standing without necessitating that the challenger actually undergo a criminal prosecution. The first is when 'the plaintiff has alleged an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by [the] statute, and there exists a credible threat of prosecution.' The second type of injury is when a plaintiff 'is chilled from exercising her right to free expression or forgoes expression in order to avoid enforcement consequences.'"

Blum v. Holder, 744 F.3d 790, 796 (1st Cir. 2014) cert. denied, 135 S. Ct. 477 (2014) (quoting Mangual v. Rotger-Sabat, 317 F.3d 45, 56-57 (1st Cir. 2003)). In both of these situations, the plaintiff's standing "hinge[s] on the existence of a credible threat that the challenged law will be enforced." N.H. Right to Life, 99 F.3d at 14. "If such a threat exists, then it poses a classic dilemma for an affected party: either to engage in the expressive activity, thus courting prosecution, or to succumb to the threat, thus forgoing free expression. Either injury is justiciable." Id. Absent such a threat, however, the plaintiff's "[a]llegations of a subjective 'chill' are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm," and thus do not amount to an injury that confers standing. Laird v. Tatum, 408 U.S. 1, 13-14 (1972). Thus, the plaintiffs' standing to bring

this pre-enforcement challenge turns on whether there is a credible threat that the Act will be enforced against them.

"An allegation of future injury may suffice" to create standing "if the threatened injury is 'certainly impending,' or there is a 'substantial risk that the harm will occur.'" SBA List, 134 S. Ct. at 2341 (quoting Clapper, 133 S. Ct. at 1150 n.5). In Clapper, individuals in the United States who communicated internationally with others who, in turn, might have been subject to surveillance under the Foreign Intelligence Surveillance Act of 1978 (FISA), 50 U.S.C. § 1881a, challenged that statute as violative of their rights under the First Amendment. 133 S. Ct. at 1142. The Supreme Court concluded the plaintiffs' "theory of standing . . . relie[d] on a highly attenuated chain of possibilities," including speculation as to whether their contacts would be subject to collection of intelligence under § 1881a, whether the Foreign Intelligence Surveillance Court would authorize surveillance of those contacts' communications under the same, and whether the plaintiffs' own communications would be intercepted if the Government succeeded in acquiring those contacts' communications. Id. at 1148-50. Because of that attenuation, the Court concluded that the plaintiffs "[did] not face a threat of certainly impending interception" of their communications

under § 1881a, and, thus, any harm they incurred as a result of their fear of such interception failed to create standing. Id. at 1152.

The Court came to the opposite conclusion under the facts of SBA List. There, an Ohio statute prohibited "certain 'false statement[s]' 'during the course of any campaign for nomination or election to public office or office of a political party.'" 134 S. Ct. at 2338 (quoting Ohio Rev. Code. Ann. § 3517.21(B)). The Court found that an advocacy organization, the Susan B. Anthony List, had standing to challenge the statute even though it had not yet been enforced against it because (1) the plaintiff had "alleged an intention to engage in a course of conduct arguably affected with a constitutional interest" by pleading an intention to continue engaging in political speech; (2) the plaintiff's "intended future conduct [was] arguably proscribed by the statute they wish[ed] to challenge" in the sense that some of that speech, in the eyes of another, may be perceived to be false; and (3) "the threat of future enforcement of the false statement statute [was] substantial," particularly in light of a prior complaint that led to enforcement against that plaintiff. Id. at 2343-46.

As in SBA List, the plaintiffs here have alleged an intention to continue their expressive activities -- such as

sidewalk counseling, prayer, and carrying signs -- outside clinics in New Hampshire. This conduct would arguably be proscribed by the Act if it took place within a demarcated buffer zone. See N.H. Rev. Stat. Ann. § 132:38, I. Plaintiffs then might be warned in writing to cease and, if they failed to do so, fined.[6] See N.H. Rev. Stat. Ann. § 132:39. The question before the court, then, is whether this threat of a perceived future injury is "certainly impending," or at the very least, "substantial." SBA List, 134 S. Ct. at 2341; see also Clapper, 133 S. Ct. at 1155; Blum, 744 F.3d at 799 (observing that the "'substantial risk' of harm standard that the Court has applied

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[6] Plaintiffs contend that enforcement does not require establishment of a buffer zone because the statute itself "established" 25-foot buffer zones. This reading of the Act misconstrues its plain language. See United States v. Howe, 736 F.3d 1, 3 (1st Cir. 2013) ("A court interpreting New Hampshire law must 'first look to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning.'" (quoting State v. Dor, 165 N.H. 198, 200 (2013)). By its plain language, the Act allows the creation of buffer zones of less than 25 feet. N.H. Rev. Stat. Ann. § 132:38, I. The Acts describes such zones not as "created" or "established," but "authorized." Id. § 132:38, II; see Dor, 165 N.H. at 200 ("We do not read words or phrases in isolation, but in the context of the entire statutory scheme."). Finally, the Act requires the posting of signs informing the public that there is to be "No Congregating, Patrolling, Picketing, or Demonstrating Between Signs" before the enforcement mechanisms can be engaged. N.H. Rev. Stat. Ann. §§ 132:38, II and 132:39, III. Considering these sections together, the court cannot conclude that the Act created 25-foot zones around all clinics upon going into effect.

in some cases" is "potentially more lenient" than the "certainly impending" standard invoked in Clapper). The court is not convinced that it is.

What differentiates this case from the circumstances under which pre-enforcement challenges were brought in SBA List and N.H. Right to Life is the existence of conditions precedent to enforcement that have not been met. Before the Act can be enforced -- that is, before any warning or citation may be issued for violation of the Act -- one of the clinics must demarcate a zone. N.H. Rev. Stat. Ann. § 132:39, I. Both (a) the decision to draw a zone and (b) the specific boundaries of such a zone depend on the choices and actions of independent decisionmakers. Clapper, 133 S. Ct. at 1149-50 ("[W]e have been reluctant to endorse standing theories that require guesswork as to how independent decisionmakers will exercise their judgment."). Once a clinic has demarcated a zone, the Act still cannot be enforced until the clinic posts the appropriate signage. N.H. Rev. Stat. Ann. §§ 132:38, II and 132:39, I. These signs serve as a notification to those who gather outside of the clinics in question -- such as the plaintiffs in this case -- that the Act may be enforced. As the defendants argue,[7]

[7] In evaluating the risk of enforcement, "[p]articular weight must be given to the Government disavowal of any

the Act cannot be enforced until these conditions are met. Absent that possibility, the court cannot conclude that there is a "substantial risk," let alone a "credible threat," that the Act will be enforced against the plaintiffs so as to give them standing. And as of yet, no clinic has drawn a zone of any size, be it 25 feet or less, or posted the signage required before the Act can be enforced.[8]

Importantly, the conclusion that conditions precedent for enforcement have not been met at this juncture does not leave plaintiffs without a meaningful opportunity for relief. Once a

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intention to prosecute on the basis of the Government's own interpretation of the statute and its rejection of plaintiffs' interpretation as unreasonable." Blum, 744 F.3d at 798. Though the circumstances here differ slightly from those in Blum, the result is much the same. There, the Government "affirmatively represented that it does not intend to prosecute [the plaintiffs'] conduct because it does not think it is prohibited by the statute." Id. Here, the Attorney General has made clear that he disavows prosecution in the absence of a demarcated zone. See Attorney General's Supp. Mem. (document no. 81) at 5-6. Though the Attorney General characterizes this as an effective disavowal of enforcement, given the present circumstances -- which, under "the Government's own interpretation" of the Act, render enforcement impossible -- it maintains that the Act may be enforced once a buffer zone has been drawn, depending on the characteristics of that zone.

[8] While there is no evidence in the record that the third and fourth requirements -- consultation with local law enforcement and the land use code enforcement authorities -- have been undertaken, it would be inaccurate to say that the parties have so stipulated.

zone is in place, they and others in their position would still have an opportunity to seek injunctive relief before the court adjudicated the merits of their challenge.[9] At that time, the court would have before it sufficient factual developments to conduct a proper review as undertaken in McCullen. For example, there would be a record as to why such a zone was drawn and what circumstances prompted its creation. It would, hopefully, also reflect the considerations undertaken by the clinic before drawing the zone. Finally, the parties and the court would also know the size of the zone, whether a full 25 feet as the Act permits, or a mere six feet, as the Act also permits. Finally, there would be a record as to whether any warnings or citations had issued -- that is, whether the Act had been enforced. While

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[9] That the plaintiffs in this case obtained a temporary restraining order against enforcement of the Act shortly after filing suit, see Order of July 9, 2014 (document no. 9) illustrates the availability of this relief. The court's effort to resolve the standing issue in a manner satisfactory to all parties, and to avoid the elevation of form over substance while fully respecting applicable jurisdictional requirements, does likewise. To that end, the court suggested an agreed-to disposition: dismissal of the case, without prejudice, for lack of standing, followed by an administrative closing of the case, permitting the plaintiffs to re-initiate the case by motion, on an expedited basis, if and when any clinic demarcated a buffer zone. The parties were unable to agree to such a resolution, however, based inter alia on a dispute over potential prevailing-party fee-shifting for the pre-dismissal period. See 42 U.S.C. § 1988.

enforcement is clearly not a prerequisite to standing in a First Amendment challenge, SBA List, 134 S. Ct. at 2342, this more developed factual record would provide the court a more concrete, far less hypothetical framework within which to analyze the constitutionality of the Act. Such a framework simply does not exist under these circumstances, where no zone of any size -- whether 25 feet or less -- has been drawn.

Plaintiffs shoulder the burden of demonstrating standing. Katz, 672 F.3d at 71. They offer three arguments to that end. The court finds none of them persuasive.

First, plaintiffs equate a threat that a zone will be demarcated with a threat that the Act will be enforced. Specifically, they claim injury in having self-censored their speech to avoid the possibility that one of the clinics might demarcate a buffer zone, which would lead to possible enforcement of the Act. It is true that the Act imposes little impediment to a zone's creation.[10] It requires only that

[10] Taking the contrary position at oral argument (albeit without support in the language of the Act), the Attorney General contended that the imposed obligation to "consult with local law enforcement" requires the clinics to obtain approval from local authorities before posting the signs. At oral argument, counsel for the remaining defendants -- the very

"[p]rior to posting the signage . . . a reproductive health care facility shall consult with local law enforcement and those local authorities with responsibilities specific to approval of locations and size of the signs to ensure compliance with all local ordinances." N.H. Rev. Stat. Ann. § 132:38, III. Any such consultation could be a brief affair, as plaintiffs point out, leading to posted signs within hours -- if not minutes -- of any perceived misstep by the plaintiffs. The potential proximity between a clinic's decision to demarcate a zone and actual demarcation does not negate the fact that a zone must

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municipalities that would provide such local approvals -- affirmatively disavowed such an interpretation.

The Attorney General bases this interpretation on language in the Act's legislative history. As the Attorney General correctly observes, "[w]hen interpreting state law, a federal court employs the method and approach announced by the state's highest court." Cahoon v. Shelton, 647 F.3d 18, 22 (1st Cir. 2011). As mentioned supra, in undertaking that task, the Supreme Court of New Hampshire "first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning." Dor, 165 N.H. at 200. Neither of the cases upon which the Attorney General balances this argument compels this court go beyond the plain language and read the statute's legislative history into the statute itself. Id. ("We will not consider what the legislature might have said or add language that the legislature did not see fit to include."); cf. State v. Paul, 167 N.H. 39, 42 (2014) (considering, but not importing limitations from, session laws); State v. Cartier, 133 N.H. 217, 222-23 (1990) (legislature established schedules of controlled drugs in session laws by incorporation of federal classifications).

still be drawn -- and the physical manifestations of the zone, the signs, put into place -- before the Act can be enforced. That these preconditions cannot be satisfied without any notice to the plaintiffs (in the form of those signs) or merely on a government official's whim further distances the decision to demarcate from the Act's enforcement.[11]

It is not, then, that plaintiffs self-censor because they fear receiving a warning or citation for their activities. Rather, they fear the creation of the conditions under which a warning or citation might be issued. So long as those conditions are absent, though, plaintiffs' allegations are "of a subjective 'chill'," which "are not an adequate substitute for a claim of specific present objective harm or a threat of specific future harm." Laird, 408 U.S. at 13-14. In an effort to render the risk of enforcement more imminent, plaintiffs cite statements made by representatives of certain clinics, which

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[11] Admittedly, the lack of any restrictions on, or conditional criteria for, the consultation/demarcation/signage requirements means that, conceivably, a clinic could establish a maximum size buffer zone (that is, a zone with a 25-foot radius) in a very short amount of time for any reason or for no reason at all. In fact, the Attorney General and counsel for the defendant municipalities all but conceded as much at oral argument, with the possible exception of the Attorney General's curious suggestion that the consultation provision also requires local police approval -- a position that no other defendant supported. See supra n. 9.

plaintiffs characterize as specific threats to demarcate zones "quickly" if plaintiffs engage in speech of which they disapprove.[12] See Plaintiffs' Obj. (document no. 65-1) at 9-10, 14; see also document nos. 39, 40, 65-2. Even drawing inferences in the plaintiffs' favor, it does not appear to the court that those statements support such an interpretation.[13] Even if they did, self-censorship under a fear that the clinics may decide to demarcate a zone and post the requisite signs if the plaintiffs engage in some unspecified expression is not injury sufficient to create standing. Cf. Clapper, 133 S. Ct.

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[12] As discussed supra Part I, the court may consider these statements as evidence submitted in support of or opposition to a motion to dismiss for lack of subject-matter jurisdiction. Aversa, 99 F.3d at 1210.

[13] In particular, the Lovering Health Center and Concord Feminist Health Center representatives explained that "having the option of creating a buffer if other methods fail, is a significant safeguard that is a very useful tool for the clinic to have in its toolbox," compared to the slower process of legislation or passing town ordinances. Document no. 39 ¶ 11; document no. 40 ¶ 6. The former noted that such an option "would be helpful when negotiating about unsafe behaviors of the demonstrators," document no. 40 ¶ 6, a forward-looking statement that does not suggest that any such "negotiation" had yet taken place. She also testified at a public hearing on House Bill 403-FN, that "the threat of having [the law] enforced . . . I think did make people behave in a better way" than previous incidents wherein "picketers . . . were using bullhorns, . . . were throwing things at cars coming in and out and blocking the driveway and generally disturbing the peace . . . ." Document no. 65-2 at 87-88.

at 1152 (absent a threat of certainly impending enforcement, costs incurred by plaintiffs to avoid enforcement "are simply the product of their fear of surveillance, and . . . such a fear is insufficient to create standing.").

Second, plaintiffs propose an interpretation of the Act allowing enforcement against them without a zone being demarcated, see Plaintiffs' Obj. (document no. 65-1) at 15-16, which, they contend, would render the threat of enforcement immediate. They propose that RSA 132:38, I "bluntly creates zones making it illegal to be present, and therefore to speak, on public ways up to 25 feet from an entrance or driveway of an abortion facility." Id. at 15. Because the zones are "created" by that section of the Act, and only "demarcated" by placement of the signs, plaintiffs contend, they could be prosecuted for speaking within those zones under, for example, New Hampshire's laws against disorderly conduct, loitering, and harassment. See N.H. Rev. Stat. Ann. §§ 644:2 and 644:4. While the court is unlikely to share that interpretation of the Act,[14] it need not

[14] As discussed supra at n.6, the language of the Act itself precludes such a reading. In particular, 132:38, II permits clinics to demarcate the zone "authorized" by the first part of that section, not the zone "created" or "established" thereby.

hang its decision there.[15] While plaintiffs suggest that such a state of affairs could chill their speech, they do not allege that they have been threatened with prosecution under these other laws. They also do not allege that their speech actually has been chilled by fear of such a prosecution. See Plaintiffs' Obj. (document no. 65-1) at 16; Compl. ¶ 92 ("Plaintiffs desire to continue engaging in peaceful sidewalk counseling and leafleting in these public areas but fear prosecution under the Act if they continue to do so."). Absent such an allegation of injury, the court cannot find standing on this basis. Cf. SBA List, 134 S. Ct. at 2340 (complaint alleged that plaintiff's speech had been chilled under the challenged statute).

Third and finally, plaintiffs suggest that this court's stay of the litigation created standing. See Plaintiffs' Obj. (document no. 65-1) at 5-7. As discussed supra, Part II.C, by its order of July 23, 2014, the court stayed all pending

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[15] Plaintiffs argue that the admonition to indulge all reasonable factual inferences in the plaintiff's favor in resolving this motion, see Katz, 672 F.3d at 70, also requires the court to defer to the plaintiff's legal interpretation of the Act. See Plaintiffs' Obj. (document no. 65-1) at 15. It is axiomatic, however, that the court need not defer to the complaint's legal conclusions in resolving a motion to dismiss. Ocasio-Hernández v. Fortuño-Burset, 640 F.3d 1, 10 (1st Cir. 2011) ("Unlike factual allegations, legal conclusions contained within a complaint are not entitled to a presumption of truth." (citing Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009)).

deadlines in this action by agreement of the parties. The parties further agreed that the defendants would not enforce the Act against the plaintiffs and, if the defendants received notice that any clinic intended to post a sign, they would notify the plaintiffs and the court. Order of July 23, 2014 (document no. 49) at 3-4. Notably, the court's order did not prohibit the clinics' creation or demarcation of any zone. If they had been drawn during the pendency of the stay, plaintiffs argue, those zones would have no legal effect because the defendants were -- by this agreement -- prohibited from issuing any warnings or citations under the Act or any other statute using speech in a buffer zone as the basis. Plaintiffs' Obj. (document no. 65-1) at 7.

Invoking the post hoc ergo propter hoc fallacy, plaintiffs suggest that the very existence of the court's stay caused the clinics to refrain from demarcating any buffer zones, thus relieving the plaintiffs from the need to self-censor their speech. Following from this, plaintiffs argue, "the impact of the Court's 2014 Order proves not only that standing exists to seek relief, but that effective relief was already awarded." Id. But Plaintiffs cite no authority for the novel theory that the court can conjure subject-matter jurisdiction from thin air by giving force to the parties' agreed-upon conditions for a

stay of the action. Nor can they; such a theory would run afoul of the requirement that plaintiffs have Article III standing at the outset of the litigation. See Friends of the Earth, 528 U.S. 167, 180. The court's actions subsequent to plaintiff's filing of the complaint did not bestow subject-matter jurisdiction over the action.

In sum, the plaintiffs are not subject to a certainly impending threat that the Act will be enforced against them, see Clapper, 133 S. Ct. at 1155, or even a substantial risk of such enforcement, see SBA List, 134 S. Ct. at 2341, because no buffer zone has been drawn, whether before commencement of the suit or in the 21 months since. Accordingly, the plaintiffs lack standing to bring a pre-enforcement challenge against the Act.

2. Delegation of undue discretion

Plaintiffs also claim that they have standing to challenge the Act as facially unconstitutional because they alleged, in their complaint, that the Act delegates what amounts to undue discretion to the clinics to demarcate the buffer zones. See Plaintiffs' Obj. (document no. 65-1) at 13-14; Plaintiffs' Supp. Brief (document no. 80) at 6-7. Plaintiffs draw this conclusion from the decision of the First Circuit Court of Appeals in Van Wagner, arguing that the Circuit Court's reasoning in that decision extends beyond the prior restraint context. But the

court finds no support for this novel theory, either in and of itself, or read generously as an argument for standing to challenge the Act as a prior restraint on plaintiffs' speech.

A plaintiff may have pre-enforcement standing to challenge a statute as unconstitutional under the First Amendment when it amounts to an invalid prior restraint. An invalid prior restraint is a regulation that "[gives] public officials the power to deny use of a forum in advance of actual expression." Ward v. Rock Against Racism, 491 U.S. 781, 795 n.5 (1989) (quotations omitted). Thus, "when a licensing statute allegedly vests unbridled discretion in a government official over whether to permit or deny expressive activity, one who is subject to the law may challenge it facially without the necessity of first applying for, and being denied, a license." City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 755-56 (1988); see also Van Wagner, 770 F.3d at 38 ("It is being subject to a prior restraint on protected expression through requirements embodying standardless discretion, not being harmed by the unfavorable exercise of such discretion, that causes the initial injury.").

Plaintiffs ask the court to interpret this standing doctrine broadly, divorcing the rhetoric of the prior restraint standing doctrine as outlined in Van Wagner from the licensing or permitting context. They read the Act to "authorize[]

private actors to do what the State cannot itself do under McCullen: create speech-suppressing zones absent a present narrow tailoring justification." Plaintiffs' Obj. (document no. 65-1) at 12. This, plaintiffs argue, amounts to vesting the clinics with the unbridled discretion over plaintiffs' expression as contemplated in City of Lakewood and Van Wagner. And this allegation of the investiture of unbridled discretion, they conclude, creates standing for them to challenge the Act, even outside the context of a regulatory or licensing program. See Plaintiffs' Supp. Brief at 6 ("The import of Van Wagner for the purposes of standing is that plaintiffs may assert a facial claim against state-conferred discretion over protected free speech when the statute conferring that discretion is enacted . . . .").

But the Supreme Court has rejected so broad a reading of the prior restraint doctrine, and so must this court. "[C]oncerns about 'prior restraints' relate to restrictions imposed by official censorship." Hill v. Colorado, 530 U.S. 703, 734 (2000). When public officials are given

> the power to deny use of a forum in advance of actual expression[,] . . . the Court has felt obliged to condemn systems in which the exercise of such authority was not bounded by precise and clear standards. . . . Our distaste for censorship -- reflecting the natural distaste of a free people -- is deep-written in our law.

Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975). This is, however, not such a case. Here, the plaintiffs are not obligated to seek a license or advance permission to speak -- whether from a government official or a third party to whom the government has delegated that power. Thus, this situation does not implicate the same concerns of a priori censorship as the regulatory licensing or permitting schemes that gave rise to standing in Southeastern Promotions, City of Lakewood, and Van Wagner. It is, rather, a situation in which "particular speakers [would be] at times completely banned within certain zones," and the Supreme Court has consistently rejected attempts to characterize such statutes as prior restraints on speech. Hill, 530 U.S. at 733-34; see also Schenk v. Pro-Choice Network of Western N.Y., 519 U.S. 357, 374 n.6 (1997); Madsen v. Women's Health Center, Inc., 512 U.S. 753, 764 n.2 (1994).

Nor does the court read the holding in Van Wagner to extend as far as plaintiffs argue it does. There, the First Circuit Court of Appeals held that the plaintiff had standing because it "plausibly alleged that it is subject to a regulatory permitting scheme that chills protected expression by granting a state official unbridled discretion over the licensing of its expressive conduct." Van Wagner, 770 F.3d at 42. Nowhere in

that decision does the Court find the suggestion that pleading the grant of unbridled discretion, absent the context of a government official acting within a licensing or permitting scheme, is alone sufficient to create standing. To the contrary, the Court of Appeals' decision appears, at least to this court, firmly couched in the prior restraint context.

Plaintiffs are thus left to argue that an allegation of delegation is enough to give the plaintiffs standing completely divorced from that context. In doing so, plaintiffs lean heavily on the decision of the Tenth Circuit Court of Appeals in First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114 (10th Cir. 2002). There, the city sold a portion of a main downtown thoroughfare to a church, but retained a pedestrian easement over the property. Id. at 1117-18. In its agreement with the church, the city disclaimed the easement as a public forum and permitted the church to prohibit certain forms of expression thereupon. Id. at 1118. The plaintiffs challenged the sale and easement, arguing, among other things, that the prohibitions of expression on what, in effect, remained a public passageway, offended the First Amendment. The Tenth Circuit Court of Appeals concluded that it did, and that the city could not ameliorate that offense by delegating its power to enforce that prohibition to a third

party. Id. at 1132. As far as this court can tell, however, the Court of Appeals focused its standing analysis, which comprised a single paragraph, on the threat of enforcement of an effective prohibition of all expression on a public thoroughfare, not the delegation of authority or the amount of discretion exercised by the delegate. See id. at 1121. As discussed supra, Part III.A.1, no such threat of enforcement exists here absent the demarcation of a buffer zone and posting of accompanying signage.

The reasoning of First Unitarian thus does not compel the conclusion the plaintiffs have standing to challenge the Act under a delegation or unbridled discretion theory outside of the prior restraint context. And, as discussed above, even if plaintiffs argued that the Act serves as a prior restraint on their speech, they could not successfully do so where, as here, no licensing or permitting scheme is implicated. Accordingly, plaintiffs' attempt to dress their discretion allegations in the clothing of prior restraint for standing purposes must fail.

B. As-applied challenge

As established above, the plaintiffs lack standing to challenge the Act as unconstitutional on its face. The plaintiffs similarly lack standing to challenge the Act as unconstitutional as applied to them. It is "an uncontroversial

principle of constitutional adjudication[] that a plaintiff generally cannot prevail on an as-applied challenge without showing that the law has in fact been (or is sufficiently likely to be) unconstitutionally applied to him." McCullen, 134 S. Ct. 2518, 2535 n.4 (2014) (emphasis in original). As discussed supra, Part III.A.1, the plaintiffs have not carried their burden of showing that the Act is likely to be applied to them. And the parties all agree that the Act has not, to date, been applied to the plaintiffs. No buffer zone has been demarcated and no plaintiff has been warned, fined, or prosecuted under this Act or any other law for engaging in expressive activity outside the clinics. Absent any demarcated buffer zone, there can be no basis on which to analyze whether the Act has been applied to any of the plaintiffs in a manner that abrogates their rights under the First Amendment.[16] Cf. Wash. State Grange

[16] The parties appear to disagree on whether McCullen is best characterized as disposing of an as-applied challenge to the Massachusetts buffer zone statute (the Attorney General's position), or a facial challenge (the plaintiffs' position). Compare Attorney General's Mem. (document no. 63-1) at 4-5 (Massachusetts statute was found "unconstitutional as applied to the plaintiffs in that case because it was not narrowly tailored to serve a significant government interest based on the factual record before the Court"), with Plaintiffs' Obj. (document no. 65-1) at 14 ("McCullen reviewed and struck down the Massachusetts law as being facially invalid."). (Indeed, plaintiffs appear to disagree with themselves on this issue. Compare Plaintiffs' Obj. (document no. 65-1) at 14 with Plaintiffs' Supp. Brief (document no. 80) at 2 (characterizing

v. Wash. State Republican Party, 128 S. Ct. 1184, 1195 (2008) (factual determinations control as-applied challenges).

IV. Conclusion

The plaintiffs' lack of standing to bring this action deprives the court of subject-matter jurisdiction over it. United Seniors Ass'n, Inc. v. Philip Morris USA, 500 F.3d 19, 26 (1st Cir. 2007). Lacking subject-matter jurisdiction, the court is obligated to dismiss the action. Fed. R. Civ. P. 12(h)(3). Accordingly, the Attorney General's renewed motion to dismiss the complaint[17] is GRANTED, albeit without prejudice to the plaintiffs seeking relief anew under different factual circumstances. For the same reasons, the municipal defendants'

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pre-enforcement challenges as "as applied challenges under McCullen's narrow tailoring test").) This court is inclined to view McCullen as addressing a facial challenge, as did the First Circuit Court of Appeals. See Cutting v. City of Portland, 802 F.3d 79, 86 (1st Cir. 2015) (describing McCullen as "striking down content-neutral, sidewalk buffer zone law facially on narrow tailoring grounds."). Whether McCullen involved an as-applied or facial challenge, however, the Supreme Court relied on factual record developed by the district court over two bench trials. See McCullen, 134 S. Ct. at 2528. Because this question comes before this court as a motion to dismiss for lack of standing, the court has not had the opportunity to develop such a record. And, more importantly, because no buffer zone has yet been drawn around which such a record could be based, there are few facts to develop here.

[17] Document no. 63.

motions for judgment on the pleadings[18] are likewise GRANTED.[19]

The clerk shall enter judgment accordingly and close the case.

SO ORDERED.

Joseph N. Laplante
United States District Judge

Dated: April 1, 2016

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[18] Document nos. 75 & 77.

[19] Because the court concludes that it lacks subject-matter jurisdiction over this matter, it need not -- and accordingly does not -- address the municipal defendants' arguments under Federal Rules of Civil Procedure 12(b)(6), 12(b)(7), and 19.

UNITED STATES DISTRICT COURT
DISTRICT OF NEW HAMPSHIRE

Mary Rose Reddy, et al

v.

Civil No. 14-cv-299-JL

NH Attorney General, et al.

JUDGMENT

In accordance with the Order dated April 1, 2016, by Chief Judge Joseph N. Laplante, the Notice of Voluntary Dismissal as to Town of Derry, NH, dated July 23, 2014, and the Notice of Voluntary Dismissal as to Strafford County Attorney, Thomas Velardi dated July 14, 2014, judgment is hereby entered.

By the Court,

Daniel J. Lynch
Clerk of Court

Date: April 1, 2016

cc: Michael J. Tierney, Esq.
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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned hereby certifies that this brief complies with the type-volume limitation of Federal Rules of Appellate Procedure 32(a)(7)(B)(i).

1. Exclusive of the exempted portions of the brief, as provided in Federal Rule of Appellate Procedure 32(a)(7)(B), the brief contains 8,066 words.

2. The brief has been prepared in proportionally spaced typeface using Microsoft Word 2013 in 14 point Times New Roman font. As permitted by Federal Rule of Appellate Procedure 32(a)(7)(B), the undersigned has relied upon the word count feature of this word processing system in preparing this certificate.

August 1, 2016

s/ *Matthew S. Bowman*
Matthew S. Bowman

CERTIFICATE OF SERVICE

I hereby certify that on August 1, 2016, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF System.

I certify that the following parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system.

/s/ Matthew S. Bowman
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