

**Case Number: 16-1432**  
**United States Court of Appeals**  
**FOR THE FIRST CIRCUIT**

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

*Plaintiffs- Appellants*

v.

JOSEPH FOSTER, *et al.*

*Defendants-Appellees*

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

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**PETITION FOR PANEL REHEARING PURSUANT TO FRAP 40**

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*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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The Plaintiff-Appellants, Sister Mary Rose Reddy, Sue Clifton, Jennifer Robidoux, Joan Espinola, Terry Barnum, Jackie Pelletier, and Betty Buzzell, by and through their attorneys, respectfully petition this Court to rehear its decision of January 11, 2017 pursuant to Federal Rule of Appellate Procedure 40, stating as follows:

1. In its January 11, 2017, Opinion, this Court affirmed the dismissal of Plaintiff-Appellants' claims in the District Court on the basis that sufficient facts have not yet been developed to consider whether the challenged statute has unlawfully delegated power to private corporations to control free speech on public sidewalks.
2. The Court held the case was not ripe until the private entities at issue have exercised the power delegated to them. In particular, the Court held “the possible establishment and contours of such a future zone are highly uncertain. ‘[W]e have no idea whether or when’ a clinic will demarcate a zone.” Opinion, at 25.
3. This holding runs contrary to *Whitman v. Am. Trucking Associations*, 531 U.S. 457, 472 (2001), in which the Supreme Court held that challenges to the improper delegation of legislative power to administrative agencies are ripe for constitutional review even if the agency has agreed not to exercise the delegated powers. “We have never suggested that an agency can cure an unlawful delegation

of legislative power by adopting in its discretion a limiting construction of the statute.” *Whitman*, 531 U.S. at 472.

4. As the *Whitman* Court recognized, the determination that Congress improperly delegated authority to the EPA is not dependent on whether the EPA exercises that authority. Rather, a challenge to the improper delegation of legislative power is ripe for adjudication as soon as Congress delegates authority by statute. “Whether the statute delegates legislative power is a question for the courts, and an agency's voluntary self-denial has no bearing upon the answer. . . [t]he question before us here is purely one of statutory interpretation that would not ‘benefit from further factual development of the issues presented.’” *Id.* at 473-479.

5. Similarly, where the statute being challenged in this case unlawfully delegates power to private organizations, no factual development is needed to render Plaintiff-Appellants' challenge to the statute ripe. *See Dep't of Transp. v. Ass'n of Am. Railroads*, 135 S. Ct. 1225, 1238 (2015) (“By any measure, handing off regulatory power to a private entity is ‘legislative delegation in its most obnoxious form.’” *quoting Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936))

6. Finally, the Court cites the Plaintiff-Appellants' June 2014 Complaint and July 2014 Declarations as evidence that “the plaintiffs have not alleged that the Act has meaningfully altered their expressive activities.” Opinion, at \*3. The Complaint was filed prior to the statute’s effective date and the Plaintiff-

Appellants' July 2014 Declarations were filed while the District Court's July 9, 2014 Temporary Restraining Order was in place, enjoining the enforcement of any zones that would be drawn. See D.Ct. ECF Doc. 9. Although Plaintiff-Appellants do not believe that any facts are necessary to determine the statute unconstitutionally delegates power to control speech on public sidewalks, to the extent that evidence of the statute's effect is relevant to standing and ripeness, this case should be remanded to the District Court for additional fact finding regarding the effect on the Plaintiffs' activities after the lifting of the injunction against enforcement.

Respectfully submitted,

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#### **CERTIFICATE OF SERVICE**

I hereby certify that on January 25, 2017, 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 parties or their counsel of record are registered as ECF Filers and that they will be served by the CM/ECF system.

s/ Michael J. Tierney  
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