UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

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

Plaintiffs,

v.

JOSEPH FOSTER, in his official capacity as Attorney General for the State of New Hampshire; **D. CHRIS MCLAUGHLIN**, in his official capacity as County Attorney for Cheshire County, NH; **SCOTT W. MURRAY,** in his official capacity as County Attorney for Merrimack County, NH; **PATRICIA M. LAFRANCE**, in her official capacity as County Attorney for Hillsborough County, NH; **TOM VELARDI**, in his official capacity as County Attorney for Strafford County, NH; **PATRICIA CONWAY**, in her official capacity as acting County Attorney for Rockingham County, NH**; CITY OF MANCHESTER, NH**; **CITY OF CONCORD, NH**; **CITY OF KEENE, NH**; **TOWN OF GREENLAND, NH**; and **TOWN OF DERRY, NH**;

Defendants.

Case No. 14-CV-00299

MEMORANDUM IN SUPPORT OF PLAINTIFF'S MOTION FOR AN ORDER TO SHOW CAUSE FOR AN *EX PARTE* TEMPORARY RESTRAINING ORDER, AND A PRELIMINARY INJUNCTION AFTER HEARING

Oral Argument Requested for Preliminary Injunction

Now come Plaintiffs Sister Mary Rose Reddy, Sue Clifton, Jennifer Robidoux, Joan Espinola, Terry Barnum, Jackie Pelletier, and Betty Buzzell and respectfully offer this memorandum in support of their submitted order to show cause why an *ex parte* temporary restraining order and a preliminary injunction with notice should not be entered against Defendants.

I. Introduction and Request for Relief

This motion challenges the constitutionality of the recently enacted N.H. Rev. Stat. Ann. § 132:28, entitled "An Act Relative to Access to Reproductive Health Care Facilities" (hereinafter "the Act"), which is set to go into effect on July 10, 2014, 30 days after the governor's signature. The Act creates anti-free-speech zones 25 feet from "any portion of an entrance, exit or driveway of a reproductive health care facility." § 132:28 I.

This motion requests an order to show cause issuing an *ex parte* temporary restraining order to prevent the Act from going into effect in violation of Plaintiffs' free speech rights and the Supreme Court decision *McCullen v. Coakley*, No. 12-1168 (June 26, 2014) (unanimously overturning the Massachusetts statute upon which New Hampshire's newly adopted statute is based), and an order that Defendants appeal to show cause why Plaintiffs should not be granted a preliminary injunction against the Act for the same reasons.

This case is governed by *McCullen*, which unanimously found a strikingly similar statute unconstitutional in Massachusetts. This Act violates the First Amendment since it is neither content neutral nor narrowly tailored to serve significant governmental interests.

The imminent imposition of this unconstitutional Act threatens irreparable harm to Plaintiffs' rights including their freedom of speech. Yet despite *McCullen*, the Act and Defendants' enforcement thereof persists unabated. Thus, Plaintiffs respectfully request an order to show cause granting an *ex parte* temporary restraining order against the Act and setting Plaintiffs' preliminary injunction request for hearing.

II. Facts

The factual background summarized here is set forth in full in the sworn and Verified Complaint filed in this case (docket # 1, hereinafter VC), which constitutes affidavit evidence in

support of injunctive relief. Plaintiffs seek to engage in peaceful, prayerful conversations and literature distribution outside of five of New Hampshire's abortion clinics in order to offer alternatives and support to women entering the clinics. VC ¶¶ 55-93. Plaintiffs have found that their message of support and options can only be effectively communicated through personal interaction. *Id*.

But on July 10, 2014 the Act will take effect and authorize clinics to create buffer zones 25 feet from "any portion of an entrance, exit or driveway" of an abortion clinic within which Plaintiffs may not enter—even upon a public sidewalk. The Defendants will then be authorized by the Act to charge the plaintiffs with a violation and fine the plaintiffs for leafleting or speaking on a public sidewalk. In particular, the Act will prevent Plaintiffs from speaking with persons within the buffer zone and significantly curtail the delivery of their message. VC ¶¶ 90-92. Plaintiffs are entitled to an *ex parte* temporary restraining order and preliminary injunction against Defendants, each of whom is given authority to enforce the Act against Plaintiffs.

III. Plaintiffs Are Entitled to Immediate Injunctive Relief.

This Court grants a preliminary injunction when a plaintiff establishes four elements: "that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Bruns v. Mayhew*, 750 F.3d 61, 65 (1st Cir. 2014) (*quoting Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20 (2008)). The first factor, the likelihood of success on the merits is the predominate factor in this determination. *Corporate Technologies v. Harnett*, 731 F.3d 6, 10 (1st Cir. 2013); *see also, Sindicato Puertorriqueno de Trabajadores v. Fortuno* 699 F.3d 1, 10 (1st Cir. 2012) ("In the First Amendment context, the likelihood of success on the merits is the linchpin of the preliminary injunction analysis.").

Since this case is governed by the Court's recent decision in *McCullen v. Coakley*, No. 12-1168 (June 26, 2014), which held a similar law unconstitutional, Plaintiffs will clearly prevail on the merits. Plaintiffs will also be irreparably harmed if an injunction is not granted and have the balance of equities in their favor. Further, the public interest is benefited by the protection of the constitutional right to free speech. Thus, Plaintiffs ask the Court to issue the attached order to show cause granting them an *ex parte* temporary restraining order, and setting their request for a preliminary injunction for hearing.

A. Plaintiffs Have Shown a Likelihood of Success on the Merits Because The Act Violates Plaintiffs' First Amendment Free Speech Rights under *McCullen*.

Plaintiffs are likely to prevail on the merits of their free speech claim. Under the Supreme Court's recent decision in *McCullen*, this law violates Plaintiffs' First Amendment free speech rights because it is neither content neutral nor is it narrowly tailored. Since this most important factor in this determination weighs in Plaintiffs favor, Plaintiffs' motion for a preliminary injunction should be granted to protect their First Amendment rights.

The Act violates Plaintiffs' right to free speech under the First Amendment. This case is governed by the Supreme Court's recent decision in *McCullen v. Coakley*, No. 12-1168 (June 26, 2014), which unanimously found a similar law unconstitutional. In *McCullen*, the Court analyzed a similar buffer zone law under "time, place, and manner" standard for restrictions in a traditional public forum. *Id.* As here, the law at issue in *McCullen* imposed a fixed "buffer zone" outside the entrances and around the driveways of abortion clinics in Massachusetts. *Id*. A content-neutral law imposing such restrictions may only be upheld if "the restrictions 'are justified without reference to the content of the regulated speech, (. . .) are narrowly tailored to serve a significant governmental interest, and (. . .) leave open ample alternative channels for communication of the information." *Id.* at 9 (*quoting Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Under

McCullen, this Act is not narrowly tailored, and therefore violates the First Amendment. In fact the Act in this case is also content-based, and therefore would also necessarily be unconstitutional under *McCullen* which used an even more lenient standard.

The Act fails to satisfy the requirement that it be "narrowly tailored to serve a significant governmental interest." A law restricting the time, place and manner of speech is not narrowly tailored if it "burdens substantially more speech than is necessary to further the government's legitimate interests." *McCullen*, No. 12-1168, slip op. at 19 (*quoting Ward*, 491 U.S., at 799).

First, the Act makes it more difficult to distribute literature or engage in personal conversations. *McCullen*, No. 12-1168, slip op. at 19–23. In *McCullen*, the Court noted the historical importance of these two forms of expression in First Amendment protection and their particular importance to the sidewalk counselor's message. *Id.* Sidewalk counselors such as Plaintiffs "are not protestors;" their message of support and alternatives must be conveyed through quiet, compassionate conversations to be effective. *Id.* at 22. Plaintiffs wish to engage in the same kind of speech as the plaintiffs in McCullen, but are restricted in doing so by the Act. VC ¶¶ 92. Thus, restrictions on sidewalk counselors' ability to offer assistance through offering literature or conducting compassionate conversations substantially burden their speech.

Second, if a state has or could enact laws to further these interests without substantially burdening speech unrelated to those goals, then more speech is burdened than necessary and the Act is not narrowly tailored. *McCullen*, slip op. at 23–27. The Act asserts the same government interests that were asserted in *McCullen*. The Act seeks to preserve "access" to reproductive health facilities; and (2) preventing "fear," "intimidation," and the "belie[f]" of threats to safety due to pro-life "demonstrations." The government in *McCullen* asserted interests in "ensuring public safety outside abortion clinics, preventing harassment and intimidation of patients and clinic staff,

and combating deliberate obstruction of clinic entrances." *McCullen*, slip op. at 23. But the Court walked through all these interests and proposed multiple alternatives that could amply serve the government's interests, including: (1) using an unchallenged subsection of that act which prohibited blocking doors and driveways, without banning speech; (2) enacting a state version of the federal Freedom of Access to Clinic Entrances Act (FACE Act); (3) enacting an ordinance specifically prohibiting harassment, if drafted within First Amendment parameters; (4) using existing ordinances against obstruction of doors and driveways; (5) using "generic criminal statutes"; and (6) seeking injunctive relief as necessary against specific persons with a history of obstructing access. *Id.* at 23–26. These exact alternatives exist to the Defendants in the present case, rendering the Act not narrowly tailored because it purses these interests by substantially burdening speech.

McCullen insists that if a government wishes to serve the interests of "public safety, patient access to healthcare, and the unobstructed use of public sidewalks and roadways," the government must "look to less intrusive means of addressing its concerns" without curtailing speech. *Id.* at 23–25. So where the government is concerned about "obstruction," it can rely on laws that specifically curtail obstruction. *Id.* slip op. at 23–24. If a government is concerned about "harassment" (as distinct from mere speech, even when unwelcome), it could pursue a not-vague, not-overbroad law focusing on harassment. *Id.* slip op. at 24 & n.8. If a government is concerned about "public safety risk created when protestors obstruct driveways," it must simply use laws that prohibit blocking driveways. *Id.* slip op. at 24–25. The government's "interest in preventing congestion in front of abortion clinics" can be served by "more targeted means" such as ordinances that require crowd dispersal. *Id.* slip op. at 26. The government also fails narrow tailoring due to the availability of "generic criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the

like." *Id.* slip op. at 25. And narrow tailoring is undermined by the availability of "targeted injunctions as alternatives to broad, prophylactic measures." *Id.* Thus no interest the government Defendants could plausibly insist is served by the Act is sufficient to justify its attempt to target speech itself as the harm to be remedied.

McCullen rejects, as too dismissive of First Amendment interests, the government's response that other methods of regulation just won't work. *Id.* at 27–28. A government does not pass narrow tailoring if it "has not shown that it seriously undertook to address the problem with less intrusive tools readily available to it." *Id.* at 27. It is not clear that the Defendants have tried *any* tools to address any problems outside abortion clinics, or even if those problems exist. "To meet the requirement of narrow tailoring, the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." *Id.* at 28.

Several of the alternatives suggested in *McCullen* are existing laws in New Hampshire: statutes forbidding obstructing sidewalks (N.H. REV. STAT. ANN. § 644:2 II (c) (2014)) and generic criminal statute (N.H. REV. STAT. ANN. 644:4 (I) (2014) (criminalizing harassment) and N.H. REV. STAT. ANN. 644:6 (2014) (criminalizing loitering)). Additionally, Manchester, where one of New Hampshire's abortion clinics is located, has a local ordinance which provides: "Three or more persons shall not stand in a group, or near each other, on any foot or sidewalk, so as to obstruct a free passage for foot passengers, and any person or persons obstructing the foot or sidewalks shall move on immediately after a request made by any police officer or watchman." MANCHESTER, N.H., ORDINANCES § 130.02. Finally, Plainitffs are aware of only one injunction targeted at past persons obstructing access at a New Hampshire abortion clinic – from 1988 – restricting the activities of members of a particular group at particular dates and times based upon

their particular history. This demonstrates both that tailored injunctions are an option to sufficiently serve the government's interests when needed, and that no sufficient problem exists for the government to have pursued them. Thus, the Defendants have failed to use existing laws and regulations before curtailing free speech by means of the Act.

Defendants could also consider enacting one of the other laws mentioned by the Supreme Court to address its alleged problems without implicating First Amendment concerns. The statute at issue in *McCullen* had an unchallenged subsection which specifically prohibited "knowingly obstruct[ing], detain[ing], hinder[ing], imped[ing] or block[ing] another person's entry to or exit from a reproductive health care facility." MASS. GEN. LAWS ch. 266, § 120E½ (e) (2014). This Act does not attempt to specifically prohibit this type of problematic conduct explicitly in its law. But noting stops the state from doing so, instead of burdening free speech.

McCullen also noted that "For a problem shown to arise only once a week in one city at one clinic, creating 35-foot buffer zones at every clinic across the Commonwealth is hardly a narrowly tailored solution." *Id*. Here the Act references no actual evidence of a problem at any New Hampshire abortion facility in particular, much less at all of them and to an extent that burdening speech is absolutely necessary.

Quiet leafleting as Plaintiffs seek to do in this case constitutes the most cherished form of speech under the Constitution. "'[O]ne-on-one communication' is 'the most effective, fundamental, and perhaps economical avenue of political discourse.'" *Id.* at 21 (quoting *Meyer v. Grant*, 486 U. S. 414, 424 (1988)). "When the government makes it more difficult to engage in these modes of communication, it imposes an especially significant First Amendment burden." *Id.* at 21–22. "It is thus no answer to say that petitioners can still be 'seen and heard' by women

within the buffer zones," when under the Act they must stop at the edge of the zones and raise their voices if they want to be heard by people in them. *Id.* at 22.

Since the Act substantially burdens the Plaintiffs' speech will ignoring many less intrusive means to achieve its interests, the Act is not narrowly tailored and is thus unconstitutional under the First Amendment.

B. Plaintiffs Will Be Irreparably Harmed if the Act Takes Effect.

Plaintiffs will be irreparably harmed in the absence of a preliminary injunction. VC ¶¶ 92-93. Any loss of constitutional rights is presumed to be an irreparable injury. *Colon-Marrero v. Conty Perez*, 698 F.3d 46, 47 (1st Cir. 2012) (*quoting Elrod v. Burns*, 427 U.S. 347, 373 (1976)). If the Act takes effect, Plaintiffs will be prohibited from exercising their First Amendment free speech rights on the public sidewalks and ways within the buffer zones and this loss must be presumed irreparable. Thus, Plaintiffs will be irreparably harmed by the loss of their First Amendment rights if a preliminary injunction is not granted.

C. The Balance of Equities Favors Plaintiffs.

The status quo in New Hampshire can only be preserved by granting Plaintiffs injunctive relief. Plaintiffs' hardships if the injunction is not granted, however, outweigh the State's if the injunction is granted. In *McCullen*, the Court noted that restrictions on sidewalk counselors' ability to have personal conversations and offer pamphlets "impose[] an especially significant First Amendment burden." No. 12-1168, slip op. at 22. If the Act goes into effect, Plaintiffs will be unable to engage in exactly this same kind of speech. In contrast, the government Defendants will not suffer any hardship if the injunction is granted. As discussed previously, the government has other means to further its interests in public health, safety and welfare. Thus, the balance of hardships weighs in favor of Plaintiffs.

D. The Public Interest is Served by the Granting of a Preliminary Injunction.

The public interest will be benefited by the granting of a preliminary injunction to Plaintiffs. It is in the public's interest to protect constitutional rights. *See Hyde Park Partners, L.P. v. Connolly*, 839 F.2d 837, 854 (1st Cir. 1988) ("obviously, should the statute be unconstitutional, the public interest would be adversely affected by denial of [] an injunction"). Granting a preliminary injunction in favor of Plaintiffs would protect the freedom of speech. Thus, the public interest is best served by the granting of the injunction.

IV. Conclusion

McCullen controls this case. The law it struck down is materially indistinguishable than the Act challenged here. Plaintiffs will be irreparably harmed if injunctive relief does not issue immediately. For the foregoing reasons, the Plaintiffs have made the showing entitling them to temporary and preliminary injunctive relief. Thus, Plaintiffs respectfully request that the Court immediately grant their order to show cause, issuing an *ex parte* temporary restraining order against the Act and setting Plaintiffs' request for a preliminary injunction for hearing.

Respectfully submitted this 7th day of July, 2014.

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**Pro hac vice motions forthcoming.*

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