Bill as Introduced

HB 1570-FN - AS INTRODUCED

2016 SESSION

16-2439
01/05

HOUSE BILL ***1570-FN***

AN ACT repealing the law governing access to reproductive health care facilities.

SPONSORS: Rep. Hoell, Merr. 23; Rep. Goulette, Hills. 23; Rep. Itse, Rock. 10; Rep. Ingbretson, Graf. 15; Rep. Abramson, Rock. 20; Rep. W. O'Brien, Hills. 5; Rep. Rideout, Coos 7; Rep. Notter, Hills. 21; Rep. Groen, Straf. 10; Rep. Seidel, Hills. 28

COMMITTEE: Judiciary

ANALYSIS

This bill repeals the law relative to providing certain parameters for access to reproductive health care facilities.

Explanation: Matter added to current law appears in ***bold italics.***
Matter removed from current law appears [~~in brackets and struckthrough.~~]
Matter which is either (a) all new or (b) repealed and reenacted appears in regular type.

HB 1570-FN AS INTRODUCED

16-2439
01/05

STATE OF NEW HAMPSHIRE

In the Year of Our Lord Two Thousand Sixteen

AN ACT repealing the law governing access to reproductive health care facilities.

Be it Enacted by the Senate and House of Representatives in General Court convened:

1 Statement of Findings and Purpose.

I. The general court hereby finds that:

(a) The exercise of a person's right to free speech is a First Amendment activity, the protection of which is paramount.

(b) RSA 132:37 through RSA 132:40 (2014, 81) was based on a similar Massachusetts statute, Mass. Gen. Laws, ch. 266 section 120E ½.

(c) On June 26, 2014 the United States Supreme Court unanimously struck down as unconstitutional the Massachusetts statute in the case of *McCullen v. Coakley*, 134 S. Ct. 2518.

(d) On July 9, 2014, the United States District Court for the District of New Hampshire held in the case of *Sister Mary Rose Reddy v. Foster*, Docket 14-CV-00299-JL that RSA 132:37 through RSA 132:40 "is materially indistinguishable from the Massachusetts statute that the Supreme Court invalidated in *McCullen v. Coakley.*"

II. States and towns have been charged significant fees for keeping these statutes in law. The state of Massachusetts had to pay $1.2 million in plaintiffs' attorneys fees for its unconstitutional buffer zone, Burlington, Vermont had to pay $200,000 and on October 8, 2015, the United States district court in Maine entered an order requiring Portland Maine to pay the pro-life sidewalk counselors' attorneys fees in the amount of $56,500.

III. The New Hampshire attorney general stated: "This case is of public interest and importance. The statute and subject matter at issue has been the focus of media coverage and legislative action, and will likely be the subject of future legislative action." Case no. 14-CV-00299, motion to record, filed 10-19-2015.

IV. Therefore, the general court hereby repeals RSA 132:37 through RSA 132:40 because if left as law, this statute will cause the state of New Hampshire to expend considerable sums defending a law which the United States Supreme Court unanimously found unconstitutional.

2 Repeal. RSA 132:37-132:40, relative to providing certain parameters for access to reproductive health care facilities, are repealed.

3 Effective Date. This act shall take effect upon its passage.

HB 1570-FN AS INTRODUCED

LBAO
16-2439
11/30/15

HB 1570-FN- FISCAL NOTE

AN ACT repealing the law governing access to reproductive health care facilities.

FISCAL IMPACT:

The Judicial Branch and Department of Justice state this bill, **as introduced**, will decrease state expenditure by an indeterminable amount in FY 2017 and each year thereafter. There will be no fiscal impact on state revenue or on county and local revenues and expenditures.

METHODOLOGY:

The Judicial Branch states this bill would repeal RSA 132:37 through 40 regarding access to reproductive health care facilities. These sections make violation of the statute a violation level offense and authorize the attorney general or county attorney to bring injunctive relief to prevent further violations. The potential impact to the Judicial Branch would be fewer violation level offenses in the circuit court and fewer injunction actions in the superior court. The Branch has no information on the possible reduction in the number of violation level offenses or injunction actions but does have dated information on the average cost of such actions. The Branch estimates the cost of an average violation level offense in the district division of the circuit court will be $47.91 in FY 2017 and $50.93 in FY 2018. The injunction actions would be considered complex equity cases in the superior court with an estimated average cost of $716.75 in FY 2017 and $740.15 in FY 2018. The Branch notes the cost figures for these cases are based on studies of judicial and clerical weighted caseload times for processing average cases. The Branch states these studies are now more than ten years old for judicial time in both courts and clerical time in the district court, and over eight years old for clerical time in the superior court. The Branch also states there have changes been since then that could impact the average processing times. In addition, the Branch indicates the cost figures no not include the cost of any appeals that might be taken following trial.

The Department of Justice indicates the statutes have been challenges in federal court and passage of the bill would eliminate the basis for that legal challenge and the potential cost of litigation, which cannot be determined.

The New Hampshire Association of Counties states the bill will have no impact on county expenditures or revenue.

The New Hampshire Municipal Association cannot identify any impact on municipal revenue

or expenditures.

Committee Minutes

SENATE CALENDAR NOTICE
Health and Human Services

Sen Andy Sanborn, Chair
Sen Molly Kelly, Vice Chair
Sen Kevin Avard, Member
Sen Sharon Carson, Member
Sen Martha Fuller Clark, Member

Date: March 17, 2016

HEARINGS

Tuesday	03/22/2016
(Day)	(Date)

Health and Human Services	LOB 101	1:00 p.m.
(Name of Committee)	(Place)	(Time)

EXECUTIVE SESSION MAY FOLLOW

1:00 p.m.	**HB 1570-FN**	repealing the law governing access to reproductive health care facilities.
1:30 p.m.	**HB 1453**	relative to qualifying medical conditions for purposes of therapeutic cannabis.
2:00 p.m.	**HB 1316**	relative to hospital rates for self-pay patients.

Sponsors:

HB 1570-FN

Rep. Hoell	Rep. Goulette	Rep. Itse	Rep. Ingbretson
Rep. Abramson	Rep. W. O'Brien	Rep. Rideout	Rep. Notter
Rep. Groen	Rep. Seidel		

HB 1453

Rep. Luneau	Rep. Myler	Rep. Wallner	Sen. Feltes

HB 1316

Rep. Hunt

Kelly Flathers 271-3091

Andy Sanborn
Chairman

CANCELLED
SENATE CALENDAR NOTICE
Health and Human Services

Sen Andy Sanborn, Chair
Sen Molly Kelly, Vice Chair
Sen Kevin Avard, Member
Sen Sharon Carson, Member
Sen Martha Fuller Clark, Member

Date: March 17, 2016

HEARINGS

Tuesday	03/22/2016
(Day)	(Date)

Health and Human Services	LOB 101	1:00 p.m.
(Name of Committee)	(Place)	(Time)

EXECUTIVE SESSION MAY FOLLOW

1:00 p.m.	**HB 1570-FN**	repealing the law governing access to reproductive health care facilities.
1:30 p.m.	**HB 1453**	relative to qualifying medical conditions for purposes of therapeutic cannabis.
2:00 p.m.	**HB 1316**	relative to hospital rates for self-pay patients.

Sponsors:

HB 1570-FN

Rep. Hoell	Rep. Goulette	Rep. Itse	Rep. Ingbretson
Rep. Abramson	Rep. W. O'Brien	Rep. Rideout	Rep. Notter
Rep. Groen	Rep. Seidel		

HB 1453

Rep. Luneau	Rep. Myler	Rep. Wallner	Sen. Feltes

HB 1316

Rep. Hunt

Kelly Flathers 271-3091

Andy Sanborn
Chairman

SENATE CALENDAR NOTICE
Health and Human Services

Sen Andy Sanborn, Chair
Sen Molly Kelly, Vice Chair
Sen Kevin Avard, Member
Sen Sharon Carson, Member
Sen Martha Fuller Clark, Member

Date: March 31, 2016

HEARINGS

Tuesday	04/05/2016
(Day)	(Date)

Health and Human Services	LOB 101	1:00 p.m.
(Name of Committee)	(Place)	(Time)

EXECUTIVE SESSION MAY FOLLOW

1:00 p.m.	**HB 1664-FN**	(New Title) relative to contracts between carriers or pharmacy benefit managers and certain pharmacies.
1:30 p.m.	**HB 1608-FN**	relative to uniform prior authorization forms.
2:00 p.m.	**HB 1570-FN**	repealing the law governing access to reproductive health care facilities.
2:30 p.m.	**HB 1661-FN**	relative to conversion therapy seeking to change a person's sexual orientation.

Sponsors:
HB 1664-FN
Rep. Luneau Rep. Myler Rep. Butler Sen. Feltes

HB 1608-FN

Rep. Fothergill	Rep. Sherman	Rep. Hunt	Sen. Bradley
Sen. Woodburn			

HB 1570-FN

Rep. Hoell	Rep. Goulette	Rep. Itse	Rep. Ingbretson
Rep. Abramson	Rep. W. O'Brien	Rep. Rideout	Rep. Notter
Rep. Groen	Rep. Seidel		

HB 1661-FN

Rep. Schleien	Rep. Zaricki	Rep. Eastman	Rep. Sad
Rep. C. Roberts	Rep. Horrigan	Rep. Simpson	Rep. Eaton

Kelly Flathers 271-3091

Andy Sanborn
Chairman

REVISED

SENATE CALENDAR NOTICE
Health and Human Services

Sen Andy Sanborn, Chair
Sen Molly Kelly, Vice Chair
Sen Kevin Avard, Member
Sen Sharon Carson, Member
Sen Martha Fuller Clark, Member

Date: March 31, 2016

HEARINGS

Tuesday		04/05/2016
(Day)		(Date)

Health and Human Services	LOB 204	1:00 p.m.
(Name of Committee)	(Place)	(Time)

EXECUTIVE SESSION MAY FOLLOW

1:00 p.m.	**HB 1664-FN**	(New Title) relative to contracts between carriers or pharmacy benefit managers and certain pharmacies.
1:30 p.m.	**HB 1608-FN**	relative to uniform prior authorization forms.
2:00 p.m.	**HB 1570-FN**	repealing the law governing access to reproductive health care facilities.
2:30 p.m.	**HB 1661-FN**	relative to conversion therapy seeking to change a person's sexual orientation.

Sponsors:

HB 1664-FN

Rep. Luneau	Rep. Myler	Rep. Butler	Sen. Feltes

HB 1608-FN

Rep. Fothergill	Rep. Sherman	Rep. Hunt	Sen. Bradley
Sen. Woodburn			

HB 1570-FN

Rep. Hoell	Rep. Goulette	Rep. Itse	Rep. Ingbretson
Rep. Abramson	Rep. W. O'Brien	Rep. Rideout	Rep. Notter
Rep. Groen	Rep. Seidel		

HB 1661-FN

Rep. Schleien	Rep. Zaricki	Rep. Eastman	Rep. Sad
Rep. C. Roberts	Rep. Horrigan	Rep. Simpson	Rep. Eaton

Kelly Flathers 271-3091

Andy Sanborn
Chairman

Senate Health and Human Services Committee

Kelly Flathers 271-3091

HB 1570-FN, repealing the law governing access to reproductive health care facilities.

Hearing Date: April 5, 2016

Time Opened: 2:41 p.m. **Time Closed:** 3:41 p.m.

Members of the Committee Present: Senators Sanborn, Avard, Carson and Fuller Clark

Members of the Committee Absent: Senator Kelly

Bill Analysis: This bill repeals the law relative to providing certain parameters for access to reproductive health care facilities.

Sponsors:

Rep. Hoell	Rep. Goulette	Rep. Itse
Rep. Ingbretson	Rep. Abramson	Rep. W. O'Brien
Rep. Rideout	Rep. Notter	Rep. Groen
Rep. Seidel		

Who supports the bill: Rep. Twombly - Hillsborough 34; Rep. Ohm - Hillsborough 36; Rep. J.R. Hoell - Merrimack 23; Ellen Kolb - Self; Joan Espinola - Self; Jeanie Szulc - Self; Michael Tierney - Self; Cathy Kelley - Self; Susan Clifton - Self; Rep. Warren Groen - Strafford 10; Bethany Schieding - Self; Rep. Eric Schleien - Hillsborough 37; Catherine Deveau - Self; Elizabeth Green - Self; Theresa Leizillo - NHRTL; Sarah Koski - Cornerstone Policy; Theresa Tullen - Self; Jen Robidoux - Self; Rep. Leon Rideout - Coos 7; Rep. Linda Gould - Hillsborough 7; Rep. David Bates - Rockingham 7; Rep. Butler - Carroll 7

Who opposes the bill: Rep. Timothy Horrigan - Strafford 6; Janet Monahan - NH Medical Society; Kayla McCarthy - Planned Parenthood; Sen. Soucy - District 18; Rep. Tom Sherman - Rockingham 24; Katie Robert - NH Public Health Association; Linda Kenison; Rep. David WOodbury - Judiciary Minority; Rep. Janet Wall - Strafford 6; Paula Hodges - NARAL NH; Sen. Hosmer - District 7; Natalie Moser - Self; Lauren Banker - Self; Stephanie Reighart - Self; Ruth Redmond - Self; Linda Griebsch - Joan G. Lovering Health Center

Who is neutral on the bill: No one.

Summary of testimony presented in support:

Representative J.R. Hoell - Merrimack 23 (Prime):

- This is a reintroduction of a bill that has been before this committee once before. That bill passed out of the House and the decision was 12-12 in the Senate.
- We are trying to undo SB 319 from 2014. There were numerous debates on this bill and on May 16 it was voted Ought to Pass with a roll call vote 162-100.
- 263 members were in the chamber on that day, including the speaker. That does not meet the ⅔ requirement and that bill should never have become law.
- I asked the clerk how many members had resigned their positions. If it's less than 5, this could be another lawsuit. The passing of that bill into law was unconstitutional. There are already several lawsuits regarding this law but the judge ruled that, because the law hasn't been enforced, there were no grounds to sue.
- Putting laws on the books that we don't enforce is foolish. I ask the committee to find this bill Ought to Pass, given the technical issues already pointed out.

Joan Espinola - Self

- I am speaking in support of this bill. I was a plaintiff in the buffer zone case.
- The NH legislature has abridged freedom of speech by adding this to our laws. It is ironic that it falls under Title 10, the protection of maternity and infancy.
- Free speech and press are essential to freedom in our state. This law protects the abortion clinic from unwanted speech. However, the constitution doesn't give freedom from unwanted speech.
- Pro-life people aren't in people's faces. In Manchester, we are behind a fence. If they don't want to talk to us, we don't talk to them. We are respectful to them.
- The constitution does not control the content or location of my speech. We are responsible and caring adults who are not out to harm or hurt anyone. Our purpose is to help a distressed mother going into an abortion clinic.
- Pass this bill to give everyone, not some, the right to speak freely. The abortion clinic wants the ability to kill the unborn inside the building and now they want to kill free speech outside of the building.

Jeanie Szulc - Self

- I am speaking in support of this bill. In Manchester we cause no trouble- there is a guard there and we follow directions on the sidewalk. We are not there to hurt anybody. I'm there every Thursday from 12-4. We pray and counsel the mothers. We have things to help women after abortions as well.
- One young woman came to me crying but did not have an abortion. I told her that there is a pregnancy center on the next block. We will do anything to help them carry the baby. Adoption is an option as well. We are there to help.

Michael Tierney - Self

- The McCullen v. Coakley case is over and I don't think it should impact the decision legislators make. A similar repeal bill died in a 12-12 vote. Hopefully the senators who were waiting for the court ruling are going to realize that the repeal bill should be passed.

- Unconstitutional laws should be taken off of the books. There is nothing in the court ruling as to the constitutionality of the law. The lawsuit was premature.
- While Massachusetts set up buffer zones, NH has taken the strange route of giving private businesses the right to set up the zones. However, the liability and responsibility of enforcement still falls on the state.
- People trying to sidewalk counsel aren't talking in a loud voice- it's a one-on-one conversation in a loving tone. They need the ability to hand out pamphlets, a core first amendment activity. There are existing laws on the books to prohibit harassment around abortion clinics. If there is a problem, those laws should be enforced.

Cathy Kelley - Self

- I pray in front of Planned Parenthood and I feel that I should have the right to do so. I pay taxes and I vote, so I should have the right to stand on a public sidewalk to talk and pray.
- We have been quite successful because we've been able to be close to people and talk to them. I've helped people with language barriers by finding a translator and now she's having her baby. We are there to help women, not hurt women.
- If they ask me to go away, I'll go away. We offer them healing for after the abortion. That's compassion.

Susan Clifton - Self

- I was a plaintiff in the buffer zone case. I am also on the sidewalk in Manchester on Thursdays. We offer any help that we can out of love for every person that we see. We pray for the abortion workers and love them all. We want the best for every person that enters and leaves the clinic.
- We are not there to threaten or accost anybody. We are gentle in our approach. We want to give people another option.

Jen Robidoux - Self

- I am a sidewalk counselor and was a plaintiff in the buffer zone lawsuit. In Manchester, I am not allowed to speak to people walking through private property. I am on the public sidewalk. This law is stopping me from being on public property to give my opinion and talk to people. It is stopping me from exercising my first amendment rights.
- I am not a professional counselor. A sidewalk counselor is a person on the sidewalk willing and able to give women and men information on the options available to them. We encourage them to keep the baby and find out what they need, whether that is housing, diapers, or a doctor. They don't always know all of their options.

Summary of testimony presented in opposition:

Representative Timothy Horrigan - Strafford 6

- I am speaking in opposition to this bill. I was on the House Judiciary committee when SB 319 passed. The Governor signed it and the Secretary of State approved it, so it's too late to do anything about that.

- This bill attempts to overturn the law that enables the creation of buffer zones around entrances and exits of reproductive health care facilities. The buffer zones can be no more than 25 feet wide and must be approved by the municipal government. They will only be put in place if the owners ask for it.
- The situation in Manchester is arguably the most serious, with ongoing conflict outside of the facilities. There are a number of people who feel the need to interfere and try to offer counseling to individuals trying to access the facilities. Other locations have experienced significant vandalism.
- I was one of the members who drafted and passed the final version of SB 319. When we drafted it we were fully cognizant of the McCullen v. Coakley case.
- Sister Mary Rose Reddy and various other parties challenged the law in federal court. This bill misleadingly claims that the NH District Court deemed SB 319 unconstitutional on the grounds that it was indistinguishable from MA law. However, the NH District Court has no power to declare a law unconstitutional. This was merely the sponsor's synopsis of the case.
- This was resolved April 1. The court dismissed the case, deciding that there was no standing to sue because no buffer zones were ever established. There are no immediate plans to establish any buffer zones.
- We worked hard to create something that didn't have the deficiencies in the Massachusetts law.
- HB 1570 is premature and unnecessary. We should wait and see if buffer zones are ever established.
- The buffer zones are at most 25 feet around the driveway. Anyone opposed to abortion can still express their opinions at that distance.

Senator Carson

- (Q) The law was never enacted because it was deemed there was a problem with existing law. Isn't taking a bad law off the books a duty of the legislature?
    - (A) **Rep. Horrigan**: The US District Court hasn't reached a final decision on this issue. I can't speak for the Attorney General's office. This is enabling legislation- it only becomes an issue when a provider requests a buffer zone. If they did, a law suit would be filed the minute the signs go up. I think we addressed the problems in Massachusetts law.
- (Q) Are you aware that, if someone in Manchester put in a buffer zone, it would include a public sidewalk? This interferes with freedom of speech. A lot of this could be taken care of with local ordinances. If there are problems at these clinics, the owners can get a local ordinance specifically tailored for their facility, rather than using a blanket law that may not work everywhere. Is that a better alternative?
    - (A) **Rep. Horrigan**: People claim that they're providing professional services while they're engaging in free speech. This bill calls for minimal restrictions in certain areas. People don't have the right to block off the whole street.

Senator Soucy - District 18

- I am speaking in opposition to this bill. I was the prime sponsor of SB 319, the bill that created this law. I put in this law after hearing concerns expressed by

my constituents who were attempting to access health care in Manchester and were obstructed, threatened, and bullied.

- Being aware of the McCullen v. Coakley case in front of the US Supreme Court, we crafted the bill to ensure that it was less restrictive than the law in Massachusetts. We took into account feelings of local law enforcement and code.
- We recognize the right of people to assemble outside of these buildings and are mindful of the Supreme Court decision.There have been other buffer zone cases heard across the country and upheld. The statutes are all crafted differently.
- This buffer zone is not a strict 25 feet- it says in the law that it can be less than 25 feet.
- In our statutes we also have protesting and picketing buffer zones around funerals and polling places. There are times and circumstances that require some balance to allow people to express themselves but allow others to safely access and leave certain places.

Kayla McCarthy - Planned Parenthood NH Action Fund

- I have submitted written testimony for the committee. I walk with patients through the protesters. These women deserve to feel safe when accessing health care. I have seen an increase in the volume and frequency of protest activities. I have seen people holding signs, blocking entrances, verbally assaulting patients, and photographing patients.
- This is a NH-specific piece of legislation allowing the creation of voluntary patient safety zones. On Friday, this case was dismissed. This ruling clears the way for thoughtful, deliberate implementation. It strikes the balance between privacy, the right to safe passage, and first amendment rights.
- Individuals should not have to endure violence, harassment, or threats to access their safe and legal health care.

Representative David Woodbury - Hillsborough 5

- I am here to represent the minority position of the House Judiciary committee.
- In subsection (a), the right to free speech is a first amendment activity and protection of this right is paramount.
- Regarding subsection (b), this law discusses the same subject matter as the Massachusetts law, but is not the same by any means. NH statute was drafted to be unlike Massachusetts statute. There is a substantial difference between a flat 35 foot buffer and a 25 to 0 foot buffer imposed at the discretion of the facility.
- Subsection (d) is misleading. This was not a holding of the court and the court has since thrown out the lawsuit.
- Regarding Roman II, I don't recall in the House Judiciary committee that we heard that these payments would be ordered under any set of circumstances.
- Roman III is correct. This is a quote from the Attorney General.
- Roman IV is problematic. We are now being asked to equate people's constitutional rights with money. We did not hear any evidence that the continued work on this case is somehow unusually or unduly burdensome to the state.

- The US Supreme Court has a 250 foot buffer zone. We are about 15 feet apart from one another as we speak. The idea that you must be at somebody's elbow in order to communicate is not so.
- If I were to approach your bench and talk at you loudly, you would take it badly and feel threatened. It is no different on the sidewalks of a city or town when people are trying to use these health care facilities.

Representative Janet Wall - Strafford 6

- I am serving my 15th term and I am cautious about what I sponsor and co-sponsor. I am not a co-sponsor to this bill but I drafted the language to the amendment.
- I was unable to testify when this was in judiciary in the house. I looked at this bill objectively. The bill that became law is not like Massachusetts law. The amendment is written to be different, to comply with NH Constitution, and to give local control.
- One size does not fit all- this enables a 0 to 25 foot buffer zone. We have buffer zones when we deal with zoning and planning. This is nothing new. People can still talk and pray; it just allows for a little bit of distance. Local communities can decide what works best for them.
- This bill is flawed in its drafting and flawed in the thought behind it. Until something has been put into law and has a chance to work, we don't automatically repeal it.

Jay Smith - NH Public Health Association

- I am opposed to the repeal of this law. As a physician, having the ability to intimidate people close up is problematic for care that people may be embarrassed about. I can't see how it is an infringement on people's first amendment rights.
- Local communities can establish buffer zones. I am pleased that the current challenge was thrown out.
- There were indications that some of the protesters around Planned Parenthood facilities were monitoring their behavior because this law was in place, even if it was not being enforced.
- This law should stand to protect patients- it does not impede protesting in a respectful manner.

Fiscal Note: See fiscal note dated 11/30/15.

Future Action: Pending

KEF
Date Hearing Report completed: April 11, 2016

Speakers

(1)

Senate Health and Human Services Committee: Sign-In Sheet

Date: 04/05/2016 Time: 2:00 PM Public Hearing on HB 1570-FN

HB 1570-FN repealing the law governing access to reproductive health care facilities.

Name	Representing					
Rep Twomby	Hills # 34	Support ☒	Oppose ☐	Speaking?	Yes ☐	No ☒
Rep Ohm	Hills #36	Support ☒	Oppose ☐	Speaking?	Yes ☐	No ☒
Rep. Timothy Horrigan	Strafford	Support ☐	Oppose ☒	Speaking?	Yes ☑	No ☐
Janet Monahan	NH Medical Society	Support ☐	Oppose ☒	Speaking?	Yes ☐	No ☒
Kayla McCarthy	Planned Parenthood	Support ☐	Oppose ☑	Speaking?	Yes ☒	No ☐
Senator Soucy	Senate SD18	Support ☐	Oppose ☑	Speaking?	Yes ☑	No ☐
Rep Tom Sherman	Rock 24	Support ☐	Oppose ☑	Speaking?	Yes ☐	No ☑
Katie Robert	NH Public Health Assn	Support ☐	Oppose ☒	Speaking?	Yes ☒	No ☐
Rep JR Hoell	Merr 23	Support ☒	Oppose ☐	Speaking?	Yes ☒	No ☐
Ellen Kolb	self	Support ☒	Oppose ☐	Speaking?	Yes ☐	No ☒
Linda Kenison	Rep	Support ~~☒~~	Oppose ☒	Speaking?	Yes ☐	No ☑
Rep. DAVID WOODBURY	Judiciary minority	Support ☐	Oppose ☑	Speaking?	Yes ☑	No ☐
Rep. Janet G. Wall	Strafford 6	Support ☒	Oppose ☒	Speaking?	Yes ☒	No ☐
Paula Hodges	NARAL NH	Support ☐	Oppose ☒	Speaking?	Yes ☐	No ☒
Joan Espinola	Myself	Support ☒	Oppose ☐	Speaking?	Yes ☒	No ☐
Jeanne Lyle	myself	Support ☒	Oppose ☐	Speaking?	Yes ☒	No ☐
Michael Tierney	self	Support ☒	Oppose ☐	Speaking?	Yes ☒	No ☐
Anne Kelley	"	Support ☒	Oppose ☐	Speaking?	Yes ☑	No ☐
Susan Clifton	self	Support ☒	Oppose ☐	Speaking?	Yes ☑	No ☐

Senate Health and Human Services Committee: Sign-In Sheet

Date: 04/05/2016 Time: 2:00 PM Public Hearing on HB 1570-FN

HB 1570-FN repealing the law governing access to reproductive health care facilities.

Name	Representing	Support	Oppose	Speaking? Yes	Speaking? No
RR WARREN GROEN	STRAFFORD 10	☒	~~☒~~	☐	☒
Sen Andrew Hosmer	SD7	☐	☒	☐	☒
Bethany Schieding	self	☒	~~☒~~	☐	☒
Rep Eric Schleien	Hills 37	☒	☐	☐	☒
Catherine DeVeau	Self	☒	☐	☐	☒
Elizabeth Green	self	☒	☐	☐	☒
		☐	☐	☐	☐
		☐	☐	☐	☐
		☐	☐	☐	☐
		☐	☐	☐	☐
		☐	☐	☐	☐
		☐	☐	☐	☐
		☐	☐	☐	☐
		☐	☐	☐	☐
		☐	☐	☐	☐
		☐	☐	☐	☐
		☐	☐	☐	☐
		☐	☐	☐	☐
		☐	☐	☐	☐

Senate Health and Human Services Committee: Sign-In Sheet

Date: 04/05/2016 Time: 2:00 PM Public Hearing on HB 1570-FN

HB 1570-FN repealing the law governing access to reproductive health care facilities.

Name	Representing						
Theresa LaZillo	NHRTL	Support ☒	Oppose ☐	Speaking?	Yes ☐	No ☒	✓
Natalie Moser	self	Support ☐	Oppose ☒	Speaking?	Yes ☐	No ☒	✓
Sarah Koski	Cornerstone Policy	Support ☒	Oppose ☐	Speaking?	Yes ☐	No ☒	✓
Theresa Fuller	myself	Support ☑	Oppose ☐	Speaking?	Yes ☐	No ☑	✓
Jen Robidoux	myself	Support ☑	Oppose ☐	Speaking?	Yes ☑	No ☐	✓
Rep Leon H Rideout	Coos 7	Support ☒	Oppose ☐	Speaking?	Yes ☐	No ☐	✓
Lauren Bankcer	self	Support ☐	Oppose ☒	Speaking?	Yes ☐	No ☒	✓
Stephanie Reighart	self	Support ☐	Oppose ☒	Speaking?	Yes ☐	No ☒	✓
Rep. Linda Gould	Dist 7	Support ☒	Oppose ☐	Speaking?	Yes ☐	No ☐	
Rep. David Bates	Rock 7	Support ☒	Oppose ☐	Speaking?	Yes ☐	No ☒	
Ruth Redmond	myself	Support ☐	Oppose ☒	Speaking?	Yes ☐	No ☐	
~~Rev. Edward Gorman~~	~~myself~~	Support ☐	Oppose ☐	Speaking?	Yes ☐	No ☐	
LINDA GRIEBSCH	Joan G. Lovering Health Ctr.	Support ☐	Oppose ☒	Speaking?	Yes ☐	No ☒	
Rep. Ed Butler	Carroll 7	Support ☒	Oppose ☐	Speaking?	Yes ☒	No ☐	
~~Rep Frank Edelblut~~	~~Hills 38~~	Support ☐	Oppose ☒	Speaking?	Yes ☒	No ☐	
		Support ☐	Oppose ☐	Speaking?	Yes ☐	No ☐	
		Support ☐	Oppose ☐	Speaking?	Yes ☐	No ☐	
		Support ☐	Oppose ☐	Speaking?	Yes ☐	No ☐	
		Support ☐	Oppose ☐	Speaking?	Yes ☐	No ☐	

Testimony

Testimony Against HB 1570

"AN ACT repealing the law governing access to reproductive health care facilities"

Rep, Timothy Horrigan (Strafford 6); April 5, 2016

HB 1570 attempts to overturn a 2014 bill, SB 319 (2014 chaptered law 881), which allowed reproductive health care facilities to establish buffer zones around their entrances and exits. These zones could be no more than 25 feet wide, and must be approved by local authorities. This bill was passed as a response to ongoing issues at clinics in Manchester and Greenland, amongst other communities.

I was one of the members of the majority of the House Judiciary Committee who drafted and passed the final version of SB 319, which was eventually signed into law by Governor Hassan. We were cognizant of the McCullen vs. Coakley case, which led the United States Supreme Court to declare a somewhat similar Massachusetts law to be unconstitutional. The Massachusetts law had the same basic aim as SB 319, but ours was a homegrown bill.

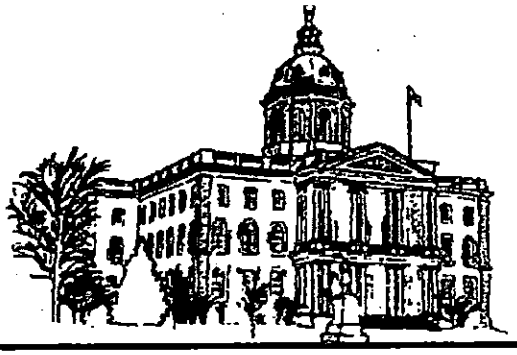
Just days after SB 319 was signed, Sister Mary Rose Eddy and various other parties challenged the new law in federal court. The preamble to HB 1570 misleadingly claims the United States District Court for the District of New Hampshire deemed SB 319 unconstitutional on July 9, 2014, on the grounds that our new law was materially indistinguishable from the Massachusetts law. In fact, Judge Joseph Laplante merely granted a restraining order to suspend enforcement of the new law pending the resolution of the Reddy v. Foster suit. As a District Court judge, he has no power to declare any law unconstitutional. The key phrase "Senate Bill 319 is materially indistinguishable from the Massachusetts statute" appears only in the judge's synopsis of the plaintiff's side of the case.

Reddy v. Foster was not resolved until April 1, 2016, when the court dismissed the case on the grounds that the plaintiffs had no standing to sue, since no buffer zones had ever been established. No definitive ruling was ever made on the constitutionality of SB 319.

I can assure you that the various legislators who contributed to SB 319 worked hard to address the deficiencies of the Massachusetts law. RSA 132:37 through RSA 132:40 (2014, 81) are in fact materially distinguishable in every respect from the Massachusetts law.

Right now, no buffer zones exist. No facilities have even tried to establish buffer zones. In addition to being justified by a totally false premise, HB 1570 is premature and unnecessary.

Planned Parenthood® of Northern New England



Planned Parenthood® Act. No matter what.

Planned Parenthood New Hampshire Action Fund

HB 1570 **Repealing the Law Governing Access to Reproductive Health Facilities**
Committee: **Senate Health and Human Services Committee**
Date: **April 5, 2016**
Position: **OPPOSE**

BACKGROUND

Reproductive health centers in New Hampshire have never been free of picketing and protest activity. However, in the past few years the volume and frequency of protests has increased and the escalating type of tactics that some protestors are willing to use has resulted in increased patient harassment and increased need for on-site security. Obstructing the driveway entrance, blocking on-street parking spaces, photographing patients and staff and verbal assaults have become routine complaints from our patients and their family members. Protestors gather in front of the entrance and create barriers for patients seeking to access health center and they invade the privacy of those who do not want to engage in dialogue entering or exiting.

To address these public safety and clinic access problems, the NH legislature enacted Senate Bill 319 in 2014, authorizing the establishment of patient safety "buffer" zones of "up to" 25 feet surrounding the entrances to reproductive health facilities. The law was not mandatory, but enabling such that each facility and each community could narrowly tailor a zone in accordance with local factors. Just weeks after Senate Bill 319 was signed into law, the U.S. Supreme Court issued a decision in *McCullen vs. Coakley 134 S.Ct 2518* which changed the legal landscape for balancing the competing constitutional rights involved.

NEW HAMPSHIRE'S LAW IS NO LONGER THE SUBJECT OF LITIGATION:

On March 31, 2016 US District Court dismissed the challenge to NH's "Buffer Zone" case. Judge LaPlante ruled that the plaintiffs lacked standing in the Mary Rose Reddy et al v. Joe Foster et al case, clearing the way for thoughtful and deliberate implementation to occur.

NEW HAMPSHIRE'S LAW IS DISTINGUISHABLE FROM THE LAW STRUCK DOWN BY THE US SUPREME COURT

The Massachusetts Law established a mandatory buffer of 35-feet and treated all facilities in the state in an identical fashion, where NH's law allows for a discretionary buffer, and only enables a patient safety zone as the facts and circumstances dictate.

LIMITED BUFFER ZONE LAWS HAVE BEEN UPHELD IN THE AFTERMATH OF THE *MCCULLEN* CASE

See *Bruni Et Al v. City of Pittsburgh* which upheld a 15-foot buffer zone surrounding reproductive health centers in the City of Pittsburgh in 2015.

We Urge the Senate HHS Committee to Maintain a Commitment to Patient Safety and Access and

Vote "Inexpedient to Legislate" on HB 1570

For more information contact:
Kayla McCarthy, Advocacy & Organizing Manager, 603.674.8372, kayla.mccarthy@ppnne.org

NEW HAMPSHIRE
PUBLIC HEALTH ASSOCIATION
Improving Health, Preventing Disease, Reducing Costs for All

NH Public Health Association
4 Park Street, 4th Floor
Concord, NH 03301
603.228.2983 | info@nhpha.org

April 4, 2016

To: Chairman Sanborn and members of the Health and Human Services Committee

Re: HB 1570-FN

Good afternoon Chairman Sanborn and members of the Committee. My name is Katie Robert and I'm here as President of the NH Public Health Association. On behalf of our individual and organizational members across NH working to protect the health of NH, I am here to voice our opposition to HB1570.

The NH Public Health Association contends that any limitation enacted by the legislature making a NH resident feel anything less than comfortable seeking basic health care is a threat to the public's health. In this case, by removing the "buffer zones" around women's health clinics and allowing pro-life advocates to congregate near the entrances of those clinics, we give already-vulnerable women facing low-wages, high costs of child care, and growing student loans one more reason not to seek medical care. Unlike the overturned laws in Massachusetts and Maine, NH's current regulations do NOT restrict the free speech of anti-abortion activists so long as they respect the privacy of the patients entering the clinics, and refrain from harassing behavior. Yesterday, a US District Court judge threw out one of these cases, saying as much. There is neither a need to repeal this statute, nor for this committee to spend any further time shadow boxing a legal battle which currently has no legs to stand on.

Having access to a full range of health care – including cancer screenings, prenatal care, contraceptive care, and other reproductive care - is a fundamental right and integral to the health and well-being of individual women and to the broader public's health. By protecting the ability of NH women to enter these clinics unimpeded, we promote better long-term health outcomes produced by the comprehensive medical care given at these clinics.

Because the NH Public Health Association opposes any restrictions limiting access to evidence-based, appropriate health care, we urge this committee to recommend ITL for HB 1570.

Good Afternoon! My name is Jennifer Robidoux. I have taken a day off from work to speak to you because this topic is very important to me. I am here to ask you to vote in favor of House Bill 1570, which repeals the so-called "buffer zone" law.

Although this law has yet to be enforced, it needs to be repealed. The idea of this law was flawed from the beginning, creating a zone where peaceful pro-lifers could not stand, pray or speak to abortion-minded women as they enter the abortion facility, thus creating an area of up to 25 feet around abortion clinics as devoid of the First Amendment. The US Supreme Court struck down a similar law in Massachusetts in June 2014 (McCullen v Coakley). However, before that case was decided, New Hampshire legislators pushed for this law to be passed- a law that was crafted to be similar to the Massachusetts law.

Proponents for this law argued that it was needed to ensure patient safety as patients entered and exited abortion facilities. They argued that patients had complained that they felt "harassed", "judged", or "scared" but where was the evidence? When this law was considered, opponents proved that there were no police reports detailing violence, harassment, or any other safety concerns for the patients at any of the abortion facilities in NH. The real reason for the law was to squelch the ability of sidewalk councilors to speak to abortion minded women, providing them with help, resources, and choices other than abortion.

When this law was signed, a lawsuit was brought to stop the enforcement of the law. Reddy vs. Foster is pending in the NH courts at this very moment. The court has issued a stay on this law, pending any changes. From July 2014 – February 2016 (present day) when the law has been in effect but not enforced, patients have continued to safely enter and exit the buildings and pro-lifers have continued to pray on the sidewalks and speak to the men and women as they walk to and from the building.

So, why is the repeal of this law important to me? I am a sidewalk councilor, I pray on the sidewalks outside of Planned Parenthood, I'm a participant and former local leader of the 40 Days for Life campaign, and I am one of the plaintiffs in the lawsuit Reddy vs. Foster.

For those of you who are unfamiliar with 40 Days for Life, it is an international peaceful and prayerful campaign aimed at bringing an end to abortion through prayer, a peaceful vigil, and community outreach. Participants are asked to sign a Statement of Peace declaring that they will be respectful, prayerful and nonviolent.

All I do when I am involved in 40 Days for Life is walk up and down the public sidewalk in front of the Planned Parenthood in Manchester and pray. Occasionally I will engage in friendly conversion with people as they walk into, out of or past the abortion clinic. The other person usually begins this dialogue and I make it clear that I am there to pray.

As a sidewalk councilor my job is to inform women of their other options. Most women go into a clinic thinking that abortion is there ONLY option. They want to return to their life of "yesterday." Some feel pressured by their spouse, boyfriend or family member. Choosing abortion is a hard decision and I want women to make an informed choice and know all of their options. When I counsel women, I invite them into a conversation. I don't yell at them. I don't judge them. I simply want to speak with them, just like I am speaking with you now. I provide them with resources about what abortion

is, the development of the baby, and other alternatives. If they don't want to talk with me I simply inform them that I am here and will be praying for them.

At the Manchester Planned Parenthood a fence surrounds the parking lot and the entrance to the clinic is inside that fence. If I want to speak with someone walking into that clinic I need to raise my voice to be heard. It may appear that I am shouting but that's only because I am not allowed any closer. A 25-foot zone around the clinic would make it impossible to speak with the women, to change hearts and minds, and to save the life of the unborn. Women deserve to have options.

Let me conclude by stating this: I have the first amendment right to speech and to peacefully assemble in public places. If this law stands and is enforced I loose my First Amendment rights in an area of up to 25 feet around a business. Why spend taxpayer money defending a law that stops taxpayers from engaging in their Constitutional rights? Why enforce a law that bars only certain people and certain speech from an area around a certain business?

Thank you for your time this afternoon. Please repeal the so-called "buffer zone" law and vote in favor of House Bill 1570.

Jennifer Robidoux
18 Washington Rd.
Windham, NH 03087

170 North Policy Street
Salem, New Hampshire 03079

April 5, 2016

Legislative Office Building, Room 101
Health and Human Services
Concord, New Hampshire 03301

Testimony on HB1570 AN ACT repealing the law governing access to reproductive health care facilities

I am one of the plaintiffs in the 'Buffer Zone' case and I am asking you to vote 'ought to pass' on HB1570. This bill stands up for the right of free speech, given to all of us by the U. S. Constitution and by our N.H. Constitution.

In the U. S. Constitution's Bill of Rights, Amendment 1, it states: 'Congress shall make no law. . . . . abridging the freedom of speech, ... The New Hampshire Legislature has abridged freedom of speech by adding RSA132:37 – 40 to its laws. It's ironic that this law falls under Title X, the chapter headed, 'Protection for Maternity and Infancy.' I don't understand how this law is protecting 'Maternity or Infancy', it is protecting the abortion clinic from unwanted speech. The Constitution doesn't give freedom from unwanted speech, it specifically states, 'Freedom OF Speech' for we the people.

In the N.H. Constitution, Part First, Article 22, it states; 'Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved.' RSA 132:37 – 40 is not preserving free speech, it's hindering it.

I conclude. The U.S. Constitution and the N.H. Constitution protect my freedom of speech. They don't say anything about content or limits or places I can speak. I, along with other prolife witnesses, are responsible and caring adults who are not out to harm or hurt anyone. Our purpose is to help a distressed mother going into an abortion clinic. I don't understand where the legislature gets the authority to waive a Constitutional right, in favor of a private business and curtail my Constitutional rights.

I ask that you vote, 'ought to pass' on HB1570, An act repealing the law governing access to reproductive health care facilities, therefore giving everyone, not some, the right to speak freely.

Thank you,

Joan Espinola

Mrs. Joan Espinola

Flathers, Kelly

From: Chroniak, Deborah on behalf of Carson, Sharon
Sent: Tuesday, April 05, 2016 11:02 AM
To: Flathers, Kelly
Subject: FW: HB 1570

Kelly,

Just in case you did not get this.

Deb

Deborah A. Chroniak
Legislative Aide
Assistant to Senator Sharon Carson, District 14
Aide to the Executive Department and Administration Committee
New Hampshire State Senate
State House Room 106
107 North Main Street
Concord, New Hampshire 03301-4951
603-271-1403

From: Lori [mailto:mermaidhorse@hotmail.com]
Sent: Tuesday, April 05, 2016 10:20 AM
To: Carson, Sharon
Subject: HB 1570

Ladies and Gentlemen of the Senate Health and Human Services Committee, my name is Lori Kyer, and I'd like to thank you for reading my written testimony today. I am a Planned Parenthood volunteer and I am also the Lead Greeter at the Manchester Health Center. I write today to urge you to vote in opposition to HB 1570.

My role consists of personally escorting women of all ages from our parking lot to the front door of our health center. I have dealt with a variety of protestors, or "sidewalk counselors", as they call themselves, and I can tell you what these people truly do when they are outside the health center.

When a patient parks in our parking lot, I introduce myself and try to engage them in small talk as we walk to the front doors of the health center. Depending on the day/protestor, this can be relatively easy in that I can talk above the shouts and physically protect the patients from the bombardment from the protestors. On some days it is simply impossible to protect patients from the barrage of insults, threats and condemnation hurtled at them. If the patient happens to park on the street they are forced to walk onto the property and the gauntlet is harder. I have seen the protestors physically surround patients while trying to "talk" to them and give them packets filled with pamphlets with full of misinformation,

rosary beads and tiny plastic "aborted" fetus sized dolls.

These "sidewalk counselors" are obsessed with getting the patient to walk away from their appointment, that I have witnessed them not even recognize when the patient obviously didn't speak English! This is a verbal and physical roadblock whose only goal is to keep women from getting to their appointment on time. There is very little compassion shown to these women. Raised and threatening voices from such protestors would scare me if I had made one of life's hardest decisions.

Is it not already hard enough to have to make the decision to have an abortion? Why would we even consider allowing people the opportunity to literally keep patients blocked from even entering the driveway? Do we not owe New Hampshire's citizens the privacy of being able to go to their doctor's appointment without getting their faces photographed, and their car license plates, makes and models written down? Why do these women not deserve the same rights that you and I are afforded?

By removing the rights to have a voluntary 25 foot buffer zone, you are taking away the patient's right to privacy. All women have the right to choose, all people have the right to privacy in regard to their own personal medical treatment. This is the law, how can we even be thinking about taking away this buffer zone when it is our responsibility to protect patient seeking access to health care services? It is your responsibility to maintain their safety and avoid the molestation of women going to their doctor's appointments. It is my strong belief that all New Hampshire citizens deserve to enter a doctor's appointment in this state without harassment, belittling, ridicule, and possibly being left with a feeling of shame.

This buffer zone law can keep people safe and keep their personal medical business private, as is clearly needed in our state. Please do not allow the voluntary buffer zone law to be taken away from these people who are already in a difficult position.

Please oppose HB 1570, and feel free to contact me with any further examples or more information. My email address is lorikyer@gmail.com. Thank you for your time.

Lori Kyer

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

---

[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

---

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

---

[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

---

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

---

[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.

---

[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

---

[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'

---

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

cc: Michael J. Tierney, Esq.
Elissa Graves, Esq.
Matthew S. Bowman, Esq.
Nancy J. Smith, Esq.
Elizabeth A. Lahey, Esq.
Garry R. Lane, Esq.
Peter R. Chiesa, Esq.
Thomas R. Clark, Esq.
Danielle L. Pacik, Esq.
James William Kennedy, Esq.
Charles P. Bauer, Esq.
Samantha Dowd Elliott, Esq.

---

[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.

Committee Report

STATE OF NEW HAMPSHIRE

SENATE

REPORT OF THE COMMITTEE

Tuesday, May 3, 2016

THE COMMITTEE ON Health and Human Services

to which was referred **HB 1570-FN**

AN ACT repealing the law governing access to reproductive health care facilities.

Having considered the same, the committee recommends that the Bill

OUGHT TO PASS

BY A VOTE OF: 3-2

Senator Sharon Carson
For the Committee

Kelly Flathers 271-3091

HEALTH AND HUMAN SERVICES

HB 1570-FN, repealing the law governing access to reproductive health care facilities.
Ought to Pass, Vote 3-2.
Senator Sharon Carson for the committee.

New Hampshire General Court - Bill Status System

Docket of HB1570

Docket Abbreviations

Bill Title: repealing the law governing access to reproductive health care facilities.

Official Docket of **HB1570**:

Date	Body	Description
2/11/2016	H	**Introduced** 01/06/2016 and referred to Judiciary **HJ 4** P. 19
2/3/2016	H	Public Hearing: 02/11/2016 03:30 PM LOB 208
2/25/2016	H	Executive Session: 03/01/2016 10:00 AM LOB 208
3/3/2016	H	Majority Committee Report: Ought to Pass for 03/09/2016 (Vote 11-9; RC) **HC 14** P. 60
3/3/2016	H	Minority Committee Report: Inexpedient to Legislate **HC 14** P. 60
3/10/2016	H	**Ought to Pass**: MA **RC** 160-152 03/09/2016 **HJ 23** P. 163
3/10/2016	H	Reconsider (Rep. Hopper): MF DV 120-195 03/09/2016 **HJ 23** P. 168
3/16/2016	S	Introduced 03/10/2016 and Referred to Health and Human Services; **SJ 9**
3/31/2016	S	Hearing: 04/05/2016, Room 204, LOB, 02:00 pm; **SC 13**
5/3/2016	S	Committee Report: Ought to Pass, 05/05/2016; **SC 17**
5/5/2016	S	Special Order HB 1570 to the present time, Without Objection, MA; **SJ 16**
5/5/2016	S	Ought to Pass: **RC** 12Y-12N, MF; 05/05/2016; **SJ 16**
5/5/2016	S	Sen. Bradley Moved Laid on Table, MA, VV; 05/05/2016; **SJ 16**
5/5/2016	S	No Pending Motion; 05/05/2016 **SJ 16**

NH House | NH Senate

Other Referrals

HB1570

COMMITTEE REPORT FILE INVENTORY

__X__ ORIGINAL REFERRAL _____ RE-REFERRAL

1. THIS INVENTORY IS TO BE SIGNED AND DATED BY THE COMMITTEE AIDE AND PLACED INSIDE THE FOLDER AS THE FIRST ITEM IN THE COMMITTEE FILE.
2. PLACE ALL DOCUMENTS IN THE FOLDER FOLLOWING THE INVENTORY IN THE ORDER LISTED.
3. THE DOCUMENTS WHICH HAVE AN "X" BESIDE THEM ARE CONFIRMED AS BEING IN THE FOLDER.
4. THE COMPLETED FILE IS THEN DELIVERED TO THE CALENDAR CLERK.

__X__ **DOCKET (Submit only the latest docket found in Bill Status)**

__X__ **COMMITTEE REPORT**

__X__ **CALENDAR NOTICE**

__X__ **HEARING REPORT**

__X__ **PREPARED TESTIMONY AND OTHER SUBMISSIONS HANDED IN AT THE PUBLIC HEARING**

_____

__X__ **SIGN-UP SHEET(S)**

ALL AMENDMENTS (passed or not) CONSIDERED BY COMMITTEE:

____ - AMENDMENT # _____ ____ - AMENDMENT # _____

____ - AMENDMENT # _____ ____ - AMENDMENT # _____

ALL AVAILABLE VERSIONS OF THE BILL:

__X__ AS INTRODUCED ____ AS AMENDED BY THE HOUSE

____ FINAL VERSION ____ AS AMENDED BY THE SENATE

__N/A__ **OTHER (Anything else deemed important but not listed above, such as amended fiscal notes):**

_____

PLEASE INCLUDE THE COMMITTEE OF CONFERENCE REPORT HERE IF IT IS SIGNED BY ALL.

DATE DELIVERED TO SENATE CLERK

8/1/16

BY:

Kelly Matthews

COMMITTEE AIDE