

UNITED STATES DISTRICT COURT  
DISTRICT OF NEW HAMPSHIRE

Mary Rose Reddy et al.

v.

Civil No. 14-cv-299-JL

Joseph Foster et al.

**PARTIAL TEMPORARY RESTRAINING ORDER AND  
PROCEDURAL ORDER FOR PRELIMINARY INJUNCTION HEARING**

Tomorrow, July 10, 2014, is the effective date of New Hampshire Senate Bill 319, an act "relative to access to reproductive health care facilities." The act defines such facilities as places, other than hospitals, "where abortions are offered or performed," and further provides that, with limited exceptions, "[n]o 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." If a reproductive health care facility, after consulting with local law enforcement, demarcates such a zone and posts it with signage as set forth in the act, an individual who fails to vacate the zone after receiving a written warning is subject to a fine of no less than \$100, and may also be subject to an action for injunctive relief to prevent further violations of the act.

The plaintiffs in this action have filed a motion seeking a temporary restraining order preventing the defendants, who

include the Attorney General of the State of New Hampshire, the County Attorneys of various New Hampshire counties, and those New Hampshire communities in which reproductive health care facilities are located, from enforcing the act against them. The plaintiffs have also filed a motion seeking a preliminary injunction to the same effect. As grounds for both motions, the plaintiffs rely upon the United States Supreme Court's recent decision in [McCullen v. Coakley, No. 12-1168 \(June 26, 2014\)](#), which invalidated a similar Massachusetts statute, reasoning that it impermissibly restricted the freedom of speech guaranteed by the First Amendment to the United States Constitution.

**I. Motion for temporary restraining order**

The court held telephone conferences with counsel for all parties (save defendant Town of Greenland, New Hampshire) on July 8 and 9, 2014, to discuss the plaintiffs' motion for a temporary restraining order. On the July 9 call, most of the defendants, including the Attorney General, agreed that they would not seek to enforce Senate Bill 319 without prior notice to this court and to the plaintiffs, until the court has heard and rendered a decision on the plaintiffs' motion for a preliminary injunction. Based upon these representations, the court rules that the motion for a temporary restraining order (document no. 3) is MOOT insofar as it seeks pre-injunction hearing (see Part II, infra) relief against the Attorney General; the County Attorneys for

Cheshire, Merrimack, Hillsborough, Strafford, and Rockingham Counties; the Cities of Manchester and Keene; and the Town of Greenland.<sup>1</sup>

Two defendants--the City of Concord and the Town of Derry--were unable to agree to refrain from enforcing Senate Bill 319 for the time being. For the reasons set forth in the plaintiffs' memorandum of law in support of their motion for a temporary restraining order, the court finds that the plaintiffs have established an entitlement to temporary injunctive relief against those defendants. As the plaintiffs note, the key factor in the temporary restraining order calculus is a likelihood that they will succeed on the merits of their claims. See [Corporate Techs., Inc. v. Harnett](#), 731 F.3d 6, 9-10 (1st Cir. 2013). The plaintiffs persuasively argue that Senate Bill 319 is materially indistinguishable from the Massachusetts statute that the Supreme Court invalidated in [McCullen](#). Neither the City of Concord nor the Town of Derry have challenged this argument, either by way of a written objection or orally at either telephone conference, nor have they otherwise objected to the plaintiffs' motion. Notably, although the Attorney General has submitted an objection to the plaintiffs' motion, that objection makes no attempt to argue that

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<sup>1</sup>Although the Town of Greenland did not participate in the conference calls, its counsel separately informed the court and plaintiffs' counsel of its agreement not to enforce Senate Bill 319 pending a decision on the preliminary injunction motion.

the New Hampshire act differs from the Massachusetts law in such a way that the plaintiffs are unlikely to succeed in this action.<sup>2</sup>

The motion for a temporary restraining order is therefore GRANTED as to the City of Concord and the Town of Derry. Those defendants, their officers, agents, servants, employees, attorneys, and anyone acting on their behalf or in active concert or participation with them, shall not enforce Senate Bill 319, as codified at [N.H. Rev. Stat. Ann. § 132:37 et seq.](#), against any person until such time as this court has issued a ruling on the plaintiffs' motion for a preliminary injunction. Acts prohibited by this order include the issuance of warnings, whether oral or written, to any person who is not in compliance with the statute; the issuance of citations for any person's failure to comply with

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<sup>2</sup>Instead, the Attorney General's objection argued that the plaintiffs had not shown that they would suffer "immediate and irreparable injury, loss, or damage" under [Federal Rule of Civil Procedure 65\(b\)\(1\)\(A\)](#). That rule, however, only applies if the court anticipates issuing a temporary restraining order "without written or oral notice to the adverse party or its attorney." It is inapposite here, where the Attorney General, and all other defendants, received notice of the plaintiffs' motion.

In a "Statement" filed between the two conferences with the court, the Attorney General did attempt to draw distinctions between the New Hampshire and Massachusetts statutes. As any discussion of these distinctions was absent from his objection, the court does not understand the Attorney General to be taking the position that they preclude the plaintiffs from obtaining temporary injunctive relief in this action (at least at present).

the statute; and the institution of any action for injunctive relief to prevent violations of the statute.

## **II. Motion for preliminary injunction**

The preliminary injunction hearing in this matter will be held **July 25, 2014** at **9:30 a.m.**, unless otherwise agreed or postponed by the parties in order to facilitate a negotiated resolution.

The parties have agreed to submit their direct testimony in the form of affidavits, and that affiants will undergo cross-examination, and appropriate "redirect."

On or before **July 18, 2014**, the parties shall jointly file:

- a **single** timeline setting forth all pertinent dates, times, and events, in whatever format the parties jointly choose (in other words, the parties need not comply with [Local Rule 5.1\(a\)](#) with respect to the timeline; any clear visual format utilizing colors or graphics to enhance clarity is permissible);
- a **single** Statement of Agreed Facts and Disputed Facts. The disputed facts are not an invitation to advocacy (i.e., "The plaintiff can not establish irreparable harm because . . . ." or "There is a strong likelihood of success on the merits because . . . ."). The parties should simply list facts they intend to establish at the hearing, or which they contend will not be established at the hearing.

Counsel shall confer (preferably in person, or else by telephone) in a good-faith effort to identify all areas of agreement and to make the statement of facts and timeline filings

as comprehensive as possible, so that open court testimony can focus on matters truly in dispute.

On or before **July 22, 2014**, each party shall file:

- a witness list;
- an exhibit list;
- all "direct examination" affidavits; and
- proposed findings of fact and rulings of law, specifically tailored to each pleaded **claim, affirmative defense, counterclaim, and defense thereto (if applicable)**.<sup>3</sup>

Counsel shall confer before the hearing to identify all areas of agreement and disagreement as to the admissibility of each exhibit.

### **III. Procedural matters**

At the telephone conferences, it was noted that the caption of the complaint in this action incorrectly names Patricia Conway as the Rockingham County Attorney. (The court also notes that the body of the complaint incorrectly names Jim Reams as the Rockingham County Attorney.) The parties agreed that the caption should reflect the fact that James Boffetti is presently the Acting County Attorney for Rockingham County. It is therefore

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<sup>3</sup>The proposed findings and rulings are meant to function as the parties' trial briefs. Counsel may, but are not required, to file separate trial briefs.

ordered that James Boffetti be substituted as a defendant in this action in place of Patricia Conway.

The court also notes that the plaintiffs characterized their motion for a temporary restraining order as an "ex parte" motion. That characterization is only appropriate when a plaintiff is seeking issuance of a temporary restraining order without notice to the adverse party, as contemplated by [Federal Rule of Civil Procedure 65\(b\)\(1\)](#). Here, the plaintiffs did in fact give notice of their motion to the defendants, as specifically noted by the "certification" attached to the motion. The plaintiffs' characterization of their motion, while incorrect, is largely harmless. It did, however, result in the Clerk of Court's office restricting electronic access to the motion and its accompanying filings to court personnel and the plaintiffs.

The court perceives no compelling reason why public access to the plaintiffs' filings should be limited in this manner. Cf. [Nat'l Org. for Marriage v. McKee](#), 649 F.3d 34, 70-71 (1st Cir. 2011) (discussing the "strong and sturdy" presumption favoring public access to judicial records and documents). Accordingly, the plaintiffs' motion for a temporary restraining order and the attachments thereto shall be unsealed, and any other restriction on public access to those documents shall be lifted.

**SO ORDERED.**

A handwritten signature in black ink that reads "Joe Laplante". The signature is written in a cursive style with a large, sweeping initial "J".

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Joseph N. Laplante  
United States District Judge

Dated: July 9, 2014

cc: Michael J. Tierney, Esq.  
Nancy J. Smith, Esq.  
Garry R. Lane, Esq.