STATE OF MAINE
CUMBERLAND, ss

SUPERIOR COURT
Docket No.: CV-15-497

STATE OF MAINE

Plaintiff,

v.

BRIAN INGALLS,

Defendant

ORDER ON DEFENDANT'S MOTION TO DISMISS

This matter comes before the court on Defendant Brian Ingalls' motion to dismiss pursuant to M.R. Civ. P. 12(b)(6). For the reasons stated herein, Defendant's motion to dismiss is denied.

I. BACKGROUND

The State brings this action against Mr. Ingalls pursuant to the Maine Civil Rights Act, 5 M.R.S. §§ 4681 and 4684-B (2)(D) (hereafter the "Act"). The State alleges that on or about October 23, 2015, Mr. Ingalls yelled toward the second floor of the building located at 443 Congress Street in Portland, in which Planned Parenthood of Northern New England operates a health care facility. The State avers that Mr. Ingalls' yelled with the intent and did in fact cause the disruption of the safe and effective delivery of health services inside the facility in violation of the Act. The State requests that the court grant relief as follows: (1) enjoin Mr. Ingalls from knowingly coming within 50 feet of Planned Parenthood's facilities; (2) enjoin Mr. Ingalls from further violating section 4684(2)(D); (3) declare that Mr. Ingalls

violated the Maine Civil Rights Act; (4) order Mr. Ingalls to pay a civil penalty of up to $5,000 for each violation; and (5) order Mr. Ingalls to pay the State's reasonable attorney's fees.

II. Standard of Review

A motion to dismiss tests the legal sufficiency of the complaint and will be granted only if the complaint fails "to state a claim upon which relief can be granted." M.R. Civ. P. 12(b)(6); *State v. Weinschenk*, 2005 ME 28, ¶ 10, 868 A.2d 200. The sufficiency of a complaint is a question of law. *Bean v. Cummings*, 2008 ME 18, ¶ 7, 939 A.2d 676. On a motion to dismiss for failure to state a claim, the facts are not adjudicated. *Marshall v. Town of Dexter*, 2015 ME 135, ¶ 2, 125 A.3d 1141. The court reviews the material allegations in the complaint in the light most favorable to the plaintiff to determine whether the plaintiff would be entitled to relief pursuant to some legal theory. *Bean*, 2008 ME 18, ¶ 7, 939 A.2d 676. Dismissal is warranted only when it appears beyond a doubt that the plaintiff is not entitled to relief under any set of facts that the plaintiff might prove in support of his or her claim. *Id.*

Defendant's motion to dismiss is bottomed on three main arguments; to wit:

1. The State has failed to make allegations that would support a claim under the Maine Civil Rights Act;

2. The relief sought by the State would constitute an impermissible restriction on Mr. Ingalls's speech rights that are afforded to him by the First Amendment; and

3. The salient provision of the Maine Civil Rights Act is unconstitutionally vague on its face.

III. Analysis

A. The Complaint sets forth allegations for which relief may be granted under 5 M.R.S. §§ 4681 and 4684-B.

The Maine Civil Rights Act empowers the Attorney General to bring an injunction action against a person who violates section 4684-B, entitled "Additional Protections." The relevant section of the "Additional Protections" section of the Act that the State presses, provides as follows:

> **2. Violation.** It is a violation of this section for any person, whether or not acting under color of law, to intentionally interfere or attempt to intentionally interfere with the exercise or enjoyment by any other person of rights secured by the Untied States Constitution or the laws of the United States or of rights secured by the Constitution of Maine or laws of the State by any of the following conduct:
>
> > D. After having been ordered by a law enforcement officer to cease such noise, intentionally making noise that can be heard within a building and with the further intent either:
> >
> > (1) To jeopardize the health of persons receiving health services within the building; or
> >
> > (2) To interfere with the safe and effective delivery of those services within the building.

The Act defines "health services" as "any medical, surgical, laboratory, testing or counseling service relating to the human body." 5 M.R.S. § 4684-B(1)(A).

The Complaint sets forth allegations, even without the assistance of viewing them in a light most favorable to the non-moving party, that amply support a claim for which relief may be granted under the foregoing provision of the Act.

Mr. Ingalls contends that the Complaint is deficient insofar as it does not allege that he engaged in violence, threats of violence, property damage or trespass. While those elements are predicate requirements of relief under a separate section

of the Act (§ 4681), they are not required for relief under section 4684-B, which revealingly is entitled "Additional Protections." The latter section of the Act is free standing, insofar as it delimits certain proscribed conduct untethered from the proscribed conduct under section 4681. For that reason the court is not required to reconcile the two provisions in the way that Mr. Ingalls suggests. Mr. Ingalls does not offer a canon of statutory construction which would support his interpretation, as none exists.

Mr. Ingalls also complains that the State fails to identify any patients or employees inside the Planned Parenthood offices who actually heard Mr. Ingalls preaching or whether it interfered with the safe and effective delivery of health services. The State counters that it will support its claim through testimony of Planned Parenthood employees without resorting to calling patients to testify. The court need not concern itself with the parties' trial strategy to resolve a motion to dismiss.

The courts do not require at the initial pleading stage the molecular level of detail that Mr. Ingalls contends the absence of which should result in a dismissal. Maine has long embraced the so-called "notice pleading" rule. *See Johnston v. Me. Energy Recovery Co.*, 2010 ME 52, ¶ 16, 997 A.2d 741, 746 (stating that Maine is a notice pleading state). Notice pleading requires that a complaint give "fair notice of the cause of action," *id.* (quotation marks omitted), by providing "a short and plain statement of the claim showing that the pleader is entitled to relief." M.R. Civ. P. 8(a)(1). "A complaint need not identify the particular legal theories that will be relied upon, but it must describe the essence of the claim and allege facts sufficient

to demonstrate that the complaining party has been injured in a way that entitles him or her to relief." *Burns v. Architectural Doors & Windows*, 2011 ME 61, ¶¶ 16-17, 19 A.3d 823, 828; *see also, Champagne v. Mid-Me. Med. Ctr.*, 1998 ME 87, ¶ 18, 711 A.2d 842, 848 (stating that notice pleading requires a party to "aver[] the essential elements" of a claim).

The Complaint comfortably clears the notice-pleading hurdle. That it lacks specific identification of the patient(s) or provider(s) who heard Mr. Ingalls, and how their hearing him interfered with the safe and effective delivery of health services is of no moment to the court for purposes of testing the legal sufficiency of the Complaint. The same is true of Mr. Ingalls argument that questions how the State could prove that he intended to interfere with the safe and effective delivery of health services. These are the types of concerns best expressed after an evidentiary record has been developed through the discovery process, which may include deposition testimony, document production and interrogatory answers. While these issues may be presented by motion for summary judgment or at trial in order to put the State to its proof, they are prematurely presented in a motion to dismiss.

B. First Amendment Challenge

Defendant argues that the Act constitutes an impermissible restriction of his speech rights afforded to him by the First Amendment. An orderly analysis of that argument requires a review of foundational principles that were absent from the parties' briefs and oral arguments.

When a statute is challenged as unconstitutional either as applied or on its face, trial courts "must construe a statute to preserve its constitutionality, or to

avoid an unconstitutional application of the statute, if at all possible." *Nader v. Me. Democratic Party*, 2012 ME 57, ¶ 19, 41 A.3d 551 (citation omitted). "Thus, when there is a reasonable interpretation of a statute that will satisfy constitutional requirements, [courts] will adopt that interpretation, notwithstanding other possible interpretations of the statue that could violate the Constitution." *Id.* (citations omitted).

An analysis of a constitutional challenge to a statute begins with a presumption that the law is constitutional. *State v. Mosher*, 2012 ME 133, ¶ 10, 58 A.3d 1070 (citing *Godbout v. WLB Holding, Inc.*, 2010 ME 46, ¶5, 997 A.2d 92); *see also Rideout v. Riendeau*, 2000 ME 198, ¶ 14, 761 A.2d 291 (noting a familiar principle that "[a] statute is presumed to be constitutional and the person challenging the constitutionality has the burden of establishing its infirmity"). "A challenger has the burden to demonstrate 'convincingly' that a statute conflicts with the constitution." *Id.* (citing *Godbout*, 2010 ME 46, ¶5, 997 A.2d 92). "[A]ll reasonable doubts must be resolved in favor of the constitutionality of the statute." *Id.* (quoting *Godbout*, 2010 ME 46, ¶5, 997 A.2d 92; citing *Driscoll v. Mains*, 2005 ME 52, ¶ 6, 870 A.2d 124)).

Courts "assume that the Legislature acted in accord with constitutional requirements if the statute can reasonably be read in such a way, notwithstanding other possible unconstitutional interpretations of the same statute." *State v. Letalien*, 2009 ME 130, ¶15, 985 A.2d 4 (citing *State v. Haskell*, 2001 ME 154, ¶ 4, 784 A.2d 4). "Great deference is given to social and economic regulations, and reasonableness is presumed because it is the job of the Legislature, not the courts, to

balance competing interests." *State v. Haskell*, 2008 ME 82, ¶ 5, 955 A.2d 737 (citing *Williamson v. Lee Optical*, 348 U.S. 483, 487 (1955)).

These principles are in harmony with those expressed by the Supreme Court. Facial challenges are disfavored for a variety of reasons, not the least of which is that they often rest on speculation, raising the risk of "premature interpretation of statutes on the basis of factually barebones records." *Sabri v. United States*, 541 U.S. 600, 609, 124 S. Ct. 1941, 158 L. Ed. 2d 891 (2004).

Moreover, facial challenges undermine the democratic process by standing athwart the will of the people from being expressed in a fashion that is consistent with the Constitution. "A ruling of unconstitutionality frustrates the intent of the elected representatives of the people." *Ayotte v. Planned Parenthood of Northern New Eng.*, 546 U.S. 320, 329, 126 S. Ct. 961, 163 L. Ed. 2d 812 (2006) (*quoting Regan v. Time, Inc.*, 468 U.S. 641, 652, 104 S. Ct. 3262, 82 L. Ed. 2d 487 (1984) (plurality opinion)). "A facial challenge to a legislative Act is . . . the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *United States v. Salerno*, 481 U.S. 739, 735 (1987).

1. Vagueness doctrine.

Defendant's argument that the Act is unconstitutionally vague is a facial challenge to the statute. There is some authority for the proposition that the standard to be applied in such circumstances is not as burdensome as articulated in *Salerno*. *City of Chicago v. Morales*, 527 U.S. 41, 55, 144 L. Ed. 2d 67, 119 S. Ct. 1849 & n. 22, 527 U.S. 41, 144 L. Ed. 2d 67, 119 S. Ct. 1849 (1999) (noting, in plurality

opinion, that the standard for evaluating facial challenges is not necessarily quite as demanding as indicated by Salerno, at least where vagueness concerns are present: a law is sometimes subject to facial attack where "vagueness permeates the text"); Richard H. Fallon, Jr., Commentary, As-Applied and Facial Challenges and Third-Party Standing, 113 Harv. L. Rev. 1321, 1321-23 (2000) (explaining the split on the Supreme Court over whether the Salerno formulation of facial challenges is correct or whether some slightly less demanding standard is appropriate).

Mr. Ingalls argues that the Act fails for vagueness because it does not contain and objective standard by which a person may determine the level of noise he is producing and whether it violates the Act. Mr. Ingalls complains that the Act ought to contain some objectively verifiable level of noise that is proscribed, such as decibel level or reference to adjectives such as "loud and raucous." Without an expressed limiting principle, Mr. Ingalls argues that the Act sweeps protected speech within its reach.

The State correctly cites to a series of cases that have examined the issue, several in the context of anti-noise statutes. The court's role in applying constitutional scrutiny to a statute is not to point out draftsmanship deficiencies. Metaphysical precision is not the constitutional requirement. All that due process requires is that the law gives fair notice of the conduct that is prohibited. *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972). A statute is "improperly vague when its language either forbids or requires the doing of an act in terms so vague that people of common intelligence must guess at its meaning." *City of Portland v. Jacobsky*, 496

A.2d 646, 649 (Me. 1985). A vagueness challenge must therefore demonstrate that no standard of conduct is specified by the statute, whatsoever.

The Act does not suffer from an epistemological problem that would render it unconstitutionally vague. The noise proscribed by the Act is one loud enough that it can be heard inside a building with the intent to and effect of interfering with the safe and effective delivery of medical services. The statute requires that the person be given a warning by a law enforcement officer, and if the person persists and does so with the intent to interfere with the safe and effective delivery of medical services, the Act may be enforced. Whatever else may be said about this provision of the Act, it provides fair notice of the conduct that it proscribes. For these reasons the court rejects Defendant's challenge to the Act as unconstitutionally vague.

2. Time, Place, and Manner Restrictions

Mr. Ingalls argues that the State is enforcing the Act against him because it objects to the content of his speech, not its volume. Defendant fashions the argument as an as-applied challenge. However, because there is no evidentiary record upon which Mr. Ingalls relies at this nascent stage, the court must necessarily analyze the argument as a facial challenge to the Act.

It is axiomatic that the government may not regulate speech based on its hostility or favoritism towards the message expressed. *R.A.V. v. City of St. Paul, Minn.*, 505 U.S. 377, 388 (1992). Likewise, the government may not restrict protected speech simply because it annoys, causes emotional upset, or expresses an unpopular political or religious viewpoint. *Snyder v. Phelps*, 131 U.S. 1207, 1219 (2011).

The State argues that the Act represents a permissible time, place and manner restriction on protected speech. *Ward v. Rock Against Ra*cism, 491 U.S. 781, 791 (1989) (government may impose reasonable restrictions on the time, place, or manner of protected speech). As such, the court must subject the Act to a four-part analysis to test its constitutionality. The restrictions must be (1) content neutral; (2) narrowly drawn; to (3) serve a significant government interest; and (4) leave open alternative channels of communication. *Id.*

The Act is content neutral. The inquiry for determining content neutrality "is not whether applying the statute requires some reference to the content of speech, but whether the legislative reason for the law is content neutral." *Hill v. Colo.*, 530 U.S. 703, 719, 720 (2000). The Act clearly has content-neutral purposes; to wit, protecting the safe and effective delivery of medical care. The fortuity that that the regulation has an incidental effect on some speakers or messages but not others is of no moment to the analysis. *Ward*, 491 U.S. at 791. The statute is a reflection of the recognition in First Amendment jurisprudence that the "right to speak does not carry with it a duty on the part of the hearer to listen." *Operation Rescue-Nat'l v. Planned Parenthood of Houston & Southeast Texas, Inc.*, 975 S.W.2d 546, 555 (Tex. 1998). This is particularly true in those instances where the regulation is aimed against a captive listener exercising her right to medical care.

The Act is narrowly drawn to serve a significant government interest. The Act merely prohibits making noise loud enough to be heard inside the building with the intent to jeopardize the health of the person receiving medical care or to disrupt the safe and effective delivery of medical care. The Act affords one warning from a

law enforcement officer, which would allow the person to seize upon the other alternative means to exercise his message in the speech marketplace. The significant government interest, as explicated above, is the protection of captive listeners to obtain safe and effective medical care.

The Act allows for alternative channels of communication. The Act does not prohibit Mr. Ingalls from handing out leaflets, displaying signs, or from counseling or preaching in a conversational tone. It does not prohibit Mr. Ingalls from speaking in other than a conversational tone if done without the intent to interfere with the safe and effective delivery of medical services inside the building. The court is satisfied that the Act is nothing more than a simple time, place and manner restriction.[1]

Although neither of the parties addressed the distinction between a facial and an as-applied challenge to the Act, the court addresses that issue separately to clarify the future course of proceedings. The motion to dismiss merely tests the legal sufficiency of the Complaint and, as such, does not involve the evaluation of an evidentiary record. By its own procedural limitations, any constitutional issues raised in the motion to dismiss and rejected by the court involve only a rejection of facial challenges to the statute. A facial challenge is only successful when there are no circumstances under which the Act would be valid.

While the court concludes that the Act is valid on its face, it is still possible that enforcement against a person in a particular situation could be invalid on an as-applied basis. Mr. Ingalls preserves the opportunity in this case to show that he is

[1] *See, e.g., Madsen v. Women's Health Ctr.*, 512 U.S. 753 (1994); *Pine v. City of W. Palm*

such a person, after an evidentiary record is developed through discovery. Such a challenge may be based on the argument that while the Act itself is neutral and constitutional on its face, it has been enforced selectively in a viewpoint discriminatory way against Mr. Ingalls. The denial of Defendant's motion to dismiss does not impair his right to present an as-applied challenge if supported by the record evidence and the law.

For the foregoing reasons, Defendant's motion to dismiss is denied.

The Clerk is directed to enter this Order on the civil docket by reference pursuant to Maine Rule of Civil Procedure 79(a).

Date: 3/17/16

Lance E. Walker
Justice, Superior Court