No. 17-1669

In the
UNITED STATES COURT OF APPEALS
for the Fourth Circuit

PEOPLE FOR THE ETHICAL TREATMENT OF ANIMALS, INC., ET AL.

Plaintiffs-Appellees,

v.

JOSH STEIN, ET AL.

Defendants-Appellants,

On Appeal from the United States District Court
For the Middle District of North Carolina

BRIEF OF PROFESSORS ALAN CHEN, ERWIN CHEMERINSKY, ERIC FINK, JUSTIN PIDOT, JOHN F. PREIS, AND ALEXANDER A. REINERT AS *AMICI CURIAE* IN SUPPORT OF PLAINTIFF-APPELLANTS

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BRIEF OF *AMICI CURIAE*

Amici curiae, Professors Alan Chen, Erwin Chemerinsky, Eric Fink, Justin Pidot, John F. Preis, and Alexander A. Reinert, submit this brief in support of appellants and respectfully urge this Court to reverse the decision of the trial court.[1]

INTEREST OF THE AMICI

Amici curiae are scholars with expertise in federal courts, civil procedure, and constitutional law who have an interest in the proper interpretation of questions regarding Article III standing. In *amici*'s view, the lower court incorrectly held that Plaintiffs' pre-enforcement challenge was not justiciable because they challenged a civil statute rather than a criminal statute. As discussed below, the District Court's reasoning undermines First Amendment rights while lacking a sound basis in law or logic.

List of Amici Curiae:[2]

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Professor of Law

[1] All parties have consented to the filing of this brief. See Fed. R. App. P. 29(a). Amici state that: (a) no party's counsel authored this brief in whole or in part; (b) no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and (c) no person—other than amici curiae, its members, or its counsel— contributed money that was intended to fund preparing or submitting this brief. Fed. R. App. P. 29(c)(5).

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SUMMARY OF ARGUMENT

Plaintiffs challenge a state law that, if they were to violate it, would impose liability on them for engaging in constitutionally protected conduct. Such suits have been litigated in the federal courts for well over a century. *See Ex parte Young*, 209 U.S. 123 (1908). Despite this, the District Court found that Plaintiffs' suit must be dismissed because they lack standing. Although the District Court's decision rests on multiple grounds, its fundamental premise – that Plaintiffs do not have standing because they challenge a non-criminal statute – cannot be squared with basic standing principles or controlling authority. Indeed, taken to its logical conclusion, the District Court's decision would open a gaping hole in the ability of federal courts to protect important First Amendment rights.

Plaintiffs below seek to challenge N.C. Gen. Stat. § 99A-2 ("Section 99A-2" or "the Act"), a law that they allege prevents them from engaging in First Amendment protected conduct without fear of liability. *Amici* acknowledge that this lawsuit is different from more common pre-enforcement First Amendment challenges because it is brought to invalidate a civil statute that is enforced through private tort suits, rather than against a criminal statute enforced directly by state and local officials. This case thus presents a difficult question: whether, for purposes of Article III standing, a hard line should be drawn between state-

facilitated suppression of speech through private enforcement regimes and state-initiated suppression of speech through criminal prosecutions. Your *amici* argue that although the question is not free from doubt, the private civil enforcement context of the Act should not alter the basic calculus for challenging State action that chills speech through creating a reasonable fear of liability.

Amici's position is informed foremost by the understanding that the First Amendment protects a "cognate right[]," one central to our constitutional democracy. *Thomas v. Collins*, 323 U.S. 516, 530 (1945). Permitting pre-enforcement challenges to statutes that restrict speech is central to ensuring the full exercise of First Amendment rights. Where a threat of enforcement against protected First Amendment activity exists, individuals must choose either to engage in expression, risking enforcement consequences, or succumb to the threat. In either case, there is a justiciable injury if there is a credible threat of enforcement. And the bar for showing a credible threat is low. *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710 (4th Cir. 1999) (declaring that presumption of credible threat exists where "non-moribund statute" facially regulates plaintiff's First Amendment protected activity); *Mangual v. Rotger-Sabat*, 317 F.3d 45, 57 (1st Cir. 2003) (describing threshold as "extremely low"); *see also New Hampshire Right to Life Political Action Comm. v. Gardner*, 99 F.3d 8, 14 (1st Cir. 1996) (describing credible threat inquiry as "forgiving"); *see also*

Preston v. Leake, 660 F.3d 726, 735–36 (4th Cir. 2011) (citing First Circuit case law with approval).

The District Court found that plaintiffs failed to establish Article III standing not because Plaintiffs have an unreasonable interpretation of the Act, not because Plaintiffs failed to allege that the conduct they wish to engage in is protected by the First Amendment, and not because their injuries would not be redressed by a favorable decision. Instead, the District Court found that Plaintiffs did not satisfy Article III's "injury-in-fact" requirement. In particular, the District Court found that the complaint fails to allege that Plaintiffs "have yet suffered" a cognizable injury. Joint Appendix ("J.A.") 99.

The District Court's conclusion rested on several flawed premises. It starts by refashioning Plaintiffs' alleged injury to be enforcement of the Act as opposed to the chill Plaintiffs alleged because of a reasonable fear of enforcement of the Act. J.A. 111-114. Most critically, it then found a distinction between pre-enforcement challenges to criminal versus civil statutes that is not supported by the case law and that undermines important First Amendment principles. *E.g.*, J.A. 115 (distinguishing controlling case law because Section 99A-2 "provides a civil cause of action" (emphasis in original)). Finally, because it disregarded case law involving pre-enforcement challenges to criminal statutes, the District Court then asked whether it was likely that Defendants would seek to enforce the statute

against plaintiff, an inquiry that is not appropriate in evaluating standing in this pre-enforcement posture. J.A. 116-120.

If affirmed, the District Court's decision would severely restrict citizens' abilities to bring pre-enforcement challenges to laws that restrict speech. This, in turn, would significantly erode First Amendment protections for all, because, as this Court and others have confirmed over time, pre-enforcement First Amendment challenges are vital to ensuring that the State cannot suppress speech through fear of liability. For these and other reasons, *amici curiae* respectfully urge this Court to reverse the decision below.

ARGUMENT

I. Pre-Enforcement Challenges to Statutes Such as Section 99A-2 Are Central to Protecting First Amendment Rights

Plaintiffs are longstanding animal rights organizations who have engaged in important First Amendment protected activity in North Carolina in the past. J.A. 16-37. Taking the Plaintiffs' well-pleaded allegations to be true, as is required at this stage, their speech has been chilled because of a reasonable fear that they will incur substantial liability under the Act if they continue to engage in their protected activity. Moreover, Defendants have the ability to enforce the Act against Plaintiffs; indeed, the Attorney General alone has the duty to appear on behalf of the State in any case in which the State has an interest, N.C. Gen. Stat. Ann. § 114-

2, and to "defend actions instituted against the interest of the sovereign power." *Martin v. Thornburg*, 320 N.C. 533, 545–46, 359 S.E.2d 472, 479-80 (1987). This includes intervention to defend the constitutionality of a state statute. *McDonald's Corp. v. Dwyer*, 338 N.C. 445, 447, 450 S.E.2d 888, 890 (1994); 28 U.S.C. § 2403(b); *cf. Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 901 (10th Cir. 2012) (finding challenge to civil statute filed against Attorney General justiciable because a successful suit would "prevent the Attorney General from filing or defending lawsuits on the basis of the challenged provision"); *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 758 (10th Cir.2010). As will be discussed in full below, Plaintiffs have alleged more than enough to establish an injury for Article III purposes: they engaged in protected activity in the past, they have ceased their activity because they reasonably interpret the Act to apply to their protected conduct, and Defendants, like other employers in North Carolina, have the power to enforce the Act against Plaintiffs.

The District Court found that Plaintiffs lacked standing after reasoning that First Amendment challenges to privately-enforceable civil statutes should be treated differently than challenges to criminal statutes. As discussed below, this is not supported by the case law. It also cannot be squared with fundamental First Amendment principles. In a pre-enforcement challenge like this one, Article III standing requirements are designed to be forgiving, and the "leniency of First

Amendment standing manifests itself most commonly in the doctrine's first element: injury-in-fact."[3] *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013). A plaintiff can satisfy this requirement by a "sufficient showing of self-censorship," or "chill." *Id*. at 235-36 (internal quotation marks omitted). This is met when a statute is "likely to deter a person of ordinary firmness" from exercising her First Amendment rights. *Benham v. City of Charlotte*, 635 F.3d 129, 135 (4th Cir. 2011) (internal quotation marks and alterations omitted).

Adherence to liberal standing requirements in a pre-enforcement context is central to fully protecting First Amendment rights. For if a speech-restrictive statute cannot be challenged before it is enforced, individuals face a daunting choice: violate the Act and risk liability in the event a Court finds no constitutional infirmity; or simply refrain from engaging in First Amendment protected activity and never challenge the law. Standing doctrine recognizes that many people will not run the risk of liability, giving the State the power to substantially restrict First Amendment freedoms if no pre-enforcement challenge is justiciable.

[3] Standing requires (1) an actual or threatened injury ("injury-in-fact"), (2) that is fairly traceable to the challenged conduct ("causation"), and (3) will likely be redressed by a favorable decision ("redressability"). *Valley Forge Christian College v. Americans United for Separation of Church and State, Inc.*, 454 U.S. 464, 472 (1982)). Like the District Court, *amici* will focus on the injury-in-fact requirement, although as discussed below, the District Court's reasoning also appeared to rest on a misapplication of causation and redressability principles.

The District Court's decision, resting as it does on an alleged distinction between speech threatened by civil liability and speech threatened by criminal liability, will open the door to this kind of perverse regulation. It will permit government to make an end run around the Constitution by regulating speech through civil statutes rather than criminal ones. Imagine a hypothetical state legislature, for example, that sought to prohibit the teaching of the theory of evolution. If it did so through the criminal law, even one that resulted in only a $500 fine, it would be subject to a pre-enforcement challenge on First Amendment grounds. *Epperson v. Arkansas*, 393 U.S. 97 (1968). If it did so by creating a civil action imposing statutory damages of $10,000, enforceable against a teacher say, by the parents of students, the logic of the District Court's opinion would require a teacher to either forego teaching evolution or teach the doctrine and run the risk of substantial liability in the event the law was found to be unconstitutional. A state legislature seeking to eliminate the teaching of evolution would likely conclude, if the District Court's decision were upheld, that using civil statutes to restrict speech is preferable and more effective.

Moreover, permitting pre-enforcement challenges of privately-enforceable civil statutes which allegedly violate the First Amendment is important to buttressing rule of law principles for the public because it reinforces and rewards the polity's respect for the law. *Mobil Oil Corp. v. Attorney Gen. of Com. of Va.*,

940 F.2d 73, 75 (4th Cir. 1991) ("Public policy should encourage a person aggrieved by laws he considers unconstitutional to seek a declaratory judgment against the arm of the state entrusted with the state's enforcement power, all the while complying with the challenged law, rather than to deliberately break the law and take his chances in the ensuing suit or prosecution."); *see also Bland v. Fessler*, 88 F.3d 729, 737 (9th Cir. 1996) (the decision to forego regulated activity because it violated statute and bring a pre-enforcement challenge "demonstrates a commendable respect for the rule of law"); *Arizona Right to Life Political Action Comm. v. Bayless*, 320 F.3d 1002, 1007 (9th Cir. 2003) ("it would turn respect for the law on its head" to deny standing because a plaintiff "chose to comply with the statute and challenge its constitutionality, rather than to violate the law and await an enforcement action.").

II. The Injury Alleged by Plaintiffs Is Well-Recognized in the Context of First Amendment Pre-Enforcement Challenges

Plaintiffs allege that they are chilled from engaging in concrete forms of advocacy and speech because they reasonably believe them punishable under the Act. J.A. 16-17, 20, 22-25, 28-29, 31, 33, 36. These allegations are sufficient to meet the credible threat inquiry and have long been recognized to establish an imminent and concrete injury for the purposes of Article III standing. Under a long line of Supreme Court cases—*Epperson v. Ark*, 393 U.S. 97 (1968), *Doe v.*

Bolton, 410 U.S. 179 (1973), *Steffel v. Thompson*, 415 U.S. 452 (1974), *Babbitt v. UFW Nat'l Union*, 442 U.S. 289 (1979), and *Virginia v. American Booksellers Assn.*, 484 U.S. 383 (1988)—the relevant threat in a pre-enforcement challenge to a criminal or regulatory statute is the risk that one's intended conduct would violate it. So long as the statute is not moribund and the plaintiffs reasonably fear that their protected First Amendment activity is prohibited, the Supreme Court has found the threat of enforcement of a challenged statute capable of sustaining standing.

This is true where a plaintiff reasonably interprets a statute to apply to her conduct, even if that interpretation is ultimately incorrect. *See e.g., American Booksellers Assn.*, 484 U.S. at 392-93. Nor do plaintiffs need to show that enforcement of a statute is imminent or even likely. *See Epperson*, 383 U.S. at 101-02 (pre-enforcement challenge to a law that had not been used in 40 years); *Doe*, 410 U.S. at 188 (doctors had standing to bring pre-enforcement challenge to criminal abortion statute even though none had been prosecuted nor threatened with prosecution). This Circuit (consistent with the many Supreme Court decisions above) has always required only that plaintiffs have a reasonable fear that a statute, fairly read, applies to their activity to establish injury in chilling-effect First Amendment pre-enforcement actions. *North Carolina Right to Life, Inc.*, 168 F.3d at 710 (presumption of credible threat existed even where statute

had not been enforced for 25 years, because statute on its face regulated expressive activity).

In denying standing, the District Court analogized this case to the Supreme Court's decision in *Clapper v. Amnesty Int'l*, 133 S. Ct. 1138 (2013), concluding that plaintiffs' alleged injuries were too speculative to support standing. But *Clapper* is inapposite here for several reasons. First, the gravamen of the challenge in *Clapper* was premised on potential *future* Fourth Amendment violations. *Id.* at 1147-50. Second, *Clapper* arose in the national security context, where there has typically been greater deference to the government. *Id.* at 1150. And finally, to the extent that the *Clapper* plaintiffs articulated a standing theory based on subjective "chill," it was not one imposed by the risk of enforcement of the challenged statute. It was based on the fear that, notwithstanding the statutory safeguards, the government would seek, and the judiciary would approve, surveillance that violated the Fourth Amendment. *Id.* The *Clapper* plaintiffs argued that the risk of *unlawful* surveillance "is so substantial that they have been forced to take costly and burdensome measures to protect the confidentiality of their international communications; in their view, the costs they have incurred constitute present injury that is fairly traceable to [the Act]." *Id.* at 1146.

The Court rejected standing on the grounds that "the harm [the *Clapper* plaintiffs] seek to avoid is not certainly impending." *Id.* at 1151. However, the

Court cautioned that "[o]ur cases do not uniformly require plaintiffs to demonstrate that it is literally certain that the harms they identify will come about." *Id*. at 1148. The *Clapper* Court did not purport to be refashioning existing standing requirements, but rather providing a gloss on the "concededly … somewhat elastic" concept of "imminence" in cases where the claims relate to the always-contingent risk of future injuries. 133 S. Ct. at 1147 (*quoting Lujan*). On the facts before it, the Court held that the likelihood that the plaintiffs' communications would be subject to FAA surveillance was simply too remote, ultimately resting on a "speculative chain of" contingencies that the Court found exceedingly unlikely to happen. *Id*. at 1150.

The District Court's error here – leading to its erroneous reliance on *Clapper* – was to frame Plaintiffs' injury as "liability under the Act." J.A. 122. But the injury Plaintiffs allege for standing purposes is the chilled speech caused by their reasonable fear that they will be found liable under the Act. This injury is ongoing and imminent – for standing purposes, a court's role in a case like this is to determine whether the alleged fear is objectively reasonable, which requires finding that Plaintiffs reasonably construct the statute as applying to their First Amendment protected activity. In a pre-enforcement challenge like this one, the harm alleged for standing purposes can materialize even without enforcement of the challenged statute. *American Booksellers Ass'n*, 484 U.S. at 392 (stating that

self-censorship "can be realized even without an actual prosecution"); *see also Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000) ("while there may be other, perhaps even better [constructions of the disputed statute], [plaintiff's] is reasonable enough that it may legitimately fear that it will face enforcement"). By contrast, in a case like *Clapper*, many steps, including judicial approval of surveillance that violated the Fourth Amendment, had to be taken before the plaintiffs' fear could be considered "reasonable."

For this reason, the speech-chilling effect created by a statute has always been treated more liberally for purposes of standing than the chilling effect created by fear of *contingent* government action like surveillance programs that may or may not actually end up directed at specific individuals, or other programs that do "not [directly] regulate, constrain, or compel any action on their part." *Clapper*, 133 S. Ct. at 1153. Simply put, where a plaintiff alleges actual and ongoing injury, *Clapper*'s certainly-impending analysis is inapplicable. *Wikimedia Found. v. Nat'l Sec. Agency*, 857 F.3d 193, 211 (4th Cir. 2017).

III. The Statute's Civil Enforcement Regime Does Not Affect the Justiciability of Plaintiffs' Claims

Given the discussion above, it is clear that plaintiffs would satisfy Article III standing requirements if the statute they challenged imposed criminal sanctions. The question is whether – as the District Court assumed – the civil nature of the

sanction imposed by the Act changes the analysis. There is no support in logic or law for that assumption.

On its face, even if one believes that criminal liability carries more serious consequences in the run of cases, it does not follow that speech cannot also be effectively chilled by civil liability. *Sorrell*, 221 at 382 (the "fear of civil penalties can be as inhibiting of speech as can trepidation in the face of threatened criminal prosecution.") (*citing New York Times Co. v. Sullivan*, 376 U.S. 254, 277 (1964)); *cf. Susan B. Anthony List v. Driehaus*, 134 S. Ct. 2334, 2345-46 (2014) (**"**administrative action . . . may give rise to harm sufficient to justify pre-enforcement review.").[4] Of course, most Supreme Court opinions involving First Amendment pre-enforcement challenges involve criminal statutes, but none of those cases suggests that the source of fear matters for the purpose of standing inquiry. Indeed, one need only look at the cases in which the Supreme Court has permitted pre-enforcement challenges to local ordinances that provided only for fines of $500 or less, *e.g.*, *Epperson*, 393 U.S. at 97, and compare those consequences to the punitive exemplary damages authorized by the statute challenged in the instant case, to conclude that the distinction suggested by the District Court between civil and criminal statutes has no home in standing

[4] In *Sorrell*, the court found that a risk of a $10,000 civil penalty was a sufficient deterrent to the plaintiff's speech to find an injury-in-fact. 221 F.3d at 382.

jurisprudence. Although criminal penalties are often deemed more serious than civil penalties, in the First Amendment context the calculus of risk is typically reversed. A protester at city hall may be charged with misdemeanor trespass and perhaps be forced to pay a small fine. The Plaintiffs in this case, however, may face a civil judgment of many millions of dollars—an amount that could easily cripple their national organizations.

That the distinction between civil and criminal sanctions is of no moment for standing purposes can be seen by examining precedent from the Supreme Court, this Court, and its sister circuits. In *Babbitt v. UFW*, 442 US 289 (1979), for example, the Supreme Court considered a pre-enforcement challenge to election procedures related to unionization of agricultural workers. The Court found that challenges to the election procedures were justiciable without discussion of any criminal sanctions. *Id.* at 300-01. This was so even though the challengers "have not invoked the Act's election procedures in the past nor have they expressed any intention of doing so in the future." *Id.* The Court discussed criminal consequences only when discussing a challenge to a different provision of the statute, which limited the union's ability to engage in publicity. *Id.* at 301-02. Here, Plaintiffs have both engaged in conduct that would be actionable under the statute in the past and intend to do so in the future – in *Babbitt*, the Court found

standing even where the plaintiffs had not invoked the challenged act in the past, and had expressed no intent to do so in the future.

On multiple occasions, this Court has also rejected the distinction made by the District Court, confirming that civil enforcement schemes can create a chill to speech that gives rise to an injury-in-fact sufficient for pre-enforcement standing. Indeed, this Court has even found that a non-criminal regulation that simply has the effect of reducing the size of an audience is amenable to pre-enforcement challenge. *White Tail Park, Inc. v. Stroube*, 413 F.3d 451 (4th Cir. 2005).

Perhaps most telling is a decision the District Court in vain tried to distinguish: *Mobil Oil Corp. v. Attorney Gen. of Com. of Va.*, 940 F.2d 73 (4th Cir. 1991). In *Mobil Oil*, the plaintiff brought a pre-enforcement challenge to a statute that created a "stiff civil remedy": $2,500 in liquidated damages in additional to actual damages and attorney's fees. *Id.* at 75. By comparison, the civil remedy here is far more punitive – exemplary damages of $5,000 *per day* that a violation occurs, in addition to compensatory damages and attorneys' fees and costs. N.C. Gen. Stat. § 99A-2(d). But even in a challenge to a less punitive law, the *Mobil Oil* court found that the allegations of self-censorship – even in the absence of an enforcement action – were sufficient to allege standing for a pre-enforcement challenge. 940 F. 2d at 76. The harm alleged – complying with an

allegedly unconstitutional law by limiting one's protected First Amendment activity – was the same in *Mobil Oil* as it is here.

Mobil Oil also is in direct tension with the District Court's holding that the Attorney General is not properly sued here. In *Mobil Oil*, the Virginia Attorney General, sued in her official capacity, argued that there was no standing because the statute was enforced through private civil suits, not by the Attorney General. This Court rejected that argument in multiple iterations. First, even if the Attorney General herself were not the source of the injury alleged by the plaintiff, "a dispute with a state suffices to create a dispute with the state's enforcement officer sued in a representative capacity." *Id.* at 76 n.2. Second, even if the statute was "intended to be enforced by private suits," the plaintiff would in any of those suits assert that the state statute was unconstitutional, at which point the Attorney General could intervene to defend the statute's constitutionality. *Id.* at 76-77. Both circumstances are present here – the plaintiffs have sued the Attorney General in his representative capacity; and even if the statute could only be enforced by private suits, the Attorney General has the right to intervene to defend the statute's constitutionality in a suit between private citizens. N.C. Gen. Stat. Ann. § 114-2; 28 U.S.C. § 2403(b).

Finally, similar to the statute in *Mobil Oil*, the law here provides that the Attorney General has power to enforce the challenged statute. The North Carolina

Attorney General represents the state in affirmative civil litigation, and the Chancellor of the University of North Carolina at Chapel Hill is an employer who may initiate suits on behalf of that entity. *See* J.A. 80. At least one of the Plaintiffs, PETA, has engaged in undercover investigations at the University of North Carolina at Chapel Hill in the past. *See* J.A. 19. The Attorney General also may intervene to defend the constitutionality of a state statute. *McDonald's Corp.*, 338 N.C. at 447. If the Plaintiffs' challenge succeeds, the Attorney General will be prohibited from either initiating suit or intervening to defend the constitutionality of the Act. This is all that is required for standing under Article III.

In other cases, this Court has decided cases consistent with the logic that civil enforcement regimes can have the same chilling effect as criminal statutes. This Court affirmed a district court's finding of standing in a pre-enforcement challenge to a statute that imposed only civil penalties in which the Virginia attorney general argued without support that there was a relevant distinction for standing purposes between civil and criminal statutes. *Ostergren v. McDonnell*, No. CIV. A. 3:08CV362, 2008 WL 3895593, at *4 (E.D. Va. Aug. 22, 2008), *aff'd sub nom. Ostergren v. Cuccinelli*, 615 F.3d 263 (4th Cir. 2010). On appeal, the parties did not address the issue but this Court raised it *sua sponte* and found standing. *Ostergren*, 615 F.3d at 270 n.7. This Court also has upheld standing in pre-enforcement challenges to rules that impose neither civil nor criminal liability,

but that regulate professional conduct such as codes of professional responsibility for attorneys. *Hirschkop v. Snead*, 594 F.2d 356, 362-63 (4th Cir. 1979) (finding standing to challenge Virginia disciplinary rules for lawyers "because the threat of disciplinary action may deter him and other Virginia attorneys from making constitutionally protected statements").

Other circuits have come to similar conclusions. The Ninth Circuit, relying on *Mobil Oil*, held that a pre-enforcement challenge to a civil enforcement scheme relating to telephonic advertising was justiciable even in the absence of any threat of enforcement by the Attorney General, who, along with private litigants, had the power to bring civil suits under the act. *Bland v. Fessler*, 88 F.3d 729, 737 (9th Cir. 1996) ("Had he chosen to violate the civil statute, he would have run a substantial risk of civil fines and private enforcement actions.")

The Tenth Circuit similarly found no difficulty finding standing in a pre-enforcement challenge to a provision of Utah's state constitution that did not involve potential criminal liability, but instead related to the number of votes required for a citizen initiative to become law. *Initiative and Referendum Institute v. Walker*, 450 F.3d 1082 (10th Cir. 2006). That court imported the "credible threat" language from criminal cases and applied it to enforcement of the particular constitutional provision being challenged. *Id.* at 1088-89. To ensure, however, that plaintiffs do more than allege a subjective chill to maintain standing, the court

found that standing could be satisfied by (1) past engagement in the type of speech regulated by the challenged law, (2) a "present desire, though no specific plans," to engage in such speech, and (3) a "plausible" claim that they are not intending to do so because they credibly fear the statute will be enforced. *Id.*[5] The court then found standing because the plaintiffs had supported citizen initiatives in Utah in the past, they wanted to use the initiative process in the future, and they were not currently pursuing initiates because of the challenged constitutional provision. *Id.* at 1090. The Plaintiffs here fit easily within the Tenth Circuit's formulation – they have engaged in protected activity in the past, they have a desire to do so in the future, and they have refrained from doing so because of a plausible fear that the statute will be enforced against them.

IV. The District Court's Implied Causation/Redressability Analysis Was Erroneous

Putting aside the false distinction suggested by the District Court between civil and criminal enforcement regimes, the question remains whether an unconstitutional statute that provides for *private* enforcement actions should be immune from pre-enforcement challenges. The District Court did not frame the question in this way, but its opinion implicitly answered it in the negative through

[5] Although past speech activity was not required, the court held that it "lends concreteness and specificity to the plaintiffs' claims, and avoids the danger that Article III requirements be reduced to the formality of mouthing the right words." *Id.*

an unstated causation/redressability analysis. More specifically, the District Court held that Plaintiffs do not have a live controversy with the Defendants sued here because (a) it was unlikely that the Defendants would sue under the challenged statute or (b) the Defendants have no distinct enforcement authority with respect to the statute. As to the first supposition, as discussed above, this misconceives the nature of the Plaintiffs' injury – Plaintiffs do not have to show that they will be sued, or that it is likely they will be sued, under the Act. In a pre-enforcement First Amendment challenge, even when a statute has not been enforced for many years, a case or controversy exists where a plaintiff self-censors because of a reasonable fear that a statute *applies* to her conduct, not a reasonable fear that the defendant *will enforce* the statute against her. *North Carolina Right to Life, Inc. v. Bartlett*, 168 F.3d 705, 710-11 (4th Cir. 1999) (finding standing even where statute had not been enforced against plaintiffs' intended conduct for 25 years and even where defendants took the "litigation position" that they would not interpret statute to apply to plaintiffs' intended conduct).

In the present case, the Plaintiffs are not challenging a law that has been on the books for twenty-five years but never applied to them. They are challenging a statute that was enacted approximately one year ago. If North Carolina Right to Life could reasonably fear prosecution under a decades-old statute that had not yet been applied to them, surely the Plaintiffs' fear of enforcement is reasonable as

well. While it is true that *North Carolina Right to Life* involved a fear of criminal prosecution and the present case only involves a fear of civil prosecution, as discussed above, the distinction is immaterial for the purposes of standing.

Indeed, in a pre-enforcement challenge to an FEC regulation, this Court found that the alleged injury-in-fact was satisfied even though the FEC had explicitly stated that it had no intention of enforcing the relevant regulation against the plaintiff. In response to the FEC's argument that the plaintiff's alleged injuries were too speculative, the Court stated matter of factly, "[t]o establish standing for a preenforcement challenge to a regulation, it is enough to 'allege[] an intention to engage in a course of conduct arguably affected with a constitutional interest, but prescribed by a [regulation].'" *Virginia Soc'y for Human Life, Inc. v. Fed. Election Comm'n*, 263 F.3d 379, 389 (4th Cir. 2001) *overruled on other grounds by The Real Truth About Abortion, Inc. v. Fed. Election Comm'n*, 681 F.3d 544 (4th Cir. 2012) (*quoting Babbitt*, 442 U.S. at 298) (alterations in original). Standing was established because the plaintiff "alleged an intention to engage in constitutionally protected activities that would fall within the reach of the regulation." *Virginia Soc'y for Human Life, Inc.*, 263 F.3d at 389. Confirming that this Court does not apply a distinction between criminal and civil statutes for standing purposes, it altered the quotation from *Babbitt* to substitute "regulation" for "statute," while

omitting the remainder of the sentence in *Babbitt* which referred to a "credible threat of prosecution." *Babbitt*, 442 U.S. at 298.[6]

As to the District Court's suggestion that there is no case or controversy because Defendants do not have distinct enforcement authority under Section 99A-2, the court erred on multiple counts. First, as discussed above the Attorney General does have distinct authority with respect to the Act: he has a duty to appear in any case in which the State has an interest and has the power to intervene to defend the constitutionality of State law. As the Tenth Circuit has observed, even if the complained-of injuries were generally caused by private interests, not by Attorney General enforcement, a successful suit against the Attorney General was justiciable because a successful suit would "prevent the Attorney General from filing or defending lawsuits on the basis of the challenged provision." *Consumer Data Indus. Ass'n v. King*, 678 F.3d 898, 901 (10th Cir. 2012); *Chamber of Commerce of U.S. v. Edmondson*, 594 F.3d 742, 758 (10th Cir.2010).

Second, the import of the District Court's opinion is that, even if the Defendants in this case were enjoined from enforcing the Act, the Plaintiffs' injuries would not be redressed because other people could bring suit under the Act, thereby continuing to chill Plaintiffs' speech. But the Supreme Court has

[6] Although at the time the FEC could refer "willful and knowing" violations of the regulation to the Department of Justice for criminal prosecution, the parties in *Virginia Society for Human Life* focused on the FEC's civil enforcement regime.**

rejected interpretations of Article III that demand complete redressability, stressing that a plaintiff need show only that a favorable decision would redress "*an* injury," not "*every* injury." *Larson v. Valente*, 456 U.S. 228, 243 n. 15 (1982). Hence, in *Massachusetts v. EPA*, 549 U.S. 497, 526 (2007), the Supreme Court concluded that Massachusetts had standing to challenge the EPA's refusal to regulate greenhouse-gas emissions despite the attenuated causal chain linking agency non-action to potential environmental damage. Redressability was satisfied, the Court explained, because the risk of harm "would be reduced *to some extent* if petitioners received the relief they seek." *Id*. (emphasis added).

Finally, to the extent the District Court suggested that the Plaintiffs' injuries were too speculative because they were based on the potential actions of third parties not before the Court, this misconceives the doctrine. It is true that a lack of causation or redressability can be found where the plaintiff's injury "results from the independent action of some third party not before the Court." *Simon v. Eastern Kentucky Welfare Rights Organization*, 426 U.S. 26, 41-42 (1976). When an unnamed third party is the source of a plaintiff's injury, there is no reason to believe that an order of "prospective relief will remove the harm." *Warth v. Seldin*, 422 U.S. 490, 505 (1975).

In this case, however, the Plaintiffs' injuries do not stem from the "independent action of some third party not before the Court." It is instead the

existence of the Act that creates liability for speech and thus chills expression. And if the Plaintiffs engage in constitutionally protected speech, it is the Defendants themselves who have authority to initiate suits against them. Moreover, when the court has held that a "third party not before the court" thwarts standing, it has been because the third party is a private actor that is not required to obey the Constitution. But that is not relevant here where it is the actions of the State of North Carolina that caused the harm and where striking down the law would remedy the injury.

Plaintiffs' speech is chilled by the existence of the Act. Defendants are necessary parts of a process through which the State can bring about unconstitutional litigation under that law. A judgment against Defendants would plainly eliminate the threat of such litigation. Plaintiffs therefore have standing to bring this suit.

CONCLUSION

For the foregoing reasons, *Amici Curiae* respectfully request that the district court's order be reversed, and this matter be remanded for proceedings consistent with this order.

Respectfully submitted, this the 11th day of August, 2017.

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Counsel for *Amici Curiae* hereby certifies that:

1. This Brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 32(a)(7)(B). The Brief contains less than 7,000 words (as calculated by the word processing system used to prepare this brief), excluding the parts of the Brief exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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Date: August 11, 2017

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I hereby certify that on this the 11th day of August 2017, I caused this Brief of *Amici Curiae* to be filed electronically with the Clerk of Court using the CM/ECF System, which will send notice of such filing to the following registered CM/ECF users:

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