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Superior Court - Suffolk
Docket Number 2384CV02779

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION NO. 2384CV02779

COMMONWEALTH OF MASSACHUSETTS,

Plaintiff,

v.

NATIONALIST SOCIAL CLUB et al.,

Defendants.

Opposition to Defendants' Motion to Dismiss the Commonwealth's Complaint

On December 6, 2023, the Commonwealth filed this civil enforcement action against the defendants, the Nationalist Social Club, Christopher Hood and Liam McNeil (together the "Defendants"), asserting claims for public nuisance, trespass, civil conspiracy, and violations of the Civil Rights Act (G.L. c. 12, § 11H) (the "MCRA" or "Act") and Public Accommodations Law (G.L. c. 272, § 98). The Commonwealth alleges that Defendants have engaged in an escalating pattern of unlawful conduct in cities and towns across the Commonwealth, including in Suffolk County.

Defendants have now moved to dismiss the Commonwealth's MCRA claim on the grounds that (1) venue is improper in Suffolk County (Mass. R. Civ. P. Rule 12(b)(3)); and (2) the complaint fails to state a claim on which relief can be granted (Mass. R. Civ. P. Rule 12(b)(6)). The motion is without merit. First, venue is proper in Suffolk County under both G.L. c. 223, § 5, which authorizes the Commonwealth to file civil enforcement actions in Suffolk County, and under the MCRA, which permits claims to be filed in any county where actionable conduct occurred. Second, the complaint adequately alleges that Defendants have engaged in threatening, intimidating, and coercive conduct that violated the MCRA.

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Defendants' motion also raises what they term an "applied overbreadth" challenge to the MCRA claim under the First Amendment. The challenge – which is both procedurally improper on a motion to dismiss, and legally and factually baseless – fails. The MCRA is not unconstitutionally overbroad. The Commonwealth's MCRA claim targets violent and unlawful conduct, not speech. And the Commonwealth is not selectively enforcing the Act against Defendants because of their political beliefs.

Background

The Commonwealth alleges in its complaint that, over the last several years, Defendants have planned and carried out a campaign of violent and discriminatory conduct that violated state civil rights laws, and created a continuing threat to public peace and safety.[1] Defendant Nationalist Social Club (hereafter "NSC" or the "Club") is an unincorporated association with approximately 30 active members in Massachusetts.[2] Defendants Hood and McNeil hold leadership positions in the Club and, in that capacity, direct and control its activities in the state.[3] Since 2020, Defendants have periodically conducted vigilante "patrols" in Boston, and other cities and towns across Massachusetts, during which they have attempted to claim public streets and neighborhoods as the Club's "territory."[4] Defendants have also repeatedly targeted, and attempted to "disrupt and shut down," public events and activities that they deem undesirable, including because of the race, national origin, sexual orientation, and gender identity of the people involved.[5] For example, during 2022 and 2023, Defendants attempted to shut down a

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[1] *See* Compl. ¶¶ 1, 3, 22-40 (summarizing unlawful conduct and detailing the planned and coordinated nature of Defendants' activities).

[2] *Id*. at 8.

[3] *Id*. at 10-11, 18, 29-40.

[4] *Id*. at 134-154.

[5] *Id*. at 23-25.

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series of Drag Queen Story Hour events organized by LGBTQ+ groups in Jamaica Plain, the Boston Seaport, Fall River, and Taunton[6]; and targeted hotels in Kingston, Woburn, and Marlborough that were providing shelter to recent immigrants through the Commonwealth's Emergency Housing Assistance program.[7] During patrols and targeted Club actions, Defendants have assaulted members of the public[8]; instigated, and attempted to instigate, street fights[9]; vandalized (or "tagged") and trespassed upon public and private property[10]; unlawfully and discriminatorily interfered with access to, and disrupted the operation of, public accommodations[11]; and engaged in other violent, threatening, intimidating, and coercive conduct that interfered with the exercise of rights secured by state and federal law[12].

Based upon these allegations, the Commonwealth's complaint asserts claims for violations of the MCRA (Count I)[13]; violations of the Public Accommodations Law (Count II)[14]; public nuisance (Count III)[15]; trespass (Count IV)[16]; and civil conspiracy (Count V)[17]. Defendants' motion raises no challenge to Counts II – V; their arguments concern only the MCRA claim asserted in Count I. In that Count, the Commonwealth alleges that Defendants have violated the MCRA on multiple occasions, including in February 2022, when Club

[6] *Id.* at 41-96.

[7] *Id.* at 47-123.

[8] *Id.* at 70-76, 146-150.

[9] *Id.* at 57-59 , 129-133.

[10] *Id.* at 127-28, 134-42, 151-54.

[11] *Id.* at 41-50, 64-96, 97-123.

[12] *Id.* at 70-75, 83-86, 90-94, 118-120, 127-133, 146-150.

[13] *Id.* at 155-61.

[14] *Id.* at 162-67.

[15] *Id.*at 168-71.

[16] *Id.* at 172-74.

[17] *Id.* at 175-77.

members physically attacked a pedestrian who was attempting to cross the Fairfield Street bridge in Boston[18]; in November 2022, when Club members threatened and intimidated pedestrians outside an event space called the Democracy Center in Cambridge[19]; in December 2022, when Club members, who were attempting to "shut down" a Drag Queen Story Hour, assaulted members of an LGBTQ+ group on the steps of a public library in Fall River[20]; in January 2023, when Club members wearing ski masks charged into a reading room full of families with young children at a public library in Taunton, and began threatening parents and the performer at another Story Hour event, forcing local police to intervene[21]; and in September 2023, when Club members engaged in threatening, intimidating, and coercive conduct during a Club action targeting a hotel in Marlborough that was providing emergency shelter to immigrants[22]. In their motion, Defendants contend that venue for this claim is not proper in Suffolk County. They also assert that the Commonwealth has not adequately alleged that they violated the Act during the incident at the Fairfield Street bridge in Boston. Defendants do not challenge the sufficiency of the allegations concerning the other violations of the Act.

For the reasons set forth below, Defendants motion must be denied.

<u>Argument</u>

I. Venue is proper in Suffolk County.

The Commonwealth properly brought this civil enforcement action against Defendants in Suffolk County. Under G.L. c. 223, § 5 ("Section 5"), any "civil action" brought by the

[18] *Id.* at 143-150, 157.

[19] *Id.* at 124-133, 157.

[20] *Id.* at 63-78, 158.

[21] *Id.* at 79-96, 159.

[22] *Id.* at 113-123, 160.

Commonwealth may be filed "in Suffolk county." There is no exclusion in the statute for cases that include claims under the MCRA.[23] Venue is therefore proper for this civil action in Suffolk county.

Despite the fact that the Commonwealth cited to G.L. c. 223, § 5 in its complaint[24], Defendants do not contest that venue is proper under the statute. Their motion does not so much as mention Section 5. Instead, Defendants point to a separate venue provision in the MCRA to argue that venue does not lie in Suffolk County. The argument is unavailing. The court cannot simply ignore Section 5, which clearly allows the Commonwealth to bring civil enforcement actions such as this in Suffolk County. Moreover, even were the MCRA the only applicable venue provision, which it is not, venue would still be proper in Suffolk county because conduct alleged to violate the Act occurred here.

The MCRA grants the Attorney General broad enforcement authority to prevent and redress civil rights violations. *See Planned Parenthood League of Mass. v. Blake*, 417 Mass. 467, 479 (1994). The statute provides that whenever the Attorney General determines that any "person or persons" have violated, or attempted to violate, the statute, she may bring a "civil action for injunctive or other appropriate equitable relief to protect the peaceable exercise or enjoyment [of secured rights]." G.L. c. 12, § 11H(a)(1). This civil action may, of course, allege more than one violation of the Act, occurring in more than one location, at more than one time. *See, e.g., Planned Parenthood*, 417 Mass. at 469-72 (affirming judgment in MCRA action filed

[23] Section 5 differs from other venue provisions in Chapter 223 which include various exceptions and conditions. *Compare* G.L. c. 223, § 1 (providing that private transitory actions shall be brought in certain locations "except as otherwise provided").

[24] *See* Compl. at ¶ 20.

against multiple individual and organizational defendants alleging conduct that occurred in at least six counties over a period of approximately two years).

The MCRA authorizes the Attorney General – acting "in the name of the commonwealth" – to file an action in, among other places, "the county in which the conduct complained of occurred." G.L. c. 12, § 11H(a)(1). Where, as here, a civil action alleges multiple violations of the Act, occurring in multiple counties, venue is proper in any of the counties where "the conduct complained of occurred"; there is no single venue in which the case must be litigated. The Supreme Judicial Court has expressly so held in *Cormier v. Pezrow New England, Inc.*, which addressed where an employment discrimination claim arising out of an employment relationship spanning multiple counties (and states) could be brought under nearly identical statutory language. 437 Mass. 302, 305-07 (2002) (analyzing statute providing for civil action to be brought in "the county in which the alleged unlawful practice occurred"). The Court concluded that venue was proper in any county where alleged unlawful conduct occurred. *Id.* at 306 ("Limiting an employee to a single venue in which to bring a discrimination action when an unlawful decision and its implementation may have occurred in many places would be inconsistent with our mandate to construe liberally the statute to protect Massachusetts employees from workplace discrimination"). So too here. *See Batchelder v. Allied Stores Corp.*, 393 Mass. 819, 822 (1985) ("The [MCRA]…like other civil rights statutes, is remedial. As such, it is entitled to liberal construction of its terms.")

Defendants do not contest that the complaint alleges that they engaged in conduct that violated the MCRA in Suffolk County, or that this conduct provides a basis for venue in this court. Instead, Defendants argue that the MCRA effectively prohibits this court, sitting in Suffolk County, from hearing allegations of unlawful conduct that occurred in other counties. *See* Defs.

Mtn. at 2. Not so. Venue is not jurisdiction; it is procedural, addressing the convenience of particular "geographic subdivisions" of the trial court, and, unlike jurisdiction, has nothing to do with the "authority of the court" to hear claims. *Cormier*, 437 Mass. at 305 (explaining that venue is "totally distinct from jurisdiction"). Moreover, there is nothing in the Act that prevents the Court from hearing a "civil action" alleging a pattern of unlawful conduct involving multiple statutory violations committed by the same defendants. *See generally Planned Parenthood*, 417 Mass. at 470 (describing claims brought in single action alleging conduct occurring in "Hyannis, Boston, Brookline, New Bedford, Worcester, and Springfield").

A contrary interpretation of the Act would lead to absurd results. As Defendants concede, in order to "comply" with their interpretation of the MCRA, the Commonwealth would need to bring multiple overlapping cases, in multiple counties, against the same parties. But, if the Commonwealth were to do so, Defendants indicate that they would move to dismiss the various cases for "impermissible claim splitting" under Mass. R. Civ. P. 12(b)(9). *See* Defs. Mtn. at 2; *see also Lyons v. Duncan*, 81 Mass.App.Ct. 766, 770-71 (Rule 12(b)(9) "prohibits the long-barred practice of claim-splitting"; a plaintiff may not bring a civil action "in which the parties and issues are the same" as in another pending action). The Court cannot accept a reading of the law in which the Commonwealth is simultaneously required to, and prohibited from, filing cases in various venues. *See Cormier*, 437 Mass. at 305 ("When jurisdiction exists, venue requirements should be read liberally to ensure access to the Commonwealth's courts").

Even if Defendants' venue arguments were correct, it is unclear to what relief, if any, they would be entitled. Improper venue generally does not provide a basis to dismiss a case; the regular remedy is to transfer claims as necessary to cure the defect. *See Cormier*, 437 Mass. at 307; *see also Brooks v. Maloney*, 54 Mass.App.Ct. 1114, 2002 WL 807034, *1 (2002) (Rule 1:28

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Memorandum and Order) (case may not be dismissed for improper venue absent good cause for "declining to transfer the action"). However, in this case, transferring the MCRA claim (in whole or part) to another venue would simply waste time and resources. As Defendants acknowledge, the MCRA claim involves the same parties, and much of the same conduct, as the Commonwealth's other claims – venue for which is unchallenged in this court. *See* Defs. Mtn. at 2 (conceding that MCRA claim involves the same parties and "same conduct" as other claims). As such, if the MCRA claim (in whole or part) were to be transferred, the Commonwealth would be entitled to reconsolidate back in this court. *See* Mass. R. Civ. P. Rule 42(a) (providing for consolidation of cases "involving a common question of law or fact pending...in the same county or different counties").

II. The complaint states a valid claim for relief under the MCRA. Defendants do not contest the Commonwealth's allegation that they repeatedly violated the Act.

Defendants' contention that the MCRA claim should be dismissed under Mass. R. Civ. P. 12(b)(6) must fail. In its complaint, the Commonwealth has alleged that Defendants engaged in violent or otherwise unlawful conduct that violated the MCRA in multiple locations throughout Eastern Massachusetts.[25] Defendants do not contest that these allegations, taken together, are sufficient to support an MCRA claim. Defendants' motion may be denied on that basis alone. *See Iannacchino v. Ford Motor Co.*, 451 Mass. 623, 635-36 (2008) (Rule 12(b)(6) motion tests whether the allegations in the complaint establish "an entitlement to relief"); *see also Osborne-Trussell v. Children's Hospital Corp.*, 488 Mass. 248, 260 (2021) (explaining that on a Rule 12(b)(6) motion the court must "determine whether the cumulative effect of the complaint's factual allegations' constitutes a plausible claim for relief.") (cleaned up).

[25] *See* Compl. ¶¶ 157-160 (alleging violations in Boston, Cambridge, Fall River, Taunton, and Marlborough).

Defendants' motion seeks only to "dismiss"[26] the Commonwealth's allegation that they violated the Act during an incident on the Fairfield Street bridge in Boston. But they are not entitled to that limited relief, either, as Defendants' actions on the Fairfield Street bridge are actionable under the MCRA.

On a Rule 12(b)(6) motion, the Court must "accept as true the allegations in the complaint, draw every reasonable inference in favor of the plaintiff, and determine whether the factual allegations plausibly suggest an entitlement to relief under the law." *Barbuto v. Advantage Sales and Marketing, LLC,* 477 Mass. 456, 457-58 (2017). The Commonwealth's complaint easily meets this standard.

The MCRA prohibits "any person or persons"[27] from interfering with the exercise or enjoyment of rights secured by state and federal law through threats, intimidation, or coercion. G.L. c. 12, § 11H(a)(1). For the purposes of the statute, a threat "involves the intentional exertion of pressure to make another fearful or apprehensive of injury"; intimidation "involves putting in fear for the purpose of compelling or deterring conduct"; and coercion involves "the application to another of such force, either physical or moral, as to constrain him to do against his will something he would not otherwise have done." *Planned Parenthood*, 417 Mass. at 474.

The Act grants the Attorney General "special standing" to take action to protect the civil rights of the people of Massachusetts. *Id.* at 479. To prevail on an MCRA claim, she must show only that a defendant has engaged in conduct that, if repeated, would cause a reasonable person

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[26] As Defendants' do not actually contest the Commonwealth's entitlement to relief under the MCRA, the motion may more properly be construed as a motion to strike under Mass. R. Civ. P. 12(f).

[27] The definition for the term "person" in the Act is provided by G.L. c. 4, § 7 and includes an unincorporated association such as Defendant NSC. G.L. c. 4, § 7 (defining "person" to include "corporations, societies, [and] associations"); *see also Long v. Co-operating League of America,* 246 Mass. 235, 238 (1923) (definition of person under G.L. c. 4, § 7 encompasses "unincorporated voluntary association"); *Sarvis v. Boston Safe Deposit and Trust Co.*, 47 Mass.App.Ct. 86, 95-96 (1999) (holding that the term "person" in the MCRA carries the "statutory definition appearing in G.L. c. 4, § 7);

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to feel threatened, intimidated, or coerced in connection with the exercise or enjoyment of some secured right. *Id.* (establishing standard in actions brought by Attorney General); *see also Haufler v. Zotos*, 446 Mass. 489, 505 (2006) ("We use a reasonable person standard to determine whether…conduct constituted threats, intimidation, or coercion under the act."); *Redgrave v Boston Symphony Orchestra, Inc.*, 399 Mass. 93, 99-100 (1987) (holding that MCRA does not require showing of specific intent; defendants are liable for the "natural effect" of their conduct).

Defendants contend that the Commonwealth has not adequately alleged that they violated the MCRA during an incident in which they followed, surrounded, and then attacked a female pedestrian who was attempting to cross a public bridge. More specifically, and as discussed above, the Commonwealth alleges as follows:

> Defendants periodically carry out vigilante "patrols" in cities and towns across the Commonwealth. During these patrols, Club members seek out and attempt to instigate fights and other physical confrontations with members of the public. Defendants engage in this conduct in an attempt to intimidate their "enemies" and claim public spaces as their territory. Defendants also scout locations, and plan tactics, for patrols in advance. Defendants Hood and McNeil, who hold leadership positions in NSC-131, direct and control the Club's patrol activities.[28]
>
> On February 12, 2022, approximately fifteen masked and uniformed NSC members carried out a patrol in Boston during which they conducted a "banner drop" at the Fairfield Street bridge. During the patrol, a woman who was attempting to cross the bridge objected to the fact that Club members were obstructing pedestrian traffic and recording people as they passed without their consent. In response, at least one masked NSC member began following the woman as she crossed the bridge. Another masked NSC member then stepped out in front of her and performed a Nazi salute, causing the woman to stop. The woman then briefly pulled on a section of the banner the Club members had attached to the railing of the bridge. Three more NSC members then charged at the woman, surrounding her and forcing her up against the opposite railing of the bridge. One of the NSC members then assaulted the woman, striking her in the arm, while the other members shouted in her face.[29]

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[28] *See* Compl. at ¶¶ 11, 18, 26-40, 134-42

[29] *Id.* at ¶¶ 143-50

> Defendants Hood and McNeil were personally present and participated in this attack.[30]

These allegations, which are taken as true, *see Barbuto,* 477 Mass. at 457-58, are more than sufficient to establish a violation of the MCRA. It is at least plausible that Defendants' conduct, if repeated, would cause a reasonable person to feel threatened, intimidated, and coerced in the exercise and enjoyment of secured rights, including the right to personal safety and security, and the right to use public roads and sidewalks.[31] Defendants engaged in physically confrontational, violent behavior that would cause a reasonable person to feel fearful, apprehensive and concerned for their physical safety; and would deter and constrain them from using the Fairfield Street bridge (or another public way) "while that conduct continued." *Planned Parenthood*, 417 Mass. at 475-76 (holding that protesters who caused physical confrontations with abortion clinic staff and patients that were likely to cause a reasonable person to experience fear, apprehension, and concern for personal safety violated the MCRA); *see also Com. v. Oliveira*, 56 Mass.App.Ct. 1114, 2002 WL 31758664, *1-2 (2002) (Rule 1:28 Memorandum and Order) (finding that physical and verbal attacks violate "the right to personal security" under criminal Civil Rights Act, G.L. c. 265, § 37). Defendants' actions would likely have this unlawful impact on a reasonable person who was directly subjected to their abusive conduct, or on a reasonable person who witnessed that conduct. *Id.* at 473 n. 8 ("Evidence of an actual or potential physical

[30] *Id.* at 18.

[31] The term "secured right" encompasses more than those rights that are directly granted, or "fully protected," by the laws and constitution of Massachusetts and the United States; it extends to encompass any right or privilege that is created by, arises from, finds its source in, or is dependent on federal or state law. *See Bell v. Mazza*, 394 Mass. 176, 182 (1985). The right to personal safety and security is secured by Articles 1 and 10 of the Declaration of Rights (which guarantee rights to life, liberty, and safety) and G.L. c. 266, § 13A (which prohibits assault). The right to use public roads and sidewalks, which are public accommodations, is secured by G.L. c. 272, § 98 (which declares "full and equal" access to public accommodation to be a civil right) and the common law, *see, e.g., Cheney v. Baker*, 198 Mass. 356, 363 (1908) ("Our roads or public ways are established for the common good and for the use and benefit of all the inhabitants of the commonwealth.").

confrontation between two people…that has the effect of depriving a third person…of protected rights can sufficiently prove a violation of the MCRA.").

In their motion, Defendants argue that, during the incident on the Fairfield Street bridge, they did nothing more than attempt to protect their banner from the pedestrian who "briefly pulled" on it. *See* Defs. Mtn. at 3-4. Defendants attempts to recast themselves as the innocent victims of a "criminal" attack[32] is thoroughly unconvincing – and presents a factual dispute that cannot be the basis for a motion to dismiss. *See Barbuto,* 477 Mass. at 457-58; *see also Magliacane v. City of Gardner*, 483 Mass. 842, 861 (2020) (explaining that "fact-intensive" defenses and arguments cannot be resolved under Rule 12(b)(6)); *Com. v. Purdue Pharma, L.P.*, 2019 WL 5495866, *2 (Sup. Ct. Sept. 17, 2019) (Sanders, J.) (holding that defenses "disput[ing[the factual basis for the Commonwealth's allegations…cannot be resolved under Rule 12(b)(6)"). The complaint sets forth detailed allegations that Defendants intended to cause a confrontation on the Fairfield Street bridge; initiated that confrontation before the pedestrian "briefly pulled" on their banner; and continued that confrontation, and carried out an assault, after any "threat" to their property had passed.

III. The Civil Rights Act is not unconstitutionally overbroad.

Defendants' motion also asserts an "applied overbreadth" challenge to the MCRA claim under the First Amendment.[33] Defendants arguments are contradictory, underdeveloped, and provide no basis for relief.

[32] As a matter of law, a member of the public does not commit a criminal act by pulling on a banner that has been attached to a highway overpass without proper authorization from the state. *See, e.g.,* G.L. c. 266, § 126 (unauthorized material affixed to public property within the limits of a highway constitutes a statutory nuisance and may be "removed or obliterated by any person.")

[33] The Commonwealth is unaware of any case applying an "applied overbreadth" framework. In a conventional overbreadth challenge under the First Amendment, the defendant concedes that the relevant statute has been constitutionally applied in their case, but would be unconstitutional if applied in other situations. *See United States*

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First, Defendants assert that the MCRA is unconstitutionally overbroad. But Defendants do not actually make an overbreadth argument – which is, by definition, a facial and not an as-applied challenge. *See Virginia v. Hicks*, 539 U.S. 113, 118 (2003) (explaining that a First Amendment overbreadth claim is a facial challenge directed at "invalidat[ing] *all* enforcement" of a statute) (emphasis in original). To establish that the MCRA is overbroad, Defendants would have to show that the Act, on its face, "punishes a substantial amount of protected speech, judged in relation to the statute's plainly legitimate sweep." *United States v. Ackell*, 907 F.3d 67, 72 (1st Cir. 2018). The first step in presenting such a challenge is to analyze the text of the statute together with any "limiting construction…grafted on that language [through judicial interpretation]." *O'Brien v. Borowski*, 461 Mass. 415, 422 (2012); *see also United States v. Williams*, 553 U.S. 285, 293 (2008) (explaining that the "first step" in overbreadth challenge is to analyze statutory language since "it is impossible to determine whether a statute reaches too far without first knowing what the statute covers."). Defendants' motion addresses none of this. The MCRA – which is modeled on 42 U.S.C. § 1983, *see Batchelder*, 393 Mass. at 822-23 – prohibits only interference with secured rights through the use of threats, intimidation, or coercion. *See* G.L. c. 12, § 11H(a). Such a prohibition, on its face, neither targets nor improperly intrudes upon constitutionally protected speech or expression. *See Hicks*, 539 U.S. 124 ("Rarely, if ever, will an overbreadth challenge succeed against a law or regulation that is not specifically addressed to speech or to conduct necessarily associated with speech"). Moreover, the Supreme Judicial Court has already held that the Act does not apply to constitutionally protected activity. *See Redgrave*, 399 Mass. at 97 ("[A] person exercising constitutional rights…is not interfering

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v. Ackell, 907 F.3d 67, 71-72 (1st Cir. 2018)*; see also Farrell v. Burke*, 449 F.3d 470, 498 (2d Cir. 2006) ("A party alleging overbreadth claims that although a statute did not violate his or her First Amendment rights, it would violate the First Amendment rights of hypothetical third parties if applied to them).

with the rights of another person…within the meaning of [the MCRA].”). Defendants’ overbreadth challenge fails.

Second, Defendants contend that the Commonwealth’s allegation that they violated the MCRA during the incident on the Fairfield Street bridge targets speech and expressive conduct protected by the First Amendment. But the complaint itself refutes that contention. *See supra* Section II. To be perfectly clear, the Commonwealth alleges that Defendants violated the MCRA by carrying out a coordinated physical attack on a pedestrian who was attempting to cross a public bridge.[34] Defendants do not, and cannot, make any argument that assaultive conduct is protected by the First Amendment. *See, e.g., Com. v. Robicheau*, 421 Mass. 176, 183 (1995) (holding that First Amendment does not protect assault or other conduct that threatens the physical safety of another person).

Third, Defendants contend that the Attorney General is selectively enforcing the MCRA against them because of their political beliefs.[35] The challenge is procedurally improper, as well as factually and legally baseless. Selective enforcement is an affirmative defense. *See In re Crossen*, 450 Mass. 533, 572 (2008) (describing defense of selective enforcement in the civil context). An affirmative defense may be raised on a Rule 12(b)(6) motion only if it is based exclusively on the facts alleged in the complaint; a defendant may not rely on matters outside the complaint. *See Cavanagh v. Cavanagh*, 396 Mass. v. 836, 838 (1986) (holding that party may raise affirmative defense on motion to dismiss only if “the complaint shows on its face the existence of [that] affirmative defense”); *Eigerman v. Putnam Investments, Inc.*, 450 Mass. 281,

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[34] Defendants’ assertion that the Commonwealth brought the MCRA claim against them for “hanging a banner off a bridge, performing a Nazi salute, and congregating on a public sidewalk,” *see* Defs. Mtn. at 4, is inaccurate.

[35] Whereas an overbreadth challenge is based upon the contention that a statute is unconstitutional on its face, a selective enforcement challenge under the First Amendment asserts that a statute is “itself neutral and constitutional in all fact situations, but that it has been enforced selectively in a content or viewpoint discriminatory way.” *McCoy v. Town of Pittsfield*, 59 F.4th 497, 506 (t 1st Cir. 2023).

285 n. 6 (2007) ("The only facts appropriate for consideration in deciding a motion to dismiss are…factual allegations contained in the complaint or within attached exhibits.") Here, Defendants make no argument that the factual allegations set out in the complaint establish a selective enforcement defense. Nor can they; the complaint establishes that the Commonwealth has brought an MCRA claim against Defendants because they have repeatedly, and violently, interfered with the civil rights of Massachusetts residents, and engaged in conduct that presents a continuing and escalating threat to public safety. Defendants' attempt to contest those facts, and support their selective enforcement challenge, by introducing newspaper clippings is improper. *Id.* Defendants' challenge therefore fails.

Even if Defendants' challenge were procedurally proper, the newspaper articles they attach to their motion do not suggest that the Commonwealth has failed to enforce the law in situations similar to that alleged in the complaint – much less establish that it has engaged in a pattern of intentionally discriminatory viewpoint-based favoritism, as would be required to establish a selective enforcement claim. *See McCoy v. Town of Pittsfield*, 59 F.4th 497, 506 (1st Cir. 2023); *McGuire v. Reilly*, 386 F.3d 45, 63-64 (1st Cir. 2004). Defendants argue that the articles show that the Commonwealth has failed to bring MCRA claims in connection with a series of "public protest assemblies" during which protesters blocked traffic and engaged in other disruptive conduct.[36] *See* Defs. Mtn. at 5. But this is woefully insufficient to establish selective

[36] Defendants motion identifies protests by "climate change" and "Palestine" protesters, but also refers to an apparently large number of other protests carried out by unspecified groups that did not result in MCRA enforcement actions. *See* Defs. Mtn. at 5. These groups ostensibly include white-nationalist groups which, based on public reporting, appear to share a similar political viewpoint with Defendants. *See* "The white-nationalist Patriot Front is getting bigger, and more visible, in New England," Boston Globe, July 23, 2022 (accessible at https://tinyurl.com/5n8k3cz2). This undermines Defendants' argument. As discussed above and below, Defendants cannot establish selective enforcement simply by alleging that the Commonwealth has failed to bring MCRA claims in certain situations; they must show that the Commonwealth's enforcement decisions create a "pattern of unlawful favoritism" based on political viewpoint. *McGuire*, 386 F.3d at 63. If anything, Defendants motion demonstrates only that the Commonwealth does not bring MCRA claims based upon the existence of what Defendants'

enforcement. As is clear from even the brief descriptions set forth in Defendants' filing, the "protests" they point to did not involve conduct similar to that alleged to have violated the MCRA in this case. *See McGuire*, 386 F.3d at 62 (selective enforcement challenge must show favorable treatment of "similarly situated persons"). To reiterate, the complaint alleges that, over a period of several years, Defendants have repeatedly and deliberately engaged in violent, threatening, intimidating, and coercive conduct that targeted Massachusetts residents and interfered with their civil rights. S*ee* Background *supra*. In contrast, Defendants characterize the protests they point to as involving the "deliberate and forcible obstruction of traffic…in the Boston metropolitan area." Defs. Mtn. at 5. Moreover, Defendants do not contend that any unlawful conduct involved in these protests went unaddressed by the Commonwealth. In fact, Defendants acknowledge that the protests resulted in a significant number of arrests and criminal prosecutions, including felony prosecutions. *See* Defs. Mtn. at 6. Defendants' assertion that the protesters received preferential treatment because of their political beliefs is therefore inaccurate, refuted by their own submission. *See McGuire*, 386 F.3d at 63-64 (holding that party raising selective enforcement challenge must show "pattern of unlawful favoritism" attributable to "invidious intent by [law enforcement]"). Defendants, then, have failed entirely to establish that the Commonwealth is impermissibly making enforcement decisions based upon political viewpoint, as opposed to any of the "great number of legitimate, non-discriminatory reasons" the government may have to "engage in or decline [a particular] prosecution [in a particular situation]," *id.,* including the facts of the case and the availability of different enforcement tools.

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characterize as "public protest assemblies" – regardless of the political viewpoint of the individuals or groups involved.

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Conclusion

For the reasons stated, the Commonwealth respectfully requests that the Court deny the motion.

The Commonwealth Requests a Hearing Pursuant to Superior Court 9A(2).

Respectfully submitted,

COMMONWEALTH OF MASSACHUSETTS
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