IN THE UNITED STATES DISTRICT COURT
DISTRICT OF SOUTH CAROLINA

United Resource Systems, Inc., Plaintiff, v. Alan Wilson, in his official capacity as Attorney General of South Carolina., Defendant.	C/A No. 3:21-0364-JFA **ORDER**

This case is currently before the Court on Defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure. (ECF No. 15). Having been fully briefed, this matter is ripe for review. Pursuant to Local Civil Rule 7.08, this Court finds that a hearing is not necessary in adjudicating this motion.

I. FACTUAL AND PROCEDURAL HISTORY

Plaintiff United Resource Systems, Inc. filed the present action against Defendant Alan Wilson, in his official capacity as Attorney General of South Carolina, seeking a declaration that S.C. Code Ann. § 37-21-50 (2018) (the "Anti-Spoofing Statute") is unconstitutional. The Anti-Spoofing Statute is contained within the South Carolina Telephone Privacy Protection Act, ("SCTPPA") S.C. Code Ann. § 37-21-50 *et seq.* (2018), which became effective when signed into law on May 18, 2018. Plaintiff has since engaged in actions which arguably violate the Anti-Spoofing Statute. Indeed, Plaintiff initiated this action after a putative civil class action was filed against it in South Carolina state court.

See Am. Compl. ¶ 25. Defendant is not a party to that underlying state court action but does have the authority to independently investigate and enforce violations of the SCTPPA. S.C. Code Ann. § 37-21-90.

Based upon numerous constitutional arguments and 42 U.S.C. § 1983, Plaintiff brings this action seeking a declaration that the Anti-Spoofing Statute is conflict preempted and is unconstitutional, and seeks injunctive relief preventing Defendant from enforcing the same.

Defendant filed a 12(b)(1) and 12(b)(6) Motion to Dismiss Plaintiff's original Complaint on April 16, 2021. (ECF No. 7). In response, Plaintiff filed a Memorandum of Law in Opposition to Defendant's Motion to Dismiss (ECF No. 10), as well as an Amended Complaint (ECF No. 11) on May 6, 2021. Defendant filed a reply (ECF No. 13) on May 13, 2021.

Thereafter, Defendant filed the instant motion to dismiss Plaintiff's Amended Complaint pursuant to Rule 12(b)(1) on the ground that Plaintiff lacks standing to bring the present action. (ECF No. 15). Given that Plaintiff's Amended Complaint supplants its original Complaint, Defendant's initial motion to dismiss the original Complaint is now moot. Thus, the lone remaining issue is whether Plaintiff has standing to assert this action.

II. LEGAL STANDARD

A complaint should be dismissed pursuant to Rule 12(b)(1) of the Federal Rules of Civil Procedure if the court lacks jurisdiction over the subject matter. *See* Fed.R.Civ.P. 12(b)(1). There are two ways to present a motion to dismiss for lack of subject matter jurisdiction under Rule 12(b)(1). *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). First,

if it is "contended that a complaint simply fails to allege facts upon which subject matter can be based…[then] all the facts alleged in the complaint are assumed to be true and the plaintiff, in effect, is afforded the same procedural protection as he would receive under a Rule 12(b)(6) consideration." *Id.*

"Second, it may be contended that the jurisdictional allegations of the complaint were not true." *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982). "When a Rule 12(b)(1) motion challenge is raised to the factual basis for subject matter jurisdiction, the burden of proving subject matter jurisdiction is on the plaintiff." *Richmond, Fredericksburg & Potomac R. Co. v. United States*, 945 F.2d 765, 768 (4th Cir. 1991). "In determining whether jurisdiction exists, the district court is to regard the pleadings' allegations as mere evidence on the issue, and may consider evidence outside the pleadings without converting the proceeding to one for summary judgment." *Id.* In this second situation, the court "should apply the standard applicable to a motion for summary judgment, under which the nonmoving party must set forth specific facts beyond the pleadings to show that a genuine issue of material fact exists." *Id.* The moving party should prevail only if the material jurisdictional facts are not in dispute and the moving party is entitled to prevail as a matter of law. *Id.*

Given that both parties cite heavily to matters outside of the pleadings, it appears that this second avenue for attacking subject matter jurisdiction is the one most appliable to the instant motion.[1]

[1] Although the parties repeatedly cite to external documents, they do not appear to disagree as to the relevant facts alleged in the Amended Complaint. Thus, one could argue that the first method

Further, subject matter jurisdiction in the federal courts is limited to the adjudication of actual "cases" and "controversies" under Article III of the United States Constitution. *See* U.S. Const. art. III, § 2; *Deakins v. Monaghan,* 484 U.S. 193, 199, 108 S.Ct. 523, 98 L.Ed.2d 529 (1988) ("Article III of the Constitution limits federal courts to the adjudication of actual, ongoing controversies between litigants."); *Bryant v. Cheney,* 924 F.2d 525, 529 (4th Cir.1991). Article III standing is comprised of three elements: (1) an injury in fact; (2) a causal connection between the injury and the conduct complained of; and (3) the injury must likely be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

III. DISCUSSION

Apart from the constitutional minimum requirements for Article III standing discussed above, the Supreme Court has recognized a specialized form of standing for plaintiffs who are facing possible potential injury through the imminent enforcement of an allegedly unconstitutional law but have yet to suffer actual injury in fact. *See Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979)("A plaintiff who challenges a statute must demonstrate a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement. But one does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending, that is enough.")(cleaned up).

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for attacking subject matter jurisdiction, wherein the 12(b)(6) standard is applied, is the more appropriate test for adjudicating this motion. The Court would note that the outcome reached below would remain the same regardless of the standard applied.

In his motion, Defendant contends that Plaintiff lacks both Article III and pre-enforcement standing and therefore this Court lacks subject matter jurisdiction.

A. Pre-Enforcement Standing

Although Defendant disagrees with the characterization, Plaintiff contends that this case asserts a pre-enforcement action for prospective relief against an unconstitutional law. Accordingly, to show standing, "there must be a non-speculative claim of future injury, usually in the form of a credible threat that the challenged law will be enforced against the putative plaintiffs." *Abbot v. Pastides*, 900 F.3d 160, 168 (4th Cir. 2018) (internal citation and quotation marks omitted). "Unlike injuries that occurred in the past and may no longer be imminent, ongoing injuries are, by definition, *actual* injuries for purposes of Article III standing." *Deal v. Mercer County Bd. of Educ.*, 911 F.3d 183, 189 (4th Cir. 2018) (emphasis in original). "To establish standing, a plaintiff who contests the constitutionality of a criminal statute must allege 'an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and … a credible threat of prosecution thereunder.'" *Richmond Med. Ctr. For Women v. Gilmore*, 183 F.3d 303, 304 (4th Cir. 1998) (quoting *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 2309 (1979)).

Recently, the Fourth Circuit has stated:

> The injury-in-fact requirement ensures that plaintiffs have a "personal stake in the outcome of the controversy." *Warth v. Seldin*, 422 U.S. 490, 498, 95 S.Ct. 2197, 45 L.Ed.2d 343 (1975). Injury in fact is "an invasion of a legally protected interest" that is "concrete and particularized" and "actual or imminent, not conjectural or hypothetical." *Spokeo*, 136 S.Ct. at 1548. "An allegation of future injury may suffice if the threatened injury is certainly impending, or there is a substantial risk that the harm will occur." *Susan B.*

> *Anthony List v. Driehaus*, —— U.S. ——, 134 S.Ct. 2334, 2341, 189 L.Ed.2d 246 (2014) (internal quotation marks omitted). But because plaintiffs here seek declaratory and injunctive relief, they must establish an ongoing or future injury in fact. *O'Shea v. Littleton*, 414 U.S. 488, 495–96, 94 S.Ct. 669, 38 L.Ed.2d 674 (1974) ("Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief ... if unaccompanied by any continuing, present adverse effects.").
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> There are two ways that plaintiffs' allegations of a fear and risk of future arrest can satisfy the injury-in-fact requirement for prospective relief. First, there is a sufficiently imminent injury in fact if plaintiffs allege "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder." *Babbitt v. Farm Workers Nat'l Union*, 442 U.S. 289, 298, 99 S.Ct. 2301, 60 L.Ed.2d 895 (1979). "[I]t is not necessary that [a plaintiff] first expose himself to actual arrest or prosecution to be entitled to challenge a statute that he claims deters the exercise of his constitutional rights." *Steffel v. Thompson*, 415 U.S. 452, 459, 94 S.Ct. 1209, 39 L.Ed.2d 505 (1974). Separately, there is an ongoing injury in fact if plaintiffs make a "sufficient showing of self-censorship, which occurs when a claimant is chilled from exercising his right to free expression." *Cooksey v. Futrell*, 721 F.3d 226, 235 (4th Cir. 2013) (internal quotation marks omitted).
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> *Kenny v. Wilson*, 885 F.3d 280, 287–88 (4th Cir. 2018).

The *Kenny* court went on to explain that there is a credible threat of future enforcement so long as the threat is not "imaginary or wholly speculative." *Id.* "Threat of prosecution is especially credible when defendants have not 'disavowed enforcement' if plaintiffs engage in similar conduct in the future." *Id.*

Under Supreme Court and Fourth Circuit precedent, several factors may be weighed in determining whether there is a sufficient threat of future enforcement to establish pre-enforcement standing: (1) past enforcement against, or official threats towards, the plaintiff; (2) a failure to disavow future enforcement by the defendant; and (3) past

enforcement against similarly situated persons. *See Kenny v. Wilson*, 885 F.3d 280 (4th Cir. 2018); s*ee also Steffel v. Thompson*, 415 U.S. 452, 94 S. Ct. 1209 (1974).

Here, the parties do not appear to dispute that (1) Plaintiff has not been prosecuted by Defendant for violating the Anti-Spoofing Statute; (2) Defendant has not specifically or individually threatened to enforce the Anti-Spoofing Statute against Plaintiff; (3) Defendant has not yet enforced this provision against similarly situated persons; and (4) Defendant has not disavowed enforcement of the Anti-Spoofing Statute as to Plaintiff.

Defendant argues that these first three facts cut against Plaintiff considerably. Essentially, Defendant avers that Plaintiff has failed to allege that it is at serious risk of facing prosecution from Defendant and therefore lacks standing to bring this pre-enforcement action. Defendant further attests that although it has not disavowed the possibility of future enforcement, that factor is less relevant because there is no evidence of prior enforcement. This Court disagrees.

Here, Defendant's arguments regarding a failure to enforce this provision on Plaintiff or similarly situated entities carries little weight given the "very recent vintage" of the SCTPPA. *See EQT Prod. Co. v. Wender*, 191 F. Supp. 3d 583, 591 (S.D.W. Va. 2016), aff'd, 870 F.3d 322 (4th Cir. 2017). As Plaintiff points out, Defendant has touted his efforts to extend consumer protections afforded in the SCTPPA.[2] This Court agrees with

[2] *See, e.g.,* Rickey Ciapha Dennis, Jr., *South Carolina attorney general joints multi-state fight against robocalls,* The Post and Courier, Dec. 9, 2018 (updated Sept. 14, 2020), at https://www.postandcourier.com/news/south-carolinaattorney-general-joins-multi-state-fight-against-robocalls/article_bb86ed9c-fa71-11e8-ac74- 9bdadbf7cb02.html (last visited Apr. 27, 2021); *see also* "AG Alan Wilson Joins Effort to Expand Illegal Robocall Response" at http://www.scag.gov/archives/40624 (last visited May 3, 2021), "Attorney General Alan Wilson

Plaintiff's proposition that Defendant "simply cannot fashion himself as a champion of consumers' rights in the area of unwanted telephone calls and then credibly claim there is no risk to Plaintiff of him enforcing statutes designed to protect against those same calls." Why promote a statute that no one intends to enforce? *EQT Prod. Co. v. Wender*, 191 F. Supp. 3d 583, 591 (S.D.W. Va. 2016), *aff'd,* 870 F.3d 322 (4th Cir. 2017) ("It is obviously meant to be used—otherwise, why pass it and refine it in the first place?"); *see also Kenny v. Wilson*, 885 F.3d 280, 288 (4th Cir. 2018)("Furthermore, there is a presumption that a non-moribund statute that facially restricts expressive activity by the class to which the plaintiff belongs presents such a credible threat.")(internal quotations omitted).

If Defendant truly wanted to show Plaintiff had no standing in this action, he would have expressly disavowed any intention to enforce the Anti-Spoofing Statute against Plaintiff. Instead, Defendant appears to argue that he may or may not enforce this recent statute, but Plaintiff should be forced to live in constant fear of that enforcement with no means of recourse. This Court declines such an invitation. Defendant's explicit failure to disavow future enforcement in this action indicates that the threat of prosecution is not imaginary. *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 298 (1979)(citing *Younger v. Harris*, 401 U.S. 37, 42 (1971)); *see also EQT Prod. Co. v. Wender*, 191 F. Supp. 3d 583, 592 (S.D.W. Va. 2016), *aff'd,* 870 F.3d 322 (4th Cir. 2017)("Although EQT

Urges the FCC to Strengthen Efforts to Stop Robocalls" at http://www.scag.gov/archives/39367 (last visited May 3, 2021), and "Attorney General Alan Wilson Joins Coalition of 51 Attorneys General and 12 Companies in Fight Against Illegal Robocalls" at http://www.scag.gov/archives/39327 (last visited May 3, 2021).

has not shown the existence of a literal threat to prosecute from county enforcers, under these circumstances, the Ordinance itself is the threat.").

B. Article III Standing

Defendant also argues that Plaintiff lacks Article III standing to assert this action because Plaintiff's actual injury-in-fact appears to be tied to the potential civil liability it faces in the underlying state court class action. In other words, Defendant avers that Plaintiff's attempt to characterize this case as a mere "pre-enforcement" action is simply a ruse used to manufacture Article III standing. As such, Plaintiff cannot show Article III standing in the present action because the named defendant's conduct cannot be fairly traced to that injury. Defendant similarly asserts that if this Court were to find for Plaintiff and grant it the injunctive and declaratory relief sought, such relief would not provide redress as to the Plaintiff's alleged injury-in-fact in facing potential civil liability in the underlying putative class action.

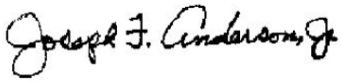
In response, Plaintiff avers that even if a favorable ruling in this case has no effect whatsoever on the pending civil action against Plaintiff in state court, Plaintiff remains at risk of adverse action by the Defendant. The Court agrees. Both consumers and Defendant can bring actions under the SCTPPA. S.C. Code Ann. §§ 37-21-80, 90(B)(1)). Thus, even if Plaintiff's potential liability in the state court action remained unaffected by this Court's ultimate determination, a favorable decision by this Court would prevent Defendant from pursuing claims based on the same conduct. As discussed above, because Defendant has failed to disavow enforcement of this fledgling provision, Plaintiff has shown it has standing to assert this pre-enforcement action. The fact that Plaintiff is also simultaneously

engaged in a state court action concerning third-party consumer claims arising from the same provision does not diminish the pre-enforcement standing Plaintiff possess in this action. Although the actions may be interrelated, they are not codependent. Thus, Plaintiff's allegations in the Amended Complaint are sufficient to establish standing.

IV. CONCLUSION

For the reasons discussed above, Defendant's motion to dismiss (ECF No. 15) is denied. Plaintiff's Amended Complaint alleges facts sufficient to show that it is, and continues, to be at risk of injury, which is sufficient to establish Article III standing. Therefore, this Court does posses subject matter jurisdiction.

IT IS SO ORDERED.



August 3, 2021
Columbia, South Carolina

Joseph F. Anderson, Jr.
United States District Judge