

APPEARANCES: (Continued)

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I N D E X

<u>WITNESS (ES)</u>	<u>DIRECT</u>	<u>CROSS</u>	<u>REDIRECT</u>	<u>RECROSS</u>
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FOR THE PLAINTIFF:

Garrett Ean	--	452	462	471
Ian Freeman	472	476	483/489	488

FOR THE DEFENDANTS:

Kathryn Ager	492	495		
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1 (Proceedings commence at 10:23 a.m.)

2 THE COURT: Good morning. Please be seated.

3 We're back on the record in the matter of City of
4 Keene versus James Cleaveland, et al. I think when we took a
5 break yesterday Mr. Ean was on the stand, if I'm correct.

6 MR. MEYER: Correct, Your Honor. Could I have him
7 resume the stand?

8 THE COURT: Yes. Absolutely.

9 (Pause)

10 THE COURT: And let me say, before you get started, I
11 apologize for starting late but the criminal pretrials took a
12 bit longer than what I'd hoped, but I'll try to move it along
13 as quickly as possible. We will need to break right almost
14 exactly at noon, because I have drug court from noon until 2.

15 Attorney Meyer.

16 MR. MEYER: Thank you.

17 GARRETT EAN, PLAINTIFF'S WITNESS, PREVIOUSLY SWORN

18 CROSS-EXAMINATION CONTINUED

19 BY MR. MEYER:

20 Q Garrett, you are still under oath. You understand
21 that?

22 A Yes, sir.

23 Q Now, you were testifying yesterday about the purpose of
24 the videotaping you did. When I say "videotaping," I also mean
25 audiotaping, correct?

1 A Correct.

2 Q And could you describe the function of that vis-a-vis
3 the internet, please?

4 A Well, in addition to the raw content that I'm
5 constantly producing, I had mentioned yesterday, I've been
6 trying to put out weekly content as well, since I've been
7 engaging in Robin Hooding, whether that be short little
8 two-minute videos or actually around the beginning of May I
9 started doing a show for Cheshire TV weekly called AKPF #1
10 which includes much of content I film in edited form from what
11 I'm getting in the street.

12 Q And has that film generated any public comment, public
13 interest?

14 A Certainly. The third episode in the Keene Sentinel ran
15 an editorial that mentioned the show and how it was -- the
16 Keene Sentinel, I'd say, has always seemed to be favoring of
17 the City's opinion. They published editorials from the City
18 manager about Robin Hooding while -- meanwhile, they haven't
19 really sought comment from me, but -- so after publishing some
20 editorials kind of opposing Robin Hooding as an activity, it
21 seemed, there was an editorial in the Sentinel that mentioned
22 my television show and said that it's only showing the
23 lighthearted stuff, or something along those lines.

24 Q Garrett, is there an opportunity for individuals to
25 communicate vis-a-vis your -- the material you're putting on

1 the internet? Do they have a chance to --

2 A Sure. In multiple --

3 Q -- feedback?

4 A In multiple forums. I'm pretty -- I wouldn't say very
5 active on Facebook, but I definitely share all of the content I
6 produce there. Also, on the Youtube videos themselves there's
7 their own comment feature through that website. And then also
8 I post the videos to Free Keene dot com where there's comment
9 features independent of those other sites. And my own website,
10 Free Concord dot org, where there's also a comment feature.

11 Q And do you in fact get a fair amount of public feedback
12 on those various formats?

13 A Most videos will generate at least a few comments.

14 Q And have any of the parking enforcement officers
15 expressed any input online?

16 A I found out that one of the parking enforcers is one of
17 my top commenters.

18 Q And who's that?

19 A That would be parking enforcer Alan.

20 Q So he's communicating, essentially, his opinions online
21 vis-a-vis the video feed that you're showing online; is that
22 correct?

23 A Yes.

24 Q Now, during the course of these proceedings, did you
25 lose -- for some period of time lose use of your video camera?

1 A I did, in fact.

2 Q And what happened? How did that occur?

3 A One morning, outside of my home, I noticed that there
4 was a vehicle circling that appeared to be an unmarked police
5 cruiser. And when I went outside after noticing that, thinking
6 it was strange, up the street, as I got about a block away from
7 my home, I saw it coming and started recording it. And then
8 two men got out of the car and told me they had a search
9 warrant for all of my electronics. But they wouldn't explain
10 why I was getting served a search warrant on.

11 Q Did you subsequently secure an explanation for what the
12 reason for the search was?

13 A The only thing I was told at the time was that it was
14 related to a dialogue I had with City attorney Tom Mullins, but
15 no information other than that. I later found out, about a day
16 later, that the search warrant was sealed. I believe it was
17 about 45 days before the search warrant was unsealed and I was
18 able to get a copy of it. And it was maybe another 15 days
19 before I was able to secure the camera back from the State
20 Police.

21 Q What was the reason for this -- your camera being
22 confiscated?

23 MR. BAUER: Your Honor, I'm going to object. I don't
24 think this is relevant to the injunctive action in front of the
25 Court. I'm not familiar with all of these goings on in terms

1 of any criminal proceedings and search warrants, since we're
2 not representing the police department in this matter.

3 THE COURT: How is this relevant?

4 MR. MEYER: Well, I think it's -- again, as the City
5 complains about the actions of the Defendants, this is part of
6 a pattern of actions by the City to slant the playing field
7 against the Defendants.

8 The offer of proof in this case will be that Mr. Ean
9 met with the City attorney -- actually, as I understand it, in
10 the context of this case. There was agreement that that
11 meeting would not be recorded. Mr. Ean subsequently presented
12 a approximate transcript of that meeting based upon his
13 recollection, put that online, and then was subject to a
14 seizure of his camera for -- based on the false allegation that
15 he had participated in wiretapping. Ultimately --

16 BY MR. MEYER:

17 Q How long was your camera removed from your presence?

18 A I believe, about two months.

19 MR. MEYER: So that, Your Honor, is the offer of
20 proof.

21 THE COURT: I don't believe that's relevant to the
22 injunction issue before the Court. The objection's sustained.

23 MR. MEYER: But the fact, I take it, that his camera
24 was gone for two months is presumably all right.

25 THE COURT: No, I understand. That's admissible,

1 yes.

2 (Pause)

3 BY MR. MEYER:

4 Q In terms of your communication with the parking
5 enforcement officers, and Mr. Givetz in particular, could you
6 describe the nature of that communications?

7 A As I mentioned yesterday, in the beginning of the
8 activity I really wasn't doing much dialogue interaction with
9 the parking enforcement, it was mostly just filling meters and
10 filming. I think maybe one of the first days I was out the
11 first communication I had with Alan was -- I asked him why the
12 City vehicles don't get ticketed -- or, if he was going to
13 ticket the City vehicles that were expired. And he said no.
14 And that was pretty much the extent of the conversation. It
15 was similar to the conversation that was played between myself
16 and Pete Eyre and Jane that was from back at the end of the
17 last year.

18 So, yeah, it was a little while actually before I
19 really started having dialogue with the enforcers. And I would
20 say that towards the beginning of the year the -- there wasn't
21 any -- there wasn't at any point any dialogue with parking
22 enforcer Linda. She was never interested in having any, so I
23 respected that request and haven't really tried to talk to her
24 much.

25 But with Alan, I noticed like we started off on, I'd

1 say, an okay footing. Like we'd have like somewhat general --
2 you know, I wouldn't really say conversations, but like we'd
3 talk throughout the day, just casually.

4 And then I noticed that as there began to be more
5 attention paid to this case -- prior to it being a lawsuit, it
6 was mentioned in the Keene Sentinel. There was a big article
7 about a harassment investigation by the City and hiring this
8 private investigator. So that drew attention to the case. I
9 noticed at that time that -- I'd say that the general stress
10 level maybe or attention level to the activity was raised. And
11 especially around the time of the lawsuit -- it was shortly
12 after that that Alan stopped doing parking enforcement.

13 Prior -- just prior to that, there stopped being any
14 dialogue between us. And maybe the other -- maybe the other
15 Robin Hooders, but I'm not sure. And I found that when we
16 stopped having dialogue it seems that that's when -- it seemed
17 that he -- he seemed more antagonized by a lack of
18 communication than the times when we were communicating and
19 just, you know, having casual communications.

20 And in addition to filming, I even offered both to
21 Jane and Alan to have conversations with them off camera, so if
22 they wanted to express anything that they didn't want to share
23 with the world, they were free to do that. And I had a number
24 of conversations that were specifically not recorded with both
25 of those parking enforcers.

1 Q About what subject matter?

2 A Mostly or usually about their comfort level with the
3 activity, any suggestions they might have about it. They said
4 -- I never heard allegations towards myself violating their
5 space, aside from the times that I mentioned yesterday. So
6 when I talked to them off camera they never -- neither parking
7 enforcer alleged that I was violating their personal space.
8 But they did say that they preferred if we'd be farther away.
9 They said that they -- one parking enforcer said that she likes
10 the way one of the other Robin Hooders does it, where they
11 don't really interact at all, they're just way up ahead filling
12 meters. And I said, like I -- you know, I understand that --
13 that critique or concern but, you know, I'm not here to bother
14 you and I hope that like we can have like -- if you don't want
15 to speak to me, you know, I respect those requests, or -- or
16 whatever. You know, just reassuring them like off camera that
17 the purpose of the activity is not about antagonizing them.

18 Q Did you take a video on February 26th 2013?

19 A Yes.

20 MR. MEYER: Your Honor, I'd like to show that video.
21 Represent to the Court it's only about a minute.

22 THE COURT: Right. Absolutely.

23 MR. MEYER: Do you want to get your --

24 THE WITNESS: Oh, yes.

25 MR. MEYER: -- iPod?

1 (Pause)

2 THE COURT: And just as yesterday, if counsel want to
3 approach.

4 (Pause)

5 THE WITNESS: So I filmed this video on February 26th
6 2013, some time in the afternoon. There is what -- very loud
7 music playing in it, but it's actually from a radio that is
8 next to the camera that doesn't really get that loud in its
9 normal state, but since it's next to the camera it does sort of
10 have a large -- it has an effect on the ability to hear the
11 conversation, but --

12 (A Videotape played at 10:36 a.m., ending at 10:37 a.m.)

13 MR. MEYER: Your Honor, I'd like to have that -- just
14 that one-minute clip admitted as our Exhibit C.

15 THE COURT: Any objection?

16 MR. BAUER: No.

17 THE COURT: That's exhibit -- Defense Exhibit C is a
18 full exhibit.

19 (Defendant's Exhibit C received)

20 BY MR. MEYER:

21 Q Garrett, could you just describe in your own words what
22 that video displays, portrays?

23 A Myself and Parking Enforcer Alan were walking west on
24 Summer Street, and I was walking in the -- I was for a while
25 following behind on the sidewalk, maybe from about 20 feet

1 away; and then, as I got closer, I went into the road and Alan
2 was on the sidewalk. So as we were approaching the corner,
3 Alan walked from the sidewalk to the road, like kind of closer
4 to me, and then he turned the corner and started walking on the
5 sidewalk south, down -- I forget what that street is but Summer
6 -- the one that connects Summer and Winter Street.

7 And as I started following behind -- I was maybe ten
8 to 12 feet away -- I noticed that he turned around and started
9 leaning into the camera, so -- as you can see, the camera
10 shakes a bit. I started moving back, because I thought that
11 was kind of strange. And he leaned in and he asked, "Is that
12 close enough for you, coward," and turned around and kept
13 walking; and I asked a question and he leans -- he turned back
14 around -- or, I said -- I think I said, "I detect that you
15 don't like the camera too much," or something like that, and he
16 turned around and like got close to the camera and said, "I
17 don't care about you or the camera."

18 Q Do you have any recollection of approximately how close
19 he got to the camera in those two times?

20 A Judging by the size of his face in the frame, I would
21 estimate between -- two to three feet.

22 MR. MEYER: Thank you. I've got no further
23 questions.

24 THE COURT: Further direct examination?

25 MR. BAUER: Yes, please.

REDIRECT EXAMINATION

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BY MR. BAUER:

Q Garrett, you can detect from that video that Alan really didn't want you coming within his space and he was trying to back you off, didn't you. You could --

A I instinctively --

Q You could detect that.

A -- moved back when he began approaching, yes.

Q You could detect that, couldn't you.

A Yes.

Q And you could detect that all of these people have tried to use their abilities out on the street to back you and the other Defendants off. You know that, don't you?

A I wouldn't agree that when I'm out there on a daily basis there is allegations that I'm violating anyone's personal space, no. There have been things said like "I hope you go to another town," or something like that. That's -- I mean, considerably more distance, but -- I mean, I -- as I said, other than the instances I mentioned yesterday, I haven't been told that I've been violating anyone's personal space.

Q Garrett, you're a smart guy, aren't you, and you read people pretty well, don't you?

A I'd like to think that I have some intellect about me.

Q Yeah. And you know that Jane and Lynn and Alan really don't like you and the other Defendants within their personal

1 space. You've detected that over a number of months, haven't
2 you?

3 A Correct, which is why I've been giving them
4 considerably more space.

5 Q Garrett, I heard a lot about your philosophies and
6 things like that, and I want to ask you a couple of other
7 questions about your philosophies. Do you recognize that the
8 City has an interest in protecting its employees from a hostile
9 work environment? Do you understand that?

10 MR. MEYER: Your Honor, among other things, that's
11 beyond -- first of all, it's -- objection on the grounds it's
12 beyond the scope of cross-examination. Secondly, again, that's
13 raising a legal question as to whether there's a legal duty,
14 without any foundation that this witness has any legal
15 background.

16 MR. BAUER: I'm cross -- I'm on redirect with regard
17 to a number of topics that Attorney Meyer brought up on cross
18 regarding philosophy, intent, motivations, about city
19 government and other things. And I think it's fair inquiry to
20 ask this witness about whether he recognizes as part of those
21 points of view what the City's points of view are. That's
22 fair.

23 THE COURT: Now -- I'm not quite sure what topic
24 you're trying to raise.

25 MR. BAUER: Well, I'll make offers of proof -- I want

1 to ask Mr. Ean whether he recognizes that a municipality, the
2 City of Keene, has an interest in protecting its employees with
3 regard to safe working environment, a non-hostile work
4 environment, to see whether he recognizes those interests.

5 THE COURT: Any further argument, Attorney Meyer?

6 MR. MEYER: Well, Your Honor, again, just -- first of
7 all, I still don't -- I still have not heard any response as to
8 how this relates to any part of my cross-examination of this
9 witness.

10 THE COURT: Well, I think he did get into a fair
11 amount of philosophy and --

12 MR. MEYER: No, he certainly talked about his
13 political philosophy, but there was never any question -- did I
14 say, anything he said about whether -- that -- has anything to
15 do with whether or not the City has a duty to protect
16 individual employees in terms of a hostile work environment.

17 But secondly -- I mean, that question -- Attorney
18 Bauer and I will have an opportunity to argue that issue this
19 afternoon. It's a legal issue to be responded to by a lawyer.

20 MR. BAUER: Well, it is a legal issue, but it also
21 has a factual basis here. Because if Mr. Ean doesn't recognize
22 those things, I think that's a relevant inquiry.

23 THE COURT: I'm going to allow the question.

24 MR. BAUER: Thank you.

25 THE WITNESS: Could you repeat that for me?

1 MR. BAUER: Yes, sir.

2 BY MR. BAUER:

3 Q So, Mr. Ean, do you recognize that the municipality,
4 the City of Keene has an interest in protecting its employees,
5 be it parking enforcement officers, DPW workers, town clerks,
6 city clerks, who work in office buildings or outside office
7 buildings. Do you recognize that the City has an interest, a
8 governmental interest in protecting its employees from a
9 hostile work environment?

10 A I would ask you to define "the City." Do you mean the
11 people that live in a certain geographical area, or do you mean
12 the City manager or do you mean the City council or -- what do
13 you mean by "the City"?

14 Q You don't know what I mean by the municipal
15 corporation, the City of Keene?

16 A Okay. So you mean the corporation? I'm not a big fan
17 of corporations. To be honest, they're a legal fiction. I
18 think it would be -- we'd be much better off if people were
19 instead doing business in their own name, rather than creating
20 something that doesn't exist and putting liability upon that
21 legal fiction.

22 Q You haven't answered my question, sir.

23 A Is there a person that's claiming to represent the City
24 of Keene? It's like -- that I'm wronging in some way or --

25 Q Do you recognize, sir, that the City of Keene has a

1 significant governmental interest in promoting safe streets?

2 A I think the people that live in the City of Keene care
3 about having safe streets, sure.

4 Q And those elected to governmental office have a duty to
5 maintain safe streets? Do you recognize that?

6 A I'd question the motives of those elected to office
7 over the people.

8 Q Is that fair to say that you don't recognize that the
9 City of Keene has a governmental interest in protecting --

10 A I don't think I said that but --

11 Q Well, I don't want to put words in your mouth, Garrett.

12 A Okay.

13 Q Do you recognize that the City of Keene has a
14 governmental interest in promoting public safety?

15 A As a person who domiciles within Keene, I have an
16 interest in promoting public safety.

17 Q And so you recognize the City -- the City's interest as
18 a governmental entity to promote safe -- safe streets and
19 safety?

20 A I don't know if I can speak to -- I mean, it sounds
21 like by "the City" -- or -- there's an attempt to create this
22 amorphous definition for like the collective interests of
23 everyone involved, and I don't think one can necessarily do
24 that. So I'm not going to speak for people other than myself,
25 like -- I can say that I'm here in the City of Keene --

1 Q I'm just asking about you.

2 A -- and I want safe streets but --

3 MR. BAUER: I know. I'm sorry, Judge.

4 BY MR. BAUER:

5 Q I'm just asking about you. I'm not asking about other
6 people.

7 Let me ask you this. Do you understand -- do you
8 recognize that in an employment relationship between an
9 employer and an employee that the employer has rights to
10 protect in those employees?

11 MR. MEYER: Your Honor, I want to --

12 BY MR. BAUER:

13 Q Do you recognize that?

14 MR. MEYER: No. I'd like to object to the question.

15 In addition to the other grounds I've given, which I
16 understand the Court has overruled, this constant rendition of
17 the phrase "do you recognize" assumes the truth of the balance
18 of the question. In other words, he makes a problematic legal
19 assessment and then says to my client "do you recognize the
20 truth of it" when in fact these are problematic. So the
21 phrasing of the question is inappropriate. The witness has
22 already testified at length to his beliefs about --

23 THE COURT: Yeah, I'd like --

24 MR. MEYER: -- government.

25 THE COURT: -- I'd like to -- mostly because I think

1 -- I think you've made the point through the questioning to the
2 extent you wanted to make a point about it; and I think just
3 rehashing this, it does get to where I think is a little bit
4 off the main point, which relates to conduct and behavior and
5 acts on the occasion and to, you know, what people's
6 philosophies or ideologies are; and I've given you some
7 latitude but I'd really like to move the hearing along.

8 MR. BAUER: Yes, sir.

9 BY MR. BAUER:

10 Q And do you understand that the City, in seeking this
11 injunction, is not trying to prohibit you or prevent you from
12 videotaping the PEOs? Do you understand that?

13 A That's not something that I understand, because by
14 creating a zone I couldn't be within a certain amount of space
15 of people, I couldn't do anything, much less videotape within
16 that space; so, yeah, I'd say that it would directly prohibit
17 my ability to videotape.

18 Q And you think you have an absolute right to videotape
19 public employees under any circumstances?

20 A I don't believe I ever said I have an absolute right to
21 record public employees under any circumstances. That sounds
22 quite broad.

23 Q Well, isn't that what you want to do with these
24 employees? Isn't that what you've been doing?

25 A No, I believe there's been some guidelines by which

1 I've conducted the activism and standard operating procedures
2 for myself, such as not videotaping them off duty. I even have
3 seen them in their personal vehicles while in uniform and
4 chosen not to videotape that, because I didn't see -- even
5 though they were technically in uniform and on the clock, I
6 didn't see a need to publicize -- since I was making, you know,
7 so much of what they were already doing public, to, you know,
8 go into those fields.

9 In fact, I also only used their first names in
10 anything I put out online so as to keep it informal. So, no, I
11 wouldn't say there's been much of an issue with --

12 Q But when you want to videotape, you want to videotape
13 how you want to videotape, when you want to videotape and how
14 close you want to videotape, don't you?

15 A I guess what you're implying is that I wouldn't respect
16 people's personal boundaries because I have some sort of idea
17 that you're imposing upon me that I believe that people don't
18 have like personal space or something. So, no, I wouldn't buy
19 -- I wouldn't affirm that question.

20 Q Do you understand that by seeking the injunction the
21 City is not prohibiting or preventing you from placing the
22 cards -- Exhibit 4 -- on any motor vehicles in the City of
23 Keene or elsewhere?

24 A Well, it is prohibiting --

25 Q Do you understand -- do you understand that?

1 A No, because like with video recording, it is
2 prohibiting me from placing those cars on any car within this
3 30 foot zone that's being devised.

4 Q Mr. Ean, do you understand that in seeking the
5 injunction the City is not trying to prohibit or prevent you
6 from plugging any meters that you want to or saving any tickets
7 that you want to? Do you understand that?

8 MR. MEYER: Your Honor, objection. Relevance. In
9 terms of the understanding of what the City wants, I think
10 that's obviously an important subject vis-a-vis the Court. I
11 don't understand what the relevance of Mr. Ean's understanding
12 of what the City wants is to any issue in dispute here.

13 THE COURT: How is that relevant?

14 MR. BAUER: It's the heart of the issue.

15 THE COURT: It's the heart of -- the heart -- his
16 understanding of what the City's seeking?

17 MR. BAUER: Yes. It's a balancing of interests. And
18 so far what I've heard is that this gentleman doesn't balance
19 any of those interests.

20 THE COURT: Okay.

21 THE WITNESS: Then you're not listening.

22 THE COURT: The objection's sustained. Move on.

23 BY MR. BAUER:

24 Q You've been expressing your First Amendment rights to
25 protest against parking enforcement and governmental action,

1 haven't you?

2 A If someone calls it a protest I wouldn't necessarily
3 object to that, but I don't necessarily define it as protest
4 per se.

5 Q What would you -- what would you call it?

6 A Activism, activity, action.

7 Q And do you understand that even if an injunction were
8 in place that you would be able to be active, you'll be able to
9 engage in that activism?

10 MR. MEYER: Ask -- Your Honor, the question of what
11 would happen if an injunction --

12 THE COURT: Sustained. Sustained.

13 MR. MEYER: Thank you.

14 MR. BAUER: Nothing further, Your Honor.

15 REXCROSS-EXAMINATION

16 BY MR. MEYER:

17 Q Garrett, you were asked about the video from Attorney
18 Bauer, whether wasn't it clear that Alan wanted you not in his
19 personal space. Before he turned around and walked towards
20 your camera, in your opinion, were you in his personal space?

21 A I was about ten feet back from him, and we were walking
22 at a normal pace, so if I was to -- or, if he was to turn
23 around and walk towards me, it would still be a second or two
24 before we'd even meet each other. So, yeah, I'd say that was a
25 safe, reasonable distance.

1 Q You also were asked a lengthy -- strike that.

2 MR. MEYER: I have no further questions.

3 THE COURT: Thank you. You may step down.

4 The City have any additional witnesses?

5 MR. DIETEL: Your Honor, we'd like to call Ian
6 Freeman.

7 (Pause)

8 THE COURT: Mr. Freeman, if you'd remain standing and
9 raise your right hand.

10 IAN FREEMAN, PLAINTIFF'S WITNESS, SWORN

11 THE COURT: Thank you. If you could be seated, and
12 state your full name, and spell your last name for the record.

13 THE WITNESS: I'm Ian Freeman, I-A-N, F-R-E-E-M-A-N.

14 MR. DIETEL: Thank you, Mr. Freeman.

15 DIRECT EXAMINATION

16 BY MR. DIETEL:

17 Q Mr. Freeman, you've heard from your codefendants that
18 one technique they use to avoid the parking enforcement
19 officers from issuing tickets is to pay meters, correct?

20 A One technique they use is to pay meters. Sure.

21 Q Have you used that technique?

22 A Yeah, I've Robin Hooded, uh-huh.

23 Q If you distract the officers from being able to monitor
24 the meters, that also makes it so that they can't give tickets,
25 correct?

1 A What do you mean by "distract"?

2 Q If you talk with them when they're doing their job,
3 does that distract them from doing -- from monitoring the
4 meters?

5 A I've never seen them have any issue with checking the
6 meters, while I've been there.

7 Q Do you know who Alan Givetz is?

8 A I don't know him well. I've only encountered him a
9 couple of times on the streets.

10 Q Have you -- how have you encountered him?

11 A There was one incident after the suit was filed.
12 Before that I don't really even remember seeing him very much.

13 Q Do you know who Jane McDermott is?

14 A Yes.

15 Q How do you know Jane?

16 A I've had conversations with Jane.

17 Q Are you aware that Alan Givetz has quit as a result of
18 the actions that we've been talking about in this hearing?

19 A I discovered that through this trial.

20 Q Are you aware that Jane McDermott has changed her
21 schedule as a result of the actions we've been discussing?

22 A I also discovered that through this trial.

23 Q If your goal is to have fewer tickets issued, then
24 reducing the number of parking enforcement officers on the
25 street would help accomplish that goal, correct?

1 A You're jumping to a conclusion there. My goal when I'm
2 Robin Hooding is to save people the heartache of getting a
3 ticket. So my number one priority is to save people from that
4 hassle and, hopefully, make people feel good as a result of
5 that. That's my goal.

6 Q So you want people to not get tickets?

7 A I want people to feel good because they haven't been
8 issued a ticket, yes, which is essentially a threat. It's a
9 threat against their freedom, it's a threat against their
10 vehicle; and I don't appreciate it when people are threatened.
11 So that's one of the reasons I'm out there.

12 Q So I understand that you're saying that your ultimate
13 goal is to keep people from getting tickets?

14 A My goal is to save people from having to deal with the
15 hassle of getting a ticket, absolutely.

16 Q So if there --

17 A Because it's wrong to threaten your neighbor.

18 Q So if there are fewer parking enforcement officers on
19 the street, that means there are fewer tickets issued, correct?

20 A No, I -- yeah, I see what you're leading at there; and
21 it's my goal as a candidate for city council to --

22 THE COURT: Mr. Freeman, if you would answer the
23 questions. This is not the time for speeches. There's a
24 question posed. If you would respond to the question.

25 THE WITNESS: Oh, I was going to get to the point.

1 My point is, I would like to see the parking enforcement
2 department shut down entirely.

3 BY MR. DIETEL:

4 Q What I asked you though was, if there are fewer parking
5 enforcement officers on the street, that means fewer tickets
6 issued, correct?

7 A Absolutely true.

8 Q You've told Jane McDermott that you'd help her find
9 another job?

10 A There was testimony to that point, but I don't recall
11 ever having done that. No.

12 Q Would you like it if she finds another job?

13 A I think that people who work for the coercive
14 organization known as the state should absolutely quit their
15 jobs and do something productive for society.

16 Q So that's a yes, you'd like if she'd find another job?

17 A Yep, absolutely. I heard that she used to do drug
18 counseling, which really seems like something that could help
19 people, rather than hurt them.

20 Q You've previously said that your goal is to shut down
21 parking enforcement, correct?

22 A Oh, yes. I just said it a moment ago. Uh-huh.

23 MR. DIETEL: Thank you. No more questions.

24 THE COURT: Cross-examination?

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CROSS-EXAMINATION

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BY MR. MEYER:

Q Ian, what is your --

MR. MEYER: You know, this, I take it, is sort of --
it's cross but it's also direct --

THE COURT: Yes, if --

MR. MEYER: So I don't have to do this twice.

THE COURT: Yes. No, no. Absolutely.

BY MR. MEYER:

Q Ian, what is your occupation?

A I'm a minister with the Shire Free Church, I'm a talk
show host with Free Talk Live, I'm the program director of
LRN.FM.

Q And do you have a political philosophy?

A Oh, most certainly.

Q Okay. And can you give us maybe like a short summary
of it?

A Sure. I believe that all human interaction should be
consensual. I think that people should interact with one
another on a consensual basis and not use threats of violence
or actual violence to get their way. If you want someone to do
something, you should persuade them rather than threaten them.

Q And is there a connection between that political
philosophy and the activity of Robin Hooding?

A Absolutely. As I alluded to earlier, I think that the

1 structure that the -- you know, the governmental structure
2 around parking is one that's based on the threat of stealing.
3 In this case, stealing somebody's vehicle or extracting money
4 from them. Basically, a ransom, as Pete Eyre had put it
5 previously. And I think that parking should be handled in the
6 marketplace, because government is inherently inefficient, they
7 don't do a good job at anything that they try to do. I mean,
8 they try their best. And I think that the people that work for
9 the government are people that have good intentions, I think
10 they want the best for their community, but they don't
11 understand that by using the threat of violence they usually
12 will create the opposite of their intended results. And it
13 doesn't bring people together, it doesn't -- you know, it's not
14 a neighborly thing to do. If the marketplace were handling
15 parking, then each property owner would be able to decide for
16 themselves what the parking spaces -- how they should be
17 administered. Maybe they want to just let anybody park, or
18 maybe they want to have a very restrictive parking scheme in
19 place; but I don't think a one-size-fits-all monopoly solution
20 is the best option, and that's what government offers.

21 Q Now, you testified earlier that you were -- the opinion
22 -- you were asked whether you thought that parking enforcement
23 officers should resign. And I think my -- am I correct in
24 summarizing your opinion as basically you feel like all
25 government employees should resign?

1 A Well, what I'd like to really see is the government --
2 which is really just people, it's just men and women -- at this
3 point -- who are, you know, using the threat of violence to
4 force their way on other men and women. I think that they
5 should stop using the threat of violence. So I'd be fine if
6 the City of Keene still existed, but if they just stopped
7 threatening people. So they should offer their services on a
8 consensual basis. And then we could have the first voluntary
9 government. I think that would be very nice.

10 Q Now, have you ever expressed the opinion that the
11 parking officers -- enforcement officers should resign?

12 A I think that -- I think that they should do the right
13 thing. And I think doing the right thing would be to stop
14 using the threat of force against others. If they could
15 somehow keep their jobs and not threaten people, that would be
16 fine with me.

17 Q Now, there was testimony I think earlier -- one or more
18 of the parking enforcement officers -- that -- I think you were
19 quoted as expressing the opinion that -- to them, that they
20 should resign. Do you have a recollection of expressing that
21 opinion to any of them?

22 A I think I may have expressed in conversation the idea
23 that I consider their job to be immoral and I think they should
24 do something more productive.

25 Q Okay. And -- I take it that is your genuine opinion?

1 A Oh, yes.

2 Q Okay. And did you -- did you ever make any effort to
3 actually persuade them to resign?

4 A No, not particularly. I mean, just general
5 conversation about what I think about their jobs and the
6 morality of it.

7 Q Did you -- do you personally have any belief that they
8 are going to give any weight to your opinion about --

9 A No.

10 Q -- government in general or about parking enforcement
11 in particular?

12 A No. And in fact, I think that part of the reason why
13 this whole process is happening is because questions of
14 morality are very uncomfortable for people that work for the
15 state. I mean, who would want to believe that their job is
16 threatening people. I mean, they certainly don't -- likely
17 don't think of themselves as -- as folks who would want to do
18 that to their neighbors. So it could be -- it could create
19 some cognitive dissonance when someone, you know, suggests,
20 "Hey, your job is immoral." I can imagine people wouldn't
21 really want to give that serious consideration, because if they
22 came to the conclusion that, well, yeah, it is immoral, then
23 that would -- that would be really uncomfortable. To find out
24 that they'd been doing wrong to their neighbors.

25 Q For how long have you been engaging in Robin Hood

1 activity?

2 A Off and on, over the years. I've been around since it
3 started. Since Lauren Canario started Robin Hooding back in
4 2009, I've been involved off and on.

5 Q So off and on for four years?

6 A Yeah. And this year, probably no more than a handful
7 of times. I'm pretty busy with my business.

8 Q And could you just explain, when you are engaging in
9 Robin Hooding, where are you -- where are you typically vis-a-
10 vis the parking-enforcement officer? Where do you try to
11 locate yourself?

12 A So generally I like to be in front of, because the goal
13 of Robin Hooding, as has been explained, is to prevent, you
14 know, people from getting tickets. So the way you do that --
15 or, the most effective way is to walk maybe about 15 feet or so
16 in front of the enforcer -- maybe ten feet, whatever is
17 comfortable -- and identify expired meters, put a nickel or a
18 dime in the meter to prevent the ticket from being written.

19 When I'm doing that, however, if I'm out alone -- and
20 normally I am, because usually if I'm Robin Hooding, I'll be
21 downtown for some other purpose -- you know, I'll be there to
22 drop off some paperwork at City Hall or something, and I'll see
23 one of them on the streets, and I'll have my cards and nickels
24 with me in my backpack. And so, you know, I just kind of pick
25 up and get started. So I'm usually there alone.

1 The ideal situation is to have two Robin Hooders, one
2 to fill the meters, the other to place a card on the
3 windshield. And the reason why you want to have two Robin
4 Hooders is so both of the Robin Hooders can continue to stay in
5 front of the parking enforcer, because if you don't stay in
6 front of the parking enforcer, at some point they're going to
7 overtake you and then they're going to be able to write a
8 ticket at some point.

9 So when I'm there alone, it's a -- it's a greater
10 challenge, because I have to put coins in the meter and also
11 leave the card on the windshield. So for all the time -- so if
12 -- let's say I'm 20 feet in front and I, you know, find an
13 expired meter, putting the coin in the meter, then turning
14 around, getting a card, putting the card on the windshield
15 takes a few seconds; and in that time the enforcer hasn't had
16 to write a ticket, so she or he is just walking and looking at
17 the meters, so they're closing that gap. So it becomes very,
18 very difficult for me to keep any level of distance, especially
19 if I'm alone.

20 Q In other words, you may start off, when you get to the
21 meter, ten or 15 feet away; but by the time you plug the meter,
22 put the card on, the parking-enforcement officer has become
23 much closer to you; is that correct?

24 A Right. And in which case I usually find myself
25 hurrying at that point to, you know, again, add some more space

1 so I have time to accomplish my task.

2 Q Are there any other times when you might come closer
3 than ten or 15 feet from a parking-enforcement officer?

4 A Generally I am very respectful of people's personal
5 space. I mean, if I were closer than that, it would simply be
6 because we were having a conversation or something like that.

7 Q How about a crosswalk?

8 A Oh, well, certainly in that case they would be
9 approaching me. It's similar to, you know, being held up at a
10 meter. If I approach a crosswalk or a corner of some sort
11 where the parking enforcer has the choice to go in different
12 directions, I need to know which direction they're going in.
13 And sometimes they'll play a little game where they'll act like
14 they're going to go in one direction and then actually go in
15 the other direction to try to, you know, psych me out. So it's
16 important for me to stay and wait until I know for sure which
17 direction they're going in.

18 Q Now, there's been discussion about I think three
19 separate incidents where Robin Hooders experience very
20 substantial negative reactions involving either physical
21 assaults or threats of physical assaults. Have you had that
22 experience?

23 A Thankfully, no. But as I said, I've only been out a
24 handful of times this year.

25 Q Have you received any positive feedback from the Robin

1 Hood activity, from members of the public?

2 A Constantly. The times that I have been out there is
3 feedback that comes from various members of the public, which
4 include random people on the street as well as people that own
5 and work in local downtown businesses. I have been
6 complimented, thanked, I've had money, gift cards handed to me
7 in the streets. People in general are very, very appreciative.

8 MR. MEYER: Thank you, Ian. I have no further
9 questions.

10 THE COURT: Further examination?

11 MR. DIETEL: A few questions, Your Honor.

12 REDIRECT EXAMINATION

13 BY MR. DIETEL:

14 Q Mr. Freeman, is it fair to characterize your testimony
15 as saying that you can do your job most effectively -- your job
16 being Robin Hooding -- when you are 15 feet away from the
17 parking enforcement officers?

18 A I wouldn't say there's any amount of feet. I'm only
19 effective if I'm in front of the parking enforcer. So long as
20 I stay in front of them, then I can prevent tickets from being
21 written by filling expired meters.

22 Q And you said that ten to 15 feet would be ideal.

23 A I wouldn't say there's any ideal amount. That's just
24 tends to be what I -- what I do. I don't like the idea of
25 invading people's personal space, and I would consider, you

1 know -- it's not my goal to make somebody feel uncomfortable by
2 close proximity necessarily. But at the same time, I do have
3 to be somewhat close, because if they play that little game
4 with trying to switch directions on me, it can be very
5 inconvenient and then I have to run to -- you know, to try to
6 catch up, and I'd rather not do that.

7 Q So you believe the purpose of being close is so that
8 you can carry out your job to plug meters?

9 A Right. Well, and also, you know, if I'm out for a
10 little while, it's nice to have a conversation with somebody.
11 Jane and I have had conversations. They've been very pleasant.
12 Linda and I used to -- she used to talk with me, up until this
13 year, where she became unfriendly, and I'm not sure why. I
14 used to have a really nice relationship with her.

15 Q Are you in the practice of talking with people that
16 don't want to have conversations with you?

17 A Well, Linda only told me this year that she didn't want
18 to have a conversation with me. But I'd like to point out that
19 as government workers they are supposed to be able to be held
20 accountable, and they're supposed to be responsive. If could
21 look at the New Hampshire constitution, which is supposed to be
22 the set of rules that they follow -- of course, as you probably
23 know, the company doesn't follow its own rules typically, but
24 if you --

25 Q Mr. Freeman, I asked you a very specific --

1 A Can I finish my --

2 Q -- question.

3 A -- question (sic)?

4 Q I asked you a very specific question which you are not
5 responding to.

6 A Can you ask it again then --

7 Q Yes.

8 A -- because I was answering you.

9 Q I asked you are you in the practice of engaging in
10 conversations with people that don't want to talk with you?

11 A Well, I generally don't disrespect individuals'
12 requests to not talk to them, but when it comes to government
13 workers, if I would like to say something to them, I have the
14 right to do that because they work for the state.

15 Q So you believe that under all circumstances because
16 government employees work for the state that you have a right
17 to speak with them?

18 A Absolutely.

19 Q In every circumstance?

20 A I can't see why I wouldn't.

21 Q Okay.

22 A I have a right to free speech. And they are supposed
23 to be accountable, open and responsive. If they don't like
24 being talked to by members of the public, they probably
25 shouldn't work for the state.

1 Q Let me ask you a question. I'd like to direct your
2 attention to these pictures that we were looking at yesterday.
3 Turn to the first page, please.

4 A Sure.

5 Q Would you agree that this is a picture of Officer
6 McDermott as she's crossing the street?

7 A Yep. That looks like Roxbury Street.

8 Q And if you turn to the next page too, you agree that
9 this is also Officer McDermott as she's crossing the street?

10 A Yep. Same street.

11 Q How are parking meters being plugged by talking to her
12 when she's crossing the street?

13 A Well, clearly there's no parking meter there.

14 Q Right. Do you think it's a safety risk to talk to
15 somebody while they're in the middle of a crosswalk?

16 A Well, I would guess if you've checked the street and
17 you feel like it's safe to cross, then, no.

18 Q Mr. Freeman, do you recall saying, "The City is worried
19 that it's parking enforcement officers will all quit and be
20 irreplaceable"?

21 MR. MEYER: Your Honor, that again is beyond the
22 scope of cross-examination. It was covered in the original
23 examination, but it was not covered in cross.

24 THE COURT: Give me a second to look through my
25 notes.

1 How is this covered on -- how is this fair for -- for
2 further examination? How was this covered -- the subject area
3 covered on cross?

4 MR. DIETEL: Your Honor, Attorney Meyer inquired of
5 Mr. Freeman regarding his purpose, why he does these things,
6 what his political philosophy is, and I think I should have an
7 opportunity to respond to that.

8 THE COURT: I'll allow it.

9 MR. DIETEL: Thank you, Your Honor.

10 THE WITNESS: Can you ask that again, please?

11 BY MR. DIETEL:

12 Q Sure. Do you recall saying, "The City is worried that
13 its parking enforcement officers will all quit and be
14 irreplaceable"?

15 A It sounds somewhat familiar.

16 Q And do you recall saying, "That's exactly the point"?

17 A I don't recall exactly, but I could have.

18 Q I'm going to show you a document. I'd like to read the
19 last sentence on this page.

20 A This is from lawyers.com.

21 "Freeman says the City is worried that its
22 parking officers -- parking enforcement officers will
23 all quit and be irreplaceable because no one will
24 want the job, and that's exactly the point."

25 That's not an actual quote. That's the

1 interpretation of the author of the article.

2 MR. DIETEL: Thank you, Your Honor. No more
3 questions.

4 THE COURT: Further examination from the Defense?

5 REXCROSS-EXAMINATION

6 BY MR. MEYER:

7 Q Ian, you were asked about the space limitation or space
8 distancing ten to 15 feet vis-à-vis the activity of putting
9 coins in the meter. Now, in terms of videotaping, is that also
10 from your perspective part of the activity?

11 A It's an important part because it helps hold the
12 government employees accountable for their actions.

13 Q And what are the -- from your perspective, the space
14 considerations vis-à-vis performing effective videotaping?

15 A Well, the closer one can be to record video the more
16 effective it is. There was some points touched on previously.
17 I can reiterate that, for instance, if you're close to someone
18 -- if you're far away from someone, you have to use the zoom
19 function to get a closer shot. And if you're shaking your
20 hands as mine tend to do, that vibration becomes very, very
21 amplified when you have a zoom shot. So the best kind of shot
22 is to be relatively close to someone; you know, maybe around
23 five feet or so and, you know, have the zoom at its widest
24 pole. And that also prevents people from walking in front of
25 the camera and also allows you to get better audio.

1 MR. MEYER: Thank you, Your Honor. I have no further
2 questions.

3 MR. DIETEL: I have one final question.

4 FURTHER REDIRECT EXAMINATION

5 BY MR. DIETEL:

6 Q Are you aware that there are devices that you can buy
7 that can eliminate that shaking?

8 A It really doesn't matter. I have no obligation to buy
9 those devices.

10 Q There are devices that you could use that would
11 eliminate that shaking?

12 A I don't really see your point.

13 Q It's a yes or no question.

14 A Is that a question or a statement? It sounded like a
15 statement.

16 Q I asked you. You are aware that there are devices that
17 you can buy that will eliminate that shaking.

18 A There are some devices, but I don't know if they will
19 eliminate shaking and I don't really know if I have any
20 obligation to buy those devices.

21 MR. DIETEL: Thank you. No more questions, Your
22 Honor.

23 MR. MEYER: I have no questions.

24 THE COURT: You may step down, Mr. Freeman.

25 ///

PLAINTIFF RESTS

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2 MR. BAUER: Your Honor, at this point the City would
3 rest its case in chief subject to putting in various documents
4 that we referred to throughout the hearing, and we can do that
5 sort of administrative cleanup, if we could, at the end in
6 terms of discs and things like that.

7 THE COURT: Actually there have been some references
8 to discs of -- there are some portions of video that were
9 played and where we didn't have discs. Things were ruled
10 subject to that cleanup. Absolutely.

11 Attorney Meyer, is Defense prepared to call any
12 witnesses?

13 MR. MEYER: Right. I have one witness, Your Honor.

14 But just one thing I would like to do is to -- I
15 didn't ask before, but the video that was shown yesterday
16 showing Mr. Coleson being confronted by Mr. Burman I'd like to
17 have that put in as Defense Exhibit D.

18 THE COURT: Yeah. So that means it's E? We're up to
19 E?

20 THE MONITOR: D.

21 THE COURT: D. So it would be D.

22 Any objection to that?

23 MR. BAUER: Your Honor, to that -- to that point, I
24 mean, I'm happy to houseclean all these matters at the end of
25 this proceeding.

1 THE COURT: I would -- I think just for the record,
2 though, it's helpful to put on the record that -- a specific
3 request, and that's --

4 MR. MEYER: Right. Because I hadn't asked -- I
5 hadn't asked -- I neglected to ask it to be admitted, so I just
6 wanted to --

7 THE COURT: Not a problem. Not a problem. I --

8 MR. BAUER: I don't have any problem with that one
9 coming in. I would only ask that if I forgot to have something
10 marked as a full exhibit --

11 THE COURT: Is --

12 MR. BAUER: -- I have the opportunity to do that at
13 the end.

14 THE COURT: Again, it's not a jury trial. It's a
15 bench trial.

16 MR. BAUER: I have no problem --

17 THE COURT: There's no problem with that.

18 MR. MEYER: Thank you.

19 MR. BAUER: We have a standing rule here that
20 anything posted on the internet is automatically admissible.
21 Your Honor --

22 THE COURT: That's a joke.

23 MR. BAUER: Yes.

24 THE COURT: That's not true.

25 MR. BAUER: That was a joke. Not a good joke, but --

1 although maybe you know the courts --

2 THE COURT: It's pretty broad.

3 MR. BAUER: The courts of the 21st Century -- or 22nd
4 Century, you know that's where we're heading.

5 THE COURT: Limits to hours in the day available to
6 review video.

7 MR. MEYER: Your Honor, the Defendants call as their
8 first witness Kate Ager.

9 THE COURT: And before you do anything, raise your
10 right hand.

11 KATHRYN AGER, DEFENDANT'S WITNESS, SWORN

12 THE COURT: Thank you. If you can be seated. And
13 state your full name and spell your last name for the record.

14 THE WITNESS: My name is Kathryn Ager, K-A-T-H-R-Y-N
15 A-G-E-R.

16 DIRECT EXAMINATION

17 BY MR. MEYER:

18 Q And, Kate, how old are you?

19 A I'm 19.

20 Q And did you participate in Robin Hood activity during
21 any particular timeframe?

22 A I did. Between December 2012 and March 2013.

23 Q And during that timeframe, approximately how many hours
24 a week?

25 A Maybe eight.

1 Q And when you say participate, can you describe what
2 activities you engaged in?

3 A Well, I walked in front of parking enforcers and
4 dropped coins in the parking meters and left cards on people's
5 windshields to let them know they've been saved from a ticket.
6 Occasionally I would have a conversation with a parking
7 enforcer, but that's pretty much it.

8 Q Did you engage in any videotaping?

9 A Very rarely. Only for like a few minutes a few times.
10 I never published videos. I deleted them because there wasn't
11 any substance to them.

12 Q What was the reason? What was your reason for engaging
13 in Robin Hood activity?

14 A Well, I thought it would be a good way to, first of
15 all, help people in the community, save them from parking
16 tickets. I've never met someone who was happy to get a parking
17 ticket. I also thought it would be a good way to open the
18 floor to discussion with people that I might not have otherwise
19 interacted with so I could share my ideas with them.

20 Q Now, you said you stopped doing it in March. What was
21 the reason that you stopped?

22 A Well, I stopped Robin Hooding in March because after my
23 mom died I decided that I wanted to focus my efforts elsewhere.
24 I wanted to raise money for the Last Mile Ride, an end-of-life
25 care support program. So I focused my efforts there.

1 Q You said that one of the reasons for doing Robin
2 Hooding was to engage in communication with the parking
3 enforcement officers. Did you ever engage in any type of
4 derogatory language to the parking enforcement officers?

5 A No, I didn't. But just to clarify, it wasn't to engage
6 specifically with the parking enforcement officers. I thought
7 that it would open up the floor to engaging with other members
8 of the community, which it did. They would ask me about what I
9 was doing and why. I didn't really have a whole interest in
10 speaking with parking enforcers unless they wanted to.

11 Q Did you have any type of physical contact with the
12 parking enforcement officers?

13 A No.

14 Q Were you ever told by any of them to maintain a greater
15 distance, physical distance from them?

16 A I was never told a specific distance to stay away from
17 them. There was one instance where Jane said that it's fine if
18 I walk ahead and put coins in the meters, but she would
19 appreciate if I don't interfere with her job. I said that I
20 always try to avoid that. And there was no further comment on
21 it ever, so I don't believe that I actually did interfere or
22 get in anybody's personal space.

23 MR. MEYER: Thank you. I have no further questions.

24 MR. DIETEL: Two very brief questions.

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CROSS-EXAMINATION

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BY MR. DIETEL:

Q Ms. Ager, sounds like you were able to fill the meters and accomplish your goals without talking to the parking enforcement officers; is that correct?

A Yes.

Q Did you see the video yesterday that we showed where Graham Coleson was following Alan Givetz around?

A Can you be more specific, please?

Q We watched a video in the morning and it was --

A We watched a lot of videos.

Q Sure.

A The 20-minute video?

Q The 20-minute video.

A Yes, I saw that video.

Q Did you see how Graham was behind Alan on a regular basis?

A I didn't really note that, but in that video I guess it looked there that he was behind him some of the time.

Q You didn't have an opportunity to see a video that we watched up at the stand here earlier this morning, but there was some description about it. And the video was one that Garrett Ian showed in which he described that he was walking behind Alan Givetz. Do you remember that?

A Yes.

1 Q Did you ever walk behind the parking enforcement
2 officers?

3 A There are times that I've been behind them, but never
4 like directly behind them. I've been walking down the road and
5 I'll see them up ahead of me. And at some point I'll move so
6 that I get in front of them without, you know, bumping into
7 them or getting in their space as I pass.

8 Q So is it fair to say that you walked in front of them
9 because that's how you would fill the meters?

10 A It's fair to say that I walked in front of them as often
11 as I could. There are times that I walked beside one when I
12 was having a conversation. But I tried to stay in front of
13 them, yes.

14 MR. DIETEL: Okay. Thank you. No more questions,
15 Your Honor.

16 THE COURT: Further examination?

17 MR. MEYER: No further questions, Your Honor.

18 THE COURT: You may step down, ma'am.

19 Any additional witnesses, Attorney Meyer?

20 MR. MEYER: No, Your Honor.

21 THE COURT: None?

22 MR. MEYER: Yeah.

23 THE COURT: I think one of your clients wants to
24 confer with you.

25 (Pause)

DEFENDANTS REST1
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MR. MEYER: Your Honor, we have no further witnesses.

THE COURT: Any further witnesses for the City?

MR. DIETEL: No, sir.

THE COURT: Okay. I'm happy to have argument right now if counsel --

MR. MEYER: I personally prefer -- I think the Court said it would be in session for something else from 12 to 2. If possible, I'd like to give you the argument at 2. That would give us a chance to prepare for it.

THE COURT: Any objection to that request?

MR. DIETEL: No.

THE COURT: We'll recess now. We'll reconvene at 2:00 for oral argument on the pending motions. Thank you.

THE BAILIFF: All rise, please.

(Recess at 11:23 a.m., recommencing at 2:02 p.m.)

THE COURT: Back on the record in the matter of City of Keene versus James Cleaveland, et al. We finished the evidence this morning. And as I stated at the very outset, I wanted to have time at the very end of the evidence presentation for argument.

I did indicate to counsel at the end of the day yesterday that if there was -- if both sides wanted additional time to submit legal memoranda -- I don't know if counsel had discussed that issue: Timing, how much time you'd like. Has

1 there been any further discussion about that?

2 MR. MEYER: Your Honor, there hasn't been further
3 discussion. I guess my thought is -- I know the Court wants to
4 work on this promptly and not put it off indefinitely. So
5 maybe like -- today's Tuesday. Maybe one week or next
6 Wednesday?

7 MR. BAUER: That's fine.

8 THE COURT: Okay. So any further legal memoranda by
9 -- to be submitted by October 9; is that acceptable to both
10 sides?

11 MR. BAUER: Sure.

12 MR. MEYER: Yes.

13 THE COURT: Okay. Attorney Meyer, because you filed
14 the motion to dismiss and it's one of the pending motions
15 before the Court, why don't I have the Defense first argue the
16 motion to dismiss.

17 MR. MEYER: Thank you, Your Honor. Your Honor, I
18 feel particularly privileged to be participating in this case
19 because I've not been in a case in which so many different
20 interesting constitutional issues were presented in one
21 proceeding.

22 I also feel privileged in representing the Defendants
23 in this case. People may agree or disagree with their
24 philosophies. They may disagree with each other. But in an
25 age of materialism and electronics, it's refreshing to find

1 young people who really are interested in ideas of politics and
2 philosophy, and not only just in an abstract way but also in
3 terms of living out their beliefs.

4 And, you know, the Supreme Court has found the First
5 Amendments rights in tobacco advertising and in contributing X
6 million dollars to a political candidate. But I think more
7 than those cases which go to the periphery of the First
8 Amendment, this case is right at the core of the First
9 Amendment. It's hard to imagine a case the implicates more
10 directly and more purely the values embodied in the First
11 Amendment.

12 Your Honor, I also want to acknowledge the fact that
13 the Court has rather than going by offers of proof, which I
14 understand to be the standard procedure in preliminary
15 injunction cases, has heard extensive testimony from both sides
16 over the course of two and a half days, and I know that -- I'm
17 sure that the parties on both sides appreciate the fact that
18 they've been heard. And I think that adequately -- you know,
19 that's an appropriate acknowledgement of the seriousness of the
20 issues before the Court.

21 Now, in terms of those issues, I want to first
22 address under the terms of our motion to dismiss the only claim
23 that is contained in the equity petition, and that is the
24 argument of interference and contractual relations.

25 Both parties have reported back to the Court that

1 based on their research that neither side has been able to find
2 any case in which this particular tort theory has ever been
3 used in a case alleging the violations of the rights of a
4 governmental entity vis-à-vis its contract with its employees.
5 So we're definitely on new terrain here.

6 Now, in terms of the cases dealing with a tort more
7 general in the State of New Hampshire, I've not been able to
8 find a single case that didn't involve basically economic
9 competition where there was some type of economic motivation
10 for one party to try to induce the other party to breach a
11 contract.

12 I don't question the fact that theoretically the tort
13 could also be applicable in cases of personal vindictiveness or
14 other types of personal spite, but I can find no basis or
15 source or precedent for the idea that this type of tort claim
16 can apply in a case like this where the motivation is
17 political. And the consequences -- precedential consequences
18 of applying the tort in the political context would be
19 completely destructive to the political process.

20 Now, there are some of us -- hopefully my clients
21 won't be outraged to hear this -- who don't believe in the
22 downsizing of government but actually would like to see a
23 larger government. And I think it's really important that in
24 terms of those who want to see smaller government versus those
25 who want to see larger government that the court system itself

1 remain neutral.

2 And basically the theory adopted by the Defense in
3 this case -- I mean, the Plaintiffs in this case, the Town in
4 this case -- strike that -- the City of Keene in this case --
5 to say that inducing people to resign in your positions to
6 downsize government is somehow potentially a breach of tort
7 law, whereas arguing in favor of the expansion of government is
8 unaffected would basically inappropriately skewer political
9 discourse.

10 Now, it's clear in terms of this tort -- and there's
11 not much really that is clear because it's certainly one of the
12 more ambiguous torts that I've encountered -- that there has to
13 be some sort of finding of illegitimate purpose, and that
14 illegitimate purpose can't be based upon this agreement with
15 somebody's political ideology.

16 Beyond that, the facts in this case I think
17 demonstrate that there was no intent to cause a breach of
18 contract. In other words, there's been testimony -- I think
19 Mr. Freeman acknowledged that he may have expressed his
20 sincerely held opinion that parking enforcement officers, like
21 a number of other public employees, should resign their
22 positions. He also believes, as do other of the Defendants,
23 that that parking enforcement function should be eliminated.
24 The Defendants (sic) take those two facts and try to stick them
25 together and say, "Ah-ha, this is all part of the conspiracy to

1 force parking enforcement officers to leave, to downsize the
2 parking enforcement function."

3 There is -- there's an important missing link here.
4 There is no evidence at all in this case of the serious effort
5 to persuade any parking enforcement officer to leave their
6 position. In stating your opinion that they should resign is a
7 far cry from trying to persuade somebody.

8 If my clients really were trying to persuade them to
9 resign, that would be in all probability be done in the context
10 of some sort of private communication, not while they were
11 engaged in public and would involve more than simply stating
12 the expression of opinion.

13 Beyond that, there's been no evidence that any of the
14 parking enforcement officers placed any weight whatsoever on
15 any opinion expressed by the Defendants. Nor did any of the
16 Defendants have any reason to believe that any of the parking
17 enforcement officers will place any weight on any of their
18 opinions.

19 In fact, the one officer who testified he resigned
20 basically testified he resigned not because he was -- heard the
21 opinion that he should resign or was encouraged to resign but
22 because he was simply too stressed out to continue in his job.

23 So essentially the argument is, "Well, Plaintiffs
24 cause -- Defendants cause stress to the Plaintiffs --
25 Defendants cause stress to the parking enforcement officers.

1 That stress resulted in one officer resigning and another
2 officer changing their hours." That is far too indirect a
3 connection to support a tort, an interference with contractual
4 relations.

5 The other aspect of this -- just looking again at the
6 tort aspect of it -- is that these were employees at will. In
7 other words, they're choosing to resign or not resign their
8 positions, did not involve a breach of contract. They could
9 leave at any time without violating the contract.

10 Now, that is not a dispositive factor in terms of
11 ruling out the tort, but certainly the statement makes clear
12 that that is a significant consideration in discussing whether
13 or not the tort's been violated.

14 So, Your Honor, I think that any way -- and the
15 attempt here, creative attempt to expand this tort well beyond
16 its existing boundaries into an area that is completely
17 inappropriate to it has no legal factual basis. But even if it
18 did, it doesn't matter because such an attempt would clearly be
19 unconstitutional.

20 Now, in terms of the constitutional rights that are
21 involved here, first of all, we do essentially have at least
22 three types of constitutional rights. First the right of free
23 speech, and I don't need to say any more about that right in
24 this context. Secondly, the right of free association.

25 And one of the unusual aspects of this case is that

1 Defense counsel kept on -- sorry. So used to being on the
2 Plaintiff side of things. The City Council -- City Council
3 kept on inquiring of my clients about the using of walkie-
4 talkies like there was something wrong with that or some -- but
5 it cuts exactly the opposite way.

6 The fact that my clients were to some degree --
7 although obviously very -- only a very decentralized way were
8 acting together speaks to the fact that they were asserting
9 their right of freedom of association. And the Court has --
10 the U.S. Supreme Court has recognized that the right of free
11 expression is particularly protected in the context of a free
12 association. So that provides a separate independent basis for
13 constitutional protection in this case.

14 Thirdly is Part I Article 8 of the New Hampshire
15 constitution which was cited by some of the Defendants in their
16 testimony. Now, that is a provision which has no counterpart
17 in the U.S. constitution. And the New Hampshire Supreme Court
18 has never interpreted it in this contest. What they have done
19 is they've interpreted it in the context of access to judicial
20 records and things of that nature. At least the language the
21 New Hampshire Supreme Court has used has been very sweeping in
22 support of that constitutional right.

23 So particularly when it comes to videotaping, it
24 seems so directly tied into the idea of government
25 accountability. The Defendants in this case are basically --

1 from a constitutional perspective far more strongly situated
2 than persons doing the same conduct in other states.

3 Now, the second factor from a constitutional
4 perspective is the location. Again, it's not disputed that the
5 location of all of these events essentially is public property
6 in the streets, sidewalks and the lighted areas of downtown
7 Keene. And the courts have said over and over again at both
8 the state and federal level that that is the area of utmost
9 constitutional protection.

10 The third factor is the nature of the speech. And,
11 again, there's no question this is speech of a public concern.
12 So, again, that is the -- that is sort of the highest standard
13 in terms of -- in terms of legal protection.

14 Now, there are three types of speech we're talking
15 about here. One is the Robin Hood and conduct itself which the
16 courts have called expressive conduct. Secondly is the
17 videotaping, which Glick and many other courts have said is
18 protected by the First Amendment also by Article 8, and finally
19 the direct communication with the parking enforcement officers,
20 which is obviously pure speech.

21 Now, yesterday I provided the Court and defense
22 counsel with a copy of NAACP v. Claiborne. Because I think
23 that's a case that is, you know -- and again given the fact
24 that is an unprecedented situation in terms of this case,
25 that's about as close as we're likely to get.

1 And, again, in the Claiborne case, the NAACP in
2 Mississippi organized a boycott of variety of white merchants
3 in Claiborne County. And the facts are striking because of the
4 degree of the persuasion coerciveness that was utilized by the
5 NAACP. As the courts described it, their goal was to prevent
6 -- it was to discourage other white -- other black individuals
7 from patronizing white stores. So what they did is they would
8 have a squad of individuals with black hats outside of white
9 merchant stores. And if they saw a black person patronizing
10 that store, that person's name and identity was recorded. The
11 person's name was then put into publications at church and
12 stigmatized. And some of those persons ultimately were the
13 subject of violence. So the tactics used were extremely tough
14 tactics. They went well, well beyond pure speech and far, far
15 tougher than anything claimed in this case.

16 And the claim made by the white merchants in that
17 case analogous to the claim being made by the City of Keene in
18 this case is that the demonstrators interfered with our
19 contractual relations. In that case with their contractual
20 relations with their customers. And that was the finding of
21 the state court. And that decision was reversed by the U.S.
22 Supreme Court. And the principle grounds for reversal was --
23 the court said, "Yes, the speech was coercive. Yes, the speech
24 was stigmatizing. Yes, some of the speech was offensive. But
25 that's what speech -- political speech is all about and that

1 doesn't make it -- that does not make it subject to regulation
2 or prohibition." And I quote:

3 "The claim that the expressive -- expressions
4 were intended to exercise a coercive impact on
5 respondent does not remove them from the reach of the
6 First Amendment."

7 So even if in this case the Defendant's speech was
8 intended to coercively persuade the parking enforcement
9 officers to leave their employment, it is nevertheless clear
10 that that speech is constitutionally protected and cannot be
11 prohibited under state tort law.

12 Now, there are a couple of other aspects to the
13 Claiborne case that are also pertinent here. Beyond
14 recognizing the right to persuade -- even if it meant
15 persuading somebody to breach their contractual perspective,
16 contractual relationship.

17 They also -- the only exception the Court recognized,
18 sole exception, was for violence and threats of violence. And
19 even in that case -- in that case there were I think either ten
20 or 12 documented cases of violence; some of them involving
21 shootings. And the court said even in that case we can't
22 attribute the violence through all the demonstrators and we
23 can't blame the participants for acts of violence that may have
24 been perpetrated by individual demonstrators.

25 But in any event, this case there's no significant

1 claim of violence. We don't have to get to that issue of
2 attribution.

3 But the fundamental fact is that persuasive speech,
4 speech that is intended to and has the effect of causing
5 somebody to breach a contractual perspective, contractual
6 relationship. He's protected constitutionally absolutely and
7 he cannot be proscribed based on a tort theory.

8 And one other thing the Court said that I think is
9 relevant here is:

10 "The right of free speech cannot be denied by
11 drawing from a trivial rough incident or a moment of
12 animal exuberance the conclusion that otherwise
13 peaceful picketing has the taint of" --

14 I'm sorry. I lost the last part.

15 But, anyway, the point was that even if there had
16 been -- you know, you can't take an isolated incident or even
17 an isolated insult and taint the whole demonstration with that.

18 Now -- and I guess the other -- again, the point that
19 the court really focuses on in Claiborne is the importance of
20 the fact that this was an organized activity and that that was
21 part of the right of free association. And the Court said:

22 "One of the foundations of free society is the
23 right of individuals to combine other persons in
24 pursuit of a common goal by lawful means."

25 Now, I'm not going to claim here that Robin Hooding

1 is the moral equivalent of fighting for racial justice. But in
2 front of the courts and under the constitution all political
3 causes are entitled to equal weight. And the principles that
4 apply in Claiborne, which was a unanimous decision of the
5 Supreme Court are absolutely applicable and dispositive in this
6 case.

7 Now, in the context of those constitutional
8 principles, I just want to address the arguments that the
9 City's made in response to that.

10 First they talked about the stress on the parking
11 enforcement officers to the extent of it being a hostile work
12 environment. And, again, there's a lot of basis for arguing
13 about what a hostile work environment means much less whether
14 it existed here, but I don't think they can really dispute that
15 it was stressful for the parking enforcement officers to have
16 citizens videotaping them, to have citizens plugging meters, et
17 cetera, et cetera.

18 But the fact is that stress on government employees
19 is not a sufficient basis for abridging constitutional rights.
20 More centrally, the exercise of constitutional rights -- and in
21 particular the right of free speech inevitably causes stress
22 and pain, sometimes far greater than pain that anything
23 observed in this case.

24 In the Glick case, which, again, the first circuit
25 case involving videotaping where the police department was

1 complaining about the -- how they would be affected if the
2 people were allowed to videotape them. The court said:

3 "In our society police officers are expected to
4 endure significant burdens caused by citizens'
5 exercise of the First Amendments rights. The same
6 restraint demanded of law enforcement officers in the
7 face of provocative and challenging speech must be
8 expressed -- must be expected when they are merely
9 the subject of videotaping and memorializes without
10 impairing their work in public spaces."

11 Now, although the Glick case specifically involved
12 police officers, I mean, there's no doctrine that would justify
13 separating -- or treating one category of public employee any
14 differently than the other.

15 Another and, again, I think recent aspect of this
16 point is the case of Snyder v. Phelps, which is a 2011 U.S.
17 Supreme Court case. And that involved -- that was a suit
18 brought by a father of a soldier who died in Iraq. And when
19 the father -- when the soldier's funeral was held, these
20 demonstrators from this church in the mid-west who believed
21 that basically soldiers because this country tolerates
22 homosexuality picketed the funeral with songs saying, God it's
23 -- "Thank God for IEDs. Thank God for dead soldiers. God hate
24 fags," et cetera, et cetera.

25 Now, predictably that caused the father -- the

1 grieving father of the dead soldier extreme distress. And, in
2 fact, when he brought a tort claim for infliction of emotional
3 tension, infliction of emotional distress, the jury awarded him
4 2.9 million dollars in compensatory damages, which I think is a
5 measure of his -- how much he suffered. Nevertheless, the
6 court said in a free society speech, even though the speech
7 causes pain, grief and sorrow, must be permitted. In
8 particular, Justice Roberts -- Chief Justice Roberts said --
9 noted that:

10 "Speech can inflict great pain, but in the
11 public debate we must tolerate insulting and even
12 outrageous speech in order to provide adequate
13 breathing space to the freedoms protected by the
14 First Amendment."

15 Now, the City argues that -- again, this idea of a
16 hostile work environment. And I think the evidence here is far
17 short of a hostile work environment. But the more important
18 legal point, Your Honor, is that notwithstanding the City's
19 assertions, a hostile work environment is not illegal.

20 The City cites the case of Michael Porter versus City
21 of Manchester, which is a case in which I represented the
22 plaintiff. Porter does not hold that a hostile work
23 environment is illegal. What the court held was that a hostile
24 work environment can amount to constructive termination, but
25 constructive termination is not illegal unless it's tied to an

1 illegal motive.

2 In Porter's case, the claim was that he was being
3 retaliated against for blowing the whistle on public policy
4 issues. But the fact that there's a hostile working
5 environment itself, again, unless it's connected to an illegal
6 motive is not illegal.

7 So the City's constant invocation of that term has no
8 meaning at all in terms of creating an illegal imperative upon
9 it to take action in this case.

10 Yeah, even if a hostile work environment were illegal
11 it would still be trumped by constitutional considerations, but
12 that's not an accurate statement of state law.

13 Now, they also -- the City also complains about
14 safety issues. And, again, there was discussion about, well,
15 one was distracted and this or that. There's no -- we've had
16 two and a half days of testimony. There's been no significant
17 testimony about any safety problem.

18 Beyond that -- except, again, for the assaults on the
19 demonstrators that I'll mention in a minute. But beyond that,
20 we're talking about downtown Keene. We're talking about, you
21 know, if the City had legitimate safety concerns, I mean,
22 they've got a whole police department in that area. There are
23 many other ways to address a safety problem beyond restrictions
24 on demonstrations.

25 Now, the lead New Hampshire case -- and I'll provide

1 the Court with a name in -- its name in my memo. But it's a
2 1970s case in which the Seabrook -- a group of Seabrook
3 demonstrators were demonstrating on a traffic island in
4 Seabrook or Hampton, and they were arrested and the --
5 basically, the town said these people -- getting all these
6 people on a traffic island, busy traffic. Look at all the
7 safety problems you're going to have. And the Court came back
8 and said that if there really is a safety problem here, the
9 city has an affirmative duty to protect the safety of the
10 demonstrators not suppress the demonstration or, for that
11 matter, restrict the demonstration.

12 In terms of the claim of this is a distraction, well,
13 perhaps it is. But surely, parking enforcement officers should
14 be trained and are trained to deal with distraction. One of
15 the facts in this case is despite all the complaints about the
16 robin hooding activity, which has now gone on for five years,
17 there's been no evidence that the city has provided any type of
18 training or protocol to its employees, which is inconsistent
19 with the argument that it somehow has prevented them from
20 carrying out their duties. The only -- again, the only
21 significant safety issue that came up in this whole case was
22 the three assaults committed on the Defendants. And again,
23 that was evidence brought up by the city as if it somehow
24 supported its position when, in fact, that evidence has the
25 opposite effect.

1 It shouldn't take a lot of argument to establish that
2 you can't have people limiting or suppressing demonstrations
3 because they are -- by assaulting demonstrators. I mean what
4 sort of precedent would that be if a city could limit rights of
5 demonstrators because these people have been subject to
6 assaults by other private citizens? I mean that is -- that's a
7 classic example of the heckler's veto.

8 And it just -- I mean, first of all, it permits the
9 drowning out of speech based on lawless activity. But the
10 other part of it is it permits those relatively smaller number,
11 a handful of people who choose to engage in illegal activity,
12 to drown out the many people who have provided, you know,
13 peaceful feedback, both positive and negative, to these
14 demonstrators. So again, it can't possibly justify any kind of
15 injunctive relief that this city is asking for.

16 Now that finally comes to really what the city's
17 fundamental argument against the constitutional claim is. And
18 that argument is that all they're asking for is reasonable time
19 and space, the time, place, and space restriction. Well,
20 they're not really asking for time restrictions or place. So
21 they're really asking for space restrictions.

22 Now, first of all, they justify these restrictions
23 based upon the theory that the proposal they're making is
24 content neutral. And I think it should be clear from the
25 two-and-a-half days of hearing this case that that's just not

1 true, that this is not a content neutral proposal that's
2 intended to apply to all demonstrators. It applies to -- it's
3 limited to one specific group of demonstrators, and it's not in
4 any way -- I think it's clear that if my clients were there
5 just telling parking enforcement officers what a great job they
6 were doing, none of this would have occurred. So, clearly, it
7 is addressed a particular type of communication by a limited
8 number of people. And if there were any question at all about
9 that, there was a shadow of a doubt, then the nature of the
10 relief here makes that absolutely clear. In other words, this
11 is -- they're not asking the Court to issue a general order
12 applicable to all people. They're asking specifically that six
13 people, and six people alone, be enjoined. And again, I'll
14 cite later as we get into the relief issue. But I mean the
15 supreme court has said on its face, U.S. Supreme Court, that
16 that is conclusive proof that this is not a neutral -- you
17 know, it's not a neutral action. And therefore, the time and
18 place -- time and manner restrictions are not applicable.
19 And that -- again, I'll cite in the memo. But that's
20 specifically in the Madsen v. Women Health Center case, that
21 the U.S. Supreme Court said that you can't apply that standard,
22 because there's a lack of neutrality when you're asking for an
23 injunction as opposed to enforcing an existing ordinance.

24 Now in terms of the space issue itself, again, there
25 are three different activities here. And space considerations

1 for each activity is different. And I think at some points
2 during this testimony, Plaintiff's counsel has tended to try to
3 merge them together. In terms of the robin hooding activity,
4 we were told that ten or 15 feet was optimal space, but there
5 would inevitably be times, when the -- they were closer to
6 parking enforcement officers, not necessarily because they went
7 to the parking enforcement officers but because the parking
8 enforcement officers would come up to them to go to the meters
9 or to go to a crosswalk, et cetera.

10 Now on the videotaping, again, certainly nobody has
11 claimed her that there's a right to stick somebody's videotape
12 camera in somebody's face. But there's been no evidence in
13 this case that that's ever happened. And in the Glick case,
14 which the -- you know, remarkably, defense counsel said was a
15 -- I mean that's -- those on the civil liberties side of things
16 in which that has been sort of a -- a strong civil liberties
17 case. The defense counsel came up and said well, it's a time,
18 place, and manner case. Well, it's an interesting
19 interpretation. But in the facts in the Glick case, the guy
20 doing the recording was ten feet away, okay. And the Court
21 said, in that case, that ten feet is well within what's
22 permitted. So the Court didn't say how close you could get.
23 It didn't say whether it was, you know, two feet, four feet,
24 six feet. But it's clearly -- the Court made it clear that the
25 permissible limit was something under ten feet, certainly

1 nothing -- any family resemblance to the 30 feet that this city
2 is arguing for in this case.

3 And finally, you've got the issue of the direct
4 dialogue with the parking enforcement officers. And the irony
5 of the 30-foot restriction imposed by the city is it does
6 precisely the opposite of what it seems to do. In other words,
7 it basically puts my clients in a position of having to yell at
8 the parking enforcement officers. It makes it almost
9 impossible to have the type of, you know, dialogues that the
10 Court has heard on a number of the videotapes.

11 Now quite apart from that, again, the eight feet --
12 sorry. The 30 feet is clearly, you know, unconstitutional. In
13 Hill versus Colorado, which is another one of the abortion
14 cases, the U.S. Supreme Court upheld an eight-foot
15 restriction, which I think is the largest footage restriction
16 that I've ever seen upheld in terms of direct communication.
17 But that was eight feet in the context of only within the 100
18 feet of an abortion provider entrance, and there was entrance
19 and exit. There's been no suggestion that eight feet would
20 have survived if it applied to the whole downtown area of a
21 municipality. So even in that restrictive sense, I mean the
22 most that's ever been contemplated is eight feet.

23 Now finally, defense counsel kept on challenging my
24 clients about didn't they understand this was all about
25 balancing of interest. And every time he asked my clients that

1 question, I sort of regretted the fact that I wasn't on the
2 witness stand, so I could have answered the question myself.
3 Because the answer is clearly no. This is not a case about
4 balancing interests. The constitution is not just --
5 constitutional rights are not just other interests that are
6 balanced under the standards of various state tort claims.
7 That's not the law and it's never been the law.

8 Now finally, I want to just respond to the question
9 the Court has asked at the end of the day yesterday, which is
10 if the interference with contractual relations claim fails, is
11 there any other claim to sustain the city's request for relief.
12 Now again, the city will have to speak to whether they're even
13 alleging any other claim, but it seems to me that there are
14 only two conceivable claims here beyond that -- beyond an
15 inference of contractual relations. One is just the claim of
16 equity itself. And I certainly acknowledge that equity is
17 supposed to be broad and flexible. But it's supposed to be
18 broad and flexible and bringing about -- and vindicating a
19 legal right. It's not supposed to be broad and flexible in
20 creating a legal right. Otherwise, we've departed from a
21 nation of laws, and we're back to, essentially, pretty much
22 unlimited judicial discretion.

23 Now in this case, basically, what the city is arguing
24 is we've got a hostile work environment. Therefore, we're
25 somehow entitled to a remedy. Now if that were the -- I mean I

1 -- you know, my regular life I'm an employment lawyer on the
2 Plaintiff's side. If the city were correct, if a hostile work
3 environment by itself merited some type of equitable response,
4 I mean that would revolutionize the law of employment. I mean
5 that stands every principle of employment law on its head. And
6 just another example of how they're seeking from the Court to
7 go well beyond the principles of law that have been recognized
8 in any other context. And that's particularly improper in this
9 case, because we're dealing, understandably, with lay people
10 who come to this proceeding with some level of distrust for
11 government. And on the one side -- and the other side we're a
12 body of government. And I think it's really importantly,
13 particularly important that the Court maintain its role of
14 neutrality and not use the idea of equity to sort of step in
15 there and create a legal right. And again, final point on
16 this. I mean to get the preliminary injunction, you have to
17 show probability success on the merits. And to me, merits
18 means it has to be some underlying legal claim to vindicate.

19 Now the final -- the city has -- as the Court noted,
20 the city has filed a damages claim as well, which is not
21 technically before the Court at this point, although I
22 understand the city plans to consolidate the two cases, or
23 attempt to consolidate them. The damage claim -- damage case
24 makes the interference claim. It doesn't make a claim based on
25 remedy, but it does add a new claim of negligence. And it

1 makes the assertion that the Defendants have a duty of care to
2 government not to create unsafe working conditions for
3 government employees. And I guess all I can say on that theory
4 is that I think just stating it verbatim makes clear how it is
5 absolutely and utterly without any type of legal foundation. I
6 mean this is a complete. It goes beyond my opinion. It goes
7 beyond creative lawyering to attempt to make something out of
8 whole cloth, which has no conceivable precedent and really
9 violates all the existing principles here, particularly as they
10 apply to the constitutionally protected conduct.

11 Your Honor, I have comments to make in terms of the
12 injunction and the proposed remedy. But at this point, I think
13 I would defer to the city to respond.

14 THE COURT: Thank you.

15 Attorney Bauer.

16 MR. BAUER: Thank you. It please the Court, on
17 behalf of the city of Keene. This Court has a unique
18 opportunity to fashion an equitable remedy that will strike a
19 balance between competing interests. And those competing
20 interests are the fundamental rights of speech, expression,
21 assembly, videotaping versus the interests of employment
22 relations. You have the equitable authority to do justice.
23 That's what equity is, to do justice, to do the right thing, to
24 balance the interests of the competing interests that are
25 involved, and to speak to the community, to bring peace and

1 harmony, as you've heard, out to the streets in the city of
2 Keene. And I would ask you to take a view of the parking meter
3 situation when you have an opportunity.

4 As an equity judge in this matter, you have an
5 opportunity to create a win-win situation where these folks can
6 continue to do all of the things that they want to do, plug the
7 meters, put the cards on the cars, do the saving of tickets,
8 and ultimately, bring down the parking enforcement of the city
9 of Keene, so long as they don't interfere, harass, taunt,
10 intimidate, and cause an unsafe and hostile working
11 environment, that at least where one employee, as you've heard,
12 has been intolerable.

13 Now the question really is that you've asked us to
14 address is a purely legal question. It is purely legal. It is
15 not based on any facts that you've heard over the last two
16 days, although the facts do give some context. But the legal
17 question is does the city of Keene, which is a corporate --
18 municipal corporation, have a right in an employment
19 relationship with an employee. If you say no, as a matter of
20 law, that will be the first time that an employment
21 relationship between an employer and employee has been
22 determined to have no rights in that relationship. And if your
23 answer is yes, that an employer, a municipal employer, does
24 have a right in an employment contractual relationship with an
25 employee, then the question becomes -- the legal question

1 becomes for you does the employer have a right to protect that
2 employment right, and the answer is yes.

3 I agree with my brother, and I agree with this court,
4 that this is a purely legal question. It's a question of first
5 impression, but it is not a major leap from the law that has
6 been developed. The law that's been developed is that
7 municipal corporations such as the city of Keene are treated as
8 natural persons. They are -- the city -- the municipal
9 corporation is like any other private corporation. A municipal
10 employer is not treated any differently than a private
11 corporate employer. And there's no dispute that a private
12 corporate employer has rights in its employees and it has
13 obligations to protect those employees. Has obligations to
14 protect those employees from work environments that are unfair,
15 that are hostile, and that are unsafe. And a failure of a
16 private corporation employer not to protect the employee does
17 give rise to potential lawsuits by the employee, intentional
18 infliction of emotional stress, negligence towards that
19 employee. So it is not just based on discrimination issues.

20 Now we believe that this Court should find that the
21 municipal corporation has rights in the employment relationship
22 with its employees. And if so, then it has the right to
23 protect those interests. If this Court, because of the lack of
24 case law out there, one way or another, my brother and I agree
25 on a couple of things. And one thing is that there is no case

1 law that says that there is no such case of action, and there
2 is no such case that says there is a cause of action. But I
3 believe, based on the precedent, that our position is not that
4 far a stretch from the private corporate employer situation.
5 And if you think otherwise, that it's an open question of first
6 impression in the state, maybe certification is the way to go.
7 But I think this court can find, through the precedence that
8 have been in the New Hampshire cases, that it is not a stretch.
9 I firmly believe that if the issue were -- is appealed, and it
10 may be appealed or it may be certified, that the New Hampshire
11 Supreme Court will certainly say that there is a right of a
12 municipal corporation employer in its employees and a right to
13 protect them. Otherwise, contracts or town managers and town
14 administrators mean nothing if some other municipality or town
15 wants to raid those employees. They certainly have employment
16 relationships that have value. And in this case, you've heard
17 evidence that the city has invested through the hiring process,
18 the training process, the payments of money, the benefits, has
19 invested in its employees, and those rights should be
20 protected.

21 What we're asking for in terms of this win-win
22 situation is an injunction that burdens the speech no more than
23 necessary than to serve the significant governmental interests
24 at stake. And that's what the United States Supreme Court said
25 in the case of Madsen, M-A-D-S-E-N, in 1994. And what Madsen

1 said was that if it's narrowly defined -- excuse me. What
2 Madsen says, if you identify significant governmental interests
3 in the first instance -- and in this case there are several.
4 They've been outlined in our briefs before. But just to
5 reiterate, significant governmental interest is a promotion to
6 public safety, public order, the motoring and walking public
7 safety, the parking enforcement rules and regulations, the
8 hiring and retention of city employees, and also the promotion
9 of freedom of expression in terms of reasonable time, place,
10 and manner restrictions.

11 And if you find that there are significant
12 governmental interests, and we think there are several, then
13 this court has the power, according to the United States
14 Supreme Court, to draft or fashion an injunction that will
15 protect those significant governmental interests and not overly
16 burden the rights of expression. And that is exactly what we
17 are asking the Court to do.

18 THE COURT: Let me ask a question. I just want to
19 make sure, and then I want to let you make a presentation. Do
20 you agree with Attorney Meyer's statement that if the claim for
21 interference with contract relations does not survive, that the
22 case is over?

23 MR. BAUER: It's not a simple yes and no answer,
24 unfortunately for the Court. And the reason for that is,
25 certainly, we have pled in the injunction action intentional

1 interference with contractual relations, which I've just
2 addressed. You know now that some damage has occurred through
3 the testimony which had not occurred before. We tried to
4 prevent that damage with the injunction, but it came too late.
5 Now we have a foot in the legal arena as well. And there is
6 not only intentional infliction -- intentional interference but
7 also a negligence claim.

8 And this court may be familiar with the New Hampshire
9 Supreme Court case of Hughes versus New Hampshire Division of
10 Aeronautics, which was decided 152 New Hampshire in 2005, when
11 a superior court judge found summary judgment on the issue of
12 intentional interference, and the supreme court reversed and
13 remanded that case. You may be familiar with that case. And
14 the reason for that is because there's an issue of fact.
15 That's what the New Hampshire Supreme Court said, there is an
16 issue of fact. And there is an issue of fact in the
17 intentional interference issue and there is an issue of fact
18 with regard to the negligence issue. So I --

19 THE COURT: I guess all I was going with the question
20 was the city is not arguing that separate and distinct from the
21 claims that have been brought, as a matter of the Court's
22 general equity powers, the Court should, in the event -- I
23 haven't -- I'm still looking at the case law.

24 MR. BAUER: Yeah.

25 THE COURT: I'm still going to look at the arguments.

1 I haven't made up my mind on this question. But I just want to
2 know the answer to the question. If a court determines that
3 the claims for tortious interference or -- perhaps I'm getting
4 ahead of myself on this, but the claim for negligent
5 interference with contractual relations, if those claims don't
6 survive independently, you're not arguing that the Court
7 should, as a separate matter, exercise its equity powers and
8 grant you the relief you request.

9 MR. BAUER: I'm not going to waive that issue, Your
10 Honor. I'm not going to waive that issue, because I will tell
11 you that under R.S.A. 498:22, this court may hear -- as
12 statutorily decreed, the Court may hear and determine such
13 cases, as in the course of equity, and grant writs of
14 injunction whenever the same are necessary to prevent
15 injustice. That is a broad equitable power given. And
16 recognized statutorily in the case of Hatch, H-A-T-C-H, a 1927
17 case, versus Hillsgrove, in Hatch, the New Hampshire Supreme
18 Court said -- Judge -- Justice Snow said that the equitable
19 jurisdiction of the Court predated the statutory provisions.
20 So there -- I'm not waiving any argument that's separate and
21 apart from intentional interference or negligence. This court
22 doesn't have the equitable jurisdiction and power to craft
23 equitable relief.

24 THE COURT: I understand.

25 MR. BAUER: I'm sorry, but I'm not --

1 THE COURT: No, I just -- I'm -- you've answered my
2 question. I'm not sure I agree with your -- with the answer,
3 but I appreciate that answer. And please continue with your
4 presentation.

5 MR. BAUER: Okay. So with regard to the legal issue,
6 the purely legal issue which is before the Court, we ask this
7 court to protect the economic relationship that exists between
8 the municipal employer and its employees by way of a reasonably
9 crafted injunction. We have suggested to the Court certain
10 distance. And the reason for the distances is not etched in
11 granite. It is a suggestion, and I would not want this court
12 to get hung up on its 30 feet or nothing or its 50 feet or
13 nothing or its ten feet or nothing.

14 I acknowledged that the United States Supreme Court
15 cases have established distances, have upheld injunctions as
16 far as 100 feet, where there's a fixed abortion clinic, down to
17 eight feet, which is the Hill case, the 2000 Hill case that the
18 supreme court granted. So the question for you is what is fair
19 and appropriate and reasonable, balancing the interests.

20 One thing that I disagree with, with my brother, is
21 that First Amendment rights, be they speech, assembly,
22 videotaping, are not absolute. He suggested that there is no
23 balancing of interest to be involved. I'm a small player in
24 this, but the United States Supreme Court, the First Circuit
25 Court of Appeals, the New Hampshire Supreme Court have always

1 recognized that First Amendment rights are not absolute. Never
2 have been, never will be. Nobody has the right to use their
3 freedom of expression in a way to harm other people. It's a
4 balancing. It's a balancing act, and it's a tough balancing
5 act that I acknowledge the Court has.

6 But I think that you've heard sufficient evidence,
7 based on probability, that if this case were to go to a jury by
8 way of the writ that's now been filed, that there a reasonable
9 likelihood of success that a jury would return a verdict in --
10 that the --

11 UNIDENTIFIED SPEAKER: Sorry.

12 THE COURT: If you would make sure that that's turned
13 off.

14 UNIDENTIFIED SPEAKER: Yeah.

15 THE COURT: Thank you.

16 MR. BAUER: That there is a reasonable likelihood
17 that a jury would find in favor of the city in protecting its
18 economic interests in these employees, because before the jury
19 there will not be this equitable injunction issue, ten feet, 30
20 feet, eight feet. It will be purely a question of fact. And
21 the jury will be asked to look at the evidence, some of which
22 you've heard, and determine whether a jury of 12 people of this
23 county believes that there has been an interference with
24 employment relations or whether there's been a breach of a
25 duty.

1 Now again, my brother and I disagree with regard to
2 the breach of duty, whether there is any duty. And I recognize
3 that the first question of whether there's a duty is a legal
4 call. But if you take a look at the situation where you've got
5 a third party who comes into any employment relationship and
6 creates a hostile work environment or an unsafe work
7 environment, that the employer has a duty to that employee to
8 protect them. And if a public corporation -- I'm sorry. If a
9 private corporation employer would have the right to go to this
10 court and seek an injunction against an individual coming into
11 an office setting or an office setting outside, then,
12 certainly, the municipal corporation employer has the same
13 right.

14 I want to address a number of things that Mr. Meyer
15 touched on if I may.

16 THE COURT: Certainly.

17 MR. BAUER: First of all, the Glick case. I too am
18 very familiar with the Glick case, having argued in front of
19 the First Circuit about two weeks ago the other side of the
20 Glick case. But that was with regard to police officers. But
21 one thing that the First Circuit says in Glick is that the
22 recording -- and it was about filming cops. The filming of
23 police officers was done without any interference of the
24 officers' performance of their duties. And that is
25 significant. That is a significant limitation, because the

1 holding suggests that if there were interference with the
2 public employee's duties, then the right under the First
3 Amendment is not absolute, and the Court says that. Judge
4 Lapee (phonetic) says that right at the outset, to be sure the
5 right to film is not without limitations.

6 In Chaplinsky versus New Hampshire, U.S. Supreme
7 Court 1942, out of this jurisdiction, the right of free speech
8 is not absolute at all times and under all circumstances, which
9 gets back to the balancing issue. Rights are not absolute.
10 They are cognizant or cognizable. They are afforded
11 protection. And they can be balanced under an injunction.

12 Most recently -- the most recent case that is --
13 addressed this issue are the McCullen cases, M-C-C-U-L-L-E-N.,
14 one decided in 2013 and one decided in 2009, coming out of the
15 First Circuit, both of which upheld zones of separation,
16 because that's really what we're talking about. Some people
17 talk about floating zones, fixed zones, but it's a zone of
18 separation. And that's what we've been asking for in this
19 case, a zone of separation. And it is for you to decide what
20 the nature and degree of that zone of separation would be
21 appropriate under these circumstances. Those two cases both
22 upheld zones of separation. They were 35-foot zones of
23 separation.

24 The case of Hill, which is a United States Supreme
25 Court case, decided in 2000, the United States Supreme Court

1 talked about the issue of unwanted discussion. And you've
2 heard evidence of that from the parking enforcement officers.
3 And I know you've heard evidence to the contrary. And it's
4 going to be your job and responsibility to weigh the
5 credibility and reliability of that testimony. But the Supreme
6 Court of the United States said an unwilling listener's
7 interest in avoiding unwanted communications has been
8 repeatedly identified in our cases. It is an aspect of the
9 broader, quote, right to be let alone, end quote, that one of
10 our wisest justices characterized as the most comprehensive of
11 all rights and right most valued by civilized -- he said men.
12 I will say people.

13 From all of this, the person sought to be influenced
14 has the right to be left free. And his employer has the right
15 to have him free. Now is it in the same context of an
16 employment relationship? No, it is not. But it is in the
17 context of protestors, anti-abortion protestors, and people
18 seeking medical advice for abortion. And in that case, which
19 is the most recent and definitive statement about injunctions
20 or protestors and balancing the rights -- the conflicting
21 rights -- and I acknowledge this is an eight-foot zone of
22 separation. And I'll tell you why. You probably know, but
23 I'll tell you.

24 The photographs that you have in evidence demonstrate
25 that two parking meters is approximately 30 feet. It's not

1 magic. It's not science. But you -- everybody needs some kind
2 of benchmark. And I've been calling it a football field, and
3 maybe I'm too old for that anymore. But one -- a zone of
4 separation of two meter -- two parking meters is about 15 feet.
5 And I would invite you to go out and take a look at the meters.
6 You'll see that three meters is about 30 feet. Two meters is
7 about 15 feet. And it depends on whether they're diagonal or
8 horizontal or parallel. But it's some reasonable benchmark.
9 And if they're -- I would also say and if -- nobody is out
10 there with a tape measure. You know, in the abortion clinic
11 cases, they actually do put tape down. In the city of Concord,
12 there is tape down around a clinic. In Boston, there is tape
13 down. There is white marking. There isn't any -- going to be
14 any marking, and we're not requesting any marking, because I
15 know that if this court issues a reasonably crafted injunction
16 against these Defendants, that they will abide by that. And we
17 will not be in here when somebody comes within X number of
18 feet. That's just not going to happen, because there's an
19 element of good faith on both sides of the fence on this issue.

20 The case of -- that Mr. Meyer brought up, the --

21 THE COURT: The NAACP case?

22 MR. BAUER: No, it was the -- I'm sorry, I'm blanking
23 on the name.

24 THE COURT: No, no.

25 MR. BAUER: But it had to do with the funeral

1 services.

2 THE COURT: Oh, the Snyder case.

3 MR. BAUER: Snyder case, thank you. And I thought I
4 had it in front of me. But in the Snyder case, again, the
5 United States Supreme Court recognized that the protestations
6 that were going on and the protestations that were entitled to
7 go on were being done at a safe distance away, a safe remove,
8 so that yes, there were some protestations, but the Court
9 recognized that that could go on. But in the court decision,
10 you will see that there's a safe distance. And the same thing
11 with Glick. Glick talks about a safe remove, whatever that is.
12 And what we're suggesting is that it is whatever you think it's
13 going to be, somewhere between eight feet and 50 feet. And
14 again, we're not suggesting that there is any precision with
15 regard to a particular distance.

16 The Second Circuit case, which has also been cited in
17 the four memos that we have filed, and which I would
18 incorporate into this argument, Your Honor --

19 THE COURT: And let me say this for both counsel in
20 terms of legal memo. There's no need to restate in the
21 arguments. I'll review all the memoranda that have been
22 submitted in connection with the case.

23 MR. BAUER: Yes. And I -- we know you will. But in
24 the Second Circuit case, which came out in 1999, referencing
25 the United States Supreme Court case of Hill, again, the Second

1 Circuit upheld a -- and their phrase was zone of separation,
2 recognizing the Madsen test. And that's why I said during the
3 trial, maybe inappropriately while the evidence was going on,
4 that's what the heart of this case is, the Madsen case. And
5 that is whether the challenged provisions of an injunction
6 burden no more speech than necessary to serve a significant
7 governmental interest. There's the balance. There's the
8 seesaw. No more restriction on speech than necessary to serve
9 the other interest, the significant governmental interest.

10 I have not had a chance to go through the 23-page
11 decision of the NAACP, Your Honor. Last night I was --

12 THE COURT: Not a problem.

13 MR. BAUER: -- putting this together. I will address
14 the Clairborn case. But it certainly sounds to me as though
15 that case decided in 1982, and my quick perusal suggests that
16 this goes back to a very dark time in our American history.
17 And it is not precedent for the case in front of you. It deals
18 with racial discrimination and the like. But I will address
19 that in a follow-up memo.

20 So in conclusion, I want to emphasize that the city
21 of Keene is an employer. The city of Keene is a corporation.
22 The law in New Hampshire recognizes that municipalities are
23 treated the same as other corporations, other employers, other
24 persons under the law. There is no difference. And if there
25 are vested rights in the private corporate employers, there are

1 such rights in public corporate employers. I think it would be
2 inappropriate for this court to find, as a matter of law, that
3 there are no such interests that the city has in its employment
4 relationships with its employees.

5 I guess I'd like to reserve a couple of minutes in
6 rebuttal to whatever else needs to be argued at this point.

7 THE COURT: Not a problem.

8 Attorney Meyer.

9 MR. MEYER: Your Honor, along the lines of the couple
10 minutes of rebuttal, I don't want to get into a tit for tat,
11 but I do want to spend about two minutes just responding or
12 adding to a couple of questions that Attorney Bauer raised.

13 First of all, does -- he says is the fundamental
14 question does the city have a right in an employment
15 relationship. I wouldn't use the word right, but I wouldn't
16 deny the fact that the city has a contractual relationship with
17 its employees. So that's not in controversy in this case. The
18 issue is whether the contractual relationship with the employee
19 enables it to then bring this interference and contractual
20 relations claim against a political organization motivated by,
21 clearly, First Amendment concerns.

22 Secondly, he raises a specter of the city being sued
23 by its employees for a hostile work environment. The fact is
24 the city is can't -- I mean an employer can't be sued by
25 employees for a hostile work environment. Even if a hostile

1 work environment by itself were illegal, which it's not, you
2 can't sue for it, because the work is comp barred. So there
3 would be no conceivable claim there. And I'm not saying that
4 the -- an employer or any employer, including the city,
5 shouldn't try to protect its employees. And I think one of the
6 remarkable facts about the record here is how little effort was
7 made to provide genuine protection. But certainly, there can
8 be no claim by the employees for a hostile work environment
9 against the employer.

10 Thirdly, Attorney Bauer repeatedly relied on the
11 McCullen case, which is the most recent First Circuit abortion
12 case, upholding a 35-foot fix buffer zone. The remarkable
13 fact, Your Honor, about that reliance is that the supreme --
14 the U.S. Supreme Court took a cert on that case. And
15 statistically, when the U.S. Supreme Court takes cert on a
16 case, 70 percent of the time it reverses. So to rely on that
17 opinion, if the heavy reliance on that opinion where the
18 supreme court has already given a strong signal that it's not
19 going to be upheld is it seems to be -- you know, but the point
20 about the McCullen case is interesting, is the McCullen case
21 really went no further than prior U.S. Supreme Court cases. So
22 the fact that the U.S. -- the current U.S. Supreme Court has
23 chosen to review it I think is a suggestion, if anything, that
24 the Court is going to be more restrictive in terms of dealing
25 with, you know -- or less likely to uphold buffer zone type

1 restrictions.

2 The final point, I guess, the question about the
3 right to be left alone that Attorney Bauer invoked in broad
4 terms. Whether there is a right to be left alone and in what
5 context exists is extremely controversial.

6 Most recently the New Hampshire Supreme Court
7 addressed that in the case of Doyle versus Department of
8 Resource and Economic Development -- which actually comes from
9 this part of the state. My client, John Doyle, was dressed up
10 in a gorilla outfit on Mount Monadnock and hikers were
11 complaining that he was disturbing their solitude.

12 And the Court said, you know, the states that were
13 standing up for the right of some hikers to be left alone, the
14 state basically said it is completely -- sorry. New Hampshire
15 Supreme Court said there's a lot of doubt whether there is such
16 a right. We're not going to have to rule on it in this case,
17 but it's certainly Doyle doesn't stand for it.

18 And even if there is a right to be left alone,
19 there's absolutely no precedent for saying the Government
20 employees have a right to be left alone. And there's a
21 qualitative difference between Government employees on the one
22 hand versus private citizens on the other.

23 And, Your Honor, in terms of the specific issues --
24 in terms of the preliminary injunction in this case, Attorney
25 Bauer made an argument that a jury is going to have to decide

1 ultimately whether or not there was a violation of the tort, if
2 the tort exists.

3 Again, it's a strange observation given the fact this
4 is an action in equity. The Plaintiff has not sought a jury
5 trial. So unless and until the Court consolidates the cases
6 and finds the right to a jury trial, this is not going to be a
7 determination by a jury, but a determination by the Court.

8 In terms of the facts of this case -- again, the
9 Court's heard two and half days, taken extensive notes. I'm
10 not going to spend the time -- the Court's time -- trying to
11 re-summarize it. I would say, just make two observations.

12 First of all, there was really more agreement between
13 the witnesses than the disagreement -- notwithstanding all the
14 theatrics surrounding the case.

15 Secondly -- and actually I'm making three points.
16 Secondly, I think that in some ways the video evidence here is
17 more reliable than the recollection of individual witnesses.
18 And the videos we presented, one of them presented Mr. Coleson,
19 who was basically the principal source of the parking
20 enforcement officer complaints, demonstrating remarkable
21 restraint and composure when confronted by a very angry and
22 abusive counter demonstrator.

23 Then there were two videos by one of the three
24 parking enforcement officers on Ms. McDermott, again showing
25 that she was engaging in, you know, very civil and sometimes

1 humorous exchanges with the Defendants.

2 And thirdly, a video of Mr. Givetz showing that he
3 was basically the one that was invading the space of the
4 videographer by deliberately turning around and moving towards
5 the videographer rather than visa-a-versa.

6 The third fact that I want to point out is there's
7 been testimony that the City, you know, retained this
8 Mr. Thomas specifically to sort of monitor the demonstrators
9 and prepare 30 odd hours of tape. Beyond that, there's
10 hundreds of hours of tape on the internet.

11 With all that material that the only tape that the
12 City found half-way incriminating was that one 20 minute or 15
13 minute tape of Mr. Coleson videotaping Mr. Givetz, I think
14 speaks for itself.

15 I mean, if in fact there was this -- any significant
16 level of misbehavior occurring on behalf of the Defendant's, I
17 think there would be some videograph evidence of that, which
18 there is not.

19 The -- I'm not claiming here and I don't think
20 anybody's going to claim on the Defense side that they're
21 perfect and I think you heard some of the parking enforcement
22 officers acknowledge that they weren't perfect either.

23 But the overwhelming weight of the testimony in this
24 case is that this is sincere political activism with no
25 violence. And any incidents of incivility were, you know,

1 greatly outweighed by instances of consideration and
2 accommodations and acknowledgment without any interference or
3 involvement by the City or need for any type of injunctive
4 relief. So again and I'll leave it to the Court beyond that to
5 weigh the facts here.

6 I would point out, though, on the preliminary
7 injunction, two final points. First of all, it's clear under
8 equity there's supposed to be irreparable harm. The City has
9 now brought another lawsuit claiming these damages can all be
10 assessed based on money damages.

11 If that's the case -- as our witness claims -- then
12 surely there's no basis here for injunctive relief. And again,
13 I would note that the claim here is not by the parking
14 enforcement officers. It's purely by the City. And it's
15 purely by the City for its financial losses. So no evidence of
16 any irreparable harm that would require injunctive relief.

17 And finally, one of the factors that a Court is
18 supposed to weigh heavily in granting or not granting
19 injunctive relief is the public interest. And the issue in
20 terms of public interest here is not, you know, my client
21 group. It's the precedent that would be set by the granting of
22 an injunction as it applies to any group of political activist
23 within this City or indeed within any city in this state. And
24 I think that that, you know, the importance of maintaining the
25 principal of free expression of political activism greatly

1 trumps any claim for any relief on behalf of the City.

2 Now in terms -- I'm going to lastly address the issue
3 of the remedy that's been proposed here. And I would suggest
4 first of all that, you know, what we're talking about here,
5 is -- well, I mean this is a remedy -- this whole case when you
6 look at the remedy becomes a case of sound and fury signifying
7 nothing.

8 Because that's what this remedy is -- the proposed
9 remedy is in this case is nothing. Now this, again, the remedy
10 has really -- the proposed remedy by the City has evolved and
11 indeed transformed.

12 It started off with a floating absolute footage
13 restriction, which once we pointed out was clearly against US
14 Supreme Court precedent, the City eventually dropped it.

15 I mean the US -- in the abortion cases you're dealing
16 with incredibly vulnerable population. I mean, women seeking
17 abortion services, medical patients, privacy issues, private
18 citizens. And you're dealing with extremely hot button issues,
19 extremely angry protesters, instances of violence, vandalism,
20 heated arguments. So a much more heated scenario than anything
21 suggested in this case.

22 Nevertheless, I mean, the US Supreme Court has
23 said -- basically said no to any type of floating zone. And
24 only permitted, you know, limited fixed zone. And most again,
25 the most recent case, the McCullen case, where it was permitted

1 by the Fifth Circuit, the US Supreme Court has said we're going
2 to take another look at that issue.

3 So certainly in the abortion context the Supreme
4 Court hasn't done this balancing of interest that Attorney
5 Bauer proposes. I mean, it's been very much -- the interest
6 that have been protected have been very much the interest of
7 the demonstrators.

8 And in this case, not only do we not have, you know,
9 a vulnerable population of medical patients, we don't
10 even -- these are public citizen -- public employees. And by
11 definition, public employees are cloaked with public authority
12 and there's no precedent at all that I'm aware of that they are
13 somehow entitled to special protection under the law.

14 Now -- but getting to the specific language of this
15 proposed agreement, one of the -- does the Court have a copy of
16 that?

17 THE COURT: I do.

18 MR. MEYER: Okay. You know, notwithstanding all the
19 argument made by the City, this proposal contains no limit on
20 videotaping from any distance. It contains no limit on speech
21 from any distance except for taunting, which is not allowed.
22 Whatever that is, not defined.

23 It contains no limit on persuading parking
24 enforcement officers from resigning -- given that's the
25 ostensible basis for this case in the first place. There's

1 nothing in here that in anyway limits the right of Defendant's
2 or anybody else to try to persuade parking enforcement officers
3 to resign.

4 So Attorney Bauer suggested that what with somehow
5 that there's a 30 foot restriction on some type of activity,
6 but the activities that are restricted are the touching,
7 taunting, obstructing, detaining, hindering, blocking,
8 intimidating, or harassing those are the only things that are
9 restricted.

10 So, you know, you could say well this is such a
11 narrow limitation what do you care. The answer is that these
12 terms are so vague that if the Court issued an injunction or
13 anything like this injunction, we'd be back in court in 24
14 hours. Not because of bad faith, not because we're quibbling
15 over how far away 30 feet is, but because the basic concepts
16 here of harassment or intimidations are completely in dispute.

17 I mean, for example, the City psychologist testified
18 that any videotaping was intimidating. So therefore, my
19 clients by that standard credent, videotaping from 100 feet
20 away -- I'm sorry not 100 -- videotaping from 25 feet away and
21 the City could claim a violation.

22 So all we're ending up with then is an argument over,
23 you know, harassment, intimidating, whatever. And I would, you
24 know, again it just -- it violates in my mind all the standards
25 of what an injunction should look like.

1 Now the City has said basically, well, don't look at
2 this so much, you put together your own proposal. And I guess
3 that really goes to the final and most important point in this
4 case, which the City has completely misconceived of the proper
5 role of this Court.

6 The City is basically asking this Court to set the
7 rules; to create the rules; to establish the rules. And that's
8 not the appropriate place for the judicial function. There
9 is -- I mean, this is not a matter -- if the Court denies the
10 injunction, it's not like anything goes.

11 I mean, there's already criminal ordinances, criminal
12 statutes that restrict demonstrators; there are civil laws that
13 restrict demonstrators; there are city ordinances that restrict
14 demonstrators. And if the City thinks that individually or
15 cumulatively those restrictions are insufficient to protect the
16 parking enforcement officers, then the City has the option of
17 putting together a new ordinance.

18 And the difference between the City going through the
19 City Counsel and putting together a new ordinance versus coming
20 to the Court and asking the Court to create one, is
21 fundamental. And it's fundamental in two ways.

22 First of all when the City promulgates an ordinance,
23 then anybody who believes it is illegal, has the right to
24 challenge it. And then the Court sits in its appropriate place
25 as the reviewing body, not as the creating body. So there's

1 delineation between the legislative and judiciary.

2 The second difference is that if the City creates the
3 ordinance, it's going to be -- it has to be of general
4 application. It's not just limited to six people or not just
5 limited to one group. It's a general -- it has to be a general
6 application and that's essentially when you're dealing
7 certainly with constitutional rights, if there are going to be
8 restrictions, they have to be generally across the board, not
9 specifically to tailored with one group of demonstrators.

10 So, if in fact, there is a need on the part of the
11 parking enforcement officers to some type of protection --
12 which again certainly hasn't been supported by the record. But
13 if there were such a need, the City has fundamentally gone
14 about it in the wrong way. And it has put the Court in the
15 wrong position.

16 And again my clients have an obligation to comply
17 with the law and there's been no argument they haven't complied
18 with the law. But they shouldn't be subject to special
19 restrictions, you know, sort of created, especially for the
20 purpose of this case, because the City is not happy with their
21 political activism.

22 Thank you, Your Honor.

23 THE COURT: Attorney Bauer.

24 MR. BAUER: One thing that can be gleaned from the
25 testimony and the arguments is that the City of Keene does not

1 object to the motivations or the conduct of the Defendants as
2 long as it does not interfere with the Governmental interest of
3 carrying out their jobs.

4 That's the one disconnect that the Defendants and my
5 brother fail to address. That there is a right to be -- to
6 protect government -- to protect employment interests. And the
7 constitution does not trump that right.

8 And this is the appropriate forum to address that
9 issue because it is -- an injunction would be tailored and not
10 so broad as to affect everybody under all circumstances. The
11 evidence that you've heard -- and you've heard evidence with
12 regard to six individuals. Some have been more intrusive than
13 others, I grant. But not everyone has -- not everyone would be
14 enjoined from this injunction.

15 We've heard testimony in this case that there are
16 other people -- and I think you've seen some photographs --
17 that there are other people who were also intrusive. This
18 injunction would not run to those folks.

19 But I suggest that the message that would be sent by
20 this Court would be that, that conduct of interfering and
21 taunting and harassing and in one case causing one employee to
22 believe it was intolerable to work under those circumstances
23 any more, believe that the message would get out.

24 And I think that the precedent, if this Court were
25 not to issue an injunction, the precedential value of that

1 would be horrendous. There would be free rein on the streets
2 of Keene. And what we're asking this Court -- and you
3 specifically -- is to balance interest not only of these folks
4 here and not only of those folks there and not only of the City
5 folks interest, but also the community.

6 You've heard that there have been engagements by
7 citizens stepping between these -- between these folks. It's
8 gone on too long. We came into court in May. We didn't rush
9 into court. We did our homework. We came in May and
10 unfortunately we're in September.

11 And yes, there has been one casualty. And just
12 because there has been one casualty, I'm sorry to say to Allen,
13 does not mean that there's an -- that there is an adequate
14 remedy at law. Perhaps for the cost that you've heard from the
15 finance director with regard to his replacement and James
16 covering of different work, but there's going to be another
17 employee.

18 And there's going to be Lynn -- who we heard from a
19 long time ago -- she's in the balance. So her interests. And
20 the City's interest in Lynn need protection through an
21 injunction.

22 The last thing I'll say because now I think we're
23 starting to repeat ourselves and that is this. The Defendants
24 can do all of the things within a reasonable distance back
25 pursuant to your injunction. They can videotape, they can have

1 discourse, they can get their message out and they can do all
2 those things and these folks and other folks like them --
3 Department of Public Works employees -- anybody else who has an
4 office.

5 You know, we're the lucky ones. We have an office in
6 the buildings. So we have restrictions placed on first
7 amendment. We have restrictions downstairs where you can't
8 bring in guns. We have restrictions for clerks of court and
9 bailiffs. These folks don't have those restrictions. They
10 don't have law enforcement responsibilities or authority.

11 And we're asking that a reasonable -- reasonably
12 crafted fashioned injunction be put in place that will be
13 abided by both sides.

14 Thank you.

15 THE COURT: Thank you both very much. Let me say
16 that I'm glad we had the time this afternoon for argument.
17 These are important issues. I recognize that these are
18 important issues to the City of Keene and the employees. And I
19 also recognize these are important issues for the Defendants.

20 I can assure counsel and everyone that I will give
21 consideration to all of the arguments and give this a lot of
22 thoughts. And I know the counsel are going submit additional
23 memorandum next Wednesday. I'll read them thoroughly and once
24 I've done that, I'll issue a decision in this case.

25 And I appreciate the time and effort and frankly the

1 skill that counsel have shown in not only arguments this
2 afternoon, but also in the presentation of the case. I think
3 it was well presented by both sides.

4 Thank you all very much.

5 Attorney Meyer, yes.

6 MR. MEYER: Can I just request that in terms of
7 deadline for the memorandum may you would like a postmark date
8 so that we don't have to bother the -- actually drive into
9 Keene?

10 THE COURT: Yeah. Not a problem. Let me say if --
11 why don't I just say that the memoranda will be submitted to
12 the Court by next Friday. That in the ordinary course --

13 MR. MEYER: Thank you, Your Honor.

14 THE COURT: And you have expedience counsel if
15 somebody runs into an issue and you need additional time, you
16 both worked very well together in terms of scheduling issues,
17 just communicate with the clerk's office. I doubt it have any
18 problem with that.

19 But we'll make a deadline next Friday.

20 MR. MEYER: And Your Honor, can we just work with the
21 Court? We have our exhibits --

22 THE COURT: Absolutely.

23 MR. MEYER: -- work with the court reporter? Thank
24 you.

25 THE COURT: Yeah. I urge you just to deal with the

1 exhibit issues.

2 Thank you all very much.

3 (Proceedings concluded at 3:33 p.m.)

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CERTIFICATE

I, Tami S. Mayes, CET**D-547, a court approved proofreader, do hereby certify that the foregoing is a correct transcript from the official electronic sound recording of the proceedings in the above-entitled matter, to the best of my professional skills and abilities.

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