



NEW HAMPSHIRE CIVIL LIBERTIES UNION

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DEVON CHAFFEE
EXECUTIVE DIRECTOR

To: Mayor Kendall W. Lane and the Keene City Council
From: Gilles Bissonnette, Staff Attorney, New Hampshire Civil Liberties Union
Date: June 11, 2014
Re: **Keene's Proposed Anti-Chalking Ordinance**

Dear Mayor Lane and the Keene City Council:

I submit this testimony on behalf of the New Hampshire Civil Liberties Union (NHCLU)—a non-partisan, non-profit organization working to protect civil liberties throughout New Hampshire—addressing the City of Keene's consideration of a no-chalking ordinance, which I understand will be reviewed at tonight's City Council meeting. To the extent the City is contemplating banning chalking on sidewalks throughout the City or in the downtown area, the NHCLU wishes to share some of its concerns about such a proposal and its potential impact on free speech rights.

I. Keene's Sidewalks Are Public Forums That Are Traditionally Open To Speech.

At the outset, it is worth noting that public sidewalks and streets, as the New Hampshire Supreme Court has explained, are "fundamental to the continuing vitality of our democracy, for 'time out of mind, [they] have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Doyle v. Comm'r, N.H. Dep't. of Resources & Economic Dev.*, 163 N.H. 215, 223 (2012) (quoting *Boos v. Barry*, 485 U.S. 312, 318 (1988)). As such, government entities like Keene "are strictly limited in their ability to regulate private speech in [such forums]." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009). These principles apply to any restrictions Keene attempts to impose on chalking on public streets and sidewalks.

II. The Desire To Prevent Annoyance And Intimidation Does Not Provide A Basis For Keene To Suppress Speech.

In examining any anti-chalking ordinance, a court would consider, in part, whether the ordinance is narrowly tailored to serve a significant governmental interest.

In addressing the governmental interest, courts have recognized that cities generally do not have a significant governmental interest in preventing its citizens from being exposed to images and messages (including those that are chalked) that may, to some, appear harassing, intimidating, or create an uncomfortable feeling. Indeed, the New Hampshire Supreme Court has questioned whether, in suppressing speech, a municipality even has a significant governmental interest in "protecting visitors from unwelcome or unwarranted interference, annoyance, or danger." *Doyle*, 163 N.H. at 223. The U.S. Supreme Court has been even more succinct, noting that, "[a]s a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." See *Boos*, 485 U.S. at 318. Simply put, embodied within the First Amendment is the principle that occasionally being exposed to messages with which one disagrees is the necessary price we pay to live in a free and open society.

III. The More Tailored Response To The June 3, 2014 Incident Would Be To Enforce Existing Criminal Laws, Not To Broadly Suppress Speech.

As to whether such an ordinance would be narrowly tailored to any asserted municipal interests, I understand this proposal is in response to a June 3, 2014 incident where a member of Free Keene was hospitalized with a head injury

after being pushed into the fountain in Central Square. According to the *Union Leader*, the Free Keene member was allegedly arguing with a woman who was in Central Square about the washing off of certain chalked drawings. During the argument, the Free Keene member may have touched the woman's arm, at which point an unknown assailant allegedly jumped into the situation and pushed the Free Keene member in the fountain, causing injury.

The NHCLU certainly understands the City Council's concern about this serious confrontation in one of the most prominent areas of the City. But I also hope that the City's response is not to broadly suppress peaceful speech in public places—including speech that is political in nature and is necessary to a functioning democracy. Here, perhaps the more tailored response to this act of violence would be to more aggressively enforce existing criminal laws that prohibit the precise physical confrontation that occurred on June 3. Courts have traditionally thought that this is a more tailored response. See *State v. Chong*, 121 N.H. 860, 862 (1981) (in holding that a city ordinance prohibiting the distribution of handbills was unconstitutional, concluding as follows: "Keeping the streets free from litter is insufficient justification for an ordinance requiring individuals to obtain a permit prior to distributing handbills. If the defendants were to litter, they could, of course, be charged with that violation.").

IV. Keene Should Be Facilitating And Encouraging The Free Exchange Of Ideas, Not Suppressing It.

The proposed ordinance also raises a broader issue: it very well may suppress the political views of certain well-known political groups in a forum and through a means of conveyance that these groups believe are very powerful. *Galvin v. Hay*, 374 F.3d 739, 751-52 (9th Cir. 2004) (location chosen for its significance to the message can affect the meaning of communication). As the New Hampshire Supreme Court has noted, groups, "engaged in the peaceful and otherwise lawful exercise of their constitutional right[s], [have] as much right to police protection as other people and institutions in the community." *State v. Nickerson*, 120 N.H. 821, 826 (1980). Indeed, "[w]hen peaceful, orderly public comment is involved"—like chalking—the City's initial instinct should not be to suppress this speech; rather, the instinct should be the opposite—namely, to "take reasonable affirmative steps to insure the maintenance of the protestors' rights to freedom of speech and expression." *Id.* I hope the City takes this course instead of broadly suppressing speech.

Thank you for considering this testimony, and please feel free to contact me with any questions.