STATE OF NEW HAMPSHIRE

CHESHIRE, SS. SUPERIOR COURT

CITY OF KEENE

v.

JAMES CLEAVELAND;
GARRETT EAN;
KATE AGER;
IAN BERNARD A/K/A IAN FREEMAN;
GRAHAM COLSON; and
PETE EYRE, PRO SE

Docket No. 213-2013-CV-00098

**DEFENDANTS' LEGAL MEMORANDUM**

In its Opinion the New Hampshire Supreme Court stated:

> *We express no opinion as to whether the City's allegations if proven, are sufficient to warrant the trial court's exercise of its equitable power, or as to whether the particular injunctive relief requested by the City would violate the Federal or State Constitutions.*

This Memorandum addresses those questions. At the most recent hearing, the City limited its requested relief to a distance based separation between Defendants and the Parking Enforcement Officers (PEOs). Accordingly, this memo is limited to the practical and constitutional infirmities of that requested remedy. Defendants request the opportunity to supplement this memo should the City request or this Court consider additional and/or alternative relief.

Because this case involves proposed restrictions on expression on matters of public concern taking place on public streets and sidewalks, the City must, at a minimum establish that its ordinance is narrowly tailored to serve a substantial

government interest. Madsen v. Women's Health Center, Inc., 512 U.S. 753, 765 (1994). "*Narrowly tailored*" requires that the restriction "*targets and eliminates no more than the exact source of the 'evil' it seeks to remedy.*" Frisby v. Schultz, 487 U.S. 474, 485 (1988). And "the government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government's interests, not simply that the chosen route is easier." McCullen v. Coakley, 134 S. Ct. 2518, 2540 (2014). "(B)y demanding a close fit between ends and means, the tailoring requirement prevents the government from too readily sacrificing speech for efficiency." Cutting v. City of Portland, ___F.3d. ___, ___ (1st Cir., 9/1/2015) (quoting from Richard H. Fallon, Jr., 113 Harv. L. Rev. 1321, 1354 (2000).

The principal dispute regarding the appropriate First Amendment standard is whether this court should require that the government interest be "*compelling*" which is the appropriate standard to be used when a proposed restriction is content based. "Government regulation of speech is content based if a law applies to particular speech because of the topic discussed or the idea or message expressed." Reed v. Town of Gilbert, Slip Op. at 6, 576 U.S. ___ (2015). These laws "are presumptively unconstitutional and may be justified only if the government proves that they are narrowly tailored to serve compelling state interests." Id.

The City insists that the requested injunctive relief is content neutral even though it only applies to a specified and limited number of demonstrators because it applies to all expressive activity by the Defendants regardless of content. This contention has been definitively refuted in the recent Reed decision. The Court pointed out that:

> the fact that a distinction is speaker based does not automatically render the distinction content neutral. Because '(s)peech restrictions based on the identity of the speaker are all too often simply a means to control content,' we have insisted that 'laws favoring some speakers over others demand strict scrutiny when the legislature's speaker preference reflect a content preference.' Id. at 13. (citations omitted.)

That is precisely the case here. Further, this risk of censorship and discriminatory application is increased where the restraint is in the form of an injunction targeting designated individuals, rather than an ordinance of general application. Madsen, supra. at 764.

The evidentiary hearings held before this court have demonstrated that the City and its witnesses are motivated by what they perceive to be the hostile message conveyed by Defendants. The testimony was replete with complaints about "taunting" and other pejorative descriptions of the content of Defendants' communication. The PEO's complaints were predicated upon what was said, not the distance from which it was expressed. Plaintiff's claim of content neutrality is further belied by its extensive cross-examination of Defendants regarding their political ideology and objectives. At the most recent hearing, both PEO's principal complaint was about the alleged "*taunting*" which term they claim described all communication from Defendant Ean, the only Defendant still engaged in regular Robin Hooding. PEO Desruisseaux testified to her dislike of the Defendants' "language used, words and looks."[1] Although Plaintiff's counsel in his examination of the PEOs repeatedly drew their attention through leading questions to the issue of the proximity of the demonstrators, it is clear from their overall

[1] Because no transcript has been prepared of the final day of the hearing, the quotations may not be exact.

testimony that their principal problem with the Defendants, in addition to the frequency of the Robin Hood activity and the videotaping, was the critical message that the Defendants expressed to them. According to PEO McDermott: "there is no distance that makes me feel good. I want them gone." PEO Desruisseaux further testified that as a regular part of her job, which involved walking throughout downtown Keene, that private citizens would approach her in close physical proximity and converse with her. The contrast between her positive response to those interactions and her negative reaction to critical communication received from the Defendant demonstrators from a greater distance further illustrates that her concern was principally based on the content of the communication not the location from which it was communicated.

At the most recent hearing, the City placed principal emphasis upon the audio/video taken by Defendant Freeman of PEO Desruisseux. Although Plaintiff's counsel claims that it showed that Desruisseux was apprehensive that Freeman would obstruct her path, that is contradicted by a review of the video itself. Desruisseux rapidly walks back and forth in an apparent effort to remove herself from earshot. He is neither in front nor behind her but parallel to her on a grassy strip between road and sidewalk. She extends her arms towards him and shouts at him: "*I have had enough*". It is clear from the context that she is upset by his "taunting", not apprehensive about physical contact, since he is not even on the sidewalk, but at a significant distance without any likelihood of obstructing her path.

If the Defendants had been engaging in demonstrations for the purpose of expressing their support of PEO's, or were making comments supportive of their job performance, this proceeding would never have been initiated. The videos and other

testimony show that other private citizens have emphatically expressed their support for the PEO's, and their opposition to the Robin Hooders, in some cases physically. No injunction is sought against any of them because they do not convey the Robin Hood message.

The requested injunction, if granted, would be a classic example of laws "that were adopted by the government 'because of disagreement with the message [the speech] conveys' . . . ." Reed, supra at 17, quoting Ward v. Rock Against Racism, 491 U.S. 781 (1989). Thus, the appropriate standard to apply is to require the City to establish that the proposed injunction is narrowly tailored to serve a compelling State interest.

It is the "rare case in which a speech restriction withstands strict scrutiny." Williams – Yulee v. Florida Bar, 575 U.S. ___, ___ (2015). (Slip. Op. at 9). The testimony and other evidence at the hearings demonstrates that the three asserted interests claimed by the City are not substantially implicated by Defendants' expressive activities, and would not be advanced by the requested injunction. Even, however, under a lesser standard of an injunction narrowly tailored to serve a significant government interest, the City's showing would still fall short. This lack of tailoring is pertinent not just to the constitutional analysis, but to the equitable considerations governing injunctive relief.

The first asserted interest is protection against disturbance of the peace. Although this interest is substantial in the abstract, it is only minimally implicated, if at all, in this case. Throughout the four days of hearing, the only testimony regarding any physical contact between any of the Defendants and the PEO's, aside from occasional

accidental bumping, was one situation where one of the Defendants accidentally touched the wrist of a PEO while reaching towards a parked vehicle. There is a criminal statute, RSA 644, which addresses and prohibits virtually every type of breach of peace. The fact that no breach of peace, disorderly conduct, or assault prosecution has been brought against any of the Robin Hood Defendants for Robin Hooding is compelling evidence that this asserted interest is not significantly implicated by their activities.

The only episodes in the record that amounted to anything approaching a disturbance of the peace were several incidents in which Robin Hooders were physically assaulted by third parties. Several instances over several years of hundreds if not thousands of Robin Hooding demonstrations hardly amounts to a substantial problem.[2] And even if it were substantial, it would violate the First Amendment to restrict the Defendants' expression activity because of illegal assaults against them by third parties. This is a classic example of a "*heckler's veto*" which is antithetical to the First Amendment because it puts speech, particularly unpopular speech at risk, and, in effect, rewards mob or individual violence. Hill v. Colorado, 530 U.S. 703, 734 (2010).

The second government interest asserted by the City is Defendants allegedly interfering with the PEO's doing their jobs. The City did not clarify what it meant by "interference". If the City's complaint is that the Robin Hood activity is making it harder for the PEO's to issue as many tickets as they might otherwise do, then this would amount to the unsustainable proposition that the expressive activity of Robin Hooding

[2] See McCullen, supra.: "For a problem shown to arise only once a week in one city at one clinic, creating 35-foot buffer zones at every clinic across the Commonwealth is hardly a narrowly tailored solution". 134 S. Ct. 2539.

itself is subject to prohibition which the City has not asserted. And the City does not have a compelling interest in the volume of traffic tickets.

The narrower argument made by the City is that Robin Hooding adversely effects working conditions of the PEO's. But that does not supersede the Defendants' First Amendment right to communicate their message in the way they choose. The PEO's testified that Robin Hooding activity was stressful to them and upsetting emotionally. But the same could be said by the target of virtually any recurrent protest activity. Protecting against stress to public employers does not trump the First Amendment right of expression. "Citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." Boos v. Barry, 485 U.S. 312, 322 (1988). From a First Amendment perspective, the opportunity to deliver an "uncomfortable message" to persons who may not be receptive is what makes public streets and sidewalks such an important locus for First Amendment expression. McCullen v. Coakley, 134 S. Ct. 2518, 2529 (2014).

That is particularly true when the recipients of the communication are public employees. It is always likely to be the case that agents of government will want greater physical distance from their critics. But any added comfort created by greater distance has not been recognized by the courts as a compelling government interest sufficient to limit free speech rights in a public forum. The right to communicate to public employees has special protection in New Hampshire because the New Hampshire Constitution, Part 1, Art. 8, elevates government accountability to a constitutional right. The fact that that accountability can be stressful to the agents of

government does not dilute the decision of the constitutional framers to elevate its importance over legislative enactment.

As recognized in the City's own job description, the job of PEO includes as an "essential duty and responsibility", the ability and willingness to put up with hostile members of the public. See Attachment A to Petition, PEO Job Description requirement to: "(e)ndure verbal and mental abuse when confronted with the hostile views and opinions of the public and other individuals often encountered in an antagonistic environment." Although the City presumably did not anticipate the Robin Hood demonstrations when it prepared this job description, there is no constitutional or equitable justification for placing Robin Hood demonstrators in a disfavored position compared with individual motorists upset about parking tickets.

The third stated City interest in a "*safe work environment*" overlaps the first two asserted interests and suffers from the same deficiencies. The record does not contain any substantiation of asserted concerns about traffic safety. Although there was some testimony that PEO's would cross the street to avoid demonstrators, they were not compelled to do that. And crossing the streets in downtown Keene with its multiplicity of crosswalks should not be a dangerous activity. If the Defendants had violated pedestrian safety rules, the City has the far less restrictive alternative of ticketing them for their violations. Unlike the abortion clinic cases, there is no documented evidence of any disruption in traffic flow or even a single accident arising out of the demonstrations.

Even if the City had been able to present a compelling interest, its requested injunction of a floating buffer zone between the PEO's and the Defendants would not serve any of those interests, much less be narrowly tailored to them. In regard to

disturbances of the peace, since the only assaults testified to were perpetrated by third parties against the Defendants, buffer zones would not have any impact. Relative to the concern about interference with job performance, the Robin Hood demonstrators might be able to "*plug*" fewer parking meters if they are at a further remove, and might need to shout louder to be heard, but the principal complaints articulated by the PEO's would not be remedied. Finally, requiring that the Defendants remain at a greater distance would increase not lessen the traffic safety issue since, as testified to by Defendant Freeman, it would require the Defendants to travel/run greater distances to maintain a floating buffer zone while getting to the parking meters before the PEOs.

Although a proximity-based injunction would not serve the City's asserted interests, it would seriously undermine the Defendants' ability to engage in their expressive activity, far more so than in a case involving a stationary demonstration. The testimony at the hearing was that the Defendants try to position themselves in front of the PEOs so that they could plug the unexpired meters before a ticket was issued. If this Court imposed a floating buffer zone, that would require the Defendants to somehow keep track of their distance from the PEO behind them, and to vacate the area around the meter once the PEO had arrived within the specified number of feet. And if the PEO changed direction and started issuing tickets on the other side of the street, the demonstrator would find himself behind her, and virtually unable to reach the meters without breaching the buffer zone. In Schenck v. Pro-Choice Network of Western New York, 519 U.S. 357 (1997), the court invalidated a fifteen foot buffer around the clinic entrance in part because its floating nature would create almost insoluble practical problems in attempted compliance by the demonstrators, Id. at 377-

378, a problem further magnified here by the fact that the zone would encompass all of the downtown.

The other principal reason for the disconnect between the asserted interest and the requested relief is that Plaintiff asked that the proposed injunction only apply to the seven named Defendants. This is overly restrictive inasmuch as the testimony at the final day of the hearing by all witnesses was that only two of the seven have engaged in any appreciable Robin Hooding for the last two years. It is also substantially under restrictive, inasmuch as it would have no application to any other person who is currently engaging in Robin Hooding or will engage in the future. This disconnect is particularly pronounced in view of the testimony on the final day of the hearing by PEO McDermott that the two episodes most alarming to her occurring over the last two years which she described as being "different kind of events" from the Robin Hooding activity by the named Defendants, and which caused her to fear for her safety, were engaged in by third parties unknown to her whom would not be affected by any proposed injunction.

This disconnect is particularly significant in light of the uncontested testimony that the Robin Hood activity is not directed or organized by the Defendants with the partial exception of the one day "*Inversion*" in which interested participants were invited to participate for that day. Thus, Defendants have no responsibility for or ability to control other demonstrators. All that would be accomplished would be to create two classes of Robin Hood demonstrators, everyone but the Defendants who could position themselves wherever they wish, and the named Defendants who would have to remain at a specified distance.

Even if the City had been able to meet the constitutional prerequisites for injunctive relief against First Amendment protected expression, the requested relief is so burdensome to the Defendants free expression and free movement rights, as to be constitutionally untenable. Plaintiff argues that they are just requesting reasonable restrictions within the time, place and manner rubric. But the fundamental distinction with the cases they rely upon is that given the nature of Robin Hood expressive activity, restrictions on the Defendants' "place" fundamentally undercuts their ability to communicate their message. This is analogous to the abortion clinic cases where the Supreme Court has repeatedly held that buffer zones are constitutionally suspect because they impair the capability of 'counselors' to have conversations with pregnant women. E.g. McCullen, supra., 134 S. Ct. 2536-2557 (Since demonstrators seek to have "personal conversations", it is "thus no answer to say that petitioners can still be 'seen and heard' [from a distance]." The Supreme Court has recognized in the abortion counseling cases that any spatial limitation beyond 8 feet, even in a narrowly defined area, unduly restricts the rights of demonstrators to converse at a "normal conversational distance". Schenck, supra., 530 U.S. at 727 (invalidating 15 foot floating zone).

There is no constitutional precedent for the type of floating buffer zone requested by the City covering the entirety of downtown Keene. As Defendant Freeman testified, it would place him in peril of a contempt proceeding just by being seated in an outdoor café when one of the PEO's approached. Even if there were an exception for accidental contact, the fundamental constitutional defect is that a buffer zone covering the entire downtown unreasonably interferes with the Defendants' freedom of

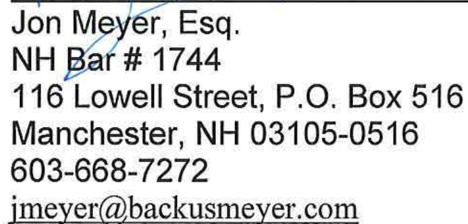
movement, and makes them by virtue of their expressive activity, second class citizens in their own city.

Respectfully submitted,

JAMES CLEAVELAND
GARRETT EAN
KATE AGER
IAN BERNARD a/k/a IAN FREEMAN
GRAHAM COLSON

By Their Attorneys,

BACKUS, MEYER & BRANCH, LLP



Dated: October 27, 2015 By: ______________________

Jon Meyer, Esq.
NH Bar # 1744
116 Lowell Street, P.O. Box 516
Manchester, NH 03105-0516
603-668-7272
jmeyer@backusmeyer.com

## CERTIFICATION

I hereby certify that on this 27th day of October, 2015, I mailed by U.S. Postal Service First Class Mail a copy of the foregoing to Charles Bauer, Esq., and Robert Dietel, Esq. counsel for the City of Keene, and Thomas P. Mullins, Esq., City of Keene.

______________________
Jon Meyer, Esq.