STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2015-0720

City of Keene

v.

James Cleaveland & a.

RULE 7 APPEAL FROM FINAL DECISION OF THE
CHESHIRE COUNTY SUPERIOR COURT

BRIEF OF PLAINTIFF-APPELLANT
CITY OF KEENE

Charles P. Bauer, #208
Robert J. Dietel, #19540
GALLAGHER, CALLAHAN &
GARTRELL, PC
214 North Main Street
Concord, NH 03301
(603) 228-1181
bauer@gcglaw.com
dietel@gcglaw.com

Oral argument to be presented by:
Robert J. Dietel

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CONSTITUTIONAL AUTHORITY

U.S. Const. amend. I

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

QUESTIONS PRESENTED

1. Did the trial court err as a matter of law, and engage in an unsustainable exercise of discretion in denying injunctive relief to the City of Keene, where the facts and law establish that: (a) the City's request for relief complies with the First Amendment to the United States Constitution, and (b) absent injunctive relief, the City and its parking enforcement officers will continue to suffer irreparable harm with no adequate remedy at law.

   Preserved: *See* City's Memorandum of Law (Oct. 27, 2015), *Appx.* at 1-17.

STATEMENT OF THE CASE AND FACTS

This case comes before the Court for the second time in approximately two years. In June 2015, this Court resolved claims arising from a dismissal of the City of Keene's ("City") action against Defendants, and remanded the City's equitable claim for injunctive relief to the trial court. *See Keene v. Cleaveland*, 167 N.H. 731 (2015). The trial court has since denied that request, and the City appeals that decision.

I. Factual and Procedural Summary

In December 2012, Defendants James Cleaveland, Garret Ean ("Ean"), Kate Ager, Ian Bernard a/k/a Freeman ("Freeman"), Graham Colson, and Pete Eyre, began a prolonged protest of the City's parking enforcement department.[1] That protest involved activities that have come to be described as "Robin Hooding." *See* Order (November 20, 2015), *Add.* at 34-36. Defendants have described Robin Hooding as an activity where they follow behind, beside, or in front of the City's parking enforcement officers ("PEOs"), looking to find and fill expired meters before the PEOs can issue a ticket. *Id.* In reality, Defendants conduct is not so innocuous.

Shortly after Robin Hooding began, Defendants turned their attention to the City's PEOs, individually. Defendants, in summary, "videotaped the PEOs from a close proximity; called the PEOs names such as 'f*****g thief,' 'coward,' 'racist,' and 'b***h'; criticized the PEOs for issuing tickets; encouraged the PEOs to quit their jobs; and waited for the PEOs during their breaks, including outside restrooms" among other harassing and intimidating conduct. *See City of Keene*, 167 N.H. at 734.

While the intensity of these interactions varied, the Defendants have been a nearly daily presence for the PEOs. *See City of Keene*, 167 N.H. at 734; *Add.* at 35, 38-39. The

[1] The City acknowledges that the involvement of each individual defendant has occurred at different periods of time and different frequencies, as found by the trial court. *See Add.* at 35.

cumulative effect on the PEOs, and the City's governmental interests has been significant. *See Add.* at 36-39, 46. Accordingly, in May 2013, the City filed a petition for preliminary and permanent injunctive relief. *See id.*

In its petition, the City alleged, and maintains, that the Defendants' conduct is intended to interfere with its employment relationship with the PEOs. *See Add.* at 39. The City later added claims for damages due to tortious interference with contractual relations and negligence. *See City of Keene*, 167 N.H. at 734. Three days of evidentiary hearings were held, after which the trial court granted Defendants' motion to dismiss. *See Add.* at 36-39. The City appealed, and this Court remanded for a determination of whether injunctive relief should enter. *City of Keene*, 167 N.H. at 743 ("We hold that the trial court erred when it failed to consider the particular factual circumstances of the case and whether an injunction should issue based upon the governmental and policy interests asserted by the City").

A fourth day of evidentiary hearings was held on October 2, 2015, and legal memoranda were provided to the Court in support of the parties arguments. *See Appx.* at 1-17. The trial court subsequently denied the City's motion for injunctive relief. *See Add.* at 47.

II. Summary of Significant Governmental Interests

The City's request for injunctive relief is grounded on four significant governmental interests: (1) Protecting the safety of its employees; (2) Preserving public safety and order on its streets and sidewalks; (3) Promoting the free flow of traffic and availability of parking in those same areas; and (4) Enforcing its municipal ordinances. *See* City's Memorandum of Law (October 27, 2015), *Appx.* at 2.

At the initial evidentiary hearings in 2013, and again after remand, the City presented evidence that these interests are being impaired, that they will continue to be impaired absent judicial relief, and that the City otherwise lacks a constitutionally permissible adequate remedy at law. *See generally Appx.* at 1-17.

In support thereof, the following evidence was submitted to the trial court.

a. Summary of Supporting Evidence – 2013

During three days of evidentiary hearings in 2013, the court received testimony from each of the City's PEOs; Linda Desruisseaux ("Desruisseaux"), Jane McDermott ("McDermott"), and Alan Givetz ("Givetz"). Together, the PEOs described a pattern of repeated ongoing harassment and intimidation that has interfered with their jobs and well-being from December 2012 through to the final evidentiary hearing on October 1, 2013. Trial Tr. vol. I, 51:8-54:15, 67:18-24; Trial Tr. vol. II, 238:10-15, 326:1-13.[2]

PEO Desruisseaux testified that during this period she had been harassed, intimidated, and video recorded within her "personal space" on a regular basis. Trial Tr. vol. I, 44:10-46:7, 47:9-23. She described Defendants running up very quickly behind her, startling her and making it difficult for her to concentrate on her job and her personal safety. Trial Tr. vol. I, 42:13-43:8, 44:10-16, 58:4-19, 61:6-18. She further described instances in which Defendants told her to terminate her employment relationship with the City, going so far as offering to assist her in finding alternative employment. Trial Tr. vol. I, 36:3-24. She testified these experiences caused her to be in a near constant state of

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[2] Copies of the trial transcripts of the 2013 evidentiary hearings in this case were provided to the Court in the appeal of *Keene v. Cleaveland* (Case No. 2013-0885). A transcript of the October 2, 2015 hearing has also been forward to the Court by AVTranz on March 24, 2016. Citations to the transcripts of the evidentiary hearings are as follows:

Trial Tr. vol. I refers to Evidentiary Hearing (Day 1), August 12, 2013;
Trial Tr. vol. II refers to Evidentiary Hearing (Day 2), September 30, 2013;
Trial Tr. vol. III refers to Evidentiary Hearing (Day 3), October 1, 2013; and
Trial Tr. vol. IV refers to Evidentiary Hearing (Day 4), October 2, 2015.

vigilance while at work, and that she would tense up and become very distracted. Trial Tr. vol. I, 48:12-51:18.

PEO McDermott testified that she was similarly pursued and crowded by groups of seven or eight, bumped into, grabbed by Defendant Colson, and repeatedly taunted and encouraged to find alternative employment. Trial Tr. vol. II, 296:10-306:2, 322:16-323:7. She explained that Defendants, sometimes acting alone, and sometimes in groups, chased her across a street, waited outside a bathroom while she was on break, followed her into buildings, and chastised her for ticketing cars parked near a funeral, among other actions. Trial Tr. vol. II, 307:9-15, 321:16-20, 322:4-13, 302:8-303:6. She noted that she had to call the police on three occasions due to safety concerns for herself or others. Trial Tr. vol. II, 303:5-6, 313:2-5; 340:7-24. She was also called a "liar," "thief," and asked how she could sleep at night. Trial Tr. vol. II, 322:22-25. She explained that these experiences, due to their persistent and ongoing basis, caused her to consider quitting her job and she inquired about other employment options. Trial Tr. vol. II, 326:14-24.

PEO Alan Givetz, who has since resigned from his position, testified that he was also followed and videotaped. Trial Tr. vol. II, 239:1-9, 244:20-245:1. He had been crowded, bumped into, and taunted by the Defendants, including being subjected to profanities and derogatory statements relative to his post military service. Trial Tr. vol. II, 239:1-13, 255:16-21. He was subjected to demeaning and derogatory comments, including calling him a "racist," "b***h," and "coward." Trial Tr. vol. II, 239:11-13, 242:12-25. He was also followed and harassed on his day off and through the internet. Trial Tr. vol. II, 242:8-250:2. He explained that he resigned in July 2013 due to this hostile work environment, and that Defendants encouraged him to quit. Trial Tr. vol. II, 238:7-20, 257:9-258:13. The cumulative impact of this pattern of persistent behavior caused Givetz to feel that he was "backed into a corner." Trial Tr. vol. II, 265:5-11, 266:13-24.

Each of the PEOs confirmed that they sought counseling with Mary Kimmel, a licensed clinical mental health counselor and certified employee assistance professional to deal with their stress and anxiety due to the hostile work environment. Trial Tr. vol. I, 72:2-76:19, 136:16-137:2, 137:10-15. Kimmel testified at the hearing and explained that the Defendants' conduct triggers the PEOs to feel a flight or fight reaction. Trial Tr. vol. I, 147:12-18. Kimmel explained that these feelings are brought on by the persistent and constant close proximity of the Defendants. Trial Tr. vol. I, 141:23-148:16.

The City also presented evidence of specific safety concerns to the PEOs and the general public. Trial Tr. vol. I, 61:6-18. Defendants' activities take up sidewalk space as the PEOs attempt to perform their job functions with Defendants following too closely. Trial Tr. vol. I, 36:7-12; Trial Tr. vol. II, 239:4-9, 297:3-21. Private citizens using City sidewalks have become ensnared in Defendants' activities and been prevented from traveling to their destinations. Trial Tr. vol. II, 59:5-23, 360:10-21. The motoring public is also at risk as Defendants run across streets to intercept PEOs. Trial Tr. vol. I, 61:12-18. Defendants frequently follow the PEOs' City vehicles on foot, on bicycles, and in cars and the PEOs are forced to be hyper-vigilant of Defendants' close proximity to their vehicles while maintaining a safe distance from the general motoring public. Trial Tr. vol. I, 49:15-50:13; Trial Tr. vol. II, 304:4-305:4. The PEOs frequently find themselves at the center of confrontations between Defendants and the general public. Trial Tr. vol. I, 59:10-60:1, 78:16-79:4; Trial Tr. vol. II, 312:13-313:10. Private citizens have shouted from cars and confronted Defendants on the sidewalks within close proximity to the PEOs. Trial Tr. vol. I, 59:10-60:1, 80:15-82:6. Such confrontations interfere with the PEOs' job functions and are dangerously distracting for the PEOs, the Defendants, and the general public when they occur on active streets and sidewalks. Trial Tr. vol. I, 48:12-50:13, 61:12-18; Trial Tr. vol. II, 239:1-13, 242:8-250:02, 304:4-17, 310:24-311:4, 312:13-313:10.

In response, Defendants attempted to minimize the effect of their actions, and generally disputed that they are harassing the PEOs. Defendants asserted that they have four core activities that they believe are protected:

1. Filling expired meters before cars were ticketed to protest against the City's parking enforcement function as a means to protect motorists from getting tickets.

2. Verbal communication with PEOs on various subjects, including defendants' political theories and their connection to parking enforcement.

3. Videotaping Parking Enforcement Officers as they perform their duties as a means of assuring government accountability.

4. Placing a Robin Hood card on the windshield of cars which had been spared from parking tickets in order to communicate a political message and secondarily to raise funds.

See Add. at 41.

Defendants acknowledged that these activities can occur at a reasonable separation from the PEOs, and "asserted that distances between five and fifteen feet away from the PEOs were 'ideal' for their activities, and that videotaping required closer proximity to the PEOs than filling meters." *See City of Keene*, 167 N.H. at 736.

Ian Freeman specifically testified that he can engage in his desired means of communication 10 to 15 feet away from the PEOs, stating "the most effective way" to engage in such conduct "is to walk maybe about 15 feet or so in front of the enforcer – maybe ten feet, whatever is comfortable – and identify expired meters, put a nickel or a dime in the meter to prevent the ticket from being written." *See* Trial Tr. vol. III, 480:15-18.

b. Summary of Supporting Evidence - 2015.

A one day evidentiary hearing was held on October 2, 2015, during which the City presented evidence of ongoing conduct by Defendants Ean and Freeman that continues to impair the City's interests.[3]

PEO Desruisseaux testified that she continues to be followed, and feels harassed and intimidated by Defendants Ean and Freeman. Trial Tr. vol. IV, 9:15; vol. IV, 35:11-13; vol. IV, 42:5-7 (stating "I just sum it up that as far as the before and after the last trial there has been no change in how I feel."). She continues to be told to quit her job. Trial Tr. vol. IV, 19:16-18. She testified that she continues to be followed by Ean three to four days per week. Trial Tr. vol. IV, 18:4-8.

Significantly, video evidence was provided of an occasion in 2014, where PEO Desruisseaux was repeatedly harassed by Defendant Freeman. A copy of that video, which was entered into evidence at the October 2, 2015 hearing as Exhibit 1, has been submitted with this brief.[4] It shows an encounter in which PEO Desruisseaux is taunted and confined by Freeman, until a member of the public intervenes and physically inserts herself between Freeman and Desruisseaux. The fear of this type of encounter reoccurring has caused PEO Desruisseaux significant stress. Trial Tr. vol. IV, 9:15 (stating she has felt "dread, deep dread" when seeing Freeman approach her).

PEO McDermott similarly testified that she is followed by Defendant Ean most days while she is on patrol, and that the stress and anxiety described during the initial hearings in 2013 remains. Trial Tr. vol. IV, 68:2-14. She remains worried about her safety. Trial Tr.

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[3] The City is no longer seeking injunctive relief with respect to Defendants James Cleaveland, Kate Ager, Graham Colson and Peter Eyre.

[4] As of May 31, 2016, the video file may also be viewed on a YouTube page associated with Ian Freeman at: https://www.youtube.com/watch?v=lIckMWibnIw

vol. IV, 69:5-6. She continues to feel "harassed and bullied and stalked on a daily basis while . . . at work." Trial Tr. vol. IV, 71:8-9.

In response, Defendants Freeman and Ean disputed the characterization of their actions and the effect on the PEOs. Freeman claimed that he has engaged in Robin Hooding only occasionally over the past two years, but acknowledged that his involvement is opportunistic and he may begin "Robin Hooding" at any time he sees the PEOs. Trial Tr. vol. IV, 135:1-2 (describing his participation as that of an "opportunist" and that he may engage in Robin Hooding "whenever I'm out and about in downtown Keene for whatever reason"). Ean admitted that he continues to follow the PEOs three to four days a week for three to four hours a day. Trial Tr. vol. IV, 108:9-10. Both Ean and Freeman implicitly acknowledged they intend to continue in this activity. Trial Tr. vol. IV, 124:10-12 (Ean stating his philosophy regarding Robin Hooding has not "changed much fundamentally" over past two years and that his goal is to "prevent the issuance of tickets"), 148:6-7 (Freeman describing continuing goal to shut down parking enforcement).

Defendants Ean and Freeman further reaffirmed that they can engage in their activities from five to fifteen feet away. Defendant Freeman testified that fifteen feet is the most effective because it allows him to follow the PEOs when they change direction. Trial Tr. vol. IV, 153:4-6. Defendant Ean also testified that he typically is four to five car lengths away from the PEOs and that when he passes them he comes "within about ten feet." Trial Tr. vol. IV, 109:24-25, 110:24-25. Defendant Ean further stated that since the initial evidentiary hearings that he is not following "within that close proximity of five feet." Trial Tr. vol. IV, 128:12-13. However, despite these admissions – i.e., that they in fact can do all of their activities from five to fifteen feet away – they alleged that a buffer of any distance would be unconstitutional and would have a significant impact. They expressed specific concern that they might not be able to always stay ahead of the PEOs, they could have

difficulty tracking the PEOs, and that they might accidentally violate an injunction if they are on the City's streets, but not otherwise Robin Hooding. *See e.g.*, Trial Tr. vol. IV, 139:1-25, 140:1-5.

III. Proposed Injunctive Relief

In response to the evidence provided at the evidentiary hearings, the City submitted a memorandum of law asking the trial court to tailor an injunction that provides a reasonable zone of separation between the PEOs and the Defendants. The City suggested two specific solutions, which are recited below:

> **Solution One:** ***Defendants must remain 10-feet away upon request.***
>
> Upon oral request of a PEO engaged in his or her official duties, Defendants Ian Freeman and Garrett Ian (and anyone acting in concert with them) must step back, and remain, at least 10-feet away from such PEO.
>
> This requirement would apply whenever a PEO is engaged in his or her official duties patrolling the City of Keene, and a PEO specifically requests Defendants to remain at such distance. Once the request is made, it would remain in effect for the duration of the PEO's work day.
>
> As an exception to the above requirement, Defendants may approach within 5 feet of a PEO while the PEO is on a sidewalk in Keene for the limited purpose of navigating past the PEO. Defendants, however, may not use this exception to encircle, confine, or otherwise impede the movement of the PEO, and must immediately continue past the PEO until a separation of 10 feet is resumed.
>
> A violation of this order will not occur absent a knowing and purposeful invasion of the 10-foot separation after request of a PEO. Defendants may otherwise continue to engage in filling expired meters, video recording, and speaking to the PEOs, provided that they do so in conformance with the above described requirements.

Solution Two: ***Defendants must remain 10-feet away when in fixed areas.***

> Within 15-feet of a parking meter, metered parking space, or crosswalk, Defendants may not knowingly approach within 10-feet of a PEO while he or she is engaged in performing his or her official duties patrolling the City of Keene.
>
> As an exception to the above requirement, Defendants may approach within 5 feet of a PEO while the PEO is on a sidewalk in Keene for the limited purpose of navigating past the PEO. Defendants, however, may not use this exception to encircle, confine, or otherwise impede the movement of the PEO, and must immediately continue past the PEO until a separation of 10 feet is resumed.
>
> A violation of this order will not occur absent a knowing and purposeful invasion of the 10-foot separation. Defendants may otherwise continue to engage in filling expired meters, video recording, and speaking to the PEOs, provided that they do so in conformance with the above described requirements.

These proposed injunctions were carefully crafted by the City to ensure that they provide a reasonable and readily identifiable separation between the PEOs and Defendants. That separation would help ensure the PEOs can perform their jobs and feel reasonably secure in their personal safety, while eliminating the extremely close personal interactions that have, in the past, lead to physical or heated altercations, disturb the public, and otherwise impair the City's governmental interests.

These proposed injunctive solutions were specifically crafted to be constitutional and to allow for Defendants to continue their activities at the precise distances that they have identified as ideal. The proposed injunctions are content-neutral, narrowly tailored solutions that serve to protect significant governmental interests, while burdening no more speech than necessary. They accomplish these objectives by providing clear instruction regarding when and where the limitations would apply, and who they would apply to, and impose a minimal separation that preserves the Defendants' ability to converse, move-freely, video record, and fill expired meters.

IV. Summary of Trial Court Order

The trial court denied the City's request for injunctive relief despite the above evidence. Of note, the trial court found and ruled that the City's established that it has significant governmental interests at stake, and that the City's proposed injunctions are content-neutral. *See Add.* at 43, 46. The trial court also noted with respect to the proposed injunctions that "[t]he Court cannot conceive of any more narrow or alternative relief that would provide any meaningful protection to the PEOs without running afoul of the Defendants' First Amendment rights." *Add.* at 46. Despite these findings, the trial court ruled that "the government interests here are not sufficient to warrant an infringement on the Defendants' First Amendment rights." *Add.* at 46.

The trial court reasoned, that "the frequency, duration, and severity of Defendants' Robin Hooding activities have decreased markedly since October 2013" and that "[a]ny injunction requiring a buffer zone of any meaningful distance would require a <u>significant change</u> in the method used by the Defendants to disseminate their protected speech." *Add.* at 46. Yet, the trial court also found that Defendant Ean continues to engage in Robin Hooding "several days per week for several hours per day" and that Defendant Freeman "continues to do so in a reduced capacity." *Add.* at 35.

Notably absent from the trial court's ruling was any explanation of how the injunctions "would require a significant change" in Defendants' conduct or speech. The trial court found that the Defendants' activities "<u>require</u>" them to stay in front of PEOs, change directions, and pass PEOs on sidewalks, but failed to explain or provide evidence to justify its ruling that an injunction would preclude these activities. The trial court did not explain how remaining ten feet back would substantively impair Defendants' ability to engage in expressive conduct and speech. The absence of any examination of this issue by the trial

court is in stark contrast to the admissions from Defendants that they can, and in fact most often do, conduct their activities from a distance of ten to fifteen feet from the PEOs.

The trial court similarly failed to provide any meaningful discussion or factual findings regarding the harassment the PEOs face, and the stress they are under. For example, with regard to Exhibit 1 submitted at the evidentiary hearing – a video showing indisputable harassment – the trial court noted that a "video filmed in 2014 shows PEO Desruisseaux being followed and spoken to by Freeman while she attempted to do her job" and that she alleged that this "impeded her from doing her job." *Add.* at 35, 38. This is an unreasonable characterization of the exchange depicted in that video, and indicates that the trial court did not give proper weight to the evidence and the impact on the PEOs. *See* City's Exhibit 1 (October 2, 2015, Evidentiary Hearing).

Additionally, the trial court did not address the testimony from Respondents Ean and Freeman indicating that their goals and objectives remain the same as when they started.

The trial court's order is in error and constitutes an unsustainable exercise of discretion.

SUMMARY OF THE ARGUMENT

The trial court's order is based on an erroneous view of constitutional law and an erroneous assessment of the evidence.

There is no genuine dispute that Defendants' conduct has impaired, and continues to impair, significant governmental interests, including (1) the safety of City employees, (2) public safety and order on streets and sidewalks, and (3) the free flow of pedestrian and vehicle traffic, among others. The trial court acknowledged this fact in ruling that the City has established significant governmental interests, and that its proposed injunctions are content-neutral. *Add.* at 46. The United States Supreme Court has held on several occasions that these precise governmental interests are significant and can warrant injunctive relief. Accordingly, the trial court engaged in an unsustainable exercise of discretion, contrary to the law and evidence, in ruling that "the governmental interests here are not sufficient to warrant an infringement on the Respondents' First Amendment rights." *Add.* at 46.

The trial court further erred in ruling that the proposed injunctions are "not sufficiently narrowly-tailored" and "[a]ny injunction requiring a buffer zone of any meaningful distance would require **a significant change** in the method used by the Respondents to disseminate their protected speech." *Add.* at 46 (emphasis supplied). This ruling represents an error of law and overlooks significant evidence.

The test in reviewing a request for injunctive relief is not whether there is a burden on speech, but rather, whether the proposed restriction burdens no more speech than necessary to serve a significant governmental interest. The City's proposed injunctions pass this test. The trial court implicitly acknowledged this in stating that "[t]he Court cannot conceive of any more narrow or alternative relief that would provide any meaningful protection to the PEOs without running afoul of the Respondents' First Amendment

Rights." *Add.* at 46. In other words, the City's injunctions, in fact, burden no more speech than necessary.

Additionally, the trial court fails to provide a factual basis to support its conclusion that the injunctions would require a "significant change," nor could it, given the evidence. Defendants have admitted that distances between five and fifteen feet away from the PEOs are ideal for their activities, and the City has proposed injunctions providing for a five to ten-foot separation. Therefore, there can be no genuine dispute that the City's injunctions leave ample room for Defendants to engage in their desired speech and conduct. Contrary to the trial court's ruling, an injunction can have an impact on speech and expressive conduct – even a significant impact – and, as here, remain constitutional.

The trial court's ruling is further in error because it depends on a finding that the "frequency, duration, and severity of Respondents' Robin Hood activities has decreased markedly since October 2013, the date of the last order." *Add.* at 46. This finding overlooks significant evidence of ongoing Robin Hooding over the past two years. Additionally, as a matter of law, a cessation or decrease in challenged conduct should not form the basis for a denial of injunctive relief, where, as here, the original conduct that gave rise to the request justifies an injunction, and certain Defendants have indicated they intend to continue the conduct.

The trial court's ruling leaves the City with ongoing injuries and no adequate constitutional remedy at law. Alternative remedies suggested by the trial court, such as enacting an ordinance or pursuing an arrest, are not constitutionally permissible where more narrowly tailored injunctive remedies exist. If the trial court's decision stands, it not only injures the City, but municipalities and their employees more generally. The City and its PEOs need this Court's assistance. An injunction should enter.

ARGUMENT

I. The City has significant governmental interests that deserve protection.

The trial court's decision that no meaningful injunctive relief can enter without offending the First Amendment is simply wrong, and contrary to well established law and the facts of this case. The Supreme Court has long recognized that a narrowly tailored injunction can enter when significant governmental interests are at stake. *See Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 776 (1994).

Here, there is no genuine dispute that the City has established it has significant governmental interest in protecting both its employees and the public, among others, that are being impaired by Defendants. This fact has been acknowledged by the trial court, and is in accord with numerous Supreme Court decisions. *See Add.* at 46. (stating "the City has significant governmental interests at stake"); *see also Madsen*, 512 U.S. at 768 ("The State also has a strong interest in ensuring the public safety and order, in promoting the free flow of traffic on public streets and sidewalks, and in protecting the property rights of all its citizens"); *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357, 376 (1997) (recognizing governmental interest in "public safety and order, promoting the free flow of traffic on streets and sidewalks, protecting property rights, and protecting a woman's freedom to seek pregnancy-related services" in combination as "certainly significant enough to justify an appropriately tailored injunction"); *Murray v. Lawson*, 138 N.J. 206 (1994) (granting injunction "pursuant to the court's authority to grant equitable relief to enforce a valid public policy of [the] State"); *City of Keene*, 118 A.3d at 263 (recognizing that the City has articulated significant governmental interests, and that an injunction may issue to enforce a valid public policy).

Accordingly, the pertinent question before the trial court was not whether the City has established sufficient interests to warrant an injunction, but rather, how best to tailor

the scope of injunctive relief. Therefore, the trial court's ruling that "the governmental interests here are not sufficient to warrant an infringement on the Respondent's First Amendment rights" is an unsustainable exercise of discretion. As discussed below, the City's proposed constitutional injunctions would protect the City's interests while burdening no more speech than necessary, and therefore, are constitutional.

II. The City's proposed injunctions are constitutional and do not impose a significant burden on Defendants' speech.

In denying the City and its PEOs injunctive relief, the trial court reasoned that the City's request is unconstitutional because "the proposed injunctions are not sufficiently narrowly-tailored" and "[a]ny injunction requiring a buffer zone of any meaningful distance would require a significant change in the method used by the Defendants to disseminate their protected speech." This ruling contains two fundamental errors.

First, an analysis of the controlling law from the United States Supreme Court makes clear that the City's proposed injunctions are narrowly tailored and are constitutional. Second, any reasonable analysis of the evidence reveals that the burden imposed by the injunctions on Defendants is minimal and that adequate alternate channels for their speech remain available to them. Accordingly, the trial court's order constitutes an unsustainable exercise of discretion in that it contains an erroneous analysis of both the law and facts.

a. The City's proposed injunctions are constitutional.

A content-neutral injunction is constitutional if it burdens no more speech than necessary to serve significant governmental interests and leaves open adequate alternate channels for communication. *See Madsen*, 512 U.S. 753, 765 (1994). The City's proposed

injunctions pass this test in all regards.[5] As the following cases demonstrate, the City's proposed injunctions, seeking a five to ten-foot buffer, satisfy the First Amendment.

i. *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994).

The Supreme Court's first significant analysis of injunctive relief and buffer zones occurred in *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753 (1994). In *Madsen*, a Florida state court enjoined protestors from engaging in a range of conduct near abortion clinics and the residences of people associated with such clinics. The injunctive relief imposed by the court had several different permutations, however, pertinent to this case, the Florida court enjoined protestors from "'congregating, picketing, patrolling, demonstrating or entering' any portion of the public right-of-way near within 36-feet of the property line of a clinic," and also enjoined protestors from physically approaching a person seeking services from a clinic, within 300 feet of the clinic, "unless such person indicates a desire to communicate." *Id.*, at 767, 774. The Supreme Court upheld the fixed 36-foot buffer but invalidated the 300-foot prohibition on approaching clinic patrons. *Id.*, at 776.

The Supreme Court reasoned with regard to the 36-foot buffer that such limitation was a reasonable solution to ensure access to and from the clinic and that the protestors could still be seen and heard from that distance. *See Madsen*, 512 U.S. at 770 ("On balance, we hold that the 36–foot buffer zone around the clinic entrances and driveway burdens no more speech than necessary to accomplish the governmental interest at stake."). However, the Supreme Court invalidated the 300-foot prohibition on approaching individuals because it was a blanket prohibition "on all uninvited approaches." *Id.*, at 774. In other words, that

[5] The trial court ruled that the City's injunctions are content neutral. *See Add.* at 43. Defendants did not file a cross-appeal of that ruling. Therefore, the City does not address that component of the constitutional standard in this brief.

portion was unconstitutional because it could apply to <u>any person</u> at <u>any time</u> within 300-feet absent independent evidence of some proscribable speech or conduct.

On remand, the Florida state court amended this portion of the injunction as follows:

> Outside of the 36 foot buffer zone, respondents and those acting in concert with them may physically approach persons seeking the services of the clinic to engage in non-threatening communications and to distribute literature. However, at all times and on all days, should any individual decline such communication, otherwise known as "sidewalk counseling," that person shall have the absolute right to leave or walk away and the respondents shall not encircle, surround, impede the progress of, harass, threaten or physically or verbally abuse those individuals who chose not to communicate with them.

Johnson v. Women's Health Center, Inc., 714 So. 2d 580, 584 (1998).

On appeal, this amended version was affirmed because it made clear that it applied to "persons seeking services of the clinic," in the "vicinity of the clinic" and enjoined "assault and other conduct of a criminal and/or tortious nature." *Id.* Thus, it was sufficiently tailored to leave open alternate channels of communication.

Applying the holdings of *Madsen* and the subsequent appeal in *Johnson* in this case makes clear that the City's proposed injunctions are constitutional. First, as *Madsen* and *Johnson* confirm, reasonable separations and buffers are constitutional (i.e., a 36 foot buffer) where the parties enjoined know where they will apply. Second, protestors do not have a right to encircle, impede, surround, harass or threaten individual(s) when/if such individual(s) have declined to communicate. Otherwise, such conduct begins to take on a criminal and tortious nature.

Here, the proposed injunctions account for these factors. In the City's first proposed solution, the Defendants would only need to remove themselves by 10-feet upon request, much like the prohibition upheld on appeal in *Johnson*. Or, under the City's second proposed solution – i.e., the 10 foot buffer within 15 feet of crosswalks, meters, and metered spaces – the Defendants would know precisely where the buffer would apply in regard to

fixed areas on the ground. Further, the distance requirement is reasonable to ensure that the PEOs can do their job without undue impediment from Defendants.

ii. *Schenck v. Pro-Choice Network of W. New York*, 519 U.S. 357 (1997).

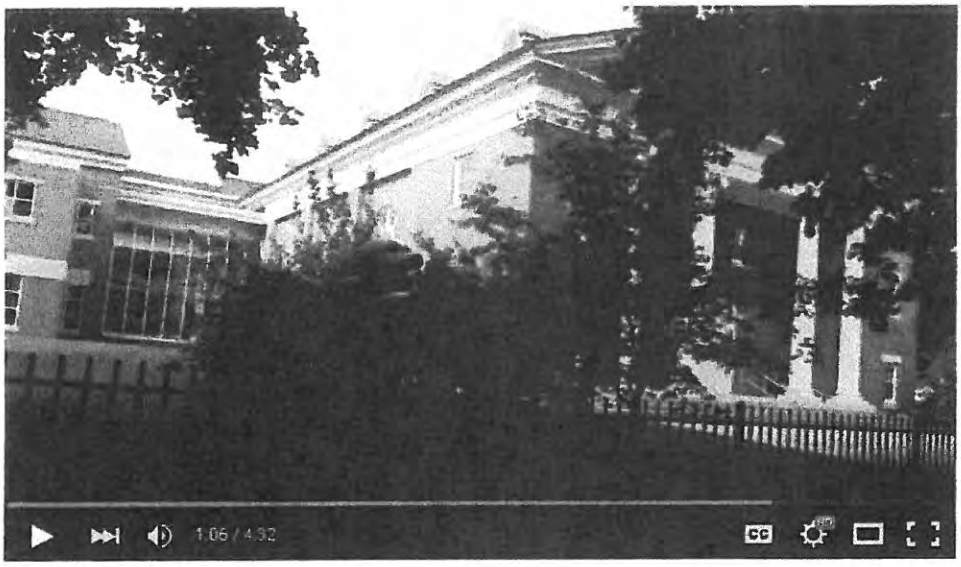
Three years after *Madsen*, the Supreme Court addressed an injunction in *Schenck v. Pro-Choice Network Of W. New York* that imposed (a) a fixed 15-foot buffer around the entrance to an abortion clinic, (b) a floating 15-foot buffer around people seeking access to the clinic, and (c) a "cease and desist" component that required protestors to retreat 15-feet from a person seeking access to a clinic once the person indicates a desire not to be counseled. 519 U.S. 357 (1997). The Supreme Court affirmed the 15-foot fixed buffer, and the 15-foot "cease and desist" component, but invalidated the floating 15-foot buffer.

As in *Madsen*, the Supreme Court reasoned that the fixed buffer zones were "necessary to ensure that people and vehicles trying to enter or exit the clinic property or clinic parking lots can do so." *Schenck*, 519 U.S. at 380. Similarly, the "cease-and-desist" portion was upheld because the protestors retained adequate alternate channels for communication; i.e., they could convey their message from 15-feet back. *Id.*, at 383-84. The "floating buffer," however, was invalidated for specific reasons not applicable in this case. Specifically, the Supreme Court was concerned that the floating buffer, while not unconstitutional per se, would make it too difficult for the protestors to understand how to comply with that portion of the injunction. *Id.*, at 376.

Under the terms of the floating buffer in *Schenck*, protestors could easily run into problems because the injunction, unlike here, could apply to anyone entering a clinic, and could result in multiple floating buffers surrounding multiple people at one time. *Id.*, at 377-378. For example, if a person was leaving the clinic and another entering, the protestor following at 15-feet could find him or herself accidentally in violation when the two patrons' paths crossed. For this reason – i.e., compliance concerns – "[t]he Court concluded that this

lack of certainty about how to comply with the injunction created a substantial risk that more speech would be burdened than the injunction prohibited." *Sabelko v. City of Phoenix*, 120 F.3d 161, 164-65 (9th Cir. 1997) (summarizing *Schenck*). The Court further reasoned that "[b]ecause other means might exist which would protect governmental interests *and* provide certainty regarding compliance . . . the floating buffer zones burdened more speech than was necessary." *Id.*

In contrast, here, the proposed injunctions do not pose the same problems because, under either of the City's solutions, the buffer would apply only to the City's two PEOs. Further, the injunctions would apply in the limited area of downtown Keene where the PEOs patrol, or under the City's second proposed solution, only within a fixed 15-foot distance of parking meters, metered spaces and crosswalks. Additionally, both of the City's proposed injunctions include scienter requirements, whereby, only purposeful invasions of the buffer would constitute a violation. The injunctions further include a carve-out exception providing a reasonable means for Defendants to navigate past the PEOs on City sidewalks. Thus, for example, if Defendants were seated at a street corner café, or conversing with friends on a City block, and an unintentional invasion of the 10-foot buffer were to occur, it would not constitute a violation of the injunction. However, actions that constitute a knowing and intentional invasion of a PEO's space, or attempts to encircle or confine the PEOs, such as depicted below, would be prohibited.



Excerpt of Exhibit 1 at 1:06 min., October 2, 2015 Evidentiary Hearing (Depicting PEO Desruisseaux attempting to ward off Defendant Freeman)

Excerpt of Exhibit 1 at 2:12 min., October 2, 2015 Evidentiary Hearing (Depicting PEO Desruisseaux's eighteenth attempt – in an approximately two minute period of time – to move past Defendant Freeman)

iii. *Hill v. Colorado*, 530 U.S. 703 (2000).

The holding in *Hill v. Colorado*, 530 U.S. 703 (2000) further confirms that the City's proposed injunctions are constitutional. In *Hill*, the State of Colorado enacted a statute that made it unlawful within 100 feet of any abortion clinic in the state, "to 'knowingly approach' within eight feet of another person, without that person's consent, 'for the purpose of passing a leaflet or handbill to, displaying a sign to, or engaging in oral protest, education, or counseling with such other person ....'" and in so doing the statute made "it more difficult to give unwanted advice, particularly in the form of a handbill or leaflet, to persons entering or leaving medical facilities." *Hill*, 530 U.S. at 707-08 (emphasis supplied). While this buffer could float around individuals, it was, nevertheless, upheld as constitutional.

At first reading, this result can seem at odds with the holding in *Schenck*; however, the Court carefully explained the distinction, stating:

> Unlike the 15–foot zone in *Schenck,* this 8–foot zone allows the speaker to communicate at a "normal conversational distance." Additionally, the statute allows the speaker to remain in one place, and other individuals can pass within eight feet of the protester without causing the protester to violate the statute. Finally, here there is a "knowing" requirement that protects speakers "who thought they were keeping pace with the targeted individual" at the proscribed distance from inadvertently violating the statute.

Hill, 530 U.S. at 726-27 (internal citations omitted).

As this analysis makes clear, the pertinent question when analyzing an injunction that would create a buffer, is not whether it "floats" around a person but whether it can reasonably be complied with, and does it leave open adequate alternate channels for communication. Here, the City's proposed injunctions satisfy these requirements.

While the proposed injunctions would create a buffer around two specific City employees, this separation would only arise either upon request of a PEO or in relation to specific fixed areas of Keene, and the trial court could have tailored other alternatives. *See*

Hill, 530 U.S. at 729-30 ("A bright-line prophylactic rule may be the best way to provide protection, and, at the same time, by offering clear guidance and avoiding subjectivity, to protect speech itself"). Therefore, under either of the City's proposed approaches, there is no reasonable concern with compliance, and the distance requested is minimal, leaving ample room for communication. *See Hill*, 530 U.S. at 735-36 (Souter, J., concurring) ("Unless regulation limited to the details of a speaker's delivery results in removing a subject or viewpoint from effective discourse (or otherwise fails to advance a significant public interest in a way narrowly fitted to that objective), a reasonable restriction intended to affect only the time, place, or manner of speaking is perfectly valid"). Much like the statute in *Hill*, the City's proposed solutions request a setback that allows for conversation, and has a "knowing" requirement that eliminates any legitimate concern regarding accidental violations.

iv. *McCullen v. Coakley*, 134 S. Ct. 2518 (2014).

The constitutional reasonableness of the City's requests is further evidenced by the recent holding in *McCullen v. Coakley*, which again recognized that injunctions are often the best solution for addressing specific conduct by specific people, and are permissible, provided that there is a narrow tailoring.

In *McCullen,* the Supreme Court analyzed a Massachusetts law that made "it a crime to knowingly stand on a 'public way or sidewalk' within 35 feet of an entrance or driveway to any place, other than a hospital, where abortions are performed." *McCullen*, 134 S. Ct. at 2525. The Supreme Court invalidated this restriction, holding that it was a blanket prohibition that took an "extreme step of closing a substantial portion of a traditional public forum to all speakers" and "has done so without seriously addressing the problem through alternatives that leave the forum open for its time-honored purposes." *Id.*, at 2541.

While this holding invalidated a buffer zone, it did so because the statute was too broad, and unlike the City's proposed approaches, not narrowly tailored to address the governmental interests at issue. To this point, the Supreme Court further explained that an injunction, such as the City seeks here, is a preferable and more constitutional approach. *McCullen*, 134 S. Ct. at 2538 ("In short, injunctive relief focuses on the precise individuals and the precise conduct causing a particular problem. The Act, by contrast, categorically excludes non-exempt individuals from the buffer zones, unnecessarily sweeping in innocent individuals and their speech.").

*****

Read together, *Madsen*, *Schenck*, *Hill* and *McCullen*, demonstrate that the Supreme Court's concern in First Amendment cases is on ensuring that a statute or injunction is narrowly tailored, and burdens no more speech than necessary. Part of that analysis is whether the enjoined party can reasonably understand and comply with the injunction. However, all of the above cases recognize that there is likely to be some impact on expression, and that impact may be significant. Accordingly, the trial court's ruling that the City's injunctions are not narrowly-tailored, is plainly erroneous. Similarly, the trial court's ruling that the injunctions would require a significant change in Defendants' conduct is not the pertinent legal test. Therefore, the trial court's ruling was in error, and the denial of injunctive relief was an unsustainable exercise of discretion.

b. The trial court's ruling that the proposed injunctions would require a significant change in the methods used by Defendants overlooks significant evidence and is contrary to the record.

As addressed above, the trial court misapplied the controlling law to determine whether the City's injunctions are narrowly tailored. Additionally, the trial court also incorrectly ruled that the injunctions would require a significant change in the methods

used by Defendants. This ruling is without support in the evidentiary record, and the trial court's order does not provide a factual basis to support its conclusion. A reasonable review of the evidence makes clear that the City's injunctions would have a minimal impact on Defendants.

To illustrate, Defendants have identified four activities that they engage in, and seek to continue:

1. Filling expired meters before cars were ticketed to protest against the City's parking enforcement function as a means to protect motorists from getting tickets.

2. Verbal communication with PEOs on various subjects, including defendants' political theories and their connection to parking enforcement.

3. Videotaping Parking Enforcement Officers as they perform their duties as a means of assuring government accountability.

4. Placing a Robin Hood card on the windshield of cars which had been spared from parking tickets in order to communicate a political message and secondarily to raise funds.

See Add. at 41.

Under either injunction proposed by the City, the Defendants would retain an almost entirely unfettered ability to engage in such conduct and promote such messages. The only restriction proposed by the City is that they would have to do so from a reasonable remove upon request by a PEO or when within a certain distance of fixed geographical locations. Specifically, a ten-foot buffer around the PEO, with an exception allowing for a reduction to five-feet when seeking to pass by the PEO.

Defendants have "asserted that distances between five and fifteen feet away from the PEOs were 'ideal' for their activities . . ." *City of Keene*, 167 N.H. at 736; *See* Trial Tr. vol. IV, 480:15-18 (testimony of Ian Freeman stating "the most effective way" to engage in such conduct "is to walk maybe about 15 feet or so in front of the enforcer – maybe ten feet, whatever is comfortable – and identify expired meters, put a nickel or a dime in the meter

to prevent the ticket from being written."). Thus, by their own admission, Defendants' conduct can most effectively occur within the separation requested by the City. Similarly, the trial court found that Defendants, when videotaping, are "typically ten feet away from the PEOs." *Add.* at 34. Therefore, given this evidence, the trial court's ruling that the injunction would cause a significant change is unreasonable.

Defendants, nevertheless, argued at the October 2, 2015 evidentiary hearing that an injunction would, under certain scenarios, require them to change their course, and might make their ability to follow the PEOs more difficult. Presumably the trial court relied on this testimony in determining that the impact would be "significant." Yet, such minimal and incidental impact is permissible, and cannot reasonably be interpreted as "significant" where all other channels of communication are left open. *See Hill*, 530 U.S. at 726 ("[W]hen a content-neutral regulation does not entirely foreclose any means of communication, it may satisfy the tailoring requirement even though it is not the least restrictive or least intrusive means of serving the statutory goal."). For constitutional purposes, a buffer zone is not a significant restriction, where, as here, it leaves Defendants free to engage in expressive conduct at that same distance they have identified as being ideal for such activities, and it was unreasonable for the trial court to conclude otherwise.

Defendants do not have a protected First Amendment right to follow the PEOs in any manner that they desire. It is self-evident that a constitutional injunction will result in some degree of limitation on speech that might otherwise be protected. This is inherent in the Supreme Court's recognition that there will be a "burden" when injunctive relief is provided. The key inquiry is not whether the burden is significant, as the trial court ruled, but rather, whether the injunction burdens <u>no more speech than necessary</u>. The City's injunction satisfies this standard. *See Add.* at 46 ("The Court cannot conceive of any more

narrow or alternative relief that would provide any meaningful protection to the PEOs without running afoul of the Defendants' First Amendment rights").

III. The trial court's finding that Defendants' activities have decreased overlooks significant evidence and does not remove the need for injunctive relief.

The trial court's decision to deny injunctive relief was premised in large part on its determination that the "frequency, duration, and severity of the Respondents' Robin Hooding activities have decreased markedly since October 2013, the date of the [trial court's] last order." *Add.* at 46. This finding, however, fails to account for significant evidence outlined above, including:

1. Defendants Ean and Freeman admitted that they continue to engage in Robin Hooding.
2. Ean and Freeman have indicated that they intend to continue this conduct.
3. Freeman, on at least one occasion since the trial court's prior order has engaged in undeniable harassment of the PEO Desruisseaux.
4. The original complained of conduct – i.e., persistent following videotaping, harassing, taunting, obstructing, circling, and otherwise impeding the PEOs – justifies an injunction on its own right.

The trial court's finding on this point is also contrary to its own recognition that Robin Hooding continues and that Defendant Ean "currently goes out to Robin Hood several days a week for several hours per day." *Add.* at 35.

Given this evidence, it was unreasonable for the trial court to conclude that the Defendants may avoid injunctive relief. Defendants' admissions, standing alone, establish a pattern of conduct that warrants an injunction.

Similarly, the trial court's order almost completely ignores video evidence submitted at the October 2, 2015 hearing of significant harassment of PEO Desruisseaux. *See* Exhibit 1 (October 2, 2015 Evidentiary Hearing). The trial court's order addresses this video only in passing, finding that "a video filed in 2014 shows PEO Desruisseaux being followed and spoken to by Freeman while she attempted to do her job." *Add.* at 35. That characterization

of the video is akin to describing a football match as people tossing a ball around on a field. While not incorrect, it is by no means a sufficient description. The trial court's only other examination of this video was in finding that PEO Desruisseaux alleged that "[o]n one videotaped occasion, Freeman followed her with a camera and impeded her from doing her job." *Add.* at 38. This is not a mere allegation. It is a fact preserved in video form that was presented to the trial court, and which a reasonable trier of fact should have found provided unambiguous evidence warranting an injunction. The trial court's cursory treatment of this video is unreasonable.

Additionally, the trial court's ruling is premised on a notion that a party may avoid injunctive relief by voluntarily modifying or ceasing the complained of conduct. Yet, courts that have examined that issue, have held that a defendant may not moot a claim for injunctive relief simply by ceasing or modifying the complained of conduct.

The United States Supreme Court has cautioned that "[i]t is the duty of the courts to beware of efforts to defeat injunctive relief by protestations or repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption." *See United States v. Oregon State Med. Soc.*, 343 U.S. 326, 333 (1952). A voluntary cessation or reduction in conduct, should only moot a case where "there is no reasonable expectation that the wrong will be repeated." *United States v. W. T. Grant Co.*, 345 U.S. 629, 633 (1953).

Here, it was reasonably foreseeable that Defendants conduct might abate to a degree during the pendency of litigation. That result, however, speaks to the importance of the Court's oversight. Additionally, Defendants Ean and Freeman continue to engage in Robin Hooding, and have stated an intent to do so indefinitely. *See Add.* at 35; Trial Tr. vol. IV, 124:10-12, 148:6-7. Therefore, the factual and legal basis for the trial court's decision that

injunctive relief is not currently warranted is in error and an unsustainable exercise of discretion.

IV. The City lacks an adequate constitutional remedy absent injunctive relief.

The trial court received abundant evidence, as outlined throughout this brief and during the City's prior appeal, that the City and its PEOs are suffering ongoing injury from Defendants. The trial court, nevertheless, suggested in its ruling that the City has other alternative remedies available to it, and the trial court seemed to partially base its decision on those grounds. Specifically, the trial court noted that "[t]o the extent conduct of the Respondents rise to the level of violating criminal statutes, there is a remedy available to the City and the PEOs." *Add.* at 47. That reasoning, however, ignores the purpose of injunctive relief, and the constitutional principles laid down by the Supreme Court. *See W. T. Grant Co.*, 345 U.S. at 633 ("The purpose of an injunction is to prevent future violations, and, of course, it can be utilized even without a showing of past wrongs").

Accordingly, because the City provided evidence of a persistent pattern of obstruction and harassment by Defendants, it was unreasonable for the trial court to deny relief on the grounds that the City might be able to use its arrest powers. The City should not have to wait for an explicit criminal act to occur before it can gain protection.

Further, the Supreme Court has made clear that governments should pursue the least restrictive means possible to protect their interests. An arrest would result in the greatest burden on Defendants' speech. Likewise, passing an ordinance to address conduct by a small group of individuals, would be overly broad.

Justice Roberts, specifically addressed this issue in the holding in *McCullen*, stating:

> We have previously noted the First Amendment virtues of targeted injunctions as alternatives to broad, prophylactic measures. Such an injunction "regulates the activities, and perhaps the speech, of a group," but only "because of the group's past *actions* in the context of a specific dispute between real parties."

> Moreover, given the equitable nature of injunctive relief, courts can tailor a remedy to ensure that it restricts no more speech than necessary. In short, injunctive relief focuses on the precise individuals and the precise conduct causing a particular problem. The Act, by contrast, categorically excludes non-exempt individuals from the buffer zones, unnecessarily sweeping in innocent individuals and their speech.

McCullen v. Coakley, 134 S. Ct. 2518, 2538 (2014) (internal citations omitted).

Thus, the City's approach in seeking an injunction is not only the most limited in scope, but has been identified by the Supreme Court, as the correct constitutional means of addressing the type of circumstances present in this case. Therefore, the permissible constitutional remedy available to the City is to seek injunctive relief. Absent such relief, the City's lacks an adequate constitutional remedy.

CONCLUSION

The trial court's order denying injunctive relief is unreasonable and untenable given the facts and law addressed above. The City's proposed injunctions are narrowly-tailored constitutional solutions that are necessary to protect significant governmental interests. Absent a judicial remedy, the City has no adequate remedy at law and will continue to suffer ongoing injury. Similarly, the reality of the PEOs day to day experiences should not be lost in weighing the facts, law, and equities under consideration. The trial court should have granted an injunction protecting both the right of the Defendants to engage in speech, and the City and PEOs significant interests. Its failure to do constitutes an unsustainable exercise of discretion that this Court should correct.

REQUEST FOR ORAL ARGUMENT

The City requests oral argument before the full court to be presented by Attorney Dietel.

Respectfully submitted,

CITY OF KEENE

By its attorneys,
GALLAGHER, CALLAHAN &
GARTRELL, P.C.

May 31, 2016

Charles P. Bauer, #208
Robert J. Dietel, #19540
214 N. Main Street
Concord, NH 03301
(603) 228-1181

CERTIFICATIONS

Pursuant to Supreme Court Rule 16(3)(i), I hereby certify that a copy of the trial court's order, dated November 20, 2015, is appended hereto.

I further certify that two copies of the foregoing brief have been sent this day by first class mail to Peter Eyre, *pro se* (at last known address), and Jon Meyer, Esq., counsel for James Cleaveland, Garrett Ean, Kate Ager, Ian Bernard a/k/a Ian Freeman, and Graham Colson.

May 31, 2016

Robert J. Dietel, #19540

ADDENDUM

ORDER (November 20, 2015) 33

THE STATE OF NEW HAMPSHIRE
SUPERIOR COURT

CHESHIRE, SS.

No. 213-2013-CV-00098;
213-2013-CV-0241

THE CITY OF KEENE

v.

JAMES CLEAVELAND,

GARRETT EAN,

KATE AGER,

IAN BERNARD A/K/A IAN FREEMAN,

GRAHAM COLSON,

AND

PETE EYER

ORDER

The Petitioner, the City of Keene (the "City"), originally brought actions claiming tortious interference with contractual relations, negligence, and civil conspiracy. The City also sought preliminary and permanent injunctive relief ordering the Respondents, James Cleaveland, Garret Ean, Kate Ager, Ian Bernard a/k/a Ian Freeman, Graham Colson, and Pete Eyer to not interfere, harass, or intimidate members of the Parking Enforcement Office ("PEO"). This Court granted Respondents' motions to dismiss. The New Hampshire Supreme Court affirmed this Court's decision in all respects except as

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11/20/2015
cc: T. Mullins, R. Dietel
J. Meyer, C. Bauer

to the requested injunctive relief, which it remanded to this Court for a decision on the merits. A hearing was held on October 2, 2015.[1] After consideration of the arguments presented, injunctive relief is DENIED.

I. Factual Background

The City currently employs Parking Enforcement Officers (collectively the "PEOs"), Linda Desruisseaux ("Desruisseaux") and Jane McDermott ("McDermott"). The Petitioner also formerly employed Alan Givetz ("Givetz") as a PEO before he resigned in 2013. The PEOs' duties include enforcing motor vehicle parking laws by monitoring parking meters and writing parking tickets. The PEOs patrol on foot and move throughout downtown Keene. Beginning in December 2012, the Respondents began following, videotaping, and talking with the PEOs on almost a daily basis. Since October 2013, the frequency of this conduct has decreased significantly.

A. Robin Hooding

Robin Hooding is done by identifying and filling expired parking meters before a PEO locates the expired meter and issues a ticket. When this is done, it is referred to as a "save." After a car has been saved, the Robin Hooders place cards on the windshield that inform the driver that they have been saved from a ticket and refer them to FreeKeene.org for donations. On occasion, Robin Hooding participants videotape while Robin Hooding, typically ten feet away from the PEOs. Garret Ean ("Ean") and Ian Freeman ("Freeman") have published videos on YouTube, FreeKeene.com,

[1] The focus of the hearing was on events after October 1, 2013, the final date of the last evidentiary hearing. This order considers the facts and evidence from the evidentiary hearings in 2013 and, more recently, on October 2, 2015.

FreeConcord.org, and Facebook detailing the Robin Hooding efforts. A video filmed on February 26, 2013, depicts former PEO Givetz being followed, turning around, and saying, "is that close enough coward." Another video filmed in 2014 shows PEO Desruisseaux being followed and spoken to by Freeman while she attempted to do her job.

The named Respondents have participated in Robin Hooding over different periods of time and at different frequencies. Freeman has participated in "Robin Hooding" since 2009 and continues to do so in a reduced capacity. Ean has been involved in Robin Hooding for several years and remains the most active Robin Hooding participant. He currently goes out to Robin Hood several days per week for several hours per day. James Cleaveland ("Cleaveland") was formerly a more involved participant, but has only Robin Hooded on a few, infrequent occasions since October 2013. One specific instance involved demonstrating how to Robin Hood to participants in a "Keene-vention." Kate Ager ("Ager") participated in Robin Hooding from December 2012 to March 2013, but has not been Robin Hooding since. Pete Eyer ("Eyer") did not actually Robin Hood himself, but on occasion before October 2013 alerted the Robin Hooders to the location of a PEO. Graham Colson ("Colson") participated in Robin Hooding in the past, but has not engaged in Robin Hooding activities since October 2013.

The nature of Robin Hooding requires the participant to get in front of the PEO in order to feed expired meters before the PEO reaches them. A Robin Hooder will have to pass by the PEO if the PEO changes direction from their anticipated path. When a Robin Hooder tries to get ahead of a PEO, the layout and dimensions of the sidewalks

and meters in downtown Keene require that the Robin Hooder pass within a few feet of the PEO. This is further compounded by pedestrians, bystanders, bikes, trash cans, pets, and other impediments in the path of the PEO and the Robin Hooder.

B. Allegations Made by PEOs About Activities Prior to October 1, 2013

McDermott has been a PEO since September 2012. Beginning in December 2012, Cleaveland, Ean, Colson, Freeman, and Ager followed her on foot. Several Respondents told the PEOs that they would help them find new jobs. The Respondents called McDermott a "liar," "thief," and asked her how she could sleep at night. McDermott originally tried to thwart the Respondents by running away and crossing streets, but the Respondents continued to follow.

The Robin Hooding caused McDermott stress because she had to constantly monitor where the Respondents were and felt like she could not get away. Even on her breaks, the Respondents sat and waited outside her car or followed her into the library or City Hall. The Respondents' close proximity made it hard to focus on her job. She refused to work Saturdays because she did not feel safe with Cleaveland's and Colson's presence. She contemplated quitting and inquired about other employment.

McDermott carried a radio that allowed her to contact the dispatcher at the Keene Police Department. On three occasions, she did need to contact the police. Once, Keene Police radioed McDermott to check on her when the group surrounding her was so large that they could not see her. On another occasion, McDermott was taking the Respondents' cards off a windshield when Colson grabbed her wrist. Initially,

she felt threatened until she realized what was happening. McDermott was not hurt and the situation resolved peacefully.

PEO Desruisseaux also experienced Robin Hooding before October 2013. While on patrol, Cleaveland and Colson attempted to stop PEO Desruisseaux and engage her in conversation to prevent her from doing her job. The Respondents told her she was vandalizing cars by chalking the tires. Moreover, Ean, Eyer, and Cleaveland made comments to Desruisseaux that she should not be doing her job because she was stealing from the citizens of Keene. On at least one occasion, Cleaveland came within about a foot of her. Desruisseaux asked Cleaveland to stay away and stop talking to her, but he continued. Desruisseaux felt the constant videotaping was intimidating no matter from what distance it was done. She never observed any of the Respondents being violent.

Desruisseaux would hear the footsteps of the Respondents following. When she heard them, she would tense up and become very distracted, which impacted her job performance. She became angry and frustrated by the Respondents' actions. She contemplated filing a grievance with her union, filing a workers compensation suit for stress, or taking a mental health day.

Givetz started working as a PEO in September 2012 and resigned in July 2013 due to the hostile work environment caused by the Respondents. Specifically, Colson made it hard for Givetz to do his job by standing in front of him and asking what Givetz was going to do. Colson also referenced Givetz's military service, suggesting he would "drone brown babies," called him a "racist," "bitch," and "coward," and followed him on his day off. Colson would follow him so closely that if Givetz turned around they would

bump into each other. On some occasions, Ean would walk with Colson and videotape. Eyer worked behind the scenes, radioing the Respondents after locating Givetz. On one occasion, Eyer asked Givetz if the Respondents' actions were boosting morale.

Colson, Ean, and Cleaveland told Givetz that they could help him find a real job that does not hurt people, and that he should quit. Givetz experienced an anger he had never experienced before because of the Respondents' constant activities. Givetz felt like he was "backed into a corner" and had to quit before he did something "stupid."

C. Allegations by PEOs About Activities Since October 1, 2013

Since October 1, 2013, PEOs Desruisseaux and McDermott have experienced continued Robin Hooding activities by Ean and Freeman. These activities have been reduced in frequency from pre-October 2013 levels. PEO Desruisseaux has been followed by Ean, sometimes accompanied by a female, three to four days per week, but has not been followed by large groups or for her full work day. She maintains that she spends most of her time while Ean is Robin Hooding trying to get away from him and that she feels panicked. Freeman has followed PEO Desruisseaux less frequently since October 2013. On one videotaped occasion, Freeman followed her with a camera and impeded her from doing her job. She responded to his videotaping and statements with "I asked you not to speak to me" and "I've had enough." She has not seen Ager, Colson, or Eyer Robin Hooding since October 2013 and has seen Cleaveland only once.

PEO McDermott has also experienced Robin Hooding since October 2013. She sees Ean most days while she tries to work. She assumes that she has been filmed

since October 2013 because she says Freeman always films, but she has not seen it. She remains apprehensive of the Robin Hooders coming up to her and feels stressed and anxious about running into someone Robin Hooding. She has not seen Ager, Colson, Eyer or Cleaveland while she was working since October 2013.

II. Procedural Posture

On May 1, 2013, the Petitioners brought this action alleging that the Respondents, acting individually and in concert, tortiously interfered with contractual relations in that the Respondents created a hostile work environment for the PEOs and forced Givetz to resign. (See Pet.'s Clarified/Amended Verified Pet. Preliminary Permanent Inj. Relief 1.) On September 23, 2013, the Petitioners filed another action against the Respondents also alleging negligence and civil conspiracy. (Pet.'s Compl. Decl., 213-2013-CV-00241.) The City sought preliminary and permanent injunctive relief "against the six Respondents, enjoining them from interfering with the PEOs' employment relationship with the City, either through the City's proposed 30 foot injunction, or through any other reasonable injunction that the Court deems appropriate." (Pet.'s Supp. Mem. Law 4.) This Court dismissed all of the Petitioner's claims in both actions. The New Hampshire Supreme Court affirmed this Court's decision on the civil claims, but remanded the equitable claim for injunctive relief for a determination on the merits. City of Keene v. Cleaveland, __ N.H. ___, 118 A.3d 253, 263 (2015). On remand, the Petitioner, the City, argues that injunctive relief is constitutional and proper given the facts here and balancing the governmental interests of the City and the First Amendment rights of the Respondents.

III. Analysis

On remand, the question for this Court is "whether the governmental interests and factual circumstances asserted by the City in its petition are sufficient to warrant properly tailored injunctive relief." Cleaveland, __ N.H. ___, 118 A.3d at 263. "It is within the trial court's sound discretion to grant an injunction after consideration of the facts and established principles of equity." Town of Atkinson v. Malborn Realty Trust, 164 N.H. 62, 66 (2012). To be granted injunctive relief, the "plaintiff must demonstrate: (1) that it has suffered an irreparable injury; (2) that remedies available at law, such as monetary damages, are inadequate to compensate for that injury; (3) that, considering the balance of hardships between the plaintiff and defendant, a remedy in equity is warranted; and (4) that the public interest would not be disserved by a permanent injunction." eBay Inc. v. MercExchange, L.L.C., 547 U.S. 388, 391 (2006). Here, the balance of hardships and the examination of the public interest require this court to examine both the Respondents' First Amendment rights and the Petitioner's governmental interests.

Preliminarily, the Court addresses the request for injunctive relief against four of the six Respondents: Eyer, Cleaveland, Ager, and Colson. In the recent hearing, no evidence was introduced that Eyer, Ager, and/or Colson have been involved in this activity in over two years. Cleaveland has only had a minimal role, engaging in limited Robin Hooding on one or two occasions. Considering all of the evidence presented in the 2013 hearings and most recent hearing, the Court finds that injunctive relief is not justified against these four Respondents and dismisses the claims against them.

A. First Amendment Right to Free Speech

The Respondents contend that a permanent injunction would infringe upon activities that are constitutionally protected:

1. Filling expired meters before cars were ticketed to protest against the City's parking enforcement function as well was a means to protect motorists from getting tickets.
2. Verbal communication with PEOs on various subjects, including defendants' political theories and their connection to parking enforcement.
3. Videotaping Parking Enforcement Officers as they perform their duties as a means of assuring government accountability.
4. Placing a Robin Hood card on the windshield of cars which had been spared from parking tickets in order to communicate a political message and secondarily to raise funds.

(Def.s' Post Hearing Mem. 5) "The Free Speech Clause of the First Amendment—Congress shall make no law . . . abridging the freedom of speech—can serve as a defense in state tort suits. . . ." Snyder v. Phelps, 562 U.S. 443, 451 (2011) (citation and quotation omitted).

On appeal and now, the City does not challenge that the content of the Respondents' speech is protected under the First Amendment as speech on a matter of public concern taking place in a traditional public forum. Cleaveland, __ N.H. ___, 118 A.3d at 260. Speech is of public concern if "it can be fairly considered as relating to any matter of political, social, or other concern to the community." Snyder, 562 U.S. at 453. Such speech "occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." Id. at 452 (quotations and citations omitted). Respondents' speech is on a matter of public concern --- the legitimacy of the City government and parking enforcement. Cleaveland, __ N.H. ___, 118 A.3d at 260. Public forums are public areas "used for public assembly and debate, the hallmarks of a

traditional public forum." Frisby v. Schultz, 487 U.S. 474, 480 (1988). Respondents' speech also takes place in a traditional public forum --- public sidewalks and streets. Cleaveland, __ N.H. ___, 118 A.3d at 260. The Respondents' speech is protected.

While some conduct accompanying speech can be curtailed within the bounds of the First Amendment, peaceful conduct should not be curtailed even if offensive. Cleaveland, __ N.H. ___, 118 A.3d at 260-61. "[T]he activity of peaceful pamphleteering is a form of communication protected by the First Amendment." NAACP v. Claiborne Hardware Co., 458 U.S. 886, 910 (1982). "The videotaping of public officials is an exercise of First Amendment liberties." Glik v. Cunniffe, 655 F.3d 78, 83 (1st Cir. 2011). While violent conduct accompanying speech is not protected, such violence must "color[ ] the entire collective effort to take an otherwise non-violent activity outside the realm of constitutional protection." Cleaveland, __ N.H. ___, 118 A.3d at 261 (citing Claiborne Hardware Co., 458 U.S. 886, 933 (1982)). Protected speech does not become unprotected merely because someone disagrees with the message being disseminated, if the dissemination is being done peacefully. Organization for a Better Austin v. Keefe, 402 U.S. 415, 419 (1971). With the exception of a single incident occurring more than two years ago when a PEO's wrist was grabbed and the PEO was unhurt, the Respondents' conduct has been non-violent.

Reasonable Time, Place or Manner Restrictions

Despite the significant protections for First Amendment rights, the Respondents' choice of when, where, and how to Robin Hood "is not beyond the Government's regulatory reach—it is subject to reasonable time, place, or manner restrictions." Snyder, 562 U.S. at 456. Content-neutral injunctions must burden no more speech than

necessary to serve a significant government interest. Cleaveland, __ N.H. ___, 118 A.3d at 263-64 (citing Madsen v. Women's Health Center, Inc., 512 U.S. 753, 765 (1994). "[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights." Nebraska Press Ass'n v. Stuart, 427 U.S. 539, 559 (1976). "Temporary restraining orders and permanent injunctions — i.e., court orders that actually forbid speech activities — are classic examples of prior restraints." Alexander v. United States, 509 U.S. 544, 550 (1993). Therefore, a high standard applies to allowing a prior restraint on speech.

To determine if a prior restraint on speech is constitutional, the Court must first determine if the proposed injunctions are content-neutral. If either injunction is content-based, the standard of review applied to the potential injunction rises to strict scrutiny. Boos v. Barry, 485 U.S. 312, 321 (1988) (noting that content-based restrictions on political speech must be subjected to the most exacting scrutiny.) A restraint on speech is content-neutral if it "serves purposes unrelated to the content of expression . . . even if it has an incidental effect on some speakers or messages but not others." Ward v. Rock Against Racism, 491 U.S. 781, 791 (1989). Even though the Petitioner seeks injunctive relief only against the named Respondents (who share similar political views and Robin Hood to spread those similar views), the purposes of the proposed injunction is to protect the PEOs and the public from the effects of disruptive conduct on the streets of Keene. These purposes are unrelated to the content of the Respondents message and the proposed injunctions are content-neutral.

In general, content-neutral time, place, or manner restrictions "need not be the least restrictive or least intrusive means of doing so, . . . so long as the . . . regulation

promotes a substantial government interest that would be achieved less effectively absent the regulation." Ward, 491 U.S. at 798-99 (internal quotations omitted). However, as noted, injunctions require greater scrutiny than legislatively-enacted statutes or regulations and require "more stringent application of general First Amendment principles." Madsen, 512 U.S. at 765. Injunctive relief, in general, "should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." Califano v. Yamasaki, 442 U.S. 682, 702 (1979). In the First Amendment context, the Court considering injunctive relief must consider "whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." Madsen, 512 U.S. at 765.

On remand, the City contends that two proposed injunctions would be reasonable time, place, and manner restrictions and would satisfy a proper balancing of the City and the Respondents' interests.

Solution One: Defendants must remain 10-feet away upon request.

Upon oral request of a PEO engaged in his or her official duties, Defendants Ian Freeman and Garret Ean (and anyone acting in concert with them) must step back, and remain, at least 10-feet away from such PEO.

This requirement would apply whenever a PEO is engaged in his or her official duties patrolling the City of Keene, and a PEO specifically requests Defendants to remain at such distance. Once the request is made, it would remain in effect for the duration of the PEO's work day.

As an exception to the above requirement, Defendants may approach within 5 feet of a PEO while the PEO is on a sidewalk in Keene for the limited purpose of navigating past the PEO. Defendants, however, may not use this exception to encircle, confine, or otherwise impede the movement of the PEO, and must immediately continue past the PEO until a separation of 10 feet is resumed.

A violation of this order will not occur absent a knowing and purposeful invasion of the 10-foot separation after request of a PEO. Defendants may otherwise continue to engage in filling expired meters, video recording, and

speaking to the PEOs, provided that they do so in conformance with the above described requirements.

Solution Two: Defendants must remain 10-feet away when in fixed areas.

Within 15-feet of a parking meter, metered parking space, or crosswalk, Defendants may not knowingly approach within 10-feet of a PEO while he or she is engages in performing his or her official duties patrolling the City of Keene.

As an exception to the above requirement, Defendants may approach within 5 feet of a PEO while the PEO is on a sidewalk in Keene for the limited purpose of navigating past the PEO. Defendants, however, may not use this exception to encircle, confine, or otherwise impede the movement of the PEO, and must immediately continue past the PEO until a separation of 10 feet is resumed.

A violation of this order will not occur absent a knowing and purposeful invasion of the 10-foot separation. Defendants may otherwise continue to engage in filling expired meters, video recording, and speaking to the PEOs, provided that they do so in conformance with the above described requirements.

(Pet. Memo. of Law, 2-3.) The City argues that the proposed injunctions are narrowly-tailored, protect the City's governmental interests, burden Respondents' speech no more than necessary, and preserve adequate alternate channels for Respondents' speech. (Pet. Memo. of Law, 2).

The decision to grant injunctive relief involving First Amendment protected speech requires an evaluation of competing interests: the government's interest in getting the injunction and the speakers' interest in being able to speak freely. To be constitutional, the injunction must burden speech no more than necessary to serve a significant government interest. This Court must determine if the City has a governmental interest in seeking the injunction that is "significant." The City clearly has an important interest in protecting its employees from harassment or impediment while doing their jobs. The City also has an interest in protecting the public from disturbance in the public streets and promoting the free flow of people and traffic in those streets. See Madsen, 512 U.S. at 768. Even with ongoing, important government interests at

stake, injunctive relief should be granted only with consideration of the nature of the conduct in question.

The frequency, duration, and severity of Respondents' Robin Hooding activities have decreased markedly since October 2013, the date of the last order. Several of the previous participants, namely Colson, Ager, and Eyer, have stopped Robin Hooding altogether, and another, Cleaveland, has participated maybe once or twice in the intervening two years. Freeman's conduct, while arguably more offensive in style than Ean's, has notably dropped off. Ean is the only named Respondent who continues to Robin Hood on a fairly regular basis, but when he does so he is generally non-combative and unobtrusive.

Even though the City has significant governmental interests at stake, the proposed injunctions are not sufficiently narrowly-tailored to protect those interests while not overburdening speech. The Court cannot conceive of any more narrow or alternative relief that would provide any meaningful protection to the PEOs without running afoul of the Respondents' First Amendment rights. An injunction related to First Amendment speech is narrowly-tailored if it burdens the speech "no more than necessary" to protect the identified significant governmental interests. Madsen, 512 U.S. at 765. As noted above, the government interests here are not sufficient to warrant an infringement on the Respondents' First Amendment rights. Any injunction requiring a buffer zone of any meaningful distance would require a significant change in the method used by the Respondents to disseminate their protected speech.

Conclusion

Much has changed in the past two years. Only two of the six named Respondents are still involved in Robin Hooding activity beyond a very minimal role. The Court agrees that the City has a significant interest in protecting the safety and well-being of its employees. The PEOs are hard-working, loyal employees. To the extent conduct of the Respondents rises to the level of violating criminal statutes, there is a remedy available to the City and the PEOs. It is not the role of this Court to weigh the relative value or worth of the constitutionally-protected activity of the Respondents. The ability of the Respondents to exercise their constitutional rights requires a careful examination of how the proposed injunctive relief would impair their speech rights. The Court has considered all of the evidence and the testimony of all of the witnesses both from 2013 and in the last two years. In the exercise of its equitable discretion, the Court finds that the City has not met its burden to warrant any injunctive relief against the Respondents.

For the foregoing reasons, the injunctive relief requested by the City is **DENIED.**

SO ORDERED.

11/20/15
Date

John C. Kissinger, Jr.
Presiding Justice