THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No. 2015-0720

CITY OF KEENE

v.

JAMES CLEAVELAND & a.

ON APPEAL FROM FINAL DECISION

OF THE CHESHIRE COUNTY SUPERIOR COURT

BRIEF ON BEHALF OF

DEFENDANTS/APPELLEES

JAMES CLEAVELAND & a.

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UNITED STATES CONSTITUTION – FIRST AMENDMENT

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.

CONSTITUTION OF NEW HAMPSHIRE

Pt. 1, Art. 8. [Accountability of Magistrates and Officers; Public's Right to Know.} All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonable restricted.

Pt. 1, Art. 22. [Free Speech; Liberty of the Press.] Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved.

RSA 47:17 BYLAWS and ORDINANCES

The city councils shall have power to make all such salutary and needful bylaws as towns and the police officers of towns and engineers or firewards by law have power to make and to annex penalties, not exceeding $1,000, for the breach thereof; and may make, establish, publish, alter, modify, amend and repeal ordinances, rules, regulations and bylaws for the purposes stated in this section. Provisions in this section granting authority to establish and collect fines for certain violations shall not be interpreted to limit the authority hereunder to establish and collect fines for any other violations:

II. Order and Police Duty. To regulate the police of the city; to prevent any riot, noise, disturbance, or disorderly assemblages; to regulate the ringing of bells, blowing of horns or bugles, and crying goods and other things; and to prescribe the powers and duties of police officers and watchmen.

VII. Use of Public Ways. To regulate all streets and public ways, wharves, docks, and squares, and the use thereof, and the placing or leaving therein any carriages, sleds, boxes, lumber, wood, or any articles or materials, and the deposit of any waste or other

thing whatever; the removal of any manure or other material therefrom; the erection of posts, signs, steps, public telephones, telephone booths, and other appurtenances thereto, or awnings; the digging up the ground by traffic thereon or in any other manner, or any other act by which the public travel may be incommoded or the city subjected to expense thereby; the securing by railings or otherwise any well, cellar, or other dangerous place in or near the line of any street; to prohibit the rolling of hoops, playing at ball or flying of kites, or any other amusement or practice having a tendency to annoy persons passing in the streets and sidewalks, or to frighten teams of horses within the same; and to compel persons to keep the snow, ice, and dirt from the sidewalks in front of the premises owned or occupied by them.

47:17-b Enforcement of Bylaws and Ordinances

In addition to any other enforcement procedure authorized by law, any city code, ordinance, bylaw, or regulation may be enforced pursuant to the procedures established in RSA 31:39-c, RSA 31:39-d, or both, subject to the provisions and limitations thereof.

Respectfully submitted,

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Dated: 8/1/2016 By: _____

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CERTIFICATION

I hereby certify that on this 8/1/2016 day of July, 2016, two copies of the within Brief for Defendants/Appellees was sent by U. S. Postal Service first class mail, postage pre-paid to:

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I. STATEMENT OF THE CASE

This action was originally brought by the City of Keene against six defendants alleging tortious interference with contractual relations and requesting injunctive relief. A subsequent amendment was added alleging a cause of action for negligence and asserting that the Defendants' were engaging in a civil conspiracy. After three days of evidentiary hearings on Plaintiff's request for preliminary injunctive relief, Defendants' motion to dismiss was granted and the request for injunctive relief denied.

Upon appeal, this Court affirmed the trial court's dismissal of Defendants' legal claims, but held that notwithstanding their dismissal, that the trial court had discretion to consider a grant of injunctive relief, and remanded the case to determine "*the issue of whether the governmental interests and factual circumstances asserted by the City in its petition are sufficient to warrant properly tailored injunctive relief*." 167 N.H. 731, 742, 118 A.3d 253, 263-4 (2015). It expressed 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.*" Id.

Upon remand, the trial court granted Defendants' motion to schedule a further evidentiary hearing regarding the nature and extent of the Robin Hood activity that has taken in place in the two years since the preceding evidentiary hearing. Following this hearing, and briefing by the parties, the trial court denied the request for injunctive relief. It noted the substantial reduction in Robin Hood activity over the intervening two years,

Op. at 2[1], Plaintiff's Brief at Add. 34, and ruled that there was no form of injunctive relief available, including those proposed by the Plaintiff, which would provide meaningful protection for Parking Enforcement Officers (PEO) without violating Defendants' First Amendment rights. Op. at 14, Plaintiff's Brief at Add. 46.

The sole question presented on this appeal by the City is whether the trial court engaged in an unsustainable exercise of discretion by denying Plaintiff's request for injunctive relief because (allegedly) the City's request complied with the First Amendment, and without injunctive relief, the City and its employees would experience irreparable harm. In a footnote to its brief, the City withdrew its request for injunctive relief against four of the six Defendants, p. 8, n. 3.

II. STATEMENT OF THE FACTS

The testimony presented to the trial court demonstrated that the Defendants engaged in multiple First Amendment activities including (1), attempting to persuade the PEO's and other onlookers regarding their political philosophy, (2) leafletting car windshields, and (3), videotaping their interactions with the PEO's. Their defining activity was communicating their opposition to City enforced public parking by inserting coins in expired meters so that motorists would not receive tickets. The goal of the demonstrators was to put a quarter in an expired meter before the PEO reached it in order to "save" the driver from getting a ticket. Op. at 9, Plaintiff's Brief at Add. 41. Thus, a Robin Hooder would need to station himself or herself ahead of the PEO,

[1] All citations in this brief to the Superior Court Opinion are to the remand opinion dated 11/20/2015.

between her and the meter. 2015 Tr. pp. 143-44[2]. However, to thwart this activity it was common for the PEO's to suddenly change direction and head to another meter. In response, the demonstrator would have to turn around and pass the PEO proceeding in the new direction. Op. at 2-3, Plaintiff's Brief at Add. 34 – 35. Thus, the complaints about the PEO being "chased" or "followed" were actually about the efforts of the demonstrators to reach expired meters before the PEOs, and the PEO's attempts to thwart their efforts.

The PEO testimony was that their territory extended approximately two miles. Tr. Vol. 2, p. 339. The sidewalks are less than six feet wide, Tr. Vol. 1, p. 88, and passing a person on the sidewalk coming from the other direction normally requires proximity to within two to three feet. Id. It would be difficult to pass somebody going in the same direction on the sidewalk without coming within two feet of them. Tr. Vol. 2, p. 336. According to one of the PEOs, the appropriate distance for conversation on the sidewalks is three to five feet away. Tr. Vol. 2, p. 333.

The rendition of the facts contained in the City's brief are dramatically overstated and one-sided. And it is fatally flawed by its failure to make any delineation between the actions of the six Defendants, even though it only currently seeks to injunctive relief against two of them: Defendants Ean and Freeman. It makes no effort to explain how the actions of other individual defendants three years ago has any bearing on the current need for injunctive relief against the remaining two.

[2] Tr. Vols. 1 – 3 refers to the transcript of the three days of hearings in 2013. 2015 Tr. refers to the one day of hearing in that year.

This omission is particularly significant because testimony demonstrated that although the six named Defendants had common practices, there were significant variations in their tactics. The only Defendant currently engaged in regular Robin Hooding, Garrett Ean, was given relative compliments in the PEO testimony at the original hearing:

> *Garrett is a - - he has a little bit more respect than the rest of them and does give you space when I ask for it. And usually, when he is following me, he is at a distance or in front of me. He's at a distance.* Tr. Vol. 2, p. 297.
>
> ---
>
> ***Question**: Now?*
>
> ***Answer**: One person. There is one person in a group that I can have conversations with.*
>
> ***Question**: Who was that?*
>
> ***Answer**: Garrett.*
>
> ***Question**: And what types of conversation have you had with him?*
>
> ***Answer**: We've had conversations about religion and videotaping and I think some political conversations.* Tr. Vol 2, p. 357.

In his most recent opinion, the trial court judge found that "*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." Op. at 14*, Plaintiff's Brief at Add. 46.

A. ROBIN HOODING IN 2013

At the time of the first hearing, the testimony was that Robin Hooding occurred on a daily basis, sometimes by more than one demonstrator. The ideal number was two: one to fill the meter, and the other to place a leaflet on the windshield of the "*saved*" motorist. Tr. Vol. 3, p. 480. There was testimony of insults back and forth between the demonstrators and the PEOs, there was also substantial testimony by both PEOs and demonstrators of friendly, humorous exchanges, as well as religious and political conversations. Tr. Vol. 2 – 3, pp. 356-357, 383, 446, 484.

The PEO's testified that they found the Robin Hood activity to be frustrating and stressful. But at none of the hearings did the City present any testimony from a police officer or other public safety employee about a threat to the safety of the public or the PEO's or interference with the flow of traffic. Nor was there a claim that any of the Defendants violated any City ordinances or state laws regulating conduct on the streets and sidewalks of downtown Keene.

Notwithstanding the frequency of the Robin Hooding activity, and putting aside several instances in which Robin Hooders were assaulted by third parties, Tr. Vol. 2, pp. 312-313, there was only one incidence of any use of physical force by the Defendants. One of the PEO's testified that in order to "*harass"* Defendants, she decided to remove

a Robin Hood leaflet from a car's windshield. As she reached the leaflet, Defendant Colson reached for her wrist. She told him to take his hand away, and he did immediately. Id. at 341-342. According to the PEO "*It was a reaction to him trying to stop me from reaching for the card. Once I realized what exactly was transpiring, no. I did not feel threatened."* Id. at 358.

Although the PEOs asserted a safety concern, when asked a leading question to that effect (e.g. Tr. Vol. 3, p. 307), no evidence was provided of any safety risk. When one of the PEO's was asked about whether she reported any safety concerns, she denied it:

> ***Question**: If any of the Defendants did something which you thought created a danger to themselves or others, should you not report it to the City?*
>
> ***Answer**: I would report it to the City.*
>
> ***Question**: And have you ever had occasion to make any such report?*
>
> ***Answer**: No.* Tr. Vol. 1, p. 100.

The one specifically identified safety concern was that the PEOs or members of the public could be inadvertently injured if third parties chose to attack the Defendants. Tr. Vol. 2, p. 360.

Defendants testified that being required to maintain a specified distance from the PEOs would substantially burden their capability to do Robin Hooding, particularly given

the practice of the PEOs of abruptly changing and reversing direction. Tr. Vol. 3, pp. 387, 420, 421. Furthermore, they testified their verbal communication would be affected requiring them to yell instead of engaging in conversations. Tr. Vol. 2, pp. 387-388, 443.

B. ROBIN HOODING IN 2015[3]

After the most recent hearing in October of 2015, the trial court noted that the "*frequency, duration and severity of respondents' Robin Hood activity have decreased markedly since October of 2013*". Op. at 14, Plaintiff's Brief at Add. 46. In the two years in between, four of the Defendants did not engage in any Robin Hooding or only did so once. Tr. pp. 65-67, 99. Only one of the Defendants engaged in Robin Hooding on anything approaching a regular basis.

In the absence of any current activity by the Defendants significantly implicating the City's claimed interests, Keene has placed primary emphasis upon a videotape of an encounter between Defendant Freeman and one of the PEO's. That videotape is marked as Exhibit 1 which is part of this Court's record. In its brief, the City alleges it demonstrates that a PEO is "*confined*" by Freeman, and claims that she made eighteen attempts to "*move past*" him. Brief at 22. In fact it shows a PEO walking back and forth on a broad sidewalk in front of Keene State College. Not only is Freeman not confining or impeding her, he is not even on the sidewalk. He is walking parallel to the PEO in the broad grassy strip between the sidewalk and the road. The PEO in her testimony confirmed that he remained on the grassy area, which she agreed was 'fairly wide', and

[3] All transcript references in this section are to the transcript of the 2015 hearing.

denied that he blocked her at any point although she testified that she was concerned he might step in front of her. Tr. p. 55. It is clear that she is upset, her chagrin is based upon what he is saying to her, not where he is located. When asked how far away he was, the PEO testified: *"Sometimes we're close, within ten feet, and other times beyond."* Id. at 10. Her request to him was not to move back, but to stop speaking to her. Id. at 12.

The PEO allegedly harassed by Freeman, acknowledged that it is not uncommon for members of the public to come up and speak to her at close range, Tr. pp. 43-45, far closer than Freeman, and she does not find that problematic. Her principal concern with the Robin Hooders is what they said to her and their tone. The other PEO testified that her objection was to what she viewed as "taunting" which included "*anything that comes out of his [Ean's] mouth.*" Tr. p. 93. Significantly, the only two encounters in the prior two years which had been "*aggressive"* enough for her to communicate her concern to her supervisor, and cause her to fear for her safety, were with two other individuals who are not defendants in this case. Tr. pp. 94-102. Again, as in the original set of hearings, the City failed to present any testimony from police or other safety official substantiating public safety or traffic concerns.

In his testimony, Ean testified that he engaged in Robin Hooding three or four days a week for three or four hours at a time. Tr. p. 108. He tries to stay four or five car lengths away from the PEO's, but a ten foot restriction would threaten his safety because it would require him to step out on the road when passing by a PEO. Id. at 110. *"(I)t's necessary to come within a few feet of them at some times . . . because if you don't that would mean you're trying to pass around buildings, going around entire*

blocks." Id. at 131-132. Freeman testified that he only engaged in Robin Hooding two to four times since the October 2013 hearing. Id. at 135-136. A ten foot buffer zone would kill his ability to Robin Hood, 2015 Id. at 139, and risk his safety by causing him to jump out into the traffic if one of the PEO's approached or they were both stopped at the same light. Tr. pp. 139-141. Both Ean and Freeman testified that in the two years since the prior hearing no PEO had told them that they were standing too close or asked them to move back. Tr. pp. 110, 155.

SUMMARY OF THE ARGUMENT

The trial court properly interpreted this Court's remand order as a direction to incorporate constitutional analysis within the equitable balancing framework required to determine the appropriateness of granting injunctive relief. Rather than attempting to define the constitutional parameters, it weighed the specific benefits of the requested injunctive relief, taking into account the extent that the government interest would be served, against the effect the requested relief would have on what has been acknowledged to be constitutionally protected political expression in a public forum. Based upon its analysis of the facts gleaned from four days of evidentiary hearings, it properly determined that the adverse impact of injunctive relief on the Defendants' First Amendment rights would be far greater than any benefit it would accord to the City of Keene.

This Court has made clear that upon appeal of the decision to grant or deny equitable relief, *"(o)ur task on appeal is not to reweigh the equities*." Town of Atkinson v. Malbour Realty Trust, 164 N.H. 62, 68 (2013). Plaintiff's appeal is based on its

misinterpretation of the remand order as requiring the trial judge to enter equitable relief. Brief at 16 - 17. It does not challenge the equitable standards applied by the trial court upon which it based its exercise of equitable discretion.

Because the trial court rejected the requested relief on equitable grounds, it suggested but did not determine that such relief would violate the Defendants' First Amendment rights. This suggestion is correct. Injunctive relief would significantly restrict their ability to express their political beliefs throughout downtown Keene. The record demonstrates that not only would the requested relief not serve the City's stated safety interest, but to the contrary, it would create a risk of safety to the Defendants and the public. The City's actual objective of protecting the PEO's from the stress of being the recipients of ongoing critical political expression is not a valid or sufficient ground for limiting First Amendment rights. And the proposed injunctions, limited to two Robin Hooders, is substantially under inclusive to the asserted interests. Finally, the City has failed to meet its constitutional burden under McCullen v. Coakley, 573 U.S. ___, 134 S. Ct. 2518, 2540 (2014), of demonstrating that alternative measures such as enforcement of ordinances or criminal statutes, would be unsuccessful.

ARGUMENT

I. The trial court properly determined, using appropriate equitable considerations, and balancing the First Amendment rights of the Defendants against the interests of the Plaintiff, that equitable relief should be denied.

The determination of the trial court not to grant equitable relief was based upon four principal findings:

1. The Defendants were exercising their right to engage in free speech on a matter of public concern in the traditional public forum of downtown Keene. Op. at 9, Plaintiff's Brief at Add. 39.
2. The exercise of their free speech was non-violent excepting a single incident occurring more than two years before which had not resulted in injury. Op. at 10, Plaintiff's Brief at Add. 40.
3. The frequency of the activities engaged in by the Defendants had decreased markedly between the first hearings in the fall of 2013 and the post-remand hearing in October of 2015. Op. at 14, Plaintiff's Brief at Add. 46.
4. "*The lay out and dimensions of the sidewalks and meters in downtown Keene required the Robin Hooder passing within a few feet of the PEO.*" Op. at 3-4, Plaintiff's Brief at Add. 35 - 36.

And, therefore, "*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."* Op. at 14. Based upon these findings, it concluded that the hardship imposed upon Defendants in granting injunctive relief would be greater than the hardship imposed upon Plaintiffs in not doing so.

Plaintiff does not dispute the legal standard adopted by the trial court, nor does it contest that Defendants were engaging in speech on a matter of public concern in a public forum, and that there had only been one isolated incident involving physical force. In response to the finding of a marked decrease in Robin Hood activity, Plaintiff appears to at least nominally contest this finding without any citation to the record or any attempt to address the overwhelming weight of the evidence supporting the trial court's

conclusion including the testimony of the PEO's. Br. at 28 – 29. Its petition had been premised in large part on the number of demonstrators and frequency of Robin Hood expression rather than Robin Hooding itself. Its position that the court should determine the need for current injunctive relief based on the original circumstances regardless of the current situation amounts to a rejection of the fundamental principle of equity that the remedy should be tailored to the problem.

Plaintiff also claims that abandonment of the complained about activity should not be permitted as a tactic to frustrate the need for injunctive relief. Br. at 17. However, almost all the testimony in this case, before and after this Court's remand, involved Robin Hooding occurring after suit was filed. There is not a scintilla of evidence in the record that the reduction in Robin Hood activity was precipitated by the filing of suit. See 2015 Tr. at 108 (frequency of Robin Hooding not affected by court decision). Plaintiff cites the proposition that mootness only occurs 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). Br. at 29. But the issue in this case is not mootness, but the appropriateness of granting equitable relief. And, there has never been a finding that the Defendants have engaged in a "*wrong*". To the contrary, the trial court, this Court, and even Plaintiff have recognized that Defendants have been engaged in constitutionally protected expression. Finally, Plaintiff's position that the reduction in Robin Hood activity is irrelevant to whether or not an injunction should issue is contradicted by its own decision to withdraw its request against four Defendants who are no longer engaging in Robin Hooding. If the current extent of Robin Hooding were irrelevant, then Plaintiff should be continuing to seek an injunction against all six.

The importance of not imposing a currently unnecessary injunction is particularly significant in this case where it is being sought against constitutionally protected speech on a matter of public concern in a public forum. The denial of the injunction on classic equitable grounds makes a constitutional ruling unnecessary which is consistent with this Court's position of not deciding constitutional issues if the case can be resolved on non-constitutional grounds. State v. Kincaid, 158 N.H. 90 (2008).

Plaintiff also contests the trial court's finding that any injunction involving a buffer zone of any meaningful distance would require a significant change in Defendants' Robin Hood expression. The record overwhelmingly supports the trial court's finding. It is apparent from the very nature of Robin Hooding, and the PEO's efforts to frustrate it, that Robin Hooders need to pass by the PEOs on the sidewalks and crosswalks of downtown Keene in order to perform their "*saves*". The sidewalks are less than six feet wide. Tr. Vol. 1, p. 88. As the trial court noted, passing the PEO's without leaping off the sidewalk requires Defendants to come within 2 – 3 feet of the PEOs.

Both proposals presented by the Plaintiff after the remand hearing provide that the "*the Defendants may approach within five feet of a PEO while a PEO is on a sidewalk . . . for the limited purpose of navigating past the PEO."* Plaintiff has not clarified what "*within five feet"* means. If it means no closer than five feet, that would force the Defendants to get off sidewalks or cross walks when passing or being passed by PEOs or waiting for a light to turn. If "*within five feet"* means any distance of less than five feet, the restriction would be meaningless. For the most part, the proposed injunctions require Defendants to maintain a ten foot separation. This would be virtually impossible given that the PEOs are normally behind the demonstrators. Even if they

were able to see behind themselves, a ten foot separation would require the Robin Hooder to get to the meter well before the PEO arrives even though the PEOs intentionally disguise which meter they are going to. The best case scenario would require the Robin Hooders to run ahead of the PEO to get to the meter, and dash away from the meter as the PEO approached. In the context of foot and vehicle traffic in downtown Keene, this would greatly increase the risk to other pedestrians and motorists, not reduce it.

Plaintiff's "*solution number one"* leaves to the discretion of the PEOs as to whether or not the ten foot requirement is imposed. It is hard to understand how if the buffer zone served a genuine safety function, it should be left to the PEO to decide whether or not to enforce it. In effect it gives the PEOs authority over Defendants' protest activity notwithstanding their manifest lack of objectivity. *"Solution number two"* is more selective about the use of a ten foot buffer zone, but expressly imposes it within fifteen feet of parking meters, parking spaces and crosswalks meaning that a Robin Hooder would be forced to cross a street outside of a crosswalk in violation of City ordinance if it were being used by the PEO, and would have to maintain a ten foot distance when performing "*saves"* on parking meters.

The common consequence of Plaintiff's proposed solutions is to increase the contention and need for court involvement. Determining what is a five foot distance, ten foot or fifteen foot distance, particularly when both parties are in motion, would lead to endless controversy. And quite apart from adjudicating measurements, the court would have to decide whether an alleged violation was "*knowing and purposeful"*. Beyond the risk of contention, the uncertainties of calculating the distances imposed would likely

have a chilling effect on the Defendants. As the Court stated in Schenck v. Pro-Choice Network of Western New York, 519 U.S. 375, 378 (1997):

> *(I)t would be quite difficult for a protester who wishes to engage in peaceful expressive activities to know how to remain in compliance with the injunction. This lack of certainty leads to a substantial risk that much more speech will be burdened than the injunction by its terms prohibit.*

By denying the requested relief, the trial court protected Defendants' constitutional rights, promoted public safety, and avoided a situation which would likely have resulted in endless litigation.

This Court's prior opinion emphasized the "*considerable discretion*" of trial courts in determining the need for equitable relief, Sands v. Stevens, 121 N.H. 1008, 1011 (1981), and the importance of the "*factual circumstances in each case*", Exeter Realty Co. v. Buck, 104 N.H. 199, 200 (1962). 167 N.H. 731, 742 (2015), 118 A.3d 253, 262 The careful factual analysis of the trial court after four days of hearing, more than adequately supports its exercise of discretion not to grant equitable relief.

Plaintiff claims that Defendants themselves have acknowledged that five to fifteen feet is the ideal separation distance for Robin Hooding. Br. at 15. But it ignores that Defendants' testimony refers to the spacing when the Robin Hooders are walking ahead of the PEO, not when the Robin Hooder is performing a "*save*", attempting to pass a PEO who has changed direction, when they are waiting at an intersection for a light to change or passing on a sidewalk or crosswalk. Imposing a five or ten foot space limitation at those junctures would make Robin Hooding much more difficult and significantly less safe.

II. As alternative independent grounds for affirming the trial court opinion, the requested injunctive relief would violate the Defendants' First Amendment rights.

A. GOVERNMENTAL INTERESTS

In its brief, the City cites four interests in support of injunctive relief:

1. Protecting the safety of employees.
2. Preserving public safety and order on its streets and sidewalks.
3. Promoting free flow of traffic and availability of parking.
4. Enforcing its municipal ordinances. Br. at p. 3.

What is most striking about the trial record in this case is the disjunction between the evidence and the Plaintiff's stated interests. As set forth in the facts section, Keene offered no testimony from any public safety employee of a safety threat. The closest testimony was a concern by a PEO about a spillover effect from third party assaults on the Robin Hooders. However, the record indicated that over the course of three years, there were only two to three third party incidents, none of which resulted in any adverse effect on PEOs or members of the public.

Even if there were a substantial risk of injury through a third party assault, it would violate the First Amendment to restrict the Defendants' political expression because of the potential for illegal assaults against them by others. A "*heckler's veto*" is antithetical to the First Amendment because it puts speech, particularly unpopular speech, at risk, and, in effect, rewards the threat of violence. Hill v. Colorado, 530 U. S. 703, 734 (2010). If the City had a genuine concern in this regard, the remedy should be to provide better police protection not limitations upon First Amendment activity. As this

Court has stated, "*(w)hen peaceful orderly comments are involved, the police have a duty to take reasonable affirmative steps to ensure the maintenance of the protester's right of freedom of speech and expression."* State v. Nickerson, 120 N.H. 821, 826 (1980) (emphasis in original).

In regard to order on the streets and sidewalks, there was again no testimony of any disruption of the public ways. As set forth supra, the granting of injunctive relief would likely make public order worse not better, by placing pressure on the Robin Hooders to accomplish their objectives through running, avoiding crosswalks, etc.

It is questionable to what extent the third interest of promoting free flow of traffic and the availability of parking is a substantial or compelling government interest sufficient to limit First Amendment rights. Cf. Reed v. Town of Gilbert, 576 U.S. ___, 135 S. Ct. 2218 (2015) (assuming for the sake of argument that public safety and aesthetic appeal are compelling government interests). But even if it were, no testimony was presented of any problems with traffic flow or parking availability.

The final claimed interest in enforcing municipal ordinances makes no sense. The Keene ordinances contain their own mechanism for enforcement, and the police department is empowered to carry it out[4]. No evidence or explanation was presented how an injunction could assist in the enforcement of municipal ordinances. To the contrary, the existence of the City's authority to adopt and enforce public safety

[4] City of Keene Charter, Section 4 G: *"Any person who violates any provision of this Charter or any City Ordinance for which no other punishment is provided, shall be guilty of a violation."* See also, RSA 47:17 giving municipalities the authority to regulate streets and public ways, and the enforcement authority contained in RSA 47:17-b.

ordinances and statutes regarding public ways is one reason why an injunction is unnecessary.

There has been a disconnect between the asserted governmental interests, and the actual interests that were supported by the record. According to the testimony and the City's argument to the trial court, the principal goal of the requested injunctive relief was not to protect public or PEO safety, but to insulate the PEOs from the ongoing stress and strain of protest activity. From a First Amendment perspective, the delineation between protection of safety and protection from 'harassment' is significant. The former is certainly compelling, but the latter is subjective and capable of swallowing up First Amendment rights. The stress of being on the receiving end of protest activity, although articulated in strong terms by the PEO witnesses, does not justify restriction of First Amendment expression. "*Citizens must tolerate insulting, and even outrageous, speech in order to provide breathing space to the freedoms protected by the First Amendment."* Boos v. Barry, 485 U.S. 312, 322 (1988); Snyder v. Phelps, 562 U.S. 443 (2011) (hateful protesting of military funeral). Thus, the fact that the PEOs interpreted the Defendants' exhortations against a public monopoly on parking and encouragement that they quit to be "*taunting"* does not deprive it of First Amendment protection.

This is particularly true when recipients of the communication are public employees. E.g. City of Houston v. Hill, 482 U.S. 451, 461 (1987) ("*(T)he First Amendment protects a significant amount of verbal criticism and challenge directed at police officers."*) Their desire for greater physical distance from their critics is understandable. But any added comfort to them created by greater distance does not amount to a sufficient government interest to limit free speech rights in a public forum.

And the right to criticize public employees has special protection in New Hampshire because the New Hampshire Constitution, Part 1, Article 8, elevates government accountability to a constitutional right.

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 Plaintiff's petition. Specifically, a PEO must have the capability to "*endure verbal and mental abuse when confronted with 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 to individual motorists upset about parking tickets.

B. CONTENT NEUTRALITY

The trial court determined that the proposed injunction was content neutral even though injunctive relief was only sought against those with a Robin Hood point of view because its purpose was unrelated to the content of respondent's message. Op. at p. 11, Plaintiff's Brief at Add. 43. This conclusion is incorrect.

In the case of Reed v. Town of Gilbert, 576 U.S. ___, 135 S. Ct. 2218 (2015), the Supreme Court clarified that a distinction which is speaker based, is subject to strict scrutiny if it reflects any content preference. The question is whether the law is "*justified without reference to the content of the regulated speech."* McCullen v. Coakley, 134 S.Ct. 2518, 2531 (citations omitted). Further, the Court has stated that restrictions

intended to protect against the listeners' reaction to unpopular speech is not content neutral. McCullen, supra, 134 S. Ct. 2532. In this case the request for injunctive relief is clearly based on hostility to the content of the Robin Hood message. Plaintiff in this case has expressly justified the need for injunctive relief based on third party hostility to the Robin Hooders. E.g. Brief at 6.

The common thread of the PEO testimony was their objection to Robin Hood "*taunting*". Virtually all of their testimony regarding space limitations was prompted by leading questions. But they need no encouragement to express their antipathy toward what the Robin Hooders had said to them.

They acknowledged in their testimony that it was common for them to have citizens approach them while they were working to converse on a variety of subject matters, and they had no objection to those exchanges or the proximity which they entailed. However, they strongly objected to any communication from the Robin Hooders, no matter how innocuous, because the Robin Hooders had a history of making adverse comments to them regarding their job duties. See, e.g., 2015 Tr. pp 43 – 47, 93 – 94.

Plaintiff's claim that the proposed distance based restrictions are unrelated to speech is belied by the evidence, common sense and precedent. Defendants testified at the hearing that a ten foot distance amidst all the noise of downtown Keene would require them to shout rather than engage in conversation. Even the PEOs acknowledged that an appropriate conversational distance was from three to five feet. Tr. Vol. 2, p. 33. One of the obvious, if unstated goals, of the requested buffer zone is to create enough distance to make normal conversation impossible.

C. NARROWLY TAILORED

Whether the governmental interest must be compelling or just significant, the Plaintiff still has the obligation of showing that the proposed restriction is narrowly tailored. McCullen v. Coakley, 134 S. Ct. 2518, 2534. Plaintiff cannot meet that test for multiple reasons:

1. To the extent there was any basis for a public safety claim (aside from the heckler's veto), the concern was that a demonstrator would jump into the street. Imposing a floating ten foot buffer zone increases that risk rather than diminishing it.
2. If this Court looks beyond the stated interests to the actual concerns animating this case of protecting PEOs from critical speech and videotaping, (assuming that such an objective were constitutional), a floating buffer zone would only be effective to the extent that communication would have to be exchanged at a higher decibel level, and the videotaping from a greater distance.
3. Even if a distance based floating buffer zone could serve a governmental purpose, that can hardly be accomplished by an injunction limited to two demonstrators, particularly where the PEO testimony at the most recent hearing, was that the only incidents in the preceding two years that led them to fear for safety involved non-defendant demonstrators. 2015 Tr. at 94 - 102.
4. Enforcement of existing law and ordinances is a less intrusive alternative to address the alleged public safety concerns.

In claiming an injunction would be less restrictive, Plaintiff is relying on the contrast between a statutorily based buffer zone (as in the McCullen case), and an injunction creating a buffer zone only applicable to designated individuals. But the pertinent contrast should be between a buffer zone applicable to all conduct, whether based on statute or equity, and enforcement of existing non-buffer zone ordinances and criminal and civil laws. Enforcement of laws of general application is less restrictive because it only applies to offending conduct, and does not create a prior restraint against the named defendants.

Plaintiff's reliance on McCullen is misplaced. It actually holds that using local ordinances or state law to address public safety issues is preferable and less intrusive on speech than creating a buffer or safety zones. It states that before imposing a buffer zone, "*government must demonstrate that alternative measures that burden substantially less speech would fail to achieve the government interests, not simply that the chosen route is easier."* Id. at 2540. Utilizing a general law, although more sweeping in its coverage, is less restrictive because it only penalizes that part of the demonstrator's conduct that violates the law, and does not burden other protest activity. Id. at 2537 – 2538. And it does not disfavor protest activity compared to other conduct in public places. The McCullen Court's reference to the virtue of injunctive relief is addressed to injunctions that are authorized by statute or ordinance to remedy adjudicated violations of those enactments. Id. at 2539. That is qualitatively different than the injunctive relief sought here which is untethered to the violation of any existing ordinance or statute.

D. SCOPE OF RELIEF

At the outset of this case, Plaintiffs sought a 50-foot buffer zone. Over time that has been reduced to ten feet. Even at ten feet, counsel has been unable to locate any precedent supporting the constitutionality of a floating buffer zone encompassing an entire municipality. Plaintiff cites the abortion buffer zone cases in an attempt to bolster its case, but omits the critical differences that in those cases the buffer zone was anchored by the entranceway to the clinics. There is no support in the logic or language of those opinions for any attempt to extend the buffer zone to a municipality generally. And even with respect to buffer zones that are anchored by a fixed location, the Court has been far more restrictive than Plaintiff's brief would suggest. In the most recent decision, McCullen, the Court struck down a 35-foot buffer zone although limited to the access and driveways around abortion clinics.

The City claims that its proposed injunctions "*burden no more speech than necessary."* Brief at 27. But it never answers the question necessary for what? The principal complaints of the PEOs, particularly at the most recent hearing, was their being "*taunted"* which was defined in one instance to be everything that came from the mouth of one of the Robin Hooders. 2015 Tr. pp 93-94. See also pp. 43 -47. A buffer zone does nothing to address this concern except require a higher decibel level and eliminate any remaining possibility of genuine dialogue.

The Supreme Court has repeatedly expressed concern about how distance based limitations impact free speech by intruding upon face-to-face conversation.

McCullen v. Coakley, 134 S.Ct. at 2535 (2014), Schenck v. Pro Choice Network of Western New York, 519 U.S. 375, 377 – 378 (1997). The adverse effect of a buffer zone on Defendants' speech rights far exceed any legitimate protection it would extend to PEOs.

E. ALTERNATIVE MEANS OF COMMUNICATION

Plaintiff suggests that any restrictions on Defendants' right of expression are incidental and inconsequential because they have alternative means of expression available. This devalues the First Amendment importance of face to face communication on public sidewalks.

As the Court recently stated:

> *(i)t is no accident that public streets and sidewalks have developed as venues for the exchange of ideas. Even today, they remain one of the few places where a speaker can be confident that he is not simply preaching to the choir. With respect to other means of communication, an individual confronted with an uncomfortable message can always turn the page, change the channel, or leave the Web site. Not so on public streets and sidewalks. There, a listener often encounters speech he might otherwise tune out. In light of the First Amendment's purpose "to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail," FCC v. League of Women Voters of Cal., 468 U.S. 364, 377, 104 S. Ct. 3106, 82 L.Ed.2d 278 (1984) (internal quotation marks omitted), this aspect of traditional public fora is a virtue, not a vice. McCullen, supra, 134 S.Ct. 2528.*

The Court held that in the universe of political expression, one on one political communication, and pamphletting were entitled to the highest level of protection. Id. at

2536. The fact that the Defendants' retain the right to communicate the same message from a greater distance does not compensate for the loss of close range communication which is so much harder to tune out. As a matter of First Amendment law as well as equitable balancing, the restrictions proposed excessively burdened the Defendants' right to directly express "*an uncomfortable message"* public employees not receptive to that message.

CONCLUSION

For the above reasons, Defendants respectfully request that this Court affirm the decision of the trial court.

REQUEST FOR ORAL ARGUMENT

Defendants request fifteen minutes of oral argument to be given by their attorney, Jon Meyer.

Respectfully submitted,

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CERTIFICATION

I hereby certify that on this _____day of July, 2016, two copies of the within Brief for Defendants/Appellees was sent by U. S. Postal Service first class mail, postage pre-paid to:

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