THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2013-0885

City of Keene

v.

James Cleaveland, et al.

Appeal Pursuant to Rule 7

BRIEF FOR THE AMICUS CURIAE NEW HAMPSHIRE CIVIL LIBERTIES UNION

Respectfully Submitted,

NEW HAMPSHIRE CIVIL LIBERTIES UNION

By Its Attorneys,

NIXON PEABODY LLP

Anthony J. Galdieri, Esq.
(NH Bar No. 18954)
agaldieri@nixonpeabody.com
900 Elm Street, 14th Floor
Manchester, NH 03101-2031
(603) 628-4000

NEW HAMPSHIRE CIVIL LIBERTIES UNION

Gilles R. Bissonnette, Esq.
(NH Bar No. 265393)
gilles@nhclu.org
18 Low Avenue
Concord, NH 03301
(603) 224-5591

TABLE OF CONTENTS

Page(s)

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

STATE STATUTES

CITY ORDINANCES

CONSTITUTIONAL PROVISIONS

TREATISES

OTHER AUTHORITIES

QUESTIONS PRESENTED

A. Whether Part I, Article 22 of the New Hampshire Constitution and the First Amendment of the United States Constitution preclude the appellant's tortious interference with contractual relations, civil conspiracy, and negligence claims. (Appendix of the Amicus Curiae New Hampshire Civil Liberties Union ("NHCLU Appendix"), Addendum A, Appellees' Mot. to Dismiss and Supporting Memo. Of Law, at 4; *id.*, Addendum C, Appellees' Post-Hearing Memo., at 23; *id.*, Addendum D, Trial Court Order, at 45-51.)[1]

B. Whether the trial court erred in denying the injunctions the appellant requested in this case. (NHCLU Appendix, Addendum C, Appellees' Post-Hearing Memo., at 25-29; Addendum D, Trial Court Order, at 50-51.)

[1] Appellant's first two questions presented essentially raise the same issue, *i.e.*, whether and to what extent Part I, Article 22 and the First Amendment preclude the appellant's tort claims.

IDENTITY OF THE AMICUS CURIAE

The New Hampshire Civil Liberties Union ("NHCLU") is the New Hampshire affiliate of the American Civil Liberties Union, a nationwide, nonpartisan, public interest organization with over 500,000 members (including 3,500 New Hampshire members) dedicated to advancing and preserving the federal and state Bill of Rights, including the First Amendment of the United States Constitution and its state counterparts.

The First Amendment and Part I, Articles 22 of the New Hampshire Constitution protect and preserve the people's right to speak freely, gather information, assemble and associate, petition their government, and to contribute without restriction to the marketplace of ideas. They drive public and private ingenuity and stimulate social, economic, and governmental change, in part, by protecting the people's right to protest their society and their government. Part I, Article 8 of the New Hampshire Constitution similarly ensures that the government and its officials remain open, accessible, accountable, and responsive to the public. Together, these constitutional provisions preclude the tort claims in this case and prevent municipalities from obtaining large floating buffer zones around entire classes of public servants in order to prevent certain individuals from accessing those public servants, videotaping them, or speaking with them in public places. The NHCLU opposes this governmental practice and firmly believes that the First Amendment and Part I, Articles 8 and 22 prohibit it.

STATEMENT OF THE CASE AND THE FACTS

The appellant, City of Keene (the "City"), employs parking enforcement officers ("PEOs") to enforce its motor vehicle parking laws. One of the essential job requirements of a PEO is the ability to "[e]ndure verbal and mental abuse when confronted with the hostile views

and opinions of the public and other individuals often encountered in an antagonistic environment." (Appellant's Appendix, Verified Pet., Attachment A, at 15).

The appellees are political activists engaged in "Robin Hooding." (*Id.*, Verified Pet., Attachment E, at 28-29.) Robin Hooding is a form of political activism where activists follow PEOs, identify expired parking meters before PEOs locate them, and insert coins into them before PEOs can issue parking tickets. (*Id.*) Activists characterize their activity as saving vehicles from what they perceive to be an unfair tax. (*See id.*) When appellees save a vehicle, they leave a card on the vehicle's windshield. (*Id.*) The card has a picture of a cartoon Robin Hood on one side and a political message on the other side, which reads: "Your meter expired! However, we saved you from the king's tariff!" (*Id.*) These activists also videotape PEOs for accountability purposes, verbally question their authority, and verbally protest their actions while they are performing their public duties in public places. (Appellant's Appendix, Verified Pet., Attachments B, C, D & E, at 17-30.) All of these activities are done peacefully and are constitutionally protected.

On May 1, 2013, the City filed suit against appellees alleging tortious interference with contractual relations. (*Id.*, Verified Pet., at 6-8.) The City premised this tort claim on the allegation that the appellees were intentionally causing its PEOs stress, anxiety, and distress. (*Id.*, Verified Pet., at 5, 7-9, ¶¶ 18, 29, 31, 35.) The City sought to amend its Verified Petition on July 11, 2013 to add a count for civil conspiracy. (*Id.*, Pet.'s Mot. To Clarify/Amend Pet., at 36, ¶¶ 5, 7; Clarified/Amended Verified Pet., at 46-47.) Paragraph 5 of Petitioner's Motion to Clarify/Amend Petition states in part:

> One of the collective and individual objectives of the Respondents is to tortuously interfere with the employment relationship between Petitioner and its [PEOs] by causing the PEOs to quit or stop their jobs for the City by causing them undue stress, anxiety, and emotional and physical distress while trying to perform their

> employment duties. Respondents are attempting to cause PEOs so much stress, anxiety, and distress so to cause the unlawful interference with their employment.

(Appellant's Appendix, Pet.'s Mot. To Clarify/Amend Verified Pet., at 36 (emphases added)). Paragraph 7 of Petitioner's Motion to Clarify/Amend Petition similarly states, in part, that: "The PEOs are experiencing stress, anxiety, and distress, which can lead to claims of worker's compensation, emotion [sic] distress, disability, or resignation." (*Id.* (emphases added)). Paragraph 35 of Petitioner's Clarified/Amended Verified Petition reads, in part:

> Respondents, acting in concert with one another and sometimes referring to themselves as "Robin Hood" and/or "Robin Hooders," jointly seek through their actions . . . to accomplish the unlawful purpose of tortious interference with the contractual employment relationship among the Petitioner and its PEO's [sic], causing damage to the Petitioner by causing stress, anxiety, and physical and emotional distress to the PEOs, which can lead to claims of workers' compensation, emotional distress, disability, or resignation from employment.

(*Id.*, Clarified/Amended Verified Pet., at 47) (emphases added).

As relief, the City sought three injunctions: (i) an access injunction; (ii) a videotaping injunction; and (iii) a speech injunction. (*Id.*, Clarified/Amended Verified Pet., at 49-51.) The access and videotaping injunctions sought to impose 50-foot floating buffer zones around current and future PEOs to prevent appellees from nearing or effectively filming them. (*Id.*, Clarified/Amended Verified Pet., at 49-50.) The speech injunction sought to prevent appellees and their associates from "taunting," "harassing," or "intimidating" the City's current and future PEOs. (*Id.*, Clarified/Amended Verified Pet., at 50.) On September 4, 2013, the appellees moved to dismiss the case arguing in part that Part I, Articles 8 and 22 and the First Amendment precluded the City's tort claims as well as the City's requested injunctions. (NHCLU Appendix, Addendum A, Appellees' Mot. to Dismiss and Supporting Memo. Of Law.)

On September 23, 2013, the City filed a new Complaint Declaration against appellees adding claims for intentional inference with employment contractual relations and negligence.

These new claims rely on the same basic allegation that appellees' protest activities "have proximately caused the PEOs to experience anxiety and emotional distress, on and off the job, which have adversely affected their work environment and job performance." (Appellant's Appendix, Compl. Declaration, at 53-59 & ¶ 23) (emphasis added). In the Complaint Declaration, the City also requested a jury trial. (*Id.*, Compl. Declaration, at 58.)

In its Verified Petition, Clarified/Amended Verified Petition, and Complaint Declaration, the City alleges that appellees' protest activities are "interfering" with its PEOs' ability to perform their job functions. The City and its PEOs describe this interference primarily as emotional distress caused by following, videotaping, and speaking to PEOs while they are performing their public duties in public places. (*See, e.g.*, Appellant's Appendix, Verified Pet., Attachments B & C, Affs. of PEOs Givets and McDermott, at 18 & 22, ¶ 4; *id.*, Attachment D, Aff. of PEO Desruisseaux, at 25, ¶ 3.) The City also asserts that appellees verbally "taunt," "harass," and "intimidate" its PEOs by publicly: (i) asking PEOs why they are stealing people's money; (ii) challenging PEOs for ticketing funeral attendees; (iii) telling PEOs to get different jobs; (iv) calling PEOs thieves, cowards, liars, and other names because of the job they perform; (v) telling PEOs that they are holding vehicles for ransom; (vi) asking PEOs how they can sleep at night; (vii) accusing PEOs of vandalism for chalking people's tires; and (viii) disparaging one PEO's military service. (*See, e.g.*, Appellant's Appendix, Verified Pet., Attachments B & C, Affs. of PEOs Givets and McDermott, at 18 & 22, ¶¶ 8-10; *id.*, Attachment D, Aff. of PEO Desruisseaux, at 25, ¶¶ 6-9.)

The City alleges that appellees sometimes crowd its PEOs. (*See, e.g.*, Appellant's Appendix, Verified Pet., Attachments B & C, Affs. of PEOs Givets and McDermott, at 18 & 22, ¶¶ 6-7; *id.*, Attachment D, Aff. of PEO Desruisseaux, at 25, ¶¶ 5-6.) The City also alleges that

one appellee, Graham Colson, has purportedly grabbed a PEO, physically blocked PEOs on occasion, followed at least one PEO close enough to bump into him, followed a PEO on his day off, and tagged that same PEO in a derogatory comment on Facebook. (*See, e.g.*, Appellant's Appendix, Verified Pet., Attachments B, Aff. of PEO Givets, at 18-19, ¶¶ 10, 20-22; *id.*, Attachment C, Aff. of PEO McDermott, at 22, ¶ 7; Attachment D, Aff. Of PEO Desruisseaux, at 25, ¶¶ 5, 8.) However, no allegations of violence on the part of appellees appear in the petitions or complaint.

On August 12, September 30, and October 1, 2013, the trial court held a hearing on the City's request for a preliminary injunction and appellees' motion to dismiss. (NHCLU Appendix, Addendum D, Trial Court Order, at 36.) At the motion hearing, the parties presented evidence. The City also reduced its access and videotaping buffer zone requests from 50 feet to 30 feet in its written submissions. (*See id.*, Addendum B, Appellant's Findings of Fact and Rulings of Law, Paragraph V, at 16.) At the end of the motion hearing, the City orally suggested reducing these floating buffer zones further to 15 feet. (*See* Appellant's Brief at 6.) On December 3, 2013, the trial court granted appellees' motion to dismiss and denied the City's request for a 30-foot access and videotaping floating buffer zone around its current and future PEOs on First Amendment grounds. (NHCLU Appendix, Addendum D, Trial Court Order, at 49-51.) This appeal followed.

SUMMARY OF THE ARGUMENT

Part I, Article 22 of the New Hampshire Constitution ("Part I, Article 22") and the First Amendment of the United States Constitution ("First Amendment") preclude the City's tortious interference with contractual relations, civil conspiracy[2], and negligence[3] claims. In order to prove tortious interference with contractual relations, the City must prove improper interference. *Hughes v. N.H. Div. of Aeronautics*, 152 N.H. 30, 40-41 (2005). Whether interference is improper requires "[i]nquiry into the 'mental and moral character of the [appellees'] conduct.'" *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159 (3d Cir. 1988) (quoting 2 Harper, James, and Gray, *The Law of Torts* § 6.12, at 349 (2d ed. 1986); *see Roberts v. Gen. Motors Corp.*, 138 N.H. 532, 540-41 (1994).

The City claims that appellees' protest activities are improper because they are intentionally inflicting emotional distress on the City's PEOs. Thus, in order to succeed on its tort claims, the City must first prove intentional infliction of emotional distress with respect to each PEO. Otherwise, the City cannot establish "improper interference" or breach of duty. *Cf. TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1201 (10th Cir. 2007) ("If the alleged [improper interference], . . . is an allegedly defamatory statement, then the interference [with prospective business relations and contracts] claim must fail if the statement is not an actionable defamation.").

---

[2]The City's civil conspiracy claim is premised entirely on the City's tortious interference with contractual relations claim. (*See* Appellant's Appendix, Pet.'s Mot. To Clarify/Amend Petition, at 36, ¶¶ 5, 7; *id.*, Clarified/Amended Verified Pet., at 46-47.) Thus, because the tortious interference with contractual relations claim fails as a matter of law, the civil conspiracy claim fails as well.

[3]It is difficult to understand how the City can even sustain a negligence claim in this case. It appears undisputed that appellees are engaged in intentional conduct—not negligent conduct—consisting of deliberate protest activities designed to influence the government, persuade the City's PEOs to leave their jobs, and to make it economically infeasible for the City to continue to employ its PEOs. Thus, as a matter of law, there appears to be no negligence in this case.

"In order to make out a claim for intentional infliction of emotional distress, a plaintiff must allege that a defendant by extreme and outrageous conduct, intentionally or recklessly cause[d] severe emotional distress to another." *Tessier v. Rockefeller*, 162 N.H. 324, 341 (2011) (internal quotation omitted). In *Snyder v. Phelps*, 131 S. Ct. 1207, 1219 (2011), the United States Supreme Court held that the First Amendment precludes a jury from deciding whether non-violent protest activities involving speech on a matter of public concern in a traditional public forum are, in fact, "outrageous" within the meaning of the tort of intentional infliction of emotional distress. That precedent applies in this case.

As pled, the City's tort claims are predicated on the City first proving intentional infliction of emotional distress with respect to each PEO. The City's tortious interference claim will require a jury to inquire into the mental and moral character of the appellees' conduct to establish "improper interference." It will also require a jury to decide whether appellees' protest activities were, in fact, outrageous. These inquires run the impermissible risk that jurors would decide this case based on their tastes, views, or sense of morality and would penalize otherwise constitutionally-protected activity. *See Snyder*, 131 S. Ct. at 1219. Part I, Article 22 and the First Amendment preclude this result. Thus, the trial court properly dismissed the City's tort claims.

The injunctions the City has requested are also unconstitutional under Part I, Article 22 and the First Amendment, as well as Part I, Article 8 of the New Hampshire Constitution ("Part I, Article 8"). The City requested three injunctions: an access injunction and a videotaping injunction that both would place 50-foot floating buffer zones around all of the City's current and future PEOs; and a speech injunction. The City reduced the size of the access and videotaping floating buffer zones to 30 feet in its written submissions. (NHCLU Appendix,

Addendum B, Appellant's Findings of Fact and Rulings of Law, Paragraph V, at 16). The City later suggested a further reduction to 15 feet (Appellant's Brief at 6).

None of these floating buffer zones are constitutional because they burden substantially more speech than necessary to serve the City's asserted interests. *See Schenck v. Pro Choice Network of Western, N.Y.*, 519 U.S. 357, 375-380 (1997) (invalidating 15-foot floating buffer zone placed around individuals attempting to access or leave a physical locality under the First Amendment because the buffer zone burdened substantially more speech than was necessary to further the state's interests in "protecting 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"). Specifically, these floating buffer zones will make it nearly impossible for appellees to live, walk, drive, park, attend funerals, or visit businesses or other private or public places in downtown Keene. Demonstrating the shear overbreadth of the request, these floating buffer zones would even prevent appellees from silently leafleting or peacefully holding a sign on a sidewalk protesting the activities of PEOs where a PEO was within 30 feet. Such a result not only violates the First Amendment and Part I, Article 22, but also violates: (i) appellees' state rights to freedom of assembly and association (Part I, Article 32); (ii) appellees' state right to access government officials (Part I, Article 8); (iii) appellees' fundamental state right to intrastate travel, *Donnelly v. City of Manchester*, 111 N.H. 50, 51 (1971); and (iv) appellees' federal and state equal protection rights, *id.* As a matter of constitutional law and public policy, such a result cannot be sanctioned.

The speech injunction also cannot be obtained. It is a content-based, prior restraint on speech that cannot withstand strict scrutiny. *See McCullen v. Coakley*, 573 U.S. __, 2014 U.S. LEXIS 4499, at *26 (June 26, 2014) (observing that a law is "content-based if it require[s]

enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred") (internal quotations omitted). It is based "on what [speakers] say," not "simply where they say it." *See id.* The categories of speech the injunction seeks to prohibit—namely, speech that is loosely characterized as taunting, harassing, and intimidating—are unconstitutionally vague and overbroad, viewpoint discriminatory, not limited solely to forms of unprotected speech, and threaten to chill appellees' right to speak with the City's PEOs or question their authority or actions in any way, even if that PEO is writing them a parking ticket.

Thus, for the above reasons, Part I, Article 22 and the First Amendment preclude the City's tort claims as a matter of law and, even if they did not, the injunctions requested are unconstitutional.

STANDARD OF REVIEW

> The standard of review in considering a motion to dismiss is whether the plaintiff's allegations are reasonably susceptible of a construction that would permit recovery. This threshold inquiry involves testing the facts alleged in the pleadings against the applicable law. Dismissal is appropriate if the facts pled do not constitute a basis for legal relief. The trial court may also consider . . . documents the authenticity of which are not disputed by the parties . . . official public records . . . or . . . documents sufficiently referred to in the complaint. The trial court need not accept allegations in the writ that are merely conclusions of law.

Beane v. Dana S. Beane & Co., P.C., 160 N.H. 708, 711 (2010) (internal quotations and citations omitted).

ARGUMENT

I. Part I, Article 22 Of The New Hampshire Constitution And The First Amendment Of The United States Constitution Preclude The City's Tort Claims.

"Part I, Article 22 of our State Constitution provides: 'Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved.'" *Doyle v. Commissioner, N.H. Dept. of Resources & Economic Development*, 163 N.H. 215, 220 (2012) (quoting N.H. CONST. pt. I, art. 22). "Similarly, the First Amendment to the United States Constitution prevents the passage of laws 'abridging the freedom of speech.'" *Id.* (quoting U.S. CONST. amend. I). "It applies to the states through the Fourteenth Amendment to the United States Constitution." *Id.* (internal quotation omitted).

Part I, Article 22 and the First Amendment protect the rights of individuals to band together to engage in non-violent public protest for the purpose of influencing societal or governmental change, even if that protest activity causes economic harm. *See NAACP. v. Claiborne Hardware Co.*, 458 U.S. 886, 916 (1982) (holding that First Amendment prohibits using state-law business tort to suppress non-violent aspects of public protests designed to influence societal or governmental change); *NAACP v. Ala. ex. rel. Flowers*, 377 U.S. 288, 307 (1964) (noting as doubtful the theory that refusal to use the Montgomery bus system in order to protest racial segregation, without more, could violate any valid state law). Such protests combine the rights to free speech, assembly, association, and petition. *See Claiborne Hardware Co.*, 458 U.S. at 911 (holding that "[t]he established elements of speech, assembly, association, and petition, though not identical, are inseparable") (internal quotations omitted).

Part I, Article 22 and the First Amendment, as well as Part I, Article 8, protect the rights of individuals to videotape public officers performing public duties in public places. *See Gericke v. Begin*, 753 F.3d 1, 15 (1st Cir. 2014) (noting that "a traffic stop does not extinguish

an individual's right to film" law enforcement activity in public places); *Glik v. Cunniffe*, 655 F.3d 78, 82-83 (1st Cir. 2011) (holding that videotaping police officers constitutes "[g]athering information about government officials in a form that can readily be disseminated" and "serves a cardinal First Amendment interest in protecting and promoting the free discussion of ideas.") (internal quotations omitted).

Part I, Article 22 and the First Amendment, as well as Part I, Article 8, also protect a significant amount of speech directed at law enforcement officers like PEOs, including speech that is perceived as offensive, hostile, or abusive. *See, 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."); *United States v. Poocha*, 259 F.3d 1077, 1082 (9th Cir. 2001) (repeatedly saying "fuck you" to park rangers, even in front of crowd while clenching fist and puffing chest, was constitutionally-protected speech that could not be punished as disorderly conduct).[4] Indeed, "a properly trained officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to 'fighting words.'" *City of Houston*, 482 U.S. at 462 (quoting *Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring)). The rationale for these decisions is straightforward: "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principle characteristics by which we distinguish a free nation from a police state." *City of Houston*, 482 U.S. at 462-63.

Part I, Article 22 and the First Amendment also protect the right of individuals to spread their political message by distributing leaflets, pamphlets, or, in this case, cards that

[4] *See also Stearns v. Clarkson*, 615 F.3d 1278, 1282-84 (10th Cir. 2010) ("you're probably the mother f***** that shot my dad" was protected, and not a threat or fighting word that would provide probable cause for arrest); *Johnson v. Campbell*, 332 F.3d 199, 211-15 (3d Cir. 2003) ("son of a bitch" statement to law enforcement was protected speech); *Sandul v. Larion*, 119 F.3d 1250, 1254 (6th Cir. 1997), *cert. denied*, 522 U.S. 979 (1997).

contain their political message. *See McCullen*, 573 U.S. __, 2014 U.S. LEXIS 4499, at *41-42 (noting that "'handing out leaflets in the advocacy of a politically controversial viewpoint . . . is the essence of First Amendment expression'; '[n]o form of speech is entitled to greater protection.'" (quoting *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995)).

Only narrow categories of speech may be liberally regulated under Part I, Article 22 and the First Amendment, such as defamation, obscenity, pornography produced with real children, fighting words, incitements to violence, true threats, and speech integral to criminal conduct. *See, e.g.*, *Doyle*, 163 N.H. at 220; *United States v. Stevens*, 559 U.S. 460, 468 (2010); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 383 (1992).

Appellees' protest activities involve non-violent speech and conduct that includes: (i) filling expired parking meters to protest the City's parking enforcement function; (ii) placing cards that contain their political message on the windshields of parked vehicles they have saved from ticketing; (iii) videotaping PEOs in the performance of their public duties to assure government accountability; (iv) informing PEOs about their political theories and their connection to the City's parking enforcement operation; and (v) speaking to PEOs about the validity of their jobs. Critical here—and ultimately dispositive—is the fact that there is no evidence of any violence (or even threats of violence) on the part of appellees.

Additionally, all of the pure speech at issue in this case—which the City characterizes as taunting, harassing, and intimidating—is constitutionally-protected speech on matters of public concern. It includes publicly: (i) asking PEOs why they are stealing people's money; (ii) challenging PEOs for issuing tickets; (iii) telling PEOs to get different jobs; (iv) offering to help find PEOs new jobs; (v) calling PEOs thieves, cowards, liars, and other names because of the job they perform; (vi) disparaging one PEO's military service on one occassion; (vii) telling

PEOs that they are holding vehicles for ransom; and (viii) asking PEOs how they can sleep at night. *See Snyder* 131 S. Ct. at 1216-17 (holding in context of protest that statements such as "God Hates Fags," "Priests Rape Boys," and "God Hates You" constituted speech on a matter of public concern). While appellees' speech could be viewed as insulting, it is nonetheless protected. *See Claiborne Hardware Co.*, 458 U.S. at 910 ("Speech does not lose its protected character . . . simply because it may embarrass others or coerce them into action."). As the United States Supreme Court has explained, "[a]s a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment." *Boos v. Barry*, 485 U.S. 312, 322 (1988).

The *amicus curiae* New Hampshire Municipal Association appears to agree that appellees' speech and conduct in this case is protected Part I, Article 22 and First Amendment activity. (Brief of Amicus Curiae N.H. Municipal Assoc. at 5 (summarizing appellees' speech and conduct and stating "[t]he amicus concedes that this is protected free speech activity").) More importantly, however, the trial court recognized appellees' speech and conduct as protected under the First Amendment and specifically found that appellees' political protest activities involved speech on a matter of public concern, a finding the City has not challenged on appeal. (NHCLU Appendix, Addendum D, Trial Court Order, at 47.)

The trial court also found that appellees' "activities occur on streets and sidewalks throughout downtown Keene." (*Id.* at 47.) Public streets and sidewalks are traditional public fora "that have historically been open to the public for speech activities." *McCullen*, 573 U.S. __, 2014 U.S. LEXIS 4499, at *21. "[T]hey remain one of the few places where a speaker can be confident that he is not simply preaching to the choir." *Id.* at *20. "There, a listener often

encounters speech he might otherwise tune out." *Id.* at *20-21. "[T]his aspect of [these] traditional public fora is a virtue, not a vice." *Id.* at *21. As this Court has explained, traditional public fora are "fundamental to the continuing vitality of our democracy, for time out of mind, [they] have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." *Doyle*, 163 N.H. at 223 (internal quotations omitted). Thus, "the government's ability to restrict speech [on public streets and sidewalks] is 'very limited,'" *McCullen*, 573 U.S. __, 2014 U.S. LEXIS 4499, at *21 (quoting *United States v. Grace*, 461 U.S. 171, 177 (1983)), and the government's ability to "restrict access to [such] traditional public fora . . . is . . . subject to First Amendment scrutiny." *Id.*

To be fair, the City does not seriously dispute the fact that appellees' political protest activities involve speech on a matter of public concern or that these protest activities occur in traditional public fora. Rather, the City argues that the trial court may regulate appellees' political protest activities because they are having a tortious economic effect on the City. The City therefore believes that those activities are "not automatically protected by the First Amendment." (Appellant's Brief at 10.) The City is incorrect.

"[S]peech constituting a state-law tort is not necessarily unprotected speech." *Coplin v. Fairfield Public Access Television Comm.*, 111 F.3d 1395, 1401 n.2 (8th Cir. 1997). "As the [United States] Supreme Court has made clear, states may not regulate speech merely because the speech is defined as a state-law tort." *Id.* That is why Part I, Article 22 and First Amendment preclude certain state tort claims, *see Snyder*, 131 S. Ct. at 1220 (holding that First Amendment precludes intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy claims against non-violent funeral protestors), and why other state tort claims abutting sensitive First Amendment freedoms require rigorous proof of additional elements.

See Masson v. New Yorker Magazine, Inc., 501 U.S. 496, 510 (1991) (holding that actual malice must be proved by clear and convincing evidence to establish defamation). In the context of non-violent protests aimed at influencing societal or governmental change, tortious speech is only actionable if it amounts to violent or unlawful conduct. *See Claiborne Hardware Co.*, 458 U.S. at 917-18 (holding in context of protest that the state may impose damages only for violent or unlawful conduct, not for non-violent protected activity, even if that non-violent protected activity causes economic harm).

In order to determine whether Part I, Article 22 and the First Amendment preclude the City's tort claims, it is important to understand what is really going on in this case. The City is suing appellees for tortious interference with contractual relations, civil conspiracy, and negligence because, in the City's opinion, appellees are intentionally inflicting emotional distress on the City's PEOs. It is this alleged emotional distress—manifesting itself in generalized nervousness, distress, and anxiety—that the City claims has caused one PEO to quit his position and has caused two other PEOs to alter their patrols, thereby thwarting performance under the City's employment contracts in whole or in part.[5]

Because the City's tort claims are predicated on this alleged intentional infliction of emotional distress, the City must first prove the elements of intentional infliction of emotional distress with respect to each PEO. Otherwise, the City cannot prove "improper interference" or a breach of duty.[6] *Cf. TMJ Implants, Inc. v. Aetna, Inc.*, 498 F.3d 1175, 1201 (10th Cir. 2007) ("If the alleged [improper interference], . . . is an allegedly defamatory statement, then the

---

[5]Indeed, the fact that the City produced what appears to be expert testimony regarding its PEOs' alleged emotional distress further demonstrates that the City is attempting to establish "improper interference" or breach of duty on that basis. (*See* Appellant's Brief at 5; NHCLU Appendix, Addendum D, Trial Court Order, at 40.)

[6]Negligent infliction of emotional distress is inapplicable because it appears undisputed that appellees' political protest activities are intentional—not negligent—and deliberately designed to dissuade the City's PEOs from remaining in their positions.

interference [with prospective business relations and contracts] claim must fail if the statement is not an actionable defamation."); *Beverly Hills Foodland, Inc. v. United Food & Commercial Workers Union, Local 655*, 39 F.3d 191, 196 (8th Cir.1994) (explaining that the elements for defamation "must equally be met for a tortious interference claim based on the same conduct or statements," a result that is "only logical as a plaintiff may not avoid the protection afforded by the Constitution . . . merely by the use of creative pleading").[7]

In order to prove tortious interference with contractual relations, the City must prove improper interference. *Hughes v. N.H. Div. of Aeronautics*, 152 N.H. 30, 40-41 (2005). Whether interference is improper requires "[i]nquiry into the 'mental and moral character of the [appellees'] conduct.'" *Brownsville Golden Age Nursing Home, Inc. v. Wells*, 839 F.2d 155, 159 (3d Cir. 1988) (quoting 2 Harper, James, and Gray, *The Law of Torts* § 6.12, at 349 (2d ed. 1986)); *see Roberts v. Gen. Motors Corp.*, 138 N.H. 532, 540-41 (1994). "Action is not improper when the interference in contractual relations fosters a 'social interest of greater public import than is the social interest invaded.'" *Wells*, 839 F.2d at 159 (quoting 2 Harper, James, and Gray, *The Law of Torts* §6.12, at 350-51); *see* Restatement (Second) of Torts § 766 comment c, at 10 (1965).

Based on the above, it is plain that Part I, Article 22 and the First Amendment preclude the City's tort claims, predicated as they are on claims of intentional infliction of emotional distress against the City's PEOs. In order to establish intentional infliction of emotional distress, the City will have to prove that the appellees' speech was, in fact, "extreme and outrageous" with respect to each PEO. *Tessier v. Rockefeller*, 162 N.H. 324, 341 (2011). In *Snyder*, 131 S. Ct. at 1219, however, the United States Supreme Court held that the First Amendment, as a matter of

[7] These cases stand for the basic proposition that litigants cannot premise a tortious interference with contract claim on another tort, such as defamation, without proving the elements of the underlying tort.

law, precludes claims for intentional infliction of emotional distress where they would require a jury to decide whether political protest activities involving speech on a matter of public concern in a traditional public forum is, in fact, outrageous. The Court explained that "[o]utrageousness, . . . is a highly malleable standard with an inherent subjectiveness about it which would allow a jury to impose liability on the basis of the jurors' tastes or views, or perhaps on the basis of their dislike of a particular expression." *Id.* (internal quotations omitted). *Snyder*'s holding reaffirmed the United States Supreme Court's "longstanding refusal to allow damages to be awarded because the speech in question may have an adverse emotional impact on the audience." *See Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 55 (1988).[8]

Applying *Snyder* to this case, the trial court correctly concluded that the First Amendment prohibited the question of "improper interference" from moving forward. In doing so, the trial court correctly found that appellees' protest activities involved speech on a matter of public concern in a traditional public forum. *See Connick v. Myers*, 461 U.S. 138, 148 n.7 (1983) ("The inquiry into the protected status of speech is one of law, not fact."). The trial court also implicitly recognized that, in order for the City to succeed on its claims, a jury would have to determine questions such as: whether appellees' political protest activities were "extreme and outrageous"; whether the appellees acted with a proper or improper motive; whether the interests of the appellees' are worthy of advancement and to what degree; and whether appellees' social actions outweigh the City's contractual interests. *See Roberts*, 138 N.H. at 540-41 (listing factors evaluated to determine improper inference). Such standards are highly malleable and run the impermissible risk that jurors will impose liability based on their tastes, views, or sense of morality and punish otherwise constitutionally-protected activity.

[8] This same principle applies to claims tried to judges. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) ("However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.").

The right to petition embodied in Part I, Articles 22 and 32 and the First Amendment also precludes the City's tort claims. The right to petition extends to political protest activity. *See, e.g., Edwards v. South Carolina,* 372 U.S. 229, 235 (1963) (holding that a protest against laws promoting racial discrimination was protected petitioning activity); *Holzemer v. City of Memphis*, 621 F.3d 512, 522 (6th Cir. 2010) (observing that the United States Supreme Court has held that protests constitute petitioning activity).[9] This right precludes others from using business torts to shut down political protests or otherwise penalize protestors. *See, e.g., State of Missouri v. Nat'l Org. of Women*, 620 F.2d 1301, 1317 (8th Cir.), *cert. denied*, 499 U.S. 842 (1980) ("[T]he right to petition is of such importance that it is not an improper interference [in the context of a state-law business tort] even where exercised by way of a boycott"); *Sierra Club v. Butz*, 349 F. Supp. 934, 938 (N.D. Cal. 1972) (holding that First Amendment protected right to persuade Forest Service to reduce or abandon its timber sales program to protect wilderness quality and that such conduct could not give rise to liability under a state law business tort).

In this case, appellees' political protest activities are aimed at influencing the City to eliminate its parking enforcement operation and repeal its parking laws. They include attempts to draw attention to the City's parking enforcement operations, to peacefully deprive the City of revenue from issuing parking tickets, and to directly persuade PEOs to leave their positions. These actions constitute protected petitioning activity. Accordingly, Part I, Articles 22 and 32 and the First Amendment preclude the City from using the threat of tort lability to shut down or otherwise penalize appellees' protest activities.

Notably, the City has not pled that appellees' protest activities violate a valid city ordinance or any civil or criminal law sufficient to establish improper interference. Nor can the

[9] *Cf. Eastern R.R. Presidents Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127, 137 (1961) (holding that the Sherman Act does not prohibit "political activity" through which "the people . . . freely inform the government of their wishes").

City point to any reasonable time, place, or manner restriction that it has enacted to regulate the activities at issue. Rather, the City admits that it has taken no legislative action (and apparently wants to take none) to put reasonable restrictions in place. (*See* Appellant's Brief at 25.) Instead, the City wants the trial court to engage in government by injunction and essentially create an ordinance for it. That much is evident from the City's fluctuating, *ad hoc* requests about what its resulting injunctions should look like. (*See* Appellant's Appendix, Verified Pet., Prayers for Relief, at 10-11; NHCLU Appendix, Addendum B, Appellant's Findings of Fact and Rulings of Law, Paragraph V, at 16; Appellant's Brief at 6.)

Such an approach must be rejected. As Justice Marshall aptly stated in his concurrence in *New York Times Company v. United States*, 403 U.S. 713, 742-43 (1971):

> [The Constitution] did not provide for government by injunction in which the courts and the Executive Branch can 'make law' without regard to the action of Congress. It may be more convenient for the Executive Branch if it need only convince a judge to prohibit conduct, rather than ask the Congress to pass a law, and it may be more convenient to enforce a contempt order than to seek a criminal conviction in a jury trial. Moreover, it may be considered politically wise to get a court to share the responsibility for arresting those who the Executive Branch has probable cause to believe are violating the law. But convenience and political considerations of the moment do not justify a basic departure from the principles of our system of government.

The same is true of the New Hampshire Constitution. It does not provide for government by injunction, where the City's executive branch can use the court system to make laws for it and thereby circumvent the legislative process. *See* N.H. Const. Part I, Art. 37. The City has the tools at its disposal to regulate appellees' political activities by proposing, debating, and passing reasonable time, place, and manner restrictions and should be required to use them.

Nonetheless, the City argues that using the democratic process to solve its public policy issues will "not provide [it] with the immediate relief it needs to protect its employees and prevent irreparable injury." (Appellant's Brief at 25.) The argument is unpersuasive. Appellees

have been engaged in their protest activities since December 2012. The City filed its lawsuit on May 1, 2013. It is common knowledge that lawsuits take significant time to litigate, particularly when they involve novel issues of constitutional law. This appeal will not be resolved until late 2014, early 2015, and may result in a further appeal to the United States Supreme Court. Thus, the notion that the City could not have been using its democratic process to attempt to enact a reasonable time, place, or manner restriction within the last two years is unconvincing, calls into serious question whether the City actually lacks an adequate remedy at law, and strongly suggests that the court system should abstain from issuing injunctions in this case.

II. The Injunctions Requested Are Unconstitutional Under Part I, Articles 8 And 22 Of The New Hampshire Constitution And Under The First Amendment Of The United States Constitution.

The City seeks three injunctions against appellees: (i) an access injunction; (ii) a videotaping injunction; and (iii) a speech injunction. The access and videotaping injunctions seek to place at least a 30-foot floating buffer zone around all of the City's current and future PEOs while they are on duty within which appellees and their associates may not enter.[10] The speech injunction seeks to prohibit appellees and their associates from "taunting, harassing, or intimidating" all of the City's current and future PEOs while they are on duty. Together, these injunctions seek to remove appellees' political message from the marketplace of ideas and prohibit their political activism entirely. Consequently, these injunctions are unconstitutional.

As stated earlier, the appellees' political protest activities involve speech on a matter of public concern and take place in traditional public fora. "[T]he guiding First Amendment

---

[10]The trial court treated the access and videotaping injunctions as a request for a 30-foot floating buffer zone likely because that is what the City affirmatively requested in its written submissions. (*See* NHCLU Appendix, Addendum B, Appellant's Findings of Fact and Rulings of Law, Paragraph V, at 16; *id.*, Addendum D, Trial Court Order, at 50.) Thus, for purposes of this analysis, the *amicus curiae* will analyze the injunctions at issue as requests for 30-foot floating buffer zones. To the extent the City suggests that it orally reduced these floating buffer zone requests to 15-feet at the motion hearing, the same analysis set forth in this section would apply. *See Schenck v. Pro Choice Network of Western, N.Y.*, 519 U.S. 357, 377-380 (1997)

principle that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content applies with full force in a traditional public forum." *McCullen*, 573 U.S. __, 2014 U.S. LEXIS 4499, at *21-22 (internal quotation omitted). Content-based restrictions are presumptively invalid, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 382 (1992), and are permitted only if they are narrowly tailored to serve a compelling government interest, *Doyle*, 163 N.H. at 221. Content-based restrictions are narrowly tailored only if they are the least restrictive option available. *See Vono v. Lewis*, 594 F. Supp. 2d 189, 204 (D.R.I. 2009).

The government may, however, "'impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant government interest, and that they leave open ample alternative channels for communication of the information.'" *McCullen*, 573 U.S. ___, 2014 U.S. LEXIS 4499, at *22 (quoting *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989)). Such restrictions are deemed content-neutral. Content-neutral restrictions "must satisfy a slightly less stringent test—they must be narrowly tailored to serve a *significant* government interest." *Doyle*, 163 N.H. at 221 (emphasis in original). Content-neutral restrictions are narrowly tailored if they do "not 'burden substantially more speech than is necessary to further the government's legitimate interests,'" *McCullen*, 573 U.S. ___, 2014 U.S. LEXIS 4499, at *37 (quoting *Ward*, 491 U.S. at 799), and leave open ample alternative channels for communication, *Doyle*, 163 N.H. at 221.

1. Under Part I, Article 22 and the First Amendment, The Access And Videotaping Injunctions Are Facially Content-Neutral, But In Practice, Content-Based; The Speech Injunction Is Content-Based.

Though the access and videotaping injunctions "say[] nothing about speech," they "restrict[] access to traditional public fora and [are] therefore subject to [Part I, Article 22 and] First Amendment scrutiny." *McCullen*, 573 U.S. __, 2014 U.S. LEXIS 4499, at *21. These

injunctions appear to be facially content-neutral, but in practice seek to quash appellees' political message in its entirety. The access injunction will prohibit the appellees from moving ahead of PEOs to save vehicles by inserting coins into parking meters. Because appellees will no longer be able to "save" vehicles, the access injunction will also prevent appellees from leaving their cards, which contain their political message, on the windshields of saved vehicles. The access injunction will also prevent appellees from speaking with PEOs or other members of the public in proximity to these PEOs peacefully at a normal conversational distance. The videotaping injunction will also significantly diminish appellees' ability to film PEOs while they are on duty. This targeting of appellees' activity strongly suggests that the access and videotaping injunctions are content-based and should be subject to strict scrutiny; however, because these injunctions cannot withstand even intermediate scrutiny, for the purposes of this analysis, the *amicus curiae* will assume that the injunctions are content-neutral.[11]

The speech injunction is, however, content-based because it will require a court to examine the content of appellees' speech and determine whether it amounts to "taunting," "harassment," or "intimidation" in order to enforce it. *See McCullen*, 573 U.S. __, 2014 U.S. LEXIS 4499, at *26 (observing that a law is "content based if it require[s] enforcement authorities to examine the content of the message that is conveyed to determine whether a violation has occurred") (internal quotations omitted). Put another way, the categories of speech this injunction seeks to prohibit—namely, speech that is taunting, harassing, and

[11]Applying intermediate scrutiny to the access and videotaping injunctions is consistent with the United States Supreme Court's opinion in *Madsen v. Women's Health Ctr., Inc.*, 512 U.S. 753, 765 (1994) (holding that injunctions can be content-neutral even if they target a group of people who espouse a certain viewpoint and that such injunctions must "burden no more speech than necessary to serve a significant government interest"). *Madsen* does not apply to court injunctions that target the content of speech, such as the speech injunction in this case; such injunctions remain subject to strict scrutiny.

intimidating—are based precisely "on what [speakers] say," not "simply where they say it." *See id.* Thus, the speech injunction is subject to strict scrutiny. *Doyle*, 163 N.H. at 221.

a. The Access, Videotaping, And Speech Injunctions Do Not Serve Significant Or Compelling Government Interests.

The appellant suggests that the injunctions requested serve at least four significant government interest: (1) preventing its PEOs from encountering so-called hostile environments; (2) maintaining the public streets and sidewalks as "safe workplaces" for its PEOs; (3) protecting its economic interest in its PEOs; and (4) preserving public safety and order. (Appellant's Brief, at 25.) On the facts alleged, however, none of these asserted government interests is significant, let alone compelling.

First, the City has no government interest in preventing its PEOs from encountering so-called hostile or uncomfortable environments. *See Cohen v. California*, 403 U.S. 15, 24-25 (1971) (holding that merely protecting listeners from offensive messages is not a legitimate government interest). Like all law enforcement officers, the City expects that its PEOs will encounter hostile environments while performing their public duties in public places and requires them to manage those situations appropriately. Indeed, the City's job description for its PEOs expressly states that the ability to deal with hostile environments is an essential requirement of the position. (*See* Appellant's Appendix, Verified Pet., Attachment A, at 15.) This Court has also questioned whether, in suppressing speech, the government even has a significant government interest in protecting individuals "from unwelcome or unwarranted interference, annoyance, or danger." *Doyle*, 163 N.H. at 223. Thus, under the case law and by its own admission, the City has no legitimate interest in preventing its PEOs from encountering so-called hostile environments.

Second, the City has no government interest in ensuring "safe workplaces" for its PEOs. Appellant's PEOs work in public, on city sidewalks and streets, places historically reserved for the free expression of ideas and where all manner of individuals are free to roam. The City cannot abridge the fundamental constitutional rights of its inhabitants in these public places on the plea that it needs to create a safe workplace for its PEOs. Indeed, the City's PEOs would be much safer if no one was permitted to approach them, to drive vehicles on city streets, or to carry guns out of their homes, but these prohibitions would certainly not be constitutional, at least not on the justification that the City needs to transform wide-open public places into "safe workplaces" for its PEOs. If such a government interest was recognized, it could be used to dramatically suppress peaceful protest activity, including, for example, protests of law enforcement practices near sidewalks adjacent to police station entrances—an activity which arguably impacts the ability of a police officer to work in a "safe workplace."

Third, the City has no significant government interest in protecting its "economic interest in its employees." As stated earlier, non-violent political protest aimed at creating societal or governmental change is protected by Part I, Article 22 and the First Amendment, even if it causes economic injury. *Claiborne Hardware Co.*, 458 U.S. at 916. Such protests are part of a long American tradition dating back decades.[12] The appellees' political activism falls into the same category of non-violent political protests and, consequently, intentional business and negligence-based torts cannot be used to shut it down.

---

[12] *See, e.g.*, Brown-Nagin, Tomiko, "Does Protest Work?" Howard Law Journal Vol. 56:721 (2013) (discussing protests related to the civil rights movement , anti-poverty efforts, school desegregation, and the present day Occupy Wall Street protests); Taylor, Quintard, "'Justice Is Slow But Sure': The Civil Rights Movement in the West: 1950-1970," Nev. Law Journal Vol. 5:84 (Fall 2004) (summarizing civil rights protest activity including sit-ins at drugstore lunch counters and soda fountains and at theatres); Freeman, Harrop A., "The Right of Protest and Civil Disobedience," Ind. L. Journal: Vol. 41, Iss.. 2, Article 3 (1966) (discussing the First Amendment and civil disobedience, including the civil rights and student anti-war movements of the 1960s).

Finally, the City has no significant government interest on the facts of this case in preserving public safety and order. As the pleadings indicate, the City's primary concern is protecting its PEOs from "emotional distress" allegedly caused by appellees' following, videotaping, and speaking to them; its concern does not appear to be maintaining public safety and order. That is why the petitions and the complaint are bereft of allegations demonstrating a real public safety or disorder concern. At most, the record indicates that appellees' protest activities have upset members of the public and caused one of them to allegedly assault an appellee on at least one occasion, but that is not a sufficient reason to censor appellees' constitutionally-protected activities. *See Terminiello v. Chicago*, 337 U.S. 1, 4-5 (1949) (noting that "freedom of speech, though not absolute, . . . , is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest"). Accordingly, the City's proffered interests are not significant or compelling.

b. The Access Injunction Is Not Narrowly Tailored.

Even assuming a significant government interest exists, such as preserving public safety and order, the access injunction, which would impose a 30-foot floating buffer zone around all current and future PEOs, is not narrowly tailored because it burdens substantially more speech than is necessary to further that interest. *Schenck v. Pro Choice Network of Western, N.Y.*, 519 U.S. 357, 377-380 (1997), is directly on point.

In *Schenck*, the respondents filed a complaint alleging in part tortious interference with business arising out of constant, overwhelming, and aggressive protests at four abortion clinics in New York. *Id.* at 362. The complaint requested injunctive relief. *Id.* After a 12-day evidentiary hearing, the district court issued an injunction establishing fixed and floating buffer zones. *Id.* at 366. The floating buffer zones prevented protesters from coming within 15 feet of any person

seeking access to or leaving one of the abortion facilities. *Id.* at 367. The United States Supreme Court held that this type of floating buffer zone burdened substantially more speech than was necessary to further the respondent's significant government interests in "protecting 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." *Id.* at 377.

The United States Supreme Court explained:

> The floating buffer zones prevent defendants . . . from communicating a message from a normal conversational distance or handing leaflets to people entering or leaving the clinics who are walking on the public sidewalks. This is a broad prohibition, both because of the type of speech that is restricted and the nature of the location. Leafletting and commenting on matters of public concern are classic forms of speech that lie at the heart of the First Amendment, and speech in public areas is at its most protected on public sidewalks, a prototypical example of a traditional public forum.

Id. The Court further stated that even on a record "that shows physically abusive conduct, harassment of the police that hampered law enforcement, and the tendency of even peaceful conversations to devolve into aggressive and sometimes violent conduct," the 15-foot floating buffer zone could not be upheld because it "floats." *Id.*

The United States Supreme Court observed the danger of large floating buffer zones. It explained that large floating buffer zones around individuals move freely and are unworkable in practice because individuals who wish to communicate their message to those within the floating buffer zone must move as the protected individuals move, maintaining a 15-foot separation at all times. *Id.* at 378. Consequently, persons desiring to use the sidewalk to walk next to individuals entering or leaving a clinic would be pushed into the street or to the very edges of the sidewalk. *Id.* Walking in front of or behind individuals that benefit from these floating buffer zones would also cause communicative and safety problems. *Id.* In short, the 15-foot floating buffer zone would make it "quite difficult" for a person desiring "to engage in peaceful expressive activities

to know how to remain in compliance with the injunction." *Id.* "This lack of certainty leads to a substantial risk that much more speech will be burdened than the injunction by its terms prohibits," *id.*; "[t]hat is, attempts to stand 15 feet from someone . . . and to communicate a message—certainly protected on the face of the injunction—will be hazardous if one wishes to remain in compliance with the injunction." *Id.*

In this case, the access injunction's 30-foot floating buffer zone will burden substantially more speech than the 15-foot floating buffer zone in *Schenck*. Specifically, the 30-foot floating buffer zone requested in this case is not tethered to a specific location in the City like a reproductive health clinic. Rather, it will appear over PEOs from the moment they begin work in the morning until the moment they leave work in the evening and will move with them everywhere they go throughout the city as they patrol sidewalks and streets inspecting parking meters. Consequently, these 30-foot floating buffer zones will prevent appellees from running in front of PEOs to save parking meters and from placing their cards on saved vehicles. Perhaps most critically, these floating buffer zones will prevent appellees from speaking to PEOs from a normal conversation distance—a form of communication which is critical to the effectiveness of appellees' message and which the United States Supreme Court has explained is "the most effective, fundamental, and perhaps economical avenue of political discourse." *See McCullen*, 573 U.S. __, 2014 U.S. LEXIS 4499, at *39-40 (striking down 35-foot fixed buffer zones, in part, because "[t]he zones ... compromise[d] petitioners' ability to initiate . . . close, personal conversations . . .," and would prevent the distribution of literature).

These 30-floating buffer zones will also likely prohibit appellees from living in, visiting or remaining in downtown Keene for any length of time. They will make visiting and remaining in local businesses or restaurants during the day very difficult, if not impossible. The presence of

more than one PEO on a sidewalk or on opposite sides of a city street may create an impassible barrier so large that it extends into or across a roadway forcing appellees to stop their vehicles and turn them around (perhaps illegally) in order to remain in compliance with the injunction. These 30-foot floating buffer zones would also prohibit appellees from approaching, speaking to, or engaging in speech or conduct with other members of the public who happen to be standing in or passing through them. These 30-foot floating buffer zones would also permit PEOs to deprive appellees of the use of their vehicles by standing near them for a period of time or depriving appellees of the use of other public or private facilities by remaining in or around them.

Nonetheless, the City and the *amicus curiae* New Hampshire Municipal Association cite *Hill v. Colorado*, 530 U.S. 703 (2000), *Frisby v. Schultz*, 487 U.S. 474 (1988), and *Rowan v. United States Post Office Dept.*, 397 U.S. 728 (1970), for the proposition that the City's PEOs have a right to privacy equivalent to that which private individuals enjoy in their homes or while accessing medical care.[13] They do not. *See* N.H. Const. Pt. I, Art. 8 (stating that "all the . . . officers of government are [the people's] substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive.").[14]

By entering into public service, the City's PEOs have voluntarily relinquished a significant amount of their privacy while they are performing their public duties under the New Hampshire and United States Constitutions. These PEOs have knowingly and voluntarily entered into a profession subject to public scrutiny and cannot escape such scrutiny by claiming that it causes them distress, anxiety, or discomfort or by claiming to be so-called "unwilling

---

[13]This privacy argument is but another example of the City attempting to assert the personal rights of its PEOs in order to establish that its PEOs have suffered some sort of emotional distress. Whether the City even has standing to raise this argument is highly questionable.

[14]*See also* RSA 91-A:1 ("Openness in the conduct of public business is essential to a democratic society. The purpose of this chapter is to ensure both the greatest possible public access to the actions, discussions and records of all public bodies, and their accountability to the people.").

listeners."[15] Moreover, any interest the City has in ensuring that PEOs are not the victim of unlawful conduct would be best served not by restricting peaceful protest activities, but by enforcing existing criminal laws—including New Hampshire's disorderly conduct (RSA 644:2), harassment (RSA 644:4), obstructing government administration (RSA 642:1), and simple assault (RSA 631:2-a) statutes or Keene's City Ordinance preventing persons from obstructing sidewalks (Section 82-36 of Keene City Code). *See McCullen*, 573 U.S. __, 2014 U.S. LEXIS 4499, at *47 (striking down 35-foot buffer zone because there were other means available, including existing "criminal statutes forbidding assault, breach of the peace, trespass, vandalism, and the like").

The City likely cites *Hill v. Colorado*, 530 U.S. 703 (2000), because in that case the United States Supreme Court upheld an 8-foot floating buffer zone around individuals entering and leaving abortion clinics. Putting aside the fact that *Hill* has recently been undermined by *McCullen*, 573 U.S. __, 2014 U.S. LEXIS 4499, at *70 (Scalia, J., concurring), *Hill* is not, and will never be, analogous to the facts of this case. *Hill* approved an 8-foot floating buffer zone, not a 30-foot floating buffer zone. 530 U.S. at 726-27. The floating buffer zone in *Hill* did not come into being until certain individuals came within 100 feet of a physical locality. *Id.* at 730. The 30-foot floating buffer zone in this case is not tethered to a physical locality, is effectively citywide, and will remain in place for the entire work day regardless of where in the city the PEOs travel. The floating buffer zone in *Hill* also contained a "knowing" requirement that protected individuals who thought they were in compliance with the law from violating it. *Id.* at 727. The 30-foot floating buffer zone the City has requested in this case contains no similar

[15]It is highly doubtful that the unwilling listener doctrine extends to law enforcement officers and other public servants, particularly in New Hampshire. *See* N.H. Const. Pt. I, Art. 8. Extending the doctrine to them while they are performing their pubic duties in public places would give law enforcement officers a dangerous license to ignore or refrain from aiding members of the public simply because they do not like them or do not want to listen to them.

requirement. Consequently, the 30-foot floating buffer zone the City has requested is far more dangerous than the 15-foot floating buffer zone invalidated in *Schenck*, and is nothing like the 8-foot floating buffer zone sanctioned in *Hill*. Thus, because the access injunction is not narrowly tailored, the City cannot obtain it under Part I, Article 22 or the First Amendment.

c. The Videotaping Injunction Is Not Narrowly Tailored.

The videotaping injunction—which similarly imposes a 30-foot buffer zone to prevent appellees from effectively filming PEOs—fails the narrow-tailoring requirement not only for the same reasons above, but also because videotaping is constitutionally protected activity. Part I, Article 22 and the First Amendment, as well as Part I, Article 8, protect the rights of individuals to film law enforcement officers while they perform their public duties in public places (especially in traditional public fora). *See, e.g.*, *Gericke*, 753 F.3d at 15 (holding in part that videotaping the police helps ensure the accountability of government officials); *Glik*, 655 F.3d at 82. "Gathering information about government officials in a form that can readily be disseminated serves a cardinal First Amendment interest in protecting and promoting 'the free discussion of governmental affairs.'" *Glik*, 655 F.3d at 82 (quoting *Mills v. Alabama*, 384 U.S. 214, 218 (1966)). The New Hampshire Constitution in particular "quite consciously ties a free press to a free state, for effective self-government cannot succeed unless the people have access to an unimpeded and uncensored flow of reporting." *Petition of Keene Sentinel*, 136 N.H. 121, 127 (1992) (internal quotation omitted). "News gathering is an integral part of the process." *Id.* (internal quotation omitted). "[T]he First Amendment right to gather news is . . . not one that inures solely to the benefit of the news media; rather, the public's right of information is coextensive with that of the press." *Glik*, 655 F.3d at 83.

The appellees have a right under Part I, Article 22 and the First Amendment, as well as Part I, Article 8, to peacefully videotape PEOs while they are performing their public duties in

public places. Distress, anxiety, or annoyance caused by such filming is not a sufficient excuse to enjoin it. This constitutional right is substantially burdened by a 30-foot floating buffer zone, which forces the person filming to maintain a specific distance away from the PEO at all times whenever the PEO moves, for the same reasons as the access injunction. Additionally, PEOs work in and around vehicles and other persons. The 30-foot floating videotape buffer zone effectively enables PEOs to avoid having most of their public conduct videotaped by allowing them to move behind and around objects or persons as they perform their public duties. Accordingly, the videotaping injunction is not narrowly tailored because it burdens substantially more speech than is necessary to further the City's alleged interests.

d. The Speech Injunction Is Not Narrowly Tailored.

As stated earlier, the speech injunction must satisfy strict scrutiny because it is a content-based restriction on speech. *See R.A.V.*, 505 U.S. at 382. Under strict scrutiny, narrow tailoring is satisfied if the injunction is the least restrictive means available for accomplishing a compelling government interest. *Doyle*, 163 N.H. at 221; *Vono*, 594 F. Supp. 2d at 204.

Assuming that the government has some compelling interest at stake (which it does not), the speech injunction is not the least restrictive means available for accomplishing that purpose. Rather, the speech injunction is hopelessly vague and overbroad, viewpoint discriminatory, not limited solely to forms of unprotected speech, vests unbridled discretion in the City's executive branch to selectively enforce it, and vests unbridled discretion in the trial court to determine whether the content of certain speech constitutes taunting, harassment, or intimidation. *See, e.g.*, *Montenegro v. N.H. DMV*, 2014 N.H. LEXIS 43, at *19 (N.H. May 7, 2014); *Opinion of the Justices*, 128 N.H. 46, 49-50 (1986) (holding that HB 148's language, which prohibited persons from "interfering with the taking of" or "disturbing" wild animals or "verbally provoking" or "verbally harassing" persons engaged in taking wild animals, rendered

the bill content-based and violated Part I, Article 22 in part because it was vague, overbroad, and viewpoint discriminatory).[16]

Moreover, the speech that the City has targeted in this case is unquestionably speech on a matter of public concern that is protected under Part I, Article 22 and the First Amendment. Consequently, the mere existence of the speech injunction will cause appellees to self-censor and possibly cease communicating with PEOs under most, if not all, circumstances, for fear of being accused of taunting, harassing, or intimidating a PEO and facing contempt proceedings for those statements. The danger of self-censorship will be particularly acute where a PEO is writing one of the appellees a parking ticket; though the appellee may have good grounds to question the PEO's actions, he likely will not for fear of contempt proceedings. Such an injunction is not, as a matter of law, the least restrictive means available for accomplishing the City's asserted government interests. Thus, the speech injunction is unconstitutional.

2. The Injunctions Requested Also Cannot Be Obtained Under Part I, Article 8 of the New Hampshire Constitution.

In New Hampshire, public servants are "at all times accountable" to the citizens of New Hampshire and must therefore be "open, accessible, accountable and responsive." N.H. Const. Pt. I, Art. 8. Appellant's PEOs are law enforcement officials. Law enforcement officials are public servants. Among other things, public servants have a legal obligation to treat all persons equally in the performance of their duties. N.H. Const. Pt. I, Arts. 1 & 2; *see McDuffee v. The Portland & Rochester R.R.*, 52 N.H. 430, 448 (1873) (explaining that a public servant's "duty being public, the correlative right is public. The public right is a common right, and a common right signifies a reasonably equal right") (Doe, J.).

[16] *See also McCullen*, 573 U.S. ___, 2014 U.S. LEXIS 4499, at *61 (Scalia, J., concurring) ("It seems to me far from certain that First Amendment rights can be imperiled by threatening jail time . . . for so vague an offense as 'follow[ing] and harass[ing]'").

The City's job description also explains that PEOs have a duty to: (i) "[a]ssist citizens requesting assistance or information"; (ii) "[t]ake whatever life-saving measures are necessary to prolong the life of any victim of an accident, injury, or assault and to continue such efforts until proper medical assistance is available"; (iii) "[a]id individuals who are in danger of physical harm and provide other services on an emergency basis"; (iv) "[p]erform any other public safety duties assigned"; and (v) "[e]ffectively communicate with dissimilar segments of the public, including juveniles, furnishing appropriate information and directions and exhibiting efficacious and professional communication skills in other formal settings." (Appellant's Appendix, Verified Pet., Attachment A, at 14-15.)

The injunctions the City seeks—particularly the access injunction—will permanently deprive the appellees of the public services that the City's PEOs are required to perform. These injunctions will seriously dissuade PEOs from assisting or communicating with appellees or other members of the public who are in proximity to appellees. Police officers, and to a lesser degree PEOs, "are trusted with . . . securing and preserving public safety." *See Everitt v. Gen. Elec. Co.*, 156 N.H. 202, 217 (2007). "On any given day, they are required to employ their training, experience, measured judgment and prudence in a variety of volatile situations . . . ." *Id.* Thus, any barrier like the injunctions at issue in this case that may cause a PEO to question whether she should provide emergency life-saving aid or public safety assistance to appellees or to other members of the public in proximity to appellees is antithetical to the requirements of Part I, Article 8, to the duties imposed on the City's PEOs by law and contract, and to the interests of the public at-large. *Cf. id.* at 217-18 (explaining that official immunity exists to protect the public from the serious harms that would arise if law enforcement had to question their actions before taking them out of fear of personal liability).

Accordingly, the injunctions the City has requested also unconstitutional under Part I, Article 8.

CONCLUSION

Thus, for the above reasons, Part I, Article 22 and the First Amendment preclude the City's tort claims and, even if they did not, the injunctions the City has requested are unconstitutional. Accordingly, the trial court's order should be affirmed.

Respectfully Submitted,
NEW HAMPSHIRE CIVIL LIBERTIES UNION

By Its Attorneys,
NIXON PEABODY LLP

Date: July 28, 2014

Anthony J. Galdieri, Esq. (NH Bar No. 18954)
agaldieri@nixonpeabody.com
900 Elm Street, 14th Floor
Manchester, NH 03101-2031
Tel: (603) 628-4000

Gilles R. Bissonnette, Esq. (NH Bar No. 265393)
gilles@nhclu.org
18 Low Avenue
Concord, NH 03301
Tel: (603) 224-5591

CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2014, two (2) copies of the *Brief for the Amicus Curiae New Hampshire Civil Liberties Union* and the *Appendix* to same was served by first class mail, postage prepaid, on each party through counsel, Charles P. Bauer, Esq. and Robert J. Dietel, Esq. for the Appellants; Jon Meyer, Esq., for the Appellees; Pete Eyre, *Pro Se*; and Stephen C. Buckley, Esq. for *Amicus Curiae* New Hampshire Municipal Association.

Anthony J. Galdieri, Esq.