

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH NORTH, ss

SUPERIOR COURT

No. 216-2022-CV-00508

JOHN DOES

v.

THE MANCHESTER POLICE DEPARTMENT

**INTERVENORS BLACK LIVES MATTER-MANCHESTER AND
ACLU OF NEW HAMPSHIRE'S REPLY TO
PLAINTIFFS' NOVEMBER 29, 2022 OBJECTION TO MOTION TO DISMISS AND
DECEMBER 1, 2022 BRIEF IN SUPPORT OF THEIR OBJECTION**

NOW COME Intervenors Black Lives Matter-Manchester (“BLM-Manchester”) and the American Civil Liberties Union of New Hampshire (“ACLU-NH”) (collectively, “Intervenors”), and respectfully submit this reply to Plaintiffs’ November 29, 2022 Objection to Intervenors’ Motion to Dismiss and December 1, 2022 Brief in Support of Their Objection. For the reasons explained below, Plaintiffs’ Amended Petition should be denied and dismissed. Intervenors respond to make the following four brief points:

First, Plaintiffs contend that this case presents a “case of first impression in this State” where the issue is “whether a police officer while off duty and on his own private electronic devices has any responsibility to take action to institute discipline involving the actions of another officer not under their command.” Pls.’ Br. at 2. But this is not the issue in this case, nor does this case break new ground. This case does not ask this Court to conclude whether the two supervisors had a legal duty to respond. Rather, this case is about whether the public has the right under the Right-to-Know Law to all the information necessary to make that determination for itself and, where appropriate, hold officers within the Department accountable if members of the public conclude that there was such a duty to respond. *Provenza* answers this question clearly. As the New

Hampshire Supreme Court explained in ordering disclosure of an investigatory report *even though the findings were “not sustained,”* the “public has a substantial interest in information about what its government is up to, as well as in knowing whether a government investigation is comprehensive and accurate.” See *Provenza v. Town of Canaan*, 175 N.H. 121, 131 (2022) (internal citations omitted). Citing one court, the *Provenza* Court added that, when an individual “becomes a law enforcement officer, that individual should expect that his or her conduct will be subject to greater scrutiny. That is the nature of the job.” *Id.* at 131 (citing *Kroeplin v. Wis. Dep’t of Natural Resources*, 725 N.W.2d 286, 301 (Wis. App. 2006)). This should end the matter, even where the supervisors were “exonerated” by the Manchester Police Department.

Second, in applying the public interest balancing test, Plaintiffs hinge much of their claim that the public interest is minimal and that the privacy interest is strong on their contention that (i) the two supervisors received the text while off duty on their private devices, and (ii) neither of the supervisors “was assigned to or had responsibility for” Mr. Horn or the complainant (a contention which is not verified). Pls.’ Br. at 1, 5. However, neither of these contentions help Plaintiffs, especially where (i) two of the Plaintiffs were supervisors, (ii) the supervisors were investigated for this very failure to report even though they were off duty, (iii) the supervisors participated in any investigation in their official capacity, (iv) the supervisors’ duty to report any misconduct exists even if the alleged misconduct occurs by an officer outside the supervisors’ chain of command, and (v) this duty to report exists even if the supervisors become aware of misconduct while off duty. As in *Stone*, this alleged failure to report, whether off duty or not, relates to the supervisors’ ability to perform their job effectively, and thus the balance tips in favor of disclosure. See *Stone v. City of Claremont*, No. 220-2020-cv-00143, at *14 (Sullivan Cty. Super. Ct. Oct. 7, 2022) (Honigberg, J.) (relying on *Provenza*, ordering disclosure of information that pertained, in

part, to off-duty conduct where that conduct “relate[d] to the Plaintiff’s performance of his official duties as a government employee”) (attached as Exhibit K to Mot. to Dismiss Am. Petition).¹

Plaintiffs’ suggestion that the supervisors “had no obligation to undertake any official action” and “had no obligation to do anything” is stunning. Pls.’ Br. at 5, 8. It should go without saying that a police supervisor cannot turn a blind eye to potential misconduct simply because that supervisor is off duty or where the misconduct concerns another officer outside the chain of command. *See* RSA 105:19 (noting the “duty of any law enforcement officer who observes” certain specified misconduct “by another law enforcement officer,” without limiting the misconduct to on-duty behavior or behavior by a direct report). Perhaps it is for this reason why the Department’s report acknowledges this potential failure (while later dismissing it), and states that “some would say” that “those supervisors should be held accountable for neglecting their duties to address the inappropriateness of the meme.” *See* Report at p. 16 (Exhibit C to Mot. to Dismiss Am. Petition). The public should have the right to reach this conclusion for itself and know the supervisors involved.

Third, the two supervisors complain that they “have a more significant interest in not being associated with the sensitive actions of another when they neither solicited nor acted upon the meme.” Pls.’ Br. at 2-3. Once again, one of the supervisors apparently stated “Haha” after the meme was sent. *See* Report at p. 11, 68 (Exhibit C to Mot. to Dismiss Am. Petition). While this supervisor denies that this statement was in response to the meme, this “Haha” text followed the receipt of the meme. Moreover, simply because someone receives something that was unsolicited does not mean that the recipient somehow obtains anonymity as to their receipt of the communication, especially where, as is the case here, there is no indication that the supervisors

¹ The petitioner has indicated that he will appeal the *Stone* decision.

were *involuntarily* on this text chain. In any event, Plaintiffs’ assumption that the mere receipt of an unsolicited racist meme will harm the recipients’ reputation if disclosed is flawed precisely because the meme was apparently unsolicited.

Finally, Plaintiffs’ objection to the Intervenors’ characterization of the meme as “racist,” *see* Pls.’ Obj. at p. 2, n.2, only highlights the need for transparency and accountability—namely, to address and shed light on how some in law enforcement cannot see racism even when it stares them in the face. Here, the meme not only made a “joke” out of the May 2020 murder of George Floyd, *but it also included the phrase “Black Love.”* The inability of law enforcement both in real time—and now in this case nearly two years after the meme was sent—to identify racism only confirms the fear that many in law enforcement are not fully sensitive to the concerns of communities of color and, in fact, often act with a cavalier attitude toward incidents of racism. New Hampshire is increasingly becoming more diverse.² If law enforcement cannot identify this clear example of racism, then how can law enforcement earn the trust of communities of color in New Hampshire? To earn this community trust, full transparency is required in this case.

² “New Hampshire is Becoming More Diverse, with Children at the Forefront,” (Sept. 1, 2021), <https://www.unh.edu/unhtoday/2021/09/nhdiversity> (“‘Racial-ethnic diversity is geographically uneven in New Hampshire, with the most diverse populations concentrated in the Manchester–Nashua urban corridor, the Hanover–Lebanon region, and in a few areas on the Seacoast. This pattern is especially evident among children,’ Johnson said. For example, Manchester and Nashua are among the most diverse places in the state ...”).

WHEREFORE, Intervenors BLM-Manchester and the ACLU-NH respectfully pray that this Honorable Court:

- A. If none of the Plaintiffs are the two supervisors who saw the meme and did not report it, dismiss the Amended Petition for Temporary and Permanent Injunctive Relief and Declaratory Judgment as moot, as Plaintiffs do not have standing to assert the privacy rights of two supervisors who are not parties to this case;
- B. If any of the Plaintiffs are the two supervisors who saw the meme and did not report it, deny and dismiss the Amended Petition for Temporary and Permanent Injunctive Relief and Declaratory Judgment because RSA ch. 91-A only allows aggrieved requesters to seek relief in Court;
- C. Alternatively, if any of the Plaintiffs are the two supervisors who saw the meme and did not report it, deny and dismiss the Amended Petition for Temporary and Permanent Injunctive Relief and Declaratory Judgment because the public interest in disclosing information concerning these two supervisors outweighs any privacy interests in nondisclosure; and
- D. Award such other relief as may be equitable.

Respectfully submitted,

BLACK LIVES MATTER-MANCHESTER AND
THE AMERICAN CIVIL LIBERTIES UNION OF
NEW HAMPSHIRE FOUNDATION,

By their attorneys,

/s/ Gilles Bissonnette
Gilles R. Bissonnette, Esq. (N.H. Bar No. 265393)
Henry Klementowicz, Esq. (N.H. Bar No. 21177)
American Civil Liberties Union of New Hampshire
18 Low Ave. # 12
Concord, NH 03301
Tel. (603) 227-6678
Gilles@aclu-nh.org

Date: December 7, 2022

Certificate of Service

I hereby certify that a copy of the foregoing was sent to all counsel of record.

/s/ Gilles Bissonnette
Gilles Bissonnette

December 7, 2022