UNITED STATES DISTRICT COURT
for the
DISTRICT OF NEW HAMPSHIRE

ALEXANDER MORIN **Plaintiff,** **v.** **TOWN OF FARMINGTON, ET AL.** **Defendants.**	**Case No.: 1:16-CV-00380**

***AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF ALEXANDER MORIN**

Amicus curiae American Civil Liberties Union of New Hampshire ("ACLU-NH") hereby submits its memorandum of law in support of Plaintiff Alexander Morin.

SUMMARY OF ARGUMENT

The Town of Farmington used, in part, Section C.4(a)(1) of its social media policy to terminate Plaintiff. This section bans the Town's public employees from, in part, expressing themselves on social media in a way that "negatively affects the public perception of the town." This policy, on its face, violates the First Amendment of the U.S. Constitution and N.H. RSA 98-E. This is not a close question, especially given the fact that the policy is not limited to situations where an employee's speech actually impairs or impedes the performance of his or her job duties.

This *amicus* brief makes two points. First, the policy is hopelessly overbroad under the First Amendment and effectively bans speech simply because the Town disfavors it. As the First Circuit has explained, the First Amendment protects employee speech critical of the government, "since it is likely that the government would be motivated to stifle only critical, revealing, or

embarrassing remarks." *Brasslett v. Cota*, 761 F.2d 827, 844 (1st Cir. 1985). Yet the Town's policy impermissibly and sweepingly bans this critical speech that would, by its very nature, cast the Town in a negative light. Indeed, this policy sweeps within its scope "negative" speech by employees in their individual capacity concerning the Town that would be of obvious public concern and promote government accountability, thereby outweighing any interest the Town may have in the efficient operation of the workplace.

Second, Section C.4(a)(1), on its face, violates Chapter 98-E. RSA 98-E:1 states that "a public employee in any capacity shall have a full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies." RSA 98-E:2 is even broader, stating that "[n]o person shall interfere in any way with the right of freedom of speech, full criticism, or disclosure by any public employee." Despite the language in Chapter 98-E, Section C.4(a)(1) explicitly prevents a public employee from speaking in his or her individual capacity on certain matters of public concern that cast the Town in a negative light. Chapter 98-E contains no such limitation and, in fact, explicitly encourages such critical speech to promote government accountability.

Accordingly, for these reasons and the reasons below, the Court should grant judgment in favor of Plaintiff as to his claims that Section C.4(a)(1) of Farmington's social media policy, on its face, (i) "unconstitutionally restricts the First Amendment rights of Town employees," *see* Second Am. Compl. ¶¶ 42, 62–63, and (ii) violates Chapter 98-E, *see* Second Am. Compl. ¶ 42.

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of New Hampshire ("ACLU-NH") is the New Hampshire affiliate of the American Civil Liberties Union ("ACLU")—a nationwide, nonpartisan, public-interest organization with over 1.2 million members (including over 8,000

New Hampshire members and supporters). The ACLU-NH engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of individual rights guaranteed under federal and state law, including the right to freedom of speech under the First Amendment.

The ACLU-NH, as well as the national ACLU, have appeared before federal and state courts in numerous free speech cases, both as direct counsel and as *amicus curiae*. This includes most recently the following New Hampshire cases: *Rideout v. Gardner*, 123 F. Supp. 3d 218 (D.N.H. 2015), *aff'd*, 838 F.3d 65 (1st Cir. 2016), *cert. denied*, 2017 U.S. LEXIS 2292 (2017) (striking down New Hampshire law banning certain forms of online speech on grounds that it violates the First Amendment); *Pendleton v. Town of Hudson, et al.*, No. 1:14-cv-00365-PB (D.N.H., filed Aug. 20, 2014) (resolved civil rights action challenging on First, Fourth, and Fourteenth Amendment grounds the Town of Hudson's practices of unlawfully detaining, harassing, threatening, trespassing, dispersing, and charging individuals who peacefully panhandle in public places; obtained stipulated injunctive relief and $37,500 settlement); *Clay v. Town of Alton, et al.*, No. 1:15-cv-00279-JL (D.N.H., filed July 14, 2015) (resolved civil rights action where client was, in violation of the First Amendment, arrested during a public meeting simply for engaging in political, non-disruptive speech on matters of public concern; obtained $42,500 settlement); *Valentin v. City of Manchester, et al.*, No. 1:15-cv-00235-PB (D.N.H., filed June 19, 2015) (pending civil rights action addressing the First Amendment right to record the police where ACLU-NH client was arrested for audio recording a conversation with two Manchester police department officers while in a public place and while the officers were performing their official duties); *Y.F. v. Wrenn*, No. 1:15-cv-00510-PB (D.N.H., filed Dec. 18, 2015) (pending First Amendment challenge to New Hampshire Department of Corrections' prison mail policy that bans all incoming original drawings and pictures, as well as greeting

cards); *Petrello v. City of Manchester, et al.*, No. 1:16-cv-00008-LM (D.N.H., filed Jan. 11, 2016) (pending First Amendment challenge to City of Manchester's anti-panhandling practices); and *City of Keene v. Cleaveland*, 167 N.H. 731 (2015) (affirming, in part, dismissal of civil causes of action against speakers on the ground that "the First Amendment shields the respondents from tort liability for the challenged conduct"). The national ACLU has also been involved in a series of cases that have helped define the free speech rights of public employees, including *Lane v. Franks*, 134 S. Ct. 2369 (2014) (as amicus), *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (as amicus), and *United States v. Nat'l Treasury Employees Union ("NTEU")*, 513 U.S. 454 (1995) (representing the plaintiffs). Thus, the ACLU-NH has a strong interest in ensuring that all citizens in New Hampshire—including public employees—are protected when they make statements of public concern on social media platforms.

Because this case presents important questions about the free speech rights of public employees, proper resolution of this matter is of significant concern to the ACLU-NH and its members. Indeed, this case presents an issue of exceptional importance concerning the constitutionality under the First Amendment of a municipal social media policy that, in part, bans an employee from, on his or her personal time, making statements on social media that "negatively affect the public perception of" the Town. The ACLU-NH believes that its experience in the legal issues surrounding free speech rights will make its brief of service to the Court.

ARGUMENT

Online political speech is not only protected under the First Amendment, but it has become vital to American culture. For most people throughout the United States, smart phones, the Internet, and social media platforms have become the predominant means for communication

and public discourse. When the Internet was in its infancy, the United States Supreme explained: "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer." *Reno v. ACLU*, 521 U.S. 844, 870 (1997); *see also Clement v. Cal. Dep't of Corrs.*, 364 F.3d 1148, 1151 (9th Cir. 2004) (holding [t]he First Amendment "protects material disseminated over the internet as well as by the means of communication devices used prior to the high-tech era"). Twenty years later—and just last month—the Court reaffirmed this notion: "While in the past there may have been difficulty in identifying the most important places (in a spatial sense) for the exchange of views, today the answer is clear. It is cyberspace—the vast democratic forums of the Internet in general, and social media in particular …. One of the most popular of these sites is Facebook …." *Packingham v. North Carolina*, 198 L. Ed. 2d 273, 280, 137 S. Ct. 1730 (2017) (internal citation and quotations omitted).

The ideas, opinions, emotions, actions, and desires capable of communication through the Internet and social media are now limited only by the human capacity for expression. "Seven in ten American adults use at least one Internet social networking service," and "Facebook has 1.79 billion active users"—which is "about three times the population of North America." *Id.* at 280. Moreover, as of 2015, nearly two-thirds (64%) of American adults own a smartphone, and three-quarters of smartphone owners report using their phone for social media.[1] Given this trend, the First Circuit has also reiterated the importance of the Internet in modern society. *See, e.g.*, *Rideout v. Gardner*, 838 F.3d 65, 75 (1st Cir. 2016) ("As amici point out, there is an increased use of social media and ballot selfies in particular in service of political speech by voters.");

[1] Pew Research Center, "6 Facts About Americans and their Smartphones," Apr. 1, 2015, *available at* http://www.pewresearch.org/fact-tank/2015/04/01/6-facts-about-americans-and-their-smartphones/.

United States v. Perazza-Mercado, 553 F.3d 65, 72 (1st Cir. 2009) ("An undue restriction on internet use renders modern life—in which, for example, the government strongly encourages taxpayers to file their returns electronically, where more and more commerce is conducted on-line, and where vast amounts of government information are communicated via website—exceptionally difficult.") (quoting *United States v. Holm*, 326 F.3d 872, 878 (7th Cir. 2003)); *United States v. Ramos*, 763 F.3d 45, 62 (1st Cir. 2014) ("[W]here a defendant's offense did not involve the use of the internet or a computer, and he did not have a history of impermissible internet or computer use, courts have vacated broad internet and computer bans regardless of probation's leeway in being able to grant exceptions.").

If First Amendment protections are to enjoy enduring relevance in the twenty-first century, they must apply with full force to speech conducted online and through social media platforms, especially where this speech is of public concern and by government employees who are more likely to have informed opinions as to how the government operates. This is where Farmington's social media policy in Section C.4(a)(1)—which the Town used as justification for Plaintiff's termination—fails. The Town simply cannot meet its significant burden of justifying this policy's onerous and overbroad restrictions. *See NTEU*, 513 U.S. at 468 ("[T]he Government's burden is greater with respect to this statutory restriction on expression than with respect to an isolated disciplinary action."); *see also United States v. Playboy Ent. Group, Inc.*, 529 U.S. 803, 816–17 (2000) ("When the Government restricts speech, the Government bears the burden of proving the constitutionality of its actions.") (collecting cases).

I. Section C.4(a)(1) of Farmington's Social Media Policy Violates the First Amendment Because It Is Overbroad

Section C.4(a)(1) of Farmington's social media policy bans public employees from expressing themselves on social media in a way that "negatively affect[s] the public perception

of the … Town." This policy is not limited to situations where an employee's speech impairs or impedes the performance of his or her job duties. *See* Section C.4(a)(1), Plaintiff's *Exhibit 17* ("On personal time, Employees are free to express themselves as private citizens on social media to the degree that their speech does not impair or impede performance of duties *or* negatively affect the public perception of the Department or Town.") (emphasis added) (located at Docket No. 26-19).[2] This policy is substantially overbroad—and therefore invalid as a matter of law—because a substantial number of its applications are unconstitutional judged in relation to the policy's plainly legitimate sweep. *See United States v. Stevens*, 559 U.S. 460, 473 (2010) ("In the First Amendment context, however, this Court recognizes a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.") (internal quotations omitted); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 237 (2002) (same). Indeed, the Fourth Circuit Court of Appeals recently struck down a similar social media policy banning "[n]egative comments on the internal operations of the Bureau [of Police], or specific conduct of supervisors or peers that impacts the public's perception of the department . . ." *Liverman v. City of Petersburg*, 844 F.3d 400, 404 (4th Cir. 2016). Other courts have reached similar decisions concerning bans on criticism. *See, e.g., Wagner v. City of Holyoke*, 100 F. Supp. 2d 78, 87–88 (D. Mass. 2000) (holding the ban on criticism of other officers was unconstitutionally overbroad); *Gasparinetti v. Kerr*, 568 F.2d 311, 316–17 (3rd Cir. 1977) (invalidating a police department's rule against public disparagement of official actions of superior officers on First

[2] *See also* King Depo. 12:16-13:3, Plaintiff's *Exhibit 10* ("Q. Okay. So if [the speech] negatively affects the public perception of the town, but it did not impair their duties then [the speech] is okay [under Section C.4(a)(1)]? A. No. I didn't say that. Every one normally are reviewed on a case-by-case basis. And broad statements are just broad statements. I mean, everybody's conduct is—or conduct that's not becoming would be reviewed on a case-by-case basis and recommended based on what was said, the severity and impact, and may or may not be disciplinary action or recommendations from that.") (located at Docket No. 26-12).

Amendment overbreadth grounds). The *Liverman* decision guides this *amicus* brief's analysis and approach.[3]

Americans do not lose their right to free speech when they become government employees. Public employees may not "be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest . . . " *Pickering v. Bd. of Educ.*, 391 U.S. 563, 568 (1968). Underlying this principle is the recognition that "public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public." *Perez v. Zayas*, 396 F. Supp. 2d 90, 98 (D.P.R. 2005); *see also City of San Diego v. Roe*, 543 U.S. 77, 82 (2004) ("Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.") (internal citation omitted). As a result, public employers cannot silence their employees simply because they disapprove of the content of their speech. As the First Circuit has explained, the First Amendment specifically protects employee speech critical of the government "since it is likely that the government would be motivated to stifle only critical, revealing, or embarrassing remarks." *Brasslett v. Cota*, 761 F.2d 827, 844 (1st Cir. 1985) ("That Brasslett's interview may have been somewhat critical of the Town or the Council hardly strips it of First Amendment sanction.").

[3] It is also important to note that an individual—here, the Plaintiff—has standing to challenge this policy as overbroad even if a more narrowly tailored law could properly be applied to him. *Parker v. Levy*, 417 U.S. 733, 759 (1974). Moreover, this Court's inquiry is not limited to the application of the challenged provisions to the particular litigant before it, as "[l]itigants … are permitted to challenge a statute not because their own rights of free expression are violated, but because of a judicial prediction or assumption that the statute's very existence may cause others not before the court to refrain from constitutionally protected speech or expression." *Broadrick v. Oklahoma*, 413 U.S. 601, 612 (1973).

To be sure, a citizen who accepts public employment "must accept certain limitations on his or her freedom." *Garcetti v. Ceballos*, 547 U.S. 410, 418 (2006). Government employers enjoy considerable discretion to manage their operations, and the First Amendment "does not require a public office to be run as a roundtable for employee complaints over internal office affairs." *Connick v. Myers*, 461 U.S. 138, 149 (1983). To determine whether a government employer has abused that discretion and infringed upon its employee's First Amendment rights, courts begin their inquiry by assessing whether the speech at issue relates to a matter of public concern. *See Pickering*, 391 U.S. at 568. If speech is purely personal, it is not protected and the inquiry is at an end. If, however, the speech is of public concern, courts must balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*; *see also Connick*, 461 U.S. at 142.

When evaluating the facial constitutionality of a speech restriction—as this *amicus* brief does in evaluating the constitutionality of the Town's social media policy—the Court's review is broader than the analysis employed when examining a disciplinary action. *See NTEU*, 513 U.S. at 466-67; *Liverman*, 844 F.3d at 409. This facial analysis begins with the United States Supreme Court's decision in *NTEU*. *NTEU* involved a statute that prohibited federal employees from accepting any compensation for giving speeches or writing articles, even when the topic was unrelated to the employee's official duties. *See NTEU*, 513 U.S. at 457. Emphasizing that the honoraria ban impeded a "broad category of expression" and "chills potential speech before it happens," the Court held that "the Government's burden is greater with respect to this statutory restriction on expression than with respect to [the] isolated disciplinary action[s]" in *Pickering* and its progeny. *Id.* at 467, 468. Accordingly, "[t]he Government must show that the interests of

both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *Id.* at 468 (quoting *Pickering*, 391 U.S. at 571). Further, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 475.

Like the speech bans in *NTEU* and *Liverman*, the Town's social media policy impedes a "broad category of expression" and "chills potential speech before it happens." *Liverman*, 844 F.3d at 407 (quoting *NTEU*, 513 U.S. at 467, 468). At the outset, it cannot be seriously disputed that the Town's social media policy regulates employees' rights to speak on matters of public concern. Like the restriction in *Liverman*, this "restraint is a virtual blanket prohibition on all speech critical of the government employer," as such speech would, by definition, cast the Town in a negative light. For example, the policy effectively prevents all employees "from making unfavorable comments on the operations and policies of the [Town], arguably the 'paradigmatic' matter of public concern." *Liverman*, 844 F.3d at 407–08 (quoting *Sanjour v. EPA*, 56 F.3d 85, 91 (D.C. Cir. 1995)). The following instances of "critical" speech of public concern were deemed constitutionally protected, yet they would have been banned by the Farmington policy had they taken place online:

- *Liverman v. City of Petersburg*, 844 F.3d 400, 407 (4th Cir. 2016) (online speech joining an ongoing public debate about the propriety of elevating inexperienced police officers to supervisory roles was of public concern and protected, even if it contained negative comments);

- *Eschert v. City of Charlotte*, No. 3:16-cv-295-FDW-DCK, 2017 U.S. Dist. LEXIS 84893, at *1 (W.D.N.C. June 2, 2017) (complaints about the safety of a public building and allegations of mismanagement of funds were of public concern and protected); and

- *Hamm v. Williams*, No. 1:15-cv-273, 2016 U.S. Dist. LEXIS 134486, at *6 (N.D. Ohio Sept. 29, 2016) (police officer's social media comments on indictments of

> fellow officers and the surrounding circumstances, as well as expression of support for the officers, were constitutionally protected).

In fact, this policy would go so far as to ban a Town employee from exposing to the public on social media his superior's corruption—speech which would undoubtedly be in the public interest, but would negatively affect the public perception of the Town.

Having satisfied this "public concern" threshold, the Town must next "show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *NTEU*, 513 U.S. at 468 (quoting *Pickering*, 391 U.S. at 571). The Town cannot meet this burden with respect to the policy's ban on comments that negatively affect the public perception of the Town. As the Fourth Circuit explained in *Liverman*:

> [S]ocial networking sites like Facebook have also emerged as a hub for sharing information and opinions with one's larger community. And the speech prohibited by the policy might affect the public interest in any number of ways, including whether the Department is enforcing the law in an effective and diligent manner, or whether it is doing so in a way that is just and evenhanded to all concerned. The Department's law enforcement policies could well become a matter of constructive public debate and dialogue between law enforcement officers and those whose safety they are sworn to protect.

Liverman, 844 F.3d at 408. What the Town's social media policy ignores is that "[g]overnment employees are often in the best position to know what ails the agencies for which they work." *Waters v. Churchill*, 511 U.S. 661, 674 (1994) (plurality opinion). Like the social media policy struck down in *Liverman*, the Town's policy "will cut short all of that," especially given that it "squashes speech on matters of public import at the very outset." *Liverman*, 844 F.3d at 408.

Because the Town's social media policy imposes a significant burden on expressive activity that is of public concern, this Court must consider whether the Town has adequately

established "real, not merely conjectural" harms to its operations. *See NTEU*, 513 U.S. at 475. Farmington Board of Selectman Chairman and Defendant Charlie King testified at deposition that the policy was necessary to regulate comments that would disrupt an employee's ability to perform his or her job. *See* King Depo. 8:19–9:1; 14:20–15:20, Plaintiff's *Exhibit 10* (located at Docket No. 26-12). Even if this interest is legitimate, here—as in *Liverman*—the Town has not satisfied its burden of demonstrating actual disruption to its mission from "negative" comments that would necessitate such an overbroad policy. Apart from the Town's generalized desire to prevent impairment of job duties, there appears to be little evidence of any material disruption arising from Plaintiff's—or any other employee's—comments on social media. As the Court explained in *Liverman*, "the speculative ills targeted by the social networking policy are not sufficient to justify such sweeping restrictions on [employees'] freedom to debate matters of public concern." *Liverman*, 844 F.3d at 408–09; *see also Connick*, 461 U.S. at 152.

Accordingly, the Town's social media policy, on its face, violates the First Amendment. In short, "[t]he widespread impact of the [policy] … gives rise to far more serious concerns than could any single supervisory decision." *See NTEU*, 513 U.S. at 468. This is, as *Liverman* explained, not a close issue or a gray area. *See Liverman*, 844 F.3d at 411–12 (rejecting qualified immunity for termination under "negative comments" provision of social media policy because the policy "lean[s] too far to one side"; further noting that "it is axiomatic that the government may not ban speech on the ground that it expresses an objecting viewpoint").

II. Section C.4(a)(1) of Farmington's Social Media Policy Violates Chapter 98-E

RSA 98-E:1 states that "a person employed as a public employee in any capacity shall have a full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies." RSA 98-E:1. The New Hampshire Supreme Court has

made clear that this statute "serves to free a State employee's speech rights from the limits imposed by the *Pickering* … balancing test." *Appeal of Booker*, 139 N.H. 337, 341 (1995). RSA 98-E:2 is even broader—and deliberately so—in stating that "[n]o person shall interfere in any way with the right of freedom of speech, full criticism, or disclosure by any public employee." RSA 98-E:2. This provision does not limit its protections to speech "concerning any government entity and its policies." This is for good reason. Speech may be of public concern even if it does not specifically pertain to a government's policies. As a matter of statutory construction, RSA 98-E:2's broader provisions protecting speech going beyond government activities must be given meaning. Failing to do so would render this separate section meaningless, thereby running afoul of the rule "that a statute should be construed so as not to render any of its phrases superfluous." *Herman v. Hector I. Nieves Transp., Inc.*, 244 F.3d 32, 36 (1st Cir. 2001).

Regardless of whether RSA 98-E:2 provides protections above and beyond RSA 98-E:1, Section C.4(a)(1) contravenes Chapter 98-E. The policy, for example, bans speech by an employee in his or her individual capacity "addressing [the Town] and its policies" where that speech casts the Town in a "negative" light. But, by its plain terms, RSA 98-E:1 provides no exemption to speech by an employee that casts a government entity in a "negative" light. To the contrary, RSA 98-E:1 was enacted precisely to protect this form of speech regardless of whether it is critical *and because this speech could very well be critical of the government*. RSA 98-E:1 describes this right as a "full" one to give "opinions," regardless whether they are critical or positive. And RSA 98-E:2 grants employees the right to engage in "full criticism," which is speech that would fall directly within the scope of the policy's ban on negative comments

concerning the Town. In short, the Town's social media policy violates Chapter 98-E's plain terms designed to promote government accountability.

CONCLUSION

Accordingly, the Court should grant judgment in favor of Plaintiff as to his claims that Section C.4(a)(1) of Farmington's social media policy, on its face, (i) "unconstitutionally restricts the First Amendment rights of Town employees," *see* Second Am. Compl. ¶¶ 42, 62-63, and (ii) violates Chapter 98-E, *see* Second Am. Compl. ¶ 42.

Respectfully Submitted,

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Dated: July 20, 2017

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded via the ECF system to the following on this 20th day of July 2017:

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