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 OBJECTION TO AND MOTION TO DISMISS PLAINTIFFS' OCTOBER 26, 2022 AMENDED PETITION FOR TEMPORARY AND PERMANENT INJUNCTIVE RELIEF AND DECLARATORY JUDGMENT

(*PRIORITY CONSIDERATION REQUESTED UNDER RSA 91-A:7***)**

NOW COME Intervenors Black Lives Matter-Manchester ("BLM-Manchester") and the American Civil Liberties Union of New Hampshire ("ACLU-NH") (collectively, "Intervenors"), and respectfully object to and move to dismiss Plaintiffs' October 26, 2022 Amended Petition for Temporary and Permanent Injunctive Relief and Declaratory Judgment. For the reasons explained below, this Amended Petition should be denied and dismissed.

INTRODUCTION

This case concerns the Manchester Police Department's ("Department") investigation into Officer Christian Horn's sustained misconduct where he, while on duty in February 2021, texted other officers a meme that made a "joke" out of the May 2020 murder of George Floyd and included the phrase "Black Love." It appears from the redacted documents produced by the Department that Mr. Horn admitted to "conduct unbecoming of an officer," and he was suspended for 10 days (7 of which were held in abeyance for one year) and ordered to undergo sensitivity training.

In an effort to narrow this dispute, Intervenors, without prejudice, are *no longer* seeking unredacted copies of *all* the records concerning the Department's investigation into the racist meme sent by Mr. Horn, including the names of *all* recipients of the meme. Rather, in response to Plaintiffs' lawsuit, Intervenors have now targeted their remaining request to include *only* the unredacted information in these responsive records concerning the two supervisors who saw the racist meme and did not report it. Based on the face of Plaintiffs' Amended Petition for Temporary and Permanent Injunctive Relief and Declaratory Judgment, it is unclear if any of the Plaintiffs are these two supervisors who saw the meme and did not respond.

As a threshold matter, if none of the named Plaintiffs are these two supervisors, then Plaintiffs' Amended Petition for Temporary and Permanent Injunctive Relief and Declaratory Judgment is now moot and should either be withdrawn or dismissed. Plaintiffs do not have standing to assert the privacy rights of two supervisors who are not direct parties to this case. With this dismissal, there would be no basis for the Department to withhold this more targeted information concerning the two supervisors.

Furthermore, if any of the Plaintiffs are the two supervisors, then this lawsuit should still be dismissed because RSA ch. 91-A only allows aggrieved requesters to seek relief in Court. *See infra* Section I. And if this Court is not inclined to reach this initial "reverse" Chapter 91-A question, then the information concerning the two supervisors should be released because the public interest in disclosure outweighs any privacy interests in nondisclosure. *See infra* Section II.

Finally, Intervenors request that this Court grant their October 5, 2022 Petition for Access to Public Records Under the Right-to-Know Law, RSA ch. 91-A, and Part I, Article 8 of the New Hampshire Constitution being filed against the Department seeking information in the requested

records concerning these two supervisors. Intervenors request expedited consideration of this case under the Right-to-Know Law. *See* RSA 91-A:7 ("In order to satisfy the purposes of this chapter, the courts shall give proceedings under this chapter high priority on the court calendar.").

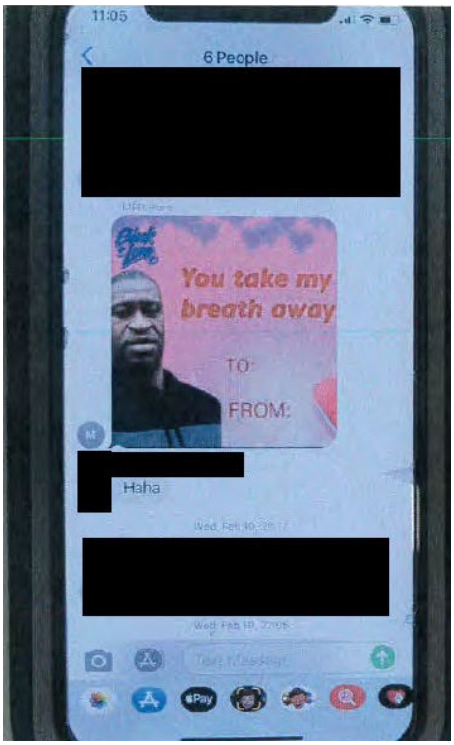
BACKGROUND AND SUMMARY OF ARGUMENT

Intervenor ACLU-NH is the New Hampshire affiliate of the American Civil Liberties Union—a nationwide, nonpartisan, public-interest organization with over 1.75 million members (including over 9,000 New Hampshire members and supporters). For over 50 years, the ACLU-NH has been dedicated to preserving the individual rights and liberties guaranteed in the Bill of Rights and Constitution in New Hampshire. Part of the ACLU-NH's work focuses on advocating for public transparency and accountability for law enforcement. To that end, the ACLU-NH was a party and counsel in *N.H. Center for Public Interest Journalism v. N.H. Dep't of Justice*, 173 N.H. 648 (2020) (holding that a list of over 275 New Hampshire police officers who have credibility/trustworthiness issues is not exempt from disclosure under RSA 105:13-b or the "internal personnel practices" and "personnel file" exemptions), and *Union Leader Corp. and ACLU-NH v. Town of Salem*, 173 N.H. 345 (2020) (overruling 1993 *Fenniman* decision in holding that the public's interest in disclosure must be balanced in determining whether the "internal personnel practices" exemption applies to requested records under RSA ch. 91-A). The ACLU-NH filed a request under RSA ch. 91-A to the Manchester Police Department on August 8, 2022 seeking "[a]ll reports, investigatory files, and records concerning Christian Horn's sending of a text message as described in the following article1, including the actual contents of the text message, any and all records relating to Mr. Horn's discipline (e.g., multiple-day suspension, sensitivity training and reassignment from detective to patrol officer), and the recipients of the message." *See* Exhibit A.

Intervenor BLM-Manchester is a non-profit community organization focused on achieving equity for Black people. BLM-Manchester works against discrimination and raises awareness to systemic racism in New Hampshire, with a heightened focus on Manchester. BLM-Manchester filed a request to the Manchester Police Department identical to the ACLU-NH's request on September 1, 2022. *See* *Exhibit B*.

The above-captioned lawsuit was filed by Plaintiffs John Does on August 27, 2022. Intervenors learned of this lawsuit on September 1, 2022 from the Department. That day, Intervenors then asked Plaintiffs' counsel for a copy of the lawsuit, a redacted version of which Plaintiffs' counsel provided on September 6, 2022. In the meantime, on September 1, 2022, the Department produced a redacted version of a March 2021 report and related records documenting a racist meme that was transmitted by Manchester Police Officer Christian Horn while he was on duty to at least ten officers on two separate text threads in February 2021. The meme made a "joke" out of the May 2020 murder of George Floyd and included the phrase "Black Love." The Department's September 1, 2022 cover letter stated, in part: "These redactions are a result of an injunction filed in Hillsborough North Superior Court on August 27, 2022. The redactions below are independent of the redactions listed in the Vaughn Index associated with these documents." The Department's March 2021 report explains that this meme was sent to four supervisors, two of whom saw the meme. The report is attached as *Exhibit C* (excluding Appendix C). It appears from the redacted documents produced by the Department that Mr. Horn admitted to "conduct unbecoming of an officer," and he was suspended for 10 days (7 of which were held in abeyance for one year) and ordered to undergo sensitivity training. *See* *Exhibit D* (Letter of Disciplinary Intent).

The racist meme at issue is the following:



The Department apparently promoted Mr. Horn over one year later.[1] During this incident, Mr. Horn was a member of the Special Enforcement Division ("SED")[2]—the same division of which former Manchester Police Officer Aaron Brown, who sent racist text messages in a prior incident, was a member.[3]

Assuming that any of the named Plaintiffs are among the two supervisors who saw the meme (which is unclear based on the Amended Petition), any effort to resist disclosure of the requested information is without basis. As a threshold mater, RSA ch. 91-A does not allow "reverse" Chapter 91-A actions like the one brought by the Plaintiffs in this case. The statute does not create a cause of action for anyone other than a requester who has been "aggrieved by a

[1] *See* Mark Hayward, "Manchester Cop, Suspended for Racially Insensitive Text, Up For Promotion," *Union Leader* (Aug. 7, 2022), https://www.unionleader.com/news/safety/manchester-cop-suspended-for-racially-insensitive-text-up-for-promotion/article_0e50b5e9-f179-5228-a1fd-d602072cfd43.html.

[2] The SED handles, SWAT, street crime, and special investigations. *See* https://www.manchesternh.gov/Departments/Police/Special-Enforcement.

[3] *See* Todd Feathers, "Fired Manchester Cop Sent Racist Messages," *Union Leader* (Apr. 6, 2019), https://www.unionleader.com/news/courts/fired-manchester-cop-sent-racist-messages/article_9e44bd97-7f02-5391-8c11-31d2e84d1d63.html.

violation" of RSA ch. 91-A due to a public body's decision to not produce records. *See infra* Section I.

In any event, as explained in more detail below, redacted information in these records should be released concerning the two supervisors who saw the meme, as there is a compelling public interest in disclosing this information. *See infra* Section II. As the March 2021 report notes, one of the Manchester officers who received the text—and who was offended by its dissemination—expressed concern that, if he simply reported this issue up the chain of command, then it would not be taken seriously.[4] As the Department's report states, the person who complained about the racist text "went outside his chain-of-command to report the incident, because he felt the lack of response from [a supervisor] implied that he would get no support from his own chain-of-command." *See* Report at p. 3 (*Exhibit C*); *see also id.* at p. 23. In other words, as the report notes, the complaining officer "was not only offended by the meme itself, but by the apparent lack of outrage and condemnation by the other recipients in the text thread." *Id.* at p. 1. The report also opines on the supervisors' failure to respond, stating in part: "[T]he remaining two supervisors … did see the meme, but as mentioned above, they simply viewed it as a bad joke. Given what has already been stated above, some would say that, because this meme was sent to someone whom Det. Horn should have known would take offense … AND supervisors were aware, those supervisors should be held accountable for neglecting their duties to address the inappropriateness of the meme." *See* Report at p. 16 (*Exhibit C*). The report exonerates the two supervisors, in part, because they "simply viewed it as a bad joke." *See id.* at pp. 16-17. It appears that interviews of these two supervisors are located on Pages 9-10/60-62 and Pages 11/67-68 in

[4] One detective, during an interview, seemed to disagree with the complainant's decision to go outside the chain of command, seeming to state—though the document is redacted—that he believed that the complainant "should have taken up the matter with Det. Horn personally." *See* Report at p. 50 (*Exhibit C*).

Exhibit C. It is also not clear if Petitioners' statement that "none of the Petitioners responded to the meme," *see* Am. Pet. ¶ 7, is accurate, as one of the supervisors apparently stated "Haha" after the meme was sent. *Id.* at pp. 11, 68.

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). 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)).

In short, in this historic moment of conversation about police accountability nationally and here in New Hampshire,[5] this information concerning the two supervisors should be released.

ARGUMENT

New Hampshire's Right-to-Know Law, RSA ch. 91-A, is designed to create transparency with respect to how the government interacts with its citizens. The preamble to the law states: "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." RSA 91-A:1. The Right-to-Know Law "helps further our State Constitutional requirement that the public's right of access to

[5] *See* Executive Order 2020-11 Creating the Commission on Law Enforcement Accountability, Community and Transparency (issued by Governor Sununu recognizing a "nationwide conversation regarding law enforcement, social justice, and the need for reforms to enhance transparency, accountability, and community relations in law enforcement") *available at* https://www.governor.nh.gov/sites/g/files/ehbemt336/files/documents/2020-11.pdf.

governmental proceedings and records shall not be unreasonably restricted." *Goode v. N.H. Legis., Budget Assistant*, 148 N.H. 551, 553 (2002).

The Right-to-Know Law has a firm basis in the New Hampshire Constitution. In 1976, Part 1, Article 8 of the New Hampshire Constitution was amended to provide as follows: "Government … should be open, accessible, accountable and responsive. To that end, the public's right of access to governmental proceedings and records shall not be unreasonably restricted." *Id.* New Hampshire is one of the few states that explicitly enshrines the public's right of access in its Constitution. *Associated Press v. State*, 153 N.H. 120, 128 (2005). Article 8's language was included upon the recommendation of the Bill of Rights Committee to the 1974 constitutional convention and adopted in 1976. While New Hampshire already had RSA ch. 91-A to address the public's right to access information, the Committee argued that the right was "extremely important and ought to be guaranteed by a constitutional provision." LAWRENCE FRIEDMAN, THE NEW HAMPSHIRE STATE CONSTITUTION 53 (2d ed. 2015).

Consistent with these principles, courts resolve questions under the Right-to-Know Law "with a view to providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents." *Union Leader Corp. v. N.H. Housing Fin. Auth.,* 142 N.H. 540, 546 (1997) (citation omitted). Courts therefore construe "provisions favoring disclosure broadly, while construing exemptions narrowly." *Goode,* 148 N.H. at 554 (citation omitted). "[W]hen a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a ***heavy burden*** to shift the balance toward nondisclosure." *Murray v. N.H. Div. of State Police*, 154 N.H. 579, 581 (2006) (emphasis added).

As explained below, the requested information concerning the two supervisors who saw the racist meme in question and did not report it should be released.

I. RSA ch. 91-A Only Allows Aggrieved Requesters to Seek Relief in Court. Accordingly, Plaintiffs' Lawsuit Seeking an Order Barring Disclosure Under the Right-to-Know Law Should Be Dismissed.

A threshold question in this case is whether the Right-to-Know Law allows Plaintiffs' "reverse RSA ch. 91-A" action where they have filed a lawsuit seeking to raise exemptions to prevent a government agency from producing records to the public. The New Hampshire Supreme Court has not addressed this question. *See Provenza v. Town of Canaan*, 175 N.H. 121, 125 (2022) ("We have not yet addressed whether RSA 91-A:7 provides a remedy for, and grants standing to, an individual who seeks to prevent disclosure of information pursuant to the Right-to-Know Law. The legislature may wish to consider whether clarification as to who is entitled to seek relief under RSA 91-A:7 is warranted.") (internal citations omitted).

Here, Plaintiffs' claim fails because the statute does not create a cause of action for anyone other than a requester who has been "aggrieved by a violation" of RSA ch. 91-A due to a public body's decision to not produce records. *See* RSA 91-A:7 ("Any person aggrieved by a violation of this chapter may petition the superior court for injunctive relief."). As a textual matter, this strongly suggests that it is the public agency—and only the public agency—that is tasked with making disclosure decisions under RSA ch. 91-A.

Similarly, the "invasion of privacy" exemption in RSA 91-A:5, IV raised by Plaintiffs—like all Right-to-Know exemptions—does not create a statutory privilege that can be invoked by a person to compel a public body to withhold the requested information. *See Marceau v. Orange Realty*, 97 N.H. 497, 499 (1952) ("It is well settled that statutory privileges … will be strictly construed."). In other words, RSA 91-A:5, IV does not prevent the Department from voluntarily disclosing any records, even if they are exempt. This is because the exemptions to the Right-to-Know Law merely provide a license to a public body to withhold information; they do not create

an affirmative privilege of confidentiality.[6] As the United States Supreme Court has similarly explained in the federal Freedom of Information Act ("FOIA") context—precedent which is persuasive here[7]—"Congress did not design the FOIA exemptions to be mandatory bars to disclosure" and, as a result, the FOIA "does not afford" a submitter "any right to enjoin agency disclosure." *See Chrysler Corp. v. Brown*, 441 U.S. 281, 293-94 (1979) ("We therefore conclude that Congress did not limit an agency's discretion to disclose information when it enacted the FOIA. It necessarily follows that the Act does not afford Chrysler any right to enjoin agency disclosure."); *see also Bartholdi Cable Co. v. FCC*, 114 F.3d 274, 281 (D.C. Cir. 1997) (declaring that the "mere fact that information falls within a FOIA exemption does not of itself bar an agency from disclosing the information"); *R.I Federation of Teachers v. Sundlun*, 595 A.2d 799, 803 (R.I. 1991) ("Our statute, like the Federal FOIA statute, is directed solely toward requiring disclosure by public agencies and does not provide a reverse remedy to prevent disclosure.").

Finally, it should go without saying that, if "reverse-Chapter 91-A" actions exist in New Hampshire allowing third parties to bring suits asserting exemptions under RSA ch. 91-A (and they do not), then these same third parties could be subjected to the fee-shifting provisions of RSA 91-A:8. *See also Carlsbad Police Officers Ass'n v. City of Carlsbad*, 49 Cal. App. 5th 135, 135 (2020) ("It is now well established that a successful intervener seeking records disclosure in a reverse-PRA action is entitled to recover attorney's fees under section 1021.5."). Fee shifting is critical to ensuring that the public's right of access to government records is properly enforced.

[6] By contrast, where the legislature has chosen to make records confidential—and thus completely prohibited from public disclosure—it has done so more forcefully. *See, e.g.*, RSA 654:45, VI (the statewide voter database "shall be private and confidential and shall not be subject to RSA 91-A and RSA 654:31, nor shall it or any of the information contained therein be disclosed pursuant to a subpoena or civil litigation discovery request"); RSA 170-G:8-a ("The case records of the department [involving juvenile delinquency proceedings] shall be confidential").

[7] *See Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325, 338(2020) ("we often look to federal case law for guidance when interpreting the exemption provisions of our Right-to-Know Law, because our provisions closely track the language used in FOIA's exemptions").

And fees are just as critical in "reverse-Chapter 91-A" actions to the extent such actions are recognized in New Hampshire. Financially strapped news and advocacy organizations, as well as members of the public, would be less likely to intervene in such cases to fight for the public's right to access records knowing they will be on the hook for their own costly attorneys' fees—even if they win. In the event of a favorable order, Intervenors reserve their right to seek attorneys' fees in this case.

II. Under RSA 91-A:5, IV's "Invasion of Privacy" Exemption, the Public Interest in Disclosure Outweighs Any Privacy Interests in Nondisclosure With Respect to Information Concerning the Two Supervisors.

RSA 91-A:5, IV exempts, among other things, "[r]ecords pertaining to … personnel … and other files whose disclosure would constitute [an] invasion of privacy." Even assuming that the requested records here constitute "personnel files" under RSA 91-A:5, IV, this is not a categorical exemption. Rather, "personnel file" records—like "other files" under the exemption—are subjected to a balancing test that evaluates the public interest in disclosure against any privacy and governmental interests in nondisclosure. *See Reid v. N.H. AG*, 169 N.H. 509, 527-28 (2016) ("[W]e now hold that the determination of whether material is subject to the exemption for 'personnel … files whose disclosure would constitute invasion of privacy,' RSA 91-A:5, IV, also requires a two-part analysis of: (1) whether the material can be considered a 'personnel file' or part of a 'personnel file'; *and (2) whether disclosure of the material would constitute an invasion of privacy*.") (emphasis added).

The Supreme Court has explained this three-step balancing analysis for "personnel file" records and "other files" as follows under RSA 91-A:5, IV:

> First, we evaluate whether there is a privacy interest at stake that would be invaded by the disclosure. Second, we assess the public's interest in disclosure. Third, we balance the public interest in disclosure against the government's interest in nondisclosure and the individual's privacy interest in nondisclosure. If no privacy interest is at stake, then the

> Right-to-Know Law mandates disclosure. Further, [w]hether information is exempt from disclosure because it is private is judged by an objective standard and not a party's subjective expectations.

Prof'l Firefighters of N.H. v. Local Gov't Ctr., 159 N.H. 699, 707 (2010) (citations and internal quotations omitted); *see also Union Leader Corp. v. N.H. Retirement Sys.*, 162 N.H. 673, 679 (2011) (same). In applying this test, the burden on the entity resisting disclosure is a heavy one. *See, e.g., Reid*, 169 N.H. at 532 ("When a public entity seeks to avoid disclosure of material under the Right-to-Know Law, that entity bears a *heavy burden* to shift the balance toward nondisclosure."). Even if the public interest in disclosure and privacy interest in nondisclosure appear equal, this Court must rule on the side of disclosure. *See Union Leader Corp. v. City of Nashua*, 141 N.H. 473, 476 (1996) ("The legislature has provided the weight to be given one side of the balance …."). In this case, this balancing analysis requires disclosure with respect to the two supervisors who are named in the requested records and did not report this racist behavior that led to a sustained finding of misconduct.

A. The Privacy Interest in Nondisclosure is Nonexistent.

Police officers have no privacy interest in records implicating the performance of their official duties—in this case, the apparent failure, whether justified or not, to report racist behavior. One of the supervisors may have even responded to the meme with the term "Haha." *See* Report at pp. 11, 68 (*Exhibit C*). Moreover, all the officers who participated in the investigation (including the two supervisors) did so in their official capacities. The information sought here does not constitute "intimate details … the disclosure of which might harm the individual," *see Mans v. Lebanon School Board*, 112 N.H. 160, 164 (1972), or the "kinds of facts [that] are regarded *as personal* because their public disclosure could subject the person to whom they pertain to embarrassment, harassment, disgrace, loss of employment or friends." *See Reid*, 169 N.H. at 530

(emphasis added). Intervenors are not seeking, for example, medical or psychological records in an officer's personnel file. Instead, Intervenors are seeking information about two supervisors who not only took no action against a subordinate after that subordinate engaged in misconduct, but also were the subject of an official internal affairs investigation for their failure—an action conducted by Department officers in their official capacities. Thus, any privacy interest here is minimal, if not nonexistent.

In examining the invasion of privacy exemption under RSA 91-A:5, IV, the New Hampshire Supreme Court has been careful to distinguish between information concerning private individuals interacting with the government and information concerning the performance of government employees. *Compare, e.g.*, *Lamy v. N.H. Public Utilities Comm'n*, 152 N.H. 106, 111 (2005) ("The central purpose of the Right–to–Know Law is to ensure that the Government's activities be opened to the sharp eye of public scrutiny, not that information about private citizens that happens to be in the warehouse of the Government be so disclosed."); *Brent v. Paquette*, 132 N.H. 415, 427 (1989) (government not required to produce records kept by school superintendent containing private students' names and addresses); *N.H. Right to Life v. Director, N.H. Charitable Trusts Unit*, 169 N.H. 95, 114, 120-121 (2016) (protecting identities of private patients and employees at a women's health clinic); with *Union Leader Corp.*, 162 N.H. at 684 (holding that the government must disclose the names of retired public employees receiving retirement funds and the amounts notwithstanding RSA 91-A:5, IV); *Prof'l Firefighters of N.H.*, 159 N.H. at 709-10 (holding that the government must disclose specific salary information of Local Government Center employees notwithstanding RSA 91-A:5, IV); *Mans*, 112 N.H. at 164 (government must disclose the names and salaries of each public schoolteacher employed by the district).

And when individuals accept positions as police officers paid by taxpayer dollars, they necessarily should expect closer public scrutiny. The New Hampshire Supreme Court has cited one case for the proposition 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." *Provenza*, 175 N.H. at 131 (citing *Kroeplin v. Wis. Dep't of Natural Resources*, 725 N.W.2d 286, 301 (Wis. App. 2006)); *see also ACLU-NH v. Dep't of Safety*, No. 217-2022-cv-00112, at *17 (Merrimack Super Ct. May 3, 2022) (Kissinger, J.) (pages 7-14 of this decision are on appeal at N.H. Sup. Ct. No. 2022-0321) (holding that there is "no substantial privacy interest in information relating to the performance of [a trooper's] official duties"), attached as Exhibit E.

Other courts outside of New Hampshire have agreed. *See, e.g., State ex rel. Bilder v. Township of Delavan*, 334 N.W.2d 252, 261-62 (Wis. 1983) ("By accepting his public position [the police chief] has, to a large extent, relinquished his right to keep confidential activities directly relating to his employment as a public law enforcement official. The police chief cannot thwart the public's interest in his official conduct by claiming that he expects the same kind of protection of reputation accorded an ordinary citizen."); *Perkins v. Freedom of Info. Comm'n*, 635 A.2d 783, 792 (Conn. 1993) ("Finally, we note that when a person accepts public employment, he or she becomes a servant of and accountable to the public. As a result, that person's reasonable expectation of privacy is diminished, especially in regard to the dates and times required to perform public duties."); *Dep't of Pub. Safety, Div. of State Police v. Freedom of Info. Comm'n*, 698 A.2d 803, 808 (Conn. 1997) ("Like the trial court, we are persuaded that the fact of exoneration is not presumptively sufficient to overcome the public's legitimate concern for the fairness of the investigation leading to that exoneration. This legitimate public concern outweighs the

department's undocumented assertion that any disclosure of investigative proceedings may lead to a proliferation of spurious claims of misconduct.").[8]

Plaintiffs' arguments in favor of privacy can be rejected. First, Plaintiffs repeatedly emphasize that they were "exonerated from any culpability in the matter." *See, e.g.*, Pls.' Am. Pet. ¶ 19. However, the New Hampshire Superior Court recently concluded that certain investigatory information concerning misconduct allegations of a police officer, *including information that was deemed "not sustained,"* should be released because "[t]he public has a substantial interest in information about what its government is up to." *See Provenza*, 175 N.H. at 131, *affirming* No. 215-2020-cv-155 (Grafton Cty. Super. Ct. Dec. 2, 2020) (Bornstein, J.) (attached as *Exhibit F*); *see also Dep't of Pub. Safety*, 698 A.2d at 808 (upholding the trial court's judgment requiring disclosure of an internal affairs investigation report exonerating a state trooper of police brutality). One Superior Court has similarly rejected such purported privacy interests. *See Union Leader Corp./ACLU-NH v. Town of Salem*, No. 218-2018-cv-01406, at *8 (Rockingham Cty. Super. Ct. Jan. 21, 2021) (Schulman, J.), attached as *Exhibit G*. There, after remand by the Supreme Court in *Union Leader Corp. v. Town of Salem*, 173 N.H. 345 (2020), a former Deputy Chief argued under the balancing test that the disclosure of redacted portions of Salem's internal audit report would be prejudicial because it presented a one-sided version of an external auditor. The Superior Court disagreed. The Superior Court recognized "that the Former Deputy Chief has a significant privacy interest" because he "denied all of the accusations of misconduct and provided plausible

[8] *See also, e.g., Baton Rouge/Parish of East Baton Rouge v. Capital City Press, L.L.C.*, 4 So. 3d 807, 809-10, 821 (La. Ct. App. 1st Cir. 2008) ("[t]hese investigations were not related to private facts; the investigations concerned public employees' alleged improper activities in the workplace"); *Cox v. N.M. Dep't of Pub. Safety*, 242 P.3d 501, 507 (N.M. Ct. App. 2010) (finding that police officer "does not have a reasonable expectation of privacy in a citizen complaint because the citizen making the complaint remains free to distribute or publish the information in the complaint in any manner the citizen chooses"); *Denver Policemen's Protective Assoc. v. Lichtenstein*, 660 F.2d 432, 436-37 (10th Cir. 1981) (rejecting officers' claim of privacy); *Burton v. York County Sheriff's Dep't.*, 594 S.E.2d 888, 895 (S.C. Ct. App. 2004) (sheriff's department records regarding investigation of employee misconduct were subject to disclosure, in part, because the requested documents did not concern "the off-duty sexual activities of the deputies involved").

innocent explanations," and that "[t]he disclosure of unproven accusations could cause embarrassment and adversely affect his reputation." *Id.* at *8. However, the Superior Court ordered disclosure because "the matters at issue relate to the Deputy Chief's interactions with the public under color of the Town's authority" and "do not relate to what he did in private, or in his home, or with respect to purely private concerns." *Id.*; *see also Union Leader Corp. v. N.H. Police Standards and Training Council.*, No. 217-2020-cv-613, at *7 (Merrimack Cty. Super. Ct. Dec. 6, 2021) (Schulman, J.) (noting, for charges that were not sustained by an arbitrator, that "[t]he point is that even though the accusations … were reviewed by [the PSTC], … [the] privacy interest in the matter is substantially outweighed by the public interest in disclosure"), attached as *Exhibit H*. The same is the case here.

As both *Provenza* and *Town of Salem* confirm, the presumption under RSA ch. 91-A is that the public is aided by transparency, not harmed by it—even where the information may be perceived to be incomplete, one-sided, or contain purported "unfounded" accusations. *See also Union Leader Corp.*, 141 N.H. at 476 ("The legislature has provided the weight to be given one side of the balance …."). The Right-to-Know Law presumes that the public is to be informed and trusted, even where the requested records implicate disputes as to what transpired. For example, criminal complaints, indictments, mugshots, police reports, and law enforcement press releases are often misleading because they do not necessarily tell the story of the accused. But this does not mean that these records are any less public under RSA ch. 91-A, *even before the defendant has received a hint of due process*. There surely is a lot of information that government officials would like to withhold from the public or press because they feel that the information is misleading or does not tell the full story. But the correct response is not for the government to suppress information it finds misleading—a response that, if permitted, would give the government massive

power to withhold information from its citizens. Here, of course, nothing prevents the two supervisors from, upon release, publicly promoting any exoneration or explaining the reasons for their inaction to mitigate any prejudice they feel may exist.

Second, information concerning a government official's performance of their official duties—here, a failure to take action and statements made during interviews conducted in an official capacity—cannot be shielded from public scrutiny because exposure may cause harm to that official's reputation. *See* Pls.' Am. Pet. ¶ 27 (arguing "[t]hat a person's reputation is sullied and harmed if attached to speech or actions that are abhorrent or distasteful in the eyes of the public."). Setting aside the questionable assumption that the mere receipt of an unsolicited racist meme will harm the recipients' reputation, it should come as little surprise that government actors often wish to keep their errors secret out of fear that the public may find out and damage their reputation by holding them publicly accountable. But such public scrutiny for official acts is the price that a government official must pay. This is because that official, including a police officer, works for the public, not themselves. They are not private citizens.

Third, Plaintiffs suggest that they have constitutional due process rights with respect to the disclosure of this information under the Right-to-Know Law, and that "Due Process would require a De Novo Hearing before the Superior Court on the underlying facts and circumstances." *See* Pls.' Am. Pet. ¶ 23. This argument—along with Plaintiffs' Count Three raising a due process claim—are without merit. Any suggestion that police officers have significant privacy and reputational interests that, as a matter of constitutional due process, can limit the public's right of access under RSA ch. 91-A or Part I, Article 8 is without merit. The New Hampshire Supreme Court has summarily rejected this argument. *Provenza*, 175 N.H. at 131 ("Provenza argues that disclosure of the Report will violate his right to procedural due process. We conclude that this

argument lacks merit, and warrants no further discussion."). Indeed, the recognition of any constitutionally-enshrined liberty interest in the public records context would conflict with the Right-to-Know Law, Part I, Article 8, and the notion that public officials must be subjected to public scrutiny. *See, e.g., Burton v. York County Sheriff's Dep't*., 594 S.E.2d 888, 895-96 (S.C. Ct. App. 2004) ("By raising this constitutional argument, the Sheriff's Department urges this Court to add another category of protection to the privacy rights the Supreme Court has found under the Fourteenth Amendment: the right of an individual's performance of his public duties to be free from public scrutiny. We find this would be ill-advised."); *Tompkins v. Freedom of Info. Comm'n*, 46 A.3d 291, 297 (Conn. App. Ct. 2012) ("the personal privacy interest protected by the fourth and fourteenth amendments is very different from that protected by the statutory exemption from disclosure of materials").[9]

The result of these cases is not surprising. Any suggestion that police officers have significant privacy and reputational interests that, as a matter of constitutional due process, can limit public disclosure under RSA ch. 91-A of acts done by public officials would be both wrong and troubling. Such a conclusion would conflict with the Right-to-Know Law and the notion that public officials are not private citizens. Rather, they work for us. In any event, the public interest balancing test under RSA ch. 91-A *explicitly provides due process* protections for individuals who, like Plaintiffs, are the subject of requested records and may have privacy interests at stake. However, that test favors disclosure in this case. Moreover, in this case, the two supervisors *did* receive due process through the investigation process where they were interviewed by and heard

[9] *See also In re AG Law Enf't Directive Nos. 2020-5 & 2020-6*, Nos. A-3950-19T4, A-3975-19T4, A-3985-19T4, A-3987-19T4, A-4002-19T4, 2020 N.J. Super. LEXIS 221, at *56 (Super. Ct. App. Div. Oct. 16, 2020) (in evaluating substantive due process claim of officer resisting disclosure, holding: "Simply stated, appellants cannot show they have a constitutionally protected reasonable expectation of privacy in their disciplinary records that is not outweighed by the government's interest in public disclosure, in light of prior case law establishing their diminished expectation of privacy in those records, and the clear statement in every IAPP issued since 2000 that the Attorney General could order the release of the records.").

by Department officials, and the fact that there may have been an "exoneration" of the two supervisors mitigates any concern about prejudice.

Plaintiffs' reliance on *Gantert v. City of Rochester*, 168 N.H. 640 (2016), in support of their due process argument is also misplaced. *See* Pls. Am. Pet. ¶¶ 45-47. This case says nothing about public disclosure under the Right-to-Know Law. Instead, this case only concerned a police officer challenging his placement on the Exculpatory Evidence Schedule ("EES") on due process grounds. It is true that this case noted that police officers have, for due process purposes, private interests in their "reputation and ability to continue to work unimpeded as a police officer." *Gantert*, 168 N.H. at 648 (quotation omitted). However, this case implicated these reputational interests only in the context of the government's placement of officers on the EES. These cases are silent on how public disclosure of information under the Right-to-Know Law can create due process concerns. And, if there was any doubt, *Provenza* rejected the argument that constitutional due process is implicated in a Right-to-Know dispute where an officer is seeking to abrogate the public's countervailing *and constitutional* right to know what the government is up to.

B. The Public Interest in Disclosure is Compelling.

Here, the public interest in disclosure is compelling for several reasons.

First, the information requested concerning the Department's investigation of two supervisors for not responding to or addressing Mr. Horn's racist misconduct is in the public interest, regardless of how the Department adjudicated the supervisors' behavior. The requested records themselves acknowledge this potential failure and state 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*). But the Department's report essentially gives these supervisors a pass, in part, because they "simply viewed it as a bad joke." *Id.* at p. 16. And one

of the supervisors apparently told investigators that "in hindsight he should have sought out a senior supervisor to seek guidance on the matter." *Id.* at 68. This alone justifies disclosure, especially where the report raises a question about the ability of the Department's SED supervisors to take racist misconduct seriously. *See, e.g., Union Leader Corp.*, 162 N.H. at 684 (noting that a public interest existed in disclosure where the "Union Leader seeks to use the information to uncover potential governmental error or corruption"); *Prof'l Firefighters of N.H.*, 159 N.H. at 709 ("Public scrutiny can expose corruption, incompetence, inefficiency, prejudice and favoritism."). As the Supreme Court has explained specifically in the context of police activity, "[t]he public has a strong interest in disclosure of information pertaining to its government activities." *NHCLU v. City of Manchester*, 149 N.H. 437, 442 (2003). Here, secrecy with respect to this information will only erode public trust and confidence in law enforcement, including in the Manchester Police Department.

Numerous cases outside of New Hampshire have similarly highlighted the public interest in revealing information that may implicate misconduct. *See, e.g., Boston Globe Media Partners, LLC v. Dep't of Criminal Justice Info. Servs*., 484 Mass. 279, 292 (2020) ("the public has a vital interest in ensuring transparency where the behavior of these public officials allegedly fails to comport with the heightened standards attendant to their office"); *Burton*, 594 S.E.2d at 895 ("[i]n the present case, we find the manner in which the employees of the Sheriff's Department prosecute their duties to be a large and vital public interest that outweighs their desire to remain out of the public eye"); *Tompkins*, 46 A.3d at 299 (in public records dispute concerning documents held by a police department implicating an employee's job termination, noting that a public concern existed where the "conduct did implicate his job as a public official"). Here, disclosure will educate the public on "the official acts of those officers in dealing with the public they are entrusted

with serving." *Cox*, 242 P.3d at 507; *see also Kroeplin*, 725 N.W.2d at 303 ("[t]he public has a particularly strong interest in being informed about public officials who have been derelict in [their] duty") (quotations omitted).

Second, whether "proven" or "sustained" (or not), disclosure of the requested records will help the public fully evaluate how the Department managed, investigated, and supervised these two supervisors, as well as Mr. Horn. The New Hampshire Supreme Court has made clear that "[t]he 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*, 175 N.H. at 131 (ordering disclosure despite "not sustained" conduct at issue); *see also Reid*, 169 N.H. at 532 ("[t]he public has a significant interest in knowing that a government investigation is comprehensive and accurate"); *Rutland Herald v. City of Rutland*, 84 A.3d 821, 825 (Vt. 2013) ("As the trial court found, there is a significant public interest in knowing how the police department supervises its employees and responds to allegations of misconduct."); *Baton Rouge/Parish of East Baton Rouge v. Capital City Press, L.L.C.*, 4 So. 3d 807, 809-10, 821 (La. Ct. App. 1st Cir. 2008) ("[t]he public has an interest in learning about the operations of a public agency, the work-related conduct of public employees, in gaining information to evaluate the expenditure of public funds, and in having information openly available to them so that they can be confident in the operation of their government").

Superior Courts in New Hampshire have generally agreed. *See, e.g., ACLU-NH v. Dep't of Safety*, No. 217-2022-cv-00112, at *19 (Merrimack Super Ct. May 3, 2022) (pages 7-14 of this decision are on appeal at N.H. Sup. Ct. No. 2022-0321) ("Disclosure of Mr. Wilber's personnel file will assist the public in determining whether the investigation into his conduct was comprehensive and accurate."), attached as *Exhibit E*; *Union Leader Corp./ACLU-NH v. Town of*

Salem, No. 218-2018-cv-01406, at *9, 23, 26-28 (Rockingham Cty. Super. Ct. Jan. 21, 2021) (Schulman, J.) (on remand, ordering disclosure of even unproven accusations because "the conduct at issue occurred in public and has been the subject of public controversy" and do not relate to "purely private concerns"; further holding that "the public has a strong interest in understanding how workplace misconduct is handled by the police department"), attached as Exhibit G; *Union Leader Corp. v. N.H. Police Standards and Training Council.*, No. 217-2020-cv-613, at *7 (Merrimack Cty. Super. Ct. Dec. 6, 2021) (Schulman, J.) (balancing test favored disclosure of unfounded allegations because "the public has a vital and compelling interest in seeing how the Manchester Police Department and its Chief responded"), attached as Exhibit H; *Salcetti v. City of Keene*, No. 213-2017-cv-00210, at *5 (Cheshire Cty. Super. Ct. Jan. 22, 2021) (Ruoff, J.) (on remand, holding: "As such powerful public servants, the public has an elevated interest in knowing whether officers are abusing their authority, whether the department is accounting for complaints seriously, and how many complaints are made. This factor strongly favors unredacted disclosure."), attached as Exhibit I; *State of New Hampshire v. Marsach*, No. 216-2021-cr-00046, at *5-9 (Hillsborough Cty. North Super. Ct., Feb. 25, 2022) (Delker, J.) (in employing public interest balancing test for Hillsborough County Attorney materials, concluding that public interest balancing analysis favors disclosure of employee information in court filings) (attached as Exhibit J); *Stone v. City of Claremont*, No. 220-2020-cv-00143, at *14 (Sullivan Cty. Super. Ct. Oct. 7, 2022) (Honigberg, J.) (relying on *Provenza*, holding that the "public's interest in disclosure … weighs heavily" where the police records "document instances of misconduct") (attached as Exhibit K).

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Even in the face of "unfounded" conduct, there is a public interest in learning not only what government officials are up to, but also *who* those government officials are. The public's ability to learn what the "government is up to" under the Right-to-Know Law includes not just the actions of the government, *see Union Leader Corp.*, 141 N.H. at 477, but also *who* engages in such actions on behalf of the government. After all, without knowing who engaged in actions on behalf of the government, how can the public hold those specific actors accountable, as well as assess whether agencies have taken appropriate steps with respect to those specific actors in the future? This is why, for example, the Supreme Court has demanded that the government produce the names of government employees—rather than mere titles—along with their salary information. *See, e.g.*, *Union Leader Corp.*, 162 N.H. at 684; *Mans*, 112 N.H. at 164. Here, Intervenors are not just seeking transparency for transparency's sake. With disclosure, the public will learn if these two supervisors are still in leadership roles and can track these supervisors as they advance in the Department in the future. If the Department seeks to promote these supervisors—as it did with Mr. Horn—despite their inaction in this case, then the public will be able to provide input and feedback on this decision. Secrecy as to this information not only would prevent this form of accountability, but it also would hurt public confidence in policing more broadly. *See Rutland Herald*, 84 A.3d at 825-26 ("redacting the employees' names would cast suspicion over the whole department and minimize the hard work and dedication shown by the vast majority of the police department").

C. The Public Interest Outweighs Any Interests in Nondisclosure.

Once the privacy interests in nondisclosure and public interest in disclosure have been assessed, courts "balance the public interest in disclosure against the government interest in nondisclosure and the individual's privacy interest in nondisclosure." *Union Leader Corp.*, 162

N.H. at 679. The Supreme Court has consistently stated that this balancing test should be heavily weighted in favor of disclosure, even where the public and privacy interests appear equal. As the Court has noted, "the legislature has provided the weight to be given one side of the balance by declaring the purpose of the Right-to-Know Law in the statute itself." *See, e.g., Reid*, 169 N.H. at 532 (citation and quotation omitted); *Union Leader Corp.*, 141 N.H. at 476 (same); *see also WMUR v. N.H. Dep't of Fish and Game*, 154 N.H. 46, 48 (2006) (noting that courts must "resolve questions regarding the Right-to-Know Law with a view providing the utmost information in order to best effectuate the statutory and constitutional objective of facilitating access to all public documents").

Here, for the reasons explained above, Plaintiffs cannot meet their heavy burden to show that any privacy interest dwarfs the compelling public interest in disclosure with respect to the two supervisors who saw Mr. Horn's racist meme and did not report this sustained misconduct. Accordingly, disclosure of this information is required.

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

Date: November 7, 2022

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Certificate of Service

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

/s/ Gilles Bissonnette
Gilles Bissonnette

November 7, 2022