STATE OF NEW HAMPSHIRE
HILLSBOROUGH COUNTY SUPERIOR COURT, NORTHERN DIVISION
Docket No. 216-2019-cv-00501

NEAL KURK, et al.

v.

CITY OF MANCHESTER

PETITIONERS' OBJECTION TO THE CITY'S MOTION TO DISMISS

Petitioners hereby file their Objection to the City's Motion to Dismiss. Petitioners incorporate by reference the argument and verified allegations in their Petition and make the following four additional arguments.

I. This Matter is Ripe for Judicial Review

The City contends in its Motion to Dismiss that Petitioners' claim is not ripe because the "Plaintiffs make no allegation [that] the City acted to determine their identities as an owner or occupant of a vehicle …." The City's ripeness argument is incorrect.

In evaluating ripeness, New Hampshire courts use a two-pronged analysis "that evaluates [A] the fitness of the issue for judicial determination and [B] the hardship to the parties if the court declines to consider the issue." *Univ. Sys. of N.H. Bd. of Trs. & a v. Dorfsman*, 168 N.H. 450, 455 (2015) (quoting *Appeal of State Employees' Assoc.*, 142 N.H. 874, 878 (1998)). "With respect to the first prong of the analysis, fitness for judicial review, a claim is fit for decision when: (1) the issues raised are primarily legal; (2) they do not require further factual development; and (3) the challenged action is final." *Id.* "The second prong of the ripeness test requires that the contested action impose an impact on the parties sufficiently direct and immediate as to render the issue appropriate for judicial review at this stage." *Id.* (quotations omitted). Federal courts adopting this two-pronged test have also concluded that, "[t]o establish ripeness in a pre-enforcement

context, a party must have concrete plans to engage immediately (or nearly so) in an arguably proscribed activity." *See Rhode Island Ass'n of Realtors, Inc. v. Whitehouse*, 199 F.3d 26, 33 (1st Cir. 1999); *see also State of R.I. v. Narragansett Indian Tribe*, 19 F.3d 685, 693 (1st Cir. 1994) ("[A] litigant does not have to await the consummation of threatened injury to obtain preventive relief. If the injury is certainly impending that is enough.") (quoting *Pacific Gas & Elec. Co. v. State Energy Resources Conserv. & Dev't Comm'n*, 461 U.S. 190, 201 (1983)). What this ripeness standard in pre-enforcement actions makes clear is that a plaintiff does not have to wait for an injury to actually occur so long as the injury is premised on a discrete legal issue and is imminent. Each of these prongs is present here.

As to the first prong, Petitioners' claim is fit for decision because the issues raised are primarily legal. This controversy is well-defined and amenable to complete and final resolution. *See, e.g., R.I. Ass'n of Realtors*, 199 F.3d at 34 (prong satisfied where "[t]his is not a case of statutory ambiguity but, rather, one that presents a single, purely legal question"). Moreover, the City's challenged action is final and certain. There is no dispute that the City will place surveillance cameras on Elm Street this summer that will capture motorists' identifying information. *See, e.g., Univ. Sys. of N.H. Bd. of Trs.*, 168 N.H. at 457 (deeming an arbitrator's decision to be final and properly the subject of judicial review); *Narragansett Indian Tribe*, 19 F.3d at 693 (case ripe, in part, because the resolution of the legal issue presented "will not be changed by further factual development").

As to the second prong, the City's action imposes on the Petitioners an impact that is sufficiently direct and imminent as to render the issue appropriate for prompt judicial review. Here, the injury is direct and impending. The City will not agree to put its planned use of surveillance cameras on hold pending the resolution of this lawsuit. And, again, there is no dispute

that the surveillance cameras will capture identifying information concerning Elm Street motorists—which include Petitioners who regularly travel on Elm Street—that, in Petitioners' view, ***could*** cause them to be identified in violation of RSA 236:130. The feed of these recordings will apparently be monitored on a 24-hour basis with the monitoring officer having the functionality to zoom in on previously-recorded images. *See R.I. Ass'n of Realtors*, 199 F.3d at 34 (case is ripe where "[t]he Association has described a concrete plan to recruit new members – an activity plainly proscribed by the text of section 38-2-6 – and no one has suggested any valid reason why resolution of the apparent conflict should await further factual development").

The City's argument that this case is not ripe because Petitioners have not shown that they specifically ***will*** be identified by the cameras is predicated on the City's incorrect reading of RSA 236:130. As Section I of Petitioners' Petition (Paragraphs 16-26) explains, for RSA 236:130 to be violated, all that is required is that the surveillance cameras capture motorists' identifying information that ***can*** cause them to be identified, regardless of whether the motorist is actually identified. Such a violation is imminent here because Petitioners will have their identifying information unlawfully recorded and these recordings ***could*** be used to identify them. The City's argument also conflates ripeness and justiciability with the merits question of how RSA 236:130 should ultimately be interpreted by this Court. Of course, the City's (incorrect) interpretation of RSA 236:130 does not create the constitutional threshold for justiciability. Rather, the standard is based on Petitioners' allegations, which sufficiently allege imminent harm in this case.

And even if the City is correct in viewing RSA 236:130 as only prohibiting the act of determining the ownership of a motor vehicle or the identity of a motorist (which it is not), the injury here is imminent because the City appears to acknowledge that its monitoring of camera footage ***will*** permit "incidental recognition" of some motorists' identities, *see* City Answer ¶ 28—

an apparent admission that establishes a violation of RSA 236:130 and should end this Court's inquiry. *See* Petitioners' Petition, Section II, ¶¶ 27-31. RSA 236:130 contains no exemption for identifying motorists "incidentally."

Significant hardship would also exist without judicial review. Under the City's ripeness theory, the only people who would have the ability to challenge the use of these surveillance cameras are those motorists who could prove that they were specifically identified by the Manchester Police Department using the cameras. However, a motorist is unlikely to ever know when they have been, in violation of the statute, identified by a police officer monitoring the cameras' live feed. That information is simply not likely to ever make its way into the hands of a motorist. As a result, this unlawful action would go unchallenged without any court review. Finding this case unripe would, in essence, render RSA 236:130 unenforceable. And such a decision would also be inconsistent with the declaratory judgment statute in RSA 491:22, which has the purpose of preventing the abridgment of rights *before it occurs*. As the New Hampshire Supreme Court has explained: "The distinguishing characteristic of the [declaratory judgment] action is that it can be brought *before an actual invasion of rights has occurred*. It is intended to permit a determination of a controversy before obligations are repudiated and rights invaded." *Portsmouth Hosp. v. Indem. Ins. Co.*, 109 N.H. 53, 55 (1968) (emphasis added).

Declining to issue a ruling would also deprive the litigants and municipalities of immediate and important judicial guidance concerning the scope of RSA 236:130. In light of the City's position, and in light of the fact that apparently other municipalities record similar motorist information, *see* City Answer ¶ 22, this guidance is critical, especially where RSA 236:130 carries the risk of criminal penalties. *See Narragansett Indian Tribe*, 19 F.3d at 693, 694 ("Rather than asking, negatively, whether denying relief would impose hardship, courts will do well to ask, in a

more positive vein, whether granting relief would serve a useful purpose, or, put another way, whether the sought-after declaration would be of practical assistance in setting the underlying controversy to rest.").

For these reasons, this case is ripe for review.

II. Petitioners Have Standing

The City contends in its Objection to Petitioners' Motion for Preliminary Injunction and Answer that Petitioners Neal Kurk and Holly Beene Seal lack standing based on *Duncan v. State*, 166 N.H. 630 (2014).

At the outset, it is important to note that *Duncan v. State*, 166 N.H. 630 (2014), which rejected taxpayer standing under the New Hampshire Constitution, was overturned by the voters during the 2018 general election. During that election, the voters added to Part I, Article 8 of the New Hampshire Constitution, in part:

> The public also has a right to an orderly, lawful, and accountable government. Therefore, any individual taxpayer eligible to vote in the State shall have standing to petition the Superior Court to declare whether the State or political subdivision in which the taxpayer resides has spent, or has approved spending, public funds in violation of a law, ordinance, or constitutional provision. In such a case, the taxpayer shall not have to demonstrate that his or her personal rights were impaired or prejudiced beyond his or her status as a taxpayer ….

Voters adopted this change to allow taxpayer standing by an approximate 83% to 17% margin and did so specifically to overrule the *Duncan* decision.[1] Thus, taxpayer standing is explicitly permitted in New Hampshire. Accordingly, Petitioners Carla Gericke and John "Brink" Slattery have standing, as they are bringing claims based on their specific injury as taxpayers in having to

[1] *See* https://ballotpedia.org/New_Hampshire_Question_1,_Taxpayer_Standing_to_Bring_Legal_Actions_Against_Government_Amendment_(2018) (statement of Rep. Paul Berch: "Until recently, the state Supreme Court recognized taxpayer standing. This amendment will assure that this important taxpayer right will continue to be recognized and enforced.")

pay for surveillance cameras that they believe constitute a violation of the law. *See* Petitioners' Petition, ¶¶ 2-3.

Further, all four Petitioners have independent standing in this case because they have proffered verified allegations of injury apart from injury as taxpayers. *See Duncan*, 166 N.H. at 642-43 ("[S]tanding under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another, with regard to an actual, not hypothetical, dispute, which is capable of judicial redress."). Here, all four Petitioners have demonstrated "some right of the party [that] has been impaired or prejudiced by the application of a rule or statute." *See Duncan*, 166 N.H. at 645. For example, Petitioners have alleged that they regularly travel on Elm Street and, thus, are "likely to have their identifying information concerning [their] vehicle captured by the Elm Street surveillance cameras planned by the City." *See* Petitioners' Petition, ¶¶ 1-4. This is more than sufficient to meet the liberal injury-in-fact standard, especially where the City does not dispute that the surveillance cameras will actually capture motorists' identifying information (again, albeit "incidentally"). *See Adams v. Watson*, 10 F.3d 915, 918 (1st Cir. 1993) ("The contours of the injury-in-fact requirement, while not precisely defined, are very generous, requiring only that claimant allege some specific, identifiable trifle of injury.") (citation, quotations, and brackets omitted).

III. Irreparable Harm and Adequate Remedies

There is a danger of immediate and irreparable harm. Absent preliminary relief, Petitioners' identifying information will be captured by the City's proposed surveillance cameras given that they regularly travel on Elm Street. Once again, the City has not disputed that motorists' identifying information will be captured (albeit "incidentally"). The City has also acknowledged that the surveillance footage would be subject to Chapter 91-A—while also subject to any

limitations for law enforcement records under *Montenegro v. City of Dover*, 162 N.H. 641 (2011). *See* City Answer ¶ 14. This raises the specter that the public will gain access to some of this identifying information and could take steps to identify motorists. And the City does not dispute that it has decided to continue implementation of its plan while this lawsuit is pending, thereby requiring immediate court intervention.

Petitioners do not have an adequate remedy at law. Section V's provisions in RSA 236:130, V—which provide criminal penalties for the statute's violation—provide no adequate legal remedy to Petitioners. These are criminal penalties that are enforced by the State. The general goal of criminal enforcement is not to provide a remedy to a victim, but rather to penalize and/or rehabilitate the entity or person who violated the law. Moreover, there is no indication that the Manchester Police Department (or the Hillsborough County Attorney's Office or Attorney General's Office, for that matter) will enforce RSA 236:130 and its criminal penalties consistent with its terms. The need for this lawsuit proves this point.

IV. The City's Reliance on RSA 261:75-a and RSA 261:75-b is Misplaced

Finally, the City suggests that, notwithstanding the provisions of RSA 236:130 enacted in 2006, the legislature has subsequently given law enforcement broader powers to monitor motorists. *see* City Answer ¶ 16. This misses the mark.

For example, the City highlights RSA 261:75-a, a 2007 law that allows a police officer to, for valid law enforcement purposes, send an electronic query to the Department of Safety to obtain "the registration information on a particular number plate and plate type or number plate validation decal for any official purpose, whether the inquiry relates to a particular offense or is for general crime detection and prevention purposes, provided a record is kept regarding such inquiry." This same 2007 bill also amended RSA 236:130, III to create an exemption to permit the use of

surveillance as part of the E-Z pass system. The City also flags RSA 261:75-b, which was enacted in 2016 and permits the use of automated number plate scanning devices. The use of these devices is narrow and cannot be used for generalized crime prevention. Rather, they "shall only be used to scan, detect, and identify license plate numbers for the purpose of identifying," for example, "(a) Stolen vehicles[,] (b) Vehicles associated with wanted, missing, or endangered persons[,] (c) Vehicles registered to a person against whom there is an outstanding warrant …," among other narrow instances. RSA 261:75-b, V. The statute also requires the officer to "develop independent reasonable suspicion for the stop or immediately confirm visually that the license plate on the vehicle matches the image of the license plate displayed on the LPR and confirm by other means that the license plate number is on one of the lists specified in paragraph V." RSA 261:75-b, VI. Further, "[r]ecords of number plates read by each LPR shall not be recorded or transmitted anywhere and ***shall be purged from the system within 3 minutes of their capture*** in such a manner that they are destroyed and are not recoverable, unless an alarm resulted in an arrest, a citation, or protective custody, or identified a vehicle that was the subject of a missing person or wanted broadcast …." RSA 261:75-b, VIII (emphasis added). This privacy protection exists to ensure that the police do not keep records of innocent motorists that could be used for later identification—a concern similar to RSA 236:130 which was designed to prevent the capturing of motorist information that ***could*** be used for identification.

These statutes say nothing about the independent protections provided in RSA 236:130 designed to prevent generalized surveillance of motorists through the ***use of cameras***. Indeed, when reading RSA 236:130 in the context of these other statutes, the legislature has attempted to strike a balance that the City will violate through its planned actions. While surveillance can be used to monitor and facilitate toll collection (RSA 236:130, III(e)), while the police can send

inquiries to the Department of Safety to obtain registration information (RSA 261:75-a), and while the police can use license plate scanning devises in very narrow circumstances with strict purging rules (RSA 261:75-b), the legislature has specifically banned the use of generalized surveillance of motorists through the use of surveillance cameras under RSA 236:130. Whatever the reasons the legislature may have for this balance, it is not for this Court to second guess. *See Boehner v. State*, 122 N.H. 79, 85 (1982) ("our task is not to second-guess the legislature or question the factors which went into its decision"). Indeed, this Court need not guess the legislature's reasons. We know its reasons. As Petitioner Representative Kurk stated before the Senate Transportation and Interstate Cooperation Committee:

> *[This] is a bill that basically says that the state shall not take general surveillance pictures of the citizens traveling on the state highways.* The purpose is to avoid becoming like London and perhaps New York City where there are surveillance cameras …. [There are over] 300 of them throughout the city [of London] taking pictures of people, not because of anything that has happened. Not to investigate a crime but just to have a record. I think that is not the way New Hampshire should go and the House agreed as did the [House] Transportation Committee …. *All [this bill] does is that it says that there can be no generalized surveillance ….*

See Legislative History, at LEG053-54 attached as ***Exhibit E*** (emphasis added). In short, as demonstrated by the text and legislative history of RSA 236:130, the surveillance proposed by the City is the very surveillance that the legislature aimed to prevent. It must be enjoined.

WHEREFORE, Petitioners seek the following relief:

A. Denial of the City's Motion to Dismiss;

B. Grant Petitioners' Petition;

C. Grant Petitioners' Motion for Preliminary Injunction; and

D. Any such other relief as may be just and proper.

Respectfully submitted,

Petitioners Neal Kurk, Carla Gericke, John "Brinck" Slattery, and Holly Beene Seal,

By and through their attorneys with the American Civil Liberties Union of New Hampshire Foundation,

/s/ Gilles Bissonnette

Gilles R. Bissonnette (N.H. Bar No. 265393)
Henry Klementowicz (N.H. Bar No. 21177)
American Civil Liberties Union of New Hampshire
18 Low Avenue
Concord, NH 03301
Tel.: 603.224.5591
gilles@aclu-nh.org
henry@aclu-nh.org

June 26, 2019

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Objection to the City's Motion to Dismiss has been served on the City of Manchester on this date, June 26, 2019.

/s/ Gilles Bissonnette
Gilles Bissonnette