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June 11, 2014

VIA EMAIL (prosecutor@littletonpd.org; psmith@littletonpd.org; ghebert@littletonpd.org)

Paul J. Smith
Chief of Police
Littleton Police Department
2 Kittridge Lane
Littleton, NH 03561

Gary Hebert
Sergeant
Littleton Police Department
2 Kittridge Lane
Littleton, NH 03561

Re: State v. Richard P. Kearns, No. 454-2014-cr-00136, Littleton Circuit Court

Dear Chief Smith and Sergeant Hebert:

I, along with Leonard D. Harden, represent Defendant Richard P. Kearns—a 72-year-old Vietnam War veteran who has been a member of the Rhode Island bar for over 40 years—in the above-referenced action. The New Hampshire Civil Liberties Union—the New Hampshire affiliate of the American Civil Liberties Union—was retained in this matter yesterday.

We demand the immediate dismissal of the charges against Mr. Kearns for (i) harassment under RSA 644:4, I(f) (a class B misdemeanor), (ii) disorderly conduct under RSA 644:2, II(b) (a violation); and (iii) harassment under RSA 644:4, I(c) (a class B misdemeanor). These charges derive solely from Mr. Kearns' exercising his free speech rights under the First Amendment and Part I, Article 22 of the New Hampshire Constitution; thus, there was absolutely no probable cause to arrest Mr. Kearns under these charges. Mr. Kearns' alleged speech that provides the sole basis for these charges consists of the following: (i) between January 3, 2014 and January 10, 2014, calling Parking Enforcement Officer ("PEO") Austin Bailey a "fucking moron" multiple times and an "idiot"; (ii) that same day, directing the following comment to PEO Bailey while PEO Bailey was across the street from Mr. Kearns' location: "Hey you fucking moron come over here. I want the people in the store to see who you are."; and apparently (though it is unclear) (iii) on January 11, 2014, directing the following comment to a passenger of his vehicle while in the presence of PEO Bailey: "Take a good look at him, he is a fucking parking Nazi."

Frankly, the Littleton Police Department's decision to obtain an arrest warrant and ultimately prosecute Mr. Kearns is outrageous, as it is obvious that each and every one of these alleged statements is not only constitutionally-protected, but also does not even satisfy the elements of the very offenses charged. The Department even went so far as to charge Mr. Kearns with harassment under RSA 644:4, I(f)—a statute which the New Hampshire Supreme Court has deemed an unconstitutional abridgement of free speech rights. *See State v. Pierce*, 152 N.H. 790 (2005). I would also note that the Department's arrest of Mr. Kearns under these charges violated clearly established law—namely, fundamental First Amendment principles—which raises the prospect of individual and municipal liability under 42 U.S.C. § 1983. As a result of his unlawful arrest and prosecution, Mr. Kearns has and continues to suffer substantial damages, including but not limited to the cost of his defense. For these reasons and the reasons below, I ask that you immediately dismiss the charges against Mr. Kearns. As Mr. Kearns' trial

is scheduled for Tuesday, June 17, 2014 and we need to commence trial preparations, I request a response by the **close of business on Thursday, June 12, 2014**. For your immediate review, I have enclosed the discovery produced in this case.

I. Mr. Kearns' Arrest And Prosecution Violate His Clearly Established Free Speech Rights Under The First Amendment And Part I, Article 22 Of The New Hampshire Constitution.

Each of Mr. Kearns' alleged statements that provide the basis for the charges are protected under the First Amendment and Part I, Article 22 of the New Hampshire Constitution. Thus, the three laws that Mr. Kearns is charged with violating cannot be constitutionally applied to his alleged behavior. At the outset, it is worth noting that the speech that Mr. Kearns allegedly engaged in occurred on public sidewalks and streets which, as the New Hampshire Supreme Court has explained, are "fundamental to the continuing vitality of our democracy, for 'time out of mind, [they] have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions.'" *Doyle v. Comm'r, N.H. Dep't. of Resources & Economic Dev.*, 163 N.H. 215, 223 (2012) (quoting *Boos v. Barry*, 485 U.S. 312, 318 (1988)). As such, government entities like the Town of Littleton "are strictly limited in their ability to regulate private speech in [such forums]." *Pleasant Grove City v. Summum*, 555 U.S. 460, 469 (2009). The New Hampshire Supreme Court has further questioned whether, in suppressing speech, a municipality even has a significant governmental interest in "protecting visitors from unwelcome or unwarranted interference, annoyance, or danger." *Doyle*, 163 N.H. at 223; *see also Boos*, 485 U.S. at 318 ("As a general matter, we have indicated that in public debate our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment.") (internal quotations omitted).

The law is clear that swearing (cursing or using profanity) in public or to enforcement officers is protected speech. Therefore, disorderly conduct and harassment citations and arrests for profanity (usually termed "obscenity" in the citations) are unconstitutional. Countless courts have repeatedly held for the last two decades that police cannot arrest people for either using profanity in public or directing it at enforcement officers or civilians. *See e.g.*, *Stearns v. Clarkson*, 615 F.3d 1278, 1282-84 (10th Cir. 2010) ("you're probably the motherfucker that shot my dad" was protected, and not a threat or fighting word that would provide probable cause for arrest; further holding that qualified immunity did not apply at summary judgment); *Johnson v. Campbell*, 332 F.3d 199, 211-15 (3d Cir. 2003) ("son of a bitches" statement to law enforcement was protected speech); *United States v. Poocha*, 259 F.3d 1077 (9th Cir. 2001) (repeatedly saying "fuck you" to park rangers, even in front of crowd, was constitutionally-protected speech that cannot be punished as disorderly conduct); *Gulliford v. Pierce County*, 136 F.3d 1345, 1350 (9th Cir. 1998), *cert. denied*, 525 U.S. 828 (1998) (telling police officer to "get the fuck off the island" was constitutionally-protected speech and could not justify disorderly conduct arrest); *Sandul v. Larion*, 119 F.3d 1250, 1254 (6th Cir. 1997), *cert. denied*, 522 U.S. 979 (1997) (Yelling "fuck you" out a car window at abortion protesters does not create probable cause to arrest the speaker; case law "should leave little doubt in the mind of the reasonable officer that the mere words and gesture 'f–k you' are constitutionally protected speech"; court also rejected qualified immunity defense in holding that "a reasonable officer should have known that the words and gestures employed by Sandul amounted to protected speech"); *Buffkins v. City of Omaha*, 922 F.2d 465, 472 (8th Cir. 1990), *cert. denied*, 502 U.S. 898 (1991) (district court reversed for failing to find as a matter of law that officer did not have probable cause to arrest plaintiff for calling him an "asshole"); *Duran v. City of Douglas, Arizona*, 904 F.2d 1372

(9th Cir. 1990) (police officer did not have probable cause to stop car simply because passenger yelled "fuck you" at him through the window and thus violated First Amendment).[1]

The rationale for these decisions is straightforward. "The freedom of individuals verbally to oppose or challenge police action without thereby risking arrest is one of the principle characteristics by which we distinguish a free nation from a police state." *Houston v. Hill*, 482 U.S. 451, 462-63 (1987). "Criticism of the police, profane or otherwise, is not [and cannot under the First Amendment to the Constitution be] a crime." *Poocha*, 259 F.3d at 1082. And simply because the criticism is accompanied by the "F-word" does not make it a crime.[2]

The police and other enforcement officers (like PEA Bailey) must expect that, as part of their jobs, they will be exposed to daily contact with citizens and that this contact will not always be comfortable. Indeed, "[a] properly trained police officer may reasonably be expected to 'exercise a higher degree of restraint' than the average citizen, and thus be less likely to respond belligerently to" such language. *Hill*, 482 U.S. at 462 (*quoting Lewis v. City of New Orleans*, 415 U.S. 130, 135 (1974) (Powell, J., concurring)). No less is true for enforcement officers like Mr. Bailey. *See also Abudiab v. City & County of San Francisco*, 833 F. Supp. 2d 1168, 1175 (N.D. Cal. 2011) (holding that a finder of fact could conclude that a parking enforcement officer—like a police officer—"should be held to a higher standard of conduct in terms of his reaction to mere criticisms, profane and otherwise, of the manner in which he conducts his official duties"; also explaining, in rejecting qualified immunity defense, that "[w]hether speech is deemed to be 'fighting words' for the purposes of First Amendment protection does not rest upon whether the listener is a peace officer rather than a parking officer, but rather whether the speech is likely to incite immediate violence"). "[W]hile police, no less than anyone else, may resent having obscene words and gestures directed at them, they may not exercise the awesome power at their disposal to punish individuals for conduct that is not merely lawful, but protected by the First Amendment." *Poocha*, 259 F.3d at 1082 (*quoting Duran v. City of Douglas, Arizona*, 904 F.2d 1372, 1378 (9th Cir. 1990)).

Finally, none of Mr. Kearns' alleged speech can remotely be considered "fighting words" or an incitement to imminent lawless action—which are very narrow exceptions to free speech protections. This is especially true where, as alleged, Mr. Kearns never threatened to commit an act of violence against PEO Bailey or any other individual. To characterize speech as actionable "fighting words," the government must prove that there existed "a likelihood that the person addressed would make an immediate violent response." *Gooding v. Wilson*, 405 U.S. 518, 528 (1972); *see also Texas v. Johnson*,

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[1] *See also Johnson v. City of Chester*, 10 F. Supp. 2d 482 (E.D. Pa. 1998) (mayor's disorderly conduct charge against woman who called him an "ignorant bastard" during public comment portion of city council meeting stated action for retaliation in violation of First Amendment); *United States v. McDermott*, 971 F. Supp. 939 (E.D. Pa. 1997) (profane tirade at police officers, including repeated uses of "fuck you," "are insufficient by themselves to constitute constitutionally unprotected fighting words"); *Id.* at 942 ("Emphatic and vulgar expressions of one's discontent with an official's actions, while distasteful to the ear and offensive to the ego, are not— standing alone—'obscene' under the First Amendment and therefore without constitutional protection."); *id.* at 943 ("It is one thing to be called vulgar for one's words, but it is quite another to be held a criminal for them."); *Brockway v. Shepherd*, 942 F. Supp. 1012 (M.D. Pa. 1996) (making obscene gesture, "middle finger" to police officer is constitutionally protected and cannot be disorderly conduct under PA statute).

[2] A state cannot make the simple public display or utterance of a four-letter word, including the "F-word," criminal conduct. *Cohen v. California*, 403 U.S. 15, 25-26 (1971) ("while the particular four-letter word being litigated here ('fuck you') is perhaps more distasteful than most others of its genre, it is nevertheless often true that one man's vulgarity is another's lyric"); *Hess v. Indiana*, 414 U.S. 105, 107 (1973) (holding the yelling "we'll take the fucking streets" could not be punished as fighting words).

491 U.S. 397, 409 (1989) ("invitation to exchange fisticuffs" constitutes fighting words); *State v. Oliveira*, 115 N.H. 559, 562 (1975) (construing New Hampshire's disorderly conduct statute as excluding from its reach offensive words that do not rise to the level of 'fighting words,' and holding that the defendant's use of the words 'f—kin pigs' and 'F—k the political pigs' in a speech were not actionable under the statute because they were not fighting words). As explained in Section II(B) below, Mr. Kearns' alleged speech cannot remotely be considered "fighting words" because there was never a likelihood that PEO Bailey would make an immediate violent response. *See Poocha*, 259 F.3d at 1082 ("Poocha's yelling 'fuck you' at Ranger Lober was [not] ... likely to provoke a violent response ... Poocha's speech is not stripped of its constitutional protection simply because it is accompanied by the aggressive gestures involved—clenching his fists and sticking out his chest. We therefore conclude that Poocha's speech did not constitute fighting words ...."); *Sandul*, 119 F.3d at 1254 (yelling "fuck you" out a car window at abortion protesters did "not rise to the level of fighting words. The actions were not likely to inflict injury or to incite an immediate breach of the peace"). Similarly, Mr. Kearns' alleged statements were clearly neither intended to nor likely to incite members of the public to break the law. *See Brandenburg v. Ohio*, 395 U.S. 444, 447 (1969). As is obvious, the natural import of Mr. Kearns' alleged speech was an expression of criticism of parking enforcement officers and that they are "bad for business"—which is protected political speech—not an incitement of any members of the public to act.

In light of this clearly established precedent demonstrating that Mr. Kearns' alleged statements providing the basis for the charges are constitutionally protected, I strongly encourage you to immediately dismiss all charges against Mr. Kearns. Otherwise, Mr. Kearns will be forced to suffer further damages, including the additional expense of preparing for trial in a case that is almost certain to be immediately dismissed.

II. Mr. Kearns' Alleged Speech Does Not Violate Any Of The Offenses Charged.

There is also no evidence that Mr. Kearns' alleged statements satisfy the elements of each offense charged.

A. Harassment Under RSA 644:4, I(f) (Class B Misdemeanor)

The first charge against Mr. Kearns is for harassment under RSA 644:4, I(f). Under this statute, "[a] person is guilty of a misdemeanor, and subject to prosecution in the jurisdiction where the communication originated or was received, if such person ... [w]ith the purpose to annoy or alarm another, having been previously notified that the recipient does not desire further communication, communicates with such person, when the communication is not for a lawful purpose or constitutionally protected."

Mr. Kearns' alleged speech that provides the sole basis for this charge consists of the following: (i) between January 3, 2014 and January 10, 2014, Mr. Kearns calling PEO Bailey a "fucking moron" multiple times and an "idiot"; and (ii) that same day, Mr. Kearns directing the following comment to PEO Bailey while PEO Bailey was across the street from Mr. Kearns' location: "Hey you fucking moron come over here. I want the people in the store to see who you are."

At the outset, this charge was unlawfully issued and must be immediately dismissed because RSA 644:4, I(f) has been deemed unconstitutional by the New Hampshire Supreme Court. As the Court

held in *State v. Pierce*, 152 N.H. 790 (2005), RSA 644:4, I(f) violates the due process provisions of Part I, Article 15 of the New Hampshire Constitution and the First, Fifth, and Fourteenth Amendments to the U.S. Constitution. As the Court made clear in *Pierce*, RSA 644:4, I(f) "is unconstitutionally overbroad because it criminalizes protected speech, thus chilling First Amendment freedoms." *Id.* at 791. The Court went on to note that, "[w]hile the 'previous notification' requirement limits slightly the breadth of RSA 644:4, I(f), it is not enough to render the statute constitutional." *Id.* at 793. Finally, I would note that the Department's decision to charge Mr. Kearns under a statute that the Supreme Court has deemed unconstitutional is deeply disturbing and raises serious concerns as to the training and supervision of your officers.

B. Disorderly Conduct Under RSA 644:2, II(b) (Violation)

The second charge against Mr. Kearns is for disorderly conduct under RSA 644:2, II(b). Under this statute, "[a] person is guilty of disorderly conduct if ... [h]e or she ... [d]irects at another person in a public place obscene, derisive, or offensive words which are likely to provoke a violent reaction on the part of an ordinary person."

Mr. Kearns' alleged speech that provides the sole basis for this charge consists of, between January 3, 2014 and January 10, 2014, Mr. Kearns directing the following comment to PEO Bailey while PEO Bailey was across the street from Mr. Kearns' location: "Hey you fucking moron come over here. I want the people in the store to see who you are."

This charge must be dismissed because the alleged statement—just like it does not constitute "fighting words"—was not "likely to provoke a violent reaction." As the New Hampshire Supreme Court held in *State v. Boulais*, 150 N.H. 216 (2003), "[b]y using the word 'violent,' the legislature intended to criminalize those offensive words which are likely to provoke extreme force or abnormally sudden physical activity." *Id.* at 218. "Prosecution is authorized under this statute only if the offending remarks create a substantial and unjustifiable risk of violent reaction on the part of an ordinary person." *State v. Hebbard*, No. 2005-0083, 2006 N.H. LEXIS 260, at *1 (N.H. Jan. 26, 2006). It is not enough that the listener experienced feelings of outrage, discomfort, and humiliation, as such a broad interpretation would be "inconsistent with the plain and ordinary meaning of the words used by the legislature." *Boulais*, 150 N.H. at 218. As the Supreme Court made specifically clear:

> We do not agree that an internal emotional response alone is sufficient to satisfy the "violent reaction" element of the statute. Because the disorderly conduct statute is intended to preserve the public peace, it does not provide the State with blanket authority to prosecute citizens for offensive remarks that cause personal embarrassment or outrage in others.

Id. at 219.

Applying these rules to this case, there is zero evidence in the record that Mr. Kearns' comment was "likely to provoke extreme force or abnormally sudden physical activity," nor is there any evidence that this comment was likely to create a breach of the peace. Nowhere in the record is there any indication that PEO Bailey contemplated engaging in violence after hearing the comment (especially where PEO Bailey was across the street at the time of the alleged statement and where such a violent reaction would be unbecoming of a trained PEO). Indeed, as alleged, Mr. Kearns on no occasion ever

threatened to commit an act of violence against PEO Bailey or any other individual. *See, e.g., Warren v. Patrone*, 75 Ohio App. 3d 595, 597 (Ohio Ct. App. 1991) (where individual approached a parking enforcement officer, "threw or placed" a parking ticket near the officer, and told the officer "this is what people think of your asshole tickets, asshole," court held that person's actions would not cause a reasonable person to be provoked into an immediate breach of the peace).

PEO Bailey's own conduct after Mr. Kearns' alleged statement was made also demonstrates that there was no likelihood that the statement was likely to cause a violent reaction either from a member of the public or PEO Bailey himself. PEO Bailey was apparently calm, cool, and collected after the statement was allegedly made, especially given that: (i) PEO Bailey walked across the street to Mr. Kearns; (ii) PEO Bailey informed Mr. Kearns that he would not go in the store because he "didn't want to make a scene"; and (iii) ultimately PEO Bailey walked away. It appears that PEO Bailey's conduct was not one of a person who was on the verge of a violent reaction. Thus, as a matter of law, this charge must be dismissed. *See also Hebbard*, 2006 N.H. LEXIS 260, at *1-2 (no rational trier of fact could find beyond a reasonable doubt that the defendant's comments created a substantial and unjustifiable risk of a violent reaction on the part of an ordinary person where (i) one recipient of the statement testified that she never tried to assault the defendant, and (ii) another recipient "did not have a violent reaction to do something violent" to the defendant); *Boulais*, 150 N.H. at 220 (statute not violated where recipients of direct invitations for sexual activity only felt upset, uncomfortable, and humiliated, which were not sufficient "to satisfy the violent reaction element of the statute"); *see also State v. Murray*, 135 N.H. 369, 371-73 (1992) (because no one other than the arresting officer was disturbed, there was not a public inconvenience, annoyance or alarm necessary for a disorderly conduct violation, and holding that "[o]n the facts here the only persons within hearing of the defendant's verbal assaults were the two officers, who, we hold, were not within the ambit of the statute's protection").

C. Harassment Under RSA 644:4, I(c) (Class B Misdemeanor)

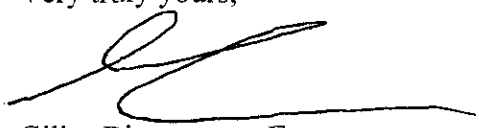
The third charge against Mr. Kearns is for harassment under RSA 644:4, I(c). Under this statute, "[a] person is guilty of a misdemeanor, and subject to prosecution in the jurisdiction where the communication originated or was received, if such person ... [i]nsults, taunts, or challenges another in a manner likely to provoke a violent or disorderly response."

Mr. Kearns' alleged speech that provides the sole basis for this charge consists of, between January 3, 2014 and January 10, 2014, Mr. Kearns calling PEO Bailey a "fucking moron" multiple times. At the outset, for the same reasons discussed above, this alleged speech cannot possibly be viewed as "likely to provoke a violent or disorderly response." There is absolutely no evidence in the record that the bare use of the term "fucking moron" created a substantial and unjustifiable risk of a violent reaction from anyone. In fact, the exact opposite appears to be true. As mentioned in the police report, PEO Bailey, after Mr. Kearns made this statement, allegedly "spoke *calmly* and advised the subject [Mr. Kearns] that he was just doing his job and that he was not going to argue with him. He ... told the subject that he could file a complaint at the town offices or at the station. PEO Bailey ... then walked away from the subject." (emphasis added). This is the very definition of a situation that is *unlikely* "to provoke a violent or disorderly response."[3]

[3] Indeed, in a far more extreme case that did not include speech in a public forum (unlike the case here) where the defendant yelled at the plaintiff and threatened to make the plaintiff's life "a living hell," the New Hampshire Supreme Court held that the speech failed to satisfy the threshold for harassment. *See Fillmore v. Fillmore*, 147 N.H. 283, 286 (2001).

Again, I urge you to review the precedents discussed above, as it is plain that the arrest and prosecution of Mr. Kearns in this case plainly violates his clearly established free speech rights. I look forward to your response by **the close of business on Thursday, June 12, 2014**. I am, of course, more than willing to discuss this matter and to answer any questions you may have concerning the issues discussed above.

Very truly yours,



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Enclosure