AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE
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EXECUTIVE DIRECTOR

March 10, 2015

VIA EMAIL (esteelaw@outlook.com)

Anthony Estee, Esq.
P.O. Box 26
Candia, NH 03034

Re: State v. Jeffrey Clay

Dear Attorney Estee:

I, along with Mark Sisti and Jared Bedrick of Sisti Law Offices, represent Jeffrey Clay—a 20-year U.S. Air Force veteran—concerning the charges the State has filed against him arising out of his arrest during the February 3, 2015 Alton Board of Selectmen ("the Board") meeting for engaging in protected political speech on matters of public concern.

On February 23, 2015, the State filed complaints against Mr. Clay alleging (i) disorderly conduct for "[k]nowingly refus[ing] to comply with a lawful order given by [Alton Police] Chief [Ryan] Heath … to move from a public place, to wit the Alton Town Hall" under RSA 644:2, II(e) and (ii) disorderly conduct for "purposely caus[ing] a breach of the peace by disrupting an Alton Board of Selectmen meeting … by continuing to speak after being informed repetitively by the board that public input was closed" under RSA 644:2, III(c). Each is being charged as a class B misdemeanor, which is punishable by a fine of up to $1,200. Because Mr. Clay's actions were lawful and constitutionally protected, the Town of Alton's ("the Town") suppression of his speech based on pure viewpoint discrimination and ultimate decision to arrest and prosecute him under RSA 644:2 were without lawful authority. Thus, there was no probable cause to arrest Mr. Clay, and the Town's actions have violated, and continue to violate, Mr. Clay's clearly-established free speech rights under the First Amendment and Part I, Article 22 of the New Hampshire Constitution.

Mr. Clay's comments during the February 3 Board meeting that led to his arrest (i) were made as part of a general public input period broadly designed to, as the Town's policy states, "provide the Board with an opportunity to receive directly from citizens any concerns, desires, or hopes they may have for the community," (ii) were political in nature, (iii) were made within the 5-minute time frame allotted to speakers, and (iv) were not remotely disruptive to the proceedings. Speech is not "disruptive" simply because it is critical of public officials. Given these facts, it is apparent that the Town's decision to suppress Mr. Clay's speech was based solely on the viewpoint it conveyed. Viewpoint discrimination—especially when such discrimination concerns political speech—is abhorrent not only to the Constitution, but also to this nation's deep history of allowing alternative and dissenting perspectives to be conveyed freely and without fear of prosecution. A video of this incident can be found at http://youtu.be/RYnSJZTFghY.

In light of this legal analysis, which is explained in more detail below, we trust that the State will immediately dismiss all charges against Mr. Clay well before his March 19, 2015 arraignment date. In light of the upcoming arraignment, we request a response by Monday, March 16.

The Facts

The facts, which the video makes clear, are the following: The Board of Selectmen opened up its February 3, 2015 meeting for "Public Input I" following the Town Administrator's Report and Update. Under a January 14, 2015 Board policy, these public input sessions are designed "to provide the Board with an opportunity to receive directly from citizens any concerns, desires, or hopes they may have for the community." The public input session is not limited to specified topics.

Mr. Clay was the first to speak, and he was given 5 minutes per the January 14 policy. He brought a timer to the table so he would be permitted to speak for the full 5 minutes. During Mr. Clay's speech, he asked all Board members to resign for their "poor actions as selectmen," "poor decisions," and "continued violations of the citizens' rights here in Alton." His remarks referenced, in part, his belief that the Board has violated New Hampshire's Right-to-Know law by holding "workshop" sessions at odd hours of the day and making decisions during them that were not transparent. He did not raise his voice or use any profanities.

Approximately 40 seconds into the remarks, Selectman David Hussey interrupted Mr. Clay, called the remarks "character assassination," and requested a "point of order." Mr. Hussey then left the room for less than 5 seconds, apparently in search of Alton Police Chief Ryan Heath. When Mr. Hussey returned—and while Mr. Clay was still speaking—Chairman R. Loring Carr recognized Mr. Hussey's request and ultimately proposed a "point of order" to "clos[e] down public input" because of the "libelous" and "defamatory statements made by Mr. Clay." Mr. Clay then stopped his timer. The 5-member Board then, with no dissenters, immediately approved the "point of order" closing down public input. Selectmen Hussey then left the room again, apparently in search of Chief Heath. All of this occurred within the first 2 minutes of Mr. Clay's allotted time.

After the Board vote, Mr. Clay restarted his timer and continued to peacefully express his political views, stating the following:

> Integrity is the quality of being honest and having strong moral principles—moral uprightness. It is generally a personal choice to uphold oneself consistently to moral and ethical standards. Integrity also demands knowledge and compliance with both the letter [and] spirit of the written and unwritten rules. To this end, this Board is morally corrupt. It is bankrupt. It is without integrity .... We the citizens pay the price in legal fees for your representation. Two little words: [I] Resign .... Stand up and resign now.
>
> Alton deserves better. Audacity is defined as boldness and daring, especially with confident, arrogant disregard for laws and rules and policies. Continued violations cannot be tolerated by the public. Stand up, take responsibility for your willful violations of the rights of the community. Resign. Do it now. Two little words. Stand up and resign.

While Mr. Clay peacefully engaged in the speech above, the Board continued to attempt to silence him before his 5 minutes had expired on the purported ground that public input had been closed. Chief Heath then approached Mr. Clay and asked him to stop speaking several times. Because Mr. Clay was not being disruptive and was merely exercising his political views peacefully within his 5 minutes of allotted time, he declined and kept conveying the remarks above. Chief Heath then informed Mr. Clay that he was under arrest. Mr. Clay immediately cooperated with the arrest, and Chief Heath removed Mr. Clay from the room by holding Mr. Clay's arm behind his back. Mr. Clay was arrested after speaking for less than 4 minutes.

After Mr. Clay's arrest, the Board then immediately reopened public input without a formal vote and permitted another individual to speak. This individual stated before his remarks that he "was happy with the Select people and you don't have to stand up and resign on my account. I like what you're doing." The Board took no action against this individual.

The Town's Actions in Arresting Mr. Clay Violated The First Amendment and Part 1, Article 22 of the New Hampshire Constitution

As created by the Town, the public input session at the February 3 Board meeting where speakers are allotted 5 minutes to voice any concerns, regardless of content, was clearly a designated public forum. *See, e.g., City of Madison Joint Sch. Dist. No. 8 v. Wis. Pub. Emp't Relations Comm'n*, 429 U.S. 167, 176 (1976) ("[W]hen the board sits in public meetings to conduct public business and hear the views of citizens, it may not be required to discriminate between speakers on the basis of . . . their speech."); *Surita v. Hyde*, 665 F.3d 860 (7th Cir. 2011); *Norse v. City of Santa Cruz*, 629 F.3d 966, 975 (9th Cir. 2010) ("council meetings, once to public participation, are limited public forums"); *Mesa v. White*, 197 F.3d 1041, 1044 (10th Cir. 1999) ("although the commission need not have created this forum in the first place, once it did so, the commission became bound by the same standards that apply in the case of a traditional public forum"); *White v. City of Norwalk*, 900 F.2d 1421, 1425 (9th Cir. 1990) ("City Council meetings like Norwalk's, where the public is afforded the opportunity to address the Council, are the focus of highly important individual and governmental interests .... [S]uch meetings, once opened, have been regarded as public forums, albeit limited ones.").

Accordingly, content-neutral time, place, and manner restrictions with respect to this designated public forum are permissible if they are narrowly drawn to achieve a significant governmental interest and if they allow communication through other channels. Content-based exclusions must be narrowly tailored to effectuate a compelling governmental interest. *Mesa*, 197 F.3d at 1044. Moreover, viewpoint discrimination is almost universally condemned and rarely passes constitutional scrutiny. "The government bears a particularly heavy burden in justifying viewpoint-based restrictions in designated public forums. Viewpoint discrimination is an egregious form of content discrimination. Content-based restrictions are subject to strict scrutiny. Viewpoint-based restrictions receive even more critical judicial treatment." *Id.* at 1047 (quoting *Church on the Rock v. City of Albuquerque*, 84 F.3d 1273, 1279 (10th Cir. 1996)). In short, in such a fora, municipal officials should know "that the government may never suppress viewpoints it doesn't like." *Norse*, 629 F.3d at 979 (Kozinski, J., concurring). And, to eject a speaker from a public meeting, the speech must "disrupt[,] disturb[] or otherwise impede[] the orderly conduct of the Council meeting." *White*, 900 F.2d at 1424-25.

Here, Mr. Clay's free speech rights embedded within the First Amendment and Part 1, Article 22 of the New Hampshire Constitution were violated because (i) the Town's actions in suppressing Mr. Clay's speech were, without proper justification, both content based and viewpoint discriminatory, (ii) Mr. Clay's speech was not disruptive of the Board proceedings, and (iii) Mr. Clay's speech was not "libelous" or "defamatory."

I. The Town Engaged In Content-Based and Viewpoint Discrimination in Suppressing Mr. Clay's Protected Political Speech.

Given the facts that are illuminated in the video, it is apparent that the Town, including by formal vote, suppressed Mr. Clay's speech because of its specific content and in a viewpoint discriminatory fashion—namely, because of the speech's content and viewpoint that the Board had engaged in "poor actions as selectmen," "poor decisions," and "continued violations of the citizens' rights here in Alton." These comments, though undoubtedly critical, were peaceful, made within the 5 minutes allotted, and well within the Board's agenda of allowing public input on "any concerns, desires, or hopes they may have for the community." Because Mr. Clay was complying with all Board policies, *see infra* Section III, it is clear that the Town's actions were motivated by a desire to suppress Mr. Clay's viewpoint. Put another way, the only interest that the Town can demonstrate is an illegitimate interest—the suppression of Mr. Clay's speech.

This discrimination is proven by the remarks of Selectmen Hussey himself, who wanted Mr. Clay's speech stopped after approximately 40 seconds because he believed it was "character assassination." It is obvious that, if Mr. Clay had expressed the viewpoint that the Board has engaged in "*good* actions as selectmen," "*good* decisions," and "continued *upholding* of the citizens' rights here in Alton," he would have been permitted to speak for the full 5 minutes allotted. And, if there is any further doubt that the Town engaged in unconstitutional viewpoint discrimination, it is dispelled by the fact that the Board immediately reopened the public input period for other viewpoints after Mr. Clay was arrested. When public input was reopened, the next speaker praised the Board. Tellingly, the Board took no action against this speaker who expressed a viewpoint precisely the opposite of Mr. Clay's.

In a free society, governmental officials are required to tolerate harsh criticism and even a demeaning attitude towards them—including viewpoints that can feel like "character assassination"—and cannot discriminate based on these critical viewpoints. *Norse*, 629 F.3d at 979 ("But, unlike der Fuhrer, government officials in America occasionally must tolerate offensive or irritating speech.") (Kozinski, J., concurring); *see also Boos v. Barry*, 485 U.S. 312, 322, (1988) ("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."). Thus, speech directed to and about the government is singled out for First Amendment protection because speech—including about how well or badly officials carry out their duties—lies at the very heart of the First Amendment. Just as concerning, the Town's actions in suppressing Mr. Clay's speech will chill others from engaging in future speech that is critical of the Board.

The Town's content-based and viewpoint discriminatory actions are further confirmed by the fact that Mr. Clay's speech plainly did not constitute a true threat, "fighting words," or an incitement to imminent lawless action—which are very narrow exceptions to free speech protections. First, Mr. Clay

never threatened to commit an act of violence against the Board or any other individual, and therefore this speech is not a threat. Second, to characterize speech as actionable "fighting words," the State 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*, 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). Nothing in Mr. Clay's speech reaches this level, especially where there is no contention (because it would not be credible) that this speech is reasonably likely to provoke a violent reaction on the part of the Board or any meeting attendee. *See 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 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"). Third, Mr. Clay's statements were 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). Here, Mr. Clay's speech was, at most, sternly critical. This is far from the rigorous standard justifying governmental censorship of political speech: "Speech is often provocative and challenging .... [B]ut it is nevertheless protected against censorship or punishment, unless shown likely to produce a clear and present danger of a serious substantive evil that rises far above public inconvenience, annoyance, or unrest." *Terminielo v. Chicago*, 337 US. 1, 4 (1974).

In short, there is little doubt that (i) the Town's attempt to suppress Mr. Clay's speech by closing the public input session was unlawful and constituted impermissible content-based and viewpoint discrimination, (ii) Mr. Clay's had a constitutional right (and otherwise had "lawful authority" under RSA 644:2, III(c)) to peacefully speak for his full allotted 5 minutes on matters of public concern, and (iii) therefore the orders by the Town designed to prevent Mr. Clay from peacefully speaking for his full allotted 5 minutes were not "lawful orders." *See State v. Biondolillo*, 164 N.H. 370, 376 (2012) (noting that RSA 644:2, II(e) cannot be applied where the defendant was "engaged in constitutionally-protected conduct"); *see also Cox v. Louisiana*, 379 U.S. 536, 551-52 (1965) (invalidating breach-of-peace statute construed to forbid causing agitation or disquiet coupled with refusing to move on when ordered to do so on the ground that it permitted conviction where the mere expression of unpopular views prompted the order that is disobeyed).

II. Mr. Clay's Speech Was Not Disruptive.

In *State v. Dominic*, 117 N.H. 573 (1977), the New Hampshire Supreme Court explained that a speaker can be lawfully removed from a public meeting without violating free speech principles if his or her conduct "prevent[s] the selectmen from continuing their meeting" and impacts "the rights of others to speak in an orderly manner." *Id.* at 576; *see also Norse*, 629 F.3d at 979 (Kozinski, J., concurring) ("The Supreme Court long ago explained that 'in our system, undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.' Even in a limited public forum like a city council meeting, the First Amendment tightly constrains the government's power; speakers may be removed only if they are actually disruptive.") (quoting *Tinker v. Des Moines Ind. Cmty. Sch. Dist.*, 393 U.S. 503, 508 (1969)); *Monteiro v. City of Elizabeth*, 436 F.3d 397, 405 (3d Cir. 2006) ("Perkins-Auguste's argument that she could have conceivably (and constitutionally) ejected

Monteiro on the basis of his disruptions is unavailing in the face of a jury verdict concluding that she acted with a motive to suppress Monteiro's speech on the basis of viewpoint.").

Mr. Clay's speech during the February 3 meeting was neither disruptive, disorderly, nor a "breach of the peace," as Mr. Clay was merely speaking within his 5 minutes allotted. Mr. Clay never attempted to speak beyond his 5 minutes allotted, as that arguably would have prevented the Board from accomplishing its business in a reasonably efficient manner. Mr. Clay's speech was also squarely within the Board's broad policy of allowing comment on "any concerns, desires, or hopes they may have for the community" during public input sessions. *See State v. Baer*, No. 450-2014-cr-01152 (Laconia Cir. Ct. Dec. 17, 2014) ("The Court does not find the actions of the Defendant to be criminal in nature which is necessary in the ordering of restrictions on a citizen's liberties in First Amendment considerations. The Court finds that the Defendant citizen's action never created a breach of peace sustaining a criminal complaint.") (Carroll, J.). Mr. Clay spoke when he was recognized. His gestures were reasonable and non-aggressive. He did not yell. He was calm. He did not use profanities. He did not engage in any physical theatrics. He did not physically approach any of the Board members. He simply spoke out against what he believes are unlawful Town practices, and he attempted to do so peacefully for the full 5 minutes allotted. For that, his speech was suppressed and he was arrested. His remarks were legitimate and protected. His remarks cannot be deemed "disruptive" merely because they are critical or have an emotive impact on Board members. Therefore, Mr. Clay's arrest and removal were both unconstitutional and not in compliance with RSA 644:2, III(c).

This is a situation where the video speaks for itself. We encourage you to watch the video that only demonstrates the non-disruptive nature of Mr. Clay's speech. As you will see, the only thing that is disruptive is the Town's repeated attempts to interrupt Mr. Clay and suppress his peaceful political speech within the 5-minute period he was allotted.

III. The Town's Actions Violated Its Own Policy.

The Town's decision to suppress Mr. Clay's speech even violated the Town's January 14, 2015 policy for public participation at Board meetings. This is true for at least three reasons. First, Mr. Clay's speech was suppressed within the 5 minutes he was allotted under the policy. Second, the policy broadly makes clear that its purpose "is to provide the Board with an opportunity to receive directly from citizens concerns, desires, or hopes they may have for the community." Nothing in the policy allows the Board to engage in viewpoint discrimination and suppress speech that is critical. And if it did, it would be facially unconstitutional. Mr. Clay indisputably complied with this policy in communicating his "concerns, desires and hope" that Board members resign their position. Simply put, his remarks were within the Board's agenda.

Third, nothing about Mr. Clay's speech was "libelous" or "defamatory" under the January 14 policy because the speech constituted protected opinion. *See Thomas v. Tel. Publ'g Co.*, 155 N.H. 314, 321 (2007) ("plaintiff proves defamation by showing that the defendant failed to exercise reasonable care in publishing a false and defamatory *statement of fact* about the plaintiff to a third party, assuming no valid privilege applies to the communication.") (quoting *Pierson v. Hubbard*, 147 N.H. 760, 763 (2002)) (emphasis added). Mr. Clay's speech was "meant to be persuasive," was "a call to action," and "meant to cause outrage" in the listener. As the New Hampshire Supreme Court and other courts have

repeatedly held, such statements cannot be considered defamatory or libelous.[1] *See id.* at 339-40; *see also Witcherman v. Community Action Council*, No. C0-94-1241, C8-94-1360, 1995 Minn. App. LEXIS 183, at *5 (Minn. Ct. App. Feb. 7, 1995) ("At worst, Ajax's statements conveyed that Ajax wished Witcherman to resign, and that she was angry with her. These statements are true, and are not actionable [defamation]."),[2]

Mr. Clay's statements also cannot be viewed as defamatory because his speech was privileged. As the New Hampshire Supreme Court has explained, under Part I, Article 32 of the New Hampshire Constitution, speech directed to a local governing body calling for the removal of a public officer is qualifiedly privileged. *See Pickering v. Frink*, 123 N.H. 326, 331 (1983) ("the desirability of allowing unfettered exercise of the constitutional right to petition for the removal of a public official is a factor that weighs so significantly in the public interest as to require greater protection to the exercise of that right than the common-law qualified or conditional privilege generally provides"; further holding "that, unless the defendants had knowledge of the falsity of the statements of facts, their petition in this case was privileged, and they are not subject to liability for any defamatory statements contained in the petition."); *see also* N.H. Const. pt. 1, art. 8 ("All power residing originally in, and being derived from, the people, all the magistrates and officers of government are their substitutes and agents, and at all times accountable to them. Government, therefore, should be open, accessible, accountable and responsive."). Simply put, opinions conveyed in public meetings are both non-defamatory and privileged. The Town's incorrect and overbroad interpretation of "defamation" and "libel" has suppressed (and will continue to suppress) speech that is constitutionally-protected. We trust that the Town will immediately correct its incorrect interpretation to ensure that free speech rights are not unconstitutionally chilled in the future.

Finally, we have enclosed the December 2014 order in *State v. Baer* from Judge James M. Carroll of Laconia Circuit Court, who will hear the pending case. As in *Baer*, "if the level of offensiveness of the [Mr. Clay's] actions were to sustain any of one of these criminal allegations, the State would be authorized to limit a citizen's free speech exercise such that it would be purely discretionary." Indeed, as in *Baer*, the Court here likely will give considerable pause "as to the chilling, if not silencing of a citizen by the State, for actions which do not warrant a criminal arrest nor conviction."

We urge you to review the precedents discussed above and immediately dismiss all charges against Mr. Clay, as it is plain that the arrest of Mr. Clay in this case violated his clearly-established free speech rights and continues to cause him damage. We look forward to your response by Monday,

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[1] In *Thomas c. Tel. Publ'g Co.*, the New Hampshire Supreme Court cited favorably to *Jorg v. Cincinnati Black United Front*, 792 N.E.2d 781, 784 (Ohio App. Ct. 2003), in which a civil rights organization accused a police department and some of its officers of having committed crimes of "murder, rape and planting evidence." While such accusations at times might be based on undisclosed facts, the Court stated that they must be interpreted in context, and that, "... given the unique nature and tenor of the letter," it was "hyperbole," "meant to be persuasive," "a call to action," and "meant to cause outrage in the reader." *Id.* at 786. The Court further deemed the letter at issue "a persuasive piece of advocacy and not a news article purporting to be objective reporting." *Id.* As such, the letter and its statements were clearly protected opinion.

[2] Moreover, because a Board member is a public official, speech concerning a Board member can only be defamatory if the statements of fact are false and made with "actual malice." This high standard "flows, in part, from a recognition that public figures have voluntarily exposed themselves to increased risk of injury from defamatory falsehoods, given their assumption of 'an influential role in ordering society.'" *Lassonde v. Stanton*, 157 N.H. 582, 589 (2008) (quoting *Thomas*, 155 N.H. at 341).

March 16. Either I, Jared, or Mark are 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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