UNITED STATES DISTRICT COURT
for the
DISTRICT OF NEW HAMPSHIRE

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

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

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

SUMMARY OF ARGUMENT

The Town of Farmington used Section C.4(a)(1) of its social media policy to terminate Plaintiff. This section bans the Town's public employees from, in part, expressing themselves on social media in a way that "negatively affects the public perception of the town." This policy, on its face, violates the First Amendment of the U.S. Constitution and N.H. RSA 98-E. This is not a close question.

This *amicus* brief makes three points. First, the policy is hopelessly overbroad under the First Amendment and effectively bans speech simply because the Town disfavors it. As the First Circuit has explained, the First Amendment protects employee speech critical of the government, "since it is likely that the government would be motivated to stifle only critical, revealing, or embarrassing remarks." *Brasslett v. Cota*, 761 F.2d 827, 844 (1st Cir. 1985). Yet the Town's policy impermissibly and sweepingly bans this critical speech that would, by its very nature, cast

the Town in a negative light. Indeed, this policy sweeps within its scope "negative" speech by employees in their individual capacity concerning the Town that would be of obvious public concern and promote government accountability, thereby outweighing any interest the Town may have in the efficient operation of the workplace.

Second, Section C.4(a)(1)'s "negatively affect the public perception" of the Town standard is impossibly vague. This standard does not give employees notice of what they can and cannot say online about the Town to comply with the policy. Put another way, the policy is so ambiguous that it allows for Town officials to engage in arbitrary and discriminatory decision-making in determining whether an employee has violated its terms. This vagueness is particularly intolerable given the free speech rights implicated and the potentially severe employment penalties for lack of compliance. This ambiguity—especially given the Town's actions against the Plaintiff—will undoubtedly cause employees to suppress constitutionally protected online speech in order to avoid the prospect of punishment.

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

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

INTEREST OF AMICUS CURIAE

The American Civil Liberties Union of New Hampshire ("ACLU-NH") is the New Hampshire affiliate of the American Civil Liberties Union ("ACLU")—a nationwide, nonpartisan, public-interest organization with over 1.2 million members (including over 8,000 New Hampshire members). The ACLU-NH engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of individual rights guaranteed under federal and state law, including the right to freedom of speech under the First Amendment.

The ACLU-NH, as well as the national ACLU, have appeared before federal and state courts in numerous free speech cases, both as direct counsel and as *amicus curiae*. This includes most recently the following New Hampshire cases: *Rideout v. Gardner*, 123 F. Supp. 3d 218 (D.N.H. 2015), *aff'd*, 838 F.3d 65 (1st Cir. 2016), *cert. denied*, 2017 U.S. LEXIS 2292 (2017) (striking down New Hampshire law banning certain forms of online speech on grounds that it violates the First Amendment); *Pendleton v. Town of Hudson, et al.*, No. 1:14-cv-00365-PB (D.N.H., filed Aug. 20, 2014) (resolved civil rights action challenging on First, Fourth, and Fourteenth Amendment grounds the Town of Hudson's practices of unlawfully detaining, harassing, threatening, trespassing, dispersing, and charging individuals who peacefully panhandle in public places; obtained stipulated injunctive relief and $37,500 settlement); *Clay v. Town of Alton, et al.*, No. 1:15-cv-00279-JL (D.N.H., filed July 14, 2015) (resolved civil rights action where client was, in violation of the First Amendment, arrested during a public meeting

simply for engaging in political, non-disruptive speech on matters of public concern; obtained $42,500 settlement); *Valentin v. City of Manchester, et al.*, No. 1:15-cv-00235-PB (D.N.H.) (pending civil rights action addressing the First Amendment right to record the police where ACLU-NH client was arrested for audio recording a conversation with two Manchester police department officers while in a public place and while the officers were performing their official duties); *Y.F. v. Wrenn*, No. 1:15-cv-00510-PB (D.N.H., filed Dec. 18, 2015) (pending First Amendment challenge to New Hampshire Department of Corrections' prison mail policy that bans all incoming original drawings and pictures, as well as greeting cards); *Petrello v. City of Manchester, et al.*, No. 1:16-cv-00008-LM (D.N.H., filed Jan. 11, 2016) (pending First Amendment challenge to City of Manchester's anti-panhandling practices); and *City of Keene v. Cleaveland*, 167 N.H. 731 (2015) (affirming, in part, dismissal of civil causes of action against speakers on the ground that "the First Amendment shields the respondents from tort liability for the challenged conduct"). The national ACLU has also been involved in a series of cases that have helped define the free speech rights of public employees, including *Lane v. Franks*, 134 S. Ct. 2369 (2014) (as amicus), *Garcetti v. Ceballos*, 547 U.S. 410 (2006) (as amicus), and *United States v. Nat'l Treasury Employees Union ("NTEU")*, 513 U.S. 454 (1995) (representing the plaintiffs). Thus, the ACLU-NH has a strong interest in ensuring that all citizens in New Hampshire—including public employees—are protected when they make statements of public concern on social media platforms.

Because this case presents important questions about the free speech rights of public employees, proper resolution of this matter is of significant concern to the ACLU-NH and its members. Indeed, this case presents an issue of exceptional importance concerning the constitutionality under the First Amendment of a municipal social media policy that, in part, bans

an employee from, on his or her personal time, making statements on social media that "negatively affect the public perception of the … Town." The ACLU-NH believes that its experience in the legal issues surrounding free speech rights will make its brief of service to the Court.

ARGUMENT

Online political speech is not only protected under the First Amendment, but it has become vital to American culture. For most people throughout the United States, smart phones, the Internet, and social media platforms have become the predominant means for communication and public discourse. When the Internet was in its infancy, the United States Supreme explained: "Through the use of chat rooms, any person with a phone line can become a town crier with a voice that resonates farther than it could from any soapbox. Through the use of Web pages, mail exploders, and newsgroups, the same individual can become a pamphleteer." *Reno v. ACLU*, 521 U.S. 844, 870 (1997); *see also Clement v. Cal. Dep't of Corrs.*, 364 F.3d 1148, 1151 (9th Cir. 2004) (holding [t]he First Amendment "protects material disseminated over the internet as well as by the means of communication devices used prior to the high-tech era").

With the recent ubiquity of smartphones, this reality is even more pronounced. The ideas, opinions, emotions, actions, and desires capable of communication through the Internet are now limited only by the human capacity for expression. As of 2015, nearly two-thirds (64%) of American adults own a smartphone, and three-quarters of smartphone owners report using their phone for social media.[1] Given this trend, the First Circuit has reiterated the importance of the Internet in modern society. *See, e.g., Rideout v. Gardner*, 838 F.3d 65, 75 (1st Cir. 2016) ("As amici point out, there is an increased use of social media and ballot selfies in particular in service

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

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

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

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

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

of the … Town." This policy is substantially overbroad—and therefore invalid as a matter of law—because a substantial number of its applications are unconstitutional judged in relation to the policy's plainly legitimate sweep. *See United States v. Stevens*, 559 U.S. 460, 473 (2010) ("In the First Amendment context, however, this Court recognizes a second type of facial challenge, whereby a law may be invalidated as overbroad if a substantial number of its applications are unconstitutional, judged in relation to the statute's plainly legitimate sweep.") (internal quotations omitted); *Ashcroft v. Free Speech Coal.*, 535 U.S. 234, 237 (2002) (same). Indeed, the Fourth Circuit Court of Appeals recently struck down a similar social media policy banning "[n]egative comments on the internal operations of the Bureau [of Police], or specific conduct of supervisors or peers that impacts the public's perception of the department . . ." *Liverman v. City of Petersburg*, 844 F.3d 400, 404 (4th Cir. 2016). Other courts have reached similar decisions concerning bans on criticism. *See, e.g., Wagner v. City of Holyoke*, 100 F. Supp. 2d 78, 87–88 (D. Mass. 2000) (holding the ban on criticism of other officers was unconstitutionally overbroad); *Gasparinetti v. Kerr*, 568 F.2d 311, 316–17 (3rd Cir. 1977) (invalidating a police department's rule against public disparagement of official actions of superior officers on First Amendment overbreadth grounds). The *Liverman* decision guides this *amicus* brief's analysis and approach.[2]

Americans do not lose their right to free speech when they become government employees. Public employees may not "be compelled to relinquish the First Amendment rights they would otherwise enjoy as citizens to comment on matters of public interest . . . " *Pickering*

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

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

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

interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Id.*; *see also Connick*, 461 U.S. at 142.

When evaluating the facial constitutionality of a speech restriction—as this *amicus* brief does in evaluating the constitutionality of the Town's social media policy—the Court's review is broader than the analysis employed when examining a disciplinary action. *See NTEU*, 513 U.S. at 466-67; *Liverman*, 844 F.3d at 409. This facial analysis begins with the United States Supreme Court's decision in *NTEU*. *NTEU* involved a statute that prohibited federal employees from accepting any compensation for giving speeches or writing articles, even when the topic was unrelated to the employee's official duties. *See NTEU*, 513 U.S. at 457. Emphasizing that the honoraria ban impeded a "broad category of expression" and "chills potential speech before it happens," the Court held that "the Government's burden is greater with respect to this statutory restriction on expression than with respect to [the] isolated disciplinary action[s]" in *Pickering* and its progeny. *Id.* at 467, 468. Accordingly, "[t]he Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." *Id.* at 468 (quoting *Pickering*, 391 U.S. at 571). Further, the government "must demonstrate that the recited harms are real, not merely conjectural, and that the regulation will in fact alleviate these harms in a direct and material way." *Id.* at 475.

Like the speech bans in *NTEU* and *Liverman*, the Town's social media policy impedes a "broad category of expression" and "chills potential speech before it happens." *Liverman*, 844 F.3d at 407 (quoting *NTEU*, 513 U.S. at 467, 468). At the outset, it cannot be seriously disputed that the Town's social media policy regulates employees' rights to speak on matters of public

concern. Like the restriction in *Liverman*, this "restraint is a virtual blanket prohibition on all speech critical of the government employer," as such speech would, by definition, cast the Town in a negative light. For example, the policy effectively prevents all employees "from making unfavorable comments on the operations and policies of the [Town], arguably the 'paradigmatic' matter of public concern." *Liverman*, 844 F.3d at 407–08 (quoting *Sanjour v. EPA*, 56 F.3d 85, 91 (D.C. Cir. 1995)). The following instances of "critical" speech of public concern were deemed constitutionally protected, yet they would have been banned by the Farmington policy had they taken place online:

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

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

- *Hamm v. Williams*, No. 1:15-cv-273, 2016 U.S. Dist. LEXIS 134486, at *6 (N.D. Ohio Sept. 29, 2016) (police officer's social media comments on indictments of fellow officers and the surrounding circumstances, as well as expression of support for the officers, were constitutionally protected).

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

> [S]ocial networking sites like Facebook have also emerged as a hub for sharing information and opinions with one's larger community. And the speech prohibited by the policy might affect the public interest in any number of ways, including

> whether the Department is enforcing the law in an effective and diligent manner, or whether it is doing so in a way that is just and evenhanded to all concerned. The Department's law enforcement policies could well become a matter of constructive public debate and dialogue between law enforcement officers and those whose safety they are sworn to protect.

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

Because the Town's social media policy imposes a significant burden on expressive activity that is of public concern, this Court must consider whether the Town has adequately established "real, not merely conjectural" harms to its operations. *See NTEU*, 513 U.S. at 475. Farmington Board of Selectman Chairman Charlie King testified at deposition that the policy was necessary to regulate comments that would disrupt an employee's ability to perform his or her job. King Depo. 8:19–9:1; 14:20–15:20. Even if this interest is legitimate, here—as in *Liverman*—the Town has not satisfied its burden of demonstrating actual disruption to its mission from "negative" comments that would necessitate such an overbroad policy. Apart from the Town's generalized desire to prevent impairment of job duties, there is little evidence of any material disruption arising from Plaintiff's—or any other employee's—comments on social media. As the Court explained in *Liverman*, "the speculative ills targeted by the social networking policy are not sufficient to justify such sweeping restrictions on [employees'] freedom to debate matters of public concern." *Liverman*, 844 F.3d at 408–09; *see also Connick*, 461 U.S. at 152.

Finally, it is worth noting that Section C.4(a)(3) of the Town's social media policy—which was another basis for Plaintiff's termination—suffers from the same constitutional defect in broadly banning various protected forms of online speech that are of public import. This provision bans employees from posting any information which "they have access [to] as a result of their position without permission from the appropriate authority." This preclearance requirement applies regardless of whether the information conveyed is of public import, is confidential, or is otherwise publicly accessible. Similar policies requiring preclearance before conveying non-confidential information to the public have been rejected, especially because they inhibit criticism based on information acquired by the public employee. *See, e.g.*, *Harman v. City of New Yor*k, 140 F.3d 111, 116, 120 (2d Cir. 1998) (invalidating policy that "[a]ll contacts with the media regarding any policies or activities of the Agency … must be referred to the ACS Media Relations Office before any information is conveyed by an employee or before any commitments are made by an employee to convey information"); *Wagner*, 100 F. Supp. 2d at 89–90 (ban on releasing information to the media was unconstitutionally overbroad; holding that, "[b]y allowing only the Chief of Police or his designee to release information regarding policy, discipline, organizational changes, and criticisms, the rule prohibits a substantial amount of otherwise permissible speech"); *LOA v. City of New York*, 165 F. Supp. 2d 587, 587–88, 591–92 (2001) (holding the NYPD's policy requiring police officers to provide pre-speech notice and post-speech reporting when making statements about the NYPD at a public event "impermissibly infringes plaintiff's right to free speech" under the *Pickering* balancing test). Indeed, in this case, the Town appears to be applying this policy to ban an employee from even referencing information on social media that has already been made public. *See* Aug. 31, 2015 Farmington Meeting Minutes ("Chief Reinert said employees are not allowed to discuss or divulge this type

of information *even it has been discussed elsewhere*.") (emphasis added); *see also* King Depo. 22:17-22; 23:12-19; 35:9-13 (stating that information could not be disclosed under the policy even if "it was disclosed to the general public"). Moreover, it is established that speech can be of public concern—and therefore be constitutionally protected—even if it contains nonpublic information. *See Eschert*, 2017 U.S. Dist. LEXIS 84893, at *5 (holding speech conveying non-public information was protected). In fact, the constitutional protections afforded to public employees assume that public officials will engage in speech that is informed by their employment. *See Waters*, 511 U.S. at 674.

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

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

Independent of but related to the ACLU's overbreadth argument, Section C.4(a)(1)'s language barring speech that "negatively affect[s] the public perception" of the Town is unconstitutionally vague.

A statute is void for vagueness "if its prohibitions are not clearly defined." *Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972); *see also Montenegro v. N.H. DMV*, 166 N.H. 215, 220 (2014) ("The vagueness doctrine, originally a due process doctrine, applies when the statutory language is unclear, and is concerned with notice to the potential wrongdoer and

prevention of arbitrary or discriminatory enforcement.") (internal quotations omitted). A law may be void for vagueness if it fails to give a "person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly." *Grayned*, 408 U.S. at 108; *see also Montenegro*, 166 N.H. at 221–22. The vagueness doctrine serves to "[rein] in the discretion of enforcement officers." *See Montenegro*, 166 N.H. at 222 (quoting *Act Now to Stop War & End Racism Coal. v. District of Columbia*, 905 F. Supp. 2d 317, 330 (D.D.C. 2012)). As the New Hampshire and U.S. Supreme Courts have stated, "if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them." *See Montenegro*, 166 N.H. at 222 (citing *Grayned*, 408 U.S. at 108). When First Amendment interests are at stake, "[c]ourts apply the vagueness doctrine with special exactitude." *Montenegro*, 166 N.H. at 222 (quoting *Act Now to Stop War*, 905 F. Supp. 2d at 351). This exactitude is necessary to avoid chilling lawful, constitutionally protected speech, as "[u]ncertain meanings inevitably lead citizens to steer far wider of the unlawful zone than if the boundaries of the forbidden areas were clearly marked." *Grayned*, 408 U.S. at 109; *see also Johnson v. United States*, 135 S. Ct. 2551, 2560–61 (2015) ("In all events, although statements in some of our opinions could be read to suggest otherwise, our holdings squarely contradict the theory that a vague provision is constitutional merely because there is some conduct that clearly falls within the provision's grasp.").

The policy's fatal ambiguity is obvious. The phrase "negatively affect[s] the public perception [of the Town]" is so imprecise that employees will have no way of knowing with any certainty how to conform their speech to ensure that they will not be punished by Town officials. The end result is a chilling effect where public employees will suppress their speech out of fear that they will run afoul of this policy's prohibitions. It is not difficult to imagine that the Town's

termination decision in this case will only further compound this chill. This policy is also so loosely constrained that it allows the Town to engage in arbitrary and discriminatory enforcement. *See Haurilak v. Kelley*, 425 F. Supp. 626, 629, 632 (D. Conn. 1997) (holding the ban on employees speaking "critically or derogatorily … regarding the orders or instructions issued by a superior officer" was unconstitutionally vague because "the chief of police is vested with almost unlimited discretion in the enforcement of the rule and officers may be disciplined for discussing among themselves the merits of any order or instruction, even though such discussion may have no adverse effect on the maintenance of morale or discipline"); *Montenegro*, 166 N.H. at 221 (holding the rule allowing the DMV to reject a license plate that "a reasonable person would find the plate offensive to good taste" was unconstitutionally vague because it "authorizes or even encourages arbitrary and discriminatory enforcement").

The social media policy here banning "negative" commentary about the Town is also inherently subjective and not susceptible of any objective definition or application. *See Coates v. Cincinnati*, 402 U.S. 611, 614 (1971) ("[I]n our opinion this ordinance is unconstitutionally vague because it subjects the exercise of the right of assembly to an unascertainable standard …."); *Staub v. City of Baxley*, 355 U.S. 313, 322 (1958) ("An ordinance which … makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent upon the uncontrolled will of an official … is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms."). For example, the Farmington Board of Selectman Chairman, Charlie King, did not explain at deposition what specific standards the Town employed in determining when speech was sufficiently "negative" about the Town to trigger the policy's prohibition. He only explained that the Town simply enforced the policy on a "case by case"

basis "depending on the level, the degree, the extent" of the negative speech based, in part, on how it handled previous situations. King Depo. 11:10-21, 13:14-21. He noted:

> Q. So this policy prohibits any speech by an employee of the Town of Farmington that negatively affects the public perception of the town; is that right?
> A. As far as the performance of their duties and their ability to perform their duties in the town.
> Q. Okay.
> A. Not to undermine the department or the ability to serve as a public servant.
> Q. Okay. So if it negatively affects the public perception of the town, but it did not impair their duties then it's okay?
> A. No. I didn't say that. Every one normally are reviewed on a case-by-case basis. And broad statements are just broad statements. I mean, everybody's conduct is—or conduct that's not becoming would be reviewed on a case-by-case basis and recommended based on what was said, the severity and impact, and may or may not be disciplinary action or recommendations from that.
> Q. So this rule is flexible then?
> A. Flexible as in the way as it will be handled on case-by-case basis depending on what—what transpires.
> Q. Okay.
> A. But should be an administrative—administered consistently throughout all staff that works for the town.
> Q. Well, so how is it consistently administered if it's done on a case-by-case basis?
> A. Consistently is more—yeah. Consistent. It can be. It's simple. It's just like any other disciplinary action. It's reviewed. And based upon policies and procedures a determination is made based upon its degree of severity on how it should be handled, so consistently as more or less treating every employee the same based upon the policy and previous situations that have come up for the town.
> Q. Okay. So if someone were to violate this policy, but it wasn't that severe they may not be subject to disciplinary action; is that right?
> A. Possibly. Depending on what—what transpires.

King Depo. 12:6–14:3. The First Amendment does not permit such ambiguous methods regulating speech promulgated under the promise that the government will use its unfettered discretion justly on a "case by case" basis. "Trust us" is not a First Amendment defense, especially given the underlying facts of this case where Plaintiff was terminated for benign statements that were far tamer than employee Dave Sowards (who used profane language but was reinstated by the Town's Board of Selectmen).

Section C.4(a)(1)'s prohibition on social media speech that "impairs[s] or impede[s] performance of duties" is similarly vague because it subjects employee speech to an unascertainable standard. This policy fails to include any objective standards by which the Town will determine how an employee's performance is "impaired" or "impeded" by employee speech. These terms are left entirely open to subjective interpretations. Thus, without specifying any standard of conduct at all, the Town requires its employees to guess whether their Internet posts might by viewed as impairing or impeding their work performance.

As such, Section C.4(a)(1), in its entirety, is void for vagueness. This policy's ambiguity unconstitutionally gives the Town the unfettered ability—and without notice to employee speakers—to restrict any speech with which it disagrees, including speech of public concern protected under the First Amendment. *See Coates*, 402 U.S. at 614 (holding the ordinance prohibiting 'annoying' conduct was unconstitutionally vague because enforcement depended on whether or not an officer was subjectively annoyed).

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

RSA 98-E:1 states that "a person employed as a public employee in any capacity shall have a full right to publicly discuss and give opinions as an individual on all matters concerning any government entity and its policies." RSA 98-E:1. The New Hampshire Supreme Court has made clear that this statute "serves to free a State employee's speech rights from the limits imposed by the *Pickering* … balancing test." *Appeal of Booker*, 139 N.H. 337, 341 (1995). RSA 98-E:2 is even broader—and deliberately so—in stating that "[n]o person shall interfere in any way with the right of freedom of speech, full criticism, or disclosure by any public employee." RSA 98-E:2. This provision does not limit its protections to speech "concerning any government entity and its policies." This is for good reason. Speech may be of public

concern even if it does not specifically pertain to a government's policies. As a matter of statutory construction, RSA 98-E:2's broader provisions protecting speech going beyond government activities must be given meaning. Failing to do so would render this separate section meaningless, thereby running afoul of the rule "that a statute should be construed so as not to render any of its phrases superfluous." *Herman v. Hector I. Nieves Transp., Inc.*, 244 F.3d 32, 36 (1st Cir. 2001).

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

CONCLUSION

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

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been forwarded via the ECF system to the following on this 16th day of June 2017:

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