

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

CARLA GERICKE
63 Durette Court
Manchester, NH 03102

and

JOHN “BRINCK” SLATTERY
77 Durette Court
Manchester, NH 03102

v.

CITY OF MANCHESTER
One City Hall Plaza
Manchester, NH 03101

**PETITIONERS’ REPLY TO THE CITY OF MANCHESTER’S OBJECTION TO
PETITIONERS’ MOTION FOR SUMMARY JUDGMENT SEEKING A
DECLARATORY JUDGMENT PURSUANT TO RSA 491:22**

NOW COME Petitioners Carla Gericke and John “Brinck” Slattery (collectively, the “Petitioners”) and respectfully submit this Reply to the City of Manchester’s Objection to Petitioners’ motion for summary judgment seeking a declaration, pursuant to RSA 491:22, stating that the Manchester Police Department’s planned use of surveillance cameras on Elm Street will violate RSA 236:130 because the cameras can and will cause the Department to determine the ownership of a motor vehicle or the identity of a motor vehicle’s occupants. As explained in Petitioners’ August 29, 2019 motion for summary judgment, Petitioners’ alternatively argue that, if this Court is not inclined to grant summary judgment in Petitioners’ favor at this stage, discovery should proceed on the nature and implementation of Manchester’s planned use of surveillance cameras on Elm Street, including on the degree to which the Department and individual officers will be identifying individual motorists.

Petitioners’ Reply to the City’s Response to Petitioners’ Statement of Material Facts

Petitioners make the following two points concerning the City’s Response to Petitioners’ Statement of Material Facts.

First, the City’s Response to Petitioners’ Statement of Material Facts confirms that there are no material facts in dispute. The City repeatedly contends in its Response that “[t]here remains a disputed issue of material fact as to whether cameras will be used for ‘surveillance’ as defined by RSA 236:130.”¹ However, this is not a “factual” dispute, but rather is the penultimate “legal” dispute in this case for this Court to resolve. Significantly, the City appears to *not* dispute the key factual premise of Petitioners’ motion for summary judgment—namely, that the City’s police officers, through its use of cameras, will inevitably determine the ownership of a motor vehicle or the identity of a motor vehicle’s occupants. This is dispositive and acts as an effective admission that the City will violate RSA 236:130. Indeed, this Court acknowledged this reality of motorist identification in its August 12, 2019 order, stating that “it is virtually inevitable that in reviewing the footage generated by the cameras, a government actor will, given enough time, recognize someone in a car on Elm Street, even if by accident.” As this Court noted, “the simple act of a government employee recognizing a vehicle or its occupants, without taking additional steps such as running a license plate through dispatch, constitutes a violation of [RSA 236:130] as written.”

Second, with respect to Paragraph 3 of Petitioners’ Statement of Facts, the City argues that there is no evidence that a police officer will be monitoring images 24 hours a day. This City’s assertion is incorrect and, in any event, the City has provided *no* evidence of its own contradicting this fact as required under RSA 491:8-a (which deems this fact admitted). *See* RSA 491:8-a, II (“The facts stated in the accompanying affidavits shall be taken to be admitted for the purpose of

¹ Even the manufacturer of the cameras calls them “surveillance” cameras. *See Exhibit C* (“AXIS Q6125-LE PTZ Network Camera offers discreet and unobtrusive *surveillance*”) (emphasis added).

the motion, unless within 30 days contradictory affidavits based on personal knowledge are filed or the opposing party files an affidavit showing specifically and clearly reasonable grounds for believing that contradictory evidence can be presented at a trial but cannot be furnished by affidavits.”), IV (“the adverse party may not rest upon mere allegations or denials of his pleadings, but his response ... *must* set forth specific facts showing that there is a genuine issue for trial”) (emphasis added). Here, the evidence indicates that this review will occur 24 hours per day. As journalist Paul Feely reported in the *Union Leader* at Petitioners’ Exhibit D, Chief Capano is quoted as stating that “[t]he monitor feed would be through our dispatch center.” The City’s Answer also admits the allegations in Paragraph 11 of the Petition, which alleges that “[t]he images captured by these surveillance cameras would apparently be regularly monitored and observed by the Manchester Police Department through a live feed transmitted to the Department’s dispatch office ...” City’s Answer ¶ 11.

The City’s intent to review this live feed 24 hours per day is further confirmed by the minutes of the April 16, 2019 meeting of the Board of Mayor and Alderman where these cameras were discussed. There, Chief Capano explained: “The monitoring would be through my dispatch center which is open 24/7. I have dispatchers in the room and that would just add to what they already monitor while they are in there.” See Exhibit H (Apr. 16, 2019 Minutes, at p. 2). These minutes further state:

Chief Capano responded quite honestly I don’t care where the recordings are held. I can always go and retrieve them. The monitoring portion you are talking about, I just think it would be difficult for the City Clerk’s Office to monitor something 24/7. We can do that at the Police Department. If a dispatcher who is in the room sees some type of illegal activity going on, we can react in real time.

Alderman Levasseur asked so you do have somebody literally watching those cameras 24 hours a day.

Chief Capano *replied yes. In our dispatch center I have six to seven employees in there at a time that are working that shift. Those are my 911 dispatchers.*

Exhibit H, at pp. 2-3 (emphasis added).

This Court Should Issue a Declaratory Judgment

The City's Objection is premised on the theory that issuing a declaratory judgment would violate the City's due process rights and would constitute issuing a verdict based on a private prosecution of a criminal offense. Both arguments are wrong.

Issuing a declaratory judgment would not constitute a violation of due process or an improper private prosecution of a criminal statute. Here, Petitioners are not engaging in a private prosecution of a criminal offense that would trigger criminal or civil penalties, but rather are seeking a pre-enforcement declaratory judgment, which is permitted under RSA 491:22. *See Portsmouth Hosp. v. Indem. Ins. Co.*, 109 N.H. 53, 55 (1968) ("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.") (emphasis added); *see also State v. Martineau*, 148 N.H. 259, 263 (2002) (only barring private citizens from bringing criminal charges "which may be punished by imprisonment") (emphasis added). Unlike *Martineau* where a private party brought a private prosecution seeking actual punishment, granting a declaratory judgment here will not impose any criminal penalties that would implicate due process rights afforded in a criminal case, especially where the surveillance camera program has not yet been implemented. Put another way, this action only seeks—consistent with *Portsmouth Hosp. v. Indem. Ins. Co.*, 109 N.H. 53 (1968)—declaratory relief as to whether the plan will violate the law. Of course, if the City does implement its surveillance camera plan and identifies motorists (as it inevitably will), and an effort is made to prosecute the City for this violation that carries the prospect of criminal penalties, then the City

would be entitled to due process rights afforded to defendants in criminal proceedings, including the “beyond a reasonable standard” under RSA 625:10. But this is not the posture of this case.

Moreover, the City has had ample due process in this case. The City has been given multiple opportunities before this Court in this case to present evidence and argue why it believes that its surveillance camera plan is lawful under RSA 236:130. In the context of Petitioners’ motion for summary judgment, the City has also been given a full and fair opportunity to present “contradictory affidavits based on personal knowledge” or an “an affidavit showing specifically and clearly reasonable grounds for believing that contradictory evidence can be presented at a trial but cannot be furnished by affidavits.” *See* RSA 491:8-a. The City has presented no such evidence despite being given the opportunity to do so. Of course, if the City believes that it needs more discovery in this case to enable it to rebut Petitioners’ motion for summary judgment, the City could have said so as permitted under RSA 491:8-a, II. It did not. Indeed, once again, the City does not appear to dispute that its surveillance camera plan will inevitably recognize motorists—an act which, as this Court explained in its August 12, 2019 order, would violate RSA 236:130. No additional “due process” would change this result.

Finally, the issuance of a declaratory judgment here is all the more important because—in the face of both the reality that motorists will inevitably be identified and this Court’s August 12, 2019 ruling that such identification will violate RSA 236:130—the City nonetheless plans to proceed with the program. It is especially bold of the City to state in its Objection that future violations of RSA 236:130 should simply be left to future prosecutors, when (i) it is the City’s Police Department that would be tasked with enforcing RSA 236:130 against itself when an officer makes an inevitable identification of a motorist, and (ii) the Department has given no indication that it will enforce this law or this Court’s interpretation against its own officers. It is concerning

that the City’s Police Department apparently does not plan to enforce this law and this Court’s August 12, 2019 interpretation against itself, while it has simultaneously adopted a “zero tolerance” policy when the Department believes that a member of the public has violated a municipal ordinance.² Just as the Department must enforce criminal laws against the public, it must also enforce such laws—including RSA 236:130—against itself.

PRAYER FOR RELIEF

WHEREFORE, Petitioners pray that:

- A. The Court, pursuant to RSA 491:22, issue a judgment declaring that the City of Manchester’s planned use of surveillance cameras on Elm Street will violate RSA 236:130 because the cameras can and will cause the Department to determine the ownership of a motor vehicle or the identity of a motor vehicle’s occupants; and
- B. Alternatively, if this Court is not inclined to grant summary judgment in Petitioners’ favor at this stage, order the parties to file a joint case structuring plan addressing discovery on the nature and implementation of Manchester’s planned use of surveillance cameras on Elm Street, including on the degree to which the Department and individual officers will be identifying individual motorists; and
- C. The Court issue any such other relief as may be just and proper.

² See Carol Robidoux, “Meeting Preview: Aldermen to Consider Proposed Amendments to City’s Public Spaces Ordinances,” ManchesterInkLink.com, Sept. 3, 2019, <https://manchesterinklink.com/meeting-preview-aldermen-to-consider-proposed-amendments-to-citys-public-spaces-ordinances/> (“Police will continue to enforce all City of Manchester ordinances with a zero-tolerance. To date, MPD has issued 371 ordinances in 2019 and recently reinforced the procedure for ejecting someone from a park with officers.”).

Respectfully submitted,

Petitioners Carla Gericke and John “Brinck” Slattery,

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

/s/ Gilles Bissonnette

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September 30, 2019

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served electronically on September 30, 2019.

/s/ Gilles Bissonnette
Gilles Bissonnette