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Vermont Superior Court
Bennington Unit
23-CV-03133

VERMONT SUPERIOR COURT
BENNINGTON UNIT
CIVIL DIVISION

CASSANDRA KEATING & JOEL FOWLER,

Plaintiffs,

v.

TOWN OF BENNINGTON,

Defendant.

Civil Action No. _____

COMPLAINT

Cassandra Keating and Joel Fowler, through their attorneys with the American Civil Liberties Union Foundation of Vermont, complain against the Town of Bennington the following:

NATURE OF THE CLAIM

1. Ms. Keating and Mr. Fowler file this action for declaratory relief and damages to vindicate their right to be free from retaliation for complaining of police misconduct and for exercising their rights to petition their representatives for a redress of grievances.

2. Ms. Keating and Mr. Fowler are former residents of Bennington, Vermont. Mr. Fowler is a Black man and Ms. Keating is a white woman. Together, they have a daughter.

3. While residing in Bennington in 2020, Ms. Keating and Mr. Fowler experienced sustained harassment, surveillance, and vilification by Bennington Police Department officers. Ms. Keating and Mr. Fowler believed—and continue to believe—that BPD's near-constant surveillance was motivated by racial animus and hostility towards Ms. Keating and Mr. Fowler as an interracial couple.

4. In response to their experience of discrimination and harassment, Ms. Keating and Mr. Fowler did what every resident of Bennington was purportedly encouraged to do: submit complaints against BPD. The Department cursorily rejected their claims.

5. At the time, the Bennington Select Board was charged with reviewing civilian complaints against the Police Department. In carrying out this charge, the Board did not even contact Ms. Keating or Mr. Fowler. Instead, it reviewed their complaints based entirely on BPD's accounts, with BPD officials in the room.

6. The Select Board then scheduled a special public meeting to clear BPD of any wrongdoing. It did not inform Ms. Keating or Mr. Fowler that it would be discussing their complaints. At the meeting, the Select Board nevertheless publicly declared that it deemed Ms. Keating's and Mr. Fowler's complaints against BPD to be baseless.

7. The Board also announced a new Town policy: from that point onwards, complaints of police misconduct would be kept confidential where the Board discovered misconduct, but for any complaint deemed unsubstantiated, the Select Board would publish all information about the complaint and those who submitted it.

8. Under the just-announced policy, the Board then voted to release "the full record" of materials about Ms. Keating and Mr. Fowler "immediately." The Town then broadcast, during the public meeting, approximately 20 minutes of police footage of Ms. Keating and Mr. Fowler.

9. The Town simultaneously published online a 62-page, unredacted document detailing nearly every aspect of Ms. Keating's and Mr. Fowler's lives. Hosted on the Town and the Bennington Police Department website, this document included past and current addresses where Ms. Keating and Mr. Fowler could be found; their birthdates, phone numbers, and driver's license numbers; descriptions of their vehicles, including license plate numbers and VINs; and the addresses, names, and birthdates of their family members.

10. Publicly shamed by the Select Board for speaking out and in fear of BPD officers, other public officials, and individuals who might seek to harm them, both Mr. Fowler and Ms. Keating were forced to flee Bennington with almost nothing, leaving behind their furniture, clothes, and other personal effects.

11. The Town's retaliation against Ms. Keating and Mr. Fowler for complaining against BPD has had lasting effects on both Ms. Keating and Mr. Fowler, as well as on their daughter.

12. The Town's acts and official policy of revealing sensitive complainant information—while keeping police misconduct confidential—also operated to chill future complainants from coming forward and petitioning their representatives for redress. This chill was particularly severe for Benningtonians most likely to experience police misconduct: Benningtonians of color.

13. Under Vermont law, individuals like Ms. Keating and Mr. Fowler have a right to complain of discrimination and official misconduct through an equitable process and without fear of retribution or public recrimination. They therefore bring this action to address the violation of their rights under the Vermont Fair Housing and Public Accommodations Act (VFHPAA), as well as Articles 7 and 20 of the Vermont Constitution.

PARTIES

A. Plaintiffs

14. Cassandra Keating was born in Vermont and has lived in the Bennington area intermittently over many years.

15. Joel Fowler moved to Vermont with Ms. Keating and their daughter in April 2020.

16. At all times relevant to this Complaint, Ms. Keating and Mr. Fowler were in a romantic relationship. They resided in Bennington until late summer 2020, when they fled following the Select Board's retaliatory acts.

B. Defendant

17. The Bennington Select Board is the elected governing body for the Town of Bennington, Vermont.

18. Under 24 V.S.A. § 901 and § 901a, a suit against Town officials or employees should be brought as a suit against the Town of Bennington.

19. Defendant Town of Bennington is a municipality located in Bennington County, in the State of Vermont. The Town maintains offices at 205 South Street, Bennington, VT 05201.

JURISDICTION AND VENUE

20. This court has jurisdiction over the subject matter of this dispute pursuant to 4 V.S.A. § 31.

21. Venue is proper in this territorial unit of the Court under 12 V.S.A. § 402(a).

22. This Court has personal jurisdiction over Defendant because the Town of Bennington is located in Bennington County and the events that give rise to this action occurred within Bennington County.

FACTUAL ALLEGATIONS

A. Mr. Fowler and Ms. Keating were targeted, harassed, surveilled, and vilified by the Bennington Police Department.

23. Mr. Fowler, Ms. Keating, and their daughter moved to Bennington on or around April 1, 2020, with the intent to stay permanently.

24. Ms. Keating is a native Benningtonian who hoped—and expected—that the town where she was born would provide a safe and stable environment for her family. Prior to the events of this case, she had dreams of serving her community by enrolling in the police academy.

25. Mr. Fowler, too, looked forward to relocating to Vermont as a haven after his time in New York, where he was victimized by the criminal legal system and in 2007 was wrongfully convicted of murder. After spending more than seven years incarcerated, he was exonerated—with the chief of the Conviction Review Unit telling the reviewing judge that Mr. Fowler had "nothing to do with the matter and was nowhere near the incident." Colleen Wright, *Another Exoneration in Brooklyn Brings Total Since Last Year to 14*, N.Y. Times, (Aug. 4, 2015).[1]

26. Almost immediately upon their arrival, Ms. Keating and Mr. Fowler observed that they were subject to near-constant police presence and surveillance, including police taking photos of the couple.

27. Police also often followed Mr. Fowler as he drove his car and rode his bike. Over the next several months, Bennington Police officers surveilled, followed, stopped, questioned, and ticketed Mr. Fowler and Ms. Keating on numerous occasions.

28. Sometimes, officers reprimanded them for reasons mundane—such as traffic violations or for supposedly unloading their clothing incorrectly outside a laundromat.

29. Sometimes, however, the interactions carried a more sinister tone: in May 2020, for example, a BPD officer approached Mr. Fowler's car and cryptically warned him that he "heard people want to hurt you." When Mr. Fowler alarmedly asked who sought to harm him, the officer refused to give specifics beyond mentioning New York—maintaining he didn't "have to" tell him and stating "I'm not gonna discuss that." Instead, the officer repeatedly responded that he "just want[ed] to make sure you don't get hurt."

30. Ms. Keating and Mr. Fowler's young daughter sat in the backseat, absorbing this threatening information at the same time as her father.

31. As Ms. Keating and Mr. Fowler tried to settle in Bennington, they frequently encountered neighbors, family, or acquaintances who described how police had approached them to warn them about Ms. Keating and Mr. Fowler or falsely insinuate that they engaged in illegal, often gang-related activity.

32. In one instance, BPD detective Larry Cole contacted Ms. Keating and Mr. Fowler's landlord and urged that he should not rent to them as they were "gang bangers" and "drug dealers."

33. Ms. Keating and Mr. Fowler deny all such allegations and mischaracterizations.

[1] Available at: https://www nytimes.com/2015/08/05/nyregion/another-exoneration-in-brooklyn-brings-total-since-last-year-to-14 html.

34. Ms. Keating and Mr. Fowler experienced constant stress and hyper-vigilance caused by the Police Department's close surveillance of their daily life and erosion of their relationships with community members.

B. Race permeated Mr. Fowler and Ms. Keating's experience of harassment and vilification.

35. Although Ms. Keating had spent significant time in Bennington, she had never experienced any similar police attention before dating Mr. Fowler.

36. Mr. Fowler and Ms. Keating believed—and continue to believe—that the Bennington Police Department's targeting, harassing, surveilling, and vilifying of them was due to their interracial relationship and Mr. Fowler's race.

37. For many years, the Town of Bennington has been the subject of public scrutiny for its police department's racially discriminatory practices and statements—and the steadfast support of that department by Town officials.

38. For example, in 2020, Bennington, the Bennington Police Department's Chief, and two Bennington police officers settled a federal lawsuit brought by Shamel Alexander in 2016 to challenge Bennington's systemic racial profiling in traffic stops. *See* Ellie French, *Man settles with Bennington police for $30,000 in racial bias case*, VTDigger (June 24, 2020).[2]

39. In denying Bennington's second attempt to dismiss that case, U.S. District Judge Geoffrey Crawford ruled that, based on facts alleged, it was reasonable to infer that "had Bennington appropriately trained or supervised its police officers with respect to racial disparities in stops and searches, Alexander would not have been stopped or searched and his equal protection rights would not have been violated." *Alexander v. Hunt*, No. 5:16-CV-192, 2018 WL 3801240, at *4 (D. Vt. Aug. 9, 2018).

40. Studies have confirmed that issues of racial disparities in stops and searches are systemic in Bennington. As explained more fully below, Stephanie Seguino and Nancy Brooks found in a 2017 study that "the Black share of [police] stops" in Bennington was "almost 2.5 times greater than their share of the county"—the second-highest racial disparity in the state of Vermont. Stephanie Seguino & Nancy Brooks, *Driving While Black and Brown in Vermont* 4 (2017).[3] This study also revealed that BPD officers search Black drivers over five times as often as white drivers, even though Black drivers were less likely than white drivers to be found with contraband that led to an arrest. *See id* at 34.

41. The Department's history of discrimination extends beyond traffic stops. For example, the Vermont Human Rights Commission (HRC) concluded after a two-year investigation that the Bennington Police Department had racially discriminated against former state legislator Kiah Morris and her husband James Lawton. As HRC documented, BPD "endangered Morris' safety by withholding crucial information from her and her family about a white supremacist who'd been targeting Morris on social media." Peter Hirschfeld, *Investigation*

[2] Available at: https://vtdigger.org/2020/06/24/man-settles-with-bennington-police-for-30000-in-racial-bias-case-%ef%bb%bf/.

[3] Available at: https://stephanieseguino.weebly.com/uploads/2/3/2/7/23270372/brooks_and_seguino__final_2.pdf.

Finds Bennington Police Discriminated In Response To Kiah Morris Case, Vermont Public (May 11, 2021).[4]

42. In 2019, public pressure and scrutiny from the Vermont Attorney General forced the Town of Bennington to contract with third-party entities to review the policies and procedures of the Bennington Police Department.

43. In April 2020, the International Association of Chiefs of Police (IACP) delivered its report, finding that Bennington's law enforcement practices "have sown deep mistrust between parts of the community and the department" and reporting that a full **fifth** of respondents described experiencing discrimination at the hands of the Department. *See* International Association of Chiefs of Police, *Assessment of the Bennington Police Department Policy and Procedures* ii, 28 (2020).[5]

44. As the IACP report noted, "[t]he danger in enacting policy in a police department without taking input from the community is that the policy could have a disparate impact on certain parts of the community, often those parts of the community that are the most disenfranchised." *Id.* at 35.

45. The report further outlined how—despite Bennington being, "by and large, a vibrant and peaceful town," *id*. at 7—the Department had embraced an aggressive "warrior" mentality, eschewed best practices, and failed to structure its mission around principles of community policing, *id.* at 30. The report detailed residents experiencing a "dual policing structure—one with civility and dignity for those viewed favorably by the department, and another for everyone else in the community." *Id.* at 16.

46. Against this backdrop, Mr. Fowler and Ms. Keating experienced BPD's targeted harassment as precisely this kind of discriminatory behavior: enforcing a racialized social order of who was "allowed" to be part of the Bennington community. Ms. Keating and Mr. Fowler understood BPD's campaign to send a message that Mr. Fowler was the "wrong" sort of individual for Bennington—and that Mr. Fowler was presumed, based on his race, to be a violent criminal.

C. Mr. Fowler and Ms. Keating submitted complaints of discrimination and harassment.

47. In response to their experience of discrimination and harassment, Ms. Keating and Mr. Fowler did what every resident of Bennington was purportedly encouraged to do: submit complaints against BPD.

48. On May 9, 2020, Mr. Fowler attempted to make a verbal complaint at BPD headquarters following an encounter with a BPD officer. Although staff initially rebuffed Mr. Fowler's

[4] Available at: https://www.vermontpublic.org/vpr-news/2021-05-11/investigation-finds-bennington-police-discriminated-in-response-to-kiah-morris-case.
[5] Available at: https://cms5 revize.com/revize/bennington/Document%20Center/Services/Police%20Department/Documents%20&%20Reports/Community%20Policing/BPD_Policy_and_Procedures_Final_Report.pdf.

attempts to submit a complaint, Mr. Fowler requested that the Department investigate, and cease, surveilling and harassing him based on his race.

49. No representative of BPD ever contacted Mr. Fowler, and the Department never investigated Mr. Fowler's claims of systemic racial harassment. A report submitted that same day acknowledged that Mr. Fowler had complained of "being harassed by [the] Bennington Police," but the report only addressed the specific encounter on May 9, where Mr. Fowler received a parking ticket. The Sergeant who authored the report concluded that they "did not see any violations of Bennington Police Department policies and procedures."

50. After Mr. Fowler received no response for two weeks, on May 27, 2020, Ms. Keating submitted a written complaint to the Bennington Police Department regarding the racially motivated targeting, harassment, surveillance, and vilification of her family. Ms. Keating's complaint described eight separate incidents and complained that she and Mr. Fowler were "being followed by different officers daily."

51. Unbeknownst to Ms. Keating and Mr. Fowler, BPD cursorily rejected their complaints.

D. The Select Board reviewed Mr. Fowler's and Ms. Keating's complaints.

52. At the time of Ms. Keating's and Mr. Fowler's complaints, the Select Board was empowered to review civilian complaints against the Bennington Police Department.

53. Prior to the Select Board's involvement, complaints against BPD were reviewed unilaterally by Town Manager Stuart Hurd.

54. The Select Board's new role was prompted by the IACP's criticism of the Town's police department and its recommendation that the Town of Bennington develop a diverse civilian review and oversight board to investigate complaints against BPD. In the immediate aftermath of the IACP report, the Select Board gave itself that interim role.

55. Both Ms. Keating and Mr. Fowler had faith in this new review structure. Although they were unsure if BPD would address their concerns, they hoped that their elected representatives would vindicate their rights if BPD failed to act.

56. Those hopes were quickly dashed. On July 2 and July 6, the Bennington Select Board met in executive session to review and discuss the Department's investigations of Mr. Fowler's and Ms. Keating's complaints.

57. Neither Ms. Keating nor Mr. Fowler were invited to the meetings or to present their perspectives. In fact, no representatives of the Bennington Police Department, the Select Board, or the Town of Bennington spoke to Ms. Keating or Mr. Fowler at all about their complaints and experiences.

58. Instead, the Select Board reviewed the complaints in the presence of multiple BPD officials, alongside Town Manager Hurd and Town counsel. The Board based its review entirely on the Bennington Police Department's own documents and findings.

E. Without notice, the Select Board enacted a "policy" of complainant disclosure—and then released Ms. Keating's and Mr. Fowler's most personal information without their consent.

59. On July 22, the Select Board held a public meeting to share the results of its review. The meeting was broadcast in its entirety via Zoom and Facebook Live and posted to YouTube and Facebook.

60. Chair Donald Campbell announced that "tonight is not a regular Select Board meeting" before explaining that the Board would be passing on allegations of police misconduct. Neither Ms. Keating nor Mr. Fowler were notified in advance that their complaints would be evaluated during the July 22 meeting.

61. Chair Campbell explained that the Select Board had reviewed the complaints in executive session, acknowledging that "specific allegations of misconduct by a police officer must be treated as confidential."

62. He then announced the Town's new "policy"—a policy that eviscerated that confidentiality for complainants.

63. As Chair Campbell explained and the official minutes reflect, the "interim" policy applied to Ms. Keating and Mr. Fowler treated materials as presumptively confidential while the Select Board reviewed them. If the Select Board found "illegal conduct by a particular officer," the materials remained confidential—at which point the Board "may" forward the report to the State's Attorney or Attorney General.

64. In contrast, if the Board determined that there was no misconduct, "the report and all supporting materials are made public."

65. Immediately after reading the policy, the Select Board voted unanimously to accept BPD's determination that six of the incidents described in Ms. Keating's complaint were "unfounded." The Select Board did not review the other two incidents, nor Ms. Keating's wider concern that she and Mr. Fowler were being tailed by police officers daily.

66. The Select Board expressed "concern" regarding an officer speaking to Mr. Fowler about threats to his family's safety while his three-year-old daughter was seated directly behind him, but it took no corrective action. Likewise, the Board expressed "concern" regarding the Bennington Police Department's practice of contacting landlords to provide them information about tenants' alleged criminality and pressuring landlords to evict those disfavored by Bennington police officers, but it took no substantive action to prevent such practices in the future.

67. Instead, the Board voted to apply the policy and release "the full record" of materials about Ms. Keating and Mr. Fowler "immediately."

68. In neither the oral summary of the review process nor the motion to apply the policy and accept BPD's determination did any Select Board member mention redacting any information. The July 22, 2020, minutes likewise nowhere reference a duty or obligation to redact sensitive information.

69. The Select Board then viewed—and transmitted for public view—multiple clips of Bennington police body-worn camera and dashboard camera footage of unredacted video and audio of Ms. Keating and Mr. Fowler interacting with law enforcement officers. The video footage lasted approximately 20 minutes.

70. After the videos had finished, the Board announced that individuals could view the so-called "report" for themselves. As Town Manager Hurd confirmed, the report was hosted on the Town's website, as well as the specific webpage for the Bennington Police Department.

71. The 62-page report included emails, police reports, police narratives, and criminal history. It also detailed nearly every aspect of Mr. Fowler's and Ms. Keating's personal lives, including:
    - past and current addresses where Ms. Keating and Mr. Fowler could be found;
    - their birthdates, phone numbers, driver's license numbers, and what appears to be a social security number;
    - descriptions of their vehicles, including license plate numbers and VINs; and
    - the addresses, names, and birthdates of their family members.

72. None of this information was redacted, in part or in whole.

73. The Town posted the unredacted report despite 1 V.S.A. § 317(c)(42), which explicitly exempts from public disclosure "information that could be used to identify a complainant who alleges that a public agency, a public employee or official . . . has engaged in a violation of law, or in waste, fraud, or abuse of authority, or in an act creating a threat to health or safety, unless the complainant consents to disclosure of his or her identity."

74. Neither Ms. Keating nor Mr. Fowler consented to the disclosure of their identities.

75. Despite expressing concern about the Bennington Police Department's actions related to speaking ill of community members or discussing danger to Mr. Fowler's family with his daughter directly behind him, the Select Board nevertheless published and aired Ms. Keating's and Mr. Fowler's personal information to the entire world.

76. The release of this comprehensive universe of Ms. Keating's and Mr. Fowler's most personal information was indistinguishable from "doxxing," *see* Rob Lever, *What is Doxxing?,* U.S. News (Dec. 16, 2021),[6] and the 62-page document quickly circulated online. For example, a post with the link to the 62-page report quickly appeared on Facebook, paired with the headline "BPD ABSOLVED OF WRONGDOING."

[6] Available at: https://www.usnews.com/360-reviews/privacy/what-is-doxxing.

F. Publicly shamed by the Select Board's acts and afraid for their safety, Ms. Keating and Mr. Fowler fled Vermont.

77. The Select Board's non-consensual disclosure had, and continues to have, a devastating effect on Ms. Keating and Mr. Fowler and their families—particularly after BPD's explicit statements to Mr. Fowler that he would be imminently harmed.

78. When Bennington published Ms. Keating's and Mr. Fowler's personal information, their status as complainants, and audio/visual recordings of them, it put them in potential danger of harm by giving any bad actor everything needed to find, identify, and track them—as well as their family members.

79. As a result of their fear of Bennington's police, other public officials, and individuals who allegedly sought to harm them, both Mr. Fowler and Ms. Keating fled Bennington with almost nothing—leaving behind their furniture, clothes, and other personal effects.

80. Ms. Keating and Mr. Fowler's unplanned and unwanted escape from Bennington caused significant economic harm to both individuals, as well as their ability to provide for their young daughter.

81. The Select Board's dissemination of Ms. Keating's and Mr. Fowler's most personal information caused other harm as well. For example, it also subjected them to public ridicule; chilled their desire to file future complaints or engage with public officials; and eviscerated their belief in local government.

82. These psychological, reputational, and economic harms have lasted well beyond the immediate aftermath of the Select Board's actions. To this day, Ms. Keating and Mr. Fowler remain fearful of possible retribution.

G. Faced with public backlash, the Select Board made minor adjustments to the policy—but retained core aspects that chilled would-be complainants.

83. The Town knew this would happen. Several individuals, including local community leaders, learned that the Select Board intended to publicize Mr. Fowler's and Ms. Keating's information. They implored the Select Board not to do so, emphasizing the impact this would have on them as individuals and on the complaint process generally. The Select Board published their information anyway.

84. The public response was immediate: as the Select Board broadcast its July 22 meeting on Facebook, a community member commented: "I am appalled. What an inappropriate way of handling this situation. This is putting the people who filed the complaints directly in harms way. Also- who will want to file a complaint after this if this is how it is handled? This is not how a civilian oversight board should be run. I'm so disappointed, I can't even believe this actually just happened."

85. In the aftermath of the Select Board's treatment of Ms. Keating and Mr. Fowler, numerous other community members accused the Town—correctly—of sending an intimidating and chilling message to future would-be complainants.

86. Despite numerous opportunities to do so, the Town of Bennington and the Bennington Select Board refused to change the core of the disclosure policy.

87. Specifically, the Select Board revisited its process for reviewing complaints of misconduct during the July 27 meeting, where it proposed a written policy, and then voted on the final interim policy on August 10, 2020.

88. During the July 27 meeting, Chair Campbell explained that the printed policy was "essentially the skeleton of what we used to analyze [Ms. Keating and Mr. Fowler's] complaint." Like the policy announced during the July 22 meeting, the policy treated meritorious and unfounded complaints differently: for any unfounded complaint, the Town would release the full investigatory report and findings; where police misconduct was found, however, the Town would release the investigatory report—"if at all"—in a way so as "not [to] identify the officer by name."

89. The revised version of the policy—unlike the July 22 protocol—also stated that when reports would be made public, they should be released "subject to any specific redactions required under 1 V.S.A. § 317(c).

90. It is unclear what the Select Board intended this language to mean—but whatever its meaning, it did not protect complainants' identities from disclosure. Despite 1 V.S.A. § 317(c)(42) expressly exempting from disclosure "information that could be used to identify a complainant who alleges that a public agency, a public employee or official . . . has engaged in a violation of law, or in waste, fraud, or abuse of authority," the Select Board made clear in both meetings that complainant identities would continue to be released for unfounded complaints.

91. For example, during the July 27 meeting, Select Board member Sarah Perrin expressed "major concerns" that even under the revised policy, the Select Board anticipated "showing [complainants'] image" and "not redacting their names." She explained that this was likely to "cause retaliatory action" against those complaining of police misconduct. Other members of the Select Board suggested gathering more information but did not seek to amend or clarify the policy in any way.

92. At the August 10 meeting, Perrin again raised concerns that releasing personal information about complainants could subject them to physical harm and retribution. In response, numerous Select Board members maintained—despite the plain language of 1 V.S.A. § 317(c)(42)—that they were advised that they were *required* to release complainant information. They passed the policy over Perrin's objection.

93. That policy—releasing all materials for unfounded complaints of misconduct, while keeping actual misconduct confidential—was the opposite of Vermont law regarding complaints of police misconduct submitted to the Vermont Criminal Justice Council. True, Vermont's 2017 law enforcement decertification statute makes only limited information public unless and until an allegation is substantiated. When a report of potential misconduct is forwarded to the Council, the Council makes public "the date and the nature of the complaint, but not including the identity of the law enforcement officer," and a summary

of the law enforcement agency's investigation. 20 V.S.A. § 2409(c)(1). But if the complaint results in discipline or charges, the Council *then* makes public the officer's identity and details of the allegations and investigation. *Id.* § 2409(c)(2). Information about the complainant's identity is required to remain confidential. *Id.* § 2409(d).

94. The bill that enacted § 2409, as introduced, would have included the complainant's name and business address among the information that would be made public when the complaint resulted in discipline or charges. *See* H. 22 (2017 Adj. Sess.) (as introduced) at 19:5-17.[7] After determining that inclusion of this information would endanger complainants and chill future complaints, the Legislature amended the bill to exclude the complainant's name and address from the information permitted to be released to the public. *See* § 2409(c)(2).

95. As enacted, § 2409's structure for making only certain information about allegations public is intended "both to protect the reputation of law enforcement officers from public disclosure of unwarranted complaints against them and to fulfill the public's right to know of any action taken against a law enforcement officer when that action is based on a determination of unprofessional conduct." § 2409(a). The logic is that officers' privacy interest in not being publicly tainted by unfounded allegations outweighs the public interest in those unfounded allegations, but, once an officer is found to have committed misconduct, the public interest in that information outweighs any privacy interest in not having that misconduct made public.

96. Bennington's policy turned this structure on its head: it kept confidential information in which there is great public interest—an officer's actual misconduct—and made public information about which there are heightened privacy interests and little public benefit—a complainant's identity and unfounded allegations against officers.

97. Because of the fear of retribution—and having witnessed the Board's treatment of Ms. Keating and Mr. Fowler—the Town's policy chilled would-be complainants from coming forward and complaining of police misconduct.

98. Indeed, immediately after the July 22 meeting where the Select Board published Ms. Keating and Mr. Fowler's information, Chair Campbell admitted that the Select Board knew that "public exposure might discourage some people from lodging complaints," but described that discouragement as simply "an unintended consequence of the board's desire to be transparent." Tiffany Tan, *Select Board dismisses complaints against BPD but releases police video*, Bennington Banner (July 26, 2020).[8]

99. Even if "unintended," the consequences of Bennington's complainant disclosure policy were severe. As the U.S. Department of Justice has explained, members of the public, especially people of color, are less likely to make complaints to the police if their personal information will be revealed publicly because they fear retaliation. *See* U.S. Dep't of Just. C.R. Div., Investigation of the Chicago Police Department 52 (Jan. 13, 2017) ("Experts in

[7] Available at: https://legislature.vermont.gov/Documents/2018/Docs/BILLS/H-0022/H-0022%20As%20Introduced.pdf.

[8] Available at: https://www.benningtonbanner.com/local-news/select-board-dismisses-complaints-against-bpd-but-releases-police-video/article_28cf49c8-09aa-11eb-bb73-5368b93acb1e html.

law enforcement investigations noted that disclosure of the complainant's identity during the investigation has the potential to chill misconduct reporting without providing discernible benefit.").

100. The fear of retaliation—and the chill it engenders—is particularly acute in Bennington.

101. The IACP's audit described how residents' "heightened fear of retaliation" had interfered with IACP factfinders' ability to gather information, as community members "expressed fear in sending emails to the independently managed inbox, completing the survey, and meeting with the team" out of concern that "they would be targeted by BPD." IACP Rpt. at 18.

102. The IACP report further found that these concerns are particularly heightened among communities of color: the report described how "[s]ome community members, particularly members of diverse populations, feel that if they make a complaint to the police—even in cases where they're a victim of a crime—" BPD has made clear that "they will become the target of the criminal investigation." *Id.* at 17.

103. That heightened chill is particularly problematic because Black Benningtonians are already disproportionately likely to be victims of police misconduct. As noted, in a 2017 study, Stephanie Seguino and Nancy Brooks found that "the Black share of [police] stops" in Bennington was "almost 2.5 times greater than their share of the county"—the second-highest racial disparity in Vermont. Seguino & Brooks, *Driving While Black and Brown in Vermont* at 4.

104. This study also revealed that BPD officers search Black drivers over five times as often as white drivers, even though Black drivers were less likely than white drivers to be found with contraband that led to an arrest. *See id* at 34.

105. As the authors explained in another study, "[t]he lower hit rate (that is, the percentage of searches that yield contraband) of drivers of color is widely regarded as providing evidence the police rely on a lower bar of evidence to search drivers of color than white drivers, suggesting possible racial bias in the decision to search." Stephanie Seguino, Nancy Brooks, & Pat Autilio, *Trends in Racial Disparities in Traffic Stops*, 2014-2019 at 3 (2021).[9]

106. Those earlier trends continued. For example, the later Seguino, Brooks, and Autilio report explained that, "in Bennington… Black drivers are over-stopped from 55% to 335% depending on the measure of driving population," *id.* at 3, and BPD officers searched Black drivers four times as often as white drivers, *id.* at 28.

[9] Available at: https://www.uvm.edu/sites/default/files/Department-of-Economics/seguino%20studies/Seguino_Brooks_Autilio_Final_Merged.pdf.

107. As the IACP report makes clear, "traffic enforcement, overwhelmingly, is most likely the way that members of the Bennington community and surrounding areas interact with the police department." IACP Rpt. at 8.

108. Despite the IACP and academic report findings, public outcry, and discussion among Select Board members regarding the ethical and safety-related problems of complainant identity disclosure, the Town of Bennington refused to change the core of the disclosure policy.

CAUSES OF ACTION

Count 1—Retaliation against Ms. Keating and Mr. Fowler in violation of the Vermont Fair Housing and Public Accommodations Act, 9 V.S.A. §§ 4500 *et seq.*

109. Ms. Keating and Mr. Fowler incorporate the foregoing paragraphs as though fully contained herein.

110. This claim is brought against the Town of Bennington, through the acts of its officers and employees.

111. The VFHPAA operates as a broad anti-discrimination statute, protecting Vermonters' equal access to goods and services provided by public accommodations regardless of their race, gender, or disability status, among other protected categories.

112. As providers of governmental services, the Select Board and the Town of Bennington are regulated entities under the Vermont Fair Housing and Public Accommodations Act. "[A]ll governmental entities [are] subject to the public accommodations law." *Dep't of Corr. v. Hum. Rts. Comm'n*, 2006 VT 134, ¶ 25. As providers of municipal services, the Select Board and the Town "offer[] to the general public" "services, facilities, goods, privileges, advantages, benefits, or accommodations" and are therefore covered by the Act. 9 V.S.A. § 4501(1).

113. The VFHPAA prohibits retaliation against anyone who has filed a complaint or who has otherwise opposed discriminatory action, stating:

> (e) A person shall not coerce, threaten, interfere, or otherwise discriminate against any individual who:
>
> (1) has opposed any act or practice that is prohibited under section 4502 or 4503 of this title;
>
> (2) has lodged a complaint or has testified, assisted, or participated in any manner with the Human Rights Commission in an investigation of acts or practices prohibited by this chapter;
>
> (3) is known by the person to be about to lodge a complaint, testify, assist, or participate in any manner in an investigation of acts or practices prohibited by this chapter;

(4) is exercising or enjoying a right granted or protected by this chapter; or
(5) is believed by the person to have acted as described in subdivisions (1) through (4) of this subsection.

9 V.S.A. § 4506(e).

114. Vermont courts have not yet directly addressed how to establish a claim of retaliation in public accommodations under § 4506(e). However, if Vermont courts followed the approach of the Second Circuit, a public accommodations retaliation claim would use the same elements as an employment retaliation claim. *See Lizardo v. Denny's Inc.*, 270 F.3d 94, 105-06 (2d Cir. 2001).

115. In order to show a prima facie case of retaliation in Vermont employment law, the plaintiff must show that: (1) they were engaged in a protected activity, (2) the defendant was aware of that activity, (3) the plaintiff suffered adverse action, and (4) there was a causal connection between the protected activity and the adverse action. *Gallipo v. City of Rutland*, 163 Vt. 83, 92 (1994).

116. Ms. Keating and Mr. Fowler have established all four elements—specifically:

1) By filing formal and credible complaints of discrimination and by making informal protests against the Bennington Police Department's racially motivated targeting, harassment, surveillance, and vilification, Ms. Keating and Mr. Fowler took part in protected activities under the anti-discrimination statute. *See Beckmann v. Edson Hill Manor, Inc.*, 171 Vt. 607, 608 (2000);

2) The Town of Bennington, through the Bennington Select Board, was aware of the complaints because it conducted a formal review of the Bennington Police Department internal investigations;

3) The Bennington Select Board took an adverse action against Ms. Keating and Mr. Fowler by publicizing their status as complainants and releasing their personally identifying information without their consent. That disclosure harmed them by placing them in immediate danger of harm, damaging their reputation in the community, subjecting them to public ridicule, chilling their desire to file future complaints and engage politically in Bennington to address discriminatory policies and practices, and forcing them to flee Bennington out of fear of harm; and

4) The Bennington Select Board publicized Ms. Keating's and Mr. Fowler's personal information as a direct result of their complaints of systematic and racially motivated targeting, harassment, surveillance, and vilification by the Bennington Police Department.

Count 2—Disparate impact discrimination in violation of the Vermont Fair Housing and Public Accommodations Act, 9 V.S.A. §§ 4500 *et seq.*

117. Ms. Keating and Mr. Fowler incorporate the foregoing paragraphs as though fully contained herein.

118. This claim is brought against the Town of Bennington directly for its Town-wide policy and practice.

119. Specifically, the Bennington Select Board's—and therefore the Town's—official policy of disclosing complainants' identities and information violated the VFHPAA because it had an unlawful disparate impact on Black individuals' ability to submit complaints of police misconduct.

120. The VFHPAA makes it unlawful for any place of public accommodation to "refuse, withhold from, or deny to [any] person any of the accommodations, advantages, facilities, and privileges" of the institution "because of the[ir] race." 9 V.S.A. § 4502(a).

121. The VFHPAA cognizes a disparate impact theory of liability. The Act's purpose, structure, and context all demonstrate that the legislature intended for numerous prohibitions to reach disparate impacts on protected Vermonters, even if those claimants could not demonstrate discriminatory animus against their protected group.

122. To make out a claim of disparate impact, a plaintiff must demonstrate that a facially neutral policy "actually or predictably . . . has a discriminatory effect," *Huntington Branch, NAACP v. Town of Huntington*, 844 F.2d 926, 934 (2d Cir. 1988), *superseded by regulation on other grounds as stated in Mhany Mgmt., Inc. v. Cnty. of Nassau*, 819 F.3d 581, 617 (2d Cir. 2016)—that is, that it "fall[s] more harshly on one group than another," *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 335 n.15 (1977).

123. The Town's policy of disclosing complainant identities and information for complaints deemed unfounded had a disproportionate impact on Black Benningtonians.

124. Studies have shown that Black drivers are likely to be stopped and searched by BPD at rates vastly higher than white drivers.

125. Despite that vastly disproportionate rate at which their privacy and autonomy are invaded by BPD officers, Black drivers are *less* likely than white drivers to be found with contraband that leads to an arrest.

126. At the same time, authorities such as the IACP report demonstrate that Black Benningtonians—historically overpoliced and underserved—are particularly impacted by the possibility of retribution and retaliation.

127. A policy that disproportionately dissuades a population from participating in a process for which it has a disproportionate need is a quintessential disparate impact. *See Gallagher v. Magner*, 619 F.3d 823, 835 (8th Cir. 2010) (the disparate impact inquiry turns on whether it is "reasonable to infer that [a] protected group will experience a disproportionate adverse effect from a policy or decision"). Bennington's policy to reveal details about those who complain of police misconduct therefore violated the VFHPAA because it disparately impacted Black Benningtonians.

Count 3—Retaliation against Ms. Keating and Mr. Fowler in violation of Chapter 1, Article 20 of the Vermont Constitution

128. Ms. Keating and Mr. Fowler incorporate the foregoing paragraphs as though fully contained herein.

129. This claim is brought against the Town of Bennington, through the acts of its officers and employees.

130. Chapter 1, Article 20 of the Vermont Constitution provides that "the people have a right to assemble together to consult for their common good—to instruct their Representatives—and to apply to the Legislature for redress of grievances, by address, petition or remonstrance."

131. Like Article 13's right to freedom of speech, Article 20's language makes clear that the provision is self-executing, and, under these circumstances, damages are available as a remedy for its violation. *See Shields v. Gerhart*, 163 Vt. 219, 227 (1995); *see also Zullo v. State*, 2019 VT 1, ¶¶ 34-36.

132. Although the values and actions protected by Article 20 and the analogous "petition" clause of the First Amendment are similar, *see, e.g.*, *In re Davenport*, 129 Vt. 546, 559 (1971), the Vermont Supreme Court has repeatedly explained that Article 20's protections exceed that of the federal Constitution, *see State v. Read*, 165 Vt. 141, 155-56 (1996).

133. It is well-settled that under the First Amendment, officials cannot retaliate against an individual for engaging in protected speech, petitioning, or other protected activities. *See, e.g.*, *Nieves v. Bartlett*, 139 S. Ct. 1715, 1722 (2019).

134. Like the First Amendment, Article 20 prohibits retaliation for protected activity.

135. Complaining to officials about misconduct is at the heartland of the Petition Clause's and Article 20's protections. *See* Stephen A. Higginson, *A Short History of the Right to Petition Government for the Redress of Grievances*, 96 Yale L.J. 142, 154 (1986).

136. Submitting a complaint to BPD, and therefore the Select Board as the reviewing body, is protected activity. *See, e.g.*, *Gable v. Lewis*, 201 F.3d 769, 771 (6th Cir. 2000) ("[S]ubmission of complaints and criticisms to nonlegislative and nonjudicial public agencies like a police department constitutes petitioning activity protected by the petition clause.").

137. Although the Vermont Supreme Court has not authoritatively confronted the framework for Article 20 retaliation claims, the Second Circuit has explained that "the proper legal test in determining whether [a government] action is adverse in First Amendment retaliation cases is whether the alleged acts 'would deter a similarly situated individual of ordinary firmness from exercising his or her constitutional rights.'" *Dillon v.*

Morano, 497 F.3d 247, 254 (2d Cir. 2007) (quoting *Zelnik v. Fashion Inst. of Tech*., 464 F.3d 217, 225 (2d Cir. 2006)).

138. As explained in detail above, the Select Board's naming and shaming of Ms. Keating and Mr. Fowler for submitting purportedly unfounded complaints, along with the release of their most personal information, would have deterred other individuals from submitting complaints of police misconduct.

139. The Select Board's acts constituted an adverse retaliatory act against Ms. Keating and Mr. Fowler in violation of Chapter 1, Article 20.

Count 4—Town policy and practice in violation of Chapter 1, Article 20 of the Vermont Constitution

140. Ms. Keating and Mr. Fowler incorporate the foregoing paragraphs as though fully contained herein.

141. This claim is brought against the Town of Bennington directly for its Town-wide policy and practice.

142. The Town's official policy regarding complaints against police—substantiated misconduct may be kept confidential, but unfounded complaints will be publicly released along with complainants' identities—chilled and deterred individuals from exercising their Article 20 right to petition their government for a redress of grievances.

143. Because of both individual complaints and the findings of the IACP report, the Town and the Select Board were on notice that many individuals in the community fear retaliation and retribution from the Bennington Police Department.

144. The Town nevertheless enacted a policy that maximizes the risks and harms for those who petition unsuccessfully, and minimizes the benefits for those who lodge what is deemed a meritorious claim.

145. This policy intentionally and foreseeably operated to chill and deter future individuals from complaining of police misconduct and for holding their government accountable.

146. The policy also deprived the public of critical information. It kept confidential information in which there is great public interest—an official's actual misconduct—and made public information about which there are heightened privacy interests and little public import—a complainant's identity and unfounded allegations against officers.

147. Because the policy operated to chill and deter the exercise of Benningtonians' rights to petition their government for a redress of grievances and sought to disadvantage the public from holding their officials accountable for misconduct, it violated Article 20 of the Vermont Constitution.

Count 5—Town policy and practice in violation of Chapter 1, Article 7, the Common Benefits Clause, of the Vermont Constitution

148. Ms. Keating and Mr. Fowler incorporate the foregoing paragraphs as though fully contained herein.

149. This claim is brought against the Town of Bennington directly for its Town-wide policy and practice.

150. Chapter 1, Article 7 of the Vermont Constitution provides that:

> [G]overnment is, or ought to be, instituted for the common benefit, protection, and security of the people, nation, or community, and not for the particular emolument or advantage of any single person, family, or set of persons, who are a part only of that community; and that the community hath an indubitable, unalienable, and indefeasible right, to reform or alter government, in such manner as shall be, by that community, judged most conducive to the public weal.

151. This provision is known as the Common Benefits Clause. "The concept of equality at the core of the Common Benefits Clause," the Supreme Court has explained, is "the elimination of artificial governmental preferments and advantages." *Baker v. State*, 170 Vt. 194, 211 (1999).

152. The "inclusionary principle" at the heart of the Clause, *id.* at 209, mandates that "government [be] established for the common benefit of the people and community as a whole," *id.* at 208. The Clause therefore "prohibits not the denial of rights to the oppressed, but rather the conferral of advantages or emoluments upon the privileged." *Id.*

153. The Clause also provides that the public has an "indubitable, unalienable and indefeasible right, to reform, alter or abolish government, in such manner as shall be, by that community, judged most conducive to the public weal." Public accountability and self-government, in other words, are inextricably intertwined with the Clause's vision of "equal access to public benefits and protections for the community as a whole." *Baker*, 170 Vt. at 211.

154. Accordingly, while the Clause prohibits *any* "governmental favoritism toward . . . groups or 'set[s] of men,'" *id.* at 208, that favoritism is particularly odious to the Constitution where government officials seek to elevate *themselves* over the public that seeks to hold them accountable.

155. The Town's official policy regarding complaints against police—substantiated misconduct may be kept confidential, but unfounded complaints will be publicly released along with complainants' identities—therefore violated Article 7.

156. Specifically, the policy operated to disadvantage private citizens seeking to hold their officials accountable. When a complaint was deemed founded, both the complainant's and police officer's identities were held confidential—as well as the

underlying misconduct itself. When a complaint was deemed unfounded, however, both the complainant's and police officer's identity were released. This maximized the benefit for the public official at all times: the officer's name is only released when the complaint is unfounded. And this minimized the benefit for citizen-complainants who received no public vindication when the complaint was meritorious—but had their information released when the complaint was unfounded.

157. Article 7 is self-executing precisely to allow individuals like Ms. Keating and Mr. Fowler to resist such policies: "affording citizens the right to challenge perceived partiality by a governmental entity ensures vigorous protection for the community compact that is the heart of government." *In re Town Highway No. 20*, 2012 VT 17, ¶ 34. Damages are available in this instance.

PRAYER FOR RELIEF

WHEREFORE, Ms. Keating and Mr. Fowler pray that the Court issue the following relief:

a. A declaratory judgment that the Select Board violated their rights under the VFHPAA, Articles 7 and 20 of the Vermont Constitution through its acts and disclosures;

b. A declaratory judgment that the Town's official policy violated the VFHPAA Articles 7 and 20;

c. An award of damages to compensate Ms. Keating and Mr. Fowler for the violations of their rights and the ensuing harm those violations caused;

d. An award of reasonable costs and attorney's fees; and

e. Allow any further relief to which Ms. Keating and Mr. Fowler may be entitled.

Ms. Keating and Mr. Fowler demand a jury trial on any issues so triable.

/s/ Harrison Stark
Lia Ernst
Hillary Rich
ACLU Foundation of Vermont
PO Box 277
Montpelier, VT 05601
(802) 223-6304
hstark@acluvt.org
lernst@acluvt.org
hrich@aclutvt.org

Counsel for Cassandra Keating and Joel Fowler

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