

October 11, 2018

VIA REGULAR AND ELECTRONIC MAIL

Mr. Nathaniel J. Tupper
Town Manager, Town of Yarmouth
200 Main Street
Yarmouth, ME 04096
ntupper@yarmouth.me.us

Re: Charter Amendment on Public Employment and Elected Office

Dear Mr. Tupper:

My name is Zachary Heiden, and I am the Legal Director of the ACLU of Maine. I am writing in regards to a proposed amendment to the Yarmouth Town Charter that would prohibit any employee of the Town of Yarmouth or the Yarmouth School Department from serving on the Yarmouth Town Council. It is my understanding that Yarmouth residents will be voting on this amendment on November 6, 2018.

We believe that prohibiting town and school employees from campaigning for and serving on the Yarmouth Town Council would violate those employees' First Amendment rights. If Yarmouth adopts the proposed amendment, it may face litigation on behalf of public employees who wish to serve their community through elected office. This litigation could prove extremely costly to the town—not only because of the expense of defending the suit, but also due to the possibility that the town could be required to pay the attorney's fees and costs of a public employee who brings a successful suit.

The proposed restriction impinges upon three related but distinct activities that are protected by the First Amendment: first, the right of employees to serve in office; second, the right of employees to campaign for office; and third, the right of residents of the town to vote for and be served by the candidate of their choice. In this circuit, it has been clearly recognized that all of these activities are strongly protected. Campaigning for office is an expressive act of the kind most heavily protected by the First Amendment. *See Mancuso v. Taft*, 476 F.2d 187, 190 (1st Cir. 1973). Limits on campaigning by public officials (whether for themselves or others) are only permissible if those limits “substantially serve government interests that are important enough to outweigh the employees’ First Amendment rights.” *See Magill v. Lynch*, 560 F.2d 22, 27 (1st Cir. 1977). Other circuits have been even more stringent, upholding restrictions on candidacy only when they are the least restrictive means of achieving the government’s “vital” interest. *See Randall v. Scott*, 610 F.3d 701, 711-12 (11th Cir. 2010).

Restrictions on who may run for election also implicate the fundamental right to vote, in that they limit the choices available to voters. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983) (holding that an early filing requirement placed an unconstitutional burden on both candidates and voters); *Lubin v. Panish*, 415 U.S. 709, 716 (1974) (holding that fee requirements burden both indigent candidates and voters); *Bullock v. Carter*, 405 U.S. 134, 141 (1972) (invalidating fee requirement as unreasonable burden on candidates and voters); *Mancuso v. Taft*, 476 F.2d at 190 (recognizing the restrictions on who may run can cause actual injury to voters).

In order for Yarmouth to justify a restriction on these important First Amendment protections, it would need to show, at a minimum, that efficient public service is somehow undermined by allowing public employees to serve on the town council, and that Yarmouth's interest in providing efficient public service outweighs the employee's interest in free expression. Yarmouth is in no position to satisfy either of these requirements. At best, the justification for this restriction seems to be simply a policy preference on the part of a number of people in the community. At worst, the proposal is based on animus towards a current member of the town council who is also a public school teacher. We are aware of no evidence that this particular employee, or any other public employee who has served in elected office in Yarmouth, has had any negative impact on the actual operation of the Yarmouth town government. And, we are aware of no legal impediment to service in nonpartisan elected office by any public employee, under either Maine or Federal law. In light of that, Yarmouth is going to have a very difficult time justifying this restriction.

In 2011, two residents of the City of South Portland filed suit challenging a restriction on public employees serving on the school board. *See Callaghan v. City of South Portland*, 2013 ME 78, 76 A.3d 348, 351. The Superior Court found in their favor, and the Maine Supreme Judicial Court affirmed that decision. The court ultimately allowed the plaintiffs to continue to serve their community in elected office, and awarded counsel for the plaintiffs over \$50,000 in legal fees and costs. We are fairly confident that a court would reach a similar result in a challenge to your proposed restriction.

We are hopeful that voters in Yarmouth will ultimately decide not to support this restriction, or that there is some way for you or the town council to prevent the restriction from being implemented. But if not, the ACLU of Maine may find it necessary to bring suit to block this restriction from going into effect.

If you have any questions, please feel free to get in touch.

Very truly yours,



Zachary L. Heiden
Legal Director, ACLU of Maine