THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2023-0663

JOHN M. FORMELLA, ATTORNEY GENERAL

v.

CHRISTOPHER HOOD, et al.

APPEAL PURSUANT TO RULE 7 FROM A DECISION OF THE ROCKINGHAM COUNTY SUPERIOR COURT

REPLY BRIEF FOR JOHN M. FORMELLA, ATTORNEY GENERAL

JOHN M. FORMELLA, ATTORNEY GENERAL

By His Attorneys,

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ATTORNEY GENERAL

and

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15-Minute Oral Argument Requested

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STATEMENT OF FACTS

The State's opening brief argued that: (1) the defendants' alleged racially-motivated trespass upon government-owned property violated the Civil Rights Act ("Act") and was not protected by the right to freedom of speech; (2) the concept of trespass contains its own limiting principle because trespass cannot occur when the actor is privileged to enter the property or otherwise lawfully present on the property; (3) a "knowing" trespass requirement has no foundation in law or fact; and (4) the State's complaint sufficiently alleges trespass even under the trial court's novel theory.

The defendants' brief asks this Court to affirm the trial court's decision based upon a theory of trespass and an interpretation of the Act repeatedly rejected by the trial court and unsupported by any law or principled statutory construction. Def. Br.[1]: 11-22. These theories are reiterated and incorporated into the defendants' argument that the State's application of the Act is unconstitutionally overbroad. Def. Br.: 23-30.

The American Civil Liberties Union ("ACLU"), both its national organization and New Hampshire chapter, filed a brief as *amicus curiae* in support of the defendants. In that brief the ACLU argues primarily that the plain language of the Act as well as the First Amendment require "discriminatory victim-selection." ACLU Br.: 18-25.

The State files this reply brief to address the new arguments raised by the ACLU and to briefly respond to the defendants' arguments.

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[1] Citations to the record are as follows: "Def. Br." refers to the Defendant's brief; "ACLU Br." refers to the *amicus* brief filed by the American Civil Liberties Union; and "App1." refers to the first appendix filed with the State's brief.

ARGUMENT

I. *AMICUS CURIAE* CANNOT RAISE OR DEVELOP NEW ARGUMENTS ON APPEAL.

As a matter of appellate procedure, the parties to the case set the issues for appellate courts to consider and address on appeal and *amici* cannot introduce new issues—even if those issues may support the ultimate outcome of the trial court. *See McCoy v. Mass. Inst. of Tech.*, 950 F.2d 13, 23 n.9 (1st Cir. 1991) (refusing to consider arguments introduced by *amici* that would "raise[] different grounds in support of reversal"). "*Amici* are allowed to participate on appeal in order to assist the court in achieving a just resolution of issues raised by the parties." *Lane v. First Nat'l Bank of Boston*, 871 F.2d 166, 175 (1st Cir. 1989). But, "the mere fact that the *amici*, like the cavalry riding belatedly to the rescue, briefed and argued their . . . theory before us does not change the case's fundamental posture." *Id*.

No authority exists to "allow[] an *amicus* to interject into a case issues which the litigants, whatever their reasons might be, have chosen to ignore." *Id*. It is the extraordinary circumstance where appellate courts will consider novel theories raised for the first time by *amici*. *See*, *e.g.*, *UPS v. Mitchell*, 451 U.S. 56, 60 n.2 (1981); *Knetsch v. United States*, 364 U.S. 361, 370 (1960). This Court has also generally declined to consider new arguments raised by *amici* unless asked to do so by one of the parties. *See*, *e.g.*, *Duquette v. Warden, N.H. State Prison*, 154 N.H. 737, 739-40 (2007).

Here, the ACLU filed an *amicus curiae* brief that raised an entire new theory regarding the interpretation and application of the Act and the

First Amendment. ACLU Br.: 18-25. Specifically, it contends that the Act applies only under circumstances where "discriminatory victim-selection" has occurred and that the First Amendment protects any other form of bias-motivated unlawful conduct. ACLU Br.: 18-25. This is an issue that has never been raised or addressed by the parties or the trial court. Accordingly, this Court should decline to address the argument for the first time on appeal.

II. NEITHER THE PLAIN LANGUAGE OF THE CIVIL RIGHTS ACT NOR ITS CONSTRUCTION WITH THE CONSTITUTION REQUIRES "DISCRIMINATORY VICTIM-SELECTION," AND SUCH A REQUIREMENT WOULD PERVERT THE ACT'S COMPELLING GOALS.

By its plain language, the Act does not require a nexus between the bias- or hate-motivation underlying the prohibited conduct and a specific, identifiable victim. Instead, the Act prohibits actual or attempted interference with the rights or lawful activities of another through certain prohibited conduct that is motivated by a person or group's protected characteristics. This interpretation is consistent with the concept of free speech because it redresses unlawful conduct—not speech. Any conclusion to the contrary perverts the intent of the legislature in crafting the Act and the purpose of laws like the Act, which aim to provide redress for bias- or hate-motivated conduct that harms groups and communities and furthers the compelling state interest of preventing discriminatory or bias-motivated unlawful conduct.

A. The Act does not require "discriminatory victim-selection," but instead redresses unlawful conduct that interferes with the rights of others including entire communities.

The Act provides that:

> All persons have the right to engage in lawful activities and to exercise and enjoy the rights secured by the United States and New Hampshire Constitutions and the laws of the United States and New Hampshire without being subject to actual or threatened physical force or violence against them or any other person or by actual or threatened damage to or trespass on property when such actual or threatened conduct is

> motivated by race, color, religion, national origin, ancestry, sexual orientation, sex, gender identity, or disability.

RSA 354-B:1, I. It further provides that, "It shall be unlawful for any person to interfere or attempt to interfere with the rights secured by this chapter." RSA 354-B:1, II. To prove that a violation of the Act has occurred, the State must prove three elements: (1) that the perpetrator actually used or threatened to use physical force, violence, property damage, or trespass; (2) that the perpetrator was motivated by race, color, religion, national origin, ancestry, sexual orientation, sex, gender identity, or disability; and (3) that the perpetrator interfered with or attempted to interfere with another person's lawful or constitutionally protected activities.[2]

The Act is unambiguous in that it does not require the perpetrator to target a specific, identified person or engage in "discriminatory victim-selection." The Act unambiguously allows for an enforcement action if a perpetrator interferes with or attempts to interfere with the rights of a single person or entire groups, so long as the perpetrator commits one of the

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[2] The Act makes no reference to speech, expressive conduct, or specific symbols like the ordinance at issue in *R.A.V. v. St. Paul*, 505 U.S. 377 (1992). It does not attempt to punish speech or expressive conduct. Instead, it punishes unlawful non-expressive conduct motivated by protected characteristics. Speech or expressive conduct may be used as evidence of the bias-motivation. Arguments suggesting otherwise misconstrue the Act.

The Act also requires the State to prove, by clear and convincing evidence, that the perpetrator was motivated to commit the unlawful act by a particular protected characteristic as opposed to the less protective standard used in the St. Paul's ordinance from *R.A.V.*: using a symbol that "one knows or has reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender." *Id*. at 380.

enumerated unlawful acts and was motivated by a protected characteristic when committing that act.

The Act unambiguously protects individuals and groups who have their rights interfered with because of their identities or for associating with people or groups because of those identities. It protects the civil rights of groups or communities that may be targeted by bias- or hate-motivated conduct, such as when a house of worship may be targeted or a bathroom in a public school is defaced with racist graffiti.[3] It also allows for enforcement to protect the civil rights of those support or advocate for the rights of marginalized groups, such as white Freedom Riders advocating for the rights of Black people or heterosexual people who show support for the LGBTQ+ community by flying Pride flags from their homes or businesses.[4] To read the Act so narrowly as the ACLU has done in its *amicus* brief would devastate the important protections it affords.

In support of that unambiguous reading, compare the Act with the hate-crime sentencing enhancement, RSA 651:6, I(f). RSA 651:6, I(f), unambiguously requires a specific, identifiable victim to prove that the perpetrator was "substantially motivated to commit the crime because of hostility toward *the victim's*" protected characteristics. The hate-crime sentencing enhancement requires a nexus between the victim and the hate-motivation that the Act lacks. This Court cannot read such a requirement

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[3] N.H. Department of Justice, *Enforcement Actions Filed Against Two Juveniles for Violation of the New Hampshire Civil Rights Act*, Sept. 20, 2022 (*available at* https://www.doj.nh.gov/news/2022/20220920-civil-rights-enforcement.htm).

[4] N.H. Department of Justice, *Enforcement Actions Filed Against Loren Faulkner for Violations of the New Hampshire Civil Rights Act*, Apr. 27, 2023 (*available at* https://www.doj.nh.gov/news/2023/20230427-faulkner-civil-rights-violations.htm).

into the Act because the legislature intentionally omitted it. *See Strike Four, LLC v. Nissan N. Am., Inc.*, 164 N.H. 729, 739 (2013) (observing that "reading into the statute a provision that the legislature did not see fit to include" would "contravene our rules of statutory interpretation"); *State v. Simone*, 151 N.H. 328, 330 (2004) (observing that "proper statutory interpretation" requires the Court to presume that by excluding certain requirements the legislature intended that exclusion).

The existence of the nexus in RSA 651:6, I(f) further shows that the legislature did not intend for a nexus to be required because the legislature knew how to create such a requirement and it did not do so. Accordingly, the plain language of the Act does not require a nexus.

B. No case or principle of law supports the proposition that only "discriminatory victim-selection" passes constitutional muster when statutes redress bias- or hate-motivated conduct as opposed to singling out bigoted speech.

The ACLU's position regarding "discriminatory victim-selection" flows from a misapplication of *Wisconsin v. Mitchell*, 508 U.S. 476 (1993), and *R.A.V.* From there, it relies upon a series of cases that never had to address whether "discriminatory victim selection" was a constitutional requirement because the plain language of the statutes showed that the statutes already required a nexus between the victim and the hate-motivation. *Mitchell* and *R.A.V.* can be reconciled will all the cases cited by the ACLU, among others, and neither *Mitchell* nor *R.A.V.* require "discriminatory victim-selection" to pass constitutional muster.

The critical element of *Mitchell* is that the statute "enhance[d] the maximum penalty for conduct motivated by a discriminatory point of view

more severely than the same conduct engaged in for some other reason or for no reason at all." *Mitchell*, 508 U.S. at 485. The Court's decision repeatedly cited or emphasized "bias-motivated offenses" over "discriminatory victim-selection." *See*, *e.g.*, *id*. at 486 ("[T]he Wisconsin Legislature has decided, as a general matter, that bias-motivated offenses warrant greater maximum penalties across the board does not alter the result here."); *id*. at 487 ("[T]he Wisconsin statute singles out for enhancement bias-inspired conduct."); *see also Ward v. Utah*, 398 F.3d 1239, 1249-50 (10th Cir. 2005) (describing *Mitchell* as requiring "the commission of a primary, conduct-based offense"); *State v. Geddes*, 998 N.W.2d 166, 176 (Iowa 2023) (emphasizing that *Mitchell* "targeted conduct, not expression"); *State v. McKnight*, 511 N.W.2d 389, 394-395 (Iowa 1994) (finding that combining evidence of hate motivation, such as speech, with unlawful conduct does not immunize that speech from consequences); *State v. Ladue*, 631 A.2d 236, 237 (Vt. 1993) ("[P]enalty-enhancement statutes based on motivation are not overbroad and do not create a chilling effect on one's First Amendment rights."). The Court distinguishes *R.A.V.* not through "discriminatory victim-selection" but by recognizing that the ordinance in *R.A.V.* singled out specific types of "fighting words" – an unlawful form of content-based discrimination. *Mitchell*, 508 U.S. at 487.

Since *Mitchell*, courts have upheld statutes and convictions where "discriminatory victim-selection" was not a requirement or where the defendants targeted entire classes of people. *See*, *e.g.*, *Lipp v. State*, 227 A.3d 818, 828 (Md. Ct. Spec. App. 2020); *In re B.C.*, 680 N.E.2d 1355, 1363-64 (Ill. 1997) (reinstating criminal charges for hate-crime enhanced

disorderly conduct where the victim was a white student assailed with "patently offensive depictions of violence toward African-Americans"); *State v. Nye*, 943 P.2d 96, 101 (Mt. 1997); *People v. McDowd*, 773 N.Y.S.2d 531, 534 (N.Y. Sup. Ct. 2004); *United States v. McDermott*, 29 F.3d 404, 410 (8th Cir. 1994) (discussing a spree of harassment aimed at discouraging Black residents from using a local park as a hate crime under federal law).

Lipp, *Nye*, and *McDowd* are particularly relevant because in those cases the defendants directed their hate motivated conduct at the community as opposed to specific individuals. *Lipp*, 227 A.3d at 819; *Nye*, 943 P.2d at 90; *McDowd*, 773 N.Y.S.2d at 534. In *Lipp*, the defendant vandalized a public school with racist, antisemitic, and anti-LGBTQ+ symbols, images, and phrases—including one phrase that targeted the school's Black principal. *Lipp*, 227 A.3d at 819. In *Nye*, the defendant defaced government road signs with bumper stickers expressing his contempt for a particular religious group. *Nye*, 943 P.2d at 90. In *McDowd*, the defendant discouraged residents of his neighborhood from selling their homes to Black people by distributing fliers that included threats to commit arson. *McDowd*, 773 N.Y.S.2d at 534.

In each of these cases, the courts, relying on *Mitchell*, rejected First Amendment challenges to these legal actions because the First Amendment does not preclude enhanced penalties for unlawful conduct such as vandalism, disorderly conduct, and criminal threatening, when bias toward certain protected characteristics motivated those unlawful acts. *Lipp*, 227 A.3d at 827-28; *Nye*, 943 P.2d at 100-01; *McDowd*, 773 N.Y.S.2d at 533-34. In none of these cases did it matter whether the defendants engaged in

"discriminatory victim-selection"; all that mattered was their bias motivated their unlawful acts. *Lipp*, 227 A.3d at 827-28; *Nye*, 943 P.2d at 100-01; *McDowd*, 773 N.Y.S.2d at 533-34.

The ACLU relies heavily upon cases where the courts purportedly emphasized "discriminatory victim-selection." ACLU Br.: 19-20. These decisions never required "discriminatory victim-selection" to satisfy the First Amendment, however; instead, the courts in those cases construed statutes where "discriminatory victim-selection" was a requirement either for the enhancement to apply or to provide sufficient evidence to convict. *See*, *e.g.*, *Lucas v. United States*, 240 A.3d 328, 335 (D.C. 2020) ("[A] designated act that demonstrates an accused's prejudice based on the actual or perceived [protected characteristics] of a victim of the subject designated act."); *State v. Stalder*, 630 So. 2d 1072, 1074 (Fla. 1994) ("[I]f the commission of such felony or misdemeanor evidences prejudice based on the [protected characteristics] of the victim."); *State v. Mortimer*, 641 A.2d 257, 260 (N.J. 1994) (enhancing penalties for certain "disorderly persons offenses" when the person acted "at least in part, with ill will, hatred or bias toward, and with a purpose to intimidate, an individual or group of individuals because of [protected characteristics]"); *State v. Talley*, 858 P.2d 217, 220 (Wa. 1993) ("A person is guilty of malicious harassment if he maliciously and with the intent to intimidate or harass another person because of . . . that person's [protected characteristics] [commits certain acts]."). At least one federal judge has recognized the confusion that this has created and that reading such a requirement into *Mitchell*'s holding undermines the important interests behind enhanced penalties for hate-motivated conduct that *Mitchell* recognized. *See United States v. Miller*,

767 F.3d 585, 606 (6th Cir. 2014) (*Sargus*, J., dissenting) (observing that to the extent *Mitchell* discusses "discriminatory victim-selection," it does so because the Wisconsin statute at issue required such selection as opposed to any other reason).

The ACLU presents a false choice: either "discriminatory victim-selection" occurs, or the statute is suspect. Scrutiny of the case law reveals that no such choice exists because *Mitchell* has always permitted legal action or enhanced penalties where a person couples their unlawful conduct with bias- or hate-motivation.

The legislature has not included a requirement for "discriminatory victim-selection" or established any required nexus between the victim and the unlawful bias-motivated conduct in the Act. This is wholly consistent with *Mitchell* and principles of free speech. Accordingly, this Court should reject the ACLU's arguments and reverse the trial court's orders.

III. AS THE TRIAL COURT RECOGNIZED, THE STATE'S COMPLAINT AND THEORY ALLEGE THAT THE DEFENDANTS ACTUALLY TRESPASSED AS DEFINED BY TORT LAW.

A trespass occurs when a person "throw[s], propel[s], or place[s] a thing" on, beneath, or above the property of another. Restatement (Second) of Torts § 158, cmt. i; *see also Moulton v. Groveton Papers Co.*, 112 N.H. 50, 54 (1972) (stating that "a trespass must be an intentional invasion of the property of another" and citing the Restatement of Torts in support of common law propositions). It does not matter that trespassers mistakenly believe that they may lawfully interfere with the property rights at issue. Restatement (Second) of Torts § 164. In the context of trespass upon chattels, a trespass occurs where a person touches or handles the chattel without the permission of the owner. Restatement (Second) of Torts § 217; *see also Glidden v. Szybiak*, 95 N.H. 318, 320 (1949) (citing the Restatement of Torts for discussion of the law regarding trespass upon chattels). The trial court agreed with this proposition and rejected similar arguments that the defendants advance on appeal. App1.: 8-10.

The State has always maintained the theory that the defendants actually trespassed upon government-owned property, a proposition that the trial court also agreed with. *See*, *e.g.*, App1.: 8, 56 n.3. The defendants' argument misreads the statute and attempts to incorporate requirements of "threatened trespass upon property" into the definition of actual trespass. Any conclusion to the contrary negates the use of "actual" in RSA 354-B:1 and would create an absurd result where the State must show evidence of

threatened behavior when alleging both actual or threatened trespass. Accordingly, this Court should reject the defendants' arguments.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court reverse the judgment below. The State requests a fifteen-minute oral argument before the Court, which will be presented by Senior Assistant Attorney General Sean R. Locke.

Respectfully Submitted,

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May 29, 2024

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CERTIFICATE OF COMPLIANCE

I, Sean R. Locke, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 2,998 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

May 29, 2024 */s/Sean R. Locke*
Sean R. Locke

CERTIFICATE OF SERVICE

I, Sean R. Locke, hereby certify that a copy of Attorney General John M. Formella's brief shall be served on counsel for the parties through the New Hampshire Supreme Court's electronic filing system.

May 29, 2024 */s/Sean R. Locke*
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