THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2023-0663

John M. Formella, Attorney General
Plaintiff / Appellant

v.

Christopher Hood, et al.
Defendants / Appellees

Appeal Pursuant to Supreme Court Rule 7 from Rockingham County
Superior Court Docket No. 218-2023-cv-00086

BRIEF OF *APPELLEES* CHRISTOPHER HOOD, et al.

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May 9, 2024

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STATEMENT OF THE CASE AND THE FACTS

On July 30, 2022, a group of about ten people associated with the group NSC-131, including Christopher Hood and Leo Anthony Cullinan, entered a public highway overpass in Portsmouth, New Hampshire and hung from the railing two banners with the message "KEEP NEW ENGLAND WHITE." (Apx. I at 156 – 157)

Portsmouth police were called to the scene, where they informed Hood that hanging banners without a permit violated a municipal ordinance. (Apx. I at 157). Hood then instructed the protesters to remove the banners from the fence and they were removed (Apx. I at 157).

On January 17, 2023, the Attorney General brought actions for civil penalties and injunctive relief under New Hampshire's Civil Rights Act, RSA 354-B:1, against Hood, Cullinan, and NSC-131 (an unincorporated association) based on the alleged conduct and the Amended Complaints of May 9, 2023 are the operative pleadings in this matter (Apx. I at 152 – 160).

The New Hampshire Civil Rights Act, RSA 354-B:1, states in relevant part:

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

The Complaints respectively alleged that Hood violated the Act by trespassing and by conspiring to commit a trespass, that Cullinan violated the Act by conspiring to commit a trespass, and that NSC-131 violated the Act by trespassing—all based on the alleged conduct of going on the highway overpass and affixing banners that read "Keep New England White" (Apx. I at 153 – 154). The Complaints do *not* allege that any particular "persons" were "subject to" trespass "motivated by race," but only that the trespass on public property through the affixing of the banners was motivated by race (Apx. I at 153).

Hood and Cullinan filed motions to dismiss (Apx. I at 76, 105). On June 5, 2023, the trial court held that the Complaints' allegations did not state a violation of: (1) New Hampshire's criminal trespass statute, RSA 635:2, because there was no indication that Defendants knew that they were not licensed or privileged to enter onto the highway overpass and affix the banners; (2) The City of Portsmouth's anti-obstruction ordinance §9.502 because the Attorney General did not allege that the banners obstructed traffic; or (3) New Hampshire's advertisement law, RSA 236:27, because the banners did not constitute an advertisement for NSC-131. (Apx. I at 3-23). The court did however conclude that the Complaints stated a common law civil trespass violation upon public property (Apx. I at 10 – 12) and it proceeded to analyze whether the Civil Rights Act validly imposes special penalties for an illicitly-motivated civil trespass.

The trial court concluded that if the Act was interpreted to punish any civil trespass on public property "motivated by" a protected characteristic, it would be substantially overbroad in violation of the both

the First Amendment and Part I, Article 22 of the New Hampshire Constitution. (Apx. I at 15 – 22) The trial court noted that the Office of the Attorney General's interpretation of the statute would empower the State to punish any number of expressive activities on public property that are abstractly "motivated by" race, religion, or any other protected characteristic, including (for example) a Black Lives Matter protest on a public street, a demonstration to "save Chinatown," an abortion protest on the statehouse lawn, or the proselytization of a particular religion. (Apx. I at 18 – 20).

The trial court concluded that the Act is partially invalid as applied to common law civil trespass on public property. (Apx. I at 21 – 22). As that was the only remaining viable theory for a Civil Rights Act violation, the trial court held that the Attorney General's Office had failed to state a claim under the Act and dismissed all three actions. (Apx. I at 22).

The Attorney General's Office filed a motion for reconsideration, which the court denied on October 18, 2023. (Apx. I at 52 – 56). The trial court reiterated its concerns that the application of the Act to civil trespass, which does not require knowledge that the defendant's presence was unauthorized and unprivileged, would render it substantially overbroad. (Apx. I at 57 – 58). The trial court explained that "a person's disability rights protest at Veteran's Park in Manchester continuing after 11 p.m. could violate [a curfew regulation], even if the protester held a good faith belief that the regulation began at midnight or that there was no such curfew," and that, "[u]nder the broader construction of the Civil Rights Act, the protester will have violated RSA 354-B:1 through their unprivileged presence on public property motivated by 'disability,' provided the protester

sufficiently 'interferes' with the lawful rights of others in doing so." (Apx. I at 62). The trial court reasoned that expansively interpreting the Act to encompass such activity would render it substantially overbroad because "regulation under these circumstances bears no relation to the government's compelling interest under the Civil Rights Act." Id.

The trial court concluded that narrowing the Act to apply only where "the person, *knowing that they are not licensed or privileged to do so*, enters or remains in any place," with illicit motivation, would largely resolve these concerns by "exclud[ing] from regulation speakers 'motivated by race' or another listed characteristic who have a good faith belief that they are engaging in lawful, protected speech but accidentally run afoul of a regulation of government property." (Apx. I at 64). The Attorney General's Office filed a second motion for reconsideration (Apx. I at 39 – 47), which was also denied (Apx. I at 39).

This appeal followed.

SUMMARY OF THE ARGUMENT

I. This case may be simply decided on the plain language and definitions in the New Hampshire Civil Rights Act ("NHCRA"), RSA 354-B:1. The statute prohibits "actual or threatened damage to or trespass on property when such actual or threatened conduct is motivated by race." (emphasis supplied). The Attorney General has doggedly maintained that someone committing a trespass (as construed under criminal law, civil law, commercial advertising statutes or city ordinances dealing with obstructing sidewalks) violates the NHCRA if such a trespass is "motivated by race."

II. The statute, however, defines what a trespass is for the purpose of the NHCRA: "trespass on property' is a communication, by physical conduct or by declaration, of an intent to inflict harm on a person or a person's property by some unlawful act with a purpose to terrorize or coerce." The pleading in this matter simply did not sufficiently allege a "declaration of an intent to inflict harm on a person or a person's property" to satisfy the statute.

III. The legislative history of the statute supports the Defendant / Appellee's interpretation of RSA 354-B:1 in that every situation considered by the legislature involved actual harm or the threat of harm to a cognizable victim. Even if a court were to accept the government's tortured interpretation of the statute, i.e., that the statute is satisfied by pleading some form of trespass "motivated by race," (without the necessary element of "a communication … by declaration of an intent to inflict harm on a person or a person's

property") there was as a matter of law insufficient pleading of a trespass of any kind.

IV. The trial court correctly held that, quite apart from what a trespass is under the statute or whether any kind of trespass was sufficiently plead in this matter, that the government's interpretation of RSA 354-B: 1 as applied to a civil trespass claim was overbroad and would chill the free expression of public speakers.

ARGUMENT

I. THE NEW HAMPSHIRE CIVIL RIGHTS ACT DEFINES A TRESPASS FOR THE PURPOSES OF THE APPLICATION OF THE STATUTE

The brief of the Attorney General doggedly maintains the contention, asserted throughout this litigation, that the statute prohibits "a trespass motivated by race" and that "the New Hampshire Civil Rights Act RSA 354 B:1 (the "Act") does not provide its own definition of "trespass on property" thus requiring looking in the dictionary, civil cases, the Restatement of Torts and the like for what constitutes a "trespass." (Appellant's Brief at 19 – 20). This argument creates a false distinction between actual and threatened trespass and to some extent lured the trial court down the rabbit hole of the exploration of definitions of "actual" trespass (Apx. I, at pp. 5-13), including civil cases, various sidewalk obstruction ordinances and highway signage regulations, before the trial court correctly determined that the Attorney General's interpretation of the Act collided with constitutional free speech guarantees.

This case, however, may be simply decided on the plain language and definitions in RSA 354-B:1. Despite the hairsplitting over "threatened trespass" or "actual trespass," a fair reading of the statute yields what a trespass is for the purpose of the Act: "**trespass on property' is a communication**, by physical conduct or by declaration, **of an intent to inflict harm on a person or a person's property** by some unlawful act with a purpose to terrorize or coerce."

It is Appellees' position that this provision clearly defines what constitutes a "trespass" under the act and it constitutes the following

essential elements: 1) a communication of an intent to inflict harm on a person or a person's property; 2) an unlawful act; and 3) a purpose to terrorize or coerce. It rejects the absurd results yielded by an interpretation that an "actual trespass, as opposed to a "threatened trespass," would eliminate the requirement of an "intention to inflict harm" and "a purpose to terrorize or coerce."

The pleading in this matter (Apx. I at 152) simply did not sufficiently allege a "*declaration of an intent to inflict harm on a person or a person's property*" to satisfy the statute, nor did it adequately plead "a purpose to terrorize or coerce."

Paragraph 4 of the Complaint alleges in pertinent part:

> "This trespass violated the Civil Rights Act because it was motivated by race and interfered with the lawful activities of others. The slogan on the banners, "Keep New England White," was plainly motivated by race. The only reasonable interpretation was to discourage people of color from residing in or visiting and making them feel unwelcome and unsafe."

Paragraph 30 of the Complaint alleges in pertinent part:

> "Race motivated the Defendants' trespass. The plain language of the banner references race and is designed to send the message that people of color are unwelcome and causing those targeted to feel unsafe in New Hampshire."

That is all there is in the entire pleading to satisfy the elements in the statute. Even if we assume, *arguendo*, that the defendants were committing a trespass and that the allegation of trespass satisfies the "unlawful act" element in the statute, there is still no sufficient allegation of "*physical conduct or by declaration of an intent to inflict harm on a person or a*

person's property" and "*a purpose to terrorize or coerce*" as the statute requires.

The Attorney General would have us believe that the slogan "Keep New England White," being racially motivated, somehow satisfies a "declaration of an intent to inflict harm" and "a purpose to terrorize or coerce," but it falls significantly short of these elements. It expresses a sentiment. A sentiment that may indeed be unsavory to many citizens no matter what their racial group, but a sentiment nonetheless.

The slogan could be interpreted at one extreme as a sentiment of "white supremacy," or it could be a statement of "white separatism" or more charitably one of white identitarianism. What it falls significantly short of, as a matter of law, is a "declaration of an intent to inflict harm on a person or a person's property."

Even the Attorney General in hearings conducted pursuant to the passage of the Act stated with regard to the necessary elements: "What we would have to have is that either the threat and damage to property or the act of violence, those three, accompanied by the hate language." Apx. II at 33. "I think we would have to prove that, we would have to establish that there was a threat of physical force, and that is defined within the statute." Id.

The Attorney General's current subjective interpretation of the slogan, that it makes people feel "unwelcome" just doesn't come close to satisfying the statutory requirement. Pleading that a message offends or triggers hurt feelings is a far cry from pleading the actual or threatened infliction of "harm on a person or a person's property." If the pleading is somehow deemed to satisfy the statute, it of course then triggers the constitutional

free speech analysis the trial court correctly applied and that will be more fully discussed below.

II. THE LEGISLATIVE HISTORY OF THE STATUTE SUPPORTS THE DEFENDANT/APPELLEE'S INTERPRETATION OF RSA 354-B:1

The legislative history of the statute supports the Appellee's interpretation of RSA 354-B:1 in that every situation considered by the legislature involved actual harm or the threat of harm to a cognizable victim. This is true of multiple representations made by members of the Attorney General's office during the legislative hearings as well as the opening statement by the chairperson of the Judiciary Committee who was the primary sponsor of the bill. Assistant Attorney General Larney stated:

> "I think what we have here is a statute that compliments what we already have. It fits in with our sentence enhancement statute and our **criminal threatening** statute."

(Apx. II at p. 30) (emphasis added).

> "I think we would have to prove that, **we would have to establish that there was a threat of physical force**, and that is defined within the statute. **The communication of an intent to inflict harm**. **We would have to establish for the Court that the writing … was a threat of an intent to inflict harm**. That is what we would have to establish to be successful."

(Apx. II at p. 33)(emphasis added).

A memorandum before the State Judiciary Committee listing among other supporters of the Bill for a Civil Rights Act, the Attorney General, contained within the Testimony report:

> "Supporters of this bill believe that it will enable the Attorney General's Office to **prosecute persons who subject others to**

> **actual or threatened physical force or violence**, **or who damage or threaten to damage property**, when such conduct is motivated by race, color, religion, national origin, ancestry, sexual orientation, gender, or disability."

(Apx. II at p. 40)(emphasis added)

The opening testimony of Senator Debora Pignatelli, who was the primary sponsor of the bill and the Chairperson of the Judiciary Committee stated:

> "This proposed legislation broadens New Hampshire's ability to respond quickly and efficiently to civil rights violations. It complements existing laws such as the criminal threatening and sentence enhancement statutes and the human rights commission statute by **providing law enforcement with an additional tool to address and prevent illegal acts of violence and threatened violence** that are motivated by hatred or animosity toward certain personal characteristics of the victim."

(Apx. II at 82)(emphasis supplied)

All of the above statements, and others like them in the legislative history, contemplate the application of the Civil Rights Act to acts of harm in the form of actual or threatened violence to persons or damage to property. Nothing in the legislative history supports an interpretation of the statute that deems a civil trespass on public property to display a message with racial content to be an exception to the statute's expressly stated purpose of "actual or threatened physical force or violence, or who damage or threaten to damage property, when such conduct is motivated by race."

III. THERE WAS AS A MATTER OF LAW INSUFFICIENT PLEADING OF A TRESPASS OF ANY KIND

Even if a court were to accept the government's interpretation of the statute, i.e., that the statute is satisfied by pleading some form of trespass "motivated by race," (without the necessary element of "a communication … by declaration of an intent to inflict harm on a person or a person's property") there was as a matter of law insufficient pleading of a trespass of any kind.

Count 1 of the Complaint claims a trespass, but none of the acts alleged in the complaint constitute a trespass under the potpourri of laws and ordinances relied upon by the Attorney General.

a. Criminal Trespass

Under New Hampshire Revised Statutes 635:2, a criminal trespass occurs if:

> …(b) The person knowingly enters or remains: (1) In any secured premises; (2) In any place in defiance of an order to leave or not to enter which was personally communicated to him by the owner or other authorized person; or (3) In any place in defiance of any court order restraining him from entering such place so long as he has been properly notified of such order.

A claim of criminal trespass is not satisfied because even if we assume, *arguendo*, that hanging a banner on public property constitutes a trespass, a completed trespass satisfying all the elements would require that the activity continue after being warned to refrain from it. Paragraphs 21 and 22 of the complaint allege:

21. “Officer Loureiro and Officer Caldwell informed the defendant that they cannot hang banners from the overpass without a permit because it violates a city ordinance, City of Portsmouth, NH Ordinances §§ 9.503, et seq.”

22. “Following this discussion, the defendant gave instructions to the group members who removed the zip ties and removed the banner from the overpass fence.”

Apx. I at 157.

The complaint clearly states the defendants complied with the orders and took the banner down. Thus, an essential element of criminal trespass, defiance of an order or warning, is absent and in fact contrary to the pleading. The trial court correctly agreed with this analysis. Apx. I at 10.

b. <u>The Portsmouth NH City Ordinance</u>

The Attorney General’s complaint also cited to Portsmouth, NH city ordinance §§ 9.503, which states:

> No person shall install or maintain any public way obstruction which in whole or in part rests upon, in or over any public sidewalk, except newsracks, without first applying for an being granted a license from the City Council. The license application shall include the following: (1) The physical dimensions of the public way obstruction; (2) The name, address and telephone number of the person or company responsible for the obstruction; and (3) A diagram showing the location of the obstruction and the dimensions of the sidewalk upon which it is to be located.

The Portsmouth City Ordinance §§ 9.503 has no applicability to the facts plead in this matter. The complaint made no reference to the obstruction or obstructing of a sidewalk. Moreover, there is no allegation

that that any item (whether an obstruction or not) was "upon, in or over" a sidewalk or that defendants obstructed the passage of pedestrians or vehicles as defined by §§ 9.501. The trial court correctly noted that the Complaint failed to adequately allege a violation of the Portsmouth City Ordinances. Apx. I at 12.

c. <u>RSA 236:27</u>

The complaint also cited as a ground for trespass RSA 236:27 which is a commercial regulation. The complaint stated in paragraph 4 in pertinent part that: "In displaying these banners, the defendant trespassed onto property…and the trespass violated city ordinance(s) and state law(s) governing posting materials on public property without permits and displaying signs and other materials on or over roadways." NH 236:27 provides:

> 236:27 Unauthorized Posting and Advertising. – If any person shall in any manner paint, put upon or affix to a bridge, fence, or other structure, or upon a rock or other natural object, the property of another, without his consent, any device, trademark, advertisement, or notice, he shall be guilty of a violation.

This provision, which appears to be limited in its scope to commercial advertising, trademarks, sales notices, and the like, is simply not cognizable as a civil or criminal trespass claim. It appears to be simply a commercial regulation punishable by at most a $50.00 fine. The trial court again correctly held that Defendants' banner was not a "device, advertisement, or notice" within the language of the statute and that if the legislature had

meant to ban all signs on the roadways it could have done so. Apx. I at pp. 13-15.

d. Civil Trespass

On this question, Appellees somewhat disagree with the conclusion of the trial court that a civil trespass was satisfied by the pleading in this matter.

Civil trespass is defined for purposes of NH law as the Restatement (Second) of Torts § 158 (1965) See, e.g., Case v. St. Mary's Bank, 164 N.H. 649, 658 (2013). The Restatement (Second) of Torts § 158 provides in relevant part, "one is subject to liability to another for trespass … if he intentionally fails to remove from the land a thing which he is under a duty to remove." Once again, assuming *arguendo* that hanging a banner off the side of a highway overpass could potentially be the basis of a trespass, the claim of civil trespass fails for the same reason as the criminal trespass. The defendants removed the item upon request.

Although Appellees agree that persons can trespass upon public property, public property is by its nature open to the public except when limited to reasonable time, place and manner restrictions. Such time, place and manner restrictions should not be applied on an ad hoc basis, especially to traditional public forums of expression such as sidewalks and streets.

Rather, before any member of the public is accused of trespass on public property, notice of the restrictions should be posted or publicized and/or a warning given. Any other dispensation makes members of the public, even ones diligently attempting to comply with the law, liable for trespass on public property for common innocuous behavior that could

include holding election signs on public sidewalks, demonstrating in front of the Town Hall or, as here, displaying a banner on a roadway overpass (one of the most common means of expression for everything including welcoming home military veterans to celebrating high school graduations).

The trial court's ruling regarding civil trespass on public property, dispensing as it does with any notice (constructive or actual) invites arbitrary or selective enforcement and further provides a mechanism for government to target only the messages that it dislikes when displayed on public property. Apx. I at pp. 15, 22.

Numerous cases are cited by the Attorney General that stand for the proposition that individuals can be prosecuted for trespassing on public property on a theory of strict liability, that is, the trespasser need not be aware that he is trespassing on public property to be liable for trespass.

However, NONE of the cases cited has reached nearly so far as the Attorney General attempts in this case. Every single case referenced by the Appellant contemplates situations where: a) the trespass on public property occurred despite posted notice warning not to trespass, b) the trespass occurred after failing to leave a public area subsequent to a order to leave by someone with lawful authority, or c) the constitutionality of statutes designed specifically to address the type of speech are upheld (for example, a statute prohibiting the posting of signage on telephone poles upheld because it is a neutrally applicable time, place, manner restriction whereas there is no statute or ordinance specifically prohibiting the type of conduct in question). None of these cases support the Appellant's far-reaching application of trespass to the facts of this case.

To start, the Appellant cites two cases that use the 2nd restatement of torts to define when a "trespass" occurs in NH. See Case v. St. Mary's Bank 164 N.H. 649 (2013); Moulton v. Groveton Papers Co., 112 N.H. 50, 54 (1972). While the Appellant accurately describes the holdings in those cases regarding trespass on private property, neither of them contemplated trespass on public property.

The issue of common law trespass on public property appears to be a novel issue of law for this Court. To further support the Appellant's interpretation of trespass they cite cases from other jurisdictions. For example, the Appellant cites an Iowa case, State v. Clay, 455 N.W. 2d 272, 274 (Iowa Ct. App. 1990) that defined "trespass to include public or private property that is entered without the express permission of the owner for certain prohibited purposes."

The Attorney General's reliance on Clay and its applicability to the facts of this case is misguided. Clay merely recited Iowa's trespass statute's language that defines "property" as meaning "any land whether publicly or privately owned." Id at 274. This case contemplated a criminal statute and did not address anything to do with a civil trespass on public property.

In 2023, the Iowa Supreme Court considered whether the enhanced hate crime application to a criminal allegation of trespass was a constitutional application of that statute and determined it was. See, State v. Geddes, 998 N.W. 2d 166 (2023). Geddes affirmed that Iowa's hate crime sentencing enhancement was applicable despite the appellant's claims that the speech at issue was protected by the First Amendment. In that case, however, the predicate act triggering the hate crime sentencing enhancement was the violation of Iowa's criminal trespass statute, a major

distinguishing factor from the facts of this case which involves no allegation that the Defendants violated a criminal statute or engaged in criminal conduct.

The Appellant also looks to State v. Korsen, 69 P.3d 126, 136 (Idaho, 2003), which involved the interpretation of a trespass statute as applied to a defendant who was arrested after refusing to leave a government building despite being told to do so. This is inapposite to the facts of this case where the Attorney General asserts a common law theory of trespass on public property, which immediately ceased upon demand by a police officer.

The Appellant also cites Abney v. United States, 616 A.2d 856 (D.C. Ct. App. 1992). Abney involved the challenge of a District of Columbia unlawful entry statute that mirrors language similar to statutes regarding trespass on public property. The court in Abney recited previous D.C. Appellate Court decisions holding that:

> "[W]hen public property is involved, in order to protect the unlawful entry statute from unconstitutional vagueness and to protect First Amendment rights, … the government must prove not only that a person lawfully in charge of public premises has ordered the defendant to leave but that there is some additional specific factor establishing the party's lack of a legal right to remain."
>
> Id. at 859. (internal quotations omitted)

In this case, even assuming that the affixing of a banner to an overpass is a public trespass, it cannot be Constitutionally upheld as applied because the Defendants immediately removed the banner upon demand from the police officer. As recognized by the trial court in its ruling on the Appellant's Motion for Reconsideration (Apx. I at 65-66), there must be an

element of knowledge for the Act to Constitutionally apply to a trespass on public property.

Absent some sort of notice or a refusal to leave upon demand by a police officer or someone else with lawful control of the premises, the application of this Act as attempted by the Attorney General is unconstitutional under both the 1st Amendment of the US Constitution and Art. 22 of the NH Constitution.

IV. THE TRIAL COURT CORRECTLY HELD THAT THE GOVERNMENT'S INTERPRETATION OF RSA 354-B: 1 AS APPLIED TO A CIVIL TRESPASS CLAIM WAS OVERBROAD AND WOULD CHILL FREE EXPRESSION

The Complaint in this matter essentially construes the NH Civil Rights Act such that the communication in question "Keep New England White" constitutes a "declaration, of an intent to inflict harm on a person or a person's property by some unlawful act with a purpose to terrorize or coerce." If this construction of the statute is adopted, it raises a host of constitutional free speech issues including vagueness, overbreadth, and the well-established protections for even unprotected categories of free speech.

A statute, or the interpretation of a statute, is overbroad if in addition to restricting activities which may be constitutionally prohibited it also encompasses within its coverage speech or conduct which is protected by the guarantees of free speech or association. Thornhill v. Alabama, 310 U.S. 88 (1940). Overbreadth is an exception to the usual requirement of standing and does not require that the governmental action be "as applied" against the litigant raising it who is entitled to assert the constitutional rights of others potentially affected by a law or by a particular construction

of a law. The overbreadth doctrine has two primary concerns: 1) the chilling effect of limiting protected speech. See, e.g., Arnett v. Kennedy, 461 U.S. 134 (1974) and 2) selective enforcement by authorities, i.e., enforcement that discriminates against certain points of view.

Overbreadth can be easily determined when the prohibitions in a statute can be readily applied to a substantial number of other situations where the expression would be clearly constitutional. Sullivan & Gunther, "Cases and Materials on Constitutional Law" at p. 1346 (14th ed. 2001). The problem of overbreadth in this matter as applied to the defendants is readily illustrated by the like or similar expressions of racial identity attached to the Defendants' Motion to Dismiss (Apx. I at pp. 76 - 104) as just a few of the many examples available from across the public spectrum:

Exhibit 1: "KEEPING HARLEM BLACK" was an internet notice by Stanford University for a sponsored event featuring a discussion of "historic preservation" and "the threat gentrification poses to black culture and agency by uprooting and displacing people of color from places like Harlem or Oakland." This message, published on the internet, has a far broader reach into New Hampshire than anything anyone can hang off a highway overpass. Its message of Keeping Harlem Black (and Oakland CA and other places too) is no less "race motivated" than the Defendants' message in this matter. It is virtually indistinguishable from the message in this case and just as susceptible to the wild claim that it violates the civil rights of the public by making them feel unwelcome or uncomfortable. Under the Attorney General's interpretation, anyone displaying this message while "trespassing" on public property could be liable under the New Hampshire Civil Rights Act! Apx. I at 94.

Exhibit 2: “SAVE CHINATOWN” This was an internet notice sponsored by a variety of groups including “Asian Americans United” and states within its text description that “our community is worth fighting for” and “Thanks to the community that has fought for generations to preserve this neighborhood, Chinatown is one of the few remaining communities of color …” Apx. I at 96-98.

This message, published on the internet, also has a far broader reach into New Hampshire than a banner on a highway overpass. Its message of Save Chinatown and its text regarding preserving “communities of color” is no less race or identity motivated than the Defendants’ message in this matter. It in fact contains several references to “fighting” and is even more susceptible to the interpretation that it contemplates unlawful acts the Attorney General claims is conveyed by the Defendants’ message.

Other examples attached to Defendants’ Motion to Dismiss include Exhibit 3: “KEEP AMERICA CHRISTIAN” a Redbubble T-Shirt bearing the legend “Keep America Christian.” This T-Shirt bearing this message would again become a civil rights violation if worn on public property in New Hampshire and the wearer can be alleged to have committed the most *de minimus* trespass. Apx. I at 100.

The T-shirt’ message of Keeping America Christian is virtually the same, in the context of religion, as the Defendants’ message in this matter. It is just as susceptible to the Attorney General’s interpretation that, to paraphrase Para. 5 of the Complaint: “The only possible interpretation is that the slogan … is to discourage [non-Christians] from residing in or visiting and making them feel unwelcome and unsafe in [America].

Exhibit 5: “BLACK POWER” -- This message of “Black Power” with a raised fist has been around since the 1960’s in the form of signs, banners, posters, t-shirts, and countless other forms throughout the country and the world. This message, “Black Power” is at least as menacing as the Defendants’ message and perhaps more so given the raised fist. Its display has never been the basis of any civil rights violation in any jurisdiction including New Hampshire, although based upon the reasoning underlying the Complaint one can easily imagine such a prosecution by the current Attorney General if the message was transformed to “White Power.” Apx. I at 104.

The above represents only a sampling of the countless examples of identity appeal and community preservation slogans that flourish in a time of rapid social and demographic change. The interpretation and application of the statute urged by the Attorney General would, if adopted, potentially outlaw all of them and of course would invite selective enforcement based on the political leanings of law enforcement. The statute if applied this way, is a textbook example of overbreadth.

Defendants contend that if the NH Civil Rights Statute is susceptible to the subjective interpretation urged by the Attorney General of what constitutes a threat “to inflict harm on a person or a person’s property,” than the statute would therefore be void for vagueness: “A ‘vague’ law, for purposes of First Amendment analysis, impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an ad hoc and subjective basis, with the attendant dangers of arbitrary and discriminatory application.” Montenegro v. New Hampshire Div. of Motor Vehicles, 93 A.3d 290 (N.H. 2014) A statute is unconstitutionally vague

when it either "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously discriminatory enforcement." United States v. Williams, 553 U.S. 285, 304 (2008); see also Hill v. Colorado, 530 U.S. 703, 732 (2000). "The operative question under the fair notice theory is whether a reasonable person would know what is prohibited by the law." Tingley v. Ferguson, 47 F.4th 1055, 1088 (9th Cir. 2022) "The terms of a law cannot require 'wholly subjective judgments without statutory definitions, narrowing context, or settled legal meanings.'" Id. (quoting Holder v. Humanitarian L. Project, 561 U.S. 1, 20 (2010)).

The standardless enforcement theory asks whether the law provides "objective standards" that "establish minimal guidelines to govern . . . enforcement." See Gonzales v. Carhart, 550 U.S. 124, 150 (2007). Vague statutes are particularly objectionable when they "involve sensitive areas of First Amendment freedoms" because "they operate to inhibit the exercise of those freedoms." Cal. Tchrs. Ass'n v. State Bd. of Educ., 271 F.3d 1141, 1150 (9th Cir. 2001) (citing Grayned v. City of Rockford, 408 U.S. 104, 108-09 (1972)). The Supreme Court has said that "when a statute 'interferes with the right of free speech or of association, a more stringent vagueness test should apply.'" Holder v. Humanitarian L. Project, 561 U.S. 1, 19 (2010) (quoting Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982)); see also McCormack v. Herzog, 788 F.3d 1017, 1031 (9th Cir. 2015), abrogated on other grounds by Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228 (2022) (applying heightened clarity requirement in vagueness challenge to statute that implicated a then-existing constitutional right).

When the challenged law implicates First Amendment rights, a facial challenge based on vagueness is appropriate. Cal. Tchrs. Ass'n, 271 F.3d 1141, 1149 (2001); see also City of Chicago v. Morales, 527 U.S. 41, 55 (1999). In considering a facial vagueness challenge, the court "consider[s] whether a statute is vague as applied to the particular facts at issue, for '[a] plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others.'" Holder, 561 U.S. at 18–19 (quoting Hoffman Estates, 455 U.S. at 495). The statute is undoubtedly vague as applied to these defendants if the interpretation urged by the Attorney General is imposed. Without the essential element of a threat "to inflict harm on a person or a person's property," under the Attorney General's approach the mere declaration of a preference for one racial or ethnic group(s) over others is itself such a threat if subjectively any member of the public audience could feel "unwelcome" or unsafe.

The definition of a threat as used in the statute does not appear difficult to determine. NH Rev. Stat. sec. 631:4 provides that a criminal threat occurs when a person "purposely places another or attempts to place another in fear of imminent bodily injury" or "threatens to commit any crime against the property of another." The dictionary definition is in accord with these meanings.

Black's Law Dictionary defines threat as "a communicated intent to inflict harm or loss on another or on another's property, esp. one that might diminish a person's freedom to act voluntarily or with lawful consent; a declaration, express or implied, of an intent to inflict loss or pain on another." Black's Law Dictionary (11th ed. 2019).

Oxford Languages defines a threat as "a denunciation to a person of ill to befall him; esp. a declaration of hostile determination or of loss, pain, punishment, or damage to be inflicted in retribution for or conditionally upon some course." Oxford English Dictionary (online ed. 2023).

Merriam Webster defines a threat as "an expression of intention to inflict evil, injury, or damage." Merriam Webster Dictionary (online ed., 2024).

None of the above common definitions of a threat would give fair notice to a defendant that an expression of racial preference or for maintaining the racial composition of a community would or could be prosecuted as a threat to commit harm against other racial or ethnic groups. If the statute can be interpreted like this, it is certainly void for vagueness.

As has been made clear in the previous discussion, the NH Civil Rights Act is being applied against these defendants solely based upon the content of the communication coupled with a strained construction of trespass upon public property. The content-based nature of this enforcement is demonstrated by observing that bystanders who could not speak or read English would not have been offended. See Cohen v. California, 403 U.S. 15 (1971). When a government tries to regulate protected political speech on account of the speech's contents, strict scrutiny applies and the government bears the burden of showing that its regulation is necessary to serve a compelling state interest and that it is narrowly drawn to achieve that end. Widmar v. Vincent, 454 U.S. 263 (1981).

Strict scrutiny of protected speech reflects the view, implicit in the First Amendment (and Art. 22 of the NH Constitution) that it is not the government's place to suppress ideas because they are "wrong." Rather, as

Justice Holmes said in Abrams v. U.S., 250 U.S. 616 (1919) there should be a "free trade in ideas" and truth and merit will become accepted through "the competition of the market." Moreover, consistent with the traditionally open character of public streets and sidewalks, the government's ability to restrict speech in such locations is very limited. McCullen v. Coakley, 573 U.S. 464 (2014).

Public ways and sidewalks occupy a special position in terms of First Amendment protection because of their historic role as sites for discussion and debate. Id. So called "hate speech" or speech that disparages other groups or individuals has been held by the Supreme Court to still fall within the category of protected speech. Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful, but the proudest boast of the Supreme Court's free speech jurisprudence is that it protects the freedom to express hated thoughts. Matal v. Tam, 137 S.Ct. 1744, 1754 (2017).

New Hampshire decisional law is in accord with these principles established by the Supreme Court. [S]peech that one reasonable person finds "offensive to good taste" may not be offensive to the good taste of another reasonable person. Montenegro v. New Hampshire Div. of Motor Vehicles, 93 A.3d 290, 297 (N.H. 2014). The Attorney General's pleading implies that the defendants' speech is unprotected speech that constitutes the equivalent of a criminal threat, but it fails this test as well.

In Brandenburg v. Ohio, 395 U.S. 444 (1969), the Supreme Court established the two-prong test still in use today. Speech advocating the use of force or crime can be proscribed only when two conditions are satisfied: 1) The speech is directed to inciting or producing imminent lawless action;

and 2) The advocacy is also likely to incite or produce such imminent lawless action. The Brandenburg case has been followed by a number of cases stressing the two requirements of incitement (as distinguished from abstract advocacy) and harm that is imminent. All of these cases have involved statements with far more overtones of actual illegal conduct than the present case.

In Watts v. U.S., 394 U.S. 705 (1969) (conviction reversed where the speaker stated "If they ever make me carry a rifle the first person I want to get in my sights is L.B.J. (the then president)." (Supreme Court finds that statement was not a true threat but a crude expression of political opposition). In Hess v. Indiana, 414 U.S. 105 (1973), the defendant and his group were moved off a street by police and he stated: "We'll take the f—king street later." The Court found that the statement was nothing more than advocacy of illegal action at "some indefinite future time."

The banner displayed by the Defendants in this matter does not even come close to the alleged threats in the above cases that themselves did not qualify as unprotected speech. The Attorney General seeks to couple the lowly offense of civil trespass upon governmental property with obviously protected but offensive speech as an attempt to generate a civil rights claim against those who blunder onto government property bearing a message he dislikes.

CONCLUSION

For the above-described reasons, Appellees respectfully request this Court affirm the Superior Court's ruling on the Appellant's Motion to Dismiss.

Dated May 9, 2024

Respectfully Submitted,

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By their Attorneys,

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STATEMENT OF COMPLIANCE

I, William E. Gens, hereby certify that this brief conforms to the Rules of the New Hampshire Supreme Court, Rules 16 and 26. Counsel certifies that the applicable word count pursuant to Rule 16 is approximately 7085 words.

/s/ William E. Gens
William E. Gens

REQUEST FOR ORAL ARGUMENT

Appellees respectfully request a 15-minute oral argument in this matter. Should this Court hold oral arguments, Attorney William Gens will argue on behalf of the Appellees.

CERTIFICATE OF SERVICE

I hereby certify that I provided a true and exact copy of the foregoing to the New Hampshire Office of the Attorney General via email and efile system on May 9, 2024.

/s/ William E. Gens
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