THE STATE OF NEW HAMPSHIRE
SUPREME COURT

CASE NO. 2014-0480

John Farrelly

v.

City of Concord, et al.

Appeal Pursuant to Rule 7

BRIEF FOR THE *AMICUS CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE AND GAY & LESBIAN ADVOCATES & DEFENDERS IN SUPPORT OF PLAINTIFF JOHN FARRELLY

Respectfully Submitted,

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

and

GAY & LESBIAN ADVOCATES & DEFENDERS

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QUESTIONS PRESENTED

(1) For a police officer to obtain official immunity for intentional torts, does Part I, Article 14 of the New Hampshire Constitution require that the officer have acted "under a reasonable belief that his conduct is authorized by law"—as mandated by this Court's decisions in *Opinion of the Justices*, 126 N.H. 554 (1985) and *Huckins v. McSweeney*, 166 N.H. 176 (2014)—or does the exclusively subjective "wanton or reckless" standard traditionally used in negligence cases under *Everitt v. Gen. Elec. Co.*, 156 N.H. 202 (2007) apply?

(2) Did the defendant police officers act in an objectively reasonable fashion measured against that of reasonably well-trained officers when they arrested the plaintiff for violating a statute, RSA 644:4, I(f), that had clearly been declared unconstitutional four years earlier in *State v. Pierce*, 152 N.H. 790 (2005)?

TEXT OF RELEVANT AUTHORITY

N.H. Const. Pt. I, Art. 14 [Legal Remedies to be Free, Complete, and Prompt.]:

Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

RSA 541-B:19, I(d):

I. Without otherwise limiting or defining the sovereign immunity of the state and its agencies, the provisions of this chapter [governing claims against the state] shall not apply to: ….

(d) Any claim arising out of an intentional tort, including assault, battery, false imprisonment, false arrest, intentional mental distress, malicious prosecution, malicious abuse of process, libel, slander, misrepresentation, deceit, invasion of privacy, interference with advantageous relations, or interference with contractual relations, provided that the employee whose conduct gives rise to the claim reasonably believes, at the time of the acts or omissions complained of, that his conduct was lawful, and provided further that the acts complained of were within the scope of official duties of the employee for the state.

INTEREST OF THE AMICUS CURIAE

The American Civil Liberties Union of New Hampshire ("ACLU") is the New Hampshire affiliate of the American Civil Liberties Union—a nationwide, nonpartisan, public interest organization with approximately 500,000 members (including over 3,500 New Hampshire members). The ACLU engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of rights guaranteed by the federal and state constitutions, including the right of those who have had their constitutional rights violated by government officials to seek redress in courts of law.

Founded in 1978, Gay & Lesbian Advocates & Defenders ("GLAD") is New England's leading public interest legal organization dedicated to ending discrimination based on sexual orientation, HIV status, and gender identity and expression. GLAD has litigated widely in New England in both state and federal courts in all areas of the law in order to protect and advance the rights of lesbians, gay men, bisexuals, transgender individuals, and people living with HIV and AIDS. GLAD's history includes litigating before the courts of the State of New Hampshire, including this Court most recently in *In re Guardianship of Madelyn B.*, 98 A.3d 494 (N.H. 2014); *In re Guardianship of Matthew L.*, 164 N.H. 484 (2012); and *Bedford v. The N.H. Technical College System et al.*, 2006 N.H. Super. LEXIS 6 (Superior Court) (case appealed to N.H. Supreme Court in No. 2006-0432 and dismissed before argument). GLAD has an enduring interest in ensuring that the rule of law adequately protects all citizens in the exercise of their constitutional rights.

In this case, the plaintiff has asserted intentional tort claims against the defendants after the defendants, in 2009, arrested and prosecuted the plaintiff pursuant to a statute, RSA 644:4, I(f), that had been struck down by this Court four years earlier in *State v. Pierce*, 152 N.H. 790 (2005) as violating the free speech protections of Part I, Article 22 of the New Hampshire Constitution.

This case raises an important question as to whether this Court will, in deciding when official immunity applies to intentional tort claims, depart from Part I, Article 14 of the New Hampshire Constitution and this Court's precedents, which provide immunity for intentional torts only when the police officer acted "under a reasonable belief that his conduct is authorized by law"—a standard which imposes both objective and subjective criteria. Here, the Superior Court's decision to exclusively rely on the officers' subjective beliefs in determining whether official immunity applies to the plaintiff's intentional tort claims—without examining whether the officers' conduct was objectively reasonable when measured against that of reasonably well-trained officers—will, if adopted by this Court, provide municipalities with sweeping and unprecedented immunity, including for intentional torts that emanate from clear violations of the federal and state constitutions.

The interest of the ACLU and GLAD in ensuring that all citizens have redress for constitutional violations and that municipalities educate their police officers on the law to ensure that individual rights are fully respected led to their involvement in this case.

STATEMENT OF THE CASE AND THE FACTS

This case arises out of the 2009 arrest and prosecution of the plaintiff pursuant to a statute, RSA 644:4, I(f), that had been struck down by this Court four years earlier in *State v. Pierce*, 152 N.H. 790 (2005) as violating the free speech protections of Part I, Article 22 of the New Hampshire Constitution. *Amici* highlight only the facts that are relevant to this brief's analysis.

On February 16, February 18, and February 21, 2009, the plaintiff sent emails to his ex-girlfriend. The ex-girlfriend perceived these emails as harassing and, on February 21, 2009, she complained to the Concord Police Department. The shift-supervising officer referred the complaint to another police officer, who then proceeded to interview the ex-girlfriend. As this interviewing officer testified at deposition concerning whether the ex-girlfriend ever verbalized

any specific concern that the plaintiff was going to do something specific to her, he testified: "Not at this time. She didn't know. She was afraid that something might happen, but she didn't say that he made any specific threats or else I would have pursued criminal threatening."

After speaking with the ex-girlfriend, the interviewing officer consulted with the shift-supervising officer. Among other things, the two officers compared the plaintiff's conduct, as reported by the ex-girlfriend, to the conduct prohibited by New Hampshire's criminal harassment statute, RSA 644:4, as reported in the 2008-2009 edition of the New Hampshire Criminal Code Annotated published by LexisNexis. In particular, they discussed the applicability of RSA 644:4, I(b) and (f). Critically, in the version of the criminal code they were using, under the heading "Notes to Decisions," the section on RSA 644:4 includes an annotation indicating that RSA 644:4, I(f) had been declared unconstitutional by this Court in *State v. Pierce*, 152 N.H. 790 (2005).[1] Neither officer took notice of the annotation.

During the afternoon of February 21, 2009, the interviewing officer went to the plaintiff's home and arrested him for criminal harassment without a warrant. At his deposition, the officer testified that, when he spoke with the plaintiff at his home, the plaintiff did not "say or do anything … that suggested he was a threat to [the ex-girlfriend's] safety." The arresting officer also testified that he did not determine that the plaintiff "presented a credible present threat to [the ex-girlfriend's] safety."

[1] In *State v. Pierce*, 152 N.H. 790 (2005), this Court struck down RSA 644:4, I(f) as violating the free speech rights embedded within Part I, Article 22 of the New Hampshire Constitution. RSA 644:4, I(f) states that "[a] person is guilty of a misdemeanor [for criminal harassment], and subject to prosecution in the jurisdiction where the communication originated or was received, if such person … [w]ith the purpose to annoy or alarm another, having been previously notified that the recipient does not desire further communication, communicates with such person, when the communication is not for a lawful purpose or constitutionally protected." Following its decision in *State v. Brobst*, 151 N.H. 420, 425 (2004) striking down another provision of New Hampshire's criminal harassment statute on free speech grounds, this Court in *Pierce* concluded that RSA 644:4, I(f) was similarly "unconstitutionally overbroad."

Three days after the plaintiff was arrested, four criminal complaints were sworn out against him for four of the emails he sent. Subsequent to the arrest, the same two police officers worked together to draft the complaints. Each complaint charged the plaintiff with the offense of harassment, in violation of RSA 644:4, I(f), based on allegations that the plaintiff did "PURPOSELY communicate through e-mail with a purpose to annoy another, to wit, [his ex-girlfriend], in that the defendant sent [his ex-girlfriend] an e-mail after she previously notified him on 02/17/2009 at 0806 not to contact her for any reason or she would call the police, the communication being not for a lawful purpose." That charge closely tracks the language of RSA 644:4, I(f), which was declared unconstitutional four years earlier in *Pierce* and which states that "[a] person is guilty of a misdemeanor" when he or she, "[w]ith the purpose to annoy or alarm another, having been previously notified that the recipient does not desire further communication, communicates with such person, when the communication is not for a lawful purpose or constitutionally protected." RSA 644:4, I(f). The charges against the plaintiff were dropped before trial due to the unconstitutionality of RSA 644:4, I(f).

The plaintiff subsequently brought suit against the two officers and the City of Concord in federal court alleging, among other things, violations of his federal constitutional rights and the state law intentional torts of (i) malicious prosecution, (ii) false imprisonment, and (iii) violating the right to free speech and the right to be free from unreasonable searches and seizures under Part I, Articles 19 and 22 of the New Hampshire Constitution. A federal magistrate judge held that the individual officers were entitled to qualified immunity as to the plaintiff's federal constitutional claims. *See Farrelly v. City of Concord*, 902 F. Supp. 2d 178, 188-200 (D.N.H. 2012) (McCafferty, M.J.). The magistrate judge also granted summary judgment as to the plaintiff's malicious prosecution claim (on official immunity grounds) and state constitution claims, *see id.* at 200-206, 215, but declined to grant summary judgment on official immunity grounds with respect

to the false imprisonment claim. *Id.* at 206-15. Three months after this decision, the magistrate judge concluded that she erred in retaining supplemental jurisdiction over the plaintiff's state law claims. The judge then vacated her decision concerning these state law claims, and dismissed them without prejudice to refile in state court. *See* No. 10-cv-583-LM, 2012 U.S. Dist. LEXIS 180173, at *2-3 (D.N.H. Dec. 20, 2012).

The plaintiff refiled these intentional tort claims in state court and, on June 27, 2014, the Superior Court granted summary judgment dismissing these claims on the grounds that the two police officers were entitled to official immunity. As a result, the Court held that the City of Concord was automatically entitled to vicarious official immunity. In concluding that the conduct of the officers was not "wanton or reckless" under the subjective standard imposed by *Everitt v. Gen. Elec. Co.*, 156 N.H. 202 (2007) for determining whether official immunity applies to negligence claims, the Superior Court relied on the fact that, at the time of the arrest, the officers were subjectively "unaware that the statute they charged [the plaintiff] under was unconstitutional." Superior Court Decision at 9. This appeal followed.

SUMMARY OF ARGUMENT

In this case, the plaintiff has asserted intentional tort claims against the defendants after the defendants arrested and prosecuted him pursuant to a statute, RSA 644:4, I(f), that had been struck down by this Court four years earlier in *State v. Pierce*, 152 N.H. 790 (2005) as violating the free speech protections of Part I, Article 22 of the New Hampshire Constitution. In applying the subjective "wanton or reckless" standard imposed by *Everitt v. Gen. Elec. Co.*, 156 N.H. 202 (2007) for determining whether official immunity applies to negligence claims, the Superior Court held that the defendants were entitled to official immunity against the plaintiff's intentional tort claims because the police officers were subjectively unaware that the statute was unconstitutional

at the time of the arrest despite being provided this information by their employer. As a result, the municipality also enjoyed vicarious immunity.

This case raises an important question as to whether, for a police officer and his employer to obtain official immunity for intentional torts, the officer in question must have acted under a "reasonable belief" that his conduct is authorized by law as required under Part I, Article 14 of the New Hampshire Constitution. Under this "reasonable belief" standard, (i) the officer must have subjectively believed that his conduct was lawful, ***and*** (ii) that belief must be objectively reasonable when measured against that of a reasonably well-trained officer. The Superior Court examined the former and not the latter.

Amici file this brief to make two important arguments. ***First***, the Superior Court's failure to examine the objective reasonableness of the officers' actions in determining whether the defendants are entitled to official immunity for the plaintiff's intentional tort claims is flatly inconsistent with (i) Part I, Article 14 of the New Hampshire Constitution, (ii) this Court's Article 14 decisions in *Opinion of the Justices*, 126 N.H. 554 (1985) and *Huckins v. McSweeney*, 166 N.H. 176 (2014) addressing sovereign and municipal immunity when intentional torts are alleged, (iii) the standard in RSA 541-B:19, I(d) memorializing the *Opinion of the Justices* decision and which applies to municipalities under *Huckins*, and (iv) analogous federal case law addressing qualified immunity for federal constitutional violations—all of which afford immunity ***only*** when the conduct of the police officer is objectively reasonable when measured against that of a reasonably well-trained officer. Accordingly, given this clear precedent, *Everitt*'s exclusively subjective standard that applies to negligence claims cannot apply to intentional tort claims under the New Hampshire Constitution.

The policy considerations of the Superior Court's decision to apply *Everitt*'s exclusively subjective standard to intentional tort claims are significant and will be fully explored in this brief.

Indeed, the Superior Court's ruling, if affirmed, would considerably restrict—if not outright eliminate—the ability of plaintiffs to seek redress for intentional torts in state courts against police officers and municipalities, including intentional torts arising out of clear violations of rights protected under the federal and state constitutions. Under the Superior Court's ruling, a municipality can obtain immunity for an intentional tort simply if the officer in question subjectively believed in the lawfulness of his or her actions, including relying on a statute that clearly has been held unconstitutional but has not been formally repealed. Such a rule would immunize, based solely on the officer's subjective beliefs, even objectively improper conduct that no reasonably well-trained officer would ever think is appropriate. An objective standard, on the other hand, recognizes the axiomatic principle that it has always been the province of the courts, not law enforcement, to determine the reasonableness of an officer's conduct in ascertaining whether immunity principles apply to intentional tort claims.

Second, though this Court should remand for a determination as to whether the defendant police officers "reasonably believed" that their conduct was lawful, if this Court addresses this question and applies an objective reasonableness standard, it should find that the officers' conduct was not objectively reasonable when they arrested the plaintiff for violating a statute that this Court had clearly declared unconstitutional. The objective standard against which an officer's conduct is measured is what the law actually is, not the officer's perception of what the law is. To hold otherwise would undermine the well-established principle that police officers are presumed to know the clear law governing their conduct. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("a reasonably competent public official should know the law governing his conduct"). This is why courts have routinely held that it is objectively unreasonable for a police officer to enforce a law that, though not formally repealed, has been deemed unconstitutional by binding appellate authority. Any finding that an officer's enforcement of a clearly unconstitutional law is

objectively reasonable when the officer did not know that the law had been struck down would diminish incentives for municipalities and police departments to provide officers with thorough and up-to-date training in the law they are tasked to enforce.

Given the Superior Court's failure to examine whether the defendant police officers' conduct was objectively reasonable when measured against that of reasonably well-trained officers as required under the New Hampshire Constitution, *Amici* respectfully submit that the Superior Court erred as a matter of law. Its decision should be vacated, and this case should be remanded for further proceedings on whether the defendants "reasonably believed" that their conduct was lawful, which considers the officers' subjective beliefs as well as the objective reasonableness of their conduct.

ARGUMENT

I. The Superior Court Erred As A Matter of Law In Holding That The Defendants Were Entitled To Official Immunity For Intentional Torts Based Solely On The Defendant Police Officers' Subjective Belief That They Were Acting Lawfully, Without Any Consideration As To Whether Their Conduct Was Objectively Reasonable.

The Superior Court's opinion granting official immunity against the plaintiff's intentional tort claims rests exclusively upon its finding that the defendant police officers were subjectively ignorant that the statute they relied upon to arrest and prosecute the plaintiff, RSA 644:4, I(f), had been deemed unconstitutional by this Court four years earlier in *State v. Pierce*, 152 N.H. 790 (2005). The Superior Court erred.

In applying the subjective "wanton or reckless" standard imposed by *Everitt v. Gen. Elec. Co.*, 156 N.H. 202 (2007) in determining official immunity for negligence claims, the Superior Court explained that the defendants were entitled to official immunity against the plaintiff's intentional tort claims because the officers were subjectively "unaware that the statute [they charged the plaintiff] under was unconstitutional." *See* Superior Court Decision at 9. However,

the Superior Court's failure to examine the objective reasonableness of the officers' actions in determining whether the defendants are entitled to official immunity for the plaintiff's intentional tort claims is flatly inconsistent with (i) Part I, Article 14 of the New Hampshire Constitution, (ii) this Court's Article 14 decisions in *Opinion of the Justices*, 126 N.H. 554 (1985) and *Huckins v. McSweeney*, 166 N.H. 176 (2014) addressing sovereign and municipal immunity when intentional torts are alleged, (iii) the standard in RSA 541-B:19, I(d) memorializing the *Opinion of the Justices* decision and which applies to municipalities under *Huckins*, and (iv) analogous federal case law addressing qualified immunity for federal constitutional violations—all of which afford immunity *only* when the conduct of a police officer is objectively reasonable when measured against that of a reasonably well-trained officer.

A. The Superior Court's Opinion Is Inconsistent With Part I, Article 14 Of The New Hampshire Constitution, This Court's Cases Interpreting It, And RSA 541-B:19, I(d), All Of Which Require Immunity For Intentional Tort Claims To Be Examined Under A "Reasonable Belief That Conduct Is Lawful" Standard That Incorporates Both Objective And Subjective Criteria.

In 1978, the legislature adopted sovereign immunity (and its exceptions) as the policy of New Hampshire. Under RSA 99-D:1, the legislature explained that "[t]he doctrine of sovereign immunity of the state, and by the extension of that doctrine, the official immunity of officers, trustees, officials, or employees of the state or any agency thereof acting within the scope of official duty and not in a wanton or reckless manner, except as otherwise expressly provided by statute, is hereby adopted as the law of the state." RSA 99-D:1. This provision, in part, articulates the State's policy of official immunity, which "protects individual government officials or employees from personal liability for discretionary actions taken by them within the course of their employment or official duties." *Everitt v. Gen. Elec. Co.*, 156 N.H. 202, 209, 214 (2007). However, as this Court explained in *Laramie v. Stone*, 160 N.H. 419 (2010), RSA 99-D:1 "is

simply a statement of policy adopting the common law doctrines of sovereign and official immunity." *Id.* at 437.

In *Everitt v. Gen. Elec. Co.*, 156 N.H. 202 (2007), this Court addressed the applicability of official immunity under RSA 99-D:1 to negligence claims against municipal police officers. The *Everitt* Court explained that, "[w]hile the legislature also has adopted isolated provisions affording immunity to certain municipal officials, it has not enacted a provision corollary to RSA 99-D:1 extending official immunity to all municipal officers, trustees, officials and employees." *Id.* at 210. Thus, whether to extend the principles of official immunity under RSA 99-D:1 to municipal police officers was a common law question. *Id.* Hence, this Court in *Everitt* applied, as a matter of common law, the general policy of official immunity concerning state employees under RSA 99-D:1 to municipal police officers who are alleged to have committed acts of negligence. *See id.* at 219. In so doing, this Court concluded that "municipal police officers are immune from personal liability for decisions, acts or omissions that are: (1) made within the scope of their official duties while in the course of their employment; (2) discretionary, rather than ministerial; and (3) not made in a wanton or reckless manner." *Id.*

On its face, the "wanton or reckless" standard in *Everitt* is conditioned solely on a police officer's subjective beliefs. *See State v. Dushame*, 136 N.H. 309, 317 (1992) (to show "recklessness," the State "had to prove that the defendant, subjectively, was aware of a known risk, and that he, again subjectively, knew of circumstances, the disregard of which, objectively, would be determined to be a gross deviation from the conduct that a law-abiding person would observe in the situation") (internal quotations omitted); Black's Law Dictionary 1613 (8th ed. 2004) (defining "wanton" as "[u]nreasonably or maliciously risking harm while being utterly indifferent to the consequences"). Also critical is the fact that *Everitt* was a negligence case and never even addressed the applicability of its exclusively subjective "wanton or reckless" standard

to intentional tort claims like those raised by the plaintiff in this case—claims which, as explained below, are instead governed by the comprehensive standard set forth in RSA 541-B:19, I(d) in light of *Huckins v. McSweeney*, 166 N.H. 176 (2014). *See Huckins*, 166 N.H. at 182-83 (differentiating immunity standard when negligence claims are alleged versus when intentional torts are alleged). The *Everitt* Court did not address intentional tort claims for good reason: consistent with its subsequent decision in *Huckins*, incorporating *Everitt*'s exclusively subjective standard to intentional tort claims would contravene Part I, Article 14 of the New Hampshire Constitution.

Part I, Article 14 of the New Hampshire Constitution provides that "[e]very subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws." N.H. Const. pt. I, art. 14. Article 14's promise to provide a remedy is especially meaningful when a police officer, as is the case here, is alleged to have committed an intentional tort. For example, in *Opinion of the Justices*, 126 N.H. 554 (1985), this Court concluded that it would be unconstitutional under Article 14 for the State to, as it was then proposing to do, immunize itself for intentional torts committed by State employees when those torts are not grounded on a "reasonable belief" in the lawfulness of the disputed act. *Id.* at 564. The Court in *Opinion of the Justices* made clear that state liability should arise "only if the employee did not reasonably believe in the lawfulness of his conduct." *Id.* The Court explained that "[t]o hold the State liable when the employee or official reasonably believes that his conduct conforms to the law would in our opinion have a chilling effect on the morale and motivation of government personnel." *Id.* But, the Court added, there is not a "similarly compelling rationale for insulating

the State from liability for intentional torts not grounded on a reasonable belief in the lawfulness of the disputed act." *Id.*

The legislature immediately codified *Opinion of the Justices'* "reasonable belief" standard for intentional tort claims against the State in RSA 541-B:19, I(d). *See* RSA 541-B:19, I(d) (State has sovereign immunity for "[a]ny claim arising out of an intentional tort, …. provided that the employee whose conduct gives rise to the claim *reasonably believes*, at the time of the acts or omissions complained of, *that his conduct was lawful*, and provided further that the acts complained of were within the scope of official duties of the employee for the state.") (emphasis added); *see also Bergeron v. City of Manchester*, 140 N.H. 417, 420 (1995) (citing RSA 541-B:19 for the proposition that "immunity is the exception, rather than the rule in torts cases"). And, as this Court recently concluded in *Huckins v. McSweeney*, 166 N.H. 176 (2014), RSA 541-B:19, I(d)'s "reasonable belief" standard also applies in determining whether a municipality is immune for the intentional torts of its employees under RSA 507-B:2 and RSA 507-B:5. *Id.* at 182 ("[W]e conclude that [state law] provide[s] immunity to municipalities for any intentional tort committed by a municipal employee under the same terms and conditions as RSA 541-B:19 provides sovereign immunity to the State for any intentional tort committed by a State employee.").

This "reasonable belief" standard required by Article 14 in both *Opinion of the Justices* and *Huckins* when intentional torts are alleged contains both subjective and objective inquiries. That is, for immunity to exist, (i) the officer must have subjectively believed that his conduct was lawful, *and* (ii) that belief must be objectively reasonable when measured against that of a reasonably well-trained officer. This Court has repeatedly held that the phrase "reasonable believes," when used in a statute or contract, contains both subjective and objective components. *See, e.g., Gulf Ins. Co. v. AMSCO, Inc*., 153 N.H. 28, 35 (2005) ("Even assuming the 'reasonable belief' clause in paragraph 3(A) applies to this case and incorporates some subjective element as

Gulf contends, the term 'reasonable' contains an objective component. In other words, Gulf must not only have subjectively believed that the expenses incurred were reasonable, but the belief must have been objectively reasonable as well."); *Progressive N. Ins. Co. v. Concord Gen. Mut. Ins. Co*., 151 N.H. 649, 653 (2005) ("reasonable belief" in insurance contract requires both a subjective belief and that such belief be objectively sound); *State v. Leaf*, 137 N.H. 97, 99 (1993) (in interpreting the "reasonable believes" standard in New Hampshire's statute governing the degree of force that parents can use on their children, RSA 627:6, stating that "[t]he operative word is 'reasonable,' which is determined by an objective standard. A belief which is unreasonable, even though honest, will not support the defense."); *State v. Holt*, 126 N.H. 394, 397 (1985) (construing "reasonably believes" language in self-defense statute, RSA 627:4, II(d), to mean that "[a] belief which is unreasonable, even though honest, will not support the defense"); *see also Conrad v. N.H. Dep't of Safety*, No. 2012-440, 2014 N.H. LEXIS 130, at *41-42 (N.H. Nov. 6, 2014) (in case alleging intentional torts against the State, applying objective standard under RSA 541-B:19, I(d) in holding that, "under the circumstances, a reasonable officer would have believed that, based upon the plaintiff's behavior and statements, holding the plaintiff in protective custody at police headquarters, until the determination was made to have a neutral police department take custody, was lawful …."); *Lane's Case*, 153 N.H. 10, 22 (2005) (Dalianis, J., dissenting) (noting that the "reasonable belief" standard under Rule 1.6(b) of the Rules of Professional Conduct contains both subjective and objective components such that "[t]he lawyer must actually suppose [the matter in question] to be true and the circumstances must be such that the belief is reasonable") (internal quotations omitted).

Finally, these Article 14-mandated rules requiring both subjective and objective inquiries in determining the applicability of sovereign and municipal immunity to intentional tort claims must also apply when, as is the case here, a court is examining whether a municipal police officer

is entitled to official immunity for intentional tort claims. As *Opinion of the Justices* and *Huckins* make clear, an exclusively subjective standard—like the one applied in *Everitt*—cannot apply under Article 14 when intentional torts are alleged against a police officer because such a standard fails to consider the objective reasonableness of the officer's actions. Indeed, applying both RSA 99-D:1 and *Everitt*'s exclusively subjective standard to intentional tort claims would contradict the standard in RSA 541-B:19, I(d), which applies to municipalities under *Huckins* and codifies these Article 14 principles by granting immunity only when the officer's actions were both subjectively and objectively reasonable. The common law official immunity doctrine stated in RSA 99-D:1 (and as applied in *Everitt* to municipalities) must be examined in conjunction with the standard in RSA 541-B:19, I(d) and cannot, without violating Article 14, be read as conflicting with RSA 541-B:19's more specific terms governing immunity for intentional tort claims. *See Laramie v. Stone*, 160 N.H. 419, 437-438 (2010) ("RSA 99-D:1, however, is simply a statement of policy adopting the common law doctrines of sovereign and official immunity …. [T]he intent of [Chapter 541-B] is significantly broader: to establish a comprehensive and exclusive procedure for persons seeking money damages from the State and/or its employees."). Put another way, if state official immunity principles under RSA 99-D:1 apply to negligence claims against municipalities under *Everitt*, so to must, as the *Huckins* Court held, RSA 541-B:19, I(d)'s heightened standard governing intentional tort claims against the State also apply to intentional tort claims against municipalities. Only such a symmetric result can reconcile this Court's decisions in *Everitt*, *Huckins*, and *Opinion of the Justices*. A holding to the contrary will create an untenable conflict between *Everitt* and the *Huckins*/*Opinion of the Justices* line of cases that fatally undermines Article 14.

Multiple federal courts have affirmatively reached this conclusion or assumed it to be true. For example, in *Soltani v. Smith*, 812 F. Supp. 1280 (D.N.H. 1993), the Court held that, following

Opinion of the Justices, RSA 99-D:1 "must be read as conditioning official immunity for intentional torts upon *the employee's reasonable belief* in the lawfulness of his conduct." 812 F. Supp. at 1300 (emphasis added); *see also Moses v. Mele*, No. 10-cv-253-PB, 2012 U.S. Dist. LEXIS 57093, at *21-22 (D.N.H. Apr. 22, 2012) (in case concerning a municipal police officer, stating: "The New Hampshire Supreme Court has not yet determined whether its 'reasonable belief' standard for official immunity has both objective and subjective components. Even if it does, however, both aspects of the reasonable belief requirement are satisfied here."); *Farrelly v. City of Concord*, 902 F. Supp. 2d 178, 205 (D.N.H. 2012) (applying subjective and objective standards), *vacated in part by*, 2012 U.S. Dist. LEXIS 180173 (D.N.H. Dec. 20, 2012).

Because the Superior Court granted official immunity for the plaintiff's intentional tort claims without applying the "reasonable belief" standard required under Article 14 and *Opinion of the Justices*/*Huckins*, the Superior Court erred as a matter of law. As New Hampshire federal courts have recognized, it would make little sense to read Article 14 as mandating one set of rules in evaluating whether the State or a municipality is entitled to sovereign/municipal immunity for intentional torts under RSA 541-B:19, I(d) (i.e., both an objective and subjective test) while allowing a more lenient set of rules in evaluating whether official immunity applies to intentional torts (i.e., only a subjective test). Article 14 does not make such an arbitrary and incongruous distinction. And, as explained below, such a distinction would also create a profound accountability gap.

B. The Superior Court's Opinion Applying Only A Subjective Standard In Determining Official Immunity For Intentional Torts Will, If Adopted, Create An Accountability Gap.

There is another important reason why this Court should apply an objective reasonableness standard in intentional torts cases where official immunity is sought: if this Court were to apply only a subjective standard, it would be creating a substantial accountability gap where the State

and municipalities could now escape liability for intentional torts committed by officers arising out of conduct that was not only objectively unreasonable, but also objectively unconstitutional. To escape liability for this objectively unreasonable conduct under the Superior Court's rule, an officer need only claim that he subjectively believed that he was acting lawfully. This is wrong as a matter of law and wrong as a matter of policy.

If the Superior Court's decision is affirmed, New Hampshire law would now have two independent grounds for sovereign/municipal immunity when intentional torts are alleged. The first is sovereign/municipal immunity as interpreted in *Opinion of the Justices* and *Huckins* and as codified in RSA 541-B:19, I(d), which requires a police officer alleged to have committed an intentional tort to have "a reasonable belief that his conduct is authorized by law"—a standard which, as explained above, incorporates both subjective and objective elements and attaches liability only to the State or a municipality, not the employee individually. *Opinion of Justices*, 126 N.H. at 564-65 ("The State's liability in tort is vicarious."; "imposition of liability on the State, however, is the only just recourse"). Under the Superior Court's opinion, the second basis for state/municipal immunity for intentional torts is vicarious official immunity applied under *Everitt v. Gen. Elec. Co.*, 156 N.H. 202 (2007), where immunity is imputed to the State or municipality if the police officer at issue is individually entitled to official immunity. *See Everitt*, 156 N.H. at 221 ("Official immunity, when available to individual public officials, generally may be vicariously extended to the government entity employing the individual, but it is not an automatic grant. Vicarious immunity ought to apply when the very policies underlying the grant of official immunity to an individual public official would otherwise be effectively undermined."). Thus, for the State or municipality to vicariously enjoy official immunity, a showing is required that the officer's actions were "not made in a wanton or reckless manner"—a standard that, as explained above, mandates only a subjective analysis into the officer's beliefs. Under this second

method, a municipality may now vicariously obtain immunity for itself without any objective examination of the officer's conduct—a finding that allows defendants to obtain a short cut around RSA 541-B:19, I(d)'s standard and this Court's Article 14 jurisprudence requiring such an objective reasonableness test.

This circumventing of both RSA 541-B:19, I(d)'s standard and Article 14 is precisely what occurred in this case. Here, the Superior Court declined to address whether municipal immunity existed under the standard in RSA 541-B:19, I(d) (as required in *Huckins*)—the first method which would have required an analysis into the officers' "reasonable belief" as to the lawfulness of their actions. *See* Superior Court Decision at 8 ("Because the individual defendants are immune under the doctrine of official immunity and, as a result, the city is vicariously immune, the court need not resolve the immunity issues under RSA 541-B:19."). Instead, the Court focused exclusively on whether the officers subjectively acted in a "wanton or reckless" fashion under *Everitt* in determining whether the municipality could obtain vicarious official immunity—the second method. *Id.* at 10 (holding that, because the defendant officers did not act in a "wanton or reckless" fashion and therefore were entitled to official immunity, "the city is entitled to vicarious immunity"). As the Superior Court's own opinion evidences, the rule it imposes allows official immunity and vicarious official immunity principles enunciated in *Everitt* to create an end-run around the objective analysis mandated by Article 14 under *Opinion of the Justices*/*Huckins*.

Under this Court's precedent, this is not how immunity is supposed to work when intentional torts are alleged. In fact, the Superior Court's analysis, if adopted by this Court, will permit the State and municipalities, almost at will, to escape liability for objectively unreasonable conduct that leads to the commission of intentional torts, including intentional torts arising out of violations of constitutional rights. Government entities could now obtain immunity simply by electing to pursue a vicarious official immunity defense requiring only the showing that the officer

believed he was acting lawfully, rather than making the added showing required in *Opinion of the Justices/Huckins* and RSA 541-B:19, I(d) that the officer's conduct was objectively reasonable under the law. *Everitt*, which only addresses negligence claims, cannot be read to provide such a doctrinal escape hatch in intentional tort cases. If the State or municipality gets to pick and choose which form of immunity to elect, with one imposing a higher burden than the other, it will surely take, as this case demonstrates, a short cut and elect the type of immunity with the lower burden. In practice, such a holding will make Article 14 and its "objective reasonableness" protections in intentional tort cases a dead letter.

The Superior Court's rule applying an exclusively subjective standard will also, in practice, encourage government intrusions on individual liberty. If, when intentional torts are alleged, the official immunity inquiry hinges solely on the subjective beliefs of a police officer about the law, such intrusions may be immunized based on all manner of innocent conduct, so long as the police officer believed that he or she was not doing anything wrong. Under the Superior Court's rule, objectively innocent conduct may lead not only to arrests, but also to vehicle stops, searches, and interrogations—all arising from a citizen's conduct that (i) is not prohibited under any applicable law or (ii) is even expressly protected by the Constitution. Even if the conduct of the citizen was completely innocent, an officer will now be immunized if he or she can merely say "I thought I was acting lawfully."

This case now presents the opportunity to conform the common law official immunity doctrine as stated in *Everitt* to the requirement under both Part I, Article 14 of the New Hampshire Constitution and RSA 541-B:19, I(d) that a police officer must, for immunity to apply when intentional torts are alleged, "reasonably believe" that his conduct was lawful. Though this is not

a substantial leap after this Court's decision in *Huckins*, this Court should nonetheless seize this opportunity to provide clarity to judges, police officers, attorneys and the public at large.[2]

C. The Superior Court's Opinion Applying Only A Subjective Standard In Determining Official Immunity For Intentional Torts Is Inconsistent With The Qualified Immunity Doctrine, Which Applies An Objective Reasonableness Standard To Ensure Government Accountability.

A finding by this Court that, when intentional torts are brought, official immunity requires an examination into whether the police officer's action was objectively reasonable is also fully consistent with how courts examine whether an officer is entitled to qualified immunity for violations of federal constitutional rights.

In the context of determining whether qualified immunity applies, it has always been a given that courts must inquire into the objective reasonableness of the officer's conduct. Indeed, in determining whether rights infringed upon by an officer were "clearly established" at the time of an arrest, this inquiry "turns on the objective legal reasonableness of [the officer's] action, assessed in light of the legal rules that were clearly established at the time it was taken." *Anderson*

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[2] There may be serious concerns under both the Part I, Article 22 of the New Hampshire Constitution and the First Amendment with the arrest and prosecution of the plaintiff for engaging in this email speech. The plaintiff's comments were undeniably vulgar. But it does not appear that the plaintiff had a subjective intent to threaten his ex-girlfriend, as is required to render his speech a "true threat" that falls outside the free speech protections of the Constitution. As the ACLU recently argued to the United States Supreme Court in the pending case *Elonis v. United States* addressing the "true threat" exception to the First Amendment, the First Amendment requires a showing of subjective intent to threaten as a predicate to criminal liability. *See* ACLU Amicus Brief in *Elonis v. United States*, http://www.americanbar.org/content/dam/aba/publications/supreme_court_preview/BriefsV4/13-983_pet_amcu_aclu-etal.authcheckdam.pdf. A State's attempt to proscribe speech without regard to the speaker's intended meaning runs the risk of punishing protected First Amendment expression simply because it is crudely or zealously expressed.

Here, the federal court erred in not fully examining the plaintiff's speech to determine whether a reasonable officer would have known that it did not fall under any traditional exception to First Amendment-protected speech (i.e., whether the speech was a "true threat" and thus unprotected). Instead, the federal court simply determined that, because RSA 644:4, I(b) had been deemed facially constitutional by this Court, a reasonable officer could have concluded that the plaintiff's speech satisfied the elements of this offense. *See Farrelly v. City of Concord*, 902 F. Supp. 2d 178, 194 (D.N.H. 2012) ("the dispositive question is whether a reasonable officer could have believed that [the plaintiff] engaged in conduct prohibited by [RSA 644:4, I(b)]"). This is the incorrect analysis. The fact that the statute a police officer wishes to apply to a speaker is not facially unconstitutional does not obviate the need for the officer to carefully determine whether the speech in and of itself is protected under the First Amendment. *See, e.g.*, *Sandul v. Larion*, 119 F.3d 1250, 1254 (6th Cir. 1997), *cert. denied*, 522 U.S. 979 (1997) (swearing out a car window at abortion protesters does not create probable cause to arrest the speaker under disorderly conduct statute, and holding that, despite the existence of the disorderly conduct statute, case law "should leave little doubt in the mind of a reasonable officer that the mere words and gesture 'f--k you' are constitutionally protected speech").

v. Creighton, 483 U.S. 635, 639 (1987) (internal quotations and citations omitted) (noting that the officer's own subjective beliefs about the legality of his conduct "are irrelevant"); *see also Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982). A constitutional or statutory right is clearly established if "[t]he contours of the right [were] sufficiently clear that a reasonable official would understand that what he is doing violates that right." *Anderson*, 483, U.S. at 640. In short, reasonable police officers are expected to know and follow clearly-established law.

Thus, to overcome qualified immunity, a plaintiff must prove "in the light of pre-existing law the unlawfulness [of the officer's conduct was] apparent." *Id.* This analysis into the objective reasonableness of the officer's conduct applies even if a neutral magistrate issued a warrant authorizing the allegedly unconstitutional arrest. As the U.S. Supreme Court explained in *Malley v. Briggs*, 475 U.S. 335 (1986), an officer is not entitled to qualified immunity if "it is obvious that no reasonably competent officer would have concluded that a warrant should issue." 475 U.S. at 341; *see also Messerschmidt v. Millender*, 132 S. Ct. 1235, 1245 (2012) ("[T]he fact that a neutral magistrate has issued a warrant authorizing the allegedly unconstitutional search or seizure does not end the inquiry into objective reasonableness.").

As federal courts have made clear time and time again, an officer is not entitled to qualified immunity simply because the officer believes that he or she was acting in compliance with the law; rather, to obtain immunity, the officer must have been acting in such a way where a reasonable officer would understand that he or she is acting lawfully. *See Snider v. City of Cape Girardeau*, 752 F.3d 1149, 1155-57 (8th Cir. 2014) (officer acted in an objectively unreasonable fashion and was therefore not entitled to qualified immunity where he arrested the plaintiff for violating Missouri's flag desecration statute that was still "on the books" because the U.S. Supreme Court had struck down similar statutes criminalizing flag desecration); *see also Conrad v. N.H. Dep't of Safety*, No. 2012-440, 2014 N.H. LEXIS 130, at *28 (N.H. Nov. 6, 2014) ("The

linchpin of qualified immunity is the objective reasonableness of the official's conduct."); *Leonard v. Robinson*, 477 F.3d 347, 361 (6th Cir. 2007) ("no reasonable officer would find that probable cause exists to arrest a recognized speaker at a chaired public assembly based solely on the content of his speech (albeit vigorous or blasphemous) unless and until the speaker is determined to be out of order by the individual chairing the assembly"); *Baribeau v. City of Minneapolis*, 596 F.3d 465, 478-79 (8th Cir. 2010) ("The state of the law at the time of the arrests was clearly established such that a reasonable person would have known there was no probable cause to arrest the plaintiffs for engaging in protected expressive conduct under the disorderly conduct statute.").

These cases apply an objective reasonableness standard in ascertaining qualified immunity for the same prudent reason that this Court required such a standard in *Opinion of the Justices* when evaluating immunity for intentional torts: because otherwise officers would escape liability for objectively unreasonable violations of the law simply by claiming that they believed they were acting lawfully. As the U.S. Supreme Court stated over 30 years ago in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), "[w]here an official could be expected to know that certain conduct would violate statutory or constitutional rights, he should be made to hesitate; and a person who suffers injury caused by such conduct may have a cause of action." *Id.* at 819.

Because the Superior Court failed to ascertain whether the defendant police officers acted in an objectively reasonable fashion as is required under the New Hampshire Constitution, the Superior Court erred as a matter of law. Its decision should be vacated, and this case should be remanded for further proceedings on the objective reasonableness of the officers' conduct.

II. Though The Court Should Remand On The Question Of Official Immunity With Instructions To Apply A "Reasonable Belief That Conduct Is Lawful" Standard, The Defendant Police Officers' Conduct Was Not Objectively Reasonable When Measured Against That Of Reasonably Well-Trained Officers.

Though this Court should remand for a determination as to whether the defendant police officers "reasonably believed" that their conduct was lawful, if this Court addresses this question and applies an objective reasonableness standard, it should find that that the officers did not act in an objectively reasonable fashion where (i) they arrested the plaintiff for violating a statute, RSA 644:4, I(f), declared unconstitutional four years earlier in *State v. Pierce*, 152 N.H. 790 (2005), (ii) they claim to have been unaware that the statute was unconstitutional at the time of the arrest, and (iii) they were provided information concerning the unconstitutionality of RSA 644:4, I(f) by their employer.

A. Arresting A Person Under A Clearly Unconstitutional Statute Is Objectively Unreasonable.

As multiple federal courts have held, it is objectively unreasonable for a police officer to enforce a law that, though not formally repealed, has clearly been deemed unconstitutional. *See, e.g., Leonard v. Robinson*, 477 F.3d 347, 356-58 (6th Cir. 2007) (holding that any reasonable peace officer would not believe that mild profanity while peacefully advocating a political position could constitute a criminal act, and noting that the Michigan laws relied upon by the police officer that had not been repealed "are either facially invalid, vague, or overbroad when applied to speech … at a democratic assembly where the speaker is not out of order"); *see also Baribeau v. City of Minneapolis*, 596 F.3d 465, 478-79 (8th Cir. 2010) (denying qualified immunity to police officers who arrested citizens for disorderly conduct for "engaging in an artistic protest" because "[t]he state of the law at the time of the arrests was clearly established such that a reasonable person would have known there was no probable cause to arrest the plaintiffs for engaging in protected expressive conduct under the disorderly conduct statute [in light of Minnesota Supreme Court

precedent limiting the statute to "fighting words" when "language" is implicated]"). These decisions are premised on the well-accepted notion that reasonable police officers are presumed to know the clearly-established law governing their conduct. *See, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982) ("a reasonably competent public official should know the law governing his conduct"); *see also United States v. Vazquez*, 724 F.3d 15, 24 (1st Cir. 2013) ("Law enforcement officials … are knowledgeable in assessing whether the facts render a search lawful. In this context, it is no great demand to expect that they know the law…."). This Court should reach the same conclusion. The decisions of this Court striking down statutes that infringe upon individual rights will mean little if police officers are not expected to know and follow them.[3]

The case at bar is remarkably similar to the recently-decided Eighth Circuit Court of Appeals case of *Snider v. City of Cape Girardeau*, 752 F.3d 1149 (8th Cir. 2014). In *Snider*, the plaintiff, while standing in his front yard, attempted to set fire to an American flag. When he was unable to ignite the flag, he shredded it with a knife and threw it into the street. A neighbor who had observed the incident reported it to the police. The defendant police officer responded to investigate. During the officer's investigation, the plaintiff admitted that he destroyed the flag and stated that "he hated the United States because it was the country's fault that he could not find a job." The officer ultimately drafted a probable cause statement indicating that he believed the

[3] In addition, all citizens are presumed to know the law. *See Cheek v. United States*, 498 U.S. 192, 199 (1991) ("The general rule that ignorance of the law or a mistake of law is no defense to criminal prosecution is deeply rooted in the American legal system."); *In the Matter of Bloomfield*, 98 A.3d 483, 492 (N.H. 2014) ("[E]very person is presumed to know the law."); *Bennett v. Town of Hampstead*, 157 N.H. 477, 485 (2008) (same); *Town of Nottingham v. Newman*, 147 N.H. 131, 136 (2001) (same); *State v. Riendeau*, 160 N.H. 288, 297 (2010) ("It is well established that 'ignorance of the law is no excuse' [to liability under the criminal law])."); *State v. Stratton*, 132 N.H. 451, 457 (1989) ("It is elementary, as well as indispensable to the orderly administration of justice, that every man is presumed to know the laws of the country in which he dwells.") (quotation omitted); *State v. Jenkins*, 128 N.H. 672, 675 (1986) ("Every citizen is generally presumed to know the law, else there would be no law."); *State v. Carver*, 69 N.H. 216 (1898) ("Ignorance of a fact may sometimes be taken as evidence of a want of criminal intent, but not ignorance of the law; and in no case can one enter a court of justice to which he has been summoned in either a civil or criminal proceeding, with the sole and naked defence [sic] that when he did the act complained of, he did not know of the existence of the law which he violated.") (internal quotations omitted). The reason for this presumption is the accepted notion that the law is "definite and knowable." *Cheek*, 498 U.S. at 192 (collecting additional cases).

plaintiff had violated Missouri's statute prohibiting flag desecration. A warrant was ultimately issued for the plaintiff's arrest, and the plaintiff was subsequently arrested and detained for eight hours. The Eighth Circuit expressly rejected the contention that the officer acted in an objectively reasonable fashion, despite the facts that (i) the Missouri flag desecration law had not been repealed in light of U.S. Supreme Court decisions striking down statutes criminalizing flag desecration as unconstitutional,[4] and (ii) the officer was unaware of these Supreme Court decisions at the time of the arrest.

The Eighth Circuit made clear that, despite the officer's subjective belief that he was acting lawfully in arresting the plaintiff, "a reasonably competent officer would have known [that the plaintiff's] expressive conduct was constitutionally protected." *Id.* at 1156. As in *Snider*, the defendant officers in the present case arrested and charged the plaintiff under a statute that this Court had struck down as unconstitutional. As in *Snider*, the defendant officers were unaware that this Court had struck down the statute they used to deprive the plaintiff of his liberty. As in *Snider*, the defendant officers should have known that the statute they were seeking to enforce had been struck down. Thus, as in *Snider*, the defendant officers, regardless of their subjective beliefs, did not act in an objectively reasonable fashion.

Moreover, this case presents an even stronger case of objective unreasonableness than *Snider* for two reasons. *First*, in *Snider*, Missouri's flag desecration statute that was enforced against the plaintiff had not specifically been struck down by any court at the time of the arrest. Rather, similar flag desecration statutes elsewhere had been deemed unconstitutional. In *Snider*, the Court explained that, though Missouri's flag desecration statute had not been explicitly struck down, the officer was expected to know that "the [U.S.] Supreme Court clearly established the

[4] *See Texas v. Johnson*, 491 U.S. 397 (1989) (invalidating a Texas flag desecration statute as unconstitutionally applied to Johnson, who had burned an American flag while participating in a protest outside of a national political convention); *United States v. Eichman*, 496 U.S. 310 (1990) (invalidating the federal Flag Protection Act as applied to defendants who were prosecuted for setting fire to American flags on the steps of the United States Capitol).

First Amendment prohibits the prosecution of an individual for using the American flag to express an opinion." *Id.* at 1156. Here, unlike in *Snider*, the ***specific*** statute with which the officers charged the plaintiff had been deemed unconstitutional by this Court in *Pierce*. This fact is dispositive as to the objective unreasonableness of the officers' conduct. Officers should be and are, as explained above, expected to know this Court's decisions. ***Second***, the unreasonableness of the defendant officers' conduct is even more pronounced because they failed to even take the minimal step of reading the annotations below the statute provided by their employer that would have shown that the statute is unconstitutional.[5] This Court should not excuse the officers' failure to engage in this most basic task of reviewing the annotations that may have ensured that the plaintiff was not improperly deprived of his liberty.[6]

Finally, a finding of objective unreasonableness here is consistent with this Court's decision in *Opinion of Justices*, 126 N.H. 554 (1985). In justifying the rule that, under Article 14, a plaintiff must prove that the police officer lacked a "reasonable belief" in the lawfulness of his conduct, the Court explained that it "*fully expect[s] government personnel to be familiar with and*

[5] This is the key distinction between this case and *Amore v. Novarro*, 624 F.3d 522 (2d Cir. 2010). In *Amore*, the Second Circuit Court of Appeals recognized the general rule that the courts "impute knowledge of the case law to public officials," *id.* at 535, and that "it is the unusual case where a police officer's enforcement of an unconstitutional statute will be immune." *Id.* at 534. However, the Court concluded that the case presented "unusual" facts warranting qualified immunity. There, the police officer arrested someone based on a statute that made it a crime to loiter "in a public place for the purpose of engaging, or soliciting another person to engage, in deviate sexual intercourse or other sexual behavior of a deviate nature." The statute had been declared unconstitutional in 1983 by the New York Court of Appeals, but had not been repealed. In *Amore*, the arresting officer "*had not* received instruction or information on the constitutionality of the statute; and he was relying on an accurate, *if unannotated*, copy of the New York Penal Law when he arrested [the plaintiff]." *Id.* at 534 (emphasis added). Here, unlike the officer in *Amore*, the defendant police officers were given by the Concord Police Department a version of the criminal code that contained a specific annotation under the heading "Notes to Decisions" indicating that RSA 644:4, I(f) had been declared unconstitutional by this Court in *State v. Pierce*, 152 N.H. 790 (2005).

[6] This is precisely where the U.S. District Court Magistrate Judge in the earlier federal case erred in concluding that "[o]bjectively, it is reasonable for a police officer to believe that he is entitled to enforce a statute printed in the criminal code he is provided by his employer." *Farrelly v. City of Concord*, 902 F. Supp. 2d 178, 205 (D.N.H. 2012), *vacated in part by* 2012 U.S. Dist. LEXIS 180173 (D.N.H. Dec. 20, 2012). Setting aside the incorrectness of this statement of law given that police officers are presumed to know the law that has been clearly established by binding appellate courts, *see, e.g., Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982), the Magistrate Judge's decision ignores the salient fact that the defendant officers were provided the very annotations that would have informed them that the statute they wished to enforce was no longer enforceable.

to conform their conduct to the law." *Id.* at 564 (emphasis added). While the Court did "recognize that unfamiliarity with the subtler nuances of the law may occasionally lead [officers] to overstep its bounds and thereby to injure unlawfully the interests of a third party," it cannot seriously be disputed that this Court's unambiguous striking down of RSA 644:4, I(f) as unconstitutional in *Pierce* *is not* a "subtle nuance." The *Pierce* decision is clear as day and the defendant police officers were, as this Court explained, "expected to be familiar with and to conform their conduct" to this decision.

B. A Finding That A Police Officer's Enforcement Of A Law That Has Clearly Been Struck Down Is Objectively Reasonable Will Create Disincentives For Law Enforcement.

Presuming that law enforcers know which laws have been clearly struck down as unconstitutional by this Court also creates positive incentives for them to learn and know the law, including the binding appellate decisions of this Court, the U.S. Supreme Court, and the First Circuit Court of Appeals. A police officer's knowledge of the law is especially critical in the context of individual constitutional rights, where the specific contours of such rights are defined less by the constitution's specific text and more by judicial decision-making interpreting this text. *See, e.g.*, *Miranda v. Arizona*, 384 U.S. 463 (1966) (no confession could be admissible under the Fifth Amendment self-incrimination clause unless a suspect had been made aware of his rights); *Lawrence v. Texas*, 539 U.S. 558 (2003) (substantive due process provisions of the Fourteenth Amendment rendered unconstitutional a state law forbidding two persons of the same sex to engage in certain intimate sexual conduct). By making clear that official immunity cannot be used as a shield against intentional torts when it is objectively clear that an officer's action is unlawful, this Court will provide incentives for police officers to achieve and maintain familiarity with the law, and encourage those who train and otherwise inform police officers of legal requirements to convey information that is clear, correct, and current.

In contrast, the Superior Court's willingness to excuse a police officer's lack of knowledge of unambiguous court decisions striking down criminal statutes in determining whether official immunity applies could create disincentives that will harm the public. *First*, such an approach diminishes incentives to ensure that police officers receive thorough and up-to-date training in the law. *Second*, excusing such blatant mistakes of law may damage the public perception of law enforcement's knowledge and authority, thereby discouraging citizens from obeying or cooperating with police and alienating law enforcement officials from those they serve. *See* Bayley, Law Enforcement and the Rule of Law: Is There a Tradeoff?, 2 Criminology & Pub. Policy 133, 141-142 (2006) ("[V]iolating the rule-of-law lessens the willingness of the public to assist the police in carrying out their assigned role."); Tyler, Procedural Justice, Legitimacy, and the Effective Rule of Law, 30 Crime & Just. 283, 323 (2003) ("Evidence suggests that a core element to the creation and maintenance of [appropriate] social values is the judgment that legal authorities exercise their authority following fair procedures."). Simply put, citizens are entitled to trust that government intrusions upon their rights are grounded in the law.

A finding in this case that the defendant police officers acted in an objectively unreasonable fashion does not, of course, mean that all mistakes of law committed by police officers are objectively unreasonable. As the U.S. Supreme Court recently decided in the Fourth Amendment context, it was not objectively unreasonable for a police officer to mistakenly stop a person under a North Carolina vehicle code provision that was, on its face, textually unclear as to whether it was unlawful to have a single brake light in operation. *See Heien v. North Carolina*, No. 13-604, 2014 U.S. LEXIS 8306 (U.S. Dec. 15, 2014). In holding that the objective reasonableness standard used in determining whether probable cause exists for mistakes of fact also applies to mistakes of law, the *Heien* Court feared that an officer may be, while in the field, abruptly confronted with a "quick decision" requiring the application of an "unclear" statute. *Id.*

at *19 ("But [the defendant's] point does not consider the reality that an officer may 'suddenly confront' a situation in the field as to which the application of a statute is unclear—however clear it may later become.").

But, as *Snider* and other federal cases demonstrate in the qualified immunity context, *Heien*'s rationale does not apply to situations where a police officer enforces a law where it has been clearly established that the law is unconstitutional. Where a statute has been struck down, a police officer is not required to make a judgment "on the fly" concerning the statute's enforceability because there is no open legal question as to the statute's enforceability. *See Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2085 (2011) ("Qualified immunity gives government officials breathing room to make reasonable but mistaken judgments about *open legal questions*") (emphasis added). In *Heien*, for example, the Court was particularly concerned that the officer in question could reasonably (though mistakenly) construe that text of the motor vehicle statute to deem unlawful having a single working brake light—as opposed to having both brake lights not in working order. *Heien*, 2014 U.S. LEXIS 8306, at *21-22. Such a construction, the Court noted, was especially reasonable because the statute "had never been previously construed by North Carolina's appellate courts." *Id.* Here, however, there was nothing "unclear" about whether RSA 644:4, I(f) had been struck down as unconstitutional at the time of the plaintiff's arrest, and thus there was nothing that the defendant officers could have learned in the field that would have made RSA 644:4, I(f) any less unenforceable. While omniscience may have been required for the officer in *Heien* to know how the motor vehicle law would ultimately be interpreted by the courts, no such omniscience was required here with respect to RSA 644:4, I(f)'s invalidity at the time of the arrest. Indeed, as opposed to mistakes of law concerning ambiguous statutes (like the one in *Heien*) where courts are understandably unwilling to second-guess discretionary police conduct made pursuant to "individual professional judgment," *see Everitt*, 156 N.H. at 211, 219, the

constitutionality—and thus enforceability—of RSA 644:4, I(f) was never a question relegated to the officers' "individual professional judgment." This Court had definitely resolved this question. As a factual matter, the arrest and prosecution of the plaintiff in this case were also not "on the fly," but rather the product of—though patently misguided—deliberation by the defendants. Simply put, declining to apply official immunity to intentional torts arising out of an officer's enforcement of a clearly unenforceable law does not, as this Court feared in *Everitt*, inhibit the ability of officers to "effectively perform the responsibilities of their government employment." *See Everitt*, 156 N.H. at 221.

C. Because Unconstitutional Statutes Frequently Remain "On The Books," The Superior Court's Ruling Immunizes A Significant Amount Of Unconstitutional Conduct.

Granting official immunity to those who enforce statutes that remain "on the books" long after being declared unconstitutional would also immunize many constitutional violations. For example, under the Superior Court's reasoning, police officers in at least 13 states who are ignorant of the U.S. Supreme Court's decision in *Lawrence v. Texas*, 539 U.S. 558 (2003) would enjoy immunity for arresting individuals based on statutes prohibiting consensual sodomy that, while not formally repealed, were struck down by *Lawrence*. Indeed, statutes adjudicated unconstitutional, in whole or in part, remain "on the books" throughout the country, ranging from the desecration of the American flag to the advertisement of abortion services to the use of lewd bumper stickers.

Given the frequency with which unconstitutional statutes remain "on the books," it comes as little surprise that, despite this Court's holding in *State v. Pierce*, 152 N.H. 790 (2005) nine years ago, the legislature has still not repealed RSA 644:4, I(f). Other examples in New Hampshire are abound. In fact, it is still a misdemeanor in New Hampshire for anyone to "cast[] contempt upon the flag of the United States by desecrating the flag when it is properly displayed," *see* RSA 646-

A:4, though the U.S. Supreme Court made clear over 20 years ago that such laws violate the First Amendment. *See, e.g., United States v. Eichman*, 496 U.S. 310 (1990) (invalidating the federal Flag Protection Act, which banned a person from knowingly mutilating, defacing, physically defiling, burning, maintaining on the floor or ground, or trampling upon any flag of the United States). In addition, despite the fact that the City of Franklin's "sex offender residency restriction ordinance" was struck down by the Merrimack Superior Court in January 2012 on equal protection grounds, the City has not repealed and, in fact, continues to publish online its provisions banning certain sex offenders from "resid[ing] within a radius of 2,500 feet of the property line of a school, child care facility, playground area, athletic field or court, public beach, or a municipal ski area." *See* Franklin City Code, Section 247, http://ecode360.com/10177067.

The problem of unconstitutional statutes remaining "on the books" is unlikely to subside soon. *Amici* are aware of no provision of law that requires state legislatures to repeal statutes that have been invalidated by courts. To the contrary, legislatures may, for a variety of reasons, fail to repeal statutes that have been adjudicated as unconstitutional. In some instances, the failure may be lack of awareness of judicial invalidation. In others, such failure may rest upon political considerations. Regardless, neither ignorance nor politics nor inertia should stand in the way of a citizen's ability to petition the courts for relief. The ability of litigants to vindicate wrongs and to secure damages for the redress of these injuries should not turn upon the political vicissitudes of a formal legislative repeal of statutes that have been adjudicated unconstitutional.

CONCLUSION

This Court should hold that, for a police officer and his employer to obtain official immunity for intentional torts, Part I, Article 14 of the New Hampshire Constitution requires that the officer have acted "under a reasonable belief that his conduct is authorized by law"—as mandated by this Court's decisions in *Opinion of the Justices*, 126 N.H. 554 (1985) and *Huckins v.*

McSweeney, 166 N.H. 176 (2014). Because the Superior Court failed to apply this standard, its decision should be vacated and this case should be remanded for further proceedings.

Respectfully Submitted,

AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

and

GAY & LESBIAN ADVOCATES & DEFENDERS

By Their Attorneys,

Date: December 16, 2014

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CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing *Brief for the Amicus Curiae American Civil Liberties Union of New Hampshire and Gay & Lesbian Advocates & Defenders in Support of Plaintiff John Farrelly* was served this 16th day of December, 2014 by first class mail, postage prepaid, and by electronic mail on counsel for the defendants, Charles P. Bauer, Gallagher, Callahan & Gartrell, P.C., 214 N. Main Street, Concord, New Hampshire 03301.

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