THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2023-0663

John M. Formella, Attorney General
Plaintiff/Appellant

v.

Christopher Hood, et al.
Defendants/Appellees

BRIEF OF *AMICI CURIAE*
AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE
AND AMERICAN CIVIL LIBERTIES UNION

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

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May 9, 2024

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INTRODUCTION AND SUMMARY OF ARGUMENT

The New Hampshire Attorney General's Office brought complaints seeking civil penalties and injunctive relief under New Hampshire's Civil Rights Act, *see* N.H. Rev. Stat. Ann. § 354-B ("the Act"), against the Defendants—National Socialist Club-131 ("NSC-131"), a neo-Nazi group, and two individuals, Christopher Hood and Leo Anthony Cullinan. That Office charged them with trespass and conspiracy to trespass under the Act for affixing two banners to a highway overpass fence that read "Keep New England White." These banners were visible to all motorists traveling on the highway.

RSA 354-B:1 states in relevant part that "[a]ll 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 … trespass on property when such actual or threatened conduct is motivated by race, color, religion, national origin, ancestry, sexual orientation, sex, gender identity, or disability." The Complaints allege that the trespass in this case violates the Act because it was "motivated by" the desire to express the racially discriminatory message contained on Defendants' banners. *Amici* submit this brief to address the narrow constitutional question presented by the specific facts of this case: Do the First Amendment and Part I, Article 22 of the New Hampshire Constitution bar the application of RSA 354-B:1 in a common law civil trespass case when, as here, there is no allegation that that Defendants engaged in any discriminatory targeting of specific individuals?

Amici agree that Defendants' speech is abhorrent and deeply harmful to New Hampshire communities. As New Hampshire rapidly diversifies,[1] Defendants' message is that people of color do not belong here. The phrase "Keep New England White" marks entire communities of color in the Granite State as second-class citizens, and its usage

[1] *See* Kenneth Johnson*, Modest Population Gains, but Growing Diversity in New Hampshire with Children in the Vanguard*, Carsey School of Public Policy Regional Issue Brief (Aug. 30, 2021), https://carsey.unh.edu/publication/modest-populationgains-but-growing-diversity-in-new-hampshire-with-children-in-vanguard.

here shows what these communities know all too well—that racism is alive and pervasive in New Hampshire and is felt by Black and Brown people every day. In resolving this case, this Court can and should acknowledge the deep harm that such speech inflicts on New Hampshire communities of color and the State as a whole. And the Attorney General's Office should be commended for its efforts to make these communities feel protected by expanding its Civil Rights Unit[2] and by bringing conduct-based actions elsewhere to help ensure that New Hampshire is a state that welcomes all.[3]

However, simply because speech is harmful—and it undoubtedly is here—does not mean that it can be prohibited because of its viewpoint. That is the central holding of the United States Supreme Court's decision in *R.A.V. v. City of St. Paul*, which struck down a municipal ordinance prohibiting bigoted speech as impermissibly content and viewpoint discriminatory, even after the state court had interpreted the ordinance to apply only to constitutionally unprotected "fighting words." 505 U.S. 377 (1992). Where, as here, a statute imposes a penalty because of the viewpoint expressed by speech (even otherwise unprotected speech), the First Amendment is violated. At the same time, the United States Supreme Court held in *Wisconsin v. Mitchell* that states can punish the discriminatory targeting of individuals for unlawful conduct. 508 U.S. 476 (1993). But, in this instance, Defendants are not charged with directing their conduct at anyone in particular, and the gravamen of the complaints against them is that they expressed a racist viewpoint.

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[2] *See* Ethan Dewitt, *Citing Surge In Complaints, New Hampshire Expands Its Civil Rights Unit*, N.H. Bulletin (Nov. 30, 2023), https://newhampshirebulletin.com/briefs/citing-surge-in-complaints-new-hampshire-expands-its-civil-rights-unit/.

[3] *See, e.g.*, Ian Lenahan, *Portsmouth Teen Charged With Racist, Antisemitic Acts Takes Deal. Here Are The Terms*., Portsmouth Herald (Mar. 20, 2024), https://www.seacoastonline.com/story/news/local/2024/03/20/portsmouth-nh-teen-charged-with-racist-antisemitic-acts-takes-deal/73042988007/; Troy Lynch, *Suspects Plead Not Guilty In Connection With Newport, Claremont Vandalism Cases*, WMUR (Dec. 20, 2023), https://www.wmur.com/article/Newport-claremont-new-hampshire-vandalism-122023/46192141.

The vast majority of enforcement actions for bias-motivated offenses address circumstances where the defendant targeted another person or group for unlawful conduct because of the other person's or group's protected characteristics or associations. This is the line—namely, where there is targeting of a specific victim—that this Court, like other courts, should embrace in applying RSA 354-B:1 consistent with free speech principles. To be clear, embracing this line would not mean that criminal or civil violations associated with hate, racism, and discrimination cannot be prosecuted by the Office of the Attorney General's Civil Rights Division. For instance, the First Amendment likely would not bar the Act's application to a defendant who affixes a racist banner to the home of a Black resident, enters the property of Black landowner with "no trespassing" signs and uses a megaphone to announce "Keep New Hampshire White," burns a cross on a Black person's lawn, or affixes an anti-gay banner to the window of an LGBTQ+-friendly café.[4] Such enforcement actions would punish the discriminatory targeting of individuals, based on animus, for trespass or other offenses—rather than punishing the defendant because of their speech. And such prosecutions would reflect the heightened seriousness with which society treats unlawful acts that constitute invidious discrimination. *Amici* agree with the Office of the Attorney General's commendable efforts to use these tools to address such invidious discrimination in New Hampshire.

This case, however, is different and an outlier with respect to the vast majority of bias-motivated offense enforcement actions. Here, there is no allegation that Defendants, in committing the offense of trespass by affixing their banners, *targeted* anyone for unlawful conduct because of their race—to the contrary, the trespass occurred on public land on a public highway overpass. Yet the State seeks to impose two $5,000 civil penalties for this speech, as well as an injunction, on the novel theory that Defendants were "motivated by" race, and therefore violated the Act, because they trespassed in order to

[4] Such a café, a private business, has repeatedly been targeted by this same Neo-Nazi group. *See* Lex McMenamin, *Drag Story Hour Targeted by Neo-Nazis in Concord, New Hampshire*, Teen Vogue (June 21, 2023), https://www.teenvogue.com/story/drag-story-hour-neo-nazis-concord-new-hampshire.

express a white supremacist message to the broader public driving on a highway. Like the ordinance struck down in *R.A.V.*, this unusual application of the Act would unconstitutionally penalize speech because of its viewpoint.

Amici share the Office of the Attorney General's revulsion at Defendants' white supremacist views, but (as the Superior Court pointed out) that Office's interpretation of the Act would allow law enforcement officials to impose heightened "bias-motivated offense" penalties on anyone who trespasses while engaged in speech about race, religion, gender, or any other protected characteristic. In practice, that would mean that law enforcement officials have the power to impose heightened penalties any time someone commits even an inadvertent trespass while engaged in speech that the officials find offensive—whether the speech is by Black Lives Matter activists condemning racism by white people, pro-Palestine activists protesting the war in Gaza, or pro-Israel proponents counterprotesting. App1: 19-20.[5] Neither the First Amendment nor the Act's legislative history support such a dramatic expansion of the Act's scope.

Accordingly, this Court should affirm the Superior Court's dismissal of the Complaints because the allegations provide no plausible basis to infer that Defendants engaged in discriminatory targeting of anyone when they trespassed on public property by affixing two banners to a fence on a public highway overpass. While *Amici* condemn Defendants' reprehensible speech in the strongest terms, the robust protections afforded by the First Amendment and Part I, Article 22 of the New Hampshire Constitution do not permit this viewpoint-based punishment of dissenting views in the specific context presented here. To be clear, however, *Amici* do not question the constitutionality of RSA 354-B:1 *per se*. Instead, *Amici*'s position addresses the question of whether, to satisfy the

[5] References to the record are as follows:
App1_refers to Volume 1 of the Appendix to the State's Brief for the New Hampshire Supreme Court.
App2_refers to Volume 2 of the Appendix to the State's Brief for the New Hampshire Supreme Court .

requirements of the First Amendment and Part I, Article 22 of the New Hampshire Constitution, that statute can be applied to civil trespassing laws in public places without any threshold allegation that specific victims were discriminatorily targeted because of their protected class or immutable attributes. As explained in more detail below, such an allegation—which would exist in most enforcement actions for bias-motivated offenses—is required, yet not present here.

IDENTITY OF *AMICI CURIAE*

The American Civil Liberties Union of New Hampshire ("ACLU-NH") is the New Hampshire affiliate of the American Civil Liberties Union ("ACLU") consisting of over 9,000 New Hampshire members and supporters. The ACLU-NH engages in litigation to encourage the protection of individual rights guaranteed under the United States and New Hampshire Constitutions, as well as under our state and federal civil rights laws. As part of its mission, the ACLU-NH works to preserve freedom of expression. Accordingly, the ACLU-NH regularly participates before this Court through direct representation and as *amicus curiae* in cases involving free speech issues. *See e.g.,* Brief for Robert Azzi and Union Leader Corporation, as Amici Curiae Supporting Appellees*, Richards v. Azzi*, No. 2022-0197 (N.H. Sup. Ct. filed Oct. 19, 2022) (ACLU-NH filing *amicus* brief in pending case arguing that various statements by a plaintiff author—including the statement that the defendant has "disseminated, across multiple media platforms, white supremacist ideology to keep Americans from learning an unexpunged American history from its 1619 origins alongside the dominant White 1776 narrative"—constitute nonactionable expressions of opinion that cannot be subjected to defamation liability under the First Amendment and N.H. Const. pt. I, art. 22); *Montenegro v. N.H. DMV*, 166 N.H. 215 (2014) (holding that, on its face, a prohibition of vanity registration plates that are "offensive to good taste" violates the right to free speech under N.H. Const. pt. I, art. 22 because the regulation authorizes or even encourages arbitrary and discriminatory enforcement; as *amicus curiae*); *City of Keene v. Cleaveland*, 167 N.H. 731 (2015) (affirming, in part, dismissal of civil causes of action against speakers on the ground that "the First Amendment shields the respondents from tort liability for the challenged conduct"; as

amicus curiae); *Automated Transactions, LLC v. American Bankers Association*, 172 N.H. 528 (2019) (affirming dismissal of defamation case alleging that use of term "patent troll" is defamatory, and concluding that the usage of the term is protected opinion; as *amicus curiae*); *State v. Bailey*, 166 N.H. 537 (2014) (holding that an ordinance establishing a park curfew of 11:00 p.m. to 7:00 a.m. does not violate defendants' right to free speech under N.H. Const. pt. I, art. 22 or the First Amendment, as the regulation satisfies the requirement of narrow tailoring for time, place, and manner restrictions given the city's significant interest in protecting public safety and welfare and maintaining the condition of the park).

The ACLU is a nationwide, nonprofit, nonpartisan organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has frequently appeared before courts throughout the country in cases involving the exercise of First Amendment rights, both as direct counsel and as *amicus curiae*. *See, e.g.*, *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939); *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Snyder v. Phelps*, 562 U.S. 443 (2011); *Mahanoy Area Sch. Dist. v. B. L.*, 594 U.S. 180 (2021). The ACLU also filed amicus briefs in support of the prevailing petitioners in two cases of central relevance to this matter: *R.A.V. v. City of St. Paul*, 505 U.S. 377 (1992), and *Wisconsin v. Mitchell*, 508 U.S. 476 (1993).

Both the ACLU-NH and the ACLU have long opposed content- and viewpoint-based restrictions on speech, including hateful speech, while supporting properly tailored laws punishing bias-motivated offenses. For these reasons, this case is of concern to the ACLU-NH and ACLU.

QUESTION PRESENTED

1. Do the First Amendment and Part I, Article 22 of the New Hampshire Constitution prohibit the New Hampshire Attorney General's Office from applying New Hampshire's bias-motivated offense statute, RSA 354-B:1, to a trespass occurring through the affixing of a banner on a public highway overpass fence that was "motivated

by" the desire to express a bigoted message to motorists where there is no indication that the defendants engaged in any discriminatory targeting of specific individuals?

STATEMENT OF THE CASE AND THE FACTS

On July 30, 2022, a group of about ten people associated with the white supremacist 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 despicable message "KEEP NEW ENGLAND WHITE." App1: 4.[6] NSC-131 describes itself as a "pro-white, street oriented fraternity dedicated to raising authentic resistance to the enemies of our people in the New England area." App1: 4. Portsmouth police were called to the scene, where they informed Hood that hanging banners without a permit violated a municipal ordinance. App1: 4-5. Hood then instructed the protesters to remove the banners from the fence, although some continued to hold the banners by hand before returning to their vehicles and departing. App1: 5. NSC-131 subsequently took credit on its social media profiles for the display of the banners. *Id.*

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 this alleged conduct. App1: 6. The Act 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 conduct is motivated by race, color, religion, national origin, ancestry, sexual orientation, sex, gender identity, or disability.

[6] As this appeal arises from the grant of motions to dismiss, the facts alleged in the Complaints are assumed to be true for the purposes of this proceeding. *See Beane v. Dana S. Beane & Co.*, 160 N.H. 708, 711 (2010) ("In reviewing an order granting a motion to dismiss, [this Court] assume[s] the truth of the facts as alleged in the plaintiff's pleadings and construe all reasonable inferences in the light most favorable to the plaintiff.") (quotation omitted).

RSA 354-B:1.

The Complaints respectively allege 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" without a permit. *See* App1: 34. The Superior Court consolidated the cases. App1: 3. 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.

Hood and Cullinan filed motions to dismiss. 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) Portsmouth's anti-obstruction ordinance, Portsmouth, N.H. Ordinance ch. 9, art. 5, § 02, because the Attorney General did not allege that the banners obstructed traffic; or (3) New Hampshire's advertisement law, RSA 236:26, because the banners did not constitute an advertisement for NSC-131. App1: 9-15. On the other hand, the court concluded that the Complaints did state a common law civil trespass violation, App1: 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. App1: 17, 20-21. 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. App1: 19-20.

The trial court concluded that the Act is partially invalid as applied to common law civil trespass on public property. App1: 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. App1: 22.

The Attorney General's Office filed a motion for reconsideration, which the court denied on October 18, 2023. App1: 52-66. 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. App1: 57-58. By way of example, the trial court explained that "a person's disability rights protest at Veteran's Park in Manchester continuing after 11 p.m. may 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." App1: 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." App1: 64. The Attorney General's Office filed a second motion for reconsideration, which was also denied.

This appeal followed.

ARGUMENT

I. The First Amendment prohibits the government from punishing speech because of its viewpoint, even if the speech is bigoted, though it allows the government to punish the discriminatory targeting of unlawful conduct.

a. The Supreme Court's decisions in *R.A.V. v. City of St. Paul* and *Wisconsin v. Mitchell* provide the appropriate First Amendment framework for this case.

The First Amendment bars the government from punishing speech because it disapproves of the speaker's message. *See, e.g.*, *Police Dep't of City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972) ("[A]bove all else, the First Amendment means that government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."). This principle applies no matter how controversial or offensive the speaker's message may be. Indeed, "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Texas v. Johnson*, 491 U.S. 397, 414 (1989); *accord Matal v. Tam*, 582 U.S. 218, 244 (2017) ("We have said time and again that 'the public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers.'") (quoting *Street v. New York*, 394 U.S. 576, 592 (1969)) (collecting cases). And the principle applies with full force to racist speech. *R.A.V.*, 505 U.S. at 391.

Accordingly, however well-intentioned, government attempts to penalize speech on the ground that it expresses a hateful message violate the First Amendment's fundamental prohibition on content and viewpoint discrimination. In *R.A.V.*, the United States Supreme Court considered a municipal ordinance criminalizing the "display of a symbol which one knows or has reason to know 'arouses anger, alarm or resentment in others on the basis of race, color, creed, religion or gender,'" as applied to the burning of a cross on a Black family's lawn. 506 U.S. at 380 (1992). Even after the state's highest court authoritatively construed the ordinance to apply only to "fighting words," *id.* at 381, which are generally unprotected by the First Amendment, the Court held that the ordinance violated the First Amendment because it selectively banned only fighting words with a proscribed

viewpoint—namely, those "that communicate messages of racial, gender, or religious intolerance." *Id.* at 394. "What we have here," the Court emphasized, "is not a prohibition of fighting words that are directed at certain persons or groups (which would be facially valid if it met the requirements of the Equal Protection Clause); but rather, a prohibition of fighting words that contain . . . messages of 'bias-motivated' hatred and in particular, as applied to this case, messages 'based on virulent notions of racial supremacy.'" *Id.* at 392 (citation omitted). The Court thus drew a distinction between permissible restrictions on the discriminatory selection of victims for unlawful conduct and impermissible content- or viewpoint-based restrictions on bigoted speech. St. Paul's ordinance fell on the wrong side of this line. Put another way, while the horrific burning of a cross on a Black family's lawn can be statutorily regulated when it is directed at certain persons or groups, or otherwise involves discriminatory victim selection, the statute at issue must require this specific discriminatory victim selection—rather than generally criminalizing a disfavored viewpoint.

Just a year later, the United States Supreme Court revisited the First Amendment's application to bias-motivated offenses in *Wisconsin v. Mitchell*. There, the defendant was convicted of aggravated battery and subjected to a sentencing enhancement under Wisconsin's hate-crimes statute, which imposed a sentencing enhancement "whenever the defendant '*[i]ntentionally selects the person* against whom the crime . . . is committed . . . because of the race, religion, color, disability, sexual orientation, national origin or ancestry of that person.'" 508 U.S. at 480 (1993) (quoting Wis. Stat. § 939.645(1)(b)) (emphasis added). The Court rejected the defendant's contention that the statute unconstitutionally punished bigoted beliefs. While it acknowledged that "a defendant's abstract beliefs, however obnoxious to most people, may not be taken into consideration by a sentencing judge," *id.* at 485 (citing *Dawson v. Delaware*, 503 U.S. 159 (1992)), the Court observed that it had already upheld a sentencing judge's discretion to consider a defendant's racial animus against the victim as an aggravating factor. *Id.* at 486 (citing *Barclay v. Florida*, 463 U.S. 939 (1983) (plurality opinion)). And it concluded that the legislature should en-

joy the same discretion to impose heightened penalties for bias-motivated offenses singling out individuals because of their race. *Id*. As the Court explained, "bias-inspired conduct . . . is thought to inflict greater individual and societal harm," including "retaliatory crimes," "distinct emotional harms" for the victims, and "community unrest." *Id.* at 487–88. The Court concluded that the State's interest in addressing these harms "provides an adequate explanation for its penalty-enhancement provision over and above mere disagreement with offenders' beliefs or biases." *Id.* at 488.

In holding that Wisconsin's statute did not unconstitutionally punish the defendant for his bigoted beliefs, but rather for his discriminatory conduct, the Court explained that "motive plays the same role under the Wisconsin statute as it does under federal and state antidiscrimination laws, which [the Court had] upheld against constitutional challenge." *Id.* at 487. It pointed, by way of example, to Title VII of the 1964 Civil Rights Act, which "makes it unlawful for an employer to discriminate against an employee '*because of* such individual's race, color, religion, sex, or national origin.'" *Id.* (emphasis in original) (quoting 42 U.S.C. § 2000e–2(a)(1)). Like Title VII, Wisconsin's bias-motivated offense statute punished discrimination against individuals because of their protected characteristics. In both contexts, the law is "aimed at conduct unprotected by the First Amendment," rather than the possession or expression of bigoted beliefs. *Id.*; *see also State v. Talley*, 858 P.2d 217, 225 (Wash. 1993) ("One cannot make a sound argument that the government can make discrimination in the hiring process illegal, but it cannot criminalize discrimination in selecting a victim for a crime."). By contrast, the St. Paul ordinance in *R.A.V.* punished fighting words that express "'bias-motivated' hatred" because such messages were "deemed particularly offensive by the city." *Mitchell*, 508 U.S. at 487 (quoting *R.A.V.*, 505 U.S. at 392). Unlike the St. Paul ordinance, Wisconsin's bias-motivated offense statute authorized the sentencing judge to consider a defendant's speech only as evidence of the defendant's discriminatory motive in selecting the victim—an assessment that does not itself infringe the First Amendment. *See id.* at 491–92. *Mitchell* thus reaffirmed *R.A.V.*'s distinction between a permissible restriction on discriminatory victim-selection and an impermissible restriction on bigoted expression.

b. Following *R.A.V.* and *Mitchell*, courts have limited bias-motivated offense statutes to circumstances involving discriminatory victim-selection.

R.A.V. and *Mitchell* collectively stand for the proposition that the government may punish conduct that is discriminatorily targeted at a specific victim because of his or her race, but may not punish the expression of bigoted views themselves because they are racist. Numerous lower courts have drawn precisely this line in interpreting and applying their states' respective bias-motivated offense laws.

The Washington Supreme Court's decision in *State v. Talley* is instructive. There, the court addressed consolidated First and Fourteenth Amendment challenges to Washington's malicious-harassment statute. The first provision of the statute prohibited harassment of another person because of that person's protected characteristics, where such harassment involves actual or threatened injury to person or property. The second provision established that cross burning or "[d]efacement of the property of the victim or a third person with symbols or words when the symbols or words historically or traditionally connote hatred or threats toward the victim" constitute *per se* violations of the statute. 858 P.2d at 220–21 (quoting Rev. Code Wash. 9A.36.080).

The court upheld the first section as a regulation of conduct that does not infringe First Amendment freedoms. It distinguished this provision from the St. Paul hate-speech ordinance in *R.A.V.*, explaining that, unlike the St. Paul ordinance, Washington's criminal harassment statute "is aimed at criminal conduct and enhances punishment for that conduct where the defendant chooses his or her victim because of their perceived membership in a protected category. The statute punishes the selection of the victim, not the reason for the selection. It increases punishment where the perpetrator acts on particularly offensive beliefs, not the beliefs themselves." *Id.* at 222. Surveying decisions from courts in Oregon, Florida, California, and New York upholding their states' respective bias-motivated offense statutes, the Washington Supreme Court observed that "[t]hese courts all agreed that the enhancement statutes in question were directed not at speech, but at conduct, and that they punished not thought or belief, but rather *victim selection*. This tight

nexus between criminal conduct and the statutes sufficiently protected free speech guaranties." *Id.* at 224 (emphasis added). As in *Mitchell*, the Washington Supreme Court analogized the malicious harassment statute to Title VII and concluded that both laws prohibited discriminatory conduct, regardless of the defendant's personal beliefs or expression. *Id.* at 225. The court also rejected the defendants' argument that the "motive" for an unlawful act cannot be punished without infringing freedom of conscience, reasoning that the statute "punishes the intentional act of discrimination, not the motive underlying the act." *Id.* at 227.

Significantly, the court reached a different conclusion with respect to the statute's second provision establishing that cross burning and the defacement of another's property with hate speech or symbols constitute *per se* malicious harassment (independent of any indication that the speech was targeted at a specific individual based on race). Whereas the first provision regulated conduct with only an incidental burden on speech, the court held that the second provision "clearly regulates protected symbolic speech based on content." *Id.* at 230. This provision differed from the first provision insofar as it was not facially tied to any sort of victim selection—cross burning (even in a public forum) or the defacement of another's property (even public property) with hate symbols would have violated the statute, even if the defendant did not engage in any targeting of a specific victim based on race. This led the Washington Supreme Court to conclude that the provision was "intended to criminalize cross burning and depiction of hate symbols 'per se,'" and that "[a]ny effect it has on regulating conduct," such as defacement of another's property, was "merely incidental" to its restriction on disfavored messages. *Id.* The court accordingly struck down this provision as an impermissible content-based restriction on speech. *Id.* at 230–31.

Most states' bias-motivated offense statutes do not raise First Amendment issues, because, as in *Wisconsin v. Mitchell*, they "define a hate crime as one in which the actor committed the offense 'because of,' 'by reason of,' or 'on account of' another person's race or other protected status." Zachary J. Wolfe, *Hate Crimes Law* § 3:8 & n.2 (2023–2024 ed.). Where statutes contain ambiguities that could be read more broadly, many

courts have interpreted them to require specific discriminatory targeting in order to avoid First Amendment problems. *Id*. *See Lucas v. United States*, 240 A.3d 328, 337 (D.C. 2020) ("conclud[ing] that the [District's] Bias-Related Crime Act is constitutional *to the extent* that it provides an enhanced penalty for bias-motivated crimes, that is, a crime that an individual perpetrates against a victim because of prejudice based on the victim's protected characteristic") (emphasis added); *State v. Stalder*, 630 So. 2d 1072, 1074–77 (Fla. 1994) (applying the canon of constitutional avoidance and construing Florida's bias-motivated offense statute, which authorizes heightened penalties for crimes that "evidence[] prejudice based on" the victim's protected characteristics, to apply only to crimes "wherein the perpetrator intentionally selects the victim because of the victim's" protected characteristic); *State v. Mortimer*, 641 A.2d 257, 266 (N.J. 1994) (construing the state's bias-motivated offense statute to prohibit "selecting a victim because of one of the listed immutable characteristics"). *But see Lipp v. State*, 227 A.3d 818, 827 (Md. 2020) (rejecting a First Amendment challenge to a statute that prohibited defacement of public or private property "if there is evidence that exhibits animosity against a person or group, because of the race, color, religious beliefs, sexual orientation, gender, disability, or national origin of that person or group or because that person or group is homeless").

In trespass cases, courts have held that a trespass against a third party's property may exhibit invidious discrimination where the trespass is targeted at a specific individual or group who are closely associated with the property. For example, in *In re Michael M.*, the defendant was charged with a bias-motivated offense where he vandalized the door of a Black teacher's public-school classroom, as well as an awning over the steps of the school's music building where Black students regularly congregated, with racial epithets and a call for racial violence. 86 Cal. App. 4th 718, 721–22 (Cal. Ct. App. 2001). The defendant argued that the bias-motivated offense statute did not apply because the property belonged to the public, rather than any private individual targeted for their protected characteristics. *Id.* at 723. The court disagreed, observing that the statute was not focused "on questions of property ownership," but rather on "preventing the intimidation

of a victim, or the interference with the victim's civil rights, when the intimidation or interference is based on the victim's actual or perceived protected characteristic." *Id.* at 726. The court concluded that, "[a]s long as the property is regularly and openly used, possessed, or occupied by the victim so that it is readily identifiable with him or her, it falls within the statutory scope." *Id. See also State v. Callen*, 97 S.W.3d 105, 110–11 (Mo. Ct. App. 2002) (holding that, even if Missouri's bias-motivated offense statute applied only to trespass against the victim's own property, the Black manager of a corporately owned property had a sufficient possessory interest to qualify as the victim of the defendant's racially-motivated trespass).

In sum, state courts have hewed to the line the United States Supreme Court drew in *R.A.V.* and *Mitchell*, distinguishing between impermissible punishment of racist messages, on the one hand, and permissible punishment of conduct that is discriminatorily targeted at a particular victim because of race or some other protected characteristic, on the other.

II. Given the First Amendment concerns presented by this unusual application of the Act, this Court should narrowly hold that RSA 354:B-1 does not apply to trespasses on public property "motivated by" the desire to engage in speech related to protected characteristics where there is no evidence of discriminatory targeting.

Here, the Complaints allege that Defendants conspired with others to trespass on a publicly-owned highway overpass when they affixed two banners to a fence that read "Keep New England White." They further allege that "[t]he slogan on the banners, 'Keep New England White,' was plainly motivated by race," because "[t]he only reasonable interpretation is that the slogan and group's intention was to discourage people of color from residing in or visiting and making them feel unwelcome and unsafe in the New England region, New Hampshire, and Portsmouth." App1: 36; App1: 45. These allegations show that Defendants were motivated to express a racially bigoted message, and that they trespassed by affixing a banner to public property in order to do so. But the Complaints do not allege that Defendants targeted any identifiable person or persons in committing the trespass. If the statute were read to reach this conduct absent these allegations, it

would violate the First Amendment and Part I, Article 22 of the New Hampshire Constitution. But this Court can avoid that result, as have other state courts, by construing the statute to be limited to discriminatory victim-selection. *See Lucas*, 240 A.3d at 335, 337; *Stalder*, 630 So.2d at 1074, 1077; *Mortimer*, 641A.2d 266.

The Office of the Attorney General's unusual application of RSA 354-B:1 to these facts, where there is no targeting of a specific individual (or group who are closely associated with the property), would violate the First Amendment and Part I, Article 22 of the New Hampshire Constitution. Unlike the Wisconsin statute upheld in *Mitchell*, it would not just punish discriminatory victim-selection. Instead, it would impose heightened penalties on anyone who trespasses (knowingly or even unwittingly) while expressing a message on issues relating to race, religion, sex, or any other protected characteristic. The imposition of bias-motivated offense liability under those circumstances punishes the message itself, and therefore triggers the First Amendment's bar on content and viewpoint discrimination—just like the "hate speech" ordinance struck down in *R.A.V*. *Id.* The fact that the message coincides with a trespass does not remove its protection under the First Amendment and Part I, Article 22, though the outcome of this case could very well be different if the conduct in question was targeted at a specific individual under the appropriate construction of the Act. *See, e.g.*, *Valle del Sol, Inc. v. Whiting*, 709 F.3d 808, 823 (9th Cir. 2013) (holding that the government "may not, consistent with the First Amendment, use a content-based law to target individuals for lighter or harsher punishment because of the message they convey while they violate an unrelated traffic law").

This Court need not, and should not, read the law as expansively as does the Attorney General's Office in this novel enforcement action. RSA 354:B-1's legislative history does not support this unusual application of the Act. The chairwoman of the New Hampshire's Senate Judiciary Committee, who introduced RSA 354:B-1, said in her opening remarks that the Act "provid[es] law enforcement with an additional tool to address and prevent illegal acts of violence and threatened violence *that are motivated by hatred or animosity towards a certain personal characteristic of the victim*." App2: 9–10 (emphasis added). The sponsor went on to state that "[a]cts of violence which are aimed at citizens

because they are members of a certain race or religion or other group are destructive to the victims and the entire community." *Id.* at 10. She added: "The individuals who are personally victimized because of who or what they are suffer a sense of personal invasion like all victims of threats and violence. But, the fear of revictimization and the sense of vulnerability increase when victims know they are singled out because of personal characteristics that they cannot change." *Id.* These remarks underscore what is clear on the statute's face: the Act was intended to address discriminatory targeting, including trespasses targeted at individuals because of their protected characteristics—rather than trespasses on public property that are "motivated by" the desire to express a message related to race, color, religion, national origin, ancestry, sexual orientation, sex, gender identity, or disability.

Because the Office of the Attorney General's novel interpretation of the Act is not supported by the Act's text or legislative history, and would raise serious First Amendment problems, this Court should reject that interpretation as a matter of constitutional avoidance. It is well established that "a statute will be construed to avoid a conflict with constitutional rights whenever that course is reasonably possible." *Sibson v. State*, 110 N.H. 8, 11 (1969); *accord State v. Paul*, 167 N.H. 39, 44–45 (2014); *State v. Ploof*, 162 N.H. 609, 620 (2011); *see also United States v. Rumely*, 345 U.S. 41, 45 (1953). Thus, if one possible interpretation of a statute presents constitutional concerns, this Court should reject that interpretation in favor of a reasonable alternative. *See, e.g.*, *State v. Smagula*, 117 N.H. 663, 666 (1977); *see also Gomez v. United States*, 490 U.S. 858, 864 (1989). Here, this Court can simply conclude that RSA 354-B:1 does not apply to trespasses on public property "motivated by" the desire to express a message related to a protected characteristic where there is no evidence of discriminatory targeting. That interpretation would be consistent with the approach adopted by other state supreme courts in the face of similarly ambiguous, and potentially unconstitutional, bias-motivated offense statutes.

Construing RSA 354-B:1 to exclude this enforcement action would also address the trial court's valid concerns about the sweeping consequences of the Office of the At-

torney General's broad construction of the Act—which would encompass *any* civil trespass on public or private party that is in some sense "motivated by" the desire to spread a message relating to a protected characteristic, even if the trespass is wholly inadvertent, the message itself is devoid of animus, and there is no targeting of any victim. As the trial court correctly pointed out, such an expansive interpretation would apply to a disability rights protester, a religious proselytizer, or a Black Lives Matter activist who has a good faith (but mistaken) belief that they are authorized to be in a public park past a particular hour or without a permit. App1: 20. This interpretation of the Act would stitch together the strict liability regime for civil trespass with a content-discriminatory ban on speech relating to protected characteristics. Any speech on those subjects that happens to coincide with a civil trespass would subject the speaker to additional punishment under the Civil Rights Act.

The trial court's concerns cannot be addressed by limiting the Act to trespasses motivated by the desire to engage in speech evincing discriminatory animus. For one thing, that would just replace a content-based restriction with a viewpoint-based one. *See R.A.V.*, 505 U.S. at 391–92. Moreover, it would embroil courts and law enforcement officials in thorny factual and legal disputes with no clearly administrable yardstick for enforcement. The speech at issue in this case was obviously motivated by racial hatred, but there will be many circumstances where the speech at issue is more ambiguous. For instance, if a protester trespasses on public property in order to display a sign that reads "Abolish whiteness," is this trespass racially motivated because it attacks white people, or is it instead criticizing white supremacy? If the defendant commits the trespass to display a sign that reads "From the river to the sea, Palestine will be free," is the trespass "motivated by" race, religion, or national origin, especially given the Governor's recent statement that college protests against the war in Gaza expressing similar messages are "pure

anti-Semitism"?[7] What if the sign instead reads, "No ceasefire with Hamas"? Is that motivated by animus against Muslims? And is a trespass "motivated by race" if the protester advocates *against* affirmative action? What if they advocate *for* affirmative action—a practice Chief Justice John Roberts has argued, in his view, constitutes "racial stereotyping"?[8] And, of course, many people disagree about whether the display of the Confederate flag demonstrates "heritage" or "hate." These perennial disputes often will not be amenable to judicial resolution. However, they will be unavoidable if RSA 354:B-1 is expanded to encompass any trespass motivated by the desire to express a message that at least some people deem bigoted. Any perceived discrepancy with respect to enforcement decisions will give rise to accusations that law enforcement officials and courts are themselves guilty of bias.

By contrast, cases involving discriminatory targeting are narrower, and therefore easier to resolve. While people disagree about the Confederate flag's meaning in general, it is fairly obvious that a defendant who pins it to the door of a Black church engaged in discriminatory victim-selection. Likewise, vandalizing a Jewish Community Center or a Palestinian restaurant with statements about the Israel–Palestine conflict will, in many cases, support an inference of discriminatory targeting. Law enforcement officials and courts throughout the country, including New Hampshire courts that apply RSA 651:6, I(f) in sentencing decisions, already make these determinations on a regular basis. Interpreting RSA 354:B-1 in line with these existing authorities will ensure that the Act serves its intended purpose without creating novel, unnecessary, and difficult constitutional problems.[9]

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[7] *See* Staff Report, *Sununu Calls College Protests Against the Israel-Hamas War 'Pure Anti-Semitism*,' InDepthNH (May 1, 2024), https://indepthnh.org/2024/05/01/sununu-calls-college-protests-against-the-israel-hamas-war-pure-anti-semitism/.

[8] *See Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 230 (2023).

[9] To be clear, this Court would not be, if it adopted *Amici*'s approach, concluding that fences on highway overpasses are public fora or that it was inappropriate for local police

CONCLUSION

For the foregoing reasons, this Court should hold RSA 354-B:1 does not apply to trespasses on public property motivated by the desire to express a message related to protected characteristics where there is no evidence of discriminatory targeting. Alternatively, this Court should hold that RSA 354-B:1 is unconstitutional applied to the facts alleged in the Complaints. In either case, the Court should affirm the trial court's dismissal of the Complaints.

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to instruct Defendants to remove the banners on July 30, 2022. While local law enforcement must obviously enforce trespass rules with respect to highway overpass banners in a content- and viewpoint-neutral manner, this case is not about whether the removal instruction was appropriate, but rather whether the Attorney General's Office can constitutionally penalize that speech months later through fines and injunctive relief under the Act. Because there are no allegations of discriminatory victim-selection, this enforcement action is impermissibly predicated on the viewpoint Defendants expressed.

Respectfully Submitted,

American Civil Liberties Union of New Hampshire, and
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By and through their attorneys,

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Dated: May 9, 2024

STATEMENT OF COMPLIANCE

I hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 7,313 words, which is fewer than the 9,500-word limit permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 9th day of May, 2024 through the electronic-filing system on all counsel of record.

/s/ Gilles Bissonnette
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