THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2022-0197

Daniel Richards
Plaintiff/Appellant

v.

ROBERT AZZI and UNION LEADER CORPORATION
Defendants/Appellees

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE, NEW ENGLAND FIRST AMENDMENT COALITION, AND GLBTQ LEGAL ADVOCATES & DEFENDERS IN SUPPORT OF DEFENDANTS/APPELLEES ROBERT AZZI AND UNION LEADER CORPORATION

Appeal Pursuant to Supreme Court Rule 7 from Grafton County Superior Court
Docket No. 215-2021-cv-00208

American Civil Liberties Union of New Hampshire,
New England First Amendment Coalition, and
GLBTQ Legal Advocates & Defenders

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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—a nationwide, nonpartisan, public-interest civil liberties organization with over 1.7 million members (including 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—including the protection of the right to engage in speech on matters of public concern. Accordingly, the ACLU-NH regularly participates before this Court through direct representation and as *amicus curiae* in cases involving free speech issues, including defending against defamation cases that hamper public debate on important issues of the day. *See e.g., 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 New England First Amendment Coalition ("NEFAC") is a non-profit corporation organized and existing under the laws of the Commonwealth of Massachusetts. It is dedicated to protecting the First Amendment and the public's right of access to governmental information in the six New England states. Its members include lawyers, journalists, historians, librarians, and academicians, as well as private citizens and organizations whose core beliefs include the principles of the First Amendment. In collaboration with other like-minded advocacy organizations, NEFAC also seeks to advance the understanding of the First Amendment and freedom of speech/press issues across the nation and around the world. Accordingly, NEFAC has participated before this Court as *amicus curiae*. *See Provenza v. Town of Canaan*, No. 2020-0563, 2022 N.H. LEXIS 46 (N.H. Sup. Ct. Apr. 22, 2022) (holding that a police investigatory report is not exempt under RSA 91-A:5, IV, as the officer's privacy interest is not weighty in that the report does not reveal intimate details of his life, but rather only information relating to his conduct as a government employee while performing his official duties; as *amicus curiae*); *Union Leader Corp. v. N.H. Ret. Sys.*, 162 N.H. 673 (2011) (ordering disclosure of a list of names of the 500 state retirement system members who received the highest annual pension payments during 2009 because the public had an interest both in knowing how public funds are spent and in uncovering corruption and error; as *amicus curiae*).

Through strategic litigation, public policy advocacy, and education, GLBTQ Legal Advocates & Defenders ("GLAD") works in New England and nationally to create a just society free of discrimination based on gender identity and expression, HIV status, and sexual orientation. GLAD has litigated widely 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.

For these reasons and the reasons below, this case is of concern to the ACLU-NH, NEFAC, and GLAD, as well as their members and supporters.

QUESTION PRESENTED

1. Did the Superior Court (Bornstein, J.) err when it held in its March 7, 2022 Order that Defendant/Appellee Robert Azzi's statements in a June 18, 2021 op-ed that

Plaintiff/Appellant Dan Richards (and others) (i) are "[d]esperate to stay bonded to America's original sins of slavery and genocide of indigenous peoples," and (ii) have "disseminated, across multiple media platforms, white supremacist ideology to keep Americans from learning an unexpunged American history from its 1619 origins along-side the dominant White 1776 narrative," as well as other statements, are nonactionable expressions of opinion that cannot be subject to defamation liability under the First Amendment and Part I, Article 22 of the New Hampshire Constitution?

STATEMENT OF THE CASE AND THE FACTS

Amici curiae incorporate by reference the Statement of the Case and Facts in the Responsive Briefs of Respondents/Appellees Robert Azzi and Union Leader Corporation.

SUMMARY OF ARGUMENT

This case is about an attempt by Plaintiff/Appellant Dan Richards to use New Hampshire's defamation law to punish criticism with which he disagrees on a matter of public concern. This Court should summarily affirm the Superior Court's dismissal of this case.

Mr. Richards claims that Defendant/Appellee Robert Azzi[1] defamed him when Mr. Azzi published a *Union Leader* op-ed on June 18, 2021 stating, in part, that Mr. Richards (and others) (i) are "[d]esperate to stay bonded to America's original sins of slavery and genocide of indigenous peoples," and (ii) have "disseminated, across multiple media platforms, white supremacist ideology to keep Americans from learning an unexpunged American history from its 1619 origins along-side the dominant White 1776 narrative." These two statements at the beginning of the op-ed are not actionable under the First Amendment and Part I, Article 22 of the New Hampshire Constitution because, as case after case has held, they are protected expressions of opinion. And even if this Court were to construe Mr. Azzi's remaining alleged defamatory statements at the end of the

[1] Defendant/Appellee Robert Azzi is on the Board of Directors of the ACLU-NH. Mr. Azzi's June 18, 2021 op-ed was written in his individual capacity. Neither Mr. Azzi nor the ACLU-NH's Board of Directors directed the ACLU-NH—or was involved in the decision—to file this brief. The litigation decisions of the ACLU-NH are—and the decision to file a brief in this case was—made by the ACLU-NH's legal staff, not its Board of Directors. Neither party in this case nor their counsel participated in the drafting of this brief, in whole or in part.

op-ed as being "of and concerning" Mr. Richards—e.g., "[t]hose who favor whitewashing history … favor suppressing the grievances of Americans unlike themselves," "favor suppressing the franchise of citizens who don't look like them," and "have shown they'll lie … to protect their privilege and power"—these statements too are protected expressions of opinion.

It is well established that an accusation of bigotry is a protected expression of opinion, rather than a defamatory statement of fact capable of being proven true or false. *See, e.g., Cooper v. Templeton (In re Sources, Inc.)*, No. 21-CV-4692 (RA), 2022 U.S. Dist. LEXIS 170820, at *19 (S.D.N.Y. Sep. 21, 2022) (rejecting defamation complaint at motion to dismiss stage, holding: "To the extent that the first and second sentences of the statement can be read together as calling Plaintiff a racist, or characterizing her conduct on May 25, 2020 as racist, the statement is inactionable as protected opinion. It is well-established that an accusation of bigotry is a protected statement of opinion, rather than a defamatory statement of fact capable of being proven true or false.") (citing cases). Indeed, this Court has been sensitive to allow breathing space for robust discussions on matters of public concern by dismissing defamation cases at the motion to dismiss stage that, if allowed to proceed, could stifle such important debate. *See Automated Transactions, LLC v. American Bankers Association*, 172 N.H. 528 (2019) (at motion to dismiss stage, concluding that use of the term "patent troll" is protected opinion); *Boyle v. Dwyer*, 172 N.H. 548, 557-558 (2019) (at motion to dismiss stage, holding that "[t]he defendant's conclusion [in a questionnaire sent to political candidates that was subsequently published on a website as part of a 'voter's guide'] that Boyle made a 'mistake' in purchasing the property is not objectively verifiable").

At the time of Mr. Azzi's June 18, 2021 statements, there was (and still is) intense debate around whether businesses and government agencies should be prohibited from engaging in diversity, equity, and inclusion ("DEI") training, and whether public schools should be prevented from addressing topics like systemic racism. As the ACLU-NH, GLAD, and others like Mr. Azzi have argued, such information would acknowledge the

lived experiences of communities of color in the Granite State[2] and, in the school context, create a better sense of belonging for New Hampshire's most marginalized individuals.[3] Mr. Richards and others disagree. On June 25, 2021, just one week after the *Union*

[2] The 2020 census indicated that New Hampshire is rapidly growing more racially diverse. The census indicated that—while New Hampshire's population grew by a modest 4.6% during the past decade—the number of residents who are people of color increased by 74.4% to 176,900 in 2020. Black, Hispanic, and other people of color now represent 12.8% (176,900) of the state's population compared to 7.5% (101,400) in 2010. *See* Kenneth Johnson, "Modest Population Gains, but Growing Diversity in New Hampshire with Children in the Vanguard," *Carsey School of Public Policy* (Aug. 30, 2021), https://carsey.unh.edu/publication/modest-populationgains-but-growing-diversity-in-new-hampshire-with-children-in-vanguard. This diversity is particularly prevalent in the southern part of New Hampshire. For example, the population of Manchester and Nashua was 98% White in 1980. *See* Campbell Gibson and Kay Jung, "Historical Census Statistics on Population Totals By Race, 1790 to 1990, and By Hispanic Origin, 1970 to 1990, For Large Cities And Other Urban Places In The United States," *U.S. Census Bureau* (Feb. 2005) (Table 30), *available at* https://www.census.gov/content/dam/Census/library/working-papers/2005/demo/POP-twps0076.pdf. Manchester now is 82.1% White, 10.7% Hispanic (approximate population 12,354), and 5.1% Black (approximate population 6,888). *See* 2021 Census Data for Manchester, https://www.census.gov/quickfacts/manchestercitynewhampshire. Nashua now is 81.7% White, 12.5% Hispanic (approximate population 11,390), and 3.4% Black (approximate population 3,098). *See* 2021 Census Data for Nashua, https://www.census.gov/quickfacts/nashuacitynewhampshire. As the Carsey School of Public Policy at the University of New Hampshire explained, "children are at the leading edge of the state's growing diversity." *See* Kenneth Johnson, "Modest Population Gains, but Growing Diversity in New Hampshire with Children in the Vanguard," *Carsey School of Public Policy* (Aug. 30, 2021), https://carsey.unh.edu/publication/modest-populationgains-but-growing-diversity-in-new-hampshire-with-children-in-vanguard. The *Union Leader* also recently reported that "more than 2 of every 5 children in Manchester and Nashua hail from families of color," and that, "[i]n 30 years, Manchester's youngest generation has shifted from 94% White in 1990 to 57% last year." *See* Michael Cousineau, "NH Grows More Diverse, Faces Call for Change," *Union Leader* (Dec. 19, 2021), https://www.unionleader.com/news/business/whats_working/nh-grows-more-diverse-faces-call-forchange/article_8c1cfc2d-73c1-51f3-9a5d-939525c3c21e.html. Students of color in Manchester are also more likely to live in poorer areas of the city. *See* Michael Cousineau, "Manchester Schools' Diversity Efforts Will Take Years," *Union Leader* (Dec. 19, 2021), https://www.unionleader.com/news/business/whats_working/manchester-schools-diversity-efforts-will-takeyears/article_e92b6c28-4b28-5df0-b407-7d5bc2031009.html.

[3] As the ACLU-NH and others have argued, New Hampshire is not immune from racial disparities that, when acknowledged, validate the lived experiences of students and communities of color in this state. For example, "the limited data suggests the [State Police's] Mobile Enforcement Team has disproportionately stopped Black and Latino drivers for certain minor infractions used as pretexts." *See* Paul Cuno-Booth, "How Pretextual Traffic Stops by N.H. Police Disproportionately Affect Black and Latino Drivers," *NHPR* (May 17, 2022), https://www.nhpr.org/nh-news/2022-05-17/pretextual-traffic-police-stops-racial-disparities-black-latino-drivers-nh. Moreover, the most recent available data from 2019 compiled by The Sentencing Project shows that, in New Hampshire, the rate of Black people incarcerated is 1,240 per 100,000 Black people. *See* The Sentencing Project, *New Hampshire Profile*, https://www.sentencingproject.org/the-facts/#map. This compares to only 261 out of 100,000 White people. The rate for Hispanic people is 349 out of 100,000. New Hampshire has Black/White imprisonment disparity ratio of 4.8 to 1 and a Hispanic/White ratio of 1.3 to 1. Though data is sparse, a 2016 *New Hampshire Public Radio* study has further exposed racial disparities in arrests and jailing. *See* Emily Corwin, "Data Shows Racial Disparities Increase at Each Step of N.H.'s Criminal Justice System," *NHPR* (Aug. 10, 2016), https://www.nhpr.org/post/data-shows-racial-disparities-increase-each-step-nhs-criminal-justice-system#stream/0. Data from this study shows that Black people have a 5 times greater chance of being jailed compared to White people—a statistic that is well above the United States average where Black people are 3.5 times more likely to be in jail than White people. According to this study, Black people in New Hampshire have a 2.8 times greater chance of being arrested compared to White people. In addition, in Hillsborough County—the most populous and diverse county in the state that contains Manchester and Nashua—Black people are nearly 6 times more likely to be in jail than White people according to this study.

Leader published Mr. Azzi's op-ed, the Governor signed into law, as part of the budget, New Hampshire's "banned concepts" law that was the subject of this intense debate for the prior six months.[4] Mr. Richards injected himself in this debate, including (i) testifying on House Bill 544 before the House Committee on Executive Departments and Administration on February 18, 2021,[5] (ii) engaging in public speaking in March 2021[6] and June 2021, including critiquing DEI work[7], (iii) publishing op-eds in March 2021,[8] and (iv) being interviewed in April 2021.[9] Despite arguing that a term like "'racist' … [is] actionable under defamation laws," *see* Richards Br. at p. 10, Mr. Richards, himself, has brandished the term "racist" to describe ideas he opposes, stating that one lecturer made "frequent and repeated racist and anti-American statements."[10] In other words, Mr. Richards now seeks to deem actionable the very type of language that he has used.

Of course, Mr. Richards has the constitutionally-protected right to espouse these views. But so do individuals who disagree with him. This Court should not permit Mr. Richards to expand defamation law to chill criticism that he may not like. Mr. Azzi's

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[4] In December 2021, the ACLU-NH, GLAD, and a group of educators, advocacy groups, and law firms filed a federal lawsuit challenging this "banned concepts" law. That lawsuit is still pending. The State of New Hampshire filed a motion to dismiss that was heard on September 14, 2022. *See* ACLU-NH, "ACLU, Largest Teachers' Union NEA-NH, Leading Disability and LGBTQ+ Advocacy Groups, and NH Law Firms File Federal Lawsuit Challenging Classroom Censorship Law, *ACLU-NH.org* (Dec. 22, 2021), https://www.aclu-nh.org/en/press-releases/hb2-lawsuit.

[5] *See* Dan Richards, Oral Testimony Before House Committee on Executive Departments and Administration (Feb. 18, 2021) (at 4:41:00), https://www.youtube.com/watch?v=0ClyrvZ-lv4&t=21911s; *see also* Dan Richards, Written Testimony Before House Committee on Executive Departments and Administration on House Bill 544 (Feb. 18, 2021) (excerpts highlighted) at Addendum ("ADD") 36.

[6] *See* D. Richards, Interview with Senator Kevin Avard (Mar 22, 2021), https://www.youtube.com/watch?v=QV2rNX7JiXU&t=2s; *see also* https://abouthollis.com/dan-richards-hanover/.

[7] *See* Your CRT Toolkit: How to Fight Racist Ideology in Our Schools (at 10:20), https://www.youtube.com/watch?v=3jUHTeLWgso.

[8] Dan Richards, "Column: HB 544 is Essential for New Hampshire and Will Protect Free Speech" *Valley News* (Mar. 25, 2021), https://www.vnews.com/Column-NH-needs-HB-544-39627430; Dan Richards, "Richards: Please Pass HB544 And Protect My Kids From Hate," *Patch.com* (Mar. 5, 2021), https://patch.com/new-hampshire/merrimack/richards-please-pass-hb544-protect-my-kids-hate; *see also* Dan Richards, "RICHARDS: Please Pass HB544 and Protect My Kids From Hate," *NH Journal* (Mar. 4, 2022), https://nhjournal.com/richards-please-pass-hb544-and-protect-my-kids-from-hate/.

[9] 1776 Action, "The Battle Rages on in New Hampshire," 1776action.org (Apr. 5, 2021), https://www.1776action.org/2021/04/05/the-battle-rages-on-in-new-hampshire/.

[10] *See* Dan Richards, Written Testimony Before House Committee on Executive Departments and Administration on House Bill 544 (Feb. 18, 2021) (excerpts highlighted) at ADD36; Dan Richards, Oral Testimony Before House Committee on Executive Departments and Administration on House Bill 544 (Feb. 18, 2021) (at 4:42:50) (stating that a person's lecture "include[d] frequent and repeated racist and anti-American statements"), https://www.youtube.com/watch?v=0ClyrvZ-lv4&t=21911s.

views, like Mr. Richards' own, are part of the marketplace of ideas. Mr. Richards' lawsuit, were it to survive and proceed to discovery, would not only chill robust debate on matters of public concern, but also would potentially cause media outlets, out of a fear of vexatious litigation, to self-censor the vital fora that they create for members of the public to debate important issues of the day. The *Union Leader* opinion section is among the most prominent and important marketplaces of ideas in New Hampshire. It gives a platform to ordinary people and presidential candidates. Mr. Richards can submit op-eds of his own for potential inclusion in this forum, just as he has done with the *Valley News*.[11] But he cannot use defamation law to punish the *Union Leader* for publishing opinions with which he disagrees.

For these reasons and the reasons below, this Court should summarily affirm the Superior Court's dismissal of this lawsuit.

ARGUMENT

Dan Richards claims that Robert Azzi defamed him when Mr. Azzi published a *Union Leader* op-ed on June 18, 2021 stating that Mr. Richards (and others) (i) are "[d]esperate to stay bonded to America's original sins of slavery and genocide of indigenous peoples," and (ii) have "disseminated, across multiple media platforms, white supremacist ideology to keep Americans from learning an unexpunged American history from its 1619 origins along-side the dominant White 1776 narrative." These two statements at the beginning of the op-ed are not actionable under the First Amendment and Part I, Article 22 of the New Hampshire Constitution because, as case after case has held, they are protected expressions of opinion. Had Mr. Azzi actually referred to Mr. Richards as a "white supremacist"—which Mr. Azzi did not do—even such a statement would fail to give rise to a defamation claim because it would constitute a protected expression

[11] Dan Richards, "Column: HB 544 is Essential for New Hampshire and Will Protect Free Speech" *Valley News* (Mar. 25, 2021), https://www.vnews.com/Column-NH-needs-HB-544-39627430.

of opinion. And even if this Court were to construe Mr. Azzi's remaining alleged defamatory statements at the end of the op-ed as being "of and concerning" Mr. Richards[12]—e.g., "[t]hose who favor whitewashing history … favor suppressing the grievances of Americans unlike themselves," "favor suppressing the franchise of citizens who don't look like them," and "have shown they'll lie … to protect their privilege and power"—these statements too are protected expressions of opinion.

I. The First Amendment and Part I, Article 22 of the New Hampshire Constitution Protect the Right of a Speaker to Condemn Views That They Find Repugnant.

The First Amendment exists to enable and protect "uninhibited, robust, and wide-open" debate on public issues, *Rosenblatt v. Baer*, 383 U.S. 75, 85 (1966) (quoting *N.Y. Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964)), and to "bring[] about . . . political and social changes desired by the people." *Roth v. United States*, 354 U.S. 476, 484 (1957). As one Court has recognized, heated discussions of opinion have "traditionally added much to the discourse of our Nation." *Horsley v. Rivera*, 292 F.3d 695, 701 (11th Cir. 2002) (citing *Milkovich v. Lorain Journal Co.*, 497 U.S. 1, 20 (1990)).

To fulfill this purpose, our national commitment to public discourse—and our First Amendment rights—"must embrace all issues about which information is needed or appropriate to enable the members of society to cope with the exigencies of their period." *Curtis Publ'g Co. v. Butts*, 388 U.S. 130, 147 (1967) (quoting *Thornhill v. Alabama*, 310 U.S. 88, 102 (1940)). In this context, speech condemning views perceived to be racist is "not only an aspect of individual liberty—and thus a good unto itself—but also is essential to the common quest for truth and the vitality of society as a whole." *See Hustler Mag., Inc. v. Falwell*, 485 U.S. 46, 51 (1988) (citation omitted). Such "[p]olitical

[12] *See Blatty v. New York Times Co.*, 728 P.2d 1177, 1182-83 (Cal. 1986) ("The 'of and concerning' or specific reference requirement limits the right of action for injurious falsehood, granting it to those who are the direct object of criticism and denying it to those who merely complain of nonspecific statements that they believe cause them some hurt. To allow a plaintiff who is not identified, either expressly or by clear implication, to institute such an action poses an unjustifiable threat to society.") (citations omitted); *Steele v. Ritz*, No. W2008-02125-COA-R3-CV, 2009 Tenn. App. LEXIS 843, at *11 (Tenn. Ct. App. Dec. 16, 2009) ("Although it contains an alleged defamatory statement, the statement does not expressly mention the plaintiffs. There is no allegation that the statement refers to the plaintiffs by reasonable implication, that Commissioner Ritz made the statement with knowledge of its falsity or defamatory nature as to the plaintiffs, or that the statement was made 'of and concerning' the plaintiffs.").

speech" is "at the core of what the First Amendment is designed to protect." *Morse v. Frederick*, 551 U.S. 393, 403 (2007) (citation omitted).

These principles apply with equal force under Part I, Article 22 of the New Hampshire Constitution. This Court has adhered to the statement of law that, "[h]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Pease v. Tel. Publ'g Co*., 121 N.H. 62, 65 (1981) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339 (1974)). Thus, public discussion about racism, white supremacy, and related abhorrent ideologies "is a social necessity required for the 'maintenance of our political system and an open society.'" *See Curtis Pub. Co*., 388 U.S. at 149 (quoting *Time, Inc. v. Hill*, 385 U.S. 374, 389 (1967)).

"Whatever is added to the field of libel is taken from the field of free debate," and thus Mr. Richards' claims must "be measured by standards that satisfy the First Amendment." *N.Y. Times*, 376 U.S. at 269, 272. As explained in more detail below, Mr. Richards' Amended Complaint, measured against these standards, fails to state a claim because Mr. Azzi's statements constitute protected expressions of opinion.[13]

II. Appellee/Defendant Robert Azzi's Statements Are Protected Expressions of Opinion That Are Critical to and Fuel Public Discourse.

Courts "have . . . been particularly vigilant to ensure that individual expressions of ideas remain free from governmentally imposed sanctions," including through civil lawsuits. *Hustler*, 485 U.S. at 51. "Under the First Amendment there is no such thing as a false idea." *Pease*, 121 N.H. at 65 (quoting *Gertz*, 418 U.S. at 339). While statements of fact capable of defamatory meaning may be actionable, statements of opinion are not. *Id.* For a statement to be facially actionable in a defamation suit, it must be "sufficiently factual to be susceptible of being proved true or false." *Milkovich*, 497 U.S. at 21.

[13] Although this brief focuses on Mr. Richards' defamation claim, the Amended Complaint fails to adequately state an invasion of privacy/false light claim for precisely the same reasons. *See N.Y. Times*, 376 U.S. at 269 (noting that insurrection, contempt, advocacy of unlawful acts, breach of the peace, obscenity, solicitation of legal business "and the various other formulae for the repression of expression" must all "be measured by standards that satisfy the First Amendment"); *see also City of Keene v. Cleaveland*, 167 N.H. 731, 741 (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"); *Hustler*, 485 U.S. at 53 (noting that the First Amendment standards governing defamation claims apply equally to intentional infliction of emotional distress claims).

As this Court has explained, "[a]n important criterion for distinguishing statements of opinion from statements of fact is verifiability, i.e., whether the statement is capable of being proven true or false." *See Automated Transactions, LLC*, 172 N.H. at 533; *see also Boyle*, 172 N.H. at 557 ("Where an expressive phrase, though pejorative and unflattering, cannot be objectively verified, it belongs squarely in the category of … opinion.") (quoting *Piccone v. Bartels*, 785 F.3d 766, 772 (1st Cir. 2015)). This Court has also made clear that "statements of 'imaginative expression' or 'rhetorical hyperbole' are generally nonactionable because they 'cannot reasonably be interpreted as stating actual facts about an individual.'" *Automated Transactions, LLC*, 172 N.H. at 533 (quoting *Milkovich*, 497 U.S. at 20); *see also Boyle*, 172 N.H. at 557. In other words, the First Amendment and Part I, Article 22 protect "rhetorical hyperbole," "vigorous epithet," and "a lusty and imaginative expression of contempt" as a matter of law. *See Greenbelt Cooperative Publishing Assn., Inc. v. Bresler*, 398 U.S. 6, 13 (1970) (characterizing a developer's aggressive negotiating style as employing "blackmail" is not libelous); *Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers, AFL-CIO v. Austin*, 418 U.S. 264, 284-86 (1974) (calling someone a "traitor" in a loose, figurative way could not be construed as a representation of fact); *Cafeteria Employees Local 302 v. Angelos*, 320 U.S. 293, 295 (1943) (hurling insults like "unfair" or "fascist" are protected). As the United States Supreme Court has recognized, "intemperate, abusive, or insulting language" can "be an effective means to make [a] point." *Old Dominion*, 418 U.S. at 282.

Applying these principles, Mr. Azzi's statements are not actionable for the five reasons below.

<u>First</u>, the statements Mr. Azzi used to describe Mr. Richards are protected expressions of opinion. Courts around the country have held that statements condemning the views of others as hateful or otherwise bigoted are not actionable. The United States Supreme Court has recognized that using "undefined slogans that are part of the conventional give-and-take in our economic and political controversies—like 'unfair' or 'fascist'—is not to falsity facts"; rather, it is a way to "demonstrate . . . strong disagreement

with the views" being described, and it is protected. *Id.* at 284.[14] As this Court has explained, "[f]or better or worse, our society has long since passed the stage at which the use of the word 'bastard' would occasion an investigation into the target's lineage or the cry 'you pig' would prompt a probe for a porcine pedigree." *Automated Transactions, LLC*, 172 N.H. at 534 (quoting *Levinsky's v. Wal-Mart Stores, Inc.*, 127 F.3d 122, 128 (1st Cir. 1997)).

Many federal circuit courts have agreed. For example, the Eleventh Circuit held that referring to a coach's treatment of one of his players as "homophobic taunting"—much like Mr. Azzi's condemnation of Mr. Richards as being "[d]esperate to stay bonded to America's original sins of slavery and genocide of indigenous peoples" and having "disseminated … white supremacist ideology"—constitutes "an opinion" and, thus, is "not actionable in a defamation suit." *Turner v. Wells*, 879 F.3d 1254, 1264 (11th Cir. 2018) (rejecting defamation complaint at motion to dismiss stage). Similarly, the Second Circuit has held that "the use of 'fascist' . . . and 'radical right' as political labels . . . cannot be regarded as having been proved to be statements of fact[.]" *Buckley v. Littell*, 539 F.2d 882, 893 (2d Cir. 1976). In so holding, the Court recognized that, when individuals are involved in "an exchange, however heated, about systems of government, . . . democracy and totalitarianism . . . the widest latitude for debate in the interests of the First Amendment must be furnished." *Buckley*, 539 F.2d at 889. "In the realm of . . . political belief, sharp differences arise" and "the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader . . . at times, resorts to . . . vilification[.]" *Id.* Similarly, the Seventh Circuit—in a decision correctly relied upon by the Superior Court (Bornstein, J.) in this case, *see* Superior Court Order, at p. 7—refused to recognize a defamation claim where the defendants described a public school principal as "very insensitive to the needs of our community, which happens to be totally black," called her statements "very racist," and described her as "a racist." *Stevens*

[14] While the Supreme Court in *Old Dominion* held that "[e]xpression of such an opinion, even in the most pejorative terms, is protected under federal labor law," *id.*, it recognized that a court's duty to insure that a claim does not improperly intrude "on the field of free expression" is the same under the First Amendment, *id.* (quoting *N.Y. Times*, 376 U.S. at 285).

v. Tillman, 855 F.2d 394, 400 (7th Cir. 1988). And the Third Circuit has held that statements asserting that a plaintiff "misrepresents her teachings and foments religious hatred and bigotry" cannot give rise to a claim of libel, in part, because "[i]t is hard to imagine an animated [political] discussion" without such statements. *Rutherford v. Dougherty*, 91 F.2d 707, 708 (3d Cir. 1937) (disposing of defamation case at dismissal stage).

These principles apply with equal force here to any suggestion that Mr. Azzi called Mr. Richards a "white supremacist"—which he did not—or that Mr. Richards disseminated "white supremacist ideology." "[T]o call a person a bigot or other appropriate name descriptive of his political, racial, religious, economic or sociological philosophies gives no rise to an action for libel." *Raible v. Newsweek*, 341 F. Supp. 804, 807 (W.D. Pa. 1972) (holding that statements describing an individual as "angry, uncultured, crude, violence prone, hostile to both rich and poor, and racially prejudiced" are not actionable). "Standing alone, . . . [an accusation of bigotry] is an opinion." *Puccia v. Edwards*, No. 98-00065, 1999 Mass. Super. LEXIS 253, at *9, 1999 WL 513895 (Mass. Super. Ct. Apr. 28, 1999).

These cases embody the principle that "[o]ur nation [has a] long history of robust public expression, including the use of abusive rhetoric." *Ward v. Zelikovsky*, 643 A.2d 972, 981 (N.J. 1994). "Americans have been hurling epithets at each other for generations. From charging 'Copperhead' during the Civil War, we have [now] come down to 'Racist,' 'Pig,' 'Fascist,' . . . and such. Certainly such name calling, either expressed or implied, does not always give rise to an action for libel." *Id.* (quoting *Raible*, 341 F. Supp. at 807). "From the pamphleteers urging revolution to abolitionists condemning the evils of slavery, American authors have sought . . . both to stimulate debate and to persuade." *Ollman v. Evans*, 750 F.2d 970, 986 (D.C. Cir. 1984). "[T]o restrict too severely the right to express such opinions, no matter how annoying or disagreeable, would be [a] dangerous curtailment of a First Amendment right. Individuals should be able to express their views about the prejudices of others without the chilling effect of a possible lawsuit in defamation resulting from their words." *Ward*, 643 A.2d at 981 (quoting *Rybas v. Wapner*, 457 A.2d 108, 110 (Pa. 1983) (holding that "anti-Semitic" is not actionable));

see also Vail v. The Plain Dealer Publ'g Co., 649 N.E.2d 182, 186 (Ohio 1995) (holding at motion to dismiss stage that "[e]ngaging in 'an anti-homosexual diatribe' and fostering 'homophobia'" are nonactionable as "one person's attempt to persuade public opinion"), *cert. denied*, 516 U.S. 1043 (1996).

Second, Mr. Azzi's statements must be analyzed within the context of the entire public debate taking place in New Hampshire on classroom censorship and DEI initiatives in schools, businesses, and government agencies—and whether the government should ban these concepts in various ways. This is a public discussion that, itself, implicates the concepts of racism and white supremacy and their relevancy in modern society. This discussion is of obvious public concern. As the Superior Court correctly noted, Mr. Azzi's "statements were made in the context of HB 544 and a larger debate on Critical Race Theory and, upon considering these circumstances, 'no reasonable reader would consider the [statements] anything but the opinion of' Azzi." *See* Superior Court Order, at p. 11 (quoting *Automated Transactions, LLC*, 172 N.H. at 534). Indeed, on June 18, 2021, Mr. Azzi's statements were part of an intense discussion as to whether the Governor should sign the budgetary provisions in House Bill 2 that contained language—including some language from a previous iteration in House Bill 544—banning certain topics from instruction in classrooms and government agencies.[15] (House Bill 2 was signed into law on June 25, 2021.) In this broader debate, Mr. Richards, himself, has leveled the charge that at least one lecturer disseminated "racist" information.[16] As one court has noted in a similar circumstance addressing the phrase "white supremacist" at the motion to dismiss stage, "[g]iven the often heated and controversial nature of political arguments generally, and the extremely heated and hyperbolic nature of the debate … no reasonable jury could conclude that the defendant's comments constituted anything other than an expression of … her opinion of the plaintiff based on her own observations and interactions

[15] Mr. Azzi references this legislation directly in his op-ed and this legislation's inclusion in the budget.
[16] *See* Dan Richards, Written Testimony Before House Committee on Executive Departments and Administration on House Bill 544 (Feb. 18, 2021) (excerpts highlighted) at ADD36; Dan Richards, Oral Testimony Before House Committee on Executive Departments and Administration on House Bill 544 (Feb. 18, 2021) (at 4:42:50) (stating that a person's lecture "include[d] frequent and repeated racist and anti-American statements"), https://www.youtube.com/watch?v=0ClyrvZ-lv4&t=21911s.

with him." *See Murphy v. Rosen*, No. UWY-CV-20-6056754-S, 2022 Conn. Super. LEXIS 585, at *24 (Conn. Super. Ct. May 16, 2022) (further noting that "the defendant's allegedly defamatory comments occurred in the context of an online political debate regarding a public statement issued by three town officials following the tragic and highly publicized death of George Floyd"). The same is true here in the context of this fierce debate.

The three cases cited by Mr. Richards are easily distinguishable and have little bearing here. *See* Richards Br. at p. 10. Unlike this case, these three cases address either speech of private concern and/or speech governing public workplaces. In *Armstrong v. Shirvell*, 596 F. Appx. 433 (6th Cir. 2015), the Sixth Circuit addressed only speech that "touched on matters of private concern" such that "heightened First Amendment protections [were] not warranted." *Id.* at 452-53. *Crews v. Monarch Fire Prot. Dist.*, 771 F.3d 1085 (8th Cir. 2014), is also off point. Unlike the case at bar, *Crews* is a public employment/workplace conduct case where the plaintiffs former fire chiefs brought a Fourteenth Amendment due process claim following their termination. There, the Court concluded that there was no stigma sufficient to deprive the chiefs of a liberty interest because "[w]e find no instance in which [the speakers] accused the chiefs of direct discrimination or harassment, nor is there any clear statement that any of the chiefs condoned the harassment for which they were fired." *Id.* at 1093. Similarly, *Taylor v. Carmouche*, 214 F.3d 788 (7th Cir. 2000), involved a public employee's claim of First Amendment retaliation for calling *her supervisor* a "racist." The Court dismissed this retaliation claim because the question of whether a supervisor is a "racist" is not an issue of public concern. *Id.* at 793-94. Unlike the facts of this case, *Taylor* underscored that the challenged statements "were internal personnel matters, dealing with the situations of the plaintiffs rather than matters of general public concern," and that "[n]one of the [challenged statements] affected political discourse." *Id.* at 792. In other words, the Court's focus was on the public employment relationship and speech of private concern—neither of which is at issue in this case. *Id.* ("whether *a given supervisor* is a racist, or practices racial discrimination

in the workplace, is a mundane issue of fact, litigated every day in federal court") (emphasis added). In sum, none of the authorities that Mr. Richards cites—*Armstrong*, *Crews*, and *Taylor*—help him escape the conclusion that the "white supremacist" or "racist" label is a non-actionable expression of opinion.

Third, given the context of an 18-paragraph op-ed in a newspaper, no reasonable reader could consider Mr. Azzi's statements as anything but opinion. The version attached to Mr. Richards' Amended Complaint, itself, is listed as an "op-ed." As the Superior Court correctly held in this case, "[i]t is significant that Azzi's column is published in the 'Op-Ed' section of the Union Leader, clearly signaling to readers that this is Azzi's opinion of the plaintiff and others identified in the op-ed; his opinion of those who oppose Critical Race Theory; and his opinion of those who support HB 544." *See* Superior Court Order, at p. 9; *see also Ollman*, 750 F.2d at 1010 ("It is significant, in the first place, that the column appeared on the Op-Ed pages of newspapers. These are pages reserved for the expression of opinion, much of it highly controversial opinion. That does not convert every assertion of fact on the Op-Ed pages into an expression of opinion merely by its placement there. It does alert the reader that he is in the context of controversy and politics, and that what he reads does not even purport to be as balanced, objective, and fair-minded as he has a right to hope to be the case with what is contained in the news columns of the paper."); *Aldoupolis v. Globe Newspaper Co.*, 500 N.E. 2d 794, 797 (Mass. 1986) ("Although the appearance of the column on the op-ed page, without more, is not at all dispositive, it is nevertheless some indication that the statements made in the column are opinions.").

Fourth, Mr. Azzi's statements that Mr. Richards is "[d]esperate to stay bonded to America's original sins of slavery and genocide of indigenous peoples" and has "disseminated … white supremacist ideology"—and may, for example, "favor suppressing the grievances of Americans unlike themselves"—means different things to different people, and therefore squarely fall within the scope of protected opinion. For example, in addition to reflecting our nation's commitment to full-throated debate, the Second Circuit's holding in *Buckley* that calling someone a "fascist" is protected opinion was based, in

part, on "the tremendous imprecision of the meaning and usage of the[] term[] in the realm of political debate[.]" 539 F.2d at 893. Similarly, in *Stevens*, the Seventh Circuit explained that, "[w]hen a word acquires a strong meaning it becomes useful in rhetoric," and "there is a tendency to invoke the word for its impact rather than to convey a precise meaning." 855 F.2d at 402. Applying that logic to the word "racist," that Court found that it has evolved over time to mean everything from "a believer in the superiority of one's own race, often a supporter of slavery or segregation, or a fomenter of hatred among the races," to "[h]e is neither for me nor of our race," "she is condescending to me, which must be because of my race," and "she thinks all black mothers are on welfare, which is stereotypical." *Id.* Given this variety of meanings, the Court determined that the word could not sustain a defamation claim. *Id.*

A defamation plaintiff's disagreement with a speaker's characterization of the plaintiff does not alter the existence of protection under the First Amendment and Part I, Article 22; if anything, it can confirm that the challenged statements constitute opinions. In *Turner*, the Eleventh Circuit refused to recognize actionable defamation at the motion to dismiss stage based on the coach's argument that he was joking and that "another reader might come to a different conclusion upon review of the facts." 879 F.3d at 1264. That Court concluded that the possibility of different views "does not make the Defendants' assessment of [his] acts anything other than opinion." *Id.* Another court similarly rejected at the motion to dismiss stage a plaintiff's defamation claim based on being called "anti-gay" even though, she argued, she could "sign a petition placing the gay-marriage question on the ballot and remain 'pro-gay.'" *McCaskill v. Gallaudet Univ.*, 36 F. Supp. 3d 145, 159 (D.D.C. 2014). The Court concluded that, "[b]ecause different constituencies can hold different—and completely plausible—views of Plaintiff's actions, statements characterizing those actions constitute protected opinion." *Id.*; *see also Florio v. Gallaudet Univ.*, No. 21-cv-01565 (CRC), 2022 U.S. Dist. LEXIS 126048, at *20 (D.D.C. July 15, 2022) (holding at the motion dismiss stage that, "[i]f statements that someone is a racist are susceptible to multiple meanings and different interpretations such that they are non-actionable opinion, then the phrase 'face of systemic racism,' as used by

President Cordano and quoted by the Post, fits even more squarely into that category"). The same is true here with respect to whether Mr. Richards has actually "disseminated … white supremacist ideology" in his oral and written remarks. The fact that different constituencies hold differing perceptions of this terminology is further reflected by the fact that Mr. Richards, himself, has leveled the charge that at least one lecturer disseminated "racist" information.[17]

Finally, if there was any further doubt, court after court has reached similar conclusions in the context of allegations that being called a "racist," "white supremacist," or similar label is defamatory. The weight of authority rejecting claims like those brought by Mr. Richards is overwhelming, including at the motion to dismiss stage of litigation. *See, e.g., Cooper v. Templeton (In re Sources, Inc.)*, No. 21-CV-4692 (RA), 2022 U.S. Dist. LEXIS 170820, at *19 (S.D.N.Y. Sep. 21, 2022) (rejecting defamation complaint at motion to dismiss stage, holding: "To the extent that the first and second sentences of the statement can be read together as calling Plaintiff a racist, or characterizing her conduct on May 25, 2020 as racist, the statement is inactionable as protected opinion. It is well-established that an accusation of bigotry is a protected statement of opinion, rather than a defamatory statement of fact capable of being proven true or false.") (citing cases); *Skidmore v. Gilbert*, No. 20-cv-06415, 2022 U.S. Dist. LEXIS 27239, at *30, 2022 WL 464177 (N.D. Cal. Feb. 15, 2022) (at motion to dismiss stage, collecting cases from "multiple courts" holding "that a term like 'racist' . . . is not actionable under defamation-type claims"), *appeal docketed*, No. 22-15394 (9th Cir. Mar. 16, 2022); *Schifanelli v. Queen Anne's Cty. Bd. of Comm'rs*, Civil Action No. GLR-20-2906, 2021 U.S. Dist. LEXIS 156202, at *21 (D. Md. Aug. 18, 2021) (noting at motion to dismiss stage that "one's personal belief that another is a 'racist' or 'liar' who is guilty of 'inciting violence'

[17] *See* Dan Richards, Written Testimony Before House Committee on Executive Departments and Administration on House Bill 544 (Feb. 18, 2021) (excerpts highlighted) at ADD36; Dan Richards, Oral Testimony Before House Committee on Executive Departments and Administration on House Bill 544 (Feb. 18, 2021) (at 4:42:50) (stating that a person's lecture "include[d] frequent and repeated racist and anti-American statements"), https://www.youtube.com/watch?v=0ClyrvZ-lv4&t=21911s.

or engaging in a 'smear campaign' is fairly construed as statement of opinion that is incapable of being proven true of false"); *Rapaport v. Barstool Sports, Inc.*, No. 18 Civ. 8783, 2021 U.S. Dist. LEXIS 59797, at *33 (S.D.N.Y. Mar. 29, 2021) (statements that a person is a "racist," "fraud," "hack," "wannabe," and a "liar" are not actionable; noting that "the observation that someone is 'racist,' i.e., someone who believes that racial differences produce an inherent superiority of a particular race, will almost always depend on the eye of the beholder"); *Doe #1 v. Syracuse Univ*., 468 F. Supp. 3d 489, 512 (N.D.N.Y. 2020) (at motion to dismiss stage, noting that "[a] reasonable reader could not conclude that Chancellor Syverud's statements that the videos were racist, anti-Semitic, homophobic, sexist, and ableist conveyed facts about Plaintiffs, rather than his opinion about what the videos depicted"); *Brimelow v. N.Y. Times Co.*, No. 20 Civ. 222 (KPF), 2020 U.S. Dist. LEXIS 237463, at *20, 2020 WL 7405261 (S.D.N.Y. Dec. 16, 2020) (holding at motion to dismiss stage that the "characterization of some individuals . . . as 'white nationalists' is . . . non-actionable opinion commentary"), *aff'd*, 2021 U.S. App. LEXIS 31672 (2d Cir. Oct. 21, 2021), *cert. denied*, 142 S. Ct. 1210 (2022); *Cummings v. City of New York*, No. 19 Civ. 7723 (CM)(OTW), 2020 U.S. Dist. LEXIS 31572, at *56, 2020 WL 882335 (S.D.N.Y. Feb. 24, 2020) (noting in the context of a motion for judgment on the pleadings that "[c]ourts in New York have consistently held that terms like 'racist' constitute nonactionable opinion") (listing cases); *Jorjani v. New Jersey Institute of Technology*, Docket No. 18-CV-11693, 2019 U.S. Dist. LEXIS 39026, at *19-20 (D.N.J. Mar. 12, 2019) (holding at motion to dismiss stage that statement that the plaintiff was "full of racism, hatred . . . bigotry, and implied that the plaintiff was a white supremacist" is not defamatory; stating that "calling someone a racist, hater, or bigot—without more—will not result in defamation liability; further noting that "calling [someone] a white supremacist is synonymous with calling [someone] racist, and thus will not result in defamation liability"); *Squitieri v. Piedmont Airlines, Inc.*, No. 3:17CV441, 2018 U.S. Dist. LEXIS 25485, at *12-13, 2018 WL 934829 (W.D.N.C. Feb. 16, 2018) ("racist" is nonactionable opinion at motion to dismiss stage); *McCaskill*, 36 F. Supp. 3d at 158-60 (at motion to dismiss stage, noting that "no decision has found statements claiming that a person is anti-gay or

homophobic to be actionable defamation") (collecting cases); *Hanson v. Cty. of Kitsap, Wash.*, No. 13-5388 RJB, 2014 U.S. Dist. LEXIS 89036, at *15-16, 2014 WL 2931817 (W.D. Wash. June 30, 2014) ("jerk" and "sexist" not defamatory); *Tillett v. BJ's Wholesale Club, Inc.*, No. 3:09-CV-1095-J-34MCR, 2010 U.S. Dist. LEXIS 79443, at *16-17, 2010 WL 11507322 (M.D. Fla. July 30, 2010) (at motion to dismiss stage, same for arguing that a plaintiff is associated with "abusive, hostile and intimidating" symbols or ideologies and thereby "'insinuat[ing]' that he is racist"); *Jackson v. United Steel, Paper & Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int'l Union, AFL-CIO-CLC*, No. 2:07-CV-461-JEO, 2009 WL 10704261, at *39 (N.D. Ala. Feb. 23, 2009) ("racist" and "radical" not defamatory); *Martin v. Brock*, No. 07C3154, 2007 U.S. Dist. LEXIS 57207, at *10-11, 2007 WL 2122184 (N.D. Ill. July 19, 2007) (same for "racist"); *Schumacher v. Argosy Educ. Grp., Inc.*, No. 05–531, 2006 U.S. Dist. LEXIS 88608, at *44-46, 2006 WL 3511795 (D. Minn. Dec. 6, 2006) (same for "homophobic"); *Smith v. Sch. Dist. of Phila.*, 112 F. Supp. 2d 417, 429 (E.D. Pa. 2000) (at motion for judgment on the pleadings stage, statements that plaintiff was "racist and anti-Semitic" were "non-fact based rhetoric"); *Standing Comm. on Discipline v. Yagman*, 55 F.3d 1430, 1438 (9th Cir. 1995) (epithets against judge, including accusing him of "anti-[S]emitism" and being "ignorant," "ill-tempered," and a "buffoon" were protected opinions); *Cibenko v. Worth Publishers, Inc.*, 510 F. Supp. 761, 765-66 (D.N.J 1981) (at motion to dismiss stage, holding that accusation of racism was nonactionable opinion under federal constitutional law).[18]

[18] State courts have reached similar results. *See, e.g., Murphy*, 2022 Conn. Super. LEXIS 585, at *27 (concluding at the motion to dismiss stage "that the defendant's words [labeling someone a white supremacist] constitute her opinion of the plaintiff, rather than a statement of objective and verifiable fact"); *Eros Intl., PLC v. Mangrove Partners*, 191 A.D.3d 465, 465-66 (N.Y. Sup. Ct., App. Div., 1st Dept. 2021) (at motion to dismiss stage, finding that a tweet describing a subject as "a fraud" was a non-actionable opinion); *Reilly v. WNEP*, 251 A.3d 1241 (Pa. Super. Ct. 2021) (unpublished) (at motion to dismiss stage, holding that a statement that a person "was for 'white-supremacists' is an expression of Mr. DeFrain's socio-political opinion, to which the law attributes no defamatory meaning"); *Garrard v. Charleston Cnty. Sch. Dist*., 838 S.E.2d 698, 714 (S.C. Ct. App. 2019) (calling someone a "racist douchebag" was not actionable under defamation law because it was "susceptible to varying viewpoints and interpretations," as "[o]ne person may view certain behavior as disrespectful and offensive, but another person might view the same behavior as noncontroversial and socially acceptable"); *Jones v. Philadelphia*, 893 A.2d 837, 845 (Pa. Cmwlth. Ct. 2006) (at pleadings stage, holding that an accusation of anti-Semitism in email following city council meeting was nonactionable), *appeal denied*, 909 A.2d 306 (Pa. 2006); *Condit v. Clermont Cty. Review*, 675 N.E.2d

CONCLUSION

Mr. Azzi's alleged defamatory statements constitute expressions of opinion protected under the First Amendment and Part I, Article 22 of the New Hampshire Constitution. A ruling in favor of Mr. Azzi would be consistent not only with the overwhelming weight of authority from other courts, but also with this Court's precedents. This Court has been sensitive to allow breathing space for robust discussions on matters of public concern by dismissing defamation cases at the motion to dismiss stage that, if allowed to proceed, could stifle such important debate. *See Automated Transactions, LLC*, 172 N.H. at 538 (at motion to dismiss stage, concluding that use of the term "patent troll" is protected opinion because the term "cannot be proven true or false" and "means different things to different people"); *see also id.* at 540 (further holding that "[w]e have consistently held that whether an opinion statement 'can be read as … implying an actionable statement of fact is a question of law,' not of fact") (quoting *Thomas v. Tel. Publ'g Co.*, 155 N.H. 314, 339 (2007)); *Boyle,* 172 N.H. at 557-558 (at motion to dismiss stage, holding that "[t]he defendant's conclusion [in a questionnaire sent to political candidates that was subsequently published on a website as part of a 'voter's guide'] that Boyle made a 'mistake' in purchasing the property is not objectively verifiable").[19] This Court should do the same here.

For these reasons, this Court should summarily affirm the Superior Court's March 7, 2022 dismissal of this lawsuit.

475, 478 (Ohio Ct. App. 1996) ("fascist" and "anti-Semite" not defamatory); *Ward*, 643 A.2d at 980 ("Most courts that have considered whether allegations of racism, ethnic hatred or bigotry are defamatory have concluded for a variety of reasons that they are not."); *Lester v. Powers*, 596 A.2d 65, 71 (Me. 1991) (same for "homophobic"); *Schwartz v. Nordstrom, Inc.*, 160 A.D.2d 240, 241 (N.Y. Sup. Ct. App. Div., 1st Dept. 1990) (remark that plaintiff was a "Nazi" deemed unactionable), *appeal dismissed*, 559 N.E.2d 1288 (N.Y. Ct. App. 1990), *appeal denied*, 564 N.E.2d 672 (N.Y. Ct. App. 1990).

[19] *See also Pease v. Tel. Publ'g Co.*, 121 N.H. 62, 65 (1981) (after a jury verdict in favor of the plaintiff, holding that the allegedly libelous statements contained in letter to editor of newspaper could not reasonably be understood as assertions of fact where writer prefaced two of statements with language such as "I do feel," and the only allegation not so prefaced concerned plaintiff's status as holder of the title "journalistic scum of the earth," which must have been perceived as no more than rhetorical hyperbole); *Morrissette v. Cowette*, 122 N.H. 731, 734-35 (1982) (at summary judgment stage, holding that "[t]he defendants' reference to a 'seemingly endless supply of money' … indicates that the statement is not based upon fact"; adding that, "[b]ecause the actual words in the defendants' letter as well as the inferences and innuendoes flowing from those words, constituted statements of opinion directed at a public figure in a political context, we hold that they were protected by the first amendment").

Respectfully Submitted,

American Civil Liberties Union of New Hampshire,
New England First Amendment Coalition, and
GLBTQ Legal Advocates & Defenders,

By and through their attorneys,

/s/ Gilles Bissonnette

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Dated: October 19, 2022

STATEMENT OF COMPLIANCE

I hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 8,481 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.

/s/ Gilles Bissonnette
Gilles R. Bissonnette, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 19th day of October, 2022 through the electronic-filing system on all counsel of record.

/s/ Gilles Bissonnette
Gilles Bissonnette, Esq.

ADDENDUM

Dan Richards, Written Testimony Before House Committee on Executive Departments and Administration House Bill 544 (Feb. 18, 2021)

HOUSE COMMITTEE ON EXECUTIVE DEPARTMENTS AND ADMINISTRATION

PUBLIC HEARING ON HB 544

BILL TITLE: **relative to the propagation of divisive concepts.**

DATE(s): February 11tha and February 18, 2021

LOB ROOM: **LOB Hybrid** **Time Public Hearing Called to Order:** **FEB 11th**

Time Adjourned: **FEB 18th**

FEB 11th Attendance

Time ~~Adjourned:~~ NOON
RECESSED TO 1:30 2/18

(please circle if present)

all present

Committee Members: Reps. McGuire, Roy, Sytek, S. Pearson, Yakubovich, Lekas, Alliegro, Bailey, Lanzara, Santonastaso, P. Schmidt, Schultz, Goley, Jeudy, Schuett, Fellows, Fontneau, Grote, M. O'Brien

FEB 18th Attendance
All Members were Present

Bill Sponsors:
Rep. Ammon **Rep. Cordelli** **Rep. Osborne**

TESTIMONY

* Use asterisk if written testimony and/or amendments are submitted.

February 11th, Public Hearing Opened -
HB 544 relative to the propagation of divisive concepts. (11:30/recessed at noon to 1:30 PM Feb. 18 so as not to interfere with Governor's budget address)

***1- Rep. Ammon, bill sponsor, introduced the bill and spoke in favor.**
He said that the bill arose from the situation of a professor at a state university who wished to remain anonymous out of fear of backlash. The bill would set state policy without affecting free speech or diversity teaching. It would not apply to private institutions unless contracting with the state.

The bill addresses "critical race theory" which is an ideology that says the US is fundamentally racist and founded in racism; that some people are born oppressors and others are born to be oppressed.

He reads the definition of "divisive concepts" from the bill. He rejects these because they are not unifying, that they break us up. He mentions a "new industry," i.e. diversity or inclusion training an aspect of which includes these ideas. He feels that this training, instead of making the problem better, actually makes it worse.

- The bill would ban belief or adoption of divisive concepts; in effect, advocacy.
- Also the bill would prohibit penalties or discrimination against those who refuse to teach such concepts.
- The bill then discusses relations with contractors and unions and would leave it up to DAS to investigate complaints.

- The bill would also direct agencies to review contracts and to ensure that all are treated equally.
- He concludes that the bill does not prohibit the teaching of these concepts but their advocacy; that this is a bill about unity.

There were many questions concerning racism in the US as related to this bill; whether this bill would actually improve the situation.

Public hearing recessed at noon to reconvene on February 18, 2021.

HB 544 relative to the propagation of divisive concepts. (This hearing was recessed on Feb. 11. It was reopened at 1:35, Feb. 18 and closed at 4:00

FEB 18th, 2021 Public Hearing Continued

2. Rep. Horrigan spoke in opposition. He said the bill is racist and anti-free speech. He said that these were theft and elaborated on that. He cited his own personal upbringing which taught equality.

3. James Lindsay. A math PhD and self-described expert on critical race theory (CRT) but **does not support its ideology and spoke in favor**. He said the bill did not ban the teaching of CRT, sensitivity training, as academic subjects. He said the bill prohibited racial scapegoating, stereotyping. He then went on to describe CRT.

4. Ken Barnes, a member of the public, spoke in opposition. He said that he felt that people would be afraid to teach some things in case someone might judge that they are teaching something banned. He was concerned about free speech aspects. He mentioned the chilling effects leading to self-censorship.

5. Dr. Karlyn Borysenko, of Merrimack, an organizational psychologist and spoke in support of the bill. She has concluded that CRT is dangerous and toxic and teaches people to hate themselves. She described what a CRT training session was like and said that it actually promotes racism.

6. Jacob Bennett, speaking for himself and an adjunct at UNH, spoke in support. He said that the bill seemed to be a reaction to CRT but that is being confused with critical inquiry which studies these matters from an empirical point of view. It does not claim inborn racism on anyone's part but is a result of generations of a system. He elaborated on all this and how it led to today's social ills, as he described it. He also had first amendment concerns.

7. Christopher Rufo, visiting fellow at the Heritage Foundation and other credentials, speaking for himself spoke in support. He discussed a training session where whites were forced to deconstruct their whiteness. He described the dangerous nature of these trainings and how non-whites were actually were demeaned.

8. Michael Belcher, spoke in support. He said that work place training, instead of relating to job skill, was more indoctrination. He gave examples of CRT training.

9. Aaron Penkacik, speaking for himself, spoke in support saying that the bill by trying to prevent of CRT promotes non-discrimination; that CRT actually promotes divisiveness.

10. Asma Eluni, a lobbyist for Rights and Democracy, spoke in opposition. She said we must eradicate racism in our society. She said she is a Muslim woman of color and spoke of how she felt those of Arab descent and Muslims are targeted and negatively portrayed. She cited her personal experiences of being subjected to institutionalized racism.

11. James Bomersbach, representing the Chair of NH Psychological Association, spoke in opposition saying that it is out of line with modern principles of racism. He distinguished goals from present situation and said this bill would prevent discussion. He spoke of privilege and how it had to be deconstructed. These biases are present in society today.

12. Daniel Richards, a business owner speaking for himself, spoke in support. He said that he and his employees are concerned about indoctrination lectures and classes in their schools teaching, in effect, that this country was built on racism. He gave several examples and took questions.

13. Gilles Bissonnette. Legal director of ACLU spoke in opposition. His concerns centered around the barring of some of the recommendations of the Governor's Commission Law Enforcement Accountability and that it would violate the first amendment. He said that it would interfere with private speech. He also took questions.

14. Sheryl Shirley speaking for herself and former member of NH Commission on Human Rights, spoke in opposition. She said it was not necessary or likely to promote anti-discrimination. She did not want a government agency pre-screening of syllabus. She was also concerned about first amendment rights.

15. Christine Carpenter, law student, spoke in opposition. She said it would hamstring teachers' ability to draw on to better know the individuals sitting in their classroom and that it was overbroad in that it would hamper the teaching of many other concepts. She gave examples of racism throughout our society.

16. Michael Patmore, Director of Advocacy, NH Medical Society, spoke in favor. He said he was speaking for many other medical professions. He spoke from a public health point of view. He said racism has negatively affected different racial groups, "health disparities." He said we must talk about the problem before we can achieve health outcomes. He spoke about how health equity affects the business community.
He was concerned that this was censorship and interference with the doctor-patient relationship.

17. Louise Spencer, speaking for herself, spoke in opposition because, like the Trump Executive Order, it was too vague. She said we need to be challenged to examine the biases in our own lives. She said ignorance is not a defense; no amendment could save this bill since it was chilling on free speech.

18. Rep. Maria Perez, spoke in support. She cited her own experiences with discrimination as an immigrant and woman of color. She felt that this bill would give people the right to discriminate. She felt that children should learn about other cultures.

19. David Hills spoke in opposition. He felt that it would give NH to dictate what classes UNH could offer and what can be taught. He mentioned concerns with the first amendment. He also spoke of the market in the sense that if people were not interested in the courses, they would not be given.

20. Doug Davidson, former HS teacher, spoke in support. He said that discrimination is discrimination in any form. He cited his experience on the '60's and the Freedom Riders. He believes in MLK's ideas. He felt that empirical data is being replaced by theory. He distinguished between equality and equity. CRT was a prism that made everything is racist.

21. Melissa Bernardin, representing herself, spoke in opposition. She said that this bill is backward and intolerant. She saw in the wording of the bill words that promote intolerance. She said that it was not sensible to think that discussing racism will cause division.

22. Joe Garruba, parent from Hollis, spoke in support. He distinguished the first amendment right to free speech and teaching that NH is systemically racist. He commented CRT that does not distinguish between benevolent and oppressive authority.

23. Grace Kindeke ("kin dek ay"), Program Director, American Friends Service Committee, spoke in opposition. She spoke of her personal instances of racism which she experienced. She said that this bill comes from a place of fear.

24. Ande Nina Diaz, an educator, now a chief diversity officer for a small college, spoke in opposition. She spoke of her personal experiences. She felt this bill was misleading; that bias was normal but we must learn about unconscious bias.

25. Mattison (?) Howard, a senior at Concord HS, spoke in opposition. She spoke of her own instances of harassment. She spoke of instances of discrimination. These cause racial disparities today. She cited progress she has seen; she gave her interpretation of the bill.

26. Lily Tang Williams, speaking for herself. She spoke in favor of the bill. She spoke of her history of escaping from the Peoples' Republic of China. She chose to come to America, not to Europe. She spoke of her personal history – for her, everyone was welcoming. She felt she was living the American Dream and she objected CRT.

27. Gabrielle Clark, speaking for herself, spoke in support. She cited her personal experience. Her son was asked to describe his identity in class. He refused and was retaliated against. She continued with the consequences and her personal story.

28. Jonathan Weinberg, Concord School Board member, as an individual, spoke in opposition. He criticized the bill as not promoting unity, ignores science and tries to prevent implicit bias training. He also discussed CRT.

29.Layla Moore, a self-described liberal, spoke in support. She said that CRT was not a good way to solve the problem of racism. She described her family situation and felt that there were better ways to handle racism. She referred to critical articles to support her disapproval of CRT.

30. Ann Marie Banfield, an advocate for excellence in education and parental rights, spoke in support. She says she has received many calls from parents and concerned teachers who fear that they will be subjected to CRT in their professional development. She expanded on her concern about CRT and says that thoughtful discussion was welcome and permitted.

31. Leah ("Lay-a") Cohen, self, a member of Granite State Progress, spoke in support. She said we need anti-racist training and has received 300 critical and threatening messages for speaking out. She felt that we must protect our neighbors from white supremacists.

32. Trystan McLain, self, described his personal experiences being discriminated against as a black person. **He spoke in opposition.**

33. Natalie Quevedo, self, spoke in opposition saying that we should be teaching anti-racism in public schools.

34. Heather Stockwell, representing Rights & Democracy spoke in opposition. She described her personal experience before being employed. She was a substitute teacher and struggled with a bullying situation and was concerned that she was not trained for it and would not be backed up.

Public Hearing adjourned.

Respectfully submitted by,
Rep John Sytek
Committee Clerk

Thank you members of the Committee for the opportunity to speak.

My name is Dan Richards and I live in Etna, New Hampshire. I also own and run a company that employs over 200 people that is headquartered in Lebanon, NH.

I come to you today to support and respectfully request you vote in favor of HB 544. My family and our fellow citizens in NH do not believe racist and discriminatory practices are acceptable under any circumstances and this bill would forever enshrine that belief in NH State law.

My wife Melissa and I have two young children, our daughter is in second grade and our son will be entering kindergarten next year at SAU70. My wife and I are deeply concerned about what is being taught and the trainings that are being conducted in our district. But I don't come here just for myself and my family. I also come here today out of concern for the dozens of my employees' children who are being educated in New Hampshire.

Let me give you an example of what is happening. This past spring, a course was taught entitled "Exploring Whiteness and Becoming an Anti-Racist Activist" that contained blatantly racist and anti-American topics. The course syllabus will be submitted following my testimony for your review.

A brief summary of the objectionable content includes:

1. A quiz that asks: The rise of white supremacy was tied most directly to:
    a. Indian removal
    b. Slavery
    c. **The Declaration of Independence**
    d. The US Constitution
    e. Ancient Greece

    The answer demanded is c: The Declaration of Independence.

2. A 2hr 13min lecture given by an individual named Tim Wise. Mr. Wise's lecture includes frequent and repeated racist and anti-American statements, including:
    a. "Rich white people telling working class white people that their problem is other working class people who just so happen to be browner than themselves. That is the whole history of America."
    b. "Let's be clear. Our ancestors from Europe were the losers of their societies."
    c. "Liberty and freedom? You think we believed in that? What history book have you been reading? We didn't believe in that."

3. A 1hr23 minute lecture from Robin DiAngelo whose entire talk is consumed with how all whites are "fragile" due their culpability and complicity in our "racist system."

4. We have also been told by a member of our elementary school leadership team that they will be using "achievement debts accumulated over hundreds of years" to "teach for social transformation." To accomplish this, equity, diversity and inclusion trainings have been conducted for months, I'm told partially funded by state grants, for all teachers, faculty and staff.

In my opinion, these kinds of teachings and trainings are as objectionable as they are false, inflammatory and racist. They have no place in our NH schools and the training programs of NH companies.

I'd like to conclude by saying I am the son of a Marine veteran and my grandfather and several great uncles served in the armed forces and fought the Axis during WWII. Some of my ancestors were rounded up, sent to camps and exterminated. My family knows what racism and white supremacy looks like. We have fought and we have died to defend the United States and the egalitarian principles for which it stands. It is sad commentary about our times that we need HB 544, but the reality is that we do. Our children deserve to be taught the history of this nation, for all of its greatness and flaws. They do not deserve to be indoctrinated with hatred not only of themselves, but also of those who choose to love this country.

I humbly request you pass HB 544 so I can send my kids to a school free from racism, discrimination and racial stereotyping.

Thank you.

Daniel L. Richards