THE STATE OF NEW HAMPSHIRE

SUPREME COURT

Case No: 2022-0114

S.D.

v.

N.B.

RULE 7 APPEAL OF DV/STALKING NOTICE OF DECISION
4TH CIRCUIT- DISTRICT DIVISION - LACONIA

BRIEF OF AMICUS NEW HAMPSHIRE LEGAL ASSISTANCE

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QUESTION PRESENTED TO AMICI

1. With respect to the following provisions of the final order of protection:

    - Defendant shall not mention Plaintiff on any social media and shall not post any images of Plaintiff including pictures of models represented to be Plaintiff. Defendant shall immediately make best efforts to remove Plaintiff's name and/or image from any social media or internet postings he has made or maintained.
    - Defendant shall not post Plaintiffs' name or any photograph or representation of her on the internet.

    Do the above-quoted restraining order provisions, under the circumstances of this case, violate the Defendant's rights under the First and Fourteenth Amendments to the United States Constitution or Part I, Article 22 of the New Hampshire Constitution?

INTEREST OF AMICUS CURIAE

New Hampshire Legal Assistance (NHLA) is a nonprofit law firm working to make justice a reality for and with people who experience economic hardship that threatens their basic human needs. Through representation and systemic advocacy, NHLA offers civil legal aid that addresses the effects and root causes of poverty. For 20 years, NHLA has operated a Domestic Violence Advocacy Project (DVAP). DVAP provides free legal advice and representation to low-income victims/survivors of domestic violence, sexual assault, and stalking in high lethality protective order cases, divorce and parenting, and other poverty law cases. High lethality refers to those cases where there is significant risk that the victim will be killed or seriously harmed by their abuser. In 2021, NHLA represented 207 victims/survivors and spent over 9,500 hours representing victims/survivors in New Hampshire courts statewide.

This appeal has serious ramifications for stalking and domestic violence victims/survivors. If Appellant prevails in his attempt to disguise online stalking violence as a protected expression of free speech, stalking victims would be placed in even greater jeopardy and fear. NHLA submits this brief to protect the rights of domestic violence and stalking victims, many of whom will go to court without legal representation.

CONSTITUTIONAL PROVISIONS AND STATUTES

I. Constitutional Provisions

U.S.C.A. Const. Amend. I

Amendment I. Establishment of Religion; Free Exercise of Religion; Freedom of Speech and the Press; Peaceful Assembly; Petition for Redress of Grievances.

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

N.H. Const. Pt. 1, Art. 22d

> Free speech and liberty of the press are essential to the security of freedom in a state: They ought, therefore, to be inviolably preserved.

II. Statutes

RSA 633:3-a, I (a)

I. A person commits the offense of stalking if such person:

(a) Purposely, knowingly, or recklessly engages in a course of conduct targeted at a specific person which would cause a reasonable person to fear for his or her personal safety or the safety of a member of that person's immediate family, and the person is actually placed in such fear;

RSA 633:3-a, II (a)

II. As used in this section:

(a) "Course of conduct" means 2 or more acts over a period of time, however short, which evidences a continuity of purpose. A course of conduct shall not include constitutionally protected activity, nor shall it include conduct that was necessary to accomplish a legitimate purpose independent of making contact with the targeted person. A course of conduct may include, but not be limited to, any of the following acts or a combination thereof:

(1) Threatening the safety of the targeted person or an immediate family member.

(2) Following, approaching, or confronting that person, or a member of that person's immediate family.

(3) Appearing in close proximity to, or entering the person's residence, place of employment, school, or other place where the person can be found, or the residence, place of employment or school of a member of that person's immediate family.

(4) Causing damage to the person's residence or property or that of a member of the person's immediate family.

(5) Placing an object on the person's property, either directly or through a third person, or that of an immediate family member.

(6) Causing injury to that person's pet, or to a pet belonging to a member of that person's immediate family.

(7) Any act of communication, as defined in RSA 644:4, II.

RSA 633:3-a, III-a

III-a. A person who has been the victim of stalking as defined in this section may seek relief by filing a civil petition in the district court in the district where the Plaintiff or defendant resides. Upon a showing of stalking by a preponderance of the evidence, the court shall grant such relief as is necessary to bring about a cessation of stalking. The types of relief that may be granted, the procedures and burdens of proof to be applied in such

proceedings, the methods of notice, service, and enforcement of such orders, and the penalties for violation thereof shall be the same as those set forth in RSA 173-B.

RSA 173-B:5, I (a) & (b)

I. A finding of abuse shall mean the defendant represents a credible threat to the safety of the Plaintiff. Upon a showing of abuse of the Plaintiff by a preponderance of the evidence, the court shall grant such relief as is necessary to bring about a cessation of abuse. Such relief shall direct the defendant to relinquish to the peace officer any and all firearms and ammunition in the control, ownership, or possession of the defendant, or any other person on behalf of the defendant for the duration of the protective order. Other relief may include:

(a) Protective orders**:**

(1) Restraining the defendant from abusing the Plaintiff.

(2) Restraining the defendant from entering the premises and curtilage where the Plaintiff resides, except when the defendant is accompanied by a peace officer and is allowed entry by the Plaintiff for the sole purpose of retrieving personal property specified by the court.

(3) Restraining the defendant from contacting the Plaintiff or entering the Plaintiff's place of employment, school, or any specified place frequented regularly by the Plaintiff or by any family or household member.

(4) Restraining the defendant from abusing the Plaintiff, Plaintiff's relatives, regardless of their place of residence, or Plaintiff's household members in any way.

(5) Restraining the defendant from taking, converting, or damaging property in which the Plaintiff may have a legal or equitable interest.

(6) Directing the defendant to relinquish to the peace officer, in addition to the relief specified in RSA 173-B:5, I, any and all deadly weapons specified in the

protective order that are in the control, ownership, or possession of the defendant, or any other person on behalf of the defendant.

(7) Granting the petitioner exclusive care, custody, or control of any animal owned, possessed, leased, kept, or held by the petitioner, defendant, or a minor child in either household, and ordering the defendant to stay away from the animal and forbidding the defendant from taking, transferring, encumbering, concealing, committing an act of cruelty or neglect, or disposing of the animal.

(b) Other relief including, but not limited to…

RSA 173-B:5 VI

VI. Any order under this section shall be for a fixed period of time not to exceed one year, but may be extended by order of the court upon a motion by the Plaintiff, showing good cause, with notice to the defendant, for one year after the expiration of the first order and thereafter each extension may be for up to 5 years, upon the request of the Plaintiff and at the discretion of the court. The court shall review the order, and each renewal thereof and shall grant such relief as may be necessary to provide for the safety and well-being of the Plaintiff. A defendant shall have the right to a hearing on the extension of any order under this paragraph to be held within 30 days of the extension. The court shall state in writing, at the respondent's request, its reason or reasons for granting the extension. The court shall retain jurisdiction to enforce and collect the financial support obligation which accrued prior to the expiration of the protective order.

STATEMENT OF THE FACTS/CASE

S.D. (“Plaintiff”) filed a stalking petition against N.B. (“Defendant”) pursuant to RSA 633:3-a, III-a, New Hampshire’s stalking law. Facts

Relied Upon By the Court, February 10, 2022 Order, J. Murray. ("Facts Relied Upon By the Court, Stalking Final Order").

After a final hearing, the trial court ruled that the Defendant had stalked the Plaintiff and issued a Final Stalking Order of Protection. It made findings including:

> …the defendant manifested a fixation with the plaintiff and began to contact her via the internet…defendant agreed that he had made internet postings regarding the plaintiff, but testified that they began in 2019.
>
> Defendant's postings regarding the plaintiff included sexual suggestions and threats. They also included comments about the defendant watching the plaintiff and being sexually aroused. The threats included a wish that Plaintiff would "get gang banged, raped or shot or he should do it since he knew where I lived" and also a threat to rape plaintiff's "sister's dead body". The threats included statements via Facebook Messenger: "I know where to find you" and "I am coming for you". Defendant admits that in 2019 he sent a message to plaintiff stating that he wanted to kill her because she was being mean to him.

Id.

In addition, Defendant rendered models that looked like Plaintiff, posting them on Twitter, Instagram and his "Deviant Art" website. *Id*. It found that "[t]he models were at times identified as the Plaintiff by name and were even used on a dating site that included a profile represented to

have been created by the Plaintiff." *Id*. These models depicted Plaintiff being stabbed through the breast by another woman and choked by a police officer among other sexual and threatening posts. *Id*. The trial court found Defendant made sexual suggestions and threats including commenting about Plaintiff, watching her and being sexually aroused. *Id*. Defendant "also posted actual pictures of Plaintiff taken from her social media pages." *Id*. The trial court concluded he "manifested a fixation" with Plaintiff. *Id*.

The trial court notes that Defendant did not object to the issuance of the Stalking Order restraining him from having contact with the Plaintiff. Rather, he objected to restrictions on his online activities. *Id*.

Defendant appealed the relief specific to his future postings. In his Notice of Appeal, he states, "the Judge ruled that I can't mention her name on social media, or post art that looks like her, and that's frivolous…" Additional Information Page, Defendant's Rule 7 Notice of Discretionary Appeal. He goes on to say, "this order allows her to stalk me, see something she doesn't like, then have me arrested." *Id*. Put another way: Defendant's request is that he be permitted to continue stalking Plaintiff online without any consequences.

SUMMARY OF THE ARGUMENT

Defendant is asking this Court to authorize him to continue stalking Plaintiff without penalty, under the guise of exercising his free speech online. But his stalking activity, which amounts to "true threats," is not protected speech under any scenario. *State v. Hanes*, 171 N.H. 173, 179 (2018) (finding that "true threats" were unprotected speech); *Virginia v. Black*, 538 U.S. 343, 359 (2003) (analyzing whether cross burning is *prima facie* evidence of a "true threat").

Overturning the trial court's specific relief would permit Defendant to pursue criminal conduct – and somehow with no sanctions. Such a result would be contrary to the very purpose of New Hampshire's stalking and domestic violence laws: "to prevent and deter domestic violence through equal enforcement of the criminal laws and the provision of judicial relief for domestic violence victims." *State v. Craig*, 167 N.H. 361, 373 (2015) (upholding a stalking conviction involving Facebook posts).

When the New Hampshire Legislature enacted RSA chapter 633:3–a, it did so in response to the "wide spread need in New Hampshire for legislation to allow the police to interfere ***before*** a domestic violence situation escalates into violence." *Craig*, 167 N.H. at 376 (citing *Fisher v. Minichiello,* 155 N.H. 188, 194 (2007) (quotations omitted in opinion) (emphasis added).[1]

Defendant committed a course of conduct targeted at Plaintiff that would cause a reasonable person to fear for their safety, and that person was placed in such fear. Findings of Facts, Stalking Final Order. "A protective order 'prohibit[s] acts of domestic violence,' providing 'the victim with the very protection the law specifically allows,' while preventing 'the defendant from engaging in behavior already specifically outlawed.'" *Hemenway v. Hemenway*, 159 NH 680, 688 (2010).[2] (Citing

[1] The Legislature acknowledged that "[s]talking is a part of [domestic violence]." *State v. Craig,* 167 N.H. at 376 (citing *Fisher v. Minichiello,* 155 N.H. 188, 194 (2007), (quotations omitted in opinion).

[2] The legislative purpose of RSA chapter 173–B and 633:3-a are aligned: to provide those who seek protective orders pursuant to the statute with "immediate and effective police protection and judicial relief." *Fisher v. Minichiello,* 155 N.H. 188, 194 (2007). The

Shah v. Shah, 184 N.J. 125, 138, 875 A.2d (2005)). The statutory restraints available, by their nature, are "prior restraints" on future activity – restraints necessary to stop continued abuse. *See In re N.B.*,169 N.H. 265, 270 (2016) (defining what constitutes a prior restraint). Preventing Defendant from continuing to stalk Plaintiff does not impair Defendant's free speech rights.

Even if this Court finds that Defendant's free speech rights are implicated, the Stalking Final Order would satisfy intermediate or even strict scrutiny. The restrictions relate specifically to stopping future stalking behavior: to stop further contact. Defendant is a private actor. Plaintiff is a private citizen. There is no political message here. There is no matter of public concern. Defendant is not broadly prohibited from speech about any person or any matter. The relief in question - to prevent Defendant from posting Plaintiff's image or name online - is extremely narrowly tailored to restrict only the very stalking behavior that he already committed and that is specifically outlawed. *Hemenway*, 159 NH at 688; *see also State v. Lilley*, 171 N.H. 766, 782 (2019) (applying intermediate scrutiny to "expressive conduct" where a restriction is "content-neutral.")

A stalking final order of protection is content-neutral and provides for no contact regardless of the message or forum. In this case, the trial court simply confirmed that Defendant's posting of Plaintiff's name, likeness, or image online is prohibited contact. *See Craig*, 167 N.H. at 377 (finding Facebook postings constituted indirect contact.); *State v. Kidder*, 150 N.H. 600, 602-604 (2004) (interpreting the relief under RSA 173-B

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protections and relief available under the stalking law are pursuant to the domestic violence law, RSA 173-B. RSA 633:3-a, III-a.

liberally as to what constitutes contact). This "tacked on" language spells it out for the Defendant so he knows not to continue with the conduct lest he pay the price.

The state has a compelling interest in preventing stalking violence, which is achieved in this case by the least restrictive means. Given the obsessive nature of Defendant's request – to continue using Plaintiff's image and name online - the trial court is well within its statutory power to prevent this continued stalking behavior. RSA 633:3-a, III-a. (Upon a showing of stalking by a preponderance of the evidence, the court shall grant such relief as is necessary to bring about a cessation of stalking.) The nature of the forum, the internet, provides no special insulation for Defendant's unlawful conduct. To find otherwise would allow threatening conduct to go on unfettered in cyberspace – apparently beyond the reach of law enforcement and the judiciary. Such an outcome would be in direct conflict with New Hampshire's stalking law. The trial court correctly issued the necessary relief to stop the furtherance of violent and threatening stalking behavior and should be upheld.

ARGUMENT

Defendant's free speech challenge fails: The trial court correctly found that he had committed stalking - and properly tailored its relief to prohibit furtherance of his stalking violence. To find otherwise would undermine the state's interest in protecting stalking victims from abuse. Defendant cannot be permitted to disguise his stalking abuse as expressive conduct – or as protected free speech – and thus somehow be allowed to continue his campaign of terror.

Defendant's argument seeks to carve out a dangerous exception for

abusers determined to continue their stalking behavior. The legislature passed RSA chapter 633:3–a with a focus upon protecting individuals from "domestic violence and problems of like gravity, such as threatening strangers and obsessive former lovers," and in recognition of the fact that "[h]arassing and threatening behaviors toward innocent people is a serious problem." *Craig*, 167 N.H. at 376; (citing *Fisher v. Minichiello,* 155 N.H. at 195, Dalianis, J., *concurring opinion*).

It cannot be left up to the largely self-policed internet to prevent acts of threatening violence such as those perpetrated by Defendant. If the trial court's relief is struck down, Defendant could be able to defend against future violations of the Stalking Final Order's no-contact provisions. New Hampshire trial courts must be able to prohibit stalking online, just as they have authority to prevent Defendant from standing on Plaintiff's step with a physical model of her stabbed body.

A. Standard of Review

The New Hampshire Supreme Court will address constitutional claims first under the State Constitution, citing to federal opinions for guidance only. *State v. Ball*, 124 N.H. 226, 231 (1983). The First Amendment to the United States Constitution applies to the states through the Fourteenth Amendment. *State v. Lilley*, 171 N.H. 766, 780 (2019). The constitutionality of trial court's specific relief is question of law reviewed *de novo*. *Lilley*, 171 N.H. at 771.

B. The Defendant's Stalking Conduct Constitutes Unprotected "True Threats"

Defendant's conduct amounts to true threats and to the extent any of his conduct contained any speech, it is unprotected speech. For these

reasons, the court can properly restrain it.

The New Hampshire Supreme Court analyzed whether speech amounted to "true threats" in *State v. Hanes*,171 N.H. 173 (2018). That case involved analysis of the defendant's First Amendment rights only under the United States' Constitution, not New Hampshire's. *Id.* at 179.[3]

In *Hanes*, this Court relied on the U.S. Supreme Court's decision in *Virginia v. Black*, 538 U.S. 343 (2003). *Hanes*, 171 N.H. at 179. In *Black*, the Supreme Court explained that: "[t]rue threats encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals." *Black*, 538 U.S. at 359 (quotations omitted). In the *Black* opinion, the court stated that "the First Amendment also permits a state to ban a 'true threat.'" *Id*.

This Court should apply the "true threat" analysis used in *Hanes* and *Black* in its analysis under the New Hampshire Constitution. In other contexts, this Court has applied the same standard to assess speech rights under both the United States and the New Hampshire Constitutions. *See State v. Bailey*, 166 N.H. 537, 543 (2014) (declining to find the New Hampshire Constitution more protective than the United States' Constitution); *State v. Biondolillo*, 164 N.H. 370, 373 (2012) (applying the same time, place and manner analysis as under federal precedent.)

Here, Defendant admits that he sent a message to Plaintiff that he wanted to kill her because she was being mean to him. Facts Relied Upon

[3] Defendant in this matter did not allege violations of New Hampshire's Constitution, just as was the case in *Hanes*.

By the Court, Stalking Final Order. Defendant's threats also included stating that he wished that Plaintiff would "get gang banged, raped or shot or he should do it" because he knew where she lived; a threat to rape her "sister's dead body"; and stating he was coming for her and knew where to find her. *Id*.

In addition, Defendant rendered models that looked like Plaintiff, posting them on Twitter, Instagram and his "Deviant Art" website. *Id*. The trial court found that "[t]he models were at times identified as the Plaintiff by name and were even used on a dating site that included a profile represented to have been created by the Plaintiff." *Id*. These models depicted violence against Plaintiff including stabbing and choking her. *Id*. The Defendant made sexual suggestions and threats against Plaintiff including commenting about her, watching her and being sexually aroused. *Id*. The trial court concluded he "manifested a fixation" with Plaintiff, indicating the obsessive nature of his conduct. *Id*.

The U.S. Supreme Court in *Black* explained that "a prohibition on true threats 'protect[s] individuals from the fear of violence' and 'from the disruption that fear engenders,' in addition to protecting people 'from the possibility that the threatened violence will occur.'" *Black*, 538 U.S. at 360. A true threat includes "where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death." *Id*.

The trial court here found that Defendant's behaviors constitute a "course of conduct targeted at a specific person which would cause a reasonable person to fear for his or her personal safety…and the person is actually placed in such fear." Findings of Fact, Stalking Final Order,

February 10, 2022, J. Murray. The trial court also found that the Defendant "purposely, knowingly or recklessly" engaged in this conduct.[4]

Given these findings and the highly specific threats made by Defendant against Plaintiff, this conduct amounts to "true threats." Any speech involved is unprotected. "Because his speech meets the definition of a 'true threat,' it falls outside the protection of the First Amendment." *Hanes*, 171 N.H. at 181. The trial court properly prohibited Defendant's continued use of Plaintiff's name and image online. This relief was "necessary to bring about the cessation of stalking," a "true threat," pursuant to the statute. RSA 633:3-a, III-a.

C. The Trial Court's Relief is a Constitutional Restriction on Future Conduct, in the Form of Impermissible Contact, and Does Not Restrain Protected Speech

In this case, even if the restraints against Defendant's future conduct sweep in any protected speech, those restraints meet constitutional muster. The trial court's restraints are targeted at the very conduct which constitutes stalking. Defendant used Plaintiff's name and image to stalk her. The trial court's narrow restriction, specifically designed to prevent recurring stalking behavior, does not sweep nearly broadly enough to prevent any

[4] In *State v. Hanes*, this Court assumed without deciding that a "true threat" requires a finding that the speaker subjectively intended his words to be understood by the recipient as a threat. 171 N.H. at180-181. It made this determination because the statute in question contained an intent element – proved at trial. The stalking statute also contains an intent element. Under RSA 633:3-a, one must be found to have "purposely, knowingly or recklessly," engaged in a course of conduct as part of the stalking finding. Here, the Defendant also specifically admitted to some of the threatening behavior, including making a threat to kill. Facts Relied Upon By the Court, Stalking Final Order.

protected speech. The no-contact provisions are content-neutral to stop future stalking abuse.

This Court in *Lilley* reiterated "we do not accept 'the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea,' however, 'we acknowledge that conduct may be sufficiently imbued with elements of communication to fall within the scope of constitutional protections.'" *Lilley*, 171 N.H. at 780 (citing *Bailey*, 166 N.H. at 541). This Court assumed without deciding that the conduct in *Lilley* - the display of naked breasts - was expressive conduct subject to speech protections. *Id.* The conduct at issue was in protest of a local ordinance banning female nipple display. *Id*. at 770-771, 779-780. This Court applied intermediate scrutiny determining the ordinance at issue was "content-neutral" on its face. *Id*. at 782.

In *In re N.B.*, this Court found that "[a] content-based prohibition on speech concerning matters of public interest must be subjected to the most exacting scrutiny." *In re N.B.*, 169 N.H. 265, 270 (2016) (Citing *Petition of Brooks*, 140 N.H. 813, 819 (1996)). The challenged injunction at issue was deemed a "prior restraint" on speech. *Id.* That case, however, included "matters of public interest," involving restrictions on a future lawsuit against a government agency. *Id.*

In re N.B., *Lilley* and other speech related cases decided before them have involved matters of public concern or freedom of the press. *See e.g., Mortgage Specialists Inc. v. Implode-Explode Heavy Industries, Inc.*, 160 N.H. 227, 244 (2010) (overturning injunction which had prohibited website publication of mortgage loan figures to inform consumers); *Petition of*

Brooks, 140 N.H. at 820 (finding confidentiality rule against disclosure of professional conduct complaint process against attorneys violated free speech). This case involves a private campaign of one private citizen stalking another private citizen. The prohibited conduct at issue here, posting online using Plaintiff's image and name, encompasses no hint of a matter of public concern. The trial court only prohibited Defendant from continuing his online campaign to torment Plaintiff, a private citizen who he was found to have stalked. There is no restraint involving a public entity or a matter of public concern.

"The rights of free speech and assembly, while fundamental in our democratic society, still do not mean that everyone with opinions or beliefs to express may address a group at any public place and at any time. The constitutional guarantee of liberty implies the existence of an organized society maintaining public order, without which liberty itself would be lost in the excesses of anarchy." *State v. Albers*, 113 N.H. 132, 138 (1973).

If the prohibited conduct here is somehow considered expressive conduct (as opposed to impermissible contact) – the conduct serves only to manifest violence against Plaintiff individually. Defendant's posting depicted Plaintiff in violent scenarios – with other animated models stabbing her and choking her - and depicted her naked body. Notably, the trial court did not prohibit Defendant from continuing to post animated models, or even those depicting violence. The trial court *only* prohibited Defendant from using Plaintiff's name, likeness, or image in his online postings.

Thus, under New Hampshire's Constitution, even if Defendant's stalking postings are somehow characterized as "expressive conduct" in the

form of "art," the very specifically threatening nature of the postings and the complete absence of *any* public concern plainly permit the trial court's restrictions. If this Court applies any scrutiny to the restrictions, it should be intermediate scrutiny. *See Lilley*, 171 N.H. at 782 (applying intermediate scrutiny where the restriction is narrowly tailored to an important government interest and allowing for "alternate channels of communication").

Using the intermediate scrutiny analysis, the restraints at issue in this case support an important and substantial government interest – stopping continued stalking behavior. The restraint is narrowly tailored – it only restricts Defendant from posting Plaintiff's image and name. The restraint also allows for "alternative channels of communication" because it does not prevent him from posting about anything other than the Plaintiff. *Bailey*, 166 N.H. at 542.

This Court should find no violation of Defendant's free speech rights. The proscribed conduct is not speech; rather, it is impermissible conduct and contact. Even if, arguendo, the stalking conduct was somehow considered as speech, the court-ordered restrictions survive the intermediate scrutiny standard.

1. Other Court Opinions Support This Application of Intermediate Review

The Pennsylvania Superior Court in *Commonwealth v. Lambert*, applied intermediate scrutiny when it found that restrictions in a protection from abuse order did not violate free speech. 147 A.3d 1221,1223, 1229

(2016).[5] Those restrictions prohibited the appellant from posting "any remark(s) and/or images regarding Plaintiff, on any social network(s), including, but [not] limited to, Facebook, Myspace, Twitter, or any other electronic networks." *Id*.

The Pennsylvania court applied the test used in *United States v. O'Brien*, 391 U.S. 367, 386 (1968), where the defendant O'Brien was convicted for destroying and mutilating his draft card in protest of the Vietnam war. *Lambert*, 147 A.3d at 1228; *see O'Brien*, 391 U.S. at 376-377 (finding the draft card burning conduct was a combination of expressive and non-expressive activity). The *Lambert* court's test is similar to New Hampshire's test where there is a content-neutral regulation, namely, that the regulation will be upheld if it furthers an important or substantial government interest and is narrowly tailored to advance the interest. *Id.* at 1228-1229. In *Lambert*, the court found the protection from abuse order in question "clearly advances an important governmental interest unrelated to speech." *Id*. at 1229. It found that the "proscription is not concerned with the *content* of the Appellant's speech but with, instead, the *target* of the speech, namely Plaintiff, whom the court has already deemed the victim of his abusive conduct." *Id*.

Here, as in *Lambert*, the trial court has determined Defendant committed stalking against Plaintiff. She is already deemed the victim of abusive stalking behavior. The Defendant did not appeal this determination. The restrictions are aimed at the cessation of abuse, and not

[5] The *Lambert* court determined the restriction was "contact-based" and thus a content-neutral restriction on speech which "advances an important governmental interest unrelated to speech and is narrowly tailored to advance this interest." *Id.* at 1229.

at the content of future posts. The challenged relief advances this important governmental interest: "to prevent and deter domestic violence through equal enforcement of the criminal laws and the provision of judicial relief for domestic violence victims" and provide "immediate and effective police protection and judicial relief." *Craig*, 167 N.H. at 373 (2015) (upholding a stalking conviction).

The trial court's relief to bar Defendant from posting Plaintiff's image or name is narrowly tailored to meet this important government interest.

2. Other Court Opinions Support Applying Lessened Scrutiny Where Speech is a Matter of Private Concern Only

Other cases that have applied strict scrutiny, provide guidance to this Court about why strict scrutiny is not necessary here. In *Bey v. Rasawehr*, the Supreme Court of Ohio found a civil protection order enjoining future posting about a petitioner was an unconstitutional prior restraint on protected speech. *Bey v. Rasawehr*, 161 Ohio St. 3d 79, 97 (2020). While that court applied a high level of scrutiny, it left open the possibility of enjoining certain speech. *Id.* at 91. The *Bey* case involved orders issued pursuant to the Ohio civil stalking protection law which is broader than New Hampshire's law.[6] The defendant in *Bey* challenged the issuance of an order whereby he was enjoined from future postings about the petitioners. *Id.* at 79.

[6] The Ohio civil stalking protection order law prohibits "a pattern of conduct" including that the offender will "cause mental distress to the other person or a family or household member of the other person." *Bey v. Rasawehr*, 161 Ohio St.3d 79, 82. New Hampshire does not include "mental distress" in its stalking law definition, rather, it involves fear to personal safety.

The *Bey* court determined that the speech restriction was "utterly sweeping" as it prohibited defendant "from writing anything about [the petitioner's] 'on any social media service, website, discussion board, or similar outlet or service.'" *Id*. at 94. In *Bey*, however, appellant's statements included accusing public officials of being involved in a criminal conspiracy with appellees. *Id*. at 96. For this reason, the speech was infused with matters of public concern and required "special protection." *Id*. This is a crucial distinction between the circumstances in *Bey* and the circumstances of this case. Unlike in *Bey*, in this case Defendant's conduct included no public officials and implicated no matters of public concern.

Noteworthy, in *Bey* the court left open the possibility that an injunction on future speech could be permitted when it enjoins "future repetition of the same statements" that led to the injunctive relief. *Id.*, at 91 (referencing a prior Ohio Appeals Court decision finding that specific defamatory statements could be enjoined from future repetition). That is exactly the relief ordered by the trial court in this case.

As demonstrated by the *Bey* decision, protection of speech related to matters of public concern is at the very core of the First Amendment. In *Snyder v. Phelps*, the U.S. Supreme Court, in its First Amendment analysis, identified speech on matters of public concern as "at the heart of the First Amendment's protection." 562 U.S. 443, 451-452 (2011) (citing *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 472 U.S. 749, 758–759 (1985) (opinion of Powell, J.) (quoting *First Nat. Bank of Boston v. Bellotti*, 435 U.S. 765, 776 (1978)). The *Snyder* decision turned "largely on whether the speech is of a public or private concern, as determined by all

the circumstances of the case." *Id.* Where matters of purely private significance are at issue, it found First Amendment protections are less rigorous. *Id*. at 452.

The *Snyder* court distinguished public speech from private speech. It found that "restricting speech on purely private matters does not implicate the same constitutional concerns as limiting speech on matters of public interest: [t]here is "no threat to the free and robust debate of public issues…or interference with a meaningful dialogue of ideas." *Id*. at 452. The "threat of liability" regarding private speech does not pose the risk of "a reaction of self-censorship" on matters of public import. *Id*.

In this case, Defendant's stalking conduct did not involve any matters of public concern. The Plaintiff is not a public figure or government official. None of Defendant's posts involved criticism of the government or business. Unlike in *Bey*, the future conduct does not enjoy any "special protection" and the prior restraints on the future conduct thus are not subject to strict scrutiny. The trial court here enjoined the very conduct that had already been perpetrated upon Plaintiff: Defendant's use of her name and image to stalk, threaten and terrorize her. The relief is specifically tailored to preventing Defendant from continuing with the online stalking conduct. It prevents Defendant from having any contact with Plaintiff - Defendant conceded he was not objecting to that general "no contact" relief.

D. Defendant's Future Posts Would be Considered Impermissible Contact "Integral to the Criminal Conduct" per the No Contact Provision of the Final Stalking Order

Even if the trial court did not specifically prevent Defendant from

posting Plaintiff's name or image, his doing so would likely constitute a violation of the Final Stalking Order of Protection. Here, the trial court did no more than enjoin the criminal conduct already illegal under New Hampshire's stalking law.

This Court in *State v. Craig* analyzed whether a defendant's Facebook postings about the Plaintiff constituted impermissible contact in violation of an existing domestic violence order. 167 N.H. at 377. It determined that RSA 633-:3-a protects victims who have viewed publicly available Facebook posts which included threatening messages, even if it required them to navigate to the page to see them. *Id*. The Court concluded that "to do otherwise would frustrate the purpose of the stalking statute." *Id.* In *Craig* this Court was "mindful" that Facebook posts, under some circumstances, could constitute protected speech but declined to address the question as it was not raised. *Craig*, 167 N.H. at 378.

Here, the restriction on the Defendant's conduct is constitutional as it does not include protected speech. Defendant challenges the restriction prohibiting use of Plaintiff's image or name in postings on his Instagram, website and other internet platforms. The no contact orders already restrict such contact. The trial court's specific prohibitions merely serve to notify Defendant what would already constitute a violation of its order. If this Court were to strike down the prohibitions, it would frustrate the statutory purpose of the stalking law: to prevent furtherance of stalking behavior.

The types of relief available in the stalking law pursuant to RSA 173-B are listed in 173-B:5. RSA 633:3-a, III-a. These include, "restraining the defendant from contacting the plaintiff…" RSA 173-B:5, I (a) (3). Contact is defined as "any action to communicate with another either

directly or indirectly, including, but not limited to, using any form of electronic communication, leaving items, or causing another to communicate in such fashion." RSA 173-B:1, IV.

In *Craig*, this Court found that defendant's Facebook postings qualified as "any action to communicate" with another indirectly. 167 N.H. at 378. It did not require the defendant to send those communications directly to the Plaintiff. *Id*. And the communications were deemed impermissible contact per the trial court's restraining orders. *Id*.

In *Craig,* this Court adopted a "broad interpretation" of what "any action to communicate" includes, in line with the statutory purpose of RSA 173-B. *Id*. (citing *State v. Kidder*, 150 N.H. at 603). In *State v. Kidder*, this Court found, "that *any* contact with a victim of domestic violence, whether legitimate or not, may be perceived by the victim as harassment, intimidation or abuse." 150 N.H. at 604. The content and the nature of the contact did not matter.

The restricted stalking behavior in question, mainly future use of Plaintiff's image and name online, is "integral to the criminal conduct" of a future stalking order violation. To the extent any of the conduct includes speech, which it does not, it does not include any protected speech. Many future postings could be construed as contact with Plaintiff. Surely, the highly specific and targeted use of her image and name would be covered.

The New Hampshire Supreme Court has not decided a case addressing this "integral to the criminal conduct" exception to free speech under either the New Hampshire or United States Constitutions. The U.S. Supreme Court decision in *Giboney v. Empire Storage & Ice Co.*, provides persuasive guidance. 336 U.S. 490, 504 (1949). *Giboney*, considered a

challenge to an injunction issued against a union for picketing in front of Empire Storage and Ice Company. *Id*. at 494. The injunction was issued because the union was picketing Empire's refusal to enter into an agreement to stop selling to non-union ice peddlers. *Id*. at 492-493. However, such agreement would have been illegal under Missouri law. *Id*. The U.S. Supreme Court upheld the injunction as it enjoined an offense against Missouri law, mainly as it was speech to compel an illegal agreement. *Id*. at 498. That court found:

> It rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute. We reject the contention now. Nothing that was said or decided in any of the cases relied on by appellants calls for a different holding.

Id.

The trial court's Final Stalking Order prohibits future criminal conduct. "A protective order is designed to 'prohibit[s] acts of domestic violence,' providing 'the victim with the very protection the law specifically allows,' while preventing 'the defendant from engaging in behavior already specifically outlawed.'" *Hemenway* 159 at 688 (citing *Shah*, 184 N.J. at 138). The specificity in the trial court's order here, mainly that Defendant cannot post using Plaintiff's name and image, prevents the illegal stalking behavior already specifically outlawed. The conduct restricted is therefore properly excluded from free speech protection because that conduct would be "integral to the criminal conduct" of a stalking order violation.

Defendant appears to claim that his postings are "private" on his Instagram and should be protected speech for this reason.[7] To the extent that matters, the trial court notes in its findings that Plaintiff "used her cell phone to show the court several of these postings," which amounted to stalking. Thus, at least some of the stalking postings were available to Plaintiff and the trial court to view.[8]

Similar to *Craig*, Defendant's threatening posts, regardless of any privacy settings, were available to Plaintiff and she is entitled to the protections pursuant to RSA 633:3-a, including restraining future postings.

E. The Trial Court's Restraints Would Survive Even Application of Strict Scrutiny

The proscribed conduct here involves "true threats" outside of free speech protection. Yet arguendo, even if this Court determines that Defendant's conduct includes expressive conduct and that any prior restraint is somehow subject to strict scrutiny, the restraints imposed by the trial court are the least restrictive means to meet the compelling government interest to stop stalking behavior. To survive strict scrutiny under New Hampshire's Constitution, "the prohibition must serve a compelling State interest and be narrowly tailored to accomplish that interest." *In re N.B.*, 169 N.H. at 270.

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[7] It is unclear whether this claim is properly preserved for review, but this Amicus Brief will address it nonetheless.

[8] Dynamics of stalking include that perpetrators use many tactics, including technology, and pursue their victims frequently. Almost half of victims report at least one unwanted contact per week and twice as many victims are stalked with technology than without. Stalking Prevention Awareness Resource Center, Stalking Fact Sheet, https://www.stalkingawareness.org/wp-content/uploads/2019/01/SPARC_StalkngFactSheet_2018_FINAL.pdf

The State interest in preventing stalking violence is compelling. New Hampshire's legislature enacted RSA chapter 633:3–a in response to the "wide spread need in New Hampshire for legislation to allow the police to interfere before a domestic violence situation escalates into violence." *Craig*, 167 N.H. at 376 (citing *Fisher v. Minichiello*, quotations omitted in opinion) [emphasis added].

"It is the public policy of this state to prevent and deter domestic violence through equal enforcement of the criminal laws and the provision of judicial relief for domestic violence victims." *Craig*, 167 N.H. at 373 (upholding a stalking conviction). The legislative purpose of RSA chapter 173–B and 633:3-are aligned: to provide those who seek protective orders pursuant to the statute with "immediate and effective police protection and judicial relief." *Craig*, 167 N.H at 373.

The state's interest in protecting stalking victims is substantial. The law was adopted to prevent threatening, obsessive stalking behavior that can lead to further violence including homicide. *Fischer v. Minichiello*, 155 N.H. 188, 195-196 (2007) Dalianis, J., *concurring opinion*. Stalking is a significant societal problem.

According to the Centers for Disease Control, 1 in 3 women and 1 in 6 men have experienced stalking in their lives.[9] Nearly 58% of women and 49% of men have been stalked before the age of 25. *Id*. The CDC reports that victims of stalking felt fearful, threatened, or concerned for their safety

[9] Centers for Disease Control and Prevention, Fast Facts: Preventing Stalking (January 20, 2022), available at https://www.cdc.gov/violenceprevention/intimatepartnerviolence/stalking/fastfact.html.

or the safety of others. *Id*. About 69% of female and 80% of male victims experienced threats of physical harm during their lifetime. *Id*. Research has shown a relationship between stalking victimization and poor physical and psychological health outcomes. *Id*.

The trial court's relief is the least restrictive means to address this substantial and compelling state interest. The Defendant here is only restricted from posting Plaintiff's name and image online. The trial court did not restrict Defendant from posting online altogether, or bar him from any specific social media, web sites or other internet-based mediums. He is not restricted from posting nude or violent images or models of people other than Plaintiff, or from posting his "deviant art" generally.

Further, Defendant would not be prohibited from posting about his opinion on having a stalking order issued against him, about his opinion on how it affects his rights, or about the trial court's relief. This is the least restrictive means possible to address the specific behavior underlying the stalking protective order.

As an additional protection, New Hampshire's stalking law excludes from the "course of conduct" constitutionally protected activity or conduct "necessary to accomplish a legitimate purpose." RSA 633:3-a II., (a). So, any finding is made with that in mind. Further, the stalking final order of protection expires in one year, and while the Plaintiff may request an extension, the order is at that time, subject to review. RSA 173-B:5 VI. These built-in constitutional protections cannot be overlooked.

For these reasons, the restriction on Defendant's stalking behavior would survive even application of the strict scrutiny test under both New

Hampshire and the United States' Constitutions.[10]

CONCLUSION

The trial court found that the Defendant had stalked the Plaintiff and issued a Final Stalking Order for her protection. The Defendant does not ask the Court to review whether he indeed stalked the Plaintiff, or whether a Final Stalking Order should have issued against him. Rather, he seeks an exception to the Final Stalking Order that would allow him to continue stalking the Plaintiff – under the guise of free speech.

Yet settled free speech law does not protect the conduct that Defendant seeks to continue. Defendant's conduct amounts to "true threats" and therefore is squarely unprotected. Even when analyzed as a potentially unconstitutional restraint on speech, the trial court restrictions survive intermediate and even strict scrutiny. The trial court's orders were extremely narrowly tailored to prevent the Defendant only from continuing to stalk the Plaintiff.

This case has significant implications for New Hampshire's stalking law, and for people subjected to the kind of stalking behavior that led Plaintiff to seek protection from the trial court. It calls for this Court to consider whether the Defendant, having been found to have engaged in stalking, may nonetheless continue to stalk the Plaintiff through online postings of her name, image, and likeness. In a time in which most people live their lives at least partly online, a decision authorizing Defendant to

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[10] Strict scrutiny under the Federal Constitution requires showing the restriction is necessary to serve a compelling state interest and that it is narrowly tailored to achieve that interest. *See e.g. Madsen v. Women's Health Center, Inc.*, 512 U.S. 753, 761 (1994).

continue stalking online would tear a dangerous hole in the fabric of the stalking law's essential, lifesaving protections. If New Hampshire's trial courts are prevented from restraining online stalking, the stalking law is significantly unraveled within the digital universe – which will have impact on people's very real lives. This is especially true where, as here, both parties are private citizens and the conduct does not pertain, in any way, to a matter of public concern. The trial court's challenged restraints do not violate his rights under New Hampshire's or the United States' Constitutions. For the foregoing reasons, New Hampshire Legal Assistance asks this Court to uphold the trial court's orders in their entirety.

Respectfully submitted,

NEW HAMPSHIRE LEGAL ASSISTANCE

By its Attorneys

November 4, 2022

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CERTIFICATE OF COMPLIANCE

I, Mary Krueger, hereby certify that the word count on this Amicus Brief is under 9,500 pursuant the Supreme Court Rules.

November 4, 2022 /s/ *Mary Krueger*
Mary Krueger

CERTIFICATE OF SERVICE

I, Mary Krueger, hereby certify that this brief is submitted to the Supreme Court Clerk, Timothy Gudas, who will provide the plaintiff and the defendant with copies of this brief pursuant to this Amicus Announcement.

November 4, 2022 /s/ *Mary Krueger*
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