THE STATE OF NEW HAMPSHIRE
SUPREME COURT

S.D.

v.

N.B.

DOCKET NO. 2022-0114

MEMORANDUM OF LAW OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE AND AMERICAN CIVIL LIBERTIES UNION

American Civil Liberties Union of New Hampshire and American Civil Liberties Union submit the following memorandum of law as *amici curiae*.

INTRODUCTION

The trial court in this case found that Defendant stalked Plaintiff in violation of RSA 633:3-a, I(a), including by: sending messages to Plaintiff expressing his desire to kill her and rape her "sister's dead body"; posting that Plaintiff should "get gang banged, raped or shot or he should do it since he knew where [she] lived"; commenting about becoming sexually aroused while watching Plaintiff; and creating nude models and animations of Plaintiff, some of which depicted her being violently assaulted. Defendant's course of conduct was abhorrent, and *amici* do not contend that it is protected under the First Amendment. Even if some of Defendant's individual communications might be entitled constitutional protection when considered in isolation, they lose any claim to constitutional protection when considered in conjunction with unprotected

conduct or speech, such as true threats, as part of Defendant's stalking campaign.

The question here, however, is whether the trial court's sweeping final protection order—which requires Defendant to "immediately make best efforts to remove Plaintiff's name and/or image from any social media or internet posting he has made or maintained" and which categorically prohibits Defendant from posting "Plaintiff's name or any photograph or representation of her on the Internet"—is consistent with the First Amendment. It is not. The final protective order's broad-based restriction on all Internet speech *about* Plaintiff, regardless whether it bears any connection to Defendant's stalking campaign, is a content-based prior restraint that encompasses a great deal of potentially protected expression. As such, the trial court's order must be subjected to the most exacting judicial scrutiny. Because the restriction is not narrowly tailored to the communications that were found to have contributed to Defendant's unlawful stalking campaign, it violates the First Amendment.

That is not to say that courts are powerless to address the very serious harms inflicted by stalking activity like Defendant's conduct here. A more carefully drawn protective order would reconcile the compelling interests underlying the anti-stalking statute with the First Amendment's strong presumption against prior restraints. For instance, a final protection order based on appropriate findings could validly prohibit Defendant from posting (1) comments about watching the plaintiff and being sexually aroused, as well as comments expressing Defendant's desire that Plaintiff would be "gang banged, raped or shot," or otherwise assaulted; (2) animations, models, or representations depicting Plaintiff in the nude, engaged in sexual activity, or being physically attacked; (3) fake dating profiles featuring Plaintiff; or (4) photographs of, representations of, or comments about, Plaintiff in a manner that purposely, knowingly, or

recklessly causes Plaintiff to reasonably fear for her personal safety or the safety of an immediate family member. This Court should therefore vacate the provisions of the final protection order that broadly restrain Defendant from posting Plaintiff's name or images, and remand with instructions to craft a more narrowly tailored remedy.

INTERESTS OF *AMICI CURIAE*

The American Civil Liberties Union ("ACLU") is a nationwide, nonprofit, nonpartisan organization with approximately two million members and supporters dedicated to the principles of liberty and equality embodied in the Constitution and our nation's civil rights laws. Since its founding in 1920, the ACLU has frequently appeared before courts throughout the country in cases involving the exercise of First Amendment rights, both as direct counsel and as *amicus curiae*. *See, e.g.*, *Hague v. Comm. for Indus. Org.*, 307 U.S. 496 (1939); *Bartnicki v. Vopper*, 532 U.S. 514 (2001); *Snyder v. Phelps*, 562 U.S. 443 (2011); *Mahanoy Area Sch. Dist. v. B. L.*, 141 S. Ct. 2038 (2021). The American Civil Liberties Union of New Hampshire ("ACLU-NH") is the New Hampshire affiliate of the ACLU and has more than nine thousand members and supporters across the state.

Both the ACLU and the ACLU-NH have long opposed prior restraints on speech, and long supported legal protections for survivors of gender-based violence. The proper resolution of this case is therefore a matter of substantial interest to the ACLU, the ACLU-NH, and their members.

ARGUMENT

I. The trial court's final protection order is subject to strict scrutiny because it imposes a content-based prior restraint.

"Courts and commentators define prior restraint as a judicial order or administrative system that restricts speech, rather than merely punishing it

after the fact." *In re N.B.*, 169 N.H. 265, 270 (2016) (quoting *Mortgage Specialists v. Implode–Explode Heavy Indus*., 160 N.H. 227, 240 (2010)). "Temporary restraining orders and permanent injunctions—*i.e.*, court orders that actually forbid speech activities—are classic examples of prior restraints." *Id.* (quotation omitted). The First Amendment was designed "to create a bulwark" against these "previous restraints upon speech." *Sindi v. El-Moslimany*, 896 F.3d 1, 31 (1st Cir. 2018).

The Constitution's distrust of prior restraints is founded on "a theory deeply etched in our law: a free society prefers to punish the few who abuse rights of speech after they break the law than to throttle them and all others beforehand. It is always difficult to know in advance what an individual will say, and the line between legitimate and illegitimate speech is often so finely drawn that the risks of freewheeling censorship are formidable." *Se. Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559 (1975). The collateral bar rule—which requires that a judicial injunction be followed on pain of contempt until modified or vacated, even if it is unconstitutional—"compounds the grave perils posed by prior restraints." *Sindi*, 896 F.3d at 32. Whereas "[a] criminal penalty . . . is subject to the whole panoply of protections afforded by deferring impact of the judgment until all avenues of appellate review have been exhausted," a prior restraint "has an immediate and irreversible sanction" that effectively prevents publication while the order remains in effect. *Neb. Press*, 427 U.S. at 559. "If it can be said that a threat of criminal or civil sanctions after publication 'chills' speech, prior restraint 'freezes' it at least for the time," which is especially dangerous when the prior restraint potentially encompasses speech on a matter of public concern. *Id.*

In sum, "[p]rior restraints are inherently suspect because they threaten the fundamental right to free speech and are the most serious and the least tolerable infringement on First Amendment rights. For these

reasons, any prior restraint on expression comes with a heavy presumption against its constitutional validity." *In re N.B.*, 169 N.H. at 270 (internal citations and quotations and omitted); *accord, e.g.*, *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 420 (1971) (vacating an injunction prohibiting a community organization that criticized a local real estate company's business practices from leafletting and picketing in the municipality). "The presumption against prior restraints is heavier—and the degree of protection broader—than that against limits on expression imposed by criminal penalties." *Se. Promotions*, 520 U.S. at 558–59.

The final protection order at issue here—which prohibits Defendant from publishing "Plaintiff's name or any photograph or representation of her on the Internet," regardless whether such speech has finally been determined to constitute stalking—is a textbook prior restraint. Furthermore, because the injunction restricts speech on the basis of its subject matter, i.e., whether it refers to or represents Plaintiff, it imposes a content-based restriction on speech. *See In re N.B.*, 169 N.H. at 270 (holding that an order requiring a litigant to file under seal any and all future pleadings in a planned damages action against the New Hampshire Division for Children, Youth and Families (DCYF) and/or the Court Appointed Special Advocates of New Hampshire (CASA) imposed a content-based prior restraint). Under the First Amendment and Part I, Article 22 of the New Hampshire Constitution, a prohibition "must be subjected to the most exacting scrutiny. To survive such scrutiny, the prohibition must serve a compelling State interest and be narrowly tailored to accomplish that interest." *Id.* (internal citations and quotations omitted).

The Ohio Supreme Court's decision in *Bey v. Rasawehr*, which addressed a similar order, recognized that "a regulation of speech that is 'about' appellees is necessarily a regulation of the subject matter of that speech," because it "puts limits on any expression that relates to that

particular subject, i.e., appellees." 161 N.E.3d 529, 539 (Ohio 2020); *see also Flood v. Wilk*, 125 N.E.3d 1114, 11126 (Ill. App. Ct. 2019) (holding that a "stalking no contact order" prohibiting the defendant from mentioning a pastor, his family, or anyone connected with his church was "a content-based restriction and presumptively prohibited" because it "targeted respondent's speech based on its subject matter—the church and its members"). An injunction that categorically restricts all speech about any particular person—whether they're the President of the United States, a local public figure, or a private person—is a content-based prior restraint because it "requires an examination of its content, i.e., the person(s) being discussed, to determine whether a violation has occurred and is concerned with undesirable effects that arise from 'the direct impact of speech on its audience" or "[l]isteners'" reactions to speech.'" *Bey*, 161 N.E.3d at 539 (quoting *McCullen v. Coakley*, 573 U.S. 464, 481 (2014)).

The Superior Court of Pennsylvania reached a different conclusion in *Commonwealth v. Lambert*, holding that a restraining order prohibiting the defendant from making any remarks "regarding Plaintiff" on social media was "not concerned with the *content* of [the defendant's] speech but with, instead, the *target* of his speech, namely, Plaintiff, whom the court has already deemed the victim of his abusive conduct."147 A.3d 1221, 1229 (Penn. Super. Ct. 2016). But as the Ohio Supreme Court pointed out in *Bey*, if "target" means the subject of a particular statement, as opposed to its audience, then it is no different than a restriction on subject matter. 161 161 N.E.3d at 539. *See also, e.g.*, *R.A.V. v. City of St. Paul*, 505 U.S. 377, 384 (1992) (recognizing that a statute selectively proscribing libels about the government would be impermissibly content based).

Nor can a categorical ban on all Internet speech referring to another person "be considered merely incidental to a regulation of conduct." *Bey*, 161 N.E.3d at 539. New Hampshire's anti-stalking statute, RSA 633:3-a,

"may be described as directed at conduct," but the trial court's application of the statute to enjoin speech naming another person focuses on conduct that "consists of communicating a message." *Holder v. Humanitarian Law Project*, 561 U.S. 1, 28 (2010). The trial court's final protection order must therefore be treated as a content-based prior restraint on speech, at least insofar as it encompasses protected expression as well as unprotected speech integral to unlawful conduct, and subjected to strict First Amendment scrutiny.

II. The trial court's protection order is not narrowly tailored to activities that have been found to contribute to Defendant's stalking of Plaintiff.

The trial court would have been well within its power to enter a protection order tailored to its factual findings, which undoubtedly support the court's conclusion that Defendant stalked Plaintiff in violation of RSA 633:3-a, I(a). Speech integral to unlawful conduct, such as stalking, is not protected by the First Amendment.

However, the protection order that the trial court actually entered is overbroad. The order sweeps well beyond the activities found to have constituted stalking in this case, prohibiting Defendant from posting "Plaintiff's name or any photograph or representation of her on the Internet." This categorical bar on all references to Plaintiff—which would encompass even innocuous statements about Plaintiff to third parties, as well as speech on matters of public concern—amounts to an impermissible prior restraint on protected expression.

Defendant's conduct here plainly violated RSA 633:3-a, I(a), which provides that a person commits the offense of stalking if they "[p]urposely, knowingly, or recklessly engage[] 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." The trial court found that the Defendant made comments about "watching the Plaintiff and being sexually aroused"; that he expressed "a wish that Plaintiff would 'get gang banged, raped or shot or he should do it since he knew where [Plaintiff] lived'"; that he made "a threat to rape Plaintiff's 'sister's dead body'"; that he made threatening statements via Facebook messenger, including "I know where to find you" and "I am coming for you"; that "he sent a message to Plaintiff stating that he wanted to kill her because she was being mean to him"; that he "created animated models resembling [Plaintiff] and posted them at various sites . . . including Twitter, Instagram and a 'Deviant Art' website"; that he identified some of the models with the plaintiff's name, including a model of an adult naked woman; that he posted a model depicting the plaintiff "being stabbed in the breast by another woman," as well as another model depicting the plaintiff "being choked by a police officer"; that these models were "used on a dating site that included a profile represented to have been created by the Plaintiff"; and that he "posted actual pictures of Plaintiff taken from her social media pages."[1]

Even viewed in isolation, many of the communications described in the trial court's order would not receive constitutional protection. For example, the First Amendment does not protect true threats, *Virginia v. Black*, 538 U.S. 343, 359 (2003), including Defendant's expressions of his desire to harm Plaintiff and her family members. The First Amendment also

[1] The trial court's findings were not clear as to whether Defendant's display of pictures of Plaintiff obtained from Plaintiff's social media accounts were integral to his stalking of Plaintiff. The analysis would likely depend on a number of factors, including the nature of the photographs, whether Plaintiff's social media accounts were publicly accessible, and the context in which Defendant posted the photographs. The trial court's findings were also unclear as to whether Defendant created the fake dating profile featuring Plaintiff, or whether the profile was created by a third party.

does not protect harassment-by-proxy, such as the creation of a fake dating profile for the purpose of soliciting third parties to contact a person against their wishes. *See United States v. Sayer*, 748 F.3d 425, 434 (1st Cir. 2014) ("Sayer does not claim that his acts of creating false online advertisements and accounts in Jane Doe's name or impersonating Jane Doe on the internet constitute legal conduct. In fact, he has admitted that his conduct, which deceptively enticed men to Jane Doe's home, put Jane Doe in danger and at risk of physical harm. To the extent his course of conduct targeting Jane Doe involved speech at all, his speech is not protected."); *accord Buchanan v. Crisler*, 922 N.W.2d 886, 896 (Mich. Ct. App. 2018); *Commonwealth v. Johnson*, 21 N.E.3d 937, 946 (Mass. 2014).

Other communications, such as Defendant's creation and dissemination of a nude model of Plaintiff, do not fall within any recognized First Amendment exception. These communications "constitute speech that, considered in isolation, might have been entitled to First Amendment protection." *United States v. Osinger*, 753 F.3d 939, 953 (9th Cir. 2014) (Watford, J., concurring). This speech is not entitled to constitutional protection here, however, because "it falls within the [First Amendment] exception for speech integral to criminal conduct"—namely, Defendant's stalking of Plaintiff. *Id.* (concluding that the defendant's creation of a fake Facebook account under his ex-girlfriend's name, and his dissemination of sexually explicit photos depicting his ex-girlfriend, constituted speech integral to criminal conduct "[b]ecause the sole immediate object' of [the defendant's] speech was to facilitate his commission of the interstate stalking offense").

If Defendant's stalking offense consisted *only* of protected expression, then "the exception for speech integral to criminal conduct shouldn't apply." *Id.* at 954. Instead, the court would have to decide whether RSA 633:3-a— which, as applied here, is a content-based

restriction on speech—survives strict scrutiny. The court need not confront that issue, however, because Defendant's stalking offense consisted of *both* protected speech and unprotected threats and harassment. Defendant's "conduct and speech together 'constituted a single and integrated course of conduct, which was in violation of [a] valid law.'" *Osinger*, 753 F.3d at 953 (alteration in original) (quoting *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 498 (1949)); *see also, e.g.*, *United States v. Petrovic*, 701 F.3d 849, 855 (8th Cir. 2012) ("Because Petrovic's harassing and distressing communications were integral to his criminal conduct of extortion under § 875(d), the communications were not protected by the First Amendment."). In short, the trial court's finding that Defendant's past communications regarding Plaintiff were integral to his unlawful stalking campaign appears to have been well-founded.

Had the trial court tailored its final protective order to prohibit Defendant from continuing to engage in activities that were found to have contributed to his unlawful stalking of Plaintiff, this would be a very different case. For instance, in addition to prohibiting Defendant from contacting Plaintiff directly, the trial court could have ordered Defendant not to post: (1) comments about watching the plaintiff and being sexually aroused, as well as comments expressing Defendant's desire that Plaintiff would be 'gang banged, raped or shot,' or otherwise assaulted; (2) animations, models, or representations depicting Plaintiff in the nude, engaged in sexual activity, or being physically attacked; (3) fake dating profiles featuring Plaintiff; or (4) photographs of, representations of, or comments about, Plaintiff in a manner that purposely, knowingly, or recklessly causes Plaintiff to reasonably fear for her personal safety or the safety of an immediate family member. This list is not exhaustive, and a revised order could immediately be issued in this case to protect the Plaintiff.

Such an order would be appropriately drawn to focus on speech that has been found integral to unlawful conduct, and therefore unprotected by the First Amendment. *See Flood*, 125 N.E. 3d at 11129 ("[T]here was ample evidence in the record that respondent had engaged in stalking behavior, and respondent does not challenge those findings on appeal. Speech that includes threats of violence or intimidation that is connected to such unlawful behavior would not be constitutionally protected if it occurs in the future."); *cf. also Sindi*, 896 F.3d at 32 ("[A]n injunction against speech sometimes may pass constitutional testing if it follows an adjudication that the expression is unprotected, and the injunction itself is narrowly tailored to avoid censoring protected speech." (collecting cases)).

Even if such an order extends beyond the specific statements identified in the trial court's findings to encompass variations on the same themes, it should withstand any applicable degree of judicial scrutiny. "The purpose of the protection from stalking statute, and the underlying stalking statute, is to protect innocent citizens from threatening conduct that subjects them to a reasonable fear of physical harm." *State v. Smith*, 452 P.3d 389, 392 (Kan. Ct. App. 2019). This is a compelling governmental interest, and a final protection order prohibiting Defendant from continuing to communicate (in one form or another) messages that have already been found to constitute stalking is narrowly tailored to vindicate that interest.[2]

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[2] The government's interest is different, and less weighty, where the speech at issue is merely defamatory. The strong presumption is that money damages are sufficient remedy for defamation, and that equity will not enjoin a libel. *See, e.g.*, *Sindi*, 896 F.3d at 35 n.15 (citing *Metro. Opera Ass'n, v. Local 100, Hotel Emps. & Rest. Emps. Int'l Union*, 239 F.3d 172, 177 (2d Cir. 2001); *Organovo Holdings, Inc. v. Dimitrov*, 162 A.3d 102, 117 & n. 67, 119 (Del. Ch. 2017)). Thus, courts have looked skeptically on anti-libel injunctions, even as applied to statements that have been finally adjudicated to constitute defamation. *See id.* at 32–34. The threat of violence inherent in stalking, as well as the fear it generates in those

Here, however, the trial court's final protective order is much more expansive than its findings. It prohibits Defendant from posting Plaintiff's name or image anywhere on the Internet. This restriction is focused on expression and is in no way limited to speech that has been finally adjudicated to constitute speech integral to Defendant's unlawful stalking of Plaintiff. If Plaintiff were to run for public office, Defendant would be prohibited from discussing her candidacy on social media. If Plaintiff were to defame Defendant over social media, Defendant would be prohibited from mounting an effective response. If Plaintiff appears in a photograph, even if it was publicly posted by Plaintiff herself or plainly innocuous (such as a group picture involving mutual acquaintances), Defendant is prohibited from posting the photograph anywhere on the Internet—regardless of whether Plaintiff would be likely to see it or experience distress if she did.

Other courts have rejected similarly sweeping restrictions for insufficient tailoring. In *Bey*, for example, the Ohio Supreme Court held that a civil-stalking protection order prohibiting the respondent "from posting about Petitioners on any social media service, website, discussion board, or similar outlet or service" was an impermissible prior restraint because the court "fail[ed] to see how an order that prohibits Rasawehr from posting *anything* about appellees either protects them from certain mental distress or prohibits only distress-causing speech. To the contrary, it prohibits everything." 161 N.E.3d at 544; *accord Flood*, 125 N.E.3d at 11126, (holding that a "stalking no contact order" that prohibits respondent from writing anything at all about his pastor or any other member of his church congregation—whether flattering or unflattering, fact or opinion, innocuous or significant, and regardless of the medium of

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targeted for abuse, is more likely to cause irreparable harm and may therefore justify more aggressive judicial intervention.

communication—certainly would not be that rare case that survives strict scrutiny").

Instead, as the Michigan Court of Appeals held in *Buchanan*, courts entering protection orders that enjoin future postings on social media or other Internet forums must make "a finding that a prior posting violates the [anti-stalking] statute," and "then consider the nature of the postings that will be restricted to ensure that constitutionally protected speech," especially speech on matters of public concern, "will not be inhibited by enjoining an individual's online postings." 922 N.W.2d at 901–02. "If the court determines that constitutionally protected speech will not be inhibited, posting a message in violation of [a valid state anti-stalking statute] may be enjoined." *Id.*

Thus, the Michigan Court of Appeals vacated and remanded a personal protection order that prohibited the defendant from posting any messages about his former criminal defense attorney, including on the Internet, because the trial court "did not make findings that support the conclusion that [the defendant's] postings amounted to a violation" of the anti-stalking statute." *Id.* at 904. The court concluded that these findings were essential to any valid personal protection order "because whether [the defendant's] online speech may be enjoined as a constitutional matter depends, at least in part, on whether his speech was integral to criminal conduct that violated" the anti-stalking statute." *Id.*

The same analysis should apply here. Insofar as the final protective order restricts Defendant's speech *about* Plaintiff, it must be more closely drawn to the specific communications that have been finally adjudicated to constitute stalking.

CONCLUSION

For the foregoing reasons, *amici* respectfully submit that the provisions of the final protection order broadly restraining Defendant from

posting Plaintiff's name or images should be vacated and the case should be remanded for the court to issue a more narrowly tailored remedy. Such an order would properly reconcile the compelling anti-stalking interests underlying RSA 633:3-a with the First Amendment's strong presumption against content-based prior restraints on protected expression. Moreover, the Court should consider issuing the mandate with its final opinion, and with instructions that the trial court proceed quickly on remand to minimize the time between vacatur of the specific provisions of the order of protection and issuance of an appropriately tailored order on remand.

Respectfully Submitted,

American Civil Liberties Union of New Hampshire and American Civil Liberties Union,

By and through their attorneys,

/s/ Henry Klementowicz
Gilles R. Bissonnette (N.H. Bar. No. 265393)
Henry R. Klementowicz (N.H. Bar No. 21177)
AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE FOUNDATION
18 Low Avenue
Concord, NH 03301
Tel. 603.224.5591
gilles@aclu-nh.org
henry@aclu-nh.org

Brian Hauss, *pro hac vice* motion filed contemporaneously
Sandra S. Park, *pro hac vice* motion filed contemporaneously
Elizabeth Gyori, *pro hac vice* motion filed contemporaneously
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad Street, 18th Floor
New York, NY 10004

Tel. 212-549-2500
bhauss@aclu.org
spark@aclu.org
egyori@aclu.org

November 4, 2022

STATEMENT OF COMPLIANCE

Counsel hereby certifies that pursuant to New Hampshire Supreme Court Rule 26(7), this memorandum complies with New Hampshire Supreme Court Rule 26(2)-(4). Further, this memorandum complies with New Hampshire Supreme Court Rule 16(4)(b), which states that memoranda of law may not exceed 4,000 words. Counsel certifies that the memorandum contains 3,972 words (including footnotes).

/s/ Henry Klementowicz
Henry Klementowicz

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was filed by electronic mail to tgudas@courts.state.nh.us with the understanding that the Court will perform service.

/s/ Henry Klementowicz
Henry Klementowicz