THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2021-0551

Dan Hynes

v.

New Hampshire Democratic Party & a.

APPEAL PURSUANT TO NEW HAMPSHIRE SUPREME COURT RULE 7 FROM A JUDGMENT OF THE HILLSBOROUGH SUPERIOR COURT

APPELLEES' BRIEF

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Dated: June 15, 2022

Fifteen minutes of oral argument requested,
William E. Christie, Esq. to argue

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TEXT OF CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES OR REGULATIONS

First Amendment to the United States Constitution

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.

New Hampshire Superior Court Rule 12(g)(2)

(2) Moving Party's Statement of Material Facts.

(a) Content. Every motion for summary judgment or its supporting memorandum shall be accompanied by a separate statement of the material facts as to which the moving party contends there is no genuine issue to be tried, set forth in consecutively numbered paragraphs, with page, paragraph and line references to supporting pleadings, depositions, answers to interrogatories, responses to requests for admission, affidavits, or other evidentiary documents. Failure to include the foregoing statement shall constitute grounds for denial of the motion.

(b) Additional Service of Electronic Form of Statement of Material Facts to other Parties. At the time the motion and separate statement of material facts are filed with the court, the statement of material undisputed facts shall also be contemporaneously sent in electronic form by email to all parties against whom summary judgment is sought to facilitate the requirements of the following paragraph. The statement of material facts in electronic form shall be sent as an attachment to an email and shall be in a Microsoft Word document (or a document convertible to Word) unless the parties agree to use another word processing format. The requirement to separately email the statement of material facts to the opposing party does not alter the date or method

of service for filing motions, memoranda or statements of material undisputed facts with the court.

STATEMENT OF THE CASE

Appellant Dan Hynes ("Hynes") is a former member of the New Hampshire House of Representatives and in 2018 was the Republican nominee for New Hampshire State Senate District 9. After losing the election, Hynes filed a civil action against Appellees New Hampshire Democratic Party and its Chairman, Raymond Buckley (collectively, "NHDP"). The complaint alleged a campaign mail piece published by NHDP prior to the November 2018 election was defamatory and an invasion of privacy. Relying on the First Amendment, NHDP moved to dismiss the complaint in its entirety. The Superior Court (Brown, J.) granted the motion with the exception that it allowed a claim to proceed alleging the mail piece was defamatory because it stated that Hynes was "disbarred" when, in fact, he was "suspended" from the practice of law after a conviction for theft by extortion. APPI. 3-14.[1]

The parties exchanged written discovery; however, Hynes took no depositions. At the close of discovery, NHDP moved for summary judgment with supporting affidavits. The Superior Court (Anderson, J.) granted the motion holding that the statement complained of was substantially true and that Hynes failed to establish NHDP acted with actual malice when publishing the statement. APPI. 15-22.

Hynes moved for reconsideration and the motion was denied for the reasons stated in NHDP's objection and the Court's prior Order. APPI. 23.

This timely appeal followed.

[1] Appellant submitted Appendix, Volume I which will be cited as APPI and Appendix, Volume II which will be cited as APPII.

STATEMENT OF THE FACTS

I. Hynes Is a Public Figure

At the time of the publication that serves as the basis of the Complaint, Hynes was the Republican nominee for New Hampshire State Senate District 9. APPII. 96. Hynes was a member of the New Hampshire House of Representatives from 2017 to 2018 and was politically active, including being an area town chair in the Hillsborough County Republican Committee. APPII. 96-97. Hynes had an active media presence both before and during the state senate election. During the election, Hynes was active through the Facebook website on both his personal account and his Dan Hynes for State Senate account. His State Senate Committee spent over $40,000 during the election cycle which had media coverage due to a contested Republican primary in September 2018 and the November 2018 General Election. APPII. 97. Based upon this record, Hynes concedes he is a public figure. Id.

II. Hynes' Criminal Record and History of Bar Discipline

Hynes is an attorney admitted to practice law in the State of New Hampshire. APPII. 97. In 2009, Hynes was convicted of theft by extortion and, as a result of the conviction, he was suspended from the practice of law. APPII. 97-98. The criminal conviction was subsequently annulled. APPII. 98. Prior to the 2018 General Election, Hynes made the fact of his conviction known to the public as it was referenced in various media articles. Hynes' bar discipline resulting from the conviction was also made public during his prior campaigns for office. APPII. 98-99.

III. The Complained-Of Statement

Direct mail is a common method of communication by political candidates and parties. In primaries and general elections dozens of direct mail pieces are sent to prospective voters by both political parties. APPII. 99.

During the 2018 General Election campaign, NHDP contracted with Bridge Communications ("Bridge") to prepare mail pieces for certain state senate races, including Senate District 9. An NHDP staffer, Nick Taylor, supported Democratic State Senate candidates and communicated with Bridge with regard to preparing the mail piece. APPII. 99-100. NHDP approved the flier which was published to prospective voters in State Senate District 9. APPII. 100.

The front of the mail piece contains a mock booking photo and bold text: "THE WRONG KIND OF CONVICTIONS." It also contains additional text: "Dan Hynes targeted **woman-owned businesses for extortion**. Hynes was charged by Republican Attorney General Kelly Ayotte, convicted by the State of New Hampshire for **"theft by extortion" and disbarred.** APPII. 100, 165 (emphasis in original). The front of the mail piece contained designations for citations 1 and 2, listed below. APPII. 100, 165.

The back of the mail piece contains the statements "Hynes' Voting Record is No Better" and "Hynes' Partisan Agenda Targets Public Education, Healthcare and Family/Medical Leave." It also contains information regarding Hynes' voting record. It goes on to state: "Dan Hynes SHOULD NOT be a State Senator. On November 6, Vote NO on Dan Hynes." APPII. 101, 166.

The back of the mail piece contained the citations: "Check the facts: 1-http://www.nashusatelegrapah.com 8/24/14 2-https://caselawfindlaw.com/nh-supreme-court/1070939.html." APPII, 101, 166. Citation 1 (http://www.nashusatelegrapah.com) is a letter to the editor of the Nashua Telegraph from Republican State Senate candidate Dan Dwyer (Mr. Hynes' 2014 Republican primary opponent) discussing Hynes' criminal conviction and subsequent annulment and stating that Hynes was "suspended from practicing law for a period." APPII. 101, 166, 168-70. Citation 2 (https://caselawfindlaw.com/nh-supreme-court/10709939.html) is the New Hampshire Supreme Court case affirming Hynes' criminal conviction. APPII. 102, 166, 172-81.

IV. NHDP's and Buckley's Intent

NHDP did not publish the statement that Hynes has been "disbarred" with actual malice. Nor did NHDP intentionally publish a false statement that Hynes had been disbarred or act with reckless disregard whether the statement was true or false. APPII. 102 (citing Buckley Aff. at ¶¶ 9-11; Add. 47).[2] Prior to publication, NHDP knew from media reports in which Hynes was quoted that Hynes had been convicted of theft by extortion and disciplined by the New Hampshire Supreme Court. APPII. 102-03. NHDP provided information to Bridge who, in turn, prepared the mail piece which was published with the approval of NHDP with the belief that the statements therein were accurate and with the intent of informing voters that Hynes had been convicted of a crime and, as a consequence of the

[2] Hynes did not submit the Buckley Affidavit in his Appendix. NHDP attached it as an Addendum to this Brief.

conviction, subject to attorney discipline. APPII. 103 (citing Buckley Aff. at ¶¶ 7, 14-16). Add. 46-47.

V. The Complaint

On January 3, 2019, Hynes filed a five-count complaint against NHDP. Counts I, II, and III alleged the "theft by extortion" and "disbarred" statements stated claims for defamation and libel. Count IV alleged invasion of privacy on the theory that the photo on the mail piece was not an actual booking photo, was used without permission and inaccurately described Hynes' height and weight. In Count V and in support of the defamation claims, Hynes also alleged that disclosure of the criminal conviction, without mention of the subsequent annulment, was a violation of RSA 651:5 which he claimed contained a private right of action.[3] APPII 3-14.

SUMMARY OF THE ARGUMENT

Based upon the allegations in the complaint, the court correctly found that Hynes did not state a claim for defamation based upon NHHP's publication of a statement that he had been convicted of "theft by extortion." As explained by the court, the statement was substantially true notwithstanding the subsequent annulment of the conviction. The court was also correct that publication of a photograph of a candidate during a political campaign does not state a claim for invasion of privacy. Finally, the court correctly determined that RSA 651:5 did not provide Hynes with a private cause of action.

[3] On June 18, 2020, Hynes file an Amended Complaint adding an additional party. The amendments do not impact the issues on appeal.

In a second order, based upon an evidentiary record, the court correctly found that NHDP was entitled to summary judgment on a defamation claim premised on the statement that Hynes had been "disbarred." The court correctly found that this statement was substantially true, and that Hynes did not present clear and convincing evidence that NHDP published the statement with actual malice.

NHDP's statement constitutes political speech which is afforded the highest protection under the First Amendment. The judgment below should be affirmed.

ARGUMENT

I. Defamation

In New Hampshire, a "plaintiff proves defamation by showing that the defendant failed to exercise reasonable care in publishing a false and defamatory statement of fact about the plaintiff to a third party, assuming no valid privilege applies to the communication." Thomas v. Tel. Publ'g Co., 155 N.H. 314, 321 (2007) (quoting Pierson v. Hubbard, 147 N.H. 760, 763 (2002)). To state a claim for defamation, "the language complained of must be defamatory, that is, it must tend to lower the plaintiff in the esteem of any substantial and respectable group, even though it may be quite a small minority. The defamatory meaning must be one that could be ascribed to the words by hearers of common and reasonable understanding." Thomson v. Cash, 119 N.H. 371, 393 (1979) (internal citations and quotation marks omitted); see also Restatement (Second) of Torts § 558 (1977).

Although strictly private plaintiffs in defamation actions may proceed under a common-law negligence standard of proof, the First Amendment

"imposes a higher hurdle for public figures and requires them to prove actual malice." Thomas, 155 N.H. at 340 (quoting Pendleton v. City of Haverhill, 156 F.3d 57, 66 (1st Cir. 1988)); see also Gertz v. Robert Welch, Inc., 418 U.S. 323, 342-48 (1974); New York Times v. Sullivan, 376 U.S. 254, 283 (1964); Kassell v. Gannett Co., 875 F.2d 935, 938 (1st Cir. 1989); Bruno & Stillman, Inc. v. Globe Newspaper Co., 633 F.2d 583, 586-88 (1st Cir. 1980). Actual malice requires clear and convincing proof "that the false statement was made intentionally or with reckless disregard as to whether it was [true or] false." Howard v. Antilla, 294 F.3d 244, 249 (1st Cir. 2002) (citing Sullivan, 376 U.S. at 285-86).

Regardless of whether a plaintiff must satisfy a negligence or actual malice standard, truth is an absolute defense under the First Amendment. See Thomas, 155 N.H. at 335. "Truth may be asserted as a defense even when a statement is not perfectly accurate." G.D. v. Kenny, 15 A.3d 300, 310 (N.J. 2011); Thomas, 155 N.H. at 335 ("In the law of defamation, truth is defined as substantial truth, as it is not necessary that every detail be accurate"). The test is whether the "published statement taken as a whole, is substantially true." Daniel C. Pope, New Hampshire Civil Jury Instructions, § NS24.102 (Substantial Truth) (2016 ed.) (citing Masson v. New Yorker Magazine, 501 U.S. 496, 516 (1991) (The law "overlooks minor inaccuracies and concentrates upon substantial truth.")). The publication or statement "need not be true in every detail. Minor inaccuracies do not amount to falsity. If the 'gist' or 'sting' of the statement is true, then the defendant is not liable." Id. (citing Masson, 501 U.S. at 517).

When reviewing a defamation claim, "[t]he threshold question … is whether the published words are reasonably capable of conveying the defamatory meaning or innuendo ascribed to them by the plaintiff." Thomson, 119 N.H. at 374. "Whether a given statement can be read as being … an actionable statement of fact is itself a question of law to be determined by the trial court in the first instance, considering the context of the publication as a whole." Nash v. Keene Publ'g Corp., 127 N.H. 214, 219 (1985) (citing Pease v. Tel. Publ'g Co., 121 N.H. 62, 65 (1981); Morrissette v. Cowette, 122 N.H. 731, 733 (1982)).

II. The Defamation Claims Arising from the Statement That Hynes Was Convicted of "Theft by Extortion" and the False Light Claims Were Properly Dismissed

A. Standard of Review

"In reviewing the trial court's grant of a motion to dismiss, our standard of review is whether the allegations in the [non-moving party's] pleadings are reasonably susceptible of a construction that would permit recovery." Plaisted v. LaBrie, 165 N.H. 194, 195 (2013). "We assume that the [non-moving party's] pleadings are true and construe all reasonable inferences in the light most favorable to [them]." Id. "However, we need not assume the truth of statements in the [non-moving party's] pleadings that are merely conclusions of law." Cluff-Landry v. Roman Catholic Bishop of Manchester, 169 N.H. 670, 673 (2017). "We then engage in a threshold inquiry that tests the facts in the petition against the applicable law, and if the allegations constitute a basis for legal relief, we must hold that it was improper to grant the motion to dismiss." Plaisted, 165 N.H. at 195.

B. The Context of the Publication—Political Speech

As alleged in the Complaint, the context of the alleged defamation and false light was the political campaign for State Senate District 9. When considering the motion to dismiss, the Superior Court noted that the parties agreed on two core points of analysis: "(1) [Hynes] is a public figure for the purpose of this civil action and thus must prove that the statement was made with 'actual malice'; and (2) the flier was political speech." APPI. 3. "[S]peech on public issues occupies the highest rung of the hierarchy of First Amendment values, and is entitled to special protection." Porter v. City of Manchester, 151 N.H. 30, 51 (2004) (quoting Connick v. Myers, 461 U.S. 138, 145 (1983)).

"The right to speak freely on matters of public concern and the right to criticize a candidate for public office implicate core values protected by [the] federal and state constitutions." Kenny, 15 A.3d at 303 (citing Buckley v. Valeo, 424 U.S. 1, 14-15 (1976); Mills v. Alabama, 384 U.S. 214, 218-19 (1966)). "The right to free speech allows for an 'uninhibited, robust, and wide-open' discussion of public issues that 'may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials.'" Id. (quoting Sullivan, 376 U.S. at 270). "In particular, '[d]iscussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution.'" Id. (quoting Buckley, 424 U.S. at 14).

Political speech is afforded the highest protection even when the statements at issue may be rhetorical hyperbole, rhetorical sophistry, satirical or stretch the lines of substantial truth. Robert D. Sack, Sack on

Defamation: Libel, Slander and Related Problems § 4:3.1[B] (5th ed.) ("Courts have … been particularly assiduous in using protections given opinion by common and constitutional law as tools to shelter strong, even outrageous political speech. Courts have been willing to read political invective as part of the political process and therefore worthy of unusually strong protection. The result is also justified on the basis that the ordinary reader or listener will, in the context of a political debate, assume that vituperation in some form of political opinion neither demonstrably true or demonstrably false.").

"That erroneous statement is inevitable in free debate, and that it must be protected if the freedoms of expression are to have the 'breathing space' that they 'need … to survive'" is universally recognized in our political system. Sullivan, 376 U.S. at 271-72 (emphasis added) (quoting N.A.A.C.P. v. Button, 371 U.S. 415, 433 (1963)). "Part of our American heritage is the right of all citizens to express their views about politicians, officeholders, and umpires, frequently in highly unfavorable terms. Indeed, were we to conclude otherwise, millions of citizens and hundreds of political pundits would currently be committing libelous and slanderous acts on a daily basis." Dodds v. Am. Broad. Co., 145 F.3d 1053, 1068 (9th Cir. 1998). It is in this context—political speech regarding a public figure on a matter of public concern—that the claims must be viewed.

C. Theft by Extortion

Hynes alleged the statement that he was convicted of "theft by extortion" is false and defamatory because the 2009 conviction was annulled in 2014. APPII. 8 (Complaint at ¶ 23). He also claimed that disclosure of his criminal conviction, without mention of its subsequent

annulment, was a violation of RSA 651:5, which, he claims, contains a private right of action. Hynes is wrong as a matter of law as established by two New Hampshire Supreme Court decisions—Grafton County Attorney's Office v. Canner, 169 N.H. 319 (2016) and Lovejoy v. Lineham, 161 N.H. 483 (2011)—as well as G.D. v. Kenny, 15 A.3d 300 (N.J. 2011), a New Jersey case relied upon by this Court in Lovejoy and described below by the Superior Court as "directly on point." APPI. 8.

Hynes' contention that RSA 651:5 creates a private right of action is foreclosed by Lovejoy, a case arising out of the 2009 election for Rockingham County Sheriff. 161 N.H. at 484. There, the Portsmouth Herald published an article stating that Lovejoy, a candidate for Sheriff, was convicted of simple assault. The article published Lovejoy's response that the conviction was annulled. Id. at 484-85. Lovejoy sued the reporter, his opponent in the race, Rockingham County and employees who allegedly provided the record of the annulled conviction to the press for invasion of privacy. Id. at 485. This Court affirmed the dismissal of the complaint on several grounds.

First, this Court held that RSA 651:5 **does not** contain a private right of action. Id. at 486-87 ("the statute does not provide a civil remedy to the person whose record is disclosed"). The Court explained that RSA 651:5, X(a) provides that "the person whose record is annulled shall be treated in all respects as if he had never been arrested, convicted or sentenced; it does not enshroud the record itself with a cloak of secrecy." Id. at 487 (quotation and brackets omitted). Treating an annulled conviction as if it had never occurred is "conceptually impossible" and "contrary to the clear language of the statute which describes various circumstances in which the

annulled record can be used." Id. (quotations, brackets, and ellipses omitted); RSA 651:5, X(a), (c), XI(b) (identifying circumstances in which annulled records may be considered or disclosed). Therefore, the Court found that "an annulment under RSA 651:5 does not expressly turn the public event of a criminal conviction into a private, secret, or secluded fact." Lovejoy, 161 N.H. at 486. As noted below by the Superior Court, "[t]his was true even when disclosure of an annulled criminal conviction was a criminal offense, and should continue to be true now that the criminal sanctions have been repealed."[4] APPI. 7-8.

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[4] The Supreme Court noted that the version of RSA 651:5 in effect at the time of the publication imposed criminal liability on one who disclosed an annulled record. Lovejoy v. Linehan, 161 N.H. 483, 487 (2011). That provision, RSA 651:5, XII, was repealed in 2012 and, does not apply to the facts of this case. Nothing in the amendments to RSA 651:5 alter the Court's reasoning in Lovejoy. Indeed, the Supreme Court continues to favorably cite Lovejoy as good law. See Canner, 169 N.H. at 325-26. Nevertheless, Hynes claims that RSA 651:5, XVI—adopted in 2011—which contain provisions that a "journalist or reporter shall not be subject to civil or criminal penalties for publishing or broadcasting" certain facts relating to annulled convictions creates a private right of action. As discussed in the main text, the position is foreclosed by Lovejoy. Moreover, there are additional reasons that Hynes' argument is without merit.

First, when the legislature creates a private right of action as part of a statutory scheme, it knows how to do so in an express manner. See RSA 358-A:10 (affirmatively creating a private action for "damages" under consumer protection act). Second, NHDP is not a journalist or reporter and, therefore, the provision does not apply. Third, the legislature repealed the criminal penalties provision in 2012 leaving this provision a dead letter. Fourth, the provision as interpreted by Hynes is contrary to the First Amendment especially when the statement involves a matter of public concern. Lovejoy,161 N.H. at 488; Kenny, 15 A.3d at 315-16.

Second, this Court held that, because Lovejoy was a candidate for public office, he "not only opened himself up to the disclosure of otherwise private facts, **but also rendered his annulled assault conviction a matter of legitimate public concern**." Id. at 488 (quoting Lambert v. Belknap County Convention, 157 N.H. 375, 384 (2008) (emphasis added)). Thus, a prior conviction whether annulled or not is relevant to the qualifications for public office, may be published by a candidate's political opponents, and may be assessed by the public to determine fitness for office. Id. at 488-89.

More recently, in Canner, this Court found that the annulled records of a private citizen were not exempt from public disclosure under the Right to Know law. APPI. 8. The Court observed that "the purpose of an annulment is to limit the legal effect of a prior arrest rather than to conceal the fact that it occurred." Canner, 169. N.H. at 326 (citing Wolfgram v. N.H. Dep't of Safety, 169 N.H. 32, 38 (2016) ("[A]lthough annulment creates a legal fiction that a person has never been arrested, convicted, or sentenced, prior convictions remain a historical reality and can be considered in limited circumstances."). In support of its conclusion that RSA 651:5 does not erase past facts or exempt the fact of an annulled conviction from public discourse, the Canner Court expressly relied upon Kenny, stating "[w]e agree with the reasoning of the New Jersey Supreme Court." Canner, 169 N.H. at 326. The opinion quoted a lengthy section of Kenny emphasizing the similarities between New Jersey law and New Hampshire law regarding annulments:

> It is true that under [New Jersey's] expungement statute, as a matter of law, an expunged conviction is deemed not to have occurred … [b]ut the expungement statute does not transmute a once-true fact into a falsehood. It does not require the

> excision of records from the historical archives or newspapers or bound volumes of reported decisions or a personal diary. It cannot banish memories. It is not intended to create an Orwellian scheme whereby previously public information—long maintained in official records—now becomes beyond reach of public discourse …. Although our expungement statute generally permits a person whose record has been expunged to misrepresent his past, it does not alter the metaphysical truth of his past, nor does it impose a regime of silence on those who know the truth.

Id. (quoting Kenny, 15 A.3d at 315-16).

As held by the Superior Court, "Kenny is directly on point." APPI. 8. As in this matter, Kenny involved alleged defamatory statements contained in a flier published during a state senate campaign. 15 A.3d at 304-06. In 1993, G.D. was convicted of possession with intent to distribute cocaine and sentenced to a five-year prison term. Id. at 304-05. In 2000 and 2001, G.D. worked as a part-time aide to then Hudson County Freeholder Brian Stack. Id. at 305. In 2006, the Superior Court expunged any record of the 1993 conviction and any record of the arrest and charges. Id. Under New Jersey law, the result of the expungement order included several benefits including the "arrest … shall be deemed not to have occurred, and [that G.D.] may answer accordingly." Id.

In 2007, Brian Stack, G.D.'s former employer, ran in the Democratic primary for New Jersey State Senate. G.D. supported Stack but was not involved in the campaign. Id. Stack was opposed by a Democratic Organization that supported another candidate in the primary. Id. The Democratic Organization published two flyers attempting to discredit Stack for his association with G.D. Id. at 306. Among other things, the flyers

published photos of Stack and G.D. and stated G.D. was a "DRUG DEALER who went to JAIL for FIVE YEARS for selling coke near a public school." Id. (emphasis in original). G.D. sued alleging the statement was defamatory, in part, because his conviction had been expunged. Id.

The Supreme Court of New Jersey held that in the context of a political campaign, publication of the fact of a criminal conviction that was subsequently expunged could not set forth a claim for defamation:

> In light of common-law and constitutional principles protecting free speech, and with the expungement statute as a backdrop, we hold that the traditionally recognized defense of truth to a defamation action was not lost in this case because of the existence of an expungement order.

Id. at 314-15 (emphasis added) (citing Rzeznik v. Chief of Police of Southampton, 373 N.E.2d 1128, 1133 (Mass. 1978) ("There is nothing in the statute or the legislative history to suggest that, once the fact of a conviction is sealed, it becomes nonexistent, and hence untrue for the purposes of the common law of defamation"); Bahr v. Statesman Journal Co., 624 P.2d 664, 665-66 (Or. 1981) (Oregon newspaper not liable in defamation for publishing embezzlement conviction of a candidate for public office that had been expunged because newspaper "was entitled to rely upon the fact that a conviction did occur as a defense")).

While an expunged conviction is "deemed not to have occurred" as a matter of New Jersey law, id. at 315, the Court also held that, in the context of "truth" as an absolute defense to a defamation claim, the annulment "does not transmute a once-true fact into a falsehood." Id. at 315. This is especially true in the context of a political campaign:

> Significantly, in this case, the campaign flyers were intended to inform the electorate about the character of previous public-officeholder appointments made by a candidate for State Senate. We do not sit as screeners of the good taste of campaign literature. We understand that past offenders who have had their records expunged look forward to placing their mistakes behind them and having a new start in life, and that society benefits from their rehabilitation. Nevertheless, G.D.'s background and association with a candidate for public office became fodder for a political campaign.

Id. at 316.

The same holds true here. Like New Jersey, New Hampshire's annulment statute provides that a "person whose record is annulled shall be treated in all respects as if he or she had never been arrested, convicted or sentenced" in a legalistic sense. RSA 651:5, X(a). However, the statute "does not extinguish the truth." Kenny, 15 A.3d at 304. The annulment statute does not require newspapers to "excise from its archives a past story", courts to "razor from the bound volumes of its reporters a published case", or people to "banish from their memories stored knowledge." Kenny, 15 A.3d at 313. And with the internet, the "beneficial purposes of the [annulment] statute, and the protections it provides, will not allow a person to fully escape the past." Id.

Hynes, like G.D., was convicted of a serious crime that was subsequently annulled. During the course of a political campaign, a flier was distributed by a political adversary truthfully publishing the fact of the prior criminal conviction. Significantly, Hynes does not allege the statement that he "targeted woman-owned businesses for extortion" is defamatory and attached to the Complaint the New Hampshire Supreme

Court decision affirming his conviction, establishing that the conviction is an easily accessible matter of public record. In this case, Hynes was the actual candidate and not a former aid of the candidate as in Kenny, which provides greater justification to the publication of the prior conviction and its importance as a matter of public concern. Lovejoy, 161 N.H. at 488.

Hynes attempts to evade this inevitable outcome by lamely claiming that Kenny is not binding upon this court and that RSA 651:5 creates a private right of action in circumstances when the facts of a conviction are published without reference to the subsequent annulment. However, Hynes blindly omits that this Court has already favorably cited Kenney when interpreting the New Hampshire annulment statute and that in Lovejoy this Court previously determined there is no private right of action under RSA 651:5. APPI. 6-9. The judgment of the Superior Court dismissing the "theft by extortion" claims should be affirmed.

D. False Light

New Hampshire has not recognized a cause of action for false light invasion of privacy. Thomas, 155 N.H. at 340; APPI. 12. Lower courts have noted that, if recognized in New Hampshire, false light would likely follow the Restatement (Second) of Torts § 652E. See Wentworth-Douglass Hosp. v. Young & Novis Pro. Ass'n, No. 10-cv-120-SM, 2011 WL 446739, at *6 (D.N.H. Feb. 4, 2011). "One who gives publicity to a matter concerning another that places the other before the public in a false light is subject to liability to the other for invasion of his privacy, if: (a) the false light in which the other was placed would be highly offensive to a reasonable person, and (b) the actor had knowledge or acted in reckless

disregard as to the falsity of the publicized matter and the false light in which the other would be placed." Restatement (Second) of Torts § 652E.

For a false light claim to succeed, it is "essential … that the matter published concerning the plaintiff is not true." Restatement (Second) of Torts § 652E cmt. a (emphasis added); see also Hamberger v. Eastman, 106 N.H. 107, 110-11 (1964) (false light depends upon "publicity" and requires "falsity or fiction"). "Thus, only statements that are provable as false are actionable." Howard, 294 F.3d at 249 (internal citation and quotation marks omitted). For this reason, "[u]nfairness, improper tone, or unfounded implication or innuendo ... will no sooner support a recovery for false-light invasion of privacy than for defamation." Sack, §12:3.1[A] (5th ed.). And a public figure must satisfy the actual malice standard. Id.

The Complaint alleged invasion of privacy because NHDP "used a recent, unflattering image of [Hynes], made to look like an old booking photo, that cast him in a false light." APPI. 12. Hynes complained the image was false "because the photo was a recent image made to look like a booking photo from a crime committed nearly ten years ago." APPI. 13. Hynes also took "issue with the random numbers meant to look like booking numbers, the angle of his face, and the height and weight being listed inaccurately." Id.

The Superior Court agreed with NHDP that the gist or the sting of the statement was that Hynes was convicted of a crime, which was substantially true, and that the "publishing of an unflattering image of a candidate for public office during the course of a political campaign does not state a claim for invasion of privacy." APPI. 13 (collecting cases); see also Lovejoy, 161 N.H. at 488 ("The qualifications of a candidate for public

office is an area of legitimate concern to the public and, therefore, a candidate loses his or her privacy right to this information.").

On appeal, Hynes concedes he "would agree with that assessment if the image in question were real" but claims the analysis should be different when the image is allegedly fabricated or photo shopped. Brief at 11. Hynes does not develop this argument in a meaningful way and therefore it is waived. See United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (refusing to "abandon the settled appellate rule that issues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived"). In any event, the Superior Court was aware the photo was a digital creation, and its analysis was both correct and squarely within the protections afforded to political speech under the First Amendment. APPI. 13.

For these reasons, the Order granting the motion to dismiss the defamation claims to the extent the claims rely upon the publication of the fact of Hynes' prior conviction (Counts I-III), the false light claim (Count IV), and the claim arising under RSA 651:5 (Count V), APPI. 4-7, 12-14 should be affirmed.

III. The Court Properly Granted Summary Judgment Because the Statement Hynes Was "Disbarred" Is Substantially True and Because Hynes Did Not Present Clear and Convincing Evidence of Actual Malice

A. Standard of Review

"When reviewing a trial court's grant of summary judgment, we consider the affidavits and other evidence, and all inferences properly drawn from them, in the light most favorable to the non-moving party."

New London Hosp. Ass'n, Inc. v. Town of Newport, 174 N.H. 68, 68 (2021) (citing Dent v. Exeter Hosp., 155 N.H. 787, 791 (2007)). "If our review of the evidence does not reveal any genuine issue of material fact, and if the moving party is entitled to judgment as a matter of law, we will affirm the trial court's decision." Id. (citing Dent, 155 N.H. at 792). "An issue of fact is 'material' for purposes of summary judgment if it affects the outcome of the litigation under the applicable substantive law. Id. (quoting Dent, 155 N.H. at 792). "We review the trial court's application of the law to the facts de novo." Id. (citing Dent, 155 N.H. at 792). To the extent we are required to interpret applicable statutes, our review is de novo. Id. (citing ElderTrust of Fla. v. Town of Epsom, 154 N.H. 693, 696 (2007)).

B. Framing the Issue

The Superior Court denied NHDP's Motion to Dismiss Counts I-III to the extent the claims rely upon the statement that Hynes was "disbarred." APPI. 7-10. While NHDP respectfully disagrees with the determination that Hynes plead sufficient facts to allow discovery to proceed, this ruling is not challenged on appeal. Rather, the Summary Judgment Order, based upon a full evidentiary record, finding that the "disbarred" statement was substantially true, and that Hynes failed to present clear and convincing evidence of actual malice should be affirmed. APPI. 15-22.

C. The Statement was Substantially True

As discussed, supra at page 9, truth is an absolute defense under the First Amendment. "[T]ruth is defined as substantial truth, as it is not necessary that every detail be accurate." Thomas, 155 N.H. at 335.

When discussing whether the statement complained of was substantially true, the Court correctly framed the issue:

> In the instant case, the graphic design of the flyer and the concept of criminality—the mock booking photo coupled with the words 'convicted,' 'extortion,' 'charged,' and 'theft by extortion'—make it plain that the 'gist' or 'sting' of the flyer is Plaintiff's previous criminal history. The text regarding Plaintiff's criminal history comprises the majority of the substance on the front of the flyer, with 'disbarred' being the last word in the sentence and the only word that relates to Plaintiff's law license. The purpose of the flyer in its entirety is to notify potential voters of Plaintiff's previous criminal activity and that, *as a result of* such criminal activity, his law license was adversely affected. Further, it is not apparent that Plaintiff's reputation would have fared better if Defendants had used the word 'suspended' as opposed to 'disbarred,' as the reader's takeaway remains the same.

APPI. 18-19 (emphasis in original).

The summary judgment record fully supports this finding. The front of the mail piece contains the bold header "THE WRONG KIND OF CONVICTIONS" and the additional text: "Dan Hynes targeted **woman-owned businesses for extortion**. Hynes was charged by Republican Attorney General Kelly Ayotte, convicted by the State of New Hampshire for **"theft by extortion" and disbarred**." APPII. 100, 165. (capitals and emphasis in original). It also contains designations for citation 1 and 2. APPII. 100-01, 165.

The back of the mail piece states: "Hynes' Voting Record is No Better" and "Hynes' Partisan Agenda Targets Public Education, Healthcare and Family/Medical Leave" followed by three specific issues important to Democratic voters that Hynes voted against when he was a member of the New Hampshire House of Representatives (public school funding, Medicaid, and family and medical leave insurance). The mail piece

continues "Dan Hynes SHOULD NOT be a State Senator. On November 6, Vote NO on Dan Hynes." App. 101, 166. It also encourages voters to "Check the facts" and provides source information for the statements contained therein including designations for citations 1 and 2 from the front of the mail piece: 1-http://www/nashusatelegrapah.com 8/24/14 2-https://caselawfindlaw.com/nh-supreme-court/1070939.html." App. 101, 166. The cited Nashua Telegraph piece is a letter to the editor from Republican State Senate candidate Dan Dwyer (who ran against Hynes in the 2014 New Hampshire State Senate primary) discussing, in a highly aggressive manner, Hynes' character in light of his criminal conviction, subsequent annulment. and suspension from the practice of law. App. 101, 166, 167-70. The New Hampshire Supreme Court case cited is the opinion affirming Hynes' conviction. App. 102, 166, 172-82.

In its proper context, the "gist" or the "sting" of the mail piece is that Hynes was convicted of a crime and as a consequence of his criminal conviction, he was not permitted to practice law for a period of time. Furthermore, the mail piece does not state at the time of publication that Hynes was then currently disbarred or suspended or that he was practicing law without a license. Rather, the use of the word "was" denotes the past, and not present tense. See Merriam-Webster.com (Definition of "was" – "past tense first- and third-person singular of BE"). Other than the use of the word "disbarred" there is no allusion to Hynes as a lawyer or his legal practice. The focus is his politics, not his law practice. The mail piece links Hynes' **criminal conviction** and bar discipline with his **convictions** as a politician with the intent of informing voters that Hynes does not have

the character to hold public office and, if elected, will vote against issues important to Democratic voters.

Clearly, no reader would view the mail piece as an objective assessment of Hynes or his stance on political and policy issues. Nor are mailers like this unique. Dozens are sent to prospective voters by both political parties during a General Election. APPII 99. Within the context of this partisan mail piece, Hynes alleges one word—"disbarred"—is defamatory. However, the language of the entire mail piece, including the word "disbarred" falls within the "uninhibited, robust, and wide-open" discussion of public issues that "may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." Sullivan, 376 U.S. at 270; see also Milkovich v. Lorain Journal Co., 497 U.S. 1, 32 (1990) (Brennan, J., dissenting) (published statement that is "pointed, exaggerated, and heavily laden with emotional rhetoric and moral outrage" cannot be defamatory).

In this context, the word "disbarred" is, at the very least, substantially true. Thomas, 155 N.H at 335 ("literal truth of a statement is not required so long as the imputation is substantially true so as to justify the gist or sting of the remark").

Again, Kenny, discussed supra at pages 16-19, is directly on point and was cited by the Court when granting summary judgement. APPI. 19. There the flyers published photos of a state senate candidate and a staffer, G.D., that stated G.D was a "DRUG DEALER who went to JAIL for FIVE YEARS for selling coke near a public school." Kenny, 15 A.3d at 306. G.D. alleged this statement was defamatory because although he had been convicted of possession with intent to distribute, the offense did not involve

selling drugs near a school and he did not serve a full five years in prison. Id. at 317-18. The Court held that, even though the conviction was not for selling drugs near a school and the plaintiff did not serve five years in prison, the statement was not defamatory because "the campaign flyers were intended to inform the electorate about the character of previous public-officeholder appointments made by a candidate for State Senate" and courts "do not sit as screeners of the good taste of campaign literature." Id. at 309, 316. With that context as a guide, the Court found that even though the statement was "imprecise" it was substantially true because the "substance", "gist" and "sting" of the statement was the conviction of possession with intent to distribute. Id. at 317-18. Here the "gist" or "sting" of the statement focusing on Hynes' criminal conduct and bar discipline in the political context commands the same result.

Based upon precedent and the record in this case, the Superior Court correctly found "that the statement that [Hynes] was disbarred was substantially true in context." APPI. 19. The Court succinctly addressed Hynes' contention that NHDP intentionally used the word "disbarred" because it presented him in a more negative light than "suspended":

> While the Court acknowledges that the general public understands that disbarment is a more serious punishment than suspension, there is no evidence in this case to suggest that [Hynes] suffered a greater harm to his reputation as a result of the use of one word versus the other, particularly considering the context of the flyer as a whole.

APPI. 19.[5]

[5] Hynes attempts to dodge this finding by incorrectly claiming because he brought a claim for defamation *per se*, he can recover general damages for

Indeed, Hynes presented no admissible evidence in response to the Motion for Summary Judgment, let alone any evidence that his already poor reputation was lowered in the esteem of any substantial and respectable group. As a result, the Court's ultimate conclusion—"Because the 'gist' or 'sting' of the flyer is [Hynes'] criminal conduct and conviction, which had an adverse effect on his law license, the statement that Plaintiff was disbarred, while inaccurate, is substantially true"—must be affirmed. APPI. 19.

D. Hynes Failed to Present Clear and Convincing Evidence of Actual Malice

Hynes concedes he is a public figure. Public figures must prove that a false publication was made with actual malice. Thomas, 155 N.H. at 340. Actual malice requires clear and convincing proof "that the false statement was made intentionally or with reckless disregard as to whether it was [true or] false." Howard, 294 F.3d at 249 (citing Sullivan, 376 U.S. at 285-86). "[R]eckless conduct is not measured by whether a reasonably prudent man would have published, or would have investigated before publishing." St. Amant v. Thompson, 390 U.S. 727, 731 (1968). "There must be sufficient evidence to permit the conclusion that defendant in fact entertained serious

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harm to his reputation. Brief at 22. Here, Hynes confuses diminution reputation as an element of substantial truth with monetary damages that may be awarded if the claim is proven at trial. Obviously, the two are not one and the same. In support, Hynes claims prospective clients would not hire him if they believed he was disbarred. Brief at 23. Again, he cites no evidence for this conjecture. In any event, as found by the Superior Court, the context of the statement was not Hynes' profession as a lawyer; it was his criminal history in the context of a political campaign.

doubts as to the truth of his publication." Id. Stated differently, "[a]ctual malice … is measured neither by reasonably prudent conduct, nor an industry's professional standards; rather it is wholly subjective." Levesque v. Doocy, 560 F.3d 82, 90 (1st Cir. 2009) (citations omitted). "The focus of an inquiry under [Sullivan] is the actual state of the knowledge of the defendant at the time of publication." Robert D. Sack, Sack on Defamation: Libel, Slander, and Related Problems § 5:5.1[b] (5th ed). "Inquiry under the [Sullivan] standard has been said to concentrate on the defendant's attitude toward the truth rather than his or her attitude toward the plaintiff." Id. And "under [Sullivan] a statement must be judged entirely on the basis of what the publisher intended it to mean. The defendant, therefore, must be aware of the defamatory meaning alleged." Id.

As summarized by the Superior Court, in an attempt to prove falsity or reckless disregard, Hynes relied "solely" on the fact the flyer cited to a Nashua Telegraph article which used the word "suspended" rather than "disbarred." APPI. 20-21. Hynes' theory is that NHDP's reliance on the citation indicated it had access to accurate information—that Hynes was suspended—and still published a statement that Hynes had been disbarred. APPI. 21. This argument was easily dispatched:

> … this is far from the "convincing clarity" with which [Hynes] must make his showing of actual malice. [Hynes] put forth no evidence that Defendants seriously doubted the truth of the publication. To highlight the lack of evidence of Defendants' subjective intent or knowledge on this issue, Plaintiff conducted no depositions of Defendant Buckley or any other employee of the NHDP or Bridge Communications in connection with this case.

APPI. 21 (citations omitted).

This holding is fully supported by the record. In conformance with Superior Court Rule 12(g)(2), NHDP submitted Chairman Buckley's affidavit establishing NHDP level of knowledge and state of mind when publishing the mail piece. NHDP was aware of media and the New Hampshire Supreme Court case referencing Hynes' conviction and bar discipline. This information was forwarded by NHDP to Bridge who prepared the mail piece which, upon approval of NHDP, was sent to prospective voters in Senate District 9. APPII. 102-03. Chairman Buckley attested that NHDP did not publish the statement with actual malice. In support of this affirmation, he attested NHDP intended to inform voters that Hynes had been convicted of a crime and subject to attorney discipline as consequence of that conviction and that the use of the word "disbarred" was accurate given Hynes' criminal record and bar discipline. APPII. 103; Add. 46-47.

Notwithstanding the obligations imposed by RSA 491:8-a and Superior Court Rule 12(g)(3), Hynes merely offered blanket denials, not admissible evidence. In response to the attestations that NHDP did not act with actual malice, Mr. Hynes stated "DENIED. This is a question for the jury." APPII. 102. In response to Chairman Buckley's statement that NHDP intended to inform voters that Hynes had been convicted of a crime and subject to attorney discipline, Hynes stated: "DENIED. Defendant intended to inform voters that Hynes was disbarred. Plaintiff **believes** that word was used because it would have a worse effect on the mind of the voter than using the correct phrase of suspended" and cited

only to his own complaint as the evidentiary basis for his belief. APPII. 103 (emphasis added). Similarly, in response to Mr. Buckley's statement that NHDP believed use of the word "disbarred" was accurate due to Hynes' criminal conviction and bar discipline, Hynes again relied on the allegations in his Complaint, not evidence, repeating verbatim he "**believes**" disbarred was used because it would have a worse effect than suspended. APPII 103-04 (emphasis added). Because Hynes conducted no depositions, he submitted no testimony rebutting Chairman Buckley's Affidavit or the other evidence in the record. Left with no evidence, he relied upon his "beliefs" and his Complaint in response to NHDP's Statement of Material Facts. Therefore, the evidence submitted by NHDP was properly credited as accurate and demonstrated there was no clear and convincing evidence of actual malice.

As noted by the Superior Court, in a desperate attempt to find actual malice somewhere in the record, Hynes cited to an interrogatory answer by Bridge Communications claiming that a NHDP staffer, Nick Taylor, was the source of the information that Hynes was disbarred. Yet, "there is no indication of where Taylor had learned that information, or whether he was also the individual who provided the citation to the Nashua Telegraph article." APPI. 21. What is more as found by the Court below, the context of the communications between Taylor and Bridge supports the finding that Hynes failed to establish actual malice:

> … upon reviewing a draft of the flyer, Taylor stated in an email to Bridge Communications: "This looks great! Only edits are the date of the case was 8/5/09 and are those his actual height and weight?" … This correspondence indicates that Taylor inquired into the accuracy of some of the

> information contained in the flyer, namely, [Hynes'] height and weight. **He raised no similar questions regarding the status of [Hynes'] law license, indicating there was no serious doubt as to the truth of the assertion that [Hynes] had been disbarred**.

APPI. 21 (emphasis added).

This finding is fully consistent with First Amendment precedent including Schatz v. Republican State Leadership Comm., 669 F.3d 50 (1st Cir. 2012) which compels affirmance of the Order below. There, yet another losing state senate candidate sued political adversaries over "flyers, brochures, and radio and TV ads days before the election that conjured up imaginary wrongs that he had supposedly done as a selectman for the town of Blue Hill." Id. at 53. In Schatz, the mailer claimed the plaintiff, as a selectman, voted to cancel a $10,000 Fourth of July fireworks display and, conversely, voted for a $10,000 contribution to a political organization, suggesting the two votes were related. Id. In reality, town residents voted to contribute to the political organization, the plaintiff voted to fund the fireworks display, and the two votes were in no way connected. Id. at 56. Notwithstanding these inaccuracies in the campaign literature, the First Circuit affirmed the dismissal of the complaint finding that Schatz merely used "actual-malice" buzzwords and alleged no facts to establish the defendants "had serious doubts about [the statements'] truth and drove recklessly ahead anyway." Id. at 56, 58. At best, Schatz established "carelessness" and "gotcha politics," which was insufficient to state a claim because "carelessness 'is an indication of negligence, not actual malice.'" Id. at 58 (quoting Levesque, 560 F.3d at 91).

Hynes does not cite any contrary authority. Indeed, he does not cite a single case allowing a defamation claim to proceed in the context of a political campaign. Rather, Hynes continues to argue because he was suspended and not disbarred that he was defamed. The simplistic analysis overlooks NHDP's state of mind, at best presents a negligence standard and, in reality, a strict liability standard. Hynes also desperately attempts to identify a genuine dispute of material fact by citing to various discovery documents in the case. Hynes misapprehends this evidence and, as recognized by the Superior Court, it does not raise a dispute of material fact. Hynes attempts to seize on a minor underlying disagreement between NHDP and Bridge regarding which party first employed the word "disbarred" during the drafting process of the mail piece and cites to two emails from Taylor to Bridge using the word "disbarred". Brief at 15-16. This "evidence" proves nothing. NHDP has always acknowledged it was aware of media discussing Hynes' past, that some of this media was provided to Bridge and that NHDP approved and published the mailer. That is not the issue. Rather, the issue remains NHDP's state of mind in context of the publication. The Superior Court's finding that Hynes failed to establish any clear and convincing evidence thar NHDP acted with actual malice should be affirmed.

IV. An Order Denying a Motion to Dismiss Is Not Res Judicata/Collateral Estoppel

Finally, Hynes argues that, because the court denied the motion to dismiss on the "disbarred" claim, that the Order could not be litigated at summary judgment due to *collateral estoppel* and *res judicata*. Brief at 27-28. Hynes fails to understand the law. Although at the pleading stage the

Court determined Hynes stated a claim and allowed discovery to go forward, Hynes developed no evidence in support of that claim. Correctly applying the summary judgment standard, Judge Anderson determined that the "disbarred" statement was substantially true, and that Hynes failed to present evidence of actual malice.[6]

Hynes fails to appreciate that the actual malice analysis is focused on the actual state of the knowledge of the defendant at the time of publication. APPI. 19-22. As recognized by the Court, NHDP presented evidence that it believed the statement was accurate or substantially true and, in response, Hynes presented no contrary affidavit or admissible evidence and did not create a genuine issue of material fact. Indeed, at the hearing, Hynes stated "that he felt gathering such evidence would be 'fruitless'" and the Court correctly observed it may not consider evidence a plaintiff fails to bring forth. APPI. 22. Even a first-year law student knows Hynes does not get a jury trial merely because he survived a motion to dismiss. Under the glare of a full record, there was no evidence to support the claim and summary judgment was properly granted at that time.

CONCLUSION

In closing, the First Circuit's admonishment in Schatz holds true:

> Campaigning for public office sometimes has the feel of a contact sport, with candidates, political organizations, and others trading rhetorical jabs and sound-bite attacks in

[6] Although not determinative of the issue presently before the Court, the two cases cited in the motion to dismiss order are inapposite because neither involved partisan, hyperbolic political speech during a political campaign and were published from neutral fact finding and informational distribution sources, rather than through a partisan lens.

> hopes of landing a knockout blow at the polls. It is not for the thin-skinned or the faint-hearted, to use two apropos clichés. And because political speech is the life-breath of democracy, the First Amendment—applied to the states via the Fourteenth—bars public figures from recovering damages under state defamation laws unless they show that the defamer acted with "actual malice."
>
> …
>
> All this makes it quite obvious that defamation law does not require that combatants for public office act like war-time neutrals, treating everyone evenhandedly and always taking the high road. Quite the contrary. Provided that they do not act with actual malice, they can badmouth their opponents, hammering them with unfair and one-sided attacks—remember, speaking out on political issues, especially criticizing public officials and hopefuls for public office, is a core freedom protected by the First Amendment and probably presents "the strongest case" for applying "the [Sullivan] rule." And absent actual malice, more speech, not damages, is the right strike-back against superheated or false rhetoric.

669 F.3d at 52 (citations omitted).

There is no actual malice here. Hynes is a public figure who chose to enter elective politics notwithstanding a checkered past, including a criminal conviction and bar discipline. He cannot complain when that history was brought to light by his political opponents. Nor does the First Amendment allow him to control the political messaging of those opponents by filing vexing litigation and then failing to take discovery to attempt to prove his claim. Hynes did not present clear and convincing evidence of actual malice. In fact, as found by the Court, the statements that Hynes was convicted of "theft by extortion" and "disbarred" are substantially true. The Orders below should be affirmed.

Respectfully submitted,

NH Democratic Party
Raymond Buckley
By Their Attorneys:

SHAHEEN & GORDON, P.A.

Dated: June 15, 2022

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, I hereby certify that this brief complies with the word limitations as there are 9,280 words in this brief, exclusive of any pages containing the table of contents and table of citations.

/s/ William E. Christie
William E. Christie

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Brief is being served electronically upon Dan Hynes through the Court's electronic filing system, in compliance with Supreme Court Rule 16(3).

/s/ William E. Christie
William E. Christie

ADDENDUM

THE STATE OF NEW HAMPSHIRE

HILLSBOROUGH, SS. SUPERIOR COURT
NORTHERN DISTRICT

Dan Hynes
v.
New Hampshire Democratic Party, et al.
Case No.: 216-2019-CV-00010

AFFIDAVIT OF RAYMOND BUCKLEY

I, Raymond Buckley, declare as follows:

1. I am the Chairman of the New Hampshire Democratic Party. The following facts are based on my own personal knowledge and, if called as a witness, I could and would testify competently thereto.

2. Direct mail is a common method of communication by political candidates and political parties.

3. In primaries and general elections dozens of direct mail pieces are sent to prospective voters by both political parties.

4. During the 2018 General Election campaign, NHDP contracted with Bridge Communications to prepare mail pieces for certain state senate candidates, including the Senate District 9 race between Jeanne Dietsch and the Plaintiff, Dan Hynes.

5. In 2018, Nick Taylor was a NHDP staffer working on, among other things, supporting Democratic candidates for the New Hampshire State Senate.

6. Mr. Taylor communicated with Bridge Communications regarding the mail piece that is the subject matter of this lawsuit.

7. The mail piece was prepared by Bridge Communications.

8. The mail piece was approved by me in my role as Chairman of NHDP and the Executive Director of NHDP.

9. NHDP did not publish the statement that Mr. Hynes had been "disbarred" with actual malice.

10. NHDP did not intentionally publish a false statement that Mr. Hynes had been "disbarred."

11. NHDP did not publish that Mr. Hynes had been "disbarred" with reckless disregard as to whether it was true or false.

12. Prior to publication of the statement, NHDP knew that Mr. Hynes had been convicted of theft by extortion and disciplined by the New Hampshire Supreme Court.

13. Prior to publication of the statement, NHDP knew the fact of Mr. Hynes' conviction and bar discipline had been published in the media including articles in which Mr. Hynes was quoted.

14. NHDP, through Mr. Taylor, provided this information to Bridge Communications.

15. NHDP intended to inform voters that Mr. Hynes, a candidate for high political office, had been convicted of a crime and subject to attorney discipline.

16. NHDP believed that use of the word "disbarred" was true or substantially true given Mr. Hynes' criminal conviction and bar discipline.

Signed this 31st day of May 2021, under penalties of perjury.

Raymond Buckley

STATE OF NEW HAMPSHIRE
COUNTY OF HILLSBOROUGH

Before me on this 31st day of May 2021, appeared the above-subscribed Raymond Buckley and made oath that the statements contained herein are true and correct to the best of his knowledge, information and belief.

Justice of the Peace/~~Notary Public~~
My Commission Expires: 1/8/25

RYAN P. MAHONEY
Justice of the Peace - New Hampshire
My Commission Expires January 8, 2025