STATE OF NEW HAMPSHIRE

10TH CIRCUIT, SS

DISTRICT DIVISION
BRENTWOOD

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| ***State*** | Case Nos.: |
| *v.* | |
| ***Jason Gerhard*** | 435-2021-CR-00039 |
| ***William Domenico*** | 435-2021-CR-00041 |
| ***Robert Farinelli*** | 435-2021-CR-00042 |
| ***William Kelly*** | 435-2021-CR-00044 |
| ***Samantha Morse*** | 435-2021-CR-00045 |

**Motion for Judgment of Acquittal**

**Come Now** Jason Gerhard, William Domenico, Robert Farinelli, William Kelly, and Samantha Morse (hereafter, the "Defendants"), by and through the Law Offices of Martin & Hipple, PLLC, and state and move this honorable Court as follows:

**Facts**[1]

1. On December 22, 2020, the Town of Newfields, NH (the "Town") adopted an ordinance (the "Newfields Ordinance") which reads in relevant part: "*It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Newfields.*" The Newfields Ordinance sets the maximum penalty at $100 for each offense.
2. On December 28, 2020, officers made contact with several people who had arrived by vehicle at the cul-de-sac located at the end of Hemlock Court in Newfields (hereafter referenced simply as the "cul-de-sac").

[1] The following facts are intended to be a summary of the evidence presented at trial, and should not be construed as an admission by any Defendant as to any particular fact which has not previously been stipulated. The Defendants hold the State to its full burden.

3. Governor Chris Sununu's residence is located on one end of the cul-de-sac and is set back from the cul-de-sac and roadway. At least one witness estimated the cul-de-sac to be approximately 500 feet end to end. Hereafter, the "far end" of the cul-de-sac references the end of the cul-de-sac furthest from the Governor's residence.
4. At least one of the Defendants testified that previous demonstrations against Governor Sununu's COVID-related executive orders had taken place at the State House in Concord, NH, but that demonstrations moved once the Governor stopped conducting state business at the Capitol and began conducting his official duties out of his Newfields home.
5. A paved footpath, which is open to and used by members of the public, also runs adjacent to the Governor's residence, from the cul-de-sac to the area of the Newfields General Store.
6. When encountering the initial vehicle containing persons whom Trooper Dodes referred to as the "organizers" arriving at the cul-de-sac, officers present informed those individuals of the Newfields Ordinance and instructed them that they could not lawfully continue with their planned candlelight vigil, but could walk the length of the street provided that they did not "target" any particular residence.
7. There is no evidence on the record indicating that any of the above-named Defendants were present for this encounter or conversation. At least one of the Defendants testified that they were not present for this initial encounter.

8. Trooper Dodes, who testified on behalf of the State, indicated that this initial encounter in which several individuals participated in a conversation initiated by the officers, was the first of three instances during which – in the State's view – one or more persons "stopped" in front of the Governor's residence.
9. After receiving explicit permission to walk the length of the roadway on the caveat that they not "target" the Governor's house, the individuals present – who now included persons who had arrived after the initial instruction given by the officers – began to walk from the cul-de-sac down the length of Hemlock Court.
10. Individuals walked along Hemlock Court away from the cul-de-sac and, at some point, turned and retraced their steps back to where their vehicles were parked.[2]
11. Trooper Dodes indicated in his testimony that some individuals paused at the far end of the cul-de-sac, though later testimony as well as video submitted by the Defendants shows that any pause at that location was incredibly brief – momentary, even – and occurred in response to an officer's instruction for people to keep their voices down. Once this instruction was heard and politely acknowledged, the individuals present continued walking.
12. Trooper Dodes indicated in his testimony that this momentary acknowledgement of the officer's instruction was the second of three instances in which – in the State's view – one or more persons "stopped" in front of the Governor's house.

[2] As noted on the record, the walk away from and back towards the cul-de-sac was removed from and is not included in the video contained in Defendants' Exhibit A.

13. None of the State's witnesses indicated that any of the above-named defendants were present during this momentary pause at the far end of the cul-de-sac. However, the three Defendants who took the stand testified that they did not stop at that location at any point, and William Domenico is clearly seen in Defendant's Exhibit A continuing to walk without stopping during this brief exchange with the officer.
14. Having received explicit permission from the officers to walk up the paved footpath to the Country Store and back, several individuals began to make their way down the path.
15. As they walked, an individual called out to Frank Staples indicating that he should walk more slowly. While most of the individuals shown in Defendant's Exhibit A continued to walk, Mr. Staples briefly stopped and turned around to engage with the person speaking to him. Nearly immediately upon Mr. Staples turning to converse with the person addressing him, the officers instructed all persons present to stop walking.
16. Trooper Dodes testified that this was the last of the three instances in which – in the State's view – one or more persons "stopped" in front of the Governor's house.
17. There is no testimony on the record indicating that any of the above-named Defendants stopped at this point prior to the order to do so. Indeed, the three Defendants who testified all testified that they did not stop walking at any point on the footpath, and William Domenico is shown on video never to have stopped walking on the footpath prior to being ordered to do so.

18. Despite this, the Defendants were, each of them, cited for violating the Newfields Ordinance.

## Argument

### I. The Newfields Ordinance is Facially Unconstitutional.

The Newfields Ordinance reads in relevant part, "*It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Newfields.*" This ordinance is overbroad both facially and as-applied to these Defendants and is therefore in violation of the U.S. and New Hampshire Constitutions.

The locations at issue in the present case are traditional public fora. *See Frisby*, 487 U.S. at 480 ("we have repeatedly referred to public streets as the archetype of a traditional public forum"). "Our prior holdings make clear that a public street does not lose its status as a traditional public forum simply because it runs through a residential neighborhood." *Id.* Indeed, the Supreme Court has "expressly recognized that public streets and sidewalks in residential neighborhoods, were public fora." *Id.* citing *Carey v. Brown*, 447 U.S. 455 (1980). *See also Pursley v. Fayetteville*, 820 F.2d 951, 954 (8th Cir. 1987) (holding that "Streets, sidewalks, parks, and other similar public places are so historically associated with the exercise of First Amendment rights that access to them for the purpose of exercising such rights cannot constitutionally be denied broadly and absolutely. Public places historically associated with the free exercise of expressive activities, such as streets, sidewalks, and parks, are considered, without more, to be public forums.") (internal quotes and citations omitted).

"A time, place and manner restriction on expressive activity in a public forum may be sustained only if the restriction (1) is content-neutral, (2) serves a significant governmental interest, (3) is narrowly tailored to serve that interest, and (4) leaves open ample alternative channels of communication." *Pursley v. Fayetteville*, 820 F.2d 951, 955 (8th Cir. 1987). *See also Frisby*, 487 U.S. at 482 ("Accordingly, we turn to consider whether the ordinance is narrowly tailored to serve a significant government interest and whether it leaves open ample alternative channels of communication") (internal quotes, citations, and brackets omitted).

**1. The Defendants Do Not Dispute That the Newfields Ordinance is Content-Neutral.**

The first step of the analysis is to determine whether the Newfields Ordinance is content-neutral. *Frisby*, 487 U.S. at 481. The Defendants do not dispute that the Newfields Ordinance is content-neutral. *See, e.g., Frisby*, 487 U.S. at 482 (accepting the lower court's conclusion that the subject ordinance was content-neutral). *See also Pursley v. Fayetteville*, 820 F.2d 951, 956 (1987) (finding a similarly-worded ordinance to be content-neutral, despite finding that the ordinance was "prompted by the picketing of Dr. Harrison's home"). *See also Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1104 (1995) (holding that the restrictions were content-neutral because they sought "to regulate not plaintiffs' message, but rather the means by which plaintiffs seek to convey their message").

### 2. The Defendants Do Not Dispute That the Newfields Ordinance Serves a Significant Governmental Interest.

The second step of the analysis is to determine if the Newfields Ordinance serves a significant governmental interest. "Although the Supreme Court has held streets and sidewalks to be public forums, the Court has also recognized the importance of peace and privacy in the home." *Pursley*, 820 F.2d at 955 (Holding "a state or municipality may protect individual privacy by enacting reasonable time, place, and manner regulations applicable to all speech irrespective of content"). "The State's interest in protecting the wellbeing, tranquility, and privacy of the home is certainly of the highest order in a free and civilized society." *Vittitow v. City of Upper Arlington*, 43 F.3d 1100, 1104 (1995), citing *Frisby*, 487 U.S. at 484-85.

### 3. The Newfields Ordinance is Overbroad and is Not Narrowly-Tailored to any Legitimate Governmental Interest.

"Because First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Pursley*, 820 F.2d at 956, quoting *NAACP v. Button*, 371 U.S. 415 (1963). "When evaluating a content-neutral injunction ... we must ask instead whether the challenged provisions of the injunction burden no more speech than necessary to serve a significant government interest." *Vittitow*, 43 F.3d at 1104, citing *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2525 (1994).

In *Frisby*, the U.S. Supreme Court considered a facial challenge to an ordinance enacted by Brookfield, WI. following a series of events in which persons picketed outside the home of a doctor who performed abortions in neighboring towns. 487 U.S. at 476. In response, the Town enacted an ordinance very similar to the one at issue in this case, which

ordinance stated that: "It is unlawful for any person to engage in picketing before or about the residence or dwelling of any individual in the Town of Brookfield." 487 U.S. at 477.

In order to avoid constitutional difficulties, the Supreme Court narrowed the *Frisby* ordinance finding that, "the use of the singular form of the words 'residence' and 'dwelling' suggest that the ordinance is intended to prohibit only picketing focused on, and taking place in front of, a particular residence." *Frisby*, 487 U.S. at 482. Similarly, the *Frisby* Court adopted the plain meaning of the term picketing to mean "posting at a particular place." 487 U.S. at 482. The *Frisby* Court further made clear that its reading of the ordinance was a "narrow one" which only banned "focused picketing taking place solely in front of a particular residence" (emphasis added), but which would not prohibit "marching through residential neighborhoods, or even walking a route in front of an entire block of houses." 487 U.S. at 483. Having so narrowed the ordinance, the *Frisby* Court then held that an ordinance forbidding picketing[3] before a single residence was not facially unconstitutional. 482 U.S. at 488.

In *Pursley*, the City of Fayetteville, Arkansas, prompted by demonstrations taking place in front of the home of an abortion doctor, passed an ordinance stating that "It shall be unlawful for any person or persons to engage in demonstrations of any type or picketing before or about the residence or dwelling place of any individual...." 820 F.2d at 952. In ruling that this ordinance was overbroad and not narrowly-tailored, the United States Court of Appeals for the 8th Circuit held that, although the interest in protecting domestic tranquility was a significant and proper one, "The way the ordinance carries out this goal, however, is to completely ban picketing anywhere a home is located, be it a house

[3] Defined as "posting at a particular place." *Frisby*, 487 U.S. at 482.

surrounded by other houses, a townhouse surrounded by shops, or an apartment sharing space in a building with offices." *Pursley*, 820 F.2d at 956. The Court noted that the Fayetteville ordinance "would, under the guise of promoting domestic tranquility, prohibit any potentially annoying conduct involving expressive conduct, while at the same time allowing conduct completely unrelated to the First Amendment, yet equally annoying, to continue unabated." *Pursley*, 280 F.2d at 956. In striking down the Fayetteville ordinance as overbroad, the 8th Circuit noted that, "If the ordinance in this case were applied to a dwelling located in a mixed commercial and residential area, the ban would have negligible effect on the serenity of the neighborhood while impinging significantly on the First Amendment" and concluded that, "We remain convinced that less restrictive alternatives are available." *Pursley*, 820 F.2d at 957.

It is important to note that the *Pursley* Court specifically acknowledged that the facts of that particular case more closely dovetailed with the governmental interest at issue – as those facts did not involve, for instance, the serenity of a neighborhood with mixed commercial and residential purposes; despite this, the *Pursley* Court reminded us that, "Although a statute may be neither vague, overbroad, nor otherwise invalid as applied to the conduct charged against a particular defendant, he is permitted to raise its vagueness or unconstitutional overbreadth as applied to others. And if the law is found deficient in one of these respects, it may not be applied to him either, until and unless a satisfactory limiting construction is placed on the statute." 820 F.2d at 957.

In *Vittitow*, the plaintiffs began a picketing campaign targeting a doctor who performed abortions. 43 F.3d at 1101. Similar to the present case, the doctor's house was situated "on a cul-de-sac that is approximately 465 feet from one end to the other. There

are only a few other houses on the same cul-de-sac." *Id.* Due to complaints regarding these demonstrations, the City of Upper Arlington codified an ordinance which stated in relevant part: "No person shall engage in picketing before or about the residence or dwelling of any individual in this City." *Id.* "Although the group, which numbered roughly 20, traversed the entire cul-de-sac, they paid particular attention to the area in front of [the doctor's] house." *Id.* A detective for the City testified that, "once they got to the front of [the doctor's] house, the line appeared to compress to some degree." *Id.* The detective added: "They slowed to a very slow pace in front of [the doctor's] home, but, however, I wouldn't describe it as having stopped." *Id.* (internal brackets omitted).

The lower court in *Vittitow* ordered that the City may not prevent the demonstrators from picketing in any particular residential neighborhood, street, or cul-de-sac, but that the City may properly prevent the demonstrators from picketing in front of the doctor's home and the two homes on either side of the doctors home. *Id.* at 1103. In doing so, the *Vittitow* Court held that "any linear extension [of a picketing ban] beyond the area solely in front of a particular residence is at best suspect, if not prohibited outright." *Id.* at 1105, citing *Madsen v. Women's Health Center, Inc.*, 114 S. Ct. 2516, 2530 (1994) (which held as unconstitutional a ban on picketing within 300 feet of a residence). The *Vittitow* Court therefore remanded with instructions to enter a permanent injunction barring enforcement of the ordinance as written. 43 F.3d at 1107.

Considering *Frisby* and its progeny, it is clear that the Newfields Ordinance is overbroad. Indeed, when the *Frisby* Court narrowed the ordinance in that case, it specifically noted that there could be situations which would weaken an argument that a picketing ban was indeed narrowly-tailored towards the goal of residential privacy:

"Particular hypothetical applications of the ordinance – to, for example, a particular resident's use of his or her home as a place of business or public meeting, or to picketing present at a particular home by invitation of the resident – may present somewhat different questions." *Frisby*, 487 U.S. at 488. Here, unlike in *Frisby*, the alleged "target" of the demonstration was a public official conducting official business from his home. Indeed, the focus of the *Frisby* decision was to protect those from speech who were presumptively unwilling to receive it. 487 U.S. at 488. But whether or not the target is willing to receive speech is much less important if they are a public official, an ostensible representative of the people. *See also Gregory v. Chicago*, 394 U.S. 111 (1969) (holding that desegregation activists' march from City Hall to the mayor's residence followed by a demonstration in front of the mayor's residence was protected 1st Amendment activity).

The reasoning applied by the *Pursley* Court applies squarely to this case. Just like in *Pursely*, the way that the Town of Newfields proposes to protect domestic tranquility both burdens and/or bans speech that is not disruptive, while at the same time failing to address non-expressive activities that are more disruptive. Just like in *Pursley*, "If the ordinance in this case were applied to a dwelling located in a mixed commercial and residential area, the ban would have negligible effect on the serenity of the neighborhood while impinging significantly on the First Amendment." 820 F.2d at 957. This is the definition of an overbroad enactment, and the Defendants argue that, just as the *Pursley* Court found, regardless of how the Town proposes to enforce the Newfields Ordinance, "less restrictive alternatives are available." *Id.*

The *Vittitow* Court noted back in 1995 that the *Frisby* ordinance was not a model to be copied: "The City enacted this ordinance long after the decision in *Frisby* was issued and should have been well aware of the pitfalls in attempting to enforce an ordinance worded this broadly. Common sense would dictate that the City build on what could be learned from *Frisby* and not adopt wording so questionable that a federal district judge, a divided Seventh Circuit Court of Appeals, and four Supreme Court Justices found it to be overbroad." 43 F.3d at 1106. "Thus, Upper Arlington's ordinance, in spite of the fact it was *identical* to Brookfield's, was found to be unconstitutional *as written*." *City of Seven Hills v. Aryan Nations*, 1995 Ohio App. LEXIS 575 (1995) (emphasis in original). The same analysis applies with equal force to the identically-worded ordinance in the present case, especially since there are cases which have upheld better-tailored ordinances. *See, e.g., Douglas v. Brownell*, 88 F.3d 1511 (8th Cir. 1996).

Further, even if the *Frisby* ordinance were a model to be copied, the Town's attempts to expand the *Frisby* holding beyond static demonstrations taking place solely in front of a particular residence is suspect if not outright unconstitutional.

**4. The Newfields Ordinance Fails to Leave Open and/or Provide Adequate Alternative Channels of Communication.**

In *Frisby*, the Supreme Court found that its *narrowed* reading of the ordinance meant that there were ample alternative means available for speech, finding specifically that "They may enter such neighborhoods, alone or in groups, even marching...." 487 U.S. at 484. However, given the State's overbroad view of what constitutes violation of the Newfields Ordinance, marching in a residential neighborhood is not available to these Defendants, as they will apparently be cited even if it is undisputed that they continued marching without stopping, merely because other proximate persons happen to have momentarily paused.

## II. The Newfields Ordinance is Unconstitutional as Applied to the Defendants.

In *Vittitow*, the Court noted that, generally, if a statute or ordinance can survive a facial challenge, then as-applied challenges are heard on a case-by-case basis. However, the *Vittitow* Court noted while it had "no quarrel with this principle in the abstract, ... here, the court was faced with a videotape and testimony demonstrating how the City did enforce the ordinance. The record made in the district court indicates the City was enforcing this ordinance in a manner contrary to the teachings of *Madsen* [which struck down a prohibition on picketing within 300 feet of a residence]." *Vittitow*, 43 F.3d at 1106. This is a similar situation.

Here, like in *Vittitow*, the Court has received video evidence, as well as testimony from the State's own witnesses, that it has enforced the Newfields Ordinance against the Defendants in such a way that is in violation of Constitutional strictures. Indeed, the State's own closing argument – which focused on whether individuals had "targeted" the Governor's home, despite this being neither what the Newfields Ordinance prohibits nor what the U.S. Constitution allows – makes clear that the Town is enforcing and has already enforced the Newfields Ordinance in a way that runs afoul of *Frisby* and its progeny.

It is likely no coincidence that the applicable section of the Newfields Ordinance is word-for-word identical to the *Frisby* ordinance. But if the State intends to rely on *Frisby* and its progeny for the proposition that the Newfields Ordinance is constitutional, this argument is belied by the Town's clear failure to follow the holdings of *Frisby* and its progeny in its dealings with the Defendants. Indeed, the State's closing argument regarding "targeting" of the Governor's residence is directly rebuffed by the *Vittitow* Court.

Just like in this case, The *Vittitow* Court noted that "the City's police view the ordinance as violated when they can discern one residence as being the target of picketing. In our view, that is a misreading of *Frisby*. All picketing of this nature will have a target, otherwise it is not really picketing. *Frisby* could not be more clear: 'Only focused picketing *taking place solely in front of a particular residence* is prohibited'" (emphasis in original). 43 F.3d at 1106-7, citing *Frisby*, 487 U.S. at 483. Going further, the *Vittitow* Court noted that "any linear extension [of a picketing ban] beyond the area solely in front of a particular residence is at best suspect, if not prohibited outright." 43 F.3d at 1105. *See also City of Prairie Village v. Hogan*, 253 Kan. 423, 430 (1993) (holding that a person who carried an anti-abortion sign across the street from a church and who walked back and forth between the two intersections that sandwiched the church did not violate an ordinance banning picketing "before or about ... any church in the city" because his conduct did not take place "solely" in front of the church).

*Frisby* made clear and *Vittitow* reiterated that the holding in *Frisby* banned only picketing – which is "posting at a particular place" as opposed to marching or other such activity[4] – taking place solely in front of a particular residence. *Frisby*, 487 U.S. at 483. *See also Vittitow*, 43 F.3d at 1105. Despite this, the Town still attempts to prosecute the defendants for having done none of these things.

There are other Constitutional issues with how the Town chose to enforce its Ordinance. For instance, Trooper Dodes testified that the second of the three supposed "stops" was the momentary pause at the far end of the cul-de-sac. Testimony at trial indicated that the far end of the cul-de-sac was about 500 feet end to end. Despite this, the

[4] *Frisby*, 487 U.S. at 482.

State and its agents appear to believe the Newfields Ordinance empowers them to punish such activity, despite *Frisby's* progeny clearly stating this is not permissible. *See Madsen v. Women's Health Ctr.*, 512 U.S. 753, 775 (1994) (holding that banning expressive conduct within 300 feet of a residence was "much larger than the zone provided for in the ordinance which we approved in *Frisby*").

The State in the present case at bar is therefore in a catch-22 situation: on one hand, it may accept the *Frisby* Court's narrowing of the ordinance but in so doing must accept that all the above-named Defendants are not guilty, as their actions clearly did not take place solely in front of a single residence, nor were any of them "posted at a particular place." On the other hand, the State may take the position that the above-named Defendants' conduct did fall within the Newfields Ordinance's prohibitions, in which case the Newfields Ordinance is overbroad.

As the Newfields Ordinance is not only facially overbroad but has also been used to prosecute the Defendants in such a way that is in clear violation of *Frisby* and its progeny, the Court should find the Newfields Ordinance unconstitutional and enter judgments of acquittal for each of the Defendants.

## Prayer for Relief

WHEREFORE, the Defendants request this honorable Court to order the following relief:

A. Find the Newfields Ordinance facially overbroad; and

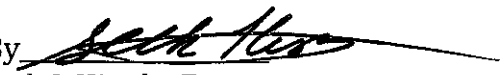
B. Find the Newfields Ordinance overbroad as-applied to the Defendants in this case; and

C. Enter a judgment of acquittal for each of the Defendants; and/or

D. Grant any other relief this honorable Court deems just and proper.

Respectfully submitted,
Jason Gerhard,
William Domenico,
Robert Farinelli,
William Kelly, and
Samantha Morse

**November 17, 2021**

By 

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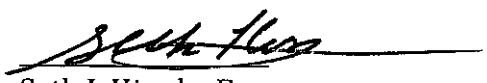
## Certificate of Service

Attorney Hipple certifies that on the above date a copy of this Motion was sent via US Mail to Attorney Michael DiCroce, 65 Main Street, Newfields NH 03856 and via email to <mfdicroce@comcast.net>.



Seth J. Hipple, Esq.