THE STATE OF NEW HAMPSHIRE
SUPREME COURT

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SUPREME COURT

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No. 2018-0031

State of New Hampshire

v.

Edward G. Proctor

Appeal Pursuant to Rule 7 from Judgment
of the Rockingham County Superior Court

BRIEF FOR THE DEFENDANT

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TEXT OF RELEVANT AUTHORITY

632-A:10. Prohibition from Child Care Service of Persons Convicted of Certain Offenses.

> I. A person is guilty of a class A felony if, having been convicted in this or any other jurisdiction of any felonious offense involving child pornography, or of a felonious physical assault on a minor, or of any sexual assault, he knowingly undertakes employment or volunteer service involving the care, instruction or guidance of minor children, including, but not limited to, service as a teacher, a coach, or worker of any type in child athletics, a day care worker, a boy or girl scout master or leader or worker, a summer camp counselor or worker of any type, a guidance counselor, or a school administrator of any type.
>
> II. A person is guilty of a class B felony if, having been convicted in this or any other jurisdiction of any of the offenses specified in paragraph I of this section, he knowingly fails to provide information of such conviction when applying or volunteering for service or employment of any type involving the care, instruction, or guidance of minor children, including, but not limited to, the types of services set forth in paragraph I.
>
> III. A person is guilty of a class B felony if, having been convicted in this or any other jurisdiction of any of the offenses specified in paragraph I of this section, he knowingly fails to provide information of such conviction when making application for initial teacher certification in this state.

QUESTIONS PRESENTED

1. Whether the evidence was sufficient to prove that Proctor undertook employment involving the care, instruction or guidance of a child.

Issue preserved by Proctor's pretrial motion to dismiss, A22*, the State's objection, A42, the parties' arguments, H 2–31, and the court's ruling, A1, and by Proctor's objection to the court's jury instruction, T 76–79, 83, and the court's ruling, T 82. If this issue is not preserved, this Court should waive the preservation requirement because raising it would have been futile given the court's ruling denying the motion to dismiss and its jury instruction. If this Court does not waive the preservation requirement, the issue is raised as plain error.

2. Whether the court erred by instructing the jury that RSA 632-A:10 prohibits a person with a qualifying conviction from hiring a minor and "supervisi[ng]" or "manag[ing]" the minor.

Issue preserved by Proctor's objection to the jury instruction, T 76–79, 83, and the court's ruling, T 82.

3. Whether, if interpreted to include Proctor's conduct, RSA 632-A:10 is unconstitutionally vague.

Issue preserved by Proctor's pretrial motion to dismiss, A22, the State's objection, A42, the parties' arguments, H 2–31, and the court's ruling, A1.

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* Citations to the record are as follows:
"A" refers to the appendix attached to this brief;
"H" refers to the hearing on Proctor's motion to dismiss, held on May 9, 2017;
"T" refers to trial, held on October 31, 2017.

STATEMENT OF THE CASE

In September 2016, the State obtained from a Rockingham County grand jury an indictment charging Edward Proctor with prohibited child care services. A20. At the conclusion of a one-day trial on October 31, 2017, the jury found Proctor guilty. A20; T 109. On December 15, 2017, the court (Delker, J.) sentenced Proctor to five to ten years at the New Hampshire State Prison, with two years of the minimum and four years of the maximum suspended for ten years from release. A68.

STATEMENT OF THE FACTS

In early 2016, Edward Proctor was a small-business owner living in Deerfield. T 30, 58, 61–64, 73. His business provided snow-blowing, yard work and handyman services. T 30–32, 34, 37–38, 61–62. Proctor had owned the business for years. T 62.

Proctor had been convicted of a sexual assault, which required him to register under RSA 651-B, and was also on parole. T 43–46, 55–59, 66–67. As part of both registration and parole, Proctor signed or initialed forms that said:

> I cannot undertake employment or volunteer service involving the care, instruction or guidance of minor children, including, but not limited to, service as a teacher, a coach, or worker of any type in child athletics, a day care worker, a boy or girl scout master or leader or worker, a summer camp counselor or worker of any type, a guidance counselor, or a school administrator of any type.

T 45, 60. Additionally, as a condition of parole, Proctor was not allowed "any unsupervised contact with minors." T 59.

Hayden Bergeron lived in Hooksett with his parents. T 29, 36. In February 2016, Bergeron was a few months away from his sixteenth birthday and wanted a job so he could save money to buy a car. T 30, 34, 36. Bergeron's parents knew Proctor through their neighbors, for whom Proctor provided snow-blowing services. T 30, 32, 37, 39. Proctor spoke to Bergeron's parents about offering Bergeron a job. T 34. Proctor initially paid Bergeron to snow-blow the neighbor's driveway, so that Proctor wouldn't have to travel to Hooksett every time it snowed. T 30, 37.

On two or three weekends in May 2016, Proctor paid Bergeron to do yard work for his business. T 31, 34, 37–38. Proctor picked Bergeron up at his house and brought him to job sites in Northwood and Manchester. T 32, 38, 73. At Proctor's instruction, Bergeron filled potholes, pulled weeds and laid down bark mulch. T 32. Bergeron went to Proctor's house once, while returning from the second job. T 73.

At the end of May 2016, Bergeron's mother typed Proctor's name into the sex offender registry and Proctor's picture appeared. T 40. Bergeron did not work for Proctor again. T 33, 40–41. He ultimately purchased a car. T 34.

SUMMARY OF THE ARGUMENT

1. RSA 632-A:10, in relevant part, prohibits an individual with a qualifying conviction from undertaking employment involving the care, instruction or guidance of children. Thus, the statute prohibits accepting certain types of employment; it does not prohibit providing employment. Here, Proctor did not accept employment; he provided it. Additionally, the examples set forth in the statute show that it only prohibits activity that inherently involves children. Proctor's yard-care business did not inherently involve children. Thus, the evidence was legally insufficient to prove his guilt.

2. A court may not add words to a statute that the legislature did not see fit to include. Here, the court instructed the jury that RSA 632-A:10 prohibits "enter[ing] into an employment relationship with a minor child in which the person [i]s responsible for the supervision or management of a minor." The phrases "enter[ing] into an employment relationship" and "responsible for the supervision or management" do not appear in the statute. Thus, the instruction erroneously expanded the definition of the crime.

3. It is the role of the legislature to define what conduct is prohibited. Thus, to comply with the Federal Constitution, a criminal statute must give ordinary people fair notice of what conduct it prohibits and must not authorize arbitrary enforcement. Here, the court's construction of RSA 632-A:10 would not have been apparent to ordinary people, and it authorizes arbitrary enforcement. The statute, as construed, is unconstitutionally vague, both facially and as applied.

I. THE EVIDENCE WAS INSUFFICIENT TO PROVE THAT PROCTOR UNDERTOOK EMPLOYMENT INVOLVING THE CARE, INSTRUCTION OR GUIDANCE OF A CHILD.

Prior to trial, Proctor filed a motion to dismiss the indictment, arguing that RSA 632-A:10 was facially invalid because it infringed on his constitutional right to travel, was impermissibly vague and overbroad, and violated equal protection and the Privileges and Immunities Clause. A22. The State objected. A42. At the hearing on the motion, the court recognized that Proctor's constitutional challenges required it first to interpret the statute. H 17 ("I'm not sure whether it's a vagueness issue or just a straight up is the conduct covered by the statute."). In its order denying Proctor's motion, the court again recognized that it "must first determine the statute's meaning." A3.

The court interpreted "employment" as "encompass[ing] situations where the person either engages in the work themselves, or employs someone for the same purpose." A6. It interpreted "care, instruction or guidance" as "envision[ing] a person of authority or . . . supervisory power," and including "supervision, management," "responsibility for or attention to safety or well-being," "giv[ing] an order or command," and "direction" or "leading." A6. Thus, the court held, the statute prohibits anyone with a qualifying conviction from "entering into an employment relationship with a minor." A7.

At trial, the court instructed the jury that a person with a qualifying conviction violates the statute if he "directly enter[s] into an employment relationship with a minor child in which [he] [i]s responsible for the supervision or management of the minor." T 104. Proctor objected to this instruction,

T 76–79, 83, but the court, referring to its order denying Proctor's pretrial motion to dismiss, reiterated its view that "[']undertook employment['] includes . . . the hiring of minors." T 82.

This Court's preservation rule is not a hyper-technical requirement. It is instead "based on common sense and judicial economy." Halifax-Am. Energy Co., LLC v. Provider Power, LLC, 170 N.H. 569, 574 (2018). Its purpose is to ensure that trial courts "have an opportunity to rule on issues and to correct errors before they are presented to the appellate court." Id.

Proctor's sufficiency challenge is preserved. Every sufficiency challenge requires a comparison of (a) the statute's elements and (b) the facts shown at trial, viewing the evidence in the light most favorable to the State. In most sufficiency challenges, the law is clear; it is the facts that are in dispute. Here, however, the facts are clear; it is the meaning of the statute that is in dispute. Although Proctor did not formally challenge the sufficiency of the evidence below by moving for dismissal, a directed verdict or judgment notwithstanding the verdict, he did present his proposed statutory interpretation in his pretrial motion to dismiss and in his objections to the court's jury instructions. Because the sufficiency challenge turns entirely on an issue of statutory interpretation, and because Proctor presented his statutory interpretation to the trial court, the sufficiency challenge is preserved.

Even if this Court finds that the sufficiency challenge is not preserved, it should waive its preservation requirement because it would have been futile for Proctor to formally challenge sufficiency below. See State v. Wilson, 169 N.H.

755, 769–70 (2017) (this Court has discretion to waive preservation obligation if it would have been futile for the appellant to raise the issue below); Ohio v. Roberts, 448 U.S. 56, 74 (1980) ("The law does not require . . . a futile act."). Both in its denial of Proctor's motion to dismiss and in its instructions to the jury, the court clearly adopted the view that the statute prohibits a person with a qualifying conviction from employing — and subsequently supervising or managing — a minor, and it clearly rejected Proctor's arguments to the contrary. Thus, it would have been futile for Proctor to relitigate that statutory-interpretation issue in a formal sufficiency challenge.

Evidence is insufficient if "no rational trier of fact, viewing all of the evidence and all reasonable inferences from it in the light most favorable to the State, could have found guilt beyond a reasonable doubt." State v. Stanin, ___ N.H. ___ (Mar. 30, 2018). Sufficiency of the evidence is reviewed de novo. Id.

In matters of statutory interpretation, this Court is "the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole." In re Search Warrant for 1832 Candia Rd., Manchester, ___ N.H. ___ (June 8, 2018). It "first look[s] to the language of the statute itself, and, if possible, construe[s] that language according to its plain and ordinary meaning." Id. It "interpret[s] legislative intent from the statute as written and will not consider what the legislature might have said or add language that the legislature did not see fit to include." Id. It "will not interpret statutory language in a literal manner when such a reading would lead to an absurd

result." State v. Serpa, ___ N.H. ___ (May 24, 2018). It "construe[s] the Criminal Code according to the fair import of its terms and to promote justice." In re Search Warrant, ___ N.H. at ___. Although it considers the statute's purpose, it does not "simplistically . . . assume that whatever furthers the statute's primary objective must be the law." State v. Dor, 165 N.H. 198, 205 (2013). Issues of statutory interpretation are reviewed de novo. In re Search Warrant, ___ N.H. at ___.

Under RSA 632-A:10, it is a class A felony if a person with a qualifying conviction:

> knowingly undertakes employment or volunteer service involving the care, instruction or guidance of minor children, including, but not limited to, service as a teacher, a coach, or worker of any type in child athletics, a day care worker, a boy or girl scout master or leader or worker, a summer camp counselor or worker of any type, a guidance counselor, or a school administrator of any type.

Here, the evidence was insufficient for two reasons. First, by hiring Bergeron, Proctor provided employment; he did not "undertake employment." Second, the purpose of the employment was to perform yard work, and yard work does not inherently involve the "care, instruction or guidance" of children.

Proctor presents three arguments below. First, the plain, unambiguous language of the statute did not prohibit Proctor from hiring a minor to perform yard work. Second, even if the statute is ambiguous, the legislative history demonstrates that the legislature did not envision that the statute would prohibit those with a qualifying conviction from hiring minors or that it would apply to activity which does not inherently involve children. Third, even if the

legislative history does not resolve the issue, the rule of lenity requires that the statute be construed to not include hiring a minor to perform yard work.

A. The plain, unambiguous language of RSA 632-A:10 did not prohibit Proctor from hiring Bergeron to perform yard work

"When a statute's language is plain and unambiguous, [this Court] need not look beyond it for further indications of legislative intent." In re Neal & DiGiulio, ___ N.H. ___ (Mar. 30, 2018). Here, RSA 632-A:10, in relevant part, prohibits those who have been convicted of a qualifying offense from "undertak[ing] employment" of a specified type.

The phrase "to undertake employment" is widely used and universally understood to mean accepting employment, not providing it. See, e.g., Bates v. State Bar of Ariz., 433 U.S. 350, 399 (1977) (Burger, C.J., dissenting) ("most lawyers are willing to undertake employment at [hourly] rates"); Evans v. Certified Eng'g & Testing Co., 834 F. Supp. 488, 494 (D. Mass. 1993) (non-competition agreement provided that former employee "shall not undertake employment with any competitor"); Serv. Emps. Int'l Union, Local 509 v. Dep't of Mental Health, 14 N.E.3d 216, 219 n.2 (Mass. 2014) (State Department of Mental Health sought to "assist clients to restore or maintain and use their strengths and skills to undertake employment"); Gillian Paull et al., Mothers' Employment and Childcare Use in Britain 6 (2002) ("the use of non-maternal childcare . . . may provide opportunities or enhanced benefits for mothers to undertake employment"); Agreement on Social Security, U.S.-Nor., art. 5.2(a)

ann., Nov. 30, 2001[1] (under Social Security Agreement, a family member of a transferred worker "will be subject only to the laws of the country from which the worker is transferred unless such a family member undertakes employment in the host country").

Despite the widespread use of the phrase "to undertake employment," the court failed to cite any instance in which any entity has used the phrase to refer to the act of providing employment. The court instead reached its conclusion by isolating the words "undertake" and "employment" and examining the separate dictionary definitions of each word. This illustrates why courts, when construing a statute, should not "simply examin[e] isolated words and phrases found therein." Appeal of Langenfeld, 160 N.H. 85, 91 (2010); see also Olson v. Town of Grafton, 168 N.H. 563, 568 (2016) (refusing to interpret word in isolation); Appeal of Ashland Elec. Dep't, 141 N.H. 336, 341 (1996) ("it is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary"). By focusing on the isolated dictionary definitions of the words "undertake" and "employment," the court failed to recognize that the phrase "to undertake employment" has its own plain and ordinary meaning: to accept employment.

Construing RSA 632-A:10 to prohibit some employers from hiring minors presents another problem. New Hampshire law prohibits age discrimination. RSA 354-A:6 provides, "The opportunity to obtain employment without discrimination because of age, . . . is hereby recognized and declared to be a

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[1] Available at: https://www.ssa.gov/international/Agreement_Texts/norway.html (last accessed July 26, 2018).

civil right." "It shall be an unlawful discriminatory practice . . . [f]or an employer, because of the age . . . of any individual . . . to refuse to hire or employ . . . such individual . . ., unless based upon a bona fide occupational qualification." RSA 354-A:7. Being at least eighteen years old is not "a bona fide occupation qualification" to perform yard work. "When interpreting two statutes that deal with a similar subject matter, [this Court] construe[s] them so that they do not contradict each other, and so that they will lead to reasonable results and effectuate the legislative purpose of the statutes." Carr v. Town of New London, 170 N.H. 10, 15 (2017). This Court should reject any interpretation of RSA 632-A:10 that compels employers to discriminate based on age.

Proctor's conduct fell outside the scope of the statute for a second reason. The statute prohibits undertaking employment:

> involving the care, instruction or guidance of minor children, including, but not limited to, service as a teacher, a coach, or worker of any type in child athletics, a day care worker, a boy or girl scout master or leader or worker, a summer camp counselor or worker of any type, a guidance counselor, or a school administrator of any type.

RSA 632-A:10, I. Under the principle of ejusdem generis, "when specific words in a statute follow general ones, the general words are construed to embrace only objects similar in nature to those enumerated by the specific words." Kurowski v. Town of Chester, 170 N.H. 307, 311 (2017). Thus, "the phrase 'including but not limited to[]' . . . limits the applicability of [the statute] to

those types of acts therein particularized." Roberts v. Gen. Motors Corp., 138 N.H. 532, 538 (1994) (brackets omitted).

The doctrine of ejusdem generis is applied in light of the statute's purpose. Wilson, 169 N.H. at 762–64. The purpose of RSA 632-A:10 is set forth in the enacting legislation:

> The general court recognizes that those who seek to exploit and abuse children often attempt to create opportunities for themselves to do so by seeking to perform services of one type or another in a field involving the care or training of children. The public policy of the state demands that these people be denied such opportunities.

Laws 1988, 257:1 (reprinted at A51). As this Court has recognized, this statement of purpose "indicat[es] . . . a legislative focus upon services that by their nature provide access to children," and the specific examples listed "all share the characteristic of providing such access." Wilson, 169 N.H. at 764. Although lawn-care businesses may sometimes employ minor teenagers, unlike those occupations listed in the statute, they do not "by their nature provide access to children." Id. Thus, under the principle of ejusdem generis, this Court should not construe the statute to encompass Proctor's conduct.

This Court will not interpret a statute to create absurd results. Serpa, ___ N.H. at ___. In other respects, the prohibition in RSA 632-A:10, I, is broad. The class of qualifying convictions is large. "Any . . . sexual assault," for instance, includes misdemeanor sexual assaults, such as consensual sex between a fifteen-year-old and a seventeen-year-old, or the unwanted groping of an adult. See RSA 632-A:4, I(c) (prohibiting sexual penetration with anyone

under 16 where the age difference is less than 4 years); RSA 632-A:4, I(a) (prohibiting sexual contact with anyone at least thirteen years old under circumstances listed in RSA 632-A:2); RSA 632-A:1, IV (defining "sexual contact" to include, among other things, the over-the-clothes touching of breasts and buttocks); RSA 632-A:2, I(m) (including indication of lack of consent among qualifying circumstances). There is no time limit; the prohibition set forth in RSA 632-A:10, I, applies for life.

Interpreting RSA 632-A:10 to cover activity that only incidentally involves minors would lead to absurd results. Many minor teenagers get jobs. See generally RSA Chapter 276-A (Youth Employment Law). Due to their lack of experience and education, they commonly work in low-skill, low-wage retail and service jobs, the same jobs that those with stigmatizing convictions most often seek. See Morris v. De La Torre, 113 P.3d 1182, 1193 (Cal. 2005) (noting that "many teenage minors . . . work in fast food restaurants"); Catherine Wagner, Note, The Good Left Undone: How to Stop Sex Offender Laws From Causing Unnecessary Harm at the Expense of Effectiveness, 38 Am. J. Crim. L. 263, 270 (2011) ("Studies have shown . . . that [finding employment] is exceedingly difficult for registered offenders."). Interpreting RSA 632-A:10 to cover activity that only incidentally involves minors could mean that anyone with a qualifying conviction could not, for instance, work at McDonald's, if that McDonald's employed minor teenagers at the same time, because he or she might have to provide "instruction" or "guidance" to those teenagers. Any employer who knowingly hired an employee with a qualifying conviction to

work alongside minor teenagers could face criminal liability as well. See RSA 626:8, I-V (accomplice liability); RSA 629:2 (solicitation); RSA 629:3 (conspiracy).

B. Even if the statute is ambiguous, the legislative history supports Proctor's interpretation.

If the statutory language is ambiguous, this Court "will resolve the ambiguity by determining the legislature's intent in light of legislative history." Hogan v. Pat's Peak Skiing, ___ N.H. ___ (July 28, 2015). RSA 632-A:10 was introduced as 1988 House Bill 1147. The records of the House and Senate committees that considered the bill indicate that no one raised the possibility that the bill would prohibit an individual from either hiring a minor teenager or from owning or working for a business, such as a lawn-care company or fast-food restaurant, that does not inherently involve children, merely because the business employs minor teenagers.

The Senate Committee records, in particular, demonstrate that the legislature was exclusively concerned with activity that inherently involves children. A co-sponsor of the bill, David Pierce, testified that that the bill "makes it a class B felony to apply for a job connected with child care, and a class A felony to accept said job." S. Pub. Insts. Health and Human Servs. Comm. Hearing, H.B. 1147 (Apr. 6, 1988) (A55). Another Senator, Eleanor Podles, expressed concern that, while state-licensed day-care centers and children's group homes conduct background checks on employees, background checks were not being conducted on "teachers, camp counselor and volunteers." Id. (A56). One of the bill's drafters and a former prosecutor,

Al Rubega, cited two examples that he hoped the bill would cover: one individual obtained a job as a substitute teacher and volunteered at the YMCA, and another obtained a job as a ski instructor and applied to boy scout troops, YMCAs and swimming programs. Id. (A60–A61).

Had the legislature intended the bill to prohibit an individual with a qualifying conviction from hiring a minor teenager, or from owning or working for any business in which minor teenagers are also employed, then one would expect to find some indication of that intent in the legislative history. There is none. Thus, the legislative history shows that the legislature intended the bill to cover only accepting employment, not providing it, and to cover only activities that inherently involve children.

C. Even if the legislative history does not resolve the issue, the rule of lenity applies.

"[T]he rule of lenity serves as a guide for interpreting criminal statutes where the legislature failed to articulate its intent unambiguously." State v. Dansereau, 157 N.H. 596, 602 (2008). It "generally holds that ambiguity in a criminal statute should be resolved against an interpretation which would increase the penalties or punishments imposed on a defendant." Id. "It is rooted in the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." Id. (quotation omitted). The rule is applied where "neither the language nor the legislative history . . . clearly establish what the legislature intended." Id. at 603.

Here, even if the legislative history does not establish that the legislature did not intend to include hiring a minor teenager, or owning or working for a

business that does not inherently involve children, even if the business sometimes employs minor teenagers, nothing in the legislative history indicates that it did intend to include such activity. Thus, this Court should employ the rule of lenity and resolve the ambiguity against including such activity.

D. Even if the error is not preserved, it is plain.

This Court may reverse for plain and prejudicial errors that seriously affect the fairness, integrity or public reputation of judicial proceedings. Stachulski v. Apple New Eng., ___ N.H. ___ (July 18, 2018); Sup. Ct. R. 16-A. Although plain error "should be used sparingly, its use limited to those circumstances in which a miscarriage of justice would otherwise result," Stachulski, ___ N.H. at ___, this Court has found that convictions based on insufficient evidence constitute plain error. State v. Houghton, 168 N.H. 269, 273–74 (2015); State v. Guay, 162 N.H. 375, 380–84 (2011). Even if this Court concludes Proctor did not preserve his sufficiency challenge, and even if it declines to waive the preservation requirement on futility grounds, it should still find plain error.

For the reasons stated above, the court erred by concluding that RSA 632-A:10 prohibited Proctor from hiring Bergeron, and that error was plain. The error was prejudicial because it resulted in Proctor's conviction. See Houghton, 168 N.H. at 274, Guay, 162 N.H. at 384. The error seriously affects the fairness, integrity or public reputation of judicial proceedings because the undisputed facts demonstrate that Proctor is innocent; he stands convicted of a

crime which he did not commit. See Houghton, 168 N.H. at 274, Guay, 162 N.H. at 384.

II. THE COURT ERRED BY INSTRUCTING THE JURY THAT RSA 632-A:10 PROHIBITS A PERSON WITH A QUALIFYING CONVICTION FROM HIRING A MINOR AND "SUPERVISI[NG]" OR "MANAG[ING]" THE MINOR.

The court correctly instructed the jury that RSA 632-A:10 prohibits a person with a qualifying conviction from "undert[aking] employment involving the care, instruction, or guidance of a minor child." T 104. However, it further instructed the jury, "[T]his means that the State must prove that [Proctor] . . . directly entered into an employment relationship with a minor child in which [Proctor] was responsible for the supervision or management of the minor." T 104. Proctor objected to this instruction. T 76–79, 83. By giving this instruction, the court erred.

"[T]he purpose of the trial court's charge is to state and explain to the jury, in clear and intelligible language, the rules of law applicable to the case." State v. Rice, 169 N.H. 783, 795 (2017). "When reviewing jury instructions, [this Court] evaluate[s] allegations of error by interpreting the disputed instructions in their entirety, as a reasonable juror would have understood them, and in light of all the evidence in the case." State v. Sanborn, 168 N.H. 400, 419 (2015). It "determine[s] whether the jury instructions adequately and accurately explain each element of the offense and reverse[s] only if the instructions did not fairly cover the issues of law in the case." Id.

In general, jury instructions are reviewed for an unsustainable exercise of discretion. State v. Washburn, ___ N.H. ___ (Apr. 13, 2018). Here, however, Proctor asserts that the court's instruction misinterpreted the statute he was alleged to have violated. The issue of whether a jury instruction correctly

interprets a statute is "a question of law, which [this Court] review[s] de novo." State v. West, 167 N.H. 465, 468 (2015); State v. McGill, 167 N.H. 423, 426 (2015).

When interpreting a statute, "[c]ourts can [not] . . . add words which the lawmakers did not see fit to include." Neal, ___ N.H. at ___. In two respects, the instruction here added words to the statute, and in so doing, misinterpreted its meaning.

First, the court's instruction permitted the jury to find Proctor guilty on the basis that he "directly entered into an employment relationship with a minor child." T 104. The phrase "directly entered into an employment relationship" does not appear anywhere in RSA 632-A:10. As Proctor argues above, the phrase that the legislature chose to use, "to undertake employment," means to accept employment, not to provide it.

Second, the court permitted the jury to find Proctor guilty if "[Proctor] was responsible for the supervision or management of the minor." T 104. Again, the phrase "responsible for the supervision or management" does not appear in RSA 632-A:10. As Proctor argues above, the statute refers to activity that inherently involves minors, not to activity — such as fast-food or lawn-care — that only incidentally involves employees who are under eighteen.

Even if this Court rejects that argument, however, the instruction was still error. By adding the words "supervision" and "management," the court expanded upon the language of RSA 632-A:10, which is limited to "care, instruction or guidance." Had the court refrained from adding "supervision"

and “management” to its instructions, a reasonable jury could have concluded that “care, instruction or guidance” referred to arrangements that are intended either to protect the minor from harm (“care”) or to advance the minor’s personal development (“instruction or guidance”), and that the arrangement here was not intended to protect Bergeron from any harm or to advance his personal development, but rather to provide Proctor’s clients with lawn-care and to provide Bergeron with money to buy a car. By adding the words “supervision” and “management,” the court added words the legislature did not see fit to include and, in effect, directed the jury to return a guilty verdict, even though it otherwise may have concluded that the employment did not, in fact, involve “care, instruction or guidance.”

III. IF INTERPRETED TO INCLUDE PROCTOR'S CONDUCT, RSA 632-A:10 IS UNCONSTITUTIONALLY VAGUE.

Prior to trial, Proctor moved to dismiss the indictment. A22. He argued, among other things, that RSA 632-A:10, I, is vague on its face, in violation of the Due Process Clause of the Fourteenth Amendment. A28–A33. The State objected. A42. At the hearing on the motion, Proctor clarified that he was making both a facial and an as-applied challenge to the statute. H 5. The court denied the motion. A1.

If the phrase "to undertake employment" is defined, consistent with its common understanding, as accepting employment, and if the phrase "employment . . . involving the care, instruction or guidance of minor children," is defined, consistent with the examples the statute provides, as activity that inherently involves children, then the statute is not unconstitutionally vague. But if "to undertake employment" is instead interpreted to include providing employment, or if "employment . . . involving the care, instruction or guidance of minor children" is instead interpreted to include activity that does not inherently involve children, merely because it involves the "supervision" or "management" of minor teenage employees, then the statute is impermissibly vague, both facially and as applied, in violation of the Due Process Clause of Fourteenth Amendment to the United States Constitution.

A. The statute is vague on its face.

"The prohibition of vagueness in criminal statutes . . . is an essential of due process, required by both ordinary notions of fair play and the settled rules of law." Sessions v. Dimaya, 138 S. Ct. 1204, 1212 (2018) (quotation omitted).

Thus, the constitution prohibits "taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement." Johnson v. United States, 135 S. Ct. 2551, 2556 (2015).

A defendant can maintain a facial vagueness challenge to a statutory provision even if his own conduct clearly falls within its scope. See Dimaya, 138 S. Ct. at 1213–16, 1242 (invalidating, as impermissibly vague on its face, statutory provision that allowed for deportation of any alien convicted of a "crime of violence," even though majority did not dispute dissent's assertion that respondent's convictions for first-degree residential burglary "fall comfortably with the scope of [the provision]"). Even if a facial vagueness challenge requires that the statute be vague as applied, that requirement is satisfied for the reasons stated in subsection B, below.

Although "[v]agueness doctrine is an outgrowth . . . of the Due Process Clause," United States v. Williams, 553 U.S. 285, 304 (2008), it has several justifications. "[T]he doctrine is a corollary of the separation of powers," in that it guarantees that the legislature, not the courts, "define[s] what conduct is sanctionable and what is not." Dimaya, 138 S. Ct. at 1212. "It is for the people, through their elected representatives, to choose the rules that will govern their future conduct." Id. at 1227 (Gorsuch, J., concurring). "[The judicial power] does not license judges to craft new laws to govern future conduct, but only to discern the course prescribed by law as it currently exists

and to follow it in resolving disputes between the people over past events." Id. (quotation and brackets omitted).

Reasonable people may disagree about whether it is a good idea to prohibit those with certain convictions from hiring minor teenagers, or from "enter[ing] an employment arrangement" involving the "supervision" or "management" of minor teenagers. But any such prohibition must come from the people. Here, the people of New Hampshire, through their elected representatives, did not enact either of these prohibitions. They were created instead by the judicial branch. Because these prohibitions were created by the judicial branch, the statute, thus construed, is unconstitutionally vague.

Related to the separation-of-powers justification for the void-for-vagueness doctrine is the "fair notice" justification. Id. at 1212. "[T]he law generally must afford ordinary people fair notice of the conduct it punishes." Id. at 1210 (ellipsis and quotation omitted). Here, ordinary people would not understand the phrase "to undertake employment" to include not only accepting employment, but also providing it. Nor would ordinary people understand the statute's reference to "employment . . . involving the care, instruction or guidance of minor children" to include businesses that do not offer services specifically for children, but rather services for the general public, merely because they happen to employ minor teenagers.

Even if ordinary people might foresee that the statute could prohibit employment at some businesses that do not offer services specifically for children, the demands of the statute are still unclear. Can a person with a

qualifying conviction apply to a McDonald's that also employs minor teenagers? If only adults are employed at the McDonald's when he starts, but the manager subsequently hires a minor teenager, must he quit? If he can work there, must he demand that he never be given the same shift as a minor teenager? What if the manager refuses to accommodate this demand? Can he work alongside minor teenagers only if he doesn't give them any "instruction" or "guidance"? If so, what, in this context, constitutes "instruction" or "guidance"? Is "I've got an order for two big macs and a side of fries" "instruction" or "guidance"? And what if he is offered a promotion to a position that involves the "management" and "supervision" of minor teenage employees? Must he refuse? The statute provides no answers to these questions. Nor did the court.

The final justification for the void-for-vagueness doctrine is to avoid arbitrary enforcement. Under the court's interpretation, enforcement of the statute would be largely left to the whim of police, prosecutors and juries. Prosecutions would be arbitrary and random at best, and targeted against disfavored groups or individuals at worst. It is precisely this type of uncertainty that the Due Process Clause forbids.

The court here failed to address any of these issues, summarily dismissing Proctor's facial vagueness challenge on the ground that it did not involve a fundamental right. A16. The court was mistaken. Under the United States Supreme Court's current case-law, a statute need not implicate a fundamental right to be facially vague in violation of the Federal Constitution. In Dimaya, for instance, the Court invalidated a provision in an immigration

statute as facially vague without mentioning any requirement of a "fundamental right." Dimaya, 138 S. Ct. at 1210–23; see also Johnson, 135 S. Ct. at 2555–63 (invalidating enhanced sentence provision without mention of any "fundamental right" requirement).

B. The statute is vague as applied

RSA 632-A:10 is also vague as applied to Proctor's conduct. Proctor did not have "fair notice" that hiring Bergeron to perform yard work violated the statute. Dimaya, 138 S. Ct. at 1212. At the time Proctor hired Bergeron to do yard work, the statute, in relevant part, only prohibited him from "undertaking employment," and even that prohibition only applied to employment "involving the care, instruction or guidance of minor children," such as "service as a teacher," "coach," "child athletics [worker]," "day care worker," "boy or girl scout master," "summer camp counselor," "guidance counselor," or "school administrator." Only after Proctor was arrested and indicted did a court pronounce that the statute barred Proctor from hiring any minor teenagers or from entering any "employment arrangement" involving the "supervision" or "management" of minor teenagers. Because the plain language of the statute failed to provide Proctor with "fair notice" of these judicially-created prohibitions, it is unconstitutionally vague.

The court found that RSA 632-A:10 provided Proctor "a reasonable opportunity to know that his particular conduct was proscribed," for two reasons. A17 (brackets omitted). First, it found that, because Proctor was subject to a parole condition prohibiting him from having contact with minors,

he "cannot now claim that he did not have sufficient notice that his particular conduct — employing a minor — was prohibited." A17. The court was mistaken. Because all parolees must refrain from committing any crime as a condition of parole, it would be redundant for a parole condition to specially prohibit conduct that is already criminal. Thus, parole conditions prohibit parolees from engaging in non-criminal conduct, such as consuming alcohol, travelling out-of-state, or staying out past a designated curfew. Thus, the fact that a parole condition prohibits specific conduct does not suggest that such conduct is criminal. See State v. Cooper, 146 N.H. 140, 141–42 (2001) (defendant "could not have been aware" that "a violation of his parole conditions would also constitute a violation of good behavior," given that "good behavior" was defined as conduct that does not "violate[] the law.").

Second, the court found that RSA 632-A:10 "is sufficiently clear in its prohibition." A17. The court found that "the statute expressly prohibits sex offenders from consciously entering into an employment relationship with responsibility for supervision of a minor child. . . . mean[ing] either accepting employment or employing another." A17. The court concluded that "[Proctor's] conduct is specifically proscribed by the statute." A18. Again, the court was mistaken. RSA 632-A:10 expressly prohibits "undertaking employment . . . involving the care, instruction or guidance of minor children." It does not "expressly prohibit . . . entering into an employment relationship with responsibility for supervision of a minor child." Nor does it contain any suggestion that it prohibits "employing another." The statute specifically

proscribes working as a teacher, coach, day care worker, scout master, camp counselor, guidance counselor or school administrator. It does not, as the court found, "specifically proscribe[]" hiring a minor teenager to do yard work.

As applied, RSA 632-A:10 encourages arbitrary enforcement. There are thousands[2] of individuals living in New Hampshire who, at some point in their lives, "hav[e] been convicted in this or any other jurisdiction of any felonious offense involving child pornography, or of a felonious physical assault on a minor, or of any sexual assault." RSA 632-A:10. Due to limited employment prospects, many individuals with such convictions run their own businesses, and many of those, no doubt, hire minor teenagers. But as far as the record shows, Proctor is the only individual to be prosecuted under these circumstances. Thus, as applied, the statute authorizes or encourages arbitrary enforcement.

The court rejected Proctor's argument that RSA 632-A:10 authorizes or encourages arbitrary enforcement, finding that hiring a minor teenager to do yard work "falls within the core of the statute's prohibition" and was a "clear violation" of the statute. A18–A19. Again, the court was mistaken. As the enumerated examples make clear, the "core" of the statute is becoming employed or volunteering in activities such as a child athletics, day care, the boy or girl scouts, a summer camp or a school. Providing employment is fundamentally different than becoming an employee or volunteer, and lawn care is fundamentally different than the activities specifically listed. Thus,

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[2] See https://business.nh.gov/NSOR/search.aspx (last accessed July 26, 2018) (listing 2,426 publicly registered offenders in New Hampshire).

hiring a minor teenager to do yard work does not fall within the “core” of the statute’s prohibition.

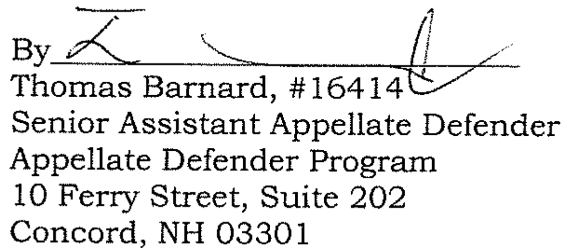
CONCLUSION

WHEREFORE, Edward Proctor respectfully requests that this Court reverse.

Undersigned counsel requests fifteen minutes oral argument.

The appealed decisions on the first two issues were not in writing and therefore are not appended to the brief. The appealed decision on the third issue is in writing and is appended to the brief.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that two copies of the foregoing Brief have been mailed, postage prepaid, to:

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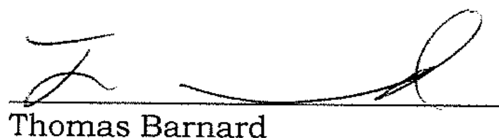

Thomas Barnard

DATED: August 3, 2018

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The State of New Hampshire
Superior Court

Rockingham S.S.

STATE OF NEW HAMPSHIRE

V.

EDWARD PROCTOR

NO. 218-2016-CR-00847

ORDER ON THE DEFENDANT'S MOTION TO DISMISS

The defendant Edward Proctor is charged with violating RSA 632-A:10, I, which prohibits persons previously convicted of certain offenses from providing child care services.[1] The defendant moves to dismiss, challenging the statute's constitutionality both on its face and as-applied. The State objects. The Court held a hearing on May 9, 2017. For the following reasons, the defendant's motion to dismiss is DENIED.

Facts

The following relevant facts are undisputed by the parties. In May 1994, the defendant was convicted of multiple counts of aggravated felonious sexual assault, and is currently on parole for these convictions. As part of his parole, the defendant was not to have contact with minors. After serving time in prison for his convictions, the defendant started his own handyman business, in which he provides general home

[1] The defendant was initially charged with two-counts of violating the statute, but in light of the New Hampshire Supreme Court's decision in State v. Wilson, __ N.H. __, 2017 WL 1500026 (decided Apr. 25, 2017), the State nolle prossed the second charge. See id. at __, 2017 WL 1500026, at *11–16 (holding that under the statute, "undertaking" was the "unit of prosecution" and charging the defendant with multiple violations for a single transaction was multiplicitous and violated double jeopardy).

repair services, among other things. The defendant is the sole proprietor of the business.

In May and June of 2016, the defendant employed H.B., a minor child (D.O.B. 6/23/2000), to assist him in his business. The defendant met H.B. and his parents while working on a job at H.B.'s neighbor's home. The defendant thereafter gave H.B.'s father his business card and offered H.B. a job. On the two occasions that H.B. worked with the defendant, the defendant transported H.B. to job sites in Northwood and Manchester, New Hampshire, as well as brought H.B. to his home in Deerfield, New Hampshire. After the second day of employment, H.B.'s mother "ran" the defendant's name and discovered that he was a registered sex-offender. H.B.'s mother notified the authorities and these charges followed.

Constitutional Claims

The defendant challenges the statute under both the State and Federal Constitutions. In doing so, he raises multiple constitutional doctrines that have a long and complex jurisprudential history. Given the complex nature of the doctrines raised, the Court outlines the defendant's arguments at the outset in order to appropriately address each alleged constitutional violation. The defendant's constitutional challenges include:

A. The statute violates the right to travel of the Privileges and Immunities clauses of Article IV, Section 2 and the Fourteenth Amendment of the United States Constitution.

B. The statute violates equal protection under Part I, Articles 2 and 3 of the New Hampshire Constitution and the Fourteenth Amendment of the United States Constitution.

C. The statute is facially overbroad under Part I, Article 15 of the New Hampshire Constitution and the Fifth Amendment of the United States Constitution.

D. The statute is unconstitutionally overbroad, as-applied, in violation of Part I, Article 15 of the New Hampshire Constitution and the Fifth Amendment of the United States.

E. The statute is facially vague under Part I, Article 15 of the New Hampshire Constitution and Fifth Amendment of the United States Constitution.

F. The statute is unconstitutionally vague, as-applied, in violation of Part I, Article 15 of the New Hampshire Constitution and the Fifth Amendment of the United States.

Analysis

A. *RSA 632-A:10, I*

Because the defendant's constitutional claims center on statutory language, the Court must first determine the statute's meaning. In interpreting the statute, the Court is cognizant that "[i]t is a fundamental principle of statutory construction that whenever possible, a statute will not be construed so as to lead to absurd consequences." Appeal of Marti, 169 N.H. 185, 190 (2016) (quotation omitted). The Court must consider the statute as a whole, and give each word its plain and ordinary meaning. In re Naswa Motor Inn, Inc., 144 N.H. 89, 90 (1999). Further, the Court presumes the statute to "be constitutional and will not declare it invalid except upon inescapable grounds." State v. Hollenbeck, 164 N.H. 154, 157 (2012). Put another way, the Court will not declare the statute invalid absent a clear and substantial conflict between the statute and the constitution. Id.

The New Hampshire Supreme Court is the final arbiter in matters of statutory interpretation. State v. Collyns, 166 N.H. 514, 518 (2014). Thus, while not wholly

germane to the facts of this case, the Supreme Court's interpretation of RSA 632-A:10, I, in Wilson is instructive in determining legislative intent and statutory meaning. Under the statute:

> A person is guilty of a class A felony if, having been convicted in this or any other jurisdiction of any felonious offense involving child pornography, or of a felonious physical assault on a minor, or of any sexual assault, he knowingly undertakes employment or volunteer service involving the care, instruction or guidance of minor children, including, but not limited to, service as a teacher, a coach, or worker of any type in child athletics, a day care worker, a boy or girl scout master or leader or worker, a summer camp counselor or worker of any type, a guidance counselor, or a school administrator of any type.

RSA 632-A:10, I. As the Supreme Court indicated, the legislation was enacted with the general recognition that "those who seek to exploit and abuse children often attempt to create opportunities for themselves to do so by seeking to perform services of one type or another in a field involving the care or training of children." Wilson, __ N.H. at __, WL 2017 1500026, at *4 (quoting Laws 1988, 257:1). Public policy, however, demanded that those people be denied that opportunity. Id. (quoting Laws 1988, 257:1). The statute seeks to achieve this end.

The relevant statutory language at issue here penalizes a person subject to its provisions when the person "knowingly undertakes employment or volunteer service involving the care, instruction or guidance of minor children . . . ." RSA 632-A:10, I (emphasis added). While the defendant focuses his statutory interpretation on defining the terms care, instruction, and guidance, the words must be interpreted in the context the statutory clause as a whole in order to appropriately discern statute's intended proscription. See Naswa Motor, 144 N.H. at 90. As indicated above, the Court will rely on the Supreme Court's interpretation in Wilson to the extent that it is applicable here.

The term knowingly is statutorily defined under the Criminal Code. "A person acts knowingly with respect to conduct or to a circumstance that is a material element of an offense when he is aware that his conduct is of such nature or that such circumstances exist." RSA 626:2, II(b). "In other words, a defendant acts knowingly when he is aware that it is practically certain that his conduct will cause a prohibited result." State v. Hall, 148 N.H. 394, 398 (2002) (quotation omitted).). "Awareness is thus central to the concept of acting knowingly." Id. (quotation omitted).

RSA 632-A:10 does not defined the term "undertakes." However, the Supreme Court in Wilson defined the term in the context of double jeopardy. This definition is instructive. "The dictionary definition of 'undertake' includes such phrases as 'to take in hand,' 'enter upon,' 'set about,' 'to take upon oneself solemnly or expressly,' and 'put oneself under obligation to perform." Wilson, __ N.H. at __, 2017 WL 1500026, at *11 (quoting Webster's Third New International Dictionary 2491 (unabridged ed. 2002) [hereinafter Webster's Third]). "[T]he term, as used in RSA 632-A:10, I, connotes an arrangement or placement of oneself in a position to provide or perform the prohibited services." Id. Thus, "the act criminalized by the statute is not the provision of service involving the care, instruction or guidance of minor children, . . . but, rather, the making of an arrangement, or the placing of oneself in a position, to do so." Id. (quotation and citation omitted). While the term was defined in the context of its relation to double jeopardy, the Court finds no reason why this interpretation should not extend to other applications. Indeed, there is no indication that the Supreme Court intended to limit the definition to the narrow issue before it in Wilson.

"Employment" is defined as "activity in which one engages and employs his time and energies," or "work (as customary trade, craft, service, or vocation) in which one's labor or services are paid for by an employer," or "the act of employing someone or something or the state of being employed." Webster's Third, supra at 743. Thus, by its plain meaning, employment encompasses situations where the person either engages in the work themselves, or employs someone for the same purpose. Naswa Motor, 144 N.H. at 90.

"Care" is defined as "charge, supervision, management," or "responsibility for or attention to safety or well-being." Webster's Third, supra at 338. "Instruction" is defined as "something given by way of direction or order." Webster's Third, supra, at 1172. Instruction's root word, "instruct," is defined as "to give special knowledge or information to," or "to provide with information about something," or "to give an order or command to." Id. Lastly, "guidance" is defined as "the superintendence or assistance rendered by a guide," or "direction," or "leading." Id. at 1009. Thus, the common understanding of these words envisions a person of authority or one with supervisory power. This is bolstered by the statutes non-exhaustive list of professions, in which these definitions would be applicable. See RSA 632-A:10, I (explaining that prohibited positions are "including, but not limited to, service as a teacher, a coach, or worker of any type in child athletics, a day care worker, a boy or girl scout master or leader or worker, a summer camp counselor or worker of any type, a guidance counselor, or a school administrator of any type.").

Taken together, the statute is intended to penalize those subjected to its terms from consciously entering into labor or service, which involves the defendant having

some supervisory or management authority over a minor child. Put another way, the statute penalizes those persons who have a felony conviction relating to child pornography or sexual assault of a minor from knowingly either applying for and accepting a position that involves supervision or management of a minor, or directly entering into an employment relationship with a minor child. Indeed, as the Supreme Court recognized, it is not the nature of employment that is relevant under the statute, "but, rather, the making of an arrangement, or the placing of oneself in a position, to do so." Wilson, __ N.H. at __, 2017 WL 1500026, at *11 (quotation and citation omitted). This clearly comports with the Legislature's intent to deny an offender the opportunity to exploit and abuse children by creating a working relationship wherein the offender exercises a position of authority over the child. Id. at __, WL 2017 1500026, at *4.

B. *Privileges and Immunities: the Right to Travel*

According to the defendant, the statute violates the Privileges and Immunities Clause of the Federal Constitution. Specifically, the defendant contends that the statute impinges on the right to travel. The Court disagrees.

"Article IV, § 2, of the Constitution provides that the 'Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.'" Supreme Court of N.H. v. Piper, 470 U.S. 274, 279 (1985) (quoting U.S. CONST. art. IV, § 2, cl. 1). It was intended to "fuse into one Nation a collection of independent, sovereign States." Id. (quotation omitted). The privileges and immunities sought to be protected "are only such as arise out of the nature and essential character of the national government, or are specifically granted or secured to all citizens or persons by the Constitution of the United States." Pollack v. Duff, 958 F. Supp. 2d 280, 289 (D.D.C.

2013) (quotation omitted). The rights to be protected include the "right to pass freely from state to state . . . ." Id. In essence, "it is [o]nly with respect to those privileges and immunities bearing on the vitality of the Nation as a single entity that a State must accord residents and nonresidents equal treatment." Piper, 470 U.S. at 279 (quotation omitted). Thus, there needs to be some deprivation of an out-of-state resident's livelihood "by the system or of access to any part of the State to which they may seek to travel." Baldwin v. Fish and Game Comm'n of Montana, 436 U.S. 371, 388 (1978).

The Privileges and Immunities Clause is comprised of three distinct components that protect a citizen's right to travel among the States. Saenz v. Roe, 526 U.S. 489, 500 (1999). These include the "right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State." Id.

However, "[l]ike many other constitutional provisions, the privileges and immunities clause is not an absolute." Toomer v. Witsell, 334 U.S. 385, 395 (1948). To start, the regulation or statute at issue must differentiate between in-state residents and out-of-state residents. See Bray v. Alexandria Women's Health Clinic, 506 U.S. 263, 277 (1993) (explaining the right "protects interstate travelers against two sets of burdens: the erection of actual barriers to interstate movement and being treated differently from intrastate travelers." (quotation omitted)); see also Zobel v. Williams, 457 U.S. 55, 76 n.6 (1982) ("The 'burden' imposed on nonresidents is relative to the benefits enjoyed by residents. . . . The Clause addresses only differences in treatment; it does not judge the quality of treatment a State affords citizens and noncitizens.").

The statute at issue in the case at bar, however, does not treat out-of-state residents differently than in-state residents. Thus, it is unclear how the statute, as written, impinges on an out-of-state resident's ability to enter New Hampshire, or how the statute treats the out-of-state resident differently once they enter the State. See Bray, 506 U.S. at 277. The statute draws no distinction between in-state and out-of-state residents. Nor does it impose any additional burdens on out-of-state residents. The statute does not, as the defendant argues, "clearly attempt[ ] to regulate the right to travel . . . ." Def.'s Mot. Dismiss ¶ 7. In fact, the statutory language clearly intends to treat in-state and out-of-state residents in the same manner. See RSA 632-A:10, I ("A person is guilty of a class A felony if, having been convicted in this or any other jurisdiction of any felonious offense involving child pornography, or of a felonious physical assault on a minor, or of any sexual assault . . . ."). As a result, the distinction is not between in-state and out-of-state residents, but between persons having been convicted of the enumerated crimes and those who have not.

Indeed, the cases relied on by the defendant support the above conclusion. As the New Hampshire Supreme Court recognized, "statutory discrimination in employment based solely on nonresidence has been frequently condemned and invalidated." Ratti v. Hinsdale Raceway, Inc., 109 N.H. 270, 271 (1969) (emphasis added). The law at issue needs to present an actual barrier to interstate movement. See Bray, 506 U.S. at 277. These barriers must be put into place in order to advance a protectionist objective. See McBurney v. Young, 133 S. Ct. 1709, 1715 (2013). Thus, it is only if "a law has no other purpose . . . than to chill the assertion of constitutional rights by penalizing those who choose to exercise them," is it "patently unconstitutional." Shapiro v. Thompson,

394 U.S. 618, 631 (1969) (holding a state may not attempt to "fence out" out-of-state indigent residents by attaching a one-year residency period to the ability to receive welfare benefits), overruled on other grounds by Edelman v. Jordan, 415 U.S. 651, 670–71 (1974). Here, however, the statute makes no distinction between in-state and out-of-state residents. It places in-state residents "upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned." Hicklin v. Orbeck, 437 U.S. 518, 524 (1978) (quotation omitted). It does not, as the defendant argues, place a disability upon those out-of-state residents such that it inhibits the "same freedom possessed by the citizens of [this State] in the acquisition and enjoyment of property and in the pursuit of happiness . . . ." Id. Absent such a protectionist distinction, the right to travel is not implicated. Cf. McBurney, 133 S. Ct. at 1715 ("[T]he Court has struck laws down as violating the privilege of pursuing a common calling only when those laws were enacted for the protectionist purpose of burdening out-of-state citizens."). Accordingly, RSA 632-A:10, I, does not impinge on the constitutionally protected right to travel, and thus the Court proceeds in its analysis under rational basis scrutiny. See LCM Enters., Inc. v. Town of Dartmouth, 14 F.2d 675, 679 (1st Cir. 1994) (holding rational basis scrutiny was appropriate where the law did not impinge on the right to travel or involve a suspect classification).[2]

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[2] The defendant's challenge under the Privilege and Immunities Clause of the Fourteenth Amendment fails for the same reasons. Because the statute does not infringe on the right to travel, it does not infringe upon the rights that are derived from national citizenship. Cf. 16B Am. Jur. 2d Constitutional Law §§ 818–19 (2017) (noting that "it has long been held that the Privileges and Immunities Clause protects only those rights that derive from United States citizenship," which includes the right to pass freely from state to state). Indeed, "[t]he 14th Amendment does not add to the privileges or immunities of citizenship in the United States; it merely furnishes guarantees additional to those that already existed." Id. § 815. Thus, the clause is inapplicable absent the infringement on a particular right.

C. *Equal Protection*

Given that rational basis scrutiny applies in this instance, the defendant's Equal Protection argument necessarily fails. The defendant argues that RSA 632-A:10, I, violates Equal Protection under both the State and Federal Constitutions. His Equal Protection claim is inextricably tied to his Privileges and Immunities claim. But as discussed above, the statute does not violate the constitutional right to travel. Indeed, the statute does not infringe upon the right to travel even under the more protective New Hampshire Constitution. See Ratti, 109 N.H. at 271–72. However, because the defendant raises claims under both the State and Federal Constitutions, the Court addresses his claim first under the State Constitution, and looks to federal law merely for guidance. See Community Resources for Justice, Inc. v. City of Manchester, 154 N.H. 748, 758 (2007).

The defendant's challenge emanates from two separate constitutional provisions—Part I, Articles 2 and 3. Article 2 provides that:

> All men have certain natural, essential, and inherent rights--among which are, the enjoying and defending life and liberty; acquiring, possessing, and protecting, property; and, in a word, of seeking and obtaining happiness. Equality of rights under the law shall not be denied or abridged by this state on account of race, creed, color, sex or national origin.

N.H. CONST. pt. I, art. 2. Under Article 3, "[w]hen men enter into a state of society, they surrender up some of their natural rights to that society, in order to ensure the protection of others; and, without such an equivalent, the surrender is void." N.H. CONST. pt. I, art. 3. The Court notes, however, that it is unclear how Article 3 is applicable in this instance. The case law interpreting this Article seem to suggest that the Clause means that "defendant cannot claim constitutional rights under . . . the Bill of

Rights without making concessions of some of his natural rights under article 3." State v. Drew, 89 N.H. 54, 57–58 (1937); see State v. Pinsince, 105 N.H. 38, 40 (1963) ("[T]he rights of the respondents under Article 32d of the Bill of Rights are conditioned upon 'concessions of some of [their] natural rights under article 3.'" (quotation omitted) (alteration in original)); cf. State v. Derrickson, 97 N.H. 91, 93 (1951) ("The Bill of Rights of the Constitution of New Hampshire does not guarantee to every individual or to every group of individuals absolute liberty."). Because the defendant has not adequately developed his argument about how Article 3 is implicated in this case, the Court will not further address that provision. See Montenegro v. City of Dover, 162 N.H. 641, 651 (2011) ("[N]either passing reference to constitutional claims nor offhand invocations of constitutional rights without support by legal argument or authority warrants extended consideration." (quotation omitted)); In re Omega Entm't, LLC, 156 N.H. 282, 288 (2007).

"[T]he equal protection guarantee is essentially a direction that all persons similarly situated should be treated alike." Alonzi v. Ne. Generation Servs. Co., 156 N.H. 656, 662 (2008) (alteration in original) (quoting In re Sandra H., 150 N.H. 634, 637 (2004)). "In considering an equal protection challenge under [the] State Constitution, [the Court] must first determine the appropriate standard of review by examining the purpose and scope of the State-created classification and the individual rights affected." Sandra H., 150 N.H. at 637 (quotation omitted). The determination of the specific classification or rights affected directs the appropriate level of scrutiny. "Classifications based upon suspect classes or affecting a fundamental right are subject to strict scrutiny." Community Resources, 154 N.H. at 758. "Classifications involving important

substantive rights are subject to intermediate scrutiny." Id. "Finally, absent some infringement of a fundamental right, an important substantive right, or application of some recognized suspect classification, the constitutional standard to be applied is that of rationality." Id. (quotation omitted). The defendant does not attempt to argue—rightly so—that the statute affects a suspect classification. Moreover, as discussed above, the statute does not impact any fundamental right. Thus, the rationality standard governs. See Sandra H., 150 N.H. at 639.

Under the rationality test, "legislation is presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate State interest." Estate of Robitaille v. N.H. Dep't of Revenue Admin., 149 N.H. 595, 596–97. The defendant, as the party challenging the statute, bears the burden of proving that "that the classification is arbitrary or without some reasonable justification." Id. He has failed to do so.

As the State correctly points out, there is a legitimate state interest in protecting minor children from being exploited by sexually dangerous persons. This was, in fact, the exact purpose of the statute. See Wilson, __ N.H. at __, WL 2017 1500026, at *4 ("The general court recognizes that those who seek to exploit and abuse children often attempt to create opportunities for themselves to do so by seeking to perform services of one type or another in a field involving the care or training of children," but "[t]he public policy of the state demands that these people be denied such opportunities." (quoting Laws 1988, 257:1)). Indeed, it is undoubtedly rational for the Legislature to make such a distinction where they "explicitly found that sexually violent predators . . . present unique risks to society." State v. Ploof, 162 N.H. 609, 627 (2011).

The defendant's argument that the statute violates Equal Protection operates under his misguided assumption that a constitutional right is implicated. But merely claiming that a statute affects a fundamental right—without making the connection between the right allegedly implicated and the underlying constitutional purpose of that right—improperly attempts to extend constitutional protections to areas traditionally unprotected. "While emotionally appealing, this reasoning forgets that a legislature has a great deal of latitude in making statutory classifications involving social and moral legislation." Schanuel v. Anderson, 546 F. Supp. 519, 525 (S.D. Ill. 1982); cf. Calhoun v. Dep't of Health and Rehabilitative Servs., 500 So.2d 674, 678 (Fla. 1987) (holding the state may deny "a convicted felon certain rights and privileges of citizenship" such as "to disqualify a convicted felon from being licensed to operate a family day care center, as children . . . are particularly vulnerable to moral and physical abuse by morally suspect adults."). Indeed, since there is no fundamental right at issue, the Legislature may create classifications for persons with a criminal record. See Dixon v. McMullen, 527 F. Supp. 711, 722 (N.D. Tex. 1981) (upholding a Texas law that prohibits ex-felons from becoming a police officer because of the nature of the position). Here, the Legislature was permitted to draw a line excluding persons who have been convicted sexually explicit crimes involving a minor child from engaging in employment with supervisory control over children. Accordingly, the Court finds that the statute is rationally related to the government's legitimate interest—namely protecting children from being exploited by sex offenders seeking to utilize positions of authority to reoffend.

D. *Overbreadth*

In the same vein, the defendant's overbreadth argument must fail. A statute is overbroad "when it sweep[s] unnecessarily broadly and thereby invade[s] . . . protected freedoms." State v. Haines, 142 N.H. 692, 699 (1998). First, it is unclear whether the doctrine applies in this instance because it is "primarily applicable in the First Amendment area," and "[a]n overbreadth challenge will rarely succeed against a law that is not specifically addressed to speech or conduct that is necessarily associated with speech . . . ." 1 R. McNamara, New Hampshire Practice: Criminal Practice and Procedure § 1.04[2], at 10–11 (5th ed. 2010); see United States v. Salerno, 481 U.S. 739, 745 (1987) ("[W]e have not recognized an 'overbreadth' doctrine outside the limited context of the First Amendment."). Nevertheless, assuming, arguendo, that the doctrine is applicable in instances outside of the First Amendment, the defendant's challenge still fails because a protected right is not implicated and thus the statute does not "proscribe behavior normally protected." Haines, 142 N.H. at 699; see State v. Albers, 113 N.H. 132, 133 (1973) ("The crucial question in each case is whether the statute or ordinance sweeps within its prohibitions what may not be punished under the First and Fourteenth Amendments." (quotation omitted)). Accordingly, absent infringement upon a specific right, the overbreadth doctrine is inapplicable.

E. *Vagueness*

The defendant further argues that the statute is both vague both facially and as-applied under Part I, Article 15 of the New Hampshire Constitution and the Fifth Amendment of the United States Constitution. Specifically, the defendant argues that the statute is vague because it fails to give constitutionally sufficient notice of the

prohibited conduct and it leaves open the possibility of arbitrary and discriminatory enforcement. Again, because the challenge comes under both the State and Federal Constitutions, the Court analyzes the claim under the State Constitution and relies on the federal law for guidance. Community Resources, 154 N.H. at 758.

The Court begins its analysis of the defendant's vagueness challenge by outlining the basic tenets governing the doctrine. It will then drill down into the specific challenges governing the defendant's claims. "The vagueness doctrine, originally a due process doctrine, applies when the statutory language is unclear, and is concerned with notice to the potential wrongdoer and prevention of arbitrary or discriminatory enforcement." Montenegro v. N.H. Div. of Motor Vehicles, 166 N.H. 215, 221 (2014) (quotation omitted). "A statute can be impermissibly vague for either of two independent reasons: (1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) it authorizes or even encourages arbitrary and discriminatory enforcement." MacElman, 154 N.H. at 307. "Mathematical exactness is not required in a penal statute, nor is a law invalid merely because it could have been drafted with greater precision." State v. Porelle, 149 N.H. 420, 423 (2003) (quotation omitted). The defendant bears the burden of proof, and must overcome the strong presumption of the statute's validity. MacElman, 154 N.H. at 307. Given, however, that a fundamental right is not at issue here, the Court need not address facial challenge. Id. ("Where a defendant's vagueness claim does not involve a fundamental right, a facial attack on the challenged statutory scheme is unwarranted."). Thus, the Court will consider the defendant's vagueness argument only in the context of an as-applied challenge.

The defendant's challenge encompasses both prongs of the vagueness doctrine. In determining whether the statute is vague as applied to the defendant, the Court must "examine whether it gave him a reasonable opportunity to know that [his] particular conduct was proscribed by the statute." Bleiler v. Chief, Dover Police Dep't, 155 N.H. 693, 703 (2007). Additionally, the Court examines the statute in "light of the facts of the case at hand." United States v. Harris, 705 F.3d 929, 932 (9th Cir. 2013) (quotation omitted). Here, it could come as no surprise to the defendant that he was prohibited from having contact with minors. Indeed, the terms of the defendant's parole prohibited him from such conduct. Thus, he was generally aware that such contact with a minor would be penalized. Armed with this knowledge, the defendant cannot now claim that he did not have sufficient notice that his particular conduct—employing a minor—was prohibited. Cf. id. (holding a defendant was on notice that bringing a dangerous weapon into a security area in an airport was prohibited because the knife had previously been turned away by TSA officials and the airport had posted warning signs of the prohibition).

Furthermore, the statute is sufficiently clear in its prohibition. As discussed above, the statute expressly prohibits sex offenders from consciously entering into an employment relationship with responsibility for the supervision of a minor child. This means either accepting employment, or employing another. Unlike the many hypotheticals posed by the defense during the hearing, there is not ambiguity in the defendant's conduct here. The defendant employed a minor and was alone with that child in the context of that employment relationship on more than one occasion. This was both a knowing violation of his parole and the statute. While the defendant posits

multiple hypotheticals in an attempt to cast doubt upon the statutory language, they are irrelevant in this instance because the defendant's conduct is specifically proscribed by the statute. See Wilson, __ N.H. at __, 2017 WL 1500026, at *9 ("In other words, regardless of whether the terms care, instruction or guidance may arguably be vague in an abstract sense or hypothetical application, the defendant's as-applied challenge fails because his activities fit[ ] within any reasonable understanding of th[ose] term[s]." (quotation omitted) (alteration in original)). Accordingly, the Court rejects "the defendant's claim that the statute is unconstitutionally vague on the ground that it fails to provide people of ordinary intelligence a reasonable opportunity to understand the conduct it prohibits." Id. (quotation omitted).

In addition, the defendant's argument that the statute authorizes or encourages arbitrary enforcement similarly fails. As the Supreme Court in Wilson explained, a challenge to a statute on the grounds that the language permits arbitrary enforcement will fail if either two factors are met:

> 1) that [the] statute as a general matter provides sufficiently clear standards to eliminate the risk of arbitrary enforcement or (2) that, even in the absence of such standards, the conduct at issue falls within the core of the statute's prohibition, so that the enforcement before the court was not the result of the unfettered latitude that law enforcement officers and factfinders might have in other, hypothetical applications of the statute.

Id. (quotation omitted). As did the Supreme Court in Wilson, the Court, here, need "not address the first prong because [it] conclude[s] that the defendant's conduct falls within the core of the statute's prohibition." Id. (quotation omitted). As indicated above, the defendant hired a minor child to work for him. He thus had supervisory authority over the child, and, in effect, created the opportunity to take advantage if the child. The statute is concerned with creating a barrier for such opportunities to occur. The

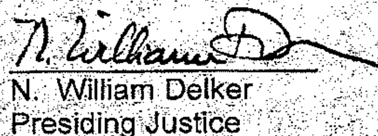
enforcement in this instance was not the result of unfettered latitude, but instead resulted from a clear violation. See Smith v. Goguen, 415 U.S. 566, 578 (1974) (explaining that there are statutes "by their terms or as authoritatively construed apply without question to certain activities," and that such statutes cannot be vague as-applied to "hard-core" violators); see also Farrell v. Burke, 449 F.3d 470, 493–94 (2d Cir. 2006). Accordingly, the defendant's as-applied vagueness challenge fails.

Conclusion

For the reasons set forth above, the defendant's motion to dismiss is DENIED.

SO ORDERED.

5/26/2017
DATE


N. William Delker
Presiding Justice

422-2016-CR-00765
DOB: 09/19/1964
M/5'11/175/W/BRO/BRO

CHILD CARE PROHIBITION - WORKING IF
RSA: 632-A:10,I
ELC: A – B

Johnson

FA

Entries Above This Line Are Not Part of Indictment

ROCKINGHAM, SS.

The State of New Hampshire

SUPERIOR COURT

INDICTMENT

At the SUPERIOR COURT holden at Brentwood, within and for the County of Rockingham, during the September, 2016 session of the Grand Jury, the Grand Jurors for the State of New Hampshire, upon their oath, present that

EDWARD PROCTOR
of
13 Cotton Road, Deerfield, NH 03037
committed the crime of

Verdict: Guilty
Date: 10/31/17
Time: 2:55 p.m.
Clerk: CMc-1

PROHIBITION FROM CHILD CARE SERVICE OF PERSONS CONVICTED OF CERTAIN OFFENSES

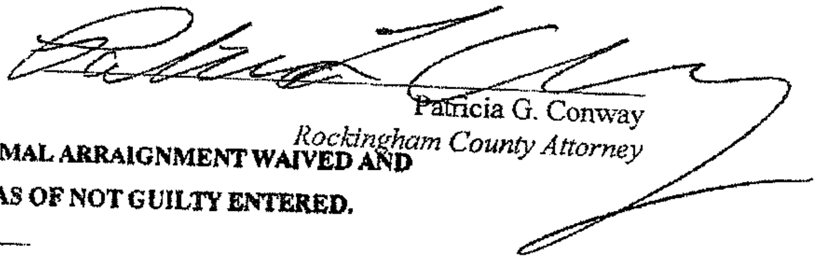
on or about the 21st day of May 2016
at Northwood in the County of Rockingham

In that:

As amended. See attached.
N William Delker 5/4/2017

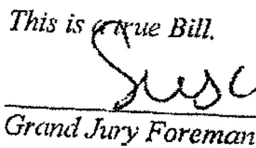
1. Edward Proctor knowingly,
2. after having been convicted of any felonious offense involving child pornography, a felonious physical assault on a minor, or of any sexual assault,
3. undertook employment or volunteer service involving the care, instruction, or guidance of minor children,
4. by employing H.B. (DOB 6/23/00) to work with him on handyman and/or home repair jobs,
5. this being the first instance,

contrary to the form of the Statute, in such case made and provided, and against the peace and dignity of the State.



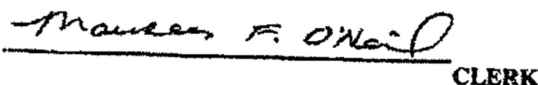
Patricia G. Conway
Rockingham County Attorney

This is a True Bill.



Grand Jury Foreman

FORMAL ARRAIGNMENT WAIVED AND PLEAS OF NOT GUILTY ENTERED.



CLERK

218-2016-CR-00847

Charge ID: 127567FC

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: Rockingham County Superior Court
Case Name: State of New Hampshire v. Edward Proctor
Case Number: 218-2016-CR-00847 Charge ID: 1275678C

COMPLAINT/INDICTMENT AMENDMENT FORM

Check only applicable amendment boxes:

☐ The offense degree is amended to:

☐ VIOLATION	MISDEMEANOR ☐ CLASS A ☐ CLASS B ☐ UNCLASSIFIED(non person)
	FELONY ☒ **CLASS A** ☐ CLASS B ☐ SPECIAL ☐ UNCLASSIFIED(non person)

☐ The RSA name and RSA reference are amended as follows:

RSA name (UCT Descriptor): **Child Care Prohibition - Working in**
RSA: **632-A:10,I**
Penalty:

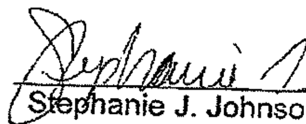
☒ The complaint narrative is changed to:

On or between the 21st and 28th days of May 2016
in the County of Rockingham

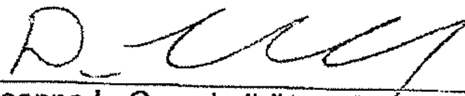
1. **Edward Proctor knowingly,**
2. **after having been convicted of any felonious offense involving child pornography, a felonious physical assault on a minor, or of any sexual assault,**
3. **undertook employment or volunteer service involving the care, instruction, or guidance of minor children,**
4. **by employing H.B. (DOB 6/23/00) to work with him on handyman and/or home repair jobs,**

☐ The inchoate reference is amended to read: **N/A**
☐ The sentence enhancer is amended to read: **N/A**

Date: 05/04/2017



Stephanie J. Johnson #18645
Assistant County Attorney
Rockingham County Attorney's Office



Deanna L. Campbell #14180

NHJB-2935 -DS (12.05.2016)

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS. SUPERIOR COURT APRIL, 2017

STATE OF NEW HAMPSHIRE

v.

EDWARD PROCTOR

218-2016-CR-00847

MOTION TO DISMISS INDICTMENTS DUE TO THE FACIAL INVALIDITY OF RSA 632-A:10, I

NOW COMES Edward Proctor, by and through counsel, Deanna L. Campbell, and respectfully requests that this Honorable Court dismiss the above-captioned indictments. The indictments must be dismissed because RSA 632-A:10, I is facially vague and overbroad in violation of Part I, Article 15 of the New Hampshire Constitution and the Fifth Amendment to the United States Constitution, as applied to the respective states through the Fourteenth Amendment. Further, RSA 632-A:10, I violates the concept of equal protection under the law, contrary to both Part 1, Articles 2 and 3 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution. Finally, RSA 632-A:10, I violates the Privileges and Immunities clauses of both Article IV, Section 2 of the United States Constitution and the Fourteenth Amendment to the United States Constitution.

In support of this motion, the following is stated:

FACTS

1. Edward Proctor is charged with two class A felony counts of Prohibition from Child Care Service, in violation of RSA 632-A:10, I.

2. It is alleged that the conduct resulting in the charges which are the subject of this Motion occurred on May 21, 2016 and May 28, 2016.

3. Mr. Proctor was convicted of multiple counts of aggravated felonious sexual assault in May 1994. Mr. Proctor had been registering as a sex offender with the Deerfield Police Department since his release from the New Hampshire State Prison in 2010.

4. Mr. Proctor has been self employed as a handyman, performing home maintenance and lawn care services for residential properties. It is alleged that Mr. Proctor employed H.B. (dob 6/23/00) to work with him on two occasions. H.B. was fifteen years old at the time of the alleged offense. According to discovery provided by the State Mr. Proctor was to pay H.B. $8 - $10 per hour for his work.

LEGAL ARGUMENT

I. RSA 632-A:10, I improperly intrudes upon a fundamental constitutional right, specifically the right to travel.

4. The statute in question reads, in relevant part, that:

> I. A person is guilty of a class A felony if, having been convicted in this or any other jurisdiction of any felonious offense involving child pornography, or of a felonious physical assault on a minor, or of ***any*** sexual assault, he knowingly undertakes employment or volunteer service ***involving the care, instruction or guidance of minor children*** . . . .

RSA 632-A:10, I (emphasis added).

5. The right to travel, while not expressly mentioned in the United States Constitution, enjoys a long history of protection by the United States Supreme Court. First enumerated in Corfield v. Coryell, Justice Washington placed the right to travel under the umbrella of the privileges and immunities of citizenship of the several states.

Specifically, this was "[t]he right of a citizen of one state to pass through, or to reside in any other state, for purposes of trade, agriculture, professional pursuits, or otherwise. . . ." Corfield v. Coryell, 6 F.Cas. 546, 552 (1823). The courts have since echoed his conclusion on numerous occasions. *See, e.g.*, Slaughter-House Cases, 83 U.S. 36, 75 (1872) ("[T]he people of each State shall have free ingress and regress to and from any other State. . . ."); Shapiro v. Thompson, 394 U.S. 618, 631 (1968) (citing United States v. Guest, 383 U.S. 745, 757-758 (1966) ("The constitutional right to travel from one State to another . . . occupies a position fundamental to the concept of our Federal Union. It is a right that has been firmly established and repeatedly recognized."); Memorial Hospital v. Maricopa County, 415 U.S. 250, 254 (1974) ("The right of interstate travel has been repeatedly recognized as a basic constitutional freedom."); Seabrook Police Association v. Town of Seabrook, 138 N.H. 177 (1993) (the right to travel is a fundamental right recognized by New Hampshire Supreme Court); Saenz v. Roe, 526 U.S. 489 (1999).

6. "Freedom of movement is basic in our scheme of values." Kent v. Dulles, 357 U.S. 116, 126 (1958). "The right to travel is a part of the 'liberty' of which the citizen cannot be deprived without the due process of law under the Fifth Amendment." Id. at 125.

> This freedom of movement is the very essence of our free society, setting us apart. Like the right of assembly and the right of association, it often makes all other rights meaningful—knowing, studying, arguing, exploring, conversing, observing and even thinking. Once the right to travel is curtailed, all other rights suffer, just as when curfew or home detention is placed on a person.

Aptheker v. Secretary of State, 378 U.S. 500, 520 (1964) (Douglas, J., concurring).

As such, the freedom of travel is due the same protections afforded other personal liberties protected by the Bill of Rights. Id. at 516. Aptheker involved a provision of the Subversive Activities Control Act which made it a felony for a member of a communist organization to apply for, use, or attempt to use a passport. The United States Supreme Court applied a strict scrutiny standard in striking down the challenged act as unconstitutional on its face. In so doing, the Court, citing Kent v. Dulles, stated that "[t]ravel abroad, like travel within the country . . . may be as close to the heart of the individual as the choice of what he eats, or wears, or reads. Freedom of movement is basic in our scheme of values." Aptheker v. Secretary of State, 378 U.S. 500, 505-506 (1964) (citing Kent v. Dulles, 357 U.S. 116, 125-126 (1958)).

7. RSA 632-A:10, I clearly attempts to regulate the right to travel and, due to this, a person contemplating a move into the State of New Hampshire must assess such a move in light of this statute. It is implicit in the constitutionally protected right to travel that persons be able to seek employment in their newly chosen state. *See* Ratti v. Hindsale Raceway, Inc., 109 N.H. 270, 271 (1969); Edwards v. California, 314 U.S. 160 (1941). In Shapiro v.Thompson, 394 U.S. 618 (1969), the United States Supreme Court struck down a statutory scheme that linked welfare payments to residency requirements. The Court noted that a person "who desires to migrate, resettle, find a new job, and start a new life will doubtless hesitate if he knows that must risk making the move without the possibility of falling back on state welfare assistance during his first year of residence, when his need may be most acute." Shapiro at 629. Similarly, the possibility of a felony charge under RSA 632-A:10, I causes the same hesitation to migrate, resettle and find a new job in New Hampshire.

8. The examples of the impact of RSA 632-A:10, I are abundant. As will be explained *infra*, virtually every job in the entire state is impacted by the application of this statute. If a person has one prior misdemeanor sexual assault on her record from any other state, she could not move to New Hampshire and work at a McDonald's restaurant. If she did, and a 16 year-old co-worker asked her how to turn on the grill, she could not answer for fear of providing "instruction" or "guidance" to a minor child. Suppose a person was convicted of a misdemeanor sexual assault in New Hampshire. He could never again work as a cashier at a grocery store where a 16 year-old employee working as a 'bagger' might ask him if a particular product should be 'double-bagged.' Answering such a question could, for the same reason as above, lead to a felony charge. This person would have to move to another state that has no such statute in order to find employment where he is not at continual risk of such criminal charge.

9. The objective of political unification uniquely structures our Constitution. As the United States Supreme Court has long held, the Constitution was "framed upon the theory that the peoples of the several states must sink or swim together, and that in the long run prosperity and salvation are in union and not division." Baldwin v. G.A.F. Seelig, Inc., 294 U.S. 511, 523 (1935) (Cardozo, J.). The principle of free interstate migration, and the simultaneous right of United States citizens to freely settle wherever they choose echoes this aim. One of the guarantees of the freedom of interstate travel is protection against "the erection of actual barriers to interstate movement. . . ." Bray v. Alexandria Women's Health Clinic, 506 U.S. 267, 277 (1993) (quoting Zobel v. Williams 457 U.S. 55, 60, n. 6 (1982)).

10. RSA 632:A-10, I is a barrier on interstate movement affecting a person's constitutionally protected right to travel, relocate, and obtain the necessities of survival. Thus, for the reasons set forth below, it is constitutionally infirm and facially invalid.

II. A facial challenge to the constitutionality of RSA 632-A:10, I is appropriate in this case.

11. Generally, vagueness and/or overbreadth challenges are limited to the facts of a given case. If, however, a statute could ***potentially*** intrude upon fundamental constitutional rights, as a result of vagueness or an overly broad scope, then a facial challenge is permitted. Grayned v. City of Rockford, 408 U.S. 104, 114-115 (1972). *See also* Whiting v. Town of Westerly, 942 F.2d 18, 21 (1st Cir. 1991)) (When determining whether a facial challenge for vagueness and/or overbreadth is appropriate, a court must first consider if the statute "reaches a substantial amount of constitutionally-protected conduct."). As explained above, RSA 632-A:10, I affects the constitutionally protected right to travel, making such a facial challenge appropriate.

12. Traditionally, overbreadth challenges are limited to the area of First Amendment jurisprudence. However, in this instance such challenge is clearly proper because the "freedom of travel is a constitutional liberty closely related to rights of free speech and association. . . ." Aptheker v. Secretary of State, 378 U.S. 500, 517 (1964). An overbroad statute is "a double-edged sword of Damocles not only menacing the exercise of constitutional freedoms, but also serving to obstruct any future adjudications with regard to unknown, innumerable other individuals who may, because of the breadth of the statute forego asserting their rights under fear of criminal prosecution and punishment." Goguen v. Smith, 471 F.2d 88, 97, (1st Cir 1972).

13. Further, when vagueness permeates a criminal statue, a facial challenge is appropriate. In City of Chicago v. Morales, 527 U.S. 41 (1999), the United States Supreme Court assessed the validity of a gang congregation ordinance in Chicago and wrote that "[s]ince we, like the Illinois Supreme Court, conclude that vagueness permeates the ordinance, a facial challenge is appropriate. . . .When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may also be adversely impacted by the statute in question." Id. at note 22. Here, the statute involved implicates a fundamental right. "In appraising a statute's inhibitory effect upon such rights, [the United States Supreme] Court has not hesitated to take into account possible applications of the statute in other factual context besides that at bar." Aptheker v. Secretary of State, 378 U.S. 500, 516 (1964) (citations omitted).

14. According to the Supreme Court, standing is the threshold issue, defined as "both threatened and actual injury as a result of the statute." *See* Id.; *See also* Secretary of State of Maryland. v. Munson Co., Inc., 467 U.S. 947 (1984). The actual injury in the case at bar is prosecution for a class A felony. More importantly to this analysis, however, is the threatened injury - that RSA 632-A:10, I exposes anyone falling under its definition to serious criminal charges for accepting a litany of potentially innocuous jobs.

III. RSA 632-A:10, I is facially vague.

15. "A criminal statute is void for vagueness when it forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application." State v. Wong, 125 N.H. 610, 621 (1984) (internal quotations omitted); *See also* State v. Chaisson, 123 N.H. 17, 26 (1983). The vagueness doctrine is inexorably intertwined with the concept of procedural due process.

Procedural due process demands that individuals have adequate notice and fair warning as to proscribed (or mandated) conduct and speech. "Procedural due process requires that a statute give fair notice to the potential offender of the specific conduct proscribed, and provide law enforcement officials and triers of fact with reasonably clear guidelines so as to prevent arbitrary and discriminatory enforcement." State v. Hewitt, 116 N.H. 711, 712-713 (1976). The Supreme Court of the United States has provided useful insight into this area. In Grayned v. City of Rockford, 408 U.S. 104 (1972), the Court explained:

> It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined. Vague laws offend several important values. First, because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning. Second, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application. Third, but related, where a vague statute abuts upon sensitive areas of basic First Amendment freedoms, it operates to inhibit the exercise of [those] freedoms. Uncertain meanings inevitably lead citizens to steer far wider of the unlawful zone . . . than if the boundaries of the forbidden areas were clearly marked.

Id. at 108-109.

16. The term "minor children" used in RSA 632-A:10, I is not defined by RSA Chapter 632-A. However, the term "minor" is defined as "a person under the age of 18" by RSA 169-B:2, VI (Delinquent Children), as "any individual under the age of 18" by RSA 170-B:2, III (Adoption), and as "a person under the age of 18" by RSA 126-K:2, V (Youth Access to and Use of Tobacco Products). Perhaps more appropriate to the issue at hand, however, is the definition of "youth" under RSA 276-A (Youth Employment Law),

which is "any person under 18 years of age," RSA 276-A:3, II, and of "child" under RSA 169-D:2 (Children in Need of Services), which is "a person who is under the age of 18 on the date the petition is filed pursuant to RSA 169-D:5." RSA 169-D:2, I.[1]

17. In any event, minors are permitted to engage in most types of employment, but such employment can be, to one degree or another, restricted in type, scope, and duration. *See generally*, RSA 276-A.

18. The terms "care," "instruction," and "guidance" are likewise not defined in RSA Chapter 632-A, and, as such, those definitions are governed by RSA 21:2.[2] "In statutory interpretation [the New Hampshire Supreme Court] is the final arbiter of the intent of the legislature as expressed in the words of a statute considered as a whole." Appeal of Naswa Motor Inn, 144 N.H. 89, 90 (1999). In interpreting statutory language, the Court relies on the plain and ordinary meaning of the words used, relying on legislative history only when unable discern that plain meaning. Id. at 90. While courts are to determine the meaning of the word or phrase as intended by the legislature, they are bound by the statute's language, and must properly presume that "the legislature was aware of the difference between words and chose to use them advisedly." John A. Cookson Co. v. N.H. Ball Bearings, Inc., 147 N.H. 352, 357 (2001).

19. "Care" is defined as: "**1**: suffering of mind: grief; **2a**: a disquieted state of blended uncertainty, apprehension, and responsibility **b**: a cause for such anxiety; **3**:

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[1] Neither RSA 276-A nor RSA 169-D:2 defines the term "minor children." The two chapters utilize the terms "youth" and "child," respectively.

[2] "Words and phrases ***shall be construed according to the common and approved usage of the language***; but technical words and phrases, and such others as may have acquired a peculiar and appropriate meaning in law, shall be construed and understood according to such peculiar and appropriate meaning." RSA 21:2 (emphasis added).

painstaking or watchful attention; **4**: regard coming from desire or esteem; **5**: charge, supervision; **6**: a person or thing that is an object of attention, anxiety or solicitude." Webster's New Collegiate Dictionary (1981). "Instruction" is defined as: "**1a**: lesson, precept, **b**: a direction calling for compliance: order, **c** *pl*: an outline or manual of technical procedure: directions, **d**: a code that tells a computer to perform a particular operation; **2**: the action, practice or profession of a teacher: teaching." Webster's New Collegiate Dictionary (1981). "Guidance" is defined as: "**1**: the act or process of guiding; **2**: advice on vocational or educational problems given to students; **3**: the process of controlling the course of a projectile by a built-in mechanism." Webster's New Collegiate Dictionary (1981).

20. The language contained in RSA 632-A:10, I is so vague it effectively eliminates all but the most obscure types of employment possibilities in New Hampshire for anyone meeting the criteria listed in section 632-A:10, I. Virtually any place of employment short of an adult bookstore or State-run liquor store conceivably exposes one to a felony conviction. Indeed, it is entirely possible for a person to secure employment at a McDonalds restaurant or a supermarket and get promoted to a supervisory position that rewarded him with not only a raise in salary and responsibility but a class A felony charge as well.

21. The requirement that criminal statutes be written with specificity gives "a person of ordinary intelligence fair notice that his contemplated conduct is forbidden by the statute." Papachristou v. City of Jacksonville, 405 U.S. 156, 162 (1972) (citing United States v. Harriss, 347 U.S. 612, 617 (1954)). This requirement provides for a

"government by clearly defined laws . . . [avoiding] moment-to-moment opinions of a policeman on his beat." State v. Albers, 113 N.H. 132, 134-135 (1973) (citing Cox v. Louisiana, 379 U.S. 536, 579 (1965)). The United States Supreme Court, after reaffirming the general principles set forth in Grayned v. City of Rockford, 408 U.S. 104 (1972) (*See infra, paragraph 8*), noted that because criminal statutes carry a heavier penalty than civil, they must be written with a greater degree of specificity. Village of Hoffman Estates v. The Flipside, Hoffman Estates, Inc., 455 U.S. 489, 498-99 (1982).

22. A position "involving the care, instruction or guidance of minor children" conceivably implicates everything from professional teacher to an assistant shift manager at the local fast food restaurant, drugstore, or Wal-Mart. Truthfully, one is hard pressed to find a job that potentially does not expose someone fitting the requisite criteria to a felony charge.

23. Moreover, it is unclear what types of working relationship are barred by the statute. "Care," "instruction," or "guidance" provides neither instruction nor guidance in interpreting work-related relationships where one party is a minor and the other has a previous conviction. Conceivably something as innocent as answering a question provides ammunition for felony charges. It is impossible for someone to know on what whim the state would choose to enforce RSA 632-A:10, I.

24. Requiring a heightened degree of specificity in our criminal statutes seeks to avoid precisely these types of situations. RSA 632:A-10, I fails because it does not provide any meaningful standard to which a person may conform their conduct. In Johnson v. United States, 135 S. Ct. 2551 (2015) the Court struck down a provision in a federal sentencing statute as facially void for vagueness. Id. At 2563. The Court also

rejected the proposition that a statute is facially vague only if it is unconstitutionally vague "in all its applications." Id. At 2560-61.

IV. RSA 632:A-10 is unconstitutionally overbroad because it unnecessarily sweeps into an area of protected freedom, specifically the right to travel, and is thereby void.

25. In addition to being vague, a statute may likewise be "overbroad." "A statute is overbroad if when it sweeps unnecessarily broadly and thereby invade[s] the area of a protected freedom." State v. Wong, 125 N.H. 610, 622 (1984) (internal quotations omitted); *See also* State v. Chaisson, 123 N.H. 17, 27 (1983) and State v. Pike, 128 N.H. 447 (1986) (A criminal statute is overbroad when it "attempts to control or prevent activities constitutionally subject to State regulation by means which sweep unnecessarily broadly and thereby invade the area of protected freedom." Pike at 450-451).

26. RSA 631-A:10, I's amorphous language dissuades certain people from exercising their constitutionally protected right to travel and relocate in New Hampshire by exposing them to possible felony charges.

27. Pike sets forth a two-part test for determining when a statute is overbroad: 1) the activity that the statute regulates is constitutionally subject to state control; and 2) the means used to regulate such activity sweep unnecessarily broadly into an area of constitutionally protected freedom. Clearly, protecting New Hampshire's younger citizens from those with past sexual offenses is within the purview of the legislature. However, the means applied here are *far* too broad in that they severely and negatively impact the right of citizens to travel, relocate, and make a living where they choose. In other words, while the end sought to be achieved by the legislature may be noble, the

means used to achieve such an end have the collateral effect of curtailing the right to travel to an unacceptable, and indeed unconstitutional, degree.

V. <u>RSA 632:A-10 violates the concept of equal protection guaranteed by Part 1, Articles 2 and 3 of the New Hampshire Constitution and the Fourteenth Amendment to the United States Constitution.</u>

28. In an equal protection analysis the touchstone issue is "whether the legislation at issue treats similarly situated persons differently, and thereby creates a classification requiring equal protection scrutiny." <u>Petition of Robert Hamel</u>, 137 N.H. 488, 490 (1993) (citation omitted). In <u>Hamel</u>, the defendant was convicted of felonious sexual assault and he requested bail pending sentencing and appeal. The Court denied this request, and the defendant challenged this ruling in a petition for writ of habeas corpus. In denying the defendant's petition, which was based in part upon equal protection grounds, the New Hampshire Supreme Court upheld the superior court's denial of bail under RSA 597:1-a, I (which included felonious sexual assault among nonbailable offenses).

29. In the case at bar, RSA 632-A:10, I creates such a classification. On one hand, there are those people with a sexual assault conviction who apply for a job involving the care, instruction and guidance of minor children. On the other hand, there are those people with a sexual assault conviction who apply for a job that does *not* involve the care, instruction, or guidance of minor children.

30. After determining that the statute created a classification, the <u>Hamel</u> Court turned its attention to the appropriate level of review. "We apply the strict scrutiny test, in which the government must show a compelling State interest in order for its actions to

be valid, when the classification involves a suspect class based on race, creed, color, gender, national origin, or legitimacy, or ***affects a fundamental right***." Hamel, 137 N.H. at 490 (citation omitted) (emphasis added). In that case, the defendant failed to claim his denial of bail affected a fundamental right, and therefore RSA 597:1-a, I was upheld under a rational basis analysis.

31. Quite the contrary, RSA 632-A:10, I *does* affect a fundamental right - the right to travel. RSA 632-A:10's vague and overbroad language make exercising the right to travel to New Hampshire virtually impossible for one targeted by section I.

32. When a governmentally-created classification has the effect of imposing a penalty on the right to travel it violates the equal protection clause "unless shown to be necessary to promote a ***compelling*** governmental interest . . . ." Shapiro v. Thompson, 394 U.S. 618, 634 (1969). (citations omitted) (emphasis added). In Shapiro, the United States Supreme Court invalidated a statutory scheme that prohibited the distribution of welfare benefits to those persons who were state residents for less than one year.

33. In this instance, RSA 632-A:10, I's language, as vague and overbroad as it is, creates an impermissible classification that has an overwhelmingly negative effect upon the right to travel. Ironically, one of the only safe ways a person defined in RSA 632-A:10, I can secure the necessities of survival in New Hampshire is through public assistance.

34. RSA 632-A:10, I's goal appears to be the protection of children. This is concededly a compelling governmental interest. However, it is not enough that the statute achieves its intended goal. Embedded in the analysis of the statute is the necessity

that the means used to achieve this compelling interest is the most narrowly tailored available to the state.

> [E]ven though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of legislative abridgment must be viewed in the light of less drastic means for achieving the same basic purpose.

Shelton v. Tucker, 364 U.S. 479, 488 (1960). In this case, there are alternative, less restrictive means available for achieving the desired result, rendering RSA 632-A:10, I invalid.[3]

35. While there may be a concern for public safety, a state may not exclude undesirable nonresidents from relocating to within its borders. *See, e.g.*, Edwards v. California, 314 U.S. 160 (1941) (making it a criminal offense to transport an indigent person into California); Shapiro v. Thompson, 394 U.S. 618 (1969) (restricting welfare benefits for new residents, thereby dissuading indigent migration).

> The states have not now, if they ever had, any power to restrict their citizenship to any classes or persons. A citizen of the United States has a perfect constitutional right to go to and reside in any State he chooses, and to claim citizenship therein, and an equality of rights with every other citizen; and the whole power of the nation is pledged to sustain him in that right.

Saenz v. Roe, 526 U.S. 489, 503-504 (1999) (citing Slaughter-House Cases, 83 U.S. 36, 112-113 (1872) (Bradley, J., dissenting).

36. RSA 632-A:10, I segregates a particular group of people who desire to relocate to New Hampshire, and restricts their fundamental right to travel by making it exceedingly difficult for them to secure employment, and thereby acquire their basic

subsistence needs. In application and effect, this law imposes an unconstitutional barrier to those people defined by RSA 632-A:10, I who desire to relocate to New Hampshire. Further, and again due to the vague and overbroad language of RSA 632-A:10, I (*see supra*), those who have "been convicted in this or any other jurisdiction of any felonious offense involving child pornography, or of a felonious physical assault on a minor, or of any sexual assault" and are currently residing in New Hampshire face a similar dilemma. To avoid a possible felony charge, these people will be encouraged to relocate to a state where the law does not virtually eliminate their ability to earn a living. Clearly both of these results are unconstitutional.

37. The New Hampshire Supreme Court has held constitutional statutes which limited the rights of people with certain types of convictions. *See, e.g.*, State v. Pike, 128 N.H. 447 (1986)[4]; State v. Smith, 132 N.H. 756 (1990). In Smith, the Court held that the right to bear arms "is not absolute and may be subject to restriction and regulation." Id. at 758. Employing strict scrutiny the Court found the statute's stated goal, protecting the public, was a compelling governmental interest. The Court also held that the means employed, disallowing dangerous people from possessing a firearm, was the most narrowly tailored means to accomplish that goal.

38. Smith is dramatically different from the issue at bar, however. With regard to RSA 632-A:10, I, the means used by the state to accomplish the goal of

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[3] Protecting children is a compelling interest for all states, yet no other state has a statute that approaches New Hampshire's. In fact, the vast majority of states rely on sexual offender registration and/or place the burden on the employer to check the background of all current employees and applicants.

[4] In Pike, the defendant challenged RSA 159:3, which made it a crime for a convicted felon to possess a firearm, on the grounds that the statute was vague and overbroad. The New Hampshire Supreme Court, affirming the defendant's conviction, found that the statute was "not lacking in clarity or precision" and was "not unnecessarily broad or invasive." State v. Pike, 128 N.H. 447, 451 (1986).

protecting children is clearly far from narrowly tailored. In fact, as pointed out *supra*, there are many instances where RSA 632-A:10, I applies and the individual affected poses no danger to minors whatsoever. Such application illustrates how RSA 632-A:10, I is fatally flawed.

39. The New Hampshire Supreme Court has also upheld specific instances where a conviction has terminated a fundamental right. In Fischer v. Governor, 145 N.H. 28 (2000), the Court upheld RSA 607(A)(2), which prohibited a person sentenced for a felony, from the time of his sentence until his final discharge, from voting in an election. In Fischer, the Court held that Part 1, Article 11 of the New Hampshire Constitution specifically empowered the legislature to set voter and candidate qualifications. However, the Fischer Court noted both the temporal limitation on such disenfranchisement ("until [a person's] final discharge") and that the standard used in reviewing the statute at issue was merely a "reasonableness" standard. Here, RSA 632-A:10, I contains no temporal limitations and the appropriate standard of review is strict scrutiny.

V. RSA 632:A-10 violates the Privileges and Immunities Clauses of both Article IV, § 2 and the Fourteenth Amendment of the United States Constitution.

40. In Saenz v. Roe, 526 U.S. 489 (1999), the United States Supreme Court invalidated a California program limiting welfare benefits of newly arrived residents for their first year in California to the same level they had in their previous state of residency because the statute violated the constitutionally protected right to travel. In its analysis, the Court held that the right to travel embraces at least three different components:

> It protects the right of a citizen of one State to enter and to leave another State, the right to be treated as a welcome visitor rather than an

> unfriendly alien when temporarily present in the second State, and, for those travelers who elect to become permanent residents, the right to be treated like other citizens of that State.

Saenz at 500. It was under the third component that the Court invalidated the California program. In so holding, the Court found that the reason proffered by California, financial strain and not a desire to keep out indigents, was invalid. The Court, consistent with Shapiro, stated that the desire to restrict citizenship to a certain class was an impermissible goal.

41. The Saenz Court explained how the Privileges and Immunities clause in Article IV, § 2 of the United States Constitution protects the second component of the right to travel (the "right to be treated as a welcome visitor rather than an unfriendly alien when temporarily present in the second State"):

> The second component of the right to travel is . . . expressly protected by the text of the Constitution. The first sentence of Article IV, § 2, provides: "The Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States." Thus, by virtue of a person's state citizenship, a citizen of one State who travels in other States, intending to return home at the end of his journey, is entitled to enjoy the "Privileges and Immunities of Citizens in the several States" that he visits. FN 14[5] This provision removes "from the citizens of each State the disabilities of alienage in the other States."

Saenz at 501.

42. The third component of the right to travel – the right of the newly arrived citizen to the same privileges and immunities enjoyed by other citizens of the same state – has traditionally been thought by scholars and jurists alike to be protected by the

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[5] Footnote 14 reads: Corfield v. Coryell, 4 Wash. C.C. 371, 6 F. Cas. 546 (CCED Pa. 1823)(Washington, J., on circuit) ("fundamental" rights protected by the privileges and immunities clause include "the right of a citizen of one state to pass through, or to reside in any other state"). Saenz v. Roe, 526 U.S. 489, 501-502, n. 14 (1999).

Fourteenth Amendment to the United States Constitution. *See generally* Saenz v. Roe, 526 U.S. 489 (1999); Slaughter-House Cases, 83 U.S. 36 (1872); Edwards v. California, 314 U.S. 160 (1941).

43. RSA 632-A:10, I impacts both the second and third component of the right to travel. A person described by 632-A:10, I may either reside out-of-state and choose to work in New Hampshire, or he may choose to move to New Hampshire permanently. In either event, such person would find it extremely difficult to secure employment which could not conceivably lead to a possible criminal charge in the future. Any job in which a "minor child" might ask for advice would be off-limits to such person. Answering the question "How do I void this sale on the cash register?" could land someone who has been convicted of *any* sexual assault in prison for 7 ½ to 15 years.

44. Of course, a state can enact reasonable restrictions which incidentally impact the right to travel. However, when those restrictions create an undue burden on the right to travel, and, as is required in this case, are not the most narrowly tailored means for the state to accomplish its compelling interest, those restrictions must fail. RSA 632-A:10, I is not the most narrowly tailored means for the State to accomplish its interest in protecting children and it impermissibly curtails the right to travel protected by the Privileges and Immunities Clauses of both Article IV, § 2 of the United States Constitution and the Fourteenth Amendment to the United States Constitution.

WHEREFORE, Mr. Proctor respectfully requests that this Court:

A. Grant the within motion;

B. Dismiss the indictments charging Mr. Proctor with violations of RSA 632-A:10, I;

C. Issue a written order explaining the Court's reasoning; and

D. Grant such further relief as is just and reasonable.

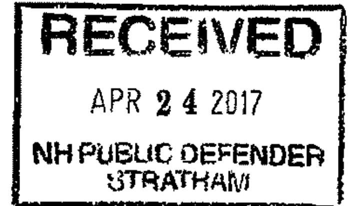
Respectfully submitted,

Deanna L. Campbell #14180
New Hampshire Public Defender
142 Portsmouth Avenue
Stratham, NH 03885
(603) 778-0526

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Motion has been forwarded this 12th day of April, 2017 to Stephanie Johnson, Esq., Assistant County Attorney for Rockingham County.

Deanna L. Campbell #14180



STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS.

SUPERIOR COURT
218-2016-CR-00847

STATE OF NEW HAMPSHIRE

v.

EDWARD PROCTOR

TRUE COPY

STATE'S OBJECTION TO DEFENDANT'S MOTION TO DISMISS DUE TO FACIAL INVALIDITY OF RSA 632-A:10, I

NOW COMES the State of New Hampshire, by and through the Office of the Rockingham County Attorney, and states as follows:

1. The Defendant is charged with two counts of Child Care Prohibitions. Trial is currently scheduled for the week of June 19, 2017.

2. On April 13, 2017 the State received the Defendant's Motion to Suppress, in which he argues that RSA 632-A:10, I improperly intrudes upon the right to travel, is facially vague, is constitutionally overbroad, violates Equal Protection, and violates the Privileges and Immunities Clause. The State objects.

FACTS[1]

3. On September 22, 1994, the Defendant was convicted of nine counts of Aggravated Felonious Sexual Assault. On May 27, 1994, the Defendant was convicted of five counts of Felonious Sexual Assault. On May 25, 1994, the Defendant was convicted of four counts of Aggravated Felonious Sexual Assault and fourteen counts of Aggravated Felonious Sexual Assault. Three of the Aggravated Felonious Sexual Assaults were committed against a victim under thirteen years old.

4. After being incarcerated as result of these convictions, the Defendant was placed on parole. One of his parole conditions was that he not have contact with minors.

5. On or about, May and June of 2016, the Defendant employed a fifteen year old child – H.B. – as his assistant in handyman-type jobs. The Defendant would pick H.B. up from his

[1] All factual assertions contained herein are derived from the narrative reports and witness statements compiled by the Deerfield Police Department during their investigation into this matter.

home and travel with him to various locations around New Hampshire, including Manchester, Northwood, and Deerfield.

6. By employing this child, the Defendant violated RSA 632-A:10, I by knowingly undertaking employment involving the care, instruction or guidance of a minor child after having been convicted of sexually assaulting minors.

ARGUMENT

A. RSA 632-A:10, I does not improperly intrude upon the right to travel.

7. The Defendant argues that RSA 632-A:10, I violates the implied right to travel granted within the umbrella of the United States Constitution privileges and immunities clause. See Defendant's Motion to Dismiss Due to Facial Invalidity of RSA 632-A:10, I ("Defendant's Motion") ¶ 5.

8. The Defendant reasons that the right to travel encompasses the ability to seek employment in a new state and that the Defendant's ability to seek employment is infringed upon if a person convicted of Aggravated Felonious Sexual Assault is not allowed to work with children. Id. at ¶ 7-8.

9. This argument is erroneous because it ignores the fact that the Defendant has a range of employment choices which do not involve working with children.

10. In fact, the Defendant could remain working in his current profession as a handyman. He could also hire employees in his current occupation. The only restriction on his employment is that he not work with or hire children. Please see RSA 632-A:10, I (2017).

11. Therefore, the Defendant's ability to seek employment and travel have not been infringed upon.

12. Second, the Defendant committed the underlying litany of sexual assaults in New Hampshire. RSA 632-A:10, I does not prevent the Defendant from exercising his right to travel by moving to another state and seeking employment there. The Defendant has not moved into this state and been unable to find employment and therefore RSA 632-A:10, I has not infringed on his right to travel. Thus, the Defendant has not suffered any injury. Additionally, the Defendant would be free to move out of the state, return, and secure employment so long as the Defendant did not care for, instruct, or guide minor children.

13. Third, the Defendant does not have standing to bring the constitutional challenge that hypothetical defendants' right to travel have been infringed upon. "A plaintiff who engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law as applied to the conduct of others." Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 495 (1982).

14. Finally, in regards to the Defendant's hypothetical that a child is hired subsequent to the hiring of a hypothetical person convicted of Aggravated Felonious Sexual Assault, the New

Hampshire Constitution requires that an actual and not hypothetical dispute be at issue for standing.

15. "[S]tanding under the New Hampshire Constitution requires parties to have personal legal or equitable rights that are adverse to one another ... with regard to an actual, *not hypothetical*, dispute." Duncan v. State, 166 N.H. 630, 642 (2014).

16. For all of the foregoing reasons, RSA 632-A:10, I does not improperly intrude upon the right to travel and the Defendant's Motion should be denied.

B. A facial challenge to the constitutionality of RSA 632-A:10, I is inappropriate.

17. The Defendant argues that a facial challenge to RSA 632-A:10, I is appropriate because the vagueness and/or overly broad reach of the statute affects the constitutionally-protected right to travel. This is erroneous because anyone in violation of RSA 632-A:10, I could travel from New Hampshire to wherever they like without problem, and anyone convicted of sexual assault could travel into New Hampshire and seek any employment that does not involve the care, instruction or guidance of a child - as illustrated *supra.*

18. The Defendant next argues that a facial challenge is appropriate because vagueness permeates RSA 632-A:10, I. This is erroneous as the plain meaning of the statute according to common and approved usage of the language is not vague nor overbroad.

19. Statutory interpretation first requires "an ambiguity that necessitates judicial interpretation." Bradley Real Estate Trust v. Taylor, Commissioner, 128 N.H. 441, 445 (1986). In determining the meaning of the terms of a statute, the Court should first consider the plain meaning of the words used in the statute "according to the common and approved usage of the language." State v. Johnson, 134 N.H. 570, 575-6 (1991). "The court should not construe the terms unconstitutional, where the terms are susceptible of a definition that would preserve the constitutionality of the statute." Id.

20. The Defendant also relies on City of Chicago v. Morales, to say that a facial challenge is appropriate because RSA 632-A:10, I violates not only the Defendant's rights to seek employment but others who may be adversely impacted. Id. at ¶ 13. However, the Morales rule requires that the law be unconstitutionally vague before proceeding to the violation of rights analysis. RSA 632-A:10, I is not unconstitutionally vague because the statute uses plain and easily understandable words - as is further illustrated *infra.*

21. For all of the foregoing reasons, a facial challenge to RSA 632-A:10, I is inappropriate and the Defendant's Motion should be denied.

C. RSA 632-A:10, I is not facially vague

22. Where a defendant's vagueness claim does not involve a fundamental right, a facial attack on the challenged statutory scheme is unwarranted. State v. Glidden, 122 N.H. 41, 46 (1982).

23. As illustrated *supra*, RSA 632-A:10, I does not infringe on the Defendant's fundamental right to travel. The Defendant has not stated that RSA 632-A:10, I violates any other fundamental right, and in fact, the statute does not violate any fundamental rights.

24. "A statute can be impermissibly vague for either of two independent reasons: (1) it fails to provide people of ordinary intelligence a reasonable opportunity to understand what conduct it prohibits; or (2) it authorizes or even encourages arbitrary and discriminatory enforcement." State v. Gatchell, 150 N.H. 642, 643 (2004).

25. The Defendant has only raised the first reason, i.e., that RSA 632-A:10, I fails to provide people of ordinary intelligence with a reasonable opportunity to understand what conduct it prohibits.

26. "A party challenging a statute as void for vagueness bears a heavy burden of proof in view of the strong presumption favoring a statute's constitutionality." *Id.* at 643, 843.

27. First, the Defendant claims that "minor children" is impermissibly vague. The Supreme Court of New Hampshire has found that a term is impermissibly vague if it requires a level of unacceptable guesswork. State v. MacElman, 154 N.H. 304, 308 (2006) ("[t]his definition of 'drug-dependent person' does not involve any level of unacceptable guesswork.").

28. Defendant relies on Webster's New Collegiate Dictionary to find the plain meaning of words. *See* Defendant's Motion ¶ 19. That dictionary defines "minor" as "not having reached majority," defines "majority" as "the age at which full civil rights are accorded – the age of majority in the U.S. is 18." Webster's New Collegiate Dictionary (1981). Additionally, it defines "child" – the singular of "children" as "a person not yet of age." Webster's New Collegiate Dictionary (1981).

29. Further, each of the three New Hampshire statutes which the Defendant cites all define the age of a minor as under eighteen. *See* Defendant's Motion ¶ 16.

30. Next, the Defendant argues that the terms "care," "instruction," and "guidance" are not defined and therefore are impermissibly vague. This argument is erroneous because a person of ordinary intelligence would have a reasonable opportunity to understand what conduct RSA 632-A:10, I prohibits without the statute defining each term. "[C]are," "instruction," and "guidance" are terms that are easily understood by their plain meaning.

31. In State v. MacElman, the defendant brought a challenge to RSA 318-B:16, arguing that the phrase "drug-dependent person" was vague. MacElman, 154 N.H. 304, 307 (2006).

32. RSA 318-B:16 states:

> Any store, shop, warehouse, dwellinghouse, building, vehicle, boat, aircraft, or any place whatever which is resorted to by *drug-dependent persons* for the purpose of using controlled drugs or

which is used for the illegal keeping or selling of the same shall be deemed a common nuisance. No person shall *knowingly* keep or maintain such a common nuisance. RSA 318-B:16 (emphasis added).

33. RSA 318-B:1(x) states:

> "Drug-dependent person" means any person who has developed a state of psychic or physical dependence, or both, upon a controlled drug following administration of that drug upon a repeated *periodic or continuous basis*. RSA 318-B:1(x) (emphasis added).

34. From defendant MacElman's Brief:

> [t]he statute fails to adequately define *'periodic or continuous' drug use*. For example, an individual who was a heavy drug user in the past, who has received treatment and maintained a period of sobriety, might suffer a relapse. Such a person may or may not be classified as a "drug dependent person" under the definition. Also, a periodic drug user could come to a person's home only once, the other periodic uses occurring elsewhere. A homeowner, such as Ms. MacElman, would not know of this past periodic use and therefore be unable to determine whether such a person was a "drug dependent person.
> Brief for Defendant at 6, State v. MacElman, 154 N.H. 304 (No. 2005-0375). (emphasis added).

35. The New Hampshire Supreme Court held that RSA 318-B:16 was not impermissibly vague because the statute used plain and easily understandable words.

> This definition of "drug-dependent person" does not involve any level of unacceptable guesswork. Among other things, it: (1) delineates the type of dependence that would render an individual "drug-dependent" (psychic or physical); (2) discusses the nature of the drug's administration to the dependent person (repeated periodic or continuous); and (3) enumerates particular classes of medication, the use of which would not render a person "drug-dependent." RSA 318-B:1, X. Furthermore, RSA 318-B:16's requirement that drug-dependent persons must resort to the particular location *for the purpose of* using controlled drugs does not leave any doubt, for a person of ordinary intelligence, as to whether the lawful and prescribed consumption of medication in one's home or other location is prohibited by the statute. MacElman, 154 N.H. at 308 (emphasis original)

36. Here, as in MacElman, the statute delineates the type of employment covered by listing employment that involves the care, instruction, or guidance of minor children.

37. Similarly, the statute at issue here enumerates a list of professions which would be employment prohibited by RSA 632-A:10, I. While this list is not exhaustive, it does provide guidance.

38. Looking at the list, it is clear that each prohibited employment is one where the prohibited person is in a position of authority over a minor child when that child is away from their parent or guardian:

> he knowingly undertakes employment or volunteer service involving the care, instruction or guidance of minor children, including, but not limited to, service as a teacher, a coach, or worker of any type in child athletics, a day care worker, a boy or girl scout master or leader or worker, a summer camp counselor or worker of any type, a guidance counselor, or a school administrator of any type.
> RSA 632-A:10, I.

39. The Defendant's employment is exactly the type of behavior that the statute is meant to prohibit. The Defendant had a position of authority over H.B. while the Defendant was alone with the child beginning when he picked H.B. up at his home in the morning until dropping him off at the end of the day.

40. Additionally, RSA 632-A:10, I requires a scienter of "knowingly undertakes." Id. The New Hampshire Supreme Court has held that a scienter requirement in a statute "ameliorates the concern that the statute does not provide adequate notice to citizens regarding the conduct that is proscribed." State v. *Porelle*, 149 N.H. 420, 423 (2003).

41. The Defendant's examples of receiving a felony along with a promotion at McDonalds would require that the Defendant accept the promotion knowing full well that children would be under his supervision. Defendant's Motion ¶ 20.

42. Likewise, the Defendant could accept a supervisory position of adults without worry that a higher supervisor hires a child without his knowledge. In fact, the Defendant's current employment is within the bounds of RSA 632-A:10, I – so long as the Defendant simply hires an adult.

43. As in MacElman, the Defendant's Motion should be denied because RSA 632-A:10, I includes the "knowingly undertakes" scienter and uses plain and easily understandable words.

44. For all the foregoing reasons, RSA 632-A:10, I is not impermissibly vague and the Defendant's Motion should be denied.

D. RSA 632-A:10, I is not unconstitutionally overbroad.

45. "A statute is void for overbreadth if it attempts to control conduct by means which invade areas of protected freedom." *State v. Pike*, 128 N.H. 447, 450–51, (1986).

46. As illustrated *supra*, RSA 632-A:10, I does not violate the implied right to travel. The Defendant has not stated that RSA 632-A:10, I violates any other protected freedom.

47. For all the foregoing reasons, RSA 632-A:10, I is not constitutionally overbroad and the Defendant's Motion should be denied.

E. RSA 632-A:10, I does not violate the concept of equal protection.

48. "We begin an equal protection analysis by asking whether the legislation at issue treats similarly situated persons differently, *LeClair v. LeClair*, 137 N.H. 213, ----, 624 A.2d 1350, 1355 (1993), and thereby creates a classification requiring equal protection scrutiny." Petition of Robert Hamel 137 N.H. 488, 490 (1993).

49. If the Court determines that the statute does create a classification, the next step is to "determine whether such a classification passes constitutional muster." Id. To do so, the Court must decide the appropriate level of scrutiny:

> We apply the strict scrutiny test, in which the government must show a compelling State interest in order for its actions to be valid, when the classification involves a suspect class based on race, creed, color, gender, national origin, or legitimacy, or affects a fundamental right.
>
> [] We apply the fair and substantial relation test to classifications involving important substantive rights, including the right to tort recovery, and the right to use and enjoy private real property subject to zoning regulations. Under this test, the classification must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation.
>
> Finally, we apply the rational basis test to claims in which the classification does not involve a suspect class, a fundamental right, or an important substantive right under our State Constitution. Under the rational basis test, legislation is *presumed to be valid and will be sustained if the classification drawn by the statute is rationally related to a legitimate state interest....* Under the rational basis analysis, the party challenging the legislation has the burden to prove that whatever classification is promulgated is arbitrary or without some reasonable justification."
>
> Id. at 490-91 (emphasis added).

50. As illustrated *supra,* RSA 632-A:10, I does not violate the implied right to travel. The Defendant has not stated that RSA 632-A:10, I violates any other fundamental right.

51. As such, the rational basis test is the appropriate measure for scrutiny. Thus RSA 632-A:10, I should be presumed to be valid and sustained because it is rationally related to the legitimate state interest of protecting children.

52. Here, as in State v. Ploof, where the statute in question created a different standard of treatment for those convicted of sexually violent crimes, this Court should find the statute valid because "[t]he legislature has thus declared that sexually violent predators are different from other civilly committed persons with respect to treatment and risk. Accordingly, the purpose of RSA chapter 135–E is to [] both provide care and treatment to sexually violent predators and to protect society from such dangerous persons. These are legitimate state interests." State v. Ploof, 162 N.H. 609, 627 (2011).

53. RSA 632-A:10, I is justified by compelling governmental interests and it creates only those procedures necessary to accomplish its legitimate purpose.

54. For all the foregoing reasons, RSA 632-A:10, I does not violate Equal Protection and the Defendant's Motion should be denied.

F. RSA 632-A:10, I does not violate the Privileges and Immunities Clause.

55. "Article IV, § 2, cl. 1, of the Constitution provides that the 'Citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States.' The provision was designed 'to place the citizens of each State upon the same footing with citizens of other States, so far as the advantages resulting from citizenship in those States are concerned.'" Supreme Court of Virginia v. Friedman, 487 U.S. 59, 64 (1988).

56. A person has the right to leave one state and enter another state to establish a new residence or for any other purpose, but RSA 632-A:10, I does not impede on the right to leave or enter New Hampshire. The Defendant retained and exercised his right to travel among the states and reside in a state of his own choosing. "[S]tate law implicates the right to travel when it actually deters such travel, ... when impeding travel is its primary objective, ... or when it uses 'any classification which serves to penalize the exercise of that right.'" Attorney General of New York v. Soto–Lopez, 476 U.S. 898, 903 (1986).

57. The Defendant has failed to show how his rights under the Privileges and Immunities Clause have been infringed. Additionally, as illustrated *supra,* the Defendant does not have standing to bring the constitutional challenge that hypothetical defendants' rights have been violated.

58. RSA 632-A:10, I does not impinge upon the right to travel because a person convicted of sexual assault outside of New Hampshire could still travel into New Hampshire and secure employment, so long as that employment does not involve caring for, instructing, or guiding

minor children. For example, that hypothetical person could secure employment in an office, construction site, or work as a handyman – as the Defendant in this case did.

59. For all the foregoing reasons, RSA 632-A:10, I does not violate the Privileges and Immunities Clause and the Defendant's Motion should be denied.

WHEREFORE, the State respectfully requests that this Honorable Court:

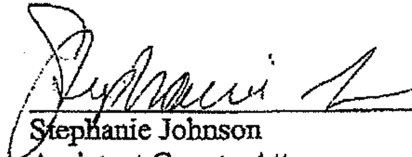
A. Deny the Defendant's Motion without a hearing; or

B. Hold a hearing on the matter; or

C. Grant such further and other relief as justice may demand.

Respectfully submitted,
THE STATE OF NEW HAMPSHIRE

April 21, 2017



Stephanie Johnson
Assistant County Attorney
Bar # 18645

CERTIFICATION OF SERVICE

I hereby certify that a copy of the foregoing State's Pleading has on this date been forwarded to the Defendant, via counsel, Deanna Campbell, Esq., NH Public Defender, P.O. Box 679, Stratham, NH 03885.

Stephanie Johnson
Assistant County Attorney

471-D:3 Exemption From Liability. Any person who disposes of property in accordance with this chapter shall not be liable for damages to the owner of such disposed property.

256:5 Reference Changes. In the following RSA provisions replace "RSA 471-A" with "RSA 471-C": RSA 348:12, 377:21, 385:5, and 543:10.

256:6 Reference Change. Amend RSA 386:27 to read as follows:

386:27 Relief on Voluntary Petition. Upon voluntary petition by any financial organization, as defined in RSA 471-C, desiring, for any reason, to pay one or more deposits and unable to locate the owners thereof, the superior court may, upon notice to the bank commissioner and the attorney general, and upon the filing of one or more affidavits that diligent effort has been made to locate the owners, decree that such deposits have been presumably abandoned. Such financial organization shall forthwith report such deposits to the state treasurer following the procedure provided in RSA 471-C:19 but on an annual basis (rather than less frequently); and such deposits shall thereafter become subject to those provisions of RSA 471-C which apply to property reported to the state treasurer as presumably abandoned.

256:7 Effective Date. This act shall take effect 60 days after its passage.

[Approved April 30, 1988.]
[Effective Date June 29, 1988.]

CHAPTER 257 (HB 1147)

AN ACT PROHIBITING PERSONS WHO HAVE BEEN CONVICTED OF CHILD PORNOGRAPHY, FELONIOUS PHYSICAL ASSAULT ON A MINOR, OR ANY SEXUAL ASSAULT, FROM ENGAGING IN ACTIVITIES RELATING TO THE CARE OF CHILDREN.

Be it Enacted by the Senate and House of Representatives in General Court convened:

257:1 Purpose. The general court recognizes that those who seek to exploit and abuse children often attempt to create opportunities for themselves to do so by seeking to perform services of one type or another in a field involving the care or training of children. The public policy of the state demands that these people be denied such opportunities.

257:2 New Section; Prohibition from Child Care Service. Amend RSA 632-A by inserting after section 9 the following new section:

632-A:10 Prohibition from Child Care Service of Persons Convicted of Certain Offenses.

I. A person is guilty of a class A felony if, having been convicted in this or any other jurisdiction of any felonious offense involving child pornography, or of a felonious physical assault on a minor, or of any sexual assault, he knowingly undertakes employment or volunteer service involving the care, instruction or guidance of minor children, including, but not limited to, service as a teacher, a coach, or worker of any type in child athletics, a day care worker, a boy or girl scoutmaster or leader or worker, a summer camp counselor or worker of any type, a guidance counselor, or a school administrator of any type.

II. A person is guilty of a class B felony if, having been convicted in this or any other jurisdiction of any of the offenses specified in paragraph I of this section, he knowingly fails to provide information of such conviction when applying or volun-

teering for service or employment of any type involving the care, instructioı guidance of minor children, including, but not limited to, the types of service: forth in paragraph I.

III. A person is guilty of a class B felony if, having been convicted in th any other jurisdiction of any of the offenses specified in paragraph I of this tion, he knowingly fails to provide information of such conviction when ma application for initial teacher certification in this state.

257:3 New Section; Revocation of Certification. Amend RSA 189 by inseı after section 14-b the following new section:

189:14-c Revocation of Certification. Any teacher certified in this state has been convicted of any felony involving child pornography or of a felon physical assault on a minor or of any sexual assault, shall have his teacher ceı cation revoked by the New Hampshire state board of education.

257:4 Effective Date. This act shall take effect January 1, 1989.

[Approved April 30, 1988.]
[Effective Date January 1, 1989.]

CHAPTER 258 (HB 1150)

AN ACT PERMITTING THE ATTORNEY GENERAL TO HIRE PART-TIME ATTORNEYS GENERAL.

Be it Enacted by the Senate and House of Representatives in General Cc convened:

258:1 Part-Time Assistant Attorneys General. Amend RSA 7:16-a to reac follows:

7:16-a Temporary Classification.

I. In the event of a vacancy in the office of assistant attorney general, attorney general may downgrade such office to the position of attorney I, II or in his discretion for the purpose of filling the same with a person lacking suffici experience to qualify for the office of assistant attorney general. Said positi when downgraded, shall entitle the person holding the same to all the rights ε privileges of the classified state system except that the persons holding the sa shall serve at the pleasure of the attorney general; and provided, that no la than the expiration of 3 years from the initial date of employment, the per: holding such position shall either be nominated and confirmed in the office assistant attorney general as provided in RSA 7:16 for the unexpired term shall be discharged. In the event that said person is discharged, the attorı general may fill the vacancy in the office of assistant attorney general for t unexpired term as provided in RSA 7:16 or may again downgrade the position attorney I, II, or III.

II. The attorney general may designate up to 3 full-time unclassified assistε attorneys general positions as temporary, part-time positions, provided such pc tions are vacant at the time of such designation. For the duration of the desigı tion of such positions the attorney general, with the approval of the governor a council, may hire attorneys as part-time assistant attorneys general, provid that the per diem compensation of such employees shall not exceed the maximı equivalent per diem compensation of an assistant attorney general pursuant

Date April 6, 1988

The Senate Committee on Public Institutions, Health and Human Services

held its hearing in Room 103 Legislative Office Building, Concord, N.H.

House Bill No. 1147-FN Title: Prohibiting persons who have been convicted of child pornography, felonious physical assault on a minor, or any sexual assault, from engaging in activities relating to the care of children.

Members of committee present:

Senator Krasker
Senator Bond
Senator Poddles
Senator White
Senator McLane

Those appearing in favor:

Name and Address	Representing
See attached	

Those appearing in opposition:

Name and Address	Representing
See attached	

Report of Committee:

Ought to pass		Interim Study	
Ought to pass w/amendment	XX	Continued Hearing	
Inexpedient to legislate		Postponed Hearing	

DATE April 6, 1988 TIME 10:00

SENATE PU PUBLIC INSTITUTIONS, HEALTH AND HUMAN SERVICES COMMITTEE

PUBLIC HEARING
ON

HB 1147-FN - Prohibiting persons who have been convicted of child pornography, felonious physical assault on a minor, or any sexual assault, from engaging in activities relating to the care of children.

APPEARING IN FAVOR (PLEASE PRINT)

NAME	ADDRESS	REPRESENTING
Sen. George F. Disnard	LOB 209A	Not Speaking In Favor
Al Rubega	P.O. Box 204 East Sullivan NH	Self
Rep. Irene Dohini		Sull. #5
Jim McGonigle Jr.	21 Lake St Concord NH	N.H. Police Association Supporter - No need to speak
Virginia Cochrane (Not speaking)	[illegible]	Support Bill 1147
Charles H. Marston	Concord	Dep't of Ed
David Pierce	Keene N.H.	Keene
Gene Ritzo	Leb Rep Dist 18 Rock	

APPEARING IN OPPOSITION: (PLEASE PRINT)

NAME	ADDRESS	REPRESENTING
Claire T. Ebel	11S Main St.	NHCLU

TIME: 10:00 a.m.
DATE: April 6, 1988
PLACE: 103, LOB

The Senate Committee on Public Institutions, Health and Human Services held a hearing on the following:

HB 1147-FN - An act prohibiting persons who have been convicted of child pornography, felonious physical assault on a minor, or any sexual assault, from engaging in activities relating to the care of children.

Senator Krasker opened the hearing by calling on one of the sponsors.

Representative David Pierce, Cheshire District 17.

The only amendment that went through on the House side was to change one word in the bill, in Paragraph 1, the word 'felonious' offense involving child pornography. 'Felonious' was the only thing that was changed, that word was added. That is the only difference from the House version to here. It is my understanding that there will be at least one amendment offered today.

As far as the bill itself goes, the main purpose is to tell previously convicted child molesters, especially ones from out of state who are coming into the state of New Hampshire to keep their hands off New Hampshire children. It makes it a Class B felony to apply for a job connected with child care, and a Class A felony to accept said job.

Representative Eugene Ritzo, Rockingham District 18.

I am a co-sponsor of HB 1147-FN for a few reasons, for which you are all familiar with. We all know from reading the papers and various articles that come out daily, that there are thousands of missing children who are murdered and molested each year in the United States. I think that there are many thousands of offenders caught and many thousands get through the law, through one loophole or another, and some go unapprehended. We have many repeat offenders, many of these people are incarcerated and upon release go out and repeat their crime. I think we have to exercise every means at our disposal to help protect our children in this country, and I think an effective measure is very much included in HB 1147-FN, where people who have been convicted of these various crimes are not allowed to resume any sort of activity or job where the care of children is concerned. I think this bill will accomplish this task, and I don't think it will violate any of the civil liberties of these individuals.

Senator Charles D. Bond: This covers volunteer service. Say you have a volunteer organization, such as the Boy Scouts, and you have somebody interested and they don't do a background check on the person. Are they exposing themselves to liability in a situation like this under this bill?

Rep. Ritzo: I don't believe they are. I am very familiar with scouting, and I know the people involved, I don't believe, are responsible or guilty of a misdemeanor or crime if they fail to screen people who are involved in these activities. I believe that will be forthcoming possibly with a bill such as this.

I don't think anything like that . . . in my experience, over 50 years in scouting, . . . has been a requirement in law.

Senator Bond: But it is your impression that this bill would not expose the Scouts, as an example, to suit, liability or prosecution because they failed to determine that somebody has a background that should have prohibited them from volunteering?

Rep. Ritzo: No, Senator. I can liken this to a State Policeman on the highway. Every drunk that goes by him, isn't apprehended by that officer that is stationed there, to try to apprehend drunken drivers. Many will get by him. He will stop somebody who will be prosecuted, but there will be others who will get by, and the state or the officer, I don't believe, is responsible for a crime or an accident committed by that motorist that goes buy him at his post, whereever he is, checking for drunken drivers. I think it would be the same type of thing. I believe the burden of guilt would be upon the institution.

Senator Bond: Would you believe, that I just want the record to reflect that clearly.

Rep. Ritzo: I would also like the record to reflect that that is my personal opinion.

Senator Eleanor Podles, District 16.

We have a statute on the books that requires a background check by the Department of Health and Human Services for anyone involved in child care, which is the licensed day care homes and group homes. Their background is checked on child abuse and neglect through the state registry and a criminal record is checked through the State Police. Teachers, camp counselors and volunteers of youth organizations are not covered. House Bill 1147-FN will further improve the system of child protection. We have a society that is very mobile. Child molesters move from state to state, undetected, especially the ones that are convicted. I would like to propose an amendment here saying that any teacher certified in this state, who has been convicted of any felony involving child pornography or of a felonious physical assault on a minor, or any sexual assault shall have his teacher's certification revoked by the New Hampshire State Board of Education.

We have Mr. Marston here today who has helped me with this amendment, and I would hope that he speaks in favor of it.

Representative Irene Domini expressing support, but not wishing to testify.

Representative David Young, Cheshire District 1.

Currently there is an amendment being passed around. It is a friendly amendment. I have talked to the sponsor of the bill, and he is in favor of this particular amendment. I shall read it. It's very simple, and I'll give a brief statement after it.

What this does is set up a study committee, that is established to study the guidelines and procedures employed by the Division of Children and Youth Services for children in the temporary custody of the division, and returning them to their families or guardians. The committee should make a report of its findings and recommendations to the Speaker of the House and the President of the Senate.

Primarily what this does, and I have a listing of the guidelines that they currently use, and I guess there is a great deal of legal background that is utilized by the court system when it makes the determination of bringing a child back into the home, whether or not a parent or guardian. Primarily what I'd like to see done is to have someone sit down and figure out one procedure for how it's done. And there isn't one. There is a series of them on how different people view it, depending on different statutes. There is a very broad guideline which, I'm sure from the hearing that you had prior to this one, that you can see that it is a very large ambiguous situation they have. There is no clear set guideline or even series of checklists that have to be maintained for something to be done. And I'm not suggesting a series of checklists at this point. I'm suggesting that we sit down and take a look at it. I'm suggesting that we set up a study committee and pull all these things together and look at the guidelines that the court uses, that the Division of Children and Youth Services uses, and sit down and make sure that it all makes sense, from what we as Legislators and a policy ruling body of the state deems necessary. It is my belief that that hasn't been done clearly and concisely enough in the past so that we really know exactly what we are dealing with. It has to be done in determining what child goes back into the home that he/she will not be abused further, either sexually or physically.

Again, it is a friendly amendment and deals with just setting up a study committee for us to take a look at, to pull all these resources together, and get some different people and sit down and make sure that what we have makes sense. And make sure that what we have isn't so broad that it allows good people to be punished and bad people to sneak through the cracks. I firmly believe that is a situation that's occuring now. You can hardly pick up the newspaper from week to week without finding a situation where a child has been returned to the home and either brutally beaten or molested or even killed. And it's a situation that is judgmental to not only us as a state, but as a nation. I urge you to look at this piece as a whole, and act accordingly on it.

Senator White: Do you have any idea how many Senate Committees have been formed in this session?

Rep. Young: There is no doubt that there has been a variety of them, but I can think of nothing more important to study than the lives of our children.

Senator White: If you think it's that important, why don't you pick a couple of colleagues and do it on your own? The Senate, unfortunately, doesn't have the amount of people that the House has, and already we're probably on at least three Task Forces. I'd like to know when we could possible find the time to do an in-depth study and have it done properly.

Rep. Young: I just didn't want to have a situation where the Senate was not involved in it. If you fell that you just want House members on it, that's fine with me. I care little who is on the committee, all I care is that it is done.

Senator Krasker: Would you consider going to a House Committee and asking them to do it?

Rep. Young: Unfortunately, we already went through the process where it had already gone to the House and the particular proposal we wanted to amend, came here by the time we decided we wanted to do this. We just want a study committee.

Senator Podles: There is an existing committee in Children and Youth of Senators and it's like a Joint Committee. They're going to study a bill - one of my bills - services that are given to children in New Hampshire and to sort of improve on them. I wonder if this could also be included in that study.

Rep. Young: I spoke to a number of people on the House side and it was their feeling that because this is dealing with specific guidelines and regulations that they weren't sure. They would feel more comfortable if we had something which said we will specifically deal with this type of arrangement.

Senator Podles: Well there is that Joint Committee that has studied a lot of things over the years, and it is already there, and I was just thinking that probably this should be there too.

Senator Disnard is in favor of this bill, but does not wish to speak.

Al Rubega, East Sullivan, New Hampshire.

I respectfully request that the Committee hear from the witness in opposition. I anticipate there are some perceived constitutional problems, and as fate would have it, I'm an attorney and was instrumental in drafting it, and there are no valid constitutional objections. I would just like to hear and address.

Claire J. Ebel, New Hampshire Civil Liberties Union.

It gives me no pleasure whatever to be here and to speak against this bill, because it is clear that the motives of the individuals who sponsored it are above reproach and they reflect concern for all of us who have children. However, this bill is constitutionally flawed.

As an example, a recent ruling in Rhode Island held that denying employment to schoolbus drivers who had been convicted of aggregated felonious sexual assault against children was unconstitutional. Bills such as this dealing, for example, with conviction of any sexual assault could prohibit any individual who is gay and who has been convicted, for example, under the sodomy statutes of - I believe 17 states still have them - those individuals would be prohibited from being teachers in the State of New Hampshire along with holding all of the other jobs listed and as the bill is quite clear, it does not limit itself to the jobs and positions and professions listed in the bill, but extends to all who have access to the care and guidance of children. I would urge the committee, because this is a difficult if not impossible bill to vote against, to take the precaution of sending it to the New Hampshire State Supreme Court for an advisory opinion. Surely, Attorney Rubega could not object to such an attempt, because he is quite certain that the Supreme Court will support his contention, and his point of view. I am equally confident that they will not. But if they do not, I will go away, and say nothing more about this bill. No doubt the committee is fully aware of the opinion that came down in the foster parent bill that was before you a session ago. If you read that opinion carefully, you will note that the court said very specifically that being gay, while it might prohibit an individual from exercising the choice to become a foster parent in the state, could in no way be used to deny employment for example, specifically mentioned in the decision, to a teacher. Now it is clear that the court did not refer specifically to individuals convicted of a felony in this or another jurisdiction, but I think the point with regard to homosexual individuals and lesbian individuals is very important to know; because many states make exercising your sexual preference choices a felony, and therefore,

I think the case could be made successfully that the way this bill is drafted is constitutionally infirm, and I would simply urge the committee to take it to the Supreme Court. If the Supreme Court says that I am wrong, I will shut up and go away.

Senator Bond: Can you suggest how this bill might be amended so that it would withstand a court case?

Ms. Ebel: I'm at a disadvantage, and perhaps I should let Mr. Rubega deal with that, but I would say the largest single flaw that I see is the line which says "of any sexual assault". It would be difficult and probably impossible to draw a connection between someone who has been convicted of a sexual assault and that person's future likelihood of representing a harm to children, because there is no necessary connection. An individual convicted of rape is probably no more or less likely to abuse a child than an individual convicted of armed robbery. Both are crimes of violence, but the question is, is a sexual assault likely to result in child abuse? I think making that connection is tenuous at best.

"Felonious physical assault on a minor"- again, I don't know about the connection, for example, all of us as parents have reached a point where we really would sell our kids for a quarter. I know my teenage daughter is constantly . . . and there are no buyers for previously owned teenagers, I've found out, but the fact is there are parents who 'lose it' and it is a crime, but also a tragedy in our society that they hurt their own children. I don't know that the individual who lost his/her temper and seriously injured his/her own child, could be barred from being a schoolbus driver. I don't know that you can do that constitutionally. I think child pornography is the most solid of the three categories of crimes that would disbar an individual, because first of all the Supreme Court has held that there is no constitutional protection for pornography. So exercising that particular activity may be the most certain - the least constitutionally infirmed. But it seems to me that the Supreme Court needs to look at this, in light of decisions all across the country, Rhode Island is not unique. And in many cases schoolbus drivers were the plaintiffs. They were the ones alleging that their rights had been violated.

Representative Emma Wheeler, Hillsborough District 10.

I rise in support of this bill, which pass our committee with flying colors. Some of the testimony was by the Majority Leader of the House, and we had a lot of prominent people who were in favor of this bill. We feel very strongly that people should not be working for day care centers, or in the schools, or any of the other places where they come in contact with children, if they already have a felony against them, and some of them are coming from other states. You know that they go from state to state. In this state I think we are beginning to get a pretty good computerized list of those people, and they tell me that they can trace them very easily in the state. I'm hoping that this is true so they won't hire them in the first place, so we won't have to do anything about it in the second place.

I also was told that one of the gentlemen wanted to add an amendment to have another committee to study some of these things. We had at least five committees that we appointed in my committee this year, and a lot of them were on children's problems; and I'm not so sure that something shouldn't be done right away on this bill. Then we can let the committees do their studying. Sometimes we don't get

things under control quick enough.

Senator Podles: Is it your committee that is studying my bill on childrens' services? That existing committee - it's a joint committee, House and Senate? I suggested that this go into your committee and be studied, rather than having another committee established.

Rep. Wheeler: Yes, I believe it would be good for us to work together.

Al Rubega, East Sullivan, NH

I am appearing in my individual capacity, and I assisted in drafting this bill back when I was an Assistant County Prosecutor in Cheshire County.

Just briefly to address the remarks of Ms. Ebel, I didn't mean to reflect that her testimony was irrelevant. As far as the recent ruling in Rhode Island, Ms. Ebel interprets it as saying it is unconstitutional to have a state of a busdriver who had been convicted of aggravated felonious sexual assault, which is essentially a forcible rape on a child, I find it very difficult to believe, however, if in fact, the Rhode Island Supreme Court chooses to do that under the R.I. constitution, it does not my any means provide that the New Hampshire Supreme Court would have to do that under our constitution. Nor does it mean it is necessarily unconstitutional under the United States Constitution. Even if the case is being correctly interpreted.

This bill would not penalize homosexuals for their behavior unless, in fact, their behavior is illegal somewhere and they were convicted for it somewhere. This isn't aimed at homosexuals, it's aimed at people who have been, not charged or accused, but convicted of crimes.

As far as the matter of referring it to the Supreme Court, if the committee feels it must do that, that would be, I suppose, all right. It just seems that the committee shouldn't necessarily make the Supreme Court a part of the legislature every time the unconstitutionality boogyman is raised. That's what was said about the homosexual foster parent bill - that it was unconstitutional. It was sent to the Supreme Court and was found to be constitutional, and the only thing that was accomplished was the delay. There is a substantial difference, however, between this bill and that one, in that this bill is addressing a clear and present danger in a much more definite way than the homosexual foster parent bill. Even those who agreed with that, and especially those who opposed it, didn't necessarily say that there was a clear and present danger from having homosexuals as foster parents.

Regarding the parents who 'lose it' and they get convicted of felonious physical assault on their children, I don't think that most people in the state would or should want such an individual driving a bus, because if one of the kids on the bus acts up, the same parent who 'lost it' with her own child, is certainly going to be susceptible to doing that to another child.

As far as the immediacy of this bill, I looked towards drafting it after I'd been a prosecutor in three different counties in this state for four years. On or about May 29, 1986 Cheshire County had to null pros a charge against a Mr. Felt. He had previous convictions at the time in both Massachusetts and North Carolina for child molestation. The Massachusetts offence involved a fondling, and the North Carolina offense involved not only felony sexual molestation, but

a severe enough beating that it was interpreted as an offense, an attempt to kill the child, silence him as a witness. Mr. Felt did two to four years in N.C.'s prisons for that offense, and made statements to the effect that no witness would testify against him again, and things of that nature. When he was released, he came to New Hampshire and obtained a job as a substitute teacher in the Keene Jr. High School. He was on duty at that job when he was arrested by the Keene Police Department. During his free hours he was attempting to gain volunteer service in the YMCA, and was spending his free time there trying to work with children. On one of these days he put a five-year-old child on the john and fondled him, but the child later was unable to pick him out of a lineup, so Mr. Felt was set free. He was subsequently convicted of another offense in Massachusetts, and is awaiting sentencing.

On or about January 15, 1987, Richard Bennett pled guilty to 8½ to 22 years in the NH State Prison. He was arrested in Rindge, and when arrested they took 13 cartons (2' x 2' x 2') out of his residence which contained pictures of naked little boys, some engaged in sex acts with adults. There were pornographic magazines, slides, photos, video tapes spanning approximately 20 years. Mr. Bennett was employed as a ski instructor at Crotched Mountain, and was turned in by a 12-year-old boy who had met him through his employment as a ski instructor. Among those things confiscated from Mr. Bennet were papers from another individual from Massachusetts, and pedophiles keep what they call collections, and the other individual's collection contained a series of letters and resumes to just about every boy scout troop, YMCA, swimming programs, etc. within a 60 mile radius of the individual's residence. Before this individual was arrested he transferred his collection to Mr. Bennett. He has since been released and is currently in New Hampshire, to the best of my knowledge.

In a study done by the University of Pennsylvania in 1984, it showed that almost half the offenders used their occupation as the major access route to the child victims. They use their occupation as an authority figure to control the child. This is a pattern that you will see over and over again.

If this is enacted, with or without going to the Supreme Court, it will probably never be challenged because you are going to have a uniquely hostile law and they have networks, which are organized groups of pedophiles and child molesters who exchange information on which states are bad to go to, how to avoid being caught, what to do if you are caught, things like that, and I guarantee if you pass this law soon, the child molesters or other types of people who put children at risk, will get out and go to other states where they don't expose themselves to this kind of risk. These offenders hopscotch from state to state.

Senator White: When Ms. Ebel testified on the second page re any sexual assault being eliminated, what are your thoughts on that being the most unconstitutional of all.

Mr. Rubega: I don't believe it is in any way unconstitutional. If someone commits any kind of felony, you can never again own a firearm. If you are in jail, you cannot vote. There are abundant examples of society imposing disability based upon one's past behavior, when that past behavior is evidenced by a criminal conviction, not an accusation, a conviction.

Senator White: Did you listen to Sen. Podles' amendment, and do you think that would be constitutional?

Mr. Rubega: I believe, the amendment involves simply providing administratively that a teacher will lose his/her certification if convicted by this type of offense. I think that would be constitutional.

Senator Podles: The effective date says January 1, 1989. Would you move it up to 60 days after passage?

Mr. Rubega: If that's possible I would sincerely urge the committee to make this effective as soon as possible.

Charles Marston, Department of Education.

I am here to testify in support of HB 1147-FN, and particularly the amendment presented by Senator Podles, pertaining to the loss of teacher certification on the basis of having been convicted of any of the offences enumerated in the bill. Notwithstanding the number of constitutional questions raised, we will leave it to the wisdom of this committee whether or not to pursue the legal questions involved with the wording of the bill. Our position at the moment is if we are to err, then we should err on the side of the children who are in the care and custody of social workers, child care centers and particularly teachers in a classroom setting. We presently have a number of other statutes and administrative rules which provide for various courses of action in dealing with teachers who have abbrogated their contractual agreements, or who have been accused of improper conduct including concerns of moral character. However, these are rather lengthy procedural processes and do not give, in our opinion, the State Board the kind of authority this particular amendment would give us to revoke a certificate for a conviction in those areas enumerated. We are supportive and agree to the basic thrust you intend in this law.

Senator White: Then you think the amendment would supercede the teacher contract that has been signed?

Mr. Marston: Yes. There are procedures that deal with a teacher's failure to abide by the specific terms of the contract and that does require granting of notice, the right to a hearing, and the right to appeal any revocation of contract to the State Board of Education. We feel that that's different than the issue of being convicted of a felony, and there are many examples of instances where a right or privilege is denied based on such conviction. We think this would be consistent with those other examples and would be in the best interests of the children of this state.

Those supporting the bill but not wishing to speak:

Jim McGonigle, Jr., NH Police Association; Judith Bell, DCYS; John Skalicky, NH Task Force on Child Abuse and Neglect; Nancy Truax, Detective, Portsmouth, NH; Rep. Vincent Palumbo, House Majority Leader.

Susan Thielen, Monadnock Volunteer Center.

I am the President of the Monadnock Volunteer Center. Up until the end of January I was the Director of Big Brother/Big Sisters of the Monadnock Region, and also served on the Keene School Board during the Richard Felt situation. I would like to speak in support of the bill and would ask you to include specifically Big Brother/Big Sister agencies under the types of agencies mentioned under I in the new section of the bill.

I would like to reiterate the these agencies are very thorough because of their standards. They have national standards that they follow and the four agencies in this state are affiliated with the national organization. They are very thorough in their screening procedures. We ask, on the application, if the person has been convicted of any crime, so there is already a provision in the procedure to ascertain whether or not a person has been convicted, provided they answer the question honestly. Police checks are run on potential volunteers, references are asked for and they are not just written references prepared ahead of time. We do contact the references. And potential volunteers are interviewed.

Another feature of this bill that I find appealing is that it places the burden on the convicted offender, if the agencies, school districts, employers, and others do their jobs as they should, people can still slip through the system. These people are very skilled at beating the system and getting through and being placed in a potential situation of great harm to a child.

Rep. David Pierce: The only thing I wanted to mention is when asking about the effective date, as you are probably all aware, the reason it was January 1st is that's the way it was mandatory that they write it up, but the committee can do as it pleases as far as effective date goes.

There being no further questions or comments the hearing was closed at 11:20.

CHILDREN, YOUTH AND ELDERLY AFFAIRS COMMITTEE MINUTES
1-20-88 LOB 206

HB 1147-FN
2:00 P.M.

HB 1147-FN, prohibiting persons who have been convicted of child pornography, felonious physical assault on a minor, or any sexual assault, from engaging in activities relating to the care of children.

Members Present: Reps. Parks, Pignatelli, Lougee, Lockwood, Wixson, Bourque, Wallner, Mayhew, Bowers, Jones, Rehlander, Wheeler.

Rep. Vincent Palumbo - co-sponsor - supports bill
Addressed new amendment from Atty. General's Office. An addition - see III. Has no comments on amendment one way or another. Do not look to favorably on study committees anymore.

Rep. Wallner - don't understand how this will work.

Susan Geiger - Assistant Attorney Gen'l. - supports
Will go far.

Questions followed - hung up on questions of volunteers.

Al Rubega - was Assist. County Attny. - Cheshire County - supports
Addressed answers to questions given by Lockwood (age), Wixson (on background checks). Addressed specific cases, especially leaving one area and going to another. Don't put burden on care provider. Concern on amendment addressed changes. (question may not have been addressed) Ought to be felony and check in N.H. Could have been convicted in another state and come up totally clean in N.H. Wished to amend to read Big Brothers, Big Sisters. Put blame on individuals than providers. But, providers should ask!

Emma turned over chair seat to Rep. Parks

Paul Blanchette - citizen - Somersworth County - supports
Believe in high moral standards. Written statement

Eugene Ritzo - co-sponsor - Dist. 18 - support
Answers some of un-answered questions. Anyone working with children must have these forms. Adopt amend - put some teeth into it. Leaves to committee changes necessary.

Susan Thielen - Big Brothers, Big Sisters - support
Affiliated with National Organization. Very strict on volunteers. Check all references. Allows us to enforce questions and protects us from liability.

Rep. Parks

Concluded 3:00 P.M.

Respectfully Submitted,
Irene Domini
Rep. Irene Domini

ID/rjo

on a category-by-category basis for all analytes, provided that such laboratory demonstrates capability to analyze samples with precision and accuracy.

Amend section 4 of the bill by replacing it with the following:

4 New Paragraphs; Rulemaking; Certification for Certain Analytes; Certification for All Analytes. Amend RSA 148-B:4-b by inserting after paragraph XI the following new paragraphs:

XII. Criteria for certification of laboratories testing for PCB's, pesticides, volatile organics, acids, and base/neutrals on a category-by-category basis.

XIII. Criteria for certification of laboratories testing for all analytes on a category-by-category basis.

Amend section 9 of the bill by replacing it with the following:

9 Effective Date. This act shall take effect upon its passage.

AMENDED ANALYSIS

The bill, as amended, authorizes the department of environmental services to establish certification standards for laboratories testing water samples for PCB's, pesticides, volatile organic chemicals, acids, and base/neutrals on a category-by-category basis. The bill also authorizes the department to certify laboratories, upon request, for the testing of water samples for all analytes on a category-by-category basis.

The bill, as amended, requires laboratories to notify the department in writing of certain changes affecting analysis performance. The bill also requires laboratories which have their certification revoked or suspended more than 3 times in 2 years to wait one year before being recertified, or to show good cause to the water supply and pollution control council for their recertification.

The bill also changes references from the division of water supply and pollution control to the department of environmental services, reflecting the commissioner's authority over the laboratory services unit.

This bill is a request of the department of environmental services.

Amendment adopted. Ordered to Third Reading.

HB 1147-FN, prohibiting persons who have been convicted of child pornography, felonious physical assault on a minor, or any sexual assault, from engaging in activities relating to the care of children. Ought to Pass with Amendment. Senator White for the Committee.

SENATOR WHITE: Basically, the bill prohibits people who have been convicted of child pornography from engaging in any activity dealing with children. What it does is takes them out of being school counselors and Boy Scout leaders and anything that would bring them in connection with children. In my own town, we had someone who has just been sentenced on a child pornography case and he was currently working at Crotched Mountain, where he had a whole group of children. It was a very sad case and it filled up the police station. But, I think if we take the access to children away from people dealing in child pornography, then we have solved part of the problem.

The amendment you will find on page 21 of today's calendar deals with teachers that have come to this state and then we find out they have a felony record and they will loose their teacher's certificate. So, we would urge your support of the amendment and the committee report of ought to pass as amended.

¶SENATOR BOND: I just would like to point out that what this bill and the amendment do is put the ownus on the felon so that it is not only the responsibility of the organization to properly screen, but should they miss somebody through misrepresented information, or lack of information, the felony is that of the individual who makes application to work with children or to teach.

SENATOR DISNARD: Would you believe this would help a school district in case of a suit involving such a situation?

SENATOR BOND: It is my impression, Senator Disnard, that that is true.

SENATOR WHITE: Not only would it help the schools, it would help all the volunteer organizations because their liability is definitely limited by this, as Senator Bond said, by putting the person who committed the felony at fault and he has to prove his innocence. So, it would help everyone and it is not limited to the volunteer organizations that are covered or any other employment that's covered, that deals with children.

AMENDMENT TO HB 1147-FN

Amend RSA 632-A:10 as inserted by section 2 of the bill by inserting after paragraph II the following new paragraph:

III. A person is guilty of a class B felony if, having been convicted in this or any other jurisdiction of any of the offenses specified

ve in paragraph I of this section, he knowingly fails to provide
ty tion of such conviction when making application for initial
ol certification in this state.

ng Amend the bill by replacing section 3 with the following:
ne
as 3 New Section; Revocation of Certification. Amend RSA
le inserting after section 14-b the following new section:
ce 189:14-c Revocation of Certification. Any teacher certifie
m state who has been convicted of any felony involving child p
ne phy or of a felonious physical assault on a minor or of an
assault, shall have his teacher certification revoked by t
ls Hampshire state board of education.
ey 4 Effective Date. This act shall take effect January 1, 198
e.

AMENDED ANALYSIS

t-
This bill makes it a felony for any person who has been c
ill of any offense involving child pornography, or felonious ph
ot sault on a minor, or of any sexual assault, to undertake em
at or volunteer service involving the care, instruction, or gu
or minor children.
es The bill also makes it a felony for any such person to k
withhold information about his conviction when applying
type of employment, volunteer service, or teacher certifica
ol The bill also provides that any teacher in this state con
any of the listed crimes shall have his teacher certification r

at Amendment adopted. Ordered to Third Reading.

HCR 13, a concurrent resolution relative to adjustment of
d ter deduction permitted under the food stamp program.
n- Pass. Senator Krasker for the Committee.
n
e. SENATOR KRASKER: HCR 13 addresses legislation
er pending in Congress to phase in the shelter allowance p
y- under the food stamp program to more accurately reflect t
cost of sheltering communities served by the program. T
be especially important to States like New Hampshire, w
ter costs are almost doubled the current $250 cap for shelt

t- Adopted. Ordered to Third Reading.

HB 921-FN, establishing a joint legislative oversight com
n- highway and bridge construction and reconstruction plans.
d Pass with Amendment. Senator Torr for the Committee.

THE STATE OF NEW HAMPSHIRE
JUDICIAL BRANCH
http://www.courts.state.nh.us

Court Name: Rockingham County Superior Court
Case Name: State of New Hampshire vs. Edward Proctor
Case Number: 218-2016-CR-00847 Charge ID Number: 1275678C
(if Known)

STATE PRISON SENTENCE

Plea/(Verdict): Guilty	Clerk: O'Neil
Crime: Prohibition From Child Care Service of Persons Convicted of Certain Offenses	Date of Crime: 05/21/2016
Monitor: Cook	Judge: Delker

A finding of GUILTY/TRUE is entered.

☐ The defendant has been convicted of Domestic Violence contrary to RSA 631:2-b. See attached RSA 631:2-b Sentencing Addendum.

☒ 1. The defendant is sentenced to the New Hampshire State Prison for not more than 10 **years**, nor less than 5 **years**. There is added to the minimum sentence a disciplinary period equal to 150 days for each year of the minimum term of the defendant's sentence, to be prorated for any part of the year.

☒ 2. This sentence is to be served as follows: ☒ Stand committed ☒ Commencing Forthwith

☒ 3. 2 years of the minimum sentence and 4 years of the maximum sentence is suspended.
Suspensions are conditioned upon good behavior and compliance with all of the terms of this order. Any suspended sentence may be imposed after a hearing at the request of the State. The suspended sentence begins today and ends 10 years from ☐ today or ☒ release on ______
(Charge ID Number)

☐ 4. ______ of the sentence is deferred for a period of ______ year(s). The Court retains jurisdiction up to and after the deferred period to impose or terminate the sentence or to suspend or further defer the sentence for an additional period of ______ year(s). Thirty (30) days prior to the expiration of the deferred period, the defendant may petition the Court to show cause why the deferred commitment should not be imposed, suspended and/or further deferred. Failure to petition within the prescribed time will result in the immediate issuance of a warrant for your arrest.

☐ 5. ______ of the minimum sentence shall be suspended by the Court on application of the defendant provided the defendant demonstrates meaningful participation in a sexual offender program while incarcerated.

☒ 6. The sentence is ☐ consecutive to ______
(Charge ID Number(s))
☒ concurrent with Current parole set-back
(Charge ID Number(s))

☒ 7. Pretrial confinement credit: 244 days.

☒ 8. The Court recommends to the Department of Corrections:
- ☐ Drug and alcohol treatment and counseling
- ☒ Sexual offender program
- ☐ Sentence to be served at House of Corrections
- ☒ **no contact with H.B. (DOB 06/23/00) or his family while incarcerated and on parole**

If required by statute or Department of Corrections policies and procedures, the defendant shall provide a sample for DNA analysis.

Case Name: State of New Hampshire vs. Edward Proctor
Case Number: 218-2016-CR-00847 **Charge ID Number: 1275678C**

STATE PRISON SENTENCE

PROBATION

☐ 9. The defendant is placed on probation for a period of ______ year(s), upon the usual terms of probation and any special terms of probation determined by the Probation/Parole Officer.
Effective: ☐ Forthwith ☐ Upon Release _____
☐ The defendant is ordered to report immediately to the nearest Probation/Parole Field Office.

☐ 10. Subject to the provisions of RSA 504-A:4, III, the probation/parole officer is granted the authority to impose a jail sentence of 1 to 7 days in response to a violation of a condition of probation, not to exceed a total of 30 days during the probationary period.

☐ 11. **Violation of probation or any of the terms of this sentence may result in revocation of probation and imposition of any sentence within the legal limits for the underlying offense.**

OTHER CONDITIONS

☒ 12. Other conditions of this sentence are:

☐ A. The defendant is fined $ ______ plus statutory penalty assessment of $______
☐ The fine, penalty assessment and any fees shall be paid: ☐ Now ☐ By ______________ OR
☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 10 % service charge is assessed for the collection of fines and fees, other than supervision fees.
☐ $ __________ of the fine and $ __________ of the penalty assessment is suspended for _____ year(s).
A $25.00 fee is assessed in each case file when a fine is paid on a date later than sentencing.

☐ B. The defendant is ordered to make restitution of $ ______________ to ______________
☐ Through the Department of Corrections as directed by the Probation/Parole Officer. A 17% administrative fee is assessed for the collection of restitution.
☐ At the request of the defendant or the Department of Corrections, a hearing may be scheduled on the amount or method of payment of restitution.
☐ Restitution is not ordered because: ______________

☒ C. The defendant is to participate meaningfully in and complete any counseling, treatment and educational programs as directed by the correctional authority or Probation/Parole Officer.

☐ D. Subject to the provisions of RSA 651-A:22-a, the Department of Corrections shall have the authority to award the defendant earned time reductions against the minimum and maximum sentences for successful completion of programming while incarcerated.

☐ E. Under the direction of the Probation/Parole Officer, the defendant shall tour the
☐ New Hampshire State Prison ☐ House of Corrections

☐ F. The defendant shall perform _________ hours of community service and provide proof to
☐ the State or ☐ probation within _________ days/within _______ months of today's date.

☐ G. The defendant is ordered to have no contact with ______________ either directly or indirectly, including but not limited to contact in-person, by mail, phone, email, text message, social networking sites or through third parties.

H. Law enforcement agencies may destroy the evidence return evidence to its rightful owner.

☐ I. The defendant and the State have waived sentence review in writing or on the record.

☒ J. The defendant is ordered to be of good behavior and comply with all the terms of this sentence.

☒ K. Other: No contact w/ H.B. (6/23/00) or his family. No unsupervised contact with juveniles under 16 years of age. Successful completion of SCT and after care treatment.

Date 12/15/2017

Presiding Justice [signature]

NHJB-2115-S (01/27/2017)