THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2018-0402

The State of New Hampshire
v.
Christina Fay

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE CARROLL COUNTY SUPERIOR COURT

BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE
Gordon J. MacDonald
Attorney General

Susan P. McGinnis,
Senior Assistant Attorney General
33 Capitol Street, Concord N.H. 03301
603-271-3658
Susan.McGinnis@doj.nh.gov
N.H. Dept. of Justice
N.H. Bar ID No. 13806
(15 minutes)

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ISSUES PRESENTED

I. Whether the trial court properly denied the defendant's motion to suppress where RSA 595-A:8 (2001) explicitly authorized the officers to take "suitable assistants" when executing the search warrant, no court has held that obtaining prior judicial authorization to do so is a constitutional prerequisite, and the defendant never argued that her right to privacy was violated.

II. Whether part I, article 2-b of the New Hampshire Constitution—adopted after the defendant filed her appeal—applied to the defendant's case where it was intended to apply prospectively and to protect information that fell outside the protections afforded by part I, article 19.

STATEMENT OF THE CASE

In 2016, the State charged the defendant, Christina Fay, with twelve counts of animal cruelty. ASB 37. *See* RSA 644:8 (2016) (amended 2018). The 3rd Circuit Court—District Division—Ossipee (*Greenhalgh*, J.) found her guilty on ten counts, and she appealed to the Carroll County Superior Court (*Ignatius*, J) (the trial court). ASB 37, 45; ADB 41.[1]

The defendant then filed pretrial motions to dismiss the charges for a violation of her right to due process, to suppress the evidence for a violation of her right against unreasonable searches, and to require a bill of particulars. SC 17; ADB 1–40, 89–94. The State objected. MH-I 13; ADB 41–58, 95–99; ASB 3–49. The court ordered the State to file a bill of particulars for five complaints and denied the other motions. MH-I 18–146; ADB 59–78, 101–07. The defendant moved to reconsider the denial of her motion to suppress, the State objected, and the court denied the motion. ADB 79–86. The State also entered *nolle prosequis* on the five insufficient complaints and replaced them with 14 new animal cruelty complaints, and the court then dismissed one complaint. FP 5–8; ADB 87–88.

The defendant stood trial over nine days in February and March 2018. The State entered a *nolle prossequi* on one charge during its case. JT 694–95. After it rested, the defendant renewed her motion to suppress,

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[1] "ADB" refers to the appendix to the defendant's brief.
"ASB" refers to the appendix to the State's brief.
"DB" refers to the defendant's brief and the attached addendum.
"FP" refers to the transcript of the final pretrial conference on February 15, 2018.
"JT" refers to the transcripts of the trial on February 27-28 and March 1-2, 5-9, 2019.
"MH-I" refers to the transcript of the motion hearing on January 30, 2018.
"SC" refers to the transcript of the status conference on January 4, 2018.
"SH" refers to the transcripts of the sentencing hearing on May 11 and June 14, 2018.

and the court again denied it. JT 879–80. Then, after the defendant rested her case, the jury convicted her on the 17 remaining charges. DB Add. 4; ADB 108, 115, 122, 129, 136, 143, 150, 157, 164, 171, 178, 185, 192, 199, 206, 213.

On June 14, 2018, the trial court sentenced the defendant to seventeen concurrent terms of twelve months, suspended for five years, with one day of pretrial confinement credit. On each conviction, it also ordered her to pay a $2,000 fine, not to own or care for more than one spayed or neutered dog in addition to the one already returned to her, to pay restitution of $18,682.88 to the Town of Wolfeboro and approximately $1,953,606 to the Humane Society of the United States (HSUS), and to get mental health counseling. DB Add. 4−10; ADB 108–219. The defendant then appealed to this Court. ASB 50.

In May 2018, the state legislature adopted 2018 CACR 16, which would add to part I of the state constitution: "Art. 2-b. Right to Privacy. An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent." ASB 73–74 (brackets omitted). In November 2018, the voters approved it, and on December 4, 2018, it became effective. ASB 99.

On May 31, 2019, the defendant filed a motion to add the issue of whether the police violated her rights under part I, article 2-b to her appeal, which this Court granted on June 13, 2019. ASB 100–03.

STATEMENT OF FACTS

A. The State's case at the suppression hearing.

On May 8, 2017, Officer Michael Strauch of the Wolfeboro Police Department (WPD) went to the defendant's home to serve a nuisance dog complaint and saw seven soaked, unopened boxes of dog food out front that had been there "a while." MH-I 22; ASB 14–15. He knocked on the front door several times and heard about 15 large dogs barking inside. MH-I 22; ASB 15. He walked to the side of the house and saw several kennel runs coming from the garage. The door was open, so he walked closer and was overcome by the odors of dog feces, dog urine, and something rotten. MH-I 22; ASB 15. He looked inside the garage and saw "several large Great Danes in kennels" on mats that were "thick with feces." ASB 15.

Marilyn Kelly approached Strauch, and he said he had paperwork for the defendant. Strauch followed Kelly to the front of the house, where Julia Smith approached him and said she was the manager of the defendant's business, De La Sang Monde Great Danes. Strauch told her about the complaint, and she told him there were forty dogs inside the residence-business. ASB 14–15. The defendant eventually came outside and Strauch served her with the complaint. The defendant said that she was trying to relocate to Canterbury and had been trying to reach the animal control officer, Earl Clough, for over a year. ASB 15–16. Strauch told her he would give Clough a message and then left. ASB 15.

Strauch then met with, and reported his observations to, Tona McCarthy, the Director of Field Service Investigations at the Pope Memorial SPCA (PMSPCA). ASB 14–15, 35. McCarthy told him that

Megan Fichter, the Director of Operations at the Lakes Region Humane Society (LRHS), had received a complaint and photographs from A.N., an employee of the defendant. ASB 14–15. McCarthy forwarded them to the WPD. ASB 14. The photos showed six dogs in 6′ x 6′ kennels with no water and floor mats covered in feces in a room with no open windows, and dogs in kennels in a garage with no open windows or open doors. There was raw chicken on a bloody cutting board and Smith was cutting raw chicken. There were flies and maggots in and around the refrigerator, and floors and walls were covered in feces. ASB 14–16.

On May 16, Maureen Prendergast, the Director of Outreach and Investigations at the Animal Rescue League of New Hampshire (ARLNH), gave Strauch information she had received from Kelly, who also worked for the Conway Area Humane Society (CAHS). ASB 16. Debra Cameron from the CAHS sent McCarthy photos from Kelly that showed two dogs in kennels in the basement with no food or water, and feces all over the floors and cage bottoms. An underweight dog was lying on the floor, and another underweight dog was standing in a kennel. There was a dog eating raw chicken in an outdoor kennel with no fresh water or dry areas, another underweight dog standing in a kennel, and a dog with canine papilloma virus warts in its mouth. The photos also showed health certificates Dr. Kate Battenfelder had issued for that dog and for another dog. ASB 16–17.

On May 20 and 22, McCarthy received photos of six dogs Dr. Monique Kramer from the CAHS had examined after Dr. Battenfelder had issued health certificates. ASB 17. They showed feces on gauze taken off dogs and several dogs with lifted, missing, or ulcerated paw pads from prolonged exposure to wet floors; open wounds; ear mites; or canine

papilloma virus warts. ASB 18. They also showed an underweight dog with compromised vision from a severe case of "cherry eye," a condition where the eyelid gland prolapses and protrudes. ASB 18. McCarthy then received Dr. Battenfelder's health certificates and Dr. Kramer's examination sheets, which confirmed that the dogs were "too thin" and had "oral papilloma like virus symptoms, decreased muscular tone, ulcer sores between the pad toes, bloody scabs, feet erosions, [and] elevated eye lids." McCarthy also received information from Cameron that a specialist had diagnosed one dog with "canine … papilloma virus and lesions on the tail." ASB 17.

On May 23, A.N. met with Strauch and McCarthy and told them that she worked for the defendant on May 2, 2017, and that "the smell inside made her sick and want to gag." There were "piles of trash," "empty boxes covered in chicken juice," and "maggots and bugs covering the floor where some of the dogs were living." Smith told A.N. one trash bag contained a dead puppy. There was so much feces and urine that they and the dogs had a hard time standing and walking. Dogs were fed raw chicken that was covered in maggots, stored in a dirty refrigerator, cut on a dirty counter, put through a dirty meat grinder, and served in dirty buckets. There were about 85 dogs, at least 25 of which were in one room. Dogs were on the defendant's bed and it was covered in feces, and newborn puppies were in the master bathroom. Smith had told A.N. the dogs got water only outside and those in the basement had not been out the day before. The urine on and under the kennel mats in the basement made A.N.'s eyes burn, many dogs in it had "severely swollen legs and feet[,] and one had such bad 'Cherry Eye' that it could[not] see." ASB 18.

On May 24, Kelly told Strauch and McCarthy that there were 78 Great Danes inside the residence and it was covered in feces. ASB 18–19. Kelly was "horrified with the living conditions." ASB 18. She had told Smith and Dr. Battenfelder, who agreed the defendant had too many dogs. ASB 19. Kelly said that five of nine puppies in a litter died and another had a broken femur. ASB 19. The defendant directed her to feed spoiled chicken to the dogs, and they got water only when they were "let outside for 10–15 minutes" a day, but some did not get let out every day. ASB 19. Many dogs "had canine Papilloma Virus which is highly contagious" and can be deadly, and many had cherry eye that compromised their vision. ASB 19. Further, over "half … ha[d] liquid stool and it [was] common to see them vomiting," many were underweight, and several had "open sores from 'Happy Tail' where the tail hits the kennel and cuts open and does[not] heal." ASB 19.

She reported that one room was covered in blood because eight dogs in it suffered from happy tail, and that all the dogs in the room weighed well over 100 pounds, but spent "23.75 hours a day in the kennels with no water" and got "fed once a day." ASB 19. The room had "no windows" and the odor of urine made her eyes burn. ASB 19. The defendant stapled dogs' wounds, but did not give them antibiotics or clean the wounds, and she gave prescribed medications to dogs for only "one or two days." ASB 19. One large dog bit everyone except her, and she used riding crops to control the dogs. ASB 19.

Kelly sent Cameron a photo of a puppy with compromised vision from severe cherry eye and told her Smith was taking a dead dog to Dr. Battenfelder. Kelly told McCarthy that four dogs had died and the

conditions in the house were getting worse. ASB 19. Later, McCarthy got a message that Smith had told "A.N.'s cousin, Taylor Struble," five dogs had overheated and one needed an IV. ASB 20. Strauch received, reviewed, and included all the foregoing information in his search warrant affidavit. MH-I 22–25.

The WPD did not have the capability, equipment, or resources to seize, transport, or care for 78 Great Danes—some as big as ponies. MH-I 27–28, 31. The existing shelters could not house the dogs because they had viruses and communicable diseases. MH-I 28. After exhausting all other options, the WPD turned to the HSUS, which was in the business of dealing with large-scale animal seizures and had "everything needed to make [them] happen." MH-I 28; *see also* ASB 4–5. The HSUS and the WPD then entered into a pre-deployment agreement. ASB 7–12.

On June 15, 2017, Strauch presented the search warrant application and affidavit to Judge Greenhalgh (the magistrate) and swore to the allegations. MH-I 25–26; ASB 14–21. The magistrate granted the warrant and authorized officers to search the defendant's entire property, ASB 21; seize all animals, written or electronic records about them, items used in connection with them; collect samples, including food, water, soil, stool, and other substances; and "take [p]hotos and video of conditions of the living areas of the animals, food storage and preparation areas, and … the general layout of the residence," ASB 22.

On June 16, all the WPD officers, other officers, deputies, fire fighters, an ambulance crew, two veterinarians, and members of the PMSPCA, CAHS, and HSUS went to the property. MH-I 30. The HSUS members took a video and photographs of the areas where the dogs were

"to further the objectives of the search." MH-I 79. They also created a map showing each room, cage, or kennel where a dog was located and a unique identifier for each dog, but their "primary function was to assist [officers] with collecting the animals." MH-I 30; *see also* MH-I 31. Each dog was "photographed in the house[,] … [next to the] veterinarians," and "in the trailer" that transported it. MH-I 30. The HSUS then housed, fed, and cared for the dogs and bore the entire cost of doing so. MH-I 81. It also shared the video and photographs with the State, which later admitted them at the circuit court trial. MH-I 79.

B. The defendant's case at the suppression hearing.

Strauch testified that he was not required to include everyone who was going to assist with executing the warrant in his application, in his affidavit, or in the warrant, and that he had not mentioned the HSUS, the firefighters, or the ambulance crew, all of whom were non-law enforcement personnel, in the affidavit. MH-I 35–38, 41–42. He also testified that whether he could use non-law enforcement personnel to assist "depend[ed] on what services [they were] offering and in what capacity," and that he "was quite clear" the HSUS's role was to "assist the [WPD]." MH-I 42.

Strauch testified that officers also took photographs. MH-I 45. He confirmed that the HSUS members had rounded up and collected the dogs and "prepared the master and take list cataloging [them]." MH-I 46. He then testified that an officer had "duplicat[ed the list] and work[ed] with [them] to add a property number to each of the dogs," and had prepared "a form labeling the dogs as property." MH-I 47; *see also* ASB 26–28. He further testified that he did not think allowing non-law enforcement

personnel to walk through and document "information for [the police] without a[n] officer there" was a problem, MH-I 48, particularly "given the … size of th[e] house [and] the amount of work that had to get done that day to get the animals out," MH-I 49. He then testified that he was not with the HSUS members who took the video, but his "entire department was there," MH-I 50, so it was "possible … [an] officer [was]," MH-I 51. He also testified that as long as non-law enforcement personnel were "there to assist [him], then [it was] under [his] direction," MH-I 52, and it was his job to ensure they did not exceed the scope of the warrant, MH-I 52–53.

Strauch testified that he did not ask the issuing court for permission to let the HSUS "use evidence it gathered … in advertising campaigns" because he was not "aware at the time," MH-I 53, and that he never authorized it, MH-I 54. He next acknowledged that the defendant's exhibits appeared to be a newspaper article, an HSUS flyer, and HSUS Facebook postings that included information about, and photographs of, the property and some of the dogs. MH-I 62–66. He then testified that he did not ask the issuing court's permission for McCarthy to collect fecal samples because McCarthy "was there to assist under [his] direction …." MH-I 76.

C. Additional evidence from the trial.

Kelly worked at the defendant's business from May 1 to May 17, 2017, and lived in an attached apartment, but neither she nor Smith worked nights or weekends. JT 373, 399, 417, 1468. On Monday mornings, the house was always in a horrible condition, but by the time she and Smith left on Friday, it "would look a little bit cleaner." JT 419; *see also* JT 385, 406, 1468. Kelly took her photographs on a Thursday after they cleaned. JT 407.

Even on weekdays, some dogs did not get water because they were either not let out at all or were let out later in the day after other groups had emptied the buckets and the defendant had not refilled them while Kelly and Smith were inside cleaning. JT 389. The dogs were usually alone outside and they sometimes fought. JT 385. Twenty to thirty dogs had happy tail "because they were kept in such confined areas." JT 420–21. Many dogs had cherry eye, and Dr. Battenfelder gave the defendant ointment to use on them, but she never did. JT 420–21.

Before Kelly made the complaint to Prendergast, she also told the defendant's friend, a mutual friend, and Dr. Battenfelder's assistant, Stephanie Macomber, about her concerns and sent photographs to one friend. JT 388–89. She begged Dr. Battenfelder and Macomber to help her, but they just told the defendant what Kelly said. JT 388–89, 412–13, 421.

McCarthy and the WPD notified Hamrick, the state director of the HSUS, about the situation, and she notified the national HSUS. JT 124. Jessica Lauginiger, the Director of Animal Crimes for the national HSUS, collaborated with the WPD about how to execute a warrant and who would be present. JT 125, 251. The HSUS also leased warehouses, shipped in kennel materials, set up a temporary shelter, sent in its disaster response team to assist the officers in seizing the dogs, and sent in other animal experts and volunteers to care for them. JT 1130–31. The WPD then decided to execute the warrant on June 16, 2017, because Dr. Kramer and Dr. Sara Proctor were both available on that day. JT 542–43.

On June 16, everyone met at the WPD, was briefed, and then went to the defendant's property around 8:10 a.m. JT 125, 237, 360–61, 541–42, 698. Strauch knocked on the front door, saw it moving, and heard many

dogs barking inside. JT 440. An officer spoke to Smith, and the defendant then opened the front door a crack, squeezed out, and said, "[P]lease don't take my dogs." JT 440. She and Smith both had feces on them. JT 125. Strauch told the defendant about the warrants. JT 440. He next arrested and handcuffed her, and she told him she had diarrhea. JT 440. She then repeatedly said, "I'm sorry, I know this looks bad." JT 440–41. She "was well aware [that she] had too many dogs and not enough help," but she had continued to breed the dogs she already had and to bring in new dogs. JT 1433; *see also* JT 443–45, 1433–34, 1474–76, 1480.

There were 20 to 25 dogs, many of which had cherry eye, in an outdoor chain link kennel. JT 442; *see also* JT 444. There were six puppies, including one the defendant had picked up the night before, on a porch outside the master bedroom that was coated with feces and urine and had no shade. JT 225, 235, 443, 445. The officers could not use the front door to enter the house because there were giant dogs loose in the foyer, so they had the puppies on the porch removed first and then entered through the master bedroom. JT 446–47. They found feces and ground-in filth all over the bed and an unbelievable amount of urine, feces, and other debris on the floor in that room and in the walk-in closets and shower room, which were labeled whelping rooms one, two, and three, and contained medication and equipment to induce labor and care for newborn puppies. JT 448–49, 699.

The officers cleared the entire house and the apartment and then let Lauginiger and Dr. Kramer enter the house. JT 126. Lauginiger and Dr. Kramer did not go into the apartment because the officers said there were no dogs in it, but they walked through, and Lauginiger took video and photos of, the entire house before anyone else walked through or touched

anything. JT 126, 225, 227. Some HSUS members then corralled the loose dogs in the foyer, so Lauginiger, Dr. Kramer, Dr. Proctor, McCarthy, and officers could do a quick sweep "to determine the best course of action, and which dogs to start removing first." JT 273; *see also* JT 498, 508, 510.

The veterinarians had planned to examine the dogs inside, but the conditions made it unsafe to do so, so they had to set up stations outside. JT 543, 701. The HSUS members "set up in teams" and started removing dogs one at a time in a logistical manner so it would be safe to transport them. JT 126; *see also* JT 259, 304, 445. They removed the loose dogs first and then WPD officers and McCarthy went back inside and McCarthy collected fecal samples from the kitchen, the family room, the master bedroom, the first whelping room, the landing overlooking the foyer, the foyer, the garage, and one of the plastic sheds outside. JT 498–502.

There were no dog bowls inside, and the buckets outside were either empty or contained only sand or a little rainwater and algae. JT 128–29, 509. In the pantry, there was blood and chicken juice everywhere; an unorganized shelf of medication, most of which was covered in dust; and surgical staplers. JT 451–52. In there and in the basement, there were several cattle prods—large Tasers designed to cause pain. JT 453–54. There was fresh and crusted over urine and feces, matted hair, and other debris covering all the floors, the bottoms and sides of the cages and kennels, the walls, the doors, the windows, and the furniture. JT 129, 277, 292, 453, 457–58, 475–76, 698–99, 712. The dogs were slipping and sliding on the filth, and they had to sleep and lie in it because they had no clean areas and only a few beds that were too small for them to stretch out in. JT 785–88. The dogs and puppies all appeared to be distressed, suffering, and "very

anxious." JT 509. Lauginiger had "never walked into a shelter environment … with that level of accumulation" before. JT 305.

It was also hot and stuffy because all the air conditioners were off, and the buildup of ammonia gases was causing choking, gagging, trouble breathing, watering eyes, and running noses. JT 129, 449–51, 573, 774–75, 1056. The highest concentrations were in the back garage and basement, which were extremely hot, stuffy, and dark. JT 223–24, 452–53, 575, 699. Some people were wearing full Tyvek suits, booties, gloves, masks, respirators, and goggles, but everyone was slipping on the filth and had to take frequent breaks for fresh air. JT 130–31, 274, 446–49, 508–09, 575, 700, 1056. "It [was] just a terrible environment" for dogs and people, JT 761, and did not meet even minimum standards for cleanliness, JT 792. In fact, the conditions were "worse than anything else [Dr. Proctor had] ever seen," including at farms where cows and horses were being neglected and "a fighting pit bull kennel." JT 736.

They seized 75 dogs and puppies from the property and 9 newborn puppies from a clinic. JT 234, 456. Strauch and an HSUS team removed the last dog from the basement around 9:00 p.m. JT 225–26, 258, 362. After the dogs and puppies arrived at the HSUS temporary shelter, the veterinarians gave them thorough examinations. JT 201, 260, 702. Chuckie (A1-06) had moderate to severe cherry eye and conjunctivitis, which is painful and itchy, in both eyes. JT 642–44, 702, 706–07. Augusta (B1-05) had infections in both ears and significant bacterial conjunctivitis, cherry eye, a sclera infection, and "diamond eye," a condition where the sides of the eyelids droop (ectropion) or fold in and cause the eyelashes to rub on the cornea (entropion), in one eye. JT 545–50, 638–41, 644–45. Charlie

Girl (C-6) had severe conjunctivitis and cherry eye and was "functionally blind." JT 645–46, 661–62, 703–04. Dolores (C7) had papilloma warts on the outside and inside of her mouth. JT 551.

Hermione (D4) had conjunctivitis and eyelid abnormalities in both eyes and severe cherry eye that compromised her vision in one eye. JT 647–48, 704–05. Frankie (E1-02) had severe papilloma lesions on the outside and inside of his mouth, on his chin, and under his nose. JT 555. Wanda (G2) was underweight and had significant conjunctivitis and diamond eye with ectropion and entropion in one eye, and a swollen left front wrist. JT 557–59, 649–50.

Ginny (H2-02) had a bacterial infection, conjunctivitis in both eyes, and severe happy tail, which is painful. JT 650–53, 705–07. Wayne (I1-03) had severe happy tail, infected abscesses on his feet, and conjunctivitis and severe diamond eye with ectropion and entropion in both eyes. JT 562–66, 650–53.

Wally (I1-04) had infected papilloma lesions and sores all over his body. JT 708–10. Oberon (I1-05) had very large infected pressure sores on his knees and elbows and papilloma warts. JT 568–69, 847–49. Graham (K1) was underweight and had bald spots on his tail and severe infections in both ears. JT 570.

The dogs with eye issues had to go to a specialist, and several had to have surgery. JT 569–70, 634–36, 643, 647–48, 650, 653. The dogs with wounds, sores, and papilloma warts and lesions had to be given antibiotics and pain medication. JT 569, 623. The HSUS also had the other dogs and puppies treated for papilloma to avoid a reinfection. JT 555, 556. In addition, the HSUS had all the dogs treated for Giardia, an intestinal

parasite that causes severe diarrhea and vomiting and can pass from a dog to a dog or a human, because all eight fecal samples had tested positive for it. JT 503–05, 512–13, 764–65, 767–68, 772.

The HSUS provided the video, photographs, and veterinary reports to the State. JT 132, 201. The State then authorized the HSUS to use some of the photographs that it intended to admit at trial. JT 1071. By the time of trial, the HSUS had spent about 1.3 million dollars on the case, used about $135,000 in donated supplies, and raised about $189,000 in cash. JT 248. Had the HSUS not stepped in, the taxpayers in Wolfeboro would have had to pay those unbudgeted costs. JT 1037.

D. The motions to suppress.

The defendant filed a pretrial motion to suppress, alleging that the police violated her rights under the Fourth Amendment to the United States Constitution and part I, article 19 of the New Hampshire Constitution. ADB 1–40. She argued that the police should have told the issuing magistrate they were going to allow the HSUS to aid in searching the house and seizing evidence, and that the HSUS's later use of the evidence was not "'related to the objects of the search' … or … to any legitimate law enforcement purpose." ADB 4 (quoting *Wilson v. Layne*, 526 U.S. 603, 611 (1999)). She also argued that the HSUS's actions impermissibly expanded the scope of the warrant and made its execution unreasonable. ADB 5–6.

In response, the State argued:

> The execution of the warrant … was reasonable because (1) RSA 595-A:8 permitted the aid of HSUS personnel, who were "suitable assistants" …; (2) [they] were present to aid officers in execution of the Warrant; (3) [it] authorized the

> seizure of dogs and documentation of the conditions at the property; (4) the [WPD] requested the assistance of HSUS; (5) HSUS personnel did not seize anything not authorized by law enforcement; and (6) nothing seized was beyond the scope of the Warrant.

ADB 47. The State also argued that a "common sense reading of the scope of the warrant necessarily included animal handling and logistical support from third party experts," and "[i]t would promote empty formalism to require courts to make explicit what [was] implicit." ADB 44–45. The State pointed out that in *State v. Chilinski*, 330 P.3d 1169 (Mont. 2014), the court had rejected the same arguments concerning the HSUS's actions, ADB 45−47 (citing *Chilinski*, 330 P.3d at 1175–76), and argued that the only difference in *Chilinski* was that the warrant included "the lead detective and 'any and all agents he m[ight] require,'" ADB 45 (quoting *Chilinski*, 330 P.3d at 1172).

Strauch testified at a hearing on the motion, and while he was doing so, the court asked defense counsel what "the use of evidence … after the search … ha[d] to do with the sufficiency of the warrant …." MH-I 56. Counsel responded that it was relevant to whether its scope was "impermissible expanded …." MH-I 56. He then cited *Wilson*, and the court responded that it was relevant only to issues concerning the execution of a warrant. MH-I 56–57.

Defense counsel argued that the State needed prior approval from the magistrate given the HSUS's and McCarthy's level of involvement in executing the warrant. MH-I 85. Counsel also argued that the "media campaign against [the defendant]" was a "huge" expansion of the scope of

the warrant, and that the proper remedy for both violations was suppression of the evidence. MH-I 87.

The court denied the motion. ADB 59–78. It held that *Chilinski* was on point because "Strauch was authorized by RSA 595-A:8 to bring with him suitable assistants," which was "the functional equivalent of having explicit authorization in a search warrant …." ADB 75–76. Further, the HSUS was allowed to assist "because its presence directly aided in the execution of the search warrant and its work was done under [Strauch's] supervision …." ADB 76. Moreover, "[t]he scope of the search was not expanded," ADB 77–78, and "[t]he fact that HSUS used photographs taken during the execution of the search warrant for a media campaign after the fact d[id] not mean the evidence collected during [it] should be suppressed," ADB 78.

The defendant moved to reconsider. ADB 79–83. She reiterated her prior arguments, ADB 80–86, and added an argument that a Montana statute also "allow[ed] law enforcement to utilize the help of assistants," but the officer in *Chilinski* had nevertheless requested and received authorization to do so, ADB 79. The State objected, and the court denied the motion. ADB 84–86.

On the first day of trial, defense counsel twice said that he was not going to renew his motion to suppress. JT 20, 240. However, after the State rested on the fourth day, he said that he was doing so because on the first day of trial, Lauginiger had "stated, 'I wasn't there when police officers were there,'" JT 878, and had been "very clear that no one else was present while [they were] collecting evidence," JT 879. The court said, "I did[not] take her testimony to mean that …." JT 879. Defense counsel then argued

that her testimony showed that the HSUS members had not been acting under the direct supervision of the officers, and so he "mov[ed] to renew the motion … on those limited grounds …." JT 879–80.

The State argued that its trial witnesses had "been clear that they were working at the direction of the [WPD] …." JT 880. The court noted that Lauginiger had not testified that "she, or anyone from HSUS, was given free rein with the police not involved or not supervising," JT 880–81, and that Strauch had testified that "it was under the ultimate direction … of … Chief Rondeau," JT 881. The court denied the motion. JT 881.

The defendant rested her case on the ninth day of trial, but did not renew her motion again. JT 1720.

SUMMARY OF THE ARGUMENT

I. This Court will not consider the substance of the defendant's arguments that the police violated her rights under part I, article 19, and that suppression of the evidence was an appropriate remedy because she did not preserve them in the trial court and has not invoked the plain-error rule on appeal. Furthermore, she cannot demonstrate that the trial court erred. She no longer had a right to privacy when the police executed the warrant, RSA 595-A:8 explicitly authorized the WPD to use suitable assistants, and this Court has never held that prior judicial notification and authorization are constitutional prerequisites to doing so. The defendant also cannot demonstrate that any error was plain because the case is of first impression.

II. This Court will not consider the substance of the defendant's arguments that the police violated her privacy rights under part I, article 2-b, and that suppression of the evidence was an appropriate remedy because she did not preserve them in the trial court and has not invoked the plain-error rule on appeal. Furthermore, there was no error because she no longer had a right to privacy when the police executed the warrant. And even if she had, the language of part I, article 2-b is ambiguous, and its history makes it clear that it applies only prospectively; it protects only information that falls outside the protections afforded by part I, article 19; it allows the police to obtain that information with a warrant; and it includes only civil remedies for violations. Finally, any error was not plain because the case is of first impression.

ARGUMENT

On appeal, the defendant argues that the police violated her rights under part I, articles 2-b and 19, and that suppression of the evidence was an appropriate remedy for both violations. DB 26, 29–31, 33–43; 44–48. "When reviewing a trial court's ruling on a motion to suppress, [this Court will] accept [its] factual findings unless they lack support in the record or are clearly erroneous, and [will] review its legal conclusions *de novo.*" *State v. Schulz*, 164 N.H. 217, 221 (2012). This Court will consider only the evidence the trial court had before it when it ruled on the motion. *State v. Gonzalez*, 143 N.H. 693, 700 (1999) (a defendant is prohibited from relying on trial evidence that did "not appear in the suppression record").

Part I, article 2-b was not enacted until after the defendant appealed her case, and she never asked for a remand to the trial court, so it cannot be a basis to find that the trial court erred. Therefore, the issues are: (1) whether the police violated part I, article 19 by using the HSUS to assist in the execution of the warrant, and (2) whether the police violated part I, article 2-b, and if so, whether suppression is an appropriate remedy. The answer to those questions is no.

I. The defendant did not preserve her part I, article 19 arguments; she has not invoked this Court's plain-error rule; and she cannot meet that strict standard because there was no plain error.

On appeal, the defendant argues that "the police violated the reasonableness requirement of Part I, Article 19 … by not seeking the issuing magistrate's authorization to use civilian assistants, and by not taking reasonable precautions such as a non-disclosure agreement to prevent the civilian assistants from trampling upon [the defendant's] right to privacy." DB 30–31. She then argues that the suppression of the evidence seized during the execution of the warrant is an appropriate remedy because "[t]he invasion of [her] privacy interests … was profound." DB 47–48.

A. This Court should not address the substance of the defendant's arguments because she did not preserve them in the trial court, and has not invoked the plain-error rule on appeal.

> Generally, [this Court will] not consider issues raised on appeal that were not presented in the trial court. This preservation requirement, expressed in both [this Court's] case law and Supreme Court Rule 16(3)(b), reflects the general policy that trial forums should have an opportunity to rule on issues and to correct errors before they are presented to the appellate court. The defendant, as the appealing party, bears the burden of demonstrating that [she] specifically raised the arguments articulated in [her] appellate brief before the trial court.

State v. Plantamuro, 171 N.H. 253, 258–59 (2018) (citations omitted).

In the trial court, the defendant argued that the police violated her rights against "unreasonable searches and seizures" because: (1) the HSUS

members and McCarthy were "literally executing the entire search warrant," and "when [there was] that level of involvement with that level of autonomy, [officers] need[ed] to have prior authorization [from] a judge," MH-I 85; and (2) the HSUS members' later use of the evidence for "a media campaign" without "the Court's permission" was "a huge expansion on the scope of …. the warrant," MH-I 87. *See also* ADB 2–6. However, she never argued that the police violated those rights by failing to get prior judicial authorization for the veterinarians, ambulance crew, and members of the CAHS, all of whom were civilians, to assist them, or by failing to take reasonable precautions before the search to prevent any of the civilians from later using the evidence for a non-law-enforcement purpose. She also never argued that the police or the civilians violated her rights to privacy, or that suppression of the evidence was necessary if they did so. To the extent she now argues that these events violated her part I, article 19 rights, her arguments are not preserved because they are fundamentally different from those she made in the trial court.

Furthermore, the defendant has not invoked this Court's plain-error rule on appeal. Therefore, it should decline to address the substance of the arguments. *See State v. Brum,* 155 N.H. 408, 417 (2007) (declining to consider Brum's argument because he did not preserve it in the trial court or invoke the plain-error rule).

B. Even if this Court addresses the defendant's arguments under the plain-error rule, she cannot meet that strict standard because there was no plain error.

> [This Court will] apply the [plain-error] rule sparingly, its use limited to those circumstances in which a miscarriage of

> justice would otherwise result. To reverse a trial court decision under the plain error rule: (1) there must be an error; (2) [it] must be plain; (3) [it] must affect substantial rights; and (4) [it] must seriously affect the fairness, integrity or public reputation of judicial proceedings.

State v. Pennock, 168 N.H. 294, 310 (2015) (quotations omitted). "[T]he defendant bears the burden under the plain error test." *State v. Cooper*, 168 N.H. 161, 168 (2015). She cannot meet that burden because there was no error, and even if there had been, it was not plain.

i. Part I, article 19 does not require the police to get the magistrate's authorization to bring civilians into a private home or to allow them to use the evidence for their own purposes because doing so is unnecessary to protect a defendant's rights.

The defendant first argues that although other courts "have not required prior judicial notification and authorization as a constitutional prerequisite to the use of civilian assistants," this Court should, arguing that "Part I, Article 19 historically provides greater protection for individual privacy, and embodies a constitutional preference for requiring prior judicial authorization," and "this case illustrates the precise harms that may occur if prior judicial authorization is not required." DB 31–32. She next argues that "[e]ven if this Court views prior judicial authorization to be unnecessary for the mere use of civilian assistants, it should require it … for agreements that allow [them] to exploit the evidence found for private gain," because "[a]bsent meaningful constraints, [they] … may impermissibly expand the scope of the warrant and intrude upon the

privacy of the homeowner in ways not permitted or even contemplated by the issuing magistrate," DB 33–34. Those arguments lack merit.

It must first be noted that this Court has declined to find that part I, article 19 is more protective than the Fourth Amendment in all contexts. *See, e.g., State v. Robinson*, 170 N.H. 52, 63 (2017) (declining "to require the process of applying for a warrant to have begun at the time of the unconstitutional search in order for the independent source doctrine to apply" under part I, article 19); *State v. Sawyer*, 147 N.H. 191, 195 (2001) (declining to "reject the apparent authority doctrine" under part I, article 19); *State v. Wong*, 138 N.H. 56, 60 (1993) (holding that "Part I, Article 19 … does not require a higher standard" for determining the scope of a third party's consent to a search). It should also do so in this case because judicial authorization to use civilian assistants is "unnecessary in light of the overarching requirement that the use of civilians in the execution of a search must still meet the constitutional standard of reasonableness." *Bellville v. Town of Northboro*, 375 F.3d 25, 33 (1st Cir. 2004). This Court should reject the defendant's argument because prior judicial authorization would do nothing to ensure that civilian assistants would not act unreasonably, "impermissibly expand the scope of the warrant," or "intrude upon the privacy of the homeowner …." DB 34.

Furthermore, this Court should reject the defendant's argument that part I, article 19 requires officers to get non-disclosure agreements from civilians before allowing them to assist because "the determination of whether a person has a legitimate expectation of privacy with respect to a certain area must be made on a case-by-case basis, considering the unique facts of each particular situation." *State v. Boyer*, 168 N.H. 553, 559 (2016)

(quotation and brackets omitted). The warrant in this case covered the entire house and everything within it having to do with the dogs. Once a "magistrate decide[s] to subject the contents of [a] home to state scrutiny by issuing a warrant," any "privacy interest in [it] abate[s] within the scope of the search warrant." *State v. Bembry*, 90 N.E.3d 891, 900 (Ohio 2017). Further, "no right to privacy is invaded when State officials allow or facilitate publication of an official act such as an arrest." *Holman v. Central Ark. Broadcasting Co., Inc.*, 610 F.2d 542, 544 (8th Cir.1979).

Once officers seize property or articles, by statute they must "safely keep them … so long as necessary to permit them to be produced or used as evidence in any trial." RSA 595-A:6 (2001). However, most departments do not have the facilities, expertise, or resources to safely keep large animals or large numbers of animals. The defendant's argument that part I, article 19 requires officers to "limit [civilians'] involvement to … assisting in the execution of the warrant," DB 33, would hamstring law enforcement's ability to prosecute these types of cases. Therefore, this Court should do as other courts have done and hold that "prior judicial notification and authorization [is not] a constitutional prerequisite to the use of civilian assistants." DB 31.

ii. The State's agreement to allow the HSUS to use the evidence for publicity and fundraising did not violate the defendant's right to privacy because she had no such right.

The defendant argues that "this Court should hold that the agreement here violated [her] constitutional rights, because it was constitutionally unreasonable for the police to allow HSUS to use evidence seized from a

private home to raise hundreds of thousands of dollars and further its own agenda," instead of taking "reasonable precautions such as a non-disclosure agreement to prevent the sort of exploitation that occurred here." DB 34. However, that argument is fundamentally flawed for several reasons.

First, in her brief, the defendant concentrates on the fact that the police brought the civilians into a "private home." *See* DB 26, 32–34, 36, 43–44, 46. However, the defendant's residence was not a private home because she ran a business there and had numerous employees, at least one of whom lived there.

Second, although she claims that the WPD "entered into an agreement for HSUS to use the evidence for non-law-enforcement purposes" before it obtained the warrant, DB 34, the pre-deployment agreement did not do so, ASB 8–12, and there is no evidence that there was any other agreement entered into before the search.

Third, although the defendant argues that the WPD "funded its operation by, in effect, licensing [her] private information to a private advocacy organization, which then embarked on a campaign to *vilify* her on social media in pursuit of its own private interests," DB 44 (emphasis added), she has not explained how doing so violated her right against unreasonable searches and seizures or her right to privacy.

Fourth, a person "has no legitimate expectation of privacy" in "matters within the public domain." *Eagle v. Morgan*, 88 F.3d 620, 625 (8th Cir. 1996) (information that is available in public documents or public proceedings is not protected by a right to privacy); *see also Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975) (holding that "the interests in privacy fade when the information involved already

appears on the public record"). Here, Strauch had included a great deal of information about the conditions inside the defendant's home and the conditions of her dogs in the warrant affidavit he filed in the circuit court.

In any event, once the "magistrate decided to subject the contents of [the defendant's entire] home to state scrutiny by issuing a warrant before the search occurred," her "privacy interest in [her home] abated within the scope of the search warrant." *Bembry*, 90 N.E.3d at 900. The defendant has not argued that the trial court erred in holding that "[t]he scope of the search was not expanded …." ADB 77–78. Therefore, the State's agreement to allow the HSUS to later use the evidence could not have violated the defendant's right to privacy because she no longer had one.

iii. RSA 595-A:8 explicitly authorized the officers to take suitable assistants with them.

The defendant first acknowledges that she "did not renew the motion to suppress after the testimony of defense witnesses … established not only that the police knew about the fundraising, but expressly sanctioned it and even supervised which photos were used …." DB 45. She then argues that "this should not result in a finding that [the] testimony may not be considered in determining whether the exclusionary rule should apply" because "[t]he trial court found no constitutional violation, so it had no reason to consider employing the exclusionary rule." DB 45. However, the trial court held that "[t]he fact that HSUS used the photographs … after the fact d[id] not mean the evidence … should be suppressed." ADB 78.

Therefore, to the extent the defendant believed her witnesses' testimony compelled a different result, it was incumbent on her to again ask the trial court to "reassess [its] ruling …." *State v. Vandebogart*, 139 N.H. 145, 165 (1995). Because she did not do so, she is prohibited from relying on that testimony. *State v. Gonzalez*, 143 N.H. 693, 700 (1999) (a defendant is prohibited from relying on evidence outside the suppression record); *see also State v. Mouser*, 168 N.H. 19, 27 (2015) ("any issues that could not have been presented to the trial court before its decision must be presented to it in a motion for reconsideration" to preserve them).

In any event, as demonstrated above, the defendant no longer had a right to privacy when the warrant was executed or when the HSUS later used the evidence. Therefore, contrary to her claim, exclusion of the evidence seized pursuant to the warrant would not serve "to redress the injury to [her] privacy …." *State v. Canelo*, 139 N.H. 376, 387 (1995).

Furthermore, other courts have held that "[o]nly evidence seized while the police are acting outside of the boundaries of the warrant is subject to suppression." *United States v. Hendrixson*, 234 F.3d 494, 497 (11th Cir. 2000) (citing *United States v. Jones*, 31 F.3d 1304, 1314 (4th Cir. 1994), *cert denied sub nom*. *Ledford v. United States*, 534 U.S. 955 (2001). They have also held that "blanket suppression is required whenever law enforcement officers grossly exceed the scope of a search warrant and, as a result, transform an otherwise valid warrant into a general warrant." *United States v. Coleman*, No. 16-CR-668 JAP, 2016 WL 11611386 at *11 (D.N.M. Aug. 26, 2016) (unpublished order). Here, the defendant has never argued that the evidence was seized while the police were acting outside the

boundaries of the warrant, and she no longer argues that they exceeded the scope of it.

New Hampshire law explicitly provides that "[a]n officer executing a search warrant may take with him suitable assistants and suffer no others to be with him." RSA 595-A:8 (2001). Furthermore, no court has ever held that judicial authorization is constitutionally required to do so. In fact, several courts, including the Court of Appeals for the First Circuit, have held that it is not. *See*, *e.g.*, *Bellville*, 376 F.3d at 33–34; *Commonwealth v. Sbordone*, 678 N.E.2d 1184, 1188 n.9 (Mass. 1997). The United States Supreme Court has also held that the Fourth Amendment is not violated where "the presence of the third parties directly aided in the execution of the warrant." *Wilson*, 526 U.S. at 611.

Here, Strauch testified that he was not required to include everyone who was going to assist him with executing the warrant in the application, MH-I 35–38, and that whether he could use non-law-enforcement assistants "depend[ed] on what services [they were] offering and in what capacity," MH-I 42. Thus, it is clear that he reasonably relied on the statute and on the existing case law.

This Court has recognized that "society would be ill-served if its police officers took it upon themselves to determine which laws are and … are not constitutionally entitled to enforcement," and that "applying the exclusionary rule [where they have relied on presumptively valid laws] would deprive [them] of the benefit of the products of their lawful conduct, whereas the rule is intended to deter unlawful conduct." *State v. De La Cruz*, 158 N.H. 564, 567 (2009) (quotation omitted). It has therefore held "that suppression of evidence obtained as a result of an officer's objectively

reasonable reliance upon a presumptively constitutional ordinance would not be consistent with the purposes of the exclusionary rule." *Id.* Other courts have also held that where "officers act in objectively reasonable reliance on case law, suppression is not required even in the absence of binding circuit precedent." *United States v. Rose*, 914 F. Supp. 2d 15, 22 (D. Mass. 2012), *aff'd* 802 F.3d 114 (1st Cir. 2015).

Thus, where no court has ever required specific judicial authorization for civilian assistance, and statutory and case law expressly allowed it, the suppression of evidence "would not be consistent with the purposes of the exclusionary rule." *De La Cruz*, 158 N.H. at 567. Accordingly, there was no error.

iv. Even if there was an error, it was not plain because this case is one of first impression.

"When the law is not clear at the time of trial and remains unsettled at the time of appeal, a decision by the trial court cannot be plain error. 'Plain' as used in the plain error rule is synonymous with clear or, equivalently, obvious." *Pennock*, 168 N.H. at 310 (quotations and citations omitted). An error is "neither clear nor unequivocally obvious" if "the case is one of first impression." *Id.*

Here, as the defendant concedes in her brief, "this is a case of first impression." DB 27. Therefore, any error was not plain.

II. The police did not violate the defendant's privacy right under part I, article 2-b.

Part I, article 2-b provides: "An individual's right to live free from governmental intrusion in private or personal information is natural, essential, and inherent."

The defendant argues that part I, article 2-b requires the police to ensure that no civilian will use any information gathered during a search for a non-law-enforcement reason, DB 41, and, in support, posits that "the enactment of Part I, Article 2-b has expanded the scope of individual privacy in [New Hampshire] …." DB 32. In substance, the defendant argues that part I, article 2-b should apply to the present case on the grounds that (1) the "language of the amendment supports a finding of retroactive application," (2) new constitutional rules "apply to all criminal cases still pending when the rule is adopted," and (3) the amendment must be considered in order for this Court to "meaningfully address whether a particular search or seizure violates [a person's] 'reasonable expectation of privacy' …." DB 36.

A. This Court should not address the substance of the defendant's arguments because she did not preserve them in the trial court and has not invoked the plain-error rule on appeal.

In Section C of the defendant's brief, she states that "[t]he issue of preservation of [her] arguments made under Part I, Article 2-b …. is discussed … in section D(2)." DB 28. Then, in section D(2), she discusses only retroactivity. However, retroactivity is a separate issue from preservation, and even if a new rule applies retroactively, it does so only if

the issue was "raised in the trial court and properly preserved." *State v. Tierney*, 150 N.H. 339, 345 (2003) (holding "that the standard [this Court] adopted in [*State v. Ramos*, 149 N.H. 118 (2003),] appl[ied] retroactively to criminal cases pending on direct appeal where the issue of joinder or severance ha[d] been raised in the trial court and properly preserved").

Here, in the trial court, the defendant never argued that she had a right to privacy, that the State or the HSUS had violated any such right, or that the suppression of the evidence was an appropriate remedy for any such violation. Therefore, her arguments are not preserved.

Furthermore, she has not invoked this Court's plain-error rule. Therefore, this Court should decline to address the substance of her arguments. *See Brum,* 155 N.H. at 417.

B. Even if this Court addresses the defendant's arguments under the plain-error rule, there was no plain error.

In order to determine whether there was error, this Court must interpret part I, article 2-b, which was adopted by popular vote. ASB 99.

> When interpreting the meaning of a constitutional provision adopted by popular vote, [this Court] will give the words in question the meaning they must be presumed to have had to the electorate when the vote was cast.… [It will] consider a delegate's statements in determining the meaning of an amendment if the statements interpret [its] language in accordance with its plain and common meaning while being reflective of its known purpose or object.

In re Opinion Of Justices, 162 N.H. 160, 167 (2011) (quotations and citations omitted).

i. Part I, article 2-b does not apply retroactively because the general rule is that constitutional amendments apply only prospectively, and the history of the amendment demonstrates that it was intended to do so.

The defendant argues that "the language of [part I, article 2-b] supports the finding that it applies retroactively," DB 36, because "it describes the privacy right as 'natural, essential, and inherent,'" and "such rights 'are not bestowed by [the] constitutional provision but rather are recognized to be among the natural and inherent rights of all humankind,'" DB 37 (quoting *Burrows v. Keene*, 121 N.H. 590, 596 (1981)). However, the fact that citizens chose to characterize it as such does not necessarily "manifest[] their intent to apply [it] retroactively." DB 37. In fact, it is unlikely that they had that intent because only days before the vote, the *Keene Sentinel* had published an article in which Representative Neal Kurk, one of the prime sponsors and co-authors of the amendment, had said that "[i]f passed, … the amendment would not be retroactive." ASB 79.

Unlike new constitutional rules, "[c]onstitutional amendments are presumed to have a purely prospective application, and overcoming the presumption requires either an express retroactivity provision in the actual language of the amendment or extrinsic sources that leave no doubt that such was the voter's manifest intent." 16 C.J.S. *Constitutional Law* § 116; *see also* 16 Am. Jur. 2d *Constitutional Law* § 48. ("the general rule is that prospective effect alone is given to provisions of state constitutions"). Here, there is no "express retroactivity provision in the actual language of the amendment," and, as demonstrated above, "extrinsic sources" leave doubt

about whether "such was the voter's manifest intent," and "leave no doubt that such was [not the Legislature's] manifest intent."

Moreover, the fact that this Court will have to consider whether the amendment affects its interpretation of part I, article 19 in the future does not mean that it must do so in this case, particularly since the defendant never argued that the police or the HSUS violated her right to privacy. Therefore, this Court need not consider part I, article 2-b in deciding this case.

ii. The history of part I, article 2-b clearly demonstrates that it does not apply in this case.

Representatives Kurk and Robert Cushing, the other co-sponsor and co-author of part I, article 2-b, both stated that it was "intentionally written to be open to judicial interpretation." ASB 76. In other words, they intentionally wrote it to be ambiguous. Thus, this Court must "turn to the circumstances surrounding the adoption of the amendment to better discern the intent of the people in adopting it." *Board of Trustees of New Hampshire Judicial Retirement Plan v. Secretary of State*, 161 N.H. 49, 54 (2010). Those circumstances make it clear that neither the legislators nor the people intended for it to apply in these circumstances.

During legislative hearings on 2018 CACR 16, Rep. Kurk said that part I, article 19 provided that "to get into a person[']s] physical possession[s]," the State had to have a warrant, and that the proposed amendment went "beyond that," but it did "not prevent the government from obtaining a search warrant" to get information that the amendment

protected. ASB 65. Jeanne Hruska from the ACLU then said that probable cause would be the standard to obtain a search warrant. ASB 66.

Professor Albert Scherr submitted written testimony stating that the amendment: (1) was "the necessary response to this technological and scientific era," (2) "fill[ed] the gap in the New Hampshire Constitution regarding individual protection from governmental intrusion in personal and private information," and (3) "provide[d] much broader protection than [part I, article 19] against a wider array of governmental intrusion of private and personal information *outside the criminal investigative context*." ASB 69 (emphasis added). He also said that "[a]ccess to personal and private information for which the government ha[d] probable cause to believe w[ould] help solve a crime w[ould] still be accessible via a search warrant." ASB 70. Prof. Scherr later provided his written testimony to the media, who published it before the vote on the amendment. ASB 95–98.

Legislators also spoke with, and provided written statements to, the media, which then published them. Rep. Kurk stated that "[t]he amendment's real purpose" was "to provide [citizens] a way to protect themselves against unforeseen privacy issues in 25 or 50 years." ASB 77. "[T]he state would only be able to get this electronic information if [it] were able to show an overwhelming public purpose, such as a warrant." ASB 77 (parenthesis omitted); *see also* ASB 81–85. He stated that it "would also help prevent the police from accessing … private information through third parties," ASB 83, and that "voters would be able to challenge any governmental collection of their personal information through lawsuits, bill proposals and the ballot box," ASB 79.

Rep. Cushing stated that the "framers of the state constitution … could not have foreseen the technological innovations that would end up colliding with the fundamental rights they were outlining," and that the amendment was "an update to a concept of privacy that[had] been in our constitution since 1784." ASB 77. Senator Martha Fuller Clark and Representative Marjorie Smith stated that the amendment "would provide much broader protection against a wider array of governmental intrusion into personal information outside the context of a criminal investigation," and that it "would require the government to obtain a warrant before accessing personal information, including DNA, online data, and information held by third parties such as internet providers." ASB 88; *see also* ASB 89.

Based on all these statements, voters could reasonably conclude only that part I, article 2-b would protect private or personal information that fell outside the protections already afforded by part I, article 19; that the State would be able to obtain personal and private information by demonstrating an overwhelming public purpose—such as a criminal investigation—that justified it in doing so; and that the remedy for any violation of it would include only civil penalties.

Therefore, part I, article 2-b does not apply here for several reasons. First, the defendant's information was already afforded protection under part I, article 19. Next, it was obtained with a warrant supported by probable cause. And finally, it was no longer personal or private when the police and the civilians executed the warrant or when the HSUS later disclosed portions of it.

The defendant suggests that part I, article 2-b "bar[s] the government from shielding itself from liability by claiming that a post on social media is not a search or seizure." DB 41. This argument is apparently a reference to the difference in the language used in article 2-b and article 19. To that extent, the argument is irrelevant because there is no evidence the government made any such claim. This Court will therefore not address it. *See State v. Fogg*, 170 N.H. 234, 236 (2017) ("we decide constitutional questions only when necessary").

Moreover, as demonstrated in § I.B.iii, above, suppression of the evidence would not be appropriate here because the defendant did not have a right to privacy, RSA 595-A:8 explicitly authorized the officers to take suitable assistants with them, and other courts have routinely held that officers do not need judicial authorization to do so. Therefore, for all the foregoing reasons, there was no error.

iii. Even if there was an error, it was not plain because this case is one of first impression and the defendant's arguments turn upon an interpretation of part I, article 2-b this Court has never adopted.

This Court has held that an error cannot be plain if "if the case is one of first impression," *Pennock*, 168 N.H. at 310, and this case is, DB 27. This Court has also held that an error cannot be plain if the language of the statute at issue is ambiguous, *Pennock*, 168 N.H. at 310, or if the defendant's argument "turns upon an interpretation of [it] that [this Court] has never adopted," *Depanphilis v. Maravelias*, No. 2017-0139, order at 3 (N.H. July 28, 2017) (non-precedential). This Court should apply the same rule here because the language in part I, article 2-b is ambiguous, and the

defendant's argument turns upon an interpretation of it that this Court has never adopted. Therefore, any error was not plain. Accordingly, for all the foregoing reasons, this Court should affirm the defendant's convictions.

CONCLUSION

For the foregoing reasons, the State respectfully requests that this Honorable Court affirm the judgment below.

The State requests a fifteen-minute oral argument.

Respectfully submitted,

THE STATE OF NEW HAMPSHIRE
Gordon J. MacDonald
Attorney General

/s/ *Susan P. McGinnis*
Senior Assistant Attorney General
33 Capitol Street
Concord, N.H. 03301
603-271-3658
Susan.McGinnis@doj.nh.gov
N.H. Dept. of Justice
NH Bar ID No. 13806

October 8, 2019

CERTIFICATE OF COMPLIANCE

I, Susan P. McGinnis, hereby certify that pursuant to New Hampshire Supreme Court Rule 16(11), this brief contains approximately 10,734 words, which is less than the total the State requested in its assented-to motion to exceed the word limit in the rule. Counsel has relied on the word count of the computer program used to prepare this brief.

October 8, 2019

/s/ *Susan P. McGinnis*
Susan P. McGinnis

CERTIFICATE OF SERVICE

I, Susan P. McGinnis, hereby certify that a copy of the State's brief and appendix will be served on Theodore M. Lothstein, counsel for the defendant, through the New Hampshire Supreme Court's electronic filing system.

October 8, 2019

/s/ *Susan P. McGinnis*
Susan P. McGinnis