THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0051

Clifford E. Avery

v.

Helen Hanks, Commissioner,
New Hampshire Department of Corrections

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

REPLY BRIEF FOR HELEN HANKS, COMMISSIONER, NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS

TO THE AMICI BRIEF OF NEW HAMPSHIRE LEGAL ASSISTANCE, DISABILITY RIGHTS CENTER- NEW HAMPSHIRE, INC., AND AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

HELEN HANKS, COMMISSIONER,
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I. SOVEREIGN IMMUNITY IS A CONSTITUTIONAL AND STATUTORY DOCTRINE.

Part I, Article 7 of the New Hampshire Constitution grants the people the right to govern as a "free, sovereign, and independent State" and extends to them "every power, jurisdiction, and right, pertaining thereto." N.H. Const. Pt. I, Art. 7. State sovereign immunity has been an inherent feature of sovereignty since the establishment of the New Hampshire Constitution in 1784 and the ratification of the United States Constitution. *See, e.g.*, *Franchise Tax Bd. Of Cal. v. Hyatt*, __ U.S. __, 139 S. Ct. 1485, 1493 (2019) (an integral component of States' sovereignty at the time the United States Constitution was ratified was "their immunity from private suits"); *Wooster v. Plymouth*, 62 N.H. 193, 204 (1882) ("It is an established principle of jurisprudence in all civilized nations that the sovereign cannot be sued in its own courts, or in any other, without its consent and permission; . . . ."). Those who established the New Hampshire Constitution would have understood the term "sovereign" in Part I, Article 7 to embrace the doctrine of sovereign immunity. *See Bd. Of Trustees of N.H. Jud. Retirement Plan v. Secretary of State*, 161 N.H. 49, 53-54 (2010) (explaining that particular expressions in the constitution are construed based on what they meant when they became part of the constitution); Federalist No. 81 (Alexander Hamilton 1788) ("It is inherent in the nature of sovereignty not to be amenable to the suit of an individual without its consent. This is the general sense, and the general practice of mankind; and

the exemption, as one of the attributes of sovereignty, is now enjoyed by the government of every State in the Union.”).

Thus, while the doctrine of sovereign immunity is not expressly detailed in the New Hampshire Constitution, *Sousa v. State*, 115 N.H. 340, 342 (1975), the doctrine is embedded within Part I, Article 7 and is of constitutional dimension. The General Court also enshrined the doctrine of sovereign immunity in RSA chapter 99-D in response to judicial efforts to abolish it by treating sovereign immunity as solely a common law doctrine.

In New Hampshire, only a legislative enactment is sufficient to waive sovereign immunity. *See, e.g.*, *XTL-NH, Inc. v. N.H. State Liquor Comm.*, 170 N.H. 653, 656 (2018); *LaRoche v. Doe*, 134 N.H. 562, 567 (1991). The General Court has partially waived sovereign immunity on State contract claims. Specifically, RSA 491:8 permits persons or entities to sue the State for breach of an express or implied-in-fact contract where the requested relief is money damages. RSA 491:8 does not waive State sovereign immunity for contract suits seeking equitable remedies. *See, e.g.*, *Lorenz v. N.H. Admin. Office of the Courts*, 152 N.H. 632, 635 (2005); *Wiseman v. State*, 98 N.H. 393, 397 (1953).

Thus, if a plaintiff is seeking solely equitable relief in a breach of contract action involving the State, the court lacks subject matter jurisdiction over the action, even if the contract settled an action pursuant to a statute under which the State could be sued. *See, e.g.*, *Alternatives Research & Develop. Foundation v. Vilsack*, 2017 WL 1177104, at *4 & n. 4 (E.D. Pa. March 30, 2017) (sovereign immunity barred specific enforcement of Department of Agriculture’s promise contained in stipulation of dismissal entered to settle Administrative Procedure Act

claim); *Duffy v. Lizert*, 2015 WL 1737898, at *3 (N.D. Fla. April 15, 2015) (sovereign immunity barred specific enforcement of provision of settlement agreement that required the Department of Veteran's Affairs "to place a crisis note in her medical records concerning her gender"); *Kogan v. Peake*, 2009 WL 1097915, at *5 (D. Minn. April 23, 2009) (sovereign immunity barred specific enforcement of provision of settlement agreement that required the Department of Veteran's Affairs to provide plaintiff "a nonthreatening, collegial work environment").

This is because the nature of a breach of contract action does not change depending on what type of case a contract settled. Federal law holds that the nature of the underlying claim settled is irrelevant to whether a federal district court has subject matter jurisdiction over a breach of settlement action. *See, e.g.*, *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375 (1994); *Hospitality House, Inc. v. Gilbert*, 298 F.3d 424 (5th Cir. 2002); *Perkins v. Booker*, 2011 WL 3664689, at *1-3 (W.D. Mich. Aug. 19, 2011) (fact that contract settled 42 U.S.C. § 1983 action irrelevant to whether court had jurisdiction to enforce the settlement agreement).

Whether and to what extent a contract entered into with the State is enforceable in state court is governed by RSA 491:8, which does not except certain settlement agreements from its restrictions based on the underlying claims settled. The legislature, not the courts, must create any such exception. Accordingly, RSA 491:8 does not confer subject matter jurisdiction on the state courts to enforce the Laaman Settlement Agreement via specific performance.

II. 42 U.S.C. § 1983 DOES NOT WAIVE STATE SOVEREIGN IMMUNITY AND ASSERTING SOVEREIGN IMMUNITY IN THIS CASE DOES NOT CONFLICT WITH FEDERAL POLICY.

A. 42 U.S.C. § 1983 is not a statutory waiver of state sovereign immunity.

In *Quern v. Jordan*, 440 U.S. 332 (1979), the United States Supreme Court "held that § 1983 does not override a State's Eleventh Amendment immunity . . . ." *Will v. Mich. Dept. of State Police*, 491 U.S. 58, 63 (1989). For similar reasons, the United States Supreme Court held in *Will* that neither "a State nor its officials acting in their official capacities are 'persons' under § 1983," as a matter of statutory construction. *Id.* at 71; *see, e.g.*, *Davis v. Cal.*, 734 Fed. Appx. 560, 564 (10th Cir. 2018) ("Section 1983 is a remedial vehicle for raising claims based on the violation of constitutional rights. It does not abrogate the states' sovereign immunity and neither the states nor their agencies qualify as "persons" under § 1983.") (Internal quotations omitted).

A state official may only be sued under 42 U.S.C. § 1983 in his official capacity for prospective injunctive relief to require him to conform his conduct to the federal constitution, pursuant to *Ex parte Young*, 209 U.S. 123 (1908). This theory of liability is not premised on a waiver of sovereign immunity; it reflects instead the notion that "when a federal court commands a state official to do nothing more than refrain from violating the federal law, he is not the State for sovereign-immunity purposes." *Va. Office for Protection & Advocacy v. Stewart*, 563 U.S. 247, 255 (2011).

In the late 1970s and early 1980s, the parties in the *Laaman* cases entered into consent decrees to end alleged ongoing violations of federal law. In the mid-1990s, Congress passed the PLRA to end consent decrees like those in the *Laaman* cases. In the late 1990s, Judge Barbadoro terminated the *Laaman* consent decrees consistent with the PLRA because no evidence existed of ongoing violations of federal law. The First Circuit reversed to give the *Laaman* plaintiffs a chance to establish current, ongoing violations of federal law. Rather than prove any existing violations, the plaintiffs chose to settle the action through an agreement that nowhere admits to the existence of present violations of federal law. Consequently, the Laaman Settlement Agreement did not settle established or admitted violations of federal law, did not arise under a statute waiving State sovereign immunity, and could not itself waive the State's sovereign immunity under RSA 491:8.

B. Neither 42 U.S.C. § 1983 nor *Felder v. Casey* overrides state sovereign immunity in this action.

The amici argue that *Felder v. Casey*, 487 U.S. 131 (1988), prevents the State from asserting sovereign immunity in a breach of contract action where the contract settled a §1983 action. *Felder*, however, concerns when and under what circumstances §1983 preempts state laws that impose requirements on the bringing of §1983 actions. *Felder* does not establish that §1983 preempts a State's sovereign immunity from suit in state court to enforce a contract in a particular way under state law. Moreover, at least one court has recognized that *Felder* has been superseded in the prison

context by the Prison Litigation Reform Act of 1996 ("PLRA"). *Higgason v. Stogsdill*, 818 N.E.2d 486, 489-90 (Ind. Ct. App. 2004).

The PLRA substantially modified the proceedings and remedies available in §1983 inmate litigation. Specifically, 18 U.S.C. § 3626 is openly hostile to consent decrees like those in the *Laaman* case. That statute requires consent decrees to be narrowly tailored to remedy the precise constitutional violation at issue and to terminate after two years unless the federal court makes specific findings of current violations of federal law, and also that the consent decree extends no further than necessary to correct those violations. 18 U.S.C. § 3626(a)-(c)(1).

The PLRA also places strict requirements on private settlement agreements of 42 U.S.C. § 1983 inmate actions. 18 U.S.C. § 3626(c)(2). Specifically, 18 U.S.C. § 3626 allows parties to enter into private settlement agreements that do not comply with its narrow terms only "if the terms of that agreement are not subject to court enforcement other than the reinstatement of the civil proceeding that the agreement settled." 18 U.S.C. § 3626(c)(2)(A). The Laaman Settlement Agreement does not meet this federal requirement.

18 U.S.C. § 3626 also does not "preclude any party claiming that a private settlement agreement has been breached from seeking in State court any remedy available under State law." 18 U.S.C. § 3626(c)(2)(B). Thus, the PLRA recognizes that certain remedies may not be available under State law for the enforcement of such settlement agreements and does not purport to abrogate or override those state law limits.

Accordingly, the fact that the Laaman Settlement Agreement resolved a case where the underlying claims were brought under §1983

provides no basis from which to conclude that the limitations of RSA 491:8 should be ignored in an action to enforce the agreement in state court. Rather, federal law contemplates the potential lack of certain remedies in state court to enforce agreements like the Laaman Settlement Agreement. *See* 18 U.S.C. § 3626(c)(2)(B).

The out-of-state cases the amici cite, none of which concern §1983 prison conditions claims and the PLRA, lack persuasive value. *See, e.g.*, *Smith v. Tillman*, 958 So. 2d 333 (Ala. 2006); *Tex. A&M University-Kingsville*, 87 S.W.3d 518 (Tex. 2002) (plurality opinion); *Klein v. Bd. Of Regents, Univ. of Wis. Sys.*, 666 N.W.2d 67 (Wis. Ct. App. 2003). Even assuming the underlying claim settled is relevant to an analysis of whether subject matter jurisdiction exists under RSA 491:8 to entertain a particular contract action, those foreign cases concern the Texas Whistleblower Act and Title VII claims –claims involving different statutes with different underlying policy goals. Those foreign cases also arise under different state law regimes that analyze sovereign immunity differently than New Hampshire. Those cases are therefore not persuasive in this context.

III. THE AMICI'S REQUEST THAT THIS COURT OVERRULE *WISEMAN* AND *LORENZ* SHOULD BE REJECTED.

The amici advance several arguments effectively asking this Court to overrule *Wiseman* and *Lorenz*. Amici's Brief at 13-24, 26-34, 38-42. But amici do not perform a *stare decisis* analysis. Instead, they offer merely a different interpretation of RSA 491:8. Their arguments should therefore be rejected.

"The doctrine of *stare decisis* demands respect in a society governed by the rule of law, for when governing legal standards are open to revision in every case, deciding cases becomes a mere exercise of judicial will with arbitrary and unpredictable results." *Jacobs v. Director, N.H. Div. of Motor Vehicles*, 149 N.H. 502, 504 (2003) (quotations omitted). "[W]hen asked to reconsider a holding, the question is not whether [this Court] would decide the issue differently de novo, but whether the ruling has come to be seen so clearly as error that its enforcement was for that very reason doomed." *State v. Quintero*, 162 N.H. 526, 539 (2011) (quotation omitted). Thus, this Court will overturn a decision only after considering: (1) whether the rule has proven to be intolerable simply by defying practical workability; (2) whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling; (3) whether related principles of law have so far developed as to have left the old rule no more than a remnant of abandoned doctrine; and (4) whether facts have so changed, or come to be seen so differently, as to have robbed the old rule of significant application or justification. *Id.* at 532-33.

The amici fail to brief these factors and, accordingly, their request that this Court overturn *Wiseman* and *Lorenz* should be rejected. *See Ford*

v. N.H. Dept. of Transp., 163 N.H. 284, 290 (2012) ("Having failed to brief any of the four stare decisis factors, the plaintiff has not persuaded us that our decision in *Trull* must be overruled.").

Additionally, the *stare decisis* factors cannot be met. ***First***, the rule of law at issue has not proven to be intolerable by defying practical workability. It is an easy-to-apply, workable rule.

Second, the rule has engendered reliance interests that would lend a special hardship to the consequence of overruling. The State enters into and renews hundreds of contracts every year, many of which are approved by Governor and Council. The State enters into these contracts in reliance on established law. *Wiseman* and *Lorenz* establish that contracts with the State cannot be enforced in state court through equitable remedies. A ruling overturning *Wiseman* and *Lorenz* could upset these reliance interests and jeopardize the validity of contracts approved when equitable remedies were not available at law. That issue alone could call into question the validity of those contracts and subject the State retroactively to liability it did not anticipate at the time of contract. Accordingly, the reliance interests at stake are substantial.

Third, principles of law have not so far developed as to have left the rule in *Wiseman* no more than a remnant of an abandoned doctrine. Rather, *Wiseman* and *Lorenz* are integral components of this Court's sovereign immunity jurisprudence and are consistent with federal jurisprudence arising under the Tucker Act. *See, e.g.*, *Coggshell Dev. Corp. v. Diamond*, 884 F.2d 1, 3 (1st Cir. 1989).

Fourth, the facts have not so changed nor have they come to be seen so differently as to have robbed the old rule of significant application or

justification. The rule in *Wiseman* ensures the orderly and predictable operations of state government. It permits the State to continue to move forward and function in the best interests of its citizens and in a manner that conforms to the evolving policy standards its elected representatives choose to implement, without being stopped in its tracks by a single individual who claims a contrary contract right. *See Larson v. Domestic & Foreign Comm. Corp.*, 337 U.S. 682, 704 (1949). Specifically enforcing agreements like the Laaman Settlement Agreement improperly constrains future legislatures and commissioners from adapting to changing technology, rehabilitative practices, and best correctional practices.

Accordingly, *Wiseman* and *Lorenz* should not be overruled.

IV. PAST PRACTICE DOES NOT WAIVE SOVEREIGN IMMUNITY.

The amici argue that the State, through the Attorney General's Office, has a past practice of settling cases for performance of certain obligations and has purported to permit those obligations to be enforced through equitable relief in state court. They also argue that because the Attorney General's Office has not raised sovereign immunity in the past and has permitted the Laaman Settlement Agreement to be enforced in state court, the Laaman Settlement Agreement should be deemed enforceable.

These arguments overlook a significant cornerstone of this Court's sovereign immunity jurisprudence: "'Sovereign immunity is a jurisdictional question not to be waived by conduct or undermined by estoppel.'" *XTL-NH, Inc.*, 170 N.H. at 656 (quoting *LaRoche*, 134 N.H. at 566). Additionally, this Court has recognized that past practice does not preclude the raising of a defect in the Court's subject matter jurisdiction. *Duncan v. State*, 166 N.H. 630, 640 (2014) (citing *Hagans v. Lavine*, 415 U.S. 528, 535 n.5 (1974)). Thus, past practice does not prohibit raising a subject matter jurisdiction defense like sovereign immunity.[1]

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[1] Moreover, the fact that sovereign immunity exists does not preclude the State from contracting to perform in a certain way. Many State settlements are temporally limited, resolve specific disputes, and dismissal of the underlying lawsuit happens only after the agreement has been performed. Most State settlements do not exist in perpetuity, do not impose extensive statute-like policy reforms on an agency, and are not capable of becoming outdated. The Laaman Settlement Agreement is unique in this regard.

V. DISMISSAL DOES NOT VIOLATE MR. AVERY'S RIGHT TO A REMEDY.

Claims that dismissal of this case will violate Mr. Avery's right to a remedy under Part I, Article 14 of the New Hampshire Constitution is not credible for at least two reasons.

First, persons have never had a right to remedy against the State. Part I, Article 7 establishes the right of the people to govern as a "sovereign." State sovereign immunity is a feature of that constitutional right to sovereignty. As a historical matter, state sovereign immunity has always existed and has never been abolished or held in a precedential opinion to violate Part I, Article 14. Instead, this Court's decision in *Sousa v. State*, 115 N.H. 340 (1975), establishes that the uniform, even-handed application of sovereign immunity does not violate a person's right to a remedy under Part I, Article 14. RSA 491:8 is a neutral, non-discriminatory law that applies equally to all contracts entered into with the State – no person may sue to enforce a contract with the State via equitable remedies in state court. RSA 491:8 therefore does not present a Part I, Article 14 problem.

Second, the Laaman Settlement Agreement specifically preserves rather than limits in any way an inmate's ability to exercise his federal or state legal rights through a lawsuit in federal or state court. Mr. Avery and other inmates therefore have many other remedies available to them to vindicate their legal rights.

CONCLUSION

Accordingly, the defendant requests that this Honorable Court affirm the judgment below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Anthony J. Galdieri, hereby certify that, pursuant to New Hampshire Supreme Court Rule 16(11), this reply brief contains approximately 2,997 words, which less than the word total permitted by the rules of this Court for a reply brief. Counsel has relied on the word count of the computer program used to prepare this brief.

May 6, 2020

/s/Anthony J. Galdieri
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CERTIFICATE OF SERVICE

I, Anthony J. Galdieri, hereby certify that a copy of this reply brief will be served on the following counsel of record, through the New Hampshire Supreme Court's electronic filing system:

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I further certify that a copy of this reply brief was mailed to Clifford E. Avery, *pro se*, Paul Blackmer, *pro se*, and Darrin Partlow, *pro se*, postage prepaid, at the following addresses:

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