

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

**SURREPLY BRIEF FOR HELEN HANKS, COMMISSIONER,
NEW HAMPSHIRE DEPARTMENT OF CORRECTIONS**

**TO THE AMICI REPLY 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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ARGUMENT

The contentions the amici raise in their reply brief are not only incorrect, they are also irrelevant. As the appellee explained in its reply brief to the amici's initial brief, the subject matter of the underlying settlement agreement is irrelevant to the court's analysis in this case. Appellant's Reply Brief at 7-12. What matters is that the settlement agreement is a private contract that can only be sued on for breach under state law. Appellant's Supplemental Brief at 21-22. Under RSA 491:8, the superior court lacks jurisdiction to enforce private contracts through equitable remedies like specific performance against the State and no federal statute undermines that immunity bar. *Id.* at 19-21; *see also* Appellant's Brief at 18-21.

However, even if the subject matter of a private contract somehow factored into the sovereign immunity analysis, the amici's insinuation that the State somehow admitted to ongoing violations of federal law when it entered the 2001 Laaman Settlement Agreement finds no support in the 2001 Laaman Settlement Agreement itself and is contradicted by the amicus New Hampshire Legal Assistance's own contemporaneous representations to the federal district court and their own class members prior to the finalization of the 2001 Laaman Settlement Agreement.

As detailed in the appellee's supplemental brief, on remand from the First Circuit, New Hampshire Legal Assistance admitted to the federal district court on behalf of the class that they knew of no current, ongoing violations of the consent decrees, as reflected in the federal district court's February 1, 2001 order. *See* Appellant's Supplemental Brief at 14 and

Addendum at 54-55 (“Plaintiffs’ counsel [New Hampshire Legal Assistance] candidly concede[s] that they are aware of no evidence that defendants are in fact engaged in any ongoing constitutional violations that are covered by the consent decree.”). The class notice New Hampshire Legal Assistance distributed to its class members does not indicate that the State is admitting to violations of the consent decrees or federal law by settling. Quite to the contrary, it advances as the reason for settling both parties’ desire to avoid the risks of trial. *See id.* at 15 and Addendum at 78 (“The parties have now determined that it is in the best interests of both plaintiffs and defendants for the parties to reach a settlement of the issue of providing minimally adequate mental health treatment to inmates at NHSP. The parties believe that a settlement is preferable to the risk and uncertainty of having this issue decided at trial.”). This risk was significant for the plaintiff class. As the First Circuit’s decision in *Laaman v. Warden, N.H. State Prison*, 238 F.3d 14 (1st Cir. 2001) indicates, the plaintiff class faced the significant risk of having the consent decrees completely terminated, even if they could eke out a narrow victory on some issue. *Id.* at 20.

Finally, the language of the 2001 Laaman Settlement Agreement itself reveals that the consent decrees were terminated and a new private settlement agreement was formed *from* provisions of the 1990 Consent Decree. The agreement states, in relevant part: “Upon approval of the stipulation of dismissal, the Consent Decree in the above-entitled matter shall expire, and the provisions of the Consent Decree approved by the court on May 22, 1990, as modified by this agreement, shall constitute a settlement agreement enforceable by the courts of the State of New Hampshire.” The 2001 Laaman Settlement Agreement therefore constitutes

a new agreement, entered into under materially new circumstances, in order to avoid the risks of trial for both parties, and without admitting any present or ongoing violations of federal law. The amici's citation to various unproven allegations they made in the 1993 contempt action and comparison of them to the terms of the 2001 Laaman Settlement Agreement does not change that reality.

CONCLUSION

Accordingly, for all of the above reasons, and the reasons provided throughout the appellant's briefing in this matter, the appellant respectfully requests that this Honorable Court affirm the judgment below.

Respectfully submitted,

HELEN HANKS,
COMMISSIONER,
NEW HAMPSHIRE DEPARTMENT OF
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July 6, 2020

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CERTIFICATE OF COMPLIANCE

I, Anthony J. Galdieri, hereby certify that, pursuant to New Hampshire Supreme Court Rule 16(11), this surreply brief contains approximately 656 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.

July 6, 2020

/s/Anthony J. Galdieri
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CERTIFICATE OF SERVICE

I, Anthony J. Galdieri, hereby certify that a copy of this surreply 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 surreply brief was mailed to
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