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

BRIEF OF *AMICI* NEW HAMPSHIRE LEGAL ASSISTANCE, DISABILITY RIGHTS CENTER – NEW HAMPSHIRE, AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE

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QUESTIONS PRESENTED TO AMICI

1. Does the doctrine of state sovereign immunity apply to breach of contract actions against the State in the following circumstances:

a) the contract at issue is a court-approved settlement agreement between class-action plaintiffs and the State, entered in federal court;

b) the settlement agreement was executed as a result of a 42 U.S.C. § 1983 action in which the federal court found that the State violated the *Laaman* plaintiffs' constitutional rights;

c) the terms of the settlement agreement comprise court-approved consent decrees previously issued in the same section 1983 action in federal court specifying the corrective steps the State must take to remedy its violation of the *Laaman* plaintiffs' constitutional rights; and

d) the State agreed that the settlement agreement would be "enforceable by the courts of the State of New Hampshire"?

2. If the doctrine of state sovereign immunity does not apply to the above circumstances, but the parties subsequently modified the settlement agreement after the federal court had approved the parties' stipulation of dismissal and in fact dismissed the case, does the doctrine of state sovereign immunity apply to a breach of contract action alleging a breach of terms resulting from these subsequent modifications?

Amici address the questions collectively, as the arguments why the doctrine of sovereign immunity should not bar plaintiff's action for specific performance apply equally to questions one and two.

INTEREST OF AMICI CURIAE

A. NHLA

New Hampshire Legal Assistance ("NHLA") is a non-profit law firm that provides civil legal services to low income clients to address legal problems affecting their daily survival and basic needs. NHLA has a history of providing both individual representation and systemic advocacy to New Hampshire's poor and disadvantaged residents. NHLA has entered into many settlement agreements with the State including all of the *Laaman* Settlement Agreements. The State's argument that specific performance actions against the State are barred by sovereign immunity, as adopted by the Superior Court in this case, poses a grave threat to NHLA's clients as well as to NHLA's ability to seek justice for them.

B. DRC

The Disability Rights Center-NH ("DRC"), which is part of a national network of protection and advocacy systems, is federally mandated to provide legal representation and related advocacy services to persons with disabilities in New Hampshire.

Many of DRC's cases are resolved by settlement agreements. For persons with disabilities, a settlement generally ensures the delivery of services and may involve certain systemic changes beneficial to similarly situated persons. The State's position, that it is immune from responsibility for complying with the promises it makes in such settlements, will adversely impact the ability of DRC to settle cases involving persons with disabilities.

C. ACLU-NH

The American Civil Liberties Union of New Hampshire ("ACLU-NH") is the New Hampshire affiliate of the American Civil Liberties Union ("ACLU"). The ACLU-NH engages in litigation, by direct representation and as *amicus curiae*, to encourage the protection of individual rights guaranteed under state and federal law, including the civil rights of prisoners. Through litigation, advocacy, and public education, the ACLU has worked to ensure that conditions of confinement are consistent with health, safety, and human dignity, and that prisoners retain all rights of free persons that are not inconsistent with incarceration.

STATEMENT OF THE FACTS/CASE

Amici adopt the Plaintiff's and Defendant's statements made in their respective briefs.

SUMMARY OF ARGUMENT

The answers to the two primary questions posed in the Court's amicus notice are no, for four reasons.

First, there is no question that the State was not immune from liability for the *Laaman* claims, which arose from the State's federal law violations and for which 42 U.S.C. §1983 provided a remedy. The cases on which the State principally relies (*Wiseman v. State*, 98 N.H. 393 (1953), *Lorenz v. New Hampshire Administrative Office of the Courts, 152 N.H. 632 (2005)* and *XTL-NH, Inc. v. New Hampshire State Liquor Commission,* 170 N.H. 653 (2017)) to describe the State's immunity do not apply to

actions to enforce the State's settlement of a civil rights action. As the United States Supreme Court stated in *Felder v. Casey*, "a state law that immunizes government conduct otherwise subject to suit under §1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy." *Felder v. Casey*, 487 U.S. 131, 139 (1988) (citations omitted). Just as state immunity or other laws may not operate to thwart the vindication of federal rights in an original action, they should not operate to undermine the vindication of an action to enforce a settlement of those rights. To hold otherwise would allow the State to nullify its liability by settling such claims with an agreement on which it later claims it cannot be sued for any relief except for money damages.

Second, if the Court concludes that *Wiseman* applies, then this Court must conclude that applying sovereign immunity to this case would violate Part 1, Article 14 of the New Hampshire Constitution, which mandates that an adequate remedy be provided when the State violates the legal rights of its citizens. When equitable relief is the only meaningful remedy for the State's breach of contract, RSA 491:8, as interpreted by the Court in *Wiseman*, must give way to the right to redress secured by Part 1, Article 14. Given the nature of the programmatic relief the *Laaman* Settlement Agreements secured, interpreting RSA 491:8 to limit plaintiff's remedy to money damages provides him with no meaningful remedy for the State's breach. In such cases the application of sovereign immunity to bar an action in equity for specific performance violates Part 1, Article 14 of the state constitution.

Third, this Court has found implied waivers of sovereign immunity on behalf of certain institutionalized populations. *See Chasse v. Banas*, 119 N.H. 93, 96 (1979) (sovereign immunity waived based on RSA 135-B:43, which provides a right to adequate and humane treatment for civilly committed mentally ill persons); *State v. Brosseau*, 124 N.H. 184, 191 (1983) (sovereign immunity waived based on RSA 171-A:13). Similarly, this Court should find an implied waiver of sovereign immunity for inmates under the state statutes governing the corrections system.

Fourth, this Court should reexamine the plain language of RSA 491:8 and overrule the 1953 *Wiseman* decision. The first sentence of RSA 491:8 is clear: "[t]he superior court shall have jurisdiction to enter judgment against the state of New Hampshire founded upon *any* express or implied contract with the state" (emphasis added). An action for specific performance is one that is founded on an express or implied contract. In reading an exception for equitable actions *"founded upon contracts"* into RSA 491:8, the *Wiseman* court added words to the statute that "the legislature did not see fit to include." *Keelin B.*, 162 N.H. 38, at 42 (2011). Based on the plain language of the statute, *Wiseman* was incorrect, and this Court should overrule its holding.

Finally, it is worthy of note that the Department's position in this case is not only belied by its historic practice of entering into settlement agreements containing equitable remedies, but also by the fact that the Department – in at least two prior lawsuits seeking to enforce the *Laaman* settlement agreement – has submitted to the jurisdiction of the state court

system. The State's position here that certain settlement agreements it signs are unenforceable is not only new, but wrong.

I. *WISEMAN* AND ITS PROGENY MUST NOT APPLY TO BAR ENFORCEMENT OF SETTLEMENTS THE STATE MAKES TO SETTLE LIABILITY FOR WHICH IT WAS NOT IMMUNE.

The State was not immune from liability for the civil rights claims settled by the *Laaman* Settlement Agreements. Congress certainly did not envision that states could settle their civil rights liability and then shield themselves from enforcement of such settlement. *Wiseman*, *Lorenz* and *XTL-NH, Inc*. should not be read otherwise. Indeed, allowing specific enforcement of such settlement agreements promotes the interests of plaintiffs as well as the State. In that respect, rejecting the State's interpretation of these cases is consistent with the principles underlying state immunity.

A. State Immunity Should Not Operate to Thwart Enforcement of the Settlement of Civil Rights Claims.

The broad language used in the *Wiseman*, *Lorenz* and *XTL-NH, Inc.* decisions to describe the state's immunity should be limited to the factual circumstances and claims presented in those cases. To begin with, the claims asserted with respect to the alleged contracts at issue in prior decisions of this Court are readily distinguishable from the contract claims at issue here. Specifically, none of those cases involved an action seeking to enforce the terms of a settlement agreement expressly entered into by the State to resolve constitutional claims under 42 U.S.C. §1983 for which the State was not immune. As the State appears to acknowledge in its brief,

limiting claims against the State under RSA 491:8 to damages claims only makes sense "in the absence of a claim of constitutional harm." Brief for the State of New Hampshire at 18 (citing *Larson v. Domestic & Foreign Commerce Corp*., 337 U.S. 682, 704 (1949)). Nor do any of the federal Tucker Act cases the State seeks to rely on involve claims of constitutional harm. *See* Brief for the State of New Hampshire at 20-21 (citing unpublished and published federal court cases). The contract claims at issue here *do* involve claims of constitutional harm. In an action brought by inmates under 42 U.S.C. §1983, from which the State was clearly not immune, the State entered into the *Laaman* agreement precisely because a federal court found that it had violated the Eighth Amendment of the U.S. Constitution.

As the United States Supreme Court stated in *Felder v. Casey*, "a state law that immunizes government conduct otherwise subject to suit under §1983 is preempted, even where the federal civil rights litigation takes place in state court, because the application of the state immunity law would thwart the congressional remedy." *Felder v. Casey*, 487 U.S. 131, 139 (1988) (citations omitted). "Section 1983 creates a species of liability in favor of persons deprived of their federal civil rights by those wielding state authority. As [the Court has] repeatedly emphasized, 'the central objective of the Reconstruction-Era civil rights statutes ... is to ensure that individuals whose federal constitutional or statutory rights are abridged may recover damages or secure injunctive relief.' Thus, §1983 provides 'a uniquely federal remedy against incursions ... upon rights secured by the Constitution and laws of the Nation…,' and is to be accorded 'a sweep as

broad as its language.'" *Id*. (internal citations omitted). Where a state law "'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress'" it must yield. *Id*. at 138 (citations and internal quotations omitted). *See also* 42 U.S.C. §1988 (state law will apply only if not "inconsistent with the Constitution and laws of the United States").

An action to enforce the State's settlement of a §1983 action should be considered a part of the original action, to which the State also is not immune. To hold otherwise, in cases in which a settlement agreement which involves non-monetary relief, the State could nullify its liability by settling such claims with an agreement on which it later claims it cannot be sued. This is because, traditionally as part of any settlement agreement, the plaintiff releases the State, thereby barring the plaintiff from refiling this claim. The plaintiff's only relief is to file a contract action alleging breach of the negotiated settlement that resolved the underlying §1983 claim. However, under the State's position, such breach of contract actions seeking specific performance would be barred. The one-sided nature of the State's position is demonstrated by the fact that the State is permitted to file breach of contract actions against individual persons where the State seeks specific performance arising out of settlement agreements that resolved §1983 cases. Just as state immunity or other laws may not operate to thwart the vindication of federal rights in an original action, they should not operate to undermine the vindication of an action to enforce a settlement of those rights.

Similar issues have been considered by the Wisconsin Court of Appeals, the Alabama Supreme Court, and the Texas Supreme Court. Although those courts analyzed the issues differently, all three courts determined that a state should not be able to shield itself from liability by settling a case in which state immunity does not lie and then asserting immunity to bar enforcement of the settlement agreement.

The court in *Klein v. Board of Regents, University of Wisconsin System*, 666 N.W.2d 67 (Wis. Ct. App. 2003), held that the plaintiff's action to enforce her settlement agreement with the State was a part of her original Title VII civil rights claim. *Klein*, 666 N.W. 2d at 71-72. As such, the action to enforce the agreement was "brought under" Title VII. *Id*. Because the state is not immune from liability under Title VII, it was not immune from an action to enforce the settlement. *Id*. at 72. Significant to the *Klein* court's holding was the importance Congress placed on vindication of civil rights, particularly though the conciliation process provided for in Title VII. *Id*. at 71-72. Although Title VII did not provide a mechanism for enforcement of settlements, the court reasoned that Congress must have intended there be a means to do so. *Id.* The court explained that treating the enforcement action as a part of the original claim furthered the policies underlying Title VII. *Id*.

The Alabama Supreme Court came to the same conclusion for different reasons in *Smith v. Tillman*, 958 So.2d 333 (Ala. 2006). The plaintiff settled a Title VII claim that had been commenced in federal court against a county sheriff's department and the case was dismissed pursuant to a settlement agreement. *Smith*, 958 So.2d at 334. The plaintiff later

brought a breach of contract action in state court against the sheriff to enforce the terms of the agreement. The sheriff moved to dismiss claiming official and individual immunity under the state's immunity law. *Id*. The court concluded that the state immunity did not afford the sheriff protection from a state court action seeking to enforce a Title VII settlement agreement. *Id*. at 338-39. In reaching this decision, the court recognized, as did the *Klein* court, that the state has no immunity against Title VII actions. *Id*. at 336. Although the court declined to follow the *Klein* reasoning, the court found that the sheriff's obligations under the settlement were ministerial in nature and his willful failure to perform them was not protected by the state's immunity law. *Id*. at 336-38.

The original action in *Texas A&M University-Kingsville v. Lawson,* 87 S.W.3d 518 (Tex. 2002)*,* did not involve federal civil rights claims from which the state was not immune, but it did involve violations of the state's whistleblower statute. *Texas A&M University-Kingsville*, 87 S.W.3d at 520-21. As with Title VII, the state was not immune from claims under its whistleblower statute. Sometime after settling her whistleblower claims with the state, plaintiff commenced a new action for breach of the settlement agreement. *Id*. The court disagreed with the state that it was immune from the enforcement action, holding that

> when a governmental entity is exposed to suit because of a waiver of immunity, it cannot nullify that waiver by settling the claim with an agreement on which it cannot be sued. The government cannot recover waived immunity by settling without defeating the purpose of the waiver in the first place. Such a rule would limit settlement agreements with the government to those fully performed before dismissal of the

> lawsuit because any executory provision could not thereafter be enforced. One can easily envision circumstances like those now before us when settlement on terms acceptable to the parties either would not be possible or would delay dismissal of the lawsuit…. While it is certainly true, as the University argues, that a suit for breach of a settlement agreement is separate and apart from the suit on the settled claim, enforcement of a settlement of a liability for which immunity is waived should not be barred by immunity.

Id. at 521 (emphasis added).

Similar to the reasoning in *Klein*, the Texas Supreme Court determined that the state's waiver of immunity for an initial whistleblower claim would be meaningless if the state was immune from the enforcement of any settlement of such a claim. *Id*. at 522. The court explained that,

> having determined to allow suits on such claims and prescribed the available remedies, the Legislature must surely have considered—indeed, hoped—that claims would often be settled. If anything, for the government to be immune from the enforcement of such settlements would impair the purposes of the waiver by limiting its effectiveness in cases not tried to a final judgment.

Id.

Relative to any suggestion the State may make in *Avery* in defense of its assertion of immunity, the Texas Supreme Court noted that the continued waiver of immunity for enforcement actions should not result in exposing the state to liability it could not fairly plan for, impair public welfare, or otherwise constrain future policy decisions. In planning for litigation or deciding to settle a case, the court explained that there is no reason to believe the state would distinguish between its obligations under a

potential judgment versus a settlement. *Id*. As the court explained, "[a] settlement of a claim trades unknowns—such as what the evidence will be, and how a jury will view it—for knowns—obligations that are more accurately assessable. In reaching a settlement, the government is guided by legal counsel to help gauge the degree of exposure to liability and the fairness of the settlement." *Id*.

The principles underlying the holdings in *Klein*, *Smith*, and *Texas A&M University-Kingsville* should apply with equal force here. The vindication of civil rights under Section 1983 is no less important than under Title VII. Congress most certainly did not envision that a state would enjoy immunity from the enforcement of any settlement of its liability for the deprivation of civil rights.

B. Specific Performance Advances the Goals of RSA 491:8.

This Court has articulated two policy reasons underlying the limitation on actions for breach of contract against the State that it has read into RSA 491:8: 1) "protection from profligate encroachment on public treasury;" and 2) the "need for the orderly administration of government which, in the absence of immunity, would be disrupted if the state could be sued at the instance of every citizen." *Lorenz, 152 N.H.* at 634. Not only does an action for specific performance of the State's settlement agreements not undermine these important considerations, it advances them.

In regard to "profligate encroachment on the public treasury," the *Laaman* Settlement Agreements, like many other settlement agreements,

were entered into by the State, at least in part, because the Department of Corrections as well as the Attorney General recognized the potential liability of the State if the plaintiffs prevailed in court. Such decisions are made after careful deliberations at the highest levels of state government and are consistent with the policy goal of protecting the public treasury from "profligate encroachment." Equitable relief can also prevent injuries to potential plaintiffs before they suffer compensable harm, thereby *avoiding* expenditures from the public treasury.

Specific enforcement of State's settlement agreements importantly furthers the second reason underlying sovereign immunity: the need for the orderly administration of government. When plaintiffs file actions for injunctive relief – particularly in "institutional litigation" such as *Laaman* – the plaintiffs' goal is to correct the government's unlawful conduct before compensable harm occurs. Often the most efficient means for the State to ensure the orderly administration of government is to settle the litigation, clearly defining its obligations and enabling it to plan for the changes it is agreeing to make. If the State can simply walk away from any settlement agreement it makes, parties aggrieved by unlawful government conduct will have little choice but to litigate their claims to conclusion, rather than settle with the State. Such a result will cause havoc in the administration in government. First, government agencies will be forced to waste substantial amounts of time, money, and other resources defending against lawsuits that could readily be avoided through negotiation. Second, there will be an increase in the number of cases that go to judgment, which likely could result in unpredictable, and sometimes contradictory results. Third, courts

may impose deadlines for compliance that stress a department's ability to carry out its other functions. Finally, the demands on the time and resources of the Attorney General's office would expand exponentially.

The problems posed by barring equitable actions to enforce the State's settlements are not confined to actions involving the settlement of class action or institutional litigation. Consider the case of a low-income mother seeking medical assistance for her children, who were improperly found ineligible for Medicaid. She appeals and soon thereafter makes an agreement with the Department of Health and Human Services to withdraw her appeal in exchange for the Department's written promise to enroll her children in the program. If the Department fails to enroll the children in Medicaid however, and the woman files an emergency lawsuit in state superior court to enforce the settlement agreement so that her children can receive the medical treatment they need right now, the State can claim sovereign immunity. The State could in effect force the woman to wait until her children were egregiously injured through lack of medical care and can then file a damages lawsuit. This unintended, but clearly foreseeable, result of the application of sovereign immunity to enforcement actions against the State, is both egregiously unjust and a terrible waste of administrative and judicial resources.

Contrary to any stated concern that courts might be overburdened with suits for specific performance if immunity is not applied, it is important to note that allowing cases to be brought against the State for specific performance does not mean such actions will proceed to trial. Like all equity cases, specific performance requires an initial finding that there is

no adequate remedy at law. *Tuttle v. Palmer*, 117 N.H, 477, 478 (1977). ("It is basic hornbook law that specific performance will be denied if the plaintiff has an adequate remedy at law." *Id.* (citation omitted). Thus, only in cases, such as the instant case, in which damages are inadequate to remedy the State's breach of an express or implied contract, will the case proceed beyond a pre-trial motion stage. It is also worth noting that prison lawsuits seeking to enforce the *Laaman* Settlement Agreements have not been a common occurrence. A request made under RSA 91-A has revealed that, since January 1, 2010, the only such lawsuit filed has been this case. (Amici App.15-17).

C. The State's Longstanding Practice—Including in this Case—Supports Permitting Specific Performance of Contracts the State Makes to Settle Civil Rights Claims under 42 U.S.C. §1983.

The State's own conduct in other cases in the last several years belies the position it now advances and demonstrates that settlements contemplating the specific performance of certain terms benefit the State. In response to a request made under RSA 91-A in February 2020, the State produced three separate agreements it has entered into to settle litigation against the State. As those agreements reveal, and contrary to its position in *Avery*, the State agreed to undertake specific performance of certain actions to settle those cases. In those cases, the State promised it would reinstate former employees, follow certain processes and procedures for employment related meetings and information sharing, and follow a certain process for urine collection at the prison. Moreover, three of those settlement agreements specifically provided for parties to seek equitable

remedies upon a breach of the agreement. Amici Appendix (Amici App. at 25, 32 and 43). Contrary to any concern the State may raise, resolving cases with promises that relate to State agency operations, such as employment of staff, development and management of agency operations, and adoption of rules necessary to perform agency functions, are all within the authority of the executive branch agencies. *See In re Opinion of Justices*, 162 N.H. 160, 166-68 (2011) (discussing separation of powers between legislative and executive branches).

It is also worthy of note that, in 2004, NHSP inmates filed a Petition for Declaratory and Injunctive Relief in Merrimack County Superior Court (*Holliday v. Curry*, Docket #04-E-0203) alleging extensive violations of the mental health provisions of the *Laaman* Agreements. After a six-day trial, the court found that the Commissioner violated the agreements and ordered the State to "specifically perform" certain provisions of the agreements. (Amici App. at 57). Not once during the case did the State claim it was immune from enforcement. *See also Lepine v. Risley*, Merrimack County Superior Court, #98-E-393 (awarding injunctive relief to inmates based on the state's noncompliance with the vocational education provisions of the 1990 consent decree, in which the state never raised a defense based on sovereign immunity) (Amici App. at 71).

Given the compelling importance of protecting civil rights under 42 U.S.C. §1983, the adverse consequences to the State resulting from its inability to settle cases if immunity applies as the State contends, and, most importantly, the imperative that the State bargain in good faith with its citizens, this Court should not extend the *Wiseman* holding to equity actions

in which a plaintiff seeks to enforce an agreement that settled a case from which the state was not immune.

II. IF *WISEMAN* APPLIES, THEN DISMISSAL OF PLAINTIFF'S ACTION BASED ON SOVEREIGN IMMUNITY VIOLATES HIS RIGHT TO A REMEDY GUARANTEED BY PART 1, ARTICLE 14 OF THE N.H. CONSTITUTION.

If the Court concludes that *Wiseman* applies in this case, then this Court must conclude that applying sovereign immunity would violate Part 1, Article 14 of the New Hampshire Constitution (an issue that was never raised in *Wiseman*). Part 1, Article 14 mandates the provision of an adequate remedy when the State violates the legal rights of its citizens. When equitable relief is the only meaningful remedy for the State's breach of contract, RSA 491:8, as interpreted by the *Wiseman* Court, must give way to the right to redress secured by Part 1, Article 14.

Part 1, Article 14 of the New Hampshire Constitution states:

> Every subject of this state is entitled to a certain remedy, by having recourse to the laws, for all injuries he may receive in his person, property, or character; to obtain right and justice freely, without being obliged to purchase it; completely, and without any denial; promptly, and without delay; conformably to the laws.

This Court has explicitly held that "this provision provides that all citizens have a right to the redress of their actionable injuries." *Gonya v. Commissioner, New Hampshire Insurance Dept.*, 153 N.H. 521, 525 (2006) (citing N.H. Const. Pt. 1, Art. 14; *Gould v. Concord Hospital*, 126 N.H. 405, 409 (1985)). "It makes civil remedies readily available and guards

against arbitrary and discriminatory infringements on access to courts." *Id*. (citing *City of Dover v. Imperial Cas. & Indemn. Co.*, 133 N.H. 109, 116 (1990)). Although the right to recover for one's injuries is not a fundamental right, "it is nevertheless an important substantive right," *Carson v. Maurer*, 120 N.H. 925, 931-932 (1980), and is "accorded solicitous protection," *Gould*, 126 N.H. at 408; *Gonya*, 153 N.H. at 525. *See also DeBenedetto v. CLD Consulting Engineers, Inc.*, 153 N.H. 793, 797 (2006).

The *Laaman* Settlement Agreements unquestionably confer substantial rights on the prison inmates. The rights arose from a suit the inmates brought against the State pursuant to 42 U.S.C. §1983, alleging violations of the Eighth Amendment of the Constitution of the United States related to their conditions of confinement. The claims were vindicated in a sweeping federal court decision that found, *inter alia:*

> The totality of the conditions of confinement, including, but not limited to, the traumatic introduction to prison life in the quarantine period, the failure to diagnose, classify and separate the violent, deranged and diseased from the general population, the lack of adequate medical and mental health care services, the pervasive idleness and inactivity of inmates, both with and without jobs, the scarcity of any meaningful vocational training, educational, recreational or religious programs, the lack of sufficient personnel for the medical, mental health, work, vocational and educational services, the restrictions on visitation, … the disregard for the safety of the inmates in terms of fire or other general emergency, … leads this court to conclude that, as a result of their incarceration at NHSP, plaintiffs lose whatever useful and acceptable skills and attitudes they had before they entered prison and become entrapped in the criminal culture. Deep anger and hatred of

> the society that relegates prisoners in the name of reform to cages with nothing to do, frustration and hostility engendered by false promises, and the loss of pride and self-esteem inherent in such a degrading experience spawn anti-authoritarian and often violent criminal behavior.

Laaman v. Helgemoe, 437 F. Supp. 269, 324-325 (D.N.H. 1977).

Based on this finding, the court ordered the State to make specific improvements in programs, services, facilities and conditions of confinement at the prison. *Id*. at 325-330. Subsequent to the State's appeal, the parties entered into the 1978 Consent Decree (the first of the *Laaman* Settlement Agreements), which gave form to the rights the inmates secured as a result of the litigation. Part 1, Article 14 of the New Hampshire Constitution demands that the *Laaman* class members have access to a meaningful remedy when the State violates the rights articulated in the agreements.

A. A Contract Action for Damages Provides Plaintiff with No Meaningful Relief.

The State does not deny that the *Laaman* Settlement Agreements conferred rights on the plaintiff. Instead, it contends that the only redress for its violation of those rights is a breach of contract action seeking money damages. An action for damages, however, would not provide the plaintiff with any meaningful relief. Applying immunity to deny him specific performance and limiting him to monetary damages effectively deprives him of his right to access to the courts to redress his injuries in violation of Part 1, Article 14.

As in many cases filed by inmates challenging the conditions of their confinement, *Laaman* was not about obtaining monetary damages. *See Hutto v. Finney*, 437 U.S. 678 (1978), rehearing denied, 439 U.S. 1122 (1979), originally litigated as *Holt v. Sarver*, 300 F. Supp. 825 (E.D. Ark. 1969); *Gates v. Collier*, 349 F. Supp. 881 (N.D. Miss. 1972). The sole remedy sought by the *Laaman* plaintiffs was an order directing the prison to take corrective measures to cure the constitutional violations. The federal court's order was followed by Consent Decrees and then settlement agreements. As with the original action, the purpose of these consent decrees and settlement agreements was to prevent future harm by compelling the prison to comply with their constitutional obligations.

In many cases—especially institutional litigation—consent decrees and settlement agreements require officials to take actions which are essential for the health and safety of inmates, or residents of other facilities. Often, concrete harm, though imminent, has yet to occur. Understanding the cruelty and senselessness of a policy that would deny plaintiffs relief from policies and practices that pose unreasonable and imminent threats to their health and safety until someone suffers serious injury, courts have not hesitated to grant preventative injunctive relief. *See Farmer v. Brennan,* 511 U.S 825, 845 (1994) ("[o]ne does not have to await the consummation of threatened injury to obtain preventive relief" (citing *Pennsylvania v. West Virginia*, 262 U.S. 553 (1923)); *Campbell v. Beto*, 460 F.2d 765 (5th Cir. 1972) (state's failure to fulfill its affirmative duty violates the Eighth Amendment and prisoners need not await the inevitable harm); *Laaman*, 397 F. Supp at 312 ("nor need prison inmates wait until the harm they

suffer from lack of medical attention is so egregious as to independently 'shock the conscience'").

The federal court in *Laaman* found*, inter alia*: 1) medical services and facilities at the prison "endanger the lives and health of the prison community," 2) "isolation cells at NHSP violate the Eighth Amendment's proscription against cruel and unusual punishment," 3) "[t]here is a clear and present danger of serious loss of life of both inmates and staff at NHSP due to the combined effects of a partially combustible physical plant, inadequate fire protections…," and 4) conditions in the prison kitchen are "deplorable" and "the food services have been a danger to the health and safety of the inmates and staff." *Laaman*, 437 F. Supp at 323- 24. The Settlement Agreements provide specific requirements, which when implemented would ameliorate these conditions. Yet if, as the State now contends, specific performance is barred by sovereign immunity, the inmates must wait until they suffer injury and then sue for monetary damages. Such suits may or may not provide compensation for the personal injuries inmates may suffer, but it would be unconscionable to force the inmates to suffer injury when an order for specific performance would have prevented the injuries in the first place. Moreover, such actions might provide the inmate with damages in tort under 42 U.S.C. §1983 but they would provide no meaningful relief for the State's breach of contract, and the inmates would be totally deprived of the benefit of the bargain they made with the State.

There are provisions of the *Laaman* Settlement Agreements which, if breached by the State, would not create an imminent risk of serious harm

to inmates. However, many of these provisions create extremely important rights which, due to the near impossibility of ascertaining damages, are simply not amenable to monetary remedy in a breach of contract action. If, for example, the State steadfastly refused to provide any of the six vocational education programs it promised to establish (1990 Consent Decree para. 107, App. 191) how would an inmate quantify his damages? Would he have to wait until release from prison to see whether he could obtain a decent paying job? And if he couldn't find one, could he prove that the State's breach of the settlement agreement's provisions for vocational training caused his inability to obtain a decent paying job? In many cases the fact that a job applicant is a convicted felon is enough to cause an employer to refuse to hire him. With few exceptions, employers don't have an obligation to disclose their reasons for rejecting a job applicant, so a former inmate seldom even knows whether or not there is any connection between the State's breach and his failure to obtain employment. In short, a former inmate's damages for even the most blatant breach of the State's contractual obligations under the Settlement Agreements would be wildly speculative.

Likewise, if the inmate were to file a suit for damages while still incarcerated, what would be his theory of damages? If he spends most of his day cleaning the tiers, engaging in outdoor recreation, and reading in his cell, how could the court possibly value the damages caused by the State's breach of promise to provide vocational education? Even if the total absence of the vocational programs promised by the State caused him to sit in his cell all day, thereby causing him great mental anguish, under the

State's theory his only remedy would be to file a tort action which he could file even if there were no settlement agreement.

It is worth noting that the State never suggests how monetary damages for breach of contract could meaningfully remedy its breaches. Rather, it takes the position that to the extent that plaintiff claims constitutional violations his remedy is to "file a civil rights claim under 42 U.S.C. §1983 in the state or federal courts…" (Defendant's brief p. 35). In other words, the State asserts it can ignore the explicit requirements of its settlement agreement because the plaintiff can start the litigation from which the settlement agreement arose all over again. Such new litigation may or may not vindicate plaintiff's claims, but it renders the hard-won benefits that they obtained from the mutually beneficial and negotiated settlement agreements a nullity.

In *Petition of Abbott*, 139 N.H. 412 (1995), this Court observed "[t]he complete abolition of the rights of a class of persons to recover damages for their injuries would contravene the plain language of Part I, Article 14 of the New Hampshire Constitution, '*in the absence of provision of a satisfactory substitute*.'" *Id.* at 416 (quotation omitted). *Abbott* arose in the context of a worker's compensation claim, but the principle is the same for the inmates who struggled for years to obtain the relief set forth in the Settlement Agreements. The remedy of monetary damages not only fails to provide "a satisfactory substitute" for enforcement of the prisoners' rights, it provides no remedy at all.

Part I, Article 14 "does *not* guarantee that all injured persons will receive *full compensation* for their injuries..." *Cargill's Estate v. City of Rochester*, 119 N.H. 661, 665 (1979) (emphasis added). In the instant case, however, the plaintiff does not seek *full* compensation for the State's breach, merely *some* meaningful relief. If the right to redress in Part 1, Article 14 means anything, it requires that much.

B. The Barriers Erected by Sovereign Immunity Should be Lowered to Comply with Part I, Article 14 of the New Hampshire Constitution.

Amici are well aware that, out of respect for the prerogatives of the legislative branch, the majority opinions in *Wiseman, Lorenz,* and *XTL-NH, Inc.* left it to the legislature to establish the contours of sovereign immunity. However, this Court has intervened on a number of occasions when it has found excessive restrictions on remedies available to plaintiffs. As the Court works to reconcile the important rights guaranteed by Part 1, Article 14 with governmental immunity, Amici urge it to consider the voices that have called into question the continuing validity of the latter.

In *Gossler v. Manchester*, 107 N.H. 310, 314 (1966), the Court acknowledged that "the complexities of modern government may from time to time require some relaxation of our rule of governmental immunity as various situations and conditions present themselves. There is much persuasiveness in the arguments of the proponents of the abrogation of governmental immunity…." A year later, Chief Justice Kenison acknowledged that he "takes a dim view of governmental immunity…." *Krzysztalowski v. Fortin*, 108 N.H. 187, 189 (1967).

In *Merrill v. City of Manchester,* 114 N.H. 724 (1974), the Court significantly altered the common law immunity of municipalities by abolishing the governmental-proprietary function distinction, noting that "[i]t is foreign to the spirit of our constitutional guarantee that every subject is entitled to a legal remedy for injuries he may receive in his person or property. N.H. Const. pt. I, art. 14." *Merrill*, 114 N.H. at 725.

In a concurring opinion in *State v. Brosseau,* 124 N.H.184 (1983), Justices Douglas and Batchelder thoroughly reviewed the doctrine of sovereign immunity, and concluded, "Part 1, Article 14 provides that all injured parties are entitled to a certain, just, and prompt remedy. It is no longer tenable for us to read into this constitutional provision a proviso: all injured parties *except* those injured by the State." 124 N.H. at 196 (Douglas, J. and Batchelder, J. concurring specially) (internal citation omitted). While *Brosseau* involved a waiver of sovereign immunity to enable the plaintiffs to recover damages for negligent care and treatment while in state institutions, the reasoning of the concurring opinion is applicable to cases in which an award of damages is not a meaningful remedy for the injured party. Two years after *Brosseau,* this Court explained,

> The continued existence of any application of the doctrine of sovereign immunity depends upon whether the restrictions it places on an injured person's right to recovery be not so serious that [they] outweigh [ ] the benefits sought to be conferred upon the general public.

Opinion of the Justices, 126 N.H. 554, 559-60 (1985) (quoting *Brosseau*, 124 N.H. at 197).

Application of the sovereign immunity doctrine not only restricts the plaintiff's right to recovery, it renders such right a nullity. Moreover, it actually *harms the general public*. As Judge Bownes observed in *Laaman:*

> Deep anger and hatred of the society that relegates prisoners in the name of reform to cages with nothing to do, frustration and hostility engendered by *false promises*, and the loss of pride and self-esteem inherent in such a degrading experience spawn anti-authoritarian and often violent criminal behavior.

Laaman, 437 F. Supp at 325 (emphasis added).

The strongest recent affirmation of the right of the people to seek redress from the courts is the amendment to Part 1, Article 8 of the New Hampshire Constitution which, in November 2018, was overwhelmingly ratified by the electorate. Although the amendment did not directly address sovereign immunity, the amendment expanded the right of taxpayers to challenge the taxing and spending decisions of state and local governments, through declaratory judgment actions without having to show specific injury beyond one's status as a taxpayer. The constitutional amendment demonstrates that it is the will of the people that there be expanded access to the courts to demand government accountability. It is difficult to conceive of an action that is more contrary to the notion of governmental accountability than depriving citizens of the right to compel the government to live up to its express contractual obligations. In this era of dangerously increasing cynicism about government, the right of citizens to access to the court for redress of injuries inflicted by the government, guaranteed by Part 1, Article 14, has never been more important. As the authors of the concurring opinion in *Brosseau* reminded us, "*We,* 'the people,' are the

sovereigns under our State Constitution. A contrary theory may make sense in a monarchy or a dictatorship, but not in a democracy based upon the American theory of a freely formed social compact." *Brosseau*, 124 N.H. at 203 (citing N.H. Const. pt 1, arts. 3 and 8).

The Court should acknowledge the erosion of the rationale and support for the sovereign immunity doctrine by ruling that, in this case, the rights secured by the inmates in the *Laaman* Settlement Agreements are protected by Part 1, Article 14, and permitting the plaintiff to proceed with his action for specific performance.

III. THE LEGISLATURE HAS IMPLIEDLY WAIVED SOVEREIGN IMMUNITY TO ALLOW STATE PRISONERS TO GO TO STATE COURT TO ENFORCE THE TERMS OF THEIR SETTLEMENT AGREEMENT WITH THE STATE.

Regardless of how this Court rules on the extent of the waiver of sovereign immunity found in RSA 491:8, Amici submit that by enacting the correctional statutes set forth below, the legislature impliedly waived sovereign immunity and that plaintiff's action for specific performance should be permitted to proceed.

This Court has recognized that by enacting statutes that create rights for certain persons the legislature has impliedly waived the State's immunity to allow these persons to enforce their rights in state court. In *Chasse v. Banas*, 119 N.H. 93 (1979), a State Hospital patient filed a damages action for negligent treatment which caused permanent injury to her eyesight. The Court held that the legislature had waived sovereign immunity through its enactment of RSA 135-B:43, which guarantees every

civilly committed mentally ill patient the right to "adequate and humane treatment." *Chasse*, 119 N.H. at 96. The Court concluded that by enacting RSA 135-B:43, the legislature "has done more than enunciate general objectives and goals …; it has recognized the civil rights of the mentally disabled who are confined in State institutions." *Id*.[1]

The Court found that the statutory "mandate" created in RSA 135-B:43 not only creates a "right" for involuntarily committed patients, it "concomitantly imposes a duty" upon State Hospital employees to provide adequate and humane treatment. *Id*. The Court noted that the "existence of a statutory right implies the existence of all necessary and appropriate remedies." *Id*. (citing *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 239 (1969)). The Court further stated "[t]he only way in which a civilly committed patient can obtain a remedy is to bring an action against the State Hospital or its agents." *Chasse*, 119 N.H. at 96.

In *State v. Brosseau*, 124 N.H. 184, 191 (1983), the Court reaffirmed *Chasse,* holding that RSA 135-B:43 and RSA 171-A:13 waived any claim of sovereign immunity for the State and its agents as to statutory and tort claims brought by institutionalized patients. The Court further held that the "virtually identical" language in RSA 171-A:13 ("a right to adequate and humane treatment") "compels" it to conclude that the legislature similarly intended to waive immunity to permit developmentally impaired clients of

[1] While RSA ch. 135-B was repealed in 1986 it was replaced in 1986 with RSA ch. 135-C. The right to "adequate and humane treatment" was preserved in the "Purpose and Policy" section of RSA 135-C:I, II, as well as in other sections of RSA ch. 135-C, including RSA 135-C:13, Discrimination Prohibited.

state mental facilities to sue the State and its agents for violation of the rights granted by that statute. *Brosseau*, 124 N.H. at 191.

As the Court did in *Chasse* and *Brosseau*, it should find that the legislature has impliedly waived the State's sovereign immunity through the enactment of the following corrections statutes, thereby permitting inmates to enforce the terms of the State's settlement agreements related to the terms of their confinement. Notably, the Commissioner's powers and duties emphasize the Commissioner's duty to treat inmates humanely: "The commissioner shall adopt ... (a) ... procedures for the operation of the state prison ... including *provisions for the humane treatment of inmates*." RSA 21-H:8, III(a) (emphasis added). The Commissioner makes "site visits" to "insure that programs ... operate ... effectively, and that persons committed to the commissioner's custody are treated humanely ...." RSA 21-H:9. The language "humane treatment of inmates" is strikingly similar to the language in RSA 135-B:43 and RSA 171-A:13 to provide "adequate and humane treatment." Given its use in multiple statutes, that language appears to have been an important consideration by the Court in finding an implied waiver of sovereign immunity in *Chasse* and *Brosseau*.

The legislature has mandated that the commissioner shall adopt administrative rules, "relative to ... III. Standards for the management and operation of rehabilitation related programs, including, but not limited to ... *Education*, ... *Vocational training*, ... *Work*, ... and Library." RSA 21-H:13, III. (emphasis added). The programs and services listed in RSA 21-H:13 are similar to those listed in RSA 171-A:13, Service Guarantees, for

developmentally disabled persons, such as "psychological, medical, vocational, social, educational or rehabilitative services."

The legislature has also provided for the Commissioner's responsibility to provide other programming for inmates: "The commissioner ... shall have the power ... VI ... to provide for such other employment for the prisoners ... to organize, conduct, and manage such industries as ... may be best adapted to the needs of the prisons and the prisoners ..." [and] "IX. To provide such books and other instruction as shall be deemed necessary for the convicts." RSA 622:5. These programs and services date to 1842. *See* N.H. Rev.Stat., Dec. 26, 1842, Chap. 227:5 ("Governor" ... "to provide such books and other instruction as he shall deem necessary for the convicts ..."). Further, "It shall be the duty of the commissioner ... X. *To conduct and manage the education program of the prisons*." (emphasis added). RSA 622:7

This Court previously held that the correctional statutes vest inmates with certain enforceable rights. In *State v. Evans*, 127 N.H. 501, 505 (1985), after holding that inmates have no right to rehabilitation in prison under Part 1, Article 18 of the state constitution, the Court focused on two of the statutes cited above, RSA 21-H:13, III and RSA 622:7, X, and nonetheless found that those statutes "create an entitlement" to participate in some educational programs (but not any particular one). *Evans*, 127 N.H. at 506.

The above statutes evidence a legislative intent to confer certain rights on inmates and impose certain duties on state officials. In conferring

these rights, including the right to humane treatment, the legislature has done more than simply enunciate general objectives and goals. *See Chasse*, 119 N.H. at 96. It has recognized the civil rights of inmates confined to state institutions. *Id*. As such, the legislature has, by reasonable implication, waived the State's sovereign immunity with respect to inmates who seek to enforce those civil rights in state court.

Moreover, the "existence of a statutory right implies the existence of *all necessary and appropriate remedies*." *Chase*, 119 N.H. at 96 (emphasis added). Because an action for damages provides the plaintiff with no meaningful remedy (see Argument II), specific performance is a necessary remedy in this case. Thus, the Court should allow plaintiff's claim for equitable relief to proceed.

IV. THE WAIVER OF SOVERIGN IMMUNITY SET FORTH IN RSA 491:8 FOR "ACTIONS FOUNDED UPON CONTRACTS" APPLIES TO ACTIONS FOR SPECIFIC PERFORMANCE.

The Court should reverse the superior court's ruling dismissing Plaintiff's action on the basis of sovereign immunity for the reasons set forth above, without reexamining the *Wiseman* holding. Nevertheless, Amici submit that that *Wiseman* was wrongly decided and should be overturned.

RSA 491:8 reads:

> The superior court shall have jurisdiction to enter judgment against the state of New Hampshire *founded upon any express or implied contract with the state*. Any action brought under this section shall be instituted by bill of complaint and shall

> be tried by the court without a jury. The jurisdiction conferred upon the superior court by this section includes any set-off, claim or demand whatever on the part of the state against any plaintiff commencing an action under this section. The attorney general, upon the presentation of a claim founded upon a judgment against the state, shall submit the claim to the department or agency which entered into the contract, and said department or agency shall manifest said claim for payment from the appropriation under which the contract was entered into; provided, that if there is not sufficient balance in said appropriation, the attorney general shall present said claim to the general court for the requisite appropriation.

(emphasis added)

It is axiomatic that statutes are to be interpreted according to their plain meaning. "When a statute's language is plain and unambiguous, we need not look beyond it for further indication of legislative intent, and we will not consider what the legislature might have said or add language that the legislature did not see fit to include." *Carlisle v. Frisbie Mem. Hosp.*, 152 N.H. 762, 773 (2005); *DeBenedetto,* 153 N.H. at 797. *See also Keelin B.*, 162 NH at 42 (In interpreting a statute, the Court must "first examine the language used, and, where possible, … ascribe the plain and ordinary meaning to words used."); *In the Matter of LaRue & Bedard,* 156 N.H. 378 at 380 (2007) ("If the language is plain and unambiguous, then we need not look beyond it for further indication of legislative intent.")

The first sentence of the statute could not be clearer: "[t]he superior court shall have jurisdiction to enter judgment against the state of New Hampshire founded upon *any* express or implied contract with the state" (emphasis added). It is beyond dispute that an action for specific

performance is one that is founded on an express or implied contract. Without a contract there is no claim. In reading an exception for equitable actions *"founded upon contracts"* into RSA 491:8, the *Wiseman* court added words to the statute that "the legislature did not see fit to include." *Keelin B.*, 162 N.H. at 42.

In ruling that RSA 491:8 limits the waiver of sovereign immunity to actions for monetary damages, the court in *Wiseman* reasoned that, "[RSA 491:8] contains no reference to redress in equity and therefore requires *a fortiori* an interpretation which limits the consent given to actions for the recovery of damages for breach of contract." *Wiseman*, 98 N.H. at 397. *See also Lorenz*, 152 N.H. at 635. The sounder interpretation is that which is suggested by the General Court's *unlimited* a*uthorization* for a plaintiff to bring *any* action founded on a contract with the State.

The legislature's inaction in overruling *Wiseman* cannot be viewed as acquiesce or agreement with this decision. At the outset, prior to this case, the State has not used *Wiseman* in the manner it seeks to here where monetary damages would not provide any meaningful relief to the plaintiff, and where the State negotiated and executed the settlement agreement sought to be enforced. It is "'impossible to assert with any degree of assurance that [a legislative] failure to act represents' affirmative [legislative] approval of" one of this Court's decisions. *See Patterson v. McLean Credit Union*, 491 U.S. 164, 175, n. 1 (1989) (quoting *Johnson v. Transportation Agency, Santa Clara Cty.*, 480 U.S. 616, 672 (1987) (Scalia, J., dissenting)); *see also Girouard v. United States*, 328 U.S. 61, 69 (1946) ("It is at best treacherous to find in congressional silence alone the

adoption of a controlling rule of law"); *Helvering v. Hallock*, 309 U.S. 106, 121 (1940) ("[W]e walk on quicksand when we try to find in the absence of corrective legislation a controlling legal principle.")

The interpretation of RSA 491:8 advanced by Amici is consistent with the Court's rulings that New Hampshire courts lack subject matter jurisdiction to hear an action against the State "unless the Legislature has prescribed the terms and conditions on which it consents to be sued, and the manner in which the suit shall be conducted." *Lorenz,* 152 N.H. at 634 (quoting *Sousa v. State,* 115 N.H. 340, 344 (1975)). An action for specific performance meets both of these requirements. RSA 491:8 requires that any such action be "instituted by a bill of complaint" in the "superior court" and tried "without a jury." There is nothing in the statute that applies to the "manner in which the suit is to be conducted" that is more applicable to an action for damages than to an action for specific performance. Indeed, the requirements that the case be filed in the superior court—New Hampshire's court of equity—and tried without a jury reinforce the idea that the legislature envisioned the waiver to cover equitable relief.

Moreover, the language starting with the fourth sentence of RSA 491:8, upon which the *Wiseman* court appears to have relied, has nothing to do with the "terms and conditions on which it [the State] consents to be sued." This part of the statute applies only to how a successful litigant can *enforce* a money judgment that the court entered against the State—something that can be particularly problematic when the relevant department has not included such payments in its budget. Amici suggest that the statute does not make reference to a decree of specific performance

because such actions will not force the State to pay any damages to a plaintiff. Nor is there reason to believe the State will be compelled to spend funds that have not been appropriated. A successful action for specific performance would only require that the State carry out the actions that it has already promised, and presumably planned, to undertake.

Amici are well aware of this Court's oft stated and well-reasoned reluctance to overrule its prior decisions. *See State v. Cora*, 170 N.H. 186 (2017); *State v. Balch*, 167 N.H. 329 (2015); *Ocassio v. Federal Express Corp.*, 162 N.H. 436, 450 (2011). Nevertheless, given the clear language of RSA 491:8 and the imperative that the State live up to bargains it makes with its citizens, the Court should adhere to one of its most important rules of statutory construction: "[w]e will not interpret a statute to effectuate an unjust result." *Ocassio*, 162 N.H. at 450; *In re Alex C.,* 161 N.H. 231, 235 (2010). It is hard to imagine results that are more unjust than those that would result were the State permitted to ignore its contractual obligations with impunity. This Court should overrule *Wiseman, XTL-NH, Inc.* and *Lorenz*, and allow plaintiff's action for specific performance to proceed.

CONCLUSION

Amici ask this Court to rule that: 1) the doctrine of sovereign immunity does not apply to settlement agreements which arise out of litigation from which the State was not immune; 2) Part 1, Article 14 of the Constitution allows citizens to specifically enforce their contracts with the State when an action for monetary damages does not provide a meaningful remedy; 3) by enacting the correctional statutes cited in Argument III of

this Brief the legislature impliedly waived sovereign immunity; and 4) the waiver of sovereign immunity in RSA 491:8 extends to actions for specific performance founded on express contracts.

ORAL ARGUMENT

Amici request oral argument on the issues addressed by Amici in this brief. If this Court schedules oral argument, Attorney Elliott Berry will argue on behalf of the Amici.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I, Elliott Berry, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 9465 words, which is fewer than the words permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

April 6, 2020 *<u>/s/ Elliott Berry</u>*
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CERTIFICATE OF SERVICE

I, Elliott Berry, hereby certify that two (2) copies of this Amicus Brief and Appendix shall be mailed to Clifford E. Avery, *pro se*, postage prepaid, at the following address:

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