THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2019-0279

New Hampshire Center for Public Interest Journalism, et al

v.

New Hampshire Department of Justice

APPEAL PURSUANT TO RULE 7 FROM A JUDGMENT OF THE
HILLSBOROUGH COUNTY SUPERIOR COURT
SOUTHERN DISTRICT

REPLY BRIEF FOR THE STATE OF NEW HAMPSHIRE

THE STATE OF NEW HAMPSHIRE

By Its Attorneys,

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(Fifteen minute oral argument requested)

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I. APPELLEES DO NOT MAKE A COMPELLING ARGUMENT FOR OVERRULING *FENNIMAN*

The appellees ask this Court to conduct a balancing test to determine whether the Exculpatory Evidence Schedule ("EES") must be disclosed, rather than apply the categorical exemption this Court articulated in *Union Leader Corp. v. Fenniman*, 136 N.H. 624 (1993), because, appellees contend, this Court must overrule *Fenniman*. Appellee, the Union Leader, devotes just a footnote to the issue, without any argument guided by this Court's decisional law on *stare decisis.* ULB[1] 17, n.1; *see Ford v. New Hampshire Dept. of Transportation*, 162 N.H. 284, 290 (2012) ("Having failed to brief the four *stare decisis* factors, the defendant has not persuaded us that [prior precedent] must be overruled."). The remaining appellees, represented by the American Civil Liberties Union ("ACLU"), refer, without argument, to three other appeals in which the State is not involved, but in which the ACLU has developed the argument. NHJB 19; *see generally Union Leader Corp. v. Salem*, No. 2019-0206; *Seacoast Newspapers, Inc. v. Portsmouth*, No. 2019-0135; *see also Salcetti v. Keene,* No. 2019-0217. The State submits this Reply to explain why the arguments to overrule *Fenniman* are unavailing.

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[1] "ULB___" refers to the opening brief filed by the Union Leader Corporation

"NHJB___" refers to the responsive brief filed The New Hampshire Center for Public Interest Journalism, Telegraph of Nashua, Newspapers of New England, Inc., Seacoast Newspapers, Inc., Keene Publishing Corporation, and The American Civil Liberties Union of New Hampshire

"App. II___" refers to volume II of the Appendix to the State's Brief

"We do not lightly overrule a prior opinion," *Alonzi v. Northeast Generation Servs. Co.,* 156 N.H. 656, 659 (2008), especially when the prior opinion construed a statute and is followed by legislative inaction. *Petition of Correia*, 128 N.H. 717, 722 (1986) ("Once the statute has been construed, *stare decisis* calls for a reasonable degree of certainty in applying that construction to future cases, subject always to the legislature's power to modify the statute itself."); *see also Jacobs v. N.H. Division of Motor Vehicles*, 149 N.H. 502, 506 (2003). The purpose of statutory construction is to explicate what the legislature meant through the words it chose, and not to infuse the words with the meaning that the result in a particular case might need. *Correia*, 128 N.H. at 722 ("Our obligation is to construe the statute, not to render its language meaninglessly protean."). Absent legislative response, therefore, statutory construction does not reflect what this Court believes the legislature's words mean, but what those words actually mean. *E.g.*, *Petition of Cigna Healthcare, Inc.*, 146 N.H. 683, 690 (2001) (the legislature is presumed to know of the construction this Court gives to statutes and, if it disagreed, would amend the statute.). The legislature's failure to act after a decision construing a statute is strong evidence that the construction is consistent with the legislature's intent, and counsels strongly in favor of *stare decisis*. *Id.*; *Correia*, 128 N.H. at 722 ("Once the statute has been construed, *stare decisis* calls for a reasonable degree of certainty in applying that construction to future cases, subject always to the legislature's power to modify the statute."); *Jacobs*, 149 N.H. at 506 ("The legislature's failure to [modify a statute after this Court's construction] counsels against overruling [precedent construing the statute].").

In *Fenniman*, this Court construed the first clause of RSA 91-A:5, IV as categorically exempting from disclosure records relating to internal personnel practices. Over the 25 years since, this Court has applied the same, categorical exemption three times and the legislature has not responded in any way. The categorical exemption is established to a "reasonable degree of certainty," *Correia*, 128 N.H. at 722, and to overrule *Fenniman* now would give the statute a different meaning than the legislature intended and make RSA 91-A:5, IV "meaninglessly protean." *Correia*, 128 N.H. at 722.

Whether or not viewed in the unique context of statutory construction, "[t]he 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) (quotation omitted). This Court has concluded, "[t]hus, when asked to reconsider a holding, the question is not whether we 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*." *Id.* at 504-05 (quotation omitted) (emphasis added).

The importance of *stare decisis* to the administration of justice means that "[j]udges are not at liberty to follow prior decisions that are well-reasoned and discard those that are not." *State v. Quintero*, 162 N.H. 256, 540 (2011) (quoting *State v. Gubitosi*, 152 N.H. 673, 678 (2005)). Instead, "principled application of *stare decisis* requires a court to adhere to even poorly reasoned precedent in the absence of some special reason over

and above the belief that a prior case was wrongly decided." *Id.* "Poor reasoning is not a separate factor to consider when determining whether special justification for departing from precedent exists." *Id.* at 540.

This Court measures special justification through a non-exclusive list of factors, none of which is dispositive: (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. *Ford*, 163 N.H. at 290. "Although these factors guide [this Court's] judgment, no single factor is wholly determinative, because the doctrine of *stare decisis* is not one to be either rigidly applied or blindly followed." *Id.*

In the appeals to which it adverts on page 19 of its brief, the ACLU argues, primarily, the first, second and fourth factors. *E.g.*, *Salem*, No. 2019-0206, ACLU Brief at 16-22; *Portsmouth*, No. 2019-0135, ACLU Brief at 14-20. But the third factor is most relevant to the *stare decisis* analysis concerning *Fenniman.* Related principles of law have not remotely left the *Fenniman* rule "no more than a remnant of an abandoned doctrine." *Ford*, 162 N.H. at 290. To the contrary, the *Fenniman* holding at issue – that records relating to internal personnel practices are categorically exempt from disclosure pursuant to RSA 91-A – has developed in a series of cases over nearly 25 years, and has been applied without concern as recently as 2017. Thirteen years after *Fenniman*, this

Court applied the categorical exemption for qualifying documents in *Hounsell v. North Country Water Precinct*, 154 N.H. 1, 3-4 (2006). Ten years after *Hounsell*, this Court examined the *Fenniman* categorical exemption in *Reid v. New Hampshire Attorney General*, 169 N.H. 509, 518-522 (2016), but did not conduct any *stare decisis* analysis and expressly declined to overrule *Fenniman*. Instead, just two months later, after soliciting supplemental briefing from the parties in light of *Reid*, this Court applied *Fenniman* without hesitation, criticism or concern. *Clay v. City of Dover*, 169 N.H. 681, 685-687 (2017).

The analysis in *Clay* enshrines, rather than undermines, the applicability of the categorical exemption. The plaintiff in *Clay* advanced an interpretation of the exemption (discussed below) based solely on *Reid. Clay*, 169 N.H. at 685. This Court responded that the plaintiff's interpretation of *Reid* ignored *Hounsell* and *Fenniman*. *Id.* at 687-688 ("[t]he plaintiff misreads our decision in *Reid* and ignores our decisions in *Hounsell* and *Fenniman*."). This Court then reiterated the definition of internal personnel practices explicated in *Hounsell* and *Fenniman. Id.* at 687. This Court acknowledged that *Reid* criticized *Fenniman* and *Hounsell* but did not overrule them. *Id.* This Court then unequivocally applied the *Fenniman* categorical exemption to the documents at issue in *Clay*. *Id.* In short, this Court applied the categorical exemption in *Clay,* mined *Fenniman* and *Hounsell* for the contours of the categorical exemption, and refused to allow the plaintiff to focus the Court solely on *Reid* at the expense of the categorical exemption. The *Clay* decision is just three years old, and marks nearly 25 years of consistent application of *Fenniman*.

The full history of *Fenniman* and its progeny precludes any credible argument that "related principles of law have developed to undercut the [*Fenniman*] rule," *Quintero*, 162 N.H. at 536, or that *Fenniman*'s "ruling has come to be seen so clearly as error that its enforcement [is] for that very reason doomed." *Jacobs*, 149 N.H. at 504-05. The ACLU argues that "the law has developed, as *Reid* makes clear, so as to have limited the holdings of *Fenniman* and *Hounsell." Seacoast Newspapers*, No. 2019-0135, ACLU Brief at 19. But the ACLU ignores *Clay*, in which this Court confirmed that limitation only as to *Fenniman*'s factual underpinnings and not to the applicability of *Fenniman*'s holding in that factual scenario. This Court's refusal in *Reid* to overrule *Fenniman*, followed by this Court's unhesitating application of *Fenniman* in *Clay*, establish that *Fenniman* is anything but a remnant of an abandoned doctrine, or otherwise "doomed." *Jacobs*, 149 N.H. at 504-05.

The same decisional history defeats the ACLU's arguments that the *Fenniman* rule "has proven to be intolerable simply by defying practical workability," factor one of the *stare decisis* analysis. *Ford*, 163 N.H. at 290. If that were the case, rather than apply the categorical exemption as a matter of course, *Clay* would reflect continuing unease with the exemption, further limitation of its application, or some effort to work around the perceived chafe of *Fenniman*. Instead, *Clay* simply explains and then applies the *Fenniman* categorical exemption. *Clay* confirms that the categorical exemption does not defy practical workability in any way.

Clay also confirms that facts have not changed in any way as to "rob[] the [*Fenniman* categorical exemption] of significant application or justification," factor four. *Ford*, 163 N.H. at 290. For 25 years, as recently

as 2017, this Court has consistently applied *Fenniman*'s categorical exemption. And *Clay* cannot be characterized as anything other than a significant application of the categorical exemption, in that it applied the exemption after rejecting further attempts to limit the exemption. *Clay*, 169 N.H. at 686. In short, all of the relevant *stare decisis* factors this Court has identified defeat the ACLU's contention that this Court should overrule *Fenniman*.[2]

In the *Salem* appeal, the ACLU argues that the categorical exemption's unworkability is "documented" by "many instances in which agencies have repeatedly withheld information in which the public has an obvious compelling interest." *E.g.*, *Salem*, No. 2019-0206, ACLU Brief at 27. But the ACLU does not anchor that assertion with any authority, because none exists, even though RSA 91-A provides an oft-used mechanism to challenge denials of right-to-know requests. To the extent the ACLU believes that agencies wrongfully rely on the exemption, they are free, as they have routinely done, to challenge application of that exemption through petitions to enforce RSA 91-A. The ACLU's dislike of the categorical exemption is not a "special justification" for overruling precedent. *Quintero*, 162 N.H. at 540.

The ACLU argues extensively that *Fenniman* is ill reasoned. *Seacoast Newspapers*, No. 2019-0135, ACLU Brief at 14-20; *Salem*, No. 2019-0206, ACLU Brief at 16-22. The arguments fall into two principal

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[2] This Court has clarified that factor two, "whether the rule is subject to a kind of reliance that would lend a special hardship to the consequence of overruling," bears most relevance "in the commercial law context . . . where advance planning of great precision is most obviously a necessity." *Quintero*, 162 N.H. at 538 (quotation and citation omitted).

categories: (1) federal courts have construed the Freedom of Information Act ("FOIA"), 5 U.S.C.§ 552, differently than this Court has construed RSA 91-A, and, (2) *Fenniman* contravenes statutory construction canons. Neither uncovers weakness in *Fenniman*'s reasoning.

According to the ACLU, the FOIA analog to the RSA 91-A internal personnel practices exemption exists solely to protect the government from the burden of producing information "in which the public could not reasonably be expected to have an interest," a more narrow construction than this Court identified in our state right-to-know statute. *Salem*, No. 2019-0206, ACLU Brief at 19; *Seacoast Newspapers*, 2019-0135, ACLU Brief at 17. In *Clay*, however, this Court emphatically rejected that very argument. In response to the plaintiff's argument that records pertain to internal personnel practices "only if they relate to matters in which the public could not reasonably be expected to have an interest," this Court pointedly explained that "[t]he plaintiff "misreads our decision in *Reid* and ignores our decisions in *Hounsell* and *Fenniman*." *Clay*, 169 N.H. at 687 (quotation and full citation omitted). While it is true that this Court might consider FOIA decisions in construing RSA 91-A, this Court has never held that FOIA controls the construction of our state statute, nor does this Court consider only FOIA decisions when seeking aid in construing RSA 91-A. *Union Leader Corp. v. New Hampshire Housing Authority*, 142 N.H. 540, 546 (1997) (construing RSA 91-A, "[w]e look to the decisions of other jurisdictions . . ." and citing state court decisional law); and 552 (distinguishing RSA 91-A from FOIA). Applying the categorical exemption, *Clay* squarely rejected the FOIA-based construction the ACLU presently advances.

Finally, the ACLU argues that *Fenniman*'s categorical exemption is inconsistent with the statutory text. Specifically, the ACLU contends that the phrase "whose disclosure would constitute an invasion of privacy" modifies all of the preceding categories of information in the entire first sentence of RSA 91-A:5, IV, including records relating to internal personnel practices. *Salem*, No. 2019-0206, ACLU Brief at 21. That construction, however, ignores the semicolons that break the first sentence of the exemption into discrete parts. At most, the invasion of privacy clause can apply to the categories of documents listed after the "and" in the first sentence of RSA 91-A:5, IV. *Fenniman* was correct, therefore, in singling out internal personnel practices records for a categorical exemption, as a semicolon separates it from the invasion of privacy category subject to a balancing test. And, as this Court explained, to the extent the statute is ambiguous, the relevant legislative history supports the categorical exemption. *Fenniman*, 136 N.H. at 627 (quoting Representative Sytek, on behalf of the Judiciary Committee, explaining that these files "*will remain confidential under the right to know law . . . .*") (Emphasis in original).

The ACLU argues that this Court cannot apply the internal personnel practices exemption categorically when it has applied a balancing test to records within the next clause of the exemption, concerning "confidential, commercial or financial information." *See Salem,* ACLU Brief at 21-22. But this Court has made clear that "we generally interpret the exemptions in RSA chapter 91-A restrictively to further the purposes of the Right-to-Know law." *Fenniman*, 136 N.H. at 626; *Union Leader Corp. v. New Hampshire Housing Finance Authority*, 142 N.H. 540, 552 ("An expansive

construction of [confidential, commercial or financial] must be avoided, since to do otherwise would allow the exemption to swallow the rule. . . .") (Quotation and citation omitted). "Records relating to internal personnel practices" is narrow, specific language that captures a small slice of public records for exemption by its own terms. By contrast, the phrase "confidential, commercial or financial" identifies three extremely broad categories of records that threaten to eclipse the purpose of the right-to-know statute, and confidentiality and invasion of privacy closely parallel. This Court's differential treatment of the two clauses, therefore, is necessary to prevent the breadth of the confidential, commercial or financial records exemption from defeating the purpose of RSA 91-A, and to give meaning to "confidential."

If this Court agrees with the ACLU that *Fenniman* was poorly reasoned, that alone does not justify overruling precedent. *Quintero*, 162 N.H. at 540 ("principled application of *stare decisis* requires a court to adhere to even poorly reasoned precedent in the absence of some special reason over and above the belief that a prior case was wrongly decided."). Not only does the ACLU fail to reveal flaws in *Fenniman*'s reasoning, but the ACLU fails to establish any special reason for this Court to overrule *Fenniman* and the categorical exemption from RSA 91-A disclosure of records relating to internal personnel practices.

II. A CATEGORICAL EXEMPTION DOES NOT VIOLATE PART I, ARTICLE 8 OF THE NEW HAMPSHIRE CONSTITUTION

In just two paragraphs, the Appellees contend that, if the EES is categorically exempt from disclosure, then RSA 91-A:5, IV violates Part I, Article 8 of the New Hampshire Constitution. The trial court did not reach this issue, and the Appellees do not develop this argument, other than to refer to the balancing argument it makes later in its brief, essentially collapsing the Part I, Article 8 analysis into the balancing test used with the exemption for records whose disclosure would constitute an invasion of privacy. NHJB 17-18; *see Appeal of Cook*, 170 N.H. 746, 753 (2018) (arguments not adequately developed will not be considered).

To the extent this Court determines to consider the Appellees' brief argument, for the reasons articulated in detail in the State's motion to dismiss pleadings below, a categorical exemption for the EES does not violate Part I, Article 8. *See* App. II 53-66, 253-54.

CONCLUSION

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

The State requests oral argument.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I, Daniel E. Will, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this reply brief contains approximately 2,922 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.

February 4, 2020 */s/Daniel E. Will*
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CERTIFICATE OF SERVICE

I, Daniel E. Will, hereby certify that a copy of the State's reply brief shall be served on the following parties of record**,** through the New Hampshire Supreme Court's electronic filing system:

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