THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0447

JOHN DOE
Petitioner/Appellant

v.

NEW HAMPSHIRE ATTORNEY GENERAL
Respondent/Appellee

BRIEF OF *AMICI CURIAE* AMERICAN CIVIL LIBERTIES UNION OF NEW HAMPSHIRE AND NEW HAMPSHIRE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF RESPONDENT/APPELLEE NEW HAMPSHIRE ATTORNEY GENERAL

Appeal Pursuant to Supreme Court Rule 7 from Merrimack County Superior Court
Docket No. 217-2020-cv-00176

American Civil Liberties Union of New Hampshire,

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May 4, 2021

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IDENTITY OF *AMICI CURIAE*

The ACLU-NH is the New Hampshire affiliate of the ACLU—a nationwide, non-partisan, public-interest civil liberties organization with over 1.75 million members (including over 9,000 New Hampshire members and supporters). The ACLU-NH engages in litigation to encourage the protection of individual rights guaranteed under state and federal law. The ACLU-NH regularly participates before this Court through direct representation or as *amicus curiae* in cases involving police accountability and criminal justice. *See e.g., Union Leader Corp. v. Town of Salem*, 173 N.H. 345 (2020) (seeking disclosure of police department's internal affairs audit report); *Seacoast Newspapers, Inc. v. City of Portsmouth*, 173 N.H. 325 (2020) (seeking disclosure of arbitration decision concerning police department's attempt to terminate an officer); *N.H. Ctr. for Pub. Interest Journalism v. N.H. D.O.J.*, 173 N.H. 648 (2020) (seeking public disclosure of the Exculpatory Evidence Schedule); *American Civil Liberties Union of N.H. v. City of Concord*, No. 2020-0036 (pending case before New Hampshire Supreme Court seeking information concerning police department's use of "covert communications equipment"); *Provenza v. Town of Canaan*, No. 2020-0563 (pending case before New Hampshire Supreme Court seeking internal report concerning investigation of allegation of excessive force); *Appeal of N.H. Dep't of Safety*, No. 2020-0450 (arguing, as *amicus curiae*, that Personnel Appeals Board decision overturning the Department of Safety's termination decision of an officer should be reversed).

The NHACDL is the voluntary, professional organization of the criminal defense bar in New Hampshire. It has over 300 members, including almost half of all practicing public defenders and virtually all members of the private bar who do any significant criminal defense work in New Hampshire. Collectively, the membership practices in all ten counties, all eleven superior courts, all fourteen district division courthouses, this Court, and the federal courts. The NHACDL's mission is to safeguard and promote the effective assistance of counsel in criminal cases, to support the lawyers who practice criminal defense, to represent in public the interests of criminal defendants, and to preserve the fairness

and integrity of the criminal justice system. Thus, when proposed legislation or a judicial decision is likely to impact the procedural fairness of criminal adjudications for years to come, the NHACDL will take a stand. The issues in this case are of direct concern to the NHACDL, as the NHACDL's past, present, and future clients are directly impacted by the EES, as the EES helps ensure that its clients are being provided all exculpatory discovery materials to which they are constitutionally entitled.

QUESTIONS PRESENTED

1. Did the Superior Court err when it held in its August 27, 2020 order that RSA 105:13-b did not apply to Officer Doe's lawsuit or provide him an independent basis to seek removal from the Exculpatory Evidence Schedule because, "[b]y its plain language … the procedure outlined under RSA 105:13-b clearly applies only when a police officer is 'serving as a witness in any criminal case'"? *See* Pet.'s Addendum at 46.

2. Based on the allegations of the Petition, did the Superior Court err when it held that Officer John Doe received adequate procedural due process?

STATEMENT OF THE CASE AND THE FACTS

Amici Curiae incorporate by reference the Statement of the Case and Facts in the Responsive Brief of Respondent/Appellee New Hampshire Attorney General.

SUMMARY OF ARGUMENT

In this case, Petitioner Officer Doe is attempting to invoke RSA 105:13-b to ask the New Hampshire court system to resolve *de novo* a disciplinary matter concerning a police officer. Officer Doe, himself, acknowledges that he is asking "the court [to] examine the underlying facts of the situation and possibly overturn the 'sustained finding' against him or determine that the sustained finding of damaging the jacket [in question] does not rise to the level of [his] name being included on the" Exculpatory Evidence Schedule ("EES"). *See* Pet.'s Br. at 31. As this brief explains, Officer Doe's claim fails for two reasons.

First, as the Superior Court correctly held, RSA 105:13-b does not apply to Officer Doe's lawsuit or provide him with an independent basis to seek removal from the EES because RSA 105:13-b only implicates how "police personnel files" are handled when "a police officer … is serving as a witness in [a] criminal case." *See* RSA 105:13-b, I. At

least five Superior Courts have reached this same conclusion, and the law's legislative history similarly supports this result. This Court declined to answer this question in *N.H. Ctr. for Pub. Interest Journalism v. N.H. D.O.J.* *See* 173 N.H. 648, 656 (2020) (assuming, "*without deciding* that RSA 105:13-b … applies outside of the context of a specific criminal case in which a police officer is testifying") (emphasis added).

Second, while this Court has procedurally allowed officers to bring procedural due process claims concerning placement on the EES—*see Duchesne v. Hillsborough Cty. Att'y*, 167 N.H. 774 (2015) and *Gantert v. City of Rochester*, 168 N.H. 640 (2016)—this Court should conclude that adequate pre-deprivation procedural due process was provided to Officer Doe based on the allegations in the Petition. Here, one day after the incident, Officer Doe was informed of the allegations of misconduct concerning his prior statement as to who had written the name on the back of the jacket, was told that an internal investigation had been conducted, was interviewed and gave a statement as part of this process, and was given an opportunity to respond. Pet. ¶ 9. In other words, Officer Doe was notified of the allegation and participated in this internal investigation. *Id.* Officer Doe was also later notified of his placement on the EES and given an opportunity to contest it before the County Attorney. Such notice appears to have been provided at or around the time that this placement occurred, which was about one year after the underlying misconduct. Pet. ¶ 11. After this notification, Officer Doe asked that his meeting with the County Attorney concerning this placement on the EES be continued because he "did not have the time" given his responsibilities as a cadet at the Police Academy. *Id.* Furthermore, Officer Doe subsequently retained counsel and later contested his placement on the EES before the Respondent/Appellee Department of Justice on two separate occasions. Both requests for removal were denied. Pet. ¶¶ 12-14. In sum, Officer Doe received adequate pre-deprivation due process where he was given the opportunity to contest the underlying finding of misconduct and was given the opportunity to contest placement on the EES. The time for Officer Doe to have challenged this misconduct and placement was back then, not years later in court through a *de novo* process that is not grounded in RSA 105:13-b. "[O]ne who

has spurned an invitation to explain himself can't complain that he has been deprived of an opportunity to be heard." *See Wozniak v. Conry*, 236 F.3d 888, 890 (7th Cir. 2001).

What Officer Doe is seeking in this case—namely, post-deprivation process in the form of *de novo* judicial review after already having received pre-deprivation process—are unique due process rights that are not provided to other public employees and many criminal defendants. For example, Officer Doe complains that he "did not have union representation when he was interviewed" by the lieutenant after the incident, and "[n]ot all police officers enjoy the benefits of belonging to a union." *See* Pet.'s Br. at 33, 20. However, every day in the trenches of the criminal justice system, people plead guilty to violation-level offenses and Class B misdemeanors without having received full discovery or the benefit of counsel. Without the benefit of counsel, many have no idea that pleading guilty can have massive collateral consequences and can lead to substantial fines. *See Lassiter v. Department of Social Services*, 452 U.S. 18, 26-27 (1981) (holding that a presumption exists that indigent individuals do not have the right to court-appointed counsel unless physical liberty is threatened); *State v. Weeks*, 141 N.H. 248, 250-51 (1996) ("when no term of incarceration is imposed, a defendant charged with a misdemeanor has no constitutional right to counsel," even where "[t]he fact that the conduct for which the defendant was convicted without the assistance of counsel *has collateral ramifications*") (emphasis added). Simply put, a defendant has a choice whether to plead guilty or not, even in the face of no representation, little information about the allegations, an uncertain sentence, and unknown collateral ramifications. And if the person pleads guilty, that person has to live with the collateral consequences of the decision and is not—except in rare circumstances—able to vacate his or her plea. *See, e.g.*, *State v. Ortiz*, 163 N.H. 506, 510 (2012) ("We have consistently held that as a matter of constitutional due process, the defendant must be advised of the direct consequences of entering a guilty plea, *but not the potential collateral consequences*, in order for the guilty plea to be considered knowing"; affirming trial court's decision denying request to vacate plea where trial court did not inform defendant of collateral immigration consequences from the conviction because New Hampshire's constitu-

tional due process protections do not require trial courts to advise defendants of such potential consequences during plea colloquy) (emphasis added); *State v. Vogt*, No. 2011-0474, 2013 N.H. LEXIS 6, at *2 (N.H. Sup. Ct. Jan. 31, 2013) (affirming lower court's denial of motion to vacate plea); *State v. Welch*, No. 2011-0703, 2012 N.H. LEXIS 103, at *1 (N.H. Sup. Ct. Aug. 1, 2012) (same). Police going through the disciplinary process have no greater constitutional rights than defendants in such similar instances, especially insofar as such misconduct could lead to collateral consequences implicating the EES. *See also Doe v. State*, 167 N.H. 382, 415 (2015) (holding that procedural due process was not violated concerning placement on the sex offender registry for a person who was convicted of a sex offense before the registry was created because "[t]he petitioner was afforded due process during the proceeding that led to his criminal conviction").

This case is important because if Officer Doe can be removed from the EES in the face of having received adequate pre-deprivation due process, then this will lead to criminal defendants not receiving disclosures in future cases in which Officer Doe is a testifying witness. This is significant, as defendants have a constitutional right to receive such exculpatory evidence. *See Brady v. Maryland*, 373 U.S. 83, 87 (1963) (in a criminal case, the State is obligated to disclose information favorable to the defendant that is material to either guilt or punishment); *State v. Laurie*, 139 N.H. 325, 329 (1995) ("In New Hampshire, criminal defendants have an explicit right to produce all proofs that may be favorable to them."). Where the constitutional rights of defendants who have their property and liberty at stake run up against the rights of police officers in employment disputes, the rights of defendants must prevail. Furthermore, in any action by an officer challenging whether misconduct is exculpatory outside a criminal case, the standard that an officer must meet for determining whether information is not exculpatory must be a high one, as it requires a court to conclude that information cannot be exculpatory in <u>*any*</u> criminal case from now into the future. This must be a difficult standard to meet because whether information is exculpatory is fact specific and can often be dependent on the defenses raised by the defendant. *See Gantert*, 168 N.H. at 649 ("The government has a great interest in placing on

the 'Laurie List' officers whose confidential personnel files may contain exculpatory information.").

ARGUMENT

I. As the Superior Court Correctly Held, RSA 105:13-b Does Not Apply to This Case or Provide Officer Doe with an Independent Basis to Seek Removal from the Exculpatory Evidence Schedule Because This Statute Only Applies in the Context of When a Police Officer is "Serving as a Witness in Any Criminal Case."

As the Superior Court correctly held in its August 27, 2020 order, RSA 105:13-b does not apply outside the context of a criminal case, and thus does not provide Officer Doe with an independent basis to seek removal from the Exculpatory Evidence Schedule. As the Superior Court explained, "the procedure outlined under RSA 105:13-b clearly applies only when a police officer is 'serving as a witness in any criminal case.'" *See* Pl.'s Addendum at 46. This holding is correct for two reasons.

First, under its plain terms, RSA 105:13-b does not implicate Officer Doe's request for removal from the EES because RSA 105:13-b *only* concerns how "police personnel files" are handled when "*a police officer ... is serving as a witness in any criminal case*." *See* RSA 105:13-b, I (emphasis added). This Court seemingly reached this conclusion in *Duchesne v. Hillsborough Cty. Att'y*, 167 N.H. 774 (2015), explaining:

> The current version of RSA 105:13-b addresses three situations that may exist *with respect to police officers who appear as witnesses in criminal cases*. First, insofar as the personnel files of such officers contain exculpatory evidence, paragraph I requires that such information *be disclosed to the defendant*. RSA 105:13-b, I. Next, paragraph II covers situations in which there is uncertainty as to whether evidence contained within police personnel files is, in fact, exculpatory. RSA 105:13-b, II. It directs that, where such uncertainty exists, the evidence at issue is to be submitted to the court for in camera review. *Id.*

Duchesne, 167 N.H. at 781 (emphasis added); *see also State v. Shaw*, 173 N.H. 700, 708 (2020) (same). One federal court has similarly concluded that this statute only concerns the treatment of "personnel files of police officers *serving as a witness or prosecutors in a criminal case*." *See Hoyt v. Connare*, 202 F.R.D. 71 (D.N.H. 1996) (Muirhead, M.J.) (rejecting position of defendant police officers that the discovery sought should not occur

because RSA 105:13-b "has no application to the discoverability of the files now at issue") (emphasis added).

Following *Duchesne*, at least five Superior Court judges—Judges Temple, Bornstein, MacLeod, Tucker, and Kissinger—have held that RSA 105:13-b only applies in the context of a criminal case. For example, as the Hillsborough County Superior Court (Southern Division) held in concluding that RSA 105:13-b did not provide a basis to withhold the EES from the public under the Right-to-Know Law:

> By its plain terms, RSA 105:13-b, I, applies to exculpatory evidence contained within the personnel file "of a police officer who is serving as a witness in any criminal case." Under this statute, the mandated disclosure is to the defendant in that criminal case. Here, in contrast, there is no testifying officer, pending criminal case, or specific criminal defendant. Rather, petitioners seek disclosure of the EES to the general public.

See Amici Addendum ("ADD") 26, *N.H. Ctr. for Public Interest Journalism v. N.H. D.O.J.*, No. 2018-cv-00537, at *3 (Hillsborough Cty. Super. Ct., S. Dist., Apr. 23, 2019) (Temple, J.), *affirmed in part, and vacated and remanded on other grounds in* 173 N.H. 648, 656 (2020) ("For the purposes of this appeal, we assume without deciding that RSA 105:13-b … applies outside of the context of a specific criminal case in which a police officer is testifying."). Judge Bornstein reached the same conclusion in a case under the Right-to-Know Law concerning whether a report investigating an excessive force allegation should be disclosed to the public. ADD 136-37, *Provenza v. Town of Canaan*, No. 215-2020-cv-155, at *13-14 (Grafton Cty. Super. Ct. Dec. 2, 2020) (Bornstein, J.) (holding that RSA 105:13-b did not apply because "RSA 105:13-b, by its plain language, applies only to situations in which 'a police officer … is serving as a witness in any criminal case'") (on appeal to Supreme Court at No. 2020-563). In another case where an officer was seeking removal from the EES, the Grafton County Superior Court granted the Department of Justice's motion to dismiss, which correctly argued that, "[b]y its plain terms, the procedure in RSA 105:13-b <u>only</u> applies when a police officer is 'serving as a witness in any criminal case.'" ADD 39-40, *Officer A.B. v. Grafton County Att'y*, No. 215-2018-cv-00437, at *3-4, ¶¶ 12-15 (Grafton Cty. Super. Ct. Oct. 12, 2019) (MacLeod, J.) (emphasis added). In

another case where an officer was seeking removal from the EES, the Merrimack County Superior Court explained that the officer's reliance on RSA 105:13-b was "inapt … as it pertains to whether information in an officer's personnel file qualifies as exculpatory or impeachment evidence in the context of a specific prosecution." *See* ADD 54, *Doe v. N.H. Att'y Gen.*, No. 217-2020-cv-250, at *4 (Merrimack Cty. Super. Ct. Oct. 20, 2020) (Tucker, J.) (emphasis added) (on appeal to Supreme Court at Case No. 2020-501). The Court added that RSA 105:13-b "does not provide for the court to make a broader finding that the information could never be material to the defense in any case." *Id.* Judge Kissinger—who authored the order at issue in this case—reached this same conclusion in another case where an officer was seeking removal from the EES. ADD 64, *Doe v. N.H. Att'y Gen.*, No. 217-2020-cv-00216, at *8 (Merrimack Cty. Super. Ct., Aug. 27, 2020) (Kissinger, J.) (holding that "the procedure outlined under RSA 105:13-b clearly applies only when a police officer is 'serving as a witness in any criminal case'") (on appeal to Supreme Court at Case No. 2020-448).

In sum, as court after court has held, nothing in RSA 105:13-b suggests that this statute applies outside the context of a criminal case. RSA 105:13-b's plain terms reflect that the legislature never intended this law to provide an independent basis to seek removal from the EES or otherwise interfere with other laws, including the public's access to information under Chapter 91-A. Indeed, this statute predates *Laurie* and the creation of the EES.

Second, to the extent that there is any textual ambiguity (and there is none), the 1992 legislative history of RSA 105:13-b refutes Officer Doe's contention that this statute can apply outside the context of a criminal case. *See State v. Brouillette*, 166 N.H. 487, 494-95 (2014) ("Absent an ambiguity, we will not look beyond the language of the statute to discern legislative intent."). The New Hampshire Association of Chiefs of Police introduced RSA 105:13-b in 1992. The focus of the bill was to create a process—which previously had been *ad hoc*—for how police personnel file information would be disclosed to defendants in the context of criminal cases. As the police chief representing the New Hampshire Association of Chiefs of Police testified after the bill was amended, the bill

would address "potential abuse *by defense attorneys* throughout the state intent on fishing expeditions." *See* ADD 109 (LEG037 at Complete 1992 RSA 105:13-b Legislative History) (emphasis added).

Moreover, the legislature specifically rejected any notion that this statute would apply in other legal contexts, including as an exemption under Chapter 91-A. In the first paragraph of the original proposed version of RSA 105:13-b, the bill contained a sentence stating, in part, that "the contents of any personnel file on a police officer shall be confidential and shall not be treated as a public record pursuant to RSA 91-A." ADD 76 (LEG004 at Complete 1992 RSA 105:13-b Legislative History). In January 14, 1992 testimony before the House Judiciary Committee, the Union Leader Corporation objected to this blanket exclusion:

> This morning we are discussing a bill that would not reinforce the existing protection of the privacy of New Hampshire's police, but instead would give them extraordinary status as men and women above the laws that apply to others. It would establish our police as a special class of public servants who are less accountable than any other municipal employees to the taxpayers and common citizens of our state. It would arbitrarily strip our judges of their powers to release information that is clearly in the public benefit. It would keep citizens from learning of misconduct by a police officer …. [I]t will knock a gaping hole in the right-to-know law …. The prohibition in the first paragraph of this bill is absolute.

ADD 85-86 (LEG013-14 at Complete 1992 RSA 105:13-b Legislative History).

Following this objection, the legislature amended the bill to delete this categorical exemption for police personnel files under Chapter 91-A. ADD 87 (LEG015). With this amendment, the title of the bill was changed to make clear that the bill only applied "to the confidentiality of police personnel files *in criminal cases*." *Id.* (emphasis added); *see also* ADD 98, 100, 101, 102, 103, 106, 107 (LEG026, 28, 29, 30, 31, 34, 35). The amended analysis of the bill similarly explained that the "bill permits the personnel file *of a police officer serving as a witness or prosecutor in a criminal case* to be opened for purposes of that case under certain conditions." ADD 88, 99, 100, 102, 106 (LEG016, 27, 28, 30, 34) (emphasis added). The amendment to delete the Chapter 91-A exemption was apparently a compromise that involved the support of multiple stakeholders, including the Union

Leader Corporation that opposed the original bill. ADD 112 (at LEG040, noting support of stakeholders for amended version); *see also* ADD 109 (at LEG037, Police Chiefs Association representative acknowledging, following the amendment, that "[f]rankly, I would like to see an absolute prohibition [on disclosure of police personnel files], but since I realized the tooth fairy died some time ago, that is not going to happen"). The legislature's amendment establishes that the legislature never intended RSA 105:13-b to apply to other legal contexts, and instead intended to limit its reach to criminal cases.

II. As Alleged, Officer Doe Received Adequate Procedural Due Process Where He Was Given an Opportunity to Contest the Underlying Finding of Misconduct and Was Given an Opportunity to Contest Placement on the Exculpatory Evidence Schedule.

Notwithstanding the provisions of RSA 105:13-b, Officer Doe does have a separate right to seek a declaration under RSA 491:22 that his procedural due process rights were violated under Part I, Article 15 of the New Hampshire Constitution. *See Gantert v. City of Rochester*, 168 N.H. 640 (2016) (addressing procedural due process claim in seeking removal from EES); *Duchesne v. Hillsborough Cty. Att'y*, 167 N.H. 774 (2015) (same). However, based on the allegations in the Petition, Officer Doe received sufficient procedural due process in this case, and simply chose not to robustly challenge the allegation of misconduct or placement on the EES.

Part I, Article 15 provides that "[n]o subject shall be … deprived of his property, immunities, or privileges … or deprived of his life, liberty, or estate … but by the law of the land." N.H. Const. pt. I, art. 15. This Court has held that "law of the land" means due process of law. *State v. Veale*, 158 N.H. 632, 636 (2009). This Court engages in a two-part analysis in addressing procedural due process claims: first, it determines whether the individual has an interest that entitles him or her to due process protection; and second, if such an interest exists, it determines what process is due. *Id.* at 637-39. "The ultimate standard for judging a due process claim is the notion of fundamental fairness." *Saviano v. Director, N.H. Div. of Motor Vehicles*, 151 N.H. 315, 320 (2004). *Amici* assume that Officer Doe has a legally-protected interest entitling him to due process protection concerning

placement on the EES. *See Duchesne*, 167 N.H. at 783 ("Although the 'Laurie List' is not available to members of the public generally, placement on the list all but guarantees that information about the officers will be disclosed to trial courts and/or defendants or their counsel any time the officers testify in a criminal case, thus potentially affecting their reputations and professional standing with those with whom they work and interact on a regular basis."). Thus, the next question of the analysis is what process is due. This Court has concluded that post-deprivation process after being placed on the EES is not required if the officer is afforded sufficient pre-deprivation process during the underlying investigation and disciplinary proceeding. As the *Gantert* Court explained in that case, there was "no need for a formalized hearing of additional process" before placement on the EES where there was an internal investigation—which the plaintiff does not allege was unfairly or improperly conducted—two layers of review within the department, an opportunity to meet with the chief, and a hearing before the police commission." *Gantert*, 168 N.H. at 650; *see also Doe*, 167 N.H. at 413-15 (holding that the application of sex offender registration requirements to a person who was convicted before the registration requirements existed did not violate procedural due process because the person was afforded due process in his criminal case).

Here, as alleged, the pre-deprivation due process provided to Officer Doe in this case was ample, both at the internal investigation phase and when he was notified of his placement on the EES (at which time he was given an opportunity to contest the placement). Because pre-deprivation notice and an opportunity to be heard were afforded to Officer Doe, post-deprivation process was not required in this case. One day after the incident, Officer Doe was informed of the allegations of misconduct concerning his prior statement as to who had written the name on the back of the jacket, was told that an internal investigation had been conducted, was interviewed and gave a statement as part of this process, and was given an opportunity to respond. Pet. ¶ 9. In other words, Officer Doe was notified of the allegation and participated in this internal investigation. *Id.*

Further, as alleged, Officer Doe was later notified of his placement on the EES and given an opportunity to contest it before the County Attorney. Pet. ¶ 11. Such notice

appears to have been provided at or around the time that this placement on the EES occurred, which was about one year after the underlying misconduct. *Id.* Officer Doe does not appear to allege that this notification belatedly occurred well after Officer Doe was formally placed on the EES. However, Officer Doe asked that his meeting with the County Attorney concerning this placement be continued because he "did not have the time" given his responsibilities as a cadet at the Police Academy. *Id.* Based on the Petition's allegations, Officer Doe effectively forewent this opportunity to contest his placement on the EES. Moreover, Officer Doe subsequently retained counsel and later contested his placement on the EES before the Respondent/Appellee Department of Justice on two separate occasions. Both requests for removal were denied. Pet. ¶¶ 12-14.

In sum, as the Superior Court correctly held, Officer Doe had two layers of pre-deprivation review—both at the investigatory stage and upon being notified of placement on the EES—thereby rendering post-deprivation review unnecessary. In at least four other similar cases, New Hampshire courts have concluded that there was no procedural due process violation. *See Gantert*, 168 N.H. at 650 (holding that the placement of plaintiff police officer on the "Laurie list" comported with due process, in part, because there was an internal investigation, two layers of review within the department, an opportunity to meet with the chief, and a hearing before the police commission before plaintiff was placed on the list); ADD 121, *Lamontagne v. Town of Derry*, No. 218-2019-cv-00338, at *4 (Rockingham Cty. Super. Ct. Apr. 27, 2020) (Schulman, J.) (concluding that officer received sufficient due process concerning placement on the EES where the officer "was given the opportunity for a due process hearing to determine factual disputes, but he expressly waived that opportunity by instead entering into a settlement agreement"); ADD 55, *Doe v. N.H. Att'y Gen.*, No. 217-2020-cv-250, at *5 (Merrimack Cty. Super. Ct. Oct. 20, 2020) (Tucker, J.) (on appeal to Supreme Court at Case No. 2020-501) (officer received procedural due process concerning placement on the EES where, in part, the officer "had an opportunity to challenge the department's disciplinary finding and elected not to do so"); ADD 67, *Doe v. N.H. D.O.J.*, No. 217-2020-cv-00216, at *11 (Merrimack Cty., Aug. 27, 2020) (Kissinger, J.) (on appeal to Supreme Court at Case No. 2020-448) (procedural

due process provided to an officer on the EES where the officer "participated in the internal investigation," "spoke with both the investigating sergeant and with the chief of police regarding the investigation," and "chose to resign instead of participating further in the internal investigation").

Despite this due process, Officer Doe asks for removal from the EES. *See* Pet., at p. 9 (Prayer for Relief B). At the outset, the relief to any procedural due process violation would be to have the employing police department provide the required process, not removal from the EES outright. Further, where there was sufficient pre-deprivation due process provided, Officer Doe's request for relief essentially asks the New Hampshire courts to permit a *de novo* second hearing to re-litigate this matter. Neither *Duchesne* nor *Gantert* stand for the proposition that a police officer gets to re-litigate misconduct leading to placement on the EES where the person already had notice and an opportunity to be heard. Here, the time for Officer Doe to have challenged this alleged misconduct and his placement on the EES was when he was informed of both events. In *Duchesne*, for example, the officer challenged the underlying finding of misconduct, which led to an unfounded finding—a finding that this Court concluded warranted removal from the EES. *See Duchesne*, 167 N.H. at 784-85 ("Given that the original allegation of excessive force has been determined to be unfounded, there is no sustained basis for the petitioners' placement on the 'Laurie List.'"). Here, unlike *Duchesne*, the finding of misconduct has not been deemed unfounded, unsustained, or otherwise "clearly … without basis." *See also Gantert*, 168 N.H. at 650 ("In *Duchesne*, we recognized that after an officer is placed on the 'Laurie List,' he may have grounds for judicial relief if the circumstances that gave rise to the placement are clearly shown to be without basis."). As alleged, Officer Doe did not attempt to reverse this finding of misconduct or timely challenge EES placement when he was notified of this placement. As one court has noted, "one who has spurned an invitation to explain himself can't complain that he has been deprived of an opportunity to be heard." *See Wozniak v. Conry*, 236 F.3d 888, 890 (7th Cir. 2001).

For these reasons, appropriate pre-deprivation process was provided in this case.

CONCLUSION

For these reasons, this Court should affirm the Superior Court's August 27, 2020 order.

Respectfully Submitted,

American Civil Liberties Union of New Hampshire,

By and through its attorneys,

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New Hampshire Association of Criminal Defense Lawyers,

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/s/ Robin Melone
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Dated: May 4, 2021

STATEMENT OF COMPLIANCE

I hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 5,052 words, which is fewer than the 9,500-word limit permitted by this Court's rules. Counsel relied upon the word count of the computer program used to prepare this brief.

/s/ Gilles Bissonnette
Gilles R. Bissonnette, Esq.

CERTIFICATE OF SERVICE

I hereby certify that a copy of forgoing was served this 4th day of May, 2021 through the electronic-filing system on all counsel of record.

/s/ Gilles Bissonnette
Gilles Bissonnette, Esq.