THE STATE OF NEW HAMPSHIRE
SUPREME COURT

No. 2020-0447

John Doe

v.

New Hampshire Attorney General

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

BRIEF FOR THE APPELLEE – NEW HAMPSHIRE ATTORNEY GENERAL

THE NEW HAMPSHIRE ATTORNEY GENERAL

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(Oral Argument Requested: 15 minutes)

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QUESTION PRESENTED

The appellant, a police officer, sued the New Hampshire Attorney General seeking removal of his name from the Exculpatory Evidence Schedule ("EES") in a three-count civil complaint filed in superior court. Count I sought *in camera* review of his police personnel file under RSA 105:13-b and a declaration that the Attorney General had violated RSA 105:13-b by including him on the EES. Count II sought preliminary and permanent injunctive and declaratory relief based on the above-referenced violation of RSA 105:13-b to effect removal of appellant's name from the EES. Count II also claims that "[t]he refusal to remove the Petitioner's name from the EES violates the United States Constitution, Amendment XIV, Section 1, which states in pertinent part that, ' . . . nor shall any State deprive any person of life, liberty or property, without due process of law . . . .'" Count III sought attorney's fees premised on the aforementioned violations of RSA 105:13-b and the Fourteenth Amendment.

The question presented is:

Taking the allegations in the verified petition as true, whether the superior court erred in dismissing the appellant's petition for failure to state a claim upon which relief could be granted. (Appellee's Addendum ("Add.") at 46-59.)

TEXT OF RELEVANT AUTHORITIES, CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

A. 105:13-b Confidentiality of Personnel Files. –

I. Exculpatory evidence in a police personnel file of a police officer who is serving as a witness in any criminal case shall be disclosed to the defendant. The duty to disclose exculpatory evidence that should have been disclosed prior to trial under this paragraph is an ongoing duty that extends beyond a finding of guilt.

II. If a determination cannot be made as to whether evidence is exculpatory, an in camera review by the court shall be required.

III. No personnel file of a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of obtaining or reviewing non-exculpatory evidence in that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case. If the judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera and make a determination as to whether it contains evidence relevant to the criminal case. Only those portions of the file which the judge determines to be relevant in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer.

Source. 1992, 45:1. 2012, 288:4, eff. June 27, 2012.

B. United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE FACTS

I. The Record on Appeal

The superior court resolved appellant's claims on a motion to dismiss. Review of the superior court's order therefore focuses on the allegations in the appellant's verified petition. The appellant departs from this standard by making factual assertions in his brief that are not contained in his verified petition and either are not supported by the record citation provided or have no supporting citation. *See, e.g.*, (Appellant's Brief at 14 (blaming the County Attorney for not getting back to him regarding an EES hearing)); *id.* at 21 (same); *id.* at 30 (same); *id.* at 33-34 (same).

The appellant has also submitted to this Court his "Discipline File," (Appellant's Sealed Appendix at 105-125)[1], which was not submitted to the superior court in that form and therefore is not part of the record on appeal. *See* Sup. Ct. R. 13(1) ("The papers and exhibits *filed and considered* in the proceedings in the trial court or administrative agency, the transcript of proceedings, if any, and the docket entries of the trial court or administrative agency shall be the record in all cases entered in the supreme court.") (emphasis added).

The only records that defense counsel is aware of that are contained in the "Discipline File" that were before the superior court were the two letters from the New Hampshire Attorney General's Office, (Appellant's Sealed Appendix at 113-14, 121-23), and an affidavit submitted by a police chief in another matter, (Appellant's Sealed Appendix at 124-25.) The

[1] The appellee makes reference solely to the Appellant's Sealed Appendix throughout. However, the citations provided should align with the same material in the Appellant's Redacted Appendix as well.

Attorney General letters were attached to the appellant's sealed objection to the appellee's motion to dismiss below, but are not reflected in the appellant's appendix as being attached to that document. *See id.* at 36-48. The superior court referenced these letters in its order. Add. 48. The affidavit was attached to appellant's motion for reconsideration and is reflected in appellant's appendix as being attached to that document. *See id.* at 92-93.

The Court should be aware of these record-related issues as it resolves this appeal.

II. Allegations in the Verified Petition

The following allegations appear in the verified petition and are taken as true for the purpose of this appeal:

On or about April 15, 2016, the appellant, a police officer, returned to the police station after completing an overnight shift. (Appellant's Sealed Appendix, Verified Pet. ¶ 7.) There, he encountered the police chief, a part-time police officer, and two other employees in the breakroom. *Id.* The police chief asked the appellant who wrote on the back of his jacket. *Id.* The appellant responded that he did not know. *Id.*

At the time, the appellant was wearing a high visibility green three-quarter length rain jacket. *Id.* ¶ 8. A specific name was written in black permanent marker on the back of the neck portion of the jacket. *Id.* The appellant had crossed out that name and had written his own last name in its place in black permanent marker. *Id.* The appellant thought the police chief was asking him who wrote the original name on the jacket and that is allegedly why the appellant responded that he did not know. *Id.*

The following day, the appellant was working a day shift when his supervisor, a lieutenant, approached him. *Id.* ¶ 9. The lieutenant informed the appellant that he had conducted an internal investigation into who wrote on the back of the appellant's rain jacket. *Id.* The lieutenant concluded that the appellant was the one that had written on the back of the jacket, and the appellant agreed with him. *Id.* The appellant was led to believe that the incident was going to result in verbal counseling, but later discovered that it had been documented in a one-page internal investigation. *Id.* It was not until sometime in February 2017 that the appellant became aware that his informal discussion with the lieutenant had turned into a documented internal investigation. *Id.*

In March 2017, the appellant took a full-time police officer job with another police department. *Id.* ¶ 10. On or about April 27, 2017, the appellant received a letter from the County Attorney's Office in the county where he had previously worked. *Id.* ¶ 11. The letter stated, in part, that the appellant's former police department had forwarded personnel file conduct information to the County Attorney's attention, the County Attorney had reviewed it, and the County Attorney considered one matter to be related to credibility and thus needed to be disclosed as exculpatory evidence. *Id.* This was the first time the appellant had learned that his name had been submitted for inclusion on the EES. *Id.* The County Attorney afforded the appellant an opportunity to contest the exculpatory evidence determination. *Id.* ¶ 13. At the time, the appellant was in the full-time police academy and did not have the time to make an argument against being included on the EES. *Id.* ¶ 11.

After the appellant graduated from the New Hampshire Police Academy, he retained an attorney in Spring 2018 to assist him in trying to get his name removed from the EES. *Id.* ¶ 12. The appellant's attorney received a letter from the New Hampshire Attorney General's Office stating that the records had indicated "that an investigation into the incident involving [the appellant's misconduct] had occurred, that the [appellant] admitted to the misconduct and as a result was counseled about it, and that the county attorney notified him that the misconduct was exculpatory in nature and afforded him the opportunity to contest that determination." *Id.* ¶ 13. The letter from the New Hampshire Attorney General's Office went on to say, "In light of the above, I consider the county attorney's communications with this office, including providing the documents just described, notification that [appellant's] name is appropriately subject to inclusion on the EES." *Id.*

On or about March 25, 2019, the appellant requested for a second time that the New Hampshire Attorney General's Office remove his name from the EES. *Id.* ¶ 14. On March 28, 2019, the appellant received a letter from the New Hampshire Attorney General's Office restating its earlier position and informing the appellant of the limited circumstances under which a name could be removed from the EES. *Id.*

On November 4, 2019, the police chief who asked the appellant who wrote on the back of the appellant's jacket provided an affidavit for the appellant. *Id.* ¶ 15. That affidavit states that the police chief conducted an informal internal investigation into the incident and that he concluded that the appellant had written on the back of the jacket. *Id.* He allegedly concluded the investigation with a sustained finding that the appellant had

damaged the jacket, but stated that the appellant's integrity was never part of the investigation. *Id.* The police chief alleged that he never submitted the appellant's name for inclusion on the EES, but believes someone else did after the police chief resigned in September 2017. *Id.* The police chief surmised that the appellant was a victim of office politics and that the appellant's name was submitted for inclusion on the EES as a form of retaliation. *Id.*

STATEMENT OF CASE

The appellant filed his verified petition initiating this action on March 27, 2020 and simultaneously moved to seal the entire case. (Appellant's Sealed Appendix at 1-20.) The superior court granted the motion to seal prior to the appellee appearing in the case. *Id.* at 18. The appellee was served with the action on April 6, 2020. *Id.* at 21.

On May 4, 2020, the appellee filed a motion to dismiss arguing that: (i) the appellant could not independently invoke RSA 105:13-b in a civil case; (ii) the verified petition failed to state a viable Fourteenth Amendment claim; and (iii) appellant's damages claim failed to state a claim. (Appellant's Sealed Appendix at 24-35.) On May 12, 2020, the appellee objected to the appellant's motion for preliminary injunction largely for the same reasons stated in his motion to dismiss. *Id.* at 49-51.

On May 14, 2020, the appellant filed an objection to the appellee's motion to dismiss. *Id.* at 36-48. The objection was noteworthy in at least two respects. First, it relied almost exclusively on this Court's decisions in *Duchesne v. Hillsborough County Attorney*, 167 N.H. 774 (2015) and *Gantert v. City of Rochester*, 168 N.H. 640 (2016), to support appellant's Fourteenth Amendment procedural due process claim. (Appellant's Sealed Appendix at 41-43.) Second, it conceded that the appellant was "not seeking removal from the EES under the theory that his pre-deprivation procedural due process ha[d] been violated." *Id.* at 41; *see id.* (explaining that appellant "is not disputing that he had a pre-deprivation opportunity, he is looking to avail himself of the post-deprivation mechanism that was

made available in the *Gantert* case in order to seek removal from the EES").

On May 15, 2020, a telephonic temporary hearing was held in the matter. *Id.* at 22. Following the hearing, the superior court entered an order narrowing its prior sealing order and directing the parties to file redacted versions of the pleadings and motions already filed. *Id.* at 23. The superior court further ordered that the parties create public and non-public versions of filings. *Id.* The superior court also set a hearing on the motion to dismiss and request for preliminary injunction for June 24, 2020. *Id.*

On May 29, 2020, the appellee filed his reply to the appellant's objection to the motion to dismiss. *Id.* at 54-75. In it, appellee pointed out, *inter alia*, that this Court's decisions in *Duchesne***Error! Bookmark not defined.** and *Gantert* interpreted Part I, Article 15 of the New Hampshire Constitution, which is more protective than the Fourteenth Amendment, and that the appellant had failed to assert a claim under Part I, Article 15 in his verified petition. *Id.* 56-57. The appellee also explained that "neither *Gantert* nor *Duchesne* holds that an individual who chooses not to pursue the pre-deprivation process available to him is entitled to a second round of procedural due process through the judicial system simply because he is dissatisfied with the results of that choice." *Id.* at 57.

At the June 24, 2020 hearing, the parties argued the motion to dismiss. The superior court granted the appellee's motion to dismiss on August 27, 2020. (Add. 59.) The appellant timely moved for reconsideration. (Appellant's Sealed Appendix at 77-95.) The appellee objected. (Add. 60-63.) On September 25, 2020, the clerk's notice of decision issued showing that the superior court had denied the motion for

reconsideration on September 23, 2020. (Appellant's Sealed Appendix at 96.) This appeal followed.

SUMMARY OF THE ARGUMENT

Generously construed, the verified petition (Appellant's Sealed Appendix at 3-12) contains two claims. Counts I and II seek declaratory and injunctive relief under RSA 105:13-b. *Id.* at 8-10. They request that the superior court review certain personnel file information *in camera* and declare whether it is in fact exculpatory in all future criminal cases. *Id.* Following such an order, they seek injunctive relief to have the appellant's name removed from the EES. *Id.* Count II also alleges that the failure to remove the appellant's name from the EES violates the Fourteenth Amendment to the United States Constitution. *Id.* at 10. The superior court correctly dismissed these counts for failure to state a viable claim for relief for at least the following reasons.

First, RSA 105:13-b's *in camera* review procedures do not apply outside the context of a particular criminal case in which a police officer is serving as a witness. RSA 105:13-b therefore cannot be independently invoked by a police officer in a civil action to have the superior court declare whether certain information in the officer's personnel file is in fact exculpatory in any and all potential future criminal cases. Such an order would be quintessentially advisory and therefore beyond the jurisdiction of the superior court to enter. *See, e.g.*, *Timberlane Reg. Ed. Ass'n v. State*, 115 N.H. 77, 79 (1975) (explaining that an opinion by the court on a regulation not in existence "would serve no useful purpose"); *Piper v. Town of Meredith*, 109 N.H. 328, 329-30 (1969) (explaining that opinion on ordinance not yet enacted was advisory and beyond the jurisdiction of the superior court to enter).

Second, the appellant's verified petition fails to state a viable claim under the Fourteenth Amendment. It does not specify whether that claim is procedural or substantive and, regardless, fails to plead facts sufficient to show either a procedural or substantive Fourteenth Amendment violation under the applicable federal tests.

Third, the appellant's verified petition manifestly does not state a claim for violation of the New Hampshire Constitution. The verified petition does not mention the New Hampshire Constitution anywhere and does not seek relief under it. However, even if the appellant's verified petition had raised a violation of the New Hampshire Constitution (and if we further assume the violation raised would have been of Part I, Article 15 of the New Hampshire Constitution), the appellant's verified petition still fails to state a viable claim for relief. The appellant admitted below that he received pre-deprivation due process and was only seeking in this action the post-deprivation process he alleges was made available in this Court's decisions in *Duchesne* and *Gantert*. (Appellant's Sealed Appendix at 41-43.) That process, however, requires an officer to come to superior court with a decision or order either exonerating him or otherwise overturning the conduct which resulted in the officer being placed on the EES. The appellant did not come to superior court with such an order. Instead, the appellant came to superior court *seeking* such an order in the first instance because he failed to take advantage of the pre-deprivation process available to him. The superior court therefore correctly concluded that the appellant did not state a violation of procedural due process under either Part I, Article 15 of the New Hampshire Constitutions or the Fourteenth Amendment of the United States Constitution.

Finally, having dismissed Counts I and II for failure to state viable claims for relief, the superior court concluded that the request for attorney's fees in Count III of the verified petition did not save the action and therefore correctly dismissed the entire case. (Add. at 59.) Accordingly, for the reasons stated above and explained more fully below, the superior court's order dismissing this case should be affirmed.

STANDARD OF REVIEW

In reviewing a motion to dismiss, the standard of review is "whether the allegations in the plaintiffs' pleadings are reasonably susceptible of a construction that would permit recovery." *Automated Transactions, LLC v. Am. Bankers Assoc.*, 172 N.H. 528, 532 (2019). The Court "assume[s] the plaintiffs' pleadings to be true and construe[s] all reasonable inferences in the light most favorable to the plaintiffs," but does not "assume the truth of statements that are merely conclusions of law." *Id.* The Court then "engage[s] in a threshold inquiry that tests the facts in the complaint against the applicable law" to determine "if the allegations constitute a basis for legal relief." *Id.*

ARGUMENT

I. A POLICE OFFICER MAY NOT INVOKE RSA 105:13-b IN A CIVIL ACTION FOR A DETERMINATION REGARDING WHETHER HIS PERSONNEL FILE CONTAINS EXCULPATORY INFORMATION.

Counts I and II of the appellant's verified petition are premised almost entirely on the theory that a police officer may invoke RSA 105:13-b in a civil action to have the superior court review certain information in his police personnel file *in camera* and, based on that review alone, determine whether that information would in fact be exculpatory in any and all future criminal proceeding. (Appellant's Sealed Appendix at 8-10.) The superior court correctly dismissed those claims for failure to state a claim.

Confirming this result requires an examination of "the language found in the statute," RSA 105:13-b, with a focus on "the plain and ordinary meanings" of the words used. *Krainewood Shores Assoc., Inc. v. Town of Moultonborough*, __ N.H. __, 2021 WL 787081, at *2 (2021). The Court "construe[s] all parts of a statute together to effectuate its overall purpose and avoid an absurd or unjust result." *Id.* "If the language of a statute is plain and unambiguous, [the Court] need not look beyond it for further indication of legislative intent." *Id.* "However, if the language is ambiguous or subject to more than one reasonable interpretation, [the Court] will examine legislative history." *Id.*

RSA 105:13-b appears in Title VII of the New Hampshire statutes, which is titled "Sheriffs, Constables, and Police Officers." RSA chapter 105 relates specifically to "Police Officers and Watchmen." It governs the appointment and employment of police chiefs, police officers, and

watchmen and establishes their powers and duties. RSA 105:1-:19. It contains RSA 105:13-b, which governs the confidentiality of police personnel files. RSA 105:13-b provides in full as follows:

> I. Exculpatory evidence in a police personnel file of a police officer who is serving as a witness in any criminal case shall be disclosed to the defendant. The duty to disclose exculpatory evidence that should have been disclosed prior to trial under this paragraph is an ongoing duty that extends beyond a finding of guilt.
> II. If a determination cannot be made as to whether evidence is exculpatory, an in camera review by the court shall be required.
> III. No personnel file of a police officer who is serving as a witness or prosecutor in a criminal case shall be opened for the purposes of obtaining or reviewing non-exculpatory evidence in that criminal case, unless the sitting judge makes a specific ruling that probable cause exists to believe that the file contains evidence relevant to that criminal case. If the judge rules that probable cause exists, the judge shall order the police department employing the officer to deliver the file to the judge. The judge shall examine the file in camera and make a determination as to whether it contains evidence relevant to the criminal case. Only those portions of the file which the judge determines to be relevant in the case shall be released to be used as evidence in accordance with all applicable rules regarding evidence in criminal cases. The remainder of the file shall be treated as confidential and shall be returned to the police department employing the officer.

By its express, unambiguous terms, RSA 105:13-b provides for disclosure of police personnel files only in the context of a specific "criminal case" in which a police officer is "serving as a witness." RSA 105:13-b, I. As this Court has previously explained, RSA 105:13-b "addresses three situations that may exist with respect to police officers

who appear as witnesses in criminal cases." *Duchesne*, 167 N.H. at 781. "First, insofar as the personnel files of such officers contain exculpatory evidence, paragraph I requires that such information be disclosed to the defendant." *Id.* The "defendant" referenced in RSA 105:13-b, I is the "defendant" in the particular criminal case in which the police officer is serving as a witness.

"Next, paragraph II covers situations in which there is uncertainty as to whether evidence contained within police personnel files is, in fact, exculpatory." *Duchesne*, 167 N.H. at 781. It applies when those undertaking an exculpatory evidence review under paragraph I are not sure whether certain personnel file information is exculpatory in the context of a particular criminal case. In that circumstance, the statute requires "the evidence at issue . . . be submitted to the court for *in camera* review." *Id.* The "court" referenced in RSA 105:13-b, II is the "court" before which the criminal matter in which the police officer will be serving as a witness is pending.

"Finally, paragraph III covers evidence that is non-exculpatory but may nonetheless be relevant to a case in which an officer is a witness." *Id.* at 782. "[T]his paragraph prohibits the opening of a police personnel file to examine the same for non-exculpatory evidence unless the trial court makes a specific finding that probable cause exists to believe that the file contains evidence relevant to the particular criminal case." *Id.* "If the judge does make such a finding, the judge is then directed to review the file *in camera* and order the release of only those portions of the file which are relevant to the case." *Id.* "The remainder of the file must be treated as confidential and returned to the police department which employs the officer." *Id.*

As the superior court correctly concluded, "the procedure outlined under RSA 105:13-b clearly applies only when a police officer is 'serving as a witness in any criminal case,'" (Add. 52 (quoting *Duchesne*, 167 N.H. at 781)), and is not privately enforceable by a police officer in a civil action. *Id.* at 8; *see Duchesne*, 167 N.H. at 780 (explaining that RSA 105:13-b was "designed to balance the rights of criminal defendants against the countervailing interests of the police and the public in the confidentiality of officer personnel records").[2] Thus, the superior court correctly dismissed Count I in its entirety and Count II to the extent it is premised on the enforcement of RSA 105:13-b.

[2] The appellant argues that this Court in *New Hampshire Center For Public Interest Journalism v. New Hampshire Department of Justice*, __ N.H. __, 2020 WL 6372970, at *4 (Oct. 30, 2020), already determined that RSA 105:13-b can be applied outside the context of a particular criminal case when it stated that: "For the purposes of this appeal, we assume without deciding that RSA 105:13-b constitutes an exception to the Right-to-Know Law and that it applies outside of a specific criminal case in which a police officer is testifying." (Appellant's Brief at 24.) This argument lacks merit. The foregoing statement clearly establishes that this Court *assumed without deciding* that RSA 105:13-b "applies outside of a specific criminal case in which a police officer is testifying" for the purposes of that appeal.

II. THE VERIFIED PETITION DOES NOT STATE A CLAIM UNDER THE NEW HAMPSHIRE CONSTITUTION.

A review of the verified petition shows that it does not assert a claim under the New Hampshire Constitution. No reference is made in the verified petition to the New Hampshire Constitution or a claim being asserted under it. No citation is made in the verified petition to this Court's decisions in *Duchesne v. Hillsborough County Attorney*, 167 N.H. 774 (2015), or *Gantert v. City of Rochester*, 168 N.H. 640 (2016). Nonetheless, the superior court analyzed appellant's verified petition as if it had asserted a procedural due process claim under Part I, Article 15 of the New Hampshire Constitution because the appellant's objection to the appellee's motion to dismiss relied heavily on this Court's decisions in *Duchesne* and *Gantert*. (Add. at 54-58.)[3]

This Court should affirm the superior court's decision on the narrow ground that the verified petition manifestly fails to state a claim for relief under the New Hampshire Constitution. *See True v. Fleet Bank-NH*, 138 N.H. 679, 682 (1994) (explaining that this Court may "affirm the [lower court's] result if a valid alternative ground for it exists"); *Long v. Long*, 136 N.H. 25, 28 (1992) (same).

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[3] Because the verified petition asserts no claim under the New Hampshire Constitution, the appellee argued in reply that the appellant's reliance on *Duchesne* and *Gantert* was misplaced because those decisions involved analyses under Part I, Article 15 of the New Hampshire Constitution, which this Court has held is more protective than the Fourteenth Amendment and involves a different constitutional test than the Fourteenth Amendment when reputational harm is involved. *See State v. Veale*, 158 N.H. 632, 645 (2009) (holding "that the State Constitution is more protective [of reputational harm] than its federal counterpart").

This result comports with this Court's "'strong policy against reaching a constitutional issue in a case that can be decided on nonconstitutional grounds.'" *Anglin v. Kleeman*, 140 N.H. 257, 260 (1995) (quoting *State v. Hodgkiss*, 132 N.H. 376, 379 (1989)); *see, e.g.*, *Bach v. N.H. Dept. of Safety*, 169 N.H. 87, 91 (2016) (explaining that this Court "decide[s] cases on constitutional grounds only when necessary").

It also comports with Part II, Article 74 of the New Hampshire Constitution, which prohibits courts from "render[ing] advisory opinions to private individuals." *Duncan v. State*, 166 N.H. 630, 640 (2014). Addressing and resolving a state constitutional claim that is not contained in the operative petition is providing an advisory opinion on a legal claim that is not before the court. *See, e.g.*, *Timberlane Reg. Ed. Ass'n*, 115 N.H. at 79 (explaining that an opinion by the court on a regulation not in existence "would serve no useful purpose"); *Piper*, 109 N.H. at 329-30 (explaining that opinion on ordinance not yet enacted was advisory and beyond the jurisdiction of the superior court to enter).

Accordingly, the superior court's decision should be affirmed on this narrow ground.

III. THE VERIFIED PETITION DOES NOT STATE A CLAIM UNDER THE FOURTEENTH AMENDMENT.

The superior court afforded the appellant's verified petition an overly generous interpretation in resolving whether it stated a viable claim under the Fourteenth Amendment. The Fourteenth Amendment is mentioned only twice in the verified petition: once in the allegations; once in the prayer for relief. The allegation states in full: "The refusal to remove the Petitioner's name from the EES violates the United States Constitution, Amendment XIV, Section 1, which states in pertinent part that, ' . . . nor shall any State deprive any person of life, liberty or property, without due process of law . . . .'" (Appellant's Sealed Appendix at 10.) The prayer for relief adds nothing further. *Id.*, Prayer E. The verified petition does not allege how the "refusal to remove" appellant's name from the EES violates the Fourteenth Amendment, either procedurally or substantively, under the relevant federal tests, nor does it make any attempt to plead allegations sufficient to meet those federal tests. For this reason alone, the superior court's decision dismissing any Fourteenth Amendment claims from this case should be affirmed. *See, e.g.*, *True*, 138 N.H. at 682; *Long*, 136 N.H. at 28.

Nonetheless, even if this Court were inclined to go further, any Fourteenth Amendment claim still fails. To state a viable claim under the Fourteenth Amendment for damage to one's reputation a plaintiff must meet the so-called "stigma-plus" test. *Paul v. David*, 424 U.S. 693 (1976); *see State v. Veale*, 158 N.H. 632, 637 (2009) (explaining that *Paul v. Davis* created what would later become known as the "stigma plus" test). Under that test, damage to one's reputation alone is not "by itself sufficient to

invoke the procedural protection of the Due Process Clause." *Paul*, 424 U.S. at 701. To state a claim under this test, a plaintiff must allege "(1) utterance of a statement about h[im] that is injurious to h[is] reputation, 'that is capable of being proved false, and that he . . . claims is false,' and (2) 'some tangible and material state-imposed burden . . . in addition to the stigmatizing statement.'" *Velez v. Levy*, 401 F.3d 75, 87 (2d Cir. 2005) (quoting *Doe v. Dept. of Pub. Safety ex rel. Lee*, 271 F.3d 38, 47 (2d Cir. 2001)).

"The defamatory statement must be sufficiently public to create or threaten a stigma; hence, a statement made only to the plaintiff, and only in private, ordinarily does not implicate a liberty interest." *Id.* "Similarly, because '[a] free-standing defamatory statement ... is not a constitutional deprivation,' but is instead 'properly viewed as a state tort of defamation,' the 'plus' imposed by the defendant must be a specific and adverse action clearly restricting the plaintiff's liberty—for example, the loss of employment or the termination or alteration of some other legal right or status." *Velez*, 401 F.3d at 87-88 (quoting *Donato v. Plainview-Old Bethpage Cent. Sch. Dist.*, 96 F.3d 623, 631-32 (2d Cir. 1996) and *Nue v. Corcoran*, 869 F.2d 662, 667 (2d Cir. 1989)). And where the stigmatizing statement does not originate from the same state actor who imposes the 'plus,' questions arise as to the viability of the claim. *See, e.g.*, *URI Student Senate v. Town of Narragansett*, 631 F.3d 1, 10 (1st Cir. 2011) ("Where the stigma and the incremental harm—the "plus" factor—derive from distinct sources, a party cannot make out a viable procedural due process claim."); *Hawkins v. R.I. Lottery Comm'n*, 238 F.3d 112, 116 (1st Cir. 2001) (holding that no viable due process claim stated under stigma-plus test

where "the party responsible for the alleged defamation was not the party responsible for the termination").

The appellant's verified petition does not plead facts capable of meeting this test. Among other things, it does not allege that the act of placing appellant's name on the EES amounts to defamation, and it is difficult to see how it could. *See Gantert v. City of Rochester*, 168 N.H. 640, 649 (2016) (explaining that one of the important purposes of the EES is to catalog those "confidential personnel files [that] *may* contain exculpatory information"). It also does not allege that appellant's placement on the EES is "sufficiently public" to create or threaten the type of stigma with which federal law is concerned. *See N.H. Ctr. For Public Interest Journalism v. N.H. Dept. of Justice*, __ N.H. __, 2020 WL 6372970, at *7 (Oct. 30, 2020) (remanding case for the superior court to decide whether disclosure of police officer identities on the EES would constitute an invasion of privacy and therefore result in their proper withholding under RSA chapter 91-A). It also fails to allege any "plus" from any source and, thus, also fails to allege the requisite connection between the "stigma" and the "plus" that federal law requires.

As to a Fourteenth Amendment substantive due process claim, the appellant had the obligation to plead the deprivation of a protected life, liberty, or property interest *and* conduct that was "so egregious as to shock the conscience" *Pagan v. Calderon*, 448 F.3d 16, 32 (1st Cir. 2006). As the superior court correctly observed, the appellant's verified petition fails to plead adequately either element. (Add. 58-59.)

Accordingly, the superior court's dismissal of any Fourteenth Amendment claim present in this case should be affirmed.

IV. THE VERIFIED PETITION FAILS TO STATE A VIABLE PROCEDURAL DUE PROCESS CLAIM UNDER EITHER THE NEW HAMPSHIRE CONSTITUTION OR THE FOURTEENTH AMENDMENT.

If the Court is inclined to reach the constitutional procedural due process issues the superior court resolved, it should affirm the superior court because the appellant's allegations reveal that he received sufficient procedural due process to justify his placement on the EES and his due process rights were not otherwise violated.

Whether the appellant received adequate procedural due process involves a two-part inquiry. *Gantert*, 168 N.H. at 647. First, the Court determines whether the plaintiff has an interest that entitles him or her to procedural due process protection. *Id.* If so, the Court determines what process is due. *Id.* In making this determination, the Court balances three factors: "(1) the private interest that is affected; (2) the risk of erroneous deprivation of that interest through the procedure used and the probable value of any additional or substitute procedural safeguards; and (3) the government's interest, including the fiscal and administrative burdens resulting from additional procedural requirements." *Id.* at 647-48.

Under the New Hampshire Constitution, the appellant has a constitutionally protected interest in his continued employment as a police officer and his professional reputation. *Id.* at 648; *Duchesne*, 167 N.H. at 782-83. On the other hand, "the government has a great interest in placing on the [EES] officers whose confidential personnel files *may* contain exculpatory information." *Gantert*, 168 N.H. at 649 (emphasis added). Keeping track of this information helps to protect the constitutional rights

of criminal defendants, ensures the integrity of pending criminal proceedings, and helps ensure that criminal convictions are not subsequently reversed due to *Laurie*/*Brady* violations. Balancing these interests, while assuming the truth of the allegations contained in the verified petition, reveals that the appellant received sufficient procedural due process.

The appellant did not argue below that he was deprived of pre-deprivation due process. (Appellant's Sealed Appendix at 41.) In fact, the appellant conceded below that he received pre-deprivation procedural due process. *Id.* Instead, relying on *Gantert*, the appellant asserted that he was entitled to additional post-deprivation process after being placed on the EES. *Id.* However, as the superior court correctly observed, additional process is not required if the officer has already been afforded sufficient pre-deprivation process during the underlying investigation and disciplinary proceeding. (Add. 55); *see Gantert*, 168 N.H. at 649-50.

In this case, the verified petition reveals sufficient procedural due process occurred to justify the appellant's placement on the EES. The police chief asked the appellant who wrote on his rain jacket. The appellant replied that he did not know. The next day the lieutenant informed the appellant he was conducting an internal investigation into who wrote on the jacket and determined it was the appellant who did so. The appellant had an opportunity to address that allegation directly to the investigating lieutenant and admitted to writing on the jacket. The incident resulted in a verbal counseling that the appellant did not challenge. The appellant later discovered that the incident had resulted in a documented one-page report being placed in his personnel file in February 2017. The appellant did not

seek to challenge that report in any way upon learning about it. In April 2017, the County Attorney contacted the appellant about that information, informed the appellant that the information appeared to be exculpatory because it implicated his credibility, and offered the appellant an opportunity to contest that determination. The appellant admits he did not have time to contest the determination and therefore chose to forego that opportunity. (Appellant's Sealed Appendix at 5-6, Verified Pet. ¶ 11.)[4]

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[4] In his brief, the appellant attempts to tell a different story that is not supported by the allegations in the verified petition: "At the time, [appellant] was in the full-time police academy, and he was not able to meet with [the County Attorney] right away. He made arrangements to continue the hearing to another date, but he never heard back from [the] County Attorney . . . ." (Appellant's Brief at 14.) The citation in the appellant's brief to page 154 of appellant's appendix does not support this assertion. The appellant doubles-down on this assertion later his brief, without citation, stating that the County Attorney "agreed to continue it, but never held a hearing," *id.* at 21, and that the County Attorney "never rescheduled [the hearing], and he was subsequently placed on the EES," *id.* at 30; *see also id.* at 33-34.

These late-breaking factual assertions seeking to blame the County Attorney are not contained in the verified petition, directly or by reasonable inference, and were therefore not before the superior court. They are also not supported by any document, properly (or improperly), before this Court. The County Attorney's correspondences, which were also not before the superior court but were included in the appellant's appendix, appear to indicate that the appellant was supposed to call the County Attorney. (Appellant's Sealed Appendix at 109-10.) The letter from appellant's previous attorney seeking appellant's removal from the EES, which was not before the superior court, makes no reference to a hearing before the County Attorney. *Id.* at 111. A letter written by the appellant himself and sent to the New Hampshire Attorney General seeking his removal from the EES, which also was not before the superior court, states that the County Attorney advised him he would have to contest his potential placement on the EES. *Id.* at 119. The appellant allegedly advised the County Attorney that he "was going to the Full Time Academy within the following weeks and could not be around to attend hearings of contesting the case." *Id.* The appellant then states in the same letter: "Since I was not available to contest I was later advised that I was placed on the list." *Id.*

In short, there is no allegation or other record support for the factual contention made for the first time on appeal that the appellant had made arrangements to continue his

Thus, the appellant had notice of the allegations against him and multiple opportunities to contest them or otherwise explain his interpretation of events on or about the time of his placement on the EES. The fact that the appellant failed to avail himself of those opportunities does not negate the fact that he was provided sufficient pre-deprivation due process. *See Wozniak v. Conry*, 236 F.3d 888, 890 (7th Cir. 2001) ("One who has spurned an invitation to explain himself can't complain that he has been deprived of an opportunity to be heard.").

The appellant nonetheless argues that he is entitled to additional post-deprivation process. In his view, this additional post-deprivation process includes the opportunity to have the superior court reassess the merits of the disciplinary matter that caused him to be placed on the EES and potentially have the matter overturned. (Appellant's Brief at 31.) The appellant invokes *Duchesne* and *Gantert* as support for this proposition, but neither *Duchesne* nor *Gantert* holds that an individual who has been afforded pre-deprivation due process is entitled to a second round of due process through the judicial system simply because he is dissatisfied with the results of that choice.

In *Duchesne*, a county attorney placed the petitioners on what was then known as the "Laurie List" based on their police chief's decision to discipline them for using excessive force. 167 N.H. at 775. The petitioners invoked the process available to them under their collective bargaining agreement, had the police chief's decision overturned, but had no available

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opportunity to discuss his potential placement on the EES with the County Attorney to a different date, but never heard back from the County Attorney.

mechanism to seek removal from the Laurie List. *Id.* at 775–76. On those facts, this Court found that, "[g]iven that the original allegation of excessive force had been determined to be unfounded, there is no sustained basis for the petitioners' placement on the 'Laurie List.'" *Id.* at 784. Thus, this Court held that "the trial court unsustainably exercised its discretion in failing to order that their names be removed from said list." *Id.* at 785.

In *Gantert*, the plaintiff similarly took advantage of every level of the pre-deprivation process available to him under the applicable collective bargaining agreement to challenge a disciplinary decision that resulted in his placement on the Laurie List. 168 N.H. at 642-45. That process culminated in an arbitrator entering a finding implicating the plaintiff's honesty and integrity. *Id.* at 644. The plaintiff filed suit, arguing that he was placed on the list without proper procedural due process and should be removed. *Id.* at 645. On appeal, this Court held that the plaintiff received sufficient pre-deprivation due process, *id.* at 649-50, and that arbitrator's findings were sufficient to keep the plaintiff on the list, *id.* at 650-51. This Court also held that a separate due process procedure was not required in connection with the "'Laurie List' designation process" because "[h]aving an additional hearing to examine the same facts would serve little purpose." *Id.*[5]

[5] The appellant asserts that "he was never told that his name was going to be submitted to the EES." (Appellant's Brief at 33.) The appellant, however, does not have a right to be informed of every potential collateral consequence of admitting to engaging in conduct that implicates one's credibility as a police officer. *Cf. State v. Ortiz*, 163 N.H. 506, 510-11 (2012). And neither *Duchesne* nor *Gantert* stands for the proposition that an officer must be informed that he will be placed on the EES; they require sufficient pre-deprivation due process with respect to the underlying misconduct before an officer may be placed on the

In both *Duchesne* and *Gantert*, the plaintiff officers took advantage of the pre-deprivation process available to them, were placed on the "Laurie List" prior to that pre-deprivation process resolving, obtained final decisions after fully exhausting that pre-deprivation process, and attempted to use those final decisions in an equitable action in superior court to seek removal from the list. In *Duchesne*, the final decision from the pre-deprivation process unequivocally exonerated the officers and therefore required the superior court to order their removal from the EES. In *Gantert*, the final decision from the pre-deprivation process revealed that the plaintiff had admitted "he supplied answers on the LAP that he knew he knew he had no basis to believe were true." 168 N.H. at 650. It therefore implicated the plaintiff's honesty and integrity and, as this Court explained, was "certainly enough of a reflection on the plaintiff's general credibility to trigger at least a prosecutor's obligation to disclose such information to a court for in camera review in a case in which the plaintiff will appear as a state witness." *Id.*

In this case, the appellant concedes, and the allegations of the verified petition reveal, that he received pre-deprivation notice and opportunity to be heard on at least two occasions: first when the lieutenant questioned him, (Appellant's Sealed Appendix at 5); and second when the

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EES and provide a mechanism for removing an officer from the EES if the result of that pre-deprivation due process exonerates the officer.

Moreover, this Court's decisions in *Laurie*, *Duchesne*, and *Gantert* were decided prior to the incident in which the plaintiff was involved on or about April 15, 2016. Consequently, the appellant, as a law enforcement officer, knew, or reasonably should have known, at that time that any issues related to, or implicating, his credibility might result in him being placed on a Laurie List.

County Attorney invited him to explain why the information at issue was not exculpatory or did not otherwise go to his credibility, *id.* at 5-6, ¶¶ 11, 13.[6] Unlike the plaintiffs in *Duchesne* and *Gantert* who took advantage of the pre-deprivation process available to them and exhausted it, the appellant did not take advantage of the pre-deprivation process available to him. The appellant does not allege that he provided his present explanation for his conduct to the police chief or the investigating lieutenant during the investigation of the matter. He does not allege that he timely challenged the investigating lieutenant's conclusions as inaccurate. He does not allege that he timely challenged the one-page internal investigative report as inaccurate upon learning of it in February 2017. And he admits that he was too busy to provide his present explanation to the County Attorney in April 2017 when the County Attorney contacted him and expressly invited him to provide it. *Id.* at 5-6, ¶¶ 11, 13.

No fair reading of *Duchesne* or *Gantert* supports the proposition that, despite these choices, Part I, Article 15 of the New Hampshire Constitution or the Fourteenth Amendment requires that the appellant be provided an additional opportunity to contest the factual basis for his placement on the EES in superior court approximately three-years later. The appellant does not cite, and defense counsel are unaware of, any New Hampshire Supreme Court decision that supports that proposition. Rather, as the superior court correctly concluded, the appellant was afforded sufficient pre-deprivation due process that did not result in a finding

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[6] Arguably, he had a third opportunity when the police chief first confronted the appellant about the writing on the jacket.

crediting his present explanation or otherwise exonerating him and entitling him to removal from the EES. (Add. 54-58.)

Finally, the appellant asserts that the superior court erred in failing to examine the underlying facts of the case to determine if the conduct he admitted to, and the discipline taken against him as a result, should have been overturned. (Appellant's Brief at 30-31.) This argument lacks merit for the reasons already stated above. The appellant had notice of the allegations against him and multiple opportunities to be heard, to explain himself, or otherwise to contest the findings against him at the time it mattered most.

Accordingly, if the Court is inclined to reach the state and federal procedural due process issues, the superior court's decision with respect to it should be affirmed.[7]

[7] To the extent the appellant purports to premise any portion of this appeal on Part I, Article 14 of the New Hampshire Constitution, he neither briefs any cognizable argument under that constitutional provision nor did he ever raise an argument regarding that constitutional provision below. Appellant's Brief, at 7, Question Presented #6.

V. THE SUPERIOR COURT DID NOT ERR WHEN IT DETERMINED THAT THE QUESTION OF WHETHER CERTAIN INFORMATION IN A POLICE PERSONNEL FILE IS, IN FACT, EXCULPATORY CANNOT BE DETERMINED OUTSIDE THE FACTS OR CIRCUMSTANCES OF A PARTICULAR CRIMINAL CASE.

In resisting the appellee's motion to dismiss, the appellant invited the superior court to utilize RSA 105:13-b more broadly as a guiding framework to determine whether the conduct that caused the appellant to be on the EES was, in fact, exculpatory. The superior court rejected this argument as follows:

> Nor does [RSA 105:13-b]—despite the plaintiff's assertions to the contrary—provide this Court with a framework to determine in the abstract whether the conduct that caused the plaintiff to be on the EES is exculpatory. As the plaintiff himself concedes, 'evidence could be exculpatory in some cases, all cases, or never . . . .' (Pl.'s Obj. Mot. Dismiss ¶ 11.) Consequently, this Court cannot determine as a matter of law whether evidence in the plaintiff's personnel record is exculpatory outside the facts or circumstances of a particular criminal case.

(Add. at 53.) The superior court's analysis is correct and should be affirmed.

A court cannot evaluate whether particular conduct or information similar to the conduct and information at issue in this case constitutes exculpatory evidence favorable to the accused under *Brady v. Maryland*, 373 U.S. 83 (1963) and *State v. Laurie*, 139 N.H. 325 (1995), in the abstract, outside of a pending criminal matter, as to any and all future criminal cases. Under these authorities, "in a criminal case, the State is obligated to disclose information favorable to the defendant that is material to either guilt or punishment." *Duchesne*, 167 N.H. at 777. "This obligation

arises from a defendant's constitutional right to due process of law, and aims to ensure that defendants receive fair trials." *Id.* "The duty to disclose encompasses both exculpatory information and information that may be used to impeach the State's witnesses and applies whether or not the defendant requests the information." *Id.* (internal citations omitted). "'Essential fairness, rather than the ability of counsel to ferret out concealed information, underlies the duty to disclose.'" *Id.* (quoting *Laurie*, 139 N.H. at 329).

"The duty of disclosure falls on the prosecution and is not satisfied merely because the particular prosecutor assigned to a case is unaware of the existence of the exculpatory information." *Id.* at 778 (internal citations omitted). The Court "impute[s] knowledge among prosecutors in the same office" and holds them "responsible for at least the information possessed by certain government agencies, such as police departments or other regulatory authorities, that are involved in the matter that gives rise to the prosecution." *Id.* (internal citations omitted). "This in turn means that the individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police." *Id.* (quoting *Kyles v. Whitley,* 514 U.S. 419, 437 (1995)).

"The prosecutor's constitutional duty of disclosure extends only to information that is material to guilt or to punishment." *Id.* "'Favorable evidence is material under the federal standard only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Id.* (quoting *Laurie*, 139 N.H. at 328). However, "the New Hampshire

Constitution affords defendants greater protection than the federal standard." *Id.* Under the New Hampshire Constitution, "'[u]pon a showing by the defendant that favorable, exculpatory evidence has been knowingly withheld by the prosecution, the burden shifts to the State to prove beyond a reasonable doubt that the undisclosed evidence would not have affected the verdict.'" *Id.* (quoting *Laurie*, 139 N.H. at 330).

Against these precedents, the conduct and information in this case may reveal that the appellant did not tell the truth in the context of an investigation into his conduct or, according to the appellant, it may reveal a misunderstanding. Thus, taking the allegations in the verified petition as true, the information in appellant's personnel file *may be exculpatory* as it relates to the appellant's credibility, which is sufficient to trigger the appellant's inclusion on the EES. *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.") (emphasis added). Whether that information is, in fact, exculpatory in a future criminal case is then determined at some point in the future in accordance with RSA 105:13-b.

A declaration sought in a civil case by a police officer that specific information in a police personnel file or certain conduct in which that officer has engaged is not, in fact, exculpatory in all potential future criminal cases amounts to an advisory opinion. As the appellant himself recognized below, such information or conduct "could be exculpatory in some cases, all cases, or never," (Add. 53), and any one of those findings by one court would not bind a future court in another criminal proceeding from determining that the same information or conduct is, in fact,

exculpatory and in need of disclosure to the defendant. Such a declaration would therefore amount to nothing more than advisory legal advice about exculpatory evidence issues in future criminal cases that may never arise in violation of Part II, Article 74 of the New Hampshire Constitution. *See Piper*, 109 N.H. at 330 ("The Superior Court has no jurisdiction to give advisory opinions. The ruling that if the ordinance were enacted it would be invalid was not within the jurisdiction of the Superior Court . . . .").

This Court has recognized a single circumstance in which a police officer may bring an equitable action in superior court seeking removal from the EES: "if the circumstances that gave rise to the placement are clearly shown to be without basis." *Gantert*, 168 N.H. at 650. The appellant did not come to the superior court with a decision or order purporting to show that the circumstances that gave rise to his placement on the list are clearly without basis like the officers did in *Duchesne* and *Gantert*. The appellant has instead come to the superior court *seeking* such a decision or order in the first place because he failed to pursue and exhaust the pre-deprivation due process opportunities afforded to him. He therefore requests that the superior court issue such an order in a traditional civil action following an *in camera* review of his personnel file, instead of after a robust adversarial discovery process and subsequent merits hearing. In short, the process the appellant seeks has no grounding in *Duchesne* or *Gantert*, in modern notions of procedural due process, or in the traditional civil litigation process one must proceed through to obtain the type of declaratory and equitable relief the appellant seeks.

CONCLUSION

The superior court correctly held that a police officer cannot invoke RSA 105:13-b in a civil action to declare whether certain information in a police personnel file is, in fact, exculpatory in all future criminal cases. The superior court also correctly concluded that appellant's verified petition failed to state viable claims for procedural due process under the New Hampshire Constitution and the Fourteenth Amendment of the United States Constitution and failed to state a viable substantive due process claim under the Fourteenth Amendment. Finally, the superior court correctly concluded that it could not determine as a matter of law whether the information in the appellant's personnel file is in fact exculpatory in all potential future criminal cases. Accordingly, the superior court correctly dismissed this action for failure to state a claim upon which relief could be granted. The superior court's decision should therefore be affirmed.

REQUEST FOR ORAL ARGUMENT

The appellee requests a 15-minute oral argument to be presented by Anthony J. Galdieri, Esq.

Respectfully Submitted,

THE NEW HAMPSHIRE ATTORNEY GENERAL

By Its Attorneys,

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May 4, 2021

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CERTIFICATE OF COMPLIANCE

I, Anthony J. Galdieri, hereby certify that pursuant to Rule 16(11) of the New Hampshire Supreme Court Rules, this brief contains approximately 8,908 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.

May 4, 2021 /s/ *Anthony J. Galdieri*
Anthony J. Galdieri

CERTIFICATE OF SERVICE

I, Anthony J. Galdieri, hereby certify that a copy of the State's brief shall be served on Marc G. Beaudoin, Jr., Esquire and John S. Krupski, Esquire, counsel for John Doe, through the New Hampshire Supreme Court's electronic filing system.

May 4, 2021 /s/ *Anthony J. Galdieri*
Anthony J. Galdieri