THE STATE OF NEW HAMPSHIRE
SUPREME COURT

FEBRUARY SESSION
2021 TERM

No. 2020-0454

Jane Doe v. Lori Shibinette, Commissioner New Hampshire Department of Health and Human Services

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BRIEF FOR THE PLAINTIFF-APPELLEE

Mandatory Appeal Pursuant to Rule 7
from the Merrimack County Superior Court

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(15 Minutes Oral Argument)

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QUESTION PRESENTED

I. Whether the superior court properly granted Ms. Doe's petition for a writ of habeas corpus when the Commissioner failed to arrange for her immediate delivery to a receiving facility upon completion of the involuntary emergency admission certificate and when the circuit court failed to conduct a probable cause hearing within three days of Ms. Doe's involuntary admission into the New Hampshire Mental Health Services System?

Issue preserved by Ms. Doe's ex parte petition for writ of habeas corpus, DA 4-90; the Commissioner's motion to dismiss, DA 91-102; hearing, T 2-37; and order, DB 52-55.*

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*References to the record are as follows:
“DA” refers to the defendant's appendix to brief of the appellant;
“DB” refers to the defendant's brief;
“T” refers to the transcript of the September 21, 2020 motion hearing;
“PA” refers to the plaintiff's appendix to brief of the appellee.

STATEMENT OF CASE AND FACTS

On August 25, 2020, Dr. Jonathan Greenberg, a resident in adult psychiatry at Dartmouth Hitchcock Medical Center [hereinafter DHMC] in Lebanon, New Hampshire, prepared a complaint and prayer for compulsory mental examination of Ms. Doe pursuant to R.S.A. 135-C:28, II, and caused the petition to be presented to Justice of the Peace Shaun Mulholland. DA 4-5; DB 52. Justice Mulholland ordered that a law enforcement officer take Ms. Doe into custody for purposes of a compulsory mental examination to determine whether an involuntary emergency admission [hereinafter "IEA"] should be ordered in accordance with R.S.A. 135-C:28, I. DA 5; DB 52-53. Pursuant to Justice Mulholland's order, the Hanover Police Department took Ms. Doe into custody on August 25 and brought her to DHMC in Lebanon, New Hampshire. DA 5; DB 53.

Dr. Greenberg subsequently petitioned for Ms. Doe's IEA. DA 5; DB 53. Physician Assistant Benjamin Ames medically approved Ms. Doe for admission to an inpatient psychiatric designated receiving facility within the meaning of R.S.A. 135-C:2, XIV. DA 5; DB 53. Melissa Mullen, LICSW, conducted a mental examination of Ms. Doe. DA 5; DB 53. Dr. Christine Finn, under whose direction Mr. Ames and Ms. Mullen conducted their respective examinations, then issued a certificate of examining physician for involuntary emergency admission on August 25. DA 5; DB 53. Dr. Finn was approved to certify involuntary admissions by West Central Behavioral Health (a community mental health center designated by the Department of Health and Human Services Bureau of Behavioral Health). DB

5; T 20; DA 53. Dr. Finn is also a psychiatrist employed at DHMC. DA 5; T 20; DB 53.

Contrary to R.S.A. 135-C:29, I. Ms. Doe was not delivered immediately to a designated "receiving facility" as defined by R.S.A. 135-C:2, XIV. DA 5; DB 53. Instead, DHMC continued to detain Ms. Doe in its emergency room until September 11, 2020, and caused her to be delivered to New Hampshire Hospital [hereinafter "NHH"] only after Ms. Doe petitioned the Grafton County Superior Court for a writ of habeas corpus. DA 5-6; DA 53. DHMC, by its own admission, took this action pursuant to standing direction from the New Hampshire Department of Health and Human Services [hereinafter "the Department"]. T 20; DA 6, 30.

Ms. Doe was not provided with a copy of the complaint or the petition and certificate for involuntary admission at the time of her initial confinement. DA 6. She was not provided these documents until two or three days after her arrival, and then only at her insistence after being advised by legal counsel to seek these materials. DA 6. On information and belief, DHMC staff never advised her of the rights enumerated in R.S.A. 135-C:24 and 30. DA 6. Contrary to R.S.A. 135-C:29, I, the certificate did not identify a receiving facility to which Ms. Doe was to be transported. DA 6.

At no point did DHMC or the State of New Hampshire provide Ms. Doe with an IEA hearing before an independent finder of fact or any opportunity to challenge whether there exists probable cause for her continued detention during the term of her confinement in the DHMC emergency room. DA 6-7. Furthermore, despite Ms. Doe's specific written request, she and her attorney were denied access during the term of her confinement

in the emergency room to her medical records, including all of her psychiatric records. DA 7.

On September 15, the Sixth Circuit Court - District Division - Concord held a probable cause hearing pursuant to R.S.A. 135-C:31. DA 7. Ms. Doe filed a motion to dismiss, challenging the jurisdiction of the court and arguing for immediate release. DA 7. The court, Kissinger, R. and Spath, J., denied the motion and ordered Ms. Doe's continued detention. DA 7, 65-72; DB 54.

Ms. Doe then filed a petition for a writ of habeas corpus with the Merrimack County Superior Court. DA 4-90. Department of Health and Human Services Commissioner Lori Shibinette responded with a motion to dismiss. DA 91-103. The superior court, Tucker, J., conducted a hearing on September 21. On September 23, the superior court issued a written order, denying the Commissioner's motion to dismiss and granting Ms. Doe's petition. DB 52-55. This appeal follows.

SUMMARY OF ARGUMENT

I. Ms. Doe has a constitutionally-protected liberty interest that can only be restricted by a state actor in accordance with due process. R.S.A. chapter 135-C constitutes a comprehensive scheme for addressing not only these concerns but also to provide generally for the needs of those with mental illness. As such, it creates a system of both programs and facilities. Participants are admitted to the system and not merely to a specific physical facility.

Involuntary emergency admissions to the system are subject to a number of statutory safeguards to prevent not only erroneous but also unduly lengthy detention. Chapter 135-C should be construed in a manner consistent with the state and federal constitutions. Consequently, it does not authorize indefinite detention in hospital emergency rooms without judicial review.

The Commissioner's attempt to escape her constitutional responsibilities by denying state action is belied by a reading of the relevant statutes consistent with standing principles of construction. The overall statutory scheme is intended to ensure a logical progression that prevents untimely detention, much less indefinite detention without appropriate treatment.

The superior court properly construed the term "admission" to mean admission to the New Hampshire Mental Health System and not to a physical treatment facility. Its reading of chapter 135-C does not lead to the illogical outcomes proposed by the Commissioner, which outcomes can be avoided through strict compliance with R.S.A. 135-C:29. R.S.A. 135-C:13,

which limits services to voluntary system admittees, does not compel a different result. The Commissioner and the circuit court must conform to legislative mandates and constitutional requirements. The superior court properly granted Ms. Doe's petition when the Commissioner and the circuit court failed to do so in this case.

ARGUMENT

I. THE SUPERIOR COURT PROPERLY GRANTED MS. DOE'S PETITION FOR A WRIT OF HABEAS CORPUS WHEN THE COMMISSIONER FAILED TO ARRANGE FOR HER IMMEDIATE DELIVERY TO A RECEIVING FACILITY UPON COMPLETION OF THE INVOLUNTARY EMERGENCY ADMISSION CERTIFICATE AND WHEN THE CIRCUIT COURT FAILED TO CONDUCT A PROBABLE CAUSE HEARING WITHIN THREE DAYS OF MS. DOE'S INVOLUNTARY ADMISSION INTO THE NEW HAMPSHIRE MENTAL HEALTH SERVICES SYSTEM.

A. The Unambiguous Text of R.S.A. Chapter 135-C Required Ms. Doe Be Provided with a Probable Cause Hearing Within Three Days of the Completion of an Involuntary Emergency Admission Certificate.

The mandate of R.S.A. chapter 135-C is absolutely clear and unambiguous: No matter where a person is involuntarily detained, a probable cause hearing must occur within three days of completion of an IEA certificate. The IEA "shall be to the state mental health services system under the supervision of the commissioner." R.S.A. 135-C:28, I (emphasis added). Only a licensed mental health professional approved by the Commissioner may order an admission. Id. At this time, the person is deprived of her liberty, and "[u]pon completion of an involuntary emergency admission certificate . . ., a law enforcement officer shall . . . take custody of the person to be admitted and shall immediately deliver such person to the receiving facility identified in the certificate." R.S.A. 135-C:29, I (emphasis added). "Within 3 days after an involuntary emergency admission, not including

Sundays and holidays, . . . there shall be a probable cause hearing in the district court having jurisdiction to determine if there was probable cause for involuntary emergency admission." R.S.A. 135-C:31, I (emphasis added).

Contrary to the Commissioner's assertion, nothing in these statutes suggests that "admission" occurs only when a person is transferred to a receiving facility. They never employ the phrase "admission to a hospital" or "admission to a facility." Nor do they refer to "physical admission." Instead, as discussed in Section C below, they repeatedly reference admission to the "system," which encompasses both programs and facilities. See also Doe v. Commissioner, New Hampshire Department of Health and Human Services, Civil No. 18-cv-1039-JD, 2020 U.S. Dist. LEXIS 75759, at *22 (D. N.H. Apr. 30, 2020).

Similarly, the Commissioner's claim that the "state mental health services system" is no more than "a tangible system of state-run treatment facilities and private treatment facilities that voluntarily contract with the Department to provide mental-health treatment," DB 13, is not borne out by the actual language of chapter 135-C, with its specific and repeated reference to programs as well as facilities. The Commissioner admitted as much when she entered into a settlement agreement adopted by the federal court in the case of Amanda D. v. Hassan, Civil No. l:12-cv-53-SM (D. N.H. Feb. 12, 2014), which agreement states that "[t]he State's mental health system includes the New Hampshire Hospital ("NHH") in Concord, NH, the Glencliff Home ("Glencliff) in Benton, NH, and services, programs, and activities at other sites, including but not limited to those offered by the community mental health programs and providers across the state," PA 16,

and which requires the Commissioner to provide numerous community-based services, including housing and supported employment, PA 20-38.

The Commissioner's reading is also contrary to the plain language of R.S.A. 135-C:28, I, which provides that "[t]he admission may be ordered upon the certificate of an approved [health care provider]. As the federal court noted, "[c]ompletion of the IEA certificate carries with it immediate significant consequences . . . which changes the legal status of the IEA-certified person." Doe, 2020 U.S. Dist. LEXIS 75759, at *23, 25. No one would contend that Ms. Doe would have been free to leave the emergency room as a matter of law had DHMC declined to restrain her.

The Court must look first to the language of the statute itself, and, if possible, construe that language according to its plain and ordinary meaning. Polonsky v. Town of Bedord, 171 N.H. 89, 93 (2018). Absent ambiguity, legislative intent must be discerned from the text of the statute itself. Id. Inasmuch as the plain language of the statutes here at issue requires a probable cause hearing within three days of the execution of a certificate of admission, the superior court properly issued the writ of habeas corpus.

B. Ms. Doe Enjoys a Constitutionally-Protected Liberty Interest That Can Only Be Restricted by a State Actor Subject to Procedural Due Process Protections.

. The right to be at liberty is one of our most cherished and jealously protected rights. As such, it is enshrined in the very Preamble to the United States Constitution and part I, article 2 of the New Hampshire Constitution. A person "has a substantial liberty interest in not being confined unnecessarily for medical treatment and . . . the state's involvement in the commit-

ment decision constitutes state action under the Fourteenth Amendment." Parham v. J.R., 442 U.S. 584, 600 (1979); see also In re Gamble, 118 N.H. 771, 775 (1978) ("A person who is legally declared incompetent is substantially deprived of liberty."). Similarly, this Court has long recognized that private attempts to curtail another's liberty pose significant dangers to both individuals and the sound administration of justice. See, e.g., Waldron v. Tuttle, 4 N.H. 149, 151 (1827) (noting that private prosecutions often originate from private quarrels, are intended to vex and harass an opponent, and often do not result in a public benefit justifying the expense); Fletcher v. Merrimack County, 71 N.H. 96, 102 (1901) (discussing the manner in which an interested prosecutor poses a threat to a defendant's rights). As a consequence, prosecutions of criminal offenses punishable by imprisonment can only be initiated by public prosecutors, State v. Martineau, 148 N.H. 259, 262-63 (2002), and direct attempts to confine the movements of another will generally constitute an actionable tort, MacKenzie v. Linehan, 158 N.H. 476, 482 (2009) (detailing elements of cause of action for false imprisonment).

The Fourteenth Amendment to the United States Constitution and part I, article 15 of the New Hampshire Constitution further prevent the State from restricting a person's liberty without due process of law. These protections apply to civil commitment proceedings, In re Richard A., 146 N.H. 295, 298 (2001); Addington v. Texas, 441 U.S. 418, 425 (1979), as well as proceedings to establish mental incompetency, Gamble, 118 N.H. at 775. Consistent therewith, R.S.A. 135-B:42 (one of the predecessor statutes subsequently repealed and reenacted as part of R.S.A. chapter 135-C)

"create[d] a presumption that mentally ill persons who have not been adjudicated incompetent have the full panoply of personal rights recognized in our society." Opinion of the Justices, 123 N.H. 554, 559 (1983). "Beyond the statutory framework, the due process clause of our State Constitution provides mentally ill persons, like all other individuals, with certain fundamental liberty interests. Accordingly, mentally ill persons have a right to be free from unjustified intrusion upon their personal security." Id. (citations omitted).

Procedural due process requires, at a minimum, prompt judicial review of any extended restraint on liberty. Gerstein v. Pugh, 420 U.S. 103, 114 (1975) (applying Fourth Amendment). The federal constitution accords states flexibility in shaping appropriate review, so long as the procedure, when viewed as a whole, ensures "a fair and reasonable determination of probable cause as a condition for any significant pretrial restraint of liberty, and this determination must be made by a judicial officer either before or promptly after arrest." Id. at 124-25; see also State v. Gagne, 129 N.H. 93, 99 (1986). In New Hampshire, this means a preliminary hearing before a neutral and detached magistrate, id. at 98-99, including "adversary process," id. at 100.

C. R.S.A. Chapter 135-C Constitutes a Comprehensive Statutory Scheme Designed to Protect Ms. Doe's Liberty Interests.

R.S.A. chapter 135-C constitutes the General Court's methodology for protecting individual liberty interests whenever possible and setting out due process procedures for any necessary restraint thereof. Doe v. Concord

Hospital, No. 217-2018-CV-0048, slip op. at 6 (N.H. Super. Ct. Aug. 9, 2018) (McNamara, J.). It sets out a comprehensive scheme, and all of its parts must be construed together to effectuate its overall purpose and avoid an absurd or unjust result. , 171 N.H. at 93 (2018).

As the title of chapter 135-C itself suggests, the chapter creates the "New Hampshire Mental Health Services System." Its purpose is to "[e]stablish, maintain, and coordinate a comprehensive, effective, and efficient system of services for persons with mental illness." R.S.A. 135-C:1, I(a) (emphasis added). As a matter of policy, this system is intended to be more than a mere collection of physical facilities. Whenever possible, system services are to be provided within a person's own community, in a manner that is least restrictive of the person's freedom of movement and ability to function normally in society while being appropriate to the person's individual abilities, and with an eye towards eliminating the need for services and promoting the person's independence. R.S.A. 135-C:1, II.

Consistent with the above, chapter 135-C repeatedly distinguishes programs from physical facilities. "Community mental health programs" and "receiving facilities" are separately defined. R.S.A. 135-C:2, IV and XIV. R.S.A. 135-C:3, which creates the state services system, authorizes the Department to operate directly or contract with others to provide "any program or facility" which furnishes appropriate services. Any person seeking services from the system may apply to an approved program or facility. R.S.A. 135-C:12, III. System services are not limited to treatment, are not to be denied to someone conditionally discharged from a receiving facility, and may include assistance with locating housing. R.S.A. 135-

C:13. If a person is "sought to be admitted" to a program or facility, she has a right to legal counsel. R.S.A. 135-C:22. R.S.A. 135-C:6, I creates a bureau of behavioral services, which shall include, but is not limited to, NHH, the Glencliff home, and community mental health services. R.S.A. 135-C:7 authorizes the establishment of community mental health programs for the purpose of providing community-based services, including emergency, medical, or psychiatric screening and evaluation, case management, and psychotherapy services.

Chapter 135-C also establishes separate voluntary and involuntary subsystems. One must apply to participate in the voluntary subsystem. R.S.A. 135-C:12, I. The program or facility to which the person has applied must screen the applicant's eligibility, R.S.A. 135-C:12, III, employing statutory criteria. R.S.A. 135-C:2, XV and 13. Eligibility does not create an absolute entitlement for services. Rather, services are to be provided contingent upon available funding. R.S.A. 135-C:13.

The involuntary subsystem includes a set of general provisions, R.S.A. 135-C:20 - 26, rules regarding IEAs, R.S.A. 135-C:27 - 33; and rules regarding non-emergency involuntary admissions, R.S.A. 135-C:34 - 54. All persons subject to involuntary admissions have a right to counsel, R.S.A. 135-C:22, at state expense if indigent, R.S.A. 135-C:23, and notification thereof, R.S.A. 135-C:24.

With respect to IEAs, "admission of a person shall be to the state mental health services system under the supervision of the commissioner." R.S.A. 135-C:28, I (emphasis added). Any individual may petition for the involuntary admission of another. R.S.A. 135-C:28, I. Only health care

professionals authorized by designated receiving facilities or community mental health programs approved by the Commissioner, however, may issues certificates of admission. Id. The petitionee must first undergo both a physical and mental examination to determine whether she meets the statutory criteria for admission. R.S.A. 135-C:28, I. If the person declines to submit to a mental examination, the petitioner or a law enforcement officer may swear out a complaint and obtain authorization from a justice of the peace. R.S.A. 135-C:28, II. Alternatively, a peace officer who observes a person engaging in behavior that the officer has probable cause to believe satisfies the statutory admission criteria may take the person into protective custody until such time as an IEA is ordered or at the end of six hours, whichever event occurs first. R.S.A. 135-C:28, III.

If a Department-sanctioned health care provider issues an admissions certificate, R.S.A. 135-C:29 commands that "a law enforcement officer shall, except as provided in paragraph II, take custody of the person to be admitted and shall immediately deliver such person to the receiving facility identified in the certificate." "The health care provider who is authorized to order involuntary emergency admission under RSA 135-C:28, I" may alternatively authorize transport by ambulance. R.S.A. 135-C:29, II. The sheriff of the county in which the person is located is legally obligated to provide the transport upon the health care provider's request. Before the law enforcement officer takes custody of the person for transport, the certificate may be rescinded if alternative care arrangements can be arranged, R.S.A. 135-C:29-a, I, or if the certifying health professional determines that the

person no longer meets the criteria of R.S.A. 135-C:27, R.S.A. 135-C:29-a, II.

Within twelve hours of arrival at a receiving facility, the person must be advised of various rights. R.S.A. 135-C:30. Within three days after involuntary emergency admission, not including Sundays and holidays, the circuit court - district division must conduct a probable cause hearing. R.S.A. 135-C:31, I. No person shall be admitted for an IEA for a period longer than ten days, Saturdays and Sundays excepted, unless either a new involuntary emergency petition is filed alleging acts occurring subsequent to the initial admission or a petition for involuntary nonemergency admission is filed with the circuit court - probate division. R.S.A. 135-C:32. Any hearing on a nonemergency petition must be conducted within fifteen days of the court's receipt of the petition, excluding Saturdays, Sundays, and legal holidays. R.S.A. 135-C:37.

The statutory procedures for involuntary admission establish a process intended to progress logically through a series of steps. Doe, 2020 U.S. Dist. LEXIS 75759, at *24-25. At each step, various safeguards exist to prevent erroneous or excessive deprivation of liberty. At issue in this case is whether Ms. Doe was afforded the safeguards that R.S.A. chapter 135-C guarantees.

D. Consistent with Principles of Statutory Construction, the Superior Court Construed R.S.A. Chapter 135-C Narrowly and in a Manner That Avoids Conflicts with the New Hampshire and United States Constitutions.

"It is a basic principle of statutory construction that a legislative enactment will be construed to avoid conflict with constitutional rights." State v. Smagula, 117 N.H. 663, 666 (1977); see also State v. Paul, 167 N.H. 39, 44-45 (2014). Furthermore, statutes restricting the freedoms of those who are purportedly mentally ill must be construed narrowly in favor of the potential detainee. Writing for the D.C. Circuit Court of Appeals, Judge Bazelon wrote that the very nature of civil commitment:

> entails an extraordinary deprivation of liberty justifiable only when the respondent is "mentally ill to the extent that he is likely to injure himself or other persons if allowed to remain at liberty." A statute sanctioning such a drastic curtailment of the rights of citizens must be narrowly, even grudgingly, construed in order to avoid deprivations of liberty without due process of law.

Covington v. Harris, 419 F.2d 617, 623 (D.C. Cir. 1969); see also In the Matter of Detention of Hawkins, 238 P.3d 1175, 1177 (Wash. 2010) (as a civil commitment is a "massive curtailment of liberty," the authorizing statute must be strictly construed); Com. v. Gillis, 861 N.W.2d 422, 425 (Mass. 2007) (noting that narrow construction of civil commitment statute not only helps avoid possible due process violations but also ensures that individuals are not deprived of liberty without a clear statement of legislative intent).

The superior court construed chapter 135-C narrowly so as to protect Ms. Doe's liberty interests. These protections include a prohibition on compulsory examination to which an individual does not consent unless authorized by a government official, a prohibition on admission into the mental health system absent certification by a government-sanctioned health care provider, immediate transport to a government-authorized treatment facility, review of the certification decision within three days by a judicial officer, and release from custody within ten days of the certification decision absent a new involuntary emergency petition or a nonemergency petition to the probate division. Accordingly, the superior court found Ms. Doe's confinement unlawful because the Commissioner did not transport Ms. Does immediately to a receiving facility and did not arrange for a probable cause hearing within three days of certification.

The Commissioner now argues that the statutory scheme should be construed so as to eliminate these requirements and allow for indefinite detention of persons like Ms. Doe in hospital emergency rooms. This proposal runs contrary to the principle that statutes should be construed consistent with our constitutions and would render the IEA process unconstitutional, inasmuch as indefinite detentions without prompt judicial review are prohibited. The Commissioner's reading is also inconsistent with the doctrine of strict construction in favor of detainees. Finally, this construction is inconsistent with the plain meaning of R.S.A. 135-C:29, rendering the requirement of immediate transport meaningless.

E. The Commissioner's Claim That Ms. Doe Was Detained by Private Individuals Acting Without State Authority Is Belied by the Overall Statutory Scheme.

The Commissioner concedes that a determination of state action at the time a certificate of admission is executed would require a probable cause hearing within three days of that certification. Doe, 2020 U.S. Dist. LEXIS 75759, at *15. Consequently, she seeks to justify Ms. Doe's seventeen-day detention in DHMC's emergency room on grounds that Ms. Doe was detained by private actors without any State involvement. The superior court decided this issue in Ms. Doe's favor as a matter of law. DB 52. The proper interpretation of a statute is a question of law, subject to de novo review. Petition of Carrier, 165 N.H. 719, 721 (2013).

The plain text of the statutes employed to detain Ms. Doe repudiate the Commissioner's claim of purely private action. Initial custody is authorized by a justice of the peace – a judicial official. Custody is then effectuated by law enforcement officers – executive branch officials. Admission to the New Hampshire Mental Health System is authorized only by health care providers on a list maintained by the Commissioner and approved by designated receiving facilities or community mental health programs approved by the Commissioner. R.S.A. 135-C:28, II requires these providers conduct examinations if so ordered by a justice of the peace. See also R.S.A. 135-C:28, III (compelling examination of individuals brought directly to an emergency rooms by peace officers). The certifying provider determines how a person is transferred to a receiving facility, and the sheriff cannot decline her directive. Prior to transport, the certifying professional

can derail the transfer by arranging for alternative treatment or by determining that the statutory criteria are no longer satisfied. All of these statutory provisions constitute state action as a matter of law. No private person is authorized to exercise these powers over the liberty of another human being.

Notably, the Department is directing New Hampshire citizens to treat hospital emergency rooms and community mental health centers as the Department's agents for initiating IEAs. More specifically, the Department's web page regarding involuntary admissions states that NHH "does not provide walk-in emergency or crisis services" and that "[t]he IEA process begins with a visit to a local hospital Emergency Department or CMHC, and the completion of an IEA Petition requesting admission to New Hampshire Hospital." New Hampshire Department of Health and Human Services, Involuntary Emergency Admissions (IEA), www.dhhs.nh.gov/dcbcs/nhh/eligibility.htm (last visited January 22, 2021); PA 5.

The Commissioner attempts to negate the role of justices of the peace and law enforcement officers by arguing protective custody occurs before an IEA is ordered and expires after six hours if an admission is not ordered beforehand. DB 28. This argument fails for multiple reasons. First, R.S.A. 135-C:28, III, upon which the Commissioner relies, applies only to police officers who take individuals into custody of their own accord. R.S.A. 135-C:28, II detentions, authorized by justices of the peace, are not so limited. Second, it ignores the overall statutory scheme, which provides for different levels of response depending upon the nature of the detention involved. Law enforcement officers are afforded the lowest level

of detention power (i.e., a six hour limit) due to the nature of their role as state actors and on-the-scene observers. Justices of the peace are afforded a secondary level of power (i.e., until a mental examination is conducted), as they are neutral and detached magistrates. Certifying health care providers are accorded even greater detention powers, but they in turn are subject to check by the requirement of immediate transport to a receiving facility and an adversarial hearing within three days.

The Commissioner further posits alternative legal theories by which private actors can lawfully detain a person. T 10-11. She fails, however, to identify an actual alternative justification by which DHMC detained Ms. Doe. Rather, she offers mere possibilities. DA 93. This speculation was refuted by DHMC's and the New Hampshire Hospital Association's denial that they rely on any such alternatives. DA 6, 30.

F. The Superior Court Properly Construed the Term "Admission" to Mean Admission to the New Hampshire Mental Health System and Not to a Physical Treatment Facility.

The Commissioner argues that the term "involuntary emergency admission" within the meaning of R.S.A. chapter 135-C occurs when a patient is physically accepted at a receiving facility for mental health treatment. Her reading is contrary to the plain language of R.S.A. chapter 135-C, see § I.A, supra, and would create a constitutional violation by allowing for indefinite detention without judicial review, see §§ I.B and D, supra.

All parts of the statute must be construed together to effectuate its overall purpose and to avoid an absurd or unjust result. Polonsky, 171 N.H. at 93. Furthermore, words and phrases cannot be considered in isolation,

but rather must be analyzed within the context of the statute as a whole. Id. The Commissioner's definition of “admission” violates these principles. More specifically, her reading is contrary to the broader statutory scheme, which requires no re-examination, re-evaluation, or re-certification after a person is delivered to a receiving facility. Doe, 2020 U.S. Dist. LEXIS 75759, at *23. Furthermore, her reading runs contrary to chapter 135-C's overall system of time-line-driven checks on every other aspect of involuntary admission, including the six-hour limit for seizure by police officers, R.S.A. 135-C:28, III, the requirement of physical and mental examinations within three days of the completion of the admissions petition, 135-C:28, I, the requirement of a probable cause hearing within three days after an involuntary admission, R.S.A. 135-C:31, the limit of ten days confinement at a receiving facility unless a new petition is filed in the interim, R.S.A. 135-C:32, and the requirement that any probate petition must be heard within fifteen days of receipt by the probate division. It is inconceivable that the legislature instituted these numerous time limits on a person's involuntary detention while authorizing indefinite stays at a hospital emergency room without judicial review or other opportunity to challenge an erroneous deprivation of liberty.

The Commissioner offers a lengthy analysis regarding the tense of the verbs in various statutory sections and concentrates specially on the use of the word “shall.” DB 20-21. “Shall,” however, is used here as a command and not as a mere descriptor of some future event. Given that the legislature's primary responsibility is to command action, use of the word “shall” should come as no surprise. Indeed, the Commissioner's own pur-

ported example of a post-admission mandate – R.S.A. 135-C:31 – (which also employs the word "shall") belies her argument regarding a shift in verb tense. Even were the Commissioner correct that "shall" is meant to denote an event yet to occur, use of such language would still be entirely consistent with the superior court's reading of chapter 135-C and its overall envisioned time line of events.

The Commissioner next turns to the legislative history to support her reading of the term "involuntary emergency admission." Such an examination is inappropriate, however, when R.S.A. 135-C:13 unambiguously provides that admission is to the state mental health services system. Polonsky, 171 N.H. at 93; Hogan v. Pat's Peak Skiing, LLC, 168 N.H. 71, 73 (2015). Should this analysis be undertaken nonetheless, it does not support the Commissioner.

The Commissioner first cites various references in the legislative history to admission to NHH or a facility. These stray statements, discussed in more detail below, are unhelpful. Oftentimes, they are cited out of context. Oftentimes, the Commissioner's proposed interpretation is also consistent with admission to the mental health system. Furthermore, given that the term "admission" is commonly used in describing the start of a patient's care in a hospital, reference to "admission" to a receiving facility is unsurprising. Finally, until the psychiatric boarding crisis began in 2012, see DA 348 (legislative testimony describing origin and development of crisis), lawmakers rightly expected that once a person was involuntarily admitted into the mental health system, she would be transferred immediately to an appropriate receiving facility (as R.S.A. 135-C:29 requires).

The Commissioner thus cites the title to H.B. 488-FN (1997) ("AN ACT relative to involuntary admission to the state hospital on an emergency basis."). DA 297. A statute title, however, is not conclusive of its interpretation. In re Estate of McCarty, 166 N.H. 548, 552 (2014). Indeed, the Commissioner herself does not argue that, in light of this amendment, admission now can take place only to the state hospital and not even to a receiving facility. This language is also entirely consistent with admission to the mental health system and immediate transfer to a receiving facility thereafter.

The Commissioner cites language in a fiscal note to H.B. 1438-FN (2000) ("The Department states that within a one-year period, approximately 337 children are admitted to mental health facilities"). DA 302. This is a statistic (i.e., a statement of fact), not a statement of legislative intent. Furthermore, it is consistent with admission to the mental health system followed by immediate transfer to a facility.

The Commissioner cites the minutes of the House Committee on Judiciary relative to H.B. 1311 (2002) and the statements of Representative J. P. Manning:

> He explained the process of an IEA. First, a person fills out a petition to have a person IEA'd, then a physician needs to sign the petition, then the person is held at a state facility for three days. On that third day, a hearing must be held to determine if at the time the petition was signed, the person met the qualifications to be IEA'd.

DA 305. This statement actually supports the superior court's reading of the statute, inasmuch as it presumes immediate transfer following the signing of the petition (and not even the execution of the admissions certificate).

The Commissioner cites the statement of the House Committee on Judiciary relative to H.B. 1311 (2002) ("The IEA is when a person is taken to a facility that provides psychiatric services against their will because a member of a community believes that the individual is in emient [sic] danger of harming themselves or others."). DA 308. This statement, however, makes no mention of when an IEA occurs; it only discusses the consequences.

Finally, the Commissioner cites testimony regarding H.B. 1133 (2010), which proposed modifying R.S.A. 135-C:32 so as not to count Saturdays and Sundays in the ten-day limit. The testimony of Michael Skibbie for the Disabilities Rights Center, however, confirms the understanding that one will receive a probable cause hearing within three days of involuntary confinement. DA 325. Even more telling, Attorney Skibbie and Claire Ebel of ACLU-NH were both concerned about extending the overall period of confinement from ten days to between fourteen and sixteen days. DA 310-11. If these witnesses were concerned about adding as few as four additional days, indefinite confinement at hospital emergency rooms clearly was not contemplated.

The Commissioner's second area of argument regarding legislative history concerns what she describes as significant discussions prior to the adoption of R.S.A. chapter 135-C regarding the ability of the Department to regulate activity at various facilities serving the mental health system. DB

43. More specifically, she argues that because the Department sought power to regulate the entire system, the system is limited to physical facilities that are run by or contract with the Department. DB 44-45. This debate, however concerned whether the Department could supervise what happens once a person is at a physical facility, not whether admission was to be to a system that encompassed only physical facilities. Director Donald Shumway's written testimony regarding other aspects of the bill is further elucidating. In this testimony, he divides eligible clients (i.e., voluntary admissions) and commitment procedures (i.e., involuntary admissions) into separate categories. DA 272. He also writes that "the persons who can order the commitments are being limited so there can be greater assurance that the commitments are necessary and appropriate." Id. This language reinforces the notion that involuntary admission can only be effectuated by state actors (i.e., persons subject to direction and supervision by the State).

The Commissioner's third argument relies upon a comment from Raymond Perry at a work session of the House Committee on Finance with respect to S.B. 590 (2018). DA 338. This is the only direct statement in any of the available legislative history stating directly that a person is not admitted until after she leaves an emergency room. It was uttered by a person employed by the Department thirty-two years after chapter 135-C was enacted by the legislature, approximately six years after psychiatric boarding first became an issue, and four years after Amanda D. was settled. If Mr. Perry's statement were accurate, there would have been no reason for Section III of the bill to propose appending language to the end of R.S.A. 135-C:32 that was to read "The initial 10-day period, not including Satur-

days and Sundays, begins upon the person's admission to a designated receiving facility." PA 11. More telling still, the legislature ultimately chose not to adopt this proposed amendment. Also informative is the testimony of Kenneth Norton of NH-NAMI, who disagreed with this language because "moving a 10 day piece lessens pressure to abide by the law as written." DA 347.

As the Governor's Work Group on Mental Health Crisis and ER Boarding - Subgroup on Regulatory Barriers and Solutions explained in its testimony, no one envisioned in 1986 that psychiatric boarding would occur:

> The "queue" for inpatient beds was minimal prior to 2012, and any wait was measured by hours not days. By the beginning of 2013, a "queue" was a daily occurrence with waits measured in days rather than hours. During the past three years the number of people waiting has more than tripled, and risen as high as 70, with wait times often measured in weeks rather than days.

DA 348. Consequently, legislators could assume in 1986 that once a person was involuntarily admitted to the mental health system, she would be transported immediately to a receiving facility. No legislative history suggests legislators in 1986 believed to the contrary.

Finally, the Commissioner argues that there exists no legislative history authorizing private individuals to compel the Department to accept persons immediately. DB 45. This argument assumes private actors have such power. The statute itself, however, grants no such authority. Rather, it lim-

its admitting privileges to health care providers authorized by the Department and its designees. R.S.A. 135-C:28, I. Indeed, as discussed in Section B above, if the statute granted such authority, it would be unconstitutional.

The Commissioner also advances a series of arguments for accepting what she describes as the Department's long-standing interpretation of the term "admission." Her agreement to the settlement in Amanda D., see § I.A, supra, belies the existence of any such long-standing interpretation. Even without this telling adverse-party-admission, the Court reviews an agency's interpretation of a statute de novo. Appeal of Town of Seabrook, 163 N.H. 635, 644 (2012). The Court may defer to an agency's interpretation of a statute, but it is "not bound" by that interpretation and remains the "final arbiter of the legislature's intent as expressed in the words of the statute considered as a whole." Id. Furthermore, any deference afforded "is not absolute,"and the Court "still must examine the agency's interpretation to determine if it is consistent with the language of the [statute] and with the purpose which the [statute] is intended to serve." See Appeal of N.H. Dep't of Envtl. Servs., 173 N.H. 282, 294 (2020) ("An administrative agency must comply with the governing statute, in both spirit and letter."). Where an agency interpretation "clearly conflicts" with the express statutory language or is "plainly incorrect," the Court will not defer to it. See, e.g., Seabrook, 163 N.H. at 644; N.H. Dep't of Envtl. Servs., 173 N.H. at 293.

Here, the Commissioner's interpretation is not entitled to deference because it defies the plain text of the relevant statutes and undermines the due process protections that they secure for involuntarily-admitted patients. For the same reason, the Department's asserted long-standing interpretation

is not entitled to greater weight. Perhaps most significantly, the Commissioner's own regulations do not support the interpretation she now advances.

The Commissioner cites the current definition of "involuntary emergency admission" contained in He-M 613.02 (Admission and Discharge from New Hampshire Hospital) and He-M 612.02 (Transfers Between Receiving Facilities). Given that these regulations deal only with admission and discharge to NHH or transfer between receiving facilities, there is no reason for them to define admission any more broadly. Notably, they do not address when an admission takes place, who has authority to make the admission, or whether physical presence is required at a receiving facility before the admission is deemed an admission. This stands in sharp contrast to earlier versions of the same rules. The definition in the 1990 version of He-M 613.02 indicates that an admission occurs once a physician's certificate has been completed. DA 140. He-M 613.04 gives receiving facilities no authority to reject the physician's admission decision. DA 142. The Department re-adopted this language in 1999, DA 162, 164. Indeed, not until 2016 (four years into the psychiatric boarding crisis) did the Department make admission contingent upon the judgment of "the NHH admitting practitioner." DA 221. This history suggests rulemaking for the purpose of meeting the Department's current needs rather than to effectuate the legislature's 1986 intent.

The Commissioner also cites the current version of He-M 405.06, allowing receiving facilities to turn away patients if no bed is available. DB 22; DA 391. Earlier versions of the regulation, however, gave the Department no such authority. DA 111 (1981); DA 152 (1992); DA 181 (1999);

DA 209 (2013). Once again, this history shows that the admission took place once the certifying professional issued the certificate, not when the patient arrived at the facility. Even under the current regulation, the facility can only deny admission to the facility and not to the mental health system (the latter decision being limited by R.S.A. 135-C:28 exclusively to authorized certifying professionals).

The current version of He-M 405.06(b) was obviously adopted to deal with a problem that did not exist at the time of the statute's enactment in 1986. As this Court has noted:

> The constitutional doctrine of separation of powers limits the degree of rulemaking authority which the legislature may delegate to an administrative agency to that which is necessary to "fill in the details" of a statute in order to effectuate its purpose, see Guillou v. State, 127 N.H. 579, 582, 503 A.2d 838, 840 (1986); N.H. Const. pt. I, art. 37. The delegating statute must contain some standards or general policy to guide the administrative agency in exercising its rulemaking authority. See Guillou v. State, supra at 581, 503 A.2d at 840.

Petition of Strandell, 132 N.H. 110, 118 (1989). "'Thus, administrative rules may not add to, detract from, or modify the statute which they are intended to implement'." Appeal of Mays, 161 N.H. 470, 473 (2011) (quoting Appeal of Anderson, 147 N.H. 181, 183 (2001)). R.S.A. 135-C:28, I leaves no details unfilled about whom a certifying professional may certify for admission and certainly establishes no guidelines for the Department to make

such decisions. The current version of He-M 405.06 thus violates constitutionally-mandated separation of powers.

The Commissioner also relies on language in He-M 405.06, which indicates that physical presence shall determine admission to a designated receiving facility. DB 23; DA 111. The purposes of this language, however, is to determine when a person is a patient of a particular receiving facility, not when someone has been admitted to the mental health system generally. Thus, the remainder of the 1981 rule addresses when transfers may take place between facilities and which institution shall bear the cost. DA 111. Such financial decisions, however, are irrelevant to the change in legal status occasioned by a legal determination that a person poses a danger to herself or to others and must therefore be denied the constitutional right to liberty enjoyed by all other citizens.

G. Massachusetts Law Provides No Guidance As to When a Person Is Admitted Under New Hampshire Law.

The Commissioner turns next to Mass. Gen. Laws ch. 123, § 12, as interpreted by the Supreme Judicial Court of Massachusetts in Massachusetts General Hospital v. C.R., 142 N.E.3d 545 (Mass. 2020), to support her claim that a person is admitted to a receiving facility and not the New Hampshire Mental Health System. The statutory scheme there interpreted, however, is markedly different from R.S.A. chapter 135-C. § 12(a) allows any licensed mental health provider to restrain or authorize the restraint of a person and then apply for hospitalization at a government-designated facility for a period of three days. MGH, 142 N.E.3d at 552. Unless the appli-

cation is made by a physician specifically authorized by the Massachusetts Department of Mental Health to admit to such a facility, the patient must be given a psychiatric examination by a designated physician after arriving at the facility. Mass. Gen. Laws ch. 123, § 12(b). Mindful that patients were being held at other locations awaiting bed space at designated facilities, the Supreme Judicial Court nonetheless determined that the three-day time period in § 12 was intended to allow a qualified professional at a designated facility to evaluate a patient and determine what treatment the patient may or may not require as well as how long the prospective treatment may last. MGH, 142 N.E.3d at 552.

R.S.A. chapter 135-C does not authorize any licensed mental health care provider to restrain a patient. Nor does chapter 135-C create a provision parallel to the Massachusetts statute requiring re-examination of patients at a receiving facility to determine eligibility for admission. Rather, once a government-authorized professional certifies a person for admission, no one but a judge can overturn that decision on a finding of inadequate cause. The only power accorded by statue to receiving facilities is to discharge previously admitted patients "if the administrator decides that the person no longer meets the criteria established by RSA 135-C:27." R.S.A. 135-C:33, I (emphasis added).

The opinion of the Supreme Judicial Court is notable for two other reasons. First, it recognizes that its reading of the statute raises questions of constitutional magnitude due to the potential for indefinite restraint before a bed can be found at an authorized facility so that an admissions evaluation can be conducted. MGH, 142 N.E.3d at 560. The constitutional questions

not decided in MGH were the questions decided by the superior court in this case, which decision the Commissioner now appeals. Second, the Supreme Judicial Court was willing to defer consideration of the constitutional questions because the Massachusetts General Court was aware of the problem and appeared prepared to address it. Id. at 556. By contrast, the New Hampshire General Court, by statutory enactment, chose in 2019 to avoid the issue and allow for a judicial resolution instead. R.S.A. 151:2-h.

H. The Superior Court's Reading of R.S.A. Chapter 135-C Does Not Lead to the Illogical Outcomes Posited by the Commissioner.

While the Commissioner posits a number of illogical outcomes should the superior court's reading of R.S.A. chapter 135-C prevail, none of these concerns weather close scrutiny. Thus, she claims that private persons outside the mental health system will be able to control admission. DB 23-24. In fact, admission to the system is controlled by the Commissioner and her designees. R.S.A. 135-C:28, I. She claims that R.S.A. 135-C:30 rights will be rendered nugatory because it will be impossible to provide them at a receiving facility in a timely fashion. DB 24. In reality, the rights can be provided in a timely fashion so long as the Commissioner complies with the immediate transport requirement of R.S.A. 135-C:29. She claims that indefinite detention will be permitted at hospital emergency rooms. DB 31. Once again, this ignores the immediate transport requirement. She claims that probable cause hearings will need to be conducted in private emergency rooms. This will not be true if patients are immediately transported. Finally, she contends that if patients receive probable cause hearings while at

private emergency rooms, they will be denied adequate services while awaiting beds at appropriate receiving facilities, that they will not be advised of their R.S.A. 135-C:30 rights, and that an onslaught of petitions for habeas corpus will ensue, alleging a denial of services to which system admittees are entitled. DB 33, 34. Once again, none of these things can happen if the Commissioner complies with R.S.A. 135-C:29.

I. The State's Right to Limit Mental Health Services Is Not Impacted by the Superior Court's Reading of R.S.A. Chapter 135-C.

The Commissioner argues that she has a right to limit services to persons otherwise subject to involuntary emergency admission. In support of this position, she relies upon R.S.A. 135-C:13, Petition of Strandell, 132 N.H. 110 (1989), and a litany of negative consequences should the superior court's reading of the statute prevail.

R.S.A. 135-C:13 does provide that all persons eligible for services from the mental health system are not necessarily entitled to receive them. This statute, however, must be read in conjunction with R.S.A. 135-C:12, which governs voluntary application for services. The juxtaposition of these statutes is not an accident; they set out the system for seeking voluntary admission to the system and limit the State's financial obligations to those seeking such benefits. Persons subject to involuntary admission, however, are by definition not seeking benefits. In this section of chapter 135-C, the legislature sought to provide these individuals services even when they reject them so that they and other members of the community will be kept safe from harm. The legislature would no more sanction re-

ceiving facilities rejection of these persons than it would permit jails and prisons to refuse admission of prisoners merely because correction officials have limited funds with which to operate their facilities.

Strandell does not require a different result. In that case, the legislature authorized services for severely mentally disabled clients but failed to appropriate sufficient funds to treat all individuals eligible to receive them. 132 N.H. at 116. Accordingly, the Department enacted a regulation creating a waiting list for those eligible for services, established periodic reviews of clients's needs in order to assess their current needs and the availability of services, required that these needs be considered in developing budgets, and established a priority system for clients awaiting placement or other services. Id. at 117-18. This Court upheld that regulation. In reaching this decision, it distinguished between the rationing of limited resources to a class of beneficiaries and the creation of obligations and a duty of care to those class members to whom services are being provided. With respect to the former situation, it cited Morton v. Ruiz, 415 U.S. 199, 230-31 (1974), for the proposition that "when [the legislature] creates a class of beneficiaries which is greater than that which can be served by the amount of resources available for that purpose, and when [the legislature] is silent on how to resolve the predicament, the administering agency may establish reasonable classifications and priorities to allocate the limited resources." Id. at 119. With respect to the latter situation, it cited State v. Brousseau, 124 N.H. 184 (1983), for the proposition that those to whom the State provides services are entitled to a duty of care and may bring suit for negligent or abusive treatment in dereliction of that duty. Id. at 116-17.

Strandell is inapplicable in this case for three reasons. First, it addresses only those who seek benefits but cannot obtain them due a lack of funding, not those who actively seek to avoid benefits foisted upon them. Second, involuntary emergency admittees detained in hospital emergency rooms arguably are receiving services, just not adequate or appropriate services. More apposite is Brousseau. Ms. Doe was subjected to negligent if not abusive treatment when she was indefinitely detained against her will under conditions more restrictive and less humane than most criminal defendants suffer. Third, as opposed to developmentally disabled individuals, the Department has failed to enact regulations that establish reasonable classifications and priorities for administering benefits. It maintains no wait list organized and monitored to serve those most in need. It has developed no guidelines for prioritizing which individuals detained in emergency rooms will be entitled to receive services (at a receiving facility or through some other mechanism). Instead, the Department denies all responsibility for these individuals and relies on hospitals to assert alternative legal theories for their detention and provide what the Commissioner concedes to be inadequate treatment for their disease.

The Commissioner asserts she cannot comply with the legislative mandates of R.S.A. 135-C:27 -33 due to inadequate funding. A purported scarcity of resources, however, is not a legal justification for agency noncompliance with legislative command. See Gamble, 118 N.H. 776 (holding that State's asserted inability to find guardians for probate proceedings did not excuse it from performing its legislative mandate to locate them). Indeed, she has many alternatives open to her:

– She can seek additional legislative funding. This is not a necessary outcome of a decision in Ms. Doe's favor, and Ms. Doe does not advocate for or against this outcome. It remains, however, a viable alternative.

– She can reallocate current funding. For example, she can provide fewer services to voluntary admittees, as R.S.A. 135-C:13 authorizes her to do.

– She can come into full compliance with her obligations pursuant to the settlement agreement and order in Amanda D., see New Hampshire Community Mental Health Agreement - Expert Reviewer Report Number Twelve (Aug. 18, 2020), (noting continuing non-compliance with significant portions of Commissioner's obligations under the settlement agreement). PA 49. This would alleviate considerable pressure on the involuntary emergency admission subsystem, not only by reducing the number of individuals subject to initial petitions but also by allowing for diversion to alternative programming in a manner legislatively authorized by R.S.A. 135-C:29-a, I.

– She can set directives for those authorized to certify admissions that prioritize who to admit and who to divert. For example, she could limit certifications in the first instance to those who are actively homicidal or suicidal (Dr. Greenberg claimed neither regarding Ms. Doe), set numerical limits on certifications, or require advanced approval from Department managers for certifications.

– She can triage at receiving facilities by releasing individuals prior to their probable cause hearings or discharging less needy individuals for whom probable cause has already been found.

None of these alternatives is a panacea for the ills the New Hampshire Mental Health System currently suffers. Indeed, some of these choices might result in very bad outcomes for the individuals involved. The same, of course, can be said for New Hampshire's failure to eliminate the developmentally disabled wait list, fund a greater portion of educational costs associated with public education, or cover the full cost of every resident's medical care. The decision to limit the availability of services to those in need, however, is a policy decision entrusted by our system of government to the legislature, subject to review by New Hampshire citizens at the ballot box. Brahmen v. Rollins, 87 N.H. 290, 298 (1935) ("it is axiomatic that courts do not question the wisdom or expediency of a statute," no matter what public policy considerations they may deem contrary); Appeal of Town of Lincoln, 172 N.H. 244, 253 (2019) (supreme court may not impose obligations on easement holder that the legislature chose not to impose, even if the court deems those obligations to be "eminently fair and reasonable"); Scheffel v. Krueger, 146 N.H. 669, 672-73 (2001) (supreme court may not overturn legislative policy decision prohibiting a tort creditor from accessing trust assets).

Ultimately, these policy decisions are for another day. The only relief Ms. Doe sought from the superior court was her immediate release from detention. The only relief she seeks on appeal is to have that decision upheld.

CONCLUSION

WHEREFORE, Ms. Doe prays this Honorable Court affirm the decision of the superior court, denying the Commissioner's motion to dismiss and granting her petition for writ of habeas corpus.

Ms. Doe requests to be heard orally before the full Court on all issues briefed (15 minutes).

Respectfully submitted,

By: **/s/ Gary Apfel**

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing brief has been served by electronic filing via the New Hampshire Supreme Court E-Filing system to the Office of the New Hampshire Attorney General, Senior Assistant Attorney General Anthony J. Galdieri, Assistant Attorney General Samuel R. V. Garland, Gilles Bissonnette, Esq., Michael D. Ramsdell, Esq., and Joshua L. Gordon, Esq. this 1st day of February, 2021.

/s/ Gary Apfel

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Gary Apfel, Esq.

CERTIFICATE OF COMPLIANCE

I hereby certify that pursuant to New Hampshire Supreme Court Rule 16(11), the foregoing brief contains approximately 9497 words, which is fewer than the words permitted by this Court's rules. I relied upon the word count of the computer program used to prepare this brief.

/s/ Gary Apfel

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Gary Apfel, Esq.

DATED: February 1, 2021